

73060-6

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No. 730606

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

LARRY COSTELLO AND CHRISTY COSTELLO,
Appellant / Plaintiff

v.

TANNER ELECTRIC COOPERATIVE,
Respondent / Defendant

BRIEF OF APPELLANTS

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

BRIEF OF APPELLANTS

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred by not permitting Costellos to inspect and copy Tanner's books and records pursuant to RCW 24.06.160. The trial court also erred by granting Tanner's motion for summary judgment regarding Costellos' records request, because there were issues of material fact in dispute.

2. The trial court erred in its finding that Tanner as an electrical cooperative is exempt from RCW 19.86 the Consumer Protection Act (CPA). The trial court also erred by granting Tanner's motion for summary judgment regarding Costellos' claim under RCW 19.86, because there were issues of material fact in dispute.

3. The trial court erred when it granted summary judgment on Tanner's counterclaims pertaining to their claims for repayment of an "opt-out" fee under Tanner's smart meter Opt-out policy and related late fees and pre-judgment interest.

4. The trial court erred by granting, in part, Tanner's motion for fees and costs pursuant to RCW 4.84 *et. seq.* and Tanner's membership agreement. Insofar as the resolution of error's described in No. 1, No. 2, and No. 3 above are dispositive of the fees and costs issue, Costellos contend that any ruling favorable on the above issues would also dispose of an adverse ruling awarding attorney's fees and costs to Tanner.

Issues Pertaining to Assignments of Error

1. Are the Costellos entitled to access the books and records of Tanner pursuant with RCW 24.06.160? (*Error No. 1*)
 - a. Was the Costellos' purpose for the records request proper?
 - b. Are the Costellos entitled to access the cost and financial information they have requested pertaining to the smart meters?
 - c. Are the Costellos entitled to access the information they have requested regarding the functionality of the smart meter system?
 - d. Are the Costellos entitled to access the members list of names and addresses as described in the statute?
 - e. Are the Costellos entitled to protect their interest in the cooperative by inspecting books and records to understand how cooperative money is being spent and if management decisions are sound?
 - f. Can Tanner's "access to information" policy, that restricts access to virtually all business information, co-exist with the provisions of RCW 24.06.160? Can Tanner create policy that violates the provisions of the statute and thus prevent access to books and records the statute otherwise ensures?
 - g. Since the trial court determined there were issues of material fact regarding Costellos' motion to access Tanner's records (*RP55 – Vol. I*), do those same issues preclude granting Tanner's motion to dismiss that same claim?

- h. Is an “Attorney’s Eyes Only” constraint which Tanner read into the Protective Order appropriate when such language is not present?
- i. Can a pro se litigant be denied discovery needed to prosecute his case on the basis of an “Attorney Eyes Only” confidential standard, when there has been no showing of good cause and no showing that the litigant risks the disclosure of the information?
- j. Without a showing of good cause, can a pro se litigant be required to retain an expert witness, or other attorney in order to have access by proxy to confidential designated information?
- k. Is Tanner required to demonstrate good cause for the documents they have designated confidential and highly confidential?
- l. Are the Costellos entitled to have their challenge of the confidential designations heard? The Costellos’ challenge was brought through Tanner’s Motion to Preserve Confidentiality which the trial court mooted upon granting Tanner’s motion to dismiss Costellos’ complaint #1.
- 2. Does the Consumer Protection Act (CPA) RCW 19.86 apply to cooperative electrical utilities formed under RCW 24.06? (**Error No. 2**)
 - a. The 2015 Washington State Legislature has made it very clear in SHB 1896 that the Consumer Protection Act is applicable to cooperative electric utilities like Tanner. As such, did the trial court err by relying on dicta from *Haberman v. WWPPS*, 109

Wn.2d 107 to conclude that cooperative utilities are categorically exempt from the CPA, regardless of the facts of the case?

- b. If the Appeal Court rules on item 2a that Tanner is not exempt from the CPA, were Tanner's business practices unfair and deceptive with regard to application of smart meters and the corresponding opt-out fee such that a claim under the CPA is viable?
- c. Given the facts of this case, is the Tanner opt-out fee arbitrary and capricious and ultimately improper?

3. When counterclaims for monetary damage are determined based on a specific calculation, and that calculation is shown to be mathematically incorrect as well as in violation of contract, is the award valid? (*Error No. 3*)

- a. Are the claimed expenses for Tanner's opt-out fee required to be "ascertained, and not created", and if so, were they?
- b. Is Tanner's billing practice of charging for energy that has neither been provided to nor used by Costellos in violation of the Bylaws and Membership Agreement?
- c. Because Costellos paid the opt-out fee in full prior to Tanner filing their counterclaim for late fees and interest, and have timely paid it in full since, and since Tanner has not delineated late fees and interest associated with the opt-out fee, is Tanner's counterclaim for late fees and interest without merit?

4. In consideration of errors No. 1, No. 2, and No. 3, should the award for fees and costs be overturned? In consideration of error No. 3, when the damage claim is properly calculated, did Tanner's offer for settlement of \$30 (\$10 for each of the three counterclaims) frustrate operation of RCW 4.84.250 - 280? (*Error No. 4*)

B. STATEMENT OF CASE

1. **Background that forms the basis for the case**

a. Plaintiffs Larry and Christy Costello (Costellos) are members of Tanner Electric Cooperative (Tanner). Defendant Tanner is a cooperative electrical utility organized pursuant to RCW 24.06 and is the sole electrical provider in the area in which the Costellos reside.¹ In 2009 - 2010 Tanner decided to install smart meters as a replacement for the electro-mechanical meters that had been in use up until that time. Tanner did not provide to its members any account of the costs, or analysis of the risks and benefits of adopting this technology. Likewise, recognized concerns associated with the technology were not communicated to the members. (*CPI30, 149, 380-384, 1242*)

b. In March, 2012 when the Costellos first learned of the smart meter replacement, they refused to allow installation of a smart meter at their residence due to privacy concerns that are a well documented risk with this technology. (*CP363-365*) The Costellos immediately contacted the Tanner management and Tanner Board to communicate their concerns.

¹ Tanner consists of approximately 4,500 members in three geographical areas of western Washington – North Bend, Ames Lake, and Anderson Island.

Costellos contended that were Tanner to install a “smart-meter” on their home, Tanner would have the ability to discern information about their consumption of electricity which would be so detailed as to violate their right to privacy.² *(CP65, 944 and RP22-Vol.II)*

c. Tanner rejected Costellos’ concerns and insisted that a smart meter would need to be installed otherwise their power would be subject to disconnect.³ *(CP371-372)*

d. Throughout the remainder of 2012, the Costellos (as well as other Tanner members who shared their privacy concerns) made multiple requests for information from Tanner that described the technical capabilities and costs of the smart meters. They also met with the Tanner Board and management staff in an effort to resolve their concerns. Of primary importance to the Costellos was providing members with adequate information about Tanner’s smart meter program, and engaging members in creating a policy that would allow members to opt-out (or opt-in) of having a smart meter installed. *(CP943-977)*

e. Tanner did not provide the requested information and did not communicate with the members about the smart meter program. Instead, in November 2012, Tanner created an opt-out policy, without any member input, which included a new fee applicable to members who chose not to

² Mr. Costello is a professional electrical engineer with over 30 years experience in the design of power distribution systems and is well qualified to evaluate the inherent risks of the smart meter technology.

³ In April 2012, without notice and while being escorted by two King County Sherriff officers, Tanner attempted to force the meter replacement over the objection of the Costellos. After Costellos explained their concerns to the officers, the officers suggested that Tanner would need to resolve the issue some other way.

have a smart meter installed. Only the Costellos and three other members were made aware of this option. *(CP369, 1379, 1397)* Tanner's purported reasons for the fee were to pay for the cost of periodically manually reading Costellos' meter. However, for the previous 19 years, the Costellos self-read their meter each month at no cost to Tanner, as did at least 250 other Tanner members. *(CP967, 1244)* Tanner would then audit these readings by reconciling the self-reported readings with a once-a-year reading conducted by a Tanner employee. No evidence has been provided which would indicate that this method was inadequate. The Costellos objected to the opt-out policy and fee because the terms were unacceptable and Tanner provided no basis for the fee.⁴

f. Through January, 2013 the Costellos continued to request information from Tanner regarding the costs, business case, and technical capabilities of the smart meter installation, as well as justification for the opt-out fee. Tanner refused to provide any of the requested information. On January 29, 2013 Tanner stipulated in a letter to the Costellos that they were stopping any further communication on the smart meters, deemed Costellos subject to the opt-out policy and corresponding fee, and advised that their power would be disconnected if they did not pay the fee.⁵

g. On February 1, 2013 pursuant with their opt-out policy, Tanner began billing the Costellos under their "budget billing" plan and charging the additional monthly opt-out fee of \$23.33. Initially, the Costellos

⁴ Reference - *(CP387, 405, 713-717, 1379, 1397)*

⁵ Reference - *(CP1075, 1377, 1396-1398)*

refused to pay the opt-out fee because Tanner provided no justification for it. However, on October 18, 2013 the Costellos paid in full the entire arrearage Tanner claimed for the opt-out fee, and have paid the fee in full every month since, albeit under protest. *(CP948-950, 1085, 1086)*

h. The change in Tanner's billing procedure to the Costellos resulted in billing errors and energy overcharges. The energy overcharges were the result of Tanner estimating monthly energy use that, contrary to Tanner's Bylaws, exceeded the energy "provided to and used by" the Costellos.⁶ *(CP1376-1381, 1395-1467)*

2. Costellos' Complaint and Tanner's Response

a. In May, 2013 Costellos filed the instant lawsuit because (a) Tanner did not provide them with the information they requested and are entitled to by both common law and statute, (b) they were being charged an unjustified fee for refusing to have a smart meter installed, (c) they were being subject to billing errors due to Tanner changing their billing procedures, (d) they were provided no means of recourse regarding the billing errors, (e) they were unable to address their concerns with Tanner because Tanner discontinued further communication, and (f) they were being threatened with power disconnect.

⁶ The estimated amounts have had no correlation to Costellos' actual energy usage and violate the operation of the budget billing policy Tanner has prescribed. Other errors were computational in nature and also violated Tanner's billing policies. Costellos documented these errors each month as they occurred, notified Tanner in writing of the disputed amounts, and rightfully withheld payment on those amounts. Tanner did not acknowledge the disputed amounts other than to further impose late fees on the erroneous amounts.

b. The Costellos' four count complaint alleged; 1) they had a right to view Tanner's records pursuant to both common law and RCW 24.06.160; 2) that Tanner's requirement for the Costellos to pay an extra fee in order to enjoy their right to privacy and property as secured by Article 1, Sec. 7 of the Washington constitution is inconsistent with RCW 80.28.010 requiring that Tanner's charges be fair, just and reasonable; 3) that Tanner's action constituted discrimination in the provision of utility services forbidden by RCW 49.60; and 4) that the imposition of the opt out fee and the manner of its imposition violated the Costello's rights secured by the Consumer Protection Act, RCW 19.86. *(CPI-7)*

c. In their response to Costellos' complaint, Tanner disputed each of the counts and also counterclaimed for payment of the opt-out fee. *(CPI5)* In December, 2013, after Costellos had already paid the opt-out fee arrearage in full and continued to make timely monthly payments of the opt-out fee, Tanner filed an Amended Response and Counterclaims to include late fees, and pre-judgment interest. Prior to and since filing the Amended Response and Counterclaims, Tanner has not delineated any late fees or interest associated with the opt-out fee. ⁷

3. Motions by the Parties

a. Costellos filed a motion for partial summary judgment pursuant to CR56 seeking to obtain access to Tanner's books and records. The Trial Court denied that motion on the basis that there were disputed material facts. *(RP55 – Vol. I)*

⁷ Reference - *(CP23-42, 1390-1394, 1398-1401)*

b. Tanner also filed a motion for partial summary judgment to dismiss Costellos' Counts #2, #3, and #4 pursuant to CR12 and CR56. The Trial Court granted the motion and specifically referenced *Haberman v. WPPSS*, 109 Wn.2d 107 with respect to Count #4 concerning the CPA. **(CP799, 800)**

c. In March, 2014 a Protective Order was entered. **(CP785-796)** This Order restricted access to information Tanner deemed Confidential and Highly Confidential. Tanner asserted below that the Protective Order imposed "Attorney Eyes Only" restrictions even though there **is no such language** in the Protective Order.⁸ Tanner's application of the Protective Order restricted the Costellos from information that could have been reviewed only by an attorney or an independent expert, had Costellos chosen to employ such. It is the Costellos' contention that this restriction was without good cause, impaired their ability to prosecute their case, and had they received the information they would have prevailed. **(CP1156-1240, 1260-1261)**

d. In June, 2014 the Costellos filed a Motion to Compel due to Tanner's continued failure to be responsive to their discovery requests. After filing the motion Tanner responded with additional information pursuant with the Protective Order. As such, Costellos struck their Motion to Compel until such time they were able to complete an evaluation of the

⁸ This interpretation of that Order became crucial because on April 17, 2014, the Costellos's attorney withdrew of his own volition and the Costellos represented themselves *pro se* from then on.

new information and could determine if further discovery would be necessary. *(CP810-925)*

e. After determining that the information provided was not responsive to their discovery requests, and determining that the confidential designations were not warranted, Costellos initiated a challenge to the designations in accordance with the terms of the Protective Order. In response, Tanner filed a Motion to Preserve Confidentiality *(CP926-942)* which was scheduled for hearing on September 12, 2014. Costellos opposed this motion *(CP1156-1240)* arguing that they are entitled to the information by statute, that Tanner has not demonstrated good cause for designating documents confidential and highly confidential, that in the plain language of the Protective Order there is nothing that prescribes Attorney Eyes Only, and that barring Costellos who are pro se litigants from accessing information without showing good cause frustrates their ability to prosecute their case. The Trial Court did not rule on this motion.⁹

f. Tanner filed a motion for partial summary judgment to dismiss Costellos Count #1 regarding access to the cooperative books and records. *(CP1134-1155)* In addition to Tanner's argument that there was no longer any reason to provide discovery, Tanner also argued that Costellos did not demonstrate proper purpose for the information, which alternatively could be a ground to dismiss Count #1. Tanner also argued that the information

⁹ The trial court indicated the motion was mooted accepting Tanner's argument there was no longer any reason to provide discovery because Costellos' other three counts had been dismissed.

Costellos have requested is beyond the reach of the statute, and is further barred by a confidentiality agreement with Tanner's vendor Aclara as well as Tanner's policy on the availability of its records. Moreover, quite inexplicably, Tanner argued that despite the constraints of the Protective Order it has provided the Costellos access to all of the requested information.

The Costellos opposed the motion (*CP1241-1302*) arguing that the plain language of the statute ensures their right to access the cooperative books and records, and that they have clearly demonstrated and communicated their proper purpose for the information. Moreover, the Costellos argued that Tanner's access to information policy cannot subordinate the statute, and that the financial information they are seeking falls clearly within the language of the statute. Furthermore, the Costellos argued that they are entitled to the members list and addresses as a specific record listed in the statute, that Tanner has not provided all of the information they have requested, and that they are entitled to the information by statute regardless of whether litigation is occurring. The Trial Court granted Tanner's motion. (*CP1363-1364*)

g. On August 15, 2014 the Costellos filed a motion for summary judgment to dismiss Tanner's counterclaims (*CP943-1133*) because the Costellos had paid the opt-out fee in full (albeit under protest), and because the claim for late fees and interest was not made for a specified

amount and was claimed after payment of the opt-out fee had been made.

The Trial Court denied that motion. *(CP1361-1362)*

h. Tanner also filed a motion for summary judgment regarding the counterclaims. *(CP1365-1375)* While the motion was pending, Tanner made a written offer to the Costellos to settle its counterclaims for \$30 (\$10 for each of the three counterclaims). *(CP1476)* In response to the motion, Costellos demonstrated that the counterclaim amount, with mathematical certainty, has errors but which the trial court did not appreciate. *(CP1376-1467)* The counterclaim is also based on late fees and interest Tanner applied to energy use it billed Costellos in violation of the Bylaws, which have the force of contract. Had these errors been recognized, Tanner would not have prevailed on its counterclaims and the underlying factual predicate for Tanner's post trial motion for attorney's fees and costs would be non-existent. Despite this showing, the Trial Court granted Tanner's motion for counterclaims. *(CP1468-1469)*

i. The Costellos filed a Motion for Reconsideration regarding the ruling on Tanner's counterclaims due to the mathematical errors in the computation. The Trial Court denied that motion. *(CP1470-1492)*

j. The Trial Court issued a final judgment *(CP1493-1494)* and, subsequently, Tanner filed a Motion for Fees and Costs seeking \$201,718.90 in attorney's fees and \$10,360.47 in costs.¹⁰ Tanner based its Motion on 1) CR 11 violations ; 2) frivolity under RCW 4.84.185; 3)

¹⁰ Somewhat tellingly, this amount was later conceded to have been the product of a mathematical error and Tanner acquiesced to an immediate concession of \$10,019.65.

pursuant to contract and 4) costs pursuant to the Small Claims Statute RCW 4.84.250 arguing that it had obtained a judgment greater than its offer of settlement. *(CP1495-1513)* The Costellos vehemently objected to the characterization of their litigation as in bad faith or frivolous. Not only were the Costellos arguments always made in good faith, the Costellos maintain that the Trial Court is in error and they should have prevailed on the Claims #1 and #4. Likewise, the Trial Court's application of RCW 4.84.250 was in error because Tanner's offer was – to a mathematical certainty – MORE than the amount Tanner should have been awarded even with full respect to the lower court's substantive ruling on the issue. *(CP1514-1559)* The Trial Court awarded Tanner \$119,617.53 in total fees and \$10,189.87 in costs. *(CP2164-2167)*

k. Accordingly, the Costellos have filed the instant appeal so that this Court could evaluate the trial court's determinations pertaining to RCW 24.06.160, the applicability of the Consumer Protection Act RCW 19.86, the Court's ruling in favor of Tanner on its counterclaims for late fees and interest, and the award of fees and costs. Though adverse to the Costellos, the Costellos are not appealing the trial Court's determination regarding their second and third causes of action, unlawful fees and charges pursuant to RCW 80.28 (and the Constitutional claim arising under Article I, Sec. 7) and unlawful discrimination pursuant to RCW 49.60. *(CP1560-1563 and Amended Notice of Appeal May 20, 2015)*

C. ARGUMENT

Claim #1 – Cooperative Member Costello is Entitled by Statute to Review Tanner’s Books and Records

The trial court denied Costellos’ motion for partial summary judgment regarding access to books and records on the basis that there were issues of material fact in dispute. (*CP797-798 and RP55 – Vol. I*) Subsequently, the trial court granted Tanner’s motion to dismiss Costellos Claim #1 regarding access to books and records on the basis that “there is no disputed issue of material fact”. (*CP1363-1364*) The material facts in both motions are substantively the same, as such, the trial court’s conclusions are contradictory.

Tanner is a cooperative electrical utility created under RCW 24.06. (*CP149*). There is little doubt Washington law favors transparency¹¹ and this sentiment is embodied in RCW 24.06.160 that states:

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.**)

Contrary to Tanner’s argument and the trial court’s conclusion, there is no need for litigation to be ongoing for the Costellos to have rights under this statute - the statute says what it means and means what it says. Only if it were found that the Costello’s request was not for a proper

¹¹ See, Washington’s Public Records Act RCW 42.56 and its Open Public Meetings Act RCW 42.30.

purpose could the trial court have ruled in favor of Tanner. All of Tanner's Books and records should be available to the Costellos as they have not only articulated an interest but have demonstrated a need for these records. Mr. Costello is a licensed electrical engineer who, it is uncontested, is qualified to render opinions on the efficacy and cost-effectiveness of the smart meters. With these records, Mr. Costello could provide valuable insights to other Tanner members about how *their* cooperative is being run. This is precisely the type of beneficial dissemination of information that the statute intends to encourage.

RCW 24.06.160 grants Costellos the right to view all books and records of Tanner subject to their proper purpose - no rational argument that their purpose is improper has been proposed. It is well established that this statute does not "abridge, restrict, or repeal, but enlarge, and supplement the common law rule" entitling members access to corporate records.¹²

It is *always* presumed that "a shareholder seeks...information for a proper purpose" and that it is the burden of the corporation to show otherwise.¹³ Costellos requested information pertaining to the financial and business case records as well as technical information about the smart meter system. They made these requests in order to understand how Tanner was spending their money and what the capabilities of the smart meters are. These requests were made to protect their interests in the

¹² *State ex. rel. Grismer v. Merger Mines Corp.*, 3 Wn.2d 417, 422 (1940). (**CP73**)

¹³ *Grismer v. Merger Mines Corp.*, 3 Wn.2d 421 (1940). (**CP69**)

cooperative as well as their personal interest in protecting their privacy. The requests were made in person, and in writing, prior to the lawsuit as well as through discovery after the lawsuit was filed. Tanner was non-responsive prior to the lawsuit and has withheld information during discovery. Although Tanner has provided some information through discovery, the findings have shown that Tanner has misrepresented facts about the smart meter system including its costs and capabilities. (CP970-1076, 1247-1248) The Costellos argue that they should be allowed to review all of the records they have requested in order to capably assess the costs (including basis for any fees such as the “opt-out” fee), risks, and benefits of the smart meter program.¹⁴ Simply, these records are essential for the membership to be able to make informed and rationale decisions about their cooperative.¹⁵

In its motion Tanner argued Costellos claim for access to books and records should be dismissed for three reasons:¹⁶

- a. The statute does not require Tanner to permit inspection of the requested documents and information.
- b. The claim is moot because Tanner has provided all of the documents subject to a Protective Order.
- c. Tanner’s access to information policy restricts Costellos from the requested information.

¹⁴ In fact, other members besides Costellos also requested similar information but were also denied. Tanner did not provide members with any details about the smart meter program and the decision to install smart meters including the costs, business reasons for installing them, the technical capabilities of smart meters, and their risks. (See CP1247, 1265-1275 for declarations of other Tanner members)

¹⁵ See also *Guthrie v. Harkness*, 199 U.S. 148, 154 (1905) and *State v. Pac. Brewing & Malting Co.*, 21 Wash.451, 464 (1899). (CP69)

¹⁶ Reference (CP1141 and RP3 – Vol. II)

As to the first reason, Costellos argued, and Tanner agreed, that the plain language of the statute does not support the proposition put forth by Tanner that the only records subject to the statute are “books and records of account”. Tanner, like Costellos, found no case on point in Washington which describes either the interpretation or even the application of RCW 24.06.160. Nor has Tanner found any legislative history which would indicate how the legislature intended the statute to operate. *(CP1251)* In fact, Tanner relied on several other statutes not applicable to Tanner in an effort to support its argument. *(CP1251-1255)* Nevertheless, any ambiguity that might exist within the statute must be “liberally construed in favor of a [corporation’s members]”. *18A Am. Jur. 2d Corporations § 288* (citation omitted). As the Costellos reasoned, absent any case law to provide guidance, the statute must be viewed in its plain language, which clearly entitles a cooperative member to access all books and records subject to a proper purpose.¹⁷ *(CP72, 1251 and RP12, 13 – Vol. II)*

That RCW 24.06.160 has generated so little case law not only bolsters the argument that the plain meaning should be given to the words of the statute it also directs research to other jurisdictions to see how analogous cases have been dealt with. With facts virtually identical to those of today, in *Schein v. Northern Rio Arriba Electric Cooperative, Inc*, 122

¹⁷ Each word of the statute must be given meaning – See also *State v. Roggenkamp*, 153 Wn.2d 614, 624 (2005). Courts may interpret, but cannot add to or take from, clear and unambiguous meaning of law. *Ransom v. city of South Bend*, 76 Wash. 396, 136 P. 365 (1913).

N.M. 800, 932 P.2d 490 (N.M. 1997),¹⁸ Maureen Schein, a member of a cooperative electric company, sought to inspect legal bills that the cooperative incurred during prior litigation with Ms. Schein. Finding for Ms. Schein, the New Mexico Supreme Court opined:

Schein's motivation to investigate [Northern Rio's] use of resources and the nature and quality of the legal advice given to it was reasonably related to her role as a member. Like any business choice, the selection of legal services and a determination of the value of services received are relevant inquiries to a party concerned about his investment in the entity; as a owner of a proprietary interest in NORA, **Schein** has a legal right to be informed as to the management of the cooperative property by the Board in charge of that property. Such information would indicate whether the legal and financial choices being made by NORA were sound; also, such decisions would directly impact the capital accounts of NORA. Shareholders generally are entitled to monitor the activities of their agents.

Id. at 804 -805. Internal citations omitted. (*CP1258, 1276-1302*)

The Costellos have made it clear that they are not requesting access to all of Tanner's records, only those pertaining to the smart meter program – a very identifiable and finite universe of documents. Costellos have demonstrated in their pleadings that Tanner has not provided numerous records pertaining to the technical capabilities of the smart meters. (*CP968, 1175-1176, 1245-1246*) Additionally, Tanner has withheld specific information regarding the business case and financial records of the smart meters, which in and of itself is violative of the statute since these would

¹⁸ *Schein* is an important case and has been followed by other jurisdictions (see, for e.g. *City of Franklin v. Middle Tennessee Elec. Membership Corp.*, 2009 WL 2365572, Tenn.Ct.App) and has received favorable recognition by legal scholars as both the “correct” and the “majority” rule. For the Court's review, Costellos have attached a law review article that analyses the *Schein* decision (together with the full text of the ruling). (See Appendix A-2).

be clearly records of account. *(CP1245-1246)*. Tanner also refused to provide the members list of names and addresses which is a specific record identified by the statute and one requested by the Costellos. *(CP1003, 1246, 1252-1253)* How can it be legal for a cooperative to deny a member a list of other members so that he may attempt to solicit their influence? It simply cannot work this way – the Legislature intended cooperatives to be policed by their membership. These latter two facts, alone, represent material facts in dispute, thus calling in to question the trial court’s decision to grant Tanner’s motion.

As to the second reason, Tanner claims it has provided all of the requested information subject to a protective order. This claim is false for several reasons. First, Costellos have demonstrated in their pleadings that much of the requested information has not been provided, including partial or no response to many of their discovery requests - contrary to Tanner’s assertion.¹⁹ *(CP1107-1108, 1170-1181)* Tanner claims that it has provided the Costellos opportunity to review all documents requested. **This is**

¹⁹ In summary, the information Costellos are still seeking include:

- a. Total installed costs of the smart meter system (including materials, labor, equipment, engineering and design, software, training, technical support, startup, troubleshooting, spare parts, maintenance and service support, software support and updates, project and program management, user conferences and meetings, internal Tanner costs and expenses, and any other costs incurred by Tanner as a result of the AMI smart meter system).
- b. Source and terms of funding.
- c. Payback analysis demonstrating Tanner’s proclaimed 6-1/2 year payback (or any other payback) based on verified costs, savings, and financing.
- d. Copy of all contracts, purchase orders, and agreements regarding the installation, operation, and maintenance of the AMI smart meter system.
- e. Benefits attributed to the smart meters, based on measured and verified results.
- f. Details of the cost basis for the “opt-out” fee.
- g. Complete details of the technical capabilities of the smart meters, AMI system, and related data management.
- h. Members list including names and mailing address.

simply not true. (CP1135, 1138, 1245-1246) Second, Tanner’s use of the protective order has been to sweep all documents into the confidential designations without providing good cause for such designations. (CP969, 1156-1160, 1260-1261) A party seeking protection under a Protective Order must show good cause by demonstrating specific prejudice or harm will result if no protective order is issued. Unsubstantiated allegations of harm will not suffice.²⁰ A party asserting good cause bears the burden for each particular document it seeks to protect of showing that specific prejudice or harm will result if no protective order is granted.²¹

In the instant case, Tanner’s application of Attorney Eyes Only restrictions for documents designated “highly confidential” is not found in the plain language of the protective order, nor has Tanner provided any good cause for such an extreme remedy. (CP1167) The protective order Section 4c states in part:

“A Receiving Party (*in this case the Costellos*) may disclose Highly Confidential Documents or the information in such Documents only to the receiving Party’s counsel of record in this Litigation, and/or to independent experts or consultants for the receiving Party...” *emphasis added*

It is not feasible for the Receiving Party to disclose something that it does not itself have. There is no language restricting pro se litigants from receiving Highly Confidential information, certainly not without a demonstrated good cause – which Tanner has not provided. There is no

²⁰ *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 423 (2009) (CP1166)

²¹ *Dreiling v. Jain*, 151 Wn.2d 900, 916 (2004) (CP1166)

“Attorneys Eyes Only” language in the Protective Order.²² (*CP1158-1159, 1246*) As pro se litigants, it is not reasonable to restrict Costellos from accessing information that is needed to prosecute their case, particularly, when there has been absolutely no indication that the Costellos would not comply with the protective order. (*CP1167, 1261*) Tanner also argued that the confidential information represents trade secrets but failed to demonstrate that claim.²³

Costellos have initiated a proper challenge to the designations pursuant with the Protective Order; however, the trial court did not hear the motion for that challenge on the reasoning it was moot after the trial court dismissed Costellos Count #1 concerning access to records. (*RP5 – Vol. II*) Consequently, Tanner’s claim that they have provided all of the requested documents is simply not true. Again, this is a material fact clearly in dispute which, similar to the first reason, calls into question the trial court’s ruling.

Third, Tanner argues that Costellos letter of January 18, 2013 limits the information requests to only that which is listed in the Attachment to the letter. (*CP1136, 2027*) However, what Tanner fails to identify is what the letter actually says:

“In order to move forward with resolving this issue, it is essential that Tanner provide the information we have previously requested.

²² Tanner cited to several examples of Protective Orders with Attorney Eyes Only (AEO) language. In each of those examples there was direct use of the AEO terminology. By comparison, in the instant case, the AEO terminology does not exist. (*CP1752-1181*)

²³ Simply “conclusory statements and unsubstantiated assertions in ... declarations are insufficient to establish the documents contained trade secrets.” *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 426 (2009) (*CP74*)

To begin with, the information we need to evaluate is summarized on the attachment to this letter.” **Emphasis added (CP134-135)**

Costellos were very clear that the information listed was just a beginning, that the issues previously communicated in the several meetings and letters with Tanner were ultimately of interest.²⁴

As to the third reason, Tanner’s access to information policy is an abrogation of the record statute. The policy is so restrictive as to render virtually all of Tanner’s business information beyond the reach of a member’s request.²⁵ Section E. of the policy states:

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

Any information that consists of “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 impact on the Company’s or subsidiary’s interests.”

Simply stated, the Tanner policy seeks a state of the world that is in conflict with the Books and Records statute RCW 24.06.160, and Tanner’s policy must give way. Fundamental contract law dictates that a corporation’s bylaws, articles, and resolutions are **subordinate** to state and common law.²⁶ Therefore, where the right to inspect a corporation’s

²⁴ Reference - (CP750-752, 1062-064, 1170-1171)

²⁵ Reference - (CP1262-1263, 1138-1141)

²⁶ See, e.g., *State v. Citizens' Bank of Jennings*, 51 La. Ann. 426, 432 (1899).

records is statutory, the right “**cannot be modified or affected by a bylaw or resolution of the directors.**” *18A Am. Jur. 2d Corporations* § 290. Additionally, Tanner’s argument that because Costellos agreed to Tanner’s terms of service they waived their rights to access cooperative information is not valid. Tanner has provided zero evidence that the Costellos knowingly and intelligently waived any of their rights through the signing of the membership agreement.²⁷

Tanner also claims it cannot release confidential information because it is bound by a confidentiality agreement with Aclara (its smart meter vendor). The confidentiality agreement; however, allows information to be shared with the “organizations members” providing there is a need to know and it is for the purpose of establishing a business relationship with Aclara or for maintaining one that already exists. *(CP1259)* This completely obviates this objection of Tanner. Establishing whether there is any reason to further a business relationship with Aclara (whether that is in the best interests of the members) aligns precisely with the stated purpose Costellos have in the information they have requested. Release of the information for that reason alone is consistent with the Aclara confidentiality agreement and Tanner would not be barred from releasing it. *(CP1596-1597)*

Finally, Tanner’s claim that it maintains and protects member’s private information rings especially hollow since Tanner has on multiple

²⁷ *Lande v. South Kitsap School Dist. No. 402*, 2 Wn. App. 468, 469 (1970) (to waive rights in a business transaction, it must be a knowing and intelligent waiver of rights.) *(CP73, 1262-1263)*

occasions released Costellos' private information to the public including their address, email address, phone number, and most disturbingly, their social security number.²⁸ These demonstrated deficiencies in Tanner's procedures are precisely why Costellos want to know how member's private information, including the information collected by smart meters, is stored, maintained, secured, and accessed.

Claim #4 – Costello sufficiently alleged a violation under Washington's Consumer Protection Act RCW 19.86 and the Trial Court erred in determining that the CPA categorically does not apply to cooperative electric utilities.

Tanner is Not Exempt from the CPA: The Costellos asserted that Tanner's imposition of smart meters, and the assessment of an opt-out fee because Costellos refused to allow installation of a smart meter, violated RCW 19.86 the Washington State Consumer Protection Act (CPA). Tanner disputed this claim arguing that RCW 19.86 does not apply for three reasons: (1) Electric utility cooperatives are exempt from the CPA, (2) Smart meters are employed for legitimate business reasons, and (3) Privacy interests are not protected by the CPA. *(CP160 and RP17, 18 – Vol. D)* Tanner also argued that Costellos' CPA claim failed because they did not 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."²⁹ The trial court dismissed the claim concluding that Tanner Electric, as a cooperative electric utility, is

²⁸ Tanner has also indicated it has taped Costellos' telephone conversations without their consent. *(CP384, 731, 1514-1515)*

²⁹ *Hangman Ridge Training Stables, Inc. V. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780 (1986). *(CP161)*

exempt from the CPA and cited *Haberman v. WPPSS*, 109 Wn.2d 107 (1987) for that proposition. **(CP84)** For the following reasons, the trial court erred in that decision.

1. First, it is the Costellos' assertion that both Tanner and the trial court read *Haberman* much more expansively than intended. It should be noted that the Washington State Legislature provided no specific language in the statute indicating that cooperative utilities are exempt from operation of the statute. Rather, the *Haberman* decision inferred that outcome based on language in two other sections of the statute, specifically: (1) RCW 19.86.170 regarding exemptions and (2) RCW 19.86.90 regarding action for damages. Applying that reasoning based on the "unique facts of that case" (*Haberman* at 171), the Supreme Court ruled that the subject cooperatives in that case were exempt from operation of the CPA.

2. Since the trial court's ruling on the CPA claim in March, 2014, the Washington State Legislature has passed SHB 1896 Privacy Policy for Energy Use Information.³⁰ This bill revises RCW 19.29A to restrict disclosure of private and proprietary information collected and obtained by all electric utilities, including those created under RCW 24.06 such as Tanner. As a remedy for any violations of the disclosure law, **the CPA will apply**. The new revisions to RCW 19.29A state in part:

New Section 3, Para. 2 – "An **electric utility** may not disclose private or proprietary customer information with or to its affiliates, subsidiaries, or any other third party ..." (**emphasis added**)

³⁰ Contemporaneously with the filing of this Brief, the Costellos have moved under RAP 9.11 to supplement the record and for the Court of Appeals to take judicial notice of this recent Legislative enactment pursuant to ER 201.

New Section 3, Para. 9 – “The legislature finds that the practices covered by this section are matters vitally affecting the public interest **for the purpose of applying the consumer protection act, chapter 19.86 RCW**. A violation of this section is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the consumer protection act, chapter 19.86 RCW.” **(emphasis added)**

Further, RCW 19.29A Section 1, Para. 6 defines “**electric utility**” as a consumer-owned or investor-owned utility as defined in this section. It defines “consumer-owned utility” to include “**a mutual corporation or association formed under chapter 24.06 RCW**, that is engaged in the business of distributing electricity to more than one retail electric customer in the state.”

In addition to the language of SHB 1896, the legislative reports and related statements clarifying the bill’s purpose further emphasize that the CPA applies to consumer owned utilities. *(Reference Appendix A-1)*

3. This new bill passed unanimously in both the House and the Senate and was signed into law on May 18, 2015. These facts make it absolutely clear that the Washington State Legislature intended for the CPA to apply to cooperative electric utilities, which in the instant case, would apply to Tanner. It is informative to note that the new bill does not alter the CPA (RCW 19.86) but only clarifies in the language of the revision to RCW 19.29A that the CPA does in fact apply to cooperative electric utilities.

4. It should also be noted that even had the Legislature not gone so far as to make the clarifications that it does in SHB 1896, even its consideration of the issue is indicative that the Costellos were not making a frivolous claim or one sanctionable under CR 11 or RCW 4.84.185.

5. Notwithstanding the reasoning based on the state legislature's clear language in SHB 1896, the trial court's decision is still unsupported by its reliance on *Haberman*. The plain language of the CPA states that it applies to "natural persons, corporations, trusts, unincorporated trusts and partnerships" (RCW 19.86.010). Tanner is a corporation created under RCW 24.06. The exemptions in the statute (RCW 19.86.170) do not exempt cooperative corporations. Also, Tanner argued and the trial court agreed that Tanner is not a governmental entity or a state actor. (*CP153-155*) It is also not a municipal corporation. As such, there is no reason based on the plain language of the CPA for Tanner to be exempt from it.

6. In *Haberman*, the Court ruled that the CPA did not apply to the cooperatives based on the "unique facts of this case" and based on the reasoning in *Washington Natural Gas CO. v. PUD 1*, 77 Wn. 2d 94, 459 P.2d 633 (1969). In both of these cases, the ruling was based on "municipal corporations" and other governmental entities explicitly exempt from the CPA. But Tanner is not a "municipal corporation" and is not acting like one as in the *Haberman* case, and is specifically not one as in the *Washington Natural Gas CO. v. PUD 1* case. The *Haberman* court opined:

"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. Moreover, these entities allegedly violated the CPA only by virtue of their relationship with the Supply System, which is exempt from the CPA. We conclude that to subject the respondent rural electric

cooperatives to potential CPA liability would be contrary to the Legislature's purpose in excluding municipal corporations from liability under the CPA. Therefore, we hold in light of the unique facts of this case that, like the Supply System and other governmental entities admittedly exempt from the CPA, respondent rural electric cooperatives are also exempt from the CPA under our reasoning in *Washington Natural Gas Co. v. PUD 1*. We affirm the trial court's dismissal of intervenors' CPA claims against respondents.”

Haberman at 171-172 (internal citations omitted).

The court’s reasoning in *Haberman* was based on characterizing the cooperatives as municipal corporations due to their relationship with the “Supply System” (which itself is a municipal corporation and designated operating agency pursuant to RCW 43.52.360). In their holding the Court ruled that “in light of the unique facts of this case”, the cooperatives are “like the Supply System and other governmental entities exempt from the CPA”. (*Haberman* at 171.) The Supreme Court’s reasoning suggests that, under different circumstances, the CPA could indeed apply.³¹

7. In *Washington Natural Gas v. PUD1* the Supreme Court’s reasoning was based on the CPA’s apparent exemption of municipal corporations (which the PUD is pursuant to RCW 54). The Court arrived at this conclusion because the CPA specifically identifies “municipalities and political subdivisions” as beneficiaries of the statute (RCW 19.86.090), but does not identify them specifically as being subject to the operation of the statute.³² In the present case, since Tanner is clearly not a

³¹ This is entirely appropriate, since cooperative corporations, like Tanner, formed under RCW 24.06 are not government entities. In fact, Tanner argued below that the constitutional claims should be dismissed since Tanner was not a state actor. (*CPI53*)

³² *Washington Natural Gas CO. v. PUD 1*, 77 Wn. 2d 94 at 98.

municipality or political subdivision, it would seem that this reasoning to exempt cooperatives from the CPA does not apply, except for certain unique circumstances like in *Haberman* where the cooperatives were contractual “Participants” with a Supply System entity that is a municipal corporation exempt from CPA.

8. Similarly, in *Tanner Electric v. Puget Sound Power and Light*, 128 Wn. 2d 656, 911 P.2d 1301 (1996), the Court ruled that Puget Sound Power and Light was exempt from the CPA due to the clear language in the statute exempting actions regulated by the Washington Utilities and Transportation Commission (WUTC). Puget Power was a public utility subject to WUTC regulation, so that ruling is appropriate. However, that ruling says nothing about Tanner as a cooperative being subject to the CPA, nor was that question even raised. *(CP161)*

9. In the *Haberman v. WPPSS*, the *Wa. Nat. Gas v. PUD 1*, and the *Tanner v. Puget* cases, the key determinant for CPA exemption was tied to a “municipal corporation” and regulation by the WUTC. Tanner, as a cooperative electric corporation does not fit that criteria. For this reason, Tanner should be subject to the CPA, and specifically RCW 19.86.020 where in this case Tanner’s imposition of smart meters and an opt-out fee were unfair and deceptive.

Tanner’s Actions Have Been Unfair and Deceptive: Costellos have stated a claim under the CPA (RCW 19.86.020). The CPA makes it unlawful for a corporation to engage in unfair or deceptive acts or

practices in the conduct of commerce. Tanner argued that it has installed smart meters for a legitimate business reason, asserting its actions cannot be unfair and deceptive pursuant with RCW 19.86.920 (*RP23 – Vol. I and CP162*). The facts remain in dispute as to the validity of that assertion, and remain unvetted because of the Costellos’ inability to access the records of Tanner as explained above. To begin with, what Tanner does not divulge, and the trial court has failed to recognize, is that there is no legitimate business interest for Tanner to meter power at 15 minute intervals (3,000 times per month) (*CP346, 363, 397, 970*) when energy is only billed once a month and the business interest is satisfied with only one measurement per month – once at the end of each billing period. Tanner has provided no explanation whatsoever why significant amounts of additional data is being collected from members and how that information is used. None of the other professed benefits of the smart meters is dependent on collecting energy measurements at all, let alone in 15 minute intervals. Without a legitimate business purpose for that information, Tanner admits it is an invasion of privacy. (*RP51, 52 – Vol. I*) Furthermore, Tanner has made no provisions for actually satisfying the business interest of measuring power without invading privacy³³ other than to assess a fee - a fee that has no basis, and replaces a no cost, self reading solution that had been in place for years.³⁴

³³ It is well documented by experts that 15 minute interval readings, such as those made by Tanner’s smart meters, are an invasion of privacy. (*CP363-365, 965-966*)

³⁴ All of this was done without involvement by the Tanner members and their informed consent. (*CP970 - 977*)

Furthermore, the facts have demonstrated a deliberate effort by Tanner to misrepresent facts in order to deceive its members about the smart meter system and to deny them information that is germane to their interests in the cooperative, including: *(CP970 - 977)*

a. Withholding information from members about smart meter technology in general as well as Tanner's specific smart meter program – including the privacy issues and Tanner's plans to implement a system with those risks. *(CP966 - 977)*

b. Misrepresenting the smart meter “AMI system” to the Costellos and altering its website to deceive members about the capability of the smart meters. *(CP975, 1066-1071, 1025-1028)*

c. Claiming that the smart meters were installed to save members money; however, rates have only increased since the smart meters were installed (by more than 25%). Not a single member has benefited by reduced costs. *(CP973)*

d. Tanner deceived Costellos and other members by deliberately understating the cost of the smart meter program.³⁵

e. Tanner deceived Costellos about the frequency of power measurements made by the smart meters.³⁶ *(CP970)*

³⁵ Tanner indicated slightly less than \$1 million with a 6-1/2 year payback, but the discovery obtained thus far suggests costs well in excess of \$1 million with no demonstrated payback. *(CP972 – 973, RP28 – Vol. II, and Appendix A-4)*

³⁶ Tanner initially claimed only four measurements per day but subsequently confirmed through discovery the smart meters take 96 measurements per day - and this fact was well known by Tanner before ever communicating to the Costellos.

f. As argued above, Costellos have been denied, contrary to the record statute, access to financial and business case records (books of account) necessary for understanding the cost of the smart meter installation and prospect of payback. *(CP1245 - 1246)*

g. Costellos have been denied access to the members list – a required record subject to access in accordance with the statute.³⁷

h. Tanner withheld from all members the prospect of opting out. The opt-out policy and fee were only made known to the Costellos and three other members who also objected to the smart meters.³⁸

i. The opt-out policy and fee were created without any member input, even though Costellos requested that policy decisions regarding this matter involve member input. *(CP973, 1397)*

j. The opt-out policy and fee were created after smart meters were already installed, and only after Costellos objected to a smart meter.³⁹

k. Tanner has provided no explanation of the “true and accurate cost” and the “actual expense” it claims as the basis for the opt-out fee. All of the facts indicate this fee is arbitrary, and likely punitive because Costellos have refused a smart meter. *(CP1380)*

l. Tanner has professed to members adherence to the Seven Cooperative principles, but has acted counter to them by failing to engage members in the decision making process and education of smart meters.⁴⁰

³⁷ Tanner is preventing Costellos from communicating openly with other members about these issues, even though Costellos requested Tanner arrange for open discussion. *(CP1246, 1252, 1062-1063, 1071)*

³⁸ Reference - *(CP973, 1397)*

³⁹ Reference - *(CP1393, 1397)*

- m. Tanner relied on at least 250 members, including the Costellos, self reading their meters at no cost to Tanner for many years – 19 years in the case of the Costellos. Tanner’s claim that refusing a smart meter incurs cost to Tanner is unsupported by any facts, and is in direct conflict with the undisputed history of self read meters.⁴¹
(CP1380-1381, 1385-1386)
- n. Tanner is assessing Costellos for the cost of the smart meter system, in addition to the opt-out fee, even after making it clear that Costellos receive no benefits from the smart meter system.⁴²
- o. Tanner is violating the Bylaws and its policies when billing the Costellos pursuant with the opt-out policy, ultimately resulting in billing errors that have been disputed by Costellos but allowed no remedy by Tanner. *(CP1378, 1390-1394, 1398-1407, 1462-1464)*
- p. Tanner’s privacy policy was developed only in response to the Costellos’ objection to smart meters and was created without any member input.⁴³ *(CP385 - 386, 974)*

⁴⁰ Reference - *(CP971 - 972)*

⁴¹ If sending a person to read Costellos’ meter regularly is a cost to Tanner created by the Costellos, then the years of self-reading meters provided a benefit to Tanner for which the Costellos (and at least 250 other members) were never compensated. Using Tanner’s cost based methodology, the value of self-reading is more than \$18,000 for Costellos and likely over \$1 million for the other members. *(CP1380, 1398)*

⁴² Tanner’s actions are in direct conflict with its stated “cost causation” principle of cost allocation. Tanner’s determination of the opt-out fee has intentionally discounted the avoided cost of not having a smart meter including the capital cost, ongoing operation, and maintenance. This is deliberate and is unfair.

⁴³ The privacy policy is an open door for any number of abuses as member private information can be released to any third party for any operational requirements deemed appropriate by Tanner.

Accordingly, even without the benefit of full discovery and full access to the records of Tanner, the Costellos have not only alleged but made a prima facie case for a violation under the CPA.

Costellos Satisfy the Basis for a CPA Claim:

The public interest: Tanner’s argument, that because Costellos are only one of two members who have opted out⁴⁴ does not constitute sufficient public interest to invoke the CPA, is flawed. (*CP165 and RP21 – Vol. I*) Tanner has only made Costellos and three other members aware that an opt-out choice is even available. (*CP1397*) Tanner argues that “a substantial portion” of the public is not affected in that “of the over 4,300 members in the cooperative, only two have ‘opted-out’ of using smart meters”. (*CP165*) Tanner ignores that the CPA’s application does not depend upon how many people have complained about being deceived or being unfairly treated.

The question is whether the conduct has “the capacity to deceive a substantial portion of the public.” Even accurate information may be deceptive “if there is a representation, omission or practice that is likely to mislead.” Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA.

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 785, 719 P.2d 531 (1986).

Tanner has also argued that the Costellos “like all Tanner members” consented to the terms of service which now requires either use of a smart meter, or opting out and being subject to a fee. This notion highlights

⁴⁴ Costellos have not opted-out, rather they have contested the opt-out policy. Tanner has deemed Costellos as having opted-out based on Tanner’s unilateral determination. (*CP1398*).

exactly why Tanner's application of smart meters affects the public interest and not just the Costellos. *(CP348)* Further, the facts show that Tanner did not provide any of the members, not just the Costellos, with information regarding the privacy risks and the capability of Tanner's smart meter system.

Injury: Costellos have been harmed because they have been forced to either accept installation of a smart meter that verifiably collects energy use data with sufficient frequency as to constitute an invasion of privacy, or be forced to pay an additional fee for refusing to have a smart meter installed. Tanner has provided no justification for how the opt-out fee is determined, or how the fee is appropriate. Tanner is the sole provider of electricity and is a monopoly in the areas it serves, as such, there is no choice for Costellos when it comes to receiving electrical power. They either comply with Tanner's demands, or they lose their power.

Additionally, Costellos have been harmed due to the errors in their billing caused by Tanner violating the Bylaws and its billing policies resulting in unfounded assessment of late fees and interest. *(CP1378, 1380, 1395-1407)*

Other members have also been harmed because Tanner has intentionally withheld information about the privacy risks and the opt-out policy. *(RP36 – Vol. I)* Although Tanner is only a 4,500 (approximately) member cooperative, the entire membership is affected by the privacy, safety, security, and health issues posed by the smart meters.

Privacy Claim: The Costellos argued before the trial court that the CPA does protect on the privacy claim because there is a commercial business transaction (Costellos buying power from Tanner) that is conditioned on paying a fee or otherwise having their privacy invaded. That is a business or property interest specifically covered by the CPA. (*RP35 – Vol. I*) Further, for the reasons cited above pursuant with SHB 1896, and in the plain language of that bill, it is without doubt that the CPA applies to privacy issues.

Causation: Tanner argued that Costellos weren't deceived and that their only claim is against the opt-out fee, and because the Costellos figured out the privacy issues on their own, and did not rely on Tanner's deception or misrepresentations, that there is no link of causation between the opt-out fee and the privacy issues. (*RP22 – Vol. I*) However, Costellos argued that a business practice is not immune from the reach of the CPA simply because some customers refused to accede to the business's unfair or deceptive practice. (*CP350*) Additionally, the arbitrary creation and application of the opt-out fee is a likewise unfair and deceptive practice as is the privacy issue of a smart meter gathering personal data. Each brings its own concerns, as such there need not be a link between them in order for the CPA to apply.

For the above reasons, at a minimum, there were factual issues which precluded summary judgment on the Costellos first and fourth claims in their Complaint that the trial court erroneously dismissed.

Tanner Was Not Entitled to Summary Judgment On Its Counterclaims

1. Tanner filed a motion for summary judgment on its Counterclaims arguing that there are no issues of material fact in dispute regarding their claim for opt-out fee, late fees, and pre-judgment interest. The trial court granted this motion and awarded Tanner damages in the principal sum of \$45.70 plus \$0.89 in pre-judgment interest. Although the Costellos have paid the damage award in full, they continue to dispute Tanner's claim and have demonstrated with mathematical certainty that the claimed and awarded amount is incorrect⁴⁵, notwithstanding that the premise for the claim is conceptually flawed. The trial court's ruling is in error because the material facts of the claim are clearly in dispute.

2. In its response to Costellos' complaint, Tanner also counterclaimed for payment of the opt-out fee. *(CP15)* Initially, beginning February 2013, Costellos withheld payment of the monthly opt-out fee because Tanner provided no justification or cost basis for the fee. During this period (and ongoing), Tanner created billing errors due to energy overcharge and computational error resulting from its application of the "budget billing" policy. *(CP1390-1394)* Costellos disputed these errors each month, in writing; however Tanner provided no response other than to assess late fees on the disputed amounts. In October, 2013 Costellos back paid in full the entire amount of the claimed opt-out fees and have timely paid for the opt-out fee each month since, albeit under

⁴⁵ The awarded amount of \$45.70 is only \$26.04 when math errors are corrected. *(CP1470 and Appendix A-3)*

protest. Also, since payment was made in October 2013, Costellos have included a written statement advising Tanner:

“Due to other billing errors by Tanner documented in our billing statement since February 2013, late charges, if any, related to the smart meter fee are undetermined. Pending receipt of clarification from Tanner on correction of these errors, payment under protest of relevant late fees may also be provided.” *(CP1409)*

Tanner has never responded to this notice other than to continue assessing late fees on the disputed amounts, continued to create additional erroneous charges due to energy overcharge and computational error, and threatened power disconnect if the disputed charges were not paid. *(CP1399)*

3. In December 2013, Tanner filed an Amended Response and Counterclaim which added claims for “late fees and prejudgment interest”. However, it is undisputed that by that point Costellos had already paid the counterclaimed opt-out fee in full, and no delineated late fees associated with it had been claimed by Tanner. Consequently, the basis for Tanner’s damage award, which relied on purported late fees and corresponding prejudgment interest is fundamentally flawed, and categorically disputed by Costellos. Costellos have shown with mathematical certainty that the claim amount is in error. *(CP1391-1401)*

4. Costellos dispute the facts presented in the counterclaims for five reasons: (1) Costellos paid the opt-out fee in full prior to any subsequent claim for corresponding late fees and interest;⁴⁶ (2) Tanner has provided no basis for how the opt-out fee, to cover the expense of manually reading

⁴⁶ To the extent that Tanner has claimed late fees and interest, such claims are based on the disputed billing errors and erroneous energy charges absent any facts to the contrary, thus rendering the claim moot.

Costello's meter, has been ascertained; (3) Tanner has fabricated its claim based on energy overcharges in violation of the contract with Costellos as established in the Bylaws; (4) Tanner has fabricated its claim based on computational errors in its billing to Costellos in violation of its billing policies; (5) With mathematical certainty, Tanner's calculation of the damage claim is in error.

As to the first reason, the facts have been summarized above and are further detailed in *(CP956-957, 1391-1401)*. An accord and satisfaction was accomplished prior to Tanner claiming late fees and interest.⁴⁷

As to the second reason, Tanner has repeatedly argued that the opt-out fee is a "cost based charge" following "cost causation principle" and represents the "actual expense" and "true and accurate cost" of having a serviceman manually read Costellos' meter including the cost of "salary and benefits and vehicle operating cost". *(CPI380)* Washington courts have recognized that utility expenses are to be "**ascertained, not created, by the regulatory authority**".⁴⁸ In the instant case, the facts have demonstrated that Tanner has provided no evidence to substantiate the opt-out fee is cost based despite numerous requests by Costellos for that information. In fact, Costellos have demonstrated using their own analysis and applying Tanner's cost based methodology that the opt-out fee of

⁴⁷ *State Dept. of Fisheries v. J-Z Sales Corp.*, 25 Wash. App. 671 (1980)

⁴⁸ *People's Organization for Washington Energy Resources v. WUTC*, 104 Wash.2d 798, 81-818 (1985) *(CPI384-1389)* Tanner, as a rate-making body *(CPI369)*, is subject to this standard *(CPI386)*.

\$30⁴⁹ could not be any more than \$6.76 and would be non-existent if the methodology properly accounted for the cost avoidance of not having a smart meter and the value provided by Costellos self-reading their meter. Tanner has declared that Costellos receive no benefits from the smart meters; however, Tanner is billing them each month for the smart meter system, contrary to the very “cost based charge” theory Tanner asserts. (*CP1384-1389 and RP19-21 – Vol. III*). The facts show that Tanner has simply created its cost data out of thin air, thus making summary judgment in favor of Tanner impossible.

As to the third reason, the Costellos’ contract with Tanner for electrical service is established in the Bylaws. That bylaws create a contractual relationship is widely recognized by the Courts.⁵⁰ In the instant case, the requirements for payment of service are clear, that members are required to pay for energy actually provided to and used by the member. There is no provision requiring members to prepay for energy that they might use in the future.

Tanner Bylaws at Article I, Section 2(f) state members must “Timely pay for all products and services *used, received* or purchased from the Cooperative.”

Bylaws at Article I, Section 8 also state “A Member shall pay the Cooperative an “electric services” charge for *energy*, capacity and other electric services ... *provided to the member.*”

⁴⁹ The initial opt-out fee of \$23.33 was increased to \$30 on September 1, 2014 (*CP1385*).

⁵⁰ See for e.g. *Rodruck v. Sand Point Maint. Comm.*, 48 Wash.2d 565 (1956) at 577 where the Supreme Court noted “the bylaws, in effect, constitute a contract between the commission and its members.” See also the older case of *Child v. Idaho Hewer Mines*, 155 Wash. 280 (1930) at 292. In *Child*, the Supreme Court conclusively noted that the authorities all hold that provisions such as these incorporated in the articles of incorporation and by-laws of a company have the force and effect of a contract between the stockholder and the corporation. *Seattle Trust Co. v. Pitner*, 18 Wash. 401 (1898).

Bylaws at Article 4, Section 2 further state “Each member shall pay the Cooperative for electric power and other services *provided to the Member.*”

(Emphasis added) (CP1378)

The Costellos have demonstrated with mathematical certainty that Tanner has overcharged them in the amount of \$198.97 due to energy overcharge and computational errors in violation of the Bylaws as well as in violation of Tanner’s billing policies.⁵¹ *(CP1378)* Costellos have disputed these errors in writing each month they have occurred. The facts demonstrate that Tanner has applied late fees and interest to these overcharges in the calculation of its damage claim. Tanner has argued that Costellos have underpaid on their monthly bills because they refused to pay the overcharge; however, Costellos have demonstrated with mathematical certainty that they have timely paid for all energy, and other services, in accordance with the Bylaws and Tanner’s billing. *(CP1395-1401, 1470-1490, RP13-19 – Vol. III, and Appendix A-3)* Tanner’s claim is factually in dispute, as such, the trial court’s ruling is in error.

As to the fourth reason, Tanner has deemed Costellos subject to the “opt-out policy” because of their refusal to have a smart meter. As such, Costellos are subject to Tanner’s “budget billing policy”. *(CP1390, 1398)* The only budget billing policy prescribed by Tanner is represented on its

⁵¹ In its argument, Tanner confuses the distinctly different tasks of rate making with billing. The billing errors are not a matter of rates set by Tanner, but rather errors introduced by Tanner when applying those rates to the Costellos. *(CP1383)*

monthly billing statements, and is verified in Tanner’s pleadings to be “12 equal monthly payments (based on historical average) reset annually”.⁵²

The facts show that Costellos monthly billing of energy use under Tanner’s “opt-out policy” budget billing methodology⁵³ is not fixed and is not based on their historical average, but rather it is completely arbitrary. Consequently, Costellos have been billed on multiple occasions for energy they have not used and which has not been provided to them in contravention of the Bylaws and membership agreement. The overcharge has been upwards to two times their average monthly usage. *(CP1463)* Although Costellos have disputed these charges, Tanner has never responded to the disputes other than to assess late fees and threaten power disconnect. *(CP1391-1393)* Furthermore, the facts show that Tanner has also made computational errors in its billing to Costellos in violation of its own billing policy. *(CP1398-1405, 1448)* Altogether, these facts demonstrate that the counterclaim is factually in dispute, as such, the trial court’s ruling is in error.

As to the fifth reason, Tanner’s calculation of the damage claim is mathematically incorrect. Regardless of the contractual and policy violations, Tanner has simply erred in its calculations. Costellos have demonstrated with mathematical certainty that the judgment amount is incorrect – the award of \$45.70 should be \$26.04. Costellos filed a CR59

⁵² Reference - *(CP1971, 1407)*

⁵³ There simply is no “budget billing” program described in any of Tanner’s documents (Bylaws, membership agreement or website) that would be applicable to the present situation. Tanner simply makes up this program out of thin air.

Motion for Reconsideration on this point, but the trial court denied that motion without explanation. (*Appendix A-3, CP1470-1492*) This is relevant given that Tanner made an offer to settle of \$30, and a reduction of an award below that amount would frustrate the operation of RCW 4.84.250 and RCW 4.84.280. Tanner's Motion for Fees and Costs based on operation of these statutes has been partially granted by the trial court. Costellos argue below that the court erred because of its reliance on a mathematically incorrect damage award. (*CP1514-1559*)

The Award of Fees and Costs Should be Overturned

The trial court ordered that the Costellos pay Tanner \$119,617.53 in fees and \$10,189.87 in costs based on three grounds - RCW 4.84.250, RCW 4.84.185 and pursuant to the Tanner membership agreement signed by the Costellos. Each of these bases is fundamentally flawed, and does not support an award of attorney's fees. (*CP2164-2167*)

1. Contract did not Contemplate such Costs as Recoverable

As an initial matter, it is worth considering that the trial court awarded Tanner 2,840 times the attorney's fees and costs than Tanner recovered on their counterclaim (\$45.70).

The contractual provision in paragraph 4(d) of the Application for Membership reads: (*CP2096*)

"If the account is placed with an attorney or sued, I agree to pay a reasonable amount for attorney fees, and if placed with a collection agency I realize holder will be damaged in the amount charged for collection; and therefore agree to pay, as liquidated damages and in addition to the balance then due, an amount equal to said collection

charge, not exceeding however, fifty percent of said unpaid balance.”

The instant litigation was not founded in contract. This was a case about privacy rights, the protection of consumers, and what rights a cooperative member has to inspect the records of its cooperative. It was only the very limited issue of Tanner’s Counterclaim that is based in contract. The contractual clause contemplates the situation where a cooperative member fails to pay her demonstrably legitimate electric bill. It does not contemplate the allocation of costs when a member challenges constitutional, statutory or other common law claims.

It cannot be that the service agreement between Tanner and the Costellos contemplated the recovery of fees of this magnitude. This was clearly evidenced by the liquidated damage clause at the end of the section that places a limit for a maximum of 50% of the unpaid balance to be an appropriate sum in the event that an unpaid account is sold to a collection agent. It is an absurdity to read this clause as a basis to recover attorney’s fees unrelated to the collection of delinquent bills.

It is important to remember that the contract between the Costellos and Tanner was not a negotiated contract. If the Costellos wanted electricity, they had to sign the contract – it is a contract of adhesion. The factors considered in determining whether a contract is an adhesion contract are (1) whether the contract is a standard form printed contract, (2) whether it was “prepared by one party and submitted to the other on a ‘take it or leave it’ basis”, and (3) whether there was “no

true equality of bargaining power” between the parties.⁵⁴ Here, all three factors are present and the Court should find that it would be wholly unfair to apply the attorney’s fees provision in the membership agreement to include such expansive fees.

While it is true the court may award attorney fees for claims other than breach of contract - the contract must be central to the existence of the other claims. In other words, the dispute must actually arise from the agreement.⁵⁵ Washington courts have resisted allowing wholesale fee recovery predicated on a contractual provision in cases involving varied legal theories. This is where the error with the trial court lies. The general rule is that “[if] attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues.” *Mayer v. City of Seattle*, 102 Wash.App. 66, 79–80, 10 P.3d 408 (2000). A court need not segregate time, however, “if it determines that the various claims in the litigation are ‘so related that no reasonable segregation of successful and unsuccessful claims can be made.’” *Mayer*, 102 Wash.App. at 80, 10 P.3d 408. But not only are the fees segregable temporally, but they *should* be segregable topically – but are not because of opposing counsels’ billing practices. Simply, because of the generality of the billing by Tanner’s attorney Tanner makes it

⁵⁴ *Standard Oil Co. v. Perkins*, 347 F.2d 379, 383 n. 5 (9th Cir.1965), cited by *Blakely v. Housing Auth.*, 8 Wash.App. 204, 213, 505 P.2d 151, *review denied*, 82 Wash.2d 1003 (1973).

⁵⁵ See *Hemenway v. Miller*, 116 Wash.2d 725, 742–43, 807 P.2d 863 (1991); *Seattle–First Nat’l Bank v. Wash. Ins. Guar. Ass’n*, 116 Wash.2d 398, 413, 804 P.2d 1263 (1991); *Hill v. Cox*, 110 Wash.App. 394, 411–12, 41 P.3d 495 (2002).

impossible to ascribe which legal fees were attributable to its counterclaim.

The party claiming an award of attorney fees has the burden of segregating its lawyer's time.⁵⁶ Here this level of segregation was not accomplished by Tanner. The billing of Tanner's attorneys contains no information which would allow segregation of the arguably recoverable fees based on contract from the other issues in the case. The Costellos urge the Court to review the billing (*CP2107 - 2148*) and note the extreme generality of the descriptors of how the attorneys spent their time. Indeed, undoubtedly in partial recognition of this failure to adequately describe their time, the trial court attempted to perform some rough appropriation by assigning a fractional multiplier to the billing presented by attorney Merkel by a coefficient of 0.40 and a coefficient of 0.33 for attorney Van Kampen. Moreover, there was no explanation of the trial court's rationale why even if the fees should be reduced, why they should be reduced by differing amounts.

Finally, since the award of attorney's fees by the trial court was issued, the Costellos have sought documentation from Tanner as to what was actually paid pursuant to its rights as a member under RCW 24.06.160.⁵⁷ On May 5, 2015, the Costellos sent a letter to Tanner's counsel asking that Tanner disclose the payments made pursuant to the

⁵⁶ *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)*, 119 Wash.App. 665, 690, 82 P.3d 1199 (2004).

⁵⁷ Tanner has previously conceded in this litigation that the statute is at least expansive enough to allow cooperative members to review statements *of account (CP1147)* which would presumably include the review of records that document actual payment of these fees by Tanner.

statute. To date, such records have not been tendered. A copy of this communication is included as Appendix A-5 to this brief.

2. RCW 4.84.185 does not Apply

A trial court's award of attorney fees for a frivolous lawsuit is reviewed for an abuse of discretion.⁵⁸

The Costellos have litigated all aspects of this matter in good-faith and while perhaps not ultimately meritorious, these claims were certainly not frivolous. This was a matter of first impressions. The Costellos offered a good faith argument of extending the law to cover the application of a new technology. The trial court concedes that the Costellos first Count was non-frivolous. That is, the court recognized the existence of a legitimate dispute as to the applicability of RCW 24.06.160. Given the expansive language of RCW 24.06.160 allowing cooperative members access to books and records of the cooperative, the dearth of case law defining the statute's reach, and given Washington's strong public policy in favor of citizen access to records and proceedings so that they might oversee governmental and quasi-governmental institutions,⁵⁹ it is impossible to conclude that the Costellos brought this litigation in bad faith or without proper purpose. As it now appears additionally, that the Washington State Legislature itself has concluded that utility cooperatives are indeed subject to Washington's Consumer Protection Act, it can hardly

⁵⁸ *Wright v. Dave Johnson Ins. Inc.* (2012) 167 Wash.App. 758, 275 P.3d 339, review denied 175 Wash.2d 1008, 285 P.3d 885.

⁵⁹ See generally, RCW 42.30 (Open Public Meetings Act) and RCW 42.56 (Public Records Act)

be said that the Costellos advocacy of such coverage can be viewed as frivolous. A “frivolous action,” as would support an award of costs and attorney fees, is one that cannot be supported by any rational argument on the law or the facts.⁶⁰ Even if ultimately not the law, the Legislature’s consideration of such would lead naturally to a finding of non-frivolity.

While the Costellos now concede the inapplicability of the discrimination and constitutionality issues – and have accordingly not appealed on these grounds – the Costellos would submit that the resolution of these two counts certainly did not require the amount of litigation suggested by the Defendant. As the Costello’s argued to the trial court, Tanner simply cannot have it both ways, that the litigation was so frivolous as to be easily identified as such and also require hundreds of hours of research and drafting to dispose of such. *(CP1522)*

3. Fees are not available for Small Claims Settlement Offer Pursuant to RCW 4.84.250.

The trial court also erred in awarding Tanner attorney’s fees pursuant to RCW 4.84.250. Tanner’s offer for settlement reads in relevant part:

Tanner Electric Cooperative hereby offers to settle its counterclaims against the Plaintiffs, *and each of them*, in Case No. 13-2-18595-4 for \$10. Tanner’s counterclaims include its claim for the monthly “opt-out” fee under Tanner’s smart meter Opt-Out policy and late fees and pre-judgment interest due through November 2014. *(CP1476)*

At the Costellos’ request, Defendant clarified that its reference to “each of them” is in regard to the counterclaims. *(CP2101)* The offer made by

⁶⁰ *Ahmad v. Town of Springdale* (2013) 178 Wash.App. 333, 314 P.3d 729, review granted 180 Wash.2d 1013, 327 P.3d 55.

Tanner is for \$10 for “each of them”, and therefore represents a total offer of \$30. This is crucial, because the statute operates around whether Defendant betters his position in the event the matter is not settled.⁶¹

The problem, however, is that the trial court accepted Tanner’s conclusion that it was owed \$45.70. Plaintiffs pointed out to the Court that this sum was mathematically incorrect, is based on billing errors, and even accepting Tanner’s theory, the amounts totaled only \$26.04 which is LESS than the \$30 amount offered pursuant to RCW 4.84.250. (*CPI1470-1490*)

D. CONCLUSION

In light of the above, the Costellos pray for an order remanding to the trial court for further proceedings Count 1 (Access to Books and Records) and Count 4 (CPA Claim) with the instruction that the Costellos are entitled to review the books and records of Tanner that it sought below, and that Tanner is not categorically exempt from the Consumer Protection Act and that discovery on that issue may proceed. The Costellos also pray for an order reversing the trial court's award of Tanner’s counterclaims and reversing the award of attorney's fees and costs.

Date: June 8, 2015

Respectfully submitted,

Larry Costello and Christy Costello
Appellants, pro se

⁶¹ Tanner’s assertion that a refund claim also triggers operation of RCW 4.84.250 is not supported by the facts. Costellos have never made any claim for refund. (*CPI382*)

No. 730606

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

LARRY COSTELLO AND CHRISTY COSTELLO,
Appellant / Plaintiff

v.

TANNER ELECTRIC COOPERATIVE,
Respondent / Defendant

BRIEF OF APPELLANTS

APPENDIX

Larry Costello and Christy Costello
Appellants, Pro Se
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North Bend, WA 98045
425-922-6529

2015 JUN 8 AM 9:37
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

APPENDIX A-1

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1896

Chapter 285, Laws of 2015

64th Legislature
2015 Regular Session

ELECTRICITY CONSUMERS--PRIVACY POLICY

EFFECTIVE DATE: 7/24/2015

Passed by the House April 20, 2015
Yeas 94 Nays 1

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 13, 2015
Yeas 48 Nays 0

BRAD OWEN

President of the Senate

Approved May 18, 2015 1:55 PM

JAY INSLEE

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 **SUBSTITUTE HOUSE BILL 1896** as passed by House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

May 18, 2015

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 1896

AS AMENDED BY THE SENATE

Passed Legislature - 2015 Regular Session

State of Washington 64th Legislature 2015 Regular Session

By House Technology & Economic Development (originally sponsored by Representatives Smith, Hudgins, Tarleton, and Young)

READ FIRST TIME 02/20/15.

1 AN ACT Relating to providing a statewide minimum privacy policy
2 for disclosure of customer energy use information; amending RCW
3 19.29A.010 and 19.29A.020; and adding new sections to chapter 19.29A
4 RCW.

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

6 **Sec. 1.** RCW 19.29A.010 and 2000 c 213 s 2 are each amended to
7 read as follows:

8 The definitions in this section apply throughout this chapter
9 unless the context clearly requires otherwise.

10 (1) "Biomass generation" means electricity derived from burning
11 solid organic fuels from wood, forest, or field residue, or dedicated
12 energy crops that do not include wood pieces that have been treated
13 with chemical preservatives such as creosote, pentachlorophenol, or
14 copper-chrome-arsenic.

15 (2) "Bonneville power administration system mix" means a
16 generation mix sold by the Bonneville power administration that is
17 net of any resource specific sales and that is net of any electricity
18 sold to direct service industrial customers, as defined in section
19 3(8) of the Pacific Northwest electric power planning and
20 conservation act (16 U.S.C. Sec. 839(a)(8)).

1 (3) "Coal generation" means the electricity produced by a
2 generating facility that burns coal as the primary fuel source.

3 (4) "Commission" means the utilities and transportation
4 commission.

5 (5) "Conservation" means an increase in efficiency in the use of
6 energy use that yields a decrease in energy consumption while
7 providing the same or higher levels of service. Conservation includes
8 low-income weatherization programs.

9 (6) "Consumer-owned utility" means a municipal electric utility
10 formed under Title 35 RCW, a public utility district formed under
11 Title 54 RCW, an irrigation district formed under chapter 87.03 RCW,
12 a cooperative formed under chapter 23.86 RCW, or a mutual corporation
13 or association formed under chapter 24.06 RCW, that is engaged in the
14 business of distributing electricity to more than one retail electric
15 customer in the state.

16 (7) "Declared resource" means an electricity source specifically
17 identified by a retail supplier to serve retail electric customers. A
18 declared resource includes a stated quantity of electricity tied
19 directly to a specified generation facility or set of facilities
20 either through ownership or contract purchase, or a contractual right
21 to a stated quantity of electricity from a specified generation
22 facility or set of facilities.

23 (8) "Department" means the department of (~~community, trade, and~~
24 ~~economic development~~) commerce.

25 (9) "Electricity information coordinator" means the organization
26 selected by the department under RCW 19.29A.080 to: (a) Compile
27 generation data in the Northwest power pool by generating project and
28 by resource category; (b) compare the quantity of electricity from
29 declared resources reported by retail suppliers with available
30 generation from such resources; (c) calculate the net system power
31 mix; and (d) coordinate with other comparable organizations in the
32 western interconnection.

33 (10) "Electric meters in service" means those meters that record
34 in at least nine of twelve calendar months in any calendar year not
35 less than two hundred fifty kilowatt-hours per month.

36 (11) "Electricity product" means the electrical energy produced
37 by a generating facility or facilities that a retail supplier sells
38 or offers to sell to retail electric customers in the state of
39 Washington, provided that nothing in this title shall be construed to
40 mean that electricity is a good or product for the purposes of Title

1 62A RCW, or any other purpose. It does not include electrical energy
2 generated on-site at a retail electric customer's premises.

3 (12) "Electric utility" means a consumer-owned or investor-owned
4 utility as defined in this section.

5 (13) "Electricity" means electric energy measured in kilowatt-
6 hours, or electric capacity measured in kilowatts, or both.

7 (14) "Fuel mix" means the actual or imputed sources of
8 electricity sold to retail electric customers, expressed in terms of
9 percentage contribution by resource category. The total fuel mix
10 included in each disclosure shall total one hundred percent.

11 (15) "Geothermal generation" means electricity derived from
12 thermal energy naturally produced within the earth.

13 (16) "Governing body" means the council of a city or town, the
14 commissioners of an irrigation district, municipal electric utility,
15 or public utility district, or the board of directors of an electric
16 cooperative or mutual association that has the authority to set and
17 approve rates.

18 (17) "High efficiency cogeneration" means electricity produced by
19 equipment, such as heat or steam used for industrial, commercial,
20 heating, or cooling purposes, that meets the federal energy
21 regulatory commission standards for qualifying facilities under the
22 public utility regulatory policies act of 1978.

23 (18) "Hydroelectric generation" means a power source created when
24 water flows from a higher elevation to a lower elevation and the flow
25 is converted to electricity in one or more generators at a single
26 facility.

27 (19) "Investor-owned utility" means a company owned by investors
28 that meets the definition of RCW 80.04.010 and is engaged in
29 distributing electricity to more than one retail electric customer in
30 the state.

31 (20) "Landfill gas generation" means electricity produced by a
32 generating facility that uses waste gases produced by the
33 decomposition of organic materials in landfills.

34 (21) "Natural gas generation" means electricity produced by a
35 generating facility that burns natural gas as the primary fuel
36 source.

37 (22) "Northwest power pool" means the generating resources
38 included in the United States portion of the Northwest power pool
39 area as defined by the western systems coordinating council.

1 (23) "Net system power mix" means the fuel mix in the Northwest
2 power pool, net of: (a) Any declared resources in the Northwest power
3 pool identified by in-state retail suppliers or out-of-state entities
4 that offer electricity for sale to retail electric customers; (b) any
5 electricity sold by the Bonneville power administration to direct
6 service industrial customers; and (c) any resource specific sales
7 made by the Bonneville power administration.

8 (24) "Oil generation" means electricity produced by a generating
9 facility that burns oil as the primary fuel source.

10 (25) "Proprietary customer information" means: (a) Information
11 that relates to the source, technical configuration, destination, and
12 amount of electricity used by a retail electric customer, a retail
13 electric customer's payment history, and household data that is made
14 available by the customer solely by virtue of the utility-customer
15 relationship; and (b) information contained in a retail electric
16 customer's bill.

17 (26) "Renewable resources" means electricity generation
18 facilities fueled by: (a) Water; (b) wind; (c) solar energy; (d)
19 geothermal energy; (e) landfill gas; or (f) biomass energy based on
20 solid organic fuels from wood, forest, or field residues, or
21 dedicated energy crops that do not include wood pieces that have been
22 treated with chemical preservatives such as creosote,
23 pentachlorophenol, or copper-chrome-arsenic.

24 (27) "Resale" means the purchase and subsequent sale of
25 electricity for profit, but does not include the purchase and the
26 subsequent sale of electricity at the same rate at which the
27 electricity was purchased.

28 (28) "Retail electric customer" means a person or entity that
29 purchases electricity for ultimate consumption and not for resale.

30 (29) "Retail supplier" means an electric utility that offers an
31 electricity product for sale to retail electric customers in the
32 state.

33 (30) "Small utility" means any consumer-owned utility with
34 twenty-five thousand or fewer electric meters in service, or that has
35 an average of seven or fewer customers per mile of distribution line.

36 (31) "Solar generation" means electricity derived from radiation
37 from the sun that is directly or indirectly converted to electrical
38 energy.

39 (32) "State" means the state of Washington.

1 (33) "Waste incineration generation" means electricity derived
2 from burning solid or liquid wastes from businesses, households,
3 municipalities, or waste treatment operations.

4 (34) "Wind generation" means electricity created by movement of
5 air that is converted to electrical energy.

6 (35) "Private customer information" includes a retail electric
7 customer's name, address, telephone number, and other personally
8 identifying information.

9 **Sec. 2.** RCW 19.29A.020 and 1998 c 300 s 3 are each amended to
10 read as follows:

11 Except as otherwise provided in RCW 19.29A.040, each electric
12 utility must provide its retail electric customers with the following
13 disclosures in accordance with RCW 19.29A.030:

14 (1) An explanation of any applicable credit and deposit
15 requirements, including the means by which credit may be established,
16 the conditions under which a deposit may be required, the amount of
17 any deposit, interest paid on the deposit, and the circumstances
18 under which the deposit will be returned or forfeited.

19 (2) A complete, itemized listing of all rates and charges for
20 which the customer is responsible, including charges, if any, to
21 terminate service, the identity of the entity responsible for setting
22 rates, and an explanation of how to receive notice of public hearings
23 where changes in rates will be considered or approved.

24 (3) An explanation of the metering or measurement policies and
25 procedures, including the process for verifying the reliability of
26 the meters or measurements and adjusting bills upon discovery of
27 errors in the meters or measurements.

28 (4) An explanation of bill payment policies and procedures,
29 including due dates, applicable late fees, and the interest rate
30 charged, if any, on unpaid balances.

31 (5) An explanation of the payment arrangement options available
32 to customers, including budget payment plans and the availability of
33 home heating assistance from government and private sector
34 organizations.

35 (6) An explanation of the method by which customers must give
36 notice of their intent to discontinue service, the circumstances
37 under which service may be discontinued by the utility, the
38 conditions that must be met by the utility prior to discontinuing
39 service, and how to avoid disconnection.

1 (7) An explanation of the utility's policies governing the
2 confidentiality of private and proprietary customer information,
3 including the circumstances under which the information may be
4 disclosed and ways in which customers can control access to the
5 information.

6 (8) An explanation of the methods by which customers may make
7 inquiries to and file complaints with the utility, and the utility's
8 procedures for responding to and resolving complaints and disputes,
9 including a customer's right to complain about an investor-owned
10 utility to the commission and appeal a decision by a consumer-owned
11 utility to the governing body of the consumer-owned utility.

12 (9) An annual report containing the following information for the
13 previous calendar year:

14 (a) A general description of the electric utility's customers,
15 including the number of residential, commercial, and industrial
16 customers served by the electric utility, and the amount of
17 electricity consumed by each customer class in which there are at
18 least three customers, stated as a percentage of the total utility
19 load;

20 (b) A summary of the average electricity rates for each customer
21 class in which there are at least three customers, stated in cents
22 per kilowatt-hour, the date of the electric utility's last general
23 rate increase or decrease, the identity of the entity responsible for
24 setting rates, and an explanation of how to receive notice of public
25 hearings where changes in rates will be considered or approved;

26 (c) An explanation of the amount invested by the electric utility
27 in conservation, nonhydrorenewable resources, and low-income energy
28 assistance programs, and the source of funding for the investments;
29 and

30 (d) An explanation of the amount of federal, state, and local
31 taxes collected and paid by the electric utility, including the
32 amounts collected by the electric utility but paid directly by retail
33 electric customers.

34 NEW SECTION. **Sec. 3.** A new section is added to chapter 19.29A
35 RCW to read as follows:

36 (1) An electric utility may not sell private or proprietary
37 customer information.

38 (2) An electric utility may not disclose private or proprietary
39 customer information with or to its affiliates, subsidiaries, or any

1 other third party for the purposes of marketing services or product
2 offerings to a retail electric customer who does not already
3 subscribe to that service or product, unless the utility has first
4 obtained the customer's written or electronic permission to do so.

5 (3) The utility must:

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

11 (b) Maintain a record for each instance of permission for
12 disclosing a retail electric customer's private or proprietary
13 customer information.

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

18 (a) The confirmation of consent for the disclosure of private
19 customer information;

20 (b) A list of the date of the consent and the affiliates,
21 subsidiaries, or third parties to which the customer has authorized
22 disclosure of his or her private or proprietary customer information;
23 and

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

26 (5) This section does not require customer permission for or
27 prevent disclosure of private or proprietary customer information by
28 an electric utility to a third party with which the utility has a
29 contract where such contract is directly related to conduct of the
30 utility's business, provided that the contract prohibits the third
31 party from further disclosing any private or proprietary customer
32 information obtained from the utility to a party that is not the
33 utility and not a party to the contract with the utility.

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

36 (7) This section does not prevent the electric utility from
37 inserting any marketing information into the retail electric
38 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 NEW SECTION. **Sec. 4.** A new section is added to chapter 19.29A
17 RCW to read as follows:

18 (1) A person may not capture or obtain private or proprietary
19 customer information for a commercial purpose unless the person:

20 (a) Informs the retail electric customer before capturing or
21 obtaining private or proprietary customer information; and

22 (b) Receives the retail electric customer's written or electronic
23 permission to capture or obtain private or proprietary customer
24 information.

25 (2) A person who legally possesses private or proprietary
26 customer information that is captured or obtained for a commercial
27 purpose may not sell, lease, or otherwise disclose the private or
28 proprietary customer information to another person unless:

29 (a) The retail electric customer consents to the disclosure;

30 (b) The private or proprietary customer information is disclosed
31 to an electric utility or other third party as necessary to effect,
32 administer, enforce, or complete a financial transaction that the
33 retail electric customer requested, initiated, or authorized,
34 provided that the electric utility or third party maintains
35 confidentiality of the private or proprietary customer information
36 and does not further disclose the information except as permitted
37 under this subsection (2); or

38 (c) The disclosure is required or expressly permitted by a
39 federal statute or by a state statute.

1 (3) For the purposes of this section, "person" means any
2 individual, partnership, corporation, limited liability company, or
3 other organization or commercial entity, except that "person" does
4 not include an electric utility.

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

13 NEW SECTION. **Sec. 5.** A new section is added to chapter 19.29A
14 RCW to read as follows:

15 This chapter does not apply to energy benchmarking programs
16 authorized by: (1) Federal law; (2) state law; or (3) local laws that
17 are consistent with the personally identifying information
18 requirements of RCW 19.27A.170.

Passed by the House April 20, 2015.

Passed by the Senate April 13, 2015.

Approved by the Governor May 18, 2015.

Filed in Office of Secretary of State May 18, 2015.

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HOUSE BILL REPORT

HB 1896

As Reported by House Committee On:
Technology & Economic Development

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

Brief Description: Providing a statewide minimum privacy policy for disclosure of customer energy use information.

Sponsors: Representatives Smith, Hudgins, Tarleton and Young.

Brief History:

Committee Activity:

Technology & Economic Development: 2/11/15, 2/18/15 [DPS].

Brief Summary of Substitute Bill

- Prohibits an electric utility, including a small utility, from disclosing or selling 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.
- Prohibits a person from capturing or disclosing private or proprietary customer information for commercial purposes without the retail electric customer's written or electronic permission.
- Makes the disclosure or sale of private or proprietary retail electric customer information to an electric utility's affiliates, subsidiaries, or any other third party for the purposes of marketing services or product offerings, without the customer's written or electronic permission, an unfair or deceptive act in trade or commerce and an unfair method of competition for the purposes of applying the Consumer Protection Act (CPA).
- Makes the capture or disclosure of private or proprietary customer information by a person for commercial purposes, without a retail electric customer's written or electronic permission, an unfair or deceptive act in trade or commerce under the CPA.

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.

HOUSE COMMITTEE ON TECHNOLOGY & ECONOMIC DEVELOPMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Morris, Chair; Tarleton, Vice Chair; Smith, Ranking Minority Member; DeBolt, Assistant Ranking Minority Member; Harmsworth, Magendanz, Nealey, Ryu, Santos, Wylie and Young.

Staff: Nikkole Hughes (786-7156).

Background:

Disclosures to Retail Electric Customers.

Except for small utilities, each electric utility must provide its retail electric customers with certain disclosures, including:

- a complete, itemized listing of all rates and charges for which the customer is responsible;
- an explanation of the metering or measurement policies and procedures; and
- an explanation of the utility's policies governing the confidentiality of proprietary customer information, including the circumstances under which the information may be disclosed and the ways in which customers can control access to the information.

"Small utility" means any consumer-owned utility with 25,000 or fewer electric meters in service, or that has an average of seven or fewer customers per mile of distribution line.

"Proprietary customer information" means information that relates to the source and amount of electricity used by a retail electric customer, a retail electric customer's payment history, household data, and information contained in an electric bill.

Disclosure of Private Information.

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

Consumer-owned utilities are not under the regulatory jurisdiction of the UTC.

Consumer Protection Act.

The Washington Consumer Protection Act (CPA) declares that unfair and deceptive practices in trade or commerce are illegal. The CPA allows a person injured by an unfair or deceptive practice to bring a private cause of action for damages. The Office of the Attorney General may investigate and prosecute claims under the CPA on behalf of the state or individuals in the state.

Summary of Substitute Bill:

Disclosures to Retail Electric Customers.

Each electric utility, except for a small utility, must provide its retail electric customers with an explanation of the utility's policies governing the confidentiality of private, as well as proprietary, customer information, including the circumstances under which the information may be disclosed and the ways in which customers can control access to the information. "Private customer information" includes a retail electric customer's name, address, telephone number, and other personally identifying information. The definition for "proprietary customer information" is expanded to include the technical configuration and destination of the electricity used by a retail electric customer.

Disclosures of Retail Electric Customers' Information.

An electric utility, including a small utility, may not disclose or sell 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.

An electric utility must retain certain information for each instance of a retail electric customer's consent for disclosure of his or her private or proprietary customer information, if provided electronically. A utility may collect and release retail electric customer information in aggregate form if the aggregated information does not allow any specific customer to be identified.

A person may not capture or disclose private or proprietary customer information for commercial purposes unless the person receives a retail electric customer's written or electronic permission to capture or disclose private or proprietary customer information. "Person" means any individual, partnership, corporation, limited liability company, or other organization or commercial entity.

Consumer Protection Act.

The following acts are established as unfair or deceptive acts in trade or commerce and an unfair method of competition under the CPA:

- the disclosure or sale of private or proprietary retail electric customer information to an electric utility's affiliates, subsidiaries, or any other third party for the purposes of marketing services or product offerings, without the customer's written or electronic permission; and
- the capture or disclosure of private or proprietary customer information by a person for commercial purposes, without a retail electric customer's written or electronic permission.

Substitute Bill Compared to Original Bill:

The substitute bill:

- adds a section prohibiting the capture or disclosure of private or proprietary customer information by a person for commercial purposes unless the person receives a retail electric customer's written or electronic information; and
 - establishes the capture or disclosure of private or proprietary customer information by a person for commercial purposes, without a retail electric customer's written or electronic permission, as an unfair or deceptive act in trade or commerce under the CPA.
-

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) The purpose of this bill is equity and consumer protection. The investor-owned utilities already operate under these rules in Washington Administrative Code. This bill would extend the minimum privacy policy to other electric utilities in order to protect the information of all Washington electric customers. The distribution grid is digitizing and there is a huge amount of customer information becoming available. Electricity usage data is valuable but potentially dangerous for the customer.

(Opposed) None.

Persons Testifying: Representative Smith, prime sponsor; and Dave Warren, Washington Public Utility District Association.

Persons Signed In To Testify But Not Testifying: None.

SENATE BILL REPORT

SHB 1896

As of March 20, 2015

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

Brief Description: Providing a statewide minimum privacy policy for disclosure of customer energy use information.

Sponsors: House Committee on Technology & Economic Development (originally sponsored by Representatives Smith, Hudgins, Tarleton and Young).

Brief History: Passed House: 3/05/15, 98-0.

Committee Activity: Energy, Environment & Telecommunications: 3/18/15.

SENATE COMMITTEE ON ENERGY, ENVIRONMENT & TELECOMMUNICATIONS

Staff: William Bridges (786-7416)

Background: Proprietary Information of Retail Electric Customers. Except for small utilities, each electric utility must provide its retail electric customers an explanation of the utility's policies governing the confidentiality of proprietary customer information, including the circumstances under which the information may be disclosed and how customers can control access to the information.

Proprietary customer information means the following:

- information relating to the source and amount of electricity used by a retail electric customer;
- a retail electric customer's payment history;
- household data made available by the customer solely by virtue of the utility-customer relationship; and
- information in a retail electric customer's bill.

Small utility means any consumer-owned utility with 25,000 or fewer electric meters in service, or that has an average of seven or fewer customers per mile of distribution line.

Private Information of Investor-Owned Electric Utility Customers. The Utilities and Transportation Commission (UTC) prohibits investor-owned electric utilities from disclosing or selling private consumer information to third parties, including a utility's affiliates or

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subsidiaries, 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 first obtains the customer's written or electronic permission.

Private consumer information includes the following:

- the customer's name, address, telephone number;
- any personally identifying information; and
- information related to the quantity, technical configuration, type, destination, and amount of use of service or products subscribed to by a customer that is available to the utility solely by virtue of the customer-utility relationship.

Customer Information Held by Public Utilities Under the Public Records Act (PRA). Under the PRA, all state and local agencies must disclose public records upon request unless the records fall within certain statutory exemptions, such as the following:

- information that would be highly offensive to a reasonable person and is not of legitimate concern to the public; and
- addresses, telephone numbers, electronic contact information, and customer-specific utility usage and billing information in increments less than a billing cycle of the customers of a public utility, excepting disclosure for child support enforcement.

Exemptions under the PRA must be narrowly construed. The PRA recognizes exemptions from public disclosure as provided in other statutes.

Consumer Protection Act (CPA). The CPA 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.

Summary of Bill: Requiring Electric Utilities to Disclose Their Policies Concerning Private Customer Information. In addition to the requirements governing proprietary customer information, each electric utility must also provide its retail electric customers an explanation of the utility's policies governing the confidentiality of private customer information. Small utilities continue to be exempt from this requirement.

The definition of private customer information includes a customer's name, address, telephone number, and other personally identifying information. The definition for proprietary customer information is expanded to include the technical configuration and destination of the electricity used by a retail electric customer.

Prohibiting Electric Utilities from Disclosing or Selling Private or Proprietary Customer Information. An electric utility, including a small utility, may not disclose or sell private or proprietary retail electric customer information to third parties, including a utility's affiliates or subsidiaries, 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 first obtains the customer's written or electronic permission. A violation of this provision is a violation of the CPA.

An electric utility must retain certain information for each instance of a customer's consent for disclosure, if provided electronically. A utility may insert marketing information into customer bills and may collect and release customer information in aggregate form so long as the information does not allow any specific customer to be identified.

Prohibiting the Capture and Sale of Private or Proprietary Customer Information for a Commercial Purpose. A person may not capture or disclose private or proprietary customer information for commercial purposes without the retail electric customer's written or electronic permission.

A person who legally possesses private or proprietary customer information that is captured for a commercial purpose may not sell, lease, or otherwise disclose the information unless:

- the retail electric customer consents to the disclosure;
- the disclosure is necessary to complete a financial transaction requested by the retail electric customer and the utility or third party keeps the information confidential with specified exceptions; or
- the disclosure is required or expressly permitted by a federal or state statute.

Person means any individual, partnership, corporation, limited liability company, or other organization or commercial entity. A violation of this provision is a violation of the CPA.

Appropriation: None.

Fiscal Note: Available on original bill.

Committee/Commission/Task Force Created: No.

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

Staff Summary of Public Testimony: PRO: The bill takes a UTC rule that protects customer information of investor-owned utilities and applies it to all electric utilities by statute. The prime sponsor will work with stakeholders to perfect the bill. The WA Public Utility District Association (WPUDA) supports the prohibition against disclosing private and proprietary customer information to third parties for marketing purposes.

OTHER: This is a sensible bill that needs some small refinements to allow utilities to continue their practice of hiring third-party consultants that use aggregated customer data to evaluate the effectiveness of conservation programs. The UTC supports the bill and will continue to work with stakeholders on any amendments.

Persons Testifying: PRO: Representative Smith, prime sponsor; Dave Warren, WPUDA.

OTHER: Stan Price, NW Energy Efficiency Council; Lauren McCloy, UTC; Rose Feliciano, Seattle City Light.

Persons Signed in to Testify But Not Testifying: No one.

APPENDIX A-2

CORPORATE LAW—Formulating and Applying a “Proper Purpose” Analysis to a Books and Records Inspection Request—*Schein v. Northern Rio Arriba Electric Cooperative, Inc.*

I. INTRODUCTION

In *Schein v. Northern Rio Arriba Electric Cooperative, Inc.*¹ the New Mexico Supreme Court held that a rural electric cooperative member could inspect cooperative books and records when she desired to inform herself and others of the records' contents through publication of her findings.² The court allowed inspection because the member stated a “proper purpose.”³ The *Schein* opinion sets guidelines for what constitutes a “proper purpose” when members request information from cooperatives and when shareholders request information from companies. The court's decision is significant because it establishes, for the first time in New Mexico, that a “proper purpose” for access to corporate information should reasonably relate to the shareholder's interest and should not harm the cooperative/corporation or its members/shareholders.⁴ This Note examines the court's formulation of the “proper purpose” boundaries and discusses the significance of the decision for New Mexico business enterprises, their members and shareholders, and also for business development in our state.

II. STATEMENT OF THE CASE⁵

Maureen Schein (Schein) lives in Rio Arriba County, New Mexico, within the area served by the Northern Rio Arriba Electric Cooperative (NORA), a “cooperative nonprofit membership corporation”⁶ organized under the Rural Electric Cooperative Act.⁷ She receives her electricity from NORA and is a member in good standing. Schein works for the *Rio Grande Sun* newspaper in Española, New Mexico.

In 1992, Schein requested seven years of financial information from NORA, which NORA refused. After Schein filed a mandamus action, NORA voluntarily surrendered the documents and Schein dismissed her suit. In 1994, Schein requested NORA's budget materials for that year. NORA granted her request with the exception of one excluded page. A subsequent demand letter from Schein's counsel led to the full disclosure of the missing document. That same year, Schein also asked for access to salary figures of all NORA employees. When NORA refused, Schein brought her second mandamus action in which she sought not only current salary levels but also access to present and future budget records. Although the district court

1. 122 N.M. 800, 932 P.2d 490 (1997).

2. *See id.* at 803-04, 932 P.2d at 493-94.

3. *See id.* at 803, 932 P.2d at 493.

4. *See id.*

5. Unless otherwise noted, all factual references in this section refer to *Schein*, 122 N.M. at 801-03, 932 P.2d at 491-93.

6. *See* N.M. STAT. ANN. § 62-15-2 (Repl. Pamp. 1993).

7. N.M. STAT. ANN. §§ 62-15-1 to -33 (Repl. Pamp. 1993). Subsection 62-15-3(Q) brings cooperatives organized under the Act within the scope of the Business Corporation Act, N.M. STAT. ANN. §§ 53-11-1 to -18-12 (Repl. Pamp. 1993 & Supp. 1996), for “activities and transactions for the mutual benefit of its members and patrons” not discussed in the Rural Electric Cooperative Act or the cooperative's articles of incorporation or bylaws. *See id.* § 62-15-3(Q) (Repl. Pamp. 1993).

dismissed this action, because disclosure might violate privacy interests of NORA employees, it indicated that Schein should have access to other financial records, books and reports.

In 1995, Schein filed a third mandamus action, which is the subject of this case. Earlier that year, she requested copies of legal bills that two law firms had submitted to NORA for defending the cooperative in the previous two mandamus actions. When Schein's request for billing information led NORA to produce only edited copies of the requested bills, Schein filed suit.

Following an *in camera* review of the itemization sought, the district court granted Schein's writ. Not only did it provide for disclosure of the redacted billing information, the district court gave Schein prospective access to NORA's books and records upon reasonable request. Additionally, the writ of mandamus retained jurisdiction for the district court in the event that NORA refused to disclose a requested item. On appeal, the New Mexico Supreme Court found that the writ exceeded its permissible scope. However, the supreme court affirmed the district court's decision to permit inspection. Publication of the rural electric cooperative's legal bill was therefore a proper purpose.

III. BACKGROUND

A. *Other Jurisdictions*

Corporate shareholders' long-recognized right of inspection has evolved in their favor, entrenched not only in common law but in state statutes as well.⁸ The law confers similar inspection rights not only on corporate shareholders, but also on other business forms, including cooperatives.⁹ However, the inspection right is limited. Before exercising the right, a shareholder must have a "proper purpose," a nebulous term that has spawned much litigation.¹⁰ This section will summarize the evolution of American shareholder inspection rights, discussing the types of organizations affected and focusing on the proper purpose requirements. It will also examine the embryonic stage of New Mexico case law within the existing state statutory framework.

1. Right of Inspection

Historically, a shareholder had a right to inspect corporate records in English common law.¹¹ This right of inspection survived in America, with qualifications.¹² Generally stated, the common law allowed a shareholder, acting in good faith, to inspect corporate records at reasonable times and for proper purposes.¹³ However,

8. See Randall S. Thomas, *Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 336-40 (1996).

9. See 5A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2227, at 424 (perm. ed. rev. vol. 1995).

10. See *id.* § 2222, at 386.

11. See, e.g., *In re Steinway*, 53 N.E. 1103, 1105 (N.Y. 1899).

12. See FLETCHER, *supra* note 9, § 2214, at 342.

13. See *id.*

inspection was not granted to satisfy a shareholder's idle curiosity¹⁴ or in broad recognition of an unqualified right.¹⁵

In the nineteenth century, with the growth in complexity and numbers of corporations, shareholders desired a more reliable mechanism to promote the flow of information between the two groups.¹⁶ The ensuing codification of the common law right of inspection, with its proper purpose requirement, initially placed a significant burden upon the shareholder and bred litigation.¹⁷ Thus, many state legislatures abandoned the proper purpose requirement as too restrictive, which, in turn, led to shareholder abuse of access rights.¹⁸ Finally, the pendulum swung back towards where it points today, with the proper purpose limitation restored.¹⁹

Now, every United States jurisdiction has codified the shareholder right of inspection,²⁰ which most state courts interpret as expanding the pre-existing common law right.²¹ Generally stated, inspection rights extend "(1) to qualified shareholders (2) upon written demand (3) at reasonable times and (4) for a proper purpose."²²

The right of shareholder inspection stems from the shareholder's property interest in the business.²³ Inspection embodies the shareholder's need for self-protection.²⁴ Thus, because shareholders are owners interested in the corporation and its officers, who act on behalf of the corporation's investors, the law provides a means for promoting accountability.²⁵

2. Types of Organizations

All corporations, whether closely or publicly held, are subject to inspection by their shareholders.²⁶ Statutes also extend inspection rights to not-for-profit

14. See, e.g., *Guthrie v. Harkness*, 199 U.S. 148, 156 (1905).

15. See FLETCHER, *supra* note 9, § 2214, at 342.

16. See Thomas, *supra* note 8, at 338.

17. See JAMES W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970*, 89 (1970).

18. See Thomas, *supra* note 8, at 339. For example, rival corporations would obtain each other's stock to gain access to corporate information, thus acquiring an unearned advantage. See *id.*

19. See *id.* at 340.

20. See, e.g., DEL. CODE ANN. tit. 8, § 220 (Supp. 1996); N.Y. BUS. CORP. LAW § 624 (McKinney 1986); N.M. STAT. ANN. § 53-11-50 (Repl. Pamph. 1993); see also MODEL BUS. CORP. ACT §§ 16.01-.04 (1984).

21. See FLETCHER, *supra* note 9, § 2215.10, at 353. Statutory right, however, co-exists with common law right absent express legislative intent to restrict common law access to corporate records. See *id.* § 2214, at 342.

22. *Id.* § 2215, at 348. See also MODEL BUS. CORP. ACT § 16.02 (1984).

23. See, e.g., *Guthrie v. Harkness*, 199 U.S. 148, 154-55 (1905) (adding that "those in charge of the corporation are merely the agents of the stockholders, who are the real owners of the property"); see also *Durmin v. Allentown Fed. Sav. & Loan Ass'n*, 218 F. Supp. 716, 718 (E.D. Pa. 1963); *Kalanges v. Champlain Valley Exposition, Inc.*, 632 A.2d 357, 359 (Vt. 1993).

24. See FLETCHER, *supra* note 9, § 2213, at 336.

25. See *William Coale Dev. Co. v. Kennedy*, 170 N.E. 434, 435 (Ohio 1930). The court stated:
Can anything be plainer than the fact that the owner of property has a clear right to inspect his own property? When the owner of property selects an agent or agents to care for and manage his property, how can that act be held to clothe the agent with power to manage the owner as well as to manage the property, and to prevent the owner from even looking at his own property except he do so pursuant to the rules and restrictions promulgated by the agent, who is wholly without power or authority to formulate any such rules or regulations? Are we to forget and abandon all the law pertaining to the relation of principal and agent?

Id.

26. See FLETCHER, *supra* note 9, § 2227, at 424.

corporations,²⁷ condominium associations,²⁸ cooperatives generally,²⁹ and to rural electric cooperatives specifically.³⁰ In the only decision involving rural electric cooperative members' inspection rights, the Idaho Supreme Court interpreted a statutory scheme in which such cooperatives were formed under that state's Nonprofit Corporation Act.³¹ Both of Idaho's Nonprofit Corporation Act and Idaho's Business Corporation Act provide for member/shareholder inspection rights.³² Although the Nonprofit Act controls,³³ the court has held that inspection rights would exist under either statute.³⁴

3. Proper Purpose

Much of the litigation on shareholder inspection revolves around the propriety of "purpose." In general, a shareholder states a proper purpose when his request: 1) relates to his position as a shareholder;³⁵ 2) is lawful; and 3) is not contrary or harmful to the interest of the corporation.³⁶ Courts construe the "proper purpose" test liberally in favor of shareholders.³⁷ Indeed, the burden of proof is on the corporation to prove an improper purpose.³⁸ In application, courts in other jurisdictions have

27. See, e.g., *Bill Reno, Inc. v. Rocky Mtn. Ford Dealers' Adver. Ass'n*, 378 P.2d 206, 207 (Colo. 1963) (finding inspection rights against corporation formed under not-for-profit statute with no explicit inspection provision).

28. See, e.g., *Meyer v. Board of Managers of Harbor House Condominium Ass'n*, 583 N.E.2d 14, 17 (Ill. App. 1991) (citing state statute holding associations to the same inspection standards as non-profits).

29. See, e.g., *State v. State Cloud Milk Producers' Ass'n*, 273 N.W. 603, 605-06 (Minn. 1937) (stating inspection was allowed in spite of statute's language extending inspection rights only to stock corporations because statute codified broader common law rule without restriction). Cf. *Shaw v. Agri-Mark, Inc.*, 663 A.2d 464, 472 (Del. 1995) (finding that inspection was not allowed because members of a stock cooperative corporation were not shareholders).

30. Only six states, including New Mexico, have electric cooperative legislation. See IND. CODE §§ 8-1-13-1 to -42 (Repl. Vol. 1991) (Rural Electric Membership Corporation Act, with provision allowing for state utility regulatory commission to inspect or order inspection of books and records); KY. REV. STAT. ANN. §§ 279.010-.220 (Banks-Baldwin 1996) (nameless act, without inspection provision, allowing for issuance of stock to select members; no "bridge" to business or non-profit acts); MO. ANN. STAT. §§ 394.010-.315 (West 1994 & Supp. 1997) (Rural Electric Cooperative Law, with no inspection provision, no stock, no bridge); OKLA. STAT. tit. 4, §§ 437.00-.30 (1986); S.C. CODE ANN. §§ 33-49-10 to -1330 (Law Co-op. 1976 & Supp. 1997) (Rural Electric Cooperative Act, no inspection provision, no stock, no bridge). Cf. N.M. STAT. ANN. §§ 62-15-1 to -33 (Repl. Pamph. 1993) (Rural Electric Cooperative Act, no inspection provision, no stock, bridge to Business Corporation Act).

31. See *Stueve v. Northern Lights, Inc.*, 797 P.2d 130, 130-32 (Idaho 1990); see also IDAHO CODE §§ 30-301 to -332 (1980) (Idaho has no Rural Electric Cooperative formation law).

32. See *Stueve*, 797 P.2d at 133. The Idaho Nonprofit Act contained a similar yet more explicit bridge than that of New Mexico's Rural Electric Cooperative Act, providing for application of Idaho's Business Corporation Act to nonprofits, except where the two acts conflict. Compare IDAHO CODE § 30-303 (1980), cited in *Stueve*, 797 P.2d at 132, with N.M. STAT. ANN. § 62-15-3(Q) (Repl. Pamph. 1993).

33. See *Stueve*, 797 P.2d at 132.

34. See *id.* at 133.

35. Unique among most inspection statutes, Delaware has codified this portion of the definition. See DEL. CODE ANN. tit. 8, § 220(b) (Repl. Vol. 1991).

36. See FLETCHER, *supra* note 9, § 2222, at 386; see also MODEL BUS. CORP. ACT § 16.02(c) (1984). The official comment to § 16.02(c) indicates that the section deliberately incorporates "proper purpose" in its formulation so as to encompass the body of case law surrounding this term of art. See *id.* (Official Comment to § 16.02(c)).

37. A study of Delaware inspection cases reveals that stockholders gained access to shareholder lists seventy-eight percent of the time and access to books and records sixty-eight percent of the time. See Thomas, *supra* note 8, at 354-56.

38. See *Kalanges v. Champlain Valley Exposition, Inc.*, 632 A.2d 357, 359-60 (Vt. 1993) (citing thirteen cases from as many jurisdictions in the last forty-five years as illustration of a trend away from the common law burden placement upon the shareholder). But see *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982) (placing

found a wide variety of proper inspection purposes. For example, proper purposes can include determining whether corporate affairs are legally conducted,³⁹ obtaining a list of other shareholders in hopes of consummating a tender offer,⁴⁰ and valuing one's stock.⁴¹ Examples of improper purposes defeating the inspection right include non-specific demands for a shareholder list,⁴² strictly personal investment concerns,⁴³ and to gain a competitive advantage over the party resisting inspection.⁴⁴ In a notable line of Delaware cases, improper purposes were rendered irrelevant and did not preclude inspection so long as the shareholder had previously established a proper purpose.⁴⁵

B. New Mexico

New Mexico statutory law on shareholder inspection of business⁴⁶ and non-profit⁴⁷ corporation books and records substantially comports with that of a majority of other jurisdictions.⁴⁸ Indeed, the inspection right section of the state's Business Corporation

the burden of proof on the shareholder); *Meyer v. Board of Managers of Harbor House Condominium Ass'n*, 583 N.E.2d 14, 17 (Ill. App. Ct. 1991) (placing the burden of proof on the shareholder).

39. See, e.g., *Compaq Computer Corp. v. Horton*, 631 A.2d 1, 4-6 (Del. 1993) (holding that where corporate affairs were being conducted illegally, a stockholder could inspect corporate records to solicit other shareholders to join in litigation).

40. See, e.g., *Davey v. Unital Corp.*, 585 A.2d 858, 861-62 (N.H. 1991) (even when list would be turned over to an offeror who was otherwise without access to list).

41. When courts accept them as proper, valuation purposes yield access limited to that information necessary to establish value and are not a carte blanche grant of access. See, e.g., *Tatko v. Tatko Bros. Slate Co.*, 569 N.Y.S.2d 783, 785 (App. Div. 1991) (granting shareholder of closely-held corporation already in possession of latest financial report greater access to establish "book value"). Cf. *Advance Concrete Form, Inc. v. Accuform, Inc.*, 462 N.W.2d 271, 275-76 (Wis. Ct. App. 1990) (holding that because any shareholder could maintain that an inquiry is to value stock, such a bald assertion would restore an absolute right of inspection, negating state statute).

42. See, e.g., *Weisman v. Western Pac. Indus.*, 344 A.2d 267, 267-69 (Del. Ch. 1975) (holding that stated purpose to communicate with other shareholders "with respect to how [the company] may more profitably and beneficially manage their resources and assets" as too vague and thus improper).

43. See, e.g., *Shabshelowitz v. Fall River Gas Co.*, 588 N.E.2d 630, 633-34 (Mass. 1992) (denying access to stockholder list where purpose was to solicit other shareholders for purchase of their stock, noting that in Massachusetts a shareholder's purpose must advance the company's interest and not just relate to his or her position as such).

44. See, e.g., *Advance Concrete*, 462 N.W.2d at 277-78.

45. See, e.g., *Compaq Computer Corp. v. Horton*, 631 A.2d 1, 6 (Del. 1993); *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 793 (Del. 1982); *Helmsman Mgmt. Serv., Inc. v. A&S Consultants, Inc.*, 525 A.2d 160, 164 (Del. Ch. 1987). Cf. *Advance Concrete*, 462 N.W.2d at 276 (not granting access, given that the purpose alleged, although proper, was not actually primary).

46. See N.M. STAT. ANN. § 53-11-50(B) (Repl. Pamp. 1993). This is part of the Business Corporation Act which states:

Any person who shall have been a holder of record of shares or of voting trust certificates therefor at least six months immediately preceding his demand or who shall be the holder of record of, or the holder of record of voting trust certificates for, at least five percent of all the outstanding shares of the corporation, upon written demand stating the purpose thereof, may examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its relevant books and records of account, minutes and record of shareholders and make extracts therefrom.

Id.

47. See *id.* § 53-8-27 (Repl. Pamp. 1983 & Supp. 1996). "All books and records of a corporation may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time." *Id.* The Nonprofit Corporation Act is found at N.M. STAT. ANN. §§ 53-8-1 to -99 (Repl. Pamp. 1983 & Supp. 1996).

48. See FLETCHER, *supra* note 9, § 2215, at 348.

Act adopted that of the 1970 Model Business Act nearly verbatim.⁴⁹ State case law interpreting the statutes, however, is underdeveloped. In the only significant New Mexico shareholder inspection decision, *Schwartzman v. Schwartzman Packing Co.*,⁵⁰ the supreme court interpreted the business corporation inspection law generously, in favor of the shareholders, but with limits.⁵¹ The *Schwartzman* court affirmed that the minority shareholders, who had alleged misappropriation of assets and oppressive conduct on the part of the majority shareholders, could inspect the books of a closely held family corporation.⁵² However, the court held that such rights had boundaries, which the trial court properly fixed.⁵³ At issue in *Schwartzman*, therefore, was the scope of inspection rights, rather than their existence.⁵⁴

Prior to *Schein*, no New Mexico decision had addressed inspection rights for members of cooperatives formed under the Rural Electric Cooperative Act. Indeed, that Act has no inspection provision. However, section 62-15-3(Q) of that Act applies the provisions of the Business Corporation Act⁵⁵ to rural electric cooperatives when the Rural Electric Cooperative Act⁵⁶ is silent. No New Mexico decision has addressed inspection rights of nonprofit members under the Nonprofit Corporation Act.⁵⁷

IV. RATIONALE

The *Schein* decision marks the first New Mexico interpretation of the "proper purpose" requirement. This section traces the court's decision, beginning with its recognition of inspection rights.⁵⁸ Next, the focus shifts to the court's extension of inspection rights to cooperatives⁵⁹ and its historical discussion and analytical application of the proper purpose requirement.⁶⁰ The section ends with an examination of the finding that *Schein* demonstrated a proper purpose.⁶¹

49. See N.M. STAT. ANN. § 53-11-50 (Repl. Pamp. 1993). Cf. MODEL BUS. CORP. ACT § 52 (1970). The 1984 revisions to the Model Business Corporation Act somewhat narrow the scope of the earlier provisions, adding, for example, that the records sought must directly relate to the shareholder's purpose. See MODEL BUS. CORP. ACT § 16.02(c) (1984). However, the revised Act still contains, deliberately, the necessity of a "proper purpose." *Id.*

50. 99 N.M. 436, 659 P.2d 888 (1983).

51. See *id.* at 439, 659 P.2d at 891.

52. See *id.* at 438, 659 P.2d at 890.

53. See *id.* at 438-39, 659 P.2d at 890-91. Plaintiffs had been sending teams of three to six accountants, who monopolized the office of the general manager during business hours, hampering his work. After provisions were made to accommodate the accountants after-hours, and after they failed to regularly appear, the district court allowed plaintiffs one final period of review, with as many accountants and for as much time as they wished. The accountants worked for thirty or forty consecutive hours. See *id.*

54. See *id.* at 439, 659 P.2d at 891.

55. N.M. STAT. ANN. §§ 53-11-1 to -18-12 (Repl. Pamp. 1993 & Supp. 1996).

56. N.M. STAT. ANN. §§ 62-15-1 to -32 (Repl. Pamp. 1993).

57. N.M. STAT. ANN. §§ 53-8-1 to -99 (Repl. Pamp. 1983 & Supp. 1996).

58. See *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 803, 932 P.2d 490, 493 (1997).

59. See *id.*

60. See *id.* at 803-05, 932 P.2d at 493-95.

61. See *id.* at 803, 932 P.2d at 493.

A. *Right of Inspection*

In *Schein*, the court stated the majority rule, codified⁶² and applied previously in *Schwartzman*,⁶³ that a shareholder has the right to inspect corporate records at reasonable times and places, for proper purposes.⁶⁴ Indicating its support for a policy of "generous access" in favor of shareholders, and setting the tone for the decision, the court credited a shareholder's possessory interest in the corporation as grounds for supporting inspection.⁶⁵

B. *Types of Organizations*

As a statutory basis for Schein's right of inspection, the *Schein* court cited the inspection provision of New Mexico's Business Corporation Act.⁶⁶ The court did not explain how or why the state's for-profit laws applied to NORA, a rural electric "cooperative nonprofit member corporation,"⁶⁷ nor did it invoke the inspection rights granted under New Mexico's Nonprofit Corporation Act.⁶⁸ Without so stating, the court may have relied on subsection 3(Q) of the Rural Electric Cooperative Act, which provides a bridge to the Business Corporation Act for "such other and further activities and transactions for the mutual benefit of its members and patrons" not already enumerated in the Act or the cooperative's articles of incorporation or bylaws.⁶⁹

Regardless of whether or not the court invoked subsection 3(Q) implicitly, or simply overlooked it, the court bolstered its extension of inspection rights to cooperatives by analogy to other jurisdictions.⁷⁰ The *Schein* court cited with approval⁷¹ cases in which other courts allowed inspection of a non-stock, for-profit mutual corporation comprised of capital contributing members,⁷² a non-profit corporation by a dissolved corporate member,⁷³ and a non-stock, for-profit association formed under a state Cooperative Act.⁷⁴ The court also noted a Delaware decision, which denied cooperative members' inspection rights.⁷⁵ In that case, *Shaw v. Agri-Mark, Inc.*, the state court of appeals certified a question to the Delaware Supreme Court asking if inspection was allowed for non-stockholding equity capital supplying members of a cooperative for which only directors were issued limited stock.⁷⁶ In answer, the Delaware court held that where members and stockholders co-

62. See N.M. STAT. ANN. § 53-11-50 (Repl. Pamp. 1993).

63. See *Schwartzman v. Schwartzman Packing Co.*, 99 N.M. 436, 439, 659 P.2d 888, 891 (1983).

64. See *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 803, 932 P.2d 490, 493 (1997).

65. *Id.*

66. See *id.* (citing N.M. STAT. ANN. § 53-11-50 (Repl. Pamp. 1993)).

67. As defined by the Rural Electric Cooperative Act under which NORA was formed. See N.M. STAT. ANN. § 62-15-2 (Repl. Pamp. 1993).

68. See *id.* § 53-8-27 (Repl. Pamp. 1983 & Supp. 1996)

69. See *id.* § 62-15-3(Q) (Repl. Pamp. 1993).

70. See *Schein*, 122 N.M. at 803, 932 P.2d at 493.

71. See *id.*

72. See *Fleisher Dev. Corp. v. Home Owners Warranty Corp.*, 856 F.2d 1529, 1530-31 (D.C. Cir. 1988).

73. See *Bill Reno, Inc. v. Rocky Mtn. Ford Dealers' Adver. Ass'n*, 378 P.2d 206, 207 (Colo. 1963).

74. See *State v. State Cloud Milk Producers' Ass'n*, 273 N.W. 603, 604-05 (Minn. 1937).

75. See *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 803, 932 P.2d 490, 493 (1997) (citing *Shaw v. Agri-Mark, Inc.*, 67 F.3d 18, 19 (2d Cir. 1995)).

76. See *Shaw v. Agri-Mark, Inc.*, 67 F.3d 18, 19 (2d Cir. 1995).

exist, they possess distinct rights, which, for members, do not include the right of inspection reserved under the common law specifically for shareholders.⁷⁷

C. Proper Purpose

In reaching its decision in *Schein*, the court placed the burden of proof upon the respondent to prove a shareholder's improper purpose.⁷⁸ The *Schein* court considered an improper purpose to be one harmful to the corporation.⁷⁹ "Consistent with this policy of allowing generous access," the court assumed shareholders act in good faith and have a proper purpose.⁸⁰ Further, bare assertions of impropriety will not suffice to stop inspection, as the court noted in *Curkendall v. United Federation of Correction Officers, Inc.*⁸¹ The *Schein* court cited *Curkendall* with approval.⁸² There, the corporation's motion to deny inspection, supported with affidavits of the shareholder's bad faith, met the corporation's burden of showing improper purpose.⁸³ Thus, a corporation in New Mexico must enunciate "strong and articulable" reasons for denying inspection.⁸⁴

The *Schein* court's determination of what constitutes a proper shareholder purpose relied on other jurisdictions favoring access to corporate records for legitimate shareholder concerns.⁸⁵ In the course of its survey, the court first found that a proper purpose should reasonably relate to legitimate shareholder interests, such as assessing corporate investments.⁸⁶ The court then found that a proper purpose should not harm the corporation or other shareholders.⁸⁷

According to the opinion, Schein gave three primary purposes for her desire to inspect NORA's legal bills.⁸⁸ First, she wanted to inform herself of the bills' contents; second, she hoped to inform other cooperative members; and third, she

77. See *Shaw v. Agri-Mark, Inc.*, 663 A.2d 464, 470 (Del. 1995). Both parties conceded that inspection was not warranted under Delaware statute reserving inspection rights only for "a stockholder of record." *Id.* at 468. The Delaware Supreme Court had not considered a case such as *Schein* questioning inspection rights of a member of a non-stock corporation under statutory or common law. See *id.* at 469.

78. See *Schein*, 122 N.M. at 803, 932 P.2d at 493.

79. See *id.* at 805, 932 P.2d at 495.

80. *Id.* at 803, 932 P.2d at 493.

81. 438 N.Y.S.2d 872, 874 (App. Div. 1985).

82. See *Schein*, 122 N.M. at 803, 932 P.2d at 493.

83. See *Curkendall v. United Fed'n of Correction Officers, Inc.*, 438 N.Y.S.2d 872, 874 (App. Div. 1985).

84. *Schein*, 122 N.M. at 803, 923 P.2d at 493.

85. See *Schein*, 122 N.M. at 803, 932 P.2d at 493-4. (citing *Guthrie v. Harkness*, 199 U.S. 148 (1905); *Uldrich v. Datasport, Inc.*, 394 N.W.2d 286 (Minn. Ct. App. 1984); *State ex. rel. Kennedy v. Continental Boiler Works, Inc.*, 807 S.W.2d 164 (Mo. Ct. App. 1991); *Davey v. Unifit Corp.*, 585 A.2d 858 (N.H. 1991); *Tatko v. Tatko Bros. Slate Co.*, 173 A.2d 917 (N.Y. 1991); *Carter v. Wilson Constr. Co.*, 348 S.E.2d 830 (N.C. 1986); *Shaw v. Hurst*, 582 A.2d 87 (Pa. 1990); *Sto-Rox Focus on Renewal Neighborhood Corp. v. King*, 398 A.2d 241 (Pa. 1979)).

86. See *Schein*, 122 N.M. at 804, 932 P.2d at 494 (finding "shareholder's request for information about corporation's investments reasonably germane to status as shareholder"). For this proposition, the court cited *Advance Concrete Form v. Accuform, Inc.*, 462 N.W.2d 271 (Wis. Ct. App. 1990). That decision, however, discussed the propriety of a request to value a shareholder's own investment in the corporation. See *Advance Concrete*, 462 N.W.2d at 275. The court there found such a purpose met the "reasonably related" test. See *id.* But the court further found that purpose unbelievable and thus disallowed inspection. See *id.*

87. See *Schein*, 122 N.M. at 804, 932 P.2d at 494.

88. See *id.* Although the court here characterized Schein's desire to publish newsworthy information as one of three primary purposes, it later relegated this purpose to secondary status. See *id.* at 805, 932 P.2d at 495. In so doing, the court declined to hold that secondary purposes did not matter. The potential for harm from a secondary purpose could still defeat inspection. See *id.*

proposed to notify the general public of any newsworthy information.⁸⁹ In finding that these purposes reasonably related to her membership in the cooperative, the court validated her interest in the cooperative's use of legal services.⁹⁰ The court reasoned that contracting for legal services and the value of services received can affect the value of a share or rural electric cooperative capital account.⁹¹ Thus, shareholders' and members' interest in such legal services questions reasonably relates to their position as shareholders and members concerned about their investment.⁹²

The court further found none of Schein's purposes harmful to the corporation or other shareholders.⁹³ Proposed publication of the legal billing information that Schein sought, in this situation, would not defeat inspection.⁹⁴ In so finding, the supreme court deferred to the district court, which it deemed better positioned to assess the propriety of the redacted information that the district court had reviewed *in camera*.⁹⁵ That *Schein* court found the redacted information, even if published, would not harm NORA.⁹⁶ Thus, because Schein's request reasonably related to her role as a shareholder and did not pose any harm to NORA, Schein met the proper purpose test.⁹⁷

V. ANALYSIS

By its selective treatment of Schein's stated purposes, the *Schein* court seemed determined to grant inspection and to find publication to be a proper purpose. In doing so, the court rejected arguments that the billing information sought was confidential information and inappropriate for newspaper publication.⁹⁸ The court said nothing about a potentially improper purpose raised in deposition,⁹⁹ only partially addressed another,¹⁰⁰ and instead discussed a purpose that Schein never alleged.¹⁰¹

The *Schein* court could have barred disclosure, even with a finding of proper purpose, had it adopted NORA's argument that the attorney-client privilege protected the redacted billing information.¹⁰² While recognizing that materials subject to the

89. *See id.* at 804, 932 P.2d at 494.

90. *See id.*

91. *See id.* at 804-05, 932 P.2d at 494-95.

92. *See id.*

93. *See id.* at 805, 932 P.2d at 495.

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See* Appellant's Brief-In-Chief at 15-16, *Schein v. Northern Rio Arriba Elec. Coop.*, 122 N.M. 800, 932 P.2d 490 (1997) (No. 23,333) (suggesting curiosity as a proper purpose).

100. *See Schein*, 122 N.M. at 805, 932 P.2d at 495 (discussing the impact on "the capital accounts of NORA"). *Cf.* Appellee's Answer-Brief-In-Chief at 14, *Schein* (No. 23,333) (proposing inspection "to investigate matters bearing on the value of her capital account" as a proper purpose).

101. *See Schein*, 122 N.M. at 804, 932 P.2d at 495 (suspicion of mismanagement as a proper purpose).

102. *See id.* N.M. R. Civ. P. 11-503(B) (1986), provides in part that: "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." *Id.* Rule 11-503(A) defines a confidential communication as one "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.*

attorney-client privilege may be kept from shareholders, the court held that the limits of the privilege do not extend to billing information.¹⁰³ The court likened the materials sought to information about the purpose for which NORA retained an attorney, the steps the attorney took in fulfilling his obligations, and the general nature of legal services provided, none of which are confidential and protected.¹⁰⁴ The court also rejected NORA's assertion of confidentiality, holding that a mere assertion of sensitivity would lead to unwarranted protection.¹⁰⁵ Thus, the court's action reinforces existing authority holding that simple inquiries into the dates legal services are rendered, the time allotted, and the nature of the work performed are not privileged.¹⁰⁶ More importantly, it limits corporate options in searching for a device to protect against disclosure of information relating to the company's dealings with its lawyers. A question of shareholder access will not create exceptions for traditional boundaries of attorney-client privilege.

The common-law shareholder right of inspection, purportedly adopted by the court in *Schein*,¹⁰⁷ denied that right when its object was merely to satisfy curiosity.¹⁰⁸ The court's decision, however, does little to clarify the line in New Mexico between mere curiosity and legitimate proper purpose. The court defined Schein's goal as to "inform" herself and others about the bills' contents, and perhaps publish her findings.¹⁰⁹ However, certain of her statements taken in deposition could lead one to believe that Schein was engaged in nothing more than the sort of fishing expedition frowned upon by the common law.¹¹⁰ Perhaps due to Schein's invocation of several other purposes, or the fact that curiosity underlies every request for shareholder access, the *Schein* court chose not to address statements suggestive of mere inquisitiveness.

Another of Schein's previously stated purposes not expressly recognized and inadequately addressed by the court was the valuation of her cooperative capital account.¹¹¹ Given the type and volume of material previously released to Schein, she probably already had information sufficient to value her account at the cooperative.¹¹² Release of itemized legal billing information would not further that purpose. The court, however, made no mention of this intention which it could have used to deny

103. See *Schein*, 122 N.M. at 805, 932 P.2d at 495.

104. See *id.* at 805-06, 932 P.2d at 495-96.

105. See *id.* at 806, 932 P.2d at 496.

106. See *id.*; see also *Colton v. United States*, 306 F.2d 633, 636 (2d Cir. 1962); *Cohen v. Uniroyal, Inc.*, 80 F.R.D. 480, 483 (E.D. Pa. 1978).

107. See *Schein*, 122 N.M. at 803, 932 P.2d at 493.

108. See FLETCHER, *supra* note 9, § 2219, at 368.

109. *Schein*, 122 N.M. at 804-05, 932 P.2d at 494-95.

110. See Appellant's Brief-In-Chief at 15-16, *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 932 P.2d 490 (1997) (No. 23,333). "[S]he 'thought it would be interesting to see what issues attorneys had been asked to address for the Co-op' and 'was interested to see if [NORA's counsel] had been dealing with my case since March of '94, as well as what other issues [counsel] had been dealing with.'" *Id.* She also wanted to screen the information and "if it was interesting to me" to publish it to let readers decide if the attorney's fees in question were reasonable. *Id.* at 16.

111. See Appellee's Answer Brief at 14, *Schein* (No. 23,333) (claiming investigation of "matters bearing on the value of her capital account" are a proven, and proper, objective).

112. See *Schein* 122 N.M. at 802, 932 P.2d at 492 (indicating NORA had previously disclosed a vast array of financial information); see also Appellant's Brief-In-Chief at 17, *Schein* (No. 23,333) (citing an admission by Schein that she needs no further information to value her capital account).

Schein access. It instead focused on a general recognition that a corporation's use of legal service affects the value of a shareholder's investment.¹¹³ The court nevertheless ignored evidence that, for valuation purposes, would render access to billing narrations irrelevant. Thus, the court's decision leaves open the question of whether an unsupported assertion of intent to value one's investment suffices to constitute a proper purpose in New Mexico.

Although the *Schein* court omitted discussion of some of Schein's purposes, it did discuss a purpose that Schein did not assert.¹¹⁴ As a defense, NORA argued that Schein had no basis for suspecting improper behavior on the part of NORA management.¹¹⁵ Indeed, Schein made no such allegation. The court, however, dispelled the notion that successful shareholder plaintiffs, like those in *Schwartzman v. Schwartzman Packing Co.*,¹¹⁶ must suspect and allege improper managerial behavior before requesting inspection.¹¹⁷ According to the court, requiring such suspicions might actually make mismanagement more likely and would also deny shareholders their ownership rights.¹¹⁸ Thus, the *Schein* court's clarification of *Schwartzman*, dispensing with the need to suspect and allege managerial abuses, further tips the balance in shareholders' favor.

VI. IMPLICATIONS

The *Schein* decision may adversely affect companies and their shareholders, and cooperatives and their members, in New Mexico. Among managers, the *Schein* decision should promote accountability. A wide range of business forms should now be on notice that their shareholders or members are afforded a general presumption of propriety when seeking access to corporate books, records and probably shareholder lists. New Mexico cooperative members will better appreciate their highly respected ownership rights. All parties interested in the impact of law on economic development, including New Mexico courts, may well be concerned if New Mexico adopts a general rule that publication is always a proper purpose. Although the publication purpose should clearly be limited to the facts of this case, the analysis in *Schein* may nonetheless discourage business enterprises considering incorporating here. This section will therefore discuss *Schein*'s implications for managers and shareholders, and will then discuss how business enterprises and New Mexico courts might react.

A. Management Perspective

Leaving aside consideration of propriety of purpose, which was not an issue in her previous requests and legal battles with NORA, Schein obtained access earlier to contracts, budgets, financial statements, audit reports, invoices, bank statements, reconciliations, check registers, expense account information and management salary

113. See *Schein*, 122 N.M. at 804, 932 P.2d at 494.

114. See *id.*

115. See *id.*

116. 99 N.M. 436, 438-39, 659 P.2d 888, 890-91 (1983).

117. See *Schein*, 122 N.M. at 804, 932 P.2d at 494.

118. See *id.*

data.¹¹⁹ The only information the courts denied her were staff salary figures.¹²⁰ The message to New Mexico corporations, therefore, is to prepare to disclose to stockholders in nearly unlimited fashion.

When considering propriety of purpose, the court's placement of the burden of proof further favors disclosure. New Mexico corporations must state "strong and articulable" reasons for denying shareholder access to corporate records.¹²¹ For management, this burden will result in the need for investigation and support to overcome the shareholder's presumption of proper purpose. Further, allegations, even if supported, that the shareholder has no basis for suspecting improper or illegal actions on the part of management will not militate against shareholder inspection.¹²² Therefore, the corporate lawyer's burden will be to demonstrate the potential for harm to the corporation with well-supported pleadings to meet the high standard.¹²³

Although not successful for NORA here, the court in *Schein* recognized that arguments of confidentiality and privilege might also succeed in stopping disclosure.¹²⁴ However, such approaches are likely to be less effective because they merely state limited varieties of harm. A court may limit shareholder disclosure by finding that narrow spans of requested information would violate privacy or privilege rights if divulged, and thus may limit, rather than fully preclude shareholder disclosure. Arguing that access would harm individuals within the organization or the relationships between the company and outside professionals may serve as a partial bar to inspection. On the other hand, arguing access to information may harm the company as a whole could effectively block inspection.

B. Shareholder Perspective

Rural electric cooperative members, as well as shareholders of New Mexico corporations, may be concerned that a broad reading of *Schein* will over-expose an entity's activities to public view. All parties, however, should bear in mind that *Schein* pursued a rather restricted scope of information. *Schein* sought access to the redacted narration of NORA's legal bills.¹²⁵ NORA previously revealed to her the totals of these bills.¹²⁶ In deciding whether publication of the narratives on NORA's legal bills would be harmful to NORA, and thus an improper purpose, the court relied heavily on the district court's finding of harmlessness.¹²⁷ The court did not rule, nor was it asked to rule, on publication as a proper purpose for any of the

119. *See id.* at 802, 932 P.2d at 492.

120. *See id.* The district court reasoned that distribution of such information might violate employees' privacy interests, vitiating disclosure. *See id.*

121. *See id.* at 803, 932 P.2d at 493.

122. *See id.* at 804, 932 P.2d at 494.

123. *See id.* at 805, 932 P.2d at 495.

124. *See id.* at 806, 932 P.2d at 495-96.

125. *See id.* at 802, 932 P.2d at 492.

126. *See id.*

127. *See id.* at 805, 932 P.2d at 495. The court here cited *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (stating that the district court is in the best position to weigh parties' needs and interests). That case involved publication of information gleaned in discovery, for some of which the Supreme Court held barring publication would not violate First Amendment rights. *See Seattle Times*, 467 U.S. at 31. The *Schein* court may have wanted to stave off a constitutional question in referring to a case with comparable facts for an unrelated and relatively minor proposition concerning the weight of a district court's review.

previous disclosures NORA made to Schein.¹²⁸ Instead, the court accepted possible publication as appropriate only for the limited billing information that it characterized as “ministerial”¹²⁹ and otherwise not damaging if disclosed to the public.¹³⁰ Further, given the unprecedented acceptance of publication as a proper purpose, the practitioner arguing for such a purpose may be advised to limit *Schein*’s support for such a proposition to its context.

However, the shareholder advocate in New Mexico need not hesitate to allege valuation as a proper purpose. For those representing stockholders of closely held businesses where financial information may be less forthcoming than from a large, public entity with a regular reporting timetable,¹³¹ a desire to value one’s investment has been an acceptable purpose in most jurisdictions,¹³² and New Mexico promises to be no exception. Indeed, dicta in *Schein* indicates New Mexico’s intent to follow the majority rule.¹³³ New Mexico practitioners, however, should note three points of caution. First, valuation materials in many instances may already be available to the shareholder through proactive corporate disclosures and shareholders’ meetings. *Schein*, however, had sufficient financial assessment materials¹³⁴ and nonetheless argued valuation as proper purpose.¹³⁵ Fortunately for her, the court did not deny her.¹³⁶ The shareholder with a smaller array of purposes may not be so lucky. Second, disclosure, if granted, will probably be limited to only that information necessary for valuation purposes. Third, valuation purposes will likely protract litigation as a district court sifts through volumes of records to determine which are necessary and which are not.

Further, the New Mexico shareholder need not fear alleging mismanagement as a proper purpose. Although *Schein* did not raise the issue, the opinion is replete with language recognizing that a shareholder’s reasonable suspicion of mismanagement will warrant inspection.¹³⁷ New Mexico has already recognized the legitimacy of that purpose in *Schwartzman v. Schwartzman Packing Co.*¹³⁸ Because the issue there was

128. Schein used previously disclosed information as material for news stories in the *Rio Grande Sun*, publication of which had not been litigated. See *Schein*, 122 N.M. at 802, 932 P.2d at 492.

129. *Id.* at 806, 932 P.2d at 496.

130. See *id.* at 805, 932 P.2d at 495.

131. The Securities and Exchange Act of 1934, 15 U.S.C. § 78l(g)(1) (1994), requires companies with 500 or more shareholders and assets greater than \$10 million, as modified by SEC rule, see 17 C.F.R. § 240.12g-1 (1997), to file annual or other comparable reports with the SEC, see *id.* §§ 240.13a-1 to .13a-16, and make disclosures to shareholders, see *id.* §§ 240.14a-1 to .14f-1. The purpose of these regulations is, in part, to promote accurate valuation. See 15 U.S.C. § 78b(3) (1994).

132. See FLETCHER, *supra* note 9, § 2224, at 404.

133. See *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 804, 932 P.2d 490, 494 (1997) (“A proper purpose can include a desire to place a monetary value on stock interests . . . Like any business choice, the selection of legal services and a determination of the value of services received are relevant inquiries to a party concerned about his investment in the entity . . .”).

134. See Appellant’s Brief-in-Chief at 17, *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 932 P.2d 490 (1997) (No. 23,333).

135. See Appellee’s Answer-Brief-in-Chief at 14, *Schein* (No. 23,333).

136. See *Schein* 122 N.M. at 803, 932 P.2d at 493.

137. See *id.* at 804, 932 P.2d at 494 (“Reasonable purpose can also include inspection of corporate records to ensure that a nonprofit is managed properly . . . [S]uch access allows for . . . deterrence of abuses by corporate directors.”).

138. 99 N.M. 436, 438, 659 P.2d 888, 890 (1983).

the scope of relief, the supreme court presumed the shareholders' propriety of purpose in successfully alleging managerial wrongdoing.¹³⁹

Supported allegations of mismanagement can serve as a springboard to other actions. For example, mismanagement can be the purpose for inspection when a disgruntled shareholder is upset with a lack of dividends. Because under New Mexico statute, a corporation is under no obligation to pay a dividend,¹⁴⁰ simple allegations to that effect will not succeed. However, if the basis for a failure to pay dividends is managerial impropriety, as is often the case, the court may grant inspection, which in turn could lead to larger relief.¹⁴¹ Mismanagement can also provide support for access to a company's shareholder list. Management may be so bad that a shareholder suing the corporation can successfully gain access to the list to recruit other plaintiffs from among shareholder ranks to join in a lawsuit.¹⁴²

A shareholder's mere recitation from the index of previously proven shareholder purposes should not necessarily guarantee access. Cloaking one's true purpose intentionally may not be effective. In a well-reasoned decision, *Advance Concrete Form, Inc. v. Accuform, Inc.*,¹⁴³ which found all of the shareholder's stated purposes proper, a Wisconsin court refused to allow inspection because those purposes were simply unbelievable.¹⁴⁴ In that case, both parties were fierce competitors in the same industry.¹⁴⁵ After hiring away an employee from its smaller competitor, the larger company purchased the employee's stock, thus acquiring an interest in the competing corporation.¹⁴⁶ The new shareholder then requested access to its rival's books and records, ostensibly to value its investment and to assess the previous year's performance.¹⁴⁷ While the *Advance Concrete* court found such purposes proper, it denied inspection because of a past history of stiff competition, the potential harm to the smaller company from disclosure of vital records, and the admitted lack of a market for its stock.¹⁴⁸ The *Advance Concrete* court found the larger company's stated purposes unbelievable because of the company's underlying motive.¹⁴⁹

New Mexico shareholders therefore should be wary of the court's power to assess shareholder veracity. The *Schein* court couched this warning in its language discussing secondary purpose. The court, in a marked departure from the Delaware rule that an ulterior secondary purpose is irrelevant,¹⁵⁰ cautioned against improper secondary purposes that might defeat proper primary purposes.¹⁵¹ Although the *Schein* court's admonition differs slightly from that of the Wisconsin Court of

139. *See id.* at 438-39, 659 P.2d at 890-91.

140. *See* N.M. STAT. ANN. § 53-11-44 (Repl. Pamp. 1993).

141. *See, e.g.,* Kelley v. Axelson, 687 A.2d 268, 272 (N.J. Super. Ct. App. Div. 1997).

142. *See, e.g.,* Compaq Computer Corp. v. Horton, 631 A.2d 1, 2 (Del. 1993).

143. 462 N.W.2d 271 (Wis. Ct. App. 1990).

144. *See id.* at 276.

145. *See id.* at 277.

146. *See id.*

147. *See id.* at 273.

148. *See id.* at 276-77.

149. *See id.* at 276-78.

150. *See supra* note 45 and accompanying text.

151. *See* Schein v. Northern Rio Arriba Elec. Coop., Inc., 122 N.M. 800, 805, 932 P.2d 490, 495 (1997). Although the court previously considered Schein's proposal of publication to be a primary purpose, *see id.* at 804, 932 P.2d at 494, here it implied that publication was instead a secondary purpose, but nonetheless proper, *see id.* at 805, 932 P.2d at 495.

Appeals, which was faced instead with an improper primary purpose, the result is comparable: improper purposes harmful to the corporation, stated or implicit, will not be tolerated.

C. *Effect on New Mexico's Business Climate*

The *Schein* decision in many ways follows the national norm. While no court has ever considered publication as a proper purpose, others have affirmed inspection rights for members of rural electric cooperatives¹⁵² and found that legal bills targeted for inspection do not necessarily qualify for the attorney-client privilege.¹⁵³ The *Schein* court cited the same "proper purpose" test that others use.¹⁵⁴ It also placed the burden of proving an improper purpose on the corporation, as many other jurisdictions do.¹⁵⁵ Additionally, the *Schein* court ultimately recognized the shareholder's right of inspection, as the majority of courts do that face shareholder inspection requests.¹⁵⁶ In application, however, the *Schein* decision may be a troublesome signal regarding New Mexico's sensitivity to the justifiable needs of corporate management.

The recognition that publication of information gleaned from inspection is a proper purpose is without precedent. While *Schein* could do little harm if limited to its facts, future New Mexico court cases may not. True, the court said publishing the legal bills is an acceptable purpose "in this instance."¹⁵⁷ The opinion, however, fails to explicitly acknowledge the glaring difference between *Schein* and the vast majority of shareholder inspection decisions—the public nature of the targeted organization. NORA, for all intents, is a nonprofit public utility,¹⁵⁸ run without competition for the benefit of captive members who own no stock.¹⁵⁹ Members, therefore, participate not to earn money on an investment but simply because they live in the surrounding area and do not want to live without electricity.¹⁶⁰ Although the court did cite decisions¹⁶¹ involving non-profits,¹⁶² cooperatives¹⁶³ and utilities,¹⁶⁴ it failed to distinguish *Schein* explicitly from "true" inspection cases involving business corporations and stockholders.

152. See *Stueve v. Northern Lights, Inc.*, 797 P.2d 130, 131 (Idaho 1990).

153. See *Meyer v. Board of Managers of Harbor House Condominium Ass'n*, 583 N.E.2d 14, 18 (Ill. App. Div. 1991).

154. See *Schein*, 122 N.M. at 804, 932 P.2d at 494; FLETCHER, *supra* note 9, § 2222, at 386 (stating that a request reasonably relates to requestor's position as a shareholder and is not harmful to the corporation).

155. See *Schein*, 122 N.M. at 803, 932 P.2d. at 493; see also *supra* note 37.

156. See *Schein*, 122 N.M. at 803, 932 P.2d at 493; Thomas, *supra* note 8, at 334-35.

157. See *Schein*, 122 N.M. at 805, 932 P.2d at 495.

158. See N.M. STAT. ANN. § 62-3-3(E), (G) (Repl. Pamp. 1993 & Supp. 1997)

159. Members of New Mexico rural electric cooperatives are like customers of any other regulated New Mexico public utility—they do not have a choice of a service provider. Service areas do not overlap. See *id.* § 62-3-1(B) (all utilities are regulated so as to provide service "without unnecessary duplication and economic waste").

160. Rural electric cooperative members pay some of New Mexico's highest utility rates. See Michael G. Murphy, *Electric Co-op Merger Stalls*, ALBUQ. J., October 24, 1997, at B4.

161. See *Schein*, 122 N.M. at 803-04, 932 P.2d at 493-94.

162. See *Bill Reno, Inc. v. Rocky Mtn. Ford Dealers' Adver. Ass'n*, 378 P.2d 206 (Colo. 1963); *Sto-Rox Focus on Renewal Neighborhood Corp. v. King*, 398 A.2d 241 (Pa. Commw. Ct. 1979).

163. See *State v. State Cloud Milk Producers' Ass'n*, 273 N.W. 603, 604 (Minn. 1937) (non-stock cooperative for dairy farmers).

164. See *Davey v. Unifit Corp.*, 585 A.2d 858 (N.H. 1991) (public utility, shares issued).

Managers of New Mexico business corporations and those shareholders who have a serious economic stake in the continued well-being of their enterprise may worry that they might find the contents of the corporation's books and records spread across the pages of a local paper. The *Schein* opinion does little to allay those fears. Concerned parties should nonetheless strive to restrict *Schein* to its facts. A business corporation facing the threat of publication of records at the hands of a shareholder should, and can, compellingly point to NORA's status as a public utility. The company should point out that a corporation whose purpose is to make money for shareholders is much more subject to harm by publication than NORA. The readership of the local newspaper in which Schein wanted to publish her findings almost certainly consisted of many other cooperative members who, like Schein, obtained their power from NORA. Publication in the town paper would therefore be an effective means of reaching many members quickly. However, as the number of members or shareholders dwindles to a figure more like that of a closely held corporation, publication of corporate information in a widely circulated community paper becomes much less appropriate. To publish sensitive information for a large number of non-members or non-shareholders raises serious questions of propriety. Publication in such a situation would be more inimical to the interest of the business, and thus, an improper purpose.

New Mexico businesses justifiably may be concerned about "this policy of allowing generous access."¹⁶⁵ Certainly the odds are slim that New Mexico shareholders/journalists, more concerned about their roles as journalists rather than as shareholders with an economic stake in their enterprise, will seize on *Schein* as a way to advance their careers. Inspection cases, however, will arise in other contexts. Yet, *Schein* does not set limits on where the "generous access" ends and an improper purpose begins. True, the court indicated that improper "secondary motives" would defeat access.¹⁶⁶ That still begs the question, which *Schein* does not answer: What is an improper purpose? Other jurisdictions have found, for example, that inspection for curiosity or to second-guess corporate decisions were improper purposes.¹⁶⁷ Another decision indicates that use of a privileged position to obtain financial information and then to disclose such information to others could be a breach of a shareholder's fiduciary duty.¹⁶⁸ When a shareholder hopes to sell information taken from inspection to third parties, inspection will be denied.¹⁶⁹ Several courts have found valuation to be a proper purpose but have expressly limited inspection to documents that would further that purpose.¹⁷⁰ Because the *Schein* court declined to

165. *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 803, 932 P.2d 490, 493 (1997).

166. *Id.* at 805, 932 P.2d at 495.

167. *See Logal v. Inland Steel Indus.*, 568 N.E.2d 152, 155-56 (Ill. App. Ct. 1991).

168. *See Leviton Mfg. Co. v. Blumberg*, 660 N.Y.S.2d 726, 729 (App. Div. 1997) (complaint alleging breach reinstated where requestor was a board member and one of only two total shareholders, passing information to a prospective buyer). *See also Thomas & Betts Corp. v. Leviton Mfg. Co.*, 685 A.2d 702, 709 (Del. Ch. 1995) (disclosure to a third party would be improper where it harms the corporation).

169. *See FLETCHER, supra* note 9, §2226.20, at 416. The reader may question whether this was in fact what happened in *Schein*.

170. *See, e.g., Thomas & Betts Corp. v. Leviton Mfg. Co.*, 685 A.2d 702, 709 (Del. Ch. 1995); *Computer Solutions, Inc. v. Gnaizda*, 633 So.2d 1100, 1101-02 (Fla. Dist. Ct. App. 1994); *Tatko v. Tatko Bros. Slate Co.*, 569 N.Y.S.2d 783, 785-86 (App. Div. 1991).

attribute any of these purposes to Schein, and thus did not label them as improper, when or if the court might do so is uncertain.

The *Schein* decision affects companies and cooperatives in New Mexico in many ways. All parties now understand that corporations must be prepared to disclose. Although parties recognize that disclosure for publication is a proper purpose, *Schein* should be largely restricted to its facts. Unfortunately, courts may not so limit the *Schein* decision. *Schein*, therefore, may send discouraging signals about business development in New Mexico.

VII. CONCLUSION

In *Schein*, the New Mexico Supreme Court defined for the first time what constitutes a "proper purpose" when a shareholder or member requests access to corporate books and records. The court held that a rural electric cooperative member's desire to see a legal bill submitted to the cooperative, and to then publish its contents, constituted a proper purpose. Because the request reasonably related to her position as a cooperative member, and in this instance, would not harm the cooperative, the court granted inspection. Managers and shareholders of New Mexico corporations are now aware of the court's willingness to force inspection. However, while the court's decision helps to define certain proper purposes, it fails to address other potentially improper purposes, thus leaving unanswered questions. Further, the decision to allow publication of inspection information in a newspaper does not sufficiently recognize the target entity's uniquely public nature. Thus, the decision may discourage shareholders and managers alike, especially if the courts prove willing to apply *Schein* broadly to other inspection cases.

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Supreme Court of New Mexico.

Maureen SCHEIN, Plaintiff-Appellee, v. NORTHERN RIO ARRIBA ELECTRIC COOPERATIVE, INC., a New Mexico non-profit corporation, and Emery Maez, Defendants-Appellants.

No. 23333.

Decided: January 16, 1997

Carpenter, Comeau, Maldegen, Nixon & Templeman, Richard N. Carpenter, Michael R. Comeau, Santa Fe, for Defendants-Appellants. Peter J. Holzem, Chama, Rodey, Dickason, Sloan, Akin & Robb, P.A., William S. Dixon, Charles K. Purcell, Albuquerque, for Plaintiff-Appellee.

OPINION

1. Pursuant to Rule 12-102 NMRA 1996, Defendant-Appellant Northern Rio Arriba Electric Cooperative ("NORA"), seeks review of a decision from the First Judicial District Court. At trial, the district court decided in favor of Plaintiff-Appellee, Maureen Schein, granting her mandamus action and requiring that NORA allow Schein access to its legal billing records as a member of NORA. We review two issues on appeal: 1) whether the trial court erred in permitting access to the records, and 2) whether the resulting writ exceeded the permissible scope of mandamus. As to the first issue, we affirm the trial court's decision, holding that the trial court did not err in allowing Schein access to the records. However, regarding the second issue, we reverse the trial court's decision, finding that the writ issued by the court exceeded the permissible scope of mandamus.

I.

2. NORA is a non-profit corporation organized under the Rural Electric Cooperative Act, NMSA 1978, § 62-15-1 (Repl.Pamp.1993). It provides electricity and electric utility service to the public in northern Rio Arriba County and has its principal place of business in Chama, New Mexico. Appellant Emery Maez, is the general manager of NORA.

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3. Schein resides within Rio Arriba County, New Mexico, and within the territorial limits of the area served by NORA. Schein is a member in good standing with NORA and purchases her power from NORA. Schein is also employed by the Rio Grande Sun newspaper, a news periodical published in Espanola, New Mexico, which reports on and serves northern New Mexico. For several years Schein has attended NORA Board meetings. During this time, she has requested and received business information on NORA such as copies of contracts, annual budgets, financial statements, audit reports, vendor invoices, bank statements, reconciliations, check registers, board minutes, expense account information, and management salary data. Some of this information has been used in stories for the Rio Grande Sun.

4. Prior to the current claim, NORA and Schein had disagreed over Schein's access to some of NORA's corporate information. In 1992, Schein brought a mandamus action against NORA seeking access to seven years of financial information which NORA had declined to make available. Schein dismissed the suit when NORA surrendered the documents voluntarily. Subsequently, in 1994, Schein requested copies of NORA's 1994 budget materials. Copies were forthcoming; however, NORA did not include one page of the report in the materials offered. Eventually, Schein obtained the excluded page after her counsel sent a demand letter to NORA's attorney.

5. Also in 1994, Schein sought disclosure of the salary amounts of all NORA employees. NORA refused to reveal the compensation paid to anyone other than the cooperative's management positions. Schein then brought her second mandamus action seeking this payment information and also requesting present and future access to budgetary records. Testimony from the trial indicated that Schein's litigation costs were being covered by the Rio Grande Sun and that the information sought might be published in the Sun if it were deemed newsworthy. The trial court dismissed the mandamus action, reasoning primarily that the salary information, if disseminated, might infringe on the privacy interests of employees of NORA. Nonetheless, the trial court indicated that materials such as financial records, books, and reports should be accessible to Schein.

6. The conflict which eventually led to the current mandamus claim began on February 20, 1995. In a letter sent to Maez, Schein requested copies of certain bills submitted to NORA by the two law firms that had defended NORA in the two prior mandamus proceedings. NORA provided the requested attorney fee bills to Schein in redacted form. The bills disclosed the total amount of fees charged to NORA, but narrative portions of the bills which detailed the services performed and time spent were omitted. When it became apparent that NORA would not release any more information from the bills, Schein filed the current mandamus action against NORA.

7. At a hearing in October of 1995, the trial court examined the redacted information on the bills in camera. At the conclusion of the hearing, the court announced that it would grant the writ and compel disclosure of the withheld portions of the billing statements. It found that the sections were

not protected by privilege. The trial court also adopted the proposed form of the writ which granted Schein access to all NORA books and records in the future upon reasonable request for inspection. Furthermore, the court retained jurisdiction in the event that NORA, in good faith, believes that any item requested in the future should not be disclosed.

8. On appeal, we address two primary issues: 1) whether the trial court erred in permitting Schein access to the specifics of NORA's legal billing statements, and 2) whether the trial court's declaration of continuing jurisdiction over future disputes between the parties exceeded the permissible scope of mandamus. We uphold the trial court's decision permitting access to the redacted portions of NORA's legal bills. However, we reverse the trial court's decision regarding the issued writ, finding it exceeded the permissible scope of mandamus.

II.

9. We find that the trial court correctly granted Schein access to the narrative portions of NORA's legal billing statements because Schein had a proper purpose in requesting the information and the narrative portions sought were not protected by the attorney-client privilege.

A.

10. Schein was not motivated by an improper purpose in requesting the data from NORA's legal billing records. This Court supports a policy which grants generous access to corporate information by shareholders/members. *Schwartzman v. Schwartzman Packing Co.*, 99 N.M. 436, 439, 659 P.2d 888, 891 (1983) (holding that shareholders possess the right, at reasonable times and places, to inspect corporation's books and records for proper purposes). Such a policy recognizes the possessory or membership interests held by these individuals in the corporate entity. 5A William M. Fletcher et al., *Fletcher Cyclopedic of the Law of Corporations* § 2213, at 336 (perm.rev.ed. 1995); see also *William Coale Dev. Co. v. Kennedy*, 121 Ohio St. 582, 586, 170 N.E. 434, 435 (1930) (permitting shareholder access to corporate records and recognizing the shareholder's proprietary interest in the corporation). It also affirms the shareholder's/member's right to know how his agents, the corporation's decision-makers, are conducting the affairs of the organization. *Shaw v. Agri-Mark*, 663 A.2d 464, 467 (Del.1995).

11. Consistent with this policy of allowing generous access, the majority common-law rule, and the rule adopted by this Court, places the burden on the corporation to show improper purpose in denying shareholder access to corporate data. *Fletcher*, supra, § 2253.10, at 535; *Kalanges v. Champlain Valley Exposition, Inc.*, 160 Vt. 644, 632 A.2d 357, 359 (1993); *Curkendall v. United Fed'n of Correction Officers, Inc.*, 107 A.D.2d 935, 483 N.Y.S.2d 872, 873-74 (1985) (finding that nonprofit corporation resisting attempts by shareholder to inspect books has burden to show bad faith and improper purpose on part of party seeking inspection). Placement of the burden of proof in this manner requires that a corporation demonstrate strong and

articulable reasons for denying a shareholder/member access to information regarding his proprietary interests and legitimate concerns. Fletcher, *supra*, § 2213, at 336; see also Kennedy, 170 N.E. at 435.

12. In New Mexico, shareholders have the right to inspect, at reasonable times and places, a corporation's books and records for proper purposes. NMSA 1978, § 53-11-50 (Repl.Pamp.1993); Schwartzman Packing Co., 99 N.M. at 439, 659 P.2d at 891. This right generally extends to members of nonstock, nonprofit corporations. See Fleisher Dev. Corp. v. Home Owners Warranty Corp., 856 F.2d 1529, 1530 (D.C.Cir.1988) (finding that where member of non-stock, for-profit mutual corporation had proper purpose for inspection, he should receive access to corporation's books); Bill Reno, Inc. v. Rocky Mountain Ford Dealers Adver. Ass'n, 151 Colo. 406, 378 P.2d 206, 207 (1963) (stating that member of nonprofit corporation is entitled to information regarding corporation's business activities and has right to inspect corporate books); State v. St. Cloud Milk Producers' Ass'n, 200 Minn. 1, 273 N.W. 603, 605-06 (1937) (upholding corporate records access rights for member of cooperative); cf. Shaw v. Agri-Mark, Inc., 67 F.3d 18, 19 (2d Cir.1995) (*per curiam*).

13. The determination of what constitutes improper purpose in requesting corporate information is an issue of first impression in New Mexico. Accordingly, we look to other jurisdictions which have made judicial determinations of the propriety of shareholder purpose. Furthermore, we look to jurisdictions where decisions of corporate law policy are consistent with a policy of open access for legitimate shareholder concerns. Shareholder access to corporate information should be limited to information reasonably related to the legitimate interests of the shareholder. See, e.g., Davey v. Unifit Corp., 133 N.H. 833, 585 A.2d 858 (1991); Shaw v. Hurst, 135 Pa.Cmwlt. 635, 582 A.2d 87, 89 (1990); Advance Concrete Form v. Accuform, Inc., 158 Wis.2d 334, 462 N.W.2d 271, 275 (App.1990) (finding shareholder's request for information about corporation's investments reasonably germane to status as shareholder). A proper purpose is not harmful to the corporation or its shareholders. Davey, 585 A.2d at 860. A proper purpose can be surmised where the shareholder's purpose in requesting the information bears some reasonable relationship to the interest that the shareholder wants to protect by seeking inspection. Shaw, 663 A.2d at 467. Generally, shareholders are entitled to full information as to the management of the corporation and the manner of expenditure of its funds, and to inspection in order to obtain information. Fletcher, *supra*, § 2223, at 393. A proper purpose can include a desire to place a monetary value on stock interests and to evaluate the conduct of officers and directors. See, e.g., Tatko v. Tatko Bros. Slate Co., 173 A.D.2d 917, 569 N.Y.S.2d 783, 784 (1991) (holding that shareholder seeking to sell his stock had proper purpose in requesting access to corporate records); Uldrich v. Datasport, Inc., 349 N.W.2d 286, 288 (Minn.Ct.App.1984) (allowing shareholder access to corporate records based upon shareholder's good faith concern of potential corporate officer misconduct). Suitable subject matter for proper

shareholder oversight also extends to efforts by the shareholder to determine the value of his stock and to determine the financial condition of the corporation. *Carter v. Wilson Constr. Co.*, 83 N.C.App. 61, 348 S.E.2d 830, 832 (1986). Reasonable purpose can also include inspection of corporate records to ensure that a nonprofit is managed properly. *Sto-Rox Focus on Renewal Neighborhood Corp. v. King*, 40 Pa.Cmwlth. 640, 398 A.2d 241, 243 (1979). The propriety of such access is premised primarily on the rationale that a stockholder has the right to know corporate information that might affect his losses or gains, affecting the shareholder's ability to protect himself. *State ex rel. Kennedy v. Continental Boiler Works, Inc.*, 807 S.W.2d 164, 166 (Mo.Ct.App.1991). In addition, such access allows for discovery and deterrence of abuses by corporate directors and officers. *Guthrie v. Harkness*, 199 U.S. 148, 154-55, 26 S.Ct. 4, 5-6, 50 L.Ed. 130 (1905).

14. In beginning the analysis of this case, we reject NORA's contention that Schein needed to possess some basis for suspecting illegal or improper behavior on the part of NORA to warrant the request for information. Such a proposition would thwart efforts of oversight by shareholders, making abuses of corporate power more likely. Moreover, it would deny owners their proprietary right of monitoring and safeguarding their interests.

15. Schein offered a motive for her desire to obtain access to NORA's legal billing statements that was reasonably related to her role as a member of NORA. Schein argued, and the trial court recognized, three primary purposes for seeking access to the narrative portions of NORA's legal bills: 1) to inform herself of the contents of the bills, 2) to inform other members of the cooperative of the contents, and 3) to notify the general public and members of NORA, through the Rio Grande Sun, about any information in the billing records which might be newsworthy. Schein asserted that her desire to obtain access to the legal records was premised on her desire to investigate the nature and quality of the legal advice given to the cooperative. In addition, Schein contended that she wanted the legal bills so that she might investigate whether NORA's decision-makers were spending resources on over-priced legal representation, information which might be relevant to NORA's capital accounts.

16. Schein's motivation to investigate NORA's use of resources and the nature and quality of the legal advice given to it was reasonably related to her role as a member. Like any business choice, the selection of legal services and a determination of the value of services received are relevant inquiries to a party concerned about his investment in the entity; as a owner of a proprietary interest in NORA, Schein has a legal right to be informed as to the management of the cooperative property by the Board in charge of that property. Such information would indicate whether the legal and financial choices being made by NORA were sound; also, such decisions would directly impact the capital accounts of NORA. Shareholders generally are entitled to monitor the activities of their agents. *Meyer v. Board of*

Managers of Harbor House Condominium Ass'n, 221 Ill.App.3d 742, 164 Ill.Dec. 460, 464, 583 N.E.2d 14, 18 (1991) (allegation that entity was incurring excessive attorney fees established good faith fear that organization was mismanaging its financial matters, establishing a proper purpose to inspect corporate records); cf. Belth v. American Risk & Ins. Ass'n, 141 Wis.2d 65, 413 N.W.2d 654 (App.1987). We find that these grounds are premised upon concerns reasonably related to Schein's role as a member of NORA.

17. As noted previously, in addition to demonstrating a reasonable relationship, the information sought cannot be used for purposes harmful to the corporation or its shareholders. Davey, 585 A.2d at 860. We do not believe that Schein's stated intention of sharing newsworthy information from the bills would be harmful to NORA in this instance. The most probative evidence of the absence of potential for harm stems from the district court's review of the redacted bills. The court found that the bills did not contain any improper or harmful information. Furthermore, we believe that the district court is in a better position to weigh fairly the competing needs and interests of parties affected by the disclosure of corporate documents. Seattle Times v. Rhinehart, 467 U.S. 20, 36, 104 S.Ct. 2199, 2209, 81 L.Ed.2d 17 (1984). For this reason, we are inclined to defer to the district court's ruling regarding the potential for damage to NORA in this instance.

18. We are not willing to hold, as Schein urges, that a shareholder's secondary motives do not matter where that shareholder has demonstrated some proper purpose in requesting corporate information. Instead, this Court recognizes that even where a shareholder has demonstrated a reasonable relationship to his role as shareholder and the information requested, the acquisition of requested data can still be thwarted where the corporation can demonstrate the harmfulness of allowing access. In the present case, however, NORA has failed to demonstrate either that Schein's request was unreasonable or that the information posed potential harm to NORA if made public.

B.

19. Finally, we reject NORA's contention that the redacted information contained in the legal bills is protected by the attorney-client privilege. Under Rule 11-503(A)(4) NMRA 1996:

a communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

Corporate documents that are subject to the attorney-client privilege may be withheld from shareholders. Cf. Riser v. Genuine Parts Co., 150 Ga.App. 502, 258 S.E.2d 184, 186 (1979) (affirming denial of request for attorney's opinions and sheets of data). However, the privilege does not preclude

discovery of the instructions given to the attorney by the client, nor does the privilege bar discovery of the nature and scope of an attorney's authority. *Diversified Dev. & Inv., Inc. v. Heil*, 119 N.M. 290, 296, 889 P.2d 1212, 1218 (1995).

20. Furthermore, we agree with Schein's contention that despite testimony by NORA officials that the billing information was "sensitive" and "intended to be confidential," the information requested falls outside of the attorney-client privilege. Information about the purpose for which an attorney is retained or the steps an attorney took in fulfilling his obligations are not protected. *Colton v. United States*, 306 F.2d 633, 636 (2d Cir.1962) (no privilege where date and general nature of legal services performed by attorney is sought); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 603 (N.D.Tex.1981). Inquiries into the general nature of legal services provided do not violate the attorney-client privilege because they involve no confidential information. *Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 707 (S.D.N.Y.1979); see also *Cohen v. Uniroyal, Inc.*, 80 F.R.D. 480, 483 (E.D.Pa.1978) (finding that privilege does not attach where documents reveal only dates that services were rendered, time allotted, and nature of work performed). Appellant contends that under the statute, testimony by NORA officials that the redacted information was considered sensitive warrants granting it privileged status. However, this interpretation goes against the weight of case law which does not protect all types of ministerial information associated with legal communication, such as the information requested here. Furthermore, the trial court examined the redacted information in camera and found no indicia of confidentiality. Finally, if this Court allowed the information here to be shielded by the privilege merely because NORA officials stated that it was sensitive, it would allow organizations to protect any type of data from outside access by making a bald assertion of its intended private nature. We believe that some further showing of the data's confidentiality is necessary. NORA failed to convince the trial court of the sensitive nature of the information, and we are inclined to agree with their assessment. For these reasons, we hold that the requested information was not sought for an improper purpose, nor was it protected by the attorney-client privilege.

III.

21. The second issue on appeal involves whether the writ issued by the trial court exceeded the permissible scope of mandamus. The writ grants Schein and other NORA members access to NORA documents in the future on a "prompt and reasonable basis" following a reasonable request. NORA contends that mandamus is not an appropriate remedy for compelling performance of a future duty. Additionally, NORA argues that the writ is ambiguously phrased and puts the cooperative at an unreasonable risk of receiving a contempt citation whenever it seeks to withhold production of requested information on the basis of privilege or other confidentiality considerations. We agree. Therefore, we reverse the trial court's decision

and limit the scope of the writ of mandamus to the information in the immediate dispute only.

22. Other jurisdictions have conclusively held that mandamus is unsuited to compel the performance of a future duty. See, e.g., *Barnhart v. Bertron*, 356 S.W.2d 390 (Tex.Civ.App.1962); see also *Cleveland v. County of Jack*, 802 S.W.2d 906, 908 (Tex.App.1991) (procedural difficulties in having to appear before court with respect to alleged successive failures to perform does not justify continuing writ of mandamus). Where a duty to perform is not yet due, it cannot be subject to a writ. *Id.* Relevant rights and duties must be established before a writ of mandamus can issue. *Boards of Edu. of Sch. Districts, Etc. v. Cronin*, 54 Ill.App.3d 584, 12 Ill.Dec. 396, 398, 370 N.E.2d 19, 21 (1977).

23. In accordance with these principles, we find that the writ issued by the district court exceeded the permissible scope of mandamus, and therefore, we limit the reach of the writ in this instance to the information requested from NORA's legal billing records. In the writ's present form, NORA's duty to produce information to Schein arises when she makes a "reasonable request." As such, the writ has potential application to documents that are not in existence at this time, and this could involve information about parties that are not even NORA members at the present. Such a situation necessarily would involve rights and duties that have not yet been established. They are not part of the permissible scope of mandamus but were included in this particular writ.

24. Schein cites *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 798-99, 568 P.2d 1236, 1244-45 (1977), for the contention that mandamus under New Mexico law affords a broader remedy than is permitted in other jurisdictions. Appellee uses the case to suggest that mandamus is appropriate for compelling performance of a future duty. Appellee's reliance is incorrect. *Alarid* involved a student newspaper reporter at a university who sought an alternative writ of mandamus permitting him access to the university's nonacademic staff personnel records. *Id.* at 792, 568 P.2d at 1238. The trial court quashed the writ because it was overly broad in the information sought, seeking access to all personnel records with no recognition of statutory exemptions. *Id.* This Court held on review that the trial court should not have denied the petitioner all access to the records but only to confidential files. *Id.* at 799, 568 P.2d at 1245. Thus, the mandamus action was permitted but it was limited in scope. We do not agree with Schein that *Alarid* suggests that mandamus is appropriate for compelling performance of future duties. On the contrary, *Alarid* suggests that mandamus should be narrowly tailored.

25. Schein also urges this Court to allow for prospective access to NORA information for the sake of judicial efficiency and because of NORA's alleged history of denying access to information sought by Schein. However, we do not find arguments of judicial economy or of NORA's alleged intransigence compelling in this instance. Nor do we believe that either of these

arguments, without more, should overshadow the significant body of case law limiting mandamus to actions compelling present duties. Therefore, we find that the writ issued exceeded the permissible scope of mandamus, and we limit the writ to the information requested by Schein involving the legal billing records requested in this instance.

IV.

26. In conclusion, we hold that access to NORA's legal billing statements was properly granted. However, we also find that the district court's writ exceeded the permissible scope of mandamus. We therefore limit the scope of the writ to allow for access by the Appellee to only the information contained in the redacted portions of the legal bills in question.

27. IT IS SO ORDERED.

BACA, Justice.

FRANCHINI, C.J., and RANSOM, J., concur.

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APPENDIX A-3

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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

LARRY COSTELLO AND CHRISTY
COSTELLO,

Plaintiffs,

vs.

TANNER ELECTRIC COOPERATIVE,

Defendant.

No. 13-2-18595-4 SEA

**PLAINTIFFS' MOTION FOR
RECONSIDERATION ON SUMMARY
JUDGMENT OF DEFENDANT'S
COUNTERCLAIMS**

RELIEF REQUESTED

Pursuant with CR59, Plaintiffs ("Costellos") file this Motion for Reconsideration of the Court's ruling regarding Defendant's (Tanner) Motion for Summary Judgment on Defendant's Counterclaims and rely on the Declaration of Larry Costello ("Costello Declaration")¹ in support. For the following reasons, the amount of Tanner's counterclaim award should be changed to \$26.04 which includes \$10.48 in pre-judgment interest. The facts show that due to mathematical errors, the judgment amount of \$45.70 is not correct.

¹ Declaration of Larry Costello in Support of Plaintiff's Motion for Reconsideration, December 19, 2014.

PLAINTIFFS' MOTION FOR RECONSIDERATION
ON SUMMARY JUDGMENT OF DEFENDANT'S
COUNTERCLAIMS

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STATEMENT OF FACTS

1. Judgment in favor of Defendant’s Motion resulted in a counterclaim award of \$45.70 which includes \$11.87 in pre-judgment interest.

2. Plaintiff’s Opposition pleadings argued that due to energy overcharge as well as computational error, Defendant’s counterclaim amount was not viable.

3. Isolating only the computational and mathematical errors, Plaintiff’s have demonstrated that the Defendants determination of its counterclaim amount is flawed (Costello Declaration at ¶¶ 2, 4). *Plaintiffs have determined that the correct amount is \$26.04 which includes \$10.48 in pre-judgment interest.*

4. Plaintiff’s are requesting the Court to reconsider the judgment amount based on these findings.

STATEMENT OF ISSUES

Whether the calculation of the \$45.70 judgment is mathematically correct.

EVIDENCE RELIED UPON

- 1. Declaration of Larry Costello.
- 2. Defendant’s Motion for Summary Judgment, Supplemental Declaration of Rob

Carr.

1 **AUTHORITY**

2 Court Rule CR 59(a) provides that a Motion for Reconsideration may be granted to the
3 party aggrieved for any one of the following causes materially affecting the substantial rights
4 of such parties: Specifically, CR 59(a)(6) provides that reconsideration is warranted when:

5 Error in the assessment of the *amount of recovery whether too large or too*
6 *small*, when the action is upon a contract, or for the injury or detention of
property; (emphasis supplied).

7 Furthermore, CR 59(a)(7) provides:

8 That there is no evidence or reasonable inference from the evidence to justify
9 the verdict or the decision, or that it is contrary to law;

10 Even after giving effect to the Court’s determination as to the appropriateness of
11 Tanner’s rates, Plaintiffs ask the Court to revisit the mathematical correctness of the judgment
12 amount. It is perhaps best to reiterate here the Court’s finding during oral argument as to the
13 varying standards of review when it comes to “rates” vis à vis “billing”. With the Court
14 finding that rates use the higher arbitrary and capricious standard when it comes to “rates” but
15 recognizing the usual lower standard in civil matters of preponderance of evidence when it
16 comes to the correctness of “billing”.

17 With that in mind, Plaintiffs ask the Court to revisit the mathematical correctness of its
18 determination that the Defendant was entitled to a judgment of \$45.70. Rather, it is
19 mathematically incontrovertible that the most that can be awarded accepting the logic of
20 Tanner is \$26.04. While normally it would be expected that such a small error would be
21 insignificant and not worthy of further litigation, because Tanner has made an offer to settle
22 of \$30, a reduction of an award below that amount would frustrate the operation of RCW
23 4.84.250 and RCW 4.84.280. See *Exhibit 1* attached to this Motion where Tanner offers to

1 settle their three counterclaims (opt-out fee, late fee, pre-judgment interest) for \$10 each for a
2 total of \$30. In other words, the reduction of the judgment below \$30 could significantly alter
3 Plaintiff's responsibility for attorney's fees incurred by Tanner pursuing its counterclaims. It
4 is the potential liability for attorney's fees that is Plaintiff's substantial right which should be
5 protected from error not the several dollars in the erroneous judgment.²

6 The decision to consider new or additional evidence presented with a motion for
7 reconsideration is squarely within the trial court's discretion. *Chen v. State*, 86 Wash.App. 183
8 at 192, 937 P.2d 612 (1997). " 'In the context of summary judgment, unlike in a trial, there is
9 no prejudice if the court considers additional facts on reconsideration.' " *August v. U.S.*
10 *Bancorp*, 146 Wash.App. 328, 347, 190 P.3d 86 (2008) (quoting *Chen*, 86 Wash.App. at 192,
11 937 P.2d 612). Generally, nothing in CR 59 prohibits the submission of new or additional
12 materials on reconsideration. *Chen*, 86 Wash.App. at 192, 937 P.2d 612.

13 In the instant matter it is demonstrable that the spreadsheet used by Tanner is
14 mathematically incorrect (Costello Declaration at ¶¶ 2, 4). This can most clearly be seen
15 when examining Tanner's analysis in *Exhibit A*. There, the late fees which are supposed to
16 be 5% of the arrearage are simply not correctly calculated. For example, looking at the values
17 for September 2013 the claimed arrearage is \$24.87. The late fee for that month applied in
18 October 2013 is \$2.41 which is NOT 5% of the arrearage, but 9.7%. See the Costello
19 Declaration attached to the instant motion detailing the other mathematical errors in Tanner's
20
21

22 ² It should be noted, however, that Plaintiffs contend that these errors are more evidence supportive of the
23 shoddy billing processes that they have been asserting throughout this case and Plaintiffs hereby assert that the
instant motion provides sufficient factual basis to reverse the Court's award of summary judgment on the
counterclaims and that, at a minimum, factual disputes exist which require trial.

1 billing. When all the mathematical errors are accounted for it turns out that even under
2 Tanner's theory of how the Costellos should be billed, the liability is \$26.04 and not \$45.70.

3
4 **CONCLUSION**

5 Plaintiffs have demonstrated with mathematical certainty that Defendant's
6 counterclaim amount of \$45.70 for "opt-out fee, late fees and pre-judgment interest" was
7 calculated in error. Plaintiffs have provided evidence indicating that the amount of the
8 counterclaim following Defendant's calculation methodology is only \$26.04 which includes
9 \$10.48 in pre-judgment interest. For these reasons, the award of Defendant's counterclaim
10 should be reduced to \$26.04.

11
12 DATED this 19th day of December, 2014.

13
14
15 By: 
16 Larry Costello and Christy Costello
Plaintiffs, pro se

EXHIBIT 1

Larry Costello et al. vs. Tanner Electric Cooperative
King County Superior Court No. 13-2-18595-4 SEA
Plaintiff's Motion for Reconsideration On
Summary Judgment Of Defendant's Counterclaims
December 31, 2014

JOEL C. MERKEL

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November 6, 2014

Mr. Larry Costello
13050 470th Ave. SE
North Bend, WA 98045

Re: Offer of Settlement Pursuant to RCW 4.84.250; King Co. Case No. 13-2-18595-4

Dear Mr. Costello:

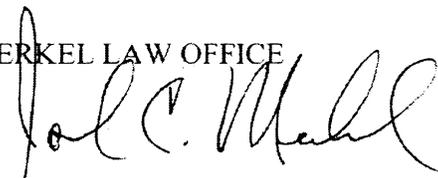
Tanner Electric Cooperative hereby offers to settle its counterclaims against the Plaintiffs, and each of them, in Case No. 13-2-18595-4 for \$10. Tanner's counterclaims include its claim for the monthly "Opt-Out" fee under Tanner's smart meter Opt-Out policy and late fees and pre-judgment interest due through November 2014. This offer is made pursuant to RCW 4.84.250--290 and has not been filed with the Superior Court. If the Plaintiffs decline this offer and Tanner is successful in this litigation, Tanner will ask the Court for an award of reasonable attorney's fees against the Plaintiffs pursuant to RCW 4.84.250.

This offer is intended to fully settle and resolve Tanner's counterclaims as described above. This includes the Plaintiffs assertion of the right to a refund of the monthly "Opt-Out" charges, which Plaintiffs initially refused to pay, but subsequently paid under "protest." The Opt-Out payments that were paid "under protest," and the late fees and interest together total somewhat over \$500. Tanner has no other counterclaims.

For the avoidance of doubt, this offer of settlement does not include settlement of Tanner's claim for attorney's fees under RCW 4.84.250, which Tanner will pursue if Plaintiffs decline to accept this settlement offer. Nor does this offer include settlement of Tanner's other claims for court costs or attorney's fees under other provisions of RCW 4.84, the Membership Agreement, and/or under the Superior Court rules, all of which are expressly preserved, and which Tanner will pursue at the conclusion of this litigation regardless of whether this offer is accepted.

Sincerely,

MERKEL LAW OFFICE



Joel C. Merkel

JCM:sm

Seattle

FILED

14 DEC 19 PM 12:39

Judge Timothy A. Bradshaw
Date of Hearing: December 31, 2014
Without Oral Argument

CASE NUMBER: 13-2-18595-4 SEA

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

LARRY COSTELLO AND CHRISTY
COSTELLO,

No. 13-2-18595-4 SEA

Plaintiffs,

**DECLARATION OF LARRY
COSTELLO IN SUPPORT OF
PLAINTIFF'S MOTION FOR
RECONSIDERATION**

vs.

TANNER ELECTRIC COOPERATIVE,

Defendant.

I, Larry Costello, declare as follows pursuant to GR 13 and RCW 9A.72.085:

1. I am providing this declaration in order to describe my evaluation of the Defendant's calculations which were provided as evidence to support Defendant's counterclaims for the opt-out fee, late fees, and prejudgment interest in the amount of \$45.70 (*Exhibit A*).¹

2. In my previous Declaration², I presented from the billing records that Defendant's determination of its counterclaims was flawed due to energy overcharge and computational error. Although the Court has ruled in favor of the Defendant's Motion, *the analysis used by the Defendants to determine its claim is flawed strictly from a computational standpoint*. With regard to the claim amount, I have identified several mathematical errors

¹ Supplemental Declaration of Rob Carr in Support of Defendant's Motion on Counterclaims, December 8, 2014 - Exhibit 1.

² Declaration of Larry Costello in Support of Plaintiff's Opposition to Defendant's Motion on Counterclaims, December 1, 2014 at ¶¶11-13.

Larry and Christy Costello, Pro Se
13050 470th Ave. SE
North Bend, WA 98045
(425) 922-6529
LC59@comcast.net

DECLARATION OF LARRY COSTELLO
IN SUPPORT OF PLAINTIFF'S MOTION FOR
RECONSIDERATION

1 resulting in the claim totaling only \$26.04 which includes \$10.48 in interest. Details of the
2 analysis are presented in *Exhibit B*.

3 3. Additionally, Defendants have confirmed that there is a discrepancy between its
4 billing statement to us and the claim amount as indicated in the email exchange between myself
5 and Defendant's attorney, Mr. Joel Merkel (*Exhibit C*). These ongoing billing discrepancies
6 have frustrated my ability to determine the correct amount to be paid in order to settle any
7 legitimate obligations.

8 4. The computational errors with the claim amount consist of :

- 9 a. **Late fees being miscalculated.** Beginning September 2013 as indicated in *Exhibit A*, the
10 late fees reported in Defendant's analysis do not correlate with the corresponding arrearage
11 and 5% late fee rate. Using a correct application of Tanner's rates and computational
12 methodology, the true calculation of late fees is shown in *Exhibit B*.
- 13 b. **Miscalculation of energy charge in the August 2013 billing.** Based on Defendant's billing
14 statement (*Exhibit D*), the billed energy for August 2013 was \$77.90, which at a rate of
15 0.0998/kW-hr., corresponds to 780.6 kW-hrs. However, the meter readings reported by
16 Tanner on the bill (Previous = 31890; Present = 32634) correspond to energy usage of 744
17 kW-hrs. This difference of 36.6kW-hrs. represents a \$3.65 computational overcharge
18 relative to the meter readings Tanner made; otherwise, the "Present" meter reading would
19 need to be 32670.6. The following month for September 2013, Tanner charged for energy
20 using the value 32634 as the "Previous" reading. This indicates that Tanner double charged
21 by \$3.65 since in August it had already charged to a meter value of 32670.6. Defendant's
22 analysis is flawed due to mathematical error.

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I declare under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct and was executed by me this 19th day of December, 2014 at North Bend, Washington.



Larry Costello

DECLARATION OF LARRY COSTELLO
IN SUPPORT OF PLAINTIFF'S MOTION FOR
RECONSIDERATION

Larry and Christy Costello, Pro Se
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EXHIBIT A

Larry Costello et al. vs. Tanner Electric Cooperative
King County Superior Court No. 13-2-18595-4 SEA
Plaintiff's Motion for Reconsideration On
Summary Judgment Of Defendant's Counterclaims
December 31, 2014

	AMOUNTS TANNER BILLED					AMOUNT PAID BY COSTELLOS	MONTHLY DIFFERENCE	ARREARAGE THROUGH CURRENT MONTH	Interest @ 1% per month on Arrearage
	Energy Bill								
	(using budget billing)	Smart Meter Opt out Fee	Late Fees	Facility Charge	TOTAL				
Feb-13	\$ 120.75	\$ 23.33	\$ -	\$ 17.05	\$ 161.13	\$ 137.80	\$ 23.33	\$ 23.33	
Mar-13	\$ 114.67	\$ 23.33		\$ 17.05	\$ 155.05	\$ 131.72	\$ 23.33	\$ 46.66	\$ 0.47
Apr-13	\$ 117.71	\$ 23.33		\$ 17.05	\$ 158.09	\$ 127.44	\$ 30.65	\$ 77.31	\$ 0.77
May-13	\$ 27.06	\$ 23.33		\$ 17.05	\$ 67.44	\$ 51.44	\$ 16.00	\$ 93.31	\$ 0.93
Jun-13	\$ 72.39	\$ 23.33	\$ 4.67	\$ 17.05	\$ 117.44	\$ 89.44	\$ 28.00	\$ 121.31	\$ 1.21
Jul-13	\$ 52.30	\$ 23.33	\$ 6.07	\$ 17.05	\$ 98.75	\$ 69.35	\$ 29.40	\$ 150.71	\$ 1.51
Aug-13	\$ 77.90	\$ 23.33	\$ 7.54	\$ 17.05	\$ 125.82	\$ 91.30	\$ 34.52	\$ 185.23	\$ 1.85
Sep-13	\$ 127.44	\$ 23.33	\$ 8.22	\$ 17.05	\$ 176.04	\$ 336.40	\$ (160.36)	\$ 24.87	\$ 0.25
Oct-13	\$ 165.07	\$ 23.33	\$ 2.41	\$ 17.05	\$ 207.86	\$ 131.40	\$ 76.46	\$ 101.33	\$ 1.01
Nov-13	\$ (55.60)	\$ 23.33	\$ 6.23	\$ 17.05	\$ (8.99)	\$ 76.91	\$ (85.90)	\$ 15.43	\$ 0.15
Dec-13	\$ 54.79	\$ 23.33	\$ 0.77	\$ 17.05	\$ 95.94	\$ 95.17	\$ 0.77	\$ 16.20	\$ 0.16
Jan-14	\$ -	\$ 23.33	\$ 1.98	\$ 17.05	\$ 42.36	\$ 40.38	\$ 1.98	\$ 18.18	\$ 0.18
Feb-14	\$ 242.00	\$ 23.33	\$ 0.91	\$ 17.05	\$ 283.29	\$ 282.40	\$ 0.89	\$ 19.07	\$ 0.19
Mar-14	\$ 121.06	\$ 23.33	\$ 0.95	\$ 17.05	\$ 162.39	\$ 161.44	\$ 0.95	\$ 20.02	\$ 0.20
Apr-14	\$ 181.54	\$ 23.33	\$ 2.17	\$ 17.05	\$ 224.09	\$ 132.70	\$ 91.39	\$ 111.41	\$ 1.11
May-14	\$ (58.28)	\$ 23.33	\$ 6.74	\$ 17.05	\$ (11.16)	\$ 71.32	\$ (82.48)	\$ 28.93	\$ 0.29
Jun-14	\$ 61.88	\$ 23.33	\$ 1.45	\$ 17.05	\$ 103.71	\$ 102.06	\$ 1.65	\$ 30.58	\$ 0.31
Jul-14	\$ 1.70	\$ 23.33	\$ 2.69	\$ 19.50	\$ 47.22	\$ 44.53	\$ 2.69	\$ 33.27	\$ 0.33
Aug-14	\$ 31.74	\$ 23.33	\$ 1.65	\$ 19.50	\$ 76.22	\$ 81.24	\$ (5.02)	\$ 28.25	\$ 0.28
Sep-14	\$ 179.44	\$ 30.00	\$ 2.56	\$ 19.50	\$ 231.50	\$ 228.94	\$ 2.56	\$ 30.81	\$ 0.31
Oct-14	\$ 105.58	\$ 30.00	\$ 3.03	\$ 19.50	\$ 158.11	\$ 155.09	\$ 3.02	\$ 33.83	\$ 0.34
							<u>\$ 33.83</u>		<u>\$ 11.87</u>

A

B

A \$ 3.65 COMPUTATIONAL ERROR AUGUST 2013 FOR ENERGY BILL

B LATE FEES MISCALCULATED FROM SEPTEMBER 2013 ON

EXHIBIT B

Larry Costello et al. vs. Tanner Electric Cooperative
King County Superior Court No. 13-2-18595-4 SEA
Plaintiff's Motion for Reconsideration On
Summary Judgment Of Defendant's Counterclaims
December 31, 2014

Month	Energy	Opt-out	Late Fee	Facility	Total	Paid	Monthly Difference	Arrearage	Interest
Feb-13	\$120.75	\$23.33		\$17.05	\$161.13	\$137.80	\$23.33	\$23.33	
Mar-13	\$114.67	\$23.33		\$17.05	\$155.05	\$131.72	\$23.33	\$46.66	\$0.47
Apr-13	\$117.71	\$23.33		\$17.05	\$158.09	\$127.44	\$30.65	\$77.31	\$0.77
May-13	\$27.06	\$23.33		\$17.05	\$67.44	\$51.44	\$16.00	\$93.31	\$0.93
Jun-13	\$72.39	\$23.33	\$4.67	\$17.05	\$117.44	\$89.44	\$28.00	\$121.31	\$1.21
Jul-13	\$52.30	\$23.33	\$6.07	\$17.05	\$98.75	\$69.35	\$29.40	\$150.70	\$1.51
Aug-13		\$23.33	\$7.54	\$17.05	\$122.17	\$91.30	\$30.87	\$181.57	\$1.82
Sep-13	\$127.44	\$23.33	\$9.08	\$17.05	\$176.90	\$336.40	-\$159.50	\$22.06	\$0.22
Oct-13	\$165.07	\$23.33	\$1.10	\$17.05	\$206.55	\$131.40	\$75.15	\$97.22	\$0.97
Nov-13	-\$55.60	\$23.33	\$4.86	\$17.05	-\$10.36	\$76.91	-\$87.27	\$9.95	\$0.10
Dec-13	\$54.79	\$23.33	\$0.50	\$17.05	\$95.67	\$95.17	\$0.50	\$10.45	\$0.10
Jan-14	\$0.00	\$23.33	\$0.52	\$17.05	\$40.90	\$40.38	\$0.52	\$10.97	\$0.11
Feb-14	\$242.00	\$23.33	\$0.55	\$17.05	\$282.93	\$282.40	\$0.53	\$11.50	\$0.11
Mar-14	\$121.06	\$23.33	\$0.57	\$17.05	\$162.01	\$161.44	\$0.57	\$12.07	\$0.12
Apr-14	\$181.54	\$23.33	\$0.60	\$17.05	\$222.52	\$132.70	\$89.82	\$101.89	\$1.02
May-14	-\$58.28	\$23.33	\$5.09	\$17.05	-\$12.81	\$71.32	-\$84.13	\$17.77	\$0.18
Jun-14	\$61.88	\$23.33	\$0.89	\$17.05	\$103.15	\$102.06	\$1.09	\$18.86	\$0.19
Jul-14	\$1.70	\$23.33	\$0.94	\$19.50	\$45.47	\$44.53	\$0.94	\$19.80	\$0.20
Aug-14	\$31.74	\$23.33	\$0.99	\$19.50	\$75.56	\$81.24	-\$5.68	\$14.12	\$0.14
Sep-14	\$179.44	\$30.00	\$0.71	\$19.50	\$229.65	\$228.94	\$0.71	\$14.83	\$0.15
Oct-14	\$105.58	\$30.00	\$0.74	\$19.50	\$155.82	\$155.09	\$0.73	\$15.56	\$0.16
	\$77.90	Billed amount							
		Correct amount				Total			

EXHIBIT C

Larry Costello et al. vs. Tanner Electric Cooperative
King County Superior Court No. 13-2-18595-4 SEA
Plaintiff's Motion for Reconsideration On
Summary Judgment Of Defendant's Counterclaims
December 31, 2014

Larry Costello

Subject: FW: Costello v. Tanner - November 2014 Billing Discrepancy

From: "Joel Merkel" <joel@merkellaw.com>

Date: December 16, 2014 4:00:06 PM PST

To: "Larry Costello" <lc59@comcast.net>

Subject: RE: Costello v. Tanner - November 2014 Billing Discrepancy

Mr. Costello—

I am advised by Tanner that there are several reasons why the amount shown as past due per the 12/2/14 bill does not equate to the amount awarded by the Court through October (i.e. the \$45.70). One reason is that amount requested was only through October and did not include the most recent bill for November. Another is that the spreadsheet shows statutory prejudgment interest, which is not included in the billing statement. Another reason is that the cumulative arrearage through the November is based on estimated usage because the last actual read was 9/29/14.

However, I am told that your calculations in paragraphs 2. and 3 of your e-mail are correct as to the amounts owed on the latest bill and that once the payment for the \$45.70 is made along with the current month of \$192, you're your Tanner account would be current as shown on the statement dated 1/1/15. I would note, however, that there will be a small amount of interest (on the \$45.70) shown on the form of Judgment to be presented to the Court; and, as previously noted, any attorney's fee award would be separate from amounts that appear on your monthly statement and would also bear judgment interest.

Joel Merkel

From: Joel Merkel [<mailto:joel@merkellaw.com>]

Sent: Tuesday, December 16, 2014 11:37 AM

To: 'Larry Costello'

Subject: RE: Costello v. Tanner - November 2014 Billing Discrepancy

Mr. Costello—

See comments below:

From: Larry Costello [<mailto:lc59@comcast.net>]

Sent: Monday, December 15, 2014 5:53 AM

To: 'Joel Merkel'

Subject: Costello v. Tanner - November 2014 Billing Discrepancy

Mr. Merkel,

In consideration of the ruling from December 12th there is a discrepancy between Tanner's current billing statement (attached) and the amount the court has ordered be paid (\$45.70). We need to make our billing payment no later than December 15th, but the amount on the billing statement (\$66.82) regarding disputed charges does not correlate to the ordered amount. I propose the following:

1. As a sign of good faith, we will pay the court ordered amount of \$45.70 on December 15th provided you provide us with a receipt that the judgment is satisfied and it is agreed that such payment in no way is construed as a waiver of any right of appeal. For these reasons we propose to pay this to you for conveyance to Tanner. Please confirm the name of the payee for issuance of the check.

There are several matters that still need to be resolved which I would hope that we could agree on without having to ask the Court to intervene.

- Although Tanner's 4 motions for partial summary judgment have been granted and your motions for summary judgment have been denied, no formal "Judgment" has been entered as required by RCW 4.64.030. I will be drafting a form of "Judgment" in the next few days following the format required by the statute. I will forward that to you for review I would hope that we can agree on the form of the Judgment for submittal to the Court. The Judgment is intended to simply reflect what the Court has done. Your agreement to the form of the Judgment does not mean that you agree with the substance of the Court's rulings or preclude your right to appeal. You may wish to consult with your legal advisor about this.
- As no claims remain to be resolved in this case, an order striking the trial date needs to be entered. Again, I will draft an order and provide it to you for review before submitting it to the Court.
- Tanner intends to file a motion for attorney's fees and costs. I do not expect that you will agree with that; however, perhaps we could agree on a schedule for filing and briefing such a motion.
- Tanner has no reason to object to your proposed payment of the \$45.70, consistent with the Court's decision last Friday, as a full payment of the amount due on your account through October 31, 2014. I don't believe there has ever been an issue regarding Tanner crediting your account with any payments that you have made, but if you want a receipt, I will ask Tanner to give you one. For purposes of future bills, I believe it would be helpful to have your agreement not to continue your practice of rewriting your Tanner bills in the future months to delete charges which the court has ruled are appropriate, including Tanner's Opt-Out fee, energy charges under its estimated billing procedure, its late fee (if there are arrearages) and the application of statutory interest to any arrearages. If you elect to appeal, I assume that the appropriateness of the trial court's ruling on all of those charges would be part of your appeal and those charges would be subject to revision based on the outcome of the appeal.
- I do not believe that payment of your Tanner bill in accordance with the Court's rulings would preclude you from appealing the Court's rulings. Tanner will not claim that compliance with the Court's order by paying your bills during the pendency of an appeal is a waiver of your right to appeal the court's rulings.
- I will ask Tanner to explain why the Prior Balance is shown as \$63.84 on the November bill as compared to the \$45.70 which was shown on Mr. Carr's Supplemental Declaration as the amount due through October. There was probably some additional late fee and interest that got added to the November bill as you did not pay the October bill in full by November 20 when it was due, however, at the moment I don't have, but will get, an explanation as to why the Prior Balance shown on the November bill is greater than \$45.70. In any case, Tanner will abide by the Court's ruling that only \$45.70 was due through October.
- I am not sure that it makes sense to "satisfy" a judgment that is being appealed. I assume that if you appeal, you will contest that the summary judgment order for \$47.50 through October 2014 is correct. It seems inconsistent to satisfy a

judgment that is being challenged on appeal. Moreover, a full satisfaction would need to include payment of any attorney's fees that may be awarded. It is possible to file "partial" satisfactions of a judgment and perhaps that could be done subject to the results of any appeal.

2. The balance of the bill for facility charge (\$19.50), energy charge (\$142.51), and manual meter read (\$30.00) totaling \$192.01 will be paid to Tanner's billing.
 - I am hesitant to interpret the bill myself. I will ask Tanner to respond to this question.
3. The payments from items 1 and 2 above totaling \$237.71 are payment in full for all obligations Tanner is claiming and owed in accordance with the court's ruling and the current billing statement.
 - Same as above.
4. You will coordinate with Tanner as necessary to reconcile their billing records to reflect these arrangements and payments.
 - I will be able to perform an intermediary function necessary to reach agreement on any reconciliation that may be needed on the billing records.

Please confirm no later than close of business December 17, 2014 that you agree to these arrangements or provide alternate satisfactory arrangements. Otherwise, we will file a Motion to Reconsider or a Motion for Clarification seeking the Courts assistance to remedy the discrepancy.

Thank you.

Larry Costello, PE
13050 470th Ave. SE
North Bend, WA 98045
425-922-6529
LC59@comcast.net

EXHIBIT D

Larry Costello et al. vs. Tanner Electric Cooperative
King County Superior Court No. 13-2-18595-4 SEA
Plaintiff's Motion for Reconsideration On
Summary Judgment Of Defendant's Counterclaims
December 31, 2014

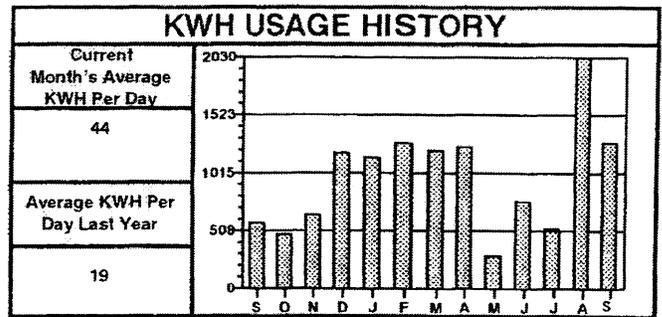
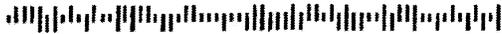


TANNER ELECTRIC
 Cooperative
 PO Box 1426
 North Bend, WA 98045-1426
 A Touchstone Energy® Cooperative

Billing Date: 10/01/2013

1802 1 AV 0.360
 LARRY COSTELLO
 CHRISTY COSTELLO
 PO BOX 1669
 NORTH BEND WA 98045-1669

4 1802
 C-6 P-6



Avg Temp° This Year: 65 Last Year: 61

OFFICE LOCATION: 45710 SE North Bend Way, North Bend
 OFFICE HOURS: 7:30 a.m. - 4:30 p.m. Monday - Friday
 24-hour secure payment drop box available.
 24-hour Emergency Service
 PHONE: 425-888-0623 or 800-472-0208
 Visit us at www.tannerelectric.coop

NO PREPAY

ACCOUNT NUMBER		TELEPHONE		POLE #		SERVICE ADDRESS	
26045000		(425) 888-6010		2X28L46RU20L6		13050 470TH AVE SE	
SERVICE INFORMATION				READING		USAGE	
METER #	FROM	TO	DAYS	PREVIOUS	PRESENT	MULT	KWH
96262249	08/27/2013	09/26/2013 10-14-13	29	32634	32911 EST 33730 ACTUAL	1.0	1277 1096
Activity Since Last Bill			\$ Amount		Current Bill Information		\$ Amount
Previous Balance			# 91.30 299.86		BALANCE FORWARD		(A) 288.56
Payments			91.30 CR		FACILITY CHARGE		17.05
Adjustments			0.00		ENERGY		1277.6 KWH @ .099800 \$ 109.38
Balance Prior to this Billing			299.86		LATE CHARGE		(A) 8.22
Payments made after the 24th of the month may not be reflected on this bill.					MANUEL METER READ		23.35
MONTHLY NOTICES				Account is Past Due. Past Due amounts should be paid immediately to prevent possible disconnection.			
YOUR CAPITAL CREDIT ALLOCATION FOR 2012 IS \$221.15. ENDING UNRETIRED BALANCE IS \$993.84.				ACCOUNT IS CURRENT - PAID IN FULL (A) ERRONEOUS CHARGE NOT PAID			
				PROBATED BILL			
				Amount Due Upon Receipt			
				Amount Due after 10/20/2013			

Retain top portion for your records and return bottom portion with your payment.



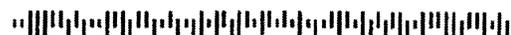
TANNER ELECTRIC
 Cooperative
 PO Box 1426
 North Bend, WA 98045-1426

LARRY COSTELLO
 CHRISTY COSTELLO
 PO BOX 1669
 NORTH BEND WA 98045-1669

ACCOUNT NUMBER:	26045000
Amount Due Upon Receipt	384.00
Amount Due after 10/20/2013	400.04
AMOUNT PAID	\$ 126.43



Tanner Electric Cooperative
 PO Box 1426
 North Bend, WA 98045-1426 01



MORE INFORMATION ON BACK

Check One:

Visa MasterCard Every Month

Account Number:

Expiration Date: Signature: _____

Phone Number:

Please make any address corrections on the back.

FILED

14 DEC 01 PM 1:10

Judge Timothy A. Bradshaw

Date of Hearing: December 12, 2014

KING COUNTY
SUPERIOR COURT CLERK

Time: 9:00 am

E-FILED

With Oral Argument

CASE NUMBER: 13-2-18595-4 SEA

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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

LARRY COSTELLO AND CHRISTY
COSTELLO,

Plaintiffs,

vs.

TANNER ELECTRIC COOPERATIVE,

Defendant.

No. 13-2-18595-4 SEA

**DECLARATION OF LARRY
COSTELLO IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION ON
COUNTERCLAIMS**

I, Larry Costello, declare as follows pursuant to GR 13 and RCW 9A.72.085:

1. I am providing this declaration in order to describe my actions regarding:
 - a. Tanner's application of an "opt-out" fee concerning its decision to implement smart meters,
 - b. Payment of Tanner's monthly billings.

2. I stand by my previous Declarations filed and incorporate their entire content herein for reference.¹

¹ Declaration of Larry Costello in Support of Plaintiff's Motion to Dismiss Defendant's Counterclaims, August 15, 2014; Second Declaration of Larry Costello in Support of Plaintiff's Motion to Dismiss Defendant's Counterclaims, September 8, 2014; Declaration of Larry Costello in Support of Plaintiff's Opposition to Defendant's Motion, March 10, 2014; Declaration of Larry Costello in Support of Motion for PSJ, October 18, 2013; Second Declaration of Larry Costello in Support of Motion for PSJ, November 11, 2013.

DECLARATION OF LARRY COSTELLO
IN SUPPORT OF PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION

Larry and Christy Costello, Pro Se
13050 470th Ave. SE
North Bend, WA 98045
(425) 922-6529
LC59@comcast.net

1 3. In March 2012, I learned that Tanner planned on replacing their existing analog
2 electric meters with “smart meters” as part of an Advanced Metering Infrastructure (AMI)
3 modification. Without prior notice, Tanner sent staff to our residence whereby they announced
4 they were going to replace our analog meter with a “smart meter”.

5 4. Given my education and credentials as a Professional Electrical Engineer, I am
6 generally familiar with smart meters, the underlying technology, and the risks they pose to
7 privacy, security, health, and safety. As an expert in electrical power distribution, I am well
8 qualified in stating that smart meters are not needed by the utility to operate, maintain or
9 administer their system – they are purely optional technology. I am well qualified in stating that
10 smart meters will provide me no value, but do pose a risk.

11 5. Given my personal concerns about the smart meter and its potential threat to my
12 and my wife’s privacy, I explicitly objected to and rejected the installation of a smart meter on
13 my home. After objecting to the installation of the smart meter, I communicated with and met
14 with the Tanner’s Board of Directors and management staff on several occasions where I
15 expressed my concerns. Throughout these communications I requested additional information
16 on the smart meter program in order to fully research (1) the business causes(s), if any, that
17 Tanner had for switching to smart meters; (2) whether using smart meters was a proper use of
18 members’ resources; and (3) the cost/benefit considerations Tanner made, if any, given the risks
19 associated with the type of smart meter it opted to use. However, my requests were largely
20 ignored as they continued to be during discovery since filing this lawsuit.

21 6. Since I refused to have the smart meter placed on my home, Tanner has agreed
22 not to install one. However, because of my refusal, Tanner has since required me and my wife to
23

1 pay an additional \$23.33 monthly fee (increased to \$30.00 since September, 2014) allegedly to
2 cover the cost of having a technician read my traditional meter – something that I have done and
3 reported to Tanner every month since we first became cooperative members in 1994 and at no
4 cost to Tanner. During these years of self-reading our meter, Tanner has never provided a
5 reduction in the amount of our monthly bill, or has not offered any other form of adjustment on
6 our bill commensurate with the new fee they are charging us now. Since filing this lawsuit, we
7 have verified through discovery that at least 250 other Tanner members also self read their
8 meters under similar circumstances.²

9 7. The opt-out fee was not established as part of the smart meter program during its
10 origination, but was created under a new “Opt-out Policy” only after we objected to having a
11 smart meter installed on our property. Tanner did not engage members in the development of the
12 Opt-out Policy. Members were not given any opportunity to question, to challenge or to provide
13 comments on the policy and corresponding opt-out fee. Development of the policy was not open
14 and transparent to members. In fact, Tanner has not informed all members about the Opt-out
15 Policy, and based on discovery response, only the Costellos and three other members have been
16 made aware the policy even exists.³ It is clear that Tanner has intentionally withheld information
17 from members.

18 8. Tanner has not provided information demonstrating the basis for the opt-out fee
19 although I have requested that information numerous times including through discovery.
20 Tanner’s explanation for this fee is not supported by fact and their assertion that the fee is

21 _____
22 ² Plaintiff’s MSJ to Dismiss Defendant’s Counterclaims Exhibit E – Supplementary Response to Interrogatory
23 No. 2, Tanner states “However, it is estimated that in 2009 there were approximately 250 members in all three
areas who elected to self-read their meters.”

³ Plaintiff’s Discovery Request No. 1, Request for Production No. 13 and Declarations from members
Boulanger, Milliman, and Snider submitted in previous pleadings.

1 indicated on their fee schedule is false. The reference Tanner makes to their fee schedule is
2 explicit to “Service call for Re-connect” (Exhibit A) which is a completely different service with
3 a different cost structure. Though I have paid this additional monthly fee, I have done so under
4 protest because Tanner has failed to demonstrate the basis for the fee and, although Tanner
5 claims it to be a “cost based charge”, has not provided any details to explain how it is calculated.

6 9. Tanner has notified us that by choosing not to have a smart meter Tanner has
7 deemed us subject to the “Opt-out Policy” and, consequently, we do not receive any of the
8 professed benefits smart meters provide.⁴ Even though Tanner has made it clear we do not
9 receive any benefits from the smart meter system, Tanner has not provided us with any “cost
10 based” adjustment (i.e. – cost of meter, cost of maintenance and operation) to our power bill
11 commensurate with the avoided cost of that service. Not only are we paying for an arbitrary opt-
12 out fee, but we are also paying the same rates and fees as other members to subsidize the capital
13 cost, operation, and maintenance of the smart meter system that we are not using and Tanner has
14 made clear we do not benefit from.

15 10. Tanner shut down further discussion with me in its January 29, 2013 letter
16 without having responded to our requests for information and without addressing our concerns.⁵
17 It was at that time that Tanner deemed us subject to the Opt-out Policy, began billing us the
18 monthly opt-out fee, and threatened power disconnect if we did not pay the fee.

19 11. Since imposing the opt-out fee, Tanner’s billing to us has violated the Bylaws by
20 including overcharges for energy use that has not been provided to us or used by us, has
21

22 ⁴ Plaintiff’s Motion for Summary Judgment to Dismiss Defendant’s Counterclaims, Exhibit D – Tanner’s Opt-
out Policy states “As a condition of “opting out” ... members shall first sign and return Tanner’s standard form
“Opt-Out” Agreement, including agreement to forego the benefits of AMI metering...”

23 ⁵ Plaintiff’s Motion for Summary Judgment to Dismiss Defendant’s Counterclaims, Exhibit J.

1 overcharged us due to computational error in violation of Tanner's stated billing practice
 2 (Exhibit A), has not complied with the Opt-Out Policy "Budget Billing"⁶ that Tanner has
 3 deemed us subject to (Exhibit B), and has included late fees⁷ (and now also interest)⁸ on these
 4 erroneous charges. All of these charges are in addition to the arbitrary opt-out fee that we have
 5 paid in full, albeit under protest. A complete record of our billing statements since February
 6 2013 through October 2014 is included in Exhibit C.⁹ These records are undisputed and they
 7 clearly show the erroneous charges imposed by Tanner and disputed by me, each and every
 8 month. Tanner has not responded to these notices other than to impose additional late fees and to
 9 threaten me and my wife with power disconnect.

10 12. The facts indicated in the billing statements clearly show the disputed
 11 overcharges which are summarized as follows:

Month Billed	Disputed Amount (*)	Cause of Overcharge (*)
April, 2013	\$7.32	OVERCHARGE
August, 2013	\$3.65	COMPUTATIONAL
September, 2013	\$18.06	OVERCHARGE
October, 2013	\$74.05	OVERCHARGE
April, 2014	\$89.22	OVERCHARGE
July, 2014	\$6.67	INCORRECT FEE
Total	\$198.97	

19 ⁶ As noted on the monthly billing statement from Tanner, for those members subject to Budget Billing, the
 20 "amount due includes monthly fixed budget" and further states that the "the amount billed stays the same (fixed)
 for a 12 month period".

21 ⁷ Tanner has not distinguished any specific amount for late fees attributed to the opt-out fee (subject of the
 counterclaim) as apart from late fees attributed to energy overcharges that Plaintiffs have no obligation to pay.

22 ⁸ Until Tanner filed their instant Motion, no amount for interest has been claimed nor has there been any defined
 or referenced policy to explain how interest would be determined.

23 ⁹ Defendant's Motion, Declaration of Rob Carr, Exhibit 3 is an inaccurate and incomplete representation of the
 Costellos' billing and payment records. Missing is the payment record for December 2013, Notice of Payment
 Under Protest records, disputed Disconnect Notices, and disputed Friendly Reminders.

DECLARATION OF LARRY COSTELLO
 IN SUPPORT OF PLAINTIFF'S OPPOSITION TO
 DEFENDANT'S MOTION

Larry and Christy Costello, Pro Se
 13050 470th Ave. SE
 North Bend, WA 98045
 (425) 922-6529
 LCS9@comcast.net

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“Cause of Overcharge”:

OVERCHARGE - Overcharged energy use in violation of the Bylaws. Defendant billed for energy usage that was not provided to and used by the Plaintiffs. (Exhibit D)

COMPUTATIONAL - Computational error. Defendant’s billing calculation was in error and did not comply with the stated calculation methodology. (Exhibit A)

INCORRECT FEE - Incorrect fee for “manual meter read”. Defendant charged \$30.00 for the Manual Meter Read when the “opt-out” fee according to policy was \$23.33.

(*) The disputed overcharges represent the actual discrepancy that was identified for the month indicated. Defendant’s counterclaim of \$42.34 includes undetermined amounts for late fees (and now interest) that have been assessed on these disputed amounts, compounding them each month. *Defendant’s counterclaim is wholly unviable given the misapplication of facts used to determine it.*

13. As an example to better see how Tanner has billed us arbitrarily by overcharging for energy use, I have provided the following analysis of the April, 2014 bill applying Tanner’s own bill calculation methodology (Exhibits A and E):

- a. Close of billing period April 27, 2014
- b. Tanner reading 41,014 kW-hr.
 (Tanner’s “estimated” reading as of the closing date April 27, 2014)
- c. Costello reading 40,120 kW-hr.
 (Costello’s actual reading on May 14, 2014 the date payment was remitted)
- d. **Tanner’s Charge** - Using Tanner’s billing calculation methodology (Exhibit A)

Current Meter Reading	41,014 (*)
Previous Meter Reading	39,195
kWh Usage	1,819
Charge per kWh	x \$0.0998
Total Energy Charge	\$181.54
Monthly Customer Service Charge	+ \$17.05
Total Electric Charge	\$198.59 (*)

1 (*) Estimated charge is in violation of the Bylaws. The charge includes energy
2 usage that exceeded the amount that was actually used as of the date 17 days later
3 when Costellos paid the bill. *It is physically impossible for Costellos to have*
4 *used more energy as of April 27, 2014 than as of May 14, 2014. It is a*
5 *mathematical certainty that Tanner billed for energy that was not used by and*
6 *provided to Costellos which is a violation of the Bylaws.*

7 e. **Costello's Payment - Using Tanner billing calculation methodology (Exhibit A)**

8 Current Meter Reading	40,120 (*)
9 Previous Meter Reading	39,195
10 kWh Usage	925
11 Charge per kWh	x \$0.0998
12 Total Energy Charge	\$92.32
13 Monthly Customer Service Charge	+ \$17.05
14 Total Electric Charge	\$109.37(*)

15 (*) Amount paid is the actual energy used as of the date when payment was
16 made. This amount includes energy used 17 days after the billing period closed
17 to ensure Costellos paid for actual energy used in accordance with the Bylaws
18 and Tanner's billing policy. *Tanner overcharged Costellos by \$89.22 (difference*
19 *between Tanner's erroneous charge of \$198.59 and the \$109.37 amount for*
20 *energy provided to and used by Costellos) in violation of the Bylaws and*
21 *subsequently assessed late fees and interest on this erroneous charge.*

22 The Bylaws are clear that we have no obligation to pay for these energy overcharges and
23 erroneous late fees (and interest). Tanner could easily avoid these disputes by simply complying
with its own policy.

I declare under penalty of perjury pursuant to the laws of the State of Washington that the
foregoing is true and correct and was executed by me this 1st day of December, 2014 at North
Bend, Washington.


Larry Costello

DECLARATION OF LARRY COSTELLO
IN SUPPORT OF PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION

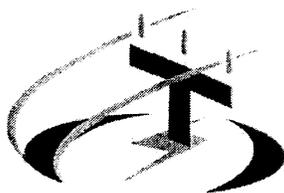
7

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EXHIBIT A

Larry Costello et al. vs. Tanner Electric Cooperative
King County Superior Court No. 13-2-18595-4 SEA
Plaintiff's Opposition to Defendant's Motion
for Summary Judgment on Defendant's Counterclaims
December 12, 2014

[News And Events](#) | [Contact Us](#) | [Report An Outage](#)



Together We Save
TANNER ELECTRIC

Cooperative

Report an Outage

A Touchstone Energy
Cooperative



HOURS M-F 7:30AM-4:30PM

425-888-0623 1-800-472-0208

Clean or replace filters on furna

[Main](#) [Community Services](#) [Member Services](#) [Reliability & Outages](#) [Conservation Topics](#)

About Tanner

Electrical Rates

Rate Schedules Effective August 1, 2014

Bills will be mailed to you monthly and calculated in the following manner:

Residential

Monthly Customer Service Charge	\$19.50
Monthly Customer Service Charge – Anderson Island	\$36.17
All Energy per kWh at	\$0.0998

Commercial

Monthly Customer Service Charge	
Single Phase	\$19.50
Three Phase	\$32.05
Energy per kWh (First 20,000 kWh)	\$0.0922
Energy per kWh (After 20,000 kWh)	\$0.0796
Demand per kW* (First 40 kW)	No Charge
Demand per kW* (After 40 kW)	\$6.00
*Subject to Power Factor Adjustment	

Security Lighting

100W High Pressure Sodium per Month	\$9.00
200W High Pressure Sodium per Month	\$13.00
400W High Pressure Sodium per Month	\$20.00

Utility Taxes

State Utility Tax on Energy Sales	3.87%
City of North Bend Tax on Energy Sales	6.00%

Report an Outage
(425) 888-0623

Outages

Ames Lake

No Outage updates to report for Ames Lake.

Anderson Island

No Outage updates to report for Anderson Island.

North Bend

No Outage updates to report for North Bend.

Weather Outages

There is no Weather outage information to report.

None

Service Charges Effective June 2014

Account Charge for Transfer of Services	\$20.00
Temporary Meter Fee	\$387.00
Service Call for Re-Connect (8:00 a.m. to 2:30 p.m. weekdays)	\$90.00
After Hours Re-Connect	\$200.00
Return Check Fee	\$10.00
Late Fee	5% of Bill

*A deposit may be required on new service accounts

Calculating Your Bill

Current Meter Reading	33045
Previous Meter Reading	34862
kWh Usage	1,817
Charge per kWh	x \$0.0998
Total Energy Charge	\$181.34
Monthly Customer Service Charge (North Bend/Ames Lake)	+ \$19.50
Total Electric Charge	\$200.84
100W HPS Light	+ \$9.00
Total Utility Bill Amount	\$209.84

If you live within the City of North Bend, you must also multiply the Total Utility Charges by the City of North Bend Tax of 6% to arrive at your Total Utility Bill



- [Main](#)
 - [Community Services](#)
 - [Member Services](#)
 - [Reliability & Outages](#)
 - [Conservation](#)
- [Topics](#)
 - [About Tanner](#)
 - [Jobs](#)

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Utility Taxes

State Utility Tax on Energy Sales	3.87%
City of North Bend Tax on Energy Sales	6.00%

Service Charges Effective July 1, 2007

Account Setup Fee (Permanent)	\$70.00
Temporary Meter Fee	\$65.00
Service Call for Re-Connect (7:00 a.m. to 2:30 p.m. weekdays)	\$70.00
After Hours Re-Connect	\$135.00
Return Check Fee	\$10.00
Late Fee	5% of Bill

Rec'd 4x/year
 ↑
 $\$70 \times 4 = \280
 ↗ divided by 12
 $= \$23.33/mo$

**A deposit may be required on new service accounts*

Calculating Your Bill

Current Meter Reading	33045
Previous Meter Reading	34862
kWh Usage	1,817
Charge per kWh	x \$0.0998
Total Energy Charge	\$181.34
Monthly Customer Service Charge	+ \$17.05
Total Electric Charge	\$198.39
100W HPS Light	+ \$6.50
Total Utility Bill Amount	\$204.89

EXHIBIT B

Larry Costello et al. vs. Tanner Electric Cooperative
King County Superior Court No. 13-2-18595-4 SEA
Plaintiff's Opposition to Defendant's Motion
for Summary Judgment on Defendant's Counterclaims
December 12, 2014

*** WHAT TO DO IF YOUR POWER IS OUT ***

When your power is interrupted, first check your fuses or circuit breakers, then check to see if your neighbors have power. If you believe the problem is on Tanner Electric Cooperative lines, report the outage by calling 1-800-472-0208. Your account number and map location will expedite locating the problem.

Understanding Your Tanner Electric Cooperative Bill

Definition of Terms

1. **Facilities Charge:** A fixed monthly charge that reflects cost to have facilities in place and available for use. This monthly charge remains the same, regardless if electricity is used. The facility charge helps to cover the cost of billing, maintenance of electrical equipment and meters.
2. **Late Charge:** Assessed on past due amount at the rate of 5%.
3. **Deposit:** Assessed based on previous credit history and/or disconnection.
4. **Estimated Bill:** If an actual reading is not obtained, then an estimate reading is necessary to process billing.
5. **Service Address:** The address where the meter is located. The mailing address is where the bill is sent.
6. **Kilowatt-Hour (KWH):** Standard measurement for electricity. One kWh equals 1000 watts of electricity used for 1 hour.
7. **Meter Reading:** Used to determine quantity of kWh's used for billing.
8. **Rate:** Identifies the billing value that applies to the metered service.
9. **Multiplier:** Used in certain metering applications to multiply the kWh reading for actual usage.
10. **Usage:** Amount of Kilowatts used during the billing period.
11. **Pole #:** Numbers and/or letters that indicate the metering point on Tanner Electric Cooperative's mapping system. May be used in reporting outages.
12. **City Tax:** Some cities and towns levy a municipal tax. If your bill shows this tax, the money goes to your community.
13. **Bill Type:** Describes the type of bill such as Budget, Regular, Estimated, and Prorated, etc.

**Billing Services Offered By
Tanner Electric Cooperative**

1. **EFT:** Electronic Funds Transfer. Pay your bill the effortless way with EFT. On or before the 20th of each month your bank transfers the amount of your bill directly to our bank account. Never write another check to TEC! This service is free and easy to use. Give us a call, and we will be happy to give further details.
2. **Payment Options:** We offer many convenient ways to pay:
 - a. **Credit Cards:** You can pay 3 ways using your credit card and there are no additional charges!
 1. Automatic Credit Card (ACC): Your energy bill is automatically applied to your credit card on or before the 20th of each month.
 2. Phone: Just call us, and a representative will process your credit card payment by phone.
 3. Web site: Pay from the comfort of your home via the Internet.
 - b. **Check By Phone:** Just give us a call during normal business hours and we'll take your payment over the phone.
 - c. **Online:** Allows you to pay by credit card, debit card or check via the Internet.
 - d. **By Mail:** Don't forget the stamp.
 - e. **At Our Office:** Where we will personally wait on you Mon. - Fri. 7:30 a.m. - 4:30 p.m.
 - f. **24 Hour Drop Box:** Located outside the front of our building at 45710 SE North Bend Way, North Bend, WA.
3. **Online:** Login to "E-Bill" at our Web site, and we will email you each month when your bill is available to be viewed online. You can also pay online and view your historical billing information.

Past Due Amounts

The due date on your bill only applies to the current charges. Any past due amount should be paid immediately to prevent the possibility of having your service disconnected. If past due amounts are not paid, your service will be subject to disconnection, which could include additional charges and a deposit. **Please call 1-800-472-0208 if you have questions concerning a collection/disconnect notice.**

Mailing Address Change Request:

Please complete the form below only if the mailing address information on the front of this bill is incorrect. (Please check the address change box on front.)

MAILING ADDRESS
CITY, STATE, ZIP CODE
HOME PHONE NUMBER ()
WORK PHONE NUMBER ()

Budget Billing Information

This information is provided for those members utilizing our Budget Billing Option.

Budget Due	Budget Billing amount due, this includes monthly fixed budget and all past due budget amounts.
Account Balance	Total amount owed if Budget Billing is terminated.
Budget	The amount billed stays the same (fixed) for a 12 month period.
Recalculation Month	Each May the next 12 month budget amount will go into effect.

Be sure to visit our Web site for more valuable and up-to-date information
www.tannerelectric.coop

EXHIBIT D

Larry Costello et al. vs. Tanner Electric Cooperative
King County Superior Court No. 13-2-18595-4 SEA
Plaintiff's Opposition to Defendant's Motion
for Summary Judgment on Defendant's Counterclaims
December 12, 2014

**Costello Billing and Energy Use Record
For Tanner Products and Services**

Year	Month	Costello Reading		kW-hours	Tanner Reading		kW-hours	kW-hours	Comments
		date	kW-hr.	(actual)	date	kW-hr.	(charged)	(paid)	
	Nov	14-Nov	44293	866	27-Oct	44239	1058	1058	
	Oct	14-Oct	43427	586	29-Sep	43181	1798	1798	
	Sept	14-Sep	42841	743	25-Aug	41383	318	318	
2014	Aug	14-Aug	42098	683	25-Jul	41065	17	17	
	July	14-Jul	41415	644	27-Jun	41048	618	618	
	June	14-Jun	40771	651	27-May	40430	-584	310	
	May	14-May	40120	795	27-Apr	41014	1819	925	Tanner over charged.
	Apr	14-Apr	39325	865	25-Mar	39195	1213	1213	
	Mar	14-Mar	38460	820	25-Feb	37982	2425	2425	
	Feb	14-Feb	37640	992	27-Jan	35557	0	0	
	Jan	14-Jan	36648	1016	26-Dec	35557	549	549	
	Avg.			787					
2013	Dec	14-Dec	35632	990	26-Nov	35008	-557	366	
	Nov	14-Nov	34642	912	25-Oct	35565	1654	912	Tanner over charged.
	Oct	14-Oct	33730	643	25-Sep	33911	1277	1096	Tanner over charged.
	Sept	14-Sep	33087	729	27-Aug	32634	744	744	Tanner over charged - billing error.
	Aug	14-Aug	32358	682	25-Jul	31890	524	524	
	July	14-Jul	31676	684	25-Jun	31366	762	762	
	June	14-Jun	30992	750	27-May	30604	285	362	
	May	14-May	30242	792	25-Apr	30319	1239	1162	Tanner over charged.
	Apr	14-Apr	29450	870	25-Mar	29080	1207	1207	
	Mar	14-Mar	28580	907	19-Feb	27873	1271	1271	
	Feb	14-Feb	27673	1071	13-Jan	26602	1142	1142	
	Jan	13-Jan	26602	1142	15-Dec	25460	1185	1185	
	Avg.		25460	848		24275			
2012	Dec			645					
	Nov			470					
	Oct			576					
	Sept			521					
	Aug			638					
	July			579					
	June			1004					
	May			626					
	Apr			1381					
	Mar			1238					
	Feb			1140					
	Jan			1276					
	Avg.			841					
2011	Dec			1065					
	Nov			708					
	Oct			843					
	Sept			765					
	Aug			681					
	July			603					
	June			1111					
	May			1041					
	Apr			1104					
	Mar			1028					
	Feb			1178					
	Jan			1034					
	Avg.			930					
2010	Dec			1072					
	Nov			694					
	Oct			887					
	Sept			711					
	Aug			715					
	July			515					
	June			920					
	May			1020					
	Apr			926					
	Mar			926					
	Feb			1154					
	Jan			1147					
	Avg.			891					

Larry:
Regarding kW-hrs. charged, Tanner's Opt-out policy requires Budget Billing. Budget Billing per Tanner policy is a "fixed" budget amount for a 12 month period. Clearly, these records demonstrate that Tanner is violating its own policy. The billed amounts are not fixed - no two are the same. They also vary wildly from a low of -584 kW-hr. to a high of 2,425 kW-hr. (a variation of over 3,000 kW-hr).

Larry:
High-lighted values indicate an **over-charge** for energy not used by Costellos or provided to Costellos in violation of the Bylaws. These are illegitimate charges. Costellos have no obligation to pre-pay for power or to pay for products and services not provided to them by Tanner.

Larry:
Costellos historical energy use record for a five year look back demonstrates a consistent pattern of energy use, with a monthly average of approximately 860 kW-hrs. Clearly, Tanner has this same information and is able to implement a rational application of its Budget Billing policy based on this historical record.

**Costello Billing and Energy Use Record
For Tanner Products and Services**

Year	Month	Costello Reading		kW-hours (actual)	Tanner Reading		kW-hours (charged)	kW-hours (paid)	Comments
		date	kW-hr.		date	kW-hr.			
2009	Dec			1013					
	Nov			785					
	Oct			739					
	Sept			632					
	Aug			682					
	July			433					
	June			1137					
	May			880					
	Apr			911					
	Mar			1010					
	Feb			1263					
	Jan			847					
		Avg.			861				

EXHIBIT E

Larry Costello et al. vs. Tanner Electric Cooperative
King County Superior Court No. 13-2-18595-4 SEA
Plaintiff's Opposition to Defendant's Motion
for Summary Judgment on Defendant's Counterclaims
December 12, 2014

Notice of Payment Under Protest
Notice of Billing Errors
Account #26045000

We, Larry Costello and Christy Costello, hereby make this payment representing one or more monthly fees charged by Tanner Electric Cooperative as a consequence of our refusal to allow the installation of a smart meter at our home. We make this payment under protest and without any agreement or concession that the fee is legal or appropriate and we specifically reserve the right to challenge such fee or fees and seek judicial resolution regarding our dispute with Tanner Electric Cooperative regarding these fees.

This payment covers fees for the months listed below. Due to other billing errors by Tanner documented in our billing statements since February, 2013, late charges, if any, related to the smart meter fee are undetermined. Pending receipt of clarification from Tanner on correction of these errors, payment under protest of relevant late fees may also be provided.

Payment Summary:

February, 2013	\$23.33	
March, 2013	\$23.33	
April, 2013	\$23.33	
May, 2013	\$23.33	
June, 2013	\$23.33	
July, 2013	\$23.33	
August, 2013	\$23.33	
September, 2013	\$23.33	
October, 2013	<u>\$23.33</u>	
Total Enclosed	\$209.97	paid October 18, 2013
Total Enclosed	\$23.33	paid November 14, 2013
Total Enclosed	\$23.33	paid December 14, 2013
Total Enclosed	\$23.33	paid January 14, 2014
Total Enclosed	\$23.33	paid February 14, 2014
Total Enclosed	\$23.33	paid March 14, 2014
Total Enclosed	\$23.33	paid April 14, 2014
Total Enclosed	\$23.33	paid May 14, 2014

 5-14-14

 Larry Costello Date

 5-14-14

 Christy Costello Date

