

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SCOTT KASEBURG, et al.,

Plaintiffs,

v.

PORT OF SEATTLE, et al.,

Defendants.

CASE NO. C14-0784 JCC

ORDER GRANTING PUGET
SOUND ENERGY'S MOTION FOR
SUMMARY JUDGMENT AND
KING COUNTY'S PETITION FOR
ATTORNEY FEES

This matter comes before the Court on Defendant Puget Sound Energy's (PSE) motion for summary judgment (Dkt. No. 143) and Defendant King County's petition for attorney fees (Dkt. No. 151). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS PSE's motion (Dkt. No. 143) and King County's petition (Dkt. No. 151) for the reasons explained herein.

I. PSE'S MOTION FOR SUMMARY JUDGMENT

The facts in this matter are well established. The Burlington Northern Santa Fe Railway Company (BNSF) previously operated a railroad through a right of way/railway corridor (the "corridor") along the eastern shore of Lake Washington. (Dkt. No. 83 at 3, 37-38.) In 2008, BNSF transferred the South Rail Line portion of the corridor to Defendants Port of Seattle (the "Port") and King County. (*Id.* at 40-41.) In 2009, BNSF quitclaimed its interests in the South Rail Line to the Port. (*Id.* at 41.) Subsequently, PSE paid \$13,339,821.21 to the Port for utility

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1 rights “over under, along, across and through” the corridor. (*Id.* at 42-43; Dkt. No. 123-1 at 2,
2 21.) On December 21, 2010, PSE recorded its “South Rail Line Easement.” (Dkt. No. 113-17 at
3 1.) This easement allegedly crosses Plaintiffs’ properties. (Dkt. No. 83 at 40-41.)

4 The “South Rail Line Easement” purports to grant PSE the right to “construct, operate,
5 maintain, repair, replace, improve, remove, enlarge, and use the Easement Area for one or more
6 utility systems for purposes of transmission, distribution and sale of electricity.” (Dkt. No. 113-
7 17 at 2.) This includes the right to construct “Overhead” and “Underground” facilities. (*Id.*) It
8 also grants PSE the right to maintain its “utility systems for purposes of transmission,
9 distribution, and sale of gas.” (*Id.*)

10 The Court has already held that the underlying “Corridor Easements,” which are again at
11 issue here and from which PSE’s easement derives, include “the exclusive right to possess and
12 control the corridor for certain incidental uses that are consistent with trail use and the operation
13 of a railroad.” (Dkt. No. 138 at 18.) PSE now argues that the activities included within its
14 electrical and gas utility rights are such incidental uses. The Court agrees.

15 “Historically in Washington, railroads are viewed as ‘public highway[s], created for
16 public purposes.’” *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, 121
17 Wash. App. 714, 732 (2004) *aff'd in part, rev'd in part*, 156 Wash. 2d 253, 126 P.3d 16 (2006)
18 (quoting *Puget Sound Elec. Ry. v. R.R. Comm'n*, 65 Wash. 75, 84 (1911)). The Court therefore
19 finds that because public highway easements may include gas and electrical utilities as incidental
20 uses, so too may railroad easements. *See State ex rel. York v. Bd. of Comm'rs of Walla Walla*
21 *Cty.*, 28 Wash. 2d 891, 898, 904 (holding that “there are numerous other purposes for which the
22 public ways way be used, such as for watermains, gas pipes, telephone and telegraph lines,” as
23 well as for “[p]oles and wires for carrying electric current”).

24 PSE’s easement is also explicitly subject to the Port’s use of the easement for purposes
25 related to railbanking, including trail use. (Dkt. No. 113-17 at 3, 6.) And it is also subject to the
26 reactivation of the railroad for interstate freight rail use. (*Id.* at 6.) Therefore, PSE’s requested

1 incidental uses are “consistent with trail use and the operation of a railroad.” (Dkt. No. 138 at
2 18); *see also Kansas E. R.R., Inc.--Abandonment Exemption--in Butler & Greenwood Ctys., KS*,
3 AB-563 (SUB 1X), 2006 WL 1516602, at *3 (June 1, 2006) (“Here, the plans for the dual use of
4 the right-of-way as both a trail and a utility corridor, and the use of the right-of-way for
5 agricultural purposes, are not inconsistent with the Trails Act because the County has explained
6 that the utility corridor will not interfere with any trail use and future rail use.”).

7 Plaintiffs’ arguments to the contrary are unavailing. They spend much of their response
8 attempting to reargue the Court’s decision that the Corridor Easements have been preserved. But
9 the Court has already addressed these arguments at length on multiple occasions, and will not do
10 so again. (*See* Dkt. Nos. 107, 138, and 142.) Plaintiffs also argue that PSE’s utility rights are not
11 an incidental use because they do not “further the railroad’s business as a transportation
12 company.” (Dkt. No. 150 at 11.) However, the case they cite, *Neitzel v. Spokane Int’l Ry. Co.*,
13 refers specifically to *abandoned* railroad easements. 80 Wash. 30, 34 (1914) (“Whether or not
14 there has been an abandonment depends upon the intention of the owner of the easement.”). The
15 Court has already explained on two occasions that the Corridor Easements were not abandoned.
16 (*See* Dkt. No. 107 at 8; Dkt. No. 138 at 10 n.4.) Moreover, the Washington Court of Appeals
17 ruled in *Kershaw* that incidental uses need not serve a direct railroad purpose, and specifically
18 affirmed utility rights as a permissible incidental use. *See* 121 Wash. App. at 731-32 (holding
19 that “a railroad may use its easement to conduct not only railroad-related activities, but also any
20 other incidental activities that are not inconsistent and do not interfere with the operation of the
21 railroad,” and including “poles and wires for carrying electric current” as permissible incidental
22 uses) (internal quotation marks omitted). Plaintiffs again argue that *Kershaw* was overruled or is
23 inapplicable, but the Court has already addressed these arguments. (*See* Dkt. No. 138 at 15-16.)

24 The Court therefore GRANTS PSE’s motion for summary judgment (Dkt. No. 143) and
25 finds that the activities included within its electrical and gas utility rights are permissible
26 incidental uses.

1 **II. KING COUNTY’S PETITION FOR ATTORNEY FEES**

2 The Court has already held that Plaintiffs must pay the reasonable expenses Defendant
3 King County incurred in bringing its motion to compel. (Dkt. No. 148 at 2.) Defendant King
4 County now petitions the Court to order Plaintiffs to pay a total of \$17,589.50. (Dkt. No. 141 at
5 2.) King County incurred attorney fees of \$15,484 in prosecuting its motion to compel. (Dkt. No.
6 152 at 2.) It also incurred an additional \$2,105.50 in preparing its fee petition. (*Id.* at 3.) “The
7 law is well established that, when fees are available to the prevailing party, that party may also
8 be awarded fees on fees.” *Brown v. Sullivan*, 916 F.2d 492, 497 (9th Cir. 1990) (quoting *General*
9 *Fed’n of Women’s Clubs v. Iron Gate Inn, Inc.*, 537 A.2d 1123, 1129–1130 (D.C. App. 1988)).

10 Reasonable attorney fees are calculated using the lodestar method, under which a court
11 “determines a reasonable fee by multiplying ‘the number of hours reasonably expended on the
12 litigation’ by ‘a reasonable hourly rate.’” *Marrocco v. Hill*, 291 F.R.D. 586, 588 (D. Nev. 2013)
13 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). King County’s attorneys charge
14 hourly rates of \$260 and \$375. (Dkt. No. 152 at 2.) The Court finds that these rates are
15 reasonable given the attorneys’ experience and prevailing local rates. (*Id.* at 2; Dkt. No. 153 at
16 2); *Getty Images (U.S.), Inc. v. Virtual Clinics*, No. C13-0626JLR, 2014 WL 1744522, at *3
17 (W.D. Wash. Apr. 29, 2014) (holding that hourly rates ranging from \$275 to \$465 are
18 “reasonable and sensible” and “commensurate with market rates”). King County’s attorneys
19 expended a total of 60 hours in prosecuting the motion to compel and preparing the fee petition.
20 (Dkt. No. 152 at 2-3.) The Court has inspected counsel’s activity logs, and finds that the hours
21 expended were reasonable. (Dkt. No. 152 at 6-8; Dkt. No. 153 at 2-3.)

22 Plaintiffs argue that defense counsel expended an unreasonable number of hours on this
23 matter. But Plaintiffs’ arguments are unsupported and unconvincing, and King County ably
24 rebuts them. (*See* Dkt. No. 156 at 2) (“King County’s motion required analysis of Plaintiffs’
25 inadequate discovery responses, attempts to secure cooperation without intervention from the
26 Court, research into controlling law, initial drafting, supporting declarations, review for

1 consistency with overall case strategy, and similar tasks in reply to Plaintiffs’ lengthy opposition,
2 and then again for King County’s fee petition.”). Moreover, Plaintiffs’ response brief was
3 submitted on December 14, 2015—six days after the deadline—without any explanation. (*See*
4 Dkt. No. 148 at 2) (ordering Plaintiffs to submit their response brief on or before December 8,
5 2015). Under Local Civil Rule 7(b)(2), this “may be considered by the court as an admission that the
6 motion has merit.”

7 The Court therefore GRANTS King County’s petition for attorney fees (Dkt. No. 151) in full.
8 Plaintiffs are ORDERED to pay King County’s reasonable expenses of \$17,589.50.

9 **III. CONCLUSION**

10 For the foregoing reasons, Defendant Puget Sound Energy’s motion for summary
11 judgment (Dkt. No. 143) and Defendant King County’s petition for attorney fees (Dkt. No. 151)
12 are hereby GRANTED.

13 DATED this 16th day of March 2016.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE