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6 **BEFORE THE WASHINGTON**
7 **UTILITIES AND TRANSPORTATION COMMISSION**

8 WASHINGTON UTILITIES AND
9 TRANSPORTATION COMMISSION,

10 Complainant,

11 v.

12 INLAND TELEPHONE COMPANY,

13 Respondent.
14

DOCKET NO. UT-050606

INLAND TELEPHONE COMPANY'S
RESPONSE TO COMMISSION STAFF'S
MOTION FOR SUMMARY DETERMINATION

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16 1. Inland Telephone Company ("Inland") hereby presents its Response to Commission Staff's
17 Motion for Summary Determination (the "Motion").

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19 I. SUMMARY

20 2. Commission Staff's Motion should be denied for at least two reasons. First, Commission
21 Staff's Motion is premised on the wrong standard for the Commission's consideration of the tariff
22 filing in this docket. In addition, Commission Staff's Motion is premature.
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26 INLAND TELEPHONE COMPANY'S
RESPONSE TO COMMISSION STAFF'S
MOTION FOR SUMMARY
DETERMINATION - 1

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1 II. COMMISSION STAFF APPLIES AN ERRONEOUS STANDARD
2 FOR ITS MOTION

3 3. Commission Staff states the standard to apply to their Motion is as follows: "Staff files this
4 Motion for Summary Determination because the pleadings and testimony of Petitioner Inland
5 Telephone Company and Intervenor Suncadia, LLC fail to establish any genuine issues of material
6 fact, and Staff is entitled to judgment as a matter of law." Motion at ¶1. Staff goes on to assert that:
7 "Inland is required to show that its tariff to change its exchange boundary is fair, just, reasonable
8 and sufficient and in the public interest." Motion at ¶3. Commission Staff then cites to a number of
9 statutes. Commission Staff goes on to address the public interest portion of their statement of the
10 standard as follows: "Inland has failed to establish any present harm that has or will come to Inland
11 by declining to approve the tariff." Motion at ¶4.

12 4. There are at least four ways in which this statement of the applicable standard is in error.
13 First, it is a misstatement of the rules to state that Inland has the burden to establish that there are
14 genuine issues of material fact through its pleadings and testimony. Second, the formulation of
15 "fair, just, reasonable and sufficient" applies to requests to increase rates, not to the type of tariff
16 filing before the Commission in this docket. Third, the public interest test has never been that a
17 proponent of a filing must show that it will suffer harm if the filing is not approved. Fourth, it is not
18 at all clear that Inland has the burden of proof in this proceeding. Each of these will now be
19 addressed in greater detail.
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1 A. The burden for a Motion for Summary Determination is for the moving party to demonstrate
2 that there are no material issues of fact and that they are entitled to judgment as a matter of
3 law.

4 Commission Staff argues that it is up to Inland through its pleadings and testimony to
5 establish a genuine issue of material fact. In a Motion for Summary Determination under WAC
6 480-07-380(2), the burden of proof to demonstrate that there are no issues of material fact is on the
7 moving party. This is the commonly understood proposition under CR 56. Further, under WAC
8 480-07-380(2), the examination must be of the pleadings with any “properly admissible evidentiary
9 support.” To date, there is no admissible evidentiary support filed with Commission Staff’s Motion.
10 The testimony has not been admitted at this stage. In addition, Inland is entitled to respond to the
11 testimonial issues raised by Commission Staff in their pre-filed testimony (and which are referred to
12 in Commission Staff’s Motion without actually citing to those passages of testimony). Commission
13 Staff has failed to provide any properly admissible evidence as to why its position in this case is to
14 be supported. Commission Staff’s Motion is therefore defective as to its statement of the applicable
15 standard and its failure to meet the correct standard. Further, as is pointed out below, Inland fully
16 intends to respond to the factual issues raised by Commission Staff in Staff’s pre-filed testimony.

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18 B. The application of a standard that the tariff proposal must be “fair, just, reasonable and
19 sufficient” does not apply in this case.

20 5. The standard that a tariff must be shown to be fair, just, reasonable and sufficient applies
21 primarily in the case of tariff rate increases. It does not apply to situations such as the filing before
22 the Commission in this docket, which is simply a change to Inland’s service area map. For
23 example, RCW 80.04.130(1), cited by Commission Staff, allows the Commission to conduct a
24 hearing when there is a change to “any rate, charge, rental or toll theretofore charged” to determine
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1 the “reasonableness and justness thereof” This proceeding does not involve the change to a rate,
2 charge, rental or toll previously charged. RCW 80.04.130 does not apply.

3 6. Under RCW 80.36.080, the requirement is that the rates, tolls, contracts and charges, and
4 rules and regulations of companies for messages, conversations, services rendered and equipment
5 and facilities supplied “shall be fair, just, reasonable and sufficient.” This tariff filing before the
6 Commission in this docket is not about messages or conversations provided or services rendered or
7 equipment and facilities supplied. The standard of fair, just, reasonable and sufficient is not
8 applicable.¹

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10 C. Commission Staff misstates the applicable public interest test.

11 7. Commission Staff is correct to the extent that they argue that a public interest test is
12 applicable in this proceeding. However, they misstate the applicable test.

13 8. Under RCW 80.01.040(3), the Commission is given the authority to regulate in the public
14 interest “as provided by the public service laws” the rates, services, facilities and practices of
15 telecommunications companies. Thus, the scope of the extent of regulation is determined by the
16 public service laws. Under RCW 80.36.230 and RCW 80.36.240, the Commission is given the
17 authority to prescribe exchange area boundaries for telecommunications companies. Taken
18 together, this means that a public interest test is applicable.

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20 9. However, Commission Staff translates the public interest test to a requirement that Inland
21 must establish that it will be harmed if the tariff filing is not approved. This is a very strange
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24 ¹ Commission Staff also cites to RCW 80.36.100. That statute requires that tariff schedules be filed and open to the
25 public. It does not contain a standard for determining whether a tariff change should or should not be approved.

1 formulation of the public interest test. Under this formulation, a company cannot clarify the
2 application of its tariff unless it can demonstrate that without the change in the tariff it will be
3 harmed. This makes no sense.

4 10. The applicable standard is better stated as the reverse of the formulation asserted by
5 Commission Staff: That is, is there any harm that will come about from the proposed filing? If not,
6 then the filing should be allowed to take effect. No party in this proceeding has produced any
7 evidence that there will be any harm that will result from allowing the tariff to become effective.
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9 11. To the extent that wrestling with the public interest of a particular filing is a balancing of
10 competing interests, Inland will discuss why its filing is in the public interest in Section IV below.
11 However, Commission Staff's formulation of the public interest test, that Inland is required to show
12 it will be harmed if the tariff is not approved, should not be adopted as the proper application of the
13 public interest test.

14 D. Commission Staff erroneously assumes Inland has the burden of proof in this proceeding.

15 12. The Motion set forth by Commission Staff assumes that Inland has the burden of proof in
16 this proceeding. That assumption is not clearly established. While Inland probably has the burden
17 of proceeding, which it has met by setting forth its filing and the reasons for that filing, it is not
18 clear that Inland has the burden of proof.
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20 13. To return for a moment to RCW 80.04.130; that statute clearly states that where there is an
21 increase to any rate, charge, rental or toll "the burden of proof to show that such increase is just and
22 reasonable shall be upon the public service company." RCW 80.04.130(2). Nowhere can a similar
23 statement of the burden of proof be found where a tariff filing does not increase a rate. Under
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1 common rules of statutory construction, the implication is, therefore, that the public service
2 company DOES NOT have the burden of proof. State v. Rains, 87 Wn.2d 626, 555 P.2d 1368
3 (1976) (different meanings are presumed to be intended for different words in statute); Koker v.
4 Armstrong Cork, 60 Wn. App. 466, 804 P.2d 659 (1991) (differences in terminology indicates
5 differences in legislative intent); Simpson v. State, 26 Wn. App. 687, 615 P.2d 1297 (1980) (express
6 inclusion of one item in a statute manifests a legislative intent to exclude other items which are not
7 mentioned).

9 14. What is before the Commission in this proceeding is the question of whether the tariff filing
10 issued by Inland to modify the scope of its exchange boundary should or should not be approved.
11 Nowhere within the public service laws is there a clear delineation that under those circumstances
12 Inland has the burden of proof. If the public interest test is applied to a question, it is more of a
13 balancing of the pros and cons for the tariff filing, rather than a question of burden of proof.

16 III. COMMISSION STAFF'S MOTION IS PREMATURE

17 15. It is interesting that Commission Staff hypothesizes at least two reasons why the tariff filing
18 should be denied.² Although not stated in these terms, it is apparently Commission Staff's effort at
19 describing why it is in the public interest to deny the tariff filing submitted by Inland.

20 16. The first of these two hypothetical reasons as stated by Commission Staff is that "Inland and
21 Suncadia" have not "shown that additional private business negotiations will not reach a resolution
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24 ² Yet, Commission Staff argues that one of the harms advanced by Inland – damage to its reputation – is "hypothetical"
25 and should be ignored. Why may Commission Staff characterize a position supported by real evidence as
"hypothetical," yet advance unsupported hypotheticals of its own?

1 prior to any harmful situation arising.” Commission Staff goes on to argue that denying Inland’s
2 petition may force the parties (Inland and Suncadia) to return to the bargaining table. Motion at ¶5.
3 First, that argument is pure speculation that has no basis in fact in this record. Staff has no
4 supporting evidence or affidavit for its assertion. At best it is a pure “musing” about what might be.
5 In any event, to the extent that this represents a position of Commission Staff in its pre-filed
6 testimony, Inland still has the opportunity to put rebuttal testimony into the record. Thus,
7 Commission Staff’s Motion is premature.
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9 17. The other hypothetical advanced by Commission Staff is that denying the tariff filing would
10 permit “customers to maintain their options for obtaining service.” Staff goes on to state “Staff also
11 believes that it is the Commission’s role to provide stability to consumers in obtaining services.”
12 Motion at ¶6.

13 18. Again, these are hypothetical assertions that appear without any support in the record and
14 without any supporting affidavit. These also happen to be statements that are contained in
15 Commission Staff’s pre-filed testimony. Inland has the opportunity to submit rebuttal testimony
16 addressing these points. Commission Staff has not shown how denying the petition “permits
17 consumers to maintain their options for obtaining service.” In its pre-filed testimony, Commission
18 Staff hypothesizes the unlikely scenario that a customer may bring a lawsuit to force a means by
19 which Inland can serve that customer.³ Inland has the right to present rebuttal testimony addressing
20 Commission Staff’s position. Thus, Commission Staff’s Motion is premature.
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24 ³ This position as advanced by Commission Staff is precisely the sort of hypothetical facts that should be ignored in
25 considering summary disposition. Brown v. McPherson, 86 Wn.2d 293, 298 (1975).

1 19. To summarize, Commission Staff has raised issues in its pre-filed testimony and is now
2 using those issues as stated in its pre-filed testimony as reasons to foreclose further proceedings in
3 this matter. That is inappropriate. Inland has the right to address the factual and policy issues
4 raised by Commission Staff in its pre-filed testimony in Inland's rebuttal testimony. In that rebuttal
5 testimony, Inland intends to address the concept of whether denying the tariff filing will encourage
6 Inland and Suncadia to engage in further negotiations. Inland Telephone Company will address the
7 concept raised by Commission Staff that customers should continue to have access to Inland's
8 service (although physically impossible) and the concept raised by Commission Staff that Inland
9 should be required to be ready to serve a customer that may bring a lawsuit against Suncadia, LLC
10 to obtain an easement. These concepts raise factual, cost and policy issues that Inland will address
11 in its rebuttal testimony. Further, Staff raises the concept that Inland's filing presents issues related
12 to service to the Suncadia Resort by three existing wireless ETCs that have universal service
13 obligations in that area. These issues are raised in Mr. Shirley's Testimony as well as cross-
14 referenced in Ms. Reynolds' Testimony. Inland intends to respond to this testimony. It is
15 inappropriate for Commission Staff to raise issues as to why the tariff filing should be defeated and
16 then try to foreclose a response to those factual and policy issues by filing this Motion.
17 Commission Staff's Motion is premature.
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20 21 IV. PUBLIC INTEREST ANALYSIS

22 20. The Suncadia Resort is a planned community resort area. In that sense, it is much like a
23 private campus in the same way as Pacific Lutheran University is a private educational campus, in
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1 the same way that Microsoft's Redmond complex is a private business campus and in the same way
2 that a condominium complex is a private residential campus. In the situation of a condominium, or
3 a business campus or a university campus, the owners of that property have the right to determine
4 how telecommunications services will be provisioned.⁴ In the case of Suncadia, they have
5 determined that their business plan would not include service by Inland. Without going through an
6 extremely expensive and uncertain process of condemning easements, Inland is effectively
7 precluded from serving the Suncadia Resort. Thus, the tariff filing in this docket represents that
8 factual reality. Inland is not going to be providing service in the Suncadia Resort area. Those
9 people do not have the choice of Inland's service today and, without physical access to the area for
10 Inland, the residences and businesses in the Suncadia Resort area will not have Inland's service in
11 the future. See, Declaration of John P. Coonan ("Coonan Declaration").

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13 21. Commission Staff even recognizes this reality in their footnote 2 in the Motion. In that
14 footnote, they assert that Inland, acting pursuant to WAC 480-120-061(1)(h), correctly refuses
15 service to customers it cannot physically access. If, as Staff argues, this is the determination of
16 what constitutes the public interest, it is logical that Inland's tariff filing should be approved. That
17 is, if it is in the public interest to refuse service to customers the company cannot physically access,
18 it is in the public interest to remove the geographic territory from the company's service area that
19 the company cannot physically access.

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21 22. In addition to reflecting reality, there is another public interest aspect to Inland's filing. ICS
22 has made no secret that it intends to serve the Suncadia Resort area. See, Coonan Declaration.
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25 ⁴ Within the context of the applicable statutes, of course. For example, see RCW 80.36.370(5).

1 Suncadia and ICS will essentially create a *de facto* monopoly under which ICS is the provider of
2 telecommunication services. ICS has also made it clear that it intends to obtain universal service
3 support for its operations at the Suncadia Resort. See, Coonan Declaration and ICS's filing in
4 Docket No. UT-053041. Under the current rules for obtaining support, ICS would serve what is a
5 more densely populated area (when it is built out) in the Suncadia Resort, but receives support as
6 though it served the less dense, rural areas that Inland serves.⁵ See, Coonan Declaration. Inland's
7 filing would prevent that sort of manipulation and creamskimming of the universal service system.
8 If Suncadia and ICS want to create a *de facto* monopoly, then they should do it without universal
9 service support that is premised upon the costs of providing service to the far less dense areas
10 served by Inland.
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12 23. Thus, not only has no party shown that any harm would come from Inland's tariff filing,
13 Inland's tariff filing furthers the public interest by preventing parties from gaming the universal
14 service support system.
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16 V. OTHER ISSUES

17 24. There are three items addressed in this section.

18 25. First, as a matter of some small irritation, but not a determinative factor, Inland notes that
19 Commission Staff's Motion erroneously characterized the tariff filing as being made by both
20 Suncadia and Inland. For example, at ¶4, Commission Staff states: "It is uncontested that Inland
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24 ⁵ Density is a good predictor of cost of service in telecommunications. The more populated an area, the less costly it is
25 to serve on a relative basis.

1 and Suncadia propose the solution....” Further, at ¶6, Commission Staff states: “Because Inland
2 and Suncadia have failed to show any tangible harm that will be caused by maintaining the status
3 quo, Inland’s petition should be denied.” Inland and Suncadia have not made a joint filing.
4 Suncadia had no part in Inland’s decision to make this tariff filing, and, in fact, initially opposed the
5 filing in a letter to the Commission dated May 10, 2005. What the record of this docket shows is
6 that Suncadia was concerned with Inland’s tariff filing after the filing was made. Their concern
7 centered around how services that were presently being provided to Suncadia would continue to be
8 provided. That concern was assuaged through the negotiation of a contract that has been filed with
9 the Commission. Inland had no discussions with Suncadia about the tariff filing prior to the time it
10 was made. See, Coonan Declaration.

12 26. Second, as a separate matter, Commission Staff makes the statement that “Approving
13 Inland’s petition may give Inland and Suncadia greater predictability and opportunity for profit...”
14 Motion at ¶6. This same language is contained in Staff’s pre-filed testimony. Obviously, Inland
15 will want to respond to this statement in its rebuttal testimony. Again, Commission Staff’s Motion
16 is premature.

18 27. However, more to the point, the statement is just flat wrong. While the Suncadia Resort
19 would be an expensive area to serve, it is less expensive, because of its density, on a relative basis
20 than other areas that Inland serves. See, Coonan Declaration. Thus, the tariff filing does not
21 increase the opportunity for profit for Inland. Instead, by making the tariff filing, Inland is
22 foregoing (because it is physically prevented from serving the area) the opportunity to make a
23 profit. Commission Staff’s statements have no basis in fact.

1 28. The third item is that Staff seems to focus on the concept that the only harm to Inland that
2 the tariff filing will cure is damage to Inland's reputation, which Commission Staff characterized as
3 hypothetical. The primary reason for the tariff filing is that Inland did not want to be in the position
4 of having an obligation to serve an area to which it does not have physical access. An analogous
5 situation would be if a company had an area in its service territory that was quite mountainous in
6 which it had no facilities and there were no customers. Then, there is a huge landslide that closes
7 the only access road to the area, making it economically prohibitive to provide service to that area.
8 In order to address a situation that could arise in the future, that company files to remove the area to
9 which it does not have access from its service area and from its obligation to serve requirements. It
10 is a practical response to a real situation.
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12 29. While not the only reason for this filing, Inland is concerned about damage to its reputation.
13 In fact, there has been at least one instance, as stated in Mr. Coonan's Testimony, in which there has
14 been some damage to Inland's existing reputation. That is not a hypothetical situation as asserted
15 by Commission Staff in its Motion.
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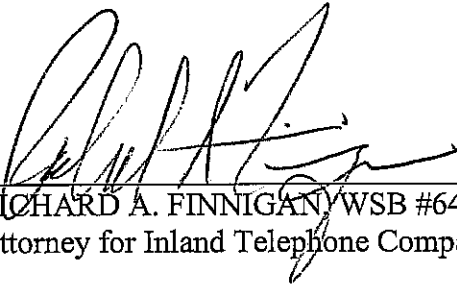
17 VI. CONCLUSION

18 30. As stated earlier, the Commission Staff has premised its Motion on erroneous standards for
19 its Motion and as it applies to Inland's tariff filing (fair, just, reasonable and sufficient). Further, to
20 the extent the Commission Staff premises its Motion on a public interest standard, it has misapplied
21 the public interest test.
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1 31. Further, to the extent the Commission Staff has raised factual and policy issues (although
2 without factual support) in their pre-filed testimony and in their Motion, Inland still has the
3 opportunity to file rebuttal testimony responding to those factual and policy issues. As a result,
4 Commission Staff's Motion is premature. Finally, as Inland has and will demonstrate, the tariff
5 filing is in the public interest.

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7 32. For these reasons, Commission Staff's Motion should be denied.

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9 Respectfully submitted this 6th day of January, 2006.

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13 _____
14 RICHARD A. FINNIGAN, WSB #6443
15 Attorney for Inland Telephone Company