

**Summary of Comments and Record of Facilities Management Division Responses and Adjustments to Proposed Public Rule for Determining Franchise Compensation Under K.C.C. 6.27.080
December 29, 2017**

In November 2016, the King County Council approved Ordinance 18403, which authorizes the Facilities Management Division (FMD) to “establish policies that create a process for the determination of franchise compensation.” K.C.C. 6.27.080.D. Pursuant to the Ordinance, the scope of the proposed rule is accordingly focused on the process for determining franchise compensation. This process includes a methodology for creating an estimate of franchise compensation that is provided to the franchise applicant. The franchise applicant thereafter shall have a reasonable opportunity to suggest amendments to the estimate in order to reach agreement with King County as to the amount and type of franchise compensation.

A proposed rule outlining a process for FMD to determine franchise compensation was issued for public comment for 45 days, from October 23 through December 7, 2017. Notice of the proposed rule and comment period was issued as follows:

- Notice of the proposed rule and comment period was published in the Seattle Times, the Official County Newspaper, on October 23, 2017.
- The proposed rule, explanatory worksheets, and links to related information were posted on the FMD website beginning on October 23, 2017. The website also included contact information for the project manager, and a section where comments could be submitted.
- A user-friendly url (kingcounty.gov/franchise) was created for the proposed rule website.
- Letters were sent to utilities on record as operating in King County rights-of-way along with a link to the FMD website and a copy of the proposed rule.

At the end of the comment period, FMD received over 1000 comments through the website, approximately 70 comments through the mail, and approximately 55 emails and phone calls. FMD also received more than 350 comments through the mail after the comment period closed. All comments were considered by FMD.

FMD also offered to meet with several utility providers that made inquiries prior to and during the comment period. FMD engaged in phone and email discussions with several utility providers to review the proposed rule and met with one utility to review the proposed rule.

After thoroughly reviewing the comments, FMD has made some adjustments to the proposed public rule. Those adjustments are reflected in the final rule. A summary of comments received by FMD and FMD’s responses and adjustments to the public rule follows.

FMD received comments objecting to Ordinance 18403.	Ordinance 18403 was approved in November 2016. While Ordinance 18403 authorized this public rule, FMD will not further respond here to comments on the ordinance itself. Such comments go beyond the scope of this rule making process.
FMD received comments questioning the authority of the County to receive Franchise Compensation in exchange for granting a utility a franchise to use the right-of-way.	The County’s authority for receiving franchise compensation includes both its inherent legislative authority under Article XI, Sections 4 and 11 of the Washington State Constitution and its power to grant franchises under RCW 36.55.010. The Washington Supreme Court has for many years held, consistent with the United States Supreme Court and the courts of other jurisdictions that the power to grant a franchise carries with it inherent authority to receive payment in return. <u>City of Spokane v. Spokane Gas and</u>

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	<u>Fuel Company</u> , 175 Wash. 103 (1933). The Attorney General has stated that it is a “generally recognized principle of law” that “[a] municipal corporation, having entire control of its streets and the power to impose conditions on granting a franchise to use the streets, may require compensation for their use . . . as a condition of the grant of the right to use them, unless forbidden by statute, or contrary to public policy.” AGO 1977, No. 19.
FMD received comments questioning whether the County owns a sufficient interest in the right-of-way to be able to grant a franchise to a utility and receive reasonable compensation for the Utility’s use of the right-of-way.	It is true that a County’s property interest in a right-of-way is often a roadway easement. Well established law in Washington makes clear that where a County acquires an easement to establish a right-of-way, the scope of its property interest is substantial. Counties have absolute control over county road rights-of-way. <u>State ex re. York v. Board of Com’rs of Walla Walla County</u> , 28 Wash.2d 891 (1947).
FMD received comments asking if finalization of the public rule could be postponed while the County is responding to public records requests related to Ordinance 18403	The County has been diligently responding to several public records requests related to Ordinance 18403. As part of this response effort, the County has been working closely with representatives of a number of the requestors. From the volume and specificity of the comments received, the status of the public records requests does not appear to have interfered with the ability of the requestors to submit comments.
FMD received a request to provide examples of and/or define “in kind services or other nonmonetary benefits” referenced in the definition of Franchise Compensation	The reference in Section III.5 to “in kind services or other nonmonetary benefits, accruing to King County” is taken directly from K.C.C. 6.27.080.B, which the King County Council approved in November 2016. Any franchise compensation negotiated by the parties will take into account the circumstances of and proposals made between the utility and County at the time of negotiation. No examples of in kind services or nonmonetary benefits have been approved as part of a franchise agreement by the Council to date.
FMD received comments questioning the County’s intent to use private roads and roads that the County has vacated in the methodology to estimate franchise compensation. Questions were also raised about the inclusion of unopened and unmaintained right-of-way.	Franchise Compensation is in the nature of rent for a utility’s use of county-owned rights of way. As such, the County does not intend to use areas where the county lacks a roadway easement, fee or other property interest to estimate franchise compensation. In addition, the definition of “County road right-of-way” in Section III.9 of the proposed rule does not include ROW corridors where the county has no property interest.
FMD received comments indicating that the proposed rule should include the following: <ul style="list-style-type: none"> • That costs incurred for fire suppression water facilities and fire suppression water 	Ordinance 18403 authorized FMD to “establish policies that create a process for the determination of franchise compensation.” K.C.C. 6.27.080.D. The scope of the proposed rule addresses the process for determining franchise compensation. This process includes a methodology for creating an estimate of franchise compensation that K.C.C. 6.27.080.D requires FMD to provide to the franchise applicant. K.C.C. 6.27.080.D also provides franchise applicants a reasonable opportunity thereafter to provide input on

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<p>services are credited against any franchise compensation</p> <ul style="list-style-type: none"> • A standard term period for franchises • A process for negotiation of franchises • A process to be used by the County and utilities to determine the annual inflationary adjustment and full adjustment (5 years) referenced in Section IV.1. 	<p>and suggest amendments to the estimate in order to reach agreement with King County as to the amount and type of franchise compensation.</p> <p>In developing the proposed rule, FMD opted not to restate most provisions that were already codified in the King County Code, such as crediting the costs incurred by franchisees for fire suppression water facilities and services against any franchise compensation, as such is specifically addressed in K.C.C. 6.27.060.C.2.</p> <p>Similarly, FMD opted to not impose a standard term for the duration of franchises, as the franchise term is negotiated between the County and utility.</p> <p>FMD also opted to not impose a specific process for negotiation, so that the parties have flexibility to develop a reasonable negotiation approach and schedule in light of their circumstances. FMD, however, clarified in Section IV.1.1.1 of the rule that the parties would negotiate both franchise compensation and other terms of the franchise agreement.</p> <p>The intent of annual inflationary adjustments and full adjustments is to keep pace with market values and changes to utility providers' service areas in unincorporated King County. Like other terms of a franchise agreement, the County considers annual inflationary adjustments and full adjustments subject to negotiation between the County and utility provider based on available information at that time. FMD added language to Section IV clarifying that such adjustments are to be as agreed upon by the parties. With regard to the full adjustment, the parties will proceed in a manner that is consistent with the process for determining franchise compensation in the public rule.</p>
<p>FMD received comments asking for clarification of how franchise compensation would be paid and when franchise compensation would start.</p>	<p>K.C.C. 6.27.080.B. requires that franchise compensation be paid annually. FMD added a clarification to Section IV.1.2 that franchise compensation would begin to accrue on the effective date of the public rule unless otherwise required by an existing franchise agreement or unless otherwise agreed to by the parties during negotiations. This reflects the fact that utilities using the right-of-way are currently benefiting from use of the valuable property right granted by a franchise without compensating the public, and should be compensating the public for this benefit.</p>
<p>FMD received comments objecting to elements of the methodology that use the assessed land values of property adjacent to the right-of-way, that adjust this assessed value to more accurately reflect market value, that base the estimated Franchise</p>	<p>The methodology was prepared based on well-established appraisal principals to arrive at a reasonable rental value for use of county property. The methodology follows the across-the-fence approach used to value property interests in corridors, the value of which may be derived from the value of adjacent parcels. It consistently uses conservative assumptions to avoid overcharging for use of the right-of-way. In light of the fact that a utility uses only a portion of the entire right-of-way, the compensation is based on the assumption that the utility will be able to use a standard utility easement width, that the full width of the easement is nonexclusive, and that within that footprint, the utility will be able to use and impact only a portion of the available space. The</p>

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<p>Compensation on the width of a typical utility easement and whether the utility facilities will be underground or aerial, and that apply a rate of return to estimate annual franchise compensation.</p>	<p>width and location assumptions include allowance not only for the utility lines, but also necessary clearance from other utilities, modest and varied appurtenances such as connections to customers, meters, hydrants, power poles and transformers, and access for construction maintenance and repairs. As a result of the broad scope of facilities and uses allowed, the current 15 foot width and the location adjustments of 10 percent for subsurface and 25 percent for aerial lie well within typical industry standards. Finally, use of a rate-of-return to calculate the estimated annual franchise compensation follows the well-established appraisal method for determining rent. The rate of return on real property method reflects the typical methodology employed by municipalities and private parties. As noted above, utilities will also have the opportunity to provide input on and seek amendment to the estimate produced by the methodology.</p> <p>With regard to the adjustment of the assessed value to reflect the extent it lags behind market value in Section IV.2.1.2, FMD removed this step in the estimate methodology.</p>
<p>FMD received comments objecting to the use of the land value of parcels adjacent to the right-of-way where the property owner does not receive utility service.</p>	<p>The across-the-fence methodology in the proposed public rule uses the land value of parcels that are not exempt from property tax and that are adjacent to the right-of-way to derive the per-square foot value of the right-of-way. Use of such parcels adjacent to the right-of-way, whether or not they are served by the utility, is consistent with the across-the-fence appraisal methodology. Use of these parcels does not create any obligation for the owners to pay the utility.</p>
<p>FMD received comments suggesting that the rule should require case by case adjustments to the following:</p> <ul style="list-style-type: none"> • Average width of a utility easement; • Percentage reductions for aerial or underground use by utilities; • Differences in the condition of the right-of-way. 	<p>Because the end result of the methodology outlined in the proposed rule is a general estimate that is intended to be the starting point for discussions and negotiations between the County and a utility, the estimate methodology is designed as a starting point for administration of the Ordinance, using conservative assumptions that are reasonably applicable to all utilities operating in County rights-of-way.</p> <p>In addition, K.C.C. 6.27.080.D guarantees applicants for franchises a “reasonable opportunity to suggest amendments to the estimate in order to reach agreement with King County as to the amount and type of franchise compensation.” This opportunity is also reflected in Section IV.1.1.2 of the public rule.</p>
<p>FMD received comments questioning its authority to determine the following discretionary factors used in the proposed methodology:</p> <ul style="list-style-type: none"> • Rate of adjustment reflecting the extent to which the Assessed Land Value in King County lags behind the fair market value 	<p>The King County Council, through K.C.C. 6.27.080.D, specifically authorized FMD to establish policies that create a process for the determination of franchise compensation, with discretion to include different processes depending upon the size and complexity of the franchise, and the authority to request information relevant to the determination of franchise compensation from franchise applicants.</p> <p>K.C.C. 6.27.080.C additionally requires FMD to determine franchise compensation through the following factors, not all of which must be applied to each franchise:</p>

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<p>of real estate in King County (Section IV 2.1.2.1);</p> <ul style="list-style-type: none"> • Width of a typical utility easement (Section IV.2.2.4.2) • Adjustment for aerial or underground facility locations (Section IV.2.2.4.2) • Rate of return (Section IV.2.3.1) • Maintenance of the rule for determining franchise compensation (Section VI) 	<ul style="list-style-type: none"> • 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; • 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. <p>As the agency responsible for establishing the policies that create a process for the determination of franchise compensation, FMD is also responsible for ensuring that the rule is updated as needed in accord with King County policy requirements.</p>
<p>FMD received comments alleging that the Financial Impact Protection provisions conflict with the authority of the Washington Utilities and Transportation Commission (WUTC) to set utility rates in the state of Washington.</p>	<p>The financial impact protection provisions were not intended to and do not impose any requirement related to whether, or in what amount utilities charge customers as a result of paying franchise compensation. Nothing in the proposed rule requires utilities to pass franchise compensation onto customers, or specifies how this operational cost may or may not influence customer rates. Instead, these provisions were intended to provide FMD with the ability to cap the initial estimate if conditions unique to the utility’s service area result in a Franchise Compensation estimate that is unusually high. FMD adjusted the language in Section IV.2.4 to make clear it is not intended to in any way set utility rates.</p>
<p>FMD received comments and questions about what utility customers would be charged as a result of the franchise compensation requirement.</p>	<p>Nothing in 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, with possible input from a regulatory authority, determines its own customer rates.</p>
<p>FMD received comments objecting to any methodology that is not based on the actual use of the ROW by utilities.</p>	<p>Section 2.2.4.1 of the proposed rule authorizes FMD to reduce the number of linear feet of ROW used in the calculation if the utility provides verifiable information specifying the location of its facilities over, under, within, or across the ROW. FMD intends for this provision to be mandatory.</p> <p>FMD clarified this Section to make clear that it is required to reduce the number of linear feet of ROW used in the calculation when the utility provides verifiable information.</p> <p>In addition, verifiable information about the location of facilities will be accepted during negotiations. It is requested in the franchise application so that it can be used in the calculation of the estimate that FMD is required to provide to the utility during the application review process.</p>

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<p>FMD received comments related to the lack of a definition of “lateral connection” referenced in Section IV.2.5.3.</p>	<p>Section IV.2.5 outlines the methodology for estimating franchise compensation for utilities that occupy the ROW only by crossing from one side to the other. The statement, “Lateral connections to a facility within the ROW are not considered to be crossings,” in Section IV.2.5.3 was intended to clarify that connections from a main utility line that cross the ROW to reach customers is not considered a “crossing” subject to the methodology in Section IV.2.5.</p>
<p>FMD received questions about the reference to “ARMMS” in Section V.</p>	<p>ARMMS is the acronym for King County’s Department of Executive Services, Records and Licensing Services Division, Archives, Records Management, and Mail Services Section. ARMMS is responsible for coding and indexing King County Rules. The reference to ARMMS in Section V is a placeholder for the date that the rule becomes effective, which according to ARMMS policy, is 30 days after the rule is signed and filed with ARMMS.</p>
<p>FMD received comments alleging that the definition of “franchise area” is vague and subject to the discretion of the utility at the time of application.</p>	<p>A utility, rather than FMD, has current information about the location of its facilities and service area, and is therefore in the best position to provide information about the size and location of its requested franchise area. K.C.C. 6.27.060 does require that franchises be consistent with the County Comprehensive Plan, and with a previously approved comprehensive plan for the applicant if the applicant is required to have a plan by K.C.C. 13.24.010. Applicants, who are necessarily aware of their own service areas, will be responsible for meeting these requirements.</p>
<p>FMD received comments suggesting that the rule should include a mechanism for expanding or contracting utility service areas.</p>	<p>The scope of the proposed public rule is limited to the determination of franchise compensation. Neither Ordinance 18403 nor the proposed rule limits a utility provider from requesting an amendment to an existing franchise, or from proposing a mechanism for administratively expanding or contracting service areas in a new franchise. FMD will consider including in franchise agreements an administrative mechanism for expanding or contracting service areas if warranted and when other franchise terms are not affected.</p>
<p>FMD received comments about the rule being unclear or difficult to follow.</p>	<p>FMD included two worksheets on the notice and comment website (www.kingcounty.gov/franchise). One included a step by step explanation of the proposed methodology in a picture format, and the other was an interactive Excel document that reflected the mathematical formulas used in the proposed methodology. FMD staff communicated with utility providers that made inquiries about the proposed methodology, including walking step by step through the methodology using information related to the utility’s franchise area in unincorporated King County.</p> <p>In addition, FMD expects that it will continue to provide step by step review of the methodology for utilities as well as of the worksheets that will include GIS data related to the utilities’ franchise areas in unincorporated King County.</p>