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October 30, 2016

phh

Sponsor: Upthegrove, Balducci, Dembowski,
Lambert

phh

Proposed No.: 2016-0521

1 **AMENDMENT TO PROPOSED ORDINANCE 2016-0521, VERSION 1**

2 On page 1, beginning on line 15, strike everything through page 16, line 337, and insert:

3 "BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

4 **SECTION 1. Findings:**

5 A. RCW 36.75.020 grants King County broad authority to establish and regulate
6 the use of county roads.

7 B. RCW 36.55.010 authorizes King County "to grant franchises . . . to use the
8 right-of-way of county roads . . . for the construction and maintenance of waterworks, gas
9 pipes, telephone, telegraph, and electric light lines, sewers and any other such facilities."

10 C. RCW 80.32.010 authorizes the legislative authority of King County to grant
11 authority and prescribe the terms and conditions for the construction, maintenance and
12 operation of electrical lines for the transmission of electrical power upon, over, along or
13 across the county streets and roads.

14 D. King County grants franchises to public and private utility companies that
15 authorize the utility companies to use the right-of-way of county roads to provide utility
16 service within King County and elsewhere. Franchises grant a valuable property right to
17 utility companies to use the right-of-way, which allows the utility companies to profit and
18 benefit from the use of the right-of-way in a manner not generally available to the public.

19 E. Utility companies must apply for a franchise to use the right-of-way under
20 K.C.C. chapter 6.27. Franchises are memorialized in a franchise agreement that is
21 negotiated by the parties and approved by the King County council. King County
22 currently recovers from utility companies some but not all of the cost of reviewing and
23 processing the application for a franchise and in some cases has reserved the right in
24 franchise agreements to be compensated for the use of the right-of-way that is authorized
25 by a franchise.

26 F. In exchange for the valuable property right to use the right-of-way, King
27 County has authority to require utility companies to provide reasonable compensation.

28 G. Under these authorities and in light of the valuable property right granted by a
29 franchise, it is in the best interests of the public to require a utility to provide reasonable
30 compensation in return for its use of the right-of-way of county roads. In pursuing the
31 best interests of the public, King County intends to evaluate the use of the right-of-way
32 by utilities not subject to the requirement for reasonable compensation in this ordinance,
33 and as appropriate to extend the requirement for reasonable compensation to such
34 utilities.

35 H. RCW 35.58.050 authorizes King County to perform water supply and water
36 pollution abatement and RCW 58.08.010 authorizes the County to establish a public
37 utility district to form an electric utility, which authorities provide the opportunity for
38 King County to establish its own municipal utilities for the benefit of the public.

39 I. To assure access to the right-of-way of county roads, to increase long term
40 certainty as to the compensation due for use of the right-of-way, and to ease the
41 administrative burden of determining such compensation, some utility companies may

42 desire to enter into an agreement to pay a negotiated amount in exchange for a
43 commitment from King County to grant a franchise and to forbear from competing with
44 the utility company or from requiring the utility company to pay reasonable
45 compensation for use of the right-of-way. Subject to approval by the King County
46 council, such an agreement would be in the best interests of the public.

47 SECTION 2. Ordinance 17515, Section 4, as amended, and K.C.C. 4A.675.020
48 are each hereby amended to read as follows:

49 A. The franchise application fee for a party requesting a new franchise, an
50 amended franchise, a renewal((,)) or extension of an existing franchise or a transfer of its
51 franchise rights under K.C.C. 6.27.054 is ((~~two~~) ten thousand ((~~five hundred~~)) dollars.

52 B. The advertising fee under K.C.C. 6.27.054 is the full advertising costs
53 associated with the application.

54 C. The real estate services section of the facilities management division may
55 assess a surcharge to recover the actual costs ((~~and all expenses~~)) as specified in K.C.C.
56 6.27.054.B.

57 SECTION 3. Ordinance 17515, Section 8, as amended, and K.C.C. 4A.675.030
58 are each hereby amended to read as follows:

59 A. The right-of-way construction permit application fee for a party requesting a
60 permit under K.C.C. chapter 14.44, is two hundred dollars, as specified in K.C.C.
61 14.44.040.A.

62 B. The real estate services section of the facilities management division may
63 assess a surcharge to recover the actual costs ((~~and all expenses~~)) as specified in K.C.C.
64 14.44.040.B.

65 ((C. The total of the permit application fee under subsection A. of this section
66 and the surcharge assessed under Subsection B. of this section shall not exceed two
67 thousand dollars.))

68 SECTION 4. Ordinance 1710, Section 2, as amended, and K.C.C. 6.27.020 are
69 each hereby amended to read as follows:

70 ((Persons or private or municipal corporations are required, in accordance with
71 RCW 36.55.010, to obtain a right of way)) In accordance with RCW 36.55.010, the
72 county requires persons or private or municipal corporations to obtain a franchise
73 approved by the King County council in order to use the right-of-way of county roads for
74 the construction and maintenance of waterworks, gas pipes, telephone, telegraph and
75 electric lines, sewers, cable TV and petroleum products and any other such public and
76 private utilities. This requirement may be waived for the purpose of issuing
77 ((emergency)) right-of-way construction permits as provided in K.C.C. 14.44.055.

78 SECTION 5. Ordinance 1710, Section 3, and K.C.C. 6.27.030 are each hereby
79 amended to read as follows:

80 Applications for ((right-of-way)) franchises shall be submitted, in a form
81 approved by the ((property and purchasing)) facilities management division, to the clerk
82 of the King County council.

83 SECTION 6. Ordinance 10171, Section 1, as amended, and K.C.C. 6.27.054 are
84 each hereby amended to read as follows:

85 A. A party requesting a new franchise, an amended franchise, a renewal((,)) or
86 extension of an existing franchise or a transfer of its franchise rights shall pay a franchise
87 application fee as set forth in K.C.C. 4A.675.020. The fee is for ((reimbursement to the

88 ~~real estate services section of the facilities management division for~~) the administrative
89 costs ((~~and expenses~~) incurred by the county in the reviewing and processing of the
90 franchise application. The franchise application fee is payable at the time the application
91 is filed with the clerk of the council. In addition, each applicant shall pay an advertising
92 fee as set forth in K.C.C. 4A.675.020.B. Franchise application and advertising fees are
93 not refundable, even if the application is disapproved.

94 B. The real estate services section may require applicants to reimburse the ((~~real~~
95 ~~estate services section~~) county for the actual costs ((~~and all expenses~~) incurred by the
96 ((~~real estate services section as a result of~~) county in the reviewing and processing of an
97 application for the issuance, renewal or extension, amendment((~~, extension~~)) or transfer
98 of ((a)) franchise rights, to the extent the costs exceed the costs of reviewing and
99 processing the application recovered by the application fee. The payment of actual cost
100 balances shall be made at the time of the franchise issuance.

101 C. If a franchise is granted to an applicant, the real estate services section may
102 require the grantee of the franchise to reimburse the county for the actual costs incurred
103 by the county in administering a grantee's activities under the franchise, including but not
104 limited to costs incurred for inspections, relocations, abatements and enforcement.

105 D. The facilities management division is authorized to establish rules or policies
106 that define actual costs that may be charged to an applicant for a franchise or to a grantee
107 of a franchise under subsections B. and C. of this section. Costs related to reviewing and
108 processing applications for franchises and administering franchises may include, but are
109 not limited to costs for:

110 1. Personnel, including payroll and management;

111 2. Overhead, including office rent, maintenance and utilities;

112 3. Program planning and development;

113 4. Data processing and computer;

114 5. Legal and accounting services; and

115 6. Consulting services such as engineering and environmental assessment.

116 E. The facilities management division is authorized to establish rules or policies

117 to assess annual administration charges to grantees of franchises under subsection C. of

118 this section to reasonably cover the costs incurred by the county in administering

119 franchises. If the facilities management division institutes such an administration charge,

120 the real estate services section may require applicants to reimburse the county for the

121 actual costs incurred by the county in administering a franchise, to the extent the costs

122 exceed the costs recovered by the administration charge.

123 F. All ((franchise application)) payments received under this section shall be

124 credited to the county current expense fund. The franchise application fee received under

125 K.C.C. 4A.675.020.A. and K.C.C. 6.27.054.A. shall be credited against any franchise

126 compensation required by K.C.C. 6.27.060.B.

127 ((D.)) G. This section shall not apply to franchise applications, amended

128 franchises, renewal ((-, amendments)) or extension of existing franchises or transfers

129 ((made)) or franchise rights or franchise administration under the county's cable

130 television regulations, K.C.C. chapter 6.27A.

131 SECTION 7. Ordinance 1710, Section 6, as amended, and K.C.C. 6.27.060 are

132 each hereby amended to read as follows:

133 A. All franchises ((granted for county rights-of-way)) shall be consistent with the
134 following criteria:

135 1. A previously approved comprehensive plan for the applicant; if required to

136 have such a plan by K.C.C. 13.24.010;

137 2. The county ((e))Comprehensive ((p))Plan;

138 3. The standards of good practice regarding accommodation of utilities on
139 county road right-of-way as stated in the King County Road Standards, ((pursuant to
140 Washington Administrative Code,)) under ((E))chapter 136-40 WAC;

141 4. The franchise shall include provisions requiring the grantee of a franchise to
142 carry out a program acceptable to the county for the grantee to remove or relocate at its
143 cost its facilities in the right-of-way that pose a hazard to the general public; and

144 5. The franchise shall include provisions acceptable to the county requiring the
145 grantee of the franchise to indemnify, defend and hold harmless the county against
146 damages, including environmental damages, caused by, arising out of, or incidental to the
147 grantee's exercise of rights and obligations set forth in the franchise agreement.

148 B. All franchises granted for electric, gas, water and sewer utilities shall include a
149 requirement that the grantee provide the county with franchise compensation under
150 section 8 of this ordinance in return for the right to use the right-of-way.

151 C. In addition, all franchises granted for water and sewer utilities shall be
152 consistent with the following criteria:

153 1. Health and sanitation regulations of the Seattle-King County department of
154 public health ((department)) and the state;

155 2. County standards for water mains and fire hydrants and other fire suppression
156 water facilities and services as defined in chapter 70.315 RCW. Consistent with the
157 authority in chapter 70.315 RCW, except when the county is acting as a customer or as a
158 purveyor, the grantee of a water utility franchise shall, at no expense to the county,
159 provide fire suppression water facilities and services required by applicable law and shall
160 indemnify, defend and hold harmless the county against damages arising from fire
161 suppression activities during fire events. The costs incurred by the grantee for such fire
162 suppression water facilities and services shall be credited against any franchise
163 compensation required by K.C.C. 6.27.060.B;

164 3. The grantee of the franchise shall, at no expense to the county, repair all
165 existing facilities that it owns within county road rights-of-way, including all appurtenant
166 facilities and service lines connecting its system to users, if ((such)) the repair is required
167 by the county for any reasonable purpose;

168 4. The grantee of the franchise shall, at no expense to the county, adjust, remove
169 or relocate existing facilities with county road rights-of-way, including all appurtenant
170 facilities and service lines connecting its system to users, if the county determines
171 ((such)) the adjustment, removal or relocation is reasonably necessary to allow for an
172 improvement or alteration planned by the county in ((such)) the road right-of-way. The
173 county shall give the grantee written notice of ((such)) the requirement as soon as
174 practicable, with the goal to provide the notice at the beginning of the ((~~pre-design~~)
175 predesign stage for projects that are part of the county's capital improvement program,
176 including such available information as is reasonably necessary for the grantee to plan for
177 ((such)) the adjustment, removal or relocation;

178 5. For projects that are a part of the county's capital improvement program, in
179 addition to any other notice given to the grantee of the franchise, the county shall provide
180 a vertical and horizontal profile of the roadway and drainage facilities within it, both
181 existing and as proposed by the county, and the proposed construction schedule;
182 notwithstanding any permit conditions that may later be applied to the county project, this
183 initial design information shall be given at least ((180)) one hundred eighty days before
184 construction is scheduled to begin, except in cases of urgent construction or emergencies.
185 The grantee shall respond to this notice, and to any later notices of revised designs based
186 on permit conditions, within no more than ((30)) thirty days by providing to the county
187 the best available information as to the location of all of the grantee's facilities, including
188 all appurtenant facilities and service lines connecting its system to users and all facilities
189 that it has abandoned, within the area proposed for the public works project. The county
190 shall offer the grantee the opportunity to participate in the preparation of bid documents
191 for the selection of a contractor to perform the public works project as well as all required
192 adjustments, removals or relocations of the grantee's facilities. ((Such)) The bid
193 documents shall provide for an appropriate cost allocation between the parties. The
194 county shall have sole authority to choose the contractor to perform ((such)) the work.
195 The grantee and the county may negotiate an agreement for the grantee to pay the county
196 for its allocation of costs, but neither party shall be bound to enter into such an
197 agreement. Under such an agreement, in addition to the grantee's allocation of contractor
198 costs, the grantee shall reimburse the county for costs, such as for inspections or soils
199 testing, related to the grantee's work and reasonably incurred by the county in the
200 administration of ((such)) the joint construction contract((s)). ((Such)) The costs shall be

201 calculated as the direct salary cost of the time of county professional and technical
202 personnel spent productively engaged in ((such)) the work, plus overhead costs at the
203 standard rate charged by the county on other similar projects, including joint projects
204 with other county agencies((?)); and

205 6. The grantee of the franchise shall, at no expense to the county, assume the
206 following obligations with respect to facilities connected to its system that are within
207 county road rights-of-way and ((which)) that it does not own, including appurtenant
208 facilities and service lines connecting its system to users:

209 a. The grantee shall apply for, upon request and on behalf of the owner of the
210 facilities, a county right-of-way construction permit for any repairs required for ((such))
211 the facilities((; provided such)), but only if the owner agrees to reimburse the grantee for
212 all costs incurred by the grantee and any other reasonable conditions the grantee requires
213 as a precondition to applying for the permit. All work to be performed in the county
214 right-of-way shall comply with all conditions of the county permit and all applicable
215 county requirements. The grantee may at its option perform any part of the repair with its
216 own forces or require the owner to employ a contractor for that purpose, ((provided
217 such)) but only if the contractor is approved by the county;

218 b. In the event that the county determines emergency repair of ((such)) the
219 owner's facilities is necessary to halt or prevent significant damage to county road rights-
220 of-way or significant threats to the health, safety or welfare of parties other than the
221 owner or the occupants of the building served by ((such)) the facilities, the grantee shall
222 take prompt remedial action to correct the emergency to the county's approval, which the
223 county shall not unreasonably withhold; and

224 c. When the county or its contractor provides notice to the grantee, ((~~pursuant~~
225 to)) in accordance with chapter 19.122 RCW, of its intent to excavate with county road
226 rights-of-way, the grantee shall provide to the county or its contractor the best
227 information available from the grantee's records or, where reasonable, from the use of
228 locating equipment as to the location of ((such)) the facilities, including surface markings
229 where these would reasonably be of use in the excavation. If the grantee fails to make
230 good faith efforts to provide the ((above)) information required in this subsection C.6.c.
231 within the deadlines provided by chapter 19.122 RCW, the grantee shall defend,
232 indemnify and hold the county harmless for all claims and reasonable costs that result
233 from damage to ((such)) the facilities if ((such)) the damage occurs as a result of the
234 failure to provide ((such)) the information. Nothing in this subsection is intended or shall
235 be construed to create any rights in any third party or to form the basis for any obligation
236 or liability on the part of the county or the grantee toward any third party, nor is anything
237 in this subsection intended or to be construed to alter the rights and responsibilities of the
238 parties under chapter 19.122 RCW, as amended.

239 **NEW SECTION. SECTION 8.** There is hereby added to K.C.C. chapter 6.27 a
240 new section to read as follows:

241 A. Each franchise for electric, gas, water or sewer utilities granted by King
242 County shall include a requirement that the grantee of the franchise provide the county
243 reasonable compensation in return for the right to use the right-of-way for the purposes of
244 constructing, operating, maintaining and repairing utility facilities and related
245 appurtenances, which for the purposes of this section is "franchise compensation." This
246 requirement and the process outlined in this section for determining franchise

247 compensation shall apply to franchises granted after the effective date of this ordinance,
248 and to existing franchises that include terms that authorize compensation in return for the
249 right to use the right-of-way. For the purpose of determining franchise compensation
250 under this section, an applicant for a franchise and a grantee of an existing franchise that
251 includes terms that authorize compensation in return for the right to use the right-of-way
252 is "the applicant."

253 B. Franchise compensation shall be in the nature of rent and shall be paid
254 annually. Franchise compensation may be in the form of money, in-kind services or
255 other nonmonetary benefits, accruing to King County.

256 C. Franchise compensation shall be determined through consideration of the
257 following relevant factors, not all of which must be applied to each franchise: the land
258 value of right-of-way within the applicant's service area; the approximate amount of area
259 within the right-of-way that will be needed to accommodate the applicant's use; a
260 reasonable rate of return to King County for the applicant's use of the right-of-way; the
261 business opportunity made available to the applicant; density of households served; a
262 reasonable annual adjustment; and other factors that are reasonably related to the value of
263 the franchise or the cost to King County of negotiating the franchise.

264 D. The facilities management division is authorized to establish policies that
265 create a process for the determination of franchise compensation. These policies may
266 include different processes for the determination of franchise compensation depending on
267 the size and complexity of the franchise. As part of the process, the facilities
268 management division may request from the applicant information relevant to the
269 determination of franchise compensation. Also as part of the process, the facilities

270 management division shall make a reasonable estimate of franchise compensation and
271 provide that estimate to the applicant. Thereafter, the applicant shall have a reasonable
272 opportunity to suggest adjustments to the estimate in order to reach agreement with King
273 County as to the amount and type of franchise compensation.

274 NEW SECTION. SECTION 9. There is hereby added to K.C.C. chapter 6.27 a
275 new section to read as follows:

276 A. The executive is authorized to consider alternative means of providing utility
277 services, including but not limited to:

- 278 1. Establishing a King County utility to provide utility services, or
- 279 2. Granting nonexclusive franchises.

280 B. In exchange for a forbearance payment by a utility company, the county may
281 contract with the utility company:

282 1. To forbear from establishing a King County utility to compete with the utility
283 company; and

284 2. To forbear from requiring the utility company to provide the county
285 reasonable compensation in return for the right to use the right-of-way as required by
286 K.C.C. 6.27.060.B.

287 C. The forbearance agreement may take the form of a franchise agreement, an
288 interlocal agreement under chapter 39.34 RCW or an agreement under other contracting
289 authority, and shall be subject to approval by the King County council.

290 NEW SECTION. SECTION 10. There is hereby added to K.C.C. chapter 6.27 a
291 new section to read as follows:

292 If any person or entity installs or maintains utility facilities in the right-of-way of
293 county roads without the required franchise, or has not complied with the terms of an
294 existing franchise, the executive is authorized to initiate legal proceedings to seek all
295 legal and equitable remedies to effectuate this chapter, including, but not limited to:

- 296 A. Ejecting a person or entity occupying the right-of-way of county roads that
297 refuses to enter into a franchise with King County or to pay franchise compensation as
298 required by K.C.C. 6.27.060.B., or an application fee or other cost related to use of the
299 right-of-way;
- 300 B. Confirming the reasonableness of the franchise compensation required by
301 K.C.C. 6.27.060.B. that is sought by King County;
- 302 C. Enforcing the terms and conditions of a franchise; or
- 303 D. Revoking a franchise.

304 **NEW SECTION. SECTION 11.** There is hereby added to K.C.C. chapter 6.27 a
305 new section to read as follows:

306 In addition to judicial enforcement under section 10 of this ordinance, the
307 manager of the real estate services section and the director of the road services division
308 are authorized to enforce this chapter and any rules or regulations adopted under this
309 chapter in accordance with the enforcement and penalty provisions of K.C.C. Title 23. A
310 citation under K.C.C. 23.32.010.A.1.a. for violation of this chapter and any rules or
311 regulations adopted under this chapter shall be in the amount of two hundred fifty to one
312 thousand dollars, depending on the amount of right-of-way being occupied by the person
313 or entity responsible for code compliance. A violation of a notice and order under K.C.C.
314 23.32.010.A.1.b. for violation of this chapter and any rules or regulations adopted under

315 this chapter shall be two hundred fifty to one thousand dollars, depending on the amount
316 of right-of-way being occupied by the person or entity responsible for code compliance.

317 SECTION 12. Ordinance 1711, Section 4, as amended, and K.C.C. 14.44.040 are
318 each hereby amended to read as follows:

319 A. Each application for a right-of-way construction permit requires a fee payable
320 to the ((~~real estate services section~~)) county as set forth in K.C.C. 4A.675.030 for the
321 administrative costs ((~~and expenses~~)) of reviewing and processing the application.

322 B. The real estate services section shall have the authority to require applicants to
323 reimburse the ((~~real estate services section~~)) county for the actual costs ((~~and all~~
324 ~~expenses~~)) incurred by the ((~~real estate services section~~)) county as a result of issuance,
325 renewal or amendment of a right-of-way construction permit, to the extent the costs ((~~and~~
326 ~~expenses~~)) exceed the costs of reviewing and processing the application recovered by the
327 application fee. The payment of actual costs shall be made at the time of permit issuance.

328 SECTION 13. Ordinance 11790, Section 1, as amended, and K.C.C. 14.44.055
329 are each hereby amended to read as follows:

330 A. Before January 1, 2018, ((T))the facilities management division may issue
331 right-of-way construction permits to unfranchised utilities. Thereafter, the facilities
332 management division may issue right-of-way construction permits to unfranchised
333 utilities only under the following circumstances:

334 1. When the Seattle-King County department of public health has
335 ((~~determined~~)) certified in writing to the facilities management division that the proposed
336 work is necessary to address a specifically identified public health hazard; ((~~or~~))
337 2. When the road services division of the department of transportation has

338 ((determined)) certified in writing to the facilities management division that the proposed
339 work is necessary to address specifically identified actual or imminent damage to county
340 right-of-way or to address specifically identified hazards to users of county right-of-wa;
341 or

342 3. If the unfranchised utility is involved in good-faith negotiation with the
343 county that is likely to result in a franchise that will be submitted to the council for
344 approval and the executive has certified that status in writing. The certification shall be
345 in a letter that shall be filed with the clerk of the council in the form of a paper original
346 and an electronic copy with the clerk of the council, who shall retain the original and
347 provide an electronic copy to all councilmembers.

348 B. No right-of-way construction permit for sewer or water facility construction
349 shall be issued unless the facilities management division receives a determination from
350 the chair of the utilities technical review committee that the proposed work is consistent
351 with the King County Comprehensive Plan codified in K.C.C. Title 20 and with K.C.C.
352 13.24.132, 13.24.134, 13.24.138 and 13.24.140.

353 C. The permit applicant shall be required to meet all conditions of this chapter,
354 except K.C.C. 14.44.050_A_ and C."

355 **EFFECT:**

- 356 1. Granting a one year grace period for applying franchises to reach an agreement,
357 after which subsequent construction permits would be denied except under
358 emergency circumstances as required by state law.
- 359 2. Clarification that only the application fee is credited against the franchise
360 payments.

ATTACHMENT 2

- 361 3. Adding a requirement that the agreements include indemnification language.
- 362 4. Removal of policy direction on rates associated with the forbearance agreements.
- 363