

**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
REPLY TO RESPONSES TO INLAND'S
PETITION FOR ADMINISTRATIVE REVIEW**

September 25, 2006

1 Inland Telephone Company ("Inland") respectfully submits its Reply to the
Responses submitted to Inland's Petition for Administrative Review ("Petition"), by
Intelligent Community Services, Inc. ("ICS"), Commission Staff and Public Counsel.

I. STATEMENT OF THE ULTIMATE QUESTION

2 In an effort to distill this proceeding to its ultimate question, Inland believes that
the basic proposition that must be answered is as follows: Is it in the public interest to
require a company to maintain an area within its service territory that it cannot physically
serve and does not have the legal right to serve?

3 The Initial Order in this docket answered the question in the affirmative, relying
upon a number of legal and factual fictions. As Inland pointed out in its Petition, these
fictions include such things as the customers in the Suncadia Resort Area would lose
access to Inland's tariffed services if the territory is removed from Inland's exchange
maps. Those customers, obviously, do not have access to such tariffed services. Inland
will not repeat the entire series of legal and factual fictions it identified in its Petition.
However, Inland notes that, for the most part, the responses of ICS, Commission Staff
and Public Counsel simply repeat and rely upon these fictions. At least Public Counsel
had the good grace to recognize that it would be doing no more than repeating arguments
it has already made and simply referenced its prior arguments.

II. REPLIES TO RESPONSES OF ICS, COMMISSION STAFF AND PUBLIC COUNSEL

4 In this section, Inland will address certain of the matters raised in each of the
responses filed by ICS, Commission Staff and Public Counsel. The order in which these
will be addressed are to start with Public Counsel, then ICS and finally Commission
Staff.¹

A. Response of Public Counsel.

5 As noted above, Public Counsel recognized that it would be doing no more than
repeating its prior arguments and stated that the Commission should rely upon the prior
briefing in evaluating the Initial Order. To some extent, Public Counsel is correct. The
prior briefing does cover many of the issues discussed in the Petition. However, the
Petition addresses those issues in the context of the Initial Order. For the reasons set forth
in Inland's Petition and Inland's other briefing, Public Counsel's position should not be
accepted and the Initial Order should be reversed.

B. Response of ICS.

6 In its response, ICS (and Commission Staff in its response) engages in perhaps the
biggest fiction of those used in this docket in an effort to uphold the Initial Order. That
fiction is that Inland has a duty to affirmatively negotiate third party access to Suncadia's
network that is used by ICS, through ICS, before it can be demonstrated that removal of
the territory is in the public interest.² Where is that duty in statute, rule or judicial
decision (including Commission decision)? The answer: it does not exist.

¹ The order should not be taken to imply an order of importance. It simply appears that the issues flow best
in this order of discussion.

² ICS Response at pages 2-7; Commission Staff Response at page 7 and following.

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In their responses, ICS and Commission Staff place great emphasis on the purported lack of negotiations by Inland with Suncadia, through ICS, for use of Suncadia's network to access customers in the Suncadia Resort area. Both ICS and Commission Staff premise their arguments on the public interest that until such negotiations are proven to have failed, removal of the territory from Inland's exchange service area is not in the public interest.³ This high volume exposition of such a unique concept has all the earmarks of a lawyer who pounds the table because that attorney has neither the facts nor the law to support the argued proposition. More importantly, the positions advanced by ICS and Commission Staff are contrary to the positions they have taken in this record.

8

As Inland pointed out in its Reply Brief (filed in this matter on June 21, 2006), both ICS and Commission Staff agree that Inland has no affirmative duty to obtain access to the Suncadia Resort area to provide telecommunications service. Commission Staff's witness pointed out that if a customer desired Inland's service, it would be up to the customer to obtain an easement to allow Inland to provide service.⁴ ICS agreed in its statements made in its Opening Brief at paragraph 8.

9

If Inland has no affirmative duty to seek access to such customers and it is the customer's obligation to seek access to Inland, then the presence or lack of negotiations between Inland and ICS, or Inland and Suncadia, or Inland and both, have no bearing on the public interest. Logically it is a non-sequitur.

³ Ibid.
⁴ Exhibit 51TC, p. 8, l. 4-7.

10 This is precisely Inland's point: The presence or lack of negotiations has absolutely no bearing on this matter. The fact that does have a bearing on this matter is that Inland does not have a practical legal right and certainly no existing physical right to obtain access to those customers and has no legal obligation to obtain such access. Logically then, there is nothing about the public interest that would require Inland to maintain the Suncadia Resort area within its service territory and the Initial Order is in error.

11 What Inland did by discussing in the Petition the fact that negotiations would be futile was to go the extra step to point out that even if this were a marginally relevant characteristic of the public interest, there is no way that the obligation can be met. Thus, it is an impossible standard and should not be given any weight in determining the public interest in this case.

12 On this point, ICS harps upon the point that the negotiations that Inland refers to with ICS were negotiations for indirect interconnection, not for use of Suncadia's network.⁵ Inland raised the fact that it had offered to negotiate with ICS in its June, 2005 letter (Exhibit 14) to show that past behavior is an indication of future direction. It was not to suggest that the offer was for negotiation over use of Suncadia's network. Thus, the argument raised by ICS is simply an effort to deflect attention from the real issue.

13 More importantly, the letter from Inland contained in Exhibit 14 rejected an effort

⁵ ICS also makes some comments about seeking ETC status. ICS Response beginning at paragraph 14. Those statements appear to have no bearing since, as ICS admits, it is Suncadia's network, not its own, that is used in the Suncadia Resort area. Thus, there does not appear to be any way in which ICS can qualify for ETC status. See, 47 C.F.R. §54.201(d). The threshold qualification is that an applicant for ETC status must provide service through its own network or combination of its own network and another carrier's facilities. Suncadia is not a "carrier" as the term is used in FCC rules.

by ICS to send a defective request for interconnection. Inland was very forthright about the position it would take during interconnection negotiations and offered ICS the chance to negotiate interconnection for the termination of traffic between non-competing LECs on the assumption that ultimately ICS would be serving the Suncadia Resort area and Inland would be serving its service territory which would not have the Suncadia Resort area in it.

In addition to not responding to that offer (probably because ICS business plan suggests that it should be viewed as a competitive entrant in Inland's service territory to obtain universal service funding), ICS also did not respond to the issues related to Inland's rejection of ICS' letter as qualifying as a bona fide request. Another example of ICS refusing to move the issue forward.

14 ICS is purportedly serving the Suncadia Resort area today. This area is, at least as of this moment, within Inland's service territory. ICS is serving the Suncadia Resort area without an interconnection agreement with Inland. How is this possible? Why hasn't ICS sought negotiations? Is ICS misrouting traffic? In any event, the point is that based upon the way ICS has behaved in the past, it would be futile to expect any fruitful negotiations to occur with ICS over the use of Suncadia's telecommunications network.

15 The arguments advanced by ICS in their response concerning negotiations are not relevant to the determination of the public interest. Further, if there is some minimal relevance, what this record demonstrates is that such negotiations would produce no helpful result. The positions advanced by ICS should not be accepted by the Commission.

C. Response of Commission Staff.

1. Negotiations.

16 Commission Staff also beats the drum of forced negotiations with Suncadia and ICS before it can be said that the removal of the territory is in the public interest.⁶ In this portion of the Reply, Inland will address an issue related to those theoretical negotiations. As the arguments discussed concerning negotiations in relation to the ICS response set forth above apply to Commission Staff, this discussion applies equally to ICS's position on negotiations.

17 As noted above, the whole issue of negotiations is both contrary to Commission Staff's prior position and not relevant to the issue of public interest. However, assuming that there is some tangential relevance, it is interesting to look at the timing that is involved in this proceeding. Inland negotiated long and hard with Suncadia, a fact that is apparently recognized by all parties. Those negotiations failed and in February of 2005, Inland offered Suncadia the opportunity to negotiate for use of Suncadia's network.⁷ Suncadia never responded.

18 This docket took its course. The agreement that was negotiated between Suncadia and ICS is dated April 1, 2006. It was made known to the parties in this case just prior to the hearing in this matter. The hearing in this matter was held on April 27 and 28, 2006.

19 Now, somehow, Commission Staff purports to burden Inland with an obligation to affirmatively approach ICS and undertake to negotiate with ICS under its newly hatched

⁶ Staff Response beginning at paragraph 13.

⁷ Exhibit 33.

contract with Suncadia for use of Suncadia's telecommunications network in a timeframe that under this docket was impossible.

20 For the reasons set out in the Petition and discussed in this Reply, the concept that there is a duty on Inland to negotiate with ICS or Suncadia for use of the Suncadia telecommunications network as a precursor for determining that the removal of the Suncadia Resort area from Inland's exchange territory is both a legal and factual fiction and cannot stand.

2. Burden of Proof.

21 In its response, Commission Staff argues that certain arguments raised by Inland concerning its burden of proof are both new and untimely.⁸

22 As to the argument that the positions on burden of proof are new, Commission Staff is factually mistaken. The issues related to burden of proof were discussed during Commission Staff's Motion for Summary Determination. Inland raised issues in its briefing concerning the appropriate placement of the burden of proof and that Inland itself should not be viewed as having the burden of proof.⁹

23 As to timeliness, Commission Staff seems to suggest that Inland has waived its right to raise the issue of burden of proof because the Administrative Law Judge discussed the burden of proof while denying Commission Staff's Motion for Summary Determination. By analogy to the rules of civil court, a motion for summary judgment that is denied is not appealable (particularly by the party opposing the motion). It seems

⁸ Staff Response at paragraphs 5-11.

⁹ See, e.g., Inland's Response to Commission Staff's Motion for Summary Determination at paragraphs 12-14.

that the same standard should apply to motions for summary determination in the context of Commission proceedings. Otherwise, every basis that the Commission's Administrative Law Judge uses to deny a motion for summary judgment would have to be appealed to the full Commission before the case could proceed further. That sort of piecemeal review does not make sense in terms of efficient use of the Commission's limited resources.

24 Further, in its briefing on the merits in this matter prior to the issuance of the Initial Order, Inland clearly reserved the right to take exception to the burden of proof issue. In its Reply Brief, Inland addressed the burden of proof and in footnote 84 stated as follows: "Inland reserves the right to file an exception to this ruling [that Inland has the burden of proof] as part of the Commission's review of the Initial Order and, should it occur, any subsequent court review. However, for purposes of the analysis in this section, Inland will assume, *arguendo*, that the burden as stated above applies." Inland noted that it was preserving its objection to the issue of the appropriate burden of proof in the only logical place that would apply, in the briefing on the merits after the hearing.

25 In the briefing on the Motion for Summary Judgment, Inland noted that it probably had the burden of initial proceeding, as opposed to a burden of proof.¹⁰ This makes sense in that Inland would need to put on the record its tariff filing and the reasons for its tariff filing. Then the parties present arguments about whether or not such tariff filing is in the public interest. This is what occurred. Inland's actions have been consistent with its view of the case. Inland has not waived its right to bring the burden of proof issue before the

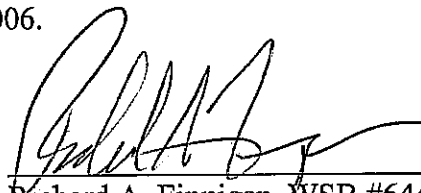
¹⁰ *Ibid.*

Commission and requests that the Commission Staff's arguments concerning waiver be denied.¹¹

CONCLUSION

26 It is Inland's position that the responses filed by ICS, Commission Staff and Public Counsel only underscore the fact that the Initial Order is incorrect. The logical inconsistencies between the purported "duty" to negotiate with Suncadia and ICS and the positions taken by the parties that there is no obligation on Inland to affirmatively obtain access to the Suncadia Resort area emphasize that the Initial Order misplaces the determination of what is or is not in the public interest insofar as this tariff filing is concerned. Inland respectfully requests that the Initial Order be reversed and that Inland's tariff filing be approved.

Dated this 25th day of September, 2006.



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¹¹ Commission Staff's other arguments in its response are merely rehashing its prior briefing and need not be addressed.