Ordinance No. 123110

Council Bill No. 116652

AN ORDINANCE relating to Seattle Public Utilities; authorizing the Director of Seattle Public Utilities to accept a franchise agreement with the City of Lake Forest Park, Washington for the operation of a water system within public rights-of-way of the City of Lake Forest Park; and ratifying and confirming certain prior acts.

CF No. _____

| | |
|---|---|
| Date Introduced: 9.21.09 | |
| Date 1st Referred: | To: (committee) Environment, Emergency Mgmt + Utilities |
| Date Re - Referred: | To: (committee) |
| Date Re - Referred: | To: (committee) |
| Date of Final Passage: 9-28-09 | Full Council Vote: 8-0 |
| Date Presented to Mayor: 9.29.09 | Date Approved: 9.30.09 |
| Date Returned to City Clerk: 10.1.09 | Date Published: 2 T.O. ___ F.T. ✓ |
| Date Vetoed by Mayor: | Date Veto Published: |
| Date Passed Over Veto: | Veto Sustained: |

# The City of Seattle - Legislative Department

Council Bill/Ordinance sponsored by: _____
Councilmember

## Committee Action:

9/22/09 passed 3-0 yes, Conlin, McIver, Burgess

9.28.09 Passed 8-0 (Excused: McIver)

This file is complete and ready for presentation to Full Council. Committee: RC 9/22/09
(initial/date)

LAW DEPARTMENT

| Law Dept. Review | OMP Review | City Clerk Review | Electronic Copy Loaded | Indexed |
|---|---|---|---|---|

Judy Gladstone/bh
SPULakeForestParkFranchise ORD
August 18, 2009
Version #2a

**ORDINANCE** 123110

AN ORDINANCE relating to Seattle Public Utilities; authorizing the Director of Seattle Public Utilities to accept a franchise agreement with the City of Lake Forest Park, Washington for the operation of a water system within public rights-of-way of the City of Lake Forest Park; and ratifying and confirming certain prior acts.

WHEREAS, the City of Seattle, through Seattle Public Utilities ("SPU") and its predecessors, has provided water service since 1963 to about 400 out-of-city retail customers who are now located within the incorporated boundaries of the City of Lake Forest Park; and

WHEREAS, SPU operates a water system within the City of Lake Forest Park's public rights-of-way that includes distribution infrastructure to retail customers as well as major regional transmission facilities; and

WHEREAS, the City of Lake Forest Park has requested a franchise agreement from SPU that includes a franchise fee to be collected from its residents by SPU through the water utility bills; and

WHEREAS, the City and SPU have reached agreement on the provisions contained in City of Lake Forest Park Ordinance No. 1001, adopted, August 13, 2009; NOW, THEREFORE,

**BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:**

Section 1. The Director of Seattle Public Utilities is authorized to accept a franchise agreement, a copy of which is included as Attachment 1, which has been granted by the City of Lake Forest Park pursuant to their Ordinance No. 1001, which grants the franchise for a water system in the City of Lake Forest Park for an initial term of three years, which automatically renews for three year terms if neither party provides notice of termination within six months of the expiration of the then current term.

Section 2. Any act consistent with the authority of this ordinance that is taken after passage of this ordinance, but prior to its effective date is hereby ratified and confirmed.



SLU COUNCIL CLERK

Section 3. This ordinance shall take effect and be in force thirty (30) days from and after its approval by the Mayor, but if not approved and returned by the Mayor within ten (10) days after presentation, it shall take effect as provided by Municipal Code Section 1.04.020.

Passed by the City Council the 28th day of September, 2009, and signed by me in open session in authentication of its passage this 28th day of September, 2009.

President _____ of the City Council

Approved by me this 30th day of September, 2009.

Gregory J. Nickels, Mayor

Filed by me this 1st day of October, 2009.

City Clerk

(Seal)

ATTACHMENT 1- Ordinance for Water System Franchise Agreement Approved by City of Lake Forest Park



LD COUNCIL CLERK

**ORDINANCE NO.**

**AN ORDINANCE OF THE CITY OF LAKE FOREST PARK, WASHINGTON, GRANTING THE CITY OF SEATTLE, ACTING THROUGH SEATTLE PUBLIC UTILITIES, A NON-EXCLUSIVE FRANCHISE TO OWN, CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR A WATER SYSTEM WITHIN PUBLIC RIGHTS-OF-WAY OF THE CITY OF LAKE FOREST PARK, 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... facilities for public conveyances, for poles, conduits, tunnels, towers and structures, pipes and wires and appurtenances thereof ... for water, sewer and other private and publicly owned and operated facilities for public service;" and

WHEREAS, The City of Seattle, acting through Seattle Public Utilities "SPU") is a municipal corporation that owns and operates a water system and related facilities located within and serving residents of the City of Lake Forest Park; and

WHEREAS, the City and SPU have determined that it is in the best interest of the residents that they serve to work cooperatively on long-range plans and to share necessary information; and

WHEREAS the City Council finds that it is in the best interests of the health, safety and welfare of the residents of the City to grant a non-exclusive franchise to SPU for the operation of a water system within the City's right-of-way, on the terms and conditions stated below; NOW, THEREFORE,

**THE CITY COUNCIL OF THE CITY OF LAKE FOREST PARK, WASHINGTON, DO ORDAIN AS FOLLOWS:**

**1. Definitions**. The following terms contained herein, unless otherwise indicated, shall be defined as follows:

1.1 City: The City of Lake Forest Park, 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 City Administrator or designee.

COUNCIL CLERK

1.4 Facilities: All pipes and appurtenances, access ways, pump stations, storage facilities, equipment, and supporting structures, located in the City's right-of-way, utilized by SPU in the operation of its activities.

1.5 Permittee: A person who has been granted a permit by the Permitting Authority, and District operating under Section 6 of this Franchise.

1.6 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.

1.7 Person: An entity or natural person.

1.8 Revenue: "Revenue" means income derived by SPU only from the sale of retail metered water to customers whose connections are within the City of Lake Forest Park. Revenue shall not include: late fees; impact or mitigation fees; any type of connection charges, general facilities charges, or local facilities charges; grants; contributed assets (CIAC); loans; income from legal settlements not related to water sales; income from cellular antenna leases; income from real property or real property sales; income from the sale of surplus equipment, tools or vehicles; interest income; penalties; hydraulic modeling fees; water system extension agreement (WSEA) fees and charges; income from street lights; labor, equipment and materials charges; income from the sale of bidders documents and plan sets; or any other fees and charges.

1.9 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, easement, and/or road right-of-way now or hereafter held or administered by the City of Lake Forest Park.

1.10 Relocation: As used herein shall mean to protect, support, temporarily disconnect, relocate or remove District facilities in the City right-of-way.

1.11 SPU "SPU" means Seattle Public Utilities, a department of the City of Seattle, a municipal corporation of the State of Washington.

CITY COUNCIL CLERK

2. **Franchise Granted**.

2.1 Pursuant to RCW 35A.47.040, the City hereby grants to SPU, its 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 SPU 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 a public water system, in, under, on, across, over, through, along or below the public right-of-way located in the City of Lake Forest Park.

2.3 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.

3. **Franchise Term**. Subject to the terms and conditions hereinafter set forth, the City grants to the District a franchise for a water supply distribution system. The initial term of the franchise shall be three (3) years commencing on the date of acceptance by SPU. At the expiration of the initial term and of each succeeding term, this franchise shall be extended for an additional term of three (3) years, unless either party gives the other written notice of intent to terminate, which notice may be given without cause, but shall be given at least six (6) months before the expiration date.

4. **Franchise Fee**. In consideration of the rights granted to SPU by this Agreement, SPU agrees:

4.1 To collect and distribute to the City a Franchise fee equal to 6% of Revenue generated from its operations within the City.

4.1.1 This Franchise fee shall be collected within 30 days of the Director of SPU accepting the franchise agreement.

4.1.2 Proceeds of the Franchise fee collected shall be distributed to the City no later than 30 days after the end of each calendar quarter (quarters ending at the end of March, June, September and December).

4.2 Should SPU be prevented by judicial or legislative action from collecting a Franchise fee on all or a part of the revenues, SPU shall be excused from the collection and distribution of that portion of the Franchise fee.

4.3 Should a court of competent jurisdiction declare, or a change in law make the Franchise fee invalid, in whole or in part, or should a court of competent jurisdiction hold that the collection of the Franchise fee by SPU is in violation of a pre-existing contractual obligation of SPU, then SPU's obligation to collect and distribute a Franchise fee to the City

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under this Section shall be terminated in accordance with and to the degree required to comply with such court action.

**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 rights-of-way 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. Such action(s) by the City shall not unreasonably affect or modify any portion of this agreement without the approval of SPU. Should SPU and City not be able to agree, they shall resolve the differences through Section 13 - Alternate Dispute Resolution.

**6. Right-of-Way Management.**

6.1 Permits Required.

6.1.1 Whenever SPU 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, and consistent with Section 6.6 of this Franchise. In no case shall any such work commence within any right-of-way without a permit, except as otherwise provided in this Ordinance.

6.2 Abandonment of SPU's Facilities. Any abandoned SPU facility above the surface shall be removed by SPU within a reasonable time. All necessary permits must be obtained prior to such work.

6.3 Restoration after Construction.

6.3.1 SPU 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. Restoration shall not require an improvement to a condition that substantially exceeds the condition prior to SPU's activities. 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. SPU agrees to promptly complete all restoration work and to promptly repair any damage caused by such work at its sole cost and expense.

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6.3.2 If it is determined that SPU has failed to restore the right-of-way in accordance with this Section, the City shall provide SPU with written notice including a description of actions the City believes necessary to restore the right-of-way.

6.4 Bonding Requirement. SPU, 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 Emergency Work, Permit Waiver. In the event of any emergency where any SPU facilities located in the right-of-way are broken or damaged, or if SPU'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, SPU shall immediately take any necessary emergency measures to repair, replace or remove its facilities without first applying for and obtaining a permit as required by this Franchise. However, this emergency provision shall not relieve SPU from later obtaining any necessary permits for the emergency work. SPU shall apply for the permits that would have been required and obtained prior to the emergency as soon as practical given the nature and duration of the emergency.

6.6 Excavations.

6.6.1 All work performed by SPU or its contractors shall be accomplished in a safe and workmanlike manner, and in a manner that will minimize interference with traffic and the use of adjoining property. SPU shall comply with applicable safety regulations during construction as required by ordinances of the City or the laws of the State of Washington.

6.6.2 SPU shall secure City rights-of-way permits to work in the public rights-of-way, including but not limited to Capital Improvement Program projects, water main repairs, and work involving excavation in the right-of-way. This would include disruption of all motorized and non-motorized travel portions of the right-of-way, including all surface water drainage facilities. In addition, SPU shall provide the City at least one (1) working day notice of its intent to commence work in the public right-of-way. For all routine operations, maintenance and repair work in the public rights-of-way such as flushing, painting hydrants, vegetation maintenance and work within existing chambers, no permit will be required.

6.6.3 If either party plans to excavate in the public rights-of-way, then upon a written request from the other, that party may share excavation upon mutually agreeable terms and conditions.



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6.7 Dangerous Conditions. Whenever Facilities or the operations of SPU cause or contribute to a condition that appears to endanger any person or substantially impair the use or lateral support of the adjoining right-of-way, public or private property, the Director may immediately inform SPU of the condition. SPU will immediately evaluate the condition and if SPU determines that a condition exists that causes endangerment to the public or impairment of the right-of-way SPU will mitigate the condition at no cost to the City. The resolution of the dangerous condition requires approval of SPU Manager and the Director before the work begins.

6.8 Relocation of System Facilities.

6.8.1 In accord with the following schedule, SPU agrees and covenants to protect, support, temporarily disconnect, relocate or remove from any right-of-way its Facilities when so required by the City to accommodate the completion of or as a result of a public project. As used in this Section, the term "public project" is a project included in the City adopted six-year Capital Improvement Program and as amended annually by the City Council.

| Age of SPU Facility | % of relocation by City | % of relocation by SPU |
|---|---|---|
| 10 years or less | 100% | 0% |
| 11 – 20 years | 50% | 50% |
| Over 20 years | 0% | 100% |

6.8.2 This Relocation requirement shall not apply to those larger Facilities that cannot reasonably be supported, disconnected, relocated or removed as set forth on Attachment A to this franchise, to be approved by both parties within 60 days of the District's adoption of this agreement. This attachment may be amended from time to time by the parties. If these Facilities are required to be moved in order to accommodate the completion of or as a result of a City project, the City shall pay 50% of the relocation cost.

For Relocations of single service lines (1½ inch or less), single fire hydrants, or blow-off assemblies, SPU shall pay the first $5000 of each and the City shall pay costs in excess of $5000. However, payments by SPU pursuant to this paragraph shall not exceed $25,000 per year.

6.8.3 All Facilities utilized for providing water service within SPU's service area and within the right-of-way shall be considered owned, operated and maintained by SPU.

6.8.4 If the City determines that a public project necessitates the Relocation or removal of SPU's existing facilities, the City shall:



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6.8.4.1 As soon as possible, but not less than one hundred eighty (180) days prior to the commencement of such project, City shall provide SPU with written notice requiring such relocation or removal; and

6.8.4.2 Provide SPU with copies of any plans and specifications pertinent to the requested relocation or removal and a proposed temporary or permanent relocation for SPU's Facilities.

6.8.4.3 After receipt of such notice and such plans and specifications, SPU shall make all reasonable efforts to complete relocation of its facilities according to the above cost sharing described in this Section.

6.8.5 SPU may, after receipt of written notice requesting relocation or removal of its facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise SPU in writing if any of the alternatives are suitable to accommodate the work that necessitates the relocation of the facilities. If so requested by either party, SPU or City shall submit additional information to assist the other party in making such evaluation. The City shall give each alternative proposed by SPU full and fair consideration and if appropriate, state why SPU's proposed alternatives are not satisfactory. In the event the City and SPU ultimately do not agree on a reasonable alternative, SPU and City shall attempt to resolve the relocation through Section 13 - Alternate Dispute Resolution.

6.8.6 If the City determines that SPU's facilities must be protected, supported, temporarily or permanently disconnected, relocated or removed from the right-of-way, City shall reimburse SPU all costs as submitted and verified by SPU within forty-five (45) days of completion of the relocation or removal by SPU in accord with paragraph 6.8.1 and 6.8.2 herein.

6.8.7 The provisions of this Section 6.8 shall in no manner preclude or restrict SPU from making any arrangements it may deem appropriate when responding to a request for relocation of its Facilities by any person or entity other than the City.

## 7. Planning Coordination.

7.1 Growth Management. The parties agree, as follows, to participate in the development of, and reasonable updates to, the each other's planning documents:



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7.1.1 For SPU's service within the City limits, SPU will participate in a cooperative effort with the City to develop a Comprehensive Plan Utilities Element that meets the requirements described in RCW 36.70A.070(4).

7.1.2 SPU will participate in a cooperative effort with the City to ensure that the Utilities Element of the City's Comprehensive plan is accurate as it relates to SPU's operations and is updated to ensure continued relevance at reasonable intervals.

7.1.3 SPU shall submit information related to the general location, proposed location, and capacity of all existing and proposed Facilities within the City as requested by the Director within a reasonable time, not exceeding sixty (60) days from receipt of a written request for such information, provided that such information is in SPU's possession, or can be reasonably developed from the information in SPU's possession.

7.1.4 SPU will update information provided to the City under this Section whenever there are major changes in SPU's system plans for the City.

7.1.5 The City will provide information relevant to SPU's operations within a reasonable period of written request to assist SPU in the development or update of its Comprehensive Water System Plan; provided that such information is in the City's possession, or can be reasonably developed from the information in the City's possession.

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

7.2.1 Annually, SPU shall provide the City with a schedule of its planned capital improvements, which may affect the right-of-way for that year;

7.2.2 Annually, the City shall provide SPU with a schedule of its planned capital improvements which may affect the right-of-way for that year including but not limited to street overlays and repairs, storm drainage improvements and construction, and all other right-of-way activities that could affect SPU capital improvements and infrastructure.

7.2.3 SPU shall meet with the City, other franchisees and users of the right-of-way, as necessary, to schedule and coordinate construction activities.



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7.2.4 All construction locations, activities, and schedules shall be coordinated, to minimize public inconvenience, disruption, or damages.

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

7.4 Maps and Records. Without charge to either party, both parties agree to provide each other 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 or SPU, and upon request, in hard copy plan form used by City or SPU. City and SPU agree to maintain confidentiality of any and all information received to the extent necessary to meet Homeland Security objectives.

**8. Indemnification.**

8.1 SPU 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, attorney's fees, or liability to any person, arising from or incidental to SPU's exercise of rights and privileges granted by this Franchise, including claims by SPU's own employees to which SPU might otherwise be immune under Title 51 RCW, arising from personal injury or damage to property allegedly due to the negligent or intentional acts or omissions of SPU, its agents, servants, officers or employees in performing activities authorized by this Franchise. This covenant of indemnification shall include, but not be limited by this reference, to claims against the City arising as a result of the acts or omissions of SPU, its agents, servants, officers or employees except for claims for injuries and damages caused in whole or in part by the sole negligence of the City. If final judgment is rendered against the City, its elected officials, employees, agents, and volunteers, or any of them, SPU shall satisfy the same. The City may appear in any proceeding it deems necessary to protect the City's or the public's interests.

8.2 Inspection or acceptance by the City of any work performed by SPU 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 settled prior to the culmination of any litigation or the institution of any litigation.

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8.3 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 SPU and the City, its officers, employees and agents, SPU's liability hereunder shall be only to the extent of SPU's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes SPU's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Franchise.

8.4 The City hereby releases and agrees to indemnify and hold harmless SPU, its elected officials, employees, agents, and volunteers from any and all claims, costs, judgments, awards or liability to any person arising from SPU's compliance with this Agreement.

8.5 The City hereby releases and agrees to indemnify, defend and hold harmless SPU, its elected officials, employees, agents and volunteers from any and all claims, costs, judgments, awards or liability to any person arising from City's decision to issue development permits based on accurate information on fire flow and water availability provided by SPU or the City's enforcement of the International Fire Code.

**9. <u>Insurance</u>.**

9.1. Grantee shall procure and maintain for the duration of the franchise, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to Grantee, its agents, representatives or employees. Grantee shall provide a insurance endorsement, naming the Grantor as an additional insured, to the City for its inspection prior to the adoption of this franchise ordinance, and such endorsement shall evidence a policy of insurance that includes:

9.1.1. Automobile Liability insurance with limits no less than $1,000,000 Combined Single Limit per occurrence for bodily injury and property damage; and

9.1.2. Commercial General Liability insurance, written on an occurrence basis with limits no less than $1,000,000 combined single limit per occurrence and $2,000,000 aggregate for personal injury, bodily injury and property damage. Coverage shall include but not be limited to: blanket contractual; products and completed operations; broad form property damage; explosion, collapse and underground (XCU); and employer's liability.



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9.2. The Grantee may satisfy the requirements of this section by a self-insurance program or membership in an insurance pool providing coverage substantially the same as set forth above.

**10. Enforcement.**

10.1 Both City and SPU reserve the right to revoke and terminate this Franchise in the event of a substantial violation or breach of its terms and conditions.

10.2 A substantial violation or breach by City or by SPU shall include, but shall not be limited to, the following:

10.2.1 An uncured violation of any material provision of this Franchise,

10.2.2 An intentional evasion or knowing attempt by either party to evade any material provision of this Franchise or practice of any fraud or deceit upon SPU or upon the City;

10.2.3 Failure to provide the services specified in the Franchise;

10.2.4 Misrepresentation of material fact during negotiations relating to this Franchise or the implementation thereof;

10.2.5 An uncured failure to pay fees associated with this Franchise; and

10.2.6 Changes in existing City regulations or ordinances or new regulations or ordinances that materially change the interpretation or application of provisions in this agreement.

10.3 No violation or breach shall occur which is without fault of SPU or the City, or which is as a result of circumstances beyond SPU's or the City's reasonable control. Neither SPU, nor the City, shall be excused by economic hardship nor by nonfeasance or malfeasance of its directors, officers, agents or employees.

10.4 Except in the case of termination pursuant to *Paragraph 10.1* of this Franchise, prior to any termination or revocation, the City, or SPU, 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 sixty (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 SPU 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

CITY COUNCIL CLERK

default and may terminate this Agreement in accord with this Section, which declaration must be in writing.

**11. 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:

Director, Seattle Public Utilities
Seattle Municipal Tower
700 Fifth Avenue, 49th Floor
Seattle, WA, 98104-5004
Phone:_____
Fax: _____

City Administrator
City of Lake Forest Park
17425 Ballinger Way NE
Lake Forest Park, WA 98155
Phone: (206) 368-5440
Fax: (206) 957-2820

**12. 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.

**13. 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 may 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.

**14. 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.

**15. Survival**. All of the provisions, conditions and requirements of Sections 6.1 Permits Required, 6.2 Abandonment Of SPU's Facilities, 6.3 Restoration After Construction, 6.6 Excavations, 6.7 Dangerous Conditions, 6.8 Relocation Of System Facilities, and 8 Indemnification, of this Franchise shall be in addition to any and all other obligations and liabilities SPU may have to the City at common law, by statute, or by contract, and shall survive the City's Franchise to SPU 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 SPU and all privileges, as well as all obligations and liabilities of SPU shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever SPU is named herein.

**16. 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



CITY COUNCIL CLERK

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.

**17.** **Directions to City Clerk**. The City Clerk is hereby authorized and directed to forward certified copies of this Ordinance to SPU. SPU 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 SPU in this ordinance.

**18.** **Publication**. In accord with state law, this ordinance shall be published in full by the City.

**19.** **Effective Date**. This ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect five (5) days after passage and publication of an approved summary thereof consisting of the title.

PASSED BY A MAJORITY VOTE of the members of the City of Lake Forest Park City Council this 8th day of January 2009.

APPROVED:

_____

Dwight A. Thompson, Mayor *pro tempore*

ATTESTED:

_____

Susan Stine, City Clerk

Seattle Public Utilities

By: _____

Ray Hoffman, Acting Director

Date: _____

COUNCIL CLERK

*Mayor*
David R. Hutchinson

17425 Ballinger Way NE
Lake Forest Park, WA 98155-5556
Telephone: 206-368-5440
Fax: 206-364-6521
E-mail: cityhall@ci.lake-forest-park.wa.us
www.cityoflfp.com

CITY OF LAKE FOREST PARK
INCORPORATED 1961

*Councilmembers*
Don Fiene
Alan S. Kiest
Sandy Koppenol
Catherine Stanford
Ed Sterner
Dwight A. Thompson
Donovan Tracy

August 25, 2009

Mr. Ray Hoffman
Acting Director
Seattle Public Utilities
Seattle Municipal Tower
700 Fifth Avenue, Suite 4900
Seattle, WA 98124-4018

Dear Mr. Hoffman:

A certified copy of Ordinance 1001, An Ordinance of the City of Lake Forest Park, Washington, Granting the City of Seattle, Acting through Seattle Public Utilities, a Non-Exclusive Franchise to Own, Construct, Maintain, Operate, Replace and Repair a Water System within Public Rights-of-Way of the City of Lake Forest Park, Washington, is enclosed for your signature. An envelope is also enclosed for your convenience in returning the signed agreement.

A second certified copy of Ordinance 1001 is enclosed for your records.

Sincerely,

Susan Stine
City Clerk

Enclosures – 3

*Mayor*
David R. Hutchinson

17425 Ballinger Way NE
Lake Forest Park, WA 98155-5556
Telephone: 206-368-5440
Fax: 206-364-6521
E-mail: cityhall@ci.lake-forest-park.wa.us
www.cityoflfp.com

CITY OF LAKE FOREST PARK
INCORPORATED 1961

*Councilmembers*
Don Fiene
Alan S. Kiest
Sandy Koppenol
Catherine Stanford
Ed Sterner
Dwight A. Thompson
Donovan Tracy

I, Susan Stine, do hereby certify that the attached document is a full and true copy of ORDINANCE 1001, AN ORDINANCE OF THE CITY OF LAKE FOREST PARK, WASHINGTON, GRANTING THE CITY OF SEATTLE, ACTING THROUGH SEATTLE PUBLIC UTILITIES, A NON-EXCLUSIVE FRANCHISE TO OWN, CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR A WATER SYSTEM WITHIN PUBLIC RIGHTS-OF-WAY OF THE CITY OF LAKE FOREST PARK, WASHINGTON, as adopted.

Susan Stine, City Clerk
City of Lake Forest Park, Washington

August 25, 2009

FILED
CITY OF SEATTLE
09 OCT -9 PM 4:21
CITY CLERK

**ORDINANCE NO. 1001**

**AN ORDINANCE OF THE CITY OF LAKE FOREST PARK, WASHINGTON, GRANTING THE CITY OF SEATTLE, ACTING THROUGH SEATTLE PUBLIC UTILITIES, A NON-EXCLUSIVE FRANCHISE TO OWN, CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR A WATER SYSTEM WITHIN PUBLIC RIGHTS-OF-WAY OF THE CITY OF LAKE FOREST PARK, WASHINGTON.**

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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... facilities for public conveyances, for poles, conduits, tunnels, towers and structures, pipes and wires and appurtenances thereof ... for water, sewer and other private and publicly owned and operated facilities for public service;" and

WHEREAS, The City of Seattle, acting through Seattle Public Utilities "SPU") is a municipal corporation that owns and operates a water system and related facilities located within and serving residents of the City of Lake Forest Park; and

WHEREAS, the City and SPU have determined that it is in the best interest of the residents that they serve to work cooperatively on long-range plans and to share necessary information; and

WHEREAS the City Council finds that it is in the best interests of the health, safety and welfare of the residents of the City to grant a non-exclusive franchise to SPU for the operation of a water system within the City's right-of-way, on the terms and conditions stated below; NOW, THEREFORE,

**THE CITY COUNCIL OF THE CITY OF LAKE FOREST PARK, WASHINGTON, DO ORDAIN AS FOLLOWS:**

**1. Definitions**. The following terms contained herein, unless otherwise indicated, shall be defined as follows:

1.1 City: The City of Lake Forest Park, 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 City Administrator or designee.

1.4 Facilities: All pipes and appurtenances, access ways, pump stations,storage facilities, equipment, and supporting structures, located in the City's right-of-way, utilized by SPU in the operation of its activities.

1.5 Permittee: A person who has been granted a permit by the Permitting Authority, and District operating under Section 6 of this Franchise.

1.6 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.

1.7 Person: An entity or natural person.

1.8 Revenue: "Revenue" means income derived by SPU only from the sale of retail metered water to customers whose connections are within the City of Lake Forest Park. Revenue shall not include: late fees; impact or mitigation fees; any type of connection charges, general facilities charges, or local facilities charges; grants; contributed assets (CIAC); loans; income from legal settlements not related to water sales; income from cellular antenna leases; income from real property or real property sales; income from the sale of surplus equipment, tools or vehicles; interest income; penalties; hydraulic modeling fees; water system extension agreement (WSEA) fees and charges; income from street lights; labor, equipment and materials charges; income from the sale of bidders documents and plan sets; or any other fees and charges.

1.9 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, easement, and/or road right-of-way now or hereafter held or administered by the City of Lake Forest Park.

1.10 Relocation: As used herein shall mean to protect, support, temporarily disconnect, relocate or remove District facilities in the City right-of-way.

1.11 SPU "SPU" means Seattle Public Utilities, a department of the City of Seattle, a municipal corporation of the State of Washington.

2. **Franchise Granted**.

2.1 Pursuant to RCW 35A.47.040, the City hereby grants to SPU, its 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 SPU 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 a public water system, in, under, on, across, over, through, along or below the public right-of-way located in the City of Lake Forest Park.

2.3 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.

3. **Franchise Term**. Subject to the terms and conditions hereinafter set forth, the City grants to the District a franchise for a water supply distribution system. The initial term of the franchise shall be three (3) years commencing on the date of acceptance by SPU. At the expiration of the initial term and of each succeeding term, this franchise shall be extended for an additional term of three (3) years, unless either party gives the other written notice of intent to terminate, which notice may be given without cause, but shall be given at least six (6) months before the expiration date.

4. **Franchise Fee**. In consideration of the rights granted to SPU by this Agreement, SPU agrees:

4.1 To collect and distribute to the City a Franchise fee equal to 6% of Revenue generated from its operations within the City.

4.1.1 This Franchise fee shall be collected within 30 days of the Director of SPU accepting the franchise agreement.

4.1.2 Proceeds of the Franchise fee collected shall be distributed to the City no later than 30 days after the end of each calendar quarter (quarters ending at the end of March, June, September and December).

4.2 Should SPU be prevented by judicial or legislative action from collecting a Franchise fee on all or a part of the revenues, SPU shall be excused from the collection and distribution of that portion of the Franchise fee.

4.3 Should a court of competent jurisdiction declare, or a change in law make the Franchise fee invalid, in whole or in part, or should a court of competent jurisdiction hold that the collection of the Franchise fee by SPU is in violation of a pre-existing contractual obligation of SPU, then SPU's obligation to collect and distribute a Franchise fee to the City

under this Section shall be terminated in accordance with and to the degree required to comply with such court action.

**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 rights-of-way 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. Such action(s) by the City shall not unreasonably affect or modify any portion of this agreement without the approval of SPU. Should SPU and City not be able to agree, they shall resolve the differences through Section 13 - Alternate Dispute Resolution.

**6. Right-of-Way Management.**

6.1 Permits Required.

6.1.1 Whenever SPU 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, and consistent with Section 6.6 of this Franchise. In no case shall any such work commence within any right-of-way without a permit, except as otherwise provided in this Ordinance.

6.2 Abandonment of SPU's Facilities. Any abandoned SPU facility above the surface shall be removed by SPU within a reasonable time. All necessary permits must be obtained prior to such work.

6.3 Restoration after Construction.

6.3.1 SPU 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. Restoration shall not require an improvement to a condition that substantially exceeds the condition prior to SPU's activities. 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. SPU 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 SPU has failed to restore the right-of-way in accordance with this Section, the City shall provide SPU with written notice including a description of actions the City believes necessary to restore the right-of-way.

6.4 Bonding Requirement. SPU, 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 Emergency Work, Permit Waiver. In the event of any emergency where any SPU facilities located in the right-of-way are broken or damaged, or if SPU'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, SPU shall immediately take any necessary emergency measures to repair, replace or remove its facilities without first applying for and obtaining a permit as required by this Franchise. However, this emergency provision shall not relieve SPU from later obtaining any necessary permits for the emergency work. SPU shall apply for the permits that would have been required and obtained prior to the emergency as soon as practical given the nature and duration of the emergency.

6.6 Excavations.

6.6.1 All work performed by SPU or its contractors shall be accomplished in a safe and workmanlike manner, and in a manner that will minimize interference with traffic and the use of adjoining property. SPU shall comply with applicable safety regulations during construction as required by ordinances of the City or the laws of the State of Washington.

6.6.2 SPU shall secure City rights-of-way permits to work in the public rights-of-way, including but not limited to Capital Improvement Program projects, water main repairs, and work involving excavation in the right-of-way. This would include disruption of all motorized and non-motorized travel portions of the right-of-way, including all surface water drainage facilities. In addition, SPU shall provide the City at least one (1) working day notice of its intent to commence work in the public right-of-way. For all routine operations, maintenance and repair work in the public rights-of-way such as flushing, painting hydrants, vegetation maintenance and work within existing chambers, no permit will be required.

6.6.3 If either party plans to excavate in the public rights-of-way, then upon a written request from the other, that party may share excavation upon mutually agreeable terms and conditions.

6.7 Dangerous Conditions. Whenever Facilities or the operations of SPU cause or contribute to a condition that appears to endanger any person or substantially impair the use or lateral support of the adjoining right-of-way, public or private property, the Director may immediately inform SPU of the condition. SPU will immediately evaluate the condition and if SPU determines that a condition exists that causes endangerment to the public or impairment of the right-of-way SPU will mitigate the condition at no cost to the City. The resolution of the dangerous condition requires approval of SPU Manager and the Director before the work begins.

6.8 Relocation of System Facilities.

6.8.1 In accord with the following schedule, SPU agrees and covenants to protect, support, temporarily disconnect, relocate or remove from any right-of-way its Facilities when so required by the City to accommodate the completion of or as a result of a public project. As used in this Section, the term "public project" is a project included in the City adopted six-year Capital Improvement Program and as amended annually by the City Council.

| Age of SPU Facility | % of relocation by City | % of relocation by SPU |
|---|---|---|
| 10 years or less | 100% | 0% |
| 11 – 20 years | 50% | 50% |
| Over 20 years | 0% | 100% |

6.8.2 This Relocation requirement shall not apply to those larger Facilities that cannot reasonably be supported, disconnected, relocated or removed as set forth on Attachment A to this franchise, to be approved by both parties within 60 days of the District's adoption of this agreement. This attachment may be amended from time to time by the parties. If these Facilities are required to be moved in order to accommodate the completion of or as a result of a City project, the City shall pay 50% of the relocation cost.

For Relocations of single service lines (1½ inch or less), single fire hydrants, or blow-off assemblies, SPU shall pay the first $5000 of each and the City shall pay costs in excess of $5000. However, payments by SPU pursuant to this paragraph shall not exceed $25,000 per year.

6.8.3 All Facilities utilized for providing water service within SPU's service area and within the right-of-way shall be considered owned, operated and maintained by SPU.

6.8.4 If the City determines that a public project necessitates the Relocation or removal of SPU's existing facilities, the City shall:

6.8.4.1 As soon as possible, but not less than one hundred eighty (180) days prior to the commencement of such project, City shall provide SPU with written notice requiring such relocation or removal; and

6.8.4.2 Provide SPU with copies of any plans and specifications pertinent to the requested relocation or removal and a proposed temporary or permanent relocation for SPU's Facilities.

6.8.4.3 After receipt of such notice and such plans and specifications, SPU shall make all reasonable efforts to complete relocation of its facilities according to the above cost sharing described in this Section.

6.8.5 SPU may, after receipt of written notice requesting relocation or removal of its facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise SPU in writing if any of the alternatives are suitable to accommodate the work that necessitates the relocation of the facilities. If so requested by either party, SPU or City shall submit additional information to assist the other party in making such evaluation. The City shall give each alternative proposed by SPU full and fair consideration and if appropriate, state why SPU's proposed alternatives are not satisfactory. In the event the City and SPU ultimately do not agree on a reasonable alternative, SPU and City shall attempt to resolve the relocation through Section 13 - Alternate Dispute Resolution.

6.8.6 If the City determines that SPU's facilities must be protected, supported, temporarily or permanently disconnected, relocated or removed from the right-of-way, City shall reimburse SPU all costs as submitted and verified by SPU within forty-five (45) days of completion of the relocation or removal by SPU in accord with paragraph 6.8.1 and 6.8.2 herein.

6.8.7 The provisions of this Section 6.8 shall in no manner preclude or restrict SPU from making any arrangements it may deem appropriate when responding to a request for relocation of its Facilities by any person or entity other than the City.

## 7. Planning Coordination.

7.1 Growth Management. The parties agree, as follows, to participate in the development of, and reasonable updates to, the each other's planning documents:

7.1.1 For SPU's service within the City limits, SPU will participate in a cooperative effort with the City to develop a Comprehensive Plan Utilities Element that meets the requirements described in RCW 36.70A.070(4).

7.1.2 SPU will participate in a cooperative effort with the City to ensure that the Utilities Element of the City's Comprehensive plan is accurate as it relates to SPU's operations and is updated to ensure continued relevance at reasonable intervals.

7.1.3 SPU shall submit information related to the general location, proposed location, and capacity of all existing and proposed Facilities within the City as requested by the Director within a reasonable time, not exceeding sixty (60) days from receipt of a written request for such information, provided that such information is in SPU's possession, or can be reasonably developed from the information in SPU's possession.

7.1.4 SPU will update information provided to the City under this Section whenever there are major changes in SPU's system plans for the City.

7.1.5 The City will provide information relevant to SPU's operations within a reasonable period of written request to assist SPU in the development or update of its Comprehensive Water System Plan; provided that such information is in the City's possession, or can be reasonably developed from the information in the City's possession.

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

7.2.1 Annually, SPU shall provide the City with a schedule of its planned capital improvements, which may affect the right-of-way for that year;

7.2.2 Annually, the City shall provide SPU with a schedule of its planned capital improvements which may affect the right-of-way for that year including but not limited to street overlays and repairs, storm drainage improvements and construction, and all other right-of-way activities that could affect SPU capital improvements and infrastructure.

7.2.3 SPU shall meet with the City, other franchisees and users of the right-of-way, as necessary, to schedule and coordinate construction activities.

7.2.4 All construction locations, activities, and schedules shall be coordinated, to minimize public inconvenience, disruption, or damages.

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

7.4 Maps and Records. Without charge to either party, both parties agree to provide each other 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 or SPU, and upon request, in hard copy plan form used by City or SPU. City and SPU agree to maintain confidentiality of any and all information received to the extent necessary to meet Homeland Security objectives.

**8. Indemnification.**

8.1 SPU 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, attorney's fees, or liability to any person, arising from or incidental to SPU's exercise of rights and privileges granted by this Franchise, including claims by SPU's own employees to which SPU might otherwise be immune under Title 51 RCW, arising from personal injury or damage to property allegedly due to the negligent or intentional acts or omissions of SPU, its agents, servants, officers or employees in performing activities authorized by this Franchise. This covenant of indemnification shall include, but not be limited by this reference, to claims against the City arising as a result of the acts or omissions of SPU, its agents, servants, officers or employees except for claims for injuries and damages caused in whole or in part by the sole negligence of the City. If final judgment is rendered against the City, its elected officials, employees, agents, and volunteers, or any of them, SPU shall satisfy the same. The City may appear in any proceeding it deems necessary to protect the City's or the public's interests.

8.2 Inspection or acceptance by the City of any work performed by SPU 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 settled prior to the culmination of any litigation or the institution of any litigation.

8.3 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 SPU and the City, its officers, employees and agents, SPU's liability hereunder shall be only to the extent of SPU's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes SPU's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Franchise.

8.4 Except as provided otherwise herein, including but not limited to Sections 4.2- 4.3, the City hereby releases and agrees to indemnify and hold harmless SPU, its elected officials, employees, agents, and volunteers from any and all claims, costs, judgments, awards or liability to any person arising from SPU's compliance with this Agreement.

8.5 The City hereby releases and agrees to indemnify, defend and hold harmless SPU, its elected officials, employees, agents and volunteers from any and all claims, costs, judgments, awards or liability to any person arising from City's decision to issue development permits based on accurate information on fire flow and water availability provided by SPU or the City's enforcement of the International Fire Code.

**9. <u>Insurance</u>.**

9.1. Grantee shall procure and maintain for the duration of the franchise, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to Grantee, its agents, representatives or employees. Grantee shall provide a insurance endorsement, naming the Grantor as an additional insured, to the City for its inspection prior to the adoption of this franchise ordinance, and such endorsement shall evidence a policy of insurance that includes:

9.1.1. Automobile Liability insurance with limits no less than $1,000,000 Combined Single Limit per occurrence for bodily injury and property damage; and

9.1.2. Commercial General Liability insurance, written on an occurrence basis with limits no less than $1,000,000 combined single limit per occurrence and $2,000,000 aggregate for personal injury, bodily injury and property damage. Coverage shall include but not be limited to: blanket contractual; products and completed operations; broad form property damage; explosion, collapse and underground (XCU); and employer's liability.

9.2. The Grantee may satisfy the requirements of this section by aself-insurance program or membership in an insurance pool providing coverage substantially the same as set forth above.

**10. Enforcement.**

10.1 Both City and SPU reserve the right to revoke and terminate this Franchise in the event of a substantial violation or breach of its terms and conditions.

10.2 A substantial violation or breach by City or by SPU shall include, but shall not be limited to, the following:

10.2.1 An uncured violation of any material provision of this Franchise,

10.2.2 An intentional evasion or knowing attempt by either party to evade any material provision of this Franchise or practice of any fraud or deceit upon SPU or upon the City;

10.2.3 Failure to provide the services specified in the Franchise;

10.2.4 Misrepresentation of material fact during negotiations relating to this Franchise or the implementation thereof;

10.2.5 An uncured failure to pay fees associated with this Franchise; and

10.2.6 Changes in existing City regulations or ordinances or new regulations or ordinances that materially change the interpretation or application of provisions in this agreement.

10.3 No violation or breach shall occur which is without fault of SPU or the City, or which is as a result of circumstances beyond SPU's or the City's reasonable control. Neither SPU, nor the City, shall be excused by economic hardship nor by nonfeasance or malfeasance of its directors, officers, agents or employees.

10.4 Except in the case of termination pursuant to *Paragraph 10.1* of this Franchise, prior to any termination or revocation, the City, or SPU, 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 sixty (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 SPU 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 and may terminate this

Agreement in accord with this Section, which declaration must be in writing.

**11. 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:

Director, Seattle Public Utilities
Seattle Municipal Tower
700 Fifth Avenue, 49th Floor
Seattle, WA, 98104-5004
Phone:_____
Fax:_____

City Administrator
City of Lake Forest Park
17425 Ballinger Way NE
Lake Forest Park, WA 98155
Phone: (206) 368-5440
Fax: (206) 957-2820

**12. 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.

**13. 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 may 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.

**14. 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.

**15. Survival**. All of the provisions, conditions and requirements of Sections 6.1 Permits Required, 6.2 Abandonment Of SPU's Facilities, 6.3 Restoration After Construction, 6.6 Excavations, 6.7 Dangerous Conditions, 6.8 Relocation Of System Facilities, and 8 Indemnification, of this Franchise shall be in addition to any and all other obligations and liabilities SPU may have to the City at common law, by statute, or by contract, and shall survive the City's Franchise to SPU 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 SPU and all privileges, as well as all obligations and liabilities of SPU shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever SPU is named herein.

**16. 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.

**17.** **Directions to City Clerk**. The City Clerk is hereby authorized and directed to forward certified copies of this Ordinance to SPU. SPU 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 SPU in this ordinance.

**18.** **Publication**. In accord with state law, this ordinance shall be published in full by the City.

**19.** **Effective Date**. This ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, and shall take effect five (5) days after passage and publication of an approved summary thereof consisting of the title.

PASSED BY A MAJORITY VOTE of the members of the City of Lake Forest Park City Council this 13th day of August 2009.

APPROVED:

David R. Hutchinson, Mayor

ATTESTED:

Susan Stine, City Clerk

**Seattle Public Utilities**

By: _____
Ray Hoffman, Acting Director

Date: Oct 1, 2009

FILED
CITY OF SEATTLE
09 OCT -9 PM 4:22
CITY CLERK

Judi Gladstone/bh
SPU, Lake Forest Park Franchise Agreement, ORD
8-18-09
Version #5

Form revised May 26, 2009

# FISCAL NOTE FOR NON-CAPITAL PROJECTS

| Department: | Contact Person/Phone: | DOF Analyst/Phone: |
|---|---|---|
| Seattle Public Utilities | Judi Gladstone 684-4642 | John McCoy 615-0768 |

**Legislation Title:**
AN ORDINANCE relating to Seattle Public Utilities; authorizing the Director of Seattle Public Utilities to accept a franchise agreement with the City of Lake Forest Park, Washington for the operation of a water system within public rights-of-way of the City of Lake Forest Park; and ratifying and confirming certain prior acts.

- **Summary of the Legislation:**
  The proposed legislation would authorize the Director of Seattle Public Utilities (SPU) to sign a franchise agreement with the City of Lake Forest Park for SPU to operate a water system within the City of Lake Forest Park right-of-way.

- **Background:** *(Include brief description of the purpose and context of legislation and include record of previous legislation and funding history, if applicable):*

  Since the early 1960s, Seattle Public Utilities and its predecessors have served about 400 out-of-city retail customers in what is now the City of Lake Forest Park. The customers are primarily residential, in an area bounded approximately by NE 145th St., 35th Ave. NE, NE 160th St. and Lake Washington. They currently pay the out-of-city water rate (schedule WOR). The City of Lake Forest Park annexed this area in 1994, and in October 2008, requested that SPU enter into a formal agreement to operate in its rights-of-way.

  This ordinance gives SPU the authority to enter into a franchise agreement that includes terms of operation within Lake Forest Park city limits and establishes a six percent franchise fee, similar to the fee charged to residents of Shoreline under that franchise agreement. A separate ordinance changes rate definitions to include the Lake Forest Park residents in the Shoreline water rates (schedule WAR). The franchise agreement would also require SPU to pay the collected franchise fee revenue to the City of Lake Forest Park. The franchise agreement is for an initial three-year term and will be automatically renewed for additional three-year terms at the conclusion of each term unless either of the parties gives notice of termination six months prior to its expiration.

  Once the franchise agreement is effective, the City of Lake Forest Park will no longer pay fire hydrant charges pursuant to a trial court ruling in the Lane case (which was not appealed) that stated entities with certain franchise agreement terms were held harmless for these costs.

  The franchise agreement also contains cost-sharing provisions related to relocation of SPU infrastructure required as a result of right-of-way improvement projects initiated by the City of Lake Forest Park. SPU does not currently plan to move or replace any infrastructure in the



I.D. COUNCIL CLERK

agreement area. However, if in the future infrastructure needs to be moved, the City of Lake Forest Park agrees to share water infrastructure relocation costs under the following schedule:

Asset age 0-10 years – paid entirely by the City of Lake Forest Park
Asset age 11-20 years – costs split 50%-50% with SPU
Asset age over 21 years – paid entirely by SPU.

- *Please check one of the following:*

____ **This legislation does not have any financial implications.** (*Stop here and delete the remainder of this document prior t o saving and printing.)*

__X__ **This legislation has financial implications.** *(Please complete all relevant sections that follow.)*

***Appropriations:*** *This table should reflect appropriations that are a direct result of this legislation. In the event that the project/programs associated with this ordinance had, or will have, appropriations in other legislation, please provide details in the Notes section below.*

| Fund Name and Number | Department | Budget Control Level* | 2009 Appropriation | 2010 Anticipated Appropriation |
|---|---|---|---|---|
| | | | | |
| | | | | |
| **TOTAL** | | | | |

**See budget book to obtain the appropriate Budget Control Level for your department.*

**Anticipated Revenue/Reimbursement: Resulting From This Legislation:** *This table should reflect revenues/reimbursements that are a direct result of this legislation. In the event that the issues/projects associated with this ordinance/resolution have revenues or reimbursements that were, or will be, received because of previous or future legislation or budget actions, please provide details in the Notes section below the table.*

| Fund Name and Number | Department | Revenue Source | 2009 Revenue | 2010 Revenue |
|---|---|---|---|---|
| Water Fund 43000 | Seattle Public Utilities | Water Service for Fire Protection | $(4,100) | $(17,500) |
| | | | | |
| **TOTAL** | | | $(4,100) | $ (17,500) |

*Notes*: Once the franchise agreement goes into effect, SPU will no longer bill the City of Lake Forest Park for public fire services (hydrants) and will lose that source of revenue. This revenue loss will have a trivial effect on water rates. Revenue changes due to the franchise fee are shown in the fiscal note for the rate-modification ordinance.

**Total Regular Positions Created, Modified, Or Abrogated Through This Legislation,**



COUNCIL CLERK

**Including FTE Impact:** *This table should only reflect the actual number of positions affected by this legislation. In the event that positions have been, or will be, created as a result of other legislation, please provide details in the Notes section below the table.*

| Position Title and Department | Position # for Existing Positions | Fund Name & # | PT/FT | 2009 Positions | 2009 FTE | 2010 Positions* | 2010 FTE* |
|---|---|---|---|---|---|---|---|
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| TOTAL | | | | | | | |

** 2010 positions and FTE are total 2010 position changes resulting from this legislation, not incremental changes. Therefore, under 2010, please be sure to include any continuing positions from 2009.*

***Notes:*** No additional FTEs will be required.

- **Do positions sunset in the future?** *(If yes, identify sunset date):*

  N/A

**Spending/Cash Flow:** *This table should be completed only in those cases where part or all of the funds authorized by this legislation will be spent in a different year than when they were appropriated (e.g., as in the case of certain grants and capital projects). Details surrounding spending that will occur in future years should be provided in the Notes section below the table.*

| Fund Name & # | Department | Budget Control Level* | 2009 Expenditures | 2010 Anticipated Expenditures |
|---|---|---|---|---|
| | | | | |
| TOTAL | | | | |

** See budget book to obtain the appropriate Budget Control Level for your department.*

***Notes:*** **N/A**

- **What is the financial cost of not implementing the legislation?** *(Estimate the costs to the City of not implementing the legislation, including estimated costs to maintain or expand an existing facility or the cost avoidance due to replacement of an existing facility, potential conflicts with regulatory requirements, or other potential costs if the legislation is not implemented.)*

  In the absence of this franchise agreement, required relocation costs would be paid entirely by SPU.

  The potential costs are unknown at this time since they arise only if the City of Lake Forest Park initiates a public improvement project and requests that SPU relocate the impacted infrastructure. The costs would depend on the scope of the improvement project and degree



COUNCIL CLERK

of infrastructure impacted by it. The current costs to relocate a 12" water main are approximately $425 per foot. There are approximately 3500 feet of 12" pipe within the City of Lake Forest Park, only a portion of which would be impacted by any one public improvement project.

- **Does this legislation affect any departments besides the originating department?** • *If so, please list the affected department(s), the nature of the impact (financial, operational, etc)., and indicate which staff members in the other department(s) are aware of this Bill.*
  No.

- **What are the possible alternatives to the legislation that could achieve the same or similar objectives?** *(Include any potential alternatives to the proposed legislation, such as reducing fee-supported activities, identifying outside funding sources for fee-supported activities, etc.)*

  No others were considered.

- **Is the legislation subject to public hearing requirements:** *(If yes, what public hearings have been held to date, and/or what plans are in place to hold a public hearing(s) in the future.)*

  No.

- **Other Issues** (*including long-term implications of the legislation*):

  None.

- **List attachments to the fiscal note below:** *(Please include headers with version numbers on all attachments, as well footers with the document's name (e.g., DOF Property Tax Fisc Att A)*



LD COUNCIL CLERK

# City of Seattle

Gregory J. Nickels, Mayor

**Office of the Mayor**

September 1, 2009

Honorable Richard Conlin
President
Seattle City Council
City Hall, 2nd Floor

Dear Council President Conlin:

I am pleased to transmit two proposed Council Bills that would authorize the Director of Seattle Public Utilities (SPU) to enter into a water service franchise agreement with the City of Lake Forest Park. This Bill would authorize SPU to sign a franchise agreement recently adopted by the Lake Forest Park City Council. It imposes a six percent franchise fee, to be paid to Lake Forest Park, and spells out how SPU and the City of Lake Forest Park will share the cost of any future infrastructure relocations. By approving this agreement, both jurisdictions are clear about their responsibilities. The second Council Bill, which is being transmitted concurrently with this one, moves the affected Lake Forest Park residents to the water rate schedule currently used in the City of Shoreline, starting in November. This action will allow SPU to collect the entire franchise fee revenue from Lake Forest Park ratepayers.

Since the 1960s, SPU and its predecessors have served about 400 retail customers in an area recently annexed by the City of Lake Forest Park. Last year, Lake Forest Park requested that SPU enter into a formal franchise agreement. This legislation complies with that request. Thank you for your consideration of this legislation. Should you have questions, please contact Judi Gladstone at 684-4642.

Sincerely,

GREG NICKELS
Mayor of Seattle

cc: Honorable Members of the Seattle City Council

600 Fourth Avenue, 7th Floor, P.O. Box 94749, Seattle, WA 98124-4749
Tel: (206) 684-4000, TDD: (206) 684-8811 Fax: (206) 684-5360, Email: mayors.office@seattle.gov
An equal employment opportunity, affirmative action employer. Accommodations for people with disabilities provided upon request.

COUNCIL CLERK

# STATE OF WASHINGTON – KING COUNTY

--ss.

245692 No.
CITY OF SEATTLE,CLERKS OFFICE

## Affidavit of Publication

The undersigned, on oath states that he is an authorized representative of The Daily Journal of Commerce, a daily newspaper, which newspaper is a legal newspaper of general circulation and it is now and has been for more than six months prior to the date of publication hereinafter referred to, published in the English language continuously as a daily newspaper in Seattle, King County, Washington, and it is now and during all of said time was printed in an office maintained at the aforesaid place of publication of this newspaper. The Daily Journal of Commerce was on the 12th day of June, 1941, approved as a legal newspaper by the Superior Court of King County.

The notice in the exact form annexed, was published in regular issues of The Daily Journal of Commerce, which was regularly distributed to its subscribers during the below stated period. The annexed notice, a

CT:123110 ORDINANCE

was published on

10/08/09

The amount of the fee charged for the foregoing publication is the sum of $ 113.20, which amount has been paid in full.

JENNIFER A. PATZER NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES OCT. 24, 2011

Subscribed and sworn to before me on 10/08/09

Notary public for the State of Washington,
residing in Seattle

# State of Washington, King County

## City of Seattle

**ORDINANCE 123110**

AN ORDINANCE relating to Seattle Public Utilities; authorizing the Director of Seattle Public Utilities to accept a franchise agreement with the City of Lake Forest Park, Washington for the operation of a water system within public rights-of-way of the City of Lake Forest Park; and ratifying and confirming certain prior acts.

WHEREAS, the City of Seattle, through Seattle Public Utilities ("SPU") and its predecessors, has provided water service since 1963 to about 400 out-of-city retail customers who are now located within the incorporated boundaries of the City of Lake Forest Park; and

WHEREAS, SPU operates a water system within the City of Lake Forest Park's public rights-of-way that includes distribution infrastructure to retail customers as well as major regional transmission facilities; and

WHEREAS, the City of Lake Forest Park has requested a franchise agreement from SPU that includes a franchise fee to be collected from its residents by SPU through the water utility bills; and

WHEREAS, the City and SPU have reached agreement on the provisions contained in City of Lake Forest Park Ordinance No. 1001, adopted, August 13, 2009; NOW, THEREFORE,

**BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:**

Section 1. The Director of Seattle Public Utilities is authorized to accept a franchise agreement, a copy of which is included as Attachment 1, which has been granted by the City of Lake Forest Park pursuant to their Ordinance No. 1001, which grants the franchise for a water system in the City of Lake Forest Park for an initial term of three years, which automatically renews for three year terms if neither party provides notice of termination within six months of the expiration of the then current term.

Section 2. Any act consistent with the authority of this ordinance that is taken after passage of this ordinance, but prior to its effective date is hereby ratified and confirmed.

Section 3. This ordinance shall take effect and be in force thirty (30) days from and after its approval by the Mayor, but if not approved and returned by the Mayor within ten (10) days after presentation, it shall take effect as provided by Municipal Code Section 1.04.020.

Passed by the City Council the 28th day of September, 2009, and signed by me in open session in authentication of its passage this 28th day of September, 2009.

Richard Conlin

President of the City Council

Approved by me this 30th day of September, 2009.

Gregory J. Nickels, Mayor

Filed by me this 5th day of October, 2009.

ATTACHMENT 1- Ordinance for Water System Franchise Agreement Approved by City of Lake Forest Park

See City Clerk for Attachment

Publication ordered by the City Clerk

Date of publication in the Seattle Daily Journal of Commerce, October 8, 2009.

10/8(245692)

# STATE OF WASHINGTON – KING COUNTY

--ss.

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