BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of Sprint Communications Company L.P. for Arbitration with Whidbey Telephone Company	Docket No. UT-073031 WHIDBEY TELEPHONE COMPANY'S BRIEF ON THRESHOLD ISSUES

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INTRODUCTION

1 Dating from Whidbey Telephone Company's ("Whidbey") first response to what Sprint Communications Company L.P. ("Sprint") characterized as a request to negotiate an interconnection agreement, Whidbey has raised three threshold issues.[1] Sprint did not respond to those threshold issues in any meaningful way. In Order No. 03 in this docket, the Washington Utilities and Transportation Commission ("Commission") established a procedure to finally address the three threshold issues.

2 As the first step in that procedure, Sprint submitted an affidavit and brief on December 7, 2007. The second step is for Whidbey to submit its response brief on December 17, 2007. This filing will constitute Whidbey's response brief as contemplated by Order No. 03.

3 As noted above, there are three threshold issues. The first is whether Whidbey can be compelled to negotiate or arbitrate an interconnection agreement where the result would be to facilitate the provision of intrastate telecommunications service by an unregistered provider of such service where registration appears to be required under RCW 80.36.350. The second threshold issue is whether Sprint qualifies as a "telecommunications carrier" with respect to its operations in the area for which it seeks local interconnection to allow it to be eligible to request interconnection pursuant to 47 U.S.C. §251(a) and (b).[2] The third issue is whether Sprint is eligible to submit a bona

[1] Whidbey actually raised very similar issues earlier in response to the Sprint LNP request.
[2] Sprint characterizes the issue as whether Sprint is a telecommunications carrier eligible for interconnection under 47 U.S.C. §251(a). See Sprint Brief at Section A. However, Sprint has requested local number portability ("LNP") and reciprocal compensation which are Section 251(b) subject matters.

fide request for local number portability ("LNP") to Whidbey.[3] Whidbey will address each of these issues in order.

THRESHOLD ISSUE NO. 1

4 Sprint clearly affirms that the service that will be offered by its cable partner[4] is a fixed interconnected VoIP service: "[T]he voice service at the customer premise is a fixed interconnected VoIP service...."[5] The FCC has been very clear that it has not preempted state regulation of fixed interconnected VoIP service. The FCC made this representation directly to the Eighth Circuit Court of Appeals in Minn. Pub. Util. Comm'n v. FCC, 483 F.3d 570, 582 (8th Cir. 2007) ("The FCC contends [the Vonage Order] is at most a prediction of what it might do if faced with the issue of fixed VoIP service providers...."). On this basis, the Eighth Circuit Court of Appeals dismissed the New York Commission's appeal[6] as not yet ripe, and held that the FCC's decision had not preempted state regulation of fixed VoIP service. 483 F.3d at 582-3.

5 Sprint has not disputed that Millenium Cable is not registered with the Commission as required by RCW 80.36.350. Since state regulation of fixed VoIP services has not been preempted by the FCC,[7] the question of the legality of entering into

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[3] Prior to mid-November, 2007, this issue was very much in contention. The Federal Communications Commission ("FCC") has now clarified the circumstances under which a telecommunications carrier may request LNP on behalf of an interconnected VoIP partner. This decision will be discussed further under Threshold Issue No. 3, below.

[4] Sprint stated that it was "partnering" with Millenium Cable to provide service in Whidbey's South Whidbey exchange. Sprint Petition, Ex. E, p. 1.

[5] Mr. Burt's Declaration at Paragraph 8.

[6] The case involved several consolidated challenges. The New York Commission's challenge addressed fixed VoIP service.

[7] The Missouri Federal District Court reached the same conclusion. See, Comcast IP Phone of Missouri, LLC v. The Missouri Pub. Serv. Comm'n., Order, Case No. 06-4233-CV-C-NKL (2007) (Order denying Comcast's Motion for Preliminary Injunction). Copy attached as Attachment 1.

an agreement that facilitates an unregistered provider offering Washington intrastate telecommunications services is directly raised.

6 This is not, as Sprint keeps trying to assert, the issue of whether Sprint is a wholesale provider or the regulatory status of its interconnected VoIP provider. Whether Sprint is a wholesale provider is not relevant to this threshold issue. The issue is, instead, whether Whidbey can be forced to enter an interconnection agreement which has as its goal the facilitation of the provision of intrastate telecommunications service by an unregistered provider.[8]

7 As to the regulatory status of the interconnected VoIP provider, the FCC in the Time Warner case was not faced with the situation in which the state law required that the provider of telecommunications services be registered. That issue is not discussed. In addition, the FCC stated "We do not find it appropriate to revisit any state commission's evidentiary assessment of whether an entity demonstrated that it held itself out to the public sufficiently to be deemed a common carrier under well-established case law."[9] The FCC stated it was focusing on the wholesale/retail provider relationship described by Time Warner "in the instant petition."[10] If the FCC was not attempting to overturn state evidentiary findings on when an entity was serving as a common carrier, it most certainly was not preempting state law. Thus, the FCC did not preempt a state's right to require a

[8] Whidbey has previously pointed out that since it holds a rural exemption under 47 U.S.C. §251(f) and the duty to negotiate is a Section 251(c) obligation, Whidbey has no duty to negotiate or enter into any interconnection agreement (as distinguished from the duty to make interconnection available) and the Commission lacks statutory authority to decree by arbitration that Whidbey has to enter into an agreement with Sprint. However, Whidbey has also said, repeatedly, that it is willing to enter into voluntary negotiations with Sprint if the threshold issues are resolved in a way that would allow an interconnection agreement for 251(a) and 251(b) obligations to be reached without violating the laws of the State of Washington.

[9] Time Warner decision at Paragraph 17.

[10] Ibid.

fixed VoIP provider to register under state law to provide intrastate telecommunications service.

8 Sprint is seeking an interconnection agreement under which its cable TV partner will provide "last mile" connectivity and have the customer relationship for the Sprint-Millenium Cable jointly provided services. From Mr. Burt's Declaration, it appears that Millenium Cable will be providing local telecommunications services in the State of Washington.

9 The duty to register to provide intrastate telecommunications service in the State of Washington is clearly stated. RCW 80.36.350 provides: "[E]ach telecommunications company not operating under tariff in Washington on January 1, 1985, shall register with the Commission before beginning operations in this state." It is not disputed that Millenium Cable has failed to register as a telecommunications company to provide services in the State of Washington. Since the FCC has not preempted state regulation of fixed VoIP providers, the duty to register is clear. Thus, what Sprint wants from Whidbey is the execution of an agreement which would facilitate the provision of unlawful service in the State of Washington.

10 Whidbey is concerned that if it were to enter into an agreement where it knew its actions were facilitating the unauthorized provision of telecommunications service, Whidbey and its officers and agents could conceivably be found to be in violation of RCW 80.04.385 and subject to possible criminal and civil sanctions.

11 Sprint's ill-conceived analogy at Paragraph 9 of its Brief does not address the issue. The issue is not whether the user of the telecommunications service is operating a business that might have some ties to criminal activity, as Sprint posited by the analogy of

providing phone service to a gambling casino run by the Mafia. The issue here is the active facilitation of an activity which appears on its face to be a violation of state law. In other words, Sprint desires that Whidbey provide some of the basic services and elements that would enable Millenium Cable to operate without registration, which appears to be a direct violation of state law. It would be unconscionable under those circumstances to require Whidbey to enter into such an agreement.

12 The Commission's concern over the provision of regulated telecommunications services by unregistered providers is underscored by the Commission's own rules on billing. In WAC 480-120-161(9), the Commission prohibits telecommunications companies from billing on behalf of entities that are not properly registered to provide service within the State of Washington. That rule reads as follows:

> A company may bill regulated telecommunications charges only for companies properly registered to provide service within the State of Washington or for billing agents. The company must, in its contractual relationship with the billing agent, require the billing agent to certify that it will submit charges only on behalf of properly registered companies; and that it will, upon request of the company, provide a current list of all companies for which it bills, including the name and telephone number of each company. The company must provide a copy of this list to the commission for its review upon request.

Thus, if Sprint were to bill on behalf of Millenium Cable, Sprint would be in violation of this regulation. More to the point, this underscores the Commission's concern over the operation of unregistered entities providing regulated telecommunications services and its policy of not permitting telecommunications companies to aid or abet the provision of telecommunications services by unregistered providers. If billing on behalf of an unregulated provider is prohibited, how can switching and completing traffic for an

unregulated provider, activities which allow the unregistered provider to function, be consistent with the public policy of the State of Washington?

13 Thus, the underlying issue that must be resolved is whether Millenium Cable can lawfully offer telecommunications services in the State of Washington without first being registered with the Commission. Whidbey believes it cannot. If it cannot, then there can be no agreement with Sprint until Millenium Cable registers.

THRESHOLD ISSUE NO. 2

14 Whidbey's position has consistently been that if Sprint could demonstrate that it meets the tests referenced by the FCC in the Time-Warner[11] order for its operations that affect its request for interconnection with Whidbey, then Whidbey would accept that Sprint qualifies as a "telecommunications carrier" for interconnection purposes under Section 251(a) and (b). It is unfortunate that Sprint did not reply to Whidbey's request for information earlier. Instead, Sprint waited until submission of the Declaration of James R. Burt to provide any meaningful information related to its qualification as a telecommunications carrier. This is months after Whidbey first raised its concerns in Whidbey's letters to Sprint. Had Sprint taken Whidbey's concerns seriously, Sprint could have saved all parties significant resources.

15 In the Declaration of James R. Burt, Sprint, for the first time, provides information that goes towards demonstrating that Sprint meets the FCC's Time Warner test to be a telecommunications carrier for purposes of Sprint's request for Section 251(a)

[11] In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55, Memorandum Opinion and Order (Released March 1, 2007) ("Time Warner").

and (b) interconnection with Whidbey. However, there is still at least one glaring omission.

16 The omission by Sprint is the basic requirement that Sprint offer the services to its class of customers in the relevant geographic area on an indiscriminate basis.[12] It is not relevant for purposes of Washington intrastate telecommunications services that Sprint offers services similar to those that it offers to Millenium Cable[13] in the State of Washington to other cable companies outside the State of Washington. The request made by Sprint to Whidbey is to enable Sprint to provide services jointly with and in partnership with Millenium Cable as local, Washington intrastate services.[14]

17 Since the test enunciated by the FCC and the courts that have addressed this issue is that the services must be provided "indiscriminately" in the market in which the services are sought to be offered for the provider to be a telecommunications carrier for interconnection purposes,[15] at a minimum there should be a clear demonstration by Sprint that it is offering those services indiscriminately to cable companies in Washington. That showing is not made in Mr. Burt's Declaration.

18 Mr. Burt could have made a simple affirmative statement that Sprint offers the services that it is providing to Millenium Cable indiscriminately to cable companies within the State of Washington.[16] However, he did not do so. Given the opportunity that the

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[12] Time Warner at Paragraph 12. The FCC references the cases which conclude that to be a provider of "telecommunications services" one must be a common carrier, which are discussed below.
[13] Sprint identifies the Millenium Cable entity as "Millennium Digital Media Systems, L.L.C." Burt Declaration at Paragraph 5.
[14] The Declaration of Mr. Burt refers to the services that are offered by Sprint and its cable company customers as jointly provided services. See Paragraphs 7 and 11 of Mr. Burt's Declaration. Sprint states that it is "partnering" with Millenium Cable. Sprint Petition, Ex. E, p. 1. If the services are provided as a joint venture or in partnership, that does not seem to be common carriage by Sprint.
[15] See discussion below.
[16] Some additional showing to support the bare statement would probably be necessary.

Commission extended to Sprint to supplement the record by means of Mr. Burt's affidavit, it may reasonably be inferred that could Sprint have made a showing that it offered its services indiscriminately within the State of Washington or within the geographic areas for which it seeks interconnection from Whidbey, it would have made that showing.

19 The Commission must find that Sprint offers the services that it offers to Millenium Cable indiscriminately in the State of Washington, or at least within the exchange(s) or rate center(s) for which it seeks interconnection with Whidbey, in order for Sprint to be a telecommunications carrier for interconnection purposes. Sprint has failed to provide the necessary support for such a Commission finding.

20 Sprint repeatedly attempts to characterize this issue as one of whether, as a wholesale provider, Sprint is entitled to seek interconnection pursuant to Sections 251(a) and (b). That is not the issue. The issue is whether, as a wholesale provider, Sprint is offering its wholesale services indiscriminately in such a manner as to constitute common carriage. Here, unlike in the Harrison Telephone Company decision attached to Sprint's brief, where Sprint's wholesale services at issue were offered pursuant to tariff,[17] Sprint has offered no evidence that its wholesale services are offered indiscriminately in the State of Washington.

21 What this issue boils down to is whether Sprint qualifies as a "common carrier" and thereby becomes eligible to be classified as a "telecommunications carrier." The legal analysis is straight-forward. In order to be a "telecommunications carrier," an entity

[17] Harrison Telephone Company v. Illinois Communications Comm'n, at p. 6 (referencing Sprint's wholesale tariff).

must be a "common carrier." The leading case is Virgin Islands Telephone v. FCC, 198 F.3d 921 (D.C. Cir. 1999) ("VITELCO"), in which the court affirmed an FCC determination that an AT&T affiliate was not a "telecommunications carrier" because it would not function as a "common carrier."

22 Common carrier status is determined by a two-pronged test: First, whether the carrier holds itself out to serve all potential users indiscriminately and, second, whether the carrier allows each customer to transmit information of the customer's own design and choosing. United States Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002), citing National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 642 (D.C. Cir. 1976) ("NARUC I"). The key determinant is whether an entity is holding itself out to serve indiscriminately. VITELCO, 198 F.3d at 927, citing NARUC I, 525 F.2d at 642. "But a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases, whether and on what terms to deal. It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so." NARUC I, 525 F.2d at 641, footnotes omitted. One of the decisions cited by Sprint is instructive on this issue.

23 In the Berkshire Telephone Corp.[18] matter, the New York Federal District Court analyzed this issue and found that Sprint failed to demonstrate that it was serving as a common carrier since it provided no evidence that the New York Commission could use to support a finding that Sprint's services were offered indiscriminately.[19]

[18] Berkshire Telephone Corp. v. Sprint Communications Co., LP, 206 WL 3095665 (W.D.N.Y.) (2006).
[19] Ibid. at pp. 5-6.

24 The Berkshire Court then went on to address an alternative means for qualifying as a common carrier. The alternative test used in Berkshire was whether the services Sprint was providing were available to all end users within the specified service territory through the business relationship with its cable partner. In reaching this decision, the New York District Court recognized that VITELCO found that providing wholesale services in some circumstances is not the action of a common carrier.[20] The New York District Court distinguished VITELCO on the basis that there was more of a direct relationship between Sprint and the end customers through Sprint's business relationship with its cable customer than between AT&T and the customers of the carriers using AT&T's services in the VITELCO case. This is, of course, a fact driven determination. Given a slight variation in the Berkshire facts and applying the VITELCO case, it would be easy to conclude that what Sprint is offering is not the provision of common carriage.

25 For example, what AT&T wanted to do in the VITELCO case was to provide capacity on an undersea cable to common carriers on an indefeasible right of use basis.[21] The FCC found that AT&T would make its service available to common carriers and large businesses.[22] The VITELCO court agreed with the FCC proposition that the distinction between common and contract carriage did not depend upon the status of the customers' customers. Instead, review would be based on the relationship between the carrier and its customer.[23] The FCC had found that AT&T would have to engage in negotiations with each of its customers "on the price and other terms which would vary

[20] VITELCO at pp. 924-926.
[21] VITELCO at p. 922.
[22] VITELCO at p. 924.
[23] VITELCO at p. 925.

depending upon the customer's needs, duration of contract, and technical specifications."[24] In the situation before the Commission, Sprint does not have a tariff. Millenium Cable is a large business. In addition, Sprint would need to negotiate individually the "price and other terms" related to the individual customer's "capacity needs, duration of contract and technical specifications." Thus, an analytical review of what Sprint has provided to date could easily conclude that what Sprint is providing is not common carriage.

26 This issue is one of first impression in the State of Washington and in the Ninth Circuit. The Berkshire case and other cases cited by Sprint are not binding precedent. The question boils down to whether the Commission views the extent of the relationship between Sprint and the end user customer as sufficient so that it can be said that Sprint is providing services that will be available to any end user within the specified service territory. In New York, the Berkshire court felt that based on the facts before the New York Commission, there was a sufficient basis to support the New York Commission's decision that Sprint met the definition of a common carrier. The question is what is the relationship between Sprint and Millenium Cable's customers in Whidbey's South Whidbey exchange and whether that is sufficient to form common carriage.

27 Based on Mr. Burt's Declaration related to the State of Washington, we know that Millenium Cable, not Sprint, will provide the last-mile facilities to the customer premise, sales and marketing, billing, customer service and installation.[25] What this means is that the end user customer will have no idea that Sprint is involved. We also know Sprint

[24] VITELCO at p. 925 citing to the FCC's decision.
[25] Mr. Burt's Declaration at Paragraph 7.

describes its relationship with Millenium Cable as joint provisioning and a partnership.[26] Is this relationship sufficient so that Sprint may be held to meet the definition of a common carrier? Offering services to a partner does not appear to be common carriage. Offering services where the retail customer is unaware of Sprint's involvement does not appear to be common carriage. It is certainly an unusual arrangement. Whidbey respectfully submits that there should be more of a relationship in order to qualify as a common carrier.

28 Further, Sprint has made no showing as to the manner in which, or extent to which, Millenium Cable will offer the fixed VoIP service that Mr. Burt has described to Millenium Cable customers within the South Whidbey exchange. If Millenium Cable does not intend to provide such service within the South Whidbey exchange, or intends to offer such service other than indiscriminately, any attempt by Sprint to base its claim to common carrier status upon Millenium Cable's service offering must fail.

THRESHOLD ISSUE NO. 3

29 In Sprint's discussion of the LNP issue, Sprint makes a completely unwarranted and unsupported assertion in a footnote that Whidbey does not appear to be able to understand Sprint's provision of certain information related to LNP.[27] That statement is irrelevant and gratuitous. Further, that statement is grossly mistaken.

30 Sprint stated that it identified its switching entities to Whidbey relevant to Sprint's request for LNP. However, each of the sources cited by Sprint in its brief (Sprint cites

[26] See, Sprint's letter of June 14, 2007, provided as Exhibit E to Sprint's Petition in this matter. There Sprint states it is "partnering with Millenium Cable to provide service in Washington."
[27] Ibid.

Whidbey's Motion for Order of Dismissal, Exhibit C, Exhibits 1, 3; Whidbey Answer, Attachment 4, Exhibit 7) provides a listing of the Whidbey switching entities or identification codes. It is not an identification of the Sprint switching entity codes as Sprint asserts in its brief. Thus, when Sprint states that these documents "provided Sprint's switching entity codes,"[28] Sprint is in error. This also reflects a serious lack of care by Sprint as to the accuracy of the representations it is making to the Commission in this proceeding.

31 More importantly, throughout the discourse between Sprint and Whidbey, Sprint failed to provide the basic information that would allow Whidbey to determine the LNP issues. Further, Sprint has completely failed to respond to Whidbey's conditional request for LNP from Sprint. A timely response by Sprint to Whidbey's requests is required by FCC rules.[29]

32 Furthermore, Sprint now seems to ignore the basic requirements for VoIP related LNP recently determined by the FCC. Whidbey acknowledges that the FCC has just very recently clarified certain LNP obligations related to the provision of LNP where a wholesale local exchange service provider requests LNP on behalf of an interconnected VoIP provider.[30] However, Sprint neglects to point out to the Commission that the FCC adopted two conditions to the provision of LNP to an interconnected VoIP provider. The first is that the interconnected VoIP provider must demonstrate that it is capable of porting

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[28] Sprint Brief, Footnote 9.
[29] 47 C.F.R. §52.23(b). See, also, Whidbey's Brief accompanying its Answer at pp. 13-18.
[30] In the Matter of Telephone Number Requirements for IP-Enabled Service Providers, et al., CC Docket No. 95-116, et al., Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, FCC 07-188 (Released November 8, 2007).

out telephone numbers as well as porting in telephone numbers.[31] The second condition is that the competitive local exchange carrier (CLEC) that is requesting LNP on behalf of the interconnected VoIP provider must either have facilities or numbering resources within the rate center for which LNP is requested.[32] To date, Sprint has failed to demonstrate that it and its interconnected VoIP provider can meet either condition.

CONCLUSION

33 Whidbey respectfully requests that the Commission issue an order addressing these three threshold issues. The Commission must resolve whether Millenium Cable can offer Washington intrastate telecommunications services without registering with the Commission. If there is a legal basis for Millenium Cable to do so, that should be articulated. Since the FCC has not preempted state regulation of fixed VoIP services, it appears that registration is required as a matter of state law. Whidbey requests that the Commission issue an order stating that Whidbey has no duty to provide local interconnection to Sprint that would allow its cable TV partner to provide local services, or to negotiate such an agreement with Sprint for such interconnection, until that partner commits to becoming registered prior to offering services facilitated by such interconnection agreement.

34 Based upon the factual information provided by Sprint, it is not at all clear, indeed it is doubtful, that Sprint qualifies as a common carrier. If Sprint does not qualify as a common carrier, it does not qualify as a telecommunications carrier that can request interconnection pursuant to Sections 251(a) and (b). Sprint has failed to provide sufficient

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[31] Ibid. at Paragraph 34.
[32] Ibid.

evidence that it qualifies as a common carrier for these purposes. Whidbey requests that the Commission issue an order finding that Sprint has failed to establish that it is a telecommunications carrier in this instance.

35 On LNP, Whidbey requests that the Commission rule that until Sprint (1) fully responds with its required identification of switching entities; (2) fully responds to Whidbey's conditional request for LNP; and (3) meets the conditions in the FCC's November 8, 2007, Order on LNP, Whidbey has no obligation to provide LNP to Sprint.

Respectfully submitted this 17th day of December, 2007.

WHIDBEY TELEPHONE COMPANY

By: _____

Richard A. Finnigan, WSBA #6443
Attorney for Whidbey Telephone Company
Law Office of Richard A. Finnigan
2112 Black Lake Blvd SW
Olympia, WA 98512
Tel. (360) 956-7001
Fax (360) 753-6862