CITY OF PORTLAND

OFFICE FOR COMMUNITY TECHNOLOGY

Ted Wheeler, Mayor
Jennifer Cooperman, Chief Financial Officer

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111 SW Columbia Street
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PETITION FOR DECLARATORY RULING

Date: March 8, 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.

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www.portlandoregon.gov/revenue

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 from a case from the U.S. Court of Appeals for the 5th Circuit, *City of Dallas v. FCC*.[1] 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."[2] 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."[3]

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…"[4] 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."[5]

The OPUC regulates "Oregon's investor-owned electric… companies."[6] 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 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*

[1] 165 F.3d 341 (1999)
[2] Id.
[3] Id.
[4] Id.
[5] Id.
[6] https://www.puc.state.or.us/Pages/about_us.aspx, as of March 8, 2019.

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. They 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.[7] 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."[8] (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."[9]

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[10] 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[11]) 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 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[12]," and explain which party is responsible for payment of these exactions, the customer or the utility.

The specific relief requested

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[7] See exhibit A
[8] Id. Page 3
[9] Id. Page 5
[10] OAR 860-022-0040
[11] See Exhibit B, the email from former OPUC employee Phil Nyegaard on October 11, 2004
[12] OAR 860-022-0040(6)

They 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.

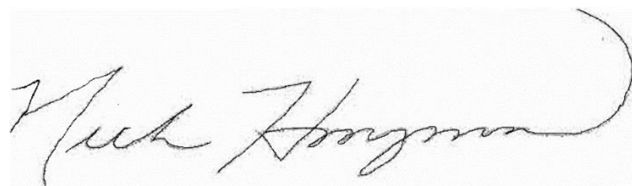
The name(s) and contact information of the City of Portland and any other person(s) to have legal rights, duties or privileges that will be affected by the request.

City of Portland
Thomas W. Lannom, Director- Revenue Division
111 SW Columbia Street, Suite 600
Portland, OR 97201
(503) 823-5157
Thomas.Lannom@portlandoregon.gov

PacifiCorp
Norm Ross, Tax Director
825 NE Multnomah Street, Suite 1050
Portland, OR 97232
Norm.Ross@pacificorp.com

Portland General Electric
Jeff Stevens, Manager- Corporate Accounting
121 SW Salmon Street, 1WTC0504
Portland, OR 97204
Jeff.Stevens@pgn.com

Sincerely,



Nicholas D. Hooyman, J.D., LL.M.
Revenue Auditor, City of Portland
(503) 865-2866
Nicholas.hooyman@portlandoregon.gov

EXHIBIT A

DRAFT

ORDER NO.

ENTERED

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 329

In the Matter of the Amendment of OAR 860-022-0040, 860-022-0042, 860-022-0045, 860-034-0330, and 860-034-0340, Relating to City, County, and Local Government Fees, Taxes and Other Assessments.	)))))	ORDER

DISPOSITION: AMENDMENTS ADOPTED

On July 8, 1997, the Public Utility Commission of Oregon opened this docket to consider amendments proposed by its Staff to OAR 860-022-0040, 860-022-0042, 860-022-0045, 860-034-0330, and 860-034-0340, relating to city, county, and local government fees, taxes and other assessments.

On July 10, 1997, the Commission filed a Notice of Proposed Rulemaking with the Oregon Secretary of State. Requests for hearing were filed, as were written comments. On October 14, 1997, the Commission filled a Notice of Rulemaking Hearing setting a public hearing for December 3, 1997.

On December 3, 1997, Thomas G. Barkin, an Administrative Law Judge for the Commission, presided over a public hearing in Salem, Oregon. Additional written comments were filed by January 12, 1998.

The Commission considered this matter at its Public Meeting on April 7, 1998. The Commission decided to adopt the amendments set out in Appendix A to this order.

The Proposed Rules

Staff modified its proposed rules in several ways during the proceeding in response to comments from the participants. The final version is set out in Appendix A.

DOCKETED

Amendments to OAR 860-022-0040, 860-022-0045, and 860-034-0340

Staff's proposed amendments to these three rules involve "housekeeping" changes consistent with revisions adopted by the Commission in dockets AR 337 and AR 338 (Orders No. 97-442 and 97-443). These changes involve word usage, sentence structure, and punctuation. No objections were raised to these changes. They are appropriate and are adopted.

PacifiCorp requests that OAR 860-022-0040 be amended to remove the limitation (3 percent for gas utilities and 3.5 percent for electric, steam, and water utilities) on the exactions which may not be itemized or billed separately to customers. It contends that the likely restructuring of the electric industry will make "unbundling" of items on utility bills, including taxes, helpful to consumers in determining their choice of a provider.

Staff and other parties suggest that PacifiCorp's proposal is premature because restructuring will not be a reality in Oregon for some time. The Commission agrees with Staff and will not adopt PacifiCorp's suggestion.

Amendments to OAR 860-022-0042 and 860-034-0330

Staff Position. These rules concern privilege taxes, fees, and certain other assessments imposed on telecommunications utilities by cities.[1] Staff proposed some housekeeping changes to these rules which were not contested. Staff also proposed some substantive changes to these rules designed to make the rules clearer and to provide for more equitable treatment of ratepayers. Changes to the substantive provisions of each rule were contested.

Under the existing rules, the aggregate amount of various exactions made by a city on a telecommunications utility up to 4 percent of gross revenues (defined as revenues derived from exchange access services, less net uncollectibles) is allowed as operating expenses for rate-making purposes and is not to be itemized on customers' bills or billed separately. The amount above that limit is to be charged pro rata to customers of basic local access services within the city and itemized or billed separately.

Staff argues that the existing rules do not apply to any city tax not based on gross revenues, such as those based on net income or payroll taxes. The proposed amendments attempt to treat all city taxes equally, regardless of name and regardless of whether they are based on revenues, net income, or some other basis. Staff notes that some cities now impose or may implement taxes and fees on telecommunications utilities

[1] OAR Chapter 860-022 deals with rates for utilities; Chapter 860-034 deals with small telecommunications utilities.

which do not fit within the definition of a gross revenue based tax or which have been given names which may suggest that the tax is outside the statutory 7 percent limitation on privilege taxes set out in ORS 221.515. The city of Eugene, for example, has enacted an "Annual Telecommunication Registration Fee" which may be outside the statutory limitation on privilege taxes. Portland has a long standing business income tax which is not subject to the limitation in ORS 221.515. Staff believes other cities may enact new ways of raising revenues that may be included in a utility's operating expenses and thus "hidden" from the ratepayers/taxpayers. Sections (1) and (2) of the amendments to these two rules therefore seek to bring within the scope of the rules every type of exaction that a city might impose on a telecommunications utility, except property taxes (*ad valorem* taxes).

Staff argues that the amendments will make the burden of payment of the exactions more equitable by increasing the proportion of the exactions that is itemized and collected from the ratepayers living in the city imposing the exaction. Taxes which are recovered in a utility's base rates are paid by all customers of the utility, wherever situated, not just by those who live in the taxing jurisdiction and who thus benefit from the taxes and fees. Taxes which are paid to the telecommunications utility directly by the customer, on the other hand, are paid by those benefiting directly from the tax. Thus, increasing the proportion of taxes which is itemized will apportion the burden more fairly.

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. Staff also argues that the proposed amendments will allow telecommunications utilities to pass on city tax increases and decreases to customers immediately instead of in a later rate proceeding.

Staff argues that its amendments do not affect the amount of taxes or other exactions that cities may charge telecommunications utilities. Moreover, in Staff's view, the changes would have no financial impact on telecommunications utilities. The aggregate amounts that appear on bills may change in some instances. Customers will thus be more aware of the amounts of and changes to city assessments.

Position of Certain Cities. The League of Oregon Cities and the cities of Portland, Springfield, Eugene, Wilsonville, Albany, Sandy, Medford, Newberg, Bend, and Hillsboro filed comments. They supported many of the modifications to the proposed rules made by Staff during the course of the proceeding. All, however, opposed the final version of both OAR 860-022-0042 and 860-034-0330. The discussion below summarizes the prevailing sentiment of the cities. The Commission recognizes, however,

that not all of the participating cities asserted every position set out below.

The cities argue that the changes proposed by Staff would significantly alter the measurement of the amount of exactions which must be itemized on the customers' bills. According to the cities, the taxes included in the 4 percent limitation on unitemized exactions would be increased and the base used to make the calculation would be shrunk. The changes would thus increase the exactions which would be itemized and billed directly to the customers. According to the cities, the amendments would shift the tax burden from the corporations to the individual customer without any examination of whether public policy justifies such changes. The amendments would in effect create a new "sales tax." Since the Commission does not have tax-making authority, this revision of the taxes on utilities "to create a tax on customers that merely flows through the corporations" is improper.

The cities also assert that the proposed changes may violate the 1996 Telecommunications Act. According to the cities, the new provisions will allow telecommunications utilities to subsidize their tax burden by shifting the taxes onto their customers. The additional expenses of tracking these funds and paying them to the appropriate city would be recoverable regulatory costs to the telecommunications utility. Other businesses, including competing telecommunications providers, might not be able to effect such shifts for economic and accounting reasons and would have no way of directly recovering the attendant costs. The competing telecommunications providers would thus be at a disadvantage vis-à-vis existing telecommunications utilities. This state of affairs would violate § 253(a) of the Telecommunications Act, which prohibits states from materially inhibiting the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.

DISPOSITION

The amendments to OAR 860-022-0040, 860-022-0045, and 860-034-0340 were not opposed by any party. They are adopted. As noted above, we do not adopt at this time PacifiCorp's suggestion that OAR 860-022-0040 be further amended to remove the percentage limitations for gas, electric, steam, and water utilities.

The amendments to OAR 860-022-0042 and 860-034-0330 were contested. We will discuss those two rules in some detail.

The amendments are designed to clarify our policies and make them internally consistent. Staff points out that differences may now exist in the treatment of various exactions, depending on their basis or even their names. The amendments seek to reduce that disparity and provide for uniformity of treatment. We conclude that they accomplish these goals.

Some of the cities argue that the amendments change the payer of the taxes or fees involved or 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. The amount of exactions cities may levy is not changed by the amendments. The amendments do, however, change the groups of customers who pay. They increase the proportion of the taxes that are paid by the residents of the city imposing the tax rather than by the entire ratepayer base of the utility. This is fair, because those living in the jurisdiction get the greatest benefit from whatever the taxes finance. Customers of the utility who live outside the city will also benefit from the services and infrastructure provided through the city's use of the tax expenditures, but the benefit to them will, in general, be much less than the benefit to the city's residents. Of course, people in a city who are not customers of the utility get a "free ride," since they neither pay the rates nor pay the taxes directly. The Commission can do nothing about that, however. There is no method within our jurisdiction to spread the tax among all those who potentially benefit from it. Thus, the proposed amendments, while not leading to a perfect symmetry between payment and benefit, move the rules closer to symmetry.

The Commission does not accept the cities' argument that the proposed amendments will violate the 1996 Telecommunications Act. We see no reason that competing telecommunications service providers cannot pass through the taxes to their customers in the same fashion that telecommunications utilities will do under the amendments: by putting them on the bill, collecting them from the customers, and passing them on to the taxing authority. If they choose not to do so, for competitive or other strategic reasons, that choice cannot reasonably be construed to make the Commission's rules violative of the Act. We note that no actual or prospective competitive telecommunications provider has raised this issue in this proceeding. We are therefore skeptical that this issue is of real concern to them.

Staff argues that the amendments will prevent Oregon cities from adopting taxes that would be "hidden" by our present rules. Of course, it is not our job to come between local governments and their constituents or to act as a tax watchdog. Nevertheless, we do believe that the taxes that affect utilities and their customers should be explicit. The proposed amendments will move us toward that goal. The cities have not provided any sound reason why the nature and amount of exactions levied against telecommunications utilities should be covert, nor have they advanced any reason that the utilities should have to recover the exactions through the rate-making process rather than directly from the customers who benefit most from them.

Some of the cities suggest that the Commission or Staff should have consulted with the cities before proposing to adopt the amendments in question. Of course, the Commission wants to be apprised of the views of all affected parties before

making a decision on a policy matter. However, that consultation need not come prior to our Staff's initial proposal to adopt, amend, or repeal a rule. It can come during the public review of the rule, as it has in this case. As noted above, 10 cities and the League of Oregon Cities have expressed their views in writing and at the public comment hearing. It is clear that we are now well informed of the views of those affected by these proposed changes.

In summary, we conclude that the proposed amendments will clarify the rules and provide for more equitable treatment of various exactions made by cities upon telecommunications utilities. They are adopted.

ORDER

IT IS ORDERED that the amendments to OAR 860-022-0040, 860-022-0042, 860-022-0045, 860-034-0330, and 860-034-0340, set out in Appendix A to this order are adopted. They will be effective upon filing with the Oregon Secretary of State.

Made, entered, and effective ______________________.

BY THE COMMISSION:

____

DRAFT

Viki Bailey-Goggins
Commission Secretary

A person may petition the Commission for the amendment or repeal of a rule pursuant to ORS 183.390. A person may petition the Court of Appeals to determine the validity of a rule pursuant to ORS 183.400.

EXHIBIT B

Subject: FW: Any confirm,ing documentation that affirms PUC position? - 1997's AJR 329

-----Original Message-----
From: NYEGAARD Phil [mailto:phil.nyegaard@state.or.us]
Sent: Monday, October 25, 2004 7:51 AM
To:
Subject: RE: Any confirm,ing documentation that affirms PUC position? - 1997's AJR 329

I don't have anything in writing to document my discussion with The person I talked to from the company was He works in the Portland headquarters.

-----Original Message-----
From:
Sent: Friday, October 22, 2004 12:43 PM
To: NYEGAARD Phil (OR)
Subject: RE: Any confirm,ing documentation that affirms PUC position? - 1997's AJR 329

Thank you again. Are there any documents (i.e. written correspondence?) you can provide me that illustrate these discussions with (or any other ILEC) or an indication of whom you spoke to? I don't want to make any mistakes in interpretation if (or any ILEC)voices a different opinion as we work with them on related issues. Thank you as always

Telecom & Cable Program Manager

-----Original Message-----
From: NYEGAARD Phil [mailto:phil.nyegaard@state.or.us]
Sent: Monday, October 11, 2004 8:29 AM
To:
Subject: RE: ROW related or not? 0 1997's AJR 329 ...can you clarify intent please

Let me add one point of clarification because we have discussed this language with in the past. The word "shall" does not indicate that must pass the additional assessment on to its local customers. is free to "eat" the charge if it wishes. The PUC's point is that the additional assessment will not be put into the company's revenue requirement and passed on to the general body of customers.

-----Original Message-----
From:
Sent: Friday, October 08, 2004 3:19 PM
To: , NYEGAARD Phil;
Subject: RE: ROW related or not? 0 1997's AJR 329 ...can you clarify intent please

860-022-0042(4) states: "The aggregate amount of all privilege taxes and fees and other assessments imposed upon a large telecommunications utility by a city, which does not exceed 4 percent of local access revenues, shall be allowed as operating expenses for rate-making purposes and shall not be itemized or billed separately. 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."

I think 860-022-0042(4) is pretty clear that the rule applies to all city assessments, whether they are for rights of way or something else. So if City A imposes some special tax, will have to add it to the bills of customers with City A.

-----Original Message-----
From:
Sent: Friday, October 08, 2004 1:04 PM
To: , NYEGAARD Phil (OR);
Subject: RE: ROW related or not? 0 1997's AJR 329 ...can you clarify intent please

Thank you , this is a good section for information.

I may have been unclear in what I am seeking about the PUC's 1997 intent. I am hoping to obtain confirmation of the PUC intended context. As I read Q 5 - 8 below, it appears the context of the PUC's action in AJR 329 was limited to city fees, taxes, surcharges, and other assessments upon an ILEC RELATING TO USE OF THE PUBLIC WAY. AM I correct in my perception? Thus, if an individual city adopts a utility tax that is NOT related to use of the rights of way, and not related to ORS 221.515 (which only relates to rights of way use), am I correct that AJR 329 does NOT apply, thus the ILEC is not REQUIRED to pass it on (but such a pass-on would remain permissible as it is for any other carrier)? Thank you - P

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City Fees and Assessments

Q5. What fees and assessments may a city charge a telecommunications provider or utility?

Cities may charge franchise fees, privilege taxes, business taxes, and other