

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of  
PUGET SOUND ENERGY,  
for a Declaratory Order Regarding a Grant of  
License to use Property for Recreational  
Purposes.

DOCKET U-180068  
  
COMMISSION STAFF'S  
STATEMENT OF FACT AND LAW  
IN RESPONSE TO PETITION

**I. INTRODUCTION**

1 Commission Staff (Staff) of the Washington Utilities and Transportation  
Commission (Commission) submits this Statement of Fact and Law in Response to Puget  
Sound Energy, Inc.'s (PSE or the Company) Petition pursuant to WAC 480-07-370(4),  
WAC 480-07-930(3), and the Commission's January 30, 2018 Notice of Opportunity to  
Submit Statements of Fact and Law in this docket.

2 On January 19, 2018, PSE filed a Petition for Declaratory Order, stating its request  
for the Commission to issue an order declaring that 1) PSE may grant a license for use of  
PSE land for public recreation, and 2) no accounting treatment is necessary because PSE is  
not transferring any interest in real property.

**II. BACKGROUND**

3 PSE owns approximately 14 miles of right of way corridor in King County known as  
the Interurban South Link 115-kV right of way. It also owns other rights of way in King  
County.<sup>1</sup>

4 Electrical transmission lines and related facilities exist on these properties.<sup>2</sup>

---

<sup>1</sup> Declaration of Joel Schleppe at 1-2, ¶ 4.

<sup>2</sup> *Id.* at 3, ¶ 7.

5 King County requested that PSE permit recreational use of these rights of way.<sup>3</sup>

6 PSE wants to grant a license to the King County Department of Natural Resources  
and Parks, permitting the public to use these rights of way for recreational use.<sup>4</sup>

7 The public recreational use will be subordinate to PSE’s operational requirements  
and will not interfere with or encumber PSE’s ability to conduct its activities in these rights  
of way.<sup>5</sup>

8 PSE will not charge a fee for the public recreational use of its property.<sup>6</sup> PSE will not  
receive any financial gain or incur any financial loss as a result of granting the license  
allowing public recreational use of its rights of way.<sup>7</sup>

9 PSE plans to use and maintain the protection from liability provided by statute in  
RCW 4.24.200 and RCW 4.24.210, which applies to situations where private landowners  
permit public recreational use of their property.<sup>8</sup>

### III. STATEMENT OF LAW

10 A company “may petition the commission for a declaratory order with respect to the  
applicability to specified circumstances of a rule, order, or statute enforceable by the  
commission, as provided by RCW 34.05.240.”<sup>9</sup> The petitioner must set forth the facts and  
reasons on which it relies to show: “(a) That uncertainty necessitating resolution exists; (b)  
That there is actual controversy arising from the uncertainty . . . ; (c) That the uncertainty  
adversely affects the petitioner; (d) That the adverse effect of uncertainty on the petitioner  
outweighs any adverse effects on others or on the general public . . . ; and (e) That the

---

<sup>3</sup> Petition of PSE at 2, ¶ 4.

<sup>4</sup> *Id.*

<sup>5</sup> *See* Declaration of Joel Schleppe at 3, ¶ 7.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *See* Petition of PSE at 3, ¶ 6.

<sup>9</sup> WAC 480-07-930(1).

petition complies with any additional requirements established by the agency. . . .”<sup>10</sup>

11 PSE’s request respects the applicability of RCW 80.12.020 and WAC 480-143-120

to the specific circumstances presented in its petition, enumerated in Section II., above.

RCW 80.12.020 states:

No public service company shall sell, lease, assign or otherwise dispose of the whole or any part of its franchises, properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public, and no public service company shall, by any means whatsoever, directly or indirectly, merge or consolidate any of its franchises, properties or facilities with any other public service company, without having secured from the commission an order authorizing it to do so. The commission shall not approve any transaction under this section that would result in a person, directly or indirectly, acquiring a controlling interest in a gas or electrical company without a finding that the transaction would provide a net benefit to the customers of the company.

WAC 480-143-120 states that “a public service company may not complete a transfer of property necessary or useful to perform its public duties unless the company first applies for, and obtains, commission approval.” The rule goes on to explain that “transfers include sale, lease, assignment of all or part of a public service company’s property, and merger or consolidation of a public service company’s property with another public service company.”

#### **IV. LEGAL ARGUMENT**

12 The specified circumstances presented by PSE in its Petition for Declaratory Order raise two legal questions. First, does the license that PSE intends to grant King County constitute a transfer, sale, lease, assignment, or other disposal of property, which are necessary or useful in the performance of its duties, such that the transfer requires ratemaking treatment? Second, what would be PSE’s liability for any injury suffered by a member of the public while present on PSE’s property? The second question is relevant for the Commission’s consideration of the public interest and potential impacts on the

---

<sup>10</sup> RCW 34.05.240(1).

ratepayers of the Company.

**A. Is this License Covered by RCW 80.12.020 or WAC 480-143-120, such that it Deserves Ratemaking Treatment?**

13 Statute and rule require that PSE obtain the Commission's approval prior to transferring, selling, leasing, assigning, or otherwise disposing of property that is necessary or useful in the performance of its duties.<sup>11</sup> However, this license is not a transfer, sale, lease, assignment, or other disposal of property. Staff does not believe ratemaking treatment is appropriate since, in addition to this license not being a transfer of property, there is no financial gain or loss to the Company or its ratepayers.

14 A license is distinguishable from a transfer, sale, or the conveyance of other interests in property like an easement or a lease. "A license authorizes the doing of some act or series of acts on the land of another without passing an estate in the land and justifies the doing of an act or acts which would otherwise be a trespass."<sup>12</sup> It is a privilege, revocable, non-assignable, created by the consent of the licensor, and does not exclude possession by the licensor.<sup>13</sup> On the other hand, leases and easements, as two examples, convey a property interest: a lease gives an interest and estate in property and permits exclusive possession of the property that can exclude even the owner;<sup>14</sup> and, an easement is a property right to use another's land and is an encumbrance upon real estate.<sup>15</sup>

15 Secondly, the property to be transferred, sold, leased, assigned, or other disposed of be necessary or useful to PSE in order for it to perform its public duties.<sup>16</sup> This question is

---

<sup>11</sup> RCW 80.12.020; WAC 480-143-120.

<sup>12</sup> *Conaway v. Time Oil Co.*, 34 Wn.2d 884, 893, 210 P.2d 1012, 1017 (1949). This definition is consistent with the definition found in Black's Law Dictionary. See LICENSE, Black's Law Dictionary (10th ed. 2014).

<sup>13</sup> *Proctor v. Huntington*, 146 Wn. App. 836, 852, 192 P.3d 958, 967 (Div. 2, 2008); *Showalter v. City of Cheney*, 118 Wn. App. 543, 548, 76 P.3d 782, 785 (Div. 3, 2003).

<sup>14</sup> *Conaway v. Time Oil Co.*, 34 Wn.2d at 893.

<sup>15</sup> *Proctor v. Huntington*, 146 Wn. App. 852-53.

<sup>16</sup> See RCW 80.12.020; WAC 480-143-120.

only reached *after* it is determined that there is a transfer, sale, lease, assignment, or other disposal of the property. It is, therefore, unnecessary for the Commission to go into this inquiry if it determines that the license is not covered by RCW 80.12.020 or WAC 480-143-120. Staff provides its analysis for completeness.

16           The properties that are necessary and useful to PSE for the providing of its duties to the public are its transmission lines and related facilities, which exist on these rights of way. The property, itself, is necessary and useful to the extent that it holds these transmission lines and related facilities. Any license that allows public recreational use of the property on which PSE's transmission lines and related facilities exists must not affect PSE's ability to operate its transmission lines. PSE has confirmed that this will be the case, here, stating that it will continue to operate its transmission lines and related facilities exactly as before. Mr. Joel Schleppe, on behalf of PSE, declares that "the public's use of the property for recreational purposes" will be "on terms that at all times provide that recreational use is subordinate to utility operational requirements."<sup>17</sup>

17           Staff believes an accounting petition is unnecessary because PSE is not transferring any property as covered under RCW 80.12.020 or WAC 480-143-120. In this Petition for Declaratory Order, PSE indicates no transfer of property and, instead, indicates a license that will be granted free of charge. A sale or transfer of property (property that was previously included in the utility's rate base) would entitle ratepayers to any gain on the sale. But there is no monetary value gained or lost by the Company or its ratepayers in this case.

18           In its Petition for Declaratory Order, PSE referred to a prior instance from 2002, when "Staff recommended that PSE's proposed transfer be treated as a sale for rate

---

<sup>17</sup> Declaration of Joel Schleppe at 3, ¶ 7.

purposes, rather than a donation, with the net gain based on fair market value of the property being transferred. In light of staff's proposed accounting treatment of the gift, PSE ultimately declined to make the donation to the State."<sup>18</sup> Those specified circumstances were different than the current circumstances and Staff strictly distinguishes them. There, PSE was transferring ownership of property, "giving fee title to the real property," to another party.<sup>19</sup> As a transfer of property, RCW 80.12.020 and WAC 480-143-120 applied and Staff determined that ratemaking treatment was appropriate.

19           Here, there is no transfer of utility property. As long as the license is revocable and does not convey an interest in the property or otherwise obstruct PSE's use of the property, this license allowing public recreational use of the rights of way is not a transfer of property under WAC 480-143-120, or a sale, lease, assignment, or other disposal of property under RCW 80.12.020. As such, Staff does not believe ratemaking treatment is appropriate because there is no financial gain or loss to the Company or its ratepayers.

**B.     What Protection from Liability for Injuries on the Premises Exists for PSE?**

20           Staff is concerned, however, whether there could be financial loss to the Company and its ratepayers should PSE be held liable for any injuries suffered while on the premises for which it is granting a license for public recreation.

21           The Commission regulates "the rates, services, facilities, and practices of" PSE in the public interest.<sup>20</sup> PSE's liability for injuries suffered while on its land is of public interest. The Legislature passed a statute to limit the premises liability of private landowners who open their land to public recreational use.<sup>21</sup> This limits the concern for PSE's liability.

---

<sup>18</sup> Declaration of Schleppe at 2, ¶ 5.

<sup>19</sup> *Id.*

<sup>20</sup> RCW 80.01.040(3).

<sup>21</sup> *See* RCW 4.24.200; RCW 4.24.210.

22

RCW 4.24.200 and RCW 4.24.210 are intended

to encourage owners or others in lawful possession and control of land and water areas or channels to make them available to the public for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.<sup>22</sup>

RCW 4.24.210(1) provides that “any public or private landowners . . . who allow members of the public to use [their lands] for the purposes of outdoor recreation . . . without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.”

23

The immunity granted by this statute is not without limitation.<sup>23</sup> A landowner remains liable for injuries to a user (1) when a fee of any kind is charged for use of the land, (2) that are intentionally inflicted, or (3) sustained “by reason of a known dangerous artificial latent condition for which warning signs [were] not been conspicuously posted.”<sup>24</sup>

24

Staff believes that PSE must be responsible for maintaining its protection from liability by complying with the conditions in RCW 4.24.210, and should consider this in any license that issues. The last of the above conditions is worthy of explanation. For the landowner to be liable for injuries suffered, the condition must be known, dangerous, artificial, and latent for the condition to result in the landowner’s liability.<sup>25</sup> The latency of a condition is the most relevant of the factors to explore in the current circumstance. “An injury-causing condition is ‘latent’ if it is ‘not readily apparent to the recreational user.’ The condition itself, not the danger it poses, must be latent. The dispositive question is whether the condition is readily apparent to the general class of recreational users, not whether one

---

<sup>22</sup> RCW 4.24.200.

<sup>23</sup> See *Davis v. State*, 144 Wn.2d 612, 616, 30 P.3d 460, 462 (2001).

<sup>24</sup> RCW 4.24.210(4)(a); *Davis v. State*, 144 Wn.2d at 616.

<sup>25</sup> See *Jewels v. City of Bellingham*, 183 Wn.2d 388, 396-97, 353 P.3d 204, 208 (2015).

user might fail to discover it.”<sup>26</sup> “This is an objective inquiry.”<sup>27</sup>

25           Transmission lines and related facilities are known to exist on the rights of way that PSE proposes to grant a license for public recreational use. Transmission lines carry dangerous amounts of electricity. They are artificial. But it is unlikely that they are latent. Making an objective inquiry, overhead transmission lines and related facilities are likely apparent to recreational users, but, especially for any type of transmission line that is not readily apparent, this is an inquiry best resolved by the Company because it has the most familiarity with its own property and may be best situated to determine whether any condition necessitates a warning sign in order to preserve the Company’s protection under statute.

26           Staff believes that certain outdoor recreational uses are compatible with transmission corridors and, informed by the Legislature’s judgment in RCW 4.24.200, that this is a case where it is in the public interest to provide access to additional recreation opportunities because these opportunities do not interfere with utility needs and obligations. Staff notes that there are outdoor recreational activities that would be inappropriate in these corridors, including for example: any type of gliding or flying; kite-flying; hunting; or any kind of outdoor recreational activity that would be considered dangerous to, or because of, the presence of electrical transmission lines and related facilities.

27           Staff believes that there must be protection from premises liability in order to protect the interests of PSE and its ratepayers. RCW 4.24.210 grants such protection as long as PSE continues to meet the statute’s conditions. This is the Company’s responsibility. Staff believes that PSE’s proposed license to allow public recreational use on its property should

---

<sup>26</sup> *Id.* at 398 (internal citations omitted).

<sup>27</sup> *Id.*



be subject to the continuation of the statutory protection provided by RCW 4.24.210. PSE must be responsible for tracking and responding to any change in statute, law, or circumstance that would affect its liability. Staff believes that PSE is aware of these factors and has addressed them in its Petition and Declaration.<sup>28</sup>

## V. RECOMMENDATION

28 Declaratory orders address the application of a Commission-enforced statute or rule to specified circumstances. Here, PSE has provided specific circumstances. Staff believes that the Commission should address the specified circumstances of this case, but need not opine on possible future circumstances that deviate from the circumstances presented here.

29 Staff believes that accounting treatment is not necessary for this license presented by PSE, where it proposes granting a license free of charge, that does not convey any interest in real property, that allows the public to use its property for recreational purposes, and that these uses are subordinate to and will not interfere with its duties as a utility. Accounting treatment would be inappropriate because the license proposed by PSE does not convey any financial gain or loss to PSE or its ratepayers. Staff notes that its position would need to be reevaluated if there were financial gain or loss to PSE or its ratepayers.

30 Additionally, Staff believes that the license proposed by PSE in this specific circumstance does not meet the standard for a transfer, sale, lease, assignment, or other disposal of utility property under RCW 80.12.020 or WAC 480-143-120. A license is importantly distinguished in these circumstances because it does not convey any interest in real property and the landowner's (PSE) rights to enter upon and use the property and its transmission facilities thereon remain unchanged.

---

<sup>28</sup> See, e.g., Petition of PSE at 3, ¶ 6.

31           The Commission continues to have jurisdiction to ensure that PSE’s facilities and practices are in the public interest. Staff does not believe that the Commission is limited simply because the license, under the circumstances presented, is not covered as a transfer of property under RCW 80.12.020 or WAC 480-143-120. Regardless of the instrument used by PSE to permit public recreational use of its property, the Commission retains jurisdiction to regulate PSE’s rates, services, facilities, and practices in the public interest.<sup>29</sup>

32           Staff believes it is important that any declaratory order issued by the Commission specify the relevant conditions and circumstances under which the Commission makes its decision. PSE has already provided the factual bases of these circumstances. The license in this case will not convey any interest in real property. The license will not interfere with PSE’s use of and access to the facilities used for the provision of service to its customers. There will be no financial gain or loss from the granting of the license. There will be protection from premises liability in order to protect the interest of PSE and its ratepayers. PSE will be responsible in retaining this protection from liability.

33           If circumstances arise outside the bounds of any declaratory order that the Commission issues, PSE should seek Commission guidance regarding applicability of Commission laws to the new circumstances, whether through another petition for declaratory order or through another process.

## **VI. CONCLUSION**

Commission Staff does not oppose the Commission issuing a declaratory order with respect to the applicability of RCW 80.12.020 and WAC 480-143-120 to the circumstances specified by PSE in its Petition, which would declare that: 1) PSE may grant a license for

---

<sup>29</sup> RCW 80.01.040(3).

use of PSE land for public recreation, subject to conditions; and 2) no accounting treatment is necessary in the specified circumstances.

DATED this 9th day of February 2018.

Respectfully submitted,

ROBERT W. FERGUSON  
Attorney General

*/s/ Andrew J. O'Connell*, WSBA No. 45887  
Assistant Attorney General  
Office of the Attorney General  
Utilities and Transportation Division  
P.O. Box 40128, Olympia, WA 98504-0128  
(360) 664-1192  
[aoconnel@utc.wa.gov](mailto:aoconnel@utc.wa.gov)