

1 the oral arguments of counsel and has reviewed the following documents submitted in support
2 of or in opposition to the motions for summary judgment:

3 1. King County's Motion for Summary Judgment, filed on June 22, 2018 (clerk's
4 docket submittal number ("sub.") 55);

5
6 2. Declaration of Anthony Gibbons, MAI, CRE in Support of King County's
7 Motion for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 57);

8 3. Declaration of Anthony Wright in Support of King County's Motion for
9 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 59);

10 4. Declaration of Rick Brater in Support of King County's Motion for Summary
11 Judgment, filed on June 22, 2018, and exhibits thereto (sub. 58);

12
13 5. Declaration of Matthew J. Segal in Support of King County's Motion for
14 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 56);

15 6. Defendant Districts' Motion for Summary Judgment, filed on June 22, 2018
16 (sub. 33);

17 7. Declaration of Cynthia Lamothe in Support of the Defendant Districts' Motion
18 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 39);

19 8. Declaration of Darcey Peterson in Support of the Defendant Districts' Motion
20 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 42);

21 9. Declaration of Eric Frimodt in Support of the Defendant Districts' Motion for
22 Summary Judgment, filed on June 22, 2018, and exhibits thereto (subs. 37 and 60);
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1 10. Declaration of James Kuntz in Support of the Defendant Districts' Motion for
2 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 43);

3 11. Declaration of John C. Krauss in Support of the Defendant Districts' Motion for
4 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 34);

5 12. Declaration of Michael Amburgey in Support of the Defendant Districts' Motion
6 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 41);

7 13. Declaration of Patrick Sorensen in Support of the Defendant Districts' Motion
8 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 40);

9 14. Declaration of Thomas D. Keown in Support of the Defendant Districts' Motion
10 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 38);

11 15. Defendant-Intervenors' Motion for Summary Judgment, filed on June 22, 2018
12 (sub. 45);

13 16. Declaration of David Jurca in Support of Intervenor-Defendants' Motion for
14 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 52);

15 17. Declaration of Denny Scott in Support of Intervenor-Defendants' Motion for
16 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 47);

17 18. Declaration of Kelly Robinson in Support of Intervenor-Defendants' Motion for
18 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 51);

19 19. Declaration of Nick Himebauch in Support of Intervenor-Defendants' Motion
20 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 50);

1 20. Declaration of Robert Pancoast in Support of Intervenor-Defendants' Motion for
2 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 46);

3 21. Declaration of Teresa L. Fowlkes in Support of Intervenor-Defendants' Motion
4 for Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 49);

5 22. Declaration of Tim Ashcraft in Support of Intervenor-Defendants' Motion for
6 Summary Judgment, filed on June 22, 2018, and exhibits thereto (sub. 48);

7 23. Motion of Washington Rural Electric Cooperative Association to File an Amicus
8 Brief, with subjoined Amicus Brief of Washington Rural Electric Cooperative Association in
9 Opposition to King County's Motion for Summary Judgment, filed on July 16, 2018 (sub.
10 77B);

11 24. Declaration of Kent Lopez in Opposition to King County's Motion for Summary
12 Judgment and in Support of WRECA's Motion to File Amicus Brief, filed on July 16, 2018,
13 and exhibits thereto (sub. 77D);

14 25. Declaration of Steven Walter in Opposition to King County's Motion for
15 Summary Judgment and in Support of WRECA's Motion to File Amicus Brief, filed on July
16 16, 2018, and exhibits thereto (sub. 77C);

17 26. King County's Combined Opposition to Motions for Summary Judgment, filed
18 on July 16, 2018 (sub. 76);

19 27. Second Declaration of Anthony Wright, filed on July 17, 2018 (sub. 78);

20 28. Second Declaration of Matthew J. Segal, filed on July 16, 2018, and exhibits
21 thereto (sub. 77);
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1 29. Defendant Districts' Response to King County's Motion for Summary
2 Judgment, filed on July 16, 2018 (sub. 65);

3 30. Declaration of Byron Murgatroyd, filed on July 16, 2018, and exhibits thereto
4 (sub. 68);

5 31. Supplemental Declaration of Eric Frimodt, filed on July 16, 2018, and exhibits
6 thereto (sub. 66);

7 32. Declaration of Hannah McFarland, filed on July 16, 2018, and exhibits thereto
8 (sub. 69);

9 33. Declaration of S. Murray Brackett, filed on July 16, 2018, and exhibit thereto
10 (sub. 67);

11 34. Errata re: Supplemental Declaration of Eric Frimodt to Correct Date of
12 Signature, filed on July 17, 2018, and attachment thereto (sub. 81);

13 35. Intervenor-Defendants' Response to King County's Motion for Summary
14 Judgment, filed on July 16, 2018 (sub. 71);

15 36. King County's Combined Reply Brief in Support of Motion for Summary
16 Judgment, filed on July 23, 2018 (sub. 87);

17 37. Praeipce to the Declaration of Anthony Gibbons in Support of King County's
18 Motion for Summary Judgment, filed on July 23, 2018, and attachment thereto (sub. 96);

19 38. Second Declaration of Anthony Gibbons, MAI, CRE in Support of King
20 County's Reply to Its Motion for Summary Judgment, filed on July 23, 2018, and exhibits
21 thereto (sub. 89);
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1 39. Third Declaration of Matthew J. Segal, filed on July 23, 2018, and exhibits
2 thereto (sub. 88);

3 40. Defendant Districts' Reply, filed on July 23, 2018 (sub. 85);

4 41. Intervenor-Defendants' Reply in Support of Their Motion for Summary
5 Judgment, filed on July 23, 2018 (sub. 82);

6 42. King County's Opposition to Motion of Washington Rural Electric Cooperative
7 Association's Motion to File an Amicus Brief, filed on July 25, 2018 (sub. 100);

8 43. Response of WRECA to King County's Objection to Motion of Washington
9 Rural Electric Cooperative Association's Motion to File an Amicus Brief, filed on July 26,
10 2018 (sub. 108);

11 44. Order Granting Motion to File Amicus Brief in Opposition to King County's
12 Motion for Summary Judgment, filed on July 26, 2018 (sub. 113); and

13 45. King County's Response to Amicus Brief of Washington Rural Electric
14 Cooperative Association, filed on July 31, 2018 (sub. 117).

15 At the conclusion of the hearing on July 27, 2018, the Court took the matter under
16 advisement and advised counsel that its decision would be announced at a telephonic hearing on
17 August 1, 2018. At a telephonic hearing on that date, the Court announced its decision on the
18 cross-motions for summary judgment. A transcript of the Court's oral ruling on that date is
19 attached hereto and by this reference is incorporated herein.
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23 Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

24 1. Plaintiff King County's motion for summary judgment is denied;
25

1 2. Defendant water-sewer districts' motion for summary judgment is granted, to the
2 extent set forth herein;

3 3. Intervenor-defendants' motion for summary judgment is granted, to the extent
4 set forth herein;

5 4. Water-sewer districts have statutory authority under RCW 57.08.005(3) and (5)
6 to locate, operate and maintain their water and sewer facilities in "public highways, roads, and
7 streets";

8 5. King County may regulate the use of county roads and public rights-of-way in
9 the public interest and charge utilities for the reasonable administrative costs of performing
10 such regulation;

11 6. However, King County (i) lacks authority to impose "franchise compensation"
12 or "rent" as provided in Ordinance 18403 on the utility defendants for using county roads or
13 public rights-of-way for delivery of utility services, and (ii) lacks the authority to require the
14 utility defendants to pay, or to agree to pay, "franchise compensation" or "rent" as provided in
15 Ordinance 18403 for use of county roads or public rights-of-way for delivery of utility services,
16 either as a condition of obtaining, maintaining or renewing a franchise or otherwise;

17 7. Franchises are contracts which must be negotiated and agreed upon by the
18 parties thereto, and King County may not require the utility defendants to enter into a franchise
19 agreement by accepting King County's franchise terms;

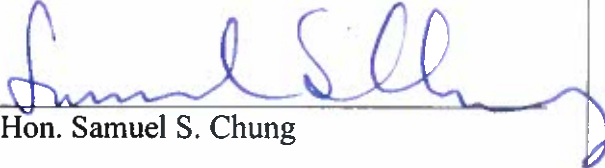
20 8. Sections 1.F, 1.G, 7.B, 8, and 10.B of Ordinance 18403, and the reference to
21 franchise compensation in section 10.A thereof ("or to pay franchise compensation as required
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1 by K.C.C. 6.27.060.B”), as well as Rule RPM 9-2 promulgated pursuant to said Ordinance, and
2 any other provision, interpretation or implementation of the Ordinance not consistent with this
3 Order, are invalid and unenforceable;

4 9. King County’s complaint is dismissed, with prejudice; and

5
6 10. The water-sewer district defendants and intervenor-defendants are deemed the
7 prevailing parties in this action and are entitled to an award of taxable costs, subject to the filing
8 and approval of a cost bill.

9
10 Dated this 4th day of September, 2018.

11 
12 Hon. Samuel S. Chung

13
14 Presented by:

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

16 By _____
17 Eric C. Frimodt, WSBA #21938
18 John W. Milne, WSBA #10697

19
20 _____
21 Hugh D. Spitzer, WSBA #5827

22 Attorneys for Water-Sewer District Defendants

23 JONSON & JONSON, P.S.

24 By _____
25 Richard Jonson, WSBA #11867

1 HELSELL FETTERMAN LLP

2 By _____
3 David F. Jurca, WSBA #2015

4 Attorneys for Intervenor-Defendants

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1 SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY
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3 KING COUNTY,)
4 Plaintiff,)
5 vs.) 18-2-02238-0 SEA
6 KING COUNTY WATER DISTRICTS)
7 NOs. 20, 45, 49, 90, 111, 119,)
8 et al,)
9 Defendants,)
10 and)
11 AMES LAKE WATER ASSOCIATION,)
12 DOCKTON WATER ASSOCIATION,)
13 Foothills WATER ASSOCIATION,)
14 SALLAL WATER ASSOCIATION,)
15 TANNER ELECTRIC COOPERATIVE,)
16 and UNION HILL WATER)
17 ASSOCIATION,)
18 Intervenor-Defendants.)



19
20 VERBATIM REPORT OF PROCEEDINGS BEFORE
21 THE HONORABLE SAMUEL S. CHUNG
22

23 AUGUST 1, 2018

24 TRANSCRIBED FROM RECORDING BY:
25 CHERYL J. HAMMER, RPR, CCR 2512



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I N D E X

PROCEEDINGS:	PAGE
Parties present via teleconference call	5
Court presents ruling	7



1 --oOo--

2
3 (BEGINNING OF TRANSCRIPTION)

4 (Proceedings begin at 3:10 p.m.)

5 THE COURT: Good afternoon, gentlemen,
6 and ladies. I just want to confirm who's on the call.
7 So let me see if I have the following people on the
8 line. Mr. Hackett.

9 MR. HACKETT: Yes, Your Honor.

10 THE COURT: Mr. Segal.

11 MR. SEGAL: Good afternoon, Your
12 Honor.

13 THE COURT: Ms. Evanson.

14 MS. EVANSON: Good afternoon, Your
15 Honor.

16 THE COURT: And then Mr. Frimodt?

17 MR. FRIMODT: Yes, Your Honor.

18 THE COURT: Mr. Spitzer.

19 MR. SPITZER: Here, Your Honor.

20 THE COURT: Mr. Jurca?

21 MR. JURCA: Here.

22 THE COURT: And Mr. Merkel.

23 MR. MERKEL: Yes, here, Your Honor.

24 THE COURT: And who else do we have on
25 the phone that I did not call?



1 MR. HARRIS: Malcolm Harris.

2 THE COURT: I'm sorry. Let's do one
3 by one.

4 MR. HARRIS: Malcolm Harris is on the
5 line.

6 THE COURT: And who do you represent?

7 MR. HARRIS: Water District 119.

8 THE COURT: All right.

9 MALE VOICE: We also have some
10 additional King County attorneys listening in. Do you
11 want their names as well?

12 THE COURT: I don't think it's
13 necessary. No offense. I think we have everyone's
14 representation on the record. So, all right. Let's
15 move forward.

16 MR. JONSON: Your Honor, my name's
17 Richard Jonson. I'm co-counsel.

18 THE COURT: I'm sorry, sir.

19 MR. JONSON: I'm co-counsel for the
20 interveners. I'm also on the line.

21 THE COURT: All right. Thank you. So
22 this is King County versus King County Water District,
23 et al, Case Number 18-2-02238-0. This is a
24 cross-motion for summary judgment. A hearing was held
25 on Friday, July 27, 2018. At the hearing I told the



1 parties that I will announce my ruling at this
2 conference call.

3 We're on record, and we're being
4 recorded. I'm going to read my ruling into the
5 record, and if there are any questions that I'll --
6 that you need to ask, if you could hold it till the
7 very end and then we can talk about it afterwards.

8 I'll try to read slow. All right. Is
9 everyone following so far?

10 COLLECTIVE VOICES: Yes, Your Honor.

11 THE COURT: Thank you. All right.

12 This matter concerns King County Ordinance 18403,
13 adopted by the county council on November 7, 2016.

14 According to the ordinance section
15 ^A 8 ~~(a)~~, quote, each franchise for electric, gas, water,
16 or sewer utilities granted by King County shall
17 include a requirement that the grantee of the
18 franchise provide the county reasonable compensation
19 ⁱⁿ and return for the right to use the right-of-way for
20 the purposes of constructing, operating, maintaining,
21 repairing utility facilities and related appurtenances
22 for which the purpose of the section is franchise
23 compensation.

24 Section B of the ordinance states,
25 franchise compensation shall be in the nature of rent



1 and shall be paid annually. The methodology for
 2 calculating the rents are land value of the
 3 right-of-way, the ^{approximate} amount of the area, reasonable rate
 4 of return for the use, et cetera.

5 The rules adopted for this ordinance
 6 provides a detailed procedure and criteria for
 7 calculating the rent and provides that the utility --
 8 that a utility would not be in compliance -- who's not
 9 in compliance will result in not being granted a
 10 franchise. Let me repeat that. It provides that a
 11 utility that is not in compliance will result in not
 12 being granted a franchise.

13 According to the King County Council
 14 Budget and Fiscal Management Committee report, the new
 15 fee is anticipated to generate approximately 9.78
 16 million dollars in 2018. The ordinance has other
 17 aspects such as an increase in the application fee, et
 18 cetera, but the issue before this court is whether the
 19 franchise compensation, as is set forth in this
 20 ordinance, is legal.

21 I rule that it is not, and I grant
 22 summary judgment in favor of the defendant utilities.
 23 I will now explain my reasoning.

24 Ordinance 18403 states that RCW
 25 36.75.020 and 040 grants King County broad authority



1 to establish and regulate the use of county roads.
 2 The county cites other sections under Title 36.75 and
 3 asserts that the county, as a home ruled county, has
 4 broad powers and that the county's rights are such
 5 that it effectively encompasses the critical
 6 attributes of a fee interest.

7 The secondary use of the
 8 right-of-ways by the utilities are permitted by state
 9 statute, but they are under the authority of the
 10 county.

11 During oral argument, counsel for the
 12 county asserted that the county's authority and powers
 13 are broad, and that unless there is a specific
 14 prohibition against such fees, the franchise
 15 compensation in this case must be upheld.

16 This case is really about statutory
 17 interpretation, which is a question of law reviewed de
 18 novo. Department of Ecology versus Campbell, 146
 19 Washington 1, a 2002 case.

20 This court's primary goal in
 21 interpreting statutes is to ascertain and give effect
 22 to legislative intent. State versus Pacific Health
 23 Center, Inc., 135 Washington App 149, a 2006 case.

24 Statutes on the same subject matter
 25 must be read together to give each effect and to



1 harmonize each with -- with the other. US West
2 Communications, Inc. versus Washington Utilities and
3 Transportation, 134 Washington 2nd 74, a 1997 case.

4 Every provision of a statute must be
5 viewed in relation to other provisions and harmonized,
6 if at all possible. In Re: Arbitration of Mooberry
7 108 Washington App 654, a 2001 case.

8 Statutes relating to the same subject
9 must be read together as unified whole to achieve a
10 harmonious statutory scheme that maintains the
11 integrity of the respective statutes. In Re: Mooberry
12 at 657.

13 As stated, the county's authority over
14 the right-of-ways must be read in harmony with other
15 statutes in play in this case. One of them is RCW
16 57.08.005, that authorizes utilities districts to have
17 certain powers. Subsection 3 provides, quote, a
18 district may take, condemn, and purchase by means of
19 aqueducts or pipeline, conduct the same throughout the
20 district and in any city or town therein and carry it
21 along and upon public highways, roads, and streets, et
22 cetera.

23 At least with respect to the public
24 utilities, this enabling statutes -- statute
25 recognizes their statutory authority to carry their



1 business over the public roads and streets.

2 The second relevant statute is RCW
3 ⁵⁵ 36.00.010 regarding the grant of franchise by the
4 county. It states, quote, any board of county
5 commissioners may grant franchises to persons or
6 private ^{or municipal} ~~permissible~~ corporations to use the
7 right-of-way of county roads in their respective
8 counties for the construction and maintenance of water
9 works, et cetera.

10 The third relevant statute is RCW
11 36.55.060, entitled limitations upon grants. It
12 provides, subsection 1, any person constructing or
13 operating any utility on or along the county road
14 shall be liable to the county for all necessary
15 expense incurred in restoring the county road to a
16 suitable condition for travel. I'm not going to read
17 all five subsections on that one.

18 Reading these statutes together, it is
19 apparent to this court that the county, when it grants
20 a franchise to utilities, is entitled to recover its
21 restoration costs and other related expenses. It is
22 the -- the statutes are silent as to any rents based
23 on usage.

24 I recognize that this is a new area of
25 law. Counsel for the county conceded at oral argument



1 that this franchise compensation rent is brand new and
 2 no other county in Washington has tried it before. As
 3 a result, there really is no case squarely on point,
 4 and the closest case that comes to provide guidance is
 5 a published opinion from Division 2, the City of
 6 Lakewood versus Pierce County, 106 Washington App 63,
 7 a 2001 case.

8 I'm not going to recite the facts, as
 9 the parties seem to know the case much better than I
 10 do and have spent many pages trying to uphold or
 11 distinguish it, depending on which side you're on.

12 The setting, however, was the city
 13 versus county, and although it involved a different
 14 statute, RCW 35A.47.040, the language of the statute
 15 is identical and analogous because it states a city,
 16 quote, may grant nonexclusive franchise ^{for} use of the
 17 public streets, similar to RCW 36.55.010, which
 18 provides county, quote, may grant franchise, end
 19 quote.

20 The holding in that case upholding the
 21 trial court's decision that the City of Lakewood may
 22 not require the county to enter into a franchise
 23 agreement and to accept the terms it offered is
 24 applicable here as well.

25 A franchise is a contract and requires



1 the parties to negotiate and enter into an agreement.
2 The county, despite its valiant efforts and all the
3 hard work by many smart people, cannot compel its
4 terms unilaterally on the utilities.

5 Because I'm finding that the county
6 lacked the authority to impose a franchise
7 compensation rent, I'm granting summary judgment in
8 favor of the defendant utilities, and I will sign an
9 order accordingly.

10 That's the ruling, and I'm going to
11 ask the prevailing party to submit a written order for
12 review and my signature.

13 Any questions from anyone?

14 MALE VOICE: First question, Your
15 Honor. This is ^{Dave Ingle} (unintelligible). Will the reporter
16 be able to provide us with a copy of the -- or the
17 transcript of the ruling? It would be very helpful in
18 preparing the order.

19 THE COURT: I was hoping that you
20 would have recorded this by now, but can you provide
21 them a transcript? We can make arrangements to do
22 that and Mr. Palmer will stick around to have that
23 done.

24 MALE VOICE: Thank you.

25 THE COURT: All right. I want to



1 thank all the counsels for all their work. It was a
2 hard fought battle, it appears, and good luck on your
3 appeals.

4 All right. I don't have anything to
5 add, so I'll sign off then.

6 MALE VOICE: Thank you, Your Honor.

7 MALE VOICE: Thank you, Your Honor.

8 THE COURT: All right. Bye bye.

9 (Proceedings concluded at 3:43 p.m.)

10 (END OF TRANSCRIPTION)

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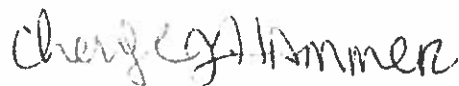
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TRANSCRIPTION CERTIFICATE

I, CHERYL J. HAMMER, the undersigned
Certified Court Reporter in and for the state of
Washington, do hereby certify:

That the foregoing transcript was
transcribed under my direction; that the transcript is
true and accurate to the best of my knowledge and
ability to hear the audio; that I am not a relative or
employee of any attorney or counsel employed by the
parties hereto; nor am I financially interested in the
event of the cause.

WITNESS MY HAND this 21st day of August
2018.



CHERYL J. HAMMER
Certified Court Reporter
CCR No. 2512
chammer@yomreporting.com

