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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

CITY OF SEATAC,

Petitioner,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

Docket No. UE-010891
Consolidated

.....

CITY OF CLYDE HILL,

Petitioner,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

Docket No. UE-011027
Consolidated

MOTION OF CITY OF SEATAC FOR
SUMMARY DETERMINATION

INTRODUCTION

The City of SeaTac (“SeaTac” or “City”) is engaged in Phase II of a street improvement project on South 170th Street from 37th Avenue South to Military Road South (“170th Street Project”). A dispute has arisen between SeaTac and Puget Sound Energy (“PSE”) regarding the

1 applicability of Schedule 70 to the underground conversion. In order to resolve this dispute, the City
2 files this Motion for Summary Determination pursuant to WAC 480-09-426(2). There is no genuine
3 issue as to any material fact, and the City is entitled to judgment as a matter of law. For these
4 reasons, the City respectfully requests that the Commission enter an order of summary determination
5 in its favor declaring that Schedule 70 applies to the 170th Street Project underground conversion.
6

7 **STATEMENT OF FACTS**

8 SeaTac has directed PSE to convert its overhead facilities to underground in the area of the
9 South 170th Street Project (“Conversion Area”), and PSE has agreed to do so. Joint Statement of
10 Issues, Stipulation of Facts, and Stipulated Exhibit List (“Stipulated Fact”), No. 1. On July 11, 2001,
11 SeaTac directed the contractor to proceed with the 170th Street Project, and construction is now
12 underway. Declaration of Tom Gut (“Gut Decl.”), ¶ 3.
13

14 All of the buildings within the Conversion Area are residential dwellings. Stipulated Fact
15 No. 4. An aerial photograph of the Conversion Area shows that the residential area contains houses
16 only and no commercial buildings. Gut Decl., Ex. C. The Conversion Area is zoned “Urban Low
17 Density -- Residential.” Gut Decl., Ex. B. The SeaTac Comprehensive Plan also classifies the
18 Conversion Area as “Residential Low Density.” Gut Decl., Ex. A. The City of SeaTac has issued
19 no business permits within the Conversion Area. Gut Decl., ¶ 4.
20

21 PSE's existing overhead distribution system in the SeaTac Conversion Area is a three-phase
22 feeder system. Stipulated Fact No. 8. However, the service lines from the distribution system are
23 single-phase. Stipulated Fact No. 8. South 170th Street is a collector arterial that connects Military
24 Road South and International Boulevard, as well as the Seattle Tacoma Airport. Stipulated Fact No.
25 3. International Boulevard and the Airport are commercial areas. Stipulated Fact No. 3.
26

1 On July 11, 2001, SeaTac issued the notice to proceed to its contractor, and the 170th Street
2 Project is under construction. Gut Decl., ¶ 3.

3
4 **MEMORANDUM OF LAW**

5 **I. Schedule 70 Applies To The Conversion Area Because It Is Zoned And Used**
6 **Exclusively For Residential Purposes.**

7 **A. The Plain Language Of The Tariff Requires Application Of Schedule 70.**

8 Schedule 70, by its terms, applies when the Conversion Area is “zoned and used exclusively
9 for residential purposes.” WN U-60, Schedule 70, First Revised Sheet No. 70 (“Schedule 70”). The
10 “availability” section of Schedule 70 states:

11 **AVAILABILITY.** Subject to availability of equipment and materials, the Company
12 will provide and install a Main Distribution System and will remove existing
13 overhead electric distribution lines of 15,000 volts or less together with Company-
14 owned poles following the removal of all utility wires therefrom in areas which are
15 zoned and used exclusively for residential purposes, provided that at the time of such
16 installation the Company shall have adequate operating rights, and provided further
17 that the Conversion Area must be not less than one (1) city block in length, or in the
18 absence of city blocks, not less than six (6) contiguous building lots abutting each
19 side of the public thoroughfare with all real property on both sides of each public
20 thoroughfare to receive electric service from the Main Distribution System.

21 Schedule 70, § 2 (emphasis added).

22 In construing Schedule 70, the Commission applies standard principles of statutory
23 construction. *See National Union Ins. Co. v. Puget Power & Light Co.*, 94 Wn. App. 163, 171, 972
24 P.2d 481 (1999). Since the language of Schedule 70 is clear and unambiguous, the Commission can
25 decide the application of Schedule 70 as a matter of law: “Where the language of a tariff is “plain,
26 free from ambiguity, and devoid of uncertainty, there is no room for construction because the
meaning will be discovered from the wording of the statute itself.” *People’s Org. for Wash. Energy*
Resources v. WUTC, 101 Wn.2d 425, 429-30, 679 P.2d 922 (1984). Plain words do not require

1 construction. *See Western Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 609, 998
2 P.2d 884 (2000).

3 **A. The Conversion Area Is Zoned And Used Exclusively For Residential Purposes.**

4 PSE agrees that the buildings within the Conversion Area are residential dwellings.
5 Stipulated Fact No. 4. An aerial photograph confirms that no commercial structures of any kind are
6 located in the Conversion Area. Gut Decl., Ex. C. There can be no dispute that the Conversion Area
7 is zoned "Urban Low Density -- Residential." Gut Decl., Ex. B. SeaTac has issued no business
8 permits within the Conversion Area, Gut Decl., ¶ 4, and the Conversion Area is designated
9 "Residential Low Density" in SeaTac's Comprehensive Plan. Gut Decl., Ex. A.

10 The only reasonable conclusion that can be inferred from these facts is that the Conversion
11 Area is "zoned and used exclusively for residential purposes" within the meaning of Schedule 70.
12 Even if there were disputed facts – which there are not – summary determination is proper when
13 reasonable minds could reach but one conclusion from the evidence. *See Central Wash. Bank v.*
14 *Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 353, 779 P.2d 697 (1989). SeaTac, therefore, urges the
15 Commission to declare that Schedule 70 applies to the Conversion Area.
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18 **II. Schedule 71 Does Not Apply To The Conversion Area.**

19 In spite of the plain language of Schedule 70, PSE argues that Schedule 71 applies to the
20 Conversion Area. The application of Schedule 71 rather than Schedule 70 would result in
21 substantially higher rates to the City for the cost of the underground conversion. Gut Decl., ¶ 6.
22 PSE is prohibited from charging a different rate to SeaTac for underground conversion than the rate
23 applicable to others as set forth in Schedule 70. RCW 80.28.080.
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1 The filed rate doctrine requires PSE to charge only those rates that the Commission has
2 approved in the applicable tariff. *See Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 331-332,
3 962 P.2d 104 (1998). The filed rate doctrine applies not just to rates, but also to provision of
4 services. *See AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 221-224, 141 L. Ed.2d 222, 118 S. Ct.
5 1956 (1998).
6

7 **A. The Use Of South 170th Street As An Arterial Does Not Change The Character**
8 **Of The Conversion Area From Residential To Commercial.**

9 PSE argues that Schedule 71 should apply to the Conversion Area because South 170th Street
10 is a “collector arterial” that provides access to the commercial area around the Seattle Tacoma
11 Airport. PSE’s Answer to Complaint And Petition For Declaratory Relief (“Answer”), ¶ 12. In
12 support, PSE presented to the Commission a section from the SeaTac Draft Supplemental
13 Programmatic Environmental Impact Statement (“EIS”). *See Answer, Ex. A.*

14 Contrary to PSE’s argument, the EIS demonstrates that the Conversion Area is residential,
15 not commercial. The EIS identifies the Conversion Area as one of several areas the City intends to
16 preserve as “single family neighborhoods.” The purpose of the EIS study is to create and define
17 SeaTac’s urban center. In identifying the urban center, the EIS distinguishes between the “City
18 Center Area,” which extends from the Airport approximately to 32nd Avenue South, and the
19 residential neighborhoods “to the east.” *See EIS, § 1.3, p. 1-3.* The Conversion Area, the western
20 boundary of which is 37th Avenue South, lies more than five blocks outside the “City Center Area.”
21 The Conversion Area, therefore, is one of the “single family neighborhoods to the east.”¹
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25 ¹ Phase I of the South 170th Street Project included the area from International Boulevard to
26 37th Avenue South, which is a commercial area. Some of this area is included in the “City Center
Area” under study in the EIS. *EIS, § 1.3, p. 1-3.* PSE performed the underground conversion of
Phase I under Schedule 71 because the area was partly a commercial area.

1 Although the EIS notes that South 170th Street and Military Road might experience traffic
2 increases as a result of the designation of a City Center Area, the Conversion Area would not be
3 affected. The EIS goes on to observe:

4 However, these traffic increases are within the capacity of these streets and the
5 residential neighborhoods east of the City Center area would not be significantly
6 impacted by SeaTac City Center growth.

7 EIS, § 3.8.2a, p. 3-41 (emphasis added).

8 Contrary to PSE’s argument, the fact that South 170th Street is an arterial leading to a
9 commercial area does not change the Conversion Area from a residential into a commercial area.
10 Neither Schedule 70 nor Schedule 71 defines “Conversion Area” by a particular street, but rather as
11 “that geographical area wherein the Company’s overhead electric distribution system is replaced or
12 is to be replaced by an underground electric distribution system.” In SeaTac, the “geographical
13 area” includes the side streets and the area on both sides of South 170th Street between 37th Avenue
14 South and Military Road. *See* Gut Decl., Exs. A, B. The “geographical area” is exclusively
15 residential even if South 170th is an arterial. The fact that South 170th Street happens to connect two
16 commercial areas does not change the character of the Conversion Area from residential to
17 commercial.

18
19 **B. The Electrical Load Requirements In The Conversion Area Are Typical Of The**
20 **Requirements Of A Residential Area, Not A Developed Commercial Area.**

21 PSE also contends that its use of three-phase distribution lines on South 170th Street changes
22 the Conversion Area into a Schedule 71 project. Answer, ¶ 18. In so arguing, PSE is attempting to
23 read words into both Schedule 70 and Schedule 71 that are not there. Neither Schedule 70 nor
24 Schedule 71 makes any reference to single-phase or three-phase service. Nor do PSE’s guidelines
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1 for Underground Distribution System Design, which do not even mention single-phase or three-
2 phase service, make such a distinction. *See* Exhibit C to PSE’s Answer.

3 In a related argument, PSE contends that Schedule 71 applies because it is available “in such
4 other areas of such municipalities which have electrical load requirements which are comparable
5 with developed commercial areas.” Schedule 71, § 2. However, there is no evidence that the load
6 requirement of any dwelling within the SeaTac Conversion Area is any different from that of a
7 typical residential load. Although the existing overhead electrical distribution system for the 170th
8 Street Project is three phase, the overhead service lines to the homes within the conversion area are
9 single phase. Stipulated Fact No. 8. PSE’s electrical plans for the underground conversion for the
10 170th Street Project show an isolated three-phase feeder circuit with no three-phase service from the
11 feeder to individual dwellings. Gut Decl., ¶ 5. All of the service lines to individual dwellings are to
12 be single-phase. *Id.*

13 PSE’s installation of a three-phase system along 170th Street does not change the character of
14 PSE’s installation of a three-phase system along 170th Street does not change the character of
15 the residential load served within the Conversion Area. PSE does not even offer three-phase service
16 to residential customers except under certain circumstances and at a special rate. *See* WN U-60,
17 Schedule 7, Twenty-First Revised Sheet No. 7. PSE’s engineers may well require a three-phase
18 distribution lines on South 170th Street in order to deliver electric service to the commercial area to
19 the west of the Conversion Area, but PSE’s design requirements for customers outside the
20 Conversion Area cannot be used to measure the electrical load requirements of the residential
21 dwellings within the Conversion Area.

22 Schedule 71 does not, by its terms, apply to the Conversion Area in the 170th Street Project.
23 PSE’s attempt to impose Schedule 71 would result in higher charges to SeaTac than PSE charges to
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1 other customers requesting underground conversion in areas zoned residential and used exclusively
2 for residential purposes. Such discrimination is unlawful and must not be tolerated.

3 **CONCLUSION**

4 Schedule 70 clearly is available and applicable to SeaTac's 170th Street Project. The
5 Conversion Area is zoned and used exclusively for residential purposes. The fact that a street
6 running through the Conversion Area is an arterial connecting to a commercial area does not change
7 the character of the Conversion Area, nor does the fact that PSE operates a three-phase system along
8 South 170th Street for service to customers outside the Conversion Area. The Conversion Area
9 carries a typical residential electrical load, and there is no reason to apply Schedule 71.

10 Summary judgment should be granted when the facts admit only one reasonable conclusion.
11 *Christiano v. Spokane County Health Dist.*, 93 Wn. App. 90, 93, 969 P.2d 1078 (1998). For these
12 reasons, the City of SeaTac urges the Commission to grant summary determination in its favor and
13 issue an order declaring that Schedule 70 applies to the underground conversion in the 170th Street
14 Project.
15

16 DATED this 13th day of August, 2001.

17 PRESTON GATES & ELLIS LLP

18
19
20 By _____
21 Carol S. Arnold, WSBA # 18474
22 Laura K. Clinton, WSBA # 29846
23 Attorneys for Petitioner
24 City of SeaTac
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the MOTION OF CITY OF SEATAC FOR SUMMARY DETERMINATION, upon all parties of record in this proceeding, via facsimile, followed by U.S. mail, as follows:

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DATED at Seattle, Washington, this 13th day of August, 2001.

Jo Ann Sunderlage
Secretary to Carol S. Arnold