

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND)	DOCKET NO. UT-050606
TRANSPORTATION COMMISSION,)	
)	
Complainant,)	ORDER NO. 05
)	
v.)	
)	ORDER DENYING MOTION
INLAND TELEPHONE COMPANY,)	FOR SUMMARY
)	DETERMINATION
Respondent.)	
)	
.....)	

1 **Synopsis:** *This order denies Commission Staff’s motion for summary determination.*

2 **NATURE OF PROCEEDING.** Docket No. UT-050606 involves the suspension of a tariff filed by Inland Telephone Company (Inland) on April 19, 2005. The tariff provided for the removal from Inland’s service area the territory at the southern edge of the Roslyn exchange comprised of the Suncadia Resort and the addition of other territory north of the Roslyn exchange. The Commission suspended the proposed tariff revisions on June 29, 2005.

3 **APPEARANCES.** Richard A. Finnigan, attorney, Olympia, WA, represents Inland. Judy Krebs, Assistant Attorney General, Seattle, WA, represents the Public Counsel Section of the Washington Office of the Attorney General. Chris Swanson, Assistant Attorney General, Olympia, WA, represents the Commission’s regulatory staff (“Commission Staff” or “Staff”). John L. West and Richard M. Peterson, attorneys, Seattle, WA, represent Suncadia LLC (Suncadia). Gregory J. Kopta, attorney, Seattle, WA, represents Intelligent Community Services (ICS).

4 **BACKGROUND.** This case centers around the question of the provision of telecommunications service to Suncadia, a private resort development located near Roslyn, Washington. Suncadia currently is included in Inland's service territory. When construction is completed, Suncadia may include 2,800 single-family dwellings, a hotel, and resort commercial business, for a total of about 4,000 telephone line connections.¹ Inland and Suncadia engaged in lengthy negotiations which concluded in a June 1, 2005 agreement to insure Inland's continuation of its present services to Suncadia, but nothing beyond that.² Suncadia refuses to grant Inland sufficient long-term easements that are required if Inland is to provide service to additional customers in the resort area.³ In fact, Suncadia has been negotiating with ICS, a telecommunications provider and intervenor in this proceeding, to provide the telecommunications services that the resort will require.⁴ As a result of Suncadia's alleged refusal to grant Inland the permanent or long-term easements that Inland requires to install its facilities for provision of telecommunications service, Inland filed this request to remove Suncadia from its service territory.

5 **MOTION FOR SUMMARY DETERMINATION.** On December 21, 2005, Commission Staff filed a motion for summary determination. Public Counsel supported Staff's motion and Inland opposed it.⁵

6 Staff contends that the Commission is authorized to prescribe exchange boundaries under RCW 80.36.230⁶ and that Inland is required to show that its

¹ Direct Testimony of Paul J. Eisenberg, filed October 21, 2005, pp. 2-3.

² *Id.*, p. 4.

³ Direct Testimony of John P. Coonan, filed October 21, 2005, pp. 5-6.

⁴ Direct Testimony of Paul J. Eisenberg, p. 5.

⁵ On December 21, 2006, Commission Staff filed a Motion for Summary Determination (Staff's Motion). On January 6, 2006, Public Counsel filed an Answer Supporting Staff's Motion and Inland filed a Response to Staff's Motion (Answer in Support). On January 17, 2006, Staff filed a Reply to Inland's Response (Staff's Reply) and Inland filed a Response to Public Counsel's

tariff removing the Suncadia resort from Inland's exchange territory is fair, just, reasonable, and sufficient and in the public interest.⁷

7 Staff asserts that Inland's direct testimony⁸ fails to establish that any present, tangible harm has or will come to Inland if the tariff filing is not approved. Staff points out that Inland's claim of harm to its reputation⁹ if the Commission declines to grant the tariff revision is hypothetical and speculative, and already addressed under Commission rule.¹⁰ Staff further asserts that if the Commission denies Inland's petition, it might bring Suncadia and Inland back to the negotiating table and would permit consumers to have access to the diverse supply of telecommunications services intended under in RCW 80.36.300.¹¹

8 Public Counsel reiterates that the Commission's has authority to define the company's geographical boundaries under RCW 80.36.230 and also asserts that Inland has an obligation to provide service within its geographical boundaries

Answer Supporting Staff's Motion (Inland Response to Public Counsel). On January 19, 2006, Inland filed a Response to Staff's Objections (Inland Response to Staff Objections).

⁶ RCW 80.36.230 states: The commission is hereby granted the power to prescribe exchange area boundaries and/or territorial boundaries for telecommunications companies.

⁷ Staff's Motion, ¶ 5.

⁸ See, Direct Testimony of John P. Coonan, filed October 21, 2005.

⁹ *Id.*, pp. 5. Mr. Coonan stated that customers might expect that Inland would provide them service, when in fact, because Suncadia will not grant Inland the required easements to do so, Inland cannot serve any customer within Suncadia's territory.

¹⁰ See, Staff's Motion ¶ 4 and WAC 480-120-061(1)(h). This rule identifies circumstances when a telecommunications provider may refuse service to an applicant in its service territory.

¹¹ RCW 80.36.300 states: The legislature declares it is the policy of the state to: (1) Preserve affordable universal telecommunications service; (2) Maintain and advance the efficiency and availability of telecommunications service; (3) Ensure that customers pay only reasonable charges for telecommunications service; (4) Ensure that rates for noncompetitive telecommunications services do not subsidize the competitive ventures of regulated telecommunications companies; (5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state; and (6) Permit flexible regulation of competitive telecommunications companies and services.

under RCW 80.36.090.¹² Public Counsel contends that the Commission must exercise its authority regarding exchange boundaries taking into consideration this obligation to serve as well as the requirement to ensure a diverse supply of service under RCW 80.36.300.¹³ Public Counsel states that Inland bears the burden of proof that the elimination of Suncadia from its service territory would be in the public interest and would result in rates that are fair, just reasonable and sufficient under RCW 80.36.080 and RCW 80.36.140,¹⁴ and that Inland fails to meet that burden.

9 Public Counsel cites several Commission orders for the proposition that the Commission will reject the request of a telecommunications company to relinquish its obligations to provide service within its territory absent a showing of “actual and substantial harm outweighing the substantial benefits it receives as a de facto monopoly provider”¹⁵ and that the Commission first requires a showing that a suitable tariffed [wire line] alternative exists to substitute for the withdrawn service.¹⁶

10 The issues raised in the motion and responses to the motion are: (1) who has the burden of proof; (2) what is the proper standard for determining the outcome of the motion for summary determination; (3) what may the parties rely on to prove their position; and, (4) have the respective burdens been met. These issues are addressed in the following sections of this order.

¹² RCW 80.36.090 requires in part that every telecommunications company in the state “shall, upon reasonable notice, furnish to all persons and corporations who may apply therefore and be reasonably entitled thereto suitable and proper facilities and connections for telephonic communication and furnish telephone service as demanded;” *See*, also, Public Counsel Answer in Support, ¶ 2.

¹³ Public Counsel Answer in Support, ¶2.

¹⁴ *Id.*, ¶ 4.

¹⁵ Docket No. UT-961638, Fourth Supplemental Order (January 1998); *see*, also Public Counsel Answer in Support, ¶ 5.

¹⁶ Docket No. UT-960126, Fifth Supplemental Order (December 1996); Docket Nos. UT-911488, UT-911490, &UT-920252 (Consolidated), Fourth Supplemental Order (November 1993).

1. Who has the burden of proof?

- 11 Commission Staff and Public Counsel contend that Inland has the burden of proof to show that the prefiled testimony satisfies the “fair, just, reasonable, sufficient and in the public interest” test, and that if the burden is not satisfied, Inland’s tariff filing should be rejected.¹⁷
- 12 Inland responds that in a motion for summary determination, the burden of proof to demonstrate that there are no issues of material fact is on the moving party.¹⁸ Inland also contends that while it may have the burden of proceeding in the tariff case, it is not clear whether Inland also has the burden of proof.¹⁹ Inland claims that only if it proposes to increase rates does the burden of proof fall upon a public service company,²⁰ and that the public service laws do not identify the burden of proof for modifications to exchange boundaries.²¹
- 13 **Discussion and decision.** A motion for summary determination is governed by WAC 480-07-380. This rule provides that the Commission will consider a motion to be one for summary determination if a party “presents an affidavit or other material in support of its motion to dismiss and the material is not excluded by the commission.”²² The rule further states:

A party may move for summary determination of one or more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support (*e.g.*,

¹⁷ Staff Motion, ¶ 3; Public Counsel Answer in Support, ¶ 4.

¹⁸ Inland Response to Staff Motion, ¶ 4.

¹⁹ Inland Response to Staff Motion, ¶ 12.

²⁰ *Id.*, ¶ 13.

²¹ *Id.*, ¶ 14.

²² WAC 480-07-380(1)(a); see also Public Counsel Answer in Support, ¶ 5 and fn. 5.

affidavits, fact stipulations, matters of which official notice may be taken), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion made under this subsection, the commission will consider the standards applicable to a motion made under CR 56 of the Washington Superior Court's civil rules.²³

14 The moving party has the burden of showing that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law.²⁴

15 The courts have determined that in deciding motions for summary judgment under CR 56:

The initial burden of demonstrating the absence of material facts rests with the party moving for summary judgment; the burden then shifts to the nonmoving party to come forward with a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.²⁵

16 Following this reasoning, Staff bears the initial burden of showing that there are no issues of material fact with regard to its motion for summary determination. The burden then shifts to Inland to demonstrate that material facts exist which require Commission consideration. As to the burden of proof with regard to the tariff proceeding itself, the Commission has determined that where the tariff

²³ WAC 480-07-380(2)(a); see also Washington Superior Court Rule 56.

²⁴ Deschamps v. Mason County Sheriff's Office(Deschamps), 123 Wash App 551, 557; 96 P. 3d 413 (2004)

²⁵ Deschamps, at 557.

proposes to eliminate or curtail service, the burden of proof is on the public service company.²⁶

2. What is the proper standard for consideration of Staff's motion?

17 Staff and Public Counsel contend that to meet its burden of proof, Inland must show that the proposed boundary change is fair, just, reasonable and sufficient and in the public interest.²⁷

18 Inland responds that the "fair, just, reasonable and sufficient" standard does not apply to its tariff filing because it does not request a rate increase. Instead, Inland contends the Commission may apply only a "public interest" test to the tariff filing.²⁸

19 **Discussion and decision.** In prior cases, the Commission has adopted a "fair, just, reasonable, and in the public interest" test for determining whether to approve tariff revisions that eliminate or curtail service.²⁹ Because this case involves an analogous situation, Inland's proposal to end its obligation to serve the Suncadia area, the same test should apply in this proceeding. In light of the Commission's adoption of that standard, Inland's argument that the tariff does not propose a rate change is inapposite.

²⁶ Docket No. UT-961638, Fourth Supplemental Order, pp. 15, 20, 22.

²⁷ Staff Motion, ¶ 3 Public Counsel Answer in Support, ¶4.

²⁸ Inland Response to Staff, ¶ 5-6.

²⁹ *WUTC v. US West*, Docket No. UT-961638, Fourth Supplemental Order Rejecting Tariff Filing, (*US West*, Fourth Supplemental Order) January 16, 1998, p. 20.

3. What materials may be used to meet the parties' respective burdens of proof?

20 Staff contends that Inland may rely only on the company's prefiled direct testimony to support its position.³⁰

21 Inland contends that reliance on prefiled testimony is improper because it has not yet been admitted in evidence,³¹ although Inland's arguments cite Staff's and the company's prefiled testimony.

22 **Discussion and decision.** The courts have held that a motion for summary judgement may be granted "if... after viewing the entire record and drawing all reasonable inferences in favor of the nonmoving party, [it is determined] that there are no genuine issues of material fact..."³² Moreover, WAC 480-07-380 does not limit the type of material to be relied on in a motion for summary determination except to state that it must be "properly admissible." The Commission has determined that prefiled testimony, considered in the light most favorable to the nonmoving party, will be considered in deciding motions to dismiss.³³

23 It is concluded that Inland may rely on its own prefiled testimony, Staff's prefiled testimony, the materials filed with the motion and responses to the motion, and the arguments of the parties, to show whether there are material issues of fact in dispute.

³⁰ Staff Reply to Inland, p. 4.

³¹ Inland Reply to Staff, p. 3.

³² Deschamps at 557.

³³ Docket Nos. UE-011163 and UE-011170, Sixth Supplemental Order, p. 5.

4. Have the parties' respective burdens been met?

24 Staff contends Inland's claim that its reputation would be harmed if the Commission granted Inland's petition is insufficient to meet Inland's burden because it is hypothetical and speculative.³⁴ Staff points out that WAC 480-120-061(1)(h) allows a public service company to refuse to serve customers in certain circumstances, such as when easements cannot be obtained. Staff appears to contend that this rule provision allows the company to avoid harm to its reputation.³⁵

25 Staff also asserts that Inland has thus failed to show any present harm and that denying the petition would encourage further negotiations between Inland and Suncadia; would permit consumers to maintain their options for obtaining service. Staff suggests that granting the application would give Inland and Suncadia an opportunity for profit.

26 Public Counsel relies on several prior Commission orders for the proposition that the Commission will reject the request of a telecommunications company to relinquish its obligations to provide service within its territory absent a showing of "actual and substantial harm outweighing the substantial benefits it receives as a de facto monopoly provider"³⁶ and that the Commission first requires a showing that a suitable tariffed [wire line] alternative exists to substitute for the withdrawn service.³⁷

³⁴ Staff Motion, ¶ 4.

³⁵ *Id.*

³⁶ Docket No. UT-961638, Fourth Supplemental Order (January 1998); *see*, also Public Counsel Answer in Support, ¶ 5.

³⁷ Docket No. UT-960126, Fifth Supplemental Order (December 1996); Docket Nos. UT-911488, UT-911490, & UT-920252 (Consolidated), Fourth Supplemental Order (November 1993); *see* also Public Counsel Answer in Support, ¶ 2.

- 27 Inland responds that the prefiled testimony, taken as a whole, shows that damage to its reputation is not the only support for the tariff petition.³⁸ Inland points out that factual questions exist in terms of what harms it might suffer if the petition is granted; whether there are any substitute services available, including the potential for service by ICS; whether Inland's other customers would suffer if Inland were required to maintain plant to serve Suncadia even if there was limited or no potential for such customers to materialize. Inland posits that it should be able to provide testimony to address Staff's contention that a customer could bring a lawsuit to force provision of service by Inland and that Staff's arguments that dismissal of the tariff filing would encourage further negotiations are speculative at best.
- 28 Finally, Inland raises the issue whether it is in the public interest to allow ICS the opportunity to gain ETC status to serve Suncadia, taking as its service area Inland's exchange territory.³⁹ Inland contends that this would have the affect of permitting ICS to obtain universal service support based on Inland's lower density exchange area, while serving only the higher density of the Suncadia resort. Inland points out that this would allow ICS a windfall that could be avoided if Inland were permitted to remove Suncadia from Inland's service territory.
- 29 **Discussion and decision.** Having determined earlier in this order that Inland may rely on all the prefiled testimony to demonstrate whether there are issues of material fact, this order would propose that, the burden having shifted to Inland, the company has shown that there are substantial factual issues in dispute in this proceeding and that Staff failed to demonstrate there are no genuine issues of fact in dispute. The disputed issues include benefits and harms to Inland and its customers outside Suncadia from retaining Suncadia in its service territory, and

³⁸ Inland Response to Staff Motion, ¶ 15-19.

³⁹ Inland Response to Staff's Motion, ¶ 22.

the ramifications of removal on future potential customers in the Suncadia resort area.

30 Public Counsel's reliance on past Commission orders where a telecommunications company requested withdrawal of some aspect of its service is ill-founded. While those orders set out the criteria that the Commission would use in judging such requests, the orders themselves originated out of fully-contested hearings during an era when the telecommunications industry and competition were in an emerging state. Also, while the Commission has expressed reservations about the degree to which wireless service may substitute for wire line service, this does not mean that the Commission should not consider wireless at all in determining whether the public interest is served by permitting Inland to remove Suncadia from its service territory. It is premature to dismiss this proceeding without giving all parties an opportunity to create a record on these issues.

ORDER

31 IT IS ORDERED That Commission Staff's Motion for Summary Determination is denied.

Dated at Olympia, Washington, and effective this 16th day of February, 2006.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

THEODORA M. MACE
Administrative Law Judge

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to *WAC 480-07-810*.