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No. 84824-6

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF TACOMA, a municipal corporation,

Appellant,

v.

CITY OF BONNEY LAKE, CITY OF FIRCREST, CITY OF
UNIVERSITY PLACE, CITY OF FEDERAL WAY, PIERCE COUNTY,
and KING COUNTY,

Respondents.

Memorandum of *Amicus Curiae* Washington Water Utilities Council

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. IDENTITY AND INTEREST OF AMICUS3

III. ISSUES PRESENTED FOR REVIEW5

IV. STATEMENT OF THE CASE.....5

V. ARGUMENT7

**A. Hydrant-Related Costs are a General Governmental
Obligation and Efforts to Shift Those Costs to Water Utilities By
Means of Indemnity Language in a Franchise Will Result in an
Illegal Tax.....7**

**B. Indemnity Language in Franchise Agreements Does Not
Require Utility to Pay for Hydrant-Related Costs.....11**

**C. Water Utilities Have Broad Discretionary Authority to
Determine Hydrant-Related Costs.....16**

VI. CONCLUSION.....18

TALE OF AUTHORITIES

Cases

<i>Irvin Water Dist. No. 6 v. Jackson P'ship</i> , 109 Wn.App. 113, 34 P.3d 840 (2001)	18
<i>Lane v. Seattle</i> , 164 Wn.2d 875, 194 P.3d 977 (2008).....	passim
<i>West Valley Land Company, Inc., v. Nob Hill Water Association</i> , 107 Wn.2d 359, 729 P.2d 42 (1986).....	17
<i>Winkenwerder v. City of Yakima</i> , 52 Wn.2d 617, 328 P.2d 873 (1958).....	8

Statutes

RCW 24.06	17
RCW 35.80.010	17
RCW 35.92.010	4
RCW 36.55.010	8
RCW 54.16.030	4, 17
RCW 57.08.005	17
RCW 80.28.010	17

I. INTRODUCTION

Amicus curiae Washington Water Utilities Council (“WWUC”) supports reversal of the ruling of the superior court in this case. Specifically, WWUC asks the Court to hold that the general government Respondents have an obligation to pay for fire hydrant related costs within their jurisdictional boundaries and that the indemnity clauses in their franchises with the City of Tacoma (“Tacoma”) do not transfer responsibility for those costs back to the utility.

This Court was very clear when it previously held that fire hydrant-related costs are a “governmental responsibility for which the general government of the area must pay.” *Lane v. Seattle*, 164 Wn.2d 875, 891, 194 P.3d 977 (2008). The Court’s holding applies even when a utility provides extraterritorial service¹ within the boundaries of another general government. Respondents Pierce County and cities of Fircrest, University Place, and Federal Way (collectively “Respondents”)² seek to

¹ For ease of reference, in this brief we refer to a utility’s provision of services to another jurisdiction as “extraterritorial service.” This applies whether it is a city utility providing service in other cities or unincorporated portions of counties (as is the case between the parties in this case) or if it is a non-city utility, including public utility districts, water-sewer districts, and private utilities, who always provide service to citizens residing in general local governments. The Court’s holding in *Lane* is broad enough to cover non-city utilities, including PUDs, water-sewer districts, and private utilities; however specific guidance on this issue would be helpful as well as it is not clear whether the potential differences among these types of entities was addressed in *Lane*.

² The City of Bonney Lake and King County were defendants in the lower court proceedings but settled with Tacoma by paying the applicable hydrant-related costs before the trial court reached its decision.

avoid these costs by virtue of indemnity language in franchises authorizing Tacoma to install and maintain water facilities within their respective rights-of-way.

For the reasons stated herein, the Court should reject Respondents' contention that the indemnity language in franchise agreements that pre-date this Court's decision in *Lane* transfers the responsibility for those costs back to the water utility. If the Court were to adopt the Respondents' position, water utilities throughout the state that operate in rights-of-way pursuant to franchises would have to continue to charge ratepayers for hydrant-related costs, in direct contradiction to *Lane*. The language in indemnification clauses typical to franchise agreements does not require such an incongruous result. Finally, when reviewing Tacoma's methodology of calculating hydrant-related costs of hydrant services, the Court should acknowledge the broad statutory discretion given to utilities to set rates and charges.

The Court's guidance on the three issues raised in this case is important not only to the parties to this case, but to all water utilities and local governments throughout the state that either provide or receive hydrant services and operate within the rights-of-way pursuant to a franchise. The Court's holding in this case will also provide guidance

necessary for local governments and utilities to negotiate future franchise agreements.

II. IDENTITY AND INTEREST OF AMICUS

WWUC is the state association of Washington water utilities including cities, water-sewer districts, public utility districts, mutual and cooperative water utilities, and investor-owned water utilities. The water systems owned and operated by WWUC members serve approximately 80 percent of the state's population.

WWUC is the statewide coordinating group on water law and policy matters affecting water utilities. WWUC's mission is to promote public policies, legislation, and regulations that ensure an adequate quantity of high-quality potable water at the lowest economic and environmental cost. WWUC develops and promotes water policy on behalf of its members by, *inter alia*, monitoring the activities of and providing input to administrative agencies, participating in discussion and debate regarding legislation, and by appearing as *amicus curiae* and intervenor in litigation of state-wide significance.

WWUC is participating as *amicus curiae* in this proceeding because the action addresses important issues to its members that provide water service to a majority of the state's population. The dispute in this case demonstrates that lingering questions remain after *Lane* regarding the

responsibility for costs of hydrant service, especially when a water utility provides service to customers in another local jurisdiction. Public water systems of all forms, including city utilities (like Tacoma and Seattle Public Utilities), special purpose districts (like water-sewer districts and public utility districts), and other entities, provide water service to customers that are within a general purpose government's jurisdiction including cities, towns and counties. *See, e.g.*, RCW 35.92.010 (cities); RCW 54.16.030 (public utility districts); RCW 57.08.005 (water-sewer districts). WWUC members often operate as the provider or receiver of extraterritorial service; like Tacoma, many of WWUC's members provide public water service to customers in other cities and urban areas and many other members have residents who receive water supply from a neighboring water utility for portions of their jurisdiction.

In many instances, these utilities obtain authorization to install and maintain water facilities within the rights-of-way of those local governments through a franchise that includes typical indemnity language, very similar to the indemnity provisions in this case. The question of whether parties can use a franchise agreement to shift hydrant-related costs to the utilities and ratepayers has broad relevance throughout the state to WWUC's members. This case addresses whether those existing franchises can reallocate hydrant-related costs back to the providing

utilities and, ultimately, their customers, in violation of *Lane*.

Additionally, this case will provide guidance to water utilities and local governments throughout the state in drafting franchises post-*Lane*. Thus, WWUC's water utility members and their customers have an interest in ensuring that the issues are addressed and resolved by this Court so that water utilities and local governments can in turn avoid further disputes.

III. ISSUES PRESENTED FOR REVIEW

WWUC incorporates by reference Tacoma's issues presented for review on pages 3-4 of Appellant's Opening Brief ("Tacoma's Brief"), dated November 3, 2010.

IV. STATEMENT OF THE CASE

WWUC incorporates by reference Tacoma's statement of the case in section II of Tacoma's Brief and adds the following.

The issues in this case stem from this Court's decision in *Lane v. Seattle*. Prior to this Court's decisions in *Lane*, utilities typically charged ratepayers directly for fire hydrant-related costs as part of their water service rates. *See, e.g., Lane*, 164 Wn.2d at 891. This Court ended that practice, concluding in *Lane* that hydrant-related costs are a "governmental responsibility for which the general government of the area must pay." *Id.*

While much of the Court's decision in *Lane* pertained to costs of hydrant services provided by Seattle Public Utilities ("SPU") within the City of Seattle, *Lane* also reached the same conclusion where SPU provided extraterritorial service in Lake Forest Park. The Court concluded that Lake Forest Park was obligated to pay Seattle the hydrant-related costs provided by SPU on two principal grounds. First, the Court held that the State Accountancy Act required local jurisdictions to pay for services provided by another jurisdiction. *Id.* at 889. Second, the Court determined that Lake Forest Park required the provision of fire suppression services such that it was a cost it was obligated to pay. *Id.* Lake Forest Park and SPU did not have a franchise that allowed SPU to operate within the rights-of-way, so this Court did not reach the central question in the present case whether indemnity clauses in franchise agreements effectively transfer responsibility for hydrant-related costs back to the utility.³

Following *Lane*, Tacoma ceased charging ratepayers for hydrant-related costs and sent invoices directly to Respondents. Respondents

³ The issue was raised at the trial court in *Lane*, where Shoreline and King County argued to the trial court that its franchise agreement with SPU effectively shifted the costs of fire hydrants back to the utility and the trial court so held. CP 419 ¶ 24 – CP 421 ¶ 8. SPU did not appeal the trial court's ruling on this issue so there is no direct precedential ruling on this fundamental issue.

refused to pay on the basis of their franchise agreements that include indemnity clauses.

V. ARGUMENT

A. **Hydrant-Related Costs are a General Governmental Obligation and Efforts to Shift Those Costs to Water Utilities By Means of Indemnity Language in a Franchise Will Result in an Illegal Tax.**

Lane holds that hydrant-related costs are a “governmental responsibility for which the general government of the area must pay,” even when provided through extraterritorial service.⁴ Respondents in this case are in a virtually identical position to Lake Forest Park in *Lane*. Like Lake Forest Park, Respondents receive water service from another City’s water utility, including hydrants and water for fire suppression purposes. And like Lake Forest Park, Respondents require hydrants and establish fire flow requirements through their land use regulations. Indeed, Respondents concede that they require hydrants.⁵

⁴ *Id.* at 891. Though *Lane* refers generally to costs of hydrants, the facts of that case demonstrate that the costs at issue, and therefore the Court’s holding, refer more broadly to hydrant-related costs. See Tacoma’s Brief at 27-28.

⁵ Brief of Respondents City of Fircrest, City of University Place, City of Federal Way, and Pierce County (“Respondents’ Brief”) at 4 (“Regardless of where their water comes from, local governments like the Respondents must enforce the fire flow mandates of the International Code, which the State requires all cities and counties to adopt.”). See Fircrest Municipal Code 12.04.020(e); University Place Municipal Code 15.04.015(A)(4); Federal Way Municipal Code 13.55.020; Pierce County Code 17C.60.010; 17C.60.160.

Respondents do not challenge these basic premises but argue that their situation is legally different from Lake Forest Park by virtue of indemnity clauses in their franchises with Tacoma. Respondents argue that they can transfer the hydrant-related charges back to the utility and its ratepayers through their franchising authority.⁶ Specifically, Respondents ask this Court to decide that typical indemnity clauses in existing franchise agreements that predate *Lane* effectively allocate those general governmental costs from the local governments and their taxpayers back to the public water utility and its ratepayers.

If the Court rules in Respondents' favor, utilities that provide extraterritorial service and operate within the rights-of-way pursuant to a franchise would need to find a way to fund hydrant-related costs. Respondents' answer to this dilemma is for the utilities to continue to collect hydrant-related costs from ratepayers but to re-characterize those costs as "business expenses."⁷ Respondents concede that their proposed

⁶ Franchises are grants to companies, individuals or partnerships to use the streets to do business with a municipality's residents. Eugene McQuillin, Vol. 12 *The Law of Municipal Corporations* (3d ed) ("McQuillin") §34:1 at 8, 15. Franchises have come to be regarded as "functions delegated to private individuals to be performed for the furtherance of the public welfare and subject to public control." *Id.* at 9 (citing *Winkenwerder v. City of Yakima*, 52 Wn.2d 617, 328 P.2d 873 (1958)). Enabling legislation for cities provides franchise authority. *See, e.g.*, RCW 35A.47.040 (statute authorizes code cities "to grant nonexclusive franchises for the use of public streets, bridges or other public ways, structures or places above or below the surface of the ground for... water..."). *See also* RCW 36.55.010 (county franchise authority).

⁷ *See* Respondents' Brief at 2 ("...if Tacoma did elect to increase rates to account for costs attributable to extra-territorial fire hydrants, this would not violate *Lane* because

approach would have Tacoma (and ostensibly other utilities in the same situation) continuing pre-*Lane* practices of billing ratepayers directly for the costs of hydrant services. *See id.* at 29-30 (“TPU might choose to charge all ratepayers, including those in Federal Way, Fircrest, University Place, and Pierce County, as a cost of doing business. In fact, that is exactly what TPU was doing prior to *Lane*”). However, as argued by Tacoma, this approach is in direct contradiction to *Lane* and would result in an illegal tax. Tacoma’s Brief at 16-23.

Respondents point to *Lane* by analogy, arguing that Seattle’s arrangement with SPU justifies Respondents’ proposed “cost of business” approach in this case. Respondents’ analogy is misguided for several reasons. In *Lane*, SPU had billed Seattle for hydrant-related costs. 164 Wn.2d at 886. To pay for this cost, Seattle chose to increase utility taxes on SPU. *Id.* SPU then raised rates to cover the increased taxes. The

Lane allows a utility to recoup its business costs through rates); *id.* at 10 (“Implicit in *Lane* is the recognition that a utility can recoup its business expenses... via rates, even if the end result is that ratepayers indirectly bear the cost of a general governmental service”); *id.* at 30 n. 8 (“There is an easy solution to TPU’s dilemma: recoup its business costs from its broad ratepayer base.”); *id.* at 31 (“If fire suppression services are provided pursuant to a franchise, the purpose of increasing water rates to cover the cost would not be to raise revenue for Tacoma’s general government, but to compensate TPU for honoring its contractual obligations. Such a rate increase would help pay for the commodity enjoyed by TPU ratepayers – low cost and efficient water service facilitated by the franchises.”); *id.* at 32 (Tacoma taxpayers would not be footing the bill for a service in another jurisdiction; TPU ratepayers would be paying for low-cost, efficient utility service made possible through the franchises.”).

Court rejected the taxpayer plaintiffs' arguments that this approach circumvents the Court's prior holding:

The law is not that Seattle must charge for hydrants to a broad range of taxpayers. Instead, it is simply that cities must have statutory authority to impose taxes and must enact them properly as taxes.

Id. at 887 (emphasis added). Therefore, *Lane* does not support Respondents' proposed approach in this scenario because neither the Respondents nor the utility will have enacted taxes to collect the revenue for hydrant-related costs. Respondents would simply have the operation of a contract substitute for the enactment of taxes. Such a result is not allowed. Respondents cannot use their franchise authority to levy taxes.

Based on the Court's holding in *Lane*, Respondents are clearly responsible for the hydrant-related costs. Respondents can raise taxes for the benefit of the general fund or can cut spending or programs to provide revenue to pay for the hydrant-related costs. However, Respondents cannot rely on a franchise to convert a taxpayer obligation into a ratepayer charge to continue pre-*Lane* practices.

Respondents urge the Court to ignore this central question, arguing that the question of how Tacoma chooses to fund fire hydrant-related costs in the event it cannot recoup such costs from Respondents is "not before this Court" and that the "rate vs. fee' debate is merely academic."

Respondents' Brief at 2, 29. Contrary to their arguments, however, the question is central to the case. It speaks directly to whether the Respondents' proposed interpretation of the franchise language is viable and legal. There are two methods for funding hydrant-related costs: the costs can be recovered as taxes or they can be collected as rates and charges from ratepayers. The logical and exclusive outcome of the Respondents' position is that the utilities will be forced to charge ratepayers for the hydrant-related costs. Thus, if the Court resolves this case without addressing that central question, it will create uncertainty for those utilities serving extraterritorially subject to franchises with indemnity provisions. The absence of this Court's analysis of the "rate vs. fee' debate" will generate further litigation.

B. Indemnity Language in Franchise Agreements Does Not Require Utility to Pay for Hydrant-Related Costs.

Respondents rely on typical indemnity language included in the franchises.⁸ The issue of whether typical indemnity clauses can excuse a local government from paying hydrant-related costs is therefore relevant to the many other utilities and local governments that provide extraterritorial service and operate within a right-of-way pursuant to a

⁸ WWUC observes that the indemnity language of Respondents' five franchise agreements in the record is common or typical to franchise agreements and other municipal contracts. The Court might take judicial notice of this fact.

franchise. The Court's interpretation of the typical indemnification clauses included in the specific franchise agreements at issue in this case will provide guidance that will be relevant to interpretation of the other existing water utility franchise agreements throughout the state. Accordingly, this case has precedential impact that extends beyond the particular contracts before the Court. The Court's resolution of this case will provide needed guidance to utilities and local jurisdictions throughout the state.

Respondents ask this Court to adopt a tortured interpretation of the indemnification clauses to excuse their obligation to pay for the hydrant-related costs. The Court should reject Respondents' interpretation for several reasons.

First, Respondents ask the Court to apply the typical indemnification provisions to disputes between the direct parties to the contract, rather than claims from third parties. As argued by Tacoma, the provisions cannot be read to govern disputes between the contracting parties because it would render absurd consequences. Respondents' interpretation would allow the indemnified parties to avoid fulfilling their contractual obligations by claiming that the other contracting party's action to enforce the contract is a "claim" by a "person" triggering the

duty to indemnify. The parties clearly did not intend this absurd result.

See Tacoma's Brief at 24-25.

Indeed, additional language in two of the contracts reinforces Tacoma's interpretation that the indemnification provisions cover only claims by third parties. The Fircrest and University Place contracts specifically include "claims by the Grantee's own employees to which the Grantee might otherwise be immune under Title 51 RCW..." CP 195; CP 212. This language clarifies that Tacoma would indemnify against claims brought by Tacoma's employees in their individual capacity. It suggests the indemnity covers a narrow class of claims (those brought by third parties) and expands that class to include claims brought by employees. If the parties intended Tacoma to indemnify Respondents against claims brought by the City of Tacoma, they would have similarly specified that awkward result. Moreover, the quoted language would be unnecessary if the parties intended Tacoma to be a "person" under the indemnification provisions.

Respondents also argue that the covenant not to sue in two of the franchises supports their broad interpretation. However, the covenant not to sue is limited by the same reasoning because it only applies to claims brought by any "person." Accordingly, in this proper context, the covenant not to sue would prohibit Tacoma from filing a cross-claim or

other action against Respondents in relation to claims for damages brought by third parties against Tacoma.

Second, Respondents' interpretation of the indemnification language is inconsistent with the scope of the franchise. Through a franchise, utilities obtain "permission to use public streets or rights-of-way in order to do business with a municipality's residents..." See McQuillin at 15. Accordingly, each of the specific franchises at issue in this case generally give Tacoma the "right, privilege, and authority to construct, operate, maintain, replace, and use all necessary equipment and facilities for a water system, in, under, on, across, over, through, along, or below the public rights-of-way and public places" within those cities.⁹

Consistent with this scope, the specific franchises at issue include terms governing the work and operation within the rights-of-way, including provisions governing excavation within rights-of-way (*see, e.g.*, CP 193; CP 208; CP 229; CP 251), restoration following construction (*see, e.g.*, CP 194; CP 210), and permitting for installation of facilities (*see, e.g.*, CP 194; CP 211-212; CP 228). The indemnification provision must be read in

⁹ CP 191 (Fircrest); CP 204 (University Place). *See also* CP 225 (Federal Way grants Tacoma the "right, privilege, authority and franchise to: (a) lay, construct, extend, repair, renew, and replace Facilities in the Franchise Area; and (b) to charge and collect tolls, rates, and compensation for such water service and such uses."); CP 251 (Pierce County grants to Tacoma the "right privilege, and authority to construct, maintain, and operate for the said period of time a water pipeline for a Water System, in, under along, and over the public roads and highways in Pierce County, Washington...").

that limited context. The franchises do not broadly “set the terms for extra-territorial water service,” as the Respondents allege. Respondents’ Brief at 18. Its purpose is more limited. The franchises do not, for example, address costs, terms and conditions of service as would be included in a water supply agreement. It simply gives permission to work and operate within the rights-of-way. The indemnity language must be read in that context. Respondents offer a much broader scope in an effort to support their interpretation that the indemnity is similarly broad. However, the rights and obligations under the franchise are not so broad that the Court can construe the indemnity clause to include the hydrant-related costs.

Finally, each of the indemnity clauses only provides indemnity when it is “alleged or proven that the acts or the omissions of the Grantee [Tacoma] caused or contributed” to the claims, costs, judgments, awards or liability. CP 195 (Fircrest); CP 212 (University Place). *See also* CP 235 (Tacoma indemnifies the Federal Way from claims only “to the extent caused in part or in whole by the acts, errors, or omissions of the Franchisee, its officers, partners, shareholders, agents, employees...”).¹⁰

¹⁰ The indemnity language in Pierce County’s contracts is even more expressly limited. It covers only: (1) damages “for personal or bodily injury”; (2) “damages to property.. arising or alleged to have arisen out of or in consequence of the condition of any equipment or facilities... or alleged to have arisen out of or in consequence of the construction, installation, operation or maintenance of any equipment or facilities...”; or

There is no allegation that the hydrant-related costs are claims, caused in part or in whole, by Tacoma's acts errors or omissions. To the contrary, as noted by the Court, the general government requires the hydrant services and therefore creates the costs. *Lane*, 164 Wn.2d at 889. Moreover, this Court's decision in *Lane* determining that the general government is responsible for the hydrant-related costs is certainly not Tacoma's "act, error, or omission."

C. Water Utilities Have Broad Discretionary Authority to Determine Hydrant-Related Costs.

Tacoma's complaint seeks declaratory relief under RCW 7.24.020 affirming Tacoma's methodology for calculating costs of hydrant services it assessed. Tacoma charged Respondents for the costs of the hydrants as well as the ongoing costs associated with providing the infrastructure necessary to make the hydrants operational and compliant with local and state laws. The Court should affirm Tacoma's authority and discretion to fix rates and charges.

As noted in *Lane*, when a utility provides extraterritorial service, the hydrant-related costs billed to the receiving general government is a fee for services, not a tax. 164 Wn.2d at 890. In general, utilities have broad authority and discretion to calculate hydrant-related costs under

(3) "damages or losses, if any, that may result arising out of the construction , installation, maintenance, condition, or operation of equipment and facilities..." CP 253

their statutory authority to fix rates and charges. Tacoma's authority is established in RCW 35.92.200. Other utilities, both public and private, have comparable authorizing statutes that provide broad discretion to fix rates and charges:

- Code Cities, RCW 35.80.010.¹¹
- Water-Sewer Districts, RCW 57.08.005(3).¹² *See also* RCW 57.08.081.¹³
- Public Utility Districts, RCW 54.16.030.¹⁴
- Private Non-Profit Water Companies, RCW 24.06.¹⁵
- Private For-Profit Water Companies, RCW 80.28.010¹⁶

¹¹ "A code city may provide utility service within and without its limits and exercise all powers to the extent authorized by general law for any class of city or town."

¹² Districts have authority to operate a water system "to furnish the district and inhabitants thereof and any other persons, both within and without the district, with an ample supply of water for all uses and purposes public and private with full authority to regulate and control the use, content, distribution, and price thereof in such a manner as is not in conflict with general law..." (emphasis added).

¹³ District commissioners have statutory authority to fix rates and charges.

¹⁴ A district may operate a water system "within or without its limits, for the purpose of furnishing the district, and the inhabitants thereof, and of the county in which the district is located, and any other persons including public and private corporations within or without the limits of the district or the county, with an ample supply of water for all purposes, public and private, including water power, domestic use, and irrigation, with full and exclusive authority to sell and regulate and control the use, distribution, and price thereof." (emphasis added).

¹⁵ *See also, West Valley Land Company, Inc., v. Nob Hill Water Association*, 107 Wn.2d 359, 729 P.2d 42 (1986) (in dispute over private water company's charges, court holds that private water company is not regulated by UTC).

¹⁶ The rates and charges of a "water company" regulated by the Utilities and Transportation Commission must be "just, fair, reasonable and sufficient."

These enabling statutes provide broad authority to set rates and charges. *See, e.g., Irvin Water Dist. No. 6 v. Jackson P'ship*, 109 Wn.App. 113, 127, 34 P.3d 840 (2001) (“[c]harges imposed by a water district are presumptively reasonable and will be upheld, unless it appears from all the circumstances that they are excessive and disproportionate to the services rendered”). Pursuant to this broad authority, water utilities have reasonable flexibility to select a cost-of-service methodology and calculate hydrant-related costs in consideration of local conditions. Indeed, water utilities throughout the state utilize different methodologies for allocating costs of fire protection services. This range of methodologies is allowed, given the broad statutory authority to calculate costs. Accordingly, in reviewing the City of Tacoma’s calculation of hydrant-related costs, the Court should honor the wide range of methodologies available to utilities in calculating charges.

VI. CONCLUSION

In sum, WWUC urges the Court to reverse the superior court and reject Respondents’ arguments that indemnification clauses in franchises that pre-date *Lane* effectively transferred the responsibility for costs of hydrant services back to the utility. Respondents ask utilities to continue pre-*Lane* practices of billing ratepayers for hydrant-related costs solely by virtue of the operation of the indemnification in the franchise. Such a

result is inconsistent with *Lane*. Moreover, the typical indemnity language included in these franchises at issue and comparable to what is used in many contracts does not address the responsibilities for hydrant-related costs and therefore does not serve to discharge Respondents of their obligations to pay for hydrant services. Finally, in reviewing the third issue before this court pertaining to Tacoma's methodology for calculating costs of hydrant services, the Court should acknowledge the broad discretion given to utilities to set rates and charges.

DATED this 22nd day of July, 2011.

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