

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 INLAND
TELEPHONE COMPANY

Inland Telephone Company ("Inland") respectfully submits its Reply Brief in this docket.

INTRODUCTION:
ISSUES ADDRESSED

1 This Reply Brief will first discuss the central premise in this case, which is the obligation to serve. Then Inland will address public policy issues relating to statutory policy principles as raised by Commission Staff and the theory of benefits of a "de facto monopoly" as raised by Public Counsel. The third section of this Brief will discuss public policy issues related to universal service funding.

2 The fourth section of this Brief will discuss specific issues raised in the various opening briefs. The first subsection in this fourth section will discuss specific issues raised by Commission Staff. The second subsection will discuss issues in Public Counsel's Opening Brief. The third subsection will discuss items raised by ICS' Opening Brief.

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3 The last section of this Reply Brief will demonstrate how Inland has met its burden
of proof in this docket and why the tariff filing should be allowed to take effect.

I. PUTTING THE OBLIGATION TO SERVE IN CONTEXT

4 Each party has discussed the meaning of the obligation to serve contained in RCW
80.36.090. The context in which the statute is being applied in this docket is as follows:
what is the obligation to serve as it applies to a privately owned master planned
community with no public rights-of-way and where the owner of the private resort desires
to control virtually every aspect of the development of the resort, including the manner
and method for providing telecommunications services. As the record demonstrates, this
is an upscale resort where the aesthetics and amenities of the resort play heavily into its
future.¹ What is the obligation to serve placed on a telecommunications company related
to such a privately owned, upscale resort?

5 There is a surprising degree of agreement on the answer to this question. Each of
the parties opposing Inland's tariff filing come to the same conclusion about Inland's
obligation to serve the Suncadia resort: INLAND HAS NO AFFIRMATIVE DUTY TO
OBTAIN ACCESS TO THE RESORT AREA TO PROVIDE
TELECOMMUNICATIONS SERVICE.

6 Commission Staff points out that if a customer desired Inland's service, it would
be up to the customer to obtain an easement to allow Inland to provide service.² ICS

¹ Suncadia's witness, Mr. Eisenberg, testified as to the importance of such aesthetics and amenities. Exhibit 31T, p. 3, l. 24-25, TR 172, l. 17 – TR 173, l. 1.

² Exhibit 51TC, p. 8, l. 4-7.

agrees.³ Public Counsel suggest a waiver under the line extension rule may be sought.⁴

7 Given this context, why is Inland required to maintain a theoretical obligation to serve the upscale Suncadia Resort by including that area within its tariffed service area? The answer cannot be “Just because.” The answer should not be to require Inland to serve as “a fall back for future resort occupants.”⁵ The answer cannot be to allow ICS to have universal service fund support, based upon Inland’s cost of serving more rural areas, in order to subsidize ICS’ service to the more densely developed, upscale resort area.⁶

8 In addition to the foregoing, everyone agrees that ICS is now present as a wireline provider of telecommunications service providing telecommunications service to the Suncadia Resort area. What no party has addressed is why ICS does not have the obligation under RCW 80.36.090 to provide service in the same manner that Inland would have that obligation, assuming Inland had access to the resort area. RCW 80.36.090 applies to “every telecommunications company operating in this state....” ICS was not granted a specific waiver of RCW 80.36.090 by the Commission when ICS was granted competitive status.⁷ Further, under WAC 480-121-063, the requirements of RCW 80.36.090 are not waived for competitive carriers. The obligation applies to ICS.⁸

9 Even if the statutory obligation to serve did not exist for ICS, the Commission has

³ ICS Opening Brief at ¶8: “Commission rules permit a carrier to refuse to provide service to a customer if the carrier cannot reasonably access that customer.”

⁴ Public Counsel Opening Brief at ¶54-59.

⁵ Commission Staff Initial Brief at ¶40.

⁶ A service where ICS does not even own the conduits, fiber or switch. TR 184, l. 23 – TR 185, l. 6 (as to the switch). As noted in the Opening Brief, much of the discussion of the fiber and conduit is under the confidential portion of the transcript. However, it has been confirmed that the fact of Suncadia’s ownership of the fiber and conduit is not confidential.

⁷ A copy of the letter granting ICS registration is attached as Appendix A.

⁸ Thus, Staff’s assertion to the contrary is incorrect. See, Commission Staff Initial Brief at ¶28. See, also, Public Counsel Opening Brief at ¶51.

the authority to make it abundantly clear that the obligation applies to ICS. The Commission can remove ICS' designation as a competitive company. As provided in RCW 80.36.320: "The commission may... reclassify any competitive telecommunications company if... the reclassification would protect the public interest." This makes more sense as a solution if having a tariffed service available is a desired end result. Maintaining Inland's tariff as a hypothetical benefit to customers residing in the Suncadia Resort area defies logic: there is no benefit from Inland's tariff for those customers. If the Commission is concerned about protecting the Suncadia Resort area customers, then it can compel the only company with access to the Suncadia Resort area -- ICS -- to file a tariff and provide service under tariff.

10 Initially, Commission Staff postulated that customers residing within the Suncadia Resort area might be able to sue Suncadia to have access to Inland's services at tariffed rates.⁹ However, Commission Staff could not articulate any legal theory that would apply.¹⁰ There is good reason why Commission Staff could not articulate a legal theory to support its assertion. No such legal theory exists. There is no basis upon which a customer could sue Suncadia to have access to Inland's service.

11 In this context, Inland does not have an obligation to serve the Suncadia Resort area in a practical or physical way. The obligation is hypothetical at best. Thus, there is no good reason why Inland's tariff filing should not be allowed to take effect.

⁹ Exhibit 51TC at p. 18, l. 4-10.

¹⁰ Exhibits 57 and 58.

II. REQUIRING INLAND TO CONTINUE TO HAVE THE THEORETICAL OR HYPOTHETICAL OBLIGATION TO SERVE THE SUNCADIA RESORT AREA DOES NOTHING TO ADVANCE PUBLIC POLICY ISSUES

1. The Public interest is not advanced by requiring Inland to maintain the Suncadia Resort area within its tariffed service area.

12 Commission Staff directs attention to the statutory telecommunications policies contained in RCW 80.36.300. Commission Staff states that “The public interest is informed in large part by the telecommunications policy statute.”¹¹ Commission Staff notes that the concept of public interest is a broad concept, citing Washington Indep. Tel. Ass’n v. WUTC, 149 Wn.2d 17 (2003).¹² Commission Staff is correct that a public interest test is construed *in pari materia* with the statutes commanding that decisions be made in the public interest.

13 Given the context of this case, it is interesting to see to what extent the public policies set forth in statute are either fulfilled or not fulfilled by the proposed tariff change. Each subsection of RCW 80.36.300 will be considered in turn, with the exception of RCW 80.36.300(1) concerning universal service policies, which will be discussed in the universal service section below (Section III).

a. RCW 80.36.300(2):

14 One statutory policy is to maintain and advance the efficiency and availability of telecommunications service. Commission Staff argues that Inland’s proposed tariff revision “might well decrease the availability of telecommunications service” by removing “the option of Inland’s service to the resort.”¹³ Commission Staff is mistaken. There are

¹¹ Commission Staff Initial Brief at ¶22.

¹² Ibid.

¹³ Commission Staff Initial Brief at ¶23.

no telecommunications services that will be provided by Inland to the residents of the Suncadia Resort. Inland does not have an affirmative duty to obtain access to the Suncadia Resort. The residents in the upscale Suncadia Resort have no realistic or legal basis of forcing Suncadia to allow them to use Inland's service. Inland's tariff filing has no effect one way or the other on the availability of telecommunications service in the Suncadia Resort.

b. RCW 80.36.300(3):

15 This statutory policy is that consumers pay only reasonable charges for telecommunications service. Commission Staff argues that if Inland's tariffed services are not available to residents of the Suncadia Resort area, this policy is thwarted.¹⁴ However, since those tariffed services are not available to the residents of Suncadia Resort area even if the Suncadia Resort area remains in Inland's filed service area, Commission Staff is mistaken. Inland's tariffed services are not available to the residents of the Suncadia Resort area.¹⁵ Inland has no access to the Suncadia Resort area today. Inland is not required to obtain access. The residents have no legal basis for forcing Suncadia to allow them access to Inland's services. There is nothing about Inland's tariff filing that is detrimental to the policies established under RCW 80.36.300(3).

¹⁴ Commission Staff Initial Brief at ¶23.

¹⁵ As pointed out earlier, if it is the existence of a tariff that will protect the public, then the Commission has the authority to compel ICS to provide service by tariff. That makes more sense and has a better outcome for the Suncadia Resort area customers than requiring Inland to maintain a hypothetical responsibility.

c. RCW 80.36.300(4):

17 The policy contained in this section of the statute are that non-competitive services should not subsidize the competitive ventures of regulated companies. Commission Staff agrees that Inland's tariff filing does not raise this issue.¹⁷

d. RCW 80.36.300(5):

18 This statutory policy is to promote the diversity and supply of telecommunications services and products and telecommunication markets throughout the state. Commission Staff essentially argues that Inland's tariff filing would have an adverse effect on this policy objective.¹⁸ Commission Staff also advances the proposition that Inland's tariff filing would mean that consumers at the resort will not experience the benefits of competition.¹⁹ However, there is no competition in the Suncadia Resort area. There is no actual reduction in the diversity of supply of telecommunications services and products by Inland's tariff filing.

19 Commission Staff also argues that the public interest is served in an important way by the availability of tariffed rates and services to future customers residing in the Suncadia Resort area.²⁰ This argument makes no sense. Inland's tariffed rates and services are not available to residents in the Suncadia Resort area. Commission Staff and

¹⁶ TR 155, l. 22 - TR 157, l. 12.

¹⁷ Commission Staff Initial Brief at ¶24.

¹⁸ Commission Staff Initial Brief at ¶27.

¹⁹ Ibid.

²⁰ Commission Staff Initial Brief at ¶29.

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the other opposing parties agree that Inland has no affirmative duty to obtain access over the private roads and private facilities owned by Suncadia. The customers have no legal way to force Suncadia to allow them to obtain the tariffed rates and services offered by Inland. Inland's tariff filing has no adverse effect on the policies set out in RCW 80.36.300(5).

20 In summary, Inland's tariff filing does not have any adverse effect on the public interest. There is nothing about this tariff filing that will violate any of the policies set forth in RCW 80.36.300.²¹

2. The Commission Policies Related to Relinquishment of the Obligation to Serve for a "de facto monopoly" Advanced by Public Counsel do not Apply in this Case.

21 Public Counsel advances the argument that the Commission has established certain standards to determine when relinquishment of the obligation to serve can be met, citing to the Commission's decision in Docket No. UT-961638. This discussion is premised around the concept that there is a "de facto monopoly" that bestows substantial benefits and responsibilities to the company.²² An analysis of each of those benefits of a de facto monopoly cited by Public Counsel demonstrates that those "benefits" are not applicable in this case.

22 Public Counsel cites to five benefits of a de facto monopoly described by the Commission in UT-961638.

23 The first of these is a "near-ubiquitous already deployed network infrastructure."

²¹ The foregoing discussion did not talk about the policy of RCW 80.36.300(6) dealing with flexible regulation of competitive services in companies. However, on its face, that policy is not at issue in this docket.

²² Public Counsel Opening Brief at ¶35 and ¶36.

The Suncadia Resort covers six thousand acres and has twenty-eight hundred residential lots. Inland has absolutely no facilities to those residential lots and virtually no facilities within the scope of the six thousand acres.²³ There is no such thing as Inland having a “near-ubiquitous already deployed network infrastructure” for the Suncadia Resort. This supposed benefit does not exist within the Suncadia Resort area.

24 The second described benefit is “established relationships with nearly one hundred percent of existing residential and business customers.” Inland has no business relationship other than with the resort itself. Inland does not have established relationships with the customers that will be living and working within the Suncadia Resort area.²⁴ This benefit does not exist.

25 The third described benefit advanced by Public Counsel is “brand name recognition acquired through ratepayer-funded advertising and communications programs aimed at customers of monopoly services.” While there may be some minimal brand name recognition, in most cases customers moving to the Suncadia Resort are from other areas (like Seattle or Bellevue) and will not have heard of Inland Telephone Company. The only brand name recognition is likely to be negative when the customers are told that Inland is supposed to provide service to the Suncadia Resort area but does not.²⁵ This benefit is illusory.

26 The fourth theoretical benefit to Inland is that there are “positive network externalities due to broad coverage.” If there is virtually no coverage by Inland’s

²³ One 100 pair cable to the Discovery Center is not a “near-ubiquitous” network to serve 4,000 access lines.

²⁴ Whatever hypothetical relationship might have existed has been tarnished by Suncadia’s improper criticism of Inland’s ability to provide service as evidenced by the discussion in Section IV.2.k., below.

²⁵ Ibid.

facilities within the Suncadia Resort area, there can be no positive network externalities. This theoretical benefit does not exist.

27 The fifth benefit advanced by Public Counsel is “protection against significant adverse financial results under rate-of-return regulation, and the opportunity, obtained both through its monopoly and ongoing regulatory protection, to fully recover its investment in all network resources.” It is true that Inland is a rate-of-return regulated company. However, this principle does not have any meaning in the context of the Suncadia Resort area as a privately-controlled, upscale resort where Inland has no access to provide service through its own facilities. There are no facilities. Thus, there is no return to earn on the non-existent facilities.

28 As an aside, Inland will also note that the Commission’s discussion in the context of Docket No. UT-961638 has far less meaning in the telecommunications environment of 2006. Inland faces competition from many wireless service providers, three of which have been designated as ETCs for the Roslyn exchange. Inland sees bypass of its services by VoIP providers. On the national level, the entire intercarrier compensation mechanism is up for discussion. The extent to which there will be full recovery of network resources in 2006 and beyond is very much in doubt.

29 The point that Inland is making is that if these benefits that the Commission described in Docket No. UT-961638, and relied upon by Public Counsel in this proceeding, do not exist in the Suncadia Resort area, then Public Counsel’s argument that

there is the corresponding obligation to serve customers in the Suncadia Resort area loses its basis.²⁶

30

In addition, Public Counsel's argument ignores the reality, as evidenced in this record, that it is ICS that is the de facto monopoly in the Suncadia Resort area, not Inland Telephone Company. Commission Staff comes close to admitting as much when it states "Without the presence of any other local wireline service providers, ICS will be in the position of a monopoly firm."²⁷ Both Public Counsel and Commission Staff seem to be of the mind that if Inland has a theoretical presence because the Suncadia Resort area is in the Inland service area, there will be competitive services and market forces at work. However, that cannot be the case. Suncadia owns the conduit, fiber and switch.²⁸ Suncadia actually controls the market. Suncadia has made it clear on the record that any telecommunications provider that desires to enter the market to provide services in the Suncadia Resort area must

That is not competition. That is, in

fact, a de facto monopoly for ICS.

III. INLAND'S TARIFF FILING IS CONSISTENT WITH UNIVERSAL SERVICE CONCERNS BY LIMITING ARBITRAGE OF UNIVERSAL SERVICE FUNDS BY ICS

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ICS has made it clear that its interest in trying to force Inland to retain the Suncadia Resort area within Inland's service territory is so ICS can draw universal service

²⁶ Public Counsel's arguments appear at ¶37 of its Opening Brief.

²⁷ Commission Staff Opening Brief at ¶27.

²⁸ See footnote 6, above.

²⁹ TR 161, l. 18 - TR 162, l. 16.

³⁰ TR 155, l. 22 - TR 157, l. 12.

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funds.³¹ Suncadia owns the conduit, fiber and switch, not ICS. Suncadia and ICS control access to the provision of telecommunications service within the Suncadia Resort area. Yet, ICS wants to be able to draw funds from the federal universal service fund, which is already criticized as being too large, based upon Inland's cost of service to a much less dense rural area than the Suncadia Resort area. The position advanced by ICS should be abhorrent to anyone concerned about the public policies concerning universal service.

32 Inland's filing to remove the Suncadia Resort area from its tariff prevents such arbitrage of universal service funding. The prevention of arbitrage of USF resources is certainly consistent with the Commission's recent statements on universal service policy concerns. In particular, this is consistent with the recent discussion the Commission has had at its open meetings of May 17, 2006 and June 6, 2006.³²

33 Commission Staff argues that the universal service policies of RCW 80.36.300(1) are served by Inland being required to retain the Suncadia Resort area within its service area because doing so will provide an incentive for competitive entry if universal service funding is available.³³ Thus, Commission Staff falls into the trap of arguing that universal service funding should be available to promote competition. As the Federal Communications Commission has stated, promotion of competition in and of itself is not a sufficient reason for making universal service funds available.³⁴ Further, as a practical

³¹ Opening Brief of ICS at ¶14.

³² Tapes of the open meeting are available through the Commission's Record Center. Inland asks that the Commission take official notice of that discussion. Technically, the June 6 meeting was a continuation of the May 17, 2006 meeting.

³³ Commission Staff Opening Brief at ¶27.

³⁴ In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Report and Order, FCC 05-46 (Released March 13, 2005) at ¶44 sub (1) ("ETC Order").

matter, as explained above, there will be no competition. Inland is not operating in the Suncadia Resort area and ICS has a de facto monopoly.

IV. RESPONSE TO SPECIFIC ISSUES RAISED IN THE OPENING BRIEFS

1. Response to Specific Issues Raised by Commission Staff.

34 In this portion of the Reply Brief, Inland will respond to selected matters that are raised by Commission Staff that may need either technical correction or a brief response. It should be noted that Commission Staff's discussion of the burden of proof will be discussed in the next main section of this Reply Brief (Section V).

a. Commission Staff's Argument That Inland's Tariff Filing Would Provide Future Customers in the Suncadia Resort Area with "Less Choice" is Mistaken.

35 In its Opening Brief, Commission Staff argues that allowing 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."³⁵ The residents within the Suncadia Resort area have no choice today. Inland's services are not available to those customers. Inland's tariffed rates are not available to those customers. There is not one thing about Inland's tariff filing that would create "less choice."

b. Commission Staff's Argument That There Would be no Subsidy of Inland's Service Within the Suncadia Resort Area by Other Inland Customers is Mistaken.

36 Commission Staff argues that there is no evidence that Inland's customers outside of the Suncadia Resort area would subsidize service inside the Suncadia Resort area if

³⁵ Commission Staff Initial Brief at ¶19 (this is the second ¶19 beginning at the bottom of page 10 of Staff's Brief).

Inland were to offer such service.³⁶ Commission Staff is mistaken.

However, it was because there was a requested sharing of regulated revenue that brought this whole docket about in the first place.³⁹

c. Statements Made in a HUD Disclosure Statement by a Third Party Are Not Binding on Inland.

37 Commission Staff argues that it would not be fair to remove the Suncadia Resort area on the theory that five hundred purchasers bought their lots at a time when the HUD disclosure statement included a statement that Inland would be the provider of telecommunications service. That is a matter between those purchasers and Suncadia. How can Suncadia's statements that Suncadia makes in Suncadia's HUD disclosure statement be binding on Inland Telephone Company? There is no possible legal principle that exists that a telecommunications company's obligation to serve is created by third party representations and statements. And, physically, Inland's service is not available

³⁶ Commission Staff Initial Brief at ¶25.

³⁷ TR 161, l. 18 - TR 165, l. 4; TR 191, l. 25 - TR 192, l. 19.

³⁸ Ibid.

³⁹ Exhibit 1T, p. 3, l. 1 - p. 4, l. 11.

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anyway. What “unfairness” is cured by keeping the Suncadia Resort area in the tariff map?

- d. Commission Staff is Mistaken When it Asserts that Customers within the Suncadia Resort Area Have a Right to Tariffed Service.

38

In its Opening Brief, the Commission Staff makes the following statement: “It is not fair to future customers 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.”⁴⁰ The tariff may exist as a theoretical construct for residents of the Suncadia Resort area. However, Commission Staff could not articulate any legal theory on which those customers could enforce their right. All parties agree that Inland has no obligation to obtain access to the customers. Where is the right in a real or tangible way that those customers would lose? As pointed out earlier, if the concern is having an entity provide service by tariff, the logical conclusion would be to compel ICS to provide service under tariff since it is the entity that has access to the customers.

- e. Inland Has no Reasonable Access to the Suncadia Resort Area.

39

Both Public Counsel and Commission Staff appear to argue that the question over the need for an easement is now moot.⁴¹ It is unquestioned that Inland was not able to obtain an easement on reasonable terms and conditions before Suncadia entered into an agreement with ICS. Further, it is unquestioned, as testified by Mr. Eisenberg, that Suncadia will not grant Inland an easement now or in the future.⁴² However, both

⁴⁰ Commission Staff Initial Brief at ¶32.

⁴¹ Commission Staff Initial Brief at ¶33; Public Counsel Opening Brief at ¶39.

⁴² TR 172, 1. 9-12.

Commission Staff and Public Counsel argue that Inland can obtain access to customers within the Suncadia Resort area through the facilities of Suncadia and ICS.

40 It is true that Inland stated that it is willing to provide service to the Suncadia Resort area if it may reach those customers on reasonable terms and conditions. Suncadia indicated that it believed third party providers such as Inland could have access if there were reasonable terms and conditions. However, any negotiations and any access would have to be through ICS.⁴³

41 A question is how likely is it that Inland and Suncadia, with ICS now in the picture, could agree on what constitutes reasonable terms and conditions? In the real world, it just is not likely. Inland and Suncadia negotiated for over six years without success.⁴⁴ When those negotiations ended, Inland offered Suncadia the opportunity for further discussions on Inland accessing the Suncadia Resort customers.⁴⁵ Suncadia never got back in response to Inland's offer, a result that Commission Staff agrees occurred.⁴⁶

42 As stated by Mr. Eisenberg,

Further, any agreement would include a sharing of revenue.⁴⁸

Since it was revenue sharing that caused negotiations to fall apart in the first place, it is unlikely, as essentially admitted by Mr. Eisenberg, that the parties will agree on what constitutes a reasonable set of terms and conditions.⁴⁹

⁴³ TR 173, l. 2-14.

⁴⁴ Exhibit 1T, p. 3, l. 1-7.

⁴⁵ Exhibit 33, p. 1, last paragraph, and p. 2.

⁴⁶ Commission Staff Initial Brief at ¶10. Note that Commission Staff has a typographical error, referring to Exhibit 33 as dated in 2003. It was prepared in 2005.

⁴⁷ TR 155, l. 22 - 157, l. 12.

⁴⁸ TR 191, l. 25 - TR 192, l. 12.

⁴⁹ TR 191, l. 12-24.

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Further, Mr. Coonan testified that an important aspect of providing service within the Suncadia Resort area would be for Inland to be able to access the facilities in order to make needed repairs. He described an instance involving the DeWatto exchange where that did not happen to underscore the importance of being able to have access for maintenance and repair purposes in the provision of service.⁵⁰ Based upon Mr. Eisenberg's description of the network within the Suncadia Resort area and the need to access that network only through ICS, it is highly unlikely that the repair and maintenance concern could be overcome. Inland would be left at the mercy of ICS as to the quality of service it would be provided. That is not an acceptable solution to carrier of last resort obligations.

In any event, all of this discussion has very little bearing on this tariff filing. Inland attempted to get access to the Suncadia Resort area even though it has no legal obligation to do so. It was denied that access. The customers in the Suncadia Resort area have no ability to demand service from Inland through Suncadia or otherwise. The Suncadia Resort area is an island of territory which has become a kingdom unto itself. There is no reason for it to remain in the Inland service area.

f. Commission Staff's Arguments That There Was No Sharing of Regulated Revenues Contemplated by Suncadia Are in Error.

For reasons that are not clear, Commission Staff argues that there is no real evidence to show that a sharing of regulated revenues was initially contemplated by Suncadia.⁵¹ However, this ignores both Mr. Coonan's un-controverted testimony⁵² and the

⁵⁰ TR 123, l. 4 - TR 124, l. 14.

⁵¹ Commission Staff Initial Brief at ¶34.

⁵² Exhibit 1T, p. 3, l. 1 - p. 4, l. 11; TR 120, l. 17 - TR 122, l. 10.

exhibits that show the correspondence between Inland and Suncadia.⁵³ There is clearly an intent by Suncadia to obtain a share of revenues from regulated services. Why else would the letter from Inland discuss the fact that that was not possible if Suncadia had not made that a key provision?

2. Response to Various Matters Raised in Public Counsel's Opening Brief

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Public Counsel makes a number of statements and assertions that are either not supported in the record or are in error in one way or another. In this portion of its Reply Brief, Inland will briefly respond to some of those matters.⁵⁴ The format in this section of the Brief will be to identify the item raised by Public Counsel and provide a brief response.

a. Public Counsel Creates an Artificial Distinction Between a Telecommunications Easement and a Communications Easement.⁵⁵

47

Not only is Public Counsel's effort to create a distinction between a "telecommunications" easement and a "communications" easement, an effort to create an artificial distinction that has no basis in reality, it ignores the evidence in the record. As Mr. Coonan testified, Inland sought a standard telecommunications easement.⁵⁶ As the exhibits in this record show, seeking to obtain a communications easement is a standard way of obtaining an easement for telecommunications services.⁵⁷ Public Counsel's assertion, based on this artificial distinction that Public Counsel creates, that Inland

⁵³ Exhibits 2 and 33.

⁵⁴ Because the number of such instances of misstatement is so great, Inland cannot point out each one of them without unduly expanding the length of this Brief.

⁵⁵ Public Counsel Opening Brief at ¶4.

⁵⁶ Exhibit 1T, p. 5, l. 16-23.

⁵⁷ Exhibits 32, 38, 39, 40.

“apparently lost sight of the fundamental obligation as a wireline provider...”⁵⁸ is offensive and not supported by the record. Public Counsel’s insinuation at the same location in its Opening Brief that Inland is more concerned about its bottom line than its service obligations is also offensive and not supported by the record.

b. Public Counsel Implies that Inland Failed to Meet an Obligation to Negotiate with Suncadia or ICS.⁵⁹

48 However, Public Counsel ignores the fact that Inland invited Suncadia to engage in further discussions.⁶⁰ As noted by Commission Staff, Suncadia never got back to Inland.⁶¹ Public Counsel’s implication is unfounded.

c. Public Counsel Apparently Asserts that the Commission can Grant Inland a Waiver of the Statutory Obligation in RCW 80.36.090.⁶²

49 However, the Commission’s ability to grant waivers under WAC 480-120-071 relate to obligations contained in regulation, not statute. The Commission cannot confer to itself, through rulemaking, authority to grant statutory waivers. The Commission does have the authority, conferred by statute, to grant statutory waivers for competitive local exchange carriers. However, it lacks that legal authority in other settings. The Commission does not have the same statutory “forbearance” authority that the FCC possesses.⁶³ Public Counsel’s suggestion that the company could have received a waiver

⁵⁸ Public Counsel Opening Brief at ¶4.

⁵⁹ Public Counsel Opening Brief at ¶5 and ¶24.

⁶⁰ Exhibit 33.

⁶¹ Commission Staff Initial Brief at ¶10.

⁶² Public Counsel Opening Brief at ¶6.

⁶³ Obviously, in the context of determining what constitutes the public interest, the Commission has some latitude. There is also some latitude in determining what constitutes compliance with certain obligations. That is why this case is filed.

of the statutory obligation is not well founded.⁶⁴

- d. Public Counsel's Theory that an ETC Can Pick and Choose Where it Provides Service is Misplaced.⁶⁵

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While at one time there may have been greater latitude about the relaxed pace under which an ETC must make its services available in the area in which it has been designated as an ETC, the FCC has clarified that an ETC must be able to provide service throughout the area for which it is designated either through its own facilities or the facilities of another carrier within a reasonable time of designation.⁶⁶

- e. Public Counsel Completely Misunderstands the Concept of Universal Service Funding.

51

Public Counsel attributes a statement to Inland that "Suncadia's lower cost of service will weigh down the average cost of service in Inland's study area and reduce the amount of money Inland will receive in universal support."⁶⁷ There is no support in the record for Public Counsel's attribution. The point about the Suncadia Resort being a lower cost area to serve is that ICS intends to draw universal service funds based upon Inland's cost of service from Inland's providing service in the higher cost portions of the Roslyn exchange. This has nothing to do with Inland losing money. Public Counsel is completely lost at sea on this argument. Inland has never made a statement in this record about it losing USF funds.

⁶⁴ Perhaps Public Counsel meant to suggest that the company could have sought a declaratory ruling that lack of access to the Suncadia Resort area meant that those customers were not "reasonably entitled" to Inland's service as those words are used in RCW 80.36.090. While that is a theoretical option, it is not a precondition to this tariff filing.

⁶⁵ Public Counsel Opening Brief at ¶7.

⁶⁶ ETC Order at ¶21-23.

⁶⁷ Public Counsel Opening Brief at ¶10. Public Counsel's reference is probably to "universal service support" not "universal support."

- f. Public Counsel's Statement that "Inland acknowledges that it was given the option of serving as a third party provider, admits it has never engaged in any negotiations and that it has no plans to do so" is a Misstatement of the Record.⁶⁸

52 Public Counsel cites to TR 48, 1. 7-11 as the basis for this statement. However, the question asked of Mr. Coonan by Commission Staff cited by Public Counsel was a hypothetical question as follows: "Have you discussed using future ICS lines should they be installed in the resort?" A hypothetical discussion about future lines should they be installed at some point in the future is not acknowledgment that Inland was given the option to serve as a third party provider. Nor is that statement an admission that Inland has "no plan" one way or the other. In fact, Inland left open the option of further discussions with Suncadia and Suncadia never responded to that invitation.⁶⁹

- g. Public Counsel's Characterization that RCW 80.36.230 Creates a Franchise is in Error.

53 A franchise is defined as a special privilege conferred by government on an individual corporation.⁷⁰ In the Electric Lightwave case, the Supreme Court made it abundantly clear that prescribing service territory under RCW 80.36.230 does not create a property right or other special privilege. In fact, what it does, is define the area in which a company may have certain obligations, such as the obligation to be a carrier of last resort. RCW 80.36.230 does not confer special privileges or property rights. Public Counsel's description of this obligation as a franchise is incorrect.

⁶⁸ Public Counsel Opening Brief at ¶24.

⁶⁹ Exhibit 33.

⁷⁰ Black's Law Dictionary, Revised Fourth Edition (1968).

- h. Public Counsel's Statement that "Inland could not identify any plant (and associated costs) required to be kept at the ready at its wire center if Suncadia remained in the territory"⁷¹ is Not a Correct Statement of the Record.

54 Public Counsel cites to the transcript at page 43, line 22 through page 44, line 17 as the source of this statement. At this point in the transcript, Commission Staff is asking Mr. Coonan a number of questions based upon a hypothetical which includes the premise that Inland has an easement that allows it to have access to the customer. See TR 42, 1. 11-14. Not a very realistic hypothetical. In any case, what Mr. Coonan actually testifies is that there would be a substantial investment. TR 44, 1. 17. Further, Exhibit 7 contains estimated costs, including plant facilities, of providing service in the Suncadia Resort area. Public Counsel has mischaracterized the record.

- i. Public Counsel's Statement that "Inland admitted that if it obtained access to the network by a leasing arrangement with reasonable terms and conditions, Inland would be left with very little costs for performing physical interconnection...." is a Mischaracterization of the Record.⁷²

55 Public Counsel relies on the transcript at page 89, line 22 through page 90, line 22 as the source for this assertion of an "admission." There is absolutely no way that Mr. Coonan's testimony can be taken as an admission that Inland would have very little costs for performing physical interconnection. What he states is that there would be some plant necessary, but he could not tell exactly what it would be because he is not an engineer. That is not an admission as to any state of facts and it is certainly not permissible to draw an inference that there would be "very little costs."

⁷¹ Public Counsel Opening Brief at ¶40.

⁷² Ibid.

- j. Public Counsel's Argument that Inland has a De Facto Monopoly and Used its Market Power to Influence its Private Business Negotiations with Suncadia Completely Misstates this Case.⁷³

56 Suncadia is the owner of Suncadia Resort. It owns the roads. It owns all levels of access to the resort. If Inland actually had market power, it would be serving the Suncadia Resort today. It was Inland's desire to serve the Suncadia Resort.⁷⁴ It is because Suncadia controls, with absolute authority, what happens within the Suncadia Resort area that Inland is not able to serve the Suncadia Resort. Public Counsel's concept of market power is exceedingly misplaced.

57 Please be sure to understand that Inland is not complaining about the fact that Suncadia controls its own resort. It is simply a fact. There are good reasons that Suncadia wants to exercise that control. Suncadia has made substantial investment and is concerned about the esthetics and services that might be available to enable it to maximize its investment. There is no ill will to be implied by the statement of fact. Inland tried for six years to be allowed to provide service in the Suncadia Resort area. That effort failed. Inland should not then be held to be a carrier of last resort for an upscale destination resort that desires to control its own fortunes.

- k. Public Counsel's Arguments that Harm to Inland is Speculative are Without Merit.⁷⁵

58 Public Counsel tries to denigrate Inland's concerns as speculative. While Inland's concerns about damage to its reputation are not the sole driving factor in this proceeding,

⁷³ Public Counsel Opening Brief at ¶48.

⁷⁴ Exhibit 1T at p. 7, l. 10-19.

⁷⁵ Public Counsel Opening Brief at ¶41-43.

Inland's reputation is important to Inland. It is also the case that to this day, Suncadia continues to disparage Inland's reputation.

59 Attached as Appendix B is the Declaration of Susan E. Weis. Ms. Weis attended the meeting of Suncadia property owners. At that meeting, Suncadia, when asked why the local telecommunications provider was not available, responded that the local provider was not able to provide the expected quality of service.⁷⁶ This statement by Suncadia's representative is false. This statement by Suncadia's representative is slanderous. This statement by Suncadia's representative does damage to Inland's reputation.

3. Response to Issues Raised by ICS.

60 In this section, Inland will respond to certain statements made by ICS in ICS' Opening Brief.

a. ICS' Statements of Fact Contained in its Opening Brief Must be Ignored.

61 ICS makes statements such as "ICS...is not willing to serve the Suncadia Resort area as an ILEC" and "ICS is also willing to negotiate such access [to Suncadia's facilities]." ⁷⁷ These are statements of counsel. ICS had the opportunity to present a witness, but did not. Without being able to find out what an ICS witness would say under cross-examination about these statements of fact and the context of these statements to test their limits, such statements of counsel must be ignored and should be stricken.

⁷⁶ Inland respectfully requests that the Declaration of Susan E. Weis be admitted as a late filed exhibit. The basis for the motion is that, obviously, this information was not available at the time of hearing. The information contained in the Declaration goes to one of the issues in the case - the harm to Inland's reputation by being forced to maintain an area within its designated service area without the ability to access that area.

⁷⁷ ICS Opening Brief at ¶7 and ¶12.

- b. ICS Argues that Permitting Inland to Exclude Territory Would Give Inland Enormous Bargaining Power in its Dealings With Land Owners.⁷⁸

62 This statement by ICS ignores the realities of the facts in this case. All bargaining power is in the hands of Suncadia. Suncadia owns all of the land including all of the roads. Suncadia controls all access. Suncadia holds all of the bargaining power, not Inland.

Further, there is nothing about this case that would lead to the conclusion that Inland can pick and choose which customers to serve. Inland cannot refuse service to a building owner in Roslyn or discriminate between building owners in providing the terms under which Inland will provide service. Such a suggestion ignores the law and the facts in this case.

- c. ICS Makes the Following Statement Without a Basis in the Record: "ICS Reached an Agreement with Suncadia to Provide Telecommunications Services to Those [Suncadia] Residents but Executed that Agreement as a CLEC with the Expectation of Serving a Portion of Inland's Roslyn Exchange."⁷⁹

63 This is an interesting statement. Again, it is a statement of fact without supporting testimony. More to the point, it must be taken as false on its face. ICS intervened in this case, which calls for the Suncadia Resort to be removed from Inland's service territory, on August 10, 2005. ICS reached agreement with Suncadia many months after that intervention. How could ICS have a realistic expectation that the Suncadia Resort area would, without doubt, still be in the boundaries of Inland's Roslyn exchange? The statement made by ICS is not credible on its face.⁸⁰

⁷⁸ ICS Opening Brief at ¶3.

⁷⁹ ICS Opening Brief at ¶11.

⁸⁰ It is probably not a relevant statement in any case. However, it certainly weighs upon the credibility of the arguments advanced by ICS.

- d. ICS Raises the Status of the Calls Between Suncadia Resort and Roslyn if Inland's Tariff Filing is Allowed to Take Effect.

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The issue of whether such calls would be toll or EAS is an issue which has not had much discussion. It would certainly be within the Commission's purview to require as a condition for allowing Inland's tariff filing to take effect that the calls be treated as EAS calls rather than toll calls. In fact, Inland voluntarily offers to make that a condition. It is not Inland's desire to impose additional costs on its customers through this filing. The intent was to simply reflect reality that Inland should not have an obligation to serve an area it cannot physically serve.

- e. ICS Suggests that if Inland's Tariff Filing is Allowed to Take Effect, ICS Will not be Able to Exchange Traffic with Inland Arguing it Will Lose the Ability to Take Advantage of the Provisions in Sections 251 and 252 of the Telecommunications Act of 1996.⁸¹

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There is nothing in the record to support that contention. First, as a rural telephone company, Inland holds an exemption from many of the substantive provisions of Section 251; in particular, those provisions in Section 251(b). Thus, this filing has no effect on the availability of those provisions. ICS' position also ignores the effect of Section 251(a) that requires all carriers to interconnect directly or indirectly. That obligation will exist even if this tariff filing goes into place. ICS' position also ignores the fact that Inland has negotiated traffic exchange agreements with other carriers.⁸² ICS also ignores the fact that Inland offered ICS the opportunity to negotiate such a traffic exchange agreement, but ICS has not responded to that offer.⁸³

⁸¹ ICS Opening Brief at ¶13.

⁸² Exhibit 15.

⁸³ Exhibit 14.

V. INLAND HAS CARRIED ITS BURDEN OF PROOF

66 In her earlier ruling, Administrative Law Judge Mace made the determination that Inland bears the burden of proof to show that its tariff filing is fair, just, reasonable and in the public interest.⁸⁴ Inland believes that it has met that burden.

67 There is nothing clear about what modicum of evidence must be presented to show that a tariff filing is fair, just and reasonable or to show that it is in the public interest. However that test is applied, it must certainly be applied within the context of the filing itself and the facts surrounding that filing.

68 As Inland has demonstrated, its filing does not have an adverse effect on the public policies set forth in RCW 80.36.300. In fact, this filing has an advantageous effect in advancing policies related to universal service by preventing a planned arbitrage of USF rules by ICS.

69 Is the filing fair? Yes. It is fair to customers in that it allows them to clearly understand where they may reasonably expect to obtain service from Inland. Customers in the Suncadia Resort area are not left with the thought that they may have a theoretical right to Inland's service only to be barred either by Suncadia refusing to allow them to access Inland's service or by the misperception that Inland is somehow refusing to provide those services. It is fair to Inland in that it removes a theoretical obligation that it cannot physically meet.

⁸⁴ Inland reserves the right to file an exception to this ruling as part of the Commission's review of the Initial Order and, should it occur, any subsequent court review. However, for purposes of the analysis in this section, Inland will assume, *arguendo*, that the burden as stated above applies.

70 Is the filing just? Yes. The filing is just in the sense that it recognizes the physical reality. It does not leave Inland festooned with a hypothetical obligation to serve as a “fall back” for the Suncadia Resort.⁸⁵

71 Is the tariff filing reasonable? Yes. For the reasons that the tariff filing is fair and just, it is also reasonable. It is a recognition of reality. It does not maintain a fiction that would be confusing to customers and a burden on the company.

72 The tariff filing is in the public interest for all of the reasons set forth above.

73 Inland notes in passing that Commission Staff makes an argument that the burden of proof should be that the Commission’s establishment of service boundaries must remain in effect unless shown to be arbitrary and capricious. Commission Staff relies on the Prescott case for this argument.⁸⁶ However, as noted by Commission Staff, the Prescott case was decided prior to In re Electric Lightwave and has little viability in today’s world.⁸⁷ The Prescott case discussed a property right as arising under RCW 80.36.230. The Electric Lightwave case made it clear that no such property right exists. While a standard of arbitrary and capricious might well apply in the context of discussing removal of the property right, it does not otherwise apply to the making of a decision whether or not to approve a tariff filing. Any reliance on the Prescott case would be misplaced.

CONCLUSION

74 To use a well established metaphor, it is time to separate the wheat from the chaff. This case does not turn on whether Inland sought a “communications” easement or a

⁸⁵ A position advanced by Commission Staff, even though Commission Staff admits that there is no evidence that the Suncadia Resort will fail or that telecommunications services will not be provided in the area. Commission Staff Initial Brief at ¶40.

⁸⁶ Commission Staff Initial Brief at ¶17-21.

⁸⁷ Commission Staff Initial Brief at ¶21.

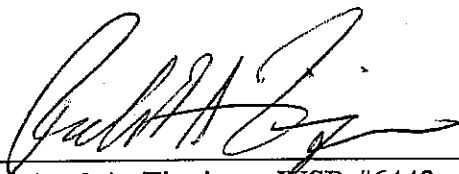
“telecommunications” easement. This case does not turn on whether there is speculation about the ability of Inland to negotiate reasonable terms and conditions with Suncadia and ICS for future access to the Suncadia Resort area. This case does not turn on whether it costs \$100,000.00 per customer or \$1.00 per customer to serve customers in the Suncadia Resort area.

75 What this case should be resolved upon are a few simple facts: Inland does not have access to the Suncadia Resort area. The Suncadia Resort is a master planned community owned by Suncadia. The roads are owned by Suncadia. All access for any service is owned and controlled by Suncadia. Inland has no legal obligation to seek access to the Suncadia Resort area. Customers within the Suncadia Resort area have no legal means to obtain service from Inland Telephone Company. Inland’s tariff filing is a simple reflection of reality of these facts. Speculation about hypothetical need at some distant point in the future does not change that reality.

76 Inland’s filing also serves the public interest by blunting the efforts of ICS to abuse the universal service system.

77 The filing is fair, just and reasonable and is in the public interest. The tariff filing should be allowed to take effect.

Dated this 21st day of June, 2006.


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