No. 91386-2

SUPREME COURT
OF THE STATE OF WASHINGTON

[Court of Appeals No. 70625-0-I]

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY,
a Washington municipal corporation,

Respondent/Cross-Petitioner,

v.

COMCAST OF WASHINGTON IV, INC., a Washington corporation; CENTURYTEL OF WASHINGTON, INC., a Washington corporation; and FALCON COMMUNITY VENTURES, I, L.P., a California limited partnership, d/b/a CHARTER COMMUNICATIONS,

Petitioners/Cross-Respondents.

RESPONDENT'S ANSWER TO PETITIONS FOR REVIEW, AND CROSS-PETITION FOR REVIEW

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I. IDENTITY OF ANSWERING PARTY

Respondent and Cross-Petitioner Public Utility District No. 2 of Pacific County (the "District") answers the Petitions for Review filed by CenturyTel of Washington, Inc.,[1] and by Comcast of Washington IV, Inc. and Falcon Community Ventures, I, L.P., d/b/a Charter Communications, (collectively "the Companies"), and Cross-Petitions for Review, as set forth below.

II. COURT OF APPEALS DECISIONS

The Companies seek review of portions of the October 13, 2014 decision of Division I of the Court of Appeals ("Division I") at 184 Wn. App. 24, 336 P.3d 65 (2014), *as amended on reconsideration* (February 10, 2015).[2]

The District seeks Cross-Review of the February 27, 2012 decision by Division II of the Court of Appeals ("Division II") granting the Companies' request for an extension of time under RAP 18.8(b) to allow them to file a late appeal. Appendix 1.[3] Cross-review of this threshold issue should terminate review of this matter entirely and reinstate the trial court's decision in favor of the District.

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[1] CenturyTel is now known as CenturyLink.

[2] The Companies seek review only of the Court of Appeals' decision with respect to the District's post-June 2008 pole attachment rate, the District's expert witness fees, and (as to CenturyLink) the applicability of the reciprocal fee-shifting provision of RCW 4.84.330. The Companies do not seek review of any other aspects of the Division I decision.

[3] After substantive appellate briefing was completed, this appeal was transferred from Division II to Division I.

III. ISSUES PRESENTED FOR REVIEW AND CROSS-REVIEW

A. **Issue on Review**. Have the Companies met the requirements under RAP 13.4(b)(1) or (4) for this Court to grant their Petitions for Review? **NO**.

B. **Issue on Cross-Review**. The District requests cross-review of the following issue:

Should this Court grant cross-review under RAP 13.4(b)(1), (2), and (4) because the Court of Appeals Division II decision is in conflict with decisions of this Court and with other decisions of the Court of Appeals, by ignoring the strict limitations of RAP 18.8(b) in allowing the Companies an extension of time to file a late appeal, where:

(1) there was a trial on the merits that resulted in a decision for the District and proper notice to the Companies of the proposed final Judgment;

(2) the Companies never monitored entry of judgment through the on-line docket, a service provider like Attorney Information Bureau, or through their local counsel; and

(3) the Companies claimed a casual remark by a court administrator to a paralegal that she would let her know "about any developments" excused them from their duty to monitor the file for entry of judgment, and two weeks later

they completely stopped all efforts to monitor entry of the final Judgment they wished to appeal? **YES**.[4]

IV. SUMMARY OF ARGUMENT

This Court should grant the District's Cross-Petition for Review on the threshold issue of whether Division II should have permitted the Companies to proceed, despite their late notice of appeal. RAP 18.8(b) sets strict standards for relief from a late appeal, and Division II's decision was contrary to that Rule and the decisions of this Court and the Court of Appeals recognizing the very limited situations in which extraordinary circumstances have been found to outweigh the importance of finality of judgments. A decision in the District's favor on this threshold issue would make it unnecessary for the Court to address the Companies' Petitions and would reinstate the trial court judgment for the District.

The Court should deny the Companies' Petitions because they raise no issues of substantial public interest regarding the District's post-2008 pole attachment rate that this Court should decide at this time. Many statutory construction cases are never decided by the Supreme Court and, at best, review of this issue is premature in light of Division I's remand to the trial court for further evidentiary proceedings. The Companies offer no authority supporting their novel argument that an appellate court abdicates its judicial responsibility by remanding to the trial court with instructions. Instead, they continue to insist on the same flawed

[4] This issue, which is not raised in the Companies' Petitions for Review, must be raised in this Answer. RAP 13.4(d).

arguments to support their interpretation of the PUD pole attachment statute (including FCC and WUTC provisions inapplicable to the District) that have been rejected multiple times by the trial court and the Court of Appeals.

The Companies' resort to standard principles of statutory construction and documentation of expert witness fees also fails to demonstrate inconsistencies between Division I's decision and decisions of this Court under RAP 13.4(b)(1). Their argument as to expert fees also misstates the record on the trial testimony of the District's expert. Last, CenturyLink's novation argument regarding reciprocal attorneys' fees under RCW 4.84.330 is contrary to the incontrovertible record that no post-1977 contract was ever entered into between CenturyLink and the District and that CenturyLink refused to sign the new pole attachment agreement the District proposed.

V. STATEMENT OF THE CASE RE PETITIONS FOR REVIEW

The decision of Division I of the Court of Appeals provides a detailed recitation of the facts and procedural background (184 Wn. App. at 35-44, 336 P.3d at 71-76), which the District incorporates by reference. The District's "Statement of the Case Re Cross-Review" is at Section VII, below.

VI. ARGUMENT WHY THE PETITIONS FOR REVIEW SHOULD BE DENIED

A. This Court Should Not Accept The Petitions For Review Under RAP 13.4(b)(4).

The Companies claim the Division I decision with respect to the District's post-2008 pole attachment rate warrants discretionary review because it involves an issue of substantial public interest that should be determined by this Court—**now**. That is incorrect.

The Companies urge this Court to conclude that their interpretation of RCW 54.04.045 is the only correct one—the same assertion rejected by the trial court on summary judgment, at trial, and upon entry of Findings of Fact and Conclusions of Law and Judgment, as well as by Division I of the Court of Appeals in its October 13, 2014 Opinion and its February 27, 2015 denial of Petitioners' Motions for Reconsideration. But unless this Court grants the District's Cross-Petition and holds the Companies' late-filed appeal should not have been excused,[5] this lawsuit is not really "over" yet as to the issue of the District's post-June 2008 pole attachment rate. The remand to Pacific County Superior Court, with instructions that it conduct further evidentiary proceedings consistent with Division I's decision, ensures that the record is still developing on this issue. Whether or not this issue should ever be decided by this Court, it is by no means clear why this issue should be reviewed by this Court at this point. It is premature.

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[5] As noted above, if that were the disposition of the threshold issue of the Companies' late appeal, this Court would not need to address the issues raised in the Companies' Petitions.

On remand, the trial court will take evidence on the post-2008 rate – *i.e.*, the application of amended RCW 54.04.045 based on data and inputs Division I correctly left to the District's discretion. 184 Wn. App. at 61 & n.27, 72-75, 336 P.3d at 89-91. Those proceedings will also include a determination of attorneys' fees and expenses on that issue, 184 Wn. App. at 83, 86-87, 336 P.3d at 95-97, and potential modification of the specific post-June 2008 rate in the injunctive relief granted. 184 Wn. App. at 88-89, 336 P.3d at 97. The trial court decision may well be appealed to the Court of Appeals again. That court can then, with a full set of facts and conclusions determined on remand by the trial court per Division I's instructions, review the trial court decision to provide an interpretation of the statute that will be truly final.[6] If review by this Court is subsequently sought, this Court can then decide whether to accept review – based on a complete record below.[7]

The Companies rely principally on the statement of intent accompanying the 2008 amendments to RCW 54.04.045 that the legislature intended to establish a "consistent cost-based formula for calculating pole attachment rates, which will ensure greater predictability and consistency in pole attachment rates statewide . . . . " "Statewide," however, does not mean the Supreme Court must decide this issue. Many

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[6] Contrary to the Companies' assertions, it is precisely because the District's rate is the first opportunity for judicial review of amended RCW 54.04.045, that a full record on which to base an appellate decision on post-2008 rates is particularly appropriate.

[7] At this point, because of the partial remand for further proceedings, the decision regarding the District's post-2008 rate on which the Companies seek review is really more akin to one that is interlocutory in nature, and the requirements for discretionary review of an interlocutory decision under RAP 13.5(b) are not met here.

lawsuits result in a Court of Appeals decision for which review by this Court is either not requested or, if requested, is not granted. Not every statutory interpretation matter is decided by the Supreme Court.

If there is ever a decision on the same issue by another division of the Court of Appeals that is different from Division I's opinion, then, at that point, the issue of post-2008 rates may or may not be appropriate for review by this Court. But unless and until that occurs, Division I's decision is the law of the State of Washington, because there is only a single Court of Appeals, albeit with three divisions. *Eugster v. State*, 171 Wn.2d 839, 841, 259 P.3d 146 (2011) (citing RCW 2.06.010 and .020).[8]

In an attempt to bolster their Petitions, the Companies, citing Trial Exhibit 81, argue that the substantial public interest test is met because PUD pole attachment rates are a barrier to private providers seeking to serve new or expanded customer bases. But that exhibit does not say, let alone establish, that PUD rates are a barrier to private providers. That is pure argument by the Companies, which their own expert witness debunked at trial. *See, e.g.*, RP 1430:19-23; Finding of Fact 46 (pole

[8] The Companies' characterization of a handful of other PUDs considering or setting pole attachment rates, in some instances a year or two before Division I's decision, hardly proves that multiple PUDs around the state are acting inconsistently and unpredictably and would not follow a truly final appellate decision after the trial court proceedings on remand. Indeed, there are tolling agreements in effect between the Companies and various PUDs reflecting just the opposite. *See, e.g.*, July 15, 2013 Tolling Agreement between Public Utility District No. 1 of Clark County and Comcast (Appendix 2). Furthermore, the Court of Appeals reiterated multiple times that 'the legislature explicitly intended the 2008 amendment "to recognize the value of the infrastructure of locally regulated utilities" and to "ensure that locally regulated utility customers do not subsidize licensees."' 184 Wn. App. at 73, 74 & n.40, 336 P.3d at 90 & n.40. Not every PUD's costs and other data are the same, as Division I recognized.

attachment rates are a very small component of the Companies' total expenses); RP 1431:25-1432:6 (there would be no material disadvantage to the Companies' business in Pacific County if they had to pay the District's adopted rate); and RP 1477:19-1478:3; Finding of Fact 45 (the Companies' expense of building their own poles, as opposed to attaching to the District poles, would exceed what they have to pay in pole attachment fees).[9]

If this Court does not resolve this lawsuit based on the District's Cross-Petition, it should let the record on the post-2008 rate issue develop below, and, if requested, decide at a later time whether discretionary review would be appropriate.

B. The Court of Appeals Did Not Abdicate Its Judicial Responsibility by Remanding the Post-2008 Rate Issue to the Trial Court With Instructions.

The Companies rely heavily on repeated accusations that Division I renounced its responsibility as an appellate court by remanding the post-2008 pole attachment rate issue to the trial court for further evidentiary proceedings, with instructions.[10] The Companies apparently believe they understand the proper role of an appellate court better than an experienced panel of Court of Appeals judges. In any event, their argument that it was error for Division I to remand this issue with instructions because that

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[9] Findings of Fact 45 and 46 were not challenged on appeal.

[10] The Court of Appeals reversed and remanded with instructions under which the District retains considerable "discretion" in setting various inputs and data used in the statutory methodology, to which the courts "should continue to defer" to the District. 184 Wn. App. at 61 & n.27, 72-75, 336 P.3d at 84, 89-91.

violated the Court of Appeals' judicial duty to interpret the statute is unavailing.

The Companies cite no case holding that an appellate court has a duty to interpret a statute, rather than to remand with instructions. They cite no case holding it is error for the Court of Appeals not to fully interpret a statute, rather than remand certain aspects to the trial court with instructions. They cite no case holding that it is only disputed issues of fact that can justify a remand with instructions. Instead, the cases on which the Companies rely are either standard statutory interpretation cases, or involve *dictum* by the Court offering guidance where a decision is based on other grounds, the issue is moot, constitutional or highly sensitive issues are involved, or in a dissenting or concurring opinion simply expressing the wish that the Supreme Court majority would have interpreted the statute at issue or decided the issue differently. None of the cases the Companies cite holds that such interpretation is legally required of an appellate court.

Thus, for example, in *State v. Gonzalez*, 110 Wn.2d 738, 757 P.2d 925 (1988), having determined the trial court committed error in ordering discovery of the names of previous sexual partners in a rape trial, the Court stated "we need go no further. However, in order to provide guidance to trial courts in this complicated and sensitive area, we offer some additional observations." 110 Wn.2d at 746-47. This was plainly

dictum, and the case did not hold there was a judicial duty to interpret a statute.

Ashenbrenner v. Dept. of Labor & Industries, 62 Wn.2d 22, 380 P.2d 730 (1963), is also not on point. That case involved the retroactive application of an amendment to the workers' compensation laws. Although the Court commented that it was obviously the duty of the Court to interpret the statute in question, *Ashenbrenner* was a standard statutory interpretation case affirming the decision below, not one involving a remand with instructions, as here. Indeed, it was decided before the Washington Court of Appeals even existed.

State v. Watson, 160 Wn.2d 1, 154 P.3d 909 (2007), is also unhelpful to the Companies. It involved the unconstitutional vagueness of a criminal statute in a prosecution for failure to register as a sex offender. The case says nothing regarding the duty of courts to interpret statutes. It only mentions that citizens may need to utilize court rulings to clarify the meaning of a statute. Furthermore, the case did not involve a remand with instructions. It affirmed the decision below.

In an appeal from a murder conviction, *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981), held that the refusal to give a manslaughter instruction to the jury prevented the defendant from presenting his theory that the killing was unintentional. The Court reversed and remanded for a new trial, stated that, because of the remand there was no need to address other assignments of error, but, like *Gonzalez*, the Court would "briefly

consider" other assignments of error to provide guidance to the trial court on remand. 95 Wn.2d at 623. Like *Gonzalez*, this is clearly *dictum*. It is not a statutory interpretation case, and there is nothing in the opinion holding there is a duty on the part of an appellate court to provide guidance to the trial court, let alone a duty to interpret a statute. In any event, providing guidance is exactly what Division I did here.

Ackerman v. Port of Seattle, 55 Wn.2d 400, 348 P.2d 664 (1960), also involved a decision reversing and remanding a trial court decision – the dismissal of an inverse condemnation claim. While the Court said it would be "remiss" if it did not provide "some guidance" to the trial court on the measure of compensation, it did exactly what Division I did here – "remanded for proceedings consistent with the views expressed in this opinion." 55 Wn.2d at 413. Furthermore, *Ackerman* was not a statutory interpretation case, and it did not hold that an appellate court has the duty to do something more than remand for proceedings consistent with its opinion, and the case predates the existence of the Court of Appeals.

The remaining cases cited by the Companies are no more persuasive. *Mall, Inc. v. Seattle*, 108 Wn.2d 369, 739 P.2d 668 (1987), involved an appeal of a building permit denial that was settled after the opinion was written, with the Court deciding to file the opinion, despite its mootness, to provide guidance in interpreting a Seattle Municipal Code zoning ordinance. *Dunner v. McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984), involved due process considerations in involuntary commitment

proceedings on which the Court provided clarification despite the case being moot because the detentions had ended. *In re Myers*, 105 Wn.2d 257, 714 P.2d 303 (1986), involved retroactive application of the Sentencing Reform Act where parole had rendered a personal restraining petition moot. *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005), involved an *ex parte* communication that had the potential to affect every drug offender alternative sentencing proceeding in Pierce County during the previous four years.[11]

Accordingly, there is no authority holding that Division I erred by not fully interpreting the post-2008 rate statute, and, instead, remanding that issue to the trial court for further evidentiary proceedings consistent with the Court's instructions and guidance.

C. The Companies' Dogged Insistence that Their Interpretation of RCW 54.04.045(3)(a) and (3)(b) Is the only Correct One Provides No Reason for This Court to Grant Review.

Not only do the Companies berate Division I for abdicating what the Companies claim was its judicial responsibility, but they also say everyone else's interpretation of RCW 54.04.045(3)(a) and (3)(b) is wrong, except theirs – i.e., that 3(a) is the FCC Cable formula and 3(b) is

[11] CenturyLink's string cite (Petition for Review at 12, n.4) fares no better. Four of the cases are dissenting opinions, and the fifth is a concurring opinion that simply expresses regret that the majority had relied on an *ad hoc* determination of what the statute at issue meant based on the particular facts of the case. Several of the cases involved situations in which the dissenting opinion noted differing previous decisions on the issue presented, unlike here. *Fergen v. Sestro*, ___ Wn.2d ___, WL 1086516 at *9-10, (2015) (noting other Washington cases, some of which had discredited the trial court medical malpractice instruction at issue on appeal, in which "the instruction has been tweaked, whittled, revised, and prodded into its current form"); *State v. Smith*, 123 Wn.2d 51, 61, 864 P.2d 1371 (1993) (noting other decisions in which the Court had considered the validity of imposing exceptional sentences for burglary and observing that it was time for the Court to provide guidance on that issue). None of the cases holds there is a judicial duty to interpret statutes or that it is error to remand with instructions.

the FCC Telecom formula (albeit, in the Companies' words, "with a slight modification"). The Companies have argued that over and over in this litigation, and it has been repeatedly rejected by the trial court and the Court of Appeals – on summary judgment, in the trial court's Memorandum Decision, in the Findings of Fact and Conclusions of Law, and by Division I's October 2014 Opinion and its February 2015 denial of the Companies' Motions for Reconsideration. Division I had no duty to accept the Companies' flawed arguments with respect to a statute the Companies themselves state "is not a model of clear drafting." See CenturyLink's Petition for Review at 18.[12]

The District will not reiterate all of its substantive responses to the Companies' arguments regarding 3(a) and 3(b). The analysis and evidence belying the Companies' assertions are summarized in the Brief of Respondent at 24-40. The record shows, for example, why Section 3(a) is not the FCC Cable formula, because that formula excludes unusable space (as conceded by one of the Companies' own witnesses), while Section 3(a) includes unusable space. *See* citations to record in Brief of Respondent at 25-26; Finding of Fact 50. In their Petitions, the Companies continue to urge acceptance of their convoluted 3-step analysis of Section 3(a), resorting to an investor-owned utility Washington statute that does not govern public utility districts, and from there to the FCC

[12] If the statute is "not a model of clear drafting," Division I's remand to the trial court to develop a more complete record on this issue would seem to make even more sense.

Cable formula, which is also inapplicable to PUDs.[13] In addition, the Companies' expert testimony on this point was severely discredited on cross-examination. *See* Brief of Respondent at 33 (2nd para.) and citations to record therein.[14] If the legislature had meant that Section 3(a) was the FCC Cable formula, it could easily have said exactly that, but did not do so. Brief of Respondent at 27.

As to Section 3(b), the Companies concede, as they must, that 3(b) is not the same as the FCC Telecom formula because 3(b) divides 100% of the support and clearance equally among the District and all attaching licensees, while the FCC Telecom formula divides only 2/3 of that space among those parties. *See* citations to record in Brief of Respondent at 27-28.

These are only a few examples, but the Companies' flawed analysis, based as it is on FCC and WUTC statutes, orders, and decisions wholly inapplicable – by law – to the District, provides no basis for review by this Court.[15]

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[13] RCW 54.04.045(7); 47 U.S.C § 224(a)(1) and 47 U.S.C. § 224(a)(3); RP 1388:2-14, 1389:4-6, 1459:1-11, 1460:24-1461:5 (testimony by the Companies' expert witness).

[14] This included the Companies' expert's admission that his testimony was limited to investor-owned utilities, was based on non-current information, and relied on a 20-year-old settlement agreement among investor-owned utilities to which neither the District nor any other consumer-owned utility was a party.

[15] The Companies also criticize the Division I decision as offering no definitive ruling on whether the cost element of pole attachment rates under RCW 54.04.045 is calculated on a net versus gross basis. But even the Companies' principal expert witness admitted that gross versus net costs are not specified in either the FCC or WUTC statutes embraced by the Companies. RP 1414:24-1415:10. *Cf. American Electric Power Service Corp. v. FCC*, 708 F.3d 183, 189 (D.C. Cir. 2013) (referring to the word "cost" in pole attachment rate statutes as being "a chameleon," a "virtually meaningless term" and being "open to a wide range of interpretations"). The District's General Manager testified that Sections 3(a) and 3(b) do not specify net versus gross costs either. RP 280:20-281:2. Moreover, this Court has rejected the argument that a party is entitled to a reduction from electric pole value for depreciation, ruling instead that full replacement cost was the appropriate

D. The Companies' Last Ditch Resort to Basic Statutory Construction Principles Does Not Support Review.

The Companies try in vain to shoehorn their Petitions into a convincing argument regarding inconsistency between the Division I decision and decisions of this Court, resorting to general principles of statutory interpretation like construing statutes as a whole, harmonizing provisions, interpreting the same or similar language, and plain meaning. But the Companies offer no authority that those kinds of standard statutory construction principles this Court, and many others, have articulated, are sufficient to meet the standard of RAP 13.4(b)(1) requiring a Court of Appeals decision be "in conflict with a decision of the Supreme Court . . . ." Otherwise, every statutory interpretation decision would be subject to review by this Court.

Once again, the Companies make the same arguments they have made at various stages of this litigation, which the trial court and Division I have repeatedly rejected, including reliance on FCC and WUTC provisions that, by law, do not apply to the District. Even the Companies' principal expert admitted that Sections 3(a) and 3(b) contain no specific mathematical formula (RP 1422:25-1423:4), and that the language in Section 3(a) is not identical to either RCW 84.04.050 (the WUTC statute) or to the FCC Cable formula (RP 1425:25-1426:7). The Companies'

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amount. *Puget Sound Power & Light Co. v. Strong*, 117 Wn.2d 400, 816 P.2d 716 (1991). This is because this Court has recognized that the life span of utility poles varies based on the same kinds of factors in the record here (condition of wood, weather, insects, etc.), and there is no market for used utility poles. 117 Wn.2d at 402-404. *See* citations to record in Brief of Respondent at 40 n.42.

resort to standard statutory interpretation principles does not justify granting their Petitions.

E. The Court of Appeals' Decision Regarding the District's Expert Witness Fees Does Not Meet the Requirements of RAP 13.4(b)(1).

Like the Companies' resort to basic statutory interpretation principles, they also try to argue their way into RAP 13.4(b)(1) with a few citations to basic principles regarding documentation and recovery of prevailing party litigation fees and expenses. This argument also fails.[16]

First, like the other portions of the Petitions arguing the applicability of RAP 13.4(b)(1), these sorts of claimed inconsistencies with this Court's precedents are not the kinds of issues that should form the basis of a grant of discretionary review by this Court. If they were, every fee and expense challenge would be subject to this Court's review.

Second, all of the Companies' arguments on this point were raised and rejected below. For example, Division I expressly rejected the Companies' assertion that the documentation was insufficient to show that the expenses of the District's expert, EES Consulting, were on the litigation itself rather than pre-dating that. 184 Wn. App. at 83-84, 336 P.3d at 95. Division I also rejected the Companies' claim that the fees of EES Consulting were excessive. 184 Wn. App. at 84-86, 336 P.3d at 95-96.

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[16] At the outset, this Court should also reject CenturyLink's argument on this point as not having been raised in its opening brief on appeal, and otherwise being improper. 184 Wn. App. at 83 n.48, 336 P.3d at 95 n.48.

The Companies then argued in their Motions for Reconsideration that Division I erred in awarding the District the amount of the EES fees it had incurred and paid because, according to them, the expert witness from EES, Gary Saleba, did not testify on non-rate terms and conditions, and his testimony was not helpful and was on an unsuccessful claim. The District responded to those arguments (*see* Respondent's January 21, 2015 Answer to Motion for Reconsideration of Appellants Comcast and Charter at 8-13), and the Companies' Motions were denied. In particular, the record shows that Mr. Saleba did testify on non-rate terms and conditions, contrary to the Companies' argument. RP 575:21-578:6.

An appellate court reviews a trial court's award of attorneys' fees and expenses for abuse of discretion. *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 149, 169, 795 P.2d 1143 (1990). There was substantial evidence in the record supporting the trial court's findings and conclusions regarding the award of expert witness fees to the District. There is no basis for this Court to grant review of the Court of Appeals' decision affirming that award.

F. The Court of Appeals' Decision Regarding The Inapplicability of RCW 4.84.330 to a Pre-1977 Contract Should Not Be Reviewed.

CenturyLink argues that Division I's ruling rejecting its claim to attorneys' fees and costs if it is the prevailing party conflicts with this Court's precedent regarding novation. That is incorrect.

RCW 4.84.330 applies only to "a contract or lease entered into after September 21, 1977 . . . ." CenturyLink claims the rate revision after

that date, done pursuant to the terms of its 1969 contract with the District, constituted a novation, creating a new post-1977 contract.[17] To work a novation, however, it must appear from what was done that the parties intended a new contract to cancel and supersede the original contract. *Mut. Reserve Ass'n v. Zeran*, 152 Wash. 342, 349, 277 P. 984 (1929) (emphasis added). And equity will not assume such an intention unless the intent clearly appears or substantial justice requires it. *Id.*

The "rate adjustment" that CenturyLink claims constituted a novation was made pursuant to the terms of the 1969 contract between CenturyLink and the District. Trial Ex. 3, § 13 (at p. PUD 000799). Under those terms, CenturyLink could reject the rate modification and cancel the contract. *Id.* It chose not to do so. There is no evidence of intent by either party to cancel the 1969 contract. The 1969 contract continued pursuant to its terms, including the anticipated rate revision. Thus, no novation occurred.

The Division I ruling – that the rate modification made pursuant to the terms of the 1969 contract did not cancel the contract and/or create a new contract – does not conflict with this Court's precedent. The case CenturyLink cites, *MacPherson v. Franco*, 34 Wn.2d 179, 208 P.2d 641 (1949), and the case the *MacPherson* Court relied upon, *Sutter v. Moore Investment Co.*, 30 Wash. 333, 70 P. 746 (1902), addressed the

[17] This argument is simply another version of the same argument CenturyLink made on appeal, which Division I rejected (184 Wn. App. at 89-91, 336 P.3d at 98-99) and then rejected again in denying CenturyLink's Motion for Reconsideration.

substitution of one debtor for another – what this Court in *Sutter* deemed "the ordinary case of novation." 30 Wash. at 336.

Here, Division I addressed different circumstances – no substitution of one debtor for another, and a rate modification contemplated by, and made pursuant to the terms of, the contract between CenturyLink and the District. No new contract was created by the rate modification, because it was the express intent of the parties not to cancel the 1969 contract and supersede it with a new contract. Division I's decision does not conflict with the ruling in either *MacPherson* or *Sutter*.

CenturyLink's attempt to reframe the issue as novation rather than termination of an at-will contract (which is how CenturyLink framed the issue below) does not change the underlying facts or the correctness of the Court of Appeals' analysis.[18] This Court should reject CenturyLink's Petition for Review on this issue.

VII. STATEMENT OF THE CASE RE CROSS-REVIEW

After a several week bench trial in October 2010, the trial court issued a Memorandum Decision in March 2011 in favor of the District. CP 1324-1327. At that point, the Companies were aware they had lost the case in the trial court. *Id.;* CP 2380 at ¶ 2. As the prevailing party, the District properly notified all parties that it would present its proposed final

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[18] CenturyLink's argument (Petition for Review at 20 n.9) based on *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984), is similarly unavailing. First, CenturyLink cites no decision of this Court with which Division I's conclusion on this issue conflicts. Furthermore, contrary to CenturyLink's assertions, the record establishes that CenturyLink did not intend to enter into the District's proposed agreement. 184 Wn. App. at 90, 336 P.3d at 98; Respondent's January 21, 2015 Answer to Appellant CenturyTel of Washington, Inc.'s Motion for Reconsideration at 5-11.

Judgment and related findings and conclusions and orders on September 16, 2011. CP 1955-1956; CP 2380 at ¶ 3. Extensive briefing by the Companies on the proposed Findings of Fact, Conclusions of Law, and Judgment followed. CP 1957-2000; CP 2075-2188. The parties presented oral argument on the proposed findings, conclusions, and Judgment on September 16, 2011. CP 2271; CP 2380 at ¶ 3. The trial court did not sign the proposed pleadings at the hearing, but instead took the matters presented under advisement. CP 2271; CP 2380 at ¶ 4. On December 12, 2011, the trial court signed and entered all of the proposed documents the District had previously noted for presentation, including the Judgment. CP 2290-2327. The Companies did not file a Notice of Appeal until January 18, 2012, well past the thirty-day time period permitted by RAP 5.2. CP 2328-2340.

Although the trial court denied the Companies' Motion to Vacate the final Judgment and Findings and Conclusions and have them re-entered on a later date so their late appeal would be timely (CP 2498-2500), on February 27, 2012, a three-judge panel of Division II of the Court of Appeals issued an Order granting the Companies additional time, allowing them to file a Notice of Appeal after expiration of the 30-day time period permitted by RAP 5.2, contrary to the restrictive standards of RAP 18.8(b) and this Court's and Court of Appeals precedent. Appendix 1. As a matter of law, the facts asserted by the Companies do

not establish the "extraordinary circumstances" and "gross miscarriage of justice" required by RAP 18.8(b) to justify this rarely allowed relief.

The Companies (through their counsel) did nothing to monitor entry of the Judgment other than receive occasional "updates" from CenturyLink's counsel at Stoel Rives. CP 2370 at ¶ 8; CP 2365 at ¶ 4. CenturyLink's counsel, in turn, assigned a paralegal, Heidi Wilder, responsibility for monitoring the status of the entry of the pending findings and conclusions and the final Judgment. CP 2370 at ¶ 7; CP 2361 at ¶ 3.

At no time did any of the three Companies monitor the trial court filings by going to the Superior Court in person, by retaining a service provider (such as Attorneys' Information Bureau), or by having local counsel check the court file.[19] Furthermore, the Companies never monitored the on-line docket information for Pacific County Superior Court, which is publicly available through the Washington Office of Administrator of Courts website. CP 2381 at ¶¶ 6-7; CP 2392-2403. Instead, Ms. Wilder, the Stoel Rives paralegal, periodically called the Pacific County Superior Court Administrator beginning in October 2011, and continuing through early December 2011, to check the status of the pending Judgment and other documents.[20] CP 2361 at ¶¶ 3-6.

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[19] During the lawsuit, the Companies used a local South Bend attorney, Elizabeth Penoyar, to assist with various filings and provide office space for Pacific County depositions. CP 2380-2381 at ¶ 5; CP 2383-2391. The Companies apparently did not ask Ms. Penoyar, whose office was just a few blocks from the Courthouse, to monitor the Pacific County court file.

[20] It appears Ms. Wilder called the Pacific County Superior Court staff about once a week beginning in October 2011, and she continued those efforts through early December 2011. CP 2361 at ¶¶ 3-6.

Ms. Wilder states that in the course of these periodic calls, she spoke with Court Administrator Marilyn Staricka on November 22, 2011, who told her that "a judgment would not likely be entered soon because of the Court's criminal trial schedule." CP 2361 at ¶ 5. Ms. Wilder claims Ms. Staricka also said she would contact her "regarding any developments that occurred in the case." *Id.*[21]

Ms. Wilder, however, did **not** rely on Ms. Staricka's alleged remarks, because **after** that conversation, Ms. Wilder continued her weekly calls to the Court Administrator in late November and early December 2011. CP 2361 at ¶ 6. Ms. Wilder spoke with court staff the week after Ms. Staricka's remark, and court staff again confirmed by phone that no judgment had yet been entered. *Id.* Ms. Wilder called again and left a message for the Court Administrator the following week (early December 2011), but did not receive a call back. *Id.* There was no additional follow up by Ms. Wilder or anyone else on behalf of any of the three Companies to ascertain the status of this matter for the next 5½ weeks. Ms. Wilder's offered excuse for her decision to stop monitoring

[21] Ms. Wilder's recollection is disputed by Ms. Staricka, who states that she did not (and would not) tell a party that she would notify them of the entry of judgments or orders that the parties may have drafted and presented because her office is not involved in that process and she would not even be aware of the entry of these items. CP 2465-2466. (Ms. Staricka, in fact, was out of the office on vacation the day the Judgment was signed and entered. CP 2466 at ¶ 3.) The Assistant Court Administrator, Angela Gilbert, concurs with Ms. Staricka, and confirms that she did not tell any of the parties that she would notify them of the entry of any judgment or order. CP 2463-2464. This Court previously denied the Companies' Motion to Strike the Staricka and Gilbert Declarations in its June 5, 2012 ruling on Pacific PUD's Motion for Discretionary Review. Appendix 3. In any event, even if Ms. Staricka had made the alleged statement, it would not excuse the Companies from their obligation to monitor entry of the Judgment.

the docket for entry of the judgment is that she had the "impression" that her contacts were exasperating court staff. CP 2361 at ¶ 5.

The final Judgment was entered on December 12, 2011. The Companies did not timely file a Notice of Appeal, so the District's counsel contacted their counsel on January 17, 2012 to address payment of the Judgment. CP 2405-2413. The Companies filed a Notice of Appeal on January 18, 2012 (CP 2328-2339), filed a Rule 60(b) Motion to Vacate and Reenter Final Judgment with the trial court on January 20, 2012 (CP 2341-2375),[22] and also filed a Motion for Extension of Time with Division II of the Court of Appeals on January 24, 2012. CP 2378. The trial court denied the Companies' Motion to Vacate on February 17, 2012. CP 2498-2500.[23] However, a three-judge panel from Division II issued an order on February 27, 2012, granting the Companies an extension under RAP 18.8(b) and allowing them to file a late appeal, articulating its reasoning in a single sentence reading: "Upon consideration, the court has decided the motion has merit." Appendix 1. The District sought interlocutory discretionary review from this Court on April 12, 2012, but that Motion for Review was denied on June 5, 2012.[24]

The Companies' failure to monitor entry of Judgment was not excusable by extraordinary circumstances, and adhering to the strict 30-

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[22] That Motion sought to vacate and then re-enter the December 12, 2011 Judgment on a later date, solely to permit the Companies to file a timely appeal.

[23] The Companies did not appeal the denial of their Motion to Vacate and Reenter the Judgment.

[24] Denial of a motion for discretionary review does not affect a party's right to obtain later review of a Court of Appeals decision or the issues pertaining to it. RAP 13.5(d).

day appeal time limit in the Rules was not a gross miscarriage of justice, especially in light of long-established precedent requiring a party who knows a matter is pending with the court and is awaiting the entry of a judgment or order to monitor the court file. Division II's decision permitting this late appeal was in conflict with decisions of this Court and other Court of Appeals decisions – precisely the situation warranting review under RAP 13.4(b)(1) and)(2).

The District seeks cross-review of the issue of the Companies' admittedly untimely appeal – an appeal that Division II should never have permitted to proceed. Cross-review of this threshold issue should terminate review of this matter entirely and reinstate the trial court's judgment in the District's favor.

VIII. ARGUMENT WHY CROSS-REVIEW SHOULD BE ACCEPTED

This Court should accept cross-review and address at the outset Division II's Order allowing the Companies to file a late Notice of Appeal, because the Cross-Petition satisfies the requirements for review under RAP 13.4(b)(1) and (2).[25] RAP 18.8(b) sets clear and strict standards that must be met to justify an extension of time to file a notice of appeal:

> The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal . . . . The appellate court will ordinarily hold that

[25] As discussed in Section VIII-C, below, the District's Cross-Petition also meets the criteria for review in RAP 13.4(b)(4).

> the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. . . .

This Court has reiterated the strict and narrow interpretation required, in contrast to the more liberal standards RAP 1.2(a) permits in the interpretation of other rules. *Shumway v. Payne,* 136 Wn.2d 383, 394-395, 964 P.2d 349 (1998) ("RAP 18.8(b) is a specific exception to the rule of liberality.")

Here, Division II's one-sentence Order allowed the Companies to obtain an extension of time by asserting reliance on a casual remark by a court administrator in the face of existing precedent that squarely places upon a litigant the obligation to monitor entry of a judgment. Whether the remark was made (or not), this does not meet the clear and definite standards found in RAP 18.8(b), in *Shumway,* and in other decisions of this Court and the Court of Appeals.[26]

A. Granting an Extension to File an Appeal Under RAP 18.8(b) Was Error Because No Extraordinary Circumstances Justified this Relief.

RAP 18.8(b) "severely restricts" an appellate court's authority to extend the time to file a notice of appeal. *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988); *accord, Shumway,* 136 Wn.2d 383. Washington courts have seldom held that a case satisfied RAP 18.8(b)'s conditions, which require that the moving party

[26] This Court's review of this issue would be *de novo. State v. Kindsvogel*, 149 Wn.2d 477, 480, 69 P.3d 870 (2003) (interpretation of court rules and application of the rules to a specific set of facts is a question of law this Court reviews *de novo*).

demonstrate "extraordinary circumstances" and a "gross miscarriage of justice." RAP 18.8(b).[27]

In *Reichelt*, a Division I case, the appellants filed their notice of appeal ten days late and then sought an extension of time because one of the "two trial attorneys left the firm during the 30 days following entry of the judgment and the firm's appellate attorney had an unusually heavy workload." *Reichelt*, 52 Wn. App. at 764. The court explained that "extraordinary circumstances" are "circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control." *Id.* at 765. After review of the record, the court held that the appellants had not demonstrated reasonable diligence. *Id.* at 766.

The *Reichelt* court stated that "[t]his rigorous test has rarely been satisfied in reported case law," and that "[i]n each of those cases, the moving party actually filed the notice of appeal **within** the 30-day period but some aspect of the filing was challenged." *Id.* at 765 (emphasis added) (citing *Weeks v. Chief of State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982) (notice timely filed in wrong court)); *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978) (notice timely filed without filing fee); *Structurals N.W., Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 714, 658 P.2d 679 (1983) (notice filed within 30 days of stipulated "amended" judgment).

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[27] In civil cases, the impact of RAP 18.8(b) is not balanced, as it is in criminal cases, against the defendant's constitutional right to an appeal. *State v. Kells*, 134 Wn.2d 309, 314, 949 P.2d 818 (1998).

In situations where the notice of appeal was actually filed outside the 30-day window, this Court and the Courts of Appeal have not been lenient. Despite the significant issues that may have been involved, in every case, save two (discussed below), where an extension under RAP 18.8(b) was requested for a late filed appeal, it has been denied. *See, e.g., Shaefco Inc. v. Columbia River Gorge Comm'n,*, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993) (finding that time limit for filing notice of appeal not extended by earlier untimely motion for reconsideration); *Bostwick v. Ballard Marine Inc.*, 127 Wn. App. 762, 775-76, 112 P.3d 571 (Div. I 2005) (finding no extraordinary circumstances where trial court did not notify party that it had entered an order and party lacked diligence in failing to monitor entry of order on pending motion); *Beckman v. DSHS*, 102 Wn. App. 687, 695, 11 P.3d 313 (Div. II 2000) (finding no extraordinary circumstances where State missed the deadline for appealing a $17 million judgment because State was "obligated to monitor the actual entry of the judgments").

As the 1975 Task Force Comment to RAP 18.8(b), cited by this Court in *Weeks* (96 Wn.2d at 895-96), explains: "This paragraph represents only a **slight** departure from the old rigid 30-day rule," designed to accommodate "those **limited** cases where extraordinary circumstances prevent the filing of a timely document." (Emphasis added). The Task Force expected that appellate courts would "**almost always** hold that the desirability of finality of decisions outweighs the

right of an individual party to obtain an extension. Thus, the court will **rarely** grant the extension permitted by this paragraph." RAP 18.8(b) 1975 Task Force Comment (emphasis added).

The two occasions where the courts have upheld an extension under RAP 18.8(b) when the notice of appeal was filed after the 30-day deadline bear no resemblance to this case. First, in *Scannell v. State*, 128 Wn.2d 829, 912 P.2d 489 (1996), this Court found that a *pro se* litigant was misled by a change to the appellate rules that took effect just three months before the superior court entered the order the litigant sought to appeal. The new rules included an internal inconsistency as to the applicable time period for filing the appeal that created, in this Court's words, "a trap for the unwary," leading an "unsophisticated *pro se* litigant to believe that RAP 15.2(a) has some kind of delaying effect on the 30-day notice of appeal deadline, even though no such language exists in the current version." *Id.* This Court then held that these "extraordinary circumstances" satisfied the "rigorous test" articulated by RAP 18.8(b). *Id.* at 834 (quoting *Reichelt*, 52 Wn. App. at 765). The Companies' error here is not "excusable," as was the error by the *pro se* litigant in *Scannell*.

Second, in a recent Division III opinion, *Mellon v. Regional Trustee Services Corp.*, 182 Wn. App. 476, 334 P.3d 1120 (2014), a different procedural posture and set of facts were involved. *Mellon* involved a suit by borrowers against their lenders arising out of a foreclosure forbearance agreement. Ultimately, after a medical leave, the

trial court issued an order denying the Mellons' motion for reconsideration and disbursing funds to the lender. However, the court did not notify the Mellons of its ruling on their motion, and they asked the court to vacate the order and reenter it so they could file a timely appeal. Instead, the trial court issued an order extending the time for the Mellons to file their appeal. Without any real substantive briefing of the issue, and without any analysis of the relevant cases, Division III, in two sentences, found "'extraordinary circumstances' – namely the trial court's failure to serve the Mellons the order denying reconsideration and releasing the injunction bond to IndyMac – 'prevent[ed] the filing of a timely document.' RAP 18.8 cmt., 86 Wn.2d 1271 (1976) [*sic*]." *Mellon*, 182 Wn. App. at 486 (brackets, internal quotations, and citations as in original). However, the cited authority appears to be inaccurate, and the citation references two unrelated unpublished dispositions from 1976 that offer no authority for the court's interpretation. The "RAP 18.8 cmt." citation may reference the 1975 Task Force Comment (see discussion, *supra* at 27-28), which emphasizes that extensions under RAP 18.8(b) will rarely be granted.

Thus, in *Mellon* – with virtually no analysis – Division III extended the time for filing an otherwise late notice of appeal without addressing any of the relevant case law, including: (1) *Beckman,* which expressly held that a litigant who receives notice that a judgment will be presented has a duty to monitor the court file for entry of the judgment; and (2) *Bostwick*, which held that a litigant who failed to monitor the court

file for entry of an order was not diligent. Like Division II's extension of time to appeal in this lawsuit, Division III's decision in *Mellon* is in error and specifically conflicts with established precedent of this Court, as well as Division I and Division II decisions analyzing this issue.

B. The Court Has No Obligation to Notify Parties of Entry of Pending Judgments or Orders, Because the Parties have the Duty to Monitor the Court File.

It has long been the rule that there is no requirement to notify a party of entry of a judgment. In *Cohen v. Stingl*, 51 Wn.2d 866, 322 P.2d 873 (1958), this Court faced a similar situation where a proposed judgment was submitted in open court, but the losing party asserted it never received notice of entry of the judgment and claimed excusable neglect. Seven months later, the trial court vacated and re-entered the judgment to permit a late notice of appeal. In dismissing the untimely appeal and reinstating the judgment, this Court held: "The original judgment was regularly entered. It was *submitted* in open court and no notice of *entry* of the judgment is required." *Id.* at 868 (emphasis in original).

Division II of the Court of Appeals has also long held that a party is "obligated to monitor the actual entry of judgment" after it receives "notice of presentation of the proposed judgments." *Beckman*, 102 Wn. App. at 695. There is no dispute here that the Companies received "notice" of the proposed judgment. Where they failed was in not monitoring entry of the proposed Judgment through the Superior Court file

by reviewing the court's online docket, or using local counsel or another service such as Attorneys' Information Bureau to check the actual court file, and then deciding in early December 2011 to stop communicating with court staff and doing nothing further to monitor entry of the Judgment. In a similar situation, Division II in *Beckman* denied an extension of time under RAP 18.8(b), where the State filed its notice of appeal of a $17 million judgment ten days after the deadline. The State argued that the plaintiff's failure to notify it of the entry of judgment amounted to "extraordinary circumstances." *Beckman*, 102 Wn. App. at 695. The Court held that it was not: "Plaintiff's counsel gave the State notice of presentation of the proposed judgments. This was all Plaintiff's counsel was required to do; the State was then obligated to monitor the actual entry of the judgments." *Id.*

Washington Court Rules do not require any party, the Clerk, or the Court to notify any party when judgment is entered. Even in the Federal courts where the civil rules require the clerk to notify all parties of entry of judgment, the failure of the clerk to do so cannot serve as a basis to extend the time for filing a notice of appeal. Fed. R. Civ. P. 77(d); *Pybas v. Paolino,* 73 Wn. App. 393, 401-02, 869 P.2d 427 (1994) (citing *Kramer v. American Postal Workers Union, AFL–CIO,* 556 F.2d 929 (9th Cir. 1977) (mere failure of court to notify appellant that judgment has been entered was insufficient to permit vacation and reentry of judgment to preserve right of appeal; granting of motion was an abuse of discretion)).

The Companies argued to Division II and to the trial court that they were excused from their obligation to monitor entry of the final Judgment after, they claim, Court Administrator Marilyn Staricka said she would let them know of any developments in the case. There is no precedent existing in Washington to support this novel interpretation of RAP 18.8(b), and such an interpretation would undermine RAP 18.8(b)'s strong policy favoring finality of decisions. This is not an obligation of court staff.

Washington courts have long held that the mistake of a litigant's lawyer or an erroneous legal conclusion does not constitute the "extraordinary circumstances" required by RAP 18.8(b) to extend the time for filing a notice necessary to obtain review. *Shumway,* 136 Wn.2d at 396–97(erroneous legal advice about whether appeal needed to be filed); *Reichelt,* 52 Wn. App. at 766 (lawyer made a mistake and missed filing deadline); *Beckman*, 102 Wn. App. at 695-96 (attorney negligence in not having calendar system in place or a lack of reasonable diligence in filing a late notice of appeal does constitute the extraordinary circumstances required by RAP 18.8(b)).

Here, as in *Shumway*, *Reichelt*, and *Beckman,* error by the Companies' legal representatives in deciding they did not need to monitor entry of the final judgment does not meet the high standard set by RAP 18.8(b). In similar circumstances where parties have claimed they were

misled by a third party – or even by a judge – the courts have uniformly found this is **not** excusable neglect.

In *Puget Sound Medical Supply v. Washington State Dep't of Soc. & Health Services*, 156 Wn. App. 364, 234 P.3d 246 (2010), Division II considered the request of a medical supply company attempting to excuse its late appeal of a DSHS Board of Appeals decision, based on the Administrative Law Judge entering an order earlier than he told the parties to expect. The court concluded:

> [E]ven though the ALJ stated that he "did not anticipate mailing his decision before January 2008," PSM **should not have relied on this statement**. In light of the need for "a responsive system which mandates compliance with judicial summons," we hold that PSM's reasons relating to the statutorily-imposed deadline are not grounds for "excusable neglect."

Id. at 375 (emphasis added) (citing *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979)).[28]

In another situation, the defendant did not monitor entry of a sanctions order imposing costs arising from a discovery dispute. After the defendant obtained summary judgment dismissal of the entire case, the plaintiff appealed, but the defendant did not cross-appeal. The defendant

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[28] Although in *Puget Sound Medical Supply*, the issue was whether a party's reliance on the ALJ's "affirmative representation" constituted "excusable neglect" under CR 60(b), rather than "extraordinary circumstances" under RAP 18.8(b), the court's holding applies with equal force under RAP 18.8(b). Courts interpreting RAP 18.8(b) routinely cite cases interpreting CR 60(b), and vice versa. *See, e.g., Pybas v. Paolino*, 73 Wn. App. 393, 401, 869 P.2d 427 (1994) (citing *Reichelt*, 52 Wn. App. 763); *Beckman*, 102 Wn. App. at 694 (citing *Pybas*, 73 Wn. App. at 401). Moreover, if a party's claimed reliance on the affirmative representation of court personnel does not constitute "excusable neglect" under CR 60(b), as the trial court determined here, it certainly does not amount to "excusable error" under the test articulated in *Reichelt* and applied in *Scannell* to determine if "extraordinary circumstances" justify an extension of time under the much more strict constraints of RAP 18.8(b).

later discovered the sanction order, and filed a motion to extend time under RAP 18.8(b), arguing that it missed the time for a cross-appeal because it had relied on King County Local Rule 7(b)(4)(C), which directs the moving party to provide the trial court with stamped envelopes pre-addressed to opposing counsel. *Bostwick v. Ballard Marine, Inc.*, 127 Wn. App. at 775. The defendant argued the local rule led it to believe that the trial court would provide the defendant with copies of the orders upon entry and claimed this amounted to "extraordinary circumstances" justifying an extension of time to file a notice of its cross-appeal. *Id.* Like the Companies here, the defendant in *Bostwick* inferred that the court would notify a party when an order was entered. The Court of Appeals rejected that interpretation, stating that "nothing in the rule requires the court to notify a party that an order has been entered." *Id.*

Despite the defendant's assertion in *Bostwick* that it was misled by the local rule, in accord with the well-established law that a party with notice of a pending judgment has a duty to monitor entry of that judgment as established by *Cohen* and *Beckman,* the *Bostwick* court held that the defendant's "lack of diligence in monitoring entry of an order on a pending motion does not amount to 'extraordinary circumstances.'" *Bostwick*, 127 Wn. App. at 775 (quoting *Beckman*, 102 Wn. App. at 695).[29] It is abundantly clear that the "impression" of Ms. Wilder, who

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[29] *Cf. Doolittle v. Small Tribes of Western Washington*, 94 Wn. App 126, 139, 971 P.2d 545 (Div. I 1999), in which the court rejected the argument that a missed deadline for filing a cost bill under RCW 4.84.090 was excusable because the trial court failed to give the prevailing party notice of entry of the final judgment, holding:

was monitoring the court file for entry of the Judgment, that she was exasperating court staff does not amount to excusable neglect or extraordinary circumstances. CP 2361 at ¶ 5. There is nothing in the record indicating that anyone at Pacific County Superior Court ever told Ms. Wilder that she was exasperating court staff or otherwise discouraged her from continuing to call weekly and follow up.

Even if the Companies' counsel believed that the Court Administrator would send them a copy of the final Judgment upon entry, whether because of the casual comment by court personnel or, as the Companies argued below, because court staff had distributed other orders in the case, there is nothing that requires court staff to notify parties of the entry of judgment or that excuses the Companies from their duty to monitor the file for entry of the judgment. Even if the Companies inferred from the court staff practices and remarks that the court would notify them of developments, their confusion does not amount to "extraordinary circumstances" under *Bostwick,* and *Beckman.*[30]

> [I]t is not the responsibility of the court or the remaining parties to notify the dismissed party of entry of final judgment; he or she must conduct his or her own monitoring. . . . It was not the court's failure [that deprived the party of a right], it was . . . [the prevailing party's] failure to . . . monitor the case . . . .

[30] The Companies may assert in response to the Cross-Petition that their appeal raises issues of substantial public importance and that there is no prejudice to the District. However, these factors may **not** properly be considered in determining whether to grant relief under RAP 18.8(b). *Shaefco*, 121 Wn.2d at 368 (holding it is improper to consider the importance of the issues the appellant wishes to raise in the context of an untimely appeal); *Reichelt*, 52 Wn. App. at 766 (granting an extension under "RAP 18.8(b) does not turn on prejudice to the responding party" because the prejudice is "to the appellate system and to litigants generally, who are entitled to an end to their day in court.").

C. Division II's Extension of Time to Appeal Is Inconsistent with the Rigorous Requirements of RAP 18.8(b) and Has Potential Negative Impact on the Judicial System, Demonstrating the Substantial Public Interests Involved that Justify Cross-Review.

While review is appropriate because the decision to allow the late appeal is in conflict with the decisions of this Court, and with other decisions of the Court of Appeals, this issue also involves an issue of substantial public interest this Court should determine. RAP 13.4(b)(4). RAP 18.8(b) expresses a strong public interest in the finality of judgments. "The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section." Longstanding Washington case law supports this policy and mandates rigorous application of this test. "We apply this test rigorously. Consequently, there are very few instances in which Washington appellate courts have found that this test was satisfied." *State v. Moon*, 130 Wn. App. 256, 260, 122 P.3d 192 (2005) (citing *Reichelt*, 52 Wn. App. at 765).

In addition to the overriding importance of finality of judicial decisions, there are other policies that are significant in the fair and efficient administration of justice that are very much at odds with Division II's order permitting the Companies' late appeal. While court staff have a public service role, and part of that involves responding to inquiries from the public, litigants, and counsel, this role does not extend to obligating court staff to perform tasks not required by court rules or applicable law. *See Cohen, Beckman, Bostwick,* and *Doolittle supra*; *see also* Declaration

of Bruce Rifkin, the retired District Court Executive and Clerk of Court for the United States District Court for the Western District of Washington. CP 2807-2811.[31] The responsibility for monitoring filing and entry of orders or judgments and associated deadlines lies with counsel, not the court clerk or court administrative staff. *Id.* This results in consistency and fairness for all involved parties. Allowing a litigant to point to a comment by court staff to avoid the adverse impact of stringent filing deadlines imposes a significant adverse impact on court staff and can lead to court staff declining to engage in providing assistance beyond that required by law and conflicting recollections of what was said, or not said. *Id.* The public interest in this issue is substantial, and this alone merits Cross-Review.

IX. THE DISTRICT IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND EXPENSES FOR ANSWERING THE PETITIONS FOR REVIEW

RAP 18.1(j) provides for the award of reasonable attorneys' fees and expenses for the preparation and filing of an answer to a petition for review to a party who prevailed in the Court of Appeals and was awarded attorneys' fees and expenses, if a petition for review by the Supreme Court is denied. Attorneys' fees and expense provisions in the pole attachment agreements between the District and the Companies support the award of

[31] This Court previously denied the Companies' Motion to Strike Mr. Rifkin's Declaration. Appendix 3. *Cf. Dioxin/Organochlorine Center v. Dep't of Ecology*, 119 Wn.2d 761, 769-70, 837 P.2d 1007 (1992) (it was proper to submit and have the Court consider an affidavit for the limited purpose of helping the Court decide whether to accept direct review).

attorneys' fees and expenses to the District. *See* Trial Exhibits Nos. 1, 2 and 3, §§ 17(c), 19, and 24; Brief of Respondent at 62-63; CP 2316, ¶ 5.[32]

Division I held that an award of fees and expenses was appropriate with regard to those incurred in connection with the District's rates prior to June 12, 2008 and the District's non-rate terms and conditions. 184 Wn. App. at 82-86, 336 P.3d at 94-96. Division I also held that, if the District prevails on remand regarding post-June 12, 2008 rates, it would be entitled to fees and expenses in connection with that issue. *Id.*

If the Court denies the Companies' Petitions for Review, it should award the District its attorneys' fees and expenses in answering the Petitions.

X. CONCLUSION

This Court should not grant the Companies' Petitions for Review. It should, however, accept review of the District's Cross-Petition, because Division II's authorization of the late appeal was in conflict with long-established decisions of this Court and the Court of Appeals, and is a matter of substantial public interest to the administration of justice this Court should determine. This Court should conclude that Division II erred because the Companies' untimely appeal should never have been permitted to go forward, and should remand with instructions to reinstate the trial court's decision. If this Court disagrees, and decides to address the merits of Division I's decision, it should be affirmed.

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[32] Basic principles of estoppel also support the award. *See* Brief of Respondent at 63-64 n.74; CP 2316, ¶¶ 6-7.

Respectfully submitted this 8th day of May, 2015.

GORDON THOMAS HONEYWELL LLP

By _____

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APPENDIX

1. February 27, 2012 Division II Order Granting Appellants' Motion to Allow Late Filing of Appeal

2. July 15, 2013 Tolling Agreement between Public Utility District No. 1 of Clark County and Comcast

3. June 5, 2012 Order Denying District Petition for Discretionary Review and Denying Companies' Motion to Strike Declarations

APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

COMCAST OF WASHINGTON IV, INC., a Washington corporation, et al.,

Appellants,

v.

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, a Washington municipal corporation,

Respondent.

No. 42994-2-II

ORDER GRANTING APPELLANTS' MOTION TO ALLOW LATE FILING OF A NOTICE OF APPEAL

APPELLANTS move for permission to file a notice of appeal in the above-referenced matter after the deadline set forth in RAP 5.2. Upon consideration, the court has decided the motion has merit. Accordingly, it is

ORDERED that the Clerk accept for filing the notice of appeal in the above-referenced matter. A perfection notice will follow in due course.

DATED this 27th day of February, 2012.

PANEL: Jj. Worswick, Hunt, Johanson

FOR THE COURT:

ACTING CHIEF JUDGE

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APPENDIX 2

TOLLING AGREEMENT

THIS TOLLING AGREEMENT ("Agreement") is made effective as of the 15th day of July 2013 ("Effective Date") by and between PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY, a Washington municipal corporation ("Clark"), and COMCAST CABLE COMMUNICATION MANAGEMENT, LLC, a Pennsylvania corporation ("Comcast"). Clark and Comcast are collectively referred to as the "Parties" and individually as the "Party".

Recitals

A. Comcast attaches its communications equipment to Clark's electric poles, and Clark invoices Comcast annually for pole attachment rent.

B. Clark issued invoices to Comcast for pole attachment rent for 2009 (dated January 20, 2010), 2010 (dated February 8, 2011), 2011 (dated November 2, 2012), and 2012 (dated January 28, 2013) (collectively, the "2009-2012 Invoices"), and intends to continue to do so for each year thereafter.

C. Comcast disagrees with various aspects of the 2009-2012 Invoices, including the rental rate amounts, which Clark asserts were calculated pursuant to RCW 54.04.045, as amended on June 8, 2012. Rather than pay the disputed amounts, Comcast made partial interim payments on the 2009-2012 Invoices based on Clark's pole attachment rate in effect prior to amended RCW 54.04.045.

D. Comcast and another public utility district, Public Utility District No. 2 of Pacific County ("Pacific PUD"), have been engaged in litigation in Pacific County Superior Court (consolidated Case No. 07-2-00484-1) since December 2007 regarding the proper calculation of pole attachment rates under RCW 54.04.045 and other terms and conditions under which Comcast attaches its communications equipment to Pacific PUD's electric poles (collectively, with all appellate proceedings arising therefrom, the "Pacific PUD Pole Attachment Lawsuit").

E. The Pacific PUD Pole Attachment Lawsuit is currently on appeal in Division II of the Washington Court of Appeals (Consolidated Case No. 42994-2-11).

F. Comcast and Clark have exchanged correspondence regarding the 2009-2012 Invoices reflecting their disagreement concerning the applicable pole attachment rate under RCW 54.04.045, as amended, and other aspects of the 2009-2012 Invoices. In their correspondence, the Parties agreed to reconcile the amounts paid or due for the 2009-2012 invoices upon a final, non-appealable decision in the Pacific PUD Pole Attachment Lawsuit.

G. The Parties wish to confirm the understandings reflected in their correspondence regarding the 2009-2012 Invoices and extend the understanding to any subsequent invoices, notwithstanding any applicable statute of limitations and without litigation, pending the final, non-appealable decision in the Pacific PUD Pole Attachment Lawsuit and any other non-appealable regulatory, judicial or other decisions regarding the applicability or inapplicability of Washington Leasehold excise tax to pole attachment rents

that may affect the amounts on the 2009-2012 Invoices and any subsequent invoices (the "Clark/Comcast Pole Attachment Dispute").

NOW, THEREFORE, in consideration of the mutual agreements hereinafter set forth, the Parties covenant and agree as follows:

Agreements

1. Definitions. As used in this Agreement, the following terms shall have the following meanings:

   a. "Claims" shall mean any and all complaints, claims, or causes of action each party may have against the other party in connection with the Clark/Comcast Pole Attachment Dispute.

   b. "Tolling Period" shall mean the period from and including the Effective Date (as defined above, regardless of the date of actual Party signatures) of this Agreement until and including the Expiration Date (as defined below) of this Agreement.

   c. "Expiration Date" shall mean the earlier of: 1) the date which is sixty (60) days after the final resolution of the Pacific PUD Pole Attachment Lawsuit as represented by the issuance of the final mandate terminating review of the Pacific PUD Pole Attachment Lawsuit by Division II of the Court of Appeals or by the Washington Supreme Court pursuant to RAP 12.5; or 2) the date which is sixty (60) days after written notice by either Party to the other Party of its intent to terminate this Agreement.

   d. "Timing Defenses" shall mean any affirmative defenses, counterclaims, or other responses to Claims each Party may have against the other Party based on any statute of limitations, laches, or otherwise on timeliness or deadlines in commencing litigation regarding the Clark/Comcast Pole Attachment Dispute.

2. Tolling of/Further Assurances Regarding Limitations Periods. The Tolling Period shall not be included in computing the time during which each Party must commence any lawsuit or action against the other Party with respect to the Clark/Comcast Pole Attachment Dispute. Each Party agrees not to assert any Timing Defenses based on the Tolling Period, and agrees that any statute of limitations or other applicable time limitation for the other Party to commence litigation related to the Clark/Comcast Pole Attachment Dispute shall be tolled and suspended during the Tolling Period. In addition to the foregoing, each Party further agrees not to assert any Timing Defenses in any litigation the other Party commences with respect to the Clark/Comcast Pole Attachment Dispute, if such action is commenced within 180 days of the Expiration Date.

3. No Admission. Nothing in this Agreement shall be construed as an admission or denial by either of the Parties as to the merits of either Party's claims, defenses, rights, assertions, and positions in the Clark/Comcast Pole Attachment Dispute (except as expressly set forth in this Agreement), and the Parties agree that this Agreement is not intended to be admissible against any Party with respect to same. Notwithstanding the immediately preceding sentence, this Agreement, if otherwise admissible, may be

introduced into evidence in any proceeding between or among the Parties specifically to enforce its terms.

4. Reservation of Rights. Except as expressly set forth in this Agreement, each of the Parties expressly reserves all of its claims, defenses, rights, assertions, and positions with respect to the Clark/Comcast Pole Attachment Dispute. Without limiting the foregoing, the Parties do not intend this Agreement to affect or modify any deadlines or timeliness requirements imposed by statute, court rule, or otherwise by law or equity, except as expressly set forth in this Agreement with respect to the Clark/Comcast Pole Attachment Dispute.

5. Entire Agreement. The provisions of this Agreement comprise all of the terms, conditions, agreements and representations of the Parties with respect to the tolling of any applicable limitations periods and Timing Defenses.

6. Amendment. This Agreement may not be altered or amended except by written agreement executed by the Parties.

7. No Waiver. No waiver of any provision or breach of this Agreement shall be effective unless such waiver is in writing and signed by the waiving Party, and any such waiver shall not be deemed a waiver of any other provision of this Agreement or other breach of this Agreement.

8. Representations; Construction. Each of the Parties represents and warrants that it has full power and authority to execute, deliver, and perform its obligations under this Agreement. Each Party acknowledges that it has had the opportunity to review this Agreement with legal counsel of its choice. The Parties further acknowledge that no provision hereof shall be construed against any Party hereto by reason of any Party having drafted or prepared this Agreement.

9. Governing Law. This Agreement is governed by and subject to the laws of the State of Washington, excluding its principles of conflicts of law.

10. Jurisdiction/Venue. The Parties consent to the personal jurisdiction of the courts of the State of Washington with respect to the enforcement or interpretation of this Agreement. Venue for any action taken to enforce or interpret the terms of this agreement shall be in Superior Court of Clark County, Washington.

11. Attorneys' Fees/Costs. If any Party commences litigation to enforce or interpret the terms of this Agreement, the prevailing Party shall be entitled to its reasonable attorneys' fees and costs from the non-prevailing Party or Parties.

12. Binding Effect. This Agreement shall be binding on and inure to the benefit of the respective Parties and their successors and assigns.

13. Survival of Rights and Obligations. The respective rights and obligations of the Parties that by their nature would continue beyond the termination, cancellation, or expiration of this Agreement, including without limitation those set forth in Section 2, shall survive any termination, cancellation, or expiration of this Agreement.

14. Notices. All notices which are required or may be given under this Agreement shall be in writing and shall be by certified or registered mail, express mail or other overnight delivery service, or hand delivery, proper postage or other charges paid and addressed or directed to the respective Parties as follows:

To Clark:

Donald S. Cohen
Gordon Thomas Honeywell, LLP
600 University Street, Suite 2100
Seattle, WA 98101

With a copy to:

John Eldridge
Legal Counsel
Public Utility District No. 1of Clark County
1200 Ft. Vancouver Way
Vancouver, WA 98668

To Comcast:

Sanford Inouye
Vice President
Government Affairs
Comcast Corporation
9605 SW Nimbus Avenue
Beaverton, OR 97008

With a copy to:

Tracy Haslett
Comcast Legal, Operations
Comcast Corporation
One Comcast Center
1701 John F. Kennedy Boulevard
Philadelphia, PA 19103

15. Counterparts. This Agreement may be executed in one or more original counterparts, each of which shall be deemed an original, but also which together will constitute one and the same instrument.

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IN WITNESS WHEREOF, this Agreement has been executed below by the Parties.

PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY

By: _____ Dated this 12TH day of JULY, 2013
Its: GENERAL MANAGER

COMCAST CABLE COMMUNICATION MANAGEMENT, LLC

By: _____ Dated this ____ day of _____, 2013
Its: _____

IN WITNESS WHEREOF, this Agreement has been executed below by the Parties.

PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY

By:_____ Dated this ____day of _____, 2013
Its: _____

COMCAST CABLE COMMUNICATION MANAGEMENT, LLC

By: _____ Dated this 22 day of July, 2013
Its: Vice President of Government Affairs

APPENDIX 3

THE SUPREME COURT OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, Petitioner, v. COMCAST OF WASHINGTON, INC., et al., Respondents.	NO. 87126-4 **ORDER** C/A No. 42994-2-II

Department II of the Court, composed of Chief Justice Madsen and Justices Chambers, Fairhurst, Stephens and González, considered this matter at its June 5, 2012, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion for Discretionary Review is denied. The Respondents' motions to strike are denied.

DATED at Olympia, Washington this 5th day of June, 2012.

For the Court

Madsen, C.J.

CHIEF JUSTICE

FILED
SUPREME COURT
STATE OF WASHINGTON
2012 JUN -5 P 3:46
BY RONALD R. CARPENTER
CLERK

637/166

EIH

No. 91386-2

SUPREME COURT
OF THE STATE OF WASHINGTON

[Court of Appeals No. 70625-0-I]

PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY,
a Washington municipal corporation,

Respondent/Cross-Petitioner,

v.

COMCAST OF WASHINGTON IV, INC., a Washington corporation; CENTURYTEL OF WASHINGTON, INC., a Washington corporation; and FALCON COMMUNITY VENTURES, I, L.P., a California limited partnership, d/b/a CHARTER COMMUNICATIONS,

Petitioners/Cross-Respondents.

CERTIFICATE OF SERVICE

GORDON THOMAS HONEYWELL LLP

Donald S. Cohen, WSBA No. 12480
Stephanie Bloomfield, WSBA No. 24251

600 University, Suite 2100
Seattle, WA 98401-1157
(206) 676-7500

Attorneys for Respondent/Cross-Petitioner
Public Utility District No. 2 of Pacific
County

CERTIFICATE OF SERVICE

I, Lynne M. Overlie, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on the 8th day of May, 2015, I caused true and correct copies of Respondent's Answer to Petition for Review, and Cross-Petition for Review to be served upon the following counsel of record in the manner indicated:

Timothy J. O'Connell **Via Email and Hand Delivery**
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101
tjoconnell@stoel.com

Eric Stahl **Via Email and Hand Delivery**
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New York, NY 10019
jillvalenstein@dwt.com

John McGrory **Via Email and Mail**
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201-5630
johnmcgrory@dwt.com

Signed this 8th day of May, 2015, at Seattle, Washington.

Lynne M. Overlie, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Overlie, Lynne
Cc: Cohen, Don
Subject: RE: PUD No. 2 of Pacific County v. Comcast of Washington IV, Inc., et al. (Supreme Court Cause No. 91386-2)

Received 5-8-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Overlie, Lynne [mailto:loverlie@gth-law.com]
Sent: Friday, May 08, 2015 12:57 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Cohen, Don
Subject: PUD No. 2 of Pacific County v. Comcast of Washington IV, Inc., et al. (Supreme Court Cause No. 91386-2)

Attached for filing are the following documents:

> Respondent's Answer to Petitions for Review, and Cross –Petition for Review; and Certificate of Service.

Filed on behalf of Donald S. Cohen, WSBA No. 12480.

Lynne Overlie
Legal Assistant

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