BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of: KING COUNTY, WASHINGTON, BNSF RAILWAY, FRONTIER COMMUNICATIONS NORTHWEST, INC., VERIZON WIRELESS, AND NEW CINGULAR WIRELESS PCS, LLC. For an Order Requiring Puget Sound Energy to Fund Replacement of Electric Facilities	NO. UE-141335 PSE'S ANSWER TO PETITION FOR ADMINISTRATIVE REVIEW OF INITIAL ORDER (ORDER 03)

I. INTRODUCTION

1. Pursuant to WAC 480-07-825(4), Puget Sound Energy, Inc., ("PSE") hereby submits to the Washington Utilities and Transportation Commission ("WUTC" or "Commission") its Answer to the Petition for Administrative Review of Initial Order ("Order 03") filed by King County, Washington, BNSF Railway, Frontier Communications Northwest, Inc., Verizon Wireless, and New Cingular Wireless PCS, LLC (collectively, "Petitioners") on September 8, 2015. PSE respectfully requests that the Commission deny the Petition for Administrative Review and adopt the findings of fact and conclusions of law set forth in Order 03 as its own.

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II. BACKGROUND

2. This proceeding began over a year ago, on June 26, 2014, with Petitioners' request for an order requiring PSE to fund replacement of the Maloney Ridge distribution line. Upon the Petitioners' request, the Commission issued a Notice of Opportunity to Submit Statements of Fact and Law. WUTC Staff and PSE submitted such statements. On August 28, 2014, following a prehearing conference, Judge Kopta converted the docket to an adjudicative proceeding and set a procedural schedule.[1] All parties submitted both opening and cross-answering testimony. The parties engaged in discovery, and each party responded to Bench Requests issued by Judge Kopta. An evidentiary hearing was held on May 27, 2015, and the parties each filed post-hearing briefs. Judge Kopta issued Order 03 on August 18, 2015.

3. Petitioners now seek administrative review of Order 03, claiming that it errs by (a) concluding that the Maloney Ridge line is not a part of PSE's distribution system; (b) determining that PSE's tariffs do not obligate PSE to incur the costs of replacing the line as a matter of law; and (c) in applying a fact-specific analysis to this matter. The Petitioners' request for review should be denied because it is conclusory in nature and is not supported by the substantial record of evidence in this proceeding.

[1] *See* Order 01.

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III. ANSWER

A. The Record Contains Substantial Evidence to Support Each of the Conclusions in Order 03.

4. A Petition for Administrative Review must point out with specificity the error of law or fact that justifies reconsideration. WAC 480-07-825(3) provides,

> Petitions for administrative review must clearly identify the nature of each challenge to the initial order, the evidence, law, rule or other authority that the petitioner relies upon to support the challenge, and state the remedy that the petitioner seeks. Petitions for review of initial orders must be specific. The petitioner must separately state and number every contention. A petition that challenges a finding of fact must cite the pertinent page or part of the record or must otherwise state the evidence it relies on to support its petition, and should include a recommended finding of fact. A petition that challenges a conclusion of law must cite the appropriate statute, rule, or case involved and should include a recommended conclusion of law. A petition that challenges the summary or discussion portion of an initial order must include a statement showing the legal or factual justification for the challenge, and a statement of how the asserted defect affects the findings of fact, the conclusions of law, and the ultimate decision.

5. The Petitioners disagree with Order 03's conclusions that 1) the Maloney Ridge line is not a part of PSE's distribution system, and 2) PSE's tariffs do not direct PSE to incur the costs of replacing the line as a matter of law.[2] Petitioners, however, do not state any specific errors in Order 03's analyses and instead simply take issue with the conclusions, claiming that there is no substantial evidence in the record to support such conclusions.[3]

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[2] *See* Petition for Administrative Review at ¶5.
[3] *See id.* at ¶6.

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1. The Maloney Ridge Line is Outside of PSE's Distribution System.

6. Judge Kopta correctly found that the Maloney Ridge line is outside PSE's general distribution system. "The line has always been a separate facility dedicated to Petitioners, not a part of PSE's distribution system."[4] Petitioners, however, disagree with Judge Kopta. In doing so, they conclude that a line extension is "inherently already incorporated into a system" and, "If PSE wanted to exclude the Maloney Ridge Line from its distribution system, it needed to have expressly done so through the Service Agreements; otherwise, the standard tariff provisions apply."[5] But the Petitioners cite no authority for their conclusion and instead attempt to cobble together an argument from out-of-context statements in PSE's tariffs and the Service Agreements. For example, in an effort to assign replacement costs to PSE, Petitioners reference a completely unrelated provision in the Service Agreements requiring PSE or a PSE contractor to conduct maintenance on the line.[6]

7. In drafting Order 03, Judge Kopta searched PSE's tariffs and the Service Agreements to find support for whether the Maloney Ridge line is part of PSE's system or not. He concluded that the answer is not found in either the Service Agreements or PSE's tariffs,[7] but

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[4] Order 03 at ¶28.

[5] Petition for Administrative Review at ¶12.

[6] *See id* at ¶16.

[7] PSE's position continues to be that the tariffs and service agreements are dispositive. The definition of "System" in the Service Agreements distinguishes the Maloney Ridge line from the rest of PSE's distribution system. Further, paragraph 7 of the Service Agreements states that if other Maloney Ridge residents want to receive service from the Maloney Ridge line, they must become parties to the Service Agreement. If the line were part of PSE's general distribution system, a new customer would not be required to contractually agree to receive service.

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in a fact-specific review of the nature of the facilities.[8] Following relevant case law, Order 03 contains a fact-specific analysis including the nature of the facilities, economics, and customer impact. The evidence clearly demonstrates that the Maloney Ridge line is outside PSE's base system. Order 03 specifically cites to the following facts as illustrative:

> The Company required GTE to pay not only all costs to construct the line but all ongoing repair and maintenance expenses as well – terms that do not apply to customers the Company serves using only its distribution system. The other Petitioners signed contracts to take service over that line under the same terms. As the contracts require, PSE has billed those customers separately for repair and maintenance costs.[9]

8. As stated above, the Petitioners ignore the factual evidence and instead argue that PSE is required to expressly state in the Service Agreements that the Maloney Ridge line is not part of PSE's distribution system.[10] No such statement is required or necessary; the line was built pursuant to a contract and it has been treated differently than PSE's base system ever since. The Petitioners themselves have treated the Maloney Ridge line separately from the rest of PSE's system by paying repair and maintenance costs every year. It is understandable that the Petitioners do not agree with the conclusion in Order 03 that the Maloney Ridge line is outside of PSE's system, yet substantial factual evidence unequivocally supports that conclusion.

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[8] *See* Order 03 at ¶27.
[9] *Id.* at ¶28.
[10] *See* Petition for Administrative Review at ¶12.

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2. The Petitioners Had Notice of Potential Replacement Costs.

9. In addition to the substantial factual evidence supporting the finding that Maloney Ridge is a separate system, the Service Agreements and Schedule 80 put the Petitioners on notice that they were buying into that separate system. The Petitioners nonetheless argue that they had no notice that they were taking service from anything other than PSE's distribution system. "There was no notice to these customers that they would be treated differently than other customers, except for the differences expressly stated in the Service Agreement."[11] This new argument is inappropriate because the Petitioners cite no evidence, law, rule or other authority that supports the challenge. Petitioner's notice argument instead necessarily relies on the assumption that all distribution power lines are inherently part of PSE's general distribution system, a finding that Judge Kopta rejected.

10. Further, the notice argument makes no sense. The Petitioners state they had no indication "that they somehow would be buying into their own system",[12] yet that is exactly how the Service Agreements refer to the Maloney Ridge line – a separate system installed to serve only Maloney Ridge. Recital B of the Service Agreements states,

> Pursuant to the economic feasibility provisions (paragraph 13) of its Electric Tariff G, Schedule 85, **Puget constructed a single phase primary voltage electrical distribution system ("System") to service the area known as Maloney Ridge** ("Maloney Ridge") located in Section 36, Township 26 North, Range 11 East, W.M. , in King County, Washington.

[11] *Id.* at ¶20.
[12] *Id.*

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(Emphasis added). Contrary to the Petitioners' claims that they had no indication or notice that they were buying into their own system, they had express notice of precisely that when they signed the Service Agreements. In fact, no new customer can connect to the Maloney Ridge line and be served by the "System" without joining as a party to the Service Agreements, either directly or indirectly.[13] If the line were part of PSE's general distribution system, a new customer would not be required to contractually agree to receive service.

11. Moreover, Paragraph 13 of Schedule 85, under which the line was constructed, expressly states that service may be provided to customers on contract terms "which require payment of an amount sufficient to justify the Company's investment in facilities". This investment to date has been limited to installation, maintenance and repair, but there is nothing in Schedule 85 that limits such economic justification to those services. The tariff language and the Service Agreements, read together, put the Petitioners on notice that they may be required to pay for replacement costs.

B. PSE's Unambiguous and Lawful Tariffs Obligate Petitioners to Pay Replacement Costs.

12. As explained below, PSE agrees with the Petitioners that Order 03 erred in determining that PSE's tariffs are not dispositive of whether PSE must pay to replace the Maloney Ridge line. PSE's tariffs clearly establish that PSE may refuse to incur costs for a project that is economically unfeasible, and it was error to conclude otherwise. However, the

[13] *See* paragraph 7 of the Service Agreements, which states that if other residents want to receive service from the System, they must become parties to the Service Agreement.

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error is harmless because the factual analysis applied in Order 03 supports the correct conclusion – that the Petitioners are obligated to pay replacement costs.

1. Interpreting Schedule 85's Ownership of Facilities Provision

13. PSE's Schedule 85 language supports PSE's and WUTC Staff's positions, not the Petitioners. The Petitioners resort to a statutory interpretation argument of the following language from Schedule 85 to argue that PSE is required to pay replacement costs:

> The Company shall own, operate, maintain, and repair all electric distribution facilities installed by or for the Company under this schedule, including replacement of such facilities if necessary so long as such replacement is not inconsistent with this schedule or a contract governing such facilities.

Order 03 rejects Petitioners' argument for multiple reasons: first because Schedule 85 applies to new lines only, not replacement lines,[14] and second because the above-referenced language refers only to the ownership of the lines, not payment responsibility.

14. Contrary to the Petitioners' claim, Order 03 correctly applies the rules of statutory interpretation when Judge Kopta recognizes that the placement of the above-referenced language is under the caption "OWNERSHIP OF FACILITIES" and does not apply to cost recovery. Rather than taking the provision out of context, Judge Kopta appropriately reviews the language in context with its caption and related provisions. "We discern the plain meaning from the ordinary meaning of the language at issue, the statute's context, related

[14] *See* Order 03 at ¶19.

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provisions, and the statutory scheme as a whole."[15] Further, the above provision makes no reference to payment responsibility. Therefore, Judge Kopta properly followed the canons of construction when he refused to insert such an inference.

> Even though we look to the broader statutory context, we do not add words where the legislature has not included them, and we construe statutes 'such that all of the language is given effect.' [16]

15. Petitioners next claim that if Order 03's interpretation of the Schedule 85's OWNERSHIP OF FACILITIES provision were correct, then 1) PSE must have a contract addressing cost recovery of every line extension, or 2) the Commission must apply a fact-specific analysis to determine every line extension case.[17] But those are not the only two options. Repayment of costs could be addressed in Schedule 85, as in the case of mobile home parks and multi-family residences,[18] it could be addressed in a separate contract, or it could be considered on a case by case basis. As Lynn Logen explained, while there is the general obligation to replace or repair facilities, "the timing and everything else" is to be determined separately.[19] WUTC Staff, PSE, and Judge Kopta all understand that the obligation to replace a line is not the same as the obligation to pay for such replacement. Judge Kopta correctly noted that there is no cost recovery mechanism implied in Schedule 85

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[15] *Olympic Tug & Barge, Inc. v. Washington State Dep't of Revenue*, 163 Wn. App. 298, 306, 259 P.3d 338, 343 (2011) (internal citations omitted).

[16] *Id.*

[17] *See* Petition for Administrative Review at ¶37.

[18] *See* Schedule 85, Sheet 85-k (Additional Terms of Service), Subsection 1.B.(i).

[19] *See* Logen, TR. 46:19-24.

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and PSE treats cost recovery for electric distribution facilities differently depending on whether those facilities are constructed within or outside of PSE's distribution system. Such treatment is supported by Commission rules, PSE's tariffs, and case law.

2. Interpreting Schedule 80's Economic Feasibility Provision

16. The point on which PSE disagrees with Order 03, however, is in its analysis of the economic feasibility provision of PSE's general tariff, Schedule 80. In Order 03 Judge Kopta refuses to rely on PSE's economic feasibility provision because it predates the repeal of WAC 480-100-056 (Refusal of service), and because he finds the concept of economic feasibility overly broad and ambiguous.[20] However, as Judge Kopta points out, the lawfulness of PSE's tariff provision is not before the Commission. PSE's tariffs, including the economic feasibility provision, are valid unless and until the Commission rules that they are not.[21] Because the provision remains valid, it is erroneous to "harmonize Schedule 80" with other Commission rules and orders by applying a fact-specific analysis.[22] The record supports a finding that the Maloney Ridge is economically unfeasible, PSE's tariffs allow for refusal of service when a project is economically unfeasible, it is in the public interest to avoid economically unfeasible projects, and case law supports refusing such projects.[23] The

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[20] *See* Order 03 at ¶¶16-17.

[21] "Once a utility's tariff is filed and approved, it has the force and effect of law." *Gen. Tel. Co. of Nw., Inc. v. City of Bothell*, 105 Wn. 2d 579, 585, 716 P.2d 879, 883 (1986).

[22] *See* Order 03 at ¶18.

[23] *See In re Petition of Verizon Northwest Inc.*, Docket UT-011439, Twelfth Supp. Order (April 2003).

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analysis should end there. Order 03, however, does apply a fact-specific analysis and correctly arrives at the same conclusion. Such analysis is supported by substantial evidence in the record and is supported by relevant case law. Further, the Petitioners claim no error in the analysis itself, only that it was erroneous to apply it. Accordingly, any error in failing to apply PSE's economic feasibility provision is harmless error.

IV. CONCLUSION

17. The Petitioners have not carried their burden of proving an error of fact or law in Order 03, and the error regarding economic feasibility is a harmless error because the factual analysis resulted in the same conclusion. Accordingly, PSE respectfully requests that the Commission deny Petitioners' Petition for Administrative review and adopt the findings of fact and conclusions of law set forth in Order 03 as its own.

DATED: September 18, 2015

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By _____

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