

No. 78449-3

SUPREME COURT OF THE STATE OF WASHINGTON

DORIS BURNS, RUD OKESON, ARTHUR T. LANE, KENNETH GOROHOF and WALTER L. WILLIAMS, individually and on behalf of the class of 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.

BRIEF OF RESPONDENT CITY OF SEATTLE

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I. NATURE OF THE CASE

The City of Seattle and the suburban cities of Shoreline, Burien, Lake Forest Park, SeaTac and Tukwila were granted summary judgment by the trial court as nonmoving parties. The trial court decided that the agreements between the cities were not prohibited by RCW 35.21.860. CP 2001-2009. The trial court also limited the scope of the class properly represented by the named plaintiffs in this case to the ratepayers residing within the Seattle city limits. CP 354-355. Plaintiffs seek direct review from this Court on both these questions.

II. COUNTER-STATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Two issues arise from the plaintiffs' Assignment of Errors.

First, does RCW 35.21.860 prohibit municipalities from entering into agreements setting the terms by which one will supply electricity to the other under an agreement, where no costs are imposed by either municipality on the other? Plaintiffs' Assignment of Error 1.

Interpretation of RCW 35.21.860 presents two substantive questions of statutory analysis:

1. Was there an "imposition" of a franchise fee on Seattle by any suburban city?
2. Is the contractual consideration provided by Seattle a "franchise fee" or "charge of whatever nature or description" for the privilege of using the rights-of-

way; or is it a payment for additional benefit as stated in the agreements?

Second, did the trial court properly limit the scope of the class of plaintiffs represented by the named plaintiffs, when named plaintiffs are all Seattle residents and residents of suburban cities pay different rates under the agreements and will be affected differently by the outcome of this case? Plaintiffs' Assignment of Error 2.

III. COUNTER-STATEMENT OF THE CASE

Seattle City Light, a department of the City of Seattle, has provided electric service outside Seattle for decades. Currently, Seattle City Light serves all or part of the cities of Shoreline, Lake Forest Park, Renton, SeaTac, Tukwila, Burien, and Normandy Park, as well as various parts of unincorporated King County. A number of these services are authorized by the agreements that are the subject of this action.

In the early 1990s, a number of unincorporated areas of King County adjacent to Seattle began to consider the merits of becoming cities. In 1995 an unincorporated area directly north of Seattle, served entirely by Seattle City Light, was incorporated into the new City of Shoreline. Shoreline consequently began to consider its options for providing electric service to the residents of this newly incorporated city. CP 1073. That process led to extensive negotiations and to the adoption of a 15-year agreement between Seattle and the City of Shoreline effective

January 1, 1999. CP 1212-1229. Other cities involved in this litigation, after further negotiations, adopted agreements with Seattle that were similar to the Shoreline agreement.

Unlike pre-franchise years, and unlike non-franchise suburban areas today, those cities with agreements may, pursuant to their terms, request customized services, such as “undergrounding” of facilities. The agreements provide that the costs of any such services will be amortized in rates to customers within the requesting city. *E.g.*, CP 1215. As a result of these agreements, the rate ordinance enacted by Seattle at the end of 1999 adopted higher rates for service outside Seattle. CP 1303.

At the time some of these suburban cities were formed in the 1990s,¹ the prevailing theory of marketing electricity and other energy was “deregulation.” One model of deregulation then under consideration would have allowed any customer to buy energy from any source. The unknown future of the energy market created a complex climate of uncertainty for both buyers and sellers of energy during that period. CP 1091-1092.

With the threat of deregulation, Seattle was faced with the prospect that Seattle City Light would have a smaller rate base across which to

¹ Tukwila became a city in 1908; Lake Forest Park in 1961; SeaTac in 1990; Burien in 1993; Shoreline in 1995.

spread costs. Higher rates within the City of Seattle would be a potential result, depending on other circumstances. CP 1134. In addition, Seattle's federal operating license for Boundary Dam, in Pend Oreille County, will expire in 2011. The outcome of the renewal application depends in part on the size of the customer base. The Federal Energy Regulatory Commission is currently considering Seattle's renewal request. Loss of suburban customers could adversely affect the Boundary Dam relicensing. CP 1302-1303. Tacoma Power, a division of Tacoma Public Utilities, had similar concerns during the 1990s. CP 1838-1841.

Within this climate of deregulation, the new cities—most of which were served partly by Seattle City Light and partly by Puget Sound Energy—considered their options for providing their residents with electricity in the future. Shoreline, for example, which was served exclusively by City Light, hired the Charlie Earl Company in September 1997 to assist that city in identifying electrical utility service alternatives as well as to lead Shoreline's eventual negotiations with Seattle. CP 1073; 1110; 1314. Shoreline considered various options, going so far as to issue an RFP for electric service providers other than Seattle City Light. In addition to soliciting proposals from other electric utilities, Shoreline also could have formed "Shoreline City Light" and purchased wholesale energy from Puget Sound Energy or the Bonneville

Power Administration as a new “public-preference” customer (a category of customers eligible for cheaper rates). CP 1314; 1302; 1099; 1118-1119.

Each of these options had difficulties to overcome, as did the option of contracting with Seattle City Light. Each of the options remains open today, including the option for Shoreline to create its own municipal electric utility, should the current agreement expire or be terminated as a result of this litigation. CP 1215-1216; 1302. The same is equally true for the other suburban cities, whose agreements are modeled on the first-adopted Shoreline agreement.

All the suburban cities were aware of their options. Lake Forest Park would have considered other options if Seattle City Light had not agreed to make the payments plaintiffs now challenge. CP 1330-1331. The City of SeaTac likewise was aware that if it could not reach agreement with Seattle City Light other options existed. CP 1347. Tukwila, together with Kent, Renton, SeaTac, and Burien, retained counsel to advise them about the possibility of jointly forming their own electric utility, and Kent put \$100,000 into its budget for consulting expenses. Coincidentally, the then-existing Seattle City Light franchise in Tukwila was under discussion in anticipation of its expiration in 2008, and

Tukwila informed Seattle that it was considering other options, which “grabbed their [Seattle’s] attention.” CP 1207-1208.

Similar discussions and negotiations occurred elsewhere. Tacoma Power and the new City of University Place, incorporated in 1995, entered into a franchise agreement in which Tacoma Power provided consideration to University Place in return for that city’s agreement not to form its own municipal utility during the period of Tacoma Power’s new franchise. Additionally, Tacoma entered into a similar franchise with the newly formed City of Lakewood, incorporated in 1996, in which Tacoma pays Lakewood for a similar agreement not to create its own electric utility. CP 1878-1879; 1882-1921; 1839; 1847-1872.

One concern suburban cities had with the electric service provided by Seattle was that the City of Seattle has the legal authority to tax the gross revenue of Seattle City Light, including revenue derived from serving residents of the suburban cities. Those cities explored ways of obtaining revenue themselves, including setting their own taxes, “tax sharing,” forming their own utilities that they could tax, and other options. Their representatives learned, in the course of exploratory discussion, that new legislation might have been needed to carry out some of the options. They also learned that certain options were thought by some to be

unavailable under controlling statutory or case law. CP 1101. These issues were discussed in the negotiations. CP 1106-1121.

With this background, and after considerable discussion and negotiation, Shoreline and Seattle City Light entered into a 15-year franchise agreement in late 1998, effective January 1, 1999. The Seattle ordinance accepting the agreement provided in part:

Shoreline has agreed that during the term of this franchise it will refrain from exercising its right to create its own municipal electric utility. In consideration for this agreement, Seattle has agreed to pay the City of Shoreline six percent of the power portion of the electric service in Shoreline, and up to six percent of the distribution portion of the electric service upon one year's notice.

Seattle Ord. 119312, passed on December 14, 1998; CP 1431-1434.

The Seattle/Shoreline agreement itself, which was adopted by Shoreline as Ordinance No. 187 authorizing the granting of a nonexclusive franchise to Seattle City Light within the Shoreline right-of-way, provides for payments by Seattle City Light in consideration of Shoreline's promise not to form its own utility. CP 1212-1229. The "Consideration" section of the agreement (CP 1215-1216) is attached to this response as Appendix A, for the Court's convenience.

The agreement entered into by Seattle City Light and Shoreline served as a model for the franchise agreements subsequently made between Seattle City Light and the other defendant cities. All but one was

effective in 1999-2000. The last was Tukwila, which chose to give up its existing, 50-year franchise agreement (which would have extended into 2008) with Seattle in early 2003 to resolve operational and other concerns. CP 1206; 1208. These agreements include the ability to receive city-specific services, such as undergrounding, with any resulting rate changes applied only within that city. The prior franchise agreement with Tukwila contained a requirement that the same terms and conditions for service that prevailed in Seattle would be applied in Tukwila. Each of the agreements also contains an 8 percent cap on the rate differential between the power rates for customers inside Seattle and outside Seattle. Seattle otherwise would have had the option to raise suburban rates to a much higher level.²

² In *Faxe v. Grandview*, 48 Wn.2d 342, 350, 294 P.2d 402 (1956), this Court upheld the validity of minimum water rates for customers outside the city that were 50 percent higher than those inside the city. “The city boundary line, at the very least, divides those customers (inhabitants of the city) for whose primary benefit the system was constructed, from those who have no such claim. The city boundary line also usually serves to divide those customers who have made a capital contribution to the system, who have assumed responsibility for its operation, and who have, through general municipal functioning, contributed to its support and development, from those who have not.” *Id.*, 48 Wn.2d at 355.

IV. SUMMARY OF ARGUMENT

Seattle urges this Court to affirm the trial court in all respects. In denying plaintiffs' request for summary judgment and granting summary judgment to the cities as non-moving parties, the trial court gave the word "impose" its common, ordinary meaning as the legislature intended. The agreements before the trial court were not "imposed" by either party upon the other and thus are not prohibited by RCW 35.21.860. Seattle and each suburban city negotiated a mutually acceptable contract provision in which Seattle agreed to pay consideration to each suburban city in exchange for that city's agreement not to create its own municipal electric utility during the term of the franchise. These are contracts negotiated at arms-length between sophisticated parties, ably represented, and supported by mutual consideration.

With regard to the trial court's decision limiting the scope of the class represented by the named plaintiffs, the trial court properly determined that the Seattle-resident plaintiffs cannot fairly and adequately represent residents of other cities who are charged different rates for different reasons and who bear different risks if plaintiffs prevail.

V. ARGUMENT

A. Standard of review

1. Summary judgment may be granted to a non-moving party

Where the facts are not disputed, summary judgment may be granted to the non-moving party. *Impecoven v. Dept. of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (this Court directed the trial court to enter summary judgment in favor of the nonmoving party because facts were not in dispute); *Schneider Homes v. City of Kent*, 87 Wn. App. 774 777 n.4, 781, 942 P.2d 1096, review denied, 134 Wn.2d 1021 (1997), (granting summary judgment to Schneider, which had requested summary judgment in its response to Kent's motion); *Barber v. Peringer*, 75 Wn. App. 248, 255, 877 P.2d 223 (1994) (holding that because the facts were not in dispute and the decision was an issue of law, summary judgment should be granted to the nonmoving party).

2. Review of a trial court summary judgment ruling is de novo

In reviewing the trial court's granting of summary judgment to the cities, this Court engages in the same inquiry as the trial court, providing de novo review. *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 796-797, 123 P.3d 88, 92 (2005) (affirming summary judgment against taxpayers challenging motor vehicle excise

taxes). *Wallace v. Lewis Cy.*, ___ P.3d ___, 2006 WL 1680946, ¶27 (2006), (Division Two of the Court of Appeals affirms the trial court’s award of summary judgment, dismisses the plaintiffs’ claims and denies their motion to amend the complaint to add additional claims).

3. Review of a trial court class action certification ruling is for abuse of discretion

This Court reviews a trial court’s determination regarding the certification of a class action under CR 23 and the scope of representation by the plaintiffs under the highly deferential “abuse of discretion” standard. *Oda v. State*, 111 Wn.App. 79, 90, 44 P.3d 8, 14 (2002).

B. An unambiguous statute must be given its plain meaning

In reviewing a statute the courts are required to give the language of the statute its plain meaning and to give effect to every word. As this Court has recently and succinctly stated:

Principles of Statutory Interpretation. The aim of statutory interpretation is ‘to discern and implement the intent of the legislature.’ A reviewing ‘court is required, whenever possible, to give effect to every word in a statute.’ Where the meaning of a provision is ‘plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.’ . . . Only when the plain, unambiguous meaning cannot be derived through such an inquiry will it be ‘appropriate [for a reviewing court] to resort to aids to construction, including legislative history.’

City of Olympia v. Drebeck, 156 Wn.2d 289, 295, 126 P.3d 802, 804, (2006) (Internal citations omitted).

RCW 35.21.860 is plain upon its face. Resorting to legislative history, as plaintiffs urge in their brief, is thus inappropriate. *Drebick* at 804.

C. RCW 35.21.860 limits only a city's or town's ability to "impose" a franchise fee; it does not prohibit voluntary agreements

None of the agreements before the trial court was unilaterally "imposed" by a city. Thus they are not within the scope of RCW 35.21.860 (1) which states:

No city or town may impose a franchise fee or any other fee or charge of whatever nature or description upon the light and power, or gas distribution businesses, as defined in RCW 82.16.010, or telephone business, as defined in RCW 82.04.065, or service provider for use of the right of way, except ... [the statute then lists five exceptions irrelevant to this matter]

The term "impose" is commonly defined as putting something in place by authority or force, as with a levy or tax.³ There is no evidence before the court that these agreements were in any fashion "imposed" by the suburban cities upon the City of Seattle, or by the City of Seattle upon the suburban cities.

The language of RCW 35.21.860 is plain and unambiguous – cities and towns may not "impose" a "franchise fee." The plaintiffs requested

³ **impose**, *vb.*, To levy or exact (a tax or duty) 771 Black's Law Dictionary (8th ed. 2004). See CP 1991 for the definition in Webster's Third New International Dictionary (2002).

an improper interpretation of RCW 35.21.860 by asking the trial court to ignore the word “impose.” In direct contravention of the words in the statute, plaintiffs asserted to the trial court that RCW 35.21.860(1) prohibits a city from “receiving” franchise fees or other payments exceeding actual administrative expenses. CP 390. This is an unreasonable extension of the statutory language. This strained interpretation of a plainly worded statute was rejected by the trial court and should not be countenanced by this Court:

Courts construe only ambiguous statutes. When the words in a statute are clear and unequivocal, we must assume the legislative body meant exactly what it said and apply the statute as written. An unambiguous statute is not subject to judicial construction and the court must derive its meaning from the plain language.

Sprint Spectrum v. Seattle, 131 Wn. App. 339, 346, 127 P.3d 755, 759, (2006) (internal citations omitted).⁴

Plaintiffs argue that since a franchise is a form of contract, giving the word “impose” its plain and ordinary meaning would render RCW 35.21.860 meaningless. *Brief of Appellants* at 25. This view ignores the facts of municipal regulation of utilities, most commonly in the context of use of rights of way, as identified in the statute itself. For example, when

⁴ In *Sprint Spectrum* the court upheld as unambiguous the inclusion of Seattle’s utility tax in the definition of “gross income” in the Seattle Municipal Code. *Id.*, ¶ 16. A copy of the opinion was provided for the trial court’s convenience. CP 1464-1469.

a utility seeks to use a municipal right of way, RCW 35.21.860 limits the fee or charge that the city can demand as a condition of that use. In most situations there is no consideration to be exchanged, as occurred here.

Plaintiffs cite *Lakewood v. Pierce County*, 106 Wn. App. 63, 23 P.3d 1 (2001) for the wrong proposition. *Brief of Appellants* at 25. In *Lakewood*, the Court considered whether the City was attempting to extract a fee from the County greater than the City's administrative cost of housing the County's sewer system in its streets and, on the other hand, whether the City could demand that the County pay a fee at all. *Lakewood* does not stand for the proposition, as plaintiffs imply, that a franchise agreement between the parties cannot include other terms: "Both parties agree, at a minimum, Lakewood may negotiate a franchise agreement with the County for the operation of sewer lines under Lakewood's streets, and that Lakewood may grant a franchise to the County if the parties reach an agreement." *Lakewood*, 106 Wn. App. at 69.

Plaintiffs misconstrue the exception for voluntary agreements in RCW 82.02.020. *Brief of Appellants* at 25. The explicit provision in that statute for a voluntary agreement is intended to allow the substitution of money for the dedication of specific property in order to fulfill the obligation to mitigate a direct impact. It does not relate to the terms of an impact mitigation agreement as a whole.

Plaintiffs likewise misconstrue the import of *Nolte v. City of Olympia*, 96 Wn. App. 944, 982 P.2d 659 (1999). *Brief of Appellants* at 33. Plaintiffs forget about the later observation in *Lakewood* quoted above, and argue that *Nolte* holds that a voluntary agreement of any kind violates RCW 35.21.860. But plaintiffs have glossed over a key aspect of the statute that *Nolte* interpreted. In *Nolte*, the plaintiffs had voluntarily agreed to pay an impact fee to the City of Olympia. But the *Nolte* court pointed out the critical definition of “impact fee” in the statute: “RCW 82.02.090 defines an ‘impact fee’ as ‘a payment of money *imposed upon* development *as a condition of development approval.*”” *Nolte*, 96 Wn. App. at 953; emphasis added. Within that definition are two conditions making the agreement invalid in *Nolte*, which are not present in this case: (1) the City of Olympia did not have authority to charge an impact fee, because it does not have the right to grant a development right outside its boundaries, and (2) within the very definition of “impact fee” is the requirement for coercion—demanding an impact fee payment “as a condition of development approval.”

In contrast, the negotiations here were (1) over terms of a franchise the suburban cities had statutory rights to offer and Seattle was not required to accept, and (2) over terms where there was no coercion. Not only is there is no element of coercion built into the definition of the term

“franchise fee” in RCW 35.21.860, the agreements were adopted voluntarily by both Seattle and Shoreline and the other suburban cities.

D. The consideration provided to the suburban cities is not a “franchise fee” for purposes of RCW 35.21.860

The suburban city parties to the agreements before the trial court have validly agreed to forgo forming their own electric utilities in return for payment of valuable consideration under the contracts. To the extent relevant here, RCW 35.21.860(1) provides: “No city or town may impose a franchise fee . . . upon the light and power . . . business . . . except: . . . (b) A fee may be charged . . . that recovers actual administrative expenses” (Emphasis added.)

Plaintiffs theorize that the payments specified under the agreements, in consideration of the suburban cities’ promise not to form their own electric utilities, are in fact imposed franchise fees for use of the right of way within the meaning of the statute. But this theory contradicts the terms of the agreements. Plaintiffs are therefore forced to assert that the payments are in excess of the “administrative costs” permitted under RCW 35.21.860. In order to adopt plaintiffs’ theory, however, this Court must ignore the plain language of the agreements, which make no reference to payment of a franchise fee or to payment of administrative

costs. The trial court properly rejected this overwrought interpretation of statutory language that is plain upon its face.

The agreements before the Court address payments made by Seattle to lessen the risk of losing a part of its service territory through formation of a municipally-owned electric utility by the respective suburban cities (a risk that has unambiguous implications for existing rates paid by ratepayers and the current relicensing process for Boundary Dam). Plaintiffs are not elucidating the meaning of clearly written words, but are seeking to have this Court completely rewrite the agreements, contrary to the rules of contract interpretation in Washington. *Hearst v. Seattle Times*, 154 Wn.2d 493, 511, 115 P.3d 262, 271 (2005).

1. Plaintiffs bear a heavy burden of proof in challenging the reasonableness of the defendants' exercise of their municipal authority to enter into contracts

The cities adopted the franchise agreements by ordinances. Since statutes and ordinances are presumed to be valid, plaintiffs have a heavy burden to succeed in challenging those at issue here. *Louthan v. King County*, 94 Wn.2d 422, 428, 617 P.2d 977 (1980). In interpreting an ordinance, the courts discern and implement the intent of the legislative body. *Tahoma Audubon Society v. Park Junction Partners*, 128 Wn. App. 671, 682, 116 P.3d 1046, 1052 (2005). The courts must give effect to an ordinance's plain meaning. *Id.*

The act of entering into contracts is generally considered to be a proprietary function of a municipality, and the extent of the power to do so is liberally construed. *Branson v. Port of Seattle*, 152 Wn.2d 862, 870, 871, 101 P.3d 67 (2004) (“There is a ‘range of reasonableness within which a municipality’s manner and means of exercising [its] powers will not be interfered with or upset by the judiciary’”); *Hite v. Public Utility Dist.*, 112 Wn.2d 456, 772 P.2d 481 (1989) (in carrying out a statutorily authorized business, municipal corporation’s right to contract is coextensive with that of a private business; municipal corporation’s exercise of proprietary power will be upheld unless the action was arbitrary, capricious, or unreasonable); *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 696, 743 P.2d 793 (1987) (actions taken pursuant to RCW 35.92.050 are proprietary functions). Here, the parties to the agreements have reasonably limited a competitive risk and have exchanged consideration accordingly.

2. Washington determines intent of parties to a contract by the objective manifestation of the agreement

In asserting that defendants have agreed to “franchise fees” that are illegal under RCW 35.21.860(1), the plaintiffs ask the Court to go beyond the unambiguous payment clauses of the agreements and eviscerate the contracts that the cities made. Washington has long followed the

“objective manifestation theory of contracts,” rather than looking to the unexpressed intent of the parties. *Hearst*, 154 Wn.2d at 503. The Court thus imputes an intent corresponding with the reasonable, ordinary, usual, and popular meaning of the words used. *Id.* In *Berg v. Hudesman*, 115 Wn.2d 657, 663-668, 801 P.2d 222 (1990), this Court endorsed and adopted the “context rule” of interpreting contracts to help in determining intent. Under this approach, the trial court’s role is to determine the parties’ intent by focusing on the objective manifestations of the agreement. *Hearst*, 154 Wn.2d at 503-504. This is precisely what the trial court did in this case when it rejected plaintiffs’ strained interpretation of RCW 35.21.860.

Extrinsic evidence is to be used only to determine the meaning of specific words used in a contract. *Hearst* 154 Wn.2d at 503. It should not be used to show evidence of one party’s unilateral or subjective intent about the meaning of the contract. *Id.* Here, none of the parties to any of the agreements seeks to vary the contractual terms.

In *Hearst*, this Court clarified its “extrinsic evidence” decision in *Berg*. Reaffirming the context rule of interpreting⁵ contracts, the court

recognized that intent of the contracting parties cannot be interpreted without examining the context surrounding an instrument’s execution. If relevant for determining mutual intent, extrinsic evidence may include (1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties.⁶

Hearst emphasized, however, that surrounding circumstances and other extrinsic evidence are to be used “to determine the meaning of *specific words and terms used*” and not to ‘show an intention independent of the instrument’ or to ‘vary, contradict or modify the written word.’” *Hearst*, 154 Wn.2d at 503 (emphasis by the Court). The context rule does not allow extrinsic evidence “to emasculate the written expression” of the meaning of contract terms, nor can it be used to show intention independent of the contract. *Id.* Subjective intent “is generally irrelevant if the intent can be determined from the actual words used.” *Id.* at 504.

⁵ “Interpretation” of contracts is the process of ascertaining the meaning of language in the document by examining objective manifestations of the parties’ intent. “Construction” is the process of applying relevant legal principles to the circumstances of a case to determine the legal consequences of the words. *Hearst*, 154 Wn.2d at 493 n.9.

⁶ *Hearst*, 154 Wn.2d at 502, citing *Berg* at 667, which in turn quoted *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973).

The court generally gives words their ordinary, usual, and popular meaning. *Id.*

To the extent relevant here, the contracts address the rights and obligations of the parties so that Seattle can provide electric service to each of the suburban cities, using rights of way within those cities. The contracts further address payments and forbearance for the mutual benefit of the parties to the contracts.

3. Payments in §4 are a material provision of the contract

The provisions of a contract must be construed together, and each provision must be given effect. *Thatcher v. Salvo*, 128 Wn. App. 579, 116 P.3d 1019 (2005). The agreements provide that if the payments provided for in §4 are rendered invalid, the entire contract is subject to renegotiation and cancellation. §4, CP 1215. The payment clause is thus a material provision of the agreement, with potential negative long-term effects on all defendants. The suburban cities have not formed their own electric utilities, and Seattle City Light has regularly made the payments called for under the clause in question. CP 1138; CP 1312.

4. The parties exchanged valuable consideration

Plaintiffs asked the trial court to believe the possibility of the suburban cities forming their own electric utilities was illusory. To the contrary, the record before the trial court was clear. Not only did several

of the cities actually explore that alternative, both historical and current conditions confirm the existence of the risk mitigated by the agreements.

For example, in the early 1900s, the City of Seattle granted a long-term electric franchise to Puget Sound Energy's predecessor, but within a few years began its own utility. Seattle refused to renew Puget Sound Energy's franchise in the early 1950s in favor of serving the total area with its own utility, Seattle City Light. CP 1838-1846.

Providing retail electric service is not a legal monopoly in Washington. In addition to investor-owned utilities, a number of different local governments and special purpose districts have explicit statutory authority to operate electric distribution systems, including cities (RCW 35.92.050), public utility districts (RCW 54.16.040), irrigation districts (RCW 87.03.015(1)), and even water-sewer districts (RCW 57.08.005(3)).

Washington courts have long upheld the right of cities to create their own utility, even when there was an existing utility-provider in that community, and to issue multiple franchises for the same utility service.

Seattle's own effort to sell municipal electric power was challenged early in the last century by supporters of the existing investor-owned utility (Puget Sound Energy's predecessor), who argued that Seattle City Light's only legal function was to provide electricity for

streetlights. The Supreme Court rejected that challenge. *Chandler v. Seattle*, 80 Wash. 154, 141 P. 331 (1914): “A grant of power to provide for lighting the city authorizes the erection and maintenance of an electric plant for lighting the streets, and also supplying, in connection therewith, electric light for the inhabitants of the city in their private homes.” *Id.*, 80 Wash. at 160.

In 1923, the Supreme Court likewise rejected the attempt of a private water company already supplying the Town of Monroe to prevent Monroe from establishing its own competing municipal water utility. *Monroe Water Co. v. Town of Monroe*, 126 Wash. 323, 218 P. 6 (1923). This Court held that the private water company that had issued bonds in reliance on continuing service in the town had assumed the risk of the city forming a water utility:

[C]ertainly where the franchise itself provides that the privileges and rights granted thereunder are not exclusive, the city has the right and authority to construct a municipally-owned water plant without in any wise violating the terms of the franchise, and it will be presumed that the appellant and those holding bonds of appellant secured upon the plant have at all times known of the condition of the franchise.

Id., 126 Wash. at 329.

Nearly thirty years after *Monroe*, this Court again affirmed the authority of a city to create its own municipal utility in competition with

the existing service provider. *PUD No. 1 of Pend Oreille County v. Newport*, 38 Wn.2d 221, 226, 228 P.2d 766, 770 (1951) (a city or town within a public utility district may acquire or construct its own utilities.).

Fifteen years after *Newport*, this Court ruled that a city having granted a franchise to provide electric service in the city could not belatedly act to confine that utility to specific parts of the city and unilaterally change the terms of the franchise. *Tukwila v. Seattle*, 68 Wn.2d 611, 414 P.2d 597 (1966) (rejecting Tukwila’s attempt to confine Puget Sound Energy and Seattle City Light to their historic service areas, to import assumed conditions into a franchise, or to allow one party to unilaterally alter a franchise agreement). “Franchises, whether statutory or by ordinance, have the legal status of contracts binding with equal force, according to the terms thereof, upon the granting authority and the granted entity.” *Id.*, 68 Wn.2d at 615.

No provision in the 1958 Tukwila franchise, however, prevented Tukwila itself from creating a third electric utility in the city – its own – and therefore eventually supplanting both Seattle City Light and Puget Sound Energy. The 2003 Tukwila franchise with Seattle, however, does contain such a provision. Simply comparing Tukwila’s 1958 franchise (CP 1436-1439) with its 2003 agreement with Seattle (CP 1291-1299),

demonstrates that Seattle City Light obtained significant, additional consideration in the more recent agreement.

Unconstrained by any similar condition limiting utility formation, the Port of Seattle has recently acted to establish its own electric distribution system at SeaTac Airport, which previously had received retail electric service from both Puget Sound Energy (South portion) and Seattle City Light (North portion). Now, instead of receiving retail rates for its service, Puget Sound Energy receives only the smaller payment for “wheeling” wholesale energy from Bonneville Power Administration to the Airport. CP 1840. The Port has also asked Seattle City Light to shift to a similar wholesale service for the North part of the airport. *Id.*; CP 1874. The Port has in effect formed “Airport Power & Light,” to the potential financial detriment of its former retail service providers. In addition, if the airport became a wholesale customer of City Light, Seattle would lose the tax revenue now derived from these retail sales outside Seattle. *King County Water Dist. 75 v. Seattle*, 89 Wn.2d 890, 903, 577 P.2d 567 (1978).

By creating its own municipal electric utility to compete with Puget Sound Energy early in the last century and by extending its municipal electric service to the south end of Tukwila in the 1960s, Seattle itself demonstrated the feasibility for another city to create its own electric

utility and to expand its service area, even when that area is already served by another electric utility. The Port of Seattle's recent, successful efforts to secure wholesale power from Bonneville and establish its own electric distribution system at SeaTac Airport is sobering proof that Seattle's and Tacoma's concerns about new suburban cities forming their own electric utilities and supplanting Seattle City Light and Tacoma Power were well-founded and not speculative.

The agreements challenged by the plaintiffs here prevent the host cities themselves from taking actions such as the Port's for the duration of the franchises. The parties have acted in accordance with the terms of the agreements and mutual benefit has accrued.

5. Informal labeling does not change the substance

The plaintiffs rely on evidence appearing in various documents in which a number of people employed by defendant cities referred to the payments made by Seattle to the suburban cities as "franchise fees." Many of the documents relate simply to billing and paying the charges. A number of those people were deposed, and stated that they were unaware there was a statute prohibiting an imposed "franchise fee." To these employees, the term was shorthand for a payment made under the agreements. CP 1316. In general, the people who negotiated the agreements were not the people implementing the agreements. CP 1138.

Imprecision of terminology in day-to-day use, however, cannot be the overriding consideration in applying the *Berg/Hearst* factors, when the result would be to “show an intention independent of the instrument.” The plaintiffs themselves stated the correct principle to the trial court in brief: “the validity or invalidity of a transaction is based on its substance, not what it is ‘called.’” CP 398.

The off-hand request that someone “Xerox this for me” does not mean that a Xerox rather than a Canon copier is being specified. Although the usage may not be legally precise, it is merely common usage for a generic request to photocopy a document. Similarly, the casual use of the short-hand phrase “franchise fee” to describe the bargained-for consideration provided by Seattle cannot alter the plain terms of the agreements themselves.

6. Parties to the agreements concur in their interpretation

Unlike *Hearst*, the *parties* to these contracts agree on their interpretation. Plaintiffs, however, urged a different interpretation upon the trial court. Plaintiffs’ interpretation would require this Court to assume that the elected and managing officials of the defendant cities, as well as their lawyers, determined that “franchise fees” within the meaning urged by plaintiffs were illegal, but nevertheless adopted those fees

through publicly enacted ordinances. This is not a reasonable assumption, and the Court should reject it.

7. Arguing that suburban cities “imposed” “franchise fees” ignores the facts

RCW 35A.47.040 gives code cities the authority, but not the duty, to grant nonexclusive franchises for the use of public rights of way “for transmission and distribution of electrical energy” The statute also provides that the power granted under this section is “in addition to the franchise authority granted by general law to cities.” Here, the suburban cities considered several alternatives for receiving the benefit of electric service to their residents. Seattle also considered the pros and cons of continuing to serve those cities. CP 1134-1136. See, for example, “Providing Utility Services to Existing Customers Outside Seattle,” CP 1441-1444. The suburban cities negotiated for specific new benefits – *e.g.*, accommodating custom service requests, resolving operational (service) concerns, and receiving payments for forgoing the right to establish their own utilities. CP 1208. Pursuant to RCW 35A.47.040, the suburban cities, after exploring their other options, granted the franchises to Seattle City Light. The Seattle City Council has approved each of these agreements.

Those terms, however, were not imposed on Seattle. Seattle agreed to them. If Seattle had not agreed, there would be no franchise. “Until both parties agree on terms, no franchise exists. . . .” *Lakewood v. Pierce County*, 106 Wn. App. at 74. *Lakewood* is a case closely parallel to this dispute, but addressing the reverse question: whether a city may “require” or “compel” a county to agree to its preferred franchise terms. The answer is no: “We assume the legislature means exactly what it says. . . . The legislature used the word ‘grant’ in RCW 35A.47.040, not ‘require,’ and without evidence of contrary intent in the statute, we assume that the statute means ‘grant’ and not ‘require’.” *Lakewood*, 106 Wn. App. at 73. Similarly, Shoreline could not have withheld a franchise and withheld permission to continue providing electric service by insisting that Seattle City Light pay a fee for using the streets greater than Shoreline’s administrative cost. A unilateral demand for higher payment by holding hostage a franchise right is exactly what RCW 35.21.860(1) prohibits.

Insisting on something unlawful as the price for a franchise is what the City of Bothell tried to do to General Telephone in the mid-1980s. Bothell demanded that General Telephone waive the tariff provision set by the Utilities and Transportation Commission providing for cost sharing by the city for requiring undergrounding of overhead utility lines. But this Court rejected Bothell’s attempt to impose its demands as the price of a

franchise: “Bothell thus tried to compel General to accept a franchise that ignored rather than included existing law.” *General Telephone v. Bothell*, 105 Wn.2d 579, 586, 716 P.2d 879 (1986).

In contrast, the consideration set out in §4 of these agreements between Seattle and the suburban cities (see Appendix A) recognizes the independent authority of the suburban cities to establish their own municipal electric utility and to acquire Seattle City Light electric distribution properties for that purpose. In consideration for each suburban city agreeing not to exercise that authority, City Light agrees to pay a certain percentage of revenue derived from the power portion of its service to that city, and if invoked, up to a certain percentage of the distribution portion of the service. CP 1834-1835. It is evident from the record that the risk of the suburban cities forming one or more new municipal utilities was not illusory and that these cities considered options apart from continuing to obtain electric service from Seattle. CP 1314; CP 1073-1074; 1085. Further, a number of south-King County cities collaborated on a possible joint utility. CP 1207. Finally, within three years of the adoption of the Shoreline agreement, the Port of Seattle demonstrated the feasibility of these alternatives by creating its own distribution system and obtaining wholesale power from Bonneville. CP 1840.

Furthermore, neither Seattle nor the suburban cities viewed the consideration paid under §4 of the agreements to be “administrative costs.” Indeed, the record shows that the parties did not contemplate payment of administrative costs. CP 1311. The payments therefore must be taken for what they are: payments in consideration⁷ of the suburban cities’ agreement not to form their own electric utilities.⁸

8. The contract payments plainly are not intended as a tax, nor are they a gift

The contracting parties discussed Seattle’s ability to tax utility revenue derived from suburban retail customers and Seattle’s view that the suburban cities could not tax Seattle City Light for business done within the suburban jurisdiction. Both of these principles are the result of this Court’s decisions.⁹ Plaintiffs, however, urge this Court to leap from this basic legal backdrop of the negotiations to the conclusion that any

⁷ Consideration is “any act, forbearance, creation, modification or destruction of a legal relationship, or return promise” bargained for and given in exchange for the promise. *Guenther v. Fariss*, 66 Wn. App. 691, 696, 833 P.2d 417 (1992) (citations omitted); *see also* Restatement of Contracts § 75.

⁸ The suburban cities cannot be prohibited from allowing a competitor to also serve within the jurisdiction. RCW 35A.47.040. Indeed, most of the cities here receive some of their service from Puget Sound Energy. CP 1204.

⁹ *Burba v. Vancouver*, 113 Wn.2d 800, 809-810, 783 P.2d 1056 (1989) (tax applied to suburban revenue valid, where the taxable event occurs largely within the city), *King County v. Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984) (Algona lacks authority to impose B&O tax on revenue of King County’s solid waste utility).

payment arrangements the parties made must be a tax that the parties knew all along to be illegal. Seattle consistently advised the suburban cities that they did not have the power to tax Seattle City Light operations in each of those jurisdictions according to this Court's holding in *King County v. Algon*. Seattle set up a special meeting with the City of Burien to convey this position when Burien first adopted a utility tax (which was thereafter repealed). CP 1156-1157. Indeed Seattle City Light has consistently maintained this position and has not paid a utility tax to Burien, Shoreline or Lake Forest Park even after those cities subsequently enacted new utility tax ordinances that ostensibly apply to Seattle City Light. CP 1164-1165; 1174.

Given the climate of threatened litigation and legislative initiative that prevailed when the agreements were negotiated in the late 1990s, the agreements understandably contain backstop protections against the possibility of either occurrence. CP 1121. As the former Superintendent of Seattle City Light testified, "A ... due diligence sort of consideration for an agreement like this, language was put in to cover changes that none of us foresee." *Id.* Plaintiffs' unsupported argument to the trial court that §4.2 of the agreement makes the payments a tax is simply reaching for an argument. CP 410-411.

Shoreline's legislative initiatives to eliminate or reduce Seattle's utility tax authority were a central element of the negotiations that led up to the agreement. CP 1074-1079. The fact that Shoreline and the other suburban cities are contractually bound not to create their own electric utility, does not, however, prevent Shoreline or any other jurisdictions or any individual legislator from again proposing similar legislation. The provision in §4.2 is a straightforward "poison pill" that acts both as a disincentive for Shoreline to do so and as an incentive to actively oppose any third-party's legislative initiative. It also acts as a backstop should legislation pass anyway.

Plaintiffs' strained portrayal of the quid pro quo balance in §4.2 provides no support to the argument that the contract payments Seattle has agreed to make to Shoreline and other suburban cities are taxes. Neither are the payments pursuant to §4 a gift. Seattle receives valuable consideration for its payments. *Louthan v. King County*, 94 Wn.2d 422, 428-429, 617 P.2d 977 (1980). For these reasons the plaintiffs' arguments fail. Seattle negotiated terms and voluntarily entered into the agreements. None of the terms and conditions were imposed on Seattle by any of the suburban cities.

E. The trial court acted within its discretion to limit the scope of the class represented by the named plaintiffs

In its order of November 7, 2005 the trial court properly limited the class of plaintiffs that the named plaintiffs were certified to represent in this class action. CP 354-355. The court found that

1. The ratepayers who reside outside the City of Seattle have different interests in the outcome of this case.
2. Relevant facts and defenses differ materially among the ratepayers of each city.
3. The plaintiffs which are Seattle residents, cannot adequately and fairly protect the interests of ratepayers who reside outside the city of Seattle.

Id.

Plaintiffs theorized that the class action would benefit all ratepayers through lower rates. However, the core facts are fatal to this assertion of predominance. Seattle rates and suburban city rates differ,¹⁰ and the suburban cities lack the same incentive to stay with City Light absent the current contract provisions.¹¹ In short, plaintiffs' proposed class failed to meet the prerequisites of CR 23(a). In addition, the predominance requirement under CR 23(b)(3) is more exacting than the commonality requirement. *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn.

¹⁰ Without the agreements, Seattle could charge outside-Seattle ratepayers even more of a rate differential. *Faxe v. Grandview*, 48 Wn.2d 342, 294 P.2d 402 (1956).

¹¹ *E.g.*, CP 172; 216-219; 241-243; 259-260; 296; 315-316; 331-332.

App. 9, 20, 65 P.3d 1 (2003). The same issues and consequences do not predominate in and outside the Seattle city limits. The trial court properly determined that plaintiffs residing in Seattle cannot fairly and adequately represent residents of other cities who are charged different rates for different reasons and bear different risks if plaintiffs should prevail.

It is not a matter of some members of the class who "... might not wish to benefit" from plaintiffs' action as in *Zimmer v. Seattle*, 19 Wn.App. 864, 870, 578 P.2d 548, 551 (1978). It is that all members of the class sought to be represented by these plaintiffs are unlikely to see lower rates or any other benefits as a result of this action. CP 130-131.

Plaintiffs have failed to meet their burden of proof to demonstrate that the trial court abused its discretion in limiting the scope of the class represented by the plaintiffs to those ratepayers residing within Seattle. The trial court properly considered the factors required by CR 23, and the plaintiffs' motion was properly denied (in part) by the trial court. The trial court should be affirmed.

VI. CONCLUSION

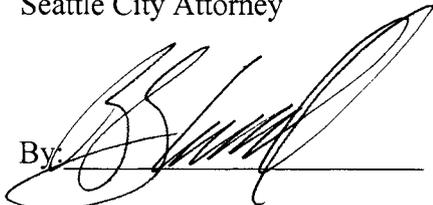
RCW 35.21.860 is unambiguous, and its language must be given its plain meaning. No franchise fees or other charges were *imposed* on Seattle. Rather, Seattle and each suburban city negotiated mutually acceptable contract provisions, including a provision in which Seattle

agreed to pay consideration to each suburban city in exchange for that city's agreement not to create its own municipal electric utility during the term of the franchise.

Seattle requests that this Court hold that RCW 35.21.860 does not prohibit the contracts before the Court, and affirm the trial court's summary judgment ruling in the cities' favor, affirm the trial court's decision limiting the scope of the class certification, and affirm the trial court's dismissal of plaintiffs' complaint.

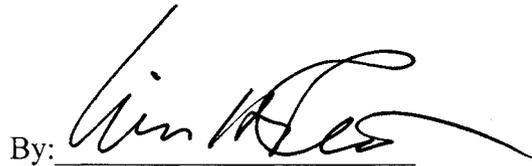
DATED this 14th day of July, 2006.

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Appendix A

3. Franchise Term. The term of the franchise granted hereunder shall be for the period of fifteen (15) years counted from the last day of the calendar month in which this ordinance became effective.

4. Consideration. It is recognized by the City and by SCL that the City has the authority to establish its own municipal electric utility, and the authority to acquire SCL electric distribution properties in the City for that purpose.

4.1. In consideration for the City agreeing not to exercise such authority during the term of this franchise, SCL agrees to the following:

4.1.1. SCL shall pay the City six percent of the amount of revenue derived from the power portion of SCL service to customers in the City, and shall pay the City zero percent of the amount of revenue derived from the distribution portion of SCL service to customers in the City. The City retains the authority to change the above percentages, to a maximum of six percent on the power portion of SCL service and to a maximum of six percent on the distribution portion of SCL service during the course of the franchise upon one year written notice to SCL.

4.1.2. SCL shall not include any part of the power portion of the payment to the City provided in Section 4.1.1, above as a component of any rate differential between customers served by SCL in the City and customers served by SCL in other jurisdictions.

4.1.3. SCL shall not charge greater than an eight percent differential in the power portion of the rates to customers in the City compared to the power portion of the rates charged to similar customers in the City of Seattle, and any differential in the power portion of the rates charged to customers in the City shall be the result of a rate review process conducted by the Seattle City Council. The power portion of SCL service to customers in the City is approximately fifty percent of the rates at the time of entering into this franchise. Any subsequent shift in the proportion of power vs. distribution in the rates to SCL customers in the City shall be the result of a rate review process conducted by the Seattle City Council.

4.1.4. SCL shall provide the City with a good faith estimate and supporting information, within a reasonable time from the City's request, of the likely differential rate impact on the distribution portion of the rates in the City, which other than the payment related to the distribution portion of SCL service under Section 4.1.1, above, may only be created by an operational request or requirement of the City which is different from operational standards in other areas served by SCL.

4.1.5. SCL shall appoint a member nominated by the City and other suburban cities to its Citizens' Rate Advisory Committee who will represent the interests of suburban cities served in whole or in part by SCL.

4.2. Should the City of Seattle be prevented by judicial or legislative action from collecting a utility tax on all or a part of the revenues derived by SCL from customers in the City, SCL shall reduce the payments to the City provided in Section 4.1.1, above by an equivalent amount.

- 4.3. Should a court of competent jurisdiction declare the consideration to be paid to the City in Section 4.1.1, above invalid, in whole or in part, or should a change in law make the consideration to be paid to the City in Section 4.1.1, above invalid, in whole or in part, this entire Agreement may be terminated by the City at any time thereafter upon 180 days written notice. During such notice period, however, SCL and the City shall attempt to agree upon acceptable, substitute provisions.
- 4.4. Payments provided for under this Section shall be paid monthly within 30 days following the end of each month.

5. City Ordinances and Regulations.

- 5.1. Nothing herein shall be deemed to direct or restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this franchise, including any reasonable ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control, by appropriate regulations, the location, elevation, and manner of construction and maintenance of any facilities of SCL located within the City right-of-way. SCL shall promptly conform with all such regulations, unless compliance would cause SCL to violate other requirements of law.

6. Right-of-Way Management.

6.1. Excavation And Notice Of Entry.

- 6.1.1. During any period of relocation or maintenance, all surface structures, if any, shall be erected and used in such places and positions within the right-of-way so as to interfere as little as possible with the safe and unobstructed passage of traffic and the unobstructed use of adjoining property. SCL shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or state law, including RCW 39.04.180, for the construction of trench safety systems.
- 6.1.2. Whenever SCL excavates in any right-of-way for the purpose of installation, construction, repair, maintenance or relocation of its facilities, it shall apply to the City for a permit to do so in accord with the ordinances and regulations of the City requiring permits to operate in the right-of-way. In no case shall any such work commence within any right-of-way without a permit, except as otherwise provided in this Ordinance. During the progress of the work, SCL shall not unnecessarily obstruct the passage or use of the right-of-way, and shall provide the City with plans, maps, and information showing the proposed and final location of any facilities in accord with Section 6.11 of this Ordinance.
- 6.1.3. At least ten (10) days prior to its intended construction of facilities, Grantee shall inform all residents in the immediately affected area, that a construction project will commence, the dates and nature of the project, and provide a toll-free or local