

No. 78449-3

SUPREME COURT OF THE STATE OF WASHINGTON

DORIS BURNS, RUD OKESON, ARTHUR T. LANE, KENNETH GOROHOFF and WALTER L. WILLIAMS, individually and on behalf of the class of all persons similarly situated,

Appellants,

v.

THE CITY OF SEATTLE, THE CITY OF SHORELINE, THE CITY OF BURIEN, THE CITY OF LAKE FOREST PARK, THE CITY OF SEATAC and THE CITY OF TUKWILA,

Respondents.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This is a class action brought on behalf of ratepayers of Seattle City Light (“SCL” or “City Light”)¹ challenging the legality of fees charged by the cities of Shoreline, Burien, Lake Forest Park, SeaTac and Tukwila (the “suburban cities”) to City Light under franchises granted by the suburban cities. The terms of the franchises were negotiated by City Light and the suburban cities and were set forth in city ordinances formally granting the franchises to City Light, which the utility then accepted. Each franchise is thus an “agreement” formed by the utility’s acceptance of the franchise offered by an ordinance of each suburban city.

Each franchise requires City Light to pay a fee to the suburban city based on a specified percentage of City Light’s revenues from service to customers within that city.² The fees paid by City Light to the five suburban cities collectively total more than \$2 million per year.

¹ City Light is a proprietary municipal electric utility of the City of Seattle. It provides electric utility service within Seattle and also to various areas outside of Seattle, including all or portions of the cities of Shoreline, Burien, Lake Forest Park, SeaTac and Tukwila. *See Okeson v. City of Seattle*, 150 Wn.2d 540, 544, 78 P.3d 1279 (2003).

² Although in negotiating the franchise arrangements the suburban cities and Seattle referred to these fees as a “sharing” of the utility tax, in actuality the fees are paid by City Light *in addition to* the 6% utility tax that it contributes to Seattle’s general fund. These fees are then passed on to City Light ratepayers. As a result, all City Light ratepayers are in effect paying a 9% utility “tax” on revenues from suburban customers (6% to Seattle’s general fund and the equivalent of another 3% (see note 17 below) to the suburban cities’ general funds). This arrangement thus imposes an exceptional burden on City Light ratepayers that was never contemplated when the Legislature adopted a cap of 6% on electric utility taxes. *See RCW 35.21.870; see also infra* at 8-9 & n.13 (absent specific statutory authorization, one municipality may not tax another or its proprietary utility).

The principal issue in this case is whether the franchise payments violate RCW 35.21.860(1), which provides in relevant part:

No city or town may impose a franchise fee or any other fee or charge of whatever nature or description upon the light and power, or gas distribution businesses, as defined in RCW 82.16.010, or telephone business, as defined in RCW 82.04.065, or service provider for use of the right of way, ...

(Emphasis added) (a copy of the statute is attached hereto as Appendix A).

The statute lists a number of exceptions, but none are applicable here.

The ratepayers contend that the franchise payments are exactly what the statute prohibits. The respondent cities' principal argument in opposition to the ratepayers' claims — and the sole basis for the trial court's decision granting summary judgment to the cities — is that the fees in question cannot be deemed "imposed" on City Light within the meaning of the statute, because by entering into the franchise agreements City Light agreed to pay them. In other words, respondents argue (and the trial court agreed) that the meaning of the word "impose" as used in RCW 35.21.860 is limited to situations where the fee is established or applied by one party acting unilaterally, by dint of having superior authority or force, rather than by a contract that was agreed to by both parties.

There is no basis in law, logic, dictionary definition or common usage for such a limitation on the meaning of the word "impose" as used in the statute. Fees or obligations can be "imposed" by contract as well as

by unilateral authority or force. In fact, a franchise fee can be “imposed” only by contract, since by definition a franchise is a form of contract. The respondent cities’ and trial court’s narrow interpretation of the word “impose” is contrary to the dictionary definition of the term, contrary to common usage, and contrary to the legislative intent underlying the statute, and would render the statute essentially meaningless.

The respondent cities also argued below that the franchise payments are not really “franchise fees” or payments for use of the suburban cities’ rights-of-way, but rather are payments to the suburban cities for other “valuable consideration” received by City Light, namely, promises by the suburban cities not to form their own electric utilities. As explained below, the undisputed facts show that the cities’ purported rationale for the payments is a fiction intended solely to circumvent the statutory prohibition against franchise fees. The respondent cities themselves repeatedly characterized the payments in question as “franchise fees” in documents pre-dating this litigation. In assessing the legality or illegality of the franchise payments, the Court should consider the substance of the transactions and the objectively manifested true purpose of the payments. Viewed in that light, the payments in question are exactly what the statute prohibits. Moreover, the statute prohibits not merely “franchise fees,” but “any other fee or charge of whatever nature or

description,” so the purported rationale for the fee is irrelevant.

The ratepayers also seek review of an earlier trial court ruling, which certified this case as a class action on behalf of City Light ratepayers residing in Seattle but excluded from the class City Light ratepayers residing outside of Seattle city limits. Appellants contend that the class should have been certified as including all City Light ratepayers, not just those living in Seattle, because the expense of the illegal franchise fees is spread among all ratepayers, not just those living in Seattle. As to the issues raised in this case, ratepayers outside of Seattle are affected in exactly the same way as ratepayers inside Seattle, and the interests of all ratepayers would be adequately protected by the class representatives.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the ratepayers’ motion for partial summary judgment, and by instead granting summary judgment to Seattle and the suburban cities, on the ratepayers’ claim that City Light’s franchise payments to the suburban cities violate RCW 35.21.860.

2. The trial court erred in limiting the certified class to only those ratepayers of City Light residing within Seattle.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under a de novo standard of review, are the fees that City Light is required to pay to the suburban cities pursuant to the franchise

agreements unlawful under RCW 35.21.860(1), which prohibits, with certain exceptions not applicable here, any city from imposing a “franchise fee or any other fee or charge of whatever nature or description” on an electric utility?

2. Under an abuse of discretion standard of review, did the trial court err in limiting the class to only those ratepayers of City Light residing in Seattle, on the ground that ratepayers living in Seattle could not represent the interests of City Light ratepayers outside of Seattle?

IV. STATEMENT OF THE CASE

A. Statement of Facts

1. The 1982 Legislation and RCW 35.21.860

In 1982 the legislature approved Engrossed Senate Bill 4972, which comprehensively and fundamentally altered local government financing in our state. The bill was described at the time as “a complex measure which both limits and increases the tax authority of counties and cities.”³ In a letter to Governor Spellman urging him to sign the bill as passed by the legislature without vetoing the new limits on B&O taxes and utility taxes, House Majority Leader Nelson described the bill as “allowing municipalities greater flexibility in the generation of revenue while still maintaining some essential restrictions for the protection of

³ CP 500-06 (memo from Donald R. Burrows, Acting Director of Department of Revenue, to Marilyn Showalter, Counsel to the Governor).

taxpayers.”⁴ The bill was enacted into law, without change, as Laws of 1982, 1st Ex. Sess., ch. 49 (the “1982 Act”).⁵

Section 2 of the Act was codified as RCW 35.21.860 and is the principal statute upon which the ratepayers’ claims are based. CP 510. As originally enacted in 1982, RCW 35.21.860 prohibited cities from imposing a “franchise fee or any other fee or charge of whatever nature or description upon the light and power, telephone or gas distribution businesses, as defined in RCW 82.16.010,”⁶ with three exceptions not applicable here.⁷ Other sections of the 1982 Act addressed a wide variety of other kinds of municipal taxes and revenues.⁸

⁴ CP 508 (letter from House Majority Leader Gary A. Nelson to Governor John Spellman) (emphasis added).

⁵ CP 510-16 (a copy of the 1982 Act is also attached hereto as Appendix B).

⁶ “Light and power business” is defined in RCW 82.16.010(5) as: “the business of operating a plant or system for the generation, production or distribution of electrical energy for hire or sale and/or for the wheeling of electricity for others.” City Light is thus a “light and power business” within the meaning of RCW 35.21.860.

⁷ One exception was for “a tax authorized by section 3 of this act.” 1982 Act § 2(1)(a) (CP 510). Another exception was for “actual administrative expenses incurred by a city or town that are directly related to receiving and approving a permit, license, and franchise, to inspecting plans and construction, or to the preparation of a detailed statement pursuant to chapter 43.21C RCW.” *Id.* at § 2(1)(b). A third exception was franchise fees imposed by a contract existing as of the effective date of the Act, for the duration of the contract. *Id.* at § 2(2). The defendants have admitted in interrogatory answers that the franchise payments in question are neither taxes nor “actual administrative expenses” (CP 418-19, ¶ 9), and the franchise agreements in question were all entered into many years after the effective date of the 1982 Act.

⁸ Section 3 of the 1982 Act, now codified as RCW 35.21.865, prohibited cities from applying any increases in utility tax rates to activities occurring prior to enactment of the tax rate increase or within 60 days thereafter. CP 510. Section 4, codified at RCW 35.21.870, set a cap of 6% on utility tax rates and provides a mechanism for “ramping down” city utility taxes then exceeding the 6% limit. *Id.* In addition to these utility-related revenue adjustments, the new law included a cap on the business and occupation

The Association of Washington Cities encouraged the governor to veto the B&O tax lid but retain the real estate tax options. With respect to the utility tax provisions, the AWC conceded that:

Utility costs, and utility tax rates were much discussed during the legislative session, and SB 4972 reflects that concern. ...The [ramping down] formula also involves the elimination of franchise fees at rates above the actual cost to the city of servicing the franchise. This is a significant consumer tax reduction – had this formula been in effect for the past five years, city utility tax revenues would be approximately \$30 million lower than they presently are.⁹

In sum, the prohibition barring a city from imposing a “franchise fee or any other fee or charge of whatever nature or description” (1982 Act § 2, CP 510) on electric utilities was viewed and intended as a protection for consumers (“a significant consumer tax reduction”) and was part of the same legislation that limited electric utility tax rates to a maximum of 6%.

Section 2 of the 1982 Act (codified as RCW 35.21.860) was amended in 1983 and again in 2000.¹⁰ Section 8 of the 2000 legislation

tax (§ 7, now codified as RCW 35.21.710, CP 511); an authorization for cities and counties to impose up to an additional 0.5% local sales tax or up to a 0.5% real estate transfer tax in lieu of the sales tax (§ 17, codified as RCW 82.14.030, CP 512-13); an equalization of sales tax revenues among cities (§22, codified as RCW 82.14.210, CP 515-16) and counties (§ 21, codified as RCW 82.14.200, CP 515) using the motor vehicle excise tax; an authorization to impose up to a 0.25% real estate transfer tax for capital purposes (§ 11, codified as RCW 82.46.010, CP 512); and a limitation on development fees (§ 5, codified as RCW 82.02.020, CP 510-11).

⁹ CP 518-21 (letter from Kent E. Swisher, Executive Director of Association of Washington Cities, to Governor Spellman) (emphasis added).

¹⁰ The 1983 amendment merely changed the phrase “the light and power, telephone or gas distribution businesses, as defined in RCW 82.16.010,” to “the light and power, or gas distribution businesses, as defined in RCW 82.16.010, or telephone business, as

dealing with telecommunications and cable television companies added the phrase “or service provider for use of the right of way” after the reference to “telephone business, as defined in RCW 82.04.065” that was added by the 1983 amendment.¹¹ The 2000 legislation also added the list of exceptions to the franchise fee prohibition that now appears in RCW 35.21.860.¹²

2. One Municipality May Not Tax Another’s Municipally Owned Utility

In order to understand the legal context in which the franchise agreements were negotiated, the Court should keep in mind another important limitation on the authority of a municipality to impose a tax on a utility: absent express statutory authority, a city cannot lawfully impose a tax on another municipality or on a utility owned by another municipality.¹³ As further explained below, it was the legal inability of

defined in RCW 82.04.065,” to reflect that the definition of “telephone business” was given in RCW 82.04.065 rather than RCW 82.16.010. Laws of 1983, 2d Ex. Sess., ch. 3, § 39 (CP 524-25). The 2000 amendment was part of new legislation dealing comprehensively with the use of municipal rights-of-way by telecommunications and cable television companies. Laws of 2000, ch. 83 (CP 528-32).

¹¹ The term “service provider” was defined in § 1(6) of the 2000 legislation as meaning a company providing telecommunications or cable television service to the general public. CP 528-29. City Light is not a “service provider” within that definition.

¹² The defendant cities do not contend that any of the exceptions are applicable here. See CP 418, ¶ 9; CP 534-66.

¹³ See *King County v. City of Algona*, 101 Wn.2d 789, 681 P.2d 1281 (1984) (City of Algona lacks authority to impose B&O tax on revenues of solid waste transfer facility in Algona owned by King County); 1990 Attorney General Opinion No. 3 (city may not impose utility tax on electric utility owned by another city) (a copy of 1990 AGO No. 3 is at CP 568-73).

the suburban cities to impose a utility tax on City Light that led to the scheme to raise revenues for those cities through illegal franchise fees instead of illegal taxes.

3. Negotiation of the Franchise Agreements

Prior to negotiation of the franchise agreements with Shoreline, Burien, Lake Forest Park and SeaTac in the late 1990s, Seattle City Light served those areas either without any formal franchise agreement or pursuant to a franchise agreement with King County to serve certain unincorporated areas. City Light did, however, have a 50-year franchise agreement with Tukwila that had been in place since 1958. CP 575-79.

The City of Shoreline was incorporated in 1995. Shortly after Shoreline's incorporation, its new city council began to consider how it would provide services to its citizens. CP 454 at 11. In the course of reviewing how electric service was delivered in Shoreline, the new city council became unhappy with the fact that the electric rates paid by Shoreline residents included a component for Seattle's 6% utility tax on revenues, including revenues from sales to Shoreline customers, *i.e.*, that Shoreline ratepayers were in effect paying a 6% utility tax that went to support Seattle's general fund instead of Shoreline's. CP 454-55 at 13-14.

Meanwhile, Seattle was making plans for upcoming negotiations with Shoreline and other newly-incorporated cities concerning franchises

to continue providing utility services to those areas. A 1996 internal Seattle memorandum explained:

Seattle currently receives approximately \$76 million from utility taxes annually. Approximately \$4.2 million of these revenues are from taxes on sales by City-operated utilities to customers outside of Seattle. Seattle's electeds [*i.e.*, the mayor and city council members] have made it clear that maintenance of this General Fund revenue stream was an important element in continuing to serve outside our city limits.

Non-Seattle areas now served by City-operated utilities were unincorporated when Seattle began serving them. Most of these areas are now incorporated and are facing General Fund revenue pressures. The tax rate limitation for electricity and case law barring one municipality from taxing another effectively prohibit these newly incorporated areas from assessing utility taxes on sales by Seattle-operated utilities in their jurisdiction.

CP 581 (emphasis added). The memorandum went on to describe the pros and cons of four options for Seattle in the upcoming negotiations.¹⁴

Shoreline, through its consultant, wrote to Seattle in August 1997 listing its "five primary interests." CP 584-85. Item four was

¹⁴ Option B was "Share the taxes," and Option C was "Find an alternative way to generate GF revenue for the customer jurisdiction." CP 582. Under Option B, the "pro" was described as "Preserves a portion of Seattle's GF revenue stream while producing a win for the customer jurisdiction," while the "con" was described as "Jurisdictions likely to want at least a 50/50 split, reducing Seattle's share to \$2.1 million." *Id.* Under Option C, the first "pro" was "May preserve Seattle's GF revenue stream while satisfying the customer jurisdiction," while the first "con" was "Some alternatives may require legislative action or be subject to legal challenge." *Id.* There were three alternatives listed under Option C, the first of which was "C1. Franchise fee -- appears to be an option for Water but is prohibited for electrical unless there is a Legislative fix." *Id.* As events unfolded, Seattle ended up pursuing Option C, utilizing a franchise fee as a way to generate general fund revenue for the suburban cities -- but without the necessary "Legislative fix."

General Fund Support:

The City of Seattle's general fund currently enjoys nearly \$1 million of B & O tax support on SCL sales in Shoreline. These funds should be available for Shoreline's general fund.

CP 585. In response, City Light stated:

We have reviewed the facts surrounding the City of Seattle's utility tax on revenue collected from all customers, including those outside our city limits. We have determined that State law and court decisions have granted us this authority, and there is no apparent statutory mechanism that would allow us to transfer any part of this tax revenue to the City of Shoreline. Current State law limits the franchise fee on another city to the costs of administration. In light of this, we would be willing to work with the City of Shoreline and other suburban jurisdictions we serve to identify possible legislative solutions that allow us to pay a higher franchise fee or enter into a contract with the City of Shoreline.

CP 588, ¶ 4.

There then ensued extensive negotiations between Seattle and Shoreline, and subsequently between Seattle and the other suburban cities, on the subject of finding a mechanism for somehow "sharing" the utility tax revenues under potential franchise agreements. In an early 1998 letter to Shoreline's mayor, City Light's superintendent proposed a compromise to "split evenly" the revenue received by Seattle from the 6% utility tax on City Light sales to customers in Shoreline:

We understand that Shoreline does not like the City of Seattle's long-standing practice of levying a six percent tax on all City Light revenues, including those earned in Shoreline....

To conclude this franchise agreement negotiation with

Shoreline, I am authorized to propose that Seattle would pay Shoreline up to six percent on the power portion of our revenues from Shoreline ratepayers, while Seattle would continue to keep its tax receipts only on the distribution-related portion. This would split evenly the \$950,000 now paid by our Shoreline customers between the two cities, reducing Seattle's General Fund by nearly a half-million dollars.

CP 593.

In March 1998, Shoreline met with the other suburban cities to discuss the franchise negotiations. In a chart summarizing the status of key issues, Shoreline described its initial position on the issue of "Utility Tax" as "asked for 100% of tax proceeds," but indicated it "settled with 50% of Seattle tax collected." CP 597. On the issue of "Contract Payment," Shoreline indicated it had "introduced [the concept of a 'contract payment'] as a means to provide for tax revenue sharing," and described Seattle's position as "initially unwilling to discuss at all, [then] willing to discuss as long as cost fully recovered from Shoreline customers, current position is unclear." *Id.* (emphasis added).

The following month, in a memorandum to the City Council, City Light's superintendent described "Seattle's Position" as follows:

In February we offered to split the tax based on "power" revenues versus "wires" revenues, shifting about half of the taxes (\$500,000 per year) from Seattle's General Fund to Shoreline's.

CP 605.

In a June 1998 briefing to the Seattle City Council, Seattle's proposal was described as "Seattle will split the tax revenue with the suburbans." CP 607 (emphasis added). On that same date, Seattle's mayor and all nine city council members signed a letter to Shoreline's mayor stating:

Seattle's six percent utility tax on Seattle City Light revenues from the suburbs it serves provides a reasonable rate of return to our citizen-owners for sharing this great utility with those neighbors; but, in the spirit of compromise, we are willing to split its proceeds with Shoreline and the other cities we serve.

CP 610 at ¶ 3 (emphasis in original).

The mechanism for sharing the tax revenue was discussed further in meetings between Seattle and the suburban cities over the summer of 1998. The handwritten notes of Lake Forest Park's city administrator at one meeting described "Seattle's intent" as:

- to share or take not more than half
- ways to accomplish
 - franchise fee
 - Seattle removes tax on power portion, Suburban Cities impose a tax
 - credit of taxes to Suburban Cities

CP 616 (emphasis in original).

At a meeting with the suburban cities in July 1998, City Light made a slide presentation (CP 619-36), which concluded with a slide entitled "Four Suggestions." CP 634. The initial item listed was "First,

amend RCW 35.21.860 to revise franchise fee limits.” *Id.* The Lake Forest Park city administrator’s handwritten notes, apparently made at that meeting, state under the heading “Timing of Utility Tax”:

call it a “Franchise Fee”
need a legislative fix to allow Seattle to give us the Utility Tax
35.21.860

CP 638.

In an August 1998 memorandum, Lake Forest Park’s city administrator reported to the city’s mayor on the subject of “Seattle City Light Utility Tax Discussions”:

I am pleased to report that on Friday, August 14, it appears that representatives from the Suburban Cities of Normandy Park, Burien, Sea-Tac, Tukwila, Shoreline, and Lake Forest Park completed successful discussions with Seattle City Light. . . .

The first part of the discussions focused on what we referred to as the tax issue which would transfer a portion of the monies collected by the City of Seattle as a utility tax from all City Light customers to the Suburban Cities. Seattle City Light has offered to return the six percent (6%) tax on the power portion of customers’ bills to the Suburban Cities. Based on today’s rates, that is approximately 50% of the customer’s bill. . . .

The Suburban Cities did not take a position that the transfer of monies had to be in a particular format and, in fact, I suggested we use a format similar to what Tacoma City Light has agreed to with the Cities of Lakewood and University Place. In their agreements, the Cities of Lakewood and University Place have agreed not to exercise their option of forming a municipal electric utility. In return, Tacoma City Light has agreed to make a payment to those cities. It is their belief that this is a contract between two parties—one party, the Cities of Lakewood and University Place, are returning to the other party something of value—and, in this case, Tacoma City Light is providing remuneration to those cities in recognition of that.

They believe that by not calling it a franchise fee, or a utility tax rebate, it satisfies the conditions in current state law and does not require any change in state law to facilitate.

According to Gary Zarker, this type of an agreement probably works best for the City of Seattle also because the payments will be made by Seattle City Light and the City of Seattle General Fund will continue to collect its utility tax on the entire Seattle City Light rate base. Therefore, the monies being paid to the Suburban Cities will not come from the Seattle General Fund but from Seattle City Light revenues.

CP 641 (emphasis added). That candid report reveals the transparency of the respondent cities' principal argument, namely, that "calling" the payments "contract payments" rather than franchise fees (or utility tax rebates) means they are not really franchise fees or tax rebates and therefore are not prohibited by Washington law. But as explained below (*see infra* at 36-42), the validity or invalidity of a transaction is based on its substance, not on what it is "called."¹⁵

An internal December 1998 Seattle document summarized the franchise agreements that City Light was about to enter into with the suburban cities as follows:

SCL will pay the following taxes and fees:

- The current six percent utility tax on all revenues (including those earned in suburbs) to the Seattle General Fund; and
- Up to six percent of the power portion of its revenues earned from customers in each suburb to that suburban

¹⁵ Moreover, as amply demonstrated in the record, Seattle and the suburban cities did in fact call the payments "franchise fees" and referred to them as a means for Seattle to share utility tax revenues with the suburban cities. *See generally* CP 729, 751, 752-860, 862-942, 944-48, 950-69, 971-97, 999-1004, 1006, 1008, 1015, 1020-21, 1023.

- city's General Fund. These fees would be recovered across SCL's entire rate base (an impact of up to 0.4 percent), not by a rate differential charged to customers in that city; and
- Up to six percent on the distribution portion of its revenue earned from customers in that city, which could be recovered by a rate differential charged to customers in that city.
 - The parties agree to include contract language to allow contract termination should the payment streams be altered by judicial or legislative actions.

As consideration in each franchise, the suburban city will agree to not exercise its authority to establish a municipal electric utility.

The parties agree to take joint legislative action to preserve their mutual interests embodied in this agreement, and expressed an interest in pursuing legislation that would broaden the ability of cities to impose franchise fees.

CP 645.

4. Franchise Agreements with Shoreline, Burien, Lake Forest Park and SeaTac

Each suburban city adopted an ordinance incorporating and approving a franchise arrangement with City Light, and then City Light accepted the terms of the individual ordinances. CP 649-725. The franchise terms in the ordinances were virtually identical.¹⁶ Shoreline's and Burien's franchise ordinances became effective on January 1, 1999, Lake Forest Park's franchise ordinance became effective on March 1,

¹⁶ Because the substantive text of each ordinance constituting the franchise agreement (or, in the case of Burien, the franchise agreement attached to the ordinance as Exhibit A) is virtually identical, the ordinance provisions will be cited collectively as "Ord. § ___" and the cites to the Clerk's Papers will be to Shoreline's franchise ordinance. A copy of Shoreline's franchise ordinance is also attached hereto as Appendix C, along with a copy of a letter showing City Light's acceptance of the ordinance.

1999, and SeaTac's franchise ordinance became effective on January 1, 2000. CP 649-725.

Under the franchise ordinances, the suburban cities agreed to allow City Light to use public rights of way in the cities for purposes of its electric utility business. CP 649-50 (Ord. title and § 2.2). City Light, in turn, agreed to pay fees to the cities based on a percentage of the "power" portion of City Light's revenues from providing utility service to customers in the respective cities. CP 651 (Ord. § 4.1.1).¹⁷ The fees paid or to be paid by City Light to the suburban cities are included in the rates charged by City Light to all of its ratepayers, not just the customers in the respective suburban cities. CP 494 at 131-32; CP 645; CP 728. If Seattle is prevented by judicial or legislative action from collecting a utility tax on all or part of the revenues derived by City Light from the customers in the suburban cities, then "[City Light] shall reduce the payments to the [suburban cities] provided in Section 4.1.1 above by an equivalent amount." CP 651 (Ord. § 4.2).¹⁸ The franchise ordinances also

¹⁷ About half of City Light's costs are attributed to "power acquisition" (generating or purchasing electricity) and half to "distribution." CP 593, 605, 641. The Shoreline, Burien, Lake Forest Park and SeaTac franchises specify in § 4.1.1 that City Light shall pay a fee equal to 6% of City Light's revenues from the "power" portion of its utility service to customers in those cities, which equates to about 3% of the utility's total revenues from service to ratepayers within those cities. CP 651, 672, 689, 712. The fee charged under the Tukwila franchise is based on percentages of both the power portion and the distribution portion of revenues from ratepayers in that city. CP 736.

¹⁸ As explained below, Ord. § 4.2 shows conclusively that the § 4.1.1 payments were intended as a mechanism for sharing the 6% utility tax with the suburban cities rather

contemplated the possibility that a court would declare illegal the payments to be made by City Light to the suburban cities under § 4.1.1. If a court were to declare the payments illegal, then the “entire Agreement may be terminated by the [suburban cities] at any time thereafter upon 180 days written notice.” CP 652 (Ord. § 4.3).

Despite the negotiations between the suburban cities and Seattle regarding a “sharing” of Seattle’s general fund revenues from the 6% utility tax, the final agreements between Seattle and each of the suburban cities do not provide that the franchise fees will be paid *in lieu of* a portion of the 6% utility tax. Instead, as noted in Seattle’s December 1998 internal document, City Light pays the franchise fees *in addition to* the 6% it pays to Seattle’s general fund. CP 645. Therefore, because the fees amount to approximately 3% of City Lights’ total revenues from service to ratepayers within the suburban cities (see note 17 above), all City Light ratepayers are being charged in effect a 9% utility “tax” on service to the suburban cities because both the 6% utility tax and the 3% franchise fee are being “recovered” across City Light’s entire rate base. CP 645.

than as consideration for the suburban cities’ promise not to form their own municipal utility. The value of such a promise to City Light would not be diminished by legislative or judicial action preventing Seattle from imposing the full 6% utility tax on revenues derived by City Light from customers in the suburban city. If anything, such legislative or judicial action would allow City Light to keep more of its revenues instead of paying them to Seattle’s general fund as utility taxes and logically would not be a reason why City Light’s franchise payments to the suburban city should be reduced.

5. Negotiations with Tukwila and Resulting Franchise Agreement

City Light's negotiation of the franchise agreement with Tukwila differed slightly from its negotiation of the franchise agreements with the other suburban cities, because City Light already had an agreement with Tukwila, which was not due to expire until 2008. CP 575-79.¹⁹ The negotiation of the new agreement with Tukwila is summarized in City Light's November 2002 "Issues Brief" on the "Tukwila Franchise Amendment." CP 731-33. As that document explains, when Shoreline, Burien, Lake Forest Park and SeaTac entered into their franchise agreements with City Light, Tukwila initially opted to retain its 1958 agreement but subsequently asked City Light to enter into a similar agreement with Tukwila: "Tukwila now wants to take advantage of a franchise fee arrangement Seattle accepted in franchises negotiated with other suburban jurisdictions in 1999 and 2000." CP 731 (emphasis added). The Tukwila agreement (CP 735-46) is virtually identical to the agreements with the other cities, except that the franchise fee formula specified in § 4.1.1 differs slightly, in that it is based on percentages of both the power portion and the distribution portion of City Light revenues from sales to customers in Tukwila. The new Tukwila agreement went

¹⁹ The 1958 franchise agreement with Tukwila provided for a modest franchise fee to be paid on the first of January of each year, beginning with a \$5,000 fee payable on January 1, 1959 and an increase of \$200 each year thereafter. CP 578, § 19.

into effect on March 1, 2003. CP 743, § 25.

6. Cities' Acknowledgment that Payments Are Franchise Fees

Despite the supposedly clever plan to escape legal problems by “calling” the payments something other than franchise fees, Seattle’s and the suburban cities’ documents (at least those written prior to the commencement of this litigation) are replete with statements referring to the payments as exactly what they are, namely, “franchise fees.” Space limitations allow us to highlight only a few examples here:

a. The remittance advice accompanying City Light’s first franchise fee payment to Shoreline expressly describes the payment as a “franchise fee.” CP 751.

b. City Light’s manager of general accounting wrote regular memos from 1999 to 2005 to its accounts payable manager requesting issuance of checks to the various suburban cities for monthly “franchise fee” payments. CP 753-860.

c. City Light produced numerous spreadsheets showing its “Suburban Franchise Fee Computations” for the monthly payments to the various suburban cities for the years 1999 to 2005 and showing the monthly “Franchise Fees Paid” in the years 1999 through 2003. CP 862-942; CP 944-48.

d. City Light wrote numerous letters to Tukwila enclosing

checks for its monthly “franchise fee” payments. CP 950-69.

e. In their respective accounting records, both Burien and Shoreline refer to the payments received from City Light as “franchise fees.” CP 971-97.

f. In its annual budgets for each year from 2000 through 2005, SeaTac refers to the payments received, or to be received, from City Light as “Franchise Fees.” CP 999-1004.

g. SeaTac produced a spreadsheet showing “Seattle City Light Franchise Fees Paid to City of SeaTac” from 2000 through 2004. CP 1006.

h. Seattle refers to the franchise payments as “franchise fees” in its internal documents. CP 729, 1008, 1015.

i. Shoreline similarly refers to the franchise payments as “franchise fees” in its internal documents. CP 1020-21.

j. Tukwila’s city council committee minutes refer to the payments to be received from City Light as “franchise fees.” CP 1023.

All of these documents constitute admissions by the various respondent cities that the payments in question are indeed “franchise fees,” despite Seattle’s and the suburban cities’ clever plan to circumvent the statutory prohibition by “calling” the payments something else.

B. Procedural History

In October 2005, the ratepayers moved for certification of a class of all City Light ratepayers, whether residing in Seattle or in the suburban cities. CP 108-26. By order dated November 7, 2005, the trial court certified this case as a class action on behalf of City Light ratepayers residing in Seattle but excluded from the class City Light ratepayers residing outside Seattle city limits. CP 354-55.

Three months later, the ratepayers moved for partial summary judgment (1) declaring that the payments made by City Light to each of the suburban cities pursuant to the franchises granted to City Light by those cities are illegal and that the fee provision of the franchise agreements (§ 4.1.1) is void and unenforceable, and (2) enjoining City Light from making any further payments to the suburban cities pursuant to § 4.1.1 of the agreements. CP 388-416. The cities responded by cross-moving for summary judgment dismissing the ratepayers' claims in their entirety. At the conclusion of the hearing on February 17, 2006, the trial court ruled that the payments in question were "voluntary" payments by City Light and therefore did not "equate" to an "imposition" of fees as prohibited by RCW 35.21.860. RP 91:17 – 93:23. The court denied the ratepayers' motion for partial summary judgment and instead granted

summary judgment to Seattle and the suburban cities dismissing the ratepayers' claims. *Id.*; CP 2001-09.

V. ARGUMENT

A. Standard of Review

On appeal from a summary judgment ruling, the appellate court engages in the same inquiry as the trial court. *Key Tronic Corp. v. Aetna*, 124 Wn.2d 618, 623-24, 881 P.2d 201 (1994). All questions of statutory authority presented by this appeal are issues of law, to be decided de novo by this Court. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) ("The meaning of a statute is a question of law reviewed de novo").

A trial court's class certification decision is reviewed for abuse of discretion. *Oda v. State*, 111 Wn. App. 79, 90, 44 P.3d 8, *rev. denied*, 147 Wn.2d 1018, 56 P.3d 992 (2002). A trial court abuses its discretion if its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. *Id.* at 91.

B. The Trial Court's Summary Judgment Ruling Was Based on an Unduly Narrow Definition of the Word "Impose" that, If Accepted, Would Render the Statute Essentially Meaningless.

Pursuant to RCW 35.21.860(1), a Washington municipality may not impose any fee or charge on a light and power business, such as City Light, unless it falls within one of the exceptions listed in the statute. The

statute provides in relevant part:

No city or town may impose a franchise fee or any other fee or charge of whatever nature or description upon the light and power, or gas distribution businesses, as defined in RCW 82.16.010, or telephone business, as defined in RCW 82.04.065, or service provider for use of the right of way, [subject to specified exceptions].

RCW 35.21.860(1) (emphasis added).²⁰

In interpreting a statute, the court's primary goal is to ascertain and give effect to the legislature's intent and purpose. *In re Parentage of J.M.K.*, 155 Wn.2d 374, 387, 119 P.3d 840 (2005). "This is done by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question." *Id.* at 387.

The respondent cities' main argument below, and the sole basis for the trial court's summary judgment ruling, was that the meaning of the word "impose" as used in RCW 35.21.860 is limited to situations where the fee is established or applied unilaterally "by authority or force" rather than by contract. But there is no basis in law, logic, dictionary definition or common usage for such a limitation. Fees or obligations can be "imposed" by contract as well as by authority or force. Thus, the statutory prohibition can certainly apply to the imposition of fees by contract as

²⁰ The statute lists six exceptions to the prohibition on the imposition of fees on an electric utility, but none are relevant to the instant case and the respondent cities do not claim otherwise. *See* CP 418-19, ¶9

well as by statute, ordinance, or superior authority or force.

First, there is nothing in the text of the statute that expresses or implies the limitation suggested by the respondent cities. To the contrary, the statute would be rendered essentially meaningless if the meaning of the word “impose” were so limited and if parties were authorized to simply contract around the statutory prohibition. Because a franchise is by its very nature a form of contract, a city can never unilaterally “impose” a franchise on a utility. *See, e.g., City of Lakewood v. Pierce County*, 106 Wn. App. 63, 74, 23 P.3d 1 (2001) (“Until both parties agree on terms, no franchise exists”). Thus, the statutory prohibition against imposing franchise fees on an electric utility can have meaning only if the prohibition applies to franchise fees that are imposed by contract, since that is the only way a franchise fee can be imposed in the first place.

Second, the very language of the statute (considered as a whole, as it must be) and related statutes show that the legislature purposely chose not to provide a contractual exception to the prohibition of franchise fees. RCW 35.21.860 was enacted as § 2 of a much broader statute, Laws of 1982, 1st Ex. Sess., ch. 49. CP 510-516. The legislature enacted an exception in § 5 of that same session law that allowed a city to collect impact fees under a “voluntary agreement” with a developer within city limits. CP 510-511 (codified at RCW 82.02.020). But the legislature did

not provide a similar “voluntary agreement” exception in § 2, which prohibits fees or charges “of whatever nature or description” upon electric utilities. If the legislature had intended to provide an exception to the franchise fee prohibition for contracts, it clearly could have done so. *See State v. Cronin*, 130 Wn.2d 392, 399, 923 P.2d 694 (1996) (“Where the legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent”). The respondent cities cannot rely on an exception that the legislature purposely did not provide in order to impose fees that the statute clearly prohibits.²¹ Moreover, when the legislature amended RCW 35.21.860 in 2000 to add references to telecommunications and cable TV service providers, it created another exception for a particular kind of “agreed” charge,²² but again chose not to create such an exception to the prohibition on the

²¹ Even contractual exceptions to prohibited fees must comply with existing law. In *Vintage Constr. Co. v. City of Bothell*, 83 Wn. App. 605, 922 P.2d 828 (1996), *aff’d*, 135 Wn.2d 833, 959 P.2d 1090 (1998), the court invalidated the city’s imposition of a \$400 per lot fee under a voluntary agreement entered into pursuant to RCW 82.02.020, because the city had failed to show that the fee was reasonably related to the value of land that might otherwise be dedicated. The city argued that even if the fee violated the statute, it should be upheld as a lawful condition of annexing the developer’s property to which the developer had agreed by contract. The court held that the agreement was immaterial to the question of the legality of the fee: “It is true that Bothell was under no obligation to annex the Shawna Downs property. Having decided to do so, however, the City was bound by the terms of RCW 82.02.020. With specified exceptions, the statute prohibits any fee, either direct or indirect, on the development of land. The statute does not make an exception in cases where the City has exercised discretionary authority to annex the property in question. The annexation agreement has no bearing on the analysis here.” 83 Wn. App. at 612 (emphasis added).

²² The 2000 amendment added a new subsection (e), which created an exception for a “site-specific charge pursuant to an agreement between the city or town and a service provider of personal wireless services acceptable to the parties.” RCW 35.21.860(1)(e).

payment of franchise fees by electric utilities to municipalities.

Third, the argument that the meaning of “impose” is limited to unilateral action by one having superior force or authority is contrary to the standard dictionary definition of the word. The standard dictionary consulted by Washington courts is Webster’s Third New International Dictionary.²³ That dictionary defines the word “impose” much more broadly than does the internet dictionary or Black’s Law Dictionary cited by the respondent cities below.²⁴ The first non-obsolete, pertinent definition is “3b (1): to make, frame, or apply (as a charge, tax, obligation, rule, penalty) as compulsory, obligatory, or enforceable.” *Webster’s Third New International Dictionary, Unabridged* (Merriam-Webster 2002). That definition certainly embraces making a fee “compulsory, obligatory, or enforceable” by contract, as well as by unilateral authority or force. It also comports with common usage, where it is not uncommon to refer to duties or obligations as imposed “by

²³ Lake Forest Park relied below upon an abbreviated definition from Black’s Law Dictionary. CP 1932. Seattle and the suburban cities other than Lake Forest Park supported their argument below with a definition from an internet dictionary that has never been cited by a court in any reported decision in Washington. CP 1803, 1819. In contrast, Webster’s Third New International Dictionary has been cited in over 800 reported decisions in Washington. *See State v. Yancy*, 92 Wn.2d 153, 155, 594 P.2d 1342 (1979) (Washington Supreme Court “generally uses” Webster’s Third New International Dictionary); *State v. Glas*, 106 Wn. App. 895, 905, 27 P.3d 216 (2001), *rev’d on other grounds*, 147 Wn.2d 410, 54 P.3d 147 (2002) (“Washington courts use Webster’s Third New International Dictionary in the absence of other authority”).

²⁴ The definition of “impose” from Webster’s Third New International Dictionary is set forth at CP 1991 and is also attached hereto as Appendix D.

contract” or, for that matter, as imposed by common sense, by common decency, by religious or moral teachings, by tradition, or by other agencies besides unilateral force or authority. Indeed, numerous Washington cases and statutes in diverse contexts expressly refer to fees, charges, duties or obligations that are imposed “by contract” rather than by unilateral force or authority.²⁵

Finally, the fees at issue here were actually set forth in ordinances adopted by the suburban cities. So even under the respondent cities’ unduly narrow definition of “impose,” the ordinances are in violation of the statute insofar as they “impose” the franchise fees.

C. Washington Law Prohibits Municipalities from Imposing Fees or Charges on Electric Utilities, and the Stated Purpose for the Fees or Charges Is Irrelevant.

As noted above, the legislature enacted RCW 35.21.860 in 1982 as part of a lengthy, comprehensive bill that restructured the taxing powers of local governments. One purpose of the statute was the reduction of

²⁵ See, e.g., *Tri-City Const. Council, Inc. v. Westfall*, 127 Wn. App. 669, ¶ 16, 112 P.3d 558 (2005) (right to equitable subrogation recognized for “those who pay the debt to another in the performance of a legal duty imposed by contract or the rules of law”); *State v. Joy*, 121 Wn.2d 333, 339-40, 851 P.2d 654 (1993) (defendant appropriated funds to own use “contrary to the restrictions imposed by contract and thereby committed theft by embezzlement”); *Sheridan v. Aetna Cas. & Sur. Co.*, 3 Wn.2d 423, 438, 100 P.2d 1024 (1940) (“whether that duty is imposed by contract or by general obligation”); RCW 18.160.090(5) (“The bond shall not be liable for any liability of the licensee for tortious acts, whether or not such liability is imposed by statute or common law, or is imposed by contract”); RCW 87.03.445(10) (procedures “for the collection and enforcement of charges for water imposed by contract entered into or administered by the district’s board of directors”) (all emphasis added).

consumer taxes, and it was viewed as a protection for consumers, including ratepayers. *See, e.g.*, CP 508, 518-21.

When originally enacted, the statute read in relevant part:

No city or town may impose a franchise fee or any other fee or charge of whatever nature or description upon the light and power, telephone, or gas distribution businesses, as defined in RCW 82.16.010, except

CP 510 (Laws of 1982, 1st Ex. Sess., ch. 49, § 2) (omitting inapplicable exceptions). A 1983 amendment clarified that the definition of “telephone business” was contained in RCW 82.04.065. CP 524 (Laws of 1983, 2d Ex. Sess., ch. 3, § 39). The last amendment to the statute in 2000 was the result of new, extensive legislation dealing with telecommunications and cable television companies’ use of municipal rights of way. CP 528-32 (Laws of 2000, ch. 83). The new legislation added the phrase “or service provider for use of the right of way” after the reference to “telephone business.” CP 531-32 at § 8. “Service provider” means a company providing telecommunications or cable television service to the general public. CP 528-29 at § 1(6).

The grammatical structure of the sentence and the legislative history outlined above make clear that the phrase “for use of the right of way” applies to the prohibition on imposing fees or charges on telecommunication or cable television service providers, but not to the

prohibition on imposing fees or charges on electric utilities. In short, the purpose of or consideration for the fee or charge (*i.e.*, whether it is “for use of the right of way” or to keep the suburban cities from forming their own utilities) is irrelevant in this case. If the fee or charge does not fall within one of the listed exceptions, it is prohibited. That is the case here, and thus the franchise payments made by City Light to the suburban cities are illegal.

D. Even If the Purpose for the Fees or Charges Were Relevant, Washington Law Prohibits the Imposition of Such Fees or Charges on an Electric Utility.

Even if the phrase “for use of the right of way” in RCW 35.21.860(1) were to apply to electric utilities, the payments in question clearly qualify as franchise fees for use of the right of way, and thus are prohibited by statute.

First, a “franchise” is “a grant to a public service company of the right to use streets for . . . electric light poles, etc.” 12 McQuillin, *Mun. Corp.* § 34:6 (3d ed., rev. vol. 2006). The title of each ordinance at issue matches this definition by providing that the suburban cities are granting City Light a franchise for use of the public right of way for operation of an electric system.²⁶ CP 649, 668, 687, 710, 735. Also, all three recitals in

²⁶ The title of each ordinance other than Tukwila’s states: “An Ordinance of the [Suburban City] Granting Seattle City Light, an Electric Utility Owned and Operated by the City of Seattle, a Municipal Corporation, a Non-Exclusive Franchise to Construct,

the ordinances address the suburban cities' grant of a franchise to City Light for use of the right of way.²⁷ *Id.* Further, the suburban cities refer throughout the ordinances to their grant of a franchise to City Light for the use of the cities' rights of way for the operation of an electric light and power system. *See, e.g.*, CP 649-725, 735-46 at §§ 2.1–2.4, 5.1, 6.

Second, the respondent cities refer multiple times in numerous separate documents to City Light's payment of a "franchise fee," which shows their true intent regarding the type of fee being paid.²⁸ The term "franchise fee" is not defined in RCW ch. 35.21, but given the meaning of a "franchise," as set forth above, a "franchise fee" is logically a fee paid

Maintain, Operate, Replace and Repair an Electric Light and Power System, In, Across, Over, Along, Under, Through and Below Certain Designated Public Rights-of-Way of the [Suburban City]." CP 649, 668, 687, 710. The title of Tukwila's ordinance varies slightly and states: "An Ordinance of the City of Tukwila, Washington, Granting Seattle City Light -- an Electric Utility Owned and Operated by the City of Seattle, a Municipal Corporation -- a Non-Exclusive Franchise to Construct, Maintain, Operate, Replace and Repair an Electric Light and Power System, In, Across, Over, Along, Under, Through and Below Certain Designated Public Rights-of-Way of the City of Tukwila, Washington; Providing for Severability; and Establishing an Effective Date." CP 735.

²⁷ The recitals in the ordinances provide:

WHEREAS, RCW 35A.11.020 grants the City broad authority to regulate the use of the public right-of-way; and

WHEREAS, RCW 35A.47.040 authorizes the City "to grant nonexclusive franchises for the use of public streets, bridges or other public ways, structures or places above or below the surface of the ground for . . . poles, conduits, tunnels, towers and structures, pipes and wire and appurtenances thereof for transmission and distribution of electric energy . . ."; and

WHEREAS, the Council finds that it is in the best interests of the health, safety and welfare of residents of the [City] community to grant a non-exclusive franchise to Seattle City Light for the operation of an electric light and power system within the City right-of-way;

CP 649, 668, 687, 710, 735 (emphasis added; ellipses in original).

²⁸ *See, e.g.*, CP 729, 751, 752-860, 862-942, 944-48, 950-69, 971-97, 999-1004, 1006, 1008, 1015, 1020-21, 1023.

by a public service company for use of a city's streets for its business. *See also City of Lakewood v. Pierce County, supra*, 106 Wn. App. at 77 (noting that franchise fee paid by public utility is in nature of rental for use and occupation of public streets).

The meaning of the term "franchise fee" is irrelevant, however, because the statutory prohibition is not limited to the payment of a "franchise fee." To the contrary, the broad prohibition includes "any other fee or charge of whatever nature or description" upon a light and power business. RCW 35.21.860(1). The fee paid by Seattle and imposed by the suburban cities is plainly a charge by a municipality against an electric utility, and thus violates RCW 35.21.860 and is unlawful, whether or not the fee is a "franchise fee" for use of the right of way.

E. Washington Law Is Clear that a City Cannot Violate the Law Under the Guise of Consideration for a Contract Even When the City Is Acting in a Proprietary Role.

As described above at 9-16, the evidence in the record concerning the negotiation of the franchise agreements shows beyond legitimate dispute that the respondent cities negotiated the franchise fees in question as a means for Seattle to "share" with the suburban cities the utility tax revenues received by Seattle's general fund from City Light's sales to suburban customers. The evidence also shows that the idea of trying to avoid the statutory prohibition of franchise fees by saying the franchise

payments were consideration for the suburban cities' promise not to form their own utilities was hatched after Seattle and the suburban cities had already agreed in principle to share the utility tax revenues on City Light's suburban sales.²⁹ CP 454-55, 581-82, 584-85, 588, 593, 597, 605, 610, 616, 638, 641, 645.

It is a fundamental principle that parties cannot lawfully agree to do by contract that which is prohibited by law. *Nolte v. City of Olympia*, 96 Wn. App. 944, 982 P.2d 659 (1999). Regardless of whether a city is acting in a governmental or proprietary role, a contract provision that violates the law is invalid. *See id.* at 954-55. It is likewise axiomatic that a contract that conflicts with statutory requirements is illegal and thus unenforceable as a matter of law. *See* 25 DeWolf & Allen, Wash. Practice: *Contract Law and Practice* § 7.3 (1998 & Supp. 2006). "The general rule in Washington is that a contract that is contrary to the terms or policy of an express legislative enactment is illegal. . . . Since any conflict with existing laws renders a contract unenforceable, if parties to an agreement contract in violation of a statute, such contract will not be

²⁹ The fact that the real intention of the suburban cities and Seattle in agreeing to the franchise payments was to serve as a mechanism for "sharing" the utility tax revenues is clearly shown by § 4.2 of the franchise ordinances. Under that provision, the fee payable by City Light to each suburban city is reduced by the equivalent amount of any judicial or legislative reduction in utility tax payable by City Light to Seattle on suburban sales – although the value to City Light of the suburban city's promise not to form its own utility would not be diminished at all by such a reduction of City Light's utility taxes payable to Seattle. *See* CP 651, 672, 690, 712, 737 at § 4.2; *see also* CP 410-11 and *infra* at 41-42.

enforced.” *Id.* at 140.

The court was presented with a situation very similar to that at issue here in *Nolte v. City of Olympia*, 96 Wn. App. 944, 982 P.2d 659 (1999). In that case, the city entered into a utility extension agreement with a developer under which the city agreed to provide water and sewer service to property outside the city limits and the developer agreed in turn to pay impact fees to the city. The developer subsequently challenged the city’s authority to impose impact fees on property outside the city limits. The city argued that the fees were consideration for the city’s agreement to provide utility service. The court held that the fees were illegal despite the fact that they were imposed by contract and the fact that the city was acting in its proprietary role:

The City argues that even if it cannot impose impact fees in its role as a municipality, it can in its role as a utility provider. But RCW 82.02.020 states in its second sentence:
‘Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land.’ By its plain terms, this statute governs the city in all of its roles. It restricts the city to imposing impact fees under RCW 82.02.050-.090, and thus it does not authorize the fees imposed here.

Nolte, 96 Wn. App. at 954-55 (emphasis added); *see also Municipality of*

Metro. Seattle v. Div. 587, Amalgamated Transit Union, 118 Wn.2d 639, 645, 826 P.2d 167 (1992) (“Actions taken pursuant to a proprietary function are authorized unless they are beyond the purposes of the statute, or contrary to an express statutory or constitutional provision”).³⁰

As in *Nolte*, the respondent cities have argued that the parties to the franchises have agreed to the fee and therefore it should be allowed under contract law. However, that argument is no more sustainable here than it was in *Nolte*. Parties, including municipalities, cannot lawfully agree to violate the law no matter the circumstances. Accordingly, the

³⁰ It is worth noting that many states recognize the power of the state to limit a city’s ability to negotiate terms for use of city rights-of-way. For instance, in Michigan, the state adopted a statute limiting the fees that a city could charge for access to its rights-of-ways. The law provides that such fees “shall not exceed the fixed and variable costs to the local unit of government in granting a permit and maintaining the right-of-ways, easements, or public places used by a provider.” Mich. Comp. Law § 484.2253. A city challenged the statute, arguing that it violated a state constitutional provision which reserved to the cities “reasonable control” over the city streets. *TCG Detroit v. City of Dearborn*, 680 N.W.2d 24 (Mich. App. 2004). The court summarized the issue as “whether the implied authority to exact fees through contract is tantamount to an unqualified right to negotiate any fee that can be regarded as reasonable, without legislative constraint on the terms of the fee. That is, does the Constitution guarantee that implied authority against interference by the Legislature?” *Id.* at 40. The court concluded that: “it does not.” *Id.* “[T]he discussion focuses on the nature of municipal and state legislative powers, and the principle that the municipality only has such powers as are expressly granted. ... [T]he Legislature can set fees as long as it does not impermissibly infringe on the right [of the city] to grant or withhold consent [to the utility].” *Id.* at 41. Similarly, an Oregon statute authorizes utilities to use public rights-of-way “free of charge.” *Pac. Northwest Bell Tel. Co. v. Multnomah County*, 681 P.2d 797 (Or. App. 1984). When a county tried to impose permit fees to offset administrative expenses, the court invalidated the fees: “A plain reading of the statute indicates that any person or corporation has the right and privilege to construct, maintain and operate water, gas, electric or communication lines, fixtures and other facilities along public roads *free of charge*. As we read this provision, *free of charge* means exactly what it says. Accordingly, we hold that Ordinance No. 367 is inconsistent with state law.” *Id.* at 798 (emphasis in original). Likewise, our state legislature has spoken in clear terms. A municipality does not have the power to contract around the prohibition of fees in granting a franchise to an electric utility.

Court should declare that § 4.1.1 of the franchise ordinances is illegal.

F. Despite the Respondent Cities' Attempt to Disguise the True Purpose of the Fees, They Are Clearly Fees Within the Meaning of RCW 35.21.860(1).

As noted above, the respondent cities have attempted to disguise the illegal franchise fees as sums paid by City Light to the suburban cities so that the suburban cities will not establish their own municipal electric utilities.³¹ The Court should not be misled by the cities' attempt to camouflage the nature of the franchise payments in an effort to escape the statutory prohibition. The substance of RCW 35.21.860 and the franchise ordinances should control over form:

[T]he trend of the law in this state is to interpret rules and statutes to reach the substance of matters so that it prevails over form.

Weeks v. Chief of Wash. State Patrol, 96 Wn.2d 893, 896, 639 P.2d 732 (1982) (upholding lower court's grant of extension of time to defendants to file notice of appeal in trial court); *see also Ito Int'l Corp. v. Prescott, Inc.*, 83 Wn. App. 282, 290-92, 921 P.2d 566 (1996) (court noted definition of security under Washington State Securities Act was flexible one emphasizing substance over form, and held that plaintiff's general partnership interest qualified as a security).

The case of *Rouse v. Peoples Leasing Co.*, 96 Wn.2d 722, 638 P.2d

³¹ See, e.g., CP 454-55, 581-82, 584-85, 588, 593, 597, 605, 610, 616, 638, 641, 645.

1245 (1982), is particularly instructive on this point. In that case, the plaintiffs signed so-called “open-ended” lease agreements for new cars. The plaintiffs claimed the agreements were in substance loans disguised as leases and were usurious because the interest rate exceeded the maximum 12% allowed by statute. The trial court granted summary judgment to the defendants, because it reasoned that since the plaintiffs intended to lease rather than purchase and finance the vehicles, the agreements were not “loans” subject to usury limitations. The Washington Supreme Court unanimously reversed the trial court and held that the transactions were in substance loans as a matter of law, regardless of what the parties called them. The Court held that the trial court had erred in applying the “two-hypotheses test” (if a contract is susceptible of two constructions, one lawful and the other unlawful, the former will be adopted), stating:

To hold as the trial court did that the two-hypotheses test applies to the question of whether the transaction is a loan or forbearance would allow a skillful party to negate the application of the usury laws simply by characterizing a transaction so that it would not be a loan or forbearance in form but would accomplish the same end and not be susceptible to usury laws. This is not nor should it be the law in Washington.

96 Wn.2d at 726 (emphasis added). Instead, the court held that the transactions were loans despite the defendant’s designation of the agreements as leases, and thus they were subject to the usury statutes. *Id.* at 728; *see also State v. PUD No. 1 of Klickitat County*, 79 Wn.2d 237,

241, 484 P.2d 393 (1971) (court found installment sales program was, in reality, loan of PUD's money and thus violated constitutional provision prohibiting municipal corporation from loaning money, despite PUD's claims that it only bought good contracts); *Sullivan v. White*, 13 Wn. App. 668, 670-71, 536 P.2d 1211 (1975) (although transaction was loan in form, in substance plaintiff was selling his credit to defendants, and thus it did not constitute usurious transaction).

Similarly, in *Port of Longview v. Taxpayers of Port of Longview*, 85 Wn.2d 216, 527 P.2d 263 (1974), multiple ports and counties brought declaratory judgment actions against taxpayers to establish the constitutionality of legislation that allowed the ports to make pollution control facilities available to nonpublic entities. Pursuant to the financing plans for the facilities, the state would issue bonds in the name of the municipalities in an amount sufficient to cover the cost of installing the pollution control facilities on the property of private corporations, and then the municipalities would buy a leasehold interest in the facilities with the bond proceeds and transfer a lump-sum payment from the proceeds to the corporations for the leasehold interest. Finally the municipalities would sublease back to the corporations their entire possessory interest in the facilities for a term equal to the original leasehold term, minus one day. The taxpayers contended that, "stripped of all its lease-sublease

terminology,” the municipalities were really just borrowing money in the form of bond issues and then impermissibly lending that same money to private corporations. *Id.* at 222. The government bodies countered that the financing plans for the facilities were simply tandem lease-sublease agreements. The court saw through the governments’ scheme and held that the financing plans amounted in reality to “loans” in violation of the state constitutional prohibition of municipal loans to a private corporation, and thus were invalid. *Id.* at 223, 231.

The court addressed a comparable situation in *Barnett v. Lincoln*, 162 Wash. 613, 299 P. 392 (1931). In that case, the plaintiffs claimed the port had exceeded its authority for entering a lease by not obtaining a bond from the lessee, as required by statute. *Id.* at 616-17. The port argued in turn that the instrument at issue was not a lease, but rather a license. The court held:

Despite the designation of the instrument as a preferential agreement or as a “privilege” and the restrictions and reservations contained therein, we hold, from a consideration of the entire instrument, that it is a lease, and not a license or a mere privilege.

Id. at 621 (emphasis added). Since the port had failed to obtain a bond before entering the lease, the agreement violated the statute defining the port’s powers, and thus was void. *Id.*

As in the cases cited above, the respondent cities here have tried to

circumvent applicable law by claiming the payments are not franchise fees, but rather consideration for the suburban cities' promises not to establish their own utilities. As the cities' own documents make clear, however, the real purpose of the franchise payments was to provide a way for the suburban cities to obtain a share of the utility taxes paid by suburban ratepayers through their electric bills and then poured into Seattle's general fund by City Light. *See, e.g.*, CP 581-647. The respondent cities prepared these documents contemporaneously with their negotiations and strategy sessions for the subject ordinances. *Id.* They hatched the idea of calling the franchise payments "contract payments" for "valuable consideration" [*i.e.*, the promise not to form a suburban municipal utility] to try to get around the twin legal prohibitions on (1) one municipality taxing another (*see King County v. City of Algona, supra*; 1990 AGO No. 3), and (2) a municipality imposing a franchise fee "or any other fee or charge of whatever nature or description" on an electric utility (RCW 35.21.860). *See* CP 596-601, 641-43.

As the documents described above (concerning the negotiation of the franchise agreements) make clear, and as confirmed by § 4.3 of the franchise ordinances (which contemplated judicial invalidation of the

franchise fee payments) (*see, e.g.*, CP 652),³² the respondent cities were obviously concerned that a court would see through their charade.

Section 4.2 of the ordinances also illustrates why the substance of the instruments should trump over the sham that City Light is paying a fee to the suburban cities so they will not build their own utility systems. That section provides:

Should the City of Seattle be prevented by judicial or legislative action from collecting a utility tax on all or a part of the revenues derived by SCL from customers in the [suburban city], SCL shall reduce the payments to the [suburban city] provided in Section 4.1.1 above by an equivalent amount.

See, e.g., CP 651. Section 4.2 shows again that City Light's payments pursuant to § 4.1.1 were intended as a mechanism for sharing the 6% utility tax with the suburban cities, rather than as consideration for the suburban cities' promises not to form their own municipal utilities. The provision allows for the reduction of the franchise payments to the suburban cities if City Light's utility taxes payable to Seattle are reduced by legislative or judicial action preventing Seattle from imposing the full 6% utility tax on revenues derived by City Light from customers in the

³² Ord. § 4.3 provides: "Should a court of competent jurisdiction declare the consideration to be paid to the City in Section 4.1.1 above invalid, in whole or in part, or should a change in law make the consideration to be paid to the City in Section 4.1.1 above invalid, in whole or in part, this entire Agreement may be terminated by the City at any time thereafter upon 180 days written notice. During such notice period, however, SCL and the City shall attempt to agree upon acceptable, substitute provisions." CP 652 (Shoreline ordinance) (emphasis added).

suburban cities. But a reduction in City Light's tax obligation to Seattle would not reduce the value of the suburban cities' promise to City Light not to develop their own utilities. If anything, such legislative or judicial action would allow City Light to keep more of its revenues instead of paying them to Seattle's general fund as utility taxes, and logically could not be a reason why City Light's franchise payments to the suburban cities should be reduced.

G. The Trial Court Erred in Limiting the Class to City Light Ratepayers Residing in Seattle.

Pursuant to CR 23(b)(1) and (2), the trial court certified a class of all persons, other than the respondent cities themselves, who were ratepayers of City Light at any time since July 27, 2002 and resided in Seattle. CP 355. It denied the ratepayers' request to include those ratepayers who reside outside the City of Seattle in the certified class. *Id.* The lower court erred in finding that, with regard to the claims at issue in this suit, ratepayers who reside outside of Seattle have different interests in the outcome of the case; that facts and defenses differ materially among the ratepayers of each City; and that ratepayers who are Seattle residents "cannot adequately and fairly protect the interests of ratepayers who reside outside the City of Seattle." *Id.*

The class certified in this case should include City Light ratepayers

who reside in the suburban cities, because the interests of all City Light ratepayers are the same with regard to the issues raised by this lawsuit. The central issue in this case is whether the suburban cities are collecting illegal franchise fees from City Light pursuant to virtually identical franchise ordinances. The ratepayers seek to end City Light's payment of unlawful franchise fees and to obtain refunds for fees already paid. There are no conflicts of interest among the ratepayers as to those claims, because all ratepayers are affected in the same way by those payments. In other words, if the ratepayers succeed in showing that the franchise fee payments are illegal, that conclusion will be true for all ratepayers and will be completely independent of any individual circumstances of the ratepayers. If the suburban cities are required to refund the illegal franchise fees to City Light and ultimately to the ratepayers, then those refunds will be owed to all ratepayers, not just to some. The named class representatives are in the same position as all ratepayers, and that is the quintessential hallmark of what it means to be a class representative.³³

The respondent cities argued below that the interests of ratepayers in Seattle and ratepayers in the suburban cities are not the same. But the

³³ The underlying rationale for any class action is this: the representative parties, if they are in the same boat as the other class members, will protect the other class members' interests at the same time as they are protecting their own interests. That is exactly the situation in this case. The named ratepayers here will be affected in the same way as any other class members by whatever happens in this case.

cities offered no explanation for why the ratepayers' interests supposedly differ with respect to the issues presented by the claims in this case. To the extent the expenses of City Light (including the expense of unlawful franchise fees paid to the suburban cities) are passed along to ratepayers through rates, all ratepayers are affected in the same way by the cities' same course of conduct. That is exactly what the "typicality" element of CR 23(a) means. *See Smith v. Behr Process Corp.*, 113 Wn. App. 306, 320, 54 P.3d 665 (2002) ("Where the same unlawful conduct is alleged to have affected both the named plaintiffs and the class members, varying fact patterns in the individual claims will not defeat the typicality requirement").

The adequacy test contained in CR 23(a)(4) is likewise met in this case, because plaintiffs are represented by competent counsel and all ratepayers are "in the same boat" with respect to the central issue presented in this case, *i.e.*, the legality or illegality of the franchise fees. In assessing the adequacy of class representatives to protect the interests of the class under CR 23(a)(4), courts consider whether there are serious conflicts of interest between the representatives and other class members.³⁴ Absence of conflict is demonstrated by the degree to which

³⁴ *See, e.g., King v. Riveland*, 125 Wn.2d 500, 519, 886 P.2d 160 (1994) ("Complete unanimity of position and purpose is not required among members of a class in order for certification to be appropriate").

the representative plaintiffs' claims are typical of the claims of the class. *See General Telephone Co. v. Falcon*, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). Minor differences or theoretical conflicts among class members that do not go to the crux of the lawsuit do not bar class certification. *See Jacobi v. Bache & Co.*, 16 Fed. R. Serv.2d 71, 73-74 (S.D.N.Y. 1972).

Moreover, “[t]he fact that some members of a class might not wish to benefit by the relief sought does not impair the legitimacy of a class action.” *Zimmer v. City of Seattle*, 19 Wn. App. 864, 870, 578 P.2d 548 (1978); *see also King v. Riveland, supra*, 125 Wn.2d at 519. Thus, even if theoretically there were some ratepayers in the suburban cities who believed they were somehow better off as a result of City Light’s payment of the unlawful franchise fees, this would not present the kind of conflict among class members that CR 23(a)(4) addresses. The respondent cities’ conduct affects all ratepayers in the same way, and thus there are no material conflicts between ratepayers who reside in Seattle and ratepayers who reside in the suburban cities in this case.

In the event the Court finds in favor of the ratepayers on the issue of whether the respondent cities have violated RCW 35.21.860, the Court should either reverse the trial court’s decision limiting the class to ratepayers residing in Seattle or remand the issue to the trial court for

further consideration in light of its ruling on the statutory issue. This would be consistent with the general principle that “[I]f there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require.” *Brown v. Brown*, 6 Wn. App. 249, 256, 492 P.2d 581 (1971) (reversing denial of motion for class certification).

To illustrate why this approach would make sense, consider the following scenario. Suppose this Court decides that the franchise payments are in violation of the statute and remands the case to the trial court for determination of an appropriate remedy. Suppose further that on remand the trial court were to determine that the class members (ratepayers) were entitled to refunds of amounts they previously paid through rates that were attributable to the illegal payments. (This is what happened on remand from this Court’s decision in *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003), invalidating Seattle’s ordinance shifting streetlight expenses from the city’s general fund to ratepayers.) It would be an anomalous result, and unfair to suburban ratepayers, if ratepayers in Seattle obtained refunds but suburban ratepayers – who paid for the illegal franchise payments in the same way

as their Seattle counterparts – were denied refunds because they were excluded from the class.

Accordingly, the trial court’s order excluding suburban ratepayers from the class should either be reversed outright, or the issue should be remanded to the trial court for further consideration in light of this Court’s decision on the issue of the statutory violation.

VI. CONCLUSION

Seattle and the suburban cities were fully aware of the twin legal prohibitions (1) on a city’s taxing another city’s proprietary utility, and (2) on a city’s imposing a franchise fee or other charge (other than an authorized tax or other exception recognized in RCW 35.21.860) on an electric utility. Despite that awareness, the respondent cities nevertheless proceeded to agree that City Light would pay both a 6% utility tax to Seattle’s general fund and a substantial franchise fee (amounting to about half of the amount of the 6% utility tax payable on City Light’s sales to suburban customers) to the suburban cities. This scheme allowed Seattle’s general fund to continue receiving the full 6% utility tax on City Light’s revenues from suburban customers and, from the suburban cities’ perspective, also allowed the suburban cities to obtain a roughly 50% “share” of the 6% utility tax on City Light’s suburban revenues. In other words, City Light is in effect paying a 9% utility “tax” on its suburban

revenues, consisting of the 6% utility tax payable to Seattle's general fund and the 3% franchise fee payable to the suburban cities' general funds. The burden of the excessive and illegal franchise payments to the suburban cities falls on all City Light ratepayers, whether they reside inside or outside the Seattle city limits, because both the 6% utility tax and the 3% franchise fee are paid from the Light Fund and are recovered across City Light's entire rate base.

This arrangement constitutes a blatant violation of RCW 35.21.860, prohibiting municipal franchise fees on an electric utility. The respondent cities were aware that their arrangement would require a "legislative fix" to be legal, but they nevertheless put their scheme in place without obtaining any such "legislative fix." Their solution, instead of trying to obtain the necessary legislation, was to pretend that the purpose of the payments was not to provide franchise revenues to the suburban cities but rather to pay the cities for their promise not to form their own electric utilities. That supposedly clever plan is not only transparent, but is legally ineffective to inoculate the arrangement against the statutory prohibition.

The basis for the trial court's summary judgment ruling is legally unsupportable. The suburban cities' franchise ordinances clearly "impose" fees on City Light that are prohibited by RCW 35.21.860,

despite City Light's agreement to pay those illegal fees by virtue of accepting the franchises. The burden of paying the illegal fees ultimately falls on all City Light ratepayers, who are therefore entitled to declaratory and injunctive relief as sought by their motion for partial summary judgment.

For the foregoing reasons, the Court should reverse the trial court's summary judgment ruling and should remand the case to the trial court for entry of judgment (1) declaring that City Light's payments to the suburban cities under § 4.1.1 of the franchise ordinances are in violation of RCW 35.21.860 and are therefore illegal, and (2) enjoining City Light from making further such payments, and for further proceedings consistent with this Court's decision (for example, the determination of appropriate refunds by the suburban cities to City Light and by City Light to the ratepayers, and the determination of attorney fees and costs). In addition, the trial court's earlier ruling excluding suburban ratepayers from the plaintiff class should be reversed, or the issue should be remanded to the trial court for further consideration in light of this Court's decision concerning violation of RCW 35.21.860.

Respectfully submitted this 12th day of May, 2006.

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APPENDIX A

APPENDIX A

RCW 35.21.860. Electricity, telephone, or natural gas business, service provider--Franchise fees prohibited-- Exceptions

(1) No city or town may impose a franchise fee or any other fee or charge of whatever nature or description upon the light and power, or gas distribution businesses, as defined in RCW 82.16.010, or telephone business, as defined in RCW 82.04.065, or service provider for use of the right of way, except:

(a) A tax authorized by RCW 35.21.865 may be imposed;

(b) A fee may be charged to such businesses or service providers that recovers actual administrative expenses incurred by a city or town that are directly related to receiving and approving a permit, license, and franchise, to inspecting plans and construction, or to the preparation of a detailed statement pursuant to chapter 43.21C RCW;

(c) Taxes permitted by state law on service providers;

(d) Franchise requirements and fees for cable television services as allowed by federal law; and

(e) A site-specific charge pursuant to an agreement between the city or town and a service provider of personal wireless services acceptable to the parties for:

(i) The placement of new structures in the right of way regardless of height, unless the new structure is the result of a mandated relocation in which case no charge will be imposed if the previous location was not charged;

(ii) The placement of replacement structures when the replacement is necessary for the installation or attachment of wireless facilities, and the overall height of the replacement structure and the wireless facility is more than sixty feet; or

(iii) The placement of personal wireless facilities on structures owned by the city or town located in the right of way. However, a site-specific charge shall not apply to the placement of personal wireless facilities on existing structures, unless the structure is owned by the city or town.

A city or town is not required to approve the use permit for the placement of a facility for personal wireless services that meets one of the criteria in this subsection absent such an agreement. If the parties are unable to agree on the amount of the charge, the service provider may submit the amount of the charge to binding arbitration by serving notice on the city or town. Within thirty days of receipt of the initial notice, each party shall furnish a list of acceptable arbitrators. The parties shall select an arbitrator; failing to agree on an arbitrator, each party shall select one arbitrator and the two arbitrators shall select a third arbitrator for an arbitration panel. The arbitrator or arbitrators shall determine the charge based on comparable siting agreements involving public land and rights of way. The arbitrator or arbitrators shall not decide any other disputed issues, including but not limited to size, location, and zoning requirements. Costs of the arbitration, including compensation for the arbitrator's services, must be borne equally by the parties participating in the arbitration and each party shall bear its own costs and expenses, including legal fees and witness expenses, in connection with the arbitration proceeding.

(2) Subsection (1) of this section does not prohibit franchise fees imposed on an electrical energy, natural gas, or telephone business, by contract existing on April 20, 1982, with a city or town, for the duration of the contract, but the franchise fees shall be considered taxes for the purposes of the limitations established in RCW 35.21.865 and 35.21.870 to the extent the fees exceed the costs allowable under subsection (1) of this section.

APPENDIX B

With the exception of Section 16, subsection 60, which I have vetoed, House Bill No. 1230 is approved."

CHAPTER 49

[Engrossed Senate Bill No. 4972]

LOCAL GOVERNMENTS—TAXING POWERS

AN ACT Relating to local government finance; amending section 4, chapter 94, Laws of 1970 ex. sess. and RCW 82.14.030; amending section 5, chapter 94, Laws of 1970 ex. sess. and RCW 82.14.040; amending section 1, chapter 87, Laws of 1972 ex. sess. as last amended by section 4, chapter 175, Laws of 1979 ex. sess. and RCW 82.44.150; amending section 6, chapter 134, Laws of 1972 ex. sess. as last amended by section 6, chapter 144, Laws of 1981 and RCW 35.21.710; adding new sections to chapter 35.21 RCW; adding new sections to chapter 82.14 RCW; adding a new chapter to Title 82 RCW; creating new sections; providing an effective date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. The legislature hereby recognizes the concern of local governmental entities regarding the financing of vital services to residents of this state. The legislature finds that local governments are an efficient and responsive means of providing these vital services to the citizens of this state. It is the intent of the legislature that vital services such as public safety, public health, and fire protection be recognized by all local governmental entities in this state as top priorities of the citizens of Washington.

NEW SECTION. Sec. 2. (1) No city or town may impose a franchise fee or any other fee or charge of whatever nature or description upon the light and power, telephone, or gas distribution businesses, as defined in RCW 82.16.010, except that (a) a tax authorized by section 3 of this act may be imposed and (b) a fee may be charged to such businesses that recovers actual administrative expenses incurred by a city or town that are directly related to receiving and approving a permit, license, and franchise, to inspecting plans and construction, or to the preparation of a detailed statement pursuant to chapter 43.21C RCW.

(2) Subsection (1) of this section does not prohibit franchise fees imposed on an electrical energy, natural gas, or telephone business, by contract existing on the effective date of this section with a city or town, for the duration of the contract, but the franchise fees shall be considered taxes for the purposes of the limitations established in sections 3 and 4 of this act to the extent the fees exceed the costs allowable under subsection (1) of this section.

NEW SECTION. Sec. 3. No city or town may increase the rate of tax it imposes on the privilege of conducting an electrical energy, natural gas, or telephone business which increase applies to business activities occurring before the effective date of the increase, and no rate change may take effect

before the expiration of sixty days following the enactment of the ordinance establishing the change.

NEW SECTION. Sec. 4. (1) Subject to the enactment into law of the 1982 amendment to RCW 82.02.020 by section 5 of this act, no city or town may impose a tax on the privilege of conducting an electrical energy, natural gas, or telephone business at a rate which exceeds six percent unless the rate is approved by a majority of the voters of the city or town voting on the proposition.

(2) Subject to the enactment into law of the 1982 amendment to RCW 82.02.020 by section 5 of this act, if a city or town is imposing a rate of tax under subsection (1) of this section in excess of six percent on the effective date of this section, the city or town shall decrease the rate to a rate of six percent or less by reducing the rate each year before November 1st by an amount equal to the lesser of (a) the weighted average increase in utility rates for the period beginning October 1st of the previous year and ending September 30th of the current year less the increase in the Seattle All Urban Consumer Price Index for the same period, multiplied by the then current tax rate or (b) one-fifth the difference between the tax rate on the effective date of this section and six percent. If the amount determined under (b) of this subsection is less than the amount determined under (a) of this subsection, then one-half of the difference between the amounts determined under (a) and (b) of this subsection shall be added to the amount determined under (a) of this subsection in the following year.

As used in this subsection, "weighted average increase in utility rates" means the percentage increase in utility revenues for each utility expected from application of increases in rates based on the previous year's revenues and service areas within each city or town.

Nothing in this subsection prohibits a city or town from reducing its rates by amounts greater than the amounts required in this subsection.

Voter approved rate increases under subsection (1) of this section shall not be included in the computations under this subsection.

Sec. 5. Section 82.02.020, chapter 15, Laws of 1961 as last amended by section 3, chapter 196, Laws of 1979 ex. sess. and RCW 82.02.020 are each amended to read as follows:

Except only as expressly provided in RCW 67.28.180 and 67.28.190 and the provisions of chapter 82.14 RCW, the state preempts the field of imposing taxes upon retail sales of tangible personal property, the use of tangible personal property, parimutuel wagering authorized pursuant to RCW 67.16.060, conveyances, and cigarettes, and no county, town, or other municipal subdivision shall have the right to impose taxes of that nature. No county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any

other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land. However, this section does not preclude dedications of land or easements pursuant to RCW 58.17.110 within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.

This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat. **PROVIDED**, That any such voluntary agreement shall be subject to the following provisions:

- (1) The payment shall be held in a reserve account and may only be expended to fund a capital improvement agreed upon by the parties to mitigate the identified, direct impact;
- (2) The payment shall be expended in all cases within five years of completion; and
- (3) Any payment not so expended shall be refunded with interest at the rate applied to judgments to the property owners of record at the time of the refund; however, if the payment is not expended within five years due to delay attributable to the developer, the payment shall be refunded without interest.

No county, city, town, or other municipal corporation shall require any payment as part of such a voluntary agreement which the county, city, town, or other municipal corporation cannot establish is reasonably necessary as a direct result of the proposed development or plat.

Nothing in this section prohibits cities, towns, counties, or other municipal corporations from collecting reasonable fees from an applicant for a permit or other governmental approval to cover the cost to the city, town, county, or other municipal corporation of processing applications, inspecting and reviewing plans, or preparing detailed statements required by chapter 43.21C RCW.

This section does not limit the existing authority of any county, city, town, or other municipal corporation to impose special assessments on property specifically benefitted thereby in the manner prescribed by law.

Nothing in this section prohibits counties, cities, or towns from imposing or permits counties, cities, or towns to impose water, sewer, natural gas drainage utility, and drainage system charges: **PROVIDED**, That no such charge shall exceed the proportionate share of such utility or system's capital costs which the county, city, or town can demonstrate are attributable to the property being charged: **PROVIDED FURTHER**, That these provisions shall not be interpreted to expand or contract any existing authority of counties, cities, or towns to impose such charges.

This section does not apply to special purpose districts formed and acting pursuant to Titles 54, 56, 57, or 87 RCW, nor is the authority conferred by these titles affected.

NEW SECTION. Sec. 6. Nothing in this act precludes the imposition of business and occupation taxes by cities and towns, or of sales and use taxes. However, nothing in this act authorizes the imposition of a business and occupation tax by any county.

Sec. 7. Section 6, chapter 134, Laws of 1972 ex. sess. as last amended by section 6, chapter 144, Laws of 1981 and RCW 35.21.710 are each amended to read as follows:

Any city which imposes a license fee or tax upon business activities consisting of the making of retail sales of tangible personal property which are measured by gross receipts or gross income from such sales, shall impose such tax at a single uniform rate upon all such business activities. The taxing authority granted to cities for taxes upon business activities measured by gross receipts or gross income from sales shall not exceed a rate of 0020; EXCEPT that any city with an adopted ordinance at a higher rate, as of January 1, 1982 shall be limited to a maximum increase of ten percent of the January 1982 rate, not to exceed an annual incremental increase of two percent of current rate: **PROVIDED**, That any adopted ordinance which classifies according to different types of business or services shall be subject to both the ten percent and the two percent annual incremental increase limitation on each tax rate: **PROVIDED FURTHER**, That all taxes on business and occupation classifications in effect as of January 1, 1982, shall expire no later than December 31, 1982, or by expiration date established by local ordinance. Cities which impose a license fee or tax upon business activities consisting of the making of retail sales of tangible personal property which are measured by gross receipts or gross income from such sales shall be required to submit an annual report to the department of revenue identifying the rate established and the revenues received from each fee or tax. This section shall not apply to any business activities subject to the tax imposed by chapter 82.16 RCW. For purposes of this section, the providing to consumers of competitive telephone service, as defined in RCW 82.16.010, shall be deemed to be the retail sale of tangible personal property.

NEW SECTION. Sec. 8. The qualified voters of any city or town may by majority vote approve rates in excess of the provisions of section 7 of this act.

NEW SECTION. Sec. 9. Every city and town first imposing a business and occupation tax or increasing the rate of the tax after the effective date of this section shall provide for a special initiative procedure on an ordinance imposing or altering each tax. Such a special initiative procedure

shall subject the ordinance imposing or altering the tax to approval or rejection by the voters. If the voters of the city or town otherwise possess the general power of initiative on city or town matters, this special initiative procedure shall conform to the requirements of that procedure. If the voters of a city or town do not otherwise possess the general power of initiative on city or town matters, this special initiative procedure shall conform to the requirements and procedures for initiative petitions provided for code cities in RCW 35A.11.100.

NEW SECTION. Sec. 10. The municipal research council shall conduct a survey to determine the various rates of business and occupation taxes in each city and town in the state of Washington. The survey shall use the rates in effect on March 1, 1982. The research council shall provide the results of the survey to the legislature no later than July 1, 1982.

NEW SECTION. Sec. 11. (1) Subject to the enactment into law of the 1982 amendment to RCW 82.02.020 by section 5 of this act, the governing body of any county or any city may impose an excise tax on each sale of real property in the unincorporated areas of the county for the county tax and in the corporate limits of the city for the city tax at a rate not exceeding one-quarter of one percent of the selling price.

(2) Subject to the enactment into law of the 1982 amendment to RCW 82.02.020 by section 5 of this act, in lieu of imposing the tax authorized in RCW 82.14.030(2), the governing body of any county or any city may impose an additional excise tax on each sale of real property in the unincorporated areas of the county for the county tax and in the corporate limits of the city for the city tax at a rate not exceeding one-half of one percent of the selling price.

(3) Taxes imposed under this section shall be collected from persons who are taxable by the state under chapter 82.45 RCW upon the occurrence of any taxable event within the unincorporated areas of the county or within the corporate limits of the city, as the case may be.

(4) Taxes imposed under this section shall comply with all applicable rules, regulations, laws, and court decisions regarding real estate excise taxes as imposed by the state under chapter 82.45 RCW.

(5) As used in this section, "city" means any city or town.

NEW SECTION. Sec. 12. Every county and city imposing a tax under section 11(2) of this act shall provide for a special initiative procedure on an ordinance imposing or altering each tax. Such a special initiative procedure shall subject the ordinance imposing or altering the tax to approval or rejection by the voters. If the voters of the county or city otherwise possess the general power of initiative on county or city matters, this special initiative procedure shall conform to the requirements of that procedure. If the voters of a county or city do not otherwise possess the general power of initiative on county or city matters, this special initiative procedure shall conform to

the requirements and procedures for initiative petitions provided for code cities in RCW 35A.11.100.

NEW SECTION. Sec. 13. (1) The county treasurer shall place one percent of the proceeds of the taxes imposed under section 11 of this act in the county current expense fund to defray costs of collection.

(2) The remaining proceeds from the county tax under section 11(1) of this act shall be placed in a county capital improvements fund. The remaining proceeds from city or town taxes under section 11(1) of this act shall be distributed to the respective cities and towns monthly and placed by the city treasurer in a municipal capital improvements fund. These capital improvements funds shall be used by the respective jurisdictions for local improvements, including those listed in RCW 35.43.040.

(3) This section does not limit the existing authority of any city, town, or county to impose special assessments on property specially benefited thereby in the manner prescribed by law.

NEW SECTION. Sec. 14. Any tax imposed under section 11 of this act and any interest or penalties thereon is a specific lien upon each piece of real property sold from the time of sale until the tax is paid, which lien may be enforced in the manner prescribed for the foreclosure of mortgages.

NEW SECTION. Sec. 15. The taxes levied under section 11 of this act are the obligation of the seller and may be enforced through an action of debt against the seller or in the manner prescribed for the foreclosure of mortgages. Resort to one course of enforcement is not an election not to pursue the other.

NEW SECTION. Sec. 16. Any taxes imposed under section 11 of this act shall be paid to and collected by the treasurer of the county within which is located the real property which was sold. The treasurer shall act as agent for any city within the county imposing the tax. The county treasurer shall cause a stamp evidencing satisfaction of the lien to be affixed to the instrument of sale or conveyance prior to its recording or to the real estate excise tax affidavit in the case of used mobile home sales. A receipt issued by the county treasurer for the payment of the tax imposed under section 11 of this act shall be evidence of the satisfaction of the lien imposed in section 11 of this act and may be recorded in the manner prescribed for recording satisfactions of mortgages. No instrument of sale or conveyance evidencing sale subject to the tax may be accepted by the county auditor for filing or recording until the tax is paid and the stamp affixed thereto; in case the tax is not due on the transfer, the instrument shall not be accepted until suitable notation of this fact is made on the instrument by the treasurer.

Sec. 17. Section 4, chapter 94, Laws of 1970 ex. sess. and RCW 82.14.030 are each amended to read as follows:

(1) The governing body of any county or city while not required by legislative mandate to do so, may, by resolution or ordinance for the purposes

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authorized by this chapter, fix and impose a sales and use tax in accordance with the terms of this chapter. Such tax shall be collected from those persons who are taxable by the state pursuant to chapters 82.08 and 82.12 RCW, upon the occurrence of any taxable event within the county or city as the case may be. The rate of such tax imposed by a county shall be five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax). The rate of such tax imposed by a city shall not exceed five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax). PROVIDED, HOWEVER, That in the event a county shall impose a sales and use tax under this subsection, the rate of such tax imposed under this subsection by any city therein shall not exceed four hundred and twenty-five one-thousandths of one percent.

(2) Subject to the enactment into law of the 1982 amendment to RCW 82.02.020 by section 5 of this 1982 act, in addition to the tax authorized in subsection (1) of this section, the governing body of any county or city may by resolution or ordinance impose an additional sales and use tax in accordance with the terms of this chapter. Such additional tax shall be collected upon the same taxable events upon which the tax imposed under subsection (1) of this section is levied. The rate of such additional tax imposed by a county shall be up to five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax). The rate of such additional tax imposed by a city shall be up to five-tenths of one percent of the selling price (in the case of a sales tax) or value of the article used (in the case of a use tax): PROVIDED HOWEVER, That in the event a county shall impose a sales and use tax under this subsection at a rate equal to or greater than the rate imposed under this subsection by a city within the county, the county shall receive fifteen percent of the city tax: PROVIDED FURTHER, That in the event that the county shall impose a sales and use tax under this subsection at a rate which is less than the rate imposed under this subsection by a city within the county, the county shall receive that amount of revenues from the city tax equal to fifteen percent of the rate of tax imposed by the county under this subsection. The authority to impose a tax under this subsection is intended in part to compensate local government for any losses from the phase-out of the property tax on business inventories.

Sec. 18. Section 5, chapter 94, Laws of 1970 ex. sess. and RCW 82.14.040 are each amended to read as follows:

(1) Any county ordinance adopted ((pursuant to this chapter)) under RCW 82.14.030(1) shall contain, in addition to all other provisions required to conform to this chapter, a provision allowing a credit against the county tax imposed under RCW 82.14.030(1) for the full amount of any city sales or use tax imposed under RCW 82.14.030(1) upon the same taxable event.

(2) Any county ordinance adopted under RCW 82.14.030(2) shall contain, in addition to all other provisions required to conform to this chapter, a provision allowing a credit against the county tax imposed under RCW 82.14.030(2) for the full amount of any city sales or use tax imposed under RCW 82.14.030(2) upon the same taxable event up to the additional tax imposed by the county under RCW 82.14.030(2).

NEW SECTION. Sec. 19. There is added to chapter 82.14 RCW a new section to read as follows:

Every county and city imposing a tax under section 17(2) of this act shall provide for a special initiative procedure on an ordinance imposing or altering each tax. Such a special initiative procedure shall subject the ordinance imposing or altering the tax to approval or rejection by the voters. If the voters of the county or city otherwise possess the general power of initiative on county or city matters, this special initiative procedure shall conform to the requirements of that procedure. If the voters of a county or city do not otherwise possess the general power of initiative on county or city matters, this special initiative procedure shall conform to the requirements and procedures for initiative petitions provided for code cities in RCW 35A.11.100.

Sec. 20. Section 1, chapter 87, Laws of 1972 ex. sess. as last amended by section 4, chapter 175, Laws of 1979 ex. sess. and RCW 82.44.150 are each amended to read as follows:

(1) The director of licensing shall on the twenty-fifth day of February, May, August and November of each year, commencing with November, 1971, advise the state treasurer of the total amount of motor vehicle excise taxes remitted to the department of licensing during the preceding calendar quarter ending on the last day of March, June, September and December, respectively, except for those payable under RCW 82.44.030 and 82.44.070, from motor vehicle owners residing within each municipality which has levied a tax under RCW 35.58.273, which amount of excise taxes shall be determined by the director as follows:

The total amount of motor vehicle excise taxes remitted to the department, except those payable under RCW 82.44.030 and 82.44.070, from each county shall be multiplied by a fraction, the numerator of which is the population of the municipality residing in such county, and the denominator of which is the total population of the county in which such municipality or portion thereof is located. The product of this computation shall be the amount of excise taxes from motor vehicle owners residing within such municipality or portion thereof. Where the municipality levying a tax under RCW 35.58.273 is located in more than one county, the above computation shall be made by county, and the combined products shall provide the total amount of motor vehicle excise taxes from motor vehicle owners residing in

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the municipality as a whole. Population figures required for these computations shall be supplied to the director by the office of financial management who shall adjust the fraction annually.

(2) On the first day of the months of January, April, July, and October of each year, the state treasurer based upon information provided by the department of licensing shall make the following apportionment and distribution of motor vehicle excise taxes deposited in the general fund. A sum equal to seventeen percent thereof shall be paid to cities and towns in the proportions and for the purposes hereinafter set forth; a sum equal to two percent of all motor vehicle excise tax receipts shall be allocable to the county sales and use tax equalization account under section 21 of this 1982 act; and a sum equal to seventy percent of all motor vehicle excise tax receipts shall be allocable to the state school equalization fund and credited and transferred each year in the following order of priority:

(a) The amount required and certified by the state finance committee each year as being necessary for payment of principal of and interest on bonds authorized by (chapter 26, Laws of 1963 extraordinary session) RCW 28A.47.760 through 28A.47.774 in the ensuing twelve months and any additional amounts required by the covenants of such bonds shall be transferred from the state school equalization fund to the 1963 public school building bond retirement fund.

(b) Any remaining amounts in the state school equalization fund from the motor vehicle excise taxes not required for debt service on the above bond issues shall be transferred and credited to the general fund.

(3) The amount payable to cities and towns shall be apportioned among the several cities and towns within the state (ratably, on the basis of the population as last determined by the office of financial management) according to the following formula:

(a) Sixty-five percent of the sum specified in subsection (2) of this section to be paid to cities and towns shall be apportioned ratably on the basis of population as last determined by the office of financial management.

(b) Thirty-five percent of the sum specified in subsection (2) of this section to be paid to cities and towns shall be apportioned to cities and towns under section 22 of this 1982 act.

(4) When so apportioned, the amount payable to each such city and town shall be transmitted to the city treasurer thereof, and shall be utilized by such city or town for the purposes of police and fire protection and the preservation of the public health therein, and not otherwise. In case it be adjudged that revenue derived from the excise tax imposed by this chapter cannot lawfully be apportioned or distributed to cities or towns, all money directed by this section to be apportioned and distributed to cities and towns shall be credited and transferred to the state general fund.

(5) On the first day of the months of January, April, July, and October of each year, the state treasurer, based upon information provided by the

department of licensing, shall remit motor vehicle excise tax revenues imposed and collected under RCW 35.58.273 as follows:

(a) The amount required to be remitted by the state treasurer to the treasurer of any municipality levying the tax shall not exceed in any calendar year the amount of locally-generated tax revenues, excluding the excise tax imposed under RCW 35.58.273 for the purposes of this section, which shall have been budgeted by the municipality to be collected in such calendar year for any public transportation purposes including but not limited to operating costs, capital costs, and debt service on general obligation or revenue bonds issued for these purposes; and

(b) In no event may the amount remitted in a single calendar quarter exceed the amount collected on behalf of the municipality under RCW 35.58.273 during the calendar quarter next preceding the immediately preceding quarter.

(6) At the close of each calendar year accounting period, but not later than April 1, each municipality that has received motor vehicle excise taxes under subsection (5) of this section shall transmit to the director of licensing and the state auditor a written report showing by source the previous year's budgeted tax revenues for public transportation purposes as compared to actual collections. Any municipality that has not submitted the report by April 1 shall cease to be eligible to receive motor vehicle excise taxes under subsection (5) of this section until the report is received by the director of licensing. If a municipality has received more or less money under subsection (5) of this section for the period covered by the report than it is entitled to receive by reason of its locally-generated collected tax revenues, the director of licensing shall, during the next ensuing quarter that the municipality is eligible to receive motor vehicle excise tax funds, increase or decrease the amount to be remitted in an amount equal to the difference between the locally-generated budgeted tax revenues and the locally-generated collected tax revenues. In no event may the amount remitted for a calendar year exceed the amount collected on behalf of the municipality under RCW 35.58.273 during that same calendar year. At the time of the next fiscal audit of each municipality, the state auditor shall verify the accuracy of the report submitted and notify the director of licensing of any discrepancies.

(7) The motor vehicle excise taxes imposed under RCW 35.58.273 and required to be remitted under this section shall be remitted without legislative appropriation.

(8) Any municipality levying and collecting a tax under RCW 35.58.273 which does not have an operating, public transit system or a contract for public transportation services in effect within one year from the initial effective date of the tax shall return to the state treasurer all motor vehicle excise taxes received under subsection (5) of this section.

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NEW SECTION. Sec. 21. There is added to chapter 82.14 RCW a new section to read as follows:

There is created in the state general fund a special account to be known as the "county sales and use tax equalization account." Into this account shall be placed a portion of all motor vehicle excise tax receipts as provided in RCW 82.44.150(2). Funds in this account shall be allocated by the state treasurer according to the following procedure:

(1) Prior to April 1st of each year the director of revenue shall inform the state treasurer of the total and the per capita levels of revenues for the unincorporated area of each county and the state-wide weighted average per capita level of revenues for the unincorporated areas of all counties imposing the sales and use tax authorized under RCW 82.14.030(1) for the previous calendar year.

(2) At such times as distributions are made under RCW 82.44.150(a) now or hereafter amended, the state treasurer shall apportion to each county by imposing the sales and use tax under RCW 82.14.030(1) at the maximum rate and receiving less than one hundred fifty thousand dollars from the tax for the previous calendar year, an amount from the county sales and use tax equalization account sufficient, when added to the amount of revenues received the previous calendar year by the county, to equal one hundred fifty thousand dollars.

(3) Subsequent to the distributions under subsection (2) of this section and at such times as distributions are made under RCW 82.44.150, as now or hereafter amended, the state treasurer shall apportion to each county imposing the sales and use tax under RCW 82.14.030(1) at the maximum rate and receiving less than seventy percent of the state-wide weighted average per capita level of revenues for the unincorporated areas of all counties sufficient, when added to the per capita sales and use tax equalization account, an amount from the county sales and use tax equalization account sufficient, when added to the per capita level of revenues for the unincorporated area received the previous calendar year by the county, to equal seventy percent of the state-wide weighted average per capita level of revenues for the unincorporated areas of all counties determined under subsection (1) of this section, subject to reduction under subsections (5) and (6) of this section. When computing distributions under this section, any distribution under subsection (2) of this section shall be considered revenues received from the tax imposed under RCW 82.14.030(1) for the previous calendar year.

(4) Subsequent to the distributions under subsection (3) of this section and at such times as distributions are made under RCW 82.44.150, as now or hereafter amended, the state treasurer shall apportion to each county imposing the sales and use tax under RCW 82.14.030(2) at the maximum rate and receiving a distribution under subsection (3) of this section, a fund distribution from the county sales and use tax equalization account. The

distribution to each qualifying county shall be equal to the distribution to the county under subsection (3) of this section, subject to the reduction under subsections (5) and (6) of this section. To qualify for the distributions under this subsection, the county must impose the tax under RCW 82.14.030(2) for the entire calendar year. Counties imposing the tax for less than the full year shall qualify for prorated allocations under this subsection proportionate to the number of months of the year during which the tax is imposed.

(5) Revenues distributed under this section in any calendar year shall not exceed an amount equal to seventy percent of the state-wide weighted average per capita level of revenues for the unincorporated areas of all counties during the previous calendar year. If distributions under subsection (5) or (4) of this section cannot be made because of this limitation, then distributions under subsection (3) or (4) of this section shall be reduced ratably among the qualifying counties.

(6) If inadequate revenues exist in the county sales and use tax equalization account to make the distributions under subsection (3) or (4) of this section, then the distributions under subsection (3) or (4) of this section shall be reduced ratably among the qualifying counties. At such time during the year as additional funds accrue to the county sales and use tax equalization account, additional distributions shall be made under subsections (3) and (4) of this section to the counties.

(7) If the level of revenues in the county sales and use tax equalization account exceeds the amount necessary to make the distributions under subsections (2) through (4) of this section, then the additional revenues shall be credited and transferred to the state general fund.

NEW SECTION. Sec. 22. There is added to chapter 82.14 RCW a new section to read as follows:

There is created in the state general fund a special account to be known as the "municipal sales and use tax equalization account." Into this account shall be placed such revenues as are provided under RCW 82.44.150(3)(b). Funds in this account shall be allocated by the state treasurer according to the following procedure:

(1) Prior to April 1st of each year the director of revenue shall inform the state treasurer of the total and the per capita levels of revenues for each city and the state-wide weighted average per capita level of revenues for all cities imposing the sales and use tax authorized under RCW 82.14.030(1) for the previous calendar year.

(2) At such times as distributions are made under RCW 82.44.150, as now or hereafter amended, the state treasurer shall apportion to each city not imposing the sales and use tax under RCW 82.14.030(2) an amount from the municipal sales and use tax equalization account equal to the amount distributed to the city under RCW 82.44.150(3)(a) multiplied by thirty-five sixty-fifths.

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(3) Subsequent to the distributions under subsection (2) of this section and at such times as distributions are made under RCW 82.44.150, as now or hereafter amended, the state treasurer shall apportion to each city imposing the sales and use tax under RCW 82.14.030(1) at the maximum rate and receiving less than seventy percent of the state-wide weighted average per capita level of revenues for all cities as determined by the department of revenue under subsection (1) of this section, an amount from the municipal sales and use tax equalization account sufficient, when added to the per capita level of revenues received the previous calendar year by the city, to equal seventy percent of the state-wide weighted average per capita level of revenues for all cities determined under subsection (1) of this section, subject to reduction under subsection (5) of this section.

(4) Subsequent to the distributions under subsection (3) of this section and at such times as distributions are made under RCW 82.44.150, as now or hereafter amended, the state treasurer shall apportion to each city imposing the sales and use tax under RCW 82.14.030(2) at the maximum rate and receiving a distribution under subsection (3) of this section, a third distribution from the municipal sales and use tax equalization account. The distribution to each qualifying city shall be equal to the distribution to the city under subsection (3) of this section, subject to the reduction under subsection (5) of this section. To qualify for the distributions under this subsection, the city must impose the tax under RCW 82.14.030(2) for the entire calendar year. Cities imposing the tax for less than the full year shall qualify for prorated allocations under this subsection proportionate to the number of months of the year during which the tax is imposed.

(5) If inadequate revenues exist in the municipal sales and use tax equalization account to make the distributions under subsection (3) or (4) of this section, then the distributions under subsection (3) or (4) of this section shall be reduced ratably among the qualifying cities. At such time during the year as additional funds accrue to the municipal sales and use tax equalization account, additional distributions shall be made under subsections (3) and (4) of this section to the cities.

(6) If the level of revenues in the municipal sales and use tax equalization account exceeds the amount necessary to make the distributions under subsections (2) through (4) of this section, then the additional revenues shall be apportioned among the several cities within the state ratably on the basis of population as last determined by the office of financial management. PROVIDED, That no such distribution shall be made to those cities receiving a distribution under subsection (2) of this section.

NEW SECTION. Sec. 23. County legislative authorities who levy optional taxes pursuant to this act shall fully consider funding for fire districts within their respective jurisdictions during the county budget process.

The local government committees of the legislature shall study fire district services and funding and shall report back to the Washington State legislature by December 31, 1982.

NEW SECTION. Sec. 24. Sections 2 through 4 and 9 of this act are each added to chapter 35.21 RCW, and sections 11 through 16 of this act shall constitute a new chapter in Title 82 RCW.

NEW SECTION. Sec. 25. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately, except section 5 of this act shall take effect July 1, 1982.

Passed the Senate April 9, 1982.

Passed the House April 10, 1982.

Approved by the Governor April 20, 1982.

Filed in Office of Secretary of State April 20, 1982.

CHAPTER 50

[Engrossed Substitute Senate Bill No. 4369]

1981-83 BUDGET—APPROPRIATIONS MODIFICATIONS

AN ACT Relating to appropriations; modifying appropriations and expenditures for the operations and capital projects of state agencies for the fiscal biennium beginning July 1, 1981, and ending June 30, 1983; amending section 4, chapter 340, Laws of 1981 as amended by section 5, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 5, chapter 340, Laws of 1981 as amended by section 6, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 6, chapter 340, Laws of 1981 as amended by section 7, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 7, chapter 340, Laws of 1981 as amended by section 8, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 8, chapter 340, Laws of 1981 as amended by section 9, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 9, chapter 340, Laws of 1981 as amended by section 10, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 10, chapter 340, Laws of 1981 as amended by section 11, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 11, chapter 340, Laws of 1981 as amended by section 12, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 12, chapter 340, Laws of 1981 as amended by section 13, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 13, chapter 340, Laws of 1981 as amended by section 14, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 14, chapter 340, Laws of 1981 as amended by section 15, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 15, chapter 340, Laws of 1981 as amended by section 16, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 16, chapter 340, Laws of 1981 as amended by section 17, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 17, chapter 340, Laws of 1981 as amended by section 18, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 18, chapter 340, Laws of 1981 as amended by section 19, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 19, chapter 340, Laws of 1981 as amended by section 20, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 20, chapter 340, Laws of 1981 (uncodified); amending section 21, chapter 340, Laws of 1981 as amended by section 22, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 22, chapter 340, Laws of 1981 as amended by section 23, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 23, chapter 340, Laws of 1981 as amended by section 24, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 24, chapter 340, Laws of 1981 as amended by section 25, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 25, chapter 340, Laws of 1981 as amended by section 26, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 26, chapter 340, Laws of 1981 as amended by section 27, chapter 14, Laws of 1981 2nd ex. sess. (uncodified); amending section 27, chapter 340, Laws of 1981 as amended by section 28, chapter 14, Laws of

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APPENDIX C

ORDINANCE NO. 187

AN ORDINANCE OF THE CITY OF SHORELINE, WASHINGTON, GRANTING SEATTLE CITY LIGHT, AN ELECTRIC UTILITY OWNED AND OPERATED BY THE CITY OF SEATTLE A MUNICIPAL CORPORATION, A NON-EXCLUSIVE FRANCHISE TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR AN ELECTRIC LIGHT AND POWER SYSTEM, IN, ACROSS, OVER, ALONG, UNDER, THROUGH AND BELOW CERTAIN DESIGNATED PUBLIC RIGHTS-OF-WAY OF THE CITY OF SHORELINE, WASHINGTON

WHEREAS, RCW 35A.11.020 grants the City broad authority to regulate the use of the public right-of-way; and

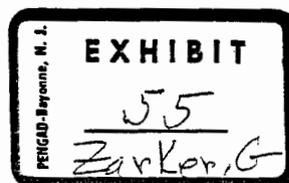
WHEREAS, RCW 35A.47.040 authorizes the City "to grant nonexclusive franchises for the use of public streets, bridges or other public ways, structures or places above or below the surface of the ground for ... poles, conduits, tunnels, towers and structures, pipes and wires and appurtenances thereof for transmission and distribution of electrical energy ..."; and

WHEREAS, the Council finds that it is in the best interests of the health, safety and welfare of residents of the Shoreline community to grant a non-exclusive franchise to Seattle City Light for the operation of an electric light and power system within the City right-of-way;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SHORELINE, WASHINGTON, DOES ORDAIN AS FOLLOWS:

1. Definitions. The following terms contained herein, unless otherwise indicated, shall be defined as follows:
 - 1.1. City: The City of Shoreline, a municipal corporation of the State of Washington, specifically including all areas incorporated therein as of the effective date of this ordinance and any other areas later added thereto by annexation or other means.
 - 1.2. Days: Calendar days.
 - 1.3. Director: The head of the Planning and Development Services department of the City, or the head of the Public Works department of the City, or the designee of either of these individuals.
 - 1.4. Facilities: All wires, lines, cables, conduits, equipment, and supporting structures, located in the City's right-of-way, utilized by the grantee in the operation of activities authorized by this Ordinance. The abandonment by grantee of any facilities as defined herein shall not act to remove the same from this definition.
 - 1.5. Grantee: As incorporated or used herein shall refer to Seattle City Light (SCL).
 - 1.6. Permittee: A person who has been granted a permit by the Permitting Authority, and SCL operating under Section 6.7 Blanket Permit of this agreement.

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- 1.7. Permitting Authority: The head of the City department authorized to process and grant permits required to perform work in the City's right-of-way, or the head of any agency authorized to perform this function on the City's behalf. Unless otherwise indicated, all references to Permitting Authority shall include the designee of the department or agency head.
- 1.8. Person: An entity or natural person.
- 1.9. Revenue: This term as used herein shall have the same meaning as utilized by the City of Seattle in calculating the amount of utility tax payable by SCL to the City of Seattle.
- 1.10. Right-of-way: As used herein shall refer to the surface of and the space along, above, and below any street, road, highway, freeway, lane, sidewalk, alley, court, boulevard, parkway, drive, utility easement, and/or road right-of-way now or hereafter held or administered by the City of Shoreline.
- 1.11. SCL: Seattle City Light, an electric utility owned and operated by the City of Seattle a municipal corporation, and its respective successors and assigns.

2. Franchise Granted.

- 2.1. Pursuant to RCW 35A.47.040, the City hereby grants to SCL, its heirs, successors, and assigns, subject to the terms and conditions hereinafter set forth, a franchise beginning on the effective date of this Ordinance.
- 2.2. This franchise shall grant SCL the right, privilege and authority, subject to the terms and conditions hereinafter set forth, to construct, operate, maintain, replace, and use all necessary equipment and facilities for an electric light and power system, in, under, on, across, over, through, along or below the public right-of-way located in the City of Shoreline, as approved under City permits issued by the Permitting Authority pursuant to this franchise and City ordinances.
- 2.3. This franchise specifically does not authorize SCL to place facilities or to otherwise utilize facilities in the City's right-of-way to provide telecommunications, cable television, point-to-point data communications, or similar services either via wire or wireless technologies regardless of whether these services are provided to any person outside SCL's organization. This Paragraph does not restrict SCL's ability to utilize telemetric devices to monitor and operate its electrical distribution system or the usage of electrical energy.
- 2.4. This franchise is granted upon the express condition that it shall not in any manner prevent the City from granting other or further franchises in, along, over, through, under, below or across any right-of-way. Such franchise shall in no way prevent or prohibit the City from using any Right-of-way or other City property or affect its jurisdiction over them or any part of them, and the City shall retain the authority to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication of the same as the City may deem fit, including the dedication, establishment, maintenance, and improvement of all new right-of-ways or other public properties of every type and description.

3. Franchise Term. The term of the franchise granted hereunder shall be for the period of fifteen (15) years counted from the last day of the calendar month in which this ordinance became effective.

4. Consideration. It is recognized by the City and by SCL that the City has the authority to establish its own municipal electric utility, and the authority to acquire SCL electric distribution properties in the City for that purpose.

4.1. In consideration for the City agreeing not to exercise such authority during the term of this franchise, SCL agrees to the following:

4.1.1. SCL shall pay the City six percent of the amount of revenue derived from the power portion of SCL service to customers in the City, and shall pay the City zero percent of the amount of revenue derived from the distribution portion of SCL service to customers in the City. The City retains the authority to change the above percentages, to a maximum of six percent on the power portion of SCL service and to a maximum of six percent on the distribution portion of SCL service during the course of the franchise upon one year written notice to SCL.

4.1.2. SCL shall not include any part of the power portion of the payment to the City provided in Section 4.1.1. above as a component of any rate differential between customers served by SCL in the City and customers served by SCL in other jurisdictions.

4.1.3. SCL shall not charge greater than an eight percent differential in the power portion of the rates to customers in the City compared to the power portion of the rates charged to similar customers in the City of Seattle, and any differential in the power portion of the rates charged to customers in the City shall be the result of a rate review process conducted by the Seattle City Council. The power portion of SCL service to customers in the City is approximately fifty percent of the rates at the time of entering into this franchise. Any subsequent shift in the proportion of power vs. distribution in the rates to SCL customers in the City shall be the result of a rate review process conducted by the Seattle City Council.

4.1.4. SCL shall provide the City with a good faith estimate and supporting information, within a reasonable time from the City's request, of the likely differential rate impact on the distribution portion of the rates in the City, which other than the payment related to the distribution portion of SCL service under Section 4.1.1. above, may only be created by an operational request or requirement of the City which is different from operational standards in other areas served by SCL.

4.1.5. SCL shall appoint a member nominated by the City and other suburban cities to its Citizens' Rate Advisory Committee who will represent the interests of suburban cities served in whole or in part by SCL.

4.2. Should the City of Seattle be prevented by judicial or legislative action from collecting a utility tax on all or a part of the revenues derived by SCL from customers in the City, SCL shall reduce the payments to the City provided in Section 4.1.1. above by an equivalent amount.

- 4.3. Should a court of competent jurisdiction declare the consideration to be paid to the City in Section 4.1.1. above invalid, in whole or in part, or should a change in law make the consideration to be paid to the City in Section 4.1.1. above invalid, in whole or in part, this entire Agreement may be terminated by the City at any time thereafter upon 180 days written notice. During such notice period, however, SCL and the City shall attempt to agree upon acceptable, substitute provisions.
- 4.4. Payments provided for under this Section shall be paid monthly within 30 days following the end of each month.

5. City Ordinances and Regulations.

- 5.1. Nothing herein shall be deemed to direct or restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this franchise, including any reasonable ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control, by appropriate regulations, the location, elevation, and manner of construction and maintenance of any facilities of SCL located within the City right-of-way. SCL shall promptly conform with all such regulations, unless compliance would cause SCL to violate other requirements of law.

6. Right-of-Way Management.

6.1. Excavation And Notice Of Entry.

- 6.1.1. During any period of relocation or maintenance, all surface structures, if any, shall be erected and used in such places and positions within the right-of-way so as to interfere as little as possible with the safe and unobstructed passage of traffic and the unobstructed use of adjoining property. SCL shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the City or state law, including RCW 39.04.180, for the construction of trench safety systems.
- 6.1.2. Whenever SCL excavates in any right-of-way for the purpose of installation, construction, repair, maintenance or relocation of its facilities, it shall apply to the City for a permit to do so in accord with the ordinances and regulations of the City requiring permits to operate in the right-of-way. In no case shall any such work commence within any right-of-way without a permit, except as otherwise provided in this Ordinance. During the progress of the work, SCL shall not unnecessarily obstruct the passage or use of the right-of-way, and shall provide the City with plans, maps, and information showing the proposed and final location of any facilities in accord with Section 6.11 of this Ordinance.
- 6.1.3. At least ten (10) days prior to its intended construction of facilities, Grantee shall inform all residents in the immediately affected area, that a construction project will commence, the dates and nature of the project, and provide a toll-free or local

number which the resident may call for further information. A pre-printed door hanger may be used for this purpose.

- 6.1.4. At least twenty-four (24) hours prior to entering right-of-way adjacent to or on private property to perform the installation, maintenance, repair, reconstruction, or removal of facilities, except those activities exempted from permit requirements in accord with Section 6.7 and Blanket Permit Definitions, a copy of which has been filed with the City Clerk and identified by Clerk's Receiving Number 781, a written notice describing the nature and location of the work to be performed shall be physically posted upon the affected private property by the Grantee. The Grantee shall make a good faith effort to comply with the property owner/resident's preferences, if any, regarding the location or placement of underground facilities consistent with sound engineering practices.

6.2. Abandonment of SCL's Facilities. No facilities laid, installed, constructed, or maintained in the right-of-way by SCL may be abandoned by SCL without the prior written consent of the Director of a removal plan. All necessary permits must be obtained prior to such work.

6.3. Restoration after Construction.

- 6.3.1. SCL shall, after any installation, construction, relocation, maintenance, or repair of facilities within the franchise area, restore the right-of-way to at least the condition the same was in immediately prior to any such abandonment, installation, construction, relocation, maintenance or repair. All concrete encased monuments which have been disturbed or displaced by such work shall be restored pursuant to all federal, state and local standards and specifications. SCL agrees to promptly complete all restoration work and to promptly repair any damage caused by such work at its sole cost and expense.

- 6.3.2. If it is determined that SCL has failed to restore the right-of-way in accord with this Section, the City shall provide SCL with written notice including a description of actions the City believes necessary to restore the right-of-way. If the right-of-way is not restored in accord with the City's notice within thirty (30) days of that notice, the City, or its authorized agent, may restore the right-of-way. SCL is responsible for all costs and expenses incurred by the City in restoring the right-of-way in accord with this Section. The rights granted to the City under this Paragraph shall be in addition to those otherwise provided by this franchise.

6.4. Bonding Requirement. SCL, as a public agency, is not required to comply with the City's standard bonding requirement for working in the City's right-of-way.

6.5. Tree Trimming. Upon approval of the City, which shall not be unreasonably withheld or delayed, and in accordance with City ordinances, the Grantee shall have the authority to trim trees and other plant life upon and overhanging the right-of-way to prevent interference with the Grantee's facilities.

- 6.5.1. The Grantee shall provide at least seven (7) days advanced written notice to the owner of the property on which any tree or plant life Grantee desires to trim is

located. Said notice may be in the form of a doorknob hanger and shall contain a contact name, address, and telephone number where the property owner can obtain information from the Grantee regarding its vegetation management plans. The Grantee shall make a good faith effort to conform with property owners' requests regarding the trimming of trees or plant life on their property without jeopardizing the safety or the operational reliability of their Facilities.

- 6.5.2. In regards to trees or other plant life in the right-of-way, the Grantee shall provide at least a seven (7) days advanced written notice to the nearest adjacent property owner. Said notice may be in the form of a doorknob hanger and shall contain a contact name, address, and telephone number where the property owner can obtain information regarding vegetation management plans and express concerns. The Grantee shall obtain authorization from the Director of all vegetation management plans regarding trees and other plant life in the right-of-way including tree removal or replacement programs.
- 6.5.3. The Grantee shall be responsible for removal of an debris generated during its vegetation management activities. The City may, at its sole discretion, remove and dispose of any such debris on City right-of-way that is not removed within twenty-four (24) hours and charge the Grantee for the cost of said removal and disposal.
- 6.5.4. The forgoing notwithstanding, Grantee shall at all times have the right to trim vegetation in the right-of-way that has caused a system failure, or is in imminent risk of doing so, without delay for prior notice.

6.6. Emergency Work, Permit Waiver. In the event of any emergency where any facilities located in the right-of-way are broken or damaged, or if SCL's construction area for their facilities is in such a condition as to place the health or safety of any person or property in imminent danger, SCL shall immediately take any necessary emergency measures to repair or remove its facilities without first applying for and obtaining a permit as required by this franchise. However, this emergency provision shall not relieve SCL from later obtaining any necessary permits for the emergency work. SCL shall apply for the required permits the next business day following the emergency work or as soon as practical.

6.7. Blanket Permit. The terms "Minor Activities" and "Blanket Activities" shall be defined in a specifically negotiated Blanket Permit Definitions, a copy of which has been filed with the City Clerk and identified by Clerk's Receiving Number 781. A Permittee shall be authorized to perform Minor Activities without a City permit of any kind and Blanket Activities under the terms and conditions of this Section. All other activities will require a separate permit in accord with City ordinances.

- 6.7.1. The Permittee shall pay the City a permit inspection/processing fee in the amount set out in Blanket Permit Definitions.
- 6.7.2. The Permittee shall provide a monthly list of permit construction activity by the 10th of the following month listing the previous month's activity authorized under this Section.

- 6.7.3. The Permittee shall provide payment of inspection fees for the monthly activity on an annual basis as provided by Section 13. No monthly statement will be provided by the City.
- 6.7.4. For each separate use of the right-of-way under this Section, and prior to commencing any work on the right-of-way under this Section, the Permittee shall:
- 6.7.4.1. Fax or otherwise deliver to the Permitting Authority, at least twenty-four (24) hours in advance of entering the right-of-way, a City Inspection Request Form, as provided by the Permitting Authority, which shall include at a minimum the following information: franchise ordinance no., street address nearest to the proposed work site; parcel no. and description of work to be performed.
- 6.7.4.2. Fax or deliver to the Permitting Authority a notice of completion in the form provided by the Permitting Authority within twenty-four (24) hours after completing work.
- 6.7.5. In the event the Permittee fails to comply with any of the conditions set forth in this Section, the City is authorized to immediately terminate the Permittee's authority to operate under this Section by providing Permittee written notice of such termination and the basis therefore.
- 6.7.6. The City reserves the right to alter the terms and conditions of Subsection 6.7 and of Blanket Permit Definitions by providing thirty (30) days written notice to the Permittee. Any change made pursuant to this Paragraph, including any change in the inspection fee stated in Blanket Permit Definitions, shall thereafter apply to all subsequent work performed pursuant to this Section. Further, the City may terminate the Permittee's authority to work in the City's right-of-way under the terms of this Section at any time without cause by providing thirty (30) days written notice to the Permittee. Notwithstanding any termination, the Permittee will not be relieved of any liability to the City.

6.8. Safety.

- 6.8.1. The Grantee, in accordance with applicable federal, state, and local safety rules and regulations shall, at all times, employ ordinary care in the installation, maintenance, and repair utilizing methods and devices commonly accepted in their industry of operation to prevent failures and accidents that are likely to cause damage, injury, or nuisance to persons or property.
- 6.8.2. All of Grantee's facilities in the right-of-way shall be constructed and maintained in a safe and operational condition.

6.9. Dangerous Conditions. Authority for City to Abate.

- 6.9.1. Whenever Facilities or the operations of the Grantee cause or contribute to a condition that appears to endanger any person or substantially impair the lateral support of the adjoining right-of-way, public or private property, the Director may direct the Grantee, at no charge or expense to the City, to take actions to resolve

the condition or remove the endangerment. Such directive may include compliance within a prescribed time period.

- 6.9.2. In the event the Grantee fails or refuses to promptly take the directed action, or fails to fully comply with such direction, or if emergency conditions exist which require immediate action to prevent imminent injury or damages to persons or property, the City may take such actions as it believes are necessary to protect persons or property and the Grantee shall be responsible to reimburse the City for its costs.

6.10. Relocation of System Facilities.

- 6.10.1. SCL agrees and covenants to protect, support, temporarily disconnect, relocate or remove from any right-of-way its facilities without cost to the City, when so required by the City, provided that SCL shall in all such cases have the privilege to temporarily bypass, in the authorized portion of the same right-of-way and upon approval by the City, any facilities required to be temporarily disconnected or removed.
- 6.10.2. If the City determines that a public project necessitates the relocation of SCL's existing facilities, the City shall:
- 6.10.2.1. As soon as possible, but not less than sixty (60) days prior to the commencement of such project, provide SCL with written notice requiring such relocation; and
- 6.10.2.2. Provide SCL with copies of any plans and specifications pertinent to the requested relocation and a proposed temporary or permanent relocation for SCL's facilities.
- 6.10.2.3. After receipt of such notice and such plans and specifications, SCL shall complete relocation of its facilities at no charge or expense to the City at least ten (10) days prior to commencement of the project.
- 6.10.3. SCL may, after receipt of written notice requesting a relocation of its facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise SCL in writing if any of the alternatives are suitable to accommodate the work that necessitates the relocation of the facilities. If so requested by the City, SCL shall submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by SCL full and fair consideration. In the event the City ultimately determines that there is no other reasonable alternative, SCL shall relocate its facilities as provided in this Section.
- 6.10.4. The provisions of this Section 6.10 shall in no manner preclude or restrict SCL from making any arrangements it may deem appropriate when responding to a request for relocation of its facilities by any person other than the City, where the improvements to be constructed by said person are not or will not become City-owned, operated or maintained, provided that such arrangements do not unduly delay or increase the cost of a planned City construction project.

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6.10.5. Whenever any person shall have obtained permission from the City to use any right-of-way for the purpose of moving any building or other oversized structure, SCL, upon fourteen (14) days written notice from the City or the Permittee (Provided the same can show sufficient evidence of a valid City permit), shall raise or remove, at the expense of the Permittee desiring to move the building or structure, any of SCL's facilities that may obstruct the movement thereof; provided, that the moving of such building or structure shall be done in accordance with regulations and general ordinances of the City. Where more than one path is available for the moving of such building or structure, the path of least interference, as determined by the City, shall be utilized.

6.11. SCL's Maps and Records. As a condition of this franchise, and without charge to the City, SCL agrees to provide the City with as-built plans, maps, and records that show the vertical and horizontal location of its facilities within the right-of-way, measured from the center line of the right-of-way, using a minimum scale of one inch equals one hundred feet (1"=100'). Maps shall be provided in Geographical Information System (GIS) or other digital electronic format used by the City and, upon request, in hard copy plan form used by SCL. This information shall be provided between one hundred twenty (120) and one hundred eighty (180) days of the effective date of this Ordinance and shall be updated upon reasonable request by the City.

7. Undergrounding. SCL hereby affirms its understanding and agreement that its activities within the City must comply with Shoreline City Ordinance No. 82, Establishing Minimum Requirements And Procedures For The Underground Installation Of Electric And Communication Facilities Within Shoreline, and in exchange for an exemption from the requirements of Section 6(b) of that ordinance, and in accord with Section 6(b)(1) thereof, SCL hereby agrees and covenants to the following:

7.1. Information. SCL shall provide to the City of Shoreline, or any entity that has noticed SCL of a joint trenching project under Section 12 of Shoreline City Ordinance No. 82, all reasonably requested information regarding the nature and location of facilities installed, owned, operated, or maintained by SCL within a proposed undergrounding area. Said information will be provided within a reasonable period of time, not to exceed thirty (30) days following the request.

7.2. Notice. SCL shall respond to any notification pursuant to Section 12 of Shoreline City Ordinance No. 82, within forty five (45) days following such notification with written commitment either to participate in the proposed project or to remove its facilities.

7.3. Cost. SCL agrees to bear its proportionate share of all costs common to participants in any joint trenching project and to bear the entire cost of all materials and labor particularly necessary for the underground installation of its facilities and, upon the completion of that installation, the removal of the overhead facilities replaced thereby.

8. Street Lighting. As a condition of placing its facilities in the public streets and as part of the electric service it provides to its customers in Shoreline, SCL shall install, maintain, and

furnish equipment and power for street illumination in accord with policies and standards established by the City of Shoreline.

9. Implementation of Service Requirements.

- 9.1. Rate Information. SCL shall provide the City with copies of all studies, reports, memoranda, or other documents provided to the legislative branches of the City of Seattle regarding the establishment of the rates, or any portion thereof, to be charged to customers in Shoreline within seven (7) days of the transmission of said documents to the legislative branches of the City of Seattle. Shoreline shall be provided a reasonable opportunity to review said documents and to comment or otherwise participate in Seattle's rate setting process. SCL shall ensure that the City receives reasonable advanced notice of all public hearings or other opportunities for the City to represent the interests of SCL customers within Shoreline during Seattle's rate setting process.
- 9.2. City Council to Review Rates. The City Council shall have the authority to establish policies regarding the implementation of SCL service requirements included in Sections 7, and 8. SCL shall assist the City Council in establishing these policies and in determining the impact, if any, such policies may have upon SCL customers within the City limits.
- 9.3. Amortization. The term of the Franchise herein notwithstanding, SCL shall amortize capital expenditures incurred in order to meet the requirements of this franchise in accordance with its standard financial policies.
- 9.4. Communication with City Customers. SCL will review with the City in advance any planned communication to its customers in the City regarding the services and rates affected by this franchise.

10. Planning Coordination.

- 10.1. Growth Management. SCL agrees, as follows, to participate in the development of, and reasonable updates to, the utilities element of the City's comprehensive plan:
- 10.1.1. For SCL's service within the City limits, SCL will participate in a cooperative effort with the City of Shoreline to develop a Comprehensive Plan Utilities Element which meets the requirements described in RCW 36.70A.070(4).
- 10.1.2. SCL will participate in a cooperative effort with the City to ensure that the Utilities Element of Shoreline's Comprehensive plan is accurate as it relates to SCL's operations and is updated to ensure it continued relevance at reasonable intervals.
- 10.1.3. SCL shall submit information related to the general location, proposed location, and capacity of all existing and proposed electrical lines as requested by the Director within a reasonable time, not exceeding sixty (60) days from receipt of a written request for such information.
- 10.1.4. SCL will updated information provided to the City under this Section 10 whenever there are major changes in SCL's electrical system plans for Shoreline.

10.2. System Development Information. SCL will assign a representative whose responsibility shall be to coordinate with the City on planning for CIP projects including those that involve undergrounding. At a minimum, such coordination shall include the following:

10.2.1. By February 1st of each year, SCL shall provide the City Manager or his designee with a schedule of its planned capital improvements, which may affect the right of way for that year;

10.2.2. SCL shall meet with the City, other franchisees and users of the right-of-way, according to a schedule to be determined by the City, to schedule and coordinate construction; and

10.2.3. All construction locations, activities, and schedules shall be coordinated, as required by the City Manager or his designee, to minimize public inconvenience, disruption, or damages.

10.3. Development of Right-of-Way Standards. SCL herein agrees to provide the staff-support necessary to enable SCL to meaningfully participate in the City's ongoing development of Right-of-Way Standards. By way of illustration and not limitation, this participation shall include attendance at City planning meetings, review and comment of documents proposed for adoption, and any other activities that may be required in the formulation of Right of Way Standards.

10.4. Coordination of Permitting Activities. The parties agree to attempt to reduce the number of transactions at different locations that must be completed by a Shoreline applicant for a land use permit as follows:

10.4.1. If the City provides office space at City Hall for SCL at no charge, SCL will assign a representative who will keep regular hours at City Hall pursuant to a schedule mutually acceptable to both parties, so long as there is sufficient workload. The SCL representative will participate with City staff in reviewing land use plans and permits requiring coordination with or approval by SCL, including any project requiring new or changed electric service or easements within the City limits.

10.5. Emergency Operations. The City and SCL agree to cooperate in the planning and implementation of emergency operations response procedures.

11. Service Quality. SCL shall exercise the same degree of technical, professional and administrative quality in serving its customers in the City that is required within the electrical energy industry and that is provided to all other customers with similar circumstances within SCL's service territory. SCL shall at all times comply with the minimum regulatory standards presently in effect or as may be amended for the sale and distribution of electrical energy.

12. City Use of SCL Property. SCL owns properties and facilities in the City which are essential to SCL's electrical utility operations. SCL will cooperate with the City in the same manner as it does with the City of Seattle in aligning the operation and management of its property and facilities to serve the goals and objectives of the City, including the City's use

of SCL property for public purposes, while at the same time protecting the safe and efficient operation of SCL's electric utility.

- 12.1. Favorable Consideration of City Requests. SCL shall give every favorable consideration to a request by the City for use of SCL property, including requests by the City to use SCL property for such public uses as public parks, public open space, public trails for non-motorized transportation, surface water management, or other specifically identified public uses.
- 12.2. Public Adoption of Proposed Uses. Each proposed use of SCL property by the City shall first be approved by Council action consistent with the City's Comprehensive Plan.
- 12.3. Prior Approval of Specific Plans by SCL. Prior to any installation, modification or extension of any improvement on SCL property proposed by the City, the City shall supply SCL with detailed drawings and specifications relating to such proposed development. No construction, installation or modification shall be performed until the plans have been approved in writing by SCL.
- 12.4. Permit for City Use of SCL Property. SCL shall provide the City with a separate permit, in a form similar to that used for the City of Seattle, for each use of SCL property requested by the City, which shall detail the terms of such use including provisions to assure the continued safe and efficient operation of the electric utility.

13. Finance.

13.1. Annual Reconciliation. Unless otherwise provided herein, all charges between the parties, except for charges for electrical service to specific City buildings, penalties, reimbursements for breach or other forms of cure, and payment pursuant to Section 4.1.1, shall be accrued and reconciled annually in accord with the following process:

- 13.1.1. Within thirty (30) days of the anniversary of the execution of this agreement, or upon such other date as the parties may agree, the parties shall exchange itemized invoices of charges that have been incurred over the previous 12 month period. Said invoice shall include all information reasonably necessary to allow each party to evaluate the validity and magnitude of each charge.
- 13.1.2. Each party shall have forty five (45) days to provide the other with written notice disputing any specific charge on the other's invoice. If an invoice is not disputed within this period, then the invoice will be deemed accurate.
- 13.1.3. Undisputed charges shall be set off against each other. The party with a remaining balance due after the set off, shall provide a reconciled invoice to the other party. Said invoice shall be satisfied within forty five (45) days of its receipt.

13.2. Other Charges. Unless otherwise provided herein, charges between the parties shall be paid within forty five (45) days of the receipt of a written invoice for said charge.

14. Indemnification.

- 14.1. SCL hereby releases, covenants not to bring suit, and agrees to indemnify, defend and hold harmless the City, its elected officials, employees, agents, and volunteers from any and all claims, costs, judgments, awards or liability to any person, including claims by SCL's own employees to which SCL might otherwise be immune under Title 51 RCW, arising from injury, sickness, or death of any person or damage to property of which the negligent acts or omissions of SCL, its agents, servants, officers or employees in performing activities authorized by this franchise. SCL further releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its elected officials, employees, agents, and volunteers from any and all claims, costs, judgments, awards or liability to any person (including claims by SCL's own employees, including those claims to which SCL might otherwise have immunity under Title 51 RCW) arising against the City solely by virtue of the City's ownership or control of the right-of-ways or other public properties, by virtue of SCL's exercise of the rights granted herein, or by virtue of the City's permitting SCL's use of the right-of-way or other public property based upon the inspection or lack of inspection of work performed by SCL, its agents and servants, officers or employees in connection with work authorized on the City's property or property over which the City has control, pursuant to this franchise or pursuant to any other permit or approval issued in connection with this franchise. This covenant of indemnification shall include, but not be limited by this reference, claims against the City arising as a result of the negligent acts or omissions of SCL, its agents, servants, officers or employees in barricading, instituting trench safety systems or providing other adequate warnings of any excavation, construction, or work in any right-of-way or other public place in performance of work or services permitted under this franchise. If final judgment is rendered against the City, its elected officials, employees, agents, and volunteers, or any of them, SCL shall satisfy the same.
- 14.2. Inspection or acceptance by the City of any work performed by SCL at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Said indemnification obligations shall extend to claims that are not reduced to a suit and any claims that may be compromised prior to the culmination of any litigation or the institution of any litigation.
- 14.3. In the event SCL refuses to undertake the defense of any suit or any claim, after the City's request for defense and indemnification has been made pursuant to the indemnification clauses contained herein, and SCL's refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of SCL, then SCL shall pay all of the City's costs and expenses for defense of the action, including reasonable attorneys' fees of recovering under this indemnification clause as well as any judgment against the City.
- 14.4. Should a court of competent jurisdiction determine that this franchise is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of SCL and the City, its officers, employees and agents, SCL's liability

hereunder shall be only to the extent of SCL's negligence. This waiver has been mutually negotiated by the parties.

15. Enforcement.

- 15.1. In addition to all other rights and powers retained by the City under this franchise, the City reserves the right to revoke and terminate this franchise and all rights and privileges of the Grantee in the event of a substantial violation or breach of its terms and conditions. Likewise, SCL may terminate this franchise in the event of a substantial violation or breach of its terms and conditions by the City.
- 15.2. A substantial violation or breach by a Grantee shall include, but shall not be limited to, the following:
 - 15.2.1. An uncured violation of any material provision of this franchise, or any material rule, order or regulation of the City made pursuant to its power to protect the public health, safety and welfare;
 - 15.2.2. An intentional evasion or knowing attempt to evade any material provision of this franchise or practice of any fraud or deceit upon the system customers or upon the City;
 - 15.2.3. Failure to begin or substantially complete any system construction or system extension as set forth in a franchise or right-of-way use agreement;
 - 15.2.4. Failure to provide the services specified in the franchise;
 - 15.2.5. Misrepresentation of material fact during negotiations relating to this franchise or the implementation thereof;
 - 15.2.6. A continuous and willful pattern of grossly inadequate service and failure to respond to legitimate customer complaints;
 - 15.2.7. An uncured failure to pay fees associated with this franchise
- 15.3. No violation or breach shall occur which is without fault of the Grantee or the City, or which is as a result of circumstances beyond the Grantee's or the City's reasonable control. Neither the Grantee, nor the City, shall be excused by economic hardship nor by nonfeasance or malfeasance of its directors, officers, agents or employees; provided, however, that damage to equipment causing service interruption shall be deemed to be the result of circumstances beyond a Grantee's or the City's control if it is caused by any negligent act or unintended omission of its employees (assuming proper training) or agents (assuming reasonable diligence in their selection), or sabotage or vandalism or malicious mischief by its employees or agents. A Grantee, or the City, shall bear the burden of proof in establishing the existence of such conditions.
- 15.4. Except in the case of termination pursuant to Paragraph 15.1.5, of this Section, prior to any termination or revocation, the City, or the Grantee, shall provide the other with detailed written notice of any substantial violation or material breach upon which it proposes to take action. The party who is allegedly in breach shall have a period of 60 days following such written notice to cure the alleged violation or breach,

demonstrate to the other's satisfaction that a violation or breach does not exist, or submit a plan satisfactory to the other to correct the violation or breach. If, at the end of said 60-day period, the City or the Grantee reasonably believes that a substantial violation or material breach is continuing and the party in breach is not taking satisfactory corrective action, the other may declare that the party in breach is in default, which declaration must be in writing. Within 20 days after receipt of a written declaration of default from, the party that is alleged to be in default may request, in writing, a hearing before a "hearing examiner" as provided by the City's development regulations. The hearing examiner's decision may be appealed to any court of competent jurisdiction.

- 15.5. The City may, in its discretion, provide an additional opportunity for the Grantee to remedy any violation or breach and come into compliance with this agreement so as to avoid the termination or revocation.
- 15.6. In addition to any other remedy provided for herein for violation of any provision, or failure to comply with any of the requirements of this franchise, the City may levy liquidated damages of up to \$500.00 for each of the first five days that a violation exists and up to \$1,000.00 for each subsequent day that a violation exists. Payment of such liquidated damages shall not relieve any person of the duty to correct the violation.
- 15.7. Any violation existing for a period greater than 30 days may be remedied by the City at the Grantee's expense.

16. Survival. All of the provisions, conditions and requirements of Sections 6.1 Excavation And Notice Of Entry, 6.2 Abandonment Of SCL's Facilities, 6.3 Restoration After Construction, 6.9 Dangerous Conditions. Authority For City To Abate, 6.10 Relocation Of System Facilities, and 14 Indemnification, of this franchise shall be in addition to any and all other obligations and liabilities SCL may have to the City at common law, by statute, or by contract, and shall survive the City's franchise to SCL for the use of the areas mentioned in Section 2 herein, and any renewals or extensions thereof. All of the provisions, conditions, regulations and requirements contained in this franchise Ordinance shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of SCL and all privileges, as well as all obligations and liabilities of SCL shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever SCL is named herein.

17. Severability. If any Section, sentence, clause or phrase of this Ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other Section, sentence, clause or phrase of this franchise Ordinance. The Parties may amend, repeal, add, replace, or modify any provision of this Franchise to preserve the intent of the parties as expressed herein prior to any finding of invalidity or unconstitutionality.

18. Assignment. This franchise shall not be sold, transferred, assigned, or disposed of in whole or in part either by sale, voluntary or involuntary merger, consolidation or otherwise, without

the written approval of the City. Any costs associated with the City's review of any transfer proposed by the Grantee shall be reimbursed to the City by the Grantee.

- 18.1. An assignment of this franchise shall be deemed to occur if there is an actual change in control or where ownership of fifty percent (50%) or more of the beneficial interests, singly or collectively, are obtained by other parties. The word "control" as used herein is not limited to majority stock ownership only, but includes actual working control in whatever manner exercised.
- 18.2. Except as otherwise provided herein, the Grantee shall promptly notify the City prior to any proposed change in, or transfer of, or acquisition by any other party of control of the Grantee's company. Every change, transfer, or acquisition of control of the Grantee's company shall cause a review of the proposed transfer. In the event that the City denies its consent and such change, transfer or acquisition of control has been effected, the Franchise is terminated.

19. Notice. Any notice or information required or permitted to be given to the parties under this franchise may be sent to the following addresses unless otherwise specified:

Superintendent of Seattle City Light 700 Fifth Avenue, Suite 3100 Seattle, WA 98104-5031 Phone: (206) 684-3200 Fax: (206) 684-3158	Director of Public Works City of Shoreline 17544 Midvale Avenue N. Shoreline, WA 98133-4921 Phone: (206) 546-1700 Fax: (206) 546-2200
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20. Non-Waiver. The failure of either party to enforce any breach or violation by the other party of any provision of this Franchise shall not be deemed to be a waiver or a continuing waiver by the non-breaching party of any subsequent breach or violation of the same or any other provision of this Franchise.

21. Alternate Dispute Resolution. If the parties are unable to resolve disputes arising from the terms of this franchise, prior to resorting to a court of competent jurisdiction, the parties shall submit the dispute to a non-binding alternate dispute resolution process agreed to by the parties. Unless otherwise agreed between the parties or determined herein, the cost of that process shall be shared equally.

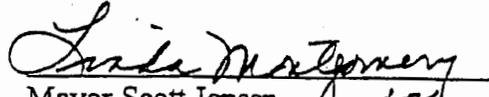
22. Entire Agreement. This franchise constitutes the entire understanding and agreement between the parties as to the subject matter herein and no other agreements or understandings, written or otherwise, shall be binding upon the parties upon execution and acceptance hereof.

23. Directions to City Clerk. The City Clerk is hereby authorized and directed to forward certified copies of this ordinance to the Grantee set forth in this ordinance. The Grantee shall have sixty (60) days from receipt of the certified copy of this ordinance to accept in writing the terms of the franchise granted to the Grantee in this ordinance.

24. Publication Costs. In accord with state law, this ordinance shall be published in full. The costs of said publication shall be borne by the Grantee.

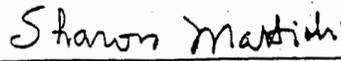
25. Effective Date. If accepted by the Grantee, this ordinance shall take effect and be in full force as of January 1, 1999. The City Clerk is hereby directed to publish this ordinance in full.

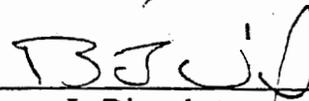
PASSED BY THE CITY COUNCIL ON DECEMBER 14, 1998.


Mayor Scott Jepsen

ATTEST:

APPROVED AS TO FORM:


Sharon Mattioli, CMC
City Clerk

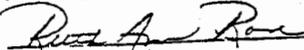

Bruce L. Disend
City Attorney

Date of Publication: December 18, 1998
Effective Date: January 1, 1999

CERTIFICATION

I, the undersigned, RUTH ANN ROSE, DEPUTY CITY CLERK of the City of Shoreline, Washington, certify that this is a true and correct copy of Ordinance No. 182

Subscribed and sealed this 15th day of December 1998.


RUTH ANN ROSE
DEPUTY CITY CLERK



City of Shoreline

17544 Midvale Avenue North
Shoreline, Washington 98133-4921
(206) 546-1700 ♦ FAX (206) 546-2200

Clerk's Receiving

No. 800

Date 12/22/98

R. A. Rose
ORD. 187

December 15, 1998

Jim Ritch
Deputy Superintendent
Seattle City Light
700 Fifth Avenue, Suite 3248
Seattle, WA 98104-5031

Dear Mr. Rich,

Attached is a certified copy of Ordinance No. 187 of the City of Shoreline which was passed by the City Council on December 14, 1998. I am forwarding this ordinance to you for acceptance by Seattle City Light.

Please obtain the appropriate authorized signature at the bottom of this letter acknowledging receipt of the ordinance, acceptance by Seattle City Light and of the terms of the franchise it grants and then return this letter to me within 60 days. If you have any questions, please contact Kristoff Bauer at 546-1297.

Sincerely,

Ruth Ann Rose
Deputy City Clerk

Attachment: Certified copy of Ordinance No. 187

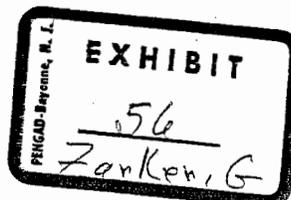
Gary Zarker
Signed

December 16, 1998
Date

Please print name:

GARY ZARKER
SEATTLE CITY LIGHT

C-18



SH 0740

APPENDIX D

APPENDIX

Main Entry: **im pose** Pronunciation Guide

Pronunciation: èm'pōz

Function: *verb*

Inflected Form(s): **-ed/-ing/-s**

Etymology: Middle French *imposer*, modification (influenced by *poser* to put, place) of Latin *imponere* to put upon, impose, deceive, cheat, from *in-*²*in-* + *ponere* to put, place -- more at POSE, POSITION

transitive verb

1 *obsolete* : **CHARGE, IMPUTE**

2 : to give or bestow (as a name or title) authoritatively or officially

3 a *obsolete* : to cause to be burdened : **SUBJECT** -- used with *to* **b** (1) : to make, frame, or apply (as a charge, tax, obligation, rule, penalty) as compulsory, obligatory, or enforceable <impose a duty on a city official> <the obligations imposed by international law -- *Encyc. Americana*> : **LEVY** <impose a tax on all unmarried men> : **INFLECT** <impose punishment upon a traitor> <flying imposes a heavy nervous strain on the individual -- H.G.Armstrong> : force one to submit to or come into accord with -- usually used with *on* or *upon* <moved the newspapers to impose a uniformity upon the written language -- Oscar Handlin> <impose their dictates on the smaller nations -- Vera M. Dean> <impose restraints upon the children> (2) : to establish forcibly <he imposed himself as leader> <impose law and order on a primitive people> <imposed a uniform organization over the whole of Lowland Britain -- L.D.Stamp> (3) : to make to prevail as a basic pattern, order, or quality <neoclassic styles were imposed on the landscape -- *American Guide Series: Arizona*> **c** *archaic* : to lay (as a charge) upon a person **d** : to bring into being : **CREATE, GENERATE** <the dangers and irritations imposed by many railroad grade crossings -- *American Guide Series: Minnesota*>

4 a *obsolete* : to lay (the hands) on in an ecclesiastical rite (as blessing or confirmation) **b** *archaic* : **SET, PLACE, PUT, DEPOSIT** **c** (1) : to arrange (type or plated pages) on an imposing stone preparatory to locking up in a chase; *sometimes* : to arrange and lock up (pages) (2) : to arrange (the component parts of a nonletterpress printing surface) in a similar manner

5 a : to force into the company or upon the attention of another <impose oneself upon others> **b** : to inflict by deception or fraud : pass off <impose fake documents upon a gullible public> <so long as imaginary events are not imposed upon the reader as historical evidence -- J.L.Clifford>

intransitive verb : to take usually unwarranted advantage of something <I was not formally invited to my friend's party and I would not wish to impose by going uninvited>

synonym see DICTATE

- **impose on or impose upon** **1 a** : to force oneself especially obnoxiously on (others) **b** *obsolete* : to encroach or infringe on : **INFRINGE** **2** : to take unwarranted advantage of : exploit a personal relationship with <got a reputation for imposing on friends for their time and money> : **ABUSE** <did not wish to impose upon what privileges he had> **3** : to practice deception on : **DECEIVE, DEFRAUD, CHEAT** <an attempt to impose on the good-natured tolerance of the public -- Roger Fry> <succeed in deceiving, and imposing upon, others -- George Meredith>

Citation format for this entry:

"impose." *Webster's Third New International Dictionary, Unabridged*. Merriam-Webster, 2002.
<http://unabridged.merriam-webster.com> (10 Feb. 2006).