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BEFORE THE WASHINGTON STATE

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UTILITIES AND TRANSPORTATION COMMISSION

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4 WASHINGTON INDEPENDENT )  
 TELECOMMUNICATIONS )  
 5 ASSOCIATION, WASHINGTON )  
 EXCHANGE CARRIER ASSOCIATION, )  
 6 THE TOLEDO TELEPHONE CO., INC., )  
 TENINO TELEPHONE COMPANY, )  
 7 KALAMA TELEPHONE COMPANY AND )  
 HOOD CANAL TELEPHONE COMPANY, )  
 8 d/b/a HOOD CANAL )  
 COMMUNICATIONS, )  
 9 Complainants, )  
 v. ) DOCKET NO. UT-111816  
 10 MCLEODUSA TELECOMMUNICATIONS )  
 SERVICES, L.L.C. AND PAETEC )  
 11 COMMUNICATIONS, INC., )  
 Respondents. )

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DISCOVERY CONFERENCE - VOL. II

Pages 13-35

14

ADMINISTRATIVE LAW JUDGE GREGORY J. KOPTA

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2:34 p.m.

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January 30, 2012

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Washington Utilities and Transportation Commission

1300 South Evergreen Park Drive Southwest

19

Olympia, Washington 98504-7250

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98504, commencing on Tuesday, January 30, 2012, at 2:34 p.m.

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REPORTED BY: KATHLEEN HAMILTON

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WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	CRT EXAM
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No Witnesses

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EXHIBITS

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1 OLYMPIA, WASHINGTON; JANUARY 30, 2012

2 2:34 P.M.

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5 THE HEARING OFFICER: Let's be on the record in  
6 docket number UT-111816 captioned Washington Independent  
7 Telecommunications Association, et al., versus McLeodUSA  
8 Telecommunications Services, LLC, et al.

9 Today's date is January 30th, 2012, and we are  
10 convened for a discovery conference to address a motion to  
11 compel responses to discovery filed by the complaints.

12 My name is Gregory J. Kopta. I'm the  
13 administrative law judge assigned to this case, and let's  
14 start with taking appearances. Mr. Finnigan first.

15 MR. FINNIGAN: Richard Finnigan appearing on  
16 behalf of the complaints.

17 THE HEARING OFFICER: And Mr. Butler.

18 MR. BUTLER: Arthur A. Butler appearing on behalf  
19 of the defendants.

20 THE HEARING OFFICER: All right. Let's get right  
21 to it, then. I have reviewed the motion and the response  
22 and the letter that Mr. Finnigan sent in in reply. Does  
23 anybody have anything to add at this point in addition to  
24 what they've submitted in writing? Mr. Finnigan.

25 MR. FINNIGAN: No, your Honor. I think the issues

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1 are straightforward and are presented in the -- in the  
2 pleadings.

3 THE HEARING OFFICER: Okay. And Mr. Butler.

4 MR. BUTLER: Yes. Specifically with respect to  
5 the first dispute. That is the one that asks for copies of  
6 every contract or agreement McLeod has with another entity  
7 for delivery of traffic within the State of Washington.

8 And we had objected on a couple grounds, but I  
9 think the one that's most relevant here is the -- the fact  
10 that the withheld agreements contain provisions which  
11 prevent us from disclosing either the terms of the agreement  
12 or any other confidential information.

13 This is confidential information of third parties,  
14 customer-specific information, which in my memory the  
15 Commission has never required be disclosed. But we have  
16 what we think should be a solution to propose, and that is  
17 that we could produce the standard wholesale services master  
18 service agreement.

19 Because that is not signed, it is therefore not  
20 itself a contract with a particular party, and then we think  
21 we would not run the risk of being found to be in breach of  
22 any commitments in the agreement. I think that should  
23 provide Mr. Finnigan with everything that he needs. Anyway,  
24 that is our suggestion.

25 THE HEARING OFFICER: Mr. Finnigan.

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1           MR. FINNIGAN: Yeah. I guess the problem occurs  
2 to me -- this is the first I'd heard of this -- that the  
3 problem that occurs to me with that solution is I won't know  
4 if there are variations. You know, you start with a master  
5 form of agreement and then you can make changes to that.

6           The issues here are that McLeod has taken the  
7 position that, on the one hand, if anyone is responsible for  
8 the payment of access charges, it's these upstream carriers.  
9 And they've included an affirmative defensive failure to  
10 name indispensable parties.

11           Without seeing those agreements, I, one, don't  
12 know if these parties are indispensable and, number two,  
13 don't have any idea as to whether there's a contractual  
14 obligation of these carriers to pay the terminating access  
15 charges as between themselves and McLeod. So it seems to me  
16 that those things are important.

17           Secondly, they've -- they've made the allegations  
18 that these carriers are not to deliver anything other than  
19 VoIP-originated traffic. They're not supposed to be  
20 delivering TDM-originated traffic, and that there are  
21 provisions in there that relate to that and the obligations  
22 of the parties.

23           Whether those -- whether those provisions are in  
24 these contracts that they have is relevant to the -- to  
25 these -- to the issues. There are two aspects to this case.

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1 One is TDM-originated traffic that terminates on the PSTM,  
2 and the second is VoIP-originated traffic which terminates  
3 on the PSTM.

4 Our position is they're both subject to  
5 terminating access charges. I believe -- I believe McLeod's  
6 position is that TDM-originated traffic is, and  
7 VoIP-originated traffic is not.

8 But -- and I may be -- I may be attributing a  
9 position to them that they're not actually going to take,  
10 but that's my understanding to date.

11 So it's important to see these agreements, and  
12 just to be given a form without knowing what the agreements  
13 themselves actually say is a step forward, but doesn't get  
14 us there. Doesn't get to the issues that are raised in the  
15 agreement or -- excuse me -- in the complaint, and it  
16 doesn't get us to the issues that the respondents themselves  
17 have raised.

18 THE HEARING OFFICER: Mr. Butler.

19 MR. BUTLER: My understanding is -- and this is  
20 Art Butler again. My understanding is that there are very  
21 rarely any changes from the standard agreement, and --  
22 but -- and I don't think that there are any changes to the  
23 operative provisions, but that's something that we can  
24 confirm. So I think having the standard agreement should  
25 suffice.



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1           THE HEARING OFFICER: Do you have a list of all  
2 customers that have signed that agreement in one way, shape  
3 or form?

4           MR. BUTLER: I'm sure the client does. I don't  
5 have it.

6           THE HEARING OFFICER: Is that something that you  
7 would be willing to provide? It sounds like that might  
8 address the second of Mr. Finnigan's concerns.

9           MR. BUTLER: Well, again my concern about having  
10 to identify individual customers, customer names are  
11 generally not required to be provided, but that's something  
12 I can check with the client about.

13          MR. FINNIGAN: If -- if there -- if they will  
14 provide a declaration that says that, just what Mr. Butler  
15 has said, that there are very -- there are very few changes,  
16 and they don't affect the operative matters that are before  
17 us, and they can provide a list of customers, then I'm fine  
18 with looking at the master form of the agreement.

19          THE HEARING OFFICER: Mr. Butler.

20          MR. BUTLER: Again, my concern is about  
21 identifying individual customers. Like I say, my  
22 understanding is the Commission has never required that.  
23 Generally if individual customers have come up, they've --  
24 the names have been masked and they've been assigned numbers  
25 or something like that.

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1           THE HEARING OFFICER: Well, I think my concern,  
2 and I think Mr. Finnigan's concern, is if McLeod is going to  
3 be saying that, "It's not our fault, it's somebody else's  
4 fault," but then they won't identify who that is, that sort  
5 of leaves us in a black hole, so --

6           MR. FINNIGAN: That's --

7           THE HEARING OFFICER: I don't know whether that is  
8 McLeod's position, but if it is, then I think it's pretty  
9 hard for you to say, "It's somebody else's fault, but we  
10 can't tell you who."

11          MR. BUTLER: Well, at this point we don't know  
12 whether there's been any violation of any of these terms.

13          THE HEARING OFFICER: Well, but let's assume for  
14 the sake of discussion that there has been a violation. Is  
15 it or do you anticipate taking the position on behalf of  
16 McLeod that it is not McLeod's responsibility, but instead  
17 who you obtain the traffic from, that it's their  
18 responsibility?

19          MR. BUTLER: Yes, I think that's correct.

20          THE HEARING OFFICER: Well, under those  
21 circumstances, I -- I don't see how you cannot identify who  
22 those people are.

23          MR. BUTLER: Well, they could be identified at the  
24 time which we determine that a customer, if any, has  
25 violated any legal obligation that it has. But to identify

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1 customers at this point when there's been no determination  
2 seems to me to be premature.

3 MR. FINNIGAN: Well, your Honor, it's -- we're in  
4 an untenable position where they've just confirmed that  
5 they're going to use a variation of the empty chair defense.  
6 You know, that "It's not our fault, look at this person  
7 who's not here's fault."

8 And I don't know at what time in this proceeding  
9 Mr. Butler would say, "Okay. Well, yeah, here's some names,  
10 but we're not going to tell you the names of all of them.  
11 We're just going to tell you the names that we think  
12 violated the terms of our agreement."

13 I think that -- I think that's problematic at  
14 best.

15 THE HEARING OFFICER: Well --

16 MR. BUTLER: Well, we might be able to provide a  
17 list in camera to the ALJ, but I mean, to disclose the  
18 identity of customers who have done nothing wrong seems to  
19 me to be inappropriate, and we could easily, if you hold  
20 Mr. Finnigan's concern, if and when a particular customer is  
21 identified as having violated some legal obligation, then at  
22 that point the identity might be ordered.

23 MR. FINNIGAN: Well, but let's get back to the  
24 premise that I said there are two types of traffic. One is  
25 TDM-originated and one is VoIP-originated, and my

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1 understanding of McLeod's position is that VoIP-originated  
2 doesn't have to pay access, and thus those people would not  
3 be in violation of the agreement that they're talking about.

4 But to us there they are -- our position is that  
5 they are responsible for terminating access. And if they  
6 then point to them and say -- to the empty chair and say,  
7 "Well, they are the ones who should be paying it without us  
8 knowing it."

9 So there's no violation, technical or otherwise,  
10 of the contract between the parties, as I understand that,  
11 without having seen it, as I understand those agreements to  
12 be. But they're going to be still be pointing to them  
13 saying, "Well, these unnamed people are -- unnamed entities  
14 are the ones who are responsible to pay my clients."

15 THE HEARING OFFICER: And I can appreciate that  
16 concern. The other concern that I have, however, is those  
17 may not be entities that are subject to the Commission's  
18 jurisdiction, in which case if it's --

19 MR. FINNIGAN: Right.

20 THE HEARING OFFICER: -- XYZ Corporation that is  
21 not a registered telecommunications provider in Washington,  
22 there's nothing we can do about it anyway, whoever they  
23 happen to be.

24 MR. FINNIGAN: But we wouldn't know that until we  
25 saw the list.

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1 THE HEARING OFFICER: Well, that's true. But --

2 MR. FINNIGAN: Plus --

3 THE HEARING OFFICER: -- if Mr. Butler provides it  
4 in camera, certainly it's something I can determine and say,  
5 "There's nobody on this list that is a registered  
6 telecommunications carrier with the Utilities and  
7 Transportation Commission." Would that satisfy you?

8 MR. FINNIGAN: No.

9 THE HEARING OFFICER: I was afraid of that.

10 MR. FINNIGAN: It would not, but plus -- plus  
11 we -- the fact is that from our own legwork, we do know  
12 there are some carriers that are subject to the Commission's  
13 jurisdiction involved because of the test calls that my  
14 clients made, and made them with specific carriers as the  
15 originating carrier, and then the traffic arrived to my  
16 clients through McLeod. So we --

17 MR. BUTLER: I think it's important to keep in  
18 mind that the allegation that Mr. Finnigan's clients have  
19 made here is that McLeod is masking these calls or changing  
20 information associated with the calls.

21 THE HEARING OFFICER: Well, again that --

22 MR. BUTLER: The discovery should be directed to  
23 that.

24 MR. FINNIGAN: But again, unless McLeod takes off  
25 the table the idea that they're going to use a defense that

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1 they're not responsible, it's someone who delivered the  
2 traffic to them that is responsible, that information needs  
3 to be produced.

4 MR. BUTLER: Well, again that's not relevant to  
5 the allegation about whether McLeod has done any particular  
6 act.

7 MR. FINNIGAN: It's certainly relevant to the  
8 defense that has been raised by the respondents.

9 MR. BUTLER: The identity of another carrier is  
10 not relevant to the allegations that have been made against  
11 McLeod.

12 THE HEARING OFFICER: Well, this is what --

13 MR. BUTLER: The other thing is that we would  
14 propose that we submit to the ALJ for your in camera review  
15 the confidentiality provisions of these agreements.

16 THE HEARING OFFICER: Well, I know that you made  
17 that proffer, and I don't know that that's going to be  
18 terribly helpful, because from my point of view, it's less  
19 important what the confidentiality provisions say than what  
20 is the information, and is it something that is  
21 reasonable -- that will be likely to lead to the discovery  
22 of admissible evidence, which is the standard that I'm  
23 looking at.

24 I mean, it's not -- I have to agree with  
25 Mr. Finnigan that it's not been in my experience an excuse

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1 to turn something over just because you have a  
2 confidentiality agreement with somebody else not to do it,  
3 if it's information that's germane to a contested proceeding  
4 before the Commission.

5 So but I -- on the other hand, I do think that the  
6 identity of the customers that you have I can see might be  
7 something that would be -- only come up in certain  
8 circumstances that maybe have not yet arisen, and so I'm  
9 sensitive to revealing, even on a confidential basis,  
10 customer proprietary network information, including customer  
11 names.

12 So I think what I will do, at least at this point,  
13 is since you've offered to give Mr. Finnigan the master  
14 agreement along with a declaration saying essentially what  
15 you've represented earlier, that I will have you do that.

16 And I will have you submit a list of the customer  
17 names of all customers who have signed that agreement in one  
18 way, shape or form in camera for my review, and I will hang  
19 onto it until such time as it appears or Mr. Finnigan files  
20 a motion to have access to that information.

21 MR. FINNIGAN: And, your Honor, there's another  
22 step that we haven't talked about, and that's whether some  
23 of the information should be available under a highly  
24 confidential -- I forget the word.

25 THE HEARING OFFICER: Highly confidential

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1 protective order.

2 MR. FINNIGAN: Right.

3 THE HEARING OFFICER: I mean, we will cross that  
4 bridge when we come to it, because it seems to me that there  
5 may be circumstances under which there would be no need for  
6 the names to be produced at all. And so I will hold that in  
7 abeyance for now.

8 If there's a determination or a request later on  
9 that this information is something that's necessary, then we  
10 can address how it can be provided and whether a highly  
11 confidential protective order would be appropriate.

12 MR. BUTLER: Thank you.

13 THE HEARING OFFICER: Okay. And as I understand  
14 it, at this point there's no longer a dispute requiring my  
15 resolution on data request 1-8; is that correct?

16 MR. FINNIGAN: That's correct, your Honor.

17 THE HEARING OFFICER: All right. That then --  
18 that just leads us to the third set of data requests. And a  
19 question that I have for you, Mr. Finnigan, is exactly what  
20 are you looking for that would be information that would  
21 lead to the discovery of admissible evidence in this  
22 proceeding through comments that are filed at the FCC?

23 MR. FINNIGAN: What I am thinking that may exist,  
24 and the reason for asking for that, is there may be  
25 essentially admissions against interest for the positions



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1 that they're taking. In other words, they may have taken a  
2 position in front of the FCC that may in part or in whole be  
3 contrary to positions they may be taking in this docket.

4 THE HEARING OFFICER: And you already have one set  
5 of comments from PAETEC Holdings; is that correct?

6 MR. FINNIGAN: That's correct.

7 THE HEARING OFFICER: So you would be looking for  
8 things that are inconsistent with that, with what you  
9 already have?

10 MR. FINNIGAN: No, no, no. Actually more there  
11 may be things that are more along those lines that -- not to  
12 get into the argument of the merits on this, but in some  
13 ways I view the set of comments that I have as -- as -- as  
14 I'll use the word potentially inconsistent with positions  
15 that may be taken by McLeod in this docket, since we haven't  
16 had formal positions taken by McLeod in this docket.

17 THE HEARING OFFICER: There is that.

18 MR. FINNIGAN: I don't know that, but it appeared  
19 to be somewhat, as I said, potentially inconsistent and  
20 that's what sparked the data request was to see what  
21 positions have they been taking on these types of related  
22 issues related to VoIP traffic and access charges.

23 THE HEARING OFFICER: And I notice that you listed  
24 some specific dockets that you've done research on the FCC's  
25 web site and those dockets for particular comments by PAETEC

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1 or Windstream?

2 MR. FINNIGAN: Yes, your Honor. And to the --  
3 what I'm -- my whole concern is that those dockets are huge.  
4 And if I miss something, even if I've tried to find it, I  
5 don't think that's a risk that I should have to inherit.

6 So yes, I'm perfectly willing to do my own  
7 research, and have done my own research, but I need to be  
8 sure that they're not holding on to something that doesn't  
9 require them to do anything but put it in the mail. And  
10 that's the -- that's the whole purpose behind those data  
11 requests.

12 THE HEARING OFFICER: I see. Well, I have to  
13 agree with McLeod that Windstream, because they just  
14 acquired the company, I don't see them as a party that's  
15 involved in this proceeding.

16 And so I -- that's too far afield, from my  
17 perspective, to require McLeod to provide Windstream  
18 comments. And I also, given that this is a -- these are  
19 proceedings before the FCC, they do have a web site  
20 available where these -- at least my experience has been  
21 it's a very, very thorough and complete listing of  
22 everything that's been filed in particular dockets, that  
23 that is also something that is really incumbent upon you to  
24 find.

25 And given that if this were a little bit closer to

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1 the bone, then I might feel differently. But given that  
2 these are comments before the FCC, and what we're talking  
3 about here is what McLeod has or has not done in the State  
4 of Washington, I think that's a little bit -- a little --  
5 not enough of a nexus for me to require McLeod do it as  
6 opposed to having you take care of it yourself.

7 Now, if something comes up, if you ask discovery,  
8 a particular question, and then say, you know, "Give all  
9 information or all documents that support your position or  
10 your answer or whatever," and those include comments filed  
11 with the FCC, then my decision might be different.

12 But just a general data request, "Give me  
13 everything that you filed in these dockets," I think is  
14 rather broad and not terribly helpful and not terribly  
15 likely to lead to something that the evidentiary -- of  
16 evidentiary value in this proceeding.

17 MR. FINNIGAN: Your Honor, I did not make that  
18 statement. I didn't ask for them to give all the comments  
19 in the docket. I identified specific subject matters that  
20 were in the first set of the one set of comments, and asked  
21 them to provide anything that was related to those  
22 particular items, which relate to VoIP traffic and  
23 terminating access charges, so they're related directly to  
24 the issues in this case.

25 I didn't ask them, you know, "What is your feeling

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1 on -- give me all comments relating to USF reform." Or  
2 "Give me all comments, you know, related to the entire  
3 docket." I did not do that.

4 MR. BUTLER: Well, in fact you did.

5 THE HEARING OFFICER: I was going to say,  
6 Mr. Butler, as I look at this request, look at request  
7 number three, "Please provide any communication filed by  
8 Windstream between January 1st, 2009, and the date of the  
9 response to this data request in any of the following  
10 dockets," and then you list the dockets. That's not narrow  
11 at all. That's everything that's been filed.

12 MR. BUTLER: And --

13 MR. FINNIGAN: We were --

14 MR. BUTLER: And the same in data request two.

15 MR. FINNIGAN: Data request one talks about -- it  
16 talks about the three identified subjects.

17 THE HEARING OFFICER: You've got two different  
18 data requests here, one that you do talk about subjects --

19 MR. FINNIGAN: Right.

20 THE HEARING OFFICER: -- regardless of docket, and  
21 one where you asked for dockets regardless of subject.

22 MR. FINNIGAN: Well, and what I'm focusing on now  
23 is the one that's related to the three identified subject  
24 areas and ask for production related to that -- related to  
25 those specific subject areas.

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1           THE HEARING OFFICER: Well, I understand that, but  
2 I think at this point, unless there is some demonstration  
3 through testimony that McLeod files that somehow or another  
4 whatever positions it has taken at the FCC impact what it  
5 does in the State of Washington, then I think it's incumbent  
6 on you to take a look at the FCC and do that research and  
7 bring that to our attention.

8           MR. FINNIGAN: Okay.

9           THE HEARING OFFICER: That's where we stand on  
10 those. All right. Anything else?

11          MR. FINNIGAN: Not from me.

12          MR. BUTLER: No.

13          THE HEARING OFFICER: All right. Then we are  
14 adjourned. I am not going to issue an order. I think you  
15 all have enough direction from what I said here, and the  
16 transcript will be available. Unless somebody feels the  
17 need for an order, then I think the transcript will stand as  
18 it is.

19          MR. BUTLER: I'm sorry to be sort of a pain, but  
20 since one of our concerns here is whether we would be put in  
21 breach of any contractual obligations that we might have, it  
22 would be helpful if we had an order on the disclosure of the  
23 confidential information.

24          THE HEARING OFFICER: All right. Then I will  
25 provide that and so that you will have something to show

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1 your client to make them understand that this is something  
2 the Commission is requiring of them. Then I think that's  
3 it.

4 MR. BUTLER: Thank you.

5 THE HEARING OFFICER: Wait a minute. One other  
6 thing, Mr. Finnigan?

7 MR. FINNIGAN: Just between -- do you guys --  
8 have you guys come up with a time that we can get together  
9 about the -- my e-mail from this morning?

10 THE HEARING OFFICER: Well, wait a minute. Let's  
11 go off the record, if we're going to have this kind of a  
12 conversation. We are adjourned. Thank you. And let's be  
13 off the record.

14 (The proceedings were concluded at 02:58 PM.)

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1 C E R T I F I C A T I O N .

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3 STATE OF WASHINGTON

4 COUNTY OF KING

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6 I, Kathleen Hamilton, a Certified Shorthand  
7 Reporter and Notary Public in and for the State of  
8 Washington, do hereby certify that the foregoing transcript  
9 of the hearing on JANUARY 30, 2012, is true and accurate to  
10 the best of my knowledge, skill and ability.

11 IN WITNESS WHEREOF, I have hereunto set my hand and  
12 seal this 7TH day of FEBRUARY, 2012.

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KATHLEEN HAMILTON, RPR, CRR, CCR

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20 My commission expires:

21 APRIL 2014

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