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NO. 65928-6

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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*Puget Sound Energy, Inc.,*

Appellant,

vs.

*City of Bellingham, Finance Department,*

Respondent.

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**BRIEF OF RESPONDENT CITY OF BELLINGHAM, FINANCE  
DEPARTMENT**

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ORIGINAL

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## I. INTRODUCTION

This is a utility tax case. PSE is an electric utility engaging in business in the City of Bellingham. All of PSE's gross income is subject to the City's electric utility tax. In an attempt to lower its tax bill, PSE claims that it also engages in so-called "non-utility" business activities and that revenues from these activities are not subject to City electric utility tax. Seeking to be compared to retailers rather than similarly situated utilities, PSE claims that the City's utility tax scheme violates the uniformity requirement and rate limitation in RCW 35.21.710 and the Equal Protection Clause of the federal and state constitutions. Finally, in contravention of controlling precedent, PSE claims its gross income does not include amounts charged to and collected from its Bellingham customers to pay City electric utility tax.

## II. RE-STATEMENT OF THE ISSUES

A. Whether PSE's total gross income from all sources was subject to the City's six percent (6%) electric utility tax without exception for revenues from sources other than electricity sales.

B. Whether the City's utility tax scheme complies with the uniformity requirement and rate limitation in RCW 35.21.710 and the Equal Protection Clause of the federal and state constitutions.

C. Whether PSE's utility tax charges collected from Bellingham customers were properly included in its gross income.

### III. RE-STATEMENT OF THE CASE

PSE provides electric light and power to customers in Bellingham. CP 381. As an electric utility, PSE is subject to the City of Bellingham's electric utility tax pursuant to Bellingham Municipal Code ("BMC") § 6.06.050(D). The electric utility tax is based on the total gross income from PSE's business activity in Bellingham. BMC § 6.06.050(D); *see also* BMC § 6.06.020(A). PSE passes this tax on to its Bellingham customers as part of its charges for electricity service. CP 69, 72-73.

PSE is appealing utility and B&O tax assessments issued by the City. CP 383-389. The City engaged Taxpayer Recovery Services, LLC ("TRS") to perform an audit of PSE with respect to business activities engaged in by PSE for sales of electricity and steam within Bellingham. CP 382. There is no dispute that Bellingham assessed tax and penalties against PSE in the amount of \$919,662.11 for the audit period January 1, 2004 through September 30, 2008 ("audit period"). CP 381-382. The assessment consisted of \$680,316.76 in utility tax and \$239,345.35 in penalties. CP 382. In response to the City's tax assessment, PSE filed its complaint seeking a judgment declaring the City's tax assessments illegal and also seeking refunds of all taxes, interest and penalties imposed. CP 389.

#### IV. ARGUMENT

##### A. Standard of Review on Appeal.

Appellate review of a decision to grant summary judgment is de novo, in that an appellate court engages in the same inquiry as the trial court, which is to determine whether “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 278, 937 P.2d 1082 (1997) (*quoting* CR 56(c)). A material fact is one on which the outcome of the case depends. *Atherton Condo. Ass’n. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

##### B. Tax Assessments Are Presumed Correct on Appeal.

Placing the burden of proving the assessment wrong upon the taxpayer is consistent with law established in this state and throughout the country. According to McQuillin,

**The burden of proving the illegality of an assessment is on the one who contests its validity, generally the taxpayer, and it is incumbent upon him to sustain his contentions by adequate proof . . .**

16 McQuillin, *Municipal Corporations*, § 44.124, 3<sup>rd</sup> Ed. Revised

(emphasis added). Other texts set out the same idea:

[T]axes are presumed to be just and legal, and the burden rests upon one assailing the tax to show its invalidity . . . . With respect to questions strictly involving burden of proof, it has been held that one who seeks a recovery of a tax already paid has the burden of establishing the facts which show its invalidity, and the same is true with respect to one seeking to enjoin the collection of a tax. Further, the burden of proof is upon one claiming that a statute authorizing the imposition of a tax is unconstitutional . . .

72 Am. Jur. 2d, "State and Local Taxation," § 1151 (emphasis added).

See also *Nathan v. Spokane County*, 35 Wash. 26, 34, 76 Pac. 521 (1904),

*Pier 67, Inc. v. King County*, 89 Wn.2d 379, 384, 573 P.2d 2 (1977), and

cases cited therein.

C. As an Electric Utility, 100% of PSE's Gross Income Is Subject to the City's 6% Utility Tax.

The City's tax treatment of PSE as an electric utility is proper.

Under Bellingham's electric utility tax scheme, the *taxable incident*<sup>1</sup> is the privilege of "engag[ing] in or carrying on the business of selling or

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<sup>1</sup> Bellingham's tax system, like any other, can fundamentally be described as follows:

To any tax system, there are three basic elements. First, there must be an **incident** that triggers the tax; a taxable incident is an identifiable activity that the legislature has designated as taxable. The second element, the tax **measure**, is the base upon which the amount of tax is determined. Finally, there is the tax **rate** that is multiplied by the tax measure, to determine the amount of the tax due.

1B Wash. Prac. § 72.3 (1997) (Emphasis added).

furnishing electric light and power” in the City. BMC § 6.06.050(D). PSE claims that only its revenues from electricity sales per kilowatt hour within the City are subject to City utility tax, and all other revenue from sources other than electricity sales is so-called “non-utility revenue” and is instead subject to B&O tax under either the retailing or service classification. PSE’s arguments are flawed for several reasons.

1. Based on the Plain Language of BMC § 6.06.050(D) and RCW 35.21.870, the Taxable Incident Is the Privilege of Engaging in an Electrical Energy Business.

Bellingham Municipal Code (“BMC”) chapter 6.06 imposes taxes on various utilities doing business in Bellingham. Specifically, § 6.06.050(D) imposes a six percent (6%) tax “[u]pon every person engaged in or carrying on *the business* of selling or furnishing electric light and power.” (Emphasis added.) Section 6.06.050(D) further provides that the tax measure is “the total gross income from *such business* in the city.” PSE advocates for an overly narrow interpretation of § 6.06.050(D), arguing that it refers only to per kilowatt hour electricity sales (“selling or furnishing electric light and power”) rather than the entirety of PSE’s business activities in Bellingham (“the business”). PSE refers to its other revenue as so-called “non-utility” revenue, which includes revenue from

sales of steam<sup>2</sup>, retail sales and leases of tangible personal property<sup>3</sup> other than steam, transformer rental charges, late payment fees, billing initiation charges, connection and reconnection charges and disconnection visit charges. CP 69, 75. These revenue sources are all part and parcel of PSE's electrical energy business.

PSE's position is further inconsistent with the state authorizing statute, RCW 35.21.870, which expressly authorizes cities to "impose a tax on the privilege of conducting an electrical energy . . . *business*" at a rate not to exceed six percent absent voter approval. RCW 35.21.870(1) (Emphasis added). RCW 35.21.870(1), authorizing a tax on the privilege of conducting an electrical energy business, supports the City's position that all of PSE's revenues, however designated, are part and parcel of PSE's electrical energy *business*. Significantly, PSE has not offered any evidence to show that these other parts of its business are unrelated to its primary business as an electrical energy utility; absent such proof, the City's assessment must stand. PSE would not engage in any of these business activities *but for* its electric utility business; it does not operate

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<sup>2</sup> The parties entered into a settlement agreement regarding steam sales; thus, the tax treatment for steam sales is not at issue on appeal.

<sup>3</sup> PSE collects hardware, software and equipment lease charges from its local subcontractor, Quanta Services, Inc. ("Quanta"), under a lease agreement dated January 23, 2007. CP 123, 229-273. Quanta handles utility construction, operation and maintenance services for PSE in Whatcom County, among other counties, under the Master Services Agreement, also dated January 23, 2007. *Id.*

stand-alone retailing and “service and other” businesses separate and apart from its electric utility business. They are all “one and the same” and collectively form the taxable incident, which is the privilege of conducting an electrical energy business in the City of Bellingham.

2. The City’s Broad Definition of “Gross Income” in BMC §6.06.020(A) Necessarily Includes 100% of PSE’s Revenues for Utility Tax Purposes.

Moreover, PSE’s argument that utility tax does not apply to so-called “non-utility revenue” is contrary to the City’s broad definition of “gross income” in its utility tax code:

**A. Gross income means the value proceeding or accruing from the sale of tangible personal property or service, and receipts, including all sums earned or charged,** whether received or not, by reason of the investment of capital in the business engaged in, including rentals, royalties, fee or other emoluments, **however designated,** excluding receipts or proceeds from the use or sale of real property or any interest therein, and the proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like, and without any deductions on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

BMC § 6.06.020(A) (emphasis added). This definition is intentionally broad. It is also clear and unambiguous and, thus, requires no interpretation.

*Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (“In interpreting a statute, [courts] do not construe a statute that is unambiguous.”). Where a statute is clear on its face, its plain meaning should “be derived from the language of the statute alone.” *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002) (citing *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)). Because the measure of Bellingham’s electric utility tax is defined broadly to include “value proceeding or accruing . . . however designated,” it necessarily includes the entirety of PSE’s revenues regardless of source and however designated, not just revenues from electricity sales. For City utility tax purposes, no distinction is made between rate-based revenues and non-rate-based revenues. CP 52. All of these revenues are related to and enable PSE’s business operations as an electrical energy utility, and PSE designating them otherwise does not change how the City’s utility tax code applies to PSE’s revenues. PSE’s revenues from sources other than electricity sales are likewise subject to utility tax because these revenues are derived from the privilege of engaging in an electric utility business and are therefore properly captured in the wide net of gross income, as that term is broadly defined, that is subject to the City’s utility tax. Bellingham legislatively enacted this taxing scheme as authorized by state law and then applied these provisions

and assessed taxes equal to six percent of PSE's total gross income however designated.

3. WAC 458-20-179 ("Rule 179") Does Not Apply to the City's Tax Scheme.

PSE relies heavily upon WAC 458-20-179 ("Rule 179"), as administered by the Washington Department of Revenue ("DOR"), to support its claim that different revenue streams are separately taxable. Appellant's Brief at 6-8. Rule 179 allows some utility revenues to be subject to B&O tax rather than utility tax, yet it has no application to the City's utility tax scheme. PSE's reliance on Rule 179 is misplaced and is a red herring. The City is not bound by DOR's Rule 179, and there is no local counterpart to that administrative rule. Well established legal precedent recognizes that cities are authorized to create their own tax classification schemes unless explicitly restrained by a constitutional provision or legislative enactment, and no such restraints exist here. *Commonwealth Title Ins. Co. v. City of Tacoma*, 81 Wn.2d 391, 394, 502 P.2d 1024 (1972); *see also, Enterprise Leasing, Inc. v. City of Tacoma*, 93 Wn. App. 663, 668-69, 970 P.2d 339 (1999). Thus, the City is not compelled to follow DOR's tax classification schemes and can independently administer its local electric utility tax consistent with state law. There is no constitutional or statutory requirement that only rate-

based revenues can be used to measure a utility tax; conversely, there is no constitutional or statutory objection to including non-rate-based revenues in a utility tax base, especially when those non-rate-based revenues enable PSE to conduct its electric utility business in the City of Bellingham.

4. PSE Incorrectly Argues That Its Business Activities Should Be Taxed Differently.

In further support of its argument that each of its different business activities should be taxed differently, PSE relies on BMC § 6.06.030(B). Appellant's Brief at 7-8. Such reliance, however, is selective and taken out of context. *Id.* at 8, fn. 4. Despite PSE's assertions to the contrary, BMC § 6.06.030(B) does not have the same operative effect as Rule 179, which under the state's public utility tax scheme allows non-rate-based utility revenues to be taxed at the applicable B&O rate. *See* WAC 458-20-179(1) & (4). BMC § 6.06.030(B) provides as follows:

**6.06.030 – Occupation License – Required**

**A.** No person shall engage in or carry on any business, occupation, pursuit, or privilege for which a license or fee is imposed *by this chapter* without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an occupation license.

**B.** Any person engaging in or carrying on more than one such business, occupation, pursuit, or privilege shall pay

the license tax so imposed upon each of the same.

C. Any taxpayer who engages in or carries on any business subject to tax *under this chapter* without having his occupation license so to do, shall be guilty of a violation *of this chapter* for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax on any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

BMC § 6.06.030 (Emphasis added).

BMC § 6.06.030(B) does not support PSE's argument that part of its revenues are subject to City B&O tax instead of City utility tax. Instead, BMC § 6.06.030(B) requires that taxpayers engaging in more than one business to which utility tax applies must pay the utility tax imposed on each such business.<sup>4</sup> Subsection (B) does not mean, as PSE incorrectly suggests, that a taxpayer is subject to utility tax for some activities and B&O tax for others. In fact, when read in its entirety, the plain language of BMC § 6.06.030 limits its application to chapter 6.06 BMC

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<sup>4</sup> The City itself is an example of the correct application of BMC § 6.06.030(B). The City is one taxpayer that owns three separate utility businesses (water, sewer and storm and surface water) and must obtain the applicable occupation license and pay the applicable utility tax of 11.5% for each of its utility businesses. BMC §§ 6.06.050(E), (G) and (J), respectively. CP 28-29. Further, amounts collected as fees from City-owned utility customers are considered utility revenue and are therefore included in total gross income for City utility tax purposes. *Id.* The City's tax treatment of its own utilities is consistent with its tax treatment of other utilities, such as PSE, engaged in business in the City of Bellingham. *Id.*

(“Occupation Tax and License”) and neither references nor relates to B&O taxes in any way, as demonstrated by the multiple references to “this chapter” throughout this section. B&O taxes are separately imposed under an entirely different and unrelated chapter of the City’s code, that is, chapter 6.04 BMC (“Business and Occupation Tax Code”). CP 52-53. Simply put, BMC chapters 6.04 (B&O Tax) and 6.06 (Occupation Tax and License) are entirely separate. *Id.* Thus, subsection 6.06.030(B) does not advance PSE’s argument that its business activities other than electricity sales are subject to the B&O tax rather than the City’s electric utility tax.

In its briefing to the trial court, PSE attempted to illustrate its point that different business activities are subject to different tax rates using a music store as an example. CP 41-42. In the music store example, the selling and leasing of instruments is taxed at the retail rate whereas lessons are taxed at the service rate. *Id.* This example is helpful to show the flaws in PSE’s arguments because although it makes sense in the context of a music store, it makes no sense as to PSE’s business. A non-utility business (*e.g.*, music store) is subject to B&O tax at different rates depending on the type of business activity (*e.g.*, retailing for instrument sales or “service and other” for lessons), whereas the City’s utility tax does not have different classifications and corresponding rates by activity type (*e.g.*, retailing, wholesaling, manufacturing and extracting), as is the

case for the B&O tax. *Cf.* BMC § 6.04.050 & § 6.06.050. The music store example is irrelevant as to PSE; it is a self-serving, apples-to-oranges (utility-to-non-utility) comparison. Simply put, the City has chosen to treat utilities as a separate and distinct class from non-utility businesses. Separate tax treatment of utilities is supported by well-established precedent. *United Parcel Serv., Inc. v. Dep't of Rev.*, 102 Wn.2d 355, 367-69, 687 P.2d 186 (1984); *see also, Bates v. McLeod*, 11 Wn.2d 648, 654-55, 120 P.2d 472 (1941) (“In the matter of classifying the subjects of taxation, the legislature has a very wide discretion . . . the question of what persons shall constitute the class is one primarily for the legislature to determine, and its determination cannot be interfered with by the courts unless clearly arbitrary and without and reasonable basis.”). The bottom line is that PSE is not a retailer such as Wal-Mart or Target and should not be taxed as such. Rather, it is taxed as an electrical energy utility business.

D. The City’s Utility Tax Scheme Complies With the Uniformity Requirement and Rate Limitation in RCW 35.21.710 and the Equal Protection Clause of the Federal and State Constitutions.

PSE claims that the City’s utility tax scheme violates the uniformity requirement and rate limitation in RCW 35.21.710. The City disagrees. RCW 35.21.710 merely requires uniformity of rates on general business taxes and establishes the overall rate limit; significantly, it is not applicable

to municipal utility taxes. Municipal utility taxes are subject to an entirely different rate limitation found in RCW 35.21.870(1), which provides that absent voter approval of a higher rate, “[n]o city or town may impose a tax on the privilege of conducting an electrical energy, . . . business at a rate which exceeds six percent.” The City’s electric utility tax meets the applicable six percent rate limitation in RCW 35.21.870(1). The City is fairly and consistently taxing PSE the same as other utilities engaging in business in Bellingham. Further, it makes no difference that, as the only electrical energy business in the City, PSE is a class of one.

PSE also argues that the City unfairly treats PSE differently from other taxpayers because PSE’s sales of tangible personal property to consumers are taxed at the 6% utility tax rate and other companies making retail sales are taxed at the 0.17% B&O tax rate. The Equal Protection clause of the U.S. Constitution and the Privileges and Immunity clauses of both the U.S. and Washington State Constitutions require that persons be treated equally under similar circumstances. *See* U.S. Const. amend. 14, § 1; Const. art. 1, § 12. In the area of taxation, however, a legislative body has very broad discretion in making classifications in the exercise of its taxing powers. *KMS Financial Services, Inc. v. City of Seattle*, 135 Wn. App. 489, 498, 146 P.3d 1195 (2006) (internal citations omitted). A city council has the same powers of classification as the Legislature. *Id.* (internal citations

omitted). If the classification is neither arbitrary nor capricious, and rests upon some reasonable consideration of difference of policy, there is no denial of equal protection of the law. *Id.* (internal citations omitted); *see also, Bucoda Trailer Park v. State*, 17 Wn. App. 79, 81, 561 P.2d 1100 (1977). In other words, one class may be taxed and another may be exempted, as long as the distinction between classes is reasonable and not arbitrary or capricious.

PSE is treated the same as other *utilities* engaging in business in Bellingham and there is no evidence to the contrary. PSE's analysis of this issue is flawed insofar as PSE asks this Court to compare PSE's activities to those of non-utilities, such as retailers. PSE is making an apples-to-oranges comparison because utilities and retailers are not in the same class of taxpayer. A valid comparison requires that PSE be compared to other utilities that are uniformly taxed at the same rate. Again, it is well settled that persons of different classes may be treated differently for tax purposes. *Financial Pacific Leasing, Inc. v. City of Tacoma*, 113 Wn.2d 143, 147-48, 776 P.2d 136 (1989) (citing *Bellevue Sch. Dist. 405 v. Brazier Constr. Co.*, 100 Wn.2d 776, 675 P.2d 232 (1984) (noting that "[I]t would be confusing to tax every separate activity in which a [taxpayer] is engaged at a different rate"). Because the City taxes PSE the same as other electric utilities, there is no equal protection violation. The City's utility tax withstands this

constitutional attack, and the trial court properly granted summary judgment in the City's favor.

E. *Sprint Spectrum Is Clear That Collected Taxes Are Properly Included in the Measure of PSE's Gross Income.*

As discussed *supra*, the City imposes a six percent utility tax on PSE for "engage[ing] in or carrying on the business of selling or furnishing electric light and power." BMC § 6.06.050(D). Although the electric utility tax is imposed on PSE and is its obligation, PSE passes this tax on to its customers within the City as part of the sales price for electricity service. A separate line item labeled "Effect of Bellingham City Tax" is identified on the customer's monthly bill. CP 69, 72-73, 123. Because PSE charges its customers to offset its local utility tax obligation, it must include the collected taxes as additional gross receipts. PSE then must pay tax on its total gross receipts, which include collected taxes.

During the audit period, PSE did not include the utility tax amounts charged to customers when calculating its total gross income for the City's utility tax under BMC § 6.06.050(D). CP 340-42. In other words, PSE improperly excluded from its tax base the amounts charged to and paid by its customers for the City's electric utility tax. *Id.* To illustrate this point, if PSE charged \$100.00 for its electricity services and the tax rate is 6.0%, then PSE collected \$6.00 from its customer to pay the tax and then excluded this

same amount from its calculation of gross income to report gross income of \$100.00 (rather than \$106.00). The City's assessment seeks to recover the tax deficiency created by PSE's methodology as described. Gross income includes amounts collected from customers to pay local utility taxes.

*Sprint Spectrum, L.P./Sprint PCS v. City of Seattle*, 131 Wn. App. 339, 127 P.3d 755 (2006), *review denied*, 158 Wn.2d 1015, 149 P.3d 377 (2006) is directly on point. CP 77-85. In that case, Division One concluded that the plain language of Seattle's definition of "gross income," which is nearly identical to Bellingham's definition, was unambiguous and clearly included the amount Sprint separately charged its customers for utility taxes. *Sprint Spectrum*, 131 Wn. App. 346-47 (CP 81-82). Like Seattle's definition, Bellingham's definition of "gross income" clearly and plainly includes "the value proceeding or accruing from the sale of tangible personal property or service . . . including all sums earned or charged . . . however designated, . . . and without any deduction . . .". BMC § 6.06.020(A) (emphasis added); *see also*, *Sprint Spectrum*, 131 Wn. App. at 346-47 (CP 81-82). Given the City's broad and all encompassing definition of the term "gross income" in its utility tax scheme, PSE's utility tax charges collected from its customers were part of its gross income and should have been included. Therefore, the tax was properly assessed.

In its complaint (CP 388), PSE relies on an unpublished opinion, *Puget Sound Energy, Inc. v. City of Redmond*, 9 Wn. App. 1075 (1999), 1999 WL 988118 (Wash. App. Div. I). CP 304-09. In *PSE v. Redmond*, PSE made the same argument it is advancing against Bellingham now, claiming that utility taxes collected from customers are not part of “gross income” under Redmond’s utility tax. Although the *PSE v. Redmond* court agreed with PSE, the court’s opinion was not published and has since been overruled by the published opinion of this court in *Sprint Spectrum*. See *Sprint Spectrum*, 131 Wn. App. at 352, n. 14. CP 85. The *Sprint Spectrum* court squarely held that amounts a utility charges its customers to recover the cost of the utility tax are included in the definition of “gross income” for tax assessment purposes where, as here, the term “gross income” is defined broadly to include such amounts. *Id.* The *Sprint* court agreed with the City of Seattle that, as a matter of law, the utility tax is a non-deductible business expense, and it is of no consequence that Sprint segregated the utility tax it owed Seattle as a separate item on the customer’s monthly bill for cellular service. *Id.* at 345. Similarly here, it is of no consequence that PSE segregated the utility tax it owed Bellingham as a separate item on its customer’s monthly bill for electricity charges. There is no dispute that the utility tax is PSE’s obligation or that PSE may pass on the tax it owes as part of the price it charges for electricity. The issue is whether PSE must include

amounts collected from its customers to pay the utility tax in its gross income, and the answer is yes. Thus, PSE's reliance on the unpublished *PSE v. Redmond* case is misplaced.

PSE's arguments that *Sprint Spectrum* is not controlling are not persuasive. First, PSE argues that it is not relying on *PSE v. Redmond* as legal precedent but rather as a party to which principles of collateral estoppel apply. Appellant's Brief at 19. Setting aside the sanctionability of relying on an unpublished appellate decision lacking precedential value (*see* RCW 2.06.040 and GR 14.1(a)), principles of collateral estoppel do not apply here. "Collateral estoppel precludes relitigation of the same issue in a subsequent action *between the same parties.*" *Carver v. State*, 147 Wn. App. 567, 572, 197 P.3d 678 (2008) (citing *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004)) (emphasis added). Collateral estoppel might apply if the present dispute involved PSE and Redmond, but because Bellingham is a different party and a separate taxing authority, the doctrine has no application whatsoever. PSE's reliance on *PSE v. Redmond* is misplaced, self-serving and disingenuous. The City properly included collected taxes in the measure of PSE's gross income consistent with the holding in *Sprint Spectrum*.

PSE also unconvincingly argues that its status as a regulated utility distinguishes it from the taxpayer in *Sprint Spectrum*. Appellant's Brief at

18. The statutory authority on which PSE relies – RCWs 80.28.020, .090 and .100 – lends no support for this argument. RCW 80.28.020 simply authorizes the WUTC to fix rates charged by electrical companies, among other regulated utilities, whenever such rates are found to be unjust, unreasonable or insufficient. And, RCWs 80.28.090 and .100 simply prohibit unreasonable preferences or discrimination in ratemaking. PSE cannot show that its customers are the proper taxpayer on whom the obligation to pay utility tax primarily rests. Further, the case on which PSE relies, *Willman v. WUTC*, 154 Wn.2d 801, 117 P.3d 343 (2005), is also inapposite. In *Willman*, a non-Indian landowner who lived within reservation boundaries challenged a tribal tax imposed on utilities that was passed on to the bills of all customers, including non-Indians. *Willman v. WUTC*, 154 Wn.2d at 803. The *Willman* court held that the WUTC did not act in an arbitrary or capricious manner in determining the tribal tax was valid and thus a prudent utility expense that may be passed directly to utility ratepayers within that jurisdiction. *Id.*, at 806-08 (“[V]alid jurisdictional taxes may be passed directly to utility ratepayers within that jurisdiction.”). The fact that PSE is regulated by the WUTC is a red herring and has absolutely no bearing on the analysis. Under the reasoning set forth in the *Sprint Spectrum* case, the City’s assessment properly included collected

taxes in PSE's gross income, and the trial court's proper ruling should be affirmed.

Finally, PSE incorrectly argues that because the *Sprint Spectrum* case was decided mid-audit, its application is limited to periods after January 30, 2006. Appellant's Brief at 19. This argument lacks merit because the *PSE v. Redmond* case on which PSE relies is unpublished and without precedential value, especially as to Bellingham. Thus, prior to January 30, 2006, there was no legal impediment to Bellingham including collected taxes in the measure of PSE's gross income.

#### V. CONCLUSION

As a matter of law, Bellingham's tax treatment of PSE is proper. The taxable incident is the privilege of conducting an electric utility business; accordingly, the total gross income from the entirety of PSE's business activities in Bellingham is subject to the City's six percent utility tax under BMC § 6.06.050(D) and RCW 35.21.870(1). Further, "gross income" is broadly defined in BMC § 6.06.020(A) and includes all of PSE's gross income as an electric utility business, not exclusively revenues derived from electricity sales. Consistent with the *Sprint Spectrum* case, the City's unambiguous definition of "gross income" must prevail over PSE's strained interpretation of an unpublished case. *Sprint Spectrum* is directly on point and squarely holds that collected taxes must

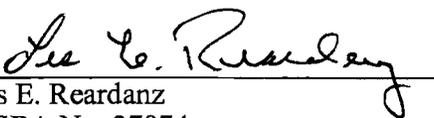
be included in gross income. PSE's reliance on the unpublished opinion in *PSE v. Redmond* is misplaced. PSE's statutory and constitutional challenges also fail as a matter of law. The trial court's order granting summary judgment in the City's favor should be affirmed.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of December, 2010.

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