BEFORE THE WASHINGTON STATE UTILITIES
AND TRANSPORTATION COMMISSION

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| WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, | ) | DOCKET UT-050606 |
| Complainant, | ) | |
| v. | ) | |
| INLAND TELEPHONE COMPANY, | ) | |
| Respondent. | ) | |
| ............................... | ) | |

# OPENING BRIEF OF INLAND TELEPHONE COMPANY

The Law Office of Richard A. Finnigan
RICHARD A. FINNIGAN
WSB #6443
2112 Black Lake Blvd SW
Olympia, WA 98512
Telephone: (360) 956-7001
Facsimile: (360) 753-6862
Attorney for Inland Telephone Company

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Inland Telephone Company ("Inland") respectfully submits its Opening Brief in this matter.

## STATEMENT OF CASE

This case stems from a tariff filing submitted by Inland which would remove the area that comprises the Suncadia Resort from Inland's service territory.[1] The Suncadia Resort is a master planned resort community that will have three golf courses, twenty-eight hundred single-family homes, and a number of commercial and business enterprises. It is expected at build out to include telecommunications service amounting to four thousand access lines.[2] By contrast, Inland's Roslyn exchange in its entirety currently serves approximately 1,500 access lines.[3]

The issue from Inland's perspective is simple. Inland does not have physical access to the Suncadia Resort to provide service to the residential and business customers. Under that circumstance, the issue is, should Inland be required to include the Suncadia Resort within its tariffed service area, encompassing the carrier of last resort obligations, for an area to which Inland does not have physical access to allow it to serve those potential customers? Inland answers this question with a resounding no.

## FACTUAL BACKGROUND

The Suncadia Resort is owned by Suncadia, LLC ("Suncadia"). Inland and Suncadia, including Suncadia's predecessors-in-interest, entered into extensive negotiations, lasting over 6 years, concerning the possibility that Inland would provide telecommunications service in the

[1] The tariff filing also adds additional, currently unserved territory. The proposal to add additional territory is not at issue in this case.
[2] Exhibit 31T, p. 2, l. 27 – p. 3, l. 1; Exhibit 51TC, p. 5, l. 14-18.
[3] See, Exhibit 13.

Suncadia Resort area.[4] The Suncadia Resort is a private, master planned community without public rights-of-way.[5] Over time, Suncadia began to view telecommunications service in the Suncadia Resort area as a potential profit center. As a condition of allowing Inland physical access to the Suncadia Resort area, Suncadia demanded that Inland enter into an agreement under which Inland would pay Suncadia a portion of the revenues Inland received from telecommunications and related services, including from regulated telecommunications services.[6]

Inland felt that the sharing of revenue from regulated services is not appropriate.[7] One basis on which it is not appropriate is the fact that RCW 80.36.170 and .180 prohibit the granting of rebates for regulated telecommunications services. A second reason that Inland felt it was not appropriate is that Inland's price for residential service does not cover the cost of service and such service is a subsidized service. Inland currently receives $21.03 per line per month for support for services offered in its service area from the federal universal service fund ("USF").[8] In essence, Inland would be paying a portion of the USF monies it receives to Suncadia if it entered into a contract with Suncadia on the terms and conditions demanded by Suncadia.

While these negotiations were underway, Inland was asked to provide services to Suncadia's sales office, known as the Discovery Center. As a result, Inland installed one hundred pair copper cable and currently provides services through fifty pair of that cable to the Discovery Center.[9]

Eventually, Suncadia and Inland could not overcome the impasse over the sharing of revenues from regulated services. Negotiations ended without Inland receiving an easement to

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[4] Exhibit 1T, p. 3, l. 1-11.
[5] See, Exhibit 1T, p. 6, l. 1-2.
[6] See, generally, Exhibit 1T, p. 3, l. 1-20 and p. 4, l. 12-19; Exhibits 2 and 3. See, also, TR 87, l. 3 – TR 89, l. 10.
[7] Exhibit 1T, p. 3, l. 21 – p. 4, l. 2.
[8] See, Exhibit 13 citing to USAC Report HC04 for Second Quarter, 2006.
[9] Exhibit 31T, p. 3, l. 11-14.

provide service. As the record shows, at most, Suncadia was willing to grant only a six month temporary easement to Inland.[10] That is not a reasonable basis upon which Inland can provide service.

At some point, Suncadia entered into negotiations with Intelligent Community Services ("ICS"), a competitive local exchange carrier ("CLEC") authorized to do business in the State of Washington.

revenues received by ICS for telecommunications and other services is paid to Suncadia.[11]

Inland does not have an easement to serve potential customers within the Suncadia Resort area. Inland cannot access those customers through public rights-of-way, since none exist. Commission Staff agrees that Inland does not have physical access to the customers in the Suncadia Resort area.[12] Mr. Eisenberg testified that it is unlikely that Inland will ever be granted an easement.[13]

It is also important to keep in mind that factually there are three wireless ETCs that have been designated as ETCs for the Roslyn exchange, which includes the Suncadia Resort area.[14] Those designations would remain in effect if Inland's tariff filing is allowed to go into effect. Those wireless ETCs receive federal USF support for providing service in the Roslyn exchange, including, presumably, the wireless service that Mr. Eisenberg testified Suncadia Resort was receiving at the time of the hearing.[15]

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[10] Exhibit 1T, p. 4, l. 3-11.
[11] Exhibits 19C and 19HC.
[12] TR 211, l. 14-17.
[13] TR 172, l. 3 – TR 173, l. 1.
[14] See, Exhibit 26.
[15] See, TR 188, l. 22 – TR 189, l. 17.



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With this factual background, the issues related to the tariff filing will now be explored.

## ARGUMENT

Commission Staff and Public Counsel oppose Inland's filing essentially on the argument that it would be poor public policy to allow an incumbent local exchange carrier ("ILEC") to remove a portion of its territory from its tariffed service map and be relieved of carrier of last resort obligations.

On the other hand, ICS opposes Inland's application for a very selfish reason. ICS has filed to be designated as an eligible telecommunications carrier ("ETC") for the Suncadia Resort area. If Inland's tariff filing is allowed to go into effect, ICS will not be allowed to gain federal USF funds for its services in the Suncadia Resort area. Remember that as a competitive ETC, ICS would draw USF support on the amount of support per-line that Inland receives for the Roslyn exchange,[16] even though Inland would be physically prevented from providing any service in the Suncadia Resort area.

In this section of the Opening Brief, Inland will address these arguments from a number of perspectives. In addition, Inland will describe why approving Inland's filing is in the public interest.

### 1. Inland Should not be Forced to Retain Carrier of Last Resort Obligations for an Area it Cannot Physically Serve.

Inland does not have physical access to the Suncadia Resort area to serve the residential customers and business customers other than a few limited services to the Discovery Center

[16] See, 47 C.F.R. §54.307.

(Suncadia's sales area).[17] Inland cannot access the Suncadia Resort over public rights-of-way, since they do not exist.

Under RCW 80.36.160, the Commission has the authority to establish the geographic service area of an ILEC. One purpose of establishing the tariffed service area under RCW 80.36.160 is to establish the area in which an ILEC has carrier of last resort obligations. See, In re Electric Lightwave, Inc., 123 Wn.2d 530, 869 P.2d 1045 (1994).

Essentially, Commission Staff and Public Counsel want Inland to be required to stand by as a safety net should ICS not be able to provide service or Suncadia goes broke.[18] However, Commission Staff and Public Counsel have no factual basis to support the hypothesis that there is any likelihood of ICS or Suncadia failing. Commission Staff has done no studies, reviews or investigation of the likelihood of Suncadia failing as a business.[19] Commission Staff has done no studies, reviews or investigations of the likelihood of Suncadia changing its existing business model.[20] On the other hand, Suncadia has constructed and owns the fibers and conduits.[21] The investment has been made. This is an unlikely scenario for service failure.

Commission Staff also posits the hypothesis that a resident in the Suncadia Resort area could obtain a private easement to receive service from Inland.[22] However, Commission Staff has conducted no analysis of the likelihood of such a theory coming into reality.[23]

Thus, the position taken by Commission Staff and Public Counsel has the same factual basis as saying that Inland should be required to include the area in its service map in case there

[17] The hundred pair cable that is to provide service to the Suncadia Discovery Center clearly is not adequate to provide service to two thousand eight hundred homes and another twelve hundred business access lines.
[18] Exhibit 51TC at p. 14, l. 7-12.
[19] Exhibit 56.
[20] Exhibit 56.
[21] TR 45, l. 23-25; TR 137, l. 14-24 (although discussed in the confidential portion of the transcript, it has been confirmed that this information is not confidential).
[22] Exhibit 51TC at p. 18, l. 4-10.
[23] Exhibit 57 and Exhibit 58.

is a forest fire that rages all of the structures in the Suncadia Resort area and, as a result, it is possible that new telecommunications infrastructure is required. While it is a theoretical possibility, the probability is exceedingly remote.

Under the view of Commission Staff and Public Counsel, Inland would be required to be ready to serve the Suncadia Resort on short notice. When asked what this means in terms of the requirements imposed upon Inland to maintain physical inventory of supplies and be ready to act, Commission Staff was unable to identify a time period or inventory requirement that would allow Inland to satisfy the obligation that Commission Staff and Public Counsel desire to impose on Inland against Inland's will.[24]

The question must be asked, how is Inland to fulfill such an inchoate obligation? What does carrier of last resort mean when an ILEC does not have physical access to the area to be served? What public policy objectives are met by imposing such a hypothetical requirement?

Inland believes that carrier of last resort obligations should be maintained in the context of being able to provide service when requested. This seems to be the import of RCW 80.36.090. The statute reads, in pertinent part, as follows: "Every telecommunications company 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." The implication of including territory in a company's tariffed service area is that it must comply with RCW 80.36.090's mandate to construct and serve customers in the area. Since there is no physical way in which Inland can provide service, Inland's tariff filing should be approved. The tariff filing in this docket does no more than recognize reality; that Inland can not physically serve the area in any

[24] See, Exhibits 59 and 60.

event. Speculation as to unlikely events, such as Suncadia going bankrupt, does not advance the public interest.

Commission Staff or Public Counsel might try to imply that the reason that Inland does not have physical access to the Suncadia Resort area is because Inland was seeking an overly broad form of easement.[25] However, it is clear that Commission Staff does not have a firm concept of what a standard telecommunications easement looks like.[26] In fact, Inland sought no more than what Suncadia had already granted other utilities -- no broader or no greater in scope.[27] This is no more than a standard form of easement.[28]

2. Forcing Inland to be Carrier of Last Resort for the Suncadia Resort Area is Unfair to Inland's Existing Customers.

Inland is very concerned about what the carrier of last resort obligation means for the Suncadia Resort area. If Inland is required to maintain an inventory of supplies in order to be ready to serve the Suncadia Resort area, those supplies are paid for by Inland's existing customers. Why is that a fair outcome?

It may be argued by one of the parties that Inland has an interest in maintaining facilities to serve the Suncadia Resort area on the premise that Inland could negotiate an agreement to provide services in the Suncadia Resort area. In his cross examination, Mr. Eisenberg suggested that Inland might be allowed to provide some services within the Suncadia Resort area in the future. However, he made it clear that it is highly unlikely that Inland would be granted its own easement.[29] He also made it clear that any services offered by Inland would have to come

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[25] See, TR 212, l. 17 – TR 218, l. 5.
[26] Ibid.
[27] See, Exhibit 1T, p. 6, l. 2-5 and compare Exhibits 4, 38, 39 and 40. See, also, TR 179, l. 4 – TR 180, l. 7.
[28] TR 75, l. 5-22; Exhibit 32.
[29] TR 172, l. 3 – TR 173, l. 1.

through ICS and any agreement that Suncadia and Inland might reach would have to take into account the existing contract between Suncadia and ICS.[30]

As stated by Mr. Eisenberg, such an arrangement would undoubtedly be a requirement to share revenue, including, presumably, revenue from regulated services.[31] Inland's opinion is that such a sharing is improper. Further, such sharing of revenue would mean that Inland's other customers are subsidizing service to the Suncadia Resort, both because their rates are effectively higher (i.e., the stated tariff rate less rebate in the Suncadia Resort area versus stated rate outside the Suncadia Resort area) and Suncadia would be receiving, at least indirectly, federal USF revenues for its own private profit.

In any event, under the circumstances facing Inland, there are very real concerns about how carrier of last resort obligations for the Suncadia Resort area can affect Inland's other customers.

3. Harm to Inland's Reputation is a Factor, But Not the Only Factor.

Commission Staff denigrates Inland's concerns by describing it as simply Inland's concern for its own reputation.[33] While Inland is concerned about its reputation, as noted above, that is not the only reason for this filing. However, a carrier's reputation is part of what makes

[30] TR 173, l. 2-24.
[31] TR 191, l. 25 – TR 192, l. 12.
[32] See, Exhibit 62, Petition of Intelligent Community Services for Designation as Eligible Telecommunications Carrier.



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the provision of satisfactory service possible.[34] To the extent that there is an unfair attack upon Inland's reputation because it is physically unable to serve an area that is within its designated service area, that situation should be allowed to be remedied by the tariff filing in this docket.

4. Other Carriers have Carrier of Last Resort Obligations for the Suncadia Resort Area.

There are three wireless ETCs designated for the entirety of the Roslyn exchange, including the Suncadia Resort area.[35] Those three carriers are Cingular, Sprint PCS and United States Cellular Corporation.

In order to be designated as an ETC, each of those carriers had to certify as to their ability to offer basic telecommunications service throughout the Roslyn exchange, including the Suncadia Resort area.[36] Each wireless carrier did so.

Of course, wireless carriers have the advantage that they do not have to physically access each lot in order to provide telecommunications service. A strategically located cell tower outside of the Suncadia Resort area may be sufficient to provide service.

In fact, as testified by Mr. Eisenberg, there is wireless service within the Suncadia Resort area today.[37] Presumably, the carrier (Cingular) providing that service is receiving federal universal service support for that service. Based upon the most recent public reports, each of the three wireless ETC carriers have reported to USAC that they are serving many customers within Inland's service area.[38]

Mr. Shirley correctly points out that the issue of whether a wireless ETC's designation

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[33] Exhibit 51TC, p. 22, l. 8-11.
[34] See, e.g., Exhibit 1T, p. 5, l. 4-15.
[35] See, Exhibit 26.
[36] See, 47 C.F.R. §54.201.
[37] TR 188, l. 22 – TR 189, l. 17.
[38] See, USAC reports for the second quarter of 2006. The reports do not differentiate between exchanges. Thus, a precise delineation of the number of wireless customers in the Roslyn exchange receiving USF support is not possible to provide at this time..

changes if the underlying incumbent's service area changes has not been determined by the Commission.[39] However, under 47 U.S.C. §214(e)(4), it is clearly contemplated that the underlying ILEC may withdraw from ETC obligations for a physical portion of its service area. The statute seems to contemplate that the previously designated area will remain in place for surviving ETCs. As stated in the statute, the state commission "shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier shall continue to be served…." This language carries the clear import that once a competitive ETC is designated for an area, it retains that area and is required to serve that area as an ETC regardless of what happens to the underlying ILEC.

5. Inland's Tariff Filing is in the Public Interest.

Mr. Coonan explains why Inland has made the tariff filing to withdraw the Suncadia Resort area from the Roslyn exchange: "Inland made the filing to better define the area in which Inland can reasonably provide service to those customers that request Inland's service. Inland prides itself on being responsive to customer needs and providing excellent quality of service to its customers. In order to provide excellent quality service, Inland needs to have access to customers and each customer's premises in order to install service, repair any problems with the service and so on. This past year, it became obvious to Inland that the owners of the Resort were not going to allow Inland to have the type of access to customers that Inland needs to provide high-quality service to customers. In fact, it appeared that Inland would not have any access to the customer premises, making it impossible to provide service."[40]

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[39] Exhibit 61T, p. 4, l. 1-7.
[40] Exhibit 1T at p. 2, l. 12-23.

If Inland does not have physical access to the area, it can not provide service to customers in any event. This tariff filing makes it clear that Inland is not expected to provide telecommunications service within the Suncadia Resort area.

As noted above, that does not mean the residents and businesses in the Suncadia Resort area will go without telecommunications service. There are at least three wireless carriers currently serving the area. ICS will provide wireline service in the Suncadia Resort area.

Again as stated by Mr. Coonan, this filing reflects reality: "What the filing in this docket represents is a reflection of reality. Inland Telephone Company cannot provide service within the Suncadia Resort area today, with the exception of a very limited set of business services provided directly to Suncadia Resort as an entity and not provided to residential lot owners or other businesses within Suncadia. Inland Telephone Company is not able to provide service for the foreseeable future. There is no increase in uncertainty about the availability and reliability of local telephone service by approving the tariff filed in this docket."[41]

Further, under Commission Staff and Public Counsel's hypothesis, if Inland were to retain a carrier of last resort obligation for the Suncadia Resort area, presumably one customer out of the two thousand eight hundred could force Inland to build expensive facilities to serve that one customer. As explained by Mr. Coonan, this would just not make practical sense. As stated by Mr. Coonan: "Under the scenario Commission Staff posits, Inland Telephone Company may have to spend tens of thousands of dollars to serve just one customer… if those costs have to be spread to the remainder of Inland's customer base, on the theory that some day a customer in the Suncadia Resort area desires service, that does not appear to Inland to be in the

[41] Exhibit 5T, p. 4, l. 10-16.

public interest."[42] Detail as to the costs that might be incurred to provide service to a customer are set out on Exhibit 7.

Inland does not believe that it is in the public interest to require a carrier to be forced to serve one customer out of a possible two thousand eight hundred at substantial costs that would be subsidized by other customers. Inland recognizes that there is always some subsidy among customers flowing back and forth. However, at some point the line is crossed where it no longer makes sense. To be required to maintain the theoretical duty and investment capability and facilities to serve one customer out of two thousand eight hundred is certainly on the far side of the line.

## CONCLUSION

Inland's tariff filing in this docket presents a reasonable solution to an untenable situation. Inland is physically precluded from providing service to residential and business customers in the Suncadia Resort area. There are no public rights-of-way. Suncadia has stated on the record that it is highly unlikely that Inland will ever be granted an easement. It is also highly unlikely that Inland will ever be able to provide service in the Suncadia Resort area given the relationship that has developed between Suncadia and ICS.

Commission Staff and Public Counsel present hypothetical situations that they urge should require Inland to retain the service area so that Inland may serve as a "safety net." However, the hypothetical situations are not premised on any reasonable set of facts.

Commission Staff and Public Counsel may be concerned that the precedent in this situation may be used in other situations where the public interest is more compelling. However,

[42] Exhibit 5T at p. 9, l. 11-17.

there really is nothing precedential about this situation other than the fact that the land owner refuses to grant the ILEC access in order that service may be provided. It is only reasonable where the land owner refuses a telephone company access, that the telephone company not be burdened with a carrier of last resort obligation for that geographic area.

Inland respectfully requests that its tariff filing be allowed to take effect.

Dated this 5th day of June, 2006.

Richard A. Finnigan, WSB #6443
Attorney for Inland Telephone Company