Supreme Court No. 91386-2

Court of Appeals No. 70625-0-I

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondent,

v.

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

Petitioners.

CENTURYLINK'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is Defendant-Appellant CenturyLink of Washington, Inc. (f/k/a CenturyTel of Washington, Inc.) ("***CenturyLink***").

II. COURT OF APPEALS DECISION

On October 13, 2014, the Court of Appeals issued its opinion in this case. App. 1-65. On February 10, 2015, the Court of Appeals ruled on timely motions for reconsideration filed by CenturyLink and Comcast of Washington IV, Inc. and Falcon Community Ventures I, L.P. (together with CenturyLink, "***Petitioners***"). App. 66-68. This Court then extended the deadline for filing petitions for review to March 27, 2015.

III. ISSUES PRESENTED FOR REVIEW

The main dispute concerns the meaning of RCW 54.04.045(3)[1] (the "***Statute***"), which mandates that public utility districts ("***PUD***s") use a two-part cost-based formula in setting pole attachment rates.[2] The two formula components, contained in subsections 3(a) and 3(b), are similar, but differ in how they attribute costs. The Statute is intended "to establish ***a consistent cost-based formula*** for calculating pole attachment rates,

[1] RCW 54.04.045 is reproduced in the Appendix at App. 70-72.

[2] Pole attachments include the wires that communications companies such as Petitioners affix to utility poles owned and maintained by PUDs to provide communication services to customers. *See* RCW 54.04.045(1)(a). For an illustration of typical pole attachments to a utility pole, see App. 69.

which will ensure greater predictability and consistency in pole attachment rates ***statewide.***" Laws of 2008, ch. 197, § 1 (emphases added).

This case is the first and only opportunity a court has had to consider the meaning of the Statute, which governs all 28 PUDs in the state and affects multiple companies with pole attachments. Plaintiff-Appellee Pacific County Public Utility District No. 2 (the "***District***") has argued, based on its consultant's work, that subsection 3(a) of the Statute means the same thing as the "FCC Telecom Rate" (47 U.S.C. § 224(e); 47 C.F.R. § 1.1409(e)(2)) and that subsection 3(b) reflects the APPA[3] Formula. Petitioners, in contrast, maintain that subsection 3(a) is equivalent to the "FCC Cable Rate" (47 U.S.C. § 224(d)) and that subsection 3(b) has the same meaning as the FCC Telecom Rate with a slight modification. All of these formulas are reproduced in the Appendix.

The Court of Appeals reversed the trial court ruling adopting the District's view, explaining that the District's approach "evinced a disregard for the words of the statute as written by the legislature" and "neglected" to apply the words of the Statute as written. App. 33, 38, 39. But rather than embrace Petitioners' interpretation or articulate an

[3] APPA stands for the American Public Power Association, a trade-organization representing consumer-owned utilities. For the APPA Formula, *see* App. 81.

alternative view, the Court of Appeals ruled, among other things, that the trial court would have to address anew on remand this pure question of law. App. 41. This Petition for Review presents the following issues:

> 1. Whether the Court of Appeals' ruling regarding the interpretation of RCW 54.04.045(3) raises issues of substantial public interest because the ruling fails to clarify the meaning of the Statute, thereby perpetuating confusion and uncertainty in an area where the legislature intended consistency and predictability.
>
> 2. Whether the Court of Appeals' ruling that the District's award of fees and expenses should be preserved if it prevails on remand is in conflict with a decision of this Court because the award includes fees for work of the District's consultant on the interpretation of RCW 54.04.045(3), which is work performed on unsuccessful claims.
>
> 3. Whether the Court of Appeals' ruling that the reciprocal fee-shifting statute, RCW 4.84.330, does not apply to CenturyLink's rate agreement with the District is in conflict with this Court's precedent because the parties executed an amendment and novation to the agreement after the effective date of the fee-shifting statute and the litigation was on a 2007 contract.

IV. STATEMENT OF THE CASE

A. Pole Attachment Rate Regulation.

The typical utility poles involved are the familiar T-shaped poles, 40 feet in length, that commonly run within public rights-of-way. For an illustration of a common joint-use of such a pole see App. 69 (CP 1067) and Ex. 192. Analytically, poles are divided into two general types of

vertical space: unusable and usable. The unusable space typically consists of 18 feet of clearance space – the space between the lowest attachment and the ground – and 6 feet of support space – the portion of the pole that is buried in the ground and acts as a stabilizing foundation. The remaining usable space is allocated to different uses. At the bottom of this length, communications providers such as Petitioners typically affix their wires and cables to the pole, running them between poles to customers. At the top, electrical equipment is affixed to the central pole and the crossbeam.

In between the electrical equipment space and communications equipment space is a space known as the safety space. RP 1069-71. Communication lines are disallowed in this space, but electric utilities regularly affix equipment in this space. *See e.g.*, Exs. 59A, 328. Whether the safety space is usable space is one of the issues in dispute.

With respect to the regulation of rates charged for attachments, in 1978, the U.S. Congress passed the federal Pole Attachment Act, 47 U.S.C. § 224, *et seq.*, to regulate the rates that *investor*-owned utilities could charge. In light of policies compelling communications companies to utilize existing poles, such regulation was necessary to prevent monopoly rents. *See* H.R. Rep. No. 94-1630, pt. 1 at 5 (1976). Under the statute, a rate would be "just and reasonable" if it

> assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d)(1). Under this cost-based formula, known as the FCC Cable Rate, pole owners may cover costs attributable to each attachment based on the percentage of usable space occupied by the attachment.

To illustrate, assume that after accounting for all of a PUD's capital and operating costs the cost of a typical 40-foot pole is $100. Sixteen feet of this pole is usable space because 18 feet of clearance space is needed between the lowest attachment and the ground and another six feet of pole is implanted into the ground for stability and support. Of the 16 feet of usable space, a pole attachment takes up one foot of space, or 6.25 percent of the usable space. Thus, the cost attributable to this pole attachment under the FCC Cable Rate is $6.25.

In 1979, pursuant to a provision of federal law allowing states to opt-out of the FCC's regulatory scheme (47 U.S.C. § 224(c)), Washington enacted its own cost-based formula for investor-owned utilities. Under this formula, a rate is deemed "just and reasonable" if it

> assure[s] the utility the recovery of not less than all the

> additional costs of procuring and maintaining pole attachments, nor more than the actual capital and operating expenses, including just compensation, of the utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities.

RCW 80.54.040. It is undisputed that the Washington Utilities and Transportation Commission ("***UTC***") and utilities applying RCW 80.54.040 understand and apply this formula consistent with the FCC Cable Rate. RP 1206. Of particular significance here, the Washington legislature has not amended this statutory provision, even after passage of the federal FCC Telecom Rate (explained below). This statutory language is virtually identical to subsection 3(a) of the Statute governing PUDs.

In 1996 Congress amended the federal Pole Attachment Act to include a separate rate formula for certain telecommunications carriers. 47 U.S.C. § 224(e). The FCC, in turn, promulgated regulations allowing for recovery of costs expressed in the following algebraic formula:

$$\frac{\text{Space Occupied} \quad + \quad 2/3 \times \left[\frac{\text{Unusable Space}}{\text{No. of Attachers}}\right]}{\text{Pole Height}}$$

47 C.F.R. § 1.1409(e)(2). Thus, in contrast to the FCC Cable Rate and subsection 3(a) of the Statute governing PUDs, the FCC Telecom Rate

allocates the costs associated with unusable space based on the number of attachers (as opposed to allocating all of the pole costs based on the amount of usable space occupied by a given pole attachment in proportion to available usable space).

To illustrate, assume that the same 40-foot pole described above has four attachers: the utility-owner and three communications companies. Under the FCC Telecom Rate the length of unusable space (24 feet) is divided by the number of attachers (4), and that quotient (6) is multiplied by two-thirds and is added to the attacher's space occupied (4 + 1). That sum (5) is then divided by the pole height, (40) resulting in 12.5 percent of pole costs attributable to the particular attacher or a rate of $12.50.

Before 1996, PUD pole attachment rates were unregulated. In 1996, to address concerns about exorbitant rates and price discrimination by non-investor owned utilities, the legislature enacted governing standards limiting pole attachment rates to amounts that were "just, reasonable, non-discriminatory and sufficient." Former RCW 54.04.045 (1996). Unlike the rate statute applicable to investor-owned utilities (RCW 80.54.040), the 1996 statute did not provide a specific rate formula.

In 2008, the legislature specifically established a rate formula for PUDs with the amendments to RCW 54.04.045 at issue here. With the

2008 amendments, the legislature specified that a just and reasonable rate would be calculated by averaging two components that differed only in requiring, for the first component, that the cost be allocated based on the proportion of the space used, subsection 3(a), and in the other component, based in part on the number of attachers, subsection 3(b). RCW 54.04.045(3). The legislature – understanding that there was a proceeding by which the FCC might revise its cable formula – further clarified that PUDs may follow the existing, or any future revised, FCC Cable Rate in calculating the subsection 3(a) component. RCW 54.04.045(4).

B. The Litigation.

In 2007 the District adopted a new rate scheme, more than doubling some rates charged. Exs. 16, 38. The District terminated the existing pole attachment agreements and sought to force each Petitioner to sign new agreements acceding to these rate increases. Ex. 136. Petitioners objected to the new scheme, in part because it was one-sided and not just, reasonable, and sufficient, as required by former RCW 54.04.045. RP 1045. The District then sued, seeking damages and injunctive relief, including, critically, an order that Petitioners be required to sign the District's 2007 contract. Petitioners counterclaimed, seeking compliance with former RCW 54.04.045.

Regarding CenturyLink, its predecessor and the District formed an agreement in 1969 containing a unilateral fee provision for the District. App. 87 (Ex. 3, § 19). This agreement pre-dated the reciprocal fee-shifting statute, RCW 4.84.330, which became effective after September 21, 1977. But by the time the District brought suit, the District and CenturyLink's predecessor were no longer dealing under the terms agreed to in 1969 because the parties, as recently as 1987, had agreed to an increase in rates. *See* App. 95-100.

During the litigation, the legislature enacted the 2008 amendments to RCW 54.04.045 discussed above, putting at issue whether the District's new rates satisfied the new mandatory cost-based formula. Even though the District adopted the new rate scheme before passage of the 2008 amendments, the District claimed that its new scheme satisfied the Statute, arguing that subsection 3(a) required following the FCC Telecom Rate and that following the APPA Formula satisfied subsection 3(b). In contrast, Petitioners argued that the formula in subsection 3(a) mirrored the formula in the FCC Cable Rate and that subsection 3(b) followed the FCC Telecom Rate, with one exception: subsection 3(b) allocates all of the unusable space costs among all attachers, while the FCC Telecom Rate allocates only two-thirds. The trial court entered judgment for the District

and an award of attorney fees and expenses for the District, including fees for work that the District's consultant performed interpreting the Statute and preexisting formulas. CP 2290-2327.

The Court of Appeals reversed on the central issue, holding that the District's rate scheme failed to satisfy the statutory formula. The Court of Appeals rejected the District's scheme, concluding that it departed dramatically from the language of the Statute. *See* App. 32-40. The Court of Appeals also criticized Petitioners' position, but it declined to clarify what subsections 3(a) and 3(b) require or why, *on the merits*, Petitioners are incorrect that subsection 3(a) follows the FCC Cable Rate and subsection 3(b) tracks the FCC Telecom Rate. *See* App. 40-42. Notably, the Court of Appeals did *not* identify any factual issues that needed to be resolved on remand in order to interpret the Statute.

In addition, the Court of Appeals ruled that, if the District prevails on remand, its earlier fee award should not be disturbed. App. 58. It so held, even though that fee award is for work performed by the District's consultant held to be part of an unsuccessful claim: that subsections 3(a) and 3(b) should be read, respectively, as having the same meaning as the FCC Telecom Rate and the APPA Rate. Further, the Court of Appeals directed the trial court that CenturyLink would not be entitled to invoke

the reciprocal fee-shifting statute in the event it prevailed on remand because its contract with the District was formed before the effective date of the reciprocal fee-shifting statute. App. 62-64. It so ruled, even though the litigation concerned the contract that the District demanded CenturyLink sign in 2007, and the trial court found the District increased rates in 1987, based on undisputed record evidence. *See* App. 95-100.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Interpretation Of RCW 54.04.045(3) Raises Issues Of Substantial Public Interest Because The Court of Appeals' Ruling Fails To Clarify The Meaning Of The Statute, Perpetuating Confusion And Uncertainty When The Legislature Intended Consistency And Predictability.

The crux of the first issue is the Court of Appeals' failure to interpret the Statute, which the legislature intended to establish a "consisten[t]" and "predictab[le]" pole attachment formula applicable to PUDs across the state. Laws of 2008, ch. 197, § 1. It is the duty of courts to interpret a statute in dispute, especially when doing so will clarify the law's meaning. *State v. Gonzalez*, 110 Wn.2d 738, 746-47, 757 P.2d 925 (1988); *Ashenbrenner v. Dep't of Labor & Indus.*, 62 Wn.2d 22, 26, 380 P.2d 730 (1963). This duty exists, in part, because "citizens may need to utilize other statutes and court rulings to clarify the meaning of a statute." *State v. Watson*, 160 Wn.2d 1, 8, 154 P.3d 909 (2007).

Clear interpretation is especially important where, as here, a trial court must grapple with an interpretive question on remand. *State v. Jones*, 95 Wn.2d 616, 623, 628 P.2d 472 (1981). Indeed, a court "would be remiss if [it] did not provide some guidance to the trial court" on issues to be tried on remand. *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 413, 348 P.2d 664 (1960).[4] Further, this Court has recognized that there is a substantial public interest in providing guidance to public officers responsible for following a statute. *Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 386, 739 P.2d 668 (1987); *Dunner v. McLaughlin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984); *In re Myers*, 105 Wn.2d 257, 261, 714 P.2d 303 (1986) (moot appeal); *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (same). There is a substantial public interest in resolving an open question of law (1) when the issue is public in character, *i.e.*, it will affect public acts well beyond the particular case, (2) when there is likely a recurrence of litigation, and (3) when there is a need for guidance.

[4] *See also Fergen v. Sestero*, Nos. 88819-1, 89192-3, 2015 WL 1086516, at *9 (Wash. Mar. 12. 2015) (Stephens, J., dissenting) (criticizing lack of guidance provided to trial courts); *In re Coats*, 173 Wn.2d 123, 144-45, 267 P.3d 324 (2011) (Madsen, C.J., concurring) (explaining that when a court declines to interpret the meaning of a statute problems are perpetuated); *In re Detention of D.F.F.*, 172 Wn.2d 37, 49, 256 P.3d 357 (2011) (Madsen, C.J., dissenting) (noting importance of providing guidance to trial courts); *Presidential Estates Apt. Assocs. v. Barrett*, 129 Wn.2d 320, 335, 917 P.2d 100 (1996) (Johnson, J., dissenting) (noting that it is appellate courts' job "to provide guidance to trial courts" on legal questions); *State v. Smith*, 123 Wn.2d 51, 61, 864 P.2d 1371 (1993) (Madsen, J., dissenting) (noting need to provide guidance to trial courts).

Applying these factors to this case, there is unquestionably a substantial public interest in resolving the dispute over the meaning of the Statute. As noted, the legislature expressly stated its intent for the 2008 amendments to "establish a cost-based formula for calculating pole attachment rates, which will ensure greater predictability and consistency pole attachment rates *statewide*." Laws of 2008, ch. 197, § 1 (emphasis added). There are 28 PUDs in the state, and since 2008 several other PUDs in addition to the District have revised their rate schemes,[5] with some districts relying on the same consultant retained by the District, *apparently using the same interpretation of the Statute*, even though the Court of Appeals rejected that interpretation.[6] Rather than clarify the Statute's meaning to guard against variegated interpretations, the ruling on appeal leaves open the door for inconsistency and unpredictability. To

[5] *See, e.g.*, P.U.D. No. 1 of Franklin County, Minutes of Nov. 12, 2013, Approving A Revised Pole Attachment Rate Schedule (p. 4), *available at* http://www.franklinpud.com/assets/uploads/11_12_13_Regular_Commission_Meeting_Minutes.pdf; P.U.D. No. 1 of Clark County, Board of Commissioners Meeting Minutes of October 9, 2012 (considering adoption of APPA Rate), *available at* http://www.clarkpublicutilities.com/index.cfm/aboutus/commissioners/minutes/archives/2012/board-of-commissioners-meeting-minutes-10-9-12/; Douglas County P.U.D., Comm'n Meeting Report for February 23, 2015 (approving pole attachment rate increase pursuant RCW 54.04.045(3)), *available at* http://www.douglaspud.org/Pages/Douglas-PUD-Commission-Meeting-Report-2015-02-23.aspx.

[6] *See* Jefferson County PUD, Pole Attachment Rate Study Final Report December 2014 (prepared by EES Consulting), *available at* http://www.jeffpud.org/wp-content/uploads/2013/08/JPUD-Pole-Attachment-Final-Report-12-01-14.pdf.

achieve the legislature's objectives, and stave off recurring litigation, the Court should grant review and clarify the meaning of the Statute.

The Court also should accept review to ensure that the Statute is interpreted according to well-established interpretive principles that the Court of Appeals did not apply. Statutory interpretation begins with "the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). When a statute uses terms that are the same as or similar to the terms used in another statute governing the same or similar subject matter, each statute must be read in light of and consistent with each other, including agency interpretations of the statutory language. *State v. Keller*, 98 Wn. App. 381, 383-84, 990 P.2d 423 (1999), *aff'd*, 143 Wn.2d 267, 282-83 (2001); *State v. Rice*, 116 Wn. App. 96, 104-05, 64 P.3d 651 (2003); *Seattle Prof'l Eng'g Emps. Ass'n v. Boeing Co.*, 92 Wn. App. 214, 223, 963 P.2d 204 (1998), *aff'd in part and rev'd in part on other grounds*, 137 Wn.2d 1027 (1999); *Bank of Am., NA v. Owens*, 173 Wn.2d 40, 54, 266 P.3d 211 (2011). And when technical terms or terms of art are used, such terms must be given their technical meaning. *Swinomish Indian Tribe Cmty. v. Wash. Dep't of Ecology*, 178 Wn.2d 571, 581-82, 311 P.3d 6

(2013). Furthermore, when a state statute is based on a federal analog, the state statute should be read consistent with the federal statute. *State v. Bobic*, 140 Wn.2d 250, 264, 996 P.2d 610 (2000); *State v. Carroll*, 81 Wn.2d 95, 109, 500 P.2d 115 (1972).

Both in the trial court and in the Court of Appeals, CenturyLink made arguments based on the specific language of subsections 3(a) and 3(b) of the Statute. In making these arguments, CenturyLink explained that the provisions are to the same effect as the FCC Cable Rate and the FCC Telecom Rate *because* of language written by the legislature. *See* CenturyLink's Opening Appellate Br. at 17-25. Unlike the District's approach, CenturyLink's proposed an interpretation is not an attempt to force the statutory language into fitting into a preexisting standard. Rather, relying on the meaning of terms as they are used within the industry, subsections 3(a) and 3(b) ultimately mean the same thing as the FCC Cable Rate and FCC Telecom Rate, respectively.

Regarding subsection 3(a), the terms provide in pertinent part that the rate "may not exceed the actual capital and operating expenses . . . attributable to that the portion of the pole . . . used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all

other uses made of the subject facilities and uses that remain available to the owner or owners of the subject facilities." RCW 54.04.045(3)(a). Based on the plain language of its terms, subsection 3(a) caps this rate component at the cost of the space used for a single pole attachment compared to the space used for other attachments and the space that remains available, *i.e.*, the usable space as a whole.

This interpretation is both confirmed and compelled by the near identical terms of RCW 80.54.040 (applicable to investor-owned utilities). Indeed, utilities subject to the statute have, with the approval of the UTC, consistently used the FCC Cable Rate when calculating rates as part of settlements between communications companies and investor-owned utilities. This point is undisputed (*see* RP 713-18, 1206-12; Ex. 6) and significant because the UTC may approve settlements between utilities and pole attachers only when such settlements are in the public interest. *See* RCW 80.01.040(3); WAC 480-07-750(1). Given the marked similarity between the statutes[7] and considering the principles of harmonization and acquiescence, the courts below were compelled to agree that subsection 3(a) is equivalent to the FCC Cable Rate. *Overton v. Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981);

[7] The similarities of the statutes are plain when set side by side. *See* App. 78-79.

Newschander v. Bd. of Trustees of the Wash. State Teachers' Ret. Sys., 94 Wn.2d 701, 711, 620 P.2d 88 (1980).

Regarding subsection 3(b) of the Statute, the plain language provides that this rate component shall consist of the cost "attributable to the share, expressed in feet, of the required support and clearance space, divided equally among the locally regulated utility and all attaching licensees, in addition to the space used for the pole attachment, which sum is divided by the height of the pole." RCW 54.04.045(3)(b). This rate component is calculated in three steps: first, by dividing the total amount of clearance and support space by the number of attachers; second, by adding that quotient to the space used for the attacher's attachment(s); and third, by dividing that sum by the total height of the pole. This formula is identical to the FCC Telecom Rate, with the exception that the FCC Telecom Rate includes a two-thirds fractional reduction in the first step.[8]

As noted above, CenturyLink presented this same statutory analysis in its briefing in the Court of Appeals. But rather than address this analysis, the Court of Appeals criticized the trial testimony of co-

[8] The virtual identity of the two formulas, expressed algebraically, can be most directly seen by direct comparison. *See* App. 80. In contrast, and as the Court of Appeals recognized (App. 32-40), the District's reliance on the APPA Formula in interpreting subsection 3(b) was improper because that formula incorporates several additional factors that are not called for in the Statute. *See* App. 81.

Petitioners' expert as flawed in the same respect as the District's expert, namely that her methodology was not contained to the statutory text. App. 40-42. CenturyLink respectfully disagrees with the Court of Appeals' assessment. In any event it is irrelevant because, as explained above, the textual analysis of both subsections 3(a) and 3(b), buttressed by the meaning of analog state and federal statutes, controls.

To be sure, the Statute is not a model of clear drafting. Analysis of its text requires patient effort, and reference to related statutory provisions provides assistance. But there is no reason why the Court of Appeals could not interpret, or should not have interpreted, the meaning of the Statute that was in sharp dispute. No further factual findings are necessary to interpret the meaning of the Statute. Even if the Court of Appeals disagreed with CenturyLink's reading, it had a duty to clarify the statutory meaning so the trial court and other PUDs bound by the Statute would have guidance. Accordingly, this Court should grant review under RAP 13.4(b)(4) to determine this issue of substantial public interest.

B. The Court Of Appeals' Ruling That The District's Award For Expert Expenses Should Be Preserved If It Prevails On Remand Conflicts With This Court's Precedent Because The Award Includes Fees For Work On An Unsuccessful Claim.

This Court has made clear that courts "should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise

unproductive time." *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 150 P.3d 976 (2007). The Court of Appeals nonetheless allowed the award for the District's expert expenses even though it analyzed his work and found it "misguided" and incorrect on the merits. App. 33, 34, 36-40.

That is the definition of work on an unsuccessful claim. CenturyLink joins in the arguments of Comcast and Charter that this clear error is one requiring review under RAP 13.4(b)(1).

C. The Court Of Appeals' Ruling That The Reciprocal Fee-Shifting Statute, RCW 4.84.330, Does Not Apply To CenturyLink's Agreement With The District Conflicts With This Court's Precedent Because The Parties Executed An Amendment And Novation To The Agreement After The Effective Date Of The Fee-Shifting Statute And The Litigation Was On The 2007 Contract.

Under Washington reciprocal fee-shifting statute, RCW 4.84.330, the prevailing party in any action on a contract entered into after September 21, 1977 that contains a fee provision, whether unilateral or not, is entitled to prevailing party attorney fees. CenturyLink's contract with the District was formed in 1969 and contains a unilateral fee provision in the District's favor. *See* App. 87. Because the contract preceded the effective date of RCW 4.84.330, the Court of Appeals held that CenturyLink could not recover fees if it prevails on remand.

This ruling conflicts with this Court's precedent that a novation, in

which one obligation is substituted for a new one, creates a new contract. *MacPherson v. Franco*, 34 Wn.2d 179, 182, 208 P.2d 641 (1949) (citing *Sutter v. Moore Inv. Co.*, 30 Wash. 333, 70 P. 746 (1902)). It is undisputed that in 1987 the District and CenturyLink's predecessor agreed to a new rate.[9] *See* App. 95-100. In adjusting the rates, an existing obligation was substituted for a new one. Were that not so, CenturyLink's predecessor could not ever have been held liable for that agreed upon rate. In view of the conflict between the Court of Appeal's ruling and this longstanding rule, review should be granted under RAP 13.4(b)(1).

VI. CONCLUSION

For the foregoing reasons, the Court should grant review under RAP 13.4(b)(1) and (4).

DATED this 27th day of March, 2015.

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[9] Moreover, the Court of Appeals compounded its error by claiming contrary to the record that CenturyLink never intended to form a contract with the District, such that CenturyLink could not rely on the 2007 contract the District demanded – and which the District sought equitable relief compelling CenturyLink to sign. *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984).

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that I caused a true and correct copy of the foregoing **CENTURYLINK'S PETITION FOR DISCRETIONARY REVIEW** to be served on the following individuals:

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DATED: March 27, 2015, at Seattle, Washington.

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s/ Leslie Lomax

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APPENDIX
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, a Washington Corporation, Respondent, v. COMCAST OF WASHINGTON IV, INC., a Washington corporation; CENTURYTEL OF WASHINGTON, INC., a Washington corporation; and FALCON COMMUNITY VENTURES I, L.P., a California limited partnership, d/b/a CHARTER COMMUNICATIONS, Appellants.	DIVISION ONE No. 70625-0-I PUBLISHED OPINION FILED: October 13, 2014

DWYER, J. — Pacific County Public Utility District No. 2 (hereinafter District) permitted Comcast of Washington IV, Inc., CenturyLink of Washington, Inc.,[1] and Falcon Community Ventures I, L.P., d/b/a Charter Communications (collectively Companies) to attach their communications equipment to its utility poles pursuant to agreements with the Companies. However, at the beginning of 2007 the District revised its rates and instituted new nonrate terms and conditions, which resulted in significant cost increases to the Companies. After the Companies refused to pay the District at the new rates, declined to sign the proposed agreement, and refused to remove their equipment from its poles, the District initiated this lawsuit.

[1] Previously d/b/a CenturyTel of Washington, Inc.

In early 2008, the legislature amended the statute governing utility pole attachment rates, RCW 54.04.045, effective June 12, 2008. Prior to the amendment, rates calculated by Washington public utility districts (PUDs) needed only to be "just, reasonable, nondiscriminatory and sufficient." Former RCW 54.04.045(2) (1996).[2] The amendment, however, included a specific formula, the result of which would yield a "just and reasonable" rate. RCW 54.04.045(3)(a)-(c). Whether the District's revised rate complied with the amended statute became the central dispute in this case.

In the trial court—and now on appeal—the District and the Companies maintained that each provision of the two-part formula written by the legislature reflected a certain preexisting formula. However, they disputed which were the apposite formulas. On appeal, we are presented with three principal issues: (1) whether the nonrate terms and conditions in the proposed agreement complied with RCW 54.04.045(2); (2) whether the trial court erred by concluding that the District's revised rates prior to June 12, 2008 complied with RCW 54.04.045(2); and (3) whether the trial court erred by concluding that the 2008 statutory amendment, codified at RCW 54.04.045(3)(a)-(c), reflects the preexisting formulas as proposed by the District's expert witness. We affirm the trial court with respect to the first two issues, subject only to the severance of a few nonrate terms. However, with respect to the third issue, we reverse and remand to the trial court for further proceedings consistent with this opinion.

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[2] "All rates, terms, and conditions made, demanded or received by a locally regulated utility for attachments to its poles must be just, reasonable, nondiscriminatory and sufficient."

I

The District, which is organized as a municipal corporation pursuant to RCW 54.04.020, is a consumer-owned utility providing services in Pacific County, Washington.[3] The District owns and maintains poles that allow it to furnish electricity to customers in Pacific County. In all, it serves approximately 17,000 customers in predominantly rural areas.

The Companies provide various communication services to customers in Washington, including in Pacific County. In order to provide these services, the Companies attach communications equipment to the District's utility poles. The Companies were initially licensed to attach their equipment to the District's poles under rental agreements assigned to them by previous communications providers in Pacific County. These assigned agreements dated back to the 1970s and 1980s with respect to Comcast and Charter, and to the 1950s and 1960s with respect to CenturyLink.

Prior to 2007, the District's annual pole attachment rates of $8.00 per pole for telephone companies and $5.75 per pole for cable companies had remained fixed for 20 years. In February of 2006, the District provided written notice to the Companies that it intended to terminate the agreements. The District advised the Companies that it would implement new pole attachment rates effective January 1, 2007, and that the District would provide copies of a new pole attachment agreement for the Companies to review.

[3] There are 28 PUDs operating in Washington. Washington Public Utility Districts Association, Frequently Asked questions, http://www.wpuda.org/pud-faqs.cfm (last visited August 28, 2014).

Several years earlier, the District had retained EES Consulting, Inc. to perform a rate study. After analyzing the District's rates, EES recommended that the District increase its rate to no less than $20.65 but closer to $36.39 per pole. In making this recommendation, EES considered four different methodologies or formulas: the Federal Communications Commission (FCC) Cable formula,[4] the FCC Telecom formula,[5] the American Public Power Association (APPA) formula,[6] and the Washington PUD Association formula.[7] Gary Saleba, the president and chief executive officer of EES, described the method by which EES arrived at its recommendation.

> The study that we performed in 2004/2005 is summarized in Exhibit 6, and what we did in Exhibit – in the study, which was

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[4] The Cable formula states that

> a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d).

[5] The Telecom formula is calculated as follows:

> (2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.
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> (3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

47 U.S.C. § 224(e).

[6] The parties provided an algebraic representation of the APPA formula, which is as follows:

> **Maximum Rate** = Assignable Space Factor + Common Space Factor
> **Assignable Space Factor** = Space Occupied by Attachment (Assignable Space) x Assignable Space (Pole Height) x Average Cost (of Bare Pole) x Carrying Charge
> **Common Space Factor** = Common Space (Pole Height) x Average Cost of Bare Pole (Number of Attachers) x Carrying Charge

[7] The parties also provided an algebraic representation of the Washington PUD Association method, which is as follows:

> Annual rental rate = Accumulated average Pole Value (PV) × Annual Cost Ratio (ACR) × Pole Use Ratio (PR)

> dated April of 2005, was to take a look at what the expenses were for the PUD or the revenue requirement for a test period of 2004, and then went through – after determining what the revenue requirement for the '04 period was, we went through the four different methodologies I talked about earlier and calculated rates, pole attachment rates for the PUD, for the FCC cable, FCC telecom, APPA method, and the PUD Association method.

While the study performed by EES utilized all four methodologies, in proposing the range between $20.65 and $36.39, EES relied on the FCC Telecom formula and the APPA formula, respectively.

Once the District received the results of the study and the recommendation from EES, the District's general manager and finance manager, Douglas Miller and Mark Hatfield—after considering and discussing the results with the District's supervisors—concluded that an annual rate of $19.70 per pole was appropriate. However, in light of the significant rate increase, Miller recommended to the District's board of commissioners a transition rate of $13.25 per pole for 2007, with the $19.70 per pole rate to commence on January 1, 2008. Miller described the deliberative process of the District in his testimony.

> Two times a month we have management staff meetings, and we talk about things that are happening, things we're working on. It's the – it's the supervisors at the PUD that work directly for me. And we meet and talk about issues. And we talked about the agreement and the rates and – or the study and the rates that were recommended. And out of that, we kicked around where we thought the numbers should be. And that's where we got the 13.25 and the 19.70.
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> We – at that time we were first starting to install fiber, our own fiber plant, which would change the number of contacts per pole, average number of contacts per pole, which would adjust the – those formulas. And we made our best guess of where that might go during the five-year period of what we were going to recommend these rates to be to the board.
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> And based on those assumptions, we came up with the

> 19.70. And then as we were debating the 19.70, we thought, you know, this is a pretty big jump from 5.75 or $8, you know, to get to the 19.70, so let's do a one-year interim rate that kind of steps to the 19.70. And if you take the 5.75 and you add that to the $8 and divide by two, it's a midpoint between those two rates. And you add that to 19.70 and then divide by two and round it off, it comes to 13.25. So that's how we got the 13.25.

Miller made his rate recommendation to the board of commissioners at hearings held on December 5, 2006 and December 19, 2006, as well as at the commissioners' meeting held on January 2, 2007. Although the Companies were aware that the meetings were open to the public, no representatives of the Companies attended the public hearings or the public meeting. Furthermore, the Companies never requested agendas or minutes, which would have been available upon request.

On January 2, 2007, the board of commissioners adopted Resolution No. 1256, which revised the District's annual pole attachment rate to $13.25 per pole, effective January 1, 2007 and $19.70 per pole, effective January 1, 2008.

In addition to revising its rate, the District developed a new form of agreement for attaching entities, which included nonrate terms and conditions. The District began with a template agreement developed by the APPA and made revisions in an effort to make it more applicable to the District. District management, including operations, engineering, and financial personnel, were consulted in developing the new agreement.

The District also communicated with the Companies regarding the proposed agreement. The District sent a version of the proposed agreement to the Companies for review and comment in early 2006. Over the next six months,

the District received feedback from the Companies. It then incorporated some of the Companies' suggestions and rejected others before mailing out for signature the proposed agreement in November 2006. This version of the proposed agreement generated additional feedback, which led the District to further modify the agreement before sending a revised version to the Companies in August 2007. The transmittal letter attached to the revised version requested that the Companies return the signed agreement by October 31, 2007. The letter stated that, in the event that the Companies did not wish to remain on the District's poles under the terms of the new agreement, the Companies were to notify the District of their plans for removing their equipment. In early October, the District contacted the Companies to remind them of the impending October 31, 2007 deadline. However, the Companies refused to sign the agreement, declined to remove their equipment, and tendered payment only at the historic rates; the District did not accept the Companies' tender of payment.[8]

Two other licensees attached their equipment to the District's poles. One executed the first draft of the new agreement and both timely began paying at the revised rate.

While the existing agreements between the District and the Companies permitted the District to remove the Companies' equipment from its poles if the

[8] The record indicates that Comcast and Charter tendered payment at the historic rates. Additionally, Charter's tender requested that the District accept the amount offered, "pending the outcome of the litigation." CenturyLink, on the other hand, tendered payment "in an effort to completely fulfill" its rental obligation. Although Comcast and Charter, in their joint briefing, cite to Exhibit 515 in what we perceive to be an attempt to direct our attention to a tender of payment made by Comcast, we find no evidence of the existence of an exhibit bearing that number, whether in the trial court record, the verbatim report of proceedings, or elsewhere in the materials designated by the parties.

Companies failed to do so, the District did not exercise its right. Instead, on December 28, 2007, the District filed complaints against all three of the Companies, alleging claims of breach of contract, trespass, and unjust enrichment, and requesting relief in the form of a declaratory judgment, injunctive relief, and damages. The Companies counterclaimed and sought to enjoin the District from imposing terms in violation of RCW 54.04.045. The lawsuits were then consolidated by agreement.

In March 2008, the legislature amended RCW 54.04.045, with an effective date of June 12, 2008. ENGROSSED SECOND SUBSTITUTE H.B. 2533, 60th Leg., Reg. Sess. (Wash. 2008). Prior to the amendment, pole attachment rates charged by Washington PUDs were required only to be "just, reasonable, nondiscriminatory and sufficient." Former RCW 54.04.045(2). In amending the statute, however, the legislature instituted a specific formula, the result of which would constitute a "just and reasonable rate." RCW 54.04.045(3).

> (3) A just and reasonable rate must be calculated as follows:
> (a) One component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities and uses that remain available to the owner or owners of the subject facilities;
> (b) The other component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to the share, expressed in feet, of the required support and clearance space, divided equally among the locally regulated utility and all attaching licensees, in

> addition to the space used for the pole attachment, which sum is divided by the height of the pole; and
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> (c) The just and reasonable rate shall be computed by adding one-half of the rate component resulting from (a) of this subsection to one-half of the rate component resulting from (b) of this subsection.

RCW 54.04.045(3)(a)-(c). With respect to subsection (3)(a), the legislature included the following provision:

> For the purpose of establishing a rate under subsection (3)(a) of this section, the locally regulated utility may establish a rate according to the calculation set forth in subsection (3)(a) of this section or it may establish a rate according to the cable formula set forth by the federal communications commission by rule as it existed on June 12, 2008, or such subsequent date as may be provided by the federal communications commission by rule, consistent with the purposes of this section.

RCW 54.04.045(4).

Included with the amendment was a statement of legislative intent, which is as follows:

> It is the policy of the state to encourage the joint use of utility poles, to promote competition for the provision of telecommunications and information services, and to recognize the value of the infrastructure of locally regulated utilities. To achieve these objectives, the legislature intends to establish a consistent cost-based formula for calculating pole attachment rates, which will ensure greater predictability and consistency in pole attachment rates statewide, as well as ensure that locally regulated utility customers do not subsidize licensees. The legislature further intends to continue working through issues related to pole attachments with interested parties in an open and collaborative process in order to minimize the potential for disputes going forward.

ENGROSSED SECOND SUBSTITUTE H.B. 2533. Whether the revised rate instituted by the District in Resolution No. 1256[9] was in compliance with the amended statute became the central dispute in this case.

After extensive discovery was conducted, the Companies filed a joint motion for partial summary judgment in December 2009, in which they requested that the trial court determine as a matter of law that RCW 54.04.045(3)(a) reflects the FCC Cable formula and that RCW 54.04.045(3)(b) reflects the FCC Telecom formula. The trial court denied the Companies' joint motion.[10]

Thereafter, in October 2010, this case was tried before the Honorable Michael J. Sullivan. Ample testimony was presented by the parties, including testimony from three expert witnesses, two of whom—Gary Saleba on behalf of the District and Patricia Kravtin on behalf of Comcast and Charter—opined that subsections (3)(a) and (3)(b) reflected preexisting formulas; however, Saleba and Kravtin disagreed as to which formulas were reflected by each subsection.[11]

On March 15, 2011, the trial court issued a memorandum decision in which it ruled in favor of the District and against the Companies. In its decision, the trial court stated that it would entertain proposed findings of fact and conclusions of law. Thereafter, the District submitted proposed findings of fact and conclusions of law, as well as a proposed judgment, to which the Companies filed extensive objections and proposed revisions. The District also submitted a

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[9] Specifically, the annual rate of $19.70 per pole, which was the rate in effect at the time that the amended statute became effective.

[10] This remained the Companies' position at trial and on appeal.

[11] The focus of Mark Simonson's testimony—the third expert witness (called by CenturyLink)—was on nonrate terms and conditions.

motion, proposed findings of fact and conclusions of law, and a proposed order, all of which related to its request for attorney fees and costs; the Companies objected and provided responses. The trial court heard oral argument on the proposed findings of fact and conclusions of law on September 16, 2011. On December 12, the trial court entered the findings of fact, conclusions of law, order, and judgment proposed by the District—both as to the substantive issues and as to the request for attorney fees and expenses. The trial court also awarded damages, as well as fees and costs, in favor of the District, totaling $1,856,155.02.

Of particular significance to the marrow of this appeal, the trial court concluded that "Section 3(a) of RCW 54.04.045 (2008) reflects the FCC Telecom method and Section 3(b) reflects the APPA method as of the date of trial." Conclusions of Law 10. Additionally, the trial court concluded that the District "did not act arbitrarily or capriciously, in interpreting Section 3(a) of RCW 54.04.045 as the FCC Telecom formula and Section 3(b) as the APPA formula for PUD pole attachment rates as of the date of trial." Conclusions of Law 11. The trial court further concluded that the District's revised rates "were just, reasonable, non-discriminatory, and sufficient, those rates being $13.25 prior to January 1, 2008, and $19.70 after January 1, 2008." Conclusions of Law 12.

In rejecting the Companies' interpretation of subsections (3)(a) and (3)(b) of RCW 54.04.045, the trial court found, among other things, that the rate derived by one of the Companies' expert witnesses—Patricia Kravtin—was "unreasonable and impractical as it relates to this case." Findings of Fact 34. In

addition, the trial court found that "[t]he opinions of Defendants' rate expert, Patricia Kravtin, were based primarily on theoretical analysis of economics and public policy, rather than actual local information regarding Pacific County and Pacific PUD. She had never visited Pacific County prior to trial." Findings of Fact 35. Moreover, the trial court found that "Defendants' rate expert Patricia Kravtin's opinion on the PUD's maximum legal rate was lower than what Defendants had been voluntarily paying for over twenty years." Findings of Fact 36.

After the Companies filed an untimely notice of appeal, Division Two entered an order permitting the Companies to appeal. On April 23, 2012, the Companies filed a separate appeal of the trial court's award of $27,690.14 for fees and costs the District incurred on the Companies' posttrial motion to vacate the judgment. That appeal was consolidated with the Companies' other appeal.

The District then filed in the Supreme Court a motion for discretionary review of the decision permitting the Companies to appeal. A subsequent motion to stay proceedings in Division Two, pending the Supreme Court's action, was granted on March 27, 2012. On June 5, 2012, the Supreme Court denied the District's motion for discretionary review.[12, 13] The Companies' appeal was then transferred to Division One.

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[12] Although the parties do not cite to the record in support of this factual assertion, they are in accord that the District's motion for discretionary review was denied. Compare CenturyLink Opening Br. at 13 n.9, with District's Br. at 16-17.

[13] In the District's merits brief, it includes a version of the procedural history that took place between the denial of its motion for discretionary review and the transfer of this appeal to Division One. However, the District fails to cite to the record to support its version of events, which precludes us from confirming the veracity of its factual statements.

II

The Companies contend that the trial court erred in its treatment of the nonrate terms and conditions in the District's proposed pole attachment agreement. Specifically, they aver that the trial court improperly applied a deferential standard of review, which, in turn, led to an erroneous conclusion that the terms and conditions were just, reasonable, nondiscriminatory, and sufficient. We disagree.

A

The Companies assert first that the trial court erred by limiting its review of the imposition of the District's nonrate terms and conditions to determining whether they were arbitrary and capricious. Their assertion is unavailing.

Where "municipal utility actions come within the purpose and object of the enabling statute and no express limitations apply," it is proper to leave "the choice of means used in operating the utility to the discretion of municipal authorities." City of Tacoma v. Taxpayers of City of Tacoma, 108 Wn.2d 679, 695, 743 P.2d 793 (1987). Accordingly, "judicial review of municipal utility choices" is limited "to whether the particular contract or action was arbitrary or capricious, or unreasonable." City of Tacoma, 108 Wn.2d at 695 (citation omitted).

> Arbitrary and capricious refers to "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous."

Lane v. Port of Seattle, 178 Wn. App. 110, 126, 316 P.3d 1070 (2013) (quoting Abbenhaus v. City of Yakima, 89 Wn.2d 855, 858-59, 576 P.2d 888 (1978)), review denied 180 Wn.2d 1004 (2014).

Consistent with its holding in City of Tacoma, our Supreme Court has shown deference to an implementing entity where the governing statute delineated general boundaries for proper rates. See People's Org. for Wash. Energy Res. v. Utils. & Transp. Comm'n, 104 Wn.2d 798, 808, 823, 711 P.2d 319 (1985) (where the rates to be set were required to be "*fair, reasonable, and sufficient*," the Supreme Court concluded that "the WUTC[14] did not exceed its statutory authority and was not arbitrary or capricious").

While RCW 54.04.045(3)(a)-(c) sets forth specific instructions regarding the method of calculating just and reasonable rates, it does not provide similar guidance with respect to nonrate terms and conditions, requiring only that they "be just, reasonable, nondiscriminatory,[15] and sufficient." RCW 54.04.045(2).

Given the similarity between the general boundaries of the statute in People's Org. for Wash. Energy Res. and the general boundaries in RCW 54.04.045(2),[16] we conclude that it was proper for the trial court to limit its review of the District's nonrate terms and conditions to determining whether they were arbitrary and capricious.

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[14] Washington Utilities and Transportation Commission.

[15] "'Nondiscriminatory' means that pole owners may not arbitrarily differentiate among or between similar classes of licensees approved for attachments." RCW 54.04.045(1)(d).

[16] It is of little significance that People's Org. for Wash. Energy Res. involved rates, whereas nonrate terms and conditions are at issue here. City of Tacoma articulates that "municipal utility actions," which surely include a PUD setting nonrate terms and conditions, are entrusted to the discretion of the municipal authorities. 108 Wn.2d at 695.

B

The Companies next take issue with the procedure by which the District considered and decided on the nonrate terms and conditions. More specifically, the Companies assert that the District's refusal to negotiate the nonrate terms and conditions of the agreement with the Companies was procedurally unconscionable. This assertion is unavailing.

Procedural unconscionability involves "blatant unfairness in the bargaining process and a lack of meaningful choice." Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 518, 210 P.3d 318 (2009).

> Procedural unconscionability is determined in light of the totality of the circumstances, including (1) the manner in which the parties entered into the contract, (2) whether the parties had a reasonable opportunity to understand the terms, and (3) whether the terms were "hidden in a maze of fine print."

Torgerson, 166 Wn.2d at 518-19 (internal quotation marks omitted) (quoting Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 391, 858 P.2d 245 (1993)).

While the Companies maintain that the District was obligated to negotiate the nonrate terms and conditions, they cite no authority to that effect. Governmental entities such as the District are held to standards of transparency, including the Open Public Meetings Act of 1971,[17] which was complied with by the District herein;[18] however, we are directed to no authority obligating the

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[17] Ch. 42.30 RCW.

[18] The trial court concluded that "[t]he District met the requirements of the Open Public Meetings Act in its consideration of new pole attachment rates, terms, and conditions." Conclusions of Law 32. CenturyLink concedes that "the District provided the requisite formal

District to negotiate individually regarding nonrate terms and conditions.

The record establishes that proper public proceedings were held, that the Companies were given notice of these proceedings, and that they failed to participate. To the extent that the District did discuss the terms of the proposed agreement with the Companies, it did so for reasons that were not tethered to any legal obligation.

C

The Companies finally take issue with the substance of many of the nonrate terms and conditions, asserting that they violate RCW 54.04.045(2) or, alternatively, that they are substantively unconscionable. From this, the Companies assert that the entire proposed agreement is invalid, arguing that "[s]evering so many unlawful provisions would render the 2007 Agreement unintelligible and unworkable." While several of the District's nonrate terms are untenable, they are severable from the proposed agreement. This is so because they do not materially alter the essence of the agreement, which is the severability standard set forth in the proposed agreement.[19] Ultimately, we decline to hold that these unsupported nonrate terms render the entire proposed agreement unenforceable, whether because of RCW 54.04.045(2) or the common law prohibition of substantively unconscionable terms.

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public notice of its Commissioners' consideration of the new rates." Neither Comcast nor Charter challenges the trial court's conclusion of law on appeal.

[19] The severability clause in the proposed agreement provides for the following:
If any provision or portion thereof of this Agreement is or becomes invalid under any applicable statute or rule of law, and such invalidity does not materially alter the essence of this Agreement to either party, such provision shall not render unenforceable this entire Agreement but rather it is the intent of the parties that this Agreement be administered as if not containing the invalid provision.

"We review the trial court's decision following a bench trial to determine whether the findings of fact are supported by substantial evidence and whether those findings support the conclusions of law." 224 Westlake, LLC v. Engstrom Props., LLC, 169 Wn. App. 700, 720, 281 P.3d 693 (2012). "'Substantial evidence' is a quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true." Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn. App. 56, 63-64, 277 P.3d 18 (2012). "If that standard is satisfied, we will not substitute our judgment for that of the trial court even though we might have resolved disputed facts differently." Green v. Normandy Park, 137 Wn. App. 665, 689, 151 P.3d 1038 (2007); accord 224 Westlake, LLC, 169 Wn. App. at 720 ("Evidence may be substantial even if there are other reasonable interpretations of the evidence."). Indeed, "[r]eview is deferential, requiring the appellate court to view the evidence and its reasonable inferences in the light most favorable to the prevailing party in the highest forum that exercised fact-finding authority." Johnson v. Dep't of Health, 133 Wn. App. 403, 411, 136 P.3d 760 (2006). On the other hand, "[w]e review questions of law and conclusions of law de novo." Newport Yacht Basin Ass'n, 168 Wn. App. at 64.

"Substantive unconscionability involves those cases where a clause or term in the contract is one-sided or overly harsh." Townsend v. Quadrant Corp., 153 Wn. App. 870, 882, 224 P.3d 818 (2009), aff'd on other grounds by 173 Wn.2d 451, 268 P.3d 917 (2012). Terms used to define substantive unconscionability include "'[s]hocking to the conscience,'" "'monstrously harsh,'"

and "'exceedingly calloused.'" Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 303, 103 P.3d 753 (2004) (internal quotation marks omitted) (quoting Nelson v. McGoldrick, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995)).

The trial court made the following findings of fact with regard to the nonrate terms and conditions:

> 30. There are credible reasons relating to safety, reliability, financial stability, cost, and other district considerations for the terms and conditions of the proposed Agreement Defendants challenged.
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> 31. There are credible reasons for provisions in the proposed Agreement Defendants challenge, including but not limited to, those relating to:
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> - Tagging of fiber
> - Unauthorized attachment fees
> - Removal of attachments after agreement termination and reimbursement of removal costs if not removed
> - Waivable requirement for a bond
> - Attacher responsibility for hazardous materials they bring onto the District's property
> - Requirement of a permit for overlashing, other than in an emergency
> - Liability and indemnification provisions providing protection to the District
> - Transfer or relocation of attachments
> - Removal of nonfunctional attachments
> - Inspections by the District
> - Annual reports on attachment locations
> - Furnishing copies of required insurance policies on District request
> - Survivability of certain continuing obligations after Agreement termination
> - Attorneys' fees and cost provisions
> - "Grandfathering" with respect to NESC requirements
> - Permitting requirements
> - Waivable professional certification requirement, including the alternative of a "licensee in good standing"
> - Invoicing and payment provisions
> - Requirement that any assignee of the Agreement sign the Agreement
> - Requirement that guy wires be bonded and insulated

- Requirement of District consent to placement of facilities within four feet of the pole base

The trial court then reached the following conclusions of law:

> 30. The proposed terms and conditions of the District's new Pole Attachment Agreement were just, reasonable, non-discriminatory, and sufficient, and were not arbitrary or capricious.
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> . . . .
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> 33. The District's proposed Pole Attachment Agreement is not unconscionable.
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> . . . .
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> 35. The non-rate terms and conditions of the District's proposed Pole Attachment Agreement meet the requirements of RCW 54.04.045, once a few undisputed revisions to the Agreement are made for pole attachment application processing timing and notification provisions in Sections 5 and 6 of the 2008 amendments.
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> 36. The District's pole attachment rates, terms, and conditions are not illegal or unlawful.

The Companies take issue with a great many of the nonrate terms and conditions. Although we agree that not all terms are valid, we do not hold that their invalidity renders the entire agreement invalid. Instead, they may be severed and the agreement may be preserved.

First, the Companies contend that the proposed agreement is ambiguous as to whether the District's attachment fees are on a per pole or a per attachment basis. Even assuming, without deciding, that this ambiguity existed, evidence was adduced at trial that clarified the District's intent to charge on a per pole basis.[20] This evidence was of a sufficient quantum to persuade a rational, fair-

[20] Contrary to the Companies' position, the parol evidence rule does not bar the admission of extrinsic evidence to interpret an ambiguous provision. See Berg v. Hudesman, 115 Wn.2d 657, 666-68, 801 P.2d 222 (1990).

minded person that the District intended to charge on a per pole basis. Accordingly, the Companies' contention lacks merit.[21]

Second, the Companies contend that the proposed agreement is ambiguous as to whether "grandfathering" is permitted. The practice of "grandfathering" excuses an attacher from upgrading its existing attachments to comply with engineering standards. The Companies assert that although section 4.1 of the proposed agreement permits "grandfathering," section 6.1 seems to foreclose its use by indicating that all preexisting installations must comply with the agreement, including service standards, within 18 months. However, Miller, the District's general manager, explained how these two provisions, in fact, work in tandem.

> What it says under 6.1 is that for attachments that did not meet the standard at the time they were installed or don't meet, you know, the standard if they've just installed. Essentially, if they don't meet the standard when they were installed, then they need to be brought up to, you know, the standard. If they did meet the standard at the time they were installed . . . then they're grandfathered, then they're okay, because under 4.1 it indicates that they're grandfathered, that they're fine.

Miller's testimony provides a sufficient quantum of evidence to persuade a rational, fair-minded person that "grandfathering" is permitted under certain, if not all, circumstances. Substantial evidence supports the trial court's findings of fact as to "grandfathering."

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[21] In addition, CenturyLink argues that the question of appropriate fees is rendered ambiguous in the agreement. This is so, it asserts, because section 3.1 indicates that the parties are to look to Appendix A to the agreement to determine applicable fees, but that Appendix A refers the parties back to section 3.1. CenturyLink's reading of these two sections is willfully blind. Prominently displayed in Appendix A are the proper fees to be charged. There is no ambiguity.

Third, Comcast and Charter contend that the requirement that they pay any "rearrangement or transfer" costs necessary to accommodate the District's own communications fiber is unreasonable. At trial, the District's general manager agreed that licensees should not be required to pay to make room for the District's communications fiber. On appeal, the District does not dispute Comcast's and Charter's contention, or otherwise direct our attention to evidence in the record supporting the trial court's finding. However, in the absence of evidence that severing this term would materially alter the essence of the agreement, we conclude that this term is severable from the proposed agreement.

Fourth, the Companies contend that section 6.3, which requires attacher employees who are responsible for installing cable attachments to have experience performing installation work on electric transmission or distribution systems, is unreasonable. However, the District's chief of engineering and operations testified that such experience would be necessary if these employees were working in the safety zone, and the record indicates that the Companies' equipment is, at times, in the safety area. We are satisfied that this type of provision, which ensures a safe work environment, is well within the bounds of reason.[22]

Fifth, Comcast and Charter contend that the requirement in section 6.3

[22] Both as to this provision and as to section 6.3 of the proposed agreement (which we address in resolving the sixth argument raised by the Companies), Comcast and Charter additionally argue that they are unreasonable because cable companies do not employ electrical workers. We summarily reject this argument.

that postconstruction inspections be performed by licensees is inconsistent with the District's own policies and standard industry practice. The District's chief of engineering testified that it would, in fact, be reasonable for the District to continue performing postconstruction inspections itself. The District does not address Comcast's and Charter's contention in its merits brief. This provision, however, is severable pursuant to the severability clause. This is so because there is no evidence that severing it from the agreement materially alters the essence of the agreement.

Sixth, Comcast and Charter contend that licensees should not, contrary to the requirement of section 6.3, have to use a professional engineer when submitting pole attachment applications. This is so, they aver, because it is not required to by law. Furthermore, Comcast and Charter argue that the District currently only requires a professional engineer for complex and large jobs where there is a concern about weight on the poles. However, Miller testified that, at the urging of the Companies, the District added a provision that would waive the requirement of using a professional engineer for "those that we haven't had issues with and have worked with us." The thrust of Miller's testimony reveals that this term was included not to burden established licensees such as Comcast and Charter but, rather, to protect the District against the prospect of irresponsible future licensees. Adopting this provision was well within the District's discretion.

Seventh, CenturyLink contends that the unilateral attorney fees provision (in the District's favor) contained in the proposed agreement is contrary to law. However, RCW 4.84.330 states, in pertinent part:

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Thus, the agreement's unilateral attorney fees provision will not preclude a prevailing party from recovering attorney fees. Contrary to CenturyLink's contention, however, RCW 4.84.330 does not declare unilateral attorney fees provisions to be void or illegal; the statute merely operates to make them bilateral.

Eighth, CenturyLink contends that the District's attempt to force it to bear the cost of "undergrounding" its facilities in section 10.3 of the proposed agreement is unlawful. In support of this contention, it cites to RCW 35.99.060, which permits "cities and towns" to require service providers to relocate facilities under certain circumstances. From this, CenturyLink urges that because the District is not a city or a town, its attempt to have CenturyLink bear the cost of "undergrounding" is contrary to law. We disagree. Nowhere in RCW 35.99.060 does the legislature foreclose a PUD from requiring an attacher to bear the cost of "undergrounding" its facilities.

Nevertheless, CenturyLink argues that this would run contrary to its Washington Utilities and Transportation Commission (WUTC) tariff, which

requires its customers to bear the cost of customer requests for relocation or rearrangement of facilities. However, CenturyLink's argument assumes that the WUTC can enforce its tariff against the District, an assumption that is rebutted by applicable statute. See RCW 54.04.045(7) ("Nothing in this section shall be construed or is intended to confer upon the utilities and transportation commission any authority to exercise jurisdiction over locally regulated utilities.").[23] The District's "undergrounding" term does not violate RCW 35.99.060 and cannot violate CenturyLink's tariff.

Ninth, CenturyLink contends that section 4.4, which purports to immunize the District from liability to CenturyLink or its customers for actual or consequential damages—even for the District's own foreseeable negligence—constitutes "overreaching." However, section 16.1 clarifies that the District is liable for its own negligence and willful misconduct. Furthermore, a witness for CenturyLink testified that the District's indemnification provision was "fair." Accordingly, we are satisfied that the alleged "overreaching" does not run afoul of RCW 54.04.045(2), the common law prohibition of substantively unconscionable terms, or on any other basis require invalidation or severability.

Tenth, CenturyLink contends that the provision of the proposed agreement that requires, in the absence of the District's permission, a four foot minimum distance between the attachers' equipment and the base of the District's poles is unreasonable and illegal. It cites the constitutionally guaranteed right to utilize

[23] It is beyond cavil that tariffs may not repeal or supersede a statute. See People's Org. for Wash. Energy Res. v. Utils. & Transp. Comm'n, 101 Wn.2d 425, 427-34, 679 P.2d 922 (1984).

the right-of-way. WASH. CONST., art. XII, § 19; RCW 80.36.040. That right, however, was guaranteed as against railroad corporations—not public utility districts. WASH. CONST., art. XII, § 19. Moreover, the constitutional provision makes clear that this right is not inviolable: "The legislature shall . . . provide reasonable regulations to give effect to this section." WASH. CONST., art. XII, § 19. Here, the legislature, through RCW 54.04.045, provided public utility districts the authority to regulate pole attachments. Miller testified that the reasons for this buffer area are safety-related. These concerns provided an adequate basis upon which the District could exercise its considerable discretion. There was no error.

Eleventh, CenturyLink contends that it was overreaching for the District to insist upon a "mirror image" agreement, meaning that the agreement purported to offset each pole owned by CenturyLink to which the District attached its equipment with each pole owned by the District to which CenturyLink attached its equipment.[24] This is so, it asserts, because whereas CenturyLink occupies only one foot of any pole owned by the District, the District occupies seven and a half feet of any pole owned by CenturyLink. The District does not respond to this argument. In the absence of evidence to the contrary, we hold that the term was unreasonable. Nevertheless, given that the term does not materially alter the essence of the agreement, it may be severed from the proposed agreement.

Twelfth and finally, CenturyLink contends that, when considered in

[24] In a few areas of Pacific County CenturyLink's predecessors erected utility poles to which the District later attached its facilities.

concert, sections 2.10 and 5.12,[25] and Article 11 would mandate removal of its material from the District's poles on unrealistic time frames. However, a CenturyLink witness confirmed that the agreement's timeframes actually provided licensees 60 days longer than the six-month notice that CenturyLink itself requested. We are satisfied that this time frame comports with RCW 54.04.045(2) and is not substantively unconscionable.

While several terms from the proposed agreement are untenable, they are severable from the agreement. The Companies have failed to demonstrate that these scattered, untenable terms—whether considered individually or collectively—are sufficient to render the entire proposed agreement unenforceable. Therefore, although the trial court was incorrect insofar as it concluded that all of the nonrate terms and conditions were valid, we hold that once the offending terms have been severed from the agreement, it is in compliance with RCW 54.04.045(2) and it does not violate the common law prohibition of substantively unconscionable terms.

III

While the Companies did not devote significant space in their merits briefing to arguing that the District's rates in effect prior to the effective date of the 2008 amendment failed to comply with RCW 54.04.045(2), they do appear to have, at the very least, assigned error to the trial court's findings and conclusions

[25] A review of the proposed agreement did not reveal the existence of a section corresponding to this number.

to the contrary.[26] However, their argument in support of this allegation, which may charitably be described as cursory, is unpersuasive.

For the same reason as given in Section II.A. of our decision, the District's rates that were calculated and charged prior to the effective date of the 2008 amendment were properly subject to the arbitrary and capricious standard of review by the trial court.

The trial court concluded that "The District's Commissioners adopted pole attachment rates that were just, reasonable, non-discriminatory, and sufficient, those rates being $13.25 prior to January 1, 2008, and $19.70 after January 1, 2008." Conclusions of Law 12. The trial court also concluded that "The District's pole attachment rates both before and after the adoption of Resolution No. 1256 and before and after the 2008 amendment to RCW 54.04.045 were not arbitrary or capricious." Conclusions of Law 29.

Review of the trial court record provides no tenable reason for us to reverse the trial court's conclusion. The record reveals that the District considered a range of potential rates, calculated by reference to four different formulas, before adopting a rate that, in spite of signifying a substantial increase

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[26] A sympathetic reading of the following assertion indicates that Comcast and Charter, in addition to challenging the District's rate after the 2008 amendment, were challenging the revised rates since their inception: "The [District's] Agreement's proposed rates, and many of its other proposed terms were unjust and unreasonable, contrary to RCW 54.04.045." Additionally, CenturyLink, in its reply brief, argues that by assigning error to a finding of fact by the trial court (33)—which dealt with the legality of the District's revised rates before the 2008 amendment—CenturyLink preserved its right to argue that the rates were not valid prior to the amendment. Nevertheless, because CenturyLink did not present argument in its opening brief in support of its assignment of error, we do not consider CenturyLink's tardy argument first advanced in its reply brief. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

from previous rates, fell below the recommendation made by EES. Moreover, in order to ease the transition for licensees, the District decided to phase in the increased rate incrementally.

In the absence of evidence to the contrary, we affirm the trial court's conclusion that the District's rates prior to the effective date of the 2008 amendment satisfied former RCW 54.04.045(2) and that these rates were not the result of arbitrary and capricious decision making. Because the Companies refused to pay the District's newly instituted rates and because they refused to remove their equipment from the District's poles, they became trespassers on the District's property. In light of the Companies' failure to pay the revised rates and failure to remove their equipment, we affirm the trial court's award of damages for unpaid fees prior to June 12, 2008, as well any damages awarded to compensate the District for the Companies' trespass prior to that date.

IV

The Companies' primary contention on appeal is that the trial court erred by concluding that the 2008 amendment to RCW 54.04.045, which established a procedure for calculating a just and reasonable pole attachment rate, reflected certain preexisting formulas, as identified by the District's consultant and expert witness. This error was induced, the Companies aver, by the trial court's deferential review of the District's post hoc interpretation of the statutory amendment. Had the trial court construed the language of the statute as amended, the Companies argue, it would have necessarily concluded that they reflect different—albeit preexisting—formulas.

We agree that the trial court improperly applied a deferential standard of review to the District's interpretation of the language of the statute. Moreover, we agree that the formulas advanced by the District and accepted by the trial court were inapposite. Yet, the trial court's error does not legitimate the Companies' proposed interpretation. The fact of the matter is that neither the District, nor the Companies, nor the trial court applied the newly minted statutory language in an effort to determine whether the District's rates did, in fact, comply with the unique formula set forth in the 2008 amendment. Instead, both in the trial court and on appeal, all parties labored—often employing tortured reasoning and contortional construction—to show how the unique formula hewed more closely to certain preexisting formulas, while trivializing any distinctive features. Notwithstanding this pervasive yet misguided approach by the parties, it was incumbent upon the trial court to apply the unique formula as written. Owing to its failure to do so, we reverse and remand with instructions to the trial court to apply the unique formula as written and in a manner not inconsistent with our analysis herein.

A

We first address the propriety of the trial court's deferential review. The Companies contend that the trial court, in applying an arbitrary and capricious standard of review, improperly deferred to what the trial court found to be the PUD commission's interpretation of the 2008 amendment to RCW 54.04.045. We agree.

The conclusion of law at issue states, in pertinent part:

The District . . . did not act arbitrarily or capriciously, in interpreting

> Section 3(a) of RCW 54.04.045 as the FCC Telecom formula and Section 3(b) as the APPA formula for PUD pole attachment rates as of the date of trial.

Conclusions of Law 11.

This conclusion of law is based on a misperception. The trial testimony was that the PUD commission adopted the $13.25 and $19.70 rates at its January 2, 2007 meeting. This was 17 months before the effective date of the statutory amendment. There is no evidence in the record that the PUD commission (the embodiment of the agency to which any deference, if appropriate, would be given) took *any* action to interpret the 2008 amendment. To the contrary, it was the District's consultant and expert witness, Saleba, who derived the theory upon which the District based its litigation strategy. Thus, in actuality, the trial court applied the arbitrary and capricious test to the testimony of the District's expert witness (not to an action of the PUD commission). In doing so, the trial court erred.

In fact, where a statute sets forth that which is required, an agency possesses no discretion to act in variance to its terms. The legislature passed the 2008 amendment in order to achieve a degree of uniformity. Thus, any preexisting discretion a PUD commission possesses is restricted by the language of the amended statute. A PUD commission has no discretion to set pole attachment rates at variance with the requirements of sections (3)(a), (b), and (c).

B

There are 28 PUDs in Washington. Each PUD commission retains its preexisting discretion with regard to rate-setting *except* as that discretion is

restricted by the amended statute. With regard to the methodology set forth in sections (3)(a), (b), and (c), that methodology must be applied. Uniformity could not be achieved if the courts deferred to 28 different PUD commission interpretations of the meaning of the words in a state statute.

Conversely, with regard to the data applied to the methodology, the PUDs retain their traditional discretion and the courts should continue to defer to the PUDs in this regard.[27]

Thus, the District must set rates by applying the formula set forth in the amended statute. The trial court erred by concluding that the District possessed the discretion to apply two different formulas—even if the District's expert witness believed them to be suitable stand-ins. On the other hand, with regard to the data, assumptions, and other information used to calculate the formula, the District retains the discretion it has long held, given that this discretion was not divested by the 2008 statutory amendment. See, e.g., People's Org. for Wash. Energy Res., 104 Wn.2d at 808 (deference accorded where the statute "in very broad terms, basically just direct[ed] them to set those rates which the agencies determine to be just and reasonable"); Teter v. Clark County, 104 Wn.2d 227, 231, 233, 237-38, 704 P.2d 1171 (1985) (where rates were authorized under the police power, and thus were subject only to the requirement that they "'reasonably tend to correct some evil or promote some interest of the state,'" rates would be sustained "unless it appears, from all the circumstances, that they

[27] For instance, the useful life of a utility pole may vary from district to district. So may the average number of attachers. The districts' calculations of such data, and the means and methods by which these calculations are derived, continue to be entitled to deference.

are excessive and disproportionate to the services rendered," so "as to be called arbitrary" (internal quotation marks omitted) (quoting Markham Advertising Co. v. State, 73 Wn.2d 405, 421-22, 439 P.2d 248 (1968))); Prisk v. City of Poulsbo, 46 Wn. App. 793, 804-05, 732 P.2d 1013 (1987) (where rates were required to be uniform, court declined to rule that they "were determined arbitrarily or unfairly"); US W. Commc'ns , Inc. v. Utils. & Transp. Comm'n, 134 Wn.2d 48, 54, 949 P.2d 1321 (1997) (where agency was required to "set rates which are fair, just, reasonable and sufficient," the court utilized an arbitrary and capricious standard of review); Cole v. Wash. Utils. & Transp. Comm'n, 79 Wn.2d 302, 309, 485 P.2d 71 (1971) (where agency was required to set rates which were just, fair, reasonable, and sufficient, the court was to utilize an arbitrary and capricious standard of review).

Given that RCW 54.04.045(3)(a)-(c) sets forth specific instructions for the District to follow, the trial court should have construed the meaning of those instructions without affording deference to the implementing entity. Any deference should have been afforded only to the District's compilation and calculation of the data to which the formula was applied.

C

As noted above, the trial court erred by deferring to the testimony of an expert witness testifying on the District's behalf. Well before the 2008 amendment to RCW 54.04.045, the District hired EES Consulting, Inc., to conduct a pole attachment rate study, the results of which prompted the District to revise its rates. Saleba, the president and chief executive officer of EES, later

testified as an expert witness on behalf of the District. Although the District offered Saleba's testimony at trial—the substance of which reveals an insistence that the validity of the District's rates should be settled by determining which preexisting formula hews most closely to subsection (3)(a) and which preexisting formula hews most closely to subsection (3)(b)—no evidence was presented to the trial court that the PUD commission ever applied the unique formula in the amended statute to determine whether its revised rate was in compliance.

The trial court credited Saleba's testimony and memorialized his approach to interpreting the statute in its conclusions of law. In so doing, the trial court—rather than deferring to an interpretation made by the PUD commission—deferred to an attempt by an expert witness to establish that the legislature did not mean everything that it said when it amended RCW 54.04.045.

This mistake is compounded by the fact that Saleba's approach to statutory interpretation was misguided. Saleba's testimony evinced a disregard for the words of the statute as written by the legislature. Instead of applying the words in subsections (3)(a) and (3)(b), he compared and contrasted each subsection with certain preexisting formulas. As Saleba explained it,

> As a general premise, when asked to review a statute and determine its rate-setting applicability, we take a look at the *options available for the rate calculation* and then compare those rate calculations to the language in the statute. And that's – that's what I did here.
>
> . . . .
>
> Again, going back to how I – I do this, I take a look at the statute and then *I compare the language and the various options to that statute*. And the two options I'm looking at in this exhibit and comparing to (3)(a) are the FCC cable and the FCC telecom.

(Emphasis added.)

Accepting that the legislature, in drafting the amendment, was unaware of these preexisting formulas—despite explicitly referencing one of them in RCW 54.04.045(4)[28]—would require, on behalf of the trial court, a willing suspension of disbelief. Yet, by sanctioning Saleba's approach, the trial court, in effect, ruled that while the legislature was aware of these various preexisting formulas, and although it intended to make subsections (3)(a) and (3)(b) reflect two of the established formulas, it instead wrote a unique formula with distinctive features. The trial court erred by accepting Saleba's "closest to the pin" approach to statutory interpretation: a desire to apply preexisting formulas that somewhat fit the language of the statute rather than applying the language of the statute itself.

A number of excerpts from Saleba's testimony further illustrate his misguided approach, which was erroneously legitimated by the trial court.

Saleba testified that RCW 54.04.045(3)(a) reflects the FCC Telecom formula. His reasoning in support of this conclusion contained an unstated, but nevertheless prominent, assumption: subsection (3)(a) must reflect either the FCC Cable formula or the FCC Telecom formula. Working from this assumption, he pointed out that although (3)(a) makes mention of "a share of the required support and clearance space," the Cable formula—in contrast—refers only to "usable space." This difference, according to Saleba, ruled out the possibility that subsection (3)(a) reflects the Cable formula.

I take a look at the statute and then I compare the language and

[28] The FCC Cable formula.

> the various options to that statute. And the two options I'm looking at in this exhibit and comparing to (3)(a) are the FCC cable and the FCC telecom. Again, (3)(a) talks about a share of required support and clearance. I take a look at – at FCC cable. It refers to usable space. It doesn't refer to support and clearance.

The merit of Saleba's observation is immaterial. His error stems from his failure to apply the language of the statute as written by the legislature.

Not only did Saleba neglect to apply the language of the unique formula, he inverted the method of determining a just and reasonable rate as prescribed by the legislature. Specifically, he postulated that if subsection (3)(a) reflected the FCC Cable formula, the allocation of bare pole costs between the District and its attachers would be, in his opinion, unreasonable.

> So anyway, I looked at GSS-5, and it showed that using FCC cable would result in a 6 percent allocation of the bare pole cost to the pole attacher. So I envisioned this pole out in the country that's got the PUD on it, and it's got a third-party attacher. And that's it. And I look at that pole and I say, does it seem reasonable to me that the cable people would pick up 6 percent of that – that pole cost and the PUD's other customers 94 percent? And to me that was an unreasonable allocation of cost.
> Q. Okay. Based on your review of (3)(a), what did – did you – what methodology did you conclude the language in Section (3)(a) represented?
> A. I concluded it represented the FCC telecom.

Although the language of subsections (3)(a) and (3)(b) is somewhat byzantine, Saleba's transposition defied an uncomplicated directive: "A just and reasonable rate must be calculated as follows: . . . ." RCW 54.04.045(3).

Saleba's misguided approach is further illustrated by his discussion of incremental costs. He testified that because the Cable formula utilizes incremental costs, which are discriminatory—and would therefore violate the

requirement that rates be nondiscriminatory—subsection (3)(a) cannot reflect the Cable formula.

> In rate setting there's a couple of ways people talk about pricing and one is to look at incremental cost and the other is to look at rolled in. Incremental costing is where you would charge somebody based upon just the incremental variable costs associated with providing service.
>
> And I'll use a real life example of maybe a rental property. Let's say that you had a – let's say I had a piece of property that I wanted to use six months and my brother wanted to use six months. Incremental pricing would be where I would charge my brother rental on the other half of the year just predicated on the additional, as an example, electricity and water he might use by using the property, with no contribution to the annual cost associated with the property.
>
> . . . .
>
> Our recommendation was that the reasonable range for pole attachment rates were between the 20.65 calculated from the FCC telecom, with a cap at 36.39 from the APPA method, and we felt the range should be higher, weighted more towards the APPA end, *because the FCC cable, in our view, arbitrarily allocated two-thirds of the unusable space to the electric utility, whereas we felt all users should pay equally in that.*

(Emphasis added.)

> Q. Okay. So then what – what – we're going to get to what you promote in a minute. But what you're really promoting is a – a formula that results in the – in the attachers providing PUD more money because it's based on a *per capita* rather than a use allocation, right?
> A. Per capita use is a – my – my – the AP- —
> Q. "Per capita" I mean per user.
> A. Correct. That's – yes. Yes, equal proportionality.
> . . . .
> Q. You don't like the cable 'cause it doesn't do that, right?
> A. Correct.

Putting aside Saleba's failure to apply the language of subsection (3)(a) as written, it is important to note that the proscription on instituting discriminatory rates prevents PUDs from arbitrarily differentiating between *licensees*; it does

not, however, require that attachers and PUDs split costs equally. RCW 54.04.045(1)(d) ("'Nondiscriminatory' means that pole owners may not arbitrarily differentiate among or between similar classes of licensees approved for attachments."). Moreover, the nondiscriminatory directive deals with the rate as a whole—not the component parts of the rate, such as subsections 3(a) and 3(b). Furthermore, the legislature, by authorizing PUDs to utilize the Cable formula, has already made a determination that the utilization of the Cable formula does not violate the nondiscriminatory requirement. See RCW 54.04.045(4).

In a final effort to corroborate his assessment that subsection (3)(a) does not reflect the Cable formula, Saleba directed the trial court's attention to section (4), which authorizes use of the Cable formula.

> For the purpose of establishing a rate under subsection (3)(a) of this section, the locally regulated utility may establish a rate according to the calculation set forth in subsection (3)(a) of this section or it may establish a rate according to the cable formula set forth by the federal communications commission by rule *as it existed on June 12, 2008, or such subsequent date as may be provided by the federal communications commission by rule, consistent with the purposes of this section.*

RCW 54.04.045(4) (emphasis added). The inclusion of the Cable formula in section (4), according to Saleba, foreclosed the possibility that subsection (3)(a) could reflect the Cable formula.

> Section (4) of the statute says that three – that in the event that – that the local utility has the option of support – of substituting the cable formula – which in this case you're talking about the FCC cable formula – in – in – for Section (3)(a). Which to me says that if Section (3)(a) was meant to be the cable, Section (4) wouldn't be needed. Because Section (4) wouldn't say you can substitute the cable for the cable.

Unsurprisingly, Saleba again neglected to apply the language of subsection (3)(a). However, he also misconstrued section (4).

Contrary to Saleba's assessment, section (4) does not conclusively establish that subsection (3)(a) reflects a formula other than the Cable formula. Instead, section (4) only discloses the legislature's intent to permit PUDs—in the event that the FCC Cable formula was altered between the date that RCW 54.04.045 was amended and the date that the amendment became effective (or subsequently thereafter)—to avail themselves of an updated FCC Cable formula. In order to understand why the legislature included this provision, it is imperative to recognize that the cable television industry is no longer a fledgling industry buttressed by taxpayer subsidies but, rather, a robust industry well-equipped for fiscal autonomy.[29] Given the industry's maturation since the advent of the Cable formula, it was reasonable for the legislature to surmise that the rate calculated using the Cable formula might increase in the future. Indeed, at the time that the legislature amended RCW 54.04.045, the FCC was undertaking a review of its pole attachment rates.[30] Consequently, it is reasonable to conclude that the legislature intended to permit the District to avail itself of a potentially higher rate

[29] The trial court found that "The FCC Cable formula was developed to support a fledgling cable TV industry, which is no longer a fledgling industry." Findings of Fact 49.

[30] Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, FCC 07-187, 22 FCC Rcd. 20195 (proposed Nov. 20, 2007) (to be codified at 47 C.F.R. pt. 1), https://apps.fcc.gov/edocs_public/attachmatch/FCC-07-187A1.pdf.

yielded by the Cable formula,[31] which would further the legislature's explicit intent in amending the statute to "ensure that locally regulated utility customers do not subsidize licensees." ENGROSSED SECOND SUBSTITUTE H.B. 2533. Rather than merely a fortuitous rider to section (4), the option for PUDs to utilize the Cable formula "consistent with the purposes of this section" is revealing of a keen understanding by the legislature of the uncertain regulatory milieu in which it acted.

Moving now to Saleba's examination of subsection (3)(b), he similarly neglected to apply the words of the statute as written by the legislature. Instead, he compared subsection (3)(b) to the Telecom formula and the APPA formula, determined that subsection (3)(b) was more similar to the APPA formula and, thus, concluded that subsection (3)(b) reflects the APPA formula.

> Q. Can you explain your review of Section (3)(b), please.
> A. Yes. Again, going back to the language of Section (3)(b), it calls out that support and clearance, or what other people call unusable space, is equally allocated among all locally – among the locally regulated utility and all licensees. And "equal" is the – the – the phrase I'm – I'm focusing on.
> Q. Okay.
> A. FCC telecom talks about putting in usable – support and clearance but only two-thirds. I don't see anything in Section (3)(b) that refers to two-thirds of the support facilities. It talks about equally, which to me is all. So – so, therefore, it told me that FCC telecom was not the appropriate formula for Section (3)(b).
> Q. Did you form an opinion on what methodology the language of Section (3)(b) represented?
> A. Yes. I then went to the APPA methodology where it talks about equally proportioning among the utilities. The "equally" in the APPA formula and the "equally" in (3)(b) hooked up in my mind,

[31] The Senate Bill Report explains that "The bill allows for use of future rate-setting methodologies as set by rule by the FCC." S.B. REP. ON ENGROSSED SECOND SUBSTITUTE H.B. 2533, 60th Leg., Reg. Sess. (Wash. 2008).

which told me that (3)(b) had to be the APPA formulation.

Even if Saleba is correct that subsection (3)(b) more closely resembles the APPA formula, the fact remains that he did not apply the words of subsection (3)(b) as written by the legislature. Had the legislature intended that subsection (3)(b) directly reflect the APPA formula, it would have so indicated.[32] Because it did not, however, it was incumbent upon the District and the trial court to apply the words as written and thereby give meaning to the unique formula conceived by the legislature.

Given the trial court's improper display of deference to the District's expert witness, we conclude not only that the trial court erred by utilizing an arbitrary and capricious standard of review, but that it erred by adopting Saleba's testimony. The legislature's amendment of RCW 54.04.045 included a rate calculating formula that, notwithstanding the legislature's decision to borrow aspects of various preexisting formulas,[33] is unique. Because it was not applied as such, we reverse the trial court's ruling.

D

Nevertheless, it is by no means certain that the trial court's error will result

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[32] As it did with respect to the FCC Cable formula in section (4).

[33] The sponsor of the 2008 amendment to RCW 54.04.045, Representative John McCoy, made the following comment on the floor of the legislature:

> Thank you, Mr. Speaker. When this bill left this house and went to the other side, it did leave a little bit of work and the senate helped and the state all helped fix that little formula that we had taken a little bit of the FCC formula, a little bit of the APPA, and they came up with an excellent formula . . . .

An audiovisual representation of McCoy's statement was admitted into evidence during the course of the trial.

in the Companies prevailing on remand.[34] The Companies, whether of their own initiative or in response to the District's approach,[35] also failed to apply the unique formula as written by the legislature. Furthermore, to the extent that the Companies did present evidence in support of their alternative interpretation, the trial court found the rate derived by one of their expert witnesses—Patricia Kravtin[36]—to be "unreasonable and impractical."[37] Findings of Fact 34-36. Therefore, on remand, the trial court need not accept the Companies' calculations simply because we reject that which was employed by the District's expert witness and deferred to by the trial court. The Companies will only prevail on remand if the District cannot, after applying the statute as written by the legislature, establish that its rates are just and reasonable, as well as nondiscriminatory and sufficient.

Kravtin adopted a flawed approach similar to that taken by Saleba. Indeed, rather than applying the words of the statute, she instead assumed that subsection (3)(b) reflects the Telecom formula and—working from that assumption—concluded that the Telecom formula may be applied, subject only

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[34] In this litigation, the Companies have taken an "If he loses, I must win" approach to the issues. As we will discuss, such is not the case—given that this case went to trial and the trier of fact did not choose to credit the testimony of the Companies' expert witnesses.

[35] In the Companies' joint motion for partial summary judgment filed in December 2009, they requested that the trial court determine as a matter of law that subsection (3)(a) functions as the FCC Cable formula and that subsection (3)(b) functions as the FCC Telecom formula.

[36] Kravtin testified on behalf of Comcast and Charter, but not CenturyLink. The trial court found that her opinions "were based primarily on theoretical analysis of economics and public policy, rather than actual local information regarding Pacific County and Pacific PUD." Findings of Fact 35.

[37] The other expert witness, Mark Simonson, testified on behalf of CenturyLink. Simonson's testimony, however, was focused on the nonrate terms and conditions of the District's proposed agreement, and only as they related to CenturyLink. Therefore, his testimony does not provide support for the Companies' position regarding the District's rates.

to a mathematical modification. Although Kravtin's divagation from the statutory text was not so pronounced as Saleba's, it nonetheless betrayed her unsound methodology.

> Q. Can you tell us what methodology, in your opinion, applies to (3)(b)?
> A. Yes. In my opinion, the methodology is the telecom formula, with a small modification.
> . . . .
> Q. Okay. . . . [C]an you explain how the telecom formula works?
> A. Yes. The telecom formula works in exactly analogous fashion to the cable formula. In fact, it was based on the cable formula. The same three components we discussed earlier, that I won't repeat.
> The only difference with regard to the telecom formula is a space allocator. It's now broken into two parts. It has the same useable space. The same allocator is used for useable space, that proportional allocator, but then for unusable space, that space, subject to a two-thirds adjustment, is divided equally by the number of attachers.

The legislature, in amending RCW 54.04.045, wrote a singular rate formula. Even assuming, without deciding, that a substantial overlap exists between the FCC Telecom formula and subsection (3)(b), it is nevertheless clear—and, indeed, the parties do not dispute—that the two are not identical. While Kravtin's switch-and-bait approach to construing the statute may hold superficial appeal, it is improper.[38]

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[38] Additionally, the trial court found that the rate derived by Kravtin was unreasonable and impractical based, in part, on the local information lacking from her proposed rate. Findings of Fact 35 ("The opinions of Defendants' rate expert, Patricia Kravtin, were based primarily on theoretical analysis of economics and public policy, rather than actual local information regarding Pacific County and Pacific PUD. She had never visited Pacific County prior to trial."); Findings of Fact 34 ("The pole attachment rate derived by Defendant's expert witness, Patricia Kravtin, is unreasonable and impractical as it relates to this case.").

An example of Kravtin's lack of local information is her conclusion that transmission poles should not be considered by the District in setting a rate, despite the fact that there were attachments by the Companies to a majority of the District's transmission poles. On the subject

E

While we hold that the trial court, on remand, must interpret the unique rate formula based on the words of the statute and not based on opinions as to what formulas it appears to resemble, we must repeat that because the formula is not designed to ensure mathematical certainty and because the District enjoyed ample discretion prior to the 2008 amendment, the District retains considerable discretion in its rate calculation. Although our directive to the trial court, unadorned, is that the statute must be applied as written, the legislature's amendment of RCW 54.04.045 did not fully divest the District of the previously liberal discretion it enjoyed. What follows is a nonexhaustive list of the discretion retained by the District in calculating a just and reasonable rate.

Both subsections (3)(a) and (3)(b) contain the phrase "shall consist of the additional *costs* of procuring and maintaining pole attachments, but may not exceed the actual capital and operating *expenses* of the locally regulated utility . . . ." RCW 54.04.045(3)(a)-(b) (emphasis added). However, neither subsection clarifies whether these costs and expenses are treated as gross costs and expenses or net costs and expenses. Nevertheless, the legislature explicitly

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of transmission poles, CenturyLink assigned error to the trial court's finding that "Including District transmission poles, as well as distribution poles, in the District's rate calculations was reasonable." Findings of Fact 38. However, its critique is based on the fact that no preexisting formulas authorize the use of transmission poles in calculating rates. As should be clear by now, we reject this approach and, in light of the Companies' common practice of attaching to the District's transmission poles, rule that the trial court's finding was supported by substantial evidence.

An example of Kravtin's unreasonable and impractical rate derivation is the deduction she made for costs that benefit only the District. For example, she addressed the "cross arms" on a pole, which do not benefit the attachers. According to Kravtin, pursuant to the FCC Cable and Telecom formulas, it is appropriate to deduct 15 percent from the District's account to offset costs stemming from features that do not benefit the attachers. However, no such deduction is authorized by the rate formula authored by the legislature.

intended the 2008 amendment "to recognize the value of the infrastructure of locally regulated utilities" and to "ensure that locally regulated utility customers do not subsidize licensees." ENGROSSED SECOND SUBSTITUTE H.B. 2533. Therefore, the District retains discretion to determine, after calculating a rate pursuant to both gross costs and expenses and net costs and expenses, which result best advances the policy explicated by the legislature.

The District also retains discretion to determine whether to designate a portion of the pole as unusable "safety space" and, if it does so, whether to require the Companies to bear a share of the cost associated with the unusable space.[39] In both subsections (3)(a) and (3)(b), the legislature directs PUDs to consider a "share" of the "required support and clearance space." In pole attachment vernacular, another term for "support and clearance space" is unusable space. However, the legislature did not define that which constitutes a proper share and it did not define that which constitutes unusable space. Rather than providing evidence as to which preexisting formula hews most closely to these subsections, the absence of further definition affords the District discretion to determine that which constitutes unusable space and, further, what share of the cost associated with the unusable space should be borne by the attachers.[40]

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[39] The Companies assign error to a finding made by the trial court regarding the safety space: "Defendants use the safety space on the District's poles, and the safety space is primarily for their benefit." Findings of Fact 39. However, the District points to numerous instances in the record of testimony that supports these findings. Accordingly, we conclude that the trial court's finding was supported by substantial evidence. See 224 Westlake, LLC, 169 Wn. App. at 720 ("We review the trial court's decision following a bench trial to determine whether the findings of fact are supported by substantial evidence and whether those findings support the conclusions of law.").

[40] Again, this discretion is guided by the legislature's statement of intent.

Instituting a policy of not using the safety space is a prerogative of the District both as a rate maker and as a utility operator.

The District also retains discretion in the manner in which it calculates the number of licensees that attach per pole. The District calculated that, on average, there were 2.38 attachers per pole owned by the District. On the other hand, the Companies offered Kravtin's testimony that, pursuant to the federal formulas, the number of attachers must be assumed to be three. However, because the formula created by the legislature is unique, it was not incumbent upon the District to assume that there were three attachers per pole; instead, it could avail itself of data derived by surveys conducted by its employees or agents in order to estimate the actual number of attachers. This approach is in harmony with the legislature's stated intent that the amendment "ensure that locally regulated utility customers do not subsidize licensees." ENGROSSED SECOND SUBSTITUTE H.B. 2533. If the District were to assume the presence of three attachers per pole, this input would ultimately lower the rate, which would, in turn, impose a higher financial burden on the District's customers.[41]

In sum, we reverse the trial court's determination that subsection (3)(a) reflects the FCC Telecom formula and that subsection (3)(b) reflects the APPA formula and remand for further proceedings. On remand, the District must apply the statute as written to the relevant data, albeit subject to the discretion that was not withdrawn by the 2008 amendment. Only after receiving evidence and

[41] Indeed, Kravtin's insistence that the FCC "3 attacher per pole" presumption be used, rather than actual data from the operation of the Pacific PUD, appears to be one basis for the trial court's finding that her testimony was not worthy of belief.

testimony based both on a proper application of the amended statute and on underlying data that, in the trial court's view, is worthy of being credited, may the trial court determine whether the District's revised rates are, in addition to the other requirements imposed by RCW 54.04.045, "just and reasonable."

V

Comcast and Charter both challenge the trial court's award of damages to the District, alleging that its prejudgment interest award was inaccurate. Specifically, they argue that, in the event that we affirm the trial court's ruling in any respect, the amount of the prejudgment interest award should be offset to account for the District's failure to mitigate its damages, as well as the trial court's failure to calculate the award at an interest rate of five percent per annum. We disagree.

"We review a prejudgment interest award for abuse of discretion." Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co., 160 Wn. App. 912, 925, 250 P.3d 121 (2011). "Under this standard, we reverse a trial court's decision only if it 'is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law.'" Humphrey Indus., Ltd. v. Clay St. Assocs., LLC, 176 Wn.2d 662, 672, 295 P.3d 231 (2013) (quoting Noble v. Safe Harbor Family Pres. Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009)).

"Prejudgment interest compensates a plaintiff for the 'use value' of damages incurred from the time of the loss until the date of judgment." Humphrey Indus., 176 Wn.2d at 672; see also Polygon Nw. Co. v. Am. Nat'l Fire

Ins. Co., 143 Wn. App. 753, 793, 189 P.3d 777 (2008) ("[A]n award of prejudgment interest is in the nature of preventing the unjust enrichment of the defendant who has wrongfully delayed payment."). Prejudgment interest may be awarded "(1) when an amount claimed is 'liquidated' or (2) when the amount of an 'unliquidated' claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion." Prier v. Refrigeration Eng'g Co., 74 Wn.2d 25, 32, 442 P.2d 621 (1968). A liquidated claim is "one where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." Prier, 74 Wn.2d at 32.

Comcast and Charter first contend that the District failed to mitigate its damages. In support of their contention, they point out that the District has refused to accept their annual offer of payment at the historic rate, despite the inclusion of a reservation of the District's right to collect the difference between payment tendered at the historic rates and the District's newly instituted rates, pending the outcome of the litigation between them. Their contention is unavailing.

"The doctrine of mitigation of damages," which generally applies in both contract and tort cases, "prevents recovery for those damages the injured party could have avoided by reasonable efforts taken after the wrong was committed." Bernsen v. Big Bend Elec. Coop., Inc., 68 Wn. App. 427, 433, 842 P.2d 1047 (1993); cf. Desimone v. Mut. Materials Co., 23 Wn.2d 876, 884, 162 P.2d 808

(1945) ("[T]he requirement of minimizing damages does not apply to cases . . . of intentional or continuing torts."). When the injured party is presented with a choice between two reasonable courses, however, "'*the person whose wrong forced the choice cannot complain that one rather than the other is chosen.*'" Hogland v. Klein, 49 Wn.2d 216, 221, 298 P.2d 1099 (1956) (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 35, AT 133-34 (1935)). Indeed, "'the plaintiff is not bound at his peril to know the best thing to do.'" Hogland, 49 Wn.2d at 221 (quoting 1 THEODORE SEDGWICK ET AL., A TREATISE ON THE MEASURE OF DAMAGES § 221, at 415 (9th ed. 1912)). Furthermore, "[t]he party whose wrongful conduct caused the damages . . . has the burden of proving the failure to mitigate." Cobb v. Snohomish County, 86 Wn. App. 223, 230, 935 P.2d 1384 (1997).

As an initial matter, any prejudgment interest that was calculated based on damages caused by the Companies' trespass is not susceptible to attack by way of alleging that the District failed to mitigate its damages. Although damages must be mitigated in most tort cases, damages resulting from an intentional tort need not be. Bernsen, 68 Wn. App. at 433. Given that trespass is an intentional tort, Broughton Lumber Co. v. BNSF Ry. Co., 174 Wn.2d 619, 630 n.9, 278 P.3d 173 (2012), it was not incumbent upon the District to mitigate damages stemming from the Companies' trespass.

Turning now to damages awarded for breach of contractual obligations, Comcast and Charter contend that the District failed to mitigate its damages by

refusing to accept their annual offers of payment at the historic rate, which, they aver, included the reservation of rights noted above.

Although the jointly filed briefing of Comcast and Charter contains argument to the effect that both Comcast and Charter tendered payment at the historic rates—*including* a reservation of rights—their citations to the record only reveal an attempt by Charter to include a reservation of rights in its tender.[42]

Contrary to Comcast's and Charter's contention, the District's refusal of its offer does not constitute a failure to mitigate damages. Had the District accepted Comcast's and Charter's offers of payment at the historic rate, it would have been receiving annual payment of $19.70 per pole from two attachers,[43, 44] $5.75 per pole from Comcast and Charter, and no money from CenturyLink.[45] By receiving different rates from its licensees, the District would have risked running afoul of the legislature's directive that rates received by the District be nondiscriminatory.[46]

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[42] As explained supra at n.8, we found no evidence of Exhibit 515 being admitted at trial or included in the record. However, even if Comcast and Charter were correct insofar as they aver that Comcast's tender of payment included a reservation of rights, for the reasons stated below, we would not hold that the District's refusal of such an offer constituted a failure to mitigate damages.

[43] "Two other companies besides Defendants which have pole attachments on the District's poles have been paying at the rates the District adopted in Resolution No. 1256 since it was put into effect in 2007." Findings of Fact 44. Because the Companies do not offer any argument as to why this finding is not supported by the evidence, we regard it as a verity on appeal. See, e.g., Karlberg v. Otten, 167 Wn. App. 522, 525 n.1, 280 P.3d 1123 (2012) ("'It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument.'" (quoting In re Estate of Lint, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998))).

[44] It would have received $13.25 per pole from these two attachers in 2007 and $19.70 per pole from each in 2008.

[45] CenturyLink does not contend that its attempt to secure an accord and satisfaction led to a failure by the District to mitigate its damages.

[46] By receiving different rates from different licensees, the District would have risked contravening an additional legislative directive contained in section (2): "A locally regulated utility

"All rates, terms, and conditions made, demanded, or received by a locally regulated utility for attachments to it poles must be just, reasonable, nondiscriminatory, and sufficient." RCW 54.04.045(2). "'Nondiscriminatory' means that pole owners may not arbitrarily differentiate among or between similar classes of licensees approved for attachments." RCW 54.04.045(1)(d).

Had the District accepted a significantly reduced rate from Comcast and Charter—both of which were trespassing—while concomitantly receiving its newly instituted rate from two other attachers, the District would have been receiving different rates from different licensees. In the absence of further legislative guidance or judicial construction, the fact that the offer from Charter included a reservation of the District's right to collect the difference between payment tendered at the historic rate and at the revised rate—in the event that the District prevailed in this litigation—was no guarantee for the District that, by accepting, it could maintain compliance with the nondiscriminatory requirement.

Furthermore, had the District accepted Comcast's and Charter's offers, it would have sent a message to the two attachers dutifully paying the new rate that they were being overcharged or, at the very least, that there were economic incentives to breach their agreements with the District. Moreover, in the absence of contrary authority, it would have been reasonable for the District to conclude that acceptance of the offers from Comcast and Charter would result in a violation of the requirement that rates received be "sufficient." The lack of further

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shall levy attachment space rental rates that are uniform for the same class of service within the locally regulated utility service area." RCW 54.04.045(2).

definition of this term in the statute would have left the District with no guidance as to whether it was in compliance with the statute.

Given the uncertainty as to whether the District could accept the offers of Comcast and Charter while still complying with RCW 54.04.045(2), coupled with the prospect of incentivizing other licensees to breach their agreements, we conclude that the District's refusal constituted a reasonable course of action, which may not be scrutinized after the fact by the parties which forced the choice. See Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 840, 100 P.3d 791 (2004). Although we do not here purport to chart the depth and breadth of what action constitutes "reasonable efforts" to prevent avoidable damages, there can be no doubt that the definition excludes assuming the risk of contravening a legislative mandate, while incentivizing other licensees to breach their agreements and become trespassers. The District did not fail to mitigate its damages.

If the Companies wished to avoid the risk of having to pay prejudgment interest, but still desired to withhold from the District the contested sum until their dispute was resolved, they should have paid that sum into the Pacific County Superior Court's registry. See Colonial Imports v. Carlton Nw., Inc., 83 Wn. App. 229, 248, 921 P.2d 575 (1996) (Baker, C.J., dissenting) ("If a defendant wishes to protect itself against the prejudgment interest rate provided by statute, all the defendant need do is pay into the registry of the court that amount which the defendant believes is the proper judgment amount. By doing so, prejudgment interest is tolled on the amount deposited."). Indeed, given that the policy undergirding prejudgment interest as a permissible form of damages "'has been

based upon the view that one who has had the use of money owing to another should in justice make compensation for its wrongful detention,'" Prier, 74 Wn.2d at 32 (quoting McCORMICK, supra, § 54), had the Companies paid into the registry of the court the amount they believed to be in dispute, they would not have had the use of that amount prior to the adverse judgment and, accordingly, any prejudgment interest on the amount deposited would have been tolled.

Comcast and Charter next contend that the trial court incorrectly calculated prejudgment interest at a rate of 12 percent per annum. This is so, they assert, because (1) the trial court justified the 12 percent interest rate based on RCW 4.56.110(4), which only addresses the interest rate that accrues from the entry of a judgment; (2) the proposed agreement from the District could not be taken into account, given that it was unsigned; and (3) the District's own rate expert calculated damages based on an interest rate of five percent. Their contention is unavailing.

"Prejudgment interest is allowed in civil litigation at the statutory judgment interest rate." Unigard Ins. Co., 160 Wn. App. at 925. RCW 4.56.110 "sets the rate for four categories of judgments: (1) breach of contract where an interest rate is specified, (2) child support, (3) tort claims, and (4) all other claims." Unigard Ins. Co., 160 Wn. App. at 925 (footnote omitted). "In determining the appropriate interest rate, a court should examine the component parts of the judgment, determine what the judgment is primarily based on, and apply the appropriate category." Unigard Ins. Co., 160 Wn. App. at 925.

None of Comcast's and Charter's assertions provide a basis upon which

we could conclude that the trial court abused its discretion in calculating prejudgment interest at a rate of 12 percent per annum. Their first assertion is foreclosed by well-established precedent, which makes clear that "[p]rejudgment interest is allowed in civil litigation at the statutory judgment interest rate." Unigard Ins. Co., 160 Wn. App. at 925. Thus, it is a proper exercise of discretion for a trial court to calculate prejudgment interest in a civil dispute at the statutory judgment interest rate reflected in RCW 4.56.110. Given this, regardless of whether the trial court improperly made reference to or relied upon an 18 percent interest rate contained in the unsigned agreement proposed by the District—their second assertion—and regardless of the five percent interest rate calculated by the District's own rate expert—the basis for their third assertion—so long as the trial court utilized a rate that was consistent with RCW 4.56.110, there was no abuse of discretion. Although this action was predicated, in part, on breach of contract claims, no interest rate was specified in the contracts. Thus, the trial court applied RCW 4.56.110(4) and settled on a rate of 12 percent interest per annum. Twelve percent is within the permissible range of interest rates pursuant to RCW 4.56.110(4).[47] See RCW 19.52.020. Accordingly, the trial court did not

[47] The ceiling for permissible interest rates is set by RCW 19.52.020(1), which is incorporated by reference in RCW 4.56.110(4) and which states:

> (1) Any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: (a) Twelve percent per annum; or (b) four percentage points above the equivalent coupon issue yield (as published by the Board of Governors of the Federal Reserve System) of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the later of (i) the establishment of the interest rate by written agreement of the parties to the contract, or (ii) any adjustment in the interest rate in the case of a written agreement permitting an adjustment in the interest rate.

abuse its discretion.

VI

The District seeks affirmance of the award of attorney fees and expenses granted to it in the trial court and an award of attorney fees and costs on appeal. First, it argues that, as the prevailing party, the trial court properly awarded it fees and expenses. Second, it argues that it should be awarded fees and costs on appeal. Third, it argues that it is entitled to an award of attorney fees based on the Companies' untimely appeal. The Companies contest all such claims.

A

The District first contends that it was properly awarded attorney fees and expenses in the trial court. With regard to the District's fees and expenses in connection with the nonrate terms and conditions, as well as the District's rates prior to June 12, 2008, we agree. However, as the District may not be the prevailing party on remand with regard to the issue of whether its rate complied with the 2008 amendment to RCW 54.04.045, it is premature to say that it is entitled to an award of fees and expenses in the trial court as to that issue.

Whether there is a legal basis for awarding attorney fees is reviewed de novo; however, a discretionary decision to award fees and expenses—and the reasonableness of such an award—is reviewed for abuse of discretion. Gander v. Yeager, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012).

"Washington follows the American rule 'that attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery of

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RCW 19.52.020(1).

such fees is permitted by contract, statute, or some recognized ground in equity.'" Panorama Vill. Condo. Owners Ass'n Bd. of Directors v. Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910 (2001) (quoting McGreevy v. Or. Mut. Ins. Co., 128 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995)). "In general, a prevailing party is one who receives an affirmative judgment in his or her favor." Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). "Contractual provisions awarding attorney fees to the prevailing party also support an award of appellate attorney fees." City of Puyallup v. Hogan, 168 Wn. App. 406, 430, 277 P.3d 49 (2012).

In light of our holding with regard to the nonrate terms and conditions and the validity of the District's rates prior to June 12, 2008, the District is properly considered the prevailing party as to those issues in the trial court and was, accordingly, entitled to an award of fees as to those issues. However, whether an award of fees in conjunction with the rates controlled by the amended statute is appropriate must abide further proceedings.

With regard to the trial court's award of expenses, we reach a similar conclusion. In response to the trial court's award of expenses to the District, Comcast and Charter[48] aver that the portion of the award given to compensate

[48] In its opening brief, CenturyLink did not challenge the trial court's award of expenses as to the work done by EES. In its reply brief, it states, "CenturyLink continues to join in all arguments made by co-defendants Comcast and Charter on the issues of damages and the awards to the District of attorneys' fees and costs." To the extent that this statement could be interpreted as an attempt by CenturyLink to challenge the trial court's award of expenses, we do not consider its challenge. See Cowiche Canyon Conservancy, 118 Wn.2d at 809 ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

Moreover, CenturyLink did not, in its merits briefing, indicate the number of hours billed by its expert witness in connection with this litigation or the hourly rate charged by its expert, or direct us to a place in the record, the verbatim report of proceedings, or elsewhere in the materials designated by the parties, where we could obtain this information. The effect of this is

the District for the expenses it incurred through the use of services provided by EES should be reversed. This is so, they contend, because EES provided both rate analysis services to the District prior to this litigation and litigation-related services (including Saleba's expert testimony) after this litigation had commenced. Comcast and Charter assert that the invoices that were submitted to the trial court failed to specify the nature of the work that formed the basis for the amount charged in the bill, which removed any indicia of reliability from the trial court's subsequent determination that the expenses were, in fact, litigation-related. We disagree.

The trial court made the following pertinent finding with respect to its award of expenses:

> The fees and expenses of EES Consulting totaling $251,150.11 billed to and paid by the District are reasonable expenses incurred in connection with this lawsuit. They were paid directly by the District to EES Consulting for expert witness work, and the documentation is sufficient to enable the Court to make this determination. The EES Consulting expenses are awarded to the District.

Contrary to Comcast's and Charter's contention, the record supports the trial court's finding. While the invoices submitted to the District by EES did not explicitly describe the nature of the work undertaken by EES, every bill was invoiced on a date that was subsequent to both the date that this litigation was commenced and the effective date of the 2008 amendment to RCW 54.04.045. Given that EES had long since completed the rate study for which it had been

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to preclude us, as part of our subsequent consideration of the reasonableness of the expenses incurred by the District with regard to EES, from also considering the hourly rate charged by CenturyLink's expert witness, as well as the number of hours for which CenturyLink was invoiced.

retained by the District, it was reasonable for the trial court to conclude that these invoices reflected work done by EES in connection with this litigation.

Alternatively, Comcast and Charter[49] argue that the award of expenses must be reversed because it was unreasonably high. In support of this argument, they reference the difference between the hours billed by their expert witness Kravtin and the hours billed by EES. We find their argument unpersuasive.[50]

The record supports the trial court's finding that the expenses incurred were reasonable. Kravtin devoted approximately 270 hours of work in connection with this litigation. EES, on the other hand, devoted nearly 1,400 hours of work in connection with this litigation. However, Kravtin's hourly rate of $375.00 was nearly twice that of Saleba's hourly rate of $200.00, whose hourly rate was higher than that of any other employee of EES who provided litigation-related services to the District.[51] Furthermore, Saleba's testimony addressed

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[49] In its opening brief, CenturyLink, in a footnote, states that it "adheres to the arguments made below regarding the impropriety of the nature and amount of the District's claimed fees and costs, particularly the District's exorbitant expert witness fees." However, we decline to consider this cursory assertion as proper appellate argument, particularly given CenturyLink's attempt to rely on argument presented to the trial court by incorporating it by reference rather than presenting a reasoned argument in its merits brief. See Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 497, 254 P.3d 835 (2011) ("'placing an argument . . . in a footnote is, at best, ambiguous or equivocal as to whether the issue is truly intended to be part of the appeal'" (internal quotation marks omitted) (quoting St. Joseph Gen. Hosp. v. Dep't of Revenue, 158 Wn. App. 450, 473, 242 P.3d 897 (2010), modified on remand, 165 Wn. App. 23, 267 P.3d 1018 (2011))); see Diversified Wood Recycling, Inc. v. Johnson, 161 Wn. App. 859, 890, 251 P.3d 293 (2011) ("We do not permit litigants to use incorporation by reference as a means to argue on appeal or to escape the page limits for briefs set forth in RAP 10.4(b).").

[50] Although a request for an award of attorney fees must reflect a lodestar method calculation, there is no such requirement with regard to the work of other professionals. The trial court may consider any competent evidence in reaching its determination.

[51] The invoices reveal that other employees of EES, whose hourly rates were lower than Saleba's, provided services to the District. These employees include the following: Anne Falcon (hourly rate of $190.00), Kelly Tarp (hourly rate of $160.00), Seung Kim (hourly rate of $160.00),

both the validity of the District's rates and the validity of its nonrate terms and conditions, whereas Kravtin's testimony merely addressed the validity of the District's rates. An inference arising from the significantly higher rate charged by Kravtin when compared to that which was charged by Saleba (or any other employee of EES) is that Kravtin's hourly yield was commensurate with her increased hourly rate. That inference, considered together with the broader scope of the testimony that was given by Saleba during the course of the trial, indicates that the trial court's finding was adequately supported by evidence contained in the record. Comcast and Charter have offered no basis for us to conclude that the trial court's award of expenses was unreasonable.

In view of our foregoing analysis, we conclude that, in the event that the District prevails on remand, the award of expenses should not be disturbed. Both the basis for and the reasonableness of the trial court's finding were adequately supported by the record. However, in the event that the Companies prevail on remand, the award of expenses will need to be reassessed in the following manner: the trial court will be required to identify and segregate the amount of expenses to award based on the work done by EES with regard to the issues on which the District prevailed, while not awarding expenses on the issue on which the District did not prevail. In any event, given our affirmance of the trial court's ruling with regard to the nonrate terms and conditions and the revised rates prior to June 12, 2008, an award of expenses that were related to litigation

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Amber Gschwend (hourly rate of $140.00), Lisa Fortney (hourly rate of $140.00), Amber Nyquist (hourly rate of $140.00), Janet White (hourly rate of $140.00) Sarah Neubauer (hourly rate of $120.00), and Diane Running (hourly rate of $120.00).

of those issues was proper.

B

The District next contends that it is entitled to an award of attorney fees and costs on appeal. Because this case is to be remanded, we delegate to the trial court, after final resolution of the merits, the question of an award of fees and costs on appeal. With regard to the nonrate issues, an award of fees is appropriate. With regard to the rates assessed prior to June 12, 2008, an award of fees is appropriate. However, with regard to the rates assessed on or after June 12, 2008, an award of fees will be appropriate only in the event that the District is the ultimate prevailing party on that issue.

C

The District next contends that it is entitled to an award of attorney fees and costs relating to the Companies' untimely appeal. This is so, it avers, because fees and costs "would not have been incurred by the district but for the Companies' failure" to appeal within the requisite period.

Review of this issue is problematic because it was briefed opaquely: the parties either do not cite to the record, cite to things outside of the record, or cite to things which may be in the record but with a citation that fails to identify where in the voluminous record it may be contained. What seems to be clear is this: the District (1) is requesting that we affirm the trial court's award of attorney fees and costs for its opposition to the Companies' motion to vacate and reenter final judgment in the trial court, and (2) is seeking an award of attorney fees and costs

with respect to the Companies' motion for extension of time, the District's motion to stay, and the District's motion for discretionary review.

With respect to the first request, we affirm the trial court's award. The District sensibly notes that because the Companies did not appeal the trial court's denial of their motion to vacate, the District is the prevailing party. The Companies do not dispute this in their briefing, and because the District prevailed on a motion that will not be reversed (or even challenged, presumably) on remand, we affirm the trial court's award of attorney fees and expenses relating to the Companies' motion to vacate.

With respect to the second request, the District argues that the "same principles applicable to the award of fees and costs" relating to the motion to vacate apply to the Companies' motion for extension of time, the District's motion to stay, and the District's motion for discretionary review by the Supreme Court. Not so. Because the District is, at this stage, only a partially prevailing party, we direct the trial court to consider this request on remand, after the merits of all substantive claims are resolved.

The District argues, alternatively, that we should impose terms or compensatory damages—or both—as provided for by RAP 18.9, which allows a court to sanction a party for its failure to comply with RAP 5.2(a), which requires filing of a notice of appeal to be done within 30 days of entry of judgment. In response, the Companies assert that Division Two already declined to award the District any fees on this basis. Although the Companies do not cite any Division Two ruling to this effect, we decline to sanction the Companies pursuant to RAP

18.9(a).

VII

In the complaints filed to commence these actions, the District requested equitable relief in the form of an injunction, which was granted by the trial court and memorialized in its conclusions of law.

> 45. In addition to the declaratory judgment, damages, and interest awarded, the District is entitled to the injunctive relief requested.
>
> 46. Defendants must start paying at the District's rates as set forth in Resolution No. 1256 and must enter into the District's proposed Pole Attachment Agreement (with revisions per Conclusion of Law 35 above), or they must remove their attachments from District poles within thirty (30) days, and if not so removed, the District may remove Defendants' attachments at Defendants' expense.

We affirm the trial court's ruling with regard to the nonrate terms and conditions and the District's revised rates prior to June 12, 2008. The trial court's grant of injunctive relief is supported by these holdings. When the Companies refused to sign the proposed agreement, refused to remove their equipment from the District's poles, and refused to pay the revised rates commencing January 1, 2007, they became trespassers on the District's property. Thus, insofar as the trial court based its grant of equitable relief upon the Companies' refusal to sign the agreement, remove their equipment, and pay the initial revised rates, the trial court's ruling was proper. However, because we remand for resolution of the propriety of the revised rates following the effective date of the amendment, we direct the trial court on remand to consider whether it should modify its grant of equitable relief, either on an interim basis or otherwise.

VIII

The Companies contend that they are entitled to an award of attorney fees on appeal. This is so, they assert, because the reciprocal fee-shifting provision of RCW 4.84.330 entitles them, as prevailing parties, to attorney fees. However, because we reverse and remand to the trial court for further proceedings, it is, at best, premature to determine that any of the Companies are entitled to an award of attorney fees. Nevertheless, we provide guidance to the trial court with respect to the Companies' argument.

The statute upon which the Companies rely is as follows:

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

RCW 4.84.330.

As an initial matter, CenturyLink will be precluded from securing attorney fees pursuant to this statute. This is so because the only contract upon which CenturyLink could sue is a contract from 1969, which was entered into before the reciprocal fee shifting provisions became effective.[52]

Nevertheless, CenturyLink cites this court's decision in Herzog Aluminum, Inc. v. General American Window Corp., 39 Wn. App. 188, 692 P.2d 867 (1984), for the proposition that RCW 4.84.330 applies to "any action" on a contract, even when the claimed contract is found to have never been formed. This is an overly

[52] Indeed, CenturyLink seeks fees pursuant to that contract.

expansive reading of Herzog Aluminum, where we held "that the broad language '[i]n any action on a contract' found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract." 39 Wn. App. at 197 (alteration in original). Indeed, Division Two rejected a similar argument in Wallace v. Kuehner, 111 Wn. App. 809, 46 P.3d 823 (2002). In that case, Division Two declined to apply Herzog Aluminum to an instance in which the parties seeking attorney fees never intended to form a contract. Wallace, 111 Wn. App. at 820 (distinguishing cases in which the parties intended to form a contract, but due to lack of a meeting of the minds, mutual mistake, or statute of limitations, the contract was not enforceable). Similarly, CenturyLink never intended to form a contract with the District and so it may not avail itself of a provision from the proposed agreement that it rejected in order to capitalize on the reciprocal fee shifting provision authorized by RCW 4.84.330.

However, CenturyLink contends that a new contract was formed in 1987. This is so, it asserts, because a party to a terminable at will contract can unilaterally modify an existing contract, and because the 1969 contract was modified in 1987 when the parties agreed to a new rate, that modification constitutes a new contract for purposes of RCW 4.84.330. In support of this, CenturyLink relies on Cascade Auto Glass, Inc. v. Progressive Casualty Insurance Co., 135 Wn. App. 760, 145 P.3d 1253 (2006). However, that case involved unilateral modification to an existing contract. See Cascade Auto Glass, 135 Wn. App. at 769. Here, admittedly, "the parties agreed to a new rate." Therefore, Cascade Auto Glass is inapposite.

Finally, CenturyLink contends that it is entitled to fees on equitable grounds. Specifically, it asks that we apply the equitable principle of mutuality of remedies. Although Washington courts have applied this principle, Kaintz v. PLG, Inc., 147 Wn. App. 782, 197 P.3d 710 (2008), Mt. Hood Bev. Co v. Constellation Brands, Inc., 149 Wn.2d 98, 63 P.3d 779 (2003), Park v. Ross Edwards, Inc., 41 Wn. App. 833, 706 P.2d 1097 (1985), those decisions were reached where bilateral attorney fees provisions precluded RCW 4.84.330 from applying (Park and Kaintz) and where a different statute applied (Mt. Hood Bev. Co.). Thus, where other contractual or statutory provisions have rendered RCW 4.84.330 inapposite, courts have sometimes applied the equitable principle of mutuality of remedies. No such provisions are present here. The statute only permits reciprocal fee shifting for contracts entered into after September 21, 1977. Applying the equitable remedy requested here would be tantamount to excising words from the statute and, even more troubling, would risk allowing the equitable remedy to swallow the statutory rule. We decline to award fees to CenturyLink on equitable grounds.

Comcast and Charter also seek attorney fees on appeal pursuant to prior contracts with the District. Just as CenturyLink does, they assert that the reciprocal fee-shifting provision of RCW 4.84.330 entitles them, as prevailing parties, to attorney fees. Unlike CenturyLink's contract, however, both Comcast's and Charter's contracts were entered into after September 21, 1977. Accordingly, if, on remand, they are prevailing parties, then they will be able to

avail themselves of the reciprocal fee-shifting provision in RCW 4.84.330.[53]

Affirmed in part. Reversed and remanded in part.

Dwyer, J.

We concur:

Verellen, A.C.J.

Becker, J.

[53] Keeping in mind, of course, that the District is already the prevailing party with regard to the litigation over the nonrate terms and the rate charged through June 12, 2008.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, a Washington Corporation, Respondent, v. COMCAST OF WASHINGTON IV, INC., a Washington corporation; CENTURYTEL OF WASHINGTON, INC., a Washington corporation; and FALCON COMMUNITY VENTURES I, L.P., a California limited partnership, d/b/a CHARTER COMMUNICATIONS, Appellants.	DIVISION ONE No. 70625-0-I ORDER GRANTING MOTION FOR RECONSIDERATION IN PART, AMENDING OPINION, AND DENYING FURTHER RELIEF

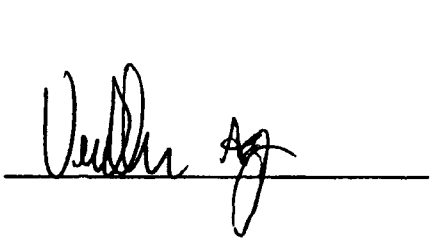
The appellant, CenturyTel of Washington, Inc., having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be granted in part only insofar as the opinion, filed on October 13, 2014, is changed as follows:

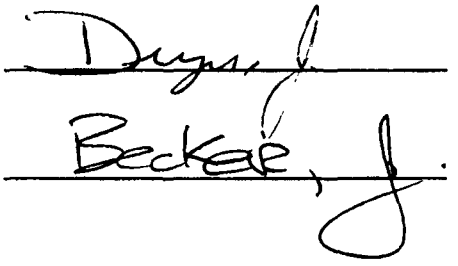
Footnote 21 of the opinion shall be changed to read as follows:

> In addition, CenturyLink argues that the question of appropriate fees is rendered ambiguous in the agreement. This is so, it asserts, because section 3.1 indicates that the parties are to look to Appendix A to the agreement to determine applicable fees, but that Appendix A refers the parties back to section 3.1. Given that the attachment fee rates are prominently displayed in Appendix A, as to those fees, CenturyLink's reading is willfully blind. Moreover, while the appropriate fees for other work described in Appendix A are not included in Appendix A, they are provided within other sections of the proposed agreement. There is no ambiguity.

The remainder of the opinion shall remain the same.

Dated this 10th day of February, 2015.





IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, a Washington Corporation, Respondent, v. COMCAST OF WASHINGTON IV, INC., a Washington corporation; CENTURYTEL OF WASHINGTON, INC., a Washington corporation; and FALCON COMMUNITY VENTURES I, L.P., a California limited partnership, d/b/a CHARTER COMMUNICATIONS, Appellants.	DIVISION ONE No. 70625-0-I ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION

The appellants, Comcast of Washington IV, Inc. and Falcon Community Ventures I, L.P., having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

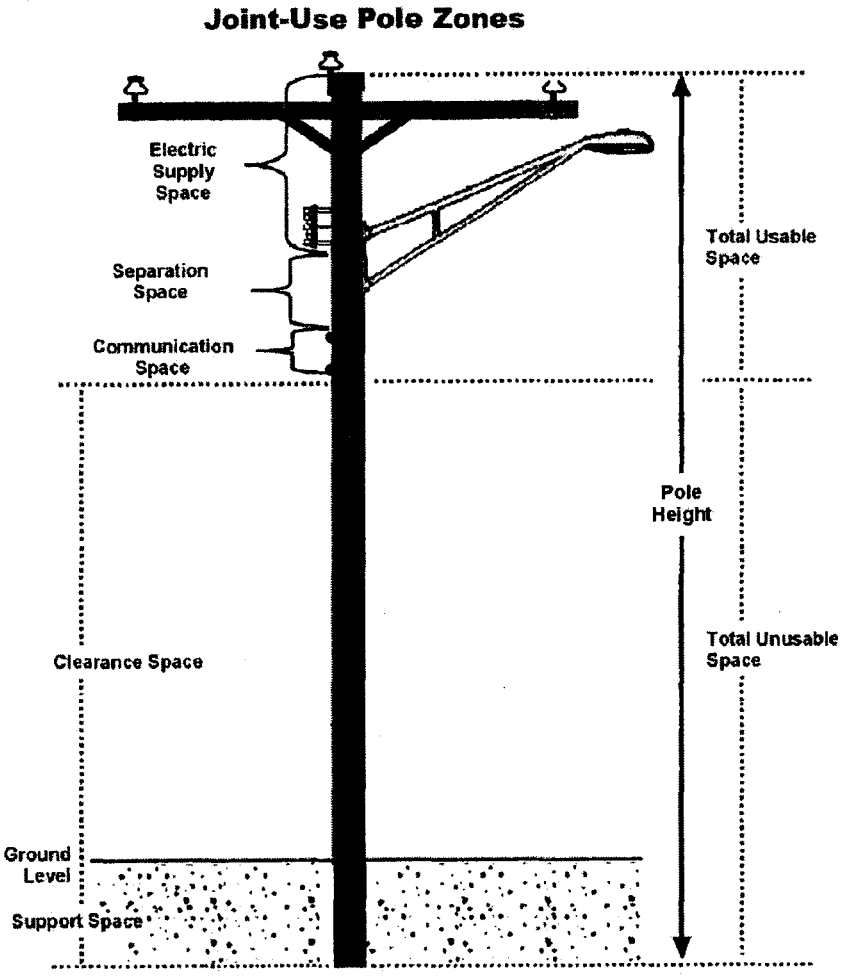
ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 10th day of February, 2015.

FOR THE COURT:

Judge

ILLUSTRATION OF JOINT USE POLE



RCW 54.04.045 provides:

(1) As used in this section:

(a) "Attachment" means the affixation or installation of any wire, cable, or other physical material capable of carrying electronic impulses or light waves for the carrying of intelligence for telecommunications or television, including, but not limited to cable, and any related device, apparatus, or auxiliary equipment upon any pole owned or controlled in whole or in part by one or more locally regulated utilities where the installation has been made with the necessary consent.

(b) "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association, or cooperatively organized association, which is authorized to construct attachments upon, along, under, or across public ways.

(c) "Locally regulated utility" means a public utility district not subject to rate or service regulation by the utilities and transportation commission.

(d) "Nondiscriminatory" means that pole owners may not arbitrarily differentiate among or between similar classes of licensees approved for attachments.

(2) All rates, terms, and conditions made, demanded, or received by a locally regulated utility for attachments to its poles must be just, reasonable, nondiscriminatory, and sufficient. A locally regulated utility shall levy attachment space rental rates that are uniform for the same class of service within the locally regulated utility service area.

(3) A just and reasonable rate must be calculated as follows:

(a) One component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities and uses that remain available to

the owner or owners of the subject facilities;

(b) The other component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to the share, expressed in feet, of the required support and clearance space, divided equally among the locally regulated utility and all attaching licensees, in addition to the space used for the pole attachment, which sum is divided by the height of the pole; and

(c) The just and reasonable rate shall be computed by adding one-half of the rate component resulting from (a) of this subsection to one-half of the rate component resulting from (b) of this subsection.

(4) For the purpose of establishing a rate under subsection (3)(a) of this section, the locally regulated utility may establish a rate according to the calculation set forth in subsection (3)(a) of this section or it may establish a rate according to the cable formula set forth by the federal communications commission by rule as it existed on June 12, 2008, or such subsequent date as may be provided by the federal communications commission by rule, consistent with the purposes of this section.

(5) Except in extraordinary circumstances, a locally regulated utility must respond to a licensee's application to enter into a new pole attachment contract or renew an existing pole attachment contract within forty-five days of receipt, stating either:

(a) The application is complete; or

(b) The application is incomplete, including a statement of what information is needed to make the application complete.

(6) Within sixty days of an application being deemed complete, the locally regulated utility shall notify the applicant as to whether the application has been accepted for licensing or rejected. In extraordinary circumstances, and with the approval of the applicant, the locally regulated utility may extend the sixty-day timeline under this subsection. If the application is rejected, the locally regulated utility must provide reasons for the rejection. A request to attach may only be denied on a nondiscriminatory basis (a) where there is insufficient capacity; or (b) for reasons of safety, reliability, or the inability to meet generally applicable

engineering standards and practices.

(7) Nothing in this section shall be construed or is intended to confer upon the utilities and transportation commission any authority to exercise jurisdiction over locally regulated utilities.
[2008 c 197 § 2; 1996 c 32 § 5.]

Intent – 2008 c 197: "It is the policy of the state to encourage the joint use of utility poles, to promote competition for the provision of telecommunications and information services, and to recognize the value of the infrastructure of locally regulated utilities. To achieve these objectives, the legislature intends to establish a consistent cost-based formula for calculating pole attachment rates, which will ensure greater predictability and consistency in pole attachment rates statewide, as well as ensure that locally regulated utility customers do not subsidize licensees. The legislature further intends to continue working through issues related to pole attachments with interested parties in an open and collaborative process in order to minimize the potential for disputes going forward." [2008 c 197 § 1.]

RCW 80.54.040 provides:

A just and reasonable rate shall assure the utility the recovery of not less than all the additional costs of procuring and maintaining pole attachments, nor more than the actual capital and operating expenses, including just compensation, of the utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities, and uses which remain available to the owner or owners of the subject facilities.

47 U.S.C. § 224 provides in pertinent part:

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or

in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in

subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

* * * * * *

47 C.F.R. § 1.1409 provides in pertinent part:

* * * * * *

(e) When parties fail to resolve a dispute regarding charges for pole attachments and the Commission's complaint procedures under Section 1.1404 are invoked, the Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\textit{Maximum Rate} = \textit{Space Factor} \times \frac{\textit{Net Cost of a Bare Pole}}{} \times \textit{Carrying Charge Rate}$$

$$\textit{Where Space Factor} = \frac{\text{Space Occupied by Attachment}}{\textit{Total Usable Space}}$$

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (e)(2)(i) or (e)(2)(ii) of this section.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(ii) of this section:

Rate = Space Factor × Cost
Where Cost in Urbanized Service Areas =
0.66 × (Net Cost of a Bare Pole × Carrying Charge Rate)
in Non-Urbanized Service Areas = 0.44 × (Net Cost of a Bare Pole × Carrying Charge Rate).

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space}}{\text{Occupied}}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(i) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\text{Maintenance and Administrative Carrying Charge Rate}\right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space}}{\text{Occupied}}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

* * * * * *

Table Comparison of Washington and Federal Rate Statutes

Re Usable Space

Washington PUD Rates	Washington Investor-Owned Utility Rates	FCC Cable Rate
A just and reasonable rate must be calculated as follows: One component of the rate **shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses** of the locally regulated utility **attributable to that portion of the pole . . . for the pole attachment,** including a share of the required support and clearance space, ***in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities*** and uses that remain available to the owner or owners of the subject facilities; RCW 54.04.045(3)(a)	**A just and reasonable rate shall assure** the utility the recovery of not less than all **the additional costs of procuring or maintaining pole attachments, nor more than the actual capital and operating expenses**, including just compensation, of the utility **attributable to that portion of the pole . . . used for the pole attachment**, including a share of the required support and clearance space, ***in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities.*** RCW 80.54.040	**[A] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by *multiplying the percentage of the total usable space*,** or the percentage of the total duct and conduit capacity, **which is occupied by the pole attachment *by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.*** 47 U.S.C. § 224(d)(1)

RCW 54.04.045(3)(a) and 47 U.S.C. § 224(d)
Space Factor
in Mathematical Terms

RCW 54.04.045(3)(a) provides:

One component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities and uses that remain available to the owner or owners of the subject facilities

Examining the part of the subsection defining the cost of the entire pole attributable to the space occupied by the attacher, the statute requires that "the space used for the pole attachment" be compared with "all other uses ... and uses that remain available to the owner." This can be expressed as:

$$\frac{\text{Space used for attachment}}{\text{All other uses and uses that remain available}}$$

This compares with the FCC's mathematical formulation of the Cable Rate formula as:

$$\frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$$

47 C.F.R. § 1.1409(e)(2) (2008).

RCW 54.04.045(3)(b) and FCC Telecom Rate Space Factor in Mathematical Terms

3(b)'s Space Factor:

$$\frac{\left[\frac{\text{Unusable Space}}{\text{No. of Attachers}}\right] + \text{Space Occupied}}{\text{Pole Height}}$$

The similarity between this formula and the Space Factor formula in the Telecom Rate is striking. The FCC expresses its Telecom Rate Space Factor as:

$$\frac{\text{Space Occupied} + 2/3 \times \left[\frac{\text{Unusable Space}}{\text{No. of Attachers}}\right]}{\text{Pole Height}}$$

47 C.F.R. § 1.1409(e)(2) (2008).

RCW 54.04.045(3)(b) and APPA Formula in Mathematical Terms

RCW 54.04.045(3)(b)'s Space Factor:

$$\frac{\left[\frac{\text{Unusable Space}}{\text{No. of Attachers}}\right] + \text{Space Occupied}}{\text{Pole Height}}$$

From the APPA Workbook, the APPA Formula:

$$\left[\frac{\text{Space Occupied by Attachment}}{\text{Assignable Space}} \times \frac{\text{Assignable Space}}{\text{Pole Height}} \times \text{Av. Cost of Bare Pole} \times \text{Carrying Charge}\right] + \left[\frac{\text{Common Space}}{\text{Pole Height}} \times \frac{\text{Av. Cost of Bare Pole}}{\text{No. of Attachers}} \times \text{Carrying Charge}\right]$$

Ex. 958.

F1720

POLE RENTAL AGREEMENT

PUBLIC UTILITY DISTRICT NO. 2 of Pacific County, Washington, a municipal corporation, hereinafter called "Licensor", and _____ _____, doing business as ILWACO TELEPHONE COMPANY _____, hereinafter called "Licensee", mutually agree that the following terms and conditions shall govern Licensee's use of Licensor's power poles, appurtenances and right-of-way located in or near _____ _____, State of Washington, as Licensor may, upon application as hereinafter provided, permit Licensee to use:

Section 1. Licensee's use of such poles, appurtenances and rights-of-way shall be confined to supporting those cables, wires, and appliances together with associated messenger cables, and other appurtenances, all hereinafter called "equipment", which Licensor shall have given Licensee written permission hereunder to install; and such equipment shall be used by Licensee only for the purpose of erecting and operating a coaxial cable subscription system for television signal distribution, or erecting or operating a telephone, telegraph or radio telephone system to the homes or business locations of Licensee's subscribers or customers.

Section 2. Licensor may permit Licensee's equipment to attach to poles which are jointly used by Licensor and other utilities in which case Licensee shall be responsible to the other utilities to the same extent as though the equipment of such other utilities were property of Licensor, and Licensee shall indemnify the other utilities against and hold them harmless from any and all damage and liability incident to the installation, presence, maintenance or use of Licensee's equipment upon such jointly used poles. Licensor shall collect and retain all amounts payable by Licensee under the provisions of Section 13 hereof for the privilege of placing and maintaining said equipment upon said jointly used poles.

Section 3. Whenever Licensee shall desire to place equipment upon any of such poles, Licensee shall make written application for permission to do so, in the number of copies and in the form of Exhibit A attached hereto or as may be from time to time prescribed by Licensor. If such application is approved, permission to place the equipment described in such application upon the pole or poles therein identified shall be granted by Licensor by signing one copy of the application in the place provided thereon for that purpose and returning such signed copy to Licensee.

Section 4. Upon receiving such signed copy of such application, but not before, Licensee shall have the right to install, maintain, and use its equipment described in the application upon the pole or poles identified therein; provided, however, that before commencing any such installation Licensee shall notify Licensor of the time when it proposes to do such work sufficiently in advance thereof so that Licensor may arrange to have its representative present when such work is performed, if Licensor so desires.

Section 5. Licensee shall, at its own sole risk and expense and in a workmanlike manner, place and maintain its equipment upon such pole or poles

(a) in a safe condition and in thorough repair,

(b) in a manner suitable to Licensor and so as not to conflict or interfere with the working use of such poles by Licensor or others using such poles, or with the working use of facilities of Licensor or others upon or from time to time placed upon such poles, and

(c) in conformity with Exhibit C attached hereto and with such requirements and specifications as Licensor shall from time to time prescribe, and with all laws, and the regulations, orders and decreees of all lawfully constituted bodies and tribunals, pertaining to pole line construction, including, without limiting the scope of the foregoing, the National Electrical Safety Code.

Section 6.

(a) If in the judgment of Licensor, the accommodation of any of Licensee's equipment would necessitate the rearrangement of facilities on an existing pole or the replacement of any existing pole to provide adequate pole facilities, Licensor will indicate on such application (Exhibit A) the necessary changes and the estimated cost thereof and return it to Licensee; and if Licensee still desires to use such pole and returns the application marked so to indicate, Licensor will provide new pole facilities if required, and Licensor and any other utility owning said facilities shall make such transfers or rearrangements of existing facilities as may be required, all to be done at the sole risk and expense of Licensee, and Licensee, on demand, will reimburse Licensor and each such other owner for the entire expense thereby incurred.

(b) If in Licensor's judgment, Licensee's existing equipment on any pole interferes with or would make substantially more difficult or expensive the placing thereon of any additional facilities required by Licensor and if such additional facilities could be placed upon such pole by removing Licensee's equipment therefrom, or by rearranging the existing facilities (excluding rearrangement of Licensee's equipment alone) thereon, Licensor may notify Licensee in writing of the rearrangements of facilities or pole replacement and transfers of facilities required in order to continue the accommodation of Licensee's equipment, together with an estimate of the cost of making any such changes; and if Licensee desires to continue to maintain its equipment on such pole and so notifies Licensor, Licensor shall make such pole replacement if required, and Licensor and any other utility owning such existing facilities shall make such rearrangements or transfer, all at the sole risk and expense of Licensee, and Licensee, on demand, will reimburse Licensor and each such other owner for the entire expense thereby incurred. If Licensee does not so notify Licensor, Licensee shall be allowed thirty (30) days from such notification by Licensor

within which to remove its equipment from such poles, provided, however, that Licensor in any emergency beyond its control, may require the Licensee to remove its equipment in the time required by such emergency. If Licensee's equipment is not removed from the pole at the end of the thirty (30) day period, or in emergencies when required by Licensor, Licensor may remove Licensee's equipment and Licensee, on demand, will reimburse Licensor for the entire expense thereby incurred.

Section 7. Nothing in this agreement shall be construed to obligate Licensor to grant Licensee permission to use any particular pole or poles. If such permission is refused, Licensee shall be free to make any other arrangement it may with to provide for its equipment at the location in question, but when Licensee establishes facilities independently of those of the Licensor, such facilities of Licensee shall at all times conform to the requirements of the National Electrical Safety Code, except where the lawful requirements of public authorities may be more stringent, in which case the latter shall govern.

Section 8.

(a) In those cases where Licensee's anchorage requirements are not coincident with those of Licensor, Licensee shall, at its own sole risk and expense, place such guys and anchors.

(b) Usually, in those cases where the anchorage requirements of Licensee and Licensor are coincident, the strains of Licensee's equipment and of Licensor's facilities on said poles are not to be held by the same guys and anchors. If requested by Licensor, Licensee, at its own sole risk and expense, shall provide separate guys or anchors, or both, to hold the strains of its equipment upon said poles.

(c) In those cases where any existing guying facilities are inadequate to hold Licensee's strains and separate guying facilities are not desired, or if guying facilities being used by Licensee should be inadequate to hold additional strains of Licensor resulting from the placing of additional facilities on such poles, and said guying facilities would have been adequate to hold the additional strains if Licensee's strains were removed therefrom, Licensor shall cause the existing guying facilities to be replaced with adequate guying facilities at the sole risk and expense of Licensee, and Licensee, on demand, will reimburse Licensor for the entire expense thereby incurred. The ownership of the new guying facilities shall immediately vest in Licensor.

Section 9. Licensor reserves to itself and to each other owner of facilities upon such poles the right to maintain said poles and to operate their facilities thereon in such manner as will best enable them to fulfill their own service requirements, and neither Licensor or any such other owner shall be liable to Licensee for any interruption to Licensee's service or for any interference with the operation of Licensee's equipment arising in any manner from the use of such poles and the facilities thereon by Licensor and each such other owner.

Section 10. Licensee will obtain from public authorities and private owners or real property any and all permits, licenses or grants necessary for the lawful exercise of the permission granted by any application approved hereunder; and Licensee shall submit to Licensor evidence of compliance with the foregoing requirements prior to or at the time of making application for permission to place such equipment upon such pole or poles.

Section 11. Licensee shall at any time, at its own sole risk and expense, upon notice from Licensor, relocate, replace or renew such equipment or transfer it to substituted poles, or temporarily relocate such equipment in order to provide increased clearance, or perform any other work in connection with such equipment that may be required by Licensor; provided however, that in cases of emergency, Licensor may, at Licensee's sole risk and expense, relocate, replace or renew such equipment, transfer it to substituted poles or perform any other work in connection with such equipment that may be required in the maintenance, replacement, removal or relocation of such poles or the facilities thereon or which may be placed thereon, or for the service needs of Licensor, and Licensee, on demand, will reimburse Licensor for the entire expense thereby incurred.

Section 12. Licensee may at any time remove its equipment from any of such poles and, in each such case, Licensee shall immediately give Licensor written notice of such removal in the number of copies and in the form of Exhibit B attached hereto or as may be from time to time prescribed by Licensor. Removal of such equipment from any pole shall constitute a termination of Licensee's right to use such pole.

Section 13. For the privilege of placing and maintaining such equipment upon such poles, Licensee will pay to Licensor semi-annually in advance amounts to be computed on the first days of June and December of each calendar year during the existence of this agreement in accordance with the following schedule.

$2.00 per year rental per contact. (A contact shall be defined to mean each pole, or appurtenance of Licensor to which is attached equipment of Licensee)

By giving six (6) months notice to Licensee, Licensor may from time to time increase or decrease the rate specified in Section 13 effective as of the date on which the semi-annual payment hereinabove provided for is to be computed next following the expiration of said six months. If such changed rate is not acceptable to Licensee, Licensee may terminate this agreement as hereinafter provided.

Section 14. No use, however extended, of any of such poles under this agreement shall create or vest in Licensee any ownership or property rights therein, but Licensee's rights therein shall be and remain a mere license, which as to any particular pole or poles may be terminated at any time by Licensor upon thirty (30) days' written notice to Licensee, and Licensee shall remove its equipment from such pole or poles within said thirty (30) days, provided

however, that in cases where Licensor, for reasons beyond its control, cannot maintain a pole or poles in the existing location for such thirty (30) days Licensee will remove its equipment in the time required by Licensor. Nothing herein contained shall be construed to compel Licensor to maintain any particular pole or poles for a period longer than demanded by its own service requirements.

Section 15. Licensee will exercise special precautions to avoid damage to the facilities of Licensor and others supported on such poles; and Licensee assumes all responsibility for any and all loss from such damage. Licensee will make an immediate report of the occurrence of any such damage to the Licensor and the owner of the damaged facilities and, on demand, will reimburse said owner for the entire expense incurred in making repairs.

Section 16. In furtherance of the purposes of laws, rules, and regulations relating to the security of communications, espionage, sabotage and subversive activities, Licensee agrees as follows:

(a) To file with the local manager of Licensor a list of the names of all of Licensee's employees, agents, and contractors who may have occasion to perform work on or about any of such poles under this agreement, and from time to time to file with said manager supplemental lists thereof to reflect changes in personnel.

(b) To provide suitable identification of each such employee, agent, or contractor.

(c) To cause each such employee, agent, and contractor to observe faithfully and to comply strictly with all general security rules which Licensor reasonably may find necessary or advisable in the premises.

(d) Not to assign any work on or about such poles to any such employee, agent, or contractor who, in the judgment of Licensor or any governmental authority having jurisdiction, is a bad security risk.

Section 17. In addition to all other indemnity and assumption of liability provisions herein contained, it is further expressly agreed that

(a) Licensee shall compensate Licensor for any damage to Licensor's property resulting directly or indirectly from the installation, presence, use, maintenance, repair or removal of Licensee's equipment except such damage, if any, as may result to Licensor's poles in attaching Licensee's equipment thereto and removing it therefrom in a proper and workmanlike manner approved by the Licensor;

(b) Licensor shall not be liable for any damage to Licensee's equipment or for any interruption or disturbance of or interference with Licensee's services to any of its

subscribers occasioned by any act or omission of Licensor, its agents or employees, or by defects or failures of Licensor's equipment and poles, or by electricity used or transmitted by Licensor;

(c) Licensee further agrees to indemnify and hold harmless Licensor, its agents and employees, from any and all claims of any kind or nature, loss, damage, injury, or death to any person or persons whomsoever, or property rights, arising from or in any way connected, either directly or indirectly, with the Licensee's installation, occupancy, presence, use, or maintenance of Licensee's equipment, facilities, or service on or over the Licensor's poles or right-of-way. Said indemnity and hold harmless shall apply equally to cost, expenses and attorneys fees incurred by the Licensor, and to such claim of any kind or nature, loss, damage, injury, death, or liability caused by or resulting in any manner from any acts or omissions, negligent or otherwise, of the Licensor, its agents or employees, causing damage or injury to the Licensee or any other person or person whomsoever, or property, when in any way directly or indirectly, connected with or related to the activities of the Licensee or from the operation, maintenance, and transmission of Licensee's cable system.

Section 18. Throughout the life of this agreement Licensee will maintain in full force and effect with a carrier or carriers selected by Licensee and satisfactory to Licensor:

(a) Compensation Insurance under and in compliance with all Workmen's Compensation Insurance and Safety Laws of the State of Washington and amendments thereto;

(b) Bodily Injury Liability Insurance with limits of $100,000 each person, and $200,000 each occurrence; and

(c) Property Damage Liability Insurance with limits of $50,000 each accident, and $100,000 aggregate.

The insurance described in (b) and (c) above shall also provide contractual liability coverage for the benefit of and satisfactory to Licensor with respect to liability assumed by Licensee under the provisions of foregoing Section 17. Written proof of compliance with the requirements of this section shall be filed with and approved by Licensor prior to the installation of any of Licensee's equipment upon Licensor's poles and prior to the expiration of each policy year thereafter.

Section 19. In the event Licensor brings any action or suit against Licensee for breach of this entire agreement, Licensor shall be entitled to recover, in addition to any judgment or decree for costs, such sum as the court shall judge reasonable as attorney's fees.

$10,000 Performance Bond waived per motion by Board of Commissioners 5/5/69

Section 20. Licensee will furnish a bond issued by a company selected by Licensee and satisfactory to Licensor in the amount of $10,000 to cover the faithful performance by Licensee of all of the terms and provisions of this agreement on its part to be performed.

Section 21. If Licensee should default in any of its obligations under this agreement and such default shall continue for thirty (30) days after written notice thereof, Licensor may, by written notice to Licensee, forthwith terminate its participation under this agreement or forthwith terminate any or all permits granted by it hereunder, in which event Licensee shall be allowed thirty (30) days from such notification within which to remove its equipment from the poles to which such termination applies.

If Licensee should default in the removal of its equipment from any pole within the time allowed for such removal or should default in the performance of any other work which it is obligated to do under this agreement, Licensor may elect to do such work at Licensee's sole risk and expense, and Licensee, on demand, will reimburse Licensor for the entire expense thereby incurred.

The failure of Licensor to enforce any provision of this agreement or the waiver thereof in any instance shall not be construed as a general waiver, relinquishment or estoppel on its part of any such provision but the same shall nevertheless be and remain in full force and effect.

Section 22. All amounts payable by Licensee to Licensor or others under the provisions of this agreement shall, unless otherwise specified, be payable within thirty (30) days after presentation of invoices, statements or charges therefor. Non-payment of any such amount when due shall constitute a default by Licensee under this agreement.

Section 23. Licensor has not and shall not grant any exclusive right, permit or privilege to Licensees and nothing herein contained shall be construed as affecting any rights or privileges previously conferred or which may be conferred hereafter by Licensor, by contract or otherwise, to others not parties to this agreement to use any poles covered by this agreement; and Licensor shall have the right to continue and extend such rights or privileges. The privileges herein granted to Licensee shall at all times be subject to any such existing contracts and arrangements and to any contracts and arrangements hereafter conferred from date hereof by Licensor.

Section 24. Unless sooner terminated as herein provided this agreement shall continue in effect from year to year, provided that at the expiration of one (1) year from the date hereof, or at any time thereafter, either party hereto may terminate the agreement in whole or in part by giving the other party at least six (6) months' written notice to that effect. At the expiration of such six (6) months, all rights and privileges of Licensee as to the poles affected by said notice shall forthwith terminate. Licensee shall remove its equipment from the poles within such six (6) months and if it fails to do so Licensor may remove same or have it removed at Licensee's risk and expense.

Any termination of this agreement in whole or in part shall not release Licensee from any liability or obligation hereunder, whether of indemnity or otherwise, which may have accrued or which may thereafter accrue or which arises out of any claim or claims that may have accrued or thereafter accrue under the terms of this agreement.

Section 25. Licensee shall not assign, transfer or sublet any privilege granted to it hereunder without the prior consent in writing of Licensor, but otherwise this agreement shall insure to the benefit of and be binding upon the heirs or successors and assigns of the parties hereto.

Section 26. In the event it is necessary to relocate television appurtenances to provide clearance for fire alarm, signal purposes, or telephone circuits, the expense involved shall be borne by Licensee.

Section 27. Wherever in this agreement notice is provided or required to be given by one party hereto to another, such notice shall be in writing and transmitted by United States mail or by personal delivery to Licensor at its office at Raymond, Washington and to Licensee at its office at _____, Washington, or to such other address as Licensor or Licensee may, from time to time, designate for that purpose by written notice to the other party.

Dated at RAYMOND, Washington, this 19th day of MAY, 1969.

PUBLIC UTILITY DISTRICT NO. 2
of Pacific County, Washington

ATTEST:

Secretary

President

LICENSOR

Ilwaco Telephone Company

By _____
President

ATTEST:

Nora Jane Saunders
Assistant Secretary

LICENSEE

(EXHIBIT A)

No. _____

APPLICATION AND PERMIT

_____

_____

_____

In accordance with the terms of the agreement dated _____, 19___, covering use of poles in and near _____, we hereby request permission to place and maintain certain equipment upon certain poles, all as more particularly described and delineated on a sketch and diagram attached.

SKETCH AND DIAGRAM: Include data as to pole locations and pole and gain numbers and kind and position of equipment sufficient to identify the poles and to describe the equipment and its position on each pole.

Dated: _____, 19___.

_____

By_____

LICENSEE

Permission is hereby granted to place the above-described equipment on the above-identified poles (see attached sketch and diagram), subject to the terms and conditions of the above-mentioned agreement, and subject to receiving authorization to make, at your sole risk and expense, the changes and rearrangements detailed on the attached sheet estimated to cost $_____.

Dated: _____, 19___.

_____

By _____

LICENSOR

You are hereby authorized to make the above-mentioned changes and rearrangements at our risk and expense.

Dated: _____, 19___.

_____

By_____

LICENSEE

(EXHIBIT B)

No. _____

NOTICE OF REMOVAL OF EQUIPMENT

_____

_____

_____

In accordance with the terms of the agreement dated _____ _____, 19____, covering use of poles in and near _____ _____, you are hereby notifed that on _____ 19___, we removed certain attachments from certain of your poles, all as more particularly described and delineated on the sketch and diagram attached.

SKETCH AND DIAGRAM: Include data as to pole locations and pole and gain numbers and kind and position of equipment sufficient to identify the poles and to describe the equipment.

Dated: _____, 19____.

_____

By _____

LICENSEE

Removal verified, _____, 19____.

_____

By_____

LICENSOR

(EXHIBIT C)

CONSTRUCTION SPECIFICATIONS

FOR TELEVISION ANTENNA SYSTEMS ON POLE LINES

I. GENERAL

Construction of television antenna systems on pole lines shall conform to the laws of the State of Washington, orders of the Public Utilities Commission of said State, rules and regulations of other legally authorized bodies having jurisdiction, and the requirements of Licensor, insofar as any or all of the foregoing may be applicable.

The following instructions shall be used as a basis for placing television antenna systems on pole lines of Licensor, including jointly used poles. For construction and clearance requirements, the television cable is considered a communication cable.

The television cable shall be attached to poles below secondary wire conductors and drop wire.

II. CONSTRUCTION REQUIREMENTS

(a) Material

The strand, strand clamps, wire, bolts, drive screws, clamps, etc. employed to attach or support television antenna systems to pole lines shall conform to standard pole line hardware specifications insofar as strength and corrosion resistance are concerned. Pole mounted equipment should be housed in substantial galvanized steel boxes, with brackets suitable for mounting on crossarms. Strand bond wires shall be not less than No. 6 solid copper wire.

(b) Supporting Strand for Television Cable to be Attached to Cable Arm

The television line cable shall be supported by a suitable strand and the cable shall be attached to the strand by means of cable rings, lashing wire, or other suitable supports, in order that clearances and other National Electrical Safety Code requirements shall be met. Strand supporting television cable crossing over railroads shall have a minimum breaking strength of 6,000 pounds.

(c) Drops

Coaxial cable should be used for television drops rather than parallel conductor ribbon. The drop shall be fastened to the supporting messenger at intervals not to exceed 30-inches and clear service drops not less than 24-inches. The house end of the messenger shall be insulated from the structure by a suitable porcelain knob or other approved insulator.

(d) Climbing Space

Television cable, drops and equipment shall be so placed on poles as to leave a free climbing space 48-inches square, 4 feet above and below the attachment level, and so arranged as to constitute a continuation of existing climbing space through telephone and power facilities.

(e) Guying

Guys shall meet all clearance and grounding or insulating requirements. Guying shall be adequate to support the resultant loads of the television attachments with the safety factors given in the applicable National Electrical Safety Code.

III. CLEARANCE REQUIREMENTS

Clearance requirements for television plant shall be the same as for telephone plant. This is applicable to horizontal and vertical clearances from ground, rails, buildings, foreign wires on poles or between conductors. All required minimum vertical clearances between television cables and telephone cables or conductors and power conductors at poles shall also be maintained throughout the span.

(a) The following minimum clearances shall be maintained between power plant and television cable on poles and in the spans:

(1) Attached to Pole - The television cable shall be supported by a four-foot cable arm attached to the pole not less than 40" below secondaries and cable supported on the field side of the pole. Cables must be 24" from the center line of the pole.

(2) Joint Use of Poles - Where pole is owned by Licensor, Licensee will not be permitted to use telephone company plant unless specifically authorized to do so by the company.

Where existing facilities or space limitations make it impracticable to place the television cable in accordance with (1) or (2) above, agreement of Licensor shall be obtained for the rearrangement of existing facilities to provide proper clearance at Licensee's expense.

(b) Licensor's Service Drops - The radial clearance between 0-750 volt service drop conductors and television service drops shall be not less than 24-inches except that where within 15 feet of the point of attachment of either service drop on a building the 24-inch clearance requirement may be reduced to 12-inches.

(c) Other Equipment - Television line and distribution amplifier housings must be galvanized metal and shall be so placed that they will meet climbing space and clearance requirements.

IV. PROTECTION REQUIREMENTS

(a) Grounding and Bonding

(1) General - The outer conductor or coaxial cables, and the strand which supports such cables, shall at all times be electrically continuous throughout the system. Television drop wire support strands shall be bonded to the television line cable support strand.

(2) At Television Antenna Mast - The outer conductor of the coaxial cable shall be electrically connected to the booster amplifier chassis which, in turn, shall be effectively grounded. An effective ground would be a suitable counterpoise (buried wire, driven rods, etc.)

(3) At Poles Which Support Telephone Company Cable - Television cable strand shall be bonded to telephone company strand at the first and last poles supporting both telephone cable and television cable and at every tenth pole between, except that if the remaining section contains 13 poles or less, the ground at the tenth pole may be omitted; or in accordance with telephone company requirements.

(4) At Television Line Amplifiers - Where telephone company strand is not available for bonding the television strand and there are no intermediate television service cables or line bridging amplifiers between three or more consecutive line amplifiers, the television strand shall be effectively grounded at every line amplifier.

(5) Inside Buildings - The outer conductor of the coaxial cable including service cable shall be effectively grounded at the buildings as close as practicable to the point of entrance.

(6) Other - All metal amplifier cases shall be bonded to the television cable strand.

(b) Fuses

120 volt services shall be provided with overcurrent protection by the customer satisfactory to serving agency at the television line amplifier and distribution amplifier housings.

V. ELECTRIC SERVICE REQUIREMENTS

(a) Conductors to television line amplifier or distribution amplifier housings which are mounted on the pole approximately ten feet above ground shall be single conductor, 600 volt, type TW, No. 10 AWG minimum copper, in conduit.

(b) Conductors to television distribution amplifier housings which are mounted in the communication level shall be 600 volt, moisture resistant, No. 10 AWG minimum copper. Conductor shielding shall be electrically continuous to the television distribution amplifier housing.

(c) All electric service required by Licensee will be supplied by Licensor and Licensor's charges therefor shall be based on the rates and provisions of its applicable tariff. If shielded or other special types of service wire or cable not normally used by Licensor should be required for connection to Licensee's facilities, all such special service wire or cable will be provided and maintained by Licensee at its own expense.

Excerpts of Trial Testimony of Douglas Miller

General Manager of Pacific County Public Utility District No. 2

(Oct. 1, 2010 RP)

97:12 What pole attachment -- I'm going to move away
97:13 from these exhibits for the moment. What pole
97:14 attachment rates was the district charging to attachers
97:15 on its poles prior to January 2007?
97:16 A. $5.75 per attachment for cable TV providers
97:17 and $8 per attachment for telephone companies.

* * * * * *

98:19 When was the last time that the PUD had
98:20 increased its pole attachment rates before early
98:21 January 2007?
98:22 A. That would have been in 1987.

Valenstein, Jill

From: Mark Hatfield [markh@pacificpud.org]
Sent: Wednesday, January 17, 2007 5:11 PM
To: Jill M Valenstein; Doug Miller
Subject: RE: List of Issues

Charter currently pays $5.75 per pole and has since 1987.

From: Jill M Valenstein [mailto:JillValenstein@dwt.com]
Sent: Wednesday, January 17, 2007 2:06 PM
To: Mark Hatfield; Doug Miller
Subject: RE: List of Issues

Also, can you please let me know what the rate is now and how long that rate has been in effect. I apologize if you have already provided me with this information.
Thanks,
Jill

From: Mark Hatfield [mailto:markh@pacificpud.org]
Sent: Wednesday, January 17, 2007 5:02 PM
To: Doug Miller; Jill M Valenstein
Subject: RE: List of Issues
Jill
To answer your questions regarding the number of poles that charter attaches to, as of the last billing there were 356 in the Naselle, Wa area and 2,425 in Long Beach, Wa.
Mark

From: Doug Miller
Sent: Wednesday, January 17, 2007 1:58 PM
To: 'Jill M Valenstein'; Mark Hatfield
Subject: RE: List of Issues

Jill,
It has been twenty years since the P.U.D. raised pole attachment rates. The Board secured the services of an independent consultant in 2005 to perform a pole attachment rate study. The consultant utilized the four recognized pole attachment methodologies; FCC, Modified FCC, APPA, and WPUDA. The results of this study produced rates ranging from $20.65 per attachment to $39.21 per attachment. The values used in the different methodologies were actual values for our P.U.D., the cost of money, price for installed poles of different sizes, etc., so yes the figures are cost based. The Board opted to adopt a rate that was lower than any of those determined using the different formulas by the consultant in 2005, that being $19.70 per attachment. However, since it had been twenty years since rates were modified and the increase was considerable, the Board selected a lower rate, $13.25 per attachment, for the first year and $19.70 for the next four years. In fact, had we adjusted pole attachment rates for each year by inflationary amounts, the rate would have been greater than the $19.70 per attachment figure. According to the study finalized two years ago, the P.U.D. is not even covering costs for pole attachments!
Hope this explanation is helpful.
Doug

From: Jill M Valenstein [mailto:JillValenstein@dwt.com]
Sent: Wednesday, January 17, 2007 11:39 AM
To: Mark Hatfield
Cc: Doug Miller
Subject: RE: List of Issues

Mark,
The process itself is confusing the way it's written in the agreement and I want to understand exactly what Charter is supposed to do, particularly if you are waiving the PE Stamp requirement. As the language is currently written, Charter is supposed to do all the engineering and then pay to have you engineer as well. I'm not sure if that's what you intend, particularly if you are waiving the PE Stamp requirement. Charter needs to understand exactly what's expected of it during permitting and I think that should be reflected in the Agreement (with the understanding that the PE requirement would be waived in the Addendum). I think we spoke about this during the call. In the Douglas PUD agreement we stream-lined and clarified the process. I think we need to do that here as well for the benefit of all parties concerned.
Also, I want to know what the application permitting fees are supposed to recover.
With regard to rates, I don't see how your board can justify such a huge rate and then such a huge increase in a year. The PUD's rates are required to be just and reasonable (i.e., cost-based) and I don't believe it is possible that the PUD's rates could be so high in 2007 or that you could predict your costs for 2008. Do you know how many poles you are billing us for now?
Jill

From: Mark Hatfield [mailto:markh@pacificpud.org]
Sent: Wednesday, January 17, 2007 2:17 PM
To: Jill M Valenstein
Cc: Doug Miller
Subject: RE: List of Issues
Jill...
Thanks for getting back to me on this.
Could you please provide some more detail on Charter's issue with the permit process/application fees?
Regarding rental rate, the rate structure in the agreement has been through the rate hearing process and approved by our commissioners. This rate structure went into effect on Jan 1, 2007 and should not be considered part of the discussion regarding terms of the attachment agreement.
Mark

From: Jill M Valenstein [mailto:JillValenstein@dwt.com]
Sent: Wednesday, January 17, 2007 6:20 AM
To: Mark Hatfield; Gary.Lee@chartercom.com
Cc: Doug Miller; Lee, Gary
Subject: RE: List of Issues

Mark,
I compared your list of Major Issues to mine. I would add that, from Charter's perspective, additional Major Issues to be discussed (*not* including the word changes I have suggested to certain sections) are: Permitting Process (including what do permit application fees cover?) and Rental Rate.
Let me know when you would like to discuss the remaining issues.
Thanks,
Jill

size=2 width="100%" align=center tabIndex=-1>
From: Mark Hatfield [mailto:markh@pacificpud.org]
Sent: Friday, January 12, 2007 12:54 PM
To: Jill M Valenstein; Gary.Lee@chartercom.com
Cc: Doug Miller
Subject: List of Issues

Jill & Gary...

Thank you for your participation and feedback during our recent discussions.

The attached document contains a list of the outstanding issues we need to resolve before we can execute the pole agreement. The list is based on issues identified during last weeks's meetings with each of our existing licensees.

I'd like to use this as a punch list to track our progress towards completion of the agreement, so please get back to me as soon as you can with any major issues I may have overlooked.

Thanks, Mark

Mark Hatfield
Finance Manager
P.U.D. No. 2 of Pacific County
markh@pacificpud.org
360.942.2411 Ext. 905

<<Major Licensee Issues with Pole Attachment Agreement as of 1.doc>>

In a strategic partnership designed to bring together two extraordinary law firms, Cole, Raywid & Braverman LLP merged with the national law firm of Davis Wright Tremaine LLP <http://www.dwt.com/> , effective January 1, 2007.

Please update your contact information with my new DWT email address. For the time being all other contact information such as my telephone number and physical address will remain the same as they have been.

In a strategic partnership designed to bring together two extraordinary law firms, Cole, Raywid & Braverman LLP merged with the national law firm of Davis Wright Tremaine LLP <http://www.dwt.com/> , effective January 1, 2007.

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HONORABLE MICHAEL J. SULLIVAN
Hearing Date: September 16, 2011 at 10:30 a.m.

2011 DEC 12 PM 4:02

SUPERIOR COURT OF WASHINGTON FOR PACIFIC COUNTY

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, a Washington Corporation, Plaintiff, v. COMCAST OF WASHINGTON IV, INC., a Washington corporation; CENTURYTEL OF WASHINGTON, INC., a Washington corporation; and FALCON COMMUNITY VENTURES, I, L.P., a California limited partnership, d/b/a CHARTER COMMUNICATIONS, Defendants.	CAUSE NO. 07-2-00484-1 ~~[PROPOSED]~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

This case came on for trial without a jury before the above Court beginning October 4, 2010. Plaintiff, Public Utility District No. 2 of Pacific County (the "District", the "PUD", or "Pacific PUD"), was represented by Donald S. Cohen of Gordon Thomas Honeywell LLP and James B. Finlay. Defendant Comcast of Washington IV, Inc., ("Comcast") and Defendant Falcon Community Ventures, I, L.P. d/b/a Charter Communications ("Charter") were represented by John McGrory, Eric Stahl, and Jill

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1980s with respect to Comcast and Charter, and the 1950s and 1960s with respect to CenturyTel.

8. In February 2006, the District provided written notice as required under the assigned agreements of the District's intent to terminate those agreements. The letter also advised Defendants that the District planned to implement new pole attachment rates effective January 1, 2007, and that the District would be providing a copy of a new pole attachment agreement for Defendants' review.

9. The Comcast and Charter Agreements with the District were terminated effective August 21, 2006. The District and CenturyTel subsequently agreed on a December 31, 2006 termination date for the two CenturyTel/District agreements.

10. On January 2, 2007, at a Commission meeting open to the public, the District adopted Resolution No. 1256, which revised the District's pole attachment rates to $13.25 per year effective January 1, 2007 and $19.70 per year effective January 1, 2008.

11. Resolution No. 1256 followed a pole attachment rate study performed by a Pacific Northwest-based outside consultant, EES Consulting, as well as District management analysis and recommendation, briefings at District Commission meetings which were open to the public, and two public hearings.

12. Prior to the adoption of Resolution No. 1256, the District's pole attachment rates had remained unchanged since 1987 at $8.00 per year for telephone companies and $5.75 per year for cable companies.

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