BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

CITY OF KENT, Petitioner, v. PUGET SOUND ENERGY, INC., Respondent.	DOCKET NO. UE-010778 (Consolidated)
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CITY OF AUBURN, CITY OF BREMERTON, CITY OF DES MOINES, CITY OF FEDERAL WAY, CITY OF LAKEWOOD, CITY OF REDMOND, CITY OF RENTON, CITY OF SEATAC, AND CITY OF TUKWILA, Petitioners, v. PUGET SOUND ENERGY, INC., Respondent.	DOCKET NO. UE-010911 (Consolidated) **CITIES' MOTION FOR SUMMARY DETERMINATION AND MEMORANDUM IN SUPPORT**

MOTION FOR SUMMARY DETERMINATION

The City of Auburn, City of Bremerton, City of Des Moines, City of Federal Way, City of Lakewood, City of Redmond, City of Renton, City of SeaTac, and City of Tukwila ("Cities") file this Motion for Summary Determination pursuant to WAC 480-09-426(2). The Cities and Puget Sound Energy ("PSE" or "Company") are engaged in a dispute regarding the interpretation of Schedule 71.

A. Relief Requested

To resolve this dispute, the Cities request that the Commission grant summary determination in its favor and issue an order declaring that:

(1) Schedule 71 is mandatory, not voluntary, and PSE must convert its overhead facilities to underground when the conditions set forth in Section 2 are satisfied;

(2) Schedule 71 does not require Cities to purchase or pay for 100% of the costs of private easements for PSE's exclusive possession and use;

(3) Schedule 71 applies to underground conversion of facilities located on PSE's property adjacent to and along the rights-of-way;

(4) Section 3 of Schedule 71 does not permit PSE to force unreasonable and inconsistent contract terms upon the Cities; and

(5) If Schedule 71 applies to the SeaTac South 170th Street Project, Schedule 71 requires PSE to pay 70 percent of the costs of underground conversion.

B. Declarations, Stipulated Facts, And Exhibits

The Cities' Motion is based upon the pleadings and Stipulation of Facts and Law, the Exhibit List, and the Comprehensive Issues List submitted on August 1, 2001. In addition, the Cities offer the following declarations and exhibits in support of their Motion:

(1) Declaration of Thomas W. Gut in Support of Cities' Motion for Summary Determination and Exhibits thereto;

(2) Declaration of Cary Roe in Support of Cities' Motion for Summary Determination and Exhibits thereto;

(3) Declaration of James F. Morrow and Exhibits thereto;

(4) Declaration of Maiya I. Andrews in Support of Cities' Complaint and Petition for Declaratory Relief; and

(5) Stipulated Exhibits Nos. 1-14, 16, 17, 19, 20.

There are no genuine issues of material fact, and the Cities are entitled to judgment as a matter of law. The Cities therefore respectfully request that the Commission grant Summary Determination in their favor.

STATEMENT OF FACTS

1. Facts Related To Easements

Cities in Washington are responsible for the construction, maintenance, and improvement of the streets and rights-of-way in their respective jurisdictions. *See, e.g.,* RCW 35.22.280(7); RCW 35A.47.040. Pursuant to their statutory authority, the Cities are planning and constructing street improvements, including projects along Pacific Highway South (Highway 99), that require underground conversion of PSE's overhead facilities in the public rights-of-way. Stipulated Fact No. 5. Pursuant to Schedule 71, the Cities have requested that PSE convert its overhead facilities in the Pacific Highway South and other planned project areas to underground. Stipulated Fact No. 6.

PSE agrees that the criteria of Section 2 of Schedule 71 are met by the Pacific Highway South projects. Stipulated Fact No. 4. However, as a condition of performing underground conversion for the Pacific Highway South and other planned projects, PSE requires that easements in PSE's name and in PSE's standard form be provided on private property for placement of underground and pad-mounted facilities. Stipulated Fact No. 7. PSE contends that Cities must obtain these easements or reimburse PSE for the costs of the easements. Stipulated Fact No. 10.

PSE contends that underground conversion under Schedule 71 is voluntary. Stipulated Exhibit Nos. 10, 14. PSE has refused to proceed with underground conversion projects under Schedule 71 until the Cities agree to acquire private easements at locations selected solely at PSE's discretion. Stipulated Exhibit 14. PSE insists that all of its new underground construction must be placed on private easements. Stipulated Exhibit 10. PSE has refused to place its facilities in City rights-of-way even where adequate space exists or Cities agree to purchase additional rights-of-way. Declaration of Maiya I. Andrews ("Andrews Decl."), ¶ 6-7. If a City will not execute PSE's current form Underground Conversion Agreement and current form Engineering Agreement, PSE refuses to convert its overhead facilities to underground. Stipulated Fact No. 9.

The relevant provisions of PSE's Schedule 71 have been in effect since at least 1970. Stipulated Fact No. 11. Until recently, PSE routinely performed underground conversion when requested by Cities under a Schedule 71 "Underground Conversion Agreement." *See*, *e.g.*, Declaration of Thomas W. Gut in Support of Cities' Motion for Summary Determination ("Gut Decl."), Ex. A. The Underground Conversion Agreement was interpreted to require Cities to provide adequate operating rights for PSE in the municipal rights-of-way or a City-owned utility easement. The Underground Conversion Agreement was not interpreted to require Cities to purchase private easements for PSE's exclusive possession and control as a condition to performing underground conversion under Schedule 71. Declaration of James F. Morrow ("Morrow Decl."), ¶ 6; Declaration of Cary Roe ("Roe Decl."), ¶ 4; Gut Decl., ¶ 18. As such, the Underground Conversion Agreement did not condition PSE's performance of the underground conversion upon the Cities' agreement to acquire or pay for private easements for PSE's exclusive possession and use. *Id.*

2. Facts Applicable To Federal Way 23rd Avenue South/South 320th Street Project

In addition to the Pacific Highway South project, the City of Federal Way is undertaking a street improvement project at the intersection of 23rd Avenue South and South 320th Street. The improvements extend along 23rd Avenue South, from South 316th to South 324th Street, and along South 320th Street on either side of 23rd Avenue South, from 20th Avenue South to 25th Avenue South. As part of this project, the City has requested that PSE convert its overhead facilities to underground. Stipulated Fact No. 12. Most of PSE's existing overhead facilities along the 320th Street portion of the street improvements are located on PSE easements outside of Federal Way's right-of-way. Federal Way's street improvements will not encroach into PSE's easement areas. Stipulated Fact No. 13.

PSE has refused to convert its overhead facilities located on PSE's easements to underground under Schedule 71. PSE is attempting to "piecemeal" the project, contending that the work on South 320th Street and the work on 23rd Avenue South are two separate projects. With respect to the portion of improvements along South 320th Street, PSE claims Schedule 71 applies only to overhead facilities located in public rights-of-way, not on private property. Stipulated Fact No. 14. PSE will convert the overhead facilities to underground along South 320th Street only if Federal Way pays PSE for 100% of the cost of the conversion. Stipulated Fact No. 15. With respect to the portion of the improvements along 23rd Avenue South, PSE contends that Schedule 71 does not apply at all, because PSE claims that the 300-foot length area along 23rd where facilities will be placed underground does not constitute "two (2) contiguous city blocks" within the meaning of Section 2 of Schedule 71.

3. Facts Applicable To SeaTac South 170th Street Project

The City of SeaTac is engaged in a separate street improvement project on South 170th Street ("South 170th Street Project"). SeaTac contends that Schedule 70 applies to the underground conversion for this project, but PSE contends that Schedule 71 applies. Stipulated Fact No. 2, Docket No. UE-010891, UE-011027 ("SeaTac Docket"). The issue of whether Schedule 70 or Schedule 71 applies to the South 170th Street Project is being litigated in the SeaTac Docket. If SeaTac prevails in the SeaTac Docket, the Commission will not need to decide any further issues in the present proceeding. However, if PSE prevails in the SeaTac Docket, there will be a dispute as to the application of the cost-sharing provisions of Section 3 of Schedule 71 to the South 170th Street Project.

If the Commission determines that Schedule 71 applies to the South 170th Street Project, SeaTac contends that its share of the costs of underground conversion is 30%. Stipulated Fact No. 16. If the Commission determines that Schedule 71 applies to the South 170th Street Project, PSE contends that SeaTac's share of the cost of underground conversion is 70%. The SeaTac South 170th Street project will widen the existing two-lane street from approximately 24 feet to 36 feet; replace gravel shoulder and drainage ditches with bicycle lanes on both sides of the street that are contiguous to the driven lanes; and add new curbs and gutters behind the bicycle lanes, new sidewalks behind the curbs, and new planter strips behind the sidewalks. Stipulated Fact No. 18. PSE agrees that SeaTac is adding "one full lane" to an arterial street or road. Stipulated Fact No. 20.

There are eight poles involved in the 170th Street underground conversion. If they were not converted to underground, two of PSE's poles would be located in the new roadway and six would be located in the sidewalk more than six inches from the street side of the curb. Stipulated Fact No.

19. Under these circumstances, SeaTac contends that if PSE Schedule 71 applies at all, SeaTac would pay only 30% of the costs of the conversion because, under Section 3(b)(1) of Schedule 71, the existing overhead system is "required to be relocated due to addition of one full lane or more to an arterial street or road." PSE, on the other hand, contends that SeaTac would pay 30% of one quarter of the total cost of the conversion because one quarter of the poles of the existing overhead system are "required to be relocated due to addition of one full lane or more to an arterial street or road" under Section 3(b)(1), but that SeaTac must pay 70% of three quarters of the total cost of the conversion because three quarters of the poles are not, in PSE's opinion, "required to be relocated due to addition of one full lane or more to an arterial street or road" under Section 3(b)(1) of Schedule 71. Stipulated Fact. No. 17.

MEMORANDUM OF LAW

Summary determination is proper when there is no genuine issue as to any material fact and the moving party is entitled to a summary determination in its favor as a matter of law. *See* WAC 480-09-426(2); *see also* CR 56(c). In the present case, there is no genuine issue as to any material fact. The Commission can determine the matter based on the Stipulation of Facts, the Stipulated Exhibits, and the Declarations. The Cities are entitled to judgment as a matter of law, and the Cities urge the Commission to grant summary determination in their favor.

I. Schedule 71 Is Mandatory, Not Voluntary; PSE Must Convert Its Overhead Facilities To Underground When The Conditions Set Forth In Section 2 Are Satisfied.

PSE contends that it may refuse to perform underground conversions "except on terms that are satisfactory to the Company." Answer, p. 20. To the contrary, PSE must convert its facilities from overhead to underground when the conditions set out in Schedule 71 are satisfied. Schedule 71

does not give PSE the discretion to decide whether or not to perform a requested underground conversion. Underground conversion under Schedule 71 is mandatory, not voluntary.

Section 2 of Schedule 71 sets forth the only conditions for the "Availability" of underground conversion:

> AVAILABILITY. Subject to availability of equipment and materials, the Company will provide and install a Main Distribution System and will remove existing overhead electric distribution lines of 15,000 volts or less together with Company-owned poles following the removal of all utility wires therefrom in those portions of municipalities which are zoned and used for commercial purposes (and in such other areas of such municipalities which have electrical load requirements which are comparable with developed commercial areas), provided that at the time of such installation the Company shall have the right to render service in such municipalities pursuant to a franchise in a form satisfactory to the Company, and provided further, that the 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.

WN U-60, First Revised Sheet No. 71 (emphasis added).

PSE is obligated by the mandatory language of Section 2 to convert its overhead electric distribution lines of 15,000 volts or its poles to an underground electric distribution system when the conditions for availability are satisfied. The only provisos in Section 2 are: (1) PSE "shall have the right to render service in such municipalities pursuant to a franchise in a form satisfactory to the Company," and (2) "the 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." *Id.* Provided these conditions are met, PSE cannot refuse to perform an underground conversion. PSE cannot make additional demands on a City to pay for private easements or comply with contract terms that are inconsistent with Schedule 71. When the conditions of Section 2 are satisfied, PSE must convert its facilities underground upon request.

II. Schedule 71 Does Not Require Cities To Purchase Or Pay 100% Of The Costs Of Private Easements For PSE's Exclusive Possession And Use.

PSE contends that, as condition of performing an underground conversion under Schedule 71, the Company may require Cities to pay 100% of the costs of obtaining private easements for PSE's exclusive possession and use. *See, e.g.,* Answer, pp. 17-22. PSE's contention is contrary to the plain language of Schedule 71. Nothing in Schedule 71 supports this contention. In fact, PSE concedes that "Schedule 71 does not directly require cities to obtain easements or to reimburse PSE for such easements." PSE's Statement of Fact and Law, ¶ 55.

In order to avoid the plain meaning of Schedule 71, PSE attempted earlier this year to revise the tariff to explicitly require private easements. Docket No. UE-01068 (February 20, 2001). PSE later withdrew the proposed tariff, and the docket was closed. Commission Minutes (March 14, 2001). The revision attempt, however, is strong evidence that even PSE does not believe the currently-effective Schedule 71 requires the purchase of private easements.

There are no genuine issues of material fact on the easement issue, and the Cities are entitled to a determination as a matter of law. Accordingly, the Cities request that the Commission rule that Schedule 71 does not permit PSE to charge cities for the costs of private easements for its exclusive possession and use.

A. Section 2 Of Schedule 71 Does Not Require Cities To Obtain Private Easements For PSE.

In construing Schedule 71, the Commission applies standard principles of statutory construction. *See National Union Ins. Co. v. Puget Power & Light*, 94 Wn. App. 163, 171, 972 P.2d 481 (1999). When the language of a tariff is clear, as it is in Section 2, the Commission need go no farther: "Where the language of a tariff is "plain, 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).

Section 2 of Schedule 71 plainly sets forth the terms for the "Availability" of Schedule 71. Not one word in Section 2 – or indeed anywhere else in Schedule 71 – requires Cities to purchase private easements for PSE. Section 2 does not even mentions easements. To the contrary, the only conditions for the "Availability" of Schedule 71 are (1) equipment and materials are available; (2) the portion of the municipality in which electrical facilities are to be converted to be underground is zoned and used for commercial purposes; (3) PSE has the right to render service in the municipality pursuant to a franchise satisfactory to the Company; and (4) the Conversion area is not less than two contiguous city blocks in length with all real property on both sides of each public street to receive electric service from PSE's main distribution system.

Section 2 is "plain, free from ambiguity, and devoid of uncertainty." *People's Org.*, 101 Wn.2d at 429-30. Plain words do not require construction. *See Western Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000). PSE's attempt to insert words into Section 2 to require Cities to buy private easements is contrary to the plain meaning of the tariff and must be rejected.

B. Section 4 Of Schedule 71 Does Not Require Cities To Obtain Private Easements For PSE's Exclusive Possession And Use.

PSE also contends that Section 4 of Schedule 71 requires Cities to provide PSE with private easements as a condition for performing underground conversions. Answer, p. 17. To the contrary, nothing in Section 4 of Schedule 71 even mentions private easements, much less requires Cities to pay 100% of the cost of private easements for PSE's exclusive possession and use.

Section 4 provides:

> OPERATING RIGHTS. The owners of real property within the Conversion Area shall, at their expense, provide space for all underground electrical facilities which in the company's judgment shall be installed on the property of said owners. In addition, said owners shall provide to the Company adequate legal rights for the construction, operation, repair, and maintenance of all electrical facilities installed by the Company pursuant to this schedule, all in a form or forms satisfactory to the Company.

WN U-60, First Revised Sheet Nos. 71-a, 71-b. Cities are not "owners of real property" within the meaning of Section 4, and any "operating rights" that the Cities provide are satisfied by the rights and privileges conferred by the municipal franchises granted to PSE.

1. Cities Are Not "Owners Of Real Property" Under Section 4.

Cities are not "owners of real property" within the meaning of Section 4. The Cities are not "owners" of the streets and rights-of-way at all, but rather they hold the streets and rights-of-way in trust for the public. *C.f. Commercial Waterway Dist. No. 1 v. Permanente Cement Co.*, 61 Wn.2d 509, 512-513, 379 P.2d 178 (1963) (waterway right-of-way is equivalent to that on land; both are held in trust by municipality for public); *Pierce County v. Thompson*, 82 Wn. 440, 444, 144 P. 704 (1914) (drainage district, like municipal authority, holds condemned land in trust for public use). In Washington, the public has only an easement of use in a public street; the underlying fee rests in the owners of abutting property. *See Christian v. Purdey*, 60 Wn. App. 798, 801, 808 P.2d 164 (1991) (*citing Bradley v. Spokane & I.E.R.R.*, 79 Wn. 455, 458 (1914)). Thus, when city streets are vacated, title reverts to abutting property owners. *See* RCW 35.79.040. The term "owners of real property" in Section 4, therefore, does not mean Cities.[1]

[1] Similarly, in a judgment dated March 13, 1998 in *Pierce County et al. v. U S West*, the Pierce County Superior Court construed the term "others requesting relocation" in US West Tariff WN U-31. The Court concluded as a matter of law that "others" did not include Counties. A copy of this decision is attached to this Motion.

2. "Owners Of Real Property" In Section 4 Are Private Owners Within The Conversion Area.

Private businesses and home owners – not Cities – are the "owners" who must provide Section 4 "Operating Rights" on private property. The owners of real property within a Conversion Area are responsible either for the entire cost of an underground conversion or, at a minimum, for the cost of the connection between their property and PSE's distribution system.

Underground conversion can be financed by a local improvement district, in which case the property owners within the conversion area pay the costs of conversion of the electrical system. *See* RCW 35.96.030. A municipality can also direct underground conversion as part of a street improvement project, in which case the municipality shares with PSE the costs of converting the distribution system underground. *See* Schedule 71, § 3. In either case, private property owners are responsible for the conversion of the service lines from the electric distribution system to their property. *See* RCW 35.96.050.

Private property owners must pay the cost of the underground connection between the electric distribution system and their property under Schedule 86. *See, e.g.*, Schedule 86, § 2 ("Underground Services Lines to Single-Family Residential Structures"). Schedule 86 provides the terms and conditions for underground conversion of service lines to private property. Property owners are required to obtain "Operating Rights" under Schedule 86 as follows:

> Adequate legal rights for the construction, operation, repair and maintenance of overhead or underground service facilities over or through all property including property not owned by the Customers, shall be provided to the Company by the Owner or owners thereof prior to the commencement of construction of said facilities. described in Schedule 71.

WN U-60, Fourth Revised Sheet No. 86-b. [2] Similarly, private property owners within the Conversion Area – not Cities – are responsible for providing PSE with "Operating Rights" under Section 4.

3. Cities Provide PSE With "Space" And "Operating Rights" In The Public Rights-Of-way.

Cities provide PSE with necessary "Operating Rights" by granting PSE municipal franchises to use the public rights-of-way. For example, a typical franchise grants to PSE

> The right, privilege, authority and franchise to set, erect, construct, support, attach, connect and stretch facilities between, maintain, repair, replace, enlarge, operate and use facilities in, upon, over, under along, across and through the franchise area for purposes of transmission, distribution and sale of energy for power heat, light and any other purpose for which energy can be used; and to charge and collect tolls, rates and compensation for such energy and such uses.

Stipulated Exhibit 6: SeaTac Ordinance No. 93-1026 (June 8, 1993), p. 1.[3]

No further "Operating Rights" are required on public rights-of-way. PSE's standard easement form conveys a "perpetual easement over, under, along, across, and through" the property, which permits PSE to construct, operate, maintain, replace, improve, remove, enlarge and use the easement area for purposes of "transmission, distribution and sale of electricity." Stipulated Exhibit No. 19. PSE's standard easement form thus conveys exactly the same "Operating Rights" that the Cities have already granted to PSE by franchise. PSE's own guidelines agree: "A large percentage of Puget Sound Energy's system is located on public road rights-of-way. Operating rights for most

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[2] *See also* Schedule 85, which provides for line extensions for customers and developers who want electric service in areas not connected by PSE's existing distribution lines. Schedule 85 also requires "the customer" to obtain the same "Operating Rights" as are required by Schedule 71. WN U-60, Fifth Revised Sheet No. 85-e.

[3] PSE's franchises with other Cities contain identical or similar language. *See*, Stipulated Exhibit No. 1 (Auburn), No. 2 (Bremerton), No. 3 (Des Moines), No. 4 (Federal Way), No. 5 (Renton), No. 6 (SeaTac), and No. 7 (Tukwila).

of this system are in the form of franchises." Stipulated Exhibit No. 20, PSE's Standard §0300.8000 - Easements, p. 4 of 5 (1997) (emphasis added).

The Cities also provide "space" for both PSE's underground and its above ground facilities in the public rights-of-way. If there is not sufficient space within the right-of-way to accommodate PSE's needs, the Cities can buy easements in the City's name for space sufficient to accommodate all utilities' facilities. *See* Gut Decl., ¶ 19; Roe Decl., ¶ 14; Andrews Decl., ¶ 7. Under no circumstances, however, are Cities required by Section 4 to provide PSE with private easements for its exclusive possession and use.

C. Requiring Cities To Purchase Easements For PSE's Exclusive Possession And Use Would Violate The Constitutional Prohibition Against Gifts Of Public Funds.

The Commission has approved schedule 71, and the Commission must construe the tariff in harmony with state law. Schedule 71 is presumed to be consistent with the law. *See City of Auburn v. QWEST Corp.*, 247 F.3d 966, *as amended*, 2001 WL 823718, at * 8 (9th Cir. July 10, 2001); *People's Org. for Wash. Energy Resources v. WUTC*, 101 Wn.2d 425, 434, 679 P.2d 922 (1984) (tariff may not set terms that conflict with statute); *National Union Ins. Co. v. Puget Sound Power & Light*, 94 Wn. App. 163, 173-75, 972 P.2d 481 (1999) (tariff purporting to absolve utility from liability should not be interpreted in conflict with statutes). "It is well settled . . . that tariffs are read to be consistent with preexisting statutory law, and cannot repeal or supersede a statute." *Auburn v. QWEST*, 2001 WL 823718, at * 8.

Interpreting Schedule 71 so as to require Cities to purchase private easements for PSE's exclusive use and possession would violate the constitutional prohibition against gifts of public funds. Article 8, Section 7 of the Washington State Constitution states that:

> No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

WASH. CONST. Art. VIII, § 7. The purpose for the constitutional rule "is to prevent the appropriation of public funds for private enterprises." *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491, 507, 857 P.2d 283 (1993) (quoting *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 701, 743 P.2d 793, 804 (1987)).

In some cases, the Courts have permitted expenditures to private entities for the public benefit. *See, e.g., Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 39, 785 P.2d 447 (1990). In analyzing transfers of public funds to a private entity for public benefit, the courts focus on the safeguards designed to protect the public interest. In *Washington State Housing Fin. Comm'n v. O'Brien*, the Court explained that such safeguards must satisfy three prerequisite criteria where a public benefit is involved. 100 Wn.2d 491, 495, 671 P.2d 247 (1983). First, the public must control the use of the publicly conferred asset, whatever its form. Second, the public must control the extent of its liability. Third, the public must retain the means to ensure that its public objectives are continually sought. *Id*.

Unless all three criteria are met, an expenditure of public funds to a private entity violates the constitutional prohibition even if a public benefit results. *Washington v. Pierce County,* 184 Wn. 414, 51 P.2d 407 (1935), is illustrative. In that case, the Court held that Pierce County's payments to

a private ferry company were unconstitutional, even though the ferries served an important public function, because the County retained no control over the ferries' future operation. *Id*., at 422-23.

Similarly, requiring Cities to buy private easements for PSE's exclusive use and possession would fail the public benefits test even though underground conversion benefits the public. The Legislature has determined that conversion of electric facilities to underground is "substantially beneficial to the public safety and welfare, is in the public interest and is a public purpose, notwithstanding any resulting incidental private benefit to any electric or communication utility affected by such conversion." RCW 35.96.010.

However, forcing Cities to buy private easements in PSE's name for PSE's exclusive use and under PSE's exclusive control would result in impermissible gifts of public funds. First, the Cities would lose control over private utility easements located outside the public rights-of-way. PSE's standard easement form grants PSE the right to use the easement only for transmission, distribution and sale of electricity, not for any other purpose. Stipulated Exhibit No. 19, ¶ 1. Telecommunications, water, sewer, gas, and other utilities could not use or cross PSE's easements. The Cities would be restricted in their ability to prevent interference with utilities located nearby on the public rights-of-way. The Cities would relinquish the authority conferred by law and by franchise to require PSE to relocate its facilities and to share in the costs of future underground relocations.

In carrying out their obligations, Cities must design and manage the area outside of the roadway as well as the streets and sidewalks. *See* "Roadside Safety Design Manual" (April 1998), Roe Decl., Ex. A. "The roadside environment is significant to safety as illustrated by the fact that nearly one third of the fatal accidents are single vehicle run-off-the-road accidents." *Id.* § 700.01.

Among the hazards in the "roadside environment" are poles and fixed objects extending above the ground. *Id.* § 7.005(2). If PSE's pad-mounted transformers and other above-ground facilities are located outside the municipal rights-of-way, Cities could not control the placement of the equipment and may be ham-strung in their ability to mitigate potential traffic hazards.

Second, the Cities would be unable to limit its liability for damages arising from PSE's use of private easements. For example, a City can be liable for improper placement of utility poles. *See, e.g., Smith v. Acme Paving Co.*, 16 Wn. App. 389, 393-93, 558 P.2d 811 (1976). When PSE's aboveground equipment is located inside the City rights-of-way, the City can require placement of utility poles so that they do not create a hazard to vehicle and pedestrian traffic. If PSE owned the easements where its poles were located, however, the City could not insure the safe placement of the equipment near the public streets and sidewalks. Additionally, the Cities could be liable for damages if the development potential of adjacent private property were diminished by granting private easements to PSE. *See* Gut Decl., ¶ 19.

Finally, the Cities would be unable to insure the continued use of private easements for the public benefit. Once PSE acquires a private easement, only PSE – not the City – would have the right to decide how the property would be used or if it would be used at all. PSE's standard easement form specifies that the easement shall not be deemed abandoned even if PSE fails to install any electric systems "within any period of time." Stipulated Exhibit No. 19, ¶ 5.

The Supreme Court has specifically held that the plain language of the Constitution prohibits imposing the costs of relocation of private utilities upon the state for road improvements. *See Washington State Highway Comm'rs v. Pacific Northwest Bell Tele. Co.*, 59 Wn.2d 216, 221-22, 367 P.2d 605 (1961). Even though the expenditures would serve a public purpose, the Court held

that the state's payment of relocation costs violated the constitutional prohibition against gifts of public funds. *Id*. Similarly, the Cities cannot grant property or give public funds to PSE for private easements for PSE's exclusive use and possession.

Street improvements are financed by municipal, state, and federal funds. *See, e.g.*, Gut Decl., ¶ 13 (state and city transportation funds). Giving these funds to PSE for its private use would be an impermissible "appropriation of public funds for private enterprises." *Northlake Marine Works*, 70 Wn. App. at 507.

D. PSE's Prior Performance Of Underground Conversions Confirms The Cities' Interpretation Of Schedule 71.

Until recently, PSE performed underground conversions consistent with the Cities' interpretation of Schedule 71. In most cases, PSE either placed its underground facilities on municipal rights-of-way or purchased private easements at its own expense. James Morrow, Director of Public Works for the City of Tukwila, stated: "To the best of my knowledge, PSE has never required the City of Tukwila to purchase private easements in connection with any underground project." Morrow Decl., ¶ 6. Tom Gut of the City of SeaTac also stated:

> There has always been a verbal understanding between the City and PSE that PSE will relocate their electric facilities, remove aerial electric wires and poles that obstruct construction on City streets, and replace these with underground facilities within the City rights-of-way on arterial streets. In fact, evidence of this verbal understanding is the fact that PSE has adhered to the City's verbal request in previous projects.

Id. ¶ 15. Mr. Gut added: "To the best of my knowledge, in the past PSE has not insisted that the City buy private easements for PSE's use for any underground conversion projects. PSE may have purchased easements at its own expense, but I have never seen any cost item for easements on invoices submitted to the City by PSE." Gut Decl., ¶ 18.

Cary Roe, Public Works Director for the City of Federal Way, stated: "To the best of my knowledge, until recently PSE has never insisted that the City buy exclusive private easements for PSE's use for any of these underground conversion projects. PSE may have purchased or obtained easements at its own expense, but I have never seen any cost item for easements on invoices submitted to the City by PSE." Roe Decl., ¶ 4.

In several underground conversion projects in the City of Federal Way, PSE agreed to place its facilities on public rights-of-way without demanding that the City pay for private easements. In 1995, Federal Way directed PSE to convert its overhead facilities to underground as part of a street improvement project on South 348th Street. The City purchased right-of-way for the street project and associated utilities, and PSE installed its lines underground within that right-of-way, along with other utilities (including water, sewer, natural gas, and telephone). The City permitted PSE to install two vaults, one of which was installed within the right-of-way; the other was installed on an easement that PSE obtained for no cost. At no time during the 348th Street project did PSE inform the City that it required that PSE facilities be installed in private, exclusive easements in PSE's name, or that the City pay for such private, exclusive easements in PSE's name. Roe Decl., ¶¶ 5, 8.

Similarly, in 1998, Federal Way directed PSE to convert its overhead facilities to underground for the South 312th Street project. As part of the project, the City purchased a three-meter (approximately 10-foot) utility easement in the City's name for the installation of underground utilities. The easement is part of the City's right-of-way. PSE installed its facilities underground on the right-of-way, along with water, sewer, natural gas and telephone utilities. PSE also installed its aboveground equipment within the City's easement or right-of-way. At no time during the 312th Street project did PSE require that PSE facilities be installed in private, exclusive easements in

PSE's name, or that the City pay for such private exclusive easements in PSE's name. Roe Decl., ¶ 7.

E. PSE's Purported Reasons For Requiring Cities To Purchase Private Easements Are Without Merit.

In its Answer, PSE attempts to justify its policy on private easements because of its professed concern for its ratepayers, for operational matters, and for safety. Answer, pp. 6-15. In the fall of 2000, however, PSE conducted a series of meetings with Federal Way, Kent, Auburn, Tukwila, Des Moines, and SeaTac. Declaration of Jim Morrow ("Morrow Decl."), ¶ 3. At the October 24, 2000, meeting, PSE announced the shift in policy requiring the Cities to purchase easements at the Cities' expense. At that meeting, PSE admitted that the purpose of the policy was financial. Morrow Decl., ¶ 4. When PSE's real reason is financial, PSE's motives for justifying the easement policy on other grounds are questionable.

1. Attempt To Escape PSE's Obligation To Relocate

PSE's insistence on locating all of its underground facilities on private easements is an attempt to avoid its responsibilities for relocation costs. When PSE's equipment must be relocated, PSE is liable for 100% of the costs of relocation. *See Granger Tel. & Tel. Co. v. Sloane Bros., Inc.*, 96 Wn. 333, 334, 165 P. 102 (1917) ("[A] city has no right directly or indirectly to burden itself or its citizens with the cost of removing and replacing of . . . electric light poles."). When street improvements require relocation of utility facilities to prevent interference with the public's use of the streets, the "long-established and unbroken rule established at common law" requires the utility to relocate its facilities at its own expense. *Auburn v. Qwest*, 2001 WL 823718, at *9 (9th Cir. July 10, 2001) (applying Washington law); *see also Washington Natural Gas Co. v. City of Seattle*, 60 Wn.2d 183, 186, 373 P.2d 133 (1962).

Its franchise agreements with the Cities also obligate PSE to relocate its poles and overhead facilities at its expense when required by the public interest. Stipulated Exhibit 2 ¶ 5 (Bremerton); Stipulated Exhibit 3 ¶ 8 (Des Moines); Stipulated Exhibit 4 ¶ 14.3 (Federal Way); Stipulated Exhibit 5 ¶ 6 (Renton); Stipulated Exhibit 6 ¶ 4 (SeaTac). PSE is further obligated under its franchises to convert its facilities underground upon the request of the Cities pursuant to Schedule 71 or other applicable tariff. Stipulated Exhibit 2 ¶ 6(b) (Bremerton); Stipulated Exhibit 3 ¶ 4 (Des Moines); Stipulated Exhibit 4 ¶ 15 (Federal Way); Stipulated Exhibit 5 ¶ 5.1 (Renton); Stipulated Exhibit 6 ¶ 5 (SeaTac).

By placing its facilities on private easements, PSE apparently hopes to avoid its common law and contractual responsibility for relocation. As PSE points out, installation of underground systems is more expensive than overhead systems and relocation is more costly. Answer, ¶¶ 32-33. However, equipment relocation is a necessary cost of doing business for a utility, and the expense is no excuse for PSE to escape its relocation obligations.

2. Rate Impact

PSE argues that if the Company had to pay for private easements, the costs would be capitalized and might increase rates. Answer, p. 20, n.6. PSE's professed concern for its ratepayers is unwarranted. Under Schedule 71, PSE and its ratepayers (or shareholders) avoid a substantial portion of the costs of underground conversion because of the cost-sharing provisions of Section 3. Cities (or property owners) pay all of the costs of trenching and restoration, including break-up of sidewalks and pavement, excavation for vaults, trenching for ducts, select backfill, concrete around ducts (if required), compaction, restoration, and all of the costs of surveying for alignment and

grades of vaults and ducts. Schedule 71, § 3(b)(2). In addition, the City (or property owners) must pay either 30% or 70% of the remaining costs of the underground conversion. *Id.*, § 3(b)(1).

PSE's argument that Cities should pay 100% of the costs of private easements to avoid PSE capitalization of the easement costs and potential rate increases assumes PSE will refuse to place its equipment on the public rights-of-way. PSE is entitled under its franchise agreement to use the City rights-of-way for free at no cost to the Company. Use of municipal easements decreases PSE's capital costs and operating expenses to the benefit of its ratepayers. When PSE uses the public rights-of-way for its overhead or underground facilities, PSE capitalizes zero easement costs. Except for PSE's costs of restoration and relocation, PSE's ratepayers bear no burden, either for the capital costs of public easements or for their operating and maintenance costs. If PSE chooses to locate its facilities in private easements, any resulting impact on the ratepayers (or shareholders) is purely a result of PSE's own decision not to use the public rights-of-way.

3. Rate Spread

PSE also announces a "principle" that "costs of undergrounding should be localized to the area in which the undergrounding occurs, and not spread through rates in PSE's territory." Answer, p. 20, n.6. There is no justification for such a "principle." Rates are spread across classes, not geographic regions. For example, an upgrade to PSE's distribution system in a remote part of its service territory may not benefit ratepayers in Bremerton or Tukwila, but the ratepayers in those Cities would share in the costs of those upgrades.

PSE's use of public rights-of-way results in economic benefits to all of its ratepayers, not just those customers who live and work in the Cities. The Cities do not charge PSE for the right to construct, install, and maintain equipment in the public rights-of-way. Even though PSE is entitled

to use its facilities to generate revenues for the benefit of all its ratepayers, the public receives no compensation for PSE's use of the rights-of-way. In the case of its transmission system and strategically-located distribution facilities, PSE's use of municipal rights-of-way directly enhances service to customers and ratepayers who are not residents of a City, but who live and operate businesses outside the franchise area.

In particular, it is wrong to assume that only citizens of the Cities benefit from underground conversion. Every PSE ratepayer – regardless of where PSE delivers service to that customer – has the right to travel the streets of Auburn, Bremerton, Des Moines, Federal Way, Lakewood, Redmond, Renton, SeaTac, and Tukwila. The right to travel is recognized as fundamental by Washington courts. *See Eggert v. City of Seattle*, 81 Wn.2d 840, 841-45, 505 P.2d 801 (1973). Underground conversion benefits all travelers by removing the traffic hazards caused by poles located along streets and major highways like Pacific Highway South. *See* Roe Decl., Ex. B, "Hazards to be Considered for Mitigation," Roadside Safety Design Manual (April 1998), § 700.05. Every member of the public – including every PSE ratepayer – has the right to use the streets in every City and to expect those streets to be safe for travel.

4. No Operational Justification

PSE argues that Cities must pay the costs of private easements for safety and operational reasons. Answer, ¶¶ 30, 31. Specifically, PSE claims that it requires specific clearances for pad-mounted transformers and oil-filled distribution switches. *Id.*, ¶ 30. Contrary to PSE's contentions, transformers and other electric equipment can be installed underground in the public rights-of-way consistent with sound engineering principles. PSE's own Guidelines contain detailed requirements

for the construction of underground vaults to contain this equipment. *See* §§ 6775.0040 (Vault and Handhole Installation), Line Work Practices Manual Vol. 2 (1995). PSE's Guidelines specify vaults and handholes to be used with "below-grade transformers, submersible switchgear, cable splices, and multi-tap primary arrangements." § 6775.0030, Line Work Practices Manual Vol. 2, p. 1 of 22 (1995). Vault and handhole covers are classified according to their use for sidewalks, planters, driveways, parking lots, and alleys. *Id.* The dimensions and materials for buried transformers and other underground equipment are specified. *Id*., pp. 5-22. PSE's Guidelines specifically contemplate underground placement of underground, oil-filled transformers. § 6315.0002 (1999).

Clearances for electric equipment are standard in the industry and can be accommodated within the public rights-of-way. For example, the Cities do not dispute that good engineering practice dictates clearances for pad-mounted electric transformers, such as those specified in PSE's Guidelines. *See* § 6315.0002 (1999). Pad-mounted transformers, however, can be designed to fit into existing or new municipal rights-of-way. Cities have or will obtain adequate space to assure proper clearances for PSE's equipment in the public rights-of-way.

For example, in the Des Moines portion of the Pacific Highway South Project, PSE provided plans to the City and the City's consultant with 46 separate easements for transformers and other pad-mounted equipment. Although PSE recently indicated that they have been able to reduce the easements down to 29, the Company has repeatedly refused the City's instructions to design the system so that this equipment can be placed within the City's rights-of-way. There is adequate space in the right-of-way, since Des Moines is purchasing seven feet or more on each side of the road to accommodate new planters and sidewalks. *See* Andrews Decl., Ex. B, p. 2 of 2.

In addition, PSE objects to using public rights-of-way because it is "subject to encroachment into the clearance zones around its facilities by other users of the rights-of-way." Answer, ¶ 10. Standard engineering guidelines and PSE's own practices refute PSE's argument that it cannot share rights-of-way with other utilities. In the past, PSE has agreed to locate its facilities in City rights-of-way along with water, sewer, natural gas, and telephone utilities. Roe Decl., ¶¶ 7, 9. It is standard for Seattle City Light, PSE, and other electrical utilities to locate underground electrical services in the same rights-of-way with gas, water, telephone, and telephone services. *See* Morrow Decl., ¶ 5; Ex. A, "Seattle City Light Construction Guidelines" (March 1995); Ex. B, "Record Drawing for Tukwila project at 42nd Avenue South."

PSE's own guidelines for locating vaults and other underground equipment contemplate location of PSE's underground equipment in the same area as other utilities. *See* Stipulated Exhibit 8, Puget Power Line Work Practices Manual ("Standards Manual") § 6775.0035, Vol. 2 (1995). For example, the Standards Manual specifically states: "Do not place a vault or handhold on top of another utility's lines." *Id.*, p. 4 of 6. The guidelines also contain specific construction requirements for trenches to be used for joint utilities installation and provide for trenches containing as many as four utilities, including gas. *Id.*, § 6790.0075, p. 3 of 10.

In cases where a conflict between utilities cannot be avoided to provide for safe clearance between facilities or to satisfy engineering guidelines, Cities are willing to purchase additional rights-of-way. As Cary Roe, the Public Works Director for the City of Federal Way stated:

> The City does not understand PSE's stated need for private easements. The City is generally willing to help accommodate PSE's need for adequate operating space, and in specific instances when conflicts with other utilities are documented to the City's satisfaction, or other circumstances indicate that additional right-of-way is needed to provide adequate room for operation and maintenance of utility facilities, Federal Way would be willing to obtain additional property or easements as necessary. Such

> property would be owned in the City's name, however, and would be public right-of-way available for PSE's use as "Franchise Area" under the Franchise.

Roe Decl., ¶ 14. PSE's argument that Cities must pay for private easements for its exclusive possession and use is simply not supported by any engineering standards or guidelines and must be rejected.

5. No Safety Justification

PSE also argues that the Cities should pay for private easements because its workers might be subject to "increased hazards if they must perform work in rights-of-way rather than private property." Answer, ¶ 33. There is no reason why work on electrical equipment cannot be safely performed from a street or roadway. "Lane closures" are routinely used for work on overhead electrical facilities in the streets, and the Cities have specifically offered lane closures to provide PSE with a safe place to work. Andrews Decl., ¶ 5. In fact, PSE's own rules for placement of transformers requires location of this equipment "where they can be accessed from a road or driveway suitable for a boom truck." Standards Manual § 6315.0002, p. 1 of 4 (1999). PSE's own Standards Manual provides detailed rules for working in the streets, including traffic control devices, flagging, required clothing and equipment, and signage. Standards Manual, § 0100.4000. Barricades, cones, and other devices are routinely used to channel traffic around lanes where utility work is performed. *Id.*

If pad-mounted transformers cannot safely be located near the street, the Cities are willing to purchase rights-of-way elsewhere. Maiya Andrews, a City Engineer for the City of Des Moines, submitted the following offer to PSE:

> If Puget Sound Energy is concerned about the safety of operating their facilities near traffic, the roadway right of way may not be the best location for its facilities. If an

> easement was determined to be necessary by the City, that easement would be per the existing franchise agreement with the City.

Stipulated Exhibit 13, p. 1 of 2. If PSE were sincerely concerned about the safety of placing transformers near the street, the Company could have accepted the City's offer to obtain a municipal easement in a different location, away from the traffic. Instead, PSE responded a few weeks later with another refusal to perform the underground conversion until Des Moines accepted PSE's demand for private easements at no cost to PSE. Andrews Decl., ¶ 11; Stipulated Exhibit 14.

PSE's reasons for the policy are not supported by PSE's own engineering guidelines and should be rejected. PSE's argument that Cities should purchase private easements for safety and operational reasons is a red herring intended to divert attention from its real purpose, which is purely financial.

III. Schedule 71 Applies To Underground Conversion Of Facilities Located On PSE's Property Adjacent To And Along The Rights-Of-Way.

The City of Federal Way is engaged in a street improvement project along South 320th Street from 20th Avenue South to 25th Avenue South. In connection with the street improvements, the City has requested that PSE convert its overhead facilities to underground. However, most of PSE's existing overhead facilities in the area of the street improvements are located on PSE easements outside of Federal Way's right-of-way. PSE has refused to convert its overhead facilities on PSE's easements to underground, claiming that Schedule 71 applies only to overhead facilities located in public rights-of-way, not on private property. PSE will convert the overhead facilities to underground only if Federal Way pays PSE for 100% of the cost of the conversion.

Schedule 71 does not support PSE's contention. Schedule 71 is available for underground conversion "in those portions of municipalities which are zoned and used for commercial purposes

(and in such other areas of such municipalities which have electrical load requirements which are comparable with developed commercial areas)." The availability of Schedule 71 is not limited to "municipal rights-of-way" or "municipally-owned property."

To the contrary, Schedule 71 applies to "areas" of the City that are zoned and used for commercial purposes. The availability requirements would make no sense if Schedule 71 were limited to rights-of-way because streets and rights-of-way are not "zoned" or "used" for commercial purposes. In short, there is no support in the plain language of Schedule 71 for PSE's limitation of the availability of the tariff to underground conversion on the public rights-of-way.

IV. Section 3 Of Schedule 71 Does Not Permit PSE To Force Unreasonable And Inconsistent Contract Terms Upon The Cities.

PSE's contracts for underground conversion must reflect the terms and conditions of Schedule 71 as approved by the Commission. Section 3 provides that PSE and a municipality will enter into a contract "in a form satisfactory to the Company" for underground conversion. Section 3, however, is not a license to coerce Cities into accepting unreasonable and unlawful contract terms.

Section 3 provides:

> The Company and the municipality having jurisdiction of the Conversion Area or the owners of all real property to be served from the Main Distribution System (or the duly appointed agent of all said property owners) shall enter into a written contract (the "Contract" herein) for the installation of such systems, which Contract shall be consistent with this schedule and shall be in a form satisfactory to the Company.

Schedule 71, § 3 (emphasis added). Contrary to the clear mandate of Section 3, PSE has attempted to force the Cities to agree to a new "form" underground conversion agreement that is not "consistent with this schedule."

A. PSE's Prior Underground Conversion Agreement Was Not Interpreted To Require Cities To Pay 100% Of The Costs Of Private Easements.

Until recently, SeaTac's Underground Conversion Agreement dated September 17, 1998, ("Agreement") was a typical PSE agreement for underground conversions under Schedule 71. Gut Decl., Ex. A. The Agreement acknowledged that "owners of real property" within the Conversion Area would provide, at their expense, space for underground and surface mounted electrical facilities located on privately owned property and operating rights to PSE. *Id.*, § 8. Accordingly, the Agreement required Cities to notify customers within the Conversion Area that their service must be converted from overhead to underground and that they must pay for secondary service conductors under Schedule 86. *Id.*, § 7. The Agreement also required that the Cities would exercise their authority under RCW 35.96.050 with respect to property owners failing to convert their service connections to underground. *Id.*, § 7.

Section 8 of the Agreement provided:

> The company shall provide reasonable assistance in obtaining such operating rights, but shall not be required to bear the costs of any easements. The cost to the Company of any easements on privately owned property, which the Company must obtain, shall be reimbursed in full by the City pursuant to paragraph 5 above. Such cost shall include, but not be limited to, the actual cost paid for any easement, staff costs (including overheads) of obtaining such easement and the actual cost of any fee, permit, attorney fee, court cost, permit fee or survey fees required by governmental agencies or property owner.

Id. "Paragraph 5 above" refers to the 30%/70% cost sharing provisions of the Agreement, making it explicit that any such costs are jointly paid by PSE and the City. *See also* Roe Decl., ¶¶ 5, 8, 11.

Although the quoted language of Section 8 is not a model of clarity, this provision has been interpreted to mean that private property owners within the Conversion Area – not the Cities – must

provide space and operating rights on their property. Cary Roe, the City Engineer for Federal Way, stated:

> This language does not require that PSE's facilities be installed in private, exclusive easements in PSE's name, or that the City pay for such easements; instead, it merely acknowledges (consistent with Paragraph 4 of Schedule 71) that the owners of real property within the Conversion Area must provide adequate space for PSE facilities, and that PSE is not required to bear the cost of obtaining property necessary for such facilities.

Roe Decl., ¶ 6.

For years, PSE performed underground conversions in accordance with this interpretation of Paragraph 8. For example, in both the South 312th Street and the South 348th Street projects in Federal Way, the City acquired rights-of-way at the City's cost and in the City's name for the PSE underground and aboveground facilities. In both projects, PSE located its facilities in the City rights-of-way. Federal Way understood that the Agreement did not require the City to obtain or pay for private easements for PSE's exclusive use, nor did PSE request that the City do so. Roe Decl., ¶ 8.

B. PSE's New Draft "Form" Underground Conversion Agreement Is Inconsistent With Schedule 71.

Last year, PSE presented its draft "Schedule 71 Underground Conversion Agreement" ("Draft Agreement") to the Cities. *See, e.g.* Gut Decl., Ex. B.[4] Unlike the six page Underground Conversion Agreement that PSE used for years, the Draft Agreement is a detailed, eleven page

[4] The Draft Agreement presented to SeaTac is nearly identical to PSE's "Current Form Schedule 71 Underground Conversion Agreement," which is Stipulated Exhibit No. 16, except that the Draft Agreement contains a reservation of rights for issues pending before the Commission. Gut Decl., Ex. B ¶ 16. Although this draft was never signed, SeaTac later entered into a similar interim agreement with a reservation of rights because PSE refused to perform the underground conversion work until a contract was signed. Since the work was underway and the contractor required PSE's conduit at the job site, SeaTac signed the interim agreement to prevent delays on the street improvement project. *See* Gut Decl. ¶ 17.

document that contains numerous provisions that are inconsistent with Schedule 71. A brief review illustrates some of objectionable terms in the Draft Agreement..

1. Placement Of Facilities On Private Easements

The Draft Agreement states that PSE will require all underground and pad-mounted electrical facilities (except, at PSE's discretion, cable and conduit) "to be installed on private property." Gut Decl., Ex. B ¶ 1(c). PSE has never implemented any such requirement in the past. To the contrary, PSE has consistently placed its facilities on City rights-of-way. *See, e.g.*, Roe Decl. ¶¶6, 7,8 ; Gut Decl. ¶¶ 18.

As discussed above, nothing in Schedule 71 permits PSE to demand private easements for its exclusive possession and use. Nothing in Schedule 71 requires Cities – as opposed to private property owners – to pay any part of the cost of private easements. The Draft Agreement, therefore, is substantially in conflict with Schedule 71.

2. City Payment Of 100% Of Easement Costs

The Draft Agreement requires Cities to pay 100% of the costs to obtain "operating rights," including private easements. Gut Decl., Ex. B ¶ 5(B)(ii). As discussed above, the prior Underground Conversion Agreement was interpreted to mean that private property owners – not Cities – must obtain space and operating rights for PSE. To the extent the prior Agreement required Cities to reimburse PSE for space or operating rights, any payment would have been subject to the 30%/70% cost-sharing provisions. By contrast, PSE's Draft Agreement requires Cities to pay 100% of easement costs, which is in direct conflict with the cost-sharing provisions of Section 3.

3. Relocation Costs

The Draft Agreement explicitly provides that if PSE "in its sole judgment" places facilities on public rights-of-way, the Cities must pay 100% of any future relocation costs. Gut Decl., Ex. B ¶ 1(e). This provision is unlawful and contrary to the well-established common law of Washington that requires utilities in the public rights-of-way to pay the costs of necessary relocation. *See discussion, supra.* The provision also violates PSE's franchise agreements with the Cities. *See* Stipulated Exhibit 2 ¶ 5 (Bremerton); Stipulated Exhibit 3 ¶ 8 (Des Moines); Stipulated Exhibit 4 ¶ 14.3 (Federal Way); Stipulated Exhibit 5 ¶ 6 (Renton); Stipulated Exhibit 6 ¶ 4 (SeaTac). Nothing in Schedule 71 authorizes PSE to impose such a condition in the Company's Draft Agreement.

4. Temporary Overhead Facilities

The Draft Agreement permits PSE to install temporary overhead facilities for service to owners who fail to convert services lines as required by RCW 35.96.050. If the property owners have not converted their service to underground within one and a half years, the Draft Agreement requires Cities to pay 100% of the costs of the underground conversion. Gut Decl., Ex. B ¶ 7. Nothing in Schedule 71 allows PSE to shift the entire costs of underground conversion to the Cities under such circumstances. To the contrary, in order to avoid inconsistent application of its tariff and unlawful discrimination, PSE must abide by the cost-sharing provisions of Section 3.

C. PSE Has Attempted To Coerce Cities Into Executing Its "Form" Draft Agreement By Delaying Projects And Refusing To Convert Its Overhead Facilities.

PSE demands that the Cities agree to execute its current "form" Underground Conversion Agreement and its "form" Engineering Agreement as a condition to underground conversion. Stipulated Fact No. 9. PSE has refused to begin work on critical projects, has stopped design work,

and has refused even to order materials unless the Cities execute its "form" agreements. PSE's conduct has created delays and threatened critical street improvements. Several examples will illustrate the seriousness of the problem:

1. The Des Moines Experience.

The City of Des Moines has been planning a major project on Pacific Highway South for several years. Declaration of Maiya Andrews ("Andrews Decl."), ¶ 2. The project requires that PSE's facilities be moved both laterally for roadway widening, and also underground. *Id.* PSE's franchise requires that PSE will relocate its facilities "in a timely manner and at no charge to the City." *See* Andrews Decl., Exhibit A.

When PSE recently demanded that Des Moines purchase 46 easements in PSE's name for PSE's exclusive use, Maiya Andrews, the Assistant City Engineer, advised PSE that there would be adequate space for all above-ground facilities within the rights-of-way and that additional frontage would be unnecessary. Andrews Decl., Exhibit B. PSE replied by letter dated January 31, 2001, that underground conversion projects were "voluntary" and refused to comply with the City's directives as to the location and placement of PSE equipment. Andrews Decl., Exhibit C. On February 21, 2001, PSE advised the City that they would continue the design for the underground conversion only if the City would agree to pay for the acquisition of private easements for PSE equipment. Andrews Decl., Exhibit D. On May 31, 2001, PSE threatened to cease work on the undergrounding project unless the City agreed by June 15 to acquire easements at no cost to PSE. Andrews Decl., Exhibit G.

It is imperative that PSE complete their design work on the Des Moines project so that the City's consultant can incorporate the details in the contract plans for bidding and construction of the

Pacific Highway South Project. Any delays to receiving PSE's plans will delay the project plans and subsequently the entire project. A delay could be very costly because inflation will increase the cost to construct the project. The City has agreements and commitments with numerous funding sources that may be compromised if the money is not spent as scheduled. Andrews Decl., ¶ 12.

2. The Federal Way Experience

Events in the City of Federal Way provide additional examples of PSE's attempt to hold a street improvement hostage to its contract demands. Last year, Federal Way directed PSE to convert its overhead facilities to underground for the SR99/South 320th Street project. Immediately prior to the City's bid opening on the SR99/320th Street project, PSE introduced a new conversion agreement, demanding that the City sign the contract before PSE would underground its facilities. Roe Decl., ¶ 10. This was the first time the City learned of PSE's request for private, exclusive easements in PSE's name. The conversion agreement proposed by PSE required the City to obtain at its expense "any and all operating rights required by the Company, in a form or forms satisfactory to the Company, to allow the Company to construct, operate, repair and maintain the Main Distribution System within the City right-of-ways in the Conversion Area."

PSE explained that a "form satisfactory to the Company" meant private, exclusive easements in PSE's name. Roe Decl., ¶ 10. The draft agreement also required the City to pay for relocation if necessary within 20 years even if PSE's franchise provided otherwise. Roe Decl., ¶ 10. In this instance, after the City complained, PSE agreed to use a conversion agreement similar to one used previously for an earlier project. However, Federal Way later directed PSE to convert its overhead facilities to underground on other projects, including the 23rd Avenue Project; the SR 99 HOV Lanes, Phase I; and the SR 99 HOV Lanes, Phase II. For each of these projects, PSE has tried to

force the City to sign an underground conversion agreement that was unacceptable to the City. The draft underground conversion agreement PSE insisted that the City sign required that Federal Way pay 100 % of the cost of "operating rights" in the form of private, exclusive easements in PSE's name. PSE has refused to perform the underground conversion until Federal Way executes the unacceptable agreement. Roe Decl., ¶ 13.

3. The SeaTac Experience

On January 29, 1999, the City first met with PSE to discuss the specifics of the conversion of overhead utilities to underground for Phase II of the South 170th Street project. Gut Decl., ¶ 10. More than two years later, on March 14, 2001, PSE presented the City with a draft Schedule 71 contract. This draft was similar to an earlier Underground Conversion Agreement, dated September 17, 1998. *See* Gut Decl., Ex. A. On July 12, 2001, PSE presented SeaTac with a new and different draft underground conversion agreement that explicitly required the City to purchase and pay 100% of the costs of private easements for its exclusive use and possession. *See* Gut Decl., Ex. B. The City objected to signing this agreement. Gut Decl. ¶ 16.

However, PSE refused to begin ordering materials for the South 170th Street Project or get started on the underground conversion until the City executed its new draft agreement. The South 170th Street project was already under way at this point, and the contractor needed the conduit for PSE's underground system at the site by August 2, 2001. In order to avoid delays and risk delay damages from its contractor, SeaTac finally agreed to execute the agreement with the objectionable terms, but with a reservation of rights on the issues in dispute before the Commission. Gut Decl. ¶ 17.

The experiences of Des Moines, Federal Way, and SeaTac illustrate PSE's attempt to convert the reference in Section 3 to a contract in a "form satisfactory to the Company" into a hammer to bludgeon Cities into signing unacceptable, unlawful contract provisions that are inconsistent with Schedule 71. This misuse of Section 3 to circumvent its obligations under Schedule 71 should not be tolerated.

V. If Schedule 71 Applies To The SeaTac South 170th Street Project, Schedule 71 Requires PSE To Pay 70 %Of The Costs Of Underground Conversion.

A. If The Commission Determines That Schedule 71 Applies To The SeaTac South 170th Street Project, Section 3 Requires PSE To Pay 70% And The City To Pay 30% Of The Costs Of Underground Conversion.

Schedule 71 requires Cities to pay PSE 30% of the total costs of an underground conversion project, excluding trenching and restoration, "when the Company's overhead system is required to be relocated due to addition of one full lane or more to an arterial street or road." Schedule 71, § 3(b)(1). In spite of the plain language of Section 3, PSE insists that SeaTac must pay 70% of the underground conversion costs for most of the 170th Street Project because most of PSE's existing poles – if they were not converted to underground – would be located on the sidewalk more than 6 inches from the curb. *See* Stip. Fact No. 19. Such an interpretation of Schedule 71 is purely arbitrary and unfounded.

In Phase II of the City of SeaTac's street improvement project on 170th Street, SeaTac will widen an existing two-lane street from approximately 24 feet to 36 feet; replace gravel shoulder and drainage ditches with bicycle lanes on both sides of the street; and add new curbs and gutters behind the bicycle lanes, new sidewalks behind the curbs, and new planter strips behind the sidewalks. Stip. Fact No. 18. There is no dispute – PSE agrees – that SeaTac is adding "one full lane" to an arterial street or road. Stip. Fact No. 20.

There are eight poles involved in Phase II of the 170th Street underground conversion. Under the current design for the street improvement project, if PSE's existing poles are not converted to underground, two of PSE's existing poles would be located in the new roadway and six would be located in the sidewalk more than six inches from the street side of the curb. Stip. Fact No. 19. Under these circumstances, PSE argues that SeaTac must pay 30% of one quarter of the total cost of the conversion because two of the eight (one quarter) of the poles of the existing overhead system are "required to be relocated due to addition of one full lane or more to an arterial street or road" under Section 3(b)(1), because the poles would be in the driving surface of the future street. PSE further contends that SeaTac must pay 70% of three quarters of the total cost of the conversion because six of the poles are not – in PSE's opinion – "required to be relocated due to addition of one full lane or more to an arterial street or road" under Section 3(b)(1) of Schedule 71, because these poles would not be in the driving surface or within six inches of the curb of the widened street. Stip. Fact. No. 17.

PSE's strange interpretation of Section 3 rests on the assumption that "relocated" means aerial relocation. Such an assumption is unfounded since Schedule 71 deals only with conversion from aerial to underground. Instead, Section 3 must be read to place 30% of the cost responsibility on the City when relocation by underground conversion is required due to the addition of one full lane or more to an arterial street or road.

In fact, PSE interpreted Section 3 exactly this way for Phase I of the 170th Street Project. On Phase I, an identical road section was built on South 170th Street, leaving some poles located in the center of the sidewalk. The dimensions of the road, the road widening, and the new sidewalk were exactly the same in Phase I of the project as they are in Phase II. Gut Decl., ¶ 9. There is no

rationale whatsoever for PSE to apply a unique new interpretation of Section 3 to Phase II of the project, other than for financial motives.

B. The Cities, Not PSE, Have The Right To Determine When Relocation Of Utility Facilities Is In The Public Interest.

The significance of the SeaTac dispute is much broader than the facts presented by the 170th Street Project. At the heart of the dispute is PSE's arbitrary decision that poles less than six inches from the street side of the curb do not require relocation. The poles and all the rest of PSE's electric facilities involved in the South 170th Street Project are located in the public rights-of-way, not on private easements. PSE seems to hold the view that the Company – not the City – has the right to manage the public rights-of-way and make decisions about when relocation is necessary.

To the contrary, the City – not PSE – must decide when the public interest requires the removal of poles in the streets and sidewalks. On South 170th Street, the City of SeaTac determined that PSE's poles must be relocated. Several of the existing poles on South 170th Street are located so that they would be in the sidewalk if the electric system were not converted to underground. If the poles remained in their current location, they would obstruct safe pedestrian traffic. In the judgment of SeaTac's engineers, the poles would need to be relocated even if the system were not converted to underground. Gut Decl., ¶ 8.

SeaTac based its determination in part on the King County Road Standards (1993), which the City has adopted. Chapter 8 "Utilities" states that on vertical curb type roads with a speed limit less than 40 mph, utility poles shall be placed five and one-half feet from the curb face in residential areas. The speed limit in this portion of South 170th Street is 30 m.p.h. Gut Decl., ¶ 12. In addition, the Washington State Safety Design Manual specifies where clear zones must be provided and the

range of clearances based on the speed and volume of traffic traveling along a particular roadway. Roe Decl., ¶ 3.

Cities in Washington are charged with establishing and maintaining the public streets and roads. *See e.g.*, Ch. 35.77 RCW (comprehensive street program); RCW 35.22.280(7) (first class cities); RCW 35.23.440(33) (second class cities). In addition, the Cities are charged with the duty to maintain the public streets and sidewalks in a safe condition. *See Kennedy v. City of Everett*, 2 Wn.2d 650, 653-4, 99 P.2d 614, *amended by* 4 Wn. 2d 729, 103 P.2d 371 (1940). The Cities cannot delegate that duty to others. *See Rivett v. City of Tacoma,* 123 Wn.2d 573, 582, 870 P.2d 299 (1994).

The Washington Legislature delegated authority to Cities – not to utilities – to regulate the placement of utility poles and structures:

> Every code city shall have authority to permit and regulate under such restrictions and conditions as it may set by charter or ordinance and to grant nonexclusive franchises for the use of public streets, bridges or other public ways, structures or places above or below the surface of the ground for . . . poles, conduits, tunnels, towers and structures, pipes and wires and appurtenances thereof for transmission and distribution of electrical energy, signals and other methods of communication. . and other private and publicly owned and operated facilities for public service.

RCW 35A.47.040 (emphasis added). *See also* RCW 35.22.280(7) (first class cities).

A utility's right to use the city streets and rights-of-way is secondary to the primary purpose of public transportation. "The use of such highways and streets for . . . [utility] lines is secondary and subordinate to the primary use for travel, and such secondary use is permissible only when not inconsistent with the primary object of the establishment of such ways." *State ex rel. Tel. Co. v. City of Spokane*, 24 Wn. 53, 59, 63 P. 1116 (1901). Streets and roads "must be kept free from obstructions, nuisances, or unreasonable encroachments which destroy, in whole or in part, or

materially impair, their use as public thoroughfares." *State ex rel. York v. Board of County Comm'rs*, 28 Wn.2d 891, 903, 184 P.2d 577 (1947), *quoting* 4 McQuillin, MUNICIPAL CORPORATIONS (Red. 2d ed.) 134 § 1437. If utility facilities obstruct the public ways, they must be moved "as it is made necessary by highway improvements." *Washington v. Public Util. Dist. No. 1*, 55 Wn.2d 645, 6551, 349 P.2d 426 (1960).

In short, PSE has no right to refuse to relocate its poles on the City rights-of-way. The City's standards– not PSE's – determine the need for relocation. "The legislative control of ways and streets for its secondary use is absolute." *State ex rel. Tel. Co.*, 24 Wn. at 59. Accordingly, the Cities request that the Commission grant summary determination as a matter of law in SeaTac's favor, based both on the specific facts of the South 170th Street project and the overwhelming legal authority confirming the Cities' discretion to determine when relocation is in the public interest.

CONCLUSION

Schedule 71 does not require Cities to purchase private easements for PSE's exclusive possession and use. PSE should not be permitted to circumvent the clear language of its tariff by imposing unilateral contract terms or by removing its equipment from the public rights-of-way onto private property.

For all of these reasons, the Cities respectfully respect the Commission to grant summary determination in their favor. Specifically, the Cities request an order declaring that:

(1) Schedule 71 is mandatory, not voluntary, and PSE must convert its overhead facilities to underground when the conditions set forth in Section 2 are satisfied;

(2) Schedule 71 does not require Cities to purchase or pay for 100% of the costs of private easements for PSE's exclusive possession and use;

(3) Schedule 71 applies to underground conversion of facilities located on PSE's property adjacent to and along the rights-of-way;

(4) Section 3 of Schedule 71 does not permit PSE to force unreasonable and inconsistent contract terms upon the Cities; and

(5) If Schedule 71 applies to the SeaTac South 170th Street Project, Schedule 71 requires PSE to pay 70 percent of the costs of underground conversion.

The issues raised by the Cities are purely legal, there are no genuine issues of fact, and the Cities respectfully urge the Commission to grant a summary determination in their favor on all issues as a matter of law.

DATED this 15th day of August, 2001.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the CITIES' MOTION FOR SUMMARY DETERMINATION AND MEMORANDUM IN SUPPORT filed by the Cities of Auburn, Bremerton, Des Moines, Federal Way, Lakewood, Redmond, Renton, SeaTac, and Tukwila, 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 15th day of August, 2001.

Jo Ann Sunderlage
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