

No. 78449-3

SUPREME COURT OF THE STATE OF WASHINGTON

DORIS BURNS, RUD OKESON, ARTHUR T. LANE, KENNETH GOROHOFF and WALTER L. WILLIAMS, individually and on behalf of the class of all persons similarly situated,

Appellants,

v.

THE CITY OF SEATTLE, THE CITY OF SHORELINE, THE CITY OF BURIEN, THE CITY OF LAKE FOREST PARK, THE CITY OF SEATAC and THE CITY OF TUKWILA,

Respondents.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Seattle and the suburban cities argue in their respective briefs that the respondent cities negotiated and agreed to the fees specified in the franchises, and thus it cannot be said that the fees were “imposed” as prohibited by statute. According to the ordinary meaning (and common usage) of the term “impose,” however, an illegal fee can be “imposed” by contract as well as by an ordinance or other legislation. Furthermore, the fees here were in fact “imposed” by the suburban cities in ordinances offering the franchises, which Seattle then accepted. No matter what the cities may call them, the fees that are imposed by the franchise agreements at issue here are expressly prohibited by RCW 35.21.860.

II. ARGUMENT

A. The Respondent Cities’ Definition of “Impose” Would Render RCW 35.21.860 Essentially Meaningless.

Seattle stresses that the franchise agreements were not “unilaterally” imposed by the suburban cities, and thus it argues the agreements do not violate RCW 35.21.860. See Brf. at 12. Similarly, the suburban cities refer to the “plain language” of the statute as being “limited in scope to prohibiting the unilateral imposition of fees or charges upon an electric utility for use of a city’s rights-of-way.” Sub. Brf. at 2, (emphasis added). Both Seattle and the suburban cities are reading the word “unilateral” into the statute, but that word is absent from the actual

language. The statute states simply that a city may not “impose a franchise fee or any other fee or charge of whatever nature or description upon . . . light and power . . . businesses.” RCW 35.21.860(1). There is nothing in the language, history or purpose of the statute that suggests its scope is limited to the “unilateral” imposition of such fees or charges.

In an effort to support their positions, Seattle and the suburban cities cite definitions for the term “impose” from Black’s Law Dictionary and Merriam-Webster’s Collegiate Dictionary. Sea. Brf. at 12; Sub. Brf. at 25-26. As noted in the ratepayers’ opening brief at 27-28, however, the actual and commonly understood meaning of the term “impose” is broader. The first, non-obsolete definition in Webster’s Third New International Dictionary, the dictionary generally used by Washington courts,¹ is: “3b (1): to make, frame, or apply (as a charge, tax, obligation, rule, penalty) as compulsory, obligatory, or enforceable.” That definition embraces making a fee “compulsory, obligatory, or enforceable” by contract, as well as by authority or force. It also comports with common usage, where it is not uncommon to refer to duties or obligations as imposed “by contract,” or “by tradition,” or “by common sense,” or in

¹ “Washington courts use Webster’s Third New International Dictionary in the absence of other authority.” *State v. Glas*, 106 Wn. App. 895, 905, 27 P.3d 216 (2001), *rev’d on other grounds*, 147 Wn.2d 410, 54 P.3d 147 (2002); *see also State v. Yancy*, 92 Wn.2d 153, 155, 594 P.2d 1342 (1979) (Washington Supreme Court “generally uses” Webster’s Third New International Dictionary).

numerous other ways besides by “force” or “authority.” Indeed, numerous Washington cases and statutes in diverse contexts refer expressly to fees, charges, duties or obligations that are imposed “by contract” rather than by force or legal authority.²

The suburban cities also argue that there is a hard-and-fast difference between obligations “imposed by contract” and obligations “imposed . . . upon” a party. Sub. Brf. at 25 n.9. The suburban cities are incorrect. Washington cases frequently refer to obligations “imposed upon” a party by contract. *See, e.g., Epperly v. City of Seattle*, 65 Wn.2d 777, 784, 399 P.2d 591 (1965) (court analyzed whether contract between city and contractor “imposed upon the city any duties . . . which the law does not normally place upon an owner”); *Smith v. Gen. Elec. Co.*, 63 Wn.2d 624, 627, 388 P.2d 550 (1964) (court noted that plaintiff was seeking to “obtain the benefits of a contract while avoiding the obligations which it imposed upon her”); *Obde v. Schlemeyer*, 56 Wn.2d 449, 454, 353 P.2d 672 (1960) (vendee may maintain action against vendor for fraud or deceit in transaction even though he has not complied with all duties

² *See* App. Brf. at 28 n.25. The suburban cities are correct that such cases and statutes do not address the language in the statute at issue. Sub. Brf. at 28-29. In fact, to date no reported cases address the language at issue in the subject statute. That is not the proposition for which the ratepayers cite those cases and statutes. They cite them to show that restrictions, obligations and other duties are often deemed “imposed” by contract, and thus the meaning of the word “impose” is not generally limited to “unilateral,” non-contractual situations, as advocated by the respondent cities.

“imposed upon him by the contract”) (quoting 24 Am. Jur. 39, *Fraud and Deceit* § 212); *Gall Landau Young Const. Co. v. Hurlen Const. Co.*, 39 Wn. App. 420, 429, 693 P.2d 207 (1985) (defendant performed all duties “imposed upon it by the contract”); *Amant v. Pacific Power & Light Co.*, 10 Wn. App. 785, 791, 520 P.2d 181 (1974) (defendant’s “contract with the city imposed upon [defendant] a duty of inspection”) (all emphasis added).

Contrary to Seattle’s assertion (Sea. Brf. at 12-13), the ratepayers are not asking the Court to ignore the term “impose.” Rather, they are asking the Court to give the term its common meaning, using the complete definition of the term. If the Court were to accept the meaning of the word “impose” advocated by the respondent cities, the statute would be rendered essentially meaningless. That is because a franchise can only be entered into contractually (*i.e.*, a city cannot “impose” a franchise on a utility). *See, e.g., City of Lakewood v. Pierce County*, 106 Wn. App. 63, 74, 23 P.3d 1 (2001) (“Until both parties agree on terms, no franchise exists”).³ Thus, the statutory prohibition against imposing franchise fees on an electric utility can have meaning only if the prohibition applies to

³ Contrary to another mischaracterization by Seattle, the ratepayers have not cited *City of Lakewood* for the proposition that “a franchise agreement cannot include other terms.” Sea. Brf. at 14. They cite *Lakewood* for the proposition that franchises, and by extension franchise fees, are always imposed “by contract” because that is the only way they can be imposed. *See* App. Brf. at 25, 32.

franchise fees that are imposed upon a party by contract, since that is the only way a franchise fee can be imposed. Since a franchise can only be created by contract, it follows that when the legislature stated that a city could not “impose” a franchise fee, it meant that the city could not lawfully impose such a fee under a contract to which the franchisee was a party, *i.e.*, to which the franchisee had agreed. To accept the respondent cities’ interpretation of the statute, one would have to ignore Washington law on the creation of franchises. That could not have been the legislature’s intent.

In sum, even if the fees here are deemed to have been imposed by contract rather than by the ordinance adopted by each suburban city, they are prohibited by RCW 35.21.860. There simply is no merit to the respondent cities’ argument that fees agreed to in a negotiated contract cannot be “imposed” and therefore are not prohibited by statute.

B. Washington Case Law and Related Statutes Show that the Legislature Did Not Intend to Allow Cities to Contract Around RCW 35.21.860.

The court’s “primary objective in interpreting a statute is to ascertain and give effect to the intent of the Legislature.” *Washington PUDs’ Utilities Sys. v. PUD No. 1 of Clallam County*, 112 Wn.2d 1, 6, 771 P.2d 701 (1989). Intent must be determined primarily from the language of the statute. *Id.* If, however, intent is not clear from the

language of the statute, then the court may resort to statutory construction. *Id.* In construing a statute, “courts may glean legislative intent from a consideration of the legislative history of the statute, as well as from an examination of other statutes dealing with the same subject.” *Id.* at 7.⁴

Seattle argues that RCW 35.21.860 is unambiguous. Sea. Brf. at 12. The ratepayers believe the statute is unambiguous as well, but obviously the parties have different constructions of the meaning of the term “impose” in RCW 35.21.860. It is the ratepayers’ position that the legislature could not have intended for cities to be able to so easily evade the statutory prohibition against payment of a franchise fee by contracting around it. In fact, the very language of the statute – considered as a whole, as it must be⁵ – shows that the legislature purposely chose not to provide a contractual exception to the prohibition of franchise fees.

Seattle argues that the ratepayers have misconstrued the exception for voluntary agreements in RCW 82.02.020, and that the statute is intended to allow for the substitution of money for the dedication of specific property. Sea. Brf. at 14. Seattle misses the point. RCW 82.02.020, which was enacted as part of a broad session law that also created RCW 35.21.860 (*see* Laws of 1982, 1st Ex. Sess., ch. 49 (CP 510-

⁴ See the ratepayers’ opening brief at 5-8 for a description of the legislative history underlying RCW 35.21.860.

⁵ See *Port of Seattle v. State Dept. of Revenue*, 101 Wn. App. 106, 113, 1 P.3d 607 (2000).

16)), allows a municipality to enter into “voluntary agreements” for the collection of certain development fees. It shows that the legislature is fully capable of providing exceptions to statutes and detailing under what circumstances parties can execute agreements that counter other statutory provisions.⁶ The legislature did not provide for a “voluntary agreement” exception in RCW 35.21.860 that would allow the imposition of franchise fees, and this establishes its intent not to do so. *See State v. Cronin*, 130 Wn.2d 392, 399, 923 P.2d 694 (1996) (“Where the legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent”).⁷

Furthermore, both the history of the legislation (*see* App. Brf. at 5-8) and its fundamental purpose (authorizing certain revenue-raising measures for local governments and restricting or limiting others, for the protection of taxpayers and ratepayers) show that the legislature intended to prevent cities from circumventing the legislative restrictions by the simple expedient of entering into a contract. For example, the same

⁶ The legislature did not, however, give parties free rein to execute agreements that countered other parts of RCW Title 82. Voluntary agreements under RCW 82.02.020 must comply with specific provisions regarding how payments must be held, expended and refunded. RCW 82.02.020 (1) & (2). Also, a municipality is not allowed to require any payment as part of any voluntary agreement, unless the municipality can establish that the payment is necessary as a direct result of the proposed development. RCW 82.02.020(3).

⁷ It also is noteworthy that when the legislature amended RCW 35.21.860 in 2000 to add references to telecommunications and cable TV service providers, it created an exception for a particular kind of “agreed” charge, but again chose not to create such an exception to the prohibition on franchise fees for electric utilities. *See* RCW 35.21.860(e).

legislation that enacted RCW 35.21.860 (Laws of 1982, 1st Ex. Sess., ch. 49, § 2 (CP 510)), prohibiting cities from imposing franchise fees on electric utilities, also enacted RCW 35.21.870 (*id.* at § 4), prohibiting cities from imposing an electric utility tax exceeding 6%. Under the reasoning of Seattle and the suburban cities, would it be permissible for a city and an electric utility to negotiate and agree to a contract under which the utility is required to pay a 9% utility tax to the city? The answer is clearly “no,” but that apparently is the respondent cities’ position.⁸ Obviously the legislature’s purpose in § 4 (RCW 35.21.870) was to protect utility ratepayers from excessive utility taxes, and it is equally obvious that the legislature also intended § 2 (RCW 35.21.860) to protect utility ratepayers from excessive franchise fees or other such charges.

The ratepayers do not claim, as argued by Seattle (Sea. Brf. at 15), that a voluntary agreement of any kind violates RCW 35.21.860. Rather, they claim that a franchise agreement that imposes a fee on an electric utility’s business is prohibited by statute. This does not prohibit, for example, agreements by the utility to put its wires underground in exchange for a promise by the suburban cities to grant certain easements

⁸ The practical effect of the franchise payments here is equivalent to imposing a 9% utility tax on City Light revenues from sales to suburban customers, 6% going to Seattle’s general fund and 3% to the suburban cities’ general funds. *See* App. Brf. at 18, 47-48. This was the scheme the cities adopted for “sharing” the utility tax on City Light’s sales to customers in the suburban cities. *Id.* at 9-16.

or similar such agreements.

Seattle also claims that the ratepayers have misconstrued the import of *Nolte v. City of Olympia*, 96 Wn. App. 944, 982 P.2d 659 (1999). Sea. Brf. at 15. In *Nolte*, a city and a developer signed a utility extension agreement which required the developer to pay fees to the city, *i.e.*, the fees were imposed by contract. The developer later challenged the fees, and the court held that the fees imposed by the contract were not authorized by statute and thus were invalid charges. Here, the respondent cities have entered into agreements requiring Seattle to pay fees that are prohibited by statute. As in *Nolte*, the franchise agreements are the “vehicle” for the collection of the fees. 96 Wn. App. at 951.

Seattle argues that the situation in the instant case is different than in *Nolte*, because in *Nolte* the city conditioned its approval of the development on the developer’s payment of the impact fees. Sea. Brf. at 15. The “coercion element” cited by Seattle (*id.*) in an attempt to distinguish *Nolte* is also present in the instant case. The suburban cities conditioned their granting of the franchises to City Light on the utility’s agreement to pay the fees in question. Seattle emphasizes that City Light was not required to accept the franchises offered by the suburban cities (Sea. Brf. at 15-16), but the same could be argued of the developer in *Nolte*. The developer was no more required to accept a utility extension

agreement in that case than City Light was required to accept the franchise agreements here. Both the developer in *Nolte* and City Light here agreed to pay the fees in question because they wanted to continue their respective businesses. The real holding of *Nolte* is that the city was illegally “imposing” a fee, even though the developer agreed to pay the fee in a contract with the city.

C. The Cities’ Authority to Enter into Contracts Is Not at Issue; Their Violation of a Statute Is at Issue.

The ratepayers are not challenging the respondent cities’ authority to enter into contracts generally; they are challenging the legality of specific contract provisions that violate a statute. Thus, the authority cited by the suburban cities for the proposition that cities have authority to enter into contracts is completely beside the point. Sub. Brf. at 18-19.

The suburban cities also make the broad statement that “RCW 35.21.860 does not limit the Suburban Cities’ authority to contract.” Sub. Brf. at 19. The suburban cities are obviously incorrect; the statute most certainly does limit their authority to enter into contracts that impose illegal franchise fees or other such prohibited charges on an electric utility.

D. The Respondent Cities Cannot Avoid the Restrictions Contained in RCW 35.21.860 by Claiming the Fees Are Consideration for the Suburban Cities’ Promise Not to Form Their Own Utilities.

Parties cannot lawfully agree to do by contract that which is prohibited by law. Regardless of whether a city is acting in a

governmental or proprietary role, a contract provision that violates the law is invalid. *See, e.g., Mincks v. City of Everett*, 4 Wn. App. 68, 480 P.2d 230 (1971) (taxpayer brought action challenging legality of contract between city and advertising company; court held that advertising company's contract with city to erect and maintain courtesy bus benches in return for being allowed to place advertisements on benches violated city ordinance prohibiting placement upon sidewalk of any object except certain enumerated containers and city ordinance prohibiting maintenance of any obstruction upon sidewalk for purposes of fastening advertisement; thus, contract was void and unenforceable).

As in *Nolte, supra*, the respondent cities here have argued that the parties to the franchises have agreed to the fee and therefore it should be allowed under contract law. However, that argument is no more sustainable here than it was in *Nolte*. Parties cannot lawfully agree to violate the law. Nor can they lawfully circumvent a statutory prohibition on franchise fees simply by agreeing to call them something else.

1. The suburban cities' desire to obtain a share of Seattle's utility tax revenues is the real reason for the fee.

The history of the negotiations between Seattle and the suburban cities is described in some detail in Appellants' Brief at 9-16. That history shows, beyond any honest dispute, that the real purpose of the payments in question was to serve as a means for Seattle to "share" with the suburban

cities a portion of the revenues received by Seattle's general fund from the utility tax on City Light's sales to customers in the suburban cities. That fact was candidly explained in an August 1998 memorandum from Lake Forest Park's city administrator to the city mayor describing a meeting where the suburban cities had "completed successful discussions" with City Light about the terms of the new franchise agreements. CP 641 (quoted in App. Brf. at 14-15). The memo explained that the parties had agreed that City Light would make the tax sharing payments in the "format" of consideration for the suburban cities' promise not to form their own utilities, in the belief that "by not calling it" a franchise fee or a utility tax rebate, it would be legal. The result of that agreement was (1) to allow the suburban cities to reach their goal of obtaining a portion (about 50%) of Seattle's utility tax revenue on sales to suburban customers, (2) to allow Seattle's general fund to keep the full 6% utility tax on City Light's sales to suburban customers, and (3) to saddle City Light and its ratepayers with what amounted to an illegal 9% tax on suburban sales.⁹

⁹ The memo explained that (i) City Light had offered to "return" to the suburban cities the 6% tax on the power portion of the sales to suburban customers (amounting to approximately 50% of the total of those sales), (ii) the suburban cities "did not take a position that the transfer of monies had to be in a particular format," (iii) the memo's author had "suggested we use a format similar to" an arrangement between Tacoma City Light and two Tacoma suburbs in which the utility's payment was said to be in return for the suburban cities' promise not to form their own utilities, and under which the Tacoma parties "believe that by not calling it a franchise fee, or a utility tax rebate, it satisfies the

2. Substance controls over form.

The respondent cities never address the cases cited by the ratepayers for the proposition that the substance of a contract prevails over its form. *See* App. Brf. at 36-40. These cases show that a court will look to what the true purpose of a contract is, rather than what it is called. *See, e.g., Sullivan v. White*, 13 Wn. App. 668, 670-71, 536 P.2d 1211 (1975) (“test of substance over form has been uniformly applied in this State”); *see also State v. PUD No. 1 of Klickitat County*, 79 Wn.2d 237, 241, 484 P.2d 393 (1971) (despite fact PUD called program an “installment sales program,” court held transactions were in fact loans that violated the state constitution).

For example, in *Rouse v. Peoples Leasing Co.*, 96 Wn.2d 722, 638 P.2d 1245 (1982), the court found that an open-ended car agreement that was termed a “lease” was functionally a loan, and thus the agreement was subject to usury laws. The court noted that the proper first test was to look to the substance rather than the form of the agreement to determine whether it was usurious. “[F]ailing to do this would render usury law nugatory because usury could effectively be hidden behind the form.” *Id.*

conditions in current state law” [referring to the prohibitions on taxing another municipality and on charging franchise fees to electric utilities], and (iv) City Light’s superintendent said that that arrangement “works best for the City of Seattle also” because it requires the payments to the suburban cities to come from City Light rather than Seattle’s general fund, allowing the general fund to retain the full 6% utility tax. CP 641-43.

at 726 (quoting *German Sav., Bldg. & Loan Ass'n v. Leavens*, 89 Wash. 78, 82, 153 P. 1092 (1916)). It is only after this test is applied that a court is authorized to apply the test quoted by the suburban cities (Sub. Brf. at 29-30), which is that if a contract is susceptible of two constructions, one lawful, and the other unlawful, the former will be adopted. *Id.* at 726-27. To hold otherwise “would allow a skillful party to negate the application of the usury laws simply by characterizing a transaction so that it would not be a loan or forbearance in form but would accomplish the same end and not be susceptible to usury laws. This is not nor should it be the law in Washington.” *Id.* at 726.

Thus, what matters is the substance of what the franchise agreements provide, not the “format” of the mechanism for making the payments and not what the contracting parties have agreed to “call” the payments.¹⁰

3. Section 4.2 of the agreements belies the cities’ claims.

The substance of the franchise payment provision in the agreements belies the respondent cities’ claim that the payments are

¹⁰ Of course, despite the parties’ agreement to try to circumvent the applicable legal prohibition by “calling” the payments consideration for the suburban cities’ promise not to form their own utilities, in actual practice the parties consistently referred to the payments as franchise fees. Contrary to the suggestion in the respondents’ briefs, the parties called the payments franchise fees not just in casual, shorthand conversations between lower level municipal employees, but in such formal contexts as annual budgets, city council minutes, formal reports, remittance advices, correspondence between the cities, accounting records and other internal documents. *See* App. Brf. at 20-21.

intended as consideration for the suburban cities' promise, supposedly of great value to City Light, not to form their own utilities. This conclusion is inescapable from the way § 4.2 of each agreement works. Under that provision, if judicial or legislative action prevents Seattle from collecting a utility tax on any portion of the revenues derived by the utility from customers in the suburban city, City Light's payments to the suburban city will be reduced by an equivalent amount.

But if some new judicial or legislative action comes along and reduces the amount of utility tax payable by City Light on suburban revenues, that could not possibly reduce the value to City Light of the suburban city's promise not to form its own utility (if anything, it might increase the value of that promise, because it would mean the utility could keep more of its revenues instead of paying them to Seattle's general fund as taxes). Section 4.2 therefore makes no sense if the payment is viewed as consideration for the suburban city's promise not to form its own utility. It makes sense only if the payment is viewed as what it was truly intended to be, *i.e.*, a means to share Seattle's utility tax revenue with the suburban cities (if the tax revenue on suburban sales is reduced by judicial or legislative action, under § 4.2 the payment to each suburban city is reduced "by an equivalent amount").

4. Since this action involves a dispute with third parties to the franchise agreements, the court is not barred from looking behind the words used by the contracting parties.

Contrary to the cities' arguments (Sea. Brf. at 18-21; Sub. Brf. at 22-24), neither the parol evidence rule, the context rule, nor any other legal principle bars the court from looking behind the contracting parties' words when the dispute is not between the contracting parties, but rather is a dispute with third parties as to whether the contract is illegal. As one leading Washington commentator explains:

The parol evidence rule applies only to controversies between the parties to the instrument or those claiming under them. It does not apply to a controversy between a party to the instrument and a third person. In the latter situation, the rule bars neither the party nor the nonparty to the instrument from introducing parol evidence at variance with the writing.

5C Karl B. Tegland, *Washington Practice, Evidence Law and Practice* § 1200.5 (4th ed. 1999) (emphasis added), and authorities cited therein.¹¹

5. The fees here are prohibited regardless of their rationale.

The evidence shows beyond legitimate dispute that the cities negotiated the franchise fees in question as a means of sharing the utility

¹¹ See also *Witenberg v. Sylvia*, 35 Wn.2d 626, 629-30, 214 P.2d 690 (1950) (in action against maker of check, admission of holder's testimony as to actual nature of transaction between him and payee did not violate parol evidence rule, despite existence of written agreements, where maker was stranger to written agreements); *State ex rel. Wirt v. Superior Court for Spokane County*, 10 Wn.2d 362, 116 P.2d 752 (1941) (it is well settled that rule against parol contradiction of written contract cannot be invoked against strangers to contract); *In re Matter of Prior Bros. Inc.*, 29 Wn. App. 905, 910, 632 P.2d 522 (1981) (general rule is third parties are not bound by parol evidence rule against parties to writing).

tax revenues received by Seattle's general fund from City Light's sales to suburban customers. The evidence also shows that the idea of saying the fees were consideration for the suburban cities' promise not to form their own utilities was developed as a way to try to get around the statutory prohibitions on imposing franchise fees on an electric utility and on imposing taxes on another municipal entity. In any event, regardless of the true rationale for the fees paid by City Light, the fees are strictly prohibited by RCW 35.21.860, because the statute forbids "a franchise fee or any other fee or charge of whatever nature or description" imposed by a city on the business of an electric utility, unless it falls within one of the specified exceptions. None of the parties claim that any of the specified exceptions apply here. CP 418-19, ¶ 9.

E. The Suburban Cities' Reliance on Florida Law Is Misplaced.

The suburban cities rely on *Florida Power Corp. v. City of Winter Park*, 827 So.2d 322 (Fla. Dist. Ct. App. 2002), for the proposition that a fee which cannot be imposed unilaterally by a city on a utility, may nevertheless be lawfully collected pursuant to the parties' negotiated franchise agreement. Sub. Brf. at 30-32. The Florida case is distinguishable on multiple grounds. First, and perhaps foremost, Florida law on the subject is essentially the opposite of Washington law, in that Florida law expressly allows a municipality to impose a franchise fee in a

franchise agreement (*Florida Power*, 827 So.2d at 324, citing *City of Pensacola v. Southern Bell Tel. Co.*, 37 So. 820, 824 (1905) (a city “may impose a reasonable charge in the nature of a rental” for the use of its streets)), but regards a unilaterally imposed fee as an unconstitutional tax (*Alachua County v. State*, 737 So.2d 1065 (1999)). Second, the issue in *Florida Power* was whether the previously agreed fees were properly chargeable during a “holdover” period after a franchise agreement had expired and was being renegotiated. The utility claimed the “holdover” fees were unconstitutional as a unilaterally imposed “tax,” since there was no agreement in effect during the “holdover” period, whereas the city argued that there was an implied contract similar to that in a holdover tenancy in a landlord-tenant context. Third, the power company was continuing to collect the fee from ratepayers but was not passing it on to the city.¹² The court ultimately adopted the holdover tenancy analogy and upheld the validity of the fees during the holdover period. 827 So.2d 324-25. That decision has no bearing here, where the parties have entered into a contract, which both parties to the contract claim is valid, but which in fact violates an express statutory provision. *See also* App. Brf. at 35 n.30 (citations to statutes and cases from other jurisdictions that recognize the

¹² On subsequent review, the Florida Supreme Court held that the power company would be unjustly enriched by retaining the fees collected from ratepayers. *Florida Power Corp. v. City of Winter Park*, 887 So.2d 1237, 1241 (Fla. 2004).

power of the state to limit a city's authority to negotiate terms for use of city rights-of-way).

F. The Trial Court Abused Its Discretion in Limiting the Class to Ratepayers Residing in Seattle.

The trial court incorrectly applied the standards of CR 23(a) and (b)(1) and (2) to the facts of this case, when it ruled (1) that ratepayers who reside outside of Seattle have different interests in the enforcement of RCW 35.21.860 than ratepayers who reside in Seattle, (2) that the relevant facts and defenses differ materially between ratepayers residing inside and outside Seattle, and (3) that ratepayers in Seattle cannot adequately protect the interests of ratepayers who reside outside of Seattle. CP 355.

1. All of the ratepayers have the same interest in the illegality of the franchise fee payments.

The suburban cities' principal argument is that the interests of ratepayers residing in Seattle differ from those of the ratepayers residing in the suburban cities, because the suburban cities' franchise agreements with City Light provide numerous important benefits to those cities. Thus, according to the suburban cities, it would not be in the best interest of ratepayers in those cities if the franchise agreements were terminated as a result of the ratepayers' claims in this case. Sub. Brf. at 34-40.

The suburban cities' argument makes a distinction without a difference. Their argument is not pertinent to the question of class certification, as it has nothing to do with any of the CR 23 criteria. If the ratepayers succeed in showing that the franchise payments are illegal, that conclusion will be true for all ratepayers. Either the payments made by City Light to the suburban cities violate RCW 35.21.860(1), or they do not. The payments cannot be illegal as to ratepayers in Seattle but not as to ratepayers outside Seattle.

In short, ratepayers who live in the suburban cities are affected by the unlawful franchise payments in the same way as ratepayers who live in Seattle, since the expense to City Light of making those payments is passed along to suburban as well as Seattle ratepayers through rates. If the Court reverses the trial court's grant of summary judgment and ratepayers become entitled to receive refunds of the improperly paid franchise fees, it would be unfair and inappropriate for ratepayers residing in Seattle to receive refunds while those residing in the suburban cities do not.

In any event, the ratepayers' claims in this case cannot cause the termination of the franchise agreements. The ratepayers' claim is only that the franchise payments by City Light are unlawful, not that the agreements as a whole must be terminated. If the ratepayers' claim is upheld and the franchise payments are declared unlawful, then, pursuant to

§ 4.3 of the agreements, the suburban cities themselves will have the option of deciding whether to (a) continue to accept the many benefits of the existing franchise agreements with City Light, (b) renegotiate the agreements with City Light, or (c) terminate the agreements. CP 652, § 4.3. Thus, any termination of the franchise agreements, or any loss of the various benefits of those agreements described by the suburban cities, can come about only by the subsequent choice of the suburban cities themselves, not by any judicial declaration being sought by appellants.¹³

2. Including the suburban ratepayers in the class satisfies the typicality and adequacy elements of CR 23.

CR 23(a)(3) - typicality. The suburban cities do not explain how the interests of ratepayers inside and outside Seattle differ with respect to the issues raised in this case. To the extent that City Light passes the expense of the franchise payments along to ratepayers through rates, all ratepayers are affected in the same way by the respondent cities' same course of conduct. That is exactly what "typicality" means:

A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of

¹³ This point can be illustrated by a simple analogy. Suppose an employer is being sued for employment practices that violate Washington statutes. Depending on the nature of the claims being asserted, the case may or may not be suitable for class certification. The suburban cities' argument here would be analogous to the employer arguing that if he is required by a court to comply with applicable law, then he might decide to shut down the plant, which would be contrary to some employees' interests because they would lose their jobs. This would not be a valid argument against class certification, because the propriety of class certification depends on the issues raised in the lawsuit, not on how the defendant might choose to react to the judgment if the plaintiffs prevail.

other class members, and if his or her claims are based on the same legal theory. [citation omitted] Where the same unlawful conduct is alleged to have affected both the named plaintiffs and the class members, varying fact patterns in the individual claims will not defeat the typicality requirement.

Smith v. Behr Process Corp., 113 Wn. App. 306, 320, 54 P.3d 665 (2002)

(emphasis added); *see also Smith v. Univ. of Wash. Law School*, 2 F.

Supp.2d 1324, 1342 (W.D. Wash. 1998) (when it is alleged that same

unlawful conduct affected both named plaintiff and class sought to be

represented, typicality requirement is usually satisfied, irrespective of

varying fact patterns which underlie individual claims; typicality turns on

defendant's actions toward class, not particularized defenses against

individual class members). The "typicality" test is clearly met here as to

all City Light ratepayers, including those residing in the suburban cities.¹⁴

CR 23(a)(4) - adequacy. The suburban cities also argue that appellants have not satisfied the adequacy requirement as to ratepayers residing in the suburban cities, because the interests of ratepayers in Seattle supposedly conflict with those of suburban ratepayers. Sub. Brf. at

¹⁴ The suburban cities also state: "Appellants presented no support for their contention that all ratepayers' rates would drop rather than rise as a result of this action." Sub. Brf. at 35. The appellants actually make no such "contention" as part of their claim in this case (although electric rates should indeed go down if the ratepayers prevail and all other factors affecting rates stay the same). The central issue in this case is not whether the ratepayer's rates would change as a consequence of this suit. This case is about whether the franchise fees are in violation of RCW 35.21.860. If the Court finds that the fees are illegal and the suburban cities subsequently choose to terminate the franchise agreements under § 4.3, that would be a consequence of their own choice, not a consequence of the ratepayers' claims in this case.

35-37. However, the cases cited by the suburban cities all involved situations where there were actual conflicts between the class members on the issues in the lawsuit, as distinguished from the situation here where any potential adverse effects would result not from the outcome of the lawsuit itself, but from the suburban cities' own voluntary choice in responding to a court decision declaring their present practices illegal.¹⁵

The adequacy test is met in this case, because appellants are represented by competent counsel and all ratepayers are affected in the same way by the respondent cities' same course of conduct.¹⁶

¹⁵ In *In re Northern Dist. of Cal., Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982) (Sub. Brf. at 36), the court determined that a nationwide class action was not appropriate, as the punitive damage standards are not the same in every state, no plaintiff appeared in the appeal in support of class certification, and none of the attorneys involved in the action were willing to serve as class counsel. The situation here is obviously different. The court also analyzed a possible California sub-class under 23(b)(3), which is not at issue here (the class here was certified under (b)(1) and (b)(2), not b(3)). In *Alston v. Virginia High School League, Inc.*, 184 F.R.D. 574 (W.D. Va. 1999) (Sub. Brf. at 36), the plaintiffs claimed gender discrimination and sought an injunction changing the scheduling of sports. The court found a conflict existed among class members because a majority of the female athletes surveyed wanted to preserve the present schedule. That is unlike the subject action, where the municipal respondents' impermissible violation of a statute cannot be preserved as the status quo. Finally, numerous courts have rejected the reasoning in *Gilpin v. Am. Fed'n of State, County & Mun. Employees, AFL-CIO*, 875 F.2d 1310 (7th Cir. 1989) (Sub. Brf. at 36). See, e.g., *Murray v. Local 2620, Dist. Council 57, Am. Fed'n of State, County & Mun. Employees, AFL-CIO*, 192 F.R.D. 629, 633-37 (N.D. Cal. 2000) (noting rejection of *Gilpin* by other courts and finding possible conflict arising from request for punitive damages from union did not bar certification of class under CR 23(b)(1) and (2)); *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 512-13 (D. N.M. 2004) (distinguishing *Gilpin* and noting that even if some class members do not share named plaintiffs' motivation for litigation, that is insufficient to defeat class certification).

¹⁶ See *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978) (citing *National Assoc. of Regional Medical Programs, Inc. v. Mathews*, 551 F.2d 340, 345 (D.C. Cir. 1976), cert. denied, 431 U.S. 954, 97 S. Ct. 2674, 53 L. Ed. 2d 270 (1977)); see generally 1 Newberg on Class Actions § 3.22 at 409-11 (4th ed. 2002); see also *King*

3. Seattle mistakenly relies upon the standards of CR 23(b)(3), when it is CR 23(b)(1) and (2) that are at issue.

Seattle makes the point that “the predominance requirement under CR 23(b)(3) is more exacting than the commonality requirement.” Sea. Brf. at 34. It then purports to apply the CR 23(b)(3) “predominance” standard to the facts of this case. *Id.* at 35. That standard is irrelevant, however, because class certification was sought (and granted as to ratepayers in Seattle) under CR 23 (b)(1) and (2) only, not under 23 (b)(3). CP 355.

III. CONCLUSION

RCW 35.21.860 plainly states that a city may not impose any fees or charges whatsoever on the business of an electric utility, except in certain defined circumstances not applicable here. The statute does not provide that a city is allowed to impose and collect such fees if it does so pursuant to a contract. It also does not provide that it is fine for a city to impose such fees if it obtains the utility’s agreement. After all, there would never be a franchise if the utility did not agree to the city’s terms.

The respondent cities are clearly violating the statute. Under the franchise ordinances adopted by the suburban cities and accepted by City

v. Riveland, 125 Wn.2d 500, 519, 886 P.2d 160 (1994) (“Complete unanimity of position and purpose is not required among members of a class in order for certification to be appropriate”); *Zimmer v. City of Seattle*, 19 Wn. App. 864, 870, 578 P.2d 548 (1978) (“The fact that some members of a class might not wish to benefit by the relief sought does not impair the legitimacy of a class action”).

Light, the suburban cities are charging fees to City Light that are based on the amount of business the utility is conducting in the suburban cities.

The respondent cities urge the Court to adopt an unduly restrictive interpretation of the word “impose” as used in the statute that is contrary to the standard dictionary definition and contrary to common legal usage, and that would render the statute essentially meaningless and would frustrate the legislative purpose of protecting ratepayers from excessive taxes (RCW 35.21.870) and franchise fees (RCW 35.21.860). The Court should uphold the plain meaning and purpose of RCW 35.21.860 and should reverse the trial court’s grant of summary judgment to the respondent cities and direct entry of judgment for the appellant ratepayers.

The Court should also reverse the trial court’s ruling limiting the class to ratepayers residing within Seattle.

Respectfully submitted this 14th day of August, 2006.

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