BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PETITION OF: PUGET SOUND ENERGY, INC. For a Declaratory Order on Schedule 74 and the Schedule 74 Design Agreement Between Puget Sound Energy, Inc. and the City of Tumwater	No. UE-061626 PUGET SOUND ENERGY, INC.'S REPLY IN SUPPORT OF PETITION FOR REVIEW OF THE INITIAL DECLARATORY ORDER

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I. INTRODUCTION

Puget Sound Energy, Inc. ("PSE") hereby submits this reply in support of its Petition for Review of the Initial Declaratory Order ("Petition" or "PSE's Petition"). This reply is necessary to respond to new arguments raised by the City of Tumwater (the "City") and the Staff of the Washington Utilities and Transportation Commission and to complete the record in this matter.

In particular, PSE's reply addresses the five points outlined below:

- Staff's admission that PSE's 1981 easement (the "Easement" or "PSE's Easement") was not extinguished by the City's annexation of the Port of Olympia's (the "Port") land leads to the inescapable conclusion that PSE's Easement remains in full force and effect such that the cost-sharing provision of Schedule 74 does not apply.
- Staff's arguments that the City, not the Port, is the grantor of the Easement are logically inconsistent.
- Staff's attempt to use extrinsic evidence to support its interpretation of Schedule 74 is inconsistent with its objection to PSE's use of extrinsic evidence to prove what Schedule 74 means to the parties.
- Several of the City's arguments in response to PSE's Petition arguing that PSE's Easement is "public" are irrelevant or misleading.
- The City's attempt to read "easement" into the annexation statute through reliance on *Clark County* must fail as the statute was enacted after *Clark County*.

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For these reasons, and the reasons set forth in PSE's Petition, the conclusions of the Initial Declaratory Order should be overturned.

II. ARGUMENT

A. Staff Admits that PSE's Easement Is an Existing Property Right

Staff now agrees with PSE that the Easement was not extinguished by annexation under RCW 35A.14.900, and asks that the Administrative Law Judge's finding be reversed on this point. *See* Answer of Commission Staff to Petition for Review of Puget Sound Energy, Inc. ("Staff Answer") at 9, ¶¶ 27-28. By so agreeing, Staff has rightfully admitted that PSE's Easement is an existing and enforceable property right of PSE. Staff, therefore, cannot ignore the nature of the Easement and whether the Easement or franchise is dominant. If the Easement is an existing property right—which it is—then, as elaborated upon in PSE's Petition, PSE's operating rights stem from this property interest, and the cost-sharing provision of Schedule 74 does not apply.

B. The City Is Not the Grantor of the Easement

Staff admits that the Port was the original "Grantor" of the Easement, but argues that the City stands in the shoes of the Port the same way that PSE stands in the shoes of Puget Sound Power & Light Company ("Puget Power"). *Id.* at 8, ¶¶ 24-26. This analogy is faulty. PSE is a successor entity to Puget Power. The City and the Port are distinct legal entities, and the Port transferred property—with the Easement—to the City. PSE's operating rights have, therefore, not been granted by the City.

C. Staff Cannot Object to PSE's Use of Extrinsic Evidence and Then Offer Its Own Extrinsic Evidence to Interpret Schedule 74

In PSE's Petition, PSE cited to deposition testimony by the City's spokesman and documents created by the City to illustrate the fact that the City agreed with PSE's

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interpretation of Schedule 74 and had committed to pay 100% of the cost of conversion. *See* Petition at 21-22. In the Staff Answer, Staff argues that "[t]he City's past practice and agreement with the Company are irrelevant to the Commission's determination of the requirements of that tariff regarding the division of cost responsibility for the Tumwater Conversation Project." *See* Staff Answer at 7, ¶ 22 (emphasis added).

But in the same Staff Answer, the City urges the Commission to review boilerplate text within the Project Design and Construction Agreements executed by the City and PSE in order to draw conclusions about Schedule 74's interpretation. *See id.* at 8, ¶ 25.

Staff cannot have it both ways. If the Commission is inclined to consider Staff's proposed Schedule 74 interpretation based on extrinsic evidence, then it should likewise consider PSE's evidence of the statements and documents from the City agreeing that the City owes 100% of the conversion costs.

D. The Placement of PSE's Facilities on a Public Thoroughfare Does Not Make PSE's Easement a Public Property Right

The City advances several arguments as to why PSE's Easement is a "public" property right and is not subject to the cost-sharing provision of Schedule 74. City of Tumwater's Answer to Puget Sound Energy's Petition for Review of Initial Order at 4-17, ¶¶ 9-36. All of these arguments are irrelevant or misleading.

First, the City's citation to pre-Schedule 74 PSE and Perkins Coie LLP testimony regarding what constitutes a public thoroughfare is irrelevant. It is not disputed that the PSE facilities the City has asked to be converted are located on a public thoroughfare. The fact that Schedule 74's definition of "public thoroughfare" includes public roads is not germane to deciding the nature of PSE's operating rights on that public thoroughfare.[1]

[1] Indeed, the Port of Olympia chose to give PSE an easement with full operating rights without qualification, notwithstanding the fact that it was within a public thoroughfare.

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Second, the City's citation of *State v. Public Utility District No. 1 of Clark County*, 55 Wn.2d 645, 649-50, 349 P.2d 426 (1960), is inapposite. That case simply holds that property rights granted by the government are subject to the government's police power. It is not disputed that the City's police power would allow it to condemn PSE's Easement if it took appropriate measures to do so. As to who bears the cost of a public utility's relocating or converting its facilities, the case addresses only the allocation of costs under a franchise, stating that "unless expressly agreed to otherwise in the franchise," the utility must bear the expense. *Clark County*, 55 Wn.2d at 649. Nothing in the case addresses or alters the application of Schedule 74 here, which provides that the City must bear 100% of conversion costs when PSE's rights derive from an easement. Similarly, neither *Sussex Rural Electric Cooperative v. Wantage*, 526 A.2d 259 (N.J. Super. Ct. App. Div. 1987) nor *City of Federal Way v. Dana Plaza LLC*, King County Cause No. 01-2-08746-1 KNT, (King County Super. Ct. 1992) address the facts or issues here, involving the treatment of PSE's private easement that was granted by the Port under Schedule 74.

Finally, the City asserts that PSE did not properly bring to the Commission's attention case law subsequent to *In re Algonquin Gas Transmission Co.*, 157 N.Y.S.2d 748, 750 (N.Y. Sup. Ct. 1956) ("*Algonquin*"), that distinguishes *Algonquin*. The City's argument is misleading and irrelevant. PSE cited the case for the proposition that "[t]he grant of a franchise does not carry with it an interest in land. It is a privilege which may be granted and acquired without involving the ownership of land. On the other hand, an easement is essentially an interest in land." *Algonquin*, 157 N.Y.S.2d at 750 (internal quotation marks and citation omitted). This proposition has not been overturned or eroded and has, in fact, been cited by two current New York treatises. 1. N.Y. Law & Practice of Real Property § 18.7 (2d. ed. 2007) (distinguishing franchises from easements); 49 N.Y. Jur. 2d *Easements*

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§ 5 (distinguishing franchises and easements). Nor has *Algonquin* itself been overruled. In fact, the subsequent case cited by the City, *Colonial Pipeline Co. v. State Board of Equalization & Assessment*, 366 N.Y.S.2d 949, 952 (N.Y. Sup. Ct. 1975), distinguishes *Algonquin* because, in *Colonial Pipeline*, the utility requested a franchise from the government entity before it obtained an easement, facts not present in *Algonquin* or here. Furthermore, PSE was under no obligation to cite subsequent case law that simply distinguished *Algonquin* on facts not applicable here.

More notably, however, the City did not even attempt to distinguish the cases that are most relevant to determining that PSE's Easement is, in fact, a private property right: *United States v. Johnson*, 4 F. Supp. 77 (W.D. Wash. 1933), and *Delmarva Power & Light Co. of Maryland v. Eberhard*, 230 A.2d 644 (Md. 1967). For the reasons explained in PSE's Petition, these cases establish that PSE's Easement is a private property right, and no contrary authority has been offered by the City or Staff.

E. The Annexation Statute Supersedes *Clark County*

The City also urges that, because *Clark County* references "easements" alongside "franchises" and "permits" when discussing the rights of public utilities to place their facilities on public lands, the annexation statute, RCW 35A.14.900, must also be read to include the term "easements." The City takes that position despite the annexation statute's plain and unambiguous references only to "franchise[s]" and "permit[s]."

The City's argument is again contrary to principles of statutory construction. The annexation statute was initially enacted in 1967—seven years after *Clark County*. When enacting new law, the legislature is presumed to be aware of prior law. *See Freitag v. McGhie*, 133 Wn.2d 816, 823, 947 P.2d 1186 (1997). The omission of the word "easement" after *Clark County* is, therefore, strong evidence that the legislature specifically meant to

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exclude easements and address only the status of franchises and permits after annexation. *See Harberd v. City of Kettle Falls*, 119 Wn. App. 1077, *published at* Wn. App. 498, 511-12, 84 P.3d 1241 (2004) ("As the Supreme Court previously noted, the legislature was presumably aware of the court's previous interpretations of the claim filing statutes when it amended the claim filing statutes in 1993. By using the general term 'damages' and the more specific term 'damages arising out of tortious conduct' in different sections of the statutes, the legislature presumably meant to distinguish the two.") (citation omitted). The City's weak attempt to read "easement" along with "franchise" or "permit" accordingly must fail.

III. CONCLUSION

For the reasons set forth above and in PSE's Petition, PSE respectfully requests that the Initial Declaratory Order be overturned and the Commission find that the City is responsible for 100% of the conversion costs associated with the Tumwater Boulevard Widening Project.

RESPECTFULLY SUBMITTED this 24th day of October, 2007.

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