

FILED: December 30, 2015

IN THE COURT OF APPEALS OF THE STATE OF OREGON

QWEST CORPORATION, a Colorado corporation, dba Centurylink,
Plaintiff-Appellant,

v.

CITY OF PORTLAND, a municipal corporation,
Defendant-Respondent.

Multnomah County Circuit Court
121216632

A154769

Henry C. Breithaupt, Judge pro tempore.

Argued and submitted on September 19, 2014.

Per A. Ramfjord argued the cause for appellant. With him on the opening brief were Theodore B. Blank and Stoel Rives LLP. With them on the reply brief was Reilley D. Keating.

Denis M. Vannier, Deputy City Attorney, argued the cause and filed the brief for respondent.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

NAKAMOTO, J.

Affirmed.

1 NAKAMOTO, J.

2 Plaintiff Qwest Corporation¹ appeals from the trial court's judgment
3 granting defendant City of Portland declaratory relief. Qwest assigns error to the trial
4 court's declaratory ruling that the "utility license fee" (ULF), a tax imposed by the city,
5 does not violate a state law capping the amount municipalities may charge
6 telecommunications carriers for the use of municipal rights-of-way. Qwest argues that
7 the ULF is preempted in that it is actually a privilege tax governed by ORS 221.515(1)
8 and the ULF exceeds the cap on such taxes set out in that statute. The city acknowledges
9 that the statute caps the rate at which it can collect privilege taxes from
10 telecommunications carriers for the use of its rights-of-way, but it argues that the statute
11 does not preclude it from imposing other taxes and fees, such as a tax on utilities for the
12 privilege of doing business within the city, and it claims that that is what the ULF is. We
13 agree with the city and therefore affirm.

14 I. BACKGROUND

15 For context, we begin with an overview of ORS 221.515, the statute on
16 which Qwest relies, and provisions of the city code that permit the city to obtain revenues
17 from Qwest's operations within the city. The statute,² which became effective in 1990,

¹ Qwest's full party name in the case is "Qwest Corporation, a Colorado corporation, dba Centurylink." For brevity and consistency with the trial court, we refer to it as "Qwest."

² ORS 221.515 provides in its entirety:

"(1) The council of every municipality in this state may levy and

- 1 Or Laws 1989, ch 484, § 9, pertains only to "telecommunications carriers" as defined in
- 2 ORS 133.721. ORS 221.515(4). Under ORS 221.515(1), Oregon municipalities "may
- 3 levy and collect from every telecommunications carrier operating within the municipality

collect from every telecommunications carrier operating within the municipality and actually using the streets, alleys or highways, or all of them, in such municipality for other than travel, a privilege tax for the use of those streets, alleys or highways, or all of them, in such municipality in an amount which may not exceed seven percent of the gross revenues of the telecommunications carrier currently earned within the boundaries of the municipality. The privilege tax authorized in this section shall be for each year, or part of each year, that such telecommunications carrier operates within the municipality.

"(2) As used in this section, 'gross revenues' means those revenues derived from exchange access services, as defined in ORS 403.105, less net uncollectibles from such revenues.

"(3) A telecommunications carrier paying the privilege tax authorized by this section shall not be required to pay any additional fee, compensation or consideration, including the free use or construction of telecommunications facilities and equipment, to the municipality for its use of public streets, alleys, or highways, or all of them, and shall not be required to pay any additional tax or fee on the gross revenues that are the measure of the privilege tax. As used in this subsection, 'use' includes, but is not limited to, street openings, construction and maintenance of fixtures or facilities by telecommunications carriers. As used in this subsection, 'additional fee, compensation or consideration' does not include commissions paid for siting public telephones on municipal property. To the extent that separate fees are imposed by the municipality on telecommunications carriers for street openings, construction, inspection or maintenance of fixtures or facilities, such fees may be deducted from the privilege tax authorized by this section. However, telecommunications carriers shall not deduct charges and penalties imposed by the municipality for noncompliance with charter provisions, ordinances, resolutions or permit conditions from the privilege tax authorized by this section.

"(4) For purposes of this section, 'telecommunications carrier' has the meaning given that term in ORS 133.721."

1 and actually using the streets, alleys or highways," except for travel, "a privilege tax for
2 the use of those streets, alleys or highways * * * in an amount which may not exceed
3 seven percent of the gross revenues of the telecommunications carrier currently earned
4 within the boundaries of the municipality." The privilege tax is calculated on a portion of
5 the telecommunications carrier's revenue "derived from exchange access service[.]" ORS
6 221.515(2). Exchange access service, defined by ORS 403.105(10), is local telephone
7 service, and does not include other services such as long-distance service. Under ORS
8 221.515(3), a telecommunications carrier that pays the privilege tax authorized under the
9 statute is not required to pay other taxes or fees to the municipality "for its use of public
10 streets, alleys, or highways, or all of them, and shall not be required to pay any additional
11 tax or fee on the gross revenues that are the measure of the privilege tax."

12 As relevant to this case, the city imposes both a utility "privilege tax" and
13 the ULF on various utilities that operate within its borders. The city imposes a privilege
14 tax on certain utilities that use or occupy the city's rights-of-way, "for the use and
15 occupancy of" those rights-of-way. Portland City Code (PCC) 7.12.060. In accordance
16 with ORS 221.515, that tax is seven percent for a "telecommunications utility,"
17 calculated on its exchange access service revenue earned within the city. PCC
18 7.12.060(C). A crediting provision allows a utility operating under a revocable permit
19 "for using the streets" to deduct from its privilege tax obligation any amount paid under
20 the permit.³ PCC 7.12.110.

³ The city requires compensation for the use of its rights-of-way in two ways. The

1 At the same time, the city requires anyone operating a "utility" within the
2 city to obtain a license from the city, for which it charges a tax--the ULF. PCC 7.14.020,
3 PCC 7.14.060. For such license purposes, a "utility" is defined, in part, as "the business
4 of supplying * * * telecommunications." PCC 7.14.040(I). In turn,
5 "telecommunications" is defined, in part and with some exceptions, as "the providing or
6 offering * * * of the transmittal of voice, data, image * * * or any other information
7 between or among points by wire, cable, fiber optics, laser, microwave, radio, or similar
8 facilities[.]" PCC 7.14.040(H). The ULF requires designated utilities, including
9 telecommunications utilities, to pay a five percent tax calculated on their gross revenues
10 earned within the city.⁴ PCC 7.14.060(A).

11 However, a crediting provision in the city's code allows utilities subject to
12 the ULF to deduct from their ULF obligations payments they make under the terms of
13 permits and franchises. PCC 7.14.070. In addition, if all of a utility's revenues "earned

first is the city's privilege tax. The second is via permits, franchises, and similar agreements. Through permits and franchises, the city grants utilities permission to use and occupy the city's rights-of-way, regulates that use, and in return requires payment. That system is relevant here as it relates to the crediting provisions of the privilege tax and the ULF. As we will discuss, Qwest uses and occupies the city's rights-of-way under a temporary revocable permit that entitles it to a credit for its permit-fee payment that eliminates its privilege tax obligation and reduces its ULF obligation.

⁴ Within the ULF law, "gross revenue," as relevant here, is defined as "any revenue earned within the City, * * * from the furnishing or sale of communications or associated services by or from a telecommunications * * * business[.]" subject to certain adjustments and exceptions. PCC 7.14.040(D). Because ORS 221.515 and the city's privilege tax also use the term "gross revenues," but define it to mean a more limited portion of revenue, for clarity we refer to the revenue base used in the statute and the privilege tax as "exchange access service revenue," and the revenue base used in the ULF as "gross revenues."

1 from operations as a utility otherwise meet the criteria for deduction under" that crediting
2 provision, it "is not required to apply for or obtain a utility license * * *." PCC
3 7.14.050(B).

4 It is undisputed that Qwest is a telecommunications carrier for purposes of
5 ORS 221.515 and that it falls within the city's definitions of a utility subject to both the
6 ULF and the city's privilege tax. That is because it is a utility doing business in the city
7 and providing telecommunication services via wires, cables, and other networked
8 equipment in the city's rights-of-way, both above and beneath city roadways.

9 Qwest has a temporary revocable permit from the city under which Qwest
10 pays the city the equivalent of the privilege tax, consisting of seven percent of its
11 exchange access service revenue, for its use of the city's rights-of-way. *See* PCC
12 7.12.110 (providing that "[a]ny amount which any utility [pays] * * * under the terms of
13 any revocable permit * * * for using the streets shall be credited against the amount"
14 owed for the privilege tax). As a utility, Qwest is also subject to the ULF, subject to the
15 credit in PCC 7.14.070.

16 Because the history of the ULF forms the basis for part of Qwest's
17 argument, we briefly review the most relevant changes to that law. In 1946, the city
18 amended its license and business code to create the ULF. Portland Ordinance 82958
19 (June 27, 1946) (1946 ULF). The city already had a privilege tax, which was enacted in
20 1932, Portland Ordinance 62282 (Mar 16, 1932), and it already used permits and
21 franchises to regulate and charge utilities for their use of the city's rights-of-way.

1 To "more equitab[ly] distribut[e] the costs of local government," the city
2 created the ULF as a business license tax that applied to specified utilities operating
3 within the city. 1946 ULF, Section 1. The tax for the required license was a percentage
4 of a covered utility's gross revenues earned within the city, with certain adjustments, and
5 utilities that made payments under licenses and franchises could deduct those payments
6 from the fee. 1946 ULF, Section 1, Article 75, §§ 20-7502, 20-7504, 20-7505.

7 The current version of the ULF remains very similar to the 1946 version.
8 *Compare* 1946 ULF, with PCC 7.14.005 - 7.14.130. The rates have changed over time,
9 and the adjustments and exceptions made in the definition of "gross revenues" have
10 changed, but the basic structure of the law remains the same: It applies to specified
11 utilities doing business in the city, imposes a license requirement and a tax on revenues
12 earned within the city, and it credits payments to the city made under permits or
13 franchises. PCC 7.14.005 - 7.14.130

14 Before June 1990, the ULF was calculated as five percent of "gross
15 revenues," which were defined for telecommunications utilities to exclude revenues from
16 "service other than noncompetitive local exchange telecommunications access service,"
17 PCC 7.14.020(a) (1985) (Portland Ordinance 157530 (June 2, 1985)). In June 1990,
18 when ORS 221.515 was about to take effect on July 1, *see* Or Laws 1989, ch 484, § 9, the
19 city amended the ULF as it applied to telecommunications utilities. The city changed the
20 revenue base and tax rate for telecommunications utilities to match the revenue base and
21 rate limits set out in the statute. PCC 7.14.040(D) (1990), PCC 7.14.060(A) (1990),

1 (Portland Ordinance 163203 (June 27, 1990)). Thus, after the amendments, for
2 telecommunications utilities, the ULF was seven percent of exchange access service
3 revenue, rather than five percent of gross revenues as they were then defined. The
4 amendments meant that, for telecommunications utilities, the revenue base and tax rate
5 for the ULF and the privilege tax were identical.

6 In 2012, after the Supreme Court had decided *US West Communications v.*
7 *City of Eugene*, 336 Or 181, 81 P3d 702 (2003) (*US West*), the city again amended the
8 ULF, again changing the revenue base and tax rate. That is the version of the ULF at
9 issue here. The amendments changed the tax for telecommunications utilities to five
10 percent of gross revenues earned within the city, with a credit for fees paid under a permit
11 or franchise, and "gross revenues" are no longer limited for telecommunications utilities
12 to only exchange access service revenue. PCC 7.14.040(D), PCC 7.14.060, PCC
13 7.14.070 (Portland Ordinance 185756 (Nov 28, 2012)).

14 Before the amendments in 2012, the ULF was calculated in the same way
15 that Qwest's permit fee and the privilege tax were calculated: each was seven percent of
16 Qwest's exchange access service revenue. Thus, the crediting provisions applied so that
17 Qwest made only one payment of seven percent of exchange access service revenue to
18 the city.

19 The 2012 amendment to the ULF that changed the revenue base raised the
20 total amount of fees and taxes that Qwest was obligated to pay the city. Qwest's ULF
21 obligation would exceed the amount of its permit fee, and Qwest would owe the city both

1 must therefore conform to the requirements of ORS 221.515(1) when applied to
2 telecommunications carriers such as Qwest. In support of that argument, Qwest asserts
3 that the ULF should be interpreted in light of its function rather than its nomenclature,
4 relying on cases such as *Automobile Club v. State of Oregon*, 314 Or 479, 493, 840 P2d
5 674 (1992) (stating that "the character of a levy is determined by its function, not by the
6 label"). Qwest argues that, because the ULF applies only to utilities that use the city's
7 rights-of-way, it necessarily is a tax for that use, and is therefore a privilege tax subject to
8 the statutory limits. Qwest also argues that the legislative history proves that the
9 legislature "understood and intended" that ORS 221.515 would limit the ULF.

10 The city counters that ORS 221.515, as interpreted by the Supreme Court in
11 *US West*, places limits on a city's authority to tax telecommunications carriers' use of
12 rights-of-way, but it does not limit a city's ability to impose additional taxes on those
13 carriers for other purposes. The city argues that, properly construed, the ULF is not a tax
14 for use of its rights-of-way, and that, to the contrary, "nearly half the utilities currently
15 subject to the ULF do not occupy any City streets, alleys, or highways."

16 In reply, Qwest argues that *US West* is irrelevant to this case, because the
17 tax at issue in that case was significantly different from the ULF. Specifically, it points
18 out that the tax at issue in *US West* did not apply solely to utilities that necessarily used
19 city rights-of-way.

20 A. *Preemption Generally*

21 Qwest's claim of error requires us to determine whether ORS 221.515

1 preempts the ULF. Thus, we begin by examining how state law might preempt a local
2 law enacted pursuant to a city's "home rule" authority. Under that framework, a local law
3 is valid and not preempted if "it is authorized by the local charter or by a statute," and if
4 it does not "contravene[] state or federal law." *Rogue Valley Sewer Services v. City of*
5 *Phoenix*, 357 Or 437, 450, 353 P3d 581 (2015) (quoting *LaGrande/Astoria v. PERB*, 281
6 Or 137, 142, 576 P2d 1204, *adh'd to on recons* 284 Or 173, 586 P2d 765 (1978).

7 A state law can preempt a municipal law in two ways. First, the state might
8 pass a law or laws expressly precluding all municipal regulation in an area, such that the
9 state "occup[ies] the field" in that area. *Id.* at 454. Second, state law will preempt a
10 municipal law if the laws conflict, such that they "cannot operate concurrently."
11 *LaGrande/Astoria*, 281 Or at 148; *accord Advocates for Effective Regulation v. City of*
12 *Eugene*, 160 Or App 292, 299, 981 P2d 368 (1999). When conducting that conflict
13 analysis, we must construe the local law "if possible, to be intended to function
14 consistently with state laws[.]" *LaGrande/Astoria*, 281 Or at 148.

15 Qwest does not argue that the city's actions exceeded its charter, nor does it
16 argue that the legislature intended to occupy the field. Accordingly, this case reduces to
17 the question whether the ULF conflicts with ORS 221.515(1), such that the two laws
18 cannot operate concurrently. That requires us to interpret both the statute and the
19 municipal law to determine if they can function concurrently or if they necessarily
20 conflict. *LaGrande/Astoria*, 281 Or at 148-49. To that end, we first determine the
21 meaning of ORS 221.515, and then we determine whether, properly interpreted, the ULF

1 cannot be harmonized with that statute.

2 B. *ORS 221.515*

3 In determining the meaning of a statute, we examine its text and context, as
4 well as any legislative history that is helpful to our analysis. *State v. Gaines*, 346 Or 160,
5 171-72, 206 P3d 1042 (2009). The goal of that inquiry is to determine the legislature's
6 intent. *IAFF, Local 3564*, 262 Or App at 661.

7 The Supreme Court has previously construed ORS 221.515 in *US West*.
8 That case provides useful context for the discussion here. The City of Eugene had
9 imposed on telecommunications carriers a two percent annual registration fee in addition
10 to the seven percent privilege tax permitted under ORS 221.515. *US West*, 336 Or at
11 183-84. *US West* sought a declaratory judgment that ORS 221.515 prohibited the two
12 percent tax.⁵ *Id.* at 184.

13 The Supreme Court noted at the outset that "[t]he question is not whether
14 ORS 221.515 authorizes the city to impose its two percent registration fee[,]" but rather,
15 "whether state * * * law prohibits the city from doing so." *Id.* at 186. *US West* argued
16 that, because "a telecommunications carrier cannot operate without using a city's rights-
17 of-way," the statute's limitation on right-of-way privilege taxes applied to the City of
18 Eugene's tax on the privilege of operating within the city, even though that tax did not
19 refer to right-of-way use. *Id.* at 187. The court explained, however, that the statute was
20 not as broad as *US West*'s argument would require. *Id.* Rather, by its plain terms, ORS

⁵ *US West* later became *Qwest*. *US West*, 336 Or at 183.

1 221.515 limits taxes on "one narrow type of activity"--the privilege of using a city's
2 rights-of-way--and it does not prohibit a city from imposing additional taxes or fees for
3 other activities:

4 "[T]he legislature focused only on a city's ability to recover a tax for one
5 narrow type of activity, *viz.*, a carrier's use of the city's rights-of-way. The
6 legislature said nothing about a city's ability to tax other business activities
7 that a telecommunications carrier might undertake within the city limits. * *
8 * [T]he legislature logically could choose to limit a city's ability to recover
9 a tax for a carrier's use of its streets without also limiting a city's authority
10 to recover other taxes or fees from carriers that do business within the city's
11 borders."

12 *Id.* at 187-88. Further, the court noted that "ORS 221.515(1) states that cities may
13 impose a tax for the privilege of using the city's streets, alleys, and highways; *it does not*
14 *address whether a city may (or may not) impose a tax for the privilege of operating*
15 *within city limits.*" *Id.* at 188 (emphasis added).

16 Here, Qwest does not argue, as in *US West*, that the city is prohibited from
17 imposing additional taxes on it beyond the privilege tax addressed in ORS 221.515(1),
18 nor does it argue that the tax violates ORS 221.515(3). Rather, Qwest argues that the
19 ULF *is* a privilege tax for the use of the city's rights-of-way, and that, as such, it is limited
20 to seven percent of Qwest's exchange access service revenue under ORS 221.515(1). We
21 focus our inquiry, therefore, on the terms of ORS 221.515(1) that define the taxes to
22 which the statute's limits apply. *See Proctor v. City of Portland*, 245 Or App 378, 382-
23 392, 263 P3d 1099 (2011), *rev den*, 351 Or 649 (2012) (resolving whether state law
24 prohibited local business license tax by first examining relevant statutes, then examining
25 municipal law at issue to determine whether state law prohibited it).

1 The "privilege taxes" that the legislature intended to limit are addressed in

2 ORS 221.515(1). Again, that provision states, in relevant part:

3 "The council of every municipality in this state may levy and collect from
4 every telecommunications carrier operating within the municipality and
5 actually using the streets, alleys or highways, or all of them, in such
6 municipality for other than travel, a privilege tax for the use of those
7 streets, alleys or highways, or all of them, in such municipality in an
8 amount which may not exceed seven percent of the gross revenues of the
9 telecommunications carrier currently earned within the boundaries of the
10 municipality."

11 ORS 221.515(1). Accordingly, a "privilege tax" to which this limitation applies by its
12 plain text is one that is (1) levied by a municipality, (2) upon a telecommunications
13 carrier, (3) operating within the municipality, and (4) *actually using* the streets, alleys or
14 highways for a purpose other than travel, and is (5) *for the use of the streets, alleys or*
15 *highways*.

16 C. *The Text and Context of the ULF*

17 With those terms in mind, we next examine whether the ULF imposes a
18 "privilege tax" on telecommunications carriers within the meaning of ORS 221.515(1),
19 and is thus subject to the limitations in that provision. We begin with the relevant text
20 and context of the city's code provisions. *See Lincoln Loan Co. v. City of Portland*, 317
21 Or 192, 199, 855 P2d 151 (1993) (applying statutory construction template to a municipal
22 ordinance).

23 Portland City Code chapter 7.14, entitled "Utility License Law," sets out
24 the provisions that make up the ULF. Under PCC 7.14.020, "[a]ny person, including any
25 bureau of the City, operating a utility within the City shall obtain a license for such

1 business * * *." The tax for that license for a telecommunications utility is five percent
2 of its "gross revenues," PCC 7.14.060(A), which, with some exclusions not relevant here,
3 include "any revenue earned within the City," PCC 7.14.040(D). That is, "gross
4 revenues" include both exchange access service revenue and nonexchange access service
5 revenue. Another provision defines "utility" as

6 "the business of supplying electrical energy, gas, district heating or cooling,
7 water, sewage disposal and treatment, cable, telecommunications, or other
8 services through or associated with telephone or coaxial cable, and other
9 operations for public service but does not include transportation service,
10 railroad operations, or services otherwise licensed under this Title."

11 PCC 7.14.040(I). Finally, a provision defines telecommunications:

12 "'Telecommunications' means the providing or offering for rent, sale or
13 lease, or in exchange for other value received, of the transmittal of voice,
14 data, image, graphic and video programming or any other information
15 between or among points by wire, cable, fiber optics, laser, microwave,
16 radio, or similar facilities, with or without benefit of any closed
17 transmission medium, but does not include:

18 "1. cable television services;

19 "2. private telecommunications network services;

20 "3. over-the-air radio or television broadcasting to the public-at-
21 large from facilities licensed by the Federal Communications Commission
22 or any successor thereto;

23 "4. direct-to-home satellite service within the meaning of Section
24 602 of the Telecommunications Act of 1996;

25 "5. services provided solely for the purpose of providing internet
26 service to the consumer;

27 "6. public safety radio systems;

28 "7. mobile service within the meaning of 47 U.S.C. § 153(33)
29 (2012) and

1 "8. services to devices exclusively utilizing electromagnetic
2 spectrum unlicensed by the Federal Communications Commission."

3 PCC 7.14.040(H).

4 By those terms and definitions, the ULF is a tax on the gross revenues of
5 utilities--including telecommunications utilities--earned within the city. It makes no
6 reference to the use of "streets, alleys or highways," or rights-of-way, and, theoretically,
7 its terms could apply to telecommunications utilities that use "laser, microwave, radio[,]
8 or similar facilities." Thus, the ULF described in PCC chapter 7.14 is not structured as a
9 privilege tax, as described in ORS 221.515.

10 That view of the ULF--as a tax based on gross revenues earned in the city--
11 is supported by the context of PCC chapter 7.14. Another chapter of the city's code, PCC
12 chapter 7.12, is devoted to permits, franchises, and taxes for using the city's rights-of-
13 way. And, PCC 7.12.060 specifically imposes a privilege tax for "using or occupying"
14 the city's rights of way. The existence of that separate code chapter and its provisions
15 concerning the city's privilege tax indicates that the ULF provides for something different
16 from a privilege tax. *See, e.g., State v. Clemente-Perez*, 357 Or 745, 755, 359 P3d 232,
17 239 (2015) ("As a general rule, we * * * assume that the legislature did not intend any
18 portion of its enactments to be meaningless surplusage." (Citing ORS 174.010.)).

19 D. *Whether, Despite the Text of the City's Code, the ULF is a Privilege Tax*

20 Despite the text of the provisions in PCC chapter 7.14 set out above, Qwest
21 contends that, in substance, the ULF is a privilege tax subject to ORS 221.515(1). The
22 thrust of Qwest's argument is that the city assesses the ULF on utilities just like a

1 privilege tax: The city assesses the ULF only if the utility uses city rights-of-way. The
2 city challenges that argument on two fronts. First, the city asserts that Qwest's argument
3 depends on flawed premises about how the ULF applies. Second, the city asserts that the
4 argument as a whole fails as a matter of logic and of law: Even if it were true that the
5 city assessed the ULF only on utilities that used or occupied the city's rights-of-way, that
6 fact would not compel the conclusion that the ULF is, in fact, a privilege tax. As we
7 explain, we are not persuaded that the ULF acts as a privilege tax.

8 First, Qwest argues that the ULF falls within the terms of ORS 221.515(1),
9 as a privilege tax for the use of the city's rights-of-way, because "access to public rights-
10 of-way *itself* is the trigger for imposition of the ULF." Qwest notably frames this
11 argument in terms of "access to" rather than the statutory language that refers to "actually
12 using" the city's rights-of-way. Qwest acknowledges that the ULF applies to a number of
13 utilities that are resellers of telecommunications services or are voice-over-internet-
14 protocol (VOIP) providers. Those utilities--which are subject to the ULF, but not the
15 city's privilege tax--do not own or operate equipment or facilities in the city's rights-of-
16 way. The resellers purchase service from other utilities that unquestionably do "actually
17 use" the city's rights-of-way, and they resell it to their customers. The VOIP utilities
18 provide telephone service to customers who typically have internet service through
19 another company. However, Qwest argues that those utilities do use cables and
20 equipment located in the city's rights-of-way to provide services, so the fact that they are
21 included in the sweep of the ULF is consistent with its position that the ULF is a tax on

1 the use of the city's rights-of-way. Like the trial court, we disagree with Qwest's view of
2 the ULF.

3 As explained above, the legislature intended that a tax levied on a
4 telecommunications carrier would be limited to the tax rate and revenue base set out in
5 ORS 221.515(1), if the tax matched the criteria set out in that provision. Those criteria
6 again are that the tax is (1) levied by a municipality, (2) upon a telecommunications
7 carrier that is (3) operating within the municipality and (4) "*actually using*" the streets,
8 alleys, or highways for a purpose other than travel, and the tax is (5) "*for the use of*" those
9 streets, alleys, or highways. (Emphases added.) Here, the ULF matches the first three
10 statutory criteria, but not the fourth and fifth.

11 As for the fourth criterion, Qwest's position would require us to conclude
12 that the phrase "actually using" in ORS 221.515(1) includes indirect use by
13 telecommunications resellers and VOIP providers. We conclude that it does not. The
14 word "actually" means, as relevant here, "in act or in fact : REALLY" and is contrasted
15 with "nominally."⁶ *Webster's Third New Int'l Dictionary 22* (unabridged ed 2002). In
16 context, then, a tax to which ORS 221.515(1) applies is one imposed on
17 telecommunications carriers that in fact, really, and not just nominally, use the city's

⁶ The full definition provides:

"**1** : in act or in fact : REALLY <nominally but not ~ independent -- Karl Loewenstein> **2** : at the present moment : for the time being <the transmission screen showing the picture that was ~ on the air -- Dennis Johnston> **3** : in the point of fact : in truth -- used to imply that one would expect the fact to be the opposite of what is stated <she ~ spoke Latin>[.]"

1 rights-of-way.

2 But the telecommunications resellers and VOIP providers do not in fact,
3 really, and not just nominally, use the city's rights-of-way. Rather, to the extent that they
4 do "use" the city's rights-of-way, they do so indirectly by either purchasing service from
5 another utility and reselling it or by providing service to a customer who has existing
6 Internet access.

7 Thus, to reach the conclusion Qwest proposes, we would have to ignore the
8 word "actually" in the legislature's phrase, "actually using." We cannot conclude that the
9 legislature intended the word "actually" in ORS 221.515(1) to be meaningless. *See* ORS
10 174.010 (in construing a statute, a court is not to "insert what has been omitted, or to omit
11 what has been inserted"); *US West*, 336 Or at 188 ("We cannot adopt the interpretation of
12 ORS 221.515 that US West urges without rewriting the statute's terms, a task that we
13 cannot undertake."). Further, we cannot conclude that the legislature intended to limit the
14 taxation powers of home rule cities in the way that Qwest claims when that conclusion
15 would require us to ignore a part of the statute that is the expression of the legislature's
16 intent.

17 Similarly, we are unconvinced that the ULF is directed at an activity other
18 than what it says: utilities doing business within the city. Qwest asserts that all of the
19 utilities to which the ULF applies supply services through wire, pipe, conduit, or cable in,
20 on, or over city streets. It follows, Qwest argues, that (1) the city imposes the ULF only
21 on utilities that actually use city rights-of-way and (2) the ULF is therefore a privilege tax

1 for the use of those rights-of-way and is subject, insofar as it applies to
2 telecommunications carriers, to the limits in ORS 221.515(1).

3 For its argument that the tax applies only to utilities that actually use city
4 rights-of-way, Qwest relies in part on its interpretation of PCC 7.14.040(I), which defines
5 a "utility" for purposes of the ULF. Qwest asserts that PCC 7.14.040(I) "describes a
6 telecommunications 'utility' as a 'business * * * supplying * * * telecommunications, or
7 other services[,] through or associated with telephone or coaxial cable.'"

8 But Qwest's position is based on a misreading of the city's code. The
9 definition of a utility in PCC 7.14.040(I) lists separate business activities in which a
10 utility might be engaged, and those activities are separated by commas. Thus, a "utility"
11 includes businesses supplying "telecommunications," and also those supplying "other
12 services through or associated with telephone or coaxial cable," just as it includes
13 businesses supplying "water," and those supplying "sewage disposal and treatment."
14 Qwest misreads the phrase "through or associated with telephone or coaxial cable" as
15 modifying "telecommunications" rather than "other services." That Qwest is misreading
16 PCC 7.14.040(I) is made even more evident when one considers the definition of
17 "telecommunications," which immediately precedes the definition of "utility." PCC
18 7.14.040(H). "Telecommunications" is defined as including "transmittal of voice, data,
19 image, graphic and video programming * * * by * * * fiber optics, laser, microwave,
20 radio, or similar facilities," *id.*, which are clearly not supplied "through or associated with
21 telephone or coaxial cable."

1 Qwest next points out that the definition of "telecommunications" excludes
2 various services--PCC 7.14.040(H)(1-8), for example, excludes direct-to-home satellite
3 service--all of which Qwest describes as non-wireline-based services. Qwest also
4 highlights that the city has implemented an administrative rule exempting wireless
5 communications providers from the ULF:

6 "All providers of wireline voice telephone and communications services to
7 subscribers in the City of Portland, whether by means of provider-owned
8 facilities or facilities owned by another, including voice services delivered
9 through the use of Internet Protocol, are required to obtain a Utility License
10 * * *. The Utility License Law does not apply to wireless communications
11 or telephone providers, nor to such providers paying compensation to the
12 City on a linear foot basis under the terms of a valid franchise, license or
13 permit."

14 *Former* Portland Administrative Rule UTIL-UFM 1.04 (2009), *renumbered as* Portland
15 Administrative Rule UTL-3.04 (2010), *renumbered as* UTL 3.05 (2011). According to
16 Qwest, the exclusions in the definition of telecommunications and the exemption of
17 wireless communications providers in the administrative rule reinforce its argument that
18 the ULF is right-of-way based, because the only telecommunications services that are
19 subject to the ULF are wireline-based services for the transmission of communications.

20 However, while the city in fact does not apply the ULF to wireless
21 communications providers, it does apply the ULF to telecommunications utilities that
22 deliver services though "facilities owned by another." *Id.* Thus, as discussed earlier,
23 resellers and VOIP providers that do not occupy the city's rights-of-way must pay the
24 ULF. The city adduced evidence that, at the time of the summary judgment proceedings,
25 71 of the 151 utilities that were paying the ULF did not occupy city rights-of-way.

1 In addition, Qwest does not controvert the city's evidence that wireless
2 communications companies do use city rights-of-way for their equipment. Those
3 companies have "right of way agreements," which are franchises that allow them to place
4 equipment in city rights-of-way, and they pay a rate per fixture. Thus, because wireless
5 communications companies do use and occupy the city's rights-of-way, the exclusion of
6 those companies does not show that use of the city's rights-of-way is the "trigger" for
7 application of the ULF to a utility, and therefore that the ULF is a tax for the use of city
8 rights-of-way, as Qwest contends.

9 Qwest also argues that the provisions of the ULF that provide credit for
10 payment of the privilege tax and permit fees--which are payments for use of the city's
11 rights-of-way--prove that the ULF is also a tax on right-of-way use. As the trial court
12 correctly pointed out, however, a tax credit of one tax payment against another tax owed
13 "does not cause the character of the first tax to define the character of the second tax."

14 Qwest also points to the legislative history of ORS 221.515 as supporting
15 its contention that the ULF was and is a privilege tax subject to the limitations in that
16 statute. Qwest argues that the legislature "understood and intended" that ORS 221.515
17 would limit the ULF given the participation of both Qwest's predecessor, US West, and
18 the city during the legislative process that led to passage of Oregon Laws 1989, ch 484
19 (HB 3000) and the enactment of ORS 221.515. According to Qwest, "the Oregon
20 legislature itself explicitly intended to target the ULF when it passed HB 3000, which
21 became ORS 221.515." (Emphasis omitted.)

1 In support of that contention, Qwest asserts that, before passage of HB
2 3000, Qwest's predecessor, US West, had for "some years" been paying the ULF as "the
3 sole assessment actually levied" by the city.⁷ The city's increase of the ULF tax rate from
4 three percent to five percent in 1985 prompted Qwest to lobby the legislature for the
5 restrictions on local taxes that became HB 3000. The city and Qwest both participated in
6 the legislative process. After engaging in negotiations, they made a joint
7 recommendation to the legislature that the tax limitation in HB 3000 should be set at
8 seven percent of exchange access service revenue. In addition, Qwest points to
9 references by the city, including in its amendment in 1990 of the ULF, as showing that
10 the city at those times regarded ORS 221.515 as applying to the ULF.

11 The city responds that the legislature's intent in enacting ORS 221.515 has
12 already been determined by the Supreme Court in *US West*. That intent was to limit only
13 "a city's ability to recover a tax for one narrow type of activity, viz., a carrier's use of the
14 city's rights-of-way." *US West*, 336 Or at 187. The *US West* court further explained, the
15 city points out, that the legislature's intent when it limited taxes for the use of streets,
16 alleys, and highways, could not be read as intending to create a broader prohibition.

17 In addition, the city notes that *the city's* understanding of the reach of ORS
18 221.515 does not demonstrate the intent of *the legislature* in enacting it. Even if the
19 city's beliefs about the law were relevant, the city argues, the fact that, after passage of

⁷ Qwest's assertion of fact is not accompanied by a citation to the record. *See* ORAP 5.20(1). Because it would not compel a different result, we assume that the record does contain evidence of that point.

1 HB 3000, the city amended both the ULF and its privilege tax "showed, at most, that the
2 City may have believed--as did many others at the time--that ORS 221.515 might limit
3 numerous kinds of taxes on utilities, not just" taxes for the use of cities' rights-of-way.
4 Citing *US West*, 336 Or at 187 (explaining that US West argued that ORS 221.515 "caps
5 a city's ability to recover [any] tax for the privilege of operating within the city"), the city
6 points out that, until the *US West* decision, that was Qwest's belief as well.

7 We are not persuaded by Qwest's legislative history argument. The
8 testimony that Qwest cites to us contains numerous references to local privilege and
9 franchise taxes and fees. We have found only one passing reference in those materials,
10 however, that is arguably a reference to the ULF. That reference is by US West's
11 lobbyist. We provide it in context:

12 "The current statutes that we're talking about dealing with here today
13 date back to the 1930s. During our discussion, we will use the terms
14 'franchise taxes' and 'privilege taxes' kind of interchangeably. And it really
15 doesn't make any difference for the sake of discussion, I don't believe,
16 because what we're really talking about is the tax authorized by ORS
17 221.450.

18 "For decades cities have levied franchise or privilege taxes on local
19 phone companies *for the privilege of conducting business within the cities*
20 and the use of city streets and alleys for their openings and construction of
21 their facilities and so on."

22 Tape Recording, Senate Government Operations and Elections Committee, HB 3000,
23 June 7, 1989, Tape 141, Side A (statement of Gary Wilhelms, Director of Legislative
24 Affairs, US West (emphasis added)). The statute Wilhelms referenced, ORS 221.450,
25 limits local privilege taxes--taxes "for the use of * * * public streets, alleys or highways"-

1 -on utilities generally. That statute previously set the limits on privilege taxes applicable
2 to all utilities, including telecommunications carriers, until passage of HB 3000 created a
3 separate limitation for telecommunications carriers. That single reference to taxes "for
4 the privilege of conducting business within" a city by US West's lobbyist, in context,
5 does not persuade us that the legislature "understood and intended" that references to
6 taxes on the actual use of city streets, alleys, and highways, would include taxes on
7 conducting business within the city generally. Nor are we persuaded that the legislature
8 "expressly intended to target the ULF."

9 Having examined the legislative history that Qwest points to as supporting
10 its position, we conclude that it is not helpful in determining the legislature's intent. It
11 does not lead us to any meaning other than that found in the plain text. Further, we find
12 no ambiguity in the plain text. And, even if a part of the legislative history revealed an
13 intention to target the ULF--which we do not find--we still would not, in effect, rewrite
14 an unambiguous statute contrary to its unambiguous plain text. *Halperin v. Pitts*, 352 Or
15 482, 494-95, 287 P3d 1069 (2012) ("It is one thing to resort to legislative history to
16 resolve an ambiguity" in a statute, but "[i]t is another thing entirely * * * to resort to
17 legislative history as a justification for inserting wording in a statute that the legislature,
18 by choice or oversight, did not include.").

19 Citing *Proctor*, 245 Or App 378, Qwest argues that we should view the
20 2012 amendments to the ULF as an attempt by the city to sidestep the limitations in ORS
21 221.515(1), by making changes to the provision while claiming a particular intent, but not

1 fundamentally changing the substance of the provision. In *Proctor*, we concluded that a
2 state statute prohibiting cities from imposing business license taxes on real estate brokers
3 working under the supervision of a principal real estate broker precluded the City of
4 Portland from enforcing an amended version of its business license tax. 245 Or App at
5 390-92. There, we undertook a similar analysis to the one we engage in here, first
6 determining the intent of the legislature in enacting the prohibition, and then examining
7 the city code provision to determine if it conflicted with the statute.

8 In *Proctor*, the statute at issue had a very broad sweep, defining a business
9 license tax as including "*any fee* paid by a person to a city or county for *any form of*
10 license that is required by the city or county in order to conduct business in that city or
11 county." ORS 701.015(6)(a) (emphases added). In addition, the legislature had created
12 an exemption for the business license tax at issue in another, related statutory provision,
13 but it had not exempted that tax from the provision at issue in *Proctor*. 245 Or App at
14 390-91. The legislature had in fact contemplated whether the statute would limit the
15 business license tax, and it had declined to exempt it. We held that, although the city had
16 cosmetically altered the code provision that was previously clearly prohibited by the
17 terms of the statute, the amendments had not succeeded in creating a provision that would
18 fall outside of the statute's broad definition of a business license tax. *Id.* at 391-92.

19 Qwest's argument here is premised on its contention, as discussed above,
20 that the ULF was previously a privilege tax clearly subject to the limitations in ORS
21 221.515, and thus, because the 2012 amendments did not fundamentally alter the ULF,

1 they did not succeed in removing it from the limitations of the statute. We have already
2 rejected that contention. As explained above, ORS 221.515(1) is a limit "only on a city's
3 ability to recover a tax for one narrow type of activity." *US West*, 336 Or at 187. The
4 statute does not limit a city's authority to impose additional taxes on utilities, such as a
5 tax for the privilege of doing business within the city.⁸ And, even if the city may have
6 believed, before *US West* was decided, that the ULF might be subject to the limitations in
7 ORS 221.515, that does not mean that it actually was. Thus, although we agree that the
8 2012 amendments did not fundamentally alter the nature of the ULF, we reject Qwest's
9 premise that the ULF was previously a privilege tax subject to ORS 221.515(1), so the
10 amendments did not need to fundamentally change the ULF's nature for it to continue to
11 fall outside of the scope of the statute's limitations.

12 We conclude that the ULF does not conflict with ORS 221.515(1), because
13 it is not a privilege tax for the use of the city's rights-of-way as contemplated by that
14 statute. Consequently, we affirm the judgment of the trial court.

⁸ The legislature did use a broader term in a related provision found in a different section of the act. Or Laws 1989, ch 484, §§ 5, 7. The related provision concerns how the Public Utility Commission should treat certain local exactions for rate-making purposes. Or Laws 1989, ch 484, § 7. That section of the act was codified as *former* ORS 759.105 (1990), *renumbered as* ORS 759.219 (2005). ORS 759.219 refers to "[t]he privilege tax authorized by ORS 221.515, *or other similar exactions* imposed by any municipality in this state upon telecommunications utilities for use and occupancy of streets, alleys or highways, or all of them[.]" (Emphasis added.) That the legislature used a broader term in a related provision, but not in the provision creating ORS 221.515, reinforces the conclusion that the limitations in ORS 221.515 apply to taxes that fit the narrow description in ORS 221.515(1) and not to a broader set of "similar exactions * * * for use and occupancy of streets, alleys or highways or all of them" described in ORS 759.219.

1

Affirmed.