NO. 42994-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, a Washington municipal corporation,

Respondent,

v.

COMCAST OF WASHINGTON IV, INC., a Washington corporation; CENTURYTEL OF WASHINGTON, INC., a Washington corporation; and FALCON COMMUNITY VENTURES I, L.P., a California limited partnership d/b/a CHARTER COMMUNICATIONS,

Appellants.

REPLY BRIEF OF APPELLANTS COMCAST OF WASHINGTON IV, INC. and FALCON COMMUNITY VENTURES I, L.P. d/b/a CHARTER COMMUNICATIONS

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I. INTRODUCTION

Respondent PPUD's brief does not withstand even the slightest scrutiny. It repeatedly mischaracterizes the record, and regrettably the Court cannot take PPUD's fact citations at face value. Its legal arguments fare no better, as detailed below. In a case that turns on interpretation of RCW 54.04.045, PPUD makes remarkably little mention of the statutory language – because its reading is at odds with the statute's text and with the rules of statutory interpretation. In contrast, Appellants offer the only interpretation consistent with the statute's language and legislative history. Comcast and Charter join Appellant CenturyTel's further argument to this Court, which should reverse the trial court, adopt Appellants' reading of the statute, hold that the Agreement's non-rate terms are not just and reasonable, and award Appellants fees and costs as the prevailing parties.

II. RESPONSE TO PPUD'S RESTATEMENT OF THE CASE

PPUD's factual misstatements include the following:

1. PPUD's assertion that its new Agreement grew out of its concerns over safety, reliability and protection of public funds (PPUD Br. 10) is contrary to the record. In fact, the chief reason PPUD sought to impose the new Agreement was to increase pole attachment rates. *See* Exs. 7, 10-12, 14-18, 20, 21, 24-25; RP 437:5-418:7. PPUD sought this increase not merely to cover its just and reasonable costs (the express

limitation imposed by RCW 54.04.045), but rather to "make a profit" from pole attachments. *See* Ex 17A (PUD 000030) (PPUD finance manager presentation).[1] Unrefuted evidence belies PPUD's claims that it was motivated by safety and other operational concerns. Of particular note, the new agreement was overseen by PPUD's Finance Manager, who had ***no*** experience with pole attachments (RP 835:10-838:7), while its Chief Engineer – the official who is responsible for pole attachments – was kept in the dark about Appellants' operational concerns with the proposed Agreement. RP 438:18-441:12; *see also* RP 443:2-14; 441:24-442:9.

2. Contrary to its suggestion, PPUD did not engage in protracted good-faith negotiations. PPUD offers a string-cite that purports to show it negotiated the Agreement (PPUD Br. 42, n.45) but the cited evidence either was not admitted (Exs. 132, 134, 137, 156); refers to parties other than Comcast or Charter (Exs. 26, 34, 35,130-137, 943-944, Moisan Dep.); is duplicative (Exs. 38 and 136); or proves Appellants' point that PPUD did no more than accept some minimal feedback (Exs. 36-39, 76, 157-175). The sum and substance of PPUD's "negotiations" with the cable companies was a single one hour-long meeting with each of Charter and Comcast in January 2007. RP 1094:16-19; 1517:17-1520:21. PPUD's claim that it was "forced" to sue Appellants ignores an obvious

[1] PPUD's proposed rate of $19.70 is almost $7.00 higher than the average charged by other pole owners in Washington. Exs. 16 (PUD 000035) and 17 (PUD 000028).

alternative: it could have negotiated a just and reasonable agreement as required by law and industry practice. RP 1094:5-19; 1511:10-1514:8.

3. PPUD repeatedly notes that the trial court denied Appellants' motion for summary judgment regarding interpretation of RCW 54.04.045(3), to suggest that Appellants' legal position lacks merit. PPUD Br. 4, 14, 32 n.30. PPUD fails to advise this Court that PPUD ***also*** asked the trial court on summary judgment to uphold the very same interpretation of RCW 54.04.045(3) that it offers here. CP 417. PPUD's summary judgment briefing admitted "the interpretation and meaning of the statutory provisions at issue here are questions of law for determination by this Court," and asked the Court to "rule, *sua sponte*," in favor of PPUD. *Id.* The trial court expressly declined to do so. CP 913.

III. APPLICATION OF THE "ARBITRARY AND CAPRICIOUS" STANDARD WAS REVERSIBLE ERROR

The trial court misperceived its task in interpreting RCW 54.04.045. Rather than independently ascertaining the statute's meaning, the court asked only whether PPUD's reading of the law was "arbitrary and capricious." As a result, its decision fails to apply the statutory rate formula as intended by the Legislature. *See* App. Br. 17-20.

PPUD responds, first, that the trial court's total deference to PPUD's interpretation of RCW 54.04.045 is justified because an

"implementing entity's statutory interpretation is accorded particular weight." PPUD Br. 20. But the only agencies entitled to such deference are ***state*** administrative agencies that are ***specifically named*** in and "charged with the administration and enforcement" of the implementing statute, based on the agency's unique ***expertise***.[2] *See City of Pasco v. Pub. Emp't Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). ***All*** of the cases PPUD cites make this clear.[3] PPUD asserts (Br. 20 n.9) that its three-member, local Board of Commissioners has authority to interpret RCW 54.04.045. But the Board (i) is not a state agency; (ii) is not named in the statute or specifically granted any authority under it; and (iii) has no special expertise beyond that held by every PUD in the state. Indeed, if PPUD's interpretation of RCW 54.040.45(3) is entitled to "great weight," then so too is that of every other PUD in Washington. But the Legislature expressly intended the statute to assure a statewide standard – "a consistent cost-based formula" – for setting pole attachment rates. RCW 54.04.045.

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[2] Also, this rule applies only where a statute is "ambiguous." *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). PPUD fails to argue, and the trial court did not find, that any portion of RCW 54.04.045 was ambiguous or that PPUD's "expertise" was needed to clarify it.

[3] *Pasco* involved PERC's interpretation of a provision PERC administers under RCW 41.56.030(5), .090. 119 Wn.2d at 507, 509. In *Port of Seattle*, 151 Wn.2d at 593-94, the court deferred to the Dept. of Ecology's interpretation of water quality standards, which that agency administers (RCW 90.48.260). *Marquis v. City of Spokane*, 130 Wn.2d 97, 106, 111, 922 P.2d 43 (1996) involved the state Human Rights Commission's interpretation of a regulation it enacted pursuant to its implementing statute.

PPUD is also wrong when it argues that the "arbitrary and capricious" standard applies here because it was engaged in "rate making." PPUD Br. 20-21. RCW 54.04.045(3) sets out a specific, cost-based formula for pole attachment rent that PUDs have ***no*** discretion to exceed. Once again, ***none*** of the cases PPUD cites is on point: all involve rate making pursuant to statutes lacking any ***specific statutory cap*** on the rate that may be charged. For example, *People's Org. for Washington Energy Resources v. WUTC*, 104 Wn.2d 798, 711 P.2d 319 (1985) involved a challenge to electrical rates – which, as the court noted, arise under statutes granting rate making power "in very broad terms, basically just directing them to set those rates which the agencies determine to be just and reasonable." 104 Wn.2d at 808; RCW 80.28.010, 020.[4] Here, in contrast, the Legislature specified the ratemaking methodology. PPUD cannot ignore it, and its legally erroneous interpretation gets no deference. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 71, 110 P.3d 812 (2005).

[4] Similarly, *Teter v. Clark Cty.*, 104 Wn.2d 227, 230, 704 P.2d 1171 (1985) involved a special assessment under RCW 35.67.020, which imposes no limit other than that fees be "uniform." *Prisk v. Poulsbo*, 46 Wn. App. 793, 804, 732 P.2d 1013 (1987), concerned a utility fee under RCW 35.92.025, which has no statutory cap other than that fees be "reasonable." *U.S. West Comm. v. WUTC*, 134 Wn.2d 48, 56, 949 P.2d 1321 (1997) concerned WUTC's "broad generalized powers in rate setting matters." *Snohomish Cty. PUD No. 1 v. Broadview Television Co.*, 91 Wn.2d 3, 586 P.2d 851 (1978) applied a deferential standard to a PUD's determination of pole attachment rates – but at the time, unlike today) PUDs had "plenary authority" to set those rates, unregulated by ***any*** statute. PPUD cites *Shoulberg v. PUD No. 1 of Jefferson Cty.*, 169 Wn. App. 173, 280 P.3d 491 (2012) for the proposition that PUDs have broad authority (Br. at 20 n.10), but that case has nothing to do with pole attachment rates or the specific rate limits set out in RCW 54.04.045.

Finally, PPUD argues that application of the "arbitrary and capricious" standard was at most harmless error, citing several Conclusions of Law that happen not to mention the "arbitrary and capricious" standard. PPUD Br. 23. This position is contrary to PPUD's insistent stance to the contrary at trial.[5] In any case, the error was not harmless. The trial court's legal analysis rests entirely on the "arbitrary and capricious" standard. The very first Conclusion of Law states that because PPUD is a municipal corporation, its actions and interpretations "are entitled to a significant degree of discretion" under this deferential standard. CL 1 (CP 2301). This conclusion is wrong, and it infects all of the conclusions that follow. PPUD also ignores the fact that the trial court failed to analyze the statutory language and made no attempt to determine its meaning independently. Instead, it found it sufficient that PPUD "did not act arbitrarily or capriciously, in interpreting Section 3(a) of RCW 54.04.045 as the FCC Telecom formula and Section 3(b) as the APPA formula[.]" CP 2303. This error was material.

IV. PPUD'S INTERPRETATION OF RCW 54.04.045(3) IS BASELESS AND MUST BE REJECTED

Rather than refute Appellants' statutory analysis, PPUD offers an interpretation that conflicts with established law, the statute's plain

[5] *See, e.g.*, CP 417 (PPUD's summary judgment argument that "rate-setting in the present case should be judged by the arbitrary and capricious standard"); App. Br. 18 n.9.

language, rules of statutory construction and legislative history. While PPUD purports to find Appellants' statutory analysis "complicated" (PPUD Br. 4), that does not excuse the failure to apply standard rules of interpretation to RCW 54.04.045(3), or the trial court's total deference to PPUD's erroneous, self-serving interpretation.[6] App. Br. 16-20.

Remarkably, PPUD's 73-page brief never once attempts to refute Appellants' arguments that its reading violates statutory canons by, for example, reading identical words differently in different sentences. In fact, PPUD barely addresses the statute's language at all. It simply asserts (without basis) that Section 3(a) "must" be the FCC Telecom Formula and 3(b) must be the APPA formula. Its reading is wrong as a matter of law.[7]

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[6] PPUD's focus on the fact that PUDs are not regulated by the FCC or the WUTC (*see, e.g.*, PPUD Br. 24) is a straw man. Appellants never claimed PUDs are regulated by the FCC or WUTC. But (i) RCW 54.04.045 is in fact based on RCW 80.54.040, the investor-owned utility rate statute governed by the WUTC, which, in turn, has been interpreted as the FCC Cable Formula (*see* App. Br. 30-31), and (ii) legislative history demonstrates that the Legislature intended RCW 54.04.045(3) to "incorporate[] existing rate methodologies of the [FCC], the [WUTC]," as well as the APPA. Ex 81, p.2.

[7] PPUD also misleads this Court by suggesting that Appellants' statutory interpretation rests entirely on the testimony of their expert, Patricia Kravtin. PPUD Br. 34. In fact, Appellants' interpretation is based on the plain language of the statute, canons of statutory construction and the legislative history. App. Br. 20-39. PPUD also misrepresents that Ms. Kravtin "supported" ***its*** position. PPUD Br. 35. PPUD elicited no testimony from Ms. Kravtin's examination that conflicted with her opinion that Section 3(a) operates like the FCC Cable Formula and 3(b) operates like the FCC Telecom Formula with a mathematical modification. Moreover, none of the issues Ms. Kravtin purportedly "admitted to" on cross-examination (PPUD Br. 35-37) have any bearing on the interpretation of RCW 54.04.045(3). Finally, while the court allowed PPUD to ask Ms. Kravtin certain questions about the unpublished trial decision, *TCI Cablevision of Washington, Inc. v. City of Seattle*, the court ruled that the decision and its findings were inadmissible. RP 1450:15-1458:25.

A. PPUD's Assertion That The FCC Cable Formula Excludes *Un*usable Space Is Wrong

PPUD argues Section 3(a) cannot be the FCC Cable Formula because Section 3(a) includes unusable (support and clearance) space while the "FCC Cable Formula excludes unusable space." PPUD Br. 25. This statement is wrong. The Cable Formula (like Section 3(a)) in fact includes and allocates (on a proportionate-use basis) the cost of the entire pole, usable and unusable space alike.[8] Indeed, when confronted with the formula's plain language, PPUD's rate expert admitted that the FCC Cable Formula (like Section 3(a)) allocates to the attacher the cost of the "entire pole" – which includes both usable and unusable space, and that his report and trial testimony to the contrary were "incorrect." RP 618:6-620:2.[9]

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[8] *See, e.g., In re Ala. Cable Telecomm's Ass'n. v. Ala. Power Co.*, Order, 16 FCC Rcd 12209, ¶ 60 (rel. May 25, 2001) ("[Alabama Power's] repeated claims that cable attachers do not pay for any costs of unusable space is a complete mischaracterization of the Pole Attachment Act and the Commission's rules. Cable attachers pay all of the costs associated with the pole attachment, which are allocated based on the portion of usable space occupied by the attachment. The costs associated with the entire pole are included in that calculation."); 2011 FCC Order, n. 397 ("The difference between the cable and existing telecom rate formulas is the way they allocate the costs associated with the unusable portion of the pole—the space on a pole that cannot be used for attachments.... The cable and telecom rate formulas both allocate the costs of usable space on a pole based on a fraction of the usable space that an attachment occupies. ***Under the cable rate formula, the costs of unusable space are allocated the same way.*** Under the telecom formula, however, two-thirds of the costs of the unusable space is allocated equally among the number of attachers, including the owner, and the remaining one third of these costs is allocated solely to the pole owner.") (emphasis added).

[9] Unable to cite its own rate expert, or any affirmative evidence to support its incorrect claim that the FCC Cable Formula does not include unusable space, PPUD relies solely on a statement made (and later recanted) by a Comcast engineer, Al Hernandez, in 2007. PPUD Br. 25- 26 n.20; RP 1565:4-1566:2. But Mr. Hernandez lacks any foundation to make the statement PPUD attributes to him: he is not a rate expert, and was not offered at trial as one. Nor is his 2007 statement probative of the

B. Costs of Unusable Space In Section 3(a) Are Allocated On A Proportionate-Use Basis, Like The FCC Cable Formula, Not On A Per-Attacher Basis, Like The FCC Telecom Formula (And Section 3(b))

Building on its erroneous premise that the FCC Cable Formula excludes unusable space, PPUD argues that Section 3(a) is the FCC Telecom Formula because Section 3(a) allocates a "share" of the unusable "support and clearance space." PPUD Br. 25 n.19. But this argument ignores that Section 3(a) expressly requires that that "share" of "support and clearance space" must be allocated on a "proportionate" use basis, like the FCC Cable Formula, not on a per "attaching licensee" basis, like the FCC Telecom Formula (and Section 3(b)).[10]

Indeed, PPUD cannot explain how Section 3(a) could be the FCC Telecom Formula when Section 3(a) does not include the phrase "attaching licensee," while Section 3(b) does. PPUD Br. 39 n.39; *see* App. Br. 29-30. Nor does PPUD explain how Section 3(a) could be the Telecom Formula when it fails to include the formula's 2/3 unusable space allocator. PPUD just concludes (with no basis) that "the phrase 'including a share of the required support and clearance space' in Section 3(a)

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meaning of the FCC Cable Formula – which, as noted above, as a matter of law undeniably includes unusable space.

[10] RCW 54.04.045(3)(a) ("the rate shall . . . not exceed the actual capital and operating expenses of the [PUD] attributable to that portion of the pole . . . used for the pole attachment, including a share of the required support and clearance space, ***in proportion to the space used for the pole attachment, as compared to all other uses made of the facilities***") (emphasis added); *see* App. Br. 25-34.

reflects that fraction." PPUD Br. 38-39.[11] Confronted with these issues at trial, PPUD's rate expert merely offered that "for 3(a) I think the telecom [sic] matches nicely. For 3(b) I don't think it does." RP 641:4-5.[12]

C. PPUD's Claim That RCW 54.04.045(4) Proves Section 3(a) Is Not The Cable Formula Ignores The Undisputed Evidence Regarding The Purpose Of Section 4

PPUD asserts that because Section 4 "includes the option of selecting either the FCC Cable rate or the rate under Section 3(a)," Section 3(a) is not the FCC Cable Formula. PPUD Br. 26. But the undisputed evidence shows Section 4 was included in the statute (which passed in March 2008, but was not effective until June 2008) to account for a then-ongoing FCC rulemaking, where the FCC was expected to change its Cable Formula to yield higher rates.[13] Section 4 was intended to ensure that PUDs could take advantage of the *revised* (higher rate-yielding) FCC Cable Formula (rather than the historic FCC Cable Formula set forth in Section 3(a)), in the event such formula was adopted on or after the statute's effective date. This is shown in the legislative history. Ex 81 (Senate bill report) ("The bill allows for future rate-setting methodologies

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[11] At the same time, PPUD argues Section 3(b) *cannot be* a modified FCC Telecom Formula because the Telecom Formula "divides only 2/3 of the support and clearance space among [the] parties." PPUD Br. 27-28.

[12] PPUD's Appendix F (the first page of which purports to demonstrate that Section 3(a) can be expressed mathematically as the Telecom Formula) was created by PPUD's General Manager, a week before trial, to illustrate PPUD's erroneous interpretation of the rate formula. The General Manager was not offered as an expert rate witness and lacks any foundation to opine on the statute's meaning. RP 171-172.

[13] RP 631:11-23; 1305:11-1307:16. *See* App. Br. 24 n.15, 31-32.

as set by rule by the FCC."). Section 4 makes no sense otherwise.[14]

In sum, the only reasonable interpretation of Section 3(a) is that it was intended to operate like the FCC Cable Formula. *See* App. Br. 20-32.

D. PPUD's Claim That Section 3(b) Is The APPA Formula Ignores The Statute's Plain Language, Canons Of Statutory Construction And Legislative History

PPUD argues that because "Section 3(b) divides 100% of the support and clearance space among the District and all attaching licensees," Section 3(b) cannot be a modified FCC Telecom Formula (which allocates only 2/3 of the unusable space). PPUD Br. 27-28. Instead, PPUD leaps to the conclusion that Section 3(b) is the APPA formula on the ground that (i) the APPA formula divides the unusable space equally and (ii) the APPA formula was referenced in the legislative history. *Id.* 28-29. While both of these statements about the APPA formula are true, as a matter of simple logic it does not follow that Section 3(b) is the APPA formula. Furthermore, PPUD makes no attempt to reconcile its interpretation with the statutory language or the legislative history. *See* App. Br. 32-39.[15] The only reasonable interpretation is that

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[14] It is undisputed the Cable Rate produces a much lower rate than the Telecom Rate. *See* CenturyTel Br. 34. Thus, if PPUD's interpretation is to be believed, Section 4 would allow a PUD to opt for a formula yielding a *much lower* rate than the Section 3(a) portion of the formula. That is at odds with both the legislative history and common sense.

[15] PPUD also misunderstand Appellants' citation to the 2011 FCC Order, claiming it is offered "to support their Section 3(b) argument." PPUD Br. 34. Appellants cite the Order in the context of Section 4, to show that the FCC revised its Telecom Formula, rather than its Cable Formula. *See* App. Br. 31-32 & n.17, 24 n.15.

Section 3(b) was intended to operate like the FCC Telecom Formula, with a mathematical modification borrowed from the APPA formula.

First, PPUD ignores the clear parallels between Section 3(b) and the FCC Telecom Formula. The only operational difference between the two is that Section 3(b) allocates 100% of the unusable support and clearance space among the pole owner and licensees while the Telecom Formula allocates only 2/3 of the unusable space to attachers. Otherwise, there is no difference (App. Br. 32-34), and PPUD points to none.

Second, PPUD cannot explain how Section 3(b) could be the APPA formula, if Section 3(a) is the Telecom Formula (as PPUD also claims). The language in Sections 3(a) and 3(b) is identical: in both, the costs "shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility" attributable to the pole as allocated by the respective space factors. *See* App. Br. 22-23. But the costs used in the APPA formula, on the one hand, and the two FCC Formulas on the other, are not the same. *Id.* at 36. The APPA formula uses gross costs, while the FCC formulas use net. *Id.* Nothing in the statute directs a PUD to use net costs in Section 3(a) but gross costs in 3(b). The cost language in both sections must mean the same thing. App. Br. 35-37. Similarly, PPUD ignores Appellants' argument (*id.* 37-38) that

the exact words in Sections 3(a) and 3(b) – "support and clearance space" – would mean vastly different things if, as PPUD contends, Section 3(a) were the FCC Telecom Formula and 3(b) were the APPA formula.

PPUD has no answer to these fatal flaws in its statutory analysis. Instead, it suggests this Court should disregard the statutory canon that identical words in the same statute mean identical things, based on one case that states "the legislature intended different meanings by using different words." PPUD Br. at 32 (purporting to distinguish *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000)). But as other cases cited by Appellants hold, "When the ***same*** words are used in different parts of the ***same*** statute, it is presumed that the Legislature intended that the words have the same meaning." *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 313, 884 P.2d 920 (1994) (emphasis added); *see* App. Br. 33, 36 n.21. PPUD ignores this authority, apparently hoping this Court will overlook it.

Under both FCC formulas, the unusable "support and clearance space" means the portion of the pole buried underground and the portion above the ground up to the lowest attachment. App. Br. 38. The APPA formula, on the other hand, includes an additional 40 inches of safety space in the unusable space (resulting in a much higher cost allocation to

the attacher). Ex 936, p. 20.[16] Yet, Section 3(b) makes no mention of safety space, and nothing in RCW 54.04.045 directs a PUD to treat the exact "support and clearance space" language in Section 3(b) differently from 3(a). It also is uncontroverted that PPUD uses the safety space for revenue-generating purposes, such as attachment of municipal street lights and its own communications fiber, and thus is "usable." App. Br. 39.[17]

Third, PPUD argues that Section 3(b) must be the APPA formula because the sponsor of the statute commented that the RCW 54.04.045(3) formula was structured using "a little bit of the FTC [sic] formula, a little bit of the APPA...." PPUD Br. 28-29. This vague statement proves nothing. Appellants agree that there is "a little bit of the APPA" formula used in Section 3(b) – namely, the 100% unusable space allocator.

Regardless of whether Section 3(a) is the FCC Telecom Formula (as PPUD argues) or the FCC Cable Formula (as Appellants argue), Section 3(b) ***cannot*** be the APPA formula. The only harmonious

[16] PPUD's claim that inclusion of the safety space in §3(b) "would not affect the formula if included," PPUD Br. 39, also makes no sense: inclusion of the safety space as unusable would result in 3.33 feet of additional pole costs allocated to the attacher. In any event, there is no support in the statute or its history that the "safety space" was intended to be included in the unusable "support and clearance" space in § 3(b).

[17] That is precisely why the FCC considers the safety space as *usable* in its formulas. *See, e.g., In Re Adoption of Rules for the Reg. of Cable Television Pole Attachments*, 72 FCC 2d 59, ¶ 24 (1979) (40-inch safety space is usable and "common practice of electric utility companies" is to use it for "street light[s]" and other purposes), *aff'd, Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981). PPUD's argument that CenturyTel "criticizes the District's rates because equipment other than the Companies' is sometimes in the safety space" (PPUD Br. 39) misses the point – which is that the safety space cannot be considered ***unusable*** space (as it is treated in the APPA formula) because the space can be and in fact is ***used*** by PPUD. App. Br. 39.

interpretation of RCW 54.04.045 is that Section 3(b) operates like the FCC Telecom Formula, but allocates the unusable support and clearance space equally among PUDs and their attachers.

V. THE NON-RATE TERMS ARE NOT JUST AND REASONABLE

While PPUD pays lip service to the requirement that the Agreement's non-rate terms must be "just and reasonable" under RCW 54.04.045, PPUD fails to acknowledge or address the obvious flaws in the un-negotiated Agreement. PPUD misrepresents Appellants' objections, and, in the process, underscores the pervasive unreasonableness of the Agreement PPUD seeks to impose on Appellants.[18]

A. PPUD's "Most Compelling Evidence" Fails To Prove That The Agreement Is Just And Reasonable

PPUD cites three points that supposedly show its Agreement is just and reasonable.[19] PPUD Br. 44-47. Rather than prove the Agreement complies with RCW 54.045, these points demonstrate that PPUD's failure to negotiate led to an Agreement that as a whole is unreasonable.

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[18] PPUD also attributes to Comcast and Charter certain objections to the Agreement made by CenturyTel, by referring to all three Appellants as the "Companies." Similarly, in an effort to show that the PUD Agreement is reasonable, PPUD misleads the court by implying that it "offered to execute an agreement with" Comcast and Charter on the same terms and conditions it demanded of them. PPUD Br. 52. Comcast and Charter are not pole owners and PPUD never made such an offer to Comcast or Charter.

[19] PPUD also states that its rate expert "confirmed" that the Agreement was just and reasonable. PPUD Br. 45. PPUD's rate expert did not testify about the reasonableness of the Agreement's non-rate terms and conditions, as he had absolutely no experience with pole attachment agreements. *See* RP 578:13-580:6.

First, PPUD relies on its General Manager's testimony, but the cited testimony shows only that he believed the Agreement was reasonable as drafted, and it does not account for Appellants' concerns. *See generally* RP 186-206. When asked about Appellants' concerns with the Agreement, it was evident that he misunderstood Appellants' objections and could not explain the reason for many of the Agreement's provisions.[20] For example, he admitted "there is no way" to know whether the Agreement allows for grandfathering or not. *See* App. Br. 41-42. PPUD's argument that the General Manager explained how the grandfathering "provisions worked together" ignores the substance of the testimony, and is a tacit acknowledgment that Appellants are correct about the conflict on grandfathering. *See* PPUD Br. 48.[21] The General Manager also admitted that it was unreasonable to require Appellants to pay to rearrange their equipment to accommodate PPUD's communications fiber, which it sells to retailers competing with Appellants. App. Br. 42-43.[22]

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[20] App. Br. 42-43.

[21] PPUD also states that Appellants "offer no convincing basis" for their objections to the requirement that its workers have experience performing installation work "on electric transmission or distribution systems." PPUD Br. 49. This misrepresents the evidence. Not only did Appellants testify that cable companies do not employ power lineman, RP 1105:23-1106:16, PPUD's own Chief of Engineering agreed there was "no need" for this requirement. RP 443:2-14.

[22] Similarly, PPUD's Chief of Engineering was unaware that the Agreement shifted to attachers the responsibility of performing post-construction inspections, which he thought the PPUD should continue to perform. *Id.* at 43-44. PPUD claims that Appellants "offer no reason why post-construction inspections by both an attacher and the District are inappropriate." PPUD Br. 49. Appellants have explained that post-

Second, PPUD claims it is significant "that another attaching entity signed the earlier version of the agreement[.]" PPUD Br. 45. PPUD fails to mention this attacher (Chinook Progressive Club) is tiny, and wholly incomparable to Appellants. It attached to 150 PPUD poles (Ex 16 (PUD 000032)), compared with 2,700 for Charter and 1,600 for Comcast.[23]

Third, the fact that some of Charter and Comcast's other pole attachment agreements contain one or more of the same terms that PPUD seeks to impose on them is irrelevant. (Many of them do not.) Appellants inherited many of those agreements from "assigning predecessors" (*see* PPUD Br. 46), and cherry-picking some provisions in other agreements does not reflect the "give and take" of negotiations. RP 1190:4-1575:4-18. PPUD has identified no agreement that has the onerous and cumulative set of unreasonable conditions proposed in its Agreement, making such comparisons meaningless.

Finally, PPUD's brief fails to address Appellants' showing that the Agreement's terms are internally contradictory, are unreasonable by PPUD managers' own admissions, and are inconsistent with PPUD and industry practice. *See* App. Br. 40-44.

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construction inspections are the duty of the pole owner and it would, in any event, be unreasonable for Appellants to perform the post-construction inspection themselves and then pay to have it performed again by PPUD. *See* Ex 174 (Section 6.3).

[23] The FCC has rejected the argument that "the fact that some attachers have signed [a] Contract] indicates the justness and reasonableness of its provisions." *Cable Television Ass'n of Ga. v. Ga. Power Co.*, 18 FCC Rcd 16333, ¶ 11 & n.40 (2003).

B. PPUD Misrepresents Appellants' Objections

PPUD mischaracterizes Appellants' objections to certain provisions of the Agreement. PPUD claims that Appellants "object to any inspections of their equipment other than every five years." PPUD Br. 47. That is not true. Comcast and Charter objected to the inspection provision (§ 13.1) because it did not differentiate between the various types of inspections that are standard in the industry, and they tried to clarify the language accordingly. *See* RP 1119:3-17; Ex 174 (Section 13.1); *see also* CP 1175. PPUD also states that Appellants objected to having to obtain permits for overlashing.[24] This is also inaccurate. Appellants offered a proposal (accepted by other pole owners, including another Washington PUD) that would allow only very light-weight overlashing (that would not create a structural issue) without a permit, so that Appellants could meet customer service requirements. *See* Ex 174 (Section 2.11.2).[25] PPUD's claim that Appellants object to removing nonfunctional attachments is also untrue. PPUD Br. 48. Appellants merely requested that they be able to self-identify what a nonfunctional attachment is. *See* Ex 174 (Section 4.9). Finally, PPUD mistakenly claims that Appellants objected to bearing

[24] Overlashing is the common practice of physically wrapping additional cable or fiber over an existing cable or fiber. *See* CP 1195-96 (Trial Br. 21-22 & n.17).

[25] This is also a competitive issue. PPUD may attach its own fiber without a permit. Preventing Comcast and Charter to perform lightweight overlashing without a permit to meet customer deadlines gives PPUD a competitive advantage. *See, e.g.*, CP 1196.

responsibility for bringing hazardous materials onto public property unless they do so willfully. PPUD Br. 47. What Appellants objected to was the requirement to "represent and warrant" that its use of the poles would not generate hazardous materials. *See* Ex 174 (Section 16.4). Appellants had no issue with liability arising from their use of PPUD's poles. *Id.*[26]

Perhaps if PPUD had negotiated with Appellants in good faith before imposing the Agreement, it would have better understood these and other objections, all of which are fully consistent with standard industry practices. In any event, the foregoing demonstrates that the Agreement as a whole is not "just and reasonable," and that this Court should reverse the trial court's finding that the Agreement complies with RCW 54.04.045, declare the PUD Agreement's terms and conditions unreasonable, and require PPUD to negotiate an agreement containing reasonable conditions.

VI. PPUD FAILED TO MITIGATE ITS DAMAGES

PPUD rejected Comcast and Charter's tender of the pole attachment rent at the historic rate. App. Br. 45. PPUD argues (Br. 59-60) that this was not a failure to mitigate, and that it was entitled to reject Appellants' tender, because the payments were offered as a "classic

[26] PPUD also states that Comcast and Charter objected to the "tagging" requirement (PPUD Br. 47), paying to underground their facilities (PPUD Br. 50), a 4-foot distance from attacher equipment to the base of the pole (PPUD Br. 51) and the timeframes for removal (PPUD Br. 53). Neither Comcast nor Charter objected to any of these requirements. *See* Exs. 163, 174 (Sections 2.12, 4.2, 10.3 and 23.1).

'accord and satisfaction' scenario" – that is, an offer of partial payment on a disputed claim intended as full payment and accepted as such by the creditor. *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 297, 38 P.3d 1024 (2002). PPUD is wrong.

First, the only evidence PPUD cites is ***CenturyTel's*** 2007 offer to pay at the historic rate "to completely fulfill [its] 2007 rental payment obligation." PPUD Br. 59; Ex 939. But there is no record evidence that Comcast or Charter sought an accord and satisfaction. To the contrary, both attempted to pay PPUD the ***undisputed*** amount of rent at the historic rates, with ***no*** claim that acceptance would waive any dispute. *See, e.g.*, Exs. 336 (letter from Charter stating payment was for undisputed amount and that disputed amounts would be "accrued" and could become "owing depending on the outcome of the litigation."); RP 334:16-18.

PPUD's argument also fails as a matter of law. Accord and satisfaction attaches only when a debtor "communicat[es] that the payment is intended as full satisfaction" and "the creditor accepts the payment." *Sorrel*, 110 Wn. App. at 297; *Boyd-Conlee Co. v. Gillingham*, 44 Wn.2d 152, 155, 266 P.2d 339 (1954). Here, Comcast and Charter communicated just the opposite: they tendered payment of the undisputed amount without condition. A party, such as PPUD, that refuses to accept such payment is precluded from recovering prejudgment interest on the

rejected amount. *Richter v. Trimberger*, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988) ("Prejudgment interest is granted to compensate the party for the loss of use of the money to which he was entitled" and is not available if debtor tenders payment without condition and creditor rejects it).[27]

VII. THE TRIAL COURT'S FEE AWARD TO PPUD SHOULD BE REVERSED IN ITS ENTIRETY

Appellants seek reversal of the trial court's award of fees and costs primarily because PPUD should not be the prevailing party. If the judgment is reversed, the fee award also should be reversed. App. Br. 47.

PPUD does not disagree, except with respect to fees incurred in opposing Appellants' successful efforts to extend by a week the deadline for filing their notice of appeal. PPUD Br. 69-72.[28] Significantly, in opposing Appellant's RAP 18.8 motion, PPUD sought fees based solely on the fee-shifting provision of the pole attachment agreements. *See* PPUD Opp. (2/3/12) 18-19. On February 27, 2012, this Court granted Appellants' motion (thus finding "extraordinary circumstances" to justify RAP 18.8(b) relief), and declined to award PPUD any fees. PPUD

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[27] PPUD's reply also cites testimony of its general manager to justify the reasonableness of the claimed 12 percent prejudgment interest rate. PPUD Br. 61. The manager, however, did not testify that 12 percent was the value of the lost payment; rather, it was just the figure provided to him by PPUD's attorney. RP 209:21-24. PPUD's rate expert testified at trial that his damages calculation was based on a 5 percent interest rate being sufficient to compensate PPUD. RP 575:6-7; Ex 197.

[28] PPUD asserts it may seek review of this Court's decision to accept the Notice of Appeal. PPUD Br. 17 n.7. Appellants do not concede that this Court's February 27, 2012, decision is subject to further review, but that issue need not be resolved here.

provides no reason to revisit that decision. PPUD also claims (Br. 72) that RAP 18.9 provides a separate basis for fees, but it waived this argument by failing to include a RAP 18.9 request in its response to Appellants' initial RAP 18.8 motion.[29] Accordingly, entitlement to fees on the post-judgment proceedings should be treated in the same manner as other fees: the party that ultimately prevails on the merits is entitled to a reasonable fee pursuant to the fee-shifting provisions in the respective pole attachment agreements (which are mutual under RCW 4.84.330).

This Court also should hold that PPUD failed to submit adequate documentation that expenses incurred by its expert consultant EES were reasonable and related to the litigation. App. Br. 47-49. PPUD cites to declarations showing that EES worked on the case (CP 1338) and that PPUD paid the bills (CP 1852-53). But the bills (CP 1864-1905) are unauthenticated by any EES representative, and contain ***no*** detail enabling a reviewing court to determine what services were performed, or whether they excluded the substantial non-litigation service EES provided the district. PPUD also suggests there is no requirement that expert expenses be reasonable and related to the litigation. PPUD Br. 65-66. But, just like attorneys' fees, expert awards are limited to amounts "reasonably

[29] *See Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 540, 762 P.2d 356 (1988) (finding appeal frivolous, but declining to award fees under RAP 18.9 as respondent did not request fees under that rule in argument on the merits, as required by RAP 18.1).

necessary" to the litigation. *Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 141-42, 26 P.3d 910 (2001).

VIII. APPELLANTS ARE ENTITLED TO FEES

Should they prevail on appeal, Appellants will be entitled to a fee award under Section 19 of their respective pole attachment agreements, the same fee-shifting provision PPUD relies on for its claim to fees. PPUD Br. 62.[30] Section 19 purports to award fees only to PPUD, but it is mutual as to Charter and Comcast by virtue of RCW 4.84.330 which, as PPUD concedes, treats unilateral fee provisions as bilateral. *Id.* at 69.

PPUD argues that Appellants are judicially estopped from recovering any fees in this litigation because they opposed PPUD's fee request at the trial level. PPUD Br. 68 (citing CP 2034-44). Judicial estoppel has no application here. In opposing PPUD's fee request below, Comcast and Charter asserted (as one of multiple alternative arguments) that Section 19 permitted a fee award only to the extent that the basis for the court's judgment was PPUD's breach of contract claim, as opposed to PPUD's multiple other causes of action. CP 2041-42. Appellants raised

[30] PPUD argues in passing (Br. 62-63) that § 17(c) of the pole attachment agreements provides a separate basis for a fee award. But PPUD's pleadings seek fees solely on the basis of § 19. CP 9 pt. 7. Further, § 17(c) is an indemnification clause, and plainly applies only to third-party claims against PPUD, not to a direct action between the contracting parties. *See, e.g.*, 41 Am. Jur. 2d. Indemnity § 1 (2005) ("indemnity is a form of compensation in which a first party is liable to a second party for a loss or damage the second party incurs to a third party."). Appellants incorporate by reference their response below to PPUD's arguments that an award of fees may be justified by Section 17(c) or by principles of equitable estoppel (PPUD Br. 69). *See* CP 2036-40, 2043-44.

this point because, at the time, the grounds for the trial court's finding of liability were unclear. The only trial court ruling at the time was the limited March 15, 2011, Memorandum Decision, which did not award fees, and which did not say whether the court had found a breach of the pole attachment contracts. CP 1324-27. Only later, in its December 12, 2011, findings, did the trial court rule that Section 19 applied because PPUD's "claims arose from a common core of related, intertwined facts, and no segregation of fees and costs among [PPUD's] claims is reasonably possible." CP 2318 (No. 17). Appellants have not challenged that finding, which is now a verity on appeal.[31]

Under these circumstances, there can be no judicial estoppel. First, the doctrine precludes a party from asserting an inconsistent position only if it *successfully* "convince[d] the court to accept the previous position[.]" *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 103-04, 220 P.3d 229 (2009); *Hous. Auth. of City of Everett v. Kirby*, 154 Wn. App. 842, 857-58, 226 P.3d 222 (2010). Here, to the extent the Appellants argued below that the agreements' fee-shifting provision did not apply, they did not succeed, and thus there is no inconsistency to estop. Nor are the other elements of

[31] PPUD also argues that Appellants' assignment of error to fee finding No. 5 (CP 2316) shows Appellants continue to question § 19's validity as a fee-shifting clause. PPUD Br. at 68 n.79. This is incorrect. Appellants assign error to finding 5 only to the extent that it cites § 17(c) (the Agreements' indemnification clause) as a separate basis for the fee award, for reasons explained in the last footnote.

judicial estoppel present: (1) as explained above, Appellants have taken no position inconsistent with their entitlement to fees under Section 19 should they prevail on appeal, (2) even if there were an inconsistency, there is no indication that the court has been misled, and (3) PPUD does not even argue any prejudice or unfair advantage exists. *See Miller v Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2010).

Finally, PPUD claims (Br. 68-69) that Appellants are not entitled to fees if they prevail because they never raised this argument below. This claim is specious. Appellants claim they are entitled to fees only if they ultimately prevail in this action. They did not prevail on the merits before the trial court, and thus had no reason or opportunity to argue their entitlement to fees below. They pled a claim for fees in their Answer (CP 25), and they have properly preserved that claim by seeking fees here. App. Br. 49; RAP 18.1(b). Nothing more is required, and the Court of Appeals routinely awards fees to prevailing appellants in similar circumstances. *See, e.g.*, *Thompson v. Lennox*, 151 Wn. App. 479, 491, 212 P.3d 597 (Div. II 2009).

IX. CONCLUSION

For all the reasons previously stated, the trial court's decision was erroneous and misinterprets RCW 54.04.045. This Court should reverse.

RESPECTFULLY SUBMITTED this 19th day of February, 2013.

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CERTIFICATE OF SERVICE

I, Eric M. Stahl, hereby certify and declare under penalty of perjury under the laws of the state of Washington that on February 19, 2013, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record in the manner indicated.

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