

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of:

King County, Washington; BNSF Railway;
Frontier Communications Northwest, Inc.;
Verizon Wireless; and New Cingular
Wireless PCS, LLC
For a Declaratory Order

Docket UE-141335

**PETITIONERS' POST-HEARING
BRIEF**

1. Pursuant to WAC 480-07-390 and the schedule Adopted by Administrative Law Judge Kopta at the evidentiary hearing held on May 27, 2015, King County, Washington (“King County”), BNSF Railway (“BNSF”), Frontier Communications Northwest, Inc. (“Frontier”), Verizon Wireless (“Verizon”), and New Cingular Wireless PCS, LLC (“AT&T”) (collectively, “Petitioners”) submit this Post-Hearing Brief. As explained below, Petitioners respectfully request that the Washington Utilities and Transportation Commission (“Commission”) order Puget Sound Energy (“PSE”) to immediately begin permitting, planning and replacing the Maloney Ridge Line; and to allocate the prudently incurred costs of such replacement in the same way it recovers its costs for other line replacements when PSE files its next general rate case.

I. INTRODUCTION

2. Petitioners initiated this proceeding to address the degradation of service each of them receives from PSE due to the physical deterioration of the 40-year-old underground cable by which electric service is provided, referred to as the “Maloney Ridge Line.” After agreeing to be

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customers of PSE, Petitioners invested millions of dollars in facilities to provide essential emergency services to Washington residents, including facilities to support emergency communications, law enforcement, and 911 services.

3. The Maloney Ridge Line is an 8.5 mile line in the Snoqualmie National Forest constructed by PSE's predecessor, Puget Sound Power & Light ("Puget Power"). PSE currently owns and operates the Maloney Ridge Line as part of its retail distribution system. The Maloney Ridge Line is experiencing increasing outages, a fact that PSE and Commission Staff ("Staff") do not dispute, and the line must be replaced. PSE and Staff, however, argue that Petitioners are required to pay the full, up-front capital cost of replacement, contrary to applicable tariff requirements, thereby treating Petitioners differently from other customers on PSE's system.
4. PSE¹ constructed the Maloney Ridge Line at the request of the General Telephone Company of the Northwest, Inc. ("GTE"). In doing so, PSE required GTE to pay all of PSE's actual costs incurred for constructing the new distribution line. PSE also required GTE to pay ongoing maintenance costs once the line was in service. As part of that agreement, PSE reserved the right to serve additional customers from the Maloney Ridge Line. Thus, while GTE was required to pay for construction and maintenance of the line, PSE made it clear that it had the ability and rights to integrate the line into its system, making it available to others. The only limit on PSE's ability to do so was that any new customers added within the first five years would be treated as if they were an original requestor of the line and, therefore, would have to contribute to the initial

¹ For ease of reading, this brief will use "PSE" to refer to both PSE and Puget Power unless the context requires a more specific reference.

investment costs just as GTE did. Outside of that restriction, however, there were no limits on PSE's ability to use the new line along with the rest of its distribution system.

5. In the 1990's, twenty years after the Maloney Ridge Line went into service, PSE began providing service to new customers from the Maloney Ridge Line. For each new customer, PSE entered into a service agreement (collectively, the "Service Agreements") that spelled out the terms of service to that customer that differed from the applicable filed tariffs.
6. The Service Agreements are similar to the original agreement with GTE only in that they continue to require customers to reimburse the utility for the ongoing operational costs of the Maloney Ridge Line. The Service Agreements otherwise depart from the original agreement with GTE in a significant manner and are silent with respect to capital investments. Specifically, as the Maloney Ridge Line had been in service for more than five years, none of the Service Agreements required a new customer to contribute to the line's initial construction costs. In fact, PSE drafted the Service Agreements in a manner that completely voided the original agreement with GTE, even for GTE as a continuing customer. Moreover, the Service Agreements make no mention of the expected service life of the line, nor mention in any way what would be required of customers in the event the line needed to be replaced.
7. PSE assumed all of the responsibilities of Puget Power with respect to serving Petitioners. Those obligations are encapsulated not only in the Service Agreements, but also in PSE's filed tariffs that establish PSE's general terms of service, and which authorize agreements like the Service Agreements in the first place.
8. As explained in the remainder of this brief, PSE's filed tariffs require PSE to operate and maintain distribution lines to provide safe, reliable service. Those tariffs further require PSE to

replace a distribution line when such safe, reliable service is no longer possible. Although the Service Agreements transferred to Petitioners the direct costs PSE incurs for operating the Maloney Ridge Line, the Service Agreements do not transfer to Petitioners the costs of replacing the line at the end of its useful life. It is essentially PSE's position that Puget Power should have transferred that obligation, and that PSE would not enter into such an agreement today. That position, however, is wholly irrelevant and is not contained in the terms Petitioners agreed to when they executed the Service Agreements.

9. At the heart of PSE's opposition to Petitioners' request is its assertion that it is only required to maintain or replace a distribution line if doing so is "economically feasible," and that PSE can terminate service to any customer if continued service requires an "economically unfeasible" investment. The failure in this argument is that, under the Commission's rules, PSE cannot unilaterally refuse service to existing customers based on an economic feasibility test. Even if it could, PSE has failed to rely on a meaningful analysis of feasibility. For example, PSE and Staff both assert that investment in plant is not feasible if the utility does not completely recover its costs from sales of service to the specific customers served by that investment. This oversimplified approach ignores well-established ratemaking principles whereby a utility recovers costs from a large pool of customers, using different plant, some of whom by definition pay more than their actual costs of service, and some of whom pay less.
10. In contrast, Petitioners present a more comprehensive approach to feasibility, analyzing factors such as costs to customers and to the utility, broader public benefits, and impacts to other ratepayers. Under that analysis, Petitioners have demonstrated that PSE can replace the Maloney Ridge Line in a manner that provides a net benefit to the public and only a negligible impact to

other ratepayers. Indeed, if PSE bears the replacement costs, it can fully recover those costs in its general rates, imposing no harm on the company, and the rate impact to Schedule 24 ratepayer will only be a 0.2 percent (0.2%) increase over current Schedule 24 rates.

II. ARGUMENT

A. It Would Be Discriminatory to Require the Customers Served on the Maloney Ridge Line To Pay Replacement Costs of that Distribution Line.

11. At the outset, it should be noted that PSE owes all customers the duties of safe and reliable service² and non-discriminatory treatment.³ It is clear that safe and reliable service is no longer available on the Maloney Ridge Line, as PSE acknowledges.⁴ There is no dispute that the line is experiencing increased outages and will ultimately fail. The dispute arises over how PSE recovers those replacement costs.
12. RCW 80.28.100 places an affirmative obligation on PSE to treat all of its customers in a non-discriminatory manner:

No gas company, electrical company, wastewater company, or water company may, directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, electricity, wastewater company services, or water, or for any service rendered or to be rendered, or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like or contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

² RCW 80.28.010(2).

³ RCW 80.28.100.

⁴ Sanders, TR 57:1-8.

Despite this statutory language, PSE and Staff rely on the Service Agreements to argue that Petitioners are responsible for the significant capital contribution (the full replacement cost) to replace what is now part of PSE's distribution network, even though PSE does not require its other customers to make capital contributions for this type of distribution network replacement. PSE's disparate treatment of similarly situated customers constitutes undue discrimination in violation of Washington utility law.

13. For more than 40 years, PSE has recovered part of its entire system cost from Petitioners and other customers served on the Maloney Ridge Line. Under the now-terminated 1971 agreement, GTE paid PSE to extend PSE facilities to serve GTE. Since then, other customers have come to be served by this line, paying the costs of maintenance and repair, in addition to paying standard retail rates under PSE's Schedule 24, which recover the costs of the entire PSE distribution system. That was the deal—the Petitioners pay for repairs and maintenance in addition to Schedule 24 rates paid by all similarly situated customers. The deal between Petitioners and PSE, which is separate from any deal made with GTE, was not to require Petitioners to pay for replacement of the line, nor was there any notice or indication that Petitioners should not expect to be treated like customers of PSE and part of PSE's system. Petitioners are now seeking a declaration that the replacement costs be allocated in the same way PSE recovers its costs of other system replacements.

B. PSE has the Obligation to Pay the Cost of Replacing the Maloney Ridge Line and the Costs Should be Allocated to Schedule 24.

14. The relationship between PSE and Petitioners is legal in nature and arises from four different sources: (1) Schedule 85 of PSE's Electric Tariff G, which governs line extensions and service lines; (2) Schedule 80 of PSE's Electric Tariff G, which establishes general rules and provisions

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of electric service (3) the Service Agreements, which establish the terms and conditions under which customers are connected to the Maloney Ridge Line; and (4) Schedule 24, which establishes the rates Petitioners pay for electric service they receive from the line. Each of these four sources is interrelated but serves a specific role. Upon review of PSE's tariffs and the Service Agreements, it is clear that PSE carries the obligation to pay for the cost to replace the Maloney Ridge Line when replacement is necessary, and, as explained in more detail below, PSE's predecessor did not shift that obligation to Petitioners by virtue of the Service Agreements.

C. PSE's Authority is Derived from Its Filed Tariffs.

15. The starting point for determining PSE's obligations is its filed tariffs. PSE has a statutory obligation to file "all rules and regulations relating to rates, charges or service, used or to be used."⁵ PSE's tariffs mirror this requirement and note that PSE has no authority to provide electric service other than through its filed tariffs, as evidenced by the express terms of Schedule 80, which state that "[s]ervice shall be supplied only under and pursuant to these General Rules and Provisions, and any modifications or additions thereto lawfully made."⁶
16. PSE's filed tariffs contemplate that PSE may enter into specific contracts that either revise or refine the default provisions of PSE's tariffs. For example, Sheet No. 85-k of Schedule 85 contains additional terms of service applicable to line extensions once a line is constructed. Those terms include the following provision:

The Company shall own, operate, maintain and repair all electric distribution facilities installed by or for the Company under this

⁵ RCW 80.28.050.

⁶ PSE Schedule 80, Sheet 80-B, Advice No. 2013-21.

schedule, including replacement of such facilities if necessary as long as such replacement is **not inconsistent** with this schedule **or a contract governing such facilities**. (Emphasis added).

As a witness for PSE further acknowledged, Schedule 80 and Schedule 85 are the primary tariffs governing the Maloney Ridge Line, and PSE used the Service Agreements “as a way to modify those tariffs to cover the unique circumstances associated with” the Maloney Ridge Line.⁷

17. Without the Service Agreements, PSE still could have extended service to GTE on the Maloney Ridge Line through Schedule 85, but in that case only the terms of the filed tariffs would have applied. Conversely, PSE had no authority to construct or provide service from the Maloney Ridge Line except through application of its tariffs.⁸ In other words, the Service Agreements modify the tariffs rather than the tariffs modifying the Service Agreements. This distinction is important because the tariffs and the Service Agreements use slightly different language and the Commission must determine which language controls. This distinction is also important because PSE argues that “the Maloney Ridge Line was not installed under Schedule 85; it was installed under a separate Service Agreement,”⁹ which PSE then relies on to avoid certain obligations under Schedule 85 and ignore some of the language in Schedule 85 that does not support its position. Not only is PSE’s argument contrary to the law, which requires PSE to provide service through its tariffs, it is contrary to the express language of the Service Agreements, which states that Puget Power constructed the Maloney Ridge Line “pursuant to” Schedule 85.¹⁰

18. With the understanding that PSE’s filed tariffs are the starting point for determining PSE’s obligations to Petitioners, the Commission must first interpret the language in those tariffs. A

⁷ Logan, TR 29:10 (“Yes, that was the reason for entering into the agreements, is the unique situation.”).

⁸ Unless otherwise approved by the Commission.

⁹ PSE’s Statement of Fact and Law, ¶25.

¹⁰ Exh. No. LFL-4 (hereinafter, “Service Agreements”), p.1, Recital B.

filed tariff “has the force and effect of law.”¹¹ Accordingly, the Commission should interpret the language of the tariff using “standard principles of statutory construction.”¹² The Washington Supreme Court recently reaffirmed the principles of statutory construction, stating that the starting point is the plain language of the law and that “[d]ifferent statutory language should not be read to mean the same thing.”¹³

19. PSE’s Schedule 85 contains the following lead-in language:

This Schedule 85 also sets forth the circumstances, terms and conditions under which the Company is responsible for the **ownership, installation, maintenance, repair or replacement** of electric distribution facilities....” (Emphasis added).¹⁴

As noted above, Schedule 85 also states that PSE “shall own, operate, maintain and repair all electric distribution facilities installed by or for the Company under this schedule, including replacement of such facilities if necessary. . . .”¹⁵ That section further provides that PSE “shall have no responsibility to operate, maintain, repair or replace any electric distribution facilities that were not installed by or for the Company under this schedule.”¹⁶

20. The plain language of Schedule 85 provides that PSE is responsible for **both** the “repair” **and** the “replacement” of a line extension. Because PSE included, and the Commission approved, both the terms “repair” and “replacement” in the tariff, they must be given different meanings. That is, applying just the tariff language from Schedule 85, PSE has an obligation to replace the line

¹¹ *General Tel. Co. of N.W., Inc. v City of Bothell*, 105 Wash. 2d 579, 585 (1986).

¹² *Nat’l Union Ins. Co. of Pittsburgh, PA v. Puget Sound Power & Light*, 94 Wash. App. 163, 171 (1999).

¹³ *Ass’n of Washington Spirits & Wine Distributors v. Washington State Liquor Control Bd.*, 182 Wash. 2d 342, 353 (2015) (“[w]hen the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings.”).

¹⁴ PSE Schedule 85, Sheet No. 85, Advice No. 2006-31.

¹⁵ PSE Schedule 85, Sheet No. 85-k, Advice No. 2006-19.

¹⁶ *Id.*

that is in addition to its obligation to repair the line. If the word “repair” included the activities that constitute replacement, then there would have been no need for the tariff to require “repair” and “replacement” as just one of those terms would have been sufficient. To come to a different interpretation of the tariff language, the word “replace” would have absolutely no meaning, which is contrary to the principles of tariff construction the courts demand.

21. One exception to PSE’s obligation under Schedule 85 to replace the line would be if the line were not installed “by or for” PSE. This exception does not apply, of course, because PSE installed the line. This fact is not in dispute.
22. Another exception to PSE’s replacement obligation would be if the replacement were inconsistent with other provisions in Schedule 85. PSE’s replacement of the Maloney Ridge Line, however, is wholly consistent with Schedule 85, which contemplates that PSE must maintain or replace the line to provide adequate service.
23. Further, Schedule 85, where it intends the customer to be responsible for replacement costs, expressly states that obligation. For example, under Paragraph 1.B.(i) of the Additional Terms of Service,¹⁷ the owner of a multi-family residential structure “shall be responsible for . . . all costs for installation, maintenance, repair and replacement” of underground service lines. PSE and Staff are unable to identify any language in Schedule 85 that imposes the cost responsibility for replacement of the Maloney Ridge Line on Petitioners.
24. A third exception to PSE’s replacement obligation under Schedule 85 exists if that obligation is inconsistent with “a contract governing such facilities.” Petitioners do not dispute that they have contracts with PSE – the Service Agreements – that refine certain provisions of Schedule 85. As

¹⁷ Id.

explained below, however, those contracts do not shift the obligation to the Petitioners to “replace” the line when necessary.

D. The Service Agreements Do Not Shift PSE’s Obligation to Replace the Maloney Ridge Line to Petitioners.

25. As described above, the Service Agreements modify certain rights and obligations contained in PSE’s filed tariffs. First, the “scope” of the Service Agreements very clearly states the agreements govern “the operation of the System and the recovery of the costs associated therewith.” Operational costs – as referred to in the Service Agreements – are distinctly different than investment costs. For example, PSE’s accounting practice in developing its cost of service and setting rates distinguishes between capital investments and operating expenses, only the latter of which includes repair costs.¹⁸ This is consistent with the Uniform System of Accounts, promulgated by the Federal Energy Regulatory Commission, which also distinguishes between costs incurred by a utility for “investments” and those incurred as “operating expenses.” The “investments” accounts are where replacement costs are recorded.¹⁹ Repairs, on the other hand, are recorded in operation and maintenance accounts.²⁰ The Service Agreements clearly mirror this construct and provide in relevant part:

Operating costs shall include any repair and maintenance costs incurred by Puget pursuant to Section 3 above, and costs in connection with securing or maintaining operating rights.²¹

26. Second, the plain language of the Service Agreements provides that Petitioners are responsible for the costs only for the “repair” of the line and not for “replacement.” PSE expressly

¹⁸ Exh. No. MPG-1T at 8:18.

¹⁹ Exh. No. MPG-1T at 7:3.

²⁰ Id.

²¹ Service Agreements, p.2, ¶4 (emphasis added).

acknowledges that the Service Agreements are silent with respect to what would happen in the event that the Maloney Ridge line needs to be replaced. PSE admits that “the Service Agreements make no specific reference to ‘replacement,’” but attempts to address that gap by claiming “it is a reasonable interpretation of the Service Agreements that replacement costs are included in ‘operating costs’ if replacement is necessary to maintain operation of the line.”²² When asked where replacement of the line is addressed in the Service Agreements, PSE witness Mr. Logan was unable to identify any such language and responded instead that such an issue is “inferred in Paragraph 4.”²³

27. Although Mr. Logan has “inferred” that line replacement is included in the Service Agreements, this is not what the language of the contract actually *states* or *implies*. Staff apparently makes the same mistaken inference. In his prefiled testimony, and as he re-acknowledged during the hearing, Mr. Nightingale has made a very specific recommendation due to the fact the Service Agreements are silent on this point:

Yes, I recommend that the Commission order the parties to amend the successor contract to incorporate a condition stating that any costs for replacement of any or all sections of Maloney Ridge distribution line shall be paid for by the customer served on that line. . . .²⁴

For Mr. Nightingale to have made this recommendation clearly means the Service Agreements do not already contain such a provision, either express or implied. Otherwise, such an amendment would be wholly unnecessary.

²² PSE’s Statement of Fact and Law, ¶13 (emphasis added).

²³ Logan, TR 30:6.

²⁴ Nightingale, TR 94:24.

28. Third, as Staff and PSE both acknowledge, the Service Agreements expressly provide that any conflicts between the Service Agreements and Schedule 85 must be resolved in favor of Schedule 85.²⁵ There is in fact no conflict to be resolved. Schedule 85 requires PSE to bear costs incurred to repair or replace the line, the Service Agreements (which modify part of Schedule 85) transfer only the repair costs to Petitioners, leaving the replacement costs with PSE.
29. In contrast, PSE's and Staff's interpretation *creates* a conflict between the two instruments, and this conflict must therefore be resolved in favor of the tariff language, as expressly provided in the Service Agreements. Specifically, PSE and Staff argue that the contract language uses the word "repair" and that "repair" really means "repair or replace." In essence, PSE and Staff are revising the definition of "repair" as that word is used in Schedule 85 because, as explained above, that tariff language uses "repair" as something distinctly different than "replacement" of the line.
30. Under Washington law, the primary task in interpreting a written contract is to determine the intent of the parties.²⁶ It must be determined what is written, and not the separate intention of a party that contradicts the written terms.²⁷ Under general principles of contract construction, courts will "construe written contracts against their drafters such that they cannot later benefit from 'mistakes' that they were in a position to prevent."²⁸
31. Washington law adopts the "context" rule as an aid to ascertain the intent of the parties. Under the context rule a court may consider (1) the subject matter and objective of the contract, (2) the

²⁵ Logan, TR 29:19-21.

²⁶ *U.S. Life Credit Life Insurance Co., v. Williams*, 129 Wn.2d 565, 569 (1996) ("Williams").

²⁷ *Berg v. Hudesman*, 115 Wn.2d 657, 669 (1990).

²⁸ *McKasson v. Johnson*, 178 Wash. App. 422, 429 (2013).

circumstances surrounding the making of the contract, (3) the subsequent conduct of the parties to the contract, (4) the reasonableness of the parties' respective interpretations, (5) statements made by the parties in preliminary negotiations, (6) usages of trade, and (7) the course of dealings between the parties.²⁹

32. While extrinsic evidence may be allowed to help determine the intent of the parties, extrinsic evidence cannot be considered for the purpose of varying the terms of the written contract.³⁰ Unilateral or subjective purposes and intentions about the meaning of what is written do not constitute evidence of the parties' intentions.³¹

33. Applying these rules of contract construction, the Commission must reject the position of PSE and Staff. First, PSE drafted both the tariff language and the Service Agreements.³² PSE was in the best position to make the terminology clear that "repair" includes "replace" if that was its original intent. Either PSE negotiated a deal that PSE would not make today by retaining the cost responsibility for replacement of the line, or PSE's attorneys failed to draft the agreements the way PSE intended. Either way, PSE cannot now take advantage of those "mistakes" and shift an obligation to Petitioners that they did not accept.

34. Moreover, neither PSE nor Staff has provided any context that aids in their interpretation of the agreements. For example, there is no testimony from any witness, or documents created contemporaneously with the Service Agreements, that explain the parties intended the interpretation that PSE and Staff present. Neither has there been a need to replace the line

²⁹ *Spectrum Glass Co., Inc. v. Pub. Utility Dist. No. 1 of Snohomish County*, 129 Wash. App. 303, 311 (2005).

³⁰ *Williams*, 129 Wn.2d at 569

³¹ *Id.* at 570.

³² Logan, TR 27:25 to 28:3.

before, so there certainly is no course of dealings between the parties to rely on. PSE and Staff also fail to present any compelling evidence that their interpretation is standard within the industry. To the contrary, the evidence is that PSE “generally” treats line extensions as part of its “base” distribution system and replaces lines when necessary as part of overall capital improvement programs.³³

35. In light of the plain language of the tariffs, the plain language of the agreements, the obligation to construe the agreements against PSE, and the failure of PSE and Staff to provide any compelling contextual evidence to clarify the plain language, Petitioners’ reading of the Service Agreements is the more reasonable one.

E. PSE Cannot Refuse Service Based on Economic Feasibility Under Schedule 80

36. Because the Service Agreements do not shift the cost responsibility for replacement of the Maloney Ridge Line to Petitioners, PSE and Staff make the alternative argument that PSE can refuse to replace the line based on whether or not the line is economically feasible as provided in Schedule 80. Staff and PSE are mistaken. Schedule 80 does not alter the obligation PSE has to replace the line for existing customers. While Paragraph 9 of Schedule 80 does address situations where PSE may “refuse service,” those situations occur where there is an applicant seeking to connect to PSE as a new customer or an applicant seeking additional service. The customers on the Maloney Ridge Distribution Line are already connected to the PSE system and are not seeking new or additional service. In fact, service has been provided on the Maloney Ridge line for more than 40 years. Accordingly, PSE continues to have an obligation to serve,

³³ Exh. No. KJB-1T at 2:16-19.

and an obligation to provide safe and reliable service, which now includes replacement of the line.

37. PSE and Staff’s argument that Schedule 80 allows PSE to consider the economic feasibility of a line replacement for current customers is contrary to Commission precedent and would treat the Petitioners differently from other current PSE customers in violation of Washington Law.³⁴
38. Under cross examination, Staff witness Nightingale stated that he did not believe the economic feasibility test applied to existing customers—only new customers:

Q. Can Puget refuse service to current customers if it is not economically feasible?

A. The economic feasibility I believe applies only to new customers, but I don’t know for sure about that.³⁵

Despite this concession, Mr. Nightingale incredulously argued that the Service Agreements allow Petitioners to be treated like new customers:

Q. So is a customer that’s been served for 40 years a new customer?

A. Now you are outside of what –then the special agreement comes into play in this case, so it is not that situation.³⁶

PSE makes a similar argument, even though the Service Agreements do not have express provisions that apply an economic feasibility test to replacement of the line. Staff further argues that the language in the recitals is instructive because it references “economic feasibility.”³⁷ But

³⁴ See RCW 80.28.100.

³⁵ Nightingale, TR 83:4-9.

³⁶ Nightingale, TR 83:12-16.

³⁷ Service Agreements, p.1, Recital B (“Pursuant to the economic feasibility provisions (paragraph 13) of its Electric Tariff G, Schedule 85, Puget constructed a single phase primary voltage electrical distribution system....”) (emphasis added).

the provision cited by Staff in the recitals merely explains how the line was originally constructed and is silent with respect to operation, maintenance, repair, or replacement.³⁸

39. But the economic feasibility test used by PSE and Staff is contrary to Commission precedent. In 2001, the Commission determined that the economic feasibility test contained in its “Refusal of Service” regulations applies to new or additional service, and not to existing customers.
40. In Docket UE-990473, the Commission repealed WAC 480-100-056 (Refusal of Service) and adopted WAC 480-100-123 (Refusal of Service) to take its place. In its Order, the Commission was clear that the economic feasibility provisions applied to new and additional service:

The Commission observes that existing language in the rule permits a **utility to refuse new or additional service** if “such service will adversely affect service being rendered to other customers” or **if to provide service would be “economically unfeasible.”** **These terms are too general and vague to be useful. Commission resolution of obligation to serve issues is likely to be based on fact-specific analysis.** So resolution of such issues is not amenable to the prescriptive language of a rule. Obligation to serve issues, when they arise and cannot be resolved otherwise, should be brought to the Commission for resolution.

The Commission has removed the original subsection (3) language that permitted a utility to refuse new or additional service if “such service will adversely affect service being rendered to other customers” or if to provide service would be “economically unfeasible.” The revised rule includes conditions in subsections (1) and (2) under which a utility may refuse to provide service, and provides a “catch all” in subsection (5) that would require a utility to file for Commission approval if the utility proposes.³⁹

³⁸ Even if the economic feasibility phrase was applicable to the substance of the agreements, it in no way provides a basis for PSE to terminate service. The Service Agreements provide that PSE may terminate service to Petitioners only if the rights of way for the system are terminated or not renewed. See Service Agreements at ¶8. No other provision in the Service Agreements allows PSE to terminate service to Petitioners, so any other termination authority must come from Schedule 80 or Schedule 85.

³⁹ *In re Adopting and Repealing Rules in Chapter 480-100 WAC Relating to Rules establishing requirements for electric companies*, Docket UE-990473, General Order No. R-495, ¶¶25-26 (Dec. 3, 2001) (“Order R-495”) (emphasis added).

The Commission's order, coupled with the language contained in WAC 480-100-123, is clear that the Refusal of Service regulation applies to new and additional service, and not to existing customers.

41. While PSE may argue that Schedule 80 has broader language than WAC 480-100-123, and that the Commission Order in Docket UE-990473 is not applicable, PSE's refusal of service authority contained in its tariffs may not exceed the authority authorized by Washington law. PSE's Schedule 80 that contains the Refusal of Service language was adopted under the rule repealed by the Commission which contained the "economic feasibility" language. But even the repealed language only applied to new customers and customers adding additional service. Accordingly, PSE's Schedule 80 argument is not only inconsistent with the Commission Order in Docket UE-990473, but would give it broader authority than the authority granted under WAC 480-100-123.
42. Even assuming the "economic feasibility" analysis is applicable to existing customers, which it is not, the Commission also determined that the terms "economically unfeasible" are "too general and vague to be useful."⁴⁰ But Staff and PSE ignore this Commission Order and simply do a calculation to see if replacement of the line pays for itself, which they assert is the test for economic feasibility. This is not the test—even for new customers—because the Commission determined that **"Commission resolution of obligation to serve issues is likely to be based on fact-specific analysis."**⁴¹
43. Petitioners' expert witness Mike Gorman provided the following fact specific analysis to determine whether the Maloney Ridge Line should be replaced:

⁴⁰ Id.

⁴¹ Id. (Emphasis added).

The methodology used to determine whether or not replacing the Maloney Ridge Distribution Line is an economically feasible transaction depends on whether or not the economic impact should be assessed from PSE's shareholders' perspective, or PSE's retail customers' perspective. Please note that PSE's 2013 Integrated Resource Plan dated May 30, 2013 in Appendix F, states that PSE reviews the financial consideration of resources based on a revenue requirement assessment from the standpoint of "Costs to PSE's Customers." Replacement of the Maloney Ridge Distribution Line is economically feasible from either perspective.⁴²

To the extent relevant to this proceeding involving existing customers on an existing distribution line, Mr. Gorman suggests that the Commission assess whether or not replacement of the Maloney Ridge line is economically feasible based on:

- (1) impact on PSE's retail rates, and
- (2) whether it is in the public interest and produces public benefits if PSE replaces the Maloney Ridge Distribution Line.⁴³

44. Mr. Gorman determined that the rate impact from replacing the Maloney Ridge line to Schedule 24 customers was 0.2 percent.⁴⁴ This impact is *de minimis* to other Schedule 24 customers, which have benefited from Petitioners' payment of Schedule 24 rates over the last 40 years. It should not be overlooked that the rates paid by Petitioners have included operation and maintenance along with replacement costs on parts of the PSE system that do not serve Petitioners.⁴⁵ Further, there is a strong public interest in providing electric service to Petitioners in order to ensure availability of 911 and other services. Indeed, Staff witness Nightingale stated:

⁴² Exh. No. MPG-6T at 3:26 to 4:5.

⁴³ Exh. No. MPG-6T at 4:24-26.

⁴⁴ Exh. No. BR-1P.

⁴⁵ Exh. No. MPG-6T at 6:5-13.

Q. Are the services provided by the Maloney Line customers important and even essential public services to the area served?

A. Yes, the services provided by the Maloney Line's customers are essential services and support emergency communications, law enforcement, and 911 services.⁴⁶

45. Based on the totality of the circumstances, the facts of this case, and the strong public interest served by having 911 and other emergency services available to citizens of the state, the Commission should determine that replacement of the line is in the public interest and should be rolled into the rates of Schedule 24 customers.
46. PSE has failed to provide any convincing evidence that it applies an economic feasibility test, or any test, to all replacements of distribution lines. Because PSE does not perform such a test on a uniform basis, PSE is singling out Petitioners in an unlawfully discriminatory manner. Staff apparently agrees, and actually attempts to justify that discrimination based on Petitioners' ability to pay. Staff Witness Ball's testimony infers that because Petitioners have access to larger pools of capital than PSE, that they should be required to pay for the Maloney Ridge Line Replacement.⁴⁷ This is not the applicable test. Further, if this was the test, large industrial customers would also pay for all costs on the system, because they, too, may have access to larger pools of capital than most other types of customers. Of course, this is not a standard PSE applies to such customers.
47. In response to a data request asking for the usual safety, reliability, cost effectiveness and other criteria and methods PSE would use to determine the need and timing of replacement of distribution feeder lines, for all parts of PSE's distribution system, PSE responded:

⁴⁶ Exh. No. DN-1T at 14:5-8 (internal citation omitted).

⁴⁷ Exh. No. JLB-4T at 4:19 to 5:5.

There are two paths that would lead to replacement of the distribution lines. The first path would be through the Cable Remediation Program. Puget Sound Energy, Inc. (“PSE”) reviews every underground outage and scopes a replacement project whenever a cable has a second outage or when there is a third failure within the cable system. The project is added to a master list of possible cable projects. The cable projects are prioritized using criteria such as number and length of outages, customers, impacted, cost to replace and proposed in the annual capital budget process. The second path is used infrequently and that would be unplanned replacement due to either a safety issue (for example lack of a solid neutral) or escalating failure that make the replacement justified.⁴⁸

48. When asked to provide the usual safety, reliability, cost effectiveness and other criteria and methods PSE would use to determine the need for and timing of replacement of distribution lines for this tariff class, PSE answered as follows:

Puget Sound Energy, Inc. (“PSE”) would use the same criteria and methods as described in PSE’s Response to WUTC Staff Data Request No. 036 for this tariff Class. The difference in this case is due to the atypical service agreement that stipulates the customers pay for the operation and maintenance of the line. In other arrangements where the replacement would have an impact in the customer costs, such as leased facilities, we would meet with the customer to explain the issues and only replace with their agreement.⁴⁹

49. As described in these data responses, PSE does not conduct an economic feasibility test for replacement of all distributions lines. In this case, PSE and Staff rely on the Service Agreements to justify the different treatment even though the Service Agreements do not modify PSE’s obligation to replace the Maloney Ridge Line.
50. Further, PSE and Staff have offered no compelling reason for why an economic feasibility test should simply be a calculation that looks at costs and expected revenue to be generated from

⁴⁸ Exh. No. JAB-10.

⁴⁹ Exh. No. JAB-9.

only a portion of the overall facilities used to serve a particular customer. PSE and Staff may attempt to rely on a prior Commission order, *In re Verizon Northwest Inc.*, (“*Verizon*”)⁵⁰ as support for looking only at the costs to the utility for determining a utility’s obligation to extend service. Such reliance is misplaced. First, the *Verizon* decision addressed only a telecommunications utility’s obligation to extend service to new customers, and specifically analyzed that obligation as it is enshrined in WAC 480-120-071(2)(a). That rule is not applicable to the present matter because no such rule applies, nor is PSE being asked to extend service to a new customer. Petitioners are current customers which take service from PSE and the line has been in service for 40 years.

51. Even if the decision in *Verizon* were instructive, it provides stronger support for Petitioners’ position than it does for the position of PSE and Staff. For example, in determining whether *Verizon* should be relieved of an obligation to extend service in that case, the Commission looked at several factors, not just cost, including alternatives to service, technological difficulties and physical barriers, and notably, the effect on individuals and communities involved. Here, PSE and Staff shun any broader analysis including effects on other individuals and communities involved. The Commission should therefore reject PSE’s and Staff’s economic feasibility analysis and adopt the approach offered by Petitioners’ expert witness, which provides a more comprehensive analysis of what is feasible.

⁵⁰ *In re Verizon Northwest Inc., For Waiver of WAC 480-120-071(2)(a)*, Docket UT-011439, Twelfth Supplemental Order (Apr. 23, 2013).

F. PSE’s and Staff’s Reliance on other Provisions of Schedule 80 Is Misplaced.

52. PSE and Staff also argue that Petitioners are responsible for replacement of the Maloney Ridge Line as a Requesting Entity under Schedule 80. PSE and Staff rely on a part of Schedule 80 that states: “Where a change in existing Electric Facilities is requested or required by a Requesting Entity, the Requesting Entity shall pay the Company for the costs due to such change.” Staff and PSE argue that the Maloney Ridge Distribution Line customers are the Requesting Entity in this case, and therefore should be responsible for the cost of this change.
53. The letter accompanying PSE’s advice filing regarding this provision of Schedule 80 undermines PSE and Staff’s argument. PSE’s stated in its letter that this language applies to “projects involving existing facilities operating below 50,000 volts or more that are requested to be relocated or changed but excludes all projects under Schedules 73, 74 and 85.” Not only would application of this provision be precluded because the Maloney Ridge Line is a project under Schedule 85, the Maloney Ridge Distribution Line customers are not requesting a change in the Maloney Ridge Distribution Line or for it to be relocated. That is, the line does not need a different supply voltage, capacity, length, or different facilities.⁵¹ Nor are Petitioners asking to move the line. Therefore, the Maloney Ridge Line customers have made no request for a change in their service. Indeed, all they want is the exact level of service they received when they signed the Service Agreements.
54. Here, the Maloney Ridge Distribution Line is failing. PSE informed the Petitions that the line will fail and service will no longer be provided. In a meeting with the Petitioners, PSE expressed:

⁵¹ Logan, TR 45:7-14.

The number of outages has been increasing over the years and it's anticipated the frequency and duration will continue to increase. Weather, environmental conditions, age and cable splices degrade system reliability and without a replacement of the system, the cables will ultimately fail and service will not be provided. Weather and snow make it increasingly difficult to respond to outages. A system map showing outages to date has been distributed to the group.⁵²

Based on this set of facts, it would be absurd to consider the Petitioners a Requesting Entity. This is certainly not what this tariff was intended to address.

55. Staff also makes the argument that Petitioners should be required to pay for the replacement of the line because a new distribution line would increase reliability.⁵³ If Staff and PSE were correct, PSE could wait for any distribution line to fail, wait for a customer to call to complain and ask for repair or replacement of the line, and then impose the costs for replacing those facilities only on the customers served by the failed facilities. This is not how a regulated utility operates, not the intended use of this tariff, and the Commission should not accept such a nonsensical and one-sided approach.

56. The replacement of the Maloney Ridge Line is needed to provide the same safe and reliable service on this line as provided in the past. It was expected under the original Service Agreement, and certainly inherent in PSE's tariff rates, that PSE will operate its system in a safe and reliable manner. It is not necessary for customers to request PSE to pursue this objective. It is PSE's responsibility to pursue this objective.

⁵² Exh. No. JMS-7 at p.5.

⁵³ Nightingale, TR 88:21 to 89:6.

G. The Maloney Ridge Line is part of PSE's Distribution System.

57. PSE's refusal to treat replacement of the Maloney Ridge Line the same as line replacements serving other Schedule 24 customers is based in part on its assertion that the line is not part of PSE's electrical distribution system. This assertion finds no support in either fact or law.
58. First, a "line extension" by its very nature is an addition to an existing distribution system. WAC 480-100-033 provides, in its entirety: "Each electric utility must file, as a part of its tariff, a distribution line extension rule setting forth the conditions under which it will extend *its facilities* to make service available to an applicant." (Emphasis added).⁵⁴ A line extension, therefore, is an extension of the utility's distribution system. A line extension is not some stand-alone service line that is distinct from the rest of the distribution system.
59. This conclusion is mirrored in at least one other Commission rule addressing line extensions. WAC 480-120-071 requires local exchange companies to extend service in certain circumstances. Under that rule, an extension of service "means an extension of company distribution plant," and distribution plant is defined as "equipment and facilities necessary to provide new residential basic local exchange service to a premises, but does not include drop wire."⁵⁵ In other words, a line extension consists of two parts – the service drop that belongs to the customer, and all other facilities and equipment that are part of the distribution system and that belong to the utility.

⁵⁴ The Commission has determined that PSE's Schedule 85 implements (is required by) this rule. *See Harbhajan Mangat, Complainant, Docket UE-120522, Order 01 at p.1 (June 5, 2012) (PSE's Schedule 85, which sets forth the Company's line extension practices and policies, as required by WAC 480-100-033).*

⁵⁵ WAC 480-120-071(2).

60. Second, the express terms of the GTE Agreement leave no doubt that the Maloney Ridge Line would become part of PSE's distribution system. As previously noted, PSE's predecessor originally constructed the Maloney Ridge Line pursuant to an agreement with GTE. The GTE agreement provides that PSE was "willing to extend" service to GTE.⁵⁶ In doing so, PSE agreed to:

furnish and install a single phase primary electrical distribution system . . . from Puget's Existing Facilities (presently terminating at Pole No. 15, approximately seven miles from the Microwave Station) along Foss River Road to Maloney Lookout Road and along Maloney Lookout Road to a transformer located at the Microwave Station.⁵⁷

As provided in that language of the Service Agreements, PSE's existing distribution system was described as "presently terminating" at a certain point. As a result of the agreement, that system would be added to when PSE furnished the additional seven miles of line, after which the distribution system would terminate at a different point – the microwave station at the end of the new line.

61. No other language in the Service Agreements even hints to the possibility that the new line would not be part of PSE's distribution system. To the contrary, other provisions reinforce the idea that the line would be part of PSE's system. For example, the GTE agreement provides that the "Distribution System shall be and remain the sole and exclusive property of Puget."⁵⁸ Similarly, the GTE agreement provides that maintenance of the line would be done "only by Puget or a contractor selected by it..."⁵⁹ Although PSE used the GTE agreement to have GTE pay for the construction and maintenance of the line, those provisions address only the

⁵⁶ Exh. No. LFL-3, p.1, Recital C (emphasis added).

⁵⁷ Id., ¶1.

⁵⁸ Id., ¶9.

⁵⁹ Id., ¶3.

mechanism by which PSE would achieve cost recovery for initial construction of the line; they do not offer any basis (express or implied) to conclude that the Maloney Ridge Line would not be part of the distribution system.

62. Indeed, the GTE Agreement also “reserves the right [for PSE] to serve customers in addition to [GTE] from the Distribution System.”⁶⁰ That reserved right required PSE to refund a portion of the line’s construction costs to GTE through a contribution from a new customer if that customer connected to the line within the first five years. However, PSE was allowed to add one customer (the U.S. Forest Service) at any time, and to add other customers after the first five years, without any refund to GTE. The only way it makes sense for PSE to be able to serve new customers from the Maloney Ridge Line without charging those customers any contribution for construction is if the line was part of PSE’s distribution system and available for providing service.
63. Nothing in the language of the Service Agreements undermines the fact that the Maloney Ridge Line became part of the distribution system just like any other line extension. The stated purpose of the Service Agreements is to “establish the terms and conditions under which additional customers will be connected to the System.”⁶¹ The Service Agreements define the “System” as “a single phase primary voltage electric distribution system” and contain no express language to indicate that the system to which the new customers will be connecting is separate from PSE’s distribution system. To the contrary, the Service Agreements contain all of the indicia of ownership and control that one would expect PSE to exercise over its “base” system. For

⁶⁰ Id., p.7, Agreement Addendum.

⁶¹ Service Agreements, Recital E.

example, just as the GTE agreement did, the Service Agreements provide that the system is “the sole and exclusive property of Puget,” that the utility is responsible for maintenance of the system, and that the utility can continue to add new customers if it wanted.

64. Moreover, the Service Agreements do not attempt to collect any contributions from new customers for the costs incurred for originally constructing the line. Nor do the Service Agreements attempt to assign or transfer any obligations of the original customer (GTE) to the new customers. In fact, the Service Agreements expressly nullify the earlier GTE agreement. In other words, a new customer signing a Service Agreement would have no indication, express or implied, that it would somehow be buying in to its own system or otherwise taking service from anything other than PSE’s distribution system. While the new customer might be agreeing to pay certain costs for use of that system, those payments do not transform the Maloney Ridge Line into a separate component of PSE’s distribution system. This is true especially in light of the fact that the new customers agreed to pay for their electric service through Schedule 24. That schedule is generally applicable to customers across the entire system based on the size of the customer’s electric load and makes no distinction between customers taking service from a line they paid for and customers taking service from a line they did not pay for. In reliance on the plain language of the Service Agreements, Petitioners invested millions of dollars to construct facilities that serve the public interest.⁶²

65. Both PSE and Staff assert that the sole basis for deeming the Maloney Ridge Line to be treated separately from the “base” system is the existence of the Service Agreements. Specifically, the following question and answer were presented during the hearing in these proceedings:

⁶² Petition for Declaratory Order, ¶¶13-23.

Q All right. So is it fair to say that the basis of your conclusion that it is not part of your system is that there is a service agreement and that this was constructed by – through the line extension policy instead of something else?

A Yes.⁶³

A Staff witness provided similar testimony:

Q Is it your understanding that in Puget's system there is a distinction between its general distribution system and any line extension customers?

A In general, no. Most line extensions are done within the distribution system, if there's a distribution extension required to get there.

Q And in this case?

A In this case it's different because there's a contract in place that covers historically the installation and now the ongoing maintenance and operation of that line. That's outside the normal distribution system.⁶⁴

66. The responses by PSE and Staff witnesses are nonsensical. Those answers attempt to describe a “base” system that covers a certain geography, with any additions to that system extending outward being considered not part of the distribution system, and any additions to that system extending inward, or “within,” being considered part of the base system. PSE's line extension policies make no such distinction. A line constructed under Schedule 85 is a new line, built to serve a new customer. While the location of that customer may impact the cost of that line, Schedule 85 contains no language to indicate that the location of the customer will result in the line either being part of the system or some stand-alone line that is not part of the system.

⁶³ Barnard, TR 62:14.

⁶⁴ Nightingale, TR 95:18.

67. Nor does the existence of the Service Agreements create such a distinction. As acknowledged by PSE during the hearing, the primary tariffs governing service to the Petitioners are Schedules 80 and 85, and the reason for the Service Agreements is to address “unique circumstances” and to contract around the provisions that would otherwise be the default provisions in the absence of such a contract.⁶⁵ If WAC 480-100-033 and Schedule 85 presume that a line extension will become part of the utility’s distribution system, and if the Service Agreements do not expressly alter that presumption, then the line extension remains part of the distribution system as presumed.

68. In light of the mandate in WAC 480-100-033 that PSE have a line extension tariff to “extend its facilities,” it is questionable whether PSE could even have a tariff in place that results in a line extension that is not part of its system without leaving full ownership and operation of a new line with the customer. Even if such an outcome is possible, PSE could have drafted either Schedule 85 or the Service Agreement using language that would have had that effect. PSE has so far chosen not to do so and it should not be able to interpret the tariff and contract language in that manner without at least some compelling evidence that the current language has that intent.

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⁶⁵ Logan, TR 29:10.

III. CONCLUSION

69. For the reasons stated, Petitioners request that the Commission order PSE to immediately begin permitting, planning and replacing the Maloney Ridge Line; and to allocate the prudently incurred costs of such replacement to Schedule 24 when PSE files its next general rate case.

Dated in Portland, Oregon, this 30th day of June 2015.



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I HEREBY CERTIFY that I have this day served the foregoing document upon all parties of record (listed below) in this proceeding by mailing a copy properly addressed with first class postage prepaid.

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