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October 20, 2006

VIA MESSENGER

Carole Washburn
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
Olympia, WA 98504-7250

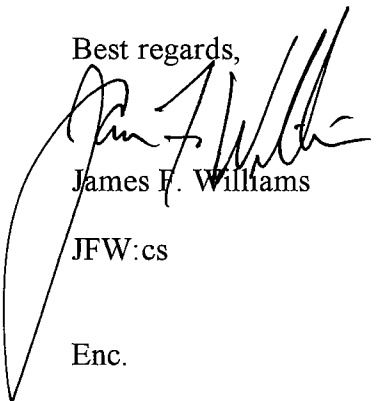
05 OCT 20 PM 9:13
RECEIVED PERKINS COIE
1201 THIRD AVENUE SUITE 4800
SEATTLE WA 98101-3099

Re: Petition for Declaratory Order

Dear Ms. Washburn:

Enclosed for filing is an original and 12 three-hole punched copies of a Petition for Declaratory Order. Please return a stamped copy with our messenger. If you have any questions, please feel free to call.

Best regards,


James F. Williams

JFW:cs

Enc.

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BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of,

PUGET SOUND ENERGY, INC.

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

No.

PETITION FOR DECLARATORY ORDER

I. INTRODUCTION

1. On September 22, 2006, Judge Richard Strophy of the Thurston County Superior Court entered an order granting Puget Sound Energy, Inc.'s ("PSE") motion to stay the case of *City of Tumwater v. Puget Sound Energy, Inc.*, No. 06-2-00697-3. See September 22, 2006, Order Granting Defendant PSE's Motion to Stay and Transcript of Proceedings (hereinafter "September 22 Order"), attached as Exhibit A to this petition. In addition to staying all dispositive motions, the September 22 Order instructs the parties to proceed with administrative review before the Washington Utilities and Transportation

PETITION FOR DECLARATORY
ORDER – 1

ORIGINAL

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
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1 Commission ("WUTC" or "Commission") of all matters relating to PSE's Electric Tariff G,
2
3 Schedule 74.

4
5 2. In accordance with the September 22 Order, RCW 34.05.250 and WAC 480-
6
7 07-370, PSE, P.O. Box 97034, Bellevue, WA 98009-9734, hereby petitions the WUTC for a
8
9 declaratory order interpreting PSE's Electric Tariff G with regard to the conversion of
10
11 certain overhead electrical facilities to underground equipment as part of a facilities
12
13 relocation and conversion project being undertaken by the City of Tumwater (the "City") in
14
15 Thurston County.

16
17 3. The following rules or statutes may be brought into issue by this Petition:
18
19 RCW 80.28 *et seq.*, RCW 80.01.040, RCW 34.05.240 and WAC 480-07-370.

20
21 4. Pursuant to RCW 80.01.040, the WUTC has broad authority over the
22
23 practices of all companies it regulates.

24
25 5. The Commission has special competence over interpretation of WUTC-
26
27 approved tariffs and related agreements.

28
29 6. The Commission has issued declaratory orders interpreting PSE's Electric
30
31 Tariff G with regard to payment responsibilities associated with underground conversion
32
33 projects like the City's in this case.

34 35 **II. STATEMENT OF FACTS**

36
37 7. The City has filed a complaint against PSE for declaratory relief and the
38
39 return of funds that were paid to PSE for the costs associated with moving PSE's electric
40
41 equipment to accommodate the Tumwater Boulevard Widening Project (the "Project"). The
42
43 City's claims in this case boil down to the assertion that: a) PSE must pay 100% of the costs
44
45 to relocate PSE's underground electric equipment because of a franchise agreement between
46
47 PSE and the City; and b) PSE must pay 60% of the costs for any conversion of overhead

1 equipment to underground because of PSE's approved tariff from the WUTC. *See*
2
3 Complaint at 1-4, attached as Exhibit B to this petition.

4
5 8. PSE denies that it must pay these costs because PSE has pre-existing
6
7 easement rights that permit the equipment to remain where it is and because the City has
8
9 already agreed in writing to pay 100% of the cost to relocate the electrical equipment and to
10
11 convert the overhead equipment to underground. *See* PSE's Answer and Counterclaim
12
13 at 12-18, attached as Exhibit C to this petition.

14
15 9. Conversion of PSE's overhead electrical facilities to underground is governed
16
17 by PSE's tariff WN U-60, Electric Tariff G, Schedules 73 and 74 ("Schedule 73" and
18
19 "Schedule 74"), which were approved by the WUTC on June 26, 2002. *See* Schedules 73
20
21 and 74, attached as Exhibits D and E to this petition. Schedules 73 and 74 replaced the prior
22
23 versions of PSE's underground conversion tariffs, Schedules 70 and 71.

24
25 10. The City and PSE executed a Schedule 74 Underground Conversion Project
26
27 Design Agreement ("Design Agreement") for the Project. The form of the Design
28
29 Agreement is part of Schedule 74. *See* Schedule 74 Design Agreement, attached as
30
31 Exhibit F to this petition. The City claims that in Recital A of the Design Agreement, PSE
32
33 "recognized that PSE's rights to operate on Tumwater Boulevard derive from 'its franchise or
34
35 other rights from the Government Entity.'" Complaint at 4-5.

36
37 11. The purpose of Recital A of the Design Agreement is not to pre-judge or
38
39 establish property rights issues impacted by a conversion project, but rather to confirm that
40
41 an underground conversion project can move forward as a Schedule 74 project rather than a
42
43 Schedule 73 project.

44
45 12. By asserting its contrary interpretation of Recital A of the Design Agreement,
46
47 the City has called into question not only the interpretation of Schedules 73 and 74 on their

1 face, but also the important technical and policy considerations underlying the structure and
2 form of these tariff schedules and their accompanying form agreements.
3

4
5 13. The City argues that by signing the Design Agreement, PSE automatically
6 agreed that the standard 60/40% cost split of Schedule 74 underground conversions applied
7 to the Project. *See* Schedule 74 at § 2.b.(1). However, Schedule 74 explicitly provides that
8 a city must pay 100% of the costs of a conversion if the facilities to be converted from
9 overhead to underground are located outside of a public thoroughfare or are situated
10 "pursuant to rights not otherwise previously granted by the Government Entity." *Id.* at
11 § 2.b.(2).
12

13
14 14. PSE's electrical facilities are located on an easement, which is not a public
15 thoroughfare and was granted to PSE by the City's predecessor.
16

17
18 15. The WUTC has been actively involved with and has ruled on disputes
19 between many other cities and PSE regarding underground conversion projects within the
20 last several years and its Staff was involved in the development of the current Schedules 73
21 and 74. Consequently, such matters are within the primary jurisdiction of the WUTC and
22 should be decided by the WUTC.
23

24 **III. CAUSE OF ACTION FOR DECLARATORY JUDGMENT**

25 **A. Declaration on the Meaning of Schedule 74 and the Design Agreement**

26
27 16. The City's complaint and refusal to pay 100% of the costs associated with
28 conversion of PSE's electric facilities constitutes a violation of Schedule 74 and its related
29 Design Agreement.
30

31 **B. Appropriateness of Declaratory Order**

32
33 17. By authority of WAC 480-07 and RCW 34.05.240(1), the Commission may
34 enter a declaratory order upon a showing:
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- 1 (a) That uncertainty necessitating resolution exists;
2
3 (b) That there is actual controversy arising from the
4 uncertainty such that a declaratory order will not be
5 merely an advisory opinion;
6
7 (c) That the uncertainty adversely affects the petitioner;
8
9 (d) That the adverse effect of uncertainty on the petitioner
10 outweighs any adverse effects on others or on the
11 general public that may likely arise from the order
12 requested; and
13
14 (e) That the petition complies with any additional
15 requirements established by the agency under
16 subsection (2) of this section.

17 18. The declaratory order requested by PSE meets these requirements, as set
18 forth below.¹

19
20
21 19. **Uncertainty Necessitating Resolution:** The uncertainty to be resolved by
22 this Petition is the City's misapplication of Schedule 74 and misunderstanding of the related
23 Design Agreement. This question requires interpretation and application of the tariff and the
24 Schedule 74 Design Agreement, and is within the purview of the Commission's primary
25 jurisdiction.
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31 20. **Actual Controversy Arising From the Uncertainty Such That a**
32 **Declaratory Order Will Not Be Merely an Advisory Opinion:** The City's actions and
33 PSE's intention to enforce its rights under Schedule 74 give rise to an actual dispute between
34 the City and PSE. The dispute involves violation of a statutory edict and/or WUTC Rule. A
35 declaratory order addressing the rights of the parties with respect to Schedule 74 and the
36 Schedule 74 Design Agreement would not be merely an advisory opinion.
37
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45 ¹ The WUTC has not established additional requirements under RCW 34.05.240(1)(e), but
46 rather requires that petitions for declaratory order comply with the remaining subsections of
47 RCW 34.05.240(1). See RCW 34.05.240(2).

1 21. **The Uncertainty Adversely Affects the Petitioner:** A ruling on
2
3 Schedule 74 by the Superior Court could be inconsistent with prior WUTC Orders and could
4
5 create inconsistent cost allocations for underground conversions if the Commission does not
6
7 interpret Schedule 74 and the Schedule 74 Design Agreement as it relates to the City's
8
9 actions.

10
11 22. **The Adverse Effect of Uncertainty on the Petitioner Outweighs any**
12
13 **Adverse Effects on Others or on the General Public That May Likely Arise From the**
14
15 **Order Requested:** Resolution of the questions raised in this petition will not result in any
16
17 adverse effect to others or the general public. The public interest is served by enforcing
18
19 Schedule 74 and the related Schedule 74 Design Agreement and the mandate of both that the
20
21 City pay 100% of the costs of relocating and converting electric facilities related to the
22
23 Project. Moreover, actions may be taken by other cities in reliance on the City's willingness
24
25 to overtly disregard both the letter and the intent of Schedule 74 and the Schedule 74 Design
26
27 Agreement.

28
29 23. The Commission has issued declaratory orders on this very subject. *See City*
30
31 *of Kent et al. v. PSE*, WUTC Docket Nos. UE-010778 and UE-010911, Third Supp. Order:
32
33 Declaratory Order on Motions for Summary Determination, 2002 Wash. UTC LEXIS 4
34
35 (Jan. 28, 2002); *City of Sea Tac et al. v. PSE*, WUTC Docket Nos. UE-010891 and UE-
36
37 01102, Third Supp. Order: Declaratory Order on Motions for Summary Determination,
38
39 2002 Wash. UTC LEXIS 6 (Jan. 28, 2002). Therefore, the Commission has authority to and
40
41 experience in ordering declaratory relief in similar matters.

42 43 **IV. RELIEF REQUESTED**

44 Petitioner respectfully requests that the Commission enter an order declaring that:
45
46
47

Exhibit A

Exhibit A

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

06 SEP 22 PM 1:06

BETTY J. SCULL, CLERK

BY _____
DEPUTY

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<input type="checkbox"/>	EXPEDITE
<input type="checkbox"/>	No hearing is set
<input checked="" type="checkbox"/>	Hearing is set
	Date: September 22, 2006
	Time: 9:00 a.m.
	Judge/Calendar: Richard Strophy

THE HONORABLE RICHARD STROPHY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

CITY OF TUMWATER, a Washington
municipal corporation,

Plaintiff,

v.

PUGET SOUND ENERGY, INC.,
a Washington corporation,

Defendant.

NO. 06-2-00697-3

~~PROPOSED~~ ORDER GRANTING
DEFENDANT PUGET SOUND
ENERGY, INC.'s MOTION TO STAY
PROCEEDINGS

This matter came before the Court on Defendant Puget Sound Energy, Inc.'s
("Defendant") Motion to Stay Proceedings with regard to the filing and consideration of
dispositive motions, but not discovery.

ORDER GRANTING DEFENDANT PUGET
SOUND ENERGY, INC.'S MOTION TO
STAY PROCEEDINGS - 1

LEGAL11233143.1

ORIGINAL

PERKINS COIE LLP
10885 NE 4th Street, Suite 700
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The Court, having considered the above Motion to Stay Proceedings and the records and files herein, and being fully advised, now therefore, finds that Defendant's Motion to Stay Proceedings is GRANTED. Now, therefore, it is

ORDERED that Defendant may proceed with administrative review of matters relating to Defendant's Electric Tariff G, Schedule 74 by the Washington Utilities and Transportation Commission; it is further

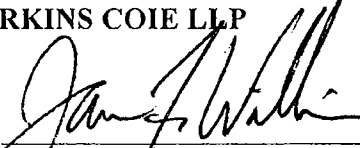
ORDERED that any and all filings of dispositive motions in this proceeding are stayed pending final resolution of Defendant's Petition for Declaratory Order by the Washington Utilities and Transportation Commission; and it is further

ORDERED that the parties should proceed with discovery pursuant to CRs 26-37, and any final WUTC order shall be referred or appealed to this Court under these proceedings
ENTERED this 22 day of September 2006

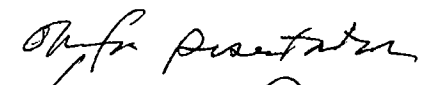


HONORABLE RICHARD STROPHY

Presented by:

PERKINS COIE LLP

By 

James F. Williams WSBA #23613
Donna L. Barnett WSBA #36794
Attorneys for Defendant Puget Sound Energy, Inc.


 WSBA 5771
Attorney for City of Thurston

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CERTIFICATION

I certify under penalty of perjury under the laws of the State of Washington that I had hand-delivered a copy of this document to all counsel of record _____ on the 11th day of September, 2006.
Signed: Cathy Schleh

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

CITY OF TUMAWATER,)
))
Plaintiff,)
))
vs.)
) Thurston County
PUGET SOUND ENERGY,) No. 06-2-00697-3
))
Defendant.)
))
))
))

ARGUMENT OF COUNSEL and COURT'S RULING

BE IT REMEMBERED that on September 22, 2006,
the above-entitled matter came on for hearing before the
HONORABLE RICHARD STROPHY, Judge of Thurston County
Superior Court.

Reported by: AURORA SHACKELL
Official Reporter, CCR#2439
2000 Lakeridge Drive SW, Bldg No. 2
Olympia, WA 98502
(360) 786-5570
shackea@co.thurston.wa.us

APPEARANCES

For the Plaintiff: WILLIAM PATTON
Foster Pepper
1111 Third Ave, Ste. 3400
Seattle, WA 98101

For the Defendant: JAMES WILLIAMS
And DONNA L. BARNETT
Perkins Coie
1201 Third Ave, Ste. 4800
Seattle, WA 98101

1 May it please the Court --
2 THE COURT: My bills are going up
3 because I made you wait all morning. I guess that's
4 the cost.
5 MR. WILLIAMS: I don't think that's the
6 case, Your Honor. We appreciate your patience, and
7 we appreciate staff being willing to work through
8 the lunch hour to get this motion heard.
9 THE COURT: Yeah, I have the challenge
10 for doing these kinds of calendars as well as every
11 Friday afternoon doing drug court, so I don't have
12 another time in which to schedule it or I would have
13 done that to give you less waiting time and more
14 argument time.
15 MR. WILLIAMS: We totally understand,
16 Your Honor. I should start by putting the motion
17 itself into context by giving you a little bit of
18 background. I have to say that the background is
19 quite fact-intensive and involved, but, for purposes
20 of this motion, the two key points that the Court
21 should be focused on are really the forms of relief
22 being sought by the City of Tumwater in this
23 declaratory relief action, because those are the two
24 things that will be dispositive we think with
25 respect to this motion to stay. The first form of

1 THE COURT: City of Tumwater versus
2 Puget Sound Energy. I've received the materials on
3 behalf of Puget Sound Energy, which, I might
4 parenthetically add, require me to spend more time
5 tabbing than I like to in preparation for the
6 calendar of the volume you've witnessed here this
7 morning. So I would gently urge parties, when
8 you're providing working copies to the Court, to
9 please tab them as well as index when they become
10 voluminous. It just takes too long to find what I'm
11 looking for, much less analyze what I'm looking for.
12 I know the clerk prohibits you from submitting
13 originals tabbed because of their file and storage
14 limitations, but the local rule specifically
15 requires working copies of any volume to be tabbed
16 as well as indexed. So word to the wise for future
17 pleadings not only in this case but otherwise in
18 this jurisdiction.
19 Okay. That having been said, I have Puget Sound
20 Energy, and you are?
21 MR. WILLIAMS: Your Honor, my name is
22 James Williams. I'm here on behalf of Puget Sound
23 Energy.
24 THE COURT: Good morning.
25 MR. WILLIAMS: Good morning, Your Honor.

1 relief they ask this Court to give is an order
2 requiring Puget Sound Energy pay 100 percent of the
3 costs to relocate some underground electric
4 transmission facilities from one underground
5 location to another. The City contends that that
6 requirement to pay 100 percent is derived from a
7 franchise agreement and their interpretation of that
8 agreement, and they say that the Court should follow
9 that agreement for purposes of entering that order.
10 The second form of relief they ask for is an
11 order requiring Puget Sound Energy to pay 60 percent
12 of the costs related to converting overhead
13 transmission equipment into underground transmission
14 equipment. I should tell the Court that with
15 respect to the first form of relief. We actually
16 agree with the City that that is an issue that is
17 ripe for the Court to decide at some point and
18 probably a jury because we believe that there are a
19 number of facts that will be involved in
20 interpreting that franchise agreement at some point,
21 and the Court is certainly appropriately prepared to
22 do that.
23 Where we disagree and the reason why we're here
24 is the second form of relief they request is based
25 on Schedule 74, which is originated from the

1 Washington Utilities and Transportation Commission.
 2 I'll say WUTC for short. The Schedule 74 and the
 3 design agreement that they have sued upon both come
 4 from the WUTC; they're both mechanisms used by the
 5 WUTC for the purpose of regulating the conversion of
 6 electrical overhead equipment to underground. It is
 7 for that reason that we're here, Your Honor, because
 8 that particular schedule is the trigger that gives,
 9 in our estimation, the WUTC primary jurisdiction to
 10 decide the question of the costs associated with
 11 converting those overhead facilities to underground.

12 With that background in mind, Your Honor, there
 13 are three reasons why we believe this motion should
 14 be granted --

15 THE COURT: Okay. Let me interrupt you
 16 just to make sure: I thought you indicated the
 17 request of this Court by Tumwater is for an order
 18 that 60 percent of the costs of equipment conversion
 19 to underground is appropriately before the Court but
 20 not its request for order that a hundred percent of
 21 the relocation costs.

22 MR. WILLIAMS: Let me explain.

23 THE COURT: And then I'm hearing you say
 24 just in your last sentence which I think was the
 25 opposite.

1 MR. WILLIAMS: Let me make sure I'm
 2 clear. On the hundred percent issue, the City is
 3 saying that arises as a result of the franchise
 4 agreement. That's a separate issue. On the 60
 5 percent issue, they're saying that arises as a
 6 result of Schedule 74, which was issued by the WUTC,
 7 along with the Schedule 74 design agreement, which
 8 also derives from the WUTC. It is on that latter
 9 part the 60 percent issue and the Schedule 74, on
 10 that part, we submit to this Court --

11 THE COURT: Primary jurisdiction.

12 MR. WILLIAMS: Primary jurisdiction.

13 THE COURT: So I think either you
 14 misspoke or I misheard.

15 MR. WILLIAMS: It's always counsel who
 16 misspoke, I'm sure.

17 THE COURT: We're good now.

18 MR. WILLIAMS: Well, there are three
 19 reasons why we think our motion should be granted.
 20 The first and foremost reason is the primary
 21 jurisdiction issue; that is, when you look at what's
 22 been put before the Court, there's no question that
 23 the issue of costs associated with converting
 24 overhead transmission to underground has been and
 25 continues to be fully regulated by the Washington

1 Utilities and Transportation Commission.

2 Converting these facilities to underground is a
 3 substantial and significant undertaking. It is a
 4 very costly undertaking. It is being done all over
 5 the state, and, for that reason, it is being
 6 regulated systemically on a regular basis by the
 7 WUTC. As a matter of fact, that's the whole reason
 8 why Schedule 74 is as it is and why those design
 9 agreements and other form of agreements that derive
 10 from Schedule 74 are in place, because the WUTC
 11 needs to have a systemic way of managing the costs.
 12 The WUTC has already looked at apportioning the
 13 costs and all the relative policy decisions that go
 14 into that and has come to the conclusion in Schedule
 15 74 that costs should be apportioned a particular
 16 way.

17 There is nothing in the City's brief to the
 18 contrary to suggest that the regulation of the
 19 conversion and the costs associated with it do not
 20 fall within the jurisdiction of the WUTC. That's
 21 the first reason.

22 The second reason is that Puget Sound Energy has
 23 met the legal standard for granting this motion.
 24 There are three things essential that the case law
 25 says that PSE had to prove. The first had to be

1 that WUTC as the agency -- we would direct this
 2 court to that -- that agency has the power,
 3 authority and ability to actually resolve this issue
 4 on conversion costs. There's no question that it
 5 has the authority to do that because it has done it
 6 for many of the cities that surround Thurston
 7 County. We submitted as part of our original motion
 8 all of the prior decisions that we're aware of by
 9 the WUTC, and we know that those decisions relate to
 10 all the cities that we're talking about. So the
 11 question of whether they have the power to resolve
 12 is already in the statute, and the case law from the
 13 WUTC settles that, as well.

14 The second question is whether the WUTC is
 15 uniquely qualified. Do they have particular
 16 expertise that would be relevant for this question
 17 because they are in the business of regulating PSE
 18 and other utility companies, because this question
 19 of cost related to diversion is fundamental to those
 20 utility companies. Without question, the WUTC has
 21 that special knowledge and experience envisioned by
 22 the courts when they talk about primary
 23 jurisdiction.

24 The last question is whether there is some
 25 comprehensive scheme or system involved with a

1 particular matter. We just talked about why
2 Schedule 74 and the design agreement was brought
3 into being in the first place, because the WUTC
4 wants to have the ability on a statewide basis to
5 regulate and control how these conversion costs are
6 allocated. There is, in fact, a scheme already in
7 place being controlled by the WUTC. So under the
8 case law that governs this dispute that the Court
9 has before it, there's no question that Puget Sound
10 Energy has actually met the legal standard necessary
11 to grant a stay.

12 The third reason why we think this motion should
13 be granted is that the City does not have any
14 legitimate reason, we believe, to oppose it. We say
15 that not lightly but because we've evaluated their
16 arguments and looked most importantly at what was
17 not said in the brief. Whenever a motion of this
18 nature is brought, the question immediately comes to
19 mind, from a judge, from anybody else's perspective,
20 is there any prejudice to the other party. There is
21 not one word in the city's brief about how the City
22 would be prejudiced by staying this proceeding and
23 having the WUTC rule on a matter that is
24 specifically within the WUCT's bailiwick.

25 As a matter of fact, we know there's no

1 prejudice because, Your Honor, PSE is not seeking a
2 stay of discovery. As a matter of fact, discovery
3 is currently ongoing between the parties. We've
4 already exchanged documents. At least PSI has
5 provided documents in response to written discovery
6 to the City. The City has been served by PSE with
7 written discovery, and we fully expect to launch
8 into depositions at some point when the written
9 discovery portion is complete.

10 So as a practical matter, this case will
11 continue to move on, even if this case is stayed
12 procedurally while the WUTC grapples with the
13 conversion cost issue.

14 Another argument raised by the City has to do
15 with this notion of conversion of costs, conversion
16 costs being relatively minor or trivial or, as the
17 City described it, a matter of document
18 construction. We disagree with that
19 characterization, Your Honor, because we think it is
20 a big deal.

21 We know it's a big deal because many other
22 cities in this state have already gone through the
23 WUTC and had declaratory orders issues related to
24 this very issue. We know it's a big deal, as well,
25 because it is fundamental to the claim in the

1 complaint that's made by the City of Tumwater. They
2 allege Schedule 74, and if this is really about
3 interpretation of documents, that is, Schedule 74
4 and the design agreement, who better to interpret
5 Schedule 74 and the design agreement than the
6 organization, the entity that caused them to be.
7 There is probably nobody else than the WUTC to say
8 what they meant when they created Schedule 74 and
9 when they created the design agreement.

10 Finally, Your Honor, one argument that was put
11 forward by the City has to do with this notion that
12 an order by WUTC will effectively end this
13 litigation. That's simply not the case, Your Honor,
14 because, as I said in the outset, there are two
15 segments, two fundamental segments of the relief
16 they seek. The first segment has to do with the
17 franchise agreement. Their contention that a
18 hundred percent of the costs related to relocating
19 -- and I just want to make sure the court
20 understands the distinction because these are terms
21 of art, the relocation versus the conversion --
22 they're saying the relocation, a hundred percent of
23 that is due to this franchise agreement which we
24 believe should be decided by the court, and we
25 believe that means the case does not come to an end

1 as a result of a stay so that the WUTC can address
2 this issue of conversion costs.

3 THE COURT: So do I take it, implicit in
4 your position is that costs of conversion is not
5 necessarily subsumed into costs of relocation when
6 relocation would involve not only relocating, but
7 when the relocation is accomplished, the equipment
8 is put in an area to which it is relocated
9 underground, as opposed to above ground?

10 MR. WILLIAMS: I understand your
11 question, Your Honor. It's a very good question,
12 and the answer is you're correct, and here's why:
13 It says so in their complaint. They specifically
14 set out those separate buckets, if you will, of
15 compensation that they want this Court to render an
16 order on. They say a hundred percent of the
17 relocation because they know relocation generally
18 means talking about moving things from one place to
19 another. Conversion is, in this industry, moving to
20 underground those things that have been overhead.
21 Much more expensive, much more involved. That's why
22 the WUTC is specifically involved with regulating.

23 I'd like to reserve some time for rebuttal, Your
24 Honor.

25 THE COURT: Thank you.

1 MR. PATTON: Good morning, Your Honor.
 2 I'm Will Patton representing the City of Tumwater.
 3 The issue -- main issue here in the motion is who,
 4 whether the WUTC or this court, has the primary
 5 jurisdiction over the issues, and Puget has already
 6 agreed that the primary issue for the question of
 7 relocation costs, that is, moving from one place in
 8 a thoroughfare to another in the same manner -- that
 9 is, whether it's overhead to overhead or underground
 10 to underground -- is within the province of this
 11 court.

12 This issue involves the franchise agreement
 13 between the City of Tumwater and Puget Sound Energy
 14 entered into in 1985. Puget's argument that that is
 15 eclipsed by a prior easement granted by the Court of
 16 Olympia in 1981 and the transfer of the jurisdiction
 17 over the street right-of-way to the City of Tumwater
 18 when it annexed that area in 1987, all of those
 19 things are contract and easement and public
 20 relationship issues which are within the primary
 21 jurisdiction of a court, including the common law in
 22 the State of Washington regarding who has
 23 responsibility when public thoroughfares are widened
 24 or changed by a public agency as to what those
 25 utilities that are located in the street

1 right-of-way, who has the responsibility to pay for
 2 that. All of that is within the jurisdiction of
 3 this Court.

4 What Puget is arguing is that the provision that
 5 exempts an electric utility such as Puget from
 6 paying 60 percent of the cost when a road is changed
 7 and the public agency demands the overhead wires go
 8 to underground instead of the 60/40 split, and
 9 that's a 40 percent payment by the City and 60
 10 percent paid by the utility, that that goes away
 11 because of two provisions within the tariff -- which
 12 the court can look at, and you don't have to go back
 13 to the UTC to look at those provisions, and those
 14 provisions are in the exhibits which were provided
 15 to you, which were attached to the complaint, so the
 16 Court has all the relevant documents necessary to
 17 decide this case.

18 And that is (2)(b)(2), which Puget argues that
 19 the exceptions for paying 60 percent of the costs --
 20 or the City paying only 40 percent of the costs --

21 THE COURT: You're citing section of?

22 MR. PATTON: Of Schedule 74 of the WUTC
 23 tariff, which is included in Exhibit C to the City's
 24 complaint.

25 THE COURT: 74.(2)(b)(2)?

1 MR. PATTON: Complicated numbing system
 2 but it's (2)(b)(2), and it's located -- I don't
 3 think this even has page numbers on it.

4 MR. PATTON: You can look at side tabs
 5 in the binding to Tumwater's complaint. It's
 6 exhibit C.

7 THE COURT: That's my problem. But,
 8 anyway, I have schedule four, if you give me a page.

9 MR. PATTON: It's quoted in the brief,
 10 but if you look at Exhibit C, it's the second page.
 11 Number two starts on the first page, agreement
 12 provisions. And then it goes over to the second
 13 page where it says (b), the design agreement and
 14 construction agreement.

15 THE COURT: I've got 73 on an Exhibit D,
 16 but that's --

17 MR. PATTON: Exhibit C.

18 THE COURT: To yours?

19 MR. PATTON: Yes. Can I hand this up to
 20 you?

21 THE COURT: Probably easier and quicker.

22 MR. PATTON: And I've highlighted it in
 23 yellow. So the exceptions that Puget argues provide
 24 it with no costs from converting from overhead to
 25 underground are, A, that it's not within a public

1 thoroughfare, and, B, that it comes from some kind
 2 of right not related to the franchise or from
 3 some -- something preceding the -- and I don't have
 4 it in front of me to quote it exactly to you --
 5 government entity.

6 But paragraph 13 of their proposed complaint to
 7 the UTC, if this Court allows them to transfer to
 8 the UTC, alleges that it's not in the public
 9 thoroughfare. That would include, A, although their
 10 answer to the City's complaint in paragraph 14
 11 admits that Tumwater Boulevard, which is the subject
 12 of the issue here formerly called Airdustrial Way is
 13 a street right-of-way.

14 The second -- so that's a factual issue, is this
 15 in a street right-of-way or not. The second
 16 exception is something that relates to the basic
 17 argument relating to relocation costs before this
 18 court, that is, what is the effect of the prior
 19 easement from the Port of Olympia for this to
 20 operate in the street right-of-way, what is the
 21 effect of the transfer to the City of Olympia in
 22 1987 of the street right-of-way jurisdiction of what
 23 used to be Airdustrial Way now renamed by the City
 24 of Tumwater to be Tumwater Boulevard and the fact of
 25 the 1985 franchise agreement and the general

1 background of law in Washington about who gets to
 2 pay for moving stuff out of the way of a street
 3 improvement.
 4 All of that is within the primary jurisdiction
 5 of this court. And the UTC looks at those factual
 6 issues that all relate to the issue of relocation
 7 costs as Puget has admitted and made some different
 8 decision, then we will be in the court of appeals
 9 with two different kind of decisions.
 10 Once this Court makes a decision about what
 11 Puget admits to be the central issue of relocation
 12 costs -- and, parenthetically, in this circumstance
 13 of Tumwater Boulevard, the relocation costs are far
 14 greater than the conversion costs, that that will
 15 answer the questions of A and B in the tariff,
 16 because this Court will have -- either by judge or
 17 jury -- will have decided is this a public
 18 thoroughfare or not. Secondly, this Court will have
 19 decided what is the relationship of the franchise
 20 agreement to the easement from a public agency, the
 21 Port of Olympia, and how does that relate to the
 22 case law in Washington regarding the responsibility
 23 of the utilities to pay for relocation out of the
 24 way of a street improvement. All of that will be
 25 decided at the end of this case, and that's the

1 primary jurisdiction for this case.
 2 If you send it off to the UTC and say, well,
 3 nothing can happen here except discovery, then we're
 4 going to have to wait two years or three for the UTC
 5 to make a decision and somebody to appeal that
 6 decision before we can ever get a ruling from this
 7 court. Yet, the primary issues are all within the
 8 province of this court, and, therefore, it should
 9 not be transferred to the UTC. The case that they
 10 cite, Hopkins, was an issue for refund charging for
 11 a telephone. That's the primary jurisdiction of
 12 what is the rate set for charging for telephones by
 13 the UTC.
 14 But the primary issues here are all related to
 15 easements, franchise agreements, transfer agreements
 16 and case law that's gone on for nearly a hundred
 17 years, all within the primary province of the court.
 18 So this motion should be denied.
 19 THE COURT: Mr. Williams.
 20 MR. WILLIAMS: Yes, Your Honor, just a
 21 few points to wrap up. The first and perhaps most
 22 important one is just clarity on this question of
 23 conversion costs versus relocation costs. Again,
 24 they're not the same, and I'm afraid that the City
 25 conflates the two. The conversion cost issue is

1 what we're here for. That's what this motion is
 2 about, conversion of overhead to underground. We
 3 want that issue to be decided by the statewide
 4 decision-making authority on that, the WUTC.
 5 The second point, we're not here to argue about
 6 the merits. Counsel has talked about what we're
 7 trying to do, how we're framing the case. That's
 8 not why we're here. We're here because we would
 9 like to have this issue settled, the conversion cost
 10 issue settled by the agency that has been
 11 historically been doing it, for the purpose of
 12 consistency, statewide, not just for the Puget but
 13 the utilities that have come before the WUTC. It
 14 doesn't matter so much at this point what the WUTC
 15 decides. What does matter is that that decision,
 16 whatever it is, comes from the body that is
 17 responsible for making that consistent overall.
 18 They may agree with Mr. Patton, okay, that's great.
 19 At least we hear from the WUTC what they understand
 20 Schedule 74 and their design agreement to mean, and,
 21 that way, Puget Sound Energy Company consistently
 22 deals with all of the cities and municipalities that
 23 it has to within its coverage area.
 24 Last point: Counsel brought up the proposed
 25 declaratory order that we submitted as an example or

1 as an exhibit with Puget Sound Energy's materials.
 2 If there's anything in there that the Court does not
 3 want pursued by the WUTC, the Court has the ability
 4 to strike or change it. That shouldn't be the
 5 decision-making point in this matter. We only
 6 submitted it to this Court to show what would be
 7 pursued before the WUTC, but if the Court believes
 8 the WUTC should in some way be narrowed because the
 9 declaratory order we proposed is too broad, and
 10 that's certainly another way of handling it and
 11 certainly allowing the State to go forward.
 12 THE COURT: Well, could another
 13 plausible approach be that -- I understand one of
 14 the aspects of your petition, paragraph 13, page
 15 three, your petition for declaratory order to be
 16 submitted, if not yet submitted to WUTC, is that the
 17 facilities it declared facilities are located on an
 18 easement which is not public thoroughfare and was
 19 granted to PSE by the City's predecessor. As I
 20 understand the argument, that's an issue that
 21 counsel for the City believes would be under the
 22 jurisdiction of this court to decide; likewise,
 23 whether the franchise agreement or some prior
 24 easement agreement would control as a matter of law.
 25 If I understand the City's argument, those

1 issues, in addition to the relocation issues are
2 matters before -- to be decided by the Court. Are
3 you seeking to have WUTC weigh in on those
4 particular issues by your petition?

5 MR. WILLIAMS: Let me take those in the
6 reverse order as I heard them, Your Honor. If I
7 miss one, please correct me. With respect to the
8 relocation cost issue, that's never been anything we
9 have suggested should go to the WUTC. Again, that's
10 a separate question. The relocation question as
11 alleged by the City relates to the franchise
12 agreement itself.

13 THE COURT: Yes.

14 MR. WILLIAMS: That's not anything
15 that's in this petition, and that's not anything
16 that would be submitted to the WUTC.

17 THE COURT: Right.

18 MR. WILLIAMS: The second question has
19 to do with this question of whether a public
20 thoroughfare exists. The WUTC grapples with that
21 issue all the time. That's the nature of what they
22 do. So we don't concede that that is something that
23 is solely within the jurisdiction of this court. On
24 balance, under the totality of the circumstances,
25 the vast majority of everything that needs to be

1 handled on the conversion cost issue should be
2 handled by the WUTC. If there's something the court
3 believes specifically it should retain, we
4 understand that, but for purposes of consistency
5 within the systemic regulation of conversion costs,
6 we submit that this case -- this particular issue
7 should go to the WUTC.

8 THE COURT: All right. Now, these costs
9 have been expended by PSE and paid for the City or
10 expended and not paid for -- because I haven't had
11 time to digest all the factual or procedural
12 background and the complaint and answer -- but, I
13 don't know, construction isn't being held up that's
14 already taken place?

15 MR. WILLIAMS: Yes, Your Honor, it's
16 already going forward. There's a stand-still
17 agreement taking place between the parties so nobody
18 would be injured on the construction itself. So
19 there really is no impact, if you will, other than
20 the allocation of who's --

21 THE COURT: Who's going to pay, absorb
22 the cost.

23 MR. WILLIAMS: Exactly, Your Honor.
24 That's why we want the WUTC to get involved. This
25 is their bailiwick. This is their area.

1 THE COURT: Okay. Thank you.
2 Mr. Patton, did you have -- I'll give you a chance
3 to comment on my questions.

4 MR. PATTON: Thank you, Your Honor.
5 Mr. Williams is correct, we did negotiate an
6 agreement whereby the construction can continue. I
7 just want to point out again that the issues
8 involved in this court deciding the relocation issue
9 are absolutely germane to the application of the
10 tariff. That is, if there's no public right-of-way,
11 then the City has no right to make a utility move
12 out of a public right-of-way.

13 And if there was no -- if the prior agreement
14 between the Port of Olympia and Puget trumps
15 anything subsequent to that, then Puget is correct
16 in the applicability of the tariff, because then the
17 City wouldn't have to pay for it, and the City would
18 have to pay a hundred percent of the relocation
19 costs. So those two issues that are exceptions
20 within the UTC tariff are central to this Court's
21 decision about whether relocation costs have to be
22 paid by the City or by Puget.

23 So these are the central issues of the case and,
24 therefore, the primary jurisdiction. As in the
25 National Union Insurance vs. Puget case, it was

1 dealing with the applicability of the tariff with
2 consistency of service to Boeing. That's a UTC
3 tariff, but the court retains jurisdiction, as did
4 the court of appeals, because it is a fundamental
5 legal issue about potential negligence and not
6 starting out an adjacent plant.

7 Here, the fundamental legal issues of the major
8 expense in the Tumwater Boulevard widening project
9 are purely issues for this court, not the UTC. And
10 once the court makes that determination, that will
11 automatically answer the UTC questions.

12 THE COURT: Well, we've run into my
13 staffing time in drug court, so we're 40 minutes
14 into the lunch hour. Suffice it to say, I've
15 considered the motion and response to the motion to
16 stay proceedings, and, basically, the Court's task
17 in deciding the motion involves its requirement to
18 apply factors governing the application of the
19 doctrine of primary jurisdiction. When both the
20 court and administrative agency arguably have
21 jurisdiction over issues before the court, the
22 doctrine of primary jurisdiction may be applied to
23 determine whether the Court should continue
24 consideration of an action or refer the issues for
25 an initial decision by the administrative agency.

1 So the argument, as I understand it, by PSE is
2 not for the court to dismiss the action but for this
3 Court to stay exercise of its jurisdiction until
4 issues PSE believes are appropriately better decided
5 by the WUTC on a threshold basis are considered and
6 ruled on before this Court considers them along with
7 other issues properly before it.

8 Further, PSE argues that an aspect or one of the
9 issues involved in this case -- and it's disputed
10 whether or not that's the primary or core issue --
11 is the cost split with respect to conversion of
12 overhead equipment to underground as part of the
13 road widening project for Tumwater Boulevard,
14 formerly Airdustrial Boulevard.

15 In the limited time I've had to digest the
16 issues and the application of the tariffs that
17 relate to conversion, specifically Tariff G,
18 Schedules 73 and 74, it occurs to me that, in many
19 situations, issues of fact as well as law are
20 decided by an administrative agency based upon a
21 hearing conducted under the Administrative
22 Procedures Act or rules akin to the APA that govern
23 the proceedings of the agency, and the law is
24 applied to those facts that are relevant to the
25 agency's regulatory or adjudicative function. In

1 that regard, I'm satisfied that there is a
2 sufficient degree of significance to the Schedules
3 73 and 74 issue and their application to facts that
4 would be established one way or another before the
5 commission to warrant the commission passing upon
6 these issues prior to the court deciding what may be
7 the legal effects of a competing easement versus a
8 franchise agreement and so forth.

9 I don't believe that those issues are so
10 separate and apart from and such a separate province
11 of the Court's jurisdiction that the WUTC in its
12 expertise in these matters should not be allowed to
13 first interpret and apply them regarding
14 cost-splitting. Also contract principles and
15 factual issues relating to just where the particular
16 right-of-way area may or may not actually be and
17 whether that area is governed by an easement or
18 franchise agreement.

19 It occurs to me further that in an
20 administrative agency review, the Court would have
21 before it the record and would then be able to
22 determine whether or not there was substantial
23 evidence in the record to support the WUTC's factual
24 findings and whether or not the WUTC's application
25 of its expertise and regulatory policies and

1 practices in light of those facts was legally
2 correct or constituted an error of law.

3 The court, in my experience, can disregard those
4 applications of the law to the facts that it
5 concludes are in error. It may give deference to
6 the agency but is not bound by the agency in that
7 manner. And it just occurs to me that, once all is
8 said and done before the WUTC and an administrative
9 record is made, the Court can review that record and
10 make its own legal analysis of which documents
11 control, which trumps the other, and still have the
12 benefit of WUTC's expertise on any cost split issues
13 that would pertain, depending upon whether or not
14 the matter involves merely a relocation from a
15 public right-of-way or involves a conversion
16 regarding an area that may or may not arguably be
17 properly classified a public right-of-way.

18 So with that explanation, as best I can make it,
19 given limitations of time, I'll grant the motion to
20 stay proceedings to allow PSE to pursue its petition
21 for declaratory orders from WUTC. And if I didn't
22 say it clearly enough, I would not consider in later
23 follow-up litigation before the court this Court
24 being bound by any legal conclusions of the WUTC
25 that the court would have concurrent jurisdiction

1 over, but at least I'd have the benefit of WUTC's
2 expertise and first consideration.

3 MR. WILLIAMS: Your Honor, I have a
4 proposed order.

5 THE COURT: I'll hand back to Mr. Patton
6 your excerpt of the Schedule 74 you were kind enough
7 to give me in your argument.

8 MR. PATTON: Your Honor, in terms of
9 your ruling, I'd request that you modify the
10 proposed order by Puget to require that the decision
11 of the UTC come back to this court rather than the
12 normal process of having to appeal it after it's
13 done. There's a whole administrative appeal
14 procedure within the UTC and where you go after you
15 go to the commission and beyond that. So that, as
16 you said, you wanted the preliminary decision by the
17 UTC to be viewed by this court when it came back.
18 So if your order --

19 THE COURT: What I think I hear you
20 saying is you want to short circuit perhaps some
21 intermediary administrative appeals process.

22 MR. PATTON: Yes, because, otherwise, we
23 are going to be, however long it takes to get
24 through the appeal process of whatever the UTC
25 decides, it's only then pursuant to the order that

1 Puget proposes that we get to come back here, which
2 may be two or three years from now.

3 THE COURT: Mr. Williams.

4 MR. WILLIAMS: Your Honor, I think the
5 statute says that appeals from the UTC come here,
6 anyway. And the second point is, the UTC in hearing
7 these other issues with the City, they were able to
8 resolve them in less than six months.

9 MR. PATTON: Well, that may be with
10 those other cities, but if the order can say that
11 the appeal will come back to this court in this case
12 already filed, then we have an order that says you
13 would want it to happen.

14 THE COURT: Well, my reluctance to agree
15 to that at this point is, I don't know by doing that
16 if I'm summarily precluding a further administrative
17 review process that either party may be entitled to.

18 For example, if there's a nuance to the initial
19 decision that the City doesn't like but takes it up
20 to the next level of administrative review and
21 prevails on that, seems to me to be a more
22 expeditious process in light of the jurisdiction of
23 the WUTC than coming to the court prematurely.

24 I'm not foreclosing that issue, but I'm not
25 comfortable in providing for that over objection of

1 remaining issues. So I understand now what you're
2 saying, and so I think that's implicit in the order.

3 If you want to craft some language or agree on some
4 language that makes that explicit, I have no problem
5 with that. I'm going to hand down to Mr. Williams
6 his copy of the proposed order submitted to me just
7 so you can have it as a worksheet; so you can stroke
8 whatever language there is in it. Anything further,
9 at least on the record?

10 MR. WILLIAMS: Nothing, Your Honor.

11 MR. PATTON: No.

12 THE COURT: If you can agree on the form
13 of order before you leave certainly it can be
14 presented to me ex parte, and I'll assure the clerk
15 will file it and get conformed copies to you. If
16 you can't agree on it, you'll have to note it for
17 presentation. I'll be in recess.

18
19
20 --o0o--
21
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25

1 PSE at this point as part of the order.

2 MR. PATTON: I was not clear then, Your
3 Honor. What I meant was, at the end of the
4 administrative process within the UTC, then this
5 appeal of whatever the UTC decides should come back
6 to this court within this case.

7 THE COURT: I think that is a logical
8 extension of the Court's granting the order to
9 merely stay rather than dismiss the action. And
10 implicit in that -- without hearing further
11 argument, which I'm not going to take the time to
12 do, I can't take the time -- implicit in that is
13 recognition that once the administrative process
14 that the WUTC has completed, then the matter would
15 be reviewed as part of this already filed legal
16 proceeding.

17 MR. PATTON: Thank you.

18 THE COURT: I can't believe either side
19 would protest that. It just makes economical sense
20 in terms of not having to file a new petition for
21 judicial review under the APA. I'm staying it so
22 that there can be, by this court, if necessary,
23 judicial review of those decisions of the WUTC which
24 the moving party, PSE, believes should be made
25 before involvement of the Court regarding the

Exhibit B

Exhibit B

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APR 17 2006

FILED

APR 13 2006

SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

EXPEDITE

Hearing is set:

Date:

Time:

Judge/Calendar: _____

PERKINS COIE LLP

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

CITY OF TUMWATER, a Washington
municipal corporation,

Plaintiff,

v.

PUGET SOUND ENERGY, a Washington
corporation,

Defendant.

The Honorable

No. **06-2-00697-3**

COMPLAINT FOR DECLARATORY
JUDGMENT AND RETURN OF
PAYMENTS

I. Nature of the Action

1. The City of Tumwater (City) asks the Court to declare that the 1985 franchise agreement under which Puget Sound Energy (PSE) provides retail electric service in the City requires PSE to pay for 100% of any relocation required by road improvements in the City and 60% of any overhead to underground conversion pursuant to Schedule 74 of PSE's approved tariff from the Washington Utilities and Transportation Commission. The City further asks the Court to order repayment from PSE to the City of any payments and costs related to the Tumwater Boulevard Widening Project that are in excess of the City's legal responsibilities to pay for 0% of any relocation cost and no more than 40% of any costs related to conversion of PSE facilities from overhead to underground.

COMPLAINT FOR DECLARATORY JUDGMENT
AND RETURN OF PAYMENTS - 1

FOSTER PEPPER PLLC
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1 **II. Parties**

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

4 3. Defendant, Puget Sound Energy, is a Washington corporation, providing retail
5 electric and gas service in parts of the State of Washington.

6 **III. Authority for PSE to provide retail service in the City**

7 4. PSE provides retail electric service in the City pursuant to a 1985 franchise
8 adopted as Ordinance No. 1034, effective June 19, 1985. (Exhibit A.)

9 5. PSE, through its predecessor, Puget Sound Power & Light Company, accepted the
10 franchise on July 11, 1985. (Exhibit B.)

11 6. The franchise has a term of 30 years. (Exhibit A, § 9.1.)

12 7. The Franchise Area includes, without qualification, "any, every and all of the
13 roads, streets, avenues, alleys, highways, grounds and public places of the City as now laid out,
14 platted, dedicated or improved; and any, every and all of the roads, streets, avenues, alleys,
15 highways, grounds and public places that may hereafter be laid out, platted, dedicated or
16 improved within the present limits of the city and as such limits may be hereafter extended."
17 (Exhibit A, § 1.1.3.)

18 **IV. PSE's requirement to relocate its facilities at its own expense**

19 8. Under the terms of its franchise agreement with the City, PSE is required to
20 relocate its facilities at its own expense as set forth in Section 4.2: "Whenever the City cause the
21 grading or widening of the Franchise Area [for purposes other than accommodating private
22 development] and such grading or widening requires the relocation of Puget's Facilities, . . .
23 Puget shall relocate its Facilities at no charge to the City in a timely manner." (Exhibit A, § 4.2.)

24 9. The only exception to PSE's requirement to relocate its facilities at no charge to
25 the City to accommodate a City (rather than private) development is when the City requires a
26

1 subsequent relocation of the same facilities within 5 years of the first relocation. (Exhibit A, §
2 4.2.)

3 **V. The costs for conversion of PSE's facilities are governed by its WUTC tariff**

4 10. At the time PSE accepted the franchise agreement with the City in 1985,
5 conversions from overhead to underground service required by a government entity were
6 governed by Puget's tariff from the Washington Utilities and Transportation Commission
7 (WUTC). The WUTC conversion tariff now in effect is PSE Electric Tariff G, Schedule 74.
8 (Exhibit C.)

9 11. Schedule 74 provides that PSE is to pay 60% of the total cost of conversion from
10 overhead to underground and the government entity is to pay the remaining 40%. (Exhibit C, §
11 2.b.(1).)

12 **VI. The City's expansion into areas of unincorporated Thurston County**

13 12. Over a number of years, the City has expanded its corporate boundaries to include
4 areas previously located within unincorporated Thurston County.

15 13. One of the areas annexed into the City is the area encompassing the Tumwater
16 Boulevard Widening Project from which this Complaint arises.

17 14. Tumwater Boulevard was formerly called "Airdustrial Way," a street right-of-way
18 located on Port of Olympia property.

19 15. The Port of Olympia conveyed the Airdustrial Way street right of way to the City
20 pursuant to a Dedication Deed dated January 21, 1987. (Exhibit D.)

21 **VII. The City's incorporation of new streets extended PSE's franchise to the same area**

22 16. Pursuant to the terms of PSE's 1985 franchise, the same terms and provisions
23 apply to any new area incorporated into the City subsequent to the date of the franchise
24 agreement. (Exhibit A, § 1.1.3.)
25
26

1 17. As a consequence, Tumwater Boulevard (formerly Airdustrial Way) is a City.
2 right of way that since 1987 has been included within the terms and conditions of PSE's
3 franchise.

4 18. Under the terms of the franchise, PSE is required to bear 100% of any relocation
5 costs required by the City for a road widening project in any area covered by the franchise.
6 (Exhibit A, § 4.2.)

7 **VIII. PSE's acceptance of the franchise agreement supersedes any prior agreements.**

8 19. PSE's predecessor, Puget Sound Power & Light Company, secured an easement
9 from the Port of Olympia in 1981 to run electric lines along right of way established by the Port,
10 including Airdustrial Way. (Exhibit E.)

11 20. The easement granted by the Port of Olympia is a standard grant to an electric
12 utility to utilize road right of way for the purpose of running electric lines. It reserves to the
13 Grantor (the Port of Olympia) the right to use the street Right of Way for such purposes, except
14 for construction of buildings on the right of way, and blasting within 300 feet without prior
15 consent. (Exhibit E, § 4.)

16 21. When PSE's predecessor, Puget Sound Power & Light Company, accepted the
17 franchise from the City in 1985, no reservation of rights was made with regard to this easement
18 grant from the Port of Olympia to use its right of way, nor with regard to any other easement.

19 22. PSE, without reservation, agreed to be bound by the franchise terms for any right
20 of way subsequently incorporated into the City. (Exhibit A, § 4.2.)

21 23. Those franchise terms extended to Tumwater Boulevard (Airdustrial Way) when
22 the Port of Olympia transferred control of that right of way to the City in 1987.

23 **IX. PSE recognized the applicability of its franchise terms to Tumwater Boulevard.**

24 24. PSE entered into a Schedule 74 Underground Conversion Project Design
25 Agreement covering the Tumwater Boulevard Widening Project in May 2004. (Exhibit F.)
26

1 25. The Underground Conversion agreement recognized that PSE's rights to operate
2 on Tumwater Boulevard derive from "its franchise or other rights from the Government Entity."
3 (Exhibit F, Recital A.)

4 26. The "Government Entity" in this Underground Conversion agreement is defined
5 to be the City of Tumwater. (Exhibit F, 1st Paragraph.)

6 27. No reservation of rights from any other government entity nor any reference to a
7 government entity other than the City is contained in this Underground Conversion agreement.

8 28. The Underground Conversion agreement incorporates the cost provisions of
9 Schedule 74 of PSE's tariff with the WUTC. (Exhibit F, Recital D.)

10 29. The Underground Conversion agreement was signed by the City's Mayor on
11 April 21, 2004 and approved as to form by the City Attorney. (Exhibit F, Signatures, p. 7.)

12 **X. A subsequent agreement purporting to supersede both PSE's franchise and the**
13 **Underground Conversion agreement is based on a material misrepresentation.**

14 30. Subsequent to the Underground Conversion agreement signed by PSE in May
15 2004, PSE purported to enter into a different cost agreement with the City regarding both
16 underground conversion and relocation on Tumwater Boulevard, titled "Facility Relocation
17 Agreement – Tumwater Boulevard Improvements," dated December 16, 2004. (Exhibit G.)

18 31. In this purported agreement, PSE states in Exhibit A that "PSE's operating rights
19 are derived from an easement document recorded on December 8, 1981 under Thurston County
20 Auditor's file No. 8112080070. All facilities are on private easement so this work is 100%
21 billable to the city." (Exhibit A to Exhibit G.)

22 32. In addition, the purported agreement states in Section 7.3 that the City would be
23 responsible for 100% of all PSE's costs and expenses for both underground conversion and
24 relocation on Tumwater Boulevard.

25 33. This agreement thus purports to supersede both the franchise agreement (Exhibit
26 A) and the Underground Conversion agreement (Exhibit F).

1 34. The statement in Exhibit A of the purported agreement (Exhibit A to Exhibit G.),
2 however, represents a material misrepresentation by PSE.

3 35. PSE in 1985 had agreed, without reservation, to be bound by the terms of the
4 franchise agreement in any subsequently acquired area. (Exhibit A.)

5 36. PSE in May 2004 had agreed, without reservation, that its authority to operate in
6 the City and specifically in relation to the Tumwater Boulevard Widening Project came entirely
7 from the City. (Exhibit F.)

8 **XI. The purported Facility Relocation Agreement is *ultra vires*.**

9 37. The cost of relocation of existing underground PSE facilities and underground
10 conversion of existing overhead PSE facilities each far exceeds \$10,000.

11 38. Chapter 2.14 of the Tumwater Municipal Code requires that all contracts over
12 \$10,000 be authorized by motion of the City Council and approved by the Mayor or Mayor pro-
13 tem. (TMC Chapter 2.14 is attached as Exhibit H.)

4 39. The Tumwater City Council never adopted a motion approving the purported
15 Facility Relocation Agreement.

16 40. Neither the Mayor nor the Mayor pro-tem signed the purported Facility
17 Relocation Agreement.

18 41. The Public Works Director therefore was without authority to override PSE's
19 1985 franchise agreement (Exhibit A) and the May 2004 Schedule 74 Underground Conversion
20 Project Design Agreement (Exhibit F).

21 42. Not only is PSE bound to know the law regarding who in the City has the
22 authority to sign agreements, but PSE had actual knowledge that the May 2004 Schedule 74
23 Underground Conversion Project Design Agreement (Exhibit F) was both signed by the Mayor
24 and approved as to form by the City Attorney before PSE executed that agreement – whereas the
25 purported Facility Relocation Agreement has neither the Mayor's nor the City Attorney's
26 signature.

1 43. The purported Facility Relocation Agreement is both *ultra vires* and void.

2 **XII. Dispute resolution procedures have been followed.**

3 44. The May 2004 Schedule 74 Underground Conversion Project Design Agreement
4 (Exhibit F) contains a dispute resolution section that requires a two part consultation process
5 relating to any dispute concerning the agreement: 1) a 10-business day period for staff to consult
6 with one another, and 2) a 20-business day period for senior management to attempt to resolve
7 the dispute. (Exhibit F, § 16(a).)

8 45. The City informed PSE of the level 1 consultation on January 6, 2006, and
9 elevated the dispute to level 2 on January 31, 2006.

10 46. More than 20 business days have elapsed since the senior management of PSE
11 was notified of the unresolved dispute regarding the material misrepresentations contained in the
12 purported Facility Relocation Agreement, and the *ultra vires* nature of that agreement.

13 47. The dispute relating to the obligations under PSE's 1985 franchise agreement
with the City, and the *ultra vires* nature of the Facility Relocation Agreement is not the type of
15 design related disputes for which binding arbitration is required under Section 16(b) of the May
16 2004 Schedule 74 Underground Conversion Project Design Agreement (Exhibit F, § 16(b)).

17 48. Pursuant to Section 16(d) of the May 2004 Schedule 74 Underground Conversion
18 Project Design Agreement, the parties are obligated to perform their respective obligations
19 during the pendency of any dispute. (Exhibit F, § 16(d).)

20 49. In addition, Section 4 of the 1985 franchise agreement requires PSE to relocate its
21 facilities in a timely manner upon request of the City. (Exhibit A, § 4.)

22 **XIII. Reservation of Rights**

23 50. As a result of the January 31, 2006, level 2 conference, PSE and the City realized
24 that they would not be able to resolve this dispute before construction of the Tumwater
25 Boulevard Widening Project began.
26

1 51. PSE, however, is required by the WUTC to have a Facility Relocation Agreement
2 and a Schedule 74 Construction Agreement in place before it can proceed to do work on the
3 Project.

4 52. Accordingly, PSE and the City entered into a Reservation of Rights Agreement
5 dated February 23, 2006 (Exhibit I) in which the parties agreed that approval of these WUTC
6 required agreements by the Tumwater City Council and execution of the agreements by the City
7 would not affect the parties' rights in any judicial determination of the issue of payment
8 responsibility for PSE's relocation and conversion expenses related to the Tumwater Boulevard
9 Widening Project. (Exhibit I, §§ 1.1; 1.2.)

10 53. The Reservation of Rights Agreement also provides that the City is entitled to a
11 refund from PSE, together with interest at an agreed upon rate, should the City prevail in this
12 dispute. (Exhibit I, §§ 1.1; 1.3.)

13 **IX. Request for relief**

14 54. The City requests that the Court declare that the 1985 franchise agreement with
15 PSE (Exhibit A) is in full force and effect, and that the franchise agreement requires PSE to pay
16 100% of all relocation costs for the Tumwater Boulevard Widening Project.

17 55. The City requests that the Court declare that, in addition, it would be
18 unconstitutional for the City to pay any of PSE's relocation costs for the City's actions to
19 improve the Tumwater Boulevard right of way in accordance with the Washington Supreme
20 Court holding in *Washington State Highway Comm. v. Pacific NW Bell*, 59 Wn.2d 216, 224, 367
21 P.2d 605 (1961).

22 56. The City requests that the Court declare that the purported Facility Relocation
23 Agreement (Exhibit G) is *ultra vires* and has been superseded by the Reservation of Rights
24 Agreement of February 23, 2006. (Exhibit I.)
25
26

1 57. The City requests that the Court declare that PSE's Tariff G, Schedule 74,
2 (Exhibit C, § 2.b.(1)) requires PSE to pay 60% of all overhead to underground conversion costs
3 for the Tumwater Boulevard Widening Project.

4 58. The City requests that the Court order repayment from PSE to the City of any
5 payments and costs, related to the Tumwater Boulevard Widening Project previously paid by the
6 City for any relocation costs, together with interest on any amounts previously paid as provided
7 in of the Reservation of Rights Agreement. (Exhibit I, §§ 1.1; 1.3.)

8 59. The City requests that the Court order repayment from PSE to the City of any
9 payments and costs related to the Tumwater Boulevard Widening Project previously paid by the
10 City for any overhead to underground conversion costs that are in excess of 40% of the costs of
11 conversion, together with interest on any such amounts previously paid as provided in the
12 Reservation of Rights Agreement. (Exhibit I, §§ 1.1; 1.3.)

13 60. The City requests that the Court order PSE to pay the City its fees and costs in
14 bringing this action and its reasonable attorney fees.

15 61. The City further requests that the Court order any additional remedies on behalf
16 of the City it deems just and proper under the circumstances.

17 Dated this 13th day of April, 2006.

18
19 FOSTER PEPPER PLLC

20
21 By: 

22 William H. Patton WSBA # 5771

23 Attorneys for Plaintiff
24 City of Tumwater
25 1111 Third Avenue, Suite 3400
26 Seattle, WA 98104-3299
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COMPLAINT FOR DECLARATORY JUDGMENT
AND RETURN OF PAYMENTS - 9

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Exhibit C

Exhibit C

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THE HONORABLE RICHARD STROPHY

SUPERIOR COURT OF WASHINGTON IN AND FOR
THURSTON COUNTY

CITY OF TUMWATER, a Washington
municipal corporation,

Plaintiff,

v.

PUGET SOUND ENERGY, INC.,
a Washington corporation,

Defendant.

NO. 06-2-00697-3

DEFENDANT'S ANSWER,
AFFIRMATIVE DEFENSES AND
COUNTERCLAIM FOR
DECLARATORY JUDGMENT

ANSWER

PUGET SOUND ENERGY, INC. ("PSE") answers the Complaint For Declaratory
Judgment And Return Of Payments of Plaintiff CITY OF TUMWATER ("the City") dated

ANSWER AND COUNTERCLAIM - 1

{07772-0220/BA061570.006}

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: (425) 635-1400
Fax: (425) 635-2400

1 April 13, 2006, as follows, with section headings and in paragraphs numbered to correspond
2 to the section headings and paragraph numbers in said Complaint:
3
4

5 **I. Nature of the Action**
6

7 1. Paragraph 1 of the Complaint sets forth a summary of the City's request for
8 relief. PSE denies that the City is entitled to the relief that it seeks with respect to the costs
9 for relocation or underground conversion of PSE's electric facilities that are involved in the
10 Tumwater Boulevard Widening Project. PSE further denies that its 1985 franchise
11 agreement with the City (the "Franchise") extinguished or supersedes the property rights that
12 were granted to PSE prior to its acceptance of the Franchise in the form of easements that
13 grant permission to PSE to install electric facilities in areas that were or may now be located
14 within the City's boundaries.
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22 **II. Parties**
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- 24 2. Answering paragraph 2, PSE admits the allegation on information and belief.
25
26 3. PSE admits the allegations in paragraph 3.
27
28

29 **III. Authority for PSE to provide retail service in the City.**
30

31 4. Answering paragraph 4, PSE admits that the City adopted a franchise
32 applicable to PSE's predecessor, Puget Sound Power & Light Company, as Ordinance No.
33 1034, effective June 19, 1985, a copy of which was provided as Exhibit A to the Complaint
34 (the "Franchise"). PSE denies that it "provides retail electric service in the City pursuant to"
35 the Franchise. The terms of the Franchise speak for themselves.
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- 40 5. PSE admits the allegation in paragraph 5.
41
42 6. Answering paragraph 6, the terms of the Franchise speak for themselves.
43
44 7. Answering paragraph 7, the terms of the Franchise speak for themselves.
45
46
47

1 **IV. PSE's requirement to relocate its facilities at its own expense.**

2 8. Answering paragraph 8, the terms of the Franchise speak for themselves.

3 9. Answering paragraph 9, the terms of the Franchise speak for themselves.

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6
7 **V. The costs for conversion of PSE's facilities are governed by its WUTC tariff.**

8 10. Paragraph 10 contains legal conclusions for which an answer is
9 inappropriate and is therefore denied. PSE further states that the conversion of its electric
10 facilities from overhead to underground is currently governed by PSE's tariff WN U-60,
11 Electric Tariff G, Schedules 73 and 74, which has been approved by the Washington
12 Utilities and Transportation Commission ("WUTC").

13 11. Answering paragraph 11, the terms of Schedule 74 speak for themselves.

14 PSE denies that the cost sharing formula of Schedule 74 that is paraphrased in
15 paragraph 11 applies to all underground conversions involving a government entity.

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23
24 **VI. The City's expansion into areas of unincorporated Thurston County**

25 12. PSE admits the allegations in paragraph 12.

26 13. PSE admits the allegations in paragraph 13.

27 14. PSE admits the allegations in paragraph 14.

28 15. Answering paragraph 15, PSE admits the existence of the Dedication Deed
29 dated January 21, 1987, a copy of which is provided with the Complaint as Exhibit D
30 ("Dedication Deed"). The terms of the Dedication Deed speak for themselves. PSE denies
31 any implied allegation in paragraph 15 that the Port of Olympia conveyed to the City any
32 greater property rights than the rights the Port of Olympia was legally entitled to convey.
33 PSE further states that at the time of the conveyance set forth in the 1987 Dedication Deed,
34 the property the Port of Olympia conveyed to the City was burdened by a pre-existing
35 easement that the Port of Olympia granted, conveyed and warranted to PSE's predecessor,
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1 Puget Sound Power & Light Company, on November 3, 1981 for the construction,
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3 operation, maintenance, repair, replacement and enlargement of electric facilities ("PSE's
4
5 Easement"), which was duly recorded in Thurston County on or about December 8, 1981.

6
7 **VII. The City's incorporation of new streets extended PSE's franchise to the same**
8 **area.**

9
10 16. Answering paragraph 9, the terms of the Franchise speak for themselves.

11
12 17. Paragraph 17 contains a legal conclusion for which an answer is
13
14 inappropriate and is therefore denied. PSE further denies any implied allegation in
15
16 paragraph 17 that the extension of the City's boundaries to encompass the former Airdustrial
17
18 Way extinguished or superseded PSE's Easement.

19
20 18. Paragraph 18 contains a legal conclusion for which an answer is
21
22 inappropriate and is therefore denied. PSE further denies that it is required to bear any
23
24 relocation costs for its facilities along the former Airdustrial Way that are located in PSE's
25
26 Easement.

27
28 **VIII. PSE's acceptance of the franchise agreement supersedes any prior agreements.**
29

30 19. Answering paragraph 19, PSE admits that on November 3, 1981, the Port
31
32 of Olympia granted, conveyed and warranted to PSE's predecessor, Puget Sound Power &
33
34 Light Company, a perpetual easement for the construction, operation, maintenance, repair,
35
36 replacement and enlargement of electric facilities in an area that included Airdustrial Way
37
38 ("PSE's Easement"). PSE further admits that a partial copy of PSE's Easement (excluding
39
40 exhibits referenced in PSE's Easement) was provided with the Complaint as Exhibit E.

41
42 The terms of PSE's Easement speak for themselves.

43
44 20. Paragraph 20 contains legal conclusions for which an answer is
45
46 inappropriate and is therefore denied. The terms of PSE's Easement speak for themselves.
47

1 21. Paragraph 21 contains legal conclusions for which an answer is
2
3 inappropriate and is therefore denied. The terms of the Franchise speak for themselves.
4
5 PSE further states that no reservation of rights was required to preserve its existing
6
7 property rights as set forth in PSE's Easement or any of PSE's other easements in or
8
9 around the City.

10 22. Paragraph 22 contains legal conclusions for which an answer is
11
12 inappropriate and is therefore denied. PSE further specifically denies that it agreed that
13
14 the Franchise superseded or extinguished any of its property rights.

15 23. Paragraph 23 contains legal conclusions for which an answer is
16
17 inappropriate and is therefore denied. PSE further specifically denies that the transfer of
18
19 Airdustrial Way by Port of Olympia to the City in 1987 did or could have extinguished the
20
21 property rights that the Port of Olympia had already granted to PSE through the PSE
22
23 Easement in 1981.

24
25
26
27 **IX. PSE recognized the applicability of its franchise terms to Tumwater Boulevard.**

28 24. PSE admits the allegation in paragraph 24.

29 25. PSE denies the allegation that the Schedule 74 Underground Conversion
30
31 Project Design Agreement referenced in Paragraph 24 and provided as Exhibit F to the
32
33 Complaint (the "Schedule 74 Design Agreement") is an "Underground Conversion
34
35 agreement" as stated in Paragraph 25. For an underground conversion to proceed under
36
37 Schedule 74, PSE and a Government Entity must first enter into a Design Agreement in
38
39 order to develop details regarding the scope of work, project plan and estimated costs and
40
41 cost sharing for a conversion. After such information has been developed per the terms of
42
43 and the schedule set forth in the Design Agreement, PSE and the Government Entity must
44
45 then also enter into a Schedule 74 Construction Agreement for the underground
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conversion. PSE further denies the implication that the Schedule 74 Design Agreement contains any waiver of PSE's rights under PSE's Easement or any "recognition" that the Franchise extinguished those rights. To the contrary, PSE informed the City of PSE's superior rights and the City's obligation to pay 100% of the costs for relocation or underground conversion of PSE's facilities both prior to and after execution of the Schedule 74 Design Agreement and the City acknowledged PSE's rights and its payment obligations. The rest of Paragraph 25 contains legal conclusions for which an answer is inappropriate and is therefore denied. The terms of the Schedule 74 Design Agreement speak for themselves, and must be read in the context of the purpose of a Design Agreement within Schedule 74 as well the structure of Schedules 73 and 74 within PSE's Electric Tariff G.

- 26. Answering Paragraph 26, PSE incorporates by reference its answer to paragraph 25 as if fully set forth herein.
- 27. Answering Paragraph 27, PSE incorporates by reference its answer to paragraph 25 as if fully set forth herein.
- 28. Answering Paragraph 28, PSE incorporates by reference its answer to paragraph 25 as if fully set forth herein. PSE further specifically denies that Recital D of the Schedule 74 Design Agreement has any bearing on the cost responsibilities associated with a potential underground conversion project.
- 29. PSE admits the allegations in paragraph 29 except as to the characterization of the Schedule 74 Design Agreement as an "Underground Conversion agreement," which PSE denies.

1 **X. A subsequent agreement purporting to supersede both PSE's franchise and the**
2 **Underground Conversion agreement is based on a material misrepresentation.**

3
4 30. PSE admits that it entered into the Facility Relocation Agreement –
5
6 Tumwater Boulevard Improvements dated December 16, 2004, that was provided with the
7
8 Complaint as Exhibit G (the "Relocation Agreement"). PSE denies each other or different
9
10 allegation in paragraph 30. PSE specifically denies that the Relocation Agreement applies
11
12 to underground conversion work related to the Tumwater Boulevard Widening Project and
13
14 denies that the Relocation Agreement was intended to or did supersede the Schedule 74
15
16 Design Agreement as to such underground conversion work.

17
18 31. Answering Paragraph 31, the terms of the Relocation Agreement speak for
19
20 themselves.

21
22 32. Answering Paragraph 32, the terms of the Relocation Agreement speak for
23
24 themselves. PSE specifically denies that Section 7.3 of the Relocation Agreement makes
25
26 any reference to or applies to underground conversion work related to the Tumwater
27
28 Boulevard Widening Project.

29
30 33. PSE denies that its Schedule 74 Design Agreement with the City was an
31
32 "Underground Conversion agreement" as stated in Paragraph 33 and further denies that the
33
34 Relocation Agreement has any applicability to underground conversion work related to the
35
36 Tumwater Boulevard Widening Project. The balance of paragraph 33 contains legal
37
38 conclusions for which an answer is inappropriate. PSE admits that it is PSE's position that
39
40 the City's obligation to pay 100% of the costs for relocating or converting to underground
41
42 PSE's electric facilities along Tumwater Boulevard is not excused or relieved by the
43
44 Franchise or the Schedule 74 Design Agreement.

45
46 34. PSE denies the allegation in paragraph 34.
47

1 35. Answering paragraph 35, PSE incorporates by reference its answer to
2 paragraphs 21 through 23 as if fully set forth herein.
3

4 36. Answering paragraph 36, PSE incorporates by reference its answer to
5 paragraphs 24 through 29 as if fully set forth herein.
6
7

8
9 **XI. The purported Facility Relocation Agreement is ultra vires.**

10 37. PSE admits the allegations in paragraph 37.
11

12 38. Paragraph 38 contains legal conclusions for which an answer is
13 inappropriate and is therefore denied.
14

15 39. PSE has insufficient information to admit or deny the allegations of
16 paragraph 39 and therefore denies these allegations.
17

18 40. PSE admits the allegations in paragraph 40.
19

20 41. Paragraph 41 contains legal conclusions for which an answer is
21 inappropriate and is therefore denied.
22

23 42. Paragraph 42 contains legal conclusions for which an answer is
24 inappropriate and is therefore denied. To the extent paragraph 42 recites who signed or
25 did not sign the referenced agreements, the agreements speak for themselves.
26
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28 43. Paragraph 43 contains legal conclusions for which an answer is
29 inappropriate and is therefore denied.
30
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32
33 **XII. Dispute resolution procedures have been followed.**

34 44. Answering Paragraph 44, the terms of the Schedule 74 Design Agreement
35 speak for themselves.
36

37 45. Responding to paragraph 45, PSE admits that the City and PSE sought to
38 resolve this dispute, in part through meetings conducted in January 2006.
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1 46. Answering Paragraph 46, PSE admits that more than 20 business days have
2 elapsed since the City notified senior management of PSE of the unresolved dispute
3 regarding relocation and underground conversion costs for PSE's electric facilities related
4 to the Tumwater Boulevard Widening Project. PSE denies each other or different
5 allegation in Paragraph 46.
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10 47. Answering Paragraph 47, PSE admits that this dispute does not require
11 binding arbitration under the Schedule 74 Design Agreement.
12

13 48. Answering Paragraph 48, the terms of the Schedule 74 Design Agreement
14 speak for themselves.
15
16
17

18 49. Answering Paragraph 49, the terms of the Franchise speak for themselves.
19
20

21 **XIII. Reservation of Rights**
22

23 50. PSE denies the allegations in paragraph 50 except that PSE admits that the
24 parties realized they would not be able to resolve this dispute before construction of the
25 Tumwater Boulevard Widening Project began.
26
27

28 51. Paragraph 51 contains legal conclusions for which an answer is
29 inappropriate and is therefore denied.
30
31

32 52. To the extent paragraph 52 contains legal conclusions for which an answer
33 is inappropriate, PSE denies the allegations in paragraph 52. PSE admits that PSE and the
34 City entered into the Reservation of Rights Agreement dated February 23, 2006 that is
35 provided with the Complaint as Exhibit I ("Reservation of Rights Agreement"). PSE
36 denies each other or different allegation in paragraph 52.
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42 53. Answering Paragraph 53, the terms of the Reservation of Rights Agreement
43 speak for themselves.
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XIV. Request for relief

54. Paragraph 54 contains legal conclusions and a request for relief for which an answer is inappropriate and is therefore denied. PSE further denies that the City is entitled to any relief from PSE related to the Tumwater Boulevard Widening Project.

55. Paragraph 55 contains legal conclusions and a request for relief for which an answer is inappropriate and is therefore denied. PSE further denies that the City is entitled to any relief from PSE related to the Tumwater Boulevard Widening Project.

56. Paragraph 56 contains legal conclusions and a request for relief for which an answer is inappropriate and is therefore denied. PSE further denies that the City is entitled to any relief from PSE related to the Tumwater Boulevard Widening Project.

57. Paragraph 57 contains legal conclusions and a request for relief for which an answer is inappropriate and is therefore denied. PSE further denies that the City is entitled to any relief from PSE related to the Tumwater Boulevard Widening Project.

58. Paragraph 58 contains legal conclusions and a request for relief for which an answer is inappropriate and is therefore denied. PSE further denies that the City is entitled to any relief from PSE related to the Tumwater Boulevard Widening Project.

59. Paragraph 59 contains legal conclusions and a request for relief for which an answer is inappropriate and is therefore denied. PSE further denies that the City is entitled to any relief from PSE related to the Tumwater Boulevard Widening Project.

60. Paragraph 60 contains a request for relief for which an answer is inappropriate and is therefore denied. PSE further denies that the City is entitled to any relief from PSE related to the Tumwater Boulevard Widening Project or this action.

1 its principal place of business and headquarters in Bellevue, Washington. PSE has paid any
2 and all fees and penalties due the State of Washington.
3

4
5 2. Counterclaim defendant the CITY OF TUMWATER ("the City") is a
6 Washington municipal corporation, formed as a mayor-council plan of government pursuant
7 to Chapter 35A.12, RCW.
8
9

10 II. JURISDICTION AND VENUE

11
12 3. This Court has subject matter jurisdiction over PSE's counterclaims pursuant
13 to RCW 2.08.010 and 7.24.010-020.
14

15
16 4. Venue in Thurston County is proper pursuant to RCW 4.12.010 and 4.12.025.
17

18 III. FACTS ENTITLING PSE TO RELIEF

19 A. PSE's Easement Rights Have Never Been Extinguished

20
21 5. On or about November 3, 1981, the Port of Olympia ("Port") granted,
22 conveyed and warranted to Puget Sound Power & Light Company, PSE's predecessor in
23 interest, a perpetual easement for the construction, operation, maintenance, repair,
24 replacement and enlargement of electric facilities ("PSE's Easement"), a copy of which
25 (excluding exhibits) was provided with the City's Complaint as Exhibit E.
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32 6. The property burdened by PSE's Easement included portions of the right of
33 way that was then called Airdustrial Way in Thurston County, Washington, although PSE's
34 Easement extended beyond the street right of way.
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38 7. PSE's Easement does not contain any provision permitting the Port to require
39 the removal or relocation of any electric facilities installed in the easement area.
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42 8. PSE's Easement provides that the rights and obligations of the parties under
43 the PSE's Easement are binding upon their respective successors and assigns.
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9. PSE's Easement was recorded on December 8, 1981, under Thurston County Auditor's file No. 8112080070.

10. As of the time PSE's Easement was granted by the Port and recorded in Thurston County, the property burdened by PSE's Easement was outside the City's boundaries.

11. After the Port granted PSE's Easement and prior to 1985, PSE installed electric distribution facilities within PSE's Easement area, including on Airdustrial Way.

12. On or about June 19, 1985, the City granted to Puget Sound Power & Light Company a franchise to, among other things, construct, operate, repair and maintain electrical facilities within the rights-of-way and other public places of the City as then-existing or subsequently extended ("Franchise"). A copy of the Franchise was provided with the City's Complaint as Exhibit B.

13. PSE accepted the Franchise on or about July 11, 1985. A copy of PSE's acceptance was provided as Exhibit C to the City's Complaint.

14. The Franchise, among other things, grants permission to PSE to construct, operate, repair and maintain electrical facilities within the Franchise Area.

15. The Franchise does not convey any property from the City to PSE or from PSE to the City.

16. On or about January 21, 1987, the Port transferred to the City by dedication deed certain property for public street right-of-way purposes (the "Dedication Deed"), including Airdustrial Way. A copy of the Dedication Deed was provided with the City's Complaint as Exhibit D.

1 17. At the time the Port executed the Dedication Deed, the City knew or should
2 have known of the existence of PSE's Easement as an encumbrance on the property
3 conveyed to the City by the Port through the Dedication Deed.
4

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6 18. The City has never commenced condemnation proceedings against PSE to
7 acquire the property rights granted to PSE through PSE's Easement.
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10 19. The City has never paid compensation to PSE in exchange for acquisition by
11 the City of the property rights granted to PSE through PSE's Easement.
12

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15 **B. PSE Constructed and has Maintained Its Facilities Along Airdustrial**
16 **Way/Tumwater Boulevard Pursuant to the Rights Granted in PSE's**
17 **Easement**
18

19 20. In early 2002, the City began discussing with PSE a potential road
20 improvement project for Airdustrial Way/Tumwater Boulevard (the "Project"). In
21 September 2002, the City notified PSE that it intended to proceed with the Project, that some
22 of PSE's utility facilities would need to be relocated, and that the City desired to convert
23 overhead utility facilities to underground as part of the Project.
24

25 21. In March 2003, PSE provided the City with a preliminary cost estimate for
26 converting overhead facilities related to the Project to underground. PSE also informed the
27 City that PSE had not yet completed its rights review for the existing overhead facilities but
28 would provide an updated cost estimate once the rights review was completed.
29

30 22. PSE subsequently determined that its electric facilities along Tumwater
31 Boulevard that the City desired to relocate or to convert to underground facilities were
32 located entirely within the area covered by PSE's Easement.
33

34 23. PSE installed the electric facilities that the City desires PSE to relocate or to
35 convert to underground as part of the Project pursuant to the rights granted to PSE by the
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1 Port in 1981 through PSE's Easement. PSE did not install these electric facilities pursuant to
2 the permissions granted to PSE in its 1985 Franchise with the City.
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4 24. Accordingly, in April 2003, PSE notified the City that the City would be
5 responsible for reimbursing PSE for all of the costs for converting or relocating PSE's
6 facilities for the Project because of the existence of PSE's Easement. Shortly thereafter, PSE
7 provided a copy of PSE's Easement to the City.
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10 25. On February 12, 2004, the City informed PSE that it wished to proceed with
11 the relocation and underground conversion of PSE's facilities and acknowledged that the
12 City would bear the expense for that work.
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18 **C. The Schedule 74 Design Agreement Did Not Extinguish or Waive PSE's**
19 **Easement Rights**
20

21 26. PSE and the City then executed a Schedule 74 Underground Conversion
22 Project Design Agreement dated May 17, 2004 ("Schedule 74 Design Agreement), a copy of
23 which was provided with the City's Complaint as Exhibit F.
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27 27. The scope of the Schedule 74 Design Agreement was limited to the
28 underground conversion aspect of the work on PSE's facilities related to the Project. The
29 Schedule 74 Design Agreement had no bearing on the terms under which existing PSE
30 facilities would be relocated as part of the Project.
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35 28. Nothing in the Schedule 74 Design Agreement extinguished or waived PSE's
36 property rights as set forth in the PSE Easement. Neither did anything in the Schedule 74
37 Design Agreement constitute an admission or a waiver by PSE as to the proper application
38 of the cost sharing provisions of Schedule 74 to the potential underground conversion
39 project. Indeed, on July 1, 2004, pursuant to the Schedule 74 Design Agreement, PSE
40 provided to the City a proposed design schedule and cost estimate for the design work for
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1 the underground conversion related to the Project. At that time, PSE stated that for most
2 conversion projects, the cost of the design work becomes a shared cost of the conversion if
3 construction proceeds within five years. But for the City's Project, PSE stated, "the facilities
4 to be converted along Tumwater Boulevard are on private easement and in accordance with
5 Schedule 74, the City of Tumwater would be responsible for one hundred percent (100%) of
6 cost of conversion including all design costs."
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12 29. On July 13, 2004, the City sent a notice to PSE to proceed with the design for
13 the Schedule 74 underground conversion work.
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16 30. In March 2005, consistent with PSE's tariff Schedule 74, PSE provided the
17 City with a proposed Schedule 74 Construction Agreement and Project Plan for the
18 underground conversion work for the Project that had been designed pursuant to the
19 Schedule 74 Design Agreement. The Project Plan provided that costs for the work were to
20 be allocated 100% to the City.
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26 31. In June 2005, PSE provided a revised proposed Schedule 74 Construction
27 Agreement and Project Plan to the City that superseded the proposed agreement and plan
28 sent in March 2005 to reflect that the City – rather than PSE – would perform trench
29 installation for the underground conversion work. The Project Plan again provided that
30 costs for the underground conversion work were to be allocated 100% to the City.
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36 32. In or about late November 2005, the City claimed for the first time that it
37 should not be responsible for 100% of the costs of the underground conversion work related
38 to the Project.
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42 33. To the extent the City alleges or claims that the Schedule 74 Design
43 Agreement extinguished or waived PSE's property rights as set forth in the PSE Easement or
44 constituted an admission or a waiver by PSE as to the proper application of the cost sharing
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1 provisions of Schedule 74 to the potential underground conversion project, resolution of
2 such allegations or claims would be within the primary jurisdiction of the Washington
3 Utilities and Transportation Commission ("WUTC") and should first be heard and resolved
4 by the WUTC.
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9 **D. The Facility Relocation Agreement Confirmed the City's and PSE's**
10 **Understanding of the Superiority of PSE's Easement Rights**

11
12 34. PSE and the City also executed a Facility Relocation Agreement dated
13 December 16, 2004 ("Facility Relocation Agreement"), a copy of which was provided as
14 Exhibit G to the City's Complaint. The Facility Relocation Agreement applied to relocation
15 and/or modification work required for PSE's facilities for the Project other than underground
16 conversion work.
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22 35. The Facility Relocation Agreement provided that PSE would provide a
23 design for and relocate certain of its electric facilities in connection with the City's
24 Tumwater Boulevard improvements, and that the City "shall be responsible for, and shall
25 reimburse PSE for, all costs and expenses incurred by PSE in connection with the
26 performance" of the design and relocation work. (Exhibit G, § 7.3)
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32 36. Consistent with the Facility Relocation Agreement, PSE provided a design
33 work plan to the City for the relocation work on January 25, 2005. On January 26, 2005, the
34 City gave PSE a Notice to Proceed with the design work.
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38 37. In June 2005, PSE sent the City a Relocation Plan for the Project pursuant to
39 the Facility Relocation Agreement. Section III of the Relocation Plan provided that the
40 "City is responsible for reimbursing PSE for 100% of the actual costs...to perform the
41 relocation portions of the work."
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1 38. In or about late November 2005, the City claimed for the first time that it
2 should not be responsible for 100% of the costs of the relocation work related to the Project.
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5 **E. Project Work Proceeds Notwithstanding This Dispute Over Cost**
6 **Responsibility**
7

8 39. In order to permit the underground conversion work to proceed without
9
10 delaying the City's Tumwater Boulevard Widening Project, the City executed a Schedule 74
11 Construction Agreement dated February 23, 2006, in the form that PSE claimed was
12 appropriate for the underground conversion work ("Construction Agreement"). A copy of
13 the Construction Agreement is provide with PSE's Answer and Counterclaim as Exhibit A
14
15 At the same time, the City reserved its rights to challenge the Construction Agreement,
16 through the Reservation of Rights Agreement provided as Exhibit I to the City's Complaint.
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20 40. In order to permit the relocation work to proceed without delaying the City's
21 Tumwater Boulevard Widening Project, the City also executed a Facility Relocation
22 Agreement dated February 23, 2006, which was also subject to the parties' Reservation of
23 Rights Agreement. A copy of the Facility Relocation Agreement is provide with PSE's
24 Answer and Counterclaim as Exhibit B.
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27
28 **IV. CAUSE OF ACTION FOR DECLARATORY JUDGMENT**
29

30 41. PSE incorporates by reference the allegations in paragraphs 1 through 40 of
31 its Counterclaim as if fully set forth herein.
32

33 42. PSE is entitled to a judgment declaring that the property rights it acquired
34 through PSE's Easement survived the 1985 Franchise, the 1987 Dedication Deed, and any
35 other agreement, deed or event that the City claims extinguished or superseded such
36 property rights, and declaring that PSE's Easement continues in full force and effect.
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1 43. PSE is entitled to a judgment declaring that the City is bound by and must
2 comply with the terms of its Construction Agreement (Exhibit A hereto) and its Facility
3 Relocation Agreement (Exhibit B hereto) with PSE.
4
5

6 44. PSE believes that the Court's determination of its property rights pursuant to
7 paragraph 42 of PSE's Counterclaim is dispositive of the question whether the City is bound
8 by the Construction Agreement, as set forth in paragraph 43 of PSE's Counterclaim. To the
9 extent the City contests PSE's claim for declaratory judgment by way of a contrary
10 interpretation or application of Schedule 74 of PSE's Electric Tariff G, the dispute would be
11 within the primary jurisdiction of the WUTC and should first be heard and resolved by the
12 WUTC.
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20 45. PSE is further entitled to a judgment declaring that neither the
21 1985 Franchise nor any subsequent expansion of the City's boundaries extinguished any
22 other of PSE's property rights within the City's boundaries.
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27 **V. PRAYER FOR RELIEF**

28 WHEREFORE, PSE seeks the following relief:
29

30 A. An Order dismissing with prejudice any and all claims against PSE by the
31 City.
32

33 B. An Order declaring that the property rights PSE acquired through PSE's
34 Easement survived the 1985 Franchise, the 1987 Dedication Deed, and any other agreement
35 or event that the City claims extinguished or superseded such property rights, and declaring
36 that PSE's Easement continues in full force and effect.
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42 C. An Order declaring that the City is bound by and must comply with the
43 terms of its Construction Agreement (Exhibit A hereto) and its Facility Relocation
44 Agreement (Exhibit B hereto) with PSE.
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D. An Order declaring that neither the 1985 Franchise nor any subsequent expansion of the City's boundaries extinguished any other of PSE's property rights within the City's boundaries.

E. An award of costs and fees, including PSE's reasonable attorneys' fees, to the extent allowed by contract and by law.

F. Such other relief as the Court may deem just and proper.

DATED this 7th day of June, 2006.

PERKINS COIE LLP

By 

Kirstin S. Dodge, WSBA #22039
Donna L. Barnett, WSBA# 36794

Attorneys for Defendant
Puget Sound Energy, Inc.

Exhibit D

Exhibit D

PUGET SOUND ENERGY
Electric Tariff G

SCHEDULE 73
CONVERSION TO UNDERGROUND SERVICE
FOR CUSTOMERS OTHER THAN GOVERNMENT ENTITIES

(N)

1. AVAILABILITY

The Company shall, in accordance with the Company's applicable standards and specifications (and subject to the other provisions of this Schedule), design and install an Underground Distribution System in the Conversion Area and remove from the Conversion Area the existing overhead electric distribution system of 15,000 volts or less together with Company-owned poles following removal of all utility wires therefrom under this Schedule when all of the following conditions are met:

- a. Sufficient materials and equipment are available.
- b. The Customer has requested the Company to install an Underground Distribution System, and the Customer and the Company have entered into a Schedule 73 Underground Conversion Agreement in the form set forth in Attachment A to this Schedule.
- c. The Company has the right to install, construct, operate, repair and maintain an electrical distribution system (including an Underground Distribution System) in the Conversion Area (i) regarding the portions of such system to be installed in a Public Thoroughfare, pursuant to a franchise granted by the applicable Government Entity and executed by the Company, or, if there is no such franchise, pursuant to some other grant of rights mutually agreed upon by the Company and such Government Entity, and (ii) regarding any other portion of such system, pursuant to a grant of rights agreed upon by the Company.
- d. All customers served by the Company within the Conversion Area will receive electric service through Underground Service Lines from the Underground Distribution System, unless the Company explicitly agrees to other electric service arrangements.
- e. The Customer requesting service under this Schedule is not a Government Entity.

Customers that are eligible to receive service under this Schedule are not eligible for service under Schedule 74 of the Company's Electric Tariff G.

(N)

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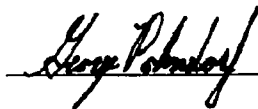
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Advice No.: 2002-12

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Issued By Puget Sound Energy

By:



George Pohndorf

Title: Director, Rates & Regulation

PUGET SOUND ENERGY
Electric Tariff G

SCHEDULE 73
CONVERSION TO UNDERGROUND SERVICE
FOR CUSTOMERS OTHER THAN GOVERNMENT ENTITIES
(Continued)

(N)

2. NON-ELIGIBLE CONVERSIONS IF PERMITTED BY THE COMPANY

Conversions of existing overhead distributions systems or portions thereof that do not meet the availability requirements of Section 1 of this Schedule shall be accomplished at the sole discretion of the Company and after payment by the Customer to the Company of one hundred percent (100%) of the Company's estimated design and construction costs to perform such conversion. Non-eligible conversions, if accomplished by the Company, shall be subject to Sections 3 through 13 of this Schedule.

3. CUSTOMER OBLIGATIONS

a. The Customer shall, at its expense, perform the following within the Conversion Area, all in accordance with the Company's specifications:

- (1) Trenching and Restoration, together with all coordination required for the installation of the Underground Distribution System; and
- (2) surveying for alignment and grades for vaults and ducts.

b. The Customer shall pay to the Company the entire amount of all of the costs described below in this Section 3.b. The Customer shall pay to the Company, prior to the Company's commencing any work under this Schedule, an amount equal to the Company's estimate of the design and construction costs for the conversion project to be accomplished by the Company pursuant to this Schedule. If the actual costs of any amounts payable by the Customer to the Company pursuant to this Schedule are different from such estimate, the Company shall refund any excess payment to the Customer or bill (and be entitled to collect from) the Customer the appropriate amount in the case of any underpayment of actual costs by the Customer, such bill to be paid by the Customer within thirty (30) days.

- (1) the actual costs to the Company for labor, materials and overheads and all other costs for design of the Underground Distribution System;
- (2) the actual costs to the Company for labor, materials and overheads and all other costs to construct and install the Underground Distribution System;
- (3) the actual design costs to the Company (including costs for labor, materials and overheads and all other costs), and the actual construction and installation costs to the Company (including costs for labor, materials and overheads and all other costs), less the salvage value (if any) to the Company of the facilities removed, for removal of the existing electrical facilities;

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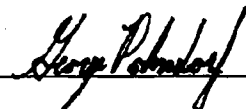
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**PUGET SOUND ENERGY
Electric Tariff G**

**SCHEDULE 73
CONVERSION TO UNDERGROUND SERVICE
FOR CUSTOMERS OTHER THAN GOVERNMENT ENTITIES
(Continued)**

- (4) the costs, if any, incurred by the Company to obtain the Operating Rights;
- (5) the incremental costs or cost reductions incurred by the Company to implement any Customer Requested Changes (including, without limitation, any overtime labor costs and costs of inspection);
- (6) the costs incurred by the Company due to delays in the Company's installation of the Underground Distribution System attributable to the acts or omissions of the Customer, its contractors or other parties the Customer allows to use the trench for the Underground Distribution System (including, without limitation, any overtime labor costs); and
- (7) the costs of (i) cancellation as provided herein; (ii) any facilities installed at the time of the conversion to provide Temporary Service, as provided for herein; and (iii) removal of any facilities installed to provide Temporary Service (less salvage value of removed equipment).

(N)
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(N)

4. GENERAL

- a. Ownership of Facilities: Except as otherwise provided in the Company's Electric Tariff G, the Company shall own, operate, and maintain the Underground Distribution System installed or provided pursuant to this Schedule.
- b. Prior Contracts: Nothing herein contained shall affect the rights or obligations of the Company under any previous agreements pertaining to existing or future facilities of greater than 15,000 Volts within any Conversion Area.
- c. Temporary Service: Temporary Service shall not exceed a term of 18 months from the date of completion of the conversion to an Underground Distribution System, unless the Company agrees to extend such term. If a Temporary Service is not disconnected or removed within such time approved by the Company acting reasonably, the Customer shall pay, without duplication of any amounts previously paid by the Customer pursuant to this Schedule, either (i) 100% of the costs for the entire Underground Distribution System or (ii) 100% of the costs of converting only the Temporary Service to underground, whichever the Customer may elect.

5. USE BY OTHER UTILITIES OF TRENCHES PROVIDED BY THE CUSTOMER

Other utilities may be permitted by the Customer to use trenches provided by the Customer pursuant to this Schedule for the installation of such other utilities' facilities, so long as such facilities, or the installation thereof, do not interfere (as determined pursuant to the Company's electrical standards) with the installation, operation or maintenance of the Company's Facilities located within such trenches. Any change to the Company's design to accommodate such use shall be deemed to be a Customer Requested Change.

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By:



Karl R. Karzmar

Title: Director, Regulatory Relations

**PUGET SOUND ENERGY
Electric Tariff G**

**SCHEDULE 73
CONVERSION TO UNDERGROUND SERVICE
FOR CUSTOMERS OTHER THAN GOVERNMENT ENTITIES
(Continued)**

(N)

6. CANCELLATION

If a Customer cancels or takes any other action that has substantially the same effect as cancellation regarding a conversion project undertaken under this Schedule prior to completion of the conversion to an Underground Distribution System, the Customer shall pay the Company all of the costs incurred by the Company to the date of such cancellation or other action, plus any future costs of the Company that may not be reasonably avoided. If on account of any Customer action or failure to act construction of a conversion project has not commenced within one year after the Company has provided an estimate of the costs for such project to the Customer, such conversion project shall be deemed to be cancelled. The Customer shall pay all design and construction costs incurred by the Company on account of cancellation (or any other action that has substantially the same effect as cancellation) within thirty (30) days after receipt of the Company's invoice therefor.

7. INSTALLATION AND OPERATING RIGHTS

- a. The Company shall, at the Customer's expense, obtain all rights to space and all legal and other rights necessary, in the Company's sole judgment, for the safe and efficient installation, operation, repair and maintenance of all of the Facilities within the Conversion Area; provided, that with the prior written consent of the Company, the Customer may, at its expense, obtain all or part of such rights. Expenses for which the Customer shall be liable pursuant to this section include, but are not limited to, Company staff costs (including overheads) and the actual costs of any easement, fee, permit, survey and reasonable attorneys' fees.
- b. If any Operating Rights are not available to the Company in a timely manner, service under this Schedule may be delayed or canceled at the discretion of the Company.

8. STREET LIGHTING

Removal and replacement of existing street lighting or installation of new street lighting within the Conversion Area suitable for service from the Underground Distribution System installed pursuant to this Schedule shall be arranged separately as provided in the Company's Electric Tariff G.

9. UNDERGROUND SERVICE LINES

Underground Service Lines shall be installed, owned, and maintained as provided in the Company's Electric Tariff G.

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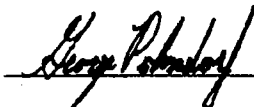
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George Pohndorf

Title: Director, Rates & Regulation

PUGET SOUND ENERGY
Electric Tariff G

SCHEDULE 73
CONVERSION TO UNDERGROUND SERVICE
FOR CUSTOMERS OTHER THAN GOVERNMENT ENTITIES
(Continued)

(N)

10. DESIGN AND COSTS

The Company exclusively shall determine the appropriate design, phase, voltage and capacity of the Underground Distribution System and appropriate costs using its cost estimating system in conjunction with sound engineering practices. The Company shall provide estimates of its design and construction costs to perform the conversion; provided, that (a) estimates shall be provided for planning purposes only, and may differ from the actual costs of conversion, and (b) the Company may, at its option, require the Customer to pay in advance the Company's cost of providing such estimates. Upon request, the Company shall provide (but not more frequently than once in any calendar month) a report of progress identifying work completed to date, work yet to be completed and an estimate regarding whether the conversion project is on target with respect to estimated budget and schedule.

11. STANDARD PRACTICES

The manner and type of construction of any Underground Distribution System or Underground Service Lines installed under this Schedule shall be determined by the Company in its sole judgment consistent with its standard practices. In the event that the applicable government authority or law requires any type of construction that results in any increase in costs over the costs that would have been incurred for design and construction pursuant to the Company's standard practices, any such increase in costs shall be paid in full by the Customer to the extent that such increased costs are not paid to the Company by the applicable government authority or other person or entity.

12. GENERAL RULES AND PROVISIONS

Service under this Schedule is subject to the General Rules and Provisions contained in Schedule 80 of the Company's Electric Tariff G.

13. DEFINITIONS

The following terms when used in this Schedule shall, solely for purposes of this Schedule, have the meanings given below:

- a. Conversion Area: The geographical area in which the Company replaces its overhead electric distribution system with an Underground Distribution System.

(N)

Issued: June 26, 2002

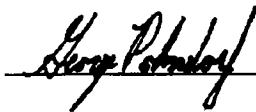
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**PUGET SOUND ENERGY
Electric Tariff G**

**SCHEDULE 73
CONVERSION TO UNDERGROUND SERVICE
FOR CUSTOMERS OTHER THAN GOVERNMENT ENTITIES
(Continued)**

- b. **Customer Requested Change:** Any change requested or caused by the Customer in the engineering, design, construction and installation plan or in the Trenching and Restoration plan of the Underground Distribution System. Customer Requested Changes may include, but are not limited to, re-routing or re-locating the Underground Distribution System, use of different or non-standard equipment, installation of equipment in indoor vault rooms, expedited installation of the Underground Distribution System or use of Customer-provided contractors to perform work that would otherwise be performed by the Company under this Schedule. Customer Requested Changes do not include any change in the size of the Conversion Area.

All Customer Requested Changes are subject to acceptance and approval by the Company. Use of Customer-provided contractors is limited to the installation of duct and vaults where (i) all materials installed by the Customer are provided by the Company, or in the case of service line conduit, provided or approved by the Company, and (ii) there is a one-hundred percent (100%) inspection and over-sight of the installation by the Company. A Customer Requested Change may include installation of service line conduit by the Customer on Customer-owned property.

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- c. **Facilities:** All components of the Underground Distribution System, including but not limited to, primary voltage cables, secondary voltage cables, connections, terminations, pad-mounted transformers, pad-mounted switches, ducts, vaults and other associated components.
- d. **Government Entity:** Any municipality, county or other government entity having authority over the Public Thoroughfare in the Conversion Area.
- e. **Operating Rights:** Any of the rights to space or other rights referred to in Section 7.a of this Schedule.
- f. **Public Thoroughfare:** Any municipal, county, state, federal or other public road, highway or thoroughway, or other public right-of-way or other public real property rights allowing for electric utility use.

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(K) Transferred to Sheet No. 73-f

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Advice No.: 2005-46

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By: 

Karl R. Karzmar

Title: Director, Regulatory Relations

PUGET SOUND ENERGY
Electric Tariff G

SCHEDULE 73
CONVERSION TO UNDERGROUND SERVICE
FOR CUSTOMERS OTHER THAN GOVERNMENT ENTITIES
(Continued)

- g. Temporary Service: Temporary Service shall have the meaning set forth in the General Rules and Provisions of the Company's Electric Tariff G and, in addition, shall mean (i) limited overhead facilities that, at the request of a Customer, the Company may elect in its sole discretion to leave in place within the Conversion Area after installation of the Underground Distribution System and/or (ii) limited overhead or underground facilities that, at the request of a Customer, the Company may elect in its sole discretion to install concurrently with the installation of the Underground Distribution System, and that, in each case, shall be used to provide overhead distribution service within the Conversion Area for such period as may be approved by the Company acting reasonably under the circumstances, (e.g., to accommodate other demolition or construction projects within the Conversion Area).
- h. Trenching and Restoration: Includes, but is not limited to, any or all of the following, whether in Public Thoroughfares or on other property: breakup of sidewalks, driveways, street surfaces and pavements; disturbance or removal of landscaping; excavating for vaults; trenching for ducts or cable; shoring, flagging, barricading and backfilling; installation of select backfill or concrete around ducts (if required); compaction; and restoration of Public Thoroughfares and other property.
- i. Underground Distribution System: An underground electric distribution system, excluding "Underground Service Lines" as such term is defined herein, that is comparable to the overhead distribution system being replaced. The Underground Distribution System includes the Facilities as defined herein. For purposes of this Schedule, a "comparable" system shall include, unless the Customer and the Company otherwise agree, the number of empty ducts (not to exceed two (2), typically having a diameter of 6" or less) of such diameter and number as may be necessary to replicate the load-carrying capacity (system amperage class) of the overhead system being replaced.
- j. Underground Service Lines: The underground electric cables and associated components extending from the service connections at the outside of the customers' structures to the designated primary voltage or secondary voltage service connection points of an Underground Distribution System.

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(M) Transferred from Sheet No. 73-e

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By:



Karl R. Karzmar

Title: Director, Regulatory Relations

Exhibit E

Exhibit E

PUGET SOUND ENERGY
Electric Tariff G**SCHEDULE 74**
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES

(N)

1. AVAILABILITY

The Company shall install an Underground Distribution System and shall remove the existing overhead electric distribution system of 15,000 volts or less together with Company-owned poles following removal of all utility wires therefrom under this Schedule when all of the following conditions are met:

- a. The Government Entity has determined that installation of an Underground Distribution System is or will be required and has notified the Company in writing of such determination, and the Company and such Government Entity have agreed upon the provisions of the Design Agreement and the Construction Agreement pursuant to which the Company shall design and install an Underground Distribution System and provide service under this Schedule.
- b. The Company has the right to install, construct, operate, repair and maintain an electrical distribution system (including an Underground Distribution System) within the Public Thoroughfare in the Conversion Area pursuant to a franchise previously granted by the Government Entity requesting such installation and executed by the Company, or, if there is no such franchise, or if such franchise does not provide such right, pursuant to some other grant of rights mutually agreed upon by the Company and the Government Entity.
- c. All customers served by the Company within the Conversion Area will receive electric service through Underground Service Lines from the Underground Distribution System, unless the Company explicitly agrees to other electric service arrangements.

Government Entities that are eligible to receive service under this Schedule are not eligible for service under Schedule 73 of the Company's Electric Tariff G.

2. AGREEMENT PROVISIONS

The Company shall provide and install an Underground Distribution System within the Conversion Area subject to the terms and conditions of a Schedule 74 Design Agreement (the "Design Agreement") and a Schedule 74 Construction Agreement (the "Construction Agreement"), and the following shall apply:

(N)

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George Pohndorf

Title: Director, Rates & Regulation

**PUGET SOUND ENERGY
Electric Tariff G**

**SCHEDULE 74
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES
(Continued)**

(N)

- a. The Design Agreement and the Construction Agreement shall (i) be consistent with this Schedule, and (ii) be substantially in the forms of Attachment A and Attachment B hereto, which attachments are by this reference incorporated in this Schedule as if fully set forth herein. Without limiting the possibility that the Company and the Government Entity may (consistent with this Schedule) mutually agree upon terms that are in addition to those contained in the forms set forth in Attachments A and B hereto, neither the Government Entity nor the Company shall be required to agree to additional terms as a condition of service under this Schedule.
- b. The Design Agreement and the Construction Agreement shall:
- (1) except as otherwise provided in Section 2.b(2), obligate the Government Entity to pay the Company 40% of the total Cost of Conversion and the Company to pay 60% of the total Cost of Conversion;
 - (2) obligate the Government Entity to pay (i) 100% of the total Cost of Conversion for conversion of that portion, if any, of the existing overhead distribution system located, as of the date on which the Government Entity provides the notice referred to in Section 4.a or the date on which the Government Entity commences acquisition or condemnation of real property to facilitate construction of any public improvements related to the conversion project, whichever 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 previously granted by the Government Entity, less (ii) the distribution pole replacement costs (if any) that would be avoided by the Company on account of such conversion, as determined consistent with the applicable Company distribution facilities replacement program, plus (iii) just compensation as provided by law for the Company's interests in real property on which such existing overhead distribution system was located prior to conversion;
 - (3) obligate the Government Entity to pay the Company 100% of the costs of (i) cancellation as provided herein; (ii) any facilities installed at the time of the conversion to provide Temporary Service, as provided for herein; and (iii) removal of any facilities installed to provide Temporary Service (less salvage value of removed equipment);
 - (4) obligate the Company to pay 100% of the cost of obtaining the rights referred to in Section 3.b; and
 - (5) obligate the Government Entity to (i) perform or to cause to be performed (A) all Trenching and Restoration and job coordination required for the installation of the Underground Distribution System and (B) all surveying for alignment and grades of vaults and ducts and (ii) to pay 100% of the cost of performance under clause (i) of this Section 2.b(5).

(N)

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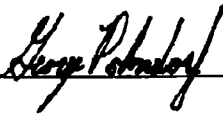
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Electric Tariff G**

**SCHEDULE 74
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES
(Continued)**

(N)

- c. The Government Entity may, at its option, install ducts and vaults, provided that (i) pursuant to the Design Agreement and the Construction Agreement the Government Entity and the Company have mutually agreed upon (A) the cost of such installation to be included in the Cost of Conversion and (B) the specifications and standards applicable to such installation, and (ii) such installation is accomplished by the Government Entity in accordance with the applicable design and construction specifications provided by the Company for such installation pursuant to the Design Agreement. To the extent the Government Entity installs any of the Facilities pursuant to the Construction Agreement, the Company shall not be required to do so under this Schedule.
- d. A Government Entity that is a municipality shall notify all persons and entities within the Conversion Area that electric service to such persons and entities must be converted from overhead to underground (as provided for in the Company's Electric Tariff G) within the applicable statutory period following written notice from the Government Entity that service from underground facilities is available in accordance with RCW 35.96.050. The Government Entity shall exercise its authority to order disconnection and removal of overhead facilities with respect to persons and entities failing to convert service lines from overhead to underground within the timelines provided in RCW 35.96.050.

3. INSTALLATION AND OPERATING RIGHTS:

- a. The Company may install all of the Facilities within a Public Thoroughfare in the locations provided for in a franchise previously granted by the Government Entity or otherwise provided for in the grant of rights referred to in Section 1.b. The Government Entity shall act in good faith and shall use its best efforts to provide space sufficient for the safe and efficient installation, operation, repair and maintenance of all of the Facilities ("Sufficient Space") within the Public Thoroughfare in the Conversion Area, and the Company shall act in good faith and shall use its best efforts to install Facilities in such space within the Public Thoroughfare. If the Company and the Government Entity agree that there is not or will not be Sufficient Space within the Public Thoroughfare in the Conversion Area, then the Government Entity shall provide Sufficient Space by obtaining additional Public Thoroughfare or other equivalent rights mutually agreeable to the Government Entity and the Company, title to which shall be in the Government Entity's name.

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**PUGET SOUND ENERGY
Electric Tariff G**

**SCHEDULE 74
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES
(Continued)**

(N)

- b. If, notwithstanding the use of best efforts by each of the Government Entity and the Company as provided in Section 3.a, the Government Entity and the Company do not agree whether there is or will be Sufficient Space within the Public Thoroughfare in the Conversion Area, the Company shall install those Facilities, for which there is not Sufficient Space within the Public Thoroughfare, on property outside the Public Thoroughfare, the rights for which shall be obtained by the Company at its sole expense. Subject to the other provisions of this Schedule, nothing in this section shall excuse the Company from complying with any work schedule agreed to by the Government Entity and the Company pursuant to the Design Agreement and the Construction Agreement.
- c. If the Government Entity requires the relocation of any Facilities installed pursuant to this Schedule in a Public Thoroughfare within five (5) years from the date of the energization for service of such Facilities, the Government Entity shall reimburse the Company for all costs incurred by the Company in connection with the relocation and reinstallation of facilities substantially equivalent to the relocated Facilities.
- d. If the Government Entity requires (or takes any action that has the effect of requiring) a third party not acting as an agent or a contractor of Government Entity to relocate any Facilities installed pursuant to this Schedule in a Public Thoroughfare within five (5) years from the date of the energization for service of such Facilities, the Government Entity shall require the third party, as a condition to the Company's performance of any relocation, to pay the Company for all costs incurred by the Company in connection with the relocation and reinstallation of facilities substantially equivalent to the relocated Facilities.

4. GENERAL

- a. **Timing:** The Company shall commence performance (as contemplated in the forms of Design Agreement and Construction Agreement attached hereto as Attachments A and B) within ten (10) business days of written notice from a Government Entity of its determination that it requires installation of an Underground Distribution System under this Schedule.
- b. **Ownership of Facilities:** Except as otherwise provided in the Company's Electric Tariff G, the Company shall own, operate, and maintain the Underground Distribution System installed or provided pursuant to this Schedule.
- c. **Prior Contracts:** Nothing herein contained shall affect the rights or obligations of the Company under any previous agreements pertaining to existing or future facilities of greater than 15,000 Volts within any Conversion Area.

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**PUGET SOUND ENERGY
Electric Tariff G**

**SCHEDULE 74
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES
(Continued)**

(N)

d. Temporary Service: Temporary Service shall not exceed a term of 18 months from the date on which service from the Underground Distribution System is available, unless the Company acting reasonably agrees to extend such term. Should a Temporary Service not be removed within such 18-month period or such other period of time that has been approved by the Company acting reasonably, a Government Entity that is a municipality shall exercise its authority under RCW 35.96.050 to order such Temporary Service disconnected and removed within the applicable statutory period following the date of mailing of the Government Entity's notice under RCW 35.96.050. Otherwise, if a Temporary Service is not disconnected or removed within such time approved by the Company acting reasonably, the Government Entity shall pay either (i) 100% of the Cost of Conversion for the entire Underground Distribution System or (ii) 100% of the costs of converting only the Temporary Service to underground, whichever the Government Entity may elect.

5. USE BY OTHER UTILITIES OF TRENCHES PROVIDED BY GOVERNMENT ENTITY

Other utilities may be permitted by the Government Entity to use trenches provided by the Government Entity pursuant to this Schedule for the installation of such other utilities' facilities, so long as such facilities, or the installation thereof, do not interfere (as determined pursuant to the Company's electrical standards) with the installation, operation or maintenance of the Company's Facilities located within such trenches.

6. CANCELLATION

If by written notice or other official action a Government Entity cancels or suspends indefinitely or takes similar official action regarding a conversion project undertaken under this Schedule prior to completion of the conversion to an Underground Distribution System, the Government Entity shall pay the Company all of the costs incurred by the Company to the date of such cancellation consistent with the termination provisions of the Design Agreement and Construction Agreement.

7. STREET LIGHTING

Removal and replacement of existing street lighting or installation of new street lighting within the Conversion Area suitable for service from the Underground Distribution System installed pursuant to this Schedule shall be arranged separately as provided in the Company's Electric Tariff G.

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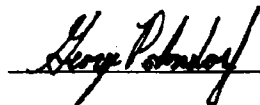
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Electric Tariff G

SCHEDULE 74
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES
(Continued)

(N)

8. UNDERGROUND SERVICE LINES

Underground Service Lines shall be installed, owned, and maintained as provided in the Company's Electric Tariff G.

9. GENERAL RULES AND PROVISIONS

Service under this Schedule is subject to the General Rules and Provisions contained in Schedule 80 of the Company's Electric Tariff G.

10. DEFINITIONS

The following terms when used in this Schedule, the Design Agreement or the Construction Agreement shall, solely for purposes of this Schedule and such agreements, have the meanings given below:

- a. **Conversion Area:** The geographical area in which the Company replaces its overhead electric distribution system with an Underground Distribution System.
- b. **Cost of Conversion:** The cost of converting an existing overhead distribution system to an Underground Distribution System shall be the sum of:
 - (i) the actual, reasonable costs to the Company for labor, materials and overheads and all other reasonable costs, not including mark-up or profit of the Company, for design of the Underground Distribution System, such costs to be determined in accordance with the Design Agreement; plus
 - (ii) the actual costs to the Company for labor, materials and overheads and all other costs, not including mark-up or profit of the Company, to construct and install the Underground Distribution System, up to a maximum amount determined in accordance with the Construction Agreement; plus
 - (iii) the actual reasonable design costs to the Company (including costs for labor, materials and overheads and all other reasonable costs), and the actual construction and installation costs to the Company (including costs for labor, materials and overheads and all other costs), less the salvage value to the Company of the facilities removed, up to a maximum amount determined in accordance with the Construction Agreement, in each case not including mark-up or profit of the Company, for removal of the existing electrical facilities; plus

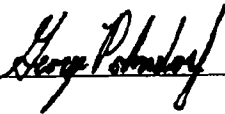
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SCHEDULE 74
CONVERSION TO UNDERGROUND SERVICE
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(Continued)

(N)

- (iv) the actual costs to the Government Entity (if any) of installation of ducts and vaults or other Facilities that the Government Entity has agreed to install for the Underground Distribution System pursuant to the Construction Agreement, up to a maximum amount determined in accordance with the Construction Agreement; plus
- (v) the actual, reasonable costs to the Government Entity (if any) of obtaining Public Thoroughfare or other equivalent rights for the Facilities pursuant to Section 3.a.

The Cost of Conversion shall not include any costs of Trenching and Restoration, or of the Company's obtaining rights pursuant to Section 3.b of this Schedule. Company upgrades and expansions, Government Entity requested changes and requested upgrades, the cost of delays and overtime labor costs shall be as provided for in the Design Agreement and the Construction Agreement.

- c. **Facilities:** All components of the Underground Distribution System, including but not limited to, primary voltage cables, secondary voltage cables, connections, terminations, pad-mounted transformers, pad-mounted switches, ducts, vaults and other associated components.
- d. **Government Entity:** The municipality, county or other government entity having authority over the Public Thoroughfare in the Conversion Area.
- e. **Public Thoroughfare:** Any municipal, county, state, federal or other public road, highway or thoroughway, or other public right-of-way or other public real property rights allowing for electric utility use.
- f. **Temporary Service:** Temporary Service shall have the meaning set forth in the General Rules and Provisions of the Company's Electric Tariff G and, in addition, shall mean (i) limited overhead facilities that, at the request of the Government Entity, the Company may elect in its sole discretion to leave in place within the Conversion Area after installation of the Underground Distribution System and/or (ii) limited overhead or underground facilities that, at the request of the Government Entity, the Company may elect in its sole discretion to install concurrently with the installation of the Underground Distribution System, and that, in each case, shall be used to provide overhead distribution service within the Conversion Area for such period as may be approved by the Company acting reasonably under the circumstances, (e.g., to accommodate other demolition or construction projects within the Conversion Area).

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SCHEDULE 74
CONVERSION TO UNDERGROUND SERVICE
FOR GOVERNMENT ENTITIES
(Continued)

(N)

- g. Trenching and Restoration: Includes, but is not limited to, any or all of the following, whether in Public Thoroughfares or on other property: breakup of sidewalks, driveways, street surfaces and pavements; disturbance or removal of landscaping; excavating for vaults; trenching for ducts or cable; shoring, flagging, barricading and backfilling; installation of select backfill or concrete around ducts (if required); compaction; and restoration of Public Thoroughfares and other property; all in accordance with the specifications applicable thereto set forth in the Design Agreement and the Construction Agreement.
- h. Underground Distribution System: An underground electric distribution system, excluding "Underground Service Lines" as such term is defined herein, that is comparable to the overhead distribution system being replaced. The Underground Distribution System includes the Facilities as defined herein. For purposes of this Schedule, a "comparable" system shall include, unless the Government Entity and the Company otherwise agree, the number of empty ducts (not to exceed two (2), typically having a diameter of 6" or less) of such diameter and number as may be specified and agreed upon in the Design Agreement and Construction Agreement necessary to replicate the load-carrying capacity (system amperage class) of the overhead system being replaced.
- i. Underground Service Lines: The underground electric cables and associated components extending from the service connections at the outside of the customers' structures to the designated primary voltage or secondary voltage service connection points of an Underground Distribution System.

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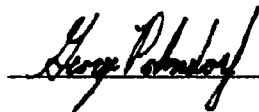
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By:



George Pohndorf

Title: Director, Rates & Regulation

Exhibit F

Exhibit F

C 2004. 044

**SCHEDULE 74 UNDERGROUND CONVERSION
Project Design Agreement**

Project Name: Tumwater - Tumwater Boulevard Widening Project
Project Number: 10475804

THIS Agreement, dated as of this 17th day of May, 2004, is made by and between the City of Tumwater (the "Government Entity"), and PUGET SOUND ENERGY, Inc., a Washington Corporation (the "Company").

RECITALS

- A. The Company is a public service company engaged in the sale and distribution of electric energy and, pursuant to its franchise or other rights from the Government Entity, currently locates its electric distribution facilities within the jurisdictional boundaries of the Government Entity.
- B. The Government Entity is considering conversion of the Company's existing overhead electric distribution system to a comparable underground electric distribution, as more specifically described in the Scope of Work (as defined in paragraph 2, below) furnished to the Company by the Government Entity (the "Conversion Project").
- C. The Government Entity has requested that the Company perform certain engineering design services and otherwise work cooperatively with the Government Entity to develop a mutually acceptable Project Plan (as defined in paragraph 6, below) for the Conversion Project, in accordance with and subject to the terms and conditions of this Agreement (the "Design Work").
- D. The Government Entity and the Company wish to execute this written contract in accordance with Schedule 74 of the Company's Electric Tariff G ("Schedule 74") to govern the Design Work for the Conversion Project.

AGREEMENT

The Government Entity and the Company therefore agree as follows:

1. Unless specifically defined otherwise herein, all terms defined in Schedule 74 shall have the same meanings when used in this Agreement.
2. The Government Entity shall, within ten (10) business days after the date of this Agreement, provide the Company with a written scope of work for the Conversion Project which includes, among other things, (a) a reasonably detailed description of the scope of the work required for the Conversion Project, (b) a list of the key milestone dates for the Conversion Project, (c) reasonably detailed drawings showing any associated planned improvements to the Public Thoroughfare, and (d) a statement as to whether the Government Entity desires to install the ducts and vaults for the Conversion Project (the "Scope of Work"). The Government Entity shall provide the Company two (2) hard copies of the Scope of Work and a copy of the relevant electronic file(s) in a mutually agreed electronic format.
3. Within ten (10) business days of its receipt of the Scope of Work, the Company shall prepare and submit to the Government Entity (a) a reasonably detailed, good faith estimate of the cost to perform the Design Work (the "Design Cost Estimate"), and (b) a proposed schedule for completion of the Design Work which, to the extent reasonably practicable, reflects the applicable key milestone dates

specified in the Scope of Work and provides for completion of the Design Work within ninety (90) business days from the date the Company receives the Government Entity's notice to proceed under paragraph 5, below (the "Design Schedule"). The proposed Design Cost Estimate and the proposed Design Schedule shall be based upon the then-current Scope of Work. Unless otherwise specified in the Scope of Work, the Design Work shall not include negotiation or acquisition of third party property rights but shall include preliminary planning between the Company and the Government Entity regarding their respective obligations for negotiating and acquiring third party property rights.

4. Within ten (10) business days after the Government Entity's receipt of the proposed Design Cost Estimate and the proposed Design Schedule from the Company, the Government Entity and the Company shall meet in order to (a) review the proposed Design Cost Estimate, (b) review the proposed Design Schedule; (c) review the Scope of Work, and (d) make any changes necessary to create a final Scope of Work, final Design Cost Estimate, and final Design Schedule that are reasonably acceptable to both parties. If the parties are unable to agree upon a final version of the Scope of Work, Design Cost Estimate, and/or Design Schedule, then either party may, by written notice to the other party, submit the matter for resolution pursuant to the dispute resolution procedures in paragraph 16, below. The final Scope of Work, Design Cost Estimate and Design Schedule, once determined in accordance with this paragraph 4, may thereafter be changed or amended only in accordance with the change procedures set forth in paragraph 13, below.
5. The Government Entity shall, within ten (10) business days after determination of the final of the Scope of Work, Design Cost Estimate, and Design Schedule, issue (a) a written notice to proceed which shall delineate the final Scope of Work, Design Cost Estimate, and Design Schedule, or (b) a written notice to terminate this Agreement without cost to the Government Entity. If the Government Entity terminates this Agreement, the costs incurred by the Company in preparing and submitting the Design Cost Estimate and the Design Schedule shall not be reimbursable to the Company, and the rights and obligations of the parties under this Agreement shall be terminated in their entirety and without liability to either party.
6. Following the Company's receipt of the notice to proceed, and within the applicable time period specified in the Design Schedule, the Company shall, with the cooperation and assistance of the Government Entity as outlined in this Agreement, prepare a project plan for the Conversion Project (the "Project Plan") which shall include, among other things, the following: (a) a detailed description of the work that is required to be performed by each party and any third party in connection with the Conversion Project (the "Construction Work"), (b) the applicable requirements, drawings, and specifications for the Construction Work, (c) a description of any operating and other property rights that are required to be obtained by each party for the Conversion Project (and the requirements and specifications with respect thereto), (d) a detailed estimate of the costs to be incurred by each party in its performance of the Construction Work, and (e) a detailed schedule for completing the Construction Work (including, without limitation, the dates for delivery of the ducts and vaults and other materials for use at the site of the Construction Work).
7. The Government Entity shall be responsible for coordinating the Design Work with all other design work to be performed in connection with the Conversion Project and any associated planned improvements to the Public Thoroughfare. The parties shall work together in an effort to mitigate the costs of the Conversion Project to each party, including, without limitation, identifying ways to accommodate the facilities of the Company to be installed as part of the Conversion Project within the Public Thoroughfare.
8. Within the applicable time period specified in the Design Schedule, the Company shall prepare and submit to the Government Entity a proposed initial draft of the Project Plan. The parties understand and acknowledge that the proposed Project Plan submitted by the Company shall be preliminary in nature and shall not include, without limitation, information required to be supplied by the Government Entity (e.g., scope and estimate of the cost of the Construction Work to be performed by the Government Entity).

9. Within the applicable time period specified in the Design Schedule, the Government Entity shall (a) review the proposed Project Plan submitted by the Company, (b) complete any information required to be supplied by the Government Entity, (c) make any changes required to conform the proposed Project Plan to the Scope of Work and this Agreement, and (d) return the amended Project Plan to the Company.
10. Within the applicable time period specified in the Design Schedule, the Company shall review the amended Project Plan submitted by the Government Entity and notify the Government Entity in writing of either the Company's acceptance of, or the Company's specific objections to, the amended Project Plan. If the Company makes any objection to the amended Project Plan, and the parties are unable to resolve the objections and mutually agree upon the Project Plan prior to the final design date specified in the Design Schedule, then either party may, by written notice to the other party, submit the matter for resolution pursuant to the dispute resolution procedures in paragraph 16, below. The Project Plan, as mutually agreed upon by the parties or established through the dispute resolution process, shall be attached to and incorporated in a Project Construction Agreement substantially in the form attached hereto as Exhibit A (the "Construction Agreement") which is to be signed by the parties prior to commencement of the Construction Work.
11. The parties intend and agree that the Design Work and the Project Plan in its final form shall conform to the following requirements:
 - (a) The Project Plan shall, if requested by the Government Entity in its Initial Scope of Work, specify that the Government Entity shall install the ducts and vaults for the Conversion Project; provided that (i) the parties mutually agree upon and set forth in the Project Plan (A) the costs of such installation work to be included in the Cost of Conversion, and (B) the specifications and standards applicable to such installation work, and (ii) such installation work is accomplished by the Government Entity in accordance with the applicable design and construction specifications provided by the Company and set forth in the Project Plan.
 - (b) Each estimate of the costs to be incurred by a party shall, at a minimum, be broken down by (i) the design and engineering costs, (ii) property and related costs, including any costs of obtaining operating rights, and (iii) construction costs, including and listing separately inspection, labor, materials, and equipment.
 - (c) All facilities of the Company installed as part of the Conversion Project shall be located, and all related property and operating rights shall be obtained, in the manner set forth in the applicable provisions of Schedule 74. The Project Plan shall describe in detail the location of such facilities, any related property and operating rights required to be obtained, and the relative responsibilities of the parties with respect thereto.
 - (d) The schedule set forth in the Project Plan for completing the Construction Work shall include, at a minimum, milestone time periods for completion of the Trenching, Installation of ducts and vaults, the construction and removal of any Temporary Service, and the removal of overhead facilities.
 - (e) The Project Plan may include the specification of work and requirements for Government-Requested Upgrades and Company-Initiated Upgrades; provided, however, that the costs incurred by the Company with respect to the design and engineering of Company-Initiated Upgrades shall not be included in the costs reimbursable to the Company under this Agreement or the Construction Agreement. For purposes of the foregoing, (i) the term "Government-Requested Upgrade" shall mean any feature of the Underground Distribution System which is requested by the Government Entity and is not reasonably required to make the Underground Distribution System comparable to the overhead distribution system being replaced, and (ii) the term "Company-Initiated Upgrade" shall mean any feature of the Underground Distribution System which is required by the Company and is not reasonably required to make the Underground Distribution System comparable to the overhead distribution system being replaced. For

purposes of subparagraph (ii), above, a "comparable" system shall include, unless the parties otherwise agree, the number of empty ducts (not to exceed two (2), typically having a diameter of 6" or less) of such diameter and number as may be specified and agreed upon in the final Scope of Work necessary to replicate the load-carrying capacity (system amperage class) of the overhead system being replaced. For purposes of subparagraph (i), above, any empty ducts installed at the request of the Government Entity shall be a Government-Requested Upgrade.

- (f) The Project Plan shall set forth all specifications, design standards and other requirements for the Construction Work and the Conversion Project, including, but not limited to, the following:
- (i) applicable federal and state safety and electric codes and standards, (ii) applicable construction and other standards of the Company, and (iii) applicable street design and other standards of the Government Entity which are in effect as of the commencement of the Conversion Project.

12. Upon request of the Government Entity, and in any event at the times specified in the Design Schedule, the Company shall provide periodic reports which compare the actual costs of the Design Work incurred to that point in time to the Design Cost Estimate, as changed or amended in accordance with paragraph 13, below. Further, if at any time the Company reasonably expects that the actual cost of the Design Work will exceed the Design Cost Estimate, as changed or amended in accordance with paragraph 13, below, the Company shall notify the Government Entity immediately. Upon receipt of the Company's notice, the Government Entity may, at its option,

- (a) notify the Company in writing that this Agreement is terminated; or
- (b) request a reasonably detailed explanation supported by documentation (reasonably satisfactory to the Government Entity) to establish that the actual costs in excess of the Design Cost Estimate are:
 - (i) reasonable,
 - (ii) consistent with the Scope of Work, and
 - (iii) consistent with sound engineering practices.

If the Government Entity requests an explanation, the Government Entity shall, within ten (10) business days after receipt of the explanation,

- (a) change the Scope of Work in accordance with paragraph 13, below, or
- (b) direct the Company to continue with the Design Work without a change in the Scope of Work, but reserving to the Government Entity the right to dispute the reasonableness of the costs to be paid the Company under paragraph 14, below, in accordance with the dispute resolution procedures in paragraph 16, below, or
- (c) direct the Company to discontinue performing the Design Work pending resolution, pursuant to paragraph 16, below, of any dispute regarding the reasonableness of the costs, in which event the Design Schedule will be adjusted to reflect the delay, or
- (d) notify the Company in writing that this Agreement is terminated.

In the event the Government Entity terminates this Agreement or discontinues the performance of the Design Work under subparagraph (c), above, for more than ninety (90) days, the Government Entity shall pay the Company for all costs incurred by the Company in its performance of the Design Work prior to the date the Company receives the Government Entity's notice of termination, plus any costs incurred by the Company for materials and other items ordered or procured by the Company with the prior authorization of the Government Entity in order to meet the schedule for the Conversion Project. The foregoing payment obligation shall survive any termination of this Agreement.

13. (a) Either party may, at any time, by written notice thereof to the other party, request changes to the Scope of Work (a "Request for Change"). No Request for Change shall be effective and binding upon the parties unless signed by an authorized representative of each party. If any approved Request for Change would cause an increase in the cost of, or the time required for, the performance of any part of the Design Work, an equitable adjustment in the Design Cost Estimate and the Design Schedule shall be made to reflect such increase. The parties shall negotiate in good faith with the objective of agreeing in writing on a mutually acceptable equitable adjustment. If the parties are unable to agree upon the terms of the equitable adjustment, either party may submit the matter for resolution pursuant to the dispute resolution procedures in paragraph 16, below. Notwithstanding any dispute or delay in reaching agreement or arriving at a mutually acceptable equitable adjustment, each party shall, if requested by the other party, proceed with the Design Work in accordance with the Request for Change. Any such request to proceed must be accompanied by a written statement setting forth the requesting party's reasons for rejecting the proposed equitable adjustment of the other party.
- (b) The Design Cost Estimate and/or the Design Schedule shall be equitably adjusted from time to time to reflect any change in the costs or time required to perform the Design Work to the extent such change is caused by: (i) any Force Majeure Event under paragraph 17, below, (ii) the discovery of any condition within the Conversion Area which affects the scope, cost, schedule or other aspect of the Design Work and was not known by or disclosed to the affected party prior to the date of this Agreement, or (iii) any change or inaccuracy in any assumptions regarding the scope, cost, schedule or other aspect of the Design Work which are expressly identified by the parties in the final Scope of Work. Upon the request of either party, the parties will negotiate in good faith with the objective of agreeing in writing on a mutually acceptable equitable adjustment. If, at any time thereafter, the parties are unable to agree upon the terms of the equitable adjustment, either party may submit the matter for resolution pursuant to the dispute resolution provisions in paragraph 16, below.
14. Upon completion of the Design Work (i.e., the date on which the Project Plan is final under paragraph 10, above, either by mutual agreement of the parties or as established through the dispute resolution procedures), the Government Entity shall pay the Company all actual, reasonable costs to the Company for the Design Work (which, if disputed in good faith by the Government Entity, may be submitted by either party for resolution pursuant to the dispute resolution provisions in paragraph 16, below), plus any costs incurred by the Company for materials and other items ordered by the Company with the prior authorization of the Government Entity in order to meet the schedule for the Conversion Project. If, thereafter, the Construction Agreement is executed by the parties and the Conversion Project is completed within five (5) years from the date of this Agreement, the full amount of the costs incurred by the Company in its performance of the Design Work shall be included in the "Shared Company Costs" under the Construction Agreement and any payment of such amounts under this Agreement shall be credited to the Government Entity in calculating the "Net Amount" payable under the Construction Agreement.
15. Within sixty (60) business days after completion of the Design Work, the Company shall issue to the Government Entity an itemized invoice for the amounts payable under this Agreement. Such invoice shall be in a form mutually agreed upon by the Company and the Government Entity and shall, at a minimum, itemize the design and engineering costs, including and listing separately inspection, labor, materials and equipment. In the event the Government Entity does not verify such invoice within ten (10) business days of receipt, the Government Entity shall provide a written request to the Company specifying the additional information needed to verify the invoice. The Company will provide, within a reasonable period after receipt of any request, such documentation and information as the Government Entity may reasonably request to verify such invoice. The Government Entity shall pay the Company all amounts payable under this Agreement within thirty (30) days after receipt of the Company's invoice. Payment as provided in this Agreement shall be full compensation for the Company's performance of the Design Work, including without limitation all services rendered and all materials, supplies, equipment, and incidentals necessary to complete the Design Work.

16. Dispute Resolution Procedures:

- (a) Any dispute, disagreement or claim arising out of or concerning this Agreement must first be presented to and considered by the parties. A party who wishes dispute resolution shall notify the other party in writing as to the nature of the dispute. Each party shall appoint a representative who shall be responsible for representing the party's interests. The representatives shall exercise good faith efforts to resolve the dispute. Any dispute that is not resolved within ten (10) business days of the date the disagreement was first raised by written notice shall be referred by the parties' representatives in writing to the senior management of the parties for resolution. In the event the senior management are unable to resolve the dispute within twenty (20) business days (or such other period as the parties may agree upon), each party may pursue resolution of the dispute through other legal means consistent with the terms of this Agreement. All negotiations pursuant to these procedures for the resolution of disputes shall be confidential and shall be treated as compromise and settlement negotiations for purposes of the state and federal rules of evidence.
- (b) Any claim or dispute arising hereunder which relates to the Scope of Work, Design Cost Estimate, and Design Schedule under paragraph 4, above; the Project Plan under paragraph 10, above; or any Request for Change (including, without limitation, any associated equitable adjustment) under paragraph 13, above; and is not resolved by senior management within the time permitted under paragraph 16(a), above, shall be resolved by arbitration in Seattle, Washington, under the Construction Industry Arbitration Rules of the American Arbitration Association then in effect. The decision(s) of the arbitrator(s) shall be final, conclusive and binding upon the Parties. All other disputes shall be resolved by litigation in any court or governmental agency, as applicable, having jurisdiction over the Parties and the dispute.
- (c) In connection with any arbitration under this paragraph 16, costs of the arbitrator(s), hearing rooms and other common costs shall be divided equally among the parties. Each party shall bear the cost and expense of preparing and presenting its own case (including, but not limited to, its own attorneys' fees); provided, that, in any arbitration, the arbitrator(s) may require, as part of his or her decision, reimbursement of all or a portion of the prevailing party's costs and expenses by the other party.
- (d) Unless otherwise agreed by the parties in writing, the parties shall continue to perform their respective obligations under this Agreement during the pendency of any dispute.
17. In the event that either party is prevented or delayed in the performance of any of its obligations under this Agreement by reason beyond its reasonable control (a "Force Majeure Event"), then that party's performance shall be excused during the Force Majeure Event. Force Majeure Events shall include, without limitation, war; civil disturbance; flood, earthquake or other Act of God; storm, earthquake or other condition which necessitates the mobilization of the personnel of a party or its contractors to restore utility service to customers; laws, regulations, rules or orders of any governmental agency; sabotage; strikes or similar labor disputes involving personnel of a party, its contractors or a third party; or any failure or delay in the performance by the other party, or a third party who is not an employee, agent or contractor of the party claiming a Force Majeure Event, in connection with the Work or this Agreement. Upon removal or termination of the Force Majeure Event, the party claiming a Force Majeure Event shall promptly perform the affected obligations in an orderly and expedited manner under this Agreement or procure a substitute for such obligation. The parties shall use all commercially reasonable efforts to eliminate or minimize any delay caused by a Force Majeure Event.
18. This Agreement is subject to the General Rules and Provisions set forth in Tariff Schedule 80 of the Company's electric Tariff G and to Schedule 74 of such Tariff as approved by the Washington Utilities and Transportation Commission and in effect as of the date of this Agreement.

19. Any notice under this Agreement shall be in writing and shall be faxed (with a copy followed by mail or hand delivery), delivered in person, or mailed, properly addressed and stamped with the required postage, to the intended recipient as follows:

If to the Government Entity:

City of Tumwater
555 Isreal Road S.W.
Tumwater, WA
Attn: Mr. Jay Eaton, PE
Fax: 360/754-4142

If to the Company:

Puget Sound Energy, Inc.
3130 South 38th Street TAC-LL
Tacoma, WA 98409
Attn: Barry Lombard
Fax: 253/476-6037

Either party may change its address specified in this paragraph by giving the other party notice of such change in accordance with this paragraph.

20. This Agreement shall in all respects be interpreted, construed and enforced in accordance with the laws of the State of Washington (without reference to rules governing conflict of laws), except to the extent such laws may be preempted by the laws of the United States of America.
21. This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof and all other agreements and understandings of the Parties, whether written or oral, with respect to the subject matter of this Agreement are hereby superseded in their entireties.
22. This Agreement shall be binding upon and inure to the benefit of the respective successors, assigns, purchasers, and transferees of the parties, including but not limited to, any entity to which the rights or obligations of a party are assigned, delegated, or transferred in any corporate reorganization, change of organization, or purchase or transfer of assets by or to another corporation, partnership, association, or other business organization or division thereof.

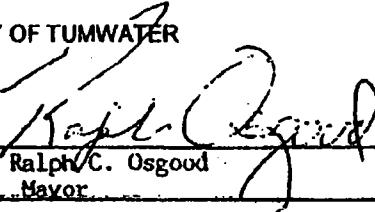
Government Entity:

Company:

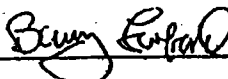
CITY OF TUMWATER

PUGET SOUND ENERGY, INC.

BY


Ralph C. Osgood

BY



ITS

Mayor

ITS Municipal Liaison Manager

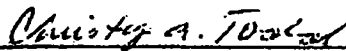
Date Signed

April 27, 2004


Date Signed

5/17/04

Approved as to form:



ATTEST:


Gayla E. Jertsen, Clerk/Treasurer
Design Agreement, Attachment A to Schedule 74, Page 7
Tumwater Boulevard Widening Project