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
A150990

S062535

ROCKWOOD WATER PEOPLE'S UTILITY DISTRICT'S BRIEF ON THE MERITS ON REVIEW

Petition for Review of the Decision of the Court of Appeals on appeal from the Judgment of the Circuit Court for Multnomah County,
Honorable Stephen K. Bushong, entered February 1, 2012

Court of Appeals Opinion Filed: July 2, 2014
Before Armstrong, Presiding Judge, and Hadlock, Judge, and Egan, Judge
Author of Opinion: Armstrong, P.J.

January 2015

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A. Legal Questions Presented on Review and Proposed Rules of Law

1. Can a city unilaterally impose a "utility license fee" in excess of five percent on a fellow municipal entity under the statutory scheme established by ORS 221.420 and ORS 221.450?

Proposed Rule: No, a city either may enter into a franchise agreement that determines the charges and fees upon which any public utility, people's utility district ("PUD"), or electric cooperative may be permitted to occupy the streets, highways or other public property within such city (under ORS 221.420 (2)), or may impose a privilege tax for the utility's use of the streets, alleys or highways within the city (under ORS 221.450). A "franchise" as used in ORS 221.450 is—at least with regard to municipal entities like PUDs—a contract ***negotiated*** between the city and a utility for the utility's use of the city's rights-of-way to provide utility services in exchange for an agreed-upon compensation. In the absence of a franchise, the charge a city is permitted to impose on a utility for use of the streets is capped at five percent by ORS 221.450.

2. Given this Court's long-held view that states and cities may not tax another unit of government unless there is a clear legislative declaration of its intention to do so, how does the Home Rule doctrine—which presumes a city act is

valid unless it contravenes state or federal law—operate in the context of a city imposing a tax or fee on another unit of government?

Proposed Rule: The Home Rule doctrine does not apply in the context of a government-to-government transaction as it applies when a city regulates ***private*** interests. Whereas the latter presumes a city tax or fee is valid unless it contravenes federal or state law, the former requires the city to have unmistakable, express statutory authority before imposing taxes or fees on another unit of government.

B. Nature of Action, Relief Sought in the Trial Court, and Nature of Judgment by the Trial Court

In July of 2011, the City of Gresham ("City" or "Appellant") adopted a resolution that purported to increase the utility "license fee" imposed on Rockwood Water People's Utility District ("Rockwood PUD" or "Intervenor-Petitioner"), Northwest Natural Gas Company, and Portland General Electric Company (together, the "Utilities") from five percent of gross revenues to seven percent ("Resolution 3056"). Because the "license fee" operates as a privilege tax, and because ORS 221.450 limits privilege taxes to five percent of gross revenues, the Utilities brought, and Rockwood PUD joined, suit seeking a declaration that the City's resolution is invalid.

The Circuit Court for Multnomah County granted Plaintiffs' Cross Motion for Summary Judgment, declaring the City's "license fee" a privilege tax within

the meaning of ORS 221.450 and declaring Resolution 3056, to the extent it purports to increase the license fee from five percent to seven percent of gross revenue, violates ORS 221.450 and is void. *See Northwest Natural Gas Co. v. City of Gresham*, No. 1107-8422, 2012 WL 3563080 (Multnomah County Circuit Court January 12, 2012) ("Trial Court Opinion").

Trial Court Judge Stephen K. Bushong correctly read the plain meaning of ORS 221.450, concluding that it is "clear from the text [of ORS 221.450] 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." *Id*. at 9. Judge Bushong, after detailed analysis, also concluded that ORS 221.450 limits "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.'" *Id*. at 13.

The City's principal contention at the Court of Appeals was that the City—by virtue of its Home Rule authority—can impose a license fee in excess of five percent notwithstanding ORS 221.450 because that statute does not include a "clear and unmistakable" intent to preempt local law. The Court of Appeals ruled in favor of the City, but did so for a reason not argued by any party. The Court of Appeals concluded that—notwithstanding the parties' stipulation that neither the

Utilities nor Rockwood PUD had negotiated a franchise agreement with the City—it could treat the City's unilaterally-imposed license as a "franchise" between the City and the Plaintiffs such that the five percent limit of ORS 221.450 did not apply. *Northwest Natural Gas Co. v. City of Gresham*, 264 Or App 34, 330 P3d 65 (2014). This Court granted review.

C. Statement of Material Facts

The parties stipulated to the material facts in this case. Rockwood PUD has never entered into a franchise agreement with the City of Gresham. ER 2 at ¶ 4. Instead, the City issued Rockwood PUD a utility license on July 3, 2002, which was effective July 1, 2001 through June 30, 2011. *Id*. On June 29, 2011, the City renewed Rockwood PUD's Amended Utility License effective July 1, 2011 through June 30, 2021. *Id*.

Unlike privately-held utilities operating in Gresham, Rockwood was not charged any privilege taxes or "license fees" until July of 2003. ER 2-3 at ¶¶ 6-8. In April of 2003, Gresham adopted Resolution No. 2607, which required Rockwood PUD to pay a license fee of five percent of user fees collected for its operations within Gresham. *Id*. at ¶ 8.

On or about May 17, 2011, the City adopted Resolution No. 3056, increasing the utility license fee under Gresham Revised Code ("GRC") Article 6.30.100 from five percent to seven percent of gross revenues for Rockwood PUD,

effective July 1, 2011. *Id*. at ¶ 9. The staff notes to the Resolution unequivocally state that "[u]tility license fees are charged to public and municipal utilities for use of the public rights of way within the City of Gresham." ER 3 at ¶ 9; ER 9. To provide notice to Rockwood PUD of the increase in its "license fees," Gresham sent a letter explaining that the increase in "license fees" from five percent to seven percent was "deemed necessary to balance a difficult budget" and "avoid further service reductions in the police and fire departments." ER 3 at ¶ 9; ER 19. In short, the City increased the "license fees" in order to provide "additional revenue" to the City's general fund. *Id*.

D. Summary of the Argument

The term "franchise" as used in ORS 221.450 means a negotiated agreement between a utility and a city that establishes the terms for the utility's use of the city's rights-of-way. The Court of Appeals' construction of that term—deeming any grant of permission to use a city's rights of way a franchise—is incorrect and renders the five percent limit of ORS 221.450 a nullity.

This Court's construction of ORS 221.420 and ORS 221.450 in its *US West Communications, Inc. v. City of Eugene*, discussion is the superior reading of the statutory tandem—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, under

ORS 221.420(2), ***or*** may impose a privilege tax for the utility's use of the streets, alleys or highways' within the city under ORS 221.450. 336 Or 181, 183 n.1, 81 P3d 702 (2003).

The legislative history of ORS 221.420 and ORS 221.450 which added PUDs to the regulatory scheme confirm the conclusion that "franchise" as used in ORS 221.450 means a negotiated agreement. Additionally, the Court of Appeals' conclusion that the City's license can be deemed a franchise because it "is the governmental grant to a utility of the special privilege to occupy the public rights-of-way" is nonsensical with respect to Rockwood PUD. As a PUD, Rockwood already had a statutory right to occupy the City's rights-of-way pursuant to ORS 261.305. Under that statute, the City's right to payment from the PUD for occupying the right of way arises only from one of three enumerated types of negotiated agreements: "franchise agreements, intergovernmental agreements under ORS chapter 190 or contracts providing for payment of such fees." ORS 261.305(14). In the absence of a negotiated agreement, the City is capped by the five percent privilege tax limit in ORS 221.450.

II. ARGUMENT

A. Standard of Review

The Court "review[s] a grant of summary judgment 'to determine whether any genuine issue of material fact exists and whether the moving party is entitled

to judgment as a matter of law.'" *Sheptow v. Geico General Ins. Co.*, 246 Or App 18, 20, 265 P3d 4 (2011) (quoting *Herman v. Valley Ins. Co.*, 145 Or App 124, 127–28, 928 P2d 985 (1996), *rev denied*, 325 Or 438 (1997)). There are no contested issues of material fact in this case; the only issues on review are legal issues, subject to review as a matter of law.

B. The Court of Appeals Misconstrued the Term "Franchise" in ORS 221.450

The Court of Appeals—notwithstanding the parties' stipulation that Rockwood PUD never had a franchise agreement with the City[1]—*sua sponte* raised the question whether the City's unilateral license could be deemed a "franchise." 264 Or App at 46, 48. The Court of Appeals ruled that a "franchise," as that term is used in ORS 221.450,[2] is not limited to a negotiated agreement with a utility setting the terms of use of the city's rights of way, but rather that a "franchise" is any grant—regardless of form—of the privilege to occupy the public rights-of-way:

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[1] *See* October 28, 2011 Stipulated Facts, ER 2 at ¶ 4.

[2] ORS 221.450 provides that:

> [A] privilege tax may be collected only if the entity is operating . . . without a franchise from the city and actually using the streets . . . . The privilege tax shall be . . . in an amount not exceeding five percent of the gross revenues of the . . . district.

> 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.

Id. at 46. A plain reading of the text and an analysis of the legislative history of ORS 221.450 as well as the related statutes establishes that the Court of Appeal's construction of the term "franchise" is wrong. Rockwood expressly joins in and relies upon the Petitioners' Brief on the Merits filed by Northwest Natural Gas Company and Portland General Electric Company ("Utilities' Brief on the Merits") examining the text and context of ORS 221.450.

This Court has described ORS 221.420 and ORS 221.450 as complementary parts of a statutory scheme. In *US West Communications v. City of Eugene*, this Court stated that "[i]f 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." 336 Or at 183 n.1.

This Court's description of the statutory scheme is consistent with the text and context of ORS 221.450 as described in the Utilities' Brief on the Merits.

Nevertheless, the Court of Appeals dismissed this Court's interpretation of ORS 221.420 and ORS 221.450 as mere *dicta*. 264 Or App at 47 ("that statement in *US West* is inapplicable *dicta*" because that case was interpreting the telecommunications statutes). The Court of Appeals' construction of the term "franchise" as used in ORS 221.450 is inferior to this Court's construction in *US West* because it is discordant with the legislature's understanding of ORS 221.420 and ORS 221.450 when it amended the statute to add people's utility districts. Moreover, the Court of Appeals' conclusion that the City's license can be deemed a franchise because it "is the governmental grant to a utility of the special privilege to occupy the public rights-of-way" is nonsensical with respect to Rockwood, which, as a PUD, already had a statutory right to occupy the City's rights-of-way before the City issued the license, pursuant to ORS 261.305. *Id.* at 46.

1. The Legislative History of ORS 221.420 and ORS 221.450 as Applied to PUDs Establishes that a Franchise is a Negotiated Agreement

The accuracy of this Court's construction of ORS 221.420 and ORS 221.450 is buttressed by the legislative history of ORS 221.420 and ORS 221.450 as well as the historical conduct of municipalities and utilities.

Prior to the 1987 amendments adding "people's utility district" to the text of ORS 221.420, municipal entities lacked the authority to impose ***any*** fees on fellow municipal entities for access to rights-of-way. *See, e.g.,* ER 22–25 *(Columbia*

River People's Utility District v. City of St. Helens, Columbia County Circuit Court Case 85-2236 (July 15, 1986)). In *Columbia River*, the plaintiff PUD began operating in the rights-of-way belonging to the defendants City of St. Helens, City of Scappoose, and City of Rainier. Those cities sought to have the plaintiff PUD enter into franchise agreements, but the PUD declined, stating that the cities lacked authority to impose such fees on a fellow municipal entity. ER 22–23. The trial court held that the PUD "stands on equal footing with the defendant cities as a municipal body" and that the PUD, in the absence of express statutory authority, was "immune or exempt from taxation." ER 24.

As described by counsel for the cities to the House Environment and Energy Committee hearing on the 1987 amendment to ORS 221.420, the ruling in *Columbia River* triggered a "legislative emergency" as the other 17 PUDs in the state had contracts with their respective cities and were now withholding (or threatening to withhold) the "franchise [fee] that keeps the payment flowing into the general fund revenues of the cities that they are used to getting over these last 40 years." ER 28–30. At the hearing, the city proponents of the amendment were unequivocal about the purpose of adding PUDs to ORS 221.420: "Clearly stat[ing] that public utility district[s] shall enter into franchise agreements with cities." *Id*. at 46. That is the limited scope of authority granted to Gresham by ORS 221.420 over fellow municipal entities like Rockwood PUD.

The legislative record addressing the difference between a franchise fee and a privilege tax further supports this Court's construction of ORS 221.420 and ORS 221.450. At the April 22, 1987 hearing, the House Environment and Energy Committee asked counsel for the cities directly, "Can you explain the difference between a franchise fee and a privilege tax?" The counsel for the cities, who played a key role in drafting the proposed amendments, stated:

> [I]n ORS 221.450 there is a . . . privilege tax whereby if . . . . [y]ou, as a private utility . . . don't sit down and negotiate a franchise regulation ordinance or agreement so that we're working together, then you're going to pay more. You're going to pay 5 percent. If you come in and get a franchise, [] you sit down at the table, which is what the legislature intended in passing . . . ORS 221.

ER 31–32. The cities and legislature, at the time of the 1987 amendment, and ever since, have understood ORS 221.420 to provide cities authority to "negotiate a franchise regulation ordinance or agreement" and that the alternative is the privilege tax.

Moreover, the parties at the time of the 1987 amendments understood that the five percent privilege tax was a cap. At the close of the April 22, 1987 hearing on the amendments to ORS 221.420 and ORS 221.450, a representative for electric cooperatives in thirty of Oregon's thirty-six counties stated on behalf of her constituents that they had no objection to the amendments because they "have

always paid a franchise fee or privilege tax" and "the bill does not propose to increase the maximum allowable tax rate [of 5%]." ER 34.

2. Rockwood Already Had the Statutory Right to Occupy the City's Rights-of-Way

This Court's construction of ORS 221.420 as authorizing the City to ***negotiate*** a franchise agreement (rather than unilaterally impose a fee above five percent) is further supported by ORS 261.305 which grants PUDs a statutory right to use the City's rights of way: Rockwood has authority to use the City rights-of-way and the City is limited to compensation of either (a) a negotiated rate of payment under a franchise agreement or intergovernmental agreement; or (b) the five percent statutory privilege tax. ORS 261.305(14); ORS 221.450. Rockwood's statutory right, as a PUD, to use the rights of way is provided in ORS 261.305(14): "Peoples utility districts shall have power: To construct works across or along any street or public highway, or over any lands which are property of this state, or any subdivision thereof." Thus, PUDs have a right to occupy the rights-of-way in a city. That construction of ORS 261.305(14) is consistent with the *Columbia River* court's ruling that the Columbia River PUD "has the right to construct works along any public street or highway and to maintain its electrical distribution thereon." ER 25 (emphasis in original)(citing ORS 261.305(14)). The PUD's right, though, is circumscribed and subject to a requirement that it pay "any fees called for under applicable franchise agreements, intergovernmental agreements under ORS chapter

190 or contracts providing for payment of such fees." ORS 261.305(14). Critically, every type of document listed in the statute that the city may rely on to extract fees is a negotiated agreement between two sovereigns. In other words, a PUD has a right to occupy a City's right-of-way, but the legislature has mandated that the parties reach a ***negotiated*** rate of pay for the PUD's access. If they do not reach a negotiated rate, the City's only recourse is to rely on ORS 221.450 and impose a privilege tax that does not exceed five percent.

The Court of Appeals' rationale for its expansive definition of "franchise" breaks down when applied to Rockwood PUD. The court's conclusion that a "franchise" is any grant—regardless of form—of the privilege to occupy the public rights-of-way is derived, primarily from the *Elliot v. City of Eugene* case. *See Northwest Natural*, 264 Or App at 45–47, citing *Elliot v. City of Eugene*, 135 Or 108, 113, 294 P 358 (1931). While the *Elliot* Court did state 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," it also recognized explicitly that the privilege was created by negotiated contract. 135 Or at 113. Even if the Court of Appeals was correct in concluding that the City's license could be deemed a franchise with respect to the Utilities because it granted "a special privilege" to occupy the rights-of-way, that analysis would fail with respect

to Rockwood PUD. As described above, Rockwood had a statutory right to occupy the City's rights-of-way before Gresham issued the license.

The Court of Appeals' rationale eviscerates the stated expectations of the stakeholders that wrote PUDs into ORS 221.420. More importantly, it is inconsistent with the design of ORS 221.420 and ORS 221.450 because under the Court of Appeals' definition of "franchise," a city need only issue a "license" to a utility to avoid the five percent cap on fees for use of the city's rights of way under ORS 221.450. The Court of Appeals' construction of ORS 221.420 and ORS 221.450 is wrong, does violence to the overall statutory design of intergovernmental cooperation, and will sow discord at the local government level.

C. The Court of Appeals' Decision Wrongly Sets Aside this Court's Rule that a City May Not Tax Another Local Government Absent Express Statutory Authority

A city's Home Rule authority to tax or exact fees is not without limit. A significant limitation on a city's Home Rule authority arises when it attempts to tax or exact fees from another unit of local government. Throughout this litigation, the City has maintained that—irrespective of the five percent limit in ORS 221.450—it had authority to unilaterally impose a fee for use of its rights-of-way in excess of five percent under its Home Rule authority. The Court of Appeals ruled that the unilateral seven percent license fee was a valid enactment by the City as a Home

Rule municipality. 264 Or App at 39, citing *City of LaGrande v. PERB*, 281 Or 137, 576 P2d 1204 (1978).

Rockwood has consistently argued that Home Rule authority cannot provide the basis for an additional two percent "license fee" on a PUD because it is a municipal entity and presumptively exempt from such taxation. The trial court ruled that Ordinance 3056 was an unlawful privilege tax in excess of five percent and did not reach whether the City had Home Rule authority to impose it on a PUD. Trial Court Opinion at 7. In reversing the trial court, the Court of Appeals acknowledged that Intervenor-Petitioner contests the City's Home Rule authority to impose a fee in excess of the statutorily-permitted five percent privilege tax. It nevertheless affirmatively ruled that the City has Home Rule authority to impose a new or additional two percent tax by citing its ruling in *Rogue Valley Sewer Services v. City of Phoenix,* 262 Or App 183, 329 P3d 1 (2014). *Northwest Natural*, 264 Or App at 39 n.3.

Rockwood incorporates herein and joins the argument of Rogue Valley Sewer Services in its Brief on the Merits, which is currently pending before this Court in docket SC No. S062277. The Court of Appeals' decision in *Rogue Valley* is incorrect—the application of a city's Home Rule authority in the context of a city's attempt to exact funds from a fellow municipal entity should be

fundamentally different than the Home Rule analysis of a city's authority to tax a privately-owned enterprise.

Oregon courts have long held that states and cities may not tax another governmental entity as part of the exercise of sovereign power, "unless there is a clear legislative declaration of its intention so to do * * *." *City of Portland v. Multnomah County*, 135 Or 469, 471, 296 P 48 (1931). Accordingly, where a municipality is the target of taxation, "exemption is the rule and taxation the exception." *Id*. (internal quotation omitted). In the *City of Portland* case, this Court established a presumption that municipalities are exempt from taxation. *Id*. at 471–72 ("[I]n the absence of an express legislative declaration . . . it is unreasonable to suppose that the Legislature intended that property belonging to the public should be taxed." (internal quotation omitted)).

As the *City of Portland* Court explained, the strict limitation on taxing other government units is based on the fact that all money in government coffers belongs to the public; one unit of government collecting money from the other does not, therefore, create new income for the public, only administrative expense:

> It would be analogous to taking money out of one pocket and putting it into another . . . . It may, therefore, be said that it is against public policy to tax such property when devoted to a public use . . . . All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one

> would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for public purposes was intended to be excluded, and the law will be administered as excluding it in fact, unless it is unmistakably included in the taxable property by the constitution or a statute.

Id. at 472 (internal quotation and citation omitted). This Court reaffirmed the presumption against intergovernmental taxation in *Central Lincoln PUD v. Stewart*, where it stated that the legislature's "intention to tax a municipality is ***not to be inferred***, but must be clearly manifested by an affirmative legislative declaration." 221 Or 398, 406, 351 P2d 694 (1960) (emphasis added).

For decades the relationships between cities and the entities listed in ORS 221.420 and ORS 221.450, like privately-owned utilities and PUDs, have honored the presumption against intergovernmental taxation and abided within the comprehensive scheme created by those statutes: the listed entities either have voluntarily entered into a franchise agreement under ORS 221.420 or been subject to a privilege tax under ORS 221.450. *See US West*, 336 Or at 183 n.1. Across Oregon, city-imposed fees for use of rights-of-way have not exceeded five percent except where the municipal entity has reached a negotiated agreement to pay a higher amount. If permitted to stand, the Court of Appeals' rulings in this case and

in *Rogue Valley* will allow cities to unilaterally impose taxes on fellow municipal entities for use of rights of way without any limit.

III. CONCLUSION

The term "franchise" as used in ORS 221.450 means a negotiated agreement between a utility and a city that establishes the terms for the utility's use of the city's rights-of-way. The Court of Appeals' construction of that term—deeming any grant of permission to use a city's rights-of-way a franchise—is incorrect and renders the five percent limit of ORS 221.450 a nullity. Moreover, even if the Court of Appeals' construction was correct, Rockwood as a PUD had a statutory right to occupy the City's rights-of-way before the City issued the license, so it could not be deemed a franchise with respect to Rockwood. Because Rockwood was operating in the City "without a franchise," the five percent limit on privilege tax pursuant to ORS 221.450 renders Ordinance 3056 unlawful. Accordingly, the Court should reverse the decision of the Court of Appeals, and remand the matter to the trial court with instructions to reinstate the judgment in favor of Rockwood PUD.

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DATED: January 8, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
AND TYPE SIZE REQUIREMENTS

Brief length

I HEREBY CERTIFY (1) this brief complies with the word-count limitation as described in ORAP 9.05(3)(a); and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 4,428 words as determined by Microsoft Word ™.

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CERTIFICATE OF E-FILING AND SERVICE

I hereby certify that on January 8, 2015, I served the foregoing **ROCKWOOD WATER PEOPLE'S UTILITY DISTRICT'S BRIEF ON THE MERITS ON REVIEW** on:

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