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STATE OF WASHINGTON
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No. 96360-6

SUPREME COURT
OF THE STATE OF WASHINGTON

KING COUNTY,

Appellant,

v.

KING COUNTY WATER DISTRICTS
Nos. 20, 45, 49, 90, 111, 119, 125, et al.,

Respondents.

AMES LAKE WATER ASSOCIATION, DOCKTON WATER
ASSOCIATION, FOOTHILLS WATER ASSOCIATION, SALLAL
WATER ASSOCIATION, TANNER ELECTRIC COOPERATIVE,
and UNION HILL WATER ASSOCIATION,

Intervenor-Respondents.

AMICUS CURIAE BRIEF OF PUGET SOUND ENERGY

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I. IDENTITY AND INTEREST OF AMICUS

Puget Sound Energy (“PSE”) is the oldest and largest utility in Washington state. It supplies electricity to over one million customers and natural gas to over 800,000 customers in ten counties in Washington. PSE currently operates in King County’s rights of way pursuant to franchise agreements between PSE and King County. CP 1248. PSE is deeply interested in the outcome of this case because it has the potential to dramatically increase rates for all PSE customers and to drastically change the way PSE has operated in public rights of ways for generations.

II. INTRODUCTION

PSE supports the briefs of Respondents King County Water District No. 20, *et al.* (“Districts”) and Intervenor-Respondents Ames Lake Water Association, *et al.* (“Intervenors”), and PSE will not repeat or duplicate the arguments made therein. The trial court correctly rejected King County’s latest attempt to impose a back-door tax on utility customers. King County has no authority to impose franchise compensation on utilities using the public right of way for a public purpose. King County’s Ordinance 18403 (“Ordinance”) and its Rules for Determining Franchise Compensation (“Rules”) are unreasonable and, therefore, they fail the County’s own test under RCW 36.55.010. Finally, the Ordinance and Rules violate the Equal Protection Clause of the Washington State Constitution.

III. ARGUMENT

A. **King County Is Without Authority to Impose Franchise Compensation.**

1. **King County's Ordinance requires all PSE customers to pay for the use of public streets.**

The Washington Utilities and Transportation Commission (“WUTC”) is the regulatory agency charged by law to regulate in the public interest the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation. RCW 80.01.040(3). *See also, People's Org. for Washington Energy Res. v. Washington Utils. & Transp. Comm'n*, 104 Wash.2d 798, 805, 711 P.2d 319, 324 (1985). Tariffs enacted pursuant to WUTC regulation have the force of state law and are preemptive authority over municipal ordinances. *Gen. Tel. Co. of Nw., Inc. v. City of Bothell*, 105 Wash.2d 579, 583, 716 P.2d 879, 882 (1986). Therefore, any attempt by King County to require PSE to pay for use and occupancy of public right of way would be invalid. *Id.*

King County claims that nothing in its Ordinance or Rules requires utilities to pass franchise compensation on to customers. CP 314. While King County may be technically correct that the Rules themselves do not impose a rate hike on customers, a dramatic rate hike is exactly what will happen if the Ordinance and Rules are legitimized. First, as Intervenors explain, all costs must be passed on to the customers of a non-profit utility. Intervenors' Br. at 7. Second, PSE's customers will bear the

burden of King County's franchise fees because franchise fees, were they to be legally imposed, would be a cost of service recoverable through rates paid by customers of investor-owned utilities like PSE. *Willman v. WUTC*, 122 Wash. App. 194, 204, 93 P.3d 909, 913 (2004). As *Willman* illustrates, if King County's Ordinance is approved, the entire cost of the franchise fee (or as the County describes it, "rent") will likely be passed on to customers, and that is exactly what King County has intended from the very beginning. In October 2016, internal discussions among King County officials revealed that King County expects all costs to be directly passed through to customers. CP 369. King County's own estimate of rate impacts also explicitly states that all the revenue will be passed on, and will be passed on equally, to all rate payers. CP 288. King County fully intends residential customers to ultimately pay the price for its latest revenue scheme.

King County's attempt to pass this cost on to PSE's customers illustrates the critical role the WUTC plays in determining what costs should be appropriately recovered through rates. PSE is authorized to charge a uniform rate and recover its embedded cost of service from all customers within its multi-county service area. King County is but one of ten counties served by PSE. By imposing a franchise fee, King County seeks to tax residential and commercial customers whose homes and businesses are located in other counties. Should these other counties respond by imposing franchise fees of their own, they will in effect levy taxes on individuals and businesses that do not reside within their borders.

Parochial schemes by local governments that are intended to use a utility's customer base to mine revenues from "taxpayers" beyond their borders flies in the face of the authority of the WUTC to determine rates that are fair, just and reasonable. *PacifiCorp v. Washington Utils. & Transp. Comm'n*, 194 Wash. App. 571, 593–94, 376 P.3d 389, 400 (2016) (WUTC appropriately disallowed out of state costs that did not benefit Washington ratepayers.)

2. King County overstates its authority.

The fundamental principal governing any county action is the principle that Washington counties have no powers other than those granted by the state constitution or legislature. *Great N.Ry. Co. v. Stevens Cty.*, 108 Wn. 238, 243, 183 P. 65, 66-67 (1919). "Municipal authorities cannot exercise powers except those expressly granted, or those necessarily implied from granted powers." *Shoulberg v. Pub. Util. Dist. No. 1 of Jefferson Cty.*, 169 Wash. App. 173, 178–79, 280 P.3d 491, 494 (2012) (internal citations omitted). "And [i]f there is a doubt as to whether the power is granted, it must be denied." 169 Wash. App. at 178-79, 280 P. 3d at 494, citing *Port of Seattle v. State Utils. & Transp. Comm'n*, 92 Wash.2d 789, 795, 597 P.2d 383, 386 (1979).

In the 100 years since *Great N.R. Co.* restricted a county's discretion, the legislature has granted Washington cities certain powers that it has not granted Washington counties. See, e.g., *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wash.2d 339, 342,

662 P.2d 845, 847 (1983) (right of city to enact and repeal B & O taxes); *see also, Hillis Homes, Inc. v. Snohomish Cty.*, 97 Wn.2d 804, 809-11, 650 P.2d 193, 195-96 (1982). In *Hillis Homes*, “Development fees” imposed by counties constituted “taxes” where ordinances imposing the fees were intended to raise money rather than to regulate residential developments, and thus ordinances imposing such fees were invalid. And contrary to King County’s claims,¹ both public and private utilities have long been authorized to use public roads for public purposes without making the public pay twice to use a public asset to receive essential public services. “Traditionally, private and public utility companies have been allowed the free use of state highways for installation of facilities.” *Washington State Highway Comm’n v. Pac. Nw. Bell Tel. Co.*, 59 Wash.2d 216, 225, 367 P.2d 605, 611 (1961) (Hunter, J., dissenting).

In fact, the public rights of way were never intended to be managed as a fee for a service enterprise. They are public rights available for the free use and enjoyment of the public. In *State ex rel. York v. Board of Comm’rs of Walla Walla County*, 28 Wash.2d 891, 184 P.2d 577 (1947), this Court laid down clear principles as to how public rights of way are to be held, used and managed for the convenience of the traveling public. These principles preclude King County from making the public “pay twice” for the use and enjoyment of its own asset. The Court said, “[Public right of way] is held in trust for the public, and the primary

¹ KC’s Opening Br. at 34–35.

purpose for which highways and streets are established and maintained is ‘for the convenience of public travel.’” 28 Wash. 2d at 898, 184 P.2d at 582 (internal citation omitted).

In addition to this primary purpose, however, there are numerous other purposes for which the public ways way [sic]be used, such as for watermains, gas pipes, telephone and telegraph lines, etc. These are termed secondary uses and are subordinate to, and permissible only when not inconsistent with, the primary object [sic] of the highways.

Id., citing *State ex rel. Spokane & B. C. Tel. & Tel. Co. v. Spokane*, 24 Wash. 53, 59, 63 P. 1116, 1118 (1901).

In subordinating utility facilities “to the convenience of public travel” and by establishing franchises as the means to manage these priorities, the Court sought to accommodate all means of commerce. Utilities are not a conflicting or inconsistent use to be taxed or burdened just because the means of commerce depend upon pipes and wires, rather than vehicles, to deliver essential public goods and services. Instead, the Court stated:

Poles and wires for carrying electric current are considered a customary incidental use of highways, and are not now generally deemed such an encroachment upon the right of abutting property owners as to afford them a right to compensation for the additional servitude to which their fee interests are subjected.

Id. at 904, 184 P.2d at 585. (internal citations omitted). It is fundamentally at odds with the principle of holding an asset in trust for the public to now make the public pay twice to use the public right of way in order to take delivery of the power, heat and light that they need for their homes and businesses.

Absent any delegated authority to impose a franchise fee, it is understandable none of the authority cited by King County is binding or persuasive. None of King County's supporting authority concludes that counties in Washington have the authority to impose franchise compensation. RP 9–10. King County argues instead that its right to grant a franchise pursuant to RCW 36.55.010 implies a right to demand rent. KC's Opening Br. at 22–23. According to the County, the only test when imposing a specific term in a franchise agreement is whether the term is "reasonable." *Id.* at 27, KC's Reply Br. at 3. To support its position, King County misinterprets this Court's ruling in *Burns v. City of Seattle*, 161 Wash.2d 129, 142, 164 P.3d 475, 482 (2007) as judicial permission to impose franchise fees for the use of public streets. As Intervenors explain, the Court in *Burns* held the opposite conclusion from what King County argues. Intervenors' Br. at 45. The Court held that a municipality *cannot* impose a fee simply for the privilege of using the public streets—it must be for something more and mutually agreed to by the parties.² *Burns*, 161 Wash.2d at 142, 164 P.3d at 492. In *Burns*, the

² *Burns* restates the rule laid down and consistently followed by this Court in prior decisions: "Indeed, a franchise is a contract." 161 Wash. 2d at 142, 164 P.3d 1t

“something more” was a promise to forebear the city’s right to start its own utility. *Id.* at 144, 164 P.3d at 484. Here, it is undisputed that King County is attempting to impose rent merely for the privilege of using public streets for public purposes and nothing more. King County does not have that authority.

3. King County’s estimates are unreasonable.

King County not only has no authority to require franchise compensation, but its compensation demand is unreasonable. King County estimates its franchise fees will amount to approximately \$10 million every year and will result in an increase of \$39.52 per year for each utility customer. CP 288, CP 370. King County admits that its estimate is merely “speculative,”³ could be off substantially,⁴ needs more detail,⁵ and is based on “atrocious”⁶ data. In fact, King County states that its \$10 million estimate is nothing more than “just a high-level guess.”⁷ While King County could have reached out to the utilities to obtain reliable data, it chose instead to rely only on publicly available information to rush the Ordinance through to a County Council vote. CP

482 citing *City of Tukwila v. City of Seattle*, 68 Wash.2d 611, 615, 414 P.2d 597 (1966) (citing 5 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 19.39, 19.40 (3d ed.1949)). A city has statutory authority to “grant” a franchise, not to “require” one. *City of Lakewood v. Pierce County*, 106 Wash.App. 63, 73, 23 P.3d 1, 7 (2001). A “city cannot . . . compel the [utility] to accept its terms for the continued occupation of the streets.” *Gen. Tel. Co. of Nw., Inc. v. City of Bothell*, 105 Wash.2d 579, 586, 716 P.2d 879, 884 (1986).

³ CP 288.

⁴ CP 369

⁵ CP 390

⁶ *Id.*, CP 1956–57.

⁷ CP 1022

369. Further, King County is not likely to ever pull together reliable information because, in the words of King County’s representative, “So I think that the data exists out there somewhere, but it would have been a pretty monumental effort to try to [get it].” CP 1957. King County then dismisses its “high-level guess” by claiming that the actual rental charge will be determined through a negotiation process based on the right of way actually used by the utility. KC’s Opening Br. at note 38.

King County’s explanation is not reassuring because more reliable data is publicly available, and that data shows King County’s estimate is likely to be a mere fraction of the illegal “rent” it ultimately demands. King County states that the actual fee will be based on a utility’s right of way width, and King County uses 15 feet for that figure. CP 304. But electric transmission rights of way typically range from 50–200 feet.⁸ The County’s error leads to a gross miscalculation, and King County could ultimately demand exponentially more from PSE customers than its “estimate” suggests. King County’s estimate is flawed in many other ways: It does not distinguish between residential or commercial customers and instead incorrectly assumes that all usage and billing are the same for each rate class.⁹ CP 370. King County’s land valuations are flawed because the County failed to follow standard valuation guidelines for its land valuation calculations. CP 1740. King County’s estimate also

⁸<https://www.transourceenergyprojects.com/docs/EncroachmentOnROW.pdf>.

⁹ PSE’s website lists electric and natural gas rate classes and actual rates for each class: <https://www.pse.com/pages/rates/schedule-summaries#sort=%40fdocumentdate85487%20descending>.

fails to consider common practicalities that will substantially add to the customer rate impact. For example, King County does not consider the common practice that a customer may receive service from multiple utility companies. In fact, it is possible for a customer to receive electric, gas, sewer, and water service at one home from four different utilities. This means that the customer could experience wildly inconsistent and unpredictable rate increases based solely on each utility's success (or lack thereof) in negotiating on the customer's behalf. Further, King County does not consider the impact to customers when other counties pass similar franchise fee legislation. Just as PSE customers who live outside King County will experience increased rates because of King County's Ordinance, all utility customers—regardless of where they live—will see even higher rates when other counties pass similar ordinances. *Willman v. Washington Utils. & Transp. Comm'n*, 154 Wash. 2d 801, 804, 117 P.3d 343, 344–45 (2008)(A franchise fee is an operating expense that can be recovered only by increasing costs systemwide).

PSE performed its own calculations using King County's methodology and PSE's mapping data. PSE calculates the costs at more than \$45 million per year for King County alone. If other counties in Washington adopt similar ordinances, the costs would likely skyrocket to over \$140 million every year.¹⁰ The Districts anticipate unreasonable rate

¹⁰ Annual costs at this rate might well compel PSE to condemn its facilities located within the franchise area. In the case of electric facilities, RCW 80.32.060 grants PSE this authority "with respect to any public road or street" where facilities have previously been authorized by franchise. PSE is also authorized to condemn "lands and

increases for their customers, as well. They point out that one water-sewer district serving more rural areas would likely see an increase of 44.7% for its sewer rates and 23.7% for water rates. Districts' Response Br. at 5–6, citing CP 854.

4. King County's financial "protection" cannot make the unreasonable term reasonable.

King County may not impose the fee at all—but if the question of the reasonableness of any such fee is reached by the court, then the fee fails for that reason too. *Id.* at 27. Using its own estimate and language in the Rules themselves, King County itself anticipates that rate increases will be unreasonable. CP 297. In an effort to mitigate these increases, King County plans to recalculate the franchise fee if the financial impact exceeds a "Financial Impact Limiting Factor." *Id.* This "protection" is at best arbitrary and capricious. At worst, it is deceptive and misleading. By the County's own admission, its calculations are based on atrocious data. Therefore, any rate impact protection using that same data will obviously be unreliable. Further, the Rules do not define or establish the "Financial Impact Limiting Factor." Rather, King County will simply choose an amount and post it on its website. *Id.* It is unclear how applying the Financial Impact Limiting Factor will reduce an unreasonable fee to a

property and interests therein" for the transmission, distribution and sale of natural gas. RCW 80.28.220. These one-time costs (like the franchise fee) would be passed through to customers, again making the public pay twice to use public right of way to deliver the essential public services that PSE provides to the public. The better principle to follow is that articulated by the Court in *State ex rel York*, that utilities are an established and appropriate secondary use of the public right of way and are held by the county in trust for those authorized purposes.

reasonable fee, but any “protection” is illusory. King County may change the Financial Impact Limiting Factor to any amount, for any reason, at any time, without notice, making it essentially meaningless.¹¹ CP 297, CP 237-39.

5. If a charge exceeds actual costs, it is unreasonable.

Assuming for argument’s sake that King County may impose a franchise fee, at what point does that fee become unreasonable? Any amount that exceeds the County’s actual costs, or any costs that are unreasonable themselves, are unreasonable. In a recent declaratory ruling, the Federal Communications Commission (“FCC”) struck down municipal franchise fees as being regulatory barriers that unlawfully inhibit the deployment of beneficial infrastructure. While not binding on this Court, the FCC’s order is instructive because it is remarkably similar to our case. The FCC was tasked with interpreting a statute that allows state and local governments to charge “fair and reasonable compensation” in exchange for a utility’s access to public rights of way. *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 F.C.C. Rcd. 9088, ¶ 50 (F.C.C. 2018). The FCC determined that to be permissible, the fees must meet the following conditions: (1) the fees are a reasonable approximation of the state or local government’s costs, (2) only objectively reasonable costs are factored into those fees, and (3)

¹¹ *Pub. Util. Dist. No. 2 of Pac. Cty. v. Comcast of Washington IV, Inc.*, 184 Wash. App. 24, 51, 336 P.3d 65, 79 (2014), as amended on reconsideration (Feb. 10, 2015) (Unreasonable contract terms will be severed from an agreement.)

the fees are no higher than the fees charged to similarly situated competitors in similar situations. *Id.* Thus, fees must be nondiscriminatory and, “fees must not only be limited to a reasonable approximation of costs, but in order to be reflected in fees, the *costs themselves* must also be reasonable.” (Emphasis in original). *Id.* at ¶ 70. The FCC states that the appropriate yardstick to measure reasonable compensation is whether the compensation recovers a reasonable approximation of a local government’s objectively reasonable costs of maintaining the right of way, maintaining a structure within the right of way, or processing an application or permit. *Id.* at ¶ 72. The FCC expressly rejected the governments’ arguments that they had the latitude to charge either any fee at all or a “market-based rent.” *Id.* at ¶ 73. The municipalities in the FCC case also made the same argument that King County makes with regard to gifting public funds. KC Br. at 35. The governments claimed that limiting the fees state and local governments may charge amounts to requiring taxpayers to subsidize private companies’ use of public resources. *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 F.C.C. Rcd. at ¶ 73. The FCC found little support in the record, legislative history, or case law for that position, and they did not see how allowing recovery of a reasonable approximation of objectively reasonable costs would involve a taxpayer subsidy. “Indeed, our approach to compensation ensures that cities are not going into the red to support or subsidize the deployment of wireless infrastructure.” *Id.* Here, King

County's Ordinance includes separate provisions that provide for recovery of the County's actual costs, and PSE does not oppose such provisions. CP 268–72. King County is attempting to charge additional fees far above and beyond its costs—fees that are not even reasonably tethered to costs. Accordingly, they are unreasonable. Because King County's franchise fee is unreasonable, it fails the County's own test under RCW 36.55.010.

B. King County's Ordinance and Rules Violate the Equal Protection Clause of the Washington State Constitution.

The Equal Protection Clause of the Washington State Constitution limits the manner in which a government entity may apply and recover fees. Even under the deferential “rational basis test” applied in an equal protection analysis, a government entity must apply legislation in an equal manner to all similarly situated members. *See* CONST. art. 1, § 12. King County's Ordinance and Rules treat each utility differently based solely on what it is, not how it is situated.

While the Districts and Intervenors understandably oppose King County's efforts to impose a franchise fee, they are not the primary focus of the Ordinance; instead, PSE is the “prime target.” CP 1017. In a meeting with Washington Association of Sewer & Water Districts (“Association”), the Director of King County's Facilities Management Division explained that King County intended to treat PSE differently than the Association, simply because of the limited amount of money the County could “get” out of the Association. CP 1017, CP 1022. “We

cannot get a tremendous amount of money out of your group. It needs to be perceived by your group as reasonable compensation to the County.” CP 1022. The Director explained that he was open to carve-outs and deductions that charge non-profit utilities differently than PSE. CP 1022. The Director went on to suggest that the Association stay engaged in the process to take some “wins” back to the Association’s members. Further, King County does not intend to charge its own Roads/Transportation Division for its use of County right of way, and the Director stated that he had no plans to charge the County’s Storm Water Division. CP 1022.

When examining legislation involving neither a suspect classification nor a fundamental right, the court employs minimal scrutiny and applies a rational basis test. *Foley v. Dept. of Fisheries*, 119 Wash.2d 783, 789, 837 P.2d 14, 17 (1992); *State v. Coria*, 120 Wash.2d 156, 169, 839 P.2d 890, 898 (1992); *Omega Nat’l Ins. Co. v. Marquardt*, 115 Wash.2d 416, 431, 799 P.2d 235, 242-43 (1990). Under the rational basis test, “a statutory classification violates the equal protection clause only if it fails to rationally further a legitimate state interest.” *Foley*, 119 Wash.2d at 789, 837 P.2d at 17; *Burlington Northern R.R. v. Ford*, 504 U.S. 648, 650, 112 S.Ct. 2184, 2186, 119 L.Ed.2d 432 (1992); *see Coria*, 120 Wash.2d at 169, 839 P.2d at 897-98. The court will uphold a legislative classification so long as “the relationship of the classification to its [legislative purpose] is not so attenuated as to render the distinction arbitrary or irrational.” *Nordlinger v. Hahn*, 505 U.S. 1, 10-11, 112 S.Ct. 2326, 2332, 120 L.Ed.2d 1 (1992).

In *Margola Associates v. City of Seattle*, 121 Wash.2d 625, 854 P.2d 23 (1993) Margola challenged a City of Seattle ordinance that required the owners of buildings with more than one dwelling unit to register their buildings and pay registration fees. Margola claimed, among other things, that the fee violated the equal protection clause because it charges the fee unequally, applying only to rental housing but not owner-occupied housing, commercial property, low-income housing, or vacant land. The court rejected Margola's arguments because the rental properties were treated different specifically because those properties have the highest risk of housing violations and therefore require greater City expense to inspect and ensure compliance. The fee was intended to offset the increased costs that were directly caused by the rental housing.

Here, King County's decision to seek more compensation from PSE and private utilities than from public utilities has no connection to the type of service offered by the utilities nor to the cost of regulating the utilities' operations. The County instead seeks to charge PSE more simply because it is a private company. Further, the County intends to charge private utilities but not its own service providers who use the same rights of way. This issue was raised in the FCC case as well, and the FCC found such practice was discriminatory. "We reiterate the Commission's previous determination that state and local governments may not impose fees on some providers that they do not impose on others." *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 F.C.C. Rcd. at ¶ 77. The County has not provided a

reasonable explanation for why PSE should be charged a fee that is greater than public or nonprofit utilities, except that King County thinks it can get more money from PSE. This distinction is arbitrary and irrational. It is a thinly veiled (or unveiled) attempt to get more money from one entity than another with no justification. The County is attempting to take money from the public to use public right of way for the delivery of public services. This flawed model is then exacerbated by a scheme designed to discriminate against customers of investor-owned utilities and therefore deny the utility and its customers the equal protection that both are afforded under the law.

IV. CONCLUSION

For the reasons discussed above and in the briefs of the Districts and Intervenors, this Court should affirm the trial court's decision that King County is without authority to impose franchise fees on utilities. King County's demand is flawed and unreasonable, and it violates the Equal Protection Clause of the Washington State Constitution. Therefore, PSE is not obligated to pay King County "rent" for use of public rights of way.

DATED: August 2, 2019

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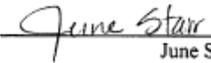
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CERTIFICATE OF SERVICE

Today I caused to be filed, electronically, the foregoing document via the Washington State Appellate Courts' Secure Portal, which will automatically cause such filing to be served on counsel for all other parties in this matter via the Court's e-filing platform.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: August 2, 2019 at Seattle, Washington.


June Starr

PERKINS COIE LLP

August 02, 2019 - 10:52 PM

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