No. 98243-1

Court of Appeals No. 51695-1-II

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

EDWARD E. (TED) COATES; MICHAEL CROWLEY; MARK BUBENIK and MARGARET BUBENIK, d/b/a Steele Manor Apartments; THOMAS H. OLDFIELD; and INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES, an Oregon nonprofit corporation,

Petitioners,

v.

CITY OF TACOMA,

Respondent.

ANSWER TO PETITION FOR REVIEW

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Back in the mid-1990s, Tacoma Power brought a declaratory judgment action against all Tacoma taxpayers and a certified class of all electric ratepayers. The Superior Court issued two orders, one authorizing the System, and the other authorizing the revenue bonds. Relying on these orders, Tacoma Power built the System.

In 2018, the trial court nevertheless granted summary judgment that the City could not operate Click! on the Excess Capacity of its System – a proprietary betterment of the System. The Court of Appeals reversed, holding that Click! is not a separate utility or undertaking, but merely a betterment of the System's Excess Capacity. ***Coates v. City of Tacoma***, 11 Wn. App. 2d 688, 457 P.3d 1160 (2019) (attached as Appendix A).

Petitioners have not established that ***Coats*** conflicts with any decisions of this Court or of the Court of Appeals. On the contrary, ***Tacoma Taxpayers***, *infra*, strongly supports ***Coates***. Petitioners cite to but show no conflicts with six other inapposite cases. As the Court of Appeals noted, none of those cases is controlling or persuasive. And no issue of substantial public interest exists.

This Court should deny review.

FACTS RELEVANT TO ANSWER

The facts are accurately stated in ***Coates v. City of Tacoma***, 11 Wn. App. 2d 688, 457 P.3d 1160 (2019) (attached as Appendix A).[1]

The Court of Appeals rejected both claims of the Petitioners. First, it held that the City did not violate the local government accounting statute (RCW 43.09.210) because Click! simply runs on the Excess Capacity of Tacoma Power's HFC Network. App. A-5 to A-7; *see also, e.g.*, App. B-6. It is not a separate "undertaking" under the statue. App. A-5 to A-7. Any other reading of that term renders the other terms in the statute unintelligible. *Id*.

Second, the Court held that the City did not violate § 4.5 of its own Charter by establishing Click! as a "betterment" to its existing HFC Network, using its Excess Capacity to provide additional services to Tacoma Power's customers. App. A-7 to A-8.

These straightforward holdings dispose of the Petition.

And the City no longer runs Click! App. B-9.

---

[1] This Court just denied direct review in ***Bowman v. City of Tacoma***, Wash. S. Ct. No. 98229-5 (April 29, 2020) (Transfer Order remanding to Division II). ***Bowman*** challenged the City's decision to transfer Click! *See* City's Response to Bowman's Statement of Grounds for Direct Review (filed April 21, 2020) (attached as Appendix B).

REASONS THIS COURT SHOULD DENY REVIEW

A. *Coates* does not conflict with any decision of this Court.

Petitioners summarily pronounce that the Opinion "cannot be reconciled with" ***City of Tacoma v. Taxpayers of Tacoma***, 108 Wn.2d 679, 695-96, 743 P.2d 793 (1987) ("***Tacoma Taxpayers***"); ***Uhler v. City of Olympia***, 87 Wash. 1, 14, 151 P. 117 (1915); ***Okeson v. City of Seattle***, 150 Wn.2d 540, 78 P.3d 1279 (2003) ("***Okeson I***"); ***Okeson v. City of Seattle***, 159 Wn.2d 436, 150 P.3d 556 (2007) ("***Okeson III***"); and ***Lane v. City of Seattle***, 164 Wn.2d 875, 194 P.3d 977 (2008). PFR 14. Yet they do not even attempt to explain any conflict. None exists.

1. *Tacoma Taxpayers* supports *Coates*.

Tacoma Taxpayers, for instance, is contrary to the Petitioners' position and does not conflict with ***Coates***. There, the City sought a declaratory judgment on the constitutional and statutory validity of an energy conservation ordinance. 108 Wn.2d at 681. The trial court agreed with the taxpayers that the ordinance constituted a gift of public funds. *Id*. This Court reversed, holding (as relevant here) that the City's exercise of proprietary powers was well within the broad discretion cities enjoy when they exercise such powers:

> Since 1910, we have broadly construed the means a municipality may use to conduct a statutorily authorized business. We have viewed the Legislature as implicitly authorizing a municipality to make all contracts, and to engage in any undertaking necessary to make its municipal electric utility system efficient and beneficial to the public. *See* ***Municipal League of Bremerton, Inc. v. Tacoma***, 166 Wash. 82, 88, 6 P.2d 587 (1931); ***Puget Sound Power & Light Co. v. PUD 1***, 17 Wn. App. 861, 864, 565 P.2d 1221 (1977). In addition, we have traditionally viewed an express grant of proprietary authority as implying those "powers . . . necessarily or fairly implied in or incident to [express powers] and also those essential to the declared objects and purposes of the [municipal] corporation." ***Port of Seattle v. State Utils. & Transp. Comm'n***, 92 Wn.2d 789, 794-95, 597 P.2d 383 (1979).

Id. at 694-95 (citing in footnote 9: ***Tacoma v. Nisqually Power Co.***, 57 Wash. 420, 433, 107 P. 199 (1910) (broadly construed power to operate electric utility as extending power to condemn and purchase to acquiring existing private utility); ***Chandler v. Seattle***, 80 Wash. 154, 141 P. 331 (1914) (broadly construed power to provide lighting as encompassing power to supply electricity); ***Tacoma v. State***, 121 Wash. 448, 209 P. 700 (1922) (authority to operate utilities conferred "broad powers upon cities"); ***Seattle v. Faussett***, 123 Wash. 613, 212 P. 1085 (1923) (broadly construed power to condemn and acquire conferred in authority to operate a utility); ***McCormacks, Inc. v. Tacoma***, 170 Wash. 103, 107, 15

P.2d 688 (1932) (city has power to conduct its light business in a reasonable manner); ***Armstrong v. Seattle***, 180 Wash. 39, 38 P.2d 377 (1934) (broadly construed power to operate stone or asphalt plant as including power to condemn despite absence of express words to that effect); ***Metro. Seattle v. Seattle***, 57 Wn.2d 446, 460, 357 P.2d 863 (1960) (authority to provide sewer system implies authority to pay another to do so)).

In light of these well-established broad proprietary powers, this Court has long limited "judicial review of municipal utility choices to whether the particular contract or action was arbitrary or capricious, *see, e.g.*, ***State ex rel. PUD 1 v. Schwab***, 40 Wn.2d 814, 829-31, 246 P.2d 1081 (1952), or unreasonable, *see, e.g.,* ***McCormacks, Inc. v. Tacoma***, 170 Wash. 103, 107, 15 P.2d 688 (1932)." ***Tacoma Taxpayers***, 108 Wn.2d at 695. This Court will note the Petitioners do not claim that any arbitrary or capricious acts occurred here.

Tacoma Taxpayers held that the City's conservation program had a "sufficiently close nexus" to the Legislature's purpose in granting the power to operate an electric utility. 108 Wn.2d at 696. Specifically, implementing "conservation measures frees up electricity supplies for sale to other customers, thereby

furthering the efficient provision of low cost energy and providing for future needs." *Id*. It is also "the cheapest and cleanest alternative for meeting future electrical supply needs." *Id*. at 696-97.

If a negative nexus like conservation is sufficiently close, then a positive nexus – maximizing the use of the City's HFC Network by selling its Excess Capacity to serve utility customers – is much closer to the purpose of providing efficient utility services. The nexus is so close here that it runs on the same network of cables. App. B-6.

In sum, not only can ***Coates*** be "reconciled" with ***Tacoma Taxpayers***, it directly supports the Court of Appeals' analysis. *See* BA 30-31. Indeed, this Court has unequivocally rejected the argument that RCW ch. 35.92 – which underlies the key cases plaintiffs rely upon[2] – limits a city's power to own a cable television system. ***Issaquah v. Teleprompter Corp.***, 93 Wn.2d 567, 574-75, 611 P.2d 741 (1980) (RCW Ch. 35.92 does "not address municipal ownership and operation of cable television systems," and "no general law . . . conflicts with the city's authority . . . to operate such a system"); *see also* ***In re Ltd Tax Gen. Obligation Bonds***, 162

[2] *E.g.*, ***Okeson I, II*** & ***III***, *supra* & *infra.*

Wn. App. 513, 526-27, 256 P.3d 1242 (2011) (citing ***Teleprompter*** to affirm city authority to operate fiber-optic network and to provide broadband internet via excess capacity). No "conflict" exists.

2. The 105-year-old *Uhler* is inapposite.

Uhler was "a suit to test the validity of a series of bonds issued by the city of Olympia under the act of 1909." 87 Wash. at 3. That city designed to "purchase by way of condemnation a waterworks plant within the city." *Id*. This Court gave two main reasons for striking down the bonds: first, the city's plan was void because it deviated from the plan presented to the voters by authorizing more than the value of the bonds (*i.e.*, commissions and costs were tacked on). *Id.* at 9 ("the city cannot by a subsequent ordinance change the plan in any of its essentials without a like vote of the people"). Second, in *dicta* the Court said the $4,500 in commissions were illegal because they exceeded the value of the bonds, because no such commissions are legally authorized, and because they are usurious. *Id*. at 10-14. The Court also ruled that it was perfectly fine for the city to pay from the general fund for the water *it* used, as it was thus properly acting in a proprietary capacity. *Id*. at 14.

Here, the taxpayers' suit on the bonds occurred in the late 1990s. *See* BA 4-6. The Superior Court authorized the bonds, including the City's plan to sell the Excess Capacity of its new system to provide cable services to its customers in a proprietary capacity. *See id.* (citing, *inter alia*, CP 649-50, 676-77, 684-85, 712, 759-69, 772-74, 788-89, 847-48, 927). Any suit challenging those final rulings on the bonds at this late date would be barred in several ways – but the Petitioners do not challenge those bonds. ***Uhler*** is inapposite. No conflict exists.

3. *Okeson I* & *III* are inapposite, not conflicting.

The Court of Appeals correctly noted that the ***Okeson*** line of cases is neither controlling nor persuasive here. App. A-6 n.5. This Court's two cases, ***Okeson I*** & ***III*** are simply inapposite.

In ***Okeson I***, Seattle (and other cities) passed an ordinance requiring utility customers to pay for streetlights. 150 Wn.2d at 544. The State Auditor told Seattle this was unlawful because providing streetlights is a public governmental function, not a proprietary utility function. *Id*. at 545. This Court ultimately held that utility customers cannot be made to pay for services provided to the public in general, as opposed to proprietary services directly to ratepayers. *Id* at 550-56. More specifically, the charges imposed on

ratepayers were a tax, not a fee for service provided; the city did not properly impose a tax, so the ordinances were invalid. *Id*.

Okeson I is obviously inapposite. Here, the City imposed no taxes on its ratepayers to provide services to the general public, like streetlights. Rather, the City charges its customers a fee for a proprietary service – Click! – provided solely to its customers. Ratepayers pay not for a public service, but for a proprietary service solely for them. ***Okeson I*** does not conflict with ***Coates***.

In ***Okeson III***, the issue was whether a municipal utility was permitted to mitigate the effects of its greenhouse-gas emissions by paying public and private entities to reduce those entities' emissions. 159 Wn.2d at 439. This Court held that, as with streetlights, "combating global warming is a general government purpose . . . not a proprietary utility purpose." *Id*. Thus, "such mitigation expenses must be borne by general taxpayers rather than utility ratepayers." *Id.* This Court rejected the contracts.

Using the Excess Capacity of the City's HFC System to provide proprietary services to utility customers is nothing like requiring ratepayers to pay for general governmental purposes like combatting global warming. ***Okeson III*** is inapposite. There is no conflict between ***Coates*** and the ***Okeson*** cases.

4. *Coates* does not conflict with *Lane*.

In ***Lane***, Seattle Public Utilities (SPU) had long paid for fire hydrants throughout the city and its suburbs. 164 Wn.2d at 879-80. After ***Okeson I*** came down, Seattle saw that hydrants are like streetlights, so it started paying for hydrants from its general fund; it then imposed a tax on SPU, who raised rates on the city and suburbs. *Id*. at 880. This Court held that hydrants are like streetlights – a general government function – but the tax was fine because it was adopted *as a tax* (unlike in ***Okeson I***, where the charges were not properly adopted as a tax). *Id*. at 886-87.

As with the ***Okeson*** cases, ***Lane*** is inapposite because it involved a utility charging ratepayers to provide services to the general public (hydrants), while ***Coates*** involved a utility providing proprietary services to customers using Excess Capacity. No conflict exists with any case. Review is unwarranted.

B. *Coates* does not conflict with any published decision of the Court of Appeals.

The Petitioners also allege that two Court of Appeals decisions are irreconcilable with ***Coates***: ***Okeson v. City of Seattle***, 130 Wn. App. 814, 125 P.3d 172 (2005) ("***Okeson II***"); and ***Kightlinger v. PUD No. 1 of Clark Cnty.***, 119 Wn. App. 501, 81 P.3d 879 (2003). Neither case conflicts with ***Coates***.

1. *Coates* does not conflict with *Okeson II*.

In ***Okeson II***, Seattle passed an ordinance requiring utilities and other city departments to allocate 1% of their capital-improvement-project budgets to support public art. 130 Wn. App. at 817. The trial court applied the "sufficiently close nexus" test (used in ***Tacoma Taxpayers***, *supra*) to invalidate many – but not all – of the art projects, and struck down the ordinance. *Id.* at 817-18. The Court of Appeals largely affirmed, but allowed the ordinance to stand, as limited by the trial court (*i.e.*, some art projects did have a sufficiently close nexus to the legislative purpose). *Id*. at 818.

This Court will note that the Petitioners did not claim below that no sufficiently close nexus exists between using Excess Capacity to provide additional customer services (*e.g.*, cable) as a proprietary betterment of their utility service, on the one hand, and the legislative intent to provide utility services, on the other. Such an argument is absurd on its face: the two services literally run hand-in-hand, inside the same System. The nexus is *very* close.

And like the other ***Okeson*** cases, ***Okeson II*** is inapposite. Again, proprietary services like Click! are analyzed differently than governmental functions like streetlights, hydrants, and some public art. *See, e.g.*, ***Lane***, 164 Wn.2d at 882 ("We treat governments

differently if they are acting as governments or as businesses"). Selling Excess Capacity to provide cable services to utility customers – a betterment of their utility – is not a general public function, but a proprietary business, albeit one that the City has now discontinued. ***Coates*** does not conflict with ***Okeson II***.

2. *Kightlinger* cannot conflict with *Coates*.

The Petitioners' reliance on ***Kightlinger*** is perplexing. This Court rejected its reasoning – and its test – as in conflict with ***Tacoma Taxpayers***, in ***Okeson III***:

> There is one other published case in which the required [sufficiently close] nexus was found to be lacking. In ***Kightlinger*** . . . taxpayers challenged a utility district's authority to run an appliance repair business. The Court of Appeals held that a utility activity bears the required close nexus to furnishing electricity only if that activity is "the same as" producing, selling, or distributing electricity. *Id*. at 511. Based on that rule, the court concluded that utility districts lack implied authority to repair appliances.
>
> While we pass no judgment here on whether appliance repairs are an authorized utility activity, **we decline to embrace the reasoning of the *Kightlinger* decision because it appears to be based on a misreading of our decision in *Taxpayers of Tacoma***.
>
> In that case, we held that the city of Tacoma had implied authority to install conservation measures in private homes and businesses. ***Taxpayers of Tacoma***, 108 Wn.2d at 696. We noted that "in the world of electric utility professionals an investment in conservation is considered the equivalent of

> purchasing electricity." *Id*. at 693. The ***Kightlinger*** court apparently relied on that language, saying the "[k]ey["] to our decision "was the unchallenged factual finding that conserving electricity was essentially the same as producing new electricity." ***Kightlinger***, 119 Wn. App. at 510.
>
> **But that was not the only ground cited by this court in concluding in *Taxpayers of Tacoma* that a sufficiently close nexus existed between conserving electricity and generating or selling it**.
>
> Rather, we were also concerned with whether Tacoma's activity served broader utility purposes of efficiency, pollution and cost control, and planning for future needs. Thus, ***Taxpayers of Tacoma*** did not establish a bright-line rule that a utility may engage only in activities that are the "same as" furnishing electricity.
>
> Rather, as noted above, ***Taxpayers of Tacoma*** **stands for the proposition that a city utility's actions are impliedly authorized as long as they comport with a utility's statutory purpose of supplying electricity and are not arbitrary, capricious, unreasonable, in conflict with express limitations, or of a general governmental nature**.
>
> In sum, because ***Kightlinger*** applied the wrong test, it is not instructive here.

Okeson III, 159 Wn.2d at 452 n.5 (emphases added; paragraphing altered for readability).

Suffice it to say there is nothing relevant left of ***Kightlinger***. It thus cannot conflict with ***Coates***.

Review is unwarranted.

C. *Coates* does not raise any substantial issues.

Petitioners rely on RAP 13.4(b)(4), "issues of substantial public interest," claiming (1) 180,000 ratepayers' "economic interests" are affected; (2) ***Coates*** renders RCW 43.09.210 "toothless"; and (3) the *res judicata* doctrine is somehow affected. None of these assertions is accurate or substantial.

As noted *supra*, the City has ceased running Click!, so *no* ratepayers are affected by it at this point – other than that the new proprietor will pay a fair amount of money to use the Excess Capacity of the System, hopefully lowering everyone's rates. *See, e.g.*, App. B-9. Contrary to Petitioner's implications, nowhere near 180,000 ratepayers ever even used Click! *See* Reply at 4 (identifying roughly 40,000 customers in 2016). And while the changes in technology (particularly wireless) rendered the Excess Capacity of the System surplus to the City's needs, its decisions to surplus it and to nonetheless recover income from its use is simply sound business judgment. App. B-15 to B-16.

Nor does ***Coates*** "detooth" RCW 43.09.210. The Court of Appeals correctly held that the Petitioners' "broad reading of the term undertaking . . . would subsume every other term in the list." App. A-6; *see* ***State v. Roggenkamp***, 153 Wn.2d 614, 623, 106

P.3d 196 (2005) ("a single word in a statute should not be read in isolation"); ***State v. Jackson***, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999) ("'the meaning of words may be indicated or controlled by those with which they are associated'") (citation omitted). If *noscitur a sociis* – words are known by the company they keep – then reading "undertaking" to mean *an activity of* one of the entities listed (*e.g.*, a department, institution, or public service industry) then none of those terms has any limiting effect: the statute would cover everything any of them did. That cannot be the Legislature's intent.

Rather, "undertaking" must mean something like a department or institution. Using the Excess Capacity of a utility system to provide an additional *service* is nothing like creating a new department, institution, or industry. As the Court of Appeals correctly held, "Click! is simply using the excess capacity of the electric utility's existing infrastructure. When reading the entire list in context, it is clear that providing an additional service using the utility's existing infrastructure is not a separate undertaking." App. A-6. This is a proper reading of the statute, not an extraction.[3]

[3] Petitioners briefly reference City Charter § 4.5. PFR 18. All three appellate judges agreed the City Charter was not offended. App. A-7, 14. Using the Excess Capacity is not creating a separate utility, but is merely a betterment of the existing infrastructure. App. A-7.

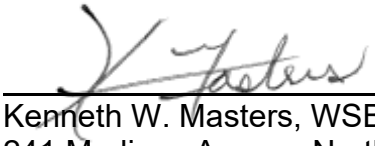
Finally, the Petitioners raise *res judicata* – an issue that they *disputed* below. ***Coates*** does not reach the issue, so it cannot affect the doctrine. It cannot provide significance here.

CONCLUSION

This Court should deny review.

RESPECTFULLY SUBMITTED this 6th day of May 2020.

MASTERS LAW GROUP, P.L.L.C.



Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
Attorney for Respondent

APPENDIX
Table of Contents

APPENDIX A

Coates v. City of Tacoma

Court of Appeals of Washington, Division Two

September 9, 2019, Oral Argument; December 10, 2019, Filed

No. 51695-1-II

Reporter
11 Wn. App. 2d 688 *; 457 P.3d 1160 **; 2019 Wash. App. LEXIS 3083 ***; 2019 WL 6716311

EDWARD E. (TED) COATES ET AL., *Respondents*, v. THE CITY OF TACOMA, *Petitioner*.

Notice: Order Granting Motion to Publish February 11, 2020.

Subsequent History: Reported at *Coates v. City of Tacoma, 11 Wn. App. 2d 1041, 457 P.3d 1160, 2019 Wash. App. LEXIS 3132 (Wash. Ct. App., Dec. 10, 2019)*

Ordered published by *Coates v. City of Tacoma, 2020 Wash. App. LEXIS 310 (Wash. Ct. App., Feb. 11, 2020)*

Prior History: [*1]** Appeal from Pierce County Superior Court. Docket No: 17-2-08907-4. Judge signing: Honorable Susan K Serko. Judgment or order under review. Date filed: 03/30/2018.

Counsel: Elizabeth Thomas, Mark S. Filipini, Kari L. Vander Stoep, and *Daniel Charles V. Wolf* (of *K&L Gates LLP*); and Kenneth W. Masters (of *Masters Law Group PLLC*), for petitioner.

David F. Jurca, Andrew J. Kinstler, and Emma Kazaryan (of *Helsell Fetterman LLP*), for respondents.

Judges: Authored by Rich Melnick. Concurring: Rebecca Glasgow, Dissenting: George Fearing.

Opinion by: Rich Melnick

Opinion

[*689] [1162]**

¶1 MELNICK, J. — In 1996, a City of Tacoma ordinance granted Tacoma Power the authority to build a telecommunications system. Under the ordinance, Tacoma

Power would utilize a portion of this system to operate a TV and internet business, later named the Click! Network (Click!). The ordinance also established that the telecommunications system would be organized financially as a sub-unit of Tacoma Power and thus would share expenses and revenue with Tacoma Power's electric utility.[1]

[*690]

¶2 Before implementing the system, the City of Tacoma filed a declaratory judgment action to determine the lawfulness of the ordinance. The taxpayers **[***2]** of the City of Tacoma and ratepayers of Tacoma Power opposed it. After two summary judgment rulings, the superior court entered a declaratory judgment that the ordinance was lawful. The taxpayers and ratepayers never appealed.

¶3 In 2017, Plaintiffs Ted Coates, Michael Crowley, Mark and Margaret Bubenik, Thomas Oldfield, and Industrial Customers of Northwest Utilities (collectively, the Ratepayers) sued the City alleging that, due to Tacoma Power's financial structure as it related to Click!, the funds from Tacoma Power's electric utility were unlawfully funding and subsidizing Click!. The superior court agreed and granted summary judgment in the Ratepayers' favor.

¶4 We reverse.

FACTS[2]

[1] We refer to Tacoma Power's "electric utility" as its traditional electric-distribution sub-units, such as generation, power management, and technology services.

[2] Where the facts are written in the present tense, they refer to facts that existed at the time of the summary judgment motions.

I. TACOMA POWER

¶5 The City of Tacoma owns Tacoma Public Utilities (TPU). TPU is governed by the Public Utility Board and consists of Tacoma Power, Tacoma Water, and Tacoma Rail. Click! is one of six sub-units that comprise Tacoma Power. The other five sub-units consist of more traditional electric-distribution functions like generation, power management, and technology services. Tacoma Power's expenses and revenues are accounted for in the City's Power Fund. Financially, Click! is intended to operate independently, **[***3]** and as a result, Click! maintains a sub-fund within the Power Fund. This fund collects Click!'s revenues and pays its expenses. In recent years, however, Click! has not been independently profitable, and the Power Fund has been used to offset Click!'s net losses.

[*691] II. HISTORY

A. Electric Industry in the 1990s

¶6 In the mid-1990s, the electric-distribution market underwent changes because of, among other factors, technological developments and changing consumer-demand market forces. Tacoma Power established a team to explore how it could respond to these changes. It decided "the best option was to construct a hybrid fiber coaxial telecommunications system." Clerk's Papers (CP) at 926.

¶7 The fiber part of the telecommunications system would improve Tacoma Power's

generation, distribution, and transmission efficiencies, and the coaxial part of the system would support smart-metering functionality. The smart-metering functionality would allow Tacoma Power to monitor data in real time, which would make billing, connection and disconnection, and pay-as-you-go electricity consumption programs run more efficiently.

¶8 The primary reason for building the telecommunications system "was to provide a platform for more efficient use **[***4]** and control of Tacoma Power's generation, transmission, **[**1163]** and distribution assets and to allow for the installation of smart meters." CP at 971 n.1. However, these features did not consume the entire load of the system. Tacoma Power realized that it could maximize revenue from the system by utilizing the remaining load and decided to do so by selling cable TV and internet service. Thus, the idea for Click! arose.

B. Ordinance

¶9 In 1996, the City passed an ordinance that created "a separate [telecommunications] system as part of the Electric System." CP at 122. It established infrastructure improvements and discussed the functions served by the new system. The first nine functions all related to traditional electric utility functions. The final three functions provided **[*692]** TV service, internet service, and the transport of other signals including video on demand and high-speed data. The ordinance contemplated that the infrastructure improvements would serve all of the functions listed.

¶10 Regarding financial arrangements, the ordinance provided that the TV and internet business would be organized as a sub-unit of Tacoma Power and would share revenue with Tacoma Power. Additionally, to provide part of the funds necessary **[***5]** to finance the project, the City proposed issuing $1 million in bonds.

C. Declaratory Judgment Action

¶11 In 1996, before implementing the telecommunications system, the City filed a declaratory judgment action in superior court seeking to establish the legality of the ordinance. The taxpayers of the City and ratepayers of Tacoma Power opposed it.

¶12 After two summary judgment motions, the court declared that the City had the authority to provide cable TV service, "lease telecommunications facilities and capacity to telecommunications providers," and issue bonds to help finance those operations. CP at 789.

¶13 As a result of the court's rulings, the City implemented the telecommunications system. The portion of the system used to sell TV and internet service was later called Click!.

D. Technological Changes in the 2000s

¶14 At its inception, the telecommunications system allowed for efficient and remote operation of Tacoma Power's infrastructure. Subsequently, technological changes in the electric-distribution industry impacted how beneficial the system was to Tacoma

Power's electric utility. As an example, although Tacoma Power initially intended the system to be used for smart metering, the industry switched **[***6]** to primarily using wireless meters. Tacoma Power itself **[*693]** stopped installing wired meters in 2009 and stopped replacing existing wired meters in 2015.

¶15 However, more recent data shows that the telecommunications system still serves a portion of its anticipated electric-distribution functions. Tacoma Power continues to use it to gather certain information and to control certain operations of electric generation, distribution, and transmission. It also still connects the remaining 14,240 wired smart meters.

¶16 The telecommunications system also continues to be utilized for Click!-related purposes. Click! utilizes the excess capacity on the system as a TV retailer and as an internet service wholesaler.

III. Current Lawsuit

¶17 In 2017, the Ratepayers filed a lawsuit for declaratory relief against Tacoma Power alleging that it was unlawfully subsidizing Click!. The Ratepayers alleged that Tacoma Power's financial structure violated the local government accounting statute, *RCW 43.09.210*, and Tacoma City Charter art. IV, § 4.5.[3]

¶18 The Ratepayers moved for partial summary judgment. The City opposed the **[**1164]** motion and also cross-moved for summary judgment.

¶19 After hearing argument, the trial court granted the Ratepayers' motion. The **[***7]** City sought discretionary review, which we granted.

[*694] Analysis

I. Legal Principles

¶20 We review an order for summary judgment de novo, performing the same inquiry as the trial court. *Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006)*. "We consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party." *Rublee v. Carrier Corp., 192 Wn.2d 190, 199, 428 P.3d 1207 (2018)*. "Summary judgment is proper when the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Munich v. Skagit Emergency Commc'ns Ctr., 175 Wn.2d 871, 877, 288 P.3d 328 (2012)*.

¶21 We review questions of statutory interpretation de novo. *Flight Options, LLC v. Dep't of Revenue, 172 Wn.2d 487, 495, 259 P.3d 234 (2011)*. In interpreting statutes, "[t]he goal … is to ascertain and carry out the legislature's intent." *Jametsky v. Olsen, 179 Wn.2d 756, 762, 317 P.3d*

[3] *RCW 43.09.210(3)* provides that "no department, public improvement, undertaking, institution, or public service industry shall benefit in any financial manner whatever by an appropriation or fund made for the support of another."

Tacoma City Charter art. IV, § 4.5 provides that "[t]he funds of any utility shall not be used to make loans to or purchase the bonds of any other utility, department, or agency of the City."

1003 (2014). We give effect to the plain meaning of the statute as "derived from the context of the entire act as well as any 'related statutes which disclose legislative intent about the provision in question.'" *Jametsky, 179 Wn.2d at 762* (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)*).

¶22 If a statute's meaning "is plain on its face, then we must give effect to that meaning as an expression of legislative intent." *Blomstrom v. Tripp, 189 Wn.2d 379, 390, 402 P.3d 831 (2017)*. However, if "after this inquiry, the statute remains ambiguous or unclear, it is appropriate to resort to canons of construction and legislative history." *Blomstrom, 189 Wn.2d at 390*. "A statute is ambiguous if 'susceptible to two or more reasonable **[***8]** interpretations,' but 'a statute is not ambiguous merely because different interpretations are conceivable.'" *HomeStreet, Inc. v. Dep't of Revenue, 166 Wn.2d 444, 452, 210 P.3d 297 (2009)* (quoting **[*695]** *State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)*). "Whenever possible, statutes are to be construed so 'no clause, sentence or word shall be superfluous, void, or insignificant.'" *HomeStreet, Inc., 166 Wn.2d at 452* (internal quotation marks omitted) (quoting *Kasper v. City of Edmonds, 69 Wn.2d 799, 804, 420 P.2d 346 (1966)*).

II. Local Government Accounting Statute[4]

¶23 The City argues that Click!'s financial structure does not violate the local government accounting statute, *RCW 43.09.210*.

¶24 The Ratepayers argue that Click! violates the statute because it is a separate "undertaking" from Tacoma Power and thus must be funded separately. We agree with the City.

[1] ¶25 The local government accounting statute "prohibits one government entity from receiving services from another government entity for free or at reduced cost absent a specific statutory exemption." *Okeson v. City of Seattle, 150 Wn.2d 540, 557, 78 P.3d 1279 (2003)* (*Okeson* I). The statute provides:

> All service rendered by, or property transferred from, one department, public improvement, undertaking, institution, or public service industry to another, shall be paid for at its true and full value by the department, public improvement, undertaking, institution, or public service industry receiving the same, and no department, public improvement, undertaking, institution, **[***9]** or public service industry shall benefit in any financial manner whatever by an **[**1165]** appropriation or fund made for the support of another.

RCW 43.09.210(3).
[*696]

¶26 The parties dispute whether Tacoma

[4] The parties spend a considerable amount of time arguing whether the Ratepayers' current claims are barred by res judicata arising from the 1990s declaratory judgment action or whether collateral estoppel bars the relitigation of any previously decided issues. Because we decide the case on the merits, we need not resolve the issue of whether the declaratory judgment action has preclusive effect on the current issues.

Power's electric utility and Click! are separate "undertakings." Neither case law[5] nor dictionary definitions[6] are particularly illuminating.

[2] ¶27 However, we rely on the principle of noscitur a sociis, which explains that "a single word in a statute should not be read in isolation." *State v. Roggenkamp, 153 Wn.2d 614, 623, 106 P.3d 196 (2005)*. Instead, "'the meaning of words may be indicated or controlled by those with which they are associated.'" *State v. Jackson, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999)* (quoting *Ball v. Stokely Foods, Inc., 37 Wn.2d 79, 87-88, 221 P.2d 832 (1950)*).

¶28 Accordingly, we read the term "undertaking" in the context of the other terms listed in the statute to determine whether Click! and Tacoma Power's electric utility are separate undertakings. We conclude they are not.

[3] ¶29 The Ratepayers encourage a broad reading of the term undertaking. However, their reading would make any different use of the existing infrastructure a separate undertaking under the accounting statute. Thus, if we adopted the Ratepayers' reading of the term undertaking, then that term would subsume every other term in the list. We interpret **[***10]** statutes to avoid such a result. *HomeStreet, Inc., 166 Wn.2d at 452*. Instead, we read the term undertaking in the context of the other terms listed, but we also give it and the other terms in the statute their own meaning.

¶30 Therefore, we agree with the dissent to the extent it argues that the term undertaking must have a different meaning than the other terms listed in the statute. **[*697]**

[4] ¶31 However, we disagree with the conclusion the dissent reaches. A separate project carried out by an entity can constitute a separate undertaking but not a separate department, public improvement, institution, or public service industry. But here, Click! is simply using the excess capacity of the electric utility's existing infrastructure. When reading the entire list in context, it is clear that providing an additional service using the utility's existing infrastructure is not a separate undertaking.

¶32 The whole telecommunications system is just one network of wires. Additionally, in deciding to implement the system, the City focused on the benefits that Tacoma Power would receive with regard to electric generation, transmission, and distribution. The system's potential cable TV and internet service capabilities were incidental and merely a way **[***11]** to maximize the new technology's potential. That structure has not changed. As such, Click! simply runs on the excess capacity of Tacoma Power's telecommunications system, a system that,

---

[5] The City relies on *Rustlewood Ass'n v. Mason County, 96 Wn. App. 788, 981 P.2d 7 (1999)*, to support its argument. The Ratepayers rely on the *Okeson* line of cases. *Okeson v. City of Seattle, 159 Wn.2d 436, 150 P.3d 556 (2007)* (*Okeson* III); *Okeson I, 150 Wn.2d 540, 78 P.3d 1279*; *Okeson v. City of Seattle, 130 Wn. App. 814, 125 P.3d 172 (2005)* (*Okeson* II). However, neither line of cases is controlling nor do we find the cases persuasive.

[6] An undertaking is "the act of one who undertakes or engages in a project or business." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 2491 (2002). "Undertake" is defined as "to take in hand," to "enter upon," or to "set about." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 2491.

as discussed above, was designed and implemented to maximize electric utility functionality. Therefore, we conclude that Click! and Tacoma Power's electric utility are one undertaking for purposes of *RCW 43.09.210(3)*.

III. TACOMA CITY CHARTER

[5] ¶33 The City argues that Click!'s financial structure does not violate Tacoma City Charter art. IV, § 4.5 because Click! and Tacoma Power are not separate "utilities." We agree.

¶34 Article IV of the Tacoma City Charter governs public utilities. The Charter generally grants the City "all the powers granted to cities by state law to … operate … public utilities for supplying water, light, heat, power, transportation, and sewage and refuse **[**1166]** collection, treatment, and disposal **[*698]** services." TACOMA CITY CHARTER art. IV, § 4.1. Besides certain exceptions, the City cannot grant "any franchise, right or privilege to sell or supply water or electricity within the City of Tacoma." TACOMA CITY CHARTER art. IV, § 4.7. "Insofar as is possible and administratively feasible, each utility shall be operated as **[***12]** a separate entity." TACOMA CITY CHARTER art. IV, § 4.20. Additionally,

> The revenue of utilities owned and operated by the City shall never be used for any purposes other than the necessary operating expenses thereof, including … the making of additions and betterments thereto and extensions thereof, and the reduction of rates and charges for supplying utility services to consumers. The funds of any utility shall not be used to make loans to or purchase the bonds of any other utility, department, or agency of the City.

TACOMA CITY CHARTER art. IV, § 4.5. "Where common services are provided, a fair proportion of the cost of such services shall be assessed against each utility served." TACOMA CITY CHARTER art. IV, § 4.20.

¶35 The parties dispute whether Click! is separate "utility" from Tacoma Power's electric utility or whether it is simply a "betterment" of the utility.

¶36 The City designed and implemented the telecommunications system to facilitate Tacoma Power's ability to distribute electricity effectively and efficiently. That it could also be used in the manner in which Click! currently operates was only incidental and was a way to maximize the system's benefits. In other words, Click! was clearly intended **[***13]** as a betterment to Tacoma Power's telecommunications system in an effort to maximize a resource and "reduc[e] … rates and charges." TACOMA CITY CHARTER art. IV, § 4.5. That structure has not changed.

¶37 The fact that Click! is currently not independently profitable does not necessarily render it no longer a betterment. Rather, the City is attempting to maximize use of its resource, the telecommunications system, by utilizing the **[*699]** system's excess capacity to sell cable TV and internet service.[7] Because Click! is a betterment of

[7] Whether Click!'s continued operation is sound business practice or

Tacoma Power, we conclude that it does not violate the Tacoma City Charter.

¶38 We reverse.

GLASGOW, J., concurs.

Dissent by: FEARING

Dissent

¶39 FEARING, J. (dissenting) — Based on the common understanding of the relevant statutory terms, based on the purposes behind the local government accounting statute, and based on Washington decisions that prohibit a city electrical utility from engaging in activities other than distribution of electricity, I conclude that, for purposes of *RCW 43.09.210(3)*, the conveyance **[***14]** of Internet service and the delivery of cable television service constitutes separate undertakings and entails distinct industries from the generation and distribution of electrical power. Because ratepayers of the city of Tacoma's electrical utility must, under current practices, subsidize the distinct endeavors of Internet service access and cable television delivery, Tacoma must cease these unprofitable activities or at least stop charging expenses of such services to ratepayers. Therefore, I respectfully dissent. I would affirm the trial court's grant of summary judgment to Edward Coates against the city of Tacoma.

¶40 For someone not knowledgeable about buried cables and sunken transmission lines, the facts of this appeal sometimes tumble into the murky underground. Tacoma Power, an arm of the city of Tacoma, constructed a hybrid fiber-coaxial telecommunications system to modernize and interconnect Tacoma Power's electrical generation, distribution, and transmission assets. A hybrid fiber-coaxial system consists of a broadband network that combines optical fiber and coaxial cable. The fiber portion of Tacoma **[*700]** Power's system improved electrical generation and distribution. The coaxial **[***15]** cable supported "smart-metering," a term for promoting efficient **[**1167]** electrical connection, disconnection, and billing.

¶41 The hybrid fiber-coaxial lines held additional capacity or load to support other uses. Tacoma Power sought to increase revenue utilizing the hybrid fiber-coaxial system by selling cable television and Internet access. Tacoma Power created a punctuated subunit, "Click!," for the purpose of marketing cable and Internet.

¶42 Click! began with Ordinance 25930 adopted by the Tacoma City Council in 1996. The tedious, but important, ordinance reads, in part:

> ORDINANCE NO. 25930
>
> AN ORDINANCE of the City of Tacoma, Washington establishing a telecommunications system as part of the Light Division [former name of Tacoma Power], supplementing Ordinance No. 23514 and providing for the issuance and sale of the City's Electric System Revenue Bonds in the

good policy is not a decision for this court.

aggregate principal amount of not to exceed $1,000,000 to provide part of the funds necessary for the acquisition, construction and installation of additions and improvements to the telecommunications system.

WHEREAS, the City of Tacoma (the "City") owns and operates an electric utility system (the "Electric System"); and

WHEREAS, **[***16]** the Ordinance provides that the City may *create a separate system as part of the Electric System and pledge that the income of such separate system be paid into the Revenue Fund*; and

WHEREAS, *RCW 35A.11.020* authorizes the City to operate and supply utility and municipal services commonly or conveniently rendered by cities or towns; and

WHEREAS, *RCW 35.92.050* authorizes cities to construct and operate works and facilities for the purpose of furnishing any persons with electricity and other means of power and to regulate and control the use thereof or lease any equipment or accessories necessary and convenient for the use thereof; and

[*701] WHEREAS, the Utility Board and the Council have determined that it is in the best interest of the City that it install a telecommunications system among all of its Electric System substations in order to improve communications for automatic substation control; and

WHEREAS, the City has determined that it is prudent and economical to provide additional capacity on such telecommunications system to provide the Electric System with sufficient capacity to perform or enhance such functions as automated meter reading and billing, appliance control, and load shaping; and

WHEREAS, the Light Division **[***17]** may wish to connect such telecommunications system to individual residences and businesses in its service area or to other providers of telecommunications services; and

WHEREAS, the City has determined that it should *create a telecommunications system as part of the Electric System* in order to construct these telecommunications improvements; and

… .

WHEREAS, after due consideration, it appears to the City Council and the Public Utility Board (the "Board") that it is in the best interest of the City to create and construct a telecommunications system and to issue Electric System Revenue Bonds to finance a portion of the costs of such construction and that the exact amount of Bonds and terms of the Bonds shall be determined by resolution of the Council … .

… .

ARTICLE II

FINDINGS; ESTABLISHMENT OF

THE TELECOMMUNICATIONS PROJECT AS A SEPARATE SYSTEM; AND ADOPTION OF PLAN AND SYSTEM

Section 2.1. Establishment of Telecommunication System. The City hereby creates a *separate system of the City's Light Division* [former name of Tacoma Power] to be known as the telecommunications system (the "Telecommunications System"). The public interest, welfare, convenience and necessity require the creation of **[***18]** the Telecommunications System contemplated **[*702]** by the plan adopted by Section 2.2 hereof, for the purposes set forth in Exhibit A. The City hereby covenants that all revenues received from the Telecommunications **[**1168]** System shall be deposited into the Revenue Fund.

Section 2.2. Adoption of Plan: Estimated Cost. The City hereby specifies and adopts the plan set forth in Exhibit A for the acquisition, construction and implementation of the Telecommunications System (the "*Telecommunications Project*"). The City may modify details of the foregoing plan when deemed necessary or desirable in the judgment of the City. The estimated cost of the Telecommunications Project, including funds necessary for the payment of all costs of issuing the Bonds, is expected to be approximately $40,000,000.

Section 2.3. Findings of Parity. The Council hereby finds and determines as required by Section 5.2 of the Ordinance as follows:

A. The Bonds will be issued for financing capital improvements to the Electric System.

… .

EXHIBIT A
TELECOMMUNICATIONS PROJECT

The Telecommunications Project will include some or all of the following elements:

Infrastructure improvements

Construct a hybrid fiber coax[ial] ("HFC") telecommunications infrastructure consisting of fiber optic **[***19]** rings and branches connecting nodes throughout the Light Division service area. This telecommunications system will be asymmetrically two-way capable. It will interconnect all Light Division substations. Connections may also be made with Light Division customers and with other providers of telecommunications infrastructure and services. This telecommunications system will have 500 channels. …

Functions to be performed by infrastructure improvements

Through construction of the HFC telecommunications system, the Light Division's Telecommunications System will be capable of performing some or all of the following functions:

- conventional substation communications functions

[*703] • automated meter reading (electric and water)

• automated billing (electric and water)

• automated bill payment (electric and water)

• demand side management (DSM) functions, such as automated load (e.g. water heater) control

• provision of information to customers that is relevant to their energy and water purchasing decisions (e.g. information on time-of-use or "green" power rates)

• distribution automation

• remote turn on/turn off for electric and water customers

• city government communications functions

• CATV [cable **[***20]** television] service

• transport of signals for service providers offering telecommunications services (e.g. Personal Communications Service (PCS), video on demand, high speed data, as well as conventional wired and wireless telecommunications services)

• Internet access service

Clerk's Papers (CP) at 122-24, 126, 145 (emphasis added) (some formatting omitted). Note that the ordinance established "a separate [telecommunications] system as part of the Electric System." CP at 122. The first nine functions listed in exhibit A of the ordinance apply to the city's electrical utility. The last three functions apply to cable television and Internet service delivery.

¶43 In 1996, before laying the new hybrid fiber-coaxial telecommunications system, the city of Tacoma filed a declaratory judgment action in superior court seeking confirmation of the legality of Ordinance 25930. Tacoma sought declarations that:

> b. The Bond ordinance was properly enacted.
>
> c. The City has authority … to utilize the Telecommunications System to provide cable television service in the [Tacoma Power] service area.
>
> **[*704]** d. The City has authority … to lease Telecommunications System facilities and capacity to telecommunications providers [sell internet service to internet service providers].
>
> e. The City has authority **[***21]** … to issue the Bonds for the purposes set for in **[**1169]** paragraphs (c) and (d) above and in the manner set forth in the Bond Ordinance.

CP at 714.

¶44 During the 1996 lawsuit, the city of Tacoma moved for summary judgment. Ratepayers opposed the motion and argued that the plan adopted by the ordinance was ambiguous and could potentially lose money. Ratepayers lamented that, as described in the ordinance, the system's financial structure would make Tacoma Power, and ultimately Tacoma Power

ratepayers, liable for any losses accrued. They argued that this structure violated section 4.2 of the Tacoma City Charter. Ratepayers also expressed concern that funding for the hybrid fiber-coaxial project would come not only from Tacoma Power's revenue but also from the City's general obligation fund and thus would subject the taxpayers of Tacoma to potential tax increases in violation of section 4.2.

¶45 The superior court, in the 1996 suit, initially granted the City's motion for summary judgment except on one question. In the initial award of judgment, the superior court ruled, in part, that the City had the legal authority to sell cable television service and access to broadband for Internet service providers. The court reserved a decision on the question **[***22]** of whether the City held authority to issue the revenue bonds.

¶46 In 1997, the City moved again for summary judgment on the question of authority to issue the bonds to finance the hybrid fiber-coaxial project. Ratepayers opposed the renewed motion and forwarded similar arguments to those raised previously. This time, ratepayers' experts opined that the "proposal represents a great financial risk and will cause a general indebtedness to the taxpayers **[*705]** and ratepayers of Tacoma that could only be paid by increasing the rates charged to the ratepayers … for utilities or borrowing from the [City's] general fund." CP at 823. In other words, ratepayers argued that, because of uncertainty in the hybrid fiber-coaxial project's profitability, genuine issues of fact precluded granting summary judgment.

¶47 Tacoma replied by arguing that it would retire the bonds solely from Tacoma Power's revenue, not the City's general obligation fund. Thus, city taxes would not increase and, as a result, section 4.2 of the Tacoma City Charter did not apply. Tacoma also argued that the question of whether the City would increase electricity rates to Tacoma Power ratepayers lacked relevance to the validity of the bonds and, in turn, **[***23]** to the merits of the summary judgment motion. Tacoma wrote in a reply summary judgment brief:

> [The Ratepayers'] brief also argues extensively that revenues from the Telecommunications System may be inadequate to cover debt service on the Bonds. This factual argument is simply not material to the question of the City's authority to issue the Bonds, and therefore cannot raise a "genuine issue as to any *material* fact[.]" Moreover, the issue is outside of the scope of the Court's review.

CP at 834 (second alteration in original) (citation omitted). In other words, Tacoma contended that the superior court should not address the profitability, or lack thereof, of Click!.

¶48 At the conclusion of the 1996 suit, the superior court granted the City's summary judgment motion and ruled that Tacoma possessed authority to issue $1 million of revenue bonds to partly finance the hybrid fiber-coaxial telecommunications system. The court handwrote the following into its May 9, 1997 summary judgment order: "however, the Court is making no finding as to the financial feasibility of the Project or

as to the legality of any future bond issues." CP at 848. Ratepayers did not appeal.

¶49 **[*706]** In 1997, the Tacoma City Council adopted **[***24]** Substitute Resolution 33668, which also addressed the new hybrid fiber-coaxial system. The resolution declares, in part:

> WHEREAS the City of Tacoma, Department of Public Utilities, Light Division [Tacoma Power] desires to: (1) develop a state-of-the art fiber optic system to support enhanced electric system control, reliability and efficiency; … (3) create greater revenue diversification through *new* ***[**1170]*** *business lines (i.e. internet transport, cable TV*, etc.).

CP at 153 (emphasis added).

¶50 As a result of the superior court's ruling in the 1996 declaratory judgment suit, Tacoma constructed and implemented the hybrid fiber-coaxial telecommunications system. Through this system, Click! delivers cable television directly to customers. Click! sells access to its hybrid fiber-coaxial broadband transmission lines for purposes of Internet service providers' marketing Internet service to the providers' customers.

¶51 The city of Tacoma intended for Click! to operate independently of the other subdivisions of Tacoma Power. According to one expert, cable television and the Internet do not support the functions of an electrical utility. As stated during oral argument, distribution of cable television and Internet **[***25]** distribution does not employ the same cables or wires as those used for transmission of electricity. Wash. Court of Appeals oral argument, *Coates v. City of Tacoma*, No. 51695-1-II (Sept. 9, 2019), at 22 min., 35 sec. through 23 min., 20 sec. (on file with court).

¶52 Although Tacoma Power initially intended the hybrid fiber-coaxial telecommunications system to be used for smart-metering, the electrical industry switched to using wireless meters. Tacoma Power stopped installing smart meters through the hybrid fiber-coaxial system in 2009 and stopped replacing existing wired meters in 2015. As of February 2018, 14,240 smart meters remained functioning.

¶53 Tacoma originally planned for 45,000 Click! customers. The number of customers peaked in 2010 at 25,000. By **[*707]** late 2014, the customers had steadily declined to 20,000. At that time, Click! provided cable service to only 17.5 percent of the homes it passed. The number of customers was projected to continue to decline.

¶54 The city of Tacoma's Power Fund accounts for the expenses and revenues of Tacoma Power. The Power Fund accounts separately for subunits of Tacoma Power, including the maintenance of a Click! subfund. This separate accounting has enabled **[***26]** the City to discern that Click! operates at a deficit. Click! loses around $5 million each year. Click! annually incurs millions of dollars of expenses related only to its operations, such as installing cable boxes, processing bills, and subscribing to programming. The Power Fund accounting also assigns to Click! shared expenses with the electrical

utility such as the cost of the building in which the subunits office. Because of the losses, Tacoma Power electricity ratepayers subsidize the operations of Click!.

¶55 In 2014, the Tacoma City Council contracted with an outside firm to conduct a general management review. The review viewed Tacoma Power and Click! as functionally different entities. The review found that Click! was not independently profitable and, as a result of the Tacoma Power and Click! revenue sharing financial structure, Tacoma Power ratepayers subsidized Click! The review deemed the subsidies unfair.

¶56 On July 16, 2015, Tacoma City Attorney Elizabeth Pauli and Chief Deputy City Attorney William Fosbre wrote a memorandum concluding that Tacoma Power unlawfully operated Click! because of its lack of a nexus to the City's electrical utility and because of the deficit spending. **[***27]** The memorandum opined:

> City electric utility revenues may be used to maintain the telecommunication system while it is being used to provide electric utility services to electric customers.
>
> City electric utility revenues may not be used to pay for the costs directly associated (such cable programming, set top **[*708]** boxes, marketing, etc.) with providing commercial telecommunications services (cable television and wholesale broadband Internet) to the public. These costs are not sufficiently related to providing electricity to utility customers, thus must be paid for from non-utility revenues. Non-utility revenues can include rates or charges to the telecommunication services customers or general government tax dollars. General government tax dollars can be used to offset the costs of providing municipal services (think theater district, Tacoma Dome, etc.).

CP at 62-63.

¶57 This court must decide whether Tacoma may require electricity ratepayers to underwrite Click!. Although Edward Coates **[**1171]** also argues that Click! violates section 4.2 of the Tacoma City Charter, I rely exclusively on the local government accounting statute, *RCW 43.09.210*, to answer in the negative.

¶58 *RCW 43.09.210* declares in part:

> (2) Separate accounts shall be kept for each department, **[***28]** public improvement, undertaking, institution, and public service industry under the jurisdiction of every taxing body.
>
> (3) All service rendered by, or property transferred from, one department, public improvement, undertaking, institution, or public service industry to another, shall be paid for at its true and full value by the department, public improvement, undertaking, institution, or public service industry receiving the same, and no department, public improvement, undertaking, institution, or public service industry shall benefit in any financial manner whatever by an

> appropriation or fund made for the support of another.

I focus on the latter half of RCW 43.09.210(3), which reads:

> [*N*]*o* department, public improvement, *undertaking*, institution, or *public service industry shall benefit in any financial manner whatever by an appropriation or fund made for the support of another*.

(Emphasis added.) This appeal compels us to decide what constitutes an "undertaking" and a "public service industry" **[*709]** for purposes of the statute. We must discern whether Internet service and cable television, on the one hand, constitute discrete undertakings or distinct industries from electricity distribution.

¶59 The city of Tacoma **[***29]** focuses only on one word, "undertaking," when arguing the subsidies afforded Click! by electrical ratepayers conforms with RCW 43.09.210(3). Tacoma contends that we should construe the term "undertaking" as being similar in nature to the other nouns found in the statute: department, public improvement, institution, and public service industry. Tacoma reasonably contends that, if the word "undertaking" does not echo the meaning of the other words, the term "undertaking" would subsume the entire statute. Stated differently, the legislature could have merely inserted the noun "undertaking" into the statute without including the words "department," "public improvement," "institution," or "public service industry" and convey the same meaning as the meaning of the statute with the additional nouns included.

¶60 Tacoma relies on the rule of statutory construction that teaches a court not to read in isolation a single word. Jongeward v. BNSF Railway Co., 174 Wn.2d 586, 601, 278 P.3d 157 (2012). Instead, associated words placed in the statute control the meaning of a word. Cito v. Rios, 3 Wn. App. 2d 748, 759, 418 P.3d 811, *review denied*, *191 Wn.2d 1017, 426 P.3d 747 (2018)*. But one can generally find a principle of interpretation that supports one's reading of a statute.

¶61 Another principle of statutory interpretation instructs the court to construe a statute to give **[***30]** effect to all the language used and avoid a construction that would render a portion of a statute meaningless or superfluous. Ford Motor Co. v. City of Seattle, 160 Wn.2d 32, 41, 156 P.3d 185 (2007). Presumably, according to this principle, we must identify at least one example where the word "undertaking" covers some municipal endeavor not covered by the other nouns. The city of Tacoma supplies us no such example. Instead, **[*710]** if we limited the word "undertaking" to cover only the same nouns in RCW 43.09.210(3), we would render nugatory a key word of the statute. Tacoma jettisons the word "undertaking" from the local government accounting statute.

¶62 RCW 43.09.210 does not define any of the nouns catalogued in subsection (3). So I rely in part on a legal dictionary and a lay dictionary to discern the parameters of the

word "undertaking" and the phrase "public service industry." A court may employ a standard English dictionary to determine the plain meaning of an undefined term. *State v. Fuentes, 183 Wn.2d 149, 160, 352 P.3d 152 (2015)*. A court may also utilize a legal dictionary. *State v. McNally, 361 Or. 314, 322, 392 P.3d 721 (2017)*; *Upshaw v. Superior Court, 22 Cal. App. 5th 489, 504, 231 Cal. Rptr. 3d 505 (2018)*.

¶63 *Black's Law Dictionary* defines "undertaking," but only in the context of a pledge for financing. BLACK'S LAW DICTIONARY 1837 (11th ed. 2019). *Merriam-Webster* defines "undertaking" as:

> **[**1172] 1 a :** the act of one who undertakes or engages in a project or business …
>
> … .
>
> **2 :** something undertaken **:** ENTERPRISE.

MERRIAM-WEBSTER ONLINE **[***31]** DICTIONARY, https://www.merriam-webster.com/dictionary/undertaking (last visited Nov. 26, 2019).

¶64 Assuming "undertaking" is synonymous with "enterprise," one might consider the hybrid fiber-coaxial transmission lines to constitute one enterprise, of which the smart-metering, cable television, and Internet are subparts. But that analysis falls short when considering that Click! is a separate business from the electrical distribution. Smart meters constitute only a portion of the facilities and technology used to operate Tacoma's electrical utility. Tacoma Power does not employ the hybrid fiber-coaxial telecommunications **[*711]** system to deliver electricity to its customers. Tacoma Power bills for electricity consumed by customers separately from cable television subscriptions and access to the cables for Internet service providers. The assessment of one enterprise further disassembles when contemplating that Tacoma Power is diminishing, if not ending, the smart-metering portion of the hybrid fiber-coaxial cable system.

¶65 Since the term "public service industry" includes three words, the lay dictionary does not define the phrase. *Black's Law Dictionary* omits any definition of "public service industry," **[***32]** but defines constituent parts of the term. The legal dictionary defines "public service" in relevant part as:

> 1. A service provided or facilitated by the government for the general public's convenience and benefit.

BLACK'S LAW DICTIONARY at 1488. Cable television and Internet is not provided by the government for the public's convenience and benefit. Electricity is. *Black's Law Dictionary* defines "industry" in relevant part as:

> 3. A particular form or branch of productive labor; an aggregate of enterprises employing similar production and marketing facilities to produce items having markedly similar characteristics.

BLACK'S LAW DICTIONARY at 927. An electrical utility does not produce a product

markedly similar to cable television and Internet.

¶66 In addition to reading dictionaries, I consider how legal settings utilize the term "public service industry." The law has considered public service industries to include railroads and bus systems. *Florida Power Corp. v. Webster, 760 So. 2d 120, 125 (Fla. 2000)*; *City of Buffalo v. State Board of Equalization & Assessment, 44 Misc. 2d 716, 718, 254 N.Y.S.2d 699 (Sup. Ct. 1964)*; *California Motor Transport Co. v. Railroad Commission, 30 Cal. 2d 184, 187-88, 180 P.2d 912 (1947)*; *Sale v. Railroad Commission, 15 Cal. 2d 612, 617-18, **[*712]** 104 P.2d 38 (1940)*. The California Supreme Court impliedly deemed a county's water system to represent a public service industry. *County of Inyo v. Public Utilities Commission, 26 Cal. 3d 154, 158, 604 P.2d 566, 161 Cal. Rptr. 172 (1980)*. One court labeled an electric light plant as a public service industry. *Consolidated Gas, Electric Light & Power Co. of Baltimore v. City of Baltimore, 130 Md. 20, 99 A. 968, 972 (1917)*. No court has labeled cable television or **[***33]** Internet service as a public service industry. Cable television is generally owned by private enterprise. Internet service providers are also usually private companies.

¶67 The word "industry" is commonly used without the appendage "public service." One law review article references the telecommunications industry as a distinct industry and electrical utilities as another distinct industry. William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 512, 516 (1979). One sometimes hears the term "cable television industry." Karl Bode, *The* Cable Industry *Makes $28 Billion Annually in Bull**** *Fees*, TECHDIRT (Oct. 9, 2019 6:23 AM), https://www.techdirt.com/articles/20191008/08474843146/cable-industry-makes-28-billion-annually-bullshit-fees.shtml; Kristina Zucchi, *5 Reasons the* Cable TV Industry *Is Dying*, INVESTOPEDIA (emphasis added), https://www.investopedia.com/articles/personal-finance/062315/5-reasons-cable-tv-industry-dying.asp (last updated June 25, 2019). One never hears the appellation "cable television and electrical industry."

¶68 One article describes the Internet industry:

> **[**1173]** The *Internet Industry* consists of companies that provide a wide variety **[***34]** of products and services primarily online through their Web sites. Operations include, but are not limited to, search engines, retailers, travel services, as well as dial-up and broadband access services.

[*713] *Industry Overview: Internet*, VALUE LINE, *http://www.valueline.com/Stocks/Industries/Industry_Overview__Internet.aspx#.XaISHmzn-Uk* (last visited Nov. 26, 2019) (emphasis added). The article does not mention power generation or electrical distribution as being a product or service of the Internet.

¶69 The Washington Supreme Court, in

City of Issaquah v. Teleprompter Corp., 93 Wn.2d 567, 574-75, 611 P.2d 741 (1980), recognized cable television as a service distinct from a city's electrical utility. The court favorably quoted a cable company's attorney as characterizing cable television as a luxury service and a television improvement. *93 Wn.2d at 574*.

¶70 One Washington statute, *RCW 80.04.010(23)*, defines a "public service company," rather than "public service industry." The statute's definition includes an "electrical company" and a "telecommunication company." But *RCW 80.04.010* defines those two companies separately as if unrelated to one another. *RCW 80.04.010(12)*, *(28)*.

¶71 I note that Tacoma Power separately accounts for the expenses and revenue of Click!. *RCW 43.09.210(2)* requires separate accounts for "each department, public improvement, understanding, **[***35]** institution, and public service industry." This separate accounting for Click! may illustrate Tacoma's understanding that Internet service and cable television involve distinct undertakings.

¶72 Ordinance 25930 recognized Click! as a distinct entity when it labeled Click! as "a separate system" within the Tacoma Power system. CP at 126, § 2.1. The follow-up resolution in 1997 described the new, separate system's Internet transport and cable TV services as "new business lines," i.e., different business lines from the electric utility's traditional business of supplying electricity to customers. CP at 153.

¶73 I now leave the minutiae of the wording found in *RCW 43.09.210(3)* and review the broad policy behind the **[*714]** local government accounting statute. Ultimately, in resolving the meaning of a statutory term, we adopt the interpretation that best advances the legislative purpose. *Citizens Alliance for Property Rights Legal Fund v. San Juan County, 184 Wn.2d 428, 437, 359 P.3d 753 (2015)*.

¶74 The Washington State Legislature enacted the local government accounting statute and the forerunner to *RCW 43.09.210* in 1909 at the height of America's progressive era. LAWS OF 1909, ch. 76, § 3. We generally think of this era as influencing national policy, but the era engendered significant improvements to local and state government. The progressive movement sought to **[***36]** rid state and local government of political corruption and to render government efficient, goals that all points on the political spectrum can support. Progressive adherents lamented the waste and inefficiency at all levels of government.

¶75 Progressive era reforms included sound accounting standards essential for better government. James L. Chan & Qi Zhang, *Government Accounting Standards and Policies, in* THE INTERNATIONAL HANDBOOK OF PUBLIC FINANCIAL MANAGEMENT 742 (Richard Allen et al. eds., 2013). During the first decade of the 1900s, the Grange promoted before state legislatures a uniform public accounting act, portions of which became Washington's local government accounting act. Ed. F. Green, *The Kansas State Grange Moving for Uniform Public Accounting*, 10 PUB.

POL'Y 22 (1904); *see also* *City of Cincinnati v. Board of Education, 30 Ohio N.P. (n.s.) 595, 601 (C.P. Hamilton County 1933)* (referencing Ohio General Code § 280: "No institution, department, improvement or public service industry shall receive financial benefit from any appropriation made or fund created for the support of another."). The uniform act promoted "the economy and efficiency in all branches of public business, so that the **[***37]** expenditures of public funds shall be placed on a systematic basis and be controlled by honest methods, in according with public needs." Green, **[**1174]** *supra*, at 22 (1904).

¶76 Click! flouts the spirit of *RCW 43.09.210* by subsuming the costs of a losing undertaking in the cost of operating **[*715]** a vital service to the residents of Tacoma. The accounting demanded by *RCW 43.09.210* has unearthed government inefficiency and should lead to the ending of a wasteful project. Characterizing Click! as the same undertaking or public service industry as the electrical utility allows a pet project of some politicians to survive despite its onus on electricity ratepayers. The onus particularly inflicts economic harm on the poor since Tacoma Power enjoys a monopoly when transmitting electricity, an essential service for all residents of Tacoma, and the poor pay a higher percentage of their income on utilities.

¶77 Click! also offends Washington case law that holds a city's electrical utility may not engage in endeavors other than the sale of electricity. Since 1890, cities have held **[***38]** statutory power to operate an electrical utility. *City of Tacoma v. Taxpayers of Tacoma, 108 Wn.2d 679, 695-96, 743 P.2d 793 (1987)*. The legislature believed that a municipality could provide lower cost and more efficient electrical service. *City of Tacoma v. Taxpayers of Tacoma, 108 Wn.2d at 696*. Municipal ownership of electrical distribution seeks to give the citizen the best possible service at the lowest possible price. *Uhler v. City of Olympia, 87 Wash. 1, 14, 151 P. 117, 152 P. 998 (1915)*. Accordingly, a municipal utility has a duty to provide low cost, efficient service. *City of Tacoma v. Taxpayers of Tacoma, 108 Wn.2d at 696*. Additionally, a municipal electric utility may not impose on ratepayers the costs of activities that do not have a "sufficiently close nexus" to the utility's primary purpose of "supplying electricity to the municipal corporation and its inhabitants." *City of Tacoma v. Taxpayers of Tacoma, 108 Wn.2d at 695-96*.

¶78 A series of Washington decisions precludes a city's electrical utility from charging ratepayers for extraneous endeavors. In *Okeson v. City of Seattle, 150 Wn.2d 540, 78 P.3d 1279 (2003)* (*Okeson* I), the Washington Supreme Court ruled that the city's imposition on electric utility customers of a rate or other charge for the maintenance and operation **[*716]** of streetlights was an unauthorized tax. The city's electric utility serves a proprietary function of the government. Therefore, the electric utility operates for the benefit of its customers, not the general public. Providing streetlights was a governmental function

unrelated to the electric **[***39]** utility.

¶79 The Washington State Legislature legislatively overruled *Okeson* I. LAWS OF 2002, ch. 102, § 1. But its main holding of prohibiting unrelated services remains true.

¶80 In *Okeson v. City of Seattle, 130 Wn. App. 814, 125 P.3d 172 (2005)* (*Okeson* II), the high court held that electric utility revenues could not be used to pay for public art not directly related to the utility. In *Okeson v. City of Seattle, 159 Wn.2d 436, 150 P.3d 556 (2007)* (*Okeson* III), the high court held that electric utility revenues could not be used to pay other parties for mitigating their greenhouse gas emissions, as part of the city's program to combat global warming. If a city electrical utility cannot charge its ratepayers for the beneficial effects of reducing greenhouse gases, this court should not allow Tacoma Power to charge its ratepayers for underwriting a flopping cable television and Internet system.

¶81 *Smith v. Spokane County, 89 Wn. App. 340, 948 P.2d 1301 (1997)* bears some resemblance. Sandra Smith filed an action against Spokane County and the city of Spokane challenging the fees imposed on water and sewer customers within the Spokane-Rathdrum Aquifer Protection Area. Division Three of this court relied on the local government accounting statute and considered the aquifer protection activities a separate undertaking from the provision of water and sewer. Therefore, under *RCW 43.09.210* the city and county could not charge **[***40]** utility customers for the activities.

¶82 The city of Tacoma relies principally on *Rustlewood Association v. Mason County, 96 Wn. App. 788, 981 P.2d 7 (1999)*. *Rustlewood Association* helps Tacoma none. This court, in *Rustlewood Association*, addressed whether costs **[*717]** needed to be allocated among different residential subdivisions served by the same utility. In contrast, Tacoma's **[**1175]** appeal concerns the allocation of expenses between an electric utility and distinct business lines.

¶83 The city of Tacoma may rely on the fact that Click! uses the same hybrid fiber-coaxial system as the electrical distribution system such that cable television, Internet, and electricity distribution entail the same undertaking and the same public service industry. Nevertheless, *RCW 43.09.210* does not suggest that, because two endeavors entail overlapping facilities, the two activities involve the same undertaking or industry. The electrical lines of Tacoma Power, the most essential byway of the utility, remain separate from the hybrid fiber-coaxial telecommunications system.

¶84 The city of Tacoma argues that Click!'s provision of Internet and cable television must be the same undertaking or public service industry since they operate within the same department, Tacoma Power. This argument would allow a municipality **[***41]** to avoid the strictures of *RCW 43.09.210* by folding unrelated endeavors into the same department. Tacoma could operate a library inside the sewer department and charge sewer customers with the cost of the library. Tacoma's argument promotes form over

substance and breaches the spirit of the local government accounting statute.

¶85 The city of Tacoma highlights that it still owns and possesses the hybrid fiber-coaxial telecommunications system. Tacoma further underscores that it only uses the system's excess capacity. Tacoma may thereby argue that, since the system exists and its excess capacity could raise revenue, the City should be permitted to operate Click!. This emphasis ignores the fact that Click!'s costs exceed the revenue accumulated by the sale of the excess capacity. The law allows Tacoma to still own and possess the system with its surplus capacity, but not to market the excess capacity at a loss. Tacoma may even operate a cable television system and allow Internet service providers access to the hybrid **[*718]** fiber-coaxial cables, but not to the detriment of electrical utility customers.

¶86 During oral argument, the city of Tacoma contended that Click! is not operated at a financial loss. Wash. Court **[***42]** of Appeals oral argument, *supra*, at 30 min, 50 sec. through 32 min., 5 sec. Nevertheless, Tacoma presented no facts, in opposition to Edward Coates's summary judgment motion, to create an issue of fact as to the profitability of Click!. Coates presented overwhelming, uncontroverted evidence of a financial loss. When questioned further during oral argument, Tacoma agreed it presented no affidavit testimony of profitability. Wash. Court of Appeals oral argument, *supra*, at 31 min., 45 sec. through 32 min., 5 sec.

¶87 The city of Tacoma also asks that this court reverse the trial court ruling on the basis of res judicata and collateral estoppel. Tacoma contends the 1996 litigation bars Edward Coates from relitigating whether Tacoma can operate Click! at a financial loss. Nevertheless, the earlier court never addressed the profitability of Click! or the impact of financial losses on Click!'s authority to conduct business. Tacoma unfairly raises issue and claim preclusion because, when ratepayers mentioned the possibility of financial losses during the **[***43]** 1996 lawsuit, the City contended that the profitability of Click! had no relevance to its declaratory judgment action.

¶88 Collateral estoppel or issue preclusion applies only when the two cases involve identical issues. *Shoemaker v. City of Bremerton, 109 Wn.2d 504, 507, 745 P.2d 858 (1987)*. The 1996 litigation did not entail the same issue.

¶89 The city of Tacoma filed the 1996 lawsuit in the form of a declaratory judgment action. *RCW 7.24.010* grants the superior court jurisdiction to declare the rights of parties. The statute further prescribes that:

> [S]uch declarations shall have the force and effect of a final judgment or decree.

¶90 Based on *RCW 7.24.010*, Tacoma argues that the same res judicata effects emanating from other lawsuit **[*719]** judgments extend to a declaratory judgment order. In turn, Tacoma emphasizes the rule

that res judicata, or claim preclusion, prohibits the relitigation of claims and issues that could have been litigated in a prior action. *Eugster v. Washington State Bar Association, 198 Wn. App. 758, 786, **[**1176]** 397 P.3d 131 (2017)*. Tacoma claims that ratepayers could have raised the issue of the lack of profitability during the 1996 litigation.

¶91 I question whether the ratepayers could have raised the argument of the lack of profitability of Click! during the earlier lawsuit when Tacoma contended that Click!'s profitability lacked any relevance to the claims asserted. **[***44]** The superior court in its 1997 order approving the bond issuance likely agreed since it handwrote a notation that it did not decide Click!'s profitability. Regardless, res judicata does not apply against Edward Coates because of the limited nature res judicata plays in the context of a declaratory judgment action.

¶92 No Washington decision has addressed the applicability of res judicata to an earlier declaratory judgment. Nevertheless, the universal rule declares that res judicata extends only to issues actually decided. Therefore, res judicata and collateral estoppel conflate in the context of a declaratory judgment action.

¶93 *Restatement (Second) of Judgments section 33* (Am. Law Inst. 1982) declares:

> A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.

22A Am. Jur. 2d Declaratory Judgments section 244 (2013) likewise reads:

> A declaratory judgment is only a bar to matters which were actually litigated, not to those that might have been litigated. Nor is it an absolute bar to subsequent proceedings where the **[*720]** parties are seeking other remedies **[***45]** even though based on claims that could have been asserted in the original action.

¶94 Numerous state courts and federal courts have addressed the extent of res judicata in the context of declaratory judgment actions and have ruled that the doctrine extends only to issues actually litigated. States so holding have a similar statute to *RCW 7.24.010* that affords declaratory orders the same status as other judgments. *Jackinsky v. Jackinsky, 894 P.2d 650, 654-57 (Alaska 1995)*; *Aerojet-General Corp. v. American Excess Insurance Co., 97 Cal. App. 4th 387, 401-03, 117 Cal. Rptr. 2d 427 (2002)*; *Eason v. Board of County Commissioners, 961 P.2d 537, 539-40 (Colo. App. 1997)*; *North Shore Realty Corp. v. Gallaher, 99 So. 2d 255, 256-57 (Fla. Dist. Ct. App. 1957)*; *Stilwyn, Inc. v. Rokan Corp., 158 Idaho 833, 842-45, 353 P.3d 1067 (2015)*; *Gansen v. Gansen, 874 N.W.2d 617, 620-23 (Iowa 2016)*; *Bankers & Shippers Insurance Co. v. Electro Enterprises, Inc., 287 Md. 641, 652-55, 415 A.2d 278 (1980)*; *Andrew Robinson International, Inc. v. Hartford Fire*

Insurance Co., 547 F.3d 48, 52-59 (1st Cir. 2008); *Ganaway v. Shelter Mutual Insurance Co., 795 S.W.2d 554, 562 (Mo. App. 1990)*; *Boca Park Marketplace Syndications Group, LLC v. Higco, Inc., 133 Nev. 923, 925-27, 407 P.3d 761 (2017)*; *Radkay v. Confalone, 133 N.H. 294, 297-98, 575 A.2d 355 (1990)*; *Tunis v. Country Club Estates Homeowners Association, 2014-NMCA-025, ¶¶ 1-22, 318 P.3d 713 (2013)*; *Harborside Refrigerated Services, Inc. v. Vogel, 959 F.2d 368, 372-73 (2d Cir. 1992)*; *In re Estate of Cox, 97 N.C. App. 312, 314-15, 388 S.E.2d 199 (1990)*; *State ex rel. Shemo v. City of Mayfield Heights, 95 Ohio St. 3d 59, 68-69, 2002-Ohio-1627, 765 N.E.2d 345*; *Oklahoma Alcoholic Beverage Control Board v. Central Liquor Co., 1966 OK 243, 421 P.2d 244, 247*; *Catawba Indian Nation v. State, 407 S.C. 526, 539-41, 756 S.E.2d 900 (2014)*; *Carver v. Heikkila, 465 N.W.2d 183, 186 (S.D. 1991)*; *Martin v. Martin, Martin & **[*721]** Richards, Inc., 989 S.W.2d 357, 359 (1998)*; *Cupola Golf Course, Inc. v. Dooley, 2006 VT 25, ¶ 10, 179 Vt. 427, 898 A.2d 134 (2006)*; *Stericycle, Inc. v. City of Delavan, 120 F.3d 657, 659 (7th Cir. 1997)*.

References

Annotated Revised Code of Washington by LexisNexis

End of Document

APPENDIX B

No. 98229-5

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

DARREL BOWMAN and MITCHELL SHOOK,

Appellants,

v.

CITY OF TACOMA,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY
NO. 19-2-11506 (consolidated with 19-2-11760-1)

RESPONSE TO BOWMAN'S STATEMENT OF GROUNDS FOR DIRECT REVIEW

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters,
WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com

OFFICE OF THE CITY ATTORNEY
Chris Bacha, Chief Deputy,
WSBA 16714
747 Market Street, Suite 1120
Tacoma, WA 98402
(253) 591-5885
cbacha@cit.tacoma.wa.us

CHRISTIE LAW GROUP, P.L.L.C.
Robert L. Christie,
WSBA 10895
2100 Westlake Avenue North,
Suite 206
Seattle, WA 98109
(206) 957-9669
bob@christielawgroup.com

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

IDENTITY OF RESPONDENT, RELIEF REQUESTED & INTRODUCTION

Respondent City of Tacoma asks this Court to deny Appellant Bowman's request for direct review of the trial court's order granting summary judgment to the City of Tacoma and dismissing his "citizen vote" lawsuit. Click! is not a separate public utility, but rather a proprietary operating unit of Tacoma Power that runs on the Excess Capacity of the City's hybrid fiber-coaxial network (HFC Network). Tacoma's Public Utility Board (PUD) and City Council passed unchallenged Resolutions that the Excess Capacity is surplus and nonessential to its utility needs. Under the plain terms of RCW 35.94.040, the public-vote requirements of RCW 35.94.020 and City Charter § 4.6 thus do not apply. The trial court correctly found no evidence that either governmental body acted in an arbitrary or capricious manner. The trial court's rulings are legally correct.

In any event, no conflicts exist with or between any other decisions, precluding direct review under RAP 4.2(a)(3). And declaring Excess Capacity surplus and nonessential does not involve an issue of broad public import under RAP 4.3(a)(4).

This Court should deny direct review and permit this appeal to proceed in the usual manner in the Court of Appeals.

FACTS RELEVANT TO RESPONSE

The factual allegations in Bowman's Statement of Grounds for Direct Review are almost entirely unsupported by any citations to the record, much less any record. This Court should disregard them.

Tacoma Power is a division of Tacoma Public Utilities (TPU), a Department of the City (formerly Tacoma City Light).[1] In 1997 and 1998, Tacoma Power began constructing the HFC Network, geographically covering the Cities of Tacoma, Fife, Fircrest, University Place, portions of Lakewood, Puyallup, and portions of unincorporated Pierce County.[2] Tacoma Power constructed this HFC Network to connect its distribution and transmission assets, to enable automated meter reading and billing, to allow distribution automation, and to provide remote turn on/turn off to electric customers.[3]

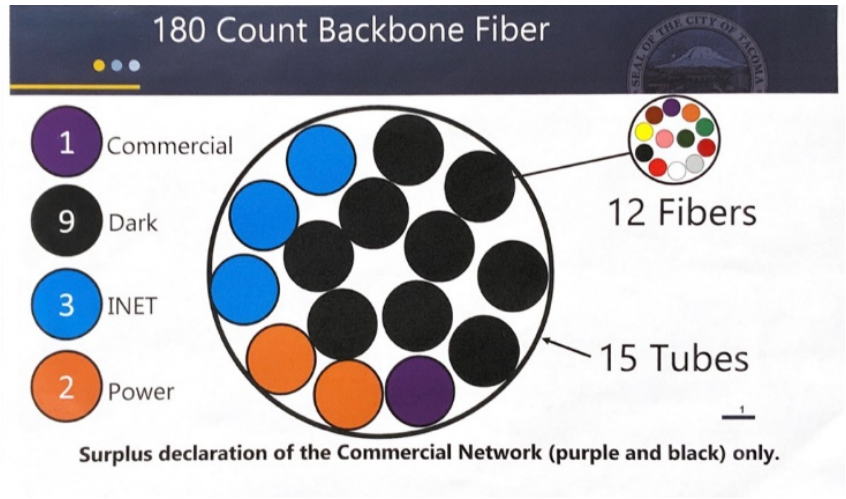
---

[1] These facts are from in the Declaration of Tenzin Gyaltsen, submitted with the City's summary judgment motion, and attached as Appendix A. Except for the Procedural History, they are essentially the same as those set forth in the City's Response to Bowman's Motion for Accelerated Review.

[2] App. A at 2-3.

[3] App. A at 3, 5, 13.

The **HFC Network** is visually depicted here:[4]



The HFC Network thus comprises a 180-strand fiber-optic backbone, and 1,200 miles of coaxial cable. There are 15 tubes, with 12 fibers in each tube, divided into four separate and independent networks: (1) the Power Control Operations Network (PCON), with 24 counts of fiber supporting internal transmission of information among and between TPU infrastructure, providing no services to the public (orange); (2) the Click! Commercial Network (CCN), with 1,200 miles of coaxial cable and 12 counts of the backbone fiber providing cable television and internet services to commercial and residential properties (purple); (3) the institutional network (INET), with 36 counts of fiber connecting major community institutions like government buildings, schools, and public safety buildings (blue);

[4] The facts in the following paragraph are supported in App. A at 4-5.

and (4) the Dark Fiber Network, with roughly 108 fiber-optic strands never put to use, providing no services internally or externally, a part of the excess capacity of the HFC Network (black).

Tacoma Power deployed a pilot smart-meter program that relies on the PCON and the CCN.[5] But due to technical changes and opportunities (product unavailability, unanticipated costs, and advances in wireless technology) the wired-pilot-smart-meter project must be replaced with *wireless* advanced-meter technology.[6] The CCN is not necessary for this new smart-meter program.[7]

"Click! Network" is the trade name for Tacoma Power's Click! Section, which uses the CCN. Click! Network is organized as one of six sub-units of Tacoma Power. It provides retail cable television services, wholesale subscription internet access service (cable-modem services), and fixed fiber-optic broadband transport and internet access services (metro ethernet services) over the CCN (collectively, "Click! Services").[8] "Excess Capacity" refers collectively

[5] App. A at 3.
[6] *Id*.
[7] *Id*.
[8] App. A at 5.

to the CCN and Dark Fiber Network, together with the electronic equipment Click! Network uses to transmit information.[9]

Over time, due to new opportunities and challenges, the Tacoma Public Utility Board (PUB)[10] and the City Council determined that the Click! Network business model was no longer financially sustainable.[11] Further, Tacoma Power determined that the Excess Capacity was no longer essential for utility purposes due to the development of wireless meter-reading technology.[12]

Accordingly, the PUB and the City Council directed the TPU Director and the City Manager to retain a consultant to issue a request for information, qualifications, and proposal (RFI/Q/P) to determine whether a new partnership agreement could be achieved to use the Excess Capacity.[13]

---

[9] *Id*.

[10] The Tacoma City Charter has established a public utility board to manage and administer three utilities – power, water, and rail. *See* City Charter (relevant excerpts attached as Appendix B) § 4.10: "The Public Utility Board, subject only to the limitations imposed by this charter and the laws of this state, shall have full power to construct, condemn and purchase, acquire, add to, maintain, and operate the electric, water, and belt line railway utility systems."

[11] App. A at 6-7.

[12] App. A at 7.

[13] *Id*.

Ultimately, after considering various responses to the RFI/Q/P, the TPU Board and the City Council (on March 18, and March 26, 2019, respectively) authorized the Director of Utilities to negotiate the final terms of an agreement transferring operational control over the Excess Capacity to Rainier Connect.[14] The PUB and the City Council approved resolutions (on October 30, and November 5, 2019, respectively) declaring the Excess Capacity surplus to the needs of the City, authorizing the Click! Business Transaction Agreement with Rainier Connect.[15] This agreement set forth the conditions precedent to transferring operational control solely to Rainier Connect. When those conditions were met on April 1, 2020, the Indefeasible Right of Use Agreement (essentially the lease) was executed and Rainer Connect assumed full operational control of the Excess Capacity.[16] TPU has ceased operating Click![17]

PROCEDURAL HISTORY

Bowman filed this suit on October 16, 2019. Separately, Mitchell Shook filed a similar suit on October 28, 2019.[18] The parties

[14] App. A at 7-8.
[15] App. C (City Council Resolutions).
[16] App. A at 10.
[17] *Id*.
[18] The City and Mr. Shook have settled. *See* Appendix F.

entered into a stipulation to consolidate the two cases on December 2, 2019.

The parties brought cross-motions for summary judgment[19] that were set for oral argument before Judge Shelly Speir on February 7, 2020. Following lengthy oral argument, Judge Speir pronounced her oral ruling granting the City's summary judgment motion and dismissing both Complaints with prejudice.[20] Specifically, Judge Spier ruled that Resolutions 40467, 40468, and U11116 (finding the Excess Capacity surplus and nonessential) had already passed – and were unchallenged – so the court could not "simply substitute its judgement for that of the" City Council.[21] Rather, the court must review only for an arbitrary and capricious decision.[22] It was undisputed that "the CLICK! Network had become outdated."[23] And the plaintiffs presented no evidence that the City's decision to surplus its nonessential Excess Capacity was arbitrary or capricious.[24] Summary judgment was appropriate.

---

[19] Plaintiffs' partial summary judgment motions concerned only the public-vote issue.

[20] The trial court's oral ruling is attached as Appendix D. She also entered a written Order, attached as Appendix E.

[21] App. D at 8.

[22] *Id*.

[23] *Id*.

[24] App. D at 10.

REASONS DIRECT REVIEW IS UNWARRANTED

A. The City acted well within its broad discretionary authority to surplus its nonessential Excess Capacity.

Tacoma City Charter § 4.1 prescribes the "General Powers Respecting Utilities," specifically granting the City authority to create, maintain, and operate, the following types of "public utilities": "water, light, heat, power, transportation, and sewage and refuse collection, treatment, and disposal services . . ." App. B at 6. As the trial court expressly noted, "If the City had created CLICK! as a stand-alone public utility, it would have violated the City Charter § 4.1." App. D at 7. But Click! is not a separate utility: it undisputedly uses the Excess Capacity of the HFC Network.

As noted, the City designed its *system* to facilitate Tacoma Power's ability to efficiently distribute electricity. That its Excess Capacity could also be used to conduct a proprietary business (Click!) was merely an incidental benefit – a way to maximize the system's value. Simply put, Click! was a "betterment" of Tacoma Power's HFC Network under City Charter § 4.5. App. D at 5.

In such circumstances, RCW 35.94.040 permits the City to deem by resolution "property," "or equipment originally acquired for public utility purposes," (1) "surplus to the city's needs," and (2) "not required for providing continued public utility service." Where, as

here, this statutory-disposition procedure is followed, the "provisions of RCW 35.94.020 . . . shall not apply to the disposition." RCW 35.94.040(2). That is, contrary to Bowman's claims, RCW 35.94.*020* (which governs only the sale or lease of municipal utilities) is expressly inapplicable under the unambiguous statutory language.

Indeed, Tacoma's PUB and City Council have already adopted three unchallenged Resolutions (Nos. 40467, 40468, and U11116) declaring (App. C at 17):

> the Click! Assets and the Excess Capacity in the HFC Network are not required for, and are not essential to, continued public utility service or continued effective utility service, and are surplus to the needs of Tacoma Power and to Tacoma Public Utilities.

Since Click! and the Excess Capacity are neither a *separate* utility, nor *essential* to delivering electrical power to Tacoma's citizens, the "public vote" requirements in City Charter § 4.6 and RCW 35.94.020 are inapplicable as a matter of law.

In sum, Bowman presents "no evidence . . . the City's decisions were willful or unreasoning . . . or . . . made . . . without consideration of and in disregard of facts and circumstances." App. D at 10. Its decisions thus were not arbitrary or capricious. This resolves *the entire appeal*. This Court should deny direct review.

B. The City's decision to surplus its nonessential property and equipment presents no fundamental or urgent issue of broad public import under RAP 4.2(a)(4).

There is no important issue here. Courts afford First-Class Charter cities like Tacoma wide latitude to exercise their proprietary functions, particularly when determining (as here) that certain public-utility property or equipment has become outmoded, cost-prohibitive, and unnecessary to deliver electricity to its customers. *See* App. D at 3. Those findings remain unchallenged here. No issue remains.

Bowman makes no claim that Click!'s wholesale internet service – packaged and resold by ISPs to individual retail customers – is *unique*, nor that Tacoma's citizens cannot easily obtain internet access elsewhere (which they can and do). Nor is there any claim that leasing the Excess Capacity impairs Tacoma Power's distribution system in any way. This case simply does not present any issue warranting direct review.

C. No conflicts exist under RAP 4.2(a)(3).

Bowman misreads both of this Court's decisions in ***Bremerton Mun. League v. Bremer,*** 15 Wn.2d 231, 130 P.2d 367 (1942) and ***Issaquah v. Teleprompter Corp.,*** 93 Wn.2d 567, 611 P.2d 741 (1980). They do not conflict with each other or with the trial court's decision. Direct review is unwarranted.

Bremerton**,* decided 23 years before RCW Chapter 35.94 was enacted, is plainly inapposite here. It was a taxpayer suit challenging a Wharf lease from the City to a private company.[25] 15 Wn.2d at 231-32. The 1917 statute at issue there set forth a procedure for lawfully leasing or selling a utility. Chapter 137, Laws of 1917, p. 573, Rem. Rev. Stat., §§ 9512-9514. That city argued the 1917 statute specifically named a list of utilities, not including wharves. *Id*. at 237. But unlike here, that statute said, "*or any similar or dissimilar utility*." *Id*. This Court held this broad language included "any kind of utility in whose operations the public has an interest" – including a wharf. *Id.* Also unlike here, that city was "attempting to lease *the entire utility*, not something merely incidental thereto." *Id*. at 238 (emphases added). ***Bremerton is inapposite here.

By contrast, ***Issaquah*** addresses whether municipal ownership of a cable television system conflicts with RCW 35A.80 and RCW 35.92. 93 Wn.2d at 573. This Court saw "no relationship between the inclusion of cable television as a '[c]ommunication utility' for the narrow purposes of RCW 35.96 and the conclusion that cable television is a utility service subject to RCW 35A.80 and 35.92." *Id.*

[25] The taxpayers' failed suit challenging Click! occurred back in the 1990s.

at 574. ***Issaquah*** does not cite or discuss ***Bremerton***. Indeed, ***Bremerton*** has never been cited by any Washington court – probably because (as here) no other City has tried to lease *an entire utility*. There is no conflict between ***Bremerton*** and ***Issaquah***, which addressed different issues, under different laws, 38 years apart.

Nor do their holdings conflict with Judge Speir's analysis here. Tacoma City Charter § 4.1 contains a specific list of utilities that the City has legal authority to create. There is no "catch all" language like in ***Bremerton***. Furthermore, the Excess Capacity is plainly not an entire utility, and no law says otherwise. Click! is a proprietary operating unit of Tacoma Power, which has properly been deemed surplus due to the advent of wireless technology, and is not essential for the continuation of the public utility. Nothing about ***Bremerton*** or ***Issaquah*** creates a basis for this this Court to accept direct review under RAP 4.2(a)(3).

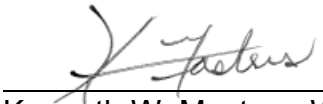
CONCLUSION

This Court should deny direct review. The Excess Capacity on which Click! runs is not a separate utility, but rather a betterment to Tacoma Power's HFC Network that attempted to maximize resources and reduce rates and charges. *See* City Charter § 4.5. The PUD and the City Council's decisions to declare Click! and the

Excess Capacity surplus under RCW 35.94.040 is not an issue of broad public interest warranting direct review – it is rather a sound economic decision regarding a proprietary function that is no longer of sufficient value to be considered essential. Nor do any conflicts exist between two inapposite cases that addressed different issues.

RESPECTFULLY SUBMITTED this 21st day of April 2020.

MASTERS LAW GROUP, P.L.L.C.



Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** on the 6th day of May 2020 as follows:

Co-counsel for Respondent

K&L Gates, LP
Elizabeth Thomas
Mark S. Filipini
Kari L. Vander Stoep
D.C. Van D Wolf
925 Fourth Avenue, Suite 2900
Seattle, WA 98103
liz.thomas@klgates.com
mark.filipini@klgates.com
kari.vanderstoep@klgates.com
dc.wolf@klgates.com
mary.klemz@klgates.com

___ U.S. Mail
_x_ E-Service
___ Facsimile

Counsel for Petitioners

Helsell Fetterman, LLP
David F. Jurca
Andrew J. Kinstler
Emma Kazaryan
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154
djurca@helsell.com
akinstler@helsell.com
ekazarvan@helsell.com

___ U.S. Mail
_x_ E-Service
___ Facsimile

Kenneth W. Masters, WSBA 22278
Attorney for Respondent

MASTERS LAW GROUP

May 06, 2020 - 4:49 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98243-1
Appellate Court Case Title:	Edward Coates, et al. v. City of Tacoma
Superior Court Case Number:	17-2-08907-4

The following documents have been uploaded:

- 982431_Answer_Reply_20200506163236SC589018_5978.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- DJurca@Helsell.com
- akinstler@helsell.com
- dc.wolf@klgates.com
- ekazaryan@helsell.com
- jburt@helsell.com
- kari.vanderstoep@klgates.com
- liz.thomas@klgates.com
- mark.filipini@klgates.com
- mary.klemz@klgates.com

Comments:

Sender Name: Tami Cole - Email: paralegal@appeal-law.com
Filing on Behalf of: Kenneth Wendell Masters - Email: ken@appeal-law.com (Alternate Email: paralegal@appeal-law.com)

Address:
241 Madison Ave. North
Bainbridge Island, WA, 98110
Phone: (206) 780-5033

Note: The Filing Id is 20200506163236SC589018