

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

INLAND TELEPHONE COMPANY,

Respondent.

DOCKET NO. UT-050606

REPLY BRIEF OF  
COMMISSION STAFF

1           The Staff of the Washington Utilities and Transportation Commission (Staff)  
submits this reply in the matter referenced above.

**I. INTRODUCTION**

2           Staff, Public Counsel, and Intelligent Community Services (ICS) all filed initial  
briefs opposing Inland's proposed tariff revision. With respect to the issues of the public  
interest and the alleged harm to Inland of maintaining the status quo, Staff concurs in the  
arguments made by Public Counsel and ICS.

3           Neither the evidence nor the arguments advanced by Inland in its initial brief has  
demonstrated that removing the Suncadia resort area from the Roslyn Exchange would be  
fair, just, reasonable, and in the public interest. The evidence shows that the interests of  
consumers, stakeholders other than Inland, and the public in maintaining the status quo far  
outweigh any of the speculative harms described by Inland. Moreover, Inland's discussion  
of these harms does little to add to our understanding of the issues because it is predicated on  
the notion that Inland cannot provide service to the resort unless Suncadia grants Inland an  
easement over resort rights of way.

4 First, this reply addresses the burdens that Inland speculates it will have to bear if the tariff revision is not approved. Then, this reply argues that Inland has failed to carry its burden in this docket of showing that removing Inland's obligation to serve in the resort area is in the interests of consumers, other stakeholders, and the public. Finally, based on these arguments, Staff concludes that the Commission should reject the tariff revision proposed by Inland.

## II. ARGUMENT

5 The standard of "fair, just, reasonable, and in the public interest" is the law of the case,<sup>1</sup> and therefore the Commission must apply this standard to decide whether to remove the Suncadia resort from the Roslyn Exchange. To decide whether a filing is fair, just, reasonable, and in the public interest, the Commission looks at whether the company's "obligation to serve impose[s] a severe and unique economic burden" on the company<sup>2</sup> and considers the "welfare of present and future consumers, stakeholders, and the general public."<sup>3</sup>

**A. Inland's obligation to serve does not impose a severe and unique economic burden on Inland such that granting the tariff revision would be fair, just, and reasonable.**

6 Along with proving that removing the resort from the Roslyn Exchange would adhere to the public interest, Inland must demonstrate that its obligation to serve "impose[s] a severe and unique economic burden"<sup>4</sup> on the company. As discussed below, Inland's contentions that it must keep plant on hand to meet its service obligations, that Suncadia

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<sup>1</sup> Docket No. UT-050606, Order No. 5, Order Denying Motion for Summary Determination at ¶19.

<sup>2</sup> *WUTC v. US West*, Docket No. UT-961638, Fourth Supplemental Order Rejecting Tariff Filing, January 16, 1998, at page 20.

<sup>3</sup> See *Washington Indep. Tel. Ass'n v. WUTC*, 149 Wn.2d 17, 28-29 (2003).

<sup>4</sup> See *WUTC v. US West*, Docket No. UT-961638, Fourth Supplemental Order Rejecting Tariff Filing at page 20.

must grant Inland easements in order for Inland to meet its service obligations, and that it has “carrier of last resort” obligations do not constitute severe and unique or even actual burdens.

**1. Inland provides no authority that it must keep plant on hand and no evidence that such a requirement would constitute a severe and unique economic burden.**

7 Inland argues that its obligation to serve burdens the company with maintaining a physical inventory of supplies in order to be ready to serve on short notice Suncadia resort customers,<sup>5</sup> but there are two problems with this argument. First, Inland has failed to cite any authority to support its proposition that “[u]nder the view of Commission Staff and Public Counsel, Inland would be required to be ready to serve the Suncadia Resort on short notice.”<sup>6</sup> Second, it is not clear from the evidence whether or to what extent Inland would need to maintain any equipment on hand to serve on short notice the resort over Suncadia’s/ICS’ lines.

8 As to the first issue, Inland never explains its assumption that it must be ready to serve on short notice nor how specifically that would be a problem if Inland were serving over Suncadia/ICS lines. Inland attempts to argue that its obligation to serve is unfair because it is vague, by claiming that “Commission Staff was unable to identify a time period or inventory requirement that would allow Inland to satisfy the obligation.”<sup>7</sup> This supposed burden of vagueness is not unique, however, because the deadlines for providing service to new customers are the same for all telecommunications companies. When asked about the deadline in a data request, Staff properly objected to the request on the grounds that the

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<sup>5</sup> Opening Brief of Inland Telephone Company at page 6.

<sup>6</sup> *Id.* at page 6.

<sup>7</sup> *Id.* at page 6.

answer would entail a legal conclusion.<sup>8</sup> Under the rule covering “company performance standards for installation or activation of access lines,” WAC 480-120-105, Inland might be obligated to provide service within 5 days, 90 days, 180 days, or even some greater number of days if the Commission granted an exemption from the rule.<sup>9</sup> In short, a company’s obligation depends on the facts and circumstances.

9           Secondly, Inland itself has contributed to the vague nature of the obligation by failing to identify what its burden would be under the most likely conditions of providing future service to the resort: that is, providing telephone service over Suncadia/ICS lines to a customer that has an existing telephone connection. Inland points out that it provided detailed costs of serving one customer in the resort area,<sup>10</sup> but this cost narrative was completed well before the contract for telecommunications service to the resort between ICS and Suncadia was signed, and it does not address the costs of serving over Suncadia/ICS lines.<sup>11</sup> On cross examination, Inland’s witness could not or would say how its plant investment to serve future resort customers would be different now that ICS has contracted with Suncadia to provide service to the resort.<sup>12</sup> Similarly, Inland could not or would not provide any meaningful answers concerning Inland’s plant investment requirements if it were to provide service over Suncadia/ICS lines to future resort customers,<sup>13</sup> so it is unknown what Inland’s burden would be. If Inland does not know what plant it would need to serve Suncadia under the most likely scenario of providing service over Suncadia/ICS

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<sup>8</sup> Exh. No. 59.

<sup>9</sup> See WAC 480-120-105 (1) and (3).

<sup>10</sup> Opening Brief of Inland Telephone Company at page 12.

<sup>11</sup> See Exh. No. 7 (Staff DR No. 12).

<sup>12</sup> TR 42: 1 – 46: 10 (Coonan). Note that although Mr. Coonan testified on page 45 at lines 15 to 17 that he had not seen the Suncadia-ICS contract, Inland’s counsel was aware of its existence and had received a copy before the hearing.

<sup>13</sup> “There would be some sort of plant necessary to interconnect. What that is, I couldn’t tell you.” TR 89: 22 – 90: 11 (Coonan).

lines, how can Inland argue that maintaining plant on hand is a burden? Because Inland has not taken the trouble to explain its burden in relation to connecting to customers over the Suncadia/ICS network, any argument that Inland's obligation to serve would constitute a severe or an unreasonable burden on Inland—or on its existing customers—is speculative at best.

**2. Inland has not shown that lack of access to the resort via easement is a severe burden on Inland.**

10 Inland's arguments in its opening brief seem to ignore the evidence that any service provided by Inland to future resort customers likely would be over Suncadia/ICS lines. Consequently, Inland's argument that its lack of physical access over easements justifies removing the resort territory from the Roslyn Exchange<sup>14</sup> inadequately explains its burdens under the status quo.

11 [REDACTED]

<sup>14</sup> See, e.g., Opening Brief of Inland Telephone Company at page 6 ("Since there is no physical way in which Inland can provide service, Inland's tariff filing should be approved").

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

<sup>16</sup> TR 137: 6-14 (Eisenberg).

<sup>17</sup> TR 136: 9-23 and 137: 8 – 138: 4 (Eisenberg).

<sup>18</sup> TR 162: 2-8 (Eisenberg).

Because Suncadia is willing to allow Inland access to future resort customers over Suncadia/ICS lines on terms agreeable to Suncadia, ICS, and Inland,<sup>20</sup> Inland does not need to access resort customers via an easement in order to fulfill its obligation to serve.

12 Inland's discussion of the burden it would bear if it were obligated to serve future resort customers, however, hardly addresses the scenario of providing service over Suncadia/ICS lines. The only burden that Inland explicitly discusses in connection with providing service over Suncadia/ICS lines involves Inland's concerns about "improper revenue sharing,"<sup>21</sup> which is addressed later in this brief. Aside from discussing speculative impediments to negotiating an access deal with Suncadia and ICS,<sup>22</sup> Inland does not demonstrate that it could not meet its service obligations by connecting to resort customers over Suncadia/ICS lines. Instead, Inland builds its argument on the assumption that without physical access to customers, Inland cannot serve the resort. Yet, Inland has admitted that it could serve over Suncadia/ICS lines through a lease or other arrangement.<sup>23</sup>

13 Inland's steadfast insistence that access to future resort customers occur on Inland's terms has proved unrealistic and fails to support the proposition that Inland cannot meet its obligation to serve under the status quo. While it is clear from Inland's testimony and argument that Inland would like to have a long-term easement as a prerequisite to serving the

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<sup>19</sup> "What we anticipated is that any third-party providers or any agreement that might be reached if Inland wanted to provide service ... would be done by going through ICS equipment and through that head-end." TR 164: 22 – 165: 4 (Eisenberg).

<sup>20</sup> TR 173: 6-14 (Eisenberg).

<sup>21</sup> See Opening Brief of Inland Telephone Company at pages 7-8.

<sup>22</sup> *Id.* at pages 7-8.

<sup>23</sup> TR 47: 7-18 (Coonan). Note that Inland's conclusion on page 12 of its opening brief that it is "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" is not supported by the evidence, given that both Inland's and Suncadia's witnesses testified on cross-examination that it would be agreeable to Suncadia and possible under terms acceptable to Inland, Suncadia, and ICS for Inland to provide service over Suncadia/ICS lines.

resort, the evidence indicates that Inland can serve—and, indeed, most likely would serve—without such an easement. Even if Inland could not provide service to future resort customers without easements through the resort granted by Suncadia, Inland would not be harmed because Commission regulation releases a carrier from its obligation to serve if the prospective customer cannot provide an easement over private land.<sup>24</sup> Although Inland seems to suggest that Inland, Suncadia and ICS might fail to agree to access terms,<sup>25</sup> this argument is speculative as Inland has not negotiated with ICS for access.<sup>26</sup> In short, the “burdens” discussed by Inland are speculative and can be addressed, if and when they materialize, by means other than removing the resort from the territory that Inland is obligated to serve. Because Inland potentially may access future resort customers over Suncadia/ICS lines and cannot show that Suncadia’s refusal to grant Inland an easement will prevent it from fulfilling its obligation to serve, Inland cannot show that lack of physical access represents a severe burden for Inland.

**3. Inland’s status as an ILEC does not make its obligation to serve uniquely burdensome.**

14 Inland provides no authority for its repeated contention that it has “carrier of last resort” obligations.<sup>27</sup> The term “carrier of last resort” does not appear in statutes or regulations enforced by the Commission. Although Inland’s witness explained his understanding of the term,<sup>28</sup> Inland’s opening brief does not define or cite authority for the “carrier of last resort” obligation. Regardless of the term used by Inland, Inland is obligated like all other telecommunications carriers operating in Washington, to furnish service in its

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<sup>24</sup> See WAC 480-120-061(1)(h).

<sup>25</sup> See Opening Brief of Inland Telephone Company at pages 7-8.

<sup>26</sup> See TR 48: 7-11 (Coonan).

<sup>27</sup> See, e.g., Opening Brief of Inland Telephone Company at page 4.

<sup>28</sup> TR 59: 1-15 (Coonan).

service area as mandated by RCW 80.36.090.<sup>29</sup> These obligations apply to all ILECs and competitive LECs and do not impose requirements on Inland that are unique.<sup>30</sup>

**B. Inland has not shown that removing the resort area is fair, just, reasonable, and in the public interest with respect to consumers and to stakeholders other than Inland.**

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Inland cannot demonstrate that its proposed tariff revision is in the interests of Inland's existing customers, future resort customers, or the general public. First, Staff exposes the speculative nature of Inland's claims that its obligation to serve burdens its existing customers. Next Staff contends that the designation of wireless carriers as ETCs for territory including the resort does not justify modifying the Roslyn Exchange. Then Staff demonstrates that Inland has not shown that relieving Inland of its obligation to serve in the resort area is fair to future consumers. Finally, Staff argues that the proposed tariff revision does not promote the policy declaration enacted by the Legislature regarding telecommunications services.

**1. Revenue sharing does not mean actual higher rates for Inland's existing customers even though it might mean a smaller profit margin for Inland.**

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Inland has not shown that paying Suncadia for access to future resort customers (or "revenue sharing") would be unfair or unreasonable to consumers, other stakeholders, or to Inland. In its opening brief, Inland argues that any service Inland provided through ICS lines would "undoubtedly [include] a requirement to share revenue, including, presumably, revenue from regulated services."<sup>31</sup> Inland continues, "Inland's opinion is that such a

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<sup>29</sup> The requirement of RCW 80.36.090 to furnish service to all those reasonably entitled applies to all telecommunications carriers.

<sup>30</sup> *WUTC v. US West*, Docket No. UT-961638, Fourth Supplemental Order Rejecting Tariff Filing, January 16, 1998, at page 26 ("RCW 80.36.090 applies equally to all teleco9mmunications companies offering to provide basic local exchange telecommunications service.").

<sup>31</sup> Opening Brief of Inland Telephone Company at page 8.



sharing is improper” and explains how it would unfairly burden Inland’s existing customers and enrich Suncadia.<sup>32</sup>

17 Inland’s argument that revenue sharing would result in effectively higher rates for its existing customers<sup>33</sup> is misleading because all customers would pay the same actual rate.<sup>34</sup> Inland, however, might experience actual lower profits from the resort service revenue. Furthermore, the argument that Suncadia indirectly might receive federal USF revenues through revenue sharing with Inland<sup>35</sup> confuses how revenue sharing might be calculated with the source of the payment. Inland might decide to allocate its USF revenue to an access payment or it might allocate funds from another revenue stream. Finally, given that Suncadia’s witness testified that Suncadia would seek revenue sharing with Inland only “to the extent that it’s allowed under law,”<sup>36</sup> there is no indication that there would be any improper revenue sharing.<sup>37</sup> Because Inland has not shown that revenue sharing would be unfair or illegal, it would not impede Inland from entering into an agreement with ICS to provide service over Suncadia/ICS lines.

**2. The fact that there are three wireless ETCs designated for the Roslyn Exchange does not support removing the Suncadia resort from the Roslyn Exchange.**

18 Inland appears to argue that Inland should be allowed to withdraw from its obligation

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<sup>32</sup> Opening Brief of Inland Telephone Company at page 8.

<sup>33</sup> Inland explains, “i.e., the stated tariff rate less rebate in the Suncadia Resort area versus stated rate outside the Suncadia Resort area.” Opening Brief of Inland Telephone Company at 8.

<sup>34</sup> Unless, of course, Inland were to propose and the Commission were to approve a special tariff for customers in the resort area. A separate tariff would be another way to address the cost of service in the resort.

<sup>35</sup> See Opening Brief of Inland Telephone Company at page 8.

<sup>36</sup> TR 191: 25 – 192: 8 (Eisenberg).

<sup>37</sup> In its opening brief, at page 2, Inland cites RCW 80.36.170 and -180 to support of its contention that “the sharing of revenue from regulated services is not appropriate.” These statutes prohibit a carrier from engaging in rate discrimination by charging different prices to different end-use customers or by charging the same price to two end-use customers and then rebating a portion of the amount paid to one of the customers. Inland cites no authority for its proposition and Staff is not aware of any Washington court holding that a master planned resort is prohibited from charging a telecommunications carrier for access to resort residents based on the amount of regulated revenue the carrier receives from the resort area.

to provide tariffed service to future resort customers because three wireless eligible telecommunications carriers (ETCs) are designated for the Roslyn Exchange.<sup>38</sup> First of all, the fact that these wireless carriers are ETCs for territory encompassing the resort has little bearing on the issue of the availability of tariffed service, except for the fact that they do not provide tariffed service. Not only has Inland failed to show that these wireless ETCs are replacements for tariffed service, they are not substitutes for wireline service.<sup>39</sup> Furthermore, although Inland cites to USAC reports in its opening brief for the proposition that “each of the three wireless ETC carriers have reported to USAC that they are serving many customers within Inland’s service area,” Inland itself reveals how little this tells us about wireless service within the Roslyn Exchange, let alone the resort area.<sup>40</sup> As the USAC reports cited by Inland have not been admitted into evidence, Staff will restrict its commentary to noting that Inland serves several, noncontiguous exchanges, and, as Inland disclosed, the USAC reports list the aggregate numbers of wireless customers per carrier for Inland’s service area as a whole.<sup>41</sup> In fact, the only evidence that there is actual wireless service in the resort comes from Mr. Eisenberg, who stated that Suncadia has service from Cingular.<sup>42</sup>

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Inland cannot demonstrate that because wireless carriers are designated as ETCs for the Roslyn Exchange that the wireless carriers will continue to be obligated to provide

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<sup>38</sup> Opening Brief of Inland Telephone Company at page 9.

<sup>39</sup> The FCC stated in its August 2003 Triennial Review Order that neither wireless nor cable is yet a substitute for wireline. Also, for the purpose of E-911 calls, wireless is not necessarily a reasonable alternative because of inconsistent signal coverage and problems associated with locating the caller.

<sup>40</sup> See Opening Brief of Inland Telephone Company at page 9, n. 38 (“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.”)

<sup>41</sup> See *id.* at page 9.

<sup>42</sup> TR 189: 7-13 (Eisenberg).

service to future resort customers.<sup>43</sup> Inland provides no authority that the federal statute on the provision of universal service contemplates, as Inland claims, that “an underlying incumbent local exchange carrier (ILEC) may withdraw from ETC obligations for a physical portion of its service area” and that “the previously designated area will remain in place for surviving ETCs.”<sup>44</sup> In fact, the statute cited by Inland does not mention ILECs.<sup>45</sup> The relevant portion of that statute provides as follows:

A State commission ... shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. [...] Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission...shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served... .

47 U.S.C. § 214(e)(4). The statute does not address the obligations of ILECs at all and does not state Inland’s contention that an ETC territory will remain the same even if removed from its exchange. Even if it is decided that an ETC retains its obligation to serve a territory that is removed from the exchange,<sup>46</sup> removal of the resort from the Roslyn Exchange still would deprive future resort customers of the availability of tariffed wireline service. Finally, the fact that other telecommunications companies may have service obligations in the resort area does not represent a *carte blanche* for a provider to withdraw from its obligations.

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<sup>43</sup> See Exh. No. 61T 4: 1-7 (Shirley).

<sup>44</sup> See Opening Brief of Inland Telephone Company at page 10.

<sup>45</sup> 47 U.S.C. § 214(e)(4). See Opening Brief of Inland Telephone Company at page 10.

<sup>46</sup> Note that no party has asked the Commission to decide this issue and that it would be best addressed in a separate proceeding that permitted all those interested to participate.

**3. Inland has not shown that the tariff revision would be fair to future resort customers.**

20 Inland's argument is silent about any benefits of the tariff revision to future resort customers. Similarly, Inland has not demonstrated that with respect to future resort customers the tariff revision would have a neutral effect. Inland maintains that because resort customers will not go without telecommunications service,<sup>47</sup> and because Inland believes it will not be able to provide service, removal of the resort area from the Roslyn Exchange would not change circumstances for future resort customers.<sup>48</sup> As addressed above, Inland's contention that it cannot provide service ignores the realities of accessing customers over the Suncadia/ICS network. Inland's argument that so long as resort customers have some service Inland should be relieved of its obligation to serve ignores the fact that its proposed tariff revision would deprive future customers of the right to tariffed service.

**4. Inland has failed to demonstrate that its proposed tariff revision would promote Washington's statutory policy objectives.**

21 Inland has not shown that the proposed tariff revision would promote the policies of maintaining and promoting the availability and diversity of telecommunications services in this state.<sup>49</sup> Inland's argument that it should not be obligated to serve because it will not be "able to provide service [to residential lot owners or other businesses within Suncadia for the foreseeable future]"<sup>50</sup> founders because even though Inland argues that it cannot provide additional service in the resort without easements, the evidence demonstrates that Inland

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<sup>47</sup> See Opening Brief of Inland Telephone Company at page 11 ("There are at least three wireless carriers currently serving the area. ICS will provide wireline service in the Suncadia Resort area.").

<sup>48</sup> See *id.* at page 11.

<sup>49</sup> See Exh. No. 51C 14: 13-19 (Reynolds); RCW 80.36.300.

<sup>50</sup> Opening Brief of Inland Telephone Company at page 11.

could serve future resort customers over Suncadia/ICS lines. Likewise, Inland's subsequent conclusion that approving its proposed tariff revision would not increase the "uncertainty about the availability and reliability of local telephone service"<sup>51</sup> is based on this same faulty premise. In fact, Inland could provide local telephone service (and other telecommunications services) over Suncadia/ICS lines; so if the resort area were removed from the Roslyn Exchange the availability of telephone service to future resort customers actually would decrease. Furthermore, if the tariff revision were approved, future resort customers would lose the availability of service from an ILEC in a territory that lacked effective competition, thereby losing diversity in the supply of communications services.<sup>52</sup> Finally, because the proposed tariff revision jeopardizes the revenue stream from universal service fund support now available to the wireless ETCs designated for areas including the resort, and thus potentially wireless service, the filing does not promote the policies of advancing and maintaining the availability of service or of increasing diversity in the supply of telecommunications services.

## VI. CONCLUSION

22 Inland's proposed tariff revision is not fair, just, reasonable, and in the public interest. 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 unfairly deprive future resort occupants of their right to tariffed service. Similarly, it is unreasonable to relieve a telecommunications company of its obligation to provide tariffed service, especially given that ownership of land can change, simply because a developer such

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<sup>51</sup> See *id.* at page 11

<sup>52</sup> Potentially affecting also the policy of preserving affordable universal telecommunications services as set out in RCW 80.36.300(1).

as Suncadia denies access to a development on the terms a telecommunications company wants. Although Inland apparently would prefer to access resort customers over long-term easements, the evidence establishes that Inland will be able to access resort customers over a future network operated by ICS pursuant to a lease or other agreement with ICS and without physical access via easement. Because Inland fails to address this reality adequately, Inland's arguments are insufficient to justify depriving future resort customers of the right to tariffed telephone service. Furthermore, Inland has not shown that, with respect to other stakeholders, consumers, and the general public, removing the resort area from the Roslyn Exchange would be fair, just, reasonable, and in the public interest. As a consequence of Inland's failure to carry its burden of proof, the Commission should reject Inland's proposed tariff revision.

DATED this 21<sup>st</sup> day of June, 2006.

Respectfully submitted,

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