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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 IN AND FOR THE COUNTY OF KING

8 KING COUNTY,

9 Plaintiff

10 vs.

11 KING COUNTY WATER DISTRICTS Nos.
12 20, 45, 49, 90, 111, 119 and 125; CEDAR
13 RIVER WATER AND SEWER DISTRICT;
14 COAL CREEK UTILITY DISTRICT;
15 COVINGTON WATER DISTRICT; FALL
16 CITY WATER DISTRICT; HIGHLINE
17 WATER DISTRICT; LAKEHAVEN WATER
18 AND SEWER DISTRICT; MIDWAY
19 SEWER DISTRICT; NE SAMMAMISH
20 SEWER AND WATER DISTRICT;
21 SAMMAMISH PLATEAU WATER AND
22 SEWER DISTRICT; SKYWAY WATER
23 AND SEWER DISTRICT; SOUTHWEST
24 SUBURBAN SEWER DISTRICT; VALLEY
VIEW SEWER DISTRICT; VASHON
SEWER DISTRICT; WOODINVILLE
WATER DISTRICT,

Defendants,

NO. 18-2-02238-0 SEA

ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIMS AND
COMPLAINT FOR DECLARATORY,
INJUNCTIVE AND OTHER RELIEF

COME NOW the Defendants King County Water District Nos. 20, 45, 49, 90, 111, 119
and 125, Cedar River Water and Sewer District, Coal Creek Utility District, Covington Water
District, Fall City Water District, Highline Water District, Lakehaven Water and Sewer

ANSWER, AFFIRMATIVE DEFENSES AND
COUNTERCLAIMS AND COMPLAINT FOR
DECLARATORY, INJUNCTIVE AND OTHER

RELIEF - Page 1
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1 District, Midway Sewer District, NE Sammamish Sewer and Water, Sammamish Plateau
2 Water and Sewer District, Skyway Water and Sewer District, Southwest Suburban Sewer
3 District, Valley View Sewer District, Vashon Sewer District and Woodinville Water District
4 (referred to herein collectively as the "Districts"), and in answer to Plaintiff King County's
5 Complaint for Declaratory Judgment ("Complaint"), state and allege as follows:

6 I. ANSWER

7 1. In Section I (Introduction) of the Plaintiff's Complaint, King County makes
8 both legal and factual assertions which are contained in three separate paragraphs. The
9 Districts' answers are set forth in the following paragraphs.

10 1.1 With respect to the first paragraph of Section I of the Complaint, the
11 Districts deny the Plaintiff's assertion that "King County owns the controlling property rights
12 in public rights of way" which is an unsupported and erroneous legal assertion. Further, at this
13 time the Districts are without sufficient information to answer further because the Districts
14 have not been provided with all of the underlying real property records relating to King
15 County's interest in the right-of-way and/or had an opportunity to examine the nature of every
16 interest for each portion of the right-of-way at issue in this matter. As a result, the Districts
17 deny King County's claims. The Districts admit that rights-of-way are valuable public assets
18 which are used both for transportation and utility services. The Districts deny all allegations in
19 the first paragraph of Section I which assert or imply that King County is the only party with a
20 valuable right or interest to use the right-of-way.

21 1.2 With respect to the second paragraph of Section I of the Complaint, the
22 Districts admit that Ordinance 18403 (the "Ordinance") was adopted on November 7, 2016.
23 The terms of the Ordinance speak for themselves. The Districts deny any and all allegations or

24 ANSWER, AFFIRMATIVE DEFENSES AND
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1 assertions that are contrary to the written terms of the Ordinance. In addition, the Districts
2 admit the Ordinance made certain findings. However, with respect to the allegation that
3 “utilities are allowed to benefit in a manner not generally available to the public,” the Districts
4 deny this statement is applicable to water-sewer districts because, among other things, King
5 County’s allegation implies that it is responsible for granting the Districts such rights or
6 benefits. The Districts further deny King County’s assertion that “[b]y requiring a reasonable
7 payment for the use of this public asset, King County ensures compliance with state
8 constitutional and statutory requirements prohibiting the uncompensated use of public
9 property” which is an unsupported and erroneous legal assertion.

10 1.3 With respect to the third paragraph of Section I of the Complaint, the
11 Districts admit that they are “water-sewer districts” governed by Title 57 RCW. The Districts
12 further admit they advised King County through both written and oral comments they intended
13 to commence legal action to challenge portions of the Ordinance and its accompanying public
14 rule as it relates to the imposition of the rental compensation requirement (referred to herein as
15 the “**Rental Fee/Tax**”) and other portions of the Ordinance. The Districts admit that they seek
16 to invalidate portions of the Ordinance. The Districts admit the Ordinance purports to cover
17 certain municipal agencies, private corporations and non-profit associations or cooperatives
18 that use public roads and right-of-way located in unincorporated King County to provide
19 electric, gas, water and sewer services. The Districts deny King County’s allegation that the
20 Districts “claim the right to use, for free, public ROW property for their own purposes”
21 because it misstates the true nature of the Districts’ claims. Although, King County has not
22 initiated negotiations with any of the Districts for a new or revised franchise agreement
23 seeking to impose the Rental Fee/Tax, and notwithstanding the fact that King County

1 prematurely filed its lawsuit before the rule implementing Ordinance 18403 purportedly went
2 into effect, the Districts admit that the Districts and King County can be assumed to have
3 reached an apparent impasse on King County's legal right to require the Districts to pay the
4 Rental Fee/Tax as a condition of using the right-of-way. The Districts admit their position is
5 that King County has no legal right or authority to impose or collect the Rental Fee/Tax. The
6 Districts further deny King County's claim it has acted "wholly within its rights by requiring
7 private and public utilities to pay for their use" of right-of-way which is an unsupported and
8 erroneous legal assertion. The Districts further admit that it is appropriate that this matter be
9 submitted to a court of competent jurisdiction for a full, fair, impartial and just resolution and
10 it is in the parties' interests, as well as the public's interest who would be forced to pay the
11 Rental Fee/Tax, to efficiently resolve the issues of law raised by the Districts. The Districts
12 deny that King County is entitled to a declaratory judgment validating its authority to enact the
13 Ordinance and its accompanying rule as portions of the Ordinance, including provisions which
14 purports to impose a Rental Fee/Tax, are unlawful.

15 1.4 The Districts deny all remaining allegations contained in Section I of the
16 Complaint not specifically answered in the preceding paragraphs.

17 2. In Section II (Parties) of the Plaintiff's Complaint, King County makes certain
18 allegations regarding the parties to this action. The Districts' answers are set forth in the
19 following paragraphs.

20 2.1 The Districts admit the allegations contained in Paragraph 1 of Section
21 II.

22 2.2 The Districts admit the allegations contained in Paragraph 2 of Section
23 II. Defendants King County Water District No. 111 and Midway Sewer District further answer

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1 that because they do not have any water and/or sewer facilities located within the right-of-way
2 subject to the Ordinance, King County has improperly commenced this action against them.

3 2.3 With respect to Paragraph 3 of Section II, the Districts admit that they
4 provide water and/or sewer services to customers located within King County, Washington
5 and therefore would be deemed to reside in King County, Washington under applicable law.
6 The Districts deny all remaining allegations in Paragraph 3 of Section II.

7 3. In Section III (Jurisdiction and Venue) of the Plaintiff's Complaint, King
8 County makes certain allegations regarding jurisdiction and venue for this action. The
9 Districts' answers are set forth in the following paragraphs.

10 3.1 With respect to Paragraph 4 of Section III, the Districts deny the court
11 has jurisdiction over this matter because King County has failed to name all persons or parties
12 who have or claim any interest which would be affected by the declaratory judgment requested
13 by King County as required under Civil Rule 19 and RCW 7.24.110.

14 3.2 With respect to Paragraph 5 of Section III, the Districts admit the right-
15 of-way at issue in this action is located in areas of unincorporated King County, Washington
16 and that venue in King County Superior Court is authorized by RCW 4.12.010 and RCW
17 36.01.050. The Districts reserve the right to seek a change of venue pursuant to RCW
18 4.12.030, RCW 36.01.050 and other applicable statutes and court rules.

19 4. In Section IV (Relevant Facts) of the Plaintiff's Complaint, King County makes
20 certain factual allegations regarding this action. The Districts' answers are set forth in the
21 following paragraphs.

22 4.1 With respect to the title of Paragraph A in Section IV, the Districts deny
23 that King County owns controlling property interests in public right-of-way.

1 4.2 With respect to Paragraph 6 of Section IV, the Districts deny King
2 County's allegation that it has individually "acquired" any county roads or right-of-way as this
3 is an unsupported and erroneous legal assertion. However, the Districts admit that King
4 County has "established, laid out, constructed, altered, repaired, improved and maintained"
5 certain County roads as the agent of the State of Washington (the "State") under the authority
6 granted to King County by RCW 36.75.020. The Districts further admit that the County roads
7 and right-of-way connect throughout the County in a consolidated system. The Districts deny
8 all remaining allegations in Paragraph 6.

9 4.3 With respect to Paragraph 7 of Section IV, the Districts deny King
10 County's allegation that it has individually "acquired" the County roads and right-of-way as
11 this is an unsupported and erroneous legal assertion. However, the Districts admit King
12 County may possess and enjoy certain non-exclusive interests in the right-of-way, as the agent
13 for the State, through condemnation, and may possess and enjoy certain easement rights by
14 dedication under which the County is a co-beneficiary along with the Districts for the benefit
15 of the public. At this time the Districts are without sufficient information to answer further
16 because the Districts have not been provided with all of the underlying real property records
17 relating to King County's interests in certain rights-of-way requested in public records
18 requests submitted by the Districts in March of 2017. Further, the Districts have not had an
19 opportunity to examine the nature of every interest for each portion of the right-of-way at issue
20 in this matter. As a result, the Districts deny the remainder of King County's claims in
21 Paragraph 7.

22 4.4 With respect to Paragraph 8 of Section IV, the Districts deny King
23 County's allegation that it individually "owns controlling property rights" in the County roads

1 and right-of-way and that it individually and exclusively “holds” the County roads and right-
2 of-way as a valuable public asset as these are unsupported and erroneous legal assertions. The
3 Districts admit the right-of-way is a valuable public asset, which includes the Districts’ right to
4 use the public right-of-way to provide water and sewer service to customers located
5 throughout King County.

6 4.5 With respect to Paragraph 9 of Section IV, the Districts admit that RCW
7 36.75.020 provides King County with the authority to establish, lay out, construct, alter, repair,
8 improve, and maintain County roads as agents of the State. The terms of RCW 36.75.020
9 speak for themselves. The Districts deny all remaining allegations in Paragraph 8.

10 4.6 With respect to Paragraph 10 of Section IV, all the Districts (except for
11 King County Water District No. 111 and Midway Sewer District) admit they use rights-of-way
12 that they possess located under County roads to provide water and/or sewer service to
13 customers located throughout King County. Further, the Districts admit they charge their
14 customers rates and charges relating to the provision of water and/or sewer service as
15 authorized by RCW 57.08.081. The Districts admit the rates and charges are required to be
16 established by the Board of Commissioners of each the Districts to produce revenues sufficient
17 to take care of the costs of maintenance and operation, revenue bond and warrant interest and
18 principal amortization requirements, and all other charges necessary for efficient and proper
19 operation of their water and/or sewer systems. The Districts admit they do not pay any rent to
20 King County for the use of the right-of-way, nor are they required to do so. The Districts deny
all remaining allegations in Paragraph 10.

21 4.7 With respect to Paragraph 11 of Section IV, the Districts admit that the
22 terms of RCW 36.55.010 and RCW 80.32.010 speak for themselves.

1 4.8 With respect to Paragraph 12 of Section IV of the Complaint, the
2 Districts admit that pursuant to the authority granted under RCW 36.55.010 and RCW
3 80.32.010, King County has issued franchises to certain public and private utilities relating to
4 the use of certain rights-of-way. The Districts deny the allegation to the extent it suggests the
5 Districts must possess a franchise issued by the County in order to use the public rights-of-way
6 the Districts already have the legal right to use. The Districts deny all remaining allegations in
7 Paragraph 12.

8 4.9 With respect to Paragraph 13 of Section IV, the Districts admit chapter
9 6.27 of King County Code (K.C.C.) sets forth the process King County requires for public and
10 private utilities to obtain a franchise for the use of right-of-way. The terms of chapter 6.27 of
11 the K.C.C. speak for themselves. The Districts deny all remaining allegations in Paragraph 13.

12 4.10 With respect to the heading shown in Paragraph B of Section IV, the
13 Districts admit the Ordinance purports to require utilities to pay a Rental Fee/Tax for using the
14 right-of-way. The Districts deny King County has the right to require payment of the Rental
15 Fee/Tax as a condition of using rights-of-way.

16 4.11 With respect to Paragraph 14 of Section IV, the Districts deny King
17 County's claim that it has a right to require water-sewer districts and other utilities to pay the
18 Rental Fee/Tax, which is an unsupported and erroneous legal assertion. The Districts admit the
19 Ordinance was adopted on November 7, 2016. The Districts further admit King County
20 accurately quoted a portion of the Ordinance title which states the purpose of the Ordinance is
21 to set "the reasonable compensation, fees and costs to be paid by a utility company applying
22 for a franchise or using the right-of-way of county roads under a franchise" By way of
23 further answer, the Districts assert the real purpose of the Ordinance is to impose an

1 unauthorized and unlawful Rental Fee/Tax on public and private utilities to raise substantial
2 revenues for King County's General Fund. The Districts deny all remaining allegations in
3 Paragraph 14.

4 4.12 With respect to Paragraph 15 of Section IV, the Districts admit the
5 Ordinance purports to require electric, gas, water and sewer utilities to pay what King County
6 refers to as "Franchise Rental Compensation" in return for the right to use the right-of-way.
7 The Districts deny King County has the right to impose this Rental Fee/Tax on the Districts.
8 The Districts deny all remaining allegations in Paragraph 15.

9 4.13 The Districts admit the allegations contained in Paragraph 16 of Section
10 IV.

11 4.14 With respect to Paragraph 17 of Section IV, the Districts admit: (a) King
12 County's Facilities Management Division ("FMD") issued a proposed rule implementing the
13 Ordinance on October 23, 2017, (b) public comments were made and submitted on the
14 proposed rule by concerned utilities, municipalities, and the public, (c) some revisions were
15 made by FMD to the final rule and (d) the final rule referred to as "Rule RPM 9-2"
16 purportedly went into effect on January 29, 2018 (referred to herein as the "Rule"). The
17 Districts deny all remaining allegations in Paragraph 17. The Districts further assert the Rule is
18 void and unenforceable.

19 4.15 With respect to Paragraph 18 of Section IV, the terms of the Rule speak
20 for themselves. The Districts deny any allegations that are in conflict with the Rule.

21 4.16 With respect to Paragraph 19 of Section IV, the terms of the Rule speak
22 for themselves. The Districts deny any allegations that are in conflict with the Rule.

1 4.17 With respect to Paragraph 20 of Section IV, the terms of the Rule speak
2 for themselves. The Districts deny any allegations that are in conflict with the Rule.

3 4.18 The Districts admit the allegations contained in Paragraph 21 of Section
4 IV.

5 4.19 The Districts admit the allegations contained in Paragraph 22 of Section
6 IV. By way of further answer, the Districts' written and oral comments at the Public Hearing
7 on January 19, 2018, included a request that FMD and the King County Executive take the
8 Ordinance back to the County Council for further review and consideration due to the
9 significant legal deficiencies in the Ordinance and Rule. King County elected not to do so and
10 instead initiated this lawsuit.

11 5. Section V (First Cause of Action) of the Plaintiff's Complaint contains King
12 County's allegations relating to its Declaratory Judgment action. The Districts' answers are set
13 forth in the following paragraphs.

14 5.1 With respect to Paragraph 23 of Section V, the Districts incorporate by
15 reference their previous answers to the applicable paragraphs of the Complaint.

16 5.2 With respect to Paragraph 24 of Section V, the Districts deny King
17 County has acted "wholly within its rights" by adopting an Ordinance that seeks to impose and
18 collect an unauthorized and unlawful Rental Fee/Tax as a condition of using the right-of-way.
19 The Districts admit they dispute King County's legal authority to impose the Rental Fee/Tax.

20 5.3 The Districts admit the allegations contained in Paragraph 25 of Section
21 V. However, the Districts assert that pursuant to RCW 7.24.110 any judicial determination will
22 not be final and conclusive as to any person or entity not named as a party to this action.

1 5.4 With respect to Paragraph 26 of Section V, the Districts admit it is in
2 King County's, the Districts' and the public's interest to efficiently and fairly resolve the
3 issues of law raised by the Districts. The remainder of Paragraph 26 is a statement that does
4 not require a specific answer or response in the form of an admission or denial.

5 5.5 With respect to Paragraph 27 of Section V, the Districts deny King
6 County is entitled to the declaratory relief it seeks.

7 6. Section VI (Prayer for Relief) of the Plaintiff's Complaint contains King
8 County's prayer for relief. The Districts deny King County is entitled to the relief it seeks.

9 **II. AFFIRMATIVE DEFENSES**

10 By way of further answer, the Districts assert the following affirmative defenses to
11 King County's claims.

12 1. King County lacks legal authority to adopt portions of the Ordinance 18403
13 relating to the Rental Tax / Fee. The Ordinance and Rule are unlawful and unenforceable in
14 whole or in part.

15 2. King County's claims are barred by the doctrines of estoppel, waiver and
16 laches.

17 3. King County's claims are barred by the doctrine of unclean hands.

18 4. King County has failed to name all necessary parties as required by Civil Rule
19 and RCW 7.24.110.

20 5. King County's lawsuit was filed prematurely before the purported effective
21 date of the Rule in an effort to deny the Districts the opportunity to select a neutral forum in an
22 adjacent county as authorized by RCW 36.01.050.

1 **III. COUNTERCLAIMS AND COMPLAINT FOR**
2 **DECLARATORY, INJUNCTIVE AND OTHER RELIEF**

3 The Districts assert the following counterclaims and complaint for declaratory,
4 injunctive and other relief (the "Counter-Complaint"). The Districts seek declaratory relief
5 pursuant to chapter 7.24 RCW and injunctive relief pursuant to chapter 7.40 RCW.

6 **A. Parties**

7 1. The Defendants King County Water District Nos. 20, 45, 49, 90, 111, 119 and
8 125, Cedar River Water and Sewer District, Coal Creek Utility District, Covington Water
9 District, Fall City Water District, Highline Water District, Lakehaven Water and Sewer
10 District, Midway Sewer District, NE Sammamish Sewer and Water, Sammamish Plateau
11 Water and Sewer District, Skyway Water and Sewer District, Southwest Suburban Sewer
12 District, Valley View Sewer District, Vashon Sewer District and Woodinville Water District
13 are all special purpose municipal corporations formed and existing under the authority of Title
14 57 RCW. The Districts provide water and/or sewer services to customers located throughout
15 King County, Washington. All the Districts, except for King County Water District No. 111
16 and Midway Sewer District, own, operate and maintain water and/or sewer facilities within
17 rights-of-way in unincorporated areas of King County. On information and belief, Defendants
18 King County Water District No. 111 and Midway Sewer District do not have any water and/or
19 sewer facilities within right-of-way located in unincorporated areas of King County.

20 2. Plaintiff King County is a political subdivision of the State of Washington.
21 King County is a general purpose government formed and existing under the authority of Title
22 36 RCW.

1 3. Pursuant to RCW 7.24.110, the Districts will cause to be served upon the
2 Attorney General of the State of Washington a copy of this Counter-Complaint because the
3 Districts have alleged that portions of Ordinance 18403 are unconstitutional. In the event the
4 Attorney General desires to be a party to this action, the Attorney General may seek to
5 intervene in this action.

6 **B. Jurisdiction and Venue**

7 1. This court has subject matter and personal jurisdiction over the parties pursuant
8 to chapter 7.24 RCW (the Uniform Declaratory Judgments Act), chapter 7.40 RCW, and
9 chapter 2.08 RCW.

10 2. Pursuant to RCW 36.01.050, all actions against any county may be commenced
11 in the superior court of such county, or in the superior court of either of the two nearest
12 judicial districts. The Districts intended to commence its action against King County in
13 Snohomish County Superior Court on or after January 29, 2018 which was the purported
14 effective date of the Rule.

15 3. In anticipation of the Districts commencing legal action against King County,
16 King County filed a preemptive and premature Declaratory Judgment action in King County
17 Superior Court four (4) days before the purported effective date of the Rule in an effort to deny
18 the Districts the opportunity to select a neutral forum in an adjacent county as authorized by
19 RCW 36.01.050.

20 4. The Districts reserve the right to seek a change in venue pursuant to RCW
21 4.12.030 or other applicable law or court rule.

1 **C. Relevant Facts**

2 **Adoption of Ordinance 18403 and the Rule**

3 **The Ordinance**

4 1. On October 24, 2016, Ordinance 2016-0521 was introduced as proposed
5 legislation which sought, among other things, to impose the requirement that public and
6 private utilities providing electric, gas, water or sewer services pay what was labeled as
7 “franchise rental compensation” (and is referred to herein as the “Rental Fee/Tax”) to King
8 County as a condition of using the right-of-way located within unincorporated areas of King
9 County. The following King County Council Members were sponsors of Ordinance 2016-
10 0521: Dave Upthegrove, Claudia Balducci, Rod Dembowski and Kathy Lambert.

11 2. Prior to introducing Ordinance 2016-0521, King County staff did not engage in
12 any outreach efforts with the Districts or other public and private utilities to discuss King
13 County’s intent to seek legislation imposing the Rental Fee/Tax on public and private utilities
14 providing electric, gas, water or sewer services. King County was aware of the controversial
15 nature of Ordinance 2016-0521 and elected strategically not to engage the public and private
16 utilities in discussions before Ordinance 2016-0521 was introduced.

17 3. King County moved Ordinance 2016-0521 through the legislative process in an
18 expedited manner and provided only the minimally required notice and opportunity for the
19 affected utilities and the public to provide comments and objections to the proposed Ordinance
20 2016-0521. Only one public hearing before the King County Council was held on proposed
21 Ordinance 2016-0521 before it was adopted.

22 4. Many written and oral comments and objections were submitted to King
23 County by public and private utilities and other members of the public who were opposed to

1 King County's adoption of Ordinance 2016-0521 for a variety of reasons, including the fact
2 the proposed ordinance was seeking to impose an unauthorized and unlawful Rental Fee/Tax.
3 The overwhelming majority of the comments submitted to King County were opposed to King
4 County's adoption of Ordinance 2016-0521 and many of the comments raised to King
5 County's attention the significant legal deficiencies and defects of the proposed ordinance.

6 5. Notwithstanding the strong public opposition, Ordinance 2016-0521 was passed
7 by a majority vote of the King County Council on November 7, 2016, just two weeks after the
8 ordinance was first introduced. Only Council Members Reagan Dunn and Pete von Reichbauer
9 voted against the adoption of Ordinance 2016-0521.

10 6. Ordinance 2016-0521 was subsequently designated as Ordinance 18403
11 (referred to herein as the "Ordinance") and the Ordinance purportedly became effective on
12 November 17, 2016.

13 7. On October 24, 2016, another proposed ordinance designated as Ordinance
14 2016-0495 was also introduced relating to the setting of fees and costs to be paid for public
15 and private utilities providing electric, gas, water and sewer services using right-of-way
16 located within unincorporated areas of King County. This proposed ordinance sought, among
17 other things, to increase the franchise application fee from \$2,500 to \$10,000 and included
18 other amendments to King County Code to allow King County to recover the full cost of
19 administering its franchise program. Proposed Ordinance 2016-0495 did not include the
20 language found in proposed Ordinance 2016-0521 that sought to impose the Rental Fee/Tax on
21 public and private utilities providing electric, gas, water or sewer services.

22 8. King County staff did not engage in any outreach efforts with the Districts or
23 other public and private utilities to discuss King County's intent to introduce proposed

1 Ordinance 2016-0495. Proposed Ordinance 2016-0495 was subsequently superseded and
2 replaced by proposed Ordinance 2016-0521.

3 9. The introduction of proposed Ordinances 2016-0495 and 2016-0521 was
4 planned and coordinated to occur at the same time by members and/or staff of King County's
5 Executive Branch and King County's Legislative Branch. These ordinances offered two
6 potential options available to King County as it considered adoption of its 2017-2018 biennial
7 budget. According to the Staff Report, proposed Ordinance 2016-0495 would generate
8 \$308,323 of additional estimated revenue for King County's General Fund for the 2017-2018
9 biennium. In comparison, according to the Staff Report proposed Ordinance 2016-0521 would
10 generate approximately \$10,000,000 per year or \$20,000,000 of additional revenue per
11 biennium which would accrue to King County's General Fund.

12 10. As part of the 2017-2018 biennium budget process, King County ultimately
13 elected to adopt Ordinance 2016-0521, due in part because the additional revenues anticipated
14 to be generated by the Rental Fee/Tax were necessary to pay for miscellaneous King County
15 programs and services included in the King County budget. All of the revenue generated from
16 the Rental Fee/Tax will accrue to King County's General Fund.

17 11. On information and belief based on records provided by King County in
18 response the public records requests submitted by some of the Districts in March of 2017, the
19 anticipated revenues from the Rental Fee/Tax were used to keep the criminal booking
20 functions at the Maleng Regional Justice Center. The budget proposed by the County
21 Executive would have eliminated the criminal booking function at the Maleng Regional
22 Justice Center which would have resulted in a savings of approximately \$932,000 in 2018.

1 12. On information and belief based on records provided by King County in
2 response the public records requests submitted by some of the Districts in March of 2017, the
3 anticipated revenues from the Rental Fee/Tax were also designated to fund special projects for
4 each of the King County Council Members where each Council Member would receive
5 \$35,000 in discretionary funding through the budget process. The source of the revenue for
6 this special projects program was identified as being from "Franchise Fee Revenue."

7 13. On information and belief based on records provided by King County in
8 response the public records requests submitted by some of the Districts in March of 2017,
9 \$4,000,000 of the revenues to be generated from the Rental Fee/Tax were informally designed
10 for use on road projects. However, the funds would first flow into the General Fund and then
11 have to be transferred to the King County Road Fund.

12 14. Pursuant to the Ordinance, King County's Facilities Management Division
13 ("FMD") was authorized and directed to establish policies that provide a process for the
14 determination of the Rental Fee/Tax to be paid by the public and private utilities providing
15 electric, gas, water and sewer services that use right-of-way located within unincorporated
16 areas of King County.

17 **The Rule**

18 15. On October 23, 2017, approximately eleven (11) months after the Ordinance
19 purportedly became effective, FMD issued a proposed rule to implement the Ordinance. FMD
20 provided notice to the public and private utilities that comments on the proposed rule would be
21 accepted until December 7, 2017. The Districts and other public and private utilities and
22 members of the public submitted comments and objections to the proposed Rule.

1 16. On December 29, 2017, FMD adopted the final Rule to implement the
2 Ordinance. FMD notified the public and private utilities that the Rule would purportedly go
3 into effect on January 29, 2018.

4 17. According to information provided by FMD, FMD received over 1,000
5 comments through FMD's website, approximately 70 comments through the mail,
6 approximately 55 emails and phone calls on the proposed Rule. In addition, FMD received
7 more than 350 comments through the mail after the comment period closed. FMD claimed to
8 have reviewed all comments. All or substantially all of the comments made were in opposition
9 to the Ordinance and Rule.

10 18. After the Rule had been finalized and before it purportedly went into effect,
11 FMD notified the public and private utilities that FMD scheduled a public hearing for January
12 19, 2018, for the stated purpose of accepting additional public comments on the Rule. FMD
13 also indicated it would accept additional written comments through January 22, 2018.
14 Representatives of certain public and private utilities attended the public hearing on January
15 19, 2018. In addition, the public hearing was attended by a number of private citizens who
16 were concerned about the Ordinance and Rule. All of the oral comments submitted at the
17 public hearing were opposed to the Ordinance and Rule. Several parties requested that the
18 Ordinance be taken back to the King County Council for further review given the concerns
19 raised about the legality of the Ordinance and Rule and the manner in which the King County
20 Council rushed the Ordinance through the legislative process.

21 19. At the conclusion of the public hearing, Anthony Wright, FMD Director,
22 indicated that FMD would be reviewing all of the oral and written comments and, depending
23 on how FMD staff viewed the comments as being minor or significant in nature, the effective

1 date of the Rule might be extended for an additional 30-45 days. However, FMD did not
2 extend the effective date of the Rule, and the Rule purportedly went into effect on Monday,
3 January 29, 2018.

4 **Discussion of Ordinance and Rule**

5 **The Ordinance**

6 20. In Section 1 (Findings) of the Ordinance, King County makes the following
7 findings, some of which overstate King County's legal power and authority:

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

9 B. RCW 36.55.010 authorizes King County "to grant franchises . . . to
10 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
11 any other such facilities.

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

14 D. King County grants franchises to public and private utility
companies that authorize the utility companies to use the right-of-way of county
15 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
16 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.

17 E. Utility companies must apply for a franchise to use the right-of-
18 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
19 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
20 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.

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

1
2 G. Under these authorities and in light of the valuable property right
3 granted by a franchise, it is in the best interests of the public to require a utility to
4 provide reasonable compensation in return for its use of the right-of-way of
5 county roads. In pursuing the best interests of the public, King County intends to
6 evaluate the use of the right-of-way by utilities not subject to the requirement for
7 reasonable compensation in this ordinance, and as appropriate to extend the
8 requirement for reasonable compensation to such utilities.

9
10 H. RCW 35.58.050 authorizes King County to perform water supply
11 and water pollution abatement and RCW 58.08.010 authorizes the County to
12 establish a public utility district to form an electric utility, which authorities
13 provide the opportunity for King County to establish its own municipal utilities
14 for the benefit of the public.

15
16 I. To assure access to the right-of-way of county roads, to increase
17 long term certainty as to the compensation due for use of the right-of-way, and to
18 ease the administrative burden of determining such compensation, some utility
19 companies may desire to enter into an agreement to pay a negotiated amount in
20 exchange for a commitment from King County to grant a franchise and to forbear
21 from competing with the utility company or from requiring the utility company to
22 pay reasonable compensation for use of the right-of-way. Subject to approval by
23 the King County council, such an agreement would be in the best interests of the
24 public.

25
26 21. King County relies upon these findings as support for its position that King
27 County "owns" the right-of-way and has the power and authority to charge the Districts and
28 other public and private utilities a Rental Fee/Tax as a condition of using the right-of-way.

29
30 22. In Section 4 of the Ordinance, King County amended King County Code to
31 provide that in accordance with RCW 36.55.010, King County has the right to require persons,
32 or private or municipal corporations to obtain a franchise in order to use the right-of-way of
33 County roads.

34
35 23. In Section 6 of the Ordinance, King County amended King County Code
36 relating to King County's ability to charge a fee for administrative costs incurred by King
37 County in reviewing and processing franchise applications. Section 6 of the Ordinance also

1 added language allowing King County to recover actual costs incurred in administering a
2 franchisee's activities under a franchise agreement. Section 6 provides that all payments
3 received by King County under Section 6 are to be credited to the County "current expense
4 fund."

5 24. In Section 7 of the Ordinance, King County amended King County Code to
6 mandate that all franchises for electric, gas, water and sewer utilities include provisions
7 requiring the franchisees to indemnify, defend and hold harmless King County from damages
8 caused by, arising out of, or incidental to the franchisee's exercise of rights and obligations in
9 the franchise agreement.

10 25. In Section 7 of the Ordinance, King County also amended King County Code to
11 mandate that all franchises for electric, gas, water and sewer utilities are required to include
12 provisions requiring franchisees to pay the Rental Fee/Tax in accordance with Section 8 of the
13 Ordinance as a condition of being allowed to use the right-of-way.

14 26. In Section 7 of the Ordinance, King County further amended King County
15 Code to mandate that all franchises for electric, gas, water and sewer utilities include
16 provisions requiring the franchisees to indemnify, defend and hold harmless King County from
17 damages arising from fire suppression activities during fire events.

18 27. In Section 8 of the Ordinance, King County amended King County Code to
19 mandate that all franchises for electric, gas, water and sewer utilities include provisions
20 requiring the franchisees to pay a Rental Fee/Tax as a condition of being allowed to use the
21 right-of-way. Section 8 provides that the Rental Fee/Tax to be paid shall be "in the nature of
22 rent" and shall be paid annually. The Rental Fee/Tax may be paid in the form of money, in-
23 kind services or other non-monetary benefits. Section 8 of the Ordinance described the factors

1 to be considered when determining the Rental Fee/Tax and further directed FMD to establish
2 policies that create a process for the determination of Rental Fee/Tax to be paid as a condition
3 using the right-of-way. Section 8 of the Ordinance does not identify to which fund the
4 revenues from the Rental Fee/Tax would be credited. However, on information and belief
5 based on the Staff Report relating to the Ordinance, all of the revenue generated from the
6 Rental Fee/Tax will be credited to King County's General Fund.

7 28. In Section 9 of the Ordinance, King County amended King County Code to
8 authorize the County Executive to consider alternate means of providing utility service and to
9 authorize King County to accept a "forbearance payment" in exchange for King County's
10 agreement not to compete against a utility. The forbearance payment concept is illusory
11 because the Districts' water and sewer service areas have already been established, accepted
12 and agreed to by King County through King County's review and approval of Districts' water
13 and sewer comprehensive plans, and through other statutory mechanisms like the Public Water
14 System Coordination Act of 1977, chapter 70.116 RCW, pursuant to which service areas were
15 assigned to many of the Districts providing water service. The Districts' service areas were
16 also reviewed and approved by the Washington State Department of Ecology and the
17 Department of Health through the review and approval of the Districts' water and sewer
18 comprehensive plans. King County has no authority to compete against the Districts in areas
19 already served or to take over and assume the Districts' water and sewer facilities or their
20 service responsibilities.

21 29. In Section 10 of the Ordinance, King County amended King County Code to
22 authorize the County Executive to initiate legal proceedings against any person or entity that
23 installs or maintains utilities in the right-of-way without the required franchise or who fails to

1 comply with the terms of an existing franchise. Section 10 of the Ordinance authorizes the
2 County Executive to seek all legal and equitable remedies, including but not limited to: (a)
3 ejecting a person or entity occupying the right-of-way who refuses to enter into a franchise or
4 to pay the Rental Fee/Tax, (b) confirming the reasonableness of the Rental Fee/Tax required to
5 be paid by King County, (c) enforcing the terms and conditions of a franchise or (d) revoking a
6 franchise.

7 30. In Section 11 of the Ordinance, King County amended King County Code to
8 authorize the imposition of fines of \$250 to \$1,000 against persons or entities that violate the
9 Ordinance or Rule.

10 31. In Section 12 of the Ordinance, King County amended King County Code to
11 provide that after January 1, 2018, FMD may only issue right-of-way construction permits to
12 unfranchised utilities under limited circumstances, including but not limited to: (a) work which
13 is necessary to address a public health hazard, (b) work which is necessary to address actual or
14 imminent damage to right-of-way or to address hazards to users of right-of-way, and (c) in the
15 case a utility does not currently have a franchise with King County, the utility must be engaged
16 in "good faith negotiations" with King County that are likely to result in a franchise being
17 submitted and approved by the County Council.

The Rule

18 32. In Paragraph 1 of Section IV (Policy) of the Rule, FMD adopted a policy
19 describing how the Rental Fee/Tax is to be determined.

20 33. Paragraph 1.1 of the Rule provides that FMD will not issue a franchise to any
21 utility that fails to reach an agreement on the payment of the Rental Fee/Tax.

1 34. Paragraph 1.2 of the Rule provides that “King County owns the ROW, which is
2 a substantial public asset.” Paragraph 1.2 further provides that the Rental Fee/Tax is required
3 to be paid by the utilities in recognition of the valuable property right granted by a franchise to
4 use the right-of-way. Paragraph 1.2 also provides that the Rental Fee/Tax began to accrue on
5 the purported effective date of the Rule which was January 29, 2018.

6 35. Paragraph 1.3 of the Rule provides that the Rental Fee/Tax to be paid will be
7 included in the franchise agreement and will be subject to annual adjustments and to a full
8 adjustment every five years.

9 36. In Paragraph 2 of Section IV (Policy) of the Rule, FMD adopted a policy
10 describing the methodology to calculate the Rental Fee/Tax. Paragraph 2.1 of the Rule
11 provides, among other things, that the Rental Fee/Tax is based on the assessed land values of
12 parcels of property located adjacent to the right-of-way. Paragraph 2.2 of the Rule describes
13 the process to be used by FMD to establish the value of the franchise use area and includes a
14 description of the mathematical calculations and inputs to be used by FMD to calculate the
15 Rental Fee/Tax. Paragraph 2.2 of the Rule further provides that FMD has the authority to
16 periodically reassess the width FMD assigns for a typical easement and the reduction factors
17 assigned to underground and aerial facility locations and to change these inputs by simply
18 posting the new assumptions and inputs on FMD’s website.

19 37. Paragraph 2.3 of the Rule authorizes FMD to determine the “rate of return”
20 FMD wants to use in the calculation of the Rental Fee/Tax. Paragraph 2.3 of the Rule provides
21 that FMD has the authority to periodically reassess the rate of return to be used to calculate the
22 Rental Fee/Tax and to change the desired rate of return by simply posting the new assumptions
23 and inputs on FMD’s website.

1 38. Paragraph 2.4 of the Rule authorizes FMD to establish a “financial impact
2 limiting factor,” the stated purpose of which is to ensure the estimate of the annual Rental
3 Fee/Tax calculated for residential customers under FMD’s prescribed methodology is
4 reasonable. If during FMD’s calculation of the estimate of annual Rental Fee/Tax the
5 prescribed calculation results in residential customers having to pay more than the established
6 financial impact limiting factor, the Rental Fee/Tax is to be re-calculated to put a cap on what
7 the residential customers may have to pay. Paragraph 2.4 does not provide a similar
8 adjustment for non-residential customers. Paragraph 2.4 of the Rule provides that FMD has the
9 authority to periodically reassess the financial impact limiting factor used to calculate the
10 Rental Fee/Tax and to change the financial impact limiting factor by simply posting the new
11 assumptions and inputs on FMD’s website.

12 39. In an attempt to clarify and explain how the Rental Fee/Tax would be
13 calculated using the Rule’s prescribed methodology, FMD prepared an “Estimation Worksheet
14 Text Explanation” and an “Estimation Worksheet with Inputs and Formulas.” These
15 worksheets are posted on the FMD website under the topic heading “Franchise compensation
16 public rule” at the following location: [https://www.kingcounty.gov/depts/facilities-](https://www.kingcounty.gov/depts/facilities-management/real-estate-services/public-rule-proposal.aspx)
17 [management/real-estate-services/public-rule-proposal.aspx](https://www.kingcounty.gov/depts/facilities-management/real-estate-services/public-rule-proposal.aspx). A copy of both worksheets are
18 attached to this Counter-Complaint as **Exhibit A**. The methodology adopted by King County
19 to arrive at the Rental Fee/Tax is fundamentally flawed, fails to reflect the true value of the
20 public rights-of-way due to the limitations on use of such rights-of-way, and is arbitrary and
21 capricious.

22 40. The Rule allows FMD to establish and periodically reassess and revise the
23 “input values” used to calculate the Rental Tax / Fee. FMD has established and posted on its

1 website the current input values to be used to calculate the Rental Tax / Fee. Under the Rule,
2 FMD currently assumes: (a) the width of the typical easement is 15 feet, (b) the reduction
3 factor for facility location is 25% for aerial facilities and 10% for underground facilities, (c)
4 the rate of return charged by King County for the use of the right-of-way is 6.6% and (d) the
5 financial impact limiting factor applicable to residential customers is \$5.00 per month. The
6 Franchise Compensation Methodology Input Values are posted on the FMD website under the
7 topic heading "Franchise compensation public rule" at the following location:
8 [https://www.kingcounty.gov/depts/facilities-management/real-estate-services/public-rule-](https://www.kingcounty.gov/depts/facilities-management/real-estate-services/public-rule-proposal.aspx)
9 [proposal.aspx](https://www.kingcounty.gov/depts/facilities-management/real-estate-services/public-rule-proposal.aspx). A copy of the Franchise Compensation Methodology Input Values is attached
10 to this Counter-Complaint as **Exhibit B**.

11 41. Under the Ordinance and the Rule, FMD has the purported authority, in its sole
12 discretion, to change any of the input values without having to seek further approval of the
13 King County Council. For example, the Rule would allow FMD to raise more General Fund
14 revenue from the Rental Fee/Tax by increasing the rate of return or raising the \$5.00 financial
15 impact limiting factor to some higher number and posting the new values and inputs on the
16 FMD website.

17 42. In Section VII (Consequences for Noncompliance) of the Rule, FMD has
18 determined public and private utilities will not be granted a franchise with King County unless
19 the utilities reach an agreement to pay King County the Rental Fee/Tax required under the
20 Rule and agree on the other terms of the franchise agreement. As such, a public or private
21 utility that refuses King County's demand to pay the Rental Fee/Tax but otherwise agrees to
22 all other terms would not be granted a franchise agreement.

Effect of Ordinance and Rule on Utility Rates

43. In email communications with one or more of the public and private utilities subject to the Ordinance and Rule, Terri Hansen, FMD's Franchise Project Manager, stated:

"Neither the Ordinance nor the proposed rule requires utilities to pass franchise compensation onto customers, or specifies how this operational cost may or may not influence customer rates. Each utility provider, with possible input from a regulatory authority, determines its own customer rates." (emphasis added)

Other representatives of King County have made similar comments suggesting that the Districts have the option to not pass the Rental Fee/Tax on to its customers.

44. The Districts are water-sewer districts that were formed and exist under the authority of Title 57 RCW. Pursuant to RCW 57.08.081(2), the rates for water and sewer service established by the Districts are required to "produce revenues sufficient to take care of the costs of maintenance and operation, revenue bond and warrant interest and principal amortization requirements, and all other charges necessary for efficient and proper operation of the system." Therefore, to the extent any Rental Fee/Tax is imposed on the Districts, the full amount of the Rental Fee/Tax would have to be passed on to the Districts' customers in the form of higher water and sewer rates.

45. Certain properties located in unincorporated areas of King County may be served by one or more public and private utilities providing water, sewer, electric and/or gas services. Therefore, some property owners or residents could see their water, sewer, electric and/or gas bills increase significantly as a result of the Rental Fee/Tax imposed by King County on the public and private utilities using the right-of-way. For example, a customer of a District who receives water, sewer, electric and/or gas services from 3 or 4 different utilities

1 could experience rate increases for each of the applicable utilities to the extent they are
2 required to pay the Rental Fee/Tax, all for using the same right-of-way.

3 46. Prior to adopting the Ordinance and issuing the proposed Rule on October 23,
4 2017, King County did not calculate the estimated amount of the Rental Fee/Tax that would be
5 required to be paid by the Districts. Rather, as acknowledged in the Staff Report supporting the
6 Ordinance, King County knowingly relied upon data that was acknowledged to be “atrocious”
7 and subject to so many variables it “could be off substantially.” On information and belief, to
8 date King County has only calculated the estimate of the Rental Fee/Tax for one of the
9 Districts (Water District No. 119).

10 47. Although King County has not calculated the estimate of the Rental Fee/Tax to
11 be collected from each of the Districts, based on the Staff Report associated with the
12 Ordinance King County anticipates the Ordinance and Rule will raise \$10,000,000 of
13 additional revenue per year for King County’s General Fund when the program is fully
14 implemented. The source of these additional revenues will be the customers of the public and
15 private utilities subject to the Rental Fee/Tax. Therefore, the practical effect of the Ordinance
16 and Rule is to impose a “back door tax” on the Districts’ customers by requiring the Districts
17 to pay a Rental Fee/Tax for using the right-of-way which has to be passed on to the Districts’
18 customers in the form of higher utility rates.

19 48. On information and belief, King County intends to impose on the Districts with
20 existing franchise agreements the requirement to pay the Rental Fee/Tax based on language
21 contained in the franchise agreements which purports to reserve to King County the right to
22 secure and receive fair market compensation for the use of the right-of-way at some time in the
23 future. This provision is found in many of the existing franchises with the Districts under a

1 franchise provision referred to generally as the "Reservation of Rights" provision which has
2 been included in franchise agreements dating back to 15-20 years ago. Based on the inclusion
3 of this Reservation of Rights in previous franchise agreements, King County has contemplated
4 attempting to impose the Rental Fee/Tax on its franchisees for a long time.

5 49. The Reservation of Rights provision contained in many of the existing franchise
6 agreements also includes language which reserved to the franchisees the right to challenge any
7 effort by King County to impose such a requirement on the franchisee. The inclusion of this
8 language reflects the fact the franchisees have previously taken the position King County lacks
9 the legal authority to impose the Rental Fee/Tax on its franchisees as a condition of using the
10 right-of-way.

11 **Water-Sewer District have express statutory authority to use the ROW**

12 50. The Washington State Legislature has expressly authorized water-sewer
13 districts to locate, operate and maintain their water and sewer facilities within public
14 highways, roads and streets.

15 51. With respect to water-sewer districts providing water service, the express
16 statutory authority to use public right-of-way is contained in RCW 57.08.005(3) which
17 provides:

18 (3) To construct, condemn and purchase, add to, maintain, and supply waterworks
19 to furnish the district and inhabitants thereof and any other persons, both within
20 and without the district, with an ample supply of water for all uses and purposes
21 public and private with full authority to regulate and control the use, content,
22 distribution, and price thereof in such a manner as is not in conflict with general
23 law and may construct, acquire, or own buildings and other necessary district
24 facilities. . . . For such purposes, a district may take, condemn and purchase,
acquire, and retain water from any public or navigable lake, river or watercourse,
or any underflowing water, and by means of aqueducts or pipeline conduct the
same throughout the district and any city or town therein and carry it along and

1 upon public highways, roads, and streets, within and without such district. . . .
2 (emphasis added)

3 52. With respect to water-sewer districts providing sewer service, the express
4 statutory authority to use public right-of-way is contained in RCW 57.08.005(5) which
5 provides:

6 (5) To construct, condemn and purchase, add to, maintain, and operate systems of
7 sewers for the purpose of furnishing the district, the inhabitants thereof, and
8 persons outside the district with an adequate system of sewers for all uses and
9 purposes, public and private, including but not limited to on-site sewage disposal
10 facilities, approved septic tanks or approved septic tank systems, on-site sanitary
11 sewerage systems, inspection services and maintenance services for private and
12 public on-site systems, point and nonpoint water pollution monitoring programs
13 that are directly related to the sewerage facilities and programs operated by a
14 district, other facilities, programs, and systems for the collection, interception,
15 treatment, and disposal of wastewater, and for the control of pollution from
16 wastewater with full authority to regulate the use and operation thereof and the
17 service rates to be charged. . . . The district may also sell surplus methane gas,
18 which may be produced as a by-product. For such purposes a district may conduct
19 sewage throughout the district and throughout other political subdivisions within
20 the district, and construct and lay sewer pipe along and upon public highways,
21 roads, and streets, within and without the district, and condemn and purchase or
22 acquire land and rights-of-way necessary for such sewer pipe. . . . (emphasis
23 added)

24 53. Given the express statutory authority contained in RCW 57.08.005(3) and (5),
the Districts are not required to enter into a franchise as a condition of using the public right-
of-way.

54. Given the express statutory authority contained in RCW 57.08.005(3) and (5),
the Districts are not required to pay the Rental Fee/Tax as a condition of using the public right-
of-way. King County has no legal right to charge the Rental Fee/Tax for a public use already
granted to the Districts by statute.

1 **No Statute Authorizes King County to Impose the Rental Fee/Tax**

2 55. The Washington State Legislature has granted counties the authority to grant
3 franchises relating to the use of the rights-of-way of county roads which is found in RCW
4 36.55.010.

5 56. RCW 36.55.010 provides as follows:

6 Any board of county commissioners may grant franchises to persons or private or
7 municipal corporations to use the right-of-way of county roads in their respective
8 counties for the construction and maintenance of waterworks, gas pipes,
9 telephone, telegraph, and electric light lines, sewers and any other such facilities.
10 (emphasis added)

11 57. There is no statute or other legal authority in Washington that expressly
12 authorizes King County to charge the Rental Fee/Tax it seeks to impose on the Districts.

13 **King County Does Not Own the Right-of-Way**

14 58. In Paragraph 1.2 of Section IV (Policy) of the Rule, King County claims it
15 “owns the ROW.”

16 59. In Paragraph 8 under Section IV (Relevant Facts) of its Complaint, King
17 County makes a similar allegation and states it “owns controlling property rights in these
18 ROW.”

19 60. RCW 36.75.020 provides as follows:

20 All of the county roads in each of the several counties shall be established, laid
21 out, constructed, altered, repaired, improved, and maintained by the legislative
22 authority of the respective counties as agents of the state, or by private individuals
23 or corporations who are allowed to perform such work under an agreement with
24 the county legislative authority. Such work shall be done in accordance with
25 adopted county standards under the supervision and direction of the county
26 engineer. (emphasis added)

27 61. Pursuant to RCW 36.75.020 and other applicable law, King County only
28 operates and maintains the County roads and rights-of-way as agents for the State. King

1 County does not own the right-of-way outright, nor does King County own the controlling
2 property rights in the right-of-way.

3 62. There is no statute or other legal authority in Washington that expressly grants
4 King County ownership of the County roads and right-of-way or ownership of any
5 “controlling property rights” in the right-of-way.

6 63. Under Washington law, fee ownership of county roads and rights-of-way are
7 retained by the abutting property owners.

8 64. King County’s interests in the County roads and right-of-way are in the nature
9 of non-exclusive easements which are for the benefit of the public and not King County in its
10 individual capacity.

11 65. The Districts also currently possess and enjoy easement rights to use the right-
12 of-way for their water and sewer facilities which are recognized and accepted coextensive uses
13 of public rights-of-way.

14 66. Many of the plats located in unincorporated areas of King County contain
15 dedication language substantially similar to the following:

16 “[the owners] hereby declare and dedicate to the use of the public forever all
17 streets and avenues shown hereon and the use thereof for all public purposes not
18 inconsistent with the use thereof for public highway purposes”

19 67. The Districts are co-beneficiaries of the easement rights granted to the public
20 for public uses through these plat dedications.

21 68. Since King County does not own the right-of-way, it has no right to charge the
22 Districts a Rental Fee/Tax as a condition of using the right-of-way.

23 69. Since the Districts already possess and enjoy easement rights, as well as
24 statutory rights, to use the public right-of-way for their water and sewer facilities, King County

1 has no right to charge the Districts a Rental Fee/Tax as a condition of using the public right-of-
2 way.

3 **King County Cannot Compel the Districts to Enter Into Franchise Agreements.**

4 70. Pursuant to RCW 36.55.010, counties have the authority to grant franchises
5 relating to certain uses of the rights-of-way of county roads.

6 71. The authority to grant franchises does not authorize or empower King County
7 to compel the Districts to enter into mandatory franchises with unlawful terms or unfavorable
8 terms not acceptable to the Districts.

9 72. Franchise agreements are contracts, the terms of which must be negotiated and
10 agreed to by the parties to the franchise. King County cannot compel the Districts to sign
11 franchise agreements.

12 73. King County has allowed numerous franchises with public and private utilities
13 to expire. Notwithstanding the expiration of the franchises, King County has allowed the
14 public and private utilities to continue using the right-of-way without detrimental impact. In
15 practice, King County has been allowing many unfranchised utilities to work in the right-of-
16 way by using the right-of-way construction permit process. Some of the public and private
17 utilities have been operating in right-of-way without a franchise since 2004 (Defendant Coal
18 Creek Utility District) and 2006 (Puget Sound Energy). Allowing public and private utilities to
19 operate in right-of-way without a franchise has not resulted in any detrimental impacts to King
20 County.

21 74. King County seeks to imbed the requirement to pay the Rental Fee/Tax in the
22 franchise agreement knowing that without a contractual agreement it is without the legal
23 authority to require such a payment. King County's threat of ejecting the Districts' water and

1 sewer facilities from the rights-of-way or revoking franchises if the Districts refuse to pay the
2 Rental Fee/Tax is intended to coerce and force the Districts to enter into franchises with
3 unlawful and unfavorable terms. Any franchises entered into under such threats would be void
4 and unenforceable as having been obtained under coercion and duress.

5 **King County's Intended Use of the Rental Fee/Tax**

6 75. According to the Staff Report relating to the Ordinance, revenues generated
7 from the Rental Fee/Tax are going to be credited to the General Fund.

8 76. RCW 36.82.020 provides as follows:

9 Any funds accruing to and to be deposited in the county road fund arising from
any levy in any road district shall be expended for proper county road purposes.

10 77. Therefore, even if King County were determined to have the power and
11 authority to impose a Rental Fee/Tax on the Districts, pursuant to RCW 36.82.020, any
12 revenues from the Rental Fee/Tax would have to be deposited into the county road fund and
13 used for solely county road purposes.

14 78. King County's intended use of the Rental Fee/Tax as General Fund revenue is
15 unlawful and would further constitute a violation of the Washington State Accountancy Act,
16 RCW 43.09.210.

17 **D. Declaratory, Injunctive and Other Relief**

18 79. The Districts re-allege and incorporate the allegations contained in Paragraphs 1
19 – 78 above as if set forth in full herein.

20 80. There is an actual, present and existing dispute between the Districts and King
21 County concerning the validity of portions of the Ordinance and the Rule, including but
22 not limited to King County's unlawful attempt to impose the Rental Fee/Tax on the

Districts as a condition of using the rights-of-way to provide water and sewer service to their customers. Accordingly, pursuant to chapter 7.24 RCW the Districts are entitled to declaratory relief on these matters.

81. Given the provisions of the Ordinance which purport to: (a) require all Districts to enter into a franchise agreement and pay the applicable Rental Fee/Tax or alternatively the “forbearance payments” and (b) give King County the right to eject the Districts from the use of the right-of-way, to revoke the franchise, or impose fines for violation of the Ordinance, the Districts would suffer great injury from King County’s actions and the Districts have no adequate remedy at law and are entitled to injunctive relief pursuant to chapter 7.40 RCW as to the matters described above.

Prayer for Relief

WHEREFORE, the Districts pray for judgment against King County as follows:

1. Declaring that Title 57 RCW “water-sewer districts” have the express statutory authority pursuant to RCW 57.08.005 (3) and (5) to locate, operate and maintain their water and sewer facilities in “public highways, roads, and streets” without a franchise agreement and without payment of the Rental Fee/Tax. Therefore, King County may not impose and collect the Rental Fee/Tax provided for in Section 8 of the Ordinance as a condition of allowing water-sewer districts to use the right-of-way.

2. Declaring that: (a) King County does not “own” any county roads as the term “county roads” is defined in RCW 36.75.010, regardless of how King County acquired the interest in the county road (e.g. fee purchase, condemnation, adverse possession and dedication), (b) pursuant to RCW 36.75.020 all of the county roads in King County are established, laid out, constructed, altered, repaired, improved, and maintained by King County

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1 solely as agents of the State, (c) King County's interest in the county roads and right-of-way is
2 in the nature of a non-exclusive easement, and (d) King County has no right to charge the
3 Rental Fee/Tax on county roads and right-of-way it does not own.

4 3. Declaring that King County has no express or implied statutory authority to
5 impose the Rental Fee/Tax on the Districts.

6 4. Declaring that the Rental Fee/Tax is an unauthorized and/or unlawful tax in
7 violation of state law.

8 5. Declaring that the Rental Fee/Tax is an unauthorized and/or unlawful property
9 tax which violates the uniformity requirements under the Washington State Constitution and
10 state law.

11 6. Declaring that Title 57 RCW "water-sewer districts" may, but shall not be
12 required to, enter into a franchise agreement with King County if the terms of a franchise are
13 negotiated and mutually agreed to by the water-sewer districts and King County.

14 7. Declaring that any plats located in unincorporated areas of King County that
15 contain dedication language substantially similar to the following:

16 "[the owners] hereby declare and dedicate to the use of the public forever all streets
17 and avenues shown hereon and the use thereof for all public purposes not inconsistent
18 with the use thereof for public highway purposes"

19 shall be interpreted as granting to water-sewer district the right to use the public right-of-way
20 for their water and sewer facilities as co-beneficiaries of the easement rights granted through
21 the dedication.

22 8. Declaring that Section 8 of the Ordinance, which purports to authorize the
23 imposition of the Rental Fee/Tax as a condition of using the right-of-way, constitutes a
24 violation of the Washington State Constitution (including without limitation Article 11, §11)

1 and other state law, and King County's own charter and/or ordinances, and is ultra vires and
2 beyond King County's legal authority.

3 9. Declaring that the Rule which purports to implement Section 8 of the
4 Ordinance constitutes a violation of the Washington State Constitution (including without
5 limitation Article 11, §11) and other state law, and King County's own charter and/or
6 ordinances, and is ultra vires and beyond King County's legal authority.

7 10. Declaring that Section 4 of the Ordinance, which purports to require the
8 Districts to enter into a written franchise as a condition of using the public right-of-way,
9 constitutes a violation of the Washington State Constitution (including without limitation
10 Article 11, §11) and other state law, and King County's own charter and/or ordinances, and is
11 ultra vires and beyond King County's legal authority.

12 11. Declaring that Section 7.A.5 of the Ordinance, which purports to require the
13 Districts to accept without negotiation and enter into a franchise that contains a provision
14 requiring the Districts to indemnify, defend and hold harmless King County against damages
15 caused by, arising out of, or incidental to the Districts' exercise of public rights under any
16 franchise with King County, constitutes a violation of the Washington State Constitution
17 (including without limitation Article 11, §11) and other state law, and King County's own
18 charter and/or ordinances, and is ultra vires and beyond King County's legal authority.

19 12. Declaring that Section 7.C.2 of the Ordinance which purports to require the
20 Districts to accept without negotiation and enter into a franchise that contains provisions
21 requiring the Districts to indemnify, defend and hold harmless King County against damages
22 arising from fire suppression activities during fire events constitutes a violation of the
23 Washington State Constitution (including without limitation Article 11, §11) and other state

1 law, and King County's own charter and/or ordinances, and is ultra vires and beyond King
2 County's legal authority.

3 13. Declaring that Section 9 of the Ordinance which purports to authorize King
4 County to accept a "forbearance payment" in lieu of the payment of the Rental Fee/Tax is
5 illusory and constitutes a violation of the Washington State Constitution (including without
6 limitation Article 11, §11) and other state law, and King County's own charter and/or
7 ordinances, and is ultra vires and beyond King County's legal authority.

8 14. Declaring that Section 13 of the Ordinance, which purports to authorize King
9 County to deny unfranchised utilities the right to work in the public right-of-way under a right-
10 of-way permit, constitutes a violation of the Washington State Constitution (including without
11 limitation Article 11, §11) and other state law, and King County's own charter and/or
12 ordinances, and is ultra vires and beyond King County's legal authority.

13 15. Declaring that King County may not charge a Title 57 RCW water-sewer
14 district with a franchise fee that exceeds the County's administrative costs relating to the
15 water-sewer districts' right to operate utility facilities in public rights-of-way.

16 16. Declaring that any existing franchise agreements with water-sewer districts that
17 contain a "reservation of rights" provision which purports to reserve to King County the right
18 to impose "fair market compensation" for the use of the right-of-way shall be deemed to be
19 void and unenforceable and in violation of the Washington State Constitution (including
20 without limitation Article 11, §11) and other state law, and King County's own charter and/or
21 ordinances, and is ultra vires and beyond King County's legal authority.

22 17. Declaring that King County shall be estopped from requiring Title 57 RCW
23 water-sewer districts to enter into written franchise agreements given the fact that King County

1 has allowed many public and private utilities to use county roads and right-of-way for years
2 dating as far back as 2004 and 2006 without a franchise agreement and such action shall be
3 deemed to be a voluntary waiver or relinquishment of any right to require a written franchise
4 agreement.

5 18. Declaring that the methodology established by the Rule to calculate the Rental
6 Fee/Tax is fundamentally flawed, fails to reflect the true value of the public rights-of-way due
7 to the limitations on use of such rights-of-way, is arbitrary and capricious and violates the due
8 process and equal protection provisions of both the state and federal constitutions.

9 19. Declaring that the Ordinance and Rule constitutes an unlawful delegation of
10 authority to King County Facilities Management Division to impose a tax on Title 57 RCW
11 water-sewer districts using the right-of-way.

12 20. Declaring that the Ordinance and Rule constitute an unlawful taking of the
13 Districts' property rights to operate and maintain their water and sewer facilities in public
14 right-of-way in violation of state and federal law.

15 21. Declaring that the Ordinance and Rule constitute an impairment of the
16 Districts' existing franchise agreements by seeking to impose an unlawful Rental Fee/Tax and
17 to otherwise impair the Districts' right to operate and maintain their water and sewer facilities
18 in right-of-way in violation of state and federal law.

19 22. Declaring that the Ordinance and Rule unlawfully interfere with the Districts'
20 full power and authority to set and establish rates for the provision of water and sewer service
21 granted to them by RCW 57.08.005 (3) and (5).

22 23. Enjoining King County from seeking to impose or collect the Rental Fee/Tax.

1 24. Enjoining King County from requiring water-sewer districts to enter into a
2 written franchise as a condition of using the public right-of-way, unless the franchise is the
3 product of good faith negotiations and mutually agreed to by both parties.

4 25. Enjoining King County from requiring the Districts to accept any terms or
5 conditions contained in a franchise which are found by the court to be in violation of the
6 Washington State Constitution and other state law, and King County's own charter and/or
7 ordinances.

8 26. To the extent the Ordinance is determined to be a valid exercise of King
9 County's power and authority, declaring that the Districts and other public utilities may offset
10 the franchise rental compensation amount required to be paid under Section 8 of the Ordinance
11 by the following benefits that shall be considered "in-kind services" or "other nonmentary
12 benefits" accruing to King County: (a) the fair market value of any road and paving
13 improvements made to county roads while working in the public right-of-way and (b) the
14 increased real property taxes received by King County resulting from the increase in value of
15 the real property located adjacent to the public right-of-way attributable to the provision of
16 water or sewer facilities to serve the subject property.

17 27. To the extent the Ordinance is determined to be a valid exercise of King
18 County's power and authority, declaring that any revenues generated by Section 8 of the
19 Ordinance are required to be deposited in the King County road fund and shall be used
20 exclusively for proper road maintenance in accordance with RCW 36.82.020 and the
21 Washington State Accountancy Act, RCW 43.09.210.

22 28. To the extent the Ordinance is determined to be a valid exercise of King
23 County's power and authority, declaring that King County shall be required to account for all

1 revenue it receives relating to the use of the public rights-of-way to ensure that King County
2 does not recover more revenue relating to the public and private utilities' use of the applicable
3 right-of-way than is supported by the County's valuation methodology under the Rule.

4 29. Awarding the Districts their attorneys' fees and costs as provided by statute, by
5 contract or in equity, including an award to the Districts and their attorneys, out of any
6 common fund created or preserved for the benefit of the Districts and their respective
7 ratepayers and customers as a result of their efforts.

8 30. Awarding the Districts such other and further relief and equitable relief as may
9 be just and proper.

10 DATED this 14th day of February, 2018.

11 INSLEE, BEST, DOEZIE & RYDER, P.S.

12 By s/ Eric C. Frimodt

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23 ANSWER, AFFIRMATIVE DEFENSES AND
24 COUNTERCLAIMS AND COMPLAINT FOR
DECLARATORY, INJUNCTIVE AND OTHER

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EXHIBIT A

Estimation of Franchise Compensation				
Key	Input			
	Output			
Valuation of Land Adjacent to the ROW in the Franchise Area				
Total Assessed Land Value				1
Total Square Feet				2
Per Square Foot Value of Land Adjacent to the ROW				3
Valuation of Franchise Use Area				
Franchise Use				
Width	6			
Length	7	Franchise Use Area		8
Reduction Factor for Facility Location	9	Value of Franchise Use Area		10
Estimated Franchise Compensation Calculation				
Rate of Return		11	Estimate of Annual Compensation 12	
Financial Impact Limiting Factor				
		Estimated Monthly Franchise Compensation	13	
Total Residential Customers	14			
Total Other Customers	15			
Estimated Monthly Cost per Customer	16	Financial Impact Limiting Factor		17
Revised Estimate of Monthly Franchise Compensation	18			
Revised Estimate of Annual Franchise Compensation	19			

1. The total Assessed Land Value of parcels adjacent to the ROW in the Franchise Area, using parcels that are not exempt from property tax. Data is provided by the King County GIS Center.

2. The total square feet of the parcels used to establish the Assessed Land Value for Box 1. Data is provided by the King County GIS Center.

3. The per-square-foot value of the land adjacent to the ROW is established by dividing the total Assessed Land Value of parcels (Box 1) by the total square feet of such parcels (Box 2).

6. Input is established by FMD as the typical width of a utility easement that provides for reasonable clearances from other utilities, modest and varied appurtenant uses in the ROW, and reasonable access for construction, maintenance, and repair.

7. The approximate number of linear feet of ROW in the Franchise Area, provided by the King County GIS Center, or the number of linear feet occupied by the Utility when the Utility provides verifiable information

8. The Franchise Use Area is established by multiplying the Width (Box 6) by Length (Box 7). The product is used to calculate the Value of the Franchise Use Area in Box 10 below.

9. Input is established by FMD as a factor that reduces the Franchise Use Area based on facility location (aerial or underground).

10. The value of the Franchise Use Area is established by multiplying the Franchise Use Area (Box 8) by the reduction factor for facility location (Box 9) and by the per square foot value of land adjacent to ROW (Box 3).

11. Input is established by FMD as reflective of the current rate of return on real estate typically charged by municipalities and private parties.

12. The estimate of annual Franchise Compensation is established by multiplying the value of the Franchise Use Area (Box 10) by the rate of return (Box 11).

13. The estimated monthly Franchise Compensation amount is established by dividing the estimated annual Franchise Compensation amount (Box 12) by 12 (months).

14. The utility will provide the number of residential customers it serves in its franchise area in unincorporated King County.

15. The utility will provide the number of non-residential customers it serves in its franchise area in unincorporated King County.

16. The estimated monthly cost per customer is established by dividing the estimated monthly Franchise Compensation amount (Box 13) by the total of customers (sum of Box 14 + Box 15).

17. Input is established by FMD for the purpose of evaluating the reasonableness of the estimate of annual Franchise Compensation..

18. If the estimated monthly cost per customer (Box 16) exceeds the monthly financial impact limiting factor, FMD will add the product of the number of residential customers (Box 14) multiplied by the monthly financial impact limiting factor (Box 17) to the product of the number of non-residential customers (Box 15) multiplied by the estimated monthly Franchise Compensation amount.

19. The revised estimate of annual Franchise Compensation is established by multiplying the estimated monthly Franchise Compensation amount (Box 18) by 12 (months).

Exhibit A

Estimation of Franchise Compensation - Sample Worksheet					
Key	Input		Output		
	Output				
Valuation of Land Adjacent to the ROW in the Franchise Area					
					Assessment Data
Total Assessed Land Value					\$73,681,000
Total Square Feet					6,392,218sf
Per Square Foot Value of Land Adjacent to the ROW					\$11.53/sf
Valuation of Franchise Use Area					
Franchise Use Width	15'		Franchise Use Area		
Length	29,278'				
Reduction Factor for Facility Location	Underground	10.0%	Value of Franchise Use Area		\$506,363
Estimated Franchise Compensation Calculation					
					Annual Compensation
Rate of Return					6.6%
					\$ 33,420
Financial Impact Limiting Factor					
					Monthly Compensation
					\$ 2,785.00
Total Residential Customers	300				
Total Other Customers	194				
Estimated Monthly Cost per Customer	\$ 5.64		Financial Impact Limiting Factor		\$ 5.00
Revised Estimate of Monthly Compensation	\$ 2,594.16				
Revised Estimate of Annual Compensation	\$ 31,129.92				

Exhibit A

EXHIBIT B



King County

Facilities Management Division

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Facilities Management Division
Franchise Compensation Methodology Input Values
Issued December 29, 2017

Section	Input Description	Input Value
IV.2.2.1 and IV.2.2.4.2	Width of a typical utility easement.	15'
IV.2.2.2 and IV.2.2.4.3	Reduction factor for facility location (aerial or underground).	Aerial Facilities: 25% Underground Facilities: 10%
IV.2.3	Rate of return.	6.6%
IV.2.4.	Financial impact limiting factor.	\$5.00 per month, at the time of estimate.

FMD may periodically reassess the determinations listed herein and will post updates on the FMD website.

FMD may also, on a case-by-case basis, adjust the values set for the approximate width of a typical utility easement and/or the reduction factor for aerial or underground facility locations if the size and location of the utility's facilities are significantly different than those contemplated in the development of the Public Rule.

Exhibit B