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## **UTILITIES - OREGON**

### [Northwest Natural Gas Co. v. City of Gresham](#)

**Supreme Court of Oregon - May 5, 2016 - P.3d - 2016 WL 2587424**

Public utilities brought declaratory relief action challenging city's resolution that increased their utility-license fees from five percent to seven percent of the gross revenue that utilities received from their city operations.

The Circuit Court granted summary judgment in favor of utilities, ruling the resolution void and unenforceable. City appealed. The Court of Appeals reversed and remanded. Utilities sought further review, which was granted.

The Supreme Court of Oregon held that:

- Resolution imposed privilege tax;
- Resolution did not create franchise agreements with utilities;
- Resolution was not preempted by state law governing public utilities operating without a franchise;
- Resolution imposed intergovernmental tax on public utility district;
- State law reaffirming cities' home-rule authority with respect to regulation of its rights-of-way did not provide express authority to impose intergovernmental tax; and
- State law governing powers of public utility districts did not provide express authority for city to impose intergovernmental tax.

Municipal enactments that increased the licensing fee that each public utility was required to pay from five percent to seven percent of the utility's gross revenues earned within the city imposed a privilege tax that city was permitted to impose on utilities that were operating without a franchise, where fee was imposed on utilities for use of city's public rights-of-way.

Municipal enactments that increased the licensing fee that each public utility was required to pay from five percent to seven percent of the utility's gross revenues earned within the city did not create franchise agreement with utilities that permitted city to impose privilege tax. Term franchise in statute permitting imposition of privilege tax on utilities operating without a franchise was meant to refer narrowly to describe negotiated agreements between a government entity and another entity for their mutual advantage.

Municipal enactments that increased the licensing fee that each public utility was required to pay from five percent to seven percent of the utility's gross revenues earned within the city were not preempted by state law governing public utilities operating without a franchise. Statute was framed as an authorization, rather than a restriction, such that it was not an unambiguous expression of an intent to preclude local governments from regulating utilities, purpose of statute was to ensure that cities had authority to deal with recompense for utilities' use of cities' rights-of-way on a local level, and city had a legitimate local concern, funding of its fire and police departments, that it chose to meet by enacting a resolution that increased the license fee paid by utilities to use its rights-of-way.

Municipal enactments that increased the licensing fee that each public utility was required to pay

from five percent to seven percent of the utility's gross revenues earned within the city constituted "intergovernmental tax" with respect to municipal utility district, and therefore city was required to have express statutory authority to impose tax. Although challenged fee was labeled a fee rather than a tax, it was not being assessed to cover costs associated with district's use of city's streets, but rather was to be expended for general public purposes.

State law reaffirming cities' home-rule authority with respect to regulation of its rights-of-way did not grant city express authority to impose intergovernmental tax on municipal utility district by way of municipal enactments that increased the licensing fee that each public utility was required to pay from five percent to seven percent of the utility's gross revenues earned within the city.

State law setting forth various powers of public utility districts (PUD) did not grant city express authority to impose intergovernmental tax on municipal utility district by way of municipal enactments that increased the licensing fee that each public utility was required to pay from five percent to seven percent of the utility's gross revenues earned within the city, where statute provided PUDs with authority to enter into franchise agreements, intergovernmental agreements, and contracts with cities and to pay fees under such agreements, but made no mention of taxation.