No. 98243-1

(Court of Appeals No. 51695-1-II)

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

CITY OF TACOMA,

Respondent.

PETITION FOR REVIEW

David F. Jurca, WSBA #2015
djurca@helsell.com
Andrew J. Kinstler, WSBA #12703
akinstler@helsell.com
Emma Kazaryan, WSBA #49885
ekazaryan@helsell.com
HELSELL FETTERMAN LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154
(206) 292-1144
Attorneys for Petitioners

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I. INTRODUCTION

This case will determine whether RCW 43.09.210, commonly known as the "local government accounting statute" or the "state accountancy act," will continue to serve as a cornerstone for trustworthy government accounting in this state, or instead will be rendered toothless by a mere naming convention that elevates form over substance. Specifically, this case is about the City of Tacoma's use of municipal electric utility revenues to subsidize a city-owned, money-losing cable TV and internet business known as the Click! Network ("Click"), contrary to the Tacoma City Attorney's advice that such subsidies violate the state accountancy act and the Tacoma City Charter.

This case also provides the Court an opportunity to rule on an important matter of first impression in this state, and to join the federal courts, the vast majority of all state courts, the *Restatement (Second) of Judgments* §33, and nearly all learned treatises that have addressed the issue, in holding that the *res judicata* effect of a declaratory judgment is limited to the matters actually decided in the judgment.

II. IDENTITY OF PETITIONERS

The petitioners ("ratepayers") are well-respected civic leaders in Tacoma and are customers of the city's municipal electric utility. They are a former director of utilities for the city (Coates), a former Tacoma mayor

and city councilman (Crowley), a former chief assistant city attorney for the city's utilities (Bubenik), a retired prominent lawyer in Tacoma (Oldfield), and an association of large industrial customers of utilities in the Pacific Northwest (ICNU).[1] They were plaintiffs in the trial court, where they obtained an order granting partial summary judgment declaring that municipal electric utility revenues may not lawfully be used to pay for expenses of the Click cable TV and internet business operated by the city. The city sought and obtained discretionary review by the court of appeals, which reversed the trial court in a divided 2-1 decision. The ratepayers now seek review by this Court of the court of appeals decision.

III. COURT OF APPEALS DECISION

On December 10, 2019 the court of appeals filed its unpublished decision, consisting of an 11-page majority opinion signed by two judges and a 25-page dissenting opinion signed by one judge. A copy of the court of appeals decision is set forth in Appendix A hereto (majority opinion at A-1 through A-11, and dissenting opinion at A-12 through A-36). The ratepayers respectfully submit that the dissenting opinion, unlike the majority opinion, is fully supported by the undisputed facts and the law, and is much better reasoned and far more persuasive than the majority opinion.

[1] As of April 1, 2018, ICNU merged with an association of industrial gas users and changed its name to the Alliance of Western Energy Consumers ("AWEC").

On December 30, 2019 the city filed a timely motion to publish, arguing that the court of appeals decision "addresses two unsettled or new questions as a matter of first impression" and that "the decision is of general public interest [and] importance." Motion to Publish, at 2. The motion was granted by the court of appeals on February 11, 2020. A copy of the order granting the motion to publish is set forth in Appendix B hereto.

IV. ISSUES PRESENTED FOR REVIEW

1. May the city's electric utility revenues lawfully be used to pay for expenses of the Click cable TV and internet business that are not attributable to the electric utility?

2. May the requirements of the state accountancy act and Tacoma City Charter be circumvented by the simple expedient of organizing the Click cable TV and internet business along with the electric utility under the name "Tacoma Power" within the city's Department of Public Utilities? More specifically, is the Click cable TV and internet business a separate "undertaking" or "public service agency" from the electric utility for purposes of the local government accounting statute (RCW 43.09.210) and the City Charter?

3. Are the ratepayers' claims barred by the *res judicata* or collateral estoppel effects of prior declaratory rulings entered in 1996 and 1997 in a bond validation lawsuit that decided different issues?

V. STATEMENT OF THE CASE

A. Tacoma's Municipal Electric Utility

Tacoma's municipal electric utility, formally named the "Light Division of the Tacoma Department of Public Utilities," does business under the trade name "Tacoma Power." Tacoma Power is one of three divisions of Tacoma Public Utilities ("TPU"), the others being Tacoma Water and Tacoma Rail. CP 97. TPU is governed by the City's public utility board, whose five members are appointed by the mayor and confirmed by the city council. Utility budgets and rates are subject to approval by the city council. CP 96-97; CP 115-116.

Tacoma Power has six business units. Five of them (Generation; Power Management; Transmission & Distribution; Rates, Planning & Analysis; and Utility Technology Services) are involved in the generation, transmission, and distribution of electricity to utility customers and are integral parts of the electric utility. CP 97-98; CP 326; CP 1147, ¶5. The sixth business unit is the Click cable TV and internet business, which has no involvement in the generation, transmission or distribution of electricity and is not part of the electric utility, although it does share certain assets with the electric utility (as do Tacoma Water, Tacoma Rail, and other city departments). *Id.*

B. Creation of Click as a "Separate System"

In 1996 the city council adopted an ordinance creating "a separate system of the City's Light Division to be known as the telecommunication system," CP 126 (Ord. 25930, §2.1, emphasis added), and adopted a plan for "the acquisition, construction and implementation" of the system. *Id.*, §2.2; CP 145. The plan called for construction of a hybrid fiber coaxial ("HFC") wired network capable of sending electronic signals to utility customers' homes and businesses and also connecting utility substations. The HFC network could be used both for the electric utility (*e.g.*, for communications between substations and automated meter reading) and for other purposes (like providing cable TV and internet service). CP 145.

C. Bond Validation Lawsuit

In July 1996 the city commenced a bond validation lawsuit in the superior court under RCW 7.24 and 7.25, seeking declaratory rulings that the city had authority to operate a new cable TV and internet business and to issue revenue bonds to fund the first phase of construction and operation of the new HFC network. CP 710-711, CP 714. In accordance with RCW 7.25.020, the court appointed a citizen to represent the city's taxpayers and ratepayers. CP 756-57.

In December 1996 the court issued an order declaring that the city had authority to provide cable TV and wholesale internet service but

declined to rule on the validity of the proposed bond issuance. CP 789. The following spring, in April 1997 the city filed a second motion for summary judgment, asking the court to address the subject it had declined to address in the December 1996 order, *i.e.*, the validity of the bond issuance. CP 791. In May 1997 the court entered an order declaring that the city's initial $1 million bond issuance was authorized but added, by handwritten interlineation in the city's proposed order: "*however the court is making no finding as to the financial feasibility of the Project or as to the legality of any future bond issues*." CP 847-48 (italics added, indicating handwriting).

D. Build-Out of HFC Network and Launch of Click

Following the court's May 1997 order, the city began building the HFC network and then launched Click as a new business in 1998. CP 107; CP 180. The HFC network presently consists of about 400 miles of fiber-optic cable and 1,200 miles of coaxial cable. CP 178. Parts of the network were used to support the electric utility function of providing electricity, and parts were used to support the Click cable TV and internet business. CP 107; CP 229-30.

About 34% of the households in the electric utility's service territory are located in geographic areas not reached by the HFC network and where Click cable TV and internet service is therefore not available. CP 107, CP 451. Even in areas where Click service is available, most households

choose to get their cable TV or internet service from other providers[2] or choose not to get such service at all or cannot afford it. In 2016, out of 176,784 electric utility customers only 17,468 (less than 10%) were Click cable TV customers and only 23,344 (about 13%) were customers of internet providers utilizing the network. CP 104, 108; *see also* CP 187.

Yet all electric ratepayers help pay for Click's capital investments and operating losses through increased electric rates, whether they are Click customers or not, or whether they live in areas where Click service is available or not. CP 77.

E. Electric Utility Subsidies for Click

In April 2000, shortly after Click started operating, a consultant for the city (PriceWaterhouseCoopers) recommended that network capital and operating expenses be segregated between those that supported cable TV and internet functions and those that supported electric utility functions. CP 203, CP 215. Another consulting firm in 2003 approved the city's method for allocating expenses between "power" applications (defined as supporting electric transmission and distribution operations) and "commercial" applications (defined as "cable TV, Internet and data transport services sold to wholesale and retail customers"). CP 229.

[2] In 2016 Click's share of the local cable TV market was about 15%. CP 107; *see* CP 187 for later projections.

Subsequent technological and other changes, including a gradual transition from wired to wireless connections for functions related to the electric utility (like reading automated meters and communicating between substations), while the wired connections continued to be used for cable TV and internet purposes, led to revised allocations starting in 2015. CP 349-50; CP 245-46, 247, 256; CP 72. The updated allocations reduced the share of network expenses attributed to the electric utility from 25% to 6%, and increased the share attributed to Click from 75% to 94%. CP 258; CP 616; CP 1147, ¶6.[3] Thus, the HFC network is used almost entirely for Click purposes, not for electric utility purposes.

The Tacoma City Charter requires that at least every ten years the city council must hire an outside consulting firm to perform a "general management review" of all utilities under the jurisdiction of the public utility board. CP 116. In 2014 the management consultant hired to perform that review concluded that the electric utility's subsidies for Click were unfair to electric ratepayers and should be ended. CP 73-74.[4]

[3] Click's net operating losses were $1,406,192 for calendar year 2014 (based on the old allocations), $5,267,364 for 2015 (based on the updated allocations), and $5,742,857 for 2016. CP 260-61, 262-63, 264-65. According to the City's publicly available financial reports posted on its website, Click's losses in 2017 were $4,910,312, and in 2018 were $3,195,427. Click's losses were covered by using money from the electric utility. CP 73; CP 347-48; CP 324; CP 375; CP 432; CP 300.

[4] The City's director of utilities agreed that the electric utility's subsidies for Click were unfair to electric ratepayers, and Tacoma Power's entire senior executive team agreed that Click should be sold, leased or closed. CP 352-57, CP 360, CP 328.

F. City Attorney's Legal Memo

In July 2015 the city attorney prepared a legal memo explaining that Click must be accounted for separately from the electric utility. CP 58-64 (Appendix C hereto). It pointed out that under City Charter §4.5, revenues of a utility may be used only for the necessary expenses of that utility and may not be used for the financial support of any other utility, department or agency (App. C at 1-2), echoing the requirements of the local government accounting statute that "separate accounts" must be kept for "each department, public improvement, undertaking, institution, and public service industry," that any service or property transferred from one public improvement or undertaking to another "shall be paid for at its true and full value," and that no public improvement or undertaking "shall benefit in any financial manner whatever by an appropriation or fund made for the support of another." App. C at 2-3, quoting RCW 43.09.210.

Applying those principles to the electric utility and Click, the memo concluded that electric utility revenues may not be used to pay for costs of providing Click cable TV and internet service, because those costs "are not sufficiently related to providing electricity to utility customers, thus must be paid for from non-utility revenues," adding that costs associated with providing both electric utility service and Click service "must be allocated and then paid separately by the two enterprises." App. C at 5-7.

G. All-In Plan

Despite the city attorney's legal advice that electric revenues may not lawfully be used to pay for Click expenses, and despite the virtually unanimous opinions of utility management professionals and outside consultants that the subsidies for Click were unfair to electric ratepayers and should be ended, in December 2015 the public utility board and city council adopted resolutions directing Tacoma Power to develop a new business, financial and marketing plan (the "All-In Plan") to provide Click customers with enhanced and upgraded cable TV and internet service, requiring even greater subsidies from the electric utility. CP 168-174; CP 79-93; CP 356-57; CP 330-31; CP 270-280; CP 187.

Unsurprisingly, the city's director of utilities and the Tacoma Power superintendent testified that the All-In Plan "was not in the interest of Tacoma Power electric ratepayers," CP 357, and would be "inconsistent" with the city attorney's legal advice. CP 446-47.

H. This Lawsuit

In early 2017 the All-In Plan was suspended after the ratepayers filed claims against the city challenging the electric utility's subsidies for Click. CP 361. In December 2017 the ratepayers filed a motion for partial summary judgment declaring that the subsidies for Click were unlawful. The city did not dispute any of the facts. Instead, it responded by arguing

(i) that the ratepayers' claims were barred by the declaratory rulings in the 1996 bond validation lawsuit, and (ii) that the state accountancy act and City Charter §4.5 were inapplicable to the subsidies for Click because the electric utility and Click were both part of Tacoma Power. CP 460-484.

On March 2, 2018, the trial court granted the ratepayers' motion and ruled that "electric utility revenues and funds may not lawfully be used to pay for Click! Network expenses or capital improvements that are attributable or properly allocable to commercial telecommunications service rather than electric utility service." CP 1084-1087.

The city was granted discretionary review, and on December 10, 2019 the court of appeals issued its unpublished opinion reversing the trial court. On February 11, 2020 it granted the city's motion for publication.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted because (i) the decision below conflicts with Supreme Court decisions and other court of appeals opinions (RAP 13.4(b)(1) & (2)), and (ii) this case presents issues of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4)).

A. The Court of Appeals Decision Is in Conflict with Decisions of the Supreme Court and Published Opinions of the Court of Appeals.

As set forth in the well-reasoned dissent, "[a] series of Washington decisions precludes a city's electrical utility from charging ratepayers for

extraneous endeavors." App. A at 30. The basic reason for using utility revenues only for utility costs was explained by this Court a century ago: "The object of municipal ownership [of utilities] is to give the citizen the best possible service at the lowest possible price…[otherwise] there can be no virtue in public ownership." *Uhler v. City of Olympia*, 87 Wn. 1, 14, 151 P. 117 (1915). The "lowest possible price" is one that covers the utility's necessary costs and not the costs of "extraneous endeavors" like Click.

Thus, this Court has held that a municipal electric utility may not impose on ratepayers the costs of activities that do not have a "sufficiently close nexus" to the utility's primary purpose of "supplying electricity to the municipal corporation and its inhabitants." *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 695-696, 743 P.2d 793 (1987). In *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003) (*"Okeson I"*), this Court held unanimously that municipal electric utility revenues could not lawfully be used to pay for public streetlighting, because streetlighting was a general governmental function and not a proprietary utility function (delivering electricity to utility customers).

Okeson was multifaceted litigation with separate appellate decisions on different phases of the case, but all holding that municipal electric utility revenues could only be used for utility purposes. *Okeson I*, as noted above, held that electric utility revenues could not be used to pay for public street

lighting.[5] *Okeson II*, 130 Wn. App. 814, 125 P.3d 172 (2005), held that electric utility revenues could not be used to pay for public art not directly related to the utility. *Okeson III*, 159 Wn.2d 436, 150 P.3d 556 (2007), held that electric utility revenues could not be used to pay for a city program to combat global warming unrelated to the utility's own costs, because that program lacked a "sufficiently close nexus" to the utility's purpose.

In *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008), this Court, again unanimously, followed the *Okeson* line of reasoning and held that municipal water utility revenues could not lawfully be used to pay for public fire hydrants. Similarly, in *Kightlinger v. PUD No. 1 of Clark County*, 119 Wn. App. 501, 119 P.3d 501 (2003), the court of appeals held that the PUD electric utility lacked authority to operate an appliance repair business because that business lacked a "sufficiently close nexus" to the utility's primary function of supplying electricity to its customers.

Like the streetlights in *Okeson I*, the art in *Okeson II*, the anti-global-warming program in *Okeson III*, the fire hydrants in *Lane*, and the appliance

[5] The dissent in the court of appeals decision does make one error. The 2002 amendment to RCW 35.92.050 did not "legislatively overrule" *Okeson I* (see App. A at 30), which was not decided until the following year. *Okeson I* held in 2003 that electric revenues could not lawfully be used to pay for public streetlights despite the 2002 legislation, because that legislation could not somehow transform the general governmental public safety function of street lighting into the proprietary utility function of delivering electricity to customers. 150 Wn.2d at 557-58. The dissent in the case at bar does correctly state that despite the 2002 legislation *Okeson I*'s "main holding of prohibiting unrelated services remains true." App. A at 30.

repair business in *Kightlinger*, the Click cable TV and internet business does not have a "sufficiently close nexus" to providing electricity to utility customers as required by *Taxpayers of Tacoma*. Using utility revenues to pay for extraneous costs does not meet the *Uhler* test of providing "the best possible service at the lowest possible price." 87 Wn.2d at 14.

The court of appeals majority opinion here makes no attempt to analyze or distinguish any of these prior decisions of this Court or the court of appeals. Instead, the opinion merely mentions the *Okeson* line of cases in a footnote and blithely says, without any explanation at all, that they are not "controlling nor do we find the cases persuasive." App. A at 8 n.5.[6]

The court of appeals majority decision cannot be reconciled with prior decisions of this Court and the court of appeals in *Uhler*, *Taxpayers of Tacoma*, the *Okeson* trilogy, *Lane* and *Kightlinger*. Thus, this Court should accept review pursuant to RAP 13.4(b)(1) and RAP 13.4(b)(2).

B. This Case Presents Issues of Substantial Public Interest that Should Be Decided by the Supreme Court.

As the city argued in its motion for publication, this case addresses "unsettled or new questions as a matter of first impression" and "the decision is of general public interest [and] importance." Motion to Publish, at 2. The case directly affects the economic interests of nearly 180,000

[6] In contrast, see the discussion in the dissenting opinion in App. A at 29-31.

ratepayers of Tacoma's municipal electric utility; more broadly, it affects the interests of local governments and their citizens all across the state, insofar as it will determine whether RCW 43.09.210 will continue to be effective in requiring local governments to provide transparent and responsible accountability in public financing. Moreover, this case gives the Court an opportunity to address an important issue of first impression in this state, about the scope of the *res judicata* effect of declaratory rulings.

1. This case directly affects the economic interests of nearly 180,000 ratepayers served by Tacoma's electric utility.

As explained above, the Click cable TV and internet business has suffered millions of dollars of losses. Those losses have been paid for by all of the city's electric ratepayers, in the form of higher rates for electric service, even though (i) only 10-13% of the ratepayers are Click customers and more than a third of the ratepayers live in areas where Click service is not even available (*supra* at 7), (ii) the city's own consultants and utility executives have said that it is unfair to the ratepayers to charge them higher electric rates to cover Click's losses (*supra* at 9) , and (iii) the city's own city attorney has advised the city council and public utility board that using electric utility revenues to pay for Click's losses is unlawful (*supra* at 10).

Misusing electric utility revenues to cover Click's losses results in higher rates for electric service and makes an essential utility service less

affordable and accessible. As the dissent below points out, the unfairness of saddling electric ratepayers with Click's cable TV and internet losses places an especially egregious burden on the poor, who must pay a higher percentage of their income for utilities. App. A at 29. Using electric utility revenues to pay for Click's losses is not only unfair, but (as Tacoma's own city attorney, the trial court, and the dissent in the court of appeals all concluded) it is unlawful. This deserves review by the Supreme Court.

2. Allowing the court of appeals decision to stand would render RCW 43.09.210 toothless and would undermine local government financial accountability across the state.

For more than a century RCW 43.09.210 has served as a cornerstone of local government financial accountability in our state. It promotes clarity and financial responsibility in government administration. However, that statute cannot continue to serve its salutary purpose if courts allow local governments to circumvent its requirements by the simple ploy of combining separate undertakings (like providing electricity and providing cable TV and internet service) under a single name (like "Tacoma Power"), despite their different functions. As the dissent below states:

> Click! flouts the spirit of RCW 43.09.210 by subsuming the costs of a losing undertaking in the cost of operating a vital service to the residents of Tacoma….Characterizing Click! as the same undertaking or public service industry as the electrical utility allows a pet project of some politicians to survive despite its onus on electricity ratepayers.

App. A at 29. Further, the city's argument, accepted by the court of appeals majority, "promotes form over substance and breaches the spirit of the local government accounting statute." App. A at 32.

As both the majority and dissenting opinions seem to acknowledge, a key issue in applying RCW 43.09.210 to this case is the proper meaning of the word "undertaking." We submit that the dissent's analysis of that issue is far more persuasive than the majority's, especially the dissent's focus on considering the purpose of the statute. *See* App. A at 27-32.

The reasoning of the court of appeals majority also goes off the rails by equating the wires of the HFC network ("The whole telecommunications system is just one network of wires," App. A at 9) with the business of operating Click, with its numerous employees, salaries, TV programming costs, cable TV set-top boxes, and a whole panoply of activities and costs that are involved in providing cable TV and internet service but have nothing whatsoever to do with providing electricity for lighting, power or heating. Maintaining the HFC network of wires is only a small part of operating the business of providing cable TV programming and internet service. The court of appeals majority opinion does not seem to recognize that electricity for lighting, power and heating is distributed through an entirely different system of wires than the HFC network used for telecom signals, and that 94% of the costs of the HFC "network of wires" are

allocated to the cable TV and internet business and only 6% to the electric utility. *Supra*, at 8. Characterizing the HFC network as a "betterment" of the electric utility is like saying the tail wags the dog.[7]

This case also involves the subversion of a Tacoma City Charter provision that echoes the policy and principles underlying the local government accounting statute, and which is intended to provide important protections for Tacoma's utility ratepayers. Section 4.5 of the City Charter provides that "[t]he revenue of utilities owned and operated by the City shall never be used for any purposes other than the necessary operating expenses thereof." *See* App. E. If the city can overcome this limitation simply by including both Click and the electric utility under the rubric of "Tacoma Power," this Charter provision is rendered effectively meaningless.

3. This case presents an important issue of first impression in Washington about the *res judicata* effect of declaratory rulings.

In both the trial court and the court of appeals, one of the city's

[7] On November 5, 2019 the city council adopted two resolutions making it even more obvious that Click is a separate "undertaking" from the electric utility. Res. No. 40467 declared that Click's assets and the portion of the HFC network used by Click are surplus to the needs of the electric utility. Res. No. 40468 authorized city officials to sign an agreement effectively selling the Click business to a privately owned telecom company, providing for the sale of Click's assets and for a long-term lease of the portion of the HFC network used by Click. The resolutions can be found on the city's website at https://cms.cityoftacoma.org/cityclerk/Files/CityCouncil/RecentLegislation/2019/RL20191105.pdf. That website location shows all legislation enacted by the city council on that date. Resolution No. 40467, including lengthy exhibits, is set forth at pages 13-198 of 218. Resolution No. 40468 is set forth at pages 199-205 of 218.

principal arguments was that the ratepayers' claims were barred by *res judicata* by virtue of the declaratory rulings in the bond validation lawsuit. Although the ratepayers did not challenge any aspect of the rulings in that lawsuit, the city argued that the declaratory rulings in that case barred any subsequent claims that arguably could have been raised in the case.

The issue was thoroughly briefed by the parties in both the trial court and the court of appeals.[8] Although the issue is not reached in the court of appeals majority opinion (*see* App. A at 7 n.4), it is discussed at some length in the dissenting opinion (*see* App. A at 33 to 36). As the dissent states:

> [n]o Washington decision has addressed the applicability of res judicata to an earlier declaratory judgment. Nevertheless, the universal rule declares that res judicata extends only to issues actually decided.

App. A at 34-35.

While the majority opinion below does not address this issue, and

[8] The ratepayers pointed out that the city itself had argued in the bond validation case that the adequacy of telecom revenues to pay for telecom expenses was "outside the scope of the Court's review" (CP 834), and that the trial court in that case had made no rulings on whether electric utility subsidies for the prospective telecom business would be lawful. The ratepayers also cited the nearly universal support for the *Restatement* position that, unlike judgments on claims for coercive relief, a declaratory ruling has *res judicata* effect only as to issues that were actually decided, not as to other issues that could have been raised and decided but were not. In addition, the ratepayers pointed out that declaratory relief can be granted only as to actual, existing disputes, not as to potential, future or hypothetical disputes (in 1996 and 1997 the telecommunication system had not been built yet, there was no Click cable TV or internet business, there were no operating losses for Click, and there were no electric utility subsidies for Click). *See* Resp. Br. at 35-47; Resp. Stmt. of Add'l Authorities at 1-9. For an especially thorough and instructive discussion of the limited extent to which a declaratory judgment has claim preclusive effect, see *Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co.*, 547 F.3d 48 (1st Cir. 2008).

therefore it need not be decided in order to reverse the court of appeals decision, the Supreme Court should take this opportunity to address this important legal principle, and should join the vast majority of state and federal courts and learned treatises in adopting the "universal rule" expressed in the *Restatement (Second) of Judgments* §33. It would promote judicial efficiency for further proceedings in this case, and would provide helpful guidance for the bench and bar generally on an important question of law as a matter of first impression in this state.

VII. CONCLUSION

The dissenting opinion in the court of appeals got it right. The majority opinion got it wrong. The majority opinion is contrary to multiple decisions of the Supreme Court and the court of appeals. Moreover, this case presents important issues of substantial public interest that should be determined by the Supreme Court. Accordingly, review of the court of appeals decision should be accepted pursuant to RAP 13(b)(1), (2), and (4).

Respectfully submitted this 5th day of March, 2020.

HELSELL FETTERMAN LLP

By _____

David F. Jurca, WSBA #2015
Andrew J. Kinstler, WSBA #12703
Emma Kazaryan, WSBA #49885
Attorneys for Petitioners (Ratepayers)

APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EDWARD E. (TED) COATES; MICHAEL CROWLEY; MARK BUBENIK and MARGARET BUBENIK d/b/a STEELE MANOR APARTMENTS; THOMAS H. OLDFIELD; and INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES, an Oregon nonprofit corporation, Respondents, v. CITY OF TACOMA, Petitioner.	No. 51695-1-II UNPUBLISHED OPINION

MELNICK, P.J. — In 1996, a City of Tacoma ordinance granted Tacoma Power the authority to build a telecommunications system. Under the ordinance, Tacoma Power would utilize a portion of this system to operate a TV and internet business, later named the Click! Network (Click!). The ordinance also established that the telecommunications system would be organized financially as a sub-unit of Tacoma Power and thus would share expenses and revenue with Tacoma Power's electric utility.[1]

Before implementing the system, the City of Tacoma filed a declaratory judgment action to determine the lawfulness of the ordinance. The taxpayers of the City of Tacoma and ratepayers

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

of Tacoma Power opposed it. After two summary judgment rulings, the superior court entered a declaratory judgment that the ordinance was lawful. The taxpayers and ratepayers never appealed.

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

We reverse.

FACTS[2]

I. TACOMA POWER

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

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

II. HISTORY

A. Electric Industry in the 1990s

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

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

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

B. Ordinance

In 1996, the City passed an ordinance that created "a separate [telecommunications] system as part of the Electric System." CP at 122. It established infrastructure improvements and discussed the functions served by the new system. The first nine functions all related to traditional electric utility functions. The final three functions provided TV service, internet service, and the

transport of other signals including video on demand and high-speed data. The ordinance contemplated that the infrastructure improvements would serve all of the functions listed.

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

C. Declaratory Judgment Action

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

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

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

D. Technological Changes in the 2000s

At its inception, the telecommunications system allowed for efficient and remote operation of Tacoma Power's infrastructure. Subsequently, technological changes in the electric-distribution industry impacted how beneficial the system was to Tacoma Power's electric utility. As an example, although Tacoma Power initially intended the system to be used for smart metering, the industry switched to primarily using wireless meters. Tacoma Power itself stopped installing wired meters in 2009 and stopped replacing existing wired meters in 2015.

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

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

III. CURRENT LAWSUIT

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

The Ratepayers moved for partial summary judgment. The City opposed the motion and also cross-moved for summary judgment.

After hearing argument, the trial court granted the Ratepayers' motion. The City sought discretionary review, which we granted.

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

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

ANALYSIS

I. LEGAL PRINCIPLES

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

We review questions of statutory interpretation de novo. *Flight Options, LLC v. Dep't of Revenue*, 172 Wn.2d 487, 495, 259 P.3d 234 (2011). In interpreting statutes, "[t]he goal . . . is to ascertain and carry out the legislature's intent." *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). We give effect to the plain meaning of the statute as "derived from the context of the entire act as well as any 'related statutes which disclose legislative intent about the provision in question.'" *Jametsky*, 179 Wn.2d at 762 (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)).

If a statute's meaning "is plain on its face, then we must give effect to that meaning as an expression of legislative intent." *Blomstrom v. Tripp*, 189 Wn.2d 379, 390, 402 P.3d 831 (2017). However, if "after this inquiry, the statute remains ambiguous or unclear, it is appropriate to resort to canons of construction and legislative history." *Blomstrom*, 189 Wn.2d at 390. "A statute is ambiguous if 'susceptible to two or more reasonable interpretations,' but 'a statute is not ambiguous merely because different interpretations are conceivable.'" *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (quoting *State v. Hahn*, 83 Wn. App. 825,

831, 924 P.2d 392 (1996)). "Whenever possible, statutes are to be construed so 'no clause, sentence or word shall be superfluous, void, or insignificant.'" *HomeStreet, Inc.*, 166 Wn.2d at 452 (internal quotation marks omitted) (quoting *Kasper v. City of Edmonds*, 69 Wn.2d 799, 804, 420 P.2d 346 (1966)).

II. LOCAL GOVERNMENT ACCOUNTING STATUTE[4]

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

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

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

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

RCW 43.09.210(3).

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

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

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

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

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

---

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

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

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

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

The whole telecommunications system is just one network of wires. Additionally, in deciding to implement the system, the City focused on the benefits that Tacoma Power would receive with regard to electric generation, transmission, and distribution. The system's potential cable TV and internet service capabilities were incidental and merely a way to maximize the new technology's potential. That structure has not changed. As such, Click! simply runs on the excess capacity of Tacoma Power's telecommunications system, a system that, as discussed above, was designed and implemented to maximize electric utility functionality. Therefore, we conclude that Click! and Tacoma Power's electric utility are one undertaking for purposes of RCW 43.09.210(3).

III. TACOMA CITY CHARTER

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

Article IV of the Tacoma City Charter governs public utilities. The Charter generally grants the City "all the powers granted to cities by state law to . . . operate . . . public utilities for supplying water, light, heat, power, transportation, and sewage and refuse collection, treatment, and disposal services." TACOMA CITY CHARTER art. IV, § 4.1. Besides certain exceptions, the

City cannot grant "any franchise, right or privilege to sell or supply water or electricity within the City of Tacoma." TACOMA CITY CHARTER art. IV, § 4.7. "Insofar as is possible and administratively feasible, each utility shall be operated as a separate entity." TACOMA CITY CHARTER art. IV, § 4.20. Additionally,

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

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

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

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

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

service.[7] Because Click! is a betterment of Tacoma Power, we conclude that it does not violate the Tacoma City Charter.

We reverse.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.
Melnick, P.J.

I concur:

Glasgow, J.
Glasgow, J.

[7] Whether Click!'s continued operation is sound business practice or good policy is not a decision for this court.

No. 51695-1-II

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

For someone not knowledgeable about buried cables and sunken transmission lines, the facts of this appeal sometimes tumble into the murky underground. Tacoma Power, an arm of the City of Tacoma, constructed a hybrid fiber-coaxial

telecommunications system to modernize and interconnect Tacoma Power's electrical generation, distribution, and transmission assets. A hybrid fiber-coaxial system consists of a broadband network that combines optical fiber and coaxial cable. The fiber portion of Tacoma Power's system improved electrical generation and distribution. The coaxial cable supported "smart-metering," a term for promoting efficient electrical connection, disconnection, and billing.

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

Click! began with Ordinance No. 25930 adopted by the City of Tacoma City Council in 1996. The tedious, but important, ordinance reads, in part:

> ORDINANCE NO. 25930
>
> AN ORDINANCE of the City of Tacoma, Washington establishing a telecommunications system as part of the Light Division [former name of Tacoma Power], supplementing Ordinance No. 23514 and providing for the issuance and sale of the City's Electric System Revenue Bonds in the aggregate principal amount of not to exceed $1,000,000 to provide part of the funds necessary for the acquisition, construction and installation of additions and improvements to the telecommunications system.
>
> WHEREAS, the City of Tacoma (the "City") owns and operates an electric utility system (the "Electric System"); and
>
> WHEREAS, the Ordinance provides that the City may *create a separate system as part of the Electric System and pledge that the income of such separate system be paid into the Revenue Fund*; and
>
> WHEREAS, RCW 35A.11.020 authorizes the City to operate and supply utility and municipal services commonly or conveniently rendered by cities or towns; and
>
> WHEREAS, RCW 35.92.050 authorizes cities to construct and operate works and facilities for the purpose of furnishing any persons with

electricity and other means of power and to regulate and control the use thereof or lease any equipment or accessories necessary and convenient for the use thereof; and

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

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

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

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

. . . .

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

. . . .

ARTICLE II

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

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

Section 2.2. Adoption of Plan: Estimated Cost. The City hereby specifies and adopts the plan set forth in Exhibit A for the acquisition, construction and implementation of the Telecommunications System (the

"*Telecommunications Project*"). The City may modify details of the foregoing plan when deemed necessary or desirable in the judgment of the City. The estimated cost of the Telecommunications Project, including funds necessary for the payment of all costs of issuing the Bonds, is expected to be approximately $40,000,000.

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

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

. . . .

EXHIBIT A

TELECOMMUNICATIONS PROJECT

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

Infrastructure improvements

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

Functions to be performed by infrastructure improvements

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

- conventional substation communications functions
- automated meter reading (electric and water)
- automated billing (electric and water)
- automated bill payment (electric and water)
- demand side management (DSM) functions, such as automated load (*e.g.* water heater) control
- provision of information to customers that is relevant to their energy and water purchasing decisions (*e.g.* information on time-of-use or "green" power rates)
- distribution automation
- remote turn on/turn off for electric and water customers
- city government communications functions
- CATV [cable television] service

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

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

In 1996, before laying the new hybrid fiber-coaxial telecommunications system, the City of Tacoma filed a declaratory judgment action in superior court seeking confirmation of the legality of Ordinance No. 25930. Tacoma sought declarations that:

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

CP at 714.

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

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

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

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

Tacoma replied by arguing that it would retire the bonds solely from Tacoma Power's revenue, not the City's general obligation fund. Thus, city taxes would not

increase, and, as a result, section 4.2 of the Tacoma City Charter did not apply. Tacoma also argued that the question of whether the City would increase electricity rates to Tacoma Power ratepayers lacked relevance to the validity of the bonds, and, in turn, to the merits of the summary judgment motion. Tacoma wrote in a reply summary judgment brief:

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

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

At the conclusion of the 1996 suit, the superior court granted the City's summary judgment motion and ruled that Tacoma possessed authority to issue $1 million of revenue bonds to partly finance the hybrid fiber-coaxial telecommunications system. The court handwrote the following into its May 9, 1997 summary judgment order: "however, the Court is making no finding as to the financial feasibility of the Project or as to the legality of any future bond issues." CP at 848. Ratepayers did not appeal.

In 1997, the City of Tacoma City Council adopted Substitute Resolution No. 33668, which also addressed the new hybrid fiber-coaxial system. The resolution declares, in part:

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

CP at 153 (emphasis added).

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

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

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

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

The city of Tacoma's Power Fund accounts for the expenses and revenues of Tacoma Power. The Power Fund accounts separately for subunits of Tacoma Power, including the maintenance of a Click! sub-fund. This separate accounting has enabled the City to discern that Click! operates at a deficit. Click! loses around $5 million each year. Click! annually incurs millions of dollars of expenses related only to its operations, such as installing cable boxes, processing bills, and subscribing to programming. The Power Fund accounting also assigns to Click! shared expenses with the electrical utility such as the cost of the building in which the subunits office. Because of the losses, Tacoma Power electricity ratepayers subsidize the operations of Click!.

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

On July 16, 2015, Tacoma City Attorney Elizabeth Pauli and Chief Deputy City Attorney William Fosbre wrote a memorandum concluding that Tacoma Power

unlawfully operated Click! because of its lack of a nexus to the City's electrical utility and because of the deficit spending. The memorandum opined:

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

CP at 62-63.

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

RCW 43.09.210 declares in part:

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

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

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

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

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

Tacoma relies on the rule of statutory construction that teaches a court not to read in isolation a single word. *Jongeward v. BNSF Railway Co.*, 174 Wn.2d 586, 601, 278 P.3d 157 (2012). Instead, associated words placed in the statute control the meaning of

a word. *Cito v. Rios*, 3 Wn. App. 2d 748, 759, 418 P.3d 811, *review denied*, 191 Wn.2d 1017, 426 P.3d 747 (2018). But one can generally find a principle of interpretation that supports one's reading of a statute.

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

RCW 43.09.210 does not define any of the nouns catalogued in subsection (3). So I rely in part on a legal dictionary and a lay dictionary to discern the parameters of the word "undertaking" and the phrase "public service industry." A court may employ a standard English dictionary to determine the plain meaning of an undefined term. *State v. Fuentes*, 183 Wn.2d 149, 160, 352 P.3d 152 (2015). A court may also utilize a legal dictionary. *State v. McNally*, 361 Or. 314, 322, 392 P.3d 721 (2017); *Upshaw v. Superior Court*, 22 Cal. App. 5th 489, 504, 231 Cal. Rptr. 3d 505 (2018).

Black's Law Dictionary defines "undertaking," but only in the context of a pledge for financing. Merriam-Webster defines "undertaking" as:

> 1a **:** the act of one who undertakes or engages in a project or business . . .
> . . . .
> 2 **:** something undertaken **:** enterprise.

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

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

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

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

BLACK'S LAW DICTIONARY 1488 (11th ed. 2019). Cable television and Internet is not provided by the government for the public's convenience and benefit. Electricity is. Black's Law Dictionary defines "industry" in relevant part as:

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

BLACK'S LAW DICTIONARY 926 (11th ed. 2019). An electrical utility does not produce a product markedly similar to cable television and Internet.

In addition to reading dictionaries, I consider how legal settings utilize the term "public service industry." The law has considered public service industries to include railroads and bus systems. *Florida Power Corp. v. Webster*, 760 So. 2d 120, 125, 25 Fla. L. Weekly S384 (Fla. 2000); *City of Buffalo v. State Board of Equalization & Assessment*, 44 Misc. 2d 716, 718, 254 N.Y.S.2d 699 (N.Y. Sup. Ct. 1964); *California Motor Transport Co. v. Railroad Commission*, 30 Cal. 2d 184, 187-88, 180 P.2d 912 (1947); *Sale v. Railroad Commission*, 15 Cal. 2d 612, 617-18, 104 P.2d 38 (1940). The California court impliedly deemed a county's water system to represent a public service industry. *County of Inyo v. Public Utilities Commission*, 26 Cal. 3d 154, 158, 604 P.2d 566, 161 Cal. Rptr. 172 (1980). One court labeled an electric light plant as a public service industry. *Consolidated Gas, Electric Light & Power Co. of Baltimore v. City of Baltimore*, 130 Md. 20, 99 A. 968, 972 (1917). No court has labeled cable television or Internet service as a public service industry. Cable television is generally owned by private enterprise. Internet service providers are also usually private companies.

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

One article describes the Internet industry:

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

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

The Washington Supreme Court, in *City of Issaquah v. Teleprompter Corp.*, 93 Wn.2d 567, 574-75, 611 P.2d 741 (1980), recognized cable television as a service

distinct from a city's electrical utility. The court favorably quoted a cable company's attorney as characterizing cable television as a luxury service and a television improvement. 93 Wn.2d at 574.

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

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

Ordinance No. 25930 recognized Click! as a distinct entity when it labelled Click! as "a separate system" within the Tacoma Power system. CP at 126, § 2.1. The follow-up resolution in 1997 described the new, separate system's Internet transport and cable TV services as "new business lines," i.e., different business lines from the electric utility's traditional business of supplying electricity to customers. CP at 153.

I now leave the minutiae of the wording found in RCW 43.09.210(3) and review the broad policy behind the local government accounting statute. Ultimately, in resolving the meaning of a statutory term, we adopt the interpretation that best advances the

legislative purpose. *Citizens Alliance for Property Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 437, 359 P.3d 753 (2015).

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

Progressive era reforms included sound accounting standards essential for better government. James L. Chan & Qi Zhang, *Government Accounting Standards and Policies*, *in* The International Handbook of Public Financial Management 742 (Richard Allen et al. eds., 2013). During the first decade of the 1900s, the Grange promoted before state legislatures a uniform public accounting act, portions which became Washington's local government accounting act. Edward F. Green, *The Kansas State Grange Moving for Uniform Public Accounting*, 10 Public Policy: Journal for Correct Understanding of Public Questions & Development of Good Citizenship 22 (1904); *see also City of Cincinnati v. Board of Education*, 30 Ohio N.P. (n.s.) 595, 601 (C.P. Hamilton County 1933) (referencing Ohio General Code § 280: "No institution, department, improvement or public service industry shall receive financial benefit from

any appropriation made or fund created for the support of another."). The uniform act promoted "the economy and efficiency in all branches of public business, so that the expenditures of public funds shall be placed on a systematic basis and be controlled by honest methods, in according with public needs." Edward F. Green, *The Kansas State Grange Moving for Uniform Public Accounting*, 10 Public Policy: Journal for Correct Understanding of Public Questions & Development of Good Citizenship 22 (1904).

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

Click! also offends Washington case law that holds a city's electrical utility may not engage in endeavors other than the sale of electricity. Since 1890, cities have held statutory power to operate an electrical utility. *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 695-96, 743 P.2d 793 (1987). The legislature believed that a municipality could provide lower cost and more efficient electrical service. *Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d at 696. Municipal ownership of electrical

distribution seeks to give the citizen the best possible service at the lowest possible price. *Uhler v. City of Olympia*, 87 Wash. 1, 14, 151 P. 117, 152 P. 998 (1915). Accordingly, a municipal utility has a duty to provide low cost, efficient service. *Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d at 696. Additionally, a municipal electric utility may not impose on ratepayers the costs of activities that do not have a "sufficiently close nexus" to the utility's primary purpose of "supplying electricity to the municipal corporation and its inhabitants." *Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d at 695-96.

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

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

In *Okeson v. City of Seattle* (*Okeson* II), 130 Wn. App. 814, 125 P.3d 172 (2005), the high court held that electric utility revenues could not be used to pay for public art not directly related to the utility. In *Okeson v. City of Seattle* (*Okeson* III), 159 Wn.2d 436, 150 P.3d 556 (2007), the high court held that electric utility revenues could not be used

to pay other parties for mitigating their greenhouse gas emissions, as part of the city's program to combat global warming. If a city electrical utility cannot charge its ratepayers for the beneficial effects of reducing greenhouse gases, this court should not allow Tacoma Power to charge its ratepayers for underwriting a flopping cable television and Internet system.

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

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

The City of Tacoma may rely on the fact that Click! uses the same hybrid fiber-coaxial system as the electrical distribution system such that cable television, Internet,

and electricity distribution entail the same undertaking and the same public service industry. Nevertheless, RCW 43.09.210 does not suggest that, because two endeavors entail overlapping facilities, the two activities involve the same undertaking or industry. The electrical lines of Tacoma Power, the most essential byway of the utility, remain separate from the hybrid fiber-coaxial telecommunications system.

The City of Tacoma argues that Click!'s provision of Internet and cable television must be the same undertaking or public service industry since they operate within the same department, Tacoma Power. This argument would allow a municipality to avoid the strictures of RCW 43.09.210 by folding unrelated endeavours into the same department. Tacoma could operate a library inside the sewer department and charge sewer customers with the cost of the library. Tacoma's argument promotes form over substance and breaches the spirit of the local government accounting statute.

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

During oral argument, the City of Tacoma contended that Click! is not operated at a financial loss. Wash. Ct. of Appeals oral argument, *Coates v. City of Tacoma*, No. 51695-1-II (Sept. 9, 2019), at 30 min, 50 sec. through 32 min., 5 sec. (on file with court). Nevertheless, Tacoma presented no facts, in opposition to Edward Coates's summary judgment motion, to create an issue of fact as to the profitability of Click!. Coates presented overwhelming, uncontroverted evidence of a financial loss. When questioned further during oral argument, Tacoma agreed it presented no affidavit testimony of profitability. Wash. Ct. of Appeals oral argument, *Coates v. City of Tacoma*, No. 51695-1-II (Sept. 9, 2019), at 31 min., 45 sec. through 32 min., 5 sec. (on file with court).

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

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

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

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

Based on RCW 7.24.010, Tacoma argues that the same res judicata effects emanating from other lawsuit judgments extend to a declaratory judgment order. In turn, Tacoma emphasizes the rule that res judicata, or claim preclusion, prohibits the relitigation of claims and issues that could have been litigated in a prior action. *Eugster v. Washington State Bar Association*, 198 Wn. App. 758, 786, 397 P.3d 131 (2017). Tacoma claims that ratepayers could have raised the issue of the lack of profitability during the 1996 litigation.

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

No Washington decision has addressed the applicability of res judicata to an earlier declaratory judgment. Nevertheless, the universal rule declares that res judicata

extends only to issues actually decided. Therefore, res judicata and collateral estoppel conflate in the context of a declaratory judgment action.

Restatement (Second) of Judgments section 33 (1982) declares:

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

22A Am. Jur. 2d Declaratory Judgments section 244 (2019) likewise reads:

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

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

International, Inc. v. Hartford Fire Insurance Co., 547 F.3d 48, 52-59 (1st Cir. 2008); *Ganaway v. Shelter Mutual Insurance Co.*, 795 S.W.2d 554, 562 (Mo. App. 1990); *Boca Park Marketplace Syndications Group, LLC v. Higco, Inc.*, 133 Nev. 923, 925-27, 407 P.3d 761 (2017); *Radkay v. Confalone*, 133 N.H. 294, 297-98, 575 A.2d 355 (1990); *Tunis v. Country Club Estates Homeowners Association, Inc.*, 2014-NMCA-025, ¶¶ 1-22, 318 P.3d 713 (N.M. App. 2013); *Harborside Refrigerated Services, Inc. v. Vogel*, 959 F.2d 368, 372-73 (2d Cir. 1992); *In re Estate of Cox*, 97 N.C. App. 312, 314-15, 388 S.E.2d 199 (1990); *State ex rel. Shemo v. City of Mayfield Heights*, 95 Ohio St. 3d 59, 68-69, 765 N.E.2d 345 (2002); *Oklahoma Alcoholic Beverage Control Board v. Central Liquor Co.*, 421 P.2d 244, 247, 1966 OK 243 (Okla. 1966); *Catawba Indian Nation v. State*, 407 S.C. 526, 539-41, 756 S.E.2d 900 (2014); *Carver v. Heikkila*, 465 N.W.2d 183, 186 (S.D. 1991); *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359, 42 Tex. Sup. Ct. J. 21 (1998); *Cupola Golf Course, Inc. v. Dooley*, 2006 VT 25, ¶10, 179 Vt. 427, 898 A.2d 134 (2006); *Stericycle, Inc. v. City of Delavan*, 120 F.3d 657, 659 (7th Cir. 1997).

Fearing, J.

Fearing, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EDWARD E. (TED) COATES; MICHAEL CROWLEY; MARK BUBENIK and MARGARET BUBENIK d/b/a STEELE MANOR APARTMENTS; THOMAS H. OLDFIELD; and INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES, an Oregon nonprofit corporation, Respondents, v. CITY OF TACOMA, Petitioner.	No. 51695-1-II ORDER GRANTING MOTION TO PUBLISH

Appellant City of Tacoma filed a motion to publish this court's December 10, 2019 opinion. Respondents filed a response to Appellant's motion. After consideration, the court grants the motion. It is now

ORDERED that the final paragraph in the majority opinion that reads "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered." is deleted. It is further

ORDERED that the opinion will now be published.

Panel: Jj. Melnick, Glasgow, Fearing

FOR THE COURT:

Melnick J.

Melnick, P.J.

APPENDIX C

City of Tacoma

Memorandum

TO: Mayor Strickland and City Council Members
Public Utility Board

FROM: Elizabeth A. Pauli, City Attorney EAP
William C. Fosbre, Chief Deputy City Attorney William Fosbre

SUBJECT: The City and TPU's Authority and Obligations Related to Providing Commercial Telecommunications Services to the Public

DATE: July 16, 2015

QUESTION

What are the City and TPU's authority and obligations related to providing commercial telecommunication services (cable television and broadband internet) to the public?

BACKGOUND AND ANALYSIS

Washington State law grants cities the authority to own and operate various utilities. See RCW 35.92.010, waterworks; RCW 35.92.020, sewerage and solid waste; RCW 35.92.030, asphalt plants; RCW 35.92.040, cold storage plants; RCW 35.92.050, gas and electricity plants; and RCW 35.92.060, transportation systems.

The citizens of Tacoma, through City Charter Section 4.1, have vested authority in the City to own and operate state-authorized utilities within or outside its corporate limits.

> **Section 4.1** – The City shall possess all the powers granted to cities by state law to construct, condemn and purchase, purchase, acquire, add to, maintain, and operate, either within or outside its corporate limits, including, but not by way of limitation, public utilities for supplying water, light, heat, power, transportation, and sewage and refuse collection, treatment, and disposal services or any of them, to the municipality and the inhabitants thereof; and also to sell and deliver any of the utility services above mentioned outside its corporate limits, to the extent permitted by state law.

Additionally, the citizens of Tacoma, through City Charter Section 4.5, have mandated that all revenue of City-owned and operated utilities be used only for the necessary operating expenses of the utilities. Utility revenue shall never be used to make loans to any other utility, department, or agency of the City.

> **Section 4.5** – The revenue of utilities owned and operated by the City shall never be used for any purposes other than the necessary operating expenses thereof, including the aforesaid gross earnings tax, interest on

> and redemption of the outstanding debt thereof, the making of additions and betterments thereto and extensions thereof, and the reduction of rates and charges for supplying utility services to consumers. The funds of any utility shall not be used to make loans to or purchase the bonds of any other utility, department, or agency of the City.

City Charter Section 4.5 is consistent with both the Washington state statute that governs local government accounting and case law interpreting the appropriate use of utility revenues. See RCW 43.09.210 and Okeson v. City of Seattle, 150 Wn.2d 540 (2003).

> **RCW 43.09.210 Local government accounting — Separate accounts for each fund or activity — Exemption for agency surplus personal property.**
> Separate accounts shall be kept for every appropriation or fund of a taxing or legislative body showing date and manner of each payment made therefrom, the name, address, and vocation of each person, organization, corporation, or association to whom paid, and for what purpose paid.
>
> Separate accounts shall be kept for each department, public improvement, undertaking, institution, and public service industry under the jurisdiction of every taxing body.
>
> All service rendered by, or property transferred from, one department, public improvement, undertaking, institution, or public service industry to another, shall be paid for at its true and full value by the department, public improvement, undertaking, institution, or public service industry receiving the same, and no department, public improvement, undertaking, institution, or public service industry shall benefit in any financial manner whatever by an appropriation or fund made for the support of another.
>
> All unexpended balances of appropriations shall be transferred to the fund from which appropriated, whenever the account with an appropriation is closed.
>
> This section does not apply to agency surplus personal property handled under RCW 43.19.1919(5).

The local government accounting statute prohibits one governmental entity from receiving services from another governmental entity for free or at reduced cost absent a specific statutory exemption. Okeson v. City of Seattle at 557. In applying this law the State Supreme Court held in Okeson that the City's electric utility could not maintain the

City's general government street lights without being paid for the value of the service. Okeson v. City of Seattle at 558. Street lighting costs must be accounted for separately and paid from non-utility revenues. Id.

Among all of the listed utilities authorized under state law (see Chapter 35.92 RCW, supra), the citizens, through City Charter Section 4.10, granted the Public Utility Board authority over only the electric, water, and belt line railway utility systems. Without an express delegation of authority from the City Council to the Public Utility Board, the Public Utility Board cannot exercise authority over any other municipal services or functions of the City.

> **Section 4.10** – The Public Utility Board, subject only to the limitations imposed by this charter and the laws of this state, shall have full power to construct, condemn and purchase, acquire, add to, maintain, and operate the electric, water, and belt line railway utility systems.

The City Charter does not prohibit the City Council from delegating additional authority to the Public Utility Board.

State law (specifically Chapter 35.92 RCW) does not grant cities authority to provide commercial telecommunication services (cable television and broadband internet) to the public.[1] Furthermore, no other state statute specifically authorizes cities to provide such services. Instead, the Washington appellate courts have ruled that a city's authority to provide commercial telecommunication services rests in a city's broad authority to self-govern in areas of local concern. When a city provides commercial telecommunication services to the public, it is not acting as a public utility. See City of Issaquah v. Teleprompter Corp, 93 Wn.2d 567, 570 (1980), and Rohrback v. City of Edmonds, 162 Wn. App. 513 (2011).[2]

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[1] As noted above, the City is expressly authorized by state statute to own, operate, and compete against private water and power utilities. Because City-provided cable and Internet services are not expressly authorized by state law, there are no Washington court decisions exploring the limits of this authority.

[2] In 2000, the State Legislature expressly granted Public Utility Districts and Port Authorities the power to own and operate telecommunications systems, but limited this authority to only providing "wholesale" internet services. State law requires these governmental entities to "separately account of any revenues and expenditures for those services.... Any revenues received ...must be dedicated to costs incurred to build and maintain any telecommunication facilities constructed, installed or acquired to provide such services, including payments on debt issued to finance such services.... When a public utility district provides wholesale telecommunications services, all telecommunication services rendered to the district for the district's internal telecommunications needs shall be allocated or charged at its true and full value. A public utility district may not charge its nontelecommunications operations rates that are preferential or discriminatory compared to those it charges entities purchasing wholesale telecommunications services." RCW 54.16.330

A recent order of the United States Federal Communications Commission does not change the fact that telecommunication services are not considered a municipal/public utility under Washington State law. See FCC GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling and Order Adopted February 26, 2015. The Federal Communications Act does not use the term "utility." The term "utility" is a state-level classification. As an alternative to this term, the Communications Act classifies services principally into "information services" and "telecommunications services." The February 26, 2015, FCC order reclassified broadband internet services from an "information service" (lightly regulated) to a "telecommunications service," also known as a "Title II" service – in reference to Title II of the Communications Act. Title II has what the FCC likes to call "utility-style" provisions (rate setting, for example). The reclassification was driven by a desire on the part of the FCC to issue net neutrality rules that would survive legal challenge, but not from a desire to regulate all aspects of broadband service. Consequently, the FCC has also taken steps under its authority to forbear the application of Title II requirements to broadband. The result is many, many of the rules that would otherwise apply to a Title II service do not apply to broadband per the FCC order. As the FCC states in its order: "Unlike the application of Title II to incumbent wireline companies in the 20th Century, a swath of utility-style provisions (including tariffing) will not be applied." See page 12. The FCC also says: "[W]e are not regulating broadband Internet access service as a utility or telephone company." See FN 1274. The FCC order does not alter prior court decisions from the Washington State Supreme Court and Court of Appeals that ruled telecommunication services provide by a city are not public utilities.

The Public Utility Board's authority is limited to approving only those activities that bear a sufficiently close nexus to the purpose of providing electric, water, or rail services to its customers. See City of Tacoma v. Taxpayers of Tacoma, 108 Wn.2d 679 (1987).

In this legal vein, the Public Utility Board has authority to approve the construction of a telecommunication system for use by the City's electric, water, and rail utilities if it will enhance utility services provided to the City's utility customers. The Public Utility Board also has authority to sell (on a temporary or permanent basis) excess or surplus system capacity not currently needed for effective delivery of utility services. See RCW 35.94.010 and 35.94.040

> **RCW 35.94.010 Authority to sell or let.**
> A city may lease for any term of years or sell and convey any public utility works, plant, or system owned by it or any part thereof, together with all or any equipment and appurtenances thereof.
>
> **RCW 35.94.040 Lease or sale of land or property originally acquired for public utility purposes.**
> Whenever a city shall determine, by resolution of its legislative authority, that any lands, property, or equipment originally acquired for public utility

> purposes is surplus to the city's needs and is not required for providing continued public utility service...may cause such lands, property, or equipment to be leased, sold, or conveyed....

The Public Utility Board is also bestowed with authority under state law to make all contracts and "to engage in any undertaking necessary to make [the City's] municipal electrical system efficient and beneficial to the public." Okeson II v. City of Seattle, 130 Wn. App. 814, 821 (2005). As mentioned above, this authority is limited. The Public Utility Board may not act beyond the purposes of the statutory grant of power under both City Charter Section 4.10 and Washington State law related to providing the utility services as listed in Chapter 35.92 RCW, and specifically RCW 35.92.050 (providing electricity). A utility activity is within the purposes of RCW 35.92.050 (and City Charter Section 4.10) only if it bears "a sufficiently close nexus to the purpose and object the Legislature intended to serve in granting the power to operate an electric utility," which is the supply of electricity to the municipality and its inhabitants. Id. at 822 (quoting Tacoma v. Taxpayers, 108 Wn.2d at 696).

Although the Public Utility Board can authorize Tacoma Power to construct and operate a telecommunications system for utility purposes, and arguably, sell surplus capacity, RCW 35.92.050 and City Charter Section 4.10 do not necessarily grant the Public Utility Board the authority to provide commercial telecommunication services to the public because such services are not sufficiently related to the production or delivery of electric services.

In 1997, the City Council officially delegated authority to the Public Utility Board to own and operate a telecommunication system for the purposes of providing commercial services (cable television and wholesale broadband internet) to the public. See Substitute Resolution No. 33668. Pursuant to that resolution, the City Council expressly authorized the Public Utility Board to approve "business and third party agreements, as appropriate under the City Charter, Tacoma Municipal Code and other applicable laws, and the City Council shall continue to be involved in the major policy decisions including construction contracts, rate setting policies, debt financings, the public rights-of-way use for telecommunications and quarterly reviews."

The Public Utility Board provides commercial telecommunications services based on this delegated authority from the Tacoma City Council, not based on its authority to govern the operations of the City's electric utility under City Charter Section 4.10.

City electric utility revenues may be used to maintain the telecommunication system while it is being used to provide electric utility services to electric customers.

City electric utility revenues may not be used to pay for the costs directly associated (such cable programming, set top boxes, marketing, etc.) with providing commercial telecommunications services (cable television and wholesale broadband internet) to the

public. These costs are not sufficiently related to providing electricity to utility customers, thus must be paid for from non-utility revenues. Non-utility revenues can include rates or charges to the telecommunication services customers or general government tax dollars. General government tax dollars can be used to offset the costs of providing municipal services (think theater district, Tacoma Dome, etc.).

Costs incurred to maintain the portions of the telecommunication system used to serve both electric utility customers and commercial telecommunication services to the public must be distributed based on an allocation methodology.

The allocation of costs incurred for services provided between two city departments or enterprises is governed by RCW 43.07.210. The City Council and the Public Utility Board have discretion in determining what methodology it will use to allocate costs. See Cedar River Water and Sewer District v. King County, 178 Wn.2d 793 (2013). The methodology need only be reasonable and does not need to be the best or most accurate formula, especially if a formula is inefficient, costly, or burdensome, as compared to any increase in accuracy. Pro rata share, percentage of budget, FTE counts, number of computers, or similar types of formulas appear to be sufficient under the court's reasoning to allocate costs. As long as the methodology is followed throughout the budget year, there is no legal requirement to true-up to actual expenditures or provide refunds if a given fund budget runs a surplus. Id. A court will look at the size of any allocation error in relationship to the total costs allocated and the amount of the operating budgets to determine if a repayment is required. In the Cedar River case, the court did not find a potential $200,000 error to be material, given the size of the allocated costs ($19 million) and operating budgets at issue (in excess of $1 billion), so no repayment was necessary.

Assuming that specific telecommunication equipment or facilities can be differentiated between electric utility uses and commercial telecommunication uses, then costs should be allocated accordingly. In the future, if a specific portion of the telecommunication system is no longer used to provide electric service but still needed for commercial telecommunication uses, then the future costs to maintain that specific portion should be borne solely by commercial telecommunication users or through tax dollars, but not utility revenues.

SUMMARY

The City's legal authority to own and operate a telecommunication system to serve electric utility customers is very different from its authority to use the system to provide cable television and broadband internet services to the public. The former authority stems from state laws and court decisions governing what functions bear a sufficiently close nexus to the primary purpose of providing electricity. The Public Utility Board has unquestioned authority to construct and operate a telecommunication system for the benefit of serving its electric customers. The latter authority - to provide commercial

telecommunication services to the public – exists separate and apart from the City's electric utility functions. This latter function has been formally delegated to the Public Utility Board to operate and administer. Administration of this function requires separate accounting of costs and revenues associated with the commercial telecommunication services provided to the public, as state law and the City Charter prohibit the use of electric utility ratepayer revenues to pay for costs solely associated with providing these commercial telecommunication services. Telecommunication system costs associated with providing both electricity to utility customers and commercial telecommunications services to the public must be allocated and then paid separately by the two enterprises. Whenever the electric utility no longer needs a specific portion of the telecommunication system, which the commercial side is still using, then the maintenance costs associated with this specific portion of the system can no longer paid with electric utility revenues.

I trust this analysis is of assistance, and please let us know if you have any questions.

cc: TC Broadnax, City Manager
William A. Gaines, Director of Utilities
Chris Robinson, Tacoma Power Superintendent

APPENDIX D

RCW 43.09.210

Local government accounting—Separate accounts for each fund or activity—Exemptions.

(1) Separate accounts shall be kept for every appropriation or fund of a taxing or legislative body showing date and manner of each payment made therefrom, the name, address, and vocation of each person, organization, corporation, or association to whom paid, and for what purpose paid.

(2) Separate accounts shall be kept for each department, public improvement, undertaking, institution, and public service industry under the jurisdiction of every taxing body.

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

(4) All unexpended balances of appropriations shall be transferred to the fund from which appropriated, whenever the account with an appropriation is closed.

(5) This section does not apply to:

(a) Agency surplus personal property handled under RCW **43.19.1919**(1)(e); or

(b) The transfer, lease, or other disposal of surplus property for public benefit purposes, as provided under RCW **39.33.015**.

[**2018 c 217 § 5; 2000 c 183 § 2; 1965 c 8 § 43.09.210.** Prior: **1909 c 76 § 3;** RRS § 9953.]

APPENDIX E

Tacoma City Charter §4.5

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

HELSELL FETTERMAN LLP

March 05, 2020 - 9:16 AM

Transmittal Information

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- liz.thomas@klgates.com
- mark.filipini@klgates.com
- mary.klemz@klgates.com
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Address:
1001 4TH AVE STE 4200
SEATTLE, WA, 98154-1154
Phone: 206-689-2140

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(COURT OF APPEALS NO. 51695-1-II)

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

CITY OF TACOMA,

Respondent.

DECLARATION OF SERVICE

David F. Jurca, WSBA #2015
djurca@helsell.com
Andrew J. Kinstler, WSBA #12703
akinstler@helsell.com
Emma Kazaryan, WSBA #49885
ekazaryan@helsell.com
Helsell Fetterman LLP
1001 4th Avenue, Suite 4200
Seattle, WA 98154
(206) 292-1144
Attorneys for Petitioners

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the 5th day of March, 2020, the undersigned caused to be served in the manner indicated below, a true and correct copy of ***Petition for Review; and this Declaration of Service*** to:

Elizabeth Thomas, WSBA #11544 Mark Filipini, WSBA #32501 Kari Vander Stoep, WSBA #35923 Daniel-Charles V. Wolf, WSBA #48211 K&L GATES, LLP 925 Fourth Avenue, Suite 2900 Seattle, Washington 98103 (206) 370-8111 (Office) Liz.thomas@klgates.com mark.filipini@klgates.com Kari.vanderstoep@klgates.com dc.wolf@klgates.com mary.klemz@klgates.com *Co-Counsel for Respondent City of Tacoma*	☒ COA E-Mail ☐ Electronic Mail ☐ USPS Mail
William Fosbre, WSBA #27825 City Attorney CITY OF TACOMA 747 Market Street, Room 1120 Tacoma, Washington 98402 (253) 591-5000 (Office) Bill.Fosbre@ci.tacoma.wa.us *Attorney for City of Tacoma*	☒ COA E-mail ☐ Electronic Mail ☐ USPS Mail

Kenneth W. Masters, WSBA #22278
Shelby R. Frost Lemmel, WSBA #33099
MASTERS LAW GROUP, P.L.L.C.
241 Madison Avenue North
Bainbridge Island, Washington 98110
(206) 780-5033 (Office)
ken@appeal-law.com
shelby@appeal-law.com
paralegal@appeal-law.com
Attorney for Respondent City of Tacoma

☒ COA E-mail
☐ Electronic Mail
☐ USPS Mail

DATED this 5th day of March, 2020, at Seattle, Washington.

/s/Joanne L. Burt
Joanne L. Burt, Legal Secretary

HELSELL FETTERMAN LLP

March 05, 2020 - 9:16 AM

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- mary.klemz@klgates.com
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