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BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

CITY OF AUBURN, CITY OF
BREMERTON, CITY OF DES MOINES,
CITY OF FEDERAL WAY, CITY OF
LAKEWOOD, CITY OF RENTON, CITY
OF SEATAC, CITY OF TUKWILA,

Complainants,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

NO. UE-010911

PUGET SOUND ENERGY, INC.'S
ANSWER TO COMPLAINT AND
RESPONSE TO PETITION FOR
DECLARATORY RELIEF

Puget Sound Energy, Inc. ("PSE" or "the Company") answers the Complaint and
Petition for Declaratory Relief of the Cities of Auburn, Bremerton, Des Moines, Federal
Way, Lakewood, Renton, SeaTac and Tukwila ("the Cities") dated June 20, 2001, as follows,
in paragraphs numbered to correspond to the paragraph numbers in said document.
Thereafter, PSE submits its statement of fact and law in response to the Cities' Petition for
Declaratory Relief (the "Petition").

The Cities' Petition brings into issue RCW 34.05.240, WAC 480-09-230,

1 RCW 34.05.482, WAC 480-09-500, RCW 80.04.110, WAC 480-09-240(5),
2
3 RCW 80.28.080, RCW 80.28.090, RCW 80.28.100, WAC 480-100-056, Schedule 71 of
4
5 PSE's Electric Tariff G ("Schedule 71"), and Schedule 80 of PSE's Electric Tariff G
6
7 ("Schedule 80").
8

9 **ANSWER**

10
11 1. PSE admits the allegations in paragraph 1 on information and belief.
12
13 2. PSE admits the allegations in paragraph 2 on information and belief.
14
15 3. Answering paragraph 3, the first sentence of this paragraph sets forth a request
16
17 to the Commission that requires no answer. PSE admits the allegations in the second
18
19 sentence of paragraph 3 as to the title of Schedule 71. However, the remaining allegations of
20
21 the second sentence state legal assertions and conclusions for which an answer is
22
23 inappropriate and is therefore denied. The third sentence of paragraph 3 states legal
24
25 assertions and conclusions for which an answer is inappropriate and is therefore denied.
26
27 Answering the fourth sentence of paragraph 3, PSE admits that it requires that cities seeking
28
29 conversions of overhead facilities to underground under Schedule 71 sign PSE's Underground
30
31 Conversion Agreement and Engineering Agreement prior to converting overhead facilities to
32
33 underground, and that PSE requires easements for certain of its facilities, but denies each
34
35 other or different allegation of this sentence. The last sentence of paragraph 3 states legal
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37 assertions and conclusions for which an answer is inappropriate and is therefore denied. PSE
38
39 denies each other or different allegation of paragraph 3.

40
41 4. Paragraph 4 states legal assertions and conclusions for which an answer is
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43 inappropriate and is therefore denied.

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45 5. Paragraph 5 states legal assertions and conclusions for which an answer is
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47 inappropriate and is therefore denied.

PUGET SOUND ENERGY, INC.'S ANSWER
TO COMPLAINT AND RESPONSE TO
PETITION FOR DECLARATORY RELIEF - 2

[/010911, PSE, Answer to Complaint and Response, 7-5-01.doc]

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1 6. Answering paragraph 6, PSE admits that several cities are currently
2
3 undertaking street improvement projects for which they have requested that PSE convert its
4
5 overhead facilities to underground. PSE further admits that it requires that cities seeking
6
7 conversions under Schedule 71 sign PSE's Underground Conversion Agreement and
8
9 Engineering Agreement prior to converting overhead facilities to underground, and that PSE
10
11 requires easements for certain of its facilities when PSE installs an underground system. PSE
12
13 denies each other or different allegation in paragraph 6, and specifically denies that it has
14
15 refused to relocate its facilities, or that conversions from overhead to underground constitute
16
17 "relocation" of PSE's facilities.

18
19 7. Answering paragraph 7, PSE denies the allegations in the first sentence.
20
21 Answering the second sentence of paragraph 7, PSE admits that it operates equipment located
22
23 within the City of Des Moines and that it has entered into a franchise agreement with the City
24
25 of Des Moines, which franchise speaks for itself. PSE denies each other or different
26
27 allegation in the second sentence. PSE admits the allegations in the third sentence of
28
29 paragraph 7 on information and belief. PSE denies the allegations in the fourth and fifth
30
31 sentence of paragraph 7.

32
33 8. Answering paragraph 8, PSE admits that it has rejected Des Moines' demands
34
35 that PSE locate all of its facilities on City rights-of-way. PSE admits receiving the letters
36
37 dated March 2, 2001, and May 8, 2001, that are attached to the Andrews Declaration at
38
39 Exhibits E and F, and sending the letters dated January 31, 2001, February 21, 2001, and
40
41 May 31, 2001, that are attached to the Andrews Declaration at Exhibits C, D and G, which
42
43 letters speak for themselves. PSE denies each other or different allegation in paragraph 8.

44
45 9. Paragraph 9 states legal assertions and conclusions for which an answer is
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47 inappropriate and is therefore denied.

1 10. Answering paragraph 10, PSE denies the allegations in the first sentence. The
2
3 second sentence of paragraph 10 states legal assertions and conclusions for which an answer
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5 is inappropriate and is therefore denied.

6 11. Paragraph 11 states legal assertions and conclusions for which an answer is
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8 inappropriate and is therefore denied.

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10 12. Paragraph 12 states legal assertions and conclusions for which an answer is
11
12 inappropriate and is therefore denied.

13
14 13. Answering paragraph 13, PSE denies the allegations in the first sentence. PSE
15
16 lacks sufficient information to form an opinion as to the allegations in the second sentence of
17
18 paragraph 13, and therefore denies the same. PSE denies the allegations in the third sentence
19
20 of paragraph 13. Furthermore, the third sentence states legal assertions and conclusions for
21
22 which an answer is inappropriate and is therefore denied. The final sentence of paragraph 13
23
24 sets forth a request to the Commission that requires no answer.

25 14. Paragraph 14 sets forth a request to the Commission that requires no answer.

26 15. Paragraph 15 sets forth a request to the Commission that requires no answer.
27
28 PSE further denies at this time that a brief adjudicative proceeding is appropriate, unless and
29
30 until the scope of this proceeding is clarified and procedural issues are resolved such that
31
32 PSE is ensured of obtaining due process.
33
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35

36
37 **STATEMENT OF FACT AND LAW IN RESPONSE TO**
38 **REQUEST FOR DECLARATORY RELIEF**

39
40 **I. INTRODUCTION**

41
42 16. The Cities wish to convert electric facilities along various street improvement
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44 projects to underground rather than to simply relocate those facilities to accommodate road
45
46 widening in connection with such projects. However, the Cities seek to require PSE to
47

1 perform such undergrounding while escaping PSE's tariff requirements for such
2
3 undergrounding, and shifting costs associated with the undergrounding and of future
4
5 relocations of undergrounded facilities to PSE and its ratepayers.
6

7 17. Schedule 71 requires that property owners in the conversion area provide
8
9 easements on their property for placement of certain facilities that are converted from
10
11 overhead, at the property owners' expense. If adequate space and rights are not provided,
12
13 then the conditions of Schedule 71 are not met, and the facilities must remain overhead (and
14
15 perhaps be relocated if required by PSE's franchise and the circumstances of a project). In an
16
17 effort to avoid this result and to cooperate with cities to ensure that an undergrounding can
18
19 proceed, PSE will agree to assist in obtaining easements from property owners, but only if
20
21 PSE is reimbursed for its costs by the city requesting the undergrounding.
22

23 18. PSE has developed its form Underground Conversion Agreement
24
25 ("Agreement")¹ in an effort to fully explain what Schedule 71 requires and how PSE
26
27 undertakes conversions. That Agreement also contains provisions describing services that
28
29 PSE will undertake outside of the scope of Schedule 71 (such as obtaining easements), and
30
31 the terms under which PSE will agree to provide such services. PSE's Agreement is fully
32
33 consistent with Schedule 71, as is the Engineering Agreement that the Cities indirectly
34
35 challenge.
36

37 19. The relief requested in the Cities' Petition is flatly contrary to the plain
38
39 language of Schedule 71. Moreover, if the Cities' Petition is granted, it would mark a
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44 ¹ PSE actually has two forms, one for municipalities (attached hereto as Exhibit A) and one
45 for non-municipal customers (attached hereto as Exhibit B), because of differences in matters such as
46 how a municipal and non-municipal requester are able to deal with undergrounding of service lines in
47 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.
8
9

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11
12 20. The Commission should declare that the provisions of PSE's agreements that
13 the Cities challenge are fully consistent with Schedule 71.
14
15

16 II. FACTUAL BACKGROUND

17 A. The Cities' Street Improvement Projects

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19 21. PSE is unable to respond in any detail to the Cities' Petition with respect to
20 particular projects because the Cities have failed to make any allegations with respect to
21 specific projects, other than the City of Des Moines' Pacific Highway South project.
22
23 Des Moines is one of a number of municipalities along Pacific Highway South (Highway 99)
24 that are undertaking improvements to Pacific Highway South, including widening the
25 roadway. The Cities claim that the Des Moines Project (the "Project") requires that PSE's
26 facilities be moved and placed underground so the street can be widened. Petition at 4:23.
27
28 This is incorrect. The Project could move forward with *relocation* of the existing overhead
29 facilities rather than *undergrounding* of those facilities. Such relocation would be at no
30 charge to Des Moines, pursuant to PSE's 1992 franchise with Des Moines.
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41 22. If Des Moines (or any of the Cities) wish PSE to convert its overhead facilities
42 to underground, then the requirements of Schedule 71 must be satisfied. As described below,
43 PSE's Underground Conversion Agreement and Engineering Agreement are fully consistent
44 with Schedule 71, and are designed to ensure that underground
45
46
47

1 conversions can move forward even if circumstances arise that would otherwise bar
2
3 conversion to underground under Schedule 71. PSE has performed numerous conversions
4
5 for municipalities under the terms the Cities now challenge, including prior conversions
6
7 within the Cities, and conversions for other sections of Pacific Highway South.
8

9 **B. Schedule 71**

10
11 23. Schedule 71 governs the conversion of overhead facilities to underground
12
13 facilities in commercial areas. It sets forth the conditions that must be met in order for PSE
14
15 to perform such conversions, and provides that certain costs for such conversion will be
16
17 shared by PSE and the requesting party on either a 30%/70% basis, or a 70%/30% basis. *See*
18
19 Schedule 71, § 3.b.(1).² Because of this cost sharing, Schedule 71 essentially provides a
20
21 subsidy to entities that request PSE to convert its overhead facilities to underground.
22

23 24. Schedule 71 does not require that all costs associated with a conversion be
24
25 shared by PSE. Rather, the 30/70 or 70/30 cost-sharing excludes "all trenching and
26
27 restoration for duct and vault systems" and "surveying for alignment and grades of vaults and
28
29 ducts," which must be provided by the requesting entity. Schedule 71, § 3.b.(2). As set forth
30
31 below, Schedule 71 also protects PSE from absorbing any costs associated with obtaining
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33 easements that are required in connection with an underground conversion. Schedule 71,
34
35 Section 4.

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37 25. Schedule 71 also does not require PSE to underground its facilities whenever
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39 an entity requests such undergrounding. Rather, it sets forth a number of conditions that must
40
41 be met in order for Schedule 71 to apply. Section 2, Availability, describes the type of
42
43 facilities that will be undergrounded (i.e., distribution but not transmission facilities) and the
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² A copy of Schedule 71 is attached hereto at Exhibit C.

1 type of system that must remain in the conversion area after the conversion (i.e., a minimum
2
3 project length, with all distribution to be underground and no overhead remaining).

4
5 26. Schedule 71 also contains another fundamental requirement:

6
7 4. OPERATING RIGHTS -- The owners of real property within
8 the Conversion Area shall, at their expense, provide space for all
9 underground electrical facilities which in the Company's judgment
10 shall be installed on the property of said owners. In addition, said
11 owners shall provide to the Company adequate legal rights for the
12 construction, operation, repair, and maintenance of all electrical
13 facilities installed by the Company pursuant to this schedule, all in a
14 form or forms satisfactory to the Company.
15

16
17 Schedule 71, § 4.

18
19 27. In addition, "[s]ervice under this schedule is subject to the General Rules and
20 Provisions contained in this tariff." Schedule 71, § 8. Those General Rules and Provisions
21 are found in Schedule 80, which provides, among other things:
22
23

24
25 The Company shall not be required to connect with or render service to
26 an applicant unless and until it has all necessary operating rights,
27 including rights-of-way, easements, franchises and permits.
28

29
30 Schedule 80, § 9.

31
32 28. Finally, Schedule 71 requires the entity that requests the conversion to:

33
34 enter into a written contract (the "Contract" herein) for the installation
35 of such systems, which Contract shall be consistent with this schedule
36 and shall be in a form satisfactory to the Company.
37

38
39 Schedule 71, § 3.a.

40
41 29. Pursuant to Section 4 of Schedule 71, PSE requires that underground facilities
42 (other than cable and conduit) and pad-mounted facilities, such as vaults for junctions, vaults
43 for pulling cable, transformers and associated vaults, and switches and associated vaults, be
44 placed on private property within easements that are in the Company's standard form. The
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1 question whether such facilities should be placed on private property is a matter that the
2
3 Tariff leaves to the sole discretion of the Company. In any case, PSE's judgment with respect
4
5 to this question is sound because undergrounding facilities raises safety, operational and cost
6
7 issues that are different than those associated with overhead facilities.

8
9 30. For safety and operational reasons, PSE requires clearances around its
10
11 underground and pad-mounted transformers and oil-filled distribution switches of between
12
13 three and 100 feet, with a setback of ten feet on the front side of all such facilities. *See* PSE
14
15 Standard 6315.0002, Clearances for Oil-Filled Equipment, attached as Exhibit D. PSE
16
17 requires clearances of between three and ten feet for its vaults and handholes. *See* PSE
18
19 Standard 6775.0035, Vault and Handhole Location, attached as Exhibit E. Such facilities
20
21 cannot be installed on top of another utility's lines. *See id.* at 4. A ten-foot setback of clear,
22
23 unobstructed space is needed because the safe operation of high voltage equipment requires
24
25 that PSE workers use long, insulated sticks. PSE's form of easement preserves these setback
26
27 requirements by ensuring that the easement area includes sufficient space around its facilities,
28
29 and prohibiting uses of the easement area that are inconsistent with the continued operation,
30
31 repair and maintenance of its facilities. *See* PSE Form Easement, attached as Exhibit F, and
32
33 PSE Standard 0300.8000, Easements, attached as Exhibit G.

34
35 31. When facilities are placed in rights-of-way controlled by municipalities and
36
37 not PSE, PSE is subject to encroachment into the clearance zones around its facilities by
38
39 other users of the rights-of-way or adjacent property owners. Moreover, even if clearances
40
41 for installation of facilities could be ensured in rights-of-way, permit and traffic-control
42
43 requirements for work performed in rights-of-way can result in significant delays when PSE
44
45 needs to access its facilities. This could result in lengthening the time of an outage when
46
47 repair work must be performed to restore service in an area served by underground facilities.

1 PSE's workers are also subjected to increased hazards if they must perform work in rights-of-
2 way rather than on private property.
3

4 32. Cost issues also support PSE's requirement that its equipment other than
5 conduit and cable be placed within easements rather than rights-of-way. In general,
6 underground systems are more complex than overhead systems and are more expensive to
7 install. An underground system in a commercial area requires Feeders (unfused circuits
8 connecting one substation breaker to another substation breaker and capable of supplying 600
9 amps). Any time PSE branches off of the Feeder, it must be fused. This often results in a
10 duplicate system that runs parallel to the unfused system. In short, it takes two systems to
11 serve underground what was served by one system overhead. The only way to fuse branches
12 off an underground feeder system is by installing a switch cabinet, which costs \$20,000 -
13 \$25,000. This is in contrast to an overhead system, where PSE hangs a fuse that costs about
14 \$30.00.
15
16

17 33. Relocation costs are also significantly more expensive for underground than
18 for overhead systems. When relocation is necessary, overhead systems are simply moved
19 along with the attached equipment. The overhead conductors are transferred to the new pole
20 while "hot" (no outage is required). For underground systems, all cables are within conduit
21 that cannot be spliced to extend a conductor within a conduit. Therefore, to move a vault, for
22 example, PSE must remove the conductors from the conduit, extend the empty conduit to the
23 new location, then pull in all new conductors and make-up connections at both ends of every
24 conductor. This generally requires an extended outage for all customers involved. Work of
25 this type sometimes requires overtime payment to employees because they are scheduled at
26 low-use times. Even when done on overtime, this work can sometimes result in claims
27 against PSE, for example by business owners in the area.
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1 34. Because PSE's franchises generally require PSE to relocate facilities located in
2 rights-of-way at PSE's expense, it is PSE, and not the municipality ordering the facilities
3 relocated, that would have to absorb these significant relocation costs. If overhead facilities
4 are converted to underground and placed in rights-of-way, municipalities have no economic
5 incentive to ensure that the underground facilities are initially placed such that they will not
6 require immediate relocation, and no economic incentive to take into account the costs of
7 relocating underground facilities when considering future projects involving the rights-of-
8 way.
9

10
11 35. For these reasons, PSE requires that if facilities are to be converted from
12 overhead to underground, facilities other than cable and conduit will be placed within
13 easements on private property where they are not subject to future relocations. If
14 underground facilities were required to be placed in rights-of-way, significant issues would
15 be raised regarding whether PSE could continue to offer undergrounding at all or, at a
16 minimum, whether the existing subsidy of undergrounding should be eliminated.
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29 **C. PSE's Conversion Agreement and Engineering Agreement**

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31 36. There are many details involved in converting facilities from overhead to
32 underground that are not spelled out in Schedule 71. Instead, Schedule 71 provides for
33 addressing such details through a written contract between PSE and the entity requesting the
34 conversion. Schedule 71, § 3.a. As long as the terms of that contract are "consistent with
35 [Schedule 71]," PSE may require that the contract be "satisfactory to the Company." *Id.*
36
37

38
39 37. Of course, in applying Schedule 71 and its contract requirements, PSE must
40 comply with the nondiscrimination provisions of RCW 80.28.090-.100. PSE has sought to
41 ensure that entities requesting conversions are treated in a nondiscriminatory manner by
42 developing and offering a form Underground Conversion Agreement ("Agreement"). *See*
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1 Exhibits A, B. The form Agreement also serves the function of educating entities requesting
2 conversions about PSE's engineering and construction practices and the details of
3 underground conversions. Questions regarding that process and inquiries regarding
4 accommodations for special circumstances can then be discussed and worked out before a
5 conversion is undertaken.
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10 38. Over time, PSE's form Agreement has been revised and refined to clarify
11 questions that have been raised by requesting entities, and to address issues identified by PSE
12 as it applies Schedule 71 to actual underground conversions. For example, municipalities
13 have at times suggested revisions to contract language that PSE feels do not change the
14 fundamental terms of the Agreement, but that the municipality is more comfortable with.
15 Under such circumstances, PSE has often agreed to the requested change, and incorporated
16 that change in future versions of the form Agreement.
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24 39. Other changes have been made to address head-on questions and challenges
25 raised to PSE's application of Schedule 71. For example, in recent years, municipalities have
26 contested issues that until then were not spelled out in detail in the form contract because
27 they had never been challenged before. Similarly, PSE has become aware of cost issues and
28 problems that can be caused by entities requesting conversions, and has revised the form
29 contract to try to head off or address such issues.
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36 40. Finally, entities requesting undergrounding also occasionally ask that PSE
37 accommodate special requests with respect to a project, or request that PSE undertake duties
38 that are not required of PSE in Schedule 71. Generally, PSE will agree to such requests, as
39 long as the requesting entity pays for the additional work or accommodation. PSE thus has
40 added sections to its contract to both spell out the basic method in which the installation will
41 be accomplished, as well as the availability of special accommodations, at the requester's
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1 expense.

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3 41. The Cities challenge PSE's requirement that cities pay for easements, as set
4 forth in the Agreement. However, that requirement reflects, fundamentally, an
5 accommodation to cities, and not imposition of a burden, as the Cities claim. As set forth
6 above, Schedule 71 requires that property owners in a conversion area provide, at their
7 expense, adequate operating rights for placement of facilities that in PSE's judgment should
8 be placed on private property. If such operating rights are not provided, then the conversion
9 does not meet the requirements of Schedule 71.
10

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16 42. In situations where the property owners within a conversion area are
17 themselves requesting the conversion to underground, there generally will be little difficulty
18 in provision of such operating rights to PSE. However, where a municipality is undertaking a
19 project and requesting the conversion, property owners within the conversion area could
20 refuse to provide operating rights, and thereby prevent the project from meeting the
21 requirements of Schedule 71.
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29 43. One response to such a situation would be for PSE to refuse to perform the
30 conversion. Where a project requires poles to be relocated, PSE would then relocate the
31 poles pursuant to franchise, but decline to convert the overhead facilities to underground. To
32 prevent that outcome, the requesting municipality would be required to obtain the required
33 operating rights from the property owners by paying for easements or through condemnation
34 proceedings, and deliver them to PSE. In an attempt to assist municipalities, PSE has
35 included provisions in its Agreement under which PSE will take on the task of obtaining the
36 required operating rights, while ensuring that PSE is not forced to absorb the costs of
37 obtaining operating rights that Schedule 71 clearly does not place on PSE.
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46 44. Thus, the Agreement provides:
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PUGET SOUND ENERGY, INC.'S ANSWER
TO COMPLAINT AND RESPONSE TO
PETITION FOR DECLARATORY
RELIEF - 13

[/010911, PSE, Answer to Complaint and Response, 7-5-01.doc]

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1 The cost to the Company of obtaining any such space and rights on any
2 property other than public rights-of-way shall be reimbursed in full by
3 the Customer. The cost to the Company to obtain space and rights
4 shall include, but not be limited to, the actual amount paid for any
5 space and rights, staff costs (including overheads), the actual cost of
6 any easement, fee, permit, attorney fee, court cost, permit fee, and any
7 survey fee.
8

9
10 Agreement, § 1.b. Similarly, Section 8 of the Agreement provides that "the Company shall
11 obtain such Operating Rights, but shall not be required to bear the costs of any Operating
12 Rights," or, alternatively, "[t]he City may, upon approval of the Company, obtain, at its
13 expense, such Operating Rights acceptable to the Company."³ Consistent with these
14 provisions, PSE's Engineering Agreement reminds cities that "the City is responsible for the
15 . . . the cost of acquiring easements that may be necessary" for a project. *See* Petition at
16 Ex. D.
17

18 45. If a municipality refuses to guarantee either that it will obtain the operating
19 rights required by Schedule 71 or that it will reimburse PSE for PSE's costs of obtaining such
20 operating rights, then Sections 3.a and 4 of Schedule 71 are not satisfied, and PSE has no
21 obligation to perform the requested conversion to underground.
22

23 III. LEGAL ISSUES

24 A. Legal Standards and the Scope of This Proceeding

25 46. As the Ninth Circuit has recognized recently, allocation of the costs of
26 *undergrounding* utility facilities, as opposed to the costs of *relocating* facilities, is a matter
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³ The requirement that a city obtain PSE's approval for obtaining such rights is meant to ensure that PSE has a chance to inform the city about the form of easements that will be required, so that the city does not obtain insufficient easements and then have to return to the same property owners for revised easements.

1 that historically has not been addressed in Washington common law or statutes. *See City of*
2
3 *Auburn v. Qwest Corp.*, 247 F.3d 966, 974 (9th Cir. 2001).⁴ Instead, the conditions and
4
5 allocation of costs for *undergrounding* have been left to utility tariffs. PSE's Schedule 71
6
7 determines the outcome of the issues presented to this Commission. It is important to note
8
9 that the Cities' Petition ignores, and indeed seeks to obfuscate, the critical distinction between
10
11 *relocation* and *undergrounding* that is reflected in Washington law.

12
13 **1. The Commission does not have authority to issue any ruling as to**
14 **PSE's franchises with the Cities.**

15
16 47. The Cities' Petition does not seek a declaration from the Commission as to the
17
18 meaning of any particular franchise, nor does it seek a ruling on the Complaint that is based
19
20 on franchise. *See* Petition at 7. Nevertheless, the Cities make a number of statements
21
22 regarding franchise issues.

23
24 48. The Commission does not have authority to issue any order in this proceeding
25
26 with respect to any franchises. An agency's authority to issue declaratory orders is limited to
27
28 "the applicability to specified circumstances of *a rule, order, or statute enforceable by the*
29
30 *agency.*" RCW 34.05.240(1) (emphasis added). The Commission's jurisdiction to issue any
31
32 declaratory order or any other order is limited to matters governed by the public service laws,
33
34 RCW Chapter 80. *See* RCW 80.01.040(3); *Cole v. Washington Utils. and Trans. Comm'n*,
35
36 79 Wn.2d 302, 306, 485 P.2d 71 (1971).

37
38 49. The Commission has authority to interpret and enforce PSE's Electric Tariff
39
40 G, which was filed with the Commission pursuant to RCW 80.28.060, and has the force and
41
42 effect of law. *See Gen. Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585, 719 P.2d 879 (1986).
43

44
45
46 ⁴ Newly-enacted RCW 35.99.010 *et seq.*, which addresses undergrounding, applies only to
47 telecommunications and cable providers, not electric companies.

1 However, PSE's franchises with the Cities are not rules, orders or statutes, but rather
2
3 contracts between PSE and the Cities. *See id.* at 584. Franchises are not the subject of the
4
5 public service laws, RCW Chapter 80. Instead, the Legislature has provided for utility
6
7 franchises through statutes governing the powers of municipalities, RCW 35.22.280(7) and
8
9 35A.47.040. Franchises are subject to the rules of contract interpretation, *City of Issaquah v.*
10
11 *Teleprompter Corp., et al.*, 93 Wn.2d 567, 578 (1980), which is a matter for the courts, not
12
13 this Commission.⁵

14
15 50. In any case, the relevant provisions of PSE's Schedule 71 have been in effect
16
17 since at least 1970, while PSE's current franchises generally have been in existence for a
18
19 much shorter period. For example, PSE's franchise with the City of Des Moines (the "Des
20
21 Moines Franchise") has existed only since 1992. No subsequently-enacted city ordinance can
22
23 supersede the provisions of Schedule 71 unless PSE agrees to the change. *See Gen. Tel. Co.*,
24
25 105 Wn.2d at 585-87. Section 4 of the Des Moines Franchise provides that any
26
27 "undergrounding shall be arranged and accomplished subject to and in accordance with
28
29 applicable Tariffs on file with the W.U.T.C." Des Moines Franchise, § 4(B). This contrasts
30
31 with the entirely separate section of the Des Moines Franchise setting forth provisions for
32
33 relocation of facilities, which does not reference PSE's tariffs. *See id.*, § 6.

34
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39 ⁵ Of course, the Commission has the power to abrogate franchise provisions where a
40
41 franchise purports to govern the rates or services provided by a utility to the public. *See State ex rel.*
42
43 *Seattle v. Seattle & R.V. Ry.*, 113 Wash. 684, 194 P. 820 (1921).

44
45 In addition, interpretation of a franchise may require that certain issues that are within the
46
47 primary jurisdiction of the Commission be considered and ruled on by this Commission. For
example, where a franchise defers to PSE's filed tariff with respect to an issue, it is appropriate that
this Commission rule on the proper interpretation of the tariff. Such tariff interpretation is the only
matter that is appropriately before this Commission.

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

2
3 51. As described above, filed and approved tariffs have the force and effect of
4
5 state law.

6
7 When, as here, parties dispute what particular provisions require, [the
8 Commission] must look first to the plain meaning of the tariff. If the
9 tariff language is plain and unambiguous, there is no need to resort to
10 rules of construction.

11
12 *Air Liquide America Corp. et al. v. Puget Sound Energy, Inc.*, Docket No. UE-981410, Fifth
13 Supplemental Order Granting Complaint, Ordering Refunds and Other Relief, 1999 Wash.
14 UTC LEXIS 591 (Aug. 3, 1999), at *10-11 (citations omitted). If tariff language is not plain,
15 or is ambiguous, the Commission applies rules of construction to determine what the
16 Commission intended in approving the tariff. *See id.* at *11-12.

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22 **B. PSE May Require the Cities to Agree to Reimburse PSE for the Costs of**
23 **Obtaining Easements for Placement of Underground Facilities as a**
24 **Condition of Converting Overhead Facilities to Underground**

25 **1. PSE has no obligation to perform conversions from overhead to**
26 **underground unless PSE is provided with easements for placement**
27 **of facilities on private property.**

28 52. Section 4 of Schedule 71 provides:

29
30 4. OPERATING RIGHTS -- *The owners of real property within*
31 *the Conversion Area shall, at their expense, provide space for all*
32 *underground electrical facilities which in the Company's judgment*
33 *shall be installed on the property of said owners. In addition, said*
34 *owners shall provide to the Company adequate legal rights for the*
35 *construction, operation, repair, and maintenance of all electrical*
36 *facilities installed by the Company pursuant to this schedule, all in a*
37 *form or forms satisfactory to the Company.*

38
39
40
41
42
43 Schedule 71, § 4 (emphasis added).

44 53. The Cities' position that PSE must place all of its underground facilities in city

1 rights of way is contrary to the plain language of Section 4, which explicitly provides for
2 installation of facilities on private property.
3

4
5 54. Moreover, Section 4 plainly leaves to "the Company's judgment" the question
6 of which facilities should be installed on private property. In PSE's judgment, underground
7 and pad-mounted facilities such as vaults for junctions, vaults for pulling cable, transformers
8 and associated vaults, and switches and associated vaults should be installed on private
9 property. Even if Section 4 could be interpreted to place any limitation on "the Company's
10 judgment," which would be contrary to the plain language of the Tariff, PSE's judgment with
11 respect to placing these facilities on private property is sound, as set forth above. The
12 clearance requirements that PSE obtains through its easement are also consistent with
13 regulations such as the National Electric Safety Code ("NESC"). See NESC §§ 323.B-C, E,
14 382, attached hereto as Exhibit H.
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25 55. Section 4 also clearly and explicitly requires that private property owners in
26 the conversion area grant PSE adequate legal rights for facilities placed on private property,
27 in a form satisfactory to PSE. PSE's requirement that easements be provided in the
28 Company's standard form complies with the Schedule 71.
29
30
31

32
33 56. Finally, Section 4 insulates PSE from any burden to obtain operating rights or
34 to pay for such rights. Instead, "[t]he *owners of real property* within the Conversion Area
35 shall, *at their expense, provide*" such rights. (Emphasis added.)
36
37
38

39 57. If the operating rights required under Section 4 are not provided, then the
40 conditions for Schedule 71 are not met, and the undergrounding project cannot go forward.
41 Provision of any "[s]ervice under [Schedule 71] is subject to the General Rules and
42 Provisions contained in this tariff." Schedule 71, § 8. Those General Rules and Provisions
43 are found in Schedule 80, which provides, among other things, that "[t]he Company shall not
44
45
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47

1 be required to connect with or render service to an applicant unless and until it has all
2 necessary operating rights, including . . . easements" Schedule 80, § 9. In addition,
3
4 WAC 480-100-56(5) provides that "[a] utility shall not be required to connect with or render
5
6 service to an applicant unless and until it can secure all necessary . . . easements"
7

8
9 58. This Commission does not have authority to directly order property owners to
10
11 comply with the Tariff by executing easements. Property owners must be incented to provide
12
13 such rights through payment for easements, or through other consideration. In the past, for
14
15 example, cities have agreed to install water service to property owners in exchange for
16
17 property owners' agreement to grant PSE utility easements for a road improvement project.
18
19 Ultimately, cities and PSE have authority to condemn easements for PSE's facilities, but then
20
21 must pay just compensation for such easements.

22
23 59. The Cities argument that PSE is not permitted to place its facilities on
24
25 easement is directly contrary to the plain terms of Schedule 71, as set forth above. The Cities
26
27 also implicitly take the position that PSE must perform an underground conversion even if
28
29 property owners in the area refuse to provide operating rights to PSE. Such position is
30
31 contrary to Section 8 of Schedule 71, Section 9 of Schedule 80 and WAC 480-100-56(5).
32
33 The Cities' reading of Schedule 71 would also shift the costs for obtaining operating rights
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35 from property owners onto PSE, in violation of Section 4 of Schedule 71.⁶ At base, if
36
37

38
39
40 ⁶ If PSE had to pay for easements, then those costs would be capitalized, potentially resulting
41
42 in increased rates to all ratepayers in the future. Similarly, if facilities are undergrounded in rights-
43
44 of-way rather than on easement, and must therefore be relocated at PSE's expense in the future, the
45
46 costs of such relocations would ultimately flow through to ratepayers. PSE has long operated on the
47
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

1 operating rights are not provided to PSE, Schedule 71 neither requires nor permits PSE to
2
3 convert the overhead facilities to underground.

4
5 **2. PSE may voluntarily agree to perform conversions from overhead**
6 **to underground where the conditions of Schedule 71 are not**
7 **satisfied, but may refuse to do so except on terms that are**
8 **acceptable to the Company.**
9

10 60. Schedule 71 requires the entity that requests the conversion to:

11
12 enter into a written contract (the "Contract" herein) for the installation
13 of such systems, which Contract shall be *consistent with this schedule*
14 *and shall be in a form satisfactory to the Company.*
15

16
17 Schedule 71, § 3.a. (emphasis added).

18
19 61. As described above, PSE utilizes a form Underground Conversion Agreement
20
21 that sets out a description of a particular undergrounding project and the details under which
22
23 the conversion will be accomplished. PSE's Agreement contains more than the provisions
24
25 that would be required if Schedule 71 were to be strictly implemented, with PSE refusing to
26
27 perform any conversions that do not meet the letter of Schedule 71. The Agreement also
28
29 contains provisions governing services that PSE is under no requirement to provide, but that
30
31 PSE will perform provided that a city agrees to pay PSE for such voluntary work, or to
32
33 comply with other related terms.⁷
34

35 62. The Cities object to the portions of the Agreement that refer to the Cities
36
37 obtaining easements or reimbursing PSE for obtaining them. It is true that Schedule 71 does
38

39
40
41 when undergrounded facilities are relocated, and whether areas with underground facilities should
42 pay higher rates for electric service than areas with overhead facilities.
43

44 ⁷ For example, in addition to the easement issue that is before the Commission, PSE will
45 agree to schedule its crews on an overtime basis to cooperate with a city's desire to expedite a
46 project, or to minimize traffic disruptions during a project. However, the city must pay 100% of the
47 extra costs caused by this special request. *See* Exhibit A at §§ 5(B)(v), 10.

PUGET SOUND ENERGY, INC.'S ANSWER
TO COMPLAINT AND RESPONSE TO
PETITION FOR DECLARATORY
RELIEF - 20

[/010911, PSE, Answer to Complaint and Response, 7-5-01.doc]

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1 not directly require cities to obtain easements or to reimburse PSE for such easements.

2
3 However, as described above, no underground conversion can be performed under
4
5 Schedule 71 unless such easements are provided to PSE, and PSE is under no obligation to
6
7 obtain or to pay for such easements.

8
9 63. PSE's Underground Conversion Agreement could simply state that the
10
11 conversion will not proceed until property owners within the conversion area provide
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13 operating rights at their expense, and then refuse to undertake any work until such rights are
14
15 provided. Unless property owners in a conversion area are the ones requesting the
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17 conversion, that would mean, as a practical matter, that cities would have to use their own
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19 employees to attempt to convince property owners to provide the operating rights, and
20
21 potentially exercise the cities' powers of eminent domain to obtain easements from property
22
23 owners who refuse.

24
25 64. In an effort to accommodate cities and ensure that the operating rights
26
27 obtained are in the proper form, PSE has in the past agreed to more proactively assist in
28
29 obtaining such rights, including using PSE's employees in that effort. However, PSE will not
30
31 agree to do so unless it is reimbursed for its costs. Nothing in Schedule 71 requires PSE to
32
33 absorb such costs, or permits PSE to shift costs of undergrounding from property owners in a
34
35 conversion area or the cost-causer to PSE's other customers. PSE's Underground Conversion
36
37 Agreement is fully consistent with Schedule 71, as is the reference in PSE's Engineering
38
39 Agreement to a city's responsibility to pay for easements.

40
41 **3. PSE's Requirement that the Cities Reimburse PSE for the Costs of**
42 **Obtaining Easements for Placement of Underground Facilities as a**
43 **Condition of Converting Overhead Facilities to Underground Does**
44 **Not Violate the Washington Constitution**
45

46 65. The Commission does not have authority to issue a declaratory order with
47

1 respect to the Washington Constitution, or to issue any ruling regarding the Washington
2
3 Constitution in the context of a complaint proceeding. As noted above, an agency's authority
4
5 to issue declaratory orders is limited to "the applicability to specified circumstances of *a rule,*
6
7 *order, or statute enforceable by the agency.*" RCW 34.05.240(1) (emphasis added). "The
8
9 construction of the meaning and scope of a constitutional provision is *exclusively a judicial*
10
11 *function.*" *Washington State Highway Comm. v. Pacific Northwest Bell Telephone Co.*, 59
12
13 Wn.2d 216, 222, 367 P.2d 605 (1961) (emphasis added).

14
15 66. Even if constitutional matters were properly before this Commission, there is
16
17 nothing unconstitutional about Schedule 71 or PSE's requirement that if its facilities are to be
18
19 converted from overhead to underground, certain of those facilities be placed on private
20
21 easements. The Cities' argument and citation to *Washington State Highway Comm. v. Pacific*
22
23 *Northwest Bell Telephone Co.*, 59 Wn.2d 216, 367 P.2d 605 (1961), improperly characterizes
24
25 the underground conversions at issue as "relocations," and ignores the dispositive case on this
26
27 constitutional issue: *General Telephone Co. v. City of Bothell*, 105 Wn.2d 579, 716 P.2d 879
28
29 (1986).

30
31 67. In *General Telephone*, the Washington Supreme Court squarely addressed the
32
33 question whether "a tariff that imposes undergrounding costs on a city result[s] in a gift of
34
35 city funds in violation of Washington Const. art. 8, § 7." *Id.* at 583. Article 8, Section 7 of
36
37 the Washington Constitution prohibits cities from giving gifts to private parties. *See*
38
39 Washington Const. art. 8, § 7. For purposes of such provision, "a gift is a transfer of property
40
41 without consideration and with donative intent." *Gen. Tel. Co.*, 105 Wn.2d at 588. The
42
43 Court held that the City of Bothell's payment to the utility for undergrounding did not violate
44
45 the Constitution because it was merely paying "for services rendered, i.e., placing its facilities
46
47 underground at the City's request. Consideration for the payment is present, and a donative

1 intent is absent." *Id.* at 588.

2
3 68. Likewise, in the present case, PSE is under no obligation to convert its
4 facilities from overhead to underground. PSE's tariff requires as part of the consideration for
5 any undergrounding that operating rights be provided on private property for placement of
6 facilities that are part of the underground system that in PSE's judgment should be placed on
7 private property rather than in rights of way. The Cities' payments for such easements are
8 part and parcel of the consideration paid to PSE in exchange for the undergrounding.
9
10 Further, the Cities clearly have no donative intent, as is demonstrated by their Petition. Their
11 payment for easements associated with underground conversions merely reflects their
12 compliance with the terms of PSE's tariff, as the Cities are obligated to do.
13
14

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20 69. The Cities fail to acknowledge the *General Telephone* case with respect to
21 their constitutional arguments (although they cite it elsewhere in the Petition for a different
22 proposition). Instead, the Cities direct the Commission to *Washington State Highway Comm.*
23 *v. Pacific Northwest Bell Telephone Co.*, 59 Wn.2d 216, 367 P.2d 605 (1961), a case that is
24 twenty-five years older than the *General Telephone* and not on point.
25
26
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30
31 70. In *Northwest Bell*, the Washington State Highway Commission ("WSHC")
32 granted to several entities, including Northwest Bell, franchises that allowed the grantees to
33 place their equipment on state rights-of-way, provided that the grantees would relocate their
34 equipment "[w]henever necessary for the construction, repair, improvement, alteration or
35 relocation of" the highway. *Id.* at 218. Subsequently, Congress passed the Federal Highway
36 Act of 1956, creating an interstate highway defense system. *Id.* In response to such Act,
37 Washington adopted resolution No. 896, which provided that no public or private utilities
38 could occupy rights-of-way near highways that were part of the interstate highway defense
39 system unless specifically authorized to do so in the resolution. *Id.* In accordance with the
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1 applicable franchises and the Washington resolution, the WSHC and the Director of
2
3 Highways directed certain utilities, including Northwest Bell, to remove their equipment
4
5 from rights-of-way that were too close to certain of the federal highways, at the utilities'
6
7 expense.

8
9 71. In defense of having to spend their own money to fund the required removal,
10
11 Northwest Bell relied on a Washington statute *enacted after the franchises were entered into*
12
13 *and after the resolution was passed*, which provided that "notwithstanding any contrary
14
15 provision of law or of any existing or future franchise held by a public utility," the state
16
17 highway commission would reimburse a utility most of the costs incurred in moving its
18
19 facilities when the move was necessitated by the construction of certain federal highways. *Id.*
20
21 at 219. The WSHC and the Director of Highways challenged that statute, claiming, among
22
23 other things, that it violated Article 8, Section 7 of the Washington Constitution. The Court
24
25 found that the utilities would be gratuitously benefited by the subsequently enacted statute,
26
27 and held it to be unconstitutional.

28
29 72. Unlike the present situation, in *Northwest Bell*, the utilities were *required by*
30
31 *state resolution* to remove their facilities and they were *required by their franchise* to pay for
32
33 any relocations. Consequently, the subsequently enacted statute was an unbargained for gift
34
35 to the utilities. Here, PSE is not required under any statute or franchise to underground its
36
37 facilities. Moreover, PSE's tariff clearly protects PSE from absorbing the costs of obtaining
38
39 easements required for any undergrounding. If the Cities reimburse PSE for the costs of
40
41 easements acquired to accommodate an underground conversion, such reimbursement
42
43 constitutes an inducement to obtain PSE's agreement to convert its overhead facilities to
44
45 underground, which PSE is not obligated to do. Thus, PSE is not gratuitously benefited by
46
47 any such payment, and such payment does not violate the Washington Constitution.

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IV. CONCLUSION

73. For the reasons set forth above, PSE respectfully requests that the Commission issue an order declaring:

- a. PSE's requirement 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 is consistent with Schedule 71;
- b. Nothing in Section 4 of Schedule 71 of Electric Tariff G or any other rate or tariff obligates the Cities to reimburse PSE for the costs of obtaining the operating rights required under Section 4 of Schedule 71. However, if the Cities refuse 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 Cities in connection with an undergrounding project, on the condition that the Cities reimburse PSE for its costs to obtain such operating rights. The sections of PSE's Underground Conversion Agreement and Engineering Agreement which so provide are consistent with Schedule 71.

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DATED: July __, 2001.

PERKINS COIE LLP

By _____
Kirstin S. Dodge
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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:

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