

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of	)	DOCKET UT-053041
	)	
INTELLIGENT COMMUNITY	)	
SERVICES, INC.	)	ORDER 06
	)	
For Designation as an Eligible	)	
Telecommunications Carrier Under 47	)	ORDER GRANTING IN PART
U.S.C. § 214(e)(2)	)	AND DENYING IN PART ICS’
	)	MOTION TO COMPEL
.....	)	

1 *Synopsis.* This Order resolves a discovery dispute between ICS, WITA and Inland. The Order denies ICS’ motion to compel responses from WITA and Inland to Data Request Nos. 2, 3, and 12, and grants the motion as to Data Request Nos. 5, 9, and 11.

**SUMMARY**

2 **NATURE OF PROCEEDING.** Docket UT-053041 involves the request of Intelligent Community Services, Inc. (ICS) for designation as an Eligible Telecommunication Carrier (ETC) under Section 214(e)(2) of the Telecommunications Act of 1996 to receive support from the federal Universal Service Fund, including support for customers in high-cost locations and low-income customers in the Roslyn, Washington exchange.

3 **APPEARANCES.** Gregory J. Kopta, Davis Wright Tremaine LLP, Seattle, Washington, represents ICS. Jennifer Cameron-Rulkowski, Assistant Attorney General, Olympia, Washington, represents the Staff of the Washington Utilities and Transportation Commission (Commission).<sup>1</sup> Richard A. Finnegan, attorney,

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<sup>1</sup>In formal proceedings, such as this, the Commission’s regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to the proceeding. There is an “*ex parte* wall” separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners’ policy and accounting advisors from all parties, including regulatory staff. RCW 34.05.455.

Olympia, Washington, represents Inland Telephone Company (Inland) and the Washington Independent Telephone Association (WITA).

## MEMORANDUM

### **A. Procedural History**

- 4 ICS filed a petition with the Commission on June 29, 2005, seeking designation as an ETC under 47 U.S.C. § 214(e)(2), in Docket UT-053041. On December 14, 2007, ICS filed an Amended Petition in the docket. The Commission set the matter for hearing at its March 27, 2008, open meeting.
- 5 The Commission held a prehearing conference on April 23, 2008, before Administrative Law Judge Ann E. Rendahl. Thereafter, the Commission adopted a procedural schedule in Order 01 and granted the interventions requested by Inland and WITA.
- 6 On May 1, 2008, the Commission issued Order 02, a Protective Order with Highly Confidential provisions.
- 7 WITA, Inland, and the Commission Staff filed a Joint Motion to Compel (Joint Motion) on June 18, 2008, seeking responses to certain data requests. The Joint Motion sought information regarding ICS' planned investment in the Suncadia community and the level of access competitors would have to ICS' facilities within the Suncadia Resort, as well as the revision of the designation of various ICS data request responses from highly confidential to confidential. On July 8, 2008, the Commission issued Order 03, granting in part and denying in part the Joint Motion.
- 8 Also on July 8, 2008, the Commission issued Order 04, granting the Joint Motion to Amend the Procedural Schedule. The Commission issued Order 05 on August 4, 2008, again amending the procedural schedule based on a request by ICS and to which none of the parties voiced opposition.

9 On July 30, 2008, ICS filed a Motion to Compel WITA and Inland to Respond to Data Requests (Motion to Compel). WITA and Inland filed a Response to ICS' Motion to Compel (Response) on August 5, 2008.

**B. ICS' Motion to Compel**

10 ICS seeks information from WITA or Inland regarding whether WITA members, including Inland, serve multiple-tenant environments (MTE) and whether the members allow competitors to access their facilities.<sup>2</sup> ICS also requests that WITA and Inland provide information on telecommunications carriers who are not members of WITA and who are providing services to an MTE located in an area served by a WITA member.

**1. Data Request Nos. 2 and 3**

11 In Data Request Nos. 2<sup>3</sup> and 3<sup>4</sup>, ICS inquires whether WITA members serve MTEs as well as whether WITA members allow other carriers to serve MTEs in the WITA

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<sup>2</sup> See, *ICS' Motion to Compel*, filed July 30, 2008.

<sup>3</sup> ICS' Data Request No. 2 asks: "Does any WITA member provide telecommunications service to customers in a[n MTE,] including but not limited to a resort area, private subdivision or community, condominium or condominium complex, apartment building or complex, office building or complex, office park, school dormitory, or shopping center? If so, please provide the following information for each such [MTE]: a) The name of the WITA member; b) The identity of the [MTE]; c) A copy of any written agreement with the person or entity that owns the [MTE] or the common areas in that environment; d) The identity of any other carrier that provides telecommunications services to customers within that [MTE] other than commercial mobile radio service providers; and e) Whether the WITA member receives universal service funding for its provision of telecommunications service to customers within that [MTE]." *ICS Motion to Compel*, at 3.

<sup>4</sup> ICS' Data Request No. 3 asks: "Other than in the Suncadia resort area in the Roslyn exchange, is any carrier other than a WITA member the exclusive or primary provider of telecommunications service to customers in a[n MTE] located in any area served by a WITA member, including but not limited to a resort area, private subdivision or community, condominium or condominium complex, apartment building or complex, office building or complex, office park, school dormitory, or shopping center? If so, please provide the following information for each such [MTE]: a) The name of the WITA member in whose service territory the [MTE] is located; b) The identity of the [MTE]; c) The identity of the carrier other than the WITA member that is the exclusive or primary provider of telecommunications service to customers in that [MTE]; and d) A description of how the WITA member in whose service territory the [MTE] is located

member's service territory. ICS seeks the information asserting that, "one of the issues in this proceeding is whether it is in the public interest for carriers who are the only landline providers of basic local exchange service to residents in an MTE to be designated as ETCs."<sup>5</sup> In its defense against the claim that the data requests are burdensome, ICS provides that,

[e]ven in the unlikely event that there are dozens or hundreds of MTEs in a particular carrier's service territory, each WITA member, at a minimum, could confirm whether it is the sole provider of landline service to the MTEs in its exchange(s), as well as whether it receives universal service funding to provide that service, and each WITA member could produce any written agreements between the carrier and an MTE."<sup>6</sup>

12 WITA posits that ICS' Data Request No. 2 is directed to all WITA members, and, other than Inland, none of those members are parties to the proceeding.<sup>7</sup> WITA argues that members of an association who are not individually parties to a proceeding cannot be compelled to respond to data requests.<sup>8</sup> Additionally, WITA argues that the request is burdensome because it seeks information that "is not maintained by WITA members in any readily accessible format."<sup>9</sup> Each WITA member would have to physically survey its service territory to ascertain whether any of its customers are located within an MTE.<sup>10</sup> WITA points out that MTE exclusivity arrangements between telecommunications providers and residential MTEs are prohibited by the Federal Communications Commission (FCC) and, as such, are unenforceable and meaningless.<sup>11</sup> That being said, WITA argues that any contractual agreements that WITA members have with customers are, by law, on file with the Commission and easily available to ICS.<sup>12</sup>

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obtains access to customers in that environment in order to provide telecommunications service, or an explanation of why the WITA member does not have such access." *ICS Motion to Compel*, at 4.

<sup>5</sup>*ICS' Motion to Compel*, at 3-4.

<sup>6</sup>*Id.*, at 4.

<sup>7</sup>*WITA Response*, at 4.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*, at 4-5.

<sup>11</sup>*Id.*, at 5.

<sup>12</sup>*Id.*, at 6.

13 WITA objects to ICS' Data Request No. 3 because the information requested involves services provided by non-WITA members in a WITA member's service territory. As WITA asserted with regard to Data Request No. 2, WITA members do not track customers by MTE status.<sup>13</sup> WITA states that its members also do not track customers in areas that they do not serve.<sup>14</sup> WITA reiterates its arguments that, as non-parties, its members are not required to respond to data requests, and that, in any event the FCC has prohibited arrangements of the type referenced in the data request, so any information WITA members could provide would not be helpful.<sup>15</sup>

## 2. Data Request No. 5

14 Concerning Data Request No. 5,<sup>16</sup> ICS states that it is unaware of any circumstance when WITA did not oppose a petition for ETC designation.<sup>17</sup> ICS argues that such information "is relevant to the credibility of WITA's objections to ICS's amended petition if, as ICS suspects, WITA has consistently opposed any and all petitions for Commission designation of competitive ETCs."<sup>18</sup>

15 WITA raises several concerns with regard to ICS' Data Request No. 5. WITA notes that Staff agrees with the organization's theory, and asks whether that fact makes either party's view less credible.<sup>19</sup> WITA cites to the U.S. Constitution's First and Fourteenth Amendments as protection against such information requests.<sup>20</sup> Furthermore, WITA argues that such a data request is burdensome as it would require the organization "to search its archives back to 1996 and then compare those archives with all Commission filings from 1996 forward..."<sup>21</sup> WITA asserts that any of its

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<sup>13</sup> *WITA Response*, at 7.

<sup>14</sup> *Id.*, at 7.

<sup>15</sup> *Id.*, at 8.

<sup>16</sup> ICS' Data Request No. 5 asks: "Has WITA ever not opposed any carrier's petition for designation as a competitive [ETC] in Washington? If so, please identify the carrier, the docket number of the proceeding, and an explanation of WITA's position on that petition." *ICS Motion to Compel*, at 5.

<sup>17</sup> *Id.*, at 5.

<sup>18</sup> *Id.*, at 5-6.

<sup>19</sup> *WITA Response*, at 9.

<sup>20</sup> *Id.*

<sup>21</sup> *WITA Response*, at 9.

filings would have been filed with the Commission, and that the information ICS is requesting is just “as readily available to ICS as [it is] to WITA.”<sup>22</sup>

### 3. Data Request Nos. 9 and 11

16 With regard to Data Request No. 9,<sup>23</sup> ICS seeks detailed information regarding Inland’s telecommunications network facilities. ICS explains that it has requested information concerning Inland’s facilities within the Roslyn exchange to which ICS may need access to construct its own network facilities within the remainder of the Roslyn exchange.<sup>24</sup>

17 WITA states that ICS has never requested access to Inland’s poles and conduits.<sup>25</sup> As proof of this, WITA cites to a May 5, 2008, letter from ICS requesting interconnection negotiations in which ICS failed to request access to Inland’s utility poles, ducts, conduits, and rights-of-way.<sup>26</sup> WITA argues that, as no company has requested access to Inland’s facilities, it would be speculative and require a special study to develop the rates, terms, and conditions ICS has requested.<sup>27</sup>

18 In Data Request No. 11,<sup>28</sup> ICS requests information regarding the level of access Inland will allow competitors to its network facilities, on a basis other than resale or purchase of tariffed services. ICS argues that the information it has requested is relevant “to WITA and Inland’s credibility in claiming that ICS’s amended petition is not in the public interest because Suncadia has only agreed to allow ICS to physically

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<sup>22</sup> *Id.*

<sup>23</sup> ICS’ Data Request No. 9 asks: “Does Inland Telephone Company own utility posed or conduit in the Roslyn exchange? If so, does or will Inland permit other carriers to attach facilities to those poles or in those conduits? If so, please provide a copy of the rates, terms and conditions under which Inland offers or is willing to provide such attachments.” *ICS Motion to Compel*, at 6.

<sup>24</sup> *See, ICS Motion to Compel*, at 6-7.

<sup>25</sup> *WITA Response*, at 10.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, at 10-11.

<sup>28</sup> ICS’ Data Request No. 11 asks: “Is Inland Telephone Company willing to provide other carriers with access, on any basis other than purchase or resale of tariffed telecommunications services, to any fiber optic or other telecommunications network facilities that Inland has deployed in the Roslyn exchange? If not, please explain why not. If so, please provide the rates, terms and conditions under which Inland is willing to provide such access.” *ICS Motion to Compel*, at 6.

access Suncadia's fiber infrastructure, if Inland does not make its own fiber network available for use by competitors."<sup>29</sup>

19 WITA explains that the circumstance of Inland seeking access to Suncadia's customers and ICS' current situation are vastly different. WITA posits that:

Inland sought access to the Suncadia customers directly[, and] Suncadia came up with the means to prevent that access. In the reverse situation, Inland has no control over the rights-of-way in the Roslyn exchange. ICS is free to use those rights-of-way, assuming they enter into a straightforward and commonplace franchise agreement with the City of Roslyn"<sup>30</sup>

#### 4. Data Request No. 12

20 In Data Request No. 12<sup>31</sup>, ICS requests information regarding the level of access other WITA members currently allow or will allow competitors to have to the members' facilities on a non-resale and non-purchase basis in the members' service territories. ICS posits that WITA has presented no evidence to indicate that the request is burdensome, and ICS asserts that WITA's members are in a far better position than the company to know whether the members provide access to competitors and under what terms and conditions.<sup>32</sup>

21 WITA reiterates its contention that members of its organization who are not parties to the proceeding cannot be compelled to respond to data requests.<sup>33</sup> Further, WITA argues that any agreements its members have entered into would have been filed with the Commission and, as such, are already available to ICS through the Commission.<sup>34</sup>

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<sup>29</sup> *ICS Motion to Compel*, at 7.

<sup>30</sup> *WITA Response*, at 12.

<sup>31</sup> ICS' Data Request No. 12 asks: "Does any WITA member other than [Inland] offer or provide other carriers with access, on any basis other than purchase or resale of finished telecommunications services, to any fiber optic or other telecommunications network facilities that the WITA member has deployed in its service territory? If not, please explain why not. If so, please provide the rates, terms and conditions under which the WITA member offers or provides such access." *ICS Motion to Compel*, at 7.

<sup>32</sup> *Id.*, at 8.

<sup>33</sup> *Id.*

<sup>34</sup> *WITA Response*, at 13.

WITA asserts that ICS is incorrect in arguing that the organization's members are in a better position than ICS to know whether and on what terms and conditions WITA members allow competitors access to their networks. WITA cites to members "Embarq and CenturyTel that have many such agreements [and for whom] it is highly unlikely that they have each such agreement memorized [... and t]he extent to which they involve access to fiber optic or other telecommunications network facilities would have to be determined by reviewing every one of those agreements."<sup>35</sup>

### C. Discussion and decision

22 The Commission's rules require that data requests "seek only information that is relevant to the issues in the adjudicative proceeding or may lead to the production of information that is relevant."<sup>36</sup> To that end, the Commission will allow discovery if the information "appears reasonably calculated to lead to discovery of admissible evidence."<sup>37</sup>

23 Having considered the contested data requests, the parties' pleadings and arguments in light of the standards for resolving discovery disputes, ICS' motion to compel WITA and Inland to Respond to Data Request Nos. 2, 3, and 12 is denied and ICS' motion to compel WITA and Inland to Respond to Data Request Nos. 5, 9, and 11 is granted.

#### 1. Compelling responses from WITA's members

24 Before addressing the individual data requests, the Commission will attend to the threshold issue of the status of WITA members in this proceeding. One of WITA's arguments is that its members, with the exception of Inland, are not parties to the proceeding and cannot be compelled to respond to data requests from ICS.<sup>38</sup> The Commission, however, deems this argument as contrary to the rights and responsibilities accruing from participating as an intervenor in the Commission's proceedings.

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<sup>35</sup> *Id.*, at 13-14.

<sup>36</sup> WAC 480-07-400(4).

<sup>37</sup> *Id.*

<sup>38</sup> *See*, WITA's Response to ICS Motion to Compel, at 4, 8, and 13.

- 25 There is no blanket rule against compelling discovery responses from members of an association or organization. Generally, whether association members should be subject to discovery depends on what issues the association is asserting and what facts are relevant to the proceeding. When an association is representing the interests of regulated companies, as WITA does here, the same is true but the likelihood of the association members possessing information relevant to the matters at issue in a particular proceeding is likely to be greater.
- 26 WITA's position in this matter is inherently inequitable. On the one hand, WITA asserts that it is representing the interests of both the association and its members, which are all telecommunications companies subject to Commission regulation. WITA's members have a substantial interest in the proceeding and have acted in conjunction with WITA to further those interests. WITA has propounded data requests to other parties after consulting with its own members, to obtain information for the benefit of those members.<sup>39</sup> Yet, with the exception of Inland, WITA simultaneously claims that its members are entirely distinct from WITA, entirely outside the scope of this proceeding, and entirely immune from discovery as to any matters affecting WITA. WITA cannot have it both ways. WITA's members are subject to Commission jurisdiction, and can be compelled to respond to data requests that are relevant to this proceeding.

## 2. WITA's remaining claims

- 27 The nexus of this proceeding is ICS' amended petition requesting that the Commission designate the company an ETC. The scope of the docket, therefore, is whether ICS has met the requirements for the requested status designation that are listed within the Commission's rules and regulations.

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<sup>39</sup>WITA has requested information from ICS in this proceeding, and filed a motion to compel ICS' responses to its own data requests. In defending its own motion to compel, WITA stated that the data requests it propounded to ICS were based on questions the organization proposed to its members. WITA claimed that it had: "consulted some of its members who are experienced with fiber networks and posited the following situation: 'Assume that there is a private fiber network that is being used by one carrier to provide services throughout a defined area...[u]nder this assumption, what do you need to know to determine whether another carrier can use that same network.'" *WITA's Reply to ICS' Opposition to WITA's Motion to Compel*, at 2.

- 28 With regard to Data Request Nos. 2 and 3, ICS argues that information concerning the practices of other carriers in other service territories serving MTEs is germane to this proceeding. ICS is requesting the information because, “one of the issues in this proceeding is whether it is in the public interest for carriers who are the only landline providers of basic local exchange service to residents in an MTE to be designated as ETCs.”<sup>40</sup> Additionally, ICS argues “it would be discriminatory to deny ETC status to ICS because it is the only landline carrier that Suncadia has permitted to have physical access to Suncadia’s fiber network when WITA members receive universal service funds for being the sole landline service provider to MTEs in their service territories.”<sup>41</sup>
- 29 ICS is correct, and even WITA and Inland have agreed, that one of the issues in this docket is whether the public interest is served when carriers are designated as ETCs in areas where they are the only landline providers of services to MTEs.<sup>42</sup> However, the sheer volume of information sought by Data Request No. 2 is unduly burdensome. ICS has already recognized that its objective is much simpler than its data request propounds. ICS asserts that it is seeking an affirmation from WITA that some of its members may be the sole provider of landline service to the MTEs in their exchanges and may receive universal funding for doing so.<sup>43</sup> While Data Request No. 2 is burdensome and should be denied, a data request seeking a general acknowledgement from the organization regarding whether some of its members are the sole landline provider of services to MTEs and whether those same members receive USF would appear reasonable.
- 30 In Data Request No. 3, ICS asks WITA members to provide information on the business activities and practices of other carriers who are not WITA members. This information, while interesting, is doubtless beyond the knowledge and reach of WITA members. The motion to compel a response to Data Request No. 3 should be denied as it is information that “is obtainable from some other source that is more convenient,” such as the non-WITA members themselves.<sup>44</sup>

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<sup>40</sup> *ICS’ Motion to Compel*, at 3-4.

<sup>41</sup> *Id.*, at 2.

<sup>42</sup> Revised Issues List, filed on May 9, 2008, at 1.

<sup>43</sup> *ICS’ Motion to Compel*, at 4.

<sup>44</sup> WAC 480-07-400(3).

- 31 ICS' Data Request No. 5 seeks information regarding positions WITA has taken in the past with regard to ETC petitions. While WITA argues its First and Fourteenth Amendment rights would be infringed if this request is compelled, the organization does not explain how this would be the case. Further, the Commission's rules provide that information which appears reasonably calculated to lead to the production of admissible evidence is discoverable. ICS' request goes to the credibility of WITA's objections to the company's amended petition, and contrary to WITA's claim, the organization is in a better position to provide ICS with the information than ICS. Therefore, Data Request No. 5 should be granted.
- 32 With regard to Data Request Nos. 9 and 11, ICS has asked for information relating to the ownership of poles and conduit within Inland's service territory and any potential access ICS may be granted to Inland's poles and conduit in the Roslyn exchange. ICS also seeks information relating to whether and to what extent Inland would be willing to allow competitive carriers to build facilities in the Roslyn exchange so as to connect to Inland's network facilities.
- 33 ICS' amended petition specifically states ICS' intention to provide services to customers within the Roslyn exchange. Further, one of the issues in this docket is the extent to which competition exists in the Roslyn exchange in general.<sup>45</sup> The requested information, as it directly relates to the provision of services by ICS within the Roslyn exchange, is relevant to the proceedings in this docket. The Commission is not persuaded by WITA and Inland's argument that Inland would be engaging in pure speculation by speaking to the rates, terms and conditions under which Inland would be willing to offer access to or provide attachments for competitors, like ICS, within the Roslyn exchange. It is disingenuous for WITA and Inland to now argue that developing rates, terms and conditions prior to a request for access would be speculative when they sought virtually the same information from ICS and Suncadia in a prior discovery dispute.
- 34 With regard to Data Request No. 12, ICS is seeking information regarding the policies and agreements of WITA members, other than Inland, allowing access and connection to the members' facilities on a basis other than resale or purchase. This

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<sup>45</sup>Issues List, Issue 4.1, Section IV.

data request appears overly broad and not reasonably calculated to lead to relevant information. Further, these access agreements, if they exist are available from the Commission's records. Unlike Data Request No. 5, where ICS seeks information regarding the positions taken by one organization, the instant data request would involve potential numerous agreements for each of the WITA members. The Commission finds that Data Request No. 12 is overly broad, burdensome, and should be denied.

**ORDER**

**THE COMMISSION ORDERS:**

- 35 (1) Intelligent Community Services, Inc.'s Motion to Compel the Washington Independent Telecommunications Association and Inland Telephone Company to Respond to Data Request Nos. 2, 3, and 12 is denied.
- 36 (2) Intelligent Community Services, Inc.'s Motion to Compel the Washington Independent Telecommunications Association and Inland Telephone Company to Respond to Data Request Nos. 5, 9, and 11 is granted.

Dated at Olympia, Washington, and effective August 27, 2008.

**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**MARGUERITE E. RUSSELL**  
Administrative Law Judge