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BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

CITY OF SEATAC,  
  
Complainant and Petitioner,  
  
v.  
  
PUGET SOUND ENERGY, INC.,  
  
Respondent.

NO. UE-010891

CITY OF CLYDE HILL, AN OPTIONAL  
MUNICIPAL CODE CITY,  
  
Complainant and Petitioner,  
  
v.  
  
PUGET SOUND ENERGY, INC.,  
  
Respondent.

NO. UE-011027

PUGET SOUND ENERGY, INC'S  
RESPONSE TO MOTIONS FOR  
SUMMARY DETERMINATION AND  
CROSS MOTION FOR SUMMARY  
DETERMINATION

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PUGET SOUND ENERGY, INC'S RESPONSE  
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**I. INTRODUCTION**

1. Puget Sound Energy, Inc. ("PSE") hereby submits its response in opposition to the Motion of City of SeaTac for Summary Determination ("SeaTac Motion") and the City of Clyde Hill's Motion for Summary Determination ("Clyde Hill Motion"), and cross moves for summary determination in PSE's favor on all issues raised in the Petitions filed by SeaTac and Clyde Hill in this consolidated proceeding.

2. This proceeding brings into issue: RCW 34.05.240, WAC 480-09-230, RCW 80.28.080, RCW 80.28.090, RCW 80.28.100, WAC 480-09-426(2), and Schedules 70, 71 and 80 of PSE's Tariff WN U-60, Electric Tariff G.

3. SeaTac and Clyde Hill are not entitled to obtain conversions of PSE's existing overhead facilities to underground for their South 170th Street and 92nd Avenue N.E. projects under Schedule 70. Schedule 70 does not apply to those conversions because the areas in question are not "used *exclusively* for residential purposes." Although the dwellings along South 170th Street and 92nd Avenue N.E. are residential, the streets themselves are used for nonresidential purposes. More importantly, PSE's electric system along both streets is a three-phase feeder system, not a single-phase system of the type that serves exclusively residential purposes. The three-phase feeder that is to be converted to underground forms part of PSE's distribution backbone, and serves commercial as well as residential purposes. Undergrounding a three-phase system is significantly more expensive than undergrounding a single-phase system, and the Schedule 70 rate was set by reference to the costs of undergrounding single-phase distribution lines, not three-phase feeders. Instead, Schedule 71 applies to the conversions of overhead facilities along SeaTac's South 170th Street and Clyde Hill's 92nd Avenue N.E., and SeaTac and Clyde Hill must

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participate in paying a share of the actual costs of the conversion pursuant to Schedule 71.

4. Clyde Hill is also not entitled to obtain conversions of PSE's existing overhead facilities to underground under Schedule 70 or Schedule 71 with respect to facilities that are located on private property rather than on public streets. Schedules 70 and 71 apply only to facilities located on *public* streets or thoroughfares. In the present case, PSE is willing to underground facilities located on private property within the Clyde Hill project, but only if Clyde Hill agrees to pay PSE 100% of the costs of the conversion.

5. Finally, although Clyde Hill did not present substantive argument on the issue, Clyde Hill has requested that the Commission declare that "[t]he City of Clyde Hill and the underground conversions described in Clyde Hill Local Improvement District No. 2001-01 are vested under the now existing version of Schedule 70." Clyde Hill Motion at 10. Utility customers do not have vested rights in tariff provisions or utility operating practices, and Clyde Hill's request for relief should be denied.

6. Therefore, for the reasons set forth below, the Commission should deny the motions of Clyde Hill and SeaTac for summary determination, should grant PSE's cross-motion for summary determination, and should issue a declaratory ruling in PSE's favor on all issues that are before the Commission in this proceeding.

**II. STATEMENT OF FACT**

7. Generally, the facts involved in the SeaTac and Clyde Hill conversions that are the subject of this proceeding are relatively straightforward and not disputed. Instead, the parties disagree over the application of Schedules 70 and 71 to the facts. PSE does not repeat the facts set forth in SeaTac's Motion and Clyde Hill's Motion, and instead simply corrects certain factual

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statements that it believes are not entirely accurate. PSE further sets forth additional facts that are not set forth in SeaTac's Motion or Clyde Hill's Motion.

**A. The SeaTac Project**

8. SeaTac states that it has "directed" PSE to convert its overhead facilities to underground, citing Stipulated Fact No. 1. Stipulated Fact No. 1 states that SeaTac has "requested" that PSE convert its facilities to underground. PSE does not believe that SeaTac has authority to "direct" PSE to convert these facilities other than pursuant to the terms of PSE's lawful Tariff. This distinction could be important in other contexts, particularly if SeaTac were to claim that its undergrounding ordinances provide it with authority to "direct" PSE to undertake actions with respect to PSE's facilities that are contrary to Washington law. However, PSE does not believe that any factual dispute over this distinction is material to the issues that are before the Commission in this case. There is no dispute that PSE's overhead facilities on the 170th Street project (the "SeaTac Conversion") are being converted to underground. The question is whether SeaTac must pay for that conversion pursuant to Schedule 70 or Schedule 71.

9. Construction is now underway on the SeaTac Conversion because PSE and SeaTac have entered into an interim agreement with reservations of rights under which the overhead facilities will be converted to underground pursuant to either Schedule 70 or 71, depending on resolution of issues raised in this proceeding and in Docket No. UE-010778. *See* Affidavit of Lynn Logen ("Logen Aff.") at ¶ 2.

**B. The Clyde Hill Project**

10. PSE notes that Clyde Hill's quotation of Schedule 70's requirement that an area is "zoned and used exclusively for residential purposes" occasionally contains a typo that changes "and

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used" to "in use." See Clyde Hill Motion at 2, lines 19, 22. Clyde Hill also paraphrases Schedule 70 inaccurately at page 5, lines 25-27 of its Motion.

11. Clyde Hill cites to Stipulated Facts Nos. 13, 14, 18 and 19 for the proposition that "[t]he conversion area is zoned and used exclusively for residential purposes." Clyde Hill Motion at 5 lines 15-17. Clyde Hill is correct that PSE has stipulated that the area within the LID boundary is *zoned* residential. However, PSE has not stipulated that it is "used exclusively for residential purposes." The phrase "used exclusively for residential purposes" is tariff language that is in dispute in this case. PSE has stipulated that all of the *buildings* in the conversion area along 92nd Ave. N.E. are *residential dwellings*. However, as described below, the conversion area along 92nd Ave. N.E. is not "used exclusively for residential purposes."

12. The existing overhead facilities within the Clyde Hill LID area that PSE claims do not meet the terms of Schedule 70 or 71 are located along *private drives and through private property* running east of and perpendicular to 92nd Avenue N.E. and west of and perpendicular to 94th Avenue N.E. See Stipulated Exhibit No. D, green highlighting. PSE's existing overhead facilities in these areas are located on PSE easements, or by invitation of the property owner, and *there is no public thoroughfare in these areas*. See Stipulated Facts No. 12.

13. In addition, 92nd Avenue N.E. in Clyde Hill is not used exclusively for residential purposes. Clyde Hill has two main through streets, 92nd Avenue N.E. and N.E. 24th Street. 92nd Avenue N.E. is significantly wider than the side streets that branch off of it. It connects to N.E. 8th Street, which is a primary point of entry into Clyde Hill from Bellevue's downtown commercial areas and continues all the way through Clyde Hill to approximately N.E. 34th Street and the entrance to State Highway 520. This contrasts with the other public side streets in the Clyde Hill LID boundary, where PSE has agreed that Schedule 70 applies, as shown on Exhibit D, pink highlighting. Logen Aff. at ¶ 18;

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Stipulated Exhibit No. G; Exhibit I. Clyde Hill's City Ordinance describes "92nd Avenue N.E., from N.E. 12th Street to State Route 520" as a "Collector Arterial," and *not* as a "Local Access Road." Clyde Hill Ordinance § 12.04.020, attached at Addendum 21-22.

**C. Additional Facts Relevant to Both Projects**

14. PSE's existing overhead system along South 170th Street and 92nd Avenue N.E. are three-phase feeder systems not single-phase systems. Stipulated Facts Nos. 8, 11.

15. There are critical differences between a three-phase (600 amp) feeder system and a single-phase (200 amp) system when converting an overhead electric system to underground. Logen Aff. at ¶ 4.

16. A "feeder" circuit on PSE's distribution system is the backbone directly from the substation. A feeder is a three-phase, heavy wire, high capacity circuit protected by the substation circuit breaker. A feeder is never single-phase. By contrast, a regular distribution circuit consists of lighter, lower capacity conductors, and is separated from the feeder circuit by fuses. Logen Aff. at ¶ 5.

17. Conversion of an above-ground three-phase feeder system to an underground system is fundamentally different than conversion of a single-phase system to an underground system. Undergrounding of a three-phase feeder system such as the one in Clyde Hill or SeaTac requires construction of a parallel single-phase underground system to serve individual, single-phase customers that were formerly served by one phase of the overhead, three-phase feeder system prior to the conversion. This is because an overhead feeder system contains conductors on each pole that can serve as points at which a regular distribution circuit can be connected through a fuse or fuses to the three-phase feeder, while an underground feeder system is encased in heavy insulation and does not contain open conductors that provide access to the feeder. Logen Aff. at ¶ 6.

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18. Stipulated Exhibit No. H, which is PSE's Standard 6750.5000, Underground Distribution System Design, demonstrates some of the above issues. Figure 1 on page 2 shows an electrical diagram of a single-phase system running parallel to a three-phase feeder. The design criteria regarding "Switch Design" on page 3 further describes the purpose of the parallel system, as follows:

Design the system so that any switch may be taken off line without an outage to customers. See Figure 1 as an example. The 200-amp systems will usually be located adjacent and parallel to both sides of the feeder to where this is possible.

The design criteria regarding "200-Amp Taps" on page 3 of Exhibit H describes the requirement that all 200-amp (single-phase) taps from a feeder shall be fused. Logen Aff. at ¶ 7.

19. In general, PSE installs single-phase systems in areas that are purely residential, and does not install three-phase systems in a residential area unless load exists in the area that needs such a system. Normally, residential areas are served by a single-phase branch of PSE's system that at some point ties into one phase of PSE's three-phase distribution feeders. In residential areas, any three-phase system is generally limited to feeder backbone to carry load that the single-phase systems tap off of, or to carry load from one commercial area to another through the residential area. By contrast, developed commercial areas in PSE's service territory contain electrical systems that are all three-phase in order to provide power for three-phase motors used for elevators, HVAC systems, refrigeration systems and other three-phase customer owned equipment. Residential customers typically do not own equipment that requires three-phase electrical service. Logen Aff. at ¶ 8.

20. Although the houses that tap off of the facilities to be converted to underground along South 170th Street in SeaTac and along 92nd Avenue N.E. in Clyde Hill are residential dwellings, with single-phase load, the

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three-phase feeder that they tap off of is part of PSE's distribution backbone that carries three-phase load to these areas, as well as to other areas in PSE's system that require three-phase service. Thus, the electric system in these areas is not "used exclusively for residential purposes."

Logen Aff. at ¶ 9.

21. The Declaration of Tom Gut dated August 10, 2001, at paragraph 5, lines 9-12, could be misleading if not clarified. Mr. Gut is correct that the SeaTac plans call for single-phase services to individual dwellings. His reading of the plans is consistent with the above descriptions of how a parallel, single-phase system will need to be installed when the existing overhead is converted to underground. However, his declaration speaks in terms of "an isolated three-phase feeder circuit" and a "secondary cable system" providing services to individual dwellings. It is the parallel, single-phase system that will be added and isolated from the three-phase system to provide single-phase service with appropriate fusing. The three-phase system will continue to connect to the rest of PSE's distribution system, as it does now. Using the word "secondary" to describe the single-phase system could be confusing, because the term "secondary" typically describes the voltage of the system, not the fact that the system is the second (and parallel) system to the three-phase system. Logen Aff. at ¶ 10.

22. PSE has estimated that the total cost for the SeaTac Conversion will be \$454,870.00. If the existing overhead system along South 170th Street were a single-phase rather than a three-phase system, PSE estimates that the cost of the conversion would be \$222,632.39. Similarly, PSE has estimated that the total cost for converting the existing overhead facilities along 92nd Ave. N.E. in Clyde Hill will be \$382,521. If the existing overhead system along 92nd Ave. N.E. were a single-phase system, PSE estimates that the cost of that conversion would be \$194,107.37. Logen Aff. at ¶ 11.

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23. If SeaTac is permitted to pay for the SeaTac Conversion under Schedule 70 rather than Schedule 71, it will pay only \$20.33 per centerline foot of all public thoroughfares within the Conversion Area utilizing surface-mounted transformers. PSE estimates this amount at \$20.33 x 1,700 feet, or \$34,561.00. If Clyde Hill is permitted to pay for the conversion of 92nd Ave. N.E. under Schedule 70 rather than Schedule 71, it will pay only \$20.33 per centerline foot of all public thoroughfares within the Conversion Area utilizing surface-mounted transformers. PSE estimates this amount for the 92nd Ave. N.E. section of the Clyde Hill Project at \$20.33 x 2,912.5 feet, or \$59,211.13. Logen Aff. at ¶ 12.

24. PSE has consistently interpreted Schedule 70 to apply only to conversions of single-phase systems to underground, and has consistently interpreted Schedule 71 to apply to conversions of three-phase systems to underground. Logen Aff. at ¶ 13. Thus, the suggestion by SeaTac and Clyde Hill that they are being asked to pay more than other customers in their position for the underground conversions at issue, and thereby being discriminated against, is incorrect. PSE is requiring SeaTac and Clyde Hill to pay exactly what any other customer would be required to pay who is seeking conversion of a three-phase overhead system to underground. *Id.*

25. SeaTac's Motion at page 7, lines 16 and 17, states that "PSE does not even offer three-phase service to residential customers except under certain circumstances and at a special rate." This statement could be misleading. One could just as well say that PSE does not even offer *single-phase* service to residential customers except under certain circumstances and at a special rate. Three-phase service is available to any residential customer upon request, subject to charges associated with three-phase service, as is evident from reviewing Schedule 7 cited in SeaTac's Motion. Logen Aff. at ¶ 16.

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**III. ARGUMENT**

**A. Standards**

26. Pursuant to WAC 480-09-426(2), a party requesting summary determination must show that "the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor." The Commission considers motions for summary determination under "the standards applicable to a motion made under CR 56 of the civil rules for superior court." *Id.* The civil rules provide:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c). A material fact is one of such nature that it affects the outcome of the litigation. *Greater Harbor 2000 v. Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997).

27. Although SeaTac and Clyde Hill were not willing to stipulate to many of the additional engineering facts set forth above, PSE does not believe that they will be contested in any respect that is material to this proceeding, if at all. Instead, PSE believes that the parties fundamentally disagree not about the facts, but rather about the application of PSE's tariff to the facts. In such a case, summary determination is appropriate.

28. There is no question that filed and approved tariffs have the force and effect of state law, and that PSE is obligated to charge its customers pursuant to its tariffs. *See Gen. Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585, 719 P.2d 879 (1986); RCW 80.28.080. The question in this case is whether PSE or the petitioners are correct with respect to what tariff schedule applies to the conversions at issue, if any.

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29. The standard for interpreting PSE's tariff is also uncontested.

When, as here, parties dispute what particular provisions require, [the Commission] must look first to the plain meaning of the tariff. If the tariff language is plain and unambiguous, there is no need to resort to rules of construction.

*Air Liquide America Corp. et al. v. Puget Sound Energy, Inc.*, Docket No. UE-981410, Fifth Supplemental Order Granting Complaint, Ordering Refunds and Other Relief, 1999 Wash. UTC LEXIS 591 (Aug. 3, 1999), at \*10-11 ("*Air Liquide*") (citations omitted). If tariff language is not plain, or is ambiguous, the Commission applies rules of construction to determine what the Commission intended in approving the tariff. *See id.* at \*11-12. *See also Nat'l Union Ins. Co. v. Puget Sound Power & Light Co.*, 94 Wn. App. 157, 171, 173, 972 P.2d 481 (1999).

**B. Schedule 70 Does Not Apply to the SeaTac Conversion or the Clyde Hill 92nd Avenue N.E. Conversion**

**1. Schedule 70 does not apply by its plain terms because the areas in question are not used *exclusively* for residential purposes**

30. Schedule 70 is available for conversion of facilities to underground only "in areas which are zoned *and used exclusively* for residential purposes." Schedule 70, § 2 (emphasis added). The conversion areas in SeaTac and along 92nd Avenue N.E. in Clyde Hill are not "used exclusively for residential purposes."

**a. South 170th Street and 92nd Avenue N.E. are not used exclusively for residential purposes**

31. These areas are not used *exclusively* for residential purposes in that the streets containing facilities that are being converted to underground carry traffic not just to and from the residential dwellings in the immediate area, but serve to route traffic through the residential area to and from surrounding commercial areas and roadways. South

170th Street is a collector arterial that provides access between

**PUGET SOUND ENERGY, INC'S RESPONSE  
TO MOTIONS FOR SUMMARY  
DETERMINATION AND CROSS MOTION  
FOR SUMMARY DETERMINATION - 10**

[07771-0879/010891, PSE, Response to Motion for Summary Determination, 8-24-01.doc]

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Military Road South and International Boulevard (Highway 99), as well as SeaTac Airport. International Boulevard and SeaTac Airport are commercial areas. Stipulated Fact No. 3.<sup>1</sup> 92nd Avenue N.E. in Clyde Hill carries traffic from commercial areas in Bellevue through Clyde Hill to State Highway 520, and is otherwise used for purposes other than access to the residential dwellings in the conversion area. See Logen Aff. at ¶ 18; Stipulated Exhibit D, yellow highlighting; Stipulated Exhibit G; Addendum at 21-22. This contrasts with the other public side streets in the Clyde Hill LID boundary, where PSE has agreed that Schedule 70 applies. See Logen Aff. at ¶ 18; Stipulated Exhibit D, pink highlighting.

32. SeaTac argues that a "Conversion Area" is not defined by a particular street but rather as a "geographical area," and that the "geographical area" to be converted in SeaTac "includes the side streets and the area on both sides of South 170th Street between 37th Avenue South and Military Road." SeaTac Motion at 6. SeaTac is correct that a "Conversion Area" is a "geographical area," but a Conversion Area will often be defined primarily by reference to a particular street, since PSE's facilities generally run along a street. Such a Conversion Area includes the dwellings on each side of the street as well as the street itself, but it may not include side streets or dwellings on those side streets if those facilities are not being converted to underground. In the case of the SeaTac Conversion, only the facilities along South 170th Street are being converted to underground. Conversion of side streets is limited to conversion up to the first pole on each side street. Logen Aff. ¶ 14.

33. In any case, SeaTac's argument on this point is irrelevant. Schedule 70 requires that a Conversion Area be "used *exclusively* for residential purposes." Schedule 70, § 2. Whether one

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<sup>1</sup> SeaTac's Motion notes that such use of South 170th Street is likely to increase as the result of further development of the neighboring City Center area. See SeaTac Motion at 6.

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looks only at South 170th Street or also at the surrounding side streets and dwellings, South 170th Street cuts through the geographic area of the conversion. Thus, the area is not used *exclusively* for residential purposes.

**b. PSE's electric system in the conversion areas is not used exclusively for residential purposes**

34. Even if the areas at issue did not contain thoroughfares that are not *exclusively* residential, Schedule 70 would not apply to the conversions because PSE's electric system in the conversion areas is not "used exclusively for residential purposes."

35. As described above, residential areas are typically served by a single-phase branch of PSE's system that at some point taps into one phase of PSE's three-phase distribution feeders. Only conversion of such a single-phase system, which is used exclusively for residential purposes, falls under Schedule 70.

36. By contrast, the facilities that PSE is to convert along South 170th Street and 92nd Avenue N.E. are not single phase. Instead, they are three-phase feeder. Stipulated Facts Nos. 8, 11.<sup>2</sup> The three-phase feeder that is to be converted forms part of the backbone of PSE's distribution system, which is used for commercial as well as residential purposes. Logen Aff. at

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<sup>2</sup> SeaTac points out that the service lines from the distribution facilities to individual dwellings are single phase. SeaTac Motion at 7. However, that is irrelevant to the dispute at issue regarding interpretation of Schedules 70 and 71. Schedule 70 provides that "Underground Service Lines shall be installed as provided in Schedule 86 of this tariff." Schedule 70, § 8. "Underground Service Lines" are the "electric service lines extending from service connections of the structure to the designated secondary service connection point of a Main Distribution System." Schedule 70, § 1.b. Schedule 71 similarly carves out Underground Service Lines and provides that Schedule 86 applies to such lines. Schedule 70, §§ 1.b, 7. Undergrounding of service lines is accomplished pursuant to Schedule 86 whether the lines are single- or three-phase.

**PUGET SOUND ENERGY, INC'S RESPONSE  
TO MOTIONS FOR SUMMARY  
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FOR SUMMARY DETERMINATION - 12**

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¶¶ 5, 8-9. Thus, these conversion areas are not "used exclusively for residential purposes" and do not meet the requirements for conversion under Schedule 70.

37. Clyde Hill argues that its "Conversion Area" is the entire area described in Stipulated Fact No. 9. Clyde Hill Motion at 7. Clyde Hill's suggestion that the entire area within the LID boundary must be considered the "Conversion Area" under a single tariff schedule does not make sense. One might just as well argue that transmission lines within a conversion area must be converted to underground along with distribution lines, even though transmission lines are not "distribution lines" and exceed 15,000 volts, in violation of Schedule 70, Section 2.

38. The electric distribution system within the Clyde Hill LID boundary contains two entirely different types of systems, single-phase and three-phase. *See* Stipulated Facts Nos. 10, 11. In conversion projects containing a single-phase system in a portion of the project area and a three-phase system in another portion, PSE converts the single-phase portion of the system to underground under Schedule 70 and the three-phase portion of the system to underground under Schedule 71. This is fully consistent with Schedules 70 and 71, which each have their own requirements for determining whether they apply to a conversion. Moreover, an applicant thereby obtains the benefit of Schedule 70 for portions of a project that are single phase, while PSE preserves the distinctions in Schedule 70 and 71 that permit PSE to better recover the additional costs involved in conversions of three-phase feeder to underground. Logen Aff. at ¶ 15. PSE has applied Schedules 70 and 71 to the Clyde Hill LID in this manner, as set forth in Stipulated Facts Nos. 9 – 12 and Stipulated Exhibit D.



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39. SeaTac and Clyde Hill seek to make much of the fact that Schedule 70 does not contain the words "single-phase" or "three-phase."<sup>3</sup> Perhaps Schedule 70 would be more clear if it used these terms. However, as described above and in Mr. Logen's affidavit, the "used exclusively for residential purposes" language serves the same purpose as would adding the term "single-phase" to the restrictions in Schedule 70. Moreover, an untrained observer cannot necessarily distinguish between three-phase and single-phase facilities just by looking at them. Thus in any case, customers will continue to rely on communications with PSE to determine whether Schedule 70 applies to a conversion.

**2. The Commission did not intend that Schedule 70 would apply to underground conversion of three-phase feeder when it approved Schedule 70's \$20.33 per centerline foot rate**

40. At a minimum, the phrase "used exclusively for residential purposes" in Schedule 70 is ambiguous with respect to whether it refers to the types of dwellings or streets in an area, or whether it refers to PSE's use of the area with respect to PSE's electric system. Thus, the Commission must apply rules of construction to determine what the Commission intended in approving the tariff. *See Air Liquide* at \*11-12; *Nat'l Union*, 94 Wn. App. at 173.

41. The position of Clyde Hill and SeaTac that Schedule 70 must apply because the dwellings along South 170th Street and 92nd Ave. N.E. are residential and take residential, single-phase service ignores that there are also non-residential uses of the streets containing the facilities that are to be converted. Stipulated Fact No. 3; Logen Aff. at ¶ 18. The cities' position also ignores the fact that PSE uses the facilities in the area for non-residential purposes as well as

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<sup>3</sup> SeaTac also complains that PSE's Underground Distribution Design standard does not mention single-phase or three-phase service. SeaTac Motion at 7. The Standard does not use the terms "single-phase" or "three-phase," but it does use the equivalent by referring to 200-amp and 600-amp facilities and systems. *See* Logen Aff. at ¶¶ 4, 7; Stipulated Exhibit H.

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residential purposes. Logen Aff. at ¶¶ 8-9. Thus, the cities' interpretation of Schedule 70 would read out of existence the word "exclusively" in Section 2 of Schedule 70, in violation of established rules of statutory construction. *See, e.g., City of Seattle v. State of Washington*, 136 Wn.2d 693, 701, 965 P.2d 619 (1998).

42. Even more importantly, the legislative history of Schedule 70 demonstrates that the Commission did not intend to include conversion of three-phase feeder within Schedule 70 when it approved the current \$20.33 per centerline foot rate. The Commission should look to the legislative history of Schedule 70 as an aid in discerning its intent in approving the tariff. *See, e.g., Cockle v. Dep't of Labor and Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001); *In re Personal Restraint of Quackenbush*, 142 Wn.2d 928, 935-36, 16 P.3d 638 (2001).

43. PSE filed for approval of the \$20.33 per centerline foot rate in Schedule 70 on March 14, 1984. Addendum at 1.<sup>4</sup> PSE submitted a cost study in support of that rate, Addendum at 7. The Commission suspended the tariff for investigation of the reasonableness and justness of the filing. *See Washington Utils. and Trans. Comm'n v. Puget Sound Power & Light Co.*, U-84-22, Complaint and Order Suspending Tariff Revisions (April 12, 1984), Addendum at 16. On September 12, 1984, the Commission approved the tariff revision. *See Washington Utils. and Trans. Comm'n v. Puget Sound Power & Light Co.*, U-84-22, Order Dismissing Complaint and Order Suspending Tariff Revisions and Granting Tariff Revisions (Sept. 12, 1984), Addendum at 17.

44. PSE's cost study described the actual conversions it analyzed to arrive at the requested rate as follows:

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<sup>4</sup> The materials in the Addendum are a matter of public record in the Commission's files. PSE attaches copies in the Addendum for the convenience of the Commission and parties.

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As a starting point, all five divisions were requested to submit a list of all underground conversions that had been completed in the past two years. In this period of time, thirty conversions were completed. Of these, seventeen were selected for closer examination. Work sketches were obtained for these conversions and it was found that only six were in *residential plats* and suitable for further study. *Two of these had to be eliminated because they included feeders running through these areas.*

Addendum at 9 (emphasis added). Thus, it is clear that the rate the Commission approved in Schedule 70 was not meant to include conversion of feeders, even if the feeders happened to run through "residential plats."

45. This legislative history demonstrating that the Commission did not intend feeders to be converted under Schedule 70 is consistent with PSE's institutional memory and historical and current application of Schedule 70. During the eleven years that Mr. Logen has been responsible for PSE's tariff interpretation and application, he has consistently interpreted Schedule 70 to apply only to conversions of single-phase systems to underground, and he has consistently interpreted Schedule 71 to apply to conversions of three-phase systems to underground, whether or not the three-phase system happens to run through an area containing residential dwellings. Logen Aff. at ¶ 13.

46. The exclusion of three-phase feeders from the Schedule 70 rate is important because of the significant additional costs involved in converting feeders to underground, as described above and in Mr. Logen's Affidavit. *See* Logen Aff. at ¶¶ 6, 11. PSE has estimated that the total cost for the SeaTac Conversion will be \$454,870.00. If the existing overhead system were a single-phase system rather than a three-phase system, PSE estimates that the cost of the conversion would be \$222,632.39, half the cost of the three-phase conversion. Similarly, PSE has estimated that the total cost for converting the existing overhead facilities along 92nd Avenue N.E. in Clyde Hill will be \$382,521. If

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the existing overhead system along 92nd Avenue N.E. were a single-phase system, PSE estimates that the cost of that conversion would be \$194,107.37, again approximately half the cost of the three-phase conversion. Logen Aff. at ¶ 11.

47. If SeaTac is permitted to pay for the South 170th Street conversion under Schedule 70 rather than Schedule 71, it will pay only \$20.33 per centerline foot of all public thoroughfares within the Conversion Area utilizing surface-mounted transformers. PSE estimates this amount at \$20.33 x 1,700 feet, or \$34,561.00. If Clyde Hill is permitted to pay for the conversion of 92nd Avenue N.E. under Schedule 70 rather than Schedule 71, it will pay only \$20.33 per centerline foot of all public thoroughfares within the Conversion Area utilizing surface-mounted transformers. PSE estimates this amount for the 92nd Ave. N.E. section of the Clyde Hill Project at \$20.33 x 2,912.5 feet, or \$59,211.13. Logen Aff. at ¶ 12.

48. Thus, the Schedule 70 rate, although insufficient to cover the entire cost of single-phase conversions at today's prices, clearly comes much closer to covering those costs than the costs to convert three-phase feeder. Conversion of three-phase feeder is significantly more expensive than conversion of single-phase distribution lines, and the Commission did not intend to require PSE to perform three-phase conversions under the Schedule 70 rate.

**3. Schedule 71 applies to the conversions of South 170th Street and 92nd Ave N.E.**

49. South 170th Street and 92nd Avenue N.E. are eligible for conversion under Schedule 71. Schedule 71 applies to:

those portions of municipalities which are zoned and used for commercial purposes (*and...such other areas of such municipalities which have electric load requirements which are comparable with developed commercial areas.*)

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Schedule 71, § 2 (emphasis added). Schedule 71 plainly applies not only to areas that are zoned commercial, but also to "other areas" of municipalities "which have electric load requirements which are comparable with developed commercial areas."

50. As set forth above, developed commercial areas in PSE's service territory contain three-phase electrical systems. The conversion areas at issue contain three-phase systems to meet load requirements of PSE's distribution backbone, including the requirements of commercial, three-phase customers, and to meet load requirements of surrounding residential areas that contain only single-phase distribution facilities which tap into PSE's three-phase distribution backbone. Logen Aff. at ¶¶ 5, 8-9. Thus, the conversion areas along South 170th Street and 92nd Avenue N.E. "have electric load requirements which are comparable with developed commercial areas."

51. SeaTac argues that even if PSE's distribution system requires that three-phase facilities run through a conversion area, "PSE's design requirements for customers outside the Conversion Area cannot be used to measure the electrical load requirements of the residential dwellings within the Conversion Area." SeaTac Motion at 7. SeaTac's argument is contrary to the Tariff. If the load requirements of PSE's system require that three-phase feeder run through an area, then that area has "electric load requirements which are comparable with developed commercial areas." Nothing in Schedule 71 suggests that load requirements are to be measured with respect to individual dwellings in an area, as opposed to with respect to PSE's electric system.

52. If the Commission determines that SeaTac and Clyde Hill are correct and that Schedule 71 does not apply to the conversions at issue, then neither Schedule 70 nor Schedule 71 would apply. In that case, PSE would still be willing to convert these facilities to underground, but SeaTac and Clyde Hill would have to pay 100% of the costs of the conversions.

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**4. PSE is not discriminating against SeaTac or Clyde Hill**

53. PSE is fully complying with its nondiscrimination and filed rate doctrine requirements with respect to the SeaTac and Clyde Hill conversions.

54. In the past, PSE consistently has interpreted Schedules 70 and 71 to require that Schedule 70 be applied only to conversions of single-phase electrical systems within residential areas, and that Schedule 71 be applied to conversions of three-phase feeder, even if the three-phase system runs through an area containing residential dwellings. Thus, SeaTac and Clyde Hill are being treated exactly the same as any other PSE customer in the same position. Logen Aff. at ¶ 13.

55. In conversion areas containing a single-phase system in a portion of the conversion area and a three-phase system in another portion, PSE has converted the single-phase portion of the system to underground under Schedule 70 and the three-phase portion of the system to underground under Schedule 71. Thus, an applicant obtains the benefit of Schedule 70 for portions of a project that are single phase, while PSE preserves the distinctions in Schedule 70 and 71 that permit PSE to better recover the additional costs involved in conversions of three-phase feeder to underground. In the present case, PSE has similarly extended to Clyde Hill the benefit of a Schedule 70 conversion in areas of the LID that contain a single-phase system (and that are not located on private property), while insisting that Schedule 71 applies to the three-phase feeder along 92nd Avenue N.E. *See* Stipulated Fact No. 10; Stipulated Exhibit D, pink highlighting. Logen Aff. at ¶ 15.

56. SeaTac and Clyde Hill are asking to obtain more favorable terms for their conversions than PSE extends to its other customers. PSE's refusal to do so fully complies with RCW 80.28.090 and 80.28.100.

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**C. The Clyde Hill Facilities Along Private Drives and Through Private Property are Not Subject to Conversion Under Schedules 70 or 71, and Clyde Hill Must Pay 100% of the Cost of Such Conversion**

57. PSE historically has interpreted Schedule 70 and Schedule 71 to apply only to conversions of PSE's overhead facilities that are located in public rights of way, and not to facilities that are located on private property and/or PSE easements. Where PSE's existing overhead facilities are located on private property and/or PSE easement, PSE generally has been willing to convert the facilities to underground, but requires the requester to pay 100% of the costs of the conversion. Logen Aff. at ¶ 19.

58. PSE's position on this issue complies with its Tariff. Schedule 70 requires that the Conversion Area must be not less than one (1) city block in length, or in the absence of city blocks, not less than six (6) contiguous building lots abutting each side of the *public thoroughfare* with all real property on both sides of each *public thoroughfare* to receive electric service from the Main Distribution System.

Schedule 70, § 2 (emphasis added).

59. The existing overhead facilities within the Clyde Hill LID area that PSE claims do not meet the terms of Schedule 70 or 71 are located along *private drives and through private property* running east of and perpendicular to 92nd Avenue N.E. and west of and perpendicular to 94th Avenue N.E. (hereinafter referred to as "Facilities on Private Drives"). See Stipulated Exhibit No. D, green highlighting. PSE's existing overhead Facilities on Private Drives are located on PSE easements, or by invitation of the property owner, and *there is no public thoroughfare in these areas*. See Stipulated Facts No. 12. Thus, the Facilities on Private Drives do not meet the conditions of a Schedule 70 conversion.

60. Moreover, if Schedule 70 were held to be applicable to the Facilities on Private Drives, PSE essentially would

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be forced by the pricing section of Schedule 70 to convert those facilities for free. An applicant for a conversion must pay PSE:

at the rate of \$20.33 per centerline foot of all *public thoroughfares* within the Conversion Area utilizing surface-mounted transformers....

Schedule 70, § 3.b (emphasis added). PSE thus is not permitted to measure private drives in calculating the number of centerline feet in a conversion area, and would not be able to charge Clyde Hill for converting the Facilities on Private Drives.

61. Schedule 71 is also not applicable to conversion of the Facilities on Private Drives.

Like Schedule 70, Schedule 71 speaks in terms of *public* streets:

[T]he 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.

Schedule 71, § 2 (emphasis added). The Facilities on Private Drives are not located on any public street.

62. Clyde Hill argues that the Facilities on Private Drives are part of the overall Conversion Area within the LID boundary. As described above, Clyde Hill's suggestion that a single tariff schedule necessarily applies within the entire LID boundary is incorrect. If a project encompasses portions of PSE's system that have different characteristics, then different Tariff schedules may apply within the overall project boundary.

63. There is good reason for Schedules 70 and 71 to speak in terms of "public thoroughfares" and "public streets," and for PSE's historical understanding that Schedules 70 and 71 apply only to facilities located in rights of way, and not on private property. Where PSE's facilities are located on private property on PSE easements or by prescriptive right, PSE cannot be ordered by the owner of the underlying private property to do anything with its facilities. *See, e.g., City of Seattle v. Nazarenius*, 60 Wn.2d

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657, 665-66, 374 P.2d 1014 (1962) (owner of easement has the right to use the property subject to the easements for the purposes stated in the easement); *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942) (a prescriptive right, once acquired, is fixed by the extent of the use and may not be disturbed by the owner of the servient estate). Thus, as against property owners, PSE has and always has had a right to leave its existing overhead facilities on private property in place.

64. Likewise, municipalities do not have authority to require PSE to convert its overhead facilities that are located on private property to underground. *See, e.g., In re Public Serv. Elec. & Gas Co.*, 35 N.J. 358, 173 A.2d 233, 240 (1961) (invalidating municipal ordinance requiring the undergrounding of wires over a private railroad right-of-way); *Duquesne Light Co. v. Monroeville*, 449 Pa. 573, 298 A.2d 252 (1972) (statute giving boroughs the power to define a reasonable district within which wires shall be placed underground did not confer upon a borough the power to compel undergrounding of a public utility's wires); *Union Elec. Co. v. Crestwood*, 499 S.W.2d 480 (Mo. 1973) (city ordinance prohibiting all overhead transmission, whether on public or private property, struck down). Indeed, "where relocation of electrical wiring on private property to underground conduits is required, a compensable 'taking' under the power of eminent domain will be deemed to have occurred." *McQuillin Mun. Corp.* § 24.588 at 313 (3d Ed. 1998).

65. By contrast, municipalities have long been held to have authority to require at least some undergrounding on public streets.<sup>5</sup> *See Edmonds v. General Tel. Co.*, 21 Wn. App. 218, 226, 584 P.2d 458 (1978) (distinguishing cases that have struck down undergrounding ordinances because: "In the instant case, the ordinance in question is not a general ordinance affecting all

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<sup>5</sup> Subject, of course, to the limitation that any such requirement may not violate a tariff or an existing franchise. *Gen. Tel. Co. v. Bothell*, 105 Wn.2d at 586-87

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overhead facilities of the company located on both public and private property...Rather, its effect is limited to one public street..."); *Union Elec. Co. v. Crestwood*, 499 S.W.2d at 484 (authority may be found to justify an ordinance prohibiting overhead wires which affected only public streets).

66. Thus, Schedules 70 and 71 were intended to set the terms and conditions for the undergrounding of PSE's facilities that could potentially be subjected to mandatory undergrounding: the facilities located in rights of way. By filing Schedules 70 and 71, PSE ensured that municipalities or property owners requesting (and potentially ordering) undergrounding of PSE's facilities located on public streets and thoroughfares would share in the costs of such undergrounding, rather than requiring PSE to convert its facilities at PSE's expense, and would provide adequate operating rights for the undergrounded facilities. PSE also limited the circumstances in which undergrounding on rights of way would be made available. There was no need for PSE to file any tariff schedule with respect to its facilities on private property because PSE could, in its sole discretion, decide whether or not to convert to underground at all, and on what terms. Schedules 70 and 71 must be interpreted to take into account the context of the overall scheme of property rights and municipal powers that related to the placement and continued operation of PSE's facilities. *See Cockle*, 142 Wn.2d at 810-13.

67. To interpret Schedules 70 and 71 to apply to PSE's facilities located on private property would be contrary to the tariff language, which speaks in terms of "public thoroughfares" and "public streets," would violate PSE's property rights, and would ignore the historical and legal context in which the schedules were filed by PSE and approved by the Commission.

**D. Clyde Hill Has No "Vested" Right to Demand Conversion Under the Current Version of PSE's Tariff**

68. Clyde Hill asks the Commission to declare that "[t]he City of Clyde Hill and the underground conversions described

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in Clyde Hill Local Improvement District No. 2001-01 are vested under the now existing version of Schedule 70." Clyde Hill Motion at 10. Clyde Hill does not provide any support for the proposition that it is entitled to obtain the conversion under the current version of Schedule 70, regardless of whether Schedule 70 is clarified or amended in the future and regardless of when Clyde Hill performs the conversion, and its vesting assertion is without merit.

69. Clyde Hill has no vested interest under Schedule 70. The term "vest" means "[t]o give an immediate, fixed right of present or future enjoyment." BLACK'S LAW DICTIONARY SIXTH EDITION at 1563. The concept of "vesting" has been applied to several types of rights, including property rights, rights to pension fund assets and rights to certain stock options. However, the concept of vesting does not extend to utility tariffs.

70. Customers take service under Schedule 70 *subject to subsequent changes to such schedules adopted by the Commission*. Section 9 of Schedule 70 provides that "[s]ervice under this schedule is subject to the General Rules and Provisions contained in this tariff." Those general rules and provisions are found in Schedule 80, which states:

The schedules and conditions specified in this tariff for electric service *are subject to change by order of the Washington utilities and Transportation Commission or upon the effectiveness of a superseding schedule* and in accordance with the laws of the state of Washington regulating public service companies and any amendments thereto.

Schedule 80, § 4 (emphasis added). Clyde Hill's suggestion that it has a right to underground conversion of its current Project under a particular version of Schedule 70, so that Clyde Hill is immune from any revision to that Schedule, is in complete derogation of the express terms of Schedules 70 and 80 and of the Commission's authority to order revisions to such schedules under appropriate circumstances.

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71. PSE's form Schedule 70 Underground Conversion Agreement contains a qualification consistent with Schedules 70 and 80:

This Agreement is subject to the General Rules and Provisions set forth in Schedule 80 of the Company's electric Tariff G and to Schedule 70 of such tariff, *as such Schedules may be revised from time to time upon approval of the Washington Utilities and Transportation Commission.* Provided, however, if either of the foregoing Schedules are revised, any price quoted will be honored for sixty (60) days following such revision. Any conflict in terms between this Agreement and the Company's Schedules 70 and 80 of its tariff shall be resolved in favor of such tariff provisions.

Schedule 70 Agreement, § 12 (emphasis added), attached to Logen Aff. at Exhibit J.

72. The only exception to the general rule that revisions to the Tariff control over the prior version of the Tariff is the sixty (60) day freeze on quoted rates that PSE extends in its Underground Conversion Agreement. That provision, however, does not support Clyde Hill's contention that it has a vested right under Schedule 70. First, Clyde Hill has not entered into an Underground Conversion Agreement with PSE, thus Clyde Hill may not rely on such provision. Second, the only quote PSE has given to Clyde Hill with respect to the underground conversion of the Clyde Hill Project at issue was calculated pursuant to PSE's interpretation of Schedules 70 and 71. PSE has never quoted the Clyde Hill Project solely on the basis of Schedule 70. *See* Stipulated Exhibit No. E.

73. While PSE has not found any Washington case law on point, the California Public Utilities Commission has refused to insulate utility customers from the effects of tariff modifications, and has explicitly ruled that the concept of vesting has no application with respect to utility tariffs or operations. *See Hargrave Secret Service v. PT&T*, 78 CPUC 201, 1975 Cal. PUC LEXIS 306 (1975) ("We hold that utility customers do not have vested rights in tariff provisions or operating practices.").

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**IV. CONCLUSION**

74. For the reasons set forth above, PSE respectfully requests that the Commission grant PSE's motion for summary determination and issue an order:

- a. Declaring that Schedule 71, rather than Schedule 70, applies to the conversion of PSE's overhead facilities to underground along South 170th Street between 37th Avenue South and Military Road South in the City of SeaTac;
- b. Declaring that Schedule 71, rather than Schedule 70, applies to the conversion of PSE's overhead facilities to underground along 92nd Avenue N.E. in the City of Clyde Hill;
- c. Declaring that neither Schedule 70 nor Schedule 71 applies to the conversion of PSE's overhead facilities to underground on private drives connecting to 92nd Avenue N.E. and 94th Avenue N.E. in the City of Clyde Hill, and that Clyde Hill must pay 100% of the cost of the conversion to PSE; and
- d. Dismissing the petitions and complaints of the City of SeaTac and the City of Clyde Hill in these dockets, with prejudice.

DATED: August \_\_\_, 2001.

**PERKINS COIE LLP**

By \_\_\_\_\_  
Kirstin S. Dodge  
William R. Bue  
Attorneys for Puget Sound Energy, Inc.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused the foregoing document, along with the accompanying Declaration of Lynn F. Logen, to be served upon all parties of record in this proceeding, by hand-delivery to:

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Dated at \_\_\_\_\_, Washington, this \_\_\_\_\_  
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