BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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| CITY OF SEATAC,<br>Petitioner,<br>v.<br>PUGET SOUND ENERGY, INC.,<br>Respondent.<br>……<br>CITY OF CLYDE HILL,<br>Petitioner,<br>v.<br>PUGET SOUND ENERGY, INC.,<br>Respondent. | Docket No. UE-010891<br>(Consolidated)<br><br>Docket No. UE-011027<br>(Consolidated)<br><br>CITY OF SEATAC'S REPLY TO PSE'S RESPONSE TO SEATAC'S MOTION FOR SUMMARY DETERMINATION |

## I. Introduction and Summary Of SeaTac's Reply

PSE's Response to Motions for Summary Determination and Cross Motion for Summary Determination ("Response") fails to demonstrate that Schedule 70 should not



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apply to the City of SeaTac's street improvement project on South 170th Street from 37th Avenue South to Military Road South. PSE agrees to the material facts, and the issues are appropriately resolved by the Commission as a matter of law. Because PSE's Response fails to raise a material issue of fact or plausible reason for not applying the plain language of Schedule 70, the foundation for PSE's interpretation of Schedule 70 and its proposed reading of the tariff should be rejected.[1]

## II. The Plain Language Of The Tariff Requires Application Of Schedule 70 To The Conversion Area.

Schedule 70 provides:

> 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 areas which are zoned and used exclusively for residential purposes, provided that at the time of such installation the Company shall have adequate operating rights, and provided further that the Conversion Area must be not less than one (1) city block in length, or in the absence of city blocks, not less than six (6) contiguous building lots abutting each side of the public thoroughfare with all real property on both sides of each public thoroughfare to receive electric service from the Main Distribution System.

Schedule 70, § 2 (emphasis added).

In the absence of a definition, the term "residential" must be given "its plain and ordinary meaning ascertained from a common dictionary." *Washington v. Sullivan,* 143

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[1] PSE also advances an argument that its tariff does not apply to undergrounding projects where PSE's equipment is located on private property. Response, at 22-23. This issue is the subject of litigation in Dockets UE-010778 and UE-010911 ("the Cities Docket"). In the present docket, PSE does not seek a declaration from the Commission regarding undergrounding on private property except as it applies to the specific Clyde Hill project. Although this argument is not directed specifically against the City of SeaTac, the City is concerned with the implications of PSE's position for the Cities Docket. The City of SeaTac will address PSE's arguments on this point as appropriate in its reply brief to be filed on September 18, 2001 in the Cities Docket.



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Wn.2d 162, 175, 19 P.3d 1012 (2001) (relying on plain language of statute) (internal cites omitted). "Residential" is "used as a residence or by residents," and "restricted to or occupied by residences." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 996 (10th ed. 1998). The Project's conversion area, indisputably zoned exclusively residential and containing exclusively residential buildings, is "restricted to" and "occupied by" residences, and therefore is used exclusively for residential purposes.

In order to escape this conclusion, PSE argues that the conversion area is not used *exclusively* for residential purposes because South 170th Street connects to commercial areas beyond the conversion area, and PSE has installed equipment in the conversion area that would support commercial electric loads. Schedule 70 does not exclude an underground conversion project for these reasons when the conversion area is "zoned and used exclusively for residential purposes." In arguing to the contrary, PSE improperly grafts additional and conflicting requirements onto the plain language of Schedule 70. *See Washington v. Sullivan*, 143 Wn.2d at 175 ("We do not add to or subtract from the clear language of a statute unless that is imperatively required to make the statute rational."). To the contrary, the plain language of Schedule 70 governs this dispute.

### A. The Traffic Load Carried By South 170th Does Not Determine The Use Of The Conversion Area.

The use of South 170th Street as an arterial does not change the character of the conversion area from residential to commercial. PSE's Response does not dispute the facts outlined by the City in its Motion regarding the character of the conversion area's zoning and physical structures. Instead, PSE argues that Schedule 71 should apply to the conversion area because South 170th Street is a "collector arterial" that provides access to commercial areas beyond the conversion area. PSE's contention is that the conversion area is



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

Response, at 10-11 (emphasis in original).

Contrary to PSE's argument, the fact that South 170th Street happens to connect to commercial areas does not change the character of the conversion area from residential to commercial. *See, e.g.*, Response at 1 ("Although the dwellings along South 170th Street … are residential, the streets themselves are used for nonresidential purposes.") (emphasis added). Streets are not classified as "residential" or "commercial." The conversion area, which is zoned and used exclusively for commercial purposes, determines the applicability of Schedule 70. Schedule 70 has no such internal limiting principle that would convert a residential neighborhood into a commercial area simply because some of its streets connect to other areas of the city. By its very nature as part of a transportation system network, every city street eventually connects to other residential, commercial, and industrial areas. Conversion projects along most city streets, therefore, would be vulnerable to PSE's analysis, rendering Schedule 70 inapplicable most everywhere. Under PSE's reasoning, the neighborhood cul-de-sac and I-5 – both of which both provide access from one area of the city to another – could be used for "nonresidential purposes."

The purpose for which motorists use a street does not determine the residential or commercial character of an area, nor does the fact that pass-through traffic flows through a neighborhood make the area commercial. Moreover, PSE fails to establish any relationship between the traffic load on South 170th and the electrical load of the conversion area. It would be absurd to read Schedule 70 to define the character of a



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conversion area by a phenomenon (traffic flow) that has no relation to the electric load in the area. For Schedule 70 purposes, the use to which an area is put – either residential or commercial – must be determined by reference to the permanent structures and the zoning in the conversion area. PSE's interpretation of Schedule 70 undermines the clear language of the tariff in favor of a strained analysis that provides no objective criteria for determining whether an area is residential or commercial. Such a reading should be rejected.

### B. The Character Of PSE's Equipment Does Not Determine The Use Of The Conversion Area.

PSE's second argument is that its use of three-phase distribution lines on South 170th Street changes the SeaTac conversion area into a Schedule 71 project. *See, e.g.*, Response, at 1 ("The three-phase feeder that is to be converted to underground forms part of PSE's distribution backbone, and serves commercial as well as residential purposes."). PSE's argument, however, is aimed at the wrong target. The inquiry under Schedule 70 is whether the conversion area is zoned and used exclusively for residential purposes, not whether PSE's equipment in the area has multiple purposes.

PSE contends that:

> Although the houses that tap off of the facilities to be converted to underground along South 170th Street in SeaTac … are residential dwellings, with single-phase load, the three-phase feeder that they tap off of is part of PSE's distribution backbone … Thus, the electric system in these areas is not "used exclusively for residential purposes."

Response, at 7. PSE's argument consistently reads out the subject of the tariff's quoted passage. *See, e.g.*, Response at 4 ("The phrase 'used exclusively for residential purposes' is the tariff language that is in dispute in this case."). The question is whether the



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conversion area is used exclusively for residential purposes, not whether PSE's equipment is used for residential or commercial purposes.[2]

This reading of the tariff is supported by the language of Schedule 70. The passage in question refers to "areas which are zoned and used exclusively for residential purposes." The subject of the phrase, "areas," plainly refers to a geographic location, not a category of equipment, because a geographic area may be both zoned and used for residential purposes. PSE's equipment, in contrast, may not be zoned and used for residential purposes, as its facilities are not the subject of zoning laws in this way. As such, the determination under Schedule 70 regarding an area's residential character could not be made with reference to the equipment PSE has chosen to install in the area.

PSE's decision to install a three-phase system along 170th Street apparently is based on the electrical requirements of its distribution system. According to the Declaration of Curtis Bagnall, a senior project manager and senior electrical engineer with almost 30 years of experience, it is standard practice for electric systems to operate using three phases. Declaration of Curtis Bagnall ("Bagnall Decl."), ¶ 3.

PSE may require a three-phase distribution line on South 170th Street in order to deliver electric service to commercial areas outside of the conversion area, but PSE's system design requirements cannot be attributed to the conversion area as if the residential area imposed a commercial electrical load.

In the alternative, PSE suggests that the character of its equipment in the conversion area demonstrates that PSE uses the conversion area for nonresidential purposes. Response at 7. The character of a conversion area cannot reasonably be

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[2] Nor is the question determined by PSE's purpose within or use of an area, which purpose or use is clearly always commercial.



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defined by PSE's own use of its own equipment for non-residential purposes. Such an interpretation would render Schedule 70 meaningless since all of PSE's equipment would be used for "commercial" purposes.

### C. The Electric Load In The Conversion Area Is Not Comparable With Developed Commercial Areas.

PSE contends that Schedule 71 rather than Schedule 70 applies to the Project because it is available "in such other areas of such municipalities which have electrical load requirements which are comparable with developed commercial areas." Schedule 71, § 2. To the contrary, the electrical load requirements in the conversion area are typical of the requirements of a residential area, not a developed commercial area, and Schedule 71 does not apply.

PSE concedes that the load requirement of the dwellings within the conversion area is that of a typical residential load. *See* Response at 7 ("the houses that tap off of the facilities to be converted to underground along South 170th Street in SeaTac … are residential dwellings, with single-phase load …").

The use of a three-phase feeder in an area with a residential load is not uncommon and has nothing to do with the applicability of Schedule 70. According to Mr. Bagnall, it can be expected that PSE has a number of three-phase circuits on its system that serve large areas that are almost exclusively residential. A three-phase circuit is able to supply 3 times the amount of electric power as a single-phase circuit for a given current (amperage). PSE uses 600 amp, three-phase circuits for its backbone system; it then uses a single-phase 200-amp circuit for local distribution. On many systems, the 200-amp circuit is also three-phase. ¶ 5. The use of a backbone feeder is related to the size of the load being served, not whether the load within a conversion area is residential or commercial. Bagnall Decl. ¶ 10.



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Mr. Bagnall notes that there are about 40 residences that front S. 170th Street, representing an electrical load of 125 to 200 kW. At typical distribution voltages of less than 15 kV, this represents 8 to 9 amps of load. A 200-amp, distribution-voltage circuit could easily serve this load. Bagnall Decl., ¶ 8. Mr. Bagnall concludes that the feeder on S. 170th Street serves much more load than is represented by the approximately 40 residences in the undergrounding project area. Bagnall Decl., ¶ 11.

The fact that PSE uses a three-phase feeder on South 170th Street, therefore, does not establish that the electrical load in the conversion area is "comparable with developed commercial areas" or that Schedule 71 rather than Schedule 70 applies to the underground conversion.

## III. There Is No Credible Evidence Of Commission Intent To Exclude Three-Phase Feeders From Schedule 70.

PSE agrees with the City that the standards of tariff interpretation require the Commission to look to the plain language of the tariff to resolve the dispute between the parties. Response at 10. PSE nevertheless advances an inconsistent argument about the Commission's intent in approving the tariff. This argument, irrelevant because the language of Schedule 70 is plain and unambiguous, is seriously flawed.

### A. Without Ambiguity, There Is No Reason To Look To Canons Of Construction.

The Commission can decide the application of Schedule 70 as a matter of law without referring to extraneous evidence. "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). Plain words do not require construction. *See Western Telepage, Inc. v. City of Tacoma Dep't of*



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*Fin.*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000). *See also Washington v. Sullivan*, 143 Wn.2d at 175 ("When a statute is unambiguous, it is not subject to judicial construction and its meaning must be derived from the plain language of the statute alone.").

To avoid the plain language rule, PSE argues that Schedule 70 is ambiguous because "areas which are zoned and used exclusively for residential purposes" could refer to the types of dwellings or streets in an area or "PSE's use of the area with respect to PSE's electric system." Response, at 14. As discussed, *supra*, PSE's reading of Schedule 70 is strained and inconsistent with the plain language of the tariff. A tariff is not ambiguous "simply because arguments regarding distinct interpretations of it are conceivable." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie, Fraternal Order of Eagles*, 27 P.3d 1254 (Wn. App. 2001) (relying on plain language of statute). Where the language of a tariff supports only one reasonable interpretation, the fact that other, unreasonable, interpretations are possible does not make the tariff ambiguous.

PSE refers the Commission to the rule of construction that holds that one should not read out of existence a term in the tariff. Response at 15. However, as discussed, *supra*, PSE's reading of the term "exclusively residential" is so narrow as to exclude the application of Schedule 70 to <u>any</u> residential area that happens to contain a through street that connects to a commercial area or that contains any PSE equipment used to serve commercial load or used for commercial purposes. To define the conversion area either by the ultimate destination of vehicle traffic or by the type of PSE's equipment would result in the application of Schedule 71 rather than Schedule 70 to areas that are zoned and used exclusively for residential purposes, in derogation of the plain language of the tariff. The Commission cannot interpret the language of Schedule 70 in such a manner as to



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reach such an unlikely, strained, or absurd conclusion. *See Washington v. Sullivan*, 143 Wn.2d at 175 (interpretation should "avoid unlikely, absurd, or strained consequences."). To determine the character of a conversion area by reference to traffic or PSE's equipment grafts additional requirements that are not present in the clear language of Schedule 70. *See Washington v. Sullivan*, 143 Wn.2d at 175 ("We do not add to or subtract from the clear language of a statute unless that is imperatively required to make the statute rational."). There is no reason, therefore, for the Commission to look to extrinsic evidence to construe Schedule 70.

### B. PSE Fails To Demonstrate Credible Evidence Of Any Commission "Intent" To Override The Clear Language Of Schedule 70.

Even if consideration of extrinsic evidence were appropriate, PSE fails to demonstrate the Commission "intent" in approving Schedule 70. PSE argues that the Commission did not intend the Schedule 70 centerline foot rate to apply to three-phase feeders. Response, at 14 – 17. The basis of PSE's argument centers on a July 1983 study submitted by PSE in 1984 to support a Schedule 70 rate increase. Response at ADD. 7 – 15. The study was based on the average cost of four underground conversions completed in the early 1980's. ADD. 9. For reasons never explained, the cost study excluded two examples of underground conversions that included feeders running through the area. *Id.* at ADD. 9.

Gleaning the Commission's "intent" from the fact that PSE's cost information did not include these two examples is an unreasonable stretch. The Commission's order granting the tariff revisions does not even mention the exclusion of three-phase feeders from the cost study. If the Commission had intended to exclude three-phase feeders from Schedule 70, it could have so stated, but the Order is silent on the applicability of



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Schedule 70 to three-phase feeders. *See* ADD. 17-18. Such flimsy evidence of Commission "intent" proves nothing and should be rejected.

PSE could just as well derive the Commission's "intent" from its recent attempt to change Schedule 70 to exclude three-phase feeders. On February 20, 2001, PSE filed revisions to Schedule 70 with the Commission. *See* Appendix A. In the proposed revised tariff, the "Availability" provisions were changed to apply only when sufficient equipment and materials are available, the existing overhead electric distribution system is 7,200 volts or less, and "the Conversion Area is zoned or used for residential purposes and contains a single phase electrical system." Second Revised Sheet No. 70-b. The Commission neither acted upon nor approved the proposed revision to Schedule 70, and PSE withdrew the proposed tariff revision. *See* Commission Minutes (March 14, 2001).

As PSE well knows, the revision to Schedule 70 would not have been needed if the existing Schedule 70 excluded underground conversion in residential areas with three-phase feeders. PSE, however, decided to abandon the proposed revision to Schedule 70. If PSE had wanted to change the terms for underground conversion to explicitly exclude three-phase feeders, PSE should have pursued its tariff filing. Tariff changes must occur in an orderly proceeding in which the Commission and its Staff have the opportunity to review and investigate the proposed revision, not by reading words into the tariff.

PSE's insistence that its current interpretation of Schedule 70 is consistent with its "institutional memory" and practice is not borne out by the facts. *See* Response at 16. SeaTac first discussed the South 170th Street Project with PSE in January 1999. *See* Declaration of Thomas W. Gut In Support Of Cities' Motion For Summary Determination ("Gut Decl."), ¶ 10. In March 2001, Tom Gut, Assistant Engineering Manager, asked why PSE had presented a Schedule 71 agreement for signature instead of a Schedule 70



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agreement. *Id.* Mr. Gut testified, "PSE told me for the first time that since the project contained three-phase distribution, PSE was going to do the underground conversion under Schedule 71." *Id.*

A more useful excerpt from PSE's "institutional memory" might be the fact that PSE does not normally use three-phase feeders in a residential area. PSE's Response states:

> In general, PSE installs single-phase systems in areas that are purely residential, and does not install three-phase systems in a residential area unless load exists in the area that needs such a system. Normally, residential areas are served by a single-phase branch of PSE's system that at some point ties into one phase of PSE's three-phase distribution feeders.

Response, at 6. Since PSE does not normally install three-phase feeders in residential areas, the issue of whether Schedule 70 applies apparently does not arise often.

Significantly, PSE's attempt to revise Schedule 70 occurred in February 2001, about the same time as the SeaTac dispute over Schedule 70. The SeaTac project may have brought home the fact that the underground conversion on South 170th Street would be more expensive than most residential conversions due to the presence of the three-phase feeder. However, if PSE believes that the increased cost of undergrounding three-phase feeders justifies a rate increase for underground conversion, PSE's remedy is to make a tariff filing. Under the Commission's rules, PSE could present up-to-date cost studies and other evidence so the Commission could determine if the proposed rates are fair and reasonable.

In short, PSE should not be permitted to charge SeaTac for the cost of underground conversion on South 170th Street based upon its own strained reading of Schedule 70 or upon its view of the Commission's supposed "intent" in approving the tariff in 1983.



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## IV. Conclusion

Schedule 70 clearly is available and applicable to SeaTac's 170th Street Project. The SeaTac conversion area is zoned and used exclusively for residential purposes. The fact that a street running through the conversion area is an arterial connecting to a commercial area does not change the character of the conversion area, nor does the fact that PSE operates a three-phase system along South 170th Street for service to customers outside the Conversion Area convert it into a commercial area.

The only reasonable conclusion that can be drawn from these facts is that the SeaTac conversion area is "zoned and used exclusively for residential purposes" within the meaning of Schedule 70. The conversion area carries a typical residential electrical load, and there is no appropriate basis for applying Schedule 71. Summary determination is proper when reasonable minds could reach but one conclusion from the evidence. *See Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 353, 779 P.2d 697 (1989).

For all of these reasons, as well as those advanced in its Motion for Summary Determination, the City of SeaTac respectfully requests that the Commission grant its Motion for Summary Determination and deny PSE's Cross Motion for Summary Determination.

DATED this 31st day of August, 2001.

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CERTIFICATE OF SERVICE

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

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DATED at Seattle, Washington, this _____ day of August, 2001.

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Jo Ann Sunderlage
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