

FILED
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VIRGINIA LEE
PACIFIC CO, WA

BY _____

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.

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

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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;

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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

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