

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of Intelligent Community Services, Inc. For Designation as Eligible Telecommunications Carrier Under 47 U.S.C. 214(e)(2)	Docket No. UT-053041 ICS OPPOSITION TO WITA MOTION TO COMPEL
---	--

Intelligent Community Services, Inc. (“ICS”) provides the following opposition to the motion of the Washington Independent Telecommunications Association (“WITA”) to compel ICS to respond or provide additional responses to certain data requests and objecting to ICS’s designation of certain information as highly confidential under the protective order issued in this docket. ICS properly objected and refused to provide some or all of the requested information and appropriately designated competitively sensitive planning data as highly confidential. The Commission should deny WITA’s motion.

DISCUSSION

A. WITA’s Generic Arguments Fail to Demonstrate that WITA’s Data Requests Are Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

1. ICS has made a diligent effort to provide WITA with information that is responsive to its data requests that bear some reasonable relationship to the legitimate issues presented in this proceeding. WITA, however, is not satisfied with this effort and now seeks to compel responses to data requests seeking information that lies well beyond the scope of this docket.

2. WITA divides the disputed data requests into two groups. The first group includes requests seeking detailed accounting of ICS's current and planned investments and details of ICS's plans for expansion into the Roslyn exchange outside of the Suncadia resort area. ICS objected to these requests but nevertheless provided responsive information. WITA wants more, claiming that it needs a granular breakdown of all expenses and exact location of all planned facilities in order to test the veracity of ICS's representations. The identity of the utility poles on which ICS plans to place its fiber and the cost of that fiber and other specific costs are unrelated to any genuine issue in this docket and have no bearing on the credibility of ICS's application or supporting testimony. Rather, WITA seeks only to increase ICS's burden and expense of pursuing ETC status and to obtain highly sensitive financial and network construction planning information from a competitor.

3. WITA's second group of data requests represents an even more blatant abuse of the discovery process. These requests seek information on Suncadia's negotiation position with respect to permitting carriers other than ICS to provide service in the resort area and detailed information about the technical characteristics of the fiber optic backbone network that Suncadia has constructed. ICS has provided responses to several of these requests, subject to objections, but WITA claims that it needs more information to determine whether, and the terms on which, Suncadia will allow access to other carriers, including whether such access is technically feasible. Suncadia is not a party to this proceeding but has made abundantly clear that while it is willing to negotiate access with other carriers, the terms and conditions for access will have to be determined as a result of those negotiations. WITA is not satisfied with that response and seeks to

compel Suncadia, through ICS, to develop and disclose its positions and provide detailed network specifications prior to any negotiations taking place. Such an effort is wholly improper.

4. ICS understands that Inland recently approached Suncadia about providing service to residents in the resort area. Assuming that the timing of this request is mere coincidence and not a callous attempt to bolster its litigation position as WITA has accused ICS of doing, Inland should obtain any information it legitimately needs from Suncadia through those negotiations. Suncadia has no obligations under the Telecommunications Act of 1996. No federal or state law requires Suncadia to provide Inland or any other carrier with access to its property short of an action in state court seeking eminent domain. Suncadia nevertheless is willing to negotiate such access. But that process is a voluntary commercial transaction, not a matter for litigation before this Commission as part of ICS's application for designation as an eligible telecommunications carrier ("ETC"). The Commission should refuse to facilitate WITA's attempt to use its participation in this docket as leverage in the private commercial negotiations between one of its members and Suncadia.

5. WITA does not individually address the data requests to which it asks the Commission to compel ICS to respond. That omission is significant because a review of each data request reveals that WITA either ignores the responsive information that ICS provided subject to its objections or fails to explain how the specific information WITA requested bears any reasonable relationship to the legitimate issues in this docket. ICS, therefore, provides the following explanation of its position on each of the data requests that WITA attached to its motion.

WITA First Set of Data Requests

10. At page 3, lines 12 through 13, Mr. Southard states as follows: “...but ICS plans to construct its own facilities in other parts of the exchange.” Please identify what facilities ICS plans to construct and where ICS plans to construct the facilities. Please provide the date of the planned construction. Please provide a copy of any of the “plans” referenced by Mr. Southard.

6. ICS objected to this data request but provided a substantive response subject to those objections that included highly confidential information on the facilities ICS plans to construct and the boundaries of the area within which ICS plans to construct those facilities. WITA offers no explanation for why this information is not responsive to WITA’s request. To the extent that WITA wants more precise information, WITA has failed to justify how more granular planning data bears any reasonable relationship to the issues in this proceeding. The exact locations where ICS currently plans to build facilities up to two and a half years in advance – to the extent that such information even exists – is entirely irrelevant to whether ICS has satisfied the requirements for designation as an ETC. ICS has provided WITA with all data to which it is reasonably entitled.

11. At page 4, line 14 of Mr. Southard’s Testimony, he states there is 1.5 million dollars “already invested in network infrastructure to serve the Roslyn exchange.” Provide a detailed list of the 1.5 million dollars in expenditures broken down by category of expenditure.

7. After objecting to this request, ICS provided a confidential breakdown of the \$1.5 million dollars in investment that Mr. Southard references in his testimony. WITA apparently is dissatisfied with the granularity of the information provided, expressing the concern that “ICS does not state that the facilities it has invested in or the facilities it plans to invest in are, in fact, telecommunications facilities.” WITA Motion at 4. This argument is baffling given that ICS currently is providing facilities-based

telecommunications services. As ICS explained in response to a subsequent WITA data request, the facilities ICS has constructed are overwhelmingly used for all of the services it provides and until the beginning of this year, ICS's accounting system did not have the ability to provide a precise assignment of costs between services. ICS thus does not have the information requested, at least in the form in which it has been requested. Attempting to create such data would require an extensive and expensive manual review of invoices and records with no guarantee that such review would be productive.

8. Such granularity, in addition to being unavailable, is valueless in this proceeding. ICS is not seeking Universal Service Fund ("USF") support based on its own costs. The Commission has never required any competitive ETC to provide a detailed accounting of its investment in facilities. ICS provided the information solely for the Commission's benefit and to demonstrate that ICS has a substantial investment in, and commitment to, providing telecommunications and other services to consumers in the Roslyn exchange. The exact amount ICS has spent on each individual expense category and network component has no bearing on any of those issues.

14. At page 6, lines 10 through 12, Mr. Southard states "ICS plans to invest more than 4.2 million over the next two years to expand its network into the remainder of the Roslyn exchange and into the adjacent Cle Elum Urban Growth Area." Please identify in detail, by classification of expenditure (e.g., fiber optic cable, copper cable, distribution facility, etc.) the expenditure of 4.2 million dollars and where such expenditures will occur in specific geographic relationship to the remainder of the Roslyn exchange and the Cle Elum Urban Growth Area.

9. Again, WITA is dissatisfied with the highly confidential breakdown of planned investments that ICS provided in response to this request subject to its objections. WITA claims, "This is important because ICS suggests that its investment levels are meant to have some relationship to the funds that it will be receiving from the high cost fund if its

application is granted.” WITA Motion at 5. ICS is making no such suggestion. Rather, as discussed above in connection with WITA request number 13, the \$4.2 million planned investment figure was intended to show only that ICS has substantial plans to provide telecommunications and other services beyond the boundaries of the Suncadia resort area. ICS has no intention of using any amounts it receives in USF support in areas outside of the Roslyn exchange or on services that are not eligible to receive such support – which ICS stated in response to subsequent WITA data requests that WITA conveniently fails to mention.

10. WITA also contends that the information it seeks is germane to the issue of whether ICS has a substantive plan of investment to be made during the first two years in which it receives USF support. The information ICS provided in its application and in response to this request more than adequately satisfies that obligation and is at least as detailed as the Commission has required of any other competitive ETC. A more granular accounting of this planned investment, to the extent that any additional granularity even exists, would not provide any admissible evidence in this proceeding.

1. **Is Suncadia willing to offer to Inland the contract that it has entered into with ICS simply substituting “Inland” for “ICS” and providing a more current date for the agreement? If no, please identify in detail all reasons why this is not an offer that Suncadia would make to Inland.**

11. ICS, after objecting to this request, provided a response in which Mr. Eisenberg explained that Suncadia is not making an offer to any carrier but is willing to negotiate with a carrier that is legitimately interested in providing service to Suncadia resort residents. WITA fails to provide any explanation for why this information is not responsive to its request. If Inland desires the arrangement with Suncadia described in

this request, Inland should request it from Suncadia, not have WITA attempt to compel ICS to get Suncadia to disclose its negotiating position in advance.

2. At page 3, lines 14 and 15 of Mr. Eisenberg’s Testimony, he states as follows: “...Suncadia would be willing to enter into negotiations with that carrier to enable it to provide such services.” Please identify in detail the terms of the negotiations that Suncadia would propose.

12. In addition to objecting to this request, ICS provided a response in which Mr. Eisenberg explained that Suncadia is not making any proposals but would entertain proposals from a carrier that is legitimately interested in providing service to Suncadia resort residents. WITA fails to provide any explanation for why this information is not responsive to its request. If any WITA members are legitimately interested in conducting negotiations with Suncadia, they should request such negotiations directly from Suncadia, not have WITA attempt to compel ICS to get Suncadia to disclose its negotiating position in advance.

WITA Second Set of Data Requests

1. In Mr. Eisenberg’s Testimony at page 3, line 4, he states “Suncadia has constructed a backbone fiberoptic network throughout the resort area...” Please identify the “backbone fiberoptic network” in detail; including, but not limited to, the following:

- a. The manufacturer of the fiberoptic cable;**
- b. Splitter configuration;**
- c. Location of nodes;**
- d. Location of hand holes;**
- e. Location of man holes;**
- f. Locations and types of cabinets identifying type of cabinet by location;**
- g. The number of fibers; and**
- h. Whether all fibers are in one sheath and, if not, the number of sheaths and the number of fibers per sheath.**

13. The detailed description WITA has requested of the fiber optic backbone Suncadia has constructed is wholly unrelated to whether ICS should be granted ETC

status. WITA argues generally that this, along with other requests in WITA's Second Set of Data Requests, focus on the issue of access by other carriers to the Suncadia infrastructure and "contain a set of technical questions which are designed to determine whether such access is even technically possible" and "whether or not the network constructed by the Suncadia Resort owners is technically compatible with Inland's network such that access would be feasible." WITA Motion at 8. Technical network interoperability between Suncadia's infrastructure and Inland's network is not an issue that is before the Commission in this docket.

14. The Suncadia infrastructure is what it is, and ICS or any other carrier seeking to provide landline service within the resort area must use those facilities. ICS currently is using that infrastructure to provide telecommunications services, so clearly the facilities are capable of being used for that purpose. If Inland or any other WITA member genuinely needs technical data to determine how that carrier could make use of the Suncadia infrastructure, the carrier should request that information as part of its negotiations with Suncadia. The granular information WITA requests does not, and could not, shed any light on any legitimate issue in this docket.

2. Please provide "as-built" staking sheets for the backbone fiberoptic network referenced in Mr. Eisenberg's Testimony.

15. WITA does not explain the term "staking sheets," but assuming it refers to technical diagrams, WITA offers no explanation for how such diagrams have anything to do with any legitimate issue in this docket. As discussed above, the purpose of this docket is not to explore issues of technical network compatibility. The issues on which WITA purports to rely are designed to explore the extent to which any *legal* impediment exists to carriers other than ICS providing basic telecommunications service to Suncadia

residents. Network schematics showing the location and configuration of the infrastructure Suncadia has constructed do not bear any relationship to that issue. If any WITA members are legitimately interested in serving Suncadia residents and have a genuine need to know the technical specifications of the Suncadia infrastructure, they should request such information from Suncadia as part of negotiating access to that infrastructure. Seeking such information through discovery in this proceeding is simply improper.

3. Please provide engineering staking sheets for planned future additions to the backbone fiberoptic network referenced in Mr. Eisenberg's Testimony.

16. Mr. Eisenberg makes no reference whatsoever in his testimony to any plans for additions to the backbone network Suncadia has constructed, and this request is even further afield from the legitimate issues presented in this docket than WITA's request for diagrams of the existing network discussed above. Access to future construction obviously is not physically feasible because it has not been built yet. More fundamentally, network schematics of planned construction by Suncadia – to the extent that any even exist – do not bear any relationship to the issue of whether any legal barriers exist to the ability of carriers other than ICS to provide service to Suncadia residents.

4. Please provide a narrative description of any planned additions to the backbone fiberoptic network referenced in Mr. Eisenberg's Testimony.

17. This request suffers from the same deficiencies as WITA's request number 3. As discussed in connection with that request, any description of planned network construction by Suncadia, whether narrative or in technical drawings, is beyond the scope

of Mr. Eisenberg's testimony and is not reasonably related to any of the legitimate issues in this proceeding.

5. Please identify whether the backbone fiberoptic network referenced in Mr. Eisenberg's Testimony is passive or active.

18. ICS objected to this request but provided a conditional response that Suncadia's network is a dark fiber network, which is ICS's understanding of the intent of WITA's request. WITA does not explain why this response is insufficient.

6. Please identify whether the backbone fiberoptic network referenced in Mr. Eisenberg's Testimony is GPON or APON.

19. ICS objected to this request but provided a conditional response referring to ICS's response to request number 5 in which ICS stated that Suncadia's network is a dark fiber network. GPON and APON apply to "lit" networks and thus have no applicability to the Suncadia network as constructed by Suncadia. Again, WITA does not explain why this response is insufficient.

7. Please identify the manufacturer of the core electronics.

20. ICS, not Suncadia, supplies the electronics needed to provide telecommunications services over the Suncadia backbone network. The identity of the manufacturer from whom ICS obtains its equipment has absolutely nothing to do with whether ICS should be granted ETC status.

8. Please identify the manufacturer of the optical NID or optical network terminal or, if both are used, the manufacturer of each.

21. ICS, not Suncadia, supplies the electronics needed to provide telecommunications services over the Suncadia backbone network. The identity of the manufacturer from whom ICS obtains its equipment has absolutely nothing to do with whether ICS should be granted ETC status.

9. Please identify whether customer drops are in conduits.

22. ICS responded to this request, subject to ICS's objections, with an explanation of how customer homes are connected to the network. Again, WITA does not explain why or how this explanation does not provide WITA with the information it requested.

10. Will Suncadia allow Inland Telephone Company to pull its own fiberoptic cable through Suncadia's distribution conduit and drop conduit, if any?

23. After objecting, ICS once again reiterated the position that Suncadia has taken in its testimony and in responses to WITA's data requests – Suncadia prohibits carriers from constructing their own network facilities on Suncadia's property with certain limited exceptions, and Suncadia is willing to negotiate with carriers other than ICS that are legitimately interested in providing service to Suncadia residents and who request such negotiations. WITA, however, improperly insists on attempting to compel ICS to have Suncadia disclose what Suncadia hypothetically will or will not do if it were to receive such a request. In this request, moreover, WITA asks whether Suncadia would permit Inland to put its own facilities in Suncadia's distribution conduit, which ICS is not permitted to do under its agreement with Suncadia. If Inland wants to explore what network construction Suncadia will and will not permit on its property, Inland should undertake such an exploration in negotiations with Suncadia, not through discovery as part of a proceeding to determine whether ICS should be granted ETC status.

11. Please identify the size and configuration of all conduit used for the backbone fiberoptic network referenced in Mr. Eisenberg's Testimony.

24. Presumably, this request is related to WITA request number 10, discussed immediately above, and this information is entirely unrelated to any legitimate issue in this proceeding, even if Suncadia were willing to provide access to its conduits that

Suncadia has not afforded ICS. Again, this information should be requested from Suncadia in individual negotiations, not as part of this Commission docket.

B. ICS Properly Designated Its Business Plans as Highly Confidential.

25. ICS provided information on its planned investment and network expansion in response to WITA data requests and designated that information as highly confidential. WITA objects to that designation, claiming that “the material that is provided is provided at a summary level, not a detailed level” and thus should only be considered confidential. WITA Motion at 9. The level of detail is irrelevant. This information reflects the highly proprietary and competitively sensitive future plans of ICS, and Inland, a WITA member is a competitor. ICS is not willing to allow anyone but counsel and outside experts to have access to such information because it could be used to ICS’s competitive harm.

26. The parties negotiated, and the Commission agreed, to establish two levels of confidentiality so that Inland, as a small company, could designate an employee to have access to certain restricted information – access that is usually denied. An officer of Inland has signed the protective order permitting him access to confidential – but not highly confidential – information without objection from ICS pursuant to that agreement. WITA now seeks to permit an officer of Inland with responsibilities for the strategic planning and direction of ICS’s primary competitor in the Roslyn exchange to have access to ICS’s plans for investment and expansion in that exchange. Such an objection is fundamentally inconsistent with the purposes for which the Commission’s standard protective order was modified for use in this docket.

27. The Commission, therefore, should overrule WITA’s objection to the designation of this information as highly confidential. If the Commission does not overrule WITA’s objection, however, ICS requests that the Commission modify the protective order to

preclude any employee of Inland from having access to confidential information, consistent with the Commission's standard protective order.

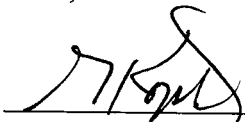
CONCLUSION

28. WITA has identified no basis on which the data it seeks to compel ICS to produce is reasonably related to any legitimate issue before the Commission in this docket, much less is reasonably calculated to lead to the discovery of admissible evidence. WITA is not entitled to attempt to conduct contract negotiations with Suncadia – which is not even a party to this proceeding – through the discovery process. Nor has WITA substantiated its objection to the highly confidential designation of information concerning ICS's planned investment and network expansion. Accordingly, the Commission should deny WITA's motion.

DATED this 25th day of June, 2008.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Intelligent Community
Services, Inc.

By



Gregory J. Kopta
WSBA No. 20519