No. 97169-2

SUPREME COURT
OF THE STATE OF WASHINGTON

[Court of Appeals No. 77310-1-I]

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

Respondent,

v.

COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC, a Delaware limited liability company;
CENTURYTEL OF WASHINGTON, INC., a Washington corporation;
and FALCON COMMUNITY VENTURES, I, L.P., a California limited partnership, d/b/a CHARTER COMMUNICATIONS,

Petitioner (CenturyTel only).

RESPONDENT'S ANSWER TO AMICUS CURIAE MEMORANDA OF THE WASHINGTON INDEPENDENT TELECOMMUNICATIONS ASSOCIATION AND THE ASSOCIATION OF WASHINGTON BUSINESS

GORDON THOMAS HONEYWELL LLP

Donald S. Cohen, WSBA No. 12480
James E. Horne, WSBA No. 12166

600 University, Suite 2100
Seattle, WA 98401-1157
(206) 676-7500

Attorneys for Respondent Public Utility District No. 2 of Pacific County

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I. IDENTITY OF ANSWERING PARTY

Respondent Public Utility District No. 2 of Pacific County (the "District" or the "PUD") files this Respondent's Answer to Amicus Curiae Memoranda of the Washington Independent Telecommunications Association and the Association of Washington Business.[1] For the reasons set forth below, neither Memorandum will assist this Court in ruling on CenturyLink's Petition for Review, which the Court should deny.

II. COURT OF APPEALS DECISION

The District incorporates Section II of Respondent's Answer to Petition for Review. The published decision of the Court of Appeals now appears at: *Public Utility District No. 2 of Pacific County v. Comcast of Washington IV, Inc., et al.*, 8 Wn. App. 2d 418, 438 P.3d 1212 (2019).

III. ISSUE PRESENTED

Do the Amicus Memoranda assist this Court in determining whether CenturyLink has met the requirements under RAP 13.4(b)(1), (2), or (4) for this Court to grant the Petition for Review? **NO**.

IV. STATEMENT OF THE CASE RE ANSWER TO AMICUS MEMORANDA

The District incorporates Section IV of Respondent's Answer to Petition for Review. The factual and procedural background is in the Court

[1] Respondent is filing a consolidated Answer to the two Amicus Memoranda because they largely duplicate one another. Amici are in this Answer sometimes referred to as "WITA" and "AWB".

of Appeals decision at 8 Wn. App. 2d at 422-440 and in the first Court of Appeals decision, 184 Wn. App. 24, 35-44, 336 P.3d 65 (2015).

V. ARGUMENT WHY THE AMICUS MEMORANDA DO NOT ASSIST IN THE COURT'S DECISION ON THE PETITION FOR REVIEW

An amicus curiae brief must "assist the appellate court." RAP 10.6(a). It must also "avoid repetition of matters in other briefs." RAP 10.3(e). Consequently, an amicus curiae brief "must be more than a mere reiteration" of a party's argument. II WASHINGTON APPELLATE PRACTICE DESKBOOK § 19.4(4) at 19-6 (4th ed. 2016). Furthermore, an amicus brief "cannot raise a new issue or theory that has not been placed before the appellate court by the parties." II WASHINGTON APPELLATE PRACTICE DESKBOOK § 19.5(6) at 19-8 (citing *Ruff v. King County,* 125 Wn.2d 697, 704 n.2, 887 P. 2d 886 (1995)). Thus, "arguments raised only by amici curiae need not be considered." *State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (citations omitted). The Amicus Memoranda fail each of these admonitions.

Amici claim the CenturyLink Petition for Review raises an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4). But the Amicus Memoranda make the same basic arguments CenturyLink asserts in its Petition -- that the Court of Appeals' decisions in the District's favor on including the safety space as part of the support and clearance space and including taxes and a return on investment in the District's actual capital and operating expenses,

improperly acquiesced in the District's arguments and sanctioned arbitrary and capricious conduct. Mimicking CenturyLink, WITA and AWB argue that these conclusions of the Court of Appeals, which were thoroughly analyzed by that Court (including twice as to the safety space issue), meet the high standard of proving arbitrary and capricious actions. But they do not, and amici's reiteration of CenturyLink's arguments does not assist this Court in its consideration of the Petition.[2]

Like CenturyLink's Petition for Review, the framework of the Amicus Memoranda is a hyperbolic "parade of horribles" amici assert will result from the Court of Appeals decision, including arresting broadband deployment in Washington and encouraging all sorts of "rogue" public agency misconduct because of a supposed absence of any meaningful judicial review. This fundamental distrust of elected public officials -- and of the judiciary -- permeates the Amicus Memoranda, as it did the Petition for Review, without any basis other than pure rhetoric. This disrespectful harangue does not assist in this Court's consideration of the Petition for Review. As the Court of Appeals noted in its decision:

> The arbitrary and capricious standard of judicial review is not a catch all standard intended to allow courts to interfere with agency decision making in order to forestall any and all mistakes or perceived errors made by public officials. Rather, it permits courts to intervene to stop only 'willful and unreasoning action taken without regard to or consideration of the facts and circumstances surrounding the action' Abbenhaus, 89 Wn.2d at 858. For other discretionary actions that do not constitute arbitrary and

[2] For the Court's information, CenturyLink, when formerly known as CenturyTel, was a member of WITA.

> capricious conduct, the remedy for those disapproving of choices made is at the ballot box.

8 Wn. App. 2d at 446 n.33 (citing *Abbenhaus v. City of Yakima*, 89 Wn.2d 855, 858, 576 P.2d 888 (1978)).

In a misguided attempt to bolster CenturyLink's Petition, amici try to argue that a Broadband Bill enacted during the 2019 legislative session is a legal "game changer" to eleven-and-a-half years of litigation, purportedly justifying this Court's granting review. But discussion of the FCC Plan does not assist this Court in deciding whether to accept CenturyLink's Petition for Review. As amici concede, the Broadband Bill was not even signed until May 13, 2019, with an effective date two months later -- after the Court of Appeals decision that is the subject of the Petition for Review. What amici contend is that a legislative enactment not even in effect until years after the District's purported arbitrary and capricious conduct was engaged in, is nevertheless somehow relevant to a determination of the legal issues in this decade-plus-long lawsuit. This makes no logical, or legal, sense. Furthermore, this new theory from amici is an improper subject of an amicus brief. *Ruff v. King County, supra,* 125 Wn.2d at 704 n.2; *State v. Gonzalez*, *supra,* 110 Wn.2d at 752 n.2 (citations omitted).[3]

[3] Amici point to a reference in the Broadband Bill to the FCC Plan, but the Washington Legislature's reference says nothing about pole attachments. And the bill did not "approve" the FCC Plan, as AWB asserts; it merely referenced it as having been adopted by the FCC, a federal agency with no jurisdiction over pole attachment rates of governmental entities like the District.

In addition, amici's argument about the Broadband Bill is pure speculation based on hypothetical facts about supposed impacts of PUD pole attachment rates on broadband deployment.[4] Even though AWB concedes this is an issue of "public policy" (AWB Brief at 4), amici and CenturyLink are asking this Court to inject itself into the legislative arena and rewrite RCW 54.04.045, by issuing an advisory opinion based on exaggerated, hypothetical suppositions that are nowhere in the record on review.[5] The Broadband Bill is an issue for the Legislature, not this Court.[6]

Unlike the Broadband Bill, the legislation and legislative policies that are relevant to this lawsuit are those cited and quoted repeatedly by the Court of Appeals in both of its opinions. Those are the Legislature's explicit intention that the 2008 amendment to RCW 54.04.045 was "to

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[4] Ironically, it is investor-owned utilities, not consumer-owned utilities like the District, that have historically resisted bringing broadband to rural areas because the low population density depresses revenues. This is why the Legislature gave public utility districts express wholesale telecommunications authority in 2000 by enacting RCW 54.16.330, and why, in the Broadband Bill, that authority was extended to retail authority when private providers cease providing service. Chapter 365, Laws of 2019 § 9 (codified in RCW 54.16.330(8)).

[5] The fact that some public utility district pole attachment rates may be higher than some investor-owned utility rates does not change this. Public utility districts are expressly not subject to Washington Utilities and Transportation Commission regulation of pole attachment rates. RCW 54.04.045(7). Furthermore, there is no evidence in the record of adverse impacts on private parties caused by the District's pole attachment rates. In this litigation, CenturyLink and the other two Defendants steadfastly took the position that their size and multi-billion-dollar annual gross revenues were irrelevant, and they objected to evidence to that effect. Interestingly, CenturyLink and the other two Defendants did not assert error in their first appeal in this lawsuit to Findings of Fact entered by the trial court that "[t]he pole attachment fees Defendants pay to the District are a small fraction of Defendants' overall costs" and that "[i]t would cost Defendants significantly more than what they pay the District to attach to its poles if they, instead, had to purchase, install, maintain, repair, and replace their own poles." FOF Nos. 45 and 46 (December 12, 2011) (CP 2300).

[6] The Amicus Memoranda cannot be viewed as requesting this Court to direct that additional evidence on the merits be taken pursuant to RAP 9.11. The requirements of that Rule are plainly not satisfied. They also cannot be viewed as a Statement of Additional Authorities because they contain argument, contrary to RAP 10.8.

recognize the value of the infrastructure of locally regulated utilities [like the District]" and "ensure that locally regulated utility customers do not subsidize licensees." LAWS OF 2008, ch. 197 § 1. The Court of Appeals based its decision on the words the Legislature included in RCW 54.04.045, the Legislature's explicit intent as set forth above and in its two opinions, the record below, and long-established law governing public entity actions under the arbitrary and capricious standard.

Further duplicating CenturyLink's arguments, amici attack the Court of Appeals decision as "radical" and as a "re-write" of Washington administrative law on arbitrary and capricious conduct. The unanimous Court of Appeals decision, however, is firmly grounded in long-established case law governing arbitrary and capricious conduct, which the Court of Appeals followed in both of its decisions. Judges Dwyer, Leach, and Verellen are experienced appellate judges. Judge Dwyer and Judge Leach have both served *pro tem* in this Court.[7] Amici, as well as CenturyLink, apparently believe they know and understand the Washington law of arbitrary and capricious conduct much better than the Court of Appeals. As the District stated with respect to CenturyLink in Respondent's Answer to Petition for Review, this kind of attack on the judiciary is, at best, unseemly, if not verging on disrespectful.

The basis for the portions of the Court of Appeals decision CenturyLink challenges is set forth comprehensively in that decision. The

[7] Judge Dwyer also served over a decade on the Edmonds City Council, so he has first-hand experience with the legal standards governing decision-making by elected officials.

Court of Appeals reviewed the record on appeal, consisting of dozens of exhibits and days of testimony, and applied the evidence to RCW 54.04.045 and the explicit legislative intent in LAWS OF 2008 Ch. 197 § 1, within the case law framework of the arbitrary and capricious standard.[8] Amici's groundless argument cannot help CenturyLink meet the heavy burden a party challenging a decision as arbitrary and capricious bears. *Greenen v. Bd. Of Accountancy*, 126 Wn. App. 824, 830, 110 P.3d 224 (2005), *rev. denied*, 156 Wn.2d 1030, 133 P. 3d 474 (2006); *In re disciplinary proceeding against Brown*, 94 Wn. App.7, 16, 972 P. 2d 101 (1998), *rev. denied*, 138 Wn.2d. 1010, 989 P.2d 1136 (1999).

The Amicus Memoranda do not help CenturyLink meet the requirements of RAP 13.4(b). There is no conflict with any decision of this Court or the Courts of Appeal, and there is no issue of substantial public interest requiring determination by this Court. Tellingly, two of the three Defendants in this litigation did not even petition for review. Those Defendants have satisfied in full the judgment for damages awarded to the District and affirmed by the Court of Appeals. Amici argue this is irrelevant and theorize that Comcast and Charter had just "grown weary" of this lawsuit. But those Defendants are multi-billion-dollar corporations like CenturyLink and would presumably have more than sufficient resources to press this litigation to its conclusion if they had wanted to do so. More likely, they concluded they could live with the Court of Appeals

[8] The District will not reiterate here the Court of Appeals' analysis of the three issues CenturyLink challenges and amici regurgitate. But, respectfully, the District refers this Court, if necessary, to the District's Brief of Respondent at 38-42, 52-61, and 62-66.

decision and that the probability of this Court granting review was low and, even if granted (which it should not be), that reversal would be unlikely. Arguing there is an issue of substantial public interest requiring determination by this Court under RAP 13.4(b)(4), when two out of three Defendants did not even petition for review, is problematic.

Perhaps even more telling is that the only member of amicus WITA with attachments on Pacific PUD's poles -- Western Wahkiakum County Telephone Company -- has paid the District at the PUD Commission-adopted $19.70 rate from its inception in 2008. 8 Wn. App. 2d at 425 n.6 (citing 184 Wn. App. 24, 40 (2015)). Western Wahkiakum has continued to pay the District at the rate CenturyLink has refused to pay and challenges in its Petition for Review. Western Wahkiakum could have done the same thing CenturyLink did -- refuse to pay, precipitating this lawsuit, but it did not do that. Nor did it pay under protest or pay with a reservation of rights. It could also have moved to intervene in superior court, but it did not do that either. Thus, not only have two of the three Defendants in this litigation not petitioned for review, but the only WITA member with attachments on District poles has never challenged the rate at issue in CenturyLink's Petition. This belies the argument that the Petition for Review raises issues of substantial public interest that should be determined by this Court.

This Court should deny CenturyLink's Petition for Review and end this eleven-and-a-half-year lawsuit. There have been two trials in this

lawsuit, two substantive appeals, and other appellate proceedings, including many months due to Defendants' missing the thirty-day deadline for their first appeal.[9] The Court of Appeals thoroughly considered the words of RCW 54.04.045, the explicit legislative intent, the evidentiary record, and the longstanding case law on arbitrary and capricious conduct. The Amicus Memoranda do not assist this Court's determination and would not lead to a result other than denial of the Petition for Review.

VI. THE DISTRICT SHOULD BE AWARDED ITS ATTORNEYS' FEES AND EXPENSES FOR ANSWERING THE AMICUS MEMORANDA

RAP 18.1(j) provides for the award of reasonable attorneys' fees and expenses for answering a Petition for Review to a party who prevailed in the Court of Appeals and was awarded attorneys' fees and expenses, if the Petition for Review is denied. As discussed in Section VI of Respondent's Answer to Petition for Review, the District was the prevailing party on appeal and attorneys' fees are provided for in the pole attachment contracts on which the District brought this lawsuit. 8 Wn. App. 2d at 457-459. If this Court denies CenturyLink's Petition for Review, as it should, the Court should award the District its attorneys' fees and expenses incurred in answering the Amicus Memoranda filed in support of the Petition for Review.

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[9] The trial court denied Defendants' motion to vacate and re-enter the first judgment, designed to moot the missed notice of appeal deadline, but Division II of the Court of Appeals permitted Defendants to proceed with their appeal despite the missed deadline. 184 Wn. App. at 44, 87. The District sought discretionary review of that decision, which this Court denied. 174 Wn.2d 1005, 280 P.3d 475 (2012).

VII. CONCLUSION

The Amicus Memoranda do not help CenturyLink establish that its Petition for Review raises issues of substantial public interest requiring determination by this Court or that the Court of Appeals decision conflicts with decisions of this Court or the Courts of Appeal. The 2019 legislation amici rely on is irrelevant to actions of the District's Commissioners taken years ago, actions the Court of Appeals thoroughly analyzed and properly concluded were consistent with longstanding Washington case law on the arbitrary and capricious standard. This Court should deny the Petition for Review and bring this litigation to an end.

Respectfully submitted this 24th day of July, 2019.

GORDON THOMAS HONEYWELL LLP

By 

Donald S. Cohen, WSBA No. 12480
James E. Horne, WSBA No. 12166
Attorneys for Respondent Public Utility
District No. 2 of Pacific County

CERTIFICATE OF SERVICE

I, Savanna L. Stevens, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on July 24, 2019, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record in the manner indicated.

Timothy J. O'Connell Stoel Rives LLP 600 University Street, Suite 3600 Seattle, WA 98101 tjoconnell@stoel.com debbie.dern@stoel.com	(X) WA S. Ct. E-Serve App (X) Email Courtesy Copy
John McGrory DAVIS WRIGHT TREMAINE LLP 1300 SW Fifth Avenue, Suite 2400 Portland, Oregon 97201-5610 johnmcgrory@dwt.com	(X) WA S. Ct. E-Serve App (X) Email Courtesy Copy
Eric M. Stahl DAVIS WRIGHT TREMAINE LLP 920 Fifth Avenue, Suite 3300 Seattle, WA 98104-1610 ericstahl@dwt.com christinekruger@dwt.com	(X) WA S. Ct. E-Serve App (X) Email Courtesy Copy
Jill Valenstein, Vice President and Assistant General Counsel CHARTER COMMUNICATIONS 400 Atlantic Street, 4th Floor Stamford, CT 06901 jill.valenstein@charter.com	(X) WA S. Ct. E-Serve App (X) Email Courtesy Copy
Richard A. Finnigan Law Office of Richard A. Finnigan 2112 Black Lake Blvd. SW Olympia, WA 98512 rickfinn@localaccess.com	(X) WA S. Ct. E-Serve App (X) Email Courtesy Copy

Robert A. Battles Association of Washington Business 1414 Cherry Street SE Olympia, WA 98507 bobb@awb.org	(X) WA S. Ct. E-Serve App (X) Email Courtesy Copy

Savanna L. Stevens, Legal Assistant

GORDON THOMAS HONEYWELL LLP

July 24, 2019 - 10:21 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97169-2
Appellate Court Case Title:	PUD No. 2 of Pacific County v. Comcast of Washington IV, Inc., et al.
Superior Court Case Number:	07-2-00484-1

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