

NO. 42994-2-II

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

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DIVISION II  
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STATE OF WASHINGTON  
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PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, a  
Washington municipal corporation,

Respondent,

v.

COMCAST OF WASHINGTON IV, INC., a Washington corporation;  
CENTURYTEL OF WASHINGTON, INC., a Washington corporation;  
and FALCON COMMUNITY VENTURES I, L.P., a California limited  
partnership d/b/a CHARTER COMMUNICATIONS,

Appellants.

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OPENING BRIEF OF APPELLANTS COMCAST OF WASHINGTON  
IV, INC. and FALCON COMMUNITY VENTURES I, L.P. d/b/a  
CHARTER COMMUNICATIONS

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 ORIGINAL

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## **I. INTRODUCTION**

This appeal centers on interpretation of RCW 54.04.045 (App. 1), which governs the rates, terms and conditions that a Washington public utility district (“PUD”) can demand from third parties that attach communications equipment to its poles. As amended in 2008, the statute caps pole attachment rates under a two-part formula, set out in RCW 54.04.045(3)(a) and (b). Rather than apply the formula as written by the Legislature, the trial court gave near-total deference to a strained interpretation proffered by Respondent Public Utility District No. 2 of Pacific County (“PPUD”) that resulted in a rate increase of over 200%. PPUD’s reading contorts the plain language of the statute and, among other things, requires interpreting the identical language in Section 3(a) and Section 3(b) differently.

Appellants Falcon Community Ventures I, L.P (“Charter”) and Comcast of Washington IV, Inc. (“Comcast”) are broadband communications companies that deliver an array of services, including cable television and high-speed Internet services to over 5,000 residential and business customers in Pacific County. Because local laws typically do not allow cable companies to install duplicate sets of poles in public rights-of-way, Charter and Comcast must attach their equipment to existing utility poles owned by, among others, PPUD.

Appellants have attached to PPUD's poles for over 30 years. In December 2007, PPUD sued Charter and Comcast because they would not agree to a proposed new pole attachment agreement that included a rate increase of over 200 percent.<sup>1</sup> Charter and Comcast also did not consider the non-rate terms and conditions in the proposed agreement to be just, reasonable, and nondiscriminatory, as required by RCW 54.04.045.

While this case was pending, the Legislature in 2008 amended RCW 54.04.045 to include the new cost-based rate formula. Interpretation of the rate formula became the chief dispute in this case. Appellants contend the two-part formula contained in RCW 54.04.045(3)(a) and (b) reflects two well-established methodologies created by the Federal Communications Commission—known, respectively, as the “FCC Cable Formula” and “FCC Telecom Formula”—widely used to calculate pole attachment rates around the country. PPUD, in contrast, interprets Section 3(a) as the FCC Telecom Formula and Section 3(b) as the “APPA formula,” which was created by the American Public Power Association (“APPA”), a utility lobbying group.

After a bench trial, the court below adopted PPUD's interpretation. The court did not independently analyze the statute's language, but instead found PPUD's reading of it was not “arbitrary and capricious.” The court

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<sup>1</sup> PPUD also sued CenturyTel of Washington, Inc. (“CenturyTel”), also an Appellant here. The cable companies join CenturyTel's arguments to this Court.

also upheld PPUD's proposed non-rate terms, and required Appellants to either sign the proposed agreement or remove their facilities from PPUD's poles. Charter and Comcast appeal, primarily because the trial court (i) improperly ceded the task of statutory interpretation to PPUD, and (ii) adopted a reading of RCW 54.04.045 that is contrary to the statute's plain language and the Legislature's intent.

## **II. ASSIGNMENTS OF ERROR**

1. The court erred in entering its Judgment, Findings of Fact ("FF") and Conclusions of Law ("CL") in favor of PPUD on December 12, 2011 (CP 2324-27, 2290-308) (App. 2, 3).

2. Appellants specifically assign error to the following findings and conclusions: **(a)** CL 1, 2, 11, 29-31, related to the trial court's application of the "arbitrary and capricious" standard; **(b)** FF 33-35, 37-41, 47-49, 50, and CL 10, 12, 13, 17-22, 24, 26-28, 36, related to PPUD's proposed rates and interpretation of RCW 54.04.045(3); **(c)** FF 14, 15, 22, 24-26, 30-32, and CL 33, 35-38, 40, related to non-rate terms and conditions and Appellants' right to attach to PPUD poles; and **(d)** FF 23 and CL 39 and 41-47 related to the court's damages calculation.

3. The trial court erred in awarding attorneys' fees and costs to PPUD for trial (CP 2314-23) and a motion to vacate (CP 2829-36).

4. Appellants specifically assign error to findings 4-7, 19 and 24 entered on the December 12, 2011, trial fee award (CP 2314-20).

5. Appellants specifically assign error to finding 8 entered on the March 23, 2012, fee award on the motion to vacate (CP 2829-32).

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. In applying a statute regulating PUDs, may a trial court defer to a PUD's statutory interpretation under the lenient "arbitrary and capricious" standard, or must the court interpret the statute *de novo* as a question of law? (Assignment of Error 1, 2(a))

2. Did the trial court correctly interpret the rate formula set out in amended RCW 54.04.045(3)? (Assignment of Error 1, 2(b))

3. Did the trial court err in concluding that the non-rate terms and conditions in PPUD's proposed pole attachment agreement satisfied RCW 54.04.045, given PPUD's admissions that the proposed agreement includes provisions that contradict one another, that PPUD itself finds unreasonable, and that deviate from PPUD's own policies and standard practices? (Assignment of Error 1, 2(c))

4. If PPUD is entitled to damages, did the trial court err in its damages calculation, by disregarding PPUD's failure to mitigate and by applying an incorrect interest rate? (Assignment of Error 1, 2(d))

5. If judgment for PPUD is affirmed, should the trial court's award of fees and costs to PPUD for its expert consultant be reversed as unreasonable, excessive and undocumented? (Assignment of Error 3, 4)

6. If judgment is reversed, should all fees and costs awarded to PPUD be reversed, and are Appellants entitled to trial and appeal fees and costs as prevailing parties? (Assignments of Error 3, 4, 5)

#### **IV. STATEMENT OF THE CASE**

##### **A. The Agreement**

For over 30 years, Comcast and Charter (or their predecessors) have attached equipment to poles owned by PPUD, to provide communications services to Pacific County residents and businesses. Exs 1, 2. Such joint use of electric utility poles is encouraged, and regulated, by state and federal law. Pacific County, like most communities, requires power and communications utilities to "share common trenches or poles" to "the maximum extent practical." CP 2134.

From 1987 to 2006, Comcast and Charter attached their equipment to PPUD poles at a rate of \$5.75 per pole occupied. Each company had a "pole attachment agreement" with PPUD setting forth the terms and conditions governing their lease of attachment space. Exs 1, 2.

In 2006, PPUD presented Appellants with a new pole attachment agreement ("PUD Agreement") to replace the parties' existing

agreements, which PPUD unilaterally terminated as of August 2006. *See, e.g.*, Ex 35. The PPUD managers involved with the PUD Agreement had no experience negotiating pole attachment agreements. RP 316:24-317:18. Their proposed agreement was based on a form advocated by the APPA. RP 108:21-109:11.

The PPUD Agreement's proposed rates, and many of its other proposed terms were unjust and unreasonable, contrary to RCW 54.04.045. *See, e.g.*, Ex 310. The PUD Agreement contained a rental rate of \$13.25 for 2007 and \$19.70 for 2008-2011—representing increases of 130 percent and 243 percent, respectively, over the existing \$5.75 rate. Ex 305 at App. A. These were the highest rates Appellants had seen. RP 1521:13-1522:2.

Despite repeated requests, PPUD refused to engage in a section-by-section review of the PUD Agreement, and largely ignored Appellants concerns. RP 885:15-22, 1094:5-1097:17, 1522:12-21. PPUD delayed implementation of the PUD Agreement during the first half of 2007, because the Legislature was considering changes to RCW 54.04.045. RP 884:19-25. But on August 20, 2007, PPUD sent Charter and Comcast a “take-it-or-leave-it” final PUD Agreement, along with a letter advising Appellants to either execute the agreement by October 31, 2007, or provide a plan to remove their equipment from PUD poles. Ex 38.

Charter and Comcast proposed limited changes to this “final” PUD Agreement to address areas of particular concern, and asked PPUD’s Board of Commissioners to direct PPUD management to discuss the proposal with Appellants. Ex 511.

These efforts were fruitless. RP 1529:9-1530:11. The parties never spoke again and Appellants did not sign the PUD Agreement.

On October 31, 2007, Charter delivered a check to PPUD sufficient to cover two years’ worth of pole attachment rent at PPUD’s historic rate of \$5.75. Ex 325 p. 2. Comcast followed suit on November 2.<sup>2</sup> See Ex 515. PPUD returned the checks, claiming the payment was insufficient. Exs 325, 515; *see also* RP 333:5-334:1. PPUD subsequently invoiced Appellants at the rates in the PUD Agreement (\$13.25 for 2007 and \$19.70 a year thereafter). Exs 44-51. Appellants have declined to pay these rates. Appellants offered to pay at the historic rate each year since, but PPUD has never accepted payment. RP 334:4-337:1; *see also* Ex 336.

### **B. The Litigation**

PPUD sued Charter, Comcast and CenturyTel on December 26, 2007, in separate actions that were consolidated. CP 42-47. PPUD claimed breach of the respective pole attachment agreements, unjust

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<sup>2</sup> Both Appellants tendered checks amounting to \$11.50 per pole. See Ex 325 p.4. Comcast was attached to 1,651 poles and tendered payment of \$21,875.84. Charter was attached to 2,781 PPUD poles and tendered payment of \$31,981.50. *Id.* p. 2.

enrichment and trespass. PPUD sought damages and an order that Appellants pay the demanded rent and either remove their equipment or sign the PUD Agreement. CP 1-10. Appellants counterclaimed, seeking to enjoin PPUD from imposing terms contrary to RCW 54.04.045. CP 18-27.

A bench trial was held before Judge Michael J. Sullivan over seven days in October 2010. On March 15, 2011, the trial court issued a Memorandum Decision, ruling in favor of PPUD and denying Appellants' requested relief. CP 1324-27. PPUD submitted findings and conclusions and Appellants filed substantive objections (CP 1957-2000, 2075-2188), which the Court heard on September 16, 2011. CP 2271. On December 12, 2011, the trial court entered, *verbatim*, the findings and conclusions as drafted by PPUD. CP 2290-2313 (App. 3).

The court concluded that amended RCW 54.04.045(3)(a) "reflects the FCC Telecom Method and Section 3(b) reflects the APPA Method." CP 1325 (Mem. Dec.) ¶ 4. The trial court cited no statutory language to support this finding, and neither its Memorandum Decision nor its findings and conclusions quotes or analyzes the statute's rate-setting language. Instead, the court rested its decision on a finding that PPUD "did not act arbitrarily or capriciously" in "electing to interpret the statute" as it did. *Id.* at ¶ 5; CP 1324; CP 2303 at CL 11.

Also on December 12, 2011, the trial court entered judgment in favor of PPUD, awarding damages (including prejudgment interest of 12 percent) totaling \$629,913 against the three Appellants. The judgment included an award of PPUD's fees and costs of \$1,054,031.37. The total judgment, as of the date of entry, is \$1,856,155.02. CP 2324-27 (App. 2).<sup>3</sup>

Appellants appealed the judgment and fee award.<sup>4</sup> CP 2328-38. On April 23, 2012, Appellants filed a separate appeal of the trial court's award of \$27,690.14 for fees and costs PPUD incurred on a post-trial motion to vacate the judgment. CP 2843-53. That appeal was desingated No. 43360-5-II, but was consolidated into this appeal on June 4, 2012.

**C. Pole Attachment Rate Regulation And The 2008 Amendments To RCW 54.04.045**

RCW 54.04.045 governs third-party attachments on PUD poles. While this case was pending and before the trial, the Legislature amended the law to, among other things, "establish a consistent cost-based formula for calculating pole attachment rates." RCW 54.04.045 (intent section). The law took effect June 12, 2008.

In amending RCW 54.04.045, the Legislature recognized that communications providers "must often use pole, ducts, conduits, or rights-

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<sup>3</sup> PPUD subsequently agreed to reduce the judgment by \$7,216.85, to reflect that Charter had removed attachments from PPUD poles in Naselle. CP 2877.

<sup>4</sup> On February 27, 2012, this Court granted Appellants' motion to accept the appeal as timely. On June 4, 2012, the Supreme Court denied PPUD's motion for discretionary review of that decision, confirming that this appeal could proceed on the merits.

of-way of competitors, other utility service providers, or governmental entities to serve new or expanded customer bases.” Ex 81 (2/29/08 Senate Bill Report, E2SHB 2533). The Legislature also declared:

It is the policy of the state to encourage the joint use of utility poles, to promote competition . . . of telecommunications and information services and to recognize the value of infrastructure [owned by PUDs]. To achieve these objectives, the legislature . . . establish[ed] a consistent cost-based formula for calculating pole attachment rates, which will ensure greater predictability and consistency in pole attachment rates statewide, as well as ensure that locally regulated utility customers do not subsidize licensees.

RCW 54.04.045 (intent section).

The rate formula in amended RCW 54.04.045(3) was not passed in a vacuum. In order to understand the statute, a brief background on pole attachment rate formulas at the federal and state levels, and the terms used to describe them, is essential.

**1. The Federal Pole Attachment Act And The FCC Cable And Telecom Formulas**

Congress passed the Pole Attachment Act in 1978 to ensure rates, terms and conditions imposed on cable companies by investor-owned utilities are “just and reasonable.” 47 U.S.C. § 224. Without such regulation, “utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly

rents from cable TV systems in the form of unreasonably high pole attachment rates.” H.R. Rep. No. 94-1630, pt. 1 at 5 (1976).

The 1978 statute includes a cost-based pole attachment rental rate formula. Congress believed that a rate was “just and reasonable” if:

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

47 U.S.C. § 224(d) (emphasis added). This formula permits a pole owner to recover its fully allocated operating and capital costs attributable to the entire pole, based on the percentage of total usable pole space occupied by that attacher. As implemented by the FCC, Section 224(d) is known as the “FCC Cable Formula.” *See, e.g., infra* n.14.

The U.S. Supreme Court has held that this formula provides pole owners with adequate compensation and is not “confiscatory.” *FCC v. Florida Power*, 480 U.S. 245, 253-54, 107 S. Ct. 1107 (1987). The FCC Cable Formula remains in effect today. PPUD’s own pole attachment rate consultant (who also was its expert witness at trial) agrees the FCC Cable Formula is generally considered the “test” of a just and reasonable pole attachment rate. Ex 6 p. 5.

In 1996, the Pole Attachment Act was amended to include a separate rate formula for competitive local exchange carrier attachers. 47 U.S.C. § 224(e). This “FCC Telecom Formula” also provides pole owners their fully allocated costs, but differs from the FCC Cable Formula in the method used to assign costs to attachers. Whereas the FCC Cable Formula assigns costs based on proportionate use, the Telecom Formula assigns pole costs proportionately only for the *usable* pole space (just as the FCC Cable Formula does), but assigns the *unusable* space costs using a per-attacher approach (i.e., among “attaching entities”). *See id.* The Telecom Formula and the concept of usable and unusable space are discussed in more detail below.

**2. The 1979 Washington Investor-Owned Utility Rate Formula, RCW 80.54.040**

States may opt out of the federal Pole Attachment Act and self-regulate pole attachments. 47 U.S.C. § 224(c). Washington did so in 1979 for investor-owned utilities. RCW 80.54.040. A pole attachment rental rate is “just and reasonable” under this statute if it:

assure[s] the utility the recovery of not less than all the additional costs of procuring and maintaining pole attachments, nor more than the actual capital and operating expenses, including just compensation, of the utility attributable to that portion of the pole, duct, or conduit used for the pole attachment, including a share of the required support and clearance space, in proportion to the space used

for the pole attachment, as compared to all other uses made of the subject facilities.

*Id.* Utilities applying this statute follow the FCC Cable Formula. RP 1206:6-16. Notably, the Legislature did *not* amend RCW 80.54.040 after Congress adopted the Telecom Formula in 1996.

### **3. The 2008 Washington PUD Rate Formula**

PUD pole attachment rates are governed by neither the federal Pole Attachment Act nor RCW 80.54.040 and, prior to 1996, were unregulated in Washington. That year, in response to attacher concerns over high pole attachment rates and access to PUD poles,<sup>5</sup> the Legislature passed the original version of RCW 54.04.045, requiring that the “rates, terms and conditions made, demanded or received by a [PUD] for attachments to its poles must be just, reasonable, nondiscriminatory and sufficient.” The statute did not provide a specific formula for calculating rates.

That changed when RCW 54.04.045 was amended effective June 12, 2008. The PUD pole attachment rate formula in the amended statute mimics the “just and reasonable” rate formula in the statute governing investor-owned utilities, RCW 80.54.040 (except for the latter portion of RCW 54.04.045(3)(b), as detailed below). Amended RCW 54.04.045(3) states that a “just and reasonable rate must be calculated as follows:”

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<sup>5</sup> Final Bill Report, ESSB 6554 (noting “concern” that PUDs “may not have standard procedures to assure non-discriminatory pricing and access to utility facilities”).

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

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

(c) The just and reasonable rate shall be computed by adding one-half of the rate component resulting from (a) of this subsection to one-half of the rate component resulting from (b) of this subsection.

RCW 54.04.045(3). In other words, the allowable rate is the average of the amounts determined under each of Sections 3(a) and (3)(b).

Charter and Comcast assert that the PPUD's proposed rates as of June 12, 2008 (the effective date of amended RCW 54.04.045) exceed the cap permitted under the new rate formula.<sup>6</sup> Specifically, they contend that as a matter of law, Section 3(a) is the FCC Cable Formula and 3(b) is the FCC Telecom Formula (with a minor modification discussed in Section

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<sup>6</sup> While Charter and Comcast contend the rates PPUD imposed from January 1, 2007 to June 11, 2008 are also excessive, they are not challenging those rates in this appeal.

V.D.3 *infra*). Applying the average of the rates calculated under Sections 3(a) and 3(b) to PPUD's own cost data yields maximum rates for 2008, 2009 and 2010 of \$10.83, \$11.23 and \$10.50, respectively. Ex 413.<sup>7</sup> In contrast, PPUD justifies its rate of \$19.70 by interpreting Section 3(a) as the Telecom Formula and Section 3(b) as the so-called "APPA formula."<sup>8</sup>

## V. ARGUMENT

### A. Summary of Argument

The trial court committed reversible error. *First*, it improperly deferred to PPUD's reading of RCW 54.04.045, by applying the "arbitrary and capricious" standard to a question of statutory interpretation. The court should have interpreted the statute as a matter of law, and independently determined whether the rates fell within the statute's rate cap and whether the proposed terms and conditions were just and reasonable. *See* Section V.C. *Second*, the reading of Section 3's rate formula proffered by PPUD and accepted by the trial court is incorrect. Under the plain language of the statute and well-established canons of statutory construction, the rate cap set out in RCW 54.04.045(3)(a) can only be read as the FCC Cable Formula, and RCW 54.04.045(3)(b) can

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<sup>7</sup> Pole attachment rates are calculated using historical data. Thus, the rates for 2008, 2009 and 2010 are calculated using data from 2007, 2008 and 2009, respectively. *See id.*

<sup>8</sup> The APPA formula was created by the American Public Power Association, which represents the consumer-owned utility industry. *See* [www.publicpower.org/aboutappa/index.cfm?ItemNumber=9487&navItemNumber=20953](http://www.publicpower.org/aboutappa/index.cfm?ItemNumber=9487&navItemNumber=20953); Ex 936 p. 17. This formula is not used by any agency that regulates pole attachment rates.

only be read as the FCC Telecom Formula (with a slight mathematical modification borrowed from the APPA formula). *See* Section V.D. *Third*, the court erred in concluding that the non-rate terms and conditions in the proposed PUD Agreement comply with RCW 54.04.045, given the undisputed evidence that the contract contains provisions that conflict and that do not comply with the PPUD’s own policies. *See* Section V.E. *Fourth*, the trial court’s damages and fee awards were erroneous. *See* Section V.F, G. *Fifth*, Appellants are entitled to an award of fees and costs both on this appeal and as the prevailing party. *See* Section V.H.

**B. Standard of Review**

This Court reviews *de novo* a trial court’s conclusions of law. *Bingham v. Lechner*, 111 Wn. App. 118, 127, 45 P.3d 562 (2002). Statutory interpretation—the primary issue in this appeal—is a legal question which this Court reviews *de novo*. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 569, 980 P.2d 1234 (1999).

The standard of review for findings of fact and conclusions of law entered in a bench trial is a two-step process. First, the appellate court “must determine if the trial court’s findings of fact were supported by substantial evidence in the record. If so, the court must decide then whether those findings of fact support the trial court’s conclusions of law.” *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 108, 1182, 86 P.3d

1175 (2004), (citing *Landmark Dev.*), 138 Wn.2d at 573. “Substantial evidence” requires record evidence “of sufficient quality to persuade a fair-minded, rational person of the truth of the declared premise.” *World Wide Video, Inc. v. Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991) (citing *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)).

**C. The Trial Court Erred In Applying The “Arbitrary and Capricious” Standard to PPUD’s Interpretation of RCW 54.04.045(3)**

Underlying the trial court’s errors is its decision to apply the deferential “arbitrary and capricious” standard to the PPUD’s interpretation of RCW 54.04.045. *See* CP 2303 (CL 11) (PPUD did not act arbitrarily and capriciously “in interpreting Section 3(a) of RCW 54.04.045 as the FCC Telecom formula and Section 3(b) as the APPA formula”); *id.* at CL 1, 29. Whether a PUD sets its rates arbitrarily or capriciously is not the question where, as here, the Legislature has determined the permissible range of rates. The trial court should have interpreted the statute for itself, and independently determined whether PPUD’s proposed rates complied. Instead, it abdicated the role of statutory interpretation to PPUD.

RCW 54.04.045 requires that “all” PUD pole attachment rates be “just, reasonable, nondiscriminatory,” and within a specific rate formula range. RCW 54.04.045(2), (3). Interpreting the statute’s meaning—

including the formula set out in Section 3—is a question of law requiring *de novo* review. See *Landmark Dev., Inc.*, 138 Wn.2d at 569; *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 838, 215 P.3d 166 (2009). In reviewing an agency’s actions, “courts retain the ultimate authority to interpret a statute.” *Waste Mgmt. of Seattle, Inc. v. Utilities and Transp. Comm’n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994). This requires the court “to give effect to the **legislature’s** intentions.” *State v. Bunker*, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010) (emphasis added). The court must do so by applying the statute’s plain meaning and, if the statute is ambiguous, by interpreting it in light of legislative history and principles of statutory construction. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708-09, 153 P.3d 846 (2007).

The trial court failed to do so here. It deferred entirely to PPUD’s statutory interpretation. PPUD led the court to this error, arguing at trial that the applicable standard was whether it acted arbitrarily and capriciously.<sup>9</sup> PPUD’s legal authority for this position rested on rate-setting cases holding that cities or counties (not PUDs) are subject to the arbitrary and capricious standard where ***there is no specific statutory limit*** on the rate the local government could charge. See CP 981 (citing *Teter v.*

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<sup>9</sup> See RP 56:12-14 (opening statement) (“the courts do not second guess the decisions of elected officials unless they’re arbitrary and capricious”); RP 1699:5-14 (closing argument); CP 980 (PPUD trial brief) (a PUD’s “decisions must be sustained if the Court can reasonably conceive of **any** state of facts to justify that determination.”).

*Clark Cnty.*, 104 Wn.2d 227, 704 P.2d 1171 (1985) and *Prisk v. City of Poulsbo*, 46 Wn. App. 793, 732 P.2d 1013 (1987)).<sup>10</sup>

In contrast, this case is governed by a statute that imposes a specific, cost-based maximum that PUDs can charge for pole attachment rent. The only discretion a PUD has under RCW 54.04.045(3) is bounded by the upper and lower statutory rate range. PPUD has no discretion to exceed the maximum cap under RCW 54.04.045(3).<sup>11</sup>

The trial court's reliance on the "arbitrary and capricious" standard taints all of its findings and conclusions, and led to its failure to examine whether the pole attachment rates complied with the rate formula cap and whether the terms and conditions demanded by PPUD were "just, reasonable [and] nondiscriminatory." The court's conclusion amounts to a

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<sup>10</sup> PPUD also relied on *Snohomish Cnty. PUD No. 1 v. Broadview Television Co.*, 91 Wn.2d 3, 586 P.2d 851 (1978), but that case was decided in 1978, 30 years before the current statutory rate formula was adopted. At the time, *no* statute regulated PUD pole attachments. The case is outdated and inapposite in light of RCW 54.04.045. Moreover, even where the arbitrary and capricious standard does apply—as where a court reviews an agency administrative order or rule—the court applies no deference “where the agency’s interpretation or application of the law is erroneous.” *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 71, 110 P.3d 812 (2005); *Waste Management*, 123 Wn.2d at 628 (courts “will not defer to an agency determination which conflicts with the statute.”). In *Tarver v. City Comm’n In and For City of Bremerton*, 72 Wn.2d 726, 731, 435 P.2d 531 (1967)—cited in *Teter* as the basis for the “arbitrary and capricious” test – the Washington Supreme Court recognized that a court’s review of municipal actions includes determining whether the actions “are arbitrary, capricious *or unlawful*.” *Id.* at 731 (emphasis added). Similarly, the judicial review provision of the Administrative Procedure Act permits reversal of agency actions not only when they are arbitrary or capricious, but also where the “agency has erroneously interpreted or applied the law” or acted “[o]utside the statutory authority of the agency or the authority conferred by a provision of law.” RCW 34.05.570(3)(b), (d).

<sup>11</sup> Calculating pole attachment rates thus differs from a PUD’s statutory authority to set electric rates. See RCW 54.16.040 (PUDs have “exclusive authority” to set electric rates without WUTC oversight). In contrast to RCW 54.04.045’s limits on pole attachment rates, a PUD’s electric rates need not be reasonable or calculated under any formula.

finding that every PUD in the state has discretion to interpret RCW 54.04.045's rate formula for itself. The Legislature expressly intended the opposite: it meant to "establish a consistent cost-based formula for calculating pole attachment rates." RCW 54.04.045 (intent section).

**D. The Only Reasonable Interpretation of RCW 54.04.045 Is That Section 3(a) Is The FCC Cable Formula and Section 3(b) Is A Slightly Modified FCC Telecom Formula**

In accepting (without analysis) PPUD's interpretation that RCW 54.04.045(3)(a) is the FCC Telecom formula and 3(b) is the industry-created APPA formula, the trial court allowed PPUD to recover far more of its pole costs from attachers than the Legislature intended. PPUD's interpretation is unsupported by any reasonable reading of the statute.

Courts must interpret a statute "so as to carry out its manifest object." *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996). Interpretation starts with the statute's plain meaning, and ends there if the words are not ambiguous. *Bostain*, 159 Wn.2d at 708-09. A statute "must be construed as a whole, and effect should be given to all the language used. All of the provisions of the act must be considered in their relation to each other, and, if possible, harmonized to insure proper construction of each provision." *State ex rel. Royal v. Board of Yakima Cnty. Comm'rs*, 123 Wn.2d 451, 459, 869 P.2d 56 (1994) (internal quote

omitted). If alternative interpretations of a statute are possible, the court must select the one that best gives effect to the legislative intent when interpreting the statute as a whole. *Fontanilla*, 128 Wn.2d at 498. Here, the only reading that comports with the statutory language and gives effect to the whole statute is that Section 3(a) is the FCC Cable Formula and Section 3(b) is the Telecom Formula, modified slightly. PPUD's proposed reading ignores the statute's language and would require interpreting the same language in Sections 3(a) and 3(b) to mean different things.<sup>12</sup>

**1. RCW 54.04.045(3) Contains Three Elements Common To The FCC Cable And FCC Telecom Formulas**

There are three elements common to both Section 3(a) and 3(b) of RCW 54.040.045, as well as to the FCC Cable and FCC Telecom Formula (47 U.S.C. §§ 224(d)(e)): (1) the "capital" investment cost element, or investment per bare pole, (2) the "operating expenses" cost element, or carrying charge factor, and (3) the "space allocator" or "space factor." In each of Section 3(a), Section 3(b), the FCC Cable Formula and the FCC Telecom Formula, the plain language describes how and how much of a pole owner's capital and operating expenses (the two "cost" elements) may be allocated to the attacher using the "space allocator" (the third element). *See, e.g.*, RP 1298:1-1299:8; 1301:5-14; 1308:3-1311:7.

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<sup>12</sup> Moreover, PPUD's proposed reading is an after-the-fact rationale offered to justify rates it had already decided to adopt. PPUD adopted its new rates on January 1, 2007, more than one year *before* RCW 54.04.045 was amended. Ex 27.

The APPA formula, in contrast, uses a different set of costs and different language to describe the space allocator from each of these four formulas. As a result, as detailed below, PPUD’s argument that Section 3(a) is the FCC Telecom Formula and Section 3(b) is the APPA formula would require interpreting the same cost and space allocator language used in both sections to mean different things. In any case, the plain language used in Sections 3(a) and 3(b) does not support PPUD’s interpretation.

**a. The Identical Cost Element Language Appears In Both Sections (3)(a) and 3(b), And Mimics the Cost Language in the FCC Formulas**

Sections 3(a) and 3(b) of RCW 54.040.045 contain identical language describing the two cost elements (capital and operating expenses). Specifically, both sections provide that a pole attachment rate “shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility . . . .” RCW 54.04.045(3)(a), (b). This identical cost language in Section 3(a) and 3(b) ensures that the final rate is “cost-based,” as the Legislature intended, and describes the allowable costs that may be recovered from the attacher.

At the low end, the permissible rate under Section 3(a) and 3(b) is identical: a PUD must charge pole attachment rates consisting of at least “the *additional* costs of procuring and maintaining pole attachments”—

*i.e.*, those incremental costs the pole owner would not have incurred “but for” the attachment, such as make-ready costs. *See, e.g.*, RP 1290:1-12. Thus, under RCW 54.04.045(3)’s plain language, a rate would be “just and reasonable” if the attacher merely pays a PUD any out-of-pocket costs the PUD incurs in making its poles available to the attacher.<sup>13</sup> RP 1290:23-1291:15.

At the high end, the rate permitted by both Sections 3(a) and Section 3(b) is capped at (“may not exceed”) the PUD’s “actual capital and operating expenses” attributable to the attacher—that is, the fully allocated capital and operating costs the pole owner incurs regardless of the presence of the attacher. The key difference between Section 3(a) and Section 3(b) is how the PUD’s fully allocated costs are attributed to each attacher, based on each provision’s specific “space allocator” (the third common statutory element, discussed further below). RP 1317:16-1318:4.

All of the cost provisions of RCW 54.04.045(3) are reflected in the FCC Cable Formula. At the low end, the Cable Formula allows a utility to charge “***not less than the additional costs*** of providing pole attachments.” 47 U.S.C. § 224(d)(1) (emphasis added). This is the same as the low-end,

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<sup>13</sup> As a routine matter, PUDs (including PPUD) recover their “but for” or “incremental” costs through “make-ready” charges (to modify the pole) and other fees *charged on top of the annual rent* to accommodate the attacher. *See, e.g.*, Ex 38 (PPUD Agreement), Article 3 & App. A. Thus, PUD pole owners always receive the statutory minimum and also always receive annual pole attachment rent *in addition to* the “but for” costs. *Id.*

incremental-cost minimum allowed under both RCW 54.04.045(3)(a) and (3)(b). At the high end, Section 224(d) allows a pole owner to recover no more than a specified portion of the “operating expenses and actual capital costs of the utility” attributable to the attacher, per the specified space allocator contained in Section 224(d). 47 U.S.C. § 224(d)(1).<sup>14</sup>

The FCC interprets the FCC Telecom Formula, 47 U.S.C § 224(e), to cover the *same* capital and operating expenses as the FCC Cable Formula. But the Telecom Formula allocates more of those costs due to its space allocator.<sup>15</sup> Thus, as with RCW 54.04.045(3)(a) and (b), the cost elements of the FCC Cable Formula and the FCC Telecom Formula are the same, and the only difference between the two is how the fully allocated costs are attributed to the attacher based on the “space allocator”

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<sup>14</sup> While the federal statute, like RCW 54.04.045(3), allows the lawful rate to be as low as purely “additional” costs, the FCC has adopted regulations and applies Section 224(d) to allow for the highest range, or “fully allocated,” cost recovery. This fully allocated formula is *the* “FCC Cable Formula.” See, e.g., *Florida Power*, 480 U.S. at 253-54.

<sup>15</sup> After trial in this matter, and after a years-long rulemaking, the FCC reinterpreted its Telecom Formula. Previously, the Telecom Formula allocated a higher percentage of pole costs to the attacher than the Cable Formula. The cost recovery under the revised Telecom Formula is intended to “approximate” the Cable Formula. CP 2157 (2011 FCC Order) ¶ 149. When it amended RCW 54.04.045 in March, 2008, the Legislature was aware of the FCC’s rulemaking, which at that time was contemplating major changes to the FCC Cable Formula. See *Implementation of § 224; Amendment of the Commission’s Rules & Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 ¶ 36 (2007). The Legislature accounted for the anticipated potential changes to the FCC Cable Formula in the amended statute. See RCW 54.04.045(4) (for purposes of setting rate under Section 3(a), a PUD may use “the calculation set forth in subsection 3(a) of this section or it may establish a rate according to the cable formula set forth by the federal communications commission by rule as it existed on June 12, 2008, or such subsequent date as may be provided by the [FCC] by rule, consistent with the purposes of this section.”). Ultimately, the FCC revised the Telecom Formula rather than the Cable Formula. Unless otherwise noted, references herein to the FCC Telecom formula refer to the formula as it existed at the time of trial and before the reinterpretation.

in each provision. RP 1317:16-1318:4. The key dispute in this case is how, and how much of, the fully allocated costs are allocated under each of Section (3)(a) and (3)(b) due to each section's space allocator. As detailed below, the space allocator language in Section 3(a) accords with the FCC Cable Formula's, and 3(b)'s accords with the FCC Telecom Formula's.

**b. The Space Allocator In The FCC Cable Formula Operates on a Proportionate-Use Basis**

There are two key concepts of "space" that control how fully allocated costs are assigned to attachers under the "space allocator" language of both FCC formulas: "unusable" space and "usable" space on the pole. Unusable space is (a) the part of the pole buried underground for stability, or "support space," and (b) the area of the pole above the ground but below the minimum attachment height for wires set by safety codes, or "clearance space." Ex 407 (App. 5); RP 1294:14-20. The unusable support and clearance space cannot be used for *any* wire attachment. *Id.* The remaining space above the minimum attachment height to the top of the pole is deemed "usable" space, which can be used for electric, phone and cable attachments. Ex 407 (App. 5).

On a typical 40-foot distribution pole, there are 24 feet of unusable space (six feet buried underground plus 18 feet to the height of the first

attachment), and the remaining 16 feet is considered usable space. *See* Ex 403 (App. 4), Ex 407 (App.5). Cable attachers are presumed to occupy one foot of usable space on a pole. 47 C.F.R. § 1.1418.

The space allocator in the FCC Cable Formula allocates a pole owner's fully allocated costs by "multiplying the *percentage of the total usable space . . . occupied by the pole attachment* by the sum of the operating expenses and actual capital costs of the utility *attributable to the entire pole . . .*" 47 U.S.C. § 224(d)(1) (emphasis added).

Mathematically, the FCC Cable Formula is expressed as follows:

$$\begin{aligned} \text{Maximum Rate} &= \text{Space Factor} \times \frac{\text{Net Cost of a Bare Pole}}{\text{Bare Pole}} \times \text{Carrying Charge Rate} \\ \text{Where Space Factor} &= \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \end{aligned}$$

47 C.F.R. § 1.1409(e)(1). In other words, the FCC Cable Formula space allocator assigns a portion of the fully allocated costs to the attacher based on the *proportion* of the usable space (the 16 feet) used by the cable attacher (the one foot). Accordingly, under this formula, each attacher on a 40-foot pole is responsible for 1/16th or 6.25 percent of a pole owner's fully allocated pole costs. *See, e.g.,* Ex 407 (App. 5).

**c. The Space Allocator In The FCC Telecom Formula Operates on a Per-Entity Basis**

As discussed above, the FCC uses the same exact fully allocated capital and operating costs to calculate both its Cable and Telecom

Formulas. The only difference between the two formulas is in the way they allocate the costs associated with “unusable” space. The Cable Formula assigns costs relating to the entire pole—both usable and unusable space—on a proportionate basis. The Telecom Formula assigns costs for the *usable* space on the same proportionate basis as the Cable Formula, but assigns the costs for *unusable* space based on the number of attachers on the pole. CP 2149 (2011 FCC Order n.397).

Specifically, the space allocator in the FCC Telecom Formula requires a pole owner to “apportion the cost of providing space on a pole ... ***other than the usable space*** among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.” 47 U.S.C. § 224(e)(2) (emphasis added). These unusable space costs are added to the cost of the pole’s usable space as determined based on the “percentage of usable space required for each entity.” 47 U.S.C. § 224(e)(3).

The FCC expresses its Telecom Formula as:

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[ \begin{array}{c} \text{Carrying} \\ \text{Charge} \\ \text{Rate} \end{array} \right]$$

$$\text{Where Space Factor} = \frac{\left[ \begin{array}{c} \text{Space} \\ \text{Occupied} \end{array} \right] + \left[ \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right]}{\text{Pole Height}}$$

47 C.F.R. § 1.1409 (e)(2) (2011).

**2. Section 3(a) of RCW 54.04.045 Operates On An Entirely Proportionate Basis Like the FCC Cable Formula, And Cannot Be The FCC Telecom Formula**

PPUD argues that the space allocator in RCW 54.04.045(3)(a) operates like the FCC Telecom Formula. That interpretation is wrong. The plain language of Section 3(a), the statutory scheme as a whole, and the evidence at trial demonstrate the space allocator in Section 3(a) operates in the same proportionate-use manner as the FCC Cable Formula.

The space allocator in Section 3(a) directs that the fully allocated pole costs be allocated based on “that portion of the pole . . . used for the pole attachment, including a share of the required support and clearance space, *in proportion to the space used for the pole attachment*, as compared to all other uses made of the subject facilities and uses that remain available to the owner or owners of the subject facilities.” RCW 54.04.045(3)(a) (emphasis added). In other words, Section 3(a)’s plain language attributes the costs of both usable and unusable space “in proportion to the space used for the pole attachment” (the one foot of space occupied by an attachment) “as compared to all other uses of the subject facilities and uses that remain available to the owner or owners of the subject facilities” (that is, in proportion to the total available space for use on the pole or *total usable space*). RP 1300:15-1301:4.

Section 3(a) thus uses the *same* proportionate-use space allocator as the FCC Cable Formula, and like the Cable Formula can be expressed as:

$$\textit{Where Space Factor} = \frac{\textit{Space Occupied by Attachment}}{\textit{Total Usable Space}}$$

There is no reasonable way to read RCW 54.04.045(3)(a) as the FCC Telecom Formula, as PPUD argues. First, the Telecom Formula, as detailed above, allocates the cost of unusable space based on the number of attaching entities. In contrast, RCW 54.040.045(3)(a) does not use the phrase “attaching entities” or anything like it. The phrase “attaching licensees” is used *only* in RCW 54.040.045(3)(b). If the Legislature intended the formula in Section 3(a) to allocate unusable space costs on a per-attacher basis, it would have used the term “attaching licensees” in Section 3(a) as well as Section 3(b). The absence of any such language in Section 3(a) demonstrates that Section 3(a) is not intended to operate on a per attacher basis—and, without such language, it cannot be the FCC Telecom Formula, which indisputably *does* contain a per-attacher allocation component. *See Mason v. Georgia-Pacific Corp.*, 166 Wn. App. 859, 864, 271 P.3d 381 (2012) (“where a statute specifically designates the things or classes of things on which it operates—an inference arises in law that the legislature intentionally omitted all things or classes of things omitted from it.”); *Guillen v. Contreras*, 169 Wn.2d 769, 776, 238 P.3d 1168 (2010) (“where the Legislature uses certain

statutory language in one instance, and different language in another, there is a difference in legislative intent.”) (citation omitted).

Similarly, Section 3(a) contains no mention of the FCC Telecom Formula’s “two-thirds” unusable space cost allocator. *See* 47 U.S.C. § 224(e)(3). In fact, PPUD argues that **Section 3(b)** cannot be the FCC Telecom Formula because the “two-thirds” language is not found in that section—but ignores that rationale with respect to Section 3(a), which PPUD claims *is* the FCC Telecom Formula. RP 638:25-642:5.<sup>16</sup> Section 3(a) also does not use the term “pole height,” which is used as the space factor denominator in both Section 3(b) and the FCC Telecom Formula. *See* RCW 54.04.0453(b) (“which sum is divided by the height of the pole); Section V.D.1.b., *supra* (Telecom Formula space factor).

The second reason why RCW 54.04.045(3)(a) cannot be the FCC Telecom Formula is that Section 3(a) is virtually identical to the rate formula contained in Washington’s investor-owned utility statute, RCW 80.54.040, which is universally interpreted as the FCC Cable Formula. RP 1207:14-1210:24; *see also* Ex 6 (PPUD Consultant Rate Study) p. 5-6. Indeed, the only rate formula in effect when RCW 80.54.040 was enacted in 1979 was the FCC Cable Formula. The Legislature did not amend RCW 80.54.040 when Congress adopted the

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<sup>16</sup> As detailed below, the logical reading is that RCW 54.04.045(3)(b) is the Telecom Formula in all respects, except that it does not use a two-thirds unusable space allocator.

Telecom Formula in 1996. The Legislature's use in RCW 54.04.045(3)(a) of the same language it used in RCW 80.54.040 is clear evidence that the former, like the latter, is intended to operate like the FCC Cable Formula.

The third reason Section 3(a) cannot be the FCC Telecom Formula is that such a reading cannot be squared with RCW 54.04.045(4), which makes clear the Legislature understood Section 3(a) to be the FCC Cable Formula. Section 4 states:

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

RCW 54.04.045(4) (emphasis added). Section 4's purpose was to allow PUDs to calculate Section 3(a) in accordance with the FCC Cable Formula as it existed in March 2008 (when the legislation was passed), or any cable formula subsequently adopted by the FCC. *See* Ex 81 (Senate Bill Report) ("The bill allows for future rate-setting methodologies as set by rule by the FCC"). Section 4 was added because when RCW 54.04.045 was amended in March 2008, the Legislature knew the FCC ***was in the midst of considering significant changes to its Cable Formula***, such that the Legislature did not know what FCC Cable Formula would be in effect on

the amendment's effective date or in the future.<sup>17</sup> Section 4's direct reference to the FCC "cable rate formula" (and the potential changes under consideration) demonstrates that Section 3(a) must be the FCC Cable Formula. Conversely, Section 4 would make no sense under the trial court's interpretation of the statute, because that interpretation reads the cable formula out of Section 3 altogether. Accordingly, the language in Section 4 confirms that the Legislature intended RCW 54.04.045(3)(a) to be the Cable Formula, not the Telecom Formula.

**3. Section 3(b) Is The FCC Telecom Formula, With A Minor Modification, And Cannot Be The APPA Formula**

The trial court also erred in finding that RCW 54.04.045(3)(b) entirely reflects the "APPA Formula" rather than a slightly modified version of the FCC Telecom Formula (due to the use of one minor element of the APPA Formula). CP 2438 (CL 10).<sup>18</sup> First, the court ignored the clear parallels in the language of Section 3(b) and the Telecom Formula. *See infra* Section V.D.3.a. The cost elements of both provisions are identical, and the space allocation element is the same, except for a simple mathematical difference: the FCC Telecom Formula multiplies the unusable space allocation component by two-thirds, and Section 3(b) does not. Second, the trial court's ruling that Section 3(b) is the so-called

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<sup>17</sup> *See*, n.15, *supra*.

<sup>18</sup> *See infra* n.20 and accompanying text.

APPA Formula, while finding that Section 3(a) is the Telecom Formula, violates the maxim that identical words used in different parts of the same statutes have the identical meaning. *See Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 313, 884 P.2d 920 (1994). The reading of Section 3(b) advanced by PPUD and accepted by the trial court would require interpreting the cost language in Section 3(a) to describe a PUD's net costs, while interpreting the *same* language in Section 3(b) to describe a PUD's gross costs. *See infra* Section V.D.3.b. Third, reading Section 3(b) as the APPA formula ignores key differences between the two formulas' treatment of unusable pole space, and again would require interpreting language in Section 3(a) to have a different meaning than the same language in Section 3(b). *See* Section V.D.3.c.

**a. The Plain Language of Section 3(b) Parallels That Of The FCC Telecom Formula**

The cost language in Section 3(b) is identical to the cost language in Section 3(a). *See supra* Section V.D.1.a. Where they differ is in the space allocator (which is also the difference between the FCC Cable and Telecom Formulas). Section 3(b)'s space allocator directs that a pole owner's fully allocated costs be "attributable to the share, expressed in feet, of the required support and clearance space, divided equally among the locally regulated utility and all attaching licensees, in addition to the

space used for the pole attachment, which sum is divided by the height of the pole.” RCW 54.04.045(3)(b). In other words, under Section 3(b) the costs of the unusable space (“support and clearance space”) are divided equally between the number of attaching licensees and the pole owner, and added to the costs of the one foot of space “used for the attachment.” That sum is then divided by the height of the pole.

As explained in Section V.D.1.c. above, this is precisely how the FCC Telecom Formula operates, with one minor difference. The FCC Telecom Formula divides only *two-thirds* of the unusable space costs equally among the attaching entities (including the pole owner) on the pole (the remaining one-third is allocated solely to the pole owner). Section 3(b) requires a PUD to divide *all* the unusable space costs among the attaching licensees and the pole owner. The Section 3(b) space factor can be expressed as:

$$\textit{Where Space Factor} = \frac{\left( \text{Space Occupied} \right) + \left( \frac{\textit{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\textit{Pole Height}}$$

The FCC Telecom Formula’s space factor, again, is expressed as:

$$\textit{Where Space Factor} = \frac{\left( \text{Space Occupied} \right) + \left( \frac{2}{3} \times \frac{\textit{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\textit{Pole Height}}$$

With the exception of the 2/3 allocator, the equations are *exactly the same*.

**b. Under The Rule That Identical Words Used In Different Parts Of A Statute Mean The Same Thing, Section 3(b) Cannot Be The APPA Formula**

The APPA expresses its formula as follows:<sup>19</sup>

Maximum Rate = Assignable Space Factor + Common Space Factor

Assignable Space Factor =  $\frac{\text{Space Occupied by Attachment}}{\text{AssignableSpace}} \times \frac{\text{AssignableSpace}}{\text{Pole Height}} \times \frac{\text{Average Cost of Bare Pole}}{\text{Carrying Charge}}$

Common Space Factor =  $\frac{\text{CommonSpace}}{\text{Pole Height}} \times \frac{\text{AverageCost of Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charge}$

Both Section (3)(b) and the APPA formula allocate the cost of unusable space to the attacher and pole owner on an equal basis, rather than the two-thirds basis used in the Telecom Formula.<sup>20</sup> But the similarities end there, and the differences among the formulas show Section 3(b) is not the APPA formula. Most important, PPUD's reading requires interpreting much of the exact language in Section 3(a) and 3(b) differently.

The cost language in Section 3(a) and 3(b) is identical: under each, the pole attachment rate "shall consist of the additional costs of procuring and maintaining pole attachments, but may not exceed the actual capital and operating expenses of the locally regulated utility attributable to" the pole as allocated by the respective space factors. RCW 54.04.045(3).

This cost language must mean the same thing in Section 3(a) as it does in

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<sup>19</sup> The APPA formula refers to "usable space" as "Assignable Space" and "unusable space" as "Common Space." Ex 936 (APPA Pole Attachment Workbook) p.17.

<sup>20</sup> The Legislature recognized that it was incorporating this one element of the APPA formula into amended RCW 54.04.045. See Ex 81 (Senate Report) p. 2 ("The two-part formula incorporates existing rate-setting methodologies of the [FCC], the Washington Utilities and Transportation Commission, and the American Public Power Association.").

3(b): “When the same words are used in different parts of the same statute, it is presumed that the Legislature intended that the words have the same meaning.” *Timberline Air Serv.*, 125 Wn.2d at 313.<sup>21</sup>

But the costs used in the APPA formula on the one hand, and the two FCC Formulas on the other, are not the same. Specifically, both the FCC Cable and FCC Telecom Formulas calculate rates using “net” costs—that is, the FCC accounts for depreciation “to reflect prior cost recoveries.” RP 1337:12-1338:13; *see* 47 C.F.R. § 1.1409(e) (setting forth FCC Cable and Telecom Formulas and requiring use of “net cost”). The APPA formula, in contrast, calculates rates using “gross” costs.” Ex 936 p. 17 (APPA formula uses “gross pole investment”).

It follows that PPUD’s interpretation of RCW 54.04.045 cannot stand under the interpretation canon noted above. If RCW 54.04.045(3)(a) were the FCC Telecom Formula, as PPUD claims, then Section 3(b) **cannot** be the APPA formula. PPUD’s reading would require interpreting Section 3(a)’s cost provision to refer to net costs, while simultaneously interpreting the identical language in Section 3(b) to refer to gross costs. The trial court should have rejected that interpretation out of hand.

It is well established that a statute “must be construed as a whole ... considering all provisions in relation to each other and, if possible,

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<sup>21</sup> *See also State v. Roggenkamp*, 153 Wn.2d 614, 625 n.4, 106 P.3d 196 (2005); *Medcalf v. Dep’t of Licensing*, 133 Wn.2d 290, 300-01, 944 P.2d 1014 (1997).

harmonizing all to insure proper construction of each provision.” *See Newschwander v. Teachers’ Ret. Sys.*, 94 Wn.2d 701, 707, 620 P.2d 88 (1980); *Belleau Woods II, LLC v. City of Bellingham*, 150 Wn. App. 228, 242-43, 208 P.3d 5 (2009) (“A court should construe each part or section of a statute in connection with every other part to harmonize the statute as a whole.”). The *only* interpretation of RCW 54.04.045 that harmonizes Sections 3(a) and 3(b) is that Section 3(a) refers to the FCC Cable Formula and Section 3(b) refers to the FCC Telecom Formula. This reading ascribes the same meaning to the identical cost provision in the two sub-sections: the provision refers in both instances to net costs.

**c. The Formulas’ Differing Treatment Of “Unusable Space” Is Further Proof That Section 3(b) Is Not The APPA Formula**

Another distinction between the APPA Formula and the FCC formulas—their different treatment of “unusable space” for purposes of rate calculation—is further evidence that Section 3(b) cannot be interpreted as the APPA Formula.

Section 3(a) and 3(b) use identical language to describe unusable space: both refer to it as “required support and clearance space.” RCW 54.04.045(3)(a), (b). But the unusable space provisions of the APPA formula on the one hand, and both FCC Formulas, on the other, differ—specifically, with respect to which parts of the pole are deemed

“unusable.” While both FCC formulas treat as unusable the support space (the buried portion of the pole) and the clearance space (the portion above ground up to the lowest attachment), the APPA formula goes further: it treats as “unusable” not only the support and clearance space, but also an additional 40 inches of so-called “safety space,” which is typically the space between the highest communications attachment and the lowest allowable electric wire.<sup>22</sup> Ex 936 p. 20. The unique “safety space” component of the APPA formula is significant for three distinct reasons.

First, RCW 54.04.045 makes no mention of “safety space.” This in itself demonstrates that RCW 54.04.045(3)(b) is not the APPA formula.

Second, this is another instance in which PPUD interprets the same words to mean one thing in Section 3(a), and another in Section 3(b). PPUD asserts Section 3(a) is the FCC Telecom formula. This amounts to an admission that the unusable space provision in Section 3(a) (“required support and clearance space”) does *not* include safety space (since the FCC Telecom Formula does not consider the safety space unusable). But for Section 3(b) to be the APPA formula, as PPUD contends, the term “required support and clearance space” must include safety space (since no other provision in Section 3(b) refers to unusable space). This violates the rule that identical terms in different provisions of a statute have

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<sup>22</sup> Treating the safety space as additional unusable space results in significantly more costs being allocated, and thus shifted, to attachers.

identical meaning. The only reading that harmonizes the unusable space provision of Section 3(a) and 3(b) is that the former is the FCC Cable Formula and the latter is the FCC Telecom Formula, slightly modified.

Third, considering safety space as usable for purposes of rate calculations (as is done under both FCC Formulas, but not the APPA formula) is consistent with the fact that pole owners actually can and do use the “safety space” for their own facilities. PPUD admitted that it is the *only* party allowed to use safety space on its poles, and that it uses that space for revenue-generating purposes such as the attachment of municipal street lights and its own communications fiber. RP 301:19-306:19, 413:17-416:1. PPUD’s own construction standards likewise show that street lights are attached in the 40 inches of safety space. *See* Ex 74 (PPUD Agreement) p. 48-49. Indeed, use of the safety space by electric utilities like PPUD is “standard.” RP 1514:12-1515:5.<sup>23</sup>

In sum, the trial court erred in finding RCW 54.04.045(3)(a) to be the FCC Telecom Formula and (3)(b) to be the APPA formula. The only reasonable interpretation is that Section 3(a) should be applied like the FCC Cable Formula and Section 3(b) should be applied like the FCC Telecom Formula, but without the two-thirds allocator.

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<sup>23</sup> The court’s findings that Appellants “use the safety space on the [PPUD’s] poles, and that the safety space is primarily for their benefit” (App. 3, FF 39) is not supported by substantial evidence. The evidence showed that any such “use” would violate applicable safety codes, and is not permitted. *See, e.g.*, RP 303:23-304:13.

**E. PPUD's Proposed Non-Rate Terms and Conditions Are Not Just And Reasonable**

The trial court also erred in upholding the PUD Agreement's non-rate terms and conditions under RCW 54.04.045, which requires that such terms be just and reasonable. The trial court's findings reflect another legally erroneous application of the "arbitrary and capricious" standard. App. 3 (CL 30, 31). Its conclusion cannot be sustained in light of the undisputed evidence that the PPUD Agreement contains numerous provisions that (1) are internally contradictory; (2) are unreasonable according to PPUD's own managers; and (3) deviate from PPUD's stated policies and industry practice.

These unreasonable provisions reflects that PPUD's managers, who had no experience negotiating pole attachment agreements, refused to engage in a customary section-by-section review with Appellants.<sup>24</sup> RP1094:5-19. Such a refusal is itself unreasonable: as the FCC has recognized, a party fails to negotiate in good faith where, as here, it offers an agreement on a "take it or leave it" basis and refuses to take part in

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<sup>24</sup> The problems with the Agreement also reflect that PPUD's Chief Engineer in charge of Appellants' pole attachments, was not advised about their concerns with the PPUD Agreement. RP 439:18-441:12.

further discussion.<sup>25</sup> The result, as discussed below, is a proposed agreement that is not just and reasonable.

### **1. The PUD Agreement's Internal Contradictions Demonstrate It Is Not Reasonable**

The PUD Agreement has internal conflicts that make it impossible to know what the Agreement requires. For example, it contains dueling provisions regarding how pole attachment rent will be charged. Section 3.3 states that the rent will be charged “per pole.” Ex 38 (PUD Agreement) p. 9. But Appendix A of the PUD Agreement (Fees and Charges) states rental rates will be assessed “per pole” and “per attachment.” This ambiguity is material, as it leaves uncertain whether PPUD may charge multiple rents per pole where, for example, an attacher has several wire attachments attached to the same bolt in the pole. PPUD did not clarify this language, despite several requests. RP 975:1-977:11; Ex 123.

The PUD Agreement also contradicts itself regarding the concept of “grandfathering,” *i.e.*, whether an attacher is excused from upgrading its existing attachments to comply with the National Electrical Safety Code (“NESC”) or a pole owner’s construction standards whenever there are

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<sup>25</sup> See, e.g., *Implementation of § 703(e) of the Telecomm. Act of 1996, Report & Order*, 1998 FCC LEXIS 628 ¶ 20 (Feb. 6, 1998) (“parties must negotiate in good faith for non-discriminatory access at just and reasonable pole attachment rates.”); 47 C.F.R. § 76.65(b)(iv) (refusal to offer “more than a single, unilateral proposal” violates duty to negotiate in good faith in retransmission consent negotiations).

revisions. Section 4.1 of the PUD Agreement allows for grandfathering, unless upgrades are required by the Agreement. Ex 38 p. 10. Section 6.1, on the other hand, states “all such pre-existing Attachments shall comply with the terms of this Agreement within eighteen (18) months of the effective date of this Agreement,” and Appendix D contains NESC standards that have been updated since the time Appellants’ plant was installed, as well as standards that exceed the NESC. Ex 38; RP 1111:18-1112:8; 1602:13-1605:3. Read together, these provisions suggest that Appellants would be required to upgrade (at significant cost) all of their existing attachments to the new standards set out in Appendix D. RP 935:20-937:24; 1103:20-1104:2. PPUD’s General Manager testified that Section 4.1 allows for grandfathering (RP 191:17-192:6) but admitted on cross-examination “there is no way” to know whether the Agreement allows for grandfathering. RP 257:13-18.

**2. The Agreement Contains Provisions That PPUD Admits Are Unreasonable**

The PUD Agreement also contains provisions that PPUD itself agrees are unreasonable. Section 9.4.1 (Ex 38 p. 18) requires Appellants to pay any “rearrangement or transfer” costs necessary to accommodate PPUD’s own communications fiber—a patently unreasonable requirement, given that PPUD alone would profit from leasing fiber

capacity to retailers in competition with Appellants. At trial, PPUD's General Manager admitted Appellants should not be required to pay to make room for PPUD's communications fiber, even though that is what the PUD Agreement requires. RP 314:22-316:23.

Another example is Section 6.3, which requires attacher employees responsible for installing cable attachments to have experience performing installation work "on electric transmission or distribution systems." Ex 38, p. 14. PPUD's Chief of Engineering admitted at trial there is "no need" for this requirement. RP 443:2-14. The provision is unreasonable, as cable companies do not employ electrical workers. RP 1105:23-1106:16.

### **3. The Agreement Includes Provisions That Deviate From PPUD's Own Policies And Standard Industry Practices**

Under PPUD's current practice, post-construction inspections (which ensure attachments comply with applicable safety codes) are performed by PPUD. RP 441:24-442:5. Section 6.3 of the PUD Agreement, on the other hand, requires such inspections be performed by the attacher. Ex 38 p. 14. At trial, PPUD's Chief of Engineering appeared unaware of this new requirement and testified it would be reasonable for PPUD to continue performing post-construction inspections itself. RP 441:24-442:9. The Agreement is also inconsistent with standard

industry practices. Most significantly, Section 6.3 requires that attachers use a Professional Engineer (“PE”) when submitting pole attachment applications. Ex 38 p. 14.<sup>26</sup> (Currently, the PUD only requires a PE for complex and large jobs where there is concern about weight on the poles. RP 361:1-362:21.) Communications attachers are not required by law to use PEs and doing so adds unnecessary cost and delay onto pole attachment projects.<sup>27</sup> RP 1606:19-1607:14.

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The foregoing is not an exhaustive list of the PUD Agreement’s unreasonable terms. (Appellants provided comprehensive objections to the most unreasonable provisions in 2007, in response to PPUD’s “final” proposal. *See* Ex 511.) But these examples demonstrate the PUD Agreement as a whole is not just and reasonable. This Court should reverse the trial court’s findings that the proposed agreement complies with RCW 54.04.045, remand for entry of judgment on Appellant’s counterclaims, declare the PUD Agreement’s terms unreasonable, and require PPUD to negotiate an agreement containing reasonable provisions.

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<sup>26</sup> While Section 6.3 gives the licensee the option to use an employee that is “approved” by PPUD, that employee is required to have electrical work experience. As noted above, cable companies do not employ such workers.

<sup>27</sup> Although the PUD Agreement permits PPUD to waive the PE requirement (Ex 38 at App. G), the waiver does not offer attachers any real relief. For example, Appendix E of the Agreement requires attachers provide pole loading calculations that typically are performed by a PE. RP 1108:9-1110:10. Also, PPUD may grant or revoke the waiver on an arbitrary basis, according to PPUD’s General Manager. RP 195:21-196:16.

**F. The Trial Court's Damages Award Was Erroneous**

Appellants seek reversal of the trial court's \$1.85 million judgment (App. 2) primarily on the ground that it rests on a proposed pole attachment rate that, as discussed above, exceeds the maximum allowed under RCW 54.04.045. In addition, Appellants appeal two aspects of the trial court's damages calculation related to the interest award, which require a reduction in damages even if the PPUD prevails on appeal.

First, the trial court awarded prejudgment interest as if Appellants had refused to pay any pole attachment rent following PPUD's unilateral termination of the prior pole attachment agreements in 2006. CP 2306-2307 (CL 42-44). But Comcast and Charter offered payment for their attachments at the historic rate of \$5.75 per pole every year during this dispute. *See supra* Section IV.A. PPUD has refused to accept payment, even under a reservation of rights. This refusal amounts to a failure by PPUD to mitigate its damages. *See Bernsen v. Big Bend Elec. Coop., Inc.*, 68 Wn. App. 427, 433, 842 P.2d 1047 (1993) (doctrine of mitigation or avoidable consequences "prevents recovery for those damages the injured party could have avoided by reasonable efforts taken after the wrong was committed."). Had PPUD accepted Appellants' good-faith offer of partial payment of the undisputed pole attachment rent, it would have avoided

part of its lost interest. Accordingly, any prejudgment interest awarded to PPUD should not accrue to those amounts Appellants attempted to pay.

Second, the trial court awarded PPUD prejudgment interest at a rate of 12 percent, even though the pole attachment agreements under which PPUD brought suit contained no provision for interest on late payment. *See* Exs 1, 2. The trial court justified a 12 percent rate as “consistent with the permissible interest rate on a judgment under RCW 4.56.110(4).” CP 2307 (App. 3), CL 43. But RCW 4.56.110(4) sets out the interest rate that accrues on a judgment “from the date of [its] entry[.]” RCW 4.56.110(4). The trial court also held that a 12 percent rate was reasonable given that the unsigned proposed PUD Agreement allowed for interest of 18 percent per annum. CP 2307 (App. 3), CL 43. But the interest rate set forth in the proposed agreement is not applicable because the agreement is not in effect. Finally, 12 percent interest is excessive in light of testimony from PPUD’s own rate expert, whose damages calculation at trial was based on a 5 percent interest rate being sufficient to compensate PPUD for any lost opportunity costs. RP 575:6-7; Ex 197.

Accordingly, if this Court affirms the judgment in any respect, the amount should be recalculated by (i) assuming PPUD received timely payment of \$5.75 per pole, and (2) applying a prejudgment interest rate of

5 percent. Recalculated damages applying these assumptions are in the record at CP 2124-2125; 2181-2184.<sup>28</sup>

### **G. The Court Erred In Awarding PPUD Its Fees**

The December 12 judgment includes over \$1 million in attorneys' fees and costs, awarded to PPUD as the prevailing party. CP 2327 (App. 2) ¶ 7. On March 23, 2012, the trial court awarded PPUD an additional \$27,690.14 in expenses incurred on a post-trial motion, again on the ground that PPUD was the prevailing party. CP 2847, 2851. If this Court reverses on the merits, it must also reverse the fee awards, because PPUD has no claim to fees apart from its status as the prevailing party.

If the fee awards are not reversed, Appellants appeal from one aspect of the December 12 fee order—the award of \$251,150.11 to PPUD's rate consultant, Gary Saleba of EES Consulting. CP 2322. These expenses should be reversed as unreasonable and unsupported.

Mr. Saleba was not only PPUD's trial expert, but also its rate analyst outside the scope of this litigation. *See, e.g.*, RP 503:14-18. Yet the bills submitted to the trial court fail to distinguish between Mr. Saleba's litigation-related work and work he performed in the usual course of business for PPUD. CP 1864-1905. In fact, the bills contain *no* narrative and *no* detail about the work performed—just a bare assertion of

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<sup>28</sup> These recalculations were performed prior to the \$7,216.85 reduction in the judgment against Charter. CP 2877.

the billing individual and the time they spent. *Id.* A prevailing party entitled to fees bears the burden of establishing that the amount requested constitutes a “reasonable number of hours spent *on the lawsuit.*” *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 773, 115 P.3d 349 (2005) (emphasis added). EES’s invoices fail to establish what portion of the work involved the litigation.<sup>29</sup>

Further, the EES bills are grossly unreasonable. They account for nearly one-quarter of the total fees PPUD incurred over four years of litigation (including a seven-day bench trial at which Mr. Saleba was just one of 11 witnesses). CP 2292. EES’s purported bill for the trial totaled 1,395 hours—nearly nine months of full-time work, and *over 1,100 hours more* than Appellants’ rate expert incurred for her work. CP 2046-47. Nor was Mr. Saleba’s testimony helpful to PPUD. It was not credited or even mentioned in the trial court’s Memorandum Decision, nor its findings and conclusions. CP 1324-27, 2290-2313.

Even if it ultimately prevails, PPUD is entitled to no more than a “reasonable” fee award. RCW 4.84.330; *Crest*, 128 Wn. App. at 773. “Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought.

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<sup>29</sup> Indeed, the EES bills are unauthenticated by any declaration from Mr. Saleba or EES. PPUD submitted evidence that it paid the bills (*see* CP 1852-53), but that declaration does not establish that bills were reasonable, or for services directly related to the lawsuit.

Courts should not simply accept unquestioningly fee affidavits from counsel.” *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998) (emphasis in original); *see also Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). Yet that is exactly what the trial court did here: it did not consider the issues noted above, demand any detail from EES, or question its bills at all. The EES fees cannot be upheld in such an “absence of an adequate record upon which to review [the] fee award[.]” *Mahler*, 135 Wn.2d at 435. Accordingly, this Court should reverse the portion of the fee award attributable to EES.

**H. Appellants Should Be Awarded Their Fees, Including Fees On Appeal**

Charter and Comcast respectfully request fees and costs on appeal. *See* RAP 18.1. They also seek their trial fees and costs if they are ultimately the prevailing party after appeal.

Appellants base their entitlement to fees on Section 19 of their respective pole attachment agreements. Ex 1 p. 6, Ex 2 p. 6. Section 19 is a non-mutual fee-shifting provision, purporting to provide PPUD, but not Appellants, the right to recover fees and costs from an action under the agreement. But the clause operates mutually as a matter of law. “Washington public policy forbids one-way attorney fee provisions.” *Mahler*, 135 Wn.2d at 426 n.17. Under RCW 4.84.330, unilateral fee-

shifting provisions such as Section 19 are deemed bilateral, to ensure “no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision.” *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009).

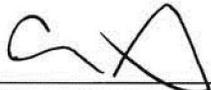
PPUD claimed fees under this same Section 19, seeking a finding from the trial court that its “claims arose from a common core of related, intertwined facts, and no segregation of fees and costs among the District’s claims is reasonably possible.” CP 2318 (FF 17). The trial court entered that finding, and Appellants do not challenge it here. For the same reasons, Appellants’ defense and counterclaims were entirely intertwined with, and cannot be segregated from, the pole attachment agreements. Accordingly, should they prevail after appeal, Appellants are entitled to all of their fees and costs incurred in this action.

## **VI. CONCLUSION**

This Court should (i) reverse the trial court’s judgments; (ii) hold that RCW 54.04.045(3)(a) reflects the FCC Cable Formula and Section 3(b) reflects a modified FCC Telecom Formula; (iii) find the Agreement as a whole is not just, reasonable and nondiscriminatory; (iv) remand to the trial court for entry of judgment denying PPUD’s claims and granting Appellants’ counterclaims; and (v) award Appellants their reasonable fees and costs as the prevailing parties for all proceedings in this matter.

RESPECTFULLY SUBMITTED this 13th day of November, 2012.

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CERTIFICATE OF SERVICE

I, Eric M. Stahl, hereby certify and declare under penalty of perjury under the laws of the state of Washington that on November 13, 2012, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record in the manner indicated.

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Executed at Seattle, Washington this 13<sup>th</sup> day of November 2012.

  
Eric M. Stahl

BY \_\_\_\_\_  
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COURT OF APPEALS  
DIVISION II

# **APPENDIX 1**

**APPENDIX 1**  
**RCW 54.04.045**

Locally regulated utilities — Attachments to poles — Rates — Contracting.

(1) As used in this section:

(a) "Attachment" means the affixation or installation of any wire, cable, or other physical material capable of carrying electronic impulses or light waves for the carrying of intelligence for telecommunications or television, including, but not limited to cable, and any related device, apparatus, or auxiliary equipment upon any pole owned or controlled in whole or in part by one or more locally regulated utilities where the installation has been made with the necessary consent.

(b) "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association, or cooperatively organized association, which is authorized to construct attachments upon, along, under, or across public ways.

(c) "Locally regulated utility" means a public utility district not subject to rate or service regulation by the utilities and transportation commission.

(d) "Nondiscriminatory" means that pole owners may not arbitrarily differentiate among or between similar classes of licensees approved for attachments.

(2) All rates, terms, and conditions made, demanded, or received by a locally regulated utility for attachments to its poles must be just, reasonable, nondiscriminatory, and sufficient. A locally regulated utility shall levy attachment space rental rates that are uniform for the same class of service within the locally regulated utility service area.

(3) A just and reasonable rate must be calculated as follows:

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

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

(c) The just and reasonable rate shall be computed by adding one-half of the rate component resulting from (a) of this subsection to one-half of the rate component resulting from (b) of this subsection.

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

(5) Except in extraordinary circumstances, a locally regulated utility must respond to a licensee's application to enter into a new pole attachment contract or renew an existing pole attachment contract within forty-five days of receipt, stating either:

(a) The application is complete; or

(b) The application is incomplete, including a statement of what information is needed to make the application complete.

(6) Within sixty days of an application being deemed complete, the locally regulated utility shall notify the applicant as to whether the application has been accepted for licensing or rejected. In extraordinary circumstances, and with the approval of the applicant, the locally regulated utility may extend the sixty-day timeline under this subsection. If the application is rejected, the locally regulated utility must provide reasons for the rejection. A request to attach may only be denied on a nondiscriminatory basis (a) where there is insufficient capacity; or (b) for reasons of safety, reliability, or the inability to meet generally applicable engineering standards and practices.

(7) Nothing in this section shall be construed or is intended to confer upon the utilities and transportation commission any authority to exercise jurisdiction over locally regulated utilities.

[2008 c 197 § 2; 1996 c 32 § 5.]

Notes:

**Intent -- 2008 c 197:** "It is the policy of the state to encourage the joint use of utility poles, to promote competition for the provision of telecommunications and information services, and to recognize the value of the infrastructure of locally regulated utilities. To achieve these objectives, the legislature intends to establish a consistent cost-based formula for calculating pole attachment rates, which will ensure greater predictability and consistency in pole attachment rates statewide, as well as ensure that locally regulated utility customers do not subsidize licensees. The legislature further intends to continue working through issues related to pole attachments with interested parties in an open and collaborative process in order to minimize the potential for disputes going forward "

[2008 c 197 § 1 ]

# **APPENDIX 2**

HONORABLE MICHAEL J. SULLIVAN  
Hearing Date: September 16, 2011 at 10:30 a.m.

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VICTOR S. ...  
...  
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SUPERIOR COURT OF WASHINGTON FOR PACIFIC COUNTY

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

CAUSE NO. 07-2-00484-1

Plaintiff,

JUDGMENT

v.

COMCAST OF WASHINGTON IV, INC., a Washington corporation; CENTURYTEL OF WASHINGTON, INC., a Washington corporation; and FALCON COMMUNITY VENTURES, I, L.P., a California limited partnership, d/b/a CHARTER COMMUNICATIONS,

11 9 00426 8

Defendants.

JUDGMENT SUMMARY

- |  |  |
|--|--|
| 1. Judgment Creditor:  | Public Utility District No. 2 of Pacific County                  |
| 2. Judgment Debtor:  | Falcon Community Ventures, I, L.P., d/b/a Charter Communications |
| 3. Judgment Debtor:  | CenturyTel of Washington, Inc.                                   |
| 4. Judgment Debtor:  | Comcast of Washington IV, Inc.                                   |
| 5. Principal Judgment Amount (Total)   | \$ 629,913.00  |
| 6. Prejudgment Interest (12% per annum) (Total)  | \$ 172,210.65  |
| 7. Principal Judgment Amount and Prejudgment Interest (12% per annum) (Falcon Community Ventures, I, L.P., d/b/a Charter Communications) | \$ 325,970.56  |
| 8. Principal Judgment Amount and Prejudgment Interest (12% per annum) (CenturyTel of Washington, Inc.)                                   | \$ 282,632.54  |

JUDGMENT - 1 of 4  
(NO. 07-2-00484-1)  
[100023032.docx]

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GORDON THOMAS HONEYWELL LLP  
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|     |   |                      |
|-----|---|----------------------|
| 9.  | Principal Judgment Amount and<br>Prejudgment Interest (12% per annum)<br>(Comcast of Washington IV, Inc.) | \$ 193,520.55        |
| 10. | Attorneys' Fees   | \$ 739,621.42        |
| 11. | Costs   | <u>\$ 314,409.95</u> |
| 12. | TOTAL Judgment Amount:  | \$1,856,155.02       |

13. The total judgment amount shall bear interest at the rate of 12% per annum.

14. Attorney for judgment creditor: Donald S. Cohen  
Gordon Thomas Honeywell, LLP  
2100 One Union Square  
600 University Street  
Seattle, Washington 98101  
(206) 676-7531

\* \* \* \* \*

THIS MATTER came before the above-entitled Court on the presentation of Judgment in favor of Plaintiff Public Utility District No. 2 of Pacific County (the "District", the "PUD", or "Pacific PUD"). The Judgment in this matter is supported by the Court's Memorandum Decision dated March 15, 2011, the written Findings of Fact and Conclusions of Law dated September 16, 2011, the Declaration of Mark Hatfield in Support of Post-September 30, 2010 Damages (with exhibits), the Court's Order Granting Plaintiff Pacific PUD's Motion for an Award of Attorneys' Fees and Litigation Expenses dated September 16, 2011, the Court's Findings of Fact and Conclusions of Law Regarding Plaintiff's Motion for Award of Attorneys' Fees and Litigation Expenses, the Declaration of Donald S. Cohen in Support of Plaintiff Pacific PUD's Motion for Award of Attorneys' Fees and Litigation Expenses (with exhibits), the Declaration of Mark Hatfield in Support of Motion for an Award of Attorneys' Fees and Litigation Expenses (with exhibits), the Declaration of Robert M. Sulkin, Plaintiff's Reply and Supplemental and Second Supplemental Declarations of Donald S. Cohen in Support of Plaintiff's Motion for Award of Attorneys' Fees and Litigation Expenses (with exhibits), and the records and files in this lawsuit.

Consistent with the Memorandum Decision and Findings of Fact and Conclusions of Law with respect to the claims and defenses in this lawsuit, and declarations, and

1 Plaintiff's Motion, declarations (with exhibits), and Findings of Fact and Conclusions of  
2 Law with respect to Plaintiff's Motion for an Award of Attorneys' Fees and Litigation  
3 Expenses, the Court enters judgment in favor of Plaintiff and against Defendants as  
4 follows:

5 (1) The District's pole attachment rates as set forth in Resolution No. 1256,  
6 being \$13.25 prior to January 1, 2008 and \$19.70 effective January 1, 2008, were just,  
7 reasonable, and non-discriminatory, are in compliance with RCW 54.04.045 (both before  
8 and after its amendment effective June 12, 2008), and are in all other respects in  
9 compliance with applicable law.

10 (2) Section 3(a) of RCW 54.04.045 (2008) reflects the FCC Telecom method,  
11 and Section 3(b) reflects the American Public Power Association ("APPA") method for  
12 public utility district pole attachment rates as of the date of trial.

13 (3) The non-rate terms and conditions in the District's proposed Pole  
14 Attachment Agreement were just, reasonable, non-discriminatory, and sufficient, are in  
15 compliance with RCW 54.04.045, and are in all other respects in compliance with  
16 applicable law, once a few undisputed revisions to the Agreement are made for pole  
17 attachment processing timing and notification provisions in Sections 5 and 6 of the 2008  
18 amendments.

19 (4) Defendants' refusal to vacate the District's poles and remove their  
20 equipment was in breach of continuing obligations in agreements between Defendants'  
21 predecessors and the District, which had been assigned to Defendants and which  
22 terminated after required notice in 2006.

23 (5) Defendants have been unjustly enriched by using the District's poles to  
24 conduct their business and failing to remove their equipment from the District's poles,  
25 without executing the new Agreement proposed by the District and paying for their pole  
26 attachments at the rate adopted by the Commission in Resolution No. 1256.

1 (6) Defendants have been intentionally occupying the District's poles without  
2 the District's permission and are liable to the District for trespass.

3 (7) Judgment for damages and attorneys' fees and litigation expenses in the  
4 total amount of \$1,856,155.02 for Plaintiff against Defendants is entered, consisting of:

5 \$325,970.56 for Plaintiff's damages and interest through entry of Judgment against  
6 Defendant Charter;

7 \$282,632.54 for Plaintiff's damages and interest through entry of Judgment against  
8 Defendant CenturyTel;

9 \$193,520.55 for Plaintiff's damages and interest through entry of Judgment against  
10 Defendant Comcast;

11 \$1,047,758.87 for Plaintiff's attorneys' fees and litigation expenses against  
12 Defendants jointly and severally; and

13 \$6,272.50 for Plaintiff's attorneys' fees and costs severally against defendant Charter.

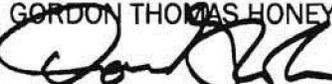
14 (8) Defendants shall pay for their attachments on the District's poles at the  
15 \$19.70 rate adopted by Resolution No. 1256 unless/until such rate is changed by  
16 District resolution and enter into the Pole Attachment Agreement proposed by the District  
17 (revised per ¶3 above), or, alternatively, remove all of their equipment from the District's  
18 poles within thirty (30) days of entry of this Judgment and, if not so removed, pay the  
19 District's expenses of removing such equipment.

20 ENTERED this 12<sup>th</sup> day of Dec., 2011.

21 

22 Honorable Michael J. Sullivan  
Judge, Pacific County Superior Court

23 Presented by:  
24 GORDON THOMAS HONEYWELL LLP

25   
26 Donald S. Cohen, WSBA No. 12480  
[dcohen@gth-law.com](mailto:dcohen@gth-law.com)  
Attorney for Plaintiff

# **APPENDIX 3**

2011 DEC 12 PM 4:02

*lll*

SUPERIOR COURT OF WASHINGTON FOR PACIFIC COUNTY

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

Plaintiff,

v.

COMCAST OF WASHINGTON IV, INC., a  
Washington corporation; CENTURYTEL OF  
WASHINGTON, INC., a Washington  
corporation; and FALCON COMMUNITY  
VENTURES, I, L.P., a California limited  
partnership, d/b/a CHARTER  
COMMUNICATIONS,

Defendants.

CAUSE NO. 07-2-00484-1

[PROPOSED] FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

I. INTRODUCTION

This case came on for trial without a jury before the above Court beginning October 4, 2010. Plaintiff, Public Utility District No. 2 of Pacific County (the "District", the "PUD", or "Pacific PUD"), was represented by Donald S. Cohen of Gordon Thomas Honeywell LLP and James B. Finlay. Defendant Comcast of Washington IV, Inc., ("Comcast") and Defendant Falcon Community Ventures, I, L.P. d/b/a Charter Communications ("Charter") were represented by John McGrory, Eric Stahl, and Jill

[PROPOSED] FINDINGS OF FACT  
AND CONCLUSIONS OF LAW – 1 of 19  
(NO. 07-2-00484-1  
[100012657.docx])

LAW OFFICES  
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1 Valenstein of Davis Wright Tremaine. Defendant CenturyTel of Washington, Inc.,  
2 ("CenturyTel") was represented by Timothy J. O'Connell and John H. Ridge of Stoel Rives.

3 Pacific PUD requested a declaratory judgment, injunctive relief, and damages for  
4 breach of contract, trespass, and unjust enrichment, relating to the District's pole  
5 attachment rates and other terms and conditions. In particular, the District requested:  
6

7 A. A declaratory judgment that:

8 (1) The District's pole attachment rates set forth in District Resolution No. 1256,  
9 and the terms and conditions of the Pole Attachment Agreement the District proposed to  
10 Defendants (the "Agreement"), are just, reasonable, and non-discriminatory, are in  
11 compliance with the Washington public utility district pole attachment statute (RCW  
54.04.045) both before and after its 2008 amendment, and are in all other respects in  
compliance with applicable law;

12 (2) The previous Pole Rental Agreements between the District and Defendants'  
13 respective predecessors (which had been assigned to defendants) terminated in 2006;

14 (3) Defendants' refusal to vacate the District's poles and remove their equipment  
was in breach of the prior agreements;

15 (4) The District may remove and dispose of Defendants' equipment on the  
16 District's poles at Defendants' expense; and

17 (5) Defendants are required to indemnify and hold the District harmless from any  
18 and all claims of any kind or nature, loss, damage resulting from Defendants' actions.

19 B. Damages for Defendants' breach of the predecessor assigned agreements,  
20 unjust enrichment, and trespass in the amount of unpaid pole attachment  
rental charges, plus interest, and attorneys' fees and litigation costs; and

21 C. An injunction ordering Defendants:

22 (1) to pay in full all District pole attachment fees accrued, plus interest; and

23 (2) to either remove all of Defendant's equipment from the District's poles within  
24 thirty (30) days of entry of the Court's order or to pay the District's expenses of removing  
25 Defendants' attachments, or to enter into the new Agreement, containing the District's  
26 terms and conditions, and to pay the pole attachment rates set by District Resolution No.  
1256 for the term of that Agreement.

1 Defendants defended by asserting that the District's pole attachment rates and  
2 other terms and conditions were unjust and unreasonable, and in violation of RCW  
3 54.04.045, denied that the District was entitled to the relief it requested, and  
4 counterclaimed for a declaratory judgment that the District's pole attachment rates,  
5 terms, and conditions were in violation of RCW 54.04.045.  
6

7 Testimony and exhibits were presented over seven days of trial—October 4-7,  
8 October 12-13, and October 20, 2010, with closing arguments made to the Court on  
9 October 20, 2010.

10 The District called the following witnesses: Douglas L. Miller (District General  
11 Manager), Jason Dunsmoor (District Chief of Engineering and Operations), Mark Hatfield  
12 (District Finance Manager), and Gary Saleba (expert witness).

13 Defendants called the following witnesses: Al Hernandez (Comcast Regional  
14 Manager of Engineering/Outside Plant), Max Cox (CenturyTel Director, Carrier Relations  
15 Support), Gary Lee (Charter Utility Coordinator), Tom McGowan (CenturyTel Manager,  
16 Joint Use Administration), Patricia Kravtin (expert witness), and Mark Simonson (expert  
17 witness).  
18

19 Testimony of Kathleen Moisan (CenturyTel Manager, Real Estate Transactions and  
20 Analysis) was presented by deposition. The District recalled Douglas L. Miller and Jason  
21 Dunsmoor as rebuttal witnesses.

22 After considering the testimony of witnesses, exhibits, briefing, and oral  
23 arguments, the Court ruled in favor of the Plaintiff, Public Utility District No. 2 of Pacific  
24 County, in a Memorandum Decision filed on March 15, 2011. A copy of the  
25  
26

1 Memorandum Decision is attached to these Findings and Conclusions as Exhibit A and  
2 incorporated by this reference.

3 Having considered all testimony and evidence admitted at trial, the Court makes  
4 the following Findings of Fact and Conclusions of Law.  
5

6 **II. FINDINGS OF FACT**

7 1. Pacific PUD is a consumer-owned utility that is a municipal corporation  
8 providing utility service in Pacific County, Washington, under the general authority of RCW  
9 54.

10 2. The District has approximately 17,000 customers and is predominantly  
11 rural, with a few small cities.

12 3. The District operates on a not-for-profit basis.

13 4. Defendants Comcast, Charter, and CenturyTel are investor-owned  
14 companies in the business of providing various communication services to customers in  
15 the State of Washington, including Pacific County, and elsewhere.

16 5. The District owns and maintains poles that allow it to furnish electricity to  
17 residents of Pacific County.

18 6. Defendants provide various communication services to customers in  
19 Pacific County by using copper wire, coaxial cable, or fiber optic cable, and associated  
20 communications equipment, attached to the District's utility poles.

21 7. Defendants were licensed to attach to the District's poles under Pole  
22 Rental Agreements they assumed by assignment from previous communications  
23 providers in Pacific County. The assigned agreements dated back to the 1970s and  
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1 1980s with respect to Comcast and Charter, and the 1950s and 1960s with respect to  
2 CenturyTel.

3  
4 8. In February 2006, the District provided written notice as required under the  
5 assigned agreements of the District's intent to terminate those agreements. The letter  
6 also advised Defendants that the District planned to implement new pole attachment  
7 rates effective January 1, 2007, and that the District would be providing a copy of a new  
8 pole attachment agreement for Defendants' review.

9 9. The Comcast and Charter Agreements with the District were terminated  
10 effective August 21, 2006. The District and CenturyTel subsequently agreed on a  
11 December 31, 2006 termination date for the two CenturyTel/District agreements.

12 10. On January 2, 2007, at a Commission meeting open to the public, the  
13 District adopted Resolution No. 1256, which revised the District's pole attachment rates  
14 to \$13.25 per year effective January 1, 2007 and \$19.70 per year effective January 1,  
15 2008.

16 11. Resolution No. 1256 followed a pole attachment rate study performed by a  
17 Pacific Northwest-based outside consultant, EES Consulting, as well as District  
18 management analysis and recommendation, briefings at District Commission meetings  
19 which were open to the public, and two public hearings.

20 12. Prior to the adoption of Resolution No. 1256, the District's pole attachment  
21 rates had remained unchanged since 1987 at \$8.00 per year for telephone companies  
22 and \$5.75 per year for cable companies.  
23  
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1           13. No representatives of Defendants attended the two public hearings on the  
2 proposed new pole attachment rates held in December 2006 or the January 2007 public  
3 meeting at which Resolution No. 1256 was adopted.

4           14. The non-rate terms and conditions in the District's proposed Pole  
5 Attachment Agreement involved a lengthy process which involved Commission briefings  
6 at properly advertised public meetings, negotiations with Defendants, some modifications  
7 to Plaintiff's initial draft agreement, and after considering PUD staff reports and  
8 recommendations.

9           15. The District communicated with Defendants over a period of many months  
10 during 2006-2007 by letter, email, telephone, and in person regarding obtaining  
11 feedback on the new proposed Pole Attachment Agreement. The District either  
12 incorporated Defendants' suggested revisions or provided reasons for not doing so.

13           16. There were three versions of the proposed Agreement sent by the District  
14 to Defendants.

15           17. The District based its Pole Attachment Agreement on a template  
16 agreement developed by the American Public Power Association ("APPA"), rather than  
17 starting the drafting process totally on its own. The District made certain revisions to the  
18 APPA model agreement to make it more directly applicable to the District. PUD  
19 management, including operations, engineering, and financial personnel, were consulted  
20 in developing the form of agreement proposed to Defendants.

21           18. A uniform pole attachment agreement made sense to the District for ease  
22 of administration and to comply with the non-discriminatory terms and conditions  
23 requirement of the PUD law.  
24  
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26

1           19. After the first version of the proposed Agreement was sent out in spring  
2 2006, a revised version of the proposed Agreement, with explanations of revisions made  
3 and the reasons some revisions proposed by Defendants were not made, was sent to  
4 Defendants in November 2006.

5           20. The District sent another revised version of the proposed Agreement to  
6 Defendants in August 2007, and stated that by the end of October 2007, each of the  
7 Defendants needed to either sign and return the Agreement or provide the District with its  
8 plan for removing its facilities from the District's poles. The District sent a reminder letter  
9 to the same effect in early October 2007.

10           21. Defendants advised the District in October 2007 letters that, if the District  
11 attempted to remove Defendants' facilities from the District's poles, emergency services  
12 in Pacific County might be disrupted and defendants would take legal action to prevent  
13 removal.

14           22. Comcast, Charter, and CenturyTel refused to enter into the new Agreement  
15 with the District and never executed the Agreement.

16           23. Comcast, Charter, and CenturyTel have never paid the District at the new  
17 pole attachment rates established by District Resolution No. 1256 in January 2007.

18           24. Defendants' communications equipment continues to occupy the District's  
19 poles without District permission.

20           25. The assigned agreements under which Defendants had attached their  
21 communication equipment to the District's poles provided that, as of the effective date of  
22 termination, the right to attach to the District's poles terminated and Defendants were  
23 required to remove their equipment from the District's poles and, if they failed to do so,  
24  
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1 the District could remove the equipment or have it removed at Defendants' risk and  
2 expense. Those agreements also provided that Defendants would indemnify and hold the  
3 District harmless from any and all claims of any kind or nature, loss, or damage arising  
4 from or in any way connected with Defendants' activities under their agreements. Under  
5 those agreements, the termination of the agreement did not release Defendants from  
6 these obligations.  
7

8 26. The PUD displayed noteworthy patience in not exercising its contractual  
9 right to initiate removal of Defendants' attachments during the time Defendants' did not  
10 pay the adopted pole attachment rates.

11 27. Prior to and even during this trial, the parties demonstrated that their  
12 respective company administrators and "on-the-ground employees" have gotten along  
13 well and that disagreements have been worked out on what appears to be a somewhat  
14 informal basis. This has been occurring for over twenty (20) years. The parties either  
15 "worked around" non-rate bothersome or disagreeable terms, ignored them, or  
16 compromised some other solution in order to "just make it work".  
17

18 28. One other company with attachments on District poles executed the first  
19 version of the new Pole Attachment Agreement the District proposed, even before the  
20 District made revisions based on input from Defendants.

21 29. The same kinds of provisions Defendants challenged in the District's  
22 proposed Agreement appear in many of Defendants' own pole attachment agreements  
23 with other parties (including some where CenturyTel is the pole owner) under which they  
24 continue to operate, and in other pole attachment agreements.  
25  
26

1           30. There are credible reasons relating to safety, reliability, financial stability,  
2 cost, and other District considerations for the terms and conditions of the proposed  
3 Agreement Defendants challenged.  
4

5           31. There are credible reasons for provisions in the proposed Agreement  
6 Defendants challenge, including but not limited to, those relating to:

- 7           ▪ Tagging of fiber
- 8           ▪ Unauthorized attachment fees
- 9           ▪ Removal of attachments after agreement termination and reimbursement  
10 of removal costs if not removed
- 11           ▪ Waivable requirement for a bond
- 12           ▪ Attacher responsibility for hazardous materials they bring onto the District's  
13 property
- 14           ▪ Requirement of a permit for overloading, other than in an emergency
- 15           ▪ Liability and indemnification provisions providing protection to the District
- 16           ▪ Transfer or relocation of attachments
- 17           ▪ Removal of nonfunctional attachments
- 18           ▪ Inspections by the District
- 19           ▪ Annual reports on attachment locations
- 20           ▪ Furnishing copies of required insurance policies on District request
- 21           ▪ Survivability of certain continuing obligations after Agreement termination
- 22           ▪ Attorneys' fees and cost provisions
- 23           ▪ "Grandfathering" with respect to NESC requirements
- 24           ▪ Permitting requirements
- 25
- 26

- 1           ▪ Waivable professional certification requirement, including the alternative of
- 2           a "licensee in good standing"
- 3           ▪ Invoicing and payment provisions
- 4           ▪ Requirement that any assignee of the Agreement sign the Agreement
- 5           ▪ Requirement that guy wires be bonded and insulated
- 6           ▪ Requirement of District consent to placement of facilities within four feet of
- 7           the pole base

8           32. The District's actions in negotiating the Pole Attachment Agreement terms  
9 and conditions were done in good faith, pursuant to the District's usual and ordinary  
10 course of conducting business.

11           33. The rates the District set in Resolution No. 1256 were lower than the rates  
12 recommended by its rate consultant, and were lower than the rates permitted by law.

13           34. The pole attachment rate derived by Defendant's expert witness, Patricia  
14 Kravtin, is unreasonable and impractical as it relates to this case.

15           35. The opinions of Defendants' rate expert, Patricia Kravtin, were based  
16 primarily on theoretical analysis of economics and public policy, rather than actual local  
17 information regarding Pacific County and Pacific PUD. She had never visited Pacific  
18 County prior to trial.

19           36. Defendants' rate expert Patricia Kravtin's opinion on the PUD's maximum  
20 legal rate was lower than what Defendants had been voluntarily paying for over twenty  
21 years.

22           37. The PUD's survey of the number of attachments, both fiber and non-fiber,  
23 on PUD poles, and its estimate of attachments per pole, were accomplished in a  
24 reasonable and practical manner.  
25  
26

[PROPOSED] FINDINGS OF FACT  
AND CONCLUSIONS OF LAW – 10 of 19  
(NO. 07-2-00484-1  
[100012657.docx])

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1           38. Including District transmission poles, as well as distribution poles, in the  
2 District's rate calculations was reasonable, particularly in light of evidence that 65% of  
3 District transmission poles have only third-party communications attachments on them.

4           39. Defendants use the safety space on the District's poles, and the safety  
5 space is primarily for their benefit.

6           40. The District installs electric poles that are longer than it would require for  
7 its own utility purposes in the absence of third-party attachers like Comcast, Charter, and  
8 CenturyTel.

9           41. The PUD's use of the excluded pole space for light fixtures was not an  
10 adopted practice, but rather was a phasing out of that use.

11           42. Estimated pole life varies from location to location due to differences in  
12 climate, insect activity, moisture, and other circumstances.

13           43. The quality of cedar used for utility poles has decreased over time, and  
14 there are more restrictions on permissible preservatives than in the past.

15           44. Two other companies besides Defendants which have pole attachments on  
16 the District's poles have been paying at the rates the District adopted in Resolution No.  
17 1256 since it was put into effect in 2007.

18           45. It would cost Defendants significantly more than what they pay the District  
19 to attach to its poles if they, instead, had to purchase, install, maintain, repair, and  
20 replace their own poles.

21           46. The pole attachment fees Defendants pay to the District are a small  
22 fraction of Defendants' overall costs.

23           47. The District does not compete with Defendants for retail customers.  
24  
25  
26

1 48. The District was not trying to disadvantage and prevent Defendants from  
2 serving customers in Pacific County.

3 49. The FCC Cable formula was developed to support a fledgling cable TV  
4 industry, which is no longer a fledgling industry.

5 50. There was documentary evidence and deposition testimony by Comcast's  
6 Regional Manager of Engineering/Outside Plant that the FCC Cable methodology  
7 excludes unusable space, while Section 3(a) of the 2008 PUD pole attachment statute  
8 includes unusable space.

9 51. The Senate Bill Report on the 2008 PUD pole attachment statute, and the  
10 statements on the floor of the Legislature by the sponsor of that legislation, reference the  
11 APPA formula as one of the components of the 2008 pole attachment statute.

12 52. The Washington State Auditor's office has never criticized the District's  
13 accounting treatment for pole attachments.

14  
15 **III. CONCLUSIONS OF LAW**

16 1. As a municipal corporation that is a consumer-owned utility governed by a  
17 local publicly-elected Board of Commissioners, the District's actions and decisions are  
18 entitled to a significant degree of discretion, under which the Court should apply an  
19 "arbitrary and capricious" standard. A decision is arbitrary and capricious only if it is  
20 willful and unreasoning, taken without regard to the attending facts or circumstances.  
21 Where there is room for two opinions, an action is not arbitrary or capricious when  
22 exercised honestly and upon due consideration

23 2. If there is a reason for an action or decision by the District, the District's  
24 action or decision is not arbitrary and capricious and will be upheld. That is true even if  
25 there is room for more than one view on a particular subject.  
26

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1           3. Pursuant to federal law, consumer-owned utilities like the District are  
2 exempt from Federal Communications Commission regulation of pole attachment rates.

3           4. RCW 80.54 provides for regulation of pole attachment rates for investor-  
4 owned utilities by the Washington Utilities and Transportation Commission ("WUTC"), but  
5 does not give the WUTC rate-making jurisdiction over consumer-owned utilities like the  
6 District.  
7

8           5. RCW 54.04.045, both before and after the 2008 amendments, specifically  
9 provides that the statute does not bring public utility districts under the jurisdiction of the  
10 WUTC.

11           6. Prior to June 12, 2008, the public utility district pole attachment statute,  
12 RCW 54.04.045, provided that PUD pole attachment rates, terms, and conditions must  
13 be "just, reasonable, non-discriminatory, and sufficient."  
14

15           7. As of June 12, 2008, the same general standard remained in RCW  
16 54.04.045, but a specific methodology was added under which pole attachment rates  
17 would be permissible as just and reasonable based on one-half calculated pursuant to  
18 Section 3(a) and one-half pursuant to Section 3(b) of that statute.

19           8. The "just and reasonable" standard set forth in RCW 54.04.045 does not  
20 require adopting the standards of or the interpretation given to RCW 80.54 relating to  
21 investor-owned utilities.  
22

23           9. There are significant differences between investor-owned utilities and  
24 consumer-owned utilities like the District.  
25  
26

23-3

1           10. Section 3(a) of RCW 54.04.045 (2008) reflects the FCC Telecom method  
2 and Section 3(b) reflects the APPA method as of the date of trial.

3           11. The District acted within the bounds of the standard of "just, reasonable,  
4 non-discriminatory, and sufficient", and did not act arbitrarily or capriciously, in  
5 interpreting Section 3(a) of RCW 54.04.045 as the FCC Telecom formula and Section 3(b)  
6 as the APPA formula for PUD pole attachment rates as of the date of trial.

7           12. The District's Commissioners adopted pole attachment rates that were just,  
8 reasonable, non-discriminatory, and sufficient, those rates being \$13.25 prior to January  
9 1, 2008, and \$19.70 after January 1, 2008.

10           13. The District's pole attachment rates adopted in Resolution No. 1256 are  
11 below the maximum permissible rate under RCW 54.04.045.

12           14. The pole attachment rates in Resolution No. 1256 were adopted after a  
13 study and recommendations by an outside consultant and District management review,  
14 analysis, and recommendations.

15           15. The FCC Cable methodology for setting pole attachment rates is not  
16 necessarily the measure of reasonableness.

17           16. Defendants' argument that the FCC Cable methodology must be followed  
18 with respect to the District's pole attachment rates must be rejected.

19           17. Under Section 4 of the 2008 amendments to RCW 54.04.045, a public  
20 utility district has the option, with respect to establishing half of its pole attachment rate,  
21 of using either the calculation in Section 3(a) or the FCC Cable formula.

22           18. The FCC Cable methodology excludes unusable space. Section 3(a) of the  
23 2008 amendments to RCW 54.04.045 includes unusable space.  
24  
25  
26

[PROPOSED] FINDINGS OF FACT  
AND CONCLUSIONS OF LAW – 14 of 19  
(NO. 07-2-00484-1  
[100012657.docx])

LAW OFFICES  
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1           19. Section 3(b) of the 2008 amendments to RCW 54.04.045 divides 100% of  
2 the safety and clearance space equally among the PUD and other attachers. The APPA  
3 methodology does the same thing. The FCC Telecom formula divides only two-thirds of  
4 the safety and clearance space among the PUD and other attachers.

5           20. The legislative history of the 2008 amendments to RCW 54.04.045 is  
6 consistent with Section 3(b) of RCW 54.04.045 being the APPA formula as of the date of  
7 trial.  
8

9           21. The PUD Commission's adopted rates of \$13.25 for 2007 and \$19.70  
10 beginning January 1, 2008 did not violate RCW 54.04.045, either before or after the  
11 2008 amendments.

12           22. The District's use of the excluded pole space for light fixtures was not  
13 adopted practice, but rather a phasing out of that use.

14           23. The District's survey of the number of attachments, both fiber and non-  
15 fiber, and its estimate of attachments per pole, were accomplished in a reasonable and  
16 practical manner.  
17

18           24. Including District transmission poles, as well as distribution poles, in the  
19 District's pole count was reasonable.

20           25. A public utility district is a fiduciary of public funds and property and must,  
21 therefore, be able to recover its costs and protect its ratepayers' financial and physical  
22 investments. This is reflected in, among other things, the requirement in RCW 54.04.045  
23 that pole attachment rates, terms, and conditions be "sufficient".  
24

25           26. Only a practical basis for adopted rates is required, not mathematical  
26 precision.

[PROPOSED] FINDINGS OF FACT  
AND CONCLUSIONS OF LAW – 15 of 19  
(NO. 07-2-00484-1  
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1           27.    Attachers on the District's poles should be responsible for more than the  
2 incremental cost of their being on the poles.

3           28.    The intent section of the 2008 amendments to RCW 54.04.045 expressly  
4 states that one of the policies of the State of Washington is "to recognize the value of  
5 infrastructure of locally-regulated utilities" and that the formula in that statute is intended  
6 to "ensure that locally-regulated utility customers do not subsidize licensees."  
7

8           29.    The District's pole attachment rates both before and after the adoption of  
9 Resolution No. 1256 and before and after the 2008 amendments to RCW 54.04.045  
10 were not arbitrary or capricious.

11           30.    The proposed terms and conditions of the District's new Pole Attachment  
12 Agreement were just, reasonable, non-discriminatory, and sufficient, and were not  
13 arbitrary or capricious.

14           31.    The District's actions during the negotiation process were just and  
15 reasonable, and not arbitrary or capricious.

16           32.    The District met the requirements of the Open Public Meetings Act in its  
17 consideration of new pole attachment rates, terms, and conditions.

18           33.    The District's proposed Pole Attachment Agreement is not unconscionable.

19           34.    Defendant CenturyTel's argument that it is a "provider of last resort" and  
20 that means it can keep its attachments on the District's poles without paying at  
21 Commission-adopted rates, and without a pole attachment agreement in place, must be  
22 rejected.  
23

24           35.    The non-rate terms and conditions of the District's proposed Pole  
25 Attachment Agreement meet the requirements of RCW 54.04.045, once a few  
26

[PROPOSED] FINDINGS OF FACT  
AND CONCLUSIONS OF LAW – 16 of 19  
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1 undisputed revisions to the Agreement are made for pole attachment application  
2 processing timing and notification provisions in Sections 5 and 6 of the 2008  
3 amendments.

4 36. The District's pole attachment rates, terms, and conditions are not illegal or  
5 unlawful.

6 37. Defendants are liable to the District for damages for breach of contract,  
7 unjust enrichment, and trespass for refusing to remove their attachments on District  
8 poles, and keeping their attachments on District poles without permission.

9 38. Defendants have been unjustly enriched by using the District's poles to  
10 conduct their business without paying at approved rates, and without executing the  
11 District's Agreement, and failing to remove their equipment from the District's poles.

12 39. Defendants materially breached the assigned predecessor agreements  
13 with the District by refusing to remove their equipment from the District's poles.

14 40. In refusing to remove their equipment from the District's poles and refusing  
15 to pay the PUD's rates adopted in Resolution No. 1256, Defendants have been  
16 intentionally occupying the District's property without District permission, in disregard of  
17 the District's express request and instructions, and have therefore been trespassing on  
18 the District's property.

19 41. The District is entitled to an award of damages against Defendants for the  
20 amount of unpaid pole attachment fees calculated at the rates adopted in Resolution No.  
21 1256.

22 42. The District is entitled to an award of interest on the damages awarded.

1 43. Using a 1% per month simple interest rate in determining the District's  
2 damages is reasonable because, had defendants entered into the District's proposed  
3 Pole Attachment Agreement when required, the interest rate would have been 50%  
4 higher than that (1.5% per month or 18% per annum). In addition, 12% annual interest is  
5 consistent with the permissible interest rate on a judgment under RCW 4.56.110(4).  
6

7 44. Damages are awarded in favor of the District against Defendants in the  
8 amount of \$802,123.65, as follows:

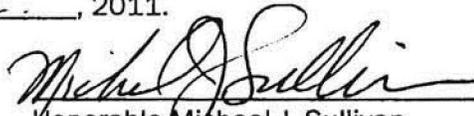
| DEFENDANT            | PRINCIPAL           | INTEREST            | TOTAL               |
|----------------------|---------------------|---------------------|---------------------|
| Charter              | \$255,992.00        | \$69,978.56         | \$325,970.56        |
| CenturyTel           | \$221,945.00        | \$60,687.54         | \$282,632.54        |
| Comcast              | \$151,976.00        | \$41,544.55         | \$193,520.55        |
| <b>TOTAL DAMAGES</b> | <b>\$629,913.00</b> | <b>\$172,210.65</b> | <b>\$802,123.65</b> |

9  
10  
11  
12  
13 45. In addition to the declaratory judgment, damages, and interest awarded,  
14 the District is entitled to the injunctive relief requested.

15 46. Defendants must start paying at the District's rates as set forth in  
16 Resolution No. 1256 and must enter into the District's proposed Pole Attachment  
17 Agreement (with revisions per Conclusion of Law 35 above), or they must remove their  
18 attachments from District poles within thirty (30) days, and if not so removed, the District  
19 may remove Defendants' attachments at Defendants' expense.  
20

21 47. Defendants have failed to prove their case as to the District's claims and  
22 all of Defendants' defenses.

23 DATED this 12<sup>th</sup> day of Dec., 2011.

24 

25 Honorable Michael J. Sullivan  
26 Judge, Pacific County Superior Court

[PROPOSED] FINDINGS OF FACT  
AND CONCLUSIONS OF LAW – 18 of 19  
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Presented by:

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Attorneys for Plaintiff

~~PROPOSED~~ FINDINGS OF FACT  
AND CONCLUSIONS OF LAW – 19 of 19  
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# Exhibit A

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FILED  
2011 MAR 15 PM 1:27  
VIRGINIA LEAGUE OF WOMEN  
PACIFIC CO. WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PACIFIC

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

Plaintiff, )

v. )

COMCAST OF WASHINGTON IV, INC., )  
a Washington corporation; CENTURY TEL )  
OF WASHINGTON, INC., a )  
Washington corporation; and )  
FALCON COMMUNITY VENTURES I, L.P., )  
a California limited partnership, d/b/a )  
CHARTER COMMUNICATIONS, )

Defendants. )

NO. 07-2-00484-1

MEMORANDUM  
DECISION

The Court held trial on this matter and heard closing arguments on October 20, 2010. The Court appreciates the parties' patience in this matter. The Court has considered the testimony of witnesses, exhibits, counsels' memorandums and oral arguments and now publishes its decision.

Burden of Persuasion

The Court accepts the Plaintiff's position that the Court should apply an "arbitrary and capricious" standard against which to judge the Plaintiff's actions.

MEMORANDUM DECISION-1

The Court finds in favor of the Plaintiff, and specifically finds that:

- 1) Plaintiff's actions in negotiating the "Pole Attachment Agreement Terms and Conditions" were reasonable, fair and not arbitrary or capricious;
- 2) Plaintiff's actions during the negotiation process were done in good faith, pursuant to the Plaintiff's usual and ordinary course of conducting business;
- 3) Plaintiff met the requirements of the Public Open Meetings Act;
- 4) Section 3(a) of the RCW 54.04.045 (2008) reflects the FCC Telecom Method and Section 3(b) reflects the APPA Method;
- 5) PUD acted within the bounds of reasonableness and fairness in electing to interpret their pole rates pursuant to Paragraph 4, above;
- 6) Public Utility District (PUD) Commissioners adopted pole attachment rates that were fair, reasonable and sufficient; those rates being \$13.25 prior to January 1, 2008, and \$19.70 after January 1, 2008;
- 7) The Non-rate Terms and Conditions in Plaintiff's proposed Pole Attachment Agreement Terms and Conditions were approved by the PUD Commissioners after a lengthy process which involved property advertised, public meetings, negotiations with Defendants, some modifications to Plaintiff's initial draft agreement and after considering PUD staff reports and recommendations;
- 8) PUD displayed noteworthy patience in not exercising their contractual right to initiate removal of Defendants' attachments during the time Defendants' did not pay the adopted pole attachment rates stated in Paragraph 5, above;
- 9) Prior to and even during this trial, the parties demonstrated that their respective company administrators and "on-the-ground employees" have gotten along

MEMORANDUM DECISION-2

2311

2312

well and that disagreements have been worked out on what appears to be a somewhat informal basis. This has been occurring for over twenty (20) years. The parties either "worked around" non-rate bothersome or disagreeable terms, ignored them, or compromised some other solution in order to "just make it work";

10) It is clear that the real, germane issue before this Court is the rate-setting method adopted by Plaintiff and not the other non-rate matters, regardless how those non-rate matters have been presented during trial;

11) Defendants failed to demonstrate by a preponderance that PUD's use of the excluded pole space for light fixtures was an adopted practice rather than a phasing out of that system;

12) PUD's survey of the number of PUD utility poles and transmission poles was accomplished in a reasonable and practical manner as well as their estimate of attachments, both fiber and non-fiber;

13) The pole attachment rate derived by Defendant's expert witness, Patricia Krafton, is unreasonable and impractical as it relates to this case.

14) Damages should be awarded against Defendants as requested by Plaintiff: \$601,108.00, plus interest through September 30, 2010, and as adjusted through entry of Judgment;

15) Plaintiff's request to enter an order for Defendant's to start paying at PUD's adopted rates set in Paragraph 6, above, or remove their attachments from PUD poles is also granted;

16) Defendant's have also failed to prove their case as to all remaining claims;

17) Attorney's Fees and Costs are reserved for argument upon sworn declarations.

18) The Court reserved ruling on the admission of Identifications 108 and 117, excerpts from the deposition of Kathleen Moisan. Both are admitted.

The Court's decision, set forth in Paragraphs 1 – 18 are not exhaustive. The Court will entertain proposed findings and conclusions consistent with this opinion when presented.

Decided March 15, 2011.

  
JUDGE MICHAEL J. SULLIVAN

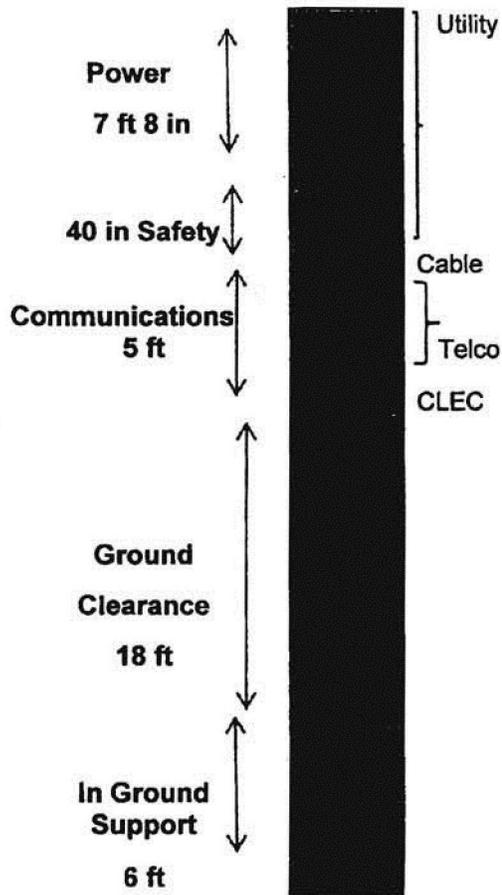
MEMORANDUM DECISION-4

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# **APPENDIX 4**

# Illustrative Space Allocation on Typical 40' Shared Utility Pole



**DEFENDANT'S  
EXHIBIT  
403**

# **APPENDIX 5**

# Allocation of Total Pole Costs under FCC Cable Formula

| 40 Ft Std Shared Pole  |  |
|--|--|
| <b>Usable Space</b><br><b>16.0'</b><br>(includes 3.33' Safety Space) | <b>Direct Cost:</b><br>Based on use of 1'<br><br>$1/16 \times (16/40) = 2.50\%$    |
| Ex. 407<br><b>Unusable Space</b><br><b>24.0'</b>                     | <b>Indirect Cost:</b><br>Based on direct use<br><br>$1/16 \times (24/40) = 3.75\%$ |
| 18' above ground clearance   |  |
| 6' below grd support   |  |
| <b>Total Cost Allocation = Direct + Indirect = 6.25%</b>             |  |

