

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

INLAND TELEPHONE COMPANY,

Respondent.

DOCKET NO. UT-050606

INITIAL BRIEF OF COMMISSION  
STAFF

1 Commission Staff submits this brief in support of its position in the matter  
referenced above.

**I. INTRODUCTION**

2 The Commission should reject the tariff revision proposed by Inland Telephone  
Company because Inland cannot show that modifying the boundary of the Roslyn Exchange  
in the manner proposed meets the standard of being fair, just, reasonable, and in the public  
interest. Court precedent directs the Commission in this situation to leave the exchange  
boundary as is. Washington State's telecommunications policies of maintaining diversity in  
the supply of telecommunications services and products and of preserving affordable  
universal telecommunications service require the Commission to retain the resort within the  
Roslyn Exchange, thereby preserving Inland's obligation to provide resort occupants with  
tariffed service. Given that the harms Inland has shown are speculative, and that the loss of  
tariffed telecommunications service to future ratepayers in the resort is real, the proposed  
tariff revision should not be approved.

## II. BACKGROUND OF THE PROCEEDING

3 Inland Telephone Company (Inland) filed the tariff revision at issue on April 19,  
2005. The filing proposes modifying the boundary of the Roslyn Exchange Area to add  
territory north of the exchange and to remove from the exchange's southern portion territory  
comprising the Suncadia Resort. Only the *removal* of territory from the exchange is at issue.

### A. Description of the Parties

#### 1. Inland Telephone Company.

4 Inland Telephone Company (Inland) is the incumbent local telephone exchange  
carrier that serves the Roslyn Exchange.<sup>1</sup>

#### 2. Suncadia

5 Suncadia, LLC (Suncadia) owns and is in the process of developing a resort in the  
area of the Roslyn Exchange that Inland proposes be removed from the exchange. Suncadia  
supports Inland's proposed tariff revision.<sup>2</sup>

#### 3. Intelligent Community Services

6 Intelligent Community Services, Inc. (ICS) is a competitively classified  
telecommunications company registered in the state of Washington that has negotiated with  
Suncadia for some time and recently signed a contract to provide telecommunications  
services to the Suncadia resort. ICS opposes the proposed tariff revision.<sup>3</sup>

### B. Procedural History

7 On June 29, 2005, the Washington Utilities and Transportation Commission  
(Commission) suspended the proposed tariff revision to determine whether it is fair, just,  
reasonable, and in the public interest.<sup>4</sup> At the first prehearing conference held August 11,  
2005, Suncadia and ICS petitioned to intervene. The Commission granted the unopposed

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<sup>1</sup> Exh. No. 51TC 4: 10-17 (Reynolds).

<sup>2</sup> Exh. No. 31T 5: 19-23 (Eisenberg); Exh. No. 34 at ¶16 (Eisenberg); TR 169: 19 – 170: 1 (Eisenberg).

<sup>3</sup> See Docket No. UT-050606, ICS Petition to Intervene at ¶ 3.

<sup>4</sup> Docket No. UT-050606, Order No. 01, Complaint and Order Suspending Tariff Revisions at ¶5.

petitions to intervene on August 16, 2005.<sup>5</sup> Staff filed a motion for summary determination, which the Commission denied on February 16, 2006.<sup>6</sup> On March 24, 2006, the Commission, at the request of Inland and with the agreement of the other parties, issued a new procedural schedule, and Inland agreed to further extend the tariff's effective date to September 2, 2006.<sup>7</sup>

### III. ISSUE PRESENTED

8 Is the removal of the territory comprising the Suncadia resort from the Roslyn Exchange Area fair, just, reasonable, and in the public interest?

### IV. STATEMENT OF FACTS

9 The Roslyn Exchange Area (Roslyn Exchange) contains the town of Roslyn and extends in an oblong strip to the northwest of town, just north of Interstate 5 in Kittitas County.<sup>8</sup> Inland is the incumbent local exchange carrier (ILEC) that provides wireline telecommunications services in the Roslyn Exchange.<sup>9</sup> In the southern portion of the Roslyn Exchange, Suncadia is in the process of developing a resort.<sup>10</sup> The resort area covers approximately 6,000 acres owned by Suncadia.<sup>11</sup> If the resort is completed as planned, it will include 2,800 single-family dwellings, several golf courses, a hotel, and commercial businesses.<sup>12</sup> As of September 8, 2005, Suncadia had sold 596 lots. Currently, several houses are complete, and about 125 houses are in various stages of construction.<sup>13</sup>

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<sup>5</sup> Docket No. UT-050606, Order No. 2, Prehearing Conference Order at ¶4.

<sup>6</sup> Docket No. UT-050606, Order No. 6, Order Denying Motion for Summary Determination.

<sup>7</sup> Docket No. UT-050606, Notice Modifying Procedural Schedule at page 2.

<sup>8</sup> Exh. No. 52 (*Maps of Roslyn Exchange*), pages 1-2.

<sup>9</sup> Exh. No. 51TC 4: 10-17 (Reynolds).

<sup>10</sup> See Exh. No. 52 at page 3.

<sup>11</sup> Exh. No. 51TC 5: 15-16 (Reynolds).

<sup>12</sup> Exh. No. 31T 2: 27-3: 1 (Eisenberg) and Exh. No. 51TC 5: 16-17 (Reynolds).

<sup>13</sup> TR 149: 22 – 150: 12-19 (Eisenberg).

Suncadia's sales center, golf courses, a pro shop, and a hotel are operating, and a restaurant also has been completed.<sup>14</sup>

10 Inland and Suncadia engaged in discussions and negotiations for over six years but were unable to agree on terms under which Inland could serve the resort.<sup>15</sup> After Suncadia decided that it would install and own the telecommunications backbone, Inland made its last documented communication to Suncadia on February 15, 2005, regarding participation by Inland in providing services to resort homeowners.<sup>16</sup> In this letter, Inland states that given Suncadia's "new approach," Inland is "not inclined to submit a proposal."<sup>17</sup> Inland proposed in this letter, however, that Inland provide various services by accessing Suncadia's network for a fee.<sup>18</sup> There is no evidence that any further negotiation about new service from Inland took place.<sup>19</sup> The primary points of contention appear to be Suncadia's refusal to provide Inland with a long-term easement,<sup>20</sup> Suncadia's revenue sharing proposals,<sup>21</sup> and, on Suncadia's side, concern about Inland's capability to provide the necessary volume of sophisticated service given that Inland serves a relatively low number of lines.<sup>22</sup>

11 Inland currently provides telecommunications services according to its tariff to Suncadia facilities, such as the sales office and the golf course,<sup>23</sup> and ICS is serving the few homes that have been completed.<sup>24</sup> Inland is providing service under a right of entry

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<sup>14</sup> See Exh. No. 31T 150: 18-19 (Eisenberg) and Exh. No. 51TC 6: 1-4 and 9: 1-2 (Reynolds).

<sup>15</sup> Exh. No. 1T 3: 5-7.

<sup>16</sup> See TR 77: 5-10 (Coonan).

<sup>17</sup> Exh. No. 33.

<sup>18</sup> Exh. No. 33.

<sup>19</sup> See TR 79: 17-19 (Coonan) ("I don't recall Suncadia ever getting back to me after I sent them this letter...").

<sup>20</sup> Exh. No. 51TC 7: 11 - 8: 1 (Reynolds); Exh. No. 31T 3: 23-28 (Eisenberg).

<sup>21</sup> Exh. No. 1T 3: 1-11 (Coonan).

<sup>22</sup> Exh. No. 31T 2: 25 - 3: 4 (Eisenberg).

<sup>23</sup> Exh. No. 51TC 8: 13 -9: 1 (Reynolds).

<sup>24</sup> See Exh. No. 31T 149: 22 - 150: 2 (Eisenberg); Exh. No. 51TC 6: 1-2 (Reynolds).

agreement with Suncadia that allows Inland to access telecommunications facilities in the resort for such purposes as maintenance and repair.<sup>25</sup> If the Commission approves Inland's proposed tariff revision and the resort is removed from Inland's service territory, Inland will continue to provide its existing service under a contract with Suncadia.<sup>26</sup> The term of the contract is 10 years, with automatic renewals every year following the initial ten-year period.<sup>27</sup> Under the contract, rates are to remain the same as the tariffed rates.<sup>28</sup>

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On April 1, 2006, Suncadia and ICS signed a contract for ICS to provide telecommunications services to the resort.<sup>29</sup> [REDACTED]

[REDACTED]

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[REDACTED]

<sup>25</sup> Exh. No. 35, Right of Entry Agreement; TR 41: 16-19 (Coonan); Exh. No. 51TC 9: 6-9 (Reynolds).

<sup>26</sup> Exh. No. 31T 5: 4-16 (Eisenberg); Exh. No. 34, Telecommunications Service Agreement.

<sup>27</sup> Exh. No. 34 at ¶8.

<sup>28</sup> See Exh. No. 34 at ¶2.

<sup>29</sup> Exh. No. 19C, *Fiber Optic Communications System and Services Agreement*.

<sup>30</sup> Exh. No. 19C at ¶ 7.1.

<sup>31</sup> See Exh. No. 19C at ¶2.1.2. ("Smart Home" services include alarm services, access control, heating and air conditioning control, lighting control, and fire safety.)

<sup>32</sup> See Exh. No. 19C at ¶2.1.2.

<sup>33</sup> TR 137: 14-17 (Eisenberg).

[REDACTED]

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[REDACTED]

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On April 1, 2006, the telecommunications service landscape at the resort changed in that now a plan and provider are in place.<sup>42</sup> If Inland wants to serve future resort occupants, it can do so without needing an easement because, assuming the terms are agreeable to Inland, Suncadia, and ICS, Inland can provide service over Suncadia and ICS lines.<sup>43</sup> Inland

<sup>34</sup> See TR 163: 9 – 165: 9 (Eisenberg).

<sup>35</sup> *Id.* at 163: 9 – 165: 9.

<sup>36</sup> TR 135: 15-19 (Eisenberg).

<sup>37</sup> TR 161: 25 – 162: 4 (Eisenberg).

<sup>38</sup> TR 162: 2-8 (Eisenberg).

<sup>39</sup> TR 163: 19-24 (Eisenberg); 164: 16 – 165: 4 (Eisenberg); see TR 136: 6-23 (Eisenberg).

<sup>40</sup> Exh. No. 19C at ¶ 3.1.2(e) and Exhibit B (ICS Network Operations Center Site).

<sup>41</sup> TR 137: 17-20 (Eisenberg).

<sup>42</sup> See Exh. No. 19C, *Fiber Optic Communications System and Services Agreement*.

<sup>43</sup> See TR 137: 8-24 and 173: 6-14 (Eisenberg).

contemplated connecting through Suncadia's network as early as February 15, 2003.<sup>44</sup>

Inland remains willing to serve the resort today under reasonable access terms and conditions,<sup>45</sup> and Inland could provide service to Suncadia residents and businesses over the lines of Suncadia or ICS pursuant to a lease, or other arrangement, with acceptable terms.<sup>46</sup> Assuming acceptable terms can be negotiated, Suncadia is willing to provide Inland with access to the resort network.<sup>47</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

## V. ARGUMENT

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The Commission has the power to set the territorial and exchange area boundaries of telecommunications companies. RCW 80.36.230. Any regulatory decision that the Commission makes, however, must be in the public interest. RCW 80.01.020. The public interest is informed by statute as well as by case law. To decide whether to modify the boundary of the Roslyn Exchange, the Commission must consider whether the modification is fair, just, reasonable, and in the public interest. Inland cannot show that the boundary

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<sup>44</sup> Exh. No. 33 ("Inland and its affiliates are interested in providing Suncadia with the ability to offer its homeowners a choice... . [...] This could be accomplished through an agreement with Suncadia whereby Suncadia allows Inland and/or its affiliates access to Suncadia's network. Please contact me ... so that we may discuss the fees Suncadia will be charging for access to its network.")

<sup>45</sup> TR 40: 23 -41: 12 (Coonan).

<sup>46</sup> TR 47: 7-18 (Coonan).

<sup>47</sup> See TR 173: 3-14 (Eisenberg).

<sup>48</sup> TR 137: 8 - 138: 4 (Eisenberg).

<sup>49</sup> TR 48: 7-11 (Coonan) (Inland has had no discussions with ICS regarding future use by Inland of ICS lines); see TR 89: 17 - 90: 22 (Coonan) ("There would be some sort of plant necessary to interconnect").

modification is appropriate under this standard, and the Commission, therefore, should deny the proposed tariff revision.

**A. The standard is “fair, just, reasonable, and in the public interest.”**

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In its decision on Staff’s Motion for Summary Determination, the Commission articulated the standard for the boundary modification as “fair, just, reasonable and in the public interest.”<sup>51</sup> While no specific statute or regulation states that this is the standard for a tariff revision consisting of an exchange boundary modification, various statutes contain components of the standard.<sup>52</sup> Because the Commission specifically adopted the “fair, just, reasonable, and in the public interest” test in this proceeding, this standard is the law of the case and must be applied.

**B. Court precedent does not support the tariff revision**

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Although prior Commission decisions on boundary modifications are not on point,<sup>53</sup> case law—while it cannot resolve the issue in this case without the help of policy considerations—does provide guidance. In 1981, the Court of Appeals adopted the principle that the boundaries of established service areas should remain undisturbed unless clearly

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<sup>50</sup> TR 138: 4-8 (Eisenberg).

<sup>51</sup> Docket No. UT-050606, Order No. 5, Order Denying Motion for Summary Determination, at ¶19. Note that the standard as enunciated in the decision does not include the term “sufficient.”

<sup>52</sup> In RCW 80.01.040(3), the legislature sets out the general mandate of the commission to “[r]egulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of ... any utility service ... including ... telecommunications companies.” Another relevant statute states that when a public service company files a tariff revision that effectively “[changes]<sup>52</sup> any rate, charge, rental, or toll theretofore charged, the commission shall have power ... to enter upon a hearing concerning such proposed change and the reasonableness and justness thereof.” RCW 80.04.130. Finally, the legislature has decided that “[a]ll rates, tolls, contracts and charges, rules and regulations of telecommunications companies for messages, conversations, services rendered and equipment and facilities supplied ... shall be fair, just reasonable and sufficient.” RCW 80.36.080.

<sup>53</sup> See *In re the Registration of Electric Lightwave, Inc.*, 123 Wn.2d 530, n. 5, 540, 869 P.2d 1045 (1994) (citing several Commission decisions dealing with boundary modification, none of which are on point in this docket).



shown to be arbitrary and unreasonable.<sup>54</sup> Because Inland has failed to demonstrate that the boundary of the Roslyn Exchange with respect to the resort is arbitrary and unreasonable, the tariff revision should be rejected.

18            *Prescott* was an exchange boundary case that, coincidentally, involved the Roslyn Exchange and the predecessor in interest to Inland, Prescott Telephone and Telegraph Company (Prescott).<sup>55</sup> The dispute centered around the right to provide service to an unpopulated territory that had been included in the exchange maps of Pacific Northwest Bell Telephone Company (PNB) but lay between the two companies' exchanges.<sup>56</sup> Prescott complained that the Commission had failed to properly prescribe exchange boundaries and sought to have the territory included in its Roslyn exchange or, in the alternative, to have the territory declared open.<sup>57</sup>

19            After deciding that the exchange areas had been properly prescribed, the court found that the Commission's decision not to declare the territory open was neither arbitrary and capricious nor clearly erroneous. The court stated, notwithstanding the fact that there were no facilities or equipment in the disputed territory, that the proper test was whether PNB had met its requirement to "act fairly, justly, and reasonably and to keep their facilities and equipment in good condition and repair."<sup>58</sup> Because there was no showing PNB had failed to respond to any request for service or that its equipment was inadequate, the court agreed with the Commission that PNB should not be deprived of its property interest in the

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<sup>54</sup> *Prescott Telephone and Telegraph Company v. Washington Utilities and Transportation Commission*, 30 Wn. App. 413, 418, 634 P.2d 897 (1981), citing *Subscribers v. Speed Telephone Co.*, 34 P.U.R.3d 32, 35 (Mo.P.U.C. 1960).

<sup>55</sup> *Prescott*, 30 Wn. App. 413.

<sup>56</sup> *Id.* at 414.

<sup>57</sup> 30 Wn. App. at 414.

<sup>58</sup> *Id.* at 418, citing RCW 80.36.080.

exchange area.<sup>59</sup> In support of its conclusion, the court adopted a policy enunciated by the Missouri Public Service Commission: "Once a service area has been established, the area should remain undisturbed unless [the boundary line] is clearly shown to be arbitrary and unreasonable."<sup>60</sup> The context of the Missouri case was a petition by a group of subscribers of Speed Telephone Company asking to have their territory removed from its existing exchange and included in an exchange served by a different LEC that used more modern equipment.<sup>61</sup>

20           *Prescott* was decided in the era before *Electric Lightwave, Inc.*, when inclusion of territory in a local exchange company's exchange area effectively gave the company the exclusive right as well as obligation to provide service there.<sup>62</sup> Local exchange carriers (LECs) generally vied for territory,<sup>63</sup> because territory meant exclusive market share.

21           In light of this context, and because, unlike PNB, Inland wants to remove the territory from its exchange, the holding in *Prescott* is of limited use. *Prescott* was analyzed according to the rule that territory will not be removed from an exchange unless there is evidence that the LEC failed to meet its statutory service requirements. While the argument could be made that because there is no evidence that Inland has failed to meet its statutory requirements the territory should remain within the exchange, this analysis simply has no

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<sup>59</sup> *Id.* at 418.

<sup>60</sup> *Id.* at 418, citing *Subscribers v. Speed Telephone Co.*, 34 P.U.R.3d 32, 35 (Mo.P.U.C. 1960).

<sup>61</sup> *Speed Telephone Co.*, 34 P.U.R.3d at 34 and 35.

<sup>62</sup> See *Electric Lightwave, Inc.*, 123 Wn.2d at 539-40 (the central holding was that the Commission does not have the power to grant monopolies or confer on any local exchange carrier the right to be the exclusive provider of telecommunications services in a given exchange).

<sup>63</sup> See *id.* at 540, n. 5 (references to Whidbey cases, Inland and Veatch cases). Note, however, that in the *Speed Telephone Co.* case, although Speed wanted to retain its territory, the other provider did not want to acquire the obligation to serve the Speed subscribers because of the costs involved in serving them. This position is to be distinguished from the Inland context in that Inland already has an obligation to serve customers in the territory at issue here and any concerns about costs to provide service to Suncadia residents are speculative at this point in time.

application that is not absurd to a request by an ILEC to remove territory from its own exchange. In contrast, while the principle that *the boundaries of established service areas should remain undisturbed unless clearly shown to be arbitrary and unreasonable* may have originated in a dissimilar historical context, the situation it addressed is the same basic situation in Inland. In *Prescott, Speed*, and now in Inland, as further discussed below, the party filing simply wanted a different deal but could not show that the status quo was unreasonable. The Commission should adopt the principle set forth in the *Prescott* case and leave the exchange boundaries in place.

**C. Inland cannot show that removing the resort area from Inland's exchange is fair, just, reasonable, and in the public interest.**

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Under RCW 80.36.090, Inland is obligated to serve residents and businesses in its exchange area.<sup>64</sup> To allow Inland to withdraw from its obligation to serve an area that is expected to be densely populated in the future would be a disservice to those future ratepayers because they would have less choice and no tariffed rates. Less choice means less competition, at a time when the Legislature's enunciated policy is to increase diversity in the supply of telecommunications services. Inland, as the moving party, bears the burden of showing that removing the territory comprised of the Suncadia resort from Inland's exchange is fair, just, reasonable, and in the public interest. Because any harm to Inland is speculative whereas future ratepayers definitely would lose their right to tariffed service if the tariff revision were approved, Inland cannot carry its burden.

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<sup>64</sup> "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." RCW 80.36.090.

**1. Fair, just, and reasonable**

20 A determination of fair, just, and reasonable is fact specific. In change of service cases, like this one, the Commission considers the company's operating requirements and the effect of the proposed change on customers. When it applied this standard in the *US West* docket, for example, the Commission considered whether the company could "offer any factual basis for its assertions that its obligation to serve imposes a severe and unique economic burden" on the company.<sup>65</sup>

**2. In the public interest**

21 The public interest is informed by statute and by case law. As to case law, the Supreme Court of Washington has addressed how to take the public interest into consideration in the context of telecommunications law.<sup>66</sup> In *WITA*, the en banc court found that neither the Commission's conclusion—that designating an additional eligible telecommunications carrier was in the public interest—nor the process by which the Commission reached its conclusion was arbitrary or capricious.<sup>67</sup> With its decision as a seal of approval, the *WITA* court walked through the analysis the Commission used in reaching its conclusion. The Commission's consideration of the public interest in the *WITA* case began with the goals of the controlling statutes and then stated this general proposition: "Public interest' is a broad concept encompassing the welfare of present and future consumers, stakeholders, and the general public."<sup>68</sup>

22 In the instant case, the public interest is informed in large part by the

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<sup>65</sup> *WUTC v. US West*, Docket No. UT-961638, Fourth Supplemental Order Rejecting Tariff Filing, January 16, 1998, at page 20.

<sup>66</sup> See *Washington Indep. Tel. Ass'n v. WUTC*, 149 Wn.2d 17, 28-29 (2003).

<sup>67</sup> *Id.* at 29.

<sup>68</sup> *Id.* at 28-29.

telecommunications policy statute.<sup>69</sup> The statute contains the declaration that 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.

RCW 80.36.300. *WITA* directs the Commission to consider any statutory public policy goals in the context of a broad analysis of the effect of the filing if approved on present and future consumers, stakeholders, and the general public.

**3. Removing the resort area from the Roslyn Exchange is not in the public interest because the removal would not comport overall with the policies enunciated by the Legislature.**

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The policy statements of RCW 80.36.300 represent the interests of the general public. As a whole, they do not support removal of the resort from the Roslyn Exchange. Regarding the second policy statement, there is no indication that removal of the resort from the exchange would advance the policy of maintaining and advancing the efficiency and availability of telecommunications service. In fact, approving Inland's proposed tariff revision might well decrease the availability of telecommunications service in that modifying the exchange could effectively remove the option of Inland service to the resort.<sup>70</sup>

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<sup>69</sup> See RCW 80.36.300.

<sup>70</sup> If the tariff revision were approved, Inland would no longer have the obligation to serve the resort as an incumbent. Unless Inland retained its obligation to serve as an ETC, Inland might not offer local service to the

And if Inland did elect to serve the resort, Inland no longer would be obligated to serve resort customers at tariffed rates. Under the status quo, in contrast, any service Inland were to provide to resort residences or businesses would be under a tariff approved by the Commission. Consequently, leaving the exchange intact and retaining Commission approval for rates is better calculated to ensure that customers pay only reasonable charges for telecommunications service, which is the third policy listed in the statute.

24           Regarding the policy of preventing noncompetitive services from subsidizing competitive ventures, the tariff revision does not raise this issue. Inland has raised the issue of subsidization, however, in the context of its existing ratepayers potentially subsidizing the installation of plant necessary to serve the resort.<sup>71</sup>

25           Inland's argument that the status quo could cause its existing ratepayers to subsidize any infrastructure investment in the resort relates to the first policy statement, the preservation of affordable universal telecommunications service. While Inland is laudably concerned with the affordability of service for its existing customers, it is not a foregone conclusion that Inland's rates would increase if the company were to serve future resort occupants. It is possible to recover any necessary infrastructure investments in other ways, such as a special extension of service tariff effective in the resort area of the exchange only, rather than through the rates of customers in the more rural areas of the exchange. Furthermore, Inland has not offered evidence that such subsidization would occur under the current situation, in which service by Inland likely would run primarily over Suncadia and ICS infrastructure. Given the speculative nature of any burden on Inland's existing customers, and the reality that future ratepayers in the resort would lose their right to tariffed

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resort at all.

service if the tariff revision were approved, the policy of affordable universal telecommunications service is best advanced by maintaining Inland's obligation to serve in the resort at tariffed rates.

26           There is no indication that approving the tariff revision would further the policy of permitting flexible regulation of competitive telecommunications companies and services. The Commission provides for flexible regulation in a competitive environment. It is not clear, however, that, following the loss of tariffed rates and service from the only other wireline service provider in the territory, a competitive environment would flourish.

27           Removing the resort area from the Roslyn Exchange may dramatically affect or even stop the flow of universal service fund dollars to carriers serving the resort area (see discussion at section D below), which in turn could affect the prices and service offered by those carriers. The problem of how to apportion universal service fund support to eligible telecommunications carriers in an area not a part of an exchange served by an ILEC also affects the policy of promoting diversity in the supply of telecommunications services and products. Unavailability of universal service fund support means that there is one less monetary incentive for competing telecommunications providers to offer service, and decreased monetary incentives generally decreases the likelihood that diverse telecommunications providers will enter or remain in a particular market. If Inland no longer is obligated to offer service under tariff in the resort area, the supply at least of local telephone service providers already will have become less diverse and consumers at the resort will not experience the benefits of competition.<sup>72</sup> Without the presence of any other local wireline service providers, ICS will be in the position of a monopoly firm. In sum,

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<sup>71</sup> See Exh. No. 1T 6: 6-18 (Coonan).

although it is difficult to predict what will happen in the resort area, the statutory telecommunications policies likely will be better served at this point in time if the resort remains in the Roslyn Exchange.

**4. Removing Inland's obligation to serve under its tariff would not be fair, just, reasonable and in the public interest.**

28 In exchange for the opportunity to earn a fair rate of return Inland has the obligation to serve anyone in its exchanges who is reasonably entitled to service.<sup>73</sup> If the resort area is removed from the Roslyn Exchange, "[t]here will be no other provider of telecommunications services that will have legal obligations comparable to those Inland has today."<sup>74</sup> Inland cannot seek to avoid these obligations in advance simply because it may be inconvenient, marginally profitable, or possibly expensive.<sup>75</sup> Not only is the proposed tariff revision not in the public interest but it is not fair, just, or reasonable for consumers and stakeholders.

**a. The proposed tariff revision is not fair, just, or reasonable with respect to the interests of consumers.**

29 Removing Inland's obligation to serve would unfairly favor private business interests over consumers. Residents and businesses in the resort would lose their right to demand service under tariffed rates, terms, and conditions.<sup>76</sup> If ICS were willing to take on the obligations of an ILEC for the resort area, the case might be different.<sup>77</sup> The availability of tariffed service would balance the absence of effective competition. However, under the current situation, the effect of the tariff revision on these future consumers (there are few

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<sup>72</sup> Exh. No. 51TC 19: 3-7 (Reynolds).

<sup>73</sup> See 80.36.090.

<sup>74</sup> Exh. No. 51TC - 12: 17-19 (Reynolds).

<sup>75</sup> Exh. No. 1T 7: 20 - 8: 3 (Coonan) (testifying that no complete analysis has been done regarding the cost to Inland of serving Suncadia).



present consumers) is to eliminate the option of tariffed service. If the filing were approved, Inland might be able to reduce risk to its business; but this hypothetical benefit does not outweigh the importance of the availability of tariffed rates and services to future consumers.<sup>78</sup>

30 In addition, Suncadia's existing businesses would lose the right to tariffed rates and service from Inland if the resort area were removed from the Roslyn Exchange.<sup>79</sup> Suncadia has protected itself from this eventuality, however, by entering into a contract with Inland that preserves the benefits of tariff-level rates in case Suncadia loses the right to tariffed service.<sup>80</sup> Suncadia supports Inland's tariff revision but only in order to lock in rates for its business telecommunication needs should the proposed tariff revision go into effect.<sup>81</sup> This support does not represent the interests of future Suncadia property owners, especially considering that some 2000 lots remain to be sold and that the owners of the approximately 600 lots already sold may not even be aware of this proceeding.<sup>82</sup>

31 It would not be fair to remove the resort area from the exchange given that 501 purchasers<sup>83</sup> contracted for their lots in reliance on a HUD disclosure statement which reads, "Telephone service will be available to the subdivision and will be supplied by Inland Telephone Company ..., a utility company which is regulated the by Washington State Utilities and Transportation Commission, or an equivalent provider."<sup>84</sup> It is Staff's position that a provider would be equivalent only if it provided tariffed service. Because ICS does

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<sup>76</sup> Exh. No. 51TC 11: 2-5, 12: 1-19 (Reynolds).

<sup>77</sup> See Exh. No. 51TC 17: 4-8 (Reynolds).

<sup>78</sup> See Exh. No. 51TC 15:24 – 16: 9 (Reynolds).

<sup>79</sup> Exh. No. 51TC 12: 7-11 (Reynolds).

<sup>80</sup> See TR 169: 19 – 170: 1 (Eisenberg); Exh. No. 34 at ¶16.

<sup>81</sup> See TR 169: 9 – 170: 1 (Eisenberg); Exh. No. 31T 5: 19-23 (Eisenberg); Exh. No. 34 at ¶16.

<sup>82</sup> See Exh. No. 51TC 13: 9 – 14: 3 (Reynolds).

<sup>83</sup> Exh. No. 51TC 13: 1-7 (Reynolds).

not offer service according to a tariff but is a competitive telecommunications company, it would not be fair, just, and reasonable with respect to consumers to remove the resort from Inland's Roslyn exchange and thereby remove their right to service under a tariff.

**b. The harms advanced by Inland are speculative and are outweighed by the harm to future ratepayers of losing their right to tariffed service.**

32 The reasons that Inland has advanced so far for its proposed tariff revision do not support a finding that removing the exchange would be fair, just, reasonable, and in the public interest. Inland has claimed that Suncadia's refusal to give Inland access under reasonable terms and conditions to resort customer premises means that as a practical matter Inland cannot provide service.<sup>85</sup> It is not fair to future consumers at the resort, however, to remove their right to tariffed service simply because two businesses failed at some point in time to agree on access terms.

33 One of the access terms Inland claims it needs is a long-term easement.<sup>86</sup> Inland states that a long-term easement is necessary because the plant it would install has long depreciation lives and the alternative of plant removal would be too costly.<sup>87</sup> Under the scenario contracted for by ICS and Suncadia this spring, however, there will be lines installed to all of the premises in the resort. Given that Inland's witness, John Coonan, testified that it would be possible for Inland to use Suncadia or ICS lines through a lease or other arrangement<sup>88</sup> and that Inland is willing to provide service to the resort under

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<sup>84</sup> Exh. No. 55 at page 1 (numbered 34), first paragraph (Excerpt from HUD Statement, 10/18/04).

<sup>85</sup> See Exh. No. 1T at 2:17-23 (Coonan).

<sup>86</sup> See Exh. No. 1T 5: 16-18 (Coonan).

<sup>87</sup> Exh. No. 1T 6:6-16 (Coonan).

<sup>73</sup> TR. 47:7-18 (Coonan).

acceptable terms and conditions,<sup>89</sup> it does not appear that a long-term easement is a prerequisite any longer to serving future resort customers. Although some plant would need to be installed in order to interconnect,<sup>90</sup> the bulk of the telecommunications plant infrastructure would already be in place. Furthermore, any concern that the lack of access will prevent Inland from fulfilling its obligation to serve is misplaced, because the Commission's rules provide that a company may refuse to connect with a consumer if the consumer has failed to secure the necessary rights of way, easements, and permits.<sup>91</sup>

34           The other access term that Inland has identified as an obstacle is Suncadia's revenue sharing requirements.<sup>92</sup> Although Inland's direct testimony intimates that the dispute revolved around sharing of *regulated* revenue,<sup>93</sup> and suggests that the proposed revenue sharing is illegal;<sup>94</sup> in fact, documentation of the discussion does not mention sharing revenue from tariffed local telephone service.<sup>95</sup> While Mr. Coonan's testimony on cross-examination claims that Suncadia had indeed requested sharing of revenue from regulated services, this is not documented,<sup>96</sup> and Suncadia's witness expressly stated that Suncadia seeks revenue sharing only to the extent allowed by law.<sup>97</sup> The documentation as well as Mr. Coonan's testimony reveal that Inland, far from rejecting all forms of revenue sharing,

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<sup>89</sup> Exh. No. 1T 7: 10-11, 16-18 (Coonan).

<sup>90</sup> TR. 90: 9-10 (Coonan).

<sup>91</sup> Exh. No. 51TC 20: 12 – 21:4 (Reynolds), *citing* WAC 480-120-061(1)(h); *see also id.* at 8: 9-11 (Inland has no obligation to negotiate with Suncadia).

<sup>92</sup> Exh. No. 51TC 3: 1 – 42 (Coonan).

<sup>93</sup> Exh. No. 51TC 3:22-23 (Coonan) (“We viewed the sharing of revenue from regulated services as an impermissible activity under the statutes that control our activities”).

<sup>94</sup> Exh. No. 1T 4: (Coonan) (“There is no provision that we know of that would allow Inland to share revenues it receives under its tariff with third parties”).

<sup>95</sup> *See* TR 88: 5-11 (Coonan).

<sup>96</sup> TR 88: 16 - 89: 10 (note, however, that the memorandum of understanding provided by Mr. Coonan as Exh. No. 3 does not discuss which services are to be included in revenue sharing).

<sup>97</sup> TR 191: 25 – 192: 8 (Eisenberg).

was actively considering these terms.<sup>98</sup> There is no evidence that the revenue sharing contemplated by Inland and Suncadia was improper. The mere fact that revenue sharing was part of the deal Suncadia and Inland were unable to negotiate does not provide a reasonable basis for releasing Inland from its obligation to serve the resort area.

35           Although Inland claims the effect of failing to remove territory will be detrimental to its reputation, customers, and its business in general, Inland has not shown that its obligation to serve imposes a “severe and unique economic burden” on the company. One residence in the resort area has asked for service from Inland.<sup>99</sup> The fact that the applicant reportedly was misinformed about why Inland could not provide service<sup>100</sup> is an insufficient basis from which to conclude that Inland’s reputation will be harmed. This harm is, by nature, speculative. What is more, now that ICS will be providing service to the resort, the likelihood of this situation repeating itself probably will decline, rather than increase, in the future. In sum, any risk of harm to Inland’s reputation from remaining obligated to serve the resort is so speculative that it carries little weight in the analysis.

36           Aside from the one potential customer who was misinformed as to Inland’s reasons for not providing service and might have formed a poor opinion of the company, Inland’s claims of harm are entirely speculative. In contrast to these speculative harms, if the tariff revision were approved, future resort residents and resort owners would lose their right to telecommunications service from Inland under tariffed rates and conditions. Although Inland might argue that its lack of access makes this right to service only theoretical, the fact is that Inland could provide service over Suncadia and ICS lines with an investment in plant

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<sup>98</sup> TR 89: 11-16 (Coonan); Exh. No. 17.

<sup>99</sup> Exh. No. 1T 3: 8 (Coonan).

<sup>100</sup> *See id.* at 3-8.

that is small compared to what was contemplated at the time of its negotiations with Suncadia. Because of the speculative nature of any harm to Inland under the status quo and the real harm to future consumers represented by the loss of the right to tariffed service from Inland if the resort area were removed from the exchange, it is not fair, just, reasonable, and in the public interest to approve the tariff revision.

**c. Removing Inland's obligation to serve is not warranted because effective competition is not present.**

Traditionally, regulation is a substitute for market forces. In the absence of effective competition, the obligation to provide service according to tariffs approved by the Commission ensures that rates and service are fair, just, and reasonable. In deciding whether to lift the obligation to serve, the Commission has considered whether there is effective competition.<sup>101</sup> When, for example, AT&T petitioned to remove the obligation to serve condition that had been imposed when it had been competitively classified, the Commission considered evidence of market power, access by competitors to the market, whether AT&T had a significant captive customer base, and whether there were reasonably available alternatives to AT&T.<sup>102</sup> Effective competition is not present in the resort area. There will be one wireline telecommunications service provider: ICS. Removing the resort from the Roslyn Exchange effectively removes the only potential competitor for telephone service. Although there are wireless service providers that offer service to the resort area, they are not substitutes for wireline service.<sup>103</sup> Furthermore, for the purpose of 911 calls, because of

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<sup>101</sup> Docket No. UT-031191, Order No. 01, *Order Granting Petition to Remove Conditions on Competitive Classification and Waiving Securities, Transfers of Property and Affiliated Interests Statutes and Rules Superseded by WAC 480-121-063*, ¶¶4 and 13.

<sup>102</sup> *Id.* at ¶¶6-7; see RCW 80.36.320.

<sup>103</sup> FCC Triennial Review Order, August 21, 2003, at ¶245 (stating that neither wireless nor cable is yet a substitute for wireline).

inconsistent signal coverage and the problems associated with locating the caller, wireless service is not necessarily a reasonable alternative. Without effective competition and without a right to service under a tariff, resort occupants could not be certain that their rates and service will be fair, just, and reasonable. Because of this uncertainty, the proposed tariff revision is not fair, just, reasonable, and in the public interest.

**D. Removing the resort area would open a Pandora's box of issues and consequences.**

37 Inland's proposed tariff revision raises issues that cannot be resolved in this docket, the resolution of which may have a profound effect on telecommunications service in the resort area. It is an open question as to whether, if this tariff revision is approved, (1) any telecommunications companies designated as Eligible Telecommunications Companies (ETCs) for the Roslyn Exchange will remain obligated to serve the resort area;<sup>104</sup> and (2) whether any of these will receive Universal Service Fund (USF) support.<sup>105</sup> Because the Commission is empowered to designate ETCs, the Commission can answer the first question; but this docket is not the place to decide this issue.<sup>106</sup> As the situation stands currently, the second question must be answered at the Federal Communications Commission. Until these issues have been resolved, it is not possible to predict the real effect of removing the resort area from the Roslyn Exchange.

38 Under federal law, states are directed to designate eligible telecommunications carriers (ETCs) for particular service areas.<sup>107</sup> ETCs must offer service throughout the

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<sup>104</sup> Exh. No. 61T 4: 1-7 (Shirley).

<sup>105</sup> Exh. No. 61T 5: 13 – 7: 19 (Shirley).

<sup>106</sup> Note that none of the parties has asked the Commission to resolve this issue in this or any other proceeding.

<sup>107</sup> 47 U.S.C. 214(e).

service area for which the designation is received.<sup>108</sup> The Commission designates ETCs in Washington State.<sup>109</sup> Three wireless telecommunications providers are designated as ETCs for the Roslyn Exchange.<sup>110</sup> If the tariff revision were to be approved and the Roslyn Exchange boundary modified, it is unknown whether these three providers would retain their obligation to serve customers in the excised territory.<sup>111</sup> This question has never been addressed at the Commission.<sup>112</sup> If their ETC territorial designations change along with modifications to exchange boundaries, then these providers would no longer be eligible to receive USF support for serving customers in the resort area.<sup>113</sup> ICS has applied to be designated as an ETC for the Roslyn Exchange.<sup>114</sup> If ICS' application were to be approved and then the boundary modified, ICS would be in the same position as the wireless ETCs. The Commission can determine the geographical boundaries of ETC service obligations,<sup>115</sup> but this docket, an adjudicative proceeding between parties that does not even include all of the carriers affected, is not the appropriate place for such a decision.

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Even if the ETCs were to remain obligated to serve the resort area, there is another problem: If the resort area were removed from the exchange, there might no longer be a basis for calculating USF support.<sup>116</sup> The basis for the calculation could be nonexistent because USF support for competitive ETCs is calculated based on the investment by the

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<sup>108</sup> See 47 U.S.C. 214 (e) (1).

<sup>109</sup> See *id.*

<sup>110</sup> See Docket No. UT-043120, Order No. 1, Order Granting Petition [of Sprint Corporation] for Designation as an Eligible Telecommunications Carrier; Docket No. UT-043011, Order No. 1, Order Granting Petition [of AT&T Wireless] for Designation as an Eligible Telecommunications Carrier; Docket No. UT-970345, Third Supplemental Order Granting Petition [of United States Cellular Corporation] for Designation as Eligible Telecommunications Carrier.

<sup>111</sup> Exh. No. 61T 7: 13-18 (Shirley).

<sup>112</sup> Exh. No. 61T 5: 2-11 (Shirley).

<sup>113</sup> Exh. 61T 6: 1-11 (Shirley).

<sup>114</sup> See Docket No. UT-053041.

<sup>115</sup> See RCW 80.36.230.

<sup>116</sup> Exh. No. 61T 6: 1-19 (Shirley).

incumbent local exchange carrier (ILEC),<sup>117</sup> which for the Roslyn Exchange is Inland. If the resort were no longer part of an exchange, then there would be no ILEC investment on which to base USF calculations.<sup>118</sup> Whether or how to calculate USF support is a decision that must be made by the Federal Communications Commission (FCC).<sup>119</sup> If the resort area were removed from the Roslyn Exchange, the FCC could decide to calculate USF support for ETCs serving the resort area based on Inland's investments in its modified, smaller, more rural exchange. This scenario could eventually result in a windfall for the ETCs in the resort area because the resort, if development continues according to plan, will be much more densely populated than the remainder of Inland's exchange. Another possibility is that the FCC could decide to treat ICS (or a successor) as an incumbent for purposes of calculating federal support.<sup>120</sup> Given that waiting for an FCC decision on this issue before making a decision in the instant docket is impracticable,<sup>121</sup> we are left with uncertainty as to the availability of USF support. While it is not clear what the effect of this uncertainty might be, it is clear that it is not fair to all of the stakeholders, especially the wireless carriers serving the resort area, to approve a tariff revision with such potentially significant consequences.<sup>122</sup> The issues of the ETC territory and basis of USF calculations, however, do not need to be resolved in this proceeding in order to decide whether to approve the tariff revision. The fact, however, that retaining the status quo removes the risks posed by these issues constitutes another argument in favor of rejecting the tariff revision.

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The final uncertainty in this case and another reason to reject this proposed tariff

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<sup>117</sup> See 47 C.F.R. 54.307(a).

<sup>118</sup> Exh. No. 61T 6: 4-8 (Shirley).

<sup>119</sup> Exh. No. 61T 6: 8-11 (Shirley).

<sup>120</sup> See Exh. No. 61T 7:2-5 (Shirley).

<sup>121</sup> Exh. No. 61T 7:2-8 (Shirley). The last time a new carrier replaced an incumbent, the FCC took more than



revision is that the telecommunications service infrastructure has yet to be completed, and the resort has yet to be fully developed. Although there is no evidence that the resort development will be unsuccessful or that the contract between ICS and Suncadia will be breached such that the resort will be left without telephone service, maintaining Inland's obligation to serve the resort area provides a fallback for future resort occupants in the event Suncadia's plans for telecommunication service do not come to fruition.<sup>123</sup> This provision for a fallback need not be perpetual; until, however, Inland faces some actual harm from carrying out its obligation to serve that cannot be addressed by a waiver, special tariff, or exception, it is not fair, just, reasonable, and in the public interest to remove the resort area from the Roslyn Exchange.

## VI. CONCLUSION

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The Commission should reject Inland's proposed tariff provision. Removal of the resort area from the Roslyn exchange might remove a risk that Inland would be forced to serve resort customers under terms unfavorable to Inland but would definitely deprive future resort occupants of their right to tariffed service. Depriving future ratepayers of this right is not justified by the speculative harms that Inland has presented. If one of these types of harm should actually materialize, there are alternatives, such as applying for a service waiver or filing a new extension of service tariff sheet, that can address these issues without removing the right to tariffed service from future occupants of the resort. Furthermore, approval of Inland's proposed tariff would frustrate the stated policies of the Legislature to foster diversity in the supply of telecommunications services and ensure affordable

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three years to determine it would treat the new carrier as an incumbent—and this was in an existing exchange.

<sup>122</sup> None of these consequences is intended in this proceeding.

<sup>123</sup> See Exh. No. 61T 8: 2 – 14: 17 (Shirley) (discussion of failed developments and the problem of providing

telecommunications service for all. For the reasons explored above, Inland cannot meet its burden of showing that modifying the boundary of the Roslyn Exchange to exclude the Suncadia resort would be fair, just, reasonable, and in the public interest. Consequently, the Commission should reject the tariff revision and preserve the right to tariffed service throughout the Suncadia resort.

Respectfully submitted:

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telephone service to their residents); Exh. No. 51TC 14: 8-12 (Reynolds).