UT 970723

1 KING COUNTY SUPERIOR COURT, WASHINGTON STATE

2
3 TCI CABLEVISION OF WASHINGTON, INC.,
4 Plaintiff,
5 v. — No. 97-2-02395-5-SEA
6 CITY OF SEATTLE,
7 Defendant.
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9 PARTIAL VERBATIM REPORT OF PROCEEDINGS
BENCH TRIAL
10 COURT'S ORAL DECISION
APRIL 14, 1998
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BEFORE: THE HONORABLE J. KATHLEEN LEARNED
13 DEPARTMENT NO. 19

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98 MAY ... PM 4:43 RECEIVED

1 MORNING SESSION

2 April 14, 1998, 9:35 a.m.

3 THE COURT: Welcome back. Sorry to keep you waiting.

4 Since we last met, I spent a fair amount of time in

5 chambers, went over everything carefully, and considered

6 the evidence and the arguments and the matters that were

7 presented during the two weeks of trial. I wrote out

8 fairly detailed notes because I knew there would be a

9 period of time between when we had the trial and when you

10 were coming back here, and I wanted to be sure not to

11 forget anything, so this may take me a little longer than

12 will be pleasant for anyone, but I'll try to be as quick

13 as I can.

14 I will not go over every fact that was important

15 because so many of the facts actually weren't in dispute.

16 For example, that there are seven feet underground of the

17 pole, nobody disputed that. So when the findings are

18 prepared, you'll need to put in some of those underlying

19 undisputed issues that nevertheless are basic to my

20 consideration.

21 First I want to talk about the legal standards. In

22 my analysis of this, I find that it's fairly clear that

23 the 1996 Pole Attachment Act does not require that the

24 city utilize the same standards as are used by the UTC for

25 the individually-owned utilities. The legislature

1 specifically did not bring municipalities under the
2 jurisdiction of the UTC and specifically said that it had
3 no intent to do so.
4 The legislature did not define just and reasonable
5 criteria for muncipally-owned utilities, but, as we know,
6 did do that for the individually-owned utilities. The
7 legislature is presumed to intend the differences. When
8 there are two different legislative acts that do differ in
9 specifics, that difference is presumed to be intentional.
10 So if the legislature meant that there should be only one
11 way to set pole attachment rates, it would presumably do
12 that and not bother to use this different formulation,
13 using only "just and reasonable" without a specific
14 definition.
15 In addition, there are significant differences
16 between individually-owned utilities and muncipally-owned
17 utilities that would justify different standards and more
18 stringent controls over the individually-owned utilities
19 than the municipally-owned ones. A municipality does have
20 as its ultimate responsibility the welfare of all its
21 constituents, of the public, including attachers. There
22 is an ultimate consumer here that has an ability to act as
23 a brake or a control. The city is presumed to have the
24 economic interest and health of the city as a whole as one
25 of its important goals more so than a private utility. A

1 municipality does not operate a profit system and is less
2 likely to be motivated by its own private interest at the
3 expense of other elements of the public.
4 Also, the attachers, as we've seen in this case, do
5 have a political voice versus municipalities, which is not
6 available with individually-owned entities -- attachers
7 don't have that kind of voice, if you will, in regard to
8 individually-owned utilities. They are much more at the
9 mercy of the individually-owned utility.
10 There is also I think the consideration that one
11 governmental unit, the state, is going to give somewhat
12 more deference to another governmental unit and
13 municipality than it would to a private owner, and will
14 recognize that there are public policy issues that may
15 affect pole attachment rates that go beyond mere
16 economics. For example, public policy issues such as the
17 urban blight matter that was referred to.
18 I would find that the intent of the legislature in
19 the 1996 act was to meet a complaint made by attachers
20 that there was no place to go for review of excessive
21 rates, and that the act then gave them a place to go. The
22 legislature, however, was not setting the standards
23 specifically, but was providing a place for review. That,
24 of course, is why we are here.
25 I would also find that RCW 80.54.040 and RCW

1 35.21.455(2) are not irreconcilably inconsistent. First
2 of all, 80.54.040, if you read it carefully, should not
3 actually be read to set a pro rata rate for the entire
4 pole. If you parse the sentence and do the diagramming,
5 with the commas, where things belong, the word
6 "proportionate" doesn't actually modify "share of support
7 zone," at least it certainly is quite reasonable to read
8 it that way.
9 But even if it did, even if "proportionate" did
10 modify the "share of the support zone," as apparently has
11 been presumed, at least by some, it's not inconsistent at
12 all for two different systems to have two different
13 approaches. This is done all the time in legislation
14 where different standards or different approaches are
15 applied to differing entities. The individually-owned
16 utilities and the muncipally-owned utilities are different
17 entities as I have described earlier.
18 So I don't find that there is an irreconcilable
19 inconsistency here that would require adopting the
20 standards and the interpretation of RCW 80.54.040.
21 So that gets me to, well, what does "just and
22 reasonable" mean and what kind of a standard is that for
23 this court to apply in this case.
24 "Reasonable," of course, is a word we're well
25 familiar with. We use it quite frequently. It means not

1 arbitrary and capricious. It means something for which a
2 reason can be given. It doesn't mean the least favorable
3 or the most favorable to one party or the other. It
4 means, as I said, something for which a reason can be
5 given that is not arbitrary and capricious.
6 But the statute doesn't use just the word
7 "reasonable," it also uses the word "just." So what does
8 "just" mean? The word "just" in the statute must mean
9 something more than not arbitrary and capricious;
10 otherwise, it would be a superfluous word. And again, we
11 presume that the legislature does not use superfluous
12 words. Otherwise, if they didn't mean to have something
13 more than arbitrary and capricious, then they would have
14 just used the word "reasonable" or "not arbitrary and
15 capricious" and not used the word "just."
16 So I do find there is something more that has to be
17 considered. And what is that? Well, I would find that
18 the word "just" means that the court also has to consider
19 an element of equity, considering all of the
20 circumstances, and that the court has to consider whether
21 or not the rates offend the sense of justice even if they
22 were not arbitrary and capricious. So my conclusion on
23 the overall standard is to look at the issue here as to
24 whether or not the rates were arbitrary and capricious or
25 were otherwise unfair or unjust.

1 Some examples, which don't precisely fit here, of
2 something that would be unjust might be where you would
3 have a rate for which you could give a reason why it
4 wasn't arbitrary and capricious, but it would totally wipe
5 out the business; and that would appear to be unjust. Or
6 you might have a rate that was imposed for purposes of
7 censorship, in other words, it might not be arbitrary
8 economically, but it might be imposed in a way that would
9 be directed at or designed at some sort of censorship
10 purpose. In other words, it will be motivated by a
11 dislike of programming or content.
12 Now, turning to the facts here, I'm not going to go
13 over the history of the '70s and the '80s. I'll leave
14 that to you to fill in. The only thing I would say,
15 because there may have been some dispute about this, is
16 that regarding the initial federal legislation, I would
17 find a couple of things are important. First, it was
18 clear that Congress was not attempting to preempt the
19 entire field and that they specifically allowed states and
20 local governments to experiment and meet local needs.
21 Secondly, there was an interest and an initial
22 congressional intent to provide a boost to a new industry
23 and there was a specific intent to adopt a methodology
24 regarding rates that did not reflect a full capital
25 investment.

1 So again, I'll skip over some of the history of the
2 pre-1988 rates and the 1988 rates and the contract. I
3 think that's all without dispute as to how that developed.
4 Then we get up to 1992, when the city decided to take
5 another look at pole attachment rates, when there was a
6 moratorium on new attachments, and the rates were then to
7 be set by ordinance.
8 Regarding the city task force that was established to
9 look at the rates and to propose a methodology, I would
10 find that the three-person task force did a detailed
11 workup and background research. I find that the task
12 force members, particularly Ms. Soder and Mr.
13 Goldstein, -- I didn't really have that much information
14 about the third member of the task force, but those two in
15 particular -- had background, experience and training that
16 were appropriate and sufficient to the task that they were
17 given. I would find that they are and were intelligent,
18 responsible and diligent in their work. They appeared to
19 be fully technically competent to analyze and evaluate the
20 issues that were presented in pole attachment rates.
21 I would also find the task force was motivated to
22 find the most accurate way to have all users share in the
23 costs of the poles and to return the cost to the city, and
24 it was not motivated to generate excess revenue or to
25 stymie competition or to adversely impact attachers.

1 I'm also not going to go over all the details of the
2 attachers. Again, I think we have in the record the
3 number of attachers and the fact that approximately 80
4 percent of the poles are jointly owned and that cable is
5 the major attacher. I believe out of 69,000 total
6 attachments, approximately 59,000 are TCI. Again, I'm not
7 going to go over all of these numbers, but I did consider
8 the number of overall poles and the number of attachers
9 and that sort of thing.
10 One of the points, however, that I do want to
11 specifically make that was significant here, is that based
12 on the 1996 bill to TCI and the testimony regarding their
13 average bills to customers, it would appear that the 1995
14 rate reflected approximately 30 cents per month per
15 customer. On the 1997 bill, I think the math came out to
16 be about 24 cents per month per customer. In general,
17 based on an average of $30 a month per customer, less than
18 1 percent of the customer's bill is for the pole
19 attachment rate at the higher, the initial, 1995 rate.
20 I would also find that it was significant that the
21 customer bill is, of course, not the total revenue or not
22 the total source of revenue to the attacher or to TCI.
23 There is additional revenue that comes from programming
24 and advertising. So if you spread the pole attachment
25 rates out over those sources of revenue as well, it would

1 be even less than 1 percent of revenue.

2 The general conclusion that I came to from all of
3 that is that the pole attachment fee is a relatively small
4 portion of the overall costs.

5 It was interesting to me and significant that I
6 really have no evidence regarding total costs and profits,
7 and it's obviously very difficult to judge what a
8 particular cost is to an entity unless you know what their
9 overall cost and profit issues are and their overall
10 revenues, costs and profits. We had some figures on
11 revenues and we had some figures on costs, but very
12 little.

13 The most there is in the record is that the FCC
14 concluded that the increase in the rates, in the proposed
15 rates reflected I think it was .6 percent of costs. As I
16 understood it, that was the increase. So the total pole
17 attachment rate would be something in the range of 1
18 percent again, 1 percent of costs.

19 Again, we have nothing on profits, so you can't
20 really say if you have an industry that is operating on a
21 very low profit margin or a very high profit margin.
22 Profit margins will impact the significance of what
23 changes in particular costs are. And of course, I had no
24 information whatsoever on profits.

25 So in general, I would find that the increased rate

1 for either year, either of the two different rates, that
2 neither one of those increases had a significant impact on
3 the financial business of TCI.
4 I did have then some testimony from currently TCI's
5 only competitor, Summit (competition in terms of serving
6 households). I also had no information from Summit that
7 due to the rate increases it was not able to expand or
8 that there was a significant negative impact on its
9 business. There didn't appear to be a significant
10 competitive advantage between TCI and Summit or some third
11 potential cable provider based on the rates. Although
12 Summit has considerably fewer poles, its service area is
13 also condensed, so its number of customers per pole is not
14 that much smaller than TCI's customers per pole. There
15 were less, but not that much fewer customers per pole, and
16 I believe it's the customers per pole which makes the
17 difference in terms of the rates.
18 So I did not find based on the testimony from Summit
19 or ELI that there was any evidence that the pole rates are
20 currently a barrier to entry into the telecommunications
21 field here by cable companies and that, to the contrary,
22 the pole rates appear to be a minor cost in the overall
23 picture for this industry.
24 Regarding the poles themselves, I'm not going to go
25 over the typical pole. I did assume that the typical pole

1 did have three users on it, but it was important to know
2 the actual number is, I think, 2.89, so the city, in using
3 an average, is shorting itself, not shorting the
4 attachers.
5 Regarding the 47-foot pole, I would find that the
6 additional two feet between 45 and 47 is primarily or was
7 exclusively due to the entry of the cable business and the
8 need to have additional feet on the pole to address the
9 needs of additional attachers.
10 I would find that the 20-foot attachment above the
11 ground is the appropriate initial attaching point for
12 whoever is there in order to keep the 18-foot clearance
13 necessary, under the Washington Administrative Code, at
14 appropriate places.
15 Most of what I was going to go over is undisputed
16 here about where the lines are on the pole.
17 I would find that a one-foot clearance between the
18 wires is reasonable.
19 TCI indicated there was actually only four inches
20 taken up by their bracket, but the issue is not so much
21 the space of the bracket, but how much clearance do you
22 need between wires. It would appear that one foot is a
23 reasonable space between the wires to prevent any kind of
24 tangling or contact if there are differential sags in the
25 different kinds of wires.

1 The way the typical pole is laid out, it looks like
2 the pole is full, but I would find from the testimony that
3 there is extra space on the poles. The city can
4 reconfigure some of its electric wires, the secondaries in
5 particular. Apparently the phone company does not use its
6 full two feet; and the cable is in fact mounted in the two
7 feet of the phone company's space. There appears to be
8 room above one cable line for another cable line. In
9 other words, you could have one at the 23-foot level. So
10 there is extra space still available on the poles, not
11 considering that you can also lash cables together, which
12 is also another way of getting more space on these poles.
13 Regarding the four-foot clearance space between cable
14 and electric, I would find that this is primarily
15 necessary to protect the non-City Light workers, in other
16 words, to protect the people who might be up there near
17 those lines who are not Seattle City Light workers. It is
18 secondarily necessary so that when the Seattle City Light
19 people are up there with their buckets and equipment they
20 are not damaging the cables below. And then thirdly, to
21 provide again convenience for the City of Seattle City
22 Light people so they don't get tangled up in their work,
23 which, if everything was too close together, potentially
24 they could.
25 So of the three primary benefits, this third one

1 would be for the benefit of Seattle City Light. The first
2 two benefits would be for the benefit of the other
3 attachers. And of course, the four-foot clearance, as we
4 know, is only necessary in those situations where there is
5 more than one attacher on the pole.
6 The street lights in the four-foot space, apparently,
7 they're not always in that space, but they are at times in
8 that space. It would appear they could go and do
9 elsewhere, that they're there because it's the easiest
10 place currently to put them. It doesn't appear that's
11 where they have to be or that it precludes other
12 attachments or rearrangements of the wires.
13 I'm going to talk a little bit about my findings for
14 the rate ordinance process and eventually I will get to my
15 conclusions, but I am going through the facts here first.
16 As we know, it was a two-to-three-year process by the
17 task force. They were gathering information on the
18 methodology to be used. The task force considered up to
19 12 different methodologies. It did consider different
20 rates from around the country. There was a wide range of
21 rates. I would find that the task force was fully aware
22 of rates around the country, rates as high as $25 or as
23 low as just a couple of dollars.
24 The task force did consider and was fully informed
25 regarding the FCC methodology. It knew that the initial

1 14.66 rate it proposed would be at the high end of rates
2 around the country. It did believe that rates around the
3 country had been affected by both policy considerations,
4 politics, and inertia. The task force did have a
5 reasonable belief that many rates did not reflect a cost
6 accounting methodology, but other issues. It also had a
7 reasonable belief that some other areas had wanted to
8 raise their rates, but hadn't done so in a while.
9 We also know that the task force did not solicit,
10 prior to the '95 ordinance, input from the cable
11 companies, but assumed that the cable companies would not
12 be happy about an increase in the rate. I would find that
13 the fact that the task force did not solicit information
14 from cable companies did not deprive it of significant
15 factual data and information in its background research.
16 It had identified the key variables in pole rates. It
17 knew that the pole use ratio was a key variable, and
18 knowingly and purposefully varied the pole ratio from the
19 FCC format.
20 During the trial, three areas focused on were: the
21 support space, the four-foot safety zone and the 359.1
22 issue. The task force knew exactly what it was doing
23 regarding these issues and why it was doing it, so it
24 wasn't due to a lack of information or confusion that it
25 did those things.

1 I would find that the task force believed what it
2 was doing was fair and that its rationale was that all
3 users used the support space equally, that there was no
4 relationship between the amount of space used above the
5 20-foot attachment zone and the amount of support space
6 below -- it's 20 feet above ground and seven feet below
7 ground. Whether you have a pole of 21 feet or 47 feet,
8 how that space between 20 and 47 is divided up bears no
9 relationship to the 20 feet of support space.
10 The third matter that the task force relied on, I
11 would find, was it understood that the rental rate was
12 still cheaper to cable than actual ownership or joint or
13 co-ownership of the pole or for cable to build their own
14 poles. It also took into account that at that time
15 Congress was apparently thinking about going to a per
16 capita pole-use ratio.
17 I would find, then, that the task force did choose a
18 full cost rate based on accepted cost accounting
19 methodology that identified benefits and costs, and the
20 task force specifically rejected incremental costs or a
21 pro rata rationale, again on the assumption that this
22 would not reflect a return of capital.
23 The 1995 ordinance was regularly adopted. It was a
24 public proceeding. Although there was no special notice,
25 it was certainly not a secret proceeding. TCI knew that

1 the rates were going to be set by ordinance and it knew
2 that its contract was coming to an end in April of '96.
3 It certainly had at least one lobbyist, if not more, whose
4 job it was to keep track of these kinds of things. So I
5 don't find there was any irregularity in not specifically
6 bringing to the attention of TCI the adoption of the rates
7 in 1995.

8 I would also find that the city council was not
9 misled or misadvised in 1995. They were advised that the
10 rates would be comparatively high, and it knew that the
11 rates were based on a policy of full return of costs.
12 There was no evidence that the council did not do what it
13 wanted to do. No council person testified that they were
14 misled or that they had made a mistake.

15 The 1995 methodology, again, I'm not going to go
16 through it, I don't think there is any dispute about what
17 it actually is or was, except to say that I would find
18 that it was based on and used accepted cost accounting
19 methodology.

20 In 1997, there are three major developments that I
21 find were significant. First, of course, is the
22 congressional act, where Congress did not go to a pure per
23 capita methodology, but backed off to the two-thirds
24 ratio. I would find this was principally a political
25 compromise and not based on cost accounting issues. There

1 was then, of course, also the Washington act, RCW 35.21,
2 which gave the utilities a place to go to complain about
3 the rates. And the third difference between 1995 and 1997
4 was that there was a major political lobbying effort by
5 TCI primarily, some of the other cable companies perhaps,
6 but primarily by TCI. TCI was present at a variety of
7 meetings and wrote a significant number of letters. TCI
8 made it clear that it would go to court if the city did
9 not back off its rates.

10 I would find that in 1997, or relative to the 1997
11 ordinance, that TCI had full input at all stages and
12 brought its points that the city should follow the FCC
13 rate fully to the attention of the city.

14 Again, as we know, the mayor's recommendation to the
15 council was basically the same as 1995 regarding the
16 methodology, but backed off to the two-thirds rather than
17 the full per capita allocation for the support space. I
18 would find this was done primarily, if not solely, for
19 reasons of the lobbying and political pressure and to
20 avoid litigation (which obviously didn't work), but that
21 this change was not due to any doubts about the
22 methodology itself or to any flaws in the cost accounting
23 rationale.

24 In 1997, then, I would find again that the council
25 enacted the rate ordinance based on full and complete

1 information. There was input from all sources, and there
2 was no factor that was not considered in the process.
3 So now, my conclusions regarding all of this.
4 I would find that neither the '95, nor the '97 rate,
5 was arbitrary or capricious. They were based on
6 articulable rationales after thorough study, and they were
7 based on the accepted cost accounting methodology. The
8 per capita versus the pro rata allocation is a reasonable
9 one. Per capita is based on the rationale that each user
10 uses and benefits from the support space equally.
11 As I said a few minutes ago, there is no relationship
12 between what's going on above 20 feet regarding what goes
13 on below the 20 feet. In addition to that, it's still
14 cheaper for attachers than building their own poles. And,
15 as I said, it's based on an accepted proper cost
16 accounting methodology that's used in other arenas.
17 There is in addition no particular reason why a
18 private enterprise should earn a profit on the city's
19 infrastructure without paying a full share of the costs.
20 The cost accounting, here again, is based on a concept
21 that each user is obtaining an equal benefit from the
22 support of the pole for their operation, so the per capita
23 rationale is eminently reasonable. The pro rata approach
24 also is rational, and arguments were made in support of
25 it. It is, however, somewhat less rational.

1 The issue here is not what's more or less rational,
2 however, it is simply was the city's rate reasonable. And
3 I would find that the per capita allocation only had to be
4 reasonable, so even though I also find that it is more
5 reasonable, it does at least meet the reasonable standard.
6 Allocation of the four-foot safety zone to the
7 support space, to be split up on a per capita basis, is
8 also a reasonable allocation. It would be rational in
9 fact to allocate it all to the other attachers since it is
10 primarily for their safety that that four-foot safety zone
11 exists. So it is certainly rational to split it per
12 capita since none of the attachers needs the space if the
13 other one is not there. It would be unreasonable to
14 assign this space all to the electric utility, and it
15 would also be unreasonable to assign it on a pro-rata
16 basis. That would actually be arbitrary, since the
17 principal reason for the four-foot safety space is for the
18 safety of the other individuals working on the lines.
19 I don't find that that the street lights issue
20 changes the methodology or the rationale. As I said, the
21 street lights apparently could go elsewhere. They're not
22 on every pole. There is no space on the pole allocated
23 for them. It may be that there should be some revenue
24 credited on the per capita basis, but whatever that might
25 be would have a very minor impact on the overall rate

1 structure.

2 Regarding the issue of the reservation of space and
3 the fact that the city is reserving the last space on the
4 pole, no particular space is reserved. In fact, all 47
5 feet of the pole are currently allocated, so there is no
6 extra space somewhere that's reserved as extra space for
7 the city. Probably the space that the city is reserving
8 is already some of its own space that it might reobtain by
9 reconfiguring the secondary wires that are currently
10 vertically on the pole that could be reconfigured to gain
11 some extra space.

12 Then, of course, reservation of space is only notice
13 essentially to everyone and reserving rights, so to speak,
14 of what might be done in the future. It does not affect
15 anything that's currently going on on the pole or any
16 attachment that currently exists on the pole. So if the
17 city does something in the future to either kick somebody
18 off the pole or not let somebody onto the pole, that might
19 be a different issue, but it doesn't affect the current
20 rate structure of who is there.

21 I would also find that it's reasonable to use the
22 average number 3 as the divisor for the per capita rate.
23 As we know, 3 is more than 2.89, which is apparently the
24 actual number, and it would probably be an administrative
25 nightmare, even with computers, to keep actual current

1 track of how many people are on each pole. So the use of
2 the number 3 is certainly reasonable and not arbitrary.
3 Using account 359.1, rather than account 359, is also
4 fully reasonable. That's comparing apples to apples. The
5 plaintiff's position on this issue reflects instead what
6 I'll call a slavish adherence to the FCC methodology,
7 which just doesn't appear to be based on the realities of
8 Seattle City Light's situation. And again, in the
9 findings, please fill the details out. You and I, we all
10 know what we're talking about, but this transcript won't
11 demonstrate that.
12 The fact that the city council moved to a two-thirds
13 per capita on the support space: I would find that that
14 does not mean or does not establish that it was wrong in
15 1995. It only demonstrates that the city was bending to
16 the political pressures of 1996 and '97, and it does not
17 make the full per capita allocation any less rational or
18 less just.
19 The FCC methodology, I would find, is not the measure
20 of reason, although it is evidence of an approach to
21 rate-making and was considered in this case. But I would
22 also find that the FCC methodology was a result of
23 legislative compromises with the purpose and the intent to
24 help a fledgling industry, which is no longer a fledgling
25 industry.

1 It is also important that the federal model
2 specifically exists for the purpose of allowing local
3 units of government to experiment with different
4 methodologies, and the federal legislation specifically
5 stated local areas were free to meet their own needs.
6 The importance of the words "reasonable and just" in
7 the state legislation means that the independent
8 rate-making authorities are to use their own independent
9 judgment based on reason and equity and not simply to
10 follow what others may be doing someplace else. So again,
11 I would reject the notion that the FCC model needs to be
12 followed or that it reflects the "best thinking" on the
13 subject. Just the opposite.
14 Regarding the issue of promoting competition,
15 clearly, the city has as one of its policies that overall
16 business competition is good. But there has been no
17 evidence here that decreasing the rates would increase
18 competition significantly in Seattle or that increasing
19 the rates has depressed competition. Again, there was no
20 evidence that Summit has been less able to compete as a
21 result of higher rates. It was important in this
22 consideration again that I had no testimony regarding
23 profits. It seems somewhat hypocritical that TCI would
24 raise this issue of competition, since, presumably, at
25 this point, increased competition with it would not be to

1 its benefit.
2 There again has been no evidence that there is any
3 need for subsidy of the cable industry in this community,
4 so I don't find that the issue of promoting competition
5 really has had any support from the evidence or any
6 bearing on the particular issues in this case.
7 So having found that the rates were reasonable and
8 not arbitrary and capricious and in fact represent the
9 more reasonable approach to cost recovery, I'll turn next
10 to the equity issues.
11 The city has pointed out that it was lucky for the
12 cable companies that the poles were already there because
13 they could simply attach to these poles and it would be
14 much more expensive for the cable companies if they had to
15 put up their own poles. So there clearly has been to some
16 extent a windfall for TCI to have the city poles already
17 there. On the other side, TCI has pointed out that it is
18 lucky for the city that other people want to attach to
19 their poles so they can get some rent or capital recovery.
20 I would find in this battle of who is the luckier one
21 that the other came along, that there really is no clear
22 winner. If any, the cable company perhaps comes out a
23 little ahead on this. They are currently paying I guess
24 it's now 16 percent and before it was 24 percent, if I've
25 got those percentages right, on the '97 and '95, of the

1 percents of pole.

2 It appears, however, that there are several areas
3 where the city is actually undercharging and still sort of
4 holding the bag if you will. The 2.89, rather than three
5 users, is one area. The city's charging itself 33 percent
6 for the cross arms. There is also the issue that one-half
7 of the jointly-owned poles are US West poles, but US West
8 is neither paying its full share to the city, nor
9 apparently charging the full share to TCI or its full cost
10 to TCI. And there is also the two-year lag time; there
11 appears to be a lag in updating the actual costs. So I
12 don't find that on those issues that there are inequities
13 to this pole rate.

14 Again, the competition doesn't raise an inequitable
15 issue here. There has been no showing at all that the
16 pole attachment rate is anything more than a minor
17 expense. The overall impact on profits is unknown. There
18 is no equitable reason why a profit-making venture
19 shouldn't share in the full cost of what is otherwise
20 borne by either the taxpayer, if there is a shortfall in
21 City Light revenues, or by the electric users.

22 Electricity is still a necessity of life, and
23 although cable may be in the process of becoming a
24 necessity of life, I don't think it is yet. I think there
25 are a number of households that do not have cable. It is

1 still an elective, in other words, so there is no reason
2 why that entity should not pay its full share of capital
3 costs if you're looking at the equity issues here.
4 I think I've really already gone over this, but I
5 don't find that the city was misled in any way either in
6 1995, or that it was somehow not fair for it to pass the
7 ordinance in 1995 because it was not subject to the
8 lobbying of TCI. Again, as I said, the city was not
9 missing any critical information. It did not abandon its
10 cost recovery approach in 1997. The recommendation came
11 from the mayor's office to back off to this two-thirds
12 position. Again, of course, no witness testified that
13 they were in any way misled by the mayor or by the task
14 force recommendations, and they knew that what they were
15 doing was based both on cost and was higher than most
16 other areas around the country.
17 That basically I think covers the major points.
18 I would say that in terms of evaluating the expert
19 testimony, there clearly was a major dispute between the
20 two experts, Mr. Glist and Mr. Katz.
21 I found that Mr. Glist was clearly, obviously, very
22 well-informed and has been involved for many years in this
23 issue. But I didn't find him an "expert" in the sense of
24 the word. He's an articulate and persistent lawyer and
25 lobbyist, but I didn't find him particularly expert in the

1 differential cost accounting methodologies that might be
2 available or potentially used. He was an obvious
3 advocate, and there is nothing wrong with that, but that
4 clearly was his contribution here, was to articulately
5 present to the court the rationale behind the methodology
6 that TCI proposed.
7 Mr. Katz, I found, was more helpful to the court in
8 explaining cost accounting and cost accounting methodology
9 that is used not only in this type of issue, but on many
10 other areas of cost accounting. He was an advocate for a
11 method that happened to be used for the city, whereas Mr.
12 Glist was an advocate for TCI, which benefited by the FCC
13 methodology. I found focusing on the methodology was more
14 helpful to the court.
15 In conclusion I really have to say that although TCI
16 presented its case very, very well, very expertly, and
17 counsel did an excellent job of putting TCI's best foot
18 forward on the case, I definitely have to say in my review
19 that the case wasn't close, and I find that the city's
20 rate-making efforts here were clearly just and reasonable.
21 The city could have done it differently. It chose not to
22 for good reasons that are fully supportable.
23 I find there is no basis for the court to interfere
24 and intervene in any way in either the '95 or the '97
25 rate-making pole attachment rates.

1 I will need the city, of course, to prepare the
2 findings and conclusions. I know I have left out a number
3 of the factual pieces that you will need to put in there,
4 but I don't think they're in any dispute. If there does
5 arise a dispute, of course, I will resolve that dispute as
6 to any of the facts.
7 So is there any particular question or issue at this
8 point?
9 MR. PATTON: One issue, your Honor, is the amount of
10 rates that are owed by TCI.
11 THE COURT: Well, you did that on the board.
12 MR. PATTON: I did that, so I'll just include that.
13 THE COURT: Yes, I didn't think there was a dispute
14 about that, obviously.
15 MR. DAVIDSON: I do have one question.
16 In our arguments in closing we talked about the
17 Employco case, which we understood to mean that the
18 provisions in Title 80.54 would apply unless there is a
19 rational reason why they should not. And while I
20 understand that the court cited several reasons why there
21 is a distinction between the privately-owned and
22 publicly-owned utilities, it seemed to me that each of
23 those reasons would have applied equally in the Employco
24 situation; that is to say, there is nothing unique about
25 the poles that would explain why those criteria should not

1 be applied.

2 THE COURT: Yes. It's not the poles, it's the owners
3 of the poles that are different.

4 MR. DAVIDSON: But aren't the criteria or the
5 characterizations of the municipality as owner of the
6 pole, wouldn't those same considerations exist in the
7 Employco case, where the court seemed to say that we need
8 to find a good reason why we should not apply the criteria
9 from the UTC statute to the municipality? If there is a
10 good reason not to, then we won't, but the city needs to
11 come forward and show us what that reason is. And I think
12 that's the reason why we relied so heavily on that case.

13 And in listening to your Honor's oral decision this
14 morning, it kind of seemed to me that the distinctions
15 that you described would apply pretty much in every case
16 as distinctions between a private and a public utility.

17 THE COURT: Well, I considered that, but in this
18 situation, where the legislature specifically did not, I
19 mean specifically set up a, using the words "just and
20 reasonable," and did not tie it in, and specifically said
21 that they're not bringing it under the jurisdiction of the
22 UTC -- and I know jurisdiction is different from
23 methodology, but the point is neither did they bring them
24 under the jurisdiction of the UTC, nor did they use or set
25 out the same statutory language. And it clearly did so

1 for a reason: To give the municipalities greater
2 flexibility than was given to the individually-owned
3 utilities.
4 All right.
5 MR. PATTON: Thank you.
6 THE COURT: It will probably take you a little while
7 to draft these. Do you want a date for presentation?
8 Maybe we better do that to be sure. Try to at least.
9 We need a presentation date.
10 THE BAILIFF: How much time do you need, counsel? I
11 mean how many days do you need?
12 MR. PATTON: Couple of weeks. Couple weeks would be
13 the week of the 27th.
14 THE BAILIFF: How about the week of the 4th?
15 MR. PATTON: That's fine.
16 THE BAILIFF: May 6th at 8:30.
17 MR. PATTON: Okay.
18 THE COURT: All right.
19 MR. PATTON: Thank you.
20 (Matter concluded: 10:40 a.m.)
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