BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. INLAND TELEPHONE COMPANY, Respondent.	DOCKET NO. UT-050606 COMMISSION STAFF'S REPLY TO MOTION FOR SUMMARY DETERMINATION

I. INTRODUCTION

1 Staff files this reply to address issues raised by Inland in its response to Staff's Motion for Summary Determination.

II. INLAND HAS THE BURDEN IN THIS PROCEEDING.

2 RCW 80.36.230 gives the Commission the power to prescribe exchange boundaries. Inland is required to show, as part of its tariff filing, that its tariff to change its exchange boundary is fair, just, reasonable, sufficient and in the public interest. RCW 80.01.040, 80.04.130, RCW 80.36.080, RCW 80.36.100, RCW 80.36.230, RCW 80.36.240.

3 RCW 80.04.130 provides in pertinent part "at any hearing involving any change in any schedule, classification, rule, or regulation the effect of which is to increase any rate, charge, rental, or toll theretofore charged, the burden of proof to show that such increase is

just and reasonable shall be upon the public service company." Inland is proposing to alter the terms under which a customer could obtain telephone service from those set out in a tariff to no tariff at all, and no limit as to the rates. Certainly this falls within the ambit of RCW 80.04.130.

4 Furthermore, even if RCW 80.01.130 did not strictly apply to changes in service territory, the common law rule would apply, that a "claimant generally has the burden of proving the facts necessary to sustain his or her claim." *State v. Anderson*, 72 Wn.App. 253, 260 (1993). Inland, not the Commission, proposed this change in its service territory and the concomitant change in the rules under which a customer may obtain service, by filing its proposed tariff. Certainly, if the tables were turned and the Commission were seeking to remove a profit center from Inland's service territory, Inland would be claiming that it was the Commission's burden to sustain its claim that the public interest necessitated the change. Inland's claim that it may not have the burden in this proceeding is wrong.

III. THE COMMISSION PROCESS FOR REVIEW OF A DISPOSITIVE MOTION.

5 Inland appears to be arguing that under Commission rules a proponent of an original tariff does not have the burden following a motion for summary determination to show that its tariff filing and prefiled testimony contain sufficient facts to sustain its burden. Inland also argues that because its prefiled testimony is not formally admitted into the record it has less significance for purposes of a motion for summary determination. Inland is plainly wrong.

6 This issue has already been addressed by the Commission in a similar context. In *WUTC v. PSE*, consolidated dockets UE-011163 and UE-011170, sixth supplemental order,

page 5-6, the Commission addressed the issue of treatment of prefiled testimony of PSE relating to a motion to dismiss filed by Public Counsel. The Commission said:

> Commission pleadings are similar, but not identical to pleadings in civil litigation. A party filing a civil complaint makes allegations of fact, which it represents that it will prove by evidence submitted at trial. In reviewing a motion to dismiss under 12(b)(6), the court asks whether the allegations may be proved by any competent evidence. Documents initiating these Commission dockets include a proposed tariff and proposed accounting order, and "prefiled" evidence – documents including the written testimony of witnesses – that the company represents that it would offer at hearing to prove its need for the requested relief. In reviewing a motion under WAC 480-09-426(1), the Commission uses the prefiled evidence to define the pleadings originating the proceeding.
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> The situation is also analogous to CR 50, which allows dismissal of a proceeding at the conclusion of the plaintiff's presentation if, taking the evidence in the light most favorable to the respondent, the evidence is insufficient to support the complaint. A company seeking a rate increase has the burden of coming forward with sufficient evidence to support its request.
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> In Commission proceedings, prefiled evidence *is* a party's evidence supporting its case. Prefiled evidence serves an essential regulatory function. The Commission resolves complex, high-stakes, multiparty litigation within time frames from start to completion that are often shorter than the civil courts can schedule and hold a trial. Other parties rely on the prefiled evidence as the basis for preparing their cross examination of witnesses and in formulating their respective evidence. If there is no cross examination and no responding evidence – as may happen, for example, in the event of a settlement – a party has no absolute right to provide additional evidence in support of its position.
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> Therefore, in reviewing the motions and the arguments for and against the motions, the Commission asks whether, putting the prefiled evidence in the light most favorable to the Company, the Commission would grant the relief.

7 The Commission in this order specifically refers to CR 50, which is analogous to CR 56 as both review the evidence to determine whether judgment as a matter of law is

appropriate. Contrary to Inland's contentions, the order plainly states that only Inland's tariff filings and prefiled testimony should be considered in review of the Motion.[1]

IV. ONLY INLAND'S PREFILED TESTIMONY SHOULD BE REVIEWED AS PART OF STAFF'S MOTION.

8 Contrary to Inland's suggestion, Staff is not relying on its response testimony to sustain Staff's motion. It is true that Staff's response testimony and its motion contain similar legal arguments. That being said, the fact that arguments are contained in both does not open the door to Inland to claim that it has the right to file reply testimony before the motion may be ruled upon. After all, Staff has raised only legal issues in its motion.

9 Indeed, Staff has not filed factual declarations supporting its motion or relied on its response testimony to support its motion because, consistent with the PSE case cited above, Staff need only show that Inland failed to meet its burden through its tariff filing and prefiled testimony.[2] Thus, its is improper for Inland to raise, in response to Staff's motion, facts not raised in its initial testimony in this proceeding and Staff objects to consideration of those facts as follows:

- Paragraph 19 of Inland's Response. Staff objects to Inland's reliance on Staff's testimony as a reason that material facts remain regarding wireless ETCs. Inland was required to meet its initial burden in this proceeding without relying on Staff's testimony.
- Paragraph 20 of Inland's Response. Inland has not plead the application of RCW 80.36.370 in its tariff filing. Even it had, however, Inland has not established through facts contained in its initial testimony that Suncadia is a "private campus" or the significance of the term "private campus" for purposes of this proceeding.

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[1] Furthermore, the fact that Staff's testimony touches on issues that Inland failed to touch on, does not relieve Inland of its burden to file initial testimony that sufficiently meets its burden.

[2] Because Staff does not rely on (or ask the Commission to consider) its answering testimony to sustain its motion, and no new issues are to be raised in reply testimony, only Inland's initial filing should be considered in analyzing whether or not it meets its burden under Staff's motion.

- Paragraphs 22 and 23 refer to issues related to universal service that Inland failed to testify about or raise in its initial testimony in this proceeding. These issues should not be considered as part of Staff's motion in this proceeding.

- Coonan's Declaration. Staff does not object to paragraphs 1, 2, and 5 or the first two sentences of paragraph 3 of Coonan's declaration because they appear to contain information already contained in Inland's initial testimony. Staff objects to the last sentence of paragraph 3 of Coonan's declaration because Inland merely speculates about whether Inland will be able to provide service in the future. Staff objects to paragraph 4 of Coonan's declaration because it contains facts outside the scope of its initial testimony filing in this proceeding. Staff also objects to paragraph 6 of Coonan's declaration because it is irrelevant to Staff's Motion – as discussed above, Staff's response testimony should not be considered as part of this Motion.

V. INLAND DOES NOT MEET ITS BURDEN.

10 It is true that it is difficult to quantify the burden of proof in commission proceedings since the public interest test is not generally thought of as a quantitative test. However, Inland has not met its burden under any measure, be it a balancing of competing interests under a public interest test or some other measure.

11 Inland has argued that the interests Staff identifies in its motion, including the opportunity for obtaining service, are hypothetical or speculative. Inland is incorrect. The focus of the statutes and Commission's rules, after all, is not to guarantee service under all circumstances. Rather, it is to provide an opportunity for service if certain criteria are met by the customer. Thus, if Inland's tariff is approved the opportunity for obtaining tariffed service would be gone, a result that is inconsistent with RCW 80.36.300.[3] It is the

[3] The significance of this "opportunity", rather than right, to obtain service is evidenced in the rules that address the very situation Inland hypothesizes. A customer in Suncadia does not have the right to service, only the opportunity to obtain service. WAC 480-120-061(1)(h) states, "a company may refuse to connect with … an applicant … [w]hen all necessary rights of way, easements, and permits have not been secured" and "the applicant is responsible for securing all necessary rights of way or easements on private property..."

destruction of this tangible opportunity to obtain service that is, per se, harmful to the public interest, if not outweighed by a countervailing interest.[4]

12 In contrast, the harm Inland alleges is purely hypothetical. Inland has argued only about speculative harm to its reputation. Although it claims it has shown harm, it has only established, at most, confusion by one customer about the proper service provider. This does not show harm to Inland's reputation, even if such harm outweighed the public interest in the opportunity to obtain service (which Staff believes it would not).

13 Inland, in its response, also labels Staff's discussion of the possibility of further negotiations between the parties as hypothetical or speculative. However, Staff is not relying on the probability of further negotiations to sustain its motion.[5] Instead, Staff is simply pointing out that the status quo maintains the options for customers to obtain service, and, in addition, the status quo does keeps alive the possibility that these private parties will workout their dispute prior to any tangible harm arising (assuming it ever would).

14 In Paragraph 28 of its response to Staff's motion, Inland states that the primary reason it is seeking the tariff change is that it does not want to have the obligation to serve an area that it does not have access to. While Staff does not object to this restatement of Inland's testimony; the only reason put forward in Inland's testimony to justify the tariff change is that harm to its reputation may result because some residents of Suncadia will not

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[4] The same opportunity for service exists with regard to other service obligations. After all, it is not true that a customer has an enforceable right to phone service even if they fail to pay their bill. Rather, a customer has a right to phone service only if they comply with all applicable requirements, including paying their bill. In other words, if the customer "pays the freight", they get the service. The same thing could be said about the obligation of customers to "pay the freight" to obtain the proper easements in order to secure service from Inland.

[5] Similarly, Staff is not relying on the fact that Inland may have the opportunity for greater predictability and profit if the tariff is approved to sustain its motion. Staff is merely pointing out that it is likely that Inland (assuming Inland is acting rationally) has filed this tariff because it is in its best business interest to do so, but that it has failed to show that the reasons for approving the tariff (as put forward in its prefiled testimony) justify its approval.

understand that Inland is not obligated to serve because residents do not have easements that permit Inland to cross Suncadia's land. Because Inland has provided no more than speculation about harm to its reputation and demonstrated only that one potential customer was confused about Inland's obligation, Inland has not sufficiently justified this change, no matter the burden that may apply. The Commission should grant Staff's motion because mere speculation cannot meet any burden that would satisfy approving the tariff.

DATED this 17th day of January, 2006.

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