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.

Court of Appeals
No. A150990

Supreme Court
No. S062535 (Control)

Multnomah County Circuit
No. 1107-08422

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

Plaintiffs-Respondents,
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and

ROCKWOOD WATER PEOPLE'S UTILITY DISTRICT,

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Court of Appeals
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v.

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

Defendant-Appellant,
Respondent on Review.

PETITIONERS NORTHWEST NATURAL GAS COMPANY AND PORTLAND GENERAL ELECTRIC'S BRIEF ON THE MERITS

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

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

Jeffrey G. Condit, OSB No. 822238
jeff.condit@millernash.com
Bruce L. Campbell, OSB No. 925377
bruce.campbell@millernash.com
Miller Nash Graham & Dunn LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 224-5858

Attorneys for Plaintiffs-Respondents/Petitioners on Review Northwest Natural Gas Company and Portland General Electric Company

David R. Ris, OSB No. 833558
david.ris@greshamoregon.gov
Gresham City Attorney's Office
1333 N.W. Eastman Parkway
Gresham, Oregon 97030
Telephone: (503) 618-2507

Of Attorneys for Defendant-Appellant/Respondent on Review City of Gresham

Casey M. Nokes, OSB No. 076641
cnokes@cablehuston.com
Tommy A. Brooks, OSB No. 076071
tbrooks@cablehuston.com
Cable Huston Benedict
Haagensen & Lloyd LLP
1001 S.W. Fifth Avenue, Suite 2000
Portland, Oregon 97204-1136
Telephone: (503) 224-3092

Of Attorneys for Intervenor-Respondent
Rockwood Water People's Utility District

Melinda J. Davison, OSB No. 930572
mjd@dvclaw.com
Jesse Emmett Cowell, OSB No. 082940
jec@dvclaw
Davison Van Cleve PC
333 S.W. Taylor Street, Suite 400
Portland, Oregon 97204
Telephone: (503) 241-7242

Attorney for Amici Curiae Northwest Industrial Gas Users and The Industrial Customers of Northwest Utilities

Lisa F. Rackner, OSB No. 873844
lisa@mcd-law.com
McDowell Rackner & Gibson PC
419 S.W. Eleventh Avenue, Suite 400
Portland, Oregon 97205
Telephone: (503) 595-3925

Attorney for Amici Curiae Avista Corporation, Idaho Power Company and PacifiCorp

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INTRODUCTION

This is an action challenging the City of Gresham's (the "City") imposition of a utility license fee that exceeds the 5 percent maximum rate that ORS 221.450 permits a city to charge a utility when the utility occupies the city's rights-of-way without a franchise. The trial court granted summary judgment on stipulated facts in favor of plaintiffs Northwest Natural Gas Company ("Northwest Natural") and Portland General Electric Company ("PGE"), and for intervenor Rockwood Water People's Utility District ("Rockwood"). The Court of Appeals reversed, ruling that ORS 221.450 does not apply to the license fee imposed by the City because Northwest Natural and PGE were operating within Gresham with a franchise from the City. *Northwest Natural Gas Co. v. City of Gresham*, 264 Or App 34, 330 P3d 65 (2014). According to the court, a "franchise" exists under ORS 221.450 whenever a city gives permission to a utility to use the city's rights-of-way to provide utility services.

On review, Northwest Natural and PGE challenge this ruling of the Court of Appeals. In determining that the term "franchise" refers to any and all methods by which a city grants permission to use its rights-of-way, the Court of Appeals has construed ORS 221.450 in a manner that effectively eliminates the statutory cap on taxes or fees that a city can impose on a utility, and has rendered the statute essentially meaningless. The court's interpretation also ignores the context surrounding ORS 221.450, which confirms that the legislature intended that a "franchise" under ORS 221.450 is an *agreement* between a city and a utility regarding the utility's use of the city's rights-of-way. Under this Court's settled rules of statutory construction, the term "franchise" means a contractual agreement between a city and a utility that governs the utility's occupation of the city's rights-of-way to provide utility service. Because Northwest Natural and PGE were not operating with such a franchise from the City, ORS 221.450 prohibits the City

from imposing a privilege tax greater than 5 percent. The Court therefore should reverse the Court of Appeals' opinion, rule that ORS 221.450 caps the City's license fee at 5 percent, and remand the matter with instructions to reinstate the judgment in favor of Northwest Natural and PGE.

QUESTION PRESENTED ON REVIEW

ORS 221.450 provides that a city may impose a privilege tax on a utility that uses the city's streets, alleys, or highways, and is operating in the city "without a franchise" for a period of 30 days. The statute caps the privilege tax at 5 percent of the utility's gross revenues derived from customers within the city.

If a city and a utility have not entered into an agreement that defines the scope and terms under which the utility occupies public rights-of-way to provide utility services, does the statute prohibit the city from imposing a charge of greater than 5 percent on the utility because the utility is operating without a franchise from the city?

RULE OF LAW TO BE ESTABLISHED

ORS 221.450 imposes a 5 percent maximum privilege tax on a utility for using a city's rights-of-way unless the utility is operating under a franchise from the city. For purposes of the statute, "franchise" means an agreement between a city and a utility—a license or permit with terms that a city unilaterally imposes on a utility is not a franchise. The 5 percent maximum applies no matter how the city characterizes the charge for using its rights-of-way, whether as a privilege tax, a license fee, or any other term.

NATURE OF THE ACTION AND FACTS MATERIAL TO REVIEW

In May 2011, the City adopted a resolution that increased its utility license fees from 5 percent to 7 percent of the utility's gross revenues collected from customers within the City. After the fee increase became effective in

July 2011, Northwest Natural and PGE brought this action against the City, seeking a declaration that its fee increase violates ORS 221.450, which provides that a city may not charge a utility operating "without a franchise" a privilege tax of greater than 5 percent for using public rights-of-way within the city.[1] Rockwood later intervened as a plaintiff, requesting a declaration to the same effect.

The parties filed cross-motions for summary judgment based on stipulated facts. The stipulation included the following facts relevant to the proceedings on review:

> "In 2001, the City enacted a utility licensing ordinance that requires any utility occupying a public right-of-way to obtain a license from the City. The license gives a utility permission to use the City's rights-of-way 'for a specified and dedicated purpose.' The ordinance requires a utility to pay a license fee in an amount to be determined by the city council, and it provides that any utility operating in the city without a license for 30 days or more must pay a privilege tax in an amount set by council resolution. The City subsequently enacted a resolution that set the license fee and privilege tax amounts at five percent of a utility's gross revenues. The City granted Northwest Natural and PGE ten-year utility licenses effective July 1, 2002.[2]

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[1] ORS 221.450 provides, in part, 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 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." (Emphasis added.)

[2] Before 2002, Northwest Natural operated in the City's rights-of-way under a franchise agreement with the City. PGE had operated in the City's rights-of-way under a franchise agreement with the City until December 1992, after which the City unilaterally granted PGE a ten-year utility license.

> "In May 2011, the City adopted a resolution that increased the utility license fee from five percent to seven percent of gross revenues. The City notified Northwest Natural and PGE that it was increasing the utility license fee 'to avoid further service disruptions in the police and fire departments.' Beginning July 1, 2011, the City assessed the seven percent fee against Northwest Natural and PGE." Stipulated Facts (ER 1-4).

The trial court granted plaintiffs' motion for summary judgment, ruling that the City's 2011 increase to its license fee violates ORS 221.450 and is void and unenforceable. In reaching its decision, the court concluded that ORS 221.450 limits any "financial exactions" that a city imposes for using its rights-of-way, whether an exaction is designated as a privilege tax, license fee, or other charge. The court also concluded that a utility operating with a license issued by the City does not have a "franchise," and that the City is therefore subject to the privilege-tax limitations in ORS 221.450. The court summarized its opinion as follows:

> "When the 1933 legislature limited the City's authority to collect a 'privilege tax' from utilities using the public way without a franchise, it understood that cities could collect more than 5 percent of gross revenues if a utility *agreed* to pay more as part of its franchise agreement with the city. Absent an agreement, the legislature intended to limit the 'financial exactions' that the City could unilaterally impose on utilities using the right-of-way to 5 percent of gross revenues, regardless of whether the City called the exaction a 'license fee' instead of a 'privilege tax.' It follows that the 7 percent license fee imposed in 2011 pursuant to Resolution 3056, as applied to NW Natural, PGE and Rockwood PUD, violates ORS 221.450." *Northwest Natural Gas Co. v. City of Gresham*, No. 1107-08422, slip op at 14 (Multnomah Cnty Cir Ct Jan. 12, 2012).

On appeal, the City raised two principal arguments. First, the City argued that notwithstanding ORS 221.450, it has the power to impose a license fee greater than 5 percent under its home-rule authority because the statute does not reveal a "clear and unmistakable" intent to preempt local law. Second, the City

argued that ORS 221.450 does not apply because its license fee is not a "privilege tax" within the meaning of the statute. Although the City did not contend that the licenses granted under its licensing ordinance are "franchises," which would make the statute inapplicable, the Court of Appeals raised the issue sua sponte, stating that it has an independent duty to correctly construe and apply statutes. *Northwest Natural Gas*, 264 Or App at 42-43.

The Court of Appeals determined that for purposes of ORS 221.450, the term "franchise" is not limited to a negotiated agreement under which a utility receives permission from a city to use its rights-of-way. Instead, the court concluded that a "franchise" is a grant of permission in any form by a city to a utility to use public rights-of-way:

> "To put it more directly, a 'franchise,' as that term is used in ORS 221.450, is the governmental grant to a utility of the special privilege to occupy the public rights-of-way; it is not a particular type of instrument (that is, it is not limited to a negotiated agreement). A franchise *can* be created by a negotiated contract, but it also can be created by other means." 264 Or App at 46.

Based on its conclusion that a franchise includes any and all forms in which a city gives a utility permission to use public rights-of-way, the court concluded that "[t]he licenses issued by the city to each plaintiff under the city's Utility Licensing Ordinance are franchises, as that term is used in ORS 221.450. * * * Because plaintiffs were operating under a franchise from the city, through the city's Utility Licensing Ordinance, ORS 221.450 does not apply and cannot preempt the city's resolution increasing its utility-license fee to seven percent." 264 Or App at 48. Thus, the court ruled that the trial court had erred in granting

summary judgment for plaintiffs and in denying summary judgment for the City, and it reversed and remanded the trial court's judgment.

SUMMARY OF ARGUMENT

An analysis of the text and context of ORS 221.450 reveals that the term "franchise" means an agreement between a utility and a city that determines the terms and conditions under which the utility occupies the city's rights-of-way to provide utility service. The interpretation of the statute proposed by the City and adopted by the Court of Appeals, which equates a "franchise" to any permitted use of a city's rights-of-way, renders the statute essentially meaningless because there are no realistic scenarios under which a utility would operate in a city's rights-of-way "without a franchise" as defined by the Court of Appeals.

The context surrounding ORS 221.450 confirms this conclusion. When the Oregon legislature enacted the predecessor to ORS 221.450 in 1931, it enacted two other statutes as part of the same bill that recognized that a utility can occupy a city's rights-of-way by way of "franchises, privileges or permits." The Court of Appeals' expansive definition of "franchise" simply cannot be reconciled with these statutes.

Because Northwest Natural and PGE did not have an agreement with the City that governed the terms and conditions under which they occupied the City's rights-of-way, they were operating "without a franchise" and ORS 221.450 limited the City's license fee to 5 percent of the utilities' gross revenues generated from customers within the City. Because the City's imposition of a 7 percent license fee—which equates to a "privilege tax"—violated ORS 221.450, the Court of Appeals erred in reversing the trial court's award of summary judgment in favor of Northwest Natural and PGE. This Court should reverse the Court of Appeals, rule that the City's ordinance that imposes a 7 percent license fee is invalid under

ORS 221.450, and remand the matter with instructions to reinstate the judgment in favor of Northwest Natural and PGE.

ARGUMENT

I. A "Franchise" Under ORS 221.450 is an Agreement Between a City and a Utility.

The focus of the parties' dispute is on the meaning of the phrase "without a franchise" as used in ORS 221.450. Northwest Natural and PGE contend that the word "franchise" means an agreement between a city and a utility that sets forth the terms under which the utility uses the city's rights-of-way. If the city and the utility have not entered into such an agreement, ORS 221.450 imposes a 5 percent cap on the privilege tax that the city can charge the utility for using the rights-of-way. The City, in turn, maintains that "franchise" is an all-encompassing term that refers to a utility's authorized use of a city's rights-of-way regardless of the manner in which the utility received permission. Under the City's view, the statutory maximum privilege tax does not apply unless the utility is using the city's rights-of-way without permission.

Thus, the question before the Court is one of statutory construction. That question requires the Court "to ascertain the meaning of the statute most likely intended by the legislature that adopted it. *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009). [The Court] ascertain[s] the legislature's intentions by examining the text of the statute in its context, along with relevant legislative history, and, if necessary, canons of construction." *State v. Cloutier*, 351 Or 68, 75, 261 P3d 1234 (2011). To view these steps in the proper context, it is helpful to begin by describing the origin and history of ORS 221.450 together with any related statutes.

A. History of ORS 221.450.

1. ORS 221.450 and its predecessors.

In 1931, the Oregon legislature enacted the predecessor statute to ORS 221.450. Or Laws 1931, ch 234, § 1. The statute was part of a bill that contained several statutes governing a city's power to regulate utilities. *See* Or Laws 1931, ch 234, §§ 1-3. In its original form, ORS 221.450 provided:

> "The city council or other governing body of every incorporated city and town in Oregon hereby is authorized to levy and collect from every privately owned public utility operating within such city or town without a franchise, for the period of one year, a privilege tax for the use of the public streets, alleys and highways in such city or town, in an amount of not less than 5 per cent annually, of the gross earning revenue of such utility currently earned within the boundary of such city or town. Should such utility fail or neglect to pay such tax the city or town levying the same may begin any suit or action or proceeding in any court of the state of Oregon to collect the same."

The legislature twice amended the statute in 1933—once in its regular session and again in a second special session. The amendments collectively reduced from one year to 30 days the period during which a utility that operates without a franchise becomes subject to the statute, and changed the 5 percent privilege tax from a floor to a ceiling. Or Laws 1933, ch 466, § 1; Or Laws 1933, ch 24, § 1 (2d Spec Sess). Following those amendments, the statute provided:

> "The city council or other governing body of every incorporated city and town in Oregon hereby is authorized to levy and collect from every privately owned public utility operating for a period of 30 days within such city or town without a franchise from such city or town and actually using the streets, alleys and/or highways in such city or town for other than travel on such streets or highways, a privilege tax for the use of said public streets, alleys and/or highways in such city or town in an amount not exceeding five per cent of the gross revenues of such utility concurrently earned within the boundary of such city or town * * *." Or Laws 1933, ch 24, § 1 (2d Spec Sess).

From 1935 through 2007, the statute was amended multiple times, generally to expand the scope of the statute to other types of utilities that operate "without a franchise." ORS 221.450 currently states in relevant part:

> "[T]he city council or other governing body of every incorporated city may levy and collect a privilege tax from Oregon Community Power and from every electric cooperative, people's utility district, privately owned public utility, telecommunications carrier as defined in ORS 133.721 or heating company. 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 streets, alleys or highways, or all of them, in such city in an amount not exceeding five percent of the gross revenues of the cooperative, utility, district or company currently earned within the boundary of the city."

2. Related statutes.

ORS 221.450 is part of a group of statutes that authorize cities to regulate certain local matters, including the provision of utility service within a city. In 1911, the Oregon legislature enacted the predecessor statute to ORS 221.420, which gave municipalities the power to regulate utilities. Or Laws 1911, ch 279, § 61. Among other things, the statute provided that municipalities "shall have power * * * [t]o determine by contract, ordinance or otherwise the quality and character of each kind of product or service to be furnished or rendered by any public utility * * * and all other terms and conditions not inconsistent with this Act upon which such public utility may be permitted to occupy the streets, highways or other public property within such municipality and such contract, ordinance or other determination of such municipality shall be in force and *prima facie* reasonable." *Id*. § 61(1).

In 1931, the legislature amended the predecessor to ORS 221.420 in the same session in which it enacted the original version of ORS 221.450. The amended version of what is now ORS 221.420 provided, in part:

> "Every city and town in Oregon shall have power * * * [t]o determine by contract or prescribe by ordinance or otherwise, the quality and character of each kind of product or service to be furnished or rendered by any public utility, furnishing any product or service within such city or town, and all other terms and conditions upon which any public utility may be permitted to occupy the streets, highways or other public property within such city or town, and to exclude or eject any public utility therefrom." Or Laws 1931, ch 103, § 8.[3]

When the legislature enacted the original version of ORS 221.450 in 1931, it also enacted—as part of the same bill—two statutes that later became ORS 221.460 and 221.470. Those statutes provided as follows:

> "Any and all franchises, privileges or permits for the use of the public highways, streets or alleys hereafter granted by any municipal corporation shall not be granted for a longer term than 20 years, and shall be subject to the provisions of section 2 of this act." Or Laws 1931, ch 234, § 3.

> "That all poles, posts, towers, wires, conduits, mains, pipes, rails, tracks, ties, railways, pole lines, telegraph, telephone or electric transmission lines, or structures or equipment of any kind, placed in, on, upon, over, under or beneath any public highway, street or alley of this state or any municipal corporation, under or by virtue of any grant, privilege or franchise, shall be removed by the owners or owner of the same within one year after the expiration of the grant, privilege or franchise * * * ." Or Laws 1931, ch 234, § 2.

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[3] In its present form, ORS 221.420 states that cities have the power to "[d]etermine by contract or prescribe by ordinance or otherwise, the terms and conditions, including 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." ORS 221.420(2)(a).

B. Analysis of ORS 221.450.

The starting point for determining the meaning of ORS 221.450 is the text of the statute. *See Halperin v. Pitts*, 352 Or 482, 486, 287 P3d 1069 (2012) ("'[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes.' * * * We begin, therefore, with the words of the statute at issue.") (quoting *Gaines*, 346 Or at 171); *State v. Ziska*, 355 Or 799, 804, 334 P3d 964 (2014) ("We begin * * * with the text of the statute.").

1. Text of ORS 221.450.

The term "franchise" in ORS 221.450 is not defined in the original version of the statute or in any of its amendments. If statutory terms are not defined and "[i]n the absence of any evidence to the contrary, [the Court] assume[s] that the legislature intended to give those words their 'plain, natural, and ordinary meaning.' To determine that ordinary meaning, [the Court] begin[s] with definitions from dictionaries that were in use at the time a statute was enacted." *Ziska*, 355 Or at 804-05 (quoting *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993)) (citing *Vannatta v. Keisling*, 324 Or 514, 530, 931 P2d 770 (1997)). The Court, however, does "not simply consult dictionaries and interpret words in a vacuum. Dictionaries, after all, do not tell us what words mean, only what words *can* mean, depending on their context and the particular manner in which they are used." *Cloutier*, 351 Or at 96.

The dictionaries in effect when ORS 221.450 was originally enacted contained differing definitions of "franchise." For example, *Ballentine's Law Dictionary* 525 (1930), contains multiple definitions of "franchise," one of which states that it is a right granted by contract and another which suggests that it is a broader right not dependent on the form of the grant:

> "**franchise** (fran´chiz or 'chīz). A species of incorporeal hereditament springing from a contract between the state and a private citizen or citizens, made upon a valuable consideration, for purposes of public benefit as well as individual advantage. [Citation omitted.]
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> * * *
>
> "A special privilege conferred by government upon individuals, and which does not belong to the citizens of a country generally, of common right. The word does not mean only the right to be a corporation, but it is generic, covering all the rights which may be granted by the legislature."

Likewise, *Webster's New Int'l Dictionary* 861-62 (1910), contains multiple definitions of "franchise." On the one hand, Webster's defines a franchise as "a particular privilege conferred by grant from a sovereign or a government and vested in an individual or individuals," and on the other hand, defines a franchise as "a species of incorporeal hereditament, and is usually granted by a charter. *Cf.* CHARTER, CORPORATION, DARTMOUTH COLLEGE CASE."[4]

Thus, based on the existing dictionary definitions when the legislature enacted the predecessor to ORS 221.450, it is possible to construe "franchise" in both the manner proposed by Northwest Natural and PGE and the manner proposed by the City—the term could mean a special privilege or right granted by contract or it could refer to any form of permission to exercise a special privilege. Nevertheless, although the term "franchise" is capable of different meanings, the interpretation proposed by the City and adopted by the Court of Appeals is problematic because it renders ORS 221.450 essentially meaningless. *See Crystal*

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[4] The dual definition of "franchise" continues to this day. Although not germane to determining the meaning of "franchise" when the legislature enacted the original version of ORS 221.450, *Webster's Third New Int'l Dictionary* 902 (unabridged ed. 2002) continues to define "franchise" as both "a right or privilege conferred by grant from a sovereign or a government and vested in an individual or a group," and "a contract for public works or public services granted by a government to an individual or company."

Communications, Inc. v. Dept. of Rev., 353 Or 300, 311, 297 P3d 1256 (2013) ("As a general rule, we construe a statute in a manner that gives effect, if possible, to all its provisions.").

Under the Court of Appeals' interpretation of ORS 221.450, if a utility uses a city's rights-of-way with the city's permission, then the utility has a franchise, whether the permission was granted by contract, by license, or by permit. But if "franchise" is synonymous with a utility's permitted use of a city's rights-of-way as the Court of Appeals ruled, it is difficult to envision a scenario under which the statute would ever apply—i.e., one in which a utility is operating "without a franchise" from the city. Although it is theoretically possible that a utility could occupy a city's rights-of-way without permission, that possibility is extremely remote given that the utility would need to incur the time and expense of installing unauthorized facilities, which would be patently obvious and would subject the utility to strict penalties from the city for violating a city ordinance.[5] It seems rather unlikely that the legislature enacted the original version of ORS 221.450 (and amended it numerous times over several decades) solely to impose a cap on a privilege tax that a city levies against a rogue utility that occupies city rights-of-way without permission. Indeed, considering that the Court of Appeals' interpretation of the statute would favor the noncompliant utility by

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[5] For example, the Gresham Revised Code ("GRC") requires that a utility obtain a license to occupy public rights-of-way, GRC 6.30.070(1), and a failure to abide by this provision would subject a utility to "a fine or penalty in the maximum amount of $1,000" per day. GRC 6.30.160. *See also* Salem Revised Code 1.070, 35.020, 35.420 (penalty of up to $500 per day for utility that occupies public right-of-way without permission); Portland City Code 17.56.050, 17.100.050 (penalty of $500 for installing poles, cables, or wires in city rights-of-way without permission); Tigard Municipal Code 15.06.050, 15.06.340, 15.06.350, 1.16.600, 1.16.640 (penalty of up to $250 per day for maintaining a utility system in a public right-of-way without permission).

imposing a 5 percent cap on any privilege tax that a city could impose against it, while subjecting law-abiding utilities to an unlimited privilege tax, the court's interpretation of the statute is simply not plausible.

In an effort to salvage some meaning in the statute under its expansive definition of "franchise," the Court of Appeals envisioned a hypothetical scenario in which a utility could operate in a city's rights-of-way without the city's permission:

> "We note that a city could determine that its permission will not be required for a utility to operate within the city's rights-of-way when the utility has obtained operating authority from another governmental source, such as the state. Operating in that manner could be preferable for cities that do not have the resources or desire to create and enforce a regulatory scheme for utilities operating within their rights-of-way. In such cases, a utility would be operating without a franchise from the city and, hence, would be subject to a privilege tax imposed under ORS 221.450." 264 Or App at 46 n.7.

The court's hypothetical, however, does not withstand close scrutiny. Under the hypothetical, the utility must meet certain preconditions (namely, receipt of state operating authority) before it can operate within the city's rights-of-way. Thus, even though the city might not grant express permission to those utilities that meet the preconditions for operating within the city's rights-of-way, it would still need to define those preconditions, thereby tacitly approving any utility that met those preconditions. If, as the court concluded, the existence of a franchise turns solely on the rights received by the utility rather than the form of the permission given to the utility, then the utility in the court's hypothetical would have a "franchise," albeit one with little oversight from the city.

The hypothetical is also internally inconsistent in that it assumes that a city can withhold permission to a utility to operate within the city's rights-of-way while simultaneously imposing a privilege tax on the utility for using those rights-

of-way. If a city charges a utility to use the city's rights-of-way, it is difficult to conceive how the city cannot be said to have permitted that use. In any event, even if a utility that receives implied permission to use a city's rights-of-way could be deemed to be operating "without a franchise," it is not reasonable to assume that the legislature drafted ORS 221.450 and amended it several times to impose a cap on a privilege tax in the rare scenario in which a city would grant implied, not express, permission to a utility to use the city's rights-of-way.

Although an interpretation of a statute that "creates some measure of redundancy is not, by itself, necessarily fatal," *Cloutier*, 351 Or at 97, the same is not true for an interpretation that robs the statute of any meaning. When, as here, a proposed interpretation of a statutory phrase drains all meaning from the statute, this Court has cautioned that the judiciary should be reluctant to construe the statute in such a manner:

> "But, at the least, an interpretation that renders a statutory provision meaningless should give us pause, both as a matter of respect for a coordinate branch of government that took the trouble to enact the provision into law and as a matter of complying with the interpretive principle that, if possible, we give a statute with multiple parts a construction that 'will give effect to all' of those parts. ORS 174.010[.]" *Cloutier*, 351 Or at 98.

Because the Court of Appeals' interpretation of the term "franchise" results in a construction of ORS 221.450 that effectively turns the statute into a dead letter, the interpretation is not plausible, and the Court should reject it.

2. Context of ORS 221.450.

An analysis of the context surrounding ORS 221.450 confirms the conclusion that the term "franchise" means an agreement between a city and a utility governing the utility's use of the city's rights-of-way.

a. Statutes enacted in same bill as ORS 221.450.

The legislature enacted the predecessor to ORS 221.450 in 1931 as part of Chapter 234. That chapter contained two other statutes that later became ORS 221.460 and ORS 221.470. Because the statutes were enacted as part of the same bill, they are considered part of the same statute and provide the closest context for ORS 221.450. *See Stevens v. Czerniak*, 336 Or 392, 401, 84 P3d 140 (2004) (context includes "other provisions of the same statute, the session laws, and related statutes").

In its original form, ORS 221.460 provided that "[a]ny and all franchises, privileges or permits for the use of the public highways, streets or alleys hereafter granted by any municipal corporation shall not be granted for a longer term than 20 years, and shall be subject to the provisions of section 2 of this act [now ORS 221.470]."[6] The plain language of the statute reveals that a franchise is but one form by which a utility or other entity can use public rights-of-way. By using the phrase "franchises, privileges or permits," it is evident that the 1931 legislative assembly understood that "franchise" does not have the sweeping meaning that the Court of Appeals ascribed to it. To the contrary, the legislature recognized that a utility can use public rights-of-way via a franchise, a privilege, or a permit, which undercuts the Court of Appeals' conclusion that "franchise" refers to any and all means by which a utility occupies a public right-of-way with permission.

The original version of ORS 221.470 uses the similar phrase "grant, privilege or franchise" in describing the various mechanisms by which a utility can

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[6] ORS 221.460 currently provides that "[a]ll franchises, privileges or permits for the use of the public highways, streets or alleys granted after June 5, 1931, by any municipal corporation shall not be granted for a longer term than 20 years, and shall be subject to the provision of ORS 221.470."

occupy a city's rights-of-way. That statute requires that the owners of any utility-related equipment such as poles, wires, conduits, and transmission lines that were placed in a city's rights-of-way "by virtue of any grant, privilege or franchise" must remove the equipment within one year after expiration of the "grant, privilege or franchise." Again, this statute reveals that the legislature in 1931 understood that a franchise was but one means by which a utility could operate within a city's rights-of-way, and that the legislature applied that understanding in drafting and enacting the original versions of ORS 221.450 through ORS 221.470.

ORS 221.460 and ORS 221.470 are particularly persuasive in construing the meaning of the term "franchise" because they establish that the legislature recognized that there were several methods (a grant, privilege, permit, or franchise) by which a utility could obtain the right to use a city's rights-of-way to provide utility service. Yet in the same bill, the legislature enacted ORS 221.450, which provides that a city can impose a tax greater than 5 percent on a utility for using the city's rights-of-way only if the utility is operating "without a franchise." *Cf. Dept. of Transportation v. Stallcup*, 341 Or 93, 101, 138 P3d 9 (2006) (use of different terms within a statute reveals legislative intent that the terms have different meanings). The Court of Appeals' conclusion that "franchise" under ORS 221.450 refers to all forms by which a utility obtains the right or privilege to use the city's rights-of-way simply cannot be squared with the legislature's enactment of the original versions of ORS 221.460 and ORS 221.470, which show that there are other means by which a utility can obtain permission to occupy a city's rights-of-way.

b. Other related statutes.

A careful analysis of other statutes related to ORS 221.450 yields a similar conclusion. Specifically, ORS 221.420, which was originally enacted in

1911 to give municipalities the power to regulate local provision of utility service, contains language that underscores the conclusion that the term "franchise" means a negotiated agreement between a city and a utility to use the city's rights-of-way.

In its original form, ORS 221.420 provided, in part, that cities have the power "[t]o determine by contract, ordinance or otherwise the quality and character" of services rendered by a utility. Or Laws 1911, ch 279, § 61(1). The legislature amended that portion of the statute in 1931 to read that cities have the power "[t]o determine by contract or prescribe by ordinance or otherwise, the quality and character" of services provided by a utility. Or Laws 1931, ch 103, § 8.

In its opinion, the Court of Appeals looked to the language of ORS 221.420 as a contextual clue that the word "franchise" in ORS 221.450 is not limited to a right gained by contract. The court stated that had "the legislature intended that a franchise could be conferred only by contract, then ORS 221.420 would not also have referred to ordinances 'or otherwise' as means by which a city could prescribe the terms and conditions under which a public utility could occupy the city's streets. That the legislature knew the difference between the term 'franchise' and 'contract' is demonstrated by its use of those different terms in different contexts." *Northwest Natural*, 264 Or App at 46-47. Although it is not altogether clear, it appears that the court was pointing out that because ORS 221.420 uses the term "contract" and ORS 221.450 uses the term "franchise," the two terms must not mean the same thing.

In fact, the legislature's uses of "contract" in ORS 221.420 and "franchise" in ORS 221.450 are easily reconciled. Whether a "franchise" is a right gained only by contract or refers more broadly to any form of permission from the city, it would not make sense to substitute the word "franchise" for "contract" in ORS 221.420. Had the legislature done so, the statute would read that a city has the power "to determine by franchise," which would be rather awkward if not

nonsensical. By using the phrase "determine by contract," ORS 221.420 suggests that the legislature understood that a franchise is a *right* gained by contract rather than a contract itself.[7] Given the different contexts in which the legislature used the terms "contract" and "franchise" in ORS 221.420 and ORS 221.450, the legislature's word choice does not indicate that "franchise" refers to anything beyond a contractual right to use a city's rights-of-way to provide utility service.

Indeed, ORS 221.420 supports the conclusion that the term "franchise" in ORS 221.450 means a contractual right to use the city's rights-of-way. When the legislature amended ORS 221.420, it drew a distinction that had not existed before—whereas the original statute stated that cities have the power "[t]o determine by contract, ordinance or otherwise" the quality and character of the utility's services, Or Laws 1911, ch 279, § 61(1), the 1931 amended version provided that cities have the power "[t]o determine by contract *or prescribe* by ordinance or otherwise" the quality and character of those services. Or Laws 1931, ch 103, § 8 (emphasis added).

Thus, the 1931 amendments to ORS 221.420 divided the city's power to regulate utilities into two categories: The city could "determine by contract" a utility's provision of services, or it could "prescribe by ordinance or otherwise" the provision of services.[8] By introducing the imperative verb "prescribe," which corresponds to "by ordinance or otherwise," and distinguishing that from the verb

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[7] In a similar vein, the legislature's use of the term "franchise" rather than "contract" in ORS 221.450 is understandable because the phrase "operating without a franchise" is more descriptive and specific than the phrase "operating without a contract."

[8] At the time of the 1931 amendments, "determine" was defined as "to set bounds to," "to fix," or "to regulate," *Webster's New Int'l Dictionary* 608 (1910), while "prescribe" meant "to lay down authoritatively," "to give direction," or "to dictate." *Id*. at 1698.

"determine," which corresponds to "by contract," it appears that the legislature contemplated that there are two fundamental alternatives by which a city can authorize a utility to use the city's rights-of-way. The city can enter into a contract with a utility in which it fixes or sets (i.e., determines) "the terms and conditions upon which any public utility may be permitted to occupy the streets, highways or other public property" in the city, or by ordinance "or otherwise" (e.g., resolutions, permits, licenses) can prescribe (i.e., dictate or direct) those terms and conditions. Or Laws 1931, ch 103, § 8.

These alternatives harmonize with ORS 221.450 and its companion statutes—ORS 221.460 and ORS 221.470. Under the first alternative, the city enters into a contract with a utility that results in the utility's gaining a franchise that governs the terms and conditions under which the utility occupies the city's rights-of-way. And under the second alternative, the city unilaterally imposes (i.e., prescribes) through an ordinance, license, or permit the terms and conditions under which a utility can occupy the city's rights-of-way Because the second alternative does not involve a franchise, the city's imposition of a privilege tax on the utility "by ordinance or otherwise" is subject to the 5 percent limitation contained in ORS 221.450.

c. Prior judicial construction.

Although the text of ORS 221.450 and its direct context reveal that the term "franchise" means an agreement between a city and a utility under which the utility occupies the city's rights-of-way, it is appropriate to look at prior cases construing the term "franchise" because they also constitute context for the statute and because the Court of Appeals gave significant weight to prior judicial decisions in concluding that a "franchise" is a governmental grant of a special

privilege without regard to the form of the grant. *See Northwest Natural*, 264 Or App at 45-47 (citing cases).

While it is true that some cases suggest that a franchise has a broader connotation than an agreement that grants a special privilege, the cases are mixed and do not collectively point in any particular direction. For example, the first case cited by the Court of Appeals, *Elliott v. City of Eugene*, 135 Or 108, 113, 294 P 358 (1931), states generally that "franchises are special privileges conferred by the government on individuals, and which do not belong to the citizens of the country generally of common right." *Elliott*, however, makes it clear that the franchise at issue was created by contract, and it uses "franchise" and "contract" synonymously:

> "[I]t is impossible to construe the charter amendment as anything but an effort to impair the contract between the Bray Brothers and the City of Eugene. It has been held so many times that the state cannot impair a franchise in violation of the aforementioned constitutional provision that it seems unnecessary to cite authorities." 135 Or at 116.

The Court of Appeals also quoted *Whitbeck v. Funk*, 140 Or 70, 73-74, 12 P2d 1019 (1932), for the proposition that "'[a] franchise is a special privilege granted by the government to a person or corporation, which privilege does not belong to the citizens of a country generally, of common right.'" 264 Or App at 44-45 n.5. But again, the franchise in question was "a contract" that "was executed with the Public Market Company of Portland for the construction of a market building." 140 Or at 73. Thus, neither *Elliott* nor *Whitbeck* offers much guidance on the question whether a franchise is limited to a special privilege created by contract or whether it generally refers to any special privilege granted by government regardless of form.

One of the cases cited by the Court of Appeals, *Western Union Tel. Co. v. Hurlburt*, 83 Or 633, 163 P 1170 (1917), does support the broader interpretation of "franchise." In *Hurlburt*, the Court held that "a permission given by municipal ordinance to a private corporation to exercise some special privilege within the city, pursuant to an express delegation of legislative authority, is a grant by the state whereby the right conferred becomes a franchise and not a license." 83 Or at 638. Although *Hurlburt* suggests that any governmental permission to exercise a special privilege is a franchise, other decisions of the Court indicate that a franchise is contractual in nature. *See, e.g., Newsom v. City of Rainier*, 94 Or 199, 202, 185 P 296 (1919) ("The ordinance which [plaintiff] accepted, and under which he claims, constituted a contract or franchise between the city and himself."); *Woodburn v. Public Service Commission*, 82 Or 114, 127-28, 161 P 391 (1916) ("When Woodburn granted the franchise to the telephone company, the city exercised its municipal right to contract * * * ."); *Haines v. Eastern Oregon Light & Power Co.*, 76 Or 402, 404-05, 149 P 87 (1915) ("The provisions of the ordinance having been accepted and acted upon by the grantee of the franchise and its successor, the enactment became an executed contract which cannot be altered without the consent of both parties."); *City of Joseph v. Joseph Water Works Co.*, 57 Or 586, 590-91, 111 P 864, 112 P 1083 (1911) (discussing contractual nature of a franchise); *Benbow v. The James Johns*, 56 Or 554, 556, 108 P 634 (1910) ("The contract is in the form of an ordinance of the city, granting a franchise to the St. Johns Transportation Company for operating such ferry under certain specified conditions and penalties * * * ."); *Tillamook Water Co. v. Tillamook City*, 139 F 405, 406 (CCD Or 1905), *aff'd*, 150 F 117 (9th Cir 1906) ("the grant of a franchise given in consideration of the performance of a public service * * * is protected

against hostile legislation by the state and by the municipality") (quoted in *Copeland v. City of Waldport*, 147 Or 60, 67, 31 P2d 670 (1934)).[9]

On balance, the judicial decisions that predated the enactment of ORS 221.450, like the dictionary definitions at the time, provide little insight or guidance in determining the intent of the legislature when it selected the term "franchise" in the original version of ORS 221.450. In any event, given that the broad interpretation of "franchise" urged by the City and adopted by the Court of Appeals renders ORS 221.450 essentially meaningless and is contrary to the term as it is used in two companion statutes, the judicial decisions are of little weight in construing ORS 221.450.

C. Judicial Opinions Interpreting ORS 221.450.

"[T]his court's prior construction of a statute at issue is an important consideration" in analyzing the meaning of the statute. *Halperin*, 352 Or at 491. Although the Court has not engaged in an extensive analysis of ORS 221.450, it has discussed the operation of the statute. In *US West Communications v. City of Eugene*, 336 Or 181, 183 n.1, 81 P3d 702 (2003), the Court, citing ORS 221.420 and ORS 221.450, observed that a city may allow a utility to use public rights-of-way by entering into a franchise agreement with the utility or by imposing a privilege tax on the utility:

> "If certain conditions are met, a city either may enter into a franchise agreement that determines the 'charges and fees upon which any public utility * * * may be permitted to occupy the streets, highways or other public property within such city,' ORS 221.420(2), or may impose a privilege tax 'for the [utility's] use of [the] streets, alleys or highways' within the city, ORS 221.450."

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[9] As illustrated by these cases, franchise agreements are generally negotiated between a city and a private entity, and become effective when adopted by city ordinance and accepted by the private entity.

This passage from *US West* is entirely consistent with the text and context of ORS 221.450, which reveal that a "franchise" exists when a city and a utility enter into an agreement, and that the term does not broadly apply to any authorized use of the public's right-of-way as the Court of Appeals concluded. Nevertheless, the Court of Appeals dismissed *US West*'s description of franchise as "inapplicable *dicta*" because the case centered on the construction of different statutes that involved telecommunications providers. 264 Or App at 47.

While it is true that the principle of *stare decisis* does not obligate courts to follow *dicta*, *Halperin*, 352 Or at 492, that does not mean that *dicta* can simply be ignored. "The fact that a prior construction amounts to *dictum* does not, by itself, mean that it was incorrect and without any force whatsoever. It merely means that [the Court is] not *required* to follow it as precedent. The prior construction, even if *dictum*, could have persuasive force because of the soundness of its reasoning." *Id.* at 494.

Thus, even assuming that the Court's statement in *US West* was *dictum*, it has persuasive force nonetheless. The Court in *US West* did not belabor the point, but its observation that ORS 221.420(2) and ORS 221.450 authorize a city either to enter into a franchise agreement with a utility or to impose a privilege tax for the utility's use of the city's rights-of-way is the only interpretation that gives effect to ORS 221.450 and that is fully consistent with its context. Therefore, in addition to construing the text and context of ORS 221.450, the Court should consider its statement in *US West*, and rule that "franchise" means an agreement between a city and a utility that governs the utility's occupation of the city's rights-of-way to provide utility service.

II. The City's License Fee is a "Privilege Tax" Under ORS 221.450, Which Preempts the City's Authority to Impose a License Fee Greater Than 5 Percent.

On the parties' cross-motions for summary judgment, the trial court ruled that the City's license fee constitutes a "privilege tax" within the meaning of ORS 221.450. *Northwest Natural Gas*, slip op at 12-14. In reaching this ruling, the court concluded that ORS 221.450 and its predecessors were designed to place a cap on any "financial exactions" imposed by a city on a utility for using the city's rights-of-way regardless of the label applied to the charge. *Id*. The trial court also concluded that ORS 221.450 preempted the City's imposition of a license fee that exceeds the 5 percent limitation. *Id*. at 8-9.

The City challenged these aspects of the trial court's ruling on appeal, and the parties briefed and argued the issues to the Court of Appeals. Although the court did not consider the issues in light of its ruling that ORS 221.450 did not apply because Northwest Natural and PGE were operating with a franchise from the City, this Court has discretion to address the issues on review. ORAP 9.20(2). *See also Sheets v. Knight*, 308 Or 220, 224-25, 779 P3d 1000 (1989) ("Because this issue was properly presented to the Court of Appeals, it is properly before us as well, ORAP 10.15(2), and will be discussed below.").

A. The City's license fee is a "privilege tax."

Neither ORS 221.450 nor any related statutes define the meaning of the phrase "privilege tax." The text of the statute, however, provides some insight as to what the legislature intended by using the term "privilege tax." In its original form, ORS 221.450 provided, in part, that a city "is authorized to levy and collect from every privately owned public utility operating within such city or town without a franchise * * * a privilege tax *for the use of the public streets, alleys and highways* in such city or town." (Emphasis added). The present version of

ORS 221.450 contains functionally equivalent language: "The privilege tax shall be for the use of those public streets, alleys or highways, or all of them, in such city * * * ." Thus, the text of the statute reveals that the purpose for the privilege tax is to compensate the city for the utility's occupation and use of the city's rights-of-way. In light of this underlying purpose, the label affixed to the charge that a city imposes for the use of its rights-of-way should have little or no consequence. So long as the charge is levied for the use of the city's rights-of-way, the charge serves as a privilege tax, whether it is designated as a privilege tax, a license fee, or any other term.

This interpretation is borne out by this Court's decision in *Northwest Auto Co. v. Hurlburt*, 104 Or 398, 408, 207 P 161 (1922), which constitutes context for the meaning of the term "privilege tax" within ORS 221.450, as well as a definitive pronouncement from the Court that the designation of a financial exaction as a privilege tax or license fee is immaterial:

> "The courts in speaking of financial exactions of the character herein described have sometimes called them 'licenses,' and sometimes 'privilege taxes;' but, by whatever name they may be called, they partake of the nature of a tax in many respects, and the designation given in the statute is immaterial, the courts being interested in the substance rather than the name. In *Briedwell v. Henderson*, [99 Or 506, 195 P 575 (1921)], we held it to be properly called a privilege tax, the result of this tax being substantially a license, a certificate that the person paying the sum required was permitted to use a particular car upon the highway for the whole or what time might remain of the current year."[10]

Because the text and context surrounding ORS 221.450 reveal that the City's 7 percent license fee imposed on Northwest Natural and PGE constitutes a

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[10] Northwest Natural and PGE also adopt and incorporate by reference the arguments on this issue presented in their opening brief on appeal, particularly those set forth in pages 9 through 18 of that brief.

"privilege tax" within the meaning of the statute, the City's license fee is subject to the 5 percent maximum rate allowed by ORS 221.450.

B. ORS 221.450 preempts the City's 7 percent license fee.

Throughout these proceedings, the City has contended that its license fee is compatible with ORS 221.450 because the statute does not reflect an intention to displace local ordinances imposing privilege taxes for the use of city rights-of-way. According to the City, ORS 221.450 does not express a "clear and unmistakable" legislative intent to preempt local authority. Appellant City of Gresham's Opening Brief at 2.

The City's contention is incorrect. In rejecting the City's preemption argument, the trial court began by setting forth the framework underlying the preemption issue:

> "The City's power to adopt ordinances and resolutions concerning the utilities' use of the public right of way and any preemptive effect of state law on those ordinances and resolutions are generally governed by the 'home rule' amendments to the Oregon Constitution. *LaGrande/Astoria v. PERB*, 281 Or 137, 140-42, [576 P2d 1204], *aff'd on reh'g*, 284 Or 173 (1978); *Thunderbird Mobile Club v. City of Wilsonville*, 234 Or App 457, 469-70, [228 P3d 650] (2010). The primary purpose of the home rule amendments was 'to allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature, as was the case before the amendments.' *LaGrande/Astoria*, 281 Or at 142. The amendments 'also carve out some limited autonomy for municipal ordinances from overriding state law, but otherwise do not limit the primacy of state legislation over inconsistent municipal enactments.' *Thunderbird Mobile Club*, 234 Or App at 470.
>
> "In this case, the parties do not dispute that the City has the authority to regulate the use of the public right-of-way and to charge utilities fees and taxes for the privilege of using the public right-of-way. Nor do the parties dispute that the Oregon legislature has the

> authority to override the City's regulation.[11] Rather, the only question in this case is whether the legislature, when it enacted ORS 221.450, effectively displaced the City's authority to collect a 7 percent license fee.
>
> "*LaGrande/Astoria* describes the principles that apply in determining whether a statute displaces a city's ordinance. The 'first inquiry must be whether the local rule in truth is incompatible with the legislative policy, either because both cannot cooperate concurrently or because the legislature meant its law to be exclusive.' *LaGrande/Astoria*, 281 Or at 148. '[W]hen a local enactment is found incompatible with state law in an area of substantive policy, the state law will displace the local rule.' *Id.* at 149. Courts must assume that the legislature did not mean to displace local laws 'unless that intention is apparent.' *Id.* In this context, a state law 'prevails over contrary policies preferred by local governments if it is clearly intended to do so[.]' *Id.* at 156.[12]" *Northwest Natural Gas*, slip op at 6-7 (some footnotes omitted).

In light of these principles, the trial court rejected the City's argument that ORS 221.450 did not preempt the City's ordinance because the statute does not manifest an intent to effect preemption:

> "The City's [preemption] argument is plainly wrong. The legislature's 'use of the word "preempt" is not necessary to state a preemptive effect[.]' *Thunderbird Mobile Club*, 234 Or App at 472. As the Court of Appeals has noted, 'a number of state statutes...explicitly displace local regulation.' Id. ORS 221.450 expressly authorizes a city to levy and collect a privilege tax for the use of the public right-of-way if a utility operates for a period of 30 days within the city without a franchise, and it expressly limits the amount of the authorized privilege tax to 'an amount not exceeding

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[11] "As the Supreme Court explained in *LaGrande/Astoria*, 'it is elementary that the legislature has plenary authority except for such limits as may be found in the constitution or in federal law.' 281 Or at 142."

[12] "This principle applies 'unless the [state] law is shown to be irreconcilable with the local community's freedom to choose its own political form.' *LaGrande/Astoria*, 281 Or at 156."

> five percent of the gross revenues' the utility earned within city boundaries. It is clear from the text that the legislature intended to preclude cities from levying and collecting privilege taxes from utilities using the public right-of-way without a franchise in any amount exceeding five percent of gross revenues. The text of the statute is a sufficient expression of legislative intent to displace any local privilege tax that exceeds the statute's five percent limitation." *Northwest Natural Gas*, slip op at 8-9 (footnote omitted).

As the trial court concluded, ORS 221.450 contains a sufficient expression of legislative intent to preclude cities from imposing a privilege tax, license fee, or other charge greater than 5 percent for using their rights-of-way. Thus, the City's imposition of a 7 percent license fee on Northwest Natural and PGE is subject to and limited by ORS 221.450.

CONCLUSION

An analysis of the text and context of ORS 221.450 reveals that the term "franchise" means an agreement between a utility and a city that determines the terms and conditions under which the utility occupies the city's rights-of-way to provide utility service. The expansive definition of "franchise" adopted by the Court of Appeals violates fundamental principles of statutory construction because it renders ORS 221.450 meaningless and fails to consider its companion statutes. Because Northwest Natural and PGE were operating in the City "without a franchise," ORS 221.450 capped at 5 percent any charge that the City could unilaterally impose on them for using the City's rights-of-way. Although the City designated its charge as a license fee rather than a privilege tax, the statute applies nonetheless and prohibits the City from imposing a fee greater than 5 percent of the utilities' gross revenues received from customers within the City. The Court should therefore reverse the decision of the Court of Appeals, rule that the City's ordinance that attempts to impose a 7 percent license fee violates ORS 221.450 and

is invalid, and remand the matter with instructions to reinstate the judgment in favor of Northwest Natural and PGE.

DATED this 8th day of January, 2015.

MILLER NASH GRAHAM & DUNN LLP

s/ *Bruce L. Campbell*

Bruce L. Campbell
Jeffrey G. Condit

Attorneys for Plaintiffs-Respondents/Petitioners on Review
Northwest Natural Gas Company and
Portland General Electric Company

CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 9,683 words.

I 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)(f).

MILLER NASH GRAHAM & DUNN LLP

s/ *Bruce L. Campbell*

Bruce L. Campbell
Jeffrey G. Condit

Attorneys for Plaintiffs-Respondents/Petitioners on Review Northwest Natural Gas Company and Portland General Electric Company

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 8th day of January, 2015, I served the foregoing petitioners Northwest Natural Gas Company and Portland General Electric's brief on the merits on:

(via electronic filing system)
David R. Ris, OSB No. 833558
david.ris@greshamoregon.gov
Gresham City Attorney's Office
1333 N.W. Eastman Parkway
Gresham, Oregon 97030

Of Attorneys for Defendant-Appellant/Respondent on Review City of Gresham

(via electronic filing system)
Casey M. Nokes, OSB No. 076641
cnokes@cablehuston.com
Tommy A. Brooks, OSB No. 076071
tbrooks@cablehuston.com
Cable Huston Benedict Haagensen & Lloyd LLP
1001 S.W. Fifth Avenue, Suite 2000
Portland, Oregon 97204-1136

Of Attorneys for Intervenor-Respondent Rockwood Water People's Utility District

(via electronic filing system)
Melinda J. Davison, OSB No. 930572
mjd@dvclaw.com
Jesse Emmett Cowell, OSB No. 082940
jec@dvclaw
Davison Van Cleve PC
333 S.W. Taylor Street, Suite 400
Portland, Oregon 97204

Attorney for Amicus Curiae Northwest Industrial Gas Users and The Industrial Customers of Northwest Utilities: Amicus Curiae

(via electronic filing system)
Lisa F. Rackner, OSB No. 873844
lisa@mcd-law.com
McDowell Rackner & Gibson PC
419 S.W. 11th Avenue, Suite 400
Portland, Oregon 97205

Attorney for Amicus Curiae Avista Corporation, Idaho Power Company: and PacifiCorp

by:

☐ United States Postal Service, certified or registered mail, return receipt requested

☒ Other (Electronic Filing System)

I further certify that on the 8th day of January, 2015, I filed the original of the foregoing petitioners' brief on the merits with:

Appellate Court Administrator
Appellate Courts Records Section
Supreme Court Building
1163 State Street
Salem, Oregon 97301-2563

by:

☒ Other (Electronic Filing System)

s/ *Bruce L. Campbell*
Bruce L. Campbell, OSB No. 925377
Of Attorneys for Petitioners on Review

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