

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

No: 79702-12001 DEC 11 P 2. 5 8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COMMUNITY TELECABLE OF SEATTLE, INC., COMCAST OF
WASHINGTON I, INC., AND COMCAST OF WASHINGTON IV,
INC.,

Petitioners,

vs.

CITY OF SEATTLE,

Respondent,

City's Answer to Motion to Admit Additional Evidence

THOMAS A. CARR
Seattle City Attorney

Kent C. Meyer, WSBA #17245
Assistant City Attorney
Attorneys for Respondent

Seattle City Attorney's Office
600 - 4th Avenue, 4th Floor
P.O. Box 94769
Seattle; Washington 98124-4769
(206) 684-8200:

COPY

I. INTRODUCTION

Defendant/Respondent City of Seattle ("City") submits this Answer

in opposition to petitioners' ("Comcast") motion to admit additional evidence and for judicial notice.

II. LEGAL AUTHORITY AND ARGUMENT

A. The Court Should Deny Comcast's Motion Because It Is Improper To Decide A Summary Judgment Motion Based On Inadmissible Evidence.

In its motion, Comcast ignores the threshold issue of the admissibility of the evidence offered. The audit reports offered as additional evidence on appeal to this Court by Comcast are inadmissible hearsay. This is an appeal of cross-motions for summary judgment filed by Comcast and the City. The court of appeals reviewed the trial court's decision de novo and that is the standard of review for this court. *U.S. Tobacco Sales v. Dep't. of Rev.*, 96 Wn. App. 932, 936, 982 P.2d 652 (1999). A court considering a summary judgment motion cannot consider inadmissible evidence. CR 56(e). *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986). Thus, this Court cannot make a de novo review of a summary judgment motion based on inadmissible evidence.

B. The Audit Reports Are Hearsay Under ER 801 And Do Not Fall Within The Public Records Exception To The Hearsay Rule:

The audit reports are hearsay because Comcast wants to use the

reports' conclusions to interpret the Department of Revenue's Excise Tax Advisory. Under ER 801(c), hearsay is defined as follows:

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c). *See In re Estate of Jones*, 152 Wn.2d 1, 13 n.5, 93 P.3d 147 (2004) (court excluded property tax assessment offered to prove value of property); *Tire Towne, Inc. v. G & L Service Co.*, 10 Wn. App. 184, 190, 518 P.2d 240 (1973) (tax document filed with county assessor allegedly showing ownership of property was inadmissible hearsay, especially because preparer was not available for cross-examination on his conclusions).

Despite arguing to the contrary, Comcast is offering documents containing statements made by a Washington Department of Revenue auditor to prove the truth of the auditor's statements. Comcast wants to use the statements in the audit report to prove that Comcast is an internet service provider and that the court of appeals misinterpreted the Department's Excise Tax Advisory No. 2029.04.245 ("ETA"). Comcast contends that the auditor's actions contradict the court of appeals reading of the ETA below. To demonstrate that Comcast is offering the reports for

the truth of the statements contained therein, the Court merely needs to ask: If the statements in the audit reports are not true, would they have any relevance? They would not. The audit reports are only useful to Comcast if the statements therein are true and contradict the court of appeals reading of the ETA.

The proffered audit reports are a classic example of why hearsay evidence is not admissible and should not be admissible—such evidence relies on an out-of-court declarant for its credibility. 5B Karl B. Teglund, *Washington Practice: Evidence* § 801.2 (5th ed.2007). The statements offered by Comcast have not been subjected to cross-examination or rebuttal evidence. Comcast wants to avoid the test of credibility that the evidence would be subjected to at the trial court. The City has not had the opportunity to examine the auditor to see if he considered the ETA, to see if the auditor would revise his conclusions if provided with other information, to see if the auditor now considers his conclusions erroneous, to see what facts about Comcast's Seattle operations he considered, to see what information Comcast provided, to see who else at the Department reviewed or approved the audit, to see if others at the Department considered the ETA and its effect on the audit, or to see if there are other audit reports of other taxpayers based on similar facts that reach different conclusions. By offering the audit reports for the first time to the Supreme

Court, Comcast is avoiding any scrutiny of the evidence in an adversarial proceeding.

The audit reports are hearsay and do not fall within any of the exceptions to the hearsay rule. The audit reports are not admissible as a public record under ER 803(a)(8) and RCW 5.4.040. Records offered under that exception to hearsay rule must contain facts, not conclusions or opinions involving the exercise of judgment. This Court has ruled that:

[N]ot every public record is automatically admissible under [this] statute...: In order to be admissible, a report or document, prepared by a public official must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion. The subject matter must relate to facts which are of a public nature; it must be retained for the benefit of the public. and there must be express statutory authority to compile the report.

State v. Monson, 113 Wn.2d. 833, 839, 784 P.2d 485 (1989) (quoting *Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941)). See also *Bierlein v. Byme*, 103 Wn. App. 865, 14 P.3d 823 (2000) (court excludes EEOC letters determining that probable cause exists to believed discrimination occurred); *Tire Towne*, 10 Wn. App. at 190 (court excludes hearsay tax filing offered not for the purpose of proving that a filing had been made, but for the purpose of proving alleged claim of ownership); *In re Estate of Jones*, 152 Wn.2d at 13 n.5 (property tax assessment excluded because it offered conclusions involving the exercise of judgment or discretion).

Here, Comcast is offering the audit reports specifically for the conclusions and opinions of the auditor. The reports also contain facts that are not of a public nature. Indeed, the audit reports are confidential and disclosure of an audit report by the state is a misdemeanor. RCW 82.32.330. The audit reports are hearsay and do not fall within the public records exception to the hearsay rule.¹

C. The Audit Reports Do Not Meet The Criteria For Admission For The First Time On Appeal Under RAP 9.11.

Even if the audit reports were admissible evidence, they would not qualify for admission on appeal to the Supreme Court under RAP 9.11.

Under that rule, a court has authority, under the following special circumstance, to admit evidence on appeal:

(a) Remedy Limited. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

¹ In addition, the audit reports are not admissible because they have not been properly authenticated by the public official as required by RCW 5.44.040 and ER 902. *Towne v. G & L Service Co.*, 10 Wn. App. 184, 190, 518 P.2d 240 (1973).

RAP 9.11(a). In order to qualify for this limited remedy, the proffered evidence must meet all the listed criteria.

The audit reports offered by Comcast do not meet the first two criteria because the reports are not needed to fairly resolve the issues on review and the additional evidence would not change the decision being reviewed. The issue on appeal is whether Comcast provides network telephone service as defined under RCW 82.04.065(2). The conclusions contained in a single audit report do not resolve this issue. An audit report is not a rule or official interpretive statement or policy by the Department of Revenue. Furthermore, there is no evidence whether the auditor considered or attempted to apply the Department policy stated in the ETA. If the auditor failed to follow the ETA, that does not affect the ETA--it simply means that the auditor erred. The audit reports are not legal precedent. In short, an official interpretive statement of an agency, such as an ETA, trumps the conclusions of an audit report. The conclusions contained in the audit reports are not precedent or interpretive statements and have no impact on the court of appeals' decision. *See Dept. of Labor & Industries v. Brugh*, 135 Wn. App. 808, 823, 147 P.3d 588 (2006) (court refuses to consider letter from federal agency that does not contain formal interpretation of federal law.)

In addition, Comcast cannot meet sixth criteria of RAP 9.11(a) by showing that it would be inequitable to decide the case solely on the evidence already taken in the trial court. This is a de novo review of the trial court's ruling. *US. Tobacco Sales v. Dep't of Rev.*, 96 Wn. App. 932, 936, 982 P.2d 652 (1999). On review of a summary judgment motion, a court considers only the evidence brought before the trial court. RAP 9.12. This Court should now rule on the same evidence considered by the trial court. The parties presented evidence of Comcast's activities in Seattle. The issue for the Court is whether those activities are taxable as network telephone services. It would be inequitable to now introduce new evidence that has not been subject to cross-examination or rebuttal. The City has not had the opportunity to cross-examine the auditor or anyone else at the Department of Revenue regarding the conclusions contained in the audit reports.. The City has not had the opportunity to discover and offer other evidence such as other audits that reach contrary conclusions to rebut the audit reports offered by Comcast. Thus, it would be prejudicial to the City, and therefore inequitable, to accept audit reports as new evidence 'on appeal.

Finally, Comcast does not meet the fourth and fifth criteria of RAP 9.11(a). If the Court determines that the audit reports may be admissible or relevant, the matter should be resolved at the trial court level where the

parties would be able to conduct discovery to rebut the evidence. Indeed, under RAP 9.11(b), if additional evidence is to be taken on appeal, the "the appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence." Here, Comcast is asking that the Court simply accept the audit reports without giving the City an opportunity to rebut or challenge the evidence. There could hardly be a more prejudicial remedy. However, if this Court desires to consider the evidence, then the Court should follow RAP 9.11(b) and direct that the trial court allow discovery-and take the additional evidence.

The case cited by Comcast, *Wash. Fed'n of State Employees v. State*, 99 Wn.2d 878, 665 P.2d 1337 (1983), does not support its position. In *State Employees*, the Court explained that it was faced with an "unusual situation" in a case involving "emergency circumstances." *Id.* at 885. In addition, the case involved the dissolution of an injunction and did not "resolve the merits of the underlying lawsuit." *Id.* at 883. The evidence was submitted only to correct a "procedural deficiency." *Id.* at 885-886. In contrast, in the present case, there is no emergency and Comcast is asking the Court to accept substantive evidence that goes directly to the merits of the case. The Court's acceptance of the evidence in *State Employees* does not support Comcast's request in this case.

D. The City's Citation Of The ETA Does Not Open The Door To Admitting The Audit Reports On Appeal.

The_City properly cited the ETA as legal authority and this citation does not, as Comcast contends, necessitate or justify admitting the audit reports as evidence on appeal. The ETA is cited by the City and the court of appeals as legal authority, whereas the audit reports are simply factual evidence. The Court acknowledged the difference between citations to law and citations to evidence in *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000). In *Ellis*, the court of appeals refused to consider the City's citation to a section of the fire code that was not cited to the trial court. The Supreme Court disagreed and considered the fire code citation, stating: "A fire code provision is not evidence; it is law." *Ellis*, 142 Wn.2d at 460 n.3. The Court held that appellate courts were free to consider laws that were not cited to trial court. *Id.* Similarly, in this case, the City's citation to the ETA was a citation to legal authority and not to new evidence.

The Department of Revenue issues ETAs under the authority granted by the legislature in RCW 34.05.230. That statute states that the legislature encourages agencies to issue interpretive and policy statements:

An agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. To better inform

and involve the public, an agency is encouraged to convert long-standing interpretive and policy statements into rules.

RCW 34.05.230(1 emphasis added), *See Association of Washington Business v. Dept. of Revenue*, 155 Wn.2d 430, 442-443, 120 P.3d 46 (2005). An interpretive statement is "a written expression of the opinion of an agency . . . as to the meaning of a statute or other provision of law, of a court decision, or of an agency order. RCW 34.05.010(8).

The Court relied on an interpretive statement in *Simpson Investment Co. v. Dept. of Revenue*, 141 Wn.2d 139, 161-164, 3 P.3d 741 (2000). In *Simpson*, the Court acknowledged the authority of an agency to issue interpretive statements and found that the Department of Revenue's Excise Tax Bulletin "established an interpretive rubric through which to analyze [RCW 82.04.4281] deduction claims." *Simpson*, 141 Wn.2d at 161. *See also Western Telepage, Inc. v. City of Tacoma*, 140 Wash.2d 599, 611-612, 998 P.2d 884 (2000) (court may give deference to agency policy statement).

The ETA at issue here states on its face that it is an "interpretive statement" issued under RCW 34.05.230. The ETA further states that "ETAs explain the Department's policy regarding how tax law applies to a specific issue or a specific set of facts." ETA, p. 1. The ETA states that it is binding on the Department until superseded by "Court action,

Legislative action, rule adoption, or an amendment to or cancellation of the ETA." ETA, p. 1.

Furthermore, under RCW 34.05.230(4), an agency issuing an interpretive statement must submit to the State Code Reviser for publication in the Washington State Register a statement describing the subject matter of the interpretive or policy statement. Here, the Department published notice of the ETA in the Washington State Register at Wash. St. Reg. 06-06-047 (February 24, 2006).

The Department of Revenue issued an interpretive statement as authorized by the legislature that explained the Department's taxation of network telephone service. The City properly cited this ETA in its brief and, as permitted by RAP 10.4(c), attached the ETA in an appendix. The ETA is a legal authority that the court of appeals correctly relied upon. In contrast, Comcast is now attempting to introduce a confidential audit report that contains the opinions and conclusions of an auditor in a specific case. The citation of legal authority by the City and the court of appeals does not permit the introduction of new factual evidence. on appeal.

E. Comcast Waived Any Objection To The Citation To The ETA.

If Comcast considered the City's citation to the ETA to be improper, Comcast could have objected to the court of appeals or asked the court of appeals to reconsider its decision for that reason. Comcast did

not do this. Comcast also did not petition this Court for review on the grounds that the City improperly cited the ETA or that the court of appeals improperly relied on the ETA. Comcast is now, in effect, making an untimely objection to the ETA by arguing that the ETA justifies the introduction of new evidence on appeal. By seeking this remedy, Comcast is attempting to avoid the rule that limits review by this Court to issues raised in the petition for review. RAP 13.7(b). *Garth Parberry Equipment Repairs, Inc. v. James*, 101 Wn.2d 220, 225 n.2, 676 P.2d 470 (1984). Comcast waived any objection to the citation to the ETA and cannot now avoid that waiver by relying on the ETA to justify the admission of additional evidence.

F. Comcast Cannot Avoid RAP 9.11 By Asking The Court To Take Judicial Notice Of The Audit Reports.

The ability of a court to take judicial notice of certain evidentiary facts under ER 201 does not relieve a party from meeting the requirements of RAP 9.11 before introducing additional evidence on appeal. The Court addressed this issue in *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 14 P.3d 133 (2000). In *King County*, the County asked the Court to take judicial notice of a certified copy of a deed following oral argument. The Court refused, finding that the deed could not be admitted under RAP 9.11:

Even though ER 201 states that certain facts may be judicially noticed at any state of a proceeding, RAP 9.11 restricts appellate consideration of additional evidence on review. The County offers no justification under the RAP 9.11 criteria for its belated offer of the deed of right.

King County, 142 Wn.2d at 549 n.5. See also *Spokane Research and Defense Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005) (RAP 9.11 applies in addition to normal judicial notice standard.)

Similarly, in this case, the Court cannot take judicial notice of the audit reports unless Comcast first meets the requirements of RAP 9.11.

In addition, the audit reports are not the type of evidence eligible for judicial notice under ER 201. The rule specifically excludes judicial notice of disputed facts that are not generally known to the public:

Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

ER 201(b). The audit reports do not contain generally known facts like the weather or other official statistics. The reports contain the confidential opinions and conclusions of an auditor that are disputed. The reports are not a source whose accuracy "cannot be reasonably questioned." The City questions the auditor's conclusions, findings, and interpretation of state law. Unlike the situations in the cases cited by Comcast, this case involves a disputed audit report that is not subject to judicial notice.

The Department of Revenue's audit is not part of this action between the City and Comcast. A court will not take judicial notice of facts from a separate proceeding even if, unlike this case, the matter involves the same parties. *Spokane Research and Defense Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005). In *Spokane Research*, a nonprofit corporation and intervener journalist sought documents from the City of Spokane under the Public Disclosure Act. The city asked the court to take judicial notice of the trial court's findings and conclusions in a related-matter between the city and the journalist. The Court refused to take notice because the issues in the second case had not been litigated in the first case. *Id.* at 97-98. Similarly, in this case, the City did not have the opportunity to challenge the auditor's work in the Comcast audit. That audit is disputed and is not a proper subject of judicial notice.

Comcast relies on the mere fact that a state agency prepared the audit as grounds for judicial notice. In *Dept. of Labor & Industries v. Brugh*, 135 Wn. App. 808, 147 P.3d 588 (2006), in a dispute over the payment of overtime by postal contractors, the Department asked the court to take judicial notice of a letter from the U.S. Department of Labor. *Id.* at 822. The court found that the letter did not meet the requirements of ER 201. The court said that this was especially true considering the fact that the 1994 letter was not a formal interpretation of a U.S. government

agency . *Id.* at 823. *See also Avery v. Washington Dept. of Social and Health Services*, 150 Wash.2d 409, 415 78 P.3d 634 (2003) (while deciding one case, court cannot take judicial notice of records of other independent and separate proceedings.) In the present case, Comcast is similarly offering a document that was produced by a state agency employee in a separate matter, but does not express a formal interpretation of state law. Accordingly, this Court should deny Comcast's request for judicial notice of the audit reports.

III. CONCLUSION

This Court should deny Comcast's request to supplement the record with audit reports prepared by a Department of Revenue auditor. The reports do not meet the criteria under RAP 9.11 because the reports are inadmissible hearsay and not relevant to the issue before this Court in this case. The reports are not needed to fairly resolve this case and would not change the court of appeals' decision being reviewed. It would be inequitable to consider the reports because the City did not have the opportunity at the trial court level to respond to or challenge the reports through cross-examination or discovery. The reports contain disputed conclusions and findings and, therefore are not proper subjects of judicial notice.

DATED this (7 day) of December, 2007.

THOMAS A. CARR
Seattle City Attorney

By:


Kent C. Meyer, WSBA #17 15
Attorneys for Respondents of Seattle

CERTIFICATE OF SERVICE DEC 11 P 2: 58

I, certify that on this date I caused a copy of appellant City, of - - -
Seattle's Answer to Motion to Admit Additional Evidence to be filed with
the Washington Supreme Court and served legal messenger on:

Randy Gainer
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045

Robert L. Mahon
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

And by U.S. Mail on:

Jon. B. Davis
Sutherland, Asbill & Brennan, LLP
1275 Pennsylvania Avenue NW
Washington, D.C. 20004-2415

Signed at Seattle, Washington, this ri day of December, 2007.



Marisa Johnson