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/
Petitioners on Review,

and

ROCKWOOD WATER PEOPLE'S UTILITY DISTRICT

Intervenor-Respondent,

v.

CITY OF GRESHAM

Defendant-Appellant/
Respondent on Review.

Supreme Court
No. S062556

Court of Appeals
No. A150990

Multnomah County Circuit
Court No. 1107-08422

BRIEF *AMICUS CURIAE* OF AVISTA CORPORATION D/B/A AVISTA UTILITIES, IDAHO POWER COMPANY, AND PACIFICORP D/B/A PACIFIC POWER IN SUPPORT OF PETITION FOR REVIEW

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

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September 2014

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This brief *amicus curiae* is filed[1] on behalf of three investor-owned energy utilities ("Joint Utilities") serving customers in the state of Oregon and regulated by the Public Utility Commission of Oregon ("OPUC"):

- Avista Corporation d/b/a Avista Utilities ("Avista") provides electric and natural gas services to approximately 690,000 customers in Oregon, Washington, and Idaho and has been in business since 1889;
- Idaho Power Company ("Idaho Power") provides electric service to approximately 511,000 customers in Oregon and Idaho and has been in business since 1916;
- PacifiCorp d/b/a Pacific Power ("PacifiCorp") provides electric services to approximately 733,000 customers in Oregon, Washington, and California, and has been in business since 1910.

Together, the Joint Utilities have more than three centuries of experience serving customers in Oregon, as well as negotiating and complying with the terms of access to streets and rights-of-way imposed by Oregon cities. For the reasons discussed below, the Joint Utilities support the Petition for Review filed by Northwest Natural Gas Company and Portland General Electric Company on

[1] Concurrent with filing this brief, the Joint Utilities separately filed an application to appear *amici curiae*.

September 3, 2014, challenging the decision of the Oregon Court of Appeals in *Northwest Natural Gas Co. v. City of Gresham*, 264 Or App 34, 330 P3d 65 (2014).

For over 80 years, the common understanding of ORS 221.450[2] has provided a necessary and beneficial restraint on the ability of cities to impose excessive charges on utilities for access to streets and rights-of-way. If the decision of the Court of Appeals is allowed to stand, cities will be free to levy unlimited fees, which would be passed on to utility customers on their gas and electric bills under OPUC regulations. Unless the Court of Appeals decision is reversed, utility bills could become a vehicle for unbounded exactions unrelated to the provision of utility service. While the Joint Utilities do not have a direct interest in the case, they do have a significant interest in the precedent involved.

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[2] ORS 221.450 provides that "the city council or other governing body of every incorporated city may levy and collect a privilege tax from [every utility]. The privilege tax may be collected only if the entity is operating for a period of 30 days within the city without a franchise from the city and actually using the streets, alleys or highways, or all of them, in such city for other than travel on such streets or highways. The privilege tax shall be for the use of those public streets, alleys or highways, or all of them, in such city in an amount not exceeding five percent of the gross revenues of the [utility] currently earned within the boundary of the city. However, the gross revenues earned in interstate commerce or on the business of the United States Government shall be exempt from the provisions of this section. The privilege tax authorized in this section shall be for each year, or part of each year, such [utility] operates without a franchise."

II. ARGUMENT

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

For over 80 years, Oregon cities and electric and gas utilities have operated under a clear understanding of the legal framework governing municipal right-of-way fees. Cities may determine the terms and conditions of a utility's access to streets and rights-of-way, including the payment of fees. ORS 221.420.[3] The parties are free to enter into bilateral negotiations to arrive at the terms and conditions of access—in which case the fee may be set at any amount agreed upon. Or the city may unilaterally dictate the terms and conditions of access through a municipal ordinance, in which case the fee—referred to as a privilege tax under the statute—is capped at five percent of the utility's gross revenues earned within the city. ORS 221.450. This understanding—which is consistent with this Court's articulation of the framework in *US West Communications v. City of Eugene*, 336 Or 181, 183 n.1, 81 P3d 702 (2003)—has provided cities with broad discretion to dictate the

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

terms and conditions of access to their streets and rights-of-way, while at the same time protecting utility customers from excessive charges.[4]

Generally, utilities prefer to negotiate a franchise agreement rather than operate under a privilege-tax ordinance. Most cities reserve the right to amend their privilege-tax ordinances—including the amount of the charge for access—at any time, leaving utilities vulnerable to unexpected increases. A franchise agreement, on the other hand—including the amount of the franchise fee—is binding for the entire term of the agreement, which is generally between 10 and 20 years.[5] A franchise agreement also provides mutually agreeable standards under which the utility is authorized to locate its facilities within the city's rights-of-way. In exchange for the stability and security of a franchise agreement, utilities have at times agreed to pay fees exceeding the five percent privilege tax limit.

A number of cities, however, decline to enter into franchise negotiations, opting instead to impose terms and conditions unilaterally. In these cases, the

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

[5] *See Rose City Transit Co. v. City of Portland,* 18 Or App 369, 525 P2d 1325 (1974) (describing a franchise as a binding contract between a city and a franchisee where the city grants the utility the right to use the streets in consideration for the benefit the public derives from the franchise).

utility is obliged to accept whatever terms the city dictates. Nevertheless, under the long-standing framework, the utility has always been assured that in no case could the city impose an exaction higher than the five-percent limit imposed by ORS 221.450 without the utility's agreement. Thus, for the past 80 years, the five-percent limit imposed in ORS 221.450 has provided a safety net for utilities, ensuring that their customers will not be charged more than five percent for access to streets and rights-of-way unless they receive consideration in the form of an offsetting benefit.

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

B. The Court of Appeals Decision Will Require Utilities to Pass Excessive Fees through to Customers on Utility Bills.

To fully appreciate the consequences of the Court of Appeals decision, it is important to understand the way in which municipal charges are included in utility customers' bills. The OPUC is charged with setting rates for all investor-owned electric and gas utilities in the state and ensuring that these rates are "fair

and reasonable."[6] In carrying out this task, the OPUC has adopted regulations specifically addressing municipal fees. Under OAR 860-022-0040, any municipal fees imposed on utilities for doing business in the city or occupying the streets or rights-of-way, up to specified thresholds, are allowed in the utilities' general revenue requirement that is collected from *all* utility customers in Oregon regardless of where they reside.[7] The OPUC has revised the thresholds over the years, but they are currently set at 3.0 percent of gross revenues for gas utilities and 3.5 percent for electric utilities. By regulation, fees exceeding the 3.0/3.5 percent thresholds are charged pro rata to customers residing within the imposing city, and must be identified separately on customers' bills. OAR 860-022-0040(1) and (6).

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

The fees within the 3.0/3.5 percent thresholds constitute reasonable compensation collected by the cities for the use of their streets and rights-of-

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[6] ORS 756.040(1) requires the OPUC to "obtain for [customers] adequate service at fair and reasonable rates [and to] balance the interests of the utility investor and the consumer in establishing fair and reasonable rates."

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

way. Inasmuch as the utility systems (pipelines for natural gas utilities and electrical grids for electric utilities) are interconnected, all of the utilities' customers derive a benefit from the utilities' ability to access city streets and rights-of-way. For this reason, fees up to the established thresholds are properly included in the rates charged to all customers of the utility. In contrast, fees above the thresholds exceed reasonable compensation for use of city streets and rights-of-way and instead constitute general revenue-raising measures. These excess fees are properly borne by those who benefit from them—namely customers who reside within the city levying the exaction. *See In the Matter of Exactions Levied upon Utilities by Cities (on Commissioner's own Motion),* Docket UF-2620, Order No. 43223 at 3-4 (Dec. 30, 1966) (adopting Rule 21-040, which is now codified as amended OAR 860-022-0040); *see also In the Matter of Exactions Levied upon Utilities by Cities (on Commissioner's own Motion)*, Docket UF-2620, Order No. 43427 at 2 (Jan. 26, 1967) (clarifying the policy announced in Order No. 43223).[8]

Together, ORS 221.450 and the OPUC's regulations have worked well to protect all utility customers. Under the OPUC's regulations, statewide

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

customers are protected from right-of-way fees exceeding amounts the OPUC deemed reasonable. Local customers are protected by ORS 221.450, which ensures that the additional surcharge they pay will be limited to a few additional percentage points. If the Court of Appeals decision stands, cities will have the ability to impose fees significantly in excess of those deemed reasonable by the OPUC and contrary to the intent of the cap in ORS 221.450.

The Joint Utilities have no desire to interfere with cities' authority to tax their citizens. They do, however, have an interest in ensuring that customer bills are reasonable overall and are not used to impose uncapped city taxes that have no reasonable relationship to utility activities. Utility customers necessarily depend on utility services to heat and light their homes and have little ability to avoid or even limit municipal surcharges. It is for this reason that the five-percent cap is so important.

Moreover, as cities increase their fees for access to streets and rights-of-way, it is the utilities—not the cities—who will bear the negative business consequences of imposing and collecting the city fees. While it is true that the OPUC has ordered that city fees in excess of the 3.0/3.5 percent thresholds be specifically and separately identified on utility bills, as a practical matter, customers are focused on the total amount of their utility bills and tend not to closely inspect individual line items. For this reason, municipal fees will

operate as a "stealth tax" for the city—and one for which customers will ultimately hold the utility responsible.

III. CONCLUSION

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

Respectfully submitted this 16th day of September, 2014.

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

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(i); and (2) the word-count of this brief as described in ORAP 5.05(2)(a) is 2,092.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 16, 2014, I filed the BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REVIEW with the Appellate Court Administrator via the eFiling system.

I further certify that on September 16, 2014, I served the BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REVIEW on the following parties via the eFiling system:

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