

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.

DOCKET UE-061626

BRIEF OF COMMISSION STAFF
IN RESPONSE TO MOTIONS FOR
SUMMARY DETERMINATION

I. INTRODUCTION

1 The Staff of the Washington Utilities and Transportation Commission files this brief in reply to the cross motions for summary determination of Puget Sound Energy, Inc. (“PSE” or “the Company”) and the City of Tumwater (“City”).¹ At issue is the division of cost responsibility between the City and PSE to convert overhead electrical facilities to underground electrical facilities along a section of Tumwater Boulevard (“Tumwater Conversion Project”).

2 The Company argues that tariff Schedule 74 requires the City to pay 100 percent of the Tumwater Conversion Project. The City argues that Schedule 74 requires it to pay only 40 percent of the Tumwater Conversion Project.

3 The plain language of Schedule 74 and the undisputed facts of record support the City’s position. A complete copy of Schedule 74 is attached as Exhibit 1.

¹ Motions for summary determination are permitted under WAC 480-07-380(2). In order to prevail on a motion for summary determination, the moving party must show, based on the pleadings and any properly admissible evidence, that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law. WAC 480-07-380(2)(a).

II. ARGUMENT

A. Governing Statutes and Legal Framework

4 Schedule 74 is a filed and approved tariff the parties agree governs underground conversion projects for governmental entities such as the City of Tumwater. Thus, the Company is required to apply the rates, charges, terms and conditions of service specified in Schedule 74 to the Tumwater Conversion Project:

No . . . electrical company . . . shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such service as specified in its schedule filed and in effect at the time . . .

No . . . electrical company . . . shall extend to any person or corporation any form of contract or agreement or any rule or regulation or any privilege or facility except such as are regularly and uniformly extended to all persons and corporations under like circumstances.²

5 Indeed, PSE's failure to apply the provisions of Schedule 74 would constitute prohibited rate discrimination or preferential treatment:

No . . . electrical company . . . shall make or grant any undue or unreasonable preference or advantage to any person, corporation, or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.³

No . . . electrical company . . . shall, directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for . . . any service rendered or to be rendered, or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like or contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.⁴

² RCW 80.28.080.

³³ RCW 80.28.090.

⁴ RCW 80.28.100.

6 Filed and approved tariffs such as Schedule 74 have the force and effect of state law.⁵ The Commission has previously summarized the general analytical framework for resolving disputes over the meaning of a tariff:

When, as here, parties dispute what particular provisions require, we must look first to the plain meaning of the tariff. *Nat'l Union Ins. Co. v. Puget Power*, 94 Wn. App. 163, 171, 972 P.2d 481 (1999). If the tariff language is plain and unambiguous, there is no need to resort to rules of construction. *Whatcom County v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996); *Food Servs. Of Am. v. Royal Heights, Inc.*, 123 Wn.2d 779, 784-85, 871 P.2d 590 (1994); *Waste Management of Seattle v. Utilities & Transp. Comm'n*, 123 Wn. 2d 621, 629, 869 P.2d 1034 (1994); *Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). If the tariff language is not plain, or is ambiguous, the Commission may examine the legislative history and other evidence to determine the meaning of the tariff and how it should be applied to the facts at hand.⁶

7 Staff concludes that the language of Schedule 74 is plain and unambiguous, and requires the cost of the Tumwater Conversion Project to be divided 60 percent and 40 percent, respectively, between the Company and the City.

B. The Plain And Unambiguous Language Of Schedule 74 Supports The City Of Tumwater

8 Schedule 74 requires the City and PSE to enter a design agreement and a construction agreement that must:

- (1) except as otherwise provided in Section 2.b(2), obligate the Government Entity to pay the Company 40% of the total Cost of Conversion and the Company to pay 60% of the total Cost of Conversion;
- (2) obligate the Government Entity to pay (i) 100% of the total Cost of Conversion for conversion of that portion, if any, of the existing overhead distribution system located, as of the date on which the Government Entity provides the notice referred to in Section 4.a or the date on which the Government Entity commences acquisition or condemnation of real property to facilitate construction of any public improvements related to the conversion

⁵ *General Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986).

⁶ *City of SeaTac, et al. v. Puget Sound Energy, Inc.*, Third Suppl. Order at ¶ 13, Docket Nos. UE-010891 and UE-011027 (January 28, 2002). See also, *City of Kent, et al. v. Puget Sound Energy, Inc.*, Third Suppl. Order at ¶ 17, Docket Nos. UE-010778 and UE-010911 (January 28, 2002).

project, whichever occurs first, (A) outside of the Public Thoroughfare or (B) pursuant to rights not derived from a franchise previously granted by the Government Entity or pursuant to rights not otherwise previously granted by the Government Entity⁷

9 The issue, therefore, is whether Tumwater Boulevard is a Public Thoroughfare, or whether PSE's authority to locate facilities in Tumwater Boulevard derives from a franchise or rights granted previously by the City. If the answer to *either* of these questions is "Yes", the City is required to pay only 40 percent of the Tumwater Conversion Project, not 100 percent as argued by the Company.

1. Tumwater Boulevard Is A "Public Thoroughfare" As Defined By Schedule 74

Schedule 74 expressly defines a "Public Thoroughfare" as follows:

Public Thoroughfare: Any municipal, county, state, federal or other public road, highway, or thoroughfare, or other *public right-of-way or other public real property rights allowing for electric utility use.*⁸ (Emphasis added.)

The conversion area of Tumwater Boulevard meets this definition in two ways.

10 First, by definition, a "Public Thoroughfare" includes a public right-of-way. The City produced evidence that all of the Company's overhead distribution facilities in the conversion area are located within the Tumwater Boulevard right-of-way.⁹ The City's evidence is uncontested by the Company. In fact, the evidence consists of PSE's own drawings provided under contract from its contractor, Potelco.¹⁰

11 Schedule 74's definition of a "Public Thoroughfare" is not limited to areas within the Tumwater Boulevard right-of-way. An alternative definition includes other public real property rights allowing for electric utility use. PSE argues that its authority to locate its

⁷ Schedule 74, Original Sheet No. 74-a, sections (b)(1) and (2).

⁸ Schedule 74, Original Sheet No. 74-f, section e.

⁹ Declaration of Jim Shoopman.

¹⁰ *Id.* at Exhibits 4 and 10.

facilities within the conversion area derives from an easement granted by the Port of Olympia in 1981. Thus, PSE's authority to operate in the conversion area meets this alternative definition of a "Public Thoroughfare" in Schedule 74.

12 It is irrelevant that the easement was granted originally to PSE by the Port of Olympia in 1981, rather than by the City of Tumwater. Schedule 74's definition of Public Thoroughfare makes no distinction as to the source of the public real property rights or the time when such rights were granted.

2. PSE's Authority To Locate Facilities In Tumwater Boulevard Derives From Rights Granted Previously By The City

13 Even if the area of conversion lies outside a Public Thoroughfare, Schedule 74 still requires the City to pay only 40 percent of the cost of the Tumwater Conversion Project if the overhead distribution facilities are located pursuant to a franchise or rights previously granted by a "Government Entity". The City of Tumwater is a "Government Entity" within this provision of Schedule 74.

14 First, in 1985, the City and the Company entered into a 30-year franchise agreement that granted PSE the authority to construct and operate an electric utility within the City.¹¹ The franchise agreement extended not only to the rights-of-way and other public property within City limits at that time, but also to any roads that later came within City limits by annexation:

"Franchise Area" means: any, every and all of the roads, streets, avenues, alleys, highways, grounds and public places of the City as now laid out, platted dedicated or improved; and any, every and al roads, streets, avenues, alleys, highways, grounds and public places that may be laid out, platted, dedicated, or improved within the limits of the City and as such limits my be hereafter extended.¹²

¹¹ Declaration of William Patton at Exhibit A to Exhibit 1.

¹² *Id.* at 1: Section 1.13.

This extension of PSE's franchise rights to areas later annexed by the City is unqualified.

15 In 1987, the City passed an ordinance that annexed all property of the Port of Olympia.¹³ The annexed areas include property that is now within the Tumwater Boulevard Conversion Project. Thus, by automatic operation of the franchise agreement itself, the Company's grant of authority to operate within the area of conversion now derives from City of Tumwater.

16 Second, the easement that the Port of Olympia granted to PSE in 1981 allowed the Company to install and operate electric facilities throughout the Port's property. That permission, however, by operation of law, was extinguished and replaced by a franchise from the City when the City in 1987 annexed all Port of Olympia property:

The annexation by any code city of any territory pursuant to this chapter shall cancel, as of the effective date of such annexation, any franchise or permit theretofore granted to any person, firm or corporation by the state of Washington, or by the governing body of such annexed territory, authorizing or otherwise permitting the operation of any public utility, including but not limited to, public electric, water, transportation, garbage disposal or other similar public service business or facility within the limits of the annexed territory, but the holder of any such franchise or permit canceled pursuant to this section shall be forthwith granted by the annexing code city a franchise to continue such business within the annexed territory for a term of not less than seven years from the date of issuance thereof . . .¹⁴

It is true that the statute refers only to the automatic cancellation of a "franchise or permit".

However, the 1981 easement granted to PSE by the Port of Olympia is the document by which the Company was authorized to operate an electric utility on Port property that was later annexed by the City. It is reasonable to interpret RCW 35A.14.900 to apply to the 1981 easement.

¹³ Declaration of Jim Shoopman at Exhibit 2.

¹⁴ RCW 35A.14.900.

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Finally, even if the 1981 easement was not extinguished by the 1987 annexation or takes precedence over the 1985 franchise, the 1981 easement contains a “successor and assigns” clause:

The rights and obligations of the parties shall inure to the benefit of and be binding their respective successors and assigns.¹⁵

Thus, any current rights of PSE under the easement to operate an electric utility within the conversion area have been granted by the City of Tumwater, which makes the City the “Government Entity” for purposes of determining the division of cost responsibility under Schedule 74.

III. CONCLUSION

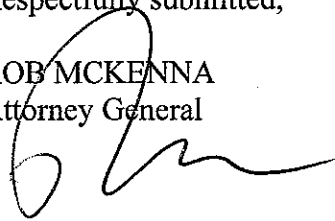
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For the reasons stated above, the plain language of Schedule 74 and the uncontested evidence of record requires the City of Tumwater to pay 40 percent of the cost of the Tumwater Conversion Project. The Commission should grant the City’s motion for summary determination.

DATED This 16th day of March, 2007

Respectfully submitted,

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¹⁵ Declaration of William Patton at Exhibit E to Exhibit 1.