Supreme Court No. 97169-2

Court of Appeals No. 77310-1-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,

Appellants.

PETITIONER'S ANSWER TO AMICI CURIAE MEMORANDA OF THE WASHINGTON INDEPENDENT TELECOMMUNICATIONS ASSOCIATION AND THE ASSOCIATION OF WASHINGTON BUSINESS

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I. ANSWER

CenturyLink of Washington, Inc., formerly known as CenturyTel of Washington, Inc. ("CenturyLink"), files this Answer[1] to Amici Curiae Memoranda of the Washington Independent Telecommunications Association ("WITA")[2] and the Association of Washington Business ("AWB") pursuant to the July 12, 2019 letter from the Supreme Court Commissioner and RAP 10.1(e).

The filing of amici curiae briefs by two important trade associations in support of CenturyLink's Petition is, in and of itself, strong evidence that the Petition involves an issue of substantial public interest, *see* RAP 13.4(b)(4), and is not an "unseemly" and "disrespectful" attack on the Court of Appeals' opinion as previously characterized by the District. WITA is the largest trade association of local providers of telecommunications and internet services in rural portions of Washington. WITA Amicus Brief at 1. AWB is the oldest and largest business membership federation in Washington, representing approximately 7,000 Washington companies that employ approximately one quarter of the state

[1] For the Court's ease of review, Petitioner will address both of WITA and AWB's amicus curiae briefs in this Answer.

[2] CenturyLink is not a member of WITA. CenturyTel of Washington, Inc., was a member of WITA before it merged with another entity and became CenturyLink almost a decade ago.

workforce. AWB Amicus Brief at 2. On behalf of their members, WITA and AWB echo CenturyLink's deep concern that the Court of Appeals' improper approval of the District's arbitrary and capricious use of inputs when calculating statutory pole attachment rates will have lasting negative effects on businesses both in the telecommunications industry and more broadly.

For example, both AWB and WITA discuss the negative effects of the Court of Appeals' decision on broadband internet expansion. As noted by AWB, the FCC emphasized the importance of broadband internet expansion throughout America in its comprehensive National Broadband Plan.[3] AWB Amicus Brief at 4-7. The National Broadband Plan concluded that access to broadband internet by all Americans is critical to creating a "high-performance America."[4] However, it noted that broadband expansion faces "significant" challenges from high pole attachment rates set by state and local governing bodies.[5] To counter this challenge to broadband expansion, the National Broadband Plan

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[3] *See* Appendix A to AWB's Amicus Brief for relevant portions of the FCC's Broadband Plan.

[4] AWB Appendix A at 18.

[5] *Id.* at 18-19.

encourages state and local governing bodies to set pole attachment rates as low as possible.[6]

Similarly, WITA discussed Washington's Broadband Bill enacted during the 2019 legislative session. WITA Amicus Brief at 2-3. Washington's Broadband Bill passed the Washington House and Senate with overwhelming bipartisan support and is designed to encourage and advance the deployment of broadband services throughout rural portions of Washington.[7] As WITA noted, the Broadband Bill cites to the FCC's Broadband Plan and reiterates the importance of following the policy recommendations stated therein.[8]

CenturyLink does not contend -- and does not believe the amici contend -- that the National Broadband Plan and Washington's Broadband Bill themselves affect the interpretation of RCW 54.04.045. Rather, the Court should take note of the National Broadband Plan and the Broadband Bill because they demonstrate how important the Court of Appeals' improper deference to the District's inputs will be on the critical issue of broadband internet expansion in Washington. Thus, while these

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[6] *Id.*

[7] Broadband Internet Service Access, Ch. 365 (2019).

[8] *Id.* at Sec. 1(4)(a)-(d).

developments do not bear on the proper interpretation of RCW 54.04.045, the do directly bear on the question whether the Court of Appeal's unduly deferential decision should be reviewed by this Court. As WITA and AWB note, the District's arbitrary and capricious inputs will drive up the cost of pole attachment rates, "diminishing the ability of telecommunication providers. . . to deploy broadband capacity," at the exact moment when the federal and state governments urge the opposite. WITA Amicus Brief at 2-3; *see also* AWB Amicus Brief at 6-7. That the Court of Appeals' improper approval of the District's inputs involves issues of substantial public interest cannot be ignored.

Moreover, amici agree with CenturyLink that the Court of Appeals' rubber stamp of the District's inputs will have wide reaching effects beyond hampering broadband internet expansion. WITA, contributing the perspective of telecommunications providers other than CenturyLink, agrees that the Court of Appeals gave inappropriate deference to the District's inclusion of safety space, return on equity, and electricity taxes as inputs in the pole attachment rate, because these inputs directly contradicted undisputed fact and the plain wording of RCW 54.04.045. WITA Amicus Brief at 4, 6-9. Such arbitrary and capricious inputs cannot be allowed. *See Lane v. Port of Seattle*, 178 Wn. App. 110,

126, 316 P.3d 1070 (2013) ("Arbitrary and capricious" refers to "'willful and unreasoning action, *taken without regard to or consideration of the facts* and circumstances surrounding the action.'") (emphasis added)

AWB contributes the perspective of Washington businesses generally, who, like CenturyLink, are concerned with the negative effects of the Court of Appeals' decision on the "arbitrary and capricious" standard of review in Washington administrative law. AWB Amicus Brief at 7. As AWB discusses, the issue is not that the Court of Appeals failed to identify the proper standard of review: it is that the Court of Appeals' failed to properly *apply* the standard of review, resulting in an unduly deferential review of the District actions. *Id.* at 10. "Of course, . . . municipal utility authority has limits." *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 695, 743 P.2d 793 (1987). Courts must review municipal utility choices to determine whether the particular action was "arbitrary or capricious, or unreasonable." *Id.* Stated another way, the standard is that "[t]he Court must scrutinize the record to determine if the result was reached through a process of reason, *not whether the result was itself reasonable in the judgment of the Court.*'" *Rios v. Washington Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002) (*citing*

Aviation W. Corp., v. Dep't of Labor & Indus., 138 Wn.2d 413,432,980 P.2d 701 (1999)) (emphasis in original).

In the instant case, the Court of Appeals' opinion lacks any meaningful review of the inputs, and instead summarily approves them. *See, e.g.* Op. 23-24[9] (citing *Pub. Util. Dist. No. 2 of Pac. Cty. v. Comcast of Wash. IV, Inc.*, 184 Wn. App. 24, 73-74, 336 P.3d 65 (2014) ("*PUD I*")) (the Court of Appeals first stated that it had previously dictated that the District has discretion to determine "that which constitutes unusable space" and then jumped to the conclusion that "because, as the District has defined unusable space, something we decided in *PUD I* that the District has the discretion to do, the safety space is unusable."). Such unreasoned approval of arbitrary and capricious conduct by a municipality, in a published opinion, will negatively influence any future challenge to any administrative agency action under the "arbitrary and capricious" standard of review–something that this Court should not allow.

Finally, WITA correctly notes that the decision of CenturyLink's co-defendants not to appeal the Court of Appeals' opinion has no bearing on CenturyLink's Petition. CenturyLink is a telecommunications provider regulated by the Washington Utilities and Transportation Commission

[9] *See* Appendix to Petition at App. 23-24.

("WUTC") under Title 80. *See, e.g.*, Chapter 80.36 RCW *et seq.* (Telecommunications). The WUTC's authority to regulate CenturyLink under Title 80 is largely subject to the "arbitrary and capricious" standard of review. *See, e.g.*, *US W. Commc'ns, Inc. v. Washington Utilities & Transp. Comm'n*, 134 Wn.2d 48, 55–56, 949 P.2d 1321 (1997); *Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 110 Wn. App. 498, 514, 41 P.3d 1212 (2002), *aff'd*, 149 Wash. 2d 17, 65 P.3d 319 (2003). CenturyLink's co-defendants are cable companies that are not regulated under Title 80. Thus, the outcome of this case concerns CenturyLink much more than its co-defendants.

Dated: July 31, 2019.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 31, 2019, I caused to be filed with the Supreme Court of the State of Washington **Petitioner's Answer to Amici Curiae Memoranda of the Washington Independent Telecommunications Association and the Association of Washington Business.** I also served a copy of the foregoing on counsel of record, by sending the same via electronic and U.S. Mail by directing delivery to the following:

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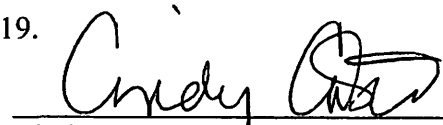

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