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.

WASHINGTON INDEPENDENT TELECOMMUNICATIONS ASSOCIATION AMICUS CURIE BRIEF

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I. BACKGROUND

The Washington Independent Telecommunications Association ("WITA") is a trade association that represents incumbent local exchange carriers providing telecommunications and Internet service in rural areas in the State of Washington. WITA's members include the following companies: Asotin Telephone Company, Consolidated Communications of Washington Company, LLC, Hat Island Telephone Company, Hood Canal Telephone Co., Inland Telephone Company, Kalama Telephone Company, Lewis River Telephone Company, Inc., McDaniel Telephone Co., Pend Oreille Telephone Company, Pioneer Telephone Company, St. John Telephone, Inc., Skyline Telecom, Inc., Tenino Telephone Company, The Toledo Telephone Co., Western Wahkiakum County Telephone Company and Whidbey Telephone Company.

Many of WITA's members[1] have pole attachment agreements with various public utility districts ("PUDs") around the state. Each of those

[1] WITA is aware that two of the defendants, Comcast and Charter, did not seek review of the Court of Appeals' opinion. WITA respectfully submits that the decisions of these two out-of-state corporations have no bearing on the merits of CenturyLink's petition. WITA members are telecommunications providers regulated by the Washington Utilities and Transportation Commission ("WUTC") under Title 80. See, e.g., Chapter 80.36 RCW. The WUTC's authority to regulate telecommunications providers under Title 80 is regularly 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) (the court shall grant relief from a WUTC order in an adjudicative proceeding if it determines that the order is arbitrary or capricious); *Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 110 Wn.App. 498, 514, 41 P.3d 1212 (2002), aff'd, 149 Wn.2d 17, 65 P.3d 319 (2003) (courts shall review for arbitrary and capricious conduct the WUTC's failure to perform a duty that is required by law to be performed). CenturyLink's co-defendants are cable companies that are not regulated under Title 80. In the opinion of WITA's members, public utilities operating throughout the state of Washington, CenturyLink's request for review plainly satisfies the requirement for a substantial public interest as called for by RAP 13.4(b).

pole attachment agreements will be affected by the decision reached by this Court on review.

II. INTRODUCTION

WITA's members provide telecommunications and broadband services throughout the State of Washington. The advancement of broadband in rural areas is a critical issue at this point in our state's history. By way of illustration, the Governor sponsored a Broadband Bill this past legislative session. See, Second Substitute Senate Bill 5511. The bill passed out of the Senate without a single negative vote, evidencing strong bipartisan support. The bill also passed the House with overwhelming support, garnering ninety-seven votes in favor. The bill was signed into law May 13, 2019. It is designated as Laws of 2019 Chapter 365. Among other things, this legislation establishes the State Broadband Office. The role of the Broadband Office is to encourage the deployment of broadband services throughout rural portions of the State. The legislation also includes a broadband grant program to advance the deployment of broadband services in Washington's rural communities.

An important element of economical deployment of broadband services in rural Washington are pole attachment rates. The level of pole attachment rates can have the effect of diminishing the ability of telecommunications providers, such as WITA's members, to deploy

broadband capacity.[2] Therefore, it is very important that the legislative intent for RCW 54.04.045 be properly determined and that intent carried out. The interpretation of RCW 54.05.045 is a matter of first impression in this proceeding.

III. THE INTERPRETATION OF RCW 54.04.045 BY THE COURT OF APPEALS IS INCORRECT

RCW 54.04.045 is predicated on the legislative declaration of policy that "it is the policy of the State to encourage the joint use of utility poles." 2008 Law Ch. 197 § 1. This declaration of policy becomes the guide for the interpretation of the statute. See, e.g., Hearst Corp. v. Hoppe, 90 Wn.2d 123, 128, 580 P.2d 246 (1978). Clearly, allowing a PUD to include items in the calculation of pole attachment rates which are not contemplated by the statute does not encourage joint use of utility poles.

The critical portion of the statute at issue here is RCW 54.04.045(3). This portion of the statute sets out the calculation for the just and reasonable rate for pole attachment. The statute reads as follows:

> (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;

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[2] SSSB 5511 specifically cited with approval the "National Broadband Plan" of the Federal Communications Commission ("FCC"). 2019 Laws c. 365, § 1(4). Excessive pole attachment rates can be such a major impediment to broadband deployment that the National Broadband Plan devotes all of Chapter 6 to the subject. The full title of the plan is "Connecting America: National Broadband Plan." It can be found on the FCC's website at www.fcc.gov/general/national-broadband-plan.

(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.

The critical language for this portion of the analysis is that the rate components set out in RCW 54.04.045(3)(a) and (b) are limited in that they "may not exceed the actual capital and operating expenses of the locally regulated utility . . . ." (Emphasis supplied). In the case of 3(a) the limitation is the actual capital and operating expenses "attributable to that portion of the pole, duct or conduit used for the pole attachment . . ." And, in the case of subsection (b) the limitation is attributable "to the share, expressed in feet, of the required support and clearance space . . ." The important point being that the limitation is to the actual capital and operating expenses, and in particular the expenses attributable to those portions of the infrastructure used for pole attachments .

One error made by the Court of Appeals is that it allowed a return on equity component to be included. Nowhere can a non-profit pubic utility district be seen as having its actual capital and operating expenses include a return on equity. That makes no sense. When a privately owned utility must raise capital, it needs to go to the investment community and attract capital through a sufficient equity return. That is not the case for a non-profit public utility district. It is a governmental entity that does have

equity investors. A return on equity is not part of a PUD's "actual capital and operating expenses."

This distinction, and the legislative intent behind it, is very clear when the formula for setting pole attachment rates for private utilities is brought forth. See, e.g., Harmon v. Dep't. of Soc. and Health Servs., 134 Wn.2d 523, 530, 951 P.2d 770 (1998) (the Court refers to other statutes dealing with the same subject matter in determining legislative intent) and Petition of Little, 95 Wn.2d 545, 547, 627 P.2d 543 (1981) in which the Court determined the intent of a statute by consideration of other statutes relating to the same subject. In the case of private utilities, RCW 80.54.040, like RCW 54.04.045(3), limits the calculation of a pole attachment rate to "actual capital and operating expenses." However, under RCW 80.54.040, the statute expressly includes a component of "just compensation" in setting pole attachment rates.

In the utility context, just compensation includes a return on equity. The seminal case for this proposition is Bluefield Waterworks & Improvement Co. v. Public Serv. Comm'n of W. VA, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923) finding that a public utility is entitled to just compensation. The United States Supreme Court defined just compensation in part as follows: "A public utility is entitled to such rates as will permit it to earn a return on the value of the property it employs for the convenience of the public equal to that generally being made at the same time and in the same region of the country." 262 U.S. at 692. See,

also, Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

When RCW 80.54.040 is compared to what the Legislature did in RCW 54.04.045, it is clear that the just compensation or return on equity component of the rate calculation is absent. There are two statutes, both setting pole attachment rates. One expressly allows a return on equity component. The second one does not. When the Legislature uses different terms, it means different things. See, In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 842, 215 P.3d 166 (2009) (where, in other statutes, the Legislature used terms to require objective versus subjective knowledge, the court recognized the Legislature is familiar with objective versus subjective "knowledge," and the use of "knowledge" on its own in the "innocent owner" provision establishes the Legislature intended actual knowledge as the standard). Thus, the Legislature could not have intended that the rate calculation for pole attachments for public utility districts include a return on equity.

CenturyLink also raises another issue about the proper interpretation of the statute. That issue is the inclusion of electricity taxes. Petition for Review p. 12-14. WITA agrees with the arguments set out by CenturyLink in its Petition for Review. The electricity taxes paid by a public utility district are based solely on the district's sales of electricity to its end-user customers: thus not one penny of those taxes are attributable

to whatever portion of a district's poles are used for pole attachments.[3] Based on WITA's Review of the record, it appears that Pacific PUD does not even attempt to dispute this fact. Therefore, the electricity taxes do not constitute "the actual capital and operating expenses . . . attributable to that portion of the pole, duct or conduit used for pole attachment . . . ." Nor does it constitute "the actual capital and operating expenses . . . attributable to the share, expressed in feet, of the required support and clearance space . . . ." Thus, electricity taxes cannot possibly be included in the formula for the reasons expressed by CenturyLink. A PUD is not able to include every expense it wants. It is limited by statute and may not exceed what the statute allows.

IV. THE STANDARD FOR REVIEW OF AN AGENCY DECISION CHALLENGED AS ARBITRARY AND CAPRICIOUS MUST HAVE SOME MEANING

The fact that the PUD was including taxes that are not related to the pole attachment brings us to the question of an arbitrary and capricious action. CenturyLink's position, as stated in its Petition for Review, is that there must be some meaningful review of agency action when a challenge is brought that action is arbitrary and capricious. While, WITA acknowledges that the standard be met under the arbitrary and capricious review is a difficult standard to achieve, WITA agrees with CenturyLink that complete deference to an agency's action is not appropriate under any circumstances.

[3] The District appears to agree. See, App. 51-52 attached to CenturyLink's Petition for Review.

The standard which has been set by this Court in the past is that "[C]onclusory action taken without regard to the surrounding facts and circumstances is arbitrary and capricious, such action being defined as a 'willful and unreasoning action, taken without regard to or consideration of the facts or circumstances surrounding the action.'" Hayes v. City of Seattle, 131 Wn.2d 706, 717-718, 934 P.2d 1179, opinion corrected 943 P.2d 265 (Wash. 1997) (quoting Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. 6, 118 Wn.2d 1, 14, 820 P.2d 497 (1991)). 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) (Emphasis in the original, citing Aviation W. Corp., v. Dep't of Labor & Indus. 138 Wn.2d 413, 432, 980 P.2d 701 (1999)).

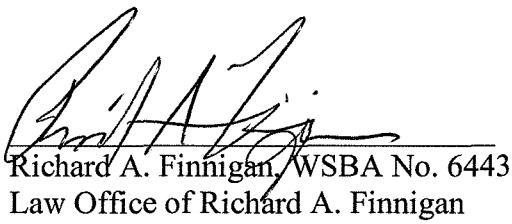
In this case, it seems clear from the Court of Appeals' decision that it acquiesced to the PUD's classification of safety space on a utility pole as "unusable space" without analysis of the facts and circumstances. This allowed the PUD to allocate a share of costs associated with the safety space to pole attachers. However, the record seems to point to the conclusion that the PUD was, in fact, using the safety space: to WITA and its members, a finding that the safety space can be used whenever customer timing needs require it means only that the safety space is in fact

usable -- and we understand that the Superior Court made precisely such a Finding of Fact, that was unappealed.[4] This conflict between the facts and what the PUD did meets the arbitrary and capricious standard. Deference to the agency in light of these facts in the record is not appropriate.

V. CONCLUSION

For the reasons set forth above and in CenturyLink's Petition for Review, WITA respectfully requests that the Court grant CenturyLink's Petition for Review and reverse the decision of the Court of Appeals.

Respectfully submitted this 28th day of June, 2019.



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[4] See, Supplemental Finding of Fact 93.

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