

No. 730606

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

LARRY COSTELLO AND CHRISTY COSTELLO,
Appellant / Plaintiff

v.

TANNER ELECTRIC COOPERATIVE,
Respondent / Defendant

REPLY BRIEF OF APPELLANTS

Larry Costello and Christy Costello
Appellants, Pro Se
13050 470th Ave. SE
North Bend, WA 98045
425-922-6529

FILED
COURT OF APPEALS
DIVISION 1
STATE OF WASHINGTON
NOV 2 2016

REPLY BRIEF OF APPELLANTS

TABLE OF CONTENTS

	Page(s)
A. TABLE OF AUTHORITIES.....	iv
B. ARGUMENT	1
Introduction	1
Claim #1 – Cooperative member Costello is entitled by statute to review Tanner’s books and records. Because there are material facts in dispute, the trial court erred by granting Tanner’s motion for summary judgment to dismiss Costellos claim for access to records.....	1
1. Material Facts Are In Dispute.....	1
2. Tanner Has Not Provided Access to Books and Records as Required by the Record Statute.....	1
3. The Record Statute is Clear – All Books and Records Are Open for Inspection Subject to Proper Purpose.....	4
4. Costellos Have Maintained Proper Purpose.....	6
5. Costellos Did Not Consent to Give Up Their Right to Access Tanner’s Books and Records.....	7
Claim #4 – Costellos sufficiently alleged a violation under Washington’s Consumer Protection Act RCW 19.86. The trial court erred in determining that the CPA categorically does not apply to cooperative electric utilities and by granting Tanner’s motion for summary judgment to dismiss Costellos CPA claim.....	8
1. Cooperative Electric Utilities Are Not Categorically Exempt From the CPA.....	8
2. The Washington State Legislature has not Exempted Cooperative Utilities From the CPA.....	9
3. Costellos Have Satisfied All of the Elements for a CPA Claim.....	10

Counterclaims. Tanner was not entitled to summary judgment on its counterclaims as there are material facts in dispute. Costellos have demonstrated with mathematical certainty that the claimed and awarded amount is in error. The trial court erred by accepting the miscalculations and ultimately granting Tanner’s counterclaim motion. 13

1. The Trial Court Erred by Accepting a Mathematically Incorrect Claim Submitted by Tanner..... 14

2. Tanner has Violated the Contract and Its Billing Policies..... 17

Fees and Costs. The award of fees and costs should be reversed. The trial court ordered that the Costellos pay Tanner \$119,617.53 in fees and \$10,189.87 in costs based on three grounds - pursuant to the Tanner membership agreement, RCW 4.84.250, and RCW 4.84.185. Each of these bases is fundamentally flawed, and does not support an award of attorney’s fees..... 20

1. The Membership Agreement Does Not Support an Award of Fees and Costs..... 20

2. Tanner’s Settlement Offer Was Insufficient to Cause RCW 4.84.250 to Apply..... 22

3. Costellos Claims Were Not Baseless or Frivolous... 23

C. CONCLUSION 25

D. APPENDIX (see separate attachments).....

A-1 Counterclaim Errors

A-2 Congressional Research Service Report February, 2012 - Application of Federal Trade Commission Act, Section 5

TABLE OF AUTHORITIES

<u>Table of Cases</u>	Page(s)
Washington Cases:	
<i>Haberman v. WPPSS</i> , 109 Wn.2d 107, 171-172 (1987).....	8, 23
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 719, 778, 780, 785 (1986).....	13
<i>Mayer v. City of Seattle</i> , 102 Wash.App. 66, 79–80, 10 P.3d 408 (2000).....	24

Statutes

RCW 4.84.185 - Frivolous Action.....	23
RCW 4.84.250-290 - Attorney fees and costs.....	22, 23
SHB 1896 (WA State 2015 legislative session) – Privacy Policy for Energy Use Information.....	9, 10, 23
HB 2264 (WA State 2015 legislative session)	9, 10, 24
RCW 19.86 - Consumer Protection Act.....	1, 8
RCW 19.86.920 – Purpose.....	9
RCW 23B.16 – Records and Reports.....	5
RCW 24.06 - Nonprofit Miscellaneous and Mutual Corporations Act.....	1
RCW 24.06.160 - Books and Records.....	2, 5, 6, 7
RCW 42.56 - Public Records Act.....	5

Other Authorities

18A Am. Jur. 2d Corporations § 288.....	5
Federal Trade Commission Act 15 U.S.C. §§ 41-58.....	9

B. ARGUMENT

Introduction:

Costellos appeal the trial court's decision regarding (a) their Records Request claim (RCW 24.06), (b) their claim under the Washington State CPA (RCW 19.86), (c) Tanner's counterclaims for opt-out fee, late fees and interest, and (d) the award of attorney fees and costs to Tanner.¹ The Costellos statement of ISSUES in their initial brief remain the issues the Costellos request this Court to determine (*Appellant's Brief AB2-5*).²

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

1. As material facts regarding Tanner's motion are in dispute, the trial court erred in granting Tanner's motion.

The trial court determined in its ruling on Costellos' motion regarding their records request that there were material facts in dispute, as such summary judgment was inappropriate (*CP797-798 and RP55-Vol. I*). The same disputed facts should have precluded the trial court from granting Tanner's motion for summary judgment to dismiss Costellos' claim for records (*RB17, AB15*). The trial court's conclusions are contradictory.

2. Tanner has not provided Costellos access to all of the requested information which must be disclosed pursuant to statute.

Tanner asserts that it has complied with provisions of the record statute requiring it to "permit inspection" of the books and records – *that assertion is unsupported by the facts* (*RB17*). Tanner has restricted the

¹ Although their claims made under RCW 80.28 and RCW 49.60 are not grounds upon which Costellos seek appeal, they do not concede that their arguments were baseless and properly dismissed. (*Respondent's Brief RB2, 3*)

² Tanner's representation of the issues does not address the issues the Costellos are appealing (*RB3-4*).

Costellos from many documents by way of the protective order using pretextual claims of confidentiality and interpreting an Attorney Eyes Only restriction that does not exist in the words of the protective order.³ Moreover, Tanner presents an absurd argument that the record statute “explicitly allows a court to limit inspection of documents” to be made by a party’s “agent or attorney” even in circumstances where, like here, the party seeking disclosure is *pro se* (RB24).⁴ There is no such provision in the statute and no support for this conclusion in common law.⁵

The Costellos have clearly identified the information Tanner has refused to provide – including financial information and members list, both of which are explicitly required even under Tanner’s highly restrictive interpretation of the record statute (AB19, 20, CP1003, CP1245-1246, CP1252-1253).⁶ Attorney Merkel nevertheless continues to represent to the Court that all requested documents, even those not subject to the protective order, have been tendered despite the fact that he knows or should know that this is false. Prior to the lawsuit, Costellos indicated in their communications with Tanner the extent of their

³ Tanner’s claims of confidentiality are unsupported. Costellos challenge to those designations under terms of the protective order was not heard by the trial court (AB20-22, CP1107-1108, 1156-1240, RP5 – Vol. II).

⁴ RCW 24.06.160 states “All books and records of a corporation may be inspected by any member or shareholder, or his or her agent or attorney, for any proper purpose at any reasonable time.” **Emphasis added.**

⁵ The “agent or attorney” provision of the statute is clearly intended as an option for the party seeking disclosure to allow their agent to inspect the cooperative’s books and records. Tanner attempts to turn Costellos’ option into their hindrance.

⁶ Tanner incorrectly argues that the Costellos’ January 18, 2013 letter represents the full extent of their records request and since the members list is not included in that letter, precludes the Costellos from obtaining it (RB6, footnote 6). However, Costellos have demonstrated that what was requested in their letter was only a portion of what they ultimately sought (CP134-135, AB22).

concerns, including their request to inform all members about smart meters in general and Tanner's system specifically.⁷ Tanner ultimately refused to accommodate the Costellos' request and refused to provide them with the members list during discovery – which, by itself, is a violation of the records statute.

Further, Tanner has admitted that they have withheld at least 110 documents by designating them Highly Confidential, and by their interpretation of the protective order, have prevented Costellos from accessing them (RB8). *Even if Costellos hired an “independent expert” or “counsel of record”⁸, that individual would be prevented from sharing his/her findings with Costellos based on Tanner’s interpretation of the Protective Order.⁹* Under their interpretation of the Protective Order, Tanner acknowledges that it has not provided all of the requested documents to Costellos and have made it impossible for them to do so.

Tanner's assertion that Costellos acknowledged the Highly Confidential designation as precluding anyone other than Costellos attorney of record or an independent expert from accessing the records is

⁷ CP1062-1063 – “The entire membership needs to be fully appraised (sic) of all of the privacy, security, and potential safety issues that have been raised.... This discussion needs to be open and comprehensive.” “A comprehensive review of the business case, financials, and history surrounding this program needs to be made available to the members. As it stands, this very expensive, and controversial program has been instituted with virtually no involvement from the members.” “As I requested at our meeting, I would like to be able to communicate to the entire membership to help in the education process.”

⁸ Under Tanner's interpretation of the protective order, Costellos have been provided access to the books and records only if they hire a counsel of record or an independent expert (RB7, 9).

⁹ Section 4 of the protective order states in part “no person receiving such Documents shall, directly or indirectly, use, transfer, disclose, or communicate in any way the Documents or their contents to any person”. (CP789)

demonstrably false (*RB7*). Costellos former attorney clearly identified this as Tanner's interpretation and nothing more. Costellos disputed that interpretation based on the plain language of the Protective Order – which remains in effect to this day. (*CP181, 182, 1212, 1213*) The plain language restricts the Receiving Party (i.e. the Costellos) from disclosing Highly Confidential information to anyone other than their counsel of record and/or independent expert (*CP789*). ***It does not restrict the Receiving Party from the information.*** The Protective Order as written provides the Costellos, as the Receiving Party, access to all information whether they are *pro se* or not. The trial court erred by accepting Tanner's interpretation.¹⁰ Because effective discovery was not accomplished, it was entirely premature for the trial court to award summary judgment in Tanner's favor.

3. The Record Statute is clear – it says what it means and means what it says. Costellos are entitled to access all of Tanner's books and records subject to proper purpose.

Tanner's assertion that Costellos have applied an overly broad reading of the record statute is misguided given the statute's proper purpose filter (*RB19*). The statute is clear, "All books and records of a corporation may be inspected by any member or shareholder, or his or her agent or attorney, for any proper purpose at any reasonable time." It is undisputed

¹⁰ In its motion, Tanner could have easily changed the protective order to align with its interpretation, but chose not to (*RB7, CP1162*). The result is a Protective Order that speaks for itself – there is no rational interpretation that includes Attorneys Eyes Only restriction. Nor should there be since the circumstances warranting such protection do not exist in this case. Tanner's interpretation of the Protective Order precludes not only a *pro se* litigant, but any litigant, from effectively prosecuting his case. Such proposition is unsupported by the law. Costellos have been wrongfully denied access to information necessary to prosecute their case.

that Costellos have always maintained proper purpose (*CP1256-1258, AB15-17*). Neither the statute itself nor any judge made law limit what cooperative records are accessible by members.

Tanner argues application of several Washington statutes that do not apply to Tanner as rationales for their misguided interpretation of the records statute RCW 24.06.160 – the only statute that does apply to Tanner (*RB19–22*). Tanner asserts that the corporate records statute RCW 23B.16 is analogous to RCW 24.06.160 but there is nothing in the law that supports that proposition. More appropriately, Costellos argue that if any ambiguity exists within the statute it must be “liberally construed in favor of a [corporation’s members]” (*CP72, AB18*). Public record statutes such as RCW42.56 are a more applicable analogy due to Tanner’s monopolistic, quasi-government status and the historical emphasis Washington law places on transparency of public entities (*AB15, CP1255, 1256*).¹¹

There is nothing to support Tanner’s assertion that “books and records” is simply a “shorthand reference” for “books and records of account” (*RB24*).¹² Tanner’s interpretation is immediately proven false when applying it to the statute’s subsequent requirement that “a record of

¹¹ In the present case, the Costello’s are captives of Tanner’s monopoly. If they wish to receive power from the electric grid, they can only do so by becoming Tanner members. When such a mandatory relationship exists it makes much more sense to look to Washington’s public policy with respect to public records than to private corporate records.

¹² Indeed, the Costellos have made multiple requests (May 2015 and August 2015) for the record of Tanner’s payments to their counsel regarding this case (Joel Merkel and Rhode & Van Kampen) and Tanner has refused all of these requests. Even taking Tanner’s reading of the statute that it provides only for financial accounts, such should be available for the Costellos’ inspection.

the names and addresses of its members and shareholders entitled to vote” be kept by the cooperative. The member list is not a record of account, as such, Tanner’s interpretation flies in the face of the express language of the statute (*CP1251-1255*).¹³

4. Costellos have proper purpose for requesting the information.

Tanner’s assertion that the Costellos have gone on a fishing expedition is not true (*RB19*). Costellos have been very specific about seeking information pertaining to the smart meter installation and its impact on the financial well-being of the cooperative and the privacy of its members (*CP1256-1258*). The information sought is essential for understanding how Tanner’s resources are spent, and for understanding the capabilities of the technology Tanner has adopted.¹⁴

Tanner asserts the Costellos record request was made for unlawful or dishonest purpose (*RB10, 11*). Tanner has provided no evidence to support this outlandish claim. Costellos’ purpose has been consistently and continuously articulated throughout this litigation, has been verified in declarations by other members (*CP1265-1275*), and has not been refuted by Tanner with any evidence. Contrary to Tanner’s unsubstantiated assertion, Costellos have never indicated they would “freely disseminate Aclara’s confidential information (including its trade secrets) without

¹³ Moreover, contrary to Tanner’s assertion (*RB23*), Black’s Law 6th Edition defines “Corporate Books” as “*Whatever is kept as written evidence of official doings and business transactions.*” *Emphasis added.*

¹⁴ Contrary to Tanner’s assertion, Costellos have never requested information concerning member bank accounts, social security numbers, payroll information, or health information (*RB18, 19*). Their requests for information have been consistent with their stated purpose and have been made in full compliance with the records statute (*RCW 24.06.160*) and the protective order.

limitation” (*RB9*). This is simply a false claim. Costellos have always acknowledged full compliance with the Protective Order and understand that they are bound by its terms (*CP1167*).

5. Costellos did not consent to limit inspection and did not consent to give up their statutory rights to access Tanners books and records.

Costellos did not contractually agree to limit documents for inspection under Tanner’s Information Policy contrary to Tanner’s assertion (*RB9, 10, 28*). The Information Policy was not created until 2009, some 15 years after Costellos became cooperative members (*CP64*). The policy was not distributed to members and is not available on Tanner’s website (*CP974*). In short, few, if any, members even know it exists. Further, the Tanner membership agreement, and corresponding policies, is a contract of adhesion (*CP1521, 1522*). The new policies and policy changes subsequent to 1994 were unilaterally created by Tanner without notice, member participation, or member acceptance.¹⁵ It cannot be that such could serve to contractually divest members of their rights under RCW 24.06.160. Further, Tanner’s policy concerning business information is so broad as to entirely frustrate the record statute, and allows the circumvention of the very protection that the Legislature intended when it enacted RCW 24.06.160. (*RB9-11, AB23-24, CP1262-1263*). Costellos have never agreed to give up their statutory rights to access cooperative books and records and Tanner has provided no evidence to support its

¹⁵ The Information Policy was only made known as a result of this litigation and was never discussed or presented prior to filing the lawsuit. The fact is, Costellos could not have agreed to policy that they have not been informed about.

claim that the clandestine enactment of Tanner's information policy can lawfully affect such. (CP1262, 1263).¹⁶

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

1. Cooperative electric utilities are not categorically exempt from the CPA.

Neither law nor public policy supports Tanner's claim that it is "categorically exempt from liability under the CPA" (RB29). The Supreme Court's ruling in *Haberman v. Washington Pub. Power Supply System, et.al*, 109 Wn.2d 107, 744 P.2d 1032 (1987) limits its decision to "the rural electric cooperatives" in that case. It does not support the categorical exemption of all electric cooperatives from the CPA. Further, the Court limited its ruling in *Haberman* to the "unique facts of this case" *Id.* at 171. (AB28, 29) In *Haberman*, 43 electric cooperatives were participants in the WPPSS contract, of which only 13 were from Washington. *Id.* at 115. The other 30 electric cooperative participants were from Idaho, Montana, Nevada, Oregon, and Wyoming. Similar to Washington, none of these other state's consumer protection laws include any exemptions pertaining to cooperative electrical utilities.¹⁷

Further, the Consumer Protection laws in these states, as in Washington, are modeled after and/or compliment the *Federal Trade*

¹⁶ The Costellos have also demonstrated that their request for records is not at odds with the Aclara Confidentiality agreement and would not be barred under terms of that agreement (CP1259, CP1596-1597).

¹⁷ Idaho Title 48, Chapter 6; Montana Title 30, Chapter 14; Nevada Chapter 598; Oregon Chapter 646; Wyoming Title 40, Chapter 12.

*Commission Act 15 U.S.C. §§ 41-58 (FTC Act).*¹⁸ In February 2012, Congressional Research Service (CRS) issued a report for Congress regarding legal implications and privacy concerns associated with smart meters (*CP420-467*). Included in that report is an analysis of FTC Act Section 5 that prohibits “unfair or deceptive acts or practices in or affecting commerce”. The analysis concludes that the Section 5 provisions may apply to non-profit electric cooperatives.¹⁹ The CRS analysis of an analogous federal law provides useful insight to Costellos argument that the Washington CPA does likewise apply to electric cooperatives such as Tanner.

2. The Washington State Legislature has not categorically exempted cooperative electric utilities from the CPA.

Contrary to Tanner’s assertion, none of the recent legislation (SHB1896 and HB2264) has altered the CPA, nor do those bills include any language exempting cooperative utilities from the CPA. Likewise, the legislative history does not include any indication that the Legislature considered that cooperative utilities are, or should be, exempt from the CPA. (*RB12*) Quite to the contrary, SHB1896 was unanimously approved by both houses of the legislature demonstrating that the Legislature

¹⁸ Reference RCW 19.86.920.

¹⁹ See *Appendix A2* for text of the CRS analysis. The reasoning in the CRS report compares the differences between the various types of electric utilities including cooperatives, PUD’s and municipal corporations. The characteristics of a non-profit cooperative electric utility wherein such entity is organized on behalf of for-profit members, imparts to members an ownership interest, provides them an economic benefit (providing electric service to members), returns net margins to members as patronage capital, and is not organized solely for charitable purposes provide that entity with the same incentives as for-profit organizations to engage in unfair or deceptive acts in commerce. These are the very factors applicable in this case.

understood that the CPA applies to cooperatives. Although HB2264 subsequently removed the CPA provisions enacted by SHB1896, that action says nothing as a general rule regarding application of the CPA to cooperative electric utilities. The House and Senate reports from both bills, and the plain language in the bills, do not indicate that cooperative utilities are exempt from the CPA.

3. Costellos have satisfied all of the elements for a CPA claim.

The Costellos have come forth with facts that demonstrate they have made a prima facie case for a violation by Tanner under the CPA - (1) Tanner has engaged in unfair and deceptive acts and practices associated with its installation of smart meters (*AB30 – 35*), (2) occurring in Tanner's sale of electric services to cooperative members (*AB31*), (3) impacting the public interest (*AB35*), (4) resulting in injury to the Costellos by forcing them to pay an unjustified opt-out fee in order to protect their privacy or otherwise have their power disconnected (*AB36*), (5) and causation whereby Tanner's actions have directly resulted in Costellos' injury. At a minimum, Costellos have demonstrated that factual issues exist which precluded summary judgment on their CPA claim.

Tanner has not demonstrated any legitimate business interest or purpose for installing smart meters in order to collect member energy use information in 15 minute intervals (3,000 times per month) when billing is only monthly (*RB31, 33, AB31, CP363, 397, 970*).²⁰

²⁰ Tanner's manner of metering members with smart meters is undisputedly an invasion of privacy (Tanner admits this *RP51, 52 – Vol. I*, experts confirm this *CP363-365*).

Tanner has not provided any facts to support its claim that the opt-out fee is based on the actual cost of manually reading Costellos meter (RB33). Costellos have demonstrated using Tanner's own methodology that this fee is arbitrary and could only be much less, if at all (CP1385-1386). Although Tanner argues that Costellos should not be allowed to transfer the meter reading cost to other members, Tanner is arbitrary in applying that standard given it charges Costellos for the smart meter system they are not using - even when Tanner has made it clear that Costellos receive no benefits from it (CP1047, 1048, 1380, 1398).²¹ In other words, the Costellos are being forced to subsidize other Tanner members even when Tanner claims that it is the policy of the cooperative not to allow that. In essence, Costellos are being double charged by having to pay for both the opt-out fee and the cost of the smart meter system. ***This is a violation of the Bylaws whereby members are required to only pay for electric services provided to and used by them (AB41, 42, CP1378, CP1088-1090).*** Further, prior to the installation of the smart meters, the Costellos and at least 250 other members self-read their meters for many years at no cost to Tanner (CP1397, 1054). Accordingly, Tanner's claim that not having a smart meter incurs added cost is unsupported by any facts.

Tanner's claim of legitimate business reasons is wholly speculative, unconfirmed and the investigation into any motives has been hamstrung by Tanner's refusal to allow the Costellos to inspect its books and records.

²¹ Tanner has deemed Costellos subject to its Opt-out Policy. That policy states "As a condition of "opting out"... members shall first sign and return Tanner's standard form "Opt-Out" Agreement, ***including agreement to forego the benefits of AMI metering...***" (CP1047, 1048) ***emphasis added.***

Tanner's claim that a public interest has not been established is not supported by the facts (*RB34, 35*). All 4,500 Tanner members, except two by Tanner's own admission, are subject to the privacy issues (*RB32*). Further, Tanner has intentionally withheld from the other members information regarding the opt-out option (*CP276, 1397*).²² The only manner of recourse for members to protect their privacy is under the opt-out arrangement (should they become aware of it) which requires payment of an arbitrary fee for manual meter reads - even though Tanner has established a long history whereby members successfully read their own meters at no cost to Tanner. Further, these issues are not only relevant to all 4,500 Tanner members, they also affect the 46 million electric customers purported by Tanner to have a smart meter (*RB4*).²³

With respect to the contractual terms between Tanner and its members, all members are subject to the same contract (the membership agreement) – it is a standard form agreement not unique to the Costellos. Contrary to Tanner's assertion, it is not a private contract exclusive to the Costellos (*RB34*). The entirety of the Tanner membership is contractually affected in the same manner as the Costellos.

²² Tanner's claim that only two members have opted out rings hollow given Tanner only made three members aware that the opt-out policy even exists (*RB 32, 34, CP276*).

²³ An ongoing example with complaints similar to Costellos is the Michigan case No. 317434 *Attorney General v. Michigan Public Service Commission* recently heard on appeal in July, 2015. There, the court determined that there was no justification for an opt-out fee, that consumers are being double charged, that the opt-out fee appears to be nothing more than a tax or penalty, and the smart meters represent only a cost to consumers with no offsetting value. The court opined "I am also greatly concerned that the opt-out costs are actually a penalty imposed to force the opt-outers to comply with the AMI program. The PSC's implied finding that it is a fee/tariff rather than a penalty or a tax is not supported by even a scintilla of evidence in this lower court record." *Id.* at 18.

Hangman Ridge Training Stables, Inc., et. al. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986) is directly on point (*RB35*). There, the Washington Supreme Court stated when evaluating the circumstances of public import, “it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest”. *Id.* at 790. The record is clear that such a condition exists. For example, Boulanger wanted to opt-out but could not afford the arbitrary opt-out fee and is forced to accept the privacy invasion or risk having her power disconnected (*CP1266-1270*).

Tanner has provided no evidence to support their claims that smart meters provide any benefits or advantage to members (*RB4, AB32, CP1000*). The smart meters have only increased cost to members – rates have increased by more than 25% since the system was deployed (*CP973*). Contrary to Tanner’s assertion, there is no demonstrated payback on the capital spent for the smart meter system.²⁴ Indeed, Costellos ability to fully assess the business details associated with the smart meters has been hindered by Tanner’s refusal to provide them access to the cooperative books and records.

Tanner Was Not Entitled to Summary Judgment On Its Counterclaims:

²⁴ Tanner deceived Costellos and other members by misrepresenting that the smart meter system cost slightly less than \$1 million and that it would pay for itself within 6-1/2 years (*AB32, CP972, 973*). The facts obtained through discovery show the costs are well in excess of \$1 million and there is no confirmed payback, and no financial benefit for using the smart meters.

1. The trial court erred by granting Tanner's motion for summary judgment and awarding the damage claim because the court accepted a mathematically incorrect calculation submitted by Tanner.

Contrary to Tanner's assertions (*RB36*), Costellos have clearly documented in their monthly billing payments the disputed amounts for the opt-out fee, as well as the energy overcharges and computational errors (*CP1408-1461 and Appendix A1*). Tanner never responded to these written disputes and only levied late fees and interest. Tanner convinced the trial court that $2+2 = 5$, at least for purposes of billing the Costellos. The trial court's acceptance of that conclusion has resulted in a wrongful judgment in favor of Tanner on its counterclaims and, consequently, a wrongful award of attorney fees and costs.

With mathematical certainty, the counterclaim amount of \$45.70 is in error – at most, it could only be \$26.04 following Tanner's own calculation methodology (*CP1483 - Appendix A1*). It would be even less or non-existent if corrected for the overcharges due to Tanner billing for energy that was neither provided to nor used by the Costellos. (*RB36, 42, AB42, CP1378, 1398-1400*). Costellos have argued a miscalculation because there is a miscalculation (*RB38*) and they have demonstrated that with certainty (*CP1470-1490*) as summarized below.²⁵

①. Tanner's spreadsheet calculated the counterclaim (*CP1477, CP1481, CP2211*). The counterclaim of \$45.70 is the sum of the October 2014 arrearage (\$33.83) (which itself is calculated from all other values on

²⁵ The numbered items 1 through 9 have been annotated on Tanner's spreadsheet and the corresponding billing records included in *Appendix A1* to more clearly demonstrate the computational errors.

the spreadsheet) and the total interest charges through October 2014 (\$11.87). The counterclaim is not discernible from any other record.

② The \$33.83 arrearage cannot be found on the actual bill for October 2014 (*CP1410*). It is not discernible from any of the billing records. In general, the arrearage amounts on *CP1481* are not discernible from the actual billing records (*CP1408-CP1461*).

③ None of the “Amount Due Upon Receipt” values on the actual billing records correlate to any of the figures on the counterclaim spreadsheet (*CP1408-CP1461*).

④ *CP1481* claims a \$23.33 arrearage for February 2013. Costellos were billed \$100 in January 2013 but paid \$125.54 – an overpayment of \$25.54 (*CP1460*). An arrearage for February 2013 is impossible.

⑤ *CP1481* claims a \$46.66 arrearage for March 2013. Costellos were billed \$100 in February 2013 but paid \$137.80 – an overpayment of \$37.80 (*CP1459*). An arrearage for March 2013 is impossible.

⑥ *CP1481* claims a \$77.31 arrearage for April 2013. Costellos were billed \$100 in March 2013 but paid \$131.72 – an overpayment of \$31.72 (*CP1458*). Cumulatively through March 2013, Costellos overpaid by \$95.06 relative to the amounts they were billed. An arrearage for April 2013 is impossible.

⑦ Beginning September 2013 and each month thereafter, every Late Fee is miscalculated following Tanner’s billing methodology of applying a 5% late charge to any arrearage carried forward (*CP1473*).

8. Tanner miscalculated the energy for August 2013 and overcharged Costellos by \$3.65 (CP1478, 1489, 1490).

9. The month of June 2014 reports a billed energy amount of \$61.88. The actual billing record shows that amount to only be \$61.68 (CP1426).

Tanner has provided absolutely no verifiable facts to support the counterclaim amount.²⁶ Tanner is now arguing that the spreadsheet it used to present the counterclaim (CP1481, 2065) is not a calculation but “merely a table” showing the amounts Tanner has claimed based on a calculation performed by their “computerized billing software” (RB36). Tanner further argues that the Costellos “could have easily determined the same by reviewing their actual bills” (RB36 footnote 31). Both of these assertions are patently false. As shown above, the billing records do not support Tanner’s argument (CP1408-1461). ***There is absolutely no way to discern from the billing records the counterclaim amount that Tanner presented in the spreadsheet.***²⁷ Also, the Costellos were never provided any information from Tanner representing the counterclaim amount until Tanner filed its counterclaim motion in November, 2014. Tanner acknowledges that it created the spreadsheet to determine its counterclaim (CP2053 – 2065) and it is undeniable that the “arrearage” used as the

²⁶ The calculation errors and other billing anomalies are blatant. Not only has Tanner treated the Costellos unfairly, but it has also deceived the court by creating and misrepresenting the counterclaim amount it must have known was false. Tanner did this even after Costellos pointed out the errors. That Tanner refuses to acknowledge the errors without providing any evidence to support its position, and that the trial court accepted that proposition without checking the facts, is manifestly unjust and precisely why summary judgment was improperly granted.

²⁷ It is not possible to determine the claimed amount from the billing records and Tanner, in fact, could not explain differences raised by the Costellos (CP1485-1487).

value for the counterclaim amount is calculated from the spreadsheet. That amount; however, cannot be ascertained from the billing records and Tanner has not shown that it can. *These are clearly issues of disputed fact, as such, summary judgment was not possible. The trial court erred by granting Tanner's counterclaim motion.*²⁸

2. Tanner has violated the Contract and its Billing Policies.

Notwithstanding Tanner's application of an opt-out fee that has no basis in fact (*CP1385-1387*), Costellos have rightly disputed Tanner's billing.²⁹ Costellos have demonstrated with mathematical certainty that billed amounts have been computed incorrectly (*CP1378*). Further, Tanner has repeatedly charged for energy that has not been provided to or used by the Costellos in violation of the Bylaws (and continues to do so) – the billing records which are undisputed clearly show this (*CP1398-1401, CP1408-1461*).³⁰ The trial court erred by accepting these erroneous charges when awarding Tanner its counterclaim and subsequent attorney fees and costs.³¹

²⁸ Tanner's argument is misguided that "This Court should not consider the Costellos argument that made a "computational error" because the Costellos failed to appeal, or even attempt to show, that the trial court abused its discretion in ruling on the Costellos' Motion for Reconsideration." (*RB36, footnote 31*) The errors were presented to the trial court (*AB Appendix 3*). Ultimately, this should not be a matter of discretion because the issue is one of fact. With mathematical certainty Tanner's claim as to the value of its counterclaim is in error. The trial court does not have discretion to deviate from mathematical facts.

²⁹ Costellos have documented the disputed amounts in writing every month they have occurred (*CP1408-1461*). Although Costellos initially withheld payment on the disputed opt-out fee, they have paid it in full since October 2013, albeit under protest.

³⁰ Rather than address the billing errors which the Costellos have brought to Tanner's attention, Tanner has seen fit only to assess additional late fees and interest while completely ignoring Costellos legitimate identification of billing errors.

³¹ Tanner provides no legal basis as to how it can violate the Bylaws, which have the force of contract. Tanner's claim that the opt-out policy permits this is false (*RB39*) –

Contrary to Tanner's assertion, Costellos have never argued that the Bylaws require it to charge for utility services based only on the kilowatt hours of energy used (*RB39*). Costellos have always recognized applicability of the Bylaws exactly as they are written, which distinguishes a separate facility charge apart from a separate energy charge (*CP1089*). In accordance with the Bylaws, members are required to pay only for the energy actually provided to and used by them (*CP1088-1090, 1378*). Prepayment for future energy they may or may not use is contrary to the Bylaws, and in fact, contrary to Tanner's past billing practices.

Also contrary to Tanner's assertion, the Bylaws do precisely define the charge for energy (*RB39, 40*). That charge is a singular billable entity covering a specific item – energy delivered to the member.³² Tanner attempts to confuse the facility charge with the energy charge but these are entirely separate costs and are billed separately.³³ (*CP1632*) There is no dispute between the parties regarding the facility charge. Tanner's arguments regarding the Rates and Charges are inconsistent with the Bylaws and are absolutely wrong - which is another reason why the trial court erred by granting summary judgment (*RB40*).

there is nothing in the policy to support that assertion and furthermore, that policy cannot subordinate the pre-existing Bylaws and membership agreement (*CP1382, 1383*).

³² Bylaws Article I Section 8 (*CP1632*) and Tanner tariff schedule (*CP1403, 1404*).

³³ Tanner's September 2014 memo to members explains the Facility Charge as a fixed charge to cover maintenance, reliability, safety, meter reading, billing and member service functions. It is independent of the energy charge. (*RP15, 16 – Vol. III*)

Tanner has as much as admitted its billing practice is arbitrary and capricious.³⁴ Tanner claims it is justified in randomly overcharging Costellos for energy on the premise such charges are to cover other unknown and yet to be determined costs – such as a “storm reserve” (*RB40, footnote 36*). However, such charges should be uniformly applied to all members, but that could not be the case since Tanner has confirmed that only one other member is subject to the opt-out policy and associated billing methodology. Tanner would have us believe it can single out one or more members at its discretion, makeup energy amounts out of thin air, and bill those arbitrary amounts in order to increase its revenue for the proverbial rainy day fund. The fact is, the Bylaws are clear and Tanner has violated them by overcharging Costellos for energy that was not provided to or used by them. The trial court erred by accepting Tanner’s counterclaim in spite of these material facts that are in dispute.

Tanner’s assertion that their interpretation of the opt-out policy “budget billing” is somehow different than its general “budget billing option” is unsupported by the facts (*RB40*). Tanner only has one defined budget billing policy which is stated on their monthly bills (*AB42-43, CP1407*). The opt-out policy provides nothing to the contrary (*CP1046-1051*) and Tanner has provided no other cooperative policy, rule, regulation or governing document to support their interpretation of the

³⁴ Arbitrary and Capricious - “A willful and unreasonable action without consideration or in disregard of facts or law or without determining principle.” - Black’s Law Dictionary.

budget billing.³⁵ Additionally, Tanner's claim that the 12 month average budget billing would result in a higher monthly bill to Costellos is absolutely false and unsupported by any facts (*RB41, footnote 37*). The Carr declaration purporting this conclusion does not withstand scrutiny.³⁶

The Trial Court Abused its Discretion by Awarding Fees and Costs to Tanner. That Decision Should be Overturned:

1. The Membership Agreement does not support an award of fees and costs based on the facts of this case. The trial court erred by awarding fees and costs based on the membership agreement.

Tanner argues that, under the terms of the Application for Membership, Plaintiffs are contractually obligated for over \$129,000 in attorneys' fees and costs (*RB42-45*). This represents some 2,800 times the amount that Tanner recovered on its counterclaim (\$45.70) – notwithstanding that the counterclaim amount itself is proven to be in error. Such a fee and cost award is contrary to both common sense and law.

The instant litigation was not based in contract. Rather, this was a case about privacy rights and what rights a cooperative member has to inspect the records of its cooperative, and how a cooperative must handle its affairs pursuant to its bylaws and state law. It was only the very limited

³⁵ Tanner provided examples of budget billing policy from other utilities as support for its argument. However, all of these examples rely on a 12 month average, reset annually – the same as Tanner's "budget billing option". The billing Tanner has applied to Costellos is completely arbitrary and is not based on Tanner's one and only documented budget billing policy and Costellos well documented billing history (*AB43, CP1986-1995, CP1462-1464*).

³⁶ Carr improperly assumes that Costellos payment history based on the actual bills submitted would remain the same under a hypothetical billing record created by Carr. That is an untenable assumption. The payments made are a reflection of the billing submitted. If the billing changes, so too would the payments. There is no correct way for Carr to make the conclusions he does. (*CP2217*)

issue of Tanner's counterclaim that is based in contract. The court may award attorney fees for claims other than breach of contract but the contract must be central to the existence of the other claims. (CP1520)

The contractual clause contemplates the situation where a cooperative member fails to pay a legitimate electric bill. It does not contemplate the allocation of costs when a member challenges privacy concerns due to technology, claims under the Consumer Protection Act or other statutory claims, or disputes billing errors. Regarding the legitimacy of Tanner's billing, Costellos have demonstrated that the billing has violated the Bylaws, has violated the billing policy, and has calculation errors – all factors that the Costellos disputed in writing each month.

Tanner argues that the attorney fees and costs are justified because under terms of the contract they were necessary to collect on the counterclaim amount of \$45.70. However, Costellos have demonstrated with mathematical certainty that the amount of the counterclaim is in error, is based on Tanner's violation of the contract by charging for energy in contravention of the Bylaws, and that it is impossible to discern from the billing the amount Tanner has claimed it was due.³⁷ Tanner unnecessarily escalated this litigation, and consequently the attorney fees and costs, because it ignored all of Costellos written notices regarding these disputed amounts.

³⁷ Costellos paid the counterclaim for the opt-out fee in full as of October 18, 2013. Subsequently in December 2013, Tanner amended its counterclaim to add late fees and pre-judgment interest on an unstated claim amount (AB9). It is undeniable from the billing records (CP1390-1394) that Tanner has assessed late fees and interest on disputed charges other than the opt-out fee, which have been included in the counterclaim award.

Tanner being awarded attorney fees and costs under terms of the membership agreement was hinged on their award of the counterclaim. Because it is proven that the counterclaim itself is in error, and the basis for the counterclaim is unfounded, it is wholly improper to award attorney fees and costs. The trial court abused its discretion by awarding attorney fees and costs to Tanner under terms of the membership agreement.

2. Tanner's Settlement Offer Was Insufficient to Cause the Small Claims Statute RCW 4.84.250 et. seq. to Apply. The Trial Court erred by Awarding Fees and Costs pursuant with the statute.

Tanner offered to settle its counterclaim for \$30 – not \$10 as Tanner asserts (*RB14, 45, 46*). The initial reading of the offer was ambiguous as to application of the phrase “and each of them” and Costellos requested clarification (*CP2101*). The phrase could have applied to the Costellos (rendering the value of the offer as \$20), or to the counterclaims.³⁸ Tanner made it perfectly clear in their email to Costellos that the phrase pertained to each of the three counterclaims (*CP2100-2102*). Thus, Tanner's offer was clearly for \$30 and Tanner has now conceded to that fact (*RB46*). The properly calculated damage claim of \$26.04³⁹ is less than Tanner's

³⁸ Tanner's offer reads “Tanner Electric Cooperative hereby offers to settle its counterclaims against the Plaintiffs, and each of them, in Case No. 13-2-18595-4 for \$10. Tanner's counterclaims include its claim for the monthly “opt-out” fee under Tanner's smart meter Opt-Out policy and late fees and pre-judgment interest due through November 2014.” Merriam-Webster Dictionary - When used to describe “to, from, or for each”, the synonym is “apiece”. Three items were offered for \$10 each (the total offer is \$30). Three items were offered each for \$10 (the total offer is still \$30). The latter variation is the offer made by Tanner.

³⁹ Tanner has not provided any factual evidence to support their claim that the arrearage as of end of November 2014 was \$45.70 – in fact, Costellos have demonstrated with mathematical certainty that this amount is incorrect and cannot be more than \$26.04. Even that conclusion does not account for the energy overcharges in violation of the Bylaws. If the energy overcharges were properly addressed pursuant with the contract, any arrearage would even be less than \$10, if at all.

\$30 offer of settlement, as such, the offer is insufficient to cause the operation of RCW 4.84.250. The trial court erred by awarding fees and costs based on the operation of this statute.

3. Costellos claims were not baseless or frivolous, accordingly, the Trial Court erred by awarding fees and costs pursuant with RCW 4.84.185.

The Costellos have litigated all aspects of this matter in good-faith and while perhaps not ultimately meritorious, these claims were certainly not frivolous (*RB47-49*). This was a matter of first impressions. The Costellos offered a good faith argument of extending the law to cover the application of a new technology.

The trial court found that Costellos first count regarding access to the cooperative books and records was non-frivolous (*CP2164-2167*). Costellos articulated a proper purpose for these records in order to protect their interest in the cooperative, to understand how their money was being spent, and to understand the capabilities of a new technology Tanner installed.

Likewise, there is nothing explicit in the CPA that exempts cooperative utilities and the ruling in the *Haberman* case was based on the specific facts of that case and does not categorically exempt cooperative electric utilities from civil action under the CPA. Tanner's actions in this case were arguably unfair and deceptive and Costellos have put forth a prima facie argument that they satisfied the elements of a CPA claim. The Washington State legislature unanimously passed SHB1896 making it

absolutely clear that the CPA applies to cooperative electrical utilities, and although the portion of that bill pertaining to the CPA was removed due to the subsequent passage of HB2264, there was nothing stated in either of those bills, or by the Legislature that the CPA does not apply to cooperative electric utilities.

The Costellos abandoned the litigation concerning their privacy claim pursuant to RCW 80.28.090 and their discrimination claim pursuant to RCW 49.60 in March 2014 after they were dismissed. The Costellos have not appealed the rulings concerning these claims.⁴⁰ It is clearly the law, “[if] attorney fees are recoverable for only some of a party’s claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues.” *Mayer v. City of Seattle*, 102 Wash.App. 66, 79–80, 10 P.3d 408 (2000). As with Tanner’s counterclaim under the membership agreement, any award of attorney fees and costs regarding counts 2 and 3 must be based on segregating the time for those specific counts.

Tanner has argued that it was necessary to prevail on Costellos counts 2, 3, and 4 in order to prevail on its counterclaims (*RBI6*). However, Costellos have presented facts disputing Tanner’s counterclaim due to contract violations, policy violations and mathematical errors – none of which have anything to do with counts 2, 3, and 4. This means that

⁴⁰ Even if deemed frivolous, the amount of resources Tanner incurred litigating these claims was minimal and would amount to a small fraction of the total amount of attorney’s fees claimed by Tanner. Tanner cannot have it both ways and say that these claims were entirely frivolous but then claim huge costs in defending against these “frivolous” claims.

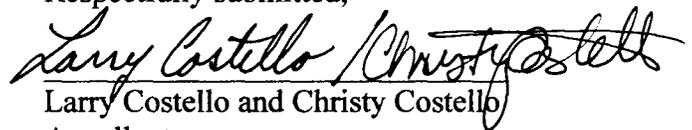
Tanner spent time arguing their counterclaim not for reasons pertaining to counts 2, 3, and 4 but for reasons attempting to justify these other improprieties. The trial court did not give proper consideration to these facts and ultimately abused its discretion in awarding attorney fees and costs on the basis that the fees and costs were solely attributed to defending counts 2, 3 and 4.

C. CONCLUSION

In light of the above, the Costellos pray for an order remanding to the trial court for further proceedings Count 1 (Access to Books and Records) and Count 4 (CPA Claim) with the instruction that the Costellos are entitled to review the books and records of Tanner that it sought below, and that Tanner is not categorically exempt from the Consumer Protection Act and that discovery on that issue may proceed. The Costellos also pray for an order reversing the trial court's award of Tanner's counterclaims, and reversing the award of attorney's fees and costs, and ordering Tanner to repay the Costellos the \$132,115.84 they paid to Tanner for settlement of the counterclaim, fees, and costs award.

Date: November 23, 2015

Respectfully submitted,


Larry Costello and Christy Costello
Appellants, pro se

No. 730606

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

LARRY COSTELLO AND CHRISTY COSTELLO,
Appellant / Plaintiff

v.

TANNER ELECTRIC COOPERATIVE,
Respondent / Defendant

REPLY BRIEF OF APPELLANTS

APPENDIX

Larry Costello and Christy Costello
Appellants, Pro Se
13050 470th Ave. SE
North Bend, WA 98045
425-922-6529

APPENDIX A-1

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

LARRY COSTELLO AND CHRISTY
COSTELLO,

No. 13-2-18595-4 SEA

Plaintiffs,

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

vs.

TANNER ELECTRIC COOPERATIVE,

Defendant.

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

1

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

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

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

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

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

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

1

EXHIBIT A

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

1

3

7

Month	AMOUNTS TANNER BILLED				Facility Charge	TOTAL	AMOUNT PAID BY COSTELLOS	MONTHLY DIFFERENCE	ARREARAGE THROUGH CURRENT MONTH	Interest @ 1% per month on Arreage
	Energy Bill (using budget billing)	Smart Meter Opt out Fee	Late Fees							
Feb-13	\$ 120.75	\$ 23.33	\$ -	\$ 17.05	\$ 161.13	\$ 137.80	\$ 23.33	\$ 23.33	0.47	
Mar-13	\$ 114.67	\$ 23.33	\$ -	\$ 17.05	\$ 155.05	\$ 131.72	\$ 23.33	\$ 46.66	0.77	
Apr-13	\$ 117.71	\$ 23.33	\$ -	\$ 17.05	\$ 158.09	\$ 127.44	\$ 30.65	\$ 77.31	0.93	
May-13	\$ 27.06	\$ 23.33	\$ -	\$ 17.05	\$ 67.44	\$ 51.44	\$ 16.00	\$ 93.31	1.21	
Jun-13	\$ 72.39	\$ 23.33	\$ 4.67	\$ 17.05	\$ 117.44	\$ 89.44	\$ 28.00	\$ 121.31	1.51	
Jul-13	\$ 52.30	\$ 23.33	\$ 6.07	\$ 17.05	\$ 98.75	\$ 69.35	\$ 29.40	\$ 150.71	1.85	
Aug-13	\$ 77.90	\$ 23.33	\$ 7.54	\$ 17.05	\$ 125.82	\$ 91.30	\$ 34.52	\$ 185.23	2.25	
Sep-13	\$ 127.44	\$ 23.33	\$ 8.22	\$ 17.05	\$ 176.04	\$ 336.40	\$ (160.36)	\$ 24.87	1.01	
Oct-13	\$ 165.07	\$ 23.33	\$ 2.41	\$ 17.05	\$ 207.86	\$ 131.40	\$ 76.46	\$ 101.33	0.15	
Nov-13	\$ (55.60)	\$ 23.33	\$ 6.23	\$ 17.05	\$ (8.99)	\$ 76.91	\$ (85.90)	\$ 15.43	0.16	
Dec-13	\$ 54.79	\$ 23.33	\$ 0.77	\$ 17.05	\$ 95.94	\$ 95.17	\$ 0.77	\$ 16.20	0.18	
Jan-14	\$ -	\$ 23.33	\$ 1.98	\$ 17.05	\$ 42.36	\$ 40.38	\$ 1.98	\$ 18.18	0.19	
Feb-14	\$ 242.00	\$ 23.33	\$ 0.91	\$ 17.05	\$ 283.29	\$ 282.40	\$ 0.89	\$ 19.07	0.20	
Mar-14	\$ 121.06	\$ 23.33	\$ 0.95	\$ 17.05	\$ 162.39	\$ 161.44	\$ 0.95	\$ 20.02	1.11	
Apr-14	\$ 181.54	\$ 23.33	\$ 2.17	\$ 17.05	\$ 224.09	\$ 132.70	\$ 91.39	\$ 111.41	0.29	
May-14	\$ (58.28)	\$ 23.33	\$ 6.74	\$ 17.05	\$ (11.16)	\$ 71.32	\$ (82.48)	\$ 28.93	0.31	
Jun-14	\$ 61.88	\$ 23.33	\$ 1.45	\$ 17.05	\$ 103.71	\$ 102.06	\$ 1.65	\$ 30.58	0.33	
Jul-14	\$ 1.70	\$ 23.33	\$ 2.69	\$ 19.50	\$ 47.22	\$ 44.53	\$ 2.69	\$ 33.27	0.28	
Aug-14	\$ 31.74	\$ 23.33	\$ 1.65	\$ 19.50	\$ 76.22	\$ 81.24	\$ (5.02)	\$ 28.25	0.31	
Sep-14	\$ 179.44	\$ 30.00	\$ 2.56	\$ 19.50	\$ 231.50	\$ 228.94	\$ 2.56	\$ 30.81	0.34	
Oct-14	\$ 105.58	\$ 30.00	\$ 3.03	\$ 19.50	\$ 158.11	\$ 155.09	\$ 3.02	\$ 33.83		

8

A

9

7 B

2

1

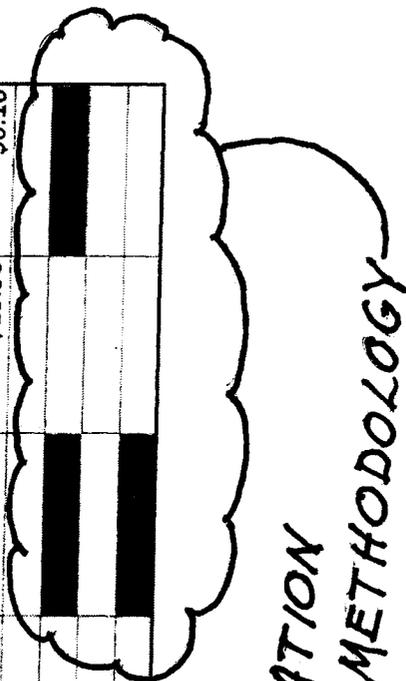
6

5

A 3.65 COMPUTATIONAL ERROR AUGUST 2013 FOR ENERGY BILL

B LATE FEES MISCALCULATED FROM SEPTEMBER 2013 ON

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



*CORRECT CALCULATION
USING TANNER'S METHODOLOGY*

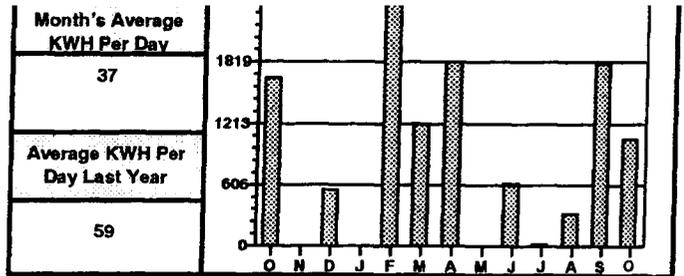


TANNER ELECTRIC
Cooperative

PO Box 1426
North Bend, WA 98045-1426

A Touchstone Energy® Cooperative

Billing Date: 11/01/2014



Avg Temp° This Year: 58 Last Year: 52

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

896 1 AV 0.378
LARRY COSTELLO
CHRISTY COSTELLO
PO BOX 1669
NORTH BEND WA 98045-1669

4 896
C-3 P-3

ELIGIBLE ORIGINAL CPIA10

ACCOUNT NUMBER		TELEPHONE		POLE #		SERVICE ADDRESS	
26045000		(425) 888-6010		2X28L46RU20L6		13050 470TH AVE SE	
SERVICE INFORMATION				READING			USAGE
METER #	FROM	TO	DAYS	PREVIOUS	PRESENT	MULT	KWH
96262249	09/29/2014	10/27/2014	28	43181	44239 EST	1.0	1058
Activity Since Last Bill		\$ Amount		Current Bill Information			\$ Amount
Previous Balance		280.55		BALANCE FORWARD			(A) 60.61
Payments		228.94 CR		FACILITY CHARGE			19.50
Adjustments		0.00		ENERGY 1058.0 KWH @ .099800			105.59
Balance Prior to this Billing		60.61		LATE CHARGE			(A) 6.00
Payments made after the 24th of the month may not be reflected on this bill.				MANUAL METER READ			(B) 30.00
MONTHLY NOTICES				Account is Past Due. Past Due amounts should be paid immediately to prevent possible disconnection.			
Thank you for being so patient with us during the most recent power outages we had. We recently added a new feature for members to report an outage on our website at the upper right called "Report an Outage" or you can simply report it by sending an email to poweroutage@tannerelectric.coop. Please note that our office will be closed for Nov. 27th-28th for the Thanksgiving Holiday. Be safe and stay warm.				ACCOUNT IS CURRENT PAID IN FULL.			
				(A) ERRONEOUS CHARGE NOT PAID.			
				(B) PAID SEPARATELY UNDER PROTEST.			
				READING 11-14-14 44293			
				PRORATED BILL			
				Amount Due Upon Receipt			
				210.70			
				Amount Due after 11/20/2014			
				228.02			

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



TANNER ELECTRIC
Cooperative

PO Box 1426
North Bend, WA 98045-1426

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

ACCOUNT NUMBER:	26045000
Amount Due Upon Receipt	210.70
Amount Due after 11/20/2014	228.02
AMOUNT PAID	#125.09

Check One:

Visa MasterCard Every Month

Account Number:

Expiration Date: Signature:

Phone Number:

Please make any address corrections on the back.



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



MORE INFORMATION ON BACK

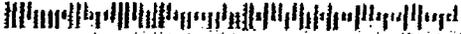




**TANNER ELECTRIC
COOPERATIVE**
PO Box 1426
North Bend, WA 98045-1426

Billing Date: 02/01/2013

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



KWH USAGE HISTORY

Current Month's Average KWH Per Day	39	
Average KWH Per Day Last Year	39	
Avg Temp°		This Year: 39 Last Year: 41

OFFICE LOCATION: 45710 SE North Bend Way, North Bend
 OFFICE HOURS: 7:30 a.m. - 4:30 p.m. Monday - Friday
 24-hour secure payment drop box available.
 24-hour Emergency Service
 PHONE: 425-888-0823 or 800-472-0208
 Visit us at www.tannerelectric.coop

ACCOUNT NUMBER		TELEPHONE		ROLE #		SERVICE ADDRESS	
26045000		(425) 888-6010		2X28L46RU20L6		13050 470TH AVE SE	
SERVICE INFORMATION				READING		USAGE	
METER #	FROM	TO	DAYS	PREVIOUS	PRESENT	MULT	KWH
96262249	12/15/2012	01/13/2013	29	25460	26602	1.0	1142
Activity Since Last Bill		\$ Amount	Current Bill Information				\$ Amount
Previous Balance		129.63	BALANCE FORWARD				0.00
Payments		129.63 CR	FACILITY CHARGE				17.05
Adjustments		0.00	ENERGY 1142.0 KWH @ .085000				108.49
Balance Prior to this Billing		0.00	MANUAL METER READING				23.55
Payments made after the 24th of the month may not be reflected on this bill.			<p><i>ERRONEOUS CHARGE NOT PAID</i></p> <p><i>PAID 2-14-13</i></p> <p><i>WE HAVE NOT REQUESTED BUDGET BILLING</i></p>				
MONTHLY NOTICES				BUDGET BILL			
Please keep your account current by updating your phone number and e-mail address.				Budget Due Upon Receipt		125.54	
				Budget Due after 02/20/2013		105.00	

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



**TANNER ELECTRIC
COOPERATIVE**
PO Box 1426
North Bend, WA 98045-1426

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

ACCOUNT NUMBER:	26045000
Budget Due Upon Receipt	125.54
Budget Due after 02/20/2013	105.00
AMOUNT PAID	125.54

Meter #	Previous Reading	Enter Meter Readings Here				
96262249	26602	2	7	6	7	3
2X28L46RU20L6						
Enter Date Read →		2/14/2013				

Please make any address corrections on the back.

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



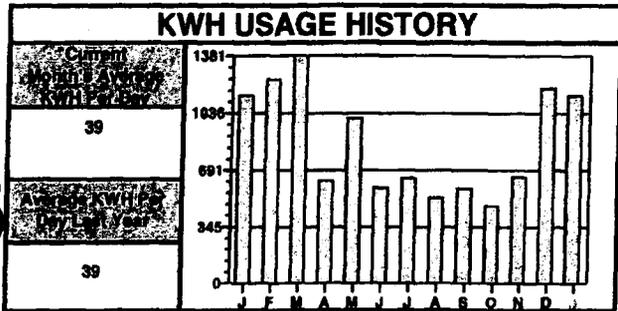
MORE INFORMATION ON BACK



LEGIBLE ORIGINAL CP1460
Billing Date: 02/01/2013

1 2

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



Avg Temp° This Year: 39 Last Year: 41

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

ACCOUNT NUMBER	TELEPHONE	ROBOT	SERVICE ADDRESS
26045000	(425) 888-6010	2X28L46RU20L6	13050 470TH AVE SE
SERVICE INFORMATION		READING	
METER	FROM	TO	DAYS
96262249	12/15/2012	01/13/2013	29
PREVIOUS	PRESENT	MULT	USAGE KWH
25460	26602	1.0	1142
Activity Since Last Bill		Current Bill Information	
Previous Balance	129.63	BALANCE FORWARD	0.00
Payments	129.63 CR	FACILITY CHARGE	17.05
Adjustments	0.00	ENERGY 1142.0 KWH @ .095000	108.49
Balance Prior to this Billing	0.00	MANUAL METER READING	25.35
Payments made after the 24th of the month may not be reflected on this bill.		<p>ERRONEOUS CHARGE NOT PAID</p> <p>PAID 2-14-13</p> <p>WE HAVE NOT REQUESTED BUDGET BILLING</p>	
MONTHLY NOTICES			
Please keep your account current by updating your phone number and e-mail address.			
		BUDGET BILL	125.54
		Budget Due Upon Receipt	100.00
		Budget Due after 02/20/2013	105.00

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



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

ACCOUNT NUMBER:	26045000
Budget Due Upon Receipt	100.00
Budget Due after 02/20/2013	105.00
AMOUNT PAID	125.54



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



MORE INFORMATION ON BACK

Meter & Location	Previous Reading	Enter Meter Readings Here
96262249	26602	2 7 6 7 3
2X28L46RU20L6		
Enter Date Read → 2/14/2013		

Please make any address corrections on the back.

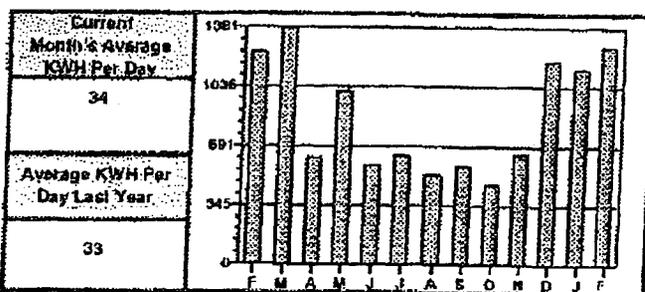


TANNER ELECTRIC
Cooperative
PO Box 1426
North Bend, WA 98045-1426

Billing Date: 03/01/2013

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

1 4



Avg Temp° This Year: 41 Last Year: 42

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

ACCOUNT NUMBER	TELEPHONE	POLE #	SERVICE ADDRESS
26045000	(425) 888-6010	2X28L46RU20L6	13050 470TH AVE SE
SERVICE INFORMATION		READING	
METER #	FROM	TO	DAYS
96262249	01/13/2013	02/19/2013	37
PREVIOUS	PRESENT	MULT	USAGE KWH
26602	27873	1.0	1271
Activity Since Last Bill	\$ Amount	Current Bill Information	\$ Amount
Previous Balance	125.54	BALANCE FORWARD	149.04
Payments	125.54 CR	FACILITY CHARGE	17.05
Adjustments	0.17 CR	ENERGY 1271.0 KWH @ .095000	120.75
Balance Prior to this Billing	8 22.95	MANUAL METER READING	23.33
Payments made after the 24th of the month may not be reflected on this bill.		PAID 3-14-13	
MONTHLY NOTICES		WE HAVE NOT REQUESTED BUDGET BILLING	
April 1st is the deadline date to apply for the high school scholarship and the lineman scholarship. Please go to our website at www.tannerelectric.coop for detailed information and application. You may also call the office at 425 888 0623.		BUDGET BILL	
		Budget Due Upon Receipt <u>137.80</u>	
		100.00	
		Budget Due after 03/20/2013 105.00	

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



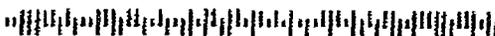
TANNER ELECTRIC
Cooperative
PO Box 1426
North Bend, WA 98045-1426

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

ACCOUNT NUMBER	26045000
Budget Due Upon Receipt	100.00
Budget Due after 03/20/2013	105.00
AMOUNT PAID	\$ 137.80



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



MORE INFORMATION ON BACK

Meter & Location	Previous Reading	Enter Meter Readings Here
96262249	27873	2 8 5 8 0
2X28L46RU20L6		
Enter Date Read		3 / 14 / 2013

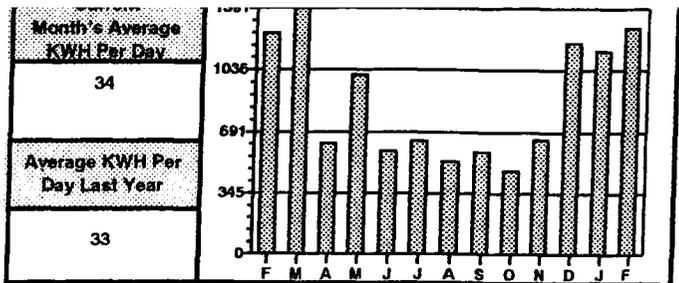
Please make any address corrections on the back.



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

EGIBLE ORIGINAL CP1459

Billing Date: 03/01/2013



Avg Temp ° This Year: 41 Last Year: 42

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

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

1 4



ACCOUNT NUMBER		TELEPHONE		POLE #		SERVICE ADDRESS	
26045000		(425) 888-6010		2X28L46RU20L6		13050 470TH AVE SE	
SERVICE INFORMATION				READING			USAGE
METER #	FROM	TO	DAYS	PREVIOUS	PRESENT	MULT	KWH
96262249	01/13/2013	02/19/2013	37	26602	27873	1.0	1271
Activity Since Last Bill		\$ Amount		Current Bill Information			\$ Amount
Previous Balance		125.54		BALANCE FORWARD			ERRONEOUS CHARGE - 28.88
Payments		125.54 CR		FACILITY CHARGE			NOT PAID 17.05
Adjustments		0.17 CR		ENERGY 1271.0 KWH @ .095000			120.75
Balance Prior to this Billing		23.93		MANUAL METER READING			ERRONEOUS CHARGE - 23.93
Payments made after the 24th of the month may not be reflected on this bill.				PAID 3-14-13			
MONTHLY NOTICES				WE HAVE NOT REQUESTED BUDGET BILLING			
April 1st is the deadline date to apply for the high school scholarship and the lineman scholarship. Please go to our website at www.tannerelectric.coop for detailed information and application. You may also call the office at 425 888 0623.				BUDGET BILL			
				Budget Due Upon Receipt			137.80
				Budget Due after 03/20/2013			105.00

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



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

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

ACCOUNT NUMBER:	26045000
Budget Due Upon Receipt	137.80
Budget Due after 03/20/2013	105.00
AMOUNT PAID	137.80



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

01



MORE INFORMATION ON BACK

Meter & Location	Previous Reading	Enter Meter Readings Here
6262249	27873	2 8 5 8 0
X28L46RU20L6		
Meter Date Read		3 / 14 / 2013

Please make any address corrections on the back.

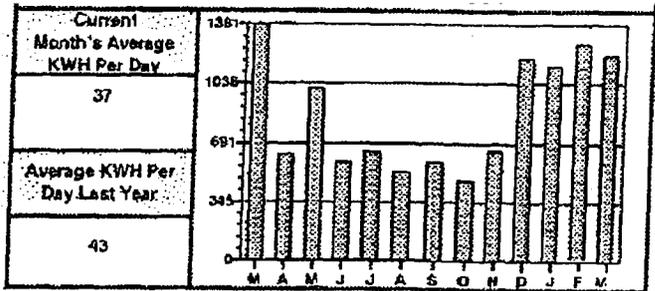


TANNER ELECTRIC
Cooperative
PO Box 1426
North Bend, WA 98045-1426

Billing Date: 04/01/2013

1799 1 AV O.360
LARRY COSTELLO
CHRISTY COSTELLO
PO BOX 1669
NORTH BEND WA 98045-1669

4 1799
C-6 P-6



Avg Temp° This Year: 52 Last Year: 42

OFFICE LOCATION: 45710 SE North Bend Way, North Bend
OFFICE HOURS: 7:30 a.m. - 4:30 p.m. Monday - Friday
24-hour secure payment drop box available.
24-hour Emergency Service
PHONE: 425-888-0623 or 800-472-0206
Visit us at www.tannerelectric.coop

ACCOUNT NUMBER		TELEPHONE		POLE #		SERVICE ADDRESS	
26045000		(425) 888-6010		2X28L46RU20L6		13050 470TH AVE SE	
SERVICE INFORMATION				READING			USAGE
METER #	FROM	TO	DAYS	PREVIOUS	PRESENT	MULT	KWH
96262249	02/21/2013	03/26/2013	32	27873	29080 EST	1.0	1207
Activity Since Last Bill		\$ Amount		Current Bill Information			\$ Amount
Previous Balance		137.80		BALANCE FORWARD			ERRONEOUS CHARGE 46.66
Payments		137.80 CR		FACILITY CHARGE			NOT PAID 17.05
Adjustments		0.00		ENERGY 1207.0 KWH @ .095000			114.67
Balance Prior to this Billing		0		MANUAL METER READING			ERRONEOUS CHARGE 23.88
Payments made after the 24th of the month may not be reflected on this bill.				PAID 4-14-13			
MONTHLY NOTICES							
Please join us for Tanner Electric's 77th annual meeting to be held May 4, 2013 10:00AM at Twin Falls Middle School for North Bend and Ames Lake Service areas. Anderson Island will be held May 11, 2013 10:00AM at Anderson Island Community Club.							
April is the month to put your account on budget monthly fixed payment. Please contact the office at 1-800-472-0208.							
				BUDGET BILL			
				Budget Due Upon Receipt			
				Budget Due after 04/20/2013			
				131.72			
				100.00			
				105.00			

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



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

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

ACCOUNT NUMBER:	26045000
Budget Due Upon Receipt	100.00
Budget Due after 04/20/2013	105.00
AMOUNT PAID	\$ 131.72

29580

Meter & Location	Previous Reading	Enter Meter Readings Here
96262249	29080	2 9 4 5 0
2X28L46RU20L6		
Enter Date Read		4 / 14 / 2013

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



MORE INFORMATION ON BACK

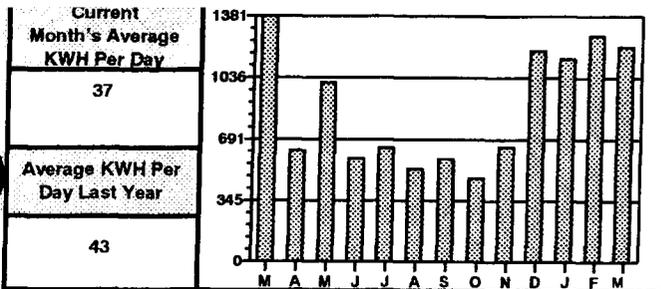
Please make any address corrections on the back.



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

LEGIBLE ORIGINAL CPI458

Billing Date: 04/01/2013



Avg Temp ° This Year: 52 Last Year: 42

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

1799 1 AV 0.360 4 1799
LARRY COSTELLO C-6 P-6
CHRISTY COSTELLO
PO BOX 1669
NORTH BEND WA 98045-1669



ACCOUNT NUMBER	TELEPHONE	POLE #	SERVICE ADDRESS				
26045000	(425) 888-6010	2X28L46RU20L6 -	13050 470TH AVE SE				
SERVICE INFORMATION		READING		USAGE			
METER #	FROM	TO	DAYS	PREVIOUS	PRESENT	MULT	KWH
96262249	02/21/2013	03/25/2013	32	27873	29080 EST	1.0	1207
Activity Since Last Bill		\$ Amount	Current Bill Information			\$ Amount	
Previous Balance	137.80	184.40	BALANCE FORWARD	<i>ERRONEOUS CHARGE</i> 46.66		17.05	
Payments		137.80 CR	FACILITY CHARGE	<i>NOT PAID</i>		114.67	
Adjustments		0.00	ENERGY	1207.0 KWH @ .095000	<i>ERRONEOUS CHARGE</i> 29.90		
Balance Prior to this Billing		46.66	MANUAL METER READING	<i>NOT PAID</i>			
Payments made after the 24th of the month may not be reflected on this bill.			<i>PAID 4-14-13</i>				
MONTHLY NOTICES							
Please join us for Tanner Electric's 77th annual meeting to be held May 4, 2013 10:00AM at Twin Falls Middle School for North Bend and Ames Lake Service areas. Anderson Island will be held May 11, 2013 10:00AM at Anderson Island Community Club.							
April is the month to put your account on budget monthly fixed payment. Please contact the office at 1-800-472-0208.							
<i>WE HAVE NOT REQUESTED BUDGET BILLING</i>						<i>131.72</i>	
BUDGET BILL							
Budget Due Upon Receipt						100.00	
Budget Due after 04/20/2013						105.00	

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



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

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

ACCOUNT NUMBER:	26045000
Budget Due Upon Receipt	100.00
Budget Due after 04/20/2013	105.00
AMOUNT PAID	<i>\$ 131.72</i>



Meter & Location	Previous Reading	Enter Meter Readings Here
96262249	29080	2 9 4 5 0
2X28L46RU20L6		
Enter Date Read	→	4 / 14 / 2013

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



MORE INFORMATION ON BACK

Please make any address corrections on the back.

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

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

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

20
21 **7**

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

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

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

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

9 a. *Late fees being miscalculated.* Beginning September 2013 as indicated in *Exhibit A*, the
10 late fees reported in Defendant's analysis do not correlate with the corresponding arrearage
11 and 5% late fee rate. Using a correct application of Tanner's rates and computational
12 methodology, the true calculation of late fees is shown in *Exhibit B*.

13 b. *Miscalculation of energy charge in the August 2013 billing.* Based on Defendant's billing
14 statement (*Exhibit D*), the billed energy for August 2013 was \$77.90, which at a rate of
15 0.0998/kW-hr., corresponds to 780.6 kW-hrs. However, the meter readings reported by
16 Tanner on the bill (Previous = 31890; Present = 32634) correspond to energy usage of 744
17 kW-hrs. This difference of 36.6kW-hrs. represents a \$3.65 computational overcharge
18 relative to the meter readings Tanner made; otherwise, the "Present" meter reading would
19 need to be 32670.6. The following month for September 2013, Tanner charged for energy
20 using the value 32634 as the "Previous" reading. This indicates that Tanner double charged
21 by \$3.65 since in August it had already charged to a meter value of 32670.6. Defendant's
22 analysis is flawed due to mathematical error.

23
8

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

2

Page 1478

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

APPENDIX A-2

The Federal Trade Commission Act (FTC Act)

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce”²⁵¹ and gives the Federal Trade Commission (FTC) jurisdiction to bring enforcement actions against “persons, partnerships, or corporations” that engage in these practices.²⁵² In the past, the FTC has used its authority under Section 5 to take action against businesses that violate their own privacy policies or that fail to adequately safeguard a consumer’s personal information.²⁵³ Although there do not appear to be any cases in which the FTC has taken action against an electric utility for failing to protect consumer smart meter data, the Commission would have authority to enforce Section 5 against a utility that fell within its statutory jurisdiction.

Covered Electric Utilities

This section considers whether the FTC would have Section 5 jurisdiction over each of the four types of electric utilities identified by the Energy Information Administration (EIA): investor-owned, publicly owned, federally owned, and cooperative.²⁵⁴ It finds that the FTC clearly has jurisdiction over investor-owned utilities. It is unclear whether the Commission has jurisdiction over publicly owned utilities or federally owned utilities. The FTC could enforce Section 5 against for-profit electric cooperatives, and case law suggests that nonprofit electric cooperatives may also be subject to the act’s requirements.

The FTC has jurisdiction to enforce Section 5 against “persons, partnerships, or corporations,” with exceptions not applicable here.²⁵⁵ Utilities that are “persons” or “partnerships” would be subject to the FTC’s enforcement powers automatically,²⁵⁶ as the statute does not provide any additional jurisdictional requirements for these entities. Most electric utilities, however, are organized as legal entities that would potentially fit within the definition of “corporation.” The FTC Act states that, for the purposes of Section 5, the term “corporation”:

shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.²⁵⁷

²⁵¹ 15 U.S.C. §45(a)(1).

²⁵² 15 U.S.C. §45(a)(2).

²⁵³ See “Enforcement of Data Privacy and Security,” *infra* p. 41; see also NIST PRIVACY REPORT, *supra* note 11, at 23 n.48.

²⁵⁴ ENERGY INFO. ADMIN., ELECTRIC POWER INDUSTRY OVERVIEW (2007) [hereinafter EIA ELECTRIC POWER OVERVIEW], available at <http://www.eia.gov/cneaf/electricity/page/prim2/toc2.html>.

²⁵⁵ 15 U.S.C. §45(a)(2).

²⁵⁶ The FTC Act does not further define “persons” or “partnerships” or impose any additional jurisdictional requirements on these entities in the way that it does for “corporations.” See 15 U.S.C. §44.

²⁵⁷ 15 U.S.C. §44.

This definition, particularly in its use of the words “shall be deemed to include,” suggests that a wide variety of legal entities could potentially constitute “corporations.” Moreover, in *California Dental Ass’n v. FTC*, the Supreme Court remarked that the “FTC Act directs the Commission to prevent the *broad set of entities* under its jurisdiction” from violating Section 5.²⁵⁸ In that case, the Court found that the term “corporation” also included *nonprofit* entities, so long as they imparted significant economic benefit to their members.²⁵⁹ Thus, as the Court’s opinion demonstrates, the key question when determining whether an entity is a “corporation” for the purposes of Section 5 jurisdiction is not what legal form the entity takes, but rather whether the entity is “organized to carry on business for its own profit or that of its members.”

Investor-Owned Utilities

Investor-owned utilities are clearly subject to the FTC’s Section 5 jurisdiction as “corporations.” The EIA defines investor-owned electric utilities as those that “have the fundamental objective of producing a profit for their investors” and distributing these profits as dividends or reinvesting them in the business.²⁶⁰ These utilities satisfy the definition of “corporation” under the statute because they are companies organized to carry on business for the profit of their investors.²⁶¹

Publicly Owned Utilities

It is unclear whether the FTC has Section 5 jurisdiction over publicly owned utilities. The agency probably lacks jurisdiction over these utilities if it characterizes them as “corporations,” but it is possible that it may have jurisdiction over them if it characterizes them as “persons.” Publicly owned utilities include “municipals, public utility districts and public power districts, State authorities, irrigation districts, and joint municipal action agencies.”²⁶² The EIA describes these as “nonprofit government entities that are organized at either the local or State level,” are exempt from state and federal income taxes, and “provide service to their communities and nearby consumers at cost.”²⁶³ In contrast to investor-owned utilities or cooperatively owned utilities, publicly owned utilities obtain capital by issuing debt rather than selling an ownership interest in the utility to investors or members.²⁶⁴

As “Corporations”

Publicly owned utilities probably do not fall within the FTC’s Section 5 jurisdiction over “corporations” because they are not organized to carry on business for profit. Rather, governments form these utilities for the sole purpose of distributing electricity to consumers at

²⁵⁸ *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 768 (1999) (emphasis added) (internal quotation marks omitted).

²⁵⁹ *Id.* at 766-69.

²⁶⁰ EIA ELECTRIC POWER OVERVIEW, *supra* note 254.

²⁶¹ Indeed, the FTC has asserted Section 5 jurisdiction over holding companies with investor-owned electric utility subsidiaries in the past. *See, e.g., DTE Energy Co.*, 131 F.T.C. 962 (May 15, 2001) (complaint); *CMS Energy Corp.*, 127 F.T.C. 827 (June 2, 1999) (complaint). *See also In re DTE Energy Co.*, FTC File No. 001 0067 (May 15, 2001) (consent order); *In re CMS Energy Corp.*, FTC File No. 991 0046 (June 2, 1999) (consent order).

²⁶² EIA ELECTRIC POWER OVERVIEW, *supra* note 254.

²⁶³ *Id.*

²⁶⁴ DAVID E. MCNABB, PUBLIC UTILITIES: MANAGEMENT CHALLENGES FOR THE 21ST CENTURY 165 (2005).

cost.²⁶⁵ Significantly, when publicly owned utilities realize net income—that is, revenues they earn in excess of their expenses—they either (1) use it to finance their operations in lieu of issuing more debt,²⁶⁶ or (2) transfer it to the general fund of the political subdivision that they serve.²⁶⁷ These utilities typically lack investors or members to which they could distribute net income as dividends.²⁶⁸ Thus, publicly owned utilities are probably not “organized to carry on business” for profit and are probably exempt from the FTC’s Section 5 jurisdiction if characterized as “corporations.”

As “Persons”

It is unclear whether a court would find that the FTC has Section 5 jurisdiction over publicly owned utilities as “persons,” as a court could employ several different canons of statutory interpretation when deciding whether “persons” includes state or local government entities.²⁶⁹ In the 1980s, the FTC attempted to assert Section 5 jurisdiction over two state-chartered municipal corporations—the cities of New Orleans and Minneapolis—as “persons,” alleging that the cities engaged in unfair methods of competition by assisting taxicab companies in maintaining high prices and stifling competition.²⁷⁰ The Commission later withdrew both complaints, and thus no court considered whether jurisdiction was proper. More recently, the Commission has asserted jurisdiction over state government agencies that regulate certain professions such as dentistry,²⁷¹ optometry,²⁷² and funeral services.²⁷³

There appears to be only one court case that engages in a full discussion and interpretation of the meaning of “persons” under Section 5. In *California State Board of Optometry v. FTC*, the D.C. Circuit Court of Appeals considered “whether a State acting in its sovereign capacity is a ‘person’ within the FTC’s enforcement jurisdiction.”²⁷⁴ The FTC had issued a rule declaring “certain state laws restricting the practice of optometry to be unfair acts or practices.”²⁷⁵ Petitioners, which were state boards of optometry and professional associations, argued that the court should strike down the rule because it went beyond the FTC’s statutory authority.²⁷⁶ In vacating the rule, the court found nothing in the relevant provisions of the FTC Act “to indicate that Congress intended to authorize the FTC to reach the ‘acts or practices’ of States acting in their sovereign capacities.”²⁷⁷

²⁶⁵ EIA ELECTRIC POWER OVERVIEW, *supra* note 254.

²⁶⁶ MCNABB, *supra* note 264, at 165.

²⁶⁷ EIA ELECTRIC POWER OVERVIEW, *supra* note 254.

²⁶⁸ MCNABB, *supra* note 264, at 165.

²⁶⁹ In contrast to entities that are “corporations,” the FTC does not have to show that entities qualifying as “persons” are organized for profit. See 15 U.S.C. §44.

²⁷⁰ *In re City of Minneapolis*, 105 F.T.C. 304 (May 7, 1985) (order withdrawing complaint); *In re City of New Orleans*, 105 F.T.C. 1 (Jan. 3, 1985) (order withdrawing complaint).

²⁷¹ *In re N.C. State Bd. of Dental Exam’rs*, 151 F.T.C. 607 (Feb. 3, 2011) (state action opinion); *In re South Carolina State Bd. of Dentistry*, 138 F.T.C. 229 (Sept. 12, 2003) (complaint).

²⁷² *In re Mass. Board of Registration in Optometry*, 110 F.T.C. 549 (June 13, 1988) (decision).

²⁷³ *In re Va. Bd. of Funeral Dirs. & Embalmers*, 138 F.T.C. 645 (Oct. 1, 2004) (complaint).

²⁷⁴ 910 F.2d 976, 979 (D.C. Cir. 1990).

²⁷⁵ *Id.* at 978.

²⁷⁶ *Id.* at 978-79.

²⁷⁷ *Id.* at 980, 982.

A court approaching the question of whether “persons” includes publicly owned utilities would start with the language of the statute. Courts traditionally give broad deference to an agency when the agency interprets the extent of its own jurisdiction unless the reach of its jurisdiction is clear from reading the statute “under ordinary principles of construction.”²⁷⁸ Attempting to discern the Commission’s jurisdiction under Section 5 of the FTC Act is difficult, as the statute does not define the term “persons” for the purposes of that provision. Title 1, Section 1 of the United States Code (the Dictionary Act) provides: “In determining the meaning of any Act of Congress, unless the context indicates otherwise ... the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”²⁷⁹

However, the context in which “persons” appears in Section 5 probably forecloses the use of the default definition of “person” in the Dictionary Act. In Section 5, Congress listed the terms “persons,” “partnerships,” and “corporations” separately, which indicates that it intended to give each term independent significance. The terms “corporations” and “partnerships” would not have independent meaning in Section 5 if the term “persons” in Section 5 included the entities listed in the Dictionary Act. Furthermore, the FTC Act requires that “corporations” be organized for their own profit or the profit of their members in order for the FTC to exercise jurisdiction over them—a requirement it does not impose on the other entities.²⁸⁰ By reading the term “persons” to include the entities listed in the Dictionary Act, the FTC could evade this additional requirement simply by bringing its complaint against an entity as a “person” rather than a “corporation”—a result that Congress probably did not intend. Thus, a court that ended its analysis here could find that the meaning of “persons” remains ambiguous. The court could then choose to defer to the FTC’s broad interpretation of its own jurisdiction under the Supreme Court’s decision in *Chevron U.S.A., Inc. v. NRDC, Inc.*²⁸¹

The *California Optometry* court, however, declined to defer to the FTC’s interpretation of its own jurisdiction because it found that principles of federalism outweighed *Chevron* deference.²⁸² Quoting the Supreme Court’s decision in *Will v. Michigan Department of State Police*,²⁸³ the

²⁷⁸ See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 765-66 (1999) (“Respondent urges deference to this interpretation of the Commission’s jurisdiction as reasonable. But we have no occasion to review the call for deference here, the interpretation urged in respondent’s brief being clearly the better reading of the statute under ordinary principles of construction.”) (internal citations omitted); see also *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

²⁷⁹ 1 U.S.C. §1 (emphasis added).

²⁸⁰ See 15 U.S.C. §44.

²⁸¹ *Chevron*, 467 U.S. at 842-43. In that case, the Court held that

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute. *Id.*

²⁸² Todd H. Cohen, *Double Vision: The FTC, State Regulation, and Deciding What’s Best for Consumers*, 59 GEO. WASH. L. REV. 1249, 1267 (1991) (“In sum, the *California State Board of Optometry* court relied on federalism principles to justify protecting state interests. The court extended the judicially-created *Parker* state action doctrine to cover FTC trade regulation rules and applied the clear statement doctrine to prevent the FTC from invalidating a state law as unfair without additional congressional action.”).

²⁸³ 491 U.S. 58 (1989).

California Optometry court stated that “in common usage, the term person does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it.”²⁸⁴ In the *Will* case, the Court considered whether the term “person” as it appeared in 42 U.S.C. §1983 included a state.²⁸⁵ The Court held that it did not, invoking the principles of federalism when it wrote that “[t]his approach is particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before.”²⁸⁶ The Court found that the statute’s language fell “far short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the ‘usual constitutional balance between the States and Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’”²⁸⁷

The Court’s decision in *Will*, as interpreted by the D.C. Circuit in *California Optometry*, suggests that Congress must clearly indicate in a particular statute when it wishes to subject states to a new form of liability, particularly when this would change the balance between state and federal authority by intruding on the actions a state takes in its sovereign capacity. There does not appear to be a clear indication that Congress intended the word “persons” in the FTC Act to subject publicly owned utilities to FTC enforcement actions.²⁸⁸ Thus, if the FTC’s enforcement of Section 5 against a publicly owned utility would alter the balance between the state and federal governments, a court might read “persons” to exclude these utilities. As the *California Optometry* court indicated, whether the balance is altered may depend on whether the operation of the utility amounts to the state acting in its sovereign capacity (balance altered) or merely engaging in a proprietary function (balance not altered).²⁸⁹ The *California Optometry* court suggested that whether a state is acting in its sovereign capacity or engaging in a proprietary function may vary according to the antitrust laws’ state action doctrine, a multi-pronged analysis that is beyond the scope of this report.²⁹⁰ If a court found that the state was acting in its sovereign capacity when the state (or one of its subdivisions) operated an electric utility, the court could hold that the FTC does not have Section 5 jurisdiction because of the federalism principles and clear statement rule that guided the interpretation of the statute in *Will* and were adopted by the court in *California Optometry*.²⁹¹

A third possible choice for a court would be to adopt the reasoning of the FTC and find that Congress clearly intended “persons” to include government entities, because under the other antitrust laws, the term “persons” includes state and local government entities, and the antitrust

²⁸⁴ *California Optometry*, 910 F.2d 976, 980 (D.C. Cir. 1990) (internal quotation marks omitted).

²⁸⁵ *Will*, 491 U.S. at 60.

²⁸⁶ *Id.* at 64.

²⁸⁷ *Id.* at 65 (citations omitted).

²⁸⁸ Representative Covington, the sponsor of the act, explained during floor debate on the measure that Section 5 “embraces within the scope of that section every kind of person, natural or artificial, who may be engaged in interstate commerce.” 51 CONG. REC. 14,928 (1914). Despite this remark, courts have not taken such a broad view of the FTC’s jurisdiction under the act. Even the Supreme Court has held that there are some limits on the entities covered by Section 5. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 766-67 (1999) (requiring, for jurisdiction, that a “proximate relation” must exist between the activities of a nonprofit and the benefit it provides to its members, and implying that the activities must confer “more than *de minimis* or merely presumed economic benefits” on the members).

²⁸⁹ See *California Optometry*, 910 F.2d at 980-81 (“This rule of statutory construction serves to ensure that the States’ sovereignty interests are adequately protected by the political process.”).

²⁹⁰ *Id.* at 980. For more information on the factors that courts consider when making this determination, see FED. TRADE COMM’N, REPORT OF THE STATE ACTION TASK FORCE (2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

²⁹¹ See Cohen, *supra* note 282, at 1267.

laws, including the FTC Act,²⁹² should be read together.²⁹³ The *California Optometry* court acknowledged this argument, writing that “several Supreme Court decisions hold that a State is a person for purposes of the antitrust laws.”²⁹⁴ The court ultimately rejected the argument, however, because it found that “when a State acts in a sovereign rather than a proprietary capacity, it is exempt from the antitrust laws even though those actions may restrain trade,” and that this state action doctrine may “limit the reach of the FTC’s enforcement jurisdiction.”²⁹⁵ Thus, if a court found that a state acted in its *proprietary* capacity when the state (or one of its subdivisions) operated a public utility, then the state action doctrine would not apply, and it would be possible for a court to find jurisdiction even under the *California Optometry* case. The FTC has advanced this reasoning, arguing that the state boards over which it asserts jurisdiction do not amount to the states acting in their sovereign capacities.²⁹⁶ Whether the operation of a particular publicly owned utility consists of the state acting in its sovereign capacity or engaging in a proprietary function may vary according to the antitrust laws’ state action doctrine, a multi-pronged analysis that is beyond the scope of this report.²⁹⁷

Thus, whether a court would find that the word “persons” in Section 5 includes certain government entities such as publicly owned utilities is unclear because it may depend on which, if any, of several principles of statutory construction the court adopts. A court could, among other options: (1) find that the meaning of “persons” in Section 5 is ambiguous, and thus defer to the FTC’s broad interpretation of its own jurisdiction because of the *Chevron* doctrine; (2) find that the statute is ambiguous, but that principles of federalism outweigh the court’s usual *Chevron* deference to the Commission’s interpretation of its own jurisdiction—a determination that may require a court to find that the state is acting in its sovereign capacity when the state (or one of its subdivisions) operates an electric utility; or (3) find that Congress clearly intended “persons” to include government entities because Section 5 should be read together with the other antitrust laws, under which the term “person” includes state and local government entities—a determination that may require a court to find that the state is performing a proprietary function when the state (or one of its subdivisions) operates a utility.

Federally Owned Utilities

It is unclear whether the FTC could enforce Section 5 against a federally owned utility. Indeed, there does not appear to be any case in which the FTC has sought to enforce Section 5 against a federal agency.²⁹⁸ The FTC probably lacks Section 5 jurisdiction over the nine federally owned

²⁹² Although this report focuses on the FTC’s consumer law cases under Section 5 (“unfair or deceptive acts or practices”), and not its antitrust cases (“unfair methods of competition”), both types of prohibited activities share the same phrase for the purposes of determining the agency’s jurisdiction: “persons, partnerships, or corporations.” See 15 U.S.C. §45(a)(2).

²⁹³ See *In re Mass. Board of Registration in Optometry*, 110 F.T.C. 549 (June 13, 1988) (decision) (citations omitted).

²⁹⁴ *California Optometry*, 910 F.2d at 980 (citations omitted).

²⁹⁵ *Id.* at 980 (citation omitted).

²⁹⁶ See, e.g., *In re N.C. State Bd. of Dental Exam’rs*, 151 F.T.C. 607 (Feb. 3, 2011) (state action opinion); *In re Mass. Board of Registration in Optometry*, 110 F.T.C. 549 (June 13, 1988) (decision).

²⁹⁷ For more information on the factors that courts consider when making this determination, see FED. TRADE COMM’N, REPORT OF THE STATE ACTION TASK FORCE (2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

²⁹⁸ This report does not consider whether any constitutional implications would result if the FTC, an independent executive branch agency, brought an enforcement proceeding against another executive branch agency. See generally Michael Eric Herz, *When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991).

utilities operating in the United States²⁹⁹ if it characterizes them as “corporations.” Like publicly owned utilities, federally owned utilities are not organized for profit. As the EIA notes, “federal power is not sold for profit, but to recover the costs of operations and repay the Treasury for funds borrowed to construct generation and transmission facilities.”³⁰⁰ If the Commission characterizes these utilities as “persons,” it is unclear whether a court would find that this term includes government entities.³⁰¹

As a practical matter, FTC enforcement of Section 5 against federally owned utilities is probably unnecessary in the context of smart meter data because of other federal laws, such as the Privacy Act,³⁰² that would likely protect this data when it is stored in records systems maintained by federal agencies, including federally owned utilities.³⁰³

Cooperatively Owned Utilities

For-profit electric cooperatives would clearly fall within the Commission’s Section 5 jurisdiction over “corporations” operated for their own profit or that of their members.³⁰⁴ Indeed, the FTC has maintained jurisdiction over for-profit cooperatives as “corporations” in the past, including a rural healthcare cooperative³⁰⁵ and a wine maker.³⁰⁶ However, it appears that most electric cooperatives—and particularly the cooperatives that will receive funds under the Department of Energy’s Smart Grid Investment Grant program—are nonprofits.³⁰⁷

It is possible that the FTC would have Section 5 jurisdiction over these nonprofit electric cooperatives as “corporations” organized for profit. These distribution utilities are owned by the “consumers they serve,” and those that are tax-exempt must “provide electric service to their members at cost, as that term is defined by the Internal Revenue Service.”³⁰⁸ However, when the activities of a cooperative result in revenues that exceed the cooperative’s costs, these “net margins ... are considered a contribution of equity by the members that are required to be returned to the members consistent with the organization’s bylaws and lender limitations imposed as a condition of loans.”³⁰⁹ Thus, in contrast to publicly owned utilities, which typically transfer any net income to the general fund of the government that they serve, electric cooperatives return net margins to their members as equity, and when that equity is retired by the board of directors, members receive cash payments.³¹⁰ Although it does not appear that a court has considered

²⁹⁹ EIA ELECTRIC POWER OVERVIEW, *supra* note 254. Among these utilities are the Tennessee Valley Authority, the four power marketing administrations in the Department of Energy, and the Army Corps of Engineers. *Id.*

³⁰⁰ *Id.*

³⁰¹ See *supra* notes 269-97 and accompanying text.

³⁰² 5 U.S.C. §552a.

³⁰³ See “The Federal Privacy Act of 1974,” *infra* p. 45.

³⁰⁴ 15 U.S.C. §44.

³⁰⁵ *In re Minn. Rural Health Coop.*, FTC File No. 051 0199 (Dec. 28, 2010) (decision and order).

³⁰⁶ *In re Heublein, Inc.*, 96 F.T.C. 385 (Oct. 7, 1980) (final order).

³⁰⁷ See DEP’T OF ENERGY, CASE STUDY – NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION SMART GRID INVESTMENT GRANT 1, available at http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/NRECA_case_study.pdf.

³⁰⁸ EIA ELECTRIC POWER OVERVIEW, *supra* note 254.

³⁰⁹ *Id.* “Net margins” is the term given to “revenues in excess of the cost of providing service.” *Id.*

³¹⁰ See, e.g., Cent. Rural Electric Coop., Patronage Capital, <http://www.crec.coop/CRECAvantage/PatronageCapital/tabid/711/Default.aspx> (“Allocated patronage capital appears as an entry on the permanent financial records of the (continued...)”).

whether the FTC has Section 5 jurisdiction over a nonprofit electric cooperative that returns its net margins to its consumer-members in addition to providing them with electricity service, the Supreme Court, as well as lower federal courts, have issued guidance on factors that a court may consider in answering this question.

Applicable Law

Under Section 5, the FTC Act requires that a “corporation” be “organized to carry on business for its own profit or that of its members.”³¹¹ In *California Dental Ass’n v. FTC*, the Court considered whether the FTC could enforce Section 5 against a “voluntary nonprofit association of local dental societies” that was exempt from paying federal income tax and furnished its members with “advantageous insurance and preferential financing arrangements” in addition to lobbying, litigating, and advertising on their behalf.³¹² The Court found that the FTC had jurisdiction over the California Dental Association as a “corporation,” stating that

the FTC Act is at pains to include not only an entity “organized to carry on business for its own profit,” but also one that carries on business for the profit “of its members.” While such a supportive organization may be devoted to helping its members in ways beyond immediate enhancement of profit, no one here has claimed that such an entity must devote itself single-mindedly to the profit of others. It could, indeed, hardly be supposed that Congress intended such a restricted notion of covered supporting organizations, with the opportunity this would bring with it for avoiding jurisdiction where the purposes of the FTC Act would obviously call for asserting it.³¹³

The Court declined to specify the percentage of a nonprofit entity’s activities that must be “aimed at its members’ pecuniary benefit” to subject it to FTC jurisdiction.³¹⁴ However, the Court wrote that a “proximate relation” must exist between the activities of the entity and the profits of its members, and implied that the activities must confer “more than *de minimis* or merely presumed economic benefits” on the members.³¹⁵ The Court’s justification for this result was that “nonprofit entities organized on behalf of for-profit members have the same capacity and derivatively, at

(...continued)

cooperative and reflect [sic] your equity or ownership in CREC. When patronage capital is retired, a check or bill credit is issued to you and your equity in the cooperative is reduced. ... When considering a retirement, the board analyzes the financial health of the cooperative and will not authorize a retirement that will adversely affect the financial integrity of the cooperative.”); Fall River Rural Electric Coop., Patronage Capital, <http://www.frec.com/myAccount/patronageCapital.aspx> (“The Cooperative’s Board of Directors retires patronage capital when finances allow, often on an annual basis. The oldest patronage capital is retired first. Fall River currently retires patronage capital on a rotation of approximately 20 years.”); Kauai Island Util. Coop., Member Patronage Capital Information, http://www.kiuc.coop/member_patcap-qa.htm (“A portion of Patronage Capital may be periodically paid to the members upon approval of the Board of Directors and our lenders.”); Sulphur Springs Valley Electric Coop., Inc., Patronage Capital Credits, http://www.ssvcc.org/?page_id=583 (“Capital credits represent your share of the Cooperative’s margins – margins are the operating revenue remaining after operating expenses. The amount assigned in your name depends on your energy purchases. To calculate this, we divide your annual energy purchase by the Cooperative’s operating income for the year. The more electricity you buy, the more capital credits you earn.”).

³¹¹ 15 U.S.C. §44 (emphasis added).

³¹² 526 U.S. 756, 759-60, 767 (1999).

³¹³ *Id.* at 766 (internal citations omitted).

³¹⁴ *Id.*

³¹⁵ *Id.* at 766-67.

least, the same incentives as for-profit organizations to engage in unfair methods of competition or unfair and deceptive acts.”³¹⁶

It is clear that the FTC may still have Section 5 jurisdiction even when the benefits that a nonprofit provides to its members are secondary to its charitable functions. In *American Medical Ass’n v. FTC*, the Second Circuit considered whether the FTC could enforce Section 5 against three medical professional associations, including the American Medical Association (AMA), a nonprofit corporation composed of “physicians, osteopaths, and medical students.”³¹⁷ The court, acknowledging that the associations served “both the business and non-business interests of their member physicians,” found jurisdiction because the “business aspects” of their activities, including lobbying for members and offering business advice to them, subjected them to the FTC’s jurisdiction despite the fact that the business aspects “were considered secondary to the charitable and social aspects of their work.”³¹⁸

When determining whether jurisdiction exists, a court may consider other factors in addition to the benefits that the nonprofit provides to its members. In *Community Blood Bank v. FTC*, the Eighth Circuit considered whether a “corporation” included all nonprofit corporations.³¹⁹ The appeals court held that the FTC lacked Section 5 jurisdiction over nonprofit blood banks because the banks’ activities did not result in “profit” in the sense of “gain from business or investment over and above expenditures.”³²⁰ The blood banks, the court observed, lacked shares of capital, capital stock, or certificates, and were “organized for and actually engaged in business for only charitable purposes.”³²¹ One bank’s articles of incorporation touted the entity’s charitable purposes, and all of the banks were exempt from paying federal income taxes.³²² Upon dissolution, the corporations would transfer their assets to other charitable or nonprofit organizations.³²³ In addition, none of the funds collected by the blood banks had “ever been distributed or inured to the benefit of any of their members, directors or officers.”³²⁴ The court found that these factors made the blood banks “charitable organizations” both “in law and in fact,” exempting them from the FTC’s Section 5 jurisdiction.³²⁵

Analysis

The case law suggests several factors that a court may weigh when determining whether a private, nonprofit entity composed of members, such as an electric cooperative, is subject to the FTC’s Section 5 jurisdiction as a “corporation.”³²⁶ The most significant factor is whether the nonprofit

³¹⁶ *Id.* at 768.

³¹⁷ 638 F.2d 443, 446 (1980).

³¹⁸ *Id.* at 448. The court noted in passing that the AMA’s articles of incorporation stated that one purpose of the organization was to “safeguard the material interests of the medical profession.” *Id.*

³¹⁹ 405 F.2d 1011, 1015 (8th Cir. 1969).

³²⁰ *See id.* at 1017. The court also remarked that at least one case had established that “even though a corporation’s income exceeds its disbursements its nonprofit character is not necessarily destroyed.” *Id.*

³²¹ *Id.* at 1020, 1022.

³²² *Id.* at 1020.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* at 1019.

³²⁶ This analysis assumes that a court would extend the holdings of the applicable case law, which covered entities organized as nonprofit corporations and professional associations, to include entities organized as nonprofit electric (continued...)

provides an economic benefit to its members that is more than *de minimis* and that is proximately related to the nonprofit's activities. This benefit need not be the sole—or even primary—function of the nonprofit. Additional factors that the case law suggests weigh in favor of a finding of jurisdiction include that the nonprofit: (1) has gain from its business or investments that exceeds its expenditures; (2) has shares of capital or capital stock or certificates; (3) is not organized solely for charitable purposes or does not engage only in charitable work; (4) has articles of incorporation that list profit-seeking objectives; (5) is subject to federal income tax liability; (6) would distribute its assets to profit-seeking entities upon dissolution; and (7) distributes any of the funds it collects to its members, directors, or officers.

It is possible that the FTC has Section 5 jurisdiction over nonprofit electric cooperatives, although the outcome in any particular case may depend on the characteristics of the individual utility. A court could find that the typical nonprofit electric cooperative provides “economic benefit” to its members in at least two ways: (a) by providing electricity service to members;³²⁷ and (b) by returning net margins to members in the form of patronage capital, which is an ownership interest in the cooperative that is later converted to cash payments to members when that capital is retired.³²⁸ With regard to (a), it is likely that a court would find that electricity service is an “economic benefit” as defined in the case law. In *California Dental Ass’n*, the nonprofit professional association provided “advantageous insurance and preferential financing arrangements,” as well as lobbying, litigation, and advertising services to its members.³²⁹ In *American Medical Ass’n*, the nonprofit lobbied on behalf of its members and offered business advice to members.³³⁰ These benefits, it is assumed, enabled the members to more easily conduct business profitably. Electricity service allows people to conduct activities at all times of the day, and thus provides a similar and clearly significant economic benefit to those who use it, whether for business or recreational purposes. As the primary objective of an electric cooperative is to provide electricity service to members, the necessary proximate relation between the activities of the nonprofit and the benefit to its members clearly exists.

Despite its pecuniary nature, there are a few problems with considering benefit (b), patronage capital, to be an “economic benefit” as defined by the Court. First, it is not clear that patronage capital actually is a benefit. A court could view patronage capital as a no-interest *loan* from the consumer-member to the utility,³³¹ or, because it is typically allocated to member accounts in a manner proportional to members’ spending on electricity, simply a *refund* of money collected from the members that reflects the actual cost of providing service in a particular year.³³² If

(...continued)

cooperatives.

³²⁷ Many cooperatives provide other services to their communities that could constitute “economic benefits.” The National Rural Electric Cooperative Association notes that, “In addition to electric service, many electric co-ops are involved in community development and revitalization projects” that include “small business development and jobs creation, improvement of water and sewer systems, and assistance in delivery of health care and educational services.” Nat’l Rural Electric Coop. Ass’n, Member Directory, <http://www.nreca.coop/members/MemberDirectory/Pages/default.aspx>.

³²⁸ See sources cited *supra* note 310.

³²⁹ *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 759-60, 767 (1999).

³³⁰ *Am. Med. Ass’n v. FTC*, 638 F.2d 443, 448 (1980).

³³¹ See, e.g., Cent. Rural Electric Coop., Patronage Capital, <http://www.crec.coop/CRECAvantage/PatronageCapital/tabid/711/Default.aspx> (“These margins represent an interest-free loan of operating capital by the membership to the cooperative.”).

³³² See, e.g., Kauai Island Util. Coop., Member Patronage Capital Information, http://www.kiuc.coop/member_patcap (continued...)

adopted by a court, neither of these characterizations would appear to be consistent with the “profit” that the statute describes³³³ or the “economic benefit” that the Supreme Court requires for a nonprofit to be a “corporation.”

Second, even if a court found patronage capital to be an economic benefit, it is not clear that it is more than *de minimis*. Patronage capital must be “retired” before members receive cash payments for it.³³⁴ Retirements are made at the discretion of the cooperative’s board of directors because the capital is needed to finance the cooperative’s ongoing expenses, and thus retirement of a class of capital typically occurs after a long rotation period, such as 20 years.³³⁵ Although the Supreme Court did not hold that an “economic benefit” must produce *immediate* advantage to the members of a nonprofit, a court could potentially view the decades-long delay in cash payments as significantly decreasing the degree of economic benefit that the capital provides. In addition, patronage capital would probably be considered *de minimis* if the cooperative’s net margins were small, as this would mean that little capital would be issued to members. It is thus difficult to discern whether a court would find that an economic benefit accrues to members as a result of their receipt of patronage capital, which nevertheless probably bears the requisite “proximate relation” to the activities of the cooperative that produce any net margins distributed as capital.

With regard to the additional factors, those favoring jurisdiction include (2) cooperatives typically have shares of capital stock, including patronage capital;³³⁶ (3) cooperatives do not operate solely for the benefit of the people outside of the organization like the nonprofits in *Community Blood Bank* did because cooperatives provide electricity service and patronage capital to their members;³³⁷ and (7) an electric cooperative typically returns any net margins to members in the form of patronage capital, an ownership interest refunded to consumer-members as cash when the capital is retired.³³⁸ Factors that cannot be evaluated because they are specific to each individual cooperative include (1) whether the revenues of the cooperative exceed its expenditures; (4) the particular objectives listed in a cooperative’s articles of incorporation or other foundational document; (5) whether a nonprofit electric cooperative is exempt from federal income tax liability, which depends on whether it meets the requirements under Section 501(c)(12) of the Internal Revenue Code;³³⁹ and (6) whether a cooperative would distribute its assets to profit-seeking entities upon dissolution—a factor that also may depend on state laws.³⁴⁰

It is likely that a court would find that nonprofit electric cooperatives impart economic benefits to their members by distributing electricity to them or, possibly, by issuing patronage capital to them. However, because many of the other factors that courts consider may differ for each

(...continued)

qa.htm (characterizing the retirement of patronage capital as a “refund”).

³³³ 15 U.S.C. §44.

³³⁴ See sources cited *supra* note 310.

³³⁵ See *id.*

³³⁶ See Nat’l Rural Electric Coop. Ass’n, Seven Cooperative Principles, <http://www.nreca.coop/members/SevenCoopPrinciples/Pages/default.aspx> (describing “Members’ Economic Participation”).

³³⁷ Whether electricity service and patronage capital, which are clearly benefits, constitute “economic benefits” within the meaning of the Supreme Court’s holding in *California Dental Ass’n* is a separate question.

³³⁸ See sources cited *supra* note 310.

³³⁹ I.R.C. §501(c)(12).

³⁴⁰ See *Cnty. Blood Bank v. FTC*, 405 F.2d 1011, 1020 (8th Cir. 1969).

particular cooperative, it is not possible to draw any general conclusions about whether the FTC would have Section 5 jurisdiction over these entities as “corporations.”

Enforcement of Data Privacy and Security

If the FTC has Section 5 jurisdiction over a particular electric utility, it may bring an enforcement action against the utility if its privacy or security practices with regard to consumer smart meter data constitute “unfair or deceptive acts or practices in or affecting commerce.”³⁴¹ The FTC Act defines an “unfair” act or practice as one that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”³⁴² According to the FTC, an act or practice is “deceptive” if it is a material “representation, omission or practice” that is likely to mislead a consumer acting reasonably in the circumstances.³⁴³ The history of the Commission’s enforcement of consumer data privacy and security practices shows that the agency has brought complaints against entities that (1) engage in “deceptive” acts or practices by failing to comply with their stated privacy policies; or (2) employ “unfair” practices by failing to adequately secure consumer data from unauthorized parties.³⁴⁴ Often, conduct constituting a violation could fall under either category, as a failure to protect consumer data may be an unfair practice because of the unavoidable injury it causes, as well as a deceptive practice because it renders an entity’s privacy policy materially misleading.

“Deceptive” Privacy Statements

A utility that fails to comply with its own privacy policy may engage in a “deceptive” act or practice under Section 5 of the FTC Act. In *Facebook, Inc.*, the FTC alleged, among other things, that the social networking site violated promises contained in its privacy policy when it made users’ personal information accessible to third parties without users’ consent.³⁴⁵ Facebook had claimed that users could limit third-party access to their personal information on the site. Despite this promise, applications run by users’ Facebook friends were able to access the users’ personal information. The Commission also charged that Facebook altered its privacy practices without users’ consent, causing personal information that had been restricted by users to be available to third parties. This change, which allegedly “caused harm to users, including, but not limited to, threats to their health and safety, and unauthorized revelation of their affiliations” constituted both a “deceptive” and an “unfair” practice in the view of the Commission.³⁴⁶ Finally, the Commission alleged that Facebook had represented to users that it would not share their personal information with advertisers but had done so anyway.

³⁴¹ 15 U.S.C. §45(a)(1). For more details on FTC enforcement of consumer data privacy and security under Section 5, see CRS Report RL34120, *Federal Information Security and Data Breach Notification Laws*, by Gina Stevens.

³⁴² 15 U.S.C. §45(n).

³⁴³ *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984) (policy statement at end of opinion).

³⁴⁴ See *Consumer Privacy: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 11th Cong. (2010) (statement of Jon D. Leibowitz, Chairman, Fed. Trade Comm’n) (describing the FTC’s enforcement activity in the areas of consumer data privacy and security), available at <http://www.ftc.gov/os/testimony/100727consumerprivacy.pdf>. The FTC recently released a preliminary report on the consumer privacy implications of new technologies. FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS (2010), available at <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>.

³⁴⁵ FTC File No. 092 3184 (Nov. 29, 2011) (complaint).

³⁴⁶ *Id.*