

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,**

**Complainant,**

**v.**

**INLAND TELEPHONE COMPANY,**

**Respondent.**

**DOCKET NO. UT-050606**

**BRIEF OF PUBLIC COUNSEL**

**POST-HEARING BRIEF CONCERNING INLAND TELEPHONE COMPANY'S  
TARIFF REMOVING SUNCADIA RESORT FROM ITS ROSLYN EXCHANGE**

**June 5, 2006**

## I. INTRODUCTION

1. The Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) files this post-hearing brief with the Washington Utilities and Transportation Commission (Commission or UTC) opposing Inland Telephone Company's (Inland) petition requesting the removal of the Suncadia, LLC Resort (Suncadia or Resort) area from its Roslyn exchange area.
2. It is undisputed that once the area containing Suncadia is removed from Inland's Roslyn exchange, Inland will be released of its obligation to serve customers at Suncadia pursuant to RCW 80.36.090. Indeed, Inland specifically seeks removal of Suncadia from its territory for the very purpose of relieving it of its obligation to serve that area.
3. Inland argues that releasing it of its obligation to serve under RCW 80.36.090 is without consequence to customers since Suncadia refused to give the Company an easement, and without physical access through an easement, it could not serve those customers anyway. Inland's argument is without merit because it is not supported by the facts.
4. First, Inland cannot say that it could not receive a perpetual easement from Suncadia to provide "telephone services" because it never asked for one. Inland's proposed easement was for "communications services" not "telephone services." An easement for "communications services" in the Suncadia Resort would have allowed Inland to lay a fiber-based network at ratepayer expense and then use that network to leverage income for its other affiliated, unregulated businesses (e.g., long distance, Internet, security, and cable television). In truth, Suncadia may have also rejected a perpetual easement for the provision of basic telephone

service but Inland, in pursuit of its own business plan, apparently lost sight of its fundamental obligation as a wireline provider and never thought to ask for one. Without an easement Inland's obligations are limited. WAC 480-120-061(1)(h), ("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 [for service] is responsible for securing all necessary rights of way or easements on private property...").

5. Second, Inland no longer needs an easement of any kind to provide telephone service. After Inland filed its tariff revision in April 2005, Suncadia built its own fiber-to-the premises network. Inland admits that it has the ability to interconnect with this network in order to provide basic telephone service to the Suncadia territory. While Inland acknowledges this option, it admits that it has never engaged in any negotiations to lease access to this network and has no current plans to do so.

6. Third, had Inland attempted negotiations with Suncadia for interconnection or attempt to do so in the future, and Suncadia insisted on unreasonable terms and conditions(still purely speculative), Inland could have sought relief from its obligation to serve Suncadia customers without the draconian step of removing Suncadia from its territory for all time. *See*, RCW 80.36.090; WAC 480-120-071.

7. Inland tries to lessen the sting of jettisoning its obligation to serve by arguing that the Commission has designated other telecommunications carriers as ETCs and these carriers will continue to serve (and are required to serve) customers at Suncadia. The problem with this argument is that the Commission itself has recognized that designating a company as an ETC for an area is no guarantee that the ETC is providing service in every location in that area.

8. We submit that this is one of those cases where it is easy to get waylaid by novel facts and academic legal theories. We urge the Commission to view this case for what it is – a bread and butter dispute about a company’s obligation to serve – and entertain only those questions truly ripe for consideration.
9. Focusing on the fairly routine nature of this case is not easy. Inland consistently raises speculative facts and argues theoretical legal questions to support its petition. Upon closer scrutiny it becomes clear that everything the Company argues is either not ripe for decision on this record or mooted by the passage of time.
10. For instance, Inland alleges that Suncadia will be a lower-cost area to serve due to future population density. Allegedly, Suncadia’s lower cost of service will weigh down the average cost of service in Inland’s study area and reduce the amount of money Inland will receive in universal support. Inland argues that it should not be forced to suffer this harm without the benefit of being able to serve Suncadia and alleges this harm justifies its proposed removal of Suncadia from its territory.
11. To date, Inland has not cited any specific authority for its “study area” argument. However, even assuming, *arguendo*, it is correct on the law, Inland’s allegation that it will lose universal service money is speculative and unsupported by the record. The record is absent of any evidence showing how much universal service money Inland will lose if Suncadia remains in the territory. Inland does not have this evidence and cannot credibly offer any at this point because Suncadia contains no more than twenty single-family residences at the moment. Twenty customers is surely not enough to affect its study area and so Inland’s allegation of lost money is simply conjecture. Lastly, because the allegation requires a prediction about what might happen

in the future, it is just as easy to imagine a situation in which the method for calculating universal support could change and Inland would not lose any support whatsoever.

12. Another speculative issue Inland appears to raise is whether Suncadia, now that it owns the fiber-to-the-premises network, should be treated like a common carrier and subject to all of the requirements that common carriers are subject to under federal and state law. While interesting, that question cannot be answered in this case since there is no evidence that anyone has asked to use Suncadia's network on reasonable terms and conditions and was refused. To the contrary, Intelligent Community Services (ICS) arrived at a contract with Suncadia for use of the network that appears otherwise.<sup>1</sup>

13. The ripeness doctrine recognizes the futility of trying to establish wise legal principles based on speculative facts. Indeed, the Commission has never failed to invoke the doctrine when it felt it necessary to do so. *See e.g., In re: US West*, Third Supplement Order, Docket No. UT-991358, p. 2 (October 11, 1999). In the end, Inland's tariff revision must stand or fall, not on novel legal theories or speculative facts, but on routine questions about easements, physical access, and its obligation to serve. Because Inland fails to carry its burden of showing that its tariff revision is fair, just, reasonable and in the public interest on any of these questions, its petition should be rejected.

## II. BACKGROUND

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<sup>1</sup> Those fees and charges can be found in Exh. No. 19-HC, at p. 13 in subsection 5; TR. 161:6-162:16 (Eisenberg). What exact charges residential customers will face resulting from that contract and whether these will be comparable to those charged by Inland is far from known.

14. Inland Telephone Company (Inland) filed tariff revisions on April 19, 2005 that, *inter alia*, would remove the Suncadia Resort (Suncadia or Resort) from Inland's Roslyn Exchange.<sup>2</sup> The Commission suspended the proposed tariff revisions, issued a Complaint and set the matter over for hearing. Order No. 01 (June 29, 2005).

**A. Inland Telephone Company.**

15. Inland is the incumbent provider of wireline telecommunications services in the Roslyn Exchange. Exh. No. 52 (Reynolds). For the year 2004, the Company reported intrastate operating revenues of \$2,201,608 and served a total of 2,706 lines. Exh. No. 51T at 5 (Reynolds). Inland's parent company is Western Elite Incorporated Services (Western Elite). *Id.*; Exh. No. 53-C (Reynolds). Besides Inland Telephone, Western Elite owns Inland Cellular Telephone Company, Inland Long Distance Company, R&R Cable Company, and Inland Security. *Id.* Inland Internet, also owned by Western Elite, is an unregulated subsidiary of Inland Telephone Company. *Id.* All of Western Elite's companies provide service in the Roslyn Exchange. *Id.*

**B. Suncadia, LLC.**

16. Suncadia is a master-planned resort community comprising approximately 6,000 acres.<sup>3</sup> Exh. No. 51T at 5 (Reynolds); TR. 134:19-22 (Eisenberg). The Suncadia Resort may ultimately include 2,800 single-family dwellings, a hotel, three golf courses and other commercial businesses requiring about 4,000 wireline connections. Exh. No. 31T at 2-3 (Eisenberg). Nearly

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<sup>2</sup> There is another tariff revision adding territory to the Roslyn exchange that is irrelevant to this case.

<sup>3</sup> There was a predecessor company who sold to Suncadia, which is not important for this case, except to say that Inland had originally negotiated with that company for the provision of telecommunications services.

six-hundred lots had been sold by September 8, 2005. Exh. No. 51T at 5 (Reynolds). However, less than twenty single family residences are currently on site. *Id.*, at 6.

**C. Inland and Suncadia's Relationship.**

**1. Service to Suncadia's Business Operations.**

17. The first structure Suncadia built at the site was the Discovery Center. TR. 169:1-2 (Eisenberg). It serves as the sales center and therefore integral to Suncadia's operations. *Id.* Around February 2004, Suncadia requested and Inland provided one-hundred pair of cable. Exh. No. 31T at 3 (Eisenberg). In addition, Suncadia ordered a "fractional T-1 (16 channels)" plus a "few analog trunks for security monitoring and fax machines." *Id.* The purpose was to get the Discovery Center and other basic operations working. TR. 169:3-6. All of the lines installed at that time are subject to tariff. TR. 169:13-14 (Eisenberg).

18. These lines remain at issue in this case because, if this tariff is approved, they would no longer be under tariff. Instead, the contract docketed as Docket No. UT-050874 would become effective and Suncadia would pay contractual rates. TR. 169:13-25 (Eisenberg). Originally, Suncadia stated its opposition to the tariff boundary change by letter to the Commission. Eisenberg Letter, May 10, 2005, Docket No. UT-050606. According to Suncadia, the sole reason for reversing its position and supporting the instant tariff revision is its concern about what would happen if Inland prevailed on this tariff revision. *Id.* In signing the contract docketed as UT-050874, Suncadia protected itself by receiving contractual rates comparable to tariffed rates in exchange for it supporting the tariff revision. *Id.*; Exh. No. 31T, 2 (Eisenberg) ("Based on the contractual undertaking made by Inland to Suncadia, Suncadia supports the request...").

## 2. The Creation of a Telecommunications Network For The Suncadia Resort.

19. Inland and Suncadia (as well as Suncadia's predecessors) engaged in negotiations over a period of years. The duration and substance of these negotiations prior to 2003 remains unclear.<sup>4</sup> However, it appears from correspondence between the companies as well as the testimony produced by cross-examination at hearing that the original idea was for Inland to build the backbone infrastructure, provide numerous and varied communications services to the Suncadia resort through this infrastructure and share revenues from the provision of some of these services with Suncadia. TR: 64:7- 65:4 (Coonan). In other words, the negotiations centered on Inland to providing services that went far beyond traditional wireline service. *Id.*
20. In a letter dated September 17, 2004, Inland confirms that it "offered to Suncadia a Fiber-to-the-premises network." Exh. No. 23, p. 46. The letter confirms Inland's offer included paying for "the infrastructure costs of the network (fiber, Sonet notes, and Optical Network Terminals) as well as the cost of conduit material." *Id.* The letter also represents that Inland and its affiliates would be able to provide "local telephone service, long distance service, internet, cable television, private networking and security system installation and monitoring." *Id.*<sup>5</sup> Of these, Inland pointed out, only local telephone rates would be regulated through the UTC. *Id.*
21. The negotiations between Suncadia and Inland ultimately proved unfruitful. Among the sticking points were Inland's concern about revenue sharing with Suncadia, Suncadia's alleged unwillingness to allow Inland to protect its investment in the infrastructure backbone it was going to build and Inland's control of third-party vendor access to the network. Exh. No. 2, p. 1;

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<sup>4</sup> On cross-examination Mr. Coonan alluded to negotiations occurring prior to 2003 but the testimony is unclear. Since Inland seems less than interested in providing clarity, it should be inferred that negotiations during this time do not support its current petition.

<sup>5</sup> See also, Exh. Nos. 17 and 18 and TR. 64:7- 65:4 (Coonan).



Exh. No. 23, p. 46; TR. 65:12-66:18; 80:24-81:13 (Coonan).<sup>6</sup> Conversely, Suncadia was concerned about Inland’s ability to carry out such a large undertaking, including what it perceived as a lack of responsiveness on Inland’s part and thus, wanted certain remedies in case Inland failed to perform as expected. Exh. No. 2, p. 1; Exh. No. 31T, p. 3 (Eisenberg).

22. Indeed, both company’s business plans flowed from control of the network and so the breadth of the easement requested by Inland became central to the conflict between it and Suncadia. Since all of the roads in the Suncadia Resort are owned by Suncadia, there are no public rights-of-way and therefore, no way for Inland to exercise eminent domain. Exh. No. 1T, at 6 (Coonan); RCW 80.36.040 (“public street or highway”).<sup>7</sup> Therefore, to receive an easement to provide services to the Suncadia territory, Inland had to negotiate with Suncadia. *Id.*, at 7. The record shows very clearly that Inland wanted a perpetual easement, which would allow it unlimited access and the ability to provide more than just traditional wireline services to Suncadia. Exh. No. 32, p. 1 (“a non-exclusive utility easement *for communication services over, under, along, across and through the real property of Grantor...*”). (Emphasis Added)

23. Suncadia, on the other hand, saw that granting such an easement to Inland would foreclose any possibility that the resort would create its own network contract with third parties for services over its network or contract with third parties over any network built by Inland.

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<sup>6</sup> Inland represents that the revenue sharing issue involved Suncadia demanding Inland share revenues from its tariffed wireline business but there is no evidence Suncadia made this demand. Suncadia says that it has always requested lawful revenue sharing. TR. 192:25-193:3 (Eisenberg). Indeed, Inland confirms that it was open to revenue sharing where lawful. TR. 89:11-90:16. (Coonan).

<sup>7</sup> Inland has the statutory option to condemn an easement through legal proceeding but decided this was not a practical option. *Id.*

Exh. No. 31T, p. 3 (Eisenberg); Exh. No. 33, p. 1. In short, the easement requested would jeopardize projected revenue central to Scandadi's business plan. *Id.*<sup>8</sup>

24. Suncadia ultimately decided that it would build its own network and contract with a third party or third parties to provide services over the network. Exh. No. 23, p. 2; Exh. No. 33, p. 1. Inland was offered the opportunity to contract with Suncadia as a third-party service provider over the Suncadia network but Inland rejected that offer, saying:

Inland believes the process to administer Suncadia's new approach will be very cumbersome if Inland were to provide the entire myriad of services Suncadia is requesting, and is therefore not inclined to submit a proposal to do so. However, Inland and its affiliates are interested in providing Suncadia with the ability to offer its homeowners a choice for those services Inland and/or its affiliates provide... This could be accomplished through an agreement with Suncadia whereby Suncadia allows Inland and/or its affiliates access to Suncadia's network.

Exh. No. 23, p. 2. In other words, Inland's position was that without direct customer access it was not interested in providing services to Suncadia. Inland acknowledges that it was given the option of serving as a third party provider, admits that it has never engaged in any negotiations and that it has no plans to do so. TR. 48:7-11 (Coonan). Intelligent Community Services.

25. Intelligent Community Services (ICS) is a competitive local exchange company (CLEC). While Suncadia built the bulk of its fiber network, it entered into negotiations with ICS for the physical extension of the Suncadia network to private residences and the provision of services over that network to the same. Exh. No. 19-HC. Those negotiations resulted in a contract between the parties executed on April 1, 2006. *Id.* In it, the specific responsibilities undertaken

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<sup>8</sup> Suncadia was also concerned about aesthetics and felt that Inland was unresponsive on this issue. Exh. No. 31T, p. 3 (Eisenberg).

by Suncadia and ICS in providing telecommunications services to the area are outlined. *Id.* In short, ICS has access to Suncadia's network for a fee. *Id.*<sup>9</sup>

**D. Procedural History.**

26. After Inland's tariff revisions were filed, the tariff was suspended, a Complaint issued and the matter was set over for hearing. A prehearing conference was held before Administrative Law Judge Theodora M. Mace on August 11, 2005. Suncadia and ICS sought intervention without objection. Order No. 02, ¶ 4 (August 16, 2005).
27. On October 21, 2005, Suncadia and Inland filed simultaneous testimony in support of Inland's petition. Inland produced one witness, Mr. John P. Coonan. Mr. Coonan is the Treasurer of Inland Telephone Company. Exh. No. 1T at 2 (Coonan). Suncadia offered the testimony of Mr. Paul J. Eisenberg, Senior Vice-President of Suncadia, LLC. Exh. No. 31T, p. 1 (Eisenberg). On December 16, 2005, Staff filed responsive testimony from Deborah J. Reynolds and Robert Shirley. Exh. Nos. 51T-C and 61T. Public Counsel and ICS did not file responsive testimony.<sup>10</sup> Inland filed reply testimony from Mr. Coonan on February 6, 2006. Exh. No. 5T (Coonan). Suncadia did not file reply testimony.
28. On December 21, 2005, Commission Staff moved for summary determination. Public Counsel supported Staff's motion and Inland opposed it. Judge Mace considered the briefing and identified the relevant legal issues on summary determination to be: "(1) who has the burden of proof; (2) what is the proper standard for determining the outcome of the motion for summary

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<sup>9</sup> See, *supra*, footnote 1.

<sup>10</sup> While Public Counsel has not submitted testimony in this matter, it fully participated in the evidentiary hearing on March 23 and 24, 2006 – as did ICS.

determination; (3) what may the parties rely on to prove their position; and, (4) have the respective burdens been met.” Order No. 05, at ¶ 10.<sup>11</sup>

29. First, Judge Mace concluded that the correct legal standard for evaluating the instant tariff revision was the same as that applied when a company seeks to “eliminate or curtail” service. There, the company must show that the tariff revision is “just, fair, reasonable, and within the public interest.” *Id.*, at ¶ 19, citing *WUTC v. US West*, Docket No. UT-961638, Fourth Supplemental Order (January 16, 1998), p. 20.<sup>12</sup> Second, Judge Mace concluded that where a company has sought to eliminate or curtail service, the Commission has held that the company has the burden of proof. *Id.*, citing Docket No. UT-961638, Fourth Supplemental Order, pp. 15, 20, 22. Therefore, she concluded that Inland bears the burden of showing that removing Suncadia from its territory is “just, fair, reasonable, and within the public interest.” *Id.*

30. Judge Mace then turned to consideration of the testimony and the briefing to determine if factual issues remained in dispute. She held that Staff failed to demonstrate that disputes were lacking and therefore, rejected the motion for summary determination. Judge Mace characterized the disputed issues in general as the “benefits and harms to Inland and its customers outside Suncadia from retaining Suncadia in its service territory, and the ramifications of removal on future potential customers in the Suncadia resort area.” *Id.*, at ¶ 29. Specifically, she identified six factual disputes needing to be resolved at hearing: (1) What harms Inland might suffer if the petition is [not] granted (including financial and reputational harms); (2)

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<sup>11</sup> We address only those legal questions still relevant to the case.

<sup>12</sup> *WUTC v. US West*, Docket No. UT-961638, Fourth Supplemental Order (January 16, 1998) (US West sought tariff revisions in order to “eliminate or curtail service” and the Commission applied this test). Judge Mace found the instant case analogous to the US West case. Order No. 05, ¶ 19.

Whether there are any substitute services available; (3) 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; (4) Whether, a customer could bring a lawsuit to force provision of service by Inland; (5) Whether dismissal of the tariff filing would encourage further negotiations; and (6) 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. *Id.*, at ¶ 27.

31. On March 23 and 24, 2006 Judge Mace conducted an evidentiary hearing in which all of the parties were represented by counsel. Mr. Coonan, Mr. Eisenberg, Ms. Reynolds and Mr. Shirley were all cross-examined on their pre-filed testimony.

### III. MEMORANDUM

#### A. **The Commission Granted Inland Telephone Company A Franchise For the Roslyn Exchange And Inland's Obligation to Serve Customers in that Exchange Flows From that Designation .**

32. The Commission defines geographical service territories and grants non-exclusive franchises. RCW 80.36.230; *In re Electric Lightwave, Inc. [In re Consolidated Cases]*, 123 Wn.2d 530, 537 (1994). The receipt of a franchise carries with it substantial benefits. *See e.g.* RCW 80.36.010 through – 070. Once a company receives a franchise, it has an obligation, within reason, to provide its territory with service on demand. RCW 80.36.090. Conversely, once the Commission allows customers in a particular service territory to be removed from a franchise, those customers lose the protection of RCW 80.36.090.

33. Given the impact of RCW 80.36.090 on a company's obligation to serve, the Commission's authority to designate (and nullify) franchises under RCW 80.36.230 must be

consistent with its statutory mandate of preserving the availability and affordability of telephone service under RCW 80.36.300. *WUTC v. U S WEST Communications, Inc.*, Docket No. UT-961638, Fourth Supplemental Order (January 1998), pp. 15-16. As discussed earlier, a company seeking to eliminate tariffed service bears the burden of proof that the proposed tariff is in the public interest and would result in rates that are fair, just, reasonable, or sufficient under RCW 80.36.080 and RCW 80.36.140. In addition, such a company must also address the Commission's mandate under RCW 80.36.300. Order No. 05, at ¶ 27. Docket No. UT-961638, at pp.15-16.

34. Here, the Commission granted Prescott Telephone and Telegraph (Prescott) the geographic franchise containing the Roslyn exchange. *Prescott Telephone and Telegraph v. WUTC*, 30 Wn. App. 413, 414 (1981).<sup>13</sup> Subsequently this franchise was transferred to Inland. Exh. No. 16; TR: 55:15-19. Thus, Inland has an obligation to serve the Roslyn exchange and that can only be relieved by the Commission amending the geographical scope of its service territory contained in its current tariff.

**B. Inland May Escape Its Obligation To Serve Existing Customers By Tariff Only If It Can Show Actual And Substantial Harm That Outweighs The Substantial Benefits It Receives As A De Facto Monopoly Provider.**

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<sup>13</sup> In that case, which occurred prior to the *Electric Lightwave* decision, *supra*, the Washington Court of Appeals was faced with the question of whether Prescott was entitled to serve the North Easton Ridge area between Prescott's Roslyn exchange and Pacific Northwest Bell's (PNB) Easton and Cle Elum exchanges. *Id.* PNB had included the North Easton Ridge in its exchange maps filed with the Commission but at the time no one lived in the service area. *Id.* Moreover, PNB did not expect any service to be needed in the near future. *Id.* The *Electric Lightwave* court distinguished the *Prescott* case on the grounds that *Prescott* involved two narrow issues: whether an LEC's exchange boundary was validly created; and whether the Commission acted arbitrarily and capriciously in holding that an exchange territory could not be taken away from the LEC absent a showing the LEC was unwilling or unable to provide service in the territory. Regardless, the case shows that at least at one point in time, telephone companies were competing to provide service in this area even though no one currently lived there. In other words, things change and so it is generally unwise to make fairly permanent decisions unless absolutely necessary.

35. In the past, the Commission has refused to allow telecommunications companies to relinquish their obligations to provide service on demand where, as here, customers will be left with any provider of last resort. For instance, in Docket No. UT-961638, the Commission strongly rejected US West's proposed tariff relieving it of its obligation to serve. There, US West's proposed tariff would have included language that said the company would "use reasonable efforts" to make services available, would furnish service "subject to the availability on a continuing basis of all the necessary facilities" at the sole discretion of the Company, and reserved for the Company the right "to limit or to allocate the use of existing facilities, or of additional facilities offered by the Company when necessary because of a lack of facilities or due to some cause beyond the Company's control." Docket UT-961638, pp. 16, 18.

36. In that case, the Commission announced a clear standard a company must meet before it will be allowed to escape its service obligation. The company must prove actual and substantial harm outweighing the substantial benefits it receives as a de facto monopoly provider. As the Commission explained, "[a de facto monopoly] bestows substantial benefits and substantial responsibilities upon the Company," the substantial benefits include:

- near-ubiquitous already deployed network infrastructure;
- established relationships with nearly 100% of existing residential and business customers;
- brand name recognition acquired through ratepayer-funded advertising and communications programs aimed at customers of monopoly services;
- positive network externalities due to broad coverage; and,
- protection against significant adverse financial results under rate of return regulation, and the opportunity, obtained both through its monopoly and ongoing regulatory protection, to fully recover its

investment on all network resources.

Docket No. UT-961638, pp. 23-24.

37. The Commission explained that in return for these benefits, companies have certain responsibilities. Among these responsibilities is the obligation to serve customers in its service territory. *Id.* According to the Commission, this obligation to serve “is a balanced response to the enormity of the above benefits which [a de facto monopoly company] continues to enjoy.” *Id.* In applying this standard, the Commission held that US West failed to meet its burden because it did not quantify and contrast the benefits of its de facto monopoly status with the unreasonable economic burden alleged in its petition. *Id.*
38. To evaluate whether Inland has met its burden in this regard, it is necessary to reiterate the harms it alleges will be caused by keeping Suncadia in its Roslyn exchange. We discuss these claims in order.

**1. The harms alleged by Inland do not justify the petition.**

**a. Inland’s claim that it and therefore its other customers, will suffer financial harm if it is not granted its petition is without merit.**

39. Inland appears to argue that if had to install physical plant at the resort without a perpetual easement, it would be unable to protect its investment and thereby suffer financial harm. At this point, this argument appears moot. Even the Company reluctantly admits that it can access Suncadia-area customers over the Suncadia network. TR. 82:24-83:3 (Coonan). Nonetheless, the Company maintains, somewhat incredibly, that if it could not negotiate reasonable leasing terms with Suncadia it might have to build duplicative plant to fulfill its obligation to serve. For reasons discussed below, this argument ignores the entire framework for relieving a company of its obligation to serve if it would be unreasonable to provide service.



40. Additionally, Inland argues that it will be financially harmed if it does not prevail on its tariff revision because it must maintain “some level of investment in facilities on hand on the abstract chance that Inland will have to provide service if the tariff filing is not approved.” Exh. No. 5T, p. 8 (Coonan); TR. 45:18-46:10 (Coonan). Inland says that it would need to “be ready at a moment’s notice [to provide service] without having any facilities in place to provide that service.” Exh. No. 26. In fact, Inland argued in its direct testimony that keeping Suncadia in its territory, with the attendant obligation to serve, meant that the mere theoretical possibility that it could serve the area relegated it to “indentured servitude”. Exh. No. 1T, pp. 8-9 (Coonan). Here, it seems that Inland is referring to investments at the wire center that would serve Suncadia. When pressed, however, Inland could not identify any plant (and associated costs) required to be kept at the ready at its wire center if Suncadia remained in the territory. TR. 43:22-44:17 (Coonan). Moreover, Inland admitted that if it obtained access to the network by a leasing arrangement with reasonable terms and conditions, Inland would be left with very little costs for performing physical interconnection and that such interconnection could be performed in less than a year’s time. TR. 89:22-90:22. In such a situation, any additional plant at the wire center would then be both economic and capable of being installed within a year.

**b. Inland’s claim that it will suffer harm to its reputation if it is not granted this petition lacks support.**

41. Inland raises the specter of harm to its reputation allegedly caused by having to tell prospective customers it cannot serve them. Mr. Coonan’s pre-filed testimony is very clear about the Company’s alleged concerns:

It became clear to us that customers might expect that Inland is the responsible entity for providing service and contact Inland for service. This had

happened on a couple of occasions, once on a referral from Qwest telling the potential customer that the area was within Inland's service territory. This then requires our employees to explain that we cannot reach the customer to have access to that customer and have to refer that customer to Suncadia for information on obtaining service. To the extent that either the customer believes Inland is stringing them along or Suncadia describes Inland as being unreasonable, then Inland's image is tarnished. Part of our overall offering of quality service to our customers is offering an image of a company that is cooperative and willing to help its customers. If that image is going to be tarnished, then the overall customer base may not have the same view of Inland as it holds today. This is a very important issue to Inland.

Exh. No. 1T, p. 5 (Coonan).

42. In fact, despite Mr. Coonan's testimony about requests for service being denied on "a couple of occasions," at hearing Mr. Coonan could only identify one time when a customer called for service and could not receive it. TR. 85:7-25 (Coonan).<sup>14</sup> Under further cross examination, it became clear that even this one incident was derived from hearsay conversations and therefore, of little weight. *Id.* Indeed, Inland could produce no first-hand accounts of customer dissatisfaction. Thus, the evidence put forth by Inland is again speculative.
43. Interestingly, a close reading of Mr. Coonan's direct testimony reveals that the concern for its reputation is really about its "overall customer base" and therefore, related to more than just its tariffed wireline business. Exh. No. 1T, p. 5 (Coonan). On cross examination, Mr. Coonan admitted that how prospective non-regulated businesses customers view Inland is among the Company's concerns. TR. 85:20-86:3 (Coonan). Clearly, this is not the kind of harm the Commission had in mind when it decided Docket No. UT-961638. To the contrary, that case supports the view that this turns a de facto monopoly benefit on its head. This will be discussed more below.

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<sup>14</sup> The request is undocumented and did not result in a complaint to the Commission.

- c. **Inland’s claim that it is harmed by losing universal support monies due potential to lower study area costs and the possibility of ICS gaining ETC status should also be rejected.**

44. Public Counsel discussed Inland’s novel theories in this regard earlier, including why these assertions are speculative. Additionally, we note that Inland’s complaints about how study areas are created and the standards by which the UTC must designate ETCs are more appropriately made to the Federal Communications Commission. *See*, 47 U.S.C. § 214(e); 47 C.F.R. § 54.101.

- d. **Inland’s claim that it is harmed because a customer could bring a lawsuit to force provision of service by Inland is without merit.**

45. If Inland is claiming that someone could bring a complaint to the Commission forcing it to provide service that is a true statement. Whether such a complaint would be successful and thereby subject Inland to harm is beyond the scope of this proceeding since no such complaint exists. Moreover, as mentioned above and discussed in depth below, Inland has consistently refused to acknowledge that the statute creating its obligation to serve contains a very clear exception in cases where service is unreasonably requested or it would be unreasonable to provide. RCW 80.36.090. Therefore, this claim is also without any merit.

## **2. De Facto Monopoly Benefits To Inland.**

46. Inland’s obligation to provide service and any harms it is experiencing by having to do so must be balanced against the benefits the Company receives from having a de facto monopoly. Again, in the *US West* case, Docket No. UT-961638, the Commission outlined a number of monopoly benefits. These were: (1) the existence of an already deployed (and already paid for) network infrastructure; (2) established relationships with existing residential and business

customers; (3) brand name recognition acquired through ratepayer-funded advertising and communications programs aimed at customers of monopoly services; (4) positive network externalities due to broad coverage; and (5) protection against significant adverse financial results under rate of return regulation, and the opportunity, obtained both through its monopoly and ongoing regulatory protection, to fully recover its investment on all network resources.

Docket No. UT-961638, pp. 23-24.

47. Inland has never acknowledged any of these benefits and, in fact, these benefits must be weighed by Inland in order for it to succeed on its petition. Docket No. UT-961638, p. 24. We discuss a few of these here.

**a. The presence of an existing network.**

48. Nothing reveals the power of a de facto monopoly more than Suncadia's support for the tariff revision Inland seeks in this case. As discussed earlier, Suncadia, as a customer receiving service from Inland, initially opposed the tariff revision. The sole reason for Suncadia (the customer) changing its position was its concern for what might happen if Inland prevailed on this petition. For Inland to exercise such raw market power over a customer seeking service is certainly noteworthy and indicative of the kind of benefits a de facto monopoly possesses. What is even more revealing though is that Suncadia had a right to demand service under RCW 80.36.090, Inland provided this service even though it did not receive a perpetual easement and then Inland attempted to withdraw this service by this petition. Clearly, the removal of the obligation to serve Suncadia as a customer already receiving tariffed service not only makes this case completely analogous to the *US West* case, it also shows how Inland as a de facto monopoly

used its market power to try to influence its private business negotiations with Suncadia as a business.

**b. Established Relationships with Customers and Brand Recognition.**

49. It is also without serious dispute that Inland uses its de facto monopoly status with customers of its regulated wireline service to build goodwill for its affiliated unregulated businesses. In fact, while not calculated in the instant case, the profits from non-affiliated businesses very often outweigh the profits from the wireline side. Moreover, Inland's branding, which is supported by ratepayer dollars, also has the collateral benefit of advertising sales of long distance services, Internet services, security services and cable television services to non-wireline customers. So when Inland claims that it is concerned about harms to its reputation with its "overall customer base," it is talking about affiliated non-regulated services which would not be nearly as profitable without the de facto monopoly benefits deriving from its tariffed wireline business. It is in this way that Inland turns the monopoly benefit of brand recognition on its head when it expresses concern for its "overall customer base."

**c. Protection from adverse financial conditions due to rate of return regulation, including the ability to recover the cost of its network.**

50. Inland again has failed to acknowledge the significant benefits of being protected from adverse financial conditions including recovering the costs of its network. The fact is that had Inland successfully negotiated an agreement with Suncadia to provide "communications" services, the entire fiber-to-the-premises network would have been recovered in rates charged to ratepayers under tariff. In addition, to this benefit, Inland would have been able to earn its authorized rate of return on that capital investment. Finally, with the entire investment paid for

by ratepayers, and without any capital risk to Inland, Inland would have parlayed significant income for its other non-regulated businesses. The fact that Inland did not succeed in doing in this instance is without import since it is the possibility of what we have described that shows the benefits received from its de facto monopoly status.

**3. Whether current and future Suncadia residents are worse off without Inland as a provider of last resort under RCW 80.36.090.**

51. The effect on current and prospective customers in the Suncadia area from the granting of this petition is among the issues the Commission considered in the *US West*, Docket No. UT-961638, pp. 15-16 and central to the Commission's mandate under RCW 80.36.300. Order No. 05, ¶ 27. There is no dispute that if Inland is relieved of its obligation to serve, no other provider will have the obligation under RCW 80.36.090.

Instead, Inland argues that the existence of designated ETCs in the service territory and the obligation companies receiving ETC support have to serve customers is sufficient to protect current and future Suncadia residents. Currently, in addition to Inland, three companies have been designated as ETCs – all of them are wireless carriers: Sprint PCS, Cingular Wireless and United States Cellular. *In re: Sprint Corporation Petition for Designation as an ETC*, Docket No. 043120, First Order (January 27, 2005); *In re: AT&T Petition for Designation as a ETC*, Docket No. UT-043011, Order No. 2 (May 2, 2005); *In re: U.S. Cellular Petition for Designation as a ETC*, Docket No. UT-970345, Third Supplemental Order (January 27, 2001).

52. The Commission's designation of Sprint PCS offers a candid discussion of whether ETCs provide ubiquitous service in the areas in which they are designated. There, the Commission explained that in receiving ETC designation:

PCS is not required to demonstrate that it can provide service in every portion of the area for which it seeks designation. If that were the standard, carriers would be required to make the investment to serve to non-economic markets before knowing whether or not federal support would be available to supplement the otherwise insufficient revenue available in the service area.

Docket No. UT-043120, *supra*, ¶ 35.<sup>15</sup>

53. The obvious thrust of the Commission’s statement is that one cannot say for certain that the existence of three other ETC designated carriers for the Roslyn exchange ensures the availability of basic phone service at Suncadia.

**C. Companies May Avoid An Obligation to Serve New Customers Under RCW 80.36.090 and The Commission’s Line Extension Rules If It Would Be Unreasonable For Them to Provide Service.**

54. Given Inland’s extreme scenarios if it maintains the obligation to serve Suncadia, a quick review of RCW 80.36.090 appears helpful. That statute says, *inter alia*, that “every telecommunications company shall, upon reasonable *notice* furnish to all persons or corporations who may apply...and be *reasonably* entitled thereto suitable and proper facilities and connections for telephone communication and furnish telephone service on demand. (Emphasis Added)

55. When an applicant for service requests service in an area not currently served, a company’s line extension policy also comes into play. A company must look to its tariffs and Commission rules to determine whether it must offer “line extensions” for these new customers.

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<sup>15</sup> Public Counsel is not unsympathetic to the complaints of Rural LECs over this issue that only it is investing in plant before receiving ETC status; however, we do not agree that it is in the public interest to allow the companies to escape providing service simply because they now potentially must compete with other ETCs in some portion of their service territories.

Inland's line extension policy is contained in Tariff Schedules 28 and 28a. Exh. No. 16.<sup>16</sup> Its duties under Commission rules are contained in WAC 480-120-071.

56. The leading case regarding waiver of WAC 480-120-071 is *In the Matter of the Petition of Verizon Northwest Inc.*, Docket No. 011439, Twelfth Supplemental Order (Taylor). In *Taylor*, Verizon received three requests for service in its Bridgeport Exchange in Douglas County. The applicants lived approximately 14 miles from the town of Bridgeport. There were three other houses that could have requested service but did not. Verizon asserted it would have to construct over 17 miles of new facilities to provide service to this location.

57. Five applicants from a second location, also in the Bridgeport exchange, but located in Okanogan County, also requested service from Verizon. Verizon asserted it would have to construct approximately 30 miles of fiber cable to serve this location.

58. The Commission held that Verizon was not required to implement the requested line extension finding that the cost of the projects at issue was "extraordinarily high," relative to the number of customers it would be serving, saying:

[T]he Commission is persuaded that there would be a potentially significant adverse effect on the company and other ratepayers if a waiver is not granted. A denial of the waiver would send the signal that extraordinarily costly line extensions to serve few customer are warranted under the new rule. This in turn would make it increasingly difficult for carriers to devote resources to their existing network and would create an unreasonable increase in the subsidies paid by other ratepayers. It would increase maintenance costs and burdens for which carriers either would not obtain cost recovery or would have to seek recovery from other ratepayers.

*Id.*, ¶ 68.

59. Our point is that, in the instant case, it is premature to jettison Suncadia from the Roslyn territory when Inland could seek a waiver of the costs of the line extension if they are

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<sup>16</sup> Inland does not acknowledge the relevance of the line-extension schedules and thus, has offered no



extraordinarily high in relation to the number of individuals served. Therefore this is another question that is not ripe for decision in this case.

#### IV. CONCLUSION

60. In conclusion, the Company failed to carry its burden of proof, having failed to show (1) that it cannot access the Suncadia area to provide service, (2) that even if it could not access the area that it explored other legal avenues short of removing its obligation to serve, (3) that it has or will suffer actual and substantial harm outweighing the benefits it receives as a monopoly provider, and (4) that basic phone service would be available to those individuals currently or potentially residing in the Suncadia area. Therefore, Public Counsel urges that the petition be denied.

DATED this 5<sup>th</sup> day of June, 2006.

ROB MCKENNA  
Attorney General

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JUDITH KREBS  
Assistant Attorney General  
Public Counsel

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