

Ex. _____ (KLE-5)
Docket Nos. UE-920433, UE-920499 and UE-921262
Witness: Kenneth L. Elgin

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PETITION OF PUGET SOUND
POWER & LIGHT COMPANY FOR AN
ORDER REGARDING THE ACCOUNTING
TREATMENT OF RESIDENTIAL
EXCHANGE BENEFITS

DOCKET NO. UE-920433

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

DOCKET NO. UE-920499

Complainant,

v.

PUGET SOUND POWER & LIGHT
COMPANY,

Respondent.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

DOCKET NO. UE-921262

Complainant,

v.

PUGET SOUND POWER & LIGHT
COMPANY,

Respondent.

RECEIVED
REPORTING AND REPORT
MAY - 9 PM 6:03
STATE OF WASHINGTON
DEPARTMENT OF
TRANSPORTATION
WASHINGTON

EXHIBIT OF

KENNETH L. ELGIN

WUTC STAFF

JURY VERDICT AND JURY INSTRUCTIONS IN TANNER V. PUGET POWER

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
UE-920433; -920499;
No. -921262 Ex. 675V

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

TANNER ELECTRIC COOPERATIVE,)

Plaintiff,)

No. 91-2-08427-1

vs.)

PUGET SOUND POWER & LIGHT)
COMPANY,)

Defendant.)

COURT'S INSTRUCTIONS ON THE LAW

DATED 3 March 1993


Dale B. Ramerman, Judge

INSTRUCTION NO. 1.01

It is your duty as a jury to determine the facts in this case from the evidence produced in court. It also is your duty to accept the court's instructions on the law, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

Each of these instructions on the law is of equal importance. The attorneys may properly discuss any specific instruction they think is particularly significant. You should, however, consider the instructions as a whole and should not place undue emphasis on any particular instruction or part of an instruction.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted by the court as evidence. It has been the court's duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that was not admitted or that was stricken by the court.

During your deliberations, the testimony will not be repeated or reproduced for you. Any exhibits admitted into evidence will go to the jury room with you for you to consider in your deliberations.

In determining whether any proposition has been proved, you should consider all of the exhibits and testimony that bear on the question and have been admitted as evidence by

the court. Which party produced or offered evidence does not limit how that evidence can be used.

You are the sole judges of the credibility of the witnesses and of the weight to be given the testimony of each. In considering the testimony of any witness, you may take into account any factors that bear on believability and weight including the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, and the reasonableness of the testimony of the witness considered in light of all the evidence.

Counsel's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remark, statement or argument that is not supported by the evidence or by the law as set forth in these instructions.

The lawyers have the right and the duty to make any objections that they deem appropriate. Such objections should not influence you, and you should not draw any inferences from any objections by counsel.

The law does not permit me to comment on the evidence in any way, and I have not intentionally done so. If it appears to you that I have so commented, during either the trial or the giving of these instructions, you must disregard the comment.

Jurors have a duty to consult with one another and to deliberate with a view to reaching a verdict. Each of you must decide the case for yourself, but only after an

impartial consideration of all of the evidence with your fellow jurors. In the course of your deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is erroneous. You should not, however, surrender your honest conviction as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

You are officers of the court. You must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you should permit neither sympathy nor prejudice to influence you.

INSTRUCTION NO. 1.02

Evidence may be either direct or circumstantial.

Direct evidence is that given by a witness who testifies concerning facts he or she has directly observed or perceived through the senses.

Circumstantial evidence consists of proof of facts or circumstances that, according to common experience, permit a reasonable inference that other facts existed or did not exist.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence; one is not necessarily more or less valuable than the other.

INSTRUCTION NO. 1.03

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

JURY INSTRUCTION NO. 1.04

The term "proximate cause" means a cause which in a direct sequence unbroken by any new independent cause, produces the event complained of and without which such event would not have happened.

There may be one or more proximate causes of an event.

JURY INSTRUCTION NO. 1.05

All parties are equal before the law whether they be a corporation, partnership, cooperative or individual. Each is entitled to the same fair and unprejudiced treatment as any individual would be under like circumstances.

A corporation or cooperative can act only through its officers, managers, or agents. An act or omission of an officer, manager or agent acting within his or her authority is an act or omission of the corporation or cooperative.

JURY INSTRUCTION NO. 1.06

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

JURY INSTRUCTION NO. 2.01

This suit involves claims made by Tanner Electric Cooperative against Puget Sound Power and Light. Tanner and Puget in 1966 entered into an agreement called the 1966 Service Area Agreement.

This lawsuit was filed on April 19, 1991. In August, 1991, this court denied a request by Tanner that the court enter a preliminary injunction that would have had the effect of requiring Puget to stop supplying power to Nintendo.

Beginning in November, 1992, the court has made three rulings on issues of law that you must follow in deciding the claims in this case:

First, that under the 1966 Service Area Agreement, Tanner made a bona fide offer to provide service to Nintendo under terms and conditions applicable generally to Tanner's other customers of the same class and within the same area, and that therefore Tanner shall not be deemed to have failed, refused or been unable to provide service to Nintendo;

Second that Puget breached the 1966 Service Area Agreement by providing electrical power to Nintendo of America Corporation at Nintendo's North Bend facility between January, 1991, and September 27, 1991; and,

Third that the 1966 Service Area Agreement expired and terminated as of September 27, 1991, and that the Service Area Agreement did not, after that date, limit any right Puget had to supply electrical power to Nintendo at North Bend.

JURY INSTRUCTION NO. 2.02

Tanner contends in this lawsuit that it is entitled to money damages from Puget for breach of contract. Tanner contends that Puget's breach of the Service Area Agreement by providing electricity to Nintendo between January and September 27, 1991, caused Tanner damage; and (2) that Puget breached the Service Area Agreement by refusing to commit to Tanner to provide more than 2.6 megawatts of power to Tanner for the North Bend area and as a result Tanner was damaged.

Tanner contends that it is entitled to an award of damages against Puget because Puget wrongfully interfered with Tanner's business expectancy.

Tanner contends that it is entitled to an award of damages against Puget because Puget breached the Consumer Protection Act.

Puget denies that it breached any contract or that any breach of contract that may have occurred caused any damage to Tanner; denies Puget interfered with any business expectancy of Tanner or violated the Consumer Protection Act; and denies that any actions on its part caused Tanner any damages.

The foregoing is merely a summary of the claims that is designed to help you understand the evidence. You should not take this summary as proof of any of the claims or defenses asserted by any party.

JURY INSTRUCTION NO. 3.01

A contract is an agreement entered into voluntarily by two or more parties.

The agreement may be oral or in writing.

The 1966 Service Area Agreement was a contract between Tanner and Puget.

JURY INSTRUCTION NO. 3.02

For Tanner to recover damages from Puget for breach of contract by Puget, Tanner has the burden of proving each of the following by a preponderance of the evidence:

- (1) That there was a contract between Tanner and Puget;**
- (2) That Puget breached the contract;**
- (3) That the breach of contract caused damage to Tanner and the amount of that damage.**

If you find that Tanner has proved each of these elements by a preponderance of the evidence, then your verdict should be for Tanner on the breach of contract claim. On the other hand, if Tanner has failed to prove any of these elements, your verdict should be for Puget on this claim.

JURY INSTRUCTION NO. 3.03

A breach of a contract is a failure, without legal excuse, to perform any promise which forms all or part of the contract. A promise is an undertaking or assurance to do or not do some act in the future.

JURY INSTRUCTION NO. 3.04

A term of a contract is ambiguous if it can reasonably be interpreted in more than one way.

An ambiguous term of a contract must be interpreted to accomplish the intent of the contracting parties. The intent of the parties is to be determined based on what the parties said or did, and should include consideration of the circumstances surrounding the making of the contract, the purposes of the contract, the acts and conduct of the parties concerning the contract both before and after a dispute arose, and the reasonableness of the respective interpretations advanced by the parties.

JURY INSTRUCTION NO. 3.05

Service Area Agreements are contracts that are authorized but not required by state law.

Revised Code of Washington 54.48.020 provides:

The legislature hereby declares that the duplication of the electric lines and service of public utilities and cooperatives is uneconomical, may create unnecessary hazards to the public safety, discourages investment in permanent underground facilities, and is unattractive, and thus is contrary to the public interest and further declares that it is in the public interest for public utilities and cooperatives to enter into agreements for the purpose of avoiding or eliminating such duplication.

JURY INSTRUCTION NO. 3.06

An agreement by one company to deliver electrical power to another party (a "wheeling" agreement) is a contract. There is no law or regulation that requires one party to enter into such an agreement with another party.

JURY INSTRUCTION NO. 4.01

In order for Tanner to recover damages from Puget for tortious (or wrongful) interference with Tanner's business expectancy, Tanner has the burden of proving by a preponderance of the evidence, each of the following:

- 1. The existence of a valid business expectancy of Tanner concerning Nintendo.**
- 2. Puget's knowledge of Tanner's business expectancy concerning Nintendo;**
- 3. That Puget intentionally interfered with Tanner's valid business expectancy by causing or inducing a termination of the expectancy;**
- 4. That Puget interfered with the Tanner expectancy for an improper purpose or by improper means; and**
- 5. That Puget's interference proximately caused damage to Tanner and the amount of the damage.**

JURY INSTRUCTION NO. 4.02

Nintendo is entitled to receive "adequate electrical service."

"Adequate" means "as much or as good as necessary for some requirement or purpose; fully sufficient, suitable or fit."

JURY INSTRUCTION NO. 4.03

A "valid business expectancy" is a reasonable, realistic expectation, not based on speculation or wishful thinking, that a contractual or other business relationship will continue to exist or will develop.

JURY INSTRUCTION NO. 4.04

A person acts "with intent" or "intentionally" when acting with the objective or purpose of accomplishing a particular result.

JURY INSTRUCTION NO. 4.05

A purpose or means is "improper" if it violates a statute, regulation or other rule of law, or an established standard of a trade, industry or profession.

Improper means include such things as violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood. A breach of contract may be an improper means or purpose.

JURY INSTRUCTION NO. 5.01

The Consumer Protection Act provides in part that unfair acts or practices in the conduct of any trade or commerce are unlawful.

For Tanner to recover damages against Puget for a violation of the Consumer Protection Act, Tanner has the burden of proving the following by a preponderance of the evidence:

- (1) That the defendant committed an unfair act or practice;**
- (2) That the unfair act or practice:**
 - (a) occurred in trade or commerce;**
 - (b) impacted the public interest, and**
 - (c) proximately caused injury to plaintiff's business or property.**

JURY INSTRUCTION NO. 5.02

In determining whether an act or practice is unfair, you should consider:

- 1. Whether the act or practice falls within a statutory, common law, or other established concepts of unfairness;**
- 2. Whether the act or practice is immoral, unethical, oppressive or unscrupulous; and,**
- 3. Whether the act or practice caused substantial injury to consumers or competitors.**

JURY INSTRUCTION NO. 5.03

The term "trade or commerce" includes the sale of products or services, and any commerce directly or indirectly affecting any person in the state of Washington.

JURY INSTRUCTION NO. 5.04

An impact on the public interest can be established by proving a violation of a statute that contains an express declaration of the public interest.

If the violation of such a statute has not been shown, in determining whether an unfair act or practice impacted the public interest, you should consider whether the act or practice:

- (1) was committed in the course of defendant's business;**
- (2) was a part of a pattern or generalized course of conduct;**
- (3) had a real and substantial potential for repetition in the future;**
- (4) was similar to prior acts or practices involving others; and,**
- (5) if not similar to other acts or practices, was likely, when it did occur, to affect many consumers.**

None of these factors considered alone is dispositive, and all need not be present in order to find an impact on the public interest.

JURY INSTRUCTION NO. 6.01

It is the duty of the court to instruct you on the measure of damages. By instructing you on damages, the Court does not mean to suggest the party for which your verdict should be rendered.

The burden of proving damages rests with Tanner and it is for you to determine, based on the evidence, whether any particular element has been proved by a preponderance of the evidence.

JURY INSTRUCTION NO. 6.02

If your verdict is for Tanner, then you must determine the amount of money that will reasonably and fairly compensate Tanner for such damages as you find were proximately caused by Puget's breach of contract, tortious interference with Tanner's business expectancy, or violation of the Consumer Protection Act. If your verdict is for plaintiff on any claim, you should consider the following items of economic damage:

- Increased expenses (excluding any costs related to this lawsuit) incurred as a proximate result of the actions of defendant
- Loss of past net income (income lost less expenses that ordinarily would have been incurred but were not incurred because the income was not received) proximately caused by the actions of defendant
- Loss of future income (income lost less expenses that ordinarily would have been incurred but will not be incurred because the income will not be received) proximately caused by the actions of defendant.

It is not necessary that plaintiff prove damages with exact calculation. Before damages can be awarded there must be a reasonable basis for estimating the amount of the loss suffered. Your award must be based on the evidence; it may not be based upon speculation. If you find for Tanner on more than one claim, you should not provide for multiple recovery for the same item of loss.

JURY INSTRUCTION NO. 6.03

Any award for future economic damages must be reduced to the present cash value of those damages.

"Present cash value" as used in these instructions means the sum of money needed now, which, when added to what that sum may reasonably be expected to earn in the future, will equal the amount of loss at the time in the future when the earnings would have been received.

The rate of interest to be applied by you in making this determination should be that rate that in your judgment is reasonable under all the circumstances taking into consideration the prevailing rates of interest in the area that can reasonably be expected from safe investments that a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

As an offset to the reduction of damages to present cash value, you may consider the future decrease in the purchasing power of money which may be caused by future inflation, if any.

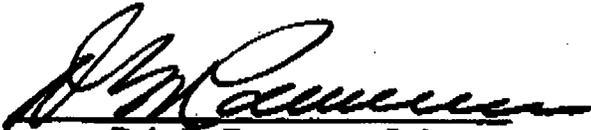
JURY INSTRUCTION NO. 7.01

Upon retiring to the jury room for your deliberation on this case, your first duty will be to select a presiding juror to act as chair. It will be her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon all question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and a special verdict form which consists of several questions for you to answer. You should answer the questions in the order in which they are asked as your answers to some questions will determine whether you are to answer all, some or none of the remaining questions. Accordingly, it is important that you read the questions carefully and that you follow the directions set forth. When five jurors have agreed upon an answer to a question, you should proceed to the next question. It is necessary that you answer each of the questions unless the questions themselves specifically provide otherwise.

To reach a verdict, the same five jurors need not agree upon the answers to all of the questions on the special verdict form. When you have reached a verdict, the presiding juror should sign the verdict (whether or not the presiding juror agrees

with the verdict) and announce your agreement to the bailiff who will conduct you
into court to declare your verdict.



Dale B. Ramerman, Judge

If you answered questions 1, 2 or 3 "Yes", answer question 4. If you answered questions 1, 2 and 3 "No", do not answer question 4.

4. What is the amount of damages suffered by Tanner that was the proximate result of breach of contract, tortious interference with business expectancy, or violation of the Consumer Protection Act by Puget?

Answer: \$ _____ (dollar amount)

Dated _____

Presiding Juror