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No. 73060-6 - I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

LARRY COSTELLO and CHRISTY COSTELLO, et ux.,

Appellants

v.

RESPONDENT TANNER ELECTRIC COOPERATIVE

Respondent

RESPONDENT'S RESPONSE BRIEF

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COURT OF APPEALS
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ORIGINAL

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I. INTRODUCTION

Tanner Electric Cooperative (“Tanner”) is a non-profit cooperative electric distribution utility providing service to approximately 4,300 members in three separate service territories (Anderson Island in Pierce County and Ames Lake and North Bend in King County). In 2009, Tanner began replacing all of its electro-mechanical meters with remotely readable Automated Meter Infrastructure (“AMI”) meters. Appellants Larry and Christy Costello, Tanner members, objected to having an AMI meter installed at their residence and they chose to “opt-out” of doing so; however, they also refused to pay a fee associated with manually reading their old electro-mechanical meter.¹ Rather than pay the fee, the Costellos sued Tanner alleging that the fee violated RCW 80.28.090-100 (claiming the fee was not “just and reasonable” because they were required to pay to protect their right to privacy), that the fee violated RCW 49.60 (Washington’s Anti-Discrimination Law), and that the fee violated RCW 19.86, the Consumer Protection Act (“CPA”). The trial court properly dismissed these three claims for failure to state a claim or on a motion for summary judgment.

¹ After the Costellos objected to Tanner installing an AMI meter, Tanner adopted an Opt-Out policy for members that did not want an AMI meter. The fee charged for remaining on an electro-mechanical meter is due to the direct cost of traveling to, reading, and importing the Costellos’ electric usage into the billing system (costs not incurred by members using an AMI meter).

The Costellos also claimed, pursuant to a records inspection statute, that they were entitled to all information regarding the AMI meter within Tanner's possession. The documents requested included proprietary trade secret information of a third-party vendor subject to a Confidentiality Agreement and the trial court appropriately entered a Protective Order to preclude disclosure of such information without court approval. Although not required to do so, Tanner agreed to provide the Costellos access to all of the requested information pursuant to the Protective Order. This led to the dismissal of the Costellos' final remaining claim.

In addition to the meter reading fee, the Costellos also chose to not pay charges related to their election to "opt-out." As it was unrefuted that the Costellos failed to pay their bills to Tanner in full, the trial court awarded judgment for the outstanding amount owed. After entering judgment in Tanner's favor, the trial court awarded attorney fees pursuant to the Tanner Membership Agreement, pursuant to the small claims statute (RCW 4.84.250 *et. seq.*), and because three of the Costellos' claims were frivolous (RCW 4.84.185).

The Costellos appeal the dismissal of their records request and CPA claims, the granting of summary judgment on Tanner's counterclaim, and the award of attorney fees. However, they now concede that their

“privacy” and “discrimination” claims made under RCW 80.28 and RCW 49.60 were properly dismissed.

II. RESTATEMENT OF THE ISSUES

1. Was it proper for the trial court to dismiss the Costellos’ records request claim because Tanner provided the Costellos access to all of the information they requested?

2. Was it proper for the trial court to dismiss the Costellos’ records request claim because the requested documents (including third party proprietary information) were outside the scope of those required to be allowed inspection under the applicable statute, RCW 24.06.160?

3. Was it proper for the trial court to dismiss the Costellos’ records request claim because the requested information was beyond what the parties had contractually agreed would be provided to Tanner’s members?

4. Was it proper for the trial court to dismiss the Costellos’ CPA claim because Tanner is exempt from such liability?

5. Was it proper for the trial court to dismiss the Costellos’ CPA claim because they failed to establish the elements for such a claim?

6. Was it proper for the trial court to award Tanner the outstanding amount that the Costellos indisputably owed on their account?

7. Did the trial court abuse its discretion in awarding Tanner its attorney's fees pursuant to the parties' contract, under the small claims statute (RCW 4.84.250), and under the frivolous claims statute (RCW 4.84.185)?

8. Should Tanner be awarded its attorney fees incurred in responding to this appeal?

III. COUNTERSTATEMENT OF THE CASE

A. THE COSTELLOS CHOSE TO NOT HAVE A "SMART METER"

In 2009, Tanner embarked on a program to upgrade its electric metering system by installing AMI meters. AMI meters have two way electronic communications capability, which allows the meter to be read remotely, thereby eliminating the need to employ meter readers. AMI meters have numerous other operational advantages over old style electro-mechanical meters, *see* CP 1613 at ¶ 11, and are replacing traditional meters as standard metering equipment in the utility industry.² Tanner installed AMI meters in Ames Lake in 2010 and on Anderson Island in 2011. No members objected to AMI meters in those service areas. In

² Smart meters are used by 500 or more of utilities to meter over 46 million electric customers in the United States to measure electric consumption. *See* CP 1613-16 at ¶¶ 12-17, CP 1465-88. In addition to cost savings due to elimination of manual meter reading, they provide numerous operational advantages, *e.g.*: (1) quicker outage identification, (2) an ability to remotely determine whether power has been restored at a member's residence, (3) improved power quality, (4) automated billing abilities, and (5) improved accuracy of power use measurement. *see* generally CP 1609-1731.

2012 AMI meter installation was scheduled for North Bend, where the Costellos reside. *See* CP 1616 at ¶ 18. When they learned of the AMI meter installation program, the Costellos expressed opposition to AMI meters, asserting that AMI meters were a “surveillance” or “wiretapping” device that would violate their “right to privacy” under WA Const., Art. I, Sec. 7 and “could facilitate threats to an occupant’s physical security and property.” CP 1616 at ¶ 18 and CP 1856 at ¶ 5. A special Board meeting was held in June 2012 to allow the Costellos to express and explain their opposition to AMI meters. *See* CP 1617 at ¶ 22; *see also* CP 131 at ¶ 6 (appellant Larry Costello acknowledging he requested and attended this meeting).

After the June 2012 meeting, Tanner went to great lengths to address the Costellos’ concerns about smart meters,³ even though Tanner believed those concerns to be unfounded. Tanner developed and adopted an “Opt-Out” policy for smart meters, CP 1721-24, similar to policies adopted by many other utilities,⁴ Tanner’s Opt-Out policy allows members who do not want to be served by an AMI meter to retain a traditional meter; however, because Tanner no longer employs meter

³ *See* CP 1834-37, and CP 1616-21 at ¶¶ 18-32.

⁴ CP 1689-1720. Tanner also adopted a Privacy Policy to clarify that it would not share smart meter data with third parties without member approval. CP 1726-29. Tanner also detailed its business reasons for moving to smart meters, which were discussed at an open Board meeting, which the Costellos attended; *see* CP 131 at ¶ 6.

readers, Tanner elected to bill opt-out members monthly based on estimated usage, with a manual true-up meter read every three months.⁵ Because the Costellos opted-out, they have never been served by the AMI meter that they object to. Only one other Tanner member has elected to opt-out of having an AMI meter installed. CP 165.

B. THE COSTELLOS' RECORDS REQUEST

On January 18, 2013, the Costellos made a formal records request to Tanner under RCW 24.06.160, the text of which appears at CP 133-35. After this lawsuit was filed, the Costellos sought the same information plus extensive additional information through CR 26 discovery requests.

C. THE PROTECTIVE ORDER ENTERED BY THE TRIAL COURT

Tanner contended that much of the information sought was proprietary information of its meter vendor, Aclara Technologies, LLC (“Aclara”), which was not subject to disclosure under the records statute,⁶

⁵ Tanner also considered performing a monthly manual meter read and charging a member for a monthly service call to a member’s residence to read the meter. However to lessen the costs for an opt-out member, Tanner elected to only manually read the meters quarterly. The opt-out fee Tanner charges is based on the costs incurred in manually reading the meters. Other utilities in Washington and in other states have adopted similar “opt-out” fees. See CP 1618-19 at ¶¶ 23-28; CP 1690-1729.

⁶ *E.g.*, The information that Aclara provided to Tanner was provided pursuant to a confidentiality agreement. CP 1740-43, 1745-50. The Costellos sought proprietary information, including, “comprehensive details of the system architecture, system support and maintenance, and details of the data management” and “...all manufacturer's product data as well as operation and maintenance manuals to disclose the full range of capabilities and features associated with the equipment...”. Notably, some of the documents the Costellos now claim to have not received (*e.g.* a list of members and their addresses) were not included in their records request. *Cf. id.*

in an attempt to satisfy the Costellos, Tanner proposed that all documents in its possession, including the Aclara documents, be made available to the Costellos pursuant to the terms of a protective order. *See* CP 1569-74. Tanner obtained Aclara's consent to make this proposal. *See* CP 1739-50. Although the Costellos initially agreed to a proposed protective order, they withdrew that approval because it contained a "Highly Confidential" designation for certain documents which could only be reviewed by their attorney of record or independent expert. *See* CP 1568-74. At the time the Costellos were represented by counsel. *See id.* Having failed to reach agreement on a protective order, Tanner moved the Court to enter the order, including the Highly Confidential designation. CP 43-50. In their Response, the Costellos acknowledged that the Highly Confidential designation would preclude review of documents by anyone other than the Costellos' attorney of record or an independent expert. CP 181-82. The Costellos strongly opposed entry of the protective order because of the 'attorneys-eyes only' provisions..." CP 182. However, despite their objections, the Trial Court entered the Protective Order as proposed by Tanner. *Cf.* CP 53-62 to CP 787-96. Thereafter, the Costellos were offered *all* of the requested information in their records request before this lawsuit was initiated and/or in response to their discovery requests, *Cf.* Cost. Br. at 20, n. 19.

D. THE COSTELLOS CHOSE TO REPRESENT THEMSELVES

When the Protective Order was entered, the appellants were represented by counsel; however, in April 2014, the Costellos' counsel withdrew as their counsel of record.⁷ Since that time, the Costellos have argued that as a "pro se" party, the Order allows them direct access to the Highly Confidential documents. Vol. 2 VRP 6-7 at 21:17-23:3; CP 952. The trial court explained to the Costellos that under the Protective Order, they were able to access documents designated Highly Confidential through the hiring of an independent expert. *See* Vol. 2 VRP 7 at 22:1-9. The Costellos would not agree to hire such an expert. *Id.* at 22:10-14.

**E. PURSUANT TO THE PROTECTIVE ORDER, TANNER
MADE AVAILABLE ALL DOCUMENTS REQUESTED
BY THE COSTELLOS IN THEIR RECORDS REQUEST**

In June 2014, Tanner made all documents related to the AMI system in its possession, including the Highly Confidential documents, accessible pursuant to the Protective Order. CP 1948-49. However, because the Costellos had still not retained an attorney or an independent expert, Tanner withheld the password to 110 Highly Confidential documents,⁸ which included proprietary information of Aclara. CP 1740-

⁷ CP 2194-96. However, during a later hearing, the Costellos acknowledged to the trial court that they still had a "legal advisor." Vol. 2 VRP 7 at 23:1-3.

⁸ Tanner provided the Costellos with a log of the Highly Confidential documents which were withheld so that they could better utilize the procedure in the protective order for

41. The Costellos did not accept this information under the Protective Order's terms because they believed that without hiring an attorney or an independent expert, they should be allowed to personally review and freely disseminate Aclara's confidential information (including its trade secrets). *See* CP 1921 at ¶ 9 and CP 1934-42. The only reason that plaintiffs have not inspected every document they requested is because they had no "counsel of record" or "independent expert" to review the "Highly Confidential" information, as required by a Protective Order entered by the trial court.⁹ At the summary judgment hearing to dismiss the records inspection claim, the trial court agreed that under the Order, Highly Confidential documents were meant to be reviewed by counsel or an independent expert. *See* Vol. 2 VRP 3 at 9:19-21, which the Costellos declined to do.

F. TANNER'S MEMBER INFORMATION POLICY

Tanner adopted a Member Information Policy in 2009 (the "Information Policy"). The Policy defined what records are available for

reclassifying restricted documents. CP 1935-42. However, as the Costellos objected to any documents being designated Highly Confidential, Tanner moved the trial court, pursuant to the Protective Order, to Preserve the Confidentiality of the documents *See* CP 926-39. This motion was never considered as it became moot when the trial court granted Tanner's motion for summary judgment on the Costellos' records request claim.

⁹ *See* CP 789-90 (Protective Order) at ¶ 4a. (providing that "Highly Confidential" documents can only be disclosed to a party's "counsel of record in this Litigation, and/or to independent experts or consultants" that have signed the agreement to be bound).

inspection in conformity with RCW 24.06.160.¹⁰ The Information Policy identifies the specific books and records available to members upon request.¹¹ The Information Policy additionally articulates limitations on providing information.¹² The Highly Confidential documents the

¹⁰ See CP 1866-72. The Costellos as members have *agreed* to comply with and be bound by the bylaws of the cooperative and the rules adopted by the Tanner Board. See CP 157-58, 1610-11, 1625-63.

¹¹ The Policy makes the following information available upon request: "...the cooperative's articles of incorporation, bylaws, rates, charges, service rules and regulations, audited financial statements for the previous three years, the minutes of prior member meetings, work plans for future construction, adopted budgets for current and future operations and capital improvements, special financial reports submitted to the Board of Directors, and other information that may be relevant to the members' interest."

¹² The limitations in the Policy include the following:

D. Conditions Applicable to Disclosure of Books and Records. A request for information may be denied if such request is for an unlawful purpose or:

4. If the information sought is of such a nature that if disclosed such disclosure would:
 - a. violate a person's right to privacy, violate any agreement with third parties with respect to trade secrets, or adversely affect Respondent in its negotiations with third parties.
 - b. adversely affect [Tanner] out of proportion to the possible competing interest of the member seeking to examine such information.

E. Information That Shall Not Be Made Available. The following information shall not be provided:

1. Any information that constitutes "Business Information." For purposes of this policy "Business Information" means all information about cooperative business, including, without limitation, information about vendors, including information concerning invoicing, payables and receivables, procurement, company business and business development plans and strategies, information constituting or relating to research, development, trade secrets, know-how, inventions, technical data, intellectual property, property acquisition plans, collective bargaining strategies and/or negotiations, or other information the use or dissemination of which the Company or any subsidiary deems would have an adverse impact on the Company's or the subsidiary's interests. * * *

Costellos sought were within section II. D and E of the Membership Information Policy.

G. TANNER'S MEMBERSHIP AGREEMENT AND BYLAWS

Disclosure of the proprietary Aclara documents is also contrary to the Tanner Membership Agreement executed by the Costellos.¹³ The agreement obligates the Costellos to abide by Tanner's Information Policy and its Bylaws, which provide that members shall abide by Tanner's contracts with third parties, which includes Tanner's Confidentiality Agreement with Aclara).¹⁴

H. TANNER REMAINS EXEMPT FROM THE CPA

The Costellos cite legislation (SHB 1896) approved by the Legislature in April 2015, after this case was decided, requiring that consumer owned electric utilities, including electric cooperatives, adopt a privacy policy and made violations of the policy a violation of the CPA.

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2. Information that the Board determines is sought for a dishonest purpose, or to gratify mere curiosity, or is otherwise inimical to the lawful interest of the Cooperative, or is not reasonably germane to the interest of the member as such.

CP 1869-70.

¹³ The Costellos executed their Membership Agreement with Tanner on August 29, 1994. See CP 1662-63.

¹⁴ See CP 1662 (which provides, among other things that the Costellos agreed to comply with "*such Rules and Regulations as may be adopted from time to time by Cooperative,*" which includes the Member Information Policy) see also CP 1634 (Article II, Section 3 which provides that the Bylaws are contractual) and CP 1628 (Article I, Section 2(e) and which provides that members agree to comply with the "Governing Documents" of the cooperative, including rules and regulations adopted by the Board).

SHB 1896 was scheduled to go into effect on July 24, 2015. The Costellos do not argue that SHB 1896 would have made Tanner's Opt-Out policy actionable under the CPA, only that it indicates that the Legislature does not view consumer owned and locally regulated utilities, like Tanner, as categorically exempt from the CPA. However, immediately after SHB 1896 was approved, the Governor and the Attorney General submitted executive request legislation (HB 2264) to repeal the portion of SHB 1896 that applied the CPA to consumer owned utilities for privacy policy violations. *See* Appendix 1 attached hereto.

HB 2264 was approved by unanimous votes in the Washington House and Senate on June 28 and 29, 2015 respectively; thus, the provision in SHB 1896 that partially applied the CPA to consumer owned utilities was repealed before it ever became effective. The Legislature thereby recognized that that SHB 1896 was contrary to long standing law that all utilities, including cooperative utilities, are exempt from the CPA.

I. THE COSTELLOS REFUSED TO PAY THEIR ENTIRE ELECTRIC BILL

Until October 2013, the Costellos refused to pay the fee to manually read their meter. After that, they continued to refuse to pay for energy based on estimated monthly usage in the two month period between quarterly "true-up" meter reads. *See* CP 1998, 2056-58 at ¶¶ 7-10. Instead, the Costellos "self-read" their meter during the intervening

two month period and crossed out the estimated energy usage as shown on their bill and inserted an amount for energy usage and recalculated their bill based on their self-read. *See* CP 2067-87. During the period when they rewrote their bills, Tanner assessed a 5% late charge of on the unpaid portion of a bill, which Costellos consistently crossed out. *See id.*

In short, rather than pay the invoices issued by Tanner, the Costellos refused to pay for charges that they objected to and instead created their own invoices which they did pay. *See id.* The Costellos' "self-billing" is incompatible with Tanner's computerized billing process and caused additional expense. CP 2054, 2059. Other than their now dismissed affirmative claims the Costellos pled no affirmative defenses which would excuse them from paying their bills. Indeed, in responding to Tanner's claim, Costellos admitted they owed the money to Tanner. *See* CP 17 at A; *see also* Vol. 3 VRP 5 at 14:8-15 (the Costellos acknowledging that the late fee and its application were legitimate).

The total amount of the Costellos' arrearages varied over the 18 months after the Costellos filed their lawsuit from as much as \$200 to as little as \$16. As of December 2014, when Tanner's motion for summary judgment on its counterclaim was heard, the arrearage, including prejudgment interest was \$45.70. *See* CP 2206 at ¶4. Summary judgment for that amount was granted. *See* CP 1468-69 and CP 1493-94.

J. TANNER OFFERED TO SETTLE ITS COUNTERCLAIMS FOR \$10

On November 6, 2014, more than 30 days before the hearing on its motion for summary judgment, Tanner offered to settle all of its monetary claims, which was the only unresolved issue in the litigation, for \$10. *See* CP 2099. Costellos declined Tanner's offer to settle. *See* CP 2100-02.

K. THE COSTELLOS BROUGHT BASELESS CLAIMS

The Costellos' Complaint alleges that they should not be made to pay any Tanner charges due by reason of their decision to opt-out of having an AMI meter installed. *See* CP 1-7. They claimed that any such charges were not "just and reasonable" because it required them to pay to protect their right to privacy (Count II), the charges were discriminatory (Count III), and they violated Washington's Consumer Protection Act (Count IV). *See id.*

In October of 2013, Tanner moved to dismiss all three of these causes of action because they had no basis in law. *See* CP 2168-93. The Costellos in turn, pursuant to CR 56(f) moved the court for additional time for discovery, a motion which was granted. *See* CP 20-21. After additional time for discovery was had, Tanner renoted the motions for summary judgment arguing that these causes of action were legally deficient. *See* CP 148-67. In March 2014, the trial court granted the motion. *See* CP 799-801.

L. THE ATTORNEY FEES AND COSTS AWARDED BY THE TRIAL COURT

After dismissal of all of the Costellos' claims and judgment in Tanner's favor on its counterclaim, Tanner moved for an award of attorney's fees and costs under the Membership Agreement,¹⁵ under the small claims statute (RCW 4.84.250), and under the frivolous claims statute (RCW 4.84.185). CP 1495-1513. Tanner only sought fees and costs for defending against the Costellos' claims that its Opt-Out Policy: (i) unjustly made them pay to prevent a violation of their right to privacy under the Washington Constitution; (ii) was discriminatory under RCW 49.60; and (iii) was an unfair trade practice under RCW 19.86. While the invasion of privacy and discrimination claims have now been abandoned, these claims (and the CPA claim) were used as a defense to payment of Tanner's counterclaim for unpaid utility service charges. *See* Vol 1 VRP 8 at 29:21-22 (Costellos admitting that their claimed harm under their claim for invasion of privacy claim was having to pay the opt-out fee); Vol 1 VRP 9 at 31:14-32:25 (explaining that their discrimination claim was based on the same). Thus, defending against the Costellos' privacy,

¹⁵ The Membership Agreement included an attorney fee provision if Tanner needed to hire counsel to pursue collection on amounts due. *See* CP 1662 (“**If the account is placed with an attorney or sued, I agree to pay reasonable amount for attorneys’ fees**”).

discrimination and CPA claims was necessary for Tanner to recover unpaid charges, as requested in its counterclaim.

The trial court awarded Tanner \$119,617.53 in total fees and \$10,189.87 in costs.¹⁶

IV. ARGUMENT

A. STANDARDS OF REVIEW

The Costellos' records request claim, their CPA claim, and Tanner's counterclaim were all determined on summary judgment. Summary judgment is appropriate when the pleadings and affidavits demonstrate there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). "A genuine issue of material fact exists if, after weighing the evidence, reasonable minds could reach different factual conclusions about an issue that is material to the disputed claim." *Jones v. State, Dept. of Health*, 170 Wn.2d 338, 352 (2010).

The Costellos also appeal the grounds on which the trial court awarded Tanner its attorney fees and costs. "The standard of review for an award of attorney's fees is abuse of discretion." *Gabelein v. Diking District No.1 of Island County*, 182 Wn.App. 217, 237, 328 P.3d 1008

¹⁶ Although the Costellos appeal the three independent reasons why the award was ordered, the Costellos do not challenge the amount the trial court awarded after conducting its lodestar analysis.

(2014). “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds.” *Id.* at 226.

**B. DISMISSAL OF THE COSTELLOS’ RECORD
REQUEST CLAIM WAS APPROPRIATE**

The material facts regarding the Costellos’ records inspection claim were not in dispute and Tanner was entitled to judgment as a matter of law for any one of the three following independent reasons:

**1. Tanner Provided the Costellos
Access to All Requested Information**

On March 21, 2014 the trial court denied the Costellos’ request for unfettered access to proprietary information in Tanner’s possession, *see* CP 797-98 (order denying appellants motion for summary judgment), and entered a Protective Order to ensure such information was appropriately protected, *see* CP 787-96. During the hearing, Tanner informed the trial court that it would provide the Costellos access to all of the documents they requested pursuant to the Protective Order. *See* Vol. 1 VRP 11-13 at 40:25-49:18.

After the hearing, Tanner did provide the Costellos such access. But for the Costellos terminating their counsel in this matter and electing to represent themselves, they would have been permitted access to all of the information they requested. As the only remedy RCW 24.06.160 affords is for a corporation to be required to permit inspection of documents and

because appellants have already been provided such documents for inspection, the Costellos' records inspection claim became moot and for that reason the trial court's dismissal of the Costellos' claim should be affirmed. The Costellos failure to abide by the trial court's Protective Order provided no reason for their claim for records to continue.

2. The Costellos Are Not Entitled to All Documents in Tanners Possession

The Costellos assert that the term "books and records" as used in RCW 24.06 entitles them to obtain essentially every document and all information in respondent's possession related in any way to respondent's decision to implement its AMI meter program.¹⁷ According to the Costellos, this includes every communication, whether internal or external, every memo, every note made by any employee, every e-mail, every third party document whether subject to a confidentiality agreement or not, every contract, every technical document or pricing information of Tanner's vendor, Aclara, whether or not the document contains information that Aclara regards as a trade secret or intellectual property, regardless of whether

¹⁷ As discussed before the trial court, the Costellos' misguided interpretation of the statute would entitle them to documents including bank account numbers of other members, Social Security numbers of other members, payroll information of Tanner's employees, health insurance information of Tanner employees, etc. *See* Vol. 1 VRP 12-13 at 45:16-46:9. The Costellos in fact admitted to the trial court that they did not believe they should be allowed to access all of the documents in Tanner's possession. Vol. 1 VRP 10-11 at 37:22-40:24.

it is subject to a confidentiality agreement,¹⁸ whether or not the document was even used or relied on by management or the board in making the decision to deploy smart meters. In short, the Costellos' claim is that the statute gives them a right to just go "fishing" in Tanner's files and records, including its electronic records, and to inspect, copy and publish any and every document and all types and categories of information in respondent's possession concerning its "smart meter" electric metering system.

a. The Costellos' Interpretation of the Records Statute is Misguided

The Costellos' theory that the term "books and records" has an extraordinarily expansive meaning in RCW 24.06.160 finds no support in logic or, importantly, in Washington law, or in the law of other states.¹⁹

Washington records statutes limit the scope of documents required by a

¹⁸ For instance, the Costellos sought to inspect a contract between Tanner and Aclara, and an Operation and Maintenance Manual that contains proprietary and technical information about the Aclara communications equipment and software that Respondent purchased. Disclosure of the Aclara documents is prohibited by a confidentiality agreement between Tanner and Aclara. See CP 1745-50. This type of information goes far beyond the scope of the documents and information subject to inspection under Washington law.

¹⁹ Tanner has found no statute or any other authority in any state, including Washington, that supports the Costellos' expansive definition of the right of inspection of "books and records." Indeed, if the Costellos' interpretation of what constitutes "books and records" were correct, one would only need to purchase a single stock in Coca-Cola to be able to review the company's long-protected secret formula, a single stock in Google to obtain its valuable search algorithm, or a single stock in Boeing to peruse the company's trade secrets. Moreover, if the Costellos' argument were correct, every corporation would be required to provide any member/stockholder personnel files, which contain sensitive information for its employees. The Costellos' request here that Tanner must provide all information – including third-party proprietary information provided to respondent under a confidentiality agreement – is in disaccord with any right-minded thinking of what a member/stockholder is entitled to inspect under the law (*e.g.* certain financial reports, meeting minutes, and corporate governance documents).

corporation to be produced to its shareholder/members. For example, the “Business Corporation Act” defines records that are required to be kept by the corporation to include:

Its articles or restated articles of incorporation and all amendments to them currently in effect; (b) Its bylaws or restated bylaws and all amendments to them currently in effect; (c) The minutes of all shareholders' meetings, and records of all corporate actions approved by shareholders without a meeting, for the past three years; (d) The financial statements described in RCW 23B.16.200(1), for the past three years; (e) All communications in the form of a record to shareholders generally within the past three years; (f) A list of the names and business addresses of its current directors and officers; and (g) Its initial report or most recent annual report delivered to the secretary of state under RCW 23B.16.220.

RCW 23B.16.010(5). RCW 23B.16.020(1) then provides a right of inspection for the records required to be kept under 23B.16.010(5), but not for other documents, as follows:

(1) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in RCW 23B.16.010(5) if the shareholder gives the corporation notice of the shareholder's demand at least five business days before the date on which the shareholder wishes to inspect and copy.

Similarly, the non-profit corporation act, RCW 24.03.135 lists the required records and the records subject to member inspection as follows:

(1) Current articles and bylaws; (2) A list of members, including names, addresses, and classes of membership, if any; (3) Correct and adequate statements of accounts and finances; (4) A list of officers' and directors' names and addresses; (5) Minutes of the proceedings of the members, if

any, the board, and any minutes which may be maintained by committees of the board.

RCW 23.86, another statute under which many Washington electric cooperatives have incorporated, has no separate records inspection provision at all, but RCW 23.86.360 incorporates RCW 23B in its entirety into RCW 23.86, thereby incorporating RCW 23B.16.010 and .020 into RCW 23.86.²⁰

Likewise, RCW 23.78, the Worker Cooperative Statute, also has no separate records inspection provision, but RCW 23.78.020 allows worker cooperatives to elect to be governed by RCW 23B, thereby incorporating RCW 23B.16.010 and .020 into RCW 23.78.

Finally, the Limited Liability Company statute, RCW 25.15 contains provisions limiting the obligation to keep records and the right of inspection of members that are entirely comparable to the for-profit and non-profit statutes.²¹

²⁰ RCW 23.86.360 provides, “The provisions of Title 23B RCW shall apply to the associations subject to this chapter, except where such provisions are in conflict with or inconsistent with the express provisions of this chapter.”

²¹ RCW 25.15.135 Records and Information, provides:

- (1) A limited liability company shall keep at its principal place of business the following:
 - (a) A current and a past list, setting forth the full name and last known mailing address of each member and manager, if any;
 - (b) A copy of its certificate of formation and all amendments thereto;
 - (c) A copy of its current limited liability company agreement and all amendments thereto, and a copy of any prior agreements no longer in effect;
 - (d) Unless contained in its certificate of formation or limited liability company

No Washington corporations, including electric cooperatives, incorporated under RCW 23.86, have a records inspection obligation that in any way resembles the Costellos' proposed interpretation of the "books and records" provision in RCW 24.06.160. As it is well established that the general corporate law of a state is applicable to corporations incorporated under special corporate statutes (e.g. non-profits, cooperatives, mutual corporations, etc.), to any extent that the definition of "books and records" available for inspection under RCW 24.06.160 lacks specificity, the Court should look to RCW 23B.16 to clarify the intended scope of the right of inspection.²²

agreement, a written statement of:

- (i) The amount of cash and a description of the agreed value of the other property or services contributed by each member (including that member's predecessors in interest), and which each member has agreed to contribute;
 - (ii) The times at which or events on the happening of which any additional contributions agreed to be made by each member are to be made; and
 - (iii) Any right of any member to receive distributions which include a return of all or any part of the member's contribution.
 - (e) A copy of the limited liability company's federal, state, and local tax returns and reports, if any, for the three most recent years; and
 - (f) A copy of any financial statements of the limited liability company for the three most recent years.
- (2) The records required by subsection (1) of this section to be kept by a limited liability company are subject to inspection and copying at the reasonable request, and at the expense, of any member during ordinary business hours. A member's agent or attorney has the same inspection and copying rights as the member.

²² Because a cooperative is a corporation, general corporate law applies to cooperatives to the extent the law is not inconsistent with specific statutes governing cooperatives. 18 Am. Jur. 2d *Cooperative Associations* § 12 (Westlaw through Nov. 2007); See also Israel Packel, *The Organization and Operation of Cooperatives* § 6(b)(3) (4th ed. 1970) ("A cooperative incorporated under a cooperative statute is still a corporation and, as such, is affected by statutes that are applicable to corporations in general.") and *Boldt v. St. Cloud*

b. RCW 24.06.160 Does Not Require Tanner to Allow Inspection of Third Party Confidential Information.

RCW 24.06.160 does not encompass a right of inspection for every document in the possession of the cooperative. The Costellos' claim is based on the faulty premise that because RCW 24.06.160 does not contain a detailed definition of "books and records," it must therefore afford a corporation's members an unlimited right of access to any and every document and all information within the corporation's possession. However, the Costellos' interpretation of the words of the statute is far broader than the actual language in the statute. RCW 24.06.160 provides,

Each corporation shall keep correct and complete *books and records of account* and shall keep minutes of the proceedings of its members, shareholders, board of directors, and committees having any of the authority of the board of directors; and shall keep at its registered office or principal office in this state a record of the names and addresses of its members and shareholders entitled to vote. All *books and records of a corporation may be inspected* by any member or shareholder, *or his or her agent or attorney*, for any proper purpose at any reasonable time. (emphasis added)

Thus, RCW 24.06.160 specifically limits the obligation of the corporation to "keep books and records *of account*."²³ The corporate

Milk Producers' Ass'n, 273 N.W. 603, 605-08, 273 N.W. 603 (Minn. 1937) (explaining corporate statutes apply to cooperative).

²³ Books and records of account refers to records of financial records. See *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.*— <http://thelawdictionary.org/books-of-account/#ixzz2jciJJ4XP> (defining "Books of Account" as "The books in which merchants, traders, and business men generally keep their accounts." See also <http://www.businessdictionary.com/definition/accounts> (defining "accounts" as

statutes cited above all limit the right of inspection to records that are required to be maintained. Thus, the reference to inspection of “books and records” in RCW 24.06.160 is simply a shorthand reference to books and records *of account*, or, at most, a reference to the type of basic corporate records that every other Washington corporation must keep and make available for inspection. It is certainly not a reference to every document and every scrap of information in the corporation’s possession – including proprietary information of a third-party only provided under a signed non-disclosure agreement. Moreover, the statute explicitly allows a court to limit inspection of documents under the statute to be made by a party’s “agent or attorney.” This is precisely what the trial court did. *See* CP 787-96.

The authority relied upon by the Costellos does not provide for a contrary result. First, the Costellos’ reliance on *Schein v. Northern Rio Arriba Elec. Co-op., Inc.*, 122 N.M. 800, 932 P.2d 490 (1997) is misplaced. *See* Brief at 18-19. In the *Schein* case the plaintiff was only seeking one document from the cooperative, the billing records of the

“[f]inancial records of an organization that register all financial transactions, and must be kept at its principal office or place of business. The purpose of these records is to enable anyone to appraise the organization's current financial position with reasonable accuracy. Firms present their annual accounts in two main parts: the balance sheet, and the income statement (profit and loss account). The annual accounts of a registered or incorporated firm are required by law to disclose a certain amount of information [and] have to be certified by an external auditor that they present a ‘true and fair view’ of the firm's financial affairs”.

cooperative's law firm. The request was far more reasonable than the Costellos request to review and disseminate proprietary information of a third party vendor. Similarly unavailing is the Costellos' reliance on *City of Franklin v. Middle Tennessee Elec. Membership Corp.* No. M2007-1060, 2009 WL 2365572 (Tenn. Ct. App. 2009) in which a municipality, which was a member of a cooperative, was interested in purchasing the assets of the cooperative and itself going into the utility business. Nothing in the case indicates that the information sought was proprietary third party information. The case turned on whether the purpose of the city's request (to inform itself about a potential buyout of the cooperative) was a "proper purpose" under Tennessee law. The Court held that it was, but the facts of that case have little to do with and offer no support for the Costellos' position. Finally the Washington authority on which the Costellos rely is inapposite.²⁴ The Costellos' request to have unfettered access to all documents in Tanner's possession (including confidential proprietary data or information provided by Aclara) is not supportable under the law.

²⁴ Cf. *State ex rel. Grismer v. Merger Mines Corp.*, 3 Wn.2d. 417, 420, 101 P.2d 308 (1940) (allowing shareholder access to shareholder register list) to RCW 23B.16.010(3) (record of shareholder must be maintained); see also *Guthrie v. Harkness*, 199 U.S. 148, 154, 16 S.Ct. 4 (1905) (affirming inspection of books, i.e. "accounting" records); *State v. Pac. Brewing Co.*, 21 Wn.451, 452 & 464 (1899) (explaining that a shareholder is entitled to review "books of account" if it is in the interest of corporation).

While RCW 24.06.160 may not be the best example of precise drafting, it is plain that the second reference to “books and records” is, at most, a reference to the same kind of corporate records than any other Washington corporation is required to keep and to allow its members or shareholders to inspect. It defies common sense and logic that the Legislature intended to require an RCW 24.06 corporation to allow members to inspect documents and information that it is not even required to keep, or that the members of cooperative corporations incorporated under RCW 24.06 would have vastly different – and more extensive rights of inspection than shareholder/members of for-profit corporations, non-profit corporations, other electric cooperatives, or members of LLCs. In fact, as shown above, the structure of the other corporate records inspection statutes is that corporations are required to keep only basic corporate records and allow inspection only of the records they are required to keep. No Washington statute or case requires that corporate entities allow member inspection of business records, such as confidential third party documents subject to a non-disclosure agreement. The information sought by appellants is outside the scope of what respondent is required to allow inspection of under RCW 24.06.160.

c. The Costellos’ Demand for Third-Party Proprietary Information is Not Supported Under the Common Law

Courts have consistently limited a stockholder/member's right from inspecting numerous sorts of confidential information.²⁵ Indeed, Tanner is not aware of a single instance anywhere where a shareholder or member was allowed unfettered access to confidential proprietary information of a third party that the corporation has access to only by way of a confidentiality agreement. Thus, the Costellos' demand that they be able to inspect virtually every document and all information in Tanner's possession related to smart meters – regardless of whether its confidential or proprietary, or otherwise protected from disclosure – is simply not the law in Washington or anywhere else.

Because the Costellos' records request falls outside the scope of the sorts of documents Tanner is required to provide its members for inspection, the Costellos' first cause of action based on such requests was properly dismissed for this second reason.

3. The Parties Agreed to Limit Documents for Inspection

²⁵ See, e.g., *National Football League Prop. Inc. v. Superior Court of Santa Clara*, 65 Cal.App.4th 100, 107, 75 Cal.Rptr.2d 893 (1998) (“Although shareholders have some rights to corporate information which are not enjoyed by the general public, shareholder status does not in and of itself entitle an individual to unfettered access to corporate confidences and secrets”); *Riser v. Genuine Parts Co.*, 150 Ga.App. 502, 505, 258 S.E.2d 184 (1979) (corporation is not required to provide “every document generated ... including confidential [information]”); *Morton v. Rogers*, 20 Ariz.App. 581, 586, 514 P.2d 752 (1973) (explaining inspection of corporate documents does not extend to trade secrets); 5A FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2239.10 (2011) (“It is well-settled that under the common law rule permitting the inspection of corporate books and records ... shareholders are ... not entitled to possession of trade secrets and confidential communications”).

Tanner's Information Policy does not include the types of information the Costellos requested. The Information Policy became part of the contract between the cooperative and its membership and it is binding on all members, including the Costellos. Thus, the Costellos are bound by the Information Policy. *See Appeal of Two Crow Ranch, Inc.*, 159 Mont. 16, 494 P.2d 915 (1972).²⁶

As members of the cooperative, the Costellos also agreed to abide by Tanner's bylaws, which require members to abide by Tanner's contracts with third parties, such as the Aclara Confidentiality Agreement.²⁷ Thus, the bylaws and Tanner's Information Policy both preclude disclosure of the information sought by the Costellos. The Costellos requested access to documents went far beyond the terms allowed

²⁶ In *Two Crow Ranch*, the Court held: "It is a well established precedent that the bylaws of a corporation, together with the articles of incorporation, the statute under which it was incorporated, and the member's application, constitute a contract between the member and the corporation. When duly enacted, the bylaws are binding upon all members of the corporation or association who are presumed to know them and contract in reference to them. This contractual relationship through corporate bylaws extends itself into the areas of correlative rights and duties of individual union members with their general charter bylaws and individual cooperative members with their respective association charters. On becoming a member of a corporation or association and subscribing to its bylaws, one thereby agrees to submit to its rules and regulations.

²⁷ Specifically, Tanner's bylaws provide that:

- (e) [Members] Agree to comply with and be bound by the Governing Documents of the Cooperative, as they may be amended from time to time, which include the Articles of Incorporation, these Bylaws, the Cooperative's service rules and regulations; the Cooperative's rate or price schedules; all rules, regulations, requirements, guidelines, procedures, policies, programs, determinations, resolutions, or actions taken, adopted, promulgated, or approved by the Board; and all applicable law and legally binding agreements regarding the Cooperative. CP 1628-29 (emphasis added).

under the parties' agreements. Accordingly, for this reason the Costellos' claim was properly dismissed.

C. DISMISSAL OF THE COSTELLOS' CPA CLAIM WAS APPROPRIATE

The trial court properly dismissed the Costellos' CPA claim against Tanner. Tanner is a non-profit electric cooperative which is exempt from liability under the CPA. Moreover, the Costellos failed to prove the elements necessary of a CPA claim.

1. Tanner is Exempt from Liability Under the CPA

The Costellos' CPA claim fails because Tanner is *categorically exempt from liability under the CPA*. In *Haberman v. WPPSS*, the Washington Supreme Court affirmed dismissal of CPA claims against electric cooperatives, holding that "rural electric cooperatives are [] exempt from the CPA." 109 Wn.2d 107, 172, 744 P.2d 1032 (1987). The Supreme Court reasoned:

Nevertheless, as the rural electric cooperatives, like the respondent PUD's and municipal utilities, are nonprofit, consumer-owned utilities serving those who reside within their service areas, *there exists no public policy reason as expressed by the CPA why the cooperatives should not be likewise exempt from the CPA*.

Id. at 171 (emphasis added). It is not disputed that Tanner is a "rural electric cooperative." See *Tanner Electric Cooperative v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 659, 911 P.2d 1301 (1996). The

Costellos nevertheless argue that the CPA exemption for electric cooperatives only applies in certain circumstances. Cost. Br. at 29. But this argument was rejected by the Supreme Court when it explained that “[a]n exemption from consumer protection legislation either applies or it does not.” *Id.* at 681. The Costellos’ CPA claim is foreclosed by Supreme Court precedent and was properly dismissed as a matter of law.

The Costellos’ reliance on SHB 1896 provides no reason to reverse the trial court’s decision. Although SHB 1896 did provide that consumer owned utilities, including cooperatives, could be liable under the CPA in a limited circumstance, that provision was repealed before it ever became law. Appendix at 5, 10 & 11. Even if it had become law, that legislation would not have applied to the circumstances at issue in this litigation.

2. The Costellos Failed to Prove Necessary Elements of a CPA Claim

To prevail on a CPA claim the Costellos must prove “(1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Because the Costellos failed to prove at least two of these elements, the trial court properly granted summary judgment on their CPA claims.

a. The Costellos Failed to Establish an Unfair or Deceptive Act or Practice

Although the Costellos allege that it is unfair and deceptive business practice to use smart meters and to charge fees for members who refuse to allow a smart meter to be installed, *see* Cost. Br. at 32-35, this claim of unfairness fails when it was uncontested that Tanner’s use of smart meters was motivated by legitimate business reasons.

It is not “unfair or deceptive” for a utility to meter its customers. It is undisputed that Tanner collects this data from its smart meters in the ordinary course of business and for valid business reasons.²⁸ AMI meters are used by 500 or more utilities to meter electric usage of over 46 million electric customers in the United States. *See* CP 1613-16 at ¶¶ 12-17, CP 1465-88. The use of AMI meters is a practice that is reflected in both federal and state energy policies, and has been approved by numerous locally-regulated utility boards and state utility commissions. CP 1609-21. No state law or regulatory body in any state has prohibited the use of AMI meters or deem it “unfair.” *See, e.g.,* WAC 480-100-505; *see also* CP 1698-1720.

²⁸ CP 1613 at ¶ 11. The Costellos may believe that the business case for using smart meters is misguided for a laundry list of reasons, Cost. Br. at 32-35, but they do not (and cannot) contend that Tanner’s smart meter policy was adopted for nefarious purposes or other than legitimate business reasons. Like most utilities, Tanner owns all metering equipment used to measure consumption for billing purposes. The Tanner Board was fully within its discretion to elect to use two-way communicating digital meters. *See* CP 1611-12.

“Where conduct is motivated by legitimate business concerns, there can be no violation of RCW 19.86.” *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 54, 56, 738 P.2d 665 (1987) (evidence shows that conduct was undertaken to reduce costs and gain efficiencies); *see also State v. Black*, 100 Wn.2d 793, 803, 676 P.2d 963 (1984) (actions “motivated by legitimate business concerns ... were not the kind of conduct within the scope of RCW 19.86.020”); RCW 19.86.920 (“this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business”). Tanner’s adoption of AMI meters plainly is consistent with “the recognition that businesses need some latitude within which to conduct their trade.” *Black*, 100 Wn.2d at 803.

Second, the Costellos have consented to being a member in the cooperative and to follow its respective rules and to “make payment of such fee as is designated in [Tanner’s tariffs]” for electric distribution services. *See* CP 1612 at ¶ 7; CP 1662-63. There was no evidence that the contract between the parties was unfair.

Third, the Tanner Board afforded the Costellos the right to opt-out of having a smart meter installed, which they and only one other (out of over 4,300 residential customers) have done. The only requirement placed on the Costellos by Tanner is for them to reimburse the cost of sending a

serviceman to their residence periodically to manually read their meter. Utility customers have no right to limit their utility from collecting power consumption data for legitimate business purposes, including by use of a “smart meter.” *See In re Maxfield*, 133 Wn.2d 332, 346, 945 P.2d 196 (1997). *Accord, Naperville Smart Meter Awareness, v. City of Naperville*, No. 11–2015 WL 4111322 at *12 (N.D. Ill. Mar. 22, 2013) at *12 (by requesting electric service, a customer necessarily consents to measurement of the service). There is nothing unfair in Tanner’s actions as the fee is directly associated with the additional costs forced upon Tanner by the Costellos.²⁹ Charging a fee, related to Tanner’s cost of providing the Costellos the extra service they requested, therefore is not an unfair practice. The Costellos have failed to demonstrate that they presented any evidence of any deceptive or unfair act by Tanner.

b. Tanner’s AMI Meters Do Not Adversely Affect the Public Interest

The Costellos’ evidence failed to satisfy the third element of a CPA claim. Tanner’s policy does not adversely affect the public interest

²⁹ *See e.g.*, CP 1619 at ¶ 28, CP 2035. Indeed, if Tanner is not allowed to charge this expense to the Costellos, then the cost would be unfairly shifted to Tanner’s other members. Tanner is a non-profit entity; there are no “shareholders” to impose costs on. The member/owner/consumers must necessarily pay all costs. *See* CP 1609-10 at ¶¶ 2-3. If Costellos were excused from paying for manual meter reads because they have refused to have a remotely readable meter installed at their residence, it would result in the cost of reading their meter being borne by other Tanner members.

because only one other member could have been harmed in the same fashion as the Costellos.

The purpose of the CPA is to protect the public from acts or practices which are injurious to consumers, not to provide an additional remedy for private wrongs that do not affect the public generally. *Lightfoot v. MacDonald*, 86 Wn.2d 331, 338-39, 544 P.2d 88 (1976) (affirming dismissal of CPA claim for failure to show that defendant's breach of contract caused damage to anyone but the plaintiff). A private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest. *Id.* at 334. Here, there is no harm to the public interest in enforcing Costellos' contractual obligations as members of Tanner.

The Costellos argue that 4,300 other cooperative members could have been affected by Tanner's smart meter policy. Cost. Br. 35. But only one other household – the other member opting out – could have been affected in the same fashion as the Costellos. The Costellos' claim is that they were forced to pay an unjustified fee for refusing to allow smart meters at their residence. Cost. Br. 8; CP 6 at ¶ 33. Only two cooperative members could possibly have suffered this harm,³⁰ and therefore, a

³⁰ The Costellos' claim that other cooperative members suffered harm to their privacy interests, which is "not a cognizable injury under the CPA." *Gragg v. Orange Cab Co.*,

“substantial portion” of the public was not affected. A CPA claim requires that a substantial portion of the public be affected by the alleged conduct. *See Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604-05, 200 P.3d 695 (2009) (reversing court of appeals because “[t]here is no likelihood or any real or substantial potential that other people will be injured in the same way [plaintiff] was injured”); *Hangman Ridge*, 105 Wn.2d at 790 (“[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest”); *Malone, et al., v Clark Nuber, P.S.*, No. C07-2046, 2008 WL 2545069 at *10 (W.D. Wash. June 23, 2008) (“The number of consumers who could conceivably find themselves in plaintiff’s circumstances ... is extremely small and unable to qualify as ‘a substantial portion of the public’ under any reasonable definition of that term. As a matter of law, conduct directed toward a small group cannot support a CPA claim.”). The Costellos’ CPA claim falls far short of meeting this standard.

The trial court’s dismissal of the Costellos’ CPA claim should be affirmed. Tanner is exempt from the CPA, and the Costellos presented no

2013 WL 1788479 *7 (W.D. Wash. April 26, 2013)(“an invasion of privacy is a ‘personal’ injury, rather than a ‘business or property’ injury,” which is the type of injury required by RCW 19.86.090). *See also Ambach v. French*, 167 Wn.2d 167, 172, 216 P.3d 405 (2009) (“The legislature’s use of the phrase ‘business or property’ in the CPA is restrictive of other categories of injury and is used in the ordinary sense [to] denote[] a commercial venture or enterprise.” [quotations omitted]).

evidence in the trial court fulfilling at least two of the elements required for a CPA claim.

**D. TANNER WAS PROPERLY AWARDED THE
OUTSTANDING AMOUNT THE COSTELLOS OWED**

The trial Court properly granted Tanner's motion for summary judgment on its counterclaim for unpaid utility charges, including late fees and prejudgment interest in the amount of \$45.70. There was no disputed issue of material fact as to the amount owing as calculated under the policies applicable to members who opt-out of having an AMI meter. *See* CP 1996-2017 and CP 2053-87. Nor was there any computational error in Tanner's bills to the Costellos.³¹ The Costellos' ongoing objection to the

³¹ After the trial court entered an order granting summary judgment in favor of Tanner for \$45.70, the Costellos filed a motion for reconsideration arguing for the first time that Tanner made a "computational error" in its billing. *Cf.* Cost. Br. at 44 to CP 1473 (Costellos admitting argument was made for the first time on reconsideration). The trial court properly denied the Costellos' new argument. CP 1491-92 (denying motion for reconsideration). This Court should not consider the Costellos argument that made a "computational error" because the Costellos failed to appeal, or even attempt to show, that the trial court abused its discretion in ruling on the Costellos' motion for reconsideration. *See, e.g. Wilcox v. Lexington Eye Institute*, 130 Wn.App. 234, 241, 122 P.3d 234 (2005) (affirming denial of motion for reconsideration where issues were raised for the first time in the motion for reconsideration explaining "[m]otions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion.").

Moreover, if a response had been requested by the trial court, Tanner would have rebutted the Costellos' arguments. The Costellos' arguments were based solely on their mischaracterization of Tanner's spread sheet as showing an error in the calculation of the late fee. However, the spread spreadsheet did not calculate the late fee, it was merely a table showing the all of the paid and unpaid charges and payments by the Costellos over the 18 months of this lawsuit *as calculated by the computerized billing software of Tanner's billing vendor*, and as shown the actual bills. CP 1997, 2001-07 The Costellos could have easily determined the same simply by reviewing their actual bills. At no time

rates and billing policies applicable to “opting-out” was the only issue. Their contention that there were incorrect “mathematical calculations” is based on the wrongheaded notion that they may unilaterally reject the billing methodology adopted by Tanner, substitute their own methodology and pay Tanner based on their own preferences. *Cf.* at Cost. Br. at 42. However, the law does not require Tanner to acquiesce to the Costellos’ billing preferences.³²

1. Tanner Has Broad Authority to Set its Rates and Policies

Tanner is a “locally regulated” electric cooperative incorporated under RCW 24.06. Locally regulated utilities have authority to set their own rates and terms of service.³³ Tanner’s decisions on rates and its policies are entitled to a presumption of validity, which can only be

did the Costellos present any evidence that the bills they received from Tanner were not calculated correctly.

³² A review of the Costellos bills submitted with their payments clearly shows that the Costellos paid only the amounts they believed they should. CP 2009-17. Each month, they rewrote their bills to conform to what they thought the rates and policies should be. *See* CP 1996-2017. Each month they struck out and refused to pay charges for electric service based on estimated energy usage in months between quarterly true-up meter reads. Each month they struck out and refused to pay any late fees.

³³ *See Inland Empire Rural Electrification, Inc. v. Dep’t of Public Serv.*, 199 Wn. 527, 539, 92 P.2d 258 (1939), reaffirmed in *West Valley Land Co., Inc. v. Nob Hill Water Ass’n*, 107 Wn.2d 359, 361, 729 P.2d 42 (1986). Rates and terms of service established by Tanner, like rates established by other rate-making authorities, are accorded “substantial discretion in selecting the appropriate rate making methodology.” *People’s Org. for Washington Energy Resources v. WUTC*, 104 Wn.2d 798, 812, 711 P.2d 319 (1985). Rates are “presumptively reasonable,” and the party challenging rates bears the burden of proving otherwise. *Teter v. Clark County*, 104 Wn.2d 227, 237, 704 P.2d 1171(1985); *Prisk v. City of Poulsbo*, 46 Wn.App. 793, 804, 732P.2d 1031 (1987), rev. denied, 108 Wn.2d 1020 (1987).

overcome by proving that such rates or policies are “palpably unreasonable.” *See, e.g.*, 64 Am. Jur.2d Public Utilities § 89, or arbitrary and capricious; *PUD No. 2 of Pacific County v. Comcast*, 184 Wn.App. 24, 336 P. 365 (2015). The Costellos do not agree with Tanner’s policies, however, they fail to make any argument to demonstrate that any of its opt-out policies are “arbitrary and capricious.” Indeed, Tanner’s policies are similar to the policies of numerous utilities throughout the country.³⁴ Tanner’s policies and charges were well within its authority.

2. Tanner Did Not Miscalculate the Costellos’ Bills and the Costellos Are Not Entitled to Create their Own Bills or Billing Methodology

The Costellos argue that Tanner miscalculated their bills. *Cf.* Cost. Br. at 43; however, the undisputed evidence showed there was no miscalculation. All of the bills are attached as Exhibit 3 to the Carr Decl., CP 2055-87, and summarized in CP 2065. The Costellos’ claim of miscalculation is really an objection to Tanner’s duly adopted billing methodology related to the opt-out members, primarily the use of

³⁴ Before adopting rates and policies applicable to “opt-out” members, the Tanner Board first considered how other utilities address this issue. The Board found that some legislative bodies and utilities will not allow individuals to opt-out of such service at all, *see* CP 1618 at ¶ 23, while others do accommodate individuals that had similar concerns as the Costellos. The Board found that virtually all utilities that do allow opting out impose a fee to periodically manually read the meter. *See* CP 2054 and CP 1618-1619 at ¶¶ 23-28, and CP 1689-1720. The Tanner Board sought to design a policy that minimized the cost of meter reading for opt-out members, CP 1619 at ¶ 28. Tanner’s opt-out fee is well within the range of what other utilities charge, *see* CP 1618-19 at ¶¶ 24 & 25, and CP 1689-1724, and is based on cost inputs similar to those for a service call, *see* CP 2034-35 at ¶ 9-10.

estimated energy usage. The calculations of the bills flowed from the methodology. Disputing the requirement to pay for energy on an estimated basis they rewrote their bills, thereby incurring arrearages and late fees which they refused to pay, *see* CP 2072-87, even though they do admit Tanner has the right to collect late charges.³⁵ The trial court properly determined that there was no disputed issue of fact as to the amount due under the methodology. The Costellos provide no legal basis to justify their decision to manufacture their own bills and pay what they believe they should. *Cf.* CP 2067-87. Accordingly, there is no reason for the Court to consider the numerous handwritten changes made by the Costellos on the invoices as being an indication of the amounts actually owed by them. *See id.* Moreover, even if the Court were to determine that the Costellos' preferences for billing were reasonable, that does not mean that the methodology chosen by Tanner is arbitrary or capricious. There was no basis for the Costellos to modify Tanner's invoices at their whim.

3. Tanner's Opt-Out Policy Does Not Conflict with Its Bylaws

The Costellos' argue that Tanner's bylaws require it to charge for utility services based only on the number of kilowatt hours of energy used each month, *see* Cost. Br. at 41, but the bylaws create no such obligation.

³⁵ *See, e.g.*, Vol. 3 VRP 5 at 14:11-12 (the Costellos informing the trial court that “[w]e do not contest the legitimacy of the late fee”); *see also* CP 1405 (showing late fee is clearly articulated on Tanner's website).

The bylaw referenced by the Costellos does not define “utility services” in terms of the kilowatt hours that run through a member’s meter in any month,³⁶ and in no way precludes estimating energy usage when a member refuses to allow installation of Tanner’s standard metering equipment, which would allow Tanner to measure monthly kWh usage without a manual meter read. Indeed, many utilities utilize estimated billing. *See* CP 1986-1995.

The Costellos additionally argue that Tanner’s “budget billing” plan for opt-out members is inconsistent with its general “Budget Billing Option.” *See* Cost. Br. at 42-43. However, the opt-out policy clearly defines the “budget billing” to be used for opt-out members, *see* CP 1723 at ¶ 6e & f, which is different than its “Budget Billing Option” (primarily designed for those on a limited budget) which allows members to prorate

³⁶ *See* CP 2207-08 at ¶¶ 8-9. The Costellos definition of “utility service is fatally flawed. Receiving utility service includes being connected to Tanner’s distribution system and the continuous availability of electricity to the Costellos’ residence, not the number of kilowatt hours delivered or used in any month. It includes everything the utility does to make electricity available on demand. Kilowatt hour billing based on monthly meter reads is one method of recovering the cost of providing utility service; however, by refusing to allow a smart meter, the Costellos prevented Tanner from obtaining meter reads without sending a serviceman to manually read the meter. All utilities, including Tanner, assess charges for costs (including maintenance, transmission, interest costs, tree trimming and emergency costs) which are not “received” each month as the Costellos use that term. They occur unevenly incurred throughout the course of a year, or several years. For instance, utilities may include a cost in its budget for anticipated emergency storm repairs. Under the Costellos’ theory they could not be billed for a storm reserve prior to the storm happening (or even perhaps only if the storm affected their service), which would lead to enormous charges to customers in the month after a storm actually occurs. Tanner has never itemized such charges and the Costellos’ misreading of the bylaws to support such an absurd result should not be considered by the Court.

their bill on a yearly basis.³⁷ The Costellos' wayward interpretation that the bylaws require monthly kWh billing based only on actual usage does not allow them to customize their bills according to their preferences.

4. There Was No Accord and Satisfaction

The Costellos assertion that Tanner's counterclaim was resolved by "accord and satisfaction," Cost. Br. at 40, is absurd. Accord and satisfaction only applies if the amount of a debt is unliquidated or disputed and a tender of "full payment" is made followed by acceptance and retention of the payment as a full satisfaction of the debt. *See, e.g., U.S. Bank Nat. Ass'n v. Whitney*, 119 Wn.App. 339, 81 P.3d 135 (2003). An "accord" requires a meeting of the minds and mutual agreement. *See e.g. Kibler v. Frank L. Garrett & Sons, Inc.*, 73 Wn.2d at 526, 439 P.2d 416 (1968).

The Costellos made a belated payment for the portion of the unpaid charges related to meter reading, policy, they paid these charges "under protest." However, they continued to refuse to pay estimated energy charges and late fees. A customer's disputed partial payment of a bill does not create an accord and satisfaction. Moreover, the Costellos were aware that

³⁷ The fact that Tanner uses the term "budget billing" in its opt-out policy (which clearly explains what that entails) and has another policy which allows low income members the ability to pay a uniform monthly payment based their monthly average over a year, does not provide any basis for the Costellos not to pay their bill. Nor can it be considered arbitrary or capricious for Tanner to use the term "budget billing" in more than one way for different policies. Furthermore, if Tanner actually used the 12 month average in billing the Costellos, the amount they owed would have been even greater. *See* CP 2206-07 at ¶ 5 and CP 2217.

Tanner did not accept the payment as a full satisfaction because they continued to be billed by Tanner for the charges they had refused to pay.

The Costellos' failed to demonstrate that the policies and applicable charges adopted by Tanner are "arbitrary and capricious." There was no miscalculation of the amount owed or accord and satisfaction. Tanner's motion for summary judgment on its Counterclaims in the amount of **\$45.70** was properly granted. This Court should affirm.

**E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
BY AWARDING TANNER ATTORNEY FEES AND COSTS**

The trial court awarded fees of \$119,617.53 and costs of \$10,189.87. The trial court did not abuse its discretion by awarding these fees and costs pursuant to the parties' contract, under the small claims statute, and because the Costellos brought claims which were baseless. All three grounds independently provide sufficient reason for this Court to affirm the award.³⁸

**1. The Trial Court Did not Abuse its Discretion by Awarding
Tanner Fees and Costs Pursuant to the Parties' Contract**

It is well established law that attorney fees and costs are recoverable pursuant to the terms of a contract. *See Gabelein*, 182 Wn.App. at 237. For a party to be entitled fees under the contract, the

³⁸ The Costellos do not contest the trial court's award of statutory fees and costs pursuant to RCW 4.84.080 as Tanner was the prevailing party on all counts. *See* CP 2166.

contract must be central to the dispute. *See Borish v. Russell*, 155 Wn.App. 892, 907, 230 P.3d 646 (2010). Where the contract is central to the dispute, all claims should be treated as actions on a contract subject to the attorney fee provision in each lease.³⁹ Here the trial court determined that the Membership agreement was central to the dispute in explaining:

The Membership Agreement contained a provision which provided that reasonable attorney fees would be paid to Defendant in the event it was necessary an attorney needed to be retained to collect on amounts that were due to Defendant. As Plaintiffs would not pay Defendant the amount they owed, claiming that the outstanding amounts were based on charges that were against the law, Defendant incurred attorney fees in disproving Plaintiffs' reasons for not paying the charges and in collection of the charges.

CP 2165. The Costellos fail to demonstrate how the trial court's conclusion was manifestly unreasonable.

First, the Costellos' argument that the fee provision does not apply "when a member challenges constitutional, statutory or other common law claims," Cost. Br. at 45, is unsupported by the fee provision, *cf.* Member Agreement ("If the account is placed with an attorney or sued, I agree to

³⁹ *See, e.g., Herzog Aluminum, Inc. v. General American Window Co.*, 39 Wn.App. 188, 197, 692 P.2d 867 (1984) ("we conclude that the broad language '[i]n any action on a contract' found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract"); *Deep Water Brewing, LLC v. Fairway Res., Ltd.*, 152 Wn.App. 229, 278, 215 P.3d 990 (2009) ("The court may award attorney fees for claims other than breach of contract when the contract is central to the existence of the claims, i.e., when the dispute actually arose from the agreements"); *Hill v. Cox*, 110 Wn.App. 394, 41 P.3d 495 (2002) ("if a tort action is based on a contract central to the dispute including an attorney fee provision, the prevailing party may receive attorney fees").

pay reasonable attorney fees”). There is absolutely no limitation for a member’s failure to pay their bill based on their faulty legal notions.

Second, the Costellos’ argument that an inapplicable liquidated damages provision – relating to a collection agent charges – limits the recovery of attorney fees, is not supported by the contract. *Cf.* Cost. Br. at 45. The only limitation on attorney fees is that they be “reasonable.” Moreover, the fact that the Costellos brought this suit and made numerous absurd arguments to avoid paying their bill – which led to the fees and costs being so high – is of their own doing. The Costellos’ Counts II, III, and IV took significant legal work to refute, including multiple summary judgment motions being filed, and Tanner should be reimbursed pursuant to the Membership Agreement. There is absolutely no reason why the other members of the cooperative should be made to pay for Costellos’ baseless rationale as to why they failed to pay their bill.⁴⁰

Finally, the Costellos’ argument that the Membership Agreement is an adhesion contract is to no avail. *Cf.* Cost. Br. at 45-46. Indeed, adhesion contracts in most circumstances are enforceable. Here the members of the cooperative who execute such an agreement are to benefit

⁴⁰ The Costellos’ argument that Tanner did not segregate its time is incorrect. *Cf.* Cost. Br. at 46-47 to CP 2091-93, 2108-2148 (explaining how Tanner assessed its fees among the claims). Moreover, in order for Tanner to prevail on its counterclaims, it was necessary to refute the Costellos’ Second, Third and Fourth causes of action, which claimed that they need not pay fees associated with smart meter.

from the same agreement being executed by other members, so there is no reason or authority which would make the Membership Agreement unenforceable. Nor have the Costellos made such argument.

The Costellos brought three causes of action against Tanner to avoid paying the full amount they owed to Tanner. The trial court did not abuse its discretion in finding that the Membership Agreement was central to all of these claims and that Tanner should be awarded its fees in costs incurred in ensuring that the Costellos paid Tanner the outstanding amount owed. Therefore this Court should affirm the trial court's award of fees pursuant to the parties' contract.

2. Fees were Properly Awarded Under the Small Claims Statute

RCW 4.84.250 provides that in cases involving claims of \$10,000 or less, attorney's fees and costs may be "taxed and allowed to the prevailing party." When analyzing a fee request under RCW 4.84.250, Washington Courts apply a three-factor test: (1) the damages sought must be equal to or less than \$10,000, (2) there must be an entry of judgment, and (3) the party seeking fees must be deemed the prevailing party. To be the "prevailing party" the person seeking the award must have made an offer in writing to settle the case.

Tanner indisputably met all three factors. Tanner requested damages for far less than \$10,000,⁴¹ it made an offer in writing to settle all of its monetary claims for \$10 more than 10 days before the hearing on its Motion for Partial Summary Judgment on its Counterclaim, *see* CP 2089 at ¶ 3, and it was prevailing party in this litigation in that the Appellants' claims have all been dismissed with prejudice and Tanner obtained judgment on its Counterclaim for \$45.70, which was the amount of the arrearage as of the hearing date on Tanner's motion.

The Costellos' only argument as to why Tanner should not be awarded its fees under the small claims statute is that Tanner's settlement offer was for \$30 and the Costellos should have only owed \$26.04. The Costellos argument fails for two reasons. First, Tanner offered to settle all monetary claims except its claim for fees and costs, for \$10. This was made clear in Tanner's settlement offer, *see* CP 2099 and in a follow-up correspondence, *see* CP 2100-02. Second, even if this Court were to find that Tanner's offer was for \$30 as the Costellos contend, the trial court did not error in granting judgment for \$45.70. The trial court did not abuse its discretion in awarding fees pursuant to the small claims statute.

⁴¹ Its counterclaims were only for the amounts due for electric utility service under its Board approved rates and charges. During the period of this lawsuit that amount varied, but was never more than approximately two hundred dollars.

3. The Trial Court Properly Awarded Tanner Fees and Costs Because the Costellos' Claims Were Frivolous

The Costellos' three substantive claims were dismissed under CR 12(c) or 56 because they were all factually and/or legally baseless.⁴² Accordingly, the trial court did not abuse its discretion in properly awarding Tanner its fees and costs in responding to the Costellos' substantive causes of action.

RCW 4.84.185 authorizes the trial court to award the prevailing party reasonable expenses, including attorney fees, incurred in opposing a frivolous action. The purpose of the statute is to discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases. *See Kearney v. Kearney*, 95 Wn.App. 405, 974 P.2d 872 (1999) "A frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts." *Bill of Rights Legal Found. v. Evergreen State College*, 44 Wn.App. 690, 696–97, 723 P.2d 483 (1986); *see also Industry Ass'n. of Washington v. McCarthy*, 152 Wn.App. 720, 746, 218 P.3d 196 (2009) (a filing is baseless, so as to warrant imposition of fees and costs under RCW

⁴² The lack of merit of the CPA claim is discussed hereinabove. For a further explanation of why the claim that Tanner's metering system violated Art. 1, Sec. 7 of the Washington Constitution and that Tanner's opt-out fee was "discriminatory" under RCW 49.60 were baseless and totally lacking in merit is discussed in Tanner's Motion for Summary Judgment on those claims, CP 152-60.

4.84.185, if it is not well grounded in fact, or not warranted by existing law, or a good faith argument for altering existing law).

RCW 4.84.185 does not require a finding of an improper purpose. Accordingly, the Costellos argument that they litigated each of their claims in “good faith” provides no reason for this Court to reverse the trial court’s award. Moreover, the Costellos’ contention that this case involved “matter[s] of first impression[,]” Cost. Br. at 48, does not negate that their claims were unsupportable under the law. The Costellos provide no legal justification for their invasion of privacy or anti-discrimination claims. Indeed, the Costellos concede that these two claims are inapplicable, *see* Cost. Br. at 49 (“the Costellos now concede the inapplicability of the discrimination and constitutional issues”), so the trial court’s award of fees was admittedly proper on these two baseless claims.⁴³

Furthermore, the trial court did not abuse its discretion by finding that the Costellos CPA claim was “unsupportable under the law.”⁴⁴ The

⁴³ The Costellos’ conjecture that baseless claims should not take hundreds of hours of legal work to dismiss, *cf.* Cost. Br. at 49, is unsupported by any authority or logic. Tanner was forced to file two separate summary judgment motions, forced to conduct discovery, and forced to refute numerous baseless arguments to have the Costellos’ claims summarily dismissed.

⁴⁴ CP 2165. Moreover, even if the Costellos were not initially aware of the fatal deficiencies in Counts II, III & IV when they initially filed their Complaint, they have been aware since October 2013 when Tanner first filed its motion for partial summary judgment on those claims. *See* CP 2168-93. The Costellos had a duty withdraw their claims against Tanner when they were informed of the current state of the law regarding Counts II, III & IV by the filing of Tanner’s motion. It was incumbent upon the

Costellos' claim was legally baseless because Tanner is categorically exempt from liability under the CPA. *See Haberman*, 109 Wn.2d at 172. Thus, it has long been the law that a claim under the CPA, as a matter of law, cannot be made against Tanner. The later legislation on which the Costellos rely (SHB 1896), *cf.* Cost. Br. 26, does not provide reason to find the trial court abused its discretion in previously finding the Costellos' claim had no basis in law. The Legislature repealed SHB 1896 before it became law, thereby reaffirming that a CPA claim cannot be made against any consumer owned utility, including electric cooperatives. Moreover, subsequent legislative action does not exonerate claims that were baseless at the time they were made.⁴⁵

There was no invasion of the Costellos' privacy, the Costellos were not unlawfully discriminated against, and their CPA claim was legally deficient. The trial court did not abuse its discretion in awarding Tanner its attorney fees in responding to these frivolous claims.⁴⁶

Costellos to withdraw or amend their claims. In *MacDonald v. Korum Ford*, 80 Wn.App. 877, 890-91, 912 P.2d 1052 (1996), the court upheld sanctions against a plaintiff and his attorney for groundless claims. The court held that the attorney should have known after depositions were taken of his client that their claims were baseless and would not succeed, yet attorney continued pursuing the case.

⁴⁵ The Costellos CPA Claim was dismissed, in part, because it was factually baseless. The Costellos failed to establish several elements necessary to make a claim under the CPA.

⁴⁶ The Costellos' defenses to Tanner's Counterclaim were the mirror image of Counts II, III & IV. For the reasons stated above their opposition to Tanner's counterclaim for

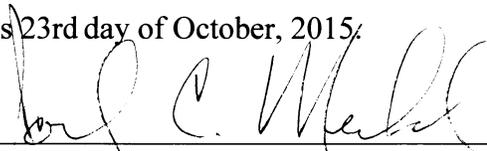
**F. THIS COURT SHOULD AWARD TANNER FEES AND COSTS
INCURRED IN RESPONDING TO THIS APPEAL**

Reasonable attorney fees are recoverable on appeal if allowed by statute, rule, or contract, and the request is made pursuant to appellate rules governing attorney fees and expenses. *See* RAP 18.1(a). As attorney fees in the underlying matter were awarded pursuant to the parties' contract and RCW 4.84 *et seq.*, for the same reasons they should also be awarded to Tanner as the prevailing party to this appeal.

CONCLUSION

For the foregoing reasons, the trial court's judgment and attorney fee award should be affirmed.

Dated this 23rd day of October, 2015:



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payment was equally baseless and fees should be awarded under RCW 4.84.185 for prosecuting that claim.

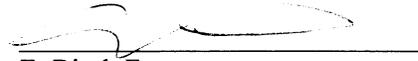
Declaration of Service

The undersigned declares that the above was served on this day, via email per parties' CR 5 agreement, on the following:

Larry and Christy Costello
P.O. Box 1669
North Bend, Washington 98045
lcostell@jhkelly.com
lc59@comcast.net

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, on October 23, 2015.



E. Birch Frost

Appendix 1

Enrolled House Bill 2264 repealing CPA provisions Applicable to Consumer
Owned Utilities Under HB 1896

CERTIFICATION OF ENROLLMENT

HOUSE BILL 2264

64th Legislature
2015 3rd Special Session

Passed by the House June 28, 2015
Yeas 97 Nays 0

Speaker of the House of Representatives

Passed by the Senate June 29, 2015
Yeas 44 Nays 0

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **HOUSE BILL 2264** as passed by House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

**Secretary of State
State of Washington**

HOUSE BILL 2264

Passed Legislature - 2015 3rd Special Session

State of Washington 64th Legislature 2015 2nd Special Session

By Representatives Smith and Haler

Read first time 06/04/15. Referred to Committee on Technology & Economic Development.

1 AN ACT Relating to amending the statewide minimum privacy policy
2 for disclosure of customer energy use information; and amending RCW
3 19.29A.---

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 19.29A.--- and 2015 c 285 s 3 are each amended to
6 read as follows:

7 (1) An electric utility may not sell private or proprietary
8 customer information.

9 (2) An electric utility may not disclose private or proprietary
10 customer information with or to its affiliates, subsidiaries, or any
11 other third party for the purposes of marketing services or product
12 offerings to a retail electric customer who does not already
13 subscribe to that service or product, unless the utility has first
14 obtained the customer's written or electronic permission to do so.

15 (3) The utility must:

16 (a) Obtain a retail electric customer's prior permission for each
17 instance of disclosure of his or her private or proprietary customer
18 information to an affiliate, subsidiary, or other third party for
19 purposes of marketing services or products that the customer does not
20 already subscribe to; and

1 (b) Maintain a record for each instance of permission for
2 disclosing a retail electric customer's private or proprietary
3 customer information.

4 (4) An electric utility must retain the following information for
5 each instance of a retail electric customer's consent for disclosure
6 of his or her private or proprietary customer information if provided
7 electronically:

8 (a) The confirmation of consent for the disclosure of private
9 customer information;

10 (b) A list of the date of the consent and the affiliates,
11 subsidiaries, or third parties to which the customer has authorized
12 disclosure of his or her private or proprietary customer information;
13 and

14 (c) A confirmation that the name, service address, and account
15 number exactly matches the utility record for such account.

16 (5)(a) This section does not require customer permission for or
17 prevent disclosure of private or proprietary customer information by
18 an electric utility to a third party with which the utility has a
19 contract where such contract is directly related to conduct of the
20 utility's business, provided that the contract prohibits the third
21 party from further disclosing or selling any private or proprietary
22 customer information obtained from the utility to a party that is not
23 the utility and not a party to the contract with the utility.

24 (b) The legislature finds that the disclosure or sale of private
25 or proprietary customer information by a third party, when prohibited
26 by a contract under this subsection (5), is a matter vitally
27 affecting the public interest for the purpose of applying the
28 consumer protection act, chapter 19.86 RCW, to the third party.
29 Disclosure or sale of private or proprietary customer information by
30 a third party, when prohibited by a contract under this subsection
31 (5), is not reasonable in relation to the development and
32 preservation of business and is an unfair or deceptive act in trade
33 or commerce and an unfair method of competition for the purpose of
34 applying the consumer protection act, chapter 19.86 RCW.

35 (6) This section does not prevent disclosure of the essential
36 terms and conditions of special contracts.

37 (7) This section does not prevent the electric utility from
38 inserting any marketing information into the retail electric
39 customer's billing package.

1 (8) An electric utility may collect and release retail electric
2 customer information in aggregate form if the aggregated information
3 does not allow any specific customer to be identified.

4 ~~(9) ((The legislature finds that the practices covered by this
5 section are matters vitally affecting the public interest for the
6 purpose of applying the consumer protection act, chapter 19.86 RCW. A
7 violation of this section is not reasonable in relation to the
8 development and preservation of business and is an unfair or
9 deceptive act in trade or commerce and an unfair method of
10 competition for the purpose of applying the consumer protection act,
11 chapter 19.86 RCW.~~

12 ~~(10))~~ The statewide minimum privacy policy established in
13 subsections (1) through (8) of this section must, in the case of an
14 investor-owned utility, be enforced by the commission by rule or
15 order.

16 (10) The statewide minimum privacy policy established in
17 subsections (1) through (8) of this section must, in the case of a
18 consumer-owned utility, be implemented by the utility through a
19 policy adopted by the governing board within one year of the
20 effective date of this section that includes provisions ensuring
21 compliance with subsections (1) through (8) of this section. The
22 policy must include procedures, consistent with applicable law, for
23 investigation and resolution of complaints by a retail electric
24 customer whose private or proprietary information may have been sold
25 by the consumer-owned utility or disclosed by the utility for the
26 purposes of marketing services or product offerings in violation of
27 this section.

--- END ---

SENATE BILL REPORT

HB 2264

As of Second Reading

Title: An act relating to amending the statewide minimum privacy policy for disclosure of customer energy use information.

Brief Description: Amending the statewide minimum privacy policy for disclosure of customer energy use information.

Sponsors: Representatives Smith and Haler.

Brief History: Passed House: 6/28/15, 97-0.

Committee Activity:

Staff: William Bridges (786-7416)

Background: The Statewide Minimum Privacy Policy for Disclosure of Customer Energy Use Information (Energy Privacy Policy). The Legislature established the Energy Privacy Policy during the 2015 regular session (SHB 1896), which becomes effective July 24, 2015. Among other things, the Energy Privacy Policy requires an electric utility to obtain customer permission before disclosing any private or proprietary customer information to a third party with which the utility has a contract.

Private customer information includes the retail electric customer's name, address, telephone number, and other personally identifying information. Proprietary customer information includes information relating to the source, technical configuration, destination, and amount of electricity used by a retail electric customer.

Consumer Protection Act (CPA). A violation of the Energy Privacy Policy is a violation of the CPA, which prohibits unfair and deceptive practices in the marketplace, and may be enforced by the Attorney General of Washington or by private lawsuits. Remedies include injunctive relief, fines, treble damages, and recovery of court costs and attorneys' fees.

The CPA does not generally apply to actions regulated by the Washington Utilities and Transportation Commission (UTC) or other regulatory bodies.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Consumer Owned Utilities Under the Washington laws governing consumers of electricity, a consumer-owned utility (COU) is a municipal electric utility, a public utility district, an irrigation district, a cooperative, or a mutual corporation or association that is engaged in the business of distributing electricity to more than one retail electric customer in the state. The UTC does not have authority to regulate COUs, which are instead primarily regulated by their own governing bodies. The State Auditor's Office, however, has authority to examine the financial affairs of all local governments, including public utility districts and municipal electric utilities.

Summary of Bill: Prohibiting the Third-Party Sale of Customer Energy Use Information. An electric utility's authority to disclose private or proprietary customer information to a third party with which the utility has a contract is modified. In addition to prohibiting the third party from further disclosing the customer information, the contract must prohibit the third party from selling the information to a party that is not the utility and not a party to the contract with the utility.

Requiring COUs to Implement the Energy Privacy Policy. A COU must implement the Energy Privacy Policy through a policy adopted by its governing board within one year of the effective date of the act. The policy must include procedures, consistent with applicable law, for investigation and resolution of complaints by a retail electric customer whose private or proprietary information may have been sold by the COU or disclosed by the utility for the purposes of marketing services or product offerings without the customer's permission.

Modifying Enforcement of the Energy Privacy Policy. Disclosure or sale of private or proprietary customer information by an electric utility is no longer declared an unfair or deceptive act in trade or commerce and enforceable under the CPA. Disclosure or sale of private or proprietary customer information by a third party remains enforceable as a CPA violation, if a contract with the electric utility prohibited the third party from further disclosure or sale of the information.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

HOUSE BILL REPORT

HB 2264

As Passed House:

June 28, 2015

Title: An act relating to amending the statewide minimum privacy policy for disclosure of customer energy use information.

Brief Description: Amending the statewide minimum privacy policy for disclosure of customer energy use information.

Sponsors: Representatives Smith and Haler.

Brief History:

Committee Activity:

Technology & Economic Development: 6/12/15 [DP].

Third Special Session

Floor Activity:

Passed House: 6/28/15, 97-0.

Brief Summary of Bill

- Requires a consumer-owned utility to implement the Statewide Minimum Privacy Policy for disclosure of customer energy use information through a policy adopted by its governing board within one year.
- Makes disclosure or sale of private or proprietary information by a third party, when prohibited by certain contracts with an electric utility, enforceable under the Consumer Protection Act.
- Removes a provision that made violation by an electric utility of requirements relating to the Statewide Minimum Privacy Policy enforceable under the Consumer Protection Act.

HOUSE COMMITTEE ON TECHNOLOGY & ECONOMIC DEVELOPMENT

Majority Report: Do pass. Signed by 10 members: Representatives Morris, Chair; Tarleton, Vice Chair; Smith, Ranking Minority Member; DeBolt, Assistant Ranking Minority Member; Magendanz, Nealey, Ryu, Santos, Wylie and Young.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Jasmine Vasavada (786-7301).

Background:

The Statewide Minimum Privacy Policy for Disclosure of Customer Energy Use Information. Legislation enacted in the 2015 regular session established the Statewide Minimum Privacy Policy (Privacy Policy) for disclosure of utility customer energy use information.

Effective July 24, 2015:

- an electric utility may not sell private or proprietary retail electric customer information;
- except under limited circumstances, an electric utility may not disclose private or proprietary retail electric customer information with or to its affiliates, subsidiaries, or any other third party for the purposes of marketing services or product offerings to a retail electric customer who does not already subscribe to the service or product, unless the utility has first obtained the customer's written or electronic permission;
- customer permission is not required when the utility has a contract with a third party that is directly related to the conduct of the utility's business, if the contract prohibits the third party from further disclosing any private or proprietary customer information to certain other third parties; and
- a person other than an electric utility may not capture, obtain, or disclose private or proprietary customer information for commercial purposes except under limited circumstances.

"Person" means any individual, partnership, corporation, limited liability company, or other organization or commercial entity, other than an electric utility.

"Private consumer information" includes the customer's name, address, telephone number, and any other personally identifying information.

Enforcement of the Privacy Policy.

Violation of the Privacy Policy is declared an unfair and deceptive act in trade or commerce and an unfair method of competition for purposes of applying the Consumer Protection Act.

Consumer Protection Act.

The Consumer Protection Act (CPA) prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce directly or indirectly affecting the people of Washington. The CPA allows a person injured by a violation of the act to bring a private cause of action for damages. In addition, the CPA allows the Attorney General (AG) to bring a CPA action in the name of the state or on behalf of persons residing in the state. In an action brought by the AG, the prevailing party may, at the discretion of the court, recover the costs of the action and reasonable attorneys' fees.

The CPA includes express language stating that it does not apply to actions or transactions that are regulated by the Utilities and Transportation Commission (UTC). Therefore, the CPA does not apply to regulated actions of an investor-owned utility. In addition, the CPA has been construed to be inapplicable to actions of municipal corporations, including public

utility districts, on the grounds that actions of such municipal corporations have not been deemed to be actions "in the conduct of trade or commerce."

Disclosure of Private Customer Energy Information by Investor-Owned Utilities.

The UTC prohibits investor-owned utilities from disclosing or selling private consumer information with or for a utility's affiliates, subsidiaries, or any other third party for the purposes of marketing services or product offerings to a customer who does not already subscribe to that service or product, unless the utility obtains the customer's written or electronic permission.

Consumer-Owned Utilities.

"Consumer-owned utility" (COU) means a municipal electric utility, a public utility district, an irrigation district, a cooperative, or a mutual corporation or association, that is engaged in the business of distributing electricity to more than one retail electric customer in the state. The UTC does not have authority to regulate COUs, which are instead primarily regulated by their own governing bodies. The State Auditor's Office has authority to examine the financial affairs of all local governments, including public utility districts and municipal electric utilities, and to audit the compliance of COUs with the Energy Independence Act.

Summary of Bill:

The Statewide Minimum Privacy Policy for Disclosure of Customer Energy Use Information.

An electric utility's authority to disclose private or proprietary customer information to a third party with which the utility has a contract is modified. In addition to prohibiting the third party from further disclosing the customer information, the contract must prohibit the third party from selling the information to a party that is not the utility and not a party to the contract with the utility.

Implementation by Consumer-Owned Utilities.

A consumer-owned utility (COU) must implement the Statewide Minimum Privacy Policy for disclosure of customer energy use information through a policy adopted by its governing board within one year of the effective date of the act. The policy must include provisions ensuring compliance with the statewide minimum privacy policy and must include procedures, consistent with applicable law, for investigation and resolution of complaints by a retail electric customer whose private or proprietary information may have been sold by the COU or disclosed by the utility for the purposes of marketing services or product offerings without the customer's permission.

Consumer Protection Act.

Disclosure or sale of private or proprietary customer information by an electric utility is no longer declared an unfair or deceptive act in trade or commerce and enforceable under the Consumer Protection Act (CPA). Disclosure or sale of private or proprietary customer information by a third party remains enforceable as a CPA violation, if a contract with the utility prohibited the third party from further disclosure or sale of the customer information.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill is a trailer bill at the request of the Governor's Office that clarifies the process for enforcing the Statewide Minimum Privacy Policy (Privacy Policy). If there is a failure by a governing board of a consumer-owned utility (COU) to take appropriate action upon request by a consumer, Consumer Protection Act enforcement is still available.

Changes were made in the Senate that resulted in some redundancy. Consumer-owned utilities have historically not been subject to the Consumer Protection Act. There is always recourse to the governing boards, who are elected officials. The State Auditor's Office would be able to enforce the Privacy Policy if there was a violation by a COU.

(Opposed) None.

(Information only) The Attorney General's Office worked with the sponsor on this language.

Persons Testifying: (In support) Representative Smith, prime sponsor; and Dave Warren, Washington Public Utilities District Association.

(Information only) Mike Webb, Office of the Attorney General.

Persons Signed In To Testify But Not Testifying: None.

Technology & Economic Development
Committee

HB 2264

Brief Description: Amending the statewide minimum privacy policy for disclosure of customer energy use information.

Sponsors: Representatives Smith and Haler.

Brief Summary of Bill

- Requires a consumer-owned utility to implement the statewide minimum privacy policy for disclosure of customer energy use information through a policy adopted by its governing board within one year.
- Makes disclosure or sale of private or proprietary information by a third party, when prohibited by certain contracts with an electric utility, enforceable under the Consumer Protection Act.
- Removes a provision that made violation by an electric utility of requirements relating to the Statewide Minimum Privacy Policy enforceable under the Consumer Protection Act.

Hearing Date: 6/12/15

Staff: Jasmine Vasavada (786-7301).

Background:

The Statewide Minimum Privacy Policy for Disclosure of Customer Energy Use Information. Legislation enacted in the 2015 session established Statewide Minimum Privacy Policy for disclosure of utility customer energy use information.

Effective July 24, 2015:

- An electric utility may not sell private or proprietary retail electric customer information.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- Except under limited circumstances, an electric utility may not disclose private or proprietary retail electric customer information with or to its affiliates, subsidiaries, or any other third party for the purposes of marketing services or product offerings to a retail electric customer who does not already subscribe to the service or product, unless the utility has first obtained the customer's written or electronic permission.
- Customer permission is not required when the utility has a contract with a third party that is directly related to the conduct of the utility's business, if the contract prohibits the third party from further disclosing any private or proprietary customer information to certain other third parties.
- A person other than an electric utility may not capture, obtain, or disclose private or proprietary customer information for commercial purposes except under limited circumstances.

"Person" means any individual, partnership, corporation, limited liability company, or other organization or commercial entity, other than an electric utility.

"Private consumer information" includes the customer's name, address, telephone number, and any other personally identifying information.

Violation of the Statewide Minimum Privacy Policy is declared an unfair and deceptive act in trade or commerce and an unfair method of competition for purposes of applying the Consumer Protection Act.

Consumer Protection Act.

The Consumer Protection Act (CPA) prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce directly or indirectly affecting the people of Washington. The CPA allows a person injured by a violation of the act to bring a private cause of action for damages. In addition, the CPA allows the Attorney General (AG) to bring a CPA action in the name of the state or on behalf of persons residing in the state. In an action brought by the AG, the prevailing party may, in the discretion of the court, recover the costs of the action and reasonable attorneys' fees.

The CPA includes express language stating that it does not apply to actions or transactions that are regulated by the Utilities and Transportation Commission (UTC). Therefore, the CPA does not apply to regulated actions of an investor-owned utility. In addition, the CPA has been construed to be inapplicable to actions of municipal corporations, including public utility districts, on the grounds that actions of such municipal corporations have not been deemed to be actions "in the conduct of trade or commerce."

Disclosure of Private Customer Energy Information by Investor-Owned Utilities.

The UTC prohibits investor-owned utilities from disclosing or selling private consumer information with or for a utility's affiliates, subsidiaries, or any other third party for the purposes of marketing services or product offerings to a customer who does not already subscribe to that service or product, unless the utility obtains the customer's written or electronic permission.

Consumer-Owned Utilities

"Consumer-owned utility" (COU) means a municipal electric utility, a public utility district, an irrigation district, a cooperative, or a mutual corporation or association, that is engaged in the

business of distributing electricity to more than one retail electric customer in the state. The UTC does not have authority to regulate COUs, which are instead regulated by their own governing bodies.

Summary of Bill:

The Statewide Minimum Privacy Policy for Disclosure of Customer Energy Use Information.

An electric utility's authority to disclose private or proprietary customer information to a third party with which the utility has a contract is modified. In addition to prohibiting the third party from further disclosing the customer information, the contract must prohibit the third party from selling the information to a party that is not the utility and not a party to the contract with the utility.

Implementation by Consumer-Owned Utilities.

A consumer-owned utility must implement the statewide minimum privacy policy for disclosure of customer energy use information through a policy adopted by its governing board within one year of the effective date of the act. The policy must include provisions ensuring compliance with the statewide minimum privacy policy and must include procedures, consistent with applicable law, for investigation and resolution of complaints by a retail electric customer whose private or proprietary information may have been sold by the consumer-owned utility or disclosed by the utility for the purposes of marketing services or product offerings without the customer's permission.

Consumer Protection Act.

Disclosure or sale of private or proprietary customer information by an electric utility is no longer declared an unfair or deceptive act in trade or commerce and enforceable under the Consumer Protection Act (CPA). Disclosure or sale of private or proprietary customer information by a third party remains enforceable as a CPA violation, if a contract with the utility prohibited the third party from further disclosure or sale of the customer information.

Appropriation: None.

Fiscal Note: Requested on June 9, 2015.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

FINAL BILL REPORT

HB 2264

C 21 L 15 E3
Synopsis as Enacted

Brief Description: Amending the statewide minimum privacy policy for disclosure of customer energy use information.

Sponsors: Representatives Smith and Haler.

House Committee on Technology & Economic Development

Background:

The Statewide Minimum Privacy Policy for Disclosure of Customer Energy Use Information. Legislation enacted in the 2015 regular session established the Statewide Minimum Privacy Policy (Privacy Policy) for disclosure of utility customer energy use information.

Effective July 24, 2015:

- an electric utility may not sell private or proprietary retail electric customer information;
- except under limited circumstances, an electric utility may not disclose private or proprietary retail electric customer information with or to its affiliates, subsidiaries, or any other third party for the purposes of marketing services or product offerings to a retail electric customer who does not already subscribe to the service or product, unless the utility has first obtained the customer's written or electronic permission;
- customer permission is not required when the utility has a contract with a third party that is directly related to the conduct of the utility's business, if the contract prohibits the third party from further disclosing any private or proprietary customer information to certain other third parties; and
- a person other than an electric utility may not capture, obtain, or disclose private or proprietary customer information for commercial purposes except under limited circumstances.

"Person" means any individual, partnership, corporation, limited liability company, or other organization or commercial entity, other than an electric utility.

"Private consumer information" includes the customer's name, address, telephone number, and any other personally identifying information.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Enforcement of the Privacy Policy.

Violation of the Privacy Policy is declared an unfair and deceptive act in trade or commerce and an unfair method of competition for purposes of applying the Consumer Protection Act (CPA).

Consumer Protection Act.

The CPA prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce directly or indirectly affecting the people of Washington. The CPA allows a person injured by a violation of the act to bring a private cause of action for damages. In addition, the CPA allows the Attorney General (AG) to bring a CPA action in the name of the state or on behalf of persons residing in the state. In an action brought by the AG, the prevailing party may, at the discretion of the court, recover the costs of the action and reasonable attorneys' fees.

The CPA does not apply to actions or transactions that are regulated by the Utilities and Transportation Commission (UTC). Therefore, the CPA does not apply to regulated actions of an investor-owned utility. In addition, the CPA has been construed to be inapplicable to actions of municipal corporations, including public utility districts, on the grounds that actions of such municipal corporations have not been deemed to be actions "in the conduct of trade or commerce."

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"Consumer-owned utility" (COU) means a municipal electric utility, a public utility district, an irrigation district, a cooperative, or a mutual corporation or association, that is engaged in the business of distributing electricity to more than one retail electric customer in the state.

The UTC does not have authority to regulate COUs, which are instead primarily regulated by their own governing bodies. The State Auditor's Office has authority to examine the financial affairs of all local governments, including public utility districts and municipal electric utilities, and to audit the compliance of COUs with the Energy Independence Act.

Summary:

The Statewide Minimum Privacy Policy for Disclosure of Customer Energy Use Information.

An electric utility's authority to disclose private or proprietary customer information to a third party with which the utility has a contract is modified. In addition to prohibiting the third party from further disclosing the customer information, the contract must prohibit the third party from selling the information to a party that is not the utility and not a party to the contract with the utility.

Implementation by Consumer-Owned Utilities.

A consumer-owned utility (COU) must implement the Statewide Minimum Privacy Policy for disclosure of customer energy use information through a policy adopted by its governing board by October 9, 2016. The policy must include provisions ensuring compliance with the statewide minimum privacy policy and must include procedures, consistent with applicable law, for investigation and resolution of complaints by a retail electric customer whose private or proprietary information may have been sold by the COU or disclosed by the utility for the purposes of marketing services or product offerings without the customer's permission.

Consumer Protection Act

Disclosure or sale of private or proprietary customer information by an electric utility is no longer declared an unfair or deceptive act in trade or commerce and enforceable under the Consumer Protection Act (CPA). Disclosure or sale of private or proprietary customer information by a third party remains enforceable as a CPA violation, if a contract with the utility prohibited the third party from further disclosure or sale of the customer information.

Votes on Final Passage:

Third Special Session

House	97	0
Senate	44	0

Effective: October 9, 2015