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The Honorable J. Kathleen Learned

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KING COUNTY
SUPERIOR COURT

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

TCI CABLEVISION OF WASHINGTON, INC., a Washington Corporation, Plaintiff, vs. CITY OF SEATTLE, a Washington municipal corporation, Defendant.	No. 97-2-02395-5SEA FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ~~[PROPOSED]~~

I. INTRODUCTION

This case came on for trial without a jury before the above Court on March 16, 1998. Plaintiff, TCI Cablevision of Washington (TCI), was represented by Mark S. Davidson and Judith A. Endejan of Williams Kastner & Gibbs. Defendant, City of Seattle (Seattle), was represented by William H. Patton, Assistant City Attorney.

Plaintiff, TCI, alleged that the rates for pole attachment established by Seattle ordinance for attachment to Seattle City Light poles for the periods 1995-96 and 1997-98 were unjust and unreasonable in violation of RCW 35.21.455(2). Seattle denied these allegations and sought recovery of unpaid pole rental charges, plus interest, from TCI.

ORIGINAL

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Testimony and evidence were presented over seven days of trial from March 16—19 and March 23—25, 1998, with closing arguments made to the Court on March 26, 1998. Plaintiff called the following witnesses: William Bennett (TCI), Douglas Cooper (TCI), Robert Goldstein (Seattle), Paul Glist (Cole, Raywid & Braverman, L.L.P., called as an expert), Paul Croom (Seattle City Light), David Arbaugh (former representative PUD Association), Ron Main (Washington State Cable Communications Association), Jane Soder (Seattle City Light), Matt Lampe (Seattle), Marshall Nelson (Davis Wright Tremaine), Steven Weed (Summit Cable), and Bob Robertson (Electric Lightwave). Defendant called the following witnesses: Jane Soder (Seattle City Light), Betty Tobin (Seattle City Light), Michael Katz (KFA Services, called as an expert), and Councilmember Tina Podlodowski (Seattle). Plaintiff recalled William Bennett (TCI) as a rebuttal witness.

After reviewing the testimony and evidence, the Court ruled in favor of the Defendant, City of Seattle, in an oral ruling delivered on April 14, 1998. A transcript of the Court's oral ruling is attached to these Findings and Conclusions as Exhibit A.

Having considered all testimony and evidence introduced in this trial, the Court makes the following Findings of Fact and Conclusions of Law and enters its Judgment:

II. FINDINGS OF FACT

A. Seattle

1. Seattle owns and operates a municipal electric utility, Seattle City Light, under the general authority of RCW 35.92.050.

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2. Seattle City Light serves customers throughout the City of Seattle, as well as adjacent areas both north and south of Seattle.

3. Seattle City Light owns approximately 93,000 distribution poles in its service area.

4. Approximately 80% of those distribution poles in the Seattle City Light service area are jointly owned by U.S. West.

5. In addition, a small number of the poles are jointly owned by three owners: Seattle City Light, U.S. West and King County Metro.

B. TCI

6. TCI owns and operates a cable television utility service which provides cable television service to subscribers both in and outside the City of Seattle.

7. TCI entered into a new, 10-year cable franchise with Seattle in December 1995, which contained a provision reserving TCI's right to challenge the legality of any actions taken by Seattle.

8. TCI entered the Seattle market in 1986 when it purchased Group W cable, and enlarged its presence in Seattle in 1996 when it purchased Viacom's cable operations.

9. TCI is now the largest cable television service provider in Seattle, with approximately 135,000 subscribers in Seattle and approximately 40,000 additional subscribers in areas served by Seattle City Light outside of Seattle.

10. Summit is the next largest cable service provider in Seattle, with approximately 12,000 subscribers.

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11. TCI provides cable service in the Seattle City Light service area, both within and outside the Seattle City limits, by attaching both coaxial and fiber optic cable to Seattle City Light poles, except in areas where underground service is provided by all utilities.

12. TCI is by far the largest renter of attachment space on Seattle City Light poles, attaching its cable to approximately 59,000 Seattle City Light distribution poles.

C. Standard Distribution Pole

13. The standard height of a Seattle City Light distribution pole prior to the arrival of cable television was a 45 foot pole.

14. After cable television service began to spread in Seattle, however, Seattle City Light began to install 47 foot poles as the standard, in order to accommodate the space needs of cable television attachments.

15. The standard height of a Seattle City Light distribution pole is now a 47 foot pole.

16. The standard pole configuration on a 47-foot Seattle City Light distribution pole from the base up is as follows: Support space -- 27 feet (7 feet underground; 20 feet from the ground to the first attachment); Telephone attachment -- 2 feet; Cable attachment -- 1 foot; Safety clearance zone -- 4 feet; Electric attachment --13 feet.

D. Pole Ownership v. Pole Rental

17. Prior to advent of cable television service in Seattle in the late 1960's and 1970's the model for sharing space on poles was an ownership model.

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18. After Seattle acquired the distribution properties of Puget Sound Power and Light in 1951, Seattle and the telephone utility increasingly agreed to joint ownership of poles, both to share expenses and to decrease aspects of urban blight caused by multiple sets of poles on the same street.

19. When Metro rewired the trolley system in the late 1970's, Metro likewise purchased an ownership share in the Seattle City Light and U.S. West poles to which it attached overhead trolley cables.

20. When cable television began to provide service in Seattle, ~~however~~ Seattle City Light agreed to rent space on its poles rather than require the new cable television operators to purchase ownership shares in each of the poles to which they attached cable.

E. Pole Attachment Rental Rates – Background

21. Pole attachment fees were originally established by Seattle City Light, through administrative action, under rule making authority delegated from the Seattle City Council.

22. When Seattle City Light raised the pole attachment fee in the mid-1980's, the cable television companies refused to pay the higher rate, and litigation between Seattle and the cable companies resulted.

23. The lawsuit between Seattle and the cable companies was settled in 1988 when the cable companies and Seattle City Light entered into an eight-year pole attachment contract, which provided for specified rates for attachment, and which also provided for automatic renewal for another eight years, unless one of the parties terminated the contract at least 180 days before its expiration.

24. Seattle City Light on October 30, 1995, formally notified TCI in writing that its pole attachment contract would be terminated at the end of the eight-year term in April 1996.

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25. The initial rates set out in the contract with TCI and other cable companies under similar contracts for attachments were $6.00/pole/year for a pole owned solely by Seattle City Light and $2.00/pole/year for jointly owned poles.

26. The rates for attachment under the contract with TCI when it was terminated in April 1996 were $6.24/pole/year for a pole owned solely by Seattle City Light and $2.80/pole/year for jointly owned poles.

27. In 1992, Seattle City Light, by administrative action, refused to act on a pole attachment application from Electric Lightwave, Inc. (ELI) and, instead, adopted a pole attachment moratorium in order to reassess its pole attachment policies in light of an anticipated increase in demand for pole attachment space from newly forming telecommunication companies.

28. ELI then sued Seattle in King County Superior Court Cause No. 92-2-07956-9, seeking a writ of mandamus to allow ELI to attach to Seattle City Light poles on the same basis as others had been permitted to do so.

29. Judge Steven Scott of the King County Superior Court issued a writ of mandamus to allow the proposed ELI attachment, unless Seattle provided reasons for its refusal other than an administrative policy review, or unless Seattle enacted a moratorium by legislative action in order to consider a change in pole attachment policy.

30. Following Judge Scott's ruling in the ELI case, Seattle enacted a pole attachment moratorium by legislative action in July 1992, in order to consider a comprehensive pole attachment policy.

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31. The moratorium did not affect the ability of TCI and other cable companies to continue to attach to Seattle City Light poles, since they continued to operate under the 1988 pole attachment contract with Seattle City Light.

32. During the pole attachment moratorium, Seattle representatives held a number of meetings with interested parties, including TCI, to discuss proposed revised pole attachment policies.

33. One of the policies proposed by Seattle, to which TCI specifically objected, was the proposal to set pole attachment rates in the future by ordinance.

34. Following a nine-month moratorium on pole attachments, Seattle enacted a revised pole attachment policy by ordinance in April 1993 by amending Seattle Municipal Code (SMC) Chapter 15.32. to include a new section, SMC §15.32.300, setting forth terms and conditions for attachment to City-owned poles.

35. Seattle provided in SMC §15.32.300(A) that the City would reserve one communication space on City-owned poles for its own use.

36. The newly adopted pole attachment policy specifically provided in SMC § 15.32.300(B)(3)(n) that the rates for pole attachment will be set by ordinance.

F. Pole Attachment Rate Task Force

37. Following the adoption of SMC § 15.32.300(B)(3)(n), Seattle established a pole attachment rate task force to develop rate proposals for consideration by the City Council in eventually enacting pole attachment rates by ordinance.

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38. The pole attachment rate task force consisted of Jane Soder and Robert Goldstein, both of whom testified in the case, and Solomon Tadesse, who did not appear as a witness.

39. The task force members, in particular the two members who testified, had the background, experience and training that were appropriate and sufficient to the task that they were given.

40. The two task force members who testified appeared to be fully technically competent to analyze and evaluate the issues that were presented in pole attachment rates.

41. The three-person task force did a detailed work-up and background research.

42. The task force members were intelligent, responsible and diligent in their work.

43. The task force worked over a two-year period gathering information on the methodology to be used.

44. The task force considered up to 12 different methodologies.

45. The task force considered different rates from around the country, and it was fully aware of rates around the country from a high of $25/pole/year to only a few dollars.

46. The task force was also fully informed regarding the FCC methodology.

47. The task force knew that the initial $14.66/pole/year rate which it proposed for a pole solely owned by Seattle City Light would be at the high end of rates around the country.

48. The task force had a reasonable belief that many rates did not reflect a cost accounting methodology, but other issues, such as policy considerations, politics and inertia.

49. The task force also had a reasonable belief that some other areas had wanted to raise their rates, but had not done so in some time.

50. The task force was motivated to find the most accurate way to have all users share in the costs of the poles and to return the cost to the City.

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51. The task force was not motivated to generate excess revenue or to stymie competition or to adversely impact attachers. [1]

52. The task force did not solicit input from the cable companies prior to passage of the 1995 rate ordinance, but assumed that the cable companies would not be happy about an increase in rates.

53. The fact that the task force did not solicit information from cable companies did not deprive it of significant factual data and information in its background research.

54. The task force had identified the key variables in the pole rates.

55. The task force knew that the pole use ratio was a key variable, and knowingly and purposefully varied the pole use ratio from the FCC format.

G. Allocation Methodologies

56. The FCC formula for pole use ratio adopts a pro rata method of allocation by allocating costs of the entire pole in proportion to an attacher's "direct" use of space on the pole as compared with the total amount of "direct" space occupied by all attachers.

57. The task force use a pole use ratio based on a per capita allocation of the support and safety clearance space, in addition to each attacher's amount of "direct" space occupied.

58. The task force understood that the rental rate it ultimately proposed was still cheaper to cable attachers than actual ownership or joint or co-ownership of existing poles, or than the expense of cable operators building their own poles.

59. The task force also took account of the fact that Congress was apparently thinking about going to a per capita pole use ratio at the time the 1995 rate ordinance was adopted.

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60. The task force knew exactly what it was doing regarding three issues focused on during trial: (1) the support space; (2) the four-foot safety zone; and (3) the FERC "sub account 369.1" issue.

61. Accordingly, it was not due to a lack of information or confusion which led the task force to make the choices it did on each of those three issues.

62. The task force specifically rejected incremental costs or a pro-rata rationale to allocate costs, on the assumption that this would not reflect a return of capital.

63. The task force chose a full cost rate based on accepted cost accounting methodology that identified benefits and costs.

I. Support Space

64. On the issue of support space, the task force chose to allocate the support space (7 feet below ground and 20 feet above ground to the first attachment) equally among the three attachments (electric, telephone and cable) which it found to be the average number of attachments on each pole.

65. The task force recommended a rationale for allocating the support space which it believed to be fair, based on the rationale that there was no relationship between the amount of space used above the point of first attachment at 20 feet and the amount of support space below (20 feet from the first attachment to the ground, and 7 feet support below ground).

J. Safety Clearance

66. In respect to the 4-foot safety clearance zone, the task force also recommended that that space be similarly allocated on a per capita basis based on the average of three attachments per pole.

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67. If there were only telecommunication attachments and cable attachments to the pole or only electric attachments then there would be no need for a safety clearance zone.

68. The primary reason for requiring the four foot safety zone is to protect the safety of workers who are not Seattle City Light trained line workers.

69. Secondarily, the safety zone protects the telephone and cable lines from damage when City Light workers are working on the electric system with bucket trucks.

70. Thirdly, the safety zone also provides convenience for the Seattle City Light electric workers who are less likely to get tangled up with communication wires when they work on the electric system.

K. FERC Sub-account 369.1

71. In determining maintenance costs as a percentage of assets, the task force used FERC sub-account 369.1 in the denominator rather than FERC account 369, because this sub-account contains assets of only overhead services, whereas account 369 also includes assets for underground services.

72. Using sub-account 369.1 as the denominator is consistent with the task force's use of FERC account 593, which contains only overhead system maintenance expenses, as the numerator in determining maintenance costs as a percentage of assets.

73. This treatment of FERC accounts is different from the treatment of those accounts by the FCC, in that the FCC uses the entire FERC account 369 in the denominator, regardless of the existence of underground services in the particular electric utility under review.

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74. The task force consciously chose to use only FERC sub account 369.1 to be consistent with the Seattle City Light's mix of underground and overhead services and to be consistent with the data for only overhead maintenance included within FERC account 593 used in the numerator.

L. 1995 Rate Process

75. The work of the task force led to recommendations for pole attachment rates which were eventually adopted by the Seattle City Council by ordinance in 1995 as part of the overall City Light rate review.

76. The pole attachment rates established by Ordinance 117490 in 1995 were codified in SMC 21.49.065 and provided for rental rates of $14.66/pole/year for a pole owned solely by Seattle City Light, $7.33/pole/year for a pole jointly owned by Seattle City Light and US West, and $4.88/pole/year for a pole jointly owned by Seattle City Light, US West and Metro. Ordinance 117490 was the budget for all of Seattle City Light's electric rates. JH

77. The 1995 rate ordinance (Ordinance 117490) was regularly adopted.

78. The consideration of this ordinance was a public proceeding.

79. Although there was no special notice sent to Plaintiff, the consideration and adoption of the rate ordinance was not a secret proceeding.

80. TCI knew that the rates were going to be adopted by ordinance.

81. TCI also knew that its contract for pole attachment was coming to an end in April 1996.

82. TCI had at least one lobbyist, if not more, whose job it was to keep track of such legislation.

83. The Seattle City Council was not misled or incorrectly advised prior to the adoption of the 1995 rate ordinance.

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84. The City Council was advised that the proposed rates for pole attachment would be comparatively high, compared with pole attachment rates in other parts of Washington and in other parts of the United States.

85. The City Council also knew that the proposed rates were based on a policy of full return of costs.

86. The methodology which led to the rates adopted by ordinance in 1995 used and was based on accepted cost accounting methodology.

87. No council member testified that that they were misled or had made a mistake.

M. 1997 Rate Process

88. The amendment of pole attachment rates in 1997 took place in the context of three significant developments: (1) Congressional action; (2) the adoption of RCW 35.21.455; and (3) a major political lobbying effort by TCI.

89. In the first of these developments, Congress passed a new Telecommunications Act in 1996, in which the Senate/House Conference Committee backed off from a pure, per capita allocation of support space passed by the House of Representatives to adopt a per capita allocation of 2/3 of the support space which would gradually be phased in for communication attachments.

90. The adoption of a per capita allocation of only 2/3 rather than all of the support space was primarily a political compromise, and not based on cost accounting issues.

91. The adoption of RCW 35.21.455 was a significant development in the context of the 1997 pole attachment rate amendments because it gave utilities which rent space on poles a place to go to complain about the rates.

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92. The third significant difference between the 1995 and the 1997 rate process was the fact that TCI and some other cable companies mounted a major lobbying effort in the Seattle rate process.

93. TCI made it clear that it would go to court, if Seattle did not back off its rates.

94. In the process leading up to the adoption of new pole attachment rates by Seattle in 1997, TCI had full input at all stages of the process; TCI attended meetings and wrote a number of letters; and TCI brought its position that Seattle should follow the FCC rate fully to the attention of Seattle officials.

95. In the 1997 rate process, the Mayor's recommendation was basically the same methodology used in the 1995 rate process, but backed off to a per capita allocation of only 2/3 of the support space, together with a per capita allocation of 2/3 of the safety clearance space, rather than a per capita allocation of all the support and clearance space.

96. The decision to back off to a per capita allocation of 2/3 of the support and clearance space was due to political pressure and primarily in an unsuccessful effort to avoid litigation.

97. The decision to back off to a per capita allocation of 2/3 of the support and clearance space was not due to any doubts about the validity of the 1995 methodology or to any perceived flaws in the cost accounting rationale.

98. In 1997, the Seattle City Council again, as in 1995, enacted pole attachment rate through ordinance based on full and complete information.

99. Seattle received input from all sources, including TCI, and there was no factor in that input that was not considered in Seattle's adoption of pole attachment rates in 1997.

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100. Seattle revised its pole attachment rates by enactment of Ordinance 118540 in March 1997, amending the previous rates codified in SMC 21.49.065 to provide for new pole attachment rates in 1997 and for 1998.

101. The 1997 pole attachment rates established by Ordinance 118540 provided for rental rates of $12.85/pole/year for a pole owned solely by Seattle City Light, $6.42/pole/year for a pole jointly owned by Seattle City Light and one other owner, and $4.28/pole/year for a pole jointly owned by Seattle City Light and two other owners.

102. The 1998 pole attachment rates established by Ordinance 118540 provided for rental rates of $13.24/pole/year for a pole owned solely by Seattle City Light, $6.62/pole/year for a pole jointly owned by Seattle City Light and one other owner, and $4.41/pole/year for a pole jointly owned by Seattle City Light and two other owners.

N. Streetlights

103. Streetlights are located on many, but not all poles.

104. Streetlights are sometimes located in the 4-foot clearance space, but not always, depending on the easiest place to mount them.

105. Placement of the streetlights in the 4-foot clearance space is not necessary, nor does such placement preclude other attachments or rearrangements of the wires.

106. Whatever revenue might be attributable to having streetlights located on the poles would have had a very minor impact on the overall rate structure.

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O. Additional Space for Attachment

107. The way in which the typical pole is configured, it may appear that the pole has no more room for additional attachments on the pole, but the testimony in the case verifies that there is extra space on the poles for additional attachments.

108. The phone company does not usually use its full 2-feet of space.

109. Seattle City Light can reconfigure its electric wires, particularly by consolidating its secondary rack of three separate wires into a wrapped bundle, termed "triplex."

110. There is often space above the first cable attachment for another cable attachment.

111. In addition, cables can be lashed together, so that they are supported by a single support strand wire, utilizing a single attachment space on the pole.

P. Beneficial Aspects of Seattle Rate Methodology

112. There are several areas where in developing its rates, the City is "undercharging" in ways which benefit TCI and other entities which make attachments to Seattle City Light poles.

113. There is a two-year lag time in updating actual costs which go into the rate calculations.

114. Seattle counts the average number of entities making attachment to the poles for purposes of making per capita calculations as rounded to the number 3, whereas the actual average is 2.89.

115. Seattle charges itself a 33 percent reduction in pole costs for cross arm expenditures, based on engineering estimates, whereas the default percentage used by the FCC is 15 percent, and the actual average for Seattle ~~appears to be closer~~ may be as little as 5 percent.

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116. Seattle charges half the single-owned pole rate for a pole jointly owned by US West, whereas US West is neither paying its full share of costs to Seattle City Light, nor charging its full cost to TCI.

Q. Effect of Pole Attachment Rates on TCI

117. The pole attachment rates under the 1995 ordinance reflected in the 1996 bill to TCI represented approximately $0.30 per subscriber, per month.

118. The pole attachment rates under the 1997 ordinance reflected in the 1997 bill to TCI represented approximately $0.24 per subscriber, per month.

119. The average subscriber payment per month to TCI is approximately $30.00 per month.

120. The pole attachment rates therefore represent less than 1% of TCI's subscriber income, even under the higher 1995 rates.

121. Subscriber income is not the only income to TCI from its cable operation, as it also receives additional revenue from programming and advertising.

122. The pole attachment rates passed in 1995, according to the FCC represented a 0.6% increase in TCI's costs.

123. No evidence was presented on the effect of the pole attachment rates on TCI's profits.

R. Non-payment of Pole Attachment Rental Rates

124. TCI has not paid any pole attachment rental fees to Seattle City Light under either the rates enacted in 1995 or the rates enacted in 1997.

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125. TCI did tender payment into court for the first four months of 1996, calculated under the 1988 pole attachment contract which did not expire until April 26, 1996, but that payment was returned by Seattle City Light, pending a resolution of the inventory of the number of poles to which TCI was attached. TCI offered to tender payment into court of the disputed amount which the court deemed unnecessary for purposes of quarantining assets for payment should TCI be unsuccessful in the litigation. N/A

126. Viacom paid the 1995 pole attachment rental rates for its 1996 cable attachments prior to the acquisition of Viacom by TCI later in 1996.

127. TCI has not paid Seattle City Light the 1997 pole attachment rental rate for either the area encompassed by former Viacom franchise area or the original TCI franchise area, nor has it paid for the remaining 8 months of 1996 for the original TCI franchise area under the rates enacted in 1995.

III. CONCLUSIONS OF LAW

A. Legal Standard

1. Pursuant to federal law, 47 U.S.C. § 224(c)(1), locally owned electric utilities are exempt from federal regulation of pole attachment rental rates.
2. RCW Chapter 80.54 provides for regulation of pole attachment rental rates for investor-owned utilities by the Washington Utilities and Transportation Commission, but does not give the WUTC rate making jurisdiction over locally-owned utilities.
3. Chapter 32 of the Laws of the State of Washington 1996 enacted a common legal standard for pole attachment rates which in separately codified sections of RCW apply to municipal electric utilities, public utility districts, and co-ops.
4. This 1996 Pole Attachment Act established the legal standard that pole rental rates must be "just, reasonable, nondiscriminatory and sufficient."

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5. The codified section of the 1996 Pole Attachment Act which applies to Seattle is RCW 35.21.455.

6. RCW 35.21.455(3) specifically provides that the statute does not bring municipal electric utilities under the jurisdiction of the Washington Utilities and Transportation Commission (WUTC) and specifically states the Legislature's intent not to do so.

7. RCW 35.21.455 does not require that Seattle use the same standards as are used by the WUTC for investor-owned utilities.

8. The Legislature did not define "just and reasonable" in RCW 35.21.455, but did define that term as applied to investor-owned utilities in RCW 80.54.040.

9. When there are two different legislative acts that differ in specifics, the differences are presumed to be intentional.

10. Accordingly, if the Legislature meant that there should be only one way to set pole attachment rates, it would presumably repeat the same formulation and not enact different language as it did in enacting RCW 35.21.455 in which the phrase "just and reasonable" was used without a specific definition.

11. In addition, there are significant differences between investor-owned utilities and municipally-owned utilities which justify different standards and more stringent controls over investor-owned utilities.

12. A municipality has as its ultimate responsibility the welfare of all of its constituents, of the public, including entities which attach to poles.

13. A city is presumed to have the economic interest and health of the city as a whole as one of its important goals, more so than a private utility.

14. A municipality does not operate a profit system and is less likely to be motivated by its own private interest at the expense of other elements of the public.

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15. In addition entities which attach to poles have a stronger political voice versus a municipality than is available to them versus an investor-owned utility, where they are much more at the mercy of the investor-owned utility.

16. The State also grants more deference to a governmental subdivision of the State, recognizing that there are public policy issues that may affect pole attachment rates, such as urban blight, which go beyond mere economics.

17. The intent of the Legislature in passing Chapter 32 of the Laws of the State of Washington 1996 was to meet a complaint made by entities which attach to poles that there was nowhere to go to ~~complain about the~~ review the reasonableness of pole attachment rates set by governmental subdivisions of the State which own poles.

18. The Legislature in passing Chapter 32 did not prescribe specific rate formulations, but rather provided a general standard of reasonableness and a recourse to court.

19. In addition, RCW 80.54.040 is not irreconcilably inconsistent with RCW 35.21.455(2).

20. Within the text of RCW 80.54.040 itself, it is not apparent that a pro rata allocation of the entire pole is mandated given that the phrase "in proportion" does not actually ~~modify "support and clearance space"~~ refer to "a share of the support and clearance space" within the sentence structure of the statute.

21. Even if a pro rata allocation of all space on the pole were found to be mandated by RCW 80.54.040 for investor-owned utilities, however, it is not inconsistent for two different regulatory systems to have different standards or different approaches.

22. The "just and reasonable" standard set forth in RCW 35.21.455 does not require adopting the standards of or the interpretation given to RCW 80.54.040.

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23. The term "reasonable" in the "just and reasonable" standard set forth in RCW 35.21.455(2) is a frequently adopted legislative standard which means not arbitrary or capricious; it means something for which a reason can be given, which doesn't mean the most or least favorable action for one party or another.

24. The term "just" in the "just and reasonable" standard set forth in RCW 35.21.455(2) means that, considering all of the circumstances, the court (also has to consider an element of equity and) must determine whether the rates are otherwise unfair or unjust, even if they are not arbitrary or capricious.

B. Application of Legal Standard to Seattle Rates

25. Neither the rates for pole attachment enacted by Seattle in 1995 nor in 1997 was arbitrary or capricious.

26. The pole attachment rates enacted by Seattle were based on articulated rationales after thorough study, and they were based on accepted cost accounting methodology.

27. The choice of per capita allocation of support and clearance space rather than a pro rata allocation is eminently reasonable; it is based on the rationale that each user uses and benefits from the support space equally.

28. The choice of per capita allocation for the support space is also based on an accepted cost accounting methodology which is applied in other situations where costs are allocated among different users.

29. There is no reasonable rationale why a profit making enterprise, such as TCI, should earn a profit by using the City's infrastructure without paying a full share of the costs.

30. The choice of a pro rata method of allocation could also be reasonable, in that arguments were made in support of it.

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31. The choice of a per capita allocation of the support space, however, is more rational, given that there is no relationship between what is attached above 20 feet on the pole and the necessity to have 20 feet of support space (and 7 feet of support space below the ground) to hold any attachment high enough off the ground.

32. The use of 20 feet support space between the ground and the first attachment, rather than an 18 foot support space urged by TCI, is appropriate, and allows for compliance with the Washington Administrative Code requirement for 18 feet of clearance at the lowest point of sag of the wires between poles.

33. Even though Seattle's choice of a per capita allocation methodology is more reasonable than the pro rata allocation methodology advanced by TCI, Seattle's choice of an allocation methodology only had to be reasonable.

34. Seattle's allocation of the 4-foot safety clearance space on a per capita basis is also reasonable.

35. It would, in fact, be reasonable to allocate all of the 4-foot safety clearance space to all attachments other than Seattle City Light, since it is primarily for the safety of the non electric attachments that the 4-foot safety clearance space exists.

36. Accordingly, it is certainly reasonable to allocate the 4-foot safety clearance space on a per capita basis, since none of the attachers would need that space if the others were not also on the pole.

37. In contrast it would be arbitrary to either assign all of the 4-foot safety clearance space to the electric utility or to allocate the 4-foot safety clearance space on a pro rata basis, since the primary purpose is to protect the safety of non-electric workers working on cable television or other communication lines.

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38. The presence of street lights in the 4-foot safety clearance space on some poles does not alter the reasonableness of Seattle's choice of a per capita allocation methodology for the 4-foot safety clearance space, in that streetlights are not on every pole, there is no space on the poles allocated to them, and whatever revenue credit streetlight attachments might have on the overall revenue to be allocated among attachers would have a very minor impact on the overall rate structure.

39. The issue of the City's reservation of space on the poles does not affect the reasonableness of the City's pole attachment rates.

40. The poles already appear occupied and the space being "reserved" is likely located in the space already occupied by Seattle City Light, and the "reservation" of the last space on the pole for City use is essentially notice of the City's intent to use part of its pole in the future, as this reservation does not affect on the current number of attachments on the poles.

41. Seattle's use of the number 3 to use as the average number of attachers in applying the per capita methodology is reasonable, given that the actual average is 2.89, and using a round number simplifies administration while at the same time benefiting the attachers which rent space on the poles.

42. Seattle's use of the FERC sub account 369.1 in determining maintenance costs as a percentage of assets rather than employing FERC account 369, which includes underground as well as overhead service assets, is a reasonable methodological choice based on an effort to make an "apples to apples" comparison.

43. In contrast, the Plaintiff's position that FERC account 369 must be used, without looking to specific sub accounts, is not rationally related to realities of Seattle's distribution system and would represent a slavish adherence to the FCC model.

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44. Seattle's use of an inflation factor to account for a lag time in assembling actual data is also reasonable.

45. The fact that Seattle moved to a per capita allocation of 2/3 of the support and safety clearance space in 1997 does not make the 1995 choice of full per capita allocation unreasonable.

46. The 1997 choice of methodology only demonstrates the City was bending to political pressures in 1996 and 1997, and does not detract from the underlying rationale of the full per capita allocation methodology employed by Seattle in enacting the 1995 rates.

47. The FCC methodology for setting pole attachment rental rates is not the measure of reason; it was the result of Congressional compromises and developed with the purpose and intent of helping a fledgling cable television industry, which is no longer a fledgling industry.

48. There is no showing that the cable television industry in Seattle is in need of any subsidy, nor is there any evidence from which it could be concluded that the pole attachment rates enacted by Seattle have had any dampening effect on competition.

49. Federal law specifically exempts local governments from FCC jurisdiction in setting pole attachment rates for the purpose of allowing local governments to experiment with different methodologies and with the freedom to meet their own needs.

50. The terms "reasonable" and "just" in RCW 35.21.455(2) also means that independent rate-making authorities are to use their own independent judgment based on reason and equity and not just follow what others are doing elsewhere in the country.

51. As a consequence, the Plaintiff's argument that the FCC model must be followed or that it necessarily reflects the best thinking on the subject must be rejected.

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52. There is no evidence that the rates Seattle enacted in either 1995 or in 1997 are unjust or otherwise inequitable.

53. Both TCI and Seattle receive equitable benefits from TCI's pole rental.

54. TCI benefits, because the expense of owning a portion of the poles or the expense of building its own set of poles is greater than the expense of renting space from Seattle.

55. Seattle benefits, because TCI's rent payments provide Seattle with some capital recovery.

56. There is not equitable reason why a profit-making venture providing a non-essential service should not share in the full cost of what is otherwise borne by either the taxpayer or by Seattle City Light ratepayers, especially when there is no showing that the pole attachment rate is anything other than a minor expense to TCI.

C. Pole Attachment Rental Owed by TCI

57. The inventory issue having been agreed upon between the parties, TCI owes Seattle City Light the $47,008.65 payment originally tendered by TCI to cover the four months of 1996 remaining under the 1998 pole attachment contract, without interest, since TCI had before tendered that amount.

58. For the remaining eight months of 1996, TCI owes Seattle City Light a total of $328,506.56, which is 2/3 of the bill for 1996 for the original TCI franchise area under the rates enacted in 1995, together with 17 months interest at 1% per month from October 17, 1996 (the same due date in 1996 as the bill sent to TCI for 1997 rental) through March 17, 1998.

59. For 1997, TCI owes Seattle City Light a total of $543,450, which is equal to the combined bill for the original TCI franchise area, plus the former Viacom franchise area, under rates adopted in the 1997

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ordinance, together with 5 months interest at 1% per month from October 17, 1997 through March 17, 1998.

D. Conclusion

60. The pole attachment rates enacted by Seattle in 1995 and 1997 are just and reasonable and in compliance with RCW 35.21.455(2).

61. TCI owes Seattle City Light unpaid pole attachment rent for the last four months under its 1988 pole attachment contract which expired at the end of April 1996, and for the remainder of 1996 plus all of 1997 under rates enacted by Seattle ordinance, together with intervening interest for unpaid rents due under Seattle's rate ordinances.

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III. JUDGMENT

Having entered the above Findings of Fact and Conclusions of Law, the Court hereby enters Judgment in favor of Defendant, City of Seattle, both with respect to Seattle's denial of Plaintiff's claims and with respect to its counterclaim against Plaintiff for unpaid pole attachment rent.

Plaintiff, TCI, is ordered to pay Seattle City Light a total of $918,966.00 for back rent, plus intervening interest, for pole attachment rental in 1996 and 1997.

Seattle, as the prevailing party, is awarded statutory attorneys fees of $125.00.

DONE IN OPEN COURT this 20th day of May, 1998

HON. J. KATHLEEN LEARNED, JUDGE

Presented by:
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