

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

An Investigation into the Intrastate Switched
Access Rates of All Kentucky Incumbent and
Competitive Local Exchange Carriers

Adm. Case No. 2010-00398

**Joint Motion of
TWTC, Level 3, and PAETEC
to Compel and for Entry of Protective Order**

tw telecom of Kentucky, llc, Level 3 Communications, LLC, and US LEC of Tennessee L.L.C. d/b/a PAETEC Business Services, through their undersigned counsel, hereby jointly move the Commission to enter a protective order adopting the terms and conditions of the attached Confidentiality Agreement and compel all parties to this proceeding to provide — upon request by another party — non-redacted data responses and testimony pursuant to the terms of the protective order. In support of this motion, the Joint Movants state as follows:

1. The situation involving the parties' exchange of confidential information in this proceeding is very confused. The fundamental problem faced by the Joint Movants is that they have not received all of the information that they have requested from other parties. Joint Movants believe other parties in this proceeding are dealing with the same issue.

2. As Cincinnati Bell Telephone Company LLC stated in its 4/15/11 Comments (p. 3), “[a]ll participants in this proceeding should have access to the data (subject to a reasonable protective order as necessary) in order to independently test assertions that more revenue is necessary.” Joint Movants have requested relevant data and information from other parties to this proceeding, but in some instances, they have not received all of it. For example, the undersigned contacted Windstream Kentucky East, LLC and Windstream Kentucky West,

LLC (“Windstream”) in late April 2011 to establish some sort of agreement in order to obtain confidential information that Windstream filed with the Commission on April 15, 2011.

Windstream was largely unresponsive to this request, and does not appear to have signed on to the Confidentiality Agreement. Importantly, Windstream has provided data and testimony designated as confidential to the Commission, but it has not provided this information to Joint Movants or to some or all of the other parties to this proceeding. There are two fundamental problems with Windstream’s approach: (i) if other parties have no access but the Commission is allowed to review Windstream’s confidential data and testimony, Windstream’s filings constitute *ex parte* communications with the Commission, and the information should be excluded from the record and from consideration; and (ii) the parties to this proceeding cannot be expected to prepare pre-filed rebuttal testimony without seeing the non-redacted direct testimony and data submitted by all parties.

3. In order to reduce confusion and streamline the exchange of confidential information in this proceeding, Joint Movants propose that the Commission enter a protective order governing the exchange of confidential information between the parties. Joint Movants suggest that the language of the protective order be taken from the terms and conditions of the attached Confidentiality Agreement, which was created by several parties to this proceeding with the intent that it would be acceptable to all parties and allow for the secure flow of sensitive information among the parties. This Confidentiality Agreement took several weeks and various drafts among the participants to finalize. Once completed, the majority of the parties to this proceeding (or their representatives) executed the Confidentiality Agreement and began exchanging information designated as “confidential” pursuant to the safeguards provided in the Agreement.

4. In order for all parties to stand on equal footing in this proceeding, Joint Movants move the Commission to (a) enter a protective order adopting the terms and conditions of the attached Confidentiality Agreement and (b) compel all parties to this proceeding to provide — upon request by another party — non-redacted data responses and testimony pursuant to the terms of the protective order.

Respectfully submitted on behalf of TWTC,
Level 3, and PAETEC:

/s/ Oran S. McFarlan, III

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION INTO THE INTRASTATE)	
SWITCHED ACCESS RATES OF ALL)	ADMINISTRATIVE
KENTUCKY INCUMBENT AND COMPETITIVE)	CASE NO. 2010-00398
LOCAL EXCHANGE CARRIERS)	
)	

CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (“Agreement”) is entered into as of June 20, 2011 (“Effective Date”) between Ballard Rural Telephone Cooperative Corporation, Inc., Brandenburg Telephone Company, Duo County Telephone Cooperative Corporation, Inc., Foothills Rural Telephone Cooperative, Inc., Gearhart Communications Co., Inc., Highland Telephone Cooperative, Inc., Logan Telephone Cooperative, Inc., Mountain Rural Telephone Cooperative, Inc., North Central Telephone Cooperative Corporation, Peoples Rural Telephone Cooperative, Inc., South Central Rural Telephone Cooperative Corporation, Inc., Thacker-Grigsby Telephone Company, Inc., and West Kentucky Rural Telephone Cooperative Corporation, Inc. (collectively, the “RLECs”); Leslie County Telephone Company, Lewisport Telephone Company, and Salem Telephone Company (collectively “TDS Telecom”); MCImetro Transmission Access Transmission Services LLC d/b/a Verizon Access Transmission Services, MCI Communications Services, Inc. d/b/a Verizon Business Services, Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, NYNEX Long Distance Company d/b/a Verizon Enterprise solutions, TTI National, Inc., Teleconnect Long Distance Service & Systems d/b/a Telecom*USA and Verizon Select Services, Inc. (collectively, “Verizon”); Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS, Nextel West Corp., and NPCR, Inc., d/b/a Nextel Partners (collectively, “Sprint Nextel”); AT&T Services, Inc. on behalf of itself and its affiliates (collectively, “AT&T”); Electric and Water Plant Board of the City of Frankfort (“Frankfort Plant Board”); SE Acquisitions, LLC d/b/a SouthEast Telephone; Cincinnati Bell Telephone Company LLC; tw telecom, llc (“twtc”), Level 3 Communications, LLC (“Level 3”), and U.S. LEC of Tennessee L.L.C. d/b/a PAETEC Business Services (“PAETEC”) (all such entities individually a “Party” and, collectively, the “Parties”). It is intended by the Parties that the terms of this Agreement shall govern the exchange of Confidential Information and Highly Confidential Information in this proceeding, at least until such time as an order addressing any motion for confidential treatment may be entered by the Kentucky Public Service Commission (“Commission”). The Parties agree that, to the extent any person or entity not a Party to this Agreement requests Confidential Information or Highly Confidential Information from a Party, the Parties will move the Commission to enter a protective order containing the same material terms and conditions set forth in this Agreement.

Any Party may need to provide to one or more other Parties Confidential Information and/or Highly Confidential Information, as defined below, for the purposes of responding to

filings, testimony and/or requests for production of documents, interrogatories, or other discovery authorized by the Kentucky Rules of Civil Procedure and the Commission's Rules. Throughout this Agreement, the "Providing Party" refers to the Party providing Confidential Information and/or Highly Confidential Information and the "Receiving Party" refers to the Party receiving Confidential Information and/or Highly Confidential Information.

1. As used herein, "Confidential Information" shall refer to any document, testimony or other material produced by a Party that it believes in good faith contains confidential proprietary, commercially valuable, trade secret, competitively sensitive business or financial information, or other confidential information that is not generally available to the public or third parties. Confidential Information encompasses documents, testimony, discovery responses or other material, and all copies thereof, and the information or data contained in such materials, regardless of the form of media in which it is provided. All Confidential Information shall be protected from disclosure as specified herein, and such protection shall continue unless and to the extent that it has been determined by the Commission or court of competent jurisdiction that particular material or information is to be filed in the public record or does not qualify for protection hereunder.

2. Confidential Information shall be used only for purposes of this proceeding and any appeals thereof, and shall not be used for any other purpose or in any other litigation, and shall not be disclosed to anyone except:

a. The Parties, their agents, employees and designees who agree to be bound by the terms of this Agreement;

b. Counsel of record, including paralegals, legal assistants and clerks for such counsel, and any other counsel for any of the Parties, along with their paralegals, legal assistants and clerks who agree to be bound by the terms of this Agreement; and

c. Any person, including experts and consultants, employed or retained by counsel of record or a Party to this proceeding to whom it is necessary to disclose such for the purpose of this proceeding, provided that each such person agrees to be bound by the terms of this Agreement.

3. The Parties may designate documents, discovery responses, transcripts, or other material "Confidential" as follows: (1) Documents, discovery responses, or other tangible materials (including, without limitation, CD-ROMs and tapes) may be designated by conspicuously affixing the label "Confidential" to each page or portion of any document, discovery response, or other tangible material containing any Confidential Information (or, in the case of computer media, on the medium and its label and/or cover); (2) If Confidential Information is disclosed in a hearing or other proceeding, the Parties may designate any or all of the transcript as "Confidential" or "Proprietary" by so stating on the record of the proceeding; and (3) All copies of any transcript that contains any Confidential Information shall be prominently marked "Confidential" on the cover thereof and on each page thereof which contains Confidential Information. If any such transcripts are filed with the Commission, such transcripts shall be filed under seal.

4. The Parties understand that the Receiving Party may need to incorporate certain portions of the Confidential Information into testimony, briefs or other filings related to this proceeding. Each Receiving Party agrees: (1) not to reveal any Confidential Information to anyone other than the Commission or its staff pursuant to a motion for protective treatment or a person who has read this Agreement and agreed in writing to be bound by its terms (a copy of such form is attached as Exhibit A hereto); (2) to utilize any Confidential Information solely for purposes of preparation for and conduct and resolution of this proceeding and any appeals thereof, and not for any other purpose; and (3) to keep all Confidential Information secure at all times in accordance with the purpose and intent of this Agreement.

5. As used herein, “Highly Confidential Information” shall be such Confidential Information that a Party designates “Highly Confidential Information – Attorney’s and Special Designee’s Eyes Only” and believes in good faith constitutes or describes the Providing Party’s marketing plans, costing and pricing aspects thereof, costing and pricing of network elements, competitive strategies, market share projections, marketing materials that have not yet been used, customer-identifying information, customer prospects for services that are subject to competition, revenue data, access line information, minutes of use, subscriber data, or other business or network information that would otherwise provide a competitive advantage if disclosed to individuals other than Counsel of Record and Special Designees as defined in Paragraph 6 below. All materials designated “Highly Confidential Information – Attorney’s and Special Designee’s Eyes Only” shall be protected from disclosure as specified herein, unless a Party obtains an order of the Commission or court of competent jurisdiction that all or certain portions of such materials are not, in fact, protected.

6. All information designated “Highly Confidential Information – Attorney’s and Special Designee’s Eyes Only” shall be disclosed only to counsel of record in this proceeding, including outside counsel of record, paralegals, legal assistants and clerks for such counsel and outside counsel (collectively, “Counsel of Record”), and only to those witnesses, employees, agents or consultants with a need to know to provide testimony or analyses solely for purposes of this proceeding (“Special Designees”), and who have signed an agreement in the form attached as Exhibit B hereto. Receiving Party shall use the Highly Confidential Information solely for the purpose of participating in this Administrative Case No. 2010-00398 and for no other purpose whatsoever. In no circumstances shall Receiving Party disclose Highly Confidential Information to individuals involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the Producing Party without submitting a written request to the Producing Party's counsel. If the requesting and producing Parties are unable to reach agreement with respect to such a request, they may submit the issue to the Commission for resolution.

7. The Parties may designate documents, discovery responses, transcripts, or other material as “Highly Confidential Information – Attorney’s and Special Designee’s Eyes Only” as follows: (1) Documents, discovery responses, or other tangible materials (including, without limitation, CD-ROMs and tapes) may be designated by conspicuously affixing the label “Highly Confidential Information – Attorney’s and Special Designee’s Eyes Only” to each page or portion of any document, discovery response, or other tangible material containing any Highly Confidential Information (or, in the case of computer media, on the medium and its label and/or cover); (2) If Highly Confidential Information is disclosed in a hearing or other proceeding, the

Parties may designate any or all of the transcript as “Highly Confidential Information – Attorney’s and Special Designee’s Eyes Only” by so stating on the record of the proceeding; and (3) All copies of any transcript that contains any Highly Confidential Information shall be prominently marked “Highly Confidential Information – Attorney’s and Special Designee’s Eyes Only” on the cover thereof and on each page thereof which contains Highly Confidential Information. If any such transcripts are filed with the Commission, such transcripts shall be filed under seal.

8. The Parties understand that the Receiving Party may need to incorporate certain portions of the materials designated “Highly Confidential Information – Attorney’s and Special Designee’s Eyes Only” into testimony, briefs, or other filings related to this proceeding. Each Receiving Party agrees: (1) not to reveal information which is designated “Highly Confidential Information – Attorney’s and Special Designee’s Eyes Only” to any person other than the Commission or its staff pursuant to a motion for protective treatment, and those Special Designees or Counsel of Record in this Proceeding, including paralegals, legal assistants and clerks for such counsel who have signed an agreement in the form attached as Exhibit B hereto; (2) to utilize any such material solely for purposes of preparation for and conduct and resolution of this proceeding and any appeals thereof, and not for any other purpose, and (3) all such material shall be carefully maintained so as to preclude access by persons who are not qualified recipients of such information under paragraph (6) of this Agreement. This Paragraph shall not apply to material or information that has been determined by the Commission not to qualify for protection hereunder.

9. The Confidential Information and Highly Confidential Information produced pursuant to this Agreement may also be subject to the terms of a Protective Order issued by an authorized official of any state or federal agency or court with jurisdiction. In this proceeding, the Parties hereto acknowledge that the Commission may enter a Protective Order providing for the confidentiality of the Confidential Information or Highly Confidential Information, which may contain terms and conditions different from this Agreement. Once entered, the terms of the Protective Order shall supersede the terms of this Agreement, but shall not relieve any person who has reviewed Confidential Information or Highly Confidential Information of their obligations under this Agreement as to that information. The Parties are permitted to file the designated material, or any portion thereof, in this proceeding, provided that the designated materials are filed under seal or pursuant to the terms of a Protective Order or this Confidentiality Agreement.

10. The inadvertent production of a document or other material without a designation of “Confidential” or “Highly Confidential Information – Attorney’s and Special Designee’s Eyes Only” shall not be a waiver of such designation. Any “Confidential” or “Highly Confidential Information – Attorney’s and Special Designee’s Eyes Only” designation that is inadvertently omitted may be corrected within a reasonable period of time by written notification to counsel for the Receiving Party. The Party receiving such notification shall thereafter take such steps as reasonably necessary to mark and treat such documents or other materials, and the information contained therein, in accordance with the terms of this Agreement. The documents or other materials, and the information contained therein, shall thereafter be fully subject to this Agreement as if they had been initially so designated.

11. Should any Confidential Information or Highly Confidential Information be inadvertently disclosed to any person or party not authorized under this Agreement to receive such Confidential Information or Highly Confidential Information, then the Receiving Party that made such inadvertent disclosure shall immediately use its best efforts to retrieve such Confidential Information, Highly Confidential Information and all documents or other materials containing that Confidential Information or Highly Confidential Information from the person to whom it was inadvertently disclosed, and shall also take all steps necessary to have the person who received the Confidential Information or Highly Confidential Information execute an agreement in the appropriate form attached as Exhibits A and B hereto. The executed agreement shall promptly be delivered to the Providing Party. In addition, the Party who made such inadvertent disclosure of the Confidential Information or Highly Confidential Information shall immediately inform the Providing Party of the fact of the inadvertent disclosure and the identity of the person to whom the inadvertent disclosure was made.

12. Confidential Information and Highly Confidential Information does not include any information:

- a. publicly disclosed by Providing Party;
- b. Providing Party in writing authorizes Receiving Party to disclose without restriction;
- c. Receiving Party already lawfully knows at the time it is disclosed by Providing Party, without an obligation to keep it confidential;
- d. Receiving Party lawfully obtains from any source other than Providing Party, provided that such source lawfully disclosed such information; and
- e. Receiving Party independently develops without any direct or indirect use of, access to or reference to Providing Party's Confidential Information or Highly Confidential Information.

13. Prior to submitting any dispute pertaining to this Agreement to the Commission or a court of competent jurisdiction, the Parties agree to first attempt to resolve any such dispute in good faith on an informal basis.

14. In the event of a dispute regarding a designation of any documents or other materials as "Confidential" or "Highly Confidential Information – Attorney's and Special Designee's Eyes Only," counsel shall endeavor in good faith to resolve the dispute informally in accordance with Paragraph 13. Material designated as "Confidential" or "Highly Confidential Information – Attorney's and Special Designee's Eyes Only" however, shall be treated in accordance with the provisions hereof, except that any Party may seek at any time an order from the Commission or court of competent jurisdiction determining that specified information or categories of information are not entitled to protection under this Agreement. During any dispute, the document or other material shall retain its "Confidential" or "Highly Confidential Information – Attorney's and Special Designee's Eyes Only" designation. The burden of demonstrating that the designation of "Confidential" or "Highly Confidential Information – Attorney's and Special Designee's Eyes Only" is appropriate and should be maintained shall be with the Providing Party.

15. If the Commission or another agency or court subpoenas or orders production or disclosure of any Confidential Information or Highly Confidential Information that a Party has obtained under the terms of this Agreement, the recipient of the subpoena or order shall promptly notify the Producing Party of the pendency of such subpoena or order at least ten (10) days before such production is scheduled or such subpoena is returnable. If the Producing Party wishes to object to the production of the same, it shall notify the recipient of that objection and take appropriate action to challenge the subpoena or order requiring production before the expiration of the ten (10)-day period. No Confidential Information or Highly Confidential Information shall be produced by a Receiving Party until such ten (10) days have elapsed or, upon proper notice having been given to the recipient of the subpoena or order, any Party's objections shall have been heard and overruled by the presiding court, arbitrator or administrative agency.

16. If a Party receives an order or subpoena requiring the production of Confidential Information or Highly Confidential Information in less than ten (10) days, that Party must notify the Producing Party as soon as practicable (preferably within twenty-four (24) hours of receipt of the subpoena). If the Producing Party wishes to object to the production, it shall notify the recipient of the objection and take appropriate action to challenge the subpoena or order requiring production before expiration of the production date.

17. Within sixty (60) days after the conclusion of this proceeding, including any appeals, the original and all copies of each document and thing, including copies given to any expert or other person pursuant to this Agreement, which contains Confidential Information or Highly Confidential Information, upon request, shall be destroyed or returned to the Producing Party (unless contrary to the Commission's rulings or the orders of an applicable reviewing or appellate court), and the Receiving Parties shall each certify in writing that all copies of such materials have been destroyed or returned. Counsel of record nonetheless may elect to retain a complete set of documents admitted into evidence or filed with the Commission.

18. Each Party warrants that it has the authority to enter into this Agreement for itself and its applicable affiliates that may be producing or receiving information hereunder.

19. The term of this Agreement and the Parties' obligations hereunder commence on the Effective Date. Thereafter, the Receiving Party's obligations with respect to any particular Confidential Information and Highly Confidential Information of the Providing Party shall remain in effect, including after the expiration or termination of this Agreement until such time as it qualifies under one of the exceptions set forth in Section 12 above.

20. Each Party acknowledges and agrees that any breach or threatened breach of this Agreement is likely to cause the Providing Party irreparable harm for which money damages may not be an appropriate or sufficient remedy. The Receiving Party, therefore, agrees that the Providing Party is entitled to seek injunctive or other equitable relief to remedy or prevent any breach or threatened breach of this Agreement. Such remedy is not the exclusive remedy for any breach or threatened breach of this Agreement, but is in addition to all other rights and remedies available at law or in equity.

21. If and to the extent any provision of this Agreement is held invalid or unenforceable at law, such provision will be deemed stricken from the Agreement, and the remainder of the Agreement will continue in effect and be valid and enforceable to the fullest extent permitted by law.

22. This Agreement is binding upon and inures to the benefit of the Parties and their heirs, executors, legal and personal representatives, successors and assigns, as the case may be.

23. This Agreement shall be governed and construed by Kentucky law, without regard to its choice of law provisions.

24. No forbearance, failure or delay in exercising any right, power or privilege is waiver thereof, nor does any single or partial exercise thereof preclude any other or future exercise thereof, or the exercise of any other right, power or privilege.

25. This Agreement, including Exhibits A and B, is the entire agreement with respect to exchange of information between and among the Parties hereunder and may not be modified or amended except by a written instrument signed by the Parties. Each Party has read this Agreement, understands it and agrees to be bound by its terms and conditions. There are no understandings or representations with respect to the subject matter hereof, express or implied, that are not stated herein.

26. The Parties acknowledge that this Agreement is the result of compromise and settlement and entered into in order to facilitate the exchange of Confidential and Highly Confidential information in connection with KPSC Case No. 2010-00398. The Parties further acknowledge that this Agreement is not and should not be taken as precedent for the manner in which confidentiality issues are resolved in other KPSC proceedings or in other jurisdictions.

27. This Agreement may be executed in counterparts, and signatures exchanged by facsimile or other electronic means are effective for all purposes hereunder to the same extent as original signatures.

Dated as of June 20, 2011

The RLECs

Verizon

By: _____

By: _____

Date: _____

Date: _____

Sprint

By: _____

Date: _____

AT&T

By: _____

Date: _____

Frankfort Plant Board

By: _____

Date: _____

SE Acquisitions, LLC

By: _____

Date: _____

Cincinnati Bell Telephone Company LLC

By: _____

Date: _____

TDS Telecom

By: _____

Date: _____

twtc, Level 3, PAETEC

By: _____

Date: _____

EXHIBIT A

I have reviewed the foregoing Confidentiality Agreement dated June 20, 2011 relating to Kentucky Public Service Commission Case No. 2010-00398, with respect to the review and use of **Confidential Information** as defined therein, and I hereby agree to be bound by the terms and conditions of such Confidentiality Agreement.

Signature

Name (type or print)

Title or Description of Position

Employer

Address

Party

Date

EXHIBIT B

(Counsel of Record and Special Designees Only)

I have reviewed the foregoing Confidentiality Agreement dated June 20, 2011 relating to Kentucky Public Service Commission Case No. 2010-00398, with respect to the review and use of **Highly Confidential Information** as defined therein, and I hereby agree to be bound by the terms and conditions of such Confidentiality Agreement.

Signature

Name (type or print)

Title or Description of Position

Firm

Address

Party

Date

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