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 PUBLIC COUNSEL

CONCERNING INLAND TELEPHONE COMPANY'S PROPOSED TARIFF REMOVING SUNCADIA RESORT FROM ITS ROSLYN EXCHANGE

June 21, 2006

I. INTRODUCTION

1. Public Counsel's Initial Brief (hereinafter Public Counsel Brief) addressed many of the issues raised in Inland's Post-Hearing Brief (Inland Brief). This Reply Brief will focus specifically on (1) Inland's refusal to acknowledge, or in the alternative directly contest, the proper legal standard that governs its petition, (2) Inland's insufficiency of facts to support its case under the correct legal standard, (3) Inland's misstatement of the facts it alleges, and (4) Inland's unsupported and cavalier representations about the availability of other carriers with an obligation to serve in the territory it seeks to excise.

II. INLAND DOES NOT MAKE ITS CASE ON THE CORRECT LEGAL STANDARD GOVERNING ITS PETITION

2. Inland fails to make its case under the well established legal test set forth in *WUTC v. US West Communications, Inc.*, Docket No. UT-961638, Fourth Supplemental Order (January 1998) and confirmed by Judge Mace's Order No. 05 (February 2, 2006) in the instant case.[1] Remarkably, Inland does not address *US West* or Order No. 05 at all in its Initial Brief. Nor does Inland renew arguments it made on summary determination challenging the standards Judge Mace derived from *US West*. Order No. 05, ¶ 19. Rather, Inland, by implication, simply asks Judge Mace to ignore her own Order and this Commission's firmly established legal precedents. Beyond Inland's disregard for the proper legal standard governing it petition, it is the Company's inability to make out its case under *US West* and Order No. 05 that is fatal to its petition.

[1] Public Counsel discusses the *US West* case at length in its Initial Brief. *See* Initial Brief, pp. 11, 13-15, 18-19 and 21.

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3. A tariff revision releasing a company of its obligation to serve is only "in the public interest," (1) if it results in rates and conditions that are just, fair, reasonable and sufficient; (2) if it preserves affordable universal service and a diversity of telecommunications providers; and (3) if the economic burdens on the company outweigh the benefits it gets as a de facto monopoly provider. *US West, supra,* pp. 15-16, 22-24; Order No. 05, at ¶ 27. Moreover, the company bears the burden of proof. No. 05, at ¶ 19; *US West, supra,* pp. 16, 22-24, citing RCW 80.36.090 and RCW 80.04.130 ("US West bears the burden of proof that the proposed tariff language is in the public interest").

4. There is no question that the Commission's mandate to regulate in the public interest and the contours of that mandate can change depending on the specific statutes, regulations and policy questions at issue.[2] That is, the standard is tailored to the context. For instance, with regard to approving or disapproving a requested property transfer, the Commission has interpreted the public interest to be a "no harm" standard. *See e.g., In the Matter of the Application of Verizon and MCI,* Docket No. UT-050814, Order No. 07 (December 23, 2005), ¶ 56, interpreting WAC 480-143-170.[3]

5. In another example, the Commission has defined the public interest, for the purpose of designating Eligible Telecommunications Carriers (ETCs), as "a broad concept encompassing the welfare of present and future consumers, stakeholders, and the general public." *Washington Indep. Tel. Ass'n v. WUTC,* 149 Wn.2d. 17, 28, fn.3 (2003), interpreting 47 U.S.C. § 214(e)(2).

[2] RCW 80.01.040 General powers and duties of commission. The utilities and transportation commission shall: (3) Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities…

Thus, at least for ETC designations, the "public interest is broader than the goal of competition alone" and "broader than the goal of advancing universal service." *Id*. (internal citations omitted).

6. Here, with regard to RCW 80.36.090 and the obligation to serve, the *US West* case articulates the public interest standard as it should be applied in the instant case. Simply put, the *US West* case tailors the public interest standard to the specific legal and policy issues arising from relieving a company of its obligation to serve. Undoubtedly, it reflects the notion that, except in extreme circumstances, de facto monopolies must take the sour with the sweet. There are obvious public policy reasons why this is so.

7. If incumbent providers were easily allowed to jettison less profitable territories, they would likely do so with little hesitation. This would leave less profitable areas without service, or at least, without a diversity of service. *See*, RCW 80.36.300. Significantly, if an incumbent abandons a higher cost area without the benefit of a rate case, the company's current rates, set on a revenue requirement that included the higher cost area, would likely result in overearning. *See*, RCW 80.04.130; RCW 80.36.080. Thus, *US West* reflects these important policy considerations, as well as others.

8. Nevertheless, *US West* recognizes that there are times when the obligation to serve may need to be waived because the actual and substantial unique economic burden on the company and its customers is too great to bear even in the face of the substantial benefits the company receives as a de facto monopoly in its franchise territory. However, Inland does not carry this threshold burden.

[3] WAC 480-143-170 Application in the public interest. If, upon the examination of any application and accompanying exhibits, or upon a hearing concerning the same, the commission finds the proposed transaction is not

9. In the Inland Brief, the Company merely asserts that its tariff revision is in the "public interest" yet it does not define what that means. Inland Brief, pp. 4, 10-12; Order No. 05, ¶ 18. To find Inland's explicit definition of the public interest test, one must look in its Answer to Staff's Motion for Summary Determination (Inland Answer to Staff) [4] and its Response to Public Counsel's Answer in Support of Staff's Motion (Inland Response to Public Counsel).[5] In both its initial brief and its summary determination briefing, the Company either explicitly (in its description of the standard) or implicitly (in its application), misstates the public interest test.

10. Regarding its explicit arguments, Inland stated that a tariff revision is in the "public interest" if no harm results from the proposed filing. Inland Answer to Staff, ¶ 10. Moreover, it argues the burden of showing harm rests with the party opposing the change. *Id*. Inland's standard is inapposite of that outlined in *US West* and Order No. 05 and must be rejected.

11. Inland applied its "no harm" standard on summary determination by stating its reasons for seeking the tariff change and challenging those opposing the tariff to show that harm would result. Answer to Staff, ¶¶ 20-23. While somewhat less explicit, Inland's initial brief follows this same route. Like its earlier briefing, the Company gives three main reasons why it seeks the

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consistent with the public interest, it shall deny the application.

[4] Inland says that the "fair, just, reasonable and sufficient" standard does not apply to its tariff filing because it does not request a rate increase. Inland Answer to Staff, ¶¶ 5-6.

[5] Inland requested an opportunity to respond to Public Counsel's Answer and we did not object. For the sake of judicial economy, we also did not request a reply even though Inland mischaracterized our argument. In refuting the notion that it must show "actual and substantial harm" to sustain its petition, Inland grossly misstated Public Counsel's position. Inland Response to Public Counsel, pp. 1-2, citing Public Counsel's Answer at ¶ 8. Inland alleged that Public Counsel argued that <u>any</u> tariff change had to meet the "actual and substantial harm" standard. *Id*. A plain reading of our Answer to Staff's Motion shows that we never argued that a company seeking a tariff revision <u>of any kind</u> must show an actual and substantial harm. To the contrary, Public Counsel took the position, as it does now, that when a company is seeking relief <u>from its obligation to serve</u>, it "must prove actual and substantial harm outweighing the substantial benefits it receives as a de facto monopoly provider." Public Counsel Answer, ¶ 5, citing *US West*. Inland's mischaracterization of our argument allowed it to construct a "straw man" argument that showed the absurdity of applying the *US West* harm test to all proposed tariff changes. Inland Response, pp. 2-3. In fact, none of the tariff revisions identified in Inland's parade of absurdities pertained to a company's obligation under RCW 80.36.090.

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tariff revision and then alleges these reasons make its petition in the public interest. Inland Brief, pp. 10-12.[6] In other words, Inland argues that *its* interests *are* the public's interests and, in doing so, does not make out its case for excising Suncadia from the Roslyn territory.[7]

III. INLAND CANNOT SHOW A SEVERE OR UNIQUE ECONOMIC BURDEN RESULTING IN ACTUAL AND SUBSTANTIAL HARM

12. Again, Public Counsel addressed many of the factual inadequacies of Inland's case in our initial brief. Public Counsel Brief, pp. 15-18. We focus here on a specific aspect of the *US West* balancing test regarding the burdens Inland must show to support its petition. Under that test, Inland must produce an evidentiary record showing that if it keeps Suncadia in its territory it will suffer a "severe or unique economic burden" resulting in "actual and substantial harm." *US West*, *supra*, at pp. 16, 18, 21. Without such a showing, a petition to remove a territory will not be granted. *Id*., at 21.

13. In the *US West* case, the Commission faulted the company for failing to produce any "specific study to quantify the effect of the proposed tariff revisions on its operations, competitive position, planning, and capital spending." *Id*., at pp. 21-22. It said that US West could not estimate the number of requests for service that would have not been filled if operating under its proposed tariff. *Id*. Nor could US West estimate the changes that would have occurred in its capital spending if the proposed tariff was in effect. *Id*., at p. 22.

[6] In sum, Inland seeks the tariff revision because: (1) it reflects the "reality" that it cannot serve Suncadia and thus, better defines the area in which Inland can reasonably provide service to those customers who request service; (2) it recognizes that lacking physical access to Suncadia, Inland cannot provide excellent quality service to customers because it needs physical access to customer's premises in order to install service or repair any problems, and (3) it would remove the possibility that one customer at Suncadia (out of a possible 2,800) could demand service and force Inland to build expensive facilities to serve that one customer. Inland Brief, pp. 10-12. Putting aside whether these are the real reasons the Company filed this petition, they are inadequate under *US West* because they are not a "severe or unique economic burden" resulting in "actual and substantial harm."

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14. The Inland Brief posited four categories of "harms"[8] that would result from a rejection of its petition:

- **The inchoate obligation:** Inland cannot physically serve Suncadia and so it is harmed if it is required to serve since this includes maintaining a physical inventory of supplies to provide service "on short notice." Inland Brief, pp. 5-6.
- **The extra cost to existing customers of keeping surplus plant:** Existing customers will be harmed if Inland is required to maintain surplus inventory because those supplies will be paid for by existing customers. Inland Brief, p. 7.
- **Inland's reputation**: Inland's reputation would be exposed to "unfair attack" because it is physically unable to serve an area that is within its designated service area. Inland Brief, p. 9.
- **Intelligent Community Services (ICS) will get federal USF support:** ICS will get federal USF support even though Inland will not be able to serve the Suncadia area. Inland Brief, p. 4.[9]

15. As discussed in the Public Counsel Brief, the harms Inland alleges do not make the grade under *US West* because they are not "actual" or "substantial." Public Counsel Brief, pp.

[7] One would be hard pressed to find a more circular argument.

[8] We continue to maintain that these are "reasons" for Inland's petition and not "harms" as defined by the *US West* case.

[9] It appears that Inland has abandoned (or saved for reply) its earlier argument that one of the harms it will experience is loss of USF support. See Inland Answer to Staff, ¶¶ 22-23. That argument has been that Suncadia will be a lower-cost area to serve and thereby weigh down the average cost of service in Inland's study area. This will, according to Inland, result in a reduced amount of money that Inland will receive in USF support. *See* Public Counsel Brief, ¶¶ 10-11, for our discussion of this argument in case Inland revives it on reply.

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15-18. Moreover, like the *US West* case, this record is devoid of any factual basis for alleging serious harms.

16. The only "study" produced by Inland is Exh. No. 7. That exhibit is Inland's response to Staff Data Request No. 12. In that data request, Staff asked Inland to estimate the costs associated with serving Suncadia over the next two years, including cost of service and new plant. Exh. No. 7, p. 1. Despite, Inland's citation to Exh. No. 7, at Inland Brief, p. 12, it admitted on cross examination that Exh. No. 7 is not a cost of service study for the Suncadia resort area, that the figures contained in that report are unreliable and that, in fact, Inland has never estimated the cost of serving Suncadia. TR 113:4-114:2 (Coonan).[10] Nonetheless, Inland continues to rely on Exh. No. 7 because it has nothing else to offer.

17. Indeed, Inland cannot identify any plant (and associated costs) required to be kept at the ready if Suncadia remained in the territory. TR. 43:22-44:17 (Coonan). 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 and that such interconnection could be performed quickly. TR. 89:22-90:22 (Coonan). In fact, Suncadia said it would be willing give Inland "access over the backbone system" for a reasonable fee. TR. 173:6-9 (Eisenberg). And, at least at one point, Inland entertained accessing the network in just this way. Exh. No. 33; TR. 77:13-78:5; 78:13-79:14 (Coonan).

[10]Unfortunately, Inland's response to Staff Data Request No. 12 is less than clear since the Company hides its answers behind a myriad of "ifs" and "buts." In essence, the Company says that (1) assuming Suncadia installs fiber "to vaults assigned to service lots in conjunction with road construction and the installation of other utilities," (2) assuming Suncadia bears the cost of construction "to the property line of all lots in the offering," (3) assuming Suncadia would extend facilities "to the lots at no cost to the lot owner," (4) assuming lot owners would pay a connection fee to Inland at the time service is requested (and that connection fee would cover the costs of extending fiber cable from the property line to the dwelling), and (5) assuming Inland was able to use all of the fiber up to the property line without any cost to it, "a major portion of the costs to provide service would be avoided." Exh. No. 7,

18. Rather than "actual" harms, as discussed in the Public Counsel Brief, all of the harms alleged by Inland are speculative. Public Counsel Brief, ¶¶ 4, 6, 10-13 and 42. Because the allegations are speculative, Inland cannot quantify the economic effect of a rejection of the tariff revision. Even if Inland's harms are somehow found to be real, the Company cannot show a "severe or unique burden" because all of the harms it alleges arise from competition waged by ICS, wireless ETCs or Suncadia. By implication, Inland appears to be asserting that its severe or unique economic burden is competition. Not only would that be a startling admission, it makes this case even easier to decide. Relieving an incumbent local exchange (ILEC) from its obligation to serve a territory just so it can avoid competition is clearly antithetical to the Telecommunications Act of 1996 and its goal of increasing competition in ILEC territories.[11] *See*, 47 U.S.C. §§ 251-261 (Development of Competitive Markets).[12]

19. Since Inland failed to establish a factual record that it will be harmed if Suncadia remains in the territory, there is no need to weigh the harms against the benefits. However, even assuming, *arguendo*, that Inland makes a prima facie showing of "harm," Inland must then weigh that harm with the "benefits" it receives as a de facto monopoly provider. *US West*, *supra*,

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at p. 1. Despite an inability to identify any investments it would make under this scenario and even with cost free access to Suncadia's fiber, Inland still asserts that it would still need an easement to protect its investments.

[11] Also clearly antithetical to the Act is Inland's charge that ICS opposes Inland's petition for a "very selfish reason" -- ICS' designation as an ETC. Setting aside the Solomonic effort of identifying what profit maximizing behavior is selfish and what is not, Congress, the FCC and this Commission have clearly decided that, whatever the motive, "[a]ccess to a variety of telecommunications service for rural customers is one of the goals of the federal Act." *In re: Sprint Corporation Petition for Designation as an ETC*, Docket No. 043120, First Order (January 27, 2005), ¶ 33 (citations omitted).

[12] In essence, Inland wants to "pick up its marbles and go home" rather than utilizing less dramatic legal options. *See,* Public Counsel Brief, ¶¶ 54-59. Additionally, the Telecommunications Act allows rural ILECs to receive relief from § 253(c) requirements, however, a company requesting relief must show that it would be "unduly economically burdensome" to comply with § 253(c). 47 U.S.C. § 253(f). For the reasons already discussed, Inland cannot support such an assertion. If Inland cannot compete under traditional regulation, perhaps a petition for

pp. 23-24. *See also*, Order No. 05, at ¶ 29 ("benefits and harms to Inland and its customers outside Suncadia from retaining Suncadia in its service territory, and the ramifications of removal on future potential customers in the Suncadia resort area").

20. Where a company fails "quantify and contrast" the "substantial benefits" it receives as a de facto monopoly provider and the "economic burden alleged," a petition removing the obligation to serve must be rejected. *US West, supra*, p. 24. Inland has never contrasted its alleged harms with the benefits its receives as a de facto monopoly and therefore, the petition should be rejected on these grounds as well.

IV. INLAND MISSTATES THE EVIDENCE

21. For the reasons already outlined, Inland's petition should be rejected. Here, for the benefit of the evidentiary record, we seek to clarify some of Inland's misstatements of fact.

A. Inland Says It Does Not Have Physical Access To The Suncadia Resort, That It Needs An Easement To Provide Service, Particularly Quality Service, To Suncadia.

22. Inland continues its stubborn insistence on an easement despite all of the evidence contradicting its need for one to provide service. Inland Brief, pp. 1-3. Inland's insistence is all the more curious since in February 2005, it was perfectly willing to access the Suncadia network without an easement. Exh. No. 33; TR. 77:13-78:5; 78:13-79:14 (Coonan).

23. Inland is correct that Suncadia now says that it is unlikely it will grant an easement to Inland. Inland Brief, p. 3. Suncadia's unwillingness to grant an easement at this point has to do with "the damage and disruption" to the resort. TR. 172:17-25 (Eisenberg). However, Mr. Eisenberg's testimony was that Suncadia's offer to grant access to the backbone network for a

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competitive classification would have been the more appropriate vehicle, but it is unlikely the Company could meet

fee is still open. TR. 173:6-9 (Eisenberg). Without the need to install duplicative plant, Inland would have no investment to protect and no need for an easement of any kind.[13] *See also*, Public Counsel Brief, ¶¶ 3-6, 39.

24. As Commission Staff has correctly noted, an easement is also not required for Inland to provide quality service. Inland is currently providing service to Suncadia as a business entity under a "right of entry" agreement. Staff Brief, ¶ 11. If Inland could reach an interconnection agreement with Suncadia that includes a right of entry provision, it can have physical access allowing it to provide quality service. Therefore, it does not matter that Suncadia will not give Inland the easement it seeks because the notion that Inland still requires a perpetual easement from Suncadia in order to provide quality service is ludicrous.

B. Inland says Suncadia Demanded Revenue Sharing From Inland's Regulated Businesses.

25. Inland continues to allege without any evidence that Suncadia demanded revenue sharing from Inland's regulated businesses in contravention of RCW 80.36.300(4). Inland Brief, p. 2. Inland asserts this to show that Suncadia insisted on an unreasonable term in earlier negotiations and therefore, it would have been futile to negotiate further. This is without merit. There is absolutely no evidence that Suncadia demanded revenue sharing from Inland's regulated companies. *See* Public Counsel Brief ¶ 21; ICS Brief ¶ 6. All of the evidence shows otherwise. *Id*. The record more accurately reflects that Inland never tried to negotiate access to the Suncadia network and therefore, it is premature to say such negotiations would have been futile.

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the requirements of those statutes either.

[13] At this point, it is difficult to comprehend Inland's allusion to building duplicative plant in order to fulfill its obligation to serve. TR. 82:3-17 (Coonan).

V. INLAND MAKES UNSPPORTED AND CAVALIER REPRESENTTATIONS ABOUT OTHER CARRIERS HAVING OLBLIGATION TO SERVE SUNCADIA

26. Likewise, despite all evidence to the contrary, Inland remains cavalier about the availability of replacement service if it leaves the territory. It is undisputed that ICS does not have an obligation to serve unless and until it is designated as an ETC. As Staff discusses in depth, it is likely that if Inland abandons the territory, ICS will not be able to receive ETC designation for Suncadia. Staff Brief, ¶¶ 37-39. Without an ETC designation, ICS would have no obligation to serve whatsoever. Therefore, Inland's prediction of other carriers having an obligation to serve cannot include ICS.

27. With regard to wireless ETCs, Staff's concerns about the ETC service area contracting with the local exchange territory are equally valid. Staff Brief, ¶¶ 37-39. Thus, the currently designated wireless ETCs may also lose their designation if Inland's petition is approved. Therefore, Inland's prediction of other carriers with an obligation remaining after it leaves the territory cannot include wireless ETCs either.

28. In addition, even if wireless ETCs possess a continued obligation to serve, there is no evidence that wireless service is even available in the entire Suncadia resort area. *See*, Public Counsel Brief, ¶ 52. Inland posits only two pieces of evidence to support its claim of wireless availability. First, Inland argues that Suncadia itself has an ATT wireless contract. Inland Brief, p. 3. Second, Inland argues that three wireless companies have been designated as ETCs for the Roslyn area. Public Counsel discusses this second assertion at ¶¶ 51-53 of its initial brief, and in the preceding paragraph and so will not reiterate our arguments here.

29. Our point here is that one should not infer the availability of a wireless signal for the entire resort simply because Suncadia (as a business) may be receiving a signal. Indeed,

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Suncadia does not use its wireless account as its primary mode of obtaining telecommunications services. To the contrary, Suncadia's participation in this docket speaks to how important wireline services are to its operations.[14] *See also,* Staff Brief, p. 21, for an excellent discussion about 911 call availability.

30. Finally, we note that it remains unclear whether the Commission's authority to force a common carrier to provide service to rural areas under 47 C.F.R. § 54.203 (where no other provider is available) is symetrical with its authority under RCW 80.36.090. Fortunately, the Commission need not reach this question here since Inland has failed to carry its burden.

VI. CONCLUSION

31. For the foregoing reasons, Public Counsel urges that Inland's petition be denied.

DATED this 21st day of June, 2006.

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[14] *See also, In re: Joint Application of Verizon Communications Inc. and MCI, Inc.*, Docket No. UT-050814, Seventh Order, ¶ 70 (December 2005) ("while wireless telephony is growing, it for the most part supplements and does not displace wireline").