

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

City of Kent,)	
)	Docket No. _____
v.)	
Petitioner,)	Petition for Declaratory Relief
)	Interpreting Schedule 71 of Electric
Puget Sound Energy, Inc.,)	Tariff G
)	
Respondent)	
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1. This petition is filed on behalf of the City of Kent, a noncharter, optional municipal code city organized under Washington law and located in south King County. The City’s address is 220 Fourth Avenue S., Kent, Washington, 98032. The City is represented in this action by the undersigned counsel, whose address appears below.

2. As authority for this request for declaratory relief, the City relies upon RCW 34.05.240 and WAC 480-09-230. The City respectfully requests that the Washington Utilities and Transportation Commission (“WUTC”) issue a declaratory order clarifying certain rights and obligations of the City and Puget Sound Energy, Inc. (“PSE”) related to “conversion to underground service in a commercial area” under Schedule 71 of Electric Tariff G. For the Commission’s convenience, a copy of Schedule 71 is attached as Exhibit A. The declaratory order sought by the City is necessary to facilitate an underground conversion agreement between the parties, without which the

City of Kent's Pacific Highway Improvement Project cannot move forward. In support of its request for relief, the City states as follows:

I. Factual Background

The City of Kent and the Pacific Highway Improvement Project

3. The City of Kent is presently in the design phase of its projected \$16-million Pacific Highway Improvement Project ("the Project"). The Project will improve a three-mile stretch of Pacific Highway South along the westerly edge of Kent, stretching roughly from the intersection with Kent-Des Moines Road on the north to the intersection with 272nd Street on the south.

4. The Pacific Highway Project will include the addition of one northbound and one southbound HOV (high occupancy vehicle) lane, plus the construction of a median and new sidewalks, curbs, and gutters. The Project also includes the undergrounding of the existing overhead electric distribution system operated by Puget Sound Energy, as well as undergrounding of telephone and cable television lines and other utilities.

5. Kent's Project has been in planning and design since 1997. Construction is scheduled to begin construction in June 2002. Several communities neighboring Kent—Sea-Tac, Des Moines, and Federal Way, plus King County—are undertaking projects that will similarly improve an additional seven miles of Pacific Highway. The Project cannot go forward without the active participation and cooperation of Puget Sound Energy.

Puget Sound Energy and the Franchise

6. Puget Sound Energy maintains and operates electric distribution facilities (poles, wires, cables, vaults, and so on) throughout the City of Kent pursuant to a 1993

franchise agreement (the “PSE Franchise”) with the City. The PSE Franchise expires in 2018. A copy of the Franchise is attached as Exhibit B.

7. The PSE Franchise grants PSE permission to locate its electric facilities within the “franchise area.” As defined in section 1.1.3 of the Franchise, “franchise area” essentially equates to existing City right of way, or future right of way that the City may happen to acquire.

8. Section 5.2 of the PSE Franchise, titled “Undergrounding of Facilities,” provides that

[i]f, during the term of this Franchise, the City shall direct Puget to underground Facilities within the Franchise Area, such undergrounding shall be arranged and accomplished subject to and in accordance with applicable rates and tariffs on file with the WUTC.

9. The City of Kent has, in fact, directed PSE to underground its facilities along the portion of Pacific Highway encompassed within the City’s Pacific Highway Improvement Project. The undergrounding requested of PSE is located entirely within a commercial area. Consequently, certain cost obligations are governed by Schedule 71 of Electric Tariff G on file with the WUTC. Schedule 71 is titled “Conversion to Underground Service in Commercial Areas.” Section 2 of Schedule 71 provides that

[s]ubject to availability of equipment and materials, the Company [PSE]...will provide and install a Main Distribution System and will remove existing overhead electric distribution lines of 15,000 volts or less together with Company-owned poles following the removal of all utility wires therefrom in those portions of municipalities which are zoned for commercial purposes...provided that at the time of such installation the Company shall have the right to render services in such municipalities pursuant to a franchise in a form satisfactory to the Company, and provided further, that the Conversion Area must be not less than two (2) contiguous city blocks in length with all real property on both sides of each public street to receive electric service from the Main Distribution System.

10. As for the criteria set forth in Section 2, PSE has the right to render services in Kent pursuant to the existing PSE Franchise (Exhibit B, attached). The “Conversion Area” (that is, the project area) exceeds two contiguous city blocks in

length. All properties on both sides of the street will receive service from the new Main Distribution System (that is, the underground electric distribution system).

11. Pursuant to Section 3.a of Schedule 71 of Electric Tariff G, the City and PSE have exchanged drafts of an “underground conversion agreement” as contemplated by the following portion of Section 3.a:

[t]he Company and the municipality having jurisdiction of the Conversion Area...shall enter into a written contract...for the installation of such systems, which Contract shall be consistent with this schedule and shall be in a form satisfactory to the Company.

Despite exchanging drafts, it is evident, as explained below, that the parties will be unable to reach agreement absent a declaratory order from the WUTC.

The Main Sources of Disagreement

PSE’s request that the City of Kent fund PSE’s acquisitions of private property and/or property rights outside of the Franchise Area.

12. When it signed its Franchise with the City of Kent, PSE acknowledged the City’s desire “to adopt a policy to encourage the undergrounding of Facilities *within the Franchise Area.*” (PSE Franchise Section 5.1, emphasis added.) The Franchise Area consists of right of way owned by the City.

13. Although the PSE Franchise contemplates undergrounding of facilities *within* the Franchise Area, PSE has informed the City that so far as the Pacific Highway Project is concerned, PSE intends to install many of its facilities on private property rather than within public right of way. Section 4 of Schedule 71 addresses the cost of acquiring private property desired by PSE outside of public right of way:

[t]he owners of real property within the Conversion Area shall, at *their* expense, provide space for all underground electrical facilities which in the Company’s judgment shall be installed on the property of said owners. In addition, said owners shall provide to the Company adequate legal rights for the construction, operation, repair, and maintenance of all electrical facilities installed by the

Company pursuant to this schedule, all in a form satisfactory to the Company. (Emphasis added).

14. Despite the foregoing provisions, PSE has insisted that the City of Kent agree to reimburse PSE for PSE's acquisitions of private property and/or property rights desired by PSE outside of the Franchise Area. Specifically, PSE requested in a draft agreement supplied by PSE Rates and Regulations Director Steve Secrist (the "Secrist draft") that the City agree to the following contract provision:

The cost to the Company of obtaining any such space and rights on any property other than public rights of way shall be reimbursed in full by the Customer. The cost to the Company to obtain space and rights shall include, but not be limited to, the actual amount paid for any space and rights, staff costs (including overheads), the actual costs of any easement, fee, permit, attorney fee, court cost, permit fee, and any survey fee.

The foregoing obligation set forth in section 1.b of the Secrist Draft is repeated elsewhere in the draft including section 8, in which the potentially vague reference to "the Customer" is changed to "the City." A copy of the Secrist draft is attached as Exhibit C. The Secrist draft contains many additional, similar provisions, all written to obligate the City of Kent to fund PSE's acquisitions of private property and/or property rights.

15. The City of Kent has not agreed to pay for PSE's property acquisitions. On March 27, 2001, Kent Public Works Director Don Wickstrom mailed to Mr. Secrist a letter challenging the basis of PSE's requested contract provisions, including many that seemed irrelevant to the Pacific Highway Project. A copy of Mr. Wickstrom's letter is attached as Exhibit D.

16. In his March 27 letter, Mr. Wickstrom requested—pursuant to Section 3.1 of the PSE Franchise (Exhibit B, attached)—that PSE identify no later than April 12 the specific basis of PSE's assertion that the City is somehow obligated to pay for PSE's acquisitions of private property. Mr. Secrist chose not to respond to Mr. Wickstrom's letter. Instead, on about May 4, 2001, PSE's Project Manager for the Pacific Highway

Project undergrounding—William Thwing—sent to Mark Howlett of Kent’s Engineering Department a request that Kent sign the very same draft agreement that Mr. Wickstrom had earlier rejected. A copy of the draft agreement provided by Mr. Thwing is attached as Exhibit E. Mr. Thwing offered no response to, and no explanation of PSE’s failure to respond to, Mr. Wickstrom’s letter. At no time has PSE identified any purported basis for its demand that the City agree to fund PSE’s acquisitions of private property. It appears that PSE is attempting to extort such an agreement from the City of Kent by holding up the Pacific Highway Improvement Project in the meantime.

17. In his May 4 letter to Kent’s Mr. Howlett, Mr. Thwing reminded Mr. Howlett that an underground conversion agreement (Exhibit E) would be required before actual conversion. Additionally, Mr. Thwing stated that the City needed to sign a separate “engineering agreement” by May 18, 2001, which, according to Thwing, was “important so we [PSE] can be sure to maintain the City’s project schedule.” A copy of Mr. Thwing’s letter (including the proposed “engineering agreement”) is attached as Exhibit F. Neither the PSE Franchise nor Schedule 71 reference an “engineering agreement.” It appears to the City once again that PSE is attempting to circumvent both the tariff and the franchise by extorting from the City an agreement to fund PSE’s acquisitions of private property rights: Mr. Thwing’s “engineering agreement” states among other things that “[t]he cost for obtaining any easements deemed necessary by PSE will be the City’s responsibility.”

18. Despite PSE’s refusal to continue engineering work without a promise by the City to fund PSE’s property acquisitions, the City will not sign Mr. Thwing’s “engineering agreement” or PSE’s underground conversion agreement absent a WUTC order that Schedule 71 somehow obligates the City to pay for PSE’s acquisitions of private property rights outside of right of way.

19. The City is not aware of any legal basis upon which it could spend public tax dollars to reimburse PSE for the costs of PSE's private property acquisitions—acquisitions that benefit PSE and its shareholders. Indeed, the contractual obligations requested of the City by PSE are directly at odds with the plain language of Section 4 of Schedule 71 of PSE's Electric Tariff G.

20. The City's Pacific Highway Project is clearly impacted by PSE's refusal to move forward without a contractual promise by the City to pay for PSE's property acquisitions. Accordingly, the City requests that the WUTC issue a declaratory order answering the following question: Does Section 4 of Schedule 71 of Electric Tariff G, or any other rate or tariff, obligate the City of Kent to spend public tax dollars to reimburse PSE for PSE's corporate acquisitions of private property or property rights?

Costs of future—and presently unknown—electric facility relocations

21. PSE has also included within its requested underground conversion agreement many other provisions with which the City cannot agree. The City remains hopeful, however, that these other issues can be resolved without further WUTC or court intervention once the issue set forth above is resolved. Nonetheless, the City finds it important to resolve one additional issue.

22. The underground conversion agreement referenced in Schedule 71 is required to be “consistent with this Schedule... .” Schedule 71 pertains only to “conversions to underground service.” PSE, however, is insistent that the City also bind itself contractually—in the underground conversion agreement—to pay for 100% of any *future* relocation of facilities installed within right of way on the Project. See Exhibit C, Section 1.e. The City cannot agree to this provision.

23. The PSE Franchise provides in Section 6 that when a public works improvement necessitates relocation of facilities within the Franchise Area, PSE shall

relocate such facilities at no charge to the City. The PSE Franchise does not expire until 2018.

24. The City does not presently anticipate any future facility relocations being necessary within the Project area once the Project is completed. Still, the City believes PSE is attempting to circumvent its contractual obligations in the existing franchise by refusing to sign an underground conversion agreement without the foregoing provision. Again, it appears the Pacific Highway Project is being held hostage. Accordingly, the City requests that the WUTC issue a declaratory order ruling that neither Schedule 71 of Electric Tariff G, nor any other rate or tariff, requires the City to enter into an agreement regarding allocation of costs of hypothetical future electric facility relocations. The City believes that cost allocations should be decided in accordance with whatever franchise and tariffs are in effect at the time, if ever, that such a relocation becomes necessary.

WHEREFORE, pursuant to RCW 34.05.240 and WAC 480-09-230, and in order to resolve the existing controversy that is delaying the City of Kent's Pacific Highway Project, the City respectfully requests the following relief:

1) A declaratory order that neither Schedule 71 of Electric Tariff G, nor any other rate or tariff on file with the Commission, obligates the City of Kent to reimburse Puget Sound Energy, Inc., for PSE's acquisitions of private property or property rights.

2) A declaratory order that neither Schedule 71 of Electric Tariff G, nor any other rate or tariff on file with the Commission, requires the City, as part of an underground conversion agreement contemplated by Schedule 71, to obligate itself as to allocation of costs of hypothetical future electric facility relocations within the Project Area.

Dated this _____ day of May 2001.

MICHAEL L. CHARNESKI,
ATTORNEY AT LAW

Michael L. Charneski, WSBA #15735
Attorney for City of Kent

Certificate of Service

I hereby certify that I have this day served this document, by mail, first class postage prepaid, as authorized by WAC 480-09-120 (2)(b), upon the following:

James W. Eldredge
Puget Sound Energy, Inc.
One Bellevue Center
Bellevue, WA 98004-5584

Carol J. Washburn, Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive
Olympia, WA 98504-7250

Dated this _____ day of May, 2001.

Michael L. Charneski