

**IN THE MATTER OF THE PETITION OF
INTELLIGENT COMMUNITY SERVICES, INC.**

**FOR DESIGNATION AS ELIGIBLE
TELECOMMUNICATIONS CARRIER UNDER
47 U.S.C. §214(e)(2)**

DOCKET NO. UT-053041

**DIRECT TESTIMONY
OF STEVEN E. WATKINS**

**ON BEHALF OF INLAND TELEPHONE COMPANY
AND THE WASHINGTON INDEPENDENT TELECOMMUNICATIONS
ASSOCIATION**

July 18, 2008

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4 **AND THE WASHINGTON INDEPENDENT TELECOMMUNICATIONS**
5 **ASSOCIATION**
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8 **Q. Please state your name, business address, and telephone number.**

9 **A. My name is Steven E. Watkins. My business address is 2154 Wisconsin Avenue, N.W.,**
10 **Suite 290, Washington, D.C., 20007.**

11 **Q. What is your current position?**

12 **A. I am a self-employed telecommunications management consultant.**

13 **Q. Please briefly describe your duties and work background.**

14 **A. I provide management and regulatory analysis and assistance to smaller local exchange**
15 **carriers (“LECs”) and other smaller firms providing telecommunications and related**
16 **services in rural and non-metropolitan areas. My work involves assisting client LECs**
17 **and related entities in their analysis of regulatory requirements and industry matters**
18 **requiring specialty expertise; negotiating, establishing and administering connecting**
19 **carrier arrangements; assisting clients in complying with the rules and regulations arising**
20 **from the passage of the 1996 revisions to the Communications Act of 1934, as amended**
21 **(the “Act”); and providing expert testimony on these matters within regulatory**
22 **proceedings before a variety of State Commissions such as this instant proceeding.**

23 Prior to the beginning of 2006, I worked for client companies in association with
24 the law firms of Kraskin, Lesse & Cosson, LLC and Kraskin, Moorman & Cosson, LLC.
25 Prior to my association with these law firms, I was the senior policy analyst for the
26 National Telephone Cooperative Association (“NTCA”), a trade association whose

1 membership consists of approximately 500 small and rural telephone companies. While
2 with NTCA, I was responsible for evaluating the then proposed revisions to the Act as
3 well as the proceedings of the Federal Communications Commission ("FCC")
4 implementing the 1996 revisions to the Act. I was also directly involved in NTCA's
5 efforts with respect to the advocacy of rules addressing the issues specifically related to
6 rural companies and their customers. Prior to my work at NTCA, I worked for 8 years
7 with the consulting firm of John Staurulakis, Inc. in Maryland doing similar work for
8 small LECs.

9 **Q. Have you prepared and attached further information regarding your background
10 and experience?**

11 **A.** Yes, this information is included as Exhibit No. _____ (SEW-2) attached to this
12 testimony.

13 **Q. On whose behalf are you testifying?**

14 **A.** I am testifying on behalf of the members of the Washington Independent
15 Telecommunications Association (to be referred to as the "Rural LECs" or "RLECs") and
16 Inland Telephone Company ("Inland").

17 **Q. What is the purpose of your testimony?**

18 **A.** I will address factual and policy issues related to the request by Intelligent Community
19 Services, Inc. ("ICS") for designation, pursuant to Section 214(e)(2) of the Act, as a
20 Competitive Eligible Telecommunications Carrier ("CETC") within the Roslyn
21 wirecenter area. I will also address public policy issues associated with the role that
22 Suncadia, LLC ("Suncadia") will play in the provision of telecommunications services to
23 residential and business end users in the areas in which ICS seeks CETC status. I am

1 submitting this testimony in response to the ICS Amended Petition filed with the
2 Washington Utilities and Transportation Commission (“Commission”) on December 11,
3 2007 in this proceeding (“Amended Petition”) and the Testimony of Paul J. Eisenberg
4 (“Eisenberg Direct”) and Keith Southard (“Southard Direct”) filed on May 23, 2008:

5 My testimony concludes that ICS should not be granted CETC status because,
6 among other reasons, to do so would further promote the anti-competitive scheme of ICS
7 and Suncadia to deny access by residents to any other facilities-based service provider.
8 Furthermore, grant of CETC status to ICS would not be consistent with the public interest
9 or the achievement of Universal Service objectives. Such action would also be counter to
10 the removal of barriers to entry that prohibit “the ability of any entity to provide any
11 interstate or intrastate telecommunications service” as required by the Act. 47 U.S.C. §
12 253(a).

13 **Q. Before addressing the specific issues that have been set for comment in this**
14 **proceeding, do you have any initial comments?**

15 **A.** Yes. I would first like to summarize some of the facts in this proceeding that are relevant
16 to the policy and issue discussion:

17 1. Suncadia has prohibited, and will continue to prohibit, other entities from
18 constructing and operating facilities within the Suncadia resort. Eisenberg Direct at p. 4,
19 lines 1-9.

20 2. Suncadia intends for it to be the sole entity to build an underground, fiber optic
21 distribution system throughout the Suncadia resort as “the sole means of providing
22 telecommunications and other communications services to residents in the resort.” *Id.* at
23 lines 3-4.

1 **** BEGIN CONFIDENTIAL TREATMENT ****

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6 **** END CONFIDENTIAL TREATMENT ****

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4. As I will demonstrate herein, Suncadia has granted an exclusive right for ICS to be the sole entity to operate the electronics for establishing communications paths over Suncadia's fiber facilities and to build and operate exclusive facilities from the fiber cable vaults to subscriber locations.

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5. The actions of Suncadia and ICS limit and control the provision of telecommunications, video and broadband services that other entities may provide to residential and business end users located within the Suncadia resort.

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6. By Suncadia's actions, the residents of the resort are denied the ability to access other service providers in any other way than through the use of the facilities that Suncadia and ICS have designed solely for their competitive benefit. There can be no facilities-based competition for service to the Suncadia residents.

18 **** BEGIN CONFIDENTIAL TREATMENT ****

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**** END CONFIDENTIAL TREATMENT ****

Q. Has the FCC addressed public policy and anti-competitive implications related to exclusivity arrangements under which other common carriers' rights to establish facilities access to customers is restricted?

A: Yes. The FCC has addressed these issues in three main decisions:

1. *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217; Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98; Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC 00-366 (released October 25, 2000) ("*Competitive Networks P*").

2. *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking in MB Docket No. 07-51, FCC 07-189 (released November 13, 2007) ("*Video Nonexclusivity Order*").

3. *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order in WT Docket No. 99-217, FCC 08-87 (released March 21, 2008) ("*Competitive Networks IP*").

Competitive Networks I, among other related actions, implemented measures to ensure that competing telecommunications providers are able to provide services to customers in commercial multiple tenant environments ("MTEs"). *Competitive Networks I* at para. 1. Specifically, the order acts to "prohibit carriers from entering into contracts that restrict or effectively restrict owners and managers of commercial [multiple tenant environments] from permitting access by competing carriers." *Id.*

In the *Video Nonexclusivity Order*, the FCC concluded that contractual agreements granting exclusive access to customers for the provision of multiple video programming distributor ("MVPD") services to multiple dwelling units ("MDU") and other real estate developments are prohibited. *Video Nonexclusivity Order* at para. 1. In

1 so doing, the FCC noted the “most exclusionary exclusivity clauses prohibit other
2 [service providers] from any access whatsoever to the premises of the MDU building or
3 real estate development.” *Id.* at note 2.

4 Most importantly, in *Competitive Networks II*, to more fully complete the policy
5 objectives, the FCC ordered that in residential settings, carriers may not enter into or
6 enforce contracts for the provision of telecommunications services with premises owners
7 that restrict consumers’ access to other telecommunications providers. *Competitive*
8 *Networks II* at para. 1, and 47 C.F.R. § 64.2500(b).

9 **Q: How did the FCC define MTEs and MDUs?**

10 **A:** For *Competitive Networks I and II*, the FCC defined “multiple tenant environments” as
11 “both residential and commercial units in the United States” including:

12 . . . any contiguous premises under common ownership or control that contains
13 two or more distinct units occupied by different tenants. Thus, MTEs include, for
14 example, apartment buildings (rental, condominium, or co-op), office buildings,
15 office parks, shopping centers, and manufactured housing communities.

16
17 *Competitive Networks I* at para. 15, and *Competitive Networks II* at paras. 6-7.

18 In the *Video Nonexclusivity Order*, the FCC defined MDUs to include:

19
20 . . . dwellings that we have defined as being MDUs in past decisions
21 implementing the Act. That is, MDUs include apartment, cooperative, and
22 condominium buildings. For purposes of this *Report and Order*, we adopt this
23 definition but expand it to include other centrally managed real estate
24 developments. Thus, the term MDUs, for purposes of this *Report and Order*,
25 also includes gated communities, mobile home parks, garden apartments, and
26 other centrally managed residential real estate developments.

27
28 *Video Nonexclusivity Order* at para. 7, footnotes omitted.

29
30 **Q. Does Suncadia own and/or operate MTEs and/or MDUs?**

31 **A.** Yes. Suncadia is the master developer of the “Suncadia Master Planned Resort” or
32 “MPR.” Public documents describe the MPR as a resort covering approximately 6,000

1 acres adjacent to Roslyn in Kittitas County, Washington. The resort will include homes
 2 and condominiums as well as other structures and facilities owned and/or operated by
 3 Suncadia. The buildings and other planned facilities will include a mixed use village
 4 with retail shops, commercial business offices, and condominiums.

5 At the very least, the MPR includes residential and business condominiums
 6 consistent with MTEs, and the resort is a centrally managed real estate development
 7 consistent with the definition of MDUs.

8 **Q. In what way does the Act address the rights of all telecommunications providers to**
 9 **provide any intrastate or interstate telecommunications service?**

10 **A.** In 1996, Congress put in place an environment, consistent with the preservation of
 11 Universal Service, that would promote competitive entry into the provision of local
 12 telephone service. Section 253 of the Act sets forth its approach to the removal of
 13 barriers to entry to accomplish that goal.

14 In its three decisions cited above, the FCC's conclusions addressed this policy
 15 objective:

16 We find that such exclusivity contracts are unjust and unreasonable practices
 17 pursuant to Section 201 because they perpetuate the barriers to facilities based
 18 competition that the 1996 Act was designed to eliminate.

19
 20 *Competitive Networks II* at para. 2, emphasis added.

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 22 We agree . . . that exclusive contracts perpetuate the very 'barriers to facilities-
 23 based competition' that the 1996 Act was designed to eliminate.

24
 25 *Competitive Networks I* at para. 35, footnote omitted, emphasis added.

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 27 The rule will prohibit the continuation and proliferation of an anticompetitive
 28 cable practice that has erected a barrier to the provision of competitive video
 29 services. It also will promote the development of new technologies that will
 30 provide facilities-based competition to existing cable operators, and thus serves
 31 the purposes set forth in Section 628(a) (as well as other provisions of law, such

1 as Section 706 of the Telecommunications Act of 1996).

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3 *Video Nonexclusivity Order* at para. 46, footnote omitted, emphasis added.

4
5 Of course, the prohibition against facilities-based competition within the
6 Suncadia resort that Suncadia and ICS have enacted is directly contrary to these
7 statutory objectives.

8 **Q. In *Competitive Networks II* (at para. 1), the FCC discusses restrictions on**
9 **“consumers access to other telecommunications providers.” What does the FCC**
10 **mean with respect to consumers’ right to access?**

11 **A.** As the citations above indicate, the FCC was addressing the public policy objectives of
12 facilities-based competition. The access between a consumer and the
13 telecommunications provider would be through the ability of the telecommunications
14 provider to reach the consumer with that provider’s facilities. The form of access that
15 Suncadia may offer would not provide access to the consumer, and would not provide the
16 consumer with access to any telecommunications carrier. A complete reading of all three
17 orders demonstrates my point -- access clearly includes consumers’ choice of facilities-
18 based service providers.

19 **Q: Would Suncadia’s ambiguous suggestion that it might negotiate with other carriers**
20 **for the use of its underground, fiber optic distribution system throughout the**
21 **Suncadia resort address the form of access consistent with the removal of barriers**
22 **to entry and the objectives of the Act?**

23 **A.** No. The Act’s prohibition (and the FCC’s discussion) against barriers to entry is to
24 ensure that any entity may provide any interstate or intrastate telecommunications
25 service. 47 U.S.C. §253(a). The Suncadia/ICS exclusive arrangement prevents Inland or

1 any other service entity from providing any interstate or intrastate wireline
2 telecommunications service because Suncadia (together with ICS) has limited services to
3 that which can be provided over its facilities and equipment. Because the only services
4 that may be provided to residents of the resort are those that must be provided over
5 Suncadia's facilities, it is a given that the scope of services do not include any interstate
6 or intrastate telecommunications services, but only those that are consistent with
7 Suncadia's and ICS's exclusive design. Section 253 (a) is not satisfied by a consumer
8 having access to one provider. The term "any" as used in Section 253(a) means that all
9 telecommunications providers should be able to offer service.

10 **Q. With respect to *Competitive Networks II*, what are the public policy reasons that the**
11 **FCC cites as the rationale for outlawing exclusivity clauses in contracts between**
12 **property owners and carriers?**

13 **A.** In addition to presenting significant barriers to entry to facilities-based carriers, the other
14 directly relevant objectives cited by the FCC include:

15 1. Exclusivity impedes the promotion of facilities broadband deployment and the
16 availability of competitive advanced services through other providers' facilities.

17 *Competitive Networks II* at paras. 2, 10, and 12.

18 2. Exclusivity frustrates the goal of removing impediments to fair competition in
19 an environment of increasingly competitive bundled service offerings. *Id.* at para. 5.

20 3. Prohibitions against exclusivity recognizes the shift between stand-alone
21 services to that between service bundles, including the "triple play" offerings, and
22 supports the removal of obstacles to facilities-based entry. *Id.* at paras. 9 and 12.

23 4. Exclusivity should be prohibited because it forecloses new entrants from

1 reaching significant numbers of households. *Id.* at para. 8, and *Video Nonexclusivity*
2 *Order* at para. 19. In the case of the resort, Suncadia is blocking access to potentially
3 thousands of users.

4 5. Exclusivity limits consumers' choice and discourages consumers from seeking
5 alternative service providers. *Competitive Networks II* at para. 8.

6 6. Exclusivity may adversely affect consumers' rates, quality of service,
7 innovation, and network redundancy. *Id.*

8 7. Exclusivity interferes with ETCs' ability to serve carrier of last resort
9 obligations. *Id.* at para. 14.

10 **Q. Why are the three FCC cited decisions relevant to this proceeding?**

11 A. All of the public policy objectives and potential consumer harms that the FCC cited for
12 its rules in the three proceedings are relevant here to the arrangement between Suncadia
13 and ICS. This Commission should, at the very least, begin to address the identical public
14 policy implications by denying CETC status to ICS. To award CETC status to ICS
15 would further thwart the goals and further exacerbate the harms. CETC status would
16 serve to reward ICS's (and Suncadia's) anti-competitive and discriminatory practices
17 contrary to the public interest, the Act, the FCC's conclusions, and presumably this
18 Commission's policies. Furthermore, if ICS (and Suncadia) were granted CETC status,
19 such action would encourage other entities in Washington to pursue similar anti-
20 competitive arrangements. Any action that advances Suncadia and ICS's scheme would
21 only serve to promote the proliferation of similar anti-competitive arrangements across
22 the State.

1 **Q. In developing its rules to address the public interest harms of exclusivity clauses,**
2 **what is the relationship between the common carrier and the property owner or**
3 **building owner that the FCC presumed?**

4 A. In general, the rules presume that a building owner or property owner will grant exclusive
5 entry to a single service provider that is a common carrier. The FCC seeks to address the
6 harmful consequences of such exclusive arrangements by imposing requirements on the
7 common carrier. *See, e.g.,* 47 C.F.R. §§64.2500(a) and (b) placing the obligations on
8 common carriers not to enter into, or enforce, exclusivity clauses in contracts.

9 **Q. Does Suncadia's and ICS's arrangement precisely fit the framework contemplated**
10 **by the FCC in adopting these rules?**

11 A. No. Suncadia, as the owner of the property and buildings, has cleverly designed the
12 relationship with ICS in an apparent attempt to circumvent the purposes of the FCC's
13 rules. In this case, Suncadia has granted exclusivity to itself, and then has found a
14 telecommunications carrier that is willing to accept Suncadia's prohibition against any
15 carrier deploying its own facilities within the resort.

16 I understand that there may be a debate of law whether the exclusive arrangement
17 that ICS has with Suncadia is unlawful under the FCC's rules. **** BEGIN

18 **CONFIDENTIAL TREATMENT ******

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In any event, there is no need in this proceeding for an absolute legal finding that the ICS/Suncadia exclusive arrangement is unlawful under the FCC's rules because there is sufficient public interest authority provided the Commission to deny CETC status for equivalent policy reasons.

Q. In what ways does the Suncadia/ICS arrangement afford exclusive advantages to ICS?

****** BEGIN CONFIDENTIAL TREATMENT ******

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****** END CONFIDENTIAL TREATMENT ******

Q. In reviewing the public interest implications in this ETC designation proceeding, is the Commission bound only to the specific and rigid rules that the FCC adopted in the three proceedings?

A. No. If Suncadia and ICS have found a novel way to design their relationship to circumvent the intent of the exclusivity prohibition rules and thwart the public policy objectives, it does not mean that such technicalities should get in the way of a proper decision in this proceeding. This Commission may or may not yet have necessary State authority to take action against Suncadia and ICS to remedy their anti-competitive disregard for the rights of the residents. However, this Commission can rely on the

1 authority granted in the Act under which the public interest is a fundamental criteria in
2 deciding an ETC designation case:

3 Upon request and consistent with the public interest, convenience, and necessity,
4 the State commission may, in the case of an area served by a rural telephone
5 company, . . . designate more than one common carrier as an eligible
6 telecommunications carrier for a service area designated by the State commission,
7 so long as each additional requesting carrier meets the requirements of paragraph
8 (1). Before designating an additional eligible telecommunications carrier for an
9 area served by a rural telephone company, the State commission shall find that the
10 designation is in the public interest.

11
12 47 U.S.C. §214(e)(2), emphasis added.

13 **Q. Would the grant of CETC status to ICS be in the public interest or consistent with**
14 **the public convenience or necessity?**

15 **A.** No. Grant of ETC status to ICS would only further thwart the goals of prohibiting
16 barriers to facilities-based entry and would reward ICS and Suncadia for their anti-
17 competitive arrangements. For all of the other public policy and public interest
18 reasons that I have set forth above, the Commission should deny CETC status to ICS.

19 **Q. Are there any other public interest implications that are relevant to the**
20 **Commission's review of this CETC request?**

21 **A.** Yes. In Subpart C - Carriers Eligible for Universal Service Support of the FCC's Part
22 54 rules, the FCC has adopted public interest standards consistent with my analysis:

23 *Public Interest Standard.* Prior to designating an eligible telecommunications
24 carrier pursuant to section 214(e)(6), the [State Commission] determines that
25 such designation is in the public interest. In so doing, the [State Commission]
26 shall consider the benefits of increased consumer choice, and the unique
27 advantages and disadvantages of the applicant's service offering.

28
29 47 C.F.R. §54.202(c).

1 As I will discuss below, there is no increased consumer choice. Moreover, if
2 ICS were to be designated as a CETC, there will be no benefits or advantages, only
3 further promotion of harm to consumers.

4 **Q. Have other states addressed real estate developers and building owners and the
5 rights of carriers to gain facility access to consumers?**

6 **A.** Other states have adopted legislation and rules that address this issue, aimed at building
7 owners and real estate developers, in addition to common carriers, as the means to
8 provide carriers with a reasonable right to deploy facilities to reach users. *See, e.g.,*
9 *Competitive Networks I* at para. 157 regarding whether a rule should be adopted that
10 would grant nondiscriminatory access to all carriers, noting the actions in the States of
11 Texas and Connecticut. I am attaching statutes and related rules from Texas as
12 Exhibit No. ____ (SEW-3), which effectively allow any provider to gain access to
13 customers with its own facilities (“Texas Rules”).

14 **Q: Would an action to grant CETC status to ICS be consistent with the Act?**

15 **A.** No. Under the Act, any State action that would further promote Suncadia’s and ICS’s
16 actions to deny the ability of any other entity to provide any interstate or intrastate
17 telecommunications service would be subject to the FCC’s review. If a State
18 Commission imposes or permits any regulation or legal requirement that violates
19 Subsections 253(a) or (b) of the Act, the FCC may preempt the regulation or legal
20 requirement to the extent necessary to correct such violation or inconsistency.

21 Preemption.--If, after notice and an opportunity for public comment, the
22 Commission determines that a State or local government has permitted or
23 imposed any statute, regulation, or legal requirement that violates subsection (a)
24 or (b), the Commission shall preempt the enforcement of such statute, regulation,
25 or legal requirement to the extent necessary to correct such violation or
26 inconsistency.

1
2 47 U.S.C. § 253(d).

3 Section 253(a) defines as a violation of, or inconsistency with, the removal of
4 barriers to entry as any State regulation or legal requirement that has:

5 . . . the effect of prohibiting the ability of any entity to provide any interstate or
6 intrastate telecommunications service.

7
8 47 U.S.C. § 253(a).

9 As I have explained above, and the ICS and Suncadia witnesses have admitted, it
10 is Suncadia's intent that all services to Suncadia residents be confined solely to provision
11 through its facilities. Suncadia's decision to deny facilities entry to all providers would
12 not be possible were it not for the exclusive deal that ICS has made with Suncadia. ****

13 **BEGIN CONFIDENTIAL TREATMENT ******

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17 ****** END CONFIDENTIAL TREATMENT ******

18 I believe that if this Commission were to grant CETC status to a carrier that is
19 actively involved in prohibiting other carriers from providing service, then such action
20 would be subject to preemption under the Act. I am not suggesting that this should be the
21 course. I am suggesting that the Commission should recognize, as a fundamental public
22 policy conclusion, that Suncadia and ICS are creating improper barriers to entry, and they
23 should not be rewarded for their harmful acts.

24 **Q. How will you organize the remainder of your testimony?**

25 **A.** I will attempt to organize my analysis and conclusions within the context of the specific

1 issues set forth for comment in this proceeding. I will begin each section of my
2 testimony by providing a caption of the specific issue. The testimony that I submit under
3 each captioned section is intended to address subject matter either directly or indirectly
4 related to the specific issue.

6
7 **I. Does ICS qualify for designation as a Competitive Eligible Telecommunications**
8 **Carrier (CETC)?**

10 **Q. How do the FCC's rules address Universal Service cost support to be provided to a**
11 **Competitive Eligible Telecommunications Carrier?**

12 **A.** Section 54.307 of the FCC's rules sets forth the mechanics for support dollars to be
13 provided to a CETC. The rules presume that the CETC is competing equally with the
14 incumbent, on a one-to-one basis for subscribers, in the incumbent's service territory. 47
15 C.F.R. §54.307(a). Specifically, the rules expect that the CETC will "capture" the
16 existing lines or serve new subscriber lines in the incumbent LEC's service area. *Id.* In
17 this case, the incumbent LEC's service area is that of Inland's Roslyn exchange.

18 These rules go on to specify that the CETC will receive support (here in a Rural
19 Telephone Company service area) "based on the support the incumbent LEC would
20 receive for each such line, disaggregated by cost zone." 47 C.F.R. §54.307(a)(1).
21 Incumbent Rural Telephone Companies receive Universal Service support dollars based
22 on the actual costs they incur to build and operate loops and switches. *E.g.*, 47 C.F.R.
23 §36.621 for loop costs.

1 **Q. Do these rules make sense in the case of ICS and Suncadia's exclusive facilities?**

2 **A.** As I discuss elsewhere in this testimony, under Suncadia's exclusive facilities and access
3 terms, Inland does not serve and will not likely ever serve the residents of Suncadia with
4 its own facilities. So, Inland would never, under any circumstances, receive support for
5 lines served in the resort based on costs of Inland's own facilities.

6 Even under the highly unlikely assumption that Inland did provide service within
7 the resort using Suncadia's exclusive facilities and under Suncadia's terms and
8 conditions, the costs to provide loops within the resort would depend on Suncadia's costs
9 and Suncadia's demands. Suncadia would have ultimate control over the costs and terms
10 and conditions under which Inland would provide loops within the resort and effectively
11 would determine Inland's costs of providing those loops. Furthermore, unless and until
12 the exclusionary and anti-competitive practices are addressed, Suncadia appears to be
13 accountable to no one.

14 Moreover, the per-unit cost of service within the expected more densely inhabited
15 resort area should be significantly less than the cost to serve the remainder of the Roslyn
16 exchange area served by Inland. When completed, the expected subscriber density
17 within the resort could be more than 10 times that of the average density of the entire
18 existing Roslyn exchange as served currently by Inland. If Inland never serves within the
19 resort, and without further disaggregation of Universal Service support into discrete cost
20 zones to recognize the distinct characteristics of the resort, ICS would receive support for
21 subscribers served within the resort based on Inland's costs to serve only outside the
22 resort.

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1.1 Is ICS a common carrier as required by 47 C.F.R. §54.201(d)?

Q. What aspects of the concept of “common carrier” will you address here?

A. 1. If ICS is a common carrier, then the Commission should use its authority to further investigate and take action against the anti-competitive arrangements that ICS has established with Suncadia.

2. To the extent that Suncadia claims that it will offer access to its exclusive facilities under non-discriminatory terms and conditions, then it would be operating as a common carrier and should be subject to the same regulatory treatment as other common carriers.

Q. In what ways should the Commission apply authority over ICS?

A. The Commission should evaluate every detail of the business arrangement that ICS has with Suncadia. If ICS is to provide services to the residents of the resort, ICS has no choice but to accept Suncadia’s terms. Therefore, the terms and conditions under which residents receive service from ICS are the terms and conditions that Suncadia has largely, if not completely, dictated to ICS. Suncadia is currently unregulated and is accountable to no one. The Commission should apply its authority over ICS to review and address the terms that ICS has established with Suncadia. The Commission should conduct a proceeding to investigate the same public interest issues as the FCC examined in its three exclusivity orders.

Q. What do you mean when you say that Suncadia may be offering the use of its facilities as a common carrier?

A. Mr. Eisenberg claims that Suncadia “is open” to permitting common carriers to use its fiber facilities network within the resort to provide telecommunications services under terms equivalent to those Suncadia has with ICS. Eisenberg Direct at p. 3, line 7 through

1 p. 4, line 9. As such, carriers use of Suncadia's fiber distribution system is no different
2 than when a carrier uses the special access facilities of one of the incumbent LECs in the
3 State (such as when an interexchange carrier, or another LEC, orders and obtains special
4 access from one of the incumbent LECs). The provision of special access by the LECs in
5 the state, even for use by another common carrier, is governed by tariff terms and
6 conditions.

7 If Mr. Eisenberg's offer were sincere, and if the offered terms were truly intended
8 to be equal, there would be no reason not to make the offer in the form of a tariff
9 available to any common carrier requesting access to those facilities, just as any other
10 common carrier in the State makes access to facilities available. If fact, if he were
11 sincere, there would be no reason not to make those terms fully public since every
12 possible common carrier would have a right under Mr. Eisenberg's testimony to equal
13 terms. If he were sincere, there would be nothing to negotiate! Eisenberg Direct at p. 3,
14 lines 12-15 and 19-20. I do not understand his need to condition the equal offering to
15 negotiation. The offered terms are either equal, or they are not. Any negotiation could
16 only serve to determine just how much unequal the terms actually would be. As I will
17 explain later, it is impossible for Suncadia to offer absolutely equal terms given the
18 extended exclusionary tactics, and Suncadia has confirmed that it will not offer equal
19 terms in its response through ICS to WITA's data request. Suncadia states as follows:

20 Suncadia is not willing to allow Inland or any other carrier to "opt in" to the
21 agreement between Suncadia and ICS because the network Suncadia has
22 constructed was designed for physical access by a single service provider.
23 Suncadia has constructed a passive optical network ("PON") that consists of dark
24 or "unlit" fiber strands. Suncadia has deployed only the fiber necessary to serve
25 the residents and businesses in the resort area, and multiple customer locations are
26 served by using a single strand of distribution fiber.
27

1 In the agreement between ICS and Suncadia, Suncadia owns the fiber distribution
 2 infrastructure and ICS owns the electronics and service extensions from the
 3 neighborhood vaults to the subscriber. It is not technically feasible for two
 4 different carriers to physically access the Suncadia distribution infrastructure
 5 because no more than one carrier can "light" any particular strand of dark fiber,
 6 and Suncadia has not deployed sufficient dark fiber for more than one carrier to
 7 have fiber dedicated to its use in serving customers within the resort area.
 8

9 The full response to the data request is attached as Exhibit No. ____ (SEW-4).
 10

11
 12 **1.2 Will ICS offer the services that are supported by federal universal service support**
 13 **mechanisms and provide the supported services throughout the area for which it**
 14 **seeks designation consistent with the requirements of 47 C.F.R. §54.201(d)?**
 15

16 **Q. How will ICS provide the supported services throughout the resort?**

17 **A.** ICS will utilize the exclusive facilities of Suncadia and its own limited facilities to
 18 provide services to residents of the resort. Southard Direct at p. 3, line 5 through p. 4,
 19 line 1, also referring to the Amended Petition para. 22-34.

20 **Q. How will ICS provide supported services in the area of the Roslyn exchange other**
 21 **than the Suncadia resort area?**

22 **A:** ICS intends to resell the retail service of Inland at the generally available tariffed rates.
 23 Amended Petition at para. 24. While ICS makes vague and speculative statements about
 24 its plans to construct facilities, there is no specific mention of what facilities, if any, it
 25 intends to construct for service to customers outside of the resort. Southard Direct at p.
 26 4, lines 6-14.

27 **Q. Has ICS obtained the right to seek to resell, on behalf of its anticipated end users,**
 28 **Inland's tariffed local exchange services?**

29 **A:** No. The Act anticipates that a CLEC will request interconnection with an incumbent
 30 LEC, and then both parties have the opportunity and right to negotiate the necessary

1 interconnection terms and conditions, including those that would address resale of
2 services pursuant to Section 251(b)(1). It is my understanding that ICS previously
3 abandoned discussions regarding interconnection with Inland, but has only very recently
4 reinitiated the process.

5 **Q. What Universal Service or public interest objectives would be served if ICS provides**
6 **service in the resort under Suncadia's exclusive facilities arrangement and provides**
7 **service elsewhere in the Roslyn exchange through resale.**

8 **A.** Absolutely none. ICS would be the sole provider within the resort; the residents of the
9 resort would have no choice of service provider. The end users outside of the resort
10 would continue to be served by the same facilities-based carrier; i.e., Inland, and a
11 needless reseller middleman; i.e., ICS, would be inserted for no other purpose than to
12 satisfy the claim that ICS is offering and providing service through the entire exchange
13 area.

15 **II. Has ICS demonstrated that it meets the Commission's requirements for designation**
16 **as a CETC?**

17 **2.1 Has ICS provided a sufficient description of how it will provide each**
18 **supported service?**

19 **2.2 Has ICS provided a substantive plan of the investments to be made during**
20 **the first two years in which support is received and a substantive description of how**
21 **those expenditures will benefit customers?**

22 **2.3 Has ICS provided sufficient information to demonstrate its ability to remain**
23 **functional in emergency situations, including a description of how it complies with**
24 **WAC 480-120-411?**

25 **2.4 Has ICS provided sufficient information that demonstrates it will comply**
26 **with the applicable consumer protection and service quality standards of Chapter**
27 **480-120 WAC?**
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Q. Has ICS demonstrated whether and how it will comply with the Commission’s service quality and consumer protection rules?

A. No. Mr. Southard has one substantive sentence in his testimony regarding both consumer protection and service quality standards. Southard Direct at p. 5, lines 3-4 referring to paras. 4-46 of the Amended Petition. For service standard rules, the Amended Petition sets forth a list of five potential rules that may apply, and then merely states that ICS will comply. Amended Petition at paras. 41-45. This cursory discussion of five issues omits other service quality rules such as the basic safety standards of WAC 480-120-402, the resolution of major outages under WAC 480-120-412, and standards related to emergency operation pursuant to WAC 480-120-414. ICS has made no demonstration for these omitted provisions. Moreover, preceding the cursory discussion of the five rules, ICS conditions compliance “to the extent” applicable to ICS. Id. at p. 14-15. Most troubling, ICS never explains which rules it actually believes are applicable to it. As such, ICS has not explained whether or fully how it will comply with the service quality rules.

It is also very important that ICS has provided no explanation about which consumer protection standards are applicable or any demonstration, whatsoever, how it will comply with consumer protections. We are left to speculate on both.

1 **III. Is ICS' request to be designated as a CETC consistent with the purposes of**
 2 **Universal Service and will it advance some or all of the purposes of Universal**
 3 **Service set forth in 47 U.S.C. §254?**
 4

5 **Q. On page 3 of its Petition, ICS attempts to bolster its argument that grant of CETC**
 6 **status will advance the purposes of Universal Service by “increasing the availability**
 7 **of services -- both basic and advanced” Is that analysis correct?**

8 **A.** No. Its argument that it will be “increasing the availability” services is a deception.
 9 First, ICS has no idea of what services Inland or other carriers would offer to residents of
 10 the resort if they were not barred from entry by Suncadia and ICS. Therefore, any ICS
 11 claim comparing its service to those of other carriers is nonsense. Second, ICS also
 12 makes claims about services not being available from existing providers. Petition at p. 4.
 13 Of course, services are not available within the resort from other wireline carriers because
 14 other wireline carriers are barred from entry.

15 Outside of the resort, ICS – if it builds its own facilities – would offer another
 16 choice of providers. However, there is nothing about the ICS service offerings that
 17 increases the availability of those types of services. They are already available.

18 **Q. With respect to the effects of selective market entry and carrier of last resort**
 19 **considerations, are there additional risks for customers in rural service areas?**

20 **A.** The demographics of rural areas present very different considerations as multiple
 21 provider competition develops. A lower-cost, fast growing, higher volume market may
 22 be divided over time without overwhelming detrimental effects on any set of customers.
 23 Market demand grows to accommodate market share shifts. On the other hand, the cost
 24 recovery and network effects on carriers and customers served in sparse density areas, or

1 slower growth areas, may lead to hardship and counter-productive effects in the form of
2 higher basic rates and lack of availability of the latest advanced services.

3 **Q. Does the Act address these additional risks?**

4 **A.** Yes. Congress recognized the potential danger to customers and potential counter-
5 productive effects presented with the advent of multiple provider local exchange service.
6 Therefore, Congress explicitly adopted provisions in 1996 beyond those that apply to
7 larger, non-rural LEC areas. While Congress clearly wants to foster more competition, it
8 does not want to do so at the cost of detrimental impacts on rural customers and threats to
9 Universal Service. For example, the Universal Service provisions of the Act address
10 special considerations related to rural service areas. Moreover, the interconnection
11 requirements are conditioned for application to rural LECs. In both instances, these
12 provisions were included to ensure that the emergence of multiple provider competition
13 does not result in harm to rural customers.

14 **Q. Under what conditions do small and rural incumbent LECs enter this era of**
15 **multiple provider competition?**

16 **A.** Small and rural LECs have until recent times been the single providers in a specific area
17 with the sole responsibility for serving all subscribers in that geographic area upon
18 reasonable request. To meet this obligation, these LECs engineered their networks based
19 on anticipated demand of all potential users in their service area and maintained prudent
20 reserves of additional switching capacity and plant facilities throughout their territories to
21 assure the ability to provide service within a reasonable period following a request.

1 In exchange for their fulfillment of these service responsibilities, LECs have been
2 provided the opportunity to recover their costs and earn a reasonable rate of return on
3 their committed network investments.

4 Compared to the larger, non-rural LECs, smaller LECs generally serve more rural,
5 less densely populated areas which tend to be characterized by higher per-unit network
6 costs, lower customer density, and relatively lower volumes of usage. Over several
7 decades, these LECs have brought quality telecommunications services to the rural areas
8 despite the challenges presented by these characteristics.

9 The development of quality networks in the rural areas has been aided by federal
10 and state policy that has led to cost recovery revenue sources derived from toll and access
11 services and more recently from explicit universal service mechanisms. These cost
12 recovery sources have allowed the rural LECs to commit capital to build and operate
13 networks in their relatively challenging areas. The regulated, primarily single-provider
14 environment of the past has afforded policy makers the ability to coordinate this plan
15 with stable, predictable, and productive results. The results have led to virtually
16 ubiquitous networks across this State and reasonable rates for all users.

17 **Q. How are these successful policies of the past stressed in a multiple provider market?**

18 **A.** These policy objectives have been achieved through a myriad of existing explicit and
19 implicit "subsidy" flows from one geographical service area to another, from one set of
20 services to other sets, from one class of customers to other classes, and from high volume
21 customers to low volume customers. These effects exist in incumbent LECs service rate
22 structures and pricing levels in a manner that may not naturally exist in a competitive
23 market.

1 New competitive providers have many options that incumbent LECs do not have
2 to concentrate their service offerings to specific areas and types of customers to exploit
3 these rate structures and policies. Furthermore, new entrants may not be required to
4 reflect the policies in their rate structure and relative prices. The incumbents often
5 remain encumbered with the rate structures, cost recovery, and rate design of those past
6 policies. The incumbents often are expected to have a “back-up” obligation to provide
7 last-resort, ubiquitous service. Rural incumbents are severely disadvantaged when
8 confronted by new entrants with the ability to exploit these differences. Harm arises both
9 for the rural LECs that are restricted by these policies and to customers not targeted as
10 ”cream” by the new entrants.

11 **Q. Are there other asymmetrical conditions placed on incumbents that do not apply**
12 **generally to the new entrants?**

13 **A.** Yes. (1) Incumbents generally operate pursuant to complex accounting, cost allocation,
14 tariffing, and other rules that limit their service offerings, while new entrants most often
15 do not; (2) incumbents generally are not allowed to exit the market while new entrants
16 generally can; and (3) incumbents effectively provide, without compensation, a “back-
17 up” network to the service provided by new entrants. The fact that the last two points
18 apply directly in this case is underscored by the Commission’s decision in UT-050606
19 which prevented Inland from removing the resort from its service area. The Commission
20 predicated its decision, at least in part, on the need for Inland to be available to serve the
21 area in case of a market failure for ICS.

1 **Q. What about carrier of last resort considerations?**

2 **A.** The ability of any carrier to continue to commit to the Universal Service principles to the
3 degree that rural LECs do today will be affected by the manner in which multiple
4 provider competition is introduced.

5 Under conditions where new entrants capture selective customers and areas, the
6 rural incumbents often remain as the last-resort network providers. The new entrant can
7 concentrate its investments and limit its risk. The rural incumbent continues to incur the
8 cost of maintaining its ubiquitous network to be recovered from a lesser number of
9 divided market customers.

10 The disparity between the costs associated with service to select markets and the
11 average cost across an entire area creates opportunities for the new entrant to extract
12 profits to the detriment of society as a whole. As select market customers move to
13 service from the new entrant, the rural incumbent is left to serve the higher cost, lower
14 demand customers. Inevitably, under these conditions the quality of service will decline,
15 the prices will rise, or both, for the remaining last-resort customers.

16 **Q. Is this cream-skimming, and if so, what will be the result?**

17 **A.** Yes. The last resort carrier will be faced with increasing the rates to a shrinking customer
18 base. And the risk of maintaining a last resort network increases significantly.

19 The escalating risk will affect rural carriers ability to continue to commit to last-
20 resort networks. Increasing the risk of cost recovery will translate inevitably into a
21 reduced level of capital commitment by the adversely affected incumbents. Faced with
22 this set of circumstances, the cost of capital for carriers that continue to serve the higher
23 cost, less populated areas will rise, and available capital to service last-resort networks

1 will contract. This will affect the ability of the last-resort carriers to deploy advanced
 2 services to the last-resort customers. Rewarding the selective market entrant with
 3 unwarranted universal service funds only heightens these consequences.

4 **Q. Is ICS a selective market entrant?**

5 **A.** Yes. ICS is the worst kind of selective market entrant! Not only has ICS concentrated its
 6 service to an area that is likely to present customer density that could be 10 times greater
 7 than the average for the Roslyn exchange, and to customers that would appear to be
 8 higher income, but it has added to that injury with the further insult of assisting Suncadia
 9 in its efforts to bar the last-resort carrier from entry! There is no reason to reward its
 10 selective market entry by providing ICS with CETC status.

12 **IV. Is the designation of ICS as a CETC in the public interest?**

13 **Q. Would designation of ICS as a CETC serve the public interest?**

14 **A.** No. As I have explained in detail above, designation would only serve to further reward
 15 and aid ICS and Suncadia in their anti-competitive tactics. As Congress and the FCC
 16 have concluded, the barriers to entry that ICS and Suncadia have enacted cause
 17 significant harm to the public.

18 **Q. On pages 4-5 of its Petition, ICS sets forth a quote that summarizes the manner in
 19 which this Commission applies a public interest standard in ETC designation
 20 proceedings. Does ICS satisfy the Commission criteria?**

21 **A.** No. The Commission recognizes that “‘Public Interest’ is a broad concept encompassing
 22 the welfare of present and future consumers, stakeholders, and the general public.”
 23 Granting CETC status to a carrier that already participates in a plan to thwart facilities-

1 based competition can hardly satisfy the criteria; providing money to ICS will only assist
2 it in its plans to injure the residents that are denied access to alternative facilities-based
3 providers.

4 In the quote, the Commission goes on to explain that grant of an ETC request
5 “furthers the public interest because rural consumers . . . will benefit from increased
6 competition in the form of a greater variety of services and more comparability of
7 services.” ICS’s plans and request fails on both points. Within the resort, there will be
8 no “increased competition” because Suncadia and ICS have barred entry. There will be
9 no “comparability of services” because there is only one way to provide service at this
10 time and that is through Suncadia’s exclusive fiber network. Outside of the resort, ICS
11 has not shown it will offer a greater variety of services than already exists. Certainly,
12 resale of services does not increase variety or comparability.

13 Finally, the Commission’s statement concludes that the public interest is served
14 where rural customers can “choose which services and technologies meet their
15 telecommunications needs.” Of course, the residents of the resort have no choice other
16 than Suncadia’s technology and the services available solely over that technology.

17 In reality, the actions of ICS and Suncadia frustrate all of these public interest
18 principles.

1 **4.1 To what extent does competition exist in the Roslyn exchange in general and**
2 **in the Suncadia resort area in particular?**

3
4 **Q. Does competition exist in the Roslyn exchange outside of the Suncadia resort?**

5 **A.** My understanding is that there are multiple Commercial Mobile Radio Service
6 (“CMRS”) providers that provide telecommunications services to users within the Roslyn
7 exchange area. Moreover, at least three of these CMRS providers have been designated
8 as CETCs. My understanding is that there are no wireline competitors in the Roslyn
9 exchange outside of the resort.

10 **Q. For the customers that Inland serves in areas of the Roslyn exchange area outside of**
11 **the resort, would Inland confine competitors’ access only to facilities that Inland**
12 **controls?**

13 **A.** No.

14 **Q. For the customers that Inland serves in areas of the Roslyn exchange area outside of**
15 **the resort, does Inland have contractual arrangements with any entity that would**
16 **prohibit facilities access to end users?**

17 **A.** It is my understanding that Inland does not have any such contractual arrangements.

18 **Q. For the areas of the Roslyn exchange area outside of the resort, is there any action**
19 **that Inland could take under which it could effectively deny competitors the ability**
20 **to serve customers with their own facilities?**

21 **A.** No.

22 **Q. Does competition exist in the Roslyn exchange within the Suncadia resort?**

23 **A.** I presume that the same CMRS providers also provide wireless service to users within the
24 resort. And, according to Mr. Southard, Inland has constructed a 100 pair cable to what
25 he refers to as the Suncadia Discovery Center apparently to provide service to Suncadia

1 during its planning and start-up phase. Southard Direct at p. 7, lines 13-15. However, for
2 all of the residents for which Suncadia's exclusive fiber system is the only wireline
3 facilities access, there is no other competitive service available other than what ICS
4 provides in conjunction with Suncadia's exclusive facilities.

5 ****** BEGIN CONFIDENTIAL TREATMENT ******

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10 ****** END CONFIDENTIAL TREATMENT ******

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12
13 **4.2 Do other wireline local exchange carriers have access to customers in**
14 **Suncadia?**

15
16 **4.3 What infrastructure is ICS or Suncadia provisioning (or planning to**
17 **provision) to which other local exchange carriers would need access in order**
18 **to provide telecommunications service to customers in the Suncadia resort**
19 **area?**

20
21 **4.4 Are both Suncadia and ICS separately willing to provide access to**
22 **Suncadia's communications infrastructure to carriers other than ICS on the**
23 **same or comparable terms and conditions as those under which ICS has**
24 **access to Suncadia's communications infrastructure? If not, are there other**
25 **conditions on which Suncadia and ICS will provide such access?**

26
27 **4.5 Will Suncadia limit the use of the infrastructure built by Suncadia to the**
28 **provision if basic telecommunications service (local calling and features) by**
29 **carriers other than ICS?**

30
31 **4.6 Is ICS affiliated with Suncadia or any of its principals?**
32

1 **Q. Sub issues 4.2 through 4.6 involve what terms and conditions may be available**
2 **under which Suncadia would allow other carriers to use its exclusive fiber facility**
3 **network. What initial reaction do you have to this set of issues?**

4 **A.** I have no objection to the Commission and interested parties examining what non-
5 discriminatory terms and conditions Suncadia may be required to offer for access to its
6 facilities, but access to Suncadia's facilities would not satisfactorily or completely
7 address other carriers' abilities and rights to compete with the allied ICS/Suncadia
8 venture or to provide service within the resort. The use of Suncadia's facilities as a
9 means to compete with the ICS/Suncadia venture must be recognized as only one option
10 among others which must also include the ability to compete with facilities-based access
11 to customers.

12 **Q. Do wireline carriers have access to customers in the Suncadia resort?**

13 **A.** No. Wireline carriers cannot gain access to the residents of the resort. Suncadia is not
14 willing to permit any carrier to construct wireline facilities within the resort area.
15 Eisenberg Direct at p. 4, lines 7-9. Moreover, access to Suncadia's exclusive facilities is
16 only a unconfirmed possibility.

17 **Q. When wireline CLECs compete with wireline incumbent LECs, are the CLECs**
18 **forced to rely on the incumbent LEC's network facilities or on the facilities of some**
19 **other private entity as the means to compete?**

20 **A.** No. CLECs can build their own facilities-based networks so as not to have to rely on
21 their competitors' network facilities. It has been my experience with CLECs with which
22 I have worked that it is a common sense realization that they cannot compete with the
23 existing carrier if they are forced to rely on that carrier's network.

1 **Q. Why is it that new entrants cannot compete if they have to rely on the competitor's**
2 **network?**

3 **A.** A new entrant service provider competes with the existing provider by distinguishing its
4 service offerings from its competitors. Carriers distinguish their telecommunications
5 service offerings based on comparative criteria including, but not limited to: (1) quality of
6 service; (2) scope of services offered; (3) price of service; (4) value of services to price;
7 (5) reliability; and (6) customer service. Where a CLEC uses the facilities of another
8 carrier, the CLEC is severely hampered in its ability to distinguish itself based on these
9 criteria. The CLEC's services and quality are significantly determined by the quality of
10 the competitor's network facilities, its operations, and the degree to which it cooperates
11 with the CLEC. In essence, significant portions of the new entrants service are actually
12 provided by the former service provider and continue to be dependent on the facilities
13 provider with which it competes. A new entrant cannot successfully or sufficiently
14 distinguish its offerings when it must rely on an often obstinate network facilities owner.

15 **Q. Would these same common sense conclusions apply if carriers used Suncadia's and**
16 **ICS's jointly operated facilities network?**

17 **A.** Yes. If Inland or any other carrier provided service in the resort, it would be the new
18 entrant and the use of the incumbent's facilities (*i.e.*, the Suncadia/ICS facilities) would
19 be subject to the same drawbacks.

20 **Q. In your view, would any other carrier want to compete with ICS in the resort if it**
21 **were confined to Suncadia's terms and conditions and the absolute use of**
22 **Suncadia's network facilities?**

23 **A.** No.

1 **Q. What factors lead you to that conclusion?**

2 **A.** First, as evidenced by their actions, Suncadia and ICS have designed the system and the
3 business arrangement to maximize the ability of ICS to be the sole provider of services
4 within the resort. One can expect Suncadia only to negotiate terms with others that
5 preserve that business interest to the maximum degree possible. If Suncadia really
6 wanted multiple competitors in its resort development, it would not have confined its
7 planning, network construction, and business deal over the last several years to a private
8 arrangement solely with ICS.

9 Second, as explained above, a new entrant is not likely to obtain terms and
10 conditions with Suncadia that will overcome the advantages that Suncadia has already
11 granted to ICS, particularly if the new entrant must use the facilities of Suncadia that ICS
12 controls.

13 Third, a new entrant is not likely to resolve truly fair terms unless it also has the
14 right to build its own facilities. If the terms offered by Suncadia are inferior to what the
15 new entrant carrier could do for itself, with its own facilities, the new entrant would not
16 agree. Normally, when users purchase from common carriers the use of their facilities, it
17 is not under conditions that prohibit the users from bypassing those facilities with their
18 own. The ability to make a choice between using the facilities of the owner, or building
19 one's own facilities, necessarily provides one restraint on the owner's establishment of
20 terms of use. No restraint exists here with respect to the terms that Suncadia may be
21 willing to negotiate.

22 Fourth, a new entrant is not likely to resolve terms for a truly equal competitive
23 opportunity to serve within the resort through the use of Suncadia's network unless

1 Suncadia is subject to full price and terms and conditions regulation as any common
2 carrier operating monopoly facilities would normally be subjected.

3 ****** BEGIN CONFIDENTIAL TREATMENT ******

4 Fifth, a new entrant is not likely to acquiesce to Suncadia's arbitrary extraction of
5 fees and service revenue sharing as a condition of using its exclusive network. *See*
6 Contract , p. 13, Section 5. License and Facility Utilization Fees. Where common
7 carriers provide access for the use of their facilities, the price paid is based on the cost of
8 the use of those facilities, not on some arbitrary sharing of revenues dictated by the
9 owner. Only where there are no alternatives (as with Suncadia) can the owner of
10 facilities extract fees and revenues based on arbitrary and unilateral terms. ****** END**

11 **CONFIDENTIAL TREATMENT ******

12 Sixth, a new entrant has no legal right currently to resolve reasonable terms in any
13 negotiation with Suncadia or in a reasonable amount of time and has no recourse if
14 negotiations were not to yield competitively fair terms. Moreover, neither Suncadia or
15 new entrants have any legal obligation to negotiate with each other.

16 Seventh, as I have already explained above, a new entrant is not likely to be able
17 to distinguish its service offerings sufficiently in the marketplace from those of ICS if the
18 new entrant must use the same facilities as ICS. If the new entrant must rely on Suncadia
19 and ICS, it will ultimately decide that there is no viable business opportunity and
20 abandon consideration.

21 These conditions describe precisely the position that Inland and any other carrier
22 find themselves. If the Suncadia and ICS barriers to entry are not satisfactorily
23 addressed, the only conditions that I could envision under which Inland would ultimately

1 provide service to users within the resort would be if ICS and Suncadia failed in their
2 business arrangement. In this case, Inland would either purchase any usable plant and
3 equipment (presuming that it would be available at the right price) or construct its own
4 facilities to serve the residents stranded by Suncadia and ICS.

5 **Q. Are you aware that Inland has expressed a desire to serve the resort?**

6 **A.** Yes. However, I also understand that only one officer of Inland has had an opportunity to
7 review the confidential portions of the agreement between ICS and Suncadia under the
8 rules that govern this proceeding. I also understand that officer has not been able to
9 review the highly confidential sections, which include the pricing. Therefore, Inland may
10 be more optimistic than I am.

11 **Q. Why would a real estate owner want to limit facilities access to its planned
12 development?**

13 **A. **** BEGIN CONFIDENTIAL TREATMENT ******

14

15

16 ****** END CONFIDENTIAL TREATMENT ******

17 **Q. And why would a carrier such as ICS agree to serve a resort if it is barred from
18 building its own facilities and must use the facilities of the developer under terms of
19 the developer?**

20 **A. **** BEGIN CONFIDENTIAL TREATMENT *****

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23

1
2 ****** END CONFIDENTIAL**

3 **TREATMENT ******

4 **Q. Assuming *arguendo* that some carrier actually wanted to use the facilities of**
5 **Suncadia to provide telecommunications service within the resort as an option, what**
6 **requirements should apply to Suncadia?**

7 **A.** Suncadia's facilities are currently subject to no regulatory oversight, but should be.
8 Suncadia owns the facilities and dictates the terms and conditions for their use. These are
9 critical facilities that determine the manner and cost under which any LEC may provide
10 telecommunications services to the residents of the resort, including ICS. To the extent
11 that the residents of the resort deserve similar public interest protections as users who
12 reside in areas where no such restrictions exist, then Suncadia should be regulated like a
13 monopoly carrier. Suncadia's operation represents a more dangerous form of monopoly
14 service than those of any incumbent carrier, even before the 1996 amendments to the Act.
15 Incumbents have never barred users from constructing their own facilities -- facility
16 bypass has been a fact for decades. Incumbents' terms under which they make facilities
17 available are an option for users; Suncadia's terms are a "take it or leave it" requirement.
18 Finally, when regulated telecommunications firms provide use of facilities, the terms are
19 governed by significant oversight regarding the reasonableness, non-discrimination, and
20 price, just to name a few considerations. Suncadia's terms should undergo similar,
21 extensive review.

1 **Q. Are Suncadia and ICS willing to provide access to Suncadia's communications**
2 **infrastructure to carriers other than ICS on the same or comparable terms as those**
3 **under which ICS has access?**

4 **A.** No. I have explained above the terms and conditions under which ICS has sole access
5 and the significant advantages afforded ICS which competitors cannot overcome. In their
6 supplemental responses to WITA's First Data Requests (which I did not receive until I
7 had completed most of this testimony), Suncadia and ICS now fully confirm all of my
8 concerns and conclusions:

9 Suncadia is not willing to allow Inland or any other carrier to "opt in" to the
10 agreement between Suncadia and ICS because the network Suncadia has
11 constructed was designed for physical access by a single service provider. . . .

12
13 In the agreement between ICS and Suncadia, Suncadia owns the fiber distribution
14 infrastructure and ICS owns the electronics and service extensions from the
15 neighborhood vaults to the subscriber. . . .

16
17 If Inland (or any other service provider) . . . wants to offer service to Suncadia
18 resort residents, Inland must access those customers by obtaining a virtual path to
19 a subscriber via the electronics and additional network infrastructure provided by
20 ICS.

21
22 ICS Supplemental Compelled Responses to WITA's First Set of Data Requests, dated
23 July 14, 2008 at pp. 2-3 attached hereto as Exhibit No. ____ (SEW-4).

24 **Q. Does this new information lead to any different conclusions than you discussed**
25 **above?**

26 **A.** Yes. While the application of the FCC's common carrier rules that prohibit exclusivity
27 clauses may be subject to legal debate as to the manner in which they apply to Suncadia.
28 the application to ICS as a common carrier is more clear. The new revelation that
29 Suncadia and ICS have agreed to an exclusivity clause that grants ICS sole facilities
30 rights with respect to "the electronics and service extensions from the neighborhood

1 vaults to the subscribe” for the “infrastructure provided by ICS” confirms what is a more
2 obvious violation of the FCC’s rules under 47 C.F.R. §§ 64.2500 (a) and (b) and 47
3 C.F.R. §§ 76.2000(a) and (b).

4 **Q. How would these terms not be the same or comparable to those under which ICS**
5 **has access to Suncadia’s communication infrastructure?**

6 **A.** The form of access that Suncadia and ICS are offering amounts to nothing more than
7 resale of ICS’s services or the use of network elements as ICS has designed them for its
8 use in providing its services. ICS has no such restrictions. ICS overwhelmingly controls
9 the fiber and customer access facilities solely for its use. Inland would have no such
10 right. ICS can construct its own facilities from the fiber distribution nodes to the
11 residents’ locations. Inland would not be provided access to the nodes if it wanted to
12 construct equivalent facilities. **** BEGIN CONFIDENTIAL TREATMENT ****

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18 **** END CONFIDENTIAL TREATMENT ****

19 **Q. How do the revelations set forth in the ICS Supplemental Compelled Responses**
20 **reflect on the testimony that Mr. Eisenberg filed in this proceeding?**

21 **A.** Mr. Eisenberg’s testimony whereby he claims that Suncadia would be willing to enable
22 other carriers to provide services under the same terms and conditions as those with ICS
23 is, at best, inconsistent with the supplemental response. Eisenberg Direct at p. 3, lines 7-

1 15. And his statement that “Suncadia’s agreement with ICS is not exclusive” (Eisenberg
 2 Direct at p. 3, line 12) is inconsistent with his supplemental response that only ICS will
 3 own and operate “the electronics and service extensions from the neighborhood vaults to
 4 the subscriber.” His testimony lacks full candor.

6
 7 **4.7 Should ICS be required to serve Suncadia pursuant to RCW 80.36.090 as the**
 8 **incumbent carrier for that area?**

9
 10 **Q. What response do you have to this issue?**

11 **A.** Suncadia has in place requirements that prevent any carrier from satisfying RCW
 12 80.36.090. My reading of RCW 80.36.090 is that it defines the obligation of a carrier to
 13 furnish facilities and connection to any person that reasonably asks for telephone service.
 14 The facts demonstrate that only Suncadia can satisfy such obligation. Suncadia is the
 15 monopoly provider that furnishes the exclusive facilities, and ICS is its contract service
 16 provider. ICS is the monopoly provider for the exclusive facilities related to the
 17 “electronics and additional network infrastructure provided by ICS.”

18 Consistent with the FCC’s discussion of what it means by “consumer access” in
 19 its three rulemakings and the Texas rules that I have attached to this testimony, if a
 20 person that resides in the resort “reasonably asks for telephone service” from any entity
 21 other than Suncadia, that entity cannot “furnish facilities” because Suncadia has barred
 22 facilities-based entry. The FCC also recognizes that exclusive facility arrangements
 23 adversely affect carrier of last resort policies (*Competitive Network II* at para. 13:
 24 “Further, to the extent that exclusivity provisions prevent [LECs] from serving a building,
 25 they could be at odds with applicable carrier of last resort obligations.”)

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4.8 Is ICS violating number assignment rules?*

Q. What comment do you have about number assignment?

A. It is my understanding that Mr. James Brooks on behalf of Inland will explain the number assignment violations in his testimony. As I understand it, ICS has been assigning numbers associated with the Cle Elum rate center area for customers ICS is serving in the Roslyn exchange.

Q. What are the problems associated with arbitrary number assignment?

A. Carriers' revenues and the well-designed public policy rate structures that have led to affordable telephone service are predicated on carriers' ability to distinguish calls subject to access charges from those that are not. Unilateral and arbitrary number assignment by carriers create chaos in the ability of carriers to properly apply the carefully developed plan. Arbitrary number assignment by one carrier can disguise traffic and adversely disrupt revenue of all other carriers. I am attaching comments submitted to the FCC that I prepared for a group of companies in the State of New York that discuss the policies issues, and dangers that should be avoided, associated with arbitrary number assignment. See, Exhibit No. ____ (SEW-5).

4.9 Is ICS engaged in cream skimming?

Q. Do you have anything more to add to your conclusions about ICS's and Suncadia's selective market entry that you discussed above in the context of Universal Service principles?

1 A. No. I conclude above that the facts demonstrate that ICS and Suncadia are pursuing the
2 most grievous form of selective market entry. ICS and Suncadia are serving an area and
3 customers that is significantly more dense with likely higher income customers, and to
4 add "insult to injury," ICS and Suncadia have devised a scheme under which any other
5 facilities-based carrier is barred from entry.

6

7
8 **V. What effect, if any, does the Federal Communications Commission's recent decision**
9 **to cap universal service funding to CETCs have on ICS's Petition?**

10

11 **Q. What is the effect of the referenced FCC decision?**

12 A. The effect of the FCC decision is that, during an interim period awaiting more permanent
13 rules to address what the proper support should be for CETCs, the support available to all
14 of the CETCs in a state is frozen at a specific dollar amount and then distributed to all
15 CETCs in the future. As any single CETC qualifies for more support, the support
16 available to all others is decreased proportionately. As more CETCs are designated and
17 receive support, the available support to all other CETCs is reduced proportionately. To
18 the extent that ICS were designated an ETC and received CETC support, the effect would
19 be to reduce all other CETCs' support proportionately in the State.

20 **Q. What relevance does that have decision have here?**

21 A. This creates the potential for an even greater negative public interest impact if ICS were
22 granted ETC status. All other CETCs that I presume have not pursued exclusive facility
23 arrangements or schemes to bar entry to facilities-based competitors would be penalized,
24 while ICS that has participated in such anti-competitive tactics would be rewarded.

25

1
2 **VI. Are there other factors that should be considered in evaluating the Petition filed by**
3 **ICS? If so, what are they and how do they apply?**
4

5 **Q. Is ICS already providing local exchange services to end users within the Roslyn**
6 **exchange?**

7 **A.** Yes. Based on Mr. Brooks testimony, that is my understanding.

8 **Q. Is it likely that ICS's Roslyn end users are placing and receiving calls to and from**
9 **Inland's Roslyn end users?**

10 **A.** Yes, it is a virtual certainty.

11 **Q. Has ICS established terms and conditions with Inland for the exchange of this**
12 **traffic?**

13 **A.** No. This traffic would be within the scope of traffic subject to §251(b)(5) of the Act.
14 Pursuant to the requirements of the Act, a CLEC is required to establish terms and
15 conditions with an incumbent LEC so that the relative rights and responsibilities of
16 carriers exchanging traffic are set forth in written contracts. Under the Act, it is the
17 responsibility of a CLEC to first request, and then negotiate and establish terms and
18 conditions of interconnection with incumbents. ICS has avoided and evaded the
19 establishment of terms by surreptitiously assigning telephone numbers to its end users
20 that mask the service and nature of the traffic exchanged.

21 **Q. What relevance does this have here?**

22 **A.** It is another example of ICS's disregard for the regulatory requirements, the public
23 interest, and its pattern of conduct to avoid regulatory requirements that apply to all other
24 carriers.

1 **Q. Are there any other issues to discuss here?**

2 **A.** Yes. Section 254(k), within the Universal Service provisions of the Act, includes
3 provisions that prohibit using USF funds derived from services to customers or in areas
4 that are not subject to competition to subsidize areas or customers that are subject to
5 competition.

6 Subsidy of Competitive Services Prohibited.--A telecommunications carrier may
7 not use services that are not competitive to subsidize services that are subject to
8 competition. The Commission, with respect to interstate services, and the States,
9 with respect to intrastate services, shall establish any necessary cost allocation
10 rules, accounting safeguards, and guidelines to ensure that services included in the
11 definition of universal service bear no more than a reasonable share of the joint
12 and common costs of facilities used to provide those services.

13
14 **Q. What relevance does this provision have in this proceeding?**

15 **A.** If ICS were to be granted CETC status (a result that I do not support), then ICS would be
16 receiving funds for its service within the resort where, as I have explained, there cannot
17 be and will not be any meaningful wireline service competition. Moreover, not only
18 would the support dollars for service in the resort be based upon dramatically higher cost
19 characteristics of Inland outside the resort, ICS could use its receipt of funds to benefit its
20 service provision elsewhere where it may be truly competing with other wireline carriers.
21 If this were to be the case, then to ensure that the prohibition of Section 253(b) is
22 enforced, ICS would need to be subject to significant and effective cost accounting and
23 allocation rules and oversight. However, it is my understanding that ICS is not subject to
24 any oversight of this nature.

1 **Q. What other considerations are relevant to the Commission's actions in this**
2 **proceeding and its treatment of ICS and Suncadia?**

3 **A.** I have already detailed earlier in this testimony the "Removal of Barriers to Entry"
4 provisions of Section 253 of the Act and explained why the grant of CETC status would
5 violate Section 253. The provisions of Section 253(b) also provide the Commission with
6 a more positive authority to act here:

7 State Regulatory Authority.--Nothing in this section shall affect the ability of a
8 State to impose, on a competitively neutral basis and consistent with section 254,
9 requirements necessary to preserve and advance universal service, protect the
10 public safety and welfare, ensure the continued quality of telecommunications
11 services, and safeguard the rights of consumers.

12 ICS and Suncadia have shown a disregard for the rights of consumers by their
13 attempts to block the residents of the resort from accessing alternate facilities-based
14 providers of telecommunications, video and broadband services. This provision of the
15 Act provides further support for the denial of ICS's CETC designation request.
16

17 Moreover, the Commission should use this provision of the Act to conduct an
18 extensive proceeding to review the barriers to entry practices of ICS and Suncadia, the
19 rights of consumers, and measures to remedy the harmful effects.

20 **Q. Does that end your Direct Testimony?**

21 **A.** Yes.