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Court of Appeals Case No. 42435-5
Thurston County Superior Court Case No. 10-2-00030-2

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO**

SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT
AREA, d/b/a COMMUNITY TRANSIT,

Petitioner/Appellant,

v.

STATE OF WASHINGTON PUBLIC EMPLOYMENT RELATIONS
COMMISSION and AMALGAMATED TRANSIT UNION,
LOCAL 1576,

Respondents/Appellees.

BRIEF OF APPELLANT

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I. INTRODUCTION

The Public Employment Relations Commission (“PERC” or “Commission”) is the state agency responsible for enforcing public employment collective bargaining law. In a case arising from a complaint filed by a union representing public employees against the Snohomish County Public Transportation Benefit Area (“Community Transit”), the PERC concluded that Community Transit complied with state law, but announced a new prospective rule of general applicability that substantially damages Community Transit and all like public employers in the State of Washington, and which is contrary to controlling authority from the Washington State Court of Appeals.

Community Transit filed a Petition for Review challenging the PERC’s prospective new rule on numerous grounds under the Administrative Procedure Act (“APA”), including that the new rule should have been adopted using APA rule-making requirements. The trial court dismissed the Petition for Review.

On appeal of the trial court’s ruling, Community Transit contends that the PERC’s new prospective rule of general applicability should be invalidated under the APA, and respectfully requests that this Court reverse the trial court’s decision.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error in the Trial Court.

No. 1: The trial court erred in entering its order of July 7, 2011, dismissing petitioner Community Transit’s Petition for Review.

B. Assignments of Error by the Public Employment Relations Commission.

No. 1: The Public Employment Relations Commission erred in the portion of its Decision No. 10267-A, issued on December 10, 2009, in which it proclaimed a change in the law applicable to interest arbitration eligible employees under chapter 41.56 RCW, holding that grievance arbitration clauses contained in collective bargaining agreements must be maintained upon expiration of the agreement until a new agreement is reached, unless the parties explicitly agree the clause should expire.

C. Issues Pertaining to Assignments of Error in the Trial Court.

No. 1: Did the PERC's pronouncement of a generally applicable and purely prospective new unfair labor practice constitute a "rule," as defined by the Administrative Procedure Act?

No. 2: Was the PERC's decision an "agency order in adjudicative proceedings," subject to judicial review under the Administrative Procedure Act, RCW 34.05.570(3)?

No. 3: Did the PERC exceed its authority to remedy unfair labor practices when it created a new unfair labor practice that was not applied to any party before it?

No. 4: Did the PERC exceed its authority when it created a new unfair labor practice that does not protect a right guaranteed by any statute?

No. 5: Did the PERC exceed its authority by purporting to overrule controlling judicial precedent?

No. 6: Did the PERC exceed its authority by undermining the Legislature's directive that the PERC should allow parties to agree on a private method to settle grievance disputes?

No. 7: Did the PERC erroneously interpret and apply the law by ignoring the plain meaning of statutory language and failing to follow basic rules of statutory construction?

No. 8: Did the PERC state facts and reasons demonstrating a rational basis for changing over twenty years of agency precedent?

No. 9: Was the PERC's purported overruling of controlling judicial precedent arbitrary and capricious?

No. 10: Does Community Transit have standing to challenge the PERC's action as an agency order in an adjudicative proceeding, when it was a party to the adjudicative proceeding?

D. Issues Pertaining to Assignments of Error by the Public Employment Relations Commission.

No. 1: Did the PERC's pronouncement of a generally applicable and purely prospective new unfair labor practice constitute a "rule," as defined by the Administrative Procedure Act?

No. 2: Did the PERC exceed its authority to remedy unfair labor practices when it created a new unfair labor practice that was not applied to any party before it?

No. 3: Did the PERC exceed its authority when it created a new unfair labor practice that does not protect a right guaranteed by any statute?

No. 4: Did the PERC exceed its authority by purporting to overrule controlling judicial precedent?

No. 5: Did the PERC exceed its authority by undermining the Legislature's directive that the PERC should allow parties to agree on a private method to settle grievance disputes?

No. 6: Did the PERC erroneously interpret and apply the law by ignoring the plain meaning of statutory language and failing to follow basic rules of statutory construction?

No. 7: Did the PERC state facts and reasons demonstrating a rational basis for changing over twenty years of agency precedent?

No. 8: Was the PERC's purported overruling of controlling judicial precedent arbitrary and capricious?

III. STATEMENT OF THE CASE

A. Factual Background.

1. The Public Employment Relations Commission.

The Washington State Legislature created the PERC in 1975 to enforce and administer five labor relations statutes. Jane Wilkinson, *Practice and Procedure Before the Washington State Public Employment Relations Commission*, 24 Gonz.L.Rev. 213, 213 (1989). The Commission consists of three citizens appointed by the Governor who serve five-year terms while primarily engaged in other occupations. *Id.*; see RCW 41.58.010 *et seq.* Day-to-day operations are conducted by an executive director and staff who perform services such as mediation, fact-finding, arbitration, unit determinations, election support, and unfair labor

practice determinations. *Id.* The Commissioners perform a quasi-adjudicatory function of hearing and deciding appeals from the decisions of staff hearing examiners. *Id.*

One of the five labor relations statutes enforced by the PERC is the Public Employees' Collective Bargaining Act ("PECBA" or "Act"), chapter 41.56 RCW. *Id.* at 214. The Act applies to county and municipal corporations and political subdivisions of the state such as police, sheriff and fire departments, the Washington State Patrol, public school districts, municipal transit systems, public libraries, and public utility districts. *Id.*

2. Collective Bargaining for Interest-Arbitration Eligible Employees.

When a public employer and a union cannot agree on wages, hours, or working conditions, the PECBA sets forth the mechanism for resolving the dispute. In doing so, the Act distinguishes between two groups of public employees: those entitled to interest arbitration and those not entitled to interest arbitration. Under the interest arbitration process, a panel of private labor arbitrators resolves the dispute and can set the terms of the parties' collective bargaining agreement. *See* RCW 41.56.430-.496. The PECBA sets forth the factors the arbitration panel should consider, provides a mechanism for enforcement of the decision in superior court, and limits judicial review to whether the award is arbitrary and capricious. RCW 41.56.465, 41.56.480, and 41.56.450. Interest arbitration is considered a significant advantage to unions who are eligible for it.

The PECBA reserves interest arbitration to “uniformed” employees, who are defined as certain types of law enforcement and fire fighting personnel. RCW 41.56.030(7). Interest arbitration is also granted to employees of public passenger transportation systems, such as petitioner Community Transit, as well as Washington State Patrol officers and employees of commercial nuclear plants. RCW 41.56.492, RCW 41.56.475, and RCW 41.56.496.

The Act gives this group of employees the right to interest arbitration because of the important public policy against strikes by these types of employees: “the uninterrupted and dedicated service of these classes of employees is vital to the welfare and public safety of the state of Washington; that to promote such dedicated and uninterrupted public service there should exist an effective and adequate alternative means of settling disputes.” RCW 41.56.430.

All other public employees covered by the PECBA are not entitled to interest arbitration. Instead, when these employees reach a bargaining impasse, all of the terms and conditions in their collective bargaining agreement remain in effect for one year, after which the employer can unilaterally implement its offer. RCW 41.56.123(1). This mechanism is expressly *unavailable* to employees entitled to interest arbitration. RCW 41.56.123(3)(a).

Of relevance to this case is the statute that explains what happens to the collective bargaining agreement between public employers and interest arbitration eligible employees pending resolution of their

bargaining disputes. Unlike the statute that applies to non-interest arbitration eligible employees (which states that the terms and conditions of their agreement remain in effect for one year), the statute applicable to interest arbitration eligible employees states, “During the pendency of the proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other....” RCW 41.56.470.

B. Procedural Background.

1. Proceedings before the PERC.

Community Transit and ATU were parties to a collective bargaining agreement (“CBA”) that expired on December 31, 2007.¹ CP 14. By November 2008, the parties had not agreed on a successor agreement. *Id.*

On November 10, 2008, ATU filed an unfair labor practice complaint with the PERC based on Community Transit’s refusal to arbitrate grievances² that had arisen after December 31, 2007. CP 14. In essence, ATU was claiming that the grievance arbitration clause in the collective bargaining agreement, which reflected the parties’ agreement to submit grievances to binding arbitration, survived the expiration of the collective bargaining agreement on December 31, 2007. CP 14-15.

¹ The facts of this case derive solely from the pleadings filed with the PERC. No adjudicatory hearing has ever been held in this case.

² Grievances are alleged breaches of collective bargaining agreements.

ATU's unfair labor practice complaint ("ULP") was dismissed as a matter of law by the PERC's Unfair Labor Practice Manager. CP 15. The ULP Manager found that the Court of Appeals' decision in *Maple Valley Firefighters, Local 3062 v. King County Fire Protection District No. 43*, 135 Wn. App. 749, 145 P.3d 1247 (2006), barred the ULP complaint and required dismissal without a hearing. *Community Transit*, Decision 10267 (PECB, 2009). The ULP Manager's decision equated to a decision not to conduct an adjudicatory hearing under RCW 34.05.416.

ATU appealed to the three-person Commission. No briefing was requested from any public employers or other interested parties except Community Transit and ATU. Based on the written record alone, the Commission issued a decision on December 10, 2009. CP 14-28. In a rare occurrence, the three members of the Commission did not reach a unanimous decision: Commissioners Marilyn Glenn Sayan and Pamela G. Bradburn issued a majority opinion, and Commissioner Thomas W. McLane dissented. *Id.*

Commissioners Sayan and Bradburn affirmed the dismissal of the ULP because Community Transit was correct that under settled law grievance arbitration clauses expire along with the remainder of the collective bargaining agreement for interest arbitration eligible employees. *Id.* However, the majority also announced that the Commission was changing that law prospectively. CP 24. Commissioner McLane agreed with the dismissal of the ULP. CP 26. However, he dissented because he recognized the substantial prejudice that would result from the majority's

decision to change the law prospectively, given the reliance that employers and unions have placed on the PERC's twenty years of agency precedent on this issue. CP 26, 28. Commissioner McLane wrote that the majority opinion contained a creative legal argument but opined, "Though ingenious, it is an argument that is bound to fail when this matter is considered by the appellate courts." CP 28.

2. Proceedings Before the Trial Court.

On January 6, 2010, Community Transit filed a Petition for Review in Thurston County Superior Court seeking invalidation of the portion of the PERC's decision changing the law on a purely prospective basis. CP 7. Immediately thereafter, the PERC filed a formal notice that it would not be participating in the case. CP 30. The trial court received briefing, and then heard oral argument on January 21, 2011. The court rendered its decision on July 7, 2011, dismissing the Petition for Review, and entered a Final Order on August 12, 2011. CP 119-124.

The trial court found that Community Transit had standing to seek review of the PERC's new standard as a "rule" under the APA, but concluded the new standard did not meet the definition of a rule because the imposition of sanctions and penalties for violating the new rule will only occur after a hearing. CP 115. The trial court also held that the PERC's new standard did not qualify as an agency "order" and could not be appealed on that basis. Last, the court held that even if it was an order, Community Transit had insufficient standing to petition for review on that basis. CP 116-117.

IV. ARGUMENT

A. Standard of Review

Appellate courts sit in the same position as the superior court and apply directly to the record before the administrative agency the standards of review under the Washington Administrative Procedure Act (“APA”), chapter 34.05 RCW. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 470, 70 P.3d 931 (2003). The APA provides different standards of judicial review depending on whether the agency action is a rule or an adjudicative proceeding. *Hillis v. Department of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997).

Judicial review of a contention that an agency’s action amounts to a rule that must comply with rule-making procedures is governed by the standard for reviewing a rule. *Hillis*, 131 Wn.2d at 373. When an agency action is a rule, the court must declare the rule invalid if it finds that the rule (1) violates constitutional provisions; (2) exceeds the statutory authority of the agency; (3) was adopted without compliance with statutory rule-making procedures; or (4) is arbitrary and capricious. RCW 34.05.570(2)(c).

Agency orders in adjudicative proceedings are reviewed pursuant to RCW 34.05.570(3). Under this standard, and of relevance to this case, a petitioner is entitled to relief if (1) the order is outside the statutory

authority or jurisdiction of the agency conferred by any provision of law; (2) the agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure; (3) the agency erroneously interpreted or applied the law; (4) the order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or (5) the order is arbitrary and capricious. RCW 34.05.570(3)(b),(c),(d), (h), and (i).

B. History of the PERC Rule That Grievance Arbitration Clauses Expire for Interest Arbitration Eligible Employees.

The rule that grievance arbitration clauses expire with the collective bargaining agreement for interest arbitration eligible employees was first recognized and applied more than 20 years ago. In *Pierce County*, Decision 2693 (PECB, 1987), a PERC Hearing Examiner explained that the simple issue to be resolved was: “Do provisions for final and binding arbitration of grievances survive the normal expiration of a collective bargaining agreement?” *Pierce County* at 4. After a thorough and well-reasoned analysis, she concluded they do not. She explained,

Grievance arbitration – calling for the interpretation of whether there has been a violation of the contract – is, by its very nature, dependent upon the existence of a valid contract to be “interpreted”.

Id.

The full Commission reached the same conclusion in *City of Yakima*, Decision 3880 (PECB, 1991), a case involving uniformed

personnel. In that case, the PERC held, “The agreement to arbitrate survives the expiration of a collective bargaining agreement only with respect to causes of action which arose while the contract was in effect.” *City of Yakima* at 4.

This settled rule was followed in other PERC decisions, including *City of Enumclaw*, Decision 4897 (PECB, 1994), which parallels the issue presented in this case. There, a union representing employees eligible for interest arbitration alleged that the employer had committed an unfair labor practice by refusing to arbitrate a disciplinary grievance arising after the labor contract expired. The PERC’s Executive Director dismissed the complaint explaining,

[T]he Commission has held that an arbitration clause does not survive contract expiration with regard to grievances arising after the expiration date. *City of Yakima*, Decision 3880 (PECB, 1991). The allegation with regard to an unlawful change of past practice by refusing to arbitrate [the] grievance fails to state a cause of action.

Id. at 1.

This rule of law has been repeatedly applied in other PERC cases spanning the last two decades. *See, e.g., City of Tacoma*, Decision 5085 n. 2 (PECB, 1995) (“Neither union security nor grievance provisions survived the expiration of a collective bargaining agreement”); *City of Seattle*, Decision 3872-A (PECB, 1992) (explaining that because certain contractual protections do not survive expiration, employers and unions facing an impending expiration “commonly enter into extension agreements to preserve the fundamental aspects of their contractual

relationship, including union security and grievance arbitration mechanisms”), *aff’d*, Decision 3872-B (PECB, 1993); *Spokane County*, Decision 6708 (PECB, 1999) (“grievance procedures are not part of the status quo which must be maintained”).

In August 2009, the PERC’s ULP Manager dismissed accusations that an employer had refused to arbitrate a grievance arising after expiration of a contract with employees eligible for interest arbitration. *Lewis County*, Decision 10511 (PECB, 2009). He wrote, “Grievance arbitration clauses do not survive the expiration of collective bargaining agreements.” *Id.* at 2.

In its decision in this case, while affirming dismissal of an unfair labor practice complaint, the PERC purported to permanently change this settled rule of law.

C. The PERC Issued a Rule Without Complying with Statutory Rule-Making Procedures.

Rules are invalid unless adopted in compliance with the APA. *Hillis*, 131 Wn.2d at 398. The purpose of rule-making procedures is to provide the public with notice of proposed rules so that interested parties have the opportunity to comment. *See Hillis*, 131 Wn.2d at 399. Rule-making procedures ensure that all members of the public can participate meaningfully in the development of agency policies that affect them. *Id.* Public input does not dictate an agency’s ultimate decision; however, it allows all interested parties to have a voice. *Id.* at 400. When an agency

makes a decision that should have followed rule-making procedures, the remedy is invalidation of the action. *Id.* at 399.

As the trial court in this case noted, it is “undisputed” that the PERC did not comply with statutory rule-making requirements. CP 115. It is also undisputed that Community Transit has standing to challenge the action as a rule pursuant to RCW 34.05.570(2)(a).³ CCP 115. Therefore, the only disputed issue is whether the PERC’s action qualifies as a rule under the APA.

1. A Generally Applicable and Purely Prospective Order Creating a New Unfair Labor Practice Is a Rule.

The Washington Supreme Court has been “vigilant in insisting that administrative agencies treat policies of general applicability as rules and comply with necessary APA procedures.” *McGee Guest Home, Inc. v. DSHS*, 142 Wn.2d 316, 322, 12 P.3d 144 (2000). “An agency cannot avoid the requirement of notice-and-comment rulemaking simply by characterizing its decision as an adjudication.” *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994).

Under the APA, a rule is defined as:

³ “Where an agency refuses to provide a procedure required by statute or the Constitution, the United States Supreme Court ‘routinely grants standing to a party’ despite the fact that ‘any injury to substantive rights attributable to failure to provide a procedure is both indirect and speculative.’” *Seattle Bldg. and Construction Trades Council v. Apprenticeship and Training Council*, 129 Wn.2d 787, 794, 920 P.2d 581 (1996) (citations omitted). Community Transit alleges that PERC failed to engage in a statutorily mandated procedure, *i.e.*, rule making. Therefore, Community Transit has standing to challenge the PERC’s failure to comply with rule making requirements.

[A]ny agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law....

RCW 34.05.010(16). The term includes amendment or repeal of a prior rule. *Id.* An action is of “general applicability” if it applies uniformly to all members of a class. *Failor’s Pharmacy v. Department of Social and Health Services*, 125 Wn.2d 488, 495, 886 P.2d 147 (1994).

In *Hillis v. Department of Ecology*, the Washington Supreme Court held that policies and procedures regarding processing of water-rights applications adopted by the Department of Ecology were subject to the rule-making requirements of the APA. *Hillis*, 131 Wn.2d at 397. In response to severe budget cuts and a growing backlog of water-rights applications, the Department established criteria for deciding which applications to process first. *Id.* at 379. The Court concluded that the policies were new requirements or qualifications relating to the benefit of having a water-right application investigated and therefore qualified as a rule. *Id.* at 400. Thus, the Department had to engage in rule-making prior to using the new criteria. *Id.*

Similarly, in *Failor’s Pharmacy*, the Washington Supreme Court struck down payment schedules adopted by the Department of Social and Health Services that were adopted without compliance with APA rule-making procedures. *Failor’s Pharmacy*, 125 Wn.2d at 497. The Court

held that prescription drug reimbursement schedules applied uniformly to all members of the class of Medicaid prescription providers and were thus “generally applicable.” *Id.* at 495-496. Further, the new schedules altered the benefits enjoyed by Medicaid patients. *Id.* at 497. Under those facts, the Court found the schedules qualified as a “rule” and were therefore procedurally invalid under the APA. *Id.*

In its Decision 10267-A, the PERC described its new rule of law as follows:

We now hold that under Chapter 41.56 RCW, a grievance arbitration clause is a term and condition of employment for interest arbitration eligible employees that must be maintained upon expiration of a collective bargaining agreement until a new agreement is reached, unless the parties explicitly agree that the grievance arbitration clause should not survive the expiration of the collective bargaining agreement.

CP 22. The PERC described its holding as “chang[ing] the manner in which arbitration clauses are enforced for interest arbitration eligible employees” and acknowledged that it was adopting “a new standard.” CP 16; 24. The PERC explained that its decision “overruled existing agency precedent.” CP 24. The PERC decided that its change in the law “must be prospective in nature.” CP 24. The effect of the PERC’s pronouncement is that it is now unlawful for public employers to treat grievance arbitration clauses as expired along with the rest of the collective bargaining agreement for interest arbitration eligible employees. Prior to the PERC’s decision, refusing to submit to grievance arbitration after an agreement covering these employees had expired was lawful.

Now it is unlawful. In effect, the PERC's decision created a brand-new unfair labor practice.

The PERC's action clearly qualifies as an order, directive or regulation of "general applicability" because the PERC stated that the change in the law *will be applied* to all employers of interest arbitration eligible employees in the future. CP 24. Therefore, its action applies uniformly to all members of a class, *i.e.*, to all employers of interest arbitration eligible employees.

The PERC's action also meets the definition of a rule because it falls within all three of the categories stated in RCW 34.05.010(16)(a)-(c).

Subsection (a) defines a rule as a directive "the violation of which subjects a person to a penalty or administrative sanction." In *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wn.2d 640, 647, 835 P.2d 1030 (1992), the court concluded that a numeric standard for the discharge of pollutants was a rule under the APA where it was "an agency directive which would subject the respondents to punishment if they do not comply with the standard." This is exactly the case here: a public employer who does not comply with the PERC's change in the law will be punished. The PERC has authority to impose severe penalties and sanctions, including back pay. *See* WAC 391-45-410. Indeed, the PERC's stated intention is to make Community Transit's conduct illegal in

the future. This is without a doubt a directive “the violation of which subjects a person to a penalty or administrative sanction.”⁴

With regard to (b) of the definition of a rule, the PERC’s action “establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings.” RCW 34.05.010(16)(b). Employers will now be required to participate in an agency hearing on an unfair labor practice complaint for actions that previously would not have resulted in a hearing. An employer previously could have expected a preliminary dismissal by the Unfair Labor Practices Manager, as occurred in this case before PERC changed the rule.

Finally, as to subsection (c) of RCW 34.05.010(16), employers like Community Transit used to have the legal privilege of negotiating a grievance procedure including binding arbitration, knowing that it would automatically expire with the rest of the collective bargaining agreement. Following the PERC’s action, Community Transit and all other public employers of interest arbitration eligible employees have lost that privilege. They now must achieve a negotiated agreement in order for the arbitration obligation to expire. The order thus satisfies the third definition of a rule: “establishes, alters, or revokes any qualification or

⁴ The trial court reasoned that the PERC’s action was not a rule under this subsection because entities would not be penalized or sanctioned until they had been “judged” to have broken the rule. CP 115. Under this reasoning, nothing would be a rule. For example, a regulation prohibiting trapping certain animals or establishing new speed limits would not a rule because entities have to be “judged” as to whether they violated them before they are punished. This is not a correct interpretation of the APA.

requirement relating to the enjoyment of benefits or privileges conferred by law.” RCW 34.05.010(16)(c).

Administrative agencies often create binding precedent through adjudication. However, an argument that the PERC did so here completely ignores the fact that the PERC did not *apply* its change in the law in this case. In an order declining to even hold a hearing on a complaint, the PERC changed the law and created a new unfair labor practice to be applied *solely on a prospective basis*. In so doing, PERC engaged in rule-making, as distinct from adjudication.

Budget Rent a Car Corp. v. Dep’t of Licensing (“DOL”), 144 Wn.2d 889, 31 P.3d 1174 (2001), does not demand a different result. In *Budget Rent a Car*, the DOL interpreted *and applied* statutory language to assess back taxes and fees. *Budget*, 144 Wn.2d at 891. The Washington Supreme Court declined to rule that DOL should have engaged in rule-making. *Id.* at 892. The court found DOL had not added any additional requirements to the statute and that there had not been a “prior differing interpretation” from the agency in the past. *Id.* at 899.

Unlike the DOL in *Budget Rent a Car*, here the PERC *has* added an additional requirement to the PECBA and *has* changed its 20 years of precedent on this rule of law. Public employers are now required to arbitrate grievances with interest arbitration eligible employees even when the collective bargaining agreement has expired, or they will be subjected to sanctions and penalties. No statute imposes this requirement. *See* discussion in section IV(D)(3) below.

The APA contains a mechanism in the event an agency decides a change in the law is warranted. That mechanism is RCW 34.05.070(1):

If it becomes apparent during the course of an adjudication or rule-making proceeding undertaken pursuant to this chapter that another form of proceeding under this chapter is necessary, is in the public interest, or is more appropriate to resolve issues affecting the participants, on his or her own motion or on the motion of any party, the presiding officer or other official responsible for the original proceeding shall advise the parties of necessary steps for conversion and, if within the official's power, commence the new proceeding.

An agency may not ignore this statutory process and simply announce a prospective change in the law and a new unfair labor practice as an “aside” in a decision declining to hold a hearing.⁵

⁵ The United States Supreme Court considered a case involving virtually indistinguishable facts and a plurality of justices concluded the National Labor Relations Board's action violated federal APA rule-making requirements. *Nat'l Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426 (1969). In *Wyman-Gordon*, the Court considered whether a general rule that had been announced, *but not applied*, in a NLRB adjudicative proceeding constituted rule-making. The Court wrote,

There is no question that, in an adjudicatory hearing, the Board could validly decide the issue whether the employer must furnish a list of employees to the union. But that is not what the Board did in *Excelsior*. The Board did not even apply the rule it made to the parties in the adjudicatory proceeding, the only entities that could properly be subject to the order in that case. Instead, the Board purported to make a rule: i.e., to exercise its quasi-legislative power.

Wyman-Gordon, 394 U.S. at 765. Federal law prohibiting agencies from legislating in an adjudicative proceeding has been more recently articulated by the Ninth Circuit as follows:

An adjudication (which results in an order) is virtually any agency action that is not rulemaking. Two principal characteristics distinguish rulemaking from adjudication. First, adjudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals. Second, because adjudications involve concrete disputes, they have an immediate effect on specific

For the reasons above, the PERC’s action creating a new unfair labor practice should be invalidated as a rule adopted in violation of the APA pursuant to RCW 34.05.570(2)(c) and RCW 41.58.050.

D. The PERC Exceeded Its Statutory Authority by Issuing an Order That Requires Employers Subject to Interest Arbitration to Arbitrate Grievances After a Contract Has Expired.

Although Washington courts generally accord great deference to PERC’s interpretation of the law it administers, PERC has no more authority than is granted to it by the Legislature. *Local 2916 LAFF v. Public Employment Relations Commission*, 128 Wn.2d 375, 379, 907 P.2d 1204 (1995). PERC derives its authority from chapter 41.58 RCW, the statutory scheme that creates the Commission, and chapter 41.56 RCW, the Public Employees’ Collective Bargaining Act. *Municipality of Metro. Seattle v. Public Employment Relations Commission*, 118 Wn.2d 621, 633, 826 P.2d 158 (1992). The power to determine the extent of that authority is a question of law ultimately vested in the courts. *Local 2916 LAFF* at 379. The Washington Supreme Court has explained that the Legislature only granted PERC “limited authority.” *Id.* at 383. “[PERC] was not created as a court of general jurisdiction, and thus it has no authority to

individuals (those involved in the dispute.) Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule is subsequently applied... (the “central distinction” between rulemaking and adjudication is that rules have legal consequences “*only* for the future”).

Yesler Terrace Community Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994) (citations omitted) (emphasis in original).

decide whether an act is an unfair labor practice unless the right that is affected is guaranteed by statute.” *Id.*

PERC’s decision to issue an order establishing a new, prospective unfair labor practice exceeded its statutory authority pursuant to RCW 34.05.570(2)(c) and 3(b), and RCW 41.58.050.

1. The PERC’s Holding Is an Agency Order in an Adjudicative Proceeding.

The trial court reasoned that the PERC’s action was not reviewable as an “agency order in adjudicative proceedings” under RCW 34.05.570(3) because it did not finally determine the legal rights of any person or entity as stated in the definition of “order” in RCW 34.05.010(11)(a). CP 116. This conclusion is not supported by the content of the PERC decision or the statutory definition of “order.”

The statutory definition of “order” states:

“Order,” without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.

RCW 34.05.010(11)(a) (emphasis added).

The PERC’s decision meets this definition. It was issued pursuant to WAC 391-45-390 in the context of an appeal of an order of dismissal of an adjudicatory proceeding. The decision is a written statement of particular application to specific persons: ATU and Community Transit. It determines the legal rights and interests of the parties. While Community Transit did not act unlawfully when it refused to arbitrate grievances preceding the decision, it is now legally required to do so.

ATU has a new legal right: the right to demand arbitration of grievances after the collective bargaining agreement expires and there is no successor agreement in effect. Indeed, the majority of Commissioners clearly intended that their decision would change the law and finally determine the legal rights of public employees eligible for interest arbitration on this issue.

Secondly, the definition of “order” in RCW 34.05.010(11)(a) is expressly conditioned by the term “without further qualification.” RCW 34.05.010(11)(a). The word “order” as used in RCW 34.05.570(3) contains an additional qualification: “in adjudicative proceedings.” Community Transit submits that the PERC’s decision clearly fits within this qualified use of the word “order” because it is a decision in an adjudicatory proceeding of an unfair labor practice case.

Because the PERC’s decision is an agency order in an adjudicative proceeding, Community Transit, who was a party to that adjudicative proceeding, has the right to challenge whether the PERC’s action in issuing the order is consistent with the requirements of the APA.

2. The PERC Exceeded Its Authority to Remedy Unfair Labor Practices.

When the PERC receives an unfair labor practice complaint, it is “empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders.” RCW 41.56.160(1). Unfair labor practices are defined by statute. *See* RCW 41.56.140 and 150. Appropriate remedial orders are “those [orders] necessary to effectuate the purposes of the

collective bargaining statute and to make PERC's lawful orders effective." *Municipality of Metro. Seattle*, 118 Wn.2d at 633.

Since the PERC concluded Community Transit did not commit a ULP, it did not have authority to order more than dismissal of the complaint. RCW 34.05.416 explains, "If an agency decides not to conduct an adjudicative proceeding in response to an application, the agency shall furnish the applicant a copy of its decision in writing, with a brief statement of the agency's reasons and of any administrative review available to the applicant." This statute does not give PERC the authority to go beyond providing a statement of reasons for its decision not to conduct a hearing.

The portion of the PERC's decision changing the law on a prospective basis is not an "appropriate remedial order" because it does not remedy an unfair labor practice. Quite to the contrary, the PERC concluded that Community Transit *did not* commit an unfair labor practice. The PERC's decision to affirm the dismissal was within its authority; however, its pronouncement of a change in the law exceeded its delegated authority in RCW 41.56.160(1).

3. The PERC Exceeded Its Authority by Creating a New Unfair Labor Practice That Does Not Protect a Right Guaranteed by Statute.

PERC's new standard also violates the Supreme Court's conclusion that PERC has "limited authority" and has no authority to

decide whether an act is a ULP unless the right is guaranteed by statute.

Local 2916 IAFF, 128 Wn.2d at 383.⁶

The new standard is not based on any right guaranteed by statute. In fact, the only statutes cited by the majority opinion as the basis for its action are RCW 41.56.430 and RCW 41.56.490. CP 24. The former is a broad statement of legislative intent related to interest arbitration, and the APA expressly prohibits agencies from relying on broad statements of legislative intent as statutory authority to make new laws. RCW 34.05.322. The latter, RCW 41.56.490, prohibits uniformed employees from striking and their employers from refusing to submit to interest arbitration. This provision has nothing to do with whether grievance arbitration clauses remain in effect once the labor contract expires.

The only remaining relevant statute is RCW 41.56.470. As discussed below in section IV(E)(1), this statute does not give interest arbitration eligible employees the statutory right to grievance arbitration. At the trial court level, ATU understood this. It asserted that the PERC's

⁶ The court explained,

[T]he Legislature has granted PERC limited authority. It was not created as a court of general jurisdiction, and thus it has no authority to decide whether an act is an unfair labor practice unless the right that is affected is guaranteed by statute. If we were to conclude otherwise, we would be effectively amending the statute to afford PERC greater power than it was given by the Legislature. Because such a result is unnecessary, unwise, and unsupportable under the statute, we affirm the decision of the trial court....

Local 2916 IAFF, 128 Wn.2d at 382. This is the same standard applied to other administrative agencies. See *Pitts v. Dep't of Social and Health Services*, 129 Wn. App. 513, 524, 119 P.3d 896 (2005) (noting that DSHS had "no authority to expand the definition of developmental disability beyond what the legislature has permitted.")

new rule fills a “statutory gap.” CP 76. Therefore, even ATU understands that the PERC created a ULP based on a right that is not guaranteed by statute.

4. The PERC Exceeded Its Authority by Purporting to Overrule Judicial Precedent.

In *Maple Valley Firefighters, supra*, the Washington State Court of Appeals addressed whether, under RCW 41.56.470, a grievance arbitration provision in an expired collective bargaining agreement remained in effect during the pendency of interest arbitration proceedings involving uniformed public employees. *Maple Valley Firefighters*, 135 Wn. App. at 753. The court held it does not. *Id.* at 750.

In its decision below in this case, the PERC states that it “respectfully decline[s] to be bound” by the Court of Appeals’ decision. CP 22, n. 6. The PERC suggests it can simply ignore the Court of Appeals’ decision because, according to the PERC, the court was simply deferring to prior PERC precedents. However, it does not matter what reasoning the Court of Appeals followed to reach its legal conclusion: its decision is published as controlling judicial authority in the State of Washington. The decision addresses the meaning of RCW 41.56.470. Administrative agencies do not have the authority to ignore controlling judicial authority. Moreover, the Court of Appeals did not blindly defer to the PERC. It arrived at its conclusion after a thorough discussion of PERC and federal precedent and an analysis of the statutory language in the PECBA. *Maple Valley Firefighters*, 135 Wn. App. at 756-60.

The PERC's action in "declining to be bound" by an appellate court is willful, unreasoning, and exceeds the PERC's statutory authority.

5. The PERC Exceeded Its Authority by Undermining the PECBA's Intent to Allow Parties to Agree on a Private Method to Settle Grievances.

The purpose of the PECBA is to "provide public employees with the right to join and be represented by labor organizations of their own choosing, and to provide for a uniform basis for implementing that right." *Municipality of Metro. Seattle v. Public Employment Relations Commission*, 118 Wn.2d 621, 633, 826 P.2d 158 (1992). By establishing the PERC, the Legislature intended to provide for the more "uniform and impartial" settlement of complaints, grievances, and disputes arising out of employer-employee relations. RCW 41.58.005(1). The Legislature also instructed the PERC that "[f]inal adjustment *by a method agreed upon by the parties* is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." RCW 41.58.020(4) (emphasis added).

The PERC exceeded its authority by undermining the Legislature's instruction in RCW 41.58.005(1) that parties should *agree* on a method for settling grievance disputes. By turning grievance arbitration clauses into a statutory right, the PERC has undermined this Legislative intent. By overturning a well-settled rule of law regarding when grievance provisions expires in collective bargaining agreements, the PERC has also undermined the PERC's statutory directive to provide for a "uniform"

system of settling grievances. As Commissioner McLane noted, “[t]he Majority’s basis for overturning twenty years of agency precedent and practice ignores existing statutes, principles of statutory construction, and is ill advised in light of the reliance that parties have placed upon that precedent.” CP 28.

E. The PERC Erroneously Interpreted and Applied the Law.

Under the error of law standard, a court may substitute its interpretation of the law for that of PERC. RCW 34.05.570(3)(d); *Pasco Police Officers’ Ass’n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997). This Court should not adopt the PERC’s new interpretation of the collective bargaining law applicable to employees eligible for interest arbitration, as it ignores fundamental principles of statutory construction and rests on an implausible interpretation of legislative intent.

1. The PERC’s Interpretation Ignores Statutory Language.

When a statute is clear on its face, the meaning should be derived from the language of the statute alone. *Densley v. Dep’t of Retirement Systems*, 162 W.2d 210, 219, 173 Pd.3d 885 (2007). “Courts should always assume the Legislature means exactly what it says” in a statute and apply it as written. *Id.* (citation omitted). Statutory construction cannot be used to read additional words into a statute. *Id.* Neither should different language be read to mean the same thing. *Id.* “When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings.” *Id.*

The interpretation of an ambiguous statute by an agency charged with its application may provide useful guidance. *Densley*, 162 Wn.2d at 221. “However, such deference is not afforded when the statute in question is unambiguous.” *Id.* Moreover, “statutes are not ambiguous simply because different interpretations are conceivable.” *Id.* (citing *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)).⁷ Statutes should also be construed so that no clause, sentence or word is “superfluous, void, or insignificant.” *City of Kent v. Beigh*, 145 Wn.2d 33, 39-40, 32 P.3d 258 (2001) (citations omitted).

The only statute that arguably comes close to addressing whether grievance arbitration clauses remain in effect after the contract expires, for interest arbitration eligible employees, is RCW 41.56.470. That statute provides,

During the pendency of the proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under chapter 131, Laws of 1973.

RCW 41.56.470. The PERC found in this statutory language “an intent to preserve the terms and conditions of employment for interest arbitration eligible employees throughout the period between collective bargaining

⁷ If deference is to be accorded to the PERC’s statutory interpretation, it should be accorded to the PERC’s interpretation over the last twenty years, which the Legislature had the opportunity to and did not repudiate. *See Hart v. Peoples National Bank of Washington*, 91 Wn.2d 197, 201, 588 P.2d 204 (1978) (“the persuasive force of [an agency’s] interpretation is strengthened when the legislature, by its failure to amend or by amending some other particular without repudiating the administrative construction, silently acquiesces in the administrative interpretation”).

agreements.” CP 24. The PERC ignores the statute’s plain meaning and basic rules of statutory construction.

First, the PERC completely ignores the prefatory clause, “During the pendency of the proceedings before the arbitration panel” The arbitration panel does not exist until impasse is declared. RCW 41.56.450. This occurs after a “reasonable period” of negotiations and mediation. RCW 41.56.450. Impasse is not necessarily declared prior to or at the point of expiration of a CBA. Indeed, bargaining can continue for years after the expiration of an agreement, with the interest arbitration process occurring at a much later date. In its decision, the PERC itself recognized this fact. CP 23, n. 7 (taking administrative notice of an interest arbitration award in late 2008 for a contract that had expired in 2004).

The PERC has in the past recognized that this phrase qualifies the provision. *See King County*, Decision 2948 (PECB, 1988) (“It suffices to say that the petition at hand was filed during the pendency of the interest arbitration proceedings and, particularly, after the interest arbitration panel had been established pursuant to RCW 41.56.450.”).

Since impasse does not occur the moment the contract expires, the PERC’s interpretation of the statute changes the first clause of RCW 41.56.470 from “[d]uring the pendency of proceedings before the arbitration panel” to “[d]uring the period between collective bargaining agreements.” Such an interpretation renders the first clause insignificant, reads new words into the statute, and is thus erroneous as a matter of law.

The PERC's interpretation also ignores its own regulations. "Administrative agencies are bound by their own rules." *Skamania County v. Woodall*, 104 Wn. App. 525, 539, 16 P.3d 701 (2001), citing *Deffenbaugh v. DSHS*, 53 Wn.App. 868, 871, 770 P.2d 1084 (1989). The PERC has a regulation defining when its staff members can serve as grievance arbitrators. WAC 391-65-010 states, "*When there is an agreement to arbitrate*, a request for appointment of an arbitrator to hear and determine issues ... may be submitted" (emphasis added). This regulation expressly refers to an "agreement" to arbitrate. It does not allow for the possibility that grievance arbitration may be statutorily mandated.

The fact that grievance arbitration is something parties voluntarily agree to is further supported by the language of RCW 41.58.020(4) and RCW 41.56.080. The former directs the PERC to take a "hands off" approach to grievance arbitration provisions. The latter indicates that public employees may request that their grievances be adjusted "if the adjustment is not inconsistent with the terms of a collective bargaining agreement *then in effect*...." RCW 41.56.080 (emphasis added). Both statutes reflect the legal principle that grievance arbitration is something that should be mutually agreed to, not statutorily imposed when there is no collective bargaining agreement in effect.

The PERC's conclusion that a grievance procedure should be included in the term "condition of employment" in RCW 41.56.470 is also flawed, as it ignores a distinction set forth elsewhere in the Act. The

statutory definition of “collective bargaining” states that employers and unions have an obligation to “execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions” RCW 41.56.030(4). Grievance procedures are listed separately from “working conditions.” Therefore, the term “conditions of employment” in RCW 41.56.470 does not include grievance provisions in a CBA.

In *Densley*, the Washington Supreme Court reversed a decision by the Department of Retirement Systems interpreting a statute involving retirement service credit. The agency had interpreted two provisions in a statute (“active federal service in the military or naval forces” and “service in the armed forces”) to be equivalent. *Densley*, 162 Wn.2d at 219. Thus, the Department required service in the armed forces to be “active” even though that portion of the statute did not contain the word “active.” *Id.* The Court reversed the Department’s action. *Id.* It held that the statute was not ambiguous and that the Legislature’s use of different words meant the provisions were intended to have different meanings. *Id.* at 220.

The PERC’s decision effectively equates RCW 41.56.123, which applies to employees who are not eligible for interest arbitration, with RCW 41.56.470, which applies to interest arbitration eligible employees. Like the Department of Retirement Systems in *Densley*, the PERC has ignored the Legislature’s use of different words in RCW 41.56.123 and RCW 41.56.470. RCW 41.56.123 refers to “all of the terms and conditions specified in the collective bargaining agreement,” which must

be maintained for one year following the expiration of a collective bargaining agreement. RCW 41.56.123. RCW 41.56.470 references “wages, hours, and other conditions of employment,” which cannot be changed during the pendency of the proceedings before the arbitration panel. RCW 41.56.470. The Legislature’s use of the two different phrases means it intended them to have different meanings. In other words, if the Legislature had intended for all terms of a CBA to remain in effect during the pendency of proceedings before an interest arbitration panel, it would presumably have used the phrase “all of the terms and conditions specified in the collective bargaining agreement.” It also presumably would not have excluded uniformed personnel from RCW 41.56.123. *See* RCW 41.56.123(3)(a). By interpreting RCW 41.56.470 as if it were the same as RCW 41.56.123, the PERC has ignored these basic rules of statutory construction.

2. Under Federal Labor Law, Grievance Arbitration Clauses Are a Contract Right That Expire with the Collective Bargaining Agreement.

Historically, Washington courts turn to federal case law for guidance in labor law cases. *Kitsap County Deputy Sheriff’s Guild v. Kitsap County*, 167 Wn.2d 428, 435, 219 P.3d 675 (2009). Under federal labor law, grievance arbitration clauses expire with the collective bargaining agreement because under federal law, grievance arbitration is solely a creature of contract.

The seminal case in this area is *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 111 S.Ct. 2215 (1991). The Court endorsed the

National Labor Relations Board's rule that arbitration clauses expire with the CBA, explaining:

The rule is grounded in the strong statutory principle, found in both the language of the NLRA and its drafting history, of consensual rather than compulsory arbitration. The rule conforms with our statement that no obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so. We reaffirm today that under the NLRA arbitration is a matter of consent and will not be imposed upon parties beyond the scope of their agreement.

Id. at 200-01.⁸ More recently, the United States Supreme Court wrote, “Indeed, the rule that arbitration is strictly a matter of consent ... is the cornerstone of the framework the Court announced in the *Steelworkers Trilogy* for deciding arbitrability disputes in LMRA cases.” *Granite Rock Co. v. Int’l Brotherhood of Teamsters*, 561 U.S. ___, 130 S.Ct. 2847 (2010), at 8, n.6. As the Supreme Court explained in *Litton*, “[t]he object of an arbitration clause is to implement a contract, not to transcend it.” A rule under which grievances arising after contract expiration remain subject to arbitration, the Court reasoned, would contradict the very purpose of an arbitration clause. *Id.* at 206-07, 111 S.Ct. at 2225. Once a collective bargaining agreement expires, there can be no breach of

⁸ Other federal courts have articulated the same reasoning. See *United Food & Commercial Workers International Union, Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990) (“the arbitration duty is a creature of the collective bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so”); *Office and Professional Employees International Union, Local 95 v. Wood County Telephone Co.*, 408 F.3d 314, 317 (7th Cir. 2005) (“[b]ecause arbitration requires agreement, the obligation to arbitrate expires with a collective bargaining agreement.”); *Coast Hotels and Casinos, Inc. v. Culinary Workers Union Local 226*, 35 F. Supp. 2d 765, 770 (D. Nev. 1999) (explaining that arbitration is strictly matter of contract and expires with contract).

contract claim and no applicable arbitration provision to resolve such a claim.

F. The PERC Failed to State Facts and Reasons Demonstrating a Rational Basis for Its Order.

The APA provides that the court shall grant relief from an agency order in an adjudicative proceeding if the order is “inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency.” RCW 34.05.570(3)(h). The PERC’s new standard is inconsistent with over twenty years of agency precedent, and the PERC failed to provide sufficient facts and reasons to demonstrate a rational basis for its inconsistency.

In the face of this overwhelmingly consistent application of the rule that grievance arbitration clauses do not survive the expiration of CBA’s, the Commission offers few “facts and reasons” supporting its inconsistency. The PERC’s proffered reasons for disregarding its own precedent, federal labor law, and the Court of Appeals’ decision in *Maple Valley Firefighters* boils down to the following statement:

[W]hen a private sector collective bargaining agreement expires, the employees typically lose the right to arbitrate post-expiration contractual grievances, but regain the right to utilize the strike as an alternative means to resolve disputes.

CP 21. The problem with this reason is that it ignores interest arbitration as the right that is gained when a CBA expires. It also ignores that federal

law is not premised on the fact that employees regain the right to strike, it is premised on elementary contract law.

G. The PERC's Attempt to Overrule Judicial Precedent Is Arbitrary and Capricious.

Agency action is arbitrary and capricious if it is “willful and unreasoning and taken without regard to the attending facts or circumstances.” *Hillis*, 131 Wn.2d at 383. The PERC’s decision to change the law is arbitrary and capricious for purposes of RCW 34.05.570(2)(c) and (3)(i) because it ignores controlling case law from the Court of Appeals. The PERC’s action in “declining to be bound” by an appellate court not only exceeds its statutory authority but is also an action taken without regard to the attending facts and circumstances. Therefore, it is arbitrary and capricious.

H. Community Transit Has Standing to Challenge PERC's Action.

In a footnote in its brief to the trial court, ATU challenged whether Community Transit has standing. The lower court recognized that if, as Community Transit contends, PERC engaged in rule-making when it “announced” a “new policy” to be applied prospectively, *see* CP 115, then Community Transit has standing to challenge PERC’s failure to follow rule-making requirements. CP 115 (citing RCW 34.05.570(2)(a)). However, the court concluded that the announcement of a new policy is not a rule, and that Community Transit lacks standing to challenge PERC’s action as an order in an adjudicative proceeding. CP 117. However this Court characterizes the PERC’s attempt to impose a new

rule in the context of an order deciding an appeal, Community Transit meets the requirements for standing to challenge the agency's action.

A "person" (which includes a governmental subdivision or agency) has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. RCW 34.05.530. A person is aggrieved or adversely affected within the meaning of this section when all three of the following conditions are present:

- (1) The agency action has prejudiced or is likely to prejudice that person;
- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

Id. The first and third factors require a showing of "injury in fact," while the second requires the party to establish that the "Legislature intended the agency to protect the party's interests when taking the action at issue." *St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 739-40, 887 P.2d 891 (1995). All three factors are derived from federal case law, and the Legislature has expressly stated that "courts should interpret provisions of [the APA] consistently with decisions of other courts interpreting similar provisions of ... the federal government" *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 794, 920 P.2d 581 (1996) (quoting RCW 34.05.001).

The injury in fact element is satisfied when a plaintiff alleges the

challenged action will cause “specific and perceptible harm.” *Leavitt v. Jefferson County*, 74 Wn. App. 668, 679, 875 P.2d 681 (1994). So for example, a sufficient injury in fact is properly pleaded when a property owner alleges ““immediate, concrete, and specific”” damage to property, even though the allegations may be “speculative and undocumented.” *Id.* (quoting *Trepanier v. City of Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992)). In addition, this condition is met when the party challenging the action demonstrates a “probable economic injury resulting from agency actions that alter competitive conditions.” *Seattle Bldg.*, 129 Wn.2d at 795 (1996) (*citing* Kenneth Culp, Davis & Richard J. Pierce, Jr., *Administrative Law Treatise*, § 16.4, at 13, § 16.5, at 30-31 (3d ed. 1994); *International Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374, 1379 (9th Cir.1989) (union challenged agency certification of foreign workers to load logs in United States waters; because of foreign competition, union members lost opportunity to compete for traditional longshore jobs and this established sufficient injury). Accordingly, the Washington Supreme Court in *Seattle Bldg.* found that plaintiffs' generalized interest in “assuring the competition is on a level field” in the marketplace was sufficient to satisfy standing requirements. *Seattle Bldg.*, 129 Wn.2d at 796. Finally, courts have recognized an injury sufficient to challenge a failure to follow notice-and-comment rule-making procedures, where the action creates a “threat” to a concrete interest of the person seeking review. *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 445 (9th Cir. 1994).

The second condition of RCW 34.05.530 involves the “zone of interest” test, which “limit[s] review to those for whom it is most appropriate.” *Seattle Bldg.*, 129 Wn.2d at 797 (citation omitted). The test focuses on whether the Legislature intended the agency to protect the party's interest when taking the action at issue. *Id.*

As for the question of whether a judgment will redress the prejudice likely to be caused, Washington appellate courts have recognized that this requirement is met when the party is seeking prospective relief. *National Elec. Contractors Ass'n v. Employment Sec. Dept. of State of Wash.*, 109 Wn. App. 213, 221, 34 P.3d 860, 865, (Wn. App. Div. 1, 2001).

Community Transit meets these requirements. First, Community Transit faces probable injury, as the PERC has eliminated a legal standard that the PERC relied on to avoid costly arbitrations in between collective bargaining agreements, as well as an incentive for unions to reach an agreement over successor collective bargaining agreements to avoid a contract “hiatus.” Community Transit relied on the existing law to support its refusal to arbitrate grievances during the year after the parties’ contract expired in 2007. ATU identified multiple grievances that Community Transit declined to arbitrate. CP 15. ATU filed the unfair labor practice complaint in order to force Community Transit to arbitrate those grievances. *Id.* When its complaint was dismissed, ATU appealed, asking the PERC to change the law. CP 15. Although the PERC affirmed the legality of Community Transit’s actions under long-standing precedent,

there can be little doubt that unions will use the new rule to their competitive advantage.

Collective bargaining agreements can last a maximum of six years. RCW 41.56.070. Employers have a duty to negotiate in good faith, and to execute an agreement regarding collective negotiations on personnel matters. RCW 41.56.030(4); RCW 41.56.100. Community Transit has to negotiate successor agreements to existing collective bargaining agreements. It, and all other public employers of interest arbitration eligible employees, has lost the negotiating leverage of the union's knowledge that a failure to reach an agreement will mean a loss of the right to arbitrate grievances for some period of time.

Second, Community Transit, as a public employer, is clearly within the zone of interests the PERC is required to consider. The purpose of the PECBA, which PERC administers, is to:

to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers

RCW 41.56.010. A judgment that the PERC's creation of a unfair labor practice (or holding with prospective application to public employers) was unlawful would ensure that Community Transit and other public employers are not required to submit to an administrative rule that was not issued pursuant to mandatory administrative rule-making requirements.

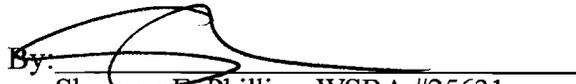
V. CONCLUSION

For the reasons discussed above, Community Transit respectfully requests that this Court invalidate the portion of the PERC's Decision 10267-A in which it pronounced a change in the law and award Community Transit its attorneys' fees and costs.

DATED this 28th day of October, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

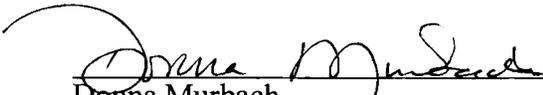
I hereby certify under penalty of perjury according to the laws of the State of Washington that on this date I caused true and correct copies of the foregoing Brief of Appellant to be served by hand delivery, addressed to the following:

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DATED October 28, 2011, at Seattle, Washington.



Donna Murbach