

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of)	DOCKET UE-141335
)	
KING COUNTY, WASHINGTON, BNSF)	
RAILWAY, FRONTIER)	
COMMUNICATIONS NORTHWEST)	ORDER 04
INC., VERIZON WIRELESS, and NEW)	
CINGULAR WIRELESS PCS, LLC,)	
)	
For an Order Requiring Puget Sound)	ORDER DENYING PETITION
Energy to Fund Replacement of Electric)	FOR ADMINSTRATIVE
Facilities)	REVIEW
.....)	

SUMMARY

- 1 **PROCEEDINGS.** On June 26, 2014, King County, Washington, BNSF Railway, Frontier Communications Northwest Inc., Verizon Wireless, and New Cingular Wireless PCS, LLC (collectively Petitioners), filed with the Washington Utilities and Transportation Commission (Commission) a Petition for Declaratory Order “to address the degradation of service each of them receive from Puget Sound Energy (PSE) due to the physical deterioration of the 40-year-old underground cable (the ‘Maloney Ridge Line’) by which electric service is provided.” Petitioners requested a Commission determination that PSE is obligated to replace the line and recover the resulting costs through the company’s Electric Tariff G Schedule 24 electric rates, rather than directly from Petitioners.

- 2 On August 27, 2014, the Commission held a prehearing conference and subsequently entered Order 01 Prehearing Conference Order. The Commission converted this proceeding to an adjudication pursuant to WAC 480-07-930(4) and established a procedural schedule that would allow for development of the factual record necessary to rule on the issues raised by Petitioners. Petitioners, PSE, and Commission Staff filed testimony in support of their respective positions pursuant to the procedural schedule and the Commission conducted an evidentiary hearing on May 27, 2015. The parties filed post-hearing briefs on June 30, 2015.

- 3 Administrative Law Judge Gregory J. Kopta entered an Initial Order, Order 03, on August 18, 2015, granting in part, and denying in part the relief sought by Petitioners. Order 03 would require PSE to replace the Maloney Ridge Line, but would require Petitioners to pay the costs of replacement that exceed \$335,000 and to pay for all operating and maintenance expenses for the line under the terms and conditions in the existing service agreements

between each of the petitioners and PSE. Order 03 otherwise denies the Petition for Declaratory Order.

4 Dissatisfied with the Initial Order’s determination that they must pay the costs of replacing the Maloney Ridge Line, Petitioners seek administrative review under RCW 34.05.464 and WAC 480-07-825. We deny their Petition for Administrative Review (Petition) for the reasons discussed below.

5 **PARTY REPRESENTATIVES.** Tommy A. Brooks and Chad M. Stokes, Cable Huston, LLP, Portland, Oregon, represent King County, BNSF, Frontier, and Verizon. Cindy Manheim, General Attorney, AT&T, Redmond, Washington, represents New Cingular Wireless. Donna L. Barnett, Perkins Coie, LLP, Bellevue, Washington, represents PSE. Patrick J. Oshie, Assistant Attorney General, Olympia, Washington, represents the Commission’s regulatory staff (Staff).

MEMORANDUM

1. Background

6 The parties’ arguments below, and now on review, are largely matters of policy and law. Indeed, Order 03 relies on underlying facts that are not disputed.¹

7 The Maloney Ridge Line is an 8.5 mile underground electric distribution cable in the Snoqualmie National Forest. PSE constructed the line for General Telephone Company of the Northwest, Inc. (GTE) pursuant to a 1971 contractual agreement between the companies. The agreement required GTE to pay all construction costs for the line and all operation and maintenance expenses associated with it. Neither the construction costs nor any part of the operation and maintenance expenses associated with the Maloney Ridge Line have ever been included for recovery in PSE’s general rates. PSE subsequently connected three additional entities, each of which executed a service agreement requiring them to pay a share of the line’s ongoing operation and maintenance expenses. These four customers have been and remain exclusively responsible for the costs of the Maloney Ridge Line. In addition, these customers pay for the electrical power they consume under general rate Schedule 24.² Schedule 24 rates include an allocated part of the fixed and variable costs of PSE’s general distribution system and commodity costs (*i.e.*, power costs).

¹ Order 03 ¶ 3.

² PSE’s original agreement with GTE provides that GTE would pay rates under “Schedule 30, Tariff I, as it may be amended.” Exh. No. LFL-3 ¶ 8.

8 The Maloney Ridge Line may be nearing the end of its useful life. The cable has experienced increasingly frequent failures, and annual repair costs now exceed \$200,000. All parties agree that the continuing pattern of piecemeal repairs is not sustainable.³ The cost to replace the line in its entirety would be approximately \$5.3 million.

9 Petitioners argue that PSE is obligated to replace the line and recover the resulting costs through the company's Electric Tariff G Schedule 24 electric rates, rather than directly from Petitioners. PSE argues that the Maloney Ridge Line is not part of its general distribution system and that it is relieved of any responsibility to pay the costs of replacing the line by the "economic unfeasibility" provisions of its tariff. PSE disputes that there is any other applicable language in PSE's tariffs that requires it to pay the costs to replace the Maloney Ridge Line.

2. Petition for Administrative Review

10 Petitioners argue in their Petition for Administrative Review that the Initial Order 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.

A. Is the Maloney Ridge Line part of PSE's distribution system?

11 Petitioners cite testimony by PSE's witness, Mr. Logen, and Staff's witness, Mr. Nightingale, that support the determination in Order 03 that the Maloney Ridge Line was constructed, operated, and maintained under a private contract, continues to operate and be maintained under private contracts, and, therefore, is not part of PSE's general distribution system.⁴ Mr. Nightingale's testimony is perfectly clear and to the point:

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

³ According to PSE, however, there are options in addition to replacement, but Petitioners have rejected these alternatives. *See* PSE Post-hearing Brief at 5, 20.

⁴ Petition ¶ 6 (quoting Logen, TR. 46:1-47:5) and ¶ 7 (quoting Nightingale, TR. 95:18-96:10).

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

Q. And in this case?

A. In this case it's different because there's a contract in place that covers historically the installation and now the ongoing maintenance and operation of that line. That's outside the normal distribution system.⁵

12 Petitioners argue that there is no additional evidence in the record on this issue, that "Staff and PSE reach the wrong conclusion" and, therefore, the conclusion "is not legally or factually supported."⁶ We disagree. The testimony is clear and supported by documentary evidence in the record. Petitioners' criticisms cite neither evidence nor legal authority that undermines the credibility of these witnesses or the substance of their testimony.

13 Moreover, contrary to Petitioners' claim, there is additional, consistent evidence in the hearing record on this point.⁷ Finally, we independently find considerable additional support for the analysis and determination of this issue in Order 03 in our review of the pre-filed testimony and exhibits.⁸

14 Petitioners do not meaningfully dispute the facts to which Messrs. Logen and Nightingale, and Ms. Barnard testified at hearing, and ignore the broader body of evidence, also undisputed substantively, that supports the following discussion in Order 03:

PSE has consistently treated the Maloney Ridge Line as an adjunct to, rather than a part of, its distribution system. 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

⁵ Petition ¶ 22 (citing Nightingale, TR. 95:18-96:8).

⁶ *Id.* ¶ 6-8.

⁷ *See, e.g.*, Logen, TR. 29:1-15; Barnard, TR. 61:1-63:19; Nightingale, TR. 72:22-73:18.

⁸ *See generally* Nightingale, Exh. No. DN-1T and Logen, Exh. No. LFL-1T; *See also* Barnard, Exh. No. KJB-1T at 1:18 - 2:20. These pre-filed testimonies are supported by documentary evidence. The record includes more than 50 exhibits.

has billed those customers separately for repair and maintenance costs. At no time did PSE formally or informally incorporate the line into the system it uses to provide service to its larger customer base. The line has always been a separate facility dedicated to Petitioners, not a part of PSE's distribution system.⁹

- 15 Taking a slightly different perspective on this question, PSE's recovery over many years of 100 percent of the costs of the Maloney Ridge Line under contracts with Petitioners means that none of costs have been included in Schedule 24 rates or in the rates of any other PSE tariff schedule. Thus, while the line may physically be part of PSE's distribution system in engineering terms, it has never been part of PSE's distribution system in financial terms and no part of its costs are recovered in Schedule 24 rates, or any other tariffed rate. The physical attachment of the Maloney Ridge Line to PSE's general distribution system is beside the point insofar as the question before us is concerned. The point salient to our analysis here is that the Maloney Ridge Line has never been and is not now part of PSE's general distribution system, the costs of which are recovered in tariffed rates.¹⁰ Indeed, a central purpose in building and operating the Maloney Ridge Line under service agreements was to relieve the broader body of PSE customers from having to bear any of the costs of the Maloney Ridge Line. The Maloney Ridge Line costs intentionally have been kept separate from the costs of PSE's general distribution system that are allocated among customer classes and recovered in general rates such as those assessed under Schedule 24.
- 16 Petitioners are seeking for the first time in this case to obtain service on the Maloney Ridge Line not on the basis of their service agreements, but as customers being served on the Company's general distribution system under PSE's tariffs of general applicability and, in particular, Schedule 24. Were the Commission to adopt Petitioners' position that they are entitled to such service on a going forward basis, the Commission would either have to approve recovery of the capital costs of installing a new, replacement line on Maloney Ridge from all Schedule 24 customers, or find such an expenditure imprudent and disallow the costs, requiring it to be absorbed by PSE's shareholders. Neither of these outcomes is legally permissible because either result would lead to rates under Schedule 24 that would fail to meet the fair, just, reasonable, and sufficient standard.
- 17 In sum, Petitioners' argument that the Maloney Ridge Line is part of PSE's general distribution system is legally and factually incorrect insofar as relevant to the question before

⁹ Order 3 ¶ 28.

¹⁰ We note that Petitioners pay Schedule 24 rates, which include an allocated part of PSE's general distribution system costs, because that system is used to bring energy to the Maloney Ridge Line.

us. In addition, Petitioners fail to meet the basic requirements of WAC 480-07-825(3) that require “[p]etitions for review of initial orders [to] be specific.”¹¹ Assertions in the Petition before us that are unsupported by specific references to the record or to legal authority provide no basis for reversing the Initial Order on the points contested. Given that there is substantial competent evidence in the record supporting the Initial Order’s determination that “[the Maloney Ridge] line has always been a separate facility dedicated to Petitioners, not a part of PSE’s distribution system,”¹² including the very evidence Petitioners cite, there also is no reason to remand Order 03 on this question for the development of yet additional evidence. We sustain Order 03 on this point. Maloney Ridge is not a part of PSE’s distribution system insofar as the determination of responsibility for the costs of its replacement is concerned, or for any other purpose.

B. Do PSE’s tariffs obligate the Company to bear the costs of replacing the line?

18 Petitioners argued below that PSE should be required to replace the Maloney Ridge Line and to be responsible for the construction costs. They rely in part on their interpretations of language in PSE’s Electric Tariff G, Schedules 80 (General Terms and Conditions) and 85 (Line Extensions). PSE and Staff relied principally on the argument that it is not economically feasible to replace the line and that if they want PSE to replace the Maloney Ridge Line, then Petitioners are responsible for all of the costs under the terms of Schedule

¹¹ 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.

¹² Order 03 ¶ 28.

80, paragraph 9, which provides in relevant part that: “The Company shall not be required to provide service if to do so would be economically unfeasible.”¹³

- 19 Order 03 determines that the quoted provision from Schedules 80 is “not dispositive of whether PSE must pay to replace the Maloney Ridge Line.”¹⁴ This determination rests in part on “concerns” about “the continuing vitality of the provision in PSE’s tariff that allows the Company to refuse to provide service that is ‘economically unfeasible’ in light of its inconsistency with applicable Commission rules.”¹⁵ Order 03 also finds that “the concept of ‘economic unfeasibility’ is overly broad and ambiguous.”¹⁶
- 20 Turning to the arguments that are grounded in Schedule 85, Order 03 observes that “the tariff . . . does not specify who is responsible for facility replacement costs.”¹⁷ Order 03 rejects the argument that replacement facilities are “new” within the meaning of PSE’s tariff, which would mean the customers requesting line extension would be required to pay, as Schedule 85 provides. This analysis in Order 03 is not challenged so we do not address it further.
- 21 Order 03 also rejects Petitioners’ interpretation of Schedule 85. Petitioners rely on the “Ownership of Facilities” provision in Schedule 85, which provides that PSE:

¹³ Logen, Exh. LFL-7 at 1. PSE and Staff rely in addition on paragraph 34 of Schedule 80 that provides:

Where a change in existing Electric Facilities is requested or required by a Requesting Entity, the Requesting Entity shall pay the Company for the cost due to such change, including the cost of additional facilities that are necessary, in the sole judgment of the Company, to maintain the existing level of reliability, as well as the cost to enhance reliability beyond the existing level of reliability if the Project requested by the Requesting Entity is intended to enhance reliability for the Requesting Entity.

¹⁴ Order 03 ¶ 15.

¹⁵ *Id.* ¶ 16. The Commission rules to which Order 03 refers, or predecessor rules, were not inconsistent with the tariff at the time PSE entered into the original contract with GTE to build the Maloney Ridge Line or at the times a replacement contract and new contracts with the additional petitioners were executed. The inconsistency to which Order 03 refers results from the removal of the “economically unfeasible” language from the Commission’s Refusal of Service rule with the repeal of WAC 480-100-056 and its replacement with WAC 480-120-123 in 2001. *See In re Adopting and Repealing Rules in Chapter 480-100 WAC Relating to Rules Establishing Requirements for Electric Companies*, Docket UE-990473, General Order No. R-495 ¶ 26 (Dec. 3, 2001).

¹⁶ *Id.* ¶ 17.

¹⁷ *Id.* ¶ 19.

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.¹⁸

As Order 03 correctly observes, “this subsection does not mention payment responsibility” and it would be inappropriate to “interpret that silence to reflect PSE’s intent to pay all costs associated with these activities.”¹⁹ Considering that PSE “treats cost recovery for electric distribution facilities differently depending on whether those facilities are constructed within or outside of the Company’s distribution system,” Order 03 determines that responsibility for the costs to replace electric distribution facilities must be “determined based on the circumstances of each case.”²⁰

22 This is consistent with the resolution in Order 03 of the concerns the order identifies in connection with the economic unfeasibility provision in PSE’s tariff. Observing that the lawfulness of PSE’s tariff provision is not an issue in this case, Order 03 resolves these concerns by “[harmonizing] Schedule 80 to the extent possible with Commission rules and orders.”²¹ Thus, considering language in the order adopting the current Refusal of Service rule that “Commission resolution of obligation to serve issues is likely to be based on fact-specific analysis,”²² Order 03 considers “whether providing service to the Petitioners is ‘economically unfeasible’ as an important factor in that analysis, but . . . not the sole determinant of the extent to which PSE must provide that service.”²³

23 Order 03 accordingly undertakes a fact-based inquiry, focusing on “[t]he most salient factors in this case. These are: the nature of the facilities, the economics of replacing the line, and the customer impact.”²⁴ Analyzing these three factors, Order 03 finds that:

- PSE constructed the Maloney Ridge Line for GTE (now Frontier) under contract and GTE paid the full costs of construction, and ongoing repair and

¹⁸ Logen, Exh. No. LFL-7 at 15.

¹⁹ Order 03 ¶ 21.

²⁰ *Id.* ¶ 23 (internal citation omitted).

²¹ *Id.* ¶ 18.

²² *In re Adopting and Repealing Rules in Chapter 480-100 WAC Relating to Rules Establishing Requirements for Electric Companies*, Docket UE-990473, General Order No. R-495 ¶ 25 (Dec. 3, 2001).

²³ Order 03 ¶ 18.

²⁴ *Id.* ¶ 26.

maintenance expenses the responsibility for which is now shared with four other customers.²⁵ “PSE has consistently treated the Maloney Ridge Line as an adjunct to, rather than a part of, its distribution system. The line has always been a separate facility dedicated to Petitioners, not a part of PSE’s distribution system.”²⁶

- The costs to replace the line vastly exceed the amount the Company would recover in the rates it charges Petitioners and it would cause an inequitable and unreasonable cross-subsidy to require other customers under Schedule 24 to pay \$5 million or more for facilities that will serve only the few customers taking service on the Maloney Ridge Line. “Customers who do not cause costs should not be responsible for paying them.”²⁷
- The fact that electricity delivered via the Maloney Ridge Line enables Petitioners to provide 911 and other public safety services does not relieve them of the responsibility to pay the costs the Company incurs to provide electric service. “The importance of electric service to a customer (or to the customer’s customers) is not a basis on which the Commission will determine who pays for that service or the facilities used to deliver it.”²⁸

²⁴ In light of these findings, Order 03 determines that:

The Company should undertake replacement of the line to the full extent it would be economic to do so. If Petitioners elect that option, therefore, they must pay all costs to replace the line in excess of \$335,000, as well as all operating and maintenance costs under the same terms and conditions in the existing service agreements.²⁹

²⁵ Petitioners pay in addition to these costs rates for service under Schedule 24 that include an allocated part of the costs of PSE’s general distribution system. The general distribution system provides service to the Maloney Ridge customers, but the Maloney Ridge Line does not provide service to any customers other than the Petitioners. The costs of the general distribution system accordingly have never included the costs of the Maloney Ridge Line.

²⁶ Order 03 ¶ 28.

²⁷ *Id.* ¶ 32.

²⁸ *Id.* ¶ 34.

²⁹ *Id.* ¶ 37.

3. Decision

- 25 We find merit in the analyses in Order 03 concerning the applicability and meaning of PSE’s Tariff G Schedules 80 and 85. We agree that the tariff alone is not dispositive of the question of who must pay if the Maloney Ridge Line is replaced. We share the two concerns discussed in Order 03 in relation to Schedule 80, General Rules and Provisions, Section 9, which states in relevant part, “The Company shall not be required to provide service if to do so would be economically unfeasible.”³⁰ However, as Order 03 observes: “The lawfulness of PSE’s tariff provision . . . is not before us.”³¹ Therefore, the economic feasibility standard remains a part of PSE’s tariff.³² Order 03 recognizes this point to the extent of finding that one important factor in the “fact-specific analysis” it undertakes is, indeed, the question of economic feasibility. We have already discussed above how Order 03 analyzes this factor, along with others, to reach its conclusion that PSE has no obligation to pay the costs to replace the Maloney Ridge Line.
- 26 The Maloney Ridge facilities are dedicated to the use of the few customers who have a continuing obligation to pay their costs. The general body of Schedule 24 customers have never been responsible for paying any of the capital investment or the ongoing operations and maintenance expenses associated with the Maloney Ridge Line. Petitioners suggest no good reason that this should change with the replacement of the deteriorated line with a new one. Nothing has changed in the relationship of these dedicated facilities that are not part of the Company’s general distribution system to the other customers who take service under Schedule 24. Schedule 24 customers other than the Maloney Ridge customers have never and will not in the future realize any benefit from the existence of the line beyond the small amount of general distribution system costs that the Petitioners have always paid, and will continue to pay. The general body of Schedule 24 customers does not cause any of the Maloney Ridge costs and should, therefore, bear none of those costs.

ORDER

THE COMMISSION ORDERS That:

- 27 (1) King County, Washington’s; BNSF Railway’s; Frontier Communications Northwest, Inc.’s; Verizon Wireless’s; and New Cingular Wireless PCS, LLC’s Petition For Administrative Review of Initial Order (Order 03) is DENIED.

³⁰ Logen, Exh. LFL-7 at 1.

³¹ Order 03 ¶ 18.

³² *Gen. Tel. Co. of N.W., Inc. v. City of Bothell, et al.*, 105 Wash. 2d 579, 585 (1986).

- 28 (2) The Findings and Conclusions in Order 03 ¶¶ 38-53 are adopted and incorporated into this Order by reference here as if set forth in full.
- 29 (3) Puget Sound Energy, upon request from King County, Washington, BNSF Railway, Frontier Communications Northwest Inc., Verizon Wireless, and New Cingular Wireless PCS, LLC, must replace the Maloney Ridge line extension currently used to provide electric service to those customers on the following conditions:
- (a) King County, Washington, BNSF Railway, Frontier Communications Northwest Inc., Verizon Wireless, and New Cingular Wireless PCS, LLC, must pay all construction costs of the line in excess of \$335,000.
 - (b) King County, Washington, BNSF Railway, Frontier Communications Northwest Inc., Verizon Wireless, and New Cingular Wireless PCS, LLC, must pay for all operating and maintenance expenses for the line under the terms and conditions in the existing service agreements between each of those entities and Puget Sound Energy.
- 30 (4) The Commission retains jurisdiction over the subject matters and parties to this proceeding to effectuate the terms of this Order.

Dated at Olympia, Washington, and effective October 13, 2015.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

ANN E. RENDAHL, Commissioner

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