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No. 58490-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

**INDOOR BILLBOARD/WASHINGTON, INC.,
individually and on behalf of a class of persons and/or entities
similarly situated,**

Appellant/Cross-Respondent,

v.

INTEGRA TELECOM OF WASHINGTON, INC.,

Respondent/Cross-Appellant.

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BRIEF OF RESPONDENT/CROSS-APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF ISSUES ON REVIEW 1

III. ASSIGNMENT OF ERROR ON CROSS REVIEW 2

 A. Assignment of Error..... 2

 B. Issues Pertaining to Assignment of Error on Cross
 Review 3

IV. STATEMENT OF THE CASE..... 3

 A. The Parties 3

 B. Integra's Price Lists and "PICC" Surcharge..... 3

 C. Integra Disclosed the PICC Surcharge in Its Initial
 Price Quote to Indoor Billboard..... 4

 D. Indoor Billboard Obtains Information From Integra's
 Competitor Regarding the PICC Surcharge..... 6

 E. Integra Assessed PICC Surcharges..... 9

 F. Indoor Billboard Independently Investigated Before
 Paying the PICC Surcharges..... 9

 G. Most CLECs Charged a PICC Surcharge 12

 H. Procedural History of Action..... 13

V. SUMMARY OF ARGUMENT 14

VI. ARGUMENT..... 17

 A. The Trial Court Properly Granted Summary Judgment
 Because Indoor Billboard Failed to Establish Essential
 Elements of Its CPA Claim..... 17

 1. Indoor Billboard failed to establish an unfair or
 deceptive trade practice..... 19

 a. Integra never told Indoor Billboard that the
 PICC surcharge was an FCC-regulated
 surcharge..... 20

b.	The label "PICC" does not state or imply that the surcharge is a governmentally regulated surcharge	23
c.	Integra's inclusion of the PICC surcharge on its invoice under the section labeled "Taxes and Surcharge" is not deceptive.....	24
2.	Indoor Billboard failed to establish the requisite causal link	28
a.	Indoor Billboard is required to prove that it actually relied on a misrepresentation made by Integra to establish causation	29
b.	Indoor Billboard cannot establish actual reliance.....	32
3.	Indoor Billboard's CPA claim is barred by the voluntary payment doctrine	36
B.	If This Court Reverses the Summary Judgment Decision, Then Integra Requests Cross Review of the Trial Court's Erroneous Denial of Integra's Motion to Dismiss.....	38
1.	The WUTC has exclusive original jurisdiction over disputes concerning charges and overcharges	38
2.	Indoor Billboard's claim is within the WUTC's exclusive original jurisdiction.....	43
3.	RCW 80.36.360 does not limit the grant of exclusive original jurisdiction under RCW 80.04.240.	48
VII.	CONCLUSION.....	50
VIII.	APPENDIX.....	A-1

TABLE OF AUTHORITIES

Cases

<i>Abraham v. Dep't of Labor & Indus.</i> , 178 Wash. 160, 34 P.2d 457 (1934).....	40
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).....	18
<i>Anderson v. Weslo, Inc.</i> , 79 Wn. App. 829, 906 P.2d 336 (1995).....	17
<i>Belcher v. Tacoma Eastern R. Co.</i> , 99 Wash. 34, 168 P. 782 (1917).....	42, 44
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).....	18
<i>Cooper's Mobile Homes, Inc. v. Simmons</i> , 94 Wn.2d 321, 617 P.2d 415 (1980).....	29
<i>D.J. Hopkins, Inc. v. GTE Northwest</i> , 89 Wn. App. 1, 947 P.2d 1220 (1997).....	44, 45, 46, 47
<i>Dwyer v. J.I. Kislak Mortgage Corp.</i> , 103 Wn. App. 542, 13 P.3d 240 (2000).....	25
<i>Edmonds v. John L. Scott Real Estate, Inc.</i> , 87 Wn. App. 834, P.2d 1072 (1997).....	32
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	18, 28, 30
<i>Hewitt Logging Co. v. Northern Pac. Ry. Co.</i> , 97 Wash. 597, 166 P. 1153 (1917).....	42, 44
<i>In re estate of Peterson</i> , 102 Wn. App. 456, 9 P.3d 845 (2000).....	38
<i>In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers</i> , Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, 16 F.C.C.R. 9923, 2001 WL 435698 (2001)	22
<i>Ledgerwood v. Lansdowne</i> , 120 Wn. App. 414, 85 P.3d 95 (2004).....	40

<i>Mason v. Mortgage Am., Inc.</i> , 114 Wn.2d 842, 792 P.2d 142 (1990).....	32
<i>Mayer v. Sto Indus., Inc.</i> , 123 Wn. App. 443, 98 P.3d 116 (2004 (citing <i>Nuttall</i>), <i>rev'd in part on other grounds</i> , 156 Wn.2d 677, 132 P.3d 115 (2006)).....	28
<i>Mulcahy v. Farmers Ins. Co.</i> , 152 Wn.2d 92, 95 P.3d 313 (2004).....	17
<i>Niven v. E.J. Bartells Co.</i> , 97 Wn. App. 507, 983 P.2d 1193 (1999).....	36
<i>Nuttall v. Dowell</i> , 31 Wn. App. 98, 639 P.2d 832 (1982).....	passim
<i>Pickett v. Holland Am. Line-Westours, Inc.</i> , 101 Wn. App. 901, 6 P.3d 63 (2000), <i>rev'd</i> , 145 Wn.2d 178, 35 P.3d 351 (2001).....	23, 29, 30
<i>Pickett v. Holland Am. Line-Westours, Inc.</i> , 145 Wn.2d 178, 35 P.3d 351 (2001).....	16, 31, 32
<i>Robinson v. Avis Rent A Car System, Inc.</i> , 106 Wn. App. 104, 22 P.3d 818 (2001).....	passim
<i>Shields v. Schorno</i> , 51 Wn.2d 737, 321 P.2d 905 (1958)	38
<i>Speckert v. Bunker Hill Arizona Mining Co.</i> , 6 Wn.2d 39, 106 P.2d 602 (1940).....	36
<i>State ex rel. Goss v. Metaline Falls Light & Water Co.</i> , 80 Wash. 652, 141 P. 1142 (1914)	41
<i>State ex rel. Home Telephone & Telegraph Co. of Spokane v. Trial Court</i> , 110 Wash. 396, 188 P. 404 (1920)	43
<i>Transamerica Title Ins. Co. v. Johnson</i> , 103 Wn.2d 409, 693 P.2d 697 (1985).....	28
<i>White v. State</i> , 131 Wn.2d 1, 929 P.2d 396 (1997).....	17, 18
<i>Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.</i> , 134 Wn.2d 692, 952 P.2d 590 (1998).....	17
<i>Young v. Key Pharmaceuticals., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	18

Statutes

1911 Wash. Session Laws, ch. 117, sec. 91 (A-59-A-60)..... 40, 41, 42
RCW 19.86.020 1
RCW 19.86.170 45, 48, 49
RCW 80.04.110 39
RCW 80.04.220-.230 39, 41, 44, 49
RCW 80.04.220-.240 passim
RCW 80.04.240 passim
RCW 80.36.310-330 3
RCW 80.36.360 48, 49
RCW Chapter 19.86..... 1
RCW Chapter 80.04..... 39

Regulations and Rules

47 C.F.R. § 69.153 22
CR 56(c)..... 17

I. INTRODUCTION

Superior Court Judge Mary Roberts correctly granted summary judgment in favor of Integra Telecom of Washington, Inc. ("Integra") in this purported class action brought by Indoor Billboard/Washington, Inc. ("Indoor Billboard"). The judgment of the trial court should be affirmed because: (1) no genuine issue of material fact exists; (2) Indoor Billboard failed to establish the essential elements of its claim under Washington's Consumer Protection Act ("CPA"), RCW Chapter 19.86, in particular the elements of an "unfair or deceptive" practice and causation; and (3) the voluntary payment doctrine bars Indoor Billboard's claim for damages.

There is also an alternative basis supporting the judgment of dismissal. This action is, in essence, a telephone customer's claim that Integra's surcharge labeled "PICC" was an unreasonable or unlawful charge. Such claims are within the exclusive original jurisdiction of the Washington Utilities and Transportation Commission ("WUTC"). If this Court were inclined to vacate or reverse the summary judgment, it should address Integra's cross review and affirm the trial court's judgment of dismissal on this alternative basis.

II. STATEMENT OF ISSUES ON REVIEW

1. Is it an unfair or deceptive trade practice in violation of RCW 19.86.020 for Integra to assess and collect a surcharge labeled

"PICC" where (a) that practice does not violate any FCC regulation, and (b) Integra disclosed the surcharge in its initial price quote and further explained the nature of the surcharge during the purchase transaction with Indoor Billboard?

2. Is there a causal link between the allegedly unfair or deceptive trade practice and Indoor Billboard's payment of the PICC surcharge where (a) Integra disclosed the surcharge in its initial price quote, (b) Integra discussed the nature of the surcharge with Indoor Billboard before it signed Integra's service agreement, and (c) Indoor Billboard conducted its own investigation into the nature of the surcharge before paying it?

3. Is Indoor Billboard's claim for damages barred by the voluntary payment doctrine where Indoor Billboard was fully informed of the facts before paying the surcharges?

III. ASSIGNMENT OF ERROR ON CROSS REVIEW

A. Assignment of Error

1. The trial court erred in entering its order of November 8, 2005, denying Integra's motion to dismiss Indoor Billboard's CPA claim.¹

¹ The order on the motion to dismiss is erroneously dated October 8, not November 8, 2005. (CP 39.)

B. Issues Pertaining to Assignment of Error on Cross Review

1. Does the WUTC have exclusive original jurisdiction over a complaint that a public service company, such as Integra, has charged an unreasonable or an unlawful rate or charge, which is the subject of Indoor Billboard's CPA claim?

IV. STATEMENT OF THE CASE

A. The Parties

Indoor Billboard is a Washington corporation that purchased local telephone service from Integra. (CP 44, 47.) Integra is an Oregon corporation that provides telephone and data services to business customers in Washington as a "competitive telecommunications company" pursuant to RCW 80.36.310-330. (CP 107, 47.) Integra is commonly known in the telecommunications industry as a competitive local exchange company, or "CLEC." (CP 108.)

B. Integra's Price Lists and "PICC" Surcharge

Integra started to charge its Washington customers a surcharge labeled "PICC", in the amount of \$4.21 per line per month, in October 2001. (CP 108.) The PICC surcharge at issue was listed in Integra's Washington price list. (CP 45.) That price list stated that Integra would assess a presubscribed interexchange carrier charge, or "PICC," at a rate of \$4.21 per line per month to "[a]ll customers, whether or not they have pre-

subscribed to an inter-exchange (long distance) carrier." (CP 45.) In January 2005, Integra filed a revised price list with the WUTC that instituted certain "telephone line surcharges . . . including: . . . presubscribed interexchange carrier charge[s]." (CP 45.) Integra stopped charging its Washington customers the PICC surcharge in August 2005. (CP 108.)

C. Integra Disclosed the PICC Surcharge in Its Initial Price Quote to Indoor Billboard

On March 24, 2005, Erin McCune, an Integra sales representative, first contacted James Shulevitz, Vice President of Indoor Billboard, about the possibility of Indoor Billboard's purchasing telephone service from Integra. (CP 121.) Mr. Shulevitz had been solely responsible for the purchase of telecommunications services in Washington, Oregon, and California for Indoor Billboard and its affiliate since 1991. (CP 115-119.)

On March 25, 2005, Ms. McCune sent an email message to Mr. Shulevitz with an attached written price quote for local and long-distance telephone and data services. (CP 121-122.) That written price quote listed Integra's proposed service charges for telephone and data services. (CP 176.) It also listed three surcharges that Integra would charge Indoor Billboard. (CP 176.) One of those listed surcharges was a "PICC" surcharge in the amount of \$4.21 per line, per month. (CP 176.)

Another listed surcharge was the "Federal Access Charge" in the amount of \$6.11 per line, per month. (CP 176.)

Mr. Shulevitz promptly responded by email to Ms. McCune's price quote with several questions. (CP 165.) He specifically questioned Integra's PICC surcharge listed on the price quote, stating: "I am not interested in your LD [long-distance] program as it appears over 30% more than what I am currently paying—so there would be no need to charge me PICC charges." (CP 165.) During his deposition, Mr. Shulevitz explained that when he received the price quote, he believed that the PICC surcharge was a charge that long-distance carriers assess their customers and that if he did not purchase Integra's long-distance service, then Integra should not charge Indoor Billboard a PICC surcharge. (CP 123.) In his email to Ms. McCune, he also questioned the Federal Access Charge, asking "Why would Federal access charges be different between Integra and Qwest (and why is yours higher)?" (CP 165.) At that time, Qwest was Indoor Billboard's telecommunications service provider in Washington. (CP 122.)

Ms. McCune answered Mr. Shulevitz's questions the next business day after receiving his email. (CP 164.) With respect to Integra's PICC surcharge, Ms. McCune told Mr. Shulevitz that Integra would charge Indoor Billboard its PICC surcharge regardless of whether Indoor

Billboard subscribed to Integra's long-distance service in addition to Integra's local service. (CP 164.) ("I have no problem with you using a different LD carrier, however the PICC unfortunately cannot be waived, regardless of whether or not you use Integra as your LD carrier.") She also answered his question about the amount of Integra's Federal Access Charge surcharge as compared with the amount of Qwest's Federal Access Charge by explaining: "CLEC surcharges, while monitored by the FCC, are not set by the FCC. They are determined by the carrier." (CP 164.)

D. Indoor Billboard Obtains Information From Integra's Competitor Regarding the PICC Surcharge

While he was evaluating Integra's price quote, Mr. Shulevitz solicited a competitive price quote from another CLEC, Eschelon, and he carefully and closely compared the two companies' price quotes, including their surcharges. (CP 126-127.) Mr. Shulevitz forwarded some of Integra's proposed prices to Eschelon to see if Eschelon could offer Indoor Billboard a lower price than Integra had quoted. (CP 167.) In response to Mr. Shulevitz's email, Frank Westby, an Eschelon sales representative, told Mr. Shulevitz that he should also evaluate and compare the amounts of the surcharges assessed by CLECs. Mr. Westby wrote: "Some other things to also look for with our competitors is their PICC Surcharge, LNP Surcharge & also Long Distance." (CP 167.) Mr. Westby also told

Mr. Shulevitz that Eschelon's PICC surcharge was \$2.35 per line.

(CP 169.)

Mr. Shulevitz responded to Eschelon the same day by asking: "Is the PICC charge federally mandated? How do you compute that number—in other words, where does that number come from and would it be the same for all carriers and if not why not." (CP 169.) Mr. Westby promptly responded: "No, it's not regulated by the government. The price is determined by the Long distance carrier/Phone company. This is why the charges vary [sic] so greatly." (CP 171.) Mr. Shulevitz had no basis not to believe what Mr. Westby told him. (CP 130.) Mr. Shulevitz testified in his deposition that, after communicating with Mr. Westby, Mr. Shulevitz understood that the PICC "was a charge that could be set and was set by individual companies." (CP 129.)

Mr. Shulevitz raised the PICC surcharge one more time with Ms. McCune prior to agreeing to purchase telecommunications services from Integra. (CP 175.) The same day that Mr. Shulevitz was emailing with Mr. Westby, Mr. Shulevitz wrote another email to Ms. McCune, comparing Integra's PICC surcharge to Eschelon's and asking why

Eschelon's PICC surcharge was approximately 44 percent lower than Integra's.² (CP 175.) Ms. McCune answered his question the next day:

Different CLECs have different PICC and LNP charges (as well as other charges), and these can vary by market. Our PICC and LNP are different in the Oregon market than in Washington, due to different market conditions. I am unable to change them, so I would recommend looking at the whole picture (line rate plus all surcharges) to make an accurate comparison. I try very hard to include all charges that will be on the bill, so there aren't any "hidden charges" that show up after you switch.

(CP 174.)

A few days later, on April 4, 2005, Mr. Shulevitz asked Ms. McCune to send him Integra's contract. (CP 174.) On April 27, 2005, Mr. Shulevitz executed Integra's service agreement on behalf of Indoor Billboard. (CP 155-156.) In deciding to switch to Integra's local telephone services, Mr. Shulevitz compared the total price, including the service charges and all surcharges, of each carrier that he was considering. (CP 131.)

When Mr. Shulevitz signed the contract with Integra, he knew that Integra was going to charge Indoor Billboard a PICC surcharge in the amount of \$4.21 per line regardless of whether Indoor Billboard subscribed to Integra's long-distance service in addition to Integra's local

² "Finally, I have included some discussion from a competitor of yours in Seattle regarding PICC charges. . . . However, Eschelon's PICC charge is roughly 44% below Integra's. Why would that be?" (CP 175.)

service. (CP 124-125.) At the time he signed Integra's service agreement, Mr. Shulevitz also knew that the amount of the PICC surcharge was set by individual companies and not by the FCC. (CP 128-130.) Also at that time, Mr. Shulevitz did not believe that Integra would remit the money it collected as a PICC surcharge to the government. (CP 120.)

Mr. Shulevitz has been satisfied with the price and quality of the local telephone and data services that Indoor Billboard has been receiving from Integra. (CP 152.)

E. Integra Assessed PICC Surcharges

On or about June 8, 2005, Integra issued its first invoice to Indoor Billboard, covering the period May 13, 2005 through June 7, 2005, in the amount of \$524.21, including a surcharge of \$39.30 described as a "PICC." (CP 47, 54-56.) On or about July 8, 2005, Integra issued a second invoice to Indoor Billboard in the amount of \$132.36, including a surcharge of \$21.05 described as a "PICC." (CP 47-48, 59-62.) Integra's third invoice to Indoor Billboard, dated August 8, 2005, did not include a PICC surcharge because Integra had stopped charging it by that time. (CP 48, 63-65.)

F. Indoor Billboard Independently Investigated Before Paying the PICC Surcharges

Mr. Shulevitz testified that he was still "confused as to the nature" of Integra's PICC surcharge after receiving Integra's first invoice, dated

June 8, 2005. (CP 134-135.) Mr. Shulevitz thus undertook his own investigation into the nature of Integra's PICC surcharge before authorizing payment of that first invoice. (CP 134-135.) Mr. Shulevitz first sent an email to his friend, Mark Berkovitch, who worked as a sales agent for several telephone service providers. (CP 133, 178-179.) In his email, Mr. Shulevitz wrote: "I just got my Integra bill and the PICC charge is on it. Do you have the regs on this or something to combat the bill?" (CP 179.) Mr. Berkovitch wrote back and directed Mr. Shulevitz to a description of a PICC surcharge on the FCC's website. (CP 178.) Mr. Berkovitch also wrote: "Here is the FCC website which states that LD companies pay the local phone company the PICC fee, so Integra is charging you and collecting it from TNCI, a double dip if you ask me." (CP 178.)

Mr. Shulevitz then reviewed the FCC website. (CP 136.) Not satisfied that he understood the surcharge, Mr. Shulevitz next called the FCC to inquire about the appropriateness of Integra's PICC, and was told that, as a CLEC, Integra was not regulated by the FCC, so the FCC could not help Indoor Billboard. (CP 136-137.) The FCC representative did not tell Mr. Shulevitz that there was anything wrong with Integra's PICC surcharge. (CP 138-141.) Mr. Shulevitz then called the WUTC for help with his "problem." (CP 137.) The WUTC representative told

Mr. Shulevitz that she was not aware that Integra's PICC surcharge was under the WUTC's regulation, and suggested that Indoor Billboard pay the bill and see if the charge appeared the next month. (CP 137.)

Next, on June 15, 2005, Mr. Shulevitz called Integra's customer service department. (CP 138.) He told Integra's customer service representative that the FCC's website said a PICC surcharge is charged only by a long-distance carrier, and that Integra is not his long-distance carrier. (CP 144.) Integra's representative told him that Integra's PICC surcharge was a "legitimate charge and they had every right to charge it." (CP 146.)

When he authorized payment of the first Integra invoice, Mr. Shulevitz "wasn't certain" whether the PICC was an appropriate surcharge. (CP 147.) Following his June 15 discussion with Integra's representative, Mr. Shulevitz was still "confused" by the PICC surcharge. (CP 145.) His confusion was based on the information that he had received from Eschelon, Mr. Berkovitch, the FCC, and the WUTC, as well as Integra. (CP 149.) Nevertheless, he authorized payment of Integra's invoice because he wanted to set the right tone for his relationship with Integra and start that relationship on a good note. (CP 147-148.)

G. Most CLECs Charged a PICC Surcharge

Other CLECs in Washington have charged their customers a surcharge labeled "PICC." (CP 108.) As noted above, Eschelon, which operates as a CLEC in Washington, informed Indoor Billboard in March 2005 that it would charge Indoor Billboard a PICC surcharge in the amount of \$2.35 if Indoor Billboard purchased local telephone service from Eschelon. (CP 169.)

Before Integra introduced the PICC surcharge in the fall of 2001, it conducted a survey of the surcharges its competitors were charging their local service customers. (CP 108.) Integra personnel reviewed actual customer bills issued by their competitors and reviewed tariffs and price lists filed with state commissions. (CP 108.) Integra learned that AT&T and McLeodUSA, other CLECs, charged their local service customers in the state of Washington a surcharge labeled "PICC." (CP 108.) Integra's survey of several other states showed that Eschelon, XO, Shared Communications, and POPP Telecom, other CLECs, also charged their local service customers a surcharge labeled "PICC." (CP 108.) Integra surveyed its competitors again in August 2005, and learned that the following CLECs were charging their local service customers a surcharge labeled "PICC" in Washington: McLeodUSA, XO, and Eschelon. (CP 108.)

Indoor Billboard's affiliate, Indoor Billboard Northwest, paid CLEC Eschelon a surcharge labeled "PICC" in the total amount of \$33.85 per month in connection with its purchase of local and long-distance telephone service in Oregon. (CP 183.) At his deposition, Mr. Shulevitz testified that he did not believe this PICC surcharge was deceptive because Eschelon was providing Indoor Billboard long-distance service in addition to local service. (CP 150-151.)

H. Procedural History of Action

On or about August 19, 2005, Indoor Billboard filed this lawsuit against Integra, alleging one claim under the Washington CPA. (CP 43-65.) On October 3, 2005, Integra moved to dismiss on the ground that the WUTC has exclusive jurisdiction or, in the alternative, primary jurisdiction over Indoor Billboard's claim. (CP 1-12.) On November 8, 2005, the trial court entered an order summarily denying Integra's motion to dismiss. (CP 39-40.)

On April 21, 2006, Integra moved for summary judgment on Indoor Billboard's CPA claim. (CP 77-183.) On April 28, 2006, Indoor Billboard moved for class certification of its CPA claim. (CP 347.) On June 2, 2006, the trial court heard oral argument on Integra's motion for summary judgment and granted Integra's motion at the conclusion of the hearing. (CP 290.) The court signed and entered a written order on the

same date. (CP 291-293.) On June 7, 2006, Indoor Billboard moved for reconsideration of the trial court's summary judgment decision. (CP 294-315.) The trial court requested that Integra file a response to the motion for reconsideration (CP 316), which Integra filed on June 19, 2006. (CP 317-28.) On July 2, 2006, the trial court entered an order denying Indoor Billboard's motion for reconsideration and a final judgment dismissing with prejudice Indoor Billboard's action. (CP 333-35, 336-37.)

On July 6, 2006, Indoor Billboard filed its notice of appeal. (CP 338-46.) On August 1, 2006, Integra timely filed its notice of appeal seeking cross review of the trial court's denial of Integra's motion to dismiss. (CP 36-40.)

V. SUMMARY OF ARGUMENT

The trial court properly granted Integra's motion for summary judgment for two independent reasons. First, Indoor Billboard failed to establish that Integra engaged in an unfair or deceptive practice by charging Indoor Billboard a surcharge labeled "PICC" at the exact price that Integra had disclosed to Indoor Billboard before Indoor Billboard chose to purchase telephone service from Integra. Indoor Billboard "admits that Integra's price quotation did indeed disclose that Integra would assess a 'PICC' surcharge in the amount of \$4.21 per line, per month." (Appellant Br. 29-30.) Integra never represented that this

surcharge was regulated by the FCC or was a pass-through of a tax or other governmental charge. As Indoor Billboard also admits, the FCC does not regulate Integra's charges to its customers and the FCC's regulations do not prohibit Integra from assessing and collecting a surcharge labeled "PICC." Integra properly listed the surcharge under the section of the invoice labeled "Taxes and Surcharges." Indoor Billboard argues that Integra failed to disclose "the nature of the surcharge" (*id.* at 30); however, not only did Integra adequately disclose this charge, Indoor Billboard also fails to establish that Integra had a duty to make any additional disclosures. There was nothing whatsoever deceptive about Integra's practice.

Second, even if charging the disclosed "PICC" surcharge were deemed an unfair or deceptive act, Indoor Billboard came forward with no evidence on summary judgment that this act caused any injury to Indoor Billboard. The undisputed evidence shows that Indoor Billboard questioned the validity of Integra's PICC surcharge from the first time it saw it in Integra's price quote. Indoor Billboard then investigated the charge by discussing it with one of Integra's competitors, an independent sales representative of several telecommunications companies, the FCC, and the WUTC. Despite the fact that Indoor Billboard continued to question the validity of the charge, it chose to subscribe to Integra's

services and to pay the two invoices that included the PICC surcharge. Indoor Billboard paid the PICC without protest, not because it was deceived, but because it wanted to get off on the right foot in its relationship with Integra.

Indoor Billboard seeks to evade the causation requirement for a Washington CPA claim by repeatedly invoking a decision that the Supreme Court reversed in *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 35 P.3d 351 (2001). Proof of individual reliance is required to support Indoor Billboard's CPA claim, but even if it were not, causation is undisputedly required and is lacking here. The trial court correctly concluded that there was no genuine issue of material fact and that Integra was entitled to summary judgment as a matter of law.

In its summary judgment order, the trial court noted that its decision was not based on the voluntary payment doctrine. Indoor Billboard's claim for damages is precluded by the voluntary payment doctrine because Indoor Billboard paid the PICC surcharges with full knowledge of the facts. This defense is an alternative basis to affirm the trial court's judgment of dismissal.

If the Court is inclined to vacate or reverse the trial court's summary judgment decision, however, the Court should address Integra's assignment of error on cross review. Pursuant to RCW 80.04.220-.240,

the WUTC, not the Superior Court, has exclusive original jurisdiction over Indoor Billboard's claim that the PICC surcharge was unreasonable or unlawful. Accordingly if the Court reaches the cross review, it should affirm the judgment of dismissal on this basis.

VI. ARGUMENT

A. **The Trial Court Properly Granted Summary Judgment Because Indoor Billboard Failed to Establish Essential Elements of Its CPA Claim**

This Court reviews de novo the trial court's ruling granting summary judgment. *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 833, 906 P.2d 336 (1995). This Court's review is governed by the same standard used by the trial court under CR 56(c). *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). Summary judgment is appropriate if the pleadings, affidavits, answers, depositions and admissions on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Mulcahy v. Farmers Ins. Co.*, 152 Wn.2d 92, 98, 95 P.3d 313 (2004). Once the moving party demonstrates entitlement to summary judgment, the opposing party must go beyond the pleadings and designate specific facts to show that there is a genuine issue for trial. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). The opposing party may not rely on speculation or argumentative assertions that unresolved

factual issues remain. *Id.* at 9. If the evidence is merely colorable or is not significantly probative, summary judgment should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Moreover, if the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

To establish its individual claim under the CPA, Indoor Billboard had to prove each of the following five elements: "(1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to [Indoor Billboard] in [its] business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). A "causal link" must exist between the allegedly unfair or deceptive trade practice and the alleged injury suffered by Indoor Billboard. *Id.* at 793. Integra moved for summary judgment on the grounds that Indoor Billboard could not establish the first and fifth elements of a CPA claim, namely an unfair or deceptive act or practice and causation.

1. Indoor Billboard failed to establish an unfair or deceptive trade practice

In its Complaint, Indoor Billboard alleged that Integra "wrongfully" assessed and collected the PICC surcharge from Indoor Billboard because FCC regulations permit only an incumbent local exchange carrier ("ILEC") to assess a surcharge labeled "PICC." (CP 45-46.) Indoor Billboard claimed that because Integra is not an ILEC, it cannot lawfully assess and collect a surcharge labeled "PICC." (CP 45-46.)

In its motion for summary judgment, Integra showed that the FCC regulations Indoor Billboard relied upon do not forbid CLECs like Integra from assessing and collecting a surcharge labeled "PICC." (CP 95-97.) In view of that showing, Indoor Billboard now concedes that no regulation prohibits Integra from assessing and collecting its PICC surcharge. (Appellant Br. at 29.) Thus, Indoor Billboard did not prove the claim it pled and the trial court properly granted summary judgment.

Indoor Billboard now contends that Integra misrepresented the "nature" of its PICC surcharge to be "a governmentally regulated Presubscribed Interexchange Carrier Charge" by labeling the surcharge "PICC" and by including the surcharge under a section of the invoice labeled "Taxes and Surcharges." (Appellant Br. at 30.) Indoor Billboard's

argument that Integra represented its charge as a so-called "true PICC" when it was not, is a transparent attempt to dress up the claim in its Complaint in slightly different garb. At its essence, however, Indoor Billboard is claiming that Integra may not lawfully charge it a surcharge labeled PICC. There is no support for Indoor Billboard's argument and this Court should reject it.

a. Integra never told Indoor Billboard that the PICC surcharge was an FCC-regulated surcharge

Indoor Billboard claims that Integra committed an unfair or deceptive practice by representing its PICC surcharge as a "true PICC." Indoor Billboard claims a "true PICC" is an FCC-regulated charge that would appear on a telephone customer's bill only if it were passed through by a long-distance carrier or as a direct charge by a local carrier if the customer had not presubscribed to a long-distance carrier. (Appellant Br. at 8-9.) However, Integra never represented to Indoor Billboard that its PICC surcharge was an FCC-imposed or FCC-regulated tax or fee, or that Integra was simply passing through a governmentally imposed tax or fee. Integra also never told Indoor Billboard that its PICC surcharge was the same as the PICC established and regulated by the FCC. In fact, Integra's sales representative, Erin McCune, specifically told Mr. Shulevitz of Indoor Billboard that Integra's PICC surcharge was not set by the federal

government and that it applied to all Integra customers, not just to Integra's long-distance customers. (CP 164.) In other words, Integra never represented to Indoor Billboard that Integra's PICC surcharge was the same PICC surcharge regulated by the FCC for ILECs. To the extent Indoor Billboard concluded that Integra's PICC surcharge was the same as the FCC-regulated PICC, it did so independently of any representation made to Indoor Billboard by Integra and despite the actual representations made by Integra to Indoor Billboard.

Nonetheless, Indoor Billboard contends that the manner in which Integra presented its PICC surcharge had the capacity to deceive customers into believing that Integra's PICC surcharge was a so-called "true, FCC-regulated PICC." (Appellant Br. at 31.) In support of this contention, Indoor Billboard relies primarily on statements made on Integra's website. (Appellant Br. at 33.) However, Mr. Shulevitz admitted that he never looked at any part of Integra's website before purchasing Integra's services or paying its bills; indeed, as of the date of his deposition he had never looked at the statements on Integra's website that Indoor Billboard now relies upon. (CP 143.) Consequently, Integra's statements on its website are irrelevant to Indoor Billboard's CPA claim. *See Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 120-21, 22 P.3d 818 (2001) (holding that characterizations of disputed fee in

materials not seen by the plaintiffs are irrelevant to determining whether a practice is deceptive for a CPA claim). Also irrelevant to Indoor Billboard's claim are an internal Integra memorandum (CP 420), which Indoor Billboard also did not see, and any statement on Integra's August 2005 invoice (CP 63), which post-dated both Indoor Billboard's purchase decision and its payment of the two Integra invoices that included the PICC surcharge. The Court should reject Indoor Billboard's attempt to ignore the representations actually made by Integra to Indoor Billboard at the time it purchased Integra's services and to rely instead on statements that had nothing to do with Indoor Billboard's decision to purchase Integra's service.

Furthermore, the distinction which Indoor Billboard attempts to draw between a so-called "true PICC" and the PICC surcharges collected by CLECs is meaningless. There is no such thing as a "true PICC." ILECs charge an FCC-regulated PICC surcharge, *see* 47 C.F.R. § 69.153, and CLECs charge other PICC surcharges that are not regulated by the FCC. *See In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, 16 F.C.C.R. 9923, 2001 WL 435698 (2001). The fact that Integra charges a PICC surcharge that is not regulated by the FCC does

not mean that Integra's charging a PICC surcharge is an unfair or deceptive practice under the CPA. It simply reflects that CLECs' rates are not regulated by the FCC.

b. The label "PICC" does not state or imply that the surcharge is a governmentally regulated surcharge

The label "PICC" for Integra's surcharge does not state, imply, or otherwise indicate that the surcharge is a governmentally regulated fee or a pass-through of a governmentally imposed tax or fee. There is nothing inherent in the label "PICC" that has the capacity to deceive customers into believing that Integra's PICC surcharge is a governmentally regulated tax or fee or that Integra is simply passing through a governmentally regulated tax or fee to its customers. The label "PICC" has no "decisive connotation" as an FCC-regulated tax or fee. *See Robinson*, 106 Wn. App. at 119 (internal citation omitted).

By contrast, in *Pickett v. Holland America Line-Westours, Inc.*, 101 Wn. App. 901, 906, 6 P.3d 63 (2000), *rev'd*, 145 Wn.2d 178, 35 P.3d 351 (2001), a marketing brochure distributed to customers stated that customers would pay "port charges and taxes." 101 Wn. App. at 906. Additionally, each customer signed a cruise contract that described the "port charges and taxes" as a direct pass-through of the "governmental charges, taxes and fees" assessed on the defendant. *Id.* at 916-17. These

representations are of an entirely different nature from simply using the label "PICC" in terms of representing that a charge is a pass-through of governmental charges. Using the label "PICC" alone does not constitute an unfair or deceptive practice.

c. Integra's inclusion of the PICC surcharge on its invoice under the section labeled "Taxes and Surcharge" is not deceptive

Indoor Billboard also argues that Integra's placement of its PICC surcharge on the billing invoice under the heading "Taxes and Surcharges" is evidence of deception because that practice "misrepresented the nature of the surcharge to be a governmentally regulated" charge. (Appellant Br. at 30.) Placing the PICC surcharge under the heading "Taxes and Surcharges" is neither deceptive nor does it convey that the PICC surcharge is a governmentally imposed tax. A surcharge, in this context and by definition,³ is simply an additional charge that Integra imposed on all customers, and that is what Integra's sales representative told Indoor Billboard when Mr. Shulevitz first questioned Integra's PICC surcharge during the sales transaction. (CP 164.) Furthermore, Indoor Billboard received Integra's invoice well after Indoor Billboard agreed to purchase Integra's services and contractually committed to pay Integra's disclosed charges. This Court previously held that "the relevant time period for

³ The American Heritage College Dictionary 1365 (3d ed. 1997) defines "surcharge" as "[a] sum added to the usual amount or cost."

purposes of analyzing whether full disclosures are made" is at the time a business quotes a price to a potential customer. *See Robinson*, 106 Wn. App. at 116. Therefore, the location of the PICC surcharge on Integra's invoice—which Indoor Billboard saw for the first time *after* Integra disclosed to Indoor Billboard the amount of the PICC—is irrelevant to Indoor Billboard's CPA claim.

The facts in this case are dissimilar to the facts presented in *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 13 P.3d 240 (2000), on which Indoor Billboard relies. There is no additional information on Integra's invoice that would cause the placement of the PICC surcharge under the heading "Taxes and Surcharges" to have the capacity to deceive a customer into believing the PICC surcharge was the FCC-regulated PICC. In *Dwyer*, the mortgage payoff statement used by the defendant contained the following representation about its "Misc Service Chgs": "This statement reflects the amount needed to prepay this mortgage in full" *Id.* at 544. The miscellaneous service charge at issue was actually not part of the required payoff amount pursuant to the deed of trust. *Id.* at 545. Under those facts, the court concluded that "[a] plain reading of [the] statement considered in light of its purpose reveals its capacity to deceive a substantial portion of the public." *Id.* at 547. A plain reading of Integra's invoice, on the other hand, does not reveal a capacity to deceive a

substantial portion of the public into believing that the PICC surcharge listed under the heading "Taxes and Surcharges" is an FCC-regulated surcharge.

Indoor Billboard has failed to identify a single misrepresentation made to Indoor Billboard by Integra about its PICC surcharge during the sales transaction. There is no dispute that Integra disclosed its PICC surcharge on the initial price quote given to Indoor Billboard. Indoor Billboard admits, as it must, that it knew that Integra would assess a PICC surcharge if Indoor Billboard purchased Integra's local telephone services, even if Indoor Billboard did not purchase long-distance service from Integra. In fact, Mr. Shulevitz, Indoor Billboard's vice president, extensively discussed the nature of the PICC surcharge with Integra's sale representative and with one of Integra's competitors, Eschelon, before Mr. Shulevitz agreed to purchase Integra's services. Mr. Shulevitz also knew at that time that the amount of the PICC was set by Integra, not the FCC, and that Integra would not remit any of the PICC charges to the government.

Rather than identify any misrepresentation Integra made to Indoor Billboard, Indoor Billboard instead repeatedly chastises Integra for failing to "explain," "clarify," "disclose," or "reveal" information regarding the "true nature" of the PICC surcharge. (Appellant Br. at 17, 29, 31, 36, 39.)

However, Indoor Billboard does not establish that Integra was under any duty to make any more disclosures regarding the PICC surcharge than it did. Citing *Robinson*, Indoor Billboard argues that a "knowing failure to reveal something of material importance is 'deceptive' within the CPA." (Appellant Br. at 29.) What the *Robinson* court found to be a material fact the defendant was required to disclose was the fact and amount of the fee at issue. *Robinson*, 106 Wn. App. at 116. Integra did disclose these material facts, the fact and amount of the PICC, to Indoor Billboard.

Indoor Billboard argues that whether a charge "is subject to governmental regulation is clearly of 'material importance.'" (Appellant Br. at 30 (quoting *Robinson*, 106 Wn. App. at 116.)) Indoor Billboard cites no authority supporting that proposition and makes no argument in support of this assertion, and Integra disagrees that such a fact is material. What is material to a purchase decision is knowing that a charge will apply and the amount of that charge. Nevertheless, regardless of whether the nature of regulation of a charge is a material fact, Integra *did* inform Indoor Billboard that the PICC was not set by the FCC, and Indoor Billboard confirmed that this was true, all before Indoor Billboard agreed to purchase services from Integra. The Court should decline Indoor Billboard's request to shift the burden from plaintiff Indoor Billboard, to

prove that Integra misrepresented the PICC, to defendant Integra, to prove that it made additional disclosures it had no duty to make.

The Court should affirm the grant of summary judgment because Integra did not commit an unfair or deceptive trade practice.

2. Indoor Billboard failed to establish the requisite causal link

"A causal link is required between the unfair or deceptive acts and the injury suffered by plaintiff." *Hangman Ridge*, 105 Wn.2d at 793.

When a claim is based on a "misrepresentation," the causal link element requires proof of actual reliance on the misrepresentation. *Robinson*, 106 Wn. App. at 119 ("A plaintiff establishes the causation element of a CPA claim if he or she shows the trier of fact that he or she relied upon a misrepresentation of fact."); *Nuttall v. Dowell*, 31 Wn. App. 98, 111, 639 P.2d 832 (1982) (causation is not established if actual reliance is not proven).⁴ A causal link cannot, however, be established if the allegedly misrepresented charge was fully disclosed with the initial price quote. *Robinson*, 106 Wn. App. at 119. Furthermore, the allegedly unfair or deceptive trade practice must cause the plaintiff's alleged injury. *Cooper's*

⁴ See also *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 418, 693 P.2d 697 (1985) (affirming summary judgment dismissal where party asserting CPA claim had not shown "reliance" and thus, any injury the party may have suffered "was not the result of" any act or practice in violation of the CPA); *Mayer v. Sto Indus., Inc.*, 123 Wn. App. 443, 458, 98 P.3d 116 (2004 (citing *Nuttall*), *rev'd in part on other grounds*, 156 Wn.2d 677, 132 P.3d 115 (2006).

Mobile Homes, Inc. v. Simmons, 94 Wn.2d 321, 327-28, 617 P.2d 415 (1980) (concluding that causation element of CPA claim was not established if unfair trade practice did not cause any injury).

a. Indoor Billboard is required to prove that it actually relied on a misrepresentation made by Integra to establish causation

Recognizing that it cannot prove that Indoor Billboard actually relied on any misrepresentation made by Integra in deciding to purchase or pay for Integra's services, Indoor Billboard asks the Court to dispense completely with this requirement. Instead, Indoor Billboard contends that the Court should conclude that causation is established by the mere fact that Indoor Billboard paid Integra's PICC surcharge. Indoor Billboard's argument relies exclusively on this Court's decision in *Pickett*, which the Supreme Court reversed. Indoor Billboard's argument misreads the *Robinson*⁵ decision and exaggerates the precedential value and applicability of the reversed Court of Appeals' decision in *Pickett*. Valid precedent requires Indoor Billboard to prove that it actually relied on a misrepresentation made by Integra to establish causation.

In *Robinson*, the Court held that the plaintiffs did not establish causation because they had "failed to show a causal relationship between

⁵ Indoor Billboard's contention that the decision in *Robinson* is limited to CPA claims based on a "hidden charge" theory is wrong. (Appellant Br. at 37-38.) The principles articulated in the *Robinson* decision have a broader applicability and are instructive in this case.

the [allegedly unfair or deceptive practice] and their claimed injury. A plaintiff establishes the causation element of a CPA claim if he or she shows the trier of fact that he or she relied upon a misrepresentation of fact." *Robinson*, 106 Wn. App. at 119. The Court of Appeals' 2001 decision in *Robinson*, which is consistent with the decision in *Nuttall v. Dowell*, 31 Wn. App. 98 (1982), establishes that the actual reliance requirement survives *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986), contrary to Indoor Billboard's argument. (See Appellant Br. at 41-44.)

Robinson was also issued after this Court's 2000 decision in *Pickett*, thus negating Indoor Billboard's ability to rely on that decision, even if it had not been reversed. This Court's *Pickett* decision is not controlling because it was reversed by the Washington Supreme Court. Even if it were controlling, the facts in *Pickett* are distinguishable from the facts of this case.

In *Pickett*, the "port charges and taxes" at issue were disclosed in a marketing brochure distributed to customers. 101 Wn. App. at 906. Additionally, each customer signed a cruise contract that described the "port charges and taxes" as a direct pass-through of the "governmental charges, taxes and fees" assessed on the defendant. *Id.* at 916-17. The evidence in *Pickett* was that the "port charges and taxes" actually charged

by the defendant included more than just the charges and taxes assessed on the defendant by governmental authorities. *Id.* at 917. The Court of Appeals would have allowed a class to be certified by finding that causation "inheres in the fact that the plaintiffs purchased cruise tickets," *id.* at 920, without requiring individual class members to prove that they actually relied on a misrepresentation. The issue before the Supreme Court in *Pickett* was whether the appellate court properly addressed the merits of the trial court's denial of class certification in the context of determining whether the class settlement was reasonable. In concluding that this Court erred in considering the merits of the trial court's denial of class certification (including, of course, the Court's decision regarding causation under the CPA), the Supreme Court did not overrule *Nuttall* and questioned the authorities cited by this Court as support for lowering the threshold to establish causation. *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 191, 197, 35 P.3d 351 (2001).

Although Indoor Billboard notes the Supreme Court decision in *Pickett*, Indoor Billboard largely ignores the Supreme Court's analysis. (Appellant Br. at 43.) In reversing the Court of Appeals decision in *Pickett*, the Supreme Court specifically questioned the holding by the Court of Appeals that "[i]njury and causation are established if the plaintiff loses money because of unlawful conduct." 145 Wn.2d at 197.

The Supreme Court expressed its doubt about that "principle" and explained that the cases cited by the Court of Appeals do not actually stand for that principle. *Id.* The Supreme Court explained that in *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 942 P.2d 1072 (1997), the first case cited by this Court in *Pickett*, the plaintiff relied on an unfair act in signing a real estate agreement and then lost money as a result of signing the agreement. *Pickett*, 145 Wn.2d at 197. In other words, the plaintiff in *Edmonds* proved actual reliance on the unfair act. The Supreme Court noted that the second case cited by the Court in *Pickett*, *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990), never reached the question of causation. *Pickett*, 145 Wn.2d at 197. Ultimately, the Supreme Court concluded that the posture of the appeal did not require resolution of whether causation requires actual reliance, but cast no doubt on the validity of *Nuttall*.

With respect to an individual CPA claim, such as Indoor Billboard's claim, Washington courts have consistently required that a plaintiff establish actual reliance on the allegedly unfair or deceptive act or practice. Indoor Billboard must do the same.

b. Indoor Billboard cannot establish actual reliance

In this case, there is no causal link between Integra's allegedly unfair or deceptive trade practice, assessing a PICC surcharge, and Indoor

Billboard's decision to subscribe to Integra's local telephone service and to pay the PICC surcharges.

Robinson holds that Indoor Billboard must establish that it relied on a misrepresentation of fact that caused it to purchase Integra's services to prove the requisite causal link. *Robinson*, 106 Wn. App. at 119. Indoor Billboard failed to establish that it relied on any misrepresentation made by Integra to Indoor Billboard regarding the PICC surcharge in deciding to purchase Integra's services. From the very beginning of his interactions with Integra, Mr. Shulevitz thought that Integra should not charge Indoor Billboard a PICC surcharge if Indoor Billboard did not purchase long-distance service from Integra. He knew, however, that Integra would charge Indoor Billboard a PICC even if Indoor Billboard did not purchase long-distance service from Integra. In responding to Mr. Shulevitz's questions about why Integra would assess a PICC surcharge, Integra never told Mr. Shulevitz that Integra's PICC surcharge was the same as the FCC-regulated PICC surcharge, and Integra never told him that it was a governmentally imposed fee or tax. Indeed, when he agreed to purchase Integra's services, Mr. Shulevitz knew that the amount of the PICC was set by individual companies and not the FCC, and he did not believe that Integra would remit the PICC charges to the government. Indoor Billboard's decision to purchase Integra's services was not based on any

misrepresentation by Integra regarding its PICC surcharge. Rather, Indoor Billboard agreed to purchase Integra's services because Mr. Shulevitz believed that Integra offered high quality services at the lowest price, including the PICC. (CP 131.)

Moreover, Indoor Billboard's decision to pay the PICC surcharge was not caused by any misrepresentation by Integra. As soon as he received the first Integra invoice, Mr. Shulevitz decided to "combat" Integra's PICC surcharge. (CP 178-179.) Mr. Shulevitz then set out to gather ammunition from outside sources to challenge Integra's PICC surcharge. (CP 133, 136-141, 144, 146, 149.) At the end of his investigation, during which he discussed Integra's PICC surcharge with several non-Integra sources, Mr. Shulevitz was still not convinced that Integra could charge a PICC surcharge because Indoor Billboard did not purchase long-distance service from Integra. (CP 149.) Nonetheless, Mr. Shulevitz paid Integra's PICC surcharge because he wanted to set a good tone with his new service provider. (CP 147-148.)

Indoor Billboard cannot establish that it paid Integra's PICC surcharge in reliance on any misrepresentation of fact. Mr. Shulevitz unequivocally stated during his deposition that he questioned the validity of Integra's PICC surcharge but paid it because he wanted to set a good tone with his new service provider. (CP 147-148.) Indoor Billboard paid

those charges after it conducted its own investigation. *See Nuttall*, 31 Wn. App. at 111 (court examined plaintiff's independent investigation as a break in any causal connection between the defendant's misrepresentation and the plaintiff's injury). The trial court properly dismissed Indoor Billboard's complaint about a surcharge that was disclosed with the initial price quote and investigated by Indoor Billboard's vice president before deciding to purchase Integra's services and before paying the surcharges.

Assuming for the sake of this argument that Integra committed an unfair or deceptive practice, which Integra denies, Indoor Billboard must nonetheless establish that it paid the PICC surcharge (its claimed injury) because it relied on a misrepresentation made by Integra to Indoor Billboard about its PICC surcharge. Mr. Shulevitz's testimony that even though he continued to question the validity of the PICC surcharge from the first time Integra disclosed it and after his extensive investigation, he paid it to set a good tone to the business relationship, defeats Indoor Billboard's CPA claim because the requisite causal link cannot be established. Therefore, this Court should affirm the trial court's summary judgment decision.

3. Indoor Billboard's CPA claim is barred by the voluntary payment doctrine

Additionally, Indoor Billboard's claim for damages under the CPA is barred by the doctrine of voluntary payment.⁶ "It is a universally recognized rule that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal, or that there was no liability to pay in the first instance." *Speckert v. Bunker Hill Arizona Mining Co.*, 6 Wn.2d 39, 52, 106 P.2d 602 (1940) (internal citation omitted); *see also Robinson*, 106 Wn. App at 122 (acknowledged voluntary payment doctrine, but found it unnecessary to address doctrine where court concluded that the defendants' practices were not unfair or deceptive).

Integra denies that its demand for payment of its PICC surcharge was illegal, but even if it were, before paying the PICC surcharge, Indoor Billboard knew all of the facts that it now relies on in support of its CPA claim. As described above, Indoor Billboard knew from Integra's representations at the time of the sales transaction that Integra's PICC

⁶ The trial court noted that it did not base its grant of summary judgment on the voluntary payment doctrine. Nevertheless, this Court may affirm the trial court's decision on this alternative basis. *See Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 513, 983 P.2d 1193 (1999) (trial court judgment may be affirmed on any grounds supported by the pleadings and proof, even if court's specific reason for granting judgment was in error).

surcharge was charged to all Integra customers, not just its long-distance customers, and that the FCC did not set the amount of its PICC surcharge. Mr. Shulevitz also conducted his own independent investigation of Integra's PICC surcharge before paying the surcharge, contacting one of Integra's competitors, an independent salesperson, the FCC, and the WUTC. After this thorough investigation, Indoor Billboard still challenges Integra's PICC surcharge in this case on the same ground that Indoor Billboard asserted when it first learned that Integra intended to impose that charge on Indoor Billboard if it chose to purchase Integra's services – that the PICC would be valid only if Integra were providing long-distance service to Indoor Billboard. Thus, Indoor Billboard had full knowledge of all the facts on which it now bases its claim before it paid Integra's first invoice containing the PICC surcharge.

Indoor Billboard simply states "the evidence of record falls far short of establishing that [Indoor Billboard] had 'full knowledge'" of its claim that it now asserts. (Appellant Br. at 48.) Indoor Billboard is wrong; all of the facts that pertain to Indoor Billboard's individual CPA claim were known by Mr. Shulevitz before he paid Integra's PICC surcharge, and Indoor Billboard paid the charges anyway. Accordingly, Indoor Billboard's voluntary payments of Integra's PICC surcharges waived any claim under the CPA that Indoor Billboard may have had. *See*

Shields v. Schorno, 51 Wn.2d 737, 739, 321 P.2d 905 (1958) (holding that party waived any claim of fraud because party made voluntary payments on promissory note). Integra was entitled to summary judgment because the voluntary payment doctrine bars Indoor Billboard's CPA claim for damages. The Court should affirm the trial court's summary judgment decision on the basis of the voluntary payment doctrine defense.

B. If This Court Reverses the Summary Judgment Decision, Then Integra Requests Cross Review of the Trial Court's Erroneous Denial of Integra's Motion to Dismiss

If the Court affirms the summary judgment in favor of Integra, Integra's cross review is moot. If this Court were inclined to vacate or reverse that judgment, however, it should address Integra's assignment of error on cross review.

Integra's motion to dismiss challenged the trial court's subject matter jurisdiction. Denial of a motion to dismiss under CR 12(b)(1) is a question of law, which this Court reviews de novo. *In re Estate of Peterson*, 102 Wn. App. 456, 462, 9 P.3d 845 (2000).

1. The WUTC has exclusive original jurisdiction over disputes concerning charges and overcharges

Integra moved to dismiss this case on the ground that the trial court lacked jurisdiction over Indoor Billboard's claim because the WUTC has exclusive original jurisdiction over complaints that a public service company, such as Integra, has charged an unreasonable or an unlawful rate

or charge. Without explanation, the trial court denied Integra's motion to dismiss Indoor Billboard's CPA claim. (CP 39-40.)

In RCW Chapter 80.04, the legislature authorized the WUTC to address a complaint filed by a customer against a public service company "concerning the reasonableness of any rate . . . or charge" (RCW 80.04.220) or alleging that the company has charged a customer "in excess of the lawful rate" (RCW 80.04.230). Upon the filing of such a customer complaint, the WUTC is required to investigate the complaint, conduct a hearing on the complaint and issue a final order resolving the complaint. RCW 80.04.110; 80.04.220-.230. If the WUTC determines that reparations or refunds of overcharges must be made by the company, then the WUTC must issue an order directing the company to refund the overcharges, plus interest. RCW 80.04.220-.230.

If the public service company does not timely comply with the WUTC's order to make a refund, then the customer may bring suit in a trial court, subject to certain enumerated time limitations. RCW 80.04.240. Further proceedings before the WUTC may be required. *Id.* RCW 80.04.240 provides that "[t]he procedure provided in this section is *exclusive*, and *neither the supreme court nor any superior court shall have jurisdiction save in the manner hereinbefore provided.*" (Emphasis added.) By that express language in RCW 80.04.240, the legislature

granted exclusive original jurisdiction to the WUTC to address a customer's complaint that a public service company has overcharged a customer by charging an unreasonable or unlawful charge.

The legislature may grant an administrative agency, like the WUTC, exclusive original jurisdiction to hear certain disputes, and when it does so, the trial court is without original jurisdiction and must dismiss any claim filed there. *Ledgerwood v. Lansdowne*, 120 Wn. App. 414, 419-20, 85 P.3d 950 (2004); *see also Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 163, 34 P.2d 457 (1934) (Department of Labor and Industries "has original and exclusive jurisdiction in all cases where claims are presented, to determine the mixed question of law and fact as to whether a compensable injury has occurred"). Although the Washington appellate courts have not analyzed whether the current versions of RCW 80.04.220-.240 grant the WUTC exclusive original jurisdiction over a CPA claim for overcharges brought against a "competitive" telecommunications company, the Washington Supreme Court has analyzed the exclusive original jurisdiction granted to the Public Service Commission (the "Commission"), the predecessor agency to the WUTC, under a prior version of RCW 80.04.240.

In 1911, the legislature adopted the Public Service Commission Law. 1911 Wash. Session Laws, ch. 117. Section 91 of the Public

Service Commission Law contained provisions similar to RCW 80.04.220-.240. *Compare* 1911 Wash. Session Laws, ch. 117, sec. 91 (A-2 - A-5) *with* RCW 80.04.220-.240 (A-6 - A-9). Like RCW 80.04.220, Section 91 authorized the Commission to order a refund of overcharges, plus interest, if the Commission determined on a customer's complaint that a public service company had charged an unreasonable rate. 1911 Wash. Session Laws, ch. 117, sec. 91. Section 91 also authorized the initiation of an action in a court of competent jurisdiction if the public service company did not comply with the Commission's order to refund an overcharge. *Id.*

On several occasions, the Supreme Court has analyzed whether the Commission had exclusive original jurisdiction under Section 91 to decide a customer's claim for overcharges. In *State ex rel. Goss v. Metaline Falls Light & Water Co.*, the Supreme Court analyzed the 1911 Public Service Commission Law to determine whether the legislature had granted the Commission exclusive original jurisdiction to "hear, pass upon, and determine" the question regarding the reasonableness of the rate charged by the public service company. 80 Wash. 652, 654, 141 P. 1142 (1914). The Supreme Court concluded that the Commission "is authorized to examine in the first instance and pass upon these problems." *Id.* A few years later, the Supreme Court again analyzed whether an action to

recover for "excess payments" and overcharges fell within the exclusive original jurisdiction of the WUTC. *See Hewitt Logging Co. v. Northern Pac. Ry. Co.*, 97 Wash. 597, 166 P. 1153 (1917); *Belcher v. Tacoma Eastern R. Co.*, 99 Wash. 34, 168 P. 782 (1917). In both *Hewitt* and *Belcher*, the Supreme Court held that the Public Service Commission Law of 1911, in particular Section 91, required a customer to submit its challenge to an unreasonable or unlawful rate or charge to the Commission and ruled that the action for overcharges pending in the trial court must be dismissed.

The current statutes governing the WUTC also require that a complaint about the reasonableness or lawfulness of a rate or charge of a public service company must be submitted to the WUTC for resolution. RCW 80.04.220-.240. RCW 80.04.240 unambiguously states that "[t]he procedure provided in this section is exclusive, and neither the supreme court nor any superior court shall have jurisdiction save in the manner hereinbefore provided." This language is even more explicit than the provisions of *former* Section 91, under which the Supreme Court found that the Commission had exclusive original jurisdiction. Accordingly, the WUTC has exclusive original jurisdiction to decide whether a public service company, like Integra, has overcharged a customer by imposing an unreasonable or unlawful charge.

2. Indoor Billboard's claim is within the WUTC's exclusive original jurisdiction

Indoor Billboard did not file a complaint with the WUTC challenging the reasonableness or lawfulness of the PICC charged by Integra. Indoor Billboard ignored the reparations and refund procedures established by the WUTC and filed suit directly in Superior Court. Indoor Billboard styled its claim as alleging an unfair and deceptive billing practice. Nonetheless, Indoor Billboard complained that Integra "wrongfully" collected the PICC surcharge (CP 46) and that the PICC surcharge was "not . . . lawful" (CP 51), and Indoor Billboard sought to recover as damages the amount of the alleged overcharge, plus interest. Indoor Billboard did not deny before the trial court that the nature of its CPA claim was to recover for an allegedly unreasonable or unlawful charge.

Indoor Billboard argued instead that the WUTC does not have jurisdiction because it brought its claim under the CPA. However, the nature of the relief sought, not the title given to the claim asserted, determines whether the claim falls within the exclusive original jurisdiction of the WUTC. *See, e.g., State ex rel. Home Telephone & Telegraph Co. of Spokane v. Trial Court*, 110 Wash. 396, 188 P. 404 (1920) (in determining whether the trial court had jurisdiction, court

analyzed the nature of the claim asserted); *Hewitt Logging*, 97 Wash. 597 (1917) (same); *Belcher*, 99 Wash. 34 (1917) (same); *see also D.J. Hopkins*, 89 Wn. App. 1, 947 P.2d 1220 (1997) (discussed *infra*). In this action, Indoor Billboard asserted a single claim under the CPA, alleging that Integra "assess[ed] and collect[ed] a surcharge falsely denominated as a 'PICC.'" (CP 51.) Indoor Billboard claims that it, and other members of the purported class, suffered damages "in that each paid monies for a 'PICC' that was not in fact a presubscribed interexchange carrier charge and was otherwise not a lawful PICC." (CP 51.) In essence, Indoor Billboard alleged either that Integra's price list established an unreasonable rate or charge for Integra's services, which is governed by RCW 80.04.220, or that Integra charged an unlawful rate or charge for its services, which is governed by RCW 80.04.230. In either event, the nature of the claim asserted by Indoor Billboard is a claim seeking the refund or repayment of the allegedly unreasonable or unlawful PICC charges. As such, Indoor Billboard's claim falls squarely within the exclusive original jurisdiction of the WUTC and, thus, the trial court lacked jurisdiction.

In a related context, the Washington Court of Appeals analyzed the nature of the relief sought in affirming the dismissal of a CPA claim. In *D.J. Hopkins, Inc. v. GTE Northwest*, the plaintiff sought to recover

damages under the CPA for wrongful telephone charges. 89 Wn. App. 1, 947 P.2d 1220 (1997). The plaintiff had purchased telephone service from the defendant, GTE, for many years. *Id.* at 3. As a general practice, GTE billed customers a charge labeled "UNREG LEASE/MAINT" if a customer used telephones provided by GTE. *Id.* For approximately nine years, GTE billed the plaintiff an "UNREG LEASE/MAINT" charge, but the plaintiff did not have a telephone provided by GTE. *Id.* at 3-4. GTE subsequently changed the label of the charge to "Desk Phone." *Id.* At that time, the plaintiff discovered that it had been paying for a leased telephone for nine years. *Id.* at 4. The plaintiff brought the improper charge to the attention of GTE and demanded a refund. *Id.* GTE agreed to discontinue the charge and refund part of the fees, but GTE refused to pay the full refund plus interest, as demanded by the plaintiff. *Id.*

Based on those facts, the plaintiff asserted a CPA claim for an "unfair and deceptive practice." *Id.* The trial court dismissed the CPA claim on the ground that the WUTC regulated GTE's billing practices and, thus, GTE was exempted from CPA claims pursuant to RCW 19.86.170. *Id.* at 4-5.

In reviewing whether the trial court properly dismissed the action, this Court reviewed the relevant WUTC statutes regulating billing practices and refunds of overcharges. *Id.* at 5-6. The Court held that

"RCW 80.04.240 then sets forth the exclusive procedure that a customer can pursue. The statute mandates that all complaints concerning overcharges resulting from the collection of *unreasonable rates and charges* or collection of amounts in excess of lawful rates shall be filed with the WUTC." *Id.* (emphasis in original). The Court further held that "[i]f a company fails to comply with an order of the WUTC to repay any overcharge determined then the customer may institute action in superior court to recover the amount of the overcharge, with interest." *Id.* at 6. The plaintiff argued that its CPA claim was not one that fell within RCW 80.04.240, because its action was not seeking to recover "overcharges," but rather was an action for damages and for "curbing of GTE's deceptive and illicit billing practices." *Id.* at 6.

This Court rejected as "purely fiction" the plaintiff's characterization of its CPA claim, and held that "even though the complaint is couched in the terms of deceptive practices, what actually is presented is a claim for overcharges." *Id.* In other words, the Court concluded that the plaintiff's CPA claim was a claim that was within the jurisdiction of the WUTC pursuant to the procedures set forth in RCW 80.04.220-.240. The Court further held that "[u]nder RCW 80.04.240, the WUTC has original jurisdiction over claims for refunds of overcharges." *Id.* at 6.

The Court in *D.J. Hopkins* was not asked to consider whether the WUTC had exclusive original jurisdiction over claims for refunds of overcharges and, thus, the Court did not address the question of exclusive original jurisdiction. Nonetheless, in order to conclude that the statutory exemption applied, the Court had to determine the nature of the CPA claim asserted. *See id.* at 4-5.

Integra is a "public service company" under Washington law, and the procedures set forth in RCW 80.04.220-.240 apply to a customer's complaint that Integra has overcharged its customers by assessing and collecting unreasonable or unlawful charges. Indoor Billboard's CPA claim, although couched in terms of an unfair and deceptive billing practice, seeks to recover the amount of the PICC surcharge as an overcharge, plus interest. Like the CPA claim in *D.J. Hopkins*, the nature of the CPA claim asserted by Indoor Billboard in this action is a claim for overcharges. Therefore, Indoor Billboard's claim falls within RCW 80.04.220-.240 and must be submitted to the WUTC. The trial court lacked jurisdiction over this action, and this action should be dismissed.

3. RCW 80.36.360 does not limit the grant of exclusive original jurisdiction under RCW 80.04.240.

RCW 19.86.170, provides an exemption from CPA liability for certain regulated actions and transactions:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by . . . the Washington utilities and transportation commission.

RCW 19.86.170. RCW 80.36.360, however, limits application of that exemption in the case of competitive telecommunications companies.

Indoor Billboard argued before the trial court that RCW 80.36.360 somehow ousted the WUTC from jurisdiction over Indoor Billboard's claim.

Unlike the defendant in *D.J. Hopkins*, Integra does not contend that it is *exempt* from a CPA claim pursuant to RCW 19.86.170. Rather, Integra contends that the trial court does not have *jurisdiction* over Indoor Billboard's claim that a public service company overcharged it by collecting a "PICC" surcharge. The competitive telecommunications company exclusion in RCW 80.36.360 from the "regulated industries" statutory exemption is expressly limited:

For the purposes of RCW 19.86.170, actions or transactions of competitive telecommunications companies, or associated with competitive telecommunications services, shall not be deemed otherwise permitted, prohibited, or regulated by the commission.

RCW 80.36.360 (emphasis added). That exclusion does not, however, limit the legislature's grant of exclusive original jurisdiction to the WUTC under RCW 80.04.240 to resolve all complaints for overcharges against public service companies, including competitive telecommunications companies. If it had so intended, the legislature would have excluded competitive telecommunications companies from the exclusive original jurisdiction granted to the WUTC in RCW 80.04.240 to resolve complaints alleging overcharges. To hold otherwise would require the Court to ignore the express terms of both RCW 80.36.360, which specifically limits its application to RCW 19.86.170, and RCW 80.04.240, which does not exclude competitive telecommunications companies, and to adopt a limitation on RCW 80.04.240 for competitive telecommunications companies that is not authorized by any statute.

Under RCW 80.04.220-.240, the WUTC is expressly granted the authority and the obligation to review rates and charges of a competitive telecommunications company to resolve a complaint alleging unreasonable or unlawful rates or charges. The WUTC also has the authority to order a competitive telecommunications company to refund any overcharges with interest, if warranted after an investigation and hearing. RCW 80.04.220-.230. Pursuant to the exclusive original jurisdiction granted to the WUTC in RCW 80.04.240, the trial court had

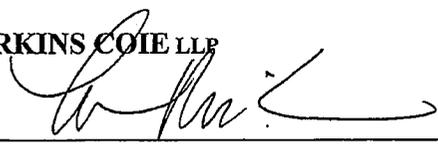
no jurisdiction to adjudicate a claim for overcharges against a competitive telecommunications company. As discussed above, Indoor Billboard seeks to recover overcharges, plus interest, in this action. Therefore, the WUTC has exclusive original jurisdiction over this action, and the trial court lacked jurisdiction and should have granted Integra's motion to dismiss. On cross review, the Court should reverse the trial court order denying Integra's motion to dismiss and dismiss this action.

VII. CONCLUSION

For the reasons discussed above, this Court should affirm the trial court's summary judgment decision and denial of reconsideration, or in the alternative, affirm the judgment by reversing the trial court's order denying Integra's motion to dismiss. In any event, this Court should affirm the trial court's judgment of dismissal.

DATED: November 17, 2006 Respectfully submitted,

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APPENDIX

SESSION LAWS

OF THE

STATE OF WASHINGTON

TWELFTH SESSION

Convened January 9; Adjourned March 9

1911

COMPILED IN CHAPTERS WITH MARGINAL NOTES

-BY-

I. M. HOWELL

SECRETARY OF STATE

PUBLISHED BY AUTHORITY

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Ch. 117
103 Wn.

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CHAPTER 117.

[S. S. B. 102.]

PUBLIC SERVICE COMMISSION LAW.

AN ACT relating to public service properties and utilities, providing for the regulation of the same, fixing penalties for the violation thereof, making an appropriation and repealing certain acts.

Be it enacted by the Legislature of the State of Washington:

ARTICLE I.

PUBLIC SERVICE COMMISSION—GENERAL PROVISIONS.

SECTION 1. *Short Title.*

This act shall be known as the "Public Service Commission law," and shall apply to the public services herein described and the commission hereby created.

SEC. 2. *Public Service Commission: Appointment; Term; Removal.*

There shall be and there is hereby created, a public service commission consisting of three persons, one of whom shall be elected as chairman, to be appointed by the governor, by and with the advice and consent of the senate. The terms of the commissioners first appointed under the provisions of this act shall be, one for the term of six years, one for the term of four years, and one for the term of two years; and thereafter the term of each commissioner shall be six years from and after the expiration of the term of his predecessor. Each commissioner shall hold office until his successor shall have been appointed and qualified.

The governor may remove any commissioner for inefficiency, neglect of duty or misconduct in office, giving to him a copy of the charges against him, and an opportunity of being publicly heard in person or by counsel in his own defense, upon not less than ten days' notice. If such commissioner shall be removed the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner, and his

Commission of three persons.

Name.

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CH. 117.]

findings thereon, to proceedings, and the same in any court.

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SEC. 3. *Qualifica*

No commissioner of the government of the any county or municipality shall engage in a with his duties as su official relation or be gages, securities, c service company en act.

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SEC. 4. *Secretar*

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order of the commission shall not be reviewed, but shall be complied with by the public service company, such petition for rehearing may be filed within six months from and after the date of the taking effect of such order, and the proceedings thereon shall be as in this section provided. The commission, may, in its discretion, permit the filing of a petition for rehearing at any time. No order of the commission upon a rehearing shall affect any right of action or penalty accruing under the original order unless so ordered by the commission.

SEC. 90. *Commission May Change Orders.*

The commission may at any time, upon notice to the public service company affected, and after opportunity to be heard as provided in the case of complaints rescind, alter or amend any order or rule made, issued or promulgated by it, and any order or rule rescinding, altering or amending any prior order or rule shall, when served upon the public service company affected, have the same effect as herein provided for original orders and rules.

SEC. 91. *Overcharge.*

When complaint has been made to the commission concerning the reasonableness of any rate, fare, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission shall determine that the public service company has charged an excessive or exorbitant amount for such service, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, with interest from the date of collection.

If the public service company does not comply with the order for the payment of the overcharge within the time limited in such order, suit may be instituted in any court of competent jurisdiction to recover the same, and in such suit the findings and order of the commission shall be *prima facie* evidence of the facts therein stated. If the complainant shall prevail in such action, he shall be allowed a reasonable attorney's fee, to be fixed and collected

as part of the overcharges 5 years from the petition for the court with the commission

SEC. 92.

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as part of the costs of the suit. All complaints concerning overcharges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission.

SEC. 92. *Valuation of Property; Procedure.*

The commission shall ascertain, as early as practicable, the cost of construction and equipment, the amount expended in permanent improvements, and the proportionate amount of such permanent improvements charged in construction and to operating expenses respectively, the present as compared with the original cost of construction, and the cost of reproducing in its present condition the property of every public service company.

It shall also ascertain the amount and present market value of the capital stock and funded indebtedness of every public service company.

It shall also ascertain, in the case of companies engaged in interstate business, the relative value of the use to which such property in this state is actually put in the conduct of interstate business and state business respectively.

It shall also ascertain the total market value of the property of each public service company operating in this state, used for the public convenience within the state.

It shall also ascertain the time intervening between the expenditure of money in the cost of construction and the time when returns in the shape of dividends were first received by each of these companies.

It shall also ascertain the probable earning capacity of each public service company under the rates now charged by such companies and the sum required to meet fixed charges and operating expenses, and in case of a company doing interstate business it shall also ascertain the probable earning capacity of such company upon intrastate business and the sum required to meet fixed charges and operating expenses on intrastate business, and the relative proportion of intrastate and interstate business, the rela-

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Ch. 182, L. 191.
33-030
Valuation
of property.
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Market
value.
33-040

Earning
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C.J.S. Public Administrative Law And
Procedure § 163.

C.J.S. Public Utilities §§ 89 to 94.

Notes of Decisions

In general 1

i. In general

Telephone local exchange carrier (LEC) received adequate notice that issue of unbundling of central switching service was before Washington Utilities and Transportation Commission (WUTC) so as to allow Commission to order carrier to unbundle its central switching service in carrier's rate case, where notice of hearing from Commission was broad and stated that issues included "rate design or structure," Commission order in prior proceeding addressing issue stated that Commission expected that carrier's future filings would move further toward unbundling goals, and testimony addressed issue in rate case. *US West Communications, Inc. v. Washington Utilities and Transp. Com'n* (1997) 134 Wash.2d 74, 949 P.2d 1337, corrected.

Orders by regulatory bodies establishing rates of return upon investment are

always subject to revision in view of changed circumstances. *State ex rel. Pacific Tel. & Tel. Co. v. Department of Public Service* (1943) 19 Wash.2d 200, 142 P.2d 498.

Reservation of jurisdiction for possible future action by department (commission) was immaterial in view of former statute. *State ex rel. Oregon-Washington R. & Nav. Co. v. Walla Walla County* (1940) 5 Wash.2d 95, 104 P.2d 764.

Under general powers conferred by former statutes (see, now, §§ 80.04.110, 80.04.210, 80.36.260), it was immaterial whether department of public works (commission) was considered as proceeding on complaint, or adopting protest of patrons, or on its own motion, in rescinding previous order and ordering on investigation and full hearing, telephone company to discontinue use of telechronometers and return to flat rate services at rates previously in effect. *State v. Baker* (1931) 164 Wash. 483, 2 P.2d 1099.

80.04.220. Reparations

When complaint has been made to the commission concerning the reasonableness of any rate, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission has determined that the public service company has charged an excessive or exorbitant amount for such service, and the commission has determined that any party complainant is entitled to an award of damages, the commission shall order that the public service company pay to the complainant the excess amount found to have been charged, whether such excess amount was charged and collected before or after the filing of said complaint, with interest from the date of the collection of said excess amount.

[1961 c 14 § 80.04.220. Prior: 1943 c 258 § 1; 1937 c 29 § 1; Rem. Supp. 1943 § 10433.]

Cross References

Similar provision relating to carriers, see § 81.04.220.

Library References

Electricity ☞ 11.3(1)-(6).
 Gas ☞ 14.1.
 Public Utilities ☞ 169.
 Waters and Water Courses ☞ 203(6).
 WESTLAW Topic Nos. 145, 190,
 317A, 405.

C.J.S. Gas §§ 64 to 67.
 C.J.S. Public Utilities §§ 89 to 94.
 C.J.S. Waters § 286 et seq.

Notes of Decisions

In general 1

1. In general

More discrimination in rates does not, of itself, call for reparations, though it may call for some other remedy or disciplinary measures. State ex rel. Model Water & Light Co. v. Department of Public Service of Washington (1939) 199 Wash. 24, 90 P.2d 243.

Statute covering matter of overcharges is procedural, creating no new

substantive right, and it cannot be given retroactive effect so as to affect vested rights. State ex rel. Standard Oil Co. of California v. Department of Public Works (1936) 185 Wash. 235, 53 P.2d 318.

Whether carrier gave reasonable rates to complainant must be determined by general rules governing powers of rate-making body when determining reasonableness. Great Northern Ry. Co. v. Department of Public Works of Washington (1931) 161 Wash. 29, 296 P. 142.

80.04.230. Overcharges—Refund

When complaint has been made to the commission that any public service company has charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, and the same has been investigated and the commission has determined that the overcharge allegation is true, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, whether such overcharge was made before or after the filing of said complaint, with interest from the date of collection of such overcharge.

[1961 c 14 § 80.04.230. Prior: 1937 c 29 § 2; RRS § 10433-1.]

Cross References

Similar provision as to carriers, see § 81.04.230.

Library References

Public Utilities ☞ 169.
 WESTLAW Topic No. 317A.
 C.J.S. Public Utilities §§ 89 to 94.

Notes of Decisions

In general 1

1. In general

Customer's damages claims alleging breach of contract and negligent misrepresentation against telephone local exchange carrier (LEC), arising from carrier's allegedly inadequately labeled charges for leasing of telephone while customer used its own telephone, were claims for refund of overcharges subject to Washington Utilities and Transportation Commission's (WUTC) statutory original jurisdiction over claims for refunds of overcharges by utilities, rather than merely claims for damages for carrier's failure to disclose; claims amounted to little more than demand for overpayments of unreasonable charges for lease of telephone which did not exist. *D.J. Hopkins, Inc. v. GTE Northwest, Inc.* (1997) 89 Wash.App. 1, 947 P.2d 1220.

Customer's breach of contract claim for damages against telephone local exchange carrier (LEC), arising from carrier's allegedly inadequately labeled charges for leasing of telephone while customer used its own telephone, was claim for refund of overcharges subject to Washington Utilities and Transportation Commission's (WUTC) statutory original jurisdiction over claims for refunds of overcharges by utilities, rather than claim on contract other than carrier's tariff, absent anything other than tariff constituting contract with customer regarding what was on bill, despite contention that carrier could not rely on its schedule of tariffs as contract because telephone leasing had been detariffed. *D.J. Hopkins, Inc. v. GTE Northwest, Inc.* (1997) 89 Wash.App. 1, 947 P.2d 1220.

Trial court did not abuse its discretion in applying doctrine of primary jurisdiction so as to refer to Washington Utilities and Transportation Commission (WUTC) customer's claims against telephone local exchange carrier (LEC) for breach of contract, negligent misrepresentation, and injunctive relief, arising from carrier's allegedly inadequately labeled charges for leasing of telephone while customer used its own telephone; carrier began using allegedly inadequate label for charge on its billing during period of full regulation by Commission, customer had to concede either that carrier violated Commission deregulation notice order or that Commission approved misleading or inadequate customer notice, Commission regulated content of telephone bills, and there was danger that court action might conflict with agency resolution if use of label was widespread practice of carrier or other telephone companies. *D.J. Hopkins, Inc. v. GTE Northwest, Inc.* (1997) 89 Wash.App. 1, 947 P.2d 1220.

80.04.240. Action in court on reparations and overcharges

If the public service company does not comply with the order of the commission for the payment of the overcharge within the time limited in such order, suit may be instituted in any superior court where service may be had upon the said company to recover the amount of the overcharge with interest. It shall be the duty of the commission to certify its record in the case, including all exhibits, to the court. Such record shall be filed with the clerk of said court within thirty days after such suit shall have been started and said suit shall be heard on the evidence and exhibits introduced before the commission and certified to by it. If the complainant shall prevail in such action, the superior court shall enter judgment for the amount of the overcharge with interest and shall allow com-

REGULATIONS—GENERAL

80.04.240

Note 1

plainant a reasonable attorney's fee, and the cost of preparing and certifying said record for the benefit of and to be paid to the commission by complainant, and deposited by the commission in the public service revolving fund, said sums to be fixed and collected as a part of the costs of the suit. If the order of the commission shall be found to be contrary to law or erroneous by reason of the rejection of testimony properly offered, the court shall remand the cause to the commission with instructions to receive the testimony so proffered and rejected and enter a new order based upon the evidence theretofore taken and such as it is directed to receive. The court may in its discretion remand any cause which is reversed by it to the commission for further action. Appeals to the supreme court shall lie as in other civil cases. All complaints concerning overcharges resulting from collecting unreasonable rates and charges or from collecting amounts in excess of lawful rates shall be filed with the commission within six months in cases involving the collection of unreasonable rates and two years in cases involving the collection of more than lawful rates from the time the cause of action accrues, and the suit to recover the overcharge shall be filed in the superior court within one year from the date of the order of the commission.

The procedure provided in this section is exclusive, and neither the supreme court nor any superior court shall have jurisdiction save in the manner hereinbefore provided.

[1961 c 14 § 80.04.240. Prior: 1943 c 258 § 2; 1937 c 29 § 3; Rem. Supp. 1943 § 10433-2.]

Cross References

Similar provision governing carriers, see § 81.04.240.

Library References

Public Utilities ⇐171.
WESTLAW Topic No. 317A.
C.J.S. Public Utilities § 95.

Notes of Decisions

In general 1

1. In general

On failure to repay overcharge ordered by regulatory body, there is created new right, independent cause of action to collect and claim by plenary action in tribunal of competent jurisdiction.

tion. Sauk River Lumber Co. v. Northern Pac. Ry. Co., D.C.Wash.1931, 56 F.2d 656.

Consumer Protection Act (CPA) exemption for actions permitted, prohibited, or regulated by Washington Utilities and Transportation Commission (WUTC) applied so as to preclude customer's claim against telephone local

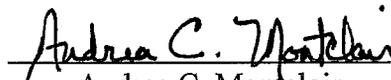
CERTIFICATE OF SERVICE

I certify under the laws of the State of Washington that on the 17th day of November, 2006, a true and correct copy of the following document was served on the below-listed counsel of record by Hand Delivery:

BRIEF OF RESPONDENT/CROSS-APPELLANT.

J. David Stahl
MUNDT MacGREGOR
999 Third Avenue, Suite 4200
Seattle, WA 98104-4082

EXECUTED at Seattle, Washington this 17th day of November, 2006.


Andrea C. Montclair

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