No. 51695-1

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

EDWARD E. (TED) COATES; MICHAEL CROWLEY; MARK BUBENIK and MARGARET BUBENIK d/b/a STEELE MANOR APARTMENTS; THOMAS H. OLDFIELD; and INDUSTRIAL CUSTOMER SOF NORTHWEST UTILITIES, an Oregon nonprofit corporation,

Respondents,

v.

CITY OF TACOMA,

Appellant.

BRIEF OF APPELLANT

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INTRODUCTION

In the mid-1990s, Tacoma Power decided to construct a hybrid fiber/coaxial telecommunications system (the "System") to connect its generation, distribution, and transmission assets. To confirm its legal authority, Tacoma Power brought a declaratory judgment action in Pierce County Superior Court against all Tacoma taxpayers (via a court-appointed representative) and a certified class of all electric ratepayers. The Superior Court issued two orders, one authorizing the System (1996 Order), and the other authorizing electric revenue bonds to fund its construction (1997 Order). Relying on these orders, Tacoma Power invested in the System.

Tacoma Power now consists of six "units," including Click. Click uses excess System capacity to sell internet access and data transport services to ISPs and others, and cable television service to eligible electric customers. Click does not serve the general public. It is not a stand-alone, separable service, but exists only to sell the System's excess capacity in Tacoma Power's proprietary capacity.

Despite its prior orders, the trial court here granted summary judgment that Tacoma Power may not fund Click. This action is barred by claim and issue preclusion. The plaintiffs' arguments are legally incorrect in any event. The Court should reverse and dismiss.

ASSIGNMENTS OF ERROR

1. The trial court erred in failing to apply claim and issue preclusion.

2. The trial court erred in misinterpreting the accountancy statute, RCW 43.09.210.

2. The trial court erred in misinterpreting Tacoma City Charter § 4.5.

4. The trial court erred in granting summary judgment despite genuine issues of material fact.

5. The trial court erred in entering its orders on summary judgment.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in declining to apply claim and issue preclusion, where it had deemed legal the City's telecommunications plan, which provided that ratepayers may have to fund Click?

2. Did the trial court misinterpret the accountancy statute, RCW 43.09.210, where binding precedent holds that the act does not apply to separate activities funded from a single account?

3. Did the trial court misinterpret Tacoma City Charter § 4.5, where that section plainly concerns entities (*i.e.*, utilities) rather than services (*i.e.*, electricity)?

4. Did the trial court improperly resolve genuine issues of material fact on summary judgment, where it could not have issued its Order without finding that Click was "separate" from Tacoma Power?

STATEMENT OF CASE

A. In 1996, Tacoma Power's Board and the City Council made a prudent investment decision to construct a telecommunications system.

In the mid-1990s, Steve Klein was the Superintendent of Tacoma Power[1] when the electric utility industry was responding to significant telecommunications advances that would enable utilities like Tacoma Power to improve generation, distribution, and transmission assets. CP 648, 688, 925-26. At the same time, interest arose across the country to allow retail competition and greater choice among electricity suppliers. CP 648, 671-73, 677-79, 926. While utilities would continue to provide the distribution, transmission, and metering infrastructure, retail customers could choose a different company to supply their electricity. CP 648, 926.

Klein established a Tacoma Power team to research using telecommunications to respond to increased competition. CP 926. After internal research and input from consultants, the team determined that the best option was to construct a hybrid fiber coaxial telecommunications system (the "System") to connect its generation, distribution, and transmission assets. *Id*. The System would also

[1] Tacoma Power is part of Tacoma Public Utilities ("TPU"), which consists of Tacoma Power, Tacoma Water, and Tacoma Rail. CP 485. Tacoma Power is the City's largest department. *Id.*

support the installation of “smart meters” at the residence or place of business of every Tacoma Power customer. *Id*.

In addition to providing important data for tracking and billing electricity consumption if retail competition were permitted, smart meters would provide immediate benefits to Tacoma Power’s customers: allowing remote meter reading, remote connection and disconnection, and pay-as-you-go electricity consumption programs. CP 649, 671-73, 678-79, 926. As originally designed, the coaxial part of the System would support the smart meters, while the fiber part of the System would help connect Tacoma Power’s generation, distribution, and transmission assets to achieve a variety of operating efficiencies. CP 927.

TPU’s Board and the City Council authorized Tacoma Power’s proposal to construct the System in 1996. CP 492-524. The Board and Council anticipated using electric revenue bonds to fund construction of the System. *Id*.

B. The Pierce County Superior Court soon confirmed Tacoma Power’s authority to fund and build the System with full knowledge that costs might exceed revenues, requiring perhaps a 2.5% increase in electric rates.

Tacoma Power then sought confirmation that it had legal authority both to own and operate the System and also to use electric

revenue bonds to fund its construction. It brought a declaratory judgment action in Pierce County Superior Court against all Tacoma taxpayers (via a court-appointed representative) and a certified class of all electric ratepayers. CP 666, 710-41, 743-48, 750-57.

The City informed the court that it planned to use the System to connect its generation, distribution, and transmission assets and to support the installation of smart meters. CP 712, 772-73. The City also informed the court that it would be building excess (or spare) capacity into the System. CP 774. The City would use this excess capacity (1) to sell data transport and internet access services to Internet Service Providers ("ISP") and others; and (2) to sell retail cable television service to Tacoma Power's electric customers. CP 676-77, 712, 759-69, 774.

In opposing the City's second motion for summary judgment,[2] the taxpayers argued revenues were unlikely to cover the costs of providing internet and cable television services, resulting in electricity rate increases for all Tacoma Power customers. CP 823, 828. The City conceded that this was a possible outcome (CP 844-45):

[2] Defendants contested both City summary judgment motions. CP 777-86, 821-31. This included having a certified public accountant opine that the System likely would fall $154,468,000 short in total income projections over a 20-year period. CP 827.

> 13. The [City] Council and [TPU] Board were aware when they voted to proceed that revenues from the provision of telecommunications and cable services might fall short of projections. As [Tacoma Power] staff informed the Board and Council, under a "worst case" shortfall, electric rates might have to be increased by as much as 2.5%. This scenario assumed that we incurred all the cost of building the system but obtained no revenues from provision of cable television service or from provision of telecommunications service to third parties.

The Superior Court issued two orders, one authorizing the System (1996 Order), and the other authorizing electric revenue bonds to fund its construction (1997 Order). CP 788-89, 847-48. In reliance on these orders, the City and Tacoma Power made a prudent investment decision to build its System and to sell its excess capacity on it. CP 649-50, 684-85, 927.

C. While economic crises and rapid technological change caused losses, the System retains significant value, and careful consideration of market conditions takes time.

The System was constructed in the late 1990s, connecting Tacoma Power's distribution and transmission assets, and allowing for efficient and remote operation of those assets, including outage tracking and detection, automatic substation control, and monitoring for preventative maintenance. CP 853. The System also enabled automated meter reading and billing, distribution automation, and remote on/off for electric customers. CP 495, 853.

At the time of its construction, the System was a state-of-the-art hybrid fiber coaxial system. CP 928, 950. During the mid-2000s, Tacoma Power also developed gateway meters (a/k/a smart meters), which relay information from electric customers to Tacoma Power headquarters via the System. CP 928, 943. At its peak, Tacoma Power had deployed over 18,000 smart meters. CP 853.

But the California electricity crisis eventually sent Tacoma Power and the rest of the electric utility industry into a financial tailspin. CP 653, 686-87, 928-29. This delayed Tacoma Power's deployment of smart meters and full and robust use of the System. *Id*. And while Tacoma Power was recovering from the financial crisis, the technology continued its rapid evolution. CP 929.

By the mid-to-late 2000s, the electric utility industry began to recognize that wireless technology would take the place of wired telecommunications systems using smart-meter applications. CP 654, 853. Tacoma Power therefore stopped deploying new smart meters in 2009, and stopped replacing existing smart meters in 2015. CP 853. But Tacoma Power still uses the System to operate the remaining 14,240 smart meters installed and operating at its customers' residences and businesses. *Id*. It also continues to use

the System to gather information from and control operations of its generation, distribution, and transmission assets. *Id*.

As smart metering has diminished over the years, Tacoma Power, the TPU Board, and City Council have been grappling with the future. CP 853-54. Although they have not yet been formally designated, significant parts of the System essentially are (or will become) surplus property. *Id*. This includes hundreds of miles of unused or "dark" fiber as well as coaxial cable that runs to individual residences and businesses in anticipation of future electric-system use. CP 855-56.

Municipal utilities and cities must care for surplus property and decide how and when to dispose of it. CP 489, 654-55, 853-54, 919. Often the best choice for a city is not to immediately sell or dispose of its surplus utility property, but rather to carefully consider market conditions. CP 489, 654-55, 919. Although the System has not reached its full anticipated use, industry experts report that it still has significant latent value to Tacoma Power and its ratepayers. CP 487, 615, 654-55, 855-56. Tacoma Power and the City need additional time to determine how best to repurpose the telecommunications assets. CP 654-55, 951. That process is ongoing.

D. The City has issued RFPs for using the excess capacity of the System.

In 2016 and 2017, the TPU Board and City Council explored whether the System could be enhanced using Tacoma Power or City funds, allowing Click to offer more robust internet and cable services – the "All-In Plan."[3] CP 950. On January 24 and 30, 2018, however, the TPU Board and City Council rescinded their previous resolutions directing development and implementation of the All-In Plan. CP 950, 958, 966. The new resolutions direct TPU management and the City Manager to issue requests for information or requests for proposals for future uses of the System. CP 950, 959, 967.

In the meantime, while TPU management and the City proceed with developing a plan for repurposing this valuable Tacoma Power asset, Tacoma Power will continue to use the System for efficient electric system management and to sell its excess capacity through its Click division. CP 856. As with other surplus properties, Tacoma Power will spend utility revenues to maintain this asset until TPU decides how best to repurpose it. *Id*.

[3] In 2015, Tacoma Power received but rejected an offer from a private entity, WaveDivision Holdings, LLC, to lease capacity on the System to replace Click's offerings. CP 950.

E. The System, including Click, is an integrated unit of Tacoma Power and the Power Fund, accounted for just like the other five units.

Tacoma Power consists of six "units," including Click. CP 949. Click uses excess System capacity to sell internet access and data transport services to ISPs and others, and cable television service to eligible electric customers. *Id*. It is important here to understand this fact: Click is not a stand-alone, separable service, but exists only to sell the System's integral excess capacity. *Id*.

As a result, all customers of the ISPs and Click are also Tacoma Power electric customers. CP 950. That is, Click/ISP customers are a subset of Tacoma Power's customer base. *Id*.

The System – including Click – has always been an integrated unit of Tacoma Power and the City's Power Fund.[4] CP 486-87, 499 (Art. II, § 2.1), 614, 682-83. Click is a unit of Tacoma Power like its Generation unit or its Transmission and Distribution unit. CP 852. Click's General Manager reports to the Power Superintendent and is part of the Power management team. *Id*.

[4] System construction and additions are funded through various revenue, including from retail electric customers; other utilities and power marketers; recreational users; ISPs; and cable television customers. CP 628-29, 674-75. All revenues are accounted for in the City's Power Fund. CP 486.

For purposes of City government funding, the revenue and expenses associated with Click's use of the excess capacity on the System have always been handled within a sub-fund of the Power Fund. CP 487, 614, 693, 696-97. Each year, the City's Finance Department prepares a financial statement for the Tacoma Power Fund to ensure that all revenue and expense transactions are appropriately recorded in accordance with Generally Accepted Accounting Principles and local and state regulatory requirements. CP 487, 614, 917. Within that financial statement, the City reports on the expenses and revenues associated with Click. CP 487, 614. The annual financial statement is professionally audited every year and presented to the Washington Auditor's Office. CP 487, 614, 917. It must show that the Power Fund has a positive balance. CP 487, 918. Nothing requires, however, that sub-funds within the Power Fund, such as Click, have a positive cash balance at year-end. *Id*.

F. The trial court granted summary judgment for the plaintiffs and certified questions to this Court, which accepted review.

The plaintiffs sought summary judgment. CP 24-459, 1060-75. The City opposed. CP 460-984. The trial court granted summary judgment. CP 1136-40. It certified an appeal. CP 1134-35. This Court granted discretionary review. Ruling Granting Review (6/14/2018).

ARGUMENT

A. The standard of review is *de novo*.

This Court reviews summary judgments *de novo* under CR 56. *See, e.g.*, ***Forbes v. Pierce Cnty.***, 5 Wn. App. 2d 423, 431, 427 P.3d 675, 680 (2018) (citing ***Keck v. Collins***, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015)). The standard is well known to this Court. *Id*.

B. Claim and issue preclusion bar the plaintiffs' claims.

Res judicata (claim preclusion) and collateral estoppel (issue preclusion) bar the plaintiffs' claims. The 1996 Superior Court Orders confirmed the City's authority to construct and operate the System and to use excess System capacity to provide cable television service and internet access. CP 788-89, 847-48. When entering those orders, the Superior Court knew (a) that the System would be a unit of Tacoma Power and of its Power Fund; (b) that the City would use Power Fund revenues for System activities and to pay any construction-finance bonds; and (c) those revenues could include retail electric rates if excess-capacity sales fell short. *Supra*, Fact § B (citing, *e.g.*, CP 712, 827, 844-45). Here, the identity of subject matter, causes of action, and parties, requires the Court to uphold those orders and bar this action.

1. Claim preclusion.

Claim preclusion bars retrying claims that could or should have been brought in a prior litigation. ***Storti v. Univ. of Wash.***, 181 Wn.2d 28, 40-41, 330 P.3d 159 (2014); *accord* ***Hisle v. Todd Pac. Shipyards Corp.***, 151 Wn.2d 853, 865, 93 P.3d 108 (2004):

> [Claim preclusion applies] not only to points upon which the court was actually required . . . to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. [Citations omitted.]

Thus, merely "asserting a new legal basis for a claim that has already been decided does not" avoid claim preclusion. ***Irondale Cmty. Action Neighbors v. W. Wash. Growth Mgmt. Hearings Bd.***, 163 Wn. App. 513, 529, 262 P.3d 81 (2011) (citations omitted).

Claim preclusion applies when the prior judgment and the current litigation have identical (a) subject matter, (b) cause of action, (c) persons and parties, and (d) quality of persons. *See, e.g.*, ***In re Election Contest Filed by Coday***, 156 Wn.2d 485, 501, 130 P.3d 809 (2006) (citing ***Loveridge v. Fred Meyer, Inc.***, 125 Wn.2d 759, 763, 887 P.2d 898 (1995)). (a) The subject matter is the same because the prior ratepayers challenged reliance on electric revenues for funding what would become Click, arguing that it would

lose money and cause increased electric rates for Tacoma Power customers.[5] The plaintiffs raise the same issue here.

(b) The cause of action is also the same. The Court considers four questions: (i) whether rights or interests established in the prior judgment would be destroyed or impaired; (ii) whether substantially the same evidence is presented in both actions; (iii) whether the suits involve infringement of the same right; and (iv) whether the suits arise out of the same transactional nucleus of facts. ***Rains v. State***, 100 Wn.2d 660, 663-64, 674 P.2d 165 (1983). Although all four are not required, they are all met here. *See* ***Feminist Women's Health Ctr. v. Codispoti***, 63 F.3d 863, 867 (9th Cir. 1995).

Applying them here, (i) the City has relied on the 1996 orders for over 20 years, reliance that would be destroyed by the trial court's order here. (ii) The prior ratepayers offered substantially the same evidence that ratepayers are allegedly "subsidizing" Click. (iii) The same "right" – not to subsidize Click – is allegedly infringed. And (iv) both suits arise out of the creation of (and spending on) the System and Click. The cause of action is thus the same.

[5] This Court has already determined that the "taxpayers of Tacoma objected in part because electricity ratepayers would have to help pay off the bonds if the revenue from cable television was insufficient to cover the debt." Ruling Granting Review at 2 n.2.

(c) The persons or parties are also the same under the "public interest" exception to the mutuality requirement. ***Stallcup v. City of Tacoma***, 13 Wash. 141, 42 P.2d 541 (1895) (taxpayer challenging validity of bonds precluded from relitigating tax that prior taxpayer challenged). Moreover, the 1996 court appointed a representative for all ratepayers and certified a class of all electric ratepayers, specifically to preclude future suits like this one. CP 743-57.

It is axiomatic that class actions protect all class members through class representatives and class counsel. Therefore, all class members (including absent members and future members) are bound by the class-action judgment. *See, e.g.,* ***Muhammad v. Warithu-Deen Umar***, 98 F. Supp. 2d 337, 340-41 (W.D.N.Y. 2000) (citing ***Cnty. of Suffolk v. Long Island Light. Co.***, 14 F. Supp. 2d 260, 266 (E.D.N.Y. 1998); ***In re Joint E. & S. Dists. Asbestos Litig. (Johns-Manville Corp.)***, 878 F. Supp. 473 (E. & S.D.N.Y. 1995); ***In re "Agent Orange" Product Liab. Litig.***, 597 F. Supp. 740 (E.D.N.Y. 1984); *see also* ***Hansberry v. Lee***, 311 U.S. 32, 42, 85 L. Ed. 22, 61 S. Ct. 115 (1940) (class-action judgment is *res judicata* as to class members not formally parties to the suit)).

> [U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation. Basic principles of res

> judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply. A judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief. A judgment in favor of the defendant extinguishes the claim, barring a subsequent action on that claim. A judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment.

Cooper v. Fed. Reserve Bank., 467 U.S. 867, 874, 81 L. Ed. 2d 718, 104 S. Ct. 2794 (1984) (citing, *inter alia*, ***Supreme Tribe of Ben-Hur v. Cauble***, 255 U.S. 356, 65 L. Ed. 673, 41 S. Ct. 338 (1921); REST. (SECOND) OF JUDGMENTS ("RSJ") § 41(1)(e) (1982)).

Thus, the persons and parties are the same.

(d) Finally, the quality of persons is the same because the ratepayers and the City are acting in the same capacities as they were in 1996. Quality is satisfied where, as here, all affected citizens were adequately represented in a substantially identical prior action. ***Coday***, 156 Wn.2d at 501-02.

In sum, the plaintiffs are precluded from relitigating the same claim the ratepayers litigated in 1996. For the first time in their reply in the trial court, the plaintiffs argued that claim preclusion is limited to claims *actually litigated* where declaratory judgments are involved. CP 1009-10. They cited no binding authority for this argument. *Id*. They instead cited RSJ § 33 (1982), *Am Jur.2d*, and 15 WASH. PRAC.,

Civ. Pro. §§ 35:41, 42:25 (2d ed.). *Id*. No Washington precedent adopts RSJ § 33, which is contrary to Washington's Uniform Declaratory Judgments Act, RCW ch. 7.24 ("UDJA").

The UDJA is "liberally construed" "to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." RCW 7.24.120. Therefore, declaratory judgments "shall have the force and effect of a final judgment or decree." RCW 7.24.010. RSJ § 33 flies in the face of this plain language.

Moreover, our UDJA permits a "person . . . whose rights, status or other legal relations are affected by a . . . municipal ordinance" to "have determined any question of construction or validity arising under the . . . ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020. The UDJA also permits the *prevailing* party in the declaratory action to seek further relief. RCW 7.24.080. No similar provision exists for these plaintiffs – against whom declaratory judgment was entered.

"All . . . judgments . . . under" the UDJA "may be reviewed as other . . . judgments." RCW 7.24.070. Thus, the appropriate way to challenge the 1996 orders would have been for plaintiffs to bring an appeal, well over 20 years ago. Review now is barred. RAP 5.2(a).

The most analogous case under the UDJA is ***McNichols v. City & Cnty. of Denver***, 74 P.2d 99 (Colo. 1937). There, the City sought a UDJA declaration that it had the legal authority to issue certain bonds for buying land and to donate the land to the Unites States. ***McNichols***, 74 P.2d at 101. The Colorado Supreme Court affirmed the trial court's declaratory judgment affirming the City's legal authority, noting that in such a suit, the government acts as a trustee to the citizens and taxpayers, who are bound by the judgment. *Id*. at 102-03. The same is true here.

Any other result destroys or impairs the 1996 Order on which the City has relied for decades. Regardless of how one characterizes the 1996 class action, the 1996 order says the City's fully disclosed plans to provide cable television services – which included the possibility of using electric utility funds to support cable operations if fees for those services proved insufficient – are legal. CP 789. The 2018 order that they are not is precluded.

In any event, whether the City may legally use electric utility revenues to pay for Click was directly litigated in 1996, as explained *supra*, Fact § B. Despite the 1996 plaintiffs' direct arguments on this issue (*see, e.g.*, CP 823, 828, 844-45) these plaintiffs claimed (again

for the first time in their summary judgment reply) that the 1996 orders do not *say* the issue was litigated. CP 1009-10.

Yet the 1996 order expressly rules that "the facts set forth in the Declaration of John Athow are true." CP 788. Athow declared that the "telecommunications infrastructure designed to meet current and future Electric System needs represents a substantial portion of the costs of this more capable Telecommunications System." CP 774. He nonetheless asserted that cable television and other "services could be provided efficiently because of the lower cost of capital and the fact that the Light Division [n/k/a Tacoma Power] already has a drop to every home." *Id*. And as noted *supra*, the 1996 plaintiffs *directly challenged* these assertions. CP 823-25, 827-29 (questioning the City's financial projections and predicting a $154,468,000 shortfall over 20 years). And the 1996 trial court ruled these precise arrangements legal. CP 788.

It is true (as the plaintiffs argued at CP 1010 n.1) that in the *1997* order authorizing the *bond issue*, the trial court declined to address the project's financial feasibility or the legality of *future bond issues*, crossing-out "that the facts set forth in the Declaration[s] of John Athow are true." CP 847-48. But it had already entered the 1996 order containing that precise ruling. CP 788. It did not have to enter

it again. Thus, plaintiffs' own arguments about the 1997 *bond* order show that the 1996 order authorizing the legality of the *Telecommunications System* – the only relevant order here – directly addressed the relevant issue.[6]

Finally on claim preclusion, the plaintiffs argued only one element, subject matter, under ***Hisle***, 151 Wn.2d 853. CP 1011-13. ***Hisle*** involved a Collective Bargaining Agreement (CBA) that employees had earlier argued (in a separate litigation) was invalidly adopted. Once the courts had rejected that argument, the employees brought a different action seeking unpaid overtime under the valid CBA. There is simply no legal basis on which to bar employees who unsuccessfully challenged a CBA from later seeking to *enforce* that admittedly valid CBA under overtime laws. ***Hisle*** – which provides no analysis – is inapposite.

In sum, the subject matter, cause of action, persons and parties, and quality of persons, are identical here. The trial court erred as a matter of law in failing to preclude the plaintiffs' claims. This Court should reverse and dismiss.

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[6] This also explains why the City's pleadings said this "factual argument is simply not material to the question of the City's authority *to issue the Bonds*." CP 1011 (emphasis altered). That assertion is correct, but does not apply to the 1996 order legally authorizing the System plans.

2. Issue preclusion.

Even if claim preclusion had not applied, issue preclusion applies. The doctrine bars relitigating issues when a party had a full and fair opportunity to litigate in a prior case, even if the subsequent litigation presents a different claim or cause of action. ***Marriage of Mudgett***, 41 Wn. App. 337, 342, 704 P.2d 169 (1985). This achieves finality of disputes, promotes judicial economy, and prevents harassment of and inconvenience to litigants. ***Hanson v. City of Snohomish***, 121 Wn.2d 552, 561, 852 P.2d 295 (1993).

Issues are precluded when (a) the two cases involved identical issues; (b) the first case resulted in a final judgment on the merits; (c) the party precluded was in privity with a party to the prior case; and (d) preclusion will not work an injustice. ***Shoemaker v. City of Bremerton***, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). All four elements are met here.

(a) The identical issue – using electric utility funds to pay for Click – was raised in both cases. (b) The summary judgment was a final judgment on the merits for preclusion purposes. ***Estate of Black***, 153 Wn.2d 152, 170, 102 P.3d 796 (2004) ("'summary judgment is a final judgment on the merits with the same preclusive effect as a full trial'") (quoting ***DeYoung v. Cenex, Ltd.***, 100 Wn.

App. 885, 892, 1 P.3d 587 (2000), *rev. denied*, 146 Wn.2d 1016 (2002))). (c) As noted above, a class-action judgment binds absent class members, satisfying privity. RSJ § 41(1)(e). And (d) no injustice arises here because no procedural bars limited or discouraged the prior ratepayers from fully disputing Click's funding sources. *See* ***Christensen v. Grant Cnty. Hosp. Dist. No. 1***, 152 Wn.2d 299, 309, 96 P.3d 957 (2004).

In sum, issue preclusion also applies. Plaintiffs made no reply on this issue in the trial court. Their claims are barred. This Court should reverse and dismiss.

C. The accountancy statute, RCW 43.09.210, does not apply to separate activities funded from a single account.

Plaintiffs challenged Tacoma Power's continued expenditures on Click under the local government accounting statute, RCW 43.09.210 ("accountancy statute").[7] CP 44-46. The accountancy statute "prohibits one government entity from receiving services from another government entity for free or at reduced cost absent a

[7] "All service rendered by, or property transferred from, one department, public improvement, undertaking, institution, or public service industry to another, shall be paid for at its true and full value by the department, public improvement, undertaking, institution, or public service industry receiving the same, and no department, public improvement, undertaking, institution or public service industry shall benefit in any financial manner whatever by an appropriation or fund made for the support of another."

specific statutory exemption." ***Okeson v. City of Seattle***, 150 Wn.2d 540, 557, 78 P.3d 1279 (2003) ("***Okeson I***"). But Click is, and always has been, a unit of Tacoma Power, with its revenue and expenses accounted for in a sub-fund of the Power Fund. The State Auditor charged with enforcing RCW 43.09.210[8] has never raised an accountancy statute concern regarding Click despite annual reviews of Tacoma Power financials – for over 20 years.

This Court rejected a similar argument in an analogous case: ***Rustlewood Ass'n v. Mason Cnty.***, 96 Wn. App. 788, 981 P.2d 7 (1999). There, Mason County operated separate water and sewer systems in three residential subdivisions. ***Rustlewood***, 96 Wn. App. at 790. The County eventually created a single fund for the three systems, with subsidiary accounts for each system for accounting purposes. *Id*.

Years after setting a uniform rate for all residential users, the County realized that it "had spent more money maintaining and operating [two of the] systems than it had collected from [their] residents, and less money on the [third] system than it had collected from [its] residents." *Id*. at 790-91. The County attempted to justify

[8] *See* RCW 43.09.260.

efforts to recoup monies from the first two system's residents based on RCW 43.09.210. *Id*. at 792. Presaging the plaintiffs' challenge here, the Court framed the issue as "the expenditure of combined funds to benefit some, though not all, of one class of ratepayors [*sic*]." *Id*. at 795. This Court then rejected the argument:

> Merely because over time the County expended more money on [one] system than it did on [another] system does not require a repayment from the [first] account. Rather, these subsidiary accounts are a single combined fund operated by a single department; they constitute one public service industry for the purposes of the accountancy [statute].
>
> . . .
>
> Here, the County did not make interdepartmental transfers of funds; rather, it used monies collected into a common sewer/utility fund to pay the various maintenance and operating expenses of the three subdivisions' systems as they arose.
>
> That the County maintained separate subsidiary accounts for each of the three subdivisions does not make [one system] a separate entity for purposes of the accountancy [statute].

Id. at 796-97 (emphases added).

Plaintiffs strain to avoid this outcome by extending the statutory term "undertaking" beyond reason. CP 44-45. Tacoma Power has always treated its System and the sale of its excess capacity through its Click unit as an integrated part of the Power Fund. *Supra* Fact § E. Plaintiffs cannot escape this reality by misinterpreting the accountancy statute or the Ordinances.

For instance, plaintiffs take a single phrase ("separate system") out of context from City Ordinance No. 25930, yet ignore its cover and first page (CP 492, emphasis added):

> AN ORDINANCE of the City of Tacoma, Washington establishing a telecommunications system as part of the Light Division. . . .

They also ignore the recitals (CP 496, emphasis added):

> WHEREAS, the City has determined that it should create a telecommunications system as part of the Electric System in order to construct these telecommunications improvements;

And their own phrase, in context (CP 495, emphasis added):

> "the Ordinance provides that the City *may create a separate system* as part of the Electric System . . .

This phrasing hardly supports the plaintiffs' claims that ***Rustlewood*** does not control or that Click is a separate "undertaking." It is, plainly, part of Tacoma Power and the Power Fund.

Indeed, the undeniable fact that Click runs on the excess capacity of the System – that it is *physically inseparable* from the existing Tacoma Power infrastructure – renders the plaintiffs' claims incomprehensible. Tacoma Power is using its own excess capacity, not rendering a service, or transferring property, to another "undertaking." RCW 43.09.210. It is one public service industry.

The plaintiffs also noted the different sources of authority or taxes for various municipal activities. CP 44-45. But cities and utilities

derive authority from a broad array of sources, including but not limited to RCW 35.22.570 (omnibus grant to charter cities like Tacoma); RCW 35.A.11.020 (broad power to offer utilities and other municipal services); RCW ch. 35.94 (right to lease surplus utility property and equipment); RCW 80.60.020 (utility may offer net metering). Like any utility, Tacoma Power pays many different taxes, depending on its activities during the year. CP 489-90. If receiving various authority or paying varying taxes were thought to establish a violation of the accountancy statute, city governments would soon grind to a halt.

In reply on this issue, the plaintiffs demonstrated why this action is precluded: even though the 1996 Superior Court entered an order legally authorizing Tacoma Power to run Click on the excess capacity of its electrical system, the plaintiffs argue that this arrangement is not legal. CP 1015-17. While they are wrong for the reasons explained immediately above, the trial court's order here eviscerates the same court's 1996 order.

In sum, the accountancy statute does not affect Click – a unit of Tacoma Power and its Power Fund. ***Rustlewood*** is controlling. The opposite result destroys the 1996 order. This Court should reverse and dismiss.

D. Tacoma City Charter § 4.5 concerns entities (*i.e.*, utilities) rather than services (*i.e.*, electricity).

Plaintiffs also argued that City Charter § 4.5 renders the 1996 court-approved System illegal. CP 42-46. They relied entirely upon a memo written by a City attorney in 2015. *Id*. (citing CP 58-64).[9] The Charter does not apply and the plaintiffs are legally incorrect.

City Charter § 4.5 provides that utility revenues must be used solely for necessary utility operating expenses, including betterments and extensions to utility operations:

> The revenues of utilities owned and operated by the City shall never be used for any purposes other than the necessary operating expenses thereof, including the aforesaid gross earnings tax, interest on and redemption of the outstanding debt thereof, the making of additions and betterments thereto and extensions thereof, and the reduction of rates and charges for supplying utility services to consumers.

CP 115. Utility revenues may not be loaned to, or used to purchase bonds from, any other City utility, department, or agency (*id*.):

[9] Caution is warranted because the memo's analysis is abbreviated and contains clear legal errors. For example, it attributes the outcome in ***Okeson I*** to the accountancy statute, whereas that court declined to rule on that basis. 150 Wn.2d at 557. More broadly, it discusses cases involving governmental functions not at issue here, misconstrues the nature of Tacoma Power's allocations, and searches for statutory authorization, where (as discussed *infra*) the legally correct approach is to confirm that nothing prevents the City from reaching prudent decisions to continue operating the System and Click as configured.

> The funds of any utility shall not be used to make loans to or purchase the bonds of any other utility, department or agency of the City.

On its face, this section does not apply to Tacoma Power using its excess capacity on its System to run one of its units, Click, for the sole benefit of its utility customers. Any funds expended on Click are for necessary utility operations, including betterments and extensions. Tacoma Power is not loaning its revenues to any other City utility, department, or agency. It is not purchasing anyone else's bonds. It is benefiting its customers. Charter § 4.5 does not apply.

Plaintiffs' challenge boils down to a claim that using excess System capacity for Click and integrating it into the Power Fund is illegal because it has not proven as profitable as everyone hoped. Again, this argument flies in the face of the 1996 order. It also defies the very limited review courts normally apply to legislative decisions like the ordinances at issue here. *See, e.g.*, ***Municipality of Metro. Seattle v. Div. 587, Amalgamated Transit Union***, 118 Wn.2d 639, 645-46, 826 P.2d 167 (1992) ("[I]f municipal utility actions come within the purpose and object of the enabling statute and no express limitations apply, this court leaves the choice of means used in operating the utility to the discretion of municipal authorities. We limit

judicial review of municipal utility choices to whether the particular contract or action was arbitrary or capricious, or unreasonable").

As noted *supra*, the City relied on numerous broad grants of authority in creating the System and Click. *See, e.g.*, RCW 35.22.570; RCW 35.A.11.020; RCW ch. 35.94; RCW 80.60.020. This includes municipal utilities' right to recover investments in stranded assets through electric rates where, as here, the investment was undisputedly prudent. *See* ***People's Org. for Wash. Energy Res. v. Utils. Transp. Comm'n***, 104 Wn.2d 798, 805, 820-22, 711 P.2d 319 (1985). This also includes the City's express authority to control and dispose of its property, including utility property and equipment rendered surplus by economic and other developments. *See also* RCW 35.22.280(3) (finances and property); RCW 35.94.040.

Plaintiffs cannot show that Tacoma Power's decision to continue using (and spending monies on) the System and Click as authorized is arbitrary, capricious, or unreasonable. The System continues to provide necessary services to Tacoma Power and is estimated to have considerable value for Tacoma Power and its ratepayers. *Supra*, Fact § C. Click itself has thousands of customers and considerable goodwill. *Id*.; CP 951, 974.

Click would quickly lose both if it had to curtail or end operations due to a lack of funds. CP 951. This in turn would impede or derail the City's imminent search for a partner or alternative mechanism for future System use. *Id.* Nothing requires Tacoma Power or the City to immediately or prematurely sell or dispose of these assets. To the contrary, the City's use of electric utility funds to maintain these assets while determining next steps is consistent with prudent utility practices. It is not arbitrary or capricious.

In any event, the plaintiffs relied on wholly inapposite authority for their arguments. Under RCW 35.A.11.020 (applicable to charter code cities like Tacoma) the "legislative body . . . shall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law." In light of this broad grant of power, our Supreme Court rejected an argument that RCW ch. 35.92 – which underlies the key cases plaintiffs rely upon[10] – limits a city's power to own a cable television system. ***Issaquah v. Teleprompter Corp.***, 93 Wn.2d 567, 574-76, 611 P.2d 741 (1980) (RCW ch. 35.92 does "not address municipal

[10] ***City of Tacoma v. Taxpayers of City of Tacoma***, 108 Wn.2d 679, 743 P.2d 793 (1987); ***Okeson I***, *supra*; ***Okeson v. City of Seattle***, 130 Wn. App. 814, 125 P.3d 172 (2005) ("***Okeson II***"); ***Okeson v. City of Seattle***, 159 Wn.2d 436, 150 P.3d 556 (2007) ("***Okeson III***"). CP 43.

ownership and operation of cable television systems," and "no general law . . . conflicts with the city's authority . . . to operate such a system"); *see also* ***In re Ltd Tax Gen. Obligation Bonds***, 162 Wn. App. 513, 526-27, 256 P.3d 1242 (2011) (citing ***Teleprompter*** to uphold City of Edmonds' authority to operate fiber optic network and to provide broadband internet via excess network capacity).

The plaintiffs' cited cases are really about services furnished to *the general public*. *See, e.g.*, ***Okeson I***, 150 Wn.2d at 550 ("Providing streetlights . . . is a governmental function because they operate for the benefit of the general public, and not for the 'comfort and use' of individual customers"). Tacoma Power provides Click – in its proprietary capacity – *solely* to its utility customers, not to the general public. Judicial review of charges imposed for proprietary functions is "limited to whether the costs were arbitrary, capricious, or unreasonable." *Id*.

Under this standard, Tacoma Power's proprietary operation of a conservation program among its electricity customers survived judicial scrutiny. ***Taxpayers***, 108 Wn.2d at 700. This was true even though "Tacoma's activity served broader utility purposes of efficiency, pollution and cost control, and planning for future needs." ***Okeson III***, 159 Wn.2d at 452 n. 5. The same is true here.

And even if plaintiffs' authority had been on point, the City would prevail. *See* ***Okeson III***, 159 Wn.2d at 451 ("In other words, a close nexus to supplying electricity exists when the action benefits the utility and its customers, but not when it benefits the general public"). The City provides Click to use its excess capacity productively and to serve its *paying* customers. It does not provide Click to anyone else, much less to the general public.

The trial court erred. This Court should reverse and dismiss.

E. Genuine issues of material fact may preclude summary judgment.

The trial court was required to take the facts in the light most favorable to the City, as is this Court. CR 56(c). The trial court failed to do so. And if the plaintiffs now contest the City's factual assertions, summary judgment would not be appropriate. Some examples of *possible* genuine issue of material fact follow.

For example, Click is a proprietary service limited to paying utility customers, so the general-public line of cases (*e.g.*, the ***Okeson*** cases) do not apply. To the extent the plaintiffs challenge the proprietary nature of the services, a trial would be required.

Similarly, Tacoma Power is dealing with surplus assets, so it has broad authority. If the plaintiffs claim these are not surplus assets, a trial would be required.

As a third example, plaintiffs argued at length about how Click is "organized," that it is "separate" from Tacoma Power, and that its existence as a unit of Tacoma Power and the Power Fund is merely "administrative." The facts – discussed at length above – are quite to the contrary. The Court should accept them, or order a trial.

Finally, plaintiffs brought a "policy" argument claiming that electric rates would drop 2%-3% if Tacoma Power abandoned Click. CP 37, 268. Tacoma Power Superintendent Chris Robinson challenged this concept. CP 855-56. Unless the plaintiffs abandon this assertion, it presents a question of fact.

CONCLUSION

This Court should reverse and dismiss.

RESPECTFULLY SUBMITTED this 4th day of January 2019.

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RCW 7.24.010
Authority of courts to render.

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

[**1937 c 14 § 1;** **1935 c 113 § 1;** RRS § 784-1.]

RCW 7.24.020
Rights and status under written instruments, statutes, ordinances.

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

[**1935 c 113 § 2;** RRS § 784-2.]

RCW 7.24.070
Review.

All orders, judgments and decrees under this chapter may be reviewed as other orders, judgments and decrees.

[**1935 c 113 § 7;** RRS § 784-7.]

RCW 7.24.080
Further relief.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. When the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

[**1935 c 113 § 8;** RRS § 784-8.]

RCW 7.24.120
Construction of chapter.

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

[**1935 c 113 § 12;** RRS § 784-12.]

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **BRIEF OF APPELLANT** on the 4th day of January 2019 as follows:

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