

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET NO. UT-050606
	)	
Complainant,	)	RESPONSE OF INTELLIGENT
	)	COMMUNITY SERVICES, INC., TO
v.	)	INLAND PETITION FOR
	)	ADMINISTRATIVE REVIEW
	)	
INLAND TELEPHONE COMPANY,	)	
	)	
Respondent.	)	
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1. Intelligent Community Services, Inc. (“ICS”) provides the following response to the Petition of Inland Telephone Company (“Inland”) for Administrative Review (“Petition”) of Order 08, Initial Order Rejecting Petition for Tariff Revision (“Initial Order”). The Petition lacks both evidentiary and legal support, as demonstrated by the prior briefing in this proceeding. ICS thus will address only Inland’s most egregious distortions of the record in this response. For the reasons discussed below and in the prior briefing of parties other than Inland, the Commission should deny the Petition and confirm the conclusions in the Initial Order.

**DISCUSSION**

**A. Inland Has Never Requested Negotiations with ICS for Access to Suncadia’s Network Infrastructure.**

2. The Initial Order correctly states that Inland’s claim that it could not obtain reasonable access to the network facilities that Suncadia, L.L.C. (“Suncadia”) has constructed and ICS manages in order to provide local service in the Suncadia resort area “is speculative because the parties have never attempted to negotiate such an

agreement.”<sup>1</sup> “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,” contending that “[n]egotiations were requested and Inland was spurned.”<sup>2</sup> Inland’s exception is nothing short of astonishing in its disregard for the facts and the evidentiary record.

3. The record clearly and unambiguously demonstrates that Inland has never requested negotiations with ICS for access to Suncadia’s network facilities. In discovery, ICS expressly requested Inland to “describe all alternatives that Inland has explored with Suncadia or ICS for Inland to offer local service in the Suncadia Resort area using facilities and/or network provided by Suncadia and/or ICS, if Suncadia and ICS negotiate to allow ICS to be the preferred provider of telecommunications service in that area.”<sup>3</sup> Inland responded, as of February 27, 2006, that any such exploration was *speculative* and *impossible* because ICS was not yet the preferred provider of telecommunications service in that area:

**Inland objects to this question as calling for speculation about future events** and is not subject to response at this time. Without waiving the foregoing objection, Inland points out that this question is predicated on the supposition that “Suncadia and ICS negotiate to allow ICS to be the preferred provider of telecommunications service in that [Suncadia Resort] area.” Based on representations made in this docket, it is Inland’s understanding that those negotiations have not been concluded. Since those negotiations have not been concluded and ICS is apparently not yet the “preferred provider of telecommunications service,” **it is not possible for Inland to have explored any alternatives with Suncadia or ICS under that precondition at the present date.**<sup>4</sup>

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<sup>1</sup> Initial Order ¶ 17; *accord id.* ¶ 28.

<sup>2</sup> Petition ¶ 19.

<sup>3</sup> Ex. 11 (Inland Response to ICS DR No. 4).

<sup>4</sup> *Id.* (emphasis added).

4. Inland cannot take exception to the Initial Order’s finding when Inland itself characterized as “speculation” and “not possible” any negotiations for Inland to provide local service over Suncadia’s network facilities. Even after ICS and Suncadia reached an agreement for ICS to be the preferred provider of telecommunications service to the Suncadia resort area, Inland did not request negotiations for access to the Suncadia facilities. When asked during the hearing whether Inland “had any contact with ICS in terms of being able to access Suncadia’s network through them,” Inland’s witness, Mr. Coonan, responded, “We haven’t.”<sup>5</sup> Inland’s witness testified and its counsel represented that Inland has not made – and could not make – any effort whatsoever to contact ICS to negotiate or obtain access to Suncadia’s network facilities. Inland cannot now claim that it requested such negotiations, much less that Inland was “spurned.”

5. The sole evidence on which Inland purports to rely to support its exception is a letter from Inland to ICS that was introduced as a cross-examination exhibit for Mr. Coonan. That letter provides absolutely no support for Inland’s position. In the letter, Inland rejects *ICS’s request* for interconnection negotiations and states Inland’s refusal to negotiate any interconnection agreement except a traffic exchange agreement once Inland is no longer obligated to serve the Suncadia resort area:

**Inland . . . will not negotiate terms of an interconnection agreement, unless what you are requesting is solely interconnection in the form of a traffic exchange agreement that would satisfy the obligations of Section 251(a) of the Act.**

. . . .

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<sup>5</sup> Tr. at 93, lines 16-18. Indeed, Inland’s false statements that Inland requested negotiation with ICS are not even consistent with Inland’s own Petition, which makes the (unsupported) assertion that because the facilities that Suncadia has constructed belong to Suncadia, not ICS, “it would be fruitless for Inland to try to negotiate access to the network infrastructure with ICS.” Petition ¶ 29.

If, on the other hand, there is some confusion on your part as to what you would like to pursue, we might be able to discuss things. If you are planning to serve Suncadia and Inland is withdrawing from Suncadia, perhaps all that is needed is a traffic exchange agreement. **We would be more than happy to talk to you about the terms of a traffic exchange agreement between non-competing providers.** However, we are not willing to negotiate an interconnection agreement under Section 251(c) and Section 252 that removes the rural exemption that is currently in place for Inland Telephone Company.<sup>6</sup>

6. Inland refused to negotiate an interconnection agreement with ICS. Indeed, Inland refused to negotiate any agreement with ICS as a competing provider of local services, and that apparently remains Inland's position today.<sup>7</sup> ICS, not Inland, was spurned in its attempts to negotiate any kind of network access. For Inland now to claim that its rejection letter to ICS was an offer to negotiate interconnection, including permitting Inland to access Suncadia's network facilities, is as insulting as it is false. The record fully supports the Initial Order finding that Inland has never requested negotiations with ICS or Suncadia for access to Suncadia's network facilities as operated by ICS.

**B. Nothing in the Initial Order Suggests Negotiations Can Override Commission Authority or Minimizes Revenue Sharing.**

7. In addition to mischaracterizing its refusal to negotiate an interconnection agreement, Inland attempts to misconstrue the Initial Order with respect to two aspects of the agreement that Inland has refused to negotiate. First, Inland contends that "[t]he Initial Order acknowledges that Suncadia, LLC would have to approve any rates that Inland would offer" and thus implicitly authorizes the Commission to "cede its

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<sup>6</sup> Ex. 14 (Letter from Inland to ICS) (emphasis added).

<sup>7</sup> See Tr. at 99-100 & 104 (Inland Coonan) (testifying that any request by ICS to negotiate a traffic exchange agreement with Inland as a competing local service provider would be referred to Inland's legal counsel).

ratemaking authority to a private entity.”<sup>8</sup> The Initial Order does no such thing. The Initial Order acknowledged only *Inland’s argument* that Suncadia’s witness “testified that any agreement that might be reached would be subject to Suncadia’s approval as to rates.”<sup>9</sup> The Initial Order made no specific finding on this testimony or on Inland’s claim because none was necessary or appropriate.

8. Inland has yet to request negotiations with ICS and Suncadia, much less entered into an agreement that includes a provision requiring Suncadia’s approval of Inland’s rates. Until such a provision is presented to the Commission for its review, the Commission cannot make any determination as to what such an obligation would be or how it would be implemented. An agreement may provide that Suncadia’s approval is required only if the service Inland provides is unregulated or classified as competitive or if the rates vary from the tariff rates Inland charges elsewhere in its Roslyn exchange. The Initial Order’s silence with respect to this testimony means nothing more than that the existence or meaning of this or any other term of an agreement for Inland to access Suncadia’s network facilities is speculative until there is an agreement or the parties have at least attempted to negotiate such an agreement. The Initial Order simply is not susceptible to Inland’s interpretation that the Commission is somehow ceding its ratemaking authority to Suncadia.

9. Inland also misconstrues the Initial Order to minimize the public interest implications of “revenue sharing.” Inland, however, is inflating the concept of “revenue sharing” out of all reasonable proportion, much less the record. The Initial Order

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<sup>8</sup> Petition ¶ 22.

<sup>9</sup> Initial Order ¶ 15.

expressly recognizes Suncadia's representation that it would not require unlawful revenue sharing and correctly states that "[l]awful revenue sharing presumably would not include the sharing of revenues from basic services, thus eliminating Inland's argument that customers outside Suncadia would subsidize Suncadia's customers or that Suncadia's customers would be charged more for regulated service."<sup>10</sup> Inland thus may (or may not) be required to share revenues from *unregulated* services, but the Commission cannot know whether, or the extent to which, any such revenue sharing is required until an agreement exists. Even then, the Commission may lack jurisdiction to determine the propriety of revenue sharing, if any is required, for services that the Commission does not regulate.

10. Any discussion of Suncadia having approval of Inland's rates or requiring Inland to share revenues from services provided in the Suncadia resort area is pure speculation. Until Inland at least attempts to negotiate an agreement with ICS and Suncadia for access to Suncadia's network facilities, Inland cannot reasonably take exception to the Initial Order's refusal to give credence to Inland's fears of hypothetical contract provisions for rate approval and revenue sharing.

**C. Inland Cannot Legitimately Object to the Initial Order's Finding that Inland Is in the Same Position as Inland Has Placed ICS.**

11. The Initial Order correctly observes, "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."<sup>11</sup> Inland claims that this statement "is

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<sup>10</sup> *Id.* ¶ 29.

<sup>11</sup> Initial Order ¶ 16.

wrong and evidences a lack of understanding of the difference in the two types of access.”<sup>12</sup> It is Inland that is wrong, and the Initial Order understands very well the circumstances presented in this case.

12. Inland accurately observes that CLEC access to ILEC networks is subject to Section 251 and 252 of the Act, as well as FCC and Commission requirements, including the requirement to negotiate – and if necessary to arbitrate – interconnection agreements. Of course, Inland neglects to mention that it takes the position that all of these ILEC obligations do not apply to Inland.<sup>13</sup> Inland refuses to negotiate an interconnection agreement under Sections 251 and 252 of the Act, refuses to provide network access to ICS as a landline competitor, and undoubtedly would object to any attempt to arbitrate such access. In other words, Inland is complaining about being in exactly the same position as Inland has placed ICS, with Inland having “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.”<sup>14</sup>

13. The Initial Order, therefore, got it exactly right. Inland is in the same boat as ICS and not surprisingly Inland does not like it one bit. Rather than creating a lack of parity, as Inland claims however, the Initial Order provides at least the incentive for some level of parity where none previously existed. ICS operates Suncadia’s network facilities to which Inland needs access, and Inland has constructed a network to serve the remainder of the Roslyn exchange to which ICS seeks access in order to be designated as an eligible

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<sup>12</sup> Petition ¶ 27.

<sup>13</sup> Ex. 14 (Letter from Inland to ICS). ICS, however, disputes Inland’s position.

<sup>14</sup> Petition ¶ 28. Inland may claim that ICS could seek to have the Commission terminate Inland’s claimed rural exemption under Section 251(f). While that is true, Inland for its part could exercise its rights of eminent domain to obtain access to the Suncadia resort area to provide telecommunications service. Both parties’ alternatives, however, are time-consuming and expensive.

telecommunications carrier (“ETC”). Both parties have something to gain through an interconnection agreement, and far from granting ICS or Suncadia an advantage, the Initial Order establishes more equal bargaining power between the parties.<sup>15</sup> Inland would rather have its cozy monopoly, but consumers stand to benefit from the Commission’s efforts to foster the development of local competition in the Roslyn exchange.

**D. The Record Does Not Demonstrate that ICS Has the Ability or the Intent to Arbitrage Universal Service Funding.**

14. Not content to misconstrue the Initial Order and make factual allegations that are contrary to the record evidence, Inland mischaracterizes ICS’s position in this docket and in the Roslyn exchange. Inland claims that “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.”<sup>16</sup> ICS’s ability to obtain the same universal service funds that are available to Inland to serve the Suncadia resort area is only one of several reasons ICS has opposed Inland’s proposal to exclude that area from its Roslyn exchange.<sup>17</sup> More to the point, Inland’s self-serving claim that ICS seeks to engage in universal service funding arbitrage is devoid of any evidentiary support.

15. Factual errors permeate Inland’s contention that ICS is seeking to “create a *de facto* monopoly that excludes Inland and yet receive federal USF funds as though it were

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<sup>15</sup> Inland alleges that “it would be fruitless for Inland to try to negotiate access to the network infrastructure with ICS” because the network belongs to Suncadia. Petition ¶ 29. Again, however, Inland has not requested negotiations with ICS (or with Suncadia, at least since ICS and Suncadia executed their agreement) so Inland does not know whether it could obtain access to Suncadia’s facilities through ICS or the extent to which ICS could work with Inland and Suncadia to negotiate such access.

<sup>16</sup> Petition ¶ 49.

<sup>17</sup> See ICS Opening Brief ¶¶ 11-14 (discussing ICS’s concerns with the negative impact on Suncadia residents and ICS’s ability to interconnect with Inland and provide service to those residents).



...serving Inland’s more remote, more costly areas to serve.”<sup>18</sup> First, as discussed above, Inland has never requested negotiations for access to Suncadia’s network as operated by ICS. The record thus does not support any claim that ICS has intended to create or has created any kind of monopoly on local exchange service to the Suncadia resort area or that ICS specifically intends to exclude Inland from providing competing service in that area. The record amply demonstrates, on the other hand, that Inland has enjoyed – and is attempting to maintain – a monopoly on the provision of landline local exchange service in its Roslyn exchange other than in the Suncadia resort area.<sup>19</sup>

16. Second, ICS has petitioned for designation as an ETC in the entire Roslyn exchange, not just in the Suncadia resort area.<sup>20</sup> ICS, therefore, will need to be able to provide basic local exchange service throughout that exchange, just as Inland currently is required to do – including in “Inland’s more remote, more costly areas to serve.” Inland has suggested that ICS may attempt to do so by reselling Inland services outside of the Suncadia resort area,<sup>21</sup> but Inland apparently takes the position that it has no obligation to do so.<sup>22</sup> Nor would ICS, rather than Inland, receive universal service funding for resale customers even if Inland were to resell its services. ICS cannot receive any “windfall” under such a scenario.

17. Finally, Inland cites no record evidence – and no such evidence exists – to support the proposition that the Suncadia resort area is more densely populated or less costly to

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<sup>18</sup> Petition ¶ 59.

<sup>19</sup> Ex. 14 (Inland Letter to ICS).

<sup>20</sup> Ex. 62 (ICS Petition for ETC designation in Docket No. UT-053041) at 5.

<sup>21</sup> Ex. 13 (Inland Response to ICS DR 6).

<sup>22</sup> See Ex. 14 (Letter from Inland to ICS).


serve than the remainder of Inland's Roslyn exchange.<sup>23</sup> To the contrary, the record reflects that ICS currently serves only a handful of customers in the resort area,<sup>24</sup> and that Inland estimates the costs of building network facilities in that area to be very high.<sup>25</sup> The evidence thus fails to demonstrate that ICS will incur any different costs to serve the Suncadia resort area than Inland incurs to serve customers in the remainder of the Roslyn exchange, or that ICS has either the ability or intent to arbitrage universal service funding.

### CONCLUSION

18. Inland's Petition lacks evidentiary and legal support and is completely devoid of merit. The Commission, therefore, should deny Inland's Petition and should reject the proposed tariff revision as the Initial Order provides.

DATED this 14th day of September, 2006.

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<sup>23</sup> Inland's counsel has developed line counts based on assumptions and projections, but counsel's representations are not evidence, are speculative, lack any empirical support, and do not include any information on density or cost, as opposed to number of lines. *See* Ex. 13 (Inland Response to ICS DR 6).

<sup>24</sup> Tr. at 149-50 (Suncadia Eisenberg).

<sup>25</sup> Ex. 7 (Inland Response to WUTC DR 12).