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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

NORTHWEST NATURAL GAS COMPANY, an Oregon corporation; and PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation,

Plaintiffs-Respondents,

and

ROCKWOOD WATER PEOPLE'S UTILITY DISTRICT,

Intervenor-Respondent/ Petitioner on Review,

v.

CITY OF GRESHAM, a municipality and public body within the state of Oregon,

Defendant-Appellant/ Respondent on Review.

Supreme Court
No. S062535 **(Control)**

Court of Appeals
No. A150990

Multnomah County Circuit
Court No. 1107-08422

NORTHWEST NATURAL GAS COMPANY, an Oregon corporation; and PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation,

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and

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Defendant-Appellant/ Respondent on Review.

Supreme Court
No. S062556

Court of Appeals
No. A150990

Multnomah County Circuit
Court No. 1107-08422

BRIEF ON THE MERITS OF *AMICI CURIAE* AVISTA CORPORATION D/B/A AVISTA UTILITIES, IDAHO POWER COMPANY, AND PACIFICORP D/B/A PACIFIC POWER IN SUPPORT OF PLAINTIFFS-RESPONDENTS/ PETITIONERS ON REVIEW

January 2015

Review of the Decision of the Court of Appeals
On Appeal From the Judgment of the Multnomah County Circuit Court
The Honorable Stephen K. Bushong, Judge

Date of Opinion: July 2, 2014
Author of Opinion: Armstrong, P.J.
Concurring: Hadlock, J., Egan, J.

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January 2015

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Administrative Rules

Administrative Orders

Other Authorities

I. INTERESTS OF *AMICI CURIAE*

This brief is filed on behalf of *amici curiae* Avista Corporation d/b/a Avista Utilities ("Avista"), Idaho Power Company ("Idaho Power") and PacifiCorp d/b/a Pacific Power ("PacifiCorp") (collectively, "Joint Utilities") in support of Plaintiffs-Respondents/Petitioners on Review Northwest Natural Gas Company and Portland General Electric Company. The Joint Utilities are investor-owned energy utilities serving customers in the state of Oregon and regulated by the Public Utility Commission of Oregon ("OPUC"):

- Avista provides electric and natural gas services to approximately 690,000 customers in Oregon, Washington, and Idaho and has been in business since 1889;
- Idaho Power provides electric service to approximately 511,000 customers in Oregon and Idaho and has been in business since 1916;
- PacifiCorp provides electric service to approximately 733,000 customers in Oregon, Washington, and California and has been in business since 1910.

Together, the Joint Utilities have more than three centuries of experience serving customers in Oregon, as well as negotiating and complying with the terms of access to streets and rights-of-way imposed by Oregon cities. For the reasons discussed below, the Joint Utilities urge this Court to reverse the

decision of the Oregon Court of Appeals in *Northwest Natural Gas Co. v. City of Gresham*, 264 Or App 34, 330 P3d 65 (2014).

II. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

For purposes of this *amicus curiae* brief, the Joint Utilities incorporate the questions presented and proposed rules of law in the Petitioner's Brief on the Merits.

III. NATURE OF THE ACTION AND RELIEF SOUGHT BELOW

For purposes of this *amicus curiae* brief, the Joint Utilities incorporate the description of the nature of the action and the relief sought below in the Petitioner's Brief on the Merits.

IV. SUMMARY OF FACTS

For purposes of this *amicus curiae* brief, the Joint Utilities incorporate the background facts and procedural history in the Petitioner's Brief on the Merits.

V. SUMMARY OF ARGUMENT

For over 80 years, the common understanding of ORS 221.450[1] has provided a necessary and beneficial restraint on the ability of cities to impose

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[1] ORS 221.450 provides that "the city council or other governing body of every incorporated city may levy and collect a privilege tax from [every utility]. The privilege tax may be collected only if the entity is operating for a period of 30 days within the city without a franchise from the city and actually using the streets, alleys or highways, or all of them, in such city for other than travel on such streets or highways. The privilege tax shall be for the use of those public

excessive charges on utilities for access to streets and rights-of-way. If the decision of the Court of Appeals is allowed to stand, cities will be free to levy ***unlimited*** fees on public utilities serving customers within their borders—fees that under OPUC regulations would be passed on to utility customers on their gas and electric bills. This result is inconsistent with the State's regulatory policy applicable to public utilities and would result in real harm to utility customers. For these reasons, the decision of the Court of Appeals should be reversed.

VI. ARGUMENT

A. The Court of Appeals Decision Eliminates a Vital Protection for Utility Customers.

For over 80 years, Oregon cities and gas and electric utilities have operated under a clear understanding of the legal framework governing municipal right-of-way fees. By statute, cities have the power to determine the terms and conditions of a utility's access to streets and rights-of-way, including the payment of fees. ORS 221.420(2)(a).[2] A city may unilaterally dictate the

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streets, alleys or highways, or all of them, in such city in an amount not exceeding five percent of the gross revenues of the [utility] currently earned within the boundary of the city. However, the gross revenues earned in interstate commerce or on the business of the United States Government shall be exempt from the provisions of this section. The privilege tax authorized in this section shall be for each year, or part of each year, such [utility] operates without a franchise."

[2] ORS 221.420(2)(a) provides that, "a city may . . . [d]etermine by contract or prescribe by ordinance or otherwise, the terms and conditions, including

terms and conditions through a municipal ordinance that establishes a licensing arrangement. In such case, the fee for access—referred to as a privilege tax under the statute—is capped at five percent of the utility's gross revenues earned within the city. ORS 221.450. Alternatively, the city is free to enter into bilateral negotiations to arrive at the terms and conditions of access, which will be memorialized in a franchise agreement. In such case, the fee for access may be set at any amount agreed upon by the parties. After the franchise agreement is negotiated, the agreement is not effective until adopted by city ordinance and then accepted by the utility. This understanding—which is consistent with this Court's articulation of the framework in *US West Communications v. City of Eugene*, 336 Or 181, 183 n 1, 81 P3d 702 (2003)—has provided cities with broad discretion to dictate the terms and conditions of access to their streets and rights-of-way, while at the same time protecting utility customers from excessive charges.[3]

Generally, utilities prefer to negotiate a franchise agreement rather than operate under a licensing ordinance imposing a privilege tax. Most cities

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payment of charges and fees, upon which any public utility . . . may be permitted to occupy the streets, highways or other public property within such city . . ."

[3] Although the discussion cited was ancillary to the holding in the case, the Court's discussion is relevant because it is consistent with the framework that the Joint Utilities' assert has predominated since 1933 and is inconsistent with the Court of Appeals' interpretation of ORS 221.450.

reserve the right to amend their licensing ordinance—including the amount of the privilege tax—at any time, leaving utilities vulnerable to unexpected increases. A franchise agreement, on the other hand—including the amount of the franchise fee—is binding for the entire term of the agreement, which is typically 10 to 20 years. *See Rose City Transit Co. v. City of Portland,* 18 Or App 369, 381, 525 P2d 1325, 1331-32 (1974) (describing a franchise as a binding contract between a city and a franchisee where the city grants the utility the right to use the streets in consideration for the benefit the public derives from the franchise). A franchise agreement also provides mutually agreeable standards under which the utility is authorized to locate its facilities within the city's streets and rights-of-way. In exchange for the stability of a binding franchise agreement, utilities have at times agreed to pay fees exceeding the five percent privilege-tax limit.

A number of cities, however, decline to enter into franchise negotiations, and opt instead to impose terms and conditions unilaterally. In these cases, the utility is obliged to accept whatever terms the city dictates. Nevertheless, under the long-standing framework, the utility has always been assured that in no case could the city demand an exaction higher than the five-percent limit imposed by ORS 221.450, without the utility's agreement. Thus, for the past 80 years, the five-percent limit imposed by ORS 221.450 has provided a safety net for utilities, ensuring that their customers will not be charged more than five

percent for access to strects and rights-of-way unless they receive consideration in the form of an offsetting benefit.

The decision of the Court of Appeals upends this balance. In finding that a unilaterally-imposed license fee is not subject to the cap imposed by ORS 221.450, the Court of Appeals removed an important protection for utility customers and issued an invitation to cities to use utility bills to collect unlimited revenues unrelated to the utilities' use of city streets and rights-of-way.

B. The Court of Appeals Interpretation is Inconsistent with State Utility Policy.

To fully appreciate the consequences of the Court of Appeals decision, it is important to understand the way in which municipal charges are included in utility customers' bills.

The OPUC is charged with setting rates for all investor-owned gas and electric utilities in the state and ensuring that these rates are "fair and reasonable." ORS 756.040(1).[4] Specifically, the OPUC is directed to "make

[4] ORS 756.040(1) provides, "the commission shall represent the customers of any public utility . . . and the public generally in all . . . matters of which the commission has jurisdiction. In respect thereof the commission shall make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates. The commission shall balance the interests of the utility investor and the consumer in establishing fair and reasonable rates. Rates are fair and reasonable . . . if the rates provide adequate revenue both for operating expenses of the public utility . . . and for capital costs of the utility, with a return to the equity holder[.]"

use of the jurisdiction and powers of the office to protect [utility] customers, and the public generally, from unjust and unreasonable exactions" and to "obtain for them adequate service at fair and reasonable rates." *Id.* The OPUC is vested with power to regulate public utilities and "to do all things necessary and convenient in the exercise of such power and jurisdiction." ORS 756.040(2).

In carrying out this task, the OPUC has adopted regulations specifically addressing municipal fees. Under these rules, any municipal fees imposed on utilities for doing business in a city or occupying city streets or rights-of-way, up to specified thresholds, are allowed in the utilities' general revenue requirement that is collected from *all* utility customers in Oregon regardless of where they reside. OAR 860-022-0040(1).[5] The OPUC has revised the thresholds over the years, but they are currently set at 3.0 percent of gross revenues for gas utilities and 3.5 percent for electric utilities. *Id.* By regulation, fees exceeding the 3.0/3.5 percent thresholds are charged pro rata to customers

[5] OAR 860-022-0040(1) provides that "[t]he aggregate amount of all business or occupation taxes, license, franchise or operating permit fees, or other similar exactions or costs . . . imposed upon energy utilities by any city in Oregon for engaging in business within such city or for use and occupancy of city streets and public ways, which does not exceed 3 percent for gas utilities or 3.5 percent for electric companies [of gross revenues], shall be allowed as operating expenses . . . All other costs not allowed as operating expenses shall be itemized or billed separately."

residing within the imposing city, and must be identified as a separate surcharge on customers' bills. OAR 860-022-0040(6).[6]

The OPUC's rationale for this rule is as follows:

The fees within the 3.0/3.5 percent thresholds constitute reasonable compensation collected by the cities for the use of their streets and rights-of-way. Inasmuch as the utility systems (pipelines for natural gas utilities and electrical grids for electric utilities) are interconnected, all of the utilities' customers derive a benefit from the utilities' ability to access city streets and rights-of-way. For this reason, fees up to the established thresholds are properly included in the rates charged to all customers of the utility. In contrast, fees above the thresholds exceed reasonable compensation for use of city streets and rights-of-way and instead constitute general revenue-raising measures. These excess fees are properly borne by those who benefit from them—namely customers who reside within the city levying the exaction. The OPUC explained this rationale when it adopted the precursor to OAR 860-022-0040. *See In the Matter of Exactions Levied upon Utilities by Cities (on Commissioner's own Motion),* Docket UF-2620, Order No. 43223 at 3-4 (Dec. 30, 1966) (adopting Rule 21-040, which is now codified as amended OAR 860-

[6] OAR 860-022-0040(6) requires that, "to the extent any city tax, fee, or other exaction referred to in sections (1) . . . exceeds the percentage levels allowable as operating expenses . . . such excess amount shall be charged pro rata to energy customers within said city and shall be separately stated on the regular billings to such customers."

022-0040); *In the Matter of Exactions Levied upon Utilities by Cities (on Commissioner's own Motion)*, Docket UF-2620, Order No. 43427 at 2 (Jan. 26, 1967) (clarifying the policy announced in Order No. 43223).[7]

Together, the OPUC's statutory ratemaking authority and its regulations governing municipal fees, and the Legislature's five-percent cap in ORS 221.450, have worked well to protect all utility customers. Under the OPUC's regulations, the statewide revenue requirement collected from all customers will include only those local right-of-way fees deemed reasonably related to right-of-way access; under ORS 221.450, surcharges paid by local customers for fees exceeding that threshold will be limited to a few additional percentage points.

If the decision of the Court of Appeals stands, cities will have the ability to impose fees significantly exceeding the amounts deemed by the OPUC to be reasonable compensation for a utility's use of streets and rights-of-way. Such a result is in conflict with the Legislature's charge to the OPUC in ORS 756.040(1) to ensure that utility rates are fair and reasonable and to protect

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[7] The Joint Utilities acknowledge that the City of Gresham cited Order 43223 for the proposition that cities have broad authority to levy taxes. The Joint Utilities focus on a separate element of this history, the OPUC's long-history of treating municipal fees above the 3.0/3.5 percent thresholds as local revenue measures.

utility customers from unjust and unreasonable exactions. It is unreasonable to suggest that the Legislature intended this outcome.[8]

C. The Court of Appeals Decision, if Undisturbed, Will Have a Real and Harmful Impact on Utility Customers.

The Joint Utilities have no desire to interfere with cities' authority to tax their citizens.[9] They do, however, have an interest in ensuring that customer utility bills are not used to impose unlimited municipal fees that have no reasonable relationship to utility activities.

As providers of utility services, the Joint Utilities recognize the impact utility bills have on the lives of their customers. The electricity and natural gas distribution provided by the Joint Utilities constitute "essential services," which allow customers to heat their homes in the winter and light their homes when it

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[8] The Legislature instructs in ORS 174.010 that, "In the construction of a statute . . . where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." Courts presume the Legislature enacts statutes "with full knowledge of the existing condition of the law and with reference to it," and accordingly, construe statutes as "part of a general and uniform system of jurisprudence." *Coates v. Marion County,* 96 Or 334, 339, 189 P 903 (1920). Courts will seek to harmonize and give effect to provisions of related statutes and construe statutes comprising a system to make that system consistent. *Daly v. Horsefly Irr. Dist.,* 143 Or 441, 445, 21 P2d 787 (1933).

[9] In this case, the City of Gresham required extra revenue for police and fire services and decided to increase the utility license fee as means of raising this extra revenue. This was noted in the Court of Appeals opinion and elsewhere. *Northwest Natural*, 264 Or App at 37.

is dark.[10] Thus, customers have little, if any, ability to avoid or minimize utility bills. Moreover, many of these customers already struggle to pay their utility bills. Some utility customers fall below the federal poverty level, and more are categorized as low income.[11] The OPUC has recognized that these customers already pay disproportionate shares of their income for essential utility services. *See Re Rate Concessions to Poor Persons and Senior Citizens*, Docket R-23, Order No. 76-039 (Jan. 16, 1976) (considering potential rate concessions to aid low-income customers and affirming, "all parties agree the poor and aged, especially those on fixed incomes, pay disproportionate shares of their income

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[10] This "essential" nature is recognized by the OPUC. *See, e.g., In re Northwest Natural*, Docket UG 157, Order No. 04-243 at Appendix A (Staff Report) (May 10, 2004) (surety alternative to deposit "allows an individual . . . to secure essential utility service"); *In re PacifiCorp,* Docket UM 1143, Order No. 04-323 at Appendix A (Staff Report) (June 11, 2004) (same language); *Re Amend OAR Chapter 860*, Docket AR 452, Order No. 03-550 at 7 (Sept. 16, 2003) ("interruption of utility service may impose significant hardships on customers . . . [a]n extended interruption in electric service during the winter months, for example, may severely impact elderly customers that rely on electricity to heat their homes"); Order No. 76-039 (rate concessions would provide "relief to poor and elderly persons who cannot easily afford essential utility energy services").

[11] According to U.S. Census Bureau statistics, 16.2 percent of Oregonians live below the federal poverty level (the national average is 15.4 percent) (available at: http://quickfacts.census.gov/qfd/states/41000.html). The number is higher for families with young children: 20.8 percent (the national average is 18.6 percent). *Id.* Households at or below 60 percent of Oregon's median income are considered low-income for purposes of most assistance programs.

for essential utility services, and are most in need of help").[12] Thus, unbounded utility fees could jeopardize vulnerable customers' ability to keep up with monthly payments—and keep the heat and lights on in their homes. *See* OAR 860-021-0335 (disconnection for nonpayment); *see also* Letter of Advice dated June 28, 1993, to Mike Kane, Assistant Commissioner, Oregon Public Utility Commission (OP-6475) at 4 (attorney general advising on disconnection for nonpayment of portion of bill relating to county library tax; concluding the utility may disconnect where customer fails to pay the rates the commission has set). It is for these reasons that the five-percent cap in ORS 221.450 is so important.

Finally, as cities increase their fees for access to streets and rights-of-way, it is the utilities—not the cities—who will bear the negative business consequences of imposing and collecting the city fees. It is true that the OPUC has ordered that city fees in excess of the 3.0/3.5 percent thresholds be specifically and separately identified on utility bills. *See* Order No. 43223 (adopting the precursor to OAR 860-022-0040); Order No. 43427 (clarifying Order No. 43223). However, as a practical matter, customers are focused on the total amount of their utility bills and tend not to closely inspect individual

[12] In the 1970s, the OPUC considered various potential rate concessions to aid low-income customers. Ultimately, the OPUC found the proposed concessions were outside of its statutory authority and concluded that the legislature was the governmental agency most appropriate and able to meet the needs of poor and elderly utility customers.

line items. As a result, when municipal fees are raised, customers will note that their utility bills are higher but are likely to attribute the increase to the utility's internal operational costs. In this way, increased municipal fees will operate as a "stealth tax" for the city, for which customers will erroneously blame the utility.

Utility bills may pose an attractive vehicle for Oregon cities to raise money to pay for police, fire and other municipal service—particularly when the charges may fly below the radar of many customers. However, cities have more straightforward options for procuring funds, including imposition of property taxes, special levies or increased fees for city services.[13] Given these alternatives, and given the state policy prohibiting utilities from including excessive exactions on utility bills, ORS 221.450 should continue to be interpreted to impose a five-percent limit on the fees that cities can impose on utilities in the absence of a bilaterally negotiated franchise agreement.

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[13] The City of Gresham has availed itself of several of these options as it awaits resolution of the challenge to the utility fee. In May 2014, the city put a $5.4 million public safety and parks property tax levy to vote, but it failed by a few hundred votes. Two weeks later, the City Council made permanent a monthly $7.50 "Police, Fire and Parks" surcharge on residents' city water bill. *See* Erie Apalategui, *After Levy Defeat, Gresham Renews Utility Fee to Pay for Public Safety, Parks Maintenance*, The Oregonian, June 5, 2014, available at: http://www.oregonlive.com/gresham/index.ssf/2014/06/after_levy_defeat_gresham_rais.html.

VII. CONCLUSION

The Court of Appeals decision is inconsistent with the prevailing interpretation of ORS 221.450. If allowed to stand, the decision will eliminate a critical protection for utility customers and will render utility bills convenient vehicles for unlimited city fees that bear no reasonable relationship to access to streets and rights-of-way. To ensure that a critical consumer protection is not erroneously read out of Oregon law, this Court should reverse the Court of Appeals decision.

Respectfully submitted this 8th day of January, 2015.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS UNDER ORAP 5.05

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i); and (2) the word-count of this brief as described in ORAP 5.05(2)(a) is 3,454.

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(g).

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 8, 2015, I filed the BRIEF ON THE MERITS OF *AMICI CURIAE* with the Appellate Court Administrator via the eFiling system.

I further certify that on January 8, 2015, I served the BRIEF ON THE MERITS OF *AMICI CURIAE* on the following parties via the eFiling system:

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