BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

CITY OF KENT, Petitioner, v. PUGET SOUND ENERGY, INC. Respondent. ……	)	DOCKET NO. UE-010778 (Consolidated)
CITY OF AUBURN, CITY OF BREMERTON, CITY OF DES MOINES, CITY OF FEDERAL WAY, CITY OF LAKEWOOD, CITY OF REDMOND, CITY OF RENTON, CITY OF SEATAC, AND CITY OF TUKWILA, Petitioners/Complainants, v. PUGET SOUND ENERGY, INC. Respondent. ……	)	DOCKET NO. UE-010911 (Consolidated) THIRD SUPPLEMENTAL ORDER: DECLARATORY ORDER ON MOTIONS FOR SUMMARY DETERMINATION

SYNOPSIS: *The Commission interprets Puget Sound Energy, Inc.'s tariff Schedule 71, and determines the applicability of the schedule to portions of various underground relocation projects in PSE's service territory.*

1 **PROCEEDINGS:** Docket No. UE-010778 concerns a Petition for Declaratory Relief filed by the City of Kent on May 29, 2001. Docket No. UE-010911 concerns a Complaint and Petition for Declaratory Relief filed by the cities of Auburn, Bremerton, Des Moines, Federal Way, Lakewood, Redmond, Renton, SeaTac, and Tukwila on June 21, 2001. The pleadings request that the Commission enter a declaratory order, or orders, establishing the respective rights and obligations of the cities and PSE in connection with PSE's administration of its Electric Tariff G,

Schedule 71, and that the Commission order other and further relief alleged to be appropriate under the facts and law asserted.

2 The Commission convened a joint prehearing conference in these dockets and in a related proceeding in Docket No. UE-010891 on April 23, 2001, in Olympia, Washington, before Administrative Law Judge Dennis J. Moss. Among other things, the Commission determined that Docket Nos. UE-010778 and UE-010911 should be consolidated, and established a procedural schedule. The Parties filed motions and cross-motions for summary determination, responses, and replies.

3 **PARTIES:** Michael L. Charneski, Attorney at Law, Woodinville, Washington, represents the City of Kent (Kent). Carol S. Arnold and Laura K. Clinton, Preston Gates Ellis LLP, Seattle, Washington, represent the Cities of Auburn, Bremerton, Des Moines, Federal Way, Lakewood, Renton, SeaTac, and Tukwila (Auburn, *et al.*). Kirsten Dodge and Bill Bue, Perkins Coie LLP, Bellevue, Washington, represent Puget Sound Energy (PSE or the Company). Mary Tennyson, Senior Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Staff).

4 **COMMISSION:** The Commission grants PSE's Cross-Motion for Summary Determination. The Commission denies the City of Kent's Motion for Summary Determination and denies Auburn, *et al.'s* Motion for Summary Determination.

MEMORANDUM

I. Background and Procedural History

5 The City of Kent filed a Petition for Declaratory Relief on May 29, 2001, in Docket No. UE-010778. The cities of Auburn, Bremerton, Des Moines, Federal Way, Lakewood, Redmond, Renton, SeaTac, and Tukwila filed a Complaint and Petition for Declaratory Relief in Docket No. UE-010911 on June 21, 2001. These pleadings raise issues concerning the interpretation and application of PSE's tariff Schedule 71—Conversion to Underground Service in Commercial Areas. Generally, the Parties dispute the scope of PSE's and the Cities' respective rights and obligations in connection with the relocation of certain overhead electric distribution facilities to underground locations, as the Cities undertake to widen and improve approximately

ten miles of Pacific Highway, also known as State Highway No. 99. Projects on other roadways also are involved.

6 The Commission convened a joint prehearing conference in these dockets and in a somewhat related proceeding in Docket No. UE-010891 on April 23, 2001, in Olympia, Washington, before Administrative Law Judge Dennis J. Moss. Based on discussions at the prehearing conference, the Commission found the pleadings present such common issues of fact and law that the consolidation of Docket Nos. UE-010778 and UE-010911 would provide significant efficiencies for the Commission and would promote the ends of justice.

7 Discussion at the prehearing conference also suggested that these proceedings might be amenable to resolution on motions for summary determination pursuant to WAC 480-09-426. Accordingly, a schedule was set for such process. On or before August 15, 2001, the Commission accepted for filing Petitioner City of Kent's Amended Motion for Summary Determination and the Cities' Motion for Summary Determination and Memorandum in Support. On September 5, 2001, PSE filed its Response and Cross-Motion for Summary Determination. Kent and the Cities filed Replies on September 18, 2001. The Parties presented oral argument before the Commission on October 11, 2001.

II. Discussion and Decision

A. Governing Statutes, Rules, and Tariffs

8 Schedule 71 of PSE's Electric Tariff G is attached as Appendix A to this Order.

9 The following statutory provisions and rules are most central to our discussion and decision:

> **RCW 80.01.040 General Powers and Duties of Commission.**
>
> The utilities and transportation commission shall:
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> * * *
>
> (3) Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility

> service or commodity to the public for compensation, and related activities; including, but not limited to, electrical companies . . . .
>
> **80.28.010 Duties as to rates, services, and facilities . . . .**
>
> (1) All charges made, demanded or received by any . . . electrical company . . . for . . . electricity . . . , or for any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient.
>
> (2) Every . . . electrical company . . . shall furnish and supply such service, instrumentalities and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable.
>
> (3) All rules and regulations issued by any . . . electrical company . . . affecting or pertaining to the sale or distribution of its product, shall be just and reasonable.
>
> **80.28.020 Commission to fix just, reasonable, and compensatory rates.**
>
> Whenever the commission shall find, after a hearing had upon its own motion, or upon complaint, that the rates or charges demanded, exacted, charged or collected by any . . . electrical company . . . for . . . electricity . . ., or in connection therewith, or that the rules, regulations, practices or contracts affecting such rates or charges are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of the law, or that such rates or charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall determine the just, reasonable, or sufficient rates, charges, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order.

10 RCW 34.05.413 establishes our authority to conduct adjudicatory proceedings. RCW 34.05.240 and WAC 480-09-230 establish our authority to enter declaratory orders and establish certain process related to our consideration of petitions for such relief.

11 WAC 480-09-426 provides that parties to an adjudication may file motions for summary determination. Pursuant to WAC 480-09-426(2), a party requesting summary determination must show that "the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor." The Commission considers motions for summary determination under "the standards applicable to a motion made under CR 56 of the civil rules for superior court." *Id.* The civil rules provide:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c). A material fact is one of such nature that it affects the outcome of the litigation. *Greater Harbor 2000 v. Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997).

B. Substantive Issues

1. Introduction.

12 The municipal parties and PSE dispute their respective rights and obligations when a city requests PSE to relocate its existing overhead facilities to underground facilities in connection with certain street improvement projects. The City of Kent has requested PSE to underground its facilities along the portion of Pacific Highway South that is within the City's Pacific Highway Improvement Project. Auburn, *et al.*, also have requested undergrounding of PSE's facilities along the portions of Pacific Highway South that are within their jurisdictions. PSE's tariff Schedule 71 governs because these projects involve underground placement of facilities in "commercial areas."

13 We begin with the observation that the pleadings and motions in this case are voluminous. The breadth of the issues argued is far wider than what is necessary to our resolution of the essential disputes. Much of the argument is devoted to discussion of what the parties contend *should* be explicit in PSE's tariff Schedule 71,

rather than to the more pertinent question of what Schedule 71 *does* explicitly provide. We focus our Order on the second question rather than the first. Argument concerning what *should* be in tariff Schedule 71 is a subject more properly considered in the context of a tariff proceeding, not in the context of this declaratory order proceeding.[1]

2. What Schedule 71 Permits and Requires Under the Facts at Hand.

14 It is important at the outset to distinguish PSE's obligation *to relocate* facilities, when a city's street improvement or other public works projects require existing facilities to be moved, from PSE's obligation *to convert* overhead facilities to underground.[2] PSE does not dispute the cities' contention that PSE is obligated as a matter of common law and contract *(i.e.*, PSE's franchise agreements with the cities) "to relocate existing facilities that are located in public rights-of-way to new locations for municipal purposes at PSE's expense." *PSE Answer/Motion at 9.* PSE argues, however, that when the question is not simply relocation, but relocation to underground, the parties' respective rights and obligations are determined not by common law or PSE's franchise agreements, but by Commission regulation.

15 With respect to relocation, *per se*, PSE states in its Answer/Motion that:

> this proceeding is not about whether PSE will relocate its existing overhead facilities that are currently located on city rights of way. PSE has offered to relocate its overhead facilities to new overhead locations to accommodate the Cities' road improvements along Pacific Highway South.

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[1] During the pendency of this case, PSE has made a general rate filing in Docket Nos. UE-011570/UG-011571 (consolidated). Among the issues that filing raises are the form and substance of Schedules 70 and 71, both of which concern the undergrounding of facilities. The Petitioners in Docket Nos. UE-010778 and UE-010911, and in related Docket Nos. UE-010891 and UE-011027, will have the opportunity to seek intervention and participation in the general rate case. Several of the municipal parties before us here have, in fact, already intervened in PSE's general rate proceeding. Nothing in this Order should be considered as indicative of what determinations we may make on matters of law and policy properly presented for our consideration in the context of Docket Nos. UE-011570/UG-011571 (consolidated).

[2] Albeit in the context of telecommunications facilities rather than electric distribution facilities, there is a useful discussion of this fundamental point in *City of Auburn, et al. v. Qwest Corp., 260 F.3d 1160, 2001 U.S. App. LEXIS 15518 (9th Cir. 2001).*

PSE Answer/Motion at 10. PSE does not dispute that it would bear 100 percent of the expense of relocating overhead facilities to other overhead facilities. The cities, however, do not want PSE to relocate its existing overheard facilities to new overhead locations. The cities want PSE to relocate its existing overhead facilities to underground locations, a far more involved and costly undertaking. There does not appear to be any actual dispute among the parties that PSE's obligation to relocate facilities to underground locations, and the allocation of costs and responsibilities associated with undergrounding, are matters governed by PSE's tariff Schedules 70 and 71. Schedule 71 is directly at issue in these dockets, there being no dispute that the facilities in question are in commercial areas.[3]

16 The cities contend that PSE is obligated to underground the facilities at issue if the requirements of Section 2 of Schedule 71, which establishes "Availability" criteria under the schedule, are met.[4] *Kent Motion at 6-7; Cities' Motion at 7-10.* Significantly, there is no dispute that the Availability requirements stated in Section 2 of Schedule 71 are satisfied with respect to the Pacific Highway projects. Thus, if the dispute here turned on the application of this single section of the tariff schedule, as the cities' arguments suggest, there would be little, if anything, for us to decide.

17 We are required, however, to consider not just Section 2 of Schedule 71, but the entire rate schedule. Filed and approved tariffs have the force and effect of state law and are analyzed in the same manner and following the same principles as govern the courts' consideration of statutes. *General Tel. Co. v. City of Bothell,* 105 Wn.2d 579, 585 (1986) In accordance with those principles, when confronted with disputes such as those present here, we must harmonize and give effect to all of the tariff's provisions. *King County v. Central Puget Sound Growth Management Hearings Board,* 91 Wn.App. 1 (Div. 1 March 2, 1998); *State ex rel. Royal v. Board of Yakima County Comm'rs,* 123 Wn.2d 451, 459, 869 P.2d 56 (1994) (quoting *Service Employees Int'l Union, Local 6 v. Superintendent of Pub. Instruction,* 104 Wn.2d 344, 348-49, 705 P.2d 776 (1985) (quoting *Washington State Human Rights Comm'n v. Cheney Sch. Dist. No. 30,* 97 Wn.2d 118, 121, 641 P.2d 163 (1982)). The cities' arguments concerning Section 2 of Schedule 71 thus beg the question of the parties' respective rights and obligations vis-à-vis Schedule 71 considered as a whole.

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[3] Schedule 70 applies in areas that are "used exclusively for residential purposes."
[4] *See* Appendix A for the language of Section 2.

18 Schedule 71 does not require PSE to convert overhead facilities to underground facilities under any and all circumstances, whenever PSE is requested to do so by a city. Schedule 71 imposes a number of requirements both on PSE and on a city that seeks to have PSE's existing overhead facilities placed underground. Again, there is no dispute that the availability requirements of Section 2 of Schedule 71 are met. The question before us is whether other requirements under Schedule 71 also are met. The key substantive provisions of Schedule 71 that we must consider include Section 3, which concerns contracting and financial arrangements, and Section 4, which concerns "Operating Rights."

19 We focus initially on that portion of Section 3 of Schedule 71 that provides (emphasis supplied):

> [t]he Company will provide and install within the Conversion Area a Main Distribution System upon the following terms:
>
> a. The Company and the municipality having jurisdiction of the Conversion Area or the owners of all real property to be served from the Main Distribution System [or their agent] shall enter into a written contract . . . for the installation of such systems, which Contract shall be consistent with this schedule and shall be in a form satisfactory to the Company.

20 The contracts that PSE has tendered to the various cities include provisions that the cities contend are not consistent with Schedule 71. If we were to agree with the cities, then PSE could not insist on such terms as a condition of undergrounding pursuant to Section 3 of Schedule 71. On the other hand, if we find the disputed contract provisions to be consistent with Schedule 71, PSE can insist on such terms and, absent agreement by the cities, PSE can refuse to go forward with the proposed undergrounding of its facilities. The heart of the dispute, then, can be stated in fairly simple terms: are the contract provisions proposed by PSE consistent with Schedule 71? We find that they are, as discussed more fully below.

21 One requirement PSE would impose as a condition of its agreement to relocate the facilities to underground locations is that the cities obtain easements (or, alternatively, reimburse PSE for the cost of obtaining easements) whenever PSE exercises its

asserted discretion under Section 4 of Schedule 71 to insist that certain underground facilities be located outside the public rights-of-way on private property. Section 4 of Schedule 71 provides that:

> [t]he owners of real property within the Conversion Area shall, at their expense, provide space for all underground electrical facilities which in the Company's judgment shall be installed on the property of said owners. In addition, said owners shall provide to the Company adequate legal rights for the construction, operation, repair, and maintenance of all electrical facilities installed by the Company pursuant to this schedule, all in a form or forms satisfactory to the Company.

(emphasis supplied).

22 PSE's Statement of Fact and Law, filed in response to the City of Kent's Petition, states that:

> Pursuant to Section 4 of Schedule 71, PSE requires that underground facilities (other than cable and conduit) and pad-mounted facilities, such as vaults for junctions, vaults for pulling cable, transformers and associated vaults, and switches and associated vaults, be placed on private property within easements that are in the Company's standard form. The question whether such facilities should be placed on private property is a matter that the Tariff leaves to the sole discretion of the Company. In any case, PSE's judgment with respect to this question is sound because undergrounding facilities raises safety, operational and cost issues that are different than those associated with overhead facilities.

23 Auburn, *et al*. complain that PSE refuses to place its facilities in city rights-of-way, even where adequate space exists or can be made available through the purchase of additional rights-of-way. Auburn, *et al.* contend PSE's principal rationale for this refusal is an effort by the Company to avoid its common law and contractual obligations in the future, if the cities require PSE to relocate the newly undergrounded facilities a second time. Auburn, *et al*. argue that PSE's "insistence on locating all of its underground facilities on private easements is an attempt to avoid its

responsibilities for relocation costs." *Id. at 20.* Auburn, *et al*. characterize equipment relocation as "a necessary cost of doing business for a utility." *Id. at 21*.

24 PSE, in fact, does take the view that Schedule 71 does not apply to its facilities that are located on private easements. PSE acknowledges that part of its exercise of judgment and discretion under Section 4, to insist that certain facilities to be located on private easements, is based on its desire to avoid the risk of having to bear the costs of relocating these facilities, once undergrounded, a second time. *See, e.g., PSE Statement of Facts and Law at ¶17; PSE Response and Cross-Motion at 30.* Again, PSE does not dispute its obligation to relocate facilities that are in the public rights-of-way. Rather, PSE wishes to avoid bearing the significant costs associated with undergrounding more than once. PSE says that while it will agree to place at least some facilities on public rights-of-way, even though it would prefer to place them on private easements, it will do so only if the Company is indemnified against having to bear the expense of any future relocation of the underground facilities. Thus, the contracts PSE has tendered also include terms that would require the cities to pay any future relocation costs for facilities placed underground in public rights-of-way.

25 Auburn, *et al.* argue that Section 4 of Schedule 71 does not apply to cities, because cities are not "owners of real property." The cities argue that the only "operating rights" they are obligated to provide are those they have committed to provide via their franchise agreements with PSE. That is, the cities contend that PSE's only alternatives are to place all of its underground facilities in public rights-of-way or, if PSE decides that some facilities should be on private property, to obtain the necessary rights to such locations at its own expense. The cities also contend that nothing in Schedule 71 allows PSE to insist on a contract term committing the cities to pay 100 percent of any future relocation of facilities PSE would prefer to place on private easements but agrees to place within public rights-of-way. They argue such a contract term is not consistent with Schedule 71.

26 Kent contends that Section 4 of Schedule 71 contemplates that property owners will grant easements to PSE without compensation in consideration of the benefits of undergrounding. *Id. at 8, 11.* Absent that, Kent argues that since Schedule 71 does not expressly require the City to pay for easement rights over private property, it must follow that PSE is obligated to pay such "just compensation" as the private property owner may demand and be entitled to for the easement rights. *Id. at 11.*

27 Citing Article 8, Section 7 of the Washington Constitution, Kent also argues that it does not have the legal authority to buy private property interests for PSE. *Id. at 12.* Kent argues that it follows from this that "the only party that can, and quite reasonably should, pay for PSE's private easements is PSE." *Id.* Like Kent, Auburn, *et al.* argue that to interpret Schedule 71 to require the cities to purchase private easements for PSE's use would violate the state Constitution's prohibition against gifts of public funds.

28 PSE concedes that nothing in Schedule 71 expressly requires the cities to bear any costs associated with easements PSE may require in the exercise of its judgment that certain facilities should be located on private property. It is equally true, however, that nothing in Schedule 71 requires PSE to bear such costs. Indeed, Section 4 states that it is the "owners of real property within the Conversion Area" that must bear such costs.[5] These property owners are not parties to this dispute. The tariff, then, simply does not squarely answer the question presented to us of who bears the responsibility for obtaining and, if necessary, paying for, private easements that PSE may require in its discretion under Section 4 of Schedule 71.

29 Kent argues that in the final analysis there are but two possible outcomes. Either PSE must pay for all costs associated with any private easements PSE requires in its judgment in connection with the undergrounding of facilities; or "there will be no undergrounding of electric facilities if a property owner from whom PSE has requested an easement asks for compensation." Kent's reasoning here, as in its earlier arguments, suffers from incompleteness.

30 In fact, there are several other possible outcomes. One possibility is that the cities can make arrangements with the property owners to secure their cooperation. PSE points out historical examples when cities have made various arrangements with private property owners, such as extending services to their property, in exchange for the owners' agreements to give PSE adequate operating rights to build, operate, and

[5] Kent also argues that not only is PSE obligated to obtain its own easements on private property that are necessary in PSE's judgment to complete an undergrounding project, but also that PSE is obligated to bear all costs associated with such easements, including direct costs attributable to the value of the easement (*i.e.*, any payment to the owner for the property right itself). That is, Kent contends that PSE must pay 100 percent of any PSE staff costs, engineering, survey, legal, or other costs incurred in connection with the identification and memorialization of easement rights, whether or not the property owner demands compensation. PSE acknowledges Kent's point in its Answer and argues that these incidental costs should be shared according to the applicable percentages under Schedule 71.

maintain underground facilities on the owners' properties. *PSE Answer/Motion at 47, 49*. Another possibility is for the cities to work with PSE and private property owners to identify alternative sites, where facilities can be located on easements without the necessity for compensation to be paid. That, too, has occurred in the past. And, despite the cities' arguments now that there is no legal way for them to do so, cities have found ways in the past to purchase easements for PSE. *PSE Response/Motion at 46-49; Kent Reply at 7-8; Auburn, et al. Reply at 22-23.*

31 The parties' submissions also relate that in some instances, PSE has located its facilities in the public rights-of-way, and has required indemnification against the costs of any subsequent relocation of those facilities. In other instances, PSE apparently has voluntarily purchased easement or other property rights in connection with undergrounding projects. All of this illustrates that PSE and various cities have exercised considerable latitude within the scope of Schedule 71 to structure arrangements for undergrounding projects. In the past, they always have found solutions to the problem that here is presented as being intractable without our intervention.

32 In our view, Section 4 of Schedule 71 gives PSE the discretion to determine that some, or all, of the facilities to be located underground as part of the Pacific Highway South projects will be placed on private property. While that is not unfettered discretion—it must be exercised reasonably—PSE's cost-based rationale cannot be said to be unreasonable.[6] By contrast, it is unreasonable for the cities to expect PSE to bear a significant share of undergrounding costs under Schedule 71 (*i.e.*, up to 70 percent of the total costs excluding trenching and restoration per Section 3.b.1 of Schedule 71), to accommodate the cities' requests for undergrounding on this occasion, and to agree to terms that would potentially leave the Company liable for the costs of future relocation of the same facilities.[7]

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[6] The parties argue at length not only about the cost rationale, but also about the engineering, operational, and safety rationales PSE uses to justify its exercise of judgment to require facilities to be located on private easements. We see no need to discuss the full range of these arguments, as it clearly is the dispute over costs that most concerns the parties in these proceedings, and because we find that PSE's cost-based concerns reasonably support its exercise of judgment. These other rationales argued by PSE, however, might also provide bases justifying the Company's position.

[7] Although in the context of telecommunications facilities rather than electric facilities, we note that the Legislature recently addressed these issues. The resulting law, Chapter 35.99 RCW, shifts to cities even *overhead relocation* costs when a city requests a second relocation within five years after a prior relocation. The statute also recognizes the distinction between relocation and undergrounding and places responsibility for *all* incremental costs of undergrounding on cities, absent a tariff that governs

33 Section 4 of Schedule 71 provides that PSE is not responsible for the costs of any easements it requires in the reasonable exercise of its discretion. It is also true that Section 4 does not by its terms place the responsibility for acquiring easements on the cities. PSE, however, does not lose its discretionary rights under Section 4 simply because Schedule 71 does not impose on the cities an obligation to pay for operating rights PSE requires in its judgment on private property. PSE is not required under Schedule 71 to locate all underground facilities on public rights-of-way, even if those rights-of-way are adequate from an engineering perspective to accommodate PSE's facilities. When, as here, PSE exercises its discretion to require facilities to be located on private easements, there must be contract provisions that reflect the practical consequences of that exercise of discretion. The contracts tendered by PSE include terms which require that the Company be provided easements at no cost to PSE as a condition of the conversion. Such terms are neither inconsistent with Schedule 71, nor unreasonable. As discussed above, the cities have various means to secure, or assist PSE to secure, adequate operating rights when PSE exercises its discretion under Section 4. If these operating rights cannot be secured, the alternative is overhead relocation.

34 If the cities wish to negotiate with PSE to secure the Company's agreement to not exercise its discretion to require facilities to be located on private easements, and to locate those facilities in the public rights-of-way, they may do so. It is neither inconsistent with Schedule 71, nor unreasonable in that circumstance for PSE to insist on a *quid pro quo* that provides the same financial protection against incurring future relocation costs that would follow if PSE did exercise its discretion to require that the facilities be located on private easements.[8]

35 PSE has the right under Section 3 of Schedule 71 to insist on contract terms that are consistent with the rate schedule and not unreasonable. The terms PSE has tendered in connection with the Pacific Highway South projects meet those criteria. If the

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the allocation of such costs. RCW 35.99.060 also allows for the utility to be reimbursed for relocation costs when the relocation is solely for aesthetic purposes, or is "primarily for private benefit." The statute does not control here, but we are struck by the consistency of its requirements with our independent analysis, findings, and conclusions in this proceeding. For PSE to insist on contract terms that are consistent with what the Legislature has required in the analogous realm of telecommunications facilities cannot be said to be unreasonable.

cities refuse to execute contracts that include such terms, then PSE is not required to "provide and install within the Conversion Area a Main Distribution System."

3. Special Issue re Federal Way's 23rd Avenue South/South 320th Street Project.

36 In addition to the Pacific Highway South Project, the City of Federal Way is undertaking a street improvement project at the intersection of 23rd Avenue South and South 320th Street. The improvements extend along 23rd Avenue South, from South 316th to South 324th Street, and along South 320th Street on either side of 23rd Avenue South from 20th Avenue South to 25th Avenue South. As part of this project, Federal Way has requested that PSE convert its overhead facilities to underground facilities. *Stipulated Fact 12*. Most of PSE's existing facilities along the 320th Street portion of the street improvements are located on PSE easements outside of Federal Way's right-of-way. Federal Way's street improvements will not encroach into PSE's easement areas. *Stipulated Fact 13*.

37 PSE argues that it "historically has interpreted Schedule 71 (as well as Schedule 70) to apply only to conversions of PSE's overhead facilities that are located in public rights-of-way, and not to facilities that are located on private property and/or PSE easements." *PSE Response/Motion at 74*. PSE states that it is generally willing to convert overhead facilities that are located on private easements to underground facilities, but only if the requesting party pays 100 percent of the cost. *Id. (citing Logen Declaration at ¶45).*

38 PSE argues that the reference in Section 2 of Schedule 71 to "public street," like the reference to "public thoroughfare" in Section 2 of Schedule 70, reflects the intention that the rate schedules should apply only to facilities located on public streets (or in public rights-of-way) and not on private property. PSE argues further that as the owner of easement rights on private property, it has complete control over its facilities within the scope of its easement rights. PSE contends that neither the fee owner of property over which PSE has an easement or prescriptive rights, nor a municipality has the authority to require PSE to convert its overhead facilities to underground facilities without just compensation. PSE argues that the Company has

[8] Whether some term limit should be imposed on the cities' obligation to pay PSE for any subsequent relocation of the facilities once undergrounded is a matter that should be considered in the context of PSE's pending general tariff proceeding, Docket Nos. UE-011570/UG-011571 (consolidated).

the sole discretion to decide to convert facilities that are on private property to underground facilities and to establish contract terms for any such conversion without the necessity for a tariff schedule. In summary, PSE argues that

> [t]o interpret Schedule 71 to apply to PSE's facilities located on private property in Federal Way would be contrary to the Tariff language, which speaks in terms of "public streets," would violate PSE's property rights, and would ignore the historical and legal context in which the schedules were filed by PSE and approved by the Commission.

PSE Response/Motion at 77.

39 Filed and approved tariffs such as Schedules 70 and 71 have the force and effect of state law. *General Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585 (1986). When, as here, parties dispute what particular provisions require, we must look first to the plain meaning of the tariff. *Nat'l Union Ins. Co. v. Puget Power,* 94 Wn. App. 163, 171, 972 P.2d 481 (1999). If the tariff language is plain and unambiguous, there is no need to resort to rules of construction. *Whatcom County v. Bellingham,* 128 Wn.2d 537, 546, 909 P.2d 1303 (1996); *Food Servs. Of Am. v. Royal Heights, Inc.,* 123 Wn.2d 779, 784-85, 871 P.2d 590 (1994); *Waste Management of Seattle v. Utilities & Transp. Comm'n,* 123 Wn. 2d 621, 629, 869 P.2d 1034 (1994); *Vita Food Prods., Inc. v. State,* 91 Wn.2d 132, 134, 587 P.2d 535 (1978). If the tariff language is not plain, or is ambiguous, the Commission may examine the legislative history and other evidence to determine the meaning of the tariff and how it should be applied to the facts at hand. In interpreting an ambiguous tariff the Commission is like a court interpreting an ambiguous statute. As the Court says in *Whatcom County*:

> If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences. The purpose of an enactment should prevail over express but inept wording. The court must give effect to legislative intent determined 'within the context of the entire statute.' Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. The meaning of a particular word in a statute 'is not gleaned from that word alone,

> because our purpose is to ascertain legislative intent of the statute as a whole.'

128 Wn.2d at 546 (citations omitted); *see City of Seattle v. Dept of L&I*, 136 Wn.2d 693, 701, 965 P.2d 619 (1998).

40 We concur with PSE, that the scope of Schedule 71 is limited to projects on public streets at least two blocks in length. PSE's is the most logical and reasonable interpretation of the last sentence of Section 2. First, the length of the project must be at least two "contiguous city blocks." The term "city blocks" implies the presence of public streets that define the blocks. Second, all real property on both sides of "each public street" must receive electric service. That there is no mention here of property on private easements suggests it was not contemplated for coverage under Schedule 71. It is not reasonable to think that the tariff would carefully provide requirements applicable to both sides of each public street, provide no similar requirements for private easements, but nevertheless apply to private easements. We find, therefore, that Schedule 71 does not apply to private easements.

41 Put another way, and limiting ourselves strictly to the stipulated facts of this case, we observe that Federal Way's street improvements will not encroach into PSE's easement areas along 320th Street. We infer from this fact that Federal Way is not in a position to require any change—relocation or undergrounding—to PSE's existing facilities. That is, the change Federal Way has requested is entirely discretionary with the city, and with PSE. Since PSE could not be required to relocate the subject facilities, and bear the costs associated with relocation to new overhead facilities, it would not be reasonable to conclude that Schedule 71 requires PSE to bear the costs of relocation to underground facilities. We find that Schedule 71 does not apply to this project, under the facts presented.

42 With respect to the facilities located along 23rd Avenue South, PSE argues that this segment of the Federal Way project must be viewed and evaluated separately from the 320th Street portion of the same project because the 320th Street facilities are, as just discussed, on private easements not subject to Schedule 71. There does not appear to be any dispute that the 23rd Avenue South facilities, considered in isolation, are not at least "two contiguous city blocks in length," as required for eligibility under Section 2 of Schedule 71. PSE acknowledges that if the 320th Street portion of the project was within Schedule 71, the rate schedule also would apply to the 23rd

Avenue South facilities "because the facilities essentially 'turn the corner' and are part of the same physical stretch of facilities." *Id. at 78.*

43 We stated our finding, two paragraphs above, that Schedule 71 does not apply to the proposed conversion of PSE's facilities along 320th Street. This means the project is not part of a "Conversion Area" under Schedule 71. The 23rd Avenue street improvement thus stands on its own for purposes of determining whether Schedule 71 applies. There is no dispute that the 23rd Avenue segment is too short to satisfy the requirements of Section 2 of Schedule 71. Accordingly, we find that Schedule 71 does not apply to Federal Way's 23rd Avenue/South 320th Street project. We also find that PSE is entitled to reimbursement for the costs of undergrounding its facilities in connection with this project.

4. Special Issue re SeaTac's South 170th Street Project.

44 We determine by separate order entered today in Docket Nos. UE-010891 and UE-011027 (consolidated) that Schedule 71 applies to a certain street improvement project on South 170th Street in SeaTac, rather than Schedule 70 as argued by SeaTac. In light of that determination, we are required to resolve another issue in this proceeding concerning the application of Schedule 71's cost-sharing provision (*i.e.*, Section 3.b.1).

45 The parties stipulate that the SeaTac South 170th Street project will widen the existing two-lane street from approximately 24 feet to 36 feet; replace gravel shoulder and drainage ditches with bicycle lanes on both sides of the street that are contiguous to the driving lanes; and add new curbs and gutters behind the bicycle lanes, new sidewalks behind the curbs, and new planter strips behind the sidewalks. *Stipulated Fact No. 18.* The parties also agree that SeaTac is adding "one full lane" to an arterial street or road. *Stipulated Fact No. 20.*

46 There are eight poles involved in the 170th Street underground conversion. If they were not converted to underground facilities, or moved, two of PSE's poles would be located in the new roadway and six would be located in the sidewalk more than six inches from the street side of the curb. *Stipulated Fact No.19.* Clearly, the two poles that would be in the new roadway are required to be relocated. PSE contends that the remaining six poles are not required to be relocated. PSE relies on WAC 296-45-045, which provides that electric utilities operating in Washington "must design, construct,

operate and maintain their lines and equipment according to the requirements of the 1997 National Electric Safety Code (NESC)." The NESC provides for the following "Clearances of Supporting Structures From Other Objects":

> B. From Streets, Roads, and Highways
>
> 1. Where there are curbs: supporting structures, support arms, or equipment attached thereto, up to 4.6m (15 ft) above the road surface shall be located a sufficient distance from the street side of the curbs to avoid contact by ordinary vehicles using and located on the traveled way. In no case shall such distance be less than 150mm (6 in.).

NESC 231.B (1997), per Stipulated Exhibit No. 22; See also Logen Affidavit at ¶ 51.

47 Considering the facts and the NESC criteria, PSE contends that SeaTac should pay 30 percent of one-quarter of the total cost of the conversion because one-quarter of the existing overhead poles are required to be relocated, and 70 percent of the remaining three-quarters of the total cost because six of the eight poles are not, PSE argues, required to be relocated to accommodate the road widening.

48 SeaTac contends that it is responsible for only 30 percent of the undergrounding costs for the entire project because, SeaTac argues, "the Company's overhead system is required to be relocated due to addition of one full lane or more to an arterial street or road." *Schedule 71, Section 3.b.1.* SeaTac argues that it is the city, not PSE, that is empowered to decide when the public interest requires the relocation of overhead facilities that would end up in the streets or sidewalks following road-widening projects. SeaTac has made that determination in connection with the South 170th Street project because leaving the existing poles in place "would obstruct safe pedestrian traffic." *Auburn, et al. Motion at 38.* SeaTac says that it is the judgment of the city's engineers that the "poles would need to be relocated even if the system were not converted to underground." *Gut Declaration, ¶8.*

49 SeaTac's determination was based in part on the King County Road Standards (1993), which SeaTac has adopted. According to Mr. Gut, Chapter 8, "Utilities" states that on vertical curb type roads in residential areas with speed limits less than 40 mph, such as the subject segment of South 170th Street, utility poles should be placed five and one-half feet from the curb face.

50 SeaTac argues that it is charged by statute to establish and maintain the public streets and roads, and required by law to maintain the public streets and sidewalks in a safe condition. *Auburn, et al. Motion at 39 (citing Chapter 35.77 RCW; RCW 35.22.280; RCW 35.23.440(33); and Kennedy v. City of Everett, 2 Wn.2d 650, 653-54, 99 P.2d 614, amended by 4 Wn.21d 729, 103 P.2d 371 (1940).* SeaTac also argues that the Legislature has delegated authority to cities, not to utilities, to regulate placement of utility poles and structures. *Auburn et al. Motion at 39 (citing, and quoting, RCW 35A.47.040).* Citing additional case authority for propositions related to the primacy of the transportation function and the cities' paramount responsibilities with respect to "the public ways," SeaTac concludes that the city's standards, not PSE's, determine the need to relocate utility facilities. PSE, SeaTac argues, "has no right to refuse to relocate its poles on the City rights-of-way." *Id. at 40.*

51 While we do not dispute the City's contentions regarding its primary responsibility for managing its public rights-of-way, we are concerned here with the administration of PSE's electric tariff and, in particular, who pays for what. Among other things, we must not interpret that tariff in a way that would leave its application subject to varying requirements that might be adopted by the many municipalities in which PSE's facilities are located. Such an interpretation would open the door to claims of undue preference or discrimination as PSE was required to bear more or less costs for otherwise similar or identical projects depending only on which city's standards are deemed to apply. Thus, it is important that we interpret Schedule 71 so that a single standard applies to determinations of whether "the Company's overhead system is required to be relocated due to addition of one full lane or more to an arterial street or road," which triggers the 30 percent reimbursement obligation under Section 3 of Schedule 71, and relieves the city from the 70 percent reimbursement to which it otherwise would be subject under Section 3.

52 We find that the NESC standard PSE applies, which is grounded in the *electricity-related* requirements of WAC 296-45-045, provides a reasonable, consistent basis upon which to determine the allocation of cost responsibility under Schedule 71. Under the facts presented, we determine that SeaTac should pay 30 percent of one-quarter of the total cost of the conversion because one-quarter of the existing overhead poles are required to be relocated, and 70 percent of the remaining three-quarters of the total cost because six of the eight poles are not required to be relocated to accommodate the road widening.

FINDINGS OF FACT

53 Having discussed above all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the ultimate decisions of the Commission are incorporated by this reference.

54 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including electric companies

55 (2) The pleadings filed in this proceeding, together with the evidentiary support provided by the parties' fact stipulations, affidavits, and other documents, show that there is no genuine issue as to any material fact.

CONCLUSIONS OF LAW

56 Having discussed above in detail all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

57 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and all parties to, these proceedings. *Title 80 RCW.*

58 (2) PSE is a "public service company" and an "electrical company" as those terms are defined in RCW 80.04.010, and as those terms otherwise may be used in Title 80 RCW. PSE is engaged in Washington State in the business of supplying utility services and commodities to the public for compensation.

59 (3) PSE is entitled to judgment in its favor, as a matter of law, that it has discretion under Section 4 of Schedule 71 reasonably to require the location of

underground facilities on private easements rather than in public rights-of-way.

60 (4) PSE is entitled to judgment in its favor, as a matter of law, that the disputed requirements PSE proposes to memorialize in contracts that are "in a form satisfactory to the Company," as provided under Section 3 of Schedule 71, are neither inconsistent with the requirements of Schedule 71, nor unreasonable.

61 (5) PSE is entitled to recover fully the costs it incurs in connection with the underground relocation of existing overhead electric distribution facilities that are located on private easements along South 320th Street in Federal Way.

62 (6) Schedule 71 does not apply to the underground relocation of existing overhead electric distribution facilities on 23rd Avenue at the intersection of that roadway with South 320th Street in Federal Way.

63 (7) Section 3.b.1 of Schedule 71 requires, with respect to the 170th Street project in SeaTac, that the City should pay 30 percent of one-quarter of the total cost of the conversion and 70 percent of the remaining three-quarters of the total cost, excluding trenching and restoration.

ORDER

64 THE COMMISSION ORDERS That PSE has the discretion under Section 4 of Schedule 71 to require that portions of the existing overhead facilities it agrees to convert to underground facilities along Pacific Highway South shall be located on private easements that are acquired at no cost to PSE. PSE may require contract provisions under Section 3 of Schedule 71 that memorialize the parties' respective obligations that arise from PSE's exercise of discretion.

65 THE COMMISSION ORDERS FURTHER That PSE is entitled to recover fully the costs it incurs in connection with the underground relocation of existing overhead electric distribution facilities that are located on private easements along South 320th Street in Federal Way.

66 THE COMMISSION ORDERS FURTHER That Schedule 71 does not apply to the underground relocation of existing overhead electric distribution facilities on 23rd Avenue at the intersection of that roadway with South 320th Street in Federal Way.

67 THE COMMISSION ORDERS FURTHER That Section 3.b.1 of Schedule 71 requires, with respect to the 170th Street project in SeaTac, that the City should pay 30 percent of one-quarter of the total cost of the conversion and 70 percent of the remaining three-quarters of the total cost, excluding trenching and restoration.

DATED at Olympia, Washington, and effective this _____ day of January, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).