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BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of,

PUGET SOUND ENERGY, INC.

For a Declaratory Order on Schedule 74
and the Schedule 74 Design Agreement
between Puget Sound Energy, Inc. and the
City of Tumwater.

No. UE-061626

PUGET SOUND ENERGY, INC.'S
MOTION FOR SUMMARY
DETERMINATION

PSE'S MOTION FOR SUMMARY
DETERMINATION

LEGAL13050663.1

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I. OVERVIEW AND RELIEF REQUESTED

This case is about the cost of converting overhead electrical facilities to underground electrical facilities and the Washington Utilities and Transportation Commission's ("WUTC" or "Commission") interpretation of Schedule 74 when the electrical facilities to be moved are located on a private easement that is owned by a public utility.¹

Schedule 74 and the Commission's prior decision in *City of Kent v. Puget Sound Energy, Inc.*, No. UE-010778 and UE-010911, 2002 Wash. UTC LEXIS 4 (Wash. Util. and Transp. Comm'n Jan. 28, 2002) ("*City of Kent*"), provide that, when Puget Sound Energy, Inc. ("PSE") is asked by a governmental entity to convert overhead electrical facilities to underground facilities on land where PSE owns an easement, the governmental entity must pay 100% of the underground conversion costs.² Moreover, between April 2003 and September 2005, the City of Tumwater ("City"), in connection with its Tumwater Boulevard widening project ("Tumwater Project"), agreed to pay PSE 100% of the underground conversion costs because the electrical facilities at issue are located on a PSE easement and because Schedule 74 allocates 100% of the underground conversion costs to the City.

¹ The term "overhead electrical facilities" means PSE transmission and/or distribution equipment that consists of poles, cross arms, aerial wires and other attachments, that are physically located above ground. The term "underground electrical facilities" means PSE transmission and/or distribution equipment that consists of buried wires, below ground or semi-buried vaults with flush-mount lids and/or pad-mounted cabinets and other attachments, and thus are physically located at ground level. The term "underground conversion" means the placement of an overhead electrical facility below ground so that it becomes an underground electrical facility. The process of underground conversion is subject to regulation by the WUTC under Tariff WN U-60, Electric Tariff G, Schedules 73 and 74. The parties agree that this dispute over underground conversion costs is governed by WUTC Schedule 74. See February 7, 2007, Deposition of City of Tumwater Director of Public Works, Jay Eaton ("Eaton Dep.") at 92:15-25, 108:6-21, 112:23-113:15, attached as Exhibit A to the Declaration of James Williams ("Williams Decl.").

² The cited decision is the "Third Supplemental Order" in the matter; it was modified but not in any relevant part by the Fourth Supplemental Order in April, 2002.

1 But, on September 20, 2005, the former City Attorney had a change of heart about
2 paying 100% of the underground conversion costs and—for the first time—argued that a
3 franchise agreement the City entered into with PSE *after* the easement somehow supersedes
4 PSE's easement and requires PSE to pay 60% of the underground conversion costs. PSE
5 respectfully disagrees and urges the Commission to find that: (1) the PSE easement is a
6 preexisting and duly recorded property right that cannot be extinguished, altered or
7 superseded by contract; (2) Schedule 74 and the *City of Kent* decision recognize the PSE
8 easement as a property right that requires the City to pay 100% of the Tumwater Project's
9 underground conversion costs; and (3) the City is bound by Schedule 74, the *City of Kent*
10 decision and the City's own party admissions where it concedes owing PSE for 100% of the
11 underground conversion costs associated with the Tumwater Project.
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22 II. BACKGROUND

23 A. PSE's Right to Operate Electrical Equipment

24 To place, maintain, and operate electrical facilities, PSE must acquire rights from the
25 entity that owns or controls such property. These rights are most commonly obtained in the
26 form of an easement or a franchise.³ Declaration of Steve Botts ("Botts Decl.") ¶¶ 1-6. The
27 decision whether to obtain an easement or a franchise is determined by the value of the
28 facilities being placed by PSE, the likelihood that those facilities will need to be moved, and
29 the resulting cost associated with moving those facilities. *Id.* ¶ 7. Where the electrical
30 facilities are significant and PSE is concerned about the cost of moving them, PSE is more
31 likely to obtain an easement because it gives PSE greater control of the land where the
32 facilities are located. *Id.* Indeed, the Commission has endorsed PSE's "cost-based"
33 easement rationale in the past. *City of Kent* at *22-23 & n.6.
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46 ³ A very few are obtained by permit or other instrument.
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1 **1. Easements - Generally**

2 An easement is a conveyance of an interest in land, and must be made by deed.
3
4 RCW 64.04.010; *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). "Easements
5 established by a dedication are property rights that cannot be extinguished or altered without
6 the approval of the easement owner or owners, unless the plat or other document creating
7 the dedicated easement provides for an alternative method or methods to extinguish or alter
8 the easement." RCW 64.04.175.
9

10 While easement language may differ, the easements PSE enters into with
11 municipalities generally provide PSE with the right to access, construct, operate, maintain,
12 repair, replace, and enlarge its electrical facilities. In addition to new construction
13 installation, easements govern relocation and/or conversion projects. Declaration of Amy
14 Tousley ("Tousley Decl.") ¶¶ 1-4. PSE currently has approximately 150,000 recorded
15 easements, a significant number of which are from governmental entities. Although not all
16 of these easements were paid for by PSE, they have a known and measurable monetary
17 value. For example, PSE has received compensation for releasing easements from both
18 private and public property owners. *Botts Decl.* ¶¶ 8-9.
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32 **2. Franchises - Generally**

33 A franchise "means the right granted by the state or a municipality to an existing
34 corporation or to an individual to do certain things which a corporation or individual
35 otherwise cannot do," such as the right to erect telephone or electric poles on a street.
36 *Wash. Water Power Co. v. Rooney*, 3 Wn.2d 642, 649, 101 P.2d 580 (1940) (quoting Eugene
37 McQuillin, *The Law of Municipal Corporations* § 1740 (2d ed.)). A franchise is a
38 contractual relationship between the governmental entity and the public utility. *See City of*
39 *Kent* at *10. PSE currently maintains approximately 180 franchises with various
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1 governmental entities. When PSE enters into a franchise relationship with a governmental
2 entity, that franchise may authorize PSE to place and service electrical equipment. Tousley
3 Decl. ¶¶ 4-5.
4
5

6
7 Where there is no operating right other than a franchise agreement, PSE agrees that it
8 is obligated as a matter of common law and contract to relocate existing overhead electrical
9 facilities to new overhead locations to accommodate municipal purposes at PSE's expense.
10
11 *See City of Kent* at *10. Although PSE generally bears the cost of relocating its electrical
12 facilities under a franchise, a franchise agreement may also limit the municipality's ability to
13 require PSE to relocate its facilities at PSE's expense, so that, for example, PSE is only
14 required to bear such relocation costs once every five years.⁴ Tousley Decl. ¶ 5.
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21 **B. PSE'S Easement Operating Rights on the Tumwater Project Area**

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23 In 1981, PSE obtained an easement from the Port of Olympia ("Port") that covers the
24 entire Tumwater Project area. *See City of Tumwater v. PSE* Complaint, Exhibit E, attached
25 as Exhibit B to the Williams Decl. ("City Complaint"). The Port granted, conveyed and
26 warranted to PSE a 10-foot-wide perpetual easement for the construction, operation,
27 maintenance, repair, replacement and enlargement of electrical facilities ("PSE Easement").
28
29 The PSE Easement provides for termination only in the event PSE ceases to use the PSE
30 Easement area and certain abandonment criteria are met. The PSE Easement also provides
31 that the rights and obligations of the parties under the PSE Easement are binding upon their
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42 ⁴ Relocation of electrical facilities is different from underground conversion and is not
43 governed by Schedule 74. Generally, franchise agreements only govern costs associated with the
44 relocation of electrical facilities, while an easement governs both relocation and underground
45 conversion. Tousley Decl. ¶¶ 4-6. Relocation means moving electrical facilities from one location
46 to another location. *See City of Kent* at *9-10. Relocation was also requested by the City in this
47 case, but those costs are the subject of a separate relocation agreement that is not at issue in this
WUTC litigation. *See Eaton Dep.* at 125:20-25, 126:1-21.

1 respective successors and assigns. The PSE Easement was recorded in Thurston County on
2
3 or about December 8, 1981. Botts Decl. ¶ 10.

4
5 On or about June 15, 1985, the City granted to PSE a franchise to, among other
6
7 things, construct, operate, repair, and maintain electrical facilities within the rights of way
8
9 and other public places of the City as then-existing or subsequently extended (the
10
11 "Franchise"). See City Complaint, Exhibit A. The Franchise did not alter or extinguish any
12
13 of PSE's other property rights. Approximately two years later, the Port transferred to the
14
15 City by dedication deed certain property, including the property within the area covered by
16
17 the PSE Easement. See City Complaint, Exhibit D (dedication deed referring to Airdustrial
18
19 Way a/k/a Tumwater Boulevard). At that time, the PSE Easement had been duly recorded
20
21 for more than five years and was recognized by the City as an existing encumbrance to the
22
23 property. See Eaton Dep. at 24:1-24, 25:22-26:14 (stating that Mr. Eaton speaks for the
24
25 City), 90:5-19 (recognizing that the PSE Easement gave PSE rights that preexisted the Port's
26
27 transfer to the City).

28
29 **C. The WUTC's Allocation of Costs to Convert Overhead Electrical Facilities to**
30 **Underground Electrical Facilities in Schedules 71 and 74**

31
32 Underground conversion of PSE's overhead electrical facilities is a highly desirable
33
34 but expensive undertaking that requires a uniform approach to cost allocation. See *City of*
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36 *Kent* at *11 (distinguishing relocation of overhead electrical facilities to another overhead
37
38 location versus the "more involved and costly undertaking" of underground conversion). It
39
40 is for that reason that the WUTC promulgated schedules addressing the cost allocation issue
41
42 in connection with PSE's 2001 General Rate Case ("GRC"). During the GRC, cities within
43
44 PSE's service area complained about the cost of underground conversion and the perceived
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47

1 unevenness of cost allocations.⁵ Those cities intervened in PSE's GRC and the end result
2
3 was a compromise on the cost of underground conversion in the form of Schedule 74.

4
5 Declaration of Barry Lombard ("Lombard Decl.") ¶ 5.
6

7 Thus, at the conclusion of the GRC in 2002, Schedule 74 replaced former
8
9 Schedule 71 and set forth the agreed-upon terms and procedures under which PSE would
10
11 convert overhead electrical facilities to underground electrical facilities at the request of
12
13 governmental entities. *See* Declaration of Kirstin S. Dodge in Support of Motion to Stay
14
15 Proceedings ("Dodge Decl.") ¶¶ 1-6. Schedule 74 was developed to settle ongoing disputes
16
17 and litigation between PSE and several cities regarding PSE's underground conversion of
18
19 electrical facilities. The WUTC Staff participated in the collaborative negotiations leading
20
21 to development of the agreed Schedule 74 and was a party to the settlement approved by the
22
23 WUTC. *Id.* ¶¶ 7-9.
24

25 Schedule 74 specifically applies to underground conversion projects for
26
27 governmental entities and it allocates costs as follows:
28

29 b. The Design Agreement and the Construction
30 Agreement shall:

31 (1) except as otherwise provided in Section 2.b(2), obligate the
32 Government Entity to pay the Company 40% of the total Cost
33 of Conversion and the Company to pay 60% of the total Cost
34 of Conversion;

35 (2) obligate the Government Entity to pay (i) 100% of the total
36 Cost of Conversion for conversion of that portion, if any, of
37 the existing overhead distribution system located, as of the
38 date on which the Government Entity provides the notice
39 referred to in Section 4.a or the date on which the Government
40 Entity commences acquisition or condemnation of real
41 property to facilitate construction of any public improvements
42 related to the conversion project, whichever occurs first,
43 (A) outside of the Public Thoroughfare or (B) pursuant to
44

45
46 ⁵ The cities were Auburn, Bellevue, Bremerton, Burien, Maple Valley, Kent, Des Moines,
47 Federal Way, Redmond, Renton, SeaTac, and Tukwila.

1 rights not derived from a franchise previously granted by the
2 Government Entity or pursuant to rights not otherwise
3 previously granted by the Government Entity

4 Schedule 74(2)(b)(1) & (2); Lombard Decl. ¶ 6 and Exhibit 1.
5

6 Thus, Schedule 74, Section 2.b(2), provides that a city must pay 100% of the costs to
7 convert electrical facilities if the facilities are located on property where PSE has rights that
8 are not derived from a franchise or rights not otherwise previously granted. *See also City of*
9 *Kent* at 12 (requiring the City of Federal Way to pay 100% of the underground conversion
10 costs where the electrical facilities were located on PSE easements). In this case, the
11 preexisting PSE Easement meets both of those criteria.
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18 **III. SEQUENCE OF EVENTS LEADING TO THE UNDERGROUND**
19 **CONVERSION COST DISPUTE**
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21 **A. April 2003–September 2005: The City Agrees that the PSE Easement Requires**
22 **It to Pay 100% of the Underground Conversion Costs**
23

24 PSE and the City began discussions regarding the expansion of Tumwater Boulevard
25 (formerly known as Airdustrial Way) in early 2003. On January 13, 2003, James
26 Shoopman, the City's Design/Construction Manager, requested that PSE enter into a design
27 contract with the City in order to convert PSE's overhead system to an underground system.
28 Lombard Decl. ¶ 7 and Exhibit 2.
29
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34 On April 16, 2003, PSE notified the City by letter that it had completed its rights
35 review on the Tumwater Project. Eaton Dep. at 87:9-18 & Exhibit 8. PSE determined that
36 it has private easement rights that cover all the PSE electrical facilities located in the
37 Tumwater Project area and that the City must pay 100% of the underground conversion
38 costs:
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44 Because the PSE easement pre-dates the City's right-of-way,
45 PSE has superior rights in this area. Therefore, all of the costs
46
47

1 for converting or relocating PSE facilities located within our
2 easement area are reimbursable by the City.

3
4 Letter from Barry Lombard, PSE, to Jay Eaton, City of Tumwater (Apr. 16, 2003).

5
6 On April 29, 2003, PSE followed up this letter with a copy of the PSE Easement.
7
8 Lombard Decl. ¶ 8 and Exhibit 3.

9
10 The City's spokesperson on easements and the underground conversion cost issue,
11 Jay Eaton, immediately understood the significance of the PSE Easement in April 2003.
12
13 Specifically, he believed that it "gave PSE a right that was in effect prior to the dedication
14 by the Port of Olympia to the city" and in his opinion "PSE had rights that were granted to
15 them that would have changed the [60%-40%] cost sharing arrangement" under
16
17 Schedule 74. *See* Eaton Dep. at 90:5-19.
18
19

20
21 Mr. Eaton confirmed that the City had the opportunity to review PSE's rights review
22 determination and the easement under which PSE asserted that the City must pay 100% of
23 the underground conversion costs. To his knowledge, no one within the City challenged
24 PSE's view at that time or any other time for almost two and a half years. *See* Eaton Dep. at
25 108:5-119:23. Indeed, the City Public Works Committee, which is composed of the Mayor
26 Pro Tem and two other members of City Council, shared Mr. Eaton's view and stated on
27 multiple occasions that the PSE Easement triggers that portion of Schedule 74 that requires
28 the City to pay 100% of the underground conversion costs:
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38 There is no cost sharing for the work on this project because
39 the facilities are in a utility easement that predates the city's
40 right-of-way ownership. The city will be required to pay all
41 costs for relocating and/or converting PSE's electrical facilities
42 from overhead to underground.

43
44 Eaton Dep. at 108:5-25, 110:10-21, 112:23-113:25, 116:13-117:25 & Exhibit 11 (quoting
45 April 20, 2004, memorandum from the City's Public Works Committee to City Council).
46
47

1 Moreover, the Mayor and former City Attorney were aware of the underground
2 conversion issue and, as of April 2004, fully agreed to move forward with PSE's contracts
3 that required the City to pay 100% of the cost. *See* Eaton Dep. at 121:1-122:3 & Exhibits
4 11-13 (illustrating the Mayor and City Attorney's signatures approving of the Schedule 74
5 underground conversion design agreement and awareness that PSE's easement required the
6 City to pay 100% of the underground conversion and relocation costs). Consistent with the
7 City's independent analysis, on July 13, 2004, the City issued a Notice to Proceed with the
8 design portion of the underground conversion project, which called for the City to pay 100%
9 of the costs. Eaton Dep. at 124:12-24, 125:16-19 & Exhibit 15.

10
11 On September 9, 2005, in a memorandum between the Department of Public Works
12 and the Public Works Committee, the City's representatives confirmed their belief that the
13 PSE Easement supersedes the City's Franchise and that the City must pay 100% of the cost
14 for underground conversion pursuant to Schedule 74:
15
16

17 The Schedule 74 Underground Conversion Agreement is
18 required and regulated by the Washington State Utility and
19 Transportation Commission (WSUTC), Tariff 'G'. The
20 existing underground portion of the facilities (and the
21 overhead portion, if not converted) are not included in the
22 Schedule 74 agreement and are typically relocated as part of
23 the utility's Franchise Agreement. Typically, facilities
24 relocated to accommodate the city's improvements in the
25 right-of-way are the responsibility of and paid for by the
26 utility, and Schedule 74 conversions have a cost sharing
27 component.

28 Because PSE had an easement over the Port of Olympia
29 property prior to Airdustrial Way being dedicated to the city
30 as public right-of-way, their rights supercede the city's under
31 the Franchise Agreement and WSUTC's Tariff 'G'. The city
32 has to bear the full cost of any relocation of PSE electrical
33 facilities in the Tumwater Boulevard right-of-way.
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1 Eaton Dep. at 142:14, 145:14 & Exhibit 21 (September 9, 2005 memorandum from the
2 Public Works Department to the Public Works Committee and the City Administrator).
3
4 This memorandum was approved, and the Public Works Committee recommended that the
5 City Council authorize the Mayor to sign agreements obligating the City to pay 100% of the
6 underground conversion costs. Eaton Dep. at 148:1–150:25 & Exhibit 22 (Public Works
7 Committee's September 9, 2005, meeting minutes recommending authorization to execute
8 the Schedule 74 Underground Conversion Construction Agreement requiring the City to pay
9 100% of the costs).
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17 **B. The Former City Attorney Changes Her Position on September 20, 2005, and**
18 **Files Suit**

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20 On September 20, 2005, the former City Attorney pulled the Public Works
21 Committee recommendation memorandum from the agenda of the City Council meeting.
22 Eaton Dep. at 151:15–152:21 & Exhibit 23. Then, at a Tumwater Project meeting in
23 October 2005, the City notified PSE for the first time that there was an issue regarding costs
24 of the Tumwater Project, but the City did not provide details. Tousley Decl. ¶¶ 8-9.
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30 To ensure that the Tumwater Project continued to move forward while the dispute
31 over underground conversion costs was litigated, the City and PSE entered into the
32 Reservation of Rights Agreement on February 23, 2006. Eaton Dep. at 163:22–164:18 &
33 Exhibit 25.⁶
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41 ⁶ On April 13, 2006, the City initiated a declaratory judgment action in Thurston County
42 Superior Court and took the position that the Franchise supersedes the PSE Easement under
43 Schedule 74 and requires PSE to pay 60% of the underground conversion costs associated with the
44 Tumwater Project. *See* Eaton Dep. at 157:18–158:16; City Complaint at 1, 3. Shortly thereafter,
45 PSE successfully moved for a stay on the basis that the Commission had primary jurisdiction over
46 the issue of allocation of underground conversion costs under Schedule 74. PSE then filed the
47 Petition for Declaratory Relief.

1 **C. The City's Representatives Continued to Honor PSE's Easement Right**

2 While the City Attorney changed her position on the cost reimbursement issue in
3
4 September 2005, the City's other representatives did not follow her lead. Approximately
5
6 five months later, the City's Public Works Committee submitted another recommendation to
7
8 enter into agreements that would require the City to pay 100% of the underground
9
10 conversion costs based on the existence of the PSE Easement. Eaton Dep. at 155:15-160:10
11
12 & Exhibit 24.
13

14 In addition, while the Tumwater Project was underway, the City moved forward with
15
16 another street construction project involving the same PSE Easement. On December 30,
17
18 2004, PSE and the City entered into a facility relocation agreement to remove certain
19
20 overhead distribution facilities at Henderson Boulevard and Old Highway 99 ("Henderson
21
22 Project"). In that agreement, the City identified the PSE Easement, and not the franchise
23
24 agreement, as the basis of PSE's operating rights. The City also recognized the superior
25
26 right of the PSE Easement and did not hesitate to pay 100% of the relocation costs even after
27
28 the former City Attorney initiated litigation. See Eaton Dep. at 163:22-172:7 & Exhibits
29
30 26-27 (Henderson Project Relocation Agreement based on PSE Easement operating rights
31
32 and paid invoice to PSE for 100% of the related costs); Tousley Decl. ¶ 10.
33

34 **IV. STATEMENT OF ISSUES**

35
36 Does Schedule 74, Section 2.b, require the City to pay 100% of the cost of
37
38 underground conversion on the Tumwater Project area where PSE's electrical facilities are
39
40 located on the PSE Easement?
41

42 **V. EVIDENCE RELIED UPON**

43
44 This motion relies on the declarations of Steve Botts, Kirstin Dodge, Barry Lombard,
45
46 Amy Tousley, James Williams, and the files and records herein.
47

1 **VI. THE LEGAL STANDARD FOR SUMMARY DETERMINATION**

2 RCW 34.05.413 establishes the WUTC's authority to conduct adjudicatory
3 proceedings. RCW 34.05.240 and WAC 480-07-305 establishes the WUTC's authority to
4 enter declaratory orders and establish certain process related to the WUTC's consideration of
5 petitions for relief. *See City of Kent* at *6-7.
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10 WAC 480-07-930 provides that the parties to an adjudication may file motions for
11 summary determination. The requesting party must show that the pleadings filed, together
12 with any admissible evidentiary support, illustrate no genuine issue of material fact and that
13 the moving party is entitled to summary determination in its favor. *Id.* The Commission
14 considers motions for summary determination under the CR 56 standard for summary
15 judgment motions. *Id.* at *7.
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22 Because there are no material factual disputes and PSE is entitled to summary
23 determination on the issue of underground conversion costs, it respectfully brings this
24 motion.
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28 **VII. AUTHORITY AND ARGUMENT**

29 **A. The PSE Easement Is an Existing Property Right that Is Superior to a**
30 **Franchise and Cannot Be Superseded**

31 The Port granted, conveyed, and warranted to PSE the PSE Easement for the
32 construction, operation, maintenance, repair, replacement, and enlargement of electric
33 facilities. The PSE Easement provides that the rights and obligations of the parties are
34 binding on their respective successors and assigns, so that when the Port transferred property
35 to the City that included property subject to the PSE Easement, the PSE Easement was
36 transferred as well. In addition, because the PSE Easement has been recorded since 1981, it
37 was known or should have been known to the City as an existing encumbrance of the
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1 property at the time the Port transferred the property to the City. "When an instrument
2 involving real property is properly recorded, it becomes notice to all the world of its
3 contents." *Strong v. Clark*, 56 Wn.2d 230, 232, 352 P.2d 183 (1960).
4
5

6 As a property right, the PSE Easement exists until such time PSE consents to
7 extinguish or alter the easement right. "Easements established by a dedication are property
8 rights that cannot be extinguished or altered without the approval of the easement owner or
9 owners, unless the plat or other document creating the dedicated easement provides for an
10 alternative method or methods to extinguish or alter the easement." RCW 64.04.175.
11
12

13 The PSE Easement also represents a dominant interest in the land, which cannot be
14 superseded by contract. Franchises are contracts—they do not grant proprietary interest.
15
16 *Gen. Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 584, 716 P.2d 879 (1986); 12 Eugene
17 McQuillin, *The Law of Municipal Corporations* § 34.2 (3d ed. 2006). "There exists a clear
18 distinction between a franchise and an easement. The grant of a franchise does not carry
19 with it an interest in land. It is a privilege which may be granted and acquired without
20 involving the ownership of land. On the other hand, an easement is essentially an interest in
21 land. It is a dominant estate imposed upon a servient estate." *In re Algonquin Gas*
22 *Transmission Co.*, 2 Misc. 2d 997, 157 N.Y.S.2d 748, 750 (1956) (quoting *Texas & Pac. Ry.*
23 *Co. v. City of El Paso*, 126 Tex. 86, 85 S.W.2d 245, 249 (1935)).
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36 In the City Complaint, the City argues that, because the Franchise did not reserve
37 PSE's rights as to the PSE Easement, the Franchise supersedes the PSE Easement. *See*
38 Complaint at 4. However, no such reservation of rights was required. Rather, under
39 Washington law, the Franchise would have to specifically alter or extinguish the PSE
40 Easement in writing in the form of a deed.
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1 Every conveyance of real estate, or any interest therein, and
2 every contract creating or evidencing any encumbrance upon
3 real estate, shall be by deed

4 RCW 64.04.010. And "[e]very deed 'shall be in writing, signed by the party bound thereby,
5 and acknowledged.'" *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995) (quoting
6 RCW 64.04.020). Nothing in the Franchise conveyed PSE's interest in the Tumwater
7 Project area to the City, or altered or extinguished the PSE Easement in any way. The
8 Franchise is simply an agreement between the City and PSE to install, maintain, and operate
9 facilities on City property. Because the PSE Easement is a property right that has been
10 properly recorded and has never been extinguished, altered, or abandoned, the Franchise
11 cannot supersede it.
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21 **B. The WUTC Has Previously Ruled that PSE Easements Are Superior Property**
22 **Rights and Require 100% Payment for Underground Conversion Costs by a**
23 **Requesting Governmental Entity**

24 In *City of Kent*, the Commission faced a variety of issues related to underground
25 conversion costs that were litigated by numerous cities in the context of Schedule 74's
26 predecessor, Schedule 71. *Id.* at *5-7.⁷ Like the City of Tumwater in this case, the cities in
27 the *City of Kent* litigation had PSE franchise agreements and insisted that PSE pay all the
28 costs for underground conversion. *Id.* at *9-10. One of the issues addressed by the
29 Commission was the City of Federal Way's request that PSE convert its overhead facilities
30 to underground facilities at PSE's expense, even though the electrical facilities at issue were
31 located on a PSE easement. *Id.* at *27-28.
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40 In that case, PSE argued that it is not obliged to convert overhead facilities that are
41 located on its private easements to underground facilities and would only do so if the
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46 ⁷ In addition to the City of Kent, the other cities involved in the litigation were Auburn,
47 Bremerton, Des Moines, Federal Way, Lakewood, Redmond, Renton, SeaTac, and Tukwila.

1 requesting party paid 100% of the cost. PSE also argued that, as the owner of easement
2 rights on private property, it has complete control over its facilities within the scope of the
3 easement rights and that a municipality does not have the authority to require PSE to convert
4 its overhead facilities to underground facilities without compensation. *Id.* at *28-29.
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9 The Commission agreed with PSE and found that the City of Federal Way was "not
10 in a position to require any change—relocation or undergrounding—to PSE's existing
11 facilities." *Id.* at *32. The Commission then ruled that, "[s]ince PSE could not be required
12 to relocate the subject facilities, and bear the costs associated with relocation to new
13 overhead facilities, it would not be reasonable to conclude that Schedule 71 requires PSE to
14 bear the costs of relocation to underground facilities." *Id.* Finally, in its conclusions of law,
15 the Commission ruled that "PSE is entitled to recover fully the costs it incurs in connection
16 with the underground relocation of existing overhead electric distribution facilities that are
17 located on private easements." *Id.* at *41-42 (Conclusion of Law #5).
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27 In sum, the Commission has clearly recognized the primacy of PSE's easement rights
28 and has already issued an order in similar litigation that the municipality requesting
29 underground conversion must pay 100% of the cost. As such, the Commission should
30 follow its prior conclusions in this case.
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35 **C. The City Has Consistently Agreed that Schedule 74 Requires that the City Pay**
36 **100% of Conversion Costs Because of the PSE Easement**
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38 As aptly noted in the City's own official records, Schedule 74 requires the City to
39 pay 100% of the underground conversion costs on the Tumwater Project because the
40 electrical facilities are located on the PSE Easement, which is a right not derived from a
41 franchise previously granted by the City or a right not otherwise previously granted by the
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1 City. That position is consistent with the language in Schedule 74, Section 2.b, and with this
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3 Commission's decision in *City of Kent*.

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5 The City's conduct indicates that it also understands that the Franchise is subservient
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7 to the PSE Easement. Indeed, the Director of Public Works, the City Council, the Mayor,
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9 and the former City Attorney all acquiesced in this interpretation on numerous occasions
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11 prior to September 2005. Moreover, the City's conduct in the Henderson Project is further
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13 evidence that the PSE Easement was understood by the City to be a property right that
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15 changed the way costs for relocation and conversion were calculated. There, the City paid
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17 100% of the costs related to the Henderson Project on property that was covered by the *same*
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19 PSE Easement even after the former City Attorney initiated this litigation.

20 21 **VIII. CONCLUSION**

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23 Based on the arguments set forth above, PSE respectfully requests that the
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25 Commission grant its motion for summary determination and issue an order declaring that:

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27 1. Schedule 74 obligates the City to pay 100% of the cost for underground
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29 conversion where the electrical facilities at issue are located on a PSE Easement;

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31 2. The PSE Easement is a preexisting property right that cannot be superseded
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33 by the Franchise; and

