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BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of

CITY OF KENT,

For Declaratory Relief Interpreting
Schedule 71 of Electric Tariff G.

NO. UE-010778

PUGET SOUND ENERGY, INC.'S
STATEMENT OF FACT AND LAW

1. Puget Sound Energy, Inc. ("PSE" or "the Company") hereby submits its Statement of Law and Fact in response to the Petition for Declaratory Relief Interpreting Schedule 71 of Electric Tariff G ("Schedule 71") filed by the City of Kent ("City") on May 29, 2001 ("Petition").

2. The City's Petition brings into issue RCW 34.05.240, WAC 480-09-230, RCW 80.28.080, RCW 80.28.090, RCW 80.28.100, WAC 480-100-056, Schedule 71, and Schedule 80 of PSE's Electric Tariff G ("Schedule 80").

I. INTRODUCTION

3. Having decided to convert electric facilities along its Pacific Highway South Project ("Project") to underground rather than to simply

PUGET SOUND ENERGY, INC.'S
STATEMENT OF FACT AND LAW - 1

[010778, PSE, Statement of Fact and Law, 6-21-01.doc]

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1 relocate those facilities to accommodate the road widening, the City now seeks to escape
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3 PSE's tariff requirements for such undergrounding and to shift costs associated with the
4
5 undergrounding to PSE and its ratepayers.

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7 4. Schedule 71 requires that property owners in the conversion area provide
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9 easements on their property for placement of certain facilities that are converted from
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11 overhead, at the property owners' expense. If adequate space and rights are not provided,
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13 then the conditions of Schedule 71 are not met, and the facilities must remain overhead (and
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15 perhaps be relocated if required by PSE's franchise and the circumstances of a project). In an
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17 effort to avoid this result and to cooperate with cities to ensure that an undergrounding can
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19 proceed, PSE will agree to assist in obtaining easements from property owners, but only if
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21 PSE is reimbursed for its costs by the city requesting the undergrounding.

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23 5. PSE has developed its form Underground Conversion Agreement
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25 ("Agreement")¹ in an effort to fully explain what Schedule 71 requires and how PSE
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27 undertakes conversions. That Agreement also contains provisions describing services that
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29 PSE will undertake outside of the scope of Schedule 71 (such as obtaining easements), and
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31 the terms under which PSE will agree to provide such services. PSE's Agreement is fully
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33 consistent with Schedule 71, as is the Engineering Agreement that the City indirectly
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35 challenges.

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37 6. The relief requested in the City's Petition is flatly contrary to the plain
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39 language of Schedule 71. Moreover, if the City's Petition is granted, it would mark a
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44 _____
45 ¹ PSE actually has two forms, one for municipalities (attached hereto as Exhibit A) and one
46 for non-municipal customers (attached hereto as Exhibit B), because of differences in matters such as
47 how a municipal and non-municipal requester are able to deal with undergrounding of service lines in
the conversion area. *Compare* Exhibit A, § 7 *with* Exhibit B, § 7.

1 fundamental shift in the manner in which PSE designs and constructs its network.
2
3 Significant safety and operational issues would be presented by placement of underground
4 facilities other than conduit and cable in crowded rights-of-way. In addition, cities with the
5 resources to convert electric lines from overhead to underground would effectively shift the
6 costs of obtaining easements or of relocating undergrounded facilities onto PSE's customers
7 throughout its service territory.
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12 7. The Commission should declare that the provisions of PSE's agreements that
13 the City challenges are fully consistent with Schedule 71.
14

15 16 **II. FACTUAL BACKGROUND**

17 18 **A. The Pacific Highway South Project**

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20 8. As the City describes, a number of municipalities along Pacific Highway
21 South (Highway 99) are undertaking improvements to Pacific Highway South, including
22 widening the roadway. The City claims that a declaratory order is necessary because its
23 portion of the Pacific Highway South improvements (the "Project") "cannot move forward"
24 without an underground conversion agreement. Petition at 1:24-2:2. This is incorrect. The
25 Project could move forward with relocation of the existing overhead facilities rather than
26 undergrounding of those facilities. Such relocation would be at no charge to the City,
27 pursuant to PSE's 1993 franchise with the City ("Franchise").
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37 9. If the City wishes PSE to convert its overhead facilities to underground, then
38 the requirements of Schedule 71 must be satisfied. As described below, PSE's Underground
39 Conversion Agreement and Engineering Agreement are fully consistent with Schedule 71,
40 and are designed to ensure that underground conversions can move forward even if
41 circumstances arise that would otherwise bar conversion to underground under Schedule 71.
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47 PSE has performed numerous conversions for municipalities

1 under the terms the City now challenges, including prior conversions within the City and
2 conversions for other sections of Pacific Highway South.
3

4
5 10. The City claims that "[a]t no time has PSE identified any purported basis for
6 its demand that the City agree to fund PSE's acquisitions of private property." Petition at 6:5-
7 8. In fact, PSE has explained its position on Schedule 71 to the City numerous times. For
8
9
10 example, on January 10 and 25, 2000, PSE's Tariff Consultant, Lynn Logen, met with
11
12 Thomas C. Brubaker, the City's Assistant City Attorney, and Timothy J. LaPorte, the City's
13
14 Manager Design Engineering, and fully explained the Company's position with respect to its
15
16 Tariff, easements and conversion agreement. On or about April 4, 2000, Mr. Logen again
17
18 explained PSE's position with respect to underground conversions in a voicemail message to
19
20 Mr. Brubaker. Mr. Brubaker responded to that message in a letter dated April 10, 2000, a
21
22 copy of which is attached hereto as Exhibit C. The City apparently simply disagrees with
23
24 PSE, and has therefore filed its Petition.
25

26
27 **B. Schedule 71**

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29 11. Schedule 71 governs the conversion of overhead facilities to underground
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31 facilities in commercial areas. It sets forth the conditions that must be met in order for PSE
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33 to perform such conversions, and provides that certain costs for such conversion will be
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35 shared by PSE and the requesting party on either a 30%/70% basis, or a 70%/30% basis. *See*
36
37 Schedule 71, § 3.b.(1).² Because of this cost sharing, Schedule 71 essentially provides a
38
39 subsidy to entities that request PSE to convert its overhead facilities to underground.
40

41 12. Schedule 71 does not require that all costs associated with a conversion be
42
43 shared by PSE. Rather, the 30/70 or 70/30 cost-sharing excludes "all trenching and
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² A copy of Schedule 71 is found at Exhibit A to the City's Petition.

1 restoration for duct and vault systems" and "surveying for alignment and grades of vaults and
2 ducts," which must be provided by the requesting entity. Schedule 71, § 3.b.(2). As set forth
3 below, Schedule 71 also protects PSE from absorbing any costs associated with obtaining
4 easements that are required in connection with an underground conversion. Schedule 71,
5 Section 4.
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11 13. Schedule 71 also does not require PSE to underground its facilities whenever
12 an entity requests such undergrounding. Rather, it sets forth a number of conditions that must
13 be met in order for Schedule 71 to apply. Section 2, Availability, describes the type of
14 facilities that will be undergrounded (i.e., distribution but not transmission facilities) and the
15 type of system that must remain in the conversion area after the conversion (i.e., a minimum
16 project length, with all distribution to be underground and no overhead remaining). Section 2
17 is not placed at issue in the City's Petition because PSE agrees that the requirements of
18 Section 2 are met with respect to the Project.
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27 14. However, the City's petition places in issue other fundamental requirements of
28 Schedule 71. In particular, Section 4 provides:
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31 4. OPERATING RIGHTS -- The owners of real property within
32 the Conversion Area shall, at their expense, provide space for all
33 underground electrical facilities which in the Company's judgment
34 shall be installed on the property of said owners. In addition, said
35 owners shall provide to the Company adequate legal rights for the
36 construction, operation, repair, and maintenance of all electrical
37 facilities installed by the Company pursuant to this schedule, all in a
38 form or forms satisfactory to the Company.
39
40

41 Schedule 71, § 4.
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43 15. In addition, "[s]ervice under this schedule is subject to the General Rules and
44 Provisions contained in this tariff." Schedule 71, § 8. Those General Rules and Provisions
45 are found in Schedule 80, which provides, among other things:
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1 The Company shall not be required to connect with or render service to
2 an applicant unless and until it has all necessary operating rights,
3 including rights-of-way, easements, franchises and permits.
4

5 Schedule 80, § 9.
6

7 16. Finally, Schedule 71 requires the entity that requests the conversion to:
8

9 enter into a written contract (the "Contract" herein) for the installation
10 of such systems, which Contract shall be consistent with this schedule
11 and shall be in a form satisfactory to the Company.
12

13 Schedule 71, § 3.a.
14

15 17. Pursuant to Section 4 of Schedule 71, PSE requires that underground facilities
16 (other than cable and conduit) and pad-mounted facilities, such as vaults for junctions, vaults
17 for pulling cable, transformers and associated vaults, and switches and associated vaults, be
18 placed on private property within easements that are in the Company's standard form. The
19 question whether such facilities should be placed on private property is a matter that the
20 Tariff leaves to the sole discretion of the Company. In any case, PSE's judgment with respect
21 to this question is sound because undergrounding facilities raises safety, operational and cost
22 issues that are different than those associated with overhead facilities.
23
24

25 18. For safety and operational reasons, PSE requires clearances around its
26 underground and pad-mounted transformers and oil-filled distribution switches of between
27 three and 100 feet, with a setback of ten feet on the front side of all such facilities. *See* PSE
28 Standard 6315.0002, Clearances for Oil-Filled Equipment, attached as Exhibit D. PSE
29 requires clearances of between three and ten feet for its vaults and handholes. *See* PSE
30 Standard 6775.0035, Vault and Handhole Location, attached as Exhibit E. Such facilities
31 cannot be installed on top of another utility's lines. *See id.* at 4. A ten-foot setback of clear,
32 unobstructed space is needed because the safe operation of high voltage equipment requires
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1 that PSE workers use long, insulated sticks. PSE's form of easement preserves these setback
2 requirements by ensuring that the easement area includes sufficient space around its facilities,
3 and prohibiting uses of the easement area that are inconsistent with the continued operation,
4 repair and maintenance of its facilities. See PSE Form Easement, attached as Exhibit F, and
5 PSE Standard 0300.8000, Easements, attached as Exhibit G.
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10 19. When facilities are placed in rights-of-way controlled by municipalities and
11 not PSE, PSE is subject to encroachment into the clearance zones around its facilities by
12 other users of the rights-of-way or adjacent property owners. The City itself has
13 acknowledged that:
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17

18 the City's engineering design and construction staff face remarkably
19 complex issues in the management, maintenance, and operation of the
20 City's right-of-way. As you know, the ground beneath our right-of-
21 ways is becoming as congested as the surface traffic traveling along
22 City streets.
23
24

25 Letter from T. Brubaker to L. Logen dated April 10, 2000 at 1, Exhibit C. Moreover, even if
26 clearances for installation of facilities could be ensured in rights-of-way, permit and traffic-
27 control requirements for work performed in rights-of-way can result in significant delays
28 when PSE needs to access its facilities. This could result in lengthening the time of an outage
29 when repair work must be performed to restore service in an area served by underground
30 facilities. PSE's workers are also subjected to increased hazards if they must perform work in
31 rights-of-way rather than on private property.
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39 20. Cost issues also support PSE's requirement that its equipment other than
40 conduit and cable be placed within easements rather than rights-of-way. In general,
41 underground systems are more complex than overhead systems and are more expensive to
42 install. An underground system in a commercial area requires Feeders (unfused circuits
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1 connecting one substation breaker to another substation breaker and capable of supplying 600
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3 amps). Any time PSE branches off of the Feeder, it must be fused. This results in a duplicate
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5 system that runs parallel to the unfused system. In short, it takes two systems to serve
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7 underground what was served by one system overhead. The only way to fuse branches off an
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9 underground feeder system is by installing a switch cabinet, which costs \$20,000 - \$25,000.

10 This is in contrast to an overhead system, where PSE hangs a fuse that costs about \$30.00.

11
12 21. Relocation costs are also significantly more expensive for underground than
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14 for overhead systems. When relocation is necessary, overhead systems are simply moved
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16 along with the attached equipment. The overhead conductors and conduit are transferred to
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18 the new pole while "hot" (no outage is required). For underground systems, all cables are
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20 within conduit that cannot be spliced to extend a conductor within a conduit. Therefore, to
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22 move a vault, for example, PSE must remove the conductors from the conduit, extend the
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24 empty conduit to the new location, then pull in all new conductors and make-up connections
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26 at both ends of every conductor. This generally requires an extended outage for all customers
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28 involved. Work of this type sometimes requires overtime payment to employees because
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30 they are scheduled at low-use times. Even when done on overtime, this work can sometimes
31
32 result in claims against PSE, for example by business owners in the area.
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34
35 22. Because PSE's franchises generally require PSE to relocate facilities located in
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37 rights-of-way at PSE's expense, it is PSE, and not the municipality ordering the facilities
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39 relocated, that would have to absorb these significant relocation costs. If overhead facilities
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41 are converted to underground and placed in rights-of-way, municipalities have no economic
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43 incentive to ensure that the underground facilities are initially placed such that they will not
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45 require immediate relocation, and no economic incentive to take into account the costs of
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47 relocating underground facilities when considering future projects involving the rights-of-

1 way.

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3 23. For these reasons, PSE requires that if facilities are to be converted from
4 overhead to underground, facilities other than cable and conduit will be placed within
5 easements on private property where they are not subject to future relocations. If
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7 underground facilities were required to be placed in rights-of-way, significant issues would
8
9 be raised regarding whether PSE could continue to offer undergrounding at all or, at a
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11 minimum, whether the existing subsidy of undergrounding should be eliminated.
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15 **C. PSE's Conversion Agreement and Engineering Agreement**

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17 24. There are many details involved in converting facilities from overhead to
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19 underground that are not spelled out in Schedule 71. Instead, Schedule 71 provides for
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21 addressing such details through a written contract between PSE and the entity requesting the
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23 conversion. Schedule 71, § 3.a. As long as the terms of that contract are "consistent with
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25 [Schedule 71]," PSE may require that the contract be "satisfactory to the Company." *Id.*

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27 25. Of course, in applying Schedule 71 and its contract requirements, PSE must
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29 comply with the nondiscrimination provisions of RCW 80.28.090-.100. PSE has sought to
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31 ensure that entities requesting conversions are treated in a nondiscriminatory manner by
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33 developing and offering a form Underground Conversion Agreement ("Agreement"). *See*
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35 Exhibits A, B. The form Agreement also serves the function of educating entities requesting
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37 conversions about PSE's engineering and construction practices and the details of
38
39 underground conversions. Questions regarding that process and inquiries regarding
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41 accommodations for special circumstances can then be discussed and worked out before a
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43 conversion is undertaken.

44
45 26. Over time, PSE's form Agreement has been revised and refined to clarify
46
47 questions that have been raised by requesting entities, and to address issues identified by PSE

1 as it applies Schedule 71 to actual underground conversions. For example, municipalities
2 have at times suggested revisions to contract language that PSE feels do not change the
3 fundamental terms of the Agreement, but that the municipality is more comfortable with.
4 Under such circumstances, PSE has often agreed to the requested change, and incorporated
5 that change in future versions of the form Agreement.
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11 27. Other changes have been made to address head-on questions and challenges
12 raised to PSE's application of Schedule 71. For example, in recent years, municipalities have
13 contested issues that until then were not spelled out in detail in the form contract because
14 they had never been challenged before. Similarly, PSE has become aware of cost issues and
15 problems that can be caused by entities requesting conversions, and has revised the form
16 contract to try to head off or address such issues.
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23 28. Finally, entities requesting undergrounding also occasionally ask that PSE
24 accommodate special requests with respect to a project, or request that PSE undertake duties
25 that are not required of PSE in Schedule 71. Generally, PSE will agree to such requests, as
26 long as the requesting entity pays for the additional work or accommodation. PSE thus has
27 added sections to its contract to both spell out the basic method in which the installation will
28 be accomplished, as well as the availability of special accommodations, at the requester's
29 expense.
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37 29. The provisions of the Agreement that the City challenges reflect,
38 fundamentally, an accommodation to cities, and not imposition of a burden, as the City
39 claims. As set forth above, Schedule 71 requires that property owners in a conversion area
40 provide, at their expense, adequate operating rights for placement of facilities that in PSE's
41 judgment should be placed on private property. If such operating rights are not provided,
42 then the conversion does not meet the requirements of Schedule 71.
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1 30. In situations where the property owners within a conversion area are
2
3 themselves requesting the conversion to underground, there generally will be little difficulty
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5 in provision of such operating rights to PSE. However, where a municipality is undertaking a
6
7 project and requesting the conversion, property owners within the conversion area could
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9 refuse to provide operating rights, and thereby prevent the project from meeting the
10
11 requirements of Schedule 71.

12 31. One response to such a situation would be for PSE to refuse to perform the
13
14 conversion. Where a project requires poles to be relocated, PSE would then relocate the
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16 poles pursuant to franchise, but decline to convert the overhead facilities to underground. To
17
18 prevent that outcome, the requesting municipality would be required to obtain the required
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20 operating rights from the property owners by paying for easements or through condemnation
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22 proceedings, and deliver them to PSE. In an attempt to assist municipalities, PSE has
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24 included provisions in its Agreement under which PSE will take on the task of obtaining the
25
26 required operating rights, while ensuring that PSE is not forced to absorb the costs of
27
28 obtaining operating rights that Schedule 71 clearly does not place on PSE.
29

30 32. Thus, the Agreement tendered to the City provides:
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32 The cost to the Company of obtaining any such space and rights on any
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34 property other than public rights-of-way shall be reimbursed in full by
35
36 the Customer. The cost to the Company to obtain space and rights
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38 shall include, but not be limited to, the actual amount paid for any
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40 space and rights, staff costs (including overheads), the actual cost of
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42 any easement, fee, permit, attorney fee, court cost, permit fee, and any
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44 survey fee.

45 Agreement, § 1.b. Similarly, Section 8 of the Agreement provides that "the Company shall
46
47 obtain such Operating Rights, but shall not be required to bear the costs of any Operating
Rights," or, alternatively, "[t]he City may, upon approval of the Company, obtain, at its

1 expense, such Operating Rights acceptable to the Company."³

2
3 33. If a municipality refuses to guarantee either that it will obtain the operating
4 rights required by Schedule 71 or that it will reimburse PSE for PSE's costs of obtaining such
5 operating rights, then Sections 3.a and 4 of Schedule 71 are not satisfied, and PSE has no
6
7 obligation to perform the requested conversion to underground.
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11 34. The City also appears to object to the Engineering Agreement that PSE
12 tendered to it in connection with the conversion, although the City does not ask the
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14 Commission for any declaratory order with respect to the Engineering Agreement other than
15 with respect to its statement that "[t]he cost for obtaining any easements deemed necessary by
16
17 PSE will be the City's responsibility." *See* Petition at 6, 8.
18
19

20
21 35. PSE's Engineering Agreement provides that a city "will pay for any costs
22 incurred by PSE in the development of the project which do not result in the final product
23 within 5 years." Petition, Exhibit F at 4. If the underground conversion is completed within
24 five years from the date of the Engineering Agreement, the costs associated with designing an
25 underground conversion under Schedule 71 are rolled into the costs of the project that are
26
27 shared by PSE and the requesting entity. *See id.* In the past, PSE did not require a separate
28 engineering agreement as part of the contract required under Section 3.a. of Schedule 71.
29
30 However, PSE has changed that practice and now requires a separate engineering agreement
31 because of the problems that are caused when PSE undertakes design work for a requesting
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33 entity and that entity then decides not to go forward with a conversion.
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44 ³ The requirement that a city obtain PSE's approval for obtaining such rights is meant to
45 ensure that PSE has a chance to inform the city about the form of easements that will be required, so
46 that the city does not obtain insufficient easements and then have to return to the same property
47 owners for revised easements.

1 36. PSE's form Agreement provides that if the requesting entity cancels the
2 project, that entity "shall reimburse the Company for all costs reasonably incurred by the
3 Company in connection with the work to be performed under this Agreement prior to the date
4 canceled." Agreement, § 15. However, significant design work is often undertaken before
5 the Agreement is executed, during the initial planning stages for a conversion. The
6 Engineering Agreement permits such preliminary work to be performed without committing
7 an entity to a conversion and permits modification of a project's design early on in the
8 planning stages, but protects PSE and its ratepayers from having to absorb the costs to design
9 a project that is then never undertaken.

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19 **III. LEGAL ISSUES**

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21 **A. Legal Standards and the Scope of This Proceeding**

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23 37. As the Ninth Circuit has recognized recently, allocation of the costs of
24 *undergrounding* utility facilities, as opposed to the costs of *relocating* facilities, is a matter
25 that historically has not been addressed in Washington common law or statutes. *See City of*
26 *Auburn v. Qwest Corp.*, 247 F.3d 966, 974 (9th Cir. 2001).⁴ Instead, the conditions and
27 allocation of costs for undergrounding have been left to utility tariffs. PSE's Schedule 71
28 determines the outcome of the issues presented to this Commission.
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⁴ Newly-enacted RCW 35.99.010 *et seq.*, which addresses undergrounding, applies only to telecommunications and cable providers, not electric companies.

1 **1. The Commission does not have authority to issue a declaratory**
2 **ruling as to PSE's franchise with the City.**
3

4 38. The City's Petition does not seek a declaration from the Commission as to the
5
6 meaning of the Franchise. *See* Petition at 8-9. Nevertheless, the City makes a number of
7
8 statements regarding the Franchise and the parties' intent with respect to the Franchise.
9

10 39. The Commission does not have authority to issue a declaratory order with
11
12 respect to the Franchise in this proceeding. An agency's authority to issue declaratory orders
13
14 is limited to "the applicability to specified circumstances of *a rule, order, or statute*
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16 *enforceable by the agency.*" RCW 34.05.240(1) (emphasis added).
17

18 40. The Commission has authority to interpret and enforce PSE's Electric Tariff
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20 G, which was filed with the Commission pursuant to RCW 80.28.060, and has the force and
21
22 effect of law. *See Gen. Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585, 719 P.2d 879 (1986).
23
24 However, PSE's Franchise with the City is not a rule, order or statute, but rather a contract
25
26 between PSE and the City. *See id.* at 584. Franchises are subject to the rules of contract
27
28 interpretation, *City of Issaquah v. Teleprompter Corp., et al.*, 93 Wn.2d 567, 578 (1980),
29
30 which is a matter for the courts, not this Commission.⁵
31

32 41. In any case, the relevant provisions of PSE's Schedule 71 have been in effect
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34 since at least 1970, while the Franchise has existed only since 1993. No subsequently-
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36 enacted city ordinance can supersede the provisions of Schedule 71 unless PSE agrees to the
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38 change. *See Gen. Tel. Co.*, 105 Wn.2d at 585-87. Contrary to the City's assertions, nothing
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44 ⁵ Of course, interpretation of the Franchise may require that certain issues that are within the
45 primary jurisdiction of the Commission be considered and ruled on by this Commission. In this case,
46 because the Franchise defers to the conditions and terms of service provided in PSE's Tariff, it is
47 appropriate that this Commission rule on the proper interpretation of PSE's Tariff.

1 in the Franchise indicates PSE's agreement that facilities converted to underground would be
2 placed inside the boundaries of the City's rights-of-way. By definition, the Franchise cannot
3 control anything outside of City rights-of-way, thus the Franchise consistently refers
4 throughout to the terms that control with respect to facilities that exist "within the Franchise
5 Area." See Franchise, attached hereto as Exhibit H. The fact that this phrase is repeated in
6 Section 5, as in nearly every other section of the Franchise, says nothing about *where* any
7 facilities will be located *once they are placed underground*. As the City acknowledges,
8 Section 5 of the Franchise limits PSE's obligation to perform any undergrounding of facilities
9 and the terms of such undergrounding to the "applicable rates and tariffs on file with the
10 WUTC." Franchise, §§ 5.1, 5.2.⁶

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21 **2. Standard for interpreting PSE's Tariff.**

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23 42. As described above, filed and approved tariffs have the force and effect of
24 state law.

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27 When, as here, parties dispute what particular provisions require, [the
28 Commission] must look first to the plain meaning of the tariff. If the
29 tariff language is plain and unambiguous, there is no need to resort to
30 rules of construction.

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32
33 *Air Liquide America Corp. et al. v. Puget Sound Energy, Inc.*, Docket No. UE-981410, Fifth
34 Supplemental Order Granting Complaint, Ordering Refunds and Other Relief, 1999 Wash.
35 UTC LEXIS 591 (Aug. 3, 1999), at *10-11 (citations omitted). If tariff language is not plain,
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⁶ The City claimed in its March 27, 2001 letter to PSE that "PSE is *likewise* required by the franchise to relocate above-ground facilities when directed to do so. Franchise Section 6." See Petition, Exhibit D at 2 (emphasis added). However, even a cursory review of the Franchise shows that Sections 5 and 6 of the Tariff are significantly different. Among other things, unlike Section 5, Section 6 explicitly states that "Puget shall relocate such Facilities . . . *at no charge to the City*." Franchise, § 6.1 (emphasis added). There is no reference in Section 6 to PSE's tariffs.

1 or is ambiguous, the Commission applies rules of construction to determine what the
2
3 Commission intended in approving the tariff. *See id.* at *11-12.

4
5 **B. PSE May Require the City to Agree to Reimburse PSE for the Costs of**
6 **Obtaining Easements for Placement of Underground Facilities as a**
7 **Condition of Converting Overhead Facilities to Underground**
8

9
10 **1. PSE has no obligation to perform conversions from overhead to**
11 **underground unless PSE is provided with easements for placement**
12 **of facilities on private property.**
13

14 43. Section 4 of Schedule 71 provides:

15
16 4. OPERATING RIGHTS -- *The owners of real property within*
17 *the Conversion Area shall, at their expense, provide space for all*
18 *underground electrical facilities which in the Company's judgment*
19 *shall be installed on the property of said owners. In addition, said*
20 *owners shall provide to the Company adequate legal rights for the*
21 *construction, operation, repair, and maintenance of all electrical*
22 *facilities installed by the Company pursuant to this schedule, all in a*
23 *form or forms satisfactory to the Company.*
24
25

26 Schedule 71, § 4 (emphasis added).
27

28 44. Section 4, on its face, permits underground facilities to be installed on private
29 property as part of a conversion. This is flatly contrary to the City's suggestion that all
30 facilities in the conversion area must be installed in rights-of-way. The City's interpretation
31 of Schedule 71 would render Section 4 meaningless, in violation of established rules of
32 statutory construction. *See, e.g., City of Seattle v. State of Washington*, 136 Wn.2d 693, 701,
33 965 P.2d 619 (1998).
34
35

36 45. Section 4 also plainly leaves to "the Company's judgment" the question of
37 which facilities should be installed on private property. In PSE's judgment, underground and
38 pad-mounted facilities such as vaults for junctions, vaults for pulling cable, transformers and
39 associated vaults, and switches and associated vaults should be installed on private property.
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1 Even if Section 4 could be interpreted to place any limitation on "the Company's judgment,"
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3 which would be contrary to the plain language of the Tariff, PSE's judgment with respect to
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5 placing these facilities on private property is sound, as set forth above. The clearance
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7 requirements that PSE obtains through its easement are also consistent with regulations such
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9 as the National Electric Safety Code ("NESC"). See NESC §§ 323.B-C, E, 382, attached
10
11 hereto as Exhibit I.

12
13 46. Section 4 also clearly and explicitly requires that private property owners in
14
15 the conversion area grant PSE adequate legal rights for facilities placed on private property,
16
17 in a form satisfactory to PSE. PSE's requirement that easements be provided in the
18
19 Company's standard form complies with the Tariff.

20
21 47. Finally, Section 4 insulates PSE from any burden to obtain operating rights or
22
23 to pay for such rights. Instead, "[t]he *owners of real property* within the Conversion Area
24
25 shall, *at their expense, provide*" such rights. (Emphasis added.)

26
27 48. The City has acknowledged that PSE has no obligation to obtain the operating
28
29 rights required by Schedule 71. As Deputy City Attorney Brubaker stated:

30
31 [A]s we have discussed before, *nothing in the Tariff obligates PSE to*
32
33 *pay for the cost of obtaining private real property rights within the*
34
35 *conversion area*, but nothing in the Tariff obligates the City to pay for
36
37 those property rights either. Accordingly, the City cannot agree to
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39 assume this responsibility when it is not required under the Tariff. . . .

40
41 . . . *The City agrees that PSE is clearly also not obligated to pay to*
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43 *obtain operating rights on privately owned property*, however, it does
44
45 not follow that this then becomes the City's obligation. Rather, it
46
47 appears that the Tariff requires that each private property owner must
individually absorb the cost of providing these operating rights.

Brubaker April 10, 2000 Letter at 3, ¶¶ 3-4, Exhibit A (emphasis added).

1 49. The City's Petition fails to acknowledge that if the operating rights required
2
3 under Section 4 are not provided, then the conditions for Schedule 71 are not met, and the
4
5 undergrounding project cannot go forward. Provision of any "[s]ervice under [Schedule 71]
6
7 is subject to the General Rules and Provisions contained in this tariff." Schedule 71, § 8.
8
9 Those General Rules and Provisions are found in Schedule 80, which provides, among other
10
11 things, that "[t]he Company shall not be required to connect with or render service to an
12
13 applicant unless and until it has all necessary operating rights, including . . . easements"
14
15 Schedule 80, § 9. In addition, WAC 480-100-56(5) provides that "[a] utility shall not be
16
17 required to connect with or render service to an applicant unless and until it can secure all
18
19 necessary . . . easements"

20
21 50. The City's insistence that property owners, and not the City, must provide and
22
23 pay for such rights fails to acknowledge that options with respect to ensuring that operating
24
25 rights are delivered to PSE are limited. This Commission does not have authority to directly
26
27 order property owners to comply with the Tariff by executing easements. Property owners
28
29 must be incented to provide such rights through payment for easements, or through other
30
31 consideration. In the past, for example, cities have agreed to install water service to property
32
33 owners in exchange for property owners' agreement to grant PSE utility easements for a road
34
35 improvement project. Ultimately, cities and PSE have authority to condemn easements for
36
37 PSE's facilities, but then must pay just compensation for such easements.

38
39 51. The City's suggestion that it is PSE's obligation to obtain operating rights from
40
41 property owners is contrary to the plain language of Section 4, which requires that *property*
42
43 *owners provide* operating rights to PSE. Moreover, the City's position that PSE must
44
45 perform an underground conversion even if property owners in the area refuse to provide
46
47 operating rights to PSE is contrary to Section 8 of Schedule 71, Section 9 of Schedule 80 and

1 WAC 480-100-56(5). The City's reading of Schedule 71 would also shift the costs for
2
3 obtaining operating rights from property owners onto PSE, in violation of Section 4 of
4
5 Schedule 71. At base, if operating rights are not provided to PSE, Schedule 71 neither
6
7 requires nor permits PSE to convert the overhead facilities to underground.

8
9 52. The City claims that it "is not aware of any legal basis upon which it could
10
11 spend public tax dollars to reimburse PSE for the costs of PSE's private property
12
13 acquisitions--acquisitions that benefit PSE and its shareholders." Petition at 7:1-3.⁷
14
15 Washington courts have rejected similar arguments. *See Gen. Tel. Co.*, 105 Wn.2d at 588. In
16
17 addition, RCW 35.96.030-.040 authorizes municipalities to contract with and pay a utility for
18
19 the costs of a conversion. The utility easements that PSE requires are recognized as a normal
20
21 and appropriate cost of street improvements. WAC 399-30-030(3) permits a local
22
23 government to apply for a loan or financing guarantee to assist in financing critical public
24
25 works projects, including:

26
27 (c) Right-of-way acquisition costs including:

28
29 (i) Purchase of land and *easements* acquired for and devoted to the
30
31 project.

32
33
34
35 ⁷ The easements at issue are not acquisitions in fee, and merely permit sufficient space and
36
37 access for PSE to construct, operate, maintain, repair, replace, enlarge and extend its facilities. *See*
38
39 Exhibit F at § 1. They do not "benefit PSE and its shareholders," but rather protect PSE's general
40
41 ratepayers. If PSE had to pay for easements, then those costs would be capitalized, potentially
42
43 resulting in increased rates to all ratepayers in the future. Similarly, if facilities are undergrounded in
44
45 rights-of-way rather than on easement, and must therefore be relocated at PSE's expense in the future,
46
47 the costs of such relocations would ultimately flow through to ratepayers. PSE has long operated on
the principle that the costs of undergrounding should be localized to the area in which the
undergrounding occurs, and not spread throughout ratepayers in PSE's territory. If that model is to
change, then fundamental questions would need to be addressed, including whether Schedule 71
should provide any subsidy for undergrounding, whether cost-causers should pay for relocation costs
when undergrounded facilities are relocated, and whether areas with underground facilities should
pay higher rates for electric service than areas with overhead facilities.

1 (Emphasis added.) The Washington State Transportation Improvement Board's ("TIB")
2
3 guidelines for project reimbursement provide that "Right of Way Acquisition Costs" are
4
5 eligible for reimbursement, including costs for "easements acquired for and devoted to the
6
7 project." TIB Guidelines at 26, excerpts of which are attached hereto as Exhibit J.⁸
8

9 **2. PSE may voluntarily agree to perform conversions from overhead**
10 **to underground where the conditions of Schedule 71 are not**
11 **satisfied, but may refuse to do so except on terms that are**
12 **acceptable to the Company.**
13

14 53. Schedule 71 requires the entity that requests the conversion to:

15
16 enter into a written contract (the "Contract" herein) for the installation
17 of such systems, which Contract shall be *consistent with this schedule*
18 *and shall be in a form satisfactory to the Company.*
19

20
21 Schedule 71, § 3.a. (emphasis added).
22

23 54. As described above, PSE utilizes a form Underground Conversion Agreement
24
25 that sets out a description of a particular undergrounding project and the details under which
26
27 the conversion will be accomplished. PSE's Agreement contains more than the provisions
28
29 that would be required if Schedule 71 were to be strictly implemented, with PSE refusing to
30
31 perform any conversions that do not meet the letter of Schedule 71. The Agreement also
32
33 contains provisions governing services that PSE is under no requirement to provide, but that
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35

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37
38 ⁸ Interestingly, the TIB limits the overall eligibility of the costs of undergrounding facilities:

39
40 Undergrouding of overhead facilities, other than street illumination and
41 traffic signal services, can be included in landscaping costs. *The Board*
42 *considers undergrounding to be an aesthetic improvement.* Therefore, any
43 *additional* cost involved in undergrounding of a facility *in excess of the*
44 *amount to relocate overhead* may be considered part of the three percent
45 allowance for landscaping costs.
46

47 Exhibit J at 29 (emphasis added).

1 PSE will perform provided that a city agrees to pay PSE for such voluntary work, or to
2
3 comply with other related terms.⁹

4
5 55. The City objects to the portions of the Agreement that refer to the City
6
7 obtaining easements or reimbursing PSE for obtaining them. The City is correct that
8
9 Schedule 71 does not directly require cities to obtain easements or to reimburse PSE for such
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11 easements. However, as described above, no underground conversion can be performed
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13 under Schedule 71 unless such easements are provided to PSE, and PSE is under no
14
15 obligation to obtain or to pay for such easements.

16
17 56. PSE's Underground Conversion Agreement could simply state that the
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19 conversion will not proceed until property owners within the conversion area provide
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21 operating rights at their expense, and then refuse to undertake any work until such rights are
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23 provided. Unless property owners in a conversion area are the ones requesting the
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25 conversion, that would mean, as a practical matter, that cities would have to use their own
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27 employees to attempt to convince property owners to provide the operating rights, and
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29 potentially exercise the cities' powers of eminent domain to obtain easements from property
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31 owners who refuse.

32
33 57. In an effort to accommodate cities and ensure that the operating rights
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35 obtained are in the proper form, PSE has in the past agreed to more proactively assist in
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37 obtaining such rights, including using PSE's employees in that effort. However, PSE will not
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39 agree to do so unless it is reimbursed for its costs. Nothing in Schedule 71 requires PSE to
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45 ⁹ For example, in addition to the easement issue that is before the Commission, PSE will
46 agree to schedule its crews on an overtime basis to cooperate with a city's desire to expedite a
47 project, or to minimize traffic disruptions during a project. However, the city must pay 100% of the
extra costs caused by this special request. *See* Exhibit A at §§ 5(B)(v), 10.

1 absorb such costs, or permits PSE to shift costs of undergrounding from property owners in a
2 conversion area or the cost-causer to PSE's other customers. PSE's Underground Conversion
3 Agreement is fully consistent with Schedule 71.
4
5

6
7 58. PSE's Engineering Agreement is also consistent with Schedule 71. PSE is
8 under no obligation to perform engineering design work for cities or other entities without
9 being paid for those services. The Engineering Agreement permits potential conversion
10 customers to obtain design and cost information about a potential Schedule 71 conversion
11 early-on in the process. If the conversion does not go forward within five years, PSE will
12 obtain payment for its services through the Engineering Agreement. If a conversion goes
13 forward under Schedule 71 within five years, the costs of the engineering design are rolled
14 into the cost of the conversion, and shared by PSE and the requesting entity pursuant to
15 Section 3.b.(1) of Schedule 71. See Petition, Exhibit F at 4. Thus, PSE's request that the City
16 sign an Engineering Agreement is fully consistent with Schedule 71. In addition, as set forth
17 above, the reference in the Engineering Agreement to the City's responsibility for the costs of
18 obtaining easements is fully consistent with Schedule 71.
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31 **C. If PSE Agrees to Place Facilities in Rights-of-Way That Would Otherwise**
32 **Have Been Placed on Private Property, PSE May Condition Such**
33 **Agreement on the City's Agreement to Pay for Future Relocations of the**
34 **Undergrounded Facilities**
35

36 59. Section 1.e. of the Agreement is limited to vaults and similar facilities that
37 would be placed on private property, except when "it is not physically or economically
38 feasible to obtain space and/or adequate legal rights on private property" for such facilities.
39 Agreement, § 1.e. Such a circumstance might arise where buildings have been constructed so
40 that they are located right on the edge of the right-of-way, leaving no physical space for
41 placement of vaults and other facilities on private property, and where there is insufficient
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1 space within or access to the buildings to place PSE's facilities.

2
3 60. This section of the Agreement is meant to benefit cities. PSE prefers never to
4 place any of its facilities that should be located on private property in rights-of-way. PSE
5 could take the position that it simply will not convert overhead facilities to underground if
6 space and rights cannot be obtained within a conversion area. Instead, PSE has added
7 Section 1.e to its form Agreement to permit conversions to go forward, while still addressing
8 the safety, operational and cost issues associated with placing underground facilities in rights-
9 of-way.
10

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16 61. As described above, PSE is entitled to demand that certain facilities be placed
17 on private property if they are converted to underground. If adequate space and rights are not
18 available, then the conditions of Schedule 71 are not met, and PSE is not required to
19 underground the facilities. PSE may nevertheless voluntarily agree to perform the
20 undergrounding, on terms to which PSE agrees.
21

22
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26 62. Nothing in Schedule 71, PSE's Tariff or the regulations or statutes
27 administered by this Commission prohibits PSE from demanding that the City agree to
28 Section 1.e. as a condition of the underground conversion for the Project.
29
30
31

32 **IV. CONCLUSION**

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34
35 63. For the reasons set forth above, PSE respectfully requests that the Commission
36 issue an order declaring:
37

- 38
39 a. PSE's requirement that underground facilities (other than cable and conduit)
40 and pad-mounted facilities, such as vaults for junctions, vaults for pulling
41 cable, transformers and associated vaults, and switches and associated vaults,
42 be placed on private property within easements that are in the Company's
43 standard form is consistent with Schedule 71;
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- b. Nothing in Section 4 of Schedule 71 of Electric Tariff G or any other rate or tariff obligates the City of Kent to reimburse PSE for the costs of obtaining the operating rights required under Section 4 of Schedule 71. However, if the City of Kent refuses to agree to such reimbursement, PSE is not obligated to obtain such operating rights, and is not obligated to convert its facilities from overhead to underground under Schedule 71;
- c. PSE may voluntarily agree to obtain operating rights for the City of Kent's Project, on the condition that the City of Kent reimburse PSE for its costs to obtain such operating rights. The sections of the Underground Conversion Agreement and Engineering Agreement that PSE tendered to the City of Kent which so provide are consistent with Schedule 71;
- d. PSE may also voluntarily agree to place facilities in rights-of-way that it would otherwise have placed on private property, on the condition that the City of Kent agree to pay 100% of the costs to relocate such facilities in the future. Section 1.e. of the Underground Conversion Agreement that PSE tendered to the City of Kent is consistent with Schedule 71. Nothing in Schedule 71 requires the City of Kent to agree to such provisions, but PSE is not obligated to place such facilities in rights-of-way in the absence of the City of Kent's agreement.

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DATED: June ____, 2001.

PERKINS COIE LLP

By _____
Kirstin S. Dodge
Attorneys for Puget Sound Energy, Inc.

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STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

LYNN F. LOGEN, being first duly sworn, deposes and says that he is the Tariff Consultant for Puget Sound Energy, Inc.; that he has read the foregoing Statement of Law and Fact and knows the contents thereof; that the facts set forth therein are true of his own knowledge, except as to matters which are therein stated on information or belief, and as to those matters, he believes them to be true.

Lynn F. Logen

SUBSCRIBED and SWORN to before me this ____ day of _____, 2001, by
LYNN F. LOGEN.

Print Name: _____
Notary Public in and for the State of Washington,
residing at _____
My commission expires: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing with postage prepaid to:

City of Kent
220 Fourth Avenue S.
Kent, WA 98032

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Dated at _____, Washington, this _____ day of _____, 2001.

Pam Iverson