

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
1/29/2018 3:20 PM  
BY SUSAN L. CARLSON  
CLERK

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2/7/2018  
BY SUSAN L. CARLSON  
CLERK

No. 94255-2

---

SUPREME COURT OF THE STATE OF WASHINGTON

---

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a  
regional transit authority, dba SOUND TRANSIT  
Respondents,  
and  
WR-SRI 120<sup>TH</sup> NORTH LLC, a Delaware limited  
liability company; et al.,  
Appellants.

---

BRIEF OF *AMICUS CURIAE* PUBLIC UTILITY DISTRICT NO. 1 OF  
SNOHOMISH COUNTY, AND PUBLIC UTILITY DISTRICT NO. 1 OF  
CHELAN COUNTY

---

Attorneys for Amicus

Anne L. Spangler, WSBA #22189  
Public Utility District No. 1  
of Snohomish County  
2320 California St.  
Everett, WA 98201-1107  
(425) 783-8688

Erik Wahlquist, WSBA #26156  
Public Utility District No. 1  
of Chelan County  
P.O. Box 1231  
Wenatchee, WA 98807-1231  
(509) 661-4237

## TABLE OF CONTENTS

|      |   |    |
|------|---|----|
| I.   | INTRODUCTION .....  | 1  |
| II.  | IDENTITY AND INTERESTS OF <i>AMICUS CURIAE</i> .....  | 2  |
| III. | STATEMENT OF THE CASE.....  | 5  |
| IV.  | ARGUMENT .....  | 6  |
|      | A. Sound Transit Does Not Have the Authority to Condemn<br>Public Property That is in Public Use. ....                                      | 6  |
|      | 1. The Lack of Express or Necessarily Implied Authority to<br>Condemn Public Land Should End the Inquiry.....                               | 6  |
|      | 2. ... Authority to Condemn Publicly Owned Property is Not<br>Implied in Sound Transit’s statute. ....                                      | 7  |
|      | B. Prior Public Use Doctrine is Protecting an Important Public<br>Use in these Cases.....   | 9  |
|      | C. The Prior Public Use Doctrine Prohibits Sound Transit’s<br>Condemnation Because it Destroys Seattle’s Public Use of the<br>Property..... | 11 |
|      | D. Sound Transit’s Large Proposed Taking is not “Compatible”<br>with High Voltage Transmission Lines .....                                  | 13 |
|      | E. Public Policy Requires the Prior Public Use Doctrine.....  | 16 |
|      | F. The Prior Public Use Doctrine Applies Because the Easements<br>are Currently in Public Use.....  | 18 |
| V.   | CONCLUSION.....   | 19 |

TABLE OF AUTHORITIES

Cases

*Brown v. State*, 130 Wn.2d 430, 924 P.2d 908 (1996) ..... 8

*City of Tacoma v. State*, 121 Wn. 448, 209 P. 700 (1922) ..... 18

*King Cty. v. City of Seattle*, 68 Wn.2d 688, 414 P.2d 1016 (1966) ..... 6

*Lakey v Puget Sound Energy, Inc.*, 176 Wn.2d 909,  
296 P.3d 860 (2013)..... 12

*Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56  
.Ed.2d 30 (1978) ..... 11

*Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 342 P.3d  
308, 317 (2015)..... 10, 11, 17, 18

*State ex rel. Columbia Valley Ry. v. Superior Court*, 45 Wash. 316, 88 P.  
332 (1907)..... 17

*State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 P.  
637 (1907)..... 17

*State ex rel. Wash. Water Power Co. v. Superior Court*, 8 Wn.2d 122, 111  
P.2d 577 (1941)..... 17

*State ex rel. Washington Water Power Co. v. Superior Court*, 8 Wn.2d 122  
(1941)..... 12

*State v. Superior Court for Jefferson Cty.*, 91 Wn. 454, 157 P. 1097  
(1916)..... 17

*State v. Superior Court for Kitsap Cty.*, 107 Wn. 228,  
181 P. 689 (1919)..... 17

*Wash. Boom Co. v. Chehalis Boom Co.*, 82 Wn. 509,  
144 P. 719 (1914)..... 17

## Statutes

|                        |      |
|------------------------|------|
| Chapter 54 RCW.....    | 2    |
| RCW 19.280.010 .....   | 10   |
| RCW 19.280.030 .....   | 11   |
| RCW 19.285.010 .....   | 12   |
| RCW 19.285.020 .....   | 12   |
| RCW 36.70A.060.....    | 15   |
| RCW 36.70A.070(4)..... | 15   |
| RCW 36.70A.150.....    | 15   |
| RCW 43.21C.030.....    | 15   |
| RCW 47.52.050 .....    | 8    |
| RCW 53.34.170 .....    | 8    |
| RCW 54.04.020 .....    | 2    |
| RCW 54.12.010 .....    | 2    |
| RCW 54.16.020 .....    | 9    |
| RCW 54.16.050 .....    | 8    |
| RCW 54.24.080 .....    | 2, 4 |
| RCW 77.55.021 .....    | 15   |
| RCW 81.112.020 .....   | 7    |
| RCW 81.112.080 .....   | 8    |
| RCW 90.48.080 .....    | 15   |

### Other Authorities

|   |    |
|---|----|
| 17 Wash. Prac., Real Estate § 9.18.Property—Property of entities that have eminent domain power (2d ed.).....   | 19 |
| 1A Julius L. Sackman, Nichols on Eminent Domain § 2.17 at 2-58 (3d ed. 1964) .....  | 10 |
| Alexandra B. Klass, “Takings and Transmission,” 91 N.C. L. Rev. 1079 (2013).....  | 12 |
| Jay L. Brigham, <i>Empowering the West: Electrical Politics Before FDR</i> 121 (1998).....  | 4  |
| Joris Naiman, Comment, <i>Judicial Balancing of Uses for Public Property: The Paramount Public Use Doctrine</i> , 17 B.C. Env't'l Aff. L.Rev. 893 (1990).....   | 18 |
| Ryan Pletka, Jagmet Khangure, Andy Rawlins, Elizabeth Waldren & Dan Wilson, Capital Costs for Transmission and Substations: Updated Recommendations for WECC Transmission Expansion Planning §2.1 (Black & Veatch Project No. 181374, prepared for the Western Electricity Coordinating Council (Feb. 2014) ..... | 11 |
| J.S. Molburg, J.A. Kavicky, and K.C. Picel, <i>The Design Construction and Operation of Long-Distance High-Voltage Technologies</i> ,(Nov.2007)   | 14 |

## I. INTRODUCTION

Public Utility District No. 1 of Snohomish County (“Snohomish”) and Public Utility District No. 1 of Chelan County (“Chelan”) (collectively the “Utilities”) respectfully urge this court to overturn the decisions of the trial court below and to dismiss the petitions in condemnation against Appellant City of Seattle, Seattle City Light (“Seattle”).

It is black letter law that the authority of a local municipal entity or special purpose entity to condemn property must be strictly construed, and the authority to condemn public property must be specifically granted or necessarily implied. Sound Transit’s condemnation statute does not contain the requisite grant of authority, and would be barred by the Prior Public Use Doctrine in any event.

From a public policy perspective, to uphold Sound Transit’s authority to condemn Seattle’s existing high voltage transmission easement would upset settled law that a condemning authority cannot usurp and displace another public entity’s existing and important public use. To do otherwise is to set a dangerous precedent that pits one condemning authority against another, to the detriment of the public,

existing public uses, and the public purse, and requires the courts to engage in a popularity contest about which public use is “better.”

There is no merit to Sound Transit’s unsupported assertion that Seattle’s high voltage transmission line uses are somehow “compatible” with the road widening and bridge that Bellevue plans to build. If that were truly the case, Sound Transit should dismiss its condemnation petitions and acquire rights in the properties subject to Seattle’s existing easements.

## **II. IDENTITY AND INTERESTS OF *AMICUS CURIAE***

Amici are public utility districts that are municipal corporations formed under Chapter 54 RCW, that provide electricity and other essential utility services to the inhabitants of their service areas. These public power utilities are consumer-owned, non-profit entities, owned by and operated for the benefit of their customers, and are governed by locally elected boards.<sup>1</sup>

Snohomish PUD serves approximately 344,000 customers in a service area of 2200 square miles, and owns and operates over six thousand miles of transmission and distribution lines throughout Snohomish County and Camano Island. Snohomish also depends on high

---

<sup>1</sup> RCW 54.04.020, 54.12.010, 54.24.080.

voltage electric lines in other parts of the state to move power supplied from major hydroelectric generators in the Columbia River Basin and from wind generation located in the Columbia River Gorge to Snohomish County.

Chelan similarly serves a large service territory and owns, operates and maintains hundreds of miles of transmission and distribution lines throughout its service areas. Chelan owns and operates three hydroelectric projects: one at Lake Chelan, and two large projects on the Columbia River. Chelan depends upon high voltage electric lines to deliver power to its customers throughout a geographically challenging service area, as well as to export power to other parts of the state and the wholesale energy market.

The Utilities have a distinct interest in this case because a decision in favor of the Respondent Sound Transit could compromise their ability to provide reliable and economic service to the Washington citizens they serve. A cornerstone of public electric utilities reason for being is to be able to provide reliable, affordable service. Chapter 54 RCW itself was created as Initiative No. 1 to the people of the State of Washington in 1930, as a result of a populist movement led by the Washington State Grange to bring electricity to the farms, ranches and rural areas that could

not obtain access to electricity without exorbitant rates.<sup>2</sup> Since then, voters in 28 of Washington's 39 counties voted to form public utility districts. Public power utilities are locally governed and thus able to be responsive to the needs of their communities and they offer cost-based rates, without the profit that would otherwise go to investors.<sup>3</sup>

Maintaining an adequate network of electric transmission lines, and the corridors in which they must run, is critical to ensuring reliability of the electric distribution system. By its nature, transmission of high voltage electricity is linear, thus the impact of a taking that interrupts an electric corridor could have a magnified impact on the Utilities' ability to maintain reliable service to the customers they serve. An adequate and uninterrupted transmission network is also critical to preserving the stability of the larger, regional electric transmission system and for moving excess energy generated in central Washington to the population centers in Spokane and Western Washington which rely on that energy to serve their customers.

Sound Transit is currently expanding its light rail service into Snohomish County, and Snohomish may face the same threats to its transmission infrastructure that Seattle is experiencing today. In addition,

---

<sup>2</sup> Jay L. Brigham, *Empowering the West: Electrical Politics Before FDR* 121 (1998).

<sup>3</sup> See, e.g., RCW 54.24.080 (requiring rates to be non-discriminatory and cover costs).

a decision in Sound Transit's favor would set a precedent for other special purpose entities to exercise condemnation authority over existing public utility transmission uses.

### III. STATEMENT OF THE CASE

The Utilities accept the statement of the case as set forth by the City of Seattle in these consolidated cases. In particular, we emphasize that Seattle's transmission line easements are part of a series of easement and fee parcels that form a contiguous corridor that runs for 100 miles from Seattle's hydroelectric generating plants that bring the electric power to Seattle's distribution system and serve the customers, and that the high voltage transmission corridor is part of a larger regional electrical transmission line system that stretches from Canada to California.<sup>4</sup>

Also significant is the fact that the proposed fee simple tracts and miscellaneous easements would consume a substantial portion of Seattle's transmission line easements, and be fundamentally incompatible with Seattle's continued operation of the existing 230 kV transmission line, and render the easements unusable for their intended purpose.<sup>5</sup>

---

<sup>4</sup> Seattle's Br. Of Appellant, *Central Puget Sound Regional Transit Auth., dba Sound Transit v. City of Seattle, Seattle City Light et al.*, No. 94406-7 at 5-6 (hereinafter *Sound Transit v. Seattle, No. 94406-7*).

<sup>5</sup> *Id.* at 7-8.

#### IV. ARGUMENT

##### **A. Sound Transit Does Not Have the Authority to Condemn Public Property That is in Public Use.**

The parties have fully briefed the issue of whether Sound Transit's eminent domain statute authorizes the acquisition of publicly owned property, particularly for a project that is primarily for the City of Bellevue. We would offer the following additional points.

##### ***1. The Lack of Express or Necessarily Implied Authority to Condemn Public Land Should End the Inquiry***

The Utilities would emphasize that *King Cty. v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966) remains controlling law. In this case, this Court found that, despite having much broader eminent domain authority than Sound Transit, King County could not condemn property owned by Seattle.<sup>6</sup> Moreover, this Court rejected an argument from King County that is the same one being advanced here, that authorization to acquire "all property" means property both publicly and privately held.<sup>7</sup> This Court required that, for one municipal corporation to have the authority to condemn the property of another, the legislature must grant it express or necessarily implied powers to condemn the property of the

---

<sup>6</sup> *King Cty v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966).

<sup>7</sup> *Id.*

State or any of its subdivisions.<sup>8</sup> Because the statute at issue was only a general grant of condemnation authority, the Supreme Court affirmed summary judgment dismissal of King County’s condemnation action against Seattle.<sup>9</sup>

Sound Transit’s statute does not mention or grant Sound Transit express or necessarily implied authority to condemn public property, or any property of another political subdivision, let alone city-owned property already devoted to an existing public use. Accordingly, the trial court should have denied Sound Transit’s motion for public use and necessity as lacking statutory authority.

***2. Authority to Condemn Publicly Owned Property is Not Implied in Sound Transit’s statute.***

Sound Transit makes two other arguments that authority to condemn Seattle’s easement is implicit in its statute. Neither have merit. First, Sound Transit argues that it can condemn publicly owned property because RCW 81.112.020 lists “rights of way” among the lands it can condemn, and “rights of way” are normally held by public entities. However, this reference can simply mean that Sound Transit may condemn easements, as opposed to lands that are already used as rights of way for existing public uses. For example, there is a line of cases, many

---

<sup>8</sup> *Id.* at 692.

<sup>9</sup> *Id.* at 694.

involving railroads, which discuss whether a grant of a “right of way” is a grant of an easement or of fee title, and a general rule that an easement is intended unless circumstances demonstrate otherwise.<sup>10</sup> This reference is hardly strong enough a basis on which to imply authority to condemn public property. The legislature has demonstrated that it knows how to enact statutes that contain express authority to condemn public property, and when it grants such authority, it uses those words.<sup>11</sup>

Sound Transit assumes that the fact that RCW 81.112.080 provides that public transportation facilities and properties owned by any city, county, county transportation authority, public transportation benefit area or metropolitan municipal corporation may be acquired or used by Sound Transit only with the consent of the agency owning such facilities, must mean that the exclusion proves the rule. In other words, the need to exclude publicly owned transportation facilities must mean that the grant of condemnation authority does include publicly owned property.<sup>12</sup>

This is not the meaning or purpose of the exclusion. Instead, it is a legislative acknowledgement of the prior public purpose doctrine, and demonstrates an intent not to allow condemnation of publicly owned

---

<sup>10</sup> See, e.g., *Brown v. State*, 130 Wn.2d 430, 436-41, 924 P.2d 908 (1996) (discussing cases).

<sup>11</sup> Seattle’s Br. Of Appellant, *Sound Transit v. Seattle*, No. 94406-7 at 23-24; see RCW 47.52.050; 53.34.170; 54.16.050.

<sup>12</sup> Sound Transit’s Br. Of Respondent, *Sound Transit v. Seattle*, No. 94406-7 at 16-17.

property already in public use. As a statute limited transit authority, Sound Transit should not be exercising eminent domain for purposes other than its own transportation projects. The statute makes clear that such eminent domain may not be used against publicly owned properties used for transportation that are already in public use. A similar limitation exists with respect to public utility districts in RCW 54.16.020, which excludes from the eminent domain authority the ability to condemn a public utility owned by a city or town.

A construction of the statute that would protect from condemnation publicly owned transportation property from condemnation by Sound Transit, but that would allow condemnation of municipally owned property serving such an essential public purpose as this is contrary to public policy at best, absurd at worst. This interpretation would allow Sound Transit to bisect a water treatment plant, or displace major county roads.

**B. Prior Public Use Doctrine is Protecting an Important Public Use in these Cases**

The prior public use doctrine provides that the exercise of the power of eminent domain will be denied when the proposed use will either destroy the existing use or interfere with it to such an extent as is

tantamount to destruction, unless the legislature has authorized the acquisition either expressly or by necessary implication.<sup>13</sup>

It is essential that this Court understand that high voltage transmission lines are carefully planned long in advance, are generally not replaceable, and are not a use that can lightly be infringed upon.

Interruption or infringement has critical, long term, local and regional electric service implications.

Electric utilities have to plan long term for future needs. Providing electricity is an extremely capital intensive business, and requires long range planning for future growth and future infrastructure. For example, the legislature has found it “essential” that electric utilities in Washington develop comprehensive integrated resource plans that

[E]xplain the mix of generation and demand-side resources they plan to use to meet their customers' electricity needs in both the short term and the long term. The legislature intends that information obtained from integrated resource planning under this chapter will be used to assist in identifying and developing: (1) New energy generation; (2) conservation and efficiency resources; (3) methods, commercially available technologies, and facilities for integrating renewable resources, including addressing any overgeneration event; and (4) related infrastructure to meet the state's electricity needs.<sup>14</sup>

---

<sup>13</sup> *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 538–39, 342 P.3d 308, 317 (2015) (citing 1A Julius L. Sackman, *Nichols on Eminent Domain* § 2.17 at 2-58 (3d ed. 1964)) (hereinafter *Okanogan Cty.*).

<sup>14</sup> RCW 19.280.010.

These integrated resource plans must be prepared every four years, with a required update every two years, and analyze at least a ten-year time horizon.<sup>15</sup> Most electric utilities use twenty-year or longer time horizons. Moreover, constructing new electric transmission can cost one to three million dollars per mile, sometimes considerably more,<sup>16</sup> and can take decades to complete.<sup>17</sup>

**C. The Prior Public Use Doctrine Prohibits Sound Transit's Condemnation Because it Destroys Seattle's Public Use of the Property.**

Seattle has demonstrated both the importance of the transmission corridor and transmission lines at issue in this case, as well as the impact of this proposed taking on its ability to provide electric service. The courts have consistently recognized electric power as a “necessity of modern life,” the loss of which may “threaten health and safety” even for short periods.<sup>18</sup> As Seattle noted in its briefing, the nature of the business of furnishing electric energy determine that it is a public use:

---

<sup>15</sup> RCW 19.280.030.

<sup>16</sup> Ryan Pletka, Jagmet Khangure, Andy Rawlins, Elizabeth Waldren & Dan Wilson, Capital Costs for Transmission and Substations: Updated Recommendations for WECC Transmission Expansion Planning §2.1 (Black & Veatch Project No. 181374, prepared for the Western Electricity Coordinating Council (Feb. 2014)), available at [https://www.wecc.biz/Reliability/2014\\_TEPPC\\_Transmission\\_CapCost\\_Report\\_B&V.pdf](https://www.wecc.biz/Reliability/2014_TEPPC_Transmission_CapCost_Report_B&V.pdf).

<sup>17</sup> We note that the Twisp transmission line for Public Utility District No. 1 of Okanogan County at issue in *Okanogan Cty.*, was announced in 1996 and ended with a Supreme Court decision in 2015.

<sup>18</sup> *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18, 98 S.Ct. 1554, 56 Ed.2d 30 (1978).

“[E]lectricity is essentially necessary in order to enable our citizens to carry on their everyday activities and pursue their accustomed manner of living.<sup>19</sup>

The Utilities emphasize that a high voltage electric transmission line is not comparable to any other type of public use. It is hard to overestimate the importance of the electric transmission grid to the reliability of electric service, and the many constraints under which it operates. Reliability and expansion of the transmission grid is necessary “to avoid debilitating and increasingly frequent blackouts and service interruptions that cost the US economy \$150 billion annually.”<sup>20</sup> Transmission lines are also especially critical for renewable energy, as the best resources can be located in remote areas far from population centers.<sup>21</sup> In Washington State, voters have made renewable energy a priority by enacting the Energy Independence Act through Initiative 937.<sup>22</sup>

In the Energy Policy Act of 2005, Congress required the Federal Energy Regulatory Commission (“FERC”) to designate an Electric Reliability Organization to turn what was once a voluntary reliability

---

<sup>19</sup> *State ex rel. Washington Water Power Co. v. Superior Court*, 8 Wn.2d 122, 132-33 (1941); *see also Lakey v Puget Sound Energy, Inc.*, 176 Wn.2d 909, 924, 296 P.3d 860 (2013) (recognizing the fundamental importance of electricity to everyday life).

<sup>20</sup> Alexandra B. Klass, “*Takings and Transmission*,” 91 N.C. L. Rev. 1079, 1084 (2013).

<sup>21</sup> *Id.* at 1116.

<sup>22</sup> RCW 19.285.010, RCW 19.285.020.

organization into a new mandatory reliability regime, in order to protect the reliability and safety of the bulk power system in the United States, which includes the interconnected high voltage electric transmission system.<sup>23</sup> The designated entity, the North American Electric Reliability Corporation (“NERC”), has since developed and implemented a broad set of mandatory reliability standards for electric utilities, that cover everything from protective devices, operating limits, equipment testing, planning, critical infrastructure protection, reliability operations, physical and cyber security, incident reporting and recovery plans.<sup>24</sup> There is a whole set of standards that specifically apply to transmission owners and operators in order to insure the integrity of the electric grid. NERC audits each utility approximately every four years, and the penalties for violations are severe, up to \$1 million per violation per day.<sup>25</sup>

**D. Sound Transit’s Large Proposed Taking is not “Compatible” with High Voltage Transmission Lines**

Sound Transit argues the Prior Public Use Doctrine does not apply because its use of the property is “compatible” with Seattle’s use. This is not a credible argument. To somehow presume that Seattle can simply

---

<sup>23</sup> 16 U.S.C. § 824o.

<sup>24</sup> *Id.*; *see, e.g.*, North American Reliability Corporation Standards, available at <http://www.nerc.com/pa/stand/Pages/default.aspx>

<sup>25</sup> 16 U.S.C. § 825o.

“adjust” its high voltage facilities to accommodate Bellevue’s bridge and road widening project, or that there is no “destruction” of Seattle’s easement because there may be some residual value to what is left of the easement is wrong. If the uses were truly compatible, Sound Transit should be able to take rights in the properties subject to Seattle’s easement.

High voltage transmission lines are not a use that can lightly be infringed upon, and wide, continuous, unobstructed rights of way are necessary for their safe operation.<sup>26</sup> Sound Transit’s brief acknowledges that Seattle presented evidence at the trial court that there would not be room in the portion of its easement remaining after Sound Transit’s taking to run a 230 kV transmission system.<sup>27</sup>

---

<sup>26</sup> In brief, towers, conductors and insulators are the most obvious components of a high voltage transmission line. The towers keep the high voltage conductors separated from their surroundings and each other to prevent unintended faults that would divert energy to the surrounding area or ground, and need to be designed for weight, power flow, sag, conductor type, wind, weather, ice, lightning, and other factors. The need to separate the conductors, and the voltage, along with the other factors, help determine the design considerations for the towers, and the physical dimensions of the towers, voltage, line arrangements and spacing define the necessary minimum dimensions of the rights of way, including clearances to natural and man-made structures. A typical tower height for a high voltage line can reach 100 feet.

See J.S. Molburg, J.A. Kavicky, and K.C. Picel, *The Design, Construction, and Operation of Long-Distance High-Voltage Electricity Transmission Technologies*, Report prepared by Argonne National Laboratory for the U.S. Department of Energy at 12-15 (Nov. 2007), available at

[http://solareis.anl.gov/documents/docs/APT\\_61117\\_EVS\\_TM\\_08\\_4.pdf](http://solareis.anl.gov/documents/docs/APT_61117_EVS_TM_08_4.pdf)

<sup>27</sup> Sound Transit’s Br. Of Respondent, *Sound Transit v. Seattle*, No. 94406-7 at 38.

There is unique and irreplaceable value in an electric transmission corridor. It can be very difficult to assemble the necessary land and property rights to create a corridor in the first place, thus, most are acquired with necessary future requirements as a result. If a utility determines a need for future electric transmission and distribution facilities, in addition to acquiring the necessary property rights, it must comply with local land use planning requirements,<sup>28</sup> perform environmental analyses as required by the State Environmental Policy Act,<sup>29</sup> and plan for and comply with a variety of laws and regulations designed to protect the environment, including wildlife, water, critical areas and other resources.<sup>30</sup> Larger transmission lines that serve regional purposes also must comply with regional transmission planning and cost allocation processes.<sup>31</sup>

Loss of a portion of this high voltage electric transmission corridor for Seattle could prove very damaging. Given the difficulty of planning

---

<sup>28</sup> See RCW 36.70A.070(4) (Growth Management Act provision requiring Comprehensive Plans to address location and capacity of utility lines); RCW 36.70A.150 (requiring counties to identify lands for utility corridors and other “public purposes”).

<sup>29</sup> RCW 43.21C.030.

<sup>30</sup> See, e.g., RCW 77.55.021 (Requiring Hydraulic Project Approvals); RCW 90.48.080 (prohibiting disposal in state waters); RCW 36.70A.060 (GMA provision requiring counties to adopt development regulations to protect natural resource lands and critical areas).

<sup>31</sup> See Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Utilities*, 136 FERC ¶61,051 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶61,132 (2012), *order on reh'g*, Order No. 1000-B, 141 FERC ¶61,044 (2012).

for and constructing high voltage electric transmission lines, they cannot simply be “adjusted” as Sound Transit seems to assume. If a portion of a corridor is lost or rendered unusable, the utility most likely would have to realign much more than the affected section, and it could be difficult, very expensive, or infeasible altogether. In addition to the planning, construction, permitting requirements, a utility must meet design standards and electrical safety requirements, including clearances, under the National Electric Safety Code.<sup>32</sup>

Finally, Sound Transit is not in a position to judge and has no basis for asserting that the utility of Seattle’s easement has been destroyed for its existing and intended purpose. Given the expertise required to design, construct and operate high voltage transmission, Seattle’s determination of its requirements for the current and future operations of its transmission lines must be given at least as much if not more of the deference that Sound Transit claims for the design of its light rail facilities.

#### **E. Public Policy Requires the Prior Public Use Doctrine**

The courts have never articulated a clear standard for holding one set of public above another where there are competing eminent domain

---

<sup>32</sup> Institute of Electrical and Electronics Engineers (IEEE), National Electric Safety Code, available at <http://standards.ieee.org/about/nesc/index.html>. The NESC is published by the IEEE and updated every five years, and sets the ground rules and guidelines nationally for the practical safeguarding of utility workers and the public in the installation, operations and maintenance of electric supply and communications lines and associated equipment.

authorities. Yet Sound Transit is essentially asking this Court to do so here.

The prior public use doctrine is an important limitation on the condemnation authority between competing public entities with eminent domain authority. Without such a limitation, an absurd result is reached, in that dueling condemnation authorities have the ability to cancel out one another's purposes. Should Seattle now go have to re-condemn the necessary rights to restore its high voltage electric transmission corridor? It is the public that suffers from such a result. The taxpayers or the ratepayers end up paying twice for the same essential public facilities.

This Court has acknowledged that, long ago, there was a test to be applied in such situations, but it has rarely been used.<sup>33</sup>

In condemnation actions between competing public uses, we have said that we consider “the present or prospective use of such property by the condemnee, the prospective use thereof by the condemner, the comparative advantages flowing to the public as between the ownership thereof by the condemnee and condemner,

---

<sup>33</sup> See *State ex rel. Wash. Water Power Co. v. Superior Court*, 8 Wn.2d 122, 131-32, 111 P.2d 577 (1941) (involving the condemnation of a private utility's franchises by a publicly owned utility which was specifically given that condemnation authority); *State v. Superior Court for Kitsap Cty.*, 107 Wn. 228, 181 P. 689 (1919) (involving a private way of necessity); *State v. Superior Court for Jefferson Cty.*, 91 Wn. 454, 157 P. 1097 (1916) (involving a petition by the Port Townsend & Puget Sound Railway Company to condemn state-owned tidelands designated for public access for a terminal).

In *State ex rel. Puget Sound & Baker River Railway Co. v. Joiner*, 182 Wn. 301, 47 P.2d 14 (1935), the court stated that property already devoted to a public use might be condemned for another public use only when the proposed public use was “superior” to the existing use. In support, the court cited two decisions that allowed one private corporation to condemn the land of another private corporation, *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 P. 637 (1907), and *State ex rel. Columbia Valley Ry. v. Superior Court*, 45 Wash. 316, 88 P. 332 (1907).

and the comparative advantage and disadvantages flowing to the condemnee and condemner by the ownership of such property.<sup>34</sup>

The inherent difficulty of sorting out these types of conflicts, and the fact that this standard has been so rarely discussed, indicates that the prior public use doctrine is a much more useful framework within which to address these types of conflicts.<sup>35</sup>

#### **F. The Prior Public Use Doctrine Applies Because the Easements are Currently in Public Use**

Sound Transit argued that the prior public use doctrine would not apply because Seattle holds the subject easements in a proprietary capacity. There is a difference between a “proprietary capacity” and a “proprietary function.” Seattle is correct to point out that “proprietary capacity” means lands not dedicated to any public use, either presently in the future.<sup>36</sup> The Utilities would emphasize this point.

While a utility may be considered a proprietary function of a governmental entity, the only time its property is held in a proprietary capacity is when it is not being used for its intended purpose. As this

---

<sup>34</sup> *Okanogan Cty.*, at 543, 342 P.3d 308, 319 (2015) (citing *Wash. Boom Co. v. Chehalis Boom Co.*, 82 Wn. 509, 514, 144 P. 719 (1914)).

<sup>35</sup> *See id.* at 539 n.10 (“Accordingly, while we recognize that jurisdictions apply different tests, we do not consider under what circumstances a condemnor may take property notwithstanding a *competing* public use. *See* Joris Naiman, Comment, *Judicial Balancing of Uses for Public Property: The Paramount Public Use Doctrine*, 17 B.C. Env’tl Aff. L.Rev. 893 (1990) (discussing various tests)”).

<sup>36</sup> Seattle’s Br. Of Appellant, *Sound Transit v. Seattle*, No. 94406-7 at 30; *Okanogan Cty.*, 182 Wn.2d at 542.

Court noted with reference to *City of Tacoma v. State*, 121 Wn. 448, 209 P. 700 (1922), lands were “considered proprietary because the deed conveying the property did not provide conditions for its use and the state never formally dedicated it to a particular use, was no longer using it, and had no intentions of using it in the future.”<sup>37</sup> Commentators tend to agree:

The concept seems to be that land is not devoted to a public use if its present use is not necessary to enable the corporation that presently owns it to perform the public services for which the corporation was chartered. For instance, if a railroad that presently owns the land is holding it in reserve and does not have on it any facilities the public uses, the land is not devoted to a public use.<sup>38</sup>

When the public utility is using property for its operations, said property is clearly in public use.

## V. CONCLUSION

If this Court were to uphold Sound Transit’s authority to condemn Seattle’s publicly owned and used easement for high voltage electric transmission, it would mean that Sound Transit’s light rail plan, and Bellevue’s street widening, are more important than Seattle’s ability to provide safe, reliable electricity to the citizens of Seattle and its surrounding communities. This is an illogical and unsustainable result. *Amicus* parties respectfully request that this Court reverse the rulings of

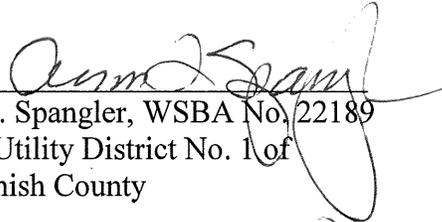
---

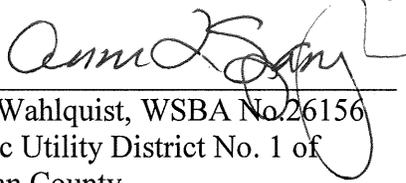
<sup>37</sup> *Okanogan Cty.*, 182 Wn.2d at 542.

<sup>38</sup>17 Wash. Prac., Real Estate § 9.18. Property—Property of entities that have eminent domain power (2d ed.).

the trial courts below and dismiss the condemnation petitions as against  
the City of Seattle.

Attorneys for Amicus

By:   
Anne L. Spangler, WSBA No. 22189  
Public Utility District No. 1 of  
Snohomish County

By:   
Erik Wahlquist, WSBA No. 26156  
Public Utility District No. 1 of  
Chelan County

*per  
Telephone  
Authority  
1-28-18*

# SNOHOMISH COUNTY PUBLIC UTILITY NO. 1

January 29, 2018 - 3:20 PM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 94255-2  
**Appellate Court Case Title:** Central Puget Sound Regional Transit Authority et al v. WR-SRI 120TH NORTH LLC, et al  
**Superior Court Case Number:** 17-2-00988-1

### The following documents have been uploaded:

- 942552\_Briefs\_20180129150155SC739985\_0621.pdf  
This File Contains:  
Briefs - Amicus Curiae  
*The Original File Name was 2018-01-29 Utilities Amicus Brief.pdf*
- 942552\_Cert\_of\_Service\_20180129150155SC739985\_9567.pdf  
This File Contains:  
Certificate of Service  
*The Original File Name was 2018-01-29 Utilities Declaration of Service.pdf*
- 942552\_Motion\_20180129150155SC739985\_4131.pdf  
This File Contains:  
Motion 1 - Amicus Curiae Brief  
*The Original File Name was 2018-01-29 Utilities Amicus Motion.pdf*

### A copy of the uploaded files will be sent to:

- Estera.Gordon@millernash.com
- Jessica.skelton@pacificalawgroup.com
- adrian.winder@foster.com
- andy@houlihan-law.com
- cnelson@corrchronin.com
- connor.o'brien@millernash.com
- courtneys@summitlaw.com
- czakrzewski@bellevuewa.gov
- dedwards@corrchronin.com
- denicet@summitlaw.com
- donya@houlihan-law.com
- eharris@corrchronin.com
- elindberg@corrchronin.com
- emily.krisher@millernash.com
- engel.lee@seattle.gov
- jackee.walker@millernash.com
- jeffrey.beaver@millernash.com
- jenifer.merkel@kingcounty.gov
- john@houlihan-law.com
- johnpaul@rdtlaw.com
- jordanh@heckerwakefield.com
- litdocket@foster.com
- lnims@corrchronin.com
- lorbera@lanepowell.com

- marisa.velling@millernash.com
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- russell.king@seattle.gov
- sdamon@corrchronin.com
- sidney@tal-fitzlaw.com
- steve.dijulio@foster.com
- sydney.henderson@pacificlawgroup.com

**Comments:**

---

Sender Name: Jill Stelter - Email: jastelter@snopud.com

**Filing on Behalf of:** Anne Louise Spangler - Email: alsangler@snopud.com (Alternate Email: )

Address:

2320 California Street

P.O. Box 1107

Everett, WA, 98206

Phone: (425) 783-8688

**Note: The Filing Id is 20180129150155SC739985**