

1
2
3
4
5
6
7 BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

8 In the Matter of the Petition of

9 PUGET SOUND ENERGY, INC.

No. UE-061626

10 For a Declaratory Order on Schedule 74 and
11 the Schedule 74 Design Agreement between
12 Puget Sound Energy, Inc. and the City of
Tumwater

CITY OF TUMWATER'S CROSS-
MOTION FOR SUMMARY
DETERMINATION

13
14
15
16 **I. Nature of the Motion and Request for Relief**

17 1. Pursuant to Judge Mace's Notice of Procedural Schedule issued December 14,
18 2006, the City of Tumwater (City) submits this cross motion for summary determination in
19 response to the Petition for Declaratory Order filed by Puget Sound Energy, Inc. (PSE) on
20 October 20, 2006. The City requests that the Washington Utilities and Transportation
21 Commission (Commission) determine that Tariff G, Schedule 74 requires the City to pay 40
22 percent and PSE to pay 60 percent of the costs of converting PSE's electric distribution facilities
23 from overhead to underground on Tumwater Boulevard between Linderson Way SW and New
24 Market Street SW.
25
26

CITY OF TUMWATER'S CROSS-MOTION FOR
SUMMARY DETERMINATION - 1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

COPY

1 **II. Parties**

2 2. The City of Tumwater, is a Washington municipal corporation, formed as a
3 mayor-council plan of government pursuant to ch. 35A.12 RCW.

4 3. Puget Sound Energy, Inc. is a Washington corporation, providing retail electric
5 and gas service in parts of the State of Washington, whose electric service tariffs are regulated
6 and adopted by the Commission.

7 **III. Procedural Background**

8 4. In 2002, the City began planning for what came to be known as the Tumwater
9 Boulevard Widening Project (Project). When a PSE draft of a Schedule 74 construction
10 agreement and a PSE draft of a relocation agreement were submitted to the City Council for
11 approval in September 2005, a dispute arose between the City and PSE about the payment
12 responsibility for both conversion and relocation costs of PSE's facilities. The proposed
13 agreements drafted by PSE would have required the City to pay 100 percent of the cost of both
14 conversion and relocation. Upon review by the City Attorney, however, the proposed
15 agreements were removed from the City Council agenda without approval, as the City disputed
16 PSE's contention that the City was obligated to pay 100 percent of the cost of both conversion
17 and relocation.
18

19 5. The Project only went forward after the City and PSE entered into a reservation of
20 rights agreement regarding the issue of payment responsibility for both conversion and relocation
21 of PSE's electric distribution facilities in the Project. To resolve these payment issues, the City
22 filed a complaint against PSE in Thurston County Superior Court on April 17, 2006. (The City's
23 compliant is provided to the Commission as Exhibit 1 to the declaration of William H. Patton.)
24
25
26

1 6. PSE denied the complaint and filed a counterclaim (Patton dec. Exhibit 2). In
2 turn, the City filed an answer denying PSE's counterclaim (Patton dec. Exhibit 3).

3 7. PSE then filed a motion to stay the proceedings in Thurston County Superior
4 Court to allow PSE to petition the Commission for a declaratory order to determine the
5 application of PSE's Tariff G, Schedule 74 to the payment dispute regarding conversion costs on
6 the one stretch of the Project where PSE still had overhead distribution lines. The trial court
7 granted PSE's motion to seek a declaratory ruling from the Commission on September 22, 2006.
8 (PSE Petition for Declaratory Order, Exhibit A.)

9 8. PSE then filed its Petition for Declaratory Order (Petition) on October 20, 2006.
10 The matter was assigned to Judge Mace.

11 9. Following several prehearing conferences, the City and PSE were unable to agree
12 on a stipulation of facts, and the Commission Staff suggested that the most efficient way to
13 resolve the petition was to have both the City and PSE submit simultaneous motions for
14 summary determination; answers to each cross motion from the Commission Staff; replies to the
15 Commission Staff and to each other by both the City and PSE; and, concluding oral argument
16 before the Commission and Judge Mace on April 5, 2007 at 1:30 p.m.

17 **IV. Commission Authority**

18 10. The Commission is vested with statutory authority to regulate investor owned
19 utilities in the state, including the electric utility owned and operated by PSE. RCW 80.01.040
20 and ch. 80.28 RCW.

21 11. The Commission issued PSE's Tariff G, Schedule 74 effective July 1, 2002, and
22 the Commission has authority to rule on a petition for a declaratory order interpreting that tariff
23
24
25
26

1 schedule. RCW 34.05.240; WAC 480-07-370. (Schedule 74 is attached as Exhibit E to PSE's
2 Petition.)

3 12. The Commission, however, does not have authority over franchise agreements
4 between cities and regulated utilities. An agency's authority to issue declaratory orders is
5 limited to "the applicability to specified circumstances of a rule, order, or statute enforceable by
6 the agency." RCW 34.05.240 (1). Franchises are binding agreements and are subject to the rules
7 of contract interpretation, *Issaquah v. Teleprompter Corp.*, 93 Wn.2d 567, 578, 611 P.2d 741
8 (1980), which is a matter for the courts, not the Commission.

9 13. The Commission's tariffs, on the other hand, have the force and effect of law.
10 *Gen. Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585, 719 P.2d 879 (1986). For that reason, the
11 tariffs must be applied as filed and may not be altered, by contract or otherwise, without
12 permission of the Commission: "Unless the commission otherwise orders, no change shall be
13 made in any rate or charge or in any form of contract or agreement or in any rule or regulation
14 relating to any rate, charge or service, or in any general privilege or facility which shall have
15 been filed and published by a gas company, electrical company or water company. . . " RCW
16 80.28.060.

17
18
19 **V. Argument: Summary determination should be granted to the City**

20 **A. The City seeks to apply the standard 40/60 split of conversion costs**

21 14. The petition for declaratory order seeks to clarify only the application of PSE's
22 Tariff G, Schedule 74 to the costs of conversion of PSE's overhead facilities to underground
23 along one stretch of the Tumwater Boulevard Widening Project where PSE itself had not yet
24 converted its facilities from overhead to underground. PSE agrees that the costs of relocation of
25
26

1 PSE's underground facilities along the other segments of Tumwater Boulevard, is an issue to be
2 decided by the courts. (Petition, Transcript of court proceedings, September 22, 2006, at 12,
3 ll. 16-24.)

4 15. PSE argues that the City should pay 100 percent of the cost under its
5 interpretation of Schedule 74, Section 2.b(2)(i). The City, on the other hand, contends that
6 pursuant to Schedule 74, Section 2.b(1), the standard division of conversion costs should be
7 applied, with the City paying 40 percent and PSE paying 60 percent of the conversion costs.
8

9 16. The focus of this inquiry, and the text on which PSE relies for its claim that the
10 City should pay 100 percent of the costs, is Section 2.b(2)(i) of Schedule 74:

11 "2.b(2) obligate the Government Entity to pay (i) 100% of the total Cost of
12 Conversion for conversion of that portion, if any, of the existing overhead distribution
13 system located, as of the date on which the Government Entity provides the notice
14 referred to in Section 4.a or the date on which the Government Entity commences
15 acquisition or condemnation of real property to facilitate construction of any public
16 improvements related to the conversion project, which ever occurs first, (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
granted by the Government Entity . . . "

17 17. The answer to the question of whether Section 2.b(2)(i) of Schedule 74 applies to
18 the Tumwater Boulevard Project comes down to (1) whether Tumwater Boulevard is a "Public
19 Thoroughfare" as that term is defined in Schedule 74, and (2) whether control over PSE's
20 presence in Tumwater Boulevard is vested in the City.

21 **B. Certain documents are central to the Commission's determination**

22 18. PSE's Petition attaches some, but not all, documents that are important for the
23 Commission's determination of the application of Schedule 74 to conversion costs on the
24 Tumwater Boulevard Widening Project. Other important documents are provided to the
25
26

1 Commission as exhibits to the declarations of Jim Shoopman and William H. Patton. The most
2 significant are listed here:

3 19. PSE's Tariff G, Schedule 74. As noted above, the City asserts that the standard
4 40/60 percent division of costs is required for conversion of PSE facilities on Tumwater
5 Boulevard pursuant to Section 2.b(1) of Schedule 74, (Petition, Exhibit E.)

6
7 20. 1981 Port of Olympia easement. The document on which PSE relies for its
8 interpretation of Schedule 74 is a 1981 easement from the Port of Olympia. That easement
9 provides PSE with blanket permission to locate its facilities throughout the Port of Olympia
10 property and on rights-of-way identified in attachments to the easement (where PSE facilities
11 had already been installed). The first two pages of the easement are found as Exhibit E to the
12 City's Complaint (Patton dec. Exhibit 1), and also found as Exhibit 1 to the declaration of Jim
13 Shoopman. In addition, the exhibits to the 1981 easement document, showing existing PSE
14 facilities on the Port's rights-of-way, are found at Shoopman dec. Exhibits 4-9.

15
16 21. 1985 Tumwater/PSE franchise agreement. The thirty-year franchise agreement
17 under which PSE has authority to operate in Tumwater, including the Port of Olympia airport
18 property, is attached as Exhibit A to the City's Complaint (Patton dec. Exhibit 1).

19 22. 1987 Tumwater Annexation Ordinance. The Tumwater ordinance annexing all of
20 the Port of Olympia property, dated January 20, 1987 is found at Shoopman dec. Exhibit 2.

21 23. 1987 Dedication deed. The January 21, 1987 dedication deed transferred
22 authority over Tumwater Boulevard and other rights-of-way to the City from the Port of
23 Olympia. (Patton dec. Exhibit 1, Exhibit D of the City's Complaint; and also Shoopman dec.
24 Exhibit 3.)
25
26

1 24. 2004 PSE design drawing of the Tumwater Boulevard conversion area. PSE's
2 design drawing of the conversion area, showing its overhead facilities within the Tumwater
3 Boulevard right-of-way, is provided to the Commission as Shoopman dec. Exhibit 10.

4 **C. Schedule 74 was adopted to resolve litigation**

5 25. Schedule 74 was developed as a result of litigation between various cities and
6 PSE in 2001 over the interpretation of Schedules 70 and 71 related to the division of conversion
7 costs between the cities and PSE. *City of SeaTac v. PSE*, UE-010891, *City of Auburn, et al., v.*
8 *PSE*, UE-010911, and *City of Clyde Hill v. PSE*, UE-0111027.

9 26. The two main issues in those Commission proceedings and in subsequent appeals
10 were (1) the term "zoned exclusively residential" and (2) private roads versus public
11 thoroughfares. The split of costs varied in the former schedules depending on whether the
12 conversion area was zoned exclusively residential or had a mixture of non residential services.
13 In addition, PSE objected to the application of any conversion cost split in the City of Clyde Hill
14 where the parties had stipulated that there were no public rights of way in Clyde Hill (the streets
15 in that City were privately owned by the residents and had not been dedicated to the public).
16 Neither Schedule 70 nor Schedule 71 contained a definition of the term "public thoroughfare."
17 PSE argued that, as a consequence of the stipulated fact that there were no public rights-of-way
18 in Clyde Hill, all PSE facilities in Clyde Hill were on private easement, and therefore no costs
19 should be paid by PSE.
20
21
22

23 27. These two main issues were resolved by the Commission's adoption of Schedule
24 74, effective July 1, 2002, at which point the cities dropped their appeals. The newly numbered
25 Schedule 74 adopted (1) a new 40/60 cost split (as opposed to the prior 30/70 or 70/30 cost split)
26

1 that does not depend on either the type of customer being served by the overhead system or on
2 local zoning regulations, and (2) a definition of the term "Public Thoroughfare."

3 28. In many ways, however, PSE's Petition is a reprise of its dispute with the City of
4 Clyde Hill under former Schedules 70 and 71. PSE claims that its overhead distribution facilities
5 in Tumwater Boulevard are not on a public thoroughfare, but rather on a private easement. As a
6 consequence, PSE argues, no cost sharing is appropriate. Petition at 4, ¶14.

7
8 **D. "Public Thoroughfare" is now specifically defined**

9 29. Section 1 of Schedule 74 (Petition, Exhibit E) requires that three conditions be
10 present for the conversion to proceed, including the right of PSE to install its equipment in the
11 public thoroughfare. The first condition (§1.a) requires a design agreement followed by a
12 construction agreement. The second condition (§1.b) requires that there be permission from the
13 Government Entity to use the Public Thoroughfare:
14

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

22 The third condition ((§1.c) requires that the customers must agree to accept underground service
23 connections unless PSE agrees otherwise.

24 30. Here, there appears to be no dispute by PSE that it has a valid franchise agreement
25 with the City. Under that franchise agreement, PSE has the right to use the City's right-of-way
26 for its overhead and underground distribution system both within the City limits as they were
established in 1985, and as those limits are later extended.

1 31. The key element to deciding PSE's assertion that its facilities are not in a public
2 thoroughfare (Petition ¶ 14) then lies in the definition of "Public Thoroughfare." As noted
3 above, a definition of "Public Thoroughfare" was not contained in prior Schedules 70 and 71,
4 and its inclusion as a defined term in Schedule 74 was a fundamental element of resolving
5 litigation between various cities and PSE.

6
7 **E. Tumwater Boulevard is by definition a "Public Thoroughfare"**

8 32. Schedule 74, §10.e, defines "Public Thoroughfare" as follows (emphasis added):
9 "Public Thoroughfare: Any municipal, county, state, federal or other public road,
10 highway, or throughway, or other public right-of-way or other public real property rights
11 allowing for electric utility use."

12 33. Tumwater Boulevard is therefore – by the definition specifically adopted in
13 Schedule 74 – a "Public Thoroughfare." PSE essentially admitted this fact in answering the
14 City's complaint, when PSE admitted that Tumwater Boulevard is a street right-of-way. (PSE's
15 Answer and Counterclaim at 3, ¶14; Patton dec. Exhibit 2.)

16 34. As a consequence, when it argues that its facilities are not on a public
17 thoroughfare (Petition ¶ 14), PSE must either contend that its overhead distribution facilities are
18 not in Tumwater Boulevard. Or contenting that, even though its facilities are in Tumwater
19 Boulevard, they are really on a "private easement," and therefore not in a Public Thoroughfare.
20 Either contention is wrong.

21 35. First, the Declaration of Jim Shoopman shows that PSE's overhead distribution
22 facilities in the conversion area are in the Tumwater Boulevard right-of-way. Reference to
23 Exhibit 10 to Shoopman's declaration demonstrates this fact by means of PSE's own engineering
24 design drawing for converting the overhead facilities. PSE's drawing (provided under contract
25
26

1 to PSE by Potelco) shows poles in the Tumwater Boulevard right-of-way that need to be
2 removed. The dashed lines along the roadway (“_____”) represent the borders of
3 the right-of-way of both Tumwater Boulevard and the other streets marked on this exhibit. As
4 Mr. Shoopman points out, “In both Exhibit 4, and in Exhibit 10, the line of poles along the north
5 side of Tumwater Boulevard (Airdustrial Way) and the one pole on the south side of Tumwater
6 Boulevard (P07) are shown to be within – not outside – the right-of-way.” Shoopman dec. ¶18.

8 36. Second, the definition of “Public Thoroughfare” in Schedule 74 makes all areas
9 outside the right-of-way on Port of Olympia property a “Public Thoroughfare,” as well as those
10 areas inside the right-of-way. PSE alleges that it has been granted preexisting and superior
11 “property rights” by the Port of Olympia. But all “property rights” granted by the Port of
12 Olympia allowing for electric use on Port property are now by definition within a Public
13 Thoroughfare. That is because the definition of “Public Thoroughfare” includes “. . . **other**
14 **public real property rights allowing for electric utility use.**” Accordingly, anywhere PSE
15 claims to operate in the City of Tumwater pursuant to “real property rights” granted by the Port
16 of Olympia is – by definition of Schedule 74– within a “Public Thoroughfare.”

18 37. The plain meaning of the defined term “Public Thoroughfare” thus encompasses
19 within the definition those very “real property rights” PSE claims to rely on for its contention
20 that its facilities lie outside a Public Thoroughfare. The Commission has long adopted the
21 standard principles of statutory construction in interpreting its tariffs.

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

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

6
7 38. The meaning of the defined term “Public Thoroughfare” in Schedule 74, §10.e,
8 however, is plain. It means rights-of-way or other real property rights granted by a public
9 agency. But should there be any claim of ambiguity about this reference, the Commission’s
10 proceedings when considering and adopting Schedule 74 confirms that that the emphasis was on
11 a grant of authority by a public entity.

12 **F. The importance of public ownership was underscored by the Commission**

13
14 39. The central point of the definition of “Public Thoroughfare” in Schedule 74 was
15 to tie the definition to a street that is owned or controlled by a public entity of any kind or other
16 public property that is allowed to be used for electrical facilities by a public entity of any kind.
17 This emphasis on public ownership, control or permission was reinforced in a settlement hearing
18 before the Commission in Dockets UE-011570 and UG-011571 when the new schedule (later
19 renumbered Schedule 74) was discussed before the Commission.

20
21 40. In the course of asking a number of questions to clarify the definition of “Public
22 Thoroughfare” in the new schedule, Chairwoman Showalter asked PSE’s representative,
23 Kimberly Harris, about the difference between a “private drive” and a “public thoroughfare.”
24 The following exchange took place (Record of Proceedings, June 14, 2002, at Tr. 1979):
25
26

1 CHAIRWOMAN SHOWALTER: . . . and I just wondered if that's – that
2 private street I'm mentioning is one, or is that private street just the same as my
3 backyard, supposing the wires go behind my house, through my back yard?

4 MS. HARRIS: I understand that this is not very clear, reading this. I
5 believe though that if it is a private drive, then it is not a public road thoroughfare.

6 CHAIRWOMAN SHOWALTER So the word public in the definition
7 doesn't mean members of the public get to walk down the road. It's not like a
8 private easement or a – well it refers to ownership, an ownership by a
9 government. Am I right on that?

10 MS. HARRIS: Yes.

11 41. Later in the same day, an exchange between Commissioner Hempstead and
12 PSE's attorney, Markham Quehrn, focused on the fact that ownership by a government may
13 include a port district (Tr. 1989-90).

14 MR. QUEHRN: . . . So the idea here is to create a nexus between the
15 concept of a municipality, county, or other governmental entity and authority over
16 public thoroughfares.

17 CHAIRWOMAN SHOWALTER Who is there other than a municipality
18 or a county that might have authority over public thoroughfares?

19 MR. QUEHRN: State Department of – DOT, Department of
20 Transportation, is one.

21 COMMISSIONER HEMPSTEAD: Port district would be another. At
22 the airport, for example, would have control over the –

23 MR. QUEHRN: Would have control over port property, to some extent.

24 COMMISSIONER HEMPSTEAD: Over the public thoroughfare.

25 MR. QUEHRN: I don't know if I want to concede that one, but comment
26 acknowledged. I think that's potentially one, but I'd obviously look at the
enabling authority to answer that question.

1 42. The discussion that followed at the Commission did not return to the subject of a
2 port district's authority. Research confirms, however, that a port district, such as the Port of
3 Olympia, does have the statutory authority to construct and operate streets, roads and highways.
4 RCW 53.08.330. In addition, a port district has the authority to expend port funds on roads in
5 conjunction with adjoining state, county, municipality or "municipal government." RCW
6 53.08.340. Indeed, a port district is itself a municipal corporation. "The legislature has created
7 port districts expressly as 'municipal corporations,' thereby classifying them in the same fashion
8 as cities and towns, public utility districts and other similar public agencies." *State ex. rel.*
9 *O'Connell v. Port of Seattle*, 65 Wn.2d 801, 803, 399 P.2d 623 (1963), citing RCW 53.04.060
10 and Art. 11, § 10, Washington constitution. Additional authority for a port district to control and
11 manage roads adjoining a municipal airport is found in RCW 14.08.120, titled "Specific powers
12 of municipalities operating airports." Port districts are included in the definition of
13 "municipality" in that chapter. RCW 14.08.010(2).

14
15
16 43. PSE has acknowledged before the Commission that the central point of the
17 definition of "Public Thoroughfare" in Schedule 74 is public ownership of the property being
18 used for electrical facilities. The PSE representatives further agreed that "government entity"
19 would include port districts (subject to check of a port district's statutory authority). It is
20 difficult to fathom, therefore, how PSE can claim that its overhead electric distribution facilities
21 along Tumwater Boulevard are not in a "Public Thoroughfare."
22

23 **G. PSE's rights are in fact derived from the City – the "Government Entity"**

24 44. PSE's request for relief also asserts that its distribution facilities exist under a
25 property right not derived from the Government Entity. (Petition, at 7, Request for Relief ¶3.)
26

1 As discussed below, that assertion in itself is wrong, and it attempts to conflate Section
2 2.b(2)(i)(B) of Schedule 74 with Section 2.b(2)(i)(A). PSE's rights to be in Tumwater Boulevard
3 do in fact derive from its franchise agreement with the City.

4 45. PSE argues that the City has misconstrued the relevance of the fact that the City
5 of Tumwater is identified as the "Government Entity" on the Design Agreement under Schedule
6 74. (Petition at 3-4, ¶¶10-13.) PSE contends that the Government Entity designation is merely
7 meant to identify the requestor as a government rather than a private party. Yet, the Project
8 Design Agreement says more about the Government Entity than just a name. It recites in
9 Paragraph A that "The Company. . . pursuant to its franchise or other rights from the
10 Government Entity, currently locates its electric distribution facilities within the jurisdictional
11 boundaries of the Government Entity," (emphasis added.). Thus PSE has acknowledged in this
12 Project Design Agreement that its franchise agreement with the City allows for and governs its
13 presence inside the City of Tumwater. No mention is made in the Project Design Agreement of
14 any other Government Entity, even though it is another government entity from which PSE
15 purports to have private property rights for its distribution facilities on Tumwater Boulevard and
16 from which PSE purports to have rights that are superior to its franchise with the City.
17 Accordingly, the allegations in ¶¶ 24 – 27 of the City's complaint are both accurate and germane
18 to the resolution of Schedule 74 conversion costs.

19 46. In addition to claiming that its overhead distribution facilities are not on a Public
20 Thoroughfare, PSE claims that it has superior rights because it has a "private property" right that
21 predates its franchise with the City. PSE is again wrong, for at least three independent reasons.
22 First, the easement from the Port of Olympia is a "public" grant of authority to locate its facilities
23
24
25
26

1 in “public” right of way and on “public” property. Second, PSE’s franchise agreement with the
2 City, entered into before Tumwater annexed the Port of Olympia airport property, has no
3 reservation of rights, and covers all City right-of-way within the City limits of Tumwater in 1985
4 or within the limits of the City that may later be extended. Third, PSE’s permission from the
5 Port of Olympia to operate and provide electric service within the Port’s airport property was
6 automatically extinguished upon annexation of the Port property into Tumwater. Each of these
7 points is further discussed as follows.

9 47. First, any permission to locate and operate electric facilities granted by the
10 easement from the Port of Olympia are “public” rights under the defined term “Public
11 Thoroughfare” in Schedule 74. “Public Thoroughfare” includes “other public real property
12 rights allowing for electric utility use.” It is beyond dispute that the Port of Olympia is a public
13 entity, in fact a municipal corporation. Therefore, any real property rights derived from the Port
14 are just that: “public real property rights.” The rights-of-way shown on the exhibits to the
15 easement (Shoopman Exhibits 4-9) and all other Port of Olympia airport property encompassed
16 in the easement (Shoopman Exhibit 2) have thus – by definition – all become a “Public
17 Thoroughfare” as that term is defined in Schedule 74, Section 10.e.

19 48. Second, the 1985 franchise agreement between PSE and the City provides that it
20 extends not only to the rights-of-way and other public property inside the city limits at that time,
21 but also to all roads within the limits of the City as they may later be extended. (Patton dec.
22 Exhibit 1, Exhibit A, § 1.1.3.) Thus, by automatic operation of the franchise agreement, the
23 grant of authority to operate on Tumwater streets in any annexed area, including the Port of
24 Olympia airport property, derive from the “Government Entity” – the City of Tumwater. There
25
26

1 is no reservation of rights for any extension of this authority as there is in franchises between
2 PSE and certain other cities. (See Patton, dec. Exhibit 4, Section 14, at 6-7, for an example of
3 this type of reservation of rights in PSE's franchise with the City of Federal Way.) Here, the
4 extension of the franchise conditions to newly annexed areas is unqualified. Therefore, PSE
5 cannot rely on the exception in Schedule 74, Section 2.b(2)(i)(B), because PSE does in fact
6 operate on Tumwater Boulevard "pursuant to a franchise previously granted by the Government
7 Entity."

9 49. Third, PSE's permission from the Port of Olympia to operate and provide electric
10 service within the airport property was automatically extinguished upon annexation of the Port
11 property into Tumwater. The easement from the Port of Olympia provided to PSE in 1981 is a
12 blanket permit to install and operate electric facilities that covers the whole of the Port of
13 Olympia airport property, as well as in the specifically described rights-of-way in the attached
14 exhibits showing the PSE facilities already in place (Shoopman dec. ¶5). The blanket easement
15 was thus the Port's way of providing PSE with government permission to operate utility service
16 within that municipal corporation. By operation of law, however, that permission was
17 automatically extinguished when the City annexed the airport property in January 1987. RCW
18 35A.14.900. That statute provides in part:
19

20 **35A.14.900 Cancellation, acquisition of franchise or permit for operation of**
21 **public service business in territory annexed--Regulation of solid waste**
22 **collection.**

23 The annexation by any code city of any territory pursuant to this chapter
24 shall cancel, as of the effective date of such annexation, any franchise or permit
25 theretofore granted to any person, firm or corporation by the state of Washington,
26 or by the governing body of such annexed territory, authorizing or otherwise
permitting the operation of any public utility, including but not limited to, public
electric, water, transportation, garbage disposal or other similar public service
business or facility within the limits of the annexed territory, but the holder of any

1 such franchise or permit canceled pursuant to this section shall be forthwith
2 granted by the annexing code city a franchise to continue such business within the
3 annexed territory for a term of not less than seven years from the date of issuance
thereof . . .

4 Upon annexation PSE was in turn automatically granted a City of Tumwater franchise to operate
5 in the annexed airport area by the automatic extension of the 1985 franchise pursuant to §1.1.3
6 (Patton dec. Exhibit 1, Exhibit A to the City's Complaint).

7 50. While the Port of Olympia's blanket permission to operate electric facilities
8 throughout the Port airport property was contained in a document labeled an "easement," it was
9 the vehicle by which the governing body of that municipal corporation granted "to any person,
10 firm or corporation by the state of Washington, or by the governing body of such annexed
11 territory, authorizing or otherwise permitting the operation of any public utility. . ." RCW
12 35A.14.900 (emphasis added).

14 51. The Washington Supreme Court has applied a comprehensive application the
15 meaning of a government authorization to operate an electric utility, regardless of the form that
16 permission takes. That authorization is subservient to interests of the public to use streets for all
17 proper governmental purposes, regardless of whether the authorization or permit is in the form of
18 a franchise, permit, easement or other right:
19

20 In the instant case, whether respondent's right to use the streets of the city of
21 Vancouver for its electrical distribution system is termed a franchise or a
22 privilege, it is subject to the express provision that it will remove and relocate
23 these facilities "whenever the removal thereof shall be deemed for the public
convenience" or "in making any other improvements by the City of Vancouver.

24 The great weight of authority supports the following rule:

25 "In the absence of an express and definite provision to the contrary, a
26 utility company maintains its structures and rights in a public street subject
to the paramount right of the city to use its streets for all proper

1 governmental purposes. A grant, franchise, easement or other right
2 accorded to a utility company by public authority, to maintain structures in
3 public streets, is at all times subject to the police power of the sovereign,
4 and unless expressly agreed to otherwise in the franchise, the company
5 must, at its own expense, make such changes as the public convenience
and necessity require, and it is bound to alter, remove, relocate, support
and maintain a structure, when necessary for the city's carrying out a
function in the interest of public health, safety or welfare. . .”

6 *State v. Public Utility District No. 1 of Clark County*, 55 Wn.2d 645, 649-50, 349 P.2d 426
7 (1960), (quoting Rhyne, *Municipal Law* 512 (1957); emphasis added; (requiring the PUD to
8 relocate its existing electric facilities to accommodate a state highway project)).

9
10 52. Should the Commission be inclined to consider the easement from the Port as a
11 “private property right,” PSE still cannot avail itself of the exception from a 40/60 percent
12 division of conversion costs by relying on Section 2.b(2)(i)(B) of Schedule 74 (“pursuant to
13 rights not derived from a franchise previously granted by the Government Entity or pursuant to
14 rights not otherwise granted by the Government Entity...”). Even if the Commission were to
15 ignore the first part of the condition – that PSE in fact does derive its operating rights from PSE’s
16 franchise with the City – PSE cannot avail itself of the second. PSE’s own allegations identify
17 the City as the grantor of those rights in a second way. In its answer and counterclaim, PSE
18 alleged that the easement from the Port of Olympia contained a “successor and assigns” clause,
19 and therefore the City was bound by the easement. (Patton dec. Exhibit 2, PSE’s Answer and
20 Counterclaim at 12, ¶8.) By so alleging, PSE has placed the City squarely in the position of
21 being the “Government Entity” from which “rights” were “granted” and thereby eliminated its
22 Schedule 74, Section 2.b(2)(i)(B) claims.
23

24
25 53. PSE, in fact, is not the named grantee in the 1981 easement from the Port. The
26 named grantee is “Puget Sound Power & Light Company.” PSE is only a successor, not the

1 named party. Accordingly, for purposes of analyzing a “grant of rights” under Schedule 74,
2 Section 2.b(2)(i)(B), if PSE is now the successor “grantee,” then the City – as successor to the
3 Port of Olympia having jurisdiction over Tumwater Boulevard – is the “grantor” of those rights.

4 **VI. Conclusion**

5 54. PSE’s contention that the City is required to pay 100 percent of conversion costs
6 for Tumwater Boulevard, based on Schedule 74, Section 2.b(2)(i), conflicts both with the plain
7 meaning of that Section and with the definition of “Public Thoroughfare.”
8

9 54.1 In the Project Design Agreement, PSE acknowledges that “The Company.
10 . . . pursuant to its franchise or other rights from the Government Entity, currently
11 locates its electric distribution facilities within the jurisdictional boundaries of the
12 Government Entity.”

13 54.2 “Public Thoroughfare” as defined in Schedule 74, means “Any . . . public
14 road, highway, or throughway, or other public right-of-way or other public real
15 property rights allowing for electric utility use.”

16 54.3 The easement from the Port of Olympia is a public grant of authority to
17 locate its facilities in public right of way and on public property, and therefore on a
18 “Public Thoroughfare.”
19

20 54.4 PSE’s franchise agreement with the City has no reservation of rights, and
21 covers all City right-of-way within the city limits of Tumwater in 1985 and within
22 the future limits of the City as those limits may later be extended.
23
24
25
26

1 54.5 PSE's permission from the Port of Olympia to operate and provide electric
2 service within the Port's airport property was automatically extinguished upon
3 annexation of the Port property into Tumwater.

4 54.6 At the point of annexation, the City's franchise terms were in turn
5 automatically extended to cover the Port's airport property pursuant to the terms of
6 the franchise agreement.

7 54.7 Further, under the terms of the easement itself, if PSE is the successor to
8 Puget Sound Power & Light Company as "grantee," then the City is the successor
9 to the Port of Olympia as the "grantor" of those rights.

10 55. PSE's Petition should therefore be dismissed, and summary determination should
11 be granted to the City. The Commission should affirm that PSE Tariff G, Schedule 74, Section
12 2.b(1) applies. Schedule 74 therefore requires the City to pay 40 percent and PSE to pay 60
13 percent of the costs of converting PSE's electric distribution facilities from overhead to
14 underground on the Tumwater Boulevard Widening Project.
15

16
17 RESPECTFULLY SUBMITTED this 22nd day of February, 2007.

18 FOSTER PEPPER PLLC

19
20 

21 William H. Patton, WSBA #5771
22 P. Stephen DiJulio, WSBA #7139
23 Attorneys for City of Tumwater