Franchise Issues after *Scoccolo*

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What’s a franchise anyway?

- A right granted by a government to use its streets for utility purposes.

(simple version)
Franchise in Legalese:

- Franchise “means the right granted by the state or a municipality to an existing corporation or to an individual to do certain things which a corporation or individual otherwise cannot do, such as the right to use a street or alley for a commercial or street railroad track, or to erect thereon poles and string wires for telegraph, telephone, or electric (con’t)
Legalese con’t:

- light purposes or to use the street or alley underneath the surface for water pipes, gas pipes or other conduits.”

And . . . a franchise is a contract

- “Franchises, whether statutory or by ordinance, have the legal status of contracts, binding with equal force, according to the terms thereof, upon the granting authority and the granted entity.”

- *Tukwila v. Seattle, 68 Wn.2d 611, 615, 414 P.2d 597 (1966).*
But, it is a contract that has aspects of “sovereignty” and common law:

- A grant, franchise, easement or other right . . . is subject to the police power of the sovereign . . . and unless expressly agreed to otherwise in the franchise the company must, at its expense, make such changes as the public convenience and necessity require.”

So... What if there’s no franchise?

- A: The same principles apply.

- “Under Washington common law... when the government allows a telecommunications company to place facilities in that right-of-way, the facilities’ presence is contingent on the company’s cooperation with maintenance and improvement of the streets.”

- City of Auburn, et. al. v. Qwest Corporation, 260 F.3d 1160, 1167 (9th Cir. 2001)
What are the basic principles that apply?

- **City has power** to force utility to move
- **Franchises are contracts** (and usually have specific notification provisions)
- **Utility must move at its own expense** (under common law and almost all utility franchise contracts)
- **City can’t foist off responsibility for moving utility onto contractor** (*Scoccolo*)
So . . . What’s the problem - Overhead:
and – Underground:
Are the franchise documents available?

- Yes, public disclosure act request will get franchise document.
- Many are available on a city’s web site.
- Asking for a copy may show that there is none – or they have expired. (Examples: Qwest in Tacoma; Qwest and PSE gas service in Seattle.)
What’s in a typical utility franchise? Example – PSE’s Renton franchise:

- **Term**: 15 years (2000 – 2015) p.2, § 2.2
- **Franchise rights granted** p. 2, § 2.3
- **Non-exclusive** p. 3 § 4
- **Undergrounding - WUTC tariffs** p.4 § 5.2
- **Relocation** at PSE expense p. 4 § 6.1
PSE’s Renton franchise - con’t:

- Potential conflict- other rights p. 7 § 6.5
- Indemnity  p. 15, § 15.1
- Insurance Notices p. 5 § 6.1 A & B + 6.4
- Insurance by PSE p. 17, § 16.6 (Beware policies and notice provisions)
PSE’s Renton franchise - con’t:

- **Franchise prevails** over other agreements p. 19, § 19 B
- **But, WUTC tariff prevails** p.20, § 19.3
- **Assignment by PSE**, but no assignment provided for City. p. 22, § 25
So ... does *Scoccolo* eliminate contractor responsibility to coordinate?

- **A: No.** Contract between City and contractor, however, needs to be clear about what responsibilities contractor has to plan, coordinate and notify.
  1. Specify plan for construction, timing and type of coordination in final contract;
  2. Require that contractor document each coordination with utilities;
  3. Require that city be notified of any delay with enough time for city to do something about it under franchise.
Can city delegate enforcement power to contractor?

- **A: No.**
- “Police and sovereign” powers noted above will not allow city to shift responsibility.
- After *Scoccolo*, courts are likely to see that shift of responsibility as an end-run around decision and statute.
- City alone retains power to force utility relocation.
Basic principles - again:

1. **City has power** to force utility to move.
2. **Franchises are contracts** (and usually have specific notification provisions).
3. **Utility must move at its own expense** (under common law and almost all utility franchise contracts).
4. **City can’t foist off responsibility** for moving utility onto contractor (*Scoccolo*).
5. **But planning, coordination and notice** may be required.