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NO. 84824-6

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IN THE 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.

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON WATER UTILITIES COUNCIL

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Rules

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I. INTRODUCTION

Respondents City of Fircrest, City of University Place, City of Federal Way, and Pierce County urge this Court to reject the arguments raised by amicus curiae Washington Water Utilities Council (WWUC). In contending that “utilities and local governments alike are watching this case to provide essential guidance on contract interpretation and drafting of future agreements,” WWUC is making a mountain out of a molehill. If utility providers were really so perplexed about how *Lane v. City of Seattle* 164 Wn.2d 875, 194 P.3d 977 (2008) affects utility franchises, they would refuse to grant or extend franchises until this case is decided. But even the largest utilities are forging ahead with their contracts, not waiting for a resolution. *See, e.g.*, CP 551 (TPU agreed to extend Federal Way’s franchise after *Lane* was decided).¹

This case presents a straight-forward issue of how to construe a utility franchise, and how well-settled Supreme Court precedent affects that franchise. The case does not present an issue of broad public import under RAP 4.2(a)(4).

¹ See <http://lakeforestpark.civicweb.net/Documents/DocumentList.aspx?ID=1921> (Seattle Public Utilities Franchise with the City of Lake Forest Park, entered into one year after *Lane*).

II. COUNTER STATEMENT OF THE CASE

The Respondents incorporate by reference the Counter Statement of the Case contained in the Respondents' Answer to Statement of Grounds for Direct Review.

III. ARGUMENT

The legal framework of Respondents' franchises with Tacoma is well-settled in this Court's prior cases, including *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003); *Lane*, 164 Wn.2d 875; and *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007). An arrangement by which Tacoma Public Utilities (TPU) provides fire suppression services, and agrees to hold the Respondents harmless from all costs, in exchange for a franchise does not violate *Okeson*. *Okeson* merely precludes a utility from adding a uniform charge to ratepayer bills to fund a government service like street lights or fire hydrants. *Lane*, 164 Wn.2d at 887. Such an arrangement also does not violate *Lane*. *Lane* contemplates that a utility can recoup its business expenses via rates. *Id.* at 887-88. Finally, such an arrangement is fully consistent with *Burns*, which presumes a utility acts in its own financial interest, recognizes the value a franchise provides, and requires a city to receive consideration (generally in the form of cash or free utility services) for a franchise. *Burns*, 161 Wn.2d at 147-48, 143, 144.

Division I of the Court of Appeals is amply qualified to judge a dispute that is a mere outgrowth of well-settled Supreme Court precedent. See, e.g., *Okeson v. City of Seattle (Okeson II)*, 130 Wn. App. 814, 125 P.3d 172 (2005) (Division I applies this Court's holding of *Okeson I* to issue of whether Seattle Public Utilities can supply public art). Because the instant dispute turns upon the language of TPU's franchises, as well as TPU's course of conduct related thereto, a ruling by Division I would shine just as much light as a ruling by this Court.

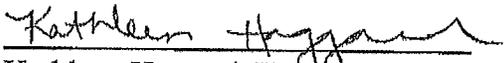
Finally, franchises need not be "uniform" for all utilities. Franchises are proprietary transactions, and therefore a utility has considerable leeway in how it crafts terms. *Burns*, 161 Wn.2d at 155. Every franchise is different; every negotiation is different. It makes no sense to suggest that a ruling by this Court would suit every situation.

IV. CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Court reject the arguments raised by WWUC and deny City of Tacoma's request for direct review.

RESPECTFULLY SUBMITTED this 2nd day of December, 2010.

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Attached for filing is a copy of the Respondents' Answer to Brief of Amicus Curiae Washington Water Utilities Council; and Certificate of Service.

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