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STATE OF WASHINGTON

2010 NOV 15 A 11:02

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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
in Support of Tacoma's Statement of Grounds for Direct Review**

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I. INTRODUCTION

Amicus curiae Washington Water Utilities Council (“WWUC”) urges this Court to accept direct review of a King County Superior Court decision in case number 09-2-45435-3 SEA which was issued on June 29, 2010, and is appended to Tacoma’s Notice of Appeal. The appeal seeks to resolve who bears the responsibility for costs of fire hydrants when a public water utility provides water service to customers in another local jurisdiction pursuant to a franchise agreement. Historically, utilities typically charged ratepayers for fire hydrant costs. This Court recently held that fire hydrant 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 parties to this case now ask the Court to decide whether those local governments can transfer the hydrant charges back to the utility and its ratepayers through the local governments’ franchising authority. Specifically, the parties ask this court to decide whether an indemnity clause in existing franchise agreements that predate *Lane* can effectively reallocate those general governmental costs back to the public water utility.

The issues in this case affect the many utilities that provide water service to customers in other jurisdictions pursuant to franchise

agreements. The case directly addresses the impact of existing franchise agreements on the responsibility for fire hydrant costs and will explore the reach and meaning of statutory authority regarding franchise agreements. The case also will provide guidance to local governments and utilities negotiating future franchise agreements. The uncertainty pending resolution of this case impacts the ability of those utilities and local governments to plan and budget. The case therefore has broad implications on those public water utilities, their customers and local governments throughout the state such that the matter is appropriate for direct review.

II. INTEREST OF AMICUS

The WWUC is an association of over 150 Washington water utilities including cities, water 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.

The WWUC functions as a statewide coordinating group on water law and policy matters affecting water utilities. The 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. The WWUC develops and promotes water policy

on behalf of its members by proposing and providing testimony on legislation and by appearing as *amicus curiae* and intervenor in significant litigation.

The WWUC seeks to participate as *amicus curiae* in this proceeding because the action addresses fundamental issues of import to its constituent water utilities that provide service to a majority of the state's population. The fundamental dispute in this case demonstrates that lingering questions remain after *Lane* regarding the responsibility for costs of fire hydrants, especially when a utility provides service to customers in another local jurisdiction pursuant to a franchise agreement. Like Tacoma, many of WWUC's members provide public water service to customers in other cities and urban areas pursuant to franchise agreements and many other members receive water supply from a neighboring water utility for portions of their jurisdiction. This case addresses the degree to which those existing agreements serve to reallocate fire hydrant costs back to the providing utilities. Additionally, this case will provide guidance to water utilities and local governments in drafting agreements post-*Lane*.

The 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 resolve remaining disputes in light of the Court's decision in *Lane*. WWUC and its members

have an interest in the prompt and final resolution of the issues presented in this case.

III. ISSUES PRESENTED FOR REVIEW

WWUC incorporates by reference the issues presented for review in the City of Tacoma's Statement of Grounds, dated September 2, 2010.

IV. ARGUMENT

Direct review is appropriate because this case involves fundamental and urgent issues of broad public import that require prompt and ultimate determination. RAP 4.2(a)(4). Specifically, this case presents unresolved questions regarding responsibility for fire hydrant costs that remain following this Court's decision in *Lane*.

In *Lane*, this Court decided that local governments must pay costs of fire hydrants out of their general funds because the provision of fire hydrants is a general governmental purpose and cannot be funded by fees and rates charged against water utility ratepayers. 164 Wn.2d at 891. This Court's decision in *Lane* has broad implications because, prior to *Lane*, utilities typically funded fire hydrants through rates assessed against utility ratepayers. *Lane* therefore prompted utilities and local governments throughout the state to reassess the mechanisms by which they funded provision and maintenance of fire hydrants. *Lane* places the burden of the costs on the local government, not the utilities.

The parties to this case ask the Court to decide whether indemnity clauses in franchise agreements that predate *Lane* effectively allocated costs of fire hydrants back to the utility. The issue was raised preliminarily in *Lane*, where Shoreline and King County argued at the trial court that its franchise agreement with Seattle Public Utilities (SPU) effectively shifted the costs of fire hydrants back to the utility. CP 419 II. 24 – CP 421 II 8. SPU did not appeal the trial court’s ruling on this issue such that there is no direct precedential ruling on this fundamental issue.

A. The Case Addresses Fundamental Issues of Broad Import.

The question of whether parties can use a franchise agreement to shift costs to the utilities has broad relevance throughout the state. Public water systems of all forms, including city utilities (like Tacoma and SPU), special purpose districts like water and sewer districts and public utility districts, and other forms of public water systems, frequently provide service to customers that are within another general governmental 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).

The general governmental jurisdiction frequently requires a franchise or other agreement for the utilities to operate within the rights of way. Enabling legislation for cities provides broad franchise authority:

Every code city shall have authority to permit and regulate under such restrictions and conditions as it may set by charter or ordinance and 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.... The power hereby granted shall be in addition to the franchise authority granted by general law to cities.

RCW 35A.47.040. *See also* RCW 36.55.010 (county franchise authority).

This case and *Lane* offer several examples that pertain to two of the largest water utilities in the state. However, many other utilities provide water service to customers in other jurisdictions under franchise agreements. For example, multiple special purpose districts, non-profit mutuals, and for profit public water systems provide water and fire fighting water supply in Pierce County under franchise agreements with Pierce County. Accordingly, the case addresses more than just Tacoma's contracts with Respondents. It addresses whether the many entities throughout the state that are in positions similar to Tacoma and Respondents can allocate the costs of fire hydrants pursuant to franchise agreements or whether the franchise authority is more limited. The Court's decision in this case will help similarly situated entities to

interpret their existing franchise agreements and will facilitate negotiation of new franchise agreements.

B. The Issues Require Prompt and Ultimate Resolution.

The uncertainty regarding who is responsible for fire hydrant costs pending the outcome of this case is affecting utilities' and local governments' planning and budgeting. Moreover, the outcome will affect the form that future franchise agreements will take. Utilities and local governments alike are watching this case to provide essential guidance on contract interpretation and drafting of future agreements. The lack of timely resolution of these issues will prolong uncertainty over responsibility for costs that have already been incurred, causing continued financial instability and potentially more litigation.

C. The Issues are More than a "Simple Question of Contract Interpretation."

In their Answer to Statement of Grounds dated September 17, 2010, Respondents argue that the case involves a "simple question of contract interpretation which turns on the particular language" of the contracts at issue. However, Tacoma's appeal raises more basic questions regarding a local government's authority to reallocate general government costs back to utilities through franchise agreements (Issue 2). This fundamental and basic question is relevant to the many other utilities and

local governments that address provision of water service under franchise agreement.

Similarly, the Court's interpretation of the generic 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, the Court should reject Petitioners' efforts to minimize the broad import of the issues before the Court. This case has precedential impact that extends beyond the particular contracts before the Court. A final resolution in this case will provide needed guidance to utilities and local jurisdictions throughout the state.

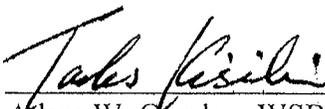
V. CONCLUSION

In sum, while the Supreme Court squarely placed responsibility for costs of fire hydrants on the general government, the Court did not address whether local governments have effectively shifted that cost back to the utility through contracts that pre-date the *Lane* decision. This case puts that question squarely before the court. A decision from this Court will help other utilities and local governments determine whether they can allocate the costs of fire hydrants pursuant to franchise agreements or whether the franchise authority is more limited. The Court's decision will resolve this question for the parties to the appeal and provide essential

guidance to other utilities and local jurisdictions throughout the state regarding interpretation of existing contracts and drafting of contracts in the future. For the foregoing reasons, WWUC requests that this Court accept direct review of this appeal.

DATED this 29th day of October, 2010.

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