

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of)	DOCKET UE-061626
)	
PUGET SOUND ENERGY, INC.,)	ORDER 04
)	
For a Declaratory Order on Schedule 74)	DENYING MOTION FOR ORAL
and the Schedule 74 Design Agreement)	ARGUMENT; DENYING MOTION
between Puget Sound Energy, Inc., and)	TO FILE REPLY; DENYING
the City of Tumwater)	PETITION FOR ADMINISTRATIVE
)	REVIEW; SUSTAINING INITIAL
)	ORDER'S RESULT
.....)	

1 ***Synopsis:** This is the Commission's Final Order on review of an Administrative Law Judge's Initial Order. The Commission denies Puget Sound Energy Inc.'s , Petition for Administrative Review and sustains the Initial Order's result denying PSE's motion for summary determination and granting Tumwater's motion for summary determination, interpreting Schedule 74 to require PSE to pay 60 percent of the cost of converting its overhead electrical facilities in the Tumwater Boulevard improvement project, and Tumwater to pay 40 percent of the conversion cost. Other than as expressly stated in this Final Order, however, the Commission rejects the reasons for this result stated in the Initial Order because it is not necessary to reach many of the issues discussed in the Initial Order.*

SUMMARY

2 **PROCEEDINGS:** This matter arises out of a Thurston County Superior Court order¹ allowing Puget Sound Energy, Inc. (PSE or the Company), to petition the Washington Utilities and Transportation Commission (Commission) for a declaratory order determining the cost responsibility under PSE's Tariff G, Schedule 74, for converting a

¹ *City of Tumwater v. Puget Sound Energy Inc., Thurston County Cause No. 06-2-00697-3, filed April 13, 2006.*

portion of PSE's overhead electric lines to underground in the City of Tumwater's (the City or Tumwater) Tumwater Boulevard improvement project.

3 **PARTY REPRESENTATIVES:** James F. Williams, attorney, Seattle, Washington, represents PSE. William H. Patton, City Attorney, represents Tumwater. Robert D. Cedarbaum, Assistant Attorney General, represents Commission Staff.

4 **COMMISSION DETERMINATIONS:** We find PSE's Petition, the answers by the City of Tumwater and Staff, and the previous filings and record of this proceeding sufficient to determine this matter on review. We accordingly deny PSE's request for oral argument.

5 We also deny PSE's Motion for leave to file a reply. WAC 480-07-825 requires that PSE demonstrate that its reply both concerns "new matters raised in the answer[s] not reasonably anticipated" and "why a reply is necessary." PSE failed to satisfy these requirements and, hence, its motion to reply is denied.

6 We deny PSE's Petition for Administrative Review. We have reviewed PSE's petition, the answers, and the record in this proceeding. We reach the same result as the Initial Order, albeit on narrower grounds, discussed below. Except as expressly discussed in this Final Order we do not accept or endorse the reasoning for the result set forth in the Initial Order because it is not necessary to determine finally many of the issues discussed in the Initial Order.

MEMORANDUM

I. Background and Procedural History.

7 As described in the Initial Order:

This matter arises out of a Thurston County Superior Court order allowing ... PSE to petition the ... Commission for a declaratory order determining the cost responsibility under PSE's Tariff G, Schedule 74, for converting a portion of PSE's overhead electric lines to underground in the City of Tumwater . . . Tumwater Boulevard improvement project. ²

² Initial Order at ¶2.

- 8 At issue are certain overhead power distribution facilities PSE installed at various points in time in the right-of-way for the street now known as Tumwater Boulevard, in Tumwater, Washington. Some of these facilities were installed as early as 1974, apparently prior to the time PSE had any recorded property right or right by virtue of franchise to install them. In 1981, PSE obtained an easement from the Port of Olympia (Port), which then owned the subject property. The easement gave PSE authority to construct, maintain and operate distribution facilities in the right-of-way. Thus, PSE's rights after 1981 were pursuant to the terms of its easement from the Port, insofar as the Tumwater Boulevard facilities were concerned.
- 9 Four years later, in 1985, PSE obtained a franchise from the City of Tumwater permitting the Company to install, operate and maintain distribution facilities on existing and future City rights-of-way. The City annexed the Port of Olympia property in 1987 and the Port dedicated the subject property to the City by deed. The property conveyed was encumbered by the easement and the City arguably became the successor to the Port insofar as the 1981 easement is concerned.³ Regardless, PSE's rights beginning in 1987 were pursuant to its franchise agreement with the City either exclusively or in addition to its rights under the easement conveyed with the property.⁴
- 10 In 2003, the City began discussions with PSE concerning plans to widen the roadway, including as part of the project the relocation of PSE's facilities to underground locations. PSE informed the City the facilities were located on an easement and asserted this required the City to pay 100 percent of the relocation costs under Tariff G, Schedule 74. The City initially agreed, but in the fall of 2005 asserted that the tariff requires PSE to pay 60 percent of the costs because the exceptions to the basic requirement for 60/40 cost-sharing under Schedule 74 do not apply.
- 11 On April 13, 2006, Tumwater filed a declaratory judgment action in Thurston County Superior Court, arguing that the Company must pay 60 percent of the cost of the

³ This point is qualified because the City argues the easement was extinguished by the annexation pursuant to RCW 35A.14.900. Staff initially supported this argument, which was sustained in the Initial Order. Staff now disavows the argument and urges the Initial Order be reversed in this regard. We neither discuss nor determine the questions argued below concerning whether annexation extinguished the easement or whether one set of rights or the other is "dominant."

⁴ As discussed below, there is no need to determine whether PSE's rights under the franchise are today the exclusive source of its rights.

conversion and Tumwater 40 percent under the terms of Schedule 74. On PSE's motion, the court granted a stay of proceedings while the Company sought a declaratory ruling from the Commission on the issue of cost allocation.

- 12 The parties chose to address the issues before the Commission by filing cross-motions for summary determination under WAC 480-07-380(2). The parties supported their motions with affidavits and voluminous documentation of the history and facts related to their dispute. Commission Staff filed a response to the cross-motions for summary determination, supporting the City.

II. Initial Order; Petition for Review

- 13 The Initial Order, entered on May 25, 2007, reaches the correct result that the exceptions under Schedule 74 do not apply. We find on review, however, that the Initial Order discusses, and determines, issues of property law and other matters that we do not need to resolve to sustain this result.⁵

- 14 PSE frames the issues on review, as follows:⁶

Error #1: The ALJ [Administrative Law Judge] erred because there is no statutory or common law basis for the conclusion that, under RCW 35A.13.900, PSE's easement was extinguished by the City's annexation of property where the easement is located.

Error #2: The ALJ erred because there is no statutory or common law basis for the conclusion that PSE's easement can be superseded by the City's 1985 Franchise Agreement.

Error #3: The ALJ erred because there is no statutory or common law basis for the conclusion that PSE's easement is a "public real property right."

Error #4: The ALJ erred because there is no factual or legal basis for the conclusion that PSE's easement was a right "granted" by the City.

⁵ The Commission granted requests by the parties to extend the dates for any petitions for review, answers, and any reply. The final pleading in the review phase was filed on October 24, 2007.

⁶ PSE Petition for Review at 3:17-36.

Error #5: The ALJ erred because PSE's operating rights under its easement were ignored in order to conclude that PSE's sole operating rights were "derived from a franchise previously granted by the Government Entity."

Error #6: The ALJ erred because there is no factual or legal basis for the conclusion that the public policy behind Schedule 74 disfavors PSE's position.

15 We need touch on only two of these assertions of error, numbers 4 and 5. We do not need to discuss and determine whether PSE's assertions of error number 1-3 and 6 have merit. Even in considering numbers 4 and 5, we determine the issues on the basis of our independent analysis of the full record, as discussed below.

III. Discussion and Decision

A. Request for Oral Argument; Motion To Submit Reply

16 PSE requests oral argument pursuant to WAC 480-07-825(6), asserting that "this matter presents complex and important issues of property law and the interpretation of Schedule 74." PSE states its belief that oral argument is likely to assist the Commission in ruling on its Petition. PSE states more particularly that it wishes to provide the Commission an opportunity to ask questions and seek clarification of the various issues briefed by the parties.

17 We find the pleadings, taken together with the Initial Order and our review of the record, adequate to our needs. Oral argument is not necessary and PSE's request should be denied.

18 PSE also filed a Motion to Submit Reply, seeking leave pursuant to WAC 480-07-825(5)(b) to file the reply that accompanied its motion. Our rule allows a party to seek leave to file a reply in support of a petition for review, "citing new matters raised in the answer and stating why those were not reasonably anticipated and why a reply is necessary." Each of the matters PSE's argues in its motion is either argued explicitly in

earlier pleadings⁷ or does not require a reply because the point is not necessary to our decision, or both. PSE's motion should be denied.

B. Tariff Schedule 74

19 Filed and approved tariffs have the force and effect of state law and are analyzed in the same manner and following the same principles as govern a court's consideration of statutes. *General Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585 (1986).

20 Schedule 74 states in relevant parts:

1. The Company shall install an Underground Distribution System and shall remove the existing overhead electric distribution system . . . when all of the following conditions are met:

* * *

b. The Company has the right to install, construct, operate, repair and maintain an electrical distribution system (including the Underground Distribution System) within the Public Thoroughfare in the Conversion Area pursuant to a franchise previously granted by the Government Entity requesting such installation and executed by the Company, or, if there is no such franchise, or if such franchise does not provide such right, pursuant to some other grant of rights mutually agreed upon by the Company and the Government Entity.

2. b. The Design Agreement and the Construction Agreement shall:

(1) except as otherwise provided in Section 2.b(2), obligate the Government Entity to pay the Company 40% of the total Cost of

⁷ For example, PSE says it could not have reasonably anticipated Staff's arguments concerning the fact that the City is not the original "Grantor" of the easement. Yet, PSE raised this very issue in its petition under its fourth assertion of error. PSE Petition for Review at 18.

Conversion and the Company to pay 60% of the total Cost of Conversion;

(2) obligate the Government Entity to pay (i) 100% of the total Cost of Conversion for conversion of that portion, if any, of the existing overhead distribution system located... (A) outside of the Public Thoroughfare or (B) pursuant to rights not derived from a franchise previously granted by the Government Entity or pursuant to rights not otherwise previously granted by the Government Entity.

21 Under these tariff provisions, the general rule of Schedule 74 is that the cost to convert overhead electrical facilities to underground electrical facilities must be split between the government entity requesting the conversion and PSE.⁸ The City, in this case, would be responsible for paying 40 percent of the cost and PSE would be responsible for 60 percent. The City would be required to pay 100 percent of the conversion costs only if at least one of three exceptions applies—the facilities are located:

1. Outside of the Public Thoroughfare.
2. Pursuant to rights not derived from a franchise previously granted by the Government Entity.
3. Pursuant to rights not otherwise previously granted by the Government Entity.

22 PSE fails to show that any of these exceptions apply.

A. The Company's Overhead Electrical Facilities are not Located Outside of a Public Thoroughfare.

23 Schedule 74 defines a "Public Thoroughfare" as any one of the following:

⁸ Schedule 74, Original Sheet No. 74-a, section (b)(1).

Any municipal, county, state, federal or other public road, highway, or thoroughfare, or other public right-of-way or other public real property rights allowing for electric utility use.⁹

24 The Company acknowledges in its petition that its overhead facilities are located within the Tumwater Boulevard public right-of-way,¹⁰ but argues that fact is irrelevant because its easement is a *private* real property right.¹¹ Therefore, according to PSE, the easement is not a “*public* real property right allowing for electric utility use” (emphasis supplied) under the alternative definition of “Public Thoroughfare” on which the Initial Order relies.¹²

25 PSE’s argument ignores the plain language of the tariff. PSE’s overhead facilities are located within a *public right-of-way*, which defines the boundaries of a *municipal road*. Tumwater Boulevard falls within each of these terms and is a Public Thoroughfare as defined by Schedule 74. Satisfaction of any one of the defining criteria set forth in Schedule 74 is sufficient to identify the location of PSE’s facilities as one that is in a Public Thoroughfare. It is unnecessary to determine whether PSE’s easement also is a “public real property right,” yet another of the alternative definitions of “Public Thoroughfare” found in the tariff. Because PSE’s facilities are located in a Public Thoroughfare, it follows that the first exception in Schedule 74 does not apply.

B. The Company’s Overhead Electrical Facilities are Located Pursuant to a Franchise Granted by the City.

26 In 1985, the City offered the Company a franchise to construct, operate, repair and maintain electrical facilities within the City.¹³ PSE accepted the franchise that same year.¹⁴ The franchise, by its terms, included rights-of-way and other public property within City limits at that time and any roads that later came within City limits by annexation:

⁹ Schedule 74, Original Sheet 74-f, section e.

¹⁰ PSE Petition for Review at 14:25-27. In fact, the Company’s easement received from the Port of Olympia in 1981 is expressly subject to the physical boundaries of that right-of-way: “Grantee’s rights shall be exercised upon that portion of the Property (the ‘Right-of-Way’ herein).” PSE Motion for Summary Determination, Declaration of James Williams, Exhibit E.

¹¹ PSE Petition for Review at 14-18.

¹² Initial Order at ¶¶40-43.

¹³ PSE’s Motion for Summary Determination, Declaration of James Williams, Exh. A.

¹⁴ PSE’s Motion for Summary Determination, Declaration of James Williams, Exh. B.

Franchise Area means: any, every and all of the roads, streets, avenues, alleys, highways, grounds and public places of the City as now laid out, platted dedicated or improved; and any, every and all roads, streets, avenues, alleys, highways, grounds and public places that may be laid out, platted, dedicated, or improved within the limits of the City and as such limits may be hereafter extended.¹⁵

The extension of PSE's franchise rights to areas later annexed by the City is unqualified.

27 In 1987, the City passed an ordinance that annexed all property of the Port of Olympia, including the area that is now Tumwater Boulevard.¹⁶ The day after the annexation, the Port transferred to the City by dedication deed that same property for public street right-of-way purposes.¹⁷ The area annexed and owned by the City includes the property that is now within the area of the Tumwater Conversion Project. Thus, since 1987, the Company's overhead facilities have been located *pursuant to rights derived from a franchise* granted by the City of Tumwater.

28 PSE does not contest the fact that its franchise authorizes the Company to locate its electric facilities within an area that includes the Tumwater Conversion Project.¹⁸ PSE alleges, however, that the Initial Order ignores the asserted "dominant" operating rights PSE derived from its 1981 easement and erroneously concluded that PSE's rights within the conversion area derive "solely" from the franchise agreement.¹⁹

29 The Initial Order, however, does not depend on the idea that the City franchise is the sole source of authority for PSE to locate facilities in the area covered by the Tumwater Conversion Project. It concludes only that the Company is operating pursuant to rights derived "from a franchise previously granted by the government entity."²⁰ This is indisputably true regardless of similar rights PSE may have by virtue of its easement or

¹⁵ *Id.* at 1: Section 1.13.

¹⁶ City of Tumwater's Cross Motion for Summary Determination, Declaration of Jim Shoopman at Exh. 2.

¹⁷ City of Tumwater's Cross Motion for Summary Determination, Declaration of Jim Shoopman at Exh. 3.

¹⁸ PSE's Motion for Summary Determination, Declaration of Kirstin S. Dodge in Support of Motion to Stay Proceedings, Exh. B at 13, ¶¶12-14.

¹⁹ PSE Petition for Review at 13-14 and 19:26-30.

²⁰ Initial Order at ¶36.

otherwise. Schedule 74 does not require us to determine a paramount right when the Company possesses more than one right to build, maintain and operate distribution facilities within or along public roads.

C. The Company's Overhead Electrical Facilities are Located Pursuant to Rights Previously Granted by the City.

30 As discussed in the preceding section, the Company's overhead facilities are located pursuant to a franchise, which is a set of "rights previously granted by the City." This grant of rights is confirmed by the Project Design and Construction agreements entered into by PSE as required by Schedule 74. Both specifically name the City as the Government Entity and state that:

The Company is a public service company engaged in the sale and distribution of electric energy and, *pursuant to its franchise or other rights from the Government Entity*, currently locates its electric distribution facilities within the jurisdictional boundaries of the Government Entity.²¹

31 Thus, these agreements clarify that the overhead conversion is being made at the request of a public entity, which obligates the utility to undertake the relocation, and clarify that the source of PSE's rights pertinent to the relocation and to Schedule 74 are those PSE obtained via its franchise agreement with the Government Entity requesting the relocation.

32 We could stop there for purposes of analyzing the third exception to the fundamental rule requiring cost sharing under Schedule 74. However, even if the franchise was not in place, we could not accept PSE's arguments that the third exception applies because the Port granted the Company its easement rather than the City. The easement the Company received from the Port of Olympia in 1981 contains the following express requirement:

The rights and obligations of the parties shall inure to the benefit of and be binding upon their respective successors and assigns.²²

²¹ City of Tumwater's Cross Motion for Summary Determination, Declaration of William Patton, Exh. 1 at Exh. F, item A and Exh. 2 at Exh. A, item A.

²² City of Tumwater's Cross Motion for Summary Determination, Declaration of William Patton, Exh. 1 at Exh. E, item 7.

- 33 The Initial Order reasons that the City stands in the Port's shoes insofar as the easement is concerned and, on that basis concludes that PSE's right to operate in the conversion area derives from a right granted previously by the City. Thus, the third and final exception in Schedule 74 that would have made the City fully responsible for the Tumwater conversion project does not apply, according to the Initial Order.²³
- 34 The Company disputes this holding because the 1981 easement names the Port of Olympia as the "Grantor".²⁴ PSE's argument is misplaced. With the 1987 annexation and dedication deed, the City assumed all of the rights and obligations of the Port of Olympia, including the burden of the easement. If PSE retains enforceable rights against the City under the easement, it must accept that it is also subject to the City's rights under Schedule 74, just as it would be subject to the Port's rights if the City had not annexed the subject property. If we assume for the sake of argument that the property never changed hands, and that the Port would undertake the Tumwater widening project, the Port would be the "Government Entity" requesting relocation and PSE would be responsible for 60 percent of the conversion costs under the terms of Schedule 74. The City, as the Port's successor, is a government entity that has the same rights as the Port and the cost allocation between the government entity and the utility under Schedule 74 must be the same regardless of which government entity originally granted those rights to PSE.

FINDINGS OF FACT

- 35 Having discussed above all matters material to this decision, the Commission now makes the following summary findings of fact incorporating by reference any pertinent portions of the preceding discussion:
- 36 (1) The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate rates, rules, regulations, practices and accounts of public service companies, including electric companies.

²³ Initial Order at ¶36.

²⁴ PSE Petition for Review at 18-19.

- 37 (2) PSE is a public service company providing electric service in the state of Washington, including service in the City of Tumwater, Washington, for compensation.
- 38 (3) The City of Tumwater is a municipality in Washington and a government entity that plans and constructs street improvement projects and engages in agreements with electric utilities such as PSE for the construction of those projects.
- 39 (4) PSE's tariff Schedule 74 governs the cost responsibility for converting overhead electric lines to underground facilities when required by street improvement projects.
- 40 (5) PSE's facilities in the Tumwater Boulevard street improvement project are in a Public Thoroughfare as that term is defined in Schedule 74.
- 41 (6) PSE's facilities in the Tumwater Boulevard street improvement project are operated pursuant to the franchise granted it by the City of Tumwater in 1985 and pursuant to other public real property rights.

CONCLUSIONS OF LAW

- 42 Having discussed above all matters material to this decision, the Commission now makes the following summary conclusions of law incorporating by reference any pertinent portions of the preceding discussion:
- 43 (1) The Commission has jurisdiction over the subject matter of, and all parties to, this proceeding.
- 44 (2) The pleadings filed in this proceeding, together with the evidentiary support provided by the parties' affidavits, and other documents, show that there is no genuine issue as to any material fact.
- 45 (3) The Commission, on its independent review and for the reasons stated in this Final Order, concludes the City of Tumwater is entitled to judgment as a matter of law, and that Schedule 74 requires PSE to pay 60 percent of the cost of conversion of overhead lines in the Tumwater Boulevard street improvement project.

ORDER

THE COMMISSION ORDERS:

- 46 (1) Puget Sound Energy Inc's, Petition for Administrative Review of the Initial Order
in this proceeding is denied.
- 47 (2) Puget Sound Energy Inc's, Motion To Submit Reply Brief and its request for oral
argument are denied.
- 48 (3) Puget Sound Energy, Inc., must pay for 60 percent of the cost of conversion of
overhead lines in the Tumwater Boulevard street improvement project pursuant to
Schedule 74 of the Company's tariff.
- 49 (4) The Commission retains jurisdiction to effectuate the terms of this order.

DATED at Olympia, Washington and effective December 19, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a Commission Final Order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.