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## PETITION FOR DECLARATORY RULING\_EDITED VERSION

**Date:** April 1, 2019

Oregon Public Utility Commission  
ATTN: Filing Center  
PO Box 1088  
Salem, OR 97308-1088

To the Commission:

They City of Portland is writing this petition to the Oregon Public Utilities Commission (OPUC) by the authority vested in ORS 756.450 in order to obtain a declaratory ruling in the form of an interpretation of the rule stated below. The City thanks the OPUC for the opportunity to submit this petition.

### **The Rule**

OAR 860-022-0040(6). “Except as provided in section (5) of this rule, to the extent any city tax, fee, or other exaction referred to in section (1) and (3) of this rule exceeds the percentage levels allowable as operating expenses in sections (1) and (3) of this rule, such excess amount shall be charged pro rata to energy customers within said city and shall be separately stated on the regular billings to such customers.” (emphasis added).

### **A detailed statement of the relevant facts, including facts to show the City of Portland’s interest**

The City of Portland negotiates and executes franchise agreements with electric utilities who install infrastructure under the City’s rights-of-way (ROW). Negotiated in those franchise agreements is the amount of compensation owed to the City for the right to install and use such infrastructure in their regular course of business. For this compensation, these electric utilities uniformly pay five percent (5%) of their gross revenues to the City, remitted quarterly. Also included in these franchise agreements are clauses which allow the City the right to conduct audits in order to verify the veracity of the electric utilities’ remittances to the City.

Electric utilities recover their City franchise fee obligations from their customers through separate itemizations on their customers’ bills. This is perfectly legal and, in fact, a common industry practice. A universal question that surfaces in these audits is whether the revenue generated from the re-billings of the City’s franchise fees should be included in the base on which these franchise fees are calculated. The City’s position is that these revenues should indeed be included in the base.

## All propositions of law or arguments asserted by petitioner

It is the City's position that the legal responsibility to pay City franchise fees is on the utility, not the customer. The utility cannot reduce the fees owed to the City if they fail to collect these fees from their customers. The fact that the utility shifts the economic responsibility of these fees to their customer does not relieve their legal responsibility to pay them. It is the City's stance that where the legal responsibility to pay these fees rests on the utility (and not the customer), the revenues generated to pay these fees shall be included in gross revenues.

The City draws support for their stance that the revenues collected from their customers to pay these fees should be included in gross revenues from several sources, including in the 9<sup>th</sup> Circuit.<sup>1</sup> The most on-point, the City specifically refers to a case from the U.S. Court of Appeals for the 5<sup>th</sup> Circuit, *City of Dallas v. FCC*.<sup>2</sup> The court in *City of Dallas* deployed *Chevron's* statutory construction test to determine whether gross revenues, as defined in 47 U.S.C. § 542(b), were "from the operation of a cable system should include the money collected from subscribers that is ultimately allocated by the cable operator to the pay their franchise fee."<sup>3</sup> The court held that it did. In support of that conclusion, the court cited the Financial Accounting Standards Board's (FASB) language concerning franchise fees: "cable franchise fees are costs no different than the general manager's salary, marketing costs, and programming costs."<sup>4</sup>

Moreover, the court elaborated on the inclusion of such franchise fees by addressing the FCC's argument that the particular cable operator at issue was "merely acting as a conduit, collecting franchise fees from subscribers on behalf of the franchising authority..."<sup>5</sup> The court disagreed with this assertion. The court responded by stating, "[w]hen franchising agreement impose fees directly upon [the provider], any money collected to pay those fees will be part of the operator's gross revenue."<sup>6</sup>

The OPUC regulates "Oregon's investor-owned electric... companies."<sup>7</sup> Specifically, the OPUC mandates the rates these utilities charge their ratepayers and from whom they can collect certain fees. If the OPUC mandates the collection of certain fees from their customers, the OPUC effectively shifts the legal responsibility to pay certain fees from the utility to their customers. At the very least, if a utility "must" charge their customers for certain fees, ambiguity arises as to which party is legally responsible to pay those fees. Notwithstanding the fact that OPUC's regulations are not binding on government

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<sup>1</sup> See *City of Dallas v. FCC*, 165 F.3d 341 (1999) (stating, "When franchising agreements impose fees directly upon cable operators, any money collected to pay those fees will be part of the operator's gross revenue..."), see also *Wirtz v. Charleston Coca Cola Bottling Co.*, 356 F.2d 428, 430 (4<sup>th</sup> Cir. 1996) (stating, "Excise taxes which are levied at the manufacturer's, wholesaler's, or other distributive level will not be excluded in calculating the dollar volume of sales..."), *Lucky Lager Brewing Co. v. Commissioner*, 246 F.2d 621, 623 (9<sup>th</sup> Cir. 1957) (stating, "While [petitioner] may pass the economic burden of the tax to the purchaser, its failure to do so would not relieve it of the tax liability... It cannot hence be said that amounts collected by petitioner, even though they effectively reimbursed it for the beer tax, were not its own "gross receipts."), *GTE Southwest v. Tax. & Rev. Dept.*, 113 N.M. 610, 830 P.2d 162 (Ct. App. 1992) (stating, "The line item on the customer's bill for a share of the municipal franchise fee is part of the charge to the customer for receiving telephone services, and payment of that amount by the customer is a gross receipt by GTE for the provision of telephone services.")

<sup>2</sup> 165 F.3d 341 (1999) 118 F.3d 393 (1997)

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> [https://www.puc.state.or.us/Pages/about\\_us.aspx](https://www.puc.state.or.us/Pages/about_us.aspx), as of March 8, 2019.

entities such as the City of Portland, the OPUC's regulations on electric utilities have tangential consequences on the fees they owe to municipalities, such as the City of Portland.

The OPUC regulates both electric utilities as well as telecommunications utilities. As a result, OPUC has promulgated "sister" provisions addressing the collection of these fees for both utilities, OAR 860-022-0040(6) and OAR 860-022-0042(4), respectively. These provisions mirror each other. Specifically, OAR 860-022-0040(6) states, "...such excess amount *shall be charged pro rata to energy customers within said city* and shall be separately stated on the regular billings to such customers." (emphasis added). Echoing this language, OAR 860-022-0042(4) states, "All privilege taxes and fees and other assessments in excess of 4 percent of local access revenues *shall be charged pro rata to users of local access services within the City*, and the aggregate excess amount shall be separately itemized on customers' bills or billed separately." (emphasis added).

AR 329 was promulgated by the OPUC in the late 1990's and contained amendments to OAR 860-022-0042(4) which are now codified in the current language of that provision. The City of Portland, as well as other governmental entities, expressed their concerns over the potential ramifications of this amendment. Specifically, the City of Portland was worried that the proposed language would transfer the burden of paying this fee from the utility onto the city residents and would transform telecommunications utilities from paying the fee into a mere collector of revenues. This would have the effect of shifting these fees from a fee on the provider to an effective sales tax on the customer.

As a result of exhaustive research into this issue, the City obtained an order from the OPUC adopting the amendments enumerated in AR 329.<sup>8</sup> In this document, "*Staff argues that its proposed amendments do not shift the burden of payment from companies to customers, as claimed by other participants. The utility will continue to be responsible for payment of the tax or other exaction. The amendments will simply change the body of customers from whom a telecommunications utility collects revenues to pay the taxes: the city's residents will pay more of the exactions and the ratepayers outside the city less.*"<sup>9</sup> (emphasis added). Continuing with this theme, the OPUC staff state later in this document, "*Some of the cities argue that the amendments change the payer of the taxes or fees involved to create a "new" tax. We conclude otherwise. The company owes and must pay the tax, either directly from its own resources, to be recouped in rates, or by collecting the tax from customers and forwarding it to the taxing authority. They are paid by "customers" in either event.*"<sup>10</sup>

A common interpretation of this rule by electric utilities is that "shall be charged" should be read alone to mean they **MUST** charge fees in excess of those exactions referred to in sections (1) and (3) of this rule<sup>11</sup> to their customers. The City of Portland's interpretation of this rule is more in line with the OPUC's interpretation of this rule's sister provision which addresses the telecommunications industry, OAR 860-022-0042(4). Specifically, the City's interpretation is that an electric utility does not have to charge this fee to their customers (they are free to "eat" that charge if it wishes<sup>12</sup>) but, if they do pass this fee onto their customers, they must do so "pro rata to energy customers within said city." In other words, an electric utility cannot pass-on the City of Portland fees to residents who do not reside within

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<sup>8</sup> See exhibit A

<sup>9</sup> Id. Page 3

<sup>10</sup> Id. Page 5

<sup>11</sup> OAR 860-022-0040

<sup>12</sup> See Exhibit B, the email from former OPUC employee Phil Nyegaard on October 11, 2004

the City of Portland.

**The questions presented**

This petition requests from the OPUC a formal interpretation of the phrase, “such excess amount shall be charged pro rata to energy customers within said city<sup>13</sup>,” and explain which party is responsible for payment of these exactions, the customer or the utility.

**The specific relief requested**

The City requests that the OPUC interpret this rule the same as they interpreted this rule’s “sister” provision, OAR 860-022-0042(4). Specifically, that this rule does not shift the responsibility to pay these exaction onto its customers, but that the utilities remain responsible for the payment of these fees.

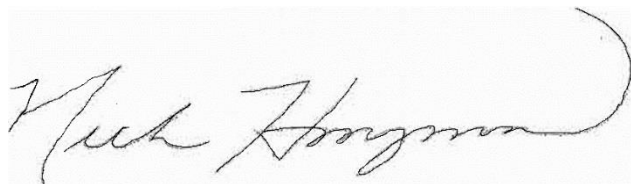
**The name(s) and contact information of the City of Portland and any other person(s) to have legal rights, duties or privileges that will be affected by the request.**

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Sincerely,



Nicholas D. Hooyman, J.D., LL.M.

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<sup>13</sup> OAR 860-022-0040(6)

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