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

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9 WASHINGTON UTILITIES AND
10 TRANSPORTATION COMMISSION,

11 Complainant,

12 v.

13 INLAND TELEPHONE COMPANY,

14 Respondent.
15

DOCKET NO. UT-050606

INLAND TELEPHONE COMPANY'S
RESPONSE TO STAFF OBJECTIONS

16 Commission Staff filed a Reply to Motion for Summary Determination on January 17, 2006.
17 In that Reply, Commission Staff files objections to certain matters contained in Inland Telephone
18 Company's Response to Commission Staff's Motion for Summary Determination ("Response"). In
19 this pleading, Inland responds to those objections. Before doing so, Inland will comment on
20 Commission Staff's mischaracterization of the Motion before the Commission.

21 I. Commission Staff Continues to Apply an Erroneous Standard of Review and Confuses a
22 Motion for Summary Determination with a Motion to Dismiss on the Pleadings.

23 1. Commission Staff continues to assert the facially improper standard that Inland must
24 justify that its filing is fair, just, reasonable and sufficient under RCW 80.04.130. The filing before
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26 INLAND TELEPHONE COMPANY'S
RESPONSE TO STAFF OBJECTIONS - 1

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1 the Commission is not a change to a rate or charge. RCW 80.04.130 does not apply. This matter is
2 set forth in depth in prior briefs and will not be re-argued here.

3 2. As a new twist, Commission Staff now argues that the standards applicable to
4 dismissal of pleadings on their face should apply to this Motion. However, that is not the motion
5 the Commission Staff brought.

6 3. Under WAC 480-07-380(2), a motion for summary determination, which is the
7 motion that Commission Staff has brought, allows the consideration of “any properly admissible
8 evidentiary support (e.g., affidavits, fact stipulations, matters of which official notice may be
9 taken)...” to show that there is or is not any genuine issue as to any material fact. The standards
10 applicable under CR 56 are applied by terms of the rule.

11 4. Yet, Commission Staff in its Reply directs the Commission to WUTC v. Puget
12 Sound Energy, Docket No. UE-011163 and Docket No. UE-011170, Sixth Supplemental Order
13 (October, 2001) (“PSE Order”). The PSE Order was brought under the precursor to WAC 480-07-
14 380(1), which is a motion to dismiss a party’s claim or case on the basis that the opposing party’s
15 pleadings failed to state a claim upon which the Commission can grant relief. At issue in the PSE
16 case was a request for interim relief, which under the Commission precedent has as a precursor very
17 specific standards that must be proven to demonstrate that the interim relief, an extraordinary form
18 of relief, is justified. The application of standards for dismissal of a pleading based on its face for
19 failure to state a claim are not analogous, as Commission Staff claims, to a motion for summary
20 determination. Under a motion for summary determination there must be (1) no genuine issue as to
21 any material fact and (2) the moving party is entitled to judgment as a matter of law. The PSE case
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1 sited by Commission Staff in its Reply is inapplicable to the case before the Commission in this
2 docket.

3 II. Commission Staff's Objections to Inland's Response and Supporting Declaration are
4 Inappropriate.

5 5. Commission Staff makes the incredible argument that "Staff need only show that
6 Inland failed to meet its burden through its tariff filing and pre-filed testimony."¹ Commission Staff
7 Reply at ¶9. This is not the standard contained in WAC 480-07-380(2). Clearly, supporting
8 affidavits (declarations) to show that there are issues of material fact can be raised. This is always
9 the case under CR 56. Commission Staff's position in this Motion misunderstands the basic
10 concepts of motion practice.

11 6. Further, Staff's assertion that the matters were not raised in the initial testimony is
12 false. The following analysis will address the specific objections raised by Commission Staff.

13 7. Commission Staff objects to ¶19 of Inland's Response. The question before the
14 Commission in Staff's Motion is whether or not there is any genuine issue as to any material fact.
15 As pointed out in ¶19 of Inland's Response, there are a number of material facts. The availability of
16 service from wireless ETCs was raised in Inland's opening testimony. Mr. Coonan's pre-filed
17 Testimony at p. 9. Commission Staff responded to that testimony. Inland now has the opportunity
18 to file reply testimony addressing Staff's position. This is clearly an issue of material fact.
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24 ¹ Even if this were the correct standard, which it is not, the supporting pre-filed testimony of Suncadia, LLC would also
25 have to be considered.

1 8. Paragraph 19 discusses the concept of whether the tariff filing will encourage further
2 negotiations. That issue is clearly raised by Staff in its pre-filed testimony as a basis for dismissing
3 the tariff filing. That is an unresolved issue of material fact.²

4 9. In ¶19 of Inland's Response, Inland addresses the physical impossibility to serve the
5 area. This is an area raised throughout Inland's opening testimony. Commission Staff has
6 responded to that issue in its responsive testimony. Inland has the right to file reply testimony.
7 This is clearly a genuine issue of material fact.

8 10. It should be noted that Staff's objection as stated in the Staff Reply to ¶19 of Inland's
9 Response is only to the issues related to wireless ETCs. This means that Commission Staff is
10 admitting that the other factual issues raised in Inland's Response in ¶19 actually exist. On this
11 basis alone, Staff's Motion should be denied.

12 11. Commission Staff objects to ¶20 of Inland's Response. Inland's opening testimony
13 raises the issue that Inland does not have access to this area called the Suncadia Resort area. This is
14 a genuine issue of material fact. Commission Staff is just wrong in asserting that Inland must have
15 proven its case on this issue. That is not the correct standard. All that has to exist for purposes of a
16 motion for summary determination is a genuine issue of material fact.

17 12. Commission Staff objects to ¶22 and ¶23 of Inland's Response. These issues relate
18 to policy matters that are involved in this tariff filing. The fact that ICS intends to seek universal
19 service support for its operations at the Suncadia Resort is certainly evidenced by ICS's filing in
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24 ² Commission Staff tries to denigrate its own testimony on this point. See, footnote 5 of Staff's Reply. This merely
25 underscores the fact that even Staff recognizes there are material factual issues yet to be resolved.

1 Docket No. UT-053041. This filing is a matter of which the Commission can take official notice, as
2 is allowed for considering motions for summary disposition under WAC 480-07-380(2)(a). It is
3 astounding that Commission Staff wants to foreclose consideration of public policy issues in the
4 determination of whether a filing is in the public interest.

5 13. Staff's last objection is to certain elements of Mr. Coonan's Declaration. It should
6 be noted that since Staff does not object to ¶1, ¶2, ¶5, and the first part of ¶3 of Mr. Coonan's
7 Declaration, there certainly are sufficiently genuine issues of material fact to defeat Staff's Motion.
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9 14. The premise of Commission Staff's objection to portions of Mr. Coonan's
10 Declaration is in large part premised upon Commission Staff's view that the only matter that this
11 Commission can consider is the initial testimony filed in this proceeding. As pointed out above,
12 that is an incorrect reading of WAC 480-07-380(2)(a). Even if Commission Staff's position is
13 correct, the testimony of Inland does discuss the density issues. See, Mr. Coonan's pre-filed
14 Testimony at p. 7. The issues related to cost support and USF support are also available by
15 reference to the rules of the FCC contained in 47 C.F.R. Part 54. All of this shows that there is a
16 genuine issue of material fact.
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18 15. In fact, the supporting testimony of Suncadia, LLC (which would be part of the
19 initial pleadings even under Staff's erroneous view of the case) also discuss those issues.

20 16. Staff's objection to portions of Mr. Coonan's Declaration is inappropriate under the
21 standards of WAC 480-07-380(2)(a).
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1 III. Staff's Efforts to Re-Argue its Motion in Chief Must be Ignored.

2 17. Beginning at ¶10 of Commission Staff's Reply, Commission Staff undertakes an
3 effort to re-argue its Motion. This is despite of the fact that the Order allowing them to file the
4 Reply warned Commission Staff not to re-argue their Motion. That part of the Commission Staff
5 Reply should be ignored.

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7 CONCLUSION

8 18. Commission Staff has chosen to bring a Motion for Summary Determination. Under
9 the standards contained in WAC 480-07-380(2)(a), any properly admissible evidentiary support can
10 be taken into account, including declarations. Commission Staff asserts the erroneous standard that
11 the Motion must be judged solely on Inland's pre-filed testimony. That is not a position that is
12 supported by Commission rule or precedent. Commission Staff's objections to portions of the
13 Declaration of Mr. Coonan and portions of Inland's Response are not warranted under WAC 480-
14 07-380(2)(a).

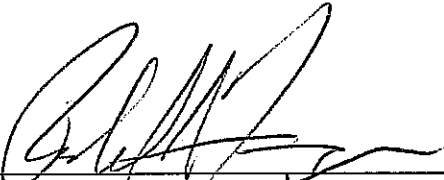
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16 19. Commission Staff is attempting to convert a motion for summary determination into
17 a motion to dismiss for failure to state a claim. Such a motion is clearly untimely under the
18 standards set forth in WAC 480-07-380(1)(b).³

19 20. Inland has clearly demonstrated that there are genuine issues of material fact.
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24 ³ As an aside, if the standards of a motion to dismiss for failure to state a claim are applied -- taking the pleadings in the
25 light most favorable to the non-moving party, has a claim for relief been stated -- Inland prevails. Mr. Coonan's pre-
26 filed Testimony, taken as uncontroverted, clearly states a basis for finding the tariff change is in the public interest.

1 21. Commission Staff's Motion is not well taken. It asserts erroneous standards both as
2 to the applicable ultimate burdens in this case and the procedural requisites for considering a motion
3 for summary determination.

4 Respectfully submitted this 19th day of January, 2006.

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9 Attorney for Inland Telephone Company
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