BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of, PUGET SOUND ENERGY, INC. For a Declaratory Order on Schedule 74 and the Schedule 74 Design Agreement between Puget Sound Energy, Inc. and the City of Tumwater.	No. UE-061626 PUGET SOUND ENERGY, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DETERMINATION

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I. INTRODUCTION

The City of Tumwater (the "City") and the Washington Utilities and Transportation Commission ("WUTC") Staff invite the WUTC to rule in the City's favor by ignoring the plain language of Schedule 74, ignoring Washington real estate law, and ignoring the WUTC's own ruling in *City of Kent v. Puget Sound Energy, Inc*., Nos. UE-010778 and UE-010911, 2002 Wash. UTC LEXIS 4 (Wash. Util. & Transp. Comm'n Jan. 28, 2002) ("*City of Kent*"), as well as other evidence supporting Puget Sound Energy, Inc.'s ("PSE") position.

The WUTC should reject that invitation and rule in PSE's favor because (1) the plain language of Schedule 74 requires the City to pay 100% of the costs associated with its decision to seek underground conversion; (2) PSE's easement within the Tumwater Boulevard widening project area ("Tumwater Project") is an unextinguished private property right from which PSE derives its authority to locate and operate its electrical facilities; and (3) the WUTC's *City of Kent* decision, the City's prior admissions, and sound public policy all support PSE's position.

II. ARGUMENT

A. The WUTC Should Follow Schedule 74's Plain Language

1. The City and Staff Cannot Rewrite Schedule 74

The City erroneously asserts in its Cross-Motion for Summary Determination, page 5, that Section 2.b(2)(i) of Schedule 74 does not apply at all if Tumwater Boulevard is a "Public Thoroughfare" and if "control over PSE's presence in Tumwater Boulevard is vested in the City." The Staff states this slightly differently, asserting that PSE is obligated to pay 60% of conversion costs if Tumwater Boulevard is a "Public Thoroughfare" or if

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"PSE's authority to locate facilities in Tumwater Boulevard derives from a franchise or rights granted previously by the City." Reply Brief of Commission Staff at 4. Neither position is based on factual or legal authority and both attempt to rewrite Schedule 74.

The plain language of Section 2.b(2)(i) of Schedule 74 unambiguously states that the City must pay 100% of underground conversion costs for any system located

> (A) outside of the Public Thoroughfare *or* (B) pursuant to rights not derived from a franchise previously granted by the Government Entity or pursuant to rights not otherwise previously granted by the Government Entity . . . .

(Emphasis added.) Thus, even if we assume that Tumwater Boulevard is a "Public Thoroughfare," the next question is from what source does PSE derive its right to operate on Tumwater Boulevard. If that source is either not a franchise or is a right not granted by the City, then the City must pay 100% of the underground conversion cost. An easement is obviously not a franchise, and it is undisputed that the easement in question was granted by the Port of Olympia.

Notwithstanding this clarity, both the City and Staff urge the WUTC to twist Section 2.b(2)(i)'s language to read that the City pays only 40% of the conversion costs if Tumwater Boulevard is a Public Thoroughfare or if PSE's rights are derived from a franchise or other grant from the City. Indeed, the Staff argues that a "yes" to either condition means that the 60/40 cost split of Section 2.b(1) applies. *See* Reply Brief of Commission Staff at 4. This novel interpretation, however, would render the "or" clause of Section 2.b(2)(i) meaningless.

Section 2.b(2)(i) is not written the way the City and Staff suggest. The derivation of PSE's rights does matter and is specifically identified in Section 2.b(2)(i)(B) as an independent basis for imposing 100% of the underground conversion costs on the City

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where—as in this case—PSE's rights are derived from a source other than the City (e.g., the pre-existing Easement granted by the Port of Olympia).

2. Whether Tumwater Boulevard Is a "Public Thoroughfare" Is Not Relevant

The issue of whether Tumwater Boulevard is a Public Thoroughfare is irrelevant in this particular case. Section 2.b(2) is written in the disjunctive: "[T]he *Government Entity* [must] pay (i) 100% of the total Cost of Conversion . . . of the existing overhead distribution system located . . . (A) outside of the Public Thoroughfare *or* (B) pursuant to rights not derived from a franchise . . . ." (Emphasis added.)

Whether Tumwater Boulevard is a Public Thoroughfare would only be relevant if PSE did not have a pre-existing easement from the Port of Olympia. Accordingly, all of the City's and Staff's arguments regarding Tumwater Boulevard being a "Public Thoroughfare" are simply unnecessary to the WUTC's determination of the issue. In particular, Kimberly Harris's testimony that "public thoroughfare" most likely means owned by a governmental entity is likewise irrelevant, as is Markham Quehrn's statement that municipalities or perhaps ports have control over public thoroughfares. The only relevant and undisputed fact is that PSE's operating rights on the property are pursuant to a private easement.

B. The WUTC Should Follow Washington Real Estate Law on Easements

1. The City admits that PSE has a pre-existing easement on the Tumwater Project

There is no dispute that PSE was granted an easement over the property by the Port of Olympia in 1981 (the "Easement"). The City admits that PSE was granted an easement by the Port of Olympia for property that is now part of the Tumwater Project. Cross-Motion for Summary Determination at 6. The City further admits that this property was annexed by the City. *Id.* at 18. However, the City and Staff assert that PSE's rights under the Easement

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are "granted" by the City, essentially arguing that the Easement is somehow a "public" property right that renders Section 2.b(2)(i) inapplicable. The City and Staff misconstrue the law of easements and predictably cite no authority for their position.

An easement to place and service utilities on a public road is a *private* property right. *See City of Kent*, 2002 Wash. UTC LEXIS 4, at *41-42 (Conclusion of Law #5); 28A C.J.S. *Easements* § 8 ("Although utilities that are granted easements are public utilities, they are privately owned companies and their easement rights are private.") (citing *Boyle v. Burk*, 749 S.W.2d 264, 266 (Tex. App. Fort Worth 1988) (holding appellee could adversely possess land subject to private easement right by utility because such easement did not render land dedicated to "public" use)). Accordingly, while Tumwater Boulevard may be a "Public Thoroughfare," it is clear that PSE's right to *operate* on Tumwater Boulevard derives from a private property right, not a franchise agreement or other permission from a government entity. PSE's operating rights are not "granted" by the City (even considering the City as a successor to the Port of Olympia) because PSE acquired its interest in the property from the Port of Olympia and thus owns a private property right over what is now Tumwater Boulevard.

2. The Easement has not been extinguished, altered, or modified

The only way that Section 2.b(2)(i)(B) would not apply would be if the Easement had been extinguished, altered, or modified so that it no longer governed PSE's operating rights on the Tumwater Project. That clearly is not the case.

While the Franchise Agreement is complementary to the Easement, it did not and does not supersede it. The Easement is a private property right, properly recorded, and it cannot be extinguished or altered except by written consent of PSE:

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> Termination of easements is not favored by the courts, and an easement can be extinguished only in some mode recognized by law. The owner of the servient estate upon which an easement rests may not, by his or her own volition, terminate or abridge an easement. Unless the instrument that creates the easement so provides, an easement may not be terminated without the consent of the owner of the easement.

1 Washington Real Property Deskbook, *Easements and Licenses* § 10.6(2) (3d ed.) (citations omitted). No reservation of rights was needed in the Franchise Agreement to preserve PSE's Easement. In fact, a similar franchise agreement with Federal Way contains no reservation of rights language in the undergrounding of facilities section, but the WUTC still found that PSE's easement rights controlled when Federal Way similarly sought to impose its underground conversion costs on PSE. *See City of Kent*, 2002 Wash. UTC LEXIS 4, at *27-32; Ordinance No. 98-315 (Franchise Agreement with City of Federal Way, Section 15, Undergrounding of Facilities), attached as Exhibit A to the Declaration of James F. Williams.

For the same reason, contrary to the City's and Staff's assertion, the Easement was not superseded by RCW 35A.14.900. RCW 35A.14.900 does not state that easements are automatically extinguished whenever property is annexed. It states that *franchises* or *permits* are extinguished by annexation and that the city annexing the property has to provide another franchise or permit for at least seven years. Nothing in the statute addresses easements. Furthermore, the statute could not extinguish an easement because that would directly contradict RCW 64.04.010, which requires that any conveyance of real estate be made by deed.[1]

[1] The City's reliance on *State v. Public Utility District No. 1 of Clark County*, 55 Wn.2d 645, 649-50, 349 P.2d 426 (1960) ("*Clark County*"), is also misplaced. *Clark County* was decided long before Schedule 71, the *City of Kent* case, and Schedule 74. Moreover, *Clark County* only deals with PSE's rights under a *franchise* agreement—not an easement. Accordingly, the utility's "right to use the streets of the city of Vancouver for its electrical distribution system is termed a franchise or a

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C. The WUTC Should Follow Its *City of Kent* Decision, Past Admissions by the City, and Public Policy in Support of PSE's Position

PSE believes that Section 2.b(2)(i)(B) of Schedule 74 unambiguously provides that the City must pay 100% of conversion costs where PSE's operating rights are pursuant to a private easement. But, even if Section 2.b(2)(i) is deemed ambiguous, the history of Schedule 74, the City's past admissions, and public policy support PSE's position.

First, *City of Kent*, 2002 Wash. UTC LEXIS 4, at *27-32, explicitly held that where PSE has a private easement, the City must absorb 100% of the costs associated with converting overhead electric facilities to underground facilities. This decision was reached in light of the fact that Federal Way also had a franchise agreement like the City's. Although, the City and Staff ignore *City of Kent* in their briefing, *City of Kent* ultimately resulted in the adoption of Schedule 74, and Schedule 74 must be interpreted in light of that case.[2]

Second, as more fully detailed in PSE's Motion for Summary Determination, the City's past admissions and conduct evidenced that, for virtually all of the Tumwater Project, the City's representatives agreed with PSE's interpretation of Schedule 74. For almost two years, they did not protest PSE's determination that the City was obligated to pay 100% of conversion costs due to PSE's pre-existing Easement on the subject property. And, only

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privilege, [and] it is subject to the express provision that it will remove and relocate these facilities whenever the removal thereof shall be deemed for the public convenience or in making any other improvements by the City of Vancouver." *Clark County*, 55 Wn.2d at 649 (internal quotation marks omitted). That holding is not relevant here, where the issue to be decided is the interpretation of Section 2.b(2)(i) of Schedule 74 and PSE's operating rights in light of its pre-existing Easement over Tumwater Boulevard.

[2] The City also claims that the WUTC "does not have authority over franchise agreements between cities and regulated utilities." Cross-Motion for Summary Determination at 4. The City ignores *City of Kent* and related rate cases. As previously determined, the WUTC is the proper entity to be deciding this matter.

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recently, the City again evidenced agreement with this interpretation on a different project. *See* PSE's Motion for Summary Determination at 15-16.

Finally, PSE's interpretation is consistent with public policy. To read Section 2.b(2)(i) as proposed by the City and Staff could render thousands of easements acquired by utilities on public property virtually worthless. As recognized by *City of Kent*, 2002 Wash. UTC LEXIS 4, at *25-26, easements are purchased by utilities like PSE to reduce uncertainty associated with the costs of converting equipment—which is exactly why Section 2.b(2)(i)(B) is written the way it is. Furthermore, revising Schedule 74 in a manner to read consistent with the City's and Staff's interpretation would unfairly reallocate the costs of converting equipment located on PSE's private easements, with the net effect of undermining the legal status of easements across the State of Washington and having those costs unfairly borne by all rate payers throughout PSE's service area.

III. CONCLUSION

For the reasons set forth above, PSE respectfully requests that its Motion for Summary Determination be granted and the City's Cross-Motion for Summary Determination be denied.

RESPECTFULLY SUBMITTED this ___ day of March, 2007.

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