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No. 51695-1

IN THE WASHINGTON COURT OF APPEALS
DIVISION II

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

Plaintiffs-Respondents,

v.

CITY OF TACOMA,

Defendant-Petitioner.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case is about the City of Tacoma's use of Tacoma Power electric utility revenues to subsidize a city-owned, money-losing internet and cable television business known as the Click! Network ("Click"). The plaintiffs-respondents are electric ratepayers of Tacoma Power.[1] They contend that the City is prohibited by both state and city law from using electric utility revenues to subsidize Click's internet and cable TV business. If the City wants to provide that service to its citizens, it can certainly do so but it must use Click's own revenues or general funds to pay for Click's expenses rather than imposing that burden on electric utility ratepayers.

An interesting feature of this case is that the city attorney and senior management of the utility agree with the ratepayers. In a non-confidential legal memo dated July 16, 2015 to the mayor, city council, and public utility board, the city attorney pointed out the difference between the City's legal authority for operating an electric utility (based on express statutory and charter authority) and its authority for providing cable TV and internet service (based on a city's broad authority to self-

[1] They are a former director of utilities for the City (Coates), a former Tacoma mayor and city councilman (Crowley), a former chief assistant city attorney for Tacoma Public Utilities (Bubenik), a prominent lawyer in Tacoma (Oldfield), and an association of large industrial customers of Tacoma Power and other Pacific Northwest utilities (ICNU).

govern in areas of local concern). CP 58, CP 60. The memo explained that under applicable law (i) revenues and expenses of the electric utility must be accounted for separately from those of Click's cable TV and internet business, (ii) state and city law prohibit using electric utility revenues to pay for Click expenses, and (iii) shared costs must be allocated between the electric utility and Click. CP 62-64.

Despite the city attorney's advice that electric revenues may not be used to pay for Click expenses, the City has been using electric revenues to subsidize Click. The subsidies result in increased electric rates for all electric ratepayers, whether they are Click customers or not.

In 2014 a management consultant report mandated by the city charter concluded that the electric utility subsidy for Click was "unfair" to electric ratepayers "and should not continue." The report recommended that Click should be sold or leased to another telecom company or, if a sale or lease was not possible, "TPU should close Click!" CP 74. In 2015 the City's director of utilities and his senior management team proposed that Click's assets be leased to another telecom company. Instead of following the utility experts' recommendation to end the subsidies by selling, leasing or closing Click, and in blatant disregard of the city attorney's legal advice that the subsidies were unlawful, the city council directed that a business plan for upgrading and expanding Click's cable

TV and internet service (the "All-In Plan") be developed, with vastly increased subsidies from the electric utility.

The ratepayers (respondents here) brought this lawsuit asking the court to declare judicially what the city attorney had already told the City about the unlawfulness of electric utility subsidies for Click, and to require reimbursement for the illegal subsidies paid by the electric utility within the applicable three-year limitations period. In March 2018 the trial court granted partial summary judgment declaring that:

> Tacoma Power electric utility revenues and funds may not be used to pay for Click! Network expenses or capital improvements that are attributable or properly allocable to commercial telecommunications service rather than electric utility service.

CP 1087. The case is now before this Court on discretionary review of that ruling.

In seeking reversal of the trial court's decision, the City makes three arguments to this Court:

First, it argues that the ratepayers' claims are barred by the *res judicata* and collateral estoppel effects of declaratory rulings in a 1996 bond validation lawsuit. Those rulings merely held that the City was authorized to offer cable TV and wholesale internet service [2] and to issue

[2] The term "wholesale internet" service refers to leasing network facilities and capacity to other telecom companies, who in turn provide "retail internet" service to homes and businesses.

municipal bonds to build the system. The ratepayers are not challenging either of those rulings. Moreover, unlike other kinds of judgments, those declaratory rulings have limited *res judicata* effect: they only bar relitigation of claims that were actually litigated and resolved, not claims that could have been raised but were not actually ruled upon by the court.

Second, the City argues that the city charter and statutory provisions cited in the city attorney's legal memo and relied upon by the ratepayers are inapplicable because the electric utility and Click are both organized administratively as part of what the City calls "Tacoma Power." That argument fails because it would allow a mere naming convention to circumvent the protections and limitations set forth in the city charter and applicable state law.

Finally, the City makes a perfunctory, largely unexplained, and totally unsupported argument (not made at all in the trial court) that there were factual issues barring partial summary judgment for the ratepayers. The City raised no material fact issues below, and there are none.

In reading the parties' briefs and reviewing the record, it is important to keep in mind the distinction between the electric utility (whose function is to deliver electricity service to its ratepayers) and the Click telecommunications business (whose function is to deliver cable TV and wholesale internet service to its telecom customers). The term

"Tacoma Power" is sometimes used to refer to just the traditional electric utility, and is sometimes used to refer to both the electric utility and Click, since they are both housed within the "Tacoma Power" division of Tacoma Public Utilities. As explained below (and in the city attorney's July 2015 legal memo), the electric utility and Click must be accounted for separately, both legally and financially.

II. STATEMENT OF ISSUES

The City's statement of "Issues Pertaining to Assignments of Error" (Br. at 2) is misleading and unfairly slanted. For example, (1) the "telecommunications plan" approved in the 1996/97 declaratory rulings did not provide that "ratepayers may have to fund Click" (indeed, the City agued in that case that such considerations were outside the scope of that lawsuit); (2) there is no "binding precedent" holding that the accountancy statute "does not apply to separate activities funded from a single account" (indeed, the point of the statute is to require separate accounting for separate business activities); and (3) the trial court did not resolve any disputed issues of fact (indeed, in the trial court the City did not dispute any facts and instead argued for judgment in its favor as a matter of law).

Stated fairly, these are the issues presented:

1. Are the ratepayers' claims barred by the *res judicata* or collateral estoppel effects of the 1996 and 1997 declaratory rulings in the

bond validation lawsuit?

2. Does the fact that the electric utility and Click are both housed within the same division (now called "Tacoma Power") of the City's Department of Public Utilities render the local government accounting statute (RCW 43.09.210) and City Charter §4.5 inapplicable to the electric utility's subsidies for Click?

3. Did the City raise disputed issues of material fact precluding entry of partial summary judgment for the ratepayers?

III. STATEMENT OF THE CASE

A. The Tacoma Power Electric Utility

Tacoma Power (formally named the "Light Division of the Tacoma Department of Public Utilities," and previously known as "Tacoma City Light") was formed in 1893 when the City purchased the assets of the former Tacoma Water and Light Company. CP 98. It is one of three divisions of Tacoma Public Utilities ("TPU"), the others being Tacoma Water and Tacoma Rail. *Id.* TPU is governed by the City's public utility board, whose five members are appointed by the mayor and confirmed by the city council. CP 96-97; CP 115 (City Charter §4.8). Utility budgets and rates are subject to approval by the city council. CP 97; CP 116 (City Charter §§4.11, 4.12).

Tacoma Power's electric utility service area includes the City of

Tacoma and a number of surrounding cities and unincorporated areas of Pierce County. In 2016 the electric utility had 157,540 residential customer accounts and 19,244 business, industrial and other customers. CP 98, CP 102.

Tacoma Power is organized into six business units. Five of them (Generation; Power Management; Transmission and Distribution; Rates, Planning and Analysis; and Utility Technology Services) involve the generation, transmission and distribution of electricity to utility customers and are integral parts of the electric utility. CP 97-98; CP 326; CP 1147, ¶5.[3] The sixth business unit is Click, which operates the City's cable TV and internet business.

B. Creation of Click

In 1996 the city council adopted an ordinance creating "a separate system of the City's Light Division to be known as the telecommunication system" for the purposes set forth in Exhibit A to the ordinance. CP 126 (Ord. 25930, §2.1, emphasis added). Section 2.2 of the ordinance adopted "the plan set forth in Exhibit A for the acquisition, construction and implementation" of the system. CP 126; *see* Ex. A at CP 145.

[3] This item in the Supplemental Clerk's Papers refers to the declaration of Douglas E. Swanson, who served as the manager of the utilities accounting division of the City's Finance Department from August 2013 to May 2017. The declaration was filed in the trial court subsequent to entry of the March 2, 2018 partial summary judgment ruling but prior to this Court's acceptance of discretionary review.

The plan called for construction of a hybrid fiber coaxial ("HFC") wired network allowing telecommunication signals to be sent between electric utility substations and also providing for wired telecom connections to utility customers' homes and businesses. The HFC network was to be used for purposes of performing "some or all" of various functions listed in Exhibit A to the ordinance, including communications between substations, automated meter reading, cable television, internet access, and transport of signals for other telecom companies. CP 145. Thus, as originally contemplated the HFC infrastructure was to be used both for electric utility purposes (like communications between substations and automated meter reading) and for non-utility purposes (like cable television and internet service).

The next year, the city council adopted a follow-up resolution expressing a desire "to create greater revenue diversification through new business lines (i.e. internet transport, cable TV, etc.)" and authorizing the Light Division to "proceed to implement said proposal for a broad band telecommunication system." CP 153-154 (emphasis added).

C. The 1996 Bond Validation Lawsuit

In July 1996 the City commenced a bond validation lawsuit in the Pierce County Superior Court under RCW 7.24 and 7.25. CP 710-741. The lawsuit sought declaratory rulings (i) that the City had authority to

operate the new telecommunications system to provide cable TV service and to lease system facilities and capacity to other telecom providers (*e.g.*, to provide wholesale internet service), and (ii) that the City had authority to issue $1,000,000 of revenue bonds to fund the first phase of construction and operation of the new system. CP 711, CP 714. The complaint stated, "The central issue in this matter is confirming that issuing the Revenue Bonds and constructing and operating the Telecommunications System are within the City's authority." CP 711 (¶2). In accordance with RCW 7.25.020, the court appointed a citizen to represent the City's taxpayers and ratepayers. CP 756-57.

In November 1996 the City moved for summary judgment for the requested declaratory relief. CP 759. The motion was supported by one declaration, from the City's telecommunications project manager Jon Athow. CP 771. The City argued that it was authorized to build and operate the telecom system under its broad powers as a first-class charter city. CP 764-65, 769. Neither the motion nor the supporting declaration said anything at all about using electric utility revenues to pay for cable TV or internet expenses. The court-appointed representative of the "taxpayers and ratepayers" opposed the motion on the ground that the City's motion was premature because the telecommunications project was not yet well enough defined. CP 778, 785-86.

In December 1996 the court issued an order reciting that, based on the documents submitted (the only evidence before the court was the City's supporting declaration from the telecom project manager), the court found "that there is no genuine issue of material fact and that the facts set forth in the Declaration of Jon Athow are true." CP 788. The order declared that (i) it had jurisdiction over the subject matter and the parties, (ii) the ordinance in question (Ord. 25930, described above) was properly enacted, (iii) the City had authority to provide cable TV service, and (iv) the City had authority to lease telecom facilities and capacity to telecom providers. The Court declined to address in that order the validity of the bond issuance, and struck out the language dealing with that subject in the proposed order. CP 789.

The following spring, in April 1997 the City filed a second motion for summary judgment, asking the court to address the subject it had declined to address in the December 1996 order, *i.e.*, the validity of the $1,000,000 bond issuance. CP 791. The City supported its motion with a second declaration of Jon Athow (giving a more detailed description of the telecommunications project) and argued that its authority to issue the bonds must be sustained in the absence of a showing of fraud, bad faith, or *ultra vires* conduct. CP 795-96. The taxpayer representative opposed the motion by arguing that issuing the bonds would be an *ultra vires* act

because under the city charter "expenditures that are utilized for an addition to or betterment of any public utility must be submitted to a vote of the electorate when a general indebtedness may be incurred," and the City had not made an adequate showing that the bonds could be repaid without using general funds. CP 822.

In reply, the City argued that the taxpayer representative had submitted no evidence of fraud or bad faith, that the court had already ruled that the City had authority to build and operate the telecom system, and that the city charter "does not require a vote of the people under the facts of this case because no such vote is required for the issuance of *revenue* bonds." CP 834 (italics in original). The City went on to state:

> Defendants' brief also argues extensively that revenues from the Telecommunications System may be inadequate to cover debt service on the Bonds. This factual argument is simply not material to the question of the City's authority to issue the Bonds, and therefore cannot raise a 'genuine issue as to any *material* fact[.]' CR 56 (emphasis supplied). <u>Moreover, the issue is outside the scope of the Court's review</u>.

CP 834 (italics in original, underlining added).

In May 1997 the court entered its order on the City's second motion for summary judgment. CP 847-48. After reciting the materials it had considered and stating that based on those documents the court found there was no genuine issue as to any material fact, the court made a point of striking out the language in the proposed printed order stating that the

facts in the declarations submitted by the City were true and instead added by handwritten interlineation: "*however the court is making no finding as to the financial feasibility of the Project or as to the legality of any future bond issues*." CP 848. The court then declared: "The City has authority . . . to issue the *$1 million of revenue* Bonds for the purposes set forth in paragraphs (3) and (4) in" the December 1996 order described above. CP 848 (language in italics added by handwritten interlineation in the printed order). The court made no other findings or rulings in that order.

Aside from the handwritten interlineation in the order stating that the court was making no finding about the financial feasibility of the project, there is nothing in the record indicating what if any consideration the court gave to the taxpayer representative's argument about the possibility that the telecom revenue might be inadequate to cover debt service on the bonds, or whether the court agreed with the City's argument that that issue was "outside the scope of the Court's review." CP 834.

D. <u>The Build-Out of Click</u>

Following the court's May 1997 order, the City began building the system and launched Click as a new business in 1998. CP 107; CP 180. Over the ensuing years, the HFC telecommunications network was built out. It presently consists of about 400 miles of fiber optic cable and 1,200 miles of coaxial cable. CP 178. Parts of the new HFC network were used

to support the electric utility function of providing electricity, and parts were used to support the new cable TV and wholesale internet business. The cable TV and internet business was referred to as "commercial telecommunications service" to distinguish it from electric utility service, and it came to be called the "Click! Network." CP 107; CP 229-30.

About 34% of the households in Tacoma Power's electric service territory are located in geographic areas not reached by the HFC network and where Click cable TV and internet service is therefore not available. CP 107, CP 451. Even in areas where Click service is available, most households choose to get their cable TV or internet service from other providers [4] or choose not to get such service at all or cannot afford it. In 2016, out of 176,784 electric utility customers only 17,468 (less than 10%) were Click cable TV customers and only 23,344 (about 13%) were wholesale internet customers. CP 104, 108; *see also* CP 187.

Yet all electric ratepayers help pay for Click's capital investments and operating losses through increased electric rates, whether they are Click customers or not, or whether they live in areas where Click service is available or not. CP 77.[5] The city attorney testified that he agreed the

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

[5] As explained below, this is perfectly appropriate to the extent shared network expenses are allocable to the electric utility, but it is not appropriate (and not lawful) to the extent network expenses are attributable or allocable to the cable TV and internet business.

electric utility subsidies for Click are unfair to the roughly one-third of all electric ratepayers who live in areas where Click cable TV and internet service is not even available to them. CP 328; *see also* unfairness discussion below at 16-17.

E. The Electric Utility's Subsidies for Click

In April 2000, shortly after Click was created and started operating, PriceWaterhouseCoopers, an independent accounting and consulting firm, reviewed Click's financial performance. It recommended that network capital and operating expenses be segregated between those that supported commercial telecommunications functions and those that supported electric utility functions. CP 203, CP 215. Another consulting firm was hired in 2003 to assess the reasonableness of the methods being used to allocate network capital and operating expenses between "power" and "commercial" applications. "Power" applications were defined as "uses of the Click! Network infrastructure that support electric transmission and distribution operations," while "commercial" applications were described as "cable TV, Internet and data transport services sold to wholesale and retail customers." CP 229.

Subsequent technological and other changes, including a gradual transition from wired connections between substations and for automated meters to wireless connections, led to a need to review the allocation of

expenses between power applications and commercial applications. CP 349-50; CP 245-46, 247, 256; CP 72. After a thorough review of its allocation methods, in August 2015 Tacoma Power adopted updated allocations, which were made retroactive to January 1, 2015. CP 258; CP 616; CP 1147, ¶6. These allocations were designed to account separately for network expenses attributable to the electric utility and those attributable instead to the commercial telecom business.

According to financial reports prepared by the city's Finance Department, the net operating losses of Click's commercial telecom business were $1,406,192 for calendar year 2014 (based on the old allocation system), $5,267,364 for 2015 (based on the updated allocations), and $5,742,857 for 2016. CP 260-61, 262-63, 264-65.[6] Those losses were covered by using money from the electric utility. CP 73; CP 347-48; CP 324; CP 375; CP 432; CP 300. In 2015 it was estimated that electric rates would be reduced by 2 to 3 percent if the Click subsidy were removed. CP 268; CP 161; CP 387-88; CP 351.

Section 4.15 of the Tacoma City Charter requires that at least every ten years the city council must hire a competent consulting firm to perform

[6] According to the City's publicly available financial reports, Click's losses in 2017 amounted to $4,910,312, and its losses in 2018 through November 30 amounted to $3,764,122 (as of this writing the information for December 2018 is not yet available on the City's website).

a "general management review" of all utilities under the jurisdiction of the public utility board. CP 116. In 2014 Sage Management Consultants, LLC was hired to perform that review. CP 352; CP 305. It issued its report on November 7, 2014. Among other things, it concluded that:

> "Power has been subsidizing Click! and the subsidies will likely grow over time."

CP 67, CP 73;

> "Click! revenue should cover its total allocated cost, including direct costs, debt service, services provided by other units, and allocated overhead. It does not and Click! is losing money. Click! financial losses are covered by the Power fund. This means that Power ratepayers are subsidizing Click! customers."

CP 73; and

> "The Power subsidy to Click! is unfair to the Power ratepayers and should not continue. . . . TPU should engage an expert firm to attempt to sell or lease Click! as soon as possible. . . . If a sale or lease is not possible, TPU should close Click!"

CP 74. The City's director of utilities at the time, William Gaines, testified that he agreed with the consultant's conclusions that the electric utility's subsidies for Click were unfair to electric ratepayers and that Click should be sold, leased or closed. CP 352-55.

In 2015 another telecom company in the cable TV and internet business (Wave Broadband) offered to buy or lease Click's assets. In a series of presentations to the public utility board and city council, the

director of utilities and Tacoma Power's entire senior executive team, together with another outside consulting firm, recommended that Click's assets be leased to Wave, as a way to end or reduce the subsidies for Click. CP 356-57, CP 360; CP 328.

F. The City Attorney's Legal Memo

In July 2015 the city attorney prepared a memorandum for the mayor, city council, and public utility board on the subject "The City and TPU's Authority and Obligations Related to Providing Commercial Telecommunications Service to the Public." CP 58-64. The legal memo explained that while the City had express statutory and city charter authority to own and operate the electric utility (CP 58-59),[7] the City's authority to provide cable TV and internet service "rests in a city's broad authority to self-govern in areas of local concern." CP 60. Thus, said the city attorney, the public utility board operates the electric utility under authority of state statutes and the city charter, but the board provides commercial telecom service based on "delegated authority from the

[7] RCW 35.92.010 - 060 authorizes cities to own and operate specified kinds of utilities, including water, sewer, stormwater, solid waste, gas, and electricity utilities, as well as asphalt plants, cold storage plants, and transportation systems. Cable TV, internet and other telecom services are not included within the statutorily authorized utilities. Tacoma City Charter §4.1 ("General Powers Respecting Utilities") authorizes the City to own and operate statutorily authorized utilities, including those providing water, light, heat, power, transportation, sewage, and refuse collection services. Again, cable TV, internet and other telecom services are not mentioned. City Charter §4.10 authorizes the public utility board to operate the "electric, water, and belt line railway utility systems," but cable TV, internet and other telecom services are not mentioned.

Tacoma City Council, not based on its authority to govern the operations of the City's electric utility under City Charter Section 4.10." CP 62.

The memo pointed out that under City Charter §4.5, revenues of a utility may be used only for the necessary expenses of that utility and may not be used for the financial support of any other utility, department or agency. CP 58-59. The memo went on to explain that Charter §4.5 echoed the requirements of Washington case law and RCW 43.09.210 that "separate accounts" must be kept for "each department, public improvement, undertaking, institution, and public service industry under the jurisdiction of every taxing body" and that:

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

CP 59-60, quoting RCW 43.09.210 (emphasis added).

Applying those principles to the electric utility and Click, the memo explained that (i) electric revenues may be used to pay for expenses of the Click network that benefit the electric utility, (ii) electric revenues may not be used to pay for expenses of the network that do not benefit the electric utility, and (iii) to the extent there are parts of the network that

benefit both the electric utility and the Click telecom business, those expenses must be allocated accordingly between Click and the electric utility. CP 62-63. The memo concluded:

> Administration of [the electric utility] function requires separate accounting of costs and revenues associated with the commercial telecommunication services provided to the public, as state law and the City Charter prohibit the use of electric utility ratepayer revenues to pay for costs solely associated with providing these commercial telecommunication services. Telecommunication system costs associated with providing both electricity to utility customers and commercial telecommunications services to the public must be allocated and then paid separately by the two enterprises. Whenever the electric utility no longer needs a specific portion of the telecommunication system, which the commercial side is still using, then the maintenance costs associated with this specific portion of the system can no longer [be] paid with electric utility revenues.

CP 64 (emphasis added).[8]

G. The All-In Plan

Despite the city attorney's legal advice that electric revenues cannot lawfully be used to pay for network expenses that are not properly allocable to the electric utility, and despite the virtually unanimous opinions of the utility management professionals and consultants that the

[8] The city attorney's July 2015 legal memo was authored by then-city attorney Elizabeth Pauli and then-chief deputy city attorney William Fosbre. Ms. Pauli became the City Manager in early 2017, and Mr. Fosbre became the city attorney. In April 2018 Ms. Pauli testified that she still agreed with the contents of the July 2015 memo and has not changed her mind about it, *i.e.*, she has not "subsequently reached a conclusion that anything said in the memo was incorrect." *See* Declaration of David F. Jurca in Support of Ratepayers' Answer to City of Tacoma's Motion for Discretionary Review, filed in this Court on May 8, 2018, Ex. B (Pauli Dep.) at 16-17.

subsidies for Click were unfair to electric ratepayers and should be ended, in December 2015 the public utility board and city council adopted resolutions directing Tacoma Power to develop a new business, financial and marketing plan (the "All-In Plan") to provide customers with enhanced and upgraded telecom service, including new retail gigabit internet service. CP 168-174; CP 79-93; CP 356-57; CP 330-31.

The new plan was developed as directed, and in September 2016 the public utility board voted 3-2 to adopt a resolution approving the All-In Plan and directing TPU staff to implement it upon approval by the city council. CP 270-80, §§1 and 2. Section 4 of the resolution provided that Tacoma Power was to transfer a minimum of $6 million per year, and if necessary up to an additional $10 million per year, from electric revenues to pay for Click's capital improvements and other expenses of implementing the new All-In Plan. CP 276-77.

According to a refined and more detailed version of the All-In Plan prepared by Click in March 2017, in consultation with an outside utility consulting firm, the cumulative subsidies from electric revenues to cover Click's capital investments and operating losses from 2016 forward under the All-In Plan were projected to amount to about $19.5 million by 2017, from $38.6 million to $39.5 million by 2020, and from $58.7 to $65.6 million by 2025. CP 187. Unsurprisingly, director of utilities Gaines

testified that in his view "it was not in the interest of Tacoma Power electric ratepayers to proceed with the All-In approach." CP 357. Moreover, as the Tacoma Power superintendent testified, proceeding with the All-In Plan would be "inconsistent" with the legal advice provided in the city attorney's July 2015 legal memo. CP 446-47.

H. This Lawsuit

In February 2017 the ratepayers (respondents here) filed a pre-litigation administrative claim against the City pursuant to RCW 4.96.020, challenging the legality of the electric utility's subsidies for Click's commercial telecom business. CP 282-285. The complaint in this action was filed on June 22, 2017.

The City suspended further implementation of the All-In Plan because of the filing of the ratepayers' claims. CP 361.

Following extensive discovery and numerous depositions, in December 2017 the ratepayers filed a motion for partial summary judgment seeking an order declaring that the electric utility subsidies for Click are unlawful. CP 24, *et seq*.[9] The City did not dispute any of the

[9] The ratepayers' motion pointed out that it was unnecessary for the court to determine what kinds of expenses were attributable or allocable to the electric utility ("power applications") or to Click's commercial telecom business ("commercial applications"), or in what amounts or proportions. Tacoma Power and the City's Finance Department had already made those determinations, and for purposes of the motion the ratepayers were not challenging the City's allocation methods or financial accounting. CP 42.

facts presented by the ratepayers. Instead, it responded to the motion by arguing (i) that the ratepayers' claims were barred by the declaratory rulings in the 1996 bond validation lawsuit, (ii) that the state accountancy act and City Charter §4.5 were inapplicable to the subsidies for Click because the electric utility and Click are both part of Tacoma Power, and (iii) that under the undisputed facts the City was entitled to summary judgment dismissing the ratepayers' claims. CP 460-484.

On March 2, 2018, after extensive briefing and oral argument, the trial court granted the ratepayers' motion for partial summary judgment and ruled as a matter of law that "Tacoma Power electric utility revenues and funds may not lawfully be used to pay for Click! Network expenses or capital improvements that are attributable or properly allocable to commercial telecommunications service rather than electric utility service." CP 1084-1087.[10]

On April 6, 2018 the City filed in the superior court a notice of discretionary review of the March 2 ruling, and on April 23 the City filed in this Court a motion for discretionary review and a motion for a stay of trial court proceedings pending a ruling on the motion for discretionary

[10] The motion for partial summary judgment did not address the subject of remedy, *i.e.*, whether the subsidies for Click should be enjoined and whether the electric utility should be reimbursed for past subsidies. The ratepayers filed a motion for partial summary judgment on remedy on April 20, 2018, but further trial court proceedings were stayed and discretionary review was granted before the motion on remedy could be heard.

review. The motion for a stay was granted on May 7, 2018, and discretionary review was granted by this Court on June 14, 2018.

IV. ARGUMENT

A. The Ratepayers Have Standing to Sue.

Electric ratepayers have standing to sue to prevent electric utility revenues from being wrongfully diverted for unlawful purposes, such as paying for Click's commercial telecom services that do not have a sufficiently close nexus to the electric utility's primary purpose of providing electricity to its customers. As a leading case in Washington on ratepayer standing has explained:

> Appellant, being a resident and taxpayer of the city of Centralia and a user of electric current furnished by the city, is interested in the fund which had accumulated from the operation of the power distribution system owned by the city and has the right to wage an action to prevent any unlawful diversion of the moneys in this fund, in the disposition of which, as a property owner, taxpayer and user of power, he has some interest.

Jones v. City of Centralia, 157 Wash. 194, 203-204, 289 P. 3 (1930).

Plaintiffs also have express statutory standing to sue under RCW 80.04.440, which provides:

> In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, . . . such public service company shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom, . . . An action to recover for such loss,

> damage or injury may be brought in any court of competent jurisdiction by any person or corporation.

Id.[11] *See also* RCW 7.24.020.[12]

The City has not challenged the ratepayers' standing to sue, *i.e.*, their right to ask for the requested relief.

B. Using Electric Utility Revenues to Subsidize Click's Commercial Telecom Service Is Unlawful.

As pointed out in the city attorney's July 2015 legal memo, the people of the City of Tacoma have resolved that a municipal utility's revenue may be used only for that utility's own expenses. Tacoma City Charter, § 4.5 provides:

> The revenue of utilities owned and operated by the City shall never be used for any purposes other than the necessary operating expenses thereof, . . . The funds of any utility shall not be used to make loans to or purchase the bonds of any other utility, department, or agency of the City.

(Emphasis added). That principle is well-founded: it ensures that utility ratepayers are not exploited as a source of general revenue for the City or for other, non-utility purposes. When utility revenue is used only for

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[11] The City is a "public service company" within the meaning of that statute. The term "public service company" is defined as including any "electrical company," which is defined as including any city owning or operating an "electric plant," which is defined as including any property used for generating, transmitting, distributing, selling or furnishing electricity for light, heat or power. RCW 80.04.010(23), (12) & (11).

[12] "A person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the . . . statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

necessary utility expenses, rates remain reasonably tied to actual costs, making essential utility services like water and electricity affordable.[13]

Charter §4.5 should be read in conjunction with Charter §4.20, which provides:

> Insofar as is possible and administratively feasible, <u>each utility shall be operated as a separate entity</u>. Where common services are provided, a fair proportion of the cost of such services shall be assessed against each utility served.

CP 117 (emphasis added).

The public policy underlying these charter provisions is well-recognized in Washington law. As the Washington Supreme Court explained a century ago, "The object of municipal ownership [of utilities] is to give the citizen the best possible service at the lowest possible price… [otherwise] there can be no virtue in public ownership." *Uhler v. City of Olympia*, 87 Wash. 1, 14, 151 P. 117 (1915). The "lowest possible price" is one that covers the utility's necessary costs and nothing more.

Thus, a municipal electric utility may not impose on ratepayers the costs of activities that do not have a "sufficiently close nexus" to the utility's primary purpose of "supplying electricity to the municipal corporation and its inhabitants." *City of Tacoma v. Taxpayers of Tacoma*,

[13] The City's electric utility is a monopoly within its service area but is unregulated by the WUTC. As an unregulated monopoly providing an essential service, the City faces no competitive pressure from other service providers to help keep utility rates down.

108 Wn.2d 679, 695-696, 743 P.2d 793 (1987); *see Okeson v. City of Seattle*, 159 Wn.2d 436, 450, 150 P.3d 556 (2007) ("*Okeson III*").[14] In *Okeson III* the Court held that Seattle City Light could not impose on electric utility ratepayers costs associated with buying "greenhouse gas emission offset credits" by paying other parties for mitigating their greenhouse gas emissions, because "combating global warming is a general government purpose, albeit a meritorious one, and not a proprietary utility purpose," and did not have a sufficiently close nexus to the utility's primary purpose of supplying electricity to its customers. *Id*. at 439, 449-452. Since the emissions mitigation program did not have a sufficiently close nexus to supplying electricity to utility customers, the court held that "mitigation expenses must be borne by general taxpayers rather than utility ratepayers." *Id*. at 439.

Washington courts have rejected tenuous links between a utility's purpose and a proposed project as a basis for using utility revenues to pay for project expenses. For example, in *Kightlinger v. PUD No. 1 of Clark Cnty.*, 119 Wn. App. 501, 81 P.3d 876 (2003), this Court held that a public

[14] *Okeson* was multifaceted litigation with separate appellate decisions on different phases of the case. *Okeson I*, 150 Wn.2d 540, 78 P.3d 1279 (2003), held that electric utility revenues could not be used to pay for public street lighting; *Okeson II*, 130 Wn. App. 814, 125 P.3d 172 (2005), held that electric utility revenues could not be used to pay for public art not directly related to the utility; and *Okeson III* held that electric utility revenues could not be used to pay other parties for mitigating their greenhouse gas emissions, as part of the city's program to combat global warming.

utility district lacked authority to engage in the business of repairing electric appliances, because that business did not have a sufficiently close nexus to the utility's primary purpose of furnishing electricity to its customers. The Court was not persuaded by the utility's argument that the appliance repair business helped promote the sale or conservation of electricity. *Id*., 119 Wn. App. at 509-511.

Similarly, in *Okeson v. City of Seattle*, 130 Wn. App. 814, 125 P.3d 172 (2005) ("*Okeson II*"), the court held that electric utility revenues could be used to pay for public art only if the art had a "sufficiently close nexus" to the utility's primary purpose of supplying electricity to its customers. Art that decorated utility offices or that promoted electricity conservation had a sufficiently close nexus to the utility purpose, but public art located on non-utility property or that merely improved the utility's public image or was for other public relations purposes did not, and could not be paid for with electric revenues.

In *Okeson III*, the court rejected as too nebulous and speculative the city's argument that combating global warming would benefit the electric utility by preserving the Cascades snowpack whose runoff was needed for hydroelectric power generation, and concluded that the payments at issue in that case were "neither proprietary in nature nor sufficiently related to the purpose of supplying electricity." 159 Wn.2d at

449-452.

Tacoma City Charter §§4.5 and 4.20 echo the public accounting principles set forth in RCW 43.09.210, sometimes referred to as the state accountancy act or the local government accounting statute. That statute requires local governments to keep "separate accounts" for "each department, public improvement, undertaking, institution, and public service industry" (RCW 43.09.210(2)) and also provides that:

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

RCW 43.09.210(3) (emphasis added). The accountancy act prohibits one governmental entity or "undertaking" from receiving services from another for free or at a reduced cost absent a specific statutory exemption. *Okeson v. City of Seattle*, 150 Wn.2d 540, 557, 78 P.3d 1279 (2003) ("*Okeson I*"). The act promotes clarity and financial traceability in local government administration and makes it easier for taxpayers to review government finances. Under the act, Click's cable TV and internet business must keep "separate accounts" for its revenues and expenses and cannot lawfully receive subsidies from the electric utility without

reimbursing the utility for those subsidies at "true and full value."[15]

The City argues that Click is not a separate "undertaking" from the electric utility because they are both part of Tacoma Power. The fact that Click's telecom business is a separate "undertaking" from the electric utility has been clear since its inception. The 1996 ordinance creating Click explicitly established it as "a separate system" of the Light Division. CP 126, §2.1. The follow-up resolution in 1997 described the new, separate system's internet transport and cable TV services as "new business lines," *i.e.*, as different business lines from the electric utility's traditional business of supplying electricity to customers. CP 153.

Unlike the electric utility, Click's cable TV and internet business is not a statutorily authorized utility at all. It is a non-utility proprietary business that "exists separate and apart from the City's electric utility functions." CP 64 (city attorney memo). This conclusion is further supported by the fact that City Charter §4.7 prohibits the City "from granting any franchise, right or privilege to sell or supply water or electricity within the City" (CP 115), yet the City does grant franchises to

[15] In accordance with these principles, PriceWaterhouseCoopers and other consultants have advised the City to account for Click's telecom revenues and operating and capital expenses separately from the revenues and expenses of the electric utility, with appropriate allocations of expenses where there is shared usage of facilities or services. The City has been doing the accounting in accordance with that advice, but has not been making the required reimbursements to the electric utility *See* above at 15-16.

other telecom companies to provide cable TV and internet service. *See, e.g.*, CP 69-71. Those franchises are allowed notwithstanding Charter §4.7 only because providing cable TV and internet service is not an electric utility function.[16] Indeed, the Washington Supreme Court held explicitly in *City of Issaquah v. Teleprompter Corp.*, 93 Wn.2d 567, 611 P.2d 741 (1980), that "cable television is not a public utility as contemplated by RCW 35A.80 and 35.92." 93 Wn.2d at 574 (emphasis added). "When a city provides commercial telecommunication services to the public, it is not acting as a public utility." CP 60 (city attorney memo).

Thus, the City's efforts to paint Click's telecom business as part of the electric utility are unavailing. The legal authority for the City's operation of the Click telecom business is entirely different from its authority for operating the electric utility. CP 58, 60-62. Even the state and city taxes and tax rates payable by the electric utility are separate and apart from the taxes payable by the telecom business. *See* CP 292.[17] The

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[16] The City is reportedly considering a "public-private partnership" in which another company would take over operation of the Click network. *See, e.g.*, CP 959, 967, 982; news article at https://www.thenewstribune.com/news/local/article227147689.html (Mar.5, 2019). Such an arrangement would be allowable under Charter §4.7 only because providing telecom service is not an electric utility function.

[17] *See* RCW 82.04.250, .257 & .290 (state B&O tax on cable TV); RCW 82.04.270 (state B&O tax on internet service); RCW 82.16.010(4), 82.16.020(1)(b), 82.02.030, WAC 458-20-179 (state tax on electric utility); Tacoma Municipal Code 6A.100.010 (7.5% city earnings tax on electric revenues and 8% on cable TV revenues), 6A.40.050 (city tax on cable service), 6A.30.050 (city B&O tax on cable TV service and internet service), 16A.03.050 (city franchise fee on cable TV service).

fact that the City chose, for whatever reasons of administrative convenience, to organize the Click commercial telecom business as part of Tacoma Power, has no more legal significance than the City's decision to organize both the electric utility and the City's rail business as part of the Department of Public Utilities (TPU).[18]

To further illustrate the point, suppose the City had decided to organize Click as a separate division of Tacoma Public Utilities instead of as part of "Tacoma Power," but in all other respects the Click telecom business was constructed and operated the same.[19] In that scenario the applicability of City Charter §§4.5 and 4.20 and RCW 43.09.210 to Click as a separate undertaking from the electric utility would be obvious, and the City's arguments would evaporate. Merely naming Click as part of "Tacoma Power" cannot change this result. Or suppose the City decided to operate a streetcar service as part of Tacoma Power. Surely that would not render the Charter provisions and RCW 43.09.210 inapplicable to electric utility funding for the streetcar service.

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[18] Or, to use a more "concrete" analogy, the City's decision to house both Click and the electric utility within the Power division of TPU has no more legal significance than the decision to house Tacoma Water and Tacoma Rail within the same Public Utilities Building as Tacoma Power.

[19] This scenario is not far-fetched. As of the date of this writing, the Tacoma Public Utilities Website Main Page, located at https://www.mytpu.org, displays a link to Click in the upper right corner as if it were a separate division of TPU, along with links to Tacoma Power, Tacoma Water and Tacoma Rail.

The electric utility's subsidizing of Click contravenes the City Charter directive that a utility should bear no expenses but its own, and the accountancy act's directive that "no . . . undertaking . . . shall benefit in any financial manner whatever by an appropriation or fund made for the support of another." The subsidies for Click have created precisely the sort of tangled confusion the accountancy act and Charter provisions are intended to prevent. Holding that the act and the Charter provisions are inapplicable because Click is organized administratively as part of Tacoma Power would elevate form over substance, and would effectively nullify the requirements of the accountancy act and City Charter §§4.5 & 4.20 through semantic gamesmanship.

The City's reliance on *Rustlewood Ass'n v. Mason County*, 96 Wn. App. 788, 981 P.2d 7 (1999) (City Br. at 23), is misplaced. That case was about whether costs needed to be allocated among different residential subdivisions served by the same utility. In contrast, this case is about allocation of expenses between an electric utility and a separate, non-utility business operated by the city, and whether the City can lawfully use electric utility revenues to subsidize a separate non-utility business.

Here, the purposes of City Charter §§4.5 and 4.20 and the state accountancy act have been subverted. Electric utility revenues have been used (and continue to be used) to pay for Click expenses that do not

benefit the electric utility. The ratepayers did not challenge, and the trial court did not rule unlawful, using electric revenues to reimburse Click for network expenses to the extent they are properly allocated to the support of the utility. Rather, the ratepayers challenged, and the trial court ruled unlawful, only the use of electric revenues to pay for telecom network expenses that are not properly allocable to the electric utility.

The City also argues that Charter §4.5 and the accountancy act "do not apply to Tacoma Power using its excess capacity . . . to run one of its units, Click, for the sole benefit of its utility customers." City Br. at 28. That statement is puzzling, because Click is not being run "for the sole benefit of . . . utility customers." It is being run for the benefit of Click customers, who are only a small fraction of the electric ratepayers,[20] or it is being run to serve some general governmental purpose of making cable TV and internet service available to Tacoma residents.

The City's argument about excess capacity is also misleading. It erroneously implies that the electric utility is somehow generating positive revenue by allowing Click to use otherwise excess facilities. In reality, Click's operation and maintenance of the network for telecom purposes results in millions of dollars of losses each year. Requiring the electric

[20] Less than 10% of electric ratepayers are Click cable TV customers, and only about 13% are internet customers. *See* above at 13.

utility to subsidize Click for those losses places a substantial – and unlawful – financial burden on the backs of the electric utility and its ratepayers each year. That is why the City's outside consultants and its own utility professionals recommended selling, leasing, or shutting down Click. *See* discussion above at 15-19.

The law, the equities, and good public policy align in this case to prohibit those subsidies for Click. Electricity is a fundamental human need in the modern world. People need electricity to warm and light their homes and prepare food to feed their families. It is unfair and bad policy to force electric ratepayers to bear extraneous costs that do not have a "sufficiently close nexus" to the provision of electric service. The misappropriation of electric utility revenue results in higher rates for electric service for all ratepayers, whether they are Click customers or not. This defeats "[t]he object of municipal ownership [of utilities] [which] is to give the citizen the best possible service at the lowest possible price." *Uhler v. City of Olympia*, *supra*, 87 Wash. at 14.

Some may argue that publicly owned cable TV and internet service is a good idea, and perhaps even that it should be subsidized by municipal government as a valuable service for the community. Whatever may be the merits of those contentions, it is clear that electric utility revenue is not a legal or appropriate source for the subsidy. If the City considers Click to

be an important service for Tacoma residents, the City can subsidize Click by using the City's general fund or other available non-utility sources.[21] As the Washington Supreme Court stated so succinctly in *Lane v. City of Seattle*, 164 Wn.2d 875, 884, 194 P.3d 977 (2008) (holding that municipal water utility revenues cannot lawfully be used to pay for fire hydrants, since fire protection is not a proprietary water utility purpose), "The question is not whether there will be . . . hydrants, but who must pay for them." Here, the issue is not whether there should be municipal ownership of a telecom business, but who should pay for it. The answer may be that the customers of that business or perhaps the City's general fund should pay for it, but it is unfair, illegal and bad public policy to impose those costs on electric utility ratepayers.

C. The Ratepayers' Claims Are Not Barred by the 1996 Bond Validation Lawsuit.

Confronted with overwhelming authority (including its own city attorney's legal opinion) that the electric utility subsidies for Click are illegal, the City resorts to an argument that its illegal conduct is immune

[21] While utility revenues may be used only for utility purposes, a city's general fund may be used for any lawful city purpose. *See* 15 *McQuillin Mun. Corp.* §39:54 (3d ed. July 2018 update). And contrary to the suggestion in the City's brief at 26, the ratepayers did not argue, and the trial court did not rule, that there would be anything unlawful about the City's (or "Tacoma Power's") operation of the Click telecom business so long as electric utility revenues were not used for Click expenses. Nothing in the trial court's ruling in this case "eviscerated" the rulings in the 1996 bond validation case that the City could lawfully offer telecom service and could issue revenue bonds to build the telecom system.

from challenge because of declaratory rulings in the 1996 bond validation lawsuit. The City's argument fails at every point of analysis.

Declaratory judgments do not have the same *res judicata* effect as other judgments. As explained below, a declaratory judgment only precludes subsequent litigation of claims that were actually litigated and decided; it does not preclude subsequent litigation of claims or issues that *might* have been or *could* have been litigated or decided but were not. *See Restatement (Second) of Judgments* § 33 (1982):

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

(Emphasis added); *see* 22A *Am. Jur.2d*, Declaratory Judgments § 244:

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

The vast majority of state and federal courts that have addressed the issue have agreed with the *Restatement* position. Since the issue whether electric utility revenues can lawfully be used to subsidize Click's telecom expenses was not addressed or decided in either of the two declaratory rulings in the 1996 bond validation case, nothing in those

rulings or in that lawsuit bars the ratepayers' claims here. The trial court was correct in rejecting the City's argument.[22]

1. There is no *issue preclusion* barring the ratepayers' claims.

The 1996 bond validation case was about whether the City had legal authority to establish a cable TV and internet business and to issue bonds to pay for building it. The court in that case ruled in the affirmative on both points. The ratepayers in this case have not challenged either of those rulings. This case is about whether electric revenues can lawfully be used to pay for Click's telecom expenses. That issue was not addressed or decided in the bond validation case.

The 1996 declaratory ruling held only that (i) the court had jurisdiction over the subject matter and the parties, (ii) the bond ordinance (Ord. 25930, creating the telecom network as a "separate system" of the Light Division and providing for issuance of $1,000,000 of revenue bonds) was properly enacted, (iii) the City had authority to provide cable TV service, and (iv) the City had authority to lease telecom facilities and capacity to telecom providers. CP 789. The 1997 declaratory ruling held

[22] The City implies that there is something strange or improper about the ratepayers having raised "[f]or the first time in their reply in the trial court" the point that declaratory judgments have limited claim-preclusive effect. (City Br. at 16). Of course the ratepayers first raised that point in their reply, since that was the ratepayers' first opportunity to respond to the *res judicata* argument made by the City in its response to the ratepayers' motion for partial summary judgment.

only that the City had authority to issue the bonds. CP 848. The court stated explicitly in that ruling that it was not addressing the financial feasibility of the telecom project (CP 848), after the City had argued that concerns about whether Click's telecom revenues would be adequate to cover expenses were "outside the scope of the Court's review." CP 834. It takes considerable *chutzpah* for the City to argue that an issue that was outside the scope of the court's review in 1997 is now foreclosed from consideration because of the 1997 ruling.

There was nothing in either side's briefing leading up to the first (1996) or second (1997) declaratory ruling in the bond validation case about whether it was legal to use electric utility revenues to pay for Click expenses that were not attributable or allocable to the electric utility. The City points to statements in the taxpayer representative's memorandum in opposition to the City's second summary judgment motion in that case to the effect that revenue shortfalls from the proposed telecom system might lead to rate increases <u>or</u> borrowing from the general fund,[23] but there was

[23] The City's brief in this case (Br. at 5) mischaracterizes the statements made by the taxpayer representative in the bond validation case. The taxpayer representative in that case did <u>not</u> say that telecom revenue shortfalls would lead to electric rate increases. He argued that such shortfalls might lead to rate increases "<u>or</u> borrowing from the general fund" (CP 823, 828, 829, emphasis added). The taxpayer representative was trying to support his argument that issuing the bonds without a vote of the people would be *ultra vires* because the City's general fund might be at risk, and he said nothing at all about whether it would be illegal to pay for telecom expenses by using electric revenues. The ratepayers in the present case are <u>not</u> challenging the legality of borrowing from or using the general fund as an alternative funding source to cover Click's financial losses.

not one word in any of the briefing in that case about whether it would or would not be legal to use electric revenues to pay for Click expenses. The court in that case was not asked to rule on that issue, and it did not.

Accordingly, there is no *collateral estoppel* (issue preclusion) effect of the bond validation case that bars the ratepayers' claims in this case. Nor is there any *res judicata* (claim preclusion) effect of the bond validation case that bars the ratepayers' present claims.

2. There is no *claim preclusion* barring the ratepayers' claims.

As noted above, it is well established that a declaratory judgment only precludes subsequent litigation of claims that were actually litigated and decided; it does not preclude subsequent litigation of issues or claims that *could* have been litigated or decided but were not. *Restatement (Second) of Judgments* § 33 (1982); 22A Am. Jur.2d, *Declaratory Judgments* § 244. This has been recognized in nearly all state and federal courts that have addressed the question. *See, e.g., Kaspar Wire Works v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 536-537 (5th Cir. 1978) (holding that declaratory judgments do not have the usual claim preclusive effect); *Harborside Refrigerated Servs., Inc. v. Vogel*, 959 F.2d 368, 372 (2d Cir. 1992) ("Many jurisdictions recognize an exception to ordinary res judicata principles where, as here, the prior action involved only a request for declaratory relief"); *Empire Fire & Marine Ins. Co. v. J. Transp., Inc.*, 880

F.2d 1291, 1296 (11th Cir. 1989); *Gant v. Grand Lodge of Tex.*, 12 F.3d 998 (10th Cir. 1993) (issue that was raised but not decided in prior action was not barred by *res judicata*); *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 549 (D.C. Cir. 1988)("Where a party asks only for declaratory relief, courts have limited the preclusive effect to the matters declared"); *Minneapolis Auto Parts Co., Inc. v. City of Minneapolis*, 739 F.2d 408, 410 (8th Cir. 1984).

The *Harborside* decision, *supra*, pointed out that both federal law and New York state law "recognize the declaratory judgment exception articulated in the *Restatement*" and explained the policy reasons for the *Restatement* position:

> A common purpose behind both declaratory judgment availability and the doctrine of res judicata is litigation reduction and the conservation of judicial resources. . . . A requirement that parties to an action for declaratory relief bring all possible claims and counterclaims at that juncture or else be barred by res judicata, would undermine efficient adjudication and optimal use of judicial resources. Actions for declaratory relief would rapidly develop into full-scale legal contests, and the option of a preliminary suit limited to a declaration of the rights of the parties would evaporate. To permit res judicata to be applied in such a case beyond the precise issue before the court would subvert the very interests in judicial economy that the doctrine was designed to serve.

959 F.2d at 373.

The more recent decision in *ASARCO, L.L.C. v. Mont. Res., Inc.*, 858 F.3d 949 (5th Cir. 2017), described this way the reason for the declaratory judgment exception to normal claim preclusion:

> The whole point of a declaratory judgment action is to decide only a single issue in a dispute, one that is often preliminary as subsequent events will need to occur before a traditional lawsuit can be pursued. Parties would be deterred from using that efficient process if it would bar all later claims arising out of the same dispute. . . . The declaratory claim on its own typically will not preclude future claims involving the same circumstances (as noted, issue preclusion may still apply to any declaration the court issues).

858 F.3d at 955-956.

In the instant case, it took a number of years after the bond validation lawsuit for the "subsequent events" (the build-out of Click, the extensive operating losses from Click's cable TV and internet business, and the electric utility's repeated and ongoing subsidies for Click) forming the basis for the present lawsuit to occur.

The most thorough and instructive judicial discussion we have found on the limited extent to which a declaratory judgment has claim preclusive effect is the First Circuit's decision in *Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co.*, 547 F.3d 48 (1st Cir. 2008). That was a diversity case in which the court was required to decide, under Massachusetts law, whether a declaratory judgment in a prior state court action barred a subsequent lawsuit arising out of the same set of facts.

The district court had dismissed the second action on the ground that it was barred by the claim-preclusive effect of the prior judgment. On appeal, the circuit court acknowledged that Massachusetts followed the usual rules giving broad claim-preclusive effect to final judgments, but was called upon to consider whether the state's highest court would recognize and apply the *Restatement* exception for declaratory judgments.

The court noted that no reported Massachusetts case had explicitly adopted the *Restatement* rule (547 F.3d at 54), but then carefully reviewed Massachusetts law and concluded that the state's highest court would likely apply the *Restatement* rule in the case at bar. *Id.* at 56. The court then engaged in a thorough and very comprehensive nationwide review of state and federal court decisions on the question:

> A canvass of the decisions in other jurisdictions is instructive. The vast majority of states that have addressed this problem unapologetically apply a special rule of claim preclusion, consistent with that of section 33 of the Second Restatement, in the declaratory judgment context. Many of these courts have cited explicitly to some edition of the Restatement. . . . Several states have used similar reasoning and adopted essentially the same rule. . . . In addition, a number of federal courts, applying state law, have adopted the Restatement's approach. . . . Last – but not least – a myriad of federal courts have opined that federal common law embraces the rule.

547 F.3d at 56 (numerous citations omitted).

Next, the court reviewed the leading treatises, concluding: "In general, they subscribe to the view that declaratory judgments should be

accorded less preclusive effect than other final judgments." *Id.* at 57. The court then proceeded to consider "the policy rationales that may bear upon the question." Echoing the court's policy discussion in *Harborside, supra,* the *Andrew Robinson* court explained:

> On the one hand, claim preclusion is a widely recognized means of husbanding judicial resources. . . . On the other hand, judicial resources also are conserved by the availability of a declaratory judgment mechanism; the prompt and efficient use of that mechanism enables courts "to clarify the legal relationships of parties before they have been disturbed thereby tending towards avoidance of full-blown litigation." *Harborside*, 959 F.2d at 373**.** <u>It would frustrate this latter policy were parties required to bring, as part of a declaratory judgment action, all conceivable claims and counterclaims on pain of preclusion</u>. The Second Restatement has weighed these competing policy rationales and concluded—sensibly, in our view—that, on balance, public policy is furthered rather than retarded by the ready availability of a no-strings-attached declaratory remedy that is simpler, faster, and less nuclear than a suit for coercive relief. *Restatement (Second) of Judgments* § 33 cmt. c.

547 F.3d at 58 (emphasis added).

Interestingly, one of the "myriad" of federal cases cited by the First Circuit in *Andrew Robinson* hits close to home in Washington. In the WPPSS securities litigation in federal court (*In re Wash. Public Power Supply System Sec. Litig.*, 623 F. Supp. 1466 (W.D. Wash. 1985), certain defendants argued that the claims in that case were barred by the prior state court declaratory judgment in *Chemical Bank v. Wash. Public Power Supply System*, 99 Wn.2d 772, 666 P.2d 329 (1983), *cert. denied*, 471 U.S.

1075, 105 S.Ct. 2154, 85 L.Ed.2d 510 (1985), declaring invalid and unenforceable the "Participants' Agreements" constituting the security for the revenue bonds that had been issued by WPPSS to build two subsequently abandoned nuclear power plants . The court rejected the defendants' argument:

> An action for declaratory relief, such as that brought by Chemical Bank in state court, precludes future litigation only of matters declared or actually litigated by the parties and determined in the action. *See Restatement of Judgments, Second*, §33, Comment C.

623 F. Supp. at 1473 (emphasis added).

One of the substantive textual provisions of the Washington declaratory judgment statute shows that declaratory judgments cannot have the same broad claim-preclusive effect as other kinds of judgments. RCW 7.24.080 expressly allows a subsequent action to be brought seeking further relief after entry of a declaratory judgment. If a declaratory judgment had the same broad claim-preclusive effect as other kinds of judgments, then a subsequent action seeking further relief would not be allowed. Therefore, a declaratory judgment must have a more limited claim-preclusive effect.

Moreover, it is important to remember that RCW chapter 7.24 is officially entitled the "Uniform Declaratory Judgments Act." *See* RCW 7.24.144. Washington is one of more than 40 states that have adopted the

Uniform Act.[24] This is important, because RCW 7.24.140 provides that:

> This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

(Emphasis added). This means that the Washington act is to be interpreted and construed in conformity with the decisions of the "vast majority" of the state and federal courts, surveyed comprehensively in *Andrew Robinson, supra,* that have adopted (either explicitly or implicitly) the rule set forth in the *Restatement (Second) of Judgments*, §33.

Finally, even under the broader *res judicata* principles applicable to judgments other than declaratory, the ratepayers' claims would not be barred by the 1996 and 1997 rulings in the bond validation case. A party asserting a *res judicata* defense has the burden of showing that the prior case and the current one have (i) the same subject matter, (ii) the same cause of action, (iii) the same persons and parties, and (iv) the same qualities of persons. All four elements are necessary for *res judicata*. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865-866, 93 P.3d 108 (2004) (*Hisle* is cited in the City's brief at 13 and 20). While the Washington Supreme Court has not yet explicitly adopted (or rejected) the

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[24]*See*https://www.uniformlaws.org/committees/communityhome?CommunityKey=a95a0b86-e7c1-42b8-8814-73ccb08843a4 for a list of states that have adopted the Uniform Declaratory Judgments Act.

Restatement rule, we submit that *Hisle* in effect adopted the *Restatement* rule *implicitly*, by narrowly construing the "identity of subject matter" element of the test where the prior judgment was only declaratory.

In *Hisle*, union members brought an action for retroactive overtime payments under the Minimum Wage Act ("MWA"). The employer argued that the employees' claims were barred by the *res judicata* effect of a prior lawsuit (*Adams*) dismissing with prejudice the employees' claim that a collective bargaining agreement ("CBA") was invalid. The trial court ruled that the employees' claims for overtime payments were barred by *res judicata*, but the court of appeals reversed. The Washington Supreme Court affirmed the court of appeals, stating:

> We find that this case involves a different subject matter than *Adams*. Whereas *Adams* concerned the procedures used to adopt the new CBA and sought to invalidate the new CBA, the current claim presumes the validity of the agreement and seeks to apply the MWA to it. Because we find that identity of subject matter does not exist, and because the res judicata test is a conjunctive one requiring satisfaction of all four elements, we do not analyze the other res judicata requirements.

Hisle, 151 Wn.2d at 866.

Similarly, the prior lawsuit here was about the validity of the 1996 city council resolution establishing Click and authorizing a bond sale, whereas the present lawsuit presumes the validity of the ordinance and bond sale but challenges the legality of the City's subsequent and

ongoing use of electric utility revenues to pay for Click telecom expenses. Just as the Supreme Court held in *Hisle*, there is no identity of subject matter between the two cases, and the ratepayers' claims in this lawsuit are not barred by any *res judicata* effect of the 1996-1997 declaratory rulings.[25]

D. <u>There Are No Disputed Material Facts</u>.

The City's argument about "possible" disputed fact issues that "may" preclude summary judgment is strange. The City did not dispute any facts in the trial court, and it does not really do so in its brief here. The only disputes in this case are about the legal implications of the facts presented to the trial court, not about the underlying facts themselves.

For example, the City says in its brief (at page 33) that the ratepayers "brought a 'policy' argument claiming that electric rates would drop 2%-3% if Tacoma Power abandoned Click." The ratepayers made no such "argument" and sought no such rate reduction in their motion. It is true that in their motion to the trial court (at CP 37) the ratepayers cited deposition testimony of the City's director of utilities (Gaines) and Click's

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[25] The City subtly mischaracterizes the nature of the second lawsuit in *Hisle*. The second lawsuit was not based on enforcing the CBA, as erroneously stated by the City at page 20 of its brief; it was based on enforcing the MWA. *See* 151 Wn.2d at 859, 866. The MWA was of course in effect at the time of the first lawsuit (*Adams*), so the employees could have asserted their MWA claims in that lawsuit. By deeming the second lawsuit as involving a different subject matter from that of the first lawsuit, although the parties and the underlying facts were essentially the same, we submit that the Washington Supreme Court was implicitly embracing the *Restatement* rule without adopting it explicitly.

general manager (Gyaltsen), and written statements provided by Gaines and Gyaltsen in response to questions from city council members, in which the City itself estimated a 2-3% reduction in electric rates if the subsidy for Click were removed; but the fact that those statements were made was not disputed by anyone. Oddly, the City says in its brief (again at page 33) that Tacoma Power Superintendent Chris Robinson "challenged this concept," citing a declaration from Mr. Robinson at CP 855-56. There is not a single word in Mr. Robinson's declaration saying anything at all about the effect on electric rates of removing the subsidy for Click, much less anything disputing the fact that the statements about such a rate reduction were made.[26]

As another example, the City proffers the characterization of Click as a "separate system" from the electric utility as a disputed fact. While that characterization of Click is drawn from facts,[27] the City does not

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[26] Ultimately, for purposes of the trial court's ruling below and this Court's review of that ruling, it does not matter at all whether elimination of the illegal subsidies for Click would result in a rate decrease for electric ratepayers of 0.2%, 2%, or 20%. All that matters is the fact that the City's statements about a rate reduction were made and not disputed, and that the subsidies for Click are affecting electric ratepayers adversely.

[27] The facts include (i) the City's own ordinances establishing Click as a "separate system" to engage in "new business lines," (ii) the differing legal authority for the City's operation of Click as compared to the legal authority for operating the electric utility, (iii) the differing functions provided by Click and the electric utility, (iv) the fact that Click serves only a small fraction of electric utility customers, (v) the fact that the taxes and tax rates payable by the electric utility are separate and distinct from the taxes and tax rates payable by the Click telecom business, (vi) the financial and accounting consultants' insistence that separate accounts be kept, and (vii) the fact that the City does in fact prepare separate accountings for Click's revenues and expenses.

dispute any of those underlying facts. The City's bald claim that Click is not "separate" from the electric utility because they are both part of Tacoma Power is a legal argument, not a genuine dispute of material fact.

The City did not dispute any of the facts presented by the ratepayers in support of their motion in the trial court. The City only disputed the legal implications of the undisputed facts. The trial court properly granted partial summary judgment based on the undisputed facts.

V. CONCLUSION

Over two decades ago, the City sought a limited declaratory judgment to confirm that that it had authority to launch a new City-owned telecom system, and to issue bonds to build the new system. The City emphasized the narrow scope of the declaratory relief it was seeking and expressly urged the court *not* to consider whether Click's revenues would be adequate to pay its expenses. The court in that case apparently agreed, stating that it was making no finding on the project's financial feasibility.

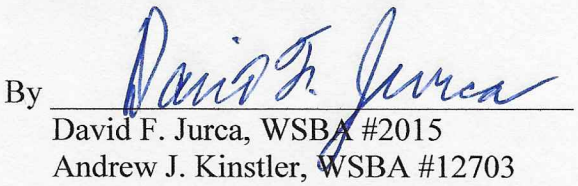
Now the City argues that the limited declaratory rulings it obtained in the 1996 bond validation lawsuit foreclose the electric ratepayers from challenging the use of utility revenues for non-utility purposes. The City asks this Court to accept that its unlawful use of electric utility revenues to subsidize Click's telecom expenses is immune from challenge because a court declared that the City had the authority to create Click in the first

place. The City's arguments are untenable and must fail. Electric ratepayers should not be forced to subsidize Click's telecom business.

For the foregoing reasons, the ratepayers ask this Court to affirm the trial court's order granting partial summary judgment declaring that electric utility revenues may not lawfully be used to pay for Click expenses that are attributable or allocable to commercial telecom service rather than electric utility service.

Respectfully submitted this 6th day of March, 2019.

HELSELL FETTERMAN LLP

By 

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COURT OF APPEALS NO. 51695-1-II

PIERCE COUNTY CAUSE NO. 17-2-08907-4

COURT OF APPEALS, DIVISION II
IN THE STATE OF WASHINGTON

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

Respondents,

v.

CITY OF TACOMA,

Appellant.

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