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8 BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION
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10 WASHINGTON INDEPENDENT
11 TELECOMMUNICATIONS ASSOCIATION,
12 WASHINGTON EXCHANGE CARRIER
13 ASSOCIATION, THE TOLEDO TELEPHONE
14 CO., INC., TENINO TELEPHONE COMPANY,
15 KALAMA TELEPHONE COMPANY AND
16 HOOD CANAL TELEPHONE COMPANY,
17 d/b/a HOOD CANAL COMMUNICATIONS,

18 Complainants,

19 v.

20 MCLEODUSA TELECOMMUNICATIONS
21 SERVICES, L.L.C. AND PAETEC
22 COMMUNICATIONS, INC.,

23 Defendants.

DOCKET NO. UT-111816

**RESPONSE TO COMPLAINANTS'
MOTION TO COMPEL RESPONSES TO
DISCOVERY**

24 Respondents McLeodUSA Telecommunications Services, L.L.C. (“McLeodUSA”) and
25 PAETEC Communications, Inc. (“PAETEC”) respectfully submit this response in opposition to
26 the complainants’ “Motion to Compel Discovery Responses” dated January 13, 2012
27 (“Motion”).

FIRST DISPUTE

28 The first disputed discovery issue relates to Data Request 1-7, which asks the respondents
29 to produce copies of every “contract or agreement McLeodUSA has with *another entity* for
30 delivery of traffic *within the state of Washington.*” Motion, at 2 (emphasis added). The

1 respondents objected to the breadth of this request, noting that, as stated, DR 1-7 does not
2 purport to limit itself to contracts or agreements relating to the termination of traffic to one of the
3 complainant carriers. The respondents also objected that some of the agreements contained
4 confidentiality provisions that prohibit disclosure. *Id.* Notwithstanding its objection, the
5 respondents produced voluminous non-Confidential agreements that were responsive to the
6 broadly-worded request. This led directly to Complainant's Fourth Set of Data Requests, **42 of**
7 ***which*** asked the respondents to explain why certain agreements were produced when they did
8 not appear to have anything to do with termination of traffic to any of the complainants. (The
9 answer, of course, is that the agreements were responsive to the overly-broad request). And yet,
10 in this Motion, complainants assert that the withheld Confidential agreements "presumably deal
11 directly with the issues in this case." *Id.* They assert further that the respondents are hiding
12 behind a claim of confidentiality "to not produce ***documents that they acknowledge reflect upon***
13 ***the dispute*** that is the subject matter of this Complaint." *Id.*, at p. 3 (emphasis added). This is
14 but one example of Complainants making assertions of ill intent on the part of the respondents,
15 with no basis in fact.

16 The undersigned counsel have both reviewed the confidentiality provisions of the
17 withheld agreements and have confirmed that the production of these documents to the
18 complainants would violate the express terms agreed upon between respondents and third
19 parties. The respondents are willing, however, to have the Administrative Law Judge review the
20 terms of the agreements that prevent disclosure *in camera* prior to ruling on this aspect of the
21 Motion.

22 SECOND DISPUTE

23 The second "disputed" discovery issue relates to the adequacy of the respondents' answer
24 to Data Request 1-8, which asked the respondents to "identify every measure McLeodUSA takes
25 to identify whether traffic delivered to it is IP-originated or TDM-originated." In a telephone
26 conference among the parties' counsel on December 27, 2011, complainants' counsel Richard
27 Finnigan made an informal request for a supplemental answer disclosing: (1) how frequently the

1 respondents check to verify that only IP-originated traffic is sent to McLeodUSA's VoIP
2 Termination product platform; and (2) identifying the specific verification algorithm and how it
3 is used. The undersigned respondents' counsel agreed to confer with the respondents, and
4 thereafter informed Mr. Finnigan that a supplemental answer would be forthcoming but that the
5 person with the information was away from the office and the answers would have to await his
6 return. The supplemental answer is now being prepared, and should be ready for service today
7 or tomorrow. There is no real dispute here, other than complainants' impatience.

8 THIRD DISPUTE

9 The third "disputed" discovery issue relates to the Complainants' Third Set of Data
10 Requests, which sought copies of all communications made to the FCC by the respondents and
11 their parent company, Windstream (a non-party to this proceeding), concerning: (a) specific
12 issues involved in this proceeding; and (b) any topics, regardless of relevance, in certain
13 specified FCC dockets.

14 Data Request 3-1 noted that the complainants had already obtained a sample of one such
15 communication by PAETEC, and attached it as Exhibit 1 to the data requests. That data request
16 seeks all other communications from PAETEC to the FCC, between January 1, 2009 and the date
17 of the response, in which PAETEC addresses three specific topics: (1) terminating access; (2)
18 exchange of IP voice traffic; and (3) phantom traffic.

19 Data Requests 3-2 and 3-3 identify five FCC proceedings by name and docket number,
20 and seek all communications filed in those proceedings, during the same time period stated in
21 DR , by PAETEC Holding Corp. and Windstream, respectively. However, those two data
22 requests are not limited by topic in any way.

23 The respondents objected to the production of Windstream documents since that entity is
24 not a party,¹ and to all of the requested documents because they are public records that are easily
25 accessible to the complainants. Respondents rely on the discovery rule set forth in WAC 480-
26

27 ¹ The complaints appear to have abandoned their request for Windstream documents, since their Motion requests only that McLeodUSA and PAETEC be required to respond. See Motion, at p. 5, ¶ 16.

1 07-400(3), which reads in part:
2

3 Parties **must not seek** discovery that is ...obtainable from some
4 other source that is more convenient, less burdensome, or less
5 expensive. A discovery request is inappropriate when the party
6 seeking discovery has had ample opportunity to obtain the
information sought or the discovery is unduly burdensome or
expensive

7 WAC 480-07-400(3) (emphasis added). In this case, it is clear that the complainants are able to
8 retrieve the public records they seek, and they have even identified specific docket numbers.

9 They are simply trying to shift the burden to the respondents. Notwithstanding the search
10 capabilities available on the FCC website,² and the ease with which the requested documents can
11 be retrieved, the complainants make the following, rather intemperate, assertions:

12 [The respondents' objection] is completely out of bounds. McLeod
13 and PaeTec would have the Complainants search literally
14 thousands of documents in several FCC dockets to try to ferret out
15 information that is readily available to McLeod and PaeTec. The
16 result could well be that the Complainants will overlook relevant
documents already in the possession and control of McLeod and
PaeTec at the Complainants' peril. ***That is apparently the hope of
McLeod and PaeTec.***

17 This is essentially the same approach that McLeod and PaeTec
18 takes [*sic*] to its [*sic*] traffic. ***That is, "we are hiding the traffic
19 from you to see if you can find it."*** That approach to providing
20 information and requiring the Complainants to act at their peril for
21 information that is easily within the reach of McLeod and PaeTec
should not be allowed to continue. ***Hiding the ball is not an
appropriate response to a data request.***

22 Motion, at pp. 4-5, ¶¶ 14-15 (emphasis added). Once again, the complainants are attributing
23 improper motives to the respondents without any basis in fact. The respondents asserted a good
24 faith objection to the production of publicly-available and easily-searchable documents based on
25 the Commission's discovery rules. It is the complainants' accusations, rather than the
26 respondents' objections, that are "out of bounds."

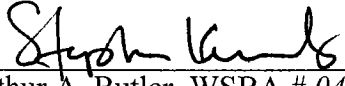
27 _____
² See, e.g., http://fjallfoss.fcc.gov/edocs_public/edocsLink.do?mode=advance&type=n

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For the above-stated reasons, the Motion should be denied.

DATED this 23rd day of January, 2012.

ATER WYNNE LLP

By: 
Arthur A. Butler, WSBA # 04678
Stephen J. Kennedy, WSBA #16341

Attorneys for Respondents

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have this 23rd day of January, 2012, served the true and correct
3 original, along with the correct number of copies, of the foregoing document upon the WUTC,
4 via the method(s) noted below, properly addressed as follows:
5

6 David S. Danner _____ Hand Delivered
7 Secretary and Executive Director _____ U.S. Mail (first-class, postage prepaid)
8 Washington Utilities and Transportation _____ x Overnight Mail (UPS)
9 Commission _____ Facsimile (360) 586-8203
10 1300 S Evergreen Park Drive SW _____ x Email (records@wutc.wa.gov)
11 PO Box 47250
12 Olympia, WA 98504-7250

13 I hereby certify that I have this 23rd day of January, 2012, served a true and correct copy
14 of the foregoing document upon parties of record, via the method(s) noted below, properly
15 addressed as follows:
16

17 ***Presiding Administrative Law Judge:***

18 Gregory J. Kopta _____ Hand Delivered
19 Washington Utilities and Transportation _____ U.S. Mail (first-class, postage prepaid)
20 Commission _____ Overnight Mail (UPS)
21 1300 S Evergreen Park Drive SW _____ Facsimile (360) 753-6862
22 PO Box 47250 _____ x Email (gkopta@uc.wa.gov)
23 Olympia, WA 98504-7250

24 ***On Behalf Of WITA, et al:***

25 Richard A. Finnigan _____ Hand Delivered
26 Law Office of Richard A. Finnigan _____ U.S. Mail (first-class, postage prepaid)
27 2112 Black Lake Boulevard SW _____ x Overnight Mail (UPS)
_____ Facsimile (360) 753-6862
_____ x Email (rickfinn@localaccess.com)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of January, 2012, at Seattle, Washington.

_____/s/_____
Erin D. Worden