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DIVISION II

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STATE OF WASHINGTON

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No. 42994-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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

Respondent

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,

Appellants.

OPENING BRIEF OF APPELLANT
CENTURYTEL OF WASHINGTON, INC.

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TABLE OF CONTENTS

	Page
I. IDENTITY OF APPELLANT AND INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	2
III. ISSUES PRESENTED.....	2
IV. STATEMENT OF THE CASE.....	3
A. Factual Background	3
1. Overview of Utility Poles	3
2. Overview of Attachment Regulation	4
3. Developments in Pacific County	9
4. PUDs’ Rates.....	11
B. Procedural Background.....	11
V. ARGUMENT.....	14
A. Standard of Review.....	14
1. As to a Court’s Interpretations of Statute	14
2. The Districts’ Interpretation of a Statute Is Not Subject to Arbitrary and Capricious Review	15
3. The Court’s Factual Findings.....	16
B. CenturyLink (and Co-Defendants) Offer the Only Reasonable Interpretation of RCW 54.04.045(3)	17
1. Subsection (3)(a) Is the FCC Cable Rate.....	17
a. Plain Language.....	17
b. 3(a) Is a Virtual Word-for-Word Copy of RCW 80.54.040	20
c. Undisputed Evidence That RCW 80.54.045 Has Been Applied as the Cable Rate.....	21
d. Recognizing That the Statute Is Based on RCW 80.54.040 Comports with Legislative History	23
2. RCW 54.04.045(3)(b) Is a Modified Version of the Telecom Rate	24
3. Under RCW 54.04.045(3)(c), the Resulting Just and Reasonable Rate Is the Average of 3(a) and 3(b).....	26

TABLE OF CONTENTS

	Page
C. The District’s and Trial Court’s Interpretation of the Statute Is a Manifest Error of Law.....	26
1. 3(a) Cannot Be the Telecom Rate.....	26
2. 3(b) Cannot Be the APPA Rate	28
a. The APPA Model Uses a Form Contrary to the Plain Language of 3(b) ...	29
b. Treating 3(b) as the APPA Rate Requires Using Identical Terms in Entirely Different Ways.....	29
c. 3(b) Cannot Be the APPA Model Because It Treats the Safety Space Contrary to Fact	31
3. Subsection 4 Does Not Preclude 3(a) from Being the FCC Cable Rate.....	33
D. The Inputs Utilized by the District Were Inappropriately Selected to Increase Rates.....	36
1. Includes a “Return on Equity” for a Nonprofit Enterprise	36
2. Includes Transmission Poles.....	37
E. The Nonrate Terms and Conditions in the District’s Unilaterally Imposed Agreement Are Not Just or Reasonable	38
1. Standards to Evaluate Terms and Conditions Under the Statute.....	38
a. Plain Language of Statute	38
b. An Unconscionable Contract Is Not Just and Reasonable	40
2. Multiple Provisions Are Contrary to Law	42
3. Multiple Provisions in the Imposed Agreement Are at Best Vague and Ambiguous, and at Worst Contrary to the Claimed Intent.....	43
4. Multiple Terms Are Overreaching.....	45
5. Some Terms Are Impossible (and Both Reflect and Enhance a Disparity in Bargaining Power)	46

TABLE OF CONTENTS

	Page
6. The District May Not Defend Its One-Sided Terms and Conditions by Comparing Them to Isolated Terms in Multiple Agreements	47
F. The Trial Court Erred in Its Awards of Fees and Costs.....	48
G. Remedy: The Case Should Be Remanded to Pacific County Superior Court for Entry of Judgment in CenturyLink’s Favor, and It Should Be Granted Its Attorneys’ Fees on Appeal and for the Underlying Trial.....	49
1. The Court Should Deny the District’s Claims and Grant CenturyLink’s Claim for Declaratory Judgment	49
2. RAP 18.1 – CenturyLink Is Entitled to Attorneys’ Fees, in This Court and Below.....	49
VI. CONCLUSION.....	50

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 103 P.3d 773 (2004) (en banc).....	40, 41
<i>Alexander v. Anthony Int'l, L.P.</i> , 341 F.3d 256 (3d Cir. 2003).....	42
<i>AT&T Corp. v. Iowa Utilities Bd.</i> , 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).....	47
<i>Bering v. SHARE</i> , 106 Wn.2d 212, 721 P.2d 918 (1986).....	16
<i>Bond v. Wiegardt</i> , 36 Wn.2d 41, 216 P.2d 196 (1950).....	44
<i>City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 136 Wn.2d 38, 959 P.2d 1091 (1998).....	14
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	39
<i>De Grief v. City of Seattle</i> , 50 Wn.2d 1, 297 P.2d 940 (1956) (en banc).....	29
<i>FCC v. Fla. Power Corp.</i> , 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987).....	5
<i>Fray v. Spokane Cnty.</i> , 134 Wn.2d 637, 952 P.2d 601 (1998).....	35
<i>Gen. Tel. Co. of N.W., Inc. v. City of Bothell</i> , 105 Wn.2d 579, 716 P.2d 879 (1986).....	43
<i>Gerberding v. Munro</i> , 134 Wn.2d 188, 949 P.2d 1366 (1998).....	39
<i>Glass v. Stahl Specialty Co.</i> , 97 Wn.2d 880, 652 P.2d 948 (1982).....	21, 23

TABLE OF AUTHORITIES

	Page(s)
<i>Hunter v. Univ. of Wash.</i> , 101 Wn. App. 283, 2 P.3d 1022 (2000).....	14
<i>In re Implementation of Section 224 of the Act</i> , WC Docket No. 07-245, GN Docket No. 09-51, FCC 11-50 (Apr. 7, 2011).....	6, 7
<i>Kelso v. City of Tacoma</i> , 63 Wn.2d 913, 390 P.2d 2 (1964).....	23
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	26
<i>Lamphiear v. Skagit Corp.</i> , 6 Wn. App. 350, 493 P.2d 1018 (1972).....	17
<i>Long v. Director, Office of Workers' Comp. Programs</i> , 767 F.2d 1578 (9th Cir. 1985)	21
<i>Mendez v. Palm Harbor Homes, Inc.</i> , 111 Wn. App. 446, 45 P.3d 594 (2002)	40, 41
<i>Nejin v. City of Seattle</i> , 40 Wn. App. 414, 698 P.2d 615 (1985).....	16
<i>New Edge Network, Inc. v. FCC</i> , 461 F.3d 1105 (9th Cir. 2006)	48
<i>Overton v. Wash. State Econ. Assistance Auth.</i> , 96 Wn.2d 552, 637 P.2d 652 (1981).....	16
<i>Patterson v. Kennewick Pub. Hosp. Dist. No. 1</i> , 57 Wn. App. 739, 790 P.2d 195 (1990).....	16
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	15
<i>Simpson Invest. Co. v. Dep't of Revenue</i> , 141 Wn.2d 139, 3 P.3d 741 (2000) (en banc).....	29
<i>Snohomish County PUD No. 1 v. Broadview Television Co.</i> , 91 Wn.2d 3, 586 P.2d 851 (1978).....	15

TABLE OF AUTHORITIES

	Page(s)
<i>State v. Bobic</i> , 140 Wn.2d 250, 996 P.2d 610 (2000).....	17, 19
<i>State v. Carroll</i> , 81 Wn.2d 95, 500 P.2d 115 (1972).....	17, 19
<i>State v. Chester</i> , 133 Wn.2d 15, 940 P.2d 1374 (1997).....	26
<i>State v. Reader’s Digest Ass’n</i> , 81 Wn.2d 259, 501 P.2d 290 (1972).....	26
<i>State v. Rhodes</i> , 58 Wn. App. 913, 795 P.2d 724 (1990).....	38
<i>State v. Rice</i> , 116 Wn. App. 96, 64 P.3d 651 (2003).....	21
<i>Teter v. Clark County</i> , 104 Wn.2d 227, 704 P.2d 1171 (1985).....	15
<i>Thorndike v. Hesperian Orchards, Inc.</i> , 54 Wn.2d 570, 343 P.2d 183 (1959).....	16
<i>Zuver v. Airtouch Comme’ns, Inc.</i> , 153 Wn.2d 293, 103 P.3d 753 (2004) (en banc).....	40, 41, 42
 Statutes	
47 U.S.C. § 224(d).....	18, 19, 20
47 U.S.C. § 224(d)(1).....	18, 19
47 U.S.C. § 224(e)(2).....	6
1979 Laws Ch. 33.....	5
1996 Laws Ch. 32.....	6
RCW 4.84.330.....	42, 50
RCW 35.99.060.....	42

TABLE OF AUTHORITIES

	Page(s)
RCW 39.99.060(3).....	42
RCW 54.04.045	passim
RCW 54.04.045(2).....	15, 38
RCW 54.04.045(3).....	17, 21
RCW 54.04.045(3)(a)	passim
RCW 54.04.045(3)(b)	passim
RCW 54.04.045(3)(c)	26
RCW 54.16.040	15
RCW 54.16.340	23
RCW 80.36.040	46
RCW 80.54.040	passim
RCW 80.54.045	21, 22, 23
Rules	
RAP 18.1	49
Regulations	
47 C.F.R. § 1.1404(g)(1)(i)-(vi).....	8
47 C.F.R. § 1.1404(g)(1)(ix).....	8
47 C.F.R. § 1.1404(g)(2).....	6, 8
47 C.F.R. § 1.1404(g)(x).....	36
47 C.F.R. § 1.1409(e)(1).....	8
47 C.F.R. § 1.1409(e)(2).....	7, 9, 27, 28
WAC 480-07-750.....	22

I. IDENTITY OF APPELLANT AND INTRODUCTION

This case concerns the rates, terms and conditions under which telecommunications providers may attach their facilities to utility poles owned by public utility districts. Utility poles are widespread in the electric and telecommunications infrastructure. This controversy over pole attachments was presented to the Superior Court for Pacific County, which manifestly erred in its determinations. This appeal was therefore filed by Appellant CenturyTel of Washington, Inc. (now known as CenturyLink of Washington, Inc., and hereinafter, “CenturyLink”).

Just and reasonable rates, terms and conditions for the deployment of communications infrastructure throughout the state are critical to the ability of Washington residents to readily communicate with one another and the world, implicating everything from the prosaic local telephone call to the most sophisticated broadband and Internet uses. The Superior Court’s decision ratifies unjust and unreasonable rates, terms and conditions, and will not promote the development of competition in these telecommunications and information services, contrary to the direction of the Legislature. Plaintiff-respondent Public Utility District No. 2 of Pacific County (the “District”) urges an untenable construction of new legislation: among other errors, the District’s interpretation of RCW 54.04.045 *requires* giving different meanings to identical terms in

adjacent subsections of RCW 54.04.045; inserting terms into RCW 54.04.045 that are not present; ignoring the undisputed interpretation and application of a previous statute that was imported virtually unchanged into RCW 54.04.045; ignoring undisputed portions of the legislative history; and relies on factual findings that are without support in the record.

II. ASSIGNMENTS OF ERROR

1. The trial court's interpretation of RCW 54.04.045 is error.
2. The trial court erred in concluding that the unilaterally promulgated "Pole Attachment License Agreement" demanded by the District complies with RCW 54.04.045.
3. The trial court erred in entering Findings of Fact, Conclusions of Law and Judgment adverse to CenturyLink.
4. The trial court erred in Findings of Fact Nos. 5, 6, 7, 14, 15, 25, 26, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 47, 48 and 49.
5. The trial court erred in awarding the District its costs and attorneys' fees at trial as well as additional attorneys' fees and costs incurred in opposing Defendants' Joint Motion to Vacate the Judgment.

III. ISSUES PRESENTED

1. Did the trial court correctly interpret RCW 54.04.045?
2. Did the unilaterally prepared pole attachment agreement, which the District presented to CenturyLink on a "take it or leave it"

basis, comply with RCW 54.04.045?

IV. STATEMENT OF THE CASE

A. Factual Background

1. Overview of Utility Poles

Utility poles are typically owned by an electric utility or a telephone company. The owner rents space on its poles to third party attachers. A discussion of utility poles and attachments relies on commonly utilized terms. Those terms can most readily be understood by examining an illustrative example of a pole designed for joint use. Please see Appendix A.¹

Analytically, the total height of a pole includes different areas. A portion must be buried below ground level to provide stability; this is the “Support Space.” From the ground level up, space is required to be kept free of all attachments extending away from the pole, so as to avoid harming traffic and passersby. Thus, from ground level to the lowest permitted attachment is the “Clearance Space.” The lowest one foot above the Clearance Space is reserved for communications attachers, including telecommunications companies such as CenturyLink, and cable TV companies such as co-defendants Comcast and Charter.² The

¹ CP at 1067; *cf.* Ex. 192.

² Comcast of Washington IV. Inc. (“Comcast”) and Falcon Community Ventures I, L.P. d/b/a Charter Communications (“Charter”).

top portion of the pole is reserved for the electric utility, the “Electric Space.” Because many of the electrical attachments are uninsulated and thus dangerous, there is a buffer between the area permitted to communications companies and the Electric Space. This buffer zone is the “separation space” or, as hereinafter, the “Safety Space.”

In Appendix A’s illustration, a street light is attached to the pole in both the Electric Space and the Safety Space. This is intentional. All parties acknowledge that the Safety Space may be used by the electric utility for revenue-generating attachments, such as street lights.

For purposes of computing rates charged to entities attaching to poles owned by other entities, the areas on a utility pole described above are sometimes grouped. Clearance space and support space, because they can hold no attachments, are referred to as “Unusable Space.” The communications space and above, which can all include attachments of the electric utility or communications attachers, is “Usable Space.”

2. Overview of Attachment Regulation

Utility poles offer many advantages for the delivery of electricity and telecommunications services. They are cost-efficient and, when properly designed, can last for many decades. RP at 415, 443. Utility poles do present disadvantages. As large, immovable objects near the right-of-way utilized by pedestrians and traffic, an excessive number of

poles would present a hazard to the public. Please see Pacific County Road Standards, Appendix B, § 10. Moreover, an excessive number of utility poles would present an aesthetic concern, as well as engender increased construction-related disruption. *Id.* Thus, it is unsurprising that it is expressly the public policy of Washington “**to encourage the joint use of utility poles.**” Ex. 81 (ESSHB 2533, codified at RCW 54.04.045 (hereinafter, the “Statute”)) § 1 (emphasis added).

Similarly, the public has long recognized that the preference for joint use places the party owning the poles in a disproportionately strong bargaining position over entities that might seek to attach to such poles. In 1978, Congress regulated pole attachment rates for investor-owned utilities. Pub. L. No. 95-234, 92 Stat. 33. Shortly thereafter, in 1979 Laws Ch. 33, the Washington Legislature authorized the Washington Utilities and Transportation Commission to hear complaints for such investor-owned utilities, thereby bringing Washington outside the direct control of the Federal Communications Commission (“FCC”), which regulates rates under the Cable Act. *FCC v. Fla. Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). In a similar fashion, the Washington Legislature recognized that utility poles were also controlled by public power providers. In 1996, the Legislature enacted legislation applicable to all public power providers, requiring that the rates charged

for entities attaching to the locally owned utility's poles be fair, just, sufficient and nondiscriminatory. 1996 Laws Ch. 32.

Tellingly, the Legislature's 1996 enactment was insufficiently specific for one category for public power providers: public utility districts. In 2008, the Legislature enacted the Statute, applicable only to public utility districts ("PUDs"); it mandated that PUDs charge attachers rates that are just, reasonable, nondiscriminatory and sufficient. The Statute went beyond previous legislation, however, by enacting a specific formula for the computation of just rates.

The Legislature did not act in a vacuum. After Congress's passage of the Cable Act, the FCC developed the "Cable Rate."³ The Cable Rate is actually a formula, designed to allow the pole owner to easily compute a rate by inputting data from established accounting records. 47 C.F.R. § 1.1404(g)(2). In 1996, Congress passed the Telecommunications Act, which changed many aspects of telecommunications regulation, including the establishment of a new formula for pole attachments by telecommunications entities. 47 U.S.C. § 224(e)(2). In response, the FCC devised a new formula, the so-called

³ The FCC has revised the relevant regulations. *See In re Implementation of Section 224 of the Act*, WC Docket No. 07-245, GN Docket No. 09-51, FCC 11-50 (Apr. 7, 2011) (Report and Order and Order on Reconsideration). All references are to the Code of Federal Regulations in effect at the time of the Statute's enactment, in 2008.

“Telecom Rate.” See 47 C.F.R. § 1.1409(e)(2). The FCC’s rates were not without their critics, including the American Public Power Association (“APPA”), a trade group representing public power providers such as the District. The APPA thus fashioned its own proposed rate, the “APPA Rate.” The Legislature acknowledged this heritage in enacting the Statute. In the Senate Bill Report, the Legislature noted that it borrowed from formulas developed by the FCC, the Washington Utilities and Transportation Commission (“WUTC”) and the APPA. Ex. 81, p. 2. Moreover, at the time the Legislature enacted the Statute, it was aware of the FCC’s then-pending review of pole attachment rates.⁴ The Legislature thus included subsection 4 of the Statute, which, as the Senate Bill Report said, “allows for future rate-setting methodologies as set by rule by the FCC.” *Id.*

At trial, the parties offered differing interpretations of the Statute’s rate terms, but all proffered interpretations used the three formulae identified above: the Cable Rate, the Telecom Rate or the APPA Rate, or minor variations of each. All the formulae have many elements in common.

⁴ *In re Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, FCC 07-187 (Nov. 20, 2007) (Notice of Proposed Rulemaking) (the “Pole Attachment Notice”).

First and most critically, all three formulae are *cost* based.⁵ 47 C.F.R. § 1.1404(g)(2); Ex. 936, p. 15. Thus, rates are based on the pole owner's actual costs, as opposed to so-called "value-based fees" that reflect the alternative investment the attacher would have to incur to create its own pole infrastructure. *Cf.* Ex. 6, p. 9. Second, all three formulae base their costs on established accounting records all pole owners maintain for their business for other regulatory or financial purposes. *E.g.*, Ex. 936, p. 17 (APPA Rate based its "Average Cost of Bare Pole" on FERC account 364). Third, all three formulae base their rate on an analysis that is simple once the inputs are computed.

Specifically, all three formulae derive an average cost of the poles used by the pole owner, without regard for extraneous additional assets. This is commonly referred to as the "Bare Pole Costs." 47 C.F.R. § 1.1404(g)(1)(i)-(vi); Ex. 936, p. 17. Then, the formulae derive an allocation of the pole owner's overall operating costs that can be properly associated with maintenance and administration of the owner's poles. This is commonly referred to as the "Carrying Charge." 47 C.F.R. § 1.1404(g)(1)(ix); Ex. 936, p. 17. Lastly, the formulae all attempt to derive a specific amount of the pole that should be allocated to the attacher. This is commonly referred to as the "Space Factor." 47 C.F.R.

⁵ Albeit using different definitions of "costs." *See* p. 30, *infra*.

§ 1.1409(e)(1), (e)(2); Ex. 936, p. 17. The result when all these figures are multiplied is the annual attachment rate.

3. Developments in Pacific County

Pacific County is a large, largely rural area in southwest Washington. RP at 87-88. Electric service throughout all of Pacific County is offered only by the District. RP at 86-87. The District also provides telecommunications services on a “wholesale” basis throughout the county. RP at 88-89. CenturyLink provides telephone service throughout Pacific County, RP at 905-906, pursuant to tariffs approved by the WUTC. RP at 945-947, 1013-1014. Among CenturyLink’s customers is the District itself. RP at 213. In addition to the services it offers to end-user customers, CenturyLink also provides wholesale telecommunications services to other entities, in competition with the District. RP at 292-293, 867, 1659.⁶

CenturyLink (and its predecessors) and the District had occupied one another’s poles throughout Pacific County under contractual arrangements going back decades. Exs. 3, 4. In 2005, CenturyLink uncovered a billing error by the District. RP at 906-907. The matter was eventually resolved on terms suggested by CenturyLink. Ex. 957; RP at 834-835, 922. Shortly thereafter, the District concluded that it needed to

⁶ This undisputed fact renders the trial court’s Findings of Fact Nos. 5, 6, 47 and 49 plainly and erroneously incomplete.

revise the pole attachment agreements that it had with all attachers. RP at 897; Ex. 34. The District concluded that it wanted to have a single uniform agreement with all attachers, regardless of the nature of the services offered. *Id.* The District started with a template agreement issued by the APPA as the base document for its form agreement, and modified⁷ it. RP at 109, 252.

The District sent notice to CenturyLink that it wished to terminate the pole attachment agreements between the parties. Ex. 26. CenturyLink agreed to a common termination for both of its attachment agreements, even though under the terms of the agreement for the southern part of Pacific County, it was entitled to apply the old agreement for an additional three years. RP at 912; Ex. 943. The District conducted no negotiations with attachers over the terms of its newly proposed attachment agreement, but accepted “comments.” RP at 319-332, 847-849, 891. Indeed, it was undisputed that in the brief telephone conferences District personnel had with CenturyLink’s negotiators, the parties did not even address many areas of the agreement about which CenturyLink had concerns. RP at 847-851, 858, 922; Ex. 944.

Simultaneously with this process, the District used an outside

⁷ Specific problematic terms and conditions in the District’s proposed agreement will be addressed in Section V(E), below.

consultant, EES Consulting, Inc. (“EES”), to unilaterally develop rates the District would charge attachers. While the District provided the requisite formal public notice of its Commissioners’ consideration of the new rates, the District acknowledged that it did not inform CenturyLink or any of the other attachers of that consideration – even though the parties communicated about the proposed attachment agreements just days prior to the Commissioners’ consideration. RP at 852.

4. PUDs’ Rates

The District’s proposed rates were devised by the District’s staff itself, based on a report prepared by EES. District staff proposed a rate that, after a transition year, would rise to \$19.70, effective in 2008.

Ex. 16. District staff recognized that the ultimate proposed rate was higher than the Telecom Rate, and more than 150% higher than the average charged by other PUDs.⁸ *Id.* at PUD 000035.

B. Procedural Background

CenturyLink concluded that many of the terms insisted on by the District were unlawful, and the rates proposed by the District were far in excess of those authorized by established rate-making models, and exceeded the fair, just and nondiscriminatory requirement of RCW 54.04.045. Moreover, with no opportunity to negotiate the terms

⁸ Staff proposed an ultimate rate of \$19.70; staff acknowledged that the average rate charged by a group of PUDs selected by staff was \$12.83.

and conditions of the agreement, CenturyLink refused to sign the agreement the District demanded. RP at 1045. CenturyLink also refused the District's demand to vacate all poles, given the immediate harm that would be caused to the public telephone network. RP at 1616-1617.

Rather than actually negotiate pole attachment agreements, the District responded by initiating this litigation. Initially, the District started separate lawsuits against the three defendants. By consent of the parties, the cases were consolidated. CP at 1-10, 42-47, 81-90, 120-129.

The trial consumed seven days. The trial court admitted 238 exhibits. The parties presented evidence on the proper interpretation of the Statute, and the facts about how various contractual provisions would be implemented. The trial court made no immediate decision but took the matter under advisement. On March 15, 2011 – more than five months after trial ended – the trial court issued its Memorandum Decision. CP at 1324-1327. In that Memorandum Decision, the trial court concluded that the District's actions were subject to an arbitrary and capricious standard of review, that subsection (3)(a) of the Statute is the Telecom Rate, that subsection (3)(b) of the Statute is the APPA Rate and that the other terms and conditions in the District's attachment agreement were supported by "credible" reasons (without delineating what those reasons were). The Memorandum Decision was not a final ruling. It

invited the submission of Findings of Fact, as well as a request by the District for attorneys' fees.

After substantial briefing, the parties presented proposed Findings of Fact and Conclusions of Law in oral argument on September 16, 2011. That argument was no mere formality. Defendants presented extensive explanation that some of the findings proposed by the District were not supported by substantial, or in some cases, any evidence. Defendants also argued that some of the proposed Conclusions of Law were contrary to the law. The parties also disputed the amount of attorneys' fees sought by the District. Again, the trial court took the matter under advisement.

On December 12, 2011,⁹ the trial court entered its final Findings of Fact and Conclusions of Law and an award of attorneys' fees included in the final Judgment. Notwithstanding the extensive argumentation on these issues, the trial court adopted the findings, conclusions and requested attorneys' fees proposed by the District

In March 2012, the District sought an additional award of attorneys' fees for having opposed CenturyLink's and co-defendants'

⁹ CenturyLink will not present facts or argument surrounding the timing of this appeal, permitted by a unanimous panel of this Court. Order, February 27, 2012. The District sought discretionary review of that ruling permitting this appeal. Again, a unanimous panel of the Supreme Court rejected the District's petition, permitting this appeal to go forward. Supreme Court Docket No. 87126-4, June 5, 2012. Respectfully, no further argument should be permitted on this issue at this juncture in these proceedings.

attempt to vacate the earlier judgment, for purposes of permitting an appeal. The trial court granted the District's motion, again awarding all amounts sought by the District, with only one modification.¹⁰

CenturyLink (and co-defendants) appealed that ruling. That appeal was consolidated with the earlier appeal, and all issues are presented here.¹¹

V. ARGUMENT

A. Standard of Review

The trial court held that the District's actions were subject to an arbitrary and capricious standard of review. This was plain error.

1. As to a Court's Interpretations of Statute

An agency's interpretation and application of a statute are subject to de novo review. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998). To this end, an appellate court is in no way bound by the agency's interpretation. Moreover, when reviewing a pure question of law, a court does not defer to the agency at all. *Hunter v. Univ. of Wash.*, 101 Wn. App. 283, 2 P.3d 1022 (2000). Additionally, an agency's application of the law to a

¹⁰ The court struck two affidavits the District had improperly obtained, and thus denied the attorneys' fees associated with obtaining those improper affidavits. CP at 2832.

¹¹ On October 11, 2012, the parties jointly presented a motion seeking several corrections to the transcript. That motion was granted by the trial court on October 19, 2012, and revised transcript pages have been transmitted for filing on November 13, 2012.

specific set of facts is subject to de novo review. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 90 P.3d 659 (2004).

Thus, when reviewing an agency's application of a statute, or compliance therewith, this Court reviews those actions de novo.

2. The Districts' Interpretation of a Statute Is Not Subject to Arbitrary and Capricious Review

The District's argument ignores cases where an agency's actions are not regulated by a specific standard, and instead improperly relies on rate-setting cases not governed by a specific statute. For instance, in *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1985), no statute provided specific standards with which the rates had to comply, and the Supreme Court expressly relied upon the county's general police power, 104 Wn.2d at 233-34, a power the District lacks. The District's reliance on *Snohomish County PUD No. 1 v. Broadview Television Co.*, 91 Wn.2d 3, 586 P.2d 851 (1978), is equally misplaced. That case involved a PUD's general rate-making authority under RCW 54.16.040, which by its terms applies no limitation at all on a PUD's "exclusive authority" to set rates. *Snohomish County PUD* is inapposite as it preceded the Legislature's 1996 and 2008 specific limitations on the PUDs' authority regarding pole attachment rates. In contrast, RCW 54.04.045(2) provides that the District's rates must be "just, reasonable, nondiscriminatory, and

sufficient.” The District’s rate setting is thus constrained, unlike the authorities on which it relies. The District’s claim thus negates the proper role of the courts: “it is ultimately for the court to determine the purpose and meaning of statutes.” *Overton v. Wash. State Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981). This Court’s interpretation of the Statute is plainly a de novo review.

3. The Court’s Factual Findings

This Court must ascertain whether the trial court’s Findings of Fact are supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. SHARE*, 106 Wn.2d 212, 721 P.2d 918 (1986). When a trial court’s factual findings are not supported by substantial evidence, reversal is required. *Patterson v. Kennewick Pub. Hosp. Dist. No. 1*, 57 Wn. App. 739, 747, 790 P.2d 195 (1990).

A trial court’s factual findings are not supported by substantial evidence when there is no evidence in the record to support the finding. *Id.* Additionally, a trial court’s factual findings are not supported by substantial evidence when the findings require an inference or speculation. *See Nejin v. City of Seattle*, 40 Wn. App. 414, 698 P.2d 615

(1985); *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 357, 493 P.2d 1018 (1972) (“When the circumstances lend equal support to inconsistent conclusions or are equally consistent with contradictory hypotheses, the evidence will not be held sufficient to establish the asserted fact.” (citation omitted)). In short, no factual finding can be supported by substantial evidence when it requires speculation or inference.¹²

B. CenturyLink (and Co-Defendants) Offer the Only Reasonable Interpretation of RCW 54.04.045(3)

1. Subsection (3)(a) Is the FCC Cable Rate

a. Plain Language

Under Washington law, when a state law is based on a federal statute, the state law “carries the same construction as the federal law and the same interpretation as federal case law.” *State v. Bobic*, 140 Wn.2d 250, 264, 996 P.2d 610 (2000); *see also State v. Carroll*, 81 Wn.2d 95, 109, 500 P.2d 115 (1972) (“It is the rule that a statute adopted from another jurisdiction will carry the construction placed upon such statute by the other jurisdiction.”). Accordingly, any Washington statute modeled after a federal statute must be interpreted similarly.

¹² In this regard, the trial court’s Findings of Fact Nos. 30 and 31 wholly fail. The conclusion that there are “credible reasons” for a contract provision simply provides no guidance as to whether that term is “just and reasonable.” *See* Section V(E).

Here, in enacting RCW 54.04.045(3)(a) (hereinafter, “3(a)”), the Legislature modeled its language on 47 U.S.C. § 224(d). 3(a) provides:

One component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities and uses that remain available to the owner or owners of the subject facilities[.]

And 47 U.S.C. § 224(d)(1) provides, in relevant part:

[A] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

The virtual identity between 3(a) and § 224(d) is clear when their terms are examined. First, both establish a *range* of permissible rates. At the low end of the range is the “additional costs of procuring and maintaining pole attachments,” 3(a), equally expressed in federal law as the “the additional costs of providing pole attachments,” § 224(d)(1). At the high end of the range, the rate “may not exceed the actual capital and operating expenses of” the pole “attributable to” the portion of the pole

used by the attacher. 3(a). Federal law also recognizes that the high end of the rate may not be “more than” a percentage of “the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole” used by the attacher. § 224(d)(1).

Thus, in both statutes the upper end of the range is some portion of the total costs attributable to the pole, but what portion? While the statutes use different words, the answer is the same. Federal law expresses the proportion as the “percentage of the total usable space ... which is occupied by the pole attachment.” *Id.* 3(a) defines the portion of the pole for which the attacher is to be charged to be “in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities and uses that remain available” to the pole owner. Just like § 224(d), 3(a) makes clear that all the pole’s costs are to be considered, by including the space available for attachments, and a share of the support and clearance space.

The near identity of 3(a) and § 224(d) can readily be confirmed when the Space Factor expressed in each is placed in mathematical terms. Please see Appendix C. Simply put, the two statutes reach precisely the same result. Thus, these two statutes are wholly similar and should carry the same interpretation. Therefore, applying well-settled principles espoused in *Carroll* and *Bobic*, this Court should interpret 3(a) so that it

is in accord with federal interpretations of § 224(d).

b. 3(a) Is a Virtual Word-for-Word Copy of RCW 80.54.040

Any doubt as to the straightforward analysis of 3(a) itself is removed by reviewing the virtually identical immediate source for 3(a), RCW 80.54.040, which provides:

A just and reasonable rate shall assure the utility the recovery of not less than all the additional costs of procuring and maintaining pole attachments, nor more than the actual capital and operating expenses, including just compensation, of the utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities, and uses which remain available to the owner or owners of the subject facilities.

Thus, RCW 80.54.040 and 3(a) are worded virtually identically. As even the District's expert agreed, RP at 708-713, the differences between the two statutes are minor and editorial, with one exception.¹³ The minor editorial changes reflect the fact that RCW 80.54.040 is a stand-alone formula, while 3(a) is one component of a larger formula. Thus, for example, RCW 80.54.040 opens by indicating that it is setting a "just and reasonable rate," which will ensure the utility of a certain recovery.

Conversely, 3(a) starts by recognizing that it is "one component" of a

¹³ Unlike RCW 80.54.040 applicable to investor owned utilities, PUDs are not entitled to include "just compensation" in 3(a). This difference undercuts other arguments by the District. *See* Section V(C)(3).

rate, specified by the Legislature as “just and reasonable” in RCW 54.04.045(3). Because RCW 80.54.040 and 3(a) are substantially the same, 3(a) should be read similar to, and in light of, RCW 80.54.040. *State v. Rice*, 116 Wn. App. 96, 104-05, 64 P.3d 651 (2003) (whenever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject matter, it will be understood as using it in the same sense); *see also Long v. Director, Office of Workers’ Comp. Programs*, 767 F.2d 1578, 1581 (9th Cir. 1985) (“[W]hen a legislature borrows an already judicially interpreted phrase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of that phrase.” (citation omitted)). Thus, the enforcing agency’s interpretation of RCW 80.54.040 at the time of its incorporation into the Statute should guide any reading of 3(a). *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 652 P.2d 948 (1982).

c. Undisputed Evidence That RCW 80.54.045 Has Been Applied as the Cable Rate

Furthermore, the *wholly undisputed* evidence at trial was that the agency charged with enforcing RCW 80.54.040 – the WUTC – as well as the industries regulated by RCW 80.54.040 have uniformly applied that statute as imposing the Cable Rate. RP at 1206-1210. Shortly after the

enactment of RCW 80.54.040, parties covered by that statute brought a dispute over the proper rate to the WUTC. The parties settled their dispute, RP at 1210-1212, a resolution, which, by WUTC practice, requires the approval of the WUTC itself. WAC 480-07-750. The settled-upon rate was approved by the WUTC as “lawful” and “consistent with the public interest.” WAC 480-07-750(1). The WUTC did approve that settlement, and afterwards all regulated parties applied RCW 80.54.045 as the Cable Rate. RP at 1210-1212.

Moreover, this expert testimony of fact was confirmed *by the District's expert*. In Gary Saleba's report to the District, he acknowledged, as an uncontroversial fact, that the WUTC had applied RCW 80.54.045 as the FCC's established rate – which could only be the Cable Rate, since this application came before the 1996 enactment of the Telecommunications Act that created the Telecom Rate. Ex. 6; RP at 713-718. Thus, the only evidence before the trial court was that, as a matter of fact, RCW 80.54.045 had been applied as the Cable Rate. In this regard, the trial court was not presented with some agency's interpretation of a statute that might present a question of law as to whether the agency's interpretation was correct. Rather, the trial court – and this Court – has before it an undisputed fact that for well over a decade, a statute had been interpreted and applied in a certain way. The

Legislature is presumed aware of this interpretation when it borrowed, virtually unchanged, RCW 80.54.045 as the source for 3(a). *See Kelso v. City of Tacoma*, 63 Wn.2d 913, 917, 390 P.2d 2 (1964) (“A familiar and fundamental rule for the interpretation of a statute is that it is presumed to have been enacted in the light of existing judicial decisions that have a direct bearing upon it.”); *Glass*, 97 Wn.2d at 887-88 (noting that courts presume the Legislature is familiar with past interpretations of its enactments and that in the absence of an indication from the Legislature that it intended to overrule those determinations, new legislation will be presumed to be in line with prior decisions).

The District has never offered any response to this undisputed fact or a rejoinder to its effect on the interpretation of 3(a). Rather, the District has only replied with a non sequitur: consideration of RCW 80.54.040 is somehow improper because the District is not subject to WUTC regulation. While largely true,¹⁴ no WUTC regulation is suggested by 3(a). The District’s reply is just an evasion, not a response.

d. Recognizing That the Statute Is Based on RCW 80.54.040 Comports with Legislative History

Moreover, the interpretation of 3(a) as being the Cable Rate is the only interpretation consistent with the undisputed legislative history. As

¹⁴ *But see* RCW 54.16.340 (PUDs’ offer to wholesale telecommunications service is subject to WUTC review).

made clear in a trial exhibit offered by the District, the Senate Bill Report for the Statute emphasized that the Legislature was borrowing from multiple formulae in enacting the Statute. Among those sources was the WUTC:

The two part formula incorporates existing rate setting methodologies of the Federal Communications System (FCC), the Washington Utilities and Transportation Commission and the American Public Power Association.

Ex. 81, p. 2. This undisputed testimony is fatal to the District's proposed interpretation of the Statute: the District's proposed interpretation has no place for *any* standard adopted by the WUTC. Such an interpretation of the Statute is wrong; that subsection is the Cable Rate.

2. RCW 54.04.045(3)(b) Is a Modified Version of the Telecom Rate

When the text of RCW 54.04.045(3)(b) (hereinafter, "3(b)") is examined, it is clear that it expressed the federal Telecom Rate, with one intentional change. 3(b) provides:

The other component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to the share, expressed in feet, of the required support and clearance space, divided equally among the locally regulated utility and all attaching licensees, in addition to the space used for the pole attachment, which sum is divided by the height of the pole[.]

Again, 3(b) largely follows the same general scheme of 3(a), generally setting a range of acceptable rates, using identical terms with one material difference: the Space Factor. 3(b) mandates that the Space Factor is to be the share, “expressed in feet, of the required support and clearance space,” which figure is to be “divided equally among the locally regulated utility and all attaching licensees.” That figure is then to be added to “the space used for the pole attachment.” The resulting “sum” is then to be “divided by the height of the pole.” The 3(b) Space Factor can thus be expressed algebraically as set forth in Appendix D. The similarity to the Telecom Rate is irrefutable.

Thus, there are only two differences between the 3(b) rate and the Telecom Rate. First, 3(b) reverses the order in which terms are added in the numerator; this is, as a mathematical matter, irrelevant. The second and only material change between 3(b) and the Telecom Rate is that 3(b) eliminates the “2/3” reduction applied to the ratio of Unusable Space to all attachers. In doing so, the Legislature borrowed from the APPA model, which is in some ways similar to the Telecom Rate, but does not allocate a more than pro rata portion to the pole owner. RP at 638-640. This borrowing from the APPA model is plainly consistent with the legislative history – that the legislature intended to make just such an adjustment. Ex. 81.

3. Under RCW 54.04.045(3)(c), the Resulting Just and Reasonable Rate Is the Average of 3(a) and 3(b)

It is fair to say that in comparison to the rest of the Statute, subsection (3)(c) is a model of clarity. One-half of the rate computed in 3(a) is to be added to one-half of the rate resulting from 3(b).

C. The District's and Trial Court's Interpretation of the Statute Is a Manifest Error of Law

Contrary to the straightforward analysis above, the trial court held that 3(a) is the Telecom Rate and 3(b) is the APPA model, and the District's proposed rates were therefore lawful.¹⁵ Respectfully, this interpretation of the Statute is manifest error, because it violates several accepted canons of statutory authority no fewer than six times.

1. 3(a) Cannot Be the Telecom Rate

Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). Similarly, a court may not add language to a clear statute, even if it believes the Legislature intended something else but failed to express it adequately. *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997).

¹⁵ Thus, the trial court's Findings of Fact Nos. 33, 35 and 49 are actually conclusions of law and should be so treated (and reversed) on appeal. *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 501 P.2d 290 (1972).

The trial court's reading of 3(a) violated those canons of construction. Critically, the trial court, in an attempt to align 3(a) with the Telecom Rate, read into the Statute three matters plainly absent from 3(a). First, it cannot be disputed that the Telecom Rate integrally depends on the *number of attachers* to the pole. 47 C.F.R. § 1.1409(e)(2) ("No. of Attaching Entities"). There simply is no portion of 3(a) that depends, in any part, on the number of attaching entities. What makes this omission all the more glaring is that the Legislature plainly knows how to so indicate when it intends to make the just and reasonable rate depend on the number of attachers – it did so, expressly, *in the immediately adjacent subsection*. See 3(b) (dividing Unusable Space "among the locally regulated utility and all attaching licensees").

Second, it is beyond cavil that the Telecom Rate reduces the amount of Unusable Space to be applied to attachers, allowing only two-thirds to be included in the just and reasonable rate. 47 C.F.R. § 1.1409(e)(2) (Unusable Space allocation to be multiplied by "2/3"). The Court will search 3(a) wholly in vain for any suggestion that the allocation for Unusable Space is to be reduced by two-thirds – or any other set amount. At trial, the District's General Manager, who claimed to have independently reviewed the Statute so as to ensure that the District's demanded rates complied with the new law, claimed to find

support for this construction in 3(a)'s reference to "a share" of the support and clearance space. RP at 269-274. Aside from the obvious misinterpretation of the Statute, *see* Section V(B)(1)(a), the District's interpretation suffers from a more glaring weakness: "a share" could be one-one hundredth, or it could be ninety nine-one hundredths. *Id.* There simply is no basis in the Statute to insert "2/3" into 3(a).

Third, it is just as equally indisputable that the Telecom Rate expressly depends on the height of the pole. 47 C.F.R. § 1.1409(e)(2) (the sum of occupied space and the share of Unusable Space is divided by "Pole Height"). Again, 3(a) simply contains no reference whatsoever to pole height. And again, the omission is glaring because the Legislature knows precisely how to indicate that pole height is to be considered when it wants to do so – the Legislature did precisely that *in the very next subsection* (the addition of used space and the share of support and clearance space is to be "divided by the height of the pole"). 3(b).

Any interpretation of 3(a) as equivalent to the Telecom Rate is not interpreting what the Legislature actually did. It is manifestly wrong.

2. 3(b) Cannot Be the APPA Rate

The District argued, and the trial court agreed, that 3(b) was the APPA model. This is clear error, for at least two independent reasons.

a. The APPA Model Uses a Form Contrary to the Plain Language of 3(b)

As was seen above, the plain language of 3(b) can be expressed in a relatively simple algebraic formula. *See* Appendix D. However, no such presentation is possible for the APPA model. *Its authors* depict the APPA model in algebraic terms as set forth in Appendix E. Ex. 936, p. 17; Ex. 958. Nowhere in 3(b), or anywhere in the Statute, nor anywhere in the Legislative history, is there any suggestion how PUDs, or pole attachers, are to convert the simple formula set forth in 3(b) into something along the lines of the APPA model as expressed by its authors.

b. Treating 3(b) as the APPA Rate Requires Using Identical Terms in Entirely Different Ways

Under Washington law, each part of a statute must be construed in connection with every other part or section. *De Grief v. City of Seattle*, 50 Wn.2d 1, 11, 297 P.2d 940 (1956) (en banc). To this end, “[i]t is well settled that when the same words are used in different parts of a statute . . ., the meaning is presumed to be the same throughout.” *Simpson Invest. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (en banc). Thus, when the same phrase is used more than once within a statute or act, that phrase should be interpreted to have the same meaning. Here, the terms at issue are within adjacent subsections of the same section. Yet, according to the District, they mean two different things.

The first such instance is the question of the costs to which the differing Space Factors must be applied. Clearly, the Legislature defined those costs in exactly the same way in 3(a) and 3(b), requiring the Space Factor to be applied to “the actual capital and operating expenses of the locally regulated utility” in each subsection. Yet, *as an undisputed matter* if the District were right, this phrase would mean two completely different things. The District’s witnesses all acknowledge that the Telecom Rate depends on “net” costs (after depreciation). RP at 280-283, 662-663. Yet, the APPA model expressly relies on “gross” costs, without deduction for depreciation. The District has consistently failed to offer any explanation for how the exact same words can mean different things. That is not how statutes are interpreted in the state of Washington.

The second such instance is the treatment of Unusable Space. In both 3(a) and 3(b) Unusable Space is defined in precisely the same way: “the required support and clearance space.” Yet, if the District is correct, the identical words – or at least, words that are “spelled the same”, RP at 683, – must mean two different things because of the treatment of the Safety Space. The Safety Space is **included** in Usable Space in the Telecom Rate. Conversely, in the APPA Rate the Safety Space must be **excluded** from Usable Space. Whether inclusion or exclusion of the

Safety Space is appropriate is not the immediate point. What is fatal to the District's interpretation is the simple fact that the two models treat Usable Space differently, even though the Legislature used a single term to describe it.¹⁶ This is contrary to the law.

c. 3(b) Cannot Be the APPA Model Because It Treats the Safety Space Contrary to Fact

The APPA model treats the Safety Space as unusable. The trial court found, in Findings of Fact No. 41, that this was acceptable because the District's admitted use of the Safety Space was being "phased out." CP at 1326. This finding is clearly erroneous because the evidence produced at trial established that the District's use¹⁷ of the Safety Space was an adopted practice consistent with the National Electric Safety Code and the District's own construction standards.

Preliminarily, the finding is clearly erroneous because there is **no evidence** supporting it. Rather, the trial court seems to have seized on a statement the District's counsel made in closing. RP at 1714. No witness so testified. While District personnel testified that it was not preferred or "standard," no District witness claimed that the District was moving

¹⁶ CenturyLink's interpretation suffers no such infirmity. Both the Cable Rate and the modified Telecom Rate use costs and Usable Space in the same way.

¹⁷ Contrary to the trial court's Findings of Fact No. 39, CenturyLink (and its co-appellants) does not use the Safety Space on the District's poles, and isolated instances when CenturyLink's facilities intrude into the Safety Space are treated as errors and corrected. RP at 1617-1618.

away from use of the Safety Space when needed. Indeed, the evidence before the trial court was replete with instances of the District placing electrical facilities (such as street lights) in the Safety Space. Exs. 58, 59, 59A, 59B, 60, 60A, 61, 62, 63, 64, 65, 66, 67, RP at 353-421; Exs. 208, 209, 210, 211, RP at 1126-1133, 1686; Ex. 328, RP at 423-445; Exs. 337, 338, 341, 342, RP at 1062-1078; Ex. 961, RP at 1622-1628.

Moreover, the District simply cannot be allowed to claim that the Safety Space is unusable, because doing so is plainly contrary to the unilaterally prepared agreement that *the District* demanded CenturyLink sign. That agreement contained an appendix providing technical specifications for pole attachments. Ex. 38 at COM 00159. In that specification, the District plainly allowed itself to place electrical facilities in the Safety Space. RP at 1635-1636. For the District to now claim that the Safety Space is not usable, when its own specifications allow it to use that space, is contrary to fact.

Moreover, fundamentally the trial court's finding misses the point. The issue is not whether the District chooses to minimize its use of the Safety Space. The issue is whether the Safety Space is usable *at all*. It plainly is, and a finding to the contrary is clearly erroneous. Thus, use of the APPA Rate is itself plainly erroneous, because it rests upon those clearly erroneous factual contentions in Findings of Fact Nos. 39 and 41.

3. Subsection 4 Does Not Preclude 3(a) from Being the FCC Cable Rate

The District offers one final argument why 3(a) cannot be the Cable Rate. The District offers a possible interpretation of subsection 4 of the Statute to the effect that PUDs are allowed to use the existing Cable Rate in lieu of 3(a), so therefore 3(a) cannot be the Cable Rate. On many levels, this argument is wrong.

Preliminarily, the context of the Legislature's action must be remembered. At the time, as all parties were aware, the FCC was considering changes to its pole attachment regulations.¹⁸ Thus, in consideration that the FCC might change at least one component of the pole attachment rate, the Legislature included subsection 4 in the Statute:

For the purpose of establishing a rate under subsection (3)(a) of this section, the locally regulated utility may establish a rate according to the calculation set forth in subsection (3)(a) of this section or it may establish a rate according to the cable formula set forth by the federal communications commission by rule as it existed on June 12, 2008, or such subsequent date as may be provided by the federal communications commission by rule, consistent with the purposes of this section.

On its face, subsection 4 allows PUDs to adjust their 3(a) calculation as the FCC adjusts the Cable Rate – which, if there was any ambiguity about the provision, is exactly what its legislative history

¹⁸ *Pole Attachment Notice supra* note 3.

makes clear. As the final Senate Bill Report (where subsection 4 was added) makes clear, “The bill allows for use of future rate-setting methodologies as set by rule by the FCC.” Ex. 81, p. 2. The District, however, seizes on the idea that subsection 4 allows PUDs to use the Cable Rate as it existed in June 2008 to mean that 3(a) could not be the preexisting Cable Rate.¹⁹ Respectfully, this argument fails.

First, at its core the claim simply makes no sense. The District would have the Court believe that 3(a) is the Telecom Rate, but subsection 4 allows a PUD – *at the PUD’s option* – to substitute the Cable Rate for the Telecom Rate. But all parties acknowledge that the Cable Rate produces a substantially lower rate than the Telecom Rate. RP at 219-220, 290, 608-609, 621. The District thus argues that a PUD would voluntarily choose a rate structure that produced a substantially lower rate. The irrationality of the District’s suggestion is manifest when the Court remembers that 3(a) authorizes a range of just and reasonable rates and the Telecom Rate (in the District’s view) is merely the upper end of the range for 3(a). If a PUD wished to use a rate below the upper end of the range, it is free to do so; no different rate formula is required.

¹⁹ The District’s interpretation is wrong because it ignores timing. Section 4 was added in the Senate Rules Committee in early March 2008, and that version of the Statute was passed out of both houses days later. Thus, Section 4 did not allow PUDs to adopt the Cable Rate as it existed at the time the Legislature was considering the Statute, but only as it might exist several months later, all the while being subject to action by the FCC at any time.

Second, the District's interpretation of subsection 4 is clearly erroneous because it would have the Court ignore the *single* noneditorial difference between 3(a) and its source, RCW 80.54.040. That statute includes among the capital and operating expenses of the utility an entitlement to "just compensation," or a return on investment. No such provision was included in 3(a). RP at 707-709. No such component was allowed to the nonprofit, publicly owned PUDs. Thus, a PUD that acknowledges it does not require "just compensation" may use 3(a); a PUD that wishes to recover some "return" on the public investment may utilize the Cable Rate. This interpretation offers the Court a construction of the Statute that avoids the absurd results if 3(a) is treated as the Cable Rate, yet does not render subsection 4 surplusage as the District would argue. *Fray v. Spokane Cnty.*, 134 Wn.2d 637, 952 P.2d 601 (1998) (courts should interpret statutes to avoid absurd or strained results so as not to render any language superfluous).

The District is wholly wrong to claim that subsection 4 somehow mandates a construction of subsection 3 that, for all the reasons expressed above, violates several different well-settled rules of statutory construction, not once but many times. Instead, subsection 4 is just what it appears to be, and what the legislative history plainly indicates it is: an allowance for PUDs to modify 3(a) in the future. Ex. 81.

D. The Inputs Utilized by the District Were Inappropriately Selected to Increase Rates

While the parties dispute which formula is appropriate, all parties agree that the Legislature intended to adopt established formulae. Ex. 81, p. 2. However, in any formula, the output depends on the inputs. In this case, the undisputed evidence established that the District repeatedly used inappropriate inputs to inflate the resulting rate, regardless of which formula is used. The two examples²⁰ identified here demonstrate that for this reason alone, the trial court erred.

1. Includes a “Return on Equity” for a Nonprofit Enterprise

As noted above, 3(a), as written, includes no provision for a “return on equity” for the not-for-profit PUDs. The FCC rates, in contrast, allow for use of an “authorized rate of return.” 47 C.F.R. § 1.1404(g)(x). The District, in contrast, has no authorized rate of return. RP at 839, 841. The District’s expert, however, simply created such a return on equity out of whole cloth, by averaging two figures having nothing to do with the District’s operation. RP at 705-712. The District’s expert could offer no theoretical justification for his wholly

²⁰ CenturyLink could cite other instances, such as the District’s inflation of its costs by using a 17-year depreciation schedule for its poles, RP at 864-865, when it admitted that surrounding Districts use a 25year life, RP at 864-866, and as an admitted fact the District designs its poles to last *40 years*, RP at 415, 443.

artificial creation. *Id.* The District should not be permitted to create a post-hoc basis for something denied it by the Statute.

2. Includes Transmission Poles

None of the established pole attachment formulae apply to attachments to “transmission poles” as opposed to “distribution poles.” Because transmission poles are substantially larger than distribution poles,²¹ they are disproportionately more expensive. RP at 1347-1348. As the District’s expert recognized, the FCC models do not apply to transmission poles, because the FCC has long recognized that most pole owners do not allow attachers to place facilities on transmission poles, or if they do those attachments are covered under special agreements. *See* Ex. 6, “Exhibit 4A,” p. PUD 007889. Even the vaunted APPA model urged by the District expressly *excludes* transmission poles. Ex. 936, p. 48. Nonetheless, on the theory that the District allows attachments to some of its transmission poles, RP at 178-179, the District included transmission poles in its calculations with the expected result of substantially increasing the rate charged for use of distribution poles, RP at 533-535, 705, 719-720. The District should not be permitted to so readily abandon requirements of the models it purports to advocate

²¹ “Transmission poles” carry very high-voltage lines between and among electricity producers and power company stations and substations. “Distribution poles” carry electrical lines from stations or substations out into the community.

whenever it is advantageous. For this reason, the trial court's Findings of Fact No. 38 that "[i]ncluding District transmission poles, as well as distribution poles[,] in the District's rate calculation was reasonable" is clearly erroneous.

These two artificially inflated inputs alone demonstrate that the District's proposed rates are not just and reasonable. The trial court clearly erred.

E. The Nonrate Terms and Conditions in the District's Unilaterally Imposed Agreement Are Not Just or Reasonable

By its terms, RCW 54.04.045(2) applies to more than just rates. It clearly requires that "[a]ll ... terms, and conditions made, demanded, or received by a locally regulated utility for attachments to its poles must be just, reasonable, nondiscriminatory, and sufficient." Numerous terms and conditions in the take-it-or-leave-it agreement unilaterally demanded by the District²² completely fail this test.

1. Standards to Evaluate Terms and Conditions Under the Statute

a. Plain Language of Statute

In ascertaining the meaning of a particular word as used in a statute, a court must consider both the statute's subject matter and the context in which the word is used. *State v. Rhodes*, 58 Wn. App. 913,

²² Ex. 38, hereinafter, the "2007 Agreement" – even though no defendant ever agreed to it.

920, 795 P.2d 724 (1990). A term that is not defined in a statute should be given its plain and ordinary meaning unless a contrary legislative intent is indicated. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549 (1992). To ascertain a word's plain and ordinary meaning, courts may look to a dictionary. *Gerberding v. Munro*, 134 Wn.2d 188, 199, 949 P.2d 1366 (1998).

In the absence of statutory definitions of “just” and “reasonable” in the context of terms and conditions those words should be given their plain and ordinary meaning. “Just” means “having a basis in fact” and “confirming to fact or reason: not false.” *Webster's Third New International Dictionary* 1228 (2002). “Reasonable” is “being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous.” *Id.* at 1892. Applying these definitions, it is patent that the District demanded that CenturyLink enter an agreement with terms that are neither just nor reasonable. Moreover, it is worth noting that under the Statute, the terms and conditions must be both just **and** reasonable. As will be seen in Section V(E)(2), below, many terms and conditions are neither just nor reasonable.²³ The discussion below offers only a few of the more egregious examples.

²³ The trial court made no specific findings with respect to whether any of the agreement's terms and conditions were “just and reasonable”; rather, Findings

b. An Unconscionable Contract Is Not Just and Reasonable

If there were any doubt as to how to apply the terms “just and reasonable,” the Court may fall back on the law of unconscionability. The 2007 Agreement wholly fails that analysis. Under Washington law, a contract may be invalidated on the basis of *either* procedural or substantive unconscionability. *See Zuver v. Airtouch Commc’ns, Inc.*, 153 Wn.2d 293, 303, 103 P.3d 753 (2004) (en banc); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004) (en banc).

A contract is procedurally unconscionable “when an irregularity taints the process of contract[] formation.” *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 459, 45 P.3d 594 (2002); *see also Adler*, 153 Wn.2d at 347. The question is ““whether in truth a meaningful choice existed.”” *Zuver*, 153 Wn.2d at 303 (citation omitted).

Below, the trial court erred in holding that the 2007 Agreement was not procedurally unconscionable. The trial court’s Findings of Fact Nos. 14, 15 and 32 that the 2007 Agreement was “negotiated” or the product of a collaborative process are plainly erroneous. *See p. 10,*

of Fact Nos. 30 and 31 found only that there were “credible reasons” for certain terms and conditions. These findings thus are simply beside the point: whether or not there are believable – “credible” – reasons for the District to desire certain terms and conditions says nothing as to whether those terms and conditions are just and reasonable. The determination made by the Court is plainly erroneous and do not support any argument that the District’s unilateral terms and conditions are just and reasonable.

supra. This is evident from the evidence that the District did not negotiate the 2007 Agreement, only accepting “comments,” and did not even hear out CenturyLink on all of its concerns with the District’s unilateral document. RP at 319-332, 847-851. Indeed, the August 20, 2007 letter from the General Manager of the District, Doug Miller, to all “Pole Attachers” makes clear that the District “is not interested in further modifications to the enclosed Agreement.” Ex. 38 at COM 00111. A take-it-or-leave-it form agreement is the essence of a contract of adhesion. The 2007 Agreement is procedurally unconscionable.

Under Washington law, “[s]ubstantive unconscionability occurs when contract terms are one-sided or overly harsh,” *Mendez*, 111 Wn. App. at 459, as is the case here. *See also Zuver*, 153 Wn.2d at 303 (same); *Adler*, 153 Wn.2d at 344 (same). As discussed above, the rates the District is seeking to enforce are outside the permissible rates permitted by the Statute and are therefore unlawful. Moreover, as will be discussed below, many of the terms and conditions are one-sided and harsh; because they are neither just nor reasonable, as required by the Statute, they are unlawful. There can be no other conclusion than that the 2007 Agreement, with its many unlawful terms and conditions, is substantively unconscionable.

Moreover, severing the unconscionable provisions will not save

the 2007 Agreement. Severing so many unlawful provisions would render the 2007 Agreement unintelligible and unworkable. *See Zuver*, 153 Wn.2d at 320 (citing *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 271 (3d Cir. 2003) (“The cumulative effect of so much illegality prevents us from enforcing the arbitration agreement.”) (quoting *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 271 (3d Cir. 2003))).

2. Multiple Provisions Are Contrary to Law

At least two examples illustrate that the 2007 Agreement is contrary to law. For example, the District insisted on Section 6.6, which expressly purports to allow attorneys’ fees to the District in the event of a dispute, but deny them to CenturyLink. This is ineffective under Washington law. RCW 4.84.330. Clearly the District sought to use its self-perceived extreme bargaining leverage to obtain a result it is not entitled to under the law.

Similarly, in Section 10.3, the District attempts to force CenturyLink to bear the cost of undergrounding its facilities on demand from the District. This is blatantly contrary to law.²⁴ The District admits that it is a customer of CenturyLink. RP at 213. CenturyLink’s approved

²⁴ CenturyLink may be required to bear the cost of some relocations of its facilities – when demanded by “cities and towns,” RCW 35.99.060, which the District is not. Moreover, even under that statutory scheme CenturyLink is entitled to reimbursement of its costs in certain instances, RCW 39.99.060(3), but Section 10.3 would not allow CenturyLink reimbursement to which it is entitled by law.

tariffs make clear that any undergrounding at a customer's request is to be at the cost of the customer. Tariff WN U-1, Sheet No. 13, Appendix F. Washington law is clear that approved tariffs have the force of state law – particularly on the instance of customers attempting to force onto telephone companies the cost of undergrounding. *Gen. Tel. Co. of N.W., Inc. v. City of Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986).

3. Multiple Provisions in the Imposed Agreement Are at Best Vague and Ambiguous, and at Worst Contrary to the Claimed Intent

The first such example of a provision at best ambiguous and at worst contrary to the District's asserted intent occurs in Appendix A to the 2007 Agreement, Ex. 38 at COM 00148. Comparing that Appendix to Section 3.3 of the 2007 Agreement makes clear that the contract is inconsistent as to whether attachers are charged on a per pole or per contact basis. Even the District's representatives acknowledge the ambiguity. RP at 261-262. The distinction is critical. Attachers are, after all, renting a foot of space on the pole. Parties dispute heavily whether the attacher should be required to pay more than once if it places multiple lines within its foot of space; the undisputed testimony was that a typical attachment consumes no more than an inch or two of the allocated one foot. RP at 1598-1599. The District's only response is that the parties can rely on the preexecution emails they exchanged on this

subject, RP at 348-349, without regard for the parol evidence rule, *id.*²⁵ This is particularly problematic, given that the 2007 Agreement purports to be an integrated agreement. *See* Ex. 38 at COM 00143. Thus, the 2007 Agreement on its face does not conform with the parties' intent.

The second example of unacceptably ambiguous provisions in the 2007 Agreement is the question of "grandfathering." Grandfathering refers to the fact that facilities attached to poles often remain there for many years. It is a routinely accepted that if engineering standards change over time, attachers need not go back and change installations that were originally properly installed. The District believed it intended to allow grandfathering. RP at 191-192. Section 4.1 indicates that revisions to existing installations are not required when not required by the 2007 Agreement. But Section 6.1 indicates that all preexisting installations must comply with the 2007 Agreement, including its service standards, within 18 months. Ex. 38 at COM 00125. This is plainly contradictory to the drafters' purported intent. RP at 936-937.

The third example of the 2007 Agreement's fatal ambiguity is the seemingly fundamental question of the fees that are to be charged.

²⁵ The parol evidence rule bars the admission of extrinsic evidence "to add to, subtract from, vary, or contradict written instruments which are contractual in nature, and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake." *Bond v. Wiegardt*, 36 Wn.2d 41, 47, 216 P.2d 196 (1950). The rule applies to exclude not merely oral utterances, but also informal writings other than the single and final written memorial. *Id.* at 48.

Appendix A to the 2007 Agreement indicates that the parties are to look to Article 3 to determine applicable fees. But fees are *not* set forth in Article 3. Indeed, the District's Finance Manager, who testified that he was involved in the drafting of the 2007 Agreement, RP at 143, 837-838, 1150-1151, was unequivocal about the difficulty: he admitted that he was "at a loss" as to how to find out what the fees were to be, RP at 861-865. It is neither just nor reasonable to expect CenturyLink to sign a contract when even the drafters acknowledge that it is contrary to their intent and its meaning cannot be determined.

4. Multiple Terms Are Overreaching

Several provisions in the 2007 Agreement demonstrate that the District sought one-sided advantage. For example, Section 4.4 purports to immunize the District from its liability to CenturyLink *or its customers* for actual or consequential damages – and that self-immunization is not alleviated by the District's own negligence.²⁶ This provision would have the effect of insulating the District from some of the foreseeable consequences of its own negligence. RP at 1618-1620.

Another example is Section 2.12. That provision would regulate

²⁶ Section 4.4 is limited only by Section 16.1 – not the entirety of Article 16, dealing with liability and indemnification. Section 16.1 is limited to damage the District might cause CenturyLink's facilities on the District's poles. It does not appear to apply to CenturyLink's obligation to defend and indemnify the District from all claims arising from facilities on the poles. Section 16.2.

CenturyLink's activity in the public right-of-way, whether or not that activity is connected with the District's poles. The District simply has no right to do so. CenturyLink has a constitutionally guaranteed right to utilize the right-of-way. Wash. Const., Art. 12, § 19; RCW 80.36.040.

Finally, the most obvious example of the District's attempt to overreach involves the question of reciprocity. It was wholly undisputed that the District attaches its facilities to poles owned by CenturyLink.²⁷ It is equally undisputed that the District occupies 7½ feet of any pole owned by CenturyLink, RP at 933, 1605-1606, but CenturyLink only occupies one foot of any pole owned by the District. Yet under the District's approach, it would execute a "mirror image" agreement and offset one for one the poles it attaches to from the District poles to which CenturyLink attaches. The District's approach to contract language could be excused, but not the one-sided nature of the economic exchange it proposes. This exchange is blatantly not fair and not just.

5. Some Terms Are Impossible (and Both Reflect and Enhance a Disparity in Bargaining Power)

Some provisions of the 2007 Agreement are simply impossible to carry out. In combination, Sections 2.10 and 5.12 and Article 11 would mandate removal of CenturyLink's material from the District's poles on

²⁷ To this end, the trial court's Findings of Fact No. 7 incompletely and erroneously addresses the relationship between the District and CenturyLink.

completely unrealistic timeframes. RP at 1610-1612.²⁸ While the District may have little concern if the telecommunications infrastructure in Pacific County is degraded, RP at 253-254, the impact on the community is literally life threatening if 911 service is interrupted, RP at 930-931, 1020-1021, 1616. Indeed, under the Pacific County Code, CenturyLink may not be able to rebuild duplicate pole lines at all. Appendix B, p. 9.

6. The District May Not Defend Its One-Sided Terms and Conditions by Comparing Them to Isolated Terms in Multiple Agreements

The undisputed testimony, from witnesses with experience with pole attachments statewide, was that the 2007 Agreement was the most one-sided agreement any of them had ever experienced. RP at 948, 1045-1046, 1224. The District has consistently sought to justify this result by picking individual clauses out of numerous other pole attachment agreements defendants had entered into – without regard for the totality of any of those agreements. CP at 991-993. This unavailing defense ignores the real world of negotiated agreements, a process in which the District did not engage. In such negotiations, some items can “be traded off against unrelated provisions.” *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 396, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). For the same

²⁸ Under the 1950 agreement between CenturyTel and the District, CenturyTel was not required to remove its facilities from the District’s poles and the District was not permitted to remove the facilities. Accordingly, the trial court’s Findings of Fact Nos. 25 and 26, to the contrary, are plainly erroneous.

reason that regulators and courts have refused to allow the cherry-picking of isolated provisions in regulated agreements,²⁹ the District should not be allowed to claim that its terms and conditions are just and reasonable by focusing only on the “take,” and ignoring the “give.”

F. The Trial Court Erred in Its Awards of Fees and Costs

The trial court’s December 12, 2011 award of attorneys’ fees, expert witness expenses and costs to the District was in error for all the reasons CenturyLink identified below. *See* CP at 2321-2323. One additional ground is now apparent: under any fair construction of the Statute, the District cannot be the prevailing party. The sole ground the District identified for such an award is therefore without basis.³⁰

Thus, the trial court’s March 23, 2012 supplemental award of fees and costs the District incurred in opposing CenturyLink’s (and its co-defendants’) efforts in the trial court to obtain review of the trial court’s erroneous decision in this case is even more in error. Not only will the District not ultimately be the prevailing party, but this particular award is

²⁹ *New Edge Network, Inc. v. FCC*, 461 F.3d 1105 (9th Cir. 2006); *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-164, at 8 (July 13, 2004) (Second Report and Order).

³⁰ CenturyLink adheres to the arguments made below regarding the impropriety of the nature and amount of the District’s claimed fees and costs, particularly the District’s exorbitant expert witness fees. CP at 2001-2015; 2019-2031. Given the foundational lack of basis for any such award, CenturyLink will not elaborate on those issues.

especially baseless, since the District did not ultimately prevail on this issue: by action of this Court (as to which the Supreme Court denied review) CenturyLink *has* been able to press this appeal.

G. Remedy: The Case Should Be Remanded to Pacific County Superior Court for Entry of Judgment in CenturyLink's Favor, and It Should Be Granted Its Attorneys' Fees on Appeal and for the Underlying Trial

For all the reasons set forth above, the trial court's interpretation of the Statute is in error, and at least several of its Findings of Fact are clearly erroneous. CenturyLink, therefore, respectfully addresses the appropriate remedy for this Court.

1. The Court Should Deny the District's Claims and Grant CenturyLink's Claim for Declaratory Judgment

The District's claims for declaratory judgment, breach of contract, unjust enrichment, trespass and injunctive relief insofar as they rest on the District's insistence on its unlawful 2007 Agreement, must be dismissed. Conversely, the Court should remand for entry of judgment granting CenturyLink's claim for declaratory judgment.³¹

2. RAP 18.1 – CenturyLink Is Entitled to Attorneys' Fees, in This Court and Below

When this Court remands this case to the trial court with

³¹ CenturyLink should emphasize that doing so does not require this Court, or the trial court, to write a pole attachment agreement for the parties. Rather, that task should be left to the parties themselves, once the courts have offered this guidance on the meaning of the Statute.

directions to enter final judgment in favor of CenturyLink, any such order should also direct the trial court to award CenturyLink, as the prevailing party, its reasonable attorneys' fees and expenses. CenturyLink is entitled to recover such fees and expenses under RCW 4.84.330, which renders such provisions reciprocal.

Here, the prior jointly executed contract between the parties contained a fee-shifting provision in favor of only the District. Ex. 3 at PUD 000801. Because CenturyLink is entitled to final judgment in its favor, it is the prevailing party in this lawsuit and therefore is entitled to an award of its attorneys' fees and costs. Accordingly, CenturyLink respectfully requests that this Court award CenturyLink its attorneys' fees and costs on appeal, and direct the trial court, on remand, to award CenturyLink its reasonable attorneys' fees and costs.

VI. CONCLUSION

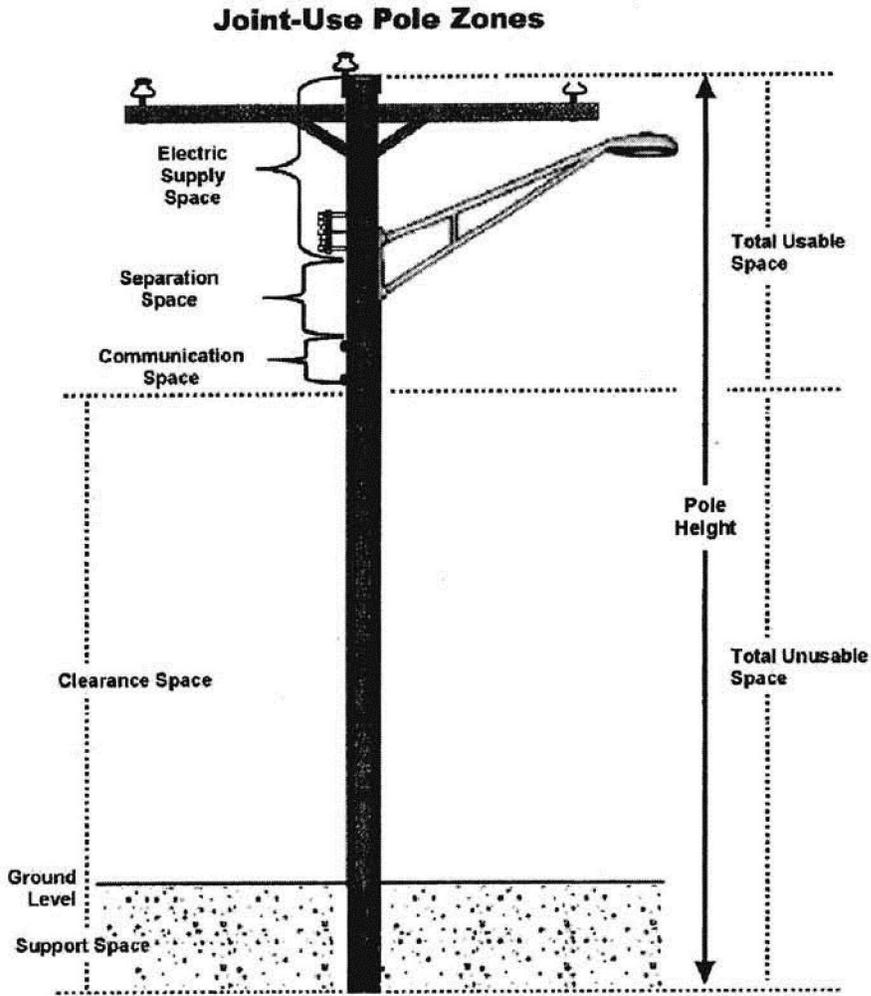
The trial court's decision in this case is plainly erroneous. For the numerous reasons identified above, its interpretation and application of the Statute were wrong, and its actions in this case must be reversed.

RESPECTFULLY SUBMITTED November 13, 2012.

STOEL RIVES LLP

By 
Timothy J. O'Connell, WSBA #15372
Of Attorneys for Appellant

**APPENDIX A
ILLUSTRATION OF JOINT USE POLE**



APPENDIX B
Pacific County Resolution No. 99-089
Adopting New Road Standards and Repealing Outdated Resolutions.
Dated August 24, 1999.

BEFORE THE BOARD OF PACIFIC COUNTY COMMISSIONERS
PACIFIC COUNTY, WASHINGTON
RESOLUTION NO. 99-089

A RESOLUTION ADOPTING NEW ROAD STANDARDS AND REPEALING OUTDATED RESOLUTIONS

WHEREAS, Pacific County needs updated Road Standards to effectuate the purposes of Ordinance No. 149 which pertains to land divisions; and

WHEREAS, Pacific County Road Standards were promulgated in Board of Commissioners Resolution No. 83-195; and

WHEREAS, Pacific County has regulated the development of roads through Board of County Commissioners Resolution No. 79-60 and the Pacific County Road Standards; and

WHEREAS, Pacific County has regulated curb and sidewalk improvements in Seaview and Ocean Park through Board of Commissioners Resolution No. 86-017; and

WHEREAS, all of the documents listed above need to be integrated; and

WHEREAS, the Administrator of Ordinance No. 149 in consultation with the County Engineer has formulated a new Road Standards Manual and recommends approval of this document; and

WHEREAS, no adverse comments have been received as part of the SEPA process pertaining to the updated Road Standards; now therefore

IT IS HEREBY RESOLVED pursuant to the authority conveyed in Subsection 3.I of Pacific County Ordinance No. 149 that Exhibit "1" is adopted as the new Pacific County Road Standards; and

IT IS FURTHER RESOLVED that Board of Commissioners Resolution No. 79-60 and Resolution No. 83-195 (which encompasses the previous version of the Pacific County Road Standards), and Resolution No. 86-017 are hereby repealed.

DATED THIS 24th DAY OF August, 1999.

BOARD OF COUNTY COMMISSIONERS
PACIFIC COUNTY, WASHINGTON

Jon C. Kain Jr.

Chairman

Norman B. Cuffel

Commissioner

Pat Hamilton

Commissioner

APPROVED AS TO FORM:

ATTEST:

Kathy Rosen

Clerk of the Board

PACIFIC COUNTY



ROAD STANDARDS

EXHIBIT "1"

**Pacific County
Road Standards
Table of Contents**

Section 1 - Introduction.....Page 1

Section 2 - General Considerations.....Page 1

Section 3 - Road Types and Geometrics.....Page 3

Section 4 - Travel Generation.....Page 5

Section 5 – Roadway Base and Surfacing.....Page 6

Section 6 – Construction Plan and Staking.....Page 7

Section 7 – Roadside Features.....Page 10

Section 8 – Retaining Walls.....Page 13

Section 9 – Bridges.....Page 14

Section 10 – Utilities.....Page 14

Section 11 – Inspection.....Page 17

Pacific County

Section 12 – Bonds.....Page 18

**Section 13 – Developments Utilizing County
Right of Way.....Page 19**

**Section 14 – Curbs and Sidewalks in Seaview and
Ocean Park.....Page 22**

Appendix A – Trip Generator Guidelines.....Page 25

Appendix B – Major/Minor Collectors.....Page 27

Appendix C – Roadway Section Collector Access.....Page 28

Appendix D – Roadway Section Collector Minor.....Page 29

Appendix E – Roadway Section Collector Major.....Page 30

Appendix F – Roadway Section Private Road.....Page 31

**Appendix G – Roadway Section Unmaintained
County Right of Way.....Page 32**

Appendix H – Drawing of Cul-de-sac and Turnaround.....Page 33

**Appendix I – Drawing of Intersection, Access Control
and Minor Collector.....Page 34**

Appendix J – Drawing of Intersection Major Collector.....Page 35

Appendix K – Drainage Sections.....Page 36

Appendix L – Driveway Designs for New Construction.....Page 37

Appendix M – Utility Locations for New Construction.....Page 38

**Appendix N – Location Maps and Standard Plans
for Section 14.....Page 39**

PACIFIC COUNTY

ROAD STANDARDS

1.00 INTRODUCTION

The purpose of these standards is to provide standardized road design and construction elements for consistency and to ensure, so far as practical, that minimum requirements of the motoring public are met. These requirements include safety, convenience and economical maintenance.

These standards are not intended to provide for all situations but to be flexible in form or content. They are intended to assist, but not substitute for, competent work by design professionals. It is expected that land surveyors, engineers, architects, and contractors will bring to each project the best of the skills from their respective disciplines and trades.

These standards are also not intended to unreasonably limit any innovative or creative effort. However, any deviations from these road standards are subject to the approval of the County Engineer based on satisfactory evidence that the proposed variance will produce a equivalent facility.

2.00 GENERAL CONSIDERATIONS

2.01 Shorten Designation

These Road Standards shall be cited as the "standards."

2.02 Applicability

These standards shall apply to all design and construction required within county right of way, proposed right of way, accesses thereto, and utility work within rights of way. These standards shall also govern all design and construction within private easements as provided herein or as provided by county regulations.

2.03 Exemptions

These standards shall not apply to the following:

- A. Logging roads, agricultural roads, or private roads intended for the sole use of the owner or developer.
- B. Maintenance work within county rights of way by county forces.
- C. Temporary repairs made on an emergency basis.

Pacific County

- D. Reconstruction, rehabilitation, and resurfacing (3R Standard) as defined in the "Local Agency Guidelines" Chapter 42.

2.04 Interpretation and Enforcement

Interpretation and enforcement of these standards shall be the responsibility of the County Engineer or designated representative.

2.05 Adopted Pacific County Specifications

Except where these standards provide otherwise, or by contract with Pacific County, all design and construction, including materials, shall be in accordance with the relevant sections of the following:

- A. "Standard Specifications for Road, Bridge, and Municipal Construction" (latest edition) published by Washington State Department of Transportation amended as follows:
 - 1. The term "Commission" or "Washington State Highway Commission" shall be interpreted to mean "Board of Pacific County Commissioners."
 - 2. The term "Department" or "Department of Transportation" shall be interpreted to mean "Pacific County Department of Public Works."
 - 3. The term "Secretary" or "Secretary of Transportation," shall be interpreted to mean the "County Engineer."
 - 4. The term "Engineer" shall be interpreted to mean the "County Engineer" or duly authorized representative(s).
 - 5. The term "State" shall be interpreted to mean "Pacific County acting through its authorized representative(s)."
 - 6. The term "Contractor" shall also be defined as "Individuals or Corporations constructing roads within Pacific County."
 - 7. Sections 1-02 through 1-10 inclusive of Division 1 are deleted in their entirety, excluding Public Works projects. Section 1-01, entitled "Definition of Terms," shall be retained.
- B. "Standard Plans for Road, Bridge, and Municipal Construction" (latest edition), published by Washington State Department of Transportation.
- C. "Manual on Uniform Traffic Control Devices", published by The U.S. Department of Transportation, (latest edition) as amended and approved by the Washington State Highway Commission.

2.06 Other Specifications

The following specifications may be followed when specifically cited by these road standards, or in the absence of specific standards when applicable and approved by the County Engineer.

- A. "Washington Chapter American Public Works Association Standard

Pacific County Road Standards

Page 2

Pacific County

- Specification for Municipal Public Works Construction," (latest edition), referred to as the "APWA Standard Specifications."
- B. "Standard Specifications for Highway Bridges, " (latest edition), adopted by the American Association of State Highway and Transportation Officials, referred to as the "AASHTO Bridge Specifications."
 - C. "Washington State Department of Transportation Design Manual, "(latest edition), referred to as the "WSDOT Design Manual."
 - D. "Washington State Department of Transportation Hydraulic Design Manual," (latest edition), referred to as the "WSDOT Hydraulic Design Manual."
 - E. Washington State Department of Transportation "Local Agencies Guidelines", (latest edition).
 - F. "A Policy on Geometric Design of Rural Highways 1965," published by AASHTO.
 - G. "Highway Capacity Manual," published by Highway Research Board.
 - H. "Action Guide Series", (latest edition), published by the National Association of County Engineers.

3.00 ROAD TYPES AND GEOMETRICS

The primary considerations used in determining the type of road are location, traffic volume and function. Section 4.00 and Appendices A through G shall be used to determine the minimum roadway standard.

For convenience, a list of major and minor collectors is contained in Appendix B. Before using the appendix, the classification of a particular road or right of way should be verified with the County Engineer.

3.01 Functional Classifications in Rural Areas

The following are road or right of way classifications based on the anticipated Average Daily Traffic (ADT) ten years hence:

- A. Access Collector (ADT 0 to 400, See Appendix C)
- B. Minor Collector (ADT 400 to 2000, See Appendix D)
- C. Major Collector (ADT 2000+, See Appendix E)
- D. Private Road (See Appendix F)
- E. Unmaintained County Right of Way (See Appendix G)

3.02 Typical Roadway Design Standards for New Construction

To obtain the geometric design for roads, first determine the traffic generation, then see applicable design and construction standard in Appendices A through G.

3.03 Cul de Sacs/Turn Arounds

- A. A cul de sac is required on any dead end access road serving two (2) or more parcels, or an approved turn around for driveway access roads in excess of

Pacific County

engineer licensed by the State of Washington, and shall be submitted for approval by the County Engineer.

9.00 BRIDGES

9.01 Design Criteria

Bridges, whether on public roads or private roads, shall be designed and constructed to meet minimum requirements set forth in the AASHTO Bridge Specifications. All new bridges shall be designed to carry an AASHTO HS 20-44 or greater live load. The bridge roadway shall comprise the full width and configuration of the road being served, to include the traveled way plus shoulders, sidewalk, walkway, and/or bike lane. In no case will the width be less than twenty-six (26') feet for two-lane traffic. Requirements of utilities shall be duly considered. Bridges shall be constructed of steel, concrete, steel and concrete or treated timber. All materials shall be new. Bridge design shall be prepared by a professional engineer licensed by the State of Washington. Final approval shall be made by the County Engineer.

10.00 UTILITIES

10.01 Franchising Policy

Utilities to be located within the county road right of way shall be constructed in accordance with current franchise and permit procedures and in compliance with these standards. In the use of right of way, utilities shall be given consideration after the traffic carrying requirements of the roadway have been met. Use of right of way for utility installation will be granted on an individual case basis, but in no circumstance will a utility be allowed to create an adverse effect on the roadway or public using the roadway. Any utility working within a county right of way must secure a franchise from the Board of Pacific County Commissioners.

10.02 Utility Locations

Utilities within the right of way on new roads or in roadways where existing topography, utilities, or storm drainage are not in conflict shall be located as indicated below and as shown in Appendix M. Where existing utilities or storm drains are in place, new utilities shall conform to the standards as nearly as practical and yet be compatible with the existing installations. All utilities shall be buried at least (30") inches below the finished grade, except the minimum cover in ditches may be twelve (12") inches below flow line grade. Exceptions shall be approved when necessary to meet the special requirements or restrictions. In locating utilities within the right of way, precedence shall be given to gravity design systems.

- A. Storm Sewers: Installed in the ditch line at a depth to be approved by the County Engineer. (Minimum cover twelve (12") inches.)
- B. Sanitary Sewers: Five (5') feet either side of centerline at a depth approved by engineer. Laterals shall be installed to the right of way line. Additional construction may be required to prevent future disruption to the road facility.

Pacific County

- C. Electrical Utilities: Power, telephone, and cable television will preferably be placed underground, on either side of the road at a depth of at least thirty (30") inches and posted accordingly. Otherwise these utilities shall be placed on poles set back of ditch line or pedestrian path, at locations compatible with driveways, intersections and other design features. To the maximum extent practical, these utilities should share common trenches or poles so that disruption of the road base and/or the number of poles in the right of way is held to a minimum.
- D. Water Lines: Thirty (30") inches below ditch line. Otherwise, in the shoulder outside the traveled lane on pavement edge.

10.03 Utility Installations in New Developments or Unmaintained County Rights of Way

- A. Utility poles and underground utilities, including service crossings shall be installed or relocated prior to the start of road construction if planned road cuts and fills are minimal and the location of road elements can be clearly identified in advance. Otherwise, such utilities, including service connections, shall be installed or relocated after the subgrade has been completed but before surfacing has been placed. All underground utilities making roadway crossings shall be cased in a conduit. Conduit shall extend past the normal ditch line unless approved by the County Engineer.
- B. All utility installations inside nonmaintained county rights of way shall be done under a revocable permit approved by the County Engineer.
- C. Pipe materials and overall installation work shall be done in accordance with WSDOT or APWA Standard Specifications.

10.04 Utility Installations on Maintained County Rights of Way

- A. Utility trenching or transverse cuts will not be permitted unless it can be shown that alternatives, such as boring, jacking, or relocating outside the paved area are not feasible or unless the utility can be installed prior to reconstruction or overlay.
- B. When trenching or cutting is permitted, the following procedure applies: Pavement patching shall include cutting, removal and disposal of the existing pavement; preparation, placement and compaction of backfill material; placement and compaction of aggregate base material to a depth of six (6") inches minimum; placement and compaction of crushed surface top course material to two (2") inches minimum; temporary patch (if required); application of tack coat; and construction of surfacing to conform to like kind pavement. All work shall be performed in accordance with the applicable sections of the WSDOT or APWA Standard Specifications and the following:
 - 1. Pavement cutting: The existing pavement shall be first cut by an appropriate means to facilitate removal. Immediately prior to

Pacific County Road Standards

Page 15

Pacific County

placement of the permanent patch, the existing pavement shall be cut as directed by the County Engineer. The pavement shall be removed so as to provide a firm, neat, straight, vertical edge to join. The contractor shall be responsible for maintaining the edge. Additional cuts will be required to correct broken or damaged edges.

2. Backfilling. Backfilling shall be done in accordance with the WSDOT Standard Specifications, Section 7-04.3(3), or equivalent. Minimum width of trench shall be two (2') feet to accommodate a vibratory compactor.
 3. Temporary pavement patching. A temporary two (2") inch thick cold asphalt plant mix patch may be required to be placed and maintained over the excavated area until final settlement has occurred. The temporary patch shall then be removed and the existing pavement cut before permanent repairs are made.
 4. Permanent pavement repair. The structural capacity of the patch shall be equal to the section of the existing pavement, but in no case shall the thickness of the asphalt concrete be less than two (2") inches compacted. Full depth asphalt concrete patches shall be placed in layers not exceeding three (3") inches with adequate compaction.
 5. Tack Coat. A tack coat of CSS-1 or approved equal shall be uniformly applied to all edges to be joined and lapped six (6") inches over the existing pavement. The lines from the new asphalt pavement shall be raked over the tack coat, feathered and rolled or tamped to seal the joint.
 6. Asphalt concrete. Asphalt concrete used for patching shall be Class B or G and shall be furnished, placed and compacted in conformance with the WSDOT or APWA Standard Specifications.
 7. Portland Cement Concrete. Cement concrete mix used for patching shall be a 6.5 sack mix and shall be furnished, placed, and compacted in conformance with the WSDOT or APWA Standard Specifications.
 8. Unpaved shoulders shall be patched similar to the roadway section except the asphalt application may be omitted.
- C. No person, firm or corporation shall commence work or permit any person, firm or corporation to commence work on construction, alteration, repair, or removal of any utility or the cutting and/or paving of any street, alley or other public place in Pacific County without first obtaining a Pacific County Permit, except under emergency conditions and then only by the franchise holder. Emergency repairs by private individuals is not permitted. If an emergency condition occurs, notification shall be made to Pacific County Public Works as soon as possible, with explanation of what occurred and what work was done within the right of way.

APPENDIX C
RCW 54.04.045(3)(a) and 47 U.S.C. § 224(d)
Space Factor
in Mathematical Terms

RCW 54.04.045(3)(a) provides:

One component of the rate shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used for the pole attachment, as compared to all other uses made of the subject facilities and uses that remain available to the owner or owners of the subject facilities

Examining the part of the subsection defining the cost of the entire pole attributable to the space occupied by the attacher, the statute requires that “the space used for the pole attachment” be compared with “all other uses ... and uses that remain available to the owner.” This can be expressed as:

Space used for attachment

All other uses and uses that remain available

This compares with the FCC’s mathematical formulation of the Cable Rate formula as:

Space Occupied by Attachment

Total Usable Space

47 C.F.R. § 1.1409(e)(2) (2008).

APPENDIX D
RCW 54.04.045(3)(b) and FCC Telecom Rate
Space Factor
in Mathematical Terms

3(b)'s Space Factor:

$$\frac{\left[\frac{\text{Unusable Space}}{\text{No. of Attachers}} \right] + \text{Space Occupied}}{\text{Pole Height}}$$

The similarity between this formula and the Space Factor formula in the Telecom Rate is striking. The FCC expresses its Telecom Rate Space Factor as:

$$\frac{\text{Space Occupied} + 2/3 \times \left[\frac{\text{Unusable Space}}{\text{No. of Attachers}} \right]}{\text{Pole Height}}$$

47 C.F.R. § 1.1409(e)(2) (2008).

APPENDIX E
RCW 54.04.045(3)(b) and APPA Formula
in Mathematical Terms

RCW 54.04.045(3)(b)'s Space Factor:

$$\frac{\left[\frac{\text{Unusable Space}}{\text{No. of Attachers}} \right] + \text{Space Occupied}}{\text{Pole Height}}$$

From the APPA Workbook, the APPA Formula:

$$\left[\frac{\text{Space Occupied by Attachment}}{\text{Assignable Space}} \times \frac{\text{Assignable Space}}{\text{Pole Height}} \times \text{Av. Cost of Bare Pole} \times \text{Carrying Charge} \right] + \left[\frac{\text{Common Space}}{\text{Pole Height}} \times \frac{\text{Av. Cost of Bare Pole}}{\text{No. of Attachers}} \times \text{Carrying Charge} \right]$$

Ex. 958.

WN U-1

Second Revised Rule and Regulation Sheet No. 13
Cancels
First Revised Rule and Regulation Sheet No. 13

CENTURYTEL OF WASHINGTON, INC.

(C)

RULE AND REGULATION

No. 8

CONSTRUCTION, MAINTENANCE AND USE OF FACILITIES

A. General

1. Except as otherwise provided in this tariff, the Company will, at its own expense, furnish, install, and maintain in the base rate area all facilities for basic service necessary to serve applicants or customers in accordance with its lawful rates, rules and regulations, and in accordance with its established construction standards.
2. Except where designated by law, the type of construction (direct burial, underground conduit, or aerial) is the prerogative of the Company.
3. When the Company is requested by the customer to install initially, relocate, rearrange or change outside plant facilities from one type to another, the cost of constructing the new and removing the old construction shall be borne by the customer with consent of owner if applicable.
4. The Company has the right of ingress and egress from the premises of customers at all reasonable hours for any purpose reasonably connected with the furnishing of telephone service and to exercise any and all rights secured to it by law of these Rules and Regulations. The Company has the right to remove any and all of its property installed on the customer's premises at the termination of service as provided for in these Rules and Regulations.
5. The customer will be held responsible for loss of or damage to any facilities, equipment or apparatus furnished by the Company, unless such loss or damage is due to causes beyond their control.

Advice No. 03-23

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Effective August 14, 2003

Issued By CENTURYTEL OF WASHINGTON, INC., d/b/a CenturyTel
P.O. Box 9901, Vancouver, WA

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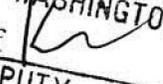
By Pamela Donovan Title Supervisor, Tariffs

Appendix F

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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that I caused a true and correct copy of the foregoing ***Opening Brief of Appellant CenturyLink of Washington, Inc.*** to be served on the following individuals:

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