BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

CITY OF KENT, Petitioner, v. PUGET SOUND ENERGY, INC. Respondent.	)	DOCKET NO. UE-010778 (Consolidated)
CITY OF AUBURN, CITY OF BREMERTON, CITY OF DES MOINES, CITY OF FEDERAL WAY, CITY OF LAKEWOOD, CITY OF REDMOND, CITY OF RENTON, CITY OF SEATAC, AND CITY OF TUKWILA, Petitioners/Complainants, v. PUGET SOUND ENERGY, INC. Respondent.	)	DOCKET NO. UE-010911 (Consolidated) FOURTH SUPPLEMENTAL ORDER: DENYING PETITION FOR RECONSIDERATION; CLARIFYING THIRD SUPPLEMENTAL ORDER

1 **PROCEEDINGS:** Docket No. UE-010778 concerns a Petition for Declaratory Relief filed by the City of Kent on May 29, 2001. Docket No. UE-010911 concerns a Complaint and Petition for Declaratory Relief filed by the cities of Auburn, Bremerton, Des Moines, Federal Way, Lakewood, Redmond, Renton, SeaTac, and Tukwila on June 21, 2001. These dockets raised common issues of fact and law, and were consolidated for purposes of hearing and decision. The Commission entered its Third Supplemental Order declaring the respective rights and obligations of the cities and PSE in connection with PSE's administration of its Electric Tariff G, Schedule 71, on January 28, 2002.

2 **PETITION FOR RECONSIDERATION:** On February 2, 2002, the City of Kent filed its "Petition for Reconsideration of Commission's January 28 2002 Third Supplemental Order." The City urges the Commission to reconsider and modify paragraphs 60 and 64 of its Order with respect to future relocation costs and the definition of "underground facilities." On March 14, 2002, Commission Staff filed its Response. Staff supports Kent's Petition with respect to future relocation costs, but otherwise opposes the Petition. Staff also recommends clarification of the Order. PSE filed its Response opposing Kent's Petition on March 15, 2002.

3 **PARTIES:** Michael L. Charneski, Attorney at Law, Woodinville, Washington, represents the City of Kent (Kent). Kirsten Dodge and Bill Bue, Perkins Coie LLP, Bellevue, Washington, represent Puget Sound Energy (PSE or the Company). Mary Tennyson, Senior Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Staff).

4 Carol S. Arnold and Laura K. Clinton, Preston Gates Ellis LLP, Seattle, Washington, represent the Cities of Auburn, Bremerton, Des Moines, Federal Way, Lakewood, Renton, SeaTac, and Tukwila (Auburn, *et al.*), but Auburn, *et al.* did not request reconsideration of the Commission's Third Supplemental Order. Auburn, *et al.,* however, have appealed the Commission's Third Supplemental Order to the Superior Court.

5 **COMMISSION:** The Commission denies Kent's Petition. The Commission clarifies its Third Supplemental Order.

MEMORANDUM

I. Background and Procedural History

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

facilities to underground electric distribution facilities, as the cities undertake to widen and improve approximately ten miles of Pacific Highway, also known as State Highway No. 99. Projects on other roadways also were involved in the dispute.

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

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

9 On January 28, 2002, the Commission entered its Third Supplemental Order: Declaratory Order On Motions For Summary Determination ("Declaratory Order"). In the fourth of seven Conclusions of Law, the Commission stated in paragraph 60 of its Declaratory Order that:

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

In paragraph 64 of its Declaratory Order, one of four ordering paragraphs, the Commission ordered that:

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

Kent urges the Commission to reconsider and modify paragraphs 60 and 64 of the Declaratory Order.

II. Discussion and Decision

10 Kent asserts that the Declaratory Order does not address specific provisions in PSE's proposed underground conversion agreement that relate to cost responsibility for specific facilities, including certain "pad-mounted" electrical facilities. *Petition at 2-4.* These provisions are included in Sections 1b and 1c of the subject underground conversion agreement tendered by PSE, according to Kent's Petition. Kent also asserts that the Commission's Declaratory Order "does not address the specific 'future relocation cost' charges imposed by PSE in Section 1e of PSE's underground conversion agreement." *Petition at 4.* Kent requests that the Commission modify paragraphs 60 and 64 of its Declaratory Order to address these proposed contract terms with specificity.

11 Kent requests that paragraph 60 be amended to read as follows, with Kent's proposed changes indicated by strike-through and underlined text:

> PSE is entitled to judgment in its favor, as a matter of law, that <u>as provided under Section 3 of Schedule 71, it may require provisions</u> ~~the disputed requirements PSE proposes to memorialize in contracts that are~~ in a "form satisfactory to the Company~~,~~" ~~as provided under Section 3 of Schedule 71,~~ <u>so long as such provisions</u> are neither inconsistent with the requirements of Schedule 71, nor unreasonable. <u>Applying that standard to the specific requirements at issue, the City of Kent is entitled to judgment in its favor, as a matter of law, that</u>
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> <u>(1) PSE does not have the discretion under Section 4 of Schedule 71 to require private easements at no cost for facilities it decides in its discretion to install *above* ground on private property outside of right</u>

> of way, because such a requirement would be inconsistent with the plain language of Section 4 and would thus be unreasonable; and
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> (2) Although PSE may engage in mutual *quid pro quo* negotiation with cities over costs of hypothetical future facility relocations, PSE does not have discretion under Schedule 71 to *require* as a condition of undergrounding that a City agree to pay for all future relocations of equipment that PSE elects to place within right of way as part of the undergrounding project.

Kent requests that paragraph 64 be amended to read as follows, again with Kent's proposed changes indicated by strike-through and underlined text:

> THE COMMISSION ORDERS That PSE has the discretion under Section 4 of Schedule 71 to require that portions of the existing overhead facilities it agrees to convert to underground facilities along Pacific Highway South shall be located on private easements that are acquired at no cost to PSE. PSE may require contract provisions under Section 3 of Schedule 71 that memorialize the parties' respective obligations that arise from PSE's exercise of discretion. PSE does not have the discretion under Section 4 of Schedule 71 to require private easements at no cost for facilities it decides in its discretion to install *above* ground on private property outside of right of way. PSE remains free to acquire such easements at its own expense if, in its discretion, it chooses to do so.

12 The Commission declared the parties' respective rights under the tariff with respect to the disputed contract, as Kent's own argument demonstrates. Paragraphs 60 and 64 of our Order clearly encompass all disputed provisions in the contract, including those cited in Kent's Petition. The Commission did not undertake, in declaring the parties' respective rights under PSE's Tariff Schedule 71, to dictate the specific terms of any underground conversion agreement between Kent and PSE, nor will we do so in response to Kent's Petition.

A. Pad-Mounted Facilities

13 In support of its request that the Commission add numbered subparagraph (1) to paragraph 60 and two new sentences to the end of paragraph 64 of our Declaratory

Order, Kent argues that although PSE indisputably can "require the location of underground facilities on private easements rather than in public right of way," this right "is restricted to underground easements for equipment that will be installed underground." *Petition at 2*.[1] Kent says that this proposition is "elementary." The proposition is elementary only in the sense that it simplistically focuses on a single word in a single sentence of Schedule 71, ignores the context in which that sentence and word appear, and ignores the evidence of record in this proceeding.

14 Staff argues in its Response that Kent's focus on a single word, in a single sentence of Section 4 of Schedule 71, is misplaced. The sentence Kent quotes from Schedule 71, Section 4—Operating Rights, reads as follows:

> Owners of real property within the Conversion Area shall, at their expense, provide space for all underground electrical facilities which in the Company's judgment shall be installed on the property of said owners.

As Staff points out in its Response, it is necessary to look only to the next sentence following the one Kent quotes in its Petition to see the fatal flaw in Kent's argument. That very next sentence in Schedule 71, Section 4—Operating Rights, says that:

> In addition, said owners shall provide to the Company adequate legal rights for the construction, operation, repair, and maintenance of *all electrical facilities* installed by the Company pursuant to this schedule, all in a form or forms satisfactory to the Company. *[emphasis added]*

15 Thus, the plain language of Schedule 71 totally belies Kent's argument.[2] Moreover, as PSE argues in its Response, it is abundantly clear from the evidence in this

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[1] We note that Kent did not make this argument in its Motion for Summary Determination. Because Kent raises this argument for the first time on its Petition for Reconsideration the argument should be, and is, rejected on that basis, as well for the substantive reasons stated in the body of this Order.

[2] Filed and approved tariffs have the force and effect of state law. *General Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585 (1986). When parties dispute what particular provisions require, we look first to the plain meaning of the tariff. *Nat'l Union Ins. Co. v. Puget Power*, 94 Wn. App. 163, 171, 972 P.2d 481 (1999). If the tariff language is plain and unambiguous, there is no need to resort to rules of construction. *Whatcom County v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996); *Food Servs. Of Am. v. Royal Heights, Inc.*, 123 Wn.2d 779, 784-85, 871 P.2d 590 (1994); *Waste Management of Seattle v. Utilities & Transp. Comm'n*, 123 Wn. 2d 621, 629, 869 P.2d 1034 (1994).

proceeding that above-ground, pad-mounted equipment is an ordinary part of underground conversion, which is the subject matter covered by Schedule 71. *PSE Response at 3.* Among other things, the evidence shows that equipment such as transformers and switches typically are pad-mounted (*i.e.,* surficial) rather than placed beneath the surface when a distribution system is converted from "overhead facilities" to "underground facilities" because it is far less expensive to place these components of the overall system above ground.[3]

16 Although Staff recognizes the flaw in Kent's argument, Staff suggests that we clarify our Declaratory Order to remove any doubt about the matter. Specifically, using legislative format to highlight its proposed change, Staff suggests that we modify paragraph 64 of our Declaratory Order as follows:

> THE COMMISSION ORDERS That PSE has the discretion under Section 4 of Schedule 71 to require that portions of the existing overhead facilities it agrees to convert ~~to underground facilities~~ along Pacific Highway South <u>pursuant to that tariff</u> shall be located on private easements that are acquired at no cost to PSE.

17 We will clarify our Declaratory Order as Staff suggests. Kent's request that we modify paragraph 60 of our Declaratory Order by adding the language it proposes concerning "above ground" facilities (*i.e.,* numbered subparagraph (1), as quoted in paragraph 11 of this Order), however, should be, and is, denied.

B. Future Relocation Costs

18 We turn next to Kent's argument that we should modify paragraph 60 of our Declaratory Order by adding the language Kent proposes concerning future relocation costs (*i.e.,* numbered subparagraph (2), as quoted in paragraph 11 of this Order). As Kent argues, there are two ways that PSE's common law obligation to relocate at its

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[3] *See, e.g.,* Declaration of Lynn F. Logen at ¶ 4 ("PSE intends to design its underground system for the Pacific Highway South projects so that facilities other than cable and conduit are placed on private property, including pad-mounted facilities . . . ."), ¶ 9 ("Least-cost principles do not support installation of total underground equipment just so that facilities can be placed in public rights-of-way, as the Cities suggest, because that equipment is significantly more expensive than pad-mounted equipment."), ¶ 23 ("pad-mounted transformers or switches" are "the most complicated and expensive type of underground facility to install and relocate").

expense any electric distribution facilities that are located within municipal right of way, when relocation is necessary. One way, as Kent acknowledges, would be by statute or tariff.[4] The other way is by contract. In this case, when the question is not simply relocation, but relocation and underground conversion,[5] there is a tariff in place—Schedule 71—that requires the parties to enter into a contract the terms of which are consistent with the tariff. Thus, the question presented to us in this case is not, as Kent contends, simply "whether Schedule 71 of Electric Tariff G shifts these relocation costs to the City." Rather, the question is whether PSE can insist on a particular contract term concerning future relocation costs as a condition of converting overhead facilities to underground facilities when requested to do so in connection with a relocation project.

19 Kent states in its Petition that "the Commission has rightly identified in paragraph 34 of its [Declaratory] Order the only other means by which these cost obligations can be shifted: negotiation and *mutual agreement* of the parties." *Petition at 7.* Kent argues that Section 1e of the form underground conversion agreement tendered to the city by PSE[6] does not comport with paragraph 34 of the Commission's Declaratory Order,

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[4] As we noted in our Declaratory Order, the legislature recently addressed this issue in the context of telecommunications facilities rather than electric facilities. Although not controlling here, we note again that the resulting law, Chapter 35.99 RCW, shifts to cities even *overhead relocation* costs when a city requests a second relocation within five years after a prior relocation. The statute also recognizes the distinction between relocation and undergrounding and places responsibility for *all* incremental costs of undergrounding on cities, absent a tariff that governs the allocation of such costs. RCW 35.99.060 also allows for the utility to be reimbursed for relocation costs when the relocation is solely for aesthetic purposes, or is "primarily for private benefit."

[5] We discussed in our Declaratory Order at pages 6-7 the important distinction between simple relocation of overhead facilities to an alternative overhead facilities location versus relocation coupled with conversion of overhead facilities to underground facilities.

[6] The disputed contract term provides that:

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

"as shown in subsection (b) below." Kent goes on to argue in "subsection (b)" of its Petition as follows:

> The Commission recognizes in paragraph 34 of its Order that, to avoid paying for a private easement for PSE, the City may wish to negotiate with PSE to have PSE locate a particular piece of equipment within right of way rather than on a private easement. The City would thereby save itself the cost of the private easement. In these negotiations, however, PSE would, in the Commission's view, reasonably insist on a *quid pro quo*, specifically
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> > the same financial protection against incurring future relocation costs that would follow if PSE did exercise its discretion to require that the facilities be located on private easements. Order at paragraph 34.
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> The Commission's Order unmistakably contemplates *negotiation* between the City and PSE in the instance in which the City wishes to avoid the cost of—or possibly the delays attendant to—the acquisition of a particular private easement desired by PSE. By definition, *quid pro quo* (Order at paragraph 34) negotiation is a give-and-take process: one party offers to forego something to which he is entitled in order to gain from the other party something to which he is *not* otherwise entitled as a matter of right. It goes without saying that such negotiations might or might not result in agreement.
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> Paragraph 34 of the Commission's Order makes clear that the City cannot *compel* PSE to locate facilities within right of way rather than on a private easement. Likewise, PSE cannot extract from the City a *quid pro quo* concession if the City is not in the first instance interested in negotiating to obtain agreement from PSE to locate equipment *within* right of way. The parties are simply free to negotiate and agree, or not, as the case may be. This is the substance of the Commission's Order at paragraph 34.

20 Kent's reading of our Declaratory Order and its effect, as stated in the three paragraphs quoted above, is essentially correct. The Commission does expect the parties to negotiate between themselves to arrive at terms that are consistent with the

requirements of Schedule 71. As we said in our Declaratory Order, consistent with Section 3 of Schedule 71, these contract terms may include language that memorializes the parties' respective obligations that arise from PSE's exercise of discretion under Section 4 of Schedule 71. Section 4 permits PSE to require that portions of the existing overhead facilities it agrees to convert to underground facilities along Pacific Highway South be located on private easements that are acquired at no cost to PSE. Alternatively, PSE may *agree* to waive its right to insist that underground facilities be located on private easements and *agree* to place the facilities on city right of way *in exchange for* Kent's *agreement* to pay the costs of any future relocation of the underground facilities. This is precisely the sort of *quid pro quo* negotiation Kent describes in its Petition as being contemplated under Schedule 71.[7]

21 The disputed provision in PSE's form contract does nothing more or less than reflect that PSE is willing to locate underground facilities on city right-of-way in exchange for Kent's agreement to pay the costs of any future relocation of the underground facilities. Nevertheless, and despite the city's apparent concession that this sort of *quid pro quo* arrangement is permitted under Schedule 71, Kent argues that:

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

[7] We note here, as we did in our Declaratory Order, that this proceeding is not about what PSE's tariff *should* provide in the future with respect to underground conversion, but rather what Schedule 71, as currently in effect, *does provide*. Part of PSE's pending general rate filing in Docket Nos. Ue-011570 and UG-011571 (consolidated) is a proposed revision of Schedule 71. Kent is a party to that proceeding and will have an opportunity there to advocate its view concerning what *should be* the parties respective rights and obligations vis-à-vis underground conversion.

> articulated by the Commission in paragraph 34 of its Order. [footnotes omitted].

22 Kent thus acknowledges in three paragraphs of its Petition that there is *quid pro quo* negotiation under the facts presented. Kent also appears to recognize that PSE has offered the *quid pro quo* of relinquishing its right to locate facilities on private easements, thus saving Kent "the cost of the private easement," in exchange for Kent's agreement to pay the costs of any future relocation of the new underground facilities. Yet, Kent then denies that this represents mutual consideration and urges us to act as if PSE has offered no *quid pro quo*. Kent's argument is at war with itself; it is internally inconsistent in its most fundamental point and, hence, unpersuasive.

23 We find Staff's argument in Kent's support on this point equally unpersuasive.[8] Staff's argument essentially is that Schedule 71 does not expressly address the question of future relocation costs. Staff argues that PSE's "sample contract unilaterally imposes the condition that the city pay for future relocations of facilities that PSE places underground at the request of the city." Staff argues that "the issue of payment for future relocations is a matter that should be subject to negotiation between the parties."

24 We do not disagree that future relocation costs are not expressly addressed in Schedule 71, but Schedule 71 also does not preclude such costs from being a matter subject to negotiation in connection with a relocation and underground conversion project. But, unlike Kent and Staff, we recognize that such negotiation is precisely what occurs when Kent requests PSE to waive its right to insist that underground facilities be placed on private easements and PSE demands as a *quid pro quo* that the city agree to indemnify PSE against the costs of any future relocation of the newly undergrounded facilities.

25 Staff, like Kent, ignores a critical fact: PSE is being asked to relinquish a right it clearly has under Schedule 71. Kent wants PSE to waive its right to require that new underground facilities be located on private easements secured at no cost to PSE.

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[8] Staff proposes that we add the following language to paragraph 60 of our Declaratory Order:

> The disputed requirements concerning future relocations are not contemplated by the language of the Schedule 71. PSE does not have discretion under Schedule 71 to require, as a condition of an underground conversion agreement, a city to agree to

Significantly, if PSE does exercise its discretion under Schedule 71 to place all underground facilities on private easements, it will, as a result, avoid liability for the costs of any future relocation. It is not unreasonable that PSE should insist on a contract term that will relieve it of liability for future relocation costs in exchange for PSE's agreement to locate underground facilities on public right-of-way instead of on private easements. The result for PSE is the same either way—it will not bear the costs of any future relocation of the subject underground facilities.

26 It is ironic, given their principled insistence on "*quid pro quo* negotiation," that Kent and Staff argue in effect that PSE should agree to relinquish its right to require that the underground facilities be located on private easements and get nothing in exchange. As we said in our Declaratory Order at paragraphs 34 and 35:

> If the cities wish to negotiate with PSE to secure the Company's agreement to not exercise its discretion to require facilities to be located on private easements, and to locate those facilities in the public rights-of-way, they may do so. It is neither inconsistent with Schedule 71, nor unreasonable in that circumstance for PSE to insist on a *quid pro quo* that provides the same financial protection against incurring future relocation costs that would follow if PSE did exercise its discretion to require that the facilities be located on private easements.
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> PSE has the right under Section 3 of Schedule 71 to insist on contract terms that are consistent with the rate schedule and not unreasonable. The terms PSE has tendered in connection with the Pacific Highway South projects meet those criteria. If the cities refuse to execute contracts that include such terms, then PSE is not required to "provide and install within the Conversion Area a Main Distribution System." *Declaratory Order at 13-14.*

27 For the foregoing reasons, we should, and do, deny Kent's request that we modify paragraph 60 of our Declaratory Order by adding numbered subparagraph (2), as proposed by Kent. For the same reasons, we reject Staff's alternative proposed modification of paragraph 60.

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pay for all future relocations of equipment that PSE elects to place within the right-of-way as part of the underground conversion project.

ORDER

28 THE COMMISSION ORDERS That the City of Kent's Petition for Reconsideration is denied.

29 THE COMMISSION ORDERS FURTHER That paragraph 64 of the Third Supplemental Order: Declaratory Order On Motions For Summary Determination in this proceeding is clarified to read as follows:

> THE COMMISSION ORDERS That PSE has the discretion under Section 4 of Schedule 71 to require that portions of the existing overhead facilities it agrees to convert along Pacific Highway South pursuant to that tariff shall be located on private easements that are acquired at no cost to PSE.

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

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner