No. 91386-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioner,

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,

Respondents.

REPLY OF PETITIONERS COMCAST OF WASHINGTON IV, INC. AND FALCON COMMUNITY VENTURES I, L.P. TO RESPONDENT'S CROSS-PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION AND IDENTITY OF REPLYING PARTIES

Petitioners/Cross-Respondents Comcast of Washington IV, Inc. ("Comcast") and Falcon Community Ventures I, L.P. ("Charter") file this Reply to Respondent Public Utility District No. 2 of Pacific County's ("District") Cross-Petition for Review.

This is the District's second attempt to obtain discretionary review of an unpublished 2012 Court of Appeals order accepting Petitioners' notice of appeal. This Court was correct to deny review the first time, because the order was proper under RAP 18.8(b), was not contrary to any case construing the rule, and was entirely justified by the facts below – facts the District's cross-petition significantly distorts. Review is even less justified now, after three more years of litigation and a 65-page Court of Appeal opinion holding the trial court erred significantly on the merits.

The evidence before the Court of Appeals when it accepted the notice of appeal in 2012 established the following: after an eight-day bench trial, the trial court accepted proposed post-trial submissions from both sides. It took all presentations under advisement, with no indication of what form of judgment it would enter, or when. Petitioners diligently sought information from the court about the status of final judgment, and were expressly told by court personnel that they would notify the parties of further case developments. This was consistent with the trial court's

practice, over four years, of providing notice and copies of every substantive ruling not entered in open court. Despite this uninterrupted practice, and contrary to the court's representation, judgment was entered on December 12, 2011, with no notice to the Petitioners. When Comcast and Charter learned of the judgment on January 17, 2012 – three court days after the deadline for a notice of appeal under RAP 5.2(a) – they filed their appeal within the hour. The District knew all along that Petitioners intended to pursue an appeal in this case, which is an important test of a recently amended statute that raises significant state policies.

RAP 18.8(b) authorizes an appellate court to extend an appeal deadline in extraordinary circumstances, to prevent a gross miscarriage of justice. The Court of Appeals made its decision based on the unique facts of this case, which are unlike those in any other case cited by the District. The District's cross-petition ignores the discretion RAP 18.8(b) vests in the "court to which the untimely notice...is directed" – here, the Court of Appeals. Recognizing that discretion, this Court has ***never*** reversed a Court of Appeals decision granting a RAP 18.8(b) extension.

A Division II panel and Department II of this Court – eight appellate judges in all – have already reviewed this matter and found it was proper for Petitioners' appeal to proceed. Cross-Petition Appendix ("App.") 1, 3. The result should be the same now. Division II's

unpublished order conflicts with no prior appellate decision. Rather, it is consistent with the only RAP 18.8(b) case arising on even remotely similar facts. *See Mellon v. Reg'l Tr. Servs. Corp.*, 182 Wn. App. 476, 486, 334 P.3d 1120 (2014) (trial court's failure to provide appealable order to party justified one-week extension under RAP 18.8). Nor would review serve any substantial public interest. To the contrary, reinstating the trial court decision (as the District proposes) would deprive the public of a definitive interpretation of RCW 54.04.045, and would undermine public confidence in the judicial process by restoring a trial outcome that was found on appeal to be largely incorrect. The cross-petition thus does not meet RAP 13.4(b)'s criteria for review.

II. RESTATEMENT OF CROSS-REVIEW ISSUE PRESENTED

The District's issue statement is argumentative and rests on mischaracterized facts. The issue presented is: did the Court of Appeals err in exercising its authority under RAP 18.8(b) to extend by six days the time to file an appeal, under the particular circumstances of this case?

III. RESTATEMENT OF THE CASE

A. Case Background

The pending petitions for review describe the underlying case in detail. Briefly, the "central dispute" here is whether the rates the District proposes to charge Petitioners to attach equipment to its utility poles are

permissible under RCW 54.04.045(3), as amended in 2008. 336 P.3d at 71. The 2008 amendment's purpose was to ensure "predictability and consistency in pole attachment rates statewide." Laws of 2008, ch. 197 §1. Despite this legislative intent, PUDs and attachers differ sharply on the meaning of the statute's cost-based formula. This case is viewed as a test of the statute by PUDs and attachers alike. Cross-Pet. 7 n.8 & App. 2 (admitting PUDs await definitive outcome of this case); CP 2369 ¶ 3.

B. Trial Court Proceedings

In the four years this case was before the trial court in Pacific County, court staff routinely notified the parties by mail, e-mail or fax, of substantive rulings and matters of case management. *Id.*; CP 2365 ¶ 2.

An eight-day bench trial took place October 2010. On March 15, 2011, the court faxed the parties a Memorandum Decision, announcing its intent to rule for the District and inviting proposed findings and conclusions. CP 1324-27. The District submitted proposed findings and conclusions, as well as a fee request. CP 2290-2320. Comcast/Charter and Petitioner CenturyTel each responded with substantial objections and contentions. *See, e.g.*, CP 1957-2000, 2019-2031, 2075-2188.

After receiving the decision, Petitioners advised the District several times they intended to appeal it once it was reduced to final judgment. Among other things, counsel discussed whether an appeal bond

would be necessary. CP 2365 ¶ 3; CP 2369 ¶¶ 4-5. All three Petitioners filed supersedeas bonds to secure the amount of the trial court's judgment pending appeal. CP 2491, 2553, 2558.

On Sept. 16, 2011, the trial court heard 90 minutes of argument on the District's proposed findings and conclusions, its fee request, and the Petitioners' competing contentions and objections. The court did not rule, but took all proposed post-trial submissions under advisement. CP 2271, 2380 ¶ 4. The court did not indicate whether it intended to enter the orders submitted by any party, or would instead draft its own order and judgment. Nor did it indicate when it would enter a decision.

C. Petitioners' Efforts To Learn Status of The Judgment

Petitioners believed court personnel, consistent with the prior practice over the previous four years, would fax or mail the judgment to them. CP 2362 ¶ 9; CP 2370 ¶ 7. But they took additional steps to inquire about the judgment as well. In October 2011, Heidi Wilder, a paralegal for counsel for CenturyTel, began placing telephone calls on behalf of Petitioners to the Court Administrator's office, checking on the status of the judgment. She made at least six additional such calls over the next several weeks. CP 2361 ¶¶ 3, 4; CP 2481-82.

On November 22, 2011, trial court Administrator Marilyn Staricka called Ms. Wilder and stated judgment still had not been entered, a

judgment was not likely soon because of the Court's criminal schedule, and she would inform Ms. Wilder of any case developments. CP 2361 ¶ 5. In the two weeks after Thanksgiving – including the week before the judgment was entered – Ms. Wilder called the Court Administrator's office at least two more times. *Id.* ¶ 6. On one of those calls, she spoke with the Administrator, who stated judgment still had not been entered and the Court was still involved in the criminal trial. *Id.* In her other call, Ms. Wilder left a message but received no response. *Id.* CenturyTel's counsel provided updates of these communications to counsel to Comcast and Charter. CP 2362 ¶ 8; CP 2365 ¶ 4.

The District attempts to create the appearance of a factual dispute regarding Petitioners' discussions with the court administrators, relying on declarations from the administrator and assistant administrator. Cross-Pet. 22 n.21, citing CP 2463-66. But there is no genuine dispute. First, both administrators *confirm* they spoke with Ms. Wilder. *Id.* While the declarations deny (in nearly identical wording, carefully parsed by the District's counsel) telling Ms. Wilder they would notify her "when an order or judgment was entered" (CP 2464 ¶ 3; CP 2466 ¶ 3), Ms. Wilder does not claim the administrators said that. Rather, she states they advised her the office would provide notice about any "case developments." CP 2361 ¶ 5; CP 2482 ¶ 4. It is thus undisputed court personnel told

Petitioners they would be notified of case developments – which, at the time, could only have meant that they would provide notice when the court entered the pending, highly contested post-trial proposals.[1]

The District also contends that Petitioners could have done more to learn judgment had been entered, but these claims rest on further factual misstatements.[2] First, the District argues Petitioners could have contacted their "local counsel," falsely suggesting they were represented by a Pacific County attorney. Cross-Pet. 21 & n.19. The referenced attorney does not represent any of the Petitioners and has never appeared in this action. The District also claims Petitioners should have monitored the "online docket" of the Office of Administrators of Courts' case information website. *Id.* at 21. But this website was not, as the District asserts, an "online docket," and did not purport to be official or even reliable. To access this website

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[1] It is surprising, to put it mildly, that the District relies on the administrator' declarations here: the trial court struck both declarations because District counsel had procured them improperly through his close ties with court staff. The District filed the declarations in the trial court in support of its response to Appellants' post-trial motion to vacate the trial court's judgment. CP 2449, 2553. The trial court struck the declarations as "obtained improperly," finding they were available to the District only because its counsel knew the administrators personally. CP 2499, 2585-87. The District failed to advise the Court of Appeals that the trial court had ruled the declarations invalid. The District suggests it can rely on the declarations here because this Court previously denied Petitioners' Motion to Strike the declarations. Cross-Pet. 22 n.21. But this Court denied the motion to strike in the same June 5, 2012, order denying the District's prior motion for discretionary review, meaning the motion to strike was effectively moot. In any event, the declarations are of no help to the District: as noted above, they do no more than deny the administrators made statements that no one has claimed they made.

[2] The District claims Petitioners should have done more, while at the same time concealing how it received notice of entry of the judgment. The District, for 3-1/2 years now, has conspicuously failed to state how it learned of the judgment.

at all, users had to acknowledge that the site was not guaranteed to be current or complete, that one "must view the court case record" to "verify the accuracy of the information under consideration," and that doing so required one to "***contact the court*** in which the case was filed."[3] As noted above, "contact[ing] the court" is precisely what Petitioners did.

D. Entry Of Judgment And Subsequent Events

Unbeknownst to any of the Petitioners, the trial court entered judgment on December 12, 2011. Petitioners received no notice or copy of the judgment or the findings and conclusions. CP 2362, 2365, 2370. They first learned on January 17, 2012 that final judgment had been entered on December 12. *Id.* ¶ 7; CP 2365 ¶ 6. Petitioners ***immediately*** arranged with the trial court to e-mail a notice of appeal, and sent it to the court less than an hour after they had first received the judgment.[4]

On January 24, 2012, Petitioners moved the Court of Appeals to accept the notice of appeal as timely under RAP 18.8(b).[5] CP 2378, 2576 ¶ 4. After reviewing the parties' arguments and declarations, a three-judge

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[3] *See* http://dw.courts.wa.gov/?fa=home.casesearchTerms (emphasis added). The website itself contained similar disclaimers. CP 2397.

[4] Petitioners mailed the notice of appeal to the trial court, and served the District, on January 17, 2012. CP 2330. The trial court filed the notice of appeal the following day, January 18, 2012, after receiving the filing fee via overnight mail. CP 2328.

[5] Under RAP 5.2(a), the notice of appeal was due January 11, 2012. Petitioners sent the notice on January 17, which was late by six days or (not counting the intervening holiday weekend) three court days.

panel of Division II, in an unpublished order, found "[u]pon consideration, the court has decided the motion has merit," and accepted the appeal as timely. App. 1 (2/27/12 Div. II Order).[6]

On April 12, 2012, the District moved this court for discretionary review of Division II's Order (the same order at issue in its instant cross-petition). The District claimed discretionary review had to be granted at that time because otherwise, it would "lose the opportunity to challenge this error[.]"[7] Department II of this Court denied the motion on June 5, 2012. Cross-Pet. 23; App. 3.

On July 24, 2013, Division II transferred the appeal to Division I. Fifteen months later, on Oct. 13, 2014, after full briefing on the merits and expanded oral argument, Division I issued its decision. Its published, 65-page opinion affirms in part, but reverses the trial court on the "central" issue, interpretation of amended RCW 54.04.045(3). 336 P.3d at 71.

The District now argues that this Court should simply "reinstate" the trial court decision. Cross-Pet. 38. Doing so, however, would mean restoring a decision the Court of Appeals has now held "improperly applied a deferential standard" to the District, and accepted an entirely "inapposite" interpretation of the statutory rate formula. 336 P.3d at 83.

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[6] Appellants also filed a motion, pursuant to CR 60(b), asking the trial court to vacate and re-enter the judgment. That motion was denied on February 17, 2012. CP 2498.

[7] *See* Motion for Discretionary Review in No. 87126-4 (Mar. 13, 2012), at page 1.

IV. ARGUMENT FOR DENIAL OF CROSS-PETITION

As the District admitted in its earlier motion for discretionary review, the "opportun[e]" time to consider the propriety of the notice of appeal was in early 2012, before the parties and Court of Appeals undertook an appeal on the merits. *See supra*, n.7. This Court did not accept review, agreeing with Division II that the appeal should proceed. The decision was correct at the time: the Court of Appeals committed no error, but instead properly exercised its discretion under RAP 18.8(b). Nothing has changed in the subsequent three years that would justify review now. Quite the contrary: the parties proceeded with a lengthy appeal, and Division I has issued a substantive opinion holding that the trial court committed important errors.

The cross-petition fails to show that Division II's unpublished RAP 18.8(b) order meets this Court's criteria for discretionary review. This Court should again deny review on this issue because the order neither conflicts with any prior appellate decision, nor implicates any substantial public interest. RAP 13.4(b)(1), (2), (4).

A. Applying RAP 18.8(b) Under The Unique Circumstances Of This Case Conflicts With No Prior Appellate Decision

The Court of Appeals decision was a proper exercise of its authority to accept this appeal on the merits. RAP 1.2(a) makes clear "that

an appellate court may ***exercise its discretion*** to consider cases and issues on their merits." *State v Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995) (emphasis added). An appellate court's discretion under RAP 1.2(a) is circumscribed on motions to extend the time for a notice of appeal, in that such motions may be granted only in "extraordinary circumstances" to "prevent a gross miscarriage of justice." RAP 18.8(b). But whether this standard is met in a given case is "determined by the appellate court to which the untimely notice ... is directed." *Id.*

Thus, review of the Court of Appeals ruling would be for abuse of discretion.[8] *Olson*, 126 Wn.2d at 323; 2 Wash. Appellate Practice Deskbook § 18.5, at 18-9 (3d ed. 2005) (abuse of discretion applies to "the many discretionary procedural rulings for which there is no single correct result and that are heavily fact-dependent.").[9] It thus would not be enough for the District to show the decision below was debatable, or that this Court might reasonably reach a different conclusion. Rather, such a discretionary ruling "will not be disturbed on review except on a clear

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[8] In a footnote, the District contends that this Court's review of the RAP 18.8 issue is *de novo*. Cross-Pet. 25 n.26. Neither the case the District cites (*State v. Kindsvogel*, 149 Wn.2d 477, 69 P.3d 870 (2003)), nor any other decision, holds that this Court reviews *de novo* the Court of Appeals' determination to accept a notice of appeal under RAP 18.8(b).

[9] In the analogous context of motions to vacate under CR 60(b), the standard of review likewise is abuse of discretion. *In re Marriage of Jennings*, 138 Wn.2d 612, 625, 980 P.2d 1248 (1999) (finding of "extraordinary circumstances" under CR 60(b)(11) reviewed for abuse of discretion); *Little v. King*, 160 Wn.2d 696, 702, 161 P.3d 345 (2007). Notably, the District ***admits*** "Courts interpreting RAP 18.8(b) routinely cite cases interpreting CR 60(b)." Cross-Pet. 33 n.28.

showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Freeman v. Freeman*, 169 Wn.2d 664, 671, 239 P.3d 557 (2010).

Not surprisingly, this Court has ***never*** reversed a Court of Appeals grant of an extension under RAP 18.8(b). The discretionary determination below thus poses no conflict with any prior decision of this Court.[10] Nor is there a conflict with any Court of Appeals decision. While the District cites several cases in which relief under RAP 18.8(b) was denied, all are easily distinguished by the fact that the appellants, unlike in this case, had ***actually received*** the judgment and/or ***knew*** judgment had been entered.[11]

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[10] This Court has *approved* relief under RAP 18.8(b) in three cases. *See State v. Kells*, 134 Wn.2d 309, 949 P.2d 818 (1998); *Scannell v. State*, 128 Wn.2d 829, 834, 912 P.2d 489 (1996); *State v. Ashbaugh*, 90 Wn.2d 432, 583 P.2d 1206 (1978). In three other cases, the Court found that extending an appeal deadline was unwarranted under the particular facts – but none involved reversal of a Court of Appeals determination that RAP 18.8(b) should be applied. *See State v. Hand*, 177 Wn.2d 1015, 308 P.3d 588 (2013) (denying discretionary review and leaving in place Court of Appeals' refusal to accept notice of appeal filed three years late); *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 367, 849 P.2d 1225 (1993) (Court of Appeals declined to accept untimely appeal and certified issue to this Court, which agreed; case contains no discussion about reasons for appellant's untimely appeal, except that no "sufficient excuse" was offered); *Shumway v. Payne* 136 Wn.2d 383, 964 P.2d 349 (1998) (finding in first instance that habeas petitioner did not satisfy RAP 18.8(b), on question certified from federal court). The District also relies on *Cohen v. Stingl*, 51 Wn.2d 866, 322 P.2d 873 (1958). But that case predates the Rules of Appellate Procedure by 18 years, and involved an appellant who had actual notice that a judgment had been entered before the deadline to appeal had run, yet waited seven months to appeal. *Id.* at 867.

[11] In *Reichelt v. Raymark Industries, Inc.*, 52 Wn. App. 763, 764, 764 P.2d 653 (1988), appellant ***knew*** judgment had been entered but filed a late appeal due to counsel's "heavy workload" and departure of a trial attorney. In *Beckman v. State*, 102 Wn. App. 687, 695-96, 11 P.3d 313 (2000), appellant's counsel had ***received a copy of the judgment***; the untimely notice was due to faulty internal office procedures. In *Bostwick v. Ballard Marine, Inc.*, 127 Wn. App. 762, 112 P.3d 571 (2005), the court declined to accept an

Indeed, the ***only*** RAP 18.8(b) decision to arise on facts remotely similar to those here is entirely consistent with the Court of Appeals order in this case. In *Mellon*, plaintiffs moved for reconsideration of the trial court's order granting defendant's CR 12(b)(6) motion to dismiss. The trial court took the motion under advisement and, "after a two-month medical absence," denied reconsideration. 182 Wn. App. at 485. But, similar to this case, plaintiffs "were not notified of the ruling and, consequently, did not appeal in time." *Id.* Just as in this case, the plaintiffs learned of the ruling a week after the RAP 5.2 deadline. *Id.* at 485-86. The Court of Appeals accepted the appeal under RAP 18.8(b) "because 'extraordinary circumstances' – namely, the trial court's failure to serve the [plaintiffs] the order denying reconsideration...'prevented[ed] the filing of a timely document.'" *Id.* at 486, citing RAP 18.8 cmt., 86 Wn.2d 1271 (1976).[12] "Thus, 'to prevent a gross miscarriage of justice,' we extend the time for the [plaintiffs] to appeal under RAP 18.8(a) and (b)." *Id.*

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untimely ***cross-appeal*** of an interlocutory order; the cross-appellant had actual notice that final judgment had been entered, in the form of the non-prevailing party's notice of appeal of dismissal on the merits. *Id.* at 765, 775-76.

[12] The District bizarrely claims *Mellon*'s citation to the 1976 authority is "inaccurate" and "unpublished." Cross-Pet. 29. The cited 1976 Task Force Comment to RAP 18.8(b) is in fact published in the bound volume at 86 Wn.2d 1271. The citation is entirely accurate.

All the factors justifying a one-week extension in *Mellon* apply in this case. Indeed, the facts are even more compelling here, given the trial court's practice of sending rulings to the parties and its affirmative statements that it would notify Petitioners of case developments. The District identifies no other decision with facts akin to those here. Thus, there is simply no basis to grant review under RAP 13.4(b)(1) or (2).

Because it cannot show any conflict with prior decisions, the District resorts to rehashing its previous arguments that the Court of Appeals simply erred in applying RAP 18.8(b) here. Cross-Pet. 25-30. Even if the District were correct, mere error is not a ground for discretionary review under RAP 13.4(b). But the Court of Appeals committed no error.

In interpreting RAP 18.8(b), this Court has held that the appellate rules "were designed to allow some flexibility in order to avoid harsh results." *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982). The Court noted that "the trend of the law in this state is to interpret rules and statutes to reach the substance of matters so that it prevails over form." *Id.* at 896 (citation omitted). The Court agreed that "applying strict form" to deny an appeal "would defeat the purpose of the rules to 'promote justice and facilitate the decision of cases on the merits.'" *Id.* (quoting RAP 1.2(a)).

Similarly, relief under RAP 18.8(b) is appropriate when a deadline is missed due to "understandable" mistake by a litigant who exercised "reasonable diligence" in pursuing an appeal. *Scannell*, 128 Wn.2d at 834 (allowing criminal defendant to proceed with untimely appeal based on his misreading of rule). To be sure, extensions on notices of appeal are not granted casually. Consistent with the general "desirability of finality of decisions," RAP 18.8(b), courts have denied extensions, for example, when a litigant fails to appear at the presentment of judgment and then fails to monitor for entry of judgment, *Beckman*, 102 Wn. App. at 695-96, or when counsel receives notice of the judgment but fails to file a timely notice of appeal due to an oversight or "heavy workload." *Reichelt*, 52 Wn. App. at 764. But, again, ***no*** case denying an extension under RAP 18.8(b) involved appellants (like Petitioners here) who were left in the dark about when judgment would be entered, despite diligent efforts in regularly contacting the trial court, and who were reassured by affirmative representations from court personnel that such notice would in fact be provided, as was the practice throughout the history of the case. Under these facts, it cannot be said the Court of Appeals abused its discretion in applying RAP 18.8(b).

The District likens this case to *Puget Sound Medical Supply v. Washington State Dept. of Soc. & Health Services*, 156 Wn. App. 364, 234

P.3d 246 (2010) ("*PSMS*") (Cross-Pet. 33), but that decision involved an administrative appeal governed by a different rule and a different standard of review.[13] Moreover, unlike here, the appellant in *PSMS* actually received the order it sought to appeal, ***before*** the appeal deadline had passed. *Id.* at 367. The appellant missed the deadline not because it was unaware of the order or was misled by the ALJ, but rather due to a "breakdown of internal office procedure." *Id.* at 373-74.[14] The case does not address whether RAP 18.8(b) applies where an appellant receives ***no*** timely notice of entry of judgment.

The District also asserts there is no requirement in Washington that a court provide notice of entry of judgment. Cross-Pet. 30. This is a straw man: Petitioners do not claim any such requirement. Rather, their contention – which the District has never refuted, and which the Court of Appeals reasonably accepted – is that it is an extraordinary circumstance

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[13] The administrative appeal was governed not by RAP 18.8, but by WAC 388–02–0580, which permits an administrative law judge to extend an appeal deadline for "a good reason." 156 Wn. App. at 368. In affirming DSHS's refusal to permit the untimely appeal, *PSMS* applied a highly deferential standard, according "great weight" to the agency's interpretation of its own rules. *Id.* at 369. Decisions under RAP 18.8, in contrast, rest entirely in the discretion of the appellate courts.

[14] The District blatantly quotes out of context *dictum* in *PSMS* that appellant "should not have relied on" the ALJ's statement that the order would be mailed a month later than it actually was mailed. Cross-Pet. 33, citing 156 Wn. App. at 375. The appellant in *PSMS* cited the ALJ's statement about the likely timing of his order as support for the argument that the timeframe for filing its notice of appeal was short. *Id.* The court rejected that argument – but it did not address the issue of reliance in the context of an affirmative representation that notice would be provided. Again, the appellant had already received actual notice of the order at issue. 156 Wn. App. at 367.

for a court to inform a party affirmatively that it ***would*** provide notice, and then fail to provide it. In *Scannell*, this Court noted (in the context of RAP 18.8(b)) that it "has been lenient in other cases where court rules caused confusion." 128 Wn.2d at 835. The same standard should apply where, as here, "confusion" results from the court's practices and representations.

In sum, the Court of Appeals' decision to grant relief under RAP 18.8 was not erroneous, given (i) Petitioners' diligent inquiries about the status of the judgment; (ii) the trial court's previously unbroken practice of providing notice; (iii) the specific representation from court staff that they would notify Petitioners of further case developments; (iv) Petitioners' clear intent (known to the District) to appeal; (v) their immediate action to initiate the appeal, within an hour of learning of the judgment; (vi) the important statewide impact of this case; and (vii) the subsequent decision on the merits finding the trial court committed multiple errors of law. *See supra* § III.C. More to the point, the ruling is not in conflict with any decision addressing RAP 18.8. *See supra*, n.10, 11.

B. The Cross-Petition Presents No Issue Of "Substantial Public Interest" Warranting This Court's Review

The District also seeks review under RAP 13.4(b)(4), which is reserved for "issues of substantial public interest that should be determined by the Supreme Court." *Id.*; Cross-Pet. 36-37. Given the

unusual facts and the slim chance they will be repeated, the cross-petition raises no issue of substantial interest. Nor is it worthy of this Court's review, particularly since the decision of whether an extension of time is warranted is expressly vested in "the appellate court to which" the request is directed – the Court of Appeals in this case. RAP 18.8(b).

The District relies primarily on the public interest in the finality of judgments. Petitioners recognize the "desirability of finality of decisions," RAP 18.8(b), but any "finality" achieved by nullifying the appeal in this case would be illusory. Absent appellate review, litigation between the same parties, and between other attachers and other PUDs, is likely to ensue quickly. CP 2369 ¶ 3. Moreover, the interest in finality must be balanced against the preference for deciding cases on their merits (RAP 1.2(a)), and the public importance of this case. The statewide public interest in a definitive interpretation of RCW 54.04.045 is not disputed: as even the District admits (in its response to the petitions for review), PUDs around the state are anticipating a ruling in this case to guide them in pending rate-setting matters. Cross-Pet. 7 n.8; App. 2. That statewide interest is precisely the type of "comparative and compelling public or private interests of those affected" which courts are directed to consider when exercising their discretion. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The District also claims a substantial public interest in assuring court staff are not obligated "to perform tasks not required by court rules or applicable law." Cross-Pet. 36. This is just another iteration of the District's straw-man argument that court personnel are not responsible for providing notice of entry of judgment. As discussed above, Petitioners do not seek to impose any such burdens on court personnel, or to relieve litigants of their responsibilities to monitor their cases. Again, Petitioners ***were*** monitoring the trial court for the entry of judgment. The District in effect claims it would be in the public interest to allow a diligent litigant to lose its right to appeal after being misled by court personnel into believing – consistent with the court's years-long practice of providing notice – that the court would provide notice of upcoming case developments. The District's attempt to obtain discretionary review based on this supposed public interest is simply untenable.[15]

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[15] The District's reliance on the declaration of former federal court clerk Bruce Rifkin does nothing to bolster its "public interest" argument. Cross-Pet. 37; CP 2807-11. First, the declaration is not properly before this Court. It was not part of the trial record nor before the Court of Appeals; Petitioners have had no opportunity to cross-examine or rebut the declaration; and it is not the sort of evidence that can be properly considered for the first time on discretionary review. RAP 17.3(b)(8). Second, Mr. Rifkin has no personal knowledge of this case. He simply parrots the District's false assertion that Petitioners' RAP 18.8 motion was based on mere "remarks" of court staff. CP 2810-11. As noted elsewhere, this is a gross distortion of the grounds for Petitioners' RAP 18.8 motion. Third, the declaration improperly offers "opinion" on the ultimate legal issue of when it is appropriate to "allow[] litigants to overcome appellate filing deadlines." CP 2811. As a matter of law, that very question "is determined by the appellate court[.]" RAP 18.8(b). Moreover, such opinion on ultimate legal issues is impermissible, and intrudes on the purview of the court to interpret the law. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344-45, 858 P.2d 1054 (1993).

Discretionary review also would be contrary to the substantial public interest in assuring confidence in a judicial system that decides cases correctly and on the merits. The District unabashedly asks this Court to "reinstate the trial court's decision" (Cross-Pet. 38) – with no acknowledgement that the trial court's decision has now been adjudged significantly wrong as a matter of law. This Court should not accede to the District's request to restore a trial decision the Court of Appeals held was improperly deferential to the District in the first place. 336 P.3d at 83. Nor should this Court place its imprimatur on a trial decision allowing the District to charge excessive rates based on an "inapposite" reading of RCW 54.04.045. *Id.* Rather, the public interest would best be served by rejecting the cross-petition, and granting the petitions for review, in order to provide a definitive, statewide interpretation of the statute.[16]

V. CONCLUSION

This Court should grant Comcast and Charter's petition for review, but should deny the District's cross-petition, which does not meet RAP 13.4(b)'s criteria for review.

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[16] This Court also should reject the District's request for fees for answering the petitions for review. Cross-Pet. 37. The District relies on RAP 18.1(j), but on its face that rule applies only "[i]f attorney fees and expenses ***are awarded*** to the party who prevailed in the Court of Appeals." No fees were awarded in the Court of Appeals. Rather, on the primary issue in the appeal (and in the petitions for review) – whether the trial court interpreted RCW 54.04.045's rate formula correctly – the District manifestly did not prevail, and the Court of Appeals specifically held any award of appellate fees and costs would be made "after final resolution of the merits." 336 P.3d at 96.

RESPECTFULLY SUBMITTED this 26th day of May, 2015.

Davis Wright Tremaine LLP
Attorneys for Petitioners/Cross-Respondents Comcast of Washington, IV, Inc. and Falcon Community Ventures I, L.P.

By _____
Eric M. Stahl
WSBA #27619

CERTIFICATE OF SERVICE

The undersigned, hereby certifies and declares under penalty of perjury under the law of the state of Washington, that on this 26th day of May, 2015, he caused a copy of the foregoing document to be served on the following attorneys via legal messenger:

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Executed this 26th day of May, 2015, at Seattle, Washington.

Eric M. Stahl, WSBA #27619

OFFICE RECEPTIONIST, CLERK

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Cc: Stahl, Eric
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Rec'd 5/26/2015

From: Kruger, Christine [mailto:ChristineKruger@DWT.COM]
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Cc: Stahl, Eric
Subject: PUD No. 2 of Pacific County v. Comcast of Washington IV, Inc., et al.; No. 91386-2

Attached for filing in the following case is the Reply of Petitioners Comcast of Washington IV, Inc. and Falcon Community Ventures I, L.P. to Respondent's Cross-Petition for Review:

PUD No. 2 of Pacific County v. Comcast of Washington IV, Inc. et al.
No. 91386-2

The attorney filing this document is:

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