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.

REPLY BRIEF

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REPLY STATEMENT OF CASE

A. Plaintiffs may not rely on evidence that was not before the trial court on summary judgment.

The plaintiffs cite – well mention – a declaration from Douglas E. Swanson that they say "was filed in the trial court subsequent to the entry of the March 2, 2018 partial summary judgment ruling but prior to this Court's acceptance of discretionary review." BR 7 n.3. In reviewing an order granting summary judgment, this Court will consider only evidence called to the attention of the trial court. RAP 9.12. This Court should disregard all assertions based on this late-filed declaration.

B. Plaintiffs' many inferences in a light most favorable to themselves are improper, at most raising disputed issues of material fact.

Throughout their Brief of Respondents (BR) – just as throughout their trial court briefing – the plaintiffs consistently make inferences in the light most favorable to themselves. They are the movants, so those inferences are improper. This Court should take the facts in the light most favorable to the City. Otherwise, the plaintiffs' assertions just raise factual disputes.

For instance, the plaintiffs claim that the original infrastructure (as adopted in 1996) was to be used for both electrical utility purposes and for "non-utility purposes (like cable television and

internet service).” BR 8. Yet they admit on the prior page that Click is one of six units *of Tacoma Power* – the utility. BR 7. It cannot be both. For purposes of summary judgment, this Court (unlike the trial court) should infer that Click serves a “utility purpose,” just like Tacoma Power’s other units. Otherwise, this is a disputed issue of material fact precluding summary judgment.

Similarly, the plaintiffs claim that the trial court’s 1997 summary judgment order does not *say* whether it considered the taxpayer representative’s argument that telecom revenue would be wholly inadequate to cover the costs. BR 12. Nonetheless, evidence showed that the 1997 trial court was made aware of this possibility. BA 5-6. The only proper inference is that the court was aware.

The plaintiffs continue making inferences in their most favorable light in claiming that, “Parts of the new HFC network were used to support the electrical utility function of providing electricity, and parts were used to support the new cable TV and wholesale internet business.” BR 12-13. On the contrary, Click runs on the *excess capacity of the same infrastructure*, not a different “part” of it. BA 10-11. And Click does not have its own name to “distinguish it from electric utility service” (BR 13) but rather to market the excess capacity of the electrical-utility infrastructure. *Id*.

The plaintiffs continue with their self-preferential inferences, reciting irrelevant statistics about who uses Click. BR 13 (citing CP 104, 108, 187). But those three cites do not support their inferences. First, CP 104 says that this "table does not include revenues from Click." Second, CP 108 provides some numbers, but the plaintiffs omit their crucial context (CP 107-08, emphases added):

> Click! Network is accounted for as part of the Electric System. In 2016 Click! Network's annual revenues were approximately $26.6 million, and annual operating expenses plus gross earnings taxes were approximately $29.7 million.
>
> Cable television is Click! Network's primary retail business. Click! currently has approximately a 15% share of a very competitive local cable television market. Cable TV products available to both residential and business customers include broadcast television, digital and high-definition channels, digital video recording capability, TiVo with access to over-the-top ("OTT") content such as Netllix, Hulu, YouTube and Pandora, TVEverywhere, and a wide variety of video-on-demand services. Video-on-demand services include local programming tied to schools, colleges, local governments and community organizations strengthening Click! Network's brand identity in the communities served.
>
> Under wholesale Master Service Agreements, seven telecommunications carriers provide high capacity last mile data transport circuits to their customers utilizing Click! Network's telecommunications infrastructure. The seven telecommunications carriers provide SONET data services ranging from DS-1 lines to OC-48 lines and customized Metro Ethernet circuits to meet data transport and web access needs of large and small businesses in the Tacoma area.
>
> Also under wholesale Master Service Agreements, two qualified locally based Internet Service Providers ("ISPs") provide high-speed Internet services via cable modems to

> their customers utilizing Click! Network's telecommunications infrastructure. The ISPs provide a variety of speed packages to meet the needs of the residential and business consumers in the Tacoma area. As part of the contract, the two ISPs also provide customer service, cable modem installation, customer premise equipment and technical support services to their Internet customers.
>
> Click! ended 2016 with 17,468 cable TV customers, 23,344 wholesale high-speed Internet service customers, and 173 wholesale broadband transport circuits.
>
> Click! also continues to provide the City of Tacoma I-Net services to approximately 190 sites to keep the cost of telecommunications low for many governmental entities.
>
> Click! Network implemented a 12.9% cable TV service rate increase effective March 1, 2017. An additional cable TV rate increase is planned for March 1, 2018. These cable TV rate increases are expected to generate approximately $7.7 million in additional revenue. A major portion of additional revenue will be used to cover increases in programming costs.

Third, CP 187 is about the "All-In" plan, which was rescinded. BA 9.

The above evidence supports an inference – properly in the City's favor – that Click is a valuable and integral asset of Tacoma Power. They do not support any inferences favorable to the plaintiffs.

The plaintiffs digress into legal argument regarding "fairness." BR 13-14. This is improper in a fact statement. RAP 10.3(a)(5). Arguments are addressed *infra*, in the Argument section.

And the rest of the plaintiffs' so-called "fact" statement is either irrelevant, legal argument, or both. BR 14-23. Arguments are addressed in the Argument. Irrelevancies are not.

REPLY ARGUMENT

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

The plaintiffs tacitly concede the *de novo* standard of review.

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

The plaintiffs' claims are precluded. The 1996/1997 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. BA 4-6 (citing, *e.g.*, CP 712, 827, 844-45). Preclusion applies.

1. Claim preclusion applies.

The plaintiffs finally address the City's leading argument on claim preclusion at BR 39-47, yet they fail to confront the City's actual argument. They begin by arguing that it is "well established" that a declaratory judgment precludes only claims that were actually litigated. BR 39-45. Beyond citing nonbinding authority never called to the trial court's attention, the plaintiffs never confront the City's

actual argument: a narrow application of *res judicata* to declaratory judgments conflicts with the plain language of *our* UDJA. BA 16-17.

Our UDJA expressly states that declaratory judgments "shall have the force and effect of a final judgment or decree." RCW 7.24.010. Regardless of RESTATEMENT (SECOND) OF JUDGMENTS § 33 (1982) (which Washington has not adopted), an *Am. Jur. 2d*, and foreign statutes or courts,[1] our courts are not empowered to rewrite plain and unambiguous statutes. *See, e.g.*, ***In re Parentage of C.A.M.A.***, 154 Wn.2d 52, 69, 109 P.3d 405 (2005) ("Courts do not amend statutes by judicial construction, nor rewrite statutes 'to avoid difficulties in construing and applying them'") (quoting ***Millay v. Cam***, 135 Wn.2d 193, 203, 955 P.2d 791 (1998) (citation omitted) (quoting ***Applied Indus. Materials Corp. v. Melton***, 74 Wn. App. 73, 79, 872 P.2d 87 (1994))). In Washington, the UDJA means what it says: declaratory judgments shall have the force and effect of a judgment. RCW 7.24.010. The plaintiffs have no response to the City's leading argument. *Res judicata* applies.

[1] The plaintiffs baldly assert that "the vast majority" of courts who have addressed this issue limit the application of *res judicata* to claims actually litigated. BR 36. They fail to support this claim. They also do not even address whether those foreign statutes are similar to ours.

Relying instead on a reimagined UDJA for an incorrect assumption that *res judicata* applies only to actually litigated claims, the plaintiffs assert that using electrical utility revenues to fund Click was not at issue in the 1996/1997 litigation. BR 37-39 (citing CP 834, 848). This is frankly incredible. The ratepayers themselves *expressly raised this issue* (CP 823, emphasis added):

> The proposal represents a great financial risk and <u>will cause a general indebtedness to the taxpayers and ratepayers of Tacoma that could only be paid by increasing the rates charged to the ratepayers for utilities</u> or borrowing from the general fund.

The plaintiffs' claims to the contrary are false. *Res judicata* applies.

Indeed, the *plaintiffs* cite to the City's Reply Brief in the 1997 litigation, *acknowledging the ratepayers argued the issue* (CP 834, emphasis added):

> through the [1996] Order, the [trial] Court has already determined that construction and operation of the Telecommunications System is not ultra vires
>
> . . .
>
> <u>Defendant's brief also argues extensively that revenues from the Telecommunications System may be inadequate to cover debt service on the bonds</u>.

It is true that the City's reply goes on to argue – as we said in the opening brief – that this issue was irrelevant *to the 1997 bond action*.

Id; BA 19-20. But the trial court was nonetheless well aware of the issue, which *could have been litigated*.[2] Again, *res judicata* applies.

The plaintiffs' second cite is to the trial court's *1997 Order* concerning the bonds, which (as the City again noted in the opening brief) did not concern the financial feasibility of the project. CP 848. Plaintiffs seem to entirely miss the point: the issue at the very least *could have been litigated*, in 1996 or 1997, so *res judicata* applies.

The plaintiffs discuss seven or eight cases (some from overlapping jurisdictions) that applied REST. § 33. BR 39-45. Yet none of those cases addresses the City's leading point: RCW 7.24.010 requires that declaratory judgments "shall have the force and effect of a final judgment or decree." Those cases are irrelevant.

The plaintiffs do mention RCW 7.24.080, but for the incorrect proposition that it somehow suggests *res judicata* applies only to actually litigated issues. BR 44. As noted in the opening brief, that statue says that "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" (emphasis added). This statute *enforces res*

[2] The plaintiffs' footnote accusations that the City "mischaracterizes" the record are both ill considered and inaccurate. *See, e.g.*, BR 38 n. 23.

judicata by permitting *further relief* under a declaratory judgment. All judgments permit further actions to *enforce* them. *See, e.g.*, CR 69 (Execution); CR 70 (Judgment for Specific Acts); RCW Ch. 6.17 (Executions); RAP 7.2(c) (trial courts have authority to enforce unsuperseded judgments during pendency of appeal). And CR 57 – Declaratory Judgments – in no way limits the *res judicata* effect required by RCW 7.24.010.

The plaintiffs belabor the obvious: the Uniform Declaratory Judgments Act is a uniform act. BR 45. And it is true, generally speaking, that our UDJA should be construed as consistent with other state's uniform acts – to the extent they are uniform. RCW 7.24.140. But the plaintiffs cite no case – and the City has found none – addressing the language of RCW 7.24.010, requiring that declaratory judgments shall have the same force and effect as any judgment. *See* BR 35-47. *Res judicata* applies.

The plaintiffs finally make an *arguendo* attempt to address *only one* of the four *res judicata* elements, subject matter, again citing ***Hisle***, which the City thoroughly distinguished at BA 20 (distinguishing ***Hisle v. Todd Pac. Shipyards Corp.***, 151 Wn.2d 853, 93 P.3d 108 (2004)). BR 45-47. But they raise a new and quite novel twist on this inapposite authority that they did not raise in the

trial court: ***Hisle*** somehow "in effect adopted the *Restatement* rule *implicitly*, by narrowly construing the 'identity of subject matter' element of the test." BR 46. Courts do not – indeed, cannot – adopt new legal rules *sub silentio*, any more than they can overrule existing rules in that manner. *Cf.* ***In re Det. of Hatfield***, 191 Wn. App. 378, 404 n. 11, 362 P.3d 997 (2015) (courts do not overrule precedent *sub silentio*) (citing ***Krawiec v. Red Dot Corp.***, 189 Wn. App. 234, 239-40, 354 P.3d 854 (2015); ***Lunsford v. Saberhagen Holdings, Inc.***, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009); ***State v. Studd***, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999)). To adopt a rule, one must at least mention it. ***Hisle*** says nothing on this issue.[3]

And the plaintiffs argue nothing further. They thus tacitly concede that – absent their imaginative misreading of ***Hisle*** – they have no response to the City's points that the (1) subject matter, (2) cause of action, (3) persons and parties, and (4) qualities of persons, are identical between the 1996/1997 declaratory action and this action. *Res judicata* thus bars this action.

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[3] In another of its many ill-advised footnotes, the plaintiffs assert that the City "subtly mischaracterizes" ***Hisle***, claiming that the second suit "was not based on enforcing the CBA," but rather on enforcing the Minimum Wage Act (MWA). BR 47 n.25. Wrong again: "In this case, we determine that Washington's [MWA] . . . applies to a collective bargaining agreement (CBA) *containing a onetime retroactive payment based on an hourly wage of actual hours worked . . . .*" 151 Wn.2d at 857 (emphasis added).

2. Issue preclusion also applies.

For the reasons discussed above, issue preclusion also applies. BA 21-22. The issues are identical, the summary judgment was final on the merits, class-action judgments bind successor class members like the plaintiffs, and no injustice arises. *Id*. This Court should reverse and dismiss.

Although they had no response to this argument in the trial court, they make a brief stab here. BR 37-39. They again claim that their legal issue – is it *illegal* to use utility funds for Click – was not previously litigated. *Id*. But where, as here, a party had a full and fair opportunity to litigate an issue in the prior case, issue preclusion applies, even where the *legal* claim differs. BA 21 (citing ***Marriage of Mudgett***, 41 Wn. App. 337, 342, 704 P.2d 169 (1985)).

Here, the *issue* relevant to both actions was the use of utility revenues to fund Click. As quoted above, the ratepayers expressly argued that the Click proposal "will cause a general indebtedness to the taxpayers and ratepayers of Tacoma that could only be paid by increasing the rates charged to the ratepayers for utilities . . . ." CP 823. While it is true that the ratepayers did not claim it was *illegal* to so use utility funds, that is simply a different legal claim based on the

same issue – use of those funds for that purpose. The ratepayers could have raised this legal claim. Issue preclusion applies.

And again, the plaintiffs do not challenge the remaining elements, finality on the merits, identity of parties, or injustice. BR 37-39. This Court should reverse and dismiss on this independently sufficient basis. It need go no further.

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

The accountancy statute "prohibits one government entity from receiving services from another government entity for free or at reduced cost absent a 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 – they are not separate entities, much less separate "undertakings." BA 10-11, 22-26. This Court's controlling decision in ***Rustlewood Ass'n v. Mason Cnty.***, 96 Wn. App. 788, 981 P.2d 7 (1999) disposes of the plaintiffs' arguments on the accountancy statute. BA 22-26.[4]

[4] Notwithstanding the plaintiffs' dismissiveness toward this Court's precedent (BR 32), ***Rustlewood*** is directly on point and controlling. BA 23-26.

The plaintiffs address this issue at BR 28-35, albeit while mushing together their analysis of the accountancy statute with that for the City Code – perhaps hoping to disguise the weakness of each argument. On the accountancy statute, the plaintiffs begin by *again* making unsupported factual inferences in their own best light. BR 29-31. Specifically, despite the undisputed evidence that Click is an integral unit of Tacoma Power and the Power Fund – just like the "separate" systems for three residential subdivisions under one fund in ***Rustlewood*** – the plaintiffs claim "that Click's telecom business is a separate 'undertaking' from the electric utility." BR 29. But it is undisputed that they form a single system. This Court must accept this for purposes of *de novo* summary judgment review. This disposes of most of the plaintiffs' argument on this point.[5]

As in ***Rustlewood***, "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]." 96 Wn. App. at 796-97. That the City "maintained separate subsidiary accounts for each of the three subdivisions does not make [one system] a separate entity for purposes of the accountancy [statute]."

[5] And of course, if this is not an undisputed fact, then summary judgment is inappropriate due to a genuine dispute of material fact.

Id. The plaintiffs' unsupported factual claims do not change the law. This Court should reverse on this independently sufficient basis.

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

The plaintiffs failed to show that Tacoma Power's decision to continue using (and spending monies on) the System and Click, as authorized in 1996, is arbitrary, capricious, or unreasonable. BA 27-32. The System continues to provide necessary services to Tacoma Power and is estimated to have considerable value for Tacoma Power and its ratepayers. BA 6-9, 27-32. Click itself has thousands of customers and considerable goodwill. *Id*.; CP 951, 974. The City provides Click to use its excess capacity productively and to serve *paying* customers, not the general public. The plaintiffs' reliance on inapposite authority is unavailing. This Court should reverse.

The plaintiffs appear to respond to this argument at BR 24-28, 32.[6] They tacitly concede the distinctions pointed out in the opening brief regarding the ***Okeson*** line of cases: they involved charging a limited group of ratepayers for services provided to the general

[6] The plaintiffs proffer a highly misleading edit of Charter § 4.5. BR 24. They omit that revenues *may* be used for "additions and betterments" and "extensions" to utilities – such as using excess system capacity to provide paying customers with Click. *See* BA 27.

public. *Compare* BR 26-28 & n.14 *with* BA 30-32 & n.10. While the plaintiffs continue to rely on this line of cases, they fail to dispute this key distinction: Tacoma Power provides Click to *paying customers*, not to the general public. The ***Okeson*** cases[7] are inapposite.

Moreover, our Supreme Court has long since rejected the claim that a city may not provide such services to paying customers. ***Issaquah v. Teleprompter Corp.***, 93 Wn.2d 567, 574-75, 611 P.2d 741 (1980) (RCW Ch. 35.92 does "not address municipal 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).[8]

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[7] ***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.

[8] Contrary to these authorities, the plaintiffs confusingly seem to suggest that the City *may not provide telecommunication services*, citing ***Kightlinger v. PUD No. 1 of Clark Cnty.***, 119 Wn. App. 501, 81 P.3d 876 (2003). BR 26-27. That case involved a separate business of repairing appliances. It has nothing to do with providing telecommunications.

It appears that the plaintiffs are trying a new tactic on appeal, claiming that Click *is* allowed under Charter § 4.5 because it "is not an electric utility function." BR 30. Click uses the *excess capacity of the electric utility system*. It is *precisely and quite literally* a function of the electric utility system.[9] The plaintiffs' repeated claims that the City is arguing a mere *administrative* or *organizational* connection are blatantly false (*e.g.*, BR 31-32): Click literally is the excess capacity of the electrical utility system – no separation exists.

The plaintiffs' counterintuitive hypotheticals[10] are thus inapplicable (*e.g.*, a *street car* could not "run" on the excess capacity of an electrical utility system). BR 30-31.[11] The distinction has been repeatedly explained to the plaintiffs: ***Okeson*** and like cases say governments may not charge some citizens for service provided to all citizens – the general public. Those cases have nothing to do with an electrical utility properly and legally providing telecommunications

[9] A "function" is an "organizational unit performing a group of related acts and processes." WEBSTER'S THIRD NEW INT'L DICTIONARY 921 (1993).

[10] The significance of hypothetically calling Click a part of TPU rather than of Tacoma Power is unclear. BR 31. The plaintiffs fail to explain. Counterfactuals are of little use on summary judgment in any event.

[11] Throughout its briefing on this subject, the plaintiffs cite to the Assistant City Attorney's memo as if it were *law.* It is a legal opinion with no binding force or authority. As noted in the opening brief, it is also wrong on the law.

services to its paying customers using the excess capacity of its existing electrical-utility infrastructure.

Administrative "naming" is beside the point. The *fact* is that Click is a function – an integral part of – the electrical-system infrastructure. It does not serve the general public. The trial court erred in "finding" to the contrary. This Court should reverse.

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

The City gave four specific (nonexclusive) examples of possible genuine issues of material fact that would preclude summary judgment if the plaintiffs insisted on their version of the facts, rather than conceding those points. BA 32-33. As demonstrated *supra*, there are numerous areas in which the plaintiffs continue to insist on taking the facts in a light most favorable to themselves, notwithstanding their telling claim that the City did not "really" do so in its brief. BR 47. We *really* did.

Most importantly, the plaintiffs claim that the City does not dispute their assertion that Click is a "separate undertaking" from the System! Many sections of the opening brief, and nearly every section of this brief, dispute that unsupported claim. This Court must infer that it is not separate, or send this case back for trial.

The plaintiffs throw a ***27th*** footnote, asserting alleged "facts" supporting their "separate" claim. BR 48 n. 27. First, they again misquote the ordinances as "establishing Click as a 'separate system.'" *Id*. For the last time, that is not what the ordinances say: CP 492 ("establishing a telecommunications system as part of the Light Division"); CP 495-96 ("create a telecommunications system as part of the Electric System"). They are not separate.

Second, the plaintiffs cite to legal arguments. BR 48 n. 27. Those are not facts.

Third, they cite the fact that Click serves fewer than all utility customers. *Id*. That fact does not make Click a separate system: it does serve *the same customers* of the utility.

Fourth, they cite the fact that different tax systems apply. *Id*. But that does not create a factually separate system. *See* BA 25-26.

Fifth, they cite facts regarding accounting practices. BR 48 n. 27. Again, accounting practices – however legally proper – do not *ipso facto* turn Click into a separate system. It is *factually* one system.

Otherwise, genuine issues of material fact abound.

Despite making so many factual assertions, the plaintiffs nonetheless claim that whether Click is a separate "undertaking" is not a question of fact! BR 49. Of course it is. And the material fact –

that Click simply exists on the excess capacity of the electrical utility system – is uncontroverted.

CONCLUSION

This Court should reverse and dismiss. If not, it should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 25th day of April 2019.

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April 25, 2019 - 3:45 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51695-1
Appellate Court Case Title:	Edward Coates, et al., Respondents v. City of Tacoma, Petitioner
Superior Court Case Number:	17-2-08907-4

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