King County

1200 King County Courthouse
516 Third Avenue
Seattle, WA 98104

KING COUNTY

Signature Report

November 8, 2016

Ordinance 18403

Proposed No. 2016-0521.3

Sponsors Balducci, Upthegrove, Lambert and Dembowski

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((,)) 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((~~,~~)) 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((~~, 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 ((e))Comprehensive ((~~p~~))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 ((~~C~~))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 ((~~180~~)) 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. ((~~Such~~)) 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 ((~~such~~)) 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 ((~~such~~)) the joint construction contract((s)). ((~~Such~~)) The costs shall be calculated as the direct salary cost of the time of county professional and technical personnel spent productively engaged in ((~~such~~)) the work, plus overhead costs at the standard rate charged by the county on other similar projects, including joint projects with other county agencies((~~.~~)); 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, ((~~T~~))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-wa; 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 councilmembers.

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.

Ordinance 18403 was introduced on 10/24/2016 and passed as amended by the Metropolitan King County Council on 11/7/2016, by the following vote:

Yes: 7 - Mr. Gossett, Ms. Lambert, Mr. McDermott, Mr. Dembowski, Mr. Upthegrove, Ms. Kohl-Welles and Ms. Balducci
No: 2 - Mr. von Reichbauer and Mr. Dunn
Excused: 0

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

J. Joseph McDermott, Chair

ATTEST:

Melani Pedroza, Acting Clerk of the Council

APPROVED this 17th day of December, 2016.

Dow Constantine, County Executive

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KING COUNTY COUNCIL
CLERK

Attachments: None