King County Ordinance 2016-0521

Ordinance 2016-0521 will increase the tax charged on all utilities in the unincorporated areas of King County, including; water, sewer, phone, gas and electric. King County is calling this tax a “rent” for the right away along each road that is not in a city and is not a state of federal road.

Please contact our King County Council members to provide your feedback regarding this ordinance.

1. Claudia Balducci  206-477-1006  claudia.balducci@kingcounty.gov
2. Dave Upthegrove  206-477-1005  dave.upthegrove@kingcounty.gov
3. Kathy Lambert  206-477-1003  kathy.lambert@kingcounty.gov
4. Rod Dembowski  206-477-1001  rod.dembowski@kingcounty.gov

*Please Note: King County Councilmember Reagan Dunn voted no on this Ordinance.

Attached you will find the following documents related to King County Ordinance 2016-0521.

A. Full Legislation Text of Ordinance 2016-0521
B. Response from PSE – dated October 31, 2016
C. Response from KCWD90 – dated November 2, 2016
D. Response from Seattle City Light – dated November 7, 2016
E. Explanation from King County – dated February 3, 2017
F. Response from Washington Association of Water & Sewer Districts – dated March 7, 2017
G. District Spring Newsletter Article from Commissioner Murgatroyd – dated April 25, 2017
AN ORDINANCE setting the reasonable compensation, fees and costs to be paid by a utility company applying for a franchise or using the right-of-way of county roads under a franchise, and authorizing a utility company to make a forbearance payment to King County; amending Ordinance 17515, Section 4, as amended, and K.C.C. 4A.675.020, Ordinance 17515, Section 8, as amended, and K.C.C. 4A.675.030, Ordinance 1710, Section 2, as amended, and K.C.C. 6.27.020, Ordinance 1710, Section 3, and K.C.C. 6.27.030, Ordinance 10171, Section 1, as amended, and K.C.C. 6.27.054, Ordinance 1710, Section 6, as amended, and K.C.C. 6.27.060, Ordinance 1711, Section 4, as amended, and K.C.C. 14.44.040 and Ordinance 11790, Section 1, as amended, and K.C.C. 14.44.055 and adding new sections to K.C.C. chapter 6.27.

BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

SECTION 1. Findings:

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

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

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

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

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

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

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

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

I. To assure access to the right-of-way of county roads, to increase long term certainty as to the compensation due for use of the right-of-way, and to ease the administrative burden of determining such
compensation, some utility companies may desire to enter into an agreement to pay a negotiated amount in exchange for a commitment from King County to grant a franchise and to forbear from competing with the utility company or from requiring the utility company to pay reasonable compensation for use of the right-of-way. Subject to approval by the King County council, such an agreement would be in the best interests of the public.

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

A. The franchise application fee for a party requesting a new franchise, an amended franchise, a renewal(1) or extension of an existing franchise or a transfer of its franchise rights under K.C.C. 6.27.054 is two thousand five hundred dollars.

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

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

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

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

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

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

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

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

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

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

SECTION 6. Ordinance 10171, Section 1, as amended, and K.C.C. 6.27.054 is hereby further amended to read as follows:

A. A party requesting a new franchise, an amended franchise, a renewal((s)) or extension of an existing franchise or a transfer of its franchise rights shall pay a franchise application fee as set forth in K.C.C. 4A.675.020. The fee is for ((reimbursement to the real estate services section of the facilities management division for)) the administrative costs ((and expenses)) incurred by the county in the reviewing and processing of the franchise application. The franchise application fee is payable at the time ((the application is filed with the clerk of the council)) of franchise issuance. In addition, each applicant shall pay an advertising fee as set forth in K.C.C. 4A.675.020.B. ((Franchise application and a)) Advertising fees are not refundable, even if the application is disapproved.

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

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

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

1. Personnel, including payroll and management;

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

3. Program planning and development;

4. Data processing and computer;

5. Legal and accounting services; and

6. Consulting services such as engineering and environmental assessment.

E. The facilities management division is authorized to establish rules or policies to assess annual administration charges to grantees of franchises under subsection C. of this section to reasonably cover the costs incurred by the county in administering franchises. If the facilities management division institutes such an administration charge, the real estate services section may require applicants to reimburse the county for the actual costs incurred by the county in administering a franchise, to the extent the costs exceed the costs recovered by the administration charge.
F. All (franchise application) payments received under this section shall be credited to the county current expense fund. The franchise application fee received under K.C.C. 4A.675.020.A, and K.C.C. 6.27.054.A, and any reimbursement of actual costs under K.C.C. 6.27.054.B, shall be credited against any franchise compensation required by K.C.C. 6.27.060.B.

((D-)) G. This section shall not apply to franchise applications, amended franchises, renewal ((amendments)) or extension of existing franchises or transfers ((made)) or franchise rights or franchise administration under the county's cable television regulations, K.C.C. chapter 6.27A.

SECTION 7. Ordinance 1710, Section 6, as amended, and K.C.C. 6.27.060 are each hereby amended to read as follows:

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

1. A previously approved comprehensive plan for the applicant; if required to have such a plan by K.C.C. 13.24.010;

2. The county ((Comprehensive Plan));

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

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

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

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

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

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

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

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

4. The grantee of the franchise shall, at no expense to the county, adjust, remove or relocate existing facilities with county road rights-of-way, including all appurtenant facilities and service lines connecting its system to users, if the county determines ((such)) the adjustment, removal or relocation is reasonably necessary to allow for an improvement or alteration planned by the county in ((such)) the road right-of-way. The county shall give the grantee written notice of ((such)) the requirement as soon as practicable, with the goal to provide the notice at the beginning of the ((pre-design)) predesign stage for projects that are part of the county's capital improvement program, including such available information as is reasonably necessary for the grantee to plan for ((such)) the adjustment, removal or relocation;
5. For projects that are a part of the county's capital improvement program, in addition to any other notice given to the grantee of the franchise, the county shall provide a vertical and horizontal profile of the roadway and drainage facilities within it, both existing and as proposed by the county, and the proposed construction schedule; notwithstanding any permit conditions that may later be applied to the county project, this initial design information shall be given at least ((±80)) one hundred eighty days before construction is scheduled to begin, except in cases of urgent construction or emergencies. The grantee shall respond to this notice, and to any later notices of revised designs based on permit conditions, within no more than ((±30)) thirty days by providing to the county the best available information as to the location of all of the grantee's facilities, including all appurtenant facilities and service lines connecting its system to users and all facilities that it has abandoned, within the area proposed for the public works project. The county shall offer the grantee the opportunity to participate in the preparation of bid documents for the selection of a contractor to perform the public works project as well as all required adjustments, removals or relocations of the grantee's facilities. ((Sueh)) The bid documents shall provide for an appropriate cost allocation between the parties. The county shall have sole authority to choose the contractor to perform ((Sueh)) the work. The grantee and the county may negotiate an agreement for the grantee to pay the county for its allocation of costs, but neither party shall be bound to enter into such an agreement. Under such an agreement, in addition to the grantee's allocation of contractor costs, the grantee shall reimburse the county for costs, such as for inspections or soils testing, related to the grantee's work and reasonably incurred by the county in the administration of ((Sueh)) the joint construction contract((s)). ((Sueh)) The costs shall be calculated as the direct salary cost of the time of county professional and technical personnel spent productively engaged in ((Sueh)) the work, plus overhead costs at the standard rate charged by the county on other similar projects, including joint projects with other county agencies((c)); and

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

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

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

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

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

A. Each franchise for electric, gas, water or sewer utilities granted by King County shall include a requirement that the grantee of the franchise provide the county reasonable compensation in return for the right to use the right-of-way for the purposes of constructing, operating, maintaining and repairing utility facilities and related appurtenances, which for the purposes of this section is "franchise compensation." This requirement and the process outlined in this section for determining franchise compensation shall apply to franchises granted after the effective date of this ordinance, and to existing franchises that include terms that authorize compensation in return for the right to use the right-of-way. For the purpose of determining franchise compensation under this section, an applicant for a franchise and a grantee of an existing franchise that includes terms that authorize compensation in return for the right to use the right-of-way is "the applicant."

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

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

D. The facilities management division is authorized to establish policies that create a process for the
determination of franchise compensation. These policies may include different processes for the determination of franchise compensation depending on the size and complexity of the franchise. As part of the process, the facilities management division may request from the applicant information relevant to the determination of franchise compensation. Also as part of the process, the facilities management division shall make a reasonable estimate of franchise compensation and provide that estimate to the applicant. Thereafter, the applicant shall have a reasonable opportunity to suggest adjustments to the estimate in order to reach agreement with King County as to the amount and type of franchise compensation.

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

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

1. Establishing a King County utility to provide utility services, or

2. Granting nonexclusive franchises.

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

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

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

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

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

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

A. Ejecting a person or entity occupying the right-of-way of county roads that refuses to enter into a
franchise with King County or to pay franchise compensation as required by K.C.C. 6.27.060.B., or an
application fee or other cost related to use of the right-of-way;

B. Confirming the reasonableness of the franchise compensation required by K.C.C. 6.27.060.B. that is
sought by King County;

C. Enforcing the terms and conditions of a franchise; or

D. Revoking a franchise.

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

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

SECTION 12. Ordinance 1711, Section 4, as amended, and K.C.C. 14.44.040 are each hereby amended
to read as follows:
A. Each application for a right-of-way construction permit requires a fee payable to the 
(real estate services section) county as set forth in K.C.C. 4A.675.030 for the administrative costs 
(and expenses) of reviewing and processing the application.

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

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

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

1. When the Seattle-King County department of public health has (determined) certified in writing to 
the facilities management division that the proposed work is necessary to address a specifically identified 
public health hazard; (or)

2. When the road services division of the department of transportation has (determined) certified in 
writing to the facilities management division that the proposed work is necessary to address specifically 
identified actual or imminent damage to county right-of-way or to address specifically identified hazards to 
users of county right-of-way; or

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

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

C. The permit applicant shall be required to meet all conditions of this chapter, except K.C.C. 14.44.050, A, and C.
October 31, 2016

Via electronic mail

King County Council
516 Third Avenue, Room 1200
Seattle, WA 98104

Dear King County Council Members,

Puget Sound Energy, Inc. (PSE) strongly opposes the proposed ordinance 2016-0521, including the creation of a “franchise compensation” requirement and the “forbearance payment” mechanism contained in new sections 8 and 9 of the proposed legislation. The proposal represents a major shift in county policy, with no opportunity for input from the affected parties. The legal issues raised by the proposal are significant. The fast-track timing precludes collaboration and forces our hand to aggressively oppose this legislation.

It is important to state that PSE highly values its relationship with King County. Our two organizations are collaborating on many initiatives that will reduce carbon through a transition away from coal-generated power, wastewater gas capture, and energy efficiency programs. In addition, we have been proud to work with the county and other stakeholders on what will become a regional gem—the Eastside Rail Corridor.

This proposed solution comes as a complete surprise and is wholly inconsistent with the spirit of collaboration we have previously enjoyed. PSE was alerted Monday morning (October 24, 2016) that the proposal had been walked-on to the budget committee, with a planned full council vote 14 days hence, on Monday November 7. We are still working to understand the customer impacts and legal issues, but believe they are significant and merit more careful review, analysis and discussion, including the following:

• The county’s powers are granted exclusively by the state constitution or legislature. The franchise compensation and forbearance payment requirements of the proposed ordinance have not been authorized by the State.

• The state legislature has granted only to cities and towns—not to counties—the authority to license business and collect fees and taxes from those businesses.
• The forbearance payment mechanism raises potential antitrust issues that could have legal risks and implications for both the county and PSE.

• The legality of the proposed ordinance will likely be challenged by utilities, ratepayers, and other affected entities and individuals with standing.

PSE is regulated by the Washington Utilities and Transportation Commission. WUTC oversight includes review of any government taxes and fees passed along to the ratepayers.

• The WUTC is charged with determining whether rates are “unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of the law, or that such rates or charges are insufficient to yield a reasonable compensation for the service rendered.” RCW 80.28.020. (Willman v. Washington Utilities & Transp. Comm’n), 122 Wn. App. 194, 204, 93 P.3d 909, 913 (2004), aff’d, 154 Wn.2d 801, 117 P.3d 343 (2005).

• The WUTC and the Attorney General are likely to challenge the fees as a presumptively invalid tax on PSE customers, including PSE customers who are not located in the county or do not benefit from such tax.

Chief among the unknowns created by the proposed ordinance is the lack of specificity with regards to how the right-of-way might be valued and how associated fees might be set. This compounds our concern about impact to PSE and our ratepayers.

Lastly, PSE has been negotiating in good faith with the county for a franchise renewal since 2006. During this time, PSE and the county have continued to operate under the terms of the existing franchise agreement, and PSE will continue to do so until a franchise renewal is in place. PSE is fully committed to continuing its good faith negotiations with the objective that a franchise renewal be finalized as soon as possible.

For these reasons, PSE has no choice but to oppose this proposed ordinance.

Regards,

Steve R. Secrist
Sr. Vice President, General Counsel, and Chief Ethics & Compliance Officer
November 2, 2016

The Honorable Joe McDermott
Chair, Metropolitan King County Council
516 Third Avenue, Room 1200
Seattle, WA 98104

RE: Proposed Franchise Fees (Ordinances 2016-0495 and 2016-0521)

Dear Chairman McDermott:

Thank you for providing King County Water District 90 (KCWD90) the opportunity to respond and comment on King County proposed Ordinances 2016-0495 and 2016-0521. KCWD90 has a number of concerns and objections to the current Ordinance text. These have been stated herein:

1) We do not agree that RCW 36.75.020, RCW 36-55.010 or RCW 80.32.010 provides King County any authority to assess a tax on KCWD90. While these RCW’s clearly state the King County can set the standards for road construction and repair, provides the right to grant and franchise, and sets the terms for those franchise agreements in no place is there permission to charge a tax or a forbearance fee to Special Purpose Districts or other utilities.

2) Water and Sewer Districts are governed by Title 57. RCW 57.08.005 expressly gives the right to water and sewer districts to convey “…by means of aqueducts or pipeline conduct the same throughout the district and any city or town therein and carry it along and upon public highways, roads, and streets, within and without such district.” The premise that King County is providing the District with a valuable property right is simply not true. As a water District, we already have that right.

3) Section 7.B.2 of the proposed Ordinances state that “the grantee of a water utility franchise shall, at no expense to the county, provide fire suppression water facilities and services required by applicable law…” We strongly object to this statement. According to the 2008, Lane vs. City of Burien case, fire suppression activities are a governmental function that should be paid for by tax funds. Fire suppression abilities account for well over half of our District’s capacity. Without the requirement to provide fire suppression abilities, our District would be upwards of 50% smaller in size and capacity. It is entirely appropriate that KCWD90 charge King County for these services as previously determined by the court. At a minimum, fire suppression services should be allowed as “in-kind” services as stated in Version 1 of proposed Ordinance 2016-0521.
4) KCWD90 completely understands that King County may not be charging enough to cover the cost of processing new Franchise Applications. Your franchise fee, permits, and inspection fees should cover your actual costs. We agree that when the District does work in the Right-of-way, it is entirely appropriate to charge Districts the total costs. We do not agree however, that a blanket charge for the value of the right-of-way is appropriate or legal.

5) In relation to the Franchise Fee, Section 6, C & B lays out all of the types of costs to be reimbursed to King County to cover the processing of a Franchise fee. How can it be that King County does not know its own hourly rate (with all of these costs, included) and have justification of those rates?

   a. As a leader in LEAN, how is it possible that King County doesn’t have a clear idea of what it takes to process a Franchise Application? The 400% increase should be justified. What are your average times to process an agreement? How many hours do you estimate?

   b. The text in this proposed Ordinance also states that actual costs above the $10,000 fee will also be charged to the applicant when applicable. However, what protection do Districts and other utilities have that the cost over-run or time-lag is not the responsibility of the County? This Ordinance gives King County unilateral authority over this process and all applicable costs.

   c. As a comparison, King County Permitting and Environmental Review, is able to provide an estimate of the total number of hours required in advance of a permitting a project. This allows Districts to plan for anticipated expenses and eliminate surprise at the last minute with bills we didn’t agree to.

6) Section 9 of proposed Ordinance 2016-0521 regarding the “forbearance” payment is laughable. The text of the Ordinance states “In exchange for a forbearance payment by a utility company... to forbear King County utility to compete with the utility company.” However, as a water District we contend that authority has already been granted by King County Ordinance 9462 passed on 5-29-90. This Ordinance ratifies the coordinated water system plan for the East King County critical water supply service area. This forbearance payment feels like the King County is strong-arming the Districts to be forced to pay a tax to solve the County’s revenue problems.

7) Ordinance 2016-0521 is incredibly vague. How could Districts agree to an Ordinance that has “__%” as the amount the District would pay? How can an Ordinance be approved with a critical number that has not even been proposed? How would Districts prepare for an unknown, as large as this? Again this “forbearance” payment is truly a tax the County is attempting to impose on Districts.

8) If this tax is passed, it will be our ratepayers who will feel the squeeze and will have to pay this tax. Since the availability of state and federal loan dollars for capital improvements
have disappeared in recent years (i.e. the Washington State legislature has repeatedly gutted the Public Works Trust Fund to fund education) Districts like ours have had to aggressively raise rates in order to cover our planned infrastructure spending. There has been a push by Cities and Counties around the state to shift costs from taxpayers to ratepayers under the assumption that it is easier to raise rates than taxes. All of this equates to rate increases that impact the poorest in our communities the most.

9) Furthermore, it is not appropriate for King County to unilaterally propose so many changes to franchise agreements without properly considering the impact to utilities and ratepayers. This overall proposal is extremely one sided, providing all of the indemnity for the County and requiring that Districts move or remove infrastructure in conflict with County plans. How does this Ordinance prepare utilities to have an honest negotiation with the County? You are simply holding all the cards.

10) Lastly, KCWD90 objects to the short amount of review time allowed to review and comment on this Ordinance. KCWD90 feels that the County is in a hurry, so as not to allow proper review of stakeholders and ratepayers. Such a review will allow all interested parties the opportunity to determine other consequences, intended or not, of these Ordinances which were only recently made available.

I hope that you will take these concerns into account as the King County Council reviews proposed Ordinances 2016-0495 and 2016-0521. Thank you for your time and attention to this request.

Sincerely,

[Signature]
Darcey J. Peterson
General Manager
King County Water District No. 90

cc: King County Council Members
    Sam Amira, Commissioner, KCWD90
    Dick Gidner, Commissioner, KCWD90
    Byron Murgatroyd, Commissioner, KCWD90
    Washington Association of Water & Sewer Districts
November 7, 2016

Via Electronic Mail

King County Council
516 Third Avenue, Room 1200
Seattle, WA 98104

Dear King County Council Members;

Seattle City Light (City Light), the City of Seattle’s municipal electric utility, serves the City of Seattle, and also serves portions of unincorporated King County and customers in several suburban cities including Burien, Shoreline, Lake Forest Park, Tukwila and SeaTac. We would like to express our strong concerns with proposed ordinance 2016-0521, including the creation of a “franchise compensation” requirement and the “forbearance payment” mechanism. The proposed compensation requirement for use of the public right of way is a new concept that is not consistent with our other franchise arrangements and would be a major shift in policy for franchise fee arrangements between City Light and the communities we serve. While the timing of this legislation has not afforded ample opportunity for thorough analysis and consideration of the impacts to the utility and its ratepayers, this legislation could result in our customers in unincorporated King County shouldering the whole burden for paying any required “franchise compensation.”

City Light as well as the City of Seattle is proud of the strong collaborative arrangement with King County and appreciates the opportunity to serve unincorporated King County with reliable, affordable and clean electricity. In addition, City Light provides one of the most generous utility discount programs for our low income customers, which includes a 60% discount on their electric bill. We also have invested significantly, along with King County, in the clean-up of the Duwamish River and the salmon recovery efforts led by the Water Resource Inventory Area (WRIA) Nine.

City Light has expressed interest in renewing a formal franchise arrangement with King County for many years. In fact, as recently as 2014, we filed the appropriate paperwork and submitted the fees to facilitate negotiations of a franchise agreement with King County. Unfortunately, King County has not considered such an agreement a priority and has not taken action to negotiate an agreement.

However, the proposed ordinance lacks specificity and certainty regarding how the proposed “franchise compensation” paid by City Light to King County would be applied and causes us great concern as to the impacts on the rates paid by our unincorporated King County residential and business customers. We would ask that the Council not take action on the proposed ordinance and instead direct the King County Executive to commence negotiations immediately on a franchise agreement with City Light under the existing King County Code. This would insure expedited action on an arrangement that works for both King County and City Light, rather than the lengthy and unnecessary delay that the lack of specificity and questionable legal authority of the mechanism in the proposed ordinance.
In closing, City Light continues to strongly support negotiating a new franchise agreement and payment of appropriate administrative fees to King County. We hope that we can work together to address both the interests of King County and City Light in moving forward with a formal franchise arrangement, which City Light has been seeking for several years.

Thank you for your consideration of this request. If you have any further questions, please feel free to contact Maura Brueger, Government and legislative Affairs Director for Seattle City Light by email at maura.brueger@seattle.gov or by phone at 206-684-3015.

Sincerely,

James Baggs
Customer Care, Communications &
Regulatory Affairs Officer
Seattle City Light
King County
Facilities Management Division
Anthony Wright, Division Director
Department of Executive Services
500 Fourth Avenue, Room 800
Seattle, WA 98104
Phone: (206) 477-9352
Fax: (206) 205-5070

February 3, 2017

Washington Association of Sewer & Water Districts
Mr. James Kuntz, Executive Director
12720 Gateway Drive, Suite 204
Tukwila, Washington 98168

Dear Mr. Kuntz,

We recognize the important utility services your members provide to citizens in our region. We share a commitment to helping serve those citizens by managing utility access to county road rights-of-way. Accordingly, I’m writing to provide further information to your organization regarding Ordinance 18403, which was passed by the King County Council in November of 2016 and, among other areas, directs the County to derive reasonable compensation for the use of county rights-of-way. Some of the other areas addressed in the Ordinance include the following:

- County criteria for franchise agreements with private or municipal corporations that use the county road rights-of-way for the construction and maintenance of waterworks, gas pipes, electric lines and sewers.
- A structure for the County to recover the actual costs it incurs in the reviewing and processing of franchise and right-of-way construction permit applications.
- A structure for the County to recover the actual costs it incurs in administering a grantee’s activities under the franchise, including costs for inspections, relations, abatements and enforcement.
- A structure for franchise agreements to provide the County annual franchise compensation, which may be in the form of money, in-kind services, or other nonmonetary benefits, accruing to King County, in return for the right to use the right-of-way.

These and other provisions contained in the Ordinance may impact your organization, regardless of the current status of the franchise.

You have my commitment to provide a meaningful opportunity to communicate your specific interests and concerns early in the planning process. In the next month, I will arrange small group gatherings to hear specific interests and concerns related to development of the implementation process for this Ordinance. Once developed, there will also be a formal opportunity for comment on proposed rules to be issued pursuant to the Ordinance.
In the interest of transparency, I will share that some organizations have questioned whether the County has authority to enact Ordinance 18403. I have attached a signed copy of Ordinance 18403 for your reference. The County has looked at this issue very carefully and is confident of its authority for the Ordinance. I would like to briefly summarize the basis of the County’s authority. The County does not, as some have suggested, rely on the business licensing or taxing authority in seeking reasonable compensation for the use of the county’s right-of-way. Instead, the County’s authority includes both its inherent legislative authority under Article XI, ¶ 11 of the Washington State Constitution and its power to grant franchises for utility use of the County’s rights-of-way under RCW 36.55.010.

The franchise statute (RCW ch. 36.55) grants explicit authority for Washington counties to give public or private utilities the privilege to use county-owned right-of-way. The Washington Supreme Court has for many years held, consistent with the United States Supreme Court and the courts of other jurisdictions, that the power to grant a franchise carries with it inherent authority to receive payment in return. City of Spokane v. Spokane Gas and Fuel Company, 175 Wash. 103 (1933). In a 1977 opinion, the Attorney General stated that it is a “generally recognized principle of law” that “[a] municipal corporation, having entire control of its streets and the power to impose conditions on granting a franchise to use the streets, may require compensation for their use...as a condition of the grant of the right to use them, unless forbidden by statute, or contrary to public policy.” AGO 1977, No 19.

As pointed out in the Spokane case the franchise compensation charge is “in the nature of rent” and is neither a “tax or a license.” Spokane, at 108. The Washington Supreme Court recently reaffirmed that, “some payments to the government are neither taxes nor regulatory fees.” City of Snoqualmie v. King Cty. Executive Dow Constantine, 386 P.3d 279, 284 (Wash. 2016). Being a reasonable payment, established by agreement, the franchise compensation is not a tax or fee. It is of the nature of rent and a valid user charge.

We value your input and anticipate that the informal gatherings described above will help to shape a fair and equitable implementation process for this Ordinance.

Please contact Project Manager Terri Hansen to update your contact information if needed, and to indicate your interest in an initial meeting to share your interests and concerns. Terri’s contact information:

Ms. Terri Hansen  
500 4th Ave., Suite 800  
Seattle, WA 98104  
Terri.Hansen@kingcounty.gov  
Desk Phone 206 477-9435

I look forward to working with you to implement the new Ordinance.

Sincerely,

[Signature]

Anthony Wright, Division Director  
Department of Executive Services, Facilities Management Division
March 2, 2017

Anthony Wright, Division Director
King County Facilities Management Division
500 Fourth Avenue, Room 800
Seattle, WA 98104

Re: King County Franchise Ordinance No. 18403

Dear Mr. Wright:

I am writing in response to your letter dated February 3, 2017, regarding King County’s position relating to Ordinance No. 18403 (the “Ordinance”) which, among other things, seeks to impose “reasonable compensation” on public and private utilities that use King County rights-of-way. In your letter, you indicate that you will be arranging small group gatherings to hear specific interests and concerns relating to the development of the implementation process for the Ordinance.

Please be advised that representatives of the Washington Association of Sewer & Water Districts (WASWD) recently attended a meeting with representatives of many King County water-sewer districts, representatives of several municipal water providers within King County and from adjacent counties and several private water associations which all have water and/or sewer facilities located within King County rights-of-way. The participants at this meeting represent over thirty (30) different municipal entities and private water associations that have a common interest in opposing King County’s implementation of the compensation/rent provision of the Ordinance. It was the consensus of the participants at this meeting that WASWD should send you a letter on behalf of the group of public utilities and private associations to respond to your offer to arrange small group gatherings to discuss the implementation of the Ordinance.

As was communicated to you during our meeting on January 12, 2017, it is our collective position that King County lacks the authority to impose a reasonable compensation charge on public utilities and private water associations that use King County rights-of-way. Therefore, while representatives of WASWD and the other utilities in our common interest group are willing to meet with King County, we want to make it clear that it will not be for the purpose of negotiating the terms relating to the reasonable compensation to be charged by King County for the use of its rights-of-way. From our perspective, that is an unauthorized term that is not subject to negotiation. However, we are willing to attend any meetings that may be convened by King County to receive information on the new franchise template to be utilized, to keep abreast of the specifics of how King County intends to implement the Ordinance and the timeline for implementation, and to provide comments on any proposed rules that may be issued by King County relating to the implementation of the Ordinance.
We renew our prior requests that King County abandon it efforts to implement the Ordinance in its current form. If King County continues to proceed with its implementation efforts, legal action is likely to address Ordinance's compensation/rent provisions. It is our sincere hope that King County will understand and recognize that there is significant organized opposition to these provisions and that further efforts to implement the compensation/rent provisions in the Ordinance will only lead to expensive legal action which will not be in the best interests of the public we all serve.

Sincerely,

James Kuntz
Executive Director
FIX TO KING COUNTY'S BUDGET WOES UNFAIRLY TARGETS DISTRICT CUSTOMERS

Unless we successfully resist, King County's fix to its budget woes includes an increase in the costs we must charge you, our customers. Last November, with little advance notice or deliberation by the Council, King County passed Ordinance 2016-0521. This Ordinance charges water, sewer, gas and electric utilities for the "rent" of the County’s road rights-of-way. (Rights-of-way for non-County roads is not included.) I personally attended the Council meeting where testimony by those affected, including testimony by our District Manager and 20 other utilities, was presented and then ignored. The estimated impact (based on County estimates) may be as much as a 10% increase in our base rates, possibly more. Water District 90 will be one of the most affected utilities. Of course, you will also pay more for gas and electric, although estimates are for a much smaller impact. The Ordinance also has provisions to attempt to seriously penalize utilities that don't simply go along, and unilaterally imposes new burdens.

The Ordinance passed 7-2, with Reagan Dunn, our councilmember, voting no. The six councilmembers who overwhelmingly represent residents of cities all voted in favor. I believe this is unfair to our unincorporated County residents, who are being asked to disproportionately shoulder the burden. In addition, I and many others believe the County lacks the legal authority to impose these costs and penalties. I have read the Ordinance and been to many meetings of like-situated utilities. Some of these utilities, including Water District 90, have banded together to assess the situation and our options forward, including the option to file a lawsuit against the County if necessary. I have been leading the District’s response to this. The County is expecting a battle from utilities on this Ordinance, however they are prepared to fight for it because they are out of other ideas to raise revenues. The District, and I personally, will remain very involved in working for you, our customers, to not have to bear this unfair burden.

For more information about this Ordinance please visit http://www.kingcounty.gov/council/legislation.aspx and enter the Ordinance number 2016-0521. We encourage each of you to contact the King County representatives sponsoring this Ordinance. You can also visit our website at www.kcwd90.com for additional information.
SPECIAL INVITATION from KCWD90 Commissioners
This summer we’re having our 65th Anniversary and Customer Appreciation Day. You are each invited to come see what’s new and enjoy the festivities and celebration. Meet our staff and commissioners and see our many modernizations. The day will be filled with food, games, demos and other fun activities for the whole family. We are grateful for our dedicated and knowledgeable staff and hope you take this opportunity to introduce yourself.

SAVE THE DATE!
SATURDAY, AUGUST 12, 2017, 11 AM – 3 PM
KING COUNTY WATER DISTRICT NO. 90
65TH ANNIVERSARY & CUSTOMER APPRECIATION DAY
FAMILY GAMES, FOOD, PRIZES, AND ACTIVITIES
FOR MORE INFORMATION OR TO RSVP VISIT OUR WEBSITE AT WWW.KCWD90.COM
OR EMAIL OUTREACH COORDINATOR, DEB GILL AT DEBG@KCWD90.COM

KING COUNTY WATER DISTRICT NO. 90 2017 Savvy Gardener Class Schedule (Free)

- Irrigation Systems Saturday, May 20, 2017 Time: 10-11:30 a.m.
  Instructor, Mark Guthrie, Landscape Water Conservation Program Manager/SPU

- Plants that Shine in the Sun Thursday, June 15, 2017 Time: 5:30-7:00 p.m.
  Instructor, Susie Egan, Cottage Lake Gardens

CLASSES ARE FREE CLASSES HELD AT DISTRICT OFFICE
For more information or to register for classes, call the District office at 425 255-9600, or Email Deb Gill, Outreach Coordinator at debg@kcwd90.com.