BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

CITY OF SEATAC, Petitioner, v. PUGET SOUND ENERGY, INC. Respondent. ……	)	DOCKET NO. UE-010891
CITY OF CLYDE HILL, Petitioner, v. PUGET SOUND ENERGY, INC. Respondent. ……	)	DOCKET NO. UE-011027 THIRD SUPPLEMENTAL ORDER: DECLARATORY ORDER ON MOTIONS FOR SUMMARY DETERMINATION

SYNOPSIS: *The Commission interprets Puget Sound Energy, Inc.'s tariff Schedules 70 and 71, and determines the applicability of the two schedules to portions of underground relocation projects in the cities of SeaTac and Clyde Hill.*

1 **PROCEEDINGS:** Docket No. UE-010891 concerns a Complaint and Petition for Declaratory Relief filed by the City of SeaTac on June 19, 2001. Docket No. UE-011027 concerns a Complaint and Petition for Declaratory Relief filed by the City of Clyde Hill on July 18, 2001. The complaints request that the Commission enter a declaratory order, or orders, establishing the respective rights and obligations of the cities and Puget Sound Energy, Inc. (PSE) in connection with PSE's administration of its tariffs that provide for the conversion of overhead electric distribution systems to underground systems under Electric Tariff G, Schedules 70 and 71. The Commission consolidated Docket Nos. UE-010891 and UE-011027 by order entered on July 30, 2001.

2 The Parties requested that the Commission resolve these matters on a paper record including certain stipulated facts. SeaTac and Clyde Hill filed their respective Motions for Summary Determination by August 13, 2001, as required under the procedural schedule. PSE filed its Response and Cross-Motion for Summary Determination on August 24, 2001. SeaTac and Clyde Hill filed their respective Replies on August 31, 2001.

3 **PARTIES:** Carol S. Arnold and Laura K. Clinton, Preston Gates Ellis, LLP, Seattle, Washington, represent the City of SeaTac. John D. Wallace, City Attorney, Clyde Hill, Washington, and Greg A. Rubstello, Ogden Murphy Wallace, P.L.L.C. represent the City of Clyde Hill. Kirsten Dodge and Bill Bue, Perkins Coie, LLP, Bellevue, Washington, represent Puget Sound Energy. Mary Tennyson, Senior Assistant Attorney General, Olympia, Washington, represents Commission Staff.

4 **COMMISSION:** The Commission denies the City of SeaTac's Motion for Summary Determination on its Complaint and Petition for Declaratory Judgment. The Commission denies Clyde Hill's Motion for Summary Determination on its Complaint and Petition for Declaratory Judgment. The Commission grants PSE's Cross-Motion for Summary Determination.

MEMORANDUM

I. Background and Procedural History

5 The City of SeaTac filed a Complaint and Petition for Declaratory Relief on June 19, 2001, initiating Docket No. UE-010891. SeaTac's pleading raised issues concerning the interpretation and application of PSE's tariff Schedules 70 and 71, which concern the conversion of overhead distribution facilities to underground facilities in residential and commercial areas in municipalities. PSE filed its Answer to SeaTac's Complaint and Petition on June 29, 2001. Later, on July 18, 2001, following certain process described below, the City of Clyde Hill filed a Complaint and Petition for Declaratory relief that raised issues factually and legally similar to those raised by SeaTac. The Clyde Hill matter was docketed under No. UE-011027. Generally, the Parties dispute the scope of PSE's and the cities' respective rights and obligations in connection with the conversion of certain overhead electric distribution facilities to underground facilities.

6 The Commission convened a joint prehearing conference in the SeaTac docket (*i.e.*, No. UE-010891), and in somewhat related proceedings in Docket Nos. UE-010778 and UE-010911, on April 23, 2001, in Olympia, Washington, before Administrative Law Judge Dennis J. Moss. Based on discussions at the prehearing conference, the Commission found that the pleadings in Docket Nos. UE-010778 and UE-010911 presented common issues of fact and law, and consolidated the two dockets. The Commission's resolution of the issues in Docket Nos. UE-010778 and UE-010911 (consolidated) is the subject of a separate order entered today.

7 The City of Clyde Hill initially sought to press its case via intervention in Docket No. UE-010891. It became apparent at the prehearing conference, however, that Clyde Hill should file its own pleading for separate docketing, even though it was also apparent that any such docket likely would be consolidated with Docket No. UE-010891. As noted above, Clyde Hill did file its own Complaint and Petition for Declaratory Relief in Docket No. UE-011027, and the matter was consolidated with Docket No. UE-010891.

8 Discussion at the prehearing conference also suggested that Docket Nos. UE-010891 and UE-011027 (consolidated) might be amenable to resolution on stipulated facts and cross-motions for summary determination pursuant to WAC 480-09-426. Accordingly, a schedule was set for such process. On August 2, 2001, the Parties filed their Joint Statement of Issues, Stipulations of Fact, and Stipulated Exhibit List. On August 13, 2001, SeaTac and Clyde Hill filed their respective Motions for Summary Determination. PSE filed its Response to Motions for Summary Determination and Cross Motion for Summary Determination on August 24, 2001. SeaTac filed its Reply on August 31, 2002, and Clyde Hill filed its Reply on September 4, 2001. The Commission heard oral argument on October 11, 2001.

II. Discussion and Decision

A. Governing Statutes, Rules, and Tariffs

9 Schedules 70 and 71 of PSE's Electric Tariff G are attached as Appendices A and B to this Order.

10 The following statutes and rules are most central to our consideration of the matters raised by the Parties' pleadings and motions:

RCW 80.01.040 General Powers and Duties of Commission.

The utilities and transportation commission shall:

* * *

(3) Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities; including, but not limited to, electrical companies . . . .

80.28.010 Duties as to rates, services, and facilities . . . .

(1) All charges made, demanded or received by any . . . electrical company . . . for . . . electricity . . . , or for any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient.

(2) Every . . . electrical company . . . shall furnish and supply such service, instrumentalities and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable.

(3) All rules and regulations issued by any . . . electrical company . . . affecting or pertaining to the sale or distribution of its product, shall be just and reasonable.

80.28.020 Commission to fix just, reasonable, and compensatory rates.

Whenever the commission shall find, after a hearing had upon its own motion, or upon complaint, that the rates or charges demanded, exacted, charged or collected by any . . . electrical company . . . for . . . electricity . . ., or in connection therewith, or that the rules, regulations, practices or contracts affecting such rates or charges are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of the law, or that such rates or charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall

determine the just, reasonable, or sufficient rates, charges, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order.

80. 28.080 Published rates to be charged—Exceptions.

No . . . electrical company . . ., shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such service as specified in its schedule filed and in effect at the time . . .

No . . . electrical company . . . shall extend to any person or corporation any form of contract or agreement or any rule or regulation or any privilege or facility except such as are regularly and uniformly extended to all persons and corporations under like circumstances.

80.28.90 Unreasonable preference prohibited.

No . . . electrical company . . . shall make or grant any undue or unreasonable preference or advantage to any person, corporation, or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

80.28.100 Rate discrimination prohibited—Exception.

No . . . electrical company . . . shall, directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for . . . any service rendered or to be rendered, or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like or contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

11 RCW 34.05.413 establishes our authority to conduct adjudicatory proceedings. RCW 34.05.240 and WAC 480-09-230 establish our authority to enter declaratory orders and establish certain process related to our consideration of petitions for such relief.

12 WAC 480-09-426 provides that parties to an adjudication may file motions for summary determination. 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.* The civil rules provide:

> 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). A material fact is one of such nature that it affects the outcome of the litigation. *Greater Harbor 2000 v. Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997).

B. Legal Standards and Analytical Framework.

13 Filed and approved tariffs such as Schedules 70 and 71 have the force and effect of state law. *General Tel. Co. v. City of Bothell,* 105 Wn.2d 579, 585 (1986). When, as here, parties dispute what particular provisions require, we must look first to the plain meaning of the tariff. *Nat'l Union Ins. Co. v. Puget Power,* 94 Wn. App. 163, 171, 972 P.2d 481 (1999). If the tariff language is plain and unambiguous, there is no need to resort to rules of construction. *Whatcom County v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996); *Food Servs. Of Am. v. Royal Heights, Inc.*, 123 Wn.2d 779, 784-85, 871 P.2d 590 (1994); *Waste Management of Seattle v. Utilities & Transp. Comm'n*, 123 Wn. 2d 621, 629, 869 P.2d 1034 (1994); *Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). If the tariff language is not plain, or is ambiguous, the Commission may examine the legislative history and other evidence to determine the meaning

of the tariff and how it should be applied to the facts at hand. In interpreting an ambiguous tariff the Commission is like a court interpreting an ambiguous statute. As the Court says in *Whatcom County*:

> If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences. The purpose of an enactment should prevail over express but inept wording. The court must give effect to legislative intent determined 'within the context of the entire statute.' Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. The meaning of a particular word in a statute 'is not gleaned from that word alone, because our purpose is to ascertain legislative intent of the statute as a whole.'

128 Wn.2d at 546 (citations omitted); *see City of Seattle v. Dept of L&I*, 136 Wn.2d 693, 701, 965 P.2d 619 (1998).

C. Substantive Issues

14 The central issue in this consolidated proceeding is whether PSE's schedule 70 (governing the conversion of overhead facilities to underground facilities in residential areas) or Schedule 71 (governing conversion of overhead facilities to underground facilities in commercial and certain other areas) applies to all or portions of certain projects planned or underway in the respective cities. The material facts are undisputed.

1. Stipulated Facts Related to SeaTac.

15 SeaTac and PSE stipulated to the following facts in their Joint Statement of Issues, Stipulations of Fact, and Stipulated Exhibit List filed on August 2, 2001:

a. The City of SeaTac ("SeaTac") has requested and PSE has agreed to convert its overhead facilities along South 170th Street between 37th Avenue South and Military Road South (the "SeaTac Conversion Area") to underground.

b. SeaTac claims that PSE should undertake the conversion under the terms of Schedule 70, while PSE claims that Schedule 71 applies to the conversion.

c. South 170th Street is a collector arterial that provides access between Military Road South and International Boulevard (Highway 99), as well as SeaTac Airport. International Boulevard and SeaTac Airport are commercial areas. The buildings currently located within the SeaTac Conversion Area are residential dwellings.

d. Stipulated Exhibit A is a true and correct copy of the aerial photograph identified as "South 170th Street Phase 2 Improvements Project Area."

e. Stipulated Exhibit B is a true and correct copy of the map identified as "City of SeaTac Zoning."

f. Stipulated Exhibit C is a true and correct copy of the map identified as "City of SeaTac Comprehensive Plan."

g. PSE's existing overhead distribution system in the SeaTac Conversion Area is a three-phase feeder system, not a single-phase system. The service lines from the distribution system are single-phase.

2. Stipulated Facts Relating to Clyde Hill:

16 Clyde Hill and PSE stipulated to the following facts in their Joint Statement of Issues, Stipulations of Fact, and Stipulated Exhibit List filed on August 2, 2001:

a. The City of Clyde Hill ("Clyde Hill") has requested that PSE convert its overhead facilities to underground along 92nd Avenue N.E. between approximately N.E. 13th Street and N.E. 20th Street, along N.E. 13th Street from 92nd Avenue N.E. eastward to the end of N.E. 13th Street, along N.E. 19th Street from 92nd Avenue N.E. to 94th Avenue N.E., along N.E. 20th Street from just west of 92nd Avenue N.E. to 96th Avenue N.E., along 94th Avenue N.E. from N.E. 19th Street to approximately N.E. 21st Street, and along private drives and through private property running east of and perpendicular to 92nd Avenue N.E. and west of and perpendicular to 94th Avenue N.E. ("Clyde Hill Project"). Stipulated Exhibit D shows the details of the locations of facilities that Clyde Hill wishes to convert to underground.

b. PSE has agreed that facilities in the following conversion areas within the Clyde Hill Project should be performed under Schedule 70: N.E. 13th Street from 92nd Avenue N.E. eastward to the end of N.E. 13th Street, N.E. 20th Street from just west of 92nd Avenue N.E. to 96th Avenue N.E., and along 94th Avenue N.E. from N.E. 19th Street to approximately N.E. 21st Street. See Exhibit D, pink highlighting. PSE's existing overhead facilities in these areas are a single-phase system.

c. PSE claims that facilities in the following conversion area should be performed under Schedule 71: along 92nd Avenue N.E. between approximately N.E. 13th Street and N.E. 20th Street. See Exhibit D, yellow highlighting. PSE's existing overhead facilities along 92nd Avenue N.E. are a three-phase feeder system, not a single-phase system.

d. PSE claims that facilities in the following conversion areas are not subject to either Schedule 70 or Schedule 71, and should be converted only if Clyde Hill pays 100% of the actual costs of the conversion: along private drives and through private property running east of and perpendicular to 92nd Avenue N.E. and west of and perpendicular to 94th Avenue N.E. See Exhibit D, green highlighting. PSE's existing overhead facilities in these areas are located on PSE easements, or by invitation of the property owner, and there is no public thoroughfare in these areas. Clyde Hill claims that Schedule 70 is applicable to these facilities.

e. Clyde Hill consists of approximately 2,900 residents and 1,100 households. There are two commercially developed lots within the corporate limits of the City and certain public and private schools and churches and city buildings, all of which are located outside the conversion area and LID boundary and receive electrical service from service lines outside of the conversion area and LID boundary. The commercially developed lots contain a gas station/convenience store and a Tully’s Coffee shop.

f. The Clyde Hill Project arose after a neighborhood of about 100 homes in a contiguous location petitioned the City Council to form a local improvement district (LID) for the purpose of burying the utility lines and installing street lighting in the neighborhood.

g. The City paid PSE $4,000.00 for developing a set of preliminary design plans.

h. On June 22, 2000, PSE provided to Clyde Hill PSE's estimate of the costs of the conversion for the Clyde Hill Project based on PSE's assertion of the application of Schedules 70 and 71, as described above. Stipulated Exhibit E is a true and correct copy of PSE's Project Estimate for Clyde Hill dated June 22, 2000. Clyde Hill advised PSE that it disagreed with PSE's position, and that it felt that Schedule 70 applied to the entire Project.

i. Approximately one year later, on June 12, 2001, after a public hearing, the City Council passed Ordinance No. 836 (Stipulated Exhibit F) creating the Local Improvement District No. 2001-01 for the conversion of overhead to underground facilities and ordering "the making of certain improvements consisting of the undergrounding of overhead lines as described in the property owners' petition therefore, to include such proper appurtenances, if any, as may be determined by the Council."

j. The total area within the boundary of the LID is zoned R1 Residential and is developed with single family residential structures. Stipulated Exhibit G is a true and correct copy of the City map depicting the zoning of the LID and boundary.

k. The buildings currently located within the Clyde Hill Project are all residential dwellings.

l. The electrical distribution lines proposed to be converted to underground in the LID are 15,000 volts or less.

3. Commission Analysis and Decision.

a. Which rate schedule applies to three-phase lines running through residential areas?

17 The cities argue that Schedule 70 is unambiguous and applies to the facts by its plain terms. They focus on the residential character of the land-use on property adjacent to the roadways as the sole criterion by which the Commission should define the clause "in areas which are zoned and used exclusively for residential purposes." Since there is no dispute that the land-use within the area where undergrounding is to occur is residential, the cities argue it follows that Schedule 70 applies.

18 In a similar vein, the cities argue that Schedule 71 does not apply because the residential character of the land-use adjacent to the undergrounding project means the project does not meet the Schedule 71 criterion: "areas of such municipalities which have electrical load requirements which are comparable with developed commercial areas."

19 PSE argues that the tariff contemplates looking beyond the land-use in the Conversion Area to determine whether there is "exclusive" residential use. PSE argues that the character of the infrastructure (both the roadway and the electric system) also is a key criterion. Thus, PSE argues that because the roads are arterial collectors, which connect commercial areas that require three-phase power, and because the facilities are a three-phase distribution backbone system that runs along those roadways, the areas in question are not "used <u>exclusively</u> for residential purposes."

20 PSE also argues that the tariff language is ambiguous, and that it is appropriate to look beyond the words to the legislative history. The "legislative history" PSE focuses on is the evidence and analysis that were used to determine the current rates and charges, which were based on the cost of undergrounding single-phase facilities, and which expressly excluded the significantly higher cost of undergrounding three-phase facilities. PSE urges us to infer from this history that Schedule 70 does not and was never meant to apply to the undergrounding of three-phase distribution systems.

21 PSE argues that Schedule 71 applies because the engineering characteristics of the distribution system along these roadways are dictated by the existence of

commercial electric load requirements (*i.e.,* three-phase power) at one or both ends of the arterial collector roadways. Thus, PSE argues, the project falls within the scope of Schedule 71's "areas of such municipalities which have electrical load requirements which are comparable with developed commercial areas." PSE contends that it does not matter whether the commercial areas served by the three-phase system are adjacent to the project area, as in the SeaTac case, or in some other part of the community, as in the Clyde Hill case.

22 We find that PSE's tariff Schedule 70 suffers from ambiguity. Viewed from different perspectives, as the parties have here, the schedule-applicability language at issue could reasonably be interpreted to mean quite different things, leading to entirely different results when applied to the facts at hand. The language in Section 2 of Schedule 70 that defines the availability of the rate schedule in terms of "areas which are zoned and used exclusively for residential purposes," if viewed strictly from a land-use perspective in the context of the stipulated facts, supports the interpretation argued by the cities. When we consider, however, that the rate schedule does not concern the governance of land-use, but rather the governance of services provided by an electric utility, the interpretation argued by PSE is at least equally plausible.

23 Guided by the principles stated in *Whatcom County, supra,* and reiterated in numerous Washington Supreme Court cases, we conclude that PSE's interpretation is the more reasonable of the two. Specifically, we find that the criterion "used exclusively for residential purposes" in Section 2 of Schedule 70 refers to electrical characteristics as well as land-use characteristics. In this case, the three-phase feeder lines that run along 170th Street in SeaTac, and along 92nd Avenue in Clyde Hill, are stipulated to be present in those locations to support PSE's distribution of electricity necessary to meet commercial load requirements. The areas in question, thus, are not used exclusively by PSE for residential purposes but, rather, are used by PSE for commercial purposes. It follows that Schedule 70 does not apply to the undergrounding projects along 170th Street in SeaTac, and along 92nd Avenue in Clyde Hill.

24 Alternatively, the undergrounding projects along 170th Street in SeaTac, and along 92nd Avenue in Clyde Hill are in areas of the respective municipalities that have electrical load requirements that are "comparable with developed commercial areas." Our focus, again, is on PSE's use of the right-of-way, or area along the right-of-way, for purposes of electric power distribution. The presence

of commercial load requirements in various geographic locations in and around the specific project locations requires that PSE install three-phase feeders along specific routes. The routes at issue were selected as suitable for that purpose and PSE uses those routes to provide power to meet commercial load requirements. Thus, Schedule 71 applies by its terms to undergrounding projects in the locations at issue whether one interprets the route as "commercial" or as an area that has "electrical load requirements which are comparable with developed commercial areas."

25 Compelling support for our interpretation is found in the legislative history provided by Mr. Lynn Logen in his affidavit and in Addendum 9 to his affidavit. In support of the tariff when its rate was last revised in 1984, PSE submitted a cost study. PSE initially compiled the costs of undergrounding projects in six geographical areas. Two of these areas, however, were excluded from the cost-study because they contained three-phase facilities. The costs to underground the remaining four areas, which contained only single-phase facilities, formed the basis for the rates in Schedule 70 of $20.33 per centerline foot. The clear (and only) inference to be drawn is that Schedule 70 was not intended to cover three-phase facilities regardless of their location. Indeed, if Schedule 70 were read to include three-phase facilities, it could not be said to reflect fair, just, reasonable, and compensatory rates, because the cost-study does not support application of the $20.33 rate to three-phase facilities.

26 In light of the relative costs associated with the two types of conversion work (*i.e.*, single-phase and three-phase), it is logical and reasonable to apply Schedule 70 to single-phase conversion work and Schedule 71 to three-phase conversion work. Mr. Logen testified that:

> PSE has estimated that the total cost for the SeaTac Conversion will be $454,870.00. If the existing overhead system were a single-phase rather than a three-phase system, PSE estimates that the cost of the conversion would be $222,632.39. Similarly, PSE has estimated that the total cost for converting the existing overhead facilities along 92nd Ave. N.E. in Clyde Hill will be $382,521. If the existing overhead system along 92nd Avenue N.E. were a single phase system, PSE estimates that the cost of that conversion would be $194,107.37.

Id. at ¶ 11. Thus, in the case of the SeaTac project, the cost for converting the three-phase system to underground is more than twice the cost that would be incurred were this a single-phase system. The difference for the Clyde Hill project is slightly less, but of a similar magnitude.

27 Our interpretation is rooted in the subject matter of the tariff (*i.e.,* the appropriate rate for an electric company's service) and its legislative history. This interpretation is also consistent with the way the tariff has been administered since its inception. Mr. Logen testified that, as the person responsible for the administration of Schedules 70 and 71 for the past eleven years, he has consistently interpreted Schedule 70 to apply only to conversions of single-phase distribution systems to underground, and he has consistently interpreted Schedule 71 to apply to conversions of three-phase systems to underground, regardless of whether the three-phase system has been located in an area that is residential in terms of its zoning and land-use. *Logen Affidavit at ¶13.* Mr. Logen testified that he is "not aware of any cases in which three-phase systems have been converted to underground under Schedule 70." *Id.* Thus, our interpretation of the tariff language in a way that is consistent with the history concerning the administration of these rate schedules, which has been continuously subject to our oversight, incidentally precludes assertions of discrimination and undue preference.

b. Does Schedule 70 apply by its terms or by inference to the private drives in Clyde Hill?

28 Turning to the additional dispute that is limited to the Clyde Hill matter, the City contends that PSE is required to treat the entire "conversion area," including public roads and private drives, under a single rate schedule, Schedule 70. Clyde Hill's initial argument is sufficiently brief to quote in full (underlining in original):

> Schedule 70 applies to the work to be performed in private easements and along 92nd Avenue NE that is part of the conversion area because it is part of the "conversion area." The "conversion area" meets all of the criteria of Section 2. Even that portion of the conversion area described in Stipulated Fact No. 12, where the existing overhead lines are within easements along private drives, are within the clear language and criteria of Section 2 of Schedule 70. The conversion area is clearly greater than one city block in

> length. There is no language in Section 2 that provides for segmenting, or breaking down, a contiguous conversion area into smaller segments for purposes of applications of the tariff. Therefore, there is no basis in Section 2 to reasonably argue that the private drives are to be evaluated separately from other segments of the conversion area.
>
> In sum, all of the conversion area comes within the clear scope of coverage of Schedule 70. There is no ambiguity in the language of Schedule 70. There is no legal basis for the Commission to go beyond the clear language of Schedule 70 to ascertain the WUTC's intent when it approved the tariff.

29 PSE responds that it is entirely appropriate to treat different portions of the project under different schedules, depending on the character of the roadway and the electric system. PSE argues that it historically has interpreted Schedule 70 to not apply to private drives because neither a private landowner nor a municipality can require PSE to underground facilities where PSE has an easement or prescriptive right. PSE argues that Schedule 70 sets the terms and conditions only for undergrounding of facilities that could potentially be subject to mandatory undergrounding; that is, facilities located in public rights-of-way. PSE argues that it has the sole discretion when its facilities are on private property to decide whether, and on what terms, to underground, if requested. PSE argues that no tariff is required to permit it to charge private property owners, or municipalities requesting undergrounding on private property, 100 percent of the costs.

30 PSE also argues that to interpret Schedule 70 to apply to PSE's facilities located on private property would be contrary to the tariff language in Section 2 that refers to "public thoroughfares." PSE argues that if Schedule 70 is deemed to apply to private drives, it will not be able to charge any rate because the rate language in Section 3.b. of the tariff refers to "$20.33 per centerline foot of all public thoroughfares."

31 Clyde Hill's logic suffers from a bootstrapping circularity (private drives must be converted at the Schedule 70 rate if the private drives are in a conversion area subject to Schedule 70) and does not reach the question at issue: whether private drives fall within the scope of Schedule 70. Clyde Hill's argument can only hold if we find that a "conversion area" comprises all work within a given geographic

area over a given period of time, and that once a "conversion area" is defined, all work within it must be charged at the same (presumably lowest) rate, regardless of whether the nature of the land and electrical use is commercial or residential, or on public thoroughfares or on private drives.

32 As our discussion in the previous section makes clear, it is not only rational but necessary that undergrounding work be segmented into different functional and rate categories—necessary in order to accord both Schedule 70 and 71 their full and complementary scopes, and necessary in order to align the rates with the underlying cost-studies that were used to support the schedules when they were first established. Whether one calls this segmentation separate conversion areas with separate rates, or one conversion area with separate rates, is a difference in semantics only. It is the character of the land and electrical function that determines whether the rate charged is covered by Schedule 70, Schedule 71—or, as Puget argues, no schedule at all.

33 The clear language of Schedule 70 limits its scope to areas that are a) at least one city block in length, or b) absent city blocks, at least six building lots abutting either side of a "public thoroughfare." The parties have stipulated that "there is no public thoroughfare in these areas," so they have stipulated to facts that by their explicit terms cannot qualify under (b). These same stipulated facts, we find, preclude application of (a), because city blocks are along public streets and rights-of-way, which must also be "public thoroughfares." We do not believe "city block" can be read to mean an abstract length along something other than a public street or right-of-way, because the language in (a) directs that in the "absence of city blocks" (which to us implies the physical presence, in general, of city streets or rights-of-way that form "blocks," not an abstract length), the language in (b) controls. That is, there are not three alternatives: a real city block, a private drive at least the length of a city block, and a public thoroughfare with at least six building lots on either side. There are only two alternatives, and private drives must fit within the definition of "public thoroughfare" to qualify. Also, only by reading the language as we have, does the rate--$20.33 per centerline foot *along the public thoroughfare*—make sense, and cover all situations under Schedule 70.

34 There is no definition in Schedule 70 of "public thoroughfare." In other contexts, (*e.g.,* Schedule 85, which governs line extensions), the term encompasses private land that has certain aspects functionally similar to public roads. In a future case, or in a new tariff filing, we may have the opportunity to review the appropriate

definition of "public thoroughfare," for purposes of Schedule 70. In either event, we could contemplate one or more factual situations, which might inform such a review. Here, the stipulated facts preclude any discussion of what constitutes a "public thoroughfare" because the parties stipulate that there *is* no public thoroughfare.

35 Not being a "city block" or a "public thoroughfare," the private drives in question do not fall under Schedule 70, so we deny Clyde Hill's petition for declaratory judgment that Schedule 70 applies, and we grant Puget's motion for a determination that Schedule 70 does not apply.

36 The remaining question is whether, since Schedule 70 does not apply, we must grant Puget's cross-motion asking us for a summary determination that the customers on the private drives in Clyde Hill (or the City, on their behalf) must pay 100% of the costs. There was very little briefing on this question (none by Clyde Hill), as the parties were more focused on whether Schedule 70 applies. We find that Puget should be able to recover its costs under the facts of this case for discretionary undergrounding activities that fall outside the scope and prescriptions of any existing tariff. We caution, however, that our ruling is limited to the bare-bones facts of this case. The great variety of easements and other arrangements respecting private lands may admit of other treatment, in other situations, depending on the facts and applicable tariffs.

FINDINGS OF FACT

37 Having discussed above all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include stipulated facts and other findings pertaining to the ultimate decisions of the Commission are incorporated by this reference.

38 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including electric companies.

39 (2) The pleadings filed in this proceeding, together with the evidentiary support provided by the parties' fact stipulations, affidavits, and other documents, show that there is no genuine issue as to any material fact.

CONCLUSIONS OF LAW

40 Having discussed above in detail all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

41 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and all parties to, these proceedings. *Title 80 RCW.*

42 (2) PSE is a "public service company" and an "electrical company" as those terms are defined in RCW 80.04.010, and as those terms otherwise may be used in Title 80 RCW. PSE is engaged in Washington State in the business of supplying utility services and commodities to the public for compensation.

43 (3) PSE is entitled to judgment in its favor, as a matter of law, that Schedule 71 applies to the underground relocation of existing overhead electric distribution facilities that are located in the SeaTac and Clyde Hill Conversion Areas and are part of PSE's three-phase power distribution system.

44 (4) PSE is entitled to judgment in its favor, as a matter of law, that Schedule 70 does not apply to the underground relocation of existing overhead electric distribution facilities that are part of PSE's single-phase power distribution system located in the Clyde Hill Conversion Area on private property alongside private roadways.

45 (5) PSE is entitled to recover fully the costs it incurs in connection with the underground relocation of existing overhead electric distribution facilities that are part of PSE's single-phase power distribution system located in

the Clyde Hill Conversion Area on private property alongside private roadways.

ORDER

46 THE COMMISSION ORDERS That PSE's tariff Schedule 71 applies to the conversion of PSE's overhead facilities along South 170th Street between 37th Avenue South and Military Road South in SeaTac (the "SeaTac Conversion Area") to underground.

47 THE COMMISSION ORDERS FURTHER That PSE's tariff Schedule 71 applies to the conversion of PSE's overhead facilities along 92nd Avenue NE between NE 13th Street and NE 20th Street in Clyde Hill to underground.

48 THE COMMISSION ORDERS FURTHER That PSE's tariff Schedule 70 does not apply to the conversion of PSE's overhead facilities on private property along private drives that are within the Clyde Hill Conversion Area, and PSE is entitled to recover fully the costs it incurs in completing such conversion.

DATED at Olympia, Washington, and effective this ____day of January 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).