BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

| | |
|---|---|
| CITY OF AUBURN, CITY OF BREMERTON, CITY OF DES MOINES, CITY OF FEDERAL WAY, CITY OF LAKEWOOD, CITY OF RENTON, CITY OF SEATAC, CITY OF TUKWILA,<br><br>Complainants,<br><br>v.<br><br>PUGET SOUND ENERGY, INC.,<br><br>Respondent. | NO. UE-010911 |
| In the Matter of the Petition of<br><br>CITY OF KENT,<br><br>For Declaratory Relief Interpreting Schedule 71 of Electric Tariff G. | NO. UE-010778<br><br>PUGET SOUND ENERGY, INC.'S RESPONSE TO MOTIONS FOR SUMMARY DETERMINATION AND CROSS MOTION FOR SUMMARY DETERMINATION |



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

**CONTENTS**






PERKINS COIE LLP

One Bellevue Center, Suite 1800

411 - 108th Avenue Northeast

Bellevue, WA 98004-5584

(425) 453-6980

PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

## I. INTRODUCTION

1. Puget Sound Energy, Inc. ("PSE") hereby submits its response in opposition to the Cities' Motion for Summary Determination and Memorandum in Support ("Cities' Motion") filed by of the Cities of Auburn, Bremerton, Des Moines, Federal Way, Lakewood, Renton, Redmond, SeaTac and Tukwila ("the Cities") and in opposition to the City of Kent's Amended Motion for Summary Determination ("Kent's Motion"), and cross moves for summary determination in PSE's favor on all issues raised in the Complaints and Petitions filed by the Cities and Kent in this consolidated proceeding. PSE sometimes refers to the Cities and Kent collectively herein as the "cities."

2. This proceeding brings into issue: RCW 9A.72.085, RCW 34.05.240, RCW 35.21.860, RCW 35.22.280, RCW 35.96.010, RCW 35.99.010, RCW 80.01.040, RCW 80.25.020, RCW 80.28.010, RCW 80.28.060, RCW 80.28.080, RCW 80.28.090, RCW 80.28.100, RCW 80.32.060, WAC 296-45-045, WAC 480-09-230, WAC 480-09-426(2), WAC 480-100-56, Schedules 70, 71 and 80 of PSE's Tariff WN U-60, Electric Tariff G, and NESC §§ 231.B 323 and 382.

3. The cities wish to have PSE convert its existing overhead electric distribution facilities along various street improvement projects to underground rather than to have PSE relocate those overhead facilities to new overhead locations to accommodate road widening. The cities seek to require PSE to perform such underground conversions on the cities' terms while ignoring the requirements in PSE's Tariff for such conversions. In doing so, the cities seek to escape some of the costs of the underground conversions, and to shift such costs to PSE and its ratepayers. The cities also seek to obtain total control over whether and when the new underground facilities must be relocated in the future, without having to bear any cost



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

consequences for a decision to require relocation of PSE's underground system.

4. Schedule 71 requires that property owners in a conversion area provide space and legal rights on their private property, at their expense, for placement of facilities that in PSE's judgment should be installed on private property, in a form satisfactory to PSE. If such operating rights are not provided, then the conditions of Schedule 71 are not met, and PSE is not required to perform the conversion. Instead, alternatives are available such as relocating the existing overhead to new overhead locations if required by the circumstances of a project. Under PSE's franchises with cities, such relocation generally would be at PSE's expense.

5. If cities requesting Schedule 71 conversions wish to obtain conversions to underground rather than relocation of existing overhead to new overhead locations, then they must be willing to take steps necessary to ensure that the operating rights that PSE requires for its facilities are provided to PSE. Such steps may include paying property owners consideration for easement rights granted to PSE if a property owner demands such consideration, or reimbursing PSE for such payments if PSE undertakes the task of negotiating with and issuing checks to property owners. Cities requesting conversions must also agree to protect PSE from the costs of forced future relocation of facilities that PSE agrees to place in the public rights-of-way rather than on private property when it installs its underground system. PSE's current form Underground Conversion Agreement explicitly spells out these obligations, and is fully consistent with Schedule 71.

6. The Cities amended their Petition to include a claim related to the underground conversion of Phase II of South 170th Street in SeaTac. That conversion is the subject of consolidated Docket Nos. UE-010891 and UE-011027 (the "Schedule 70 Proceeding"). If the Commission determines in the Schedule 70 Proceeding that Schedule 71 applies to Phase II of the SeaTac South 170th Street



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

conversion (rather than Schedule 70), then the Commission must resolve in this Schedule 71 proceeding the question whether SeaTac must pay 30% or 70% of the costs of the conversion (or of some proportion of the costs of the conversion) under the cost sharing provisions of Schedule 71. Only two of the eight existing poles on South 170th Street are "required to be relocated due to addition of one full lane or more" to South 170th Street within the meaning of Schedule 71. Thus, SeaTac must pay 30% of ¼ of the costs of the conversion and 70% of the remaining ¾of the costs of the conversion.

7. The Cities also amended their Petition to include a claim regarding a conversion along South 320th Street in Federal Way. PSE's existing overhead facilities along South 320th Street are located on PSE easement, not in Federal Way's rights-of-way. Schedule 71 does not apply to facilities located on private property. If Federal Way wishes to have PSE convert these facilities to underground, Federal Way must pay 100% of the costs of the conversion.

8. As set forth below, the Commission should deny the cities' motions for summary determination, grant PSE's cross motion for summary determination, and dismiss the Cities' and Kent's Petitions, with prejudice.

## II. STATEMENT OF FACT

9. In an effort to aid the Commission's consideration of these cross motions for summary determination, PSE does not repeat here the factual statements set forth in the parties' Stipulation of Facts and Law, or PSE's correction of certain misstatements of fact contained in the cities' motions, or PSE's additional facts related to the motions. Instead, PSE addresses such facts along with its arguments, presented below, so that the Commission can more easily consider the facts in context and determine whether there are any disputed facts that are material to the issues before the Commission.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

10. PSE submits the Declarations of Lynn F. Logen ("Logen Decl."), Mike Copps ("Copps Decl."), Doug Corbin ("Corbin Decl."), Greg Zeller ("Zeller Decl.") and Andy Lowrey ("Lowrey Decl.") in support of this response and cross motion.

## III. ARGUMENT

### A. Legal Standards and the Scope of This Proceeding

#### 1. Standard for summary determination.

11. Pursuant to WAC 480-09-426(2), a party requesting summary determination must show that "the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor." The Commission considers motions for summary determination under "the standards applicable to a motion made under CR 56 of the civil rules for superior court." *Id.* CR 56 provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c).

12. PSE does not believe that there are any facts in dispute regarding the positions of the parties or their actions as to the Pacific Highway South projects that are currently in the planning stages, and that brought these Schedule 71 issues before the Commission. *See* Stipulated Facts Nos. 1-11. There are also no essential facts in dispute regarding the SeaTac South 170th Street conversion or the Federal Way South 320th Street conversion. *See* Stipulated Facts Nos. 12-20.

13. It is clear from the competing declarations submitted by the cities and PSE that the parties do not agree generally about whether PSE's interpretation of



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

Schedule 71 with respect to easements is consistent with PSE's historical position. PSE does not believe that any such dispute is *material*. "A material fact is one of such nature that it affects the outcome of the litigation." *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). In this case, the plain language of Schedule 71 controls resolution of this proceeding, and there is no need for the Commission to look beyond the plain language of the Tariff.[1]

14. Even if the Commission were to decide that PSE's historical application of Schedule 71 as to easements were material to its resolution of this proceeding, PSE's declarations set forth specific, detailed evidence showing that its current application of Schedule 71 is fully consistent with its historical application of Schedule 71, as described below. PSE has submitted specific testimony and documents showing that PSE historically has required that easements be provided for Schedule 71 conversions, at no cost to PSE, in order for Schedule 71 projects to proceed. The cities' broad, conclusory statements to the contrary are not sufficient to prevent summary determination against them. *See, e.g., Michelsen v. The Boeing Company*, 63 Wn. App. 917, 920-21, 826 P.2d 214 (1991) (A party opposing summary determination must provide "more than conclusory allegations, speculation or argumentative assertions of the existence of unresolved factual issues," and "must set forth specific facts to rebut the moving party's contentions."); *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986) ("Issues of material fact cannot be raised by merely claiming contrary facts," and instead the other party "must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.").

---

[1] The Commission must look beyond the plain language of Schedule 71 with respect to the 30%/70% issue for the SeaTac South 170th Street conversion and the Federal Way South 320th Street Conversion. However, there are no competing facts with respect to those conversions, and the Commission can decide those issues as a matter of law.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

15. In addition, the Commission "may decide a factual issue as a matter of law if there is only one conclusion that reasonable minds could reach." *Michelson*, 63 Wn. App. at 920. In the present case, reasonable minds could only reach the conclusion that PSE's judgments with respect to undergrounding are sound, and that PSE's current interpretation of Schedule 71 is consistent with its historical interpretation of the Tariff.

**2. Standard for interpreting PSE's Tariff.**

16. There is no question that filed and approved tariffs have the force and effect of state law, and that PSE is obligated to charge its customers pursuant to its tariffs. *See Gen. Tel. Co. of the Northwest, Inc. v. City of Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986) ("*GTE v. Bothell*"); RCW 80.28.080. The question in this case is whether PSE or the petitioners are correct with respect to their interpretations of Schedule 71.

17. The standard for interpreting PSE's Tariff is also uncontested.

> When, as here, parties dispute what particular provisions require, [the Commission] must look first to the plain meaning of the tariff. If the tariff language is plain and unambiguous, there is no need to resort to rules of construction.

*Air Liquide America Corp. v. Puget Sound Energy, Inc.*, Docket No. UE-981410, Fifth Supplemental Order Granting Complaint, Ordering Refunds and Other Relief, 1999 Wash. UTC LEXIS 591 (Aug. 3, 1999), at *11 (citations omitted). If tariff language is not plain, or is ambiguous, the Commission applies rules of construction to determine what the Commission intended in approving the tariff. *See id.* at *11-12. *See also Nat'l Union Ins. Co. v. Puget Sound Power & Light Co.*, 94 Wn. App. 163, 171, 173, 972 P.2d 481 (1999).



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

### 3. The Commission does not have authority to issue any ruling based on PSE's franchises with the Cities.

18. The cities' petitions do not seek a declaration from the Commission as to the meaning of any particular franchise provision. Nevertheless, the cities make a number of statements regarding franchise issues.

19. The Commission does not have authority to issue any order in this proceeding based on PSE's franchises. An agency's authority to issue declaratory orders is limited to "the applicability to specified circumstances of *a rule, order, or statute enforceable by the agency*." RCW 34.05.240(1) (emphasis added). The Commission's jurisdiction to issue any declaratory order or any other order is limited to matters governed by the public service laws, RCW Chapter 80. *See* RCW 80.01.040(3); *Cole v. Wash. Utils. and Trans. Comm'n*, 79 Wn.2d 302, 306, 485 P.2d 71 (1971).

20. The Commission has authority to interpret and enforce PSE's Electric Tariff G, which was filed with the Commission pursuant to RCW 80.28.060 and has the force and effect of law. *See GTE v. Bothell*, 105 Wn.2d at 585. However, PSE's franchises with cities are not rules, orders or statutes, but rather contracts between PSE and the cities. *See id.* at 584. Franchises are subject to the rules of contract interpretation, *City of Issaquah v. Teleprompter Corp.*, 93 Wn.2d 567, 578 (1980), which is a matter for the courts, not this Commission.[2]

21. Of course, the Commission does have the power to abrogate franchise provisions to the degree they purport to regulate an activity that state law has delegated to the responsibility of

---

[2] Interpretation of a franchise may require that certain issues that are within the primary jurisdiction of the Commission be considered and ruled on by the Commission. For example, where a franchise defers to PSE's filed Tariff with respect to an issue, as in this case, it is appropriate that this Commission rule on the proper interpretation of the Tariff.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

the Commission. *See In re the Application of Puget Sound Power & Light Co. and Wash. Nat. Gas Co. for an Order Authorizing the Merger*, Docket Nos. UE-951270 and UE-960195, Fourteenth Supplemental Order Accepting Stipulation; Approving Merger (Feb. 5, 1997) at p. 42. In the present case, PSE's franchises with the cities do not impinge on the Commission's authority because they explicitly and appropriately defer to PSE's Tariff, as approved by the Commission, with respect to any undergrounding of PSE's facilities. For example, Section 4 of the Des Moines Franchise provides that any "undergrounding shall be arranged and accomplished subject to and in accordance with applicable Tariffs on file with the W.U.T.C." Des Moines Franchise, § 4(B), Stipulated Exhibit No. 3. This contrasts with the entirely separate section of the Des Moines Franchise setting forth provisions for relocation of facilities, which does not reference PSE's tariffs. *See id.*, § 6. Similarly, the Kent franchise limits PSE's undergrounding obligations to the "applicable rates and tariffs on file with the WUTC." Kent Franchise, § 5.2, Stipulated Exhibit No. 25.[3] PSE's franchises with the other Cities also defer to PSE's Tariff with respect to any underground conversion of PSE's facilities.

22. There is one background fact and legal issue with respect to franchises that is uncontested and that the Commission may find relevant to this proceeding: PSE's franchises with the cities generally permit the cities to require PSE to relocate existing facilities that are located in the

[3] Contrary to Kent's argument, Schedule 71 controls not only the parties' "cost obligations" with respect to undergrounding, but all of the terms and conditions of underground conversions, including whether the terms and conditions to obtain an underground conversion have been satisfied such that any undergrounding will occur at all.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

public rights-of-way to new locations for municipal purposes at PSE's expense.[4] *See* Cities' Motion at 21.

**4. The Commission does not have authority to issue any ruling as to the Washington Constitution.**

23. The Commission does not have authority to issue a declaratory order with respect to the Washington Constitution, or to issue any ruling regarding the Washington Constitution in the context of a complaint proceeding. As noted above, an agency's authority to issue declaratory orders is limited to "the applicability to specified circumstances of *a rule, order, or statute enforceable by the agency*." RCW 34.05.240(1) (emphasis added). "The construction of the meaning and scope of a constitutional provision is *exclusively a judicial function*." *Washington State Highway Comm'n. v. Pacific Northwest Bell Tel. Co.*, 59 Wn.2d 216, 222, 367 P.2d 605 (1961) (emphasis added).

24. Even if the cities were correct that the Commission can consider constitutional matters in this proceeding, there is nothing unconstitutional about requiring facilities to be placed on private easements as a condition of converting facilities from overhead to underground, or about requiring cities to pay the costs of such easements, as set forth below.

**5. The Commission should reject the cities' attempt to blur the distinction between relocation of utility facilities and underground conversions of utility facilities.**

25. As the Ninth Circuit has recognized recently, allocation of the costs of *undergrounding* utility facilities, as opposed to the costs of *relocating* facilities, is a matter that

---

[4] The cities' power to order relocations of facilities located in the rights-of-way is limited to proper exercise of their police powers and to actions that do not impair PSE's ability to exercise its rights under the franchise.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

historically has not been addressed in Washington common law or statutes. *See City of Auburn v. Qwest Corp.*, 2001 U.S. App. LEXIS 15518 (amended decision on denial of rehearing, 9th Cir. July 10, 2001). Instead, the conditions and allocation of costs for *undergrounding* have been left to regulation by the Commission, through utility tariffs. PSE's Schedule 71 determines the outcome of the issues presented to this Commission. The Cities' Motion ignores, and indeed seeks to obfuscate, the critical distinction between *relocation* and *underground conversion* that is reflected in Washington law.

26. For example, the Cities claim that their projects "require *underground conversion* of PSE's overhead facilities *in the public rights-of-way*," citing "Stipulated Fact No. 5." Cities' Motion at 3. Stipulated Fact No. 5 actually reads as follows:

> The Cities plan to undertake street improvement projects, some of which necessitate *relocation* of PSE's overhead facilities *that are currently located* in city rights-of-way.

(Emphasis added). This proceeding is not about whether PSE will relocate its existing overhead facilities that are currently located in city rights of way. PSE has offered to relocate its overhead facilities to new overhead locations to accommodate the Cities' road improvements along Pacific Highway South. Logen Decl., ¶ 3; Stipulated Fact No. 9. The cities do not want PSE to relocate its facilities to new overhead locations. Instead, they have "requested pursuant to Schedule 71 that PSE convert its overhead facilities…to underground facilities." Stipulated Fact No. 6.

27. PSE has refused to proceed with underground conversion for the cities' projects because they have refused to acknowledge and agree that they must either provide easements on private property for placement of PSE's facilities or reimburse PSE for PSE's costs to obtain such easements. Stipulated Fact No. 10.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

**B. PSE May Require the Cities to Agree to Reimburse PSE for the Costs of Obtaining Easements for Placement of Its Underground Facilities as a Condition of Converting PSE's Overhead Facilities to Underground**

**1. PSE has no obligation to perform conversions from overhead to underground unless PSE is provided with easements for placement of facilities on private property, at no cost to PSE.**

28. Schedule 71 governs the conversion of overhead facilities to underground facilities in commercial areas. It sets forth the conditions that must be met in order for PSE to perform such conversions, and provides that certain costs for such conversion will be shared by PSE and the requesting party on either a 30%/70% basis, or a 70%/30% basis. *See* Schedule 71, § 3.b.(1).[5] Because of this cost sharing, Schedule 71 essentially provides a subsidy to entities that request PSE to convert its overhead facilities to underground.

29. Schedule 71 does not require that all costs associated with a conversion be shared by PSE. Rather, the 30/70 or 70/30 cost-sharing excludes "all trenching and restoration for duct and vault systems" and "surveying for alignment and grades of vaults and ducts," which must be provided by the requesting entity. Schedule 71, § 3.b.(2). As set forth below, Schedule 71 also protects PSE from absorbing costs associated with obtaining operating rights that PSE requires in connection with an underground conversion.

30. Schedule 71 also does not require PSE to underground its facilities whenever an entity requests such undergrounding. Rather, it sets forth a number of conditions that must be met in order for Schedule 71 to apply. Section 2, Availability, describes the type of facilities that will be undergrounded (i.e., distribution but not transmission facilities, and only distribution facilities of a

---

[5] For the Commission's convenience, a copy of Schedule 71 is attached hereto in the Addendum at page 1.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

minimum length) and the type of system that must remain in the conversion area after the conversion (i.e., all distribution must be underground, with no overhead remaining). The parties agree in this case that Section 2 requirements are met with respect to the Pacific Highway South projects. *See* Stipulated Fact No. 4.

31. The cities claim that Section 2 sets forth the *only* requirements for obtaining a Schedule 71 conversion. That is not correct. In addition to the Section 2 requirements, Schedule 71 contains another fundamental requirement:

> 4. 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*.

Schedule 71, § 4 (emphasis added).

32. If such operating rights are not provided to PSE, PSE has no obligation to perform the conversion. "Service under [Schedule 71] is subject to the General Rules and Provisions contained in this tariff." Schedule 71, § 8. Those General Rules and Provisions are found in Schedule 80, which provides:

> The Company shall not be required to connect with or render service to an applicant unless and until it has all necessary operating rights, including rights-of-way, easements, franchises and permits.

Schedule 80, § 9.[6]

33. Schedule 71 further requires the entity that requests the conversion to:

---

[6] A copy of Schedule 80, Section 9 is attached hereto in the Addendum at 4.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

> 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.a. Schedule 71 also requires the entity that requests the conversion to pay PSE the appropriate share of the conversion and to provide trenching and surveying, as described above. Schedule 71, § 3.b.-c.

34. The cities' position that PSE must perform a conversion if the Section 2 requirements are met completely ignores these other limitations and conditions set forth in Schedule 71. The cities might just as well argue that PSE must convert its facilities to underground even if the cities refuse to execute the written Contract required by Schedule 71, or refuse to pay PSE for the conversion, or refuse to provide trenching or surveying for the conversion.

35. The cities seem to argue that the operating rights requirement is different from these other obligations because Schedule 71 does not explicitly state that a requesting municipality must pay for operating rights. PSE agrees that Schedule 71 does not explicitly state that cities must pay for operating rights.[7] However, Schedule 71 could not be more clear that operating rights "shall" be

---

[7] The cities attempt to make much of PSE's "concession" as to this fact. PSE's agreement on this point merely avoids any need for the parties or Commission to parce through Section 4 or the legislative history of the Tariff to determine whether the Commission intended the term "owners of real property" in Section 4 to mean "persons or entities requesting a conversion," or some similar interpretation, as the Cities do in their Motion at pages 11-12.

PSE believes Section 4 means what it says when it requires "owners of real property" in the conversion area to provide operating rights on their private property. However, that does not resolve the issues before this Commission regarding whether PSE must perform a conversion if such operating rights are not provided, and whether PSE can require cities requesting conversions to take on the burden of ensuring that the required operating rights are provided to PSE, or to agree to reimburse PSE if PSE takes on that burden and property owners demand compensation for such operating rights.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

provided on private property "for all underground electrical facilities which in the Company's judgment shall be installed on" private property, and that Schedule 71 is subject to the General Rules and Provisions of the Tariff. Schedule 80, in turn, could not be more clear that PSE "shall not be required to render service to an applicant unless and until it has all necessary operating rights, including rights-of-way [and] easements…."[8] PSE is under no obligation to convert its facilities to underground if it is not provided with operating rights on private property for facilities that PSE will require be placed on private property, "in a form or forms satisfactory to the Company." Schedule 71, § 4.[9]

36. Section 4 insulates PSE from any burden to obtain operating rights or to pay for such rights. Instead, "[t]he *owners of real property* within the Conversion Area shall, *at their expense*, *provide*" such rights. (Emphasis added.) The cities' argument that PSE must obtain

---

PSE notes that in some cases, cities actually are property owners in conversion areas. When a city owns real property in fee (as opposed to as part of the public rights-of-way), a city is obligated, as are all other property owners in the conversion area, to provide the easements PSE requires. In the past, cities have sometimes avoided having to pay property owners for providing easements to PSE by providing PSE with PSE easements on city-owned property. *See, e.g.*, Lowrey Decl. ¶¶ 4-7 and Exhibit H attached thereto.

[8] Kent claims that PSE should have let it "in on the secret" of the limitation on PSE's obligation to perform underground conversions under Schedule 71 if operating rights are not provided. Kent's Motion at 11. Clearly, Schedule 71 does so, in Section 4 and its reference to the General Terms and Conditions of PSE's Tariff, Schedule 80. Customers are deemed by law to have knowledge of the terms and conditions of service as set forth in PSE's Tariff. *See, e.g., Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 332, 962 P.2d 104 (1998).

[9] Schedule 71's limitation on PSE's service obligation is consistent with other situations in which PSE's obligation to provide a requested service depends on provision of adequate operating rights, including easements. For example, a customer requesting a new line extension must obtain all necessary easements at no cost to PSE. *See* Schedule 85, § 10, Addendum at 5. Although not directly applicable in this case, WAC 480-100-56(5) provides that "[a] utility shall not be required to connect with or render service to an applicant unless and until it can secure all necessary . . . easements . . . ."



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

easements at PSE's expense if property owners refuse to provide them for free would shift the costs for obtaining operating rights from property owners onto PSE, in violation of Section 4.

37. The Cities argue that the only "operating rights" that PSE needs are the rights granted under its franchises to install and operate its facilities in the public rights-of-way. Cities' Motion at 13. The Cities' interpretation of Section 4 would render that section of Schedule 71 meaningless, in violation of established rules of statutory construction. *See, e.g., City of Seattle v. State of Washington*, 136 Wn.2d 693, 701, 965 P.2d 619 (1998). Section 2 of Schedule 71 provides that PSE must "have the right to render service in such municipalities pursuant to a franchise in a form satisfactory to the Company." If the "operating rights" that are the subject of Section 4 were nothing more than franchise rights, then Section 4 would be superfluous.[10] In addition, the Cities' interpretation of Section 4 is contrary to their arguments at pages 11-12 of their Motion that they are not "property owners" under Section 4. It would also read out of existence the language in Section 4 requiring space to be provided "on the property of" the "owners of real property within the Conversion Area."

38. The Cities' offer to "buy easements in the City's name for space sufficient to accommodate all utilities' facilities," Cities' Motion at 14, does not satisfy the requirements of Section 4. The Cities are essentially suggesting that they will expand the width of the public rights-of-way. *See* Declaration of Thomas W. Gut ("Gut Decl."), ¶ 19 ("the relocated facilities would be subject to the terms of the franchise agreement"). Schedule 71 does not require PSE to place its

---

[10] PSE is not claiming that franchises have nothing to do with operating rights. Clearly, a franchise provides a form of operating right with respect to facilities that are placed in public rights-of-way. However, that unremarkable fact does not mean that a franchise is a sufficient operating right under Section 4 of Schedule 71 with respect to facilities that PSE wishes to place on private property as part of an underground conversion.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

facilities in the rights-of-way, and instead explicitly provides for installation of PSE's equipment on private property. Moreover, a general "utilities" easement held by a city is not "a form…satisfactory to the Company," for the reasons described in Section III.B.3, below.

39. The Cities' offer to purchase easements in their name or to acquire additional rights-of-way shows that the cost of acquiring easements is not really the issue that concerns the Cities. Even though the cities have stipulated that "Schedule 71 does not obligate PSE to locate all of its equipment within the city's right of way," Stipulated Fact No. 3, the Cities' arguments boil down to a claim that they may force PSE to place all of its underground facilities inside the boundaries of the public rights-of-way. That position is contrary to the plain language of Section 4, which explicitly provides for installation of PSE's facilities on private property.

40. Section 4 plainly leaves to "the Company's judgment" the question of which facilities should be installed on private property. Thus, Schedule 71 explicitly permits PSE to determine that its underground and pad-mounted facilities such as vaults for junctions, vaults for pulling cable, transformers and associated vaults, and switches and associated vaults should be installed on private property.

41. Section 4 also explicitly permits PSE to require that "legal rights for the construction, operation, repair, and maintenance of all electrical facilities installed by the Company" be "in a form or forms satisfactory to the Company." Thus, Schedule 71 plainly permits PSE to require that easements be provided on PSE's standard easement form.

42. Taken all together, Schedule 71 plainly permits PSE to require that easements on PSE's standard form be provided to PSE for all facilities that in PSE's judgment should be placed on private property in an underground conversion, including vaults for junctions, vaults for pulling cable, transformers and associated vaults, and switches and associated vaults. If property owners fail to provide such



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

easements at their expense, PSE has no obligation to perform the conversion. Nothing in Schedule 71 requires PSE to absorb such costs, or permits PSE to shift costs of undergrounding from property owners in a conversion area or the cost-causer of the conversion to PSE's other customers.

**2. The terms of PSE's Underground Conversion Agreement related to operating rights are fully consistent with Schedule 71.**

43. Schedule 71 requires the entity that requests the conversion to:

> 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.a. (emphasis added).

44. In compliance with the provisions of Schedule 71, PSE is asking the cities to execute Underground Conversion Agreements in the form found at Stipulated Exhibit 16, a copy of which is attached to the Declaration of Lynn Logen (hereinafter referred to as the "Form Agreement"). To date, the cities have refused to do so with respect to the Pacific Highway South projects. Logen Decl., ¶ 13.

45. Section 1 of the Form Agreement defines "Operating Rights" as follows:

> a. adequate legal rights are rights for the construction, operation, repair, and maintenance of the Main Distribution System installed under this schedule over, under, across, or through all property, including property within the Conversion Area owned or not owned by the City. All rights shall be in a form acceptable to the Company and shall be at no cost to the Company.
>
> b. The cost to the Company of obtaining any such space and rights on any property other than public rights-of-way shall be reimbursed in full by the City. The cost to obtain space and rights shall include, but not be limited to, the actual amount paid for any space and rights,



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

staff costs (including overheads), the actual cost of any easement, fee, permit, attorney fee, court cost, permit fee, and any survey fee.

c. The Company, in its sole discretion, will install cable and conduit within the rights-of-way under its franchise within the Conversion Area, but will require all other underground and pad-mounted electrical facilities, including, but not limited to, vaults for junctions, vaults for pulling cable, transformers and associated vaults, and switches and associated vaults, to be installed on private property.

d. The Company's standard easement provides an adequate legal right for facilities that will be placed on private property. A franchise in a form satisfactory to the Company provides an adequate legal right for cable and conduit that will be placed within rights-of-way. Where zoning or other land use regulations allow for limited or zero set-back of structures from the property line, thereby leaving inadequate space for the Company's equipment that is usually installed on private property, the Company, in its sole discretion, may request that the space and rights be within the structure and meet the Company's specifications.

e. Where the Company determines it is not physically or economically feasible to obtain space and/or adequate legal rights on private property for facilities that are required to be installed on private property, such facilities may, in the sole judgment of the Company, be installed on public rights-of-way under the following conditions: (1) there is, in the sole judgment of the Company, sufficient area within the public rights-of-way to allow for the safe maintenance and operation of the equipment; and (2) the governmental authority owning or controlling the rights-of-way has provided assurances deemed adequate by the Company that the location will continue to meet the Company's standards by not allowing any encroachments unless approved by the Company; and (3) the governmental authority owning or controlling the rights-of-way has agreed to pay one hundred percent (100%) of the cost of any future relocation of facilities located on rights-of-way under this provision which are requested, required or otherwise caused by actions of the governmental authority.

Form Agreement, § 1.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

46. The Form Agreement further provides that PSE will "obtain, at the City's expense, any and all Operating Rights required by the Company." Form Agreement, § 2.b. If PSE does so, the city must reimburse PSE for 100% of "the costs of any and all space and Operating Rights obtained by the Company pursuant to Paragraph 2.b. above." Form Agreement, § 5(B)(ii). Alternatively, the city may obtain such Operating Rights itself "upon request of the City and approval of the Company." Form Agreement, § 2.b.[11] If the city is obtaining the Operating Rights, it must do so at its expense. *See* Form Agreement, § 4(B)(b).

47. Similarly, Section 8 provides:

> Where the owners of real property are not participants in the conversion, the Company shall obtain such Operating Rights, but shall not be required to bear the costs of any Operating Rights. The cost of obtaining such Operating Rights on privately owned property shall be reimbursed in full by the City pursuant to Paragraph 5(B) above. Such cost shall include, but not be limited to, staff costs (including overheads), the actual cost of any easement, fee, permit, attorney fee, court cost, permit fee or survey fees required by governmental agencies or property owner. The City may, upon approval of the Company, obtain, at its expense, such Operating Rights acceptable to the Company.

Form Agreement, § 8.

48. Whether PSE or the city obtains the Operating Rights, PSE "may postpone performance of its obligations [under the Agreement] until it has obtained or been furnished with such Operating Rights." Form Agreement, § 2.c.

---

[11] PSE's requirement that a city obtain PSE's approval for obtaining operating rights on private property before obtaining such rights is meant to ensure that PSE has a chance to inform the city about the form of easement that will be required, so that the city does not obtain insufficient easements and then have to return to the same property owners for revised easements. PSE does not care whether a city obtains the operating rights or asks PSE to do it, as long as the operating rights are on PSE's easement form. Logen Decl., ¶ 14.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

49. These provisions are fully consistent with Schedule 71. As described above, Schedule 71 provides that PSE may, in its judgment, designate which facilities will be placed on private property when its overhead facilities are converted to underground. PSE is thus free to designate which facilities will be placed on private property, and has done so in the Form Agreement. Schedule 71 provides that legal rights for operation, repair and maintenance of those facilities must be provided in a form satisfactory to the PSE. PSE's Form Agreement spells out that the form that is satisfactory to PSE for facilities placed on private property is PSE's easement. Schedule 71 also provides that operating rights will be provided at no expense to PSE, and the Form Agreement ensures that PSE will not be forced to absorb the cost of easements.

50. PSE is willing to make one change to the Form Agreement based on Kent's Motion. Kent complains about being asked to pay 100% of all costs associated with easements on the grounds that even if a property owner provides PSE with an easement for free, PSE nevertheless necessarily incurs some costs associated with determining what easement is required, drafting the legal description for the easement and preparing the easement form, and similar tasks. This particular objection to the Form Agreement is one that has never been raised with PSE prior to Kent's Motion. Logen Decl., ¶ 16.

51. After considering this issue, PSE has concluded that Kent's point that a city should not have to pay 100% for *all* costs associated with easements is well taken, because it is true that PSE incurs certain costs as part of the total costs of a conversion even if a willing property owner provides an easement for free under Section 4 of Schedule 71. Such costs would include staff time to prepare and present easements and recording fees once the easement is obtained. PSE therefore agrees that cities should not be required to pay 100% of such costs. Instead, PSE and the city



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

requesting conversion should share those costs pursuant to Section 3 of Schedule 71.[12] Pursuant to Schedule 71, cities should still be required to pay 100% of (or reimburse PSE for 100% of) all payments actually made to property owners for the cost of an easement, including related attorneys' fees and expenses if the property owner is entitled to such fees. *See* RCW 8.25.020 (condemnee entitled to collect up to $750 for expenditures related to evaluating an offer). Cities should also pay 100% of governmental fees and taxes that a property owner might be required to pay in connection with providing PSE with an easement. *See* Logen Decl., ¶ 17.

52. Thus, Section 1.b. of the Form Agreement should be revised to read:

> b. The cost to the Company of obtaining any such space and rights on any property other than public rights-of-way shall be reimbursed in full by the City. The cost to obtain space and rights shall include the actual amount paid to a property owner for any space and rights such as the cost of any easement and statutory attorneys fees and the actual amount paid to a governmental agency or entity or contractor for the costs of governmental compliance, fees or taxes. Other costs associated with obtaining space and rights such as staff costs (including overheads) and filing fees shall be considered part of the actual conversion costs and shared pursuant to Paragraph 5.(A) below.

Similarly, the sentence in Section 8 of the Form Agreement that reads:

> Such cost shall include, but not be limited to, staff costs (including overheads), the actual cost of any easement, fee, permit, attorney fee, court cost, permit fee or survey fees required by governmental agencies or property owner.

should be revised as follows:

---

[12] Kent's suggestion that PSE must pay 100% of such costs is incorrect. Schedule 71 does not require PSE to pay 100% of any costs associated with a conversion. Instead, PSE performs the tasks that are not assigned to others under Schedule 71, and shares "the total cost of the conversion project excluding trenching and restoration" with the entity requesting the conversion. Schedule 71, § 3.b.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

> Such cost shall include the actual amount paid to a property owner for any space and rights such as the cost of any easement and statutory attorneys fees, and the actual amount paid to a governmental agency or entity or contractor for the costs of governmental compliance, fees or taxes. Other costs associated with obtaining space and rights such as staff costs (including overheads) and filing fees shall be considered part of the actual conversion costs and shared pursuant to Paragraph 5.(A) above.

53. That change does not resolve, however, the cities' objection that the Form Agreement cannot require them to pay for the cost of easements because Schedule 71 does not explicitly require them to pay for easements, placing the burden instead on property owners in the conversion area. There is no merit to the cities' position because, as described above, provision of operating rights to PSE at no cost to PSE is a prerequisite to any obligation by PSE to perform a Schedule 71 underground conversion.

54. In situations where the property owners within a conversion area are themselves requesting the conversion to underground, they generally will be willing to provide such operating rights to PSE. However, where a municipality is undertaking a project and requesting the conversion, property owners within the conversion area could refuse to provide operating rights, and thereby prevent the project from meeting the requirements of Schedule 71.

55. One response to such a situation would be for PSE to refuse to perform the conversion. Where a project requires poles to be relocated, PSE would then relocate the poles pursuant to franchise, but decline to convert the overhead facilities to underground. To prevent that outcome, the requesting municipality would be required to obtain the required operating rights from the property owners by paying for easements or through condemnation proceedings, and deliver them to PSE. In an attempt to assist municipalities, PSE has included provisions in its Form Agreement under which PSE will take on the task of obtaining the required operating rights, while ensuring that PSE is not forced to



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

absorb the costs of obtaining operating rights that Schedule 71 clearly does not place on PSE. While these provisions are not required by Schedule 71, the Form Agreement is fully consistent with Schedule 71.[13] If a city refuses to guarantee either that it will obtain the operating rights required by Schedule 71 or that it will reimburse PSE for PSE's costs of obtaining such operating rights, then Sections 3.a and 4 of Schedule 71 are not satisfied, and PSE has no obligation to perform the requested conversion to underground.

56. Kent claims that if the Commission rules that cities are responsible for paying for easements, then "there will be no undergrounding of electric facilities in connection with major street improvement projects" because "[c]ities cannot subject project planning, design, budgeting, and funding to factors beyond anyone's ability to control." Kent's Motion at 12-13. Kent's argument is

---

[13] PSE's Form Agreement contains provisions regarding other matters that are not required under Schedule 71, but that are consistent with it and that PSE is willing to undertake as long as its interests are protected. For example, Schedule 71 requires that all overhead electric distribution in the conversion area be converted to underground in order for Schedule 71 to apply. *See* Schedule 71, § 2. The Form Agreement permits some overhead to remain in a conversion area on a temporary basis, for example where additional planned projects would make conversion of some of the overhead service at the time of the conversion wasteful and inefficient. *See* Logen Decl., ¶19. The Form Agreement places a time limitation on such "Temporary Service" and spells out the consequences if the Temporary Service is not removed or placed underground. *See* Form Agreement, §§ 1, 5.(B)(i), 7. The Cities' Motion challenges this provision, but that challenge is not properly before the Commission because the Cities failed to raise it in their petition or amended petition. Even if the Commission were to consider the issue, the Temporary Services provision is fully consistent with Schedule 71. If the Temporary Services provision were to be removed from the Form Agreement, either all overhead in a conversion area would need to be removed or converted underground during the conversion, or the conversion would not meet the Section 2 requirements of Schedule 71 and the requesting city would pay 100% of the costs of the conversion.

Other provisions in the Form Agreement provide details needed for construction coordination that are not spelled out in Schedule 71. For example, PSE will agree to schedule its crews on an overtime basis to cooperate with a city's desire to expedite a project, or to minimize traffic disruptions during a project. However, the city must pay 100% of the extra costs caused by this special request. *See* Form Agreement, §§ 5(B)(v), 10. There is no challenge to this provision before the Commission.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

exaggerated and without merit. Property owners often provide easements for free. Where property owners want compensation, they are sometimes willing to trade provision of an easement to PSE in exchange for one-time services from the city such as curb cutouts or paving that can be accomplished during the normal course of construction. *See* Corbin Decl., ¶ 4; Zeller Decl., 6-7; Copps Decl. ¶¶ 7-8, 10; Lowrey Decl., ¶ 10. If a property owner demands payment, it could be for a minimal amount, such as a few hundred dollars. *See e.g.*, Logen Decl. ¶ 21. If a property owner wants an unreasonable amount of compensation or refuses to provide an easement, PSE is often able to redesign its system slightly to place a facility on property owned by a more accommodating property owner. *See e.g.*, Corbin Decl., ¶ 4; Lowrey Decl., ¶ 10. Even if a city must ultimately purchase easements, that is no more outside of a city's "ability to control" than many other aspects of a road improvement project, such as the amounts that contractors will ultimately bid to perform work or the cost the city will ultimately be forced to pay to property owners to widen the public rights-of-way for a project.

57. PSE's Form Agreement related to easements is fully consistent with Schedule 71, as is the reference in PSE's Engineering Agreement to a city's responsibility to pay for easements. *See* Stipulated Exhibit 19 (attached to Logen Decl.).

**3. Even if the Commission were to look behind the plain language of Schedule 71, which leaves the decision regarding which facilities to place on private property to PSE's judgment, PSE's judgment requiring placement of its facilities on private property is sound.**

58. PSE intends to design its underground system for the Pacific Highway South projects so that most facilities other than cable and conduit are placed on private property, including pad-mounted facilities, vaults for junctions, vaults for pulling cable, transformers and associated vaults, and switches and associated vaults. Depending on the circumstances of each conversion, some flush mounted equipment



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

such as pull vaults and junction vaults ("J-boxes") may be placed in the public rights-of-way rather than on private property. Logen Decl., ¶ 4; Zeller Decl., ¶¶ 11-12; Lowrey Decl., ¶ 13.[14]

59. The question of which facilities should be placed on private property is a matter that Schedule 71 leaves to the sole discretion of the Company. To the degree the Commission nevertheless looks beyond the plain language of the Tariff, PSE's judgment with respect to this question is sound because undergrounding facilities raises safety, operational and cost issues that are different than those associated with overhead facilities, and that must be taken into account when designing an underground system.

**a. Placement of equipment on private property is justified for safety and operational reasons**

60. Placement of underground and pad mounted equipment on private property on PSE easements ensures that adequate clearances will be instituted and enforced around such facilities. *See* Copps Decl., ¶ 16; PSE Standard 6315.0002, Clearances for Oil-Filled Equipment, Stipulated Exhibit 17 (copy attached to Copps Decl.); PSE Standard 6775.0035, Vault and Handhole Location, Stipulated Exhibit 18 (copy attached to Copps Decl.). Such equipment (unlike cable and conduit) cannot be installed on top of another utility's lines. *See id.* at 4. A ten-foot setback of clear, unobstructed space is needed because the safe operation of high voltage equipment requires that PSE workers use long, insulated sticks. PSE's workers should not have to do this work in traffic out in rights of way rather than on private property. They should also not be subject to having the clear zone blocked by parked cars, filled with pedestrians, or otherwise interfered with. Copps

[14] PSE has not insisted that "*all* of its new underground construction must be placed on private easements." Cities' Motion (citing Stipulated Exhibit 10.) Stipulated Exhibit 10 states that "PSE engineering staff will allow for some specific equipment to remain in right of way such as conduit, cable, and subsurface junction vaults." Stipulated Exhibit 10 at 2.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

Decl., ¶ 16. PSE's clearance requirements are consistent with the National Electric Safety Code ("NESC"), which PSE is required to follow pursuant to WAC 296-45-045. *See* NESC §§ 323.B-C, E, 382, Stipulated Exhibit 23, a copy of which is attached hereto at Addendum 7.

61. Even if clearances for installation of facilities could be ensured in rights-of-way, permit and traffic-control requirements for work performed in rights-of-way can result in significant delays when PSE needs to access its facilities. Maiya Andrews of the City of Des Moines concedes that lane closures may be required to provide PSE employees with sufficient work space if underground facilities are placed in rights-of-way. Declaration of Maiya Andrews ("Andrews Decl."), ¶ 5. Requiring employees to work in traffic lanes can result in delays due to the need to set up flagging and to obtain permits. This could result in lengthening the time of an outage when repair work must be performed to restore service in an area served by underground facilities. For routine maintenance of facilities in rights-of-way, PSE must obtain a permit from the relevant city. The time required for issuance of a permit varies by city, from seven to thirty days or more. PSE employees working on underground systems are also exposed more to hazards than when they work on overhead systems because they are not protected from traffic by their vehicles or by working in the bucket of a lift truck. These problems are not eliminated by placing facilities in planter strips or sidewalks. Logen Decl., ¶ 8.

62. The cities' suggestion that PSE's easements somehow unduly burden property in a conversion area or theoretically interfere with other utilities' rights is without merit. First, any claim with respect to the impact of a PSE easement on property value is for property owners to assert, not the cities. Moreover, any such burden is minimal. Contrary to the cities' repeated claim in their motions, PSE's easements are not "exclusive." The property owner:



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

> reserves the right to use the Easement Area for any purpose not inconsistent with the rights herein granted.

PSE Form Easement, Stipulated Exhibit 19, at 1 (attached to Logen Decl.). Uses of the area that are consistent with continued operation, repair and maintenance of PSE's equipment may include placements of other utilities' facilities, such as telephone equipment. *See* Lowrey Decl., ¶ 20.

63. The cities' suggestion that they can provide adequate clearances around PSE's facilities in the rights-of-way is not satisfactory. The cities tend not to fully understand or care about PSE's concerns with respect to its facilities, as demonstrated in part by their petitions in this proceeding.[15] As another example, some cities have suggested that PSE should place its pad mounted switches in rights-of-way, and should just turn the vault sideways so that when it is opened, PSE's workers can operate it without standing in the street. Such placement would interfere with proper placement of the vault and the manner in which conduit is fed into and placed within the switch. *See* Copps Decl., ¶ 17; PSE Standard 6056.1000, PMH Padmount Switches, page 4, Figure 1, attached to Copps Decl. as Exhibit E. In addition, putting a switch in the rights-of-way causes problems with getting other conduits by PSE's vault, such as conduits for telephone and television cable. Copps Decl., ¶ 17.

64. Even if the cities wished to provide adequate clearances for PSE's equipment, their ability to do so is questionable. As Kent has acknowledged, "the ground beneath [City] rights-of-

---

[15] James F. Morrow's declaration suggests that PSE's facilities may be placed in the rights-of-way along with other utilities. However, Exhibit A to his declaration shows how much space is needed around a pad mounted switch, and has nothing to do with whether there is sufficient space to place a switch in the rights-of-way. Exhibit B to his declaration shows details of a cross section of a typical joint utility trench. There are no vaults, pad mounted switches or transformers referenced in the drawing. The joint utility trench cross section details shows standard separation of conduits in rights-of-way but has nothing to do with locating vaults, switches or transformers in rights-of-way. Lowrey Decl., ¶ 19.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

way is becoming as congested as the surface traffic traveling along City streets. As [City] engineers design and redesign the roads, [they] must plan for and often design around a complicated array of utility systems." Logen Decl., Exhibit U.

65. The Cities argue that PSE has developed standards for placing equipment in rights-of-way, and that shows that there are no problems associated with such placement. Cities' Motion at 25. As noted in the declarations submitted with this response, PSE does occasionally place some of the equipment at issue in rights-of-way, and needs standards to do so properly. But the fact that PSE has such standards or occasionally locates such equipment in rights-of-way does not mean that such equipment should be placed in rights-of-way as a rule, or based on directions by cities rather than PSE's judgment. *See* Logen Decl., ¶¶ 4-5; Zeller Decl., ¶ 4, 11-12.

**b. Placement of equipment on private property is justified for cost reasons**

66. Even if safety and operational issues could be addressed adequately in public rights-of-way, PSE's judgment that its facilities for underground systems should be placed on PSE easements rather than in rights-of-way is sound for cost reasons. In general, underground systems are more complex than overhead systems and are more expensive to install. An underground system in a commercial area requires Feeders (unfused circuits connecting one substation breaker to another substation breaker and capable of supplying 600 amps). Any time PSE branches off of the Feeder, it must be fused. The only way to fuse branches off an underground feeder system is by installing a switch cabinet, which costs about $20,000 just for the cabinet. This is in contrast to an overhead system, where PSE hangs a fuse to connect service lines to the distribution system that costs about $160. Switch cabinets are so expensive that they are only installed every few blocks, meaning that there is usually a duplicate system that runs parallel to the unfused system. In short, it takes two systems to serve



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

underground what was served by one system overhead. When an underground system is installed, pull vaults and junction vaults must also be installed for pulling underground cable through conduits and for connecting cable to transformers. In an overhead system, wire is simply strung from pole to pole and connected wherever it ends, whether mid-span or at a pole. Copps Decl., ¶ 18.

67. Relocation costs are also significantly more expensive for underground than for overhead systems. For example, relocating a three-phase, pad mounted switch costs about $57,000, while relocating a pole with three-phase underground termination costs only $12,000. Relocating a submersible switch costs about $82,000. Relocating a three-phase pad mounted transformer costs about $11,000, while relocating a pole with a three-phase transformer costs about $7,000. Relocating a single-phase pad mounted transformer cost about $6,000, while relocating a pole with a single phase transformer costs about $4,500. Copps Decl., ¶ 19.

68. In addition, when relocation is necessary, overhead systems are simply moved along with the attached equipment. The overhead conductors are transferred to the new pole while "hot" (no outage is required). For underground systems, all cables are within conduit that cannot be spliced to extend a conductor within a conduit. Therefore, to move a vault, for example, PSE must remove the conductors from the conduit, extend the empty conduit to the new location, then pull in all new conductors and make-up connections at both ends of every conductor. This generally requires an extended outage for all customers involved. Work of this type sometimes requires overtime payment to employees because they are scheduled at low-use times. Even when done on overtime, this work can sometimes result in claims against PSE, for example by business owners in the area. Also, since the different elements of an underground system are buried underground, they must each be dug up and moved, unlike an overhead system in which the fuses and other equipment move as the poles are moved. Copps Decl., ¶ 20.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

69. Because PSE's franchises generally require PSE to relocate facilities that are in the rights-of-way at PSE's expense for municipal purposes, it is PSE, and not the municipality ordering the facilities relocated, that would have to absorb these significant relocation costs if PSE's facilities are placed in rights-of-way. If overhead facilities are converted to underground and the new underground system is placed in rights-of-way, municipalities have no economic incentive to ensure that the underground facilities are initially placed such that they will not require immediate relocation. Municipalities also have no economic incentive to take into account the costs of relocating underground facilities when considering whether to pursue conversions of overhead facilities to underground rather than keeping the electric distribution system overhead, or when considering whether to require PSE to relocate its facilities in future projects involving the rights-of-way.

70. For these reasons, PSE requires that if facilities are to be converted from overhead to underground, facilities other than cable and conduit will be placed within easements on private property, except under limited conditions in which PSE is protected from future relocation costs.

71. The Cities claim that PSE has "admitted" that its "shift in policy" on private easements is financial. First, as described elsewhere in this brief, there has been no "shift in policy," rather PSE has been attempting to hold firm to its standards against increasing efforts by cities to erode those standards. *See also* Logen Decl., ¶¶ 31-34; Zeller Decl., ¶¶ 10-11, 16-17. Second, PSE has been clear with the cities and the Commission that PSE's easement requirement is based on cost considerations in addition to safety and operational considerations. There would be serious negative cost consequences to PSE and its ratepayers if underground and pad mounted facilities are placed in public rights-of-way, and PSE has a responsibility to take financial considerations into account when designing its underground systems.

72. The Cities also argue that relocation costs are a cost of doing business for utilities. However, relocation costs for



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

any particular relocation may or may not be a cost of doing business to a utility, depending on whether the cost is assigned to the utility by its tariffs or franchises. In 1982, the Legislature prohibited municipalities from passing costs associated with operation of the rights-of-way on to utilities through franchise fees. *See* RCW 35.21.860(1). The Cities should not be permitted to circumvent this statute by claiming that all expenses associated with operating and controlling the rights-of-way must be shifted onto utilities that occupy the rights-of-way as a "cost of doing business" for the utility. Costs for relocating underground facilities may well be a cost of doing business for municipalities that undertake street improvement projects in their rights-of-way.

73. Moreover, PSE's entire system is designed using "least cost" methods in order to lessen the impact of construction costs, including costs for installation, conversion and relocation, on rates. Least-cost principles support designing underground systems so they are installed primarily on private property and not in public rights-of-way. Locating facilities on private property not only saves PSE from bearing cost responsibility for relocations, it also reduces the need generally for the facilities to ever be relocated, because they are out of the way of the public streets. Logen Decl., ¶ 9.[16]

74. If PSE had to pay for easements, then those costs would be capitalized, potentially resulting in increased rates to all ratepayers in the future. Similarly, if PSE is forced to install underground distribution systems in the rights-of-way, then PSE's construction costs will be greatly increased by the costs of relocating underground systems. The Cities suggest that the cost of easements can be avoided if PSE locates its facilities in the rights-of-way, which it can do "for

[16] Least-cost principles do not support installation of total underground equipment just so that facilities can be placed in public rights-of-way, as that equipment is significantly more expensive than pad mounted equipment. *See* Logen Decl., ¶ 9; Lowrey Decl., ¶ 14.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

free."[17] PSE faces many costs associated with installing its facilities on public rights-of-way rather than on easement, such as costs of relocation, permits, traffic control and street restoration. If facilities are undergrounded in rights-of-way rather than on easement, and must therefore be relocated at PSE's expense in the future, the costs of such relocations would ultimately flow through to ratepayers. Over time, the cost of relocating underground facilities is likely to be far more expensive than the cost of obtaining and purchasing easements. Logen Decl., ¶ 10; Copps Decl., ¶ 19.

75. PSE has long operated on the principle that the costs of undergrounding should be localized to the area in which the undergrounding occurs, and not spread throughout ratepayers in PSE's territory. If that model is to change, then fundamental questions would need to be addressed, including whether Schedule 71 should provide any subsidy for undergrounding, and whether areas with underground facilities should pay higher rates for electric service than areas with overhead facilities. The Cities argue that "rates should be spread across classes, not geographic regions." Cities' Motion at 22. However, PSE has had different rates for rural and urban areas as well as for areas where power supply costs historically were different than for other areas. Rates based on such differences were approved by the Commission, and the Commission might well wish to approve higher rates for areas that have chosen to pursue installation of underground electric systems. Logen Decl., ¶ 11.[18]

---

[17] The Cities also complain that "the public receives no compensation for PSE's use of the rights-of-way" Cities' Motion at 22-23. As described above, RCW 35.21.860(1) prohibits cities from charging PSE for use of the public rights-of-way. Public rights-of-way were not intended to serve as a revenue source for cities. PSE provides a vital service to the residents of these cities, and is subject to the cities' taxes for providing this service, thereby benefiting the cities as a whole.

[18] The Cities argue that underground conversion benefits everyone who travels the public streets by removing traffic hazards. Cities' Motion at 23. The suggestion that utility poles should all



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

76. Finally, the Cities claim that PSE avoids expenses associated with underground conversions because cities are required to pay for 100% of trenching, restoration and surveying costs, and 30% or 70% of the remaining costs of a conversion. Cities' Motion at 21. It is true that cities must pay such costs under Schedule 71. However, the cost sharing provisions of Schedule 71 are not a "benefit" to PSE, but rather to entities requesting conversions. Cities have no fundamental entitlement to this subsidy. The tariff the Commission has approved for Avista Corporation requires entities requesting conversions to pay 100% of the costs of such conversion. *See* Logen Decl., ¶ 12 and Exhibit R attached thereto, at p. 8, § 6.b.[19]

**4. PSE may require cities to pay the costs of relocating its underground facilities in the future as a condition of agreeing to place facilities in the rights of way rather than on private property.**

77. Unlike the other Cities, Kent does not claim that it can force PSE to install its underground distribution system entirely in public rights-of-way. Instead, Kent argues that it cannot be required under Schedule 71 to agree to pay the costs of "future hypothetical relocations of electric facilities that are unrelated to" its Pacific Highway improvement project. Kent Motion at 6. Kent's suggestion that potential future relocations of facilities along the Pacific Highway Project are "not related to" the Project is incorrect. The question of who will bear the responsibility for future relocation costs of PSE's underground facilities is inextricably bound to PSE's judgment with respect

---

be removed because they are a hazard to the travelling public is extreme, and ignores that the sidewalks of cities such as Seattle are full of utility poles. Even if the Cities were correct, their argument actually supports placing PSE's pad mounted equipment on private property, away from the rights-of-way, where it will be even further out of the way.

[19] Avista also has discretion to determine where its underground facilities will be installed, and to require that easements be provided as a condition of a conversion. *See* Logen Decl., ¶ 12; Exhibit R at p. 8, § 6 (General Rules apply) and p. 1, §§ 2.c.-2.d.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

to which, if any, of its facilities must be placed on private property if the overhead facilities are to be converted to underground.

78. As noted above, PSE's Form Agreement provides that facilities that PSE would otherwise require be placed on private property may be installed on public rights-of-way under certain conditions, including that:

> (3) the governmental authority owning or controlling the rights-of-way has agreed to pay one hundred percent (100%) of the cost of any future relocation of facilities located on rights-of-way under this provision which are requested, required or otherwise caused by actions of the governmental authority.

Form Agreement, § 1(e). The Form Agreement also provides:

> Notwithstanding any provision to the contrary in any franchise agreement now in place or subsequently entered into by the Company and the City, in the event the City requires (or takes any action which has the effect of requiring) the relocation of any of the facilities installed under this Agreement prior to the expiration of twenty (20) years after completion of the conversion hereunder, the City shall reimburse the Company for costs incurred by the Company in connection with relocation. Facilities installed on private property or facilities installed in public rights-of-way under the provisions of a separate agreement between the City and the Company whereby the City agrees to pay for relocation in perpetuity will be relocated at the City's expense in perpetuity.

Form Agreement, § 13.

79. These provisions are fully consistent with Schedule 71. As described above, PSE is not required to undertake a conversion project in the absence of obtaining the operating rights that PSE requires for placement of facilities "which in the Company's judgment shall be installed on" private property. Rather than requiring all facilities, including cable and conduit, to be placed on private property, PSE may exercise its judgment to place cable and conduit or other facilities in public rights of way if PSE is adequately



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

protected from the costs of relocating the underground facilities in the future.

80. In PSE's judgment, a general twenty year protection from relocation costs is adequate with respect to facilities such as cable and conduit, and may in some circumstances be adequate with respect to facilities such as flush mounted pull vaults and junction vaults. *See* Logen Decl., ¶ 23. However, greater protection is required if facilities such as pad mounted or submersible switches are to be placed in the rights-of-way. In PSE's judgment, such facilities should never be placed in rights of way unless PSE is protected from ever having to pay the costs of relocating such facilities. *Id*.

81. PSE's judgment on this issue is fundamentally sound. Cities requesting underground conversions should be incented to take cost considerations into account when requesting that facilities be placed in the rights-of-way and when undertaking future projects that might require relocation of underground facilities, or they are more likely to make decisions that result in wasteful and inefficient installation and relocation of underground facilities. Logen Decl., ¶ 22.[20]

82. PSE's Form Agreement is not inconsistent with its franchise with Kent or any of the Cities. The franchises do generally require PSE to pay the costs of relocating its facilities that are located in the public rights-of-way. However, this dispute is not about whether PSE will pay to relocate its existing overhead facilities. The cities are asking PSE to convert its existing overhead facilities to underground. The terms and conditions of any underground conversions that PSE

---

[20] The City of Des Moines states that it "*might be willing* to sign an agreement stating that if the City did require PSE to relocate in this vicinity again within a certain period of time, the City *might be willing* to pay for that relocation." Andrews Decl., ¶ 6 (emphasis added). Such vague promises by one city are insufficient to protect PSE, particularly given the City of Kent's direct challenge to the Form Agreement's relocation provisions in this proceeding, and past actions such as the City of Federal Way's misrepresentation as to whether facilities will need to be relocated in the future. *See* Logen Decl., ¶¶ 24-25.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

performs are governed by PSE's Tariff. *See, e.g*, Federal Way Franchise §§ 15.1, 15.2, Stipulated Exhibit No. 4; Kent Franchise § 5.2, Stipulated Exhibit No. 25; Des Moines Franchise § 4, Stipulated Exhibit No. 3.

83. The Cities' claim that PSE is seeking to "avoid its common law and contractual responsibility for relocation" is incorrect. Cities' Motion at 21. PSE is only obligated to relocate its facilities if they are located in the public rights-of-way. *Washington Natural Gas Co. v. City of Seattle*, 60 Wn.2d 183, 373 P.2d 133 (1962), which the Cities cite, illustrates the distinction. There, the utility's facilities were located in the public streets. *See id.*, 60 Wn.2d at 184. The principles the court enunciated were all based on a municipality's authority over public streets. *Id.* at 184-85.[21] The court noted that the utility in that case "did not have a property right in a fixed location." *Id.* at 187. Where PSE's equipment is not located in public rights-of-way, PSE has no obligation to move the equipment based on municipalities' traditional authority over public rights-of-way. Moreover, when PSE places its facilities on private property on a PSE easement, PSE does have a "property right in a fixed location." *Id.* In the present case, the facilities at issue are not located in the public streets; they have not yet been installed anywhere. Thus, PSE has no "relocation obligation" with respect to these facilities.

---

[21] Similarly, *Granger Tel. & Tel. Co. v. Sloane Bros., Inc.*, 96 Wn. 333, 165 P. 102 (1917), concerned poles that were located in a county road. *Id.* at 333. The holding of that case was that a city and its contractors are not obligated to pay just compensation to a utility if they accidentally damage the utility's facilities that are located in public streets in the course of making improvements to the public streets. The Cities have left important qualifying text out of the sentence they quote, which actually reads: "[A] city has no right directly or indirectly to burden itself or its citizens with the cost of removing and replacing of the . . .electric light poles. . .*that may necessarily be interfered with in laying its sewers in the streets*." *Id.* at 335 (emphasis added). The discussion in *Auburn v. Qwest* is also limited to relocations of facilities "located in the city's rights-of-way." 2001 U.S. App. LEXIS 15518 at *3, 6-8.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

84. The dispute between PSE and the Cities is not about whether PSE must relocate its existing overhead facilities that are located in public streets. It is about whether PSE can be forced to install underground facilities in public rights-of-way, or whether PSE is entitled to determine that if underground facilities are installed, they generally should be installed on private easements to protect them from future relocation requirements, or placed in rights-of-way under agreements that protect PSE from future relocation costs for which PSE would otherwise be liable once the facilities are installed in rights-of-way. PSE's Form Agreement provisions regarding future relocation are fully consistent with Schedule 71 and Washington law.

**5. PSE's interpretation of Schedule 71 and PSE's Form Agreement are fully consistent with PSE's historical application of its Tariff.**

85. As the Cities acknowledge, they have always been required to execute PSE's Underground Conversion Agreement to obtain Schedule 71 conversions. Cities' Motion at 4. The Cities claim that PSE's Form Agreement imposes new obligations on them that are inconsistent with PSE's historical application of Schedule 71. As an initial matter, as described above, Schedule 71 is clear on its face, and there is no need to look beyond the language of the Tariff to PSE's historical practices.

86. If the Commission believes it should nevertheless look at historical events, the cities are absolutely incorrect that PSE's Form Agreement imposes new obligations on them. The challenged provisions in PSE's Form Agreement are consistent with PSE's Underground Conversion Agreements going back at least two decades. Attached to Mr. Logen's Declaration as Exhibits A-O are copies of numerous conversion agreements that were executed by PSE and cities from 1982 to 2000. Under each of those agreements and under the Form Agreement that PSE is currently asking cities to sign (1) PSE is not required to bear the cost of easements; (2) PSE is not obligated to purchase any



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

easements in the absence of reimbursement by the City; (3) PSE is not obligated to undertake a conversion project without first being provided the necessary operating rights; and (4) PSE's obligation to absorb the costs of future relocations of facilities installed in public rights of way is limited. *See* Logen Decl., ¶ 26 and Exhibits A-O and Stipulated Exhibit 16, attached thereto.

87. The specific language in PSE's Underground Conversion Agreements has changed over time. PSE has revised its Underground Conversion Agreements to clarify questions that have been raised by requesting entities and to address new issues and circumstances that have arisen in the context of particular conversions, such as the Temporary Service issue described above. Municipalities have also at times suggested revisions to contract language that PSE feels do not change the fundamental terms of the Agreement, but that the municipality is more comfortable with. Under such circumstances, PSE has often agreed to the requested change, and incorporated that change in future versions of conversion agreements. Logen Decl., ¶ 27.

88. There is no question that the Form Agreement PSE is requiring the cities to sign is far more detailed (and repetitive) than earlier agreements. However, the fundamental requirements placed on cities have not changed. Although PSE's historical conversion agreements already clearly and explicitly set forth the cities' responsibilities with respect to easements and future relocations of property placed in rights of way, it would have been irresponsible for PSE to continue forward with its historical version of the Underground Conversion after cities began to claim that that language does not mean what it says. In addition, PSE has found it necessary to spell out the terms and conditions of conversions in far more detail than in prior years as it has become increasingly difficult to work with cities in a cooperative and non-confrontational manner. *See* Logen Decl., ¶ 28.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

**a. PSE's underground conversion agreements have long contained operating rights provisions consistent with PSE's current Form Agreement.**

89. PSE's Underground Conversion Agreement historically has consistently acknowledged the requirement that operating rights acceptable to PSE must be provided on private property for placement of PSE's facilities, that PSE is not obligated to purchase such rights in the absence of reimbursement by cities, and that PSE is not obligated to undertake a conversion project without first being provided with the necessary operating rights.

90. For example, the 1982 Agreement for Kent's West Smith Street conversion from Lincoln to North Fourth Avenue provides:

> City recognizes that Puget requires the owners of real property to be served by the Main Distribution System to provide, at their expense, space for all underground electrical facilities which must be located on privately owned property and that said owners shall grant such operating rights as may be necessary therefor. The City recognizes that the procurement of such operating rights is a prerequisite to release this conversion project for construction. Puget shall use its best efforts to obtain the same but; will not be required to pay for an easement.

Logen Decl., Exhibit A, at p. 5, § 8. PSE's cover letter to Kent for the Agreement states: "Upon receipt of two signed copies of this agreement and a purchase order number we will release this job to be scheduled for construction; subject to any necessary easements." Logen Decl., Exhibit A, at p. 1. The May 21, 1984 Agreement for Kent's West Meeker Street conversion contains identical language. *See* Logen Decl., Exhibit B at p. 4, § 8. The October 3, 1988 Agreement for the Kent River Bend Golf Course contains similar language. *See* Logen Decl, Exhibit D, at p. 2-3, § 6.

91. By 1988, PSE had made more explicit the requirement that a requesting city would pay the cost of any easements in some agreements. The July 12, 1988 Agreement for Kent's Smith Street provides:



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

> The City recognizes that Puget requires the owners of real property to be served by the Main Distribution System to provide, at their expense, space for all underground electrical facilities which must be located on privately owned property and that said owners shall grant such operating rights as may be necessary therefor. The City recognizes that the procurement of such operating rights is a prerequisite to release this conversion project for construction. Puget shall use its best efforts to obtain the same but; *should it be necessary to purchase any easements they will become part of the project cost to the City.*

Logen Decl., Exhibit C, at p. 4, § 9 (emphasis added).

92. In approximately 1992, the form of PSE's Underground Conversion Agreement changed as the result of efforts by PSE's Tariff Consultant, Lynn Logen, to gather together examples of Underground Conversion Agreements that were being used by PSE's Customer Service Engineers throughout PSE's service territory and combine them into a single form agreement that Customer Service Engineers would be required to use. *See* Logen Decl., ¶ 29.

93. The April 3, 1992 Agreement for the Des Moines Marine View Drive South conversion added language regarding easements to Section 5 of the Agreement. Section 5 required the City to pay PSE within thirty days of completion of the work and set forth the amount of such payment, but provided that

> the foregoing amount is subject to change if:
>
> …
>
> (d) Puget incurs costs to obtain easements pursuant to subparagraph 8 of this Agreement.

Logen Decl., Exhibit E, p. 3, § 5. Section 8 provided:

> The owners of real property within the Conversion Area must provide, at their expense, space for all underground and surface mounted electrical facilities located on privately owned property, and



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

> must grant such operating rights as may be necessary to permit Puget to construct, operate, repair and maintain all electrical facilities installed by Puget pursuant to the Agreement. Puget shall provide reasonable assistance in obtaining such operating rights, but shall not be required to bear the costs of any easements. The cost to Puget of any easements on privately owned property which Puget must obtain shall be reimbursed by the City pursuant to paragraph 5 above.

*Id.*, § 8. Nearly identical language appeared in the 1995 Agreement for SeaTac's South 176th Street conversion, *see* Logen Decl., Exhibit F, pp. 3, 4-5, §§ 5, 8; the May 2, 1995 Agreement for Federal Way's South 348th Street conversion, *see* Logen Decl., Exhibit G, pp. 3, 4-5, §§ 5, 8; the September 16, 1997 Agreement for Kent's South 228th Street conversion, *see* Logen Decl., Exhibit H, pp. 3, 4-5, §§ 5, 8; the July 8, 1998 Agreement for Federal Way's South 312th Street conversion, *see* Logen Decl., Exhibit I, pp. 3, 4, §§ 5, 8; and the September 17, 1998 Agreement for SeaTac's Phase I South 170th Street project, *see* Logen Decl., Exhibit J, pp. 3, 4, §§ 5, 8.

94. The August 28, 1998 Agreement for the Kent South 196th Street conversion also contained this language. *See* Logen Decl., Exhibit K, p. 2, §§ 5, 8. Don Wickstrom, Kent's Director of Public Works, claimed at the time that the form of the agreement "does not appear to be similar to past documents that I am familiar with" and claimed that "certain provisions may be in conflict with the PSE/City of Kent franchise provisions." *See* Logen Decl., Exhibit K, p. 1. That letter is one of the early indications of the cities' attempts to force PSE to change its requirements for Schedule 71 conversions, as described in greater detail below.

95. Over the next two years, the form of PSE's Underground Conversion Agreement changed slightly, but not its essential requirement that operating rights, including easements, must be provided as a condition of any conversion, and that it was the cities' responsibility, not PSE's, to pay



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

for any easements if payment were required. For example, the December 8, 1998 Agreement for Renton's Main Avenue South conversion provides:

> (c) The City shall furnish 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. The Company may postpone performance of its obligations hereunder until it has been furnished with such operating rights.

Logen Decl., Exhibit L, p. 2, § 4(c). The Agreement further provides:

> The parties acknowledge that under Schedule 71, the owners of real property within the Conversion Area must provide, at their expense, space for all underground and surface mounted electrical facilities located on privately owned property, and must grant such operating rights as may be necessary to permit the Company to construct, operate, repair and maintain all electrical facilities installed by the Company pursuant to the Agreement. The Company shall provide reasonable assistance in obtaining such operating rights, but shall not be required to bear the costs of any easements.

Logen Decl., Exhibit L, p. 3, § 8. Similar provisions are set forth in the January 19, 1999 Agreement for Auburn's B Street NW conversion. *See* Logen Decl., Exhibit M, pp. 2-3, 4, §§ 4(c), 5(d), 8.

96. By 2000, PSE's format had again changed, but continued to require provision of easements at no cost to PSE as a condition of the conversion. *See* December 19, 2000, Agreement for SeaTac's Des Moines Memorial Drive conversion. Logen Decl., Exhibit N, pp. 3, 4, 5, §§4(B)(b), 5(c), 8.

97. The cities' claim that the requirements of PSE's Form Agreement are new and different than those they have been subject to in the past is patently incorrect, as demonstrated by PSE's historical Underground Conversion Agreements with these cities. Contrary to the Cities' claim at page 4 of their Motion, these



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

Agreements clearly *did* "condition PSE's performance of the underground conversion upon the Cities' agreement to acquire or pay for private easements" that PSE required for its facilities.

98. The Cities argue that Section 8 of PSE's 1998 SeaTac Agreement required them to do nothing more than notify PSE's customers within the conversion area that their service must be converted from overhead to underground under Schedule 86 and to exercise their authority under RCW 35.96.050 if property owners fail to convert their service lines to underground, as set forth in Section 7 of the Agreement. Cities' Motion at 29. The Cities' argument is contrary to the plain language of the Agreement and Schedule 71. Sections 7 and 8 of the Agreement address entirely different subjects. Section 8 requires operating rights for "all electric facilities" that PSE installs, as does Schedule 71. *See* Logen Decl., Exhibit J, § 8; Schedule 71, § 4. Section 7 refers only to customer service lines. *Id.*, § 7. Service lines extend from a point of connection on the customer's structure to a connection point on PSE's Main Distribution System, *see* Schedule 71, §1.b, and are subject to the requirements of Schedule 86, *see* Schedule 71, §7. Moreover, contracts are to be interpreted so as to give effect to all of the words in a contract provision. *See, e.g., Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985). The Cities' interpretation of Section 8 of the Agreement to require that they do nothing more than comply with Section 7 would render Section 8 meaningless. The Cities' interpretation of Section 8 would also read out of that section the requirement that the City reimburse PSE for easements.

99. Similarly, there is no merit to the Cities' argument that the reference in Section 8 of the 1998 SeaTac Agreement to payment "pursuant paragraph 5 above" means that PSE and the City were to share the costs of easements as part of the conversion. The Cities' interpretation would read out of existence the language in Section 8 that PSE "shall not be required to bear the costs of any easements," and that it "shall be reimbursed *in full* by the City…." Logen Decl., Exhibit J, § 8 (emphasis added). The



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

reference to "paragraph 5 above" refers to the City's obligation to pay PSE within 30 days of completion of the work, and the City's agreement that the cost estimate PSE provided was subject to change if, among other reasons, PSE incurred costs to obtain easements. *See* Logen Decl., Exhibit J, § 5. Even if the Cities were correct as a matter of contract interpretation, their argument that this language obligated them to share the cost of easements with PSE is contrary to the position taken elsewhere in their Motion that they have never had any obligations with respect to providing or paying for easements.

100. In an attempt to evade the clear language of the written Underground Conversion Agreements that SeaTac has repeatedly executed, Thomas Gut claims that "[t]here 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." Declaration of Thomas W. Gut ("Gut Decl."), ¶ 15.[22] There is no foundation for Mr. Gut's testimony as to any "verbal understanding" that has "always been" between PSE and SeaTac, since Mr. Gut has worked for SeaTac for only two years. *Id.*, ¶ 1. In addition, Mr. Gut fails to provide any details that could support the elements of such an agreement, including any reference to who was involved in any verbal communications, when, or what was said.

101. Even if the City could prove that anyone from PSE had ever told SeaTac that PSE would agree to install its underground facilities "within the City rights of way" during conversions, such communication could not be used to vary or contradict the terms of the written Underground Conversion Agreements that PSE and SeaTac have entered into with each other. In Washington,

---

[22] The declarations of Mr. Gut, Cary Roe, and Maiya Andrews are not competent because they are all lacking dates or places of signature, or both. *See* RCW 9A.72.085(3).



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

evidence beyond the four corners of a contract "is not admi[ssible] for the purpose of importing an intention not expressed in the writing, but to give meaning to the words employed. Extrinsic evidence illuminates what was written, not what was intended to be written." *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 189, 840 P.2d 851 (1992). Extrinsic evidence that is *not* admissible includes: "Evidence that would show an intention independent of the instrument; or Evidence that would vary, contradict or modify the written word." *Hollis v. Garwall*, 137 Wn.2d 683, 695, 974 P.2d 836, 843 (1999).

102. In this case, SeaTac is not using the alleged verbal agreement to interpret or illuminate what the parties agreed to in their Underground Conversion Agreements. Instead, SeaTac is attempting to introduce evidence to contradict the plain language of such agreements. Each PSE Underground Conversion Agreement specifically contemplates placement of PSE's facilities on private property in connection with the underground conversion, on easements that must be provided in order for the conversion to proceed. The City's contradictory evidence cannot change the meaning of these contracts, as a matter of law.

103. Furthermore, as a matter of fact, SeaTac's assertions about a "verbal agreement" that is contrary to PSE's Underground Conversion Agreements is false. PSE has consistently been clear with SeaTac that PSE will require easements for its facilities as a condition of performing conversions, and that PSE will not absorb the costs of such easements. *See* Lowrey Decl., ¶¶ 8-9 and Exhibits I.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

**b. Historical conversions demonstrate that PSE has long required cities to obtain easements for PSE**

**i. PSE has required that its facilities be placed on easements and has placed the responsibility on cities to arrange or pay for such easements**

104. PSE employees responsible for underground conversion projects have long understood and communicated to cities that PSE must place the bulk of its facilities on private property when performing underground conversions, that PSE is not responsible for paying for any easements for such facilities, that cities must pay for easements if any payment is required, and that these requirements are a condition of performing underground conversions. *See* Corbin Decl., ¶¶ 2-4; Zeller Decl., ¶¶ 4-6; Copps Decl., ¶¶ 3, 5, 10, 13; Lowrey Decl., ¶¶ 3-4, 8-9, 11, 15.

105. In 1984, the City of Kent executed an Agreement for the West Meeker Street conversion that required that easements be provided for PSE's facilities on private property as a condition of the conversion. PSE agreed to seek to obtain such easements, but was not required to pay for any easements. PSE did in fact obtain easements for placement of its facilities in that conversion. Kent was not charged for any easements because the property owners provided the easements for free. *See* Zeller Decl., ¶ 7 and Exhibits A-C attached thereto.

106. In 1992, PSE performed a conversion for the City of Des Moines on Marine Drive. Consistent with the Agreement that Des Moines signed for the conversion, PSE's Customer Service Engineer told City representatives multiple times that PSE would require easements, that PSE would provide assistance in obtaining the easements, but that the City would have to pay for them if they cost anything. *See* Copps Decl., ¶¶ 4-6 and Exhibit A, attached thereto. Some property owners provided easements for free. When an owner demanded payment, PSE directed the City to communicate with the owner and work out payment or some other consideration. Copps Decl., ¶ 6. The City traded paving or



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

driveway cutouts for a number of easements. *Id.*, ¶ 7-8 and Exhibits B-C, attached thereto. Ultimately, nearly all of PSE's equipment other than cable and conduit was placed on easement, at no cost to PSE. Copps Decl., ¶¶ 7-8 and Exhibits C-D, attached thereto.

107. In 1995, PSE performed a conversion for Federal Way on South 348th Street. Cary Roe claims that "[a]t 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. That is incorrect. The engineer for the project rejected the City's suggestion that certain PSE facilities should be placed in the City's rights-of-way, and informed the City that "without [the easements] we do not have a project." Lowrey Decl., ¶ 21 and Exhibit Q, p. 1, attached thereto. PSE's letter to the City presenting the project estimate specified that the City would be responsible for easements purchased by PSE in addition to the project cost: "In accordance with our filed rates, Schedule 71, the charge to the City of Federal Way is $36,094.50 due on completion of the project. *Any easement paid by Puget will be additional*." *Id.*, Exhibit Q, p. 2 (emphasis added). Moreover, in the next paragraph of his declaration, Mr. Roe quotes the 348th Street Agreement that Federal Way executed, which plainly requires that easements must be provided, that PSE "shall not be required to bear the costs of any easements," and that any cost of easements "shall be reimbursed by the City." Roe Decl., ¶ 6. *See also* Lowrey Decl., ¶ 21 and Exhibit R attached thereto.

108. After Federal Way executed the Agreement, the City agreed to pay $450.00 to a property owner for an easement. The City asked that PSE write the check and that PSE bill the City later for the easement. *See* Lowrey Decl., ¶ 21, and Exhibit Q, pp. 3, 4. PSE got the easements it needed for the project, including the easement for which the property owner had requested compensation. *See id.*, Exhibit Q, p. 5; Exhibit S. Mr. Roe appears to be correct that the City was not separately billed



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

for the easement. The project manager apparently did not separate out the $450.00 amount from the total costs of the conversion and require the City to reimburse PSE for 100% of that amount. That oversight is not surprising, given that it was a $450 charge within a $182,000 project. *See* Lowrey Decl., ¶ 21, and Exhibits S, T, U.

109. In and around 1998, PSE performed a conversion for Renton on Main Avenue South. The Project Manager informed the Renton City Engineer that easements would be needed for PSE's facilities, and that if property owners required compensation for the easements, the City would be responsible for those costs. Lowrey Decl., ¶ 4. Rather than having to obtain a number of easements from individual property owners, the City agreed to provide a large easement to PSE on property that the City owned within the conversion area. PSE cooperated with the City by consolidating most of its equipment onto that large easement. The City then attempted to require PSE to pay the City for the easement. PSE refused, and the City ultimately provided the easement to PSE on PSE's standard form, for free. *See* Lowrey Decl., ¶¶ 4-7 and Exhibits A-H, attached thereto.

110. In around 2000, PSE performed a conversion for Kent on Des Moines Memorial Drive South. PSE's design called for placing its facilities on easements. The City agreed to extend its water service line to one property in exchange for the property owner granting PSE an easement, as the City acknowledges. Lowrey Decl., ¶¶ 11-12 and Exhibits K-M, attached thereto. PSE also agreed to the unusual step of placing a switch in the right-of-way in exchange for the City's agreement to pay for relocation of the switch in perpetuity. Lowrey Decl., ¶ 12 and Exhibit N attached thereto. *See also* Copps Decl., ¶ 14.

111. During the same time period, PSE also performed a conversion for SeaTac on 28th Avenue South. PSE informed SeaTac that easements would be required as a condition of the conversion. PSE ultimately agreed to



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

place a switch in the right-of-way in exchange for SeaTac's agreement to pay for the cost of relocating the switch in perpetuity. Lowrey Decl., ¶ 15 and Exhibits O-P attached thereto.

**ii. Recent conversions in Federal Way and Kent are not consistent with PSE's historical conversions or standards**

112. The 1998 Federal Way South 312th Street conversion described in Mr. Roe's declaration is not typical of PSE's conversions. Federal Way interfered with placement of PSE's facilities on PSE easement by purchasing exclusive rights to the entire frontage of the conversion area, even though PSE had designed its facilities to go on easement. PSE agreed to go forward with the conversion because of the limited amount of equipment it needed to install. *See* Copps Decl., ¶ 15; Lowrey Decl., ¶ 23. The fact that Federal Way was able to obtain that result on a single conversion does not change PSE's standards.

113. Mr. Roe makes a number of statements with respect to the 320th Street conversion in Federal Way that is incorrect. During the planning stages for the project (an earlier project than the one that is at issue in this proceeding where PSE's existing poles are located on easements), PSE tendered its then-current Underground Conversion Agreement to Federal Way. Federal Way objected to the Agreement, claiming that it was not consistent with the version of Underground Conversion Agreement that it had signed with respect to its 312th Street Project on July 8, 1998. *See* Logen Decl., ¶ 40.

114. In his declaration, Cary Roe asserts that PSE's Underground Conversion Agreements changed in 2000 because the new version required the City to pay for private easements. He claims that the 312th Street Agreement did not require the City to obtain or pay for easements for PSE. *See* Roe Decl., ¶¶ 9, 11, 13. The 312th Street Agreement states:

> The Company shall provide reasonable assistance in obtaining operating rights as



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

> may be necessary to permit the Company to construct, operate, repair, and maintain all electrical facilities installed by the Company pursuant to this Agreement. *The Company shall not be required to bear the costs of any necessary 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.

Exhibit I, p. 4, § 8 (emphasis added). The Agreement is clear on its face. It acknowledges that PSE's facilities will be placed on easement and requires Federal Way to reimburse PSE *in full* for *any* easements on privately owned property that PSE required.

115. The language set forth in the 320th Street agreement tendered to Federal Way is not materially different from the 312th Street Agreement, or from PSE's historical Agreements. It provided that "the City shall at its expense obtain" operating rights required by PSE, that PSE would "provide reasonable assistance in obtaining such operating rights, but shall not be required to bear the costs of any operating rights," and that any costs to PSE for obtaining operating rights "shall be reimbursed in full by the City." Roe Decl., ¶ 11.

116. The focus of the dispute and negotiations between Federal Way and PSE regarding the 320th Street Agreement was not the operating rights provision, but rather the future relocation provision, as described in Section III.B.4, below. *See also* Logen Decl., ¶ 43. Mr. Roe's revisionist history of the 320th Street negotiations is inaccurate. In any case, the 320th Street Agreement that Federal Way ultimately signed is identical to the 312th Street Agreement with respect to operating rights. *See* Roe Decl., ¶ 12; Logen Decl., Ex. I, §§ 5(d), 8; Logen Decl., Ex. O, §§ 5(d), 8. Mr. Roe's arguments regarding what those agreements mean is contrary to the plain language of those agreements, and the Commission should reject Mr. Roe's arguments as a matter of law. *See Hollis,* 137 Wn.2d at 695; *Nationwide Mut. Fire Ins.*, 120 Wn.2d at 189.

117. Federal Way did try to force PSE's facilities onto the right-of-way on 320th Street through means other than the



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

Underground Conversion Agreement. Using the same strategy that had been successful in the 312th Street conversion, the City purchased an exclusive "landscaping" frontage easement from property owners along the conversion area, and told PSE that it could locate its facilities in the easement despite the exclusive language of the easement. PSE refused to do so, and instead placed its facilities on private property, purchasing easements where necessary. Pursuant to the Agreement, the cost of the easements will be billed 100% to the City when the project is invoiced, which has not yet occurred. *See* Lowrey Decl., ¶¶ 24-26 and Exhibit V, attached thereto.

118. In the 256th Street Conversion in Kent, the project manager allowed more facilities to be placed in the rights-of-way and allowed PSE to do more of the undergrounding work than is consistent with PSE's standards. *See* Zeller Decl., ¶¶ 12-14, 17 and Exhibit D, attached thereto; Copps Decl., ¶ 12; Lowrey Decl., ¶ 17. Even so, the project manager required placement of at least some of PSE's facilities on easement. *See* Zeller Decl., ¶ 15.

119. These conversions took place in the context of increasing pressure by cities to force PSE into the rights-of-way. At the time the cities began to push particularly hard on PSE in the late 1990s, PSE was dealing with some internal organizational and training difficulties related to implementing its merger with Washington Natural Gas. *See* Corbin Decl., ¶ 6; Zeller Decl., ¶ 9; Logen Decl., ¶ 33.

120. In addition, Kent's and Federal Way's occasional small successes at pressuring PSE emboldened them to demand even more. For example, after Kent succeeded in pressuring one project manager to place numerous facilities in the rights-of-way in the 256th Street conversion, Tim LaPorte of Kent told the project manager for the 196th Street conversion "you're going to put your facilities in the right of way just like on 256th." Copps Decl., ¶ 13. The project manager for the 196th Street project refused. In the end, the project manager did not place PSE's facilities in the rights-of-way, although he did install



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

less equipment than usual due to the city's refusal to cooperate with respect to easements. *Id.*

121. Efforts by PSE supervisors and Tariff Consultant to prevent any more conversions that did not comply with PSE's standards and Schedule 71 gave rise to the stalemate that has resulted in this proceeding, as described in Section III.B.6, below. *See* Logen Decl., ¶¶ 34-35; Zeller Decl., ¶¶ 3, 9-13, 16-17; Lowrey Decl., ¶ 18.

**iii. The fact that cities may not have seen invoices for easements in the past does not support the cities' arguments.**

122. Mr. Gut claims that he has "never seen any cost item for easements on invoices submitted to the City by PSE." Gut Decl., ¶18. Cary Roe of Federal Way makes the same claim in using this identical, careful phrasing. Roe Decl., ¶4. Even if that were true, that fact adds little, if anything, to the Commission's consideration of the issues that are before it in this proceeding.

123. As described above, in past conversions, property owners have often provided easements for free. In other cases, cities have paid property owners directly, or have traded services for easements. *See* Corbin Decl., ¶ 4; Zeller Decl., ¶¶ 6-7; Copps Decl., ¶¶ 7-8, 10; Lowrey Decl., ¶ 10. Obviously, in such cases, no "cost item for easements" would appear on a city's invoice from PSE.

124. There may have been conversions in which PSE obtained easements for cities and ended up sharing the cost of the easement with the city because the project manager did not take time to separate out the line item for easements from the general work order and bill the city 100% of the cost of that item. *See* Lowrey Decl., ¶ 22; Zeller Decl., ¶ 15. However, the fact that a city might occasionally have been fortunate enough to escape being billed for 100% of the cost of easements after it agreed to reimburse PSE in full for easements does not change the cities' underlying payment obligation. Moreover, it is a far different matter



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

for a PSE project manager to overlook some small amounts paid for easements here and there and include those payments in the total cost of the conversion than for PSE to be forced to absorb or share in the costs of easements of a magnitude that may well be required for the Pacific Highway South projects.

**iv. PSE's decision to reduce the numbers of easements required in various conversions also does not support the cities' arguments.**

125. The cities seek to make much of the fact that in some past conversions, and in the preliminary planning for portions of the Pacific Highway South project, PSE has initially designed a conversion to include more easements than are ultimately obtained for the conversion. There is nothing significant about that fact with respect to the requirements of Schedule 71, which leave the ultimate decision regarding the number or placement of easements that will be required to PSE's judgment. There is also nothing surprising about the fact that in many cases, PSE's initial design might show an "ideal" layout for facilities that includes numerous easements all along a conversion area, but that that design is then adjusted to consolidate facilities onto fewer, larger easements, or to take into account physical impediments to placement of some of the facilities on particular property, or difficulties obtaining easements from particular property owners. *See* Lowrey Decl., ¶¶ 4, 17; Copps Decl., ¶ 3; Zeller Decl., ¶ 6.

126. The evidence regarding such changes demonstrates why Schedule 71 appropriately leaves the ultimate decision regarding placement of PSE's facilities to PSE's judgment: there is no way that Schedule 71 could possibly spell out the many factual situations or considerations that must be taken into account in making such decisions. That evidence also demonstrates that PSE has applied Schedule 71 in good faith, in cooperation with cities, to try to minimize the numbers and cost of easements required for conversions.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

**c. PSE has also long required protection from the costs of relocating its undergrounded facilities.**

127. As with the easement issue, PSE's current position with respect to relocation costs is fully consistent with its historical application of Schedule 71, as PSE has long required cities to protect PSE from the costs of future relocations of facilities installed during conversions. *See* Logen Decl, ¶ 29.

128. For example, the April 3, 1992 Agreement for the Des Moines Marine View Drive South conversion provides:

> In the event the City requires the relocation of any of the facilities installed under this Agreement prior to the expiration of twenty (20) years after completion of the conversion hereunder, the City shall bear the entire costs of such relocation.

Logen Decl., Exhibit I, p. 6, § 4.

129. Similar language appears in PSE's other Agreements, including: the 1995 Agreement for SeaTac's South 176th Street, Logen Decl., Exhibit F at pp. 6-7, § 13; the May 2, 1995 Agreement for Federal Way's South 348th Street, Logen Decl., Exhibit G at p. 7, § 14; the September 16, 1997 Agreement for Kent's South 228th Street, Logen Decl., Exhibit H at p. 5, § 13; the July 8, 1998 Agreement for Federal Way's South 312th Street, Logen Decl., Exhibit I at p. 6, § 14 (PSE did not initial or agree to Federal Way's interlineation, as described below); the August 28, 1998 Agreement for Kent's South 196th Street, Logen Decl., Exhibit K at p. 3, § 13; the September 17, 1998 Agreement for SeaTac's South 170th Street Phase I, Logen Decl., Exhibit J at p. 6, § 13; the December 8, 1998 Agreement for Renton's Main Avenue South, Logen Decl., Exhibit L at p. 5, § 13; the January 19, 1999 Agreement for Auburn's B Street NW, Logen



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

Decl., Exhibit M at p. 6, § 13; and the December 19, 2000 Agreement for SeaTac's South 192nd Street, Logen Decl., Exhibit N at p. 8, § 13.

130. Some of these Agreements from the late 1990s contain qualifying language under which cities agreed to use their "best efforts" not to require relocation of the new underground facilities. *See, e.g.*, Logen Decl., Exhibit L at p. 5, § 13. However, more recently, PSE has returned to the absolute language of its earlier agreements, with the addition of a reference to PSE's franchise to clarify matters arising out of the dispute with Federal Way described below. *See* Logen Decl., Exhibit M., p. 6, § 13; Exhibit N, p. 8, § 13.

131. PSE has had recent difficulties with one city in particular with respect to the relocation provision of its Agreements. In 1995, language was added to the relocation provision of the Federal Way South 348th Street Agreement that referenced Federal Way's franchise with PSE. *See* Logen Decl., Exhibit G, p. 7, § 14. Such language was imported into a few other Agreements during the 1997-98 time period. As Mr. Roe makes clear in his declaration at paragraph 7, Federal Way claims that that reference essentially nullifies the City's relocation obligations. Mr. Roe's interpretation is incorrect as a matter of law. However, that dispute is not before the Commission at this time. The point for the Commission's purposes in this proceeding is that once PSE realized that Federal Way (and possibly other cities) might advance such an interpretation of the relocation provision, PSE amended the relocation provision to delete the reference to the franchise.

132. Thus, the Federal Way 312th Street Project in 1998 returned to the historical relocation language:

> In the event the City requires the relocation of any of the facilities installed under this Agreement prior to the expiration of twenty (20) years after completion of the conversion hereunder, the City shall bear the entire cost of such relocation.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

Logen Decl., Exhibit I, p. 6, § 14. PSE executed the Agreement, then sent it to the City to execute. The City executed the Agreement, but it also added and initialed interlineation in an attempt to change Section 14 as follows: "In the event the City requires the relocation of any of the facilities installed under this Agreement prior to the expiration of twenty (20) years after completion of the conversion hereunder, the City shall bear the entire cost of such relocation, *unless otherwise provided in the Franchise Agreement between the parties set forth in Ordinance No. 98-315*." *Id.* (emphasis added). PSE did not agree to or initial that interlineation. Logen Decl., ¶ 43.

133. Given Federal Way's obvious intention to erode the relocation provision, the Underground Conversion Agreement that PSE tendered to the City for the 320th Street project thus further clarified the issue. The amended provision stated:

> *Notwithstanding any provision to the contrary in any franchise agreement now in place or subsequently entered into by the Company and the City*, in the event the City requires (or takes any action which has the effect of requiring) the relocation of any of the facilities installed under this Agreement prior to the expiration of twenty (20) years after completion of the conversion hereunder, the City shall reimburse the Company for costs incurred by the Company in connection with relocation.

Logen Decl., ¶ 44. Agreements with this explicit limitation were executed by SeaTac in 1998, Logen Decl., Exhibit J, p. 6, ¶ 13, and 2000, Logen Decl., Exhibit N, p. 8, § 13, and by Auburn in 1999, Logen Decl., Exhibit M, p. 6, § 13.

134. However, Federal Way would not agree to the new language, and PSE and the City engaged in extensive negotiation over the issue. Ultimately, after efforts that included moving the locations of some facilities, PSE felt that it had assurances with respect to the 320th Street project that PSE's facilities would be protected from future relocation. PSE therefore agreed to accept a "best efforts" relocation provision in order to settle the dispute and permit the conversion to go forward. PSE's concession



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

to use language from a prior agreement was a one-time settlement of a dispute that was justified in part because there were delays with the design of the underground system for that conversion for which PSE was responsible. PSE felt it was fair under the circumstances to permit the conversion to move forward without further delay caused by disputes over the precise form of the Agreement for that conversion. Logen Decl., ¶ 44.

135. PSE's Form Agreement also contains additional language that has appeared only recently in prior agreements: the reference to potential agreement between PSE and a city to place some facilities in the rights-of-way on the condition that the city agree to pay for the costs of relocation in perpetuity rather than for only 20 years. This addition is not meant to be an additional burden on cities, but rather to increase the options available to cities with respect to placement of underground facilities during conversions. Logen Decl., ¶ 30. It grew out of several examples in which PSE agreed to locate equipment such as a switch in the rights-of-way in exchange for a city's agreement to pay the costs of relocating the switch in perpetuity. *See* Lowrey Decl., ¶¶ 12, 15 and Exhibits N and P attached thereto. PSE normally would never agree to install such equipment in the rights-of-way in part because of the tremendous potential relocation liability. However, in those cases where placement on easement is unreasonably expensive or physically impossible, and if PSE can be assured that it has adequate clearances for its equipment, PSE is willing to place such equipment in the rights of way on the condition that PSE is not responsible for future relocation costs of such equipment. Logen Decl., ¶ 30. The alternative to such language is for PSE to refuse to install any switches or similar equipment in rights-of-way under any circumstances.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

**d. PSE's February 2001 filing in Docket No. UE-010168 is not evidence that PSE is seeking to impose new obligations on the cities**

136. The cities claim that PSE's February 2001 filing in Docket No. UE-010168 shows that "PSE desires a new scheme of rights, responsibilities, and cost allocation for undergrounding projects." Kent's Motion at 13. *See also* Cities' Motion at 9.

137. PSE was not seeking to institute a "new scheme of rights, responsibilities, and cost allocation" under Schedule 71, as the cities claim. All PSE desired when making its filing in UE-010168 was to clarify Schedule 71 to put an end once and for all to the increasingly aggressive attempts of cities such as the petitioners to force PSE's facilities off of private property and into public rights-of-way and to shift costs related to easement acquisition and future relocation costs from the cities to PSE, in violation of Schedule 71 and PSE's standards. Logen Decl., ¶ 38.

138. PSE withdrew the filing on the request of Staff and others, including the cities, that they have more time to review the filing. Logen Decl., ¶ 39 and Exhibit P. In the meantime, the petitioners filed the petitions in this proceeding.

**6. It is the cities, not PSE, who seek to change Schedule 71 and PSE's Underground Conversion Agreement**

139. The tendency for cities to seek greater control over PSE's system and to shift costs away from themselves and onto PSE is not new, and is an issue that PSE has at times had to address in the past. Among other things, PSE's project managers have had to be vigilant over the years to push back against cities' attempts to force PSE into the rights of way. *See* Logen Decl., ¶ 31; Zeller Decl., ¶¶ 3, 9-13, 16-17; Lowrey Decl., ¶ 18.

140. This proceeding marks the culmination of the cities' most recent attempts to increase their control over PSE's facilities and to obtain the benefits of underground electric distribution systems without having to face the



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

cost consequences of the decision to install, and therefor potentially relocate, such facilities. It is the cities, not PSE, who desire to institute a new regime for underground conversions. While the cities have won a few skirmishes in the past few years, managing to pressure some of PSE's project managers into installing more of PSE's facilities in rights-of-way than is appropriate under PSE's standards, PSE has effectively rallied and has insisted that it will not be threatened or pressured into performing underground conversions on the cities' terms, in violation of PSE's standards and the requirements of Schedule 71. *See* Logen Decl., ¶¶ 31-36, 38; Zeller Decl., ¶¶ 10-12, 16-17. Now that the cities realize that they cannot impose their will on PSE on this issue, they seek to convince the Commission it should order PSE to comply with their attempts to undercut Schedule 71.

141. The cities have also brought this matter to the Commission because, while property owners have often provided easements in the past for free or for minimal compensation, that may well be different for the Pacific Highway South projects. In addition, some recent relocations of PSE's underground facilities located on private easements have brought home to cities the tremendous costs that are involved in relocating underground facilities. *See* Logen Decl., ¶ 32; Lowrey Decl., ¶ 27; Copps Decl., ¶ 11; Zeller Decl., ¶ 8.

142. The Commission should reject the cities' cynical attempt to undermine Schedule 71 and PSE's standards based on the claim that PSE is somehow burdening them with new and unjustified obligations. As described above, PSE's Form Agreement is fully consistent with Schedule 71, and is also consistent with PSE's historical application of Schedule 71.

143. A clear decision from this Commission that PSE's Form Agreement is consistent with Schedule 71 and that Schedule 71 does not permit the cities to force PSE's facilities into public rights-of-way as part of underground conversions would also help head off future disputes between the cities and PSE. The Cities'



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

petitions make clear that they have every intention of forcing PSE entirely into the rights-of-way. For example, Mr. Roe claims that Federal Way "has no objection if PSE wishes to locate its facilities for these projects outside the rights-of-way on these projects *if permitted by the Federal Way Zoning Code*." Roe Decl., ¶ 14 (emphasis added). Federal Way is clearly positioning itself to seek to prevent PSE from locating its facilities on private property by invoking Federal Way's ordinances or any other means it can devise.

**7. PSE's requirement that cities reimburse PSE for the costs of obtaining easements as a condition of converting overhead facilities to underground does not violate the Washington Constitution.**

144. As described above, constitutional interpretation is not within the province of this Commission. Even if constitutional matters were properly before this Commission, there is nothing unconstitutional about Schedule 71 or PSE's requirement that if its facilities are to be converted from overhead to underground, those facilities be placed on private easements.

145. Article 8, Section 7 of the Washington Constitution states:

> 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….

Under this Section, there is a prohibition against gifting of public funds, and separate prohibition against lending of public credit. Each of these provisions has its own corresponding line of cases and applicable standard. *See Washington State Constitutional Limitations on Gifting of Funds to Private Enterprise: A Need for Reform*, 20 Seattle Univ. L. R. 199, 202-12 (1996). Here, the Cities have alleged that purchasing easements for PSE would be a gift of public funds. Cities' Motion at 15. Accordingly, the modern standard used in gifting of public funds cases applies. The Cities' citations to lending of credit cases and standards are irrelevant to this proceeding.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

146. The controlling standard with respect to the cities' purchase of easements is found in *General Telephone Co. v. City of Bothell*, 105 Wn.2d 579, 716 P.2d 879 (1986) ("*GTE v. Bothell*"), which is a gift of public funds case and which squarely addresses the factual situation at issue in this proceeding. The Washington Supreme Court has been using the donative intent/consideration standard set forth therein since at least 1986. *See* 20 Seattle Univ. L. R. at 209; *Adams v. Univ. of Wash.*, 106 Wn.2d 312, 722 P.2d 74 (1986); *King County v. Taxpayers of King County*, 133 Wn.2d 584, 597, 949 P.2d 1260 (1997); *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491, 507, 857 P.2d 283 (1993); *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 39, 785 P.2d 447 (1990); *Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 702, 743 P.2d 793 (1987).

147. In the past thirty-five years, the Washington Supreme Court has narrowed the scope of the constitutional prohibition against gifting of public funds such that very few transactions are found to be unconstitutional. *See* 20 Seattle Univ. L. R. at 201. Under the current standard, a governmental entity has violated the prohibition against giving gifts of public funds only when it has donative intent and does not receive consideration for the funds. *See King County*, 133 Wn.2d at 597; *Northlake Marine Works*, 70 Wn. App. at 507; *Citizens for Clean Air*, 114 Wn.2d at 39; *Taxpayers of Tacoma*, 108 Wn.2d at 702; *GTE v. Bothell*, 105 Wn.2d at 588. In *Taxpayers of Tacoma*, the Court explained the standard further, stating: "We use the donative intent element to determine how closely we scrutinize the sufficiency of the consideration, 'the key factor.'" *Taxpayers of Tacoma*, 108 Wn.2d at 703 (quoting *Adams*, 106 Wn.2d at 327). The Court has set the bar for finding donative intent very high. "The Washington State Supreme Court has never found donative intent and, thus, has never scrutinized the adequacy of the consideration exchanged." *See* 20 Seattle Univ. L. R. at 201.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

148. The Court applied the donative intent/consideration standard in *GTE v. Bothell*, where the Court squarely addressed the question of whether "a tariff that imposes undergrounding costs on a city result[s] in a gift of city funds in violation of Washington Const. art. 8, § 7." *Id.* at 588. The Court held that Bothell's payment to the utility for undergrounding did not violate the Constitution because it was merely paying "for services rendered, i.e., placing its facilities underground at the City's request. Consideration for the payment is present, and a donative intent is absent." *Id*.

149. Likewise, in the present case, the Cities cannot meet either prong of the standard. The Cities have not even attempted to make a showing that they have donative intent. In fact, their instigation of this proceeding in which they argue against having to reimburse PSE for any easements directly undermines their ability to make any such showing. Accordingly, the Commission should not undertake an in-depth analysis of the adequacy of the consideration provided by PSE, but rather should merely determine whether there is any consideration in exchange for the funds.[23] "Whether a contract is supported by consideration is a question of law and may be properly determined by a court on summary judgment." *King County*, 133 Wn.2d at 598 (quoting *Nationwide Mut. Fire Ins. Co.*, 120 Wn.2d at 195). Here, the consideration provided by PSE is: (1) that PSE will conduct work associated with the conversion, and (2) that PSE will agree to

---

[23] The Court has noted its reluctance to engage in an analysis of the adequacy of consideration. "We have been reluctant to engage in an in-depth analysis of the adequacy of consideration because such an analysis interferes unduly with governmental power to contract and would establish a 'burdensome precedent' of judicial interference with government decisionmaking." *King County*, 133 Wn.2d at 597. "Absent a showing of donative intent or gross inadequacy, trial courts should only apply a legal sufficiency test, under which a bargained-for act or forbearance is considered sufficient consideration." *Taxpayers of Tacoma*, 108 Wn.2d at 703 (quoting *Adams*, 106 Wn.2d at 327). "Legal sufficiency 'is concerned not with comparative value but with that which will support a promise.'" *King County*, 133 Wn.2d at 597.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

undertake the conversion in the first instance. Such consideration is legally sufficient.[24] Thus, PSE's requirement that cities provide and/or pay for easements for PSE's facilities does not violate the Washington Constitution.

150. The Cities have not proven either of the elements necessary to reach a conclusion to the contrary. In fact, the Cities have not even attempted to make a showing with respect to the two elements of the donative intent/consideration standard. Instead, the Cities confuse the analysis by applying a standard from a lending of credit case, *Washington State Housing Finance Comm'n v. O'Brien*, 100 Wn.2d 491, 671 P.2d 247 (1983). That case is not applicable here. First, *State Housing* is irrelevant to the analysis of an alleged unconstitutional gifting of public funds. The Court applied the "risk of loss" approach, which is concerned with the State maintaining safeguards over its assets, an analysis appropriate only to lending of credit cases. Second, *State Housing* was

---

[24] *Taxpayers of Tacoma*, also cited by the Cities, provides that "[w]here the public receives sufficient consideration, and benefit to an individual is only incidental to and in aid of the public benefit, no unconstitutional gift has occurred." *Id.*, 108 Wn.2d at 705. As the cities acknowledge, the Washington Legislature has recognized that any benefit to a utility resulting from undergrounding its facilities is incidental compared to the public benefit. Cities' Motion at 16; Kent's Motion at 13 n.8. Underground conversion "is in the public interest and is a public purpose, *notwithstanding any incidental private benefit* to any electric or communication utility affected by such conversion." RCW 35.96.010 (emphasis added).

RCW 35.96 *et seq.* provides further support for the proposition that there is nothing unconstitutional about providing whatever consideration is required by a utility in exchange for obtaining underground conversions of overhead facilities. That statute authorizes cities and towns to "contract with electric and communications utilities, as hereinafter provided, for the conversion of existing overhead electric and communication facilities to underground." RCW 35.96.030. The statute sets forth a non-exhaustive list of potential contract provisions, including "[f]or the payment to the electric and communications utilities for any work performed or services rendered by it in connection with the conversion project." RCW 35.96.040. Clearly, the Legislature contemplated that cities would pay public funds to utilities in exchange for underground conversions.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

decided prior to *GTE v. Bothell*, the case that is factually on point and that applies the correct standard.

151. Even if the Commission applied the "risk of loss" standard to the present case, the Cities have not shown that PSE's easement requirement violates the Washington Constitution. The Cities argue that if they were forced to give PSE easements on private property, they "would lose control over private utility easements." Cities' Motion at 16. This argument does not make sense. The Cities do not currently have control over private utility easements. Similarly, the Cities assertion that they "would be unable to insure the continued use of private easements for the public benefit," Cities' Motion at 17, has no merit. The Cities cannot lose something that they do not currently have, and they do not have the right to decide how private property will be used. Furthermore, it is this Commission, not the Cities, that has authority to ensure that PSE continues to operate its facilities pursuant to the public service laws, whether on public streets or on private easements.

152. The Cities also argue that if they were forced to give PSE easements on private property, "[t]he 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." Cities' Motion at 16. Again, the Cities cannot relinquish what they do not have. As described in Section III.B.4, above, and in Section III.D.1 below, the Cities do not have the right to "require PSE to relocate its facilities" without paying just compensation to PSE unless and until such facilities have been placed in the public rights-of-way. The Cities do not presently have that right with respect to the facilities at issue in this proceeding, which have not yet been installed anywhere.

153. The Cities' concerns regarding losing control of the areas near rights-of-way are also unfounded. First, PSE must abide by NESC standards, s*ee* WAC 296-45-045, and must install and operate its facilities in a "safe, adequate and efficient" manner. *See* RCW 80.28.010(2). Second, equipment located on



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

a private easements will necessarily be farther from the surface of the road than equipment located in the public rights-of-way. Accordingly, facilities in easements have a lesser likelihood of being hit by vehicles or pedestrians than facilities in rights-of-way.

154. Moreover, the Legislature has granted PSE the power of eminent domain to condemn space for its facilities on private property. *See* RCW 80.32.060. Clearly, PSE is not required to remain in public rights-of-way under the control of municipalities.

155. The Cities suggest that they may be held liable for PSE's placement of facilities on private easement and that they would lose the ability to limit this liability. Cities' Motion at 17. In support of this proposition, the Cities cite *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 558 P.2d 811. This case, however, does not discuss liability for facilities located on private easement. The alleged liability in that case arose out of a telephone pole that was located in the middle of the road. The Cities also contend that they "could be liable for damages if the development potential of adjacent private property were diminished by granting private easements to PSE." The Cities fail to cite any support for this proposition other than one of their declarations. This argument also makes little sense. The easements for which the Cities will reimburse PSE will not be granted by the cities but rather will be acquired from property owners voluntarily, even if the property owners ask for compensation for the easements. Property owners could not subsequently claim that they were damaged by granting such easements. Further, subsequent purchasers of the property will be on notice of the easements, because they are recorded.

156. Thus, even if the Commission were to apply the "risk of loss" approach to the present situation (instead of the donative intent/consideration standard, which applies to gifting of public funds cases), the Cities have not shown that PSE's application of Schedule 71 is unconstitutional.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

157. The Cities also erroneously direct the Commission to *Washington State Highway Comm. v. Pacific Northwest Bell Telephone Co.*, 59 Wn.2d 216, 367 P.2d 605 (1961), a case that is twenty-five years older than *GTE v. Bothell*, and not on point. In *Northwest Bell*, the Washington State Highway Commission ("WSHC") granted to several entities, including Northwest Bell, franchises that allowed the grantees to place their equipment on state rights-of-way, provided that the grantees would relocate their equipment "[w]henever necessary for the construction, repair, improvement, alteration or relocation of" the highway. *Id*. at 218. Subsequently, Congress passed the Federal Highway Act of 1956, creating an interstate highway defense system. *Id*. In response, Washington adopted resolution No. 896, which provided that no public or private utilities could occupy rights-of-way near highways that were part of the interstate highway defense system unless specifically authorized to do so in the resolution. *Id*. In accordance with the applicable franchises and the Washington resolution, the WSHC and the Director of Highways directed certain utilities, including Northwest Bell, to remove their equipment from rights-of-way that were too close to certain of the federal highways, at the utilities' expense.

158. Northwest Bell took the position that it was not required to pay for the required removal, relying on a Washington statute *enacted after the franchises were entered into and after the resolution was passed*, which provided that "notwithstanding any contrary provision of law or of any existing or future franchise held by a public utility," the WSHC would reimburse a utility most of the costs incurred in moving its facilities when the move was necessitated by the construction of certain federal highways. *Id*. at 219. The Court found that the utilities would be gratuitously benefited by the subsequently enacted statute, and held it to be unconstitutional.

159. Unlike the present situation, in *Northwest Bell*, the utilities were *required by state resolution* to remove their facilities and they were *required by their franchise* to pay for any relocations. Consequently, the



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

subsequently enacted statute was an unbargained for gift to the utilities. Here, PSE is not required under any statute or franchise to convert its overhead facilities to underground. Moreover, PSE's Tariff clearly protects PSE from absorbing the costs of obtaining easements required for any undergrounding. If the cities reimburse PSE for the costs of easements acquired to accommodate an underground conversion, such reimbursement constitutes an inducement to obtain PSE's agreement to convert its overhead facilities to underground. Thus, PSE is not gratuitously benefited by any such payment, and such payment does not violate the Washington Constitution.

**C. If Schedule 71 Applies to the SeaTac South 170th Street Conversion, SeaTac Must Pay 70% of the Costs of the Conversion for the Proportion of the Existing Poles That Would Be Located More Than Six Inches from the Street Side of the New Curb**

160. Schedule 71 provides that a municipality must pay 70% of the total cost of a conversion,

> or, 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, pay the Company 30% of the cost of the conversion project, excluding trenching and restoration.

Schedule 71, § 3.b.(1) (emphasis added). There is no dispute in this case that SeaTac is adding "one full lane" to South 170th Street. Stipulated Fact No. 20. The question at issue is whether PSE's existing poles are "required to be relocated due to" that lane addition, within the meaning of Schedule 71.

161. In an attempt to answer commonly asked questions and to ensure that its project managers were applying Schedule 71 consistently to conversion projects, PSE issued Rate Schedule Interpretation ("RSI") E-71-3. Logen Decl. ¶¶ 48-49, and Stipulated Exhibit 21 (attached thereto). RSI E-71-3 directly addresses the question that is before this Commission:



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

Q. What does the following mean: "the Company's overhead system is required to be relocated due to the addition of one full lane or more?"

Stipulated Exhibit 21 at 3. PSE's answer is as follows:

A. This means that the existing poles of the overhead system will be in the driven surface of the proposed road improvements or less than six (6) inches from the street side of the curb. (WAC 296-45-045 and NESC 231.B). If the poles will be in the sidewalk or planting strip (more than six (6) inches from the street side of the curb) they are not considered as meeting this requirement and the customer pays 70% even if the road is being widened by one full lane.

*Id.* RSI E-71-3 also addresses the question: "What if…only some of the poles must be relocated due to the addition of one full lane."

A. When one full lane is added but some poles don't have to be relocated, the customer pays 30% of the cost of conversion to underground poles that must be relocated and 70% of the cost of conversion of all other poles. For example, if there are 6 poles within the Conversion Area and 2 of the poles must be relocated and 4 poles are not required to be relocated, the customer pays 30% of 2/6 (or 1/3) of the actual cost of the conversion plus 70% of 4/6 (or 2/3) of the actual cost of the conversion.

*Id.*

162. It is undisputed that 2 of the 8 existing poles in the conversion area will be located in the driven surface of SeaTac's road improvement or within six inches of the street side of the curb. Stipulated Fact No. 19. PSE agrees that SeaTac must pay only 30% of the cost of conversion for the proportion of the conversion represented by those two poles (2 of 8, or ¼). Stipulated Fact No. 17. However, it is also undisputed that 6 of the 8 existing poles in the conversion area will be located more than six inches from the street side of the curb. Stipulated Fact No. 19. Those poles are not "required to be relocated due to" the additional lane within the meaning of Schedule 71, thus SeaTac must pay 70% of the



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

proportion of the conversion represented by those six poles (6 of 8, or ¾).[25]

163. The Cities argue that PSE's interpretation of Schedule 71 "is purely arbitrary and unfounded." Cities' Motion at 36. That is incorrect. As PSE's Rate Schedule Interpretation shows, PSE's interpretation is based on WAC 296-45-045 and NESC (National Electric Safety Code) 231.B. WAC 296-45-045 provides that electric utilities operating in the State of Washington "must design, construct, operate, and maintain their lines and equipment according to the requirements of the 1997 National Electrical Safety Code (NESC)." The NESC provides for the following "Clearances of Supporting Structures From Other Objects":

> B. From Streets, Roads, and Highways
>
> 1. Where there are curbs: supporting structures, support arms, or equipment attached thereto, up to 4.6m (15 ft) above the road surface shall be located a sufficient distance from the street side of the curbs to avoid contact by ordinary vehicles using and located on the traveled way. *In no case shall such distance be less than 150mm (6 in).*

NESC 231.B (1997) (emphasis added), Stipulated Exhibit No. 22 (attached to Logen Decl.). *See also* Logen Decl., ¶ 51.

164. SeaTac argues that it was required to pay only 30% of the entire cost of Phase I of the South 170th Street Project, although some poles would have been left "located in the center of the sidewalk." Cities' Motion at 37. While that may be correct, Phase I of South 170th Street was completed in September 1999. PSE's RSI E-71-3 only became effective on July 15, 2000. *See*

---

[25] Mr. Gut claims that SeaTac "finally agreed to execute an agreement containing the objectionable terms" to avoid delays to its project. In fact, the parties executed an interim agreement that attached three alternative Underground Conversion Agreements. The question of which agreement the parties will execute depends on the outcome of this proceeding and the Schedule 70 proceeding. *See* Logen Decl., ¶ 55 and Exhibit Q.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

Logen Decl., ¶ 52 and Stipulated Exhibit 21. The point of PSE's RSI E-71-3 is to ensure that Schedule 71 is applied in a consistent manner to all projects based on objective criteria. Once RSI E-71-3 was issued, PSE was required to apply it to all entities requesting conversions. Logen Decl., ¶¶ 48-49.

165. Contrary to the Cities' argument, PSE does not "rest" its interpretation of Schedule 71 "on the assumption that 'relocated' means aerial relocation." Cities' Motion at 37. PSE's interpretation rests on the plain terms of Schedule 71, which permit a city to pay 30% of the costs of a conversion only if the existing facilities are "*required* to be relocated *due to*" the addition of a lane. PSE has sought to standardize the application of this language across all conversions by setting a clear, objective standard that is based on the NESC. Clearly, under the NESC, existing poles must be relocated if they are within six inches of the street side of the new curb after a lane is added. PSE's use of the NESC standard to interpret and apply its Tariff has nothing to do with any "assumptions" about aerial relocation.[26]

166. PSE's position on the Schedule 71, Section 3 trigger for 30% payment also has nothing to do with any claim that PSE, rather than Cities, has "the right to manage the public rights-of-way" or to determine "when relocation of utility facilities is in the public interest." Cities' Motion at 38. SeaTac is free to decide whether it wants any or all of the poles along South 170th Street to be relocated and to require PSE to pay the costs of such relocation, so long as that decision is consistent with proper exercise of SeaTac's police powers and its franchise with PSE. PSE has not refused to relocate its poles along South 170th Street. SeaTac has not requested that PSE perform a franchise relocation of the poles. Logen Decl., ¶ 55.

---

[26] In advancing this argument, the Cities continue their efforts to blur the distinction between relocation of facilities on the one hand, and conversion of overhead facilities to underground on the other.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

167. Instead, SeaTac has requested that PSE convert its poles and overhead facilities to underground. The question before the Commission is not whether the poles will remain in the sidewalk or not, but whether Schedule 71 requires SeaTac to pay 30% or 70% of the costs of the underground conversion, or 30% or 70% of some proportion of the costs. The answer to that question turns on whether any or all of the existing poles are "*required* to be relocated *due to* addition of" a lane, *within the meaning of Schedule 71*. It is misleading and untrue for the Cities to argue that the issue of *how much SeaTac must pay* to obtain *underground conversion* of PSE's existing overhead facilities somehow impinges on its police powers to determine whether a pole should be relocated or not.

168. The Cities claim that PSE's interpretation of Section 3 is based only on "financial motives." Cities' Motion at 38. Obviously, there are serious cost consequences to PSE and to the Cities depending on the interpretation and application of Schedule 71 that is upheld by this Commission. There is nothing improper about this, nor is there anything improper about PSE being aware of cost considerations in interpreting and applying its Tariff.

169. Beyond financial considerations, however, PSE has good reason to set an objective standard by which to determine when the Section 3, 30% cost sharing obligation is triggered. Schedule 71 is not an easy schedule for project managers to apply because of the number of conditions and triggering factors of its various sections and because underground conversions present a myriad of facts that must be sorted through to determine whether Schedule 71 applies and, if so, whether the requester is to pay 30% or 70% of the costs of the conversion. PSE's RSI E-71-3 demonstrates the number and variety of issues that have come up and the types of questions that are raised when evaluating conversions. *See* Logen Decl., ¶¶ 48-49. Setting an objective standard for measuring when poles are "required to be relocated due to" addition of a lane assists in PSE's efforts to apply Schedule



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

71 consistently to all customers and avoid discrimination claims. *See id*., ¶ 50.

170. In that regard, SeaTac states that it has adopted King County Road Standards (1993), which requires that poles shall be placed five and one-half feet from the curb face. Cities' Motion at 38. SeaTac is free to adopt that standard to determine when it would like to have poles moved in conjunction with a road improvement, but it cannot force PSE to adopt the same standard for determining Schedule 71's cost allocations. PSE's six inch standard is based on the NESC, which PSE is required to follow, and is an objective, appropriate standard for applying Section 3.b(1) of Schedule 71. Logen Decl., ¶ 51.

**D. Federal Way Must Pay 100% of the Cost of the South 320th Street Conversion**

**1. PSE's facilities along South 320th Street are located on PSE easements, and thus are not subject to Schedule 71.**

171. As the Cities acknowledge, PSE's existing overhead facilities along South 320th Street from 20th Avenue South to 25th Avenue South are located on PSE easements, not in the rights-of-way. Federal Way's street improvements will not encroach into PSE's easement areas. Cities' Motion at 5, 27; Stipulated Fact No. 13; Lowrey Decl., ¶ 32.

172. PSE historically has interpreted Schedule 71 (as well as Schedule 70) to apply only to conversions of PSE's overhead facilities that are located in public rights-of-way, and not to facilities that are located on private property and/or PSE easements. Where PSE's existing overhead facilities are located on private property and/or PSE easement, PSE generally has been willing to convert the facilities to underground, but requires the requester to pay 100% of the costs of the conversion. Logen Decl., ¶ 45.

173. PSE's position on this issue complies with its Tariff. Schedule 71 speaks in terms of *public* streets:



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

> [T]he 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.

Schedule 71, § 2 (emphasis added).[27] The facilities along South 320th are not located on any public street.

174. There is good reason for Schedules 70 and 71 to speak in terms of "public thoroughfares" and "public streets," and for PSE's historical understanding that Schedules 70 and 71 apply only to facilities located in rights-of-way, and not on private property. Where PSE's facilities are located on private property on PSE easements or by prescriptive right, PSE cannot be ordered by the owner of the underlying private property to do anything with its facilities. *See, e.g., City of Seattle v. Nazarenus*, 60 Wn.2d 657, 665-66, 374 P.2d 1014 (1962) (owner of easement has the right to use the property subject to the easements for the purposes stated in the easement); *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942) (a prescriptive right, once acquired, is fixed by the extent of the use and may not be disturbed by the owner of the servient estate). Thus, as against property owners, PSE has and always has had a right to leave its existing overhead facilities on private property in place.

175. Likewise, municipalities do not have authority to require PSE to convert its overhead facilities that are located on private property to underground without just compensation.

---

[27] Similarly, Schedule 70 requires

> 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).



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

*See, e.g., In re Pub. Serv. Elec. & Gas Co.*, 173 A.2d 233, 240 (N.J. 1961) (invalidating municipal ordinance requiring the undergrounding of wires over a private railroad right-of-way); *Duquesne Light Co. v. Monroeville*, 298 A.2d 252 (Pa. 1972) (statute giving boroughs the power to define a reasonable district within which wires shall be placed underground did not confer upon a borough the power to compel undergrounding of a public utility's wires); *Union Elec. Co. v. Crestwood*, 499 S.W.2d 480 (Mo. 1973) (city ordinance prohibiting all overhead transmission, whether on public or private property, struck down). "[W]here relocation of electrical wiring on private property to underground conduits is required, a compensable 'taking' under the power of eminent domain will be deemed to have occurred." McQuillin Mun. Corp. § 24.588 at 313 (3d Ed. 1998).

176. By contrast, municipalities have long been held to have authority to require at least some undergrounding on public streets. *See Edmonds v. Gen. Tel. Co.*, 21 Wn. App. 218, 226, 584 P.2d 458 (1978) (distinguishing cases that have struck down undergrounding ordinances because: "In the instant case, the ordinance in question is not a general ordinance affecting all overhead facilities of the company located on both public and private property . . .. Rather, its effect is limited to one public street . . .."); *Union Elec. Co.*, 499 S.W.2d at 484 (authority may be found to justify an ordinance prohibiting overhead wires which affected only public streets). *See also* Section III.B.4, *supra*.

177. Thus, Schedules 70 and 71 were intended to set the terms and conditions for the undergrounding of PSE's facilities that could potentially be subjected to mandatory undergrounding: the facilities located in rights-of-way. By filing Schedules 70 and 71, PSE ensured that municipalities or property owners requesting (and potentially ordering) undergrounding of PSE's facilities located on public streets and thoroughfares would share in the costs of such undergrounding, rather than requiring PSE to



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

convert its facilities at PSE's expense, and would provide adequate operating rights for the new underground facilities. PSE also limited the circumstances in which undergrounding on rights of way would be made available. There was no need for PSE to file any tariff schedule with respect to its facilities on private property because PSE could, in its sole discretion, decide whether or not to convert to underground at all, and on what terms. Schedule 71 must be interpreted to take into account the context of the overall scheme of property rights and municipal powers that related to the placement and continued operation of PSE's facilities. *See, e.g., Cockle v. Dep't of Labor and Indus.*, 142 Wn.2d 801, 810-13, 16 P.3d 583 (2001).

178. To interpret Schedule 71 to apply to PSE's facilities located on private property in Federal Way would be contrary to the Tariff language, which speaks in terms of "public streets," would violate PSE's property rights, and would ignore the historical and legal context in which the schedules were filed by PSE and approved by the Commission.

**2. PSE's facilities along 23rd Avenue South span less than two city blocks.**

179. The Cities claim that PSE is "attempting to 'piecemeal' the project," by insisting that the short stretch of overhead facilities along 23rd Avenue South does not qualify for conversion under Schedule 71. Cities' Motion at 5.

180. If an entity requests undergrounding of overhead facilities, PSE looks to see which tariff schedule applies to the conversion, if any. At times, a project may be subject to more than one schedule, or portions of the project may meet Tariff requirements, while others do not. Logen Decl., ¶ 46. For example, as described in the Schedule 70 proceedings that are before the Commission in Docket Nos. UE-010981 and UE-011027, in conversion areas containing both single-phase and three-phase systems, PSE has converted the single-phase portion of the system to underground under Schedule



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

70 and the three-phase portion of the system to underground under Schedule 71. Thus, an applicant may obtain the benefit of Schedule 70 for portions of a project that are single phase, while PSE preserves the distinctions in Schedule 70 and 71 that permit PSE to better recover the additional costs involved in conversions of three-phase feeder to underground.

181. On the other hand, the manner in which the Tariff applies or does not apply to different aspects of a project may result in portions of a project not being eligible for conversion under Schedule 71. That is the case with respect to the Federal Way South 320th Street/23rd Avenue South conversion. If PSE's overhead facilities located on easements on 320th Street were subject to Schedule 71 relocation, then PSE would permit the conversion of the 23rd Avenue South facilities under Schedule 71 because the facilities essentially "turn the corner," and are part of the same physical stretch of facilities. However, because Schedule 71 does not apply to the South 320th Street facilities, the 23rd Avenue South facilities must be considered on their own to determine whether they are eligible for conversion under Schedule 71. Logen Decl., ¶ 46.

182. In order for Schedule 71 to apply,

> the Conversion Area must be not less than two (2) contiguous city blocks in length.

Schedule 71, § 2. The Cities concede that the facilities to be converted in Federal Way are no longer than 300-feet in length. Cities' Motion at 5. In fact, the facilities are even shorter than that, and they span less than one city block. Logen Decl., ¶ 46; Lowrey Decl., ¶¶ 33-34.

183. PSE is willing to convert all of these facilities to underground, but only if Federal Way pays 100% of the costs of the conversion.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

## IV. CONCLUSION

184. For the reasons set forth above, PSE respectfully requests that the Commission grant PSE's motion for summary determination and issue an order declaring that:

a. Schedule 71 does not permit the cities to force PSE's facilities into public rights-of-way during underground conversions. Schedule 71 leaves to PSE's judgment the question of which facilities associated with PSE's underground system may be installed in public rights-of-way, and which facilities must be installed on private property. PSE's requirement that underground facilities (other than cable and conduit) and pad-mounted facilities, such as vaults for junctions, vaults for pulling cable, transformers and associated vaults, and switches and associated vaults, be placed on private property within easements that are in PSE's standard form is consistent with Schedule 71;

b. Section 4 of Schedule 71 does not directly obligate the cities to obtain easements for PSE or to reimburse PSE for the costs of obtaining the easements that PSE requires under Section 4 of Schedule 71. However, pursuant to Sections 4 and 8 of Schedule 71 and Schedule 80, PSE is not obligated to perform an underground conversion until the easements PSE requires are provided. If the cities refuse to agree to obtain such easements for PSE or to agree to reimburse PSE in the event that PSE agrees to obtain the easements and property owners demand payment for such easements, PSE is not obligated to convert its facilities from overhead to underground under Schedule 71;



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

c. PSE's requirement that cities agree to pay for future relocations of PSE's facilities as a condition of installing underground facilities in the public rights-of-way rather than on private property is consistent with Schedule 71;

d. The sections of PSE's current form Underground Conversion Agreement and Engineering Agreement related to operating rights and future relocations of PSE's underground facilities are consistent with Schedule 71;

e. For Phase II of SeaTac's South 170th Street project, SeaTac must pay 30% of the ¼ of the costs of the conversion and 70% of ¾of the costs of the conversion; and

f. Schedule 71 applies only to conversion of overhead facilities that are located in public rights-of-way, and not on private easement. Thus, Federal Way must pay 100% of the costs of the conversion of PSE's facilities on South 320th Street. Federal Way must also pay 100% of the costs of the conversion of PSE's facilities on 23rd Avenue South because the facilities span less than two blocks.

DATED: September ___, 2001.

**PERKINS COIE LLP**

By _____
Kirstin S. Dodge
William R. Bue
Attorneys for Puget Sound Energy, Inc.



PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document, along with the Declaration of Lynn Logen, Declaration of Greg Zeller, Declaration of Mike Copps, Declaration of Andy Lowrey, and Declaration of Doug Corbin, upon all parties of record in this proceeding by legal messenger to:

Carol S. Arnold
Laura K. Clinton
Preston Gates & Ellis, LLP
701 Fifth Avenue, Suite 5000
Seattle, WA 98104-7078

Mary M. Tennyson
Senior Assistant Attorney General
1400 S. Evergreen Park Drive, S.W.
P.O. Box 40128
Olympia, WA 98504-0128

Michael Charneski
19812 194th Avenue N.W.
Woodinville, WA 98072

Simon ffitch
Office of the Attorney General
Public Counsel
900 - 4th Avenue, Suite 2000
Seattle, WA 98164

Dennis J. Moss
Administrative Law Judge
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
Olympia, WA 98504-7250

PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980

Dated at _____, Washington, this _____ day of _____, 2001.

_____
Pam Iverson

PERKINS COIE LLP
One Bellevue Center, Suite 1800
411 - 108th Avenue Northeast
Bellevue, WA 98004-5584
(425) 453-6980