Utility Franchises

- **Introduction**

In Washington, a utility that wishes to locate its facilities within a city's rights-of-way generally obtains a franchise from that city, which sets forth the terms under which those facilities are constructed, operated, relocated, and eventually removed. [1] Both state and federal law contain restrictions on a city's franchise authority, but these restrictions varying significantly, depending on the nature of the utility being regulated.

This Section of the Form Book addresses franchise forms applicable to a number of utilities operating within the public rights-of-way: sewers, water, cable, telecom, wireless, electrical, and various types of gas and liquid petroleum pipelines. The Section also presents information on railroad franchises, which would be applicable to railroad tracks that cross existing city rights-of-way, as opposed to the more common situation of the railroad's right-of-way existing prior to establishment of the city and its rights-of-way.

The topics addressed in franchises for the various types of utilities are largely the same (e.g., insurance requirements, indemnification, facility relocation, removal of facilities, etc.). The variations amongst the franchises relate primarily to the physical nature of the particular utility and the state or federal regulations governing that industry.

This Section presents four franchise forms. The first is a generalized franchise form, intended to be used for sewers, water, telecom, wireless, electrical, and railroad franchises. The form includes all paragraphs that are common to these franchises, and is accessed by clicking through from the appropriate, industry-specific user note, each of which sets out a brief overview of the franchising of that industry, any applicable alternate or additional paragraphs, the state and federal agencies regulating the industry, and a brief discussion of the applicable statutes.

The second form is a cable television franchise. Cable television differs from most other types of utilities in that the statutes governing cable television have preserved a significant role for local government. Local franchising authorities may oversee a number of aspects of the cable service, and the franchise form addresses the most common issues in franchising a cable television provider.

The third and fourth forms are model franchises for natural gas and for hazardous liquid pipelines, developed by the Municipal Research & Services Center for the Municipal Research Council under RCW 43.110.070. In addition to the standard franchise concerns, these forms address the environmental and life safety risks associated with such pipelines, and the utility's duty to comply with state and federal safety regulations.

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[1] There are exceptions to this statement. One example are service providers that can claim "an existing statewide grant to occupy the right of way," which are not required to obtain franchises. RCW 35.99.030; *see also, City of Auburn v. Qwest Corp*., 260 F.3d 1160 (2001).

General Franchise Authority

As stated by the Washington State Supreme Court in the 1936 case of *Neils v. City of Seattle*, 185 Wash. 269, 53 P.2d 848 (1936), "[t]he power to grant franchises is a sovereign power, resting in the state. It may be delegated by the state, but it is not within the powers of cities unless expressly delegated to them by the state." *Id.*, at 274-75 (citing *State ex rel. Spring Water Co. v. Monroe*, 40 Wash. 545, 82 P. 888; *Dolan v. Puget Sound Traction, Light & Power Co.*, 72 Wash. 343, 130 P. 353). The general rule in Washington, as stated in *General Telephone Co. of Northwest, Inc. v. City of Bothell*, 105 Wn.2d 579, 716 P.2d 879 (1986), is that a general grant of franchising authority does not automatically include the power to compel a utility to enter into a franchise. Consequently, one of the initial steps in drafting a franchise is to identify the specific statute, or statutes, that provide the delegation of the state's franchising authority and to determine whether that grant includes the power to compel a utility to enter into the franchise.

Franchise Adoption Requirements

In addition to the general requirements for the adoption of an ordinance or resolution, Code Cities, Second Class Cities, and Towns must also comply with the following statutory requirements in granting a franchise:

Towns:

> RCW 35.27.330
> Ordinances granting franchises — Requisites.
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> No ordinance or resolution granting any franchise for any purpose shall be passed by the council on the day of its introduction, nor within five days thereafter, nor at any other than a regular meeting, and no such ordinance or resolution shall have any validity or effect unless passed by the vote of at least three councilmen. The town council may require a bond in a reasonable amount from any persons and corporations obtaining a franchise from the town conditioned for the faithful performance of the conditions and terms of the franchise and providing a recovery on the bond in case of failure to perform the terms and conditions of the franchise.

Second Class Cities:

> RCW 35.23.251
> Ordinances granting franchises — Requisites.

No ordinance or resolution granting any franchise for any purpose shall be passed by the city council on the day of its introduction, nor for five days thereafter, nor at any other than a regular meeting nor without first being submitted to the city attorney.

No franchise or valuable privilege shall be granted unless by the vote of at least five members of the city council.

The city council may require a bond in a reasonable amount for any person or corporation obtaining a franchise from the city conditioned for the faithful performance of the conditions and terms of the franchise and providing a recovery on the bond in case of failure to perform the terms and conditions of franchise.

Code Cities

RCW 35A.47.040

Franchises and permits — Streets and public ways.

Every code city shall have authority to permit and regulate under such restrictions and conditions as it may set by charter or ordinance and 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 railroads and other routes and facilities for public conveyances, for poles, conduits, tunnels, towers and structures, pipes and wires and appurtenances thereof for transmission and distribution of electrical energy, signals and other methods of communication, for gas, steam and liquid fuels, for water, sewer and other private and publicly owned and operated facilities for public service. The power hereby granted shall be in addition to the franchise authority granted by general law to cities.

No ordinance or resolution granting any franchise in a code city for any purpose shall be adopted or passed by the city's legislative body on the day of its introduction nor for five days thereafter, nor at any other than a regular meeting nor without first being submitted to the city attorney, nor without having been granted by the approving vote of at least a majority of the entire legislative body, nor without being published at least once in a newspaper of general circulation in the city before becoming effective.

The city council may require a bond in a reasonable amount for any person or corporation obtaining a franchise from the city conditioned upon the faithful performance of the conditions and terms of the franchise and providing a recovery on the bond in case of failure to perform the terms and conditions of the franchise.

A code city may exercise the authority hereby granted, notwithstanding a contrary limitation of any preexisting charter provision.

Generally Applicable Case Law

The following is a small sample of the Washington state and federal case law relating to franchising. There are literally hundreds of cases that could be reasonably included in this section, but the cases listed below constitute a good starting point for research on franchising in Washington state.

City of Auburn v. Qwest Corp., 260 F.3d 1160 (2001).

> Discussion of who is responsible for the costs of relocating utility facilities located within a public right-of-way, including the relationship between the Federal Telecommunications Act of 1996, RCW Chapter 35.99, utility tariffs, Washington common-law, and local ordinances. Discussion of statewide grants of franchise.

Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton, 158 Wn.2d 506, 145 P.3d 371 (2006).

> "No damages for delay clause" in contract between city and contractor widening street held invalid as to delay caused by franchised utilities relocating their facilities. The franchisees were "acting for" city under RCW 4.24.360. City should look to franchisee for damages.

Olympic Pipeline Company v. City of Seattle, 437 F.3d 872 (2006).

> Provision of Olympic Pipeline's franchise with the City of Seattle imposing safety conditions beyond those required by state and federal regulators were preempted by the Federal Pipeline Safety Act.

City of Seattle v. Burlington Northern R. Co., 145 Wn.2d 661, 41 P.3d 1169 (2002).

> While this case deals primarily with the general topic of federal preemption in the area of railroad regulations, the Washington State Supreme Court also ruled on the legal status of franchises. While a franchise can be viewed as a contract between a city and a franchisee, the Court ruled that a franchise "is nonetheless an ordinance-that is, a law." *Id*., at 673.

General Telephone Co. of Northwest, Inc. v. City of Bothell, 105 Wn.2d 579, 716 P.2d 879 (1986).

> The general rule in Washington is that a city or town's inherent franchise authority does not include the power to compel a utility to enter into a franchise.

City of Lakewood v. Pierce County, 106 Wn. App. 63, 23 P.3d 1 (2001).

> RCW 35A.47.040, which authorizes cities to *grant* franchises, does not give cities the authority to *require* a franchise.

Note: RCW Chapter 35.99 does authorize a city to *require* telecommunications and cable television providers to obtain a franchise.