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March 30, 2007

**VIA ELECTRONIC FILING AND FEDERAL EXPRESS**

Ms. Carole J. Washburn  
Executive Secretary  
Washington Utilities and Transportation Commission  
1300 South Evergreen Park Drive SW  
P. O. Box 47250  
Olympia, WA 98504-7250

Re: In re the Matter of the Petition of Puget Sound Energy  
Docket No. UE-061626

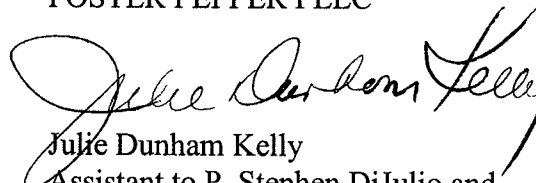
Dear Ms. Washburn:

Enclosed please find the original and twelve copies of **City of Tumwater's Reply to PSE's Motion for Summary Determination and to Staff Response; and Certificate of Service** for filing in the above-entitled case. These documents are also transmitted electronically in .pdf format to WUTC Records Center. For confirmation of receipt, I have enclosed additional copies to be date-stamped and returned to us in the enclosed self-addressed, stamped envelope.

Thank you for your consideration in this regard.

Sincerely,

FOSTER PEPPER PLLC

  
Julie Dunham Kelly  
Assistant to P. Stephen DiJulio and  
William H. Patton

Enclosures  
cc: Parties of Record

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7 BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

8 In the Matter of the Petition of

9 PUGET SOUND ENERGY, INC.

10 For a Declaratory Order on Schedule 74 and  
11 the Schedule 74 Design Agreement between  
12 Puget Sound Energy, Inc. and the City of  
Tumwater,

No. UE-061626

CITY OF TUMWATER'S  
REPLY TO PSE'S MOTION FOR  
SUMMARY DETERMINATION  
AND TO STAFF RESPONSE

13  
14 **I. Introduction**

15 1. The City of Tumwater ("City") respectfully submits this reply to the Motion for  
16 Summary Determination of Puget Sound Energy, Inc., ("PSE") and to the Brief of Commission  
17 Staff ("Staff") in Response to Motions for Summary Determination.<sup>1</sup>

18 **II. Reply to Staff Brief**

19 2. The City fully concurs with Staff.

20 **III. Reply to PSE's Motion**

21 3. Having initiated a petition to the Commission for a declaratory order on Schedule  
22 74, PSE departs from an analysis of the tariff itself and ignores the fact that a tariff, once adopted  
23 by the Commission, cannot be altered by any city official or by any utility.

24  
25  
26 <sup>1</sup> Pursuant to Judge Mace's Notice of Procedural Schedule issued December 14, 2006, the City and PSE are directed to file replies to each other's cross motions for summary determination and to Staff's response on March 30, 2007.

CITY OF TUMWATER'S REPLY TO PSE'S  
MOTION FOR SUMMARY DETERMINATION  
AND TO STAFF RESPONSE - 1

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1           **A. A Commission tariff has the force and effect of law**

2           4.       “Once a utility’s tariff is filed and approved, it has the effect and force of law.”  
3       *Gen. Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986). PSE cites to this  
4       leading case, but for a different proposition, and for one that is not exactly what the court said.<sup>2</sup>  
5       It is, however, the central holding of *GTE v. Bothell* quoted above that is critical to the  
6       Commission’s determination of PSE’s petition here. The Supreme Court recognized that the  
7       Commission’s tariffs have the status of law, and cannot be preempted by a city ordinance<sup>3</sup> or, for  
8       that matter, by a contract or by a purported property right.

9           **B. No city employee and no utility can alter a Commission tariff**

10          5.       Because the Commission’s tariff has the force and effect of law, no city employee  
11       and no utility employee may agree to alter the tariff, either unilaterally or by mutual agreement.  
12       A Commission tariff is binding on the utility just as much as on customers or other entities  
13       affected by the tariff. “Unless the commission otherwise orders, no change shall be made in any  
14       rate or charge or in any form of contract or agreement or in any rule or regulation relating to any  
15       rate, charge or service or in any general privilege or facility which shall have been filed and  
16       published by a gas company, electrical company or water company. . . .” RCW 80.28.060.  
17       Published rates must be applied by the utility. RCW 80.28.020. For PSE to apply a different  
18       rate, even if a customer agreed, would be unlawful rate discrimination. RCW 80.28.100.

19          6.       Therefore, no alleged contract or understanding between an employee of the City  
20       and PSE<sup>4</sup> can alter or affect the content and meaning of Schedule 74 and its application to the  
21       Tumwater Boulevard Widening Project. “The rights as defined by the tariff cannot be varied or

22       <sup>2</sup> PSE Motion at 13:18-21. “Franchises are contracts – they do not grant proprietary interests,” citing *GTE v.*  
23       *Bothell*, 106 Wn.2d at 284. But the issue discussed by the Supreme Court at in that part of the case was not property  
24       interests, but whether a Bothell city ordinance takes precedence over the Commission’s tariff. What the Court  
25       actually said was: “The question therefore becomes which law has precedence over the other. Franchises have the  
26       legal status of contracts. The power to grant franchises is a sovereign power that rests in the state, but which may be  
     delegated to cities.”

<sup>3</sup> “Whether seen as contractual or police power exercises, Bothell’s subsequent ordinances do not have the authority  
to preempt that tariff.” *GTE v. Bothell*, 121 Wn.2d at 587.

<sup>4</sup> PSE Motion at 11:15-33.

1 enlarged by either contract or tort of the carrier.” *Hardy v. Claircom Communications Group*, 86  
2 Wn. App. 488, 492, 937 P.2d 1128 (1997)<sup>5</sup> “The general rule is that specific contracts  
3 inconsistent with the terms of tariff schedules are void.” *Jones v. Northwest Airlines, Inc.*, 22  
4 Wn.2d 863, 865, 157 P.2d 728 (1945).

5 **C. The *Kent* litigation preceded the Commission’s adoption of Schedule 74**

6 7. PSE argues that the *Kent* proceeding should control the Commission’s  
7 determination of the issues here.<sup>6</sup> What PSE fails to acknowledge is that the *Kent* decision came  
8 before the adoption of Schedule 74, and dealt with the prior conversion tariffs – Schedules 71  
9 and 72. Following the *Kent* case, the Commission adopted Schedule 74, effective July 1, 2002.  
10 The new Schedule 74 included at least three significant changes that relate to this case. First, the  
11 new schedule eliminated issues of the zoning and length of road improvement involved in the  
12 conversion project. Second, the new schedule standardized the cost split between a city and the  
13 utility to a 40/60 percent cost division instead of the prior 30/70 or 70/30 cost split of the prior  
14 schedules. Third, Schedule 74 defined “Public Thoroughfare,” whereas the prior schedules had  
15 not done so, leading in part to the type of litigation involved in the *Kent* decision.

16 8. In defining “Public Thoroughfare” in Schedule 74 the Commission recognized  
17 that a public thoroughfare may not only be a typical road, but can be created by other public real  
18 property rights allowing for electric utility use.<sup>7</sup> Therefore the *Kent* precedent relied on PSE has  
19 no application to the situation in Tumwater. First, the PSE facilities to be converted from  
20 overhead to underground are, and always have been, on a public thoroughfare, as demonstrated  
21 by PSE’s own drawing of the conversion area. Declaration of Jim Shoopman, February 15,  
22 2007, Exhibit 10. Second, even if PSE’s facilities are, as PSE argues, located in Tumwater  
23 Boulevard under authority of an easement from the Port of Olympia instead of under authority of

24 <sup>5</sup> Discussing the “filed rate doctrine” in the context of communication company tariffs and citing *Marcus v. AT & T*  
25 *Corp.*, 938 F.Supp. 1158, 1169 (S.D.N.Y. 1996).

<sup>6</sup> PSE Motion at 14:25 – 15:33; referencing *City of Kent v. Puget Sound Energy, Inc.*, No. UE-010911.

26 <sup>7</sup> “Public Thoroughfare: Any municipal, county, state, federal or other public road, highway or thoroughway, or other  
public right-of-way or other public real property rights allowing for electric utility use.” Schedule 74, § 10.e.

1 a franchise from the City, they would still be located in a “public thoroughfare,” by definition of  
2 Schedule 74.

3 9 As a consequence, the issue of an adjacent, private easement decided by the  
4 Commission in the *Kent* case does not apply to the facts here. In *Kent* the Commission was  
5 dealing with a PSE easement (1) off the public thoroughfare and (2) granted by a private party.  
6 Here PSE facilities are (1) located in a traditional public right-of-way and (2), even if they were  
7 not, the easement PSE claims to be a private property right was issued by a public agency,  
8 thereby establishing that PSE facilities are on a public thoroughfare – by definition.

9 **D. A property owner can agree to use of its property apart from an easement**

10 10. PSE’s argument that an easement blocks and invalidates the effect of any  
11 subsequent contract or tariff<sup>8</sup> has no support in law. First, as noted above, the easement PSE  
12 claims is one issued by a public agency and therefore is defined to be a “public thoroughfare” by  
13 Schedule 74. Second, a property owner can agree to the use of its property by lease or other  
14 forms of agreement without relinquishing the underlying property interest. That is in fact the  
15 nature of a municipal utility franchise itself – a grant by the municipality of the right to use  
16 property either owned or controlled by the municipality for utility purposes.<sup>9</sup> Therefore, even if  
17 PSE owns a “dominant interest in the land” as it claims, that property interest can be and has  
18 been waived or modified by PSE (1) by proposing and accepting a tariff issued by the  
19 Commission in 2002, and (2) by accepting and entering into a 30-year franchise agreement with  
20 the City in 1985.<sup>10</sup>

21  
22 <sup>8</sup> PSE Motion at 13:17-19. “The PSE Easement also represents a dominant interest in the land which cannot be  
superseded by contract.”

23 <sup>9</sup> The Supreme Court in *Tukwila v. Seattle*, 68 Wn.2d 611, 615, 414 P.2d 597 (1966), for example, noted that the  
24 franchise granted to Seattle City Light by Tukwila authorized City Light’s use of the city’s property throughout the  
25 city. “By the terms of its franchise granted in 1958 under Tukwila ordinance 262, as accepted by Seattle in its  
ordinance No. 87631, Seattle acquired the right to use the streets and public areas of Tukwila for the transmission,  
distribution and sale of electrical energy throughout the entire area within the city’s corporate limits.”

26 <sup>10</sup> “Franchises, whether statutory or by ordinance, have the legal status of contracts, binding with equal force,  
according to the terms thereof, upon the granting authority and the granted entity.” *Tukwila v. Seattle*, 68 Wn.2d at

1           **E. PSE's own evidence and case citation support the City and Staff**

2           11.     PSE submitted a map of the "easement area" covered by the 1981 easement from  
3 the Port of Olympia. Declaration of Barry Lombard, February 22, 2007, Exhibit 3. This map  
4 shows the entire Olympia Municipal Airport property. It is the same geographic area annexed by  
5 the City in 1987. Shoopman dec., Exhibit 2. PSE claims to have private property rights over  
6 right-of-way in this entire area. This claim of a private property right over and under the Port's  
7 "right-of-way" is not credible. If it were, PSE would have a property right to locate its overhead  
8 lines up to 5 feet out into the middle of a public street anywhere in the annexed area.

9           12.     The grant of rights by the Port of Olympia is in fact the type of franchise right  
10 described by the Supreme Court in a case cited by PSE in its Motion. *Wash. Water Power v.*  
11 *Rooney*, 3 Wn.2d 642, 101 P.2d 580 (1940).<sup>11</sup> Even if it is called an 'easement,' a "grant,  
12 franchise, easement or other right . . . is subject to the police power of the sovereign . . . and  
13 unless expressly agreed to otherwise in the franchise, the company must, at its expense, make  
14 such changes as the public convenience and necessity require . . ." *State v. Public Utility District*  
15 *No. 1 of Clark County*, 55 Wn.2d 645, 649, 349 P.2d 426 (1960); emphasis added.

16           **IV. Conclusion**

17           13.     PSE cannot by claim of a private property right, or by claim of an agreement  
18 between an employee of the City and PSE, change a tariff issued by the Commission. As both  
19 the City and Staff conclude, Schedule 74 requires that the City pay 40 percent and PSE pay 60

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22           615, citing 5 McQuillan, Mun. Corp. § 19.39, 1940 (1949). The 1985 franchise agreement between the City and  
PSE is found at Declaration of William H. Patton, February 16, 2007, Exhibit 1, Exhibit A.

23           <sup>11</sup> PSE Motion at 3:40-43. The full quote from that part of the case is: "McQuillan in his work on Municipal  
24 Corporations, 2d Ed., § 1740, defines a franchise as follows: 'The term as it is ordinarily used in the decisions and  
25 by text writers . . . means the right granted by the state or a municipality to an existing corporation or to an  
individual to do certain things which a corporation or individual otherwise cannot do, such as the right to use a street  
or alley for a commercial or street railroad track, or to erect thereon poles and string wires for telegraph, telephone,  
or electric light purposes or to use the street or alley underneath the surface for water pipes, gas pipes or other  
26 conduits.'"

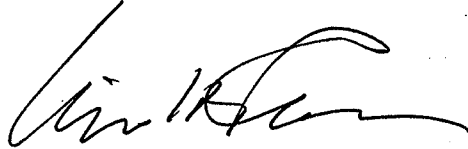
3 Wn.2d at 649-50.

1 percent of the cost of converting PSE's facilities along Tumwater Boulevard from overhead to  
2 underground.

3 14. Accordingly, the City requests that the Commission deny PSE's Motion, grant the  
4 City's Cross Motion, and adopt the Staff position in issuing the Commission's Declaratory  
5 Order.

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7  
8 RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of March, 2007.

9  
10 FOSTER PEPPER PLLC

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14 William H. Patton, WSBA #5771  
15 Attorneys for City of Tumwater

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7 BEFORE THE WASHINGTON STATE  
8 UTILITIES AND TRANSPORTATION COMMISSION

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10 PUGET SOUND ENERGY, INC.

11 For a Declaratory Order on Schedule 74 and  
12 the Schedule 74 Design Agreement between  
13 Puget Sound Energy, Inc. and the City of  
14 Tumwater

No. UE-061626

CERTIFICATE OF SERVICE

15 I, Julie Dunham Kelly, hereby certify and declare under penalty of perjury under the  
16 laws of the State of Washington that on March 30, 2007, I will cause a true and correct copy  
17 of the following documents:

18 1. City of Tumwater's Reply to PSE's Motion for Summary Determination and to  
19 Staff Response;

20 2. and this Certificate of Service

21 To be served as follows:

22 Via Federal Express  
23 Ms. Carole J. Washburn, Executive Secretary  
24 Washington Utilities and Transportation Commission  
25 1300 S. Evergreen Park Drive S.W.  
26 Olympia, WA 98504

and  
Via Electronic Filing ([Records@wutc.wa.gov](mailto:Records@wutc.wa.gov))

And

CERTIFICATE OF SERVICE - 1

FOSTER PEPPER PLLC  
1111 THIRD AVENUE, SUITE 3400  
SEATTLE, WASHINGTON 98101-3299  
PHONE (206) 447-4400 FAX (206) 447-9700

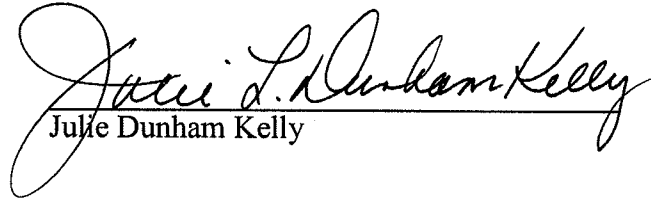


1 via legal messenger upon the following attorneys:

2 James F. Williams  
3 Donna L. Barnett  
4 Perkins Coie LLP  
5 1201 Third Avenue, 48th Floor  
6 Seattle, WA 98101-3099  
7 *Attorneys for Puget Sound Energy, Inc.*

8 I certify and declare under penalty of perjury under the laws of the State of Washington  
9 that the foregoing is true and correct.

10 Executed at Seattle, Washington this 30th day of March, 2007.

11   
12 Julie Dunham Kelly

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CERTIFICATE OF SERVICE - 2

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