BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. INLAND TELEPHONE COMPANY, Respondent.	DOCKET NO. UT-050606

INLAND TELEPHONE COMPANY'S

PETITION FOR ADMINISTRATIVE REVIEW

August 22, 2006

REDACTED

1 Inland Telephone Company ("Inland") hereby files its Petition for Administrative Review ("Petition") of Order 08, Initial Order Rejecting Petition for Tariff Revision ("Initial Order"). This filing is made pursuant to WAC 480-07-825.

I. THIS DOCKET PRESENTS A CASE OF FIRST IMPRESSION

2 This case presents a policy issue to the Commission. The policy issue is as follows: should an incumbent local exchange carrier (ILEC) be required to maintain a paper obligation to hold out service to an area that it does not have the physical right to serve? In this setting, the policy issue raises the question of the extent of the obligation to be undertaken by an ILEC under RCW 80.36.090, the "carrier of last resort" obligation.

3 This case also presents unique policy considerations involving universal service issues. In particular, whether a competitive local exchange carrier (CLEC) should be able to create a *de facto* monopoly for itself in an area and recover federal universal service funds premised upon the ILEC's overall cost of service.

II. BACKGROUND

4 The Suncadia Resort is owned by Suncadia, LLC, which has created Suncadia Resort as a master planned resort community.[1] Thus, as a resort community, it can be expected that many of the residences will be vacation homes or second homes. This resort community will serve twenty-eight hundred residential lots, have three golf courses, and offer a variety of commercial services. All told, it is expected that the resort will have some four thousand access lines when completed.[2]

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[1] Initial Order at ¶4.
[2] Ibid.

5 There are no public rights-of-way within the Suncadia Resort.[3] This is important because without access to public rights-of-way, a public service company must obtain an easement to be able to install facilities.[4] All roads are private and controlled by the owner of the resort (Suncadia, LLC). Suncadia, LLC has constructed its own telecommunications infrastructure and has negotiated with a preferred provider to operate that infrastructure.[5] The preferred provider is the competitive local exchange company (CLEC) Intelligent Community Services or ICS. Under the agreement between ICS and Suncadia, LLC,

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6 Inland does not have a telecommunications easement to serve the area. Inland cannot access the area except with the permission of Suncadia, LLC, which permission has not been granted.[7]

7 When Inland could not negotiate access to the agreement to place its own facilities, Inland offered to negotiate with Suncadia, LLC to provide services over Suncadia, LLC's facilities.[8] This offer was made in February of 2005. Suncadia, LLC has never responded to that offer.

8 Inland also offered to negotiate with ICS.[9] ICS has never responded to that offer.

9 This is not a case of a company wanting to abandon existing service or discontinuous service that it has previously offered to the public.[10] This is a case where Inland, the ILEC, does not have access, and cannot get access, to the area in question.

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[3] Ibid.
[4] Exhibit 1T, pp. 3-4; Exhibits 2-3; TR 87-89.
[5] Exhibit 19 HC.
[6] Ibid at Sections 5.3 and 5.4.
[7] There is a small exception for certain limited business services provided directly to the resort owner, Suncadia LLC, which enabled the resort owner to begin operations.
[8] Exhibit 33.
[9] Exhibit 14.
[10] The limited business services would remain by contract so long as Suncadia, LLC desires those services.

III. ASSIGNMENTS OF ERROR/EXCEPTIONS

10 A. Inland takes exception to Finding of Fact (10) at paragraph 56 that "Inland provided insufficient evidence to meet its burden of proof."

11 B. Inland also assigns error to Conclusion of Law (2) at paragraph 58 that "Inland has failed to carry its burden of proof that its proposed tariff revisions are fair, just and reasonable and in the public interest."

12 C. Further, Inland challenges the description of the appropriate burden of proof as set forth in paragraph (9) of the Findings of Fact at paragraph 55 and the statement of the composition of the burden of proof in paragraph (2) of the Conclusions of Law at paragraph 58.

13 D. Inland takes exception to the ultimate Conclusion of Law at paragraph 59.

14 E. Inland also takes exception to the Ordering paragraph (paragraph 60).

15 F. Finally, Inland challenges certain elements in the discussion paragraphs, which challenges will be set out in more detail below.

16 The basis in the record and in law for each of these exceptions is set forth below.

IV. DISCUSSION OF ASSIGNMENTS OF ERROR/EXCEPTIONS CONCERNING INLAND'S ACCESS TO THE SUNCADIA RESORT

A. The Fiction of the Lack of Negotiations.

17 Much of the Initial Order's premise that Inland has failed to produce sufficient evidence to meet its burden of proof (paragraph 56) and the conclusion that Inland has so failed (paragraph 58) are predicated on the concept that Inland has not shown that it would

be unable to negotiate an agreement with Suncadia, LLC. For example, at paragraph 17 of the Initial Order, the statement is made "Inland's claim that the parties (Inland, Suncadia and ICS) would not be able to agree on reasonable terms and conditions for third party service by Inland is speculative because the parties have never attempted to negotiate such an agreement." To what extent is Inland required to prove a negative? This statement is a prime example of the application of the theory of the "regulatory rock."[11] As the record in this case shows, Inland negotiated for a long time with Suncadia, LLC and its predecessors. An agreement could not be reached.[12] In February of 2005, Inland offered to negotiate with Suncadia, LLC over the use of Suncadia's infrastructure.[13] That offer has never been responded to. Even when the lack of a response has been emphasized in the prior briefing in this case, Suncadia, LLC has not responded. How can one party negotiate when the other party will not even respond to the offer to talk? How far does Inland have to go to show that negotiations will not work? Is not the fact that negotiations could not begin because Suncadia, LLC will not respond to Inland's offer to negotiate sufficient in and of itself? What more could Inland do?

18 Inland takes exception to the language in paragraph 17 of the Initial Order on the basis that it is not supported by the record and that it establishes a standard for Inland that is impossible to meet.

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[11] The "regulatory rock" refers to the story of the stone mason building a rock wall who says to his apprentice, "Bring me a rock." When the apprentice brings the requested rock, the stone mason looks at it and says "That's the wrong rock, bring me another." When the apprentice brings the second rock, the stone mason looks at it and says "That's the wrong rock, bring me another rock" and so the process goes on and on, ad infinitem.

[12] Initial Order at ¶7.

[13] Exhibit 33.

19 A similar statement is made at paragraph 28 to the effect "The record demonstrates that Inland could provide service over the already existing network by means of an interconnection agreement with ICS and Suncadia. It is only speculation that the parties would be unable to negotiate reasonable terms and conditions because no negotiations have as yet even been attempted." Again, Inland takes exception to this language on the basis that it is not supported by the record and establishes a standard that is impossible to meet. Negotiations were requested and Inland was spurned.

20 In addition to asking Suncadia, LLC to negotiate and receiving no response, Inland told ICS that they would be willing to negotiate certain agreements with ICS.[14] Again, Inland has received no response from ICS. This is despite the fact that this offer and lack of response has been pointed out in the prior briefing in this case. The fact in the record is that a response has not been made to offers from Inland. That silence succinctly demonstrates that there will be no negotiations.

21 In addition, it is helpful to examine the conditions for negotiations described in the record. Any such negotiations would be subject to .[15] Any agreement would require revenue sharing.[16] Any agreement would have to take into account the financial effect on ICS.[17] Can it be doubted that this raises an impossible set of circumstances? No wonder there has been no response by Suncadia, LLC or ICS. They recognize the futility of the conditions they have established.

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[14] Exhibit 14.
[15] TR 155, l. 22 – 157, l. 12.
[16] TR 191, l. 25 – 192, l. 23.
[17] Ibid.

B. The Initial Order Suggests Negotiations Can Override Commission Authority.

22 There are also certain policy issues that are raised by the concept of the negotiations as contemplated by the Initial Order. The Initial Order acknowledges that Suncadia, LLC would have to approve any rates that Inland would offer and would require a revenue sharing provision.[18] The Initial Order does not address the concept of Suncadia, LLC's approval of rates.[19] The Initial Order's silence on this point contains a tacit approval that it would be appropriate for Suncadia, LLC to have final approval over rates to be offered by Inland within the Suncadia Resort. This raises the question of why the Commission would cede its ratemaking authority to a private entity, Suncadia, LLC? Is that in the public interest? Further, the Initial Order does not acknowledge the fact that Suncadia, LLC's Senior Vice President also testified that any agreement with Inland would be subject to the concurrence, if not the outright control, of ICS.[20]

C. The Initial Order Downplays the Revenue Sharing Issue.

23 At paragraph 29, the Initial Order acknowledges that there would be revenue sharing in any agreement between Suncadia, LLC and Inland, but states that Suncadia, LLC would not require unlawful revenue sharing. However, that is the reason that negotiations failed in the first place.[21]

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[18] Initial Order at paragraph 15.
[19] The concept of revenue sharing is addressed by the Initial Order at paragraph 29, and will be discussed below.
[20] TR 195, l. 25 – 192, l. 23. That is a concept that clearly would negate any fruitful negotiations, the competitor having control over the terms of entry.
[21] Initial Order at ¶15.
[22] Exhibit 19 HC at Section 5.3.

24 In addition, at paragraph 29, the Initial Order makes the following statement: "While the Suncadia revenue sharing requirement might increase the cost to serve in the resort, Inland would have the option to reduce other costs to accommodate the need to keep rates equal." There is no discussion in this record about how Inland would "have the option to reduce other costs." That statement is entirely without factual support. Inland's other customers would, in fact, subsidize the revenue sharing in the Suncadia Resort. Is that in the public interest?

25 This issue is also raised, at least obliquely, by paragraph 16. There the Initial Order states, "While providing service on a third-party basis might prevent Inland from recovering a greater profit, or from recovering revenues at tariffed rates...." What is meant by "recovering a greater profit"? Greater than what? The statement also states that Inland might be prevented "from recovering revenues from tariffed rates." Is the Initial Order suggesting that Inland could provide service at other than tariffed rates? That would not be lawful.

26 For these reasons, Inland takes exception to paragraphs 29 and 16.

D. The Initial Order Exhibits a Misunderstanding of ILEC/CLEC Negotiations.

27 The Initial Order's contemplation as to the ability to reach a negotiated agreement not only ignores the fact there has been no response to Inland's offers, but relies upon a standard that is inapplicable. At paragraph 16, the Initial Order makes the following statement: "While providing service on a third-party basis might prevent Inland from recovering a greater profit, or from recovering revenues from tariffed rates, third-party access is no different from the access used by CLECs to serve customers over another

carrier's network." There are a number of items about this statement that are problematic. The Initial Order speculates that third-party access is no different than access used by CLECs to serve customers over another carrier's network. There is nothing in the record to support this statement. More importantly, it is wrong and evidences a lack of understanding of the difference in the two types of access.

28 A CLEC's use of an ILEC's network is subject to statutory standards contained in Sections 251 and 252 of the Telecommunications Act of 1996. 47 U.S.C. §251 and 252. Further, there are a host of FCC and Commission standards in rules and orders that set out the terms under which access to the ILEC's network is to be provided. Further, if there is intransigence in the negotiations, the CLEC can bring the ILEC before the Commission for arbitration. 47 U.S.C. §252(b). The Telecommunications Act of 1996 developed a structure where there could be as much parity in the relative bargaining powers of the CLEC and ILEC as possible. That parity is not present in Inland's unsuccessful efforts to negotiate with Suncadia, LLC. Suncadia, LLC is not a telecommunications carrier (at least to date). It is a private entity controlling its private property. Suncadia, LLC has complete authority over the terms and conditions under which it will allow access to its property. There is no parity. There is no ability to bring unsuccessful negotiations before the Commission for arbitration. Suncadia, LLC is not subject to Commission regulation.

29 If the thought is that Inland could negotiate with ICS, the response is that the Suncadia network does not belong to ICS. The network in the Suncadia Resort belongs to Suncadia, LLC. Therefore, it would be fruitless for Inland to try to negotiate access to the network infrastructure with ICS.

30 The statement in the Initial Order that the contemplated negotiation to obtain access that is no different from the access used by CLECs over another carrier's facilities is completely without legal and factual support. Inland takes exception to paragraph 16.

E. The Initial Order Speculates About the Cost that Would be Imposed on Inland to Serve the Suncadia Resort.

31 At paragraph 28, the Initial Order speculates as follows: "With respect to any cost burden third-party service would impose on Inland, it is intuitive that service to Suncadia over the existing network would be less costly than construction of a duplicate telecommunications network." As the Initial Order recognizes by relying on "intuition," there is no basis in the record for this statement. Nor, given how telecommunications cost recovery works, is it intuitive. If Inland builds its own infrastructure, it is subject to the Commission's depreciation rules as to the length of time over which it recovers its investment. The fiber transmission plant has an 18 to 20 year life. It is highly conceivable that even if negotiations were able to take place, Suncadia, LLC might require a monthly recurring cost from Inland that would be greater than Inland's depreciation expense and other costs for its investment. Regulation of investment lives for ILECs is one of the ways in which the Commission maintains affordable rates. As a private entity not subject to Commission jurisdiction, Suncadia, LLC may want to recover its investment over three to five years, rather than twenty years. The Initial Order's reliance on "intuition" is just speculation. What is not speculation is that Suncadia, LLC has not sat down to negotiate terms for use of those facilities within Inland, despite Inland's offer.

V. DISCUSSION OF PUBLIC INTEREST AND FAIR, JUST AND REASONABLE STANDARDS: WHEN DOES FICTION NEED TO BE FACT?

A. What is in the Public Interest Under RCW 80.36.090?

32 At paragraph 31, the Initial Order concludes that Inland has failed to show that it would suffer the type of harm that would support Commission approval of its proposed tariff and goes on to make the following statement: "The arguments regarding harm to Inland underline the fact that while Inland could serve Suncadia as a third-party provider without substantial financial or other harm, whether it could actually reach an agreement with Suncadia has not been tested. Whether or not such an agreement can be reached, the issue remains whether it would serve the public interest to maintain Inland's obligation as an ILEC to serve the Suncadia area under RCW 80.36.090." There are at least two items in this statement that must be addressed.[23]

33 The first item is the one that has been discussed above. The Initial Order premises its analysis on the factual fiction that Inland must negotiate an access agreement to Suncadia through use of Suncadia, LLC's infrastructure when the other side does not want to sit down at the table to negotiate. Whether an agreement can be reached with Suncadia, LLC has been tested. The offer was made and no response came back. Anything else in the record is pure speculation. Thus, the Initial Order's statement that Inland could serve as a third-party provider "without substantial financial or other harm" is pure speculation with no support in the record.

[23] In addition to the two items discussed in this portion of the Petition, the use of "harm to Inland" as the standard to measure public interest is discussed beginning at ¶65, below.

34 The other portion of this paragraph that is problematic is the concept the Initial Order adopts that even if an agreement cannot be reached, it may be in the public interest to maintain Inland's obligation to serve the Suncadia area under RCW 80.36.090. This is nothing more than a legal fiction: that is, that a paper obligation to serve an area that a company cannot physically serve because of actions of third parties advances the public interest. That is just not true. No customers would actually be served under that legal fiction.[24]

B. The Initial Order Relies on an Inappropriate Formulation of the Public Interest Test.

35 At paragraph 40, the Initial Order adopts the standard in WUTC v. US West, Docket UT-961638, Fourth Supplemental Order (January 16, 1998) as set forth at pages 15-16 and 22-24 of that Order. The Initial Order appears to adopt the premise that Inland must show (1) that the rates that would result in the Suncadia area after it leaves (in theory – in fact, Inland was never actually there) are fair, just, reasonable and sufficient; (2) that there must be affordable universal service and diversity of providers after Inland leaves where it never was; and (3) that the economic burdens on the company outweigh the benefits it receives as a *de facto* monopoly provider. The Initial Order does footnote the fact that this last element of the test is probably not appropriate and does not discuss this portion of the US West standard.

36 However, the US West standard is not appropriate in any respect for this proceeding. In the US West case, US West, now Qwest, proposed that existing services

[24] Would Inland be fined by this Commission for failing to serve the Suncadia area because the area is in Inland's tariff? Even when Inland cannot get physical access to the area?

be abandoned.[25] Here, there are no existing services being abandoned. In this case, Inland has no say over the resulting rates. Inland cannot serve the area. The customers in the Suncadia Resort cannot subscribe to Inland's service. Whether Inland is theoretically present or factually absent has no affect whatsoever on the rates that ICS charges customers in the Suncadia Resort area.

37 The Initial Order applies the US West test it sets forth in paragraph 40 in the manner that the Initial Order describes in paragraph 42: "Inland has failed to show that service from ETCs, including ICS, would continue to be available in Suncadia, or that those providers would be able to receive crucial USF support required to enable them to serve the area." Then at paragraph 45, the Initial Order states: "Inland has also failed to demonstrate that wireless service to the area would provide adequate 'available' service, comparable to wireline service. The FCC has stated that wireless service does not yet rise to the quality level of wireline, in particular with regard to the provision of 911 emergency calling service...Finally, the Commission has recognized ETCs' initial inability to provide ubiquitous service in their territories until they are able to tap into USF support funds."

38 Besides a number of errors in these statements, which will be discussed below, the underlying premise is that Inland must prove a negative. Inland must prove that even though it cannot serve an area, service from other providers would continue to be present for an area where there were no customers until the developer controlling access to the telecommunications infrastructure started developing building lots. Inland has no control

[25] Qwest (then US West) sought to exit the Centrex market, where it had a substantial number of existing customers.

over the facts that meet the standard applied in the Initial Order. It is an impossible standard to meet.

39 In addition, the statement that Inland would have to show that wireless service provides "adequate 'available' service, comparable to wireline service" again requires Inland to prove a negative. Inland has no control over the service qualities offered by other providers. This is an impossible standard to meet.

40 Inland will now discuss some of the factual errors contained in paragraphs 42 and 45. In paragraph 42, the Initial Order states that "Inland has failed to show that services from ETCs, including ICS, would continue to be available in Suncadia...." ICS is not an ETC. Inland certainly hopes that this is a mistake in construction of the sentence and the Commission is not pre-judging a pending application. Further, this statement miscomprehends the obligations inherent on an ETC. An ETC has to hold itself out to be able to provide service throughout the service territory for which it has been designated.[26] That is the standard created by statute. Thus, the standard created by statute is the presumption that the ETCs will continue to provide service in Suncadia. Absent evidence to rebut this presumption -- and there is none -- Inland is entitled to rely on the presumption that service will continue.

41 If this passage is in reference to the issue of whether a competitive ETC continues to remain an ETC if the incumbent is no longer an ETC in the area, the answer appears to be clear from statute. Under 47 U.S.C. §214(e)(4), it is clearly contemplated that the underlying ILEC may withdraw from ETC obligations for a physical portion of its service

[26] 47 U.S.C. §214(e)(1).

area. The statute contemplates that the previously designated area will remain in place for surviving ETCs. As stated in the statute, the state commission "shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier shall continue to be served...." This language carries the clear import that once a competitive ETC is designated for an area, it retains that area and is required to serve that area as an ETC regardless of what happens to the underlying ILEC. In this case, there are no customers served by the relinquishing carrier that need continuation of service. However, the concept that the territory remains included in the designated service areas for competitive ETCs is firmly grounded in this statute.

42 The other problem with paragraph 42 is the statement that "Inland has failed to show...that those providers would be able to receive crucial USF support required to enable them to serve the area." There is no evidence in the record that USF support is required for any entity to serve the Suncadia Resort area. The densities are quite a bit greater than Inland has in its other areas. The factual basis for the statement that there is "crucial USF support" does not exist in the record. The concept that USF support is required to enable those other providers to serve the area is not in the record, let alone that it is "crucial."

43 Turning to the provisions of paragraph 45, Inland notes there is no citation for the conclusion that "The FCC has stated that wireless service does not yet rise to the quality level of wireline, in particular with regard to the provision of 911 emergency call service." If wireless service does not rise to the quality level of wireline service, particularly for the provision of access to 911 calling, then why are the wireless carriers designated as ETCs? Under the definition of basic services to be offered by <u>every</u> ETC,

an ETC must provide access to 911 service.[27] The inference in the Initial Order that a wireless ETC cannot provide access to 911 service contains a legal impossibility. By definition, the wireless carriers should not be ETCs if they cannot provide that service.

44 In paragraph 45, the Initial Order postulates that Inland must demonstrate that wireless service to the area is comparable to wireline service. There is no legal standard for this conclusion. All carriers, whether wireline or wireless, have to provide the same basic services in order to be designated as an ETC.[28] Thus, if carriers are designated as an ETC for an area, the legal presumption must be that they can provide those basic services at a level that is acceptable to the Commission.

45 The Initial Order points to no standard by which to measure whether there is "adequate 'available' service, comparable to wireline service." Assuming, arguendo, that this is the correct legal standard, this is, again, the regulatory rock. Inland must keep trying to guess at what would constitute "adequate available service." However, the Initial Order provides no citation for such a standard. In addition, there is no delineation of what constitutes "comparable" service. Again, Inland would have to continue to guess at this standard. The burden that is placed on Inland is impossible to bear and cannot be the correct standard for this case.

46 The last sentence of paragraph 45 is also problematic. The statement is "Finally, the Commission has recognized ETCs' initial inability to provide ubiquitous service in their territories until they are able to tap into USF support funds." The wireless ETCs for this area have been designated as such for some time now. When must an ETC meet its

[27] 47 C.F.R. §54.101(a)(5).
[28] 47 C.F.R. §54.201(d)(1).

obligation to provide service throughout the area for which it is designated? Never? The presumption should be that those entities that are designated as can provide service throughout the area for which they are designated. That is the legal standard in statute. Otherwise, ETC designation simply provides financial windfalls to competitive ETCs.

C. Statutory Declarations of Policy.

47 At paragraph 40, the Initial Order relies on RCW 80.36.300 to conclude that granting of Inland's petition would not be in the public interest because it would diminish the availability of service. That statement relies upon a factual and legal fiction. That legal fiction is that if Inland has the paper burden of serving the Suncadia Resort, this virtual appearance in the area maintains the availability of service and increases the availability of supply. The factual fiction is that Inland can serve the area. In fact, Inland cannot provide service to the Suncadia Resort. There is no maintenance of the availability of service, nor is there an increase in availability of supply, if Inland is required to keep the Suncadia Resort in its territory. On the other hand, there is no decrease in the availability of service or supply if the Suncadia Resort is removed from Inland's service territory.

48 Inland is not arguing that the policies in RCW 80.36.300 should be ignored. Those policies should be considered. Inland's position is that the Initial Order is mistaken in its application of the policies. Inland provides the following analysis of the policies contained in RCW 80.36.300. Each applicable subsection of RCW 80.36.300 will be considered in turn.

a. RCW 80.36.300(1):

49 This section makes it the policy of the state to preserve affordable universal service. ICS has made it clear that its interest is to force Inland to retain the Suncadia Resort area within Inland's service territory so ICS can draw universal service funds.[29] Suncadia, LLC owns the conduit, fiber and switch, not ICS. Suncadia, LLC 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.

50 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.[30]

51 If Inland is required to retain the Suncadia Resort area within its service area on the theory that doing so will provide an incentive for competitive entry if universal service funding is available, then the Initial Order 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

[29] Opening Brief of ICS at ¶14. ICS did not put on a witness in this case. There is no evidence that ICS even needs USF support.

[30] Tapes of the open meeting are available through the Commission's Record Center. Inland requested that the Commission take official notice of that discussion. The Initial Order granted that request. See, Initial Order at footnote 64.

sufficient reason for making universal service funds available.[31] Further, as a practical 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.

52 The wording in RCW 80.36.300(1) is to "preserve affordable universal service." There is nothing in Inland's tariff filing that will affect this policy one way or the other. This is an area of new construction, so there is nothing to "preserve." Inland cannot access the area, so it can do nothing to preserve universal service in the area.

b. RCW 80.36.300(2):

53 This statutory policy is to maintain and advance the efficiency and availability of telecommunications service. However, there are 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. Inland cannot obtain access without going through a condemnation process. 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 does not affect, one way or the other, the availability of telecommunications service in the Suncadia Resort.

c. RCW 80.36.300(3):

54 This statutory policy is that consumers pay only reasonable charges for telecommunications service. Inland's 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. Inland has no access to the Suncadia Resort area today. Inland is not required to

[31] 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").

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).

55 As an aside, it is interesting to note that Suncadia views itself at the determinant of what is a reasonable rate for the residents of the Suncadia Resort area since it states that it would have to review and approve any charges applied in that area.[32]

d. RCW 80.36.300(4):

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

e. RCW 80.36.300(5):

57 This statutory policy is to promote the diversity and supply of telecommunications services and products and telecommunication markets throughout the state. The Initial Order states that Inland's tariff filing would have an adverse effect on this policy objective. However, there is no competition in the Suncadia Resort area. There is no actual increase or reduction in the diversity of supply of telecommunications services and products by Inland's tariff filing.

58 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

[32] TR 155, l. 22 – TR 157, l. 12.

forth in RCW 80.36.300.[33]

D. Consideration of Universal Service Policy Issues.

59 This issue is discussed, in part, above. There is a discussion in the Initial Order of the probable effects that this docket may have on universal service. At paragraph 43, the Initial Order recognizes the potential for arbitrage of USF funds by ICS. However, the Initial Order summarily dismisses those concerns as a matter of federal jurisdiction, not a concern for this Commission. That is absolutely an incorrect statement. This Commission acts as the gatekeeper for access to USF funds through the ETC designation process. While it may be correct that those determinations will occur in another docket before this Commission, it is this Commission's concern whether or not someone is going to access USF funds in a way that arbitrages the use of those funds. It is not a matter for federal determination in the first instance. Why should ICS create a *de facto* monopoly that excludes Inland and yet receive federal USF funds as though it were serving Inland's more remote, more costly areas to serve? Inland raises these issues as policy considerations for this docket, even though whether ICS will be granted ETC status will be ultimately determined in another docket.

60 Further, as a factual matter, the Initial Order's speculation that Inland's withdrawal might prevent future ETC designations for the area is not founded in law. If the area is outside of Inland's service area as a "unserved" area, meaning not served by any ILEC, then ICS would be able to petition to become the ILEC designated for that area. And, if

[33] 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.

granted, would be able to apply for ETC status based upon its own cost of service. This is exactly what happened that led to Skyline Telephone Company's service in the Mt. Hull area. The area had previously been in the service territories of Verizon and Qwest. The area was dropped from their service areas and Skyline Telephone Company was granted ILEC status for the area and ultimately received ETC designation and federal USF support.[34]

E. Application of the Public Interest Test/Burden of Proof.

61 Under the Initial Order's application of the public interest test and burden of proof, Inland must prove: (1) that there is and will continue to be service where there was no service before; (2) that Inland's "exit" from an area that it never served would result in fair, just and reasonable rates in an area it cannot serve; and (3) that ETCs that have the obligation by virtue of their designation to offer service throughout the area for which they are designated will continue to meet their regulatory obligations even though Inland has no control over those carriers. Under the Initial Order's application of the public interest test, Inland's paper presence in the Suncadia Resort provides maintenance of efficient telecommunications service (even though Inland cannot provide service) and increases the availability of suppliers (even though Inland cannot provide service). This does not make sense.

62 If the Initial Order does not make sense, what does?

63 What is before the Commission is a tariff change filed under RCW 80.36.110. The appropriate question to ask is what is the burden of proof for such a change? This is

[34] Petition of M&L Enterprises, Inc., d/b/a Skyline Telephone Company for Designation as an Eligible Telecommunications Company, Docket No. UT-013022.

not a case that involves an increase in rates. This is not a case that involves the withdrawal of existing service.

64 RCW 80.36.110 does not contain any burden of proof language. The only statutory burden of proof language that can be found is in RCW 80.04.130(2) that states "The burden of proof to show that such increase is just and reasonable shall be on the public service company." (Emphasis added.) The word "such" refers to the instance in which there is a tariff change to increase any rate, charge, rental or toll. There is no element of an increase to a rate, charge, rental or toll assessed by Inland Telephone Company in this case. What the burden of proof standard in RCW 80.04.130(2) for increases in rates, charges, rentals or tolls suggests is that there is no corresponding burden of proof for tariff filings that do not involve such increases. Under common rules of statutory construction, the implication is that the public service company does not have the burden of proof in the sense of a contested case burden of proof. State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (different meanings are presumed to be intended for different words in statute); Koker v. Armstrong Cork, Inc., 60 Wn. App. 466, 804 P.2d 659 (1991) (differences in terminology indicates differences in legislative intent); Simpson v. State, 26 Wn. App. 687, 615 P.2d 1297 (1980) (express inclusion of one item in a statute manifests the legislative intent to exclude other items which are not mentioned). The remaining arguments on burden of proof assume that the filing must be found to be in the public interest.

65 The Commission regulates in the public interest. RCW 80.04.010. The Initial Order seems to focus on two aspects of public interest. One is that Inland somehow has to prove that it is harmed without the tariff filing taking effect, before the tariff filing can

be found to be in the public interest. The other is all of the negatives that Inland has to prove, as discussed above. There is nothing in any statute that would suggest that a tariff filing under RCW 80.36.110 has to ameliorate some harm to the company before it can be approved.

66 For example, assume that a regulated company files a tariff change to its business office hours. Assume that the business office was formerly opened from 8:30 a.m. to 4:30 p.m. Assume that the change is to have the business office open from 9:00 a.m. to 5:00 p.m. The number of hours that the office is open remain the same. Is the company harmed without the change? No. Should the tariff filing be approved? It depends on whether it is in the public interest. Assume the company states that the reason for the change is that because the change would better accommodate its two customer service representatives' childcare needs. Should the tariff change be approved? Why not?

67 Assume that a regulated company makes a tariff filing to expand its business hours from 9:00 a.m. to 4:00 p.m. to 8:30 a.m. to 4:30 p.m. Is the company harmed without the tariff change? No. In fact, in one sense the company is "harmed" because of the proposed tariff change in that it has a greater level of employee expense. Does this mean the tariff change should not be approved? Of course not.

68 The applicable standard should be the reverse of what the Initial Order seems to suggest. That is, if there is no harm that will come about from the proposed filing, it should be allowed to take effect. Since all that is involved in Inland's filing is a recognition of reality -- that it cannot serve the Suncadia Resort -- there is no harm. Inland cannot serve the area. The customers cannot have Inland's service. There is no harm from this filing.

F. Summary on Burden of Proof and Public Interest Issues.

69 Inland has never provided residential service in the Suncadia Resort area. This is not a case in which Inland is seeking to abandon existing services that it is provisioning.

70 Inland said no to Suncadia, LLC when Inland was asked to share regulated revenues with Suncadia, LLC. All this tariff filing does is to reflect a physical reality, Inland cannot access the customers within the Suncadia Resort area because of the actions of the property owner, Suncadia, LLC, who is exercising control over its own private property.

71 Inland asserts that this is a simple tariff filing without precedent for those situations in which a carrier is already provisioning service and desires to abandon that service. That is not the case in this proceeding.

72 Inland's asserts that its tariff filing is consistent with the public interest or, in the somewhat convoluted legalese that is sometimes used, "not inconsistent" with the public interest. Inland is not able to provide services to customers within the Suncadia Resort area. No matter how much it is theorized or speculated that there may be some set of circumstances under which Inland can provide service in the Suncadia Resort area, the evidence in this record shows that the opportunity for service does not exist.

73 To the extent that there is a concern that the customers within the Suncadia Resort area may not receive an appropriate level of service, Inland is entitled to rely on the statutory presumptions that those entities designated as ETCs for the area will continue to offer their services throughout that area, offer the required basic services and offer those services at a level of quality that is acceptable to the Commission. In any event, Inland does not have access to the area and cannot ameliorate any customer service concerns.

74 Inland cannot be held to a standard that it must prove something that will not happen. By this, it is meant the Initial Order's premise that Inland must prove that future negotiations will fail in order to demonstrate that its tariff filing is in the public interest. When the offer to negotiate is made, and the other party does not respond, the only thing that can be said is that there are no negotiations. The absence of negotiations is a silence that speaks volumes.

VI. STATEMENT OF HOW THE ASSERTED DEFECTS IN THE INITIAL ORDER AFFECTS THE FINDINGS OF FACT, THE CONCLUSIONS OF LAW AND THE ULTIMATE DECISION AND INLAND'S RECOMMENDED FINDINGS AND CONCLUSIONS

75 WAC 480-07-825(3) asks that any petition for review include a statement showing how the asserted defects in the Initial Order affects the findings of fact, the conclusions of law, and the ultimate decision. In this docket, the discussion of the defects in the Initial Order that are set out above clearly take away the premise for the Initial Order's conclusion that Inland failed to carry its burden of proof. Inland has demonstrated how the Initial Order applied an erroneous standard for the burden of proof. Inland has demonstrated why its tariff filing is consistent with the public interest. Inland has demonstrated that the factual premises contained in the Initial Order related to Inland's lack of showing of access to the telecommunications facilities within the Suncadia Resort are not well founded. Since the Initial Order focused on a burden of proof analysis, each of the errors discussed above goes towards overturning the conclusions reached by the Initial Order.

76 Based on the foregoing, Inland recommends the following language for the challenged findings of fact and conclusions of law.

77 Initial Order Paragraph 55, Finding of Fact 9: "Inland bears the burden of proof to show that the proposed tariff revision would serve the public interest, and would be fair, just, and reasonable."

Inland's recommendation: "Inland bears the burden of presenting evidence to show that the proposed tariff revision is consistent with the public interest."

78 Initial Order Paragraph 56, Finding of Fact 10: "Inland provided insufficient evidence to meet its burden of proof."

Inland's recommendation: "Inland provided evidence demonstrating that the proposed tariff revision is consistent with the public interest. Inland's tariff revision would not violate any of the policies contained in RCW 80.36.300 and is consistent with those policies. Inland's tariff revision reflects the lack of physical access to the area Inland seeks to remove from its tariff."

79 Initial Order Paragraph 58, Conclusion of Law (2): "Inland has failed to carry its burden of proof that its proposed tariff revisions are fair, just, and reasonable and in the public interest."

Inland's recommendation: "Inland has provided sufficient evidence that its proposed tariff revisions are consistent with the public interest."

80 Initial Order Paragraph 59, Conclusion of Law (3): "Inland's proposed tariff revision removing Suncadia from Inland's service territory should be rejected."

Inland's recommendation: "Inland's proposed tariff revision should be allowed to take effect."

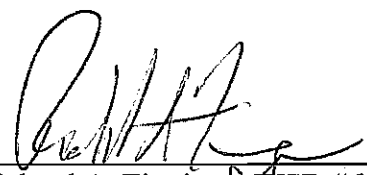
81 Initial Order Paragraph 60: "IT IS ORDERED That Inland's proposed tariff revision is rejected."

Inland's recommendation: "IT IS ORDERED That the suspension in this matter be lifted and Inland's proposed tariff revision allowed to take effect."

VI. CONCLUSION

82 For the reasons set forth above, Inland respectfully requests that the Commission grant its Petition, reverse the Initial Order and allow Inland's tariff filing to take effect.

Dated this 22nd day of August, 2006.



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