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, *et. al.*, Petitioners / Complainants v. Puget Sound Energy, Inc., Respondent	)	Docket No. UE-010911 (Consolidated) Petitioner City of Kent's Petition for Reconsideration of Commission's January 28 2002 Third Supplemental Order

Pursuant to RCW 34.05.470 and WAC 480-09-810, the City of Kent submits this Petition for Reconsideration of the Commission's January 28, 2002, "Third Supplemental Order: Declaratory Order on Motions for Summary Determination" ("Order"). Specifically, the City urges that the Commission reconsider, and modify, paragraphs 60 and 64 of its Order, as set forth below. The limited scope of this petition, however, should not be construed as a waiver of Kent's objection to, disagreement with, or right to appeal from, any aspects of the Commission's Order not addressed in this petition.

1. The specific "operating rights" requirements imposed by PSE are not consistent with Schedule 71 or with the Commission's Order. The Commission should therefore add to paragraph 64 of its Order language that will more effectively connect its Order to the actual PSE requirements at issue.

In its Conclusions of Law, the Commission observes that Section 4 of Schedule 71 allows PSE discretion to "require the location of underground facilities on private easements rather than in public right of way." Order at paragraph 59. The Commission may recall that the City of Kent stated precisely this both in its briefing and at oral argument. The question, of course, is *who pays for what, and when?*

Schedule 71, Section 4—Operating Rights—provides that

> 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. (Emphasis added).

Paragraph 64 of the Commission's Order faithfully follows the foregoing controlling language, stating that

> 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. (Emphasis added).

It is elementary under the plain language of both Schedule 71 and paragraph 64 of the Commission's Order that Section 4 discretion—and hence PSE's ability to require private easements *at no cost* to PSE—is restricted to *underground* easements for equipment that will be installed *underground.* The specific requirements imposed by PSE, however, go far beyond this. Section 1c of PSE's form underground conversion agreement[1] requires as follows:

[1] PSE's form underground conversion agreement is Stipulated Exhibit 16 in this litigation, attached to the September 4, 2001, Declaration of Lynn F. Logen filed by PSE in support of PSE's "Response to Motions for Summary Determination and Cross Motion for Summary Determination."

> The Company, in its sole discretion, will install cable and conduit within the rights-of-way under its franchise within the Conversion Area, but will require all other underground *and pad-mounted electrical facilities*, including, but not limited to, vaults for junctions, vaults for pulling cable, transformers and associated vaults, and switches and associated vaults, to be installed on private property. (Emphasis added).

PSE's requirements for acquisition of the private property rights needed to accommodate equipment contemplated by Section 1c are set forth in Section 1b of PSE's underground conversion agreement, which provides as follows:

> The cost to the Company of obtaining *any* such space and rights on *any* property other than public rights-of-way shall be reimbursed in full by the City. The cost to obtain space and rights shall include, but not be limited to, the actual amount paid for and space and rights, staff costs (including overheads), the actual cost of any easement, fee, permit, attorney fee, court cost, permit fee, and any survey fee. (Emphasis added).

The foregoing sections of PSE's form underground conversion agreement are not limited to *underground* equipment[2] and are therefore not consistent with paragraph 64 of the Commission's Order. The City of Kent remains concerned, however, that unless paragraph 64 of the Commission's Order is modified to more explicitly address the *actual requirements* imposed by PSE, PSE may continue to exceed its discretion. There is no need to belabor the basis for Kent's concerns—the parties' relationship is obviously strained. In any event, the City asks that the Commission clarify its Order to address the actual PSE requirements at issue.[3] The following addition to paragraph 64

---

[2] Pad-mounted equipment as referenced in Section 1c of PSE's underground conversion agreement is, by definition, mounted on concrete pads above ground rather than converted to underground. The word "underground" cannot sensibly by interpreted to somehow mean "above" ground. As the Commission recognized elsewhere in its Order, the plain and unambiguous language of the tariff controls. Order at paragraph 39 (*citing Whatcom County v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1301 (1996)(other citations omitted).

[3] The City's legal right to file its Petition for Declaratory Relief carries with it the right to have a ruling on the specific issues asserted in the case.

of the Order (illustrated in legislative format) would accomplish this consistent with the remainder of the Commission's Order:

> 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. PSE does not have the discretion under Section 4 of Schedule 71 to require private easements at no cost for facilities it decides in its discretion to install *above* ground on private property outside of right of way. PSE remains free to acquire such easements at its own expense if, in its discretion, it chooses to do so.

2. Given the limits on PSE discretion recognized by the Commission in paragraph 34 of its Order, the specific "future relocation cost" requirements imposed by PSE are *not* consistent with Schedule 71 or with the Commission's Order. The Commission should therefore add to paragraph 60 of its Order language that will more effectively connect its Order to the actual PSE requirements at issue.

The Commission's Order does not address the specific "future relocation cost" charges imposed by PSE in Section 1e of PSE's underground conversion agreement. PSE's charges overturn a century of common law[4] and eviscerate existing contractual relationships[5] by charging cities for PSE's costs of relocating electric facilities installed within municipal right of way.

[4] Under the common law, a utility must relocate at its *own* expense any facilities located in right of way if requested to do so. *See, e.g., General Telephone Company of Northwest, Inc. v. City of Bothell*, 105 Wn.2d 579, 583, 716 P.2d 879 (1986)("it is, of course, the general rule in this state and elsewhere that 'public utility companies operating under a franchise must bear the cost of removing and relocating their facilities, as it is made necessary by highway improvements'"(citations omitted)).

[5] The Washington Supreme Court recognized in *General Telephone, supra*, that "public utility companies operating under a franchise must bear the cost of removing and relocating their facilities…." 105 Wn.2d at 583, 716 P.2d at 879 (citations omitted). Kent's franchise agreement with PSE requires no less. *See* footnote 7 below.

Section 1e of PSE's disputed underground conversion agreement[6] requires as follows:

> Where the Company determines it is not physically or economically feasible to obtain space and/or adequate legal rights on private property for facilities that are required to be installed on private property, such facilities may, *in the sole judgment of the Company*, be installed on public rights-of-way under the following conditions:
>
> . . . (3) the *governmental authority* owning or controlling the rights-of-way *has agreed to pay one hundred percent (100%) of the cost of any future relocation of facilities located on rights-of-way under this provision* which are requested, required or otherwise caused by actions of the governmental authority. (Emphasis added).

The foregoing sections of the underground conversion agreement require that (1) PSE has the *sole right* to determine when to place its facilities within right of way—whether the City finds such placement desirable or not—and (2) the City must pay 100% of the cost of relocating any such facilities in the future.

The Commission's Order does not address PSE's Section 1e, quoted above. As shown below in sub-sections (a) and (b) of this Petition, however, Section 1e is not consistent with Schedule 71 and is not consistent with the Commission's Order. Accordingly, the City asks that the Commission modify paragraph 60 of its Order as suggested in Section 3 of this Petition (page 10, below).

(a) PSE's Section 1e is not consistent with Schedule 71.

To lend context to the issue at hand, it is wise to remember that a utility must, under the common law, relocate at its own expense any facilities located within municipal right of way when relocation is necessary. *General Telephone, supra,* 105 Wn.2d at 583, 716 P.2d 879 (citations omitted). PSE expressly agreed to this very same

[6] *See* footnote 1, above.

obligation by contract when it requested, and accepted, a franchise from the City of Kent.[7]

There are only two ways that PSE's common law obligation could be abrogated. First, the parties could choose to negotiate and bind themselves contractually to a modification of PSE's facility relocation obligations. That is the mechanism expressly contemplated by the Commission in paragraph 34 of its Order, as discussed in subsection (b) below. Barring such a *negotiated* modification of rights and responsibilities, however, the only other means of relief that PSE could obtain from relocation costs would arise, if at all, by statute or tariff. *See General Telephone, supra.* The *General Telephone* court noted the "qualification" to the common law rule:

> the common law duty of a utility to relocate its facilities at its own expense when public convenience or necessity so requires *may be changed by contract* between the utility and the municipality so that relocation expenses are borne by the municipality, *or may be changed by statute* so that relocation expenses in certain cases are borne by the state, or the municipality. 105 Wn.2d at 583, 716 P.2d 879 (citations omitted) (emphasis added).

There is no statute in the State of Washington that shifts to the City PSE's common law obligation to pay for relocation of facilities located within municipal right of way.[8] The remaining question is whether Schedule 71 of Electric Tariff G shifts these relocation costs to the City. It does not.

By its plain language, Schedule 71 relates solely to costs of underground conversions. It does not impose on cities any charge for costs of relocating facilities

---

[7] Kent's franchise agreement with Puget Sound Power and Light Company (predecessor to PSE) provides in Section 6, for example, that "[w]henever the City undertakes. . .the construction of any public works improvement within the Franchise Area and such public works improvement necessitates the relocation of Puget's then existing Facilities within the Franchise Area, . . . Puget shall relocate such Facilities within the Franchise Area at no charge to the City." A copy of Kent's franchise agreement with PSE was attached as Exhibit B to Kent's Petition for Declaratory Relief.

[8] In stark contrast, there is such a cost-shifting statute in the context of telecommunications facilities (rather than electric facilities), as the Commission itself notes in its Order at p. 12, footnote 7.

that are installed in right of way, whether or not they were installed pursuant to a prior Schedule 71 underground conversion. The Commission's own reasoning on this point proves instructive.

In connection with Federal Way's 23rd Avenue South / South 320th Street Project (Order at pp. 14-17), the Commission addressed the issue whether Schedule 71 applies to facilities presently located on private easements rather than within right of way. The Commission stated as follows:

> That there is no mention here [i.e., in Schedule 71] 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. Order at paragraph 40.

Applying the foregoing analysis, it is not reasonable to think that Schedule 71 would carefully provide requirements applicable to costs of undergrounding, provide no similar requirements for costs of future relocation of facilities located within right of way, but nevertheless apply to such costs of future relocation. Accordingly, the Commission should find that Schedule 71 does not shift to cities the costs of "future relocation" of PSE facilities.

In summary, no statute or tariff has shifted to the City PSE's common law obligation to relocate facilities within right of way at its own expense. Thus, the Commission has rightly identified in paragraph 34 of its Order the only other means by which these cost obligations can be shifted: negotiation and *mutual agreement* of the parties. Because Section 1e of PSE's underground conversion agreement does not comport with paragraph 34 of the Commission's Order, as shown in subsection (b) below, the broad wording of paragraph 60 of the Order should be modified (*see* page 10, below).

(b) PSE's Section 1e is not consistent with the Commission's Order.

The Commission recognizes in paragraph 34 of its Order that, to avoid paying for a private easement for PSE, the City may wish to negotiate with PSE to have PSE locate a particular piece of equipment within right of way rather than on a private easement. The City would thereby save itself the cost of the private easement. In these negotiations, however, PSE would, in the Commission's view, reasonably insist on a *quid pro quo,* specifically

> 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. Order at paragraph 34.

The Commission's Order unmistakably contemplates *negotiation* between the City and PSE in the instance in which the City wishes to avoid the cost of—or possibly the delays attendant to—the acquisition of a particular private easement desired by PSE. By definition, *quid pro quo*[9] (Order at paragraph 34) negotiation is a give-and-take process: one party offers to forego something to which he is entitled in order to gain from the other party something to which he is *not* otherwise entitled as a matter of right. It goes without saying that such negotiations might or might not result in agreement.

Paragraph 34 of the Commission's Order makes clear that the City cannot *compel* PSE to locate facilities within right of way rather than on a private easement. Likewise, PSE cannot extract from the City a *quid pro quo* concession if the City is not in the first instance interested in negotiating to obtain agreement from PSE to locate equipment *within* right of way. The parties are simply free to negotiate and agree, or

[9] The dictionary defines "quid pro quo" as "something that is given or taken in return for something else; substituted." *Random House Webster's College Dictionary,* New York: Random House, 1991.

not, as the case may be. This is the substance of the Commission's Order at paragraph 34.

The specific relocation cost requirements set forth in Section 1e of PSE's underground conversion agreement completely eliminate every aspect of negotiation envisioned by paragraph 34 of the Commission's Order. PSE's requirements, quoted on page 5 above, instill in PSE the *sole judgment* to locate any particular piece of equipment inside or outside of right of way. They also empower PSE to charge the City 100% of the cost of any future relocation of facilities that PSE decides, in its *sole judgment*, to locate within right of way. By definition, PSE's ability to dictate events as it may wish in its *sole judgment* removes any aspect of negotiation and guarantees that PSE will obtain protection from any and all costs of future relocation of facilities located within right of way whether the City desired such location or not.[10] This is clearly at odds with the negotiated *quid pro quo* process articulated by the Commission in paragraph 34 of its Order.

Because Section 1e of PSE's underground conversion agreement is inconsistent both with Schedule 71 and with paragraph 34 of the Commission's Order, the Commission should modify the broadly-worded paragraph 60 of its Order, as suggested below.

3. The Commission should reconsider, and modify, paragraph 60 of its Order to address *actual and specific* requirements in PSE's underground conversion agreement, and not merely general concepts that PSE "proposes" to memorialize in contracts.

The Commission states in paragraph 60 of its Order that "PSE is entitled to judgment in its favor, as a matter of law, that the disputed requirements PSE *proposes*

[10] As the Commission has observed, PSE is also protected from costs of future relocation of equipment it places on private easements *outside of* right of way.

to memorialize in contracts" (emphasis added) are not unreasonable and not inconsistent with Schedule 71. The sheer volume of pleadings and supporting papers and the hours of oral argument may have obscured the fact that the City of Kent challenged very specific requirements imposed by PSE as a precondition to PSE's conversion to underground on Pacific Highway South.

The Commission's Order generally references "disputed requirements" (Order at paragraph 60), but does not specifically identify any such requirements. Rulings on the *specific* PSE requirements challenged by the City of Kent were not included in the Order. Those requirements are identified in sections 1 and 2 of this Petition, above.[11] As established above, those requirements violate the very letter and spirit of this Commission's Order as set forth in paragraphs 34 and 64 and elsewhere. Accordingly, Kent respectfully requests that the Commission modify the broadly-worded paragraph 60 of its Order in order to address not only the general concepts already presented therein, but also the two specific PSE requirements that are discussed in sections 1 and 2 above. Paragraph 60 could be modified simply and appropriately as follows (changes are shown in legislative format):

> PSE is entitled to judgment in its favor, as a matter of law, that as provided under Section 3 of Schedule 71, it may require provisions ~~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,~~ so long as such provisions are neither inconsistent with the requirements of Schedule 71, nor unreasonable. Applying that standard to the specific requirements at issue, the City of Kent is entitled to judgment in its favor, as a matter of law, that
>
> (1) PSE does not have the discretion under Section 4 of Schedule 71 to require private easements at no cost for facilities it decides in its

[11] The City of Kent also challenged PSE requirements related to costs (attorney, engineering, survey and permit fees and so on) of obtaining private easements. The Commission noted PSE's substantial but incomplete concession on this issue (Order at page 11, footnote 5) but did not expressly rule on the underlying PSE requirements challenged by Kent.

discretion to install *above* ground on private property outside of right of way, because such a requirement would be inconsistent with the plain language[12] of Section 4 and would thus be unreasonable; and

(2) Although PSE may engage in mutual *quid pro quo* negotiation with cities over costs of hypothetical future facility relocations, PSE does not have discretion under Schedule 71 to *require* as a condition of undergrounding that a City agree to pay for all future relocations of equipment that PSE elects to place within right of way as part of the undergrounding project.

The foregoing suggested modifications to paragraph 60 amplify not only the original content of paragraph 60, but also expressly address—by applying the standards set forth in paragraphs 34 and 64 of the Order—specific PSE requirements that prompted this litigation.

Conclusion

For the foregoing reasons, the Commission should reconsider, and modify, its January 28 Order. The Commission should clarify that the specific requirements set forth in PSE's form underground conversion agreement challenged by the City of Kent[13] and discussed above are unfair, unjust, unreasonable, and therefore unlawful in light of Schedule 71 and this Commission's January 28 Order.

/ /

[12] As the Commission has often ruled, the plain meaning of the tariff governs. S*ee, e.g., Air Liquide America Corp. v. Puget Sound Energy, Inc.*, Docket No. UE-981410, Fifth Supplemental Order Granting Complaint, Ordering Refunds and Other Relief, 1999 Wash. UTC Lexis 591 (Aug. 3, 1999); *see also* January 28 Order at paragraph 39, and citations therein. The plain meaning of Section 4 is that PSE's discretion to require easements at no cost to itself applies solely to easements for *underground*, and not *above*-ground, equipment.

[13] The limited scope of this Petition for Reconsideration should not be construed as a waiver of Kent's right to object to or appeal from any aspects of the Commission's ruling that are not mentioned herein. For example, for reasons previously briefed and argued, Kent believes it cannot lawfully be compelled to pay for *any* private easements acquired by or for PSE.

/ /

Respectfully submitted this 7th day of February 2002.

MICHAEL L. CHARNESKI,
ATTORNEY AT LAW

_____

Michael L. Charneski, WSBA #15735
Attorney for Petitioner, City of Kent