

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of

PUGET SOUND ENERGY

Petition for Declaratory Order on License
to Use Property for Recreational
Purposes

DOCKET U-180068

ORDER 01

DECLARATORY ORDER

BACKGROUND

- 1 On January 19, 2018, Puget Sound Energy (PSE or Company) submitted a Petition for Declaratory Order (Petition) to the Washington Utilities and Transportation Commission (Commission). Specifically, PSE requests that the Commission “issue an order pursuant to WAC 480-07-930 declaring that 1) PSE may grant a license for use of PSE land for public recreation, and 2) no accounting treatment is necessary because PSE is not transferring any interest in real property.”¹
- 2 PSE owns right-of-way corridors in King County that the county has requested authority to manage and use for public recreational purposes. “PSE would like to make recreational use of these properties available to the public, only to the extent consistent with, and subordinate to, current and future utility uses, by granting a license to King County to maintain and permit public use of public recreational trails for recreational use.”² The specific property at issue in this docket is approximately 14 miles of right of way corridor known as the Interurban South Link 115-kV right of way (Interurban Trail).
- 3 PSE represents that it has used different means to allow public recreational use of its property in the past, typically by granting long-term temporary easements to entities like King County for such purposes. In 2002, PSE sought to give the State of Washington some of the Company’s land for recreational purposes, reserving an easement for utility uses. The Company proposed that the Commission approve the transaction as a donation and calculate the gain based on the net charitable contribution tax benefits PSE would

¹ Petition ¶ 1.

² Declaration of Joel Schleppe in Support of Petition ¶ 4.

receive. Commission staff (Staff), however, recommended that the Commission treat the transaction as a transfer of property subject to RCW 80.12.020 for ratemaking purposes and that the net gain be based on the fair market value of the property. PSE ultimately declined to make the donation.

- 4 Given this recent experience, PSE requests certainty that granting a license for King County to manage Company property for recreational purposes does not require Commission approval or accounting treatment for ratemaking purposes. PSE states that the license will not result in any financial gain or loss to the Company or its ratepayers and that PSE will continue to be able to use its property for operational purposes without any limitation:

PSE will not receive any financial gain or incur any loss as a result of the transaction. PSE's investment in the right of way will not be affected by the public's use of the property for recreational purposes on terms that at all times provide that recreational use is subordinate to utility operational requirements. PSE will continue to operate its transmission lines as it has in the past, prior to the grant of the license, and will be able to rebuild, enlarge, reconstruct, relocate, or abandon them and other utility facilities, all as circumstances warrant.³

- 5 On January 29, 2018, the Commission issued a notice to all interested persons setting a deadline of February 9, 2018, to submit a statement of fact and law on the issues raised in the Petition. The Commission received responsive comments or a statement of law and fact from Staff, the King County Parks and Recreation Division (King County), the Mayor of the city of Tukwila, the Mayor of the city of Kent, the Mayor of the city of Pacific, the mayor of the city of Auburn, the mayor of the City of Algona, the Auburn Parks and Recreation Board (Auburn Parks), and the Cascade Bicycle Club.
- 6 Staff contends that the Petition raises two issues: (1) whether the license is a transfer of property necessary or useful in the performance of PSE's regulated duties requiring Commission approval and ratemaking treatment; and (2) what are the impacts on the public interest and ratepayers of any liability PSE would incur for injuries a member of the public suffers while on PSE's property.
- 7 With respect to the first issue, Staff opines that the license is not a transfer of property under RCW 80.12.020 or WAC 480-143-120, although the Commission nevertheless has jurisdiction to ensure that PSE's rates, services, facilities, and practices are consistent

³ *Id.* ¶ 7.

with the public interest. Staff contends that ratemaking treatment of the transaction is not required under the circumstances presented here, where there is no transfer of property and no financial gain or loss to the Company or its ratepayers as a result of the transaction.

8 As for the second issue, Staff is concerned that PSE and its ratepayers could suffer financial loss if PSE is liable for any injuries that occur on the Company's property while the public is using it for recreation. Staff acknowledges that certain recreational uses are compatible with the use of PSE's property as a transmission corridor and that RCW 4.24.210 grants protections to landowners that allow members of the public to use their land for outdoor recreational purposes without charging a fee. According to Staff, the Company has the responsibility to ensure that it meets all the conditions in this statute and otherwise protects itself from premises liability for the benefit of itself and its ratepayers.

9 Staff recommends that the Commission specify the conditions and circumstances in which it makes its decision in any declaratory order. Those include (1) the license will not convey any interest in real property; (2) the license will not interfere with PSE's use of, or access to, the facilities on the land for utility purposes; (3) PSE will not realize any financial gain or loss from granting the license; (4) PSE and its customers will be protected from premises liability; and (5) PSE will be responsible in retaining this protection from liability. If circumstances of another such transaction vary from these, the Company should seek guidance from the Commission on the treatment for that transaction.

10 King County, the mayors of Tukwila, Kent, Pacific, Auburn, and Algona, Auburn Parks, and the Cascade Bicycle Club all strongly support the proposed license to allow King County to operate, maintain, and improve the Interurban Trail that traverses PSE's transmission corridors. They explain that the trail has been used extensively for decades for walking, biking, and jogging and is an invaluable, and even irreplaceable, recreational and commuter asset. King County states, "Not only is the Interurban Trail a very popular multi-use path and greenway, it adds value to our communities by improving our health, spurring economic development, and job creation, protecting our environment and creating powerful connections within, to, and across our communities." The proposed license, the county contends, would enable it to work with the cities to upgrade and improve the trail while continuing to preserve PSE's ownership and the integrity of the corridor.

11 RCW 34.05.240(5) and WAC 480-07-930(5) require the Commission to take one of the following actions within 30 days after receiving the Petition: (1) enter a declaratory

order; (2) set the matter for specified proceedings to be held no more than 90 days after receiving the Petition; (3) set a specified time no more than 90 days after receiving the Petition to enter a declaratory order; or (4) decline to enter a declaratory order. On February 14, 2018, the Commission issued a notice that it would enter a declaratory order no later than April 19, 2018.

DISCUSSION

12 The Administrative Procedure Act provides that a petition for declaratory order must show the following:

- (a) That uncertainty necessitating resolution exists;
- (b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
- (c) That the uncertainty adversely affects the petitioner; [and]
- (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested.⁴

No commenter disputes PSE's claim that the Petition satisfies these prerequisites. We find that the Company has satisfied the statutory prerequisites and therefore resolve in this declaratory order the uncertainty identified in the Petition.

13 We begin with the observation that we do not doubt the public benefits of the Interurban Trail that PSE, King County, the city mayors, Auburn Parks, and the Cascade Bicycle Club describe. Recreation and commuting options are vital to the health of any urban community, and public-private partnerships can be instrumental in serving those needs. The Commission, however, does not evaluate, approve, or otherwise determine the desirability of PSE's eleemosynary endeavors. Rather, our obligation is to ensure that the Company's rates, terms, and conditions of utility service are fair, just, reasonable, sufficient, and consistent with the public interest. We therefore limit our consideration in this docket to the applicability to the transaction of the statutes and rules we enforce and any impact it may have on PSE's ratepayers.

Transfer of Property

14 We first must determine whether the transaction PSE describes in its Petition is a transfer of property under RCW 80.12.020. That statute provides, "No public service company shall sell, lease, assign or otherwise dispose of the whole or any part of its franchises, properties or facilities whatsoever, which are necessary or useful in the performance of its

⁴ RCW 34.05.240(1).

duties to the public . . . without having secured from the commission an order authorizing it to do so.” Commission rules echo this requirement and explain that such transfers of property “include sale, lease, [or] assignment of all or part of a public service company’s property.”⁵

15 PSE contends that the proposed transaction is a license to use Company land, not a sale, lease, assignment, or any other conveyance of real property within the scope of RCW 80.12.020. PSE further maintains that the license would be subordinate to the Company’s present and future utility needs, and thus “the uses authorized by such a license would neither be necessary or useful to PSE in its utility operations, nor interfere with PSE’s use of the rights of way for such operations.”⁶ The Company accordingly concludes that the license is not subject to Commission approval as a transfer of property.

16 Staff concurs that the transaction is not a transfer of property under the statute or the Commission’s implementing rule. If the Commission reaches the same conclusion, Staff believes that the Commission need not reach the issue of whether the license is necessary or useful in the performance of the Company’s public duties. For completeness, however, Staff opines that the land is necessary or useful for those purposes to the extent that it is where PSE’s transmission lines and related equipment are located, and as long as the licensed use does not affect the Company’s ability to operate those lines, the land is not property governed by the statute.

17 We agree with PSE and Staff that the transaction PSE describes in its Petition is not a transfer of property within the contemplation of RCW 80.12.020. As both parties point out, the Washington Supreme Court has stated that “[a] license authorizes the doing of some act or series of acts on the land of another without passing an estate in the land and justifies the doing of an act or acts which would otherwise be a trespass.”⁷ PSE proposes to grant King County just such authority for the public to use the Company’s land for recreational purposes without conferring any ownership or real property interest.

18 The proposed license thus is significantly different than other means by which PSE has allowed the public to access its transmission corridors. The Company states that it has granted recreational use easements in the past, but “[a] license differs from an easement in that it is revocable and nonassignable, and does not exclude possession, either wholly or partially by the owner of the servient tenement.”⁸ Nor is a license comparable to the

⁵ WAC 480-143-120.

⁶ Petition ¶ 8.

⁷ *Conaway v. Time Oil Co.*, 34 Wn. 2d 884, 893, 210 P.2d 1012 (1949).

⁸ *Bakke v. Columbia Valley Lumber Co.*, 49 Wn. 2d 165, 170, 298 P.2d 849 (1956).

donation of land PSE considered and ultimately decided against in 2002. PSE will retain ownership and possession of the property and will merely allow recreational use subordinate to the Company's own use of the land for utility operations. Such an arrangement is not a sale, lease, assignment, or other means of disposing of property necessary or useful to PSE's regulated duties.⁹

- 19 We note, however, Washington authority observing that the legal effect of a transaction depends on the documentation, surrounding circumstances, and parties' intent, not necessarily on how the transaction is characterized. For example, "[i]n determining whether a written instrument constitutes a lease or a license, the court must consider it in its entirety, together with the circumstances under which it was made and determined and the intention of the parties."¹⁰ Similarly, "if a license is intended to be irrevocable, it is intended as an easement, as it gives an interest of a permanent or quasi permanent nature."¹¹
- 20 The Petition does not include a copy of the license PSE intends to grant to King County. We have only the Company's description. Our decision, therefore, is similarly limited. If the transaction is as the Petition describes, it is a license, not a transfer of property, and does not require Commission approval. But we cannot, and do not, determine definitively whether the proposed transaction is a license without reviewing the document to verify PSE's representations.
- 21 Accordingly, we require PSE to submit to the Commission a copy of any license it intends to grant a public entity to use Company transmission corridors for public recreational purposes. If Staff confirms that the proposed transaction is a license and otherwise complies with the conditions in this Order, the Executive Director will issue a letter confirming that the Commission will take no action on that submission.

Accounting Treatment

- 22 An electric company must account for gains and losses it realizes from its public utility operations as part of the regulated rate setting process.¹² Between rate filings, companies

⁹ We agree with Staff that having determined that a license is not a transfer of property, we need not, and do not, decide whether PSE's transmission corridors are property "necessary or useful in the performance of its duties to the public." RCW 80.12.020.

¹⁰ *Conaway*, 34 Wn. 2d at 893.

¹¹ *Bakke*, 49 Wn. 2d at 170.

¹² *See, e.g.*, WAC 480-07-510(3)(h) (requiring general rate filings for electric companies to include the company's results of operations).

generally seek Commission authorization or approval of the accounting treatment that will apply to extraordinary or unanticipated revenues or expenses.

- 23 PSE contends that no such accounting is necessary for the license it intends to grant King County because the Company plans to grant that license free of charge. The recreational use PSE intends to license, moreover, will be subordinate to the Company's utility operational requirements, and PSE states that it will continue to operate its transmission lines as it has in the past without any constraint from the licensed use. "Accordingly, PSE is not requesting an order authorizing accounting treatment associated with this grant of a license to use the land, and no ratemaking treatment is necessary now or in PSE's next general rate case."¹³ Under these circumstances, Staff also "does not believe that ratemaking treatment is appropriate because there is no financial gain or loss to the Company or its ratepayers."¹⁴
- 24 We agree that as described in the Petition and accompanying declaration, the proposed license will not result in a financial gain or loss to PSE or its ratepayers and thus does not require accounting treatment. We nevertheless expect Staff to review any license the Company submits in compliance with this Order and confirm that the transaction does not, in fact, result in such gain or loss.

Potential Liability

- 25 While Staff accepts that the proposed license itself does not result in financial gain or loss, Staff is concerned that "there could be financial loss to the Company and its ratepayers should PSE be held liable for any injuries suffered while on the premises for which it is granting a license for public recreation."¹⁵ Staff recognizes that RCW 4.24.210 provides PSE and other landowners with conditional protection from such liability when they do not charge any fee for public access for recreational purposes. Staff, however, believes the Company must be responsible for complying with the statutory conditions to ensure that it maximizes that protection.
- 26 Specifically, Staff asserts that transmission lines carry dangerous amounts of electricity, and the Company "has the most familiarity with its own property and may be best situated to determine whether any condition necessitates a warning sign in order to preserve the Company's protection under the statute."¹⁶ Staff also notes that certain types

¹³ Petition ¶ 9.

¹⁴ Staff Statement of Fact and Law ¶ 19.

¹⁵ *Id.* ¶ 20.

¹⁶ *Id.* ¶ 25.

of recreational uses would be inappropriate in transmission corridors because they would be dangerous to, or because of, the transmission lines and related equipment located on the property. Staff believes that PSE is aware of these factors and has addressed them in its Petition. Staff nevertheless recommends that the Commission state in any declaratory order it enters that PSE is responsible for taking the necessary steps to protect itself and its ratepayers against liability resulting from granting a license to use its property for recreational purposes.

27 We agree that there are risks inherent in using transmission corridors for both utility operations and recreational purposes. Not only may PSE be liable for injuries to persons using the land under the license if the statutory conditions are not satisfied, but the Company may incur additional expenses to administer and enforce the license or repair damage to PSE's facilities or interference with utility operations on the property caused by members of the public. At the same time, however, the public has been using these transmission corridors for recreational purposes for many years, and Staff cites no instances in which the Company has incurred financial loss as a result, much less sought to recover any such losses from ratepayers.

28 We do not find it necessary to condition our determination in this Order on requiring PSE to be responsible for limiting its liability under the license. The Company is well aware of RCW 4.24.210 and apparently has taken appropriate measures to comply with it in the past without a Commission requirement to do so. In the unlikely event that PSE incurs financial losses as a result of having granted the license and seeks to recover those losses from ratepayers, we will address that issue in the case in which it arises. For purposes of this Order, we declare only that (1) PSE need not obtain Commission approval to grant a license to King County or any other public entity to use the Company's land for recreational purposes; and (2) no accounting treatment for such a transaction is necessary if the licensed use is subordinate to, and will not interfere with, the Company's utility operations and PSE will not incur any financial gain or loss as a result.

ORDER

THE COMMISSION DECLARES AND ORDERS:

- 29 (1) The Commission grants Puget Sound Energy's Petition for Declaratory Order.
- 30 (2) The license described in the Petition for Declaratory Order and accompanying Declaration of Joe Schleppe is not a transfer of property within the meaning of RCW 80.12.020 or WAC 480-143-120, and accordingly Puget Sound Energy need not obtain a Commission order authorizing that transaction if it is as described.

- 31 (3) The license described in the Petition for Declaratory Order and accompanying Declaration of Joel Schleppi will be subordinate to, and not interfere with, Puget Sound Energy's use of its transmission corridor for utility purposes and will not result in any financial gain or loss to Puget Sound Energy or its ratepayers, and accordingly no ratemaking treatment for the transaction is required if it is as described.
- 32 (4) Puget Sound Energy must submit to the Commission for its review any license the Company intends to grant a public entity to use Puget Sound Energy's property for public recreational purposes. The Commission need not, and will not, approve by separate order, or require accounting treatment for, any such license that is consistent with the conditions in this Order.

DATED at Olympia, Washington and effective March 6, 2018.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

ANN E. RENDAHL, Commissioner

JAY M. BALASBAS, Commissioner