BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

| | |
|---|---|
| IN THE MATTER OF THE PETITION OF:<br><br>PUGET SOUND ENERGY, INC.<br><br>For a Declaratory Order on Schedule 74 and the Schedule 74 Design Agreement Between Puget Sound Energy, Inc. and the City of Tumwater | No. UE-061626<br><br>PUGET SOUND ENERGY, INC.'S PETITION FOR REVIEW OF THE INITIAL DECLARATORY ORDER ON MOTIONS FOR SUMMARY DETERMINATION |



**Perkins Coie** LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

## TABLE OF CONTENTS






Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

## TABLE OF CONTENTS
**(continued)**





**Perkins Coie LLP**
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

## I. INTRODUCTION AND CASE OVERVIEW

This case is about the cost of converting overhead electrical facilities to underground electrical facilities and the Washington Utilities and Transportation Commission's ("WUTC" or "Commission") interpretation of Schedule 74 when those electrical facilities are located on a private easement.[1]

Schedule 74 and the Commission's prior decision in *City of Kent v. Puget Sound Energy, Inc.*, No. UE-010778 and UE-010911, 2002 Wash. UTC LEXIS 4 (Wash. Util. and Transp. Comm'n Jan. 28, 2002) ("*City of Kent*"), provide that, when a governmental entity asks Puget Sound Energy, Inc. ("PSE") to convert overhead electrical facilities to underground facilities on land where PSE owns an easement, the governmental entity must pay 100% of the underground conversion costs.[2] Consistent with this rule, between April 2003 and September 2005, the City of Tumwater ("City") agreed to pay PSE 100% of the underground conversion costs in connection with its Tumwater Boulevard widening project ("Tumwater Project") because the electrical facilities at issue are located on a PSE easement and because Schedule 74 allocates 100% of the underground conversion costs to the City.

---

[1] The term "overhead electrical facilities" means PSE transmission and/or distribution equipment that consists of poles, cross arms, aerial wires and other attachments that are physically located aboveground. The term "underground electrical facilities" means PSE transmission and/or distribution equipment that consists of buried wires, belowground or semi-buried vaults with flush-mount lids and/or pad-mounted cabinets and other attachments, and thus the equipment is physically located at ground level. The term "underground conversion" means the placement of an overhead electrical facility belowground so that it becomes an underground electrical facility. The process of underground conversion is subject to regulation by the WUTC under Tariff WN U-60, Electric Tariff G, Schedules 73 and 74. The parties agree that this dispute over underground conversion costs is governed by WUTC Schedule 74. *See* February 7, 2007, Deposition of City of Tumwater Director of Public Works Jay Eaton ("Eaton Dep.") at 92:15-25, 108:6-21, 112:23-113:15, attached as Exhibit A to the Declaration of James F. Williams.

[2] The cited decision is the "Third Supplemental Order" in the matter; it was modified but not in any relevant part by the Fourth Supplemental Order in April 2002.



Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

The City, however, has changed its position and asserts that PSE's easement was extinguished when the City annexed Tumwater Boulevard in 1987 or is superseded by a 1985 Franchise Agreement between PSE and the City. In either event, the City now contends that the Franchise Agreement provides PSE with its sole operating rights on Tumwater Boulevard and that Schedule 74 requires PSE to pay 60% of the underground conversion costs. Accordingly, PSE and the City are before the WUTC disputing the allocation of the conversion costs associated with the Tumwater Project.

PSE's motion for a summary determination that the City pay 100% of the conversion costs was denied by Administrative Law Judge Theodora Mace ("ALJ") in a May 25, 2007, initial declaratory order ("Initial Order"). In reaching her conclusions, the ALJ made a number of findings that will have a significant impact on real property rights under Washington's common law. These findings have both to do with the application of real property law principles and the interpretation of Schedule 74.

First, the ALJ ruled that PSE's easement was automatically extinguished when, pursuant to RCW 35A.14.900, the City annexed the property where the easement is located. Initial Order ¶¶ 35, 37. Second, she found that a contract is superior to PSE's easement and, therefore, governs the real property relationship between PSE and the City. *Id.* ¶¶ 44-45. Finally, she ruled that PSE's easement is a "public real property right" that is in some way equivalent to a franchise or a license under RCW 35A.14.900. *Id.* ¶¶ 37, 39-43.

The ALJ's decision was also based on a novel application of Washington real property law to Schedule 74. Specifically, for purposes of applying one of the Schedule 74 exceptions that imposes the conversion costs on the City, the ALJ found that the City is effectively the grantor of PSE's easement, even though the City is clearly the successor-in-interest to the actual grantor. *Id.* ¶ 36. In addition, the ALJ ignored PSE's operating rights



**Perkins Coie** LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

under the easement in order to conclude that the 1985 Franchise Agreement provides PSE's sole operating rights on the Tumwater Project area. As such, she ruled that PSE fails to meet the other exception in Section 2.b(2) of Schedule 74 that requires the City to pay the cost of conversion. *Id.* ¶ 36. Finally, she ruled that the public policy behind Schedule 74 disfavors the position taken by PSE. *Id.* ¶ 38.

Because the Initial Order contains errors that will impact Washington real property law, PSE's business operations and PSE's rate payers, PSE seeks review by the Commission.

## II. ASSIGNMENT OF ERRORS

**Error #1:** The ALJ erred because there is no statutory or common law basis for the conclusion that, under RCW 35A.14.900, PSE's easement was extinguished by the City's annexation of property where the easement is located.

**Error #2:** The ALJ erred because there is no statutory or common law basis for the conclusion that PSE's easement can be superseded by the City's 1985 Franchise Agreement.

**Error #3:** The ALJ erred because there is no statutory or common law basis for the conclusion that PSE's easement is a "public real property right."

**Error #4:** The ALJ erred because there is no factual or legal basis for the conclusion that PSE's easement was a right "granted" by the City.

**Error #5:** The ALJ erred because PSE's operating rights under its easement were ignored in order to conclude that PSE's sole operating rights were "derived from a franchise previously granted by the Government Entity."

**Error #6:** The ALJ erred because there is no factual or legal basis for the conclusion that the public policy behind Schedule 74 disfavors PSE's position.

## III. STATEMENT OF THE CASE

The facts are more fully set forth in PSE's Motion for Summary Determination, which is incorporated by reference, and are summarized here.



**Perkins Coie LLP**
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

## A. PSE's Right to Operate Electrical Facilities

To place, maintain, and operate electrical facilities, PSE must acquire rights from the entity that owns or controls such property. These "operating rights" are most commonly obtained in the form of an easement or a franchise, with a few being obtained by permit. Declaration of Steve Botts in Support of PSE's Motion for Summary Determination ("Botts Decl.") ¶¶ 1-6. Since the nature of PSE's operating rights determines who bears the cost of future relocation or conversion requests, PSE decides whether to acquire an easement or enter into a franchise agreement based on a cost and risk assessment. *Id.* ¶ 7. Where the electrical facilities are significant and PSE is concerned about the cost of moving them, PSE is more likely to obtain an easement. This is because an easement, as a possessory interest in land, gives PSE greater control of the land where the facilities are located. *Id.* Indeed, the Commission has endorsed PSE's "cost-based" easement rationale in the past. *See City of Kent*, 2002 Wash. UTC LEXIS, at *22-23 & n.6. PSE currently has approximately 150,000 recorded easements, a significant number of which are from governmental entities, and 180 franchises with various governmental entities. Botts Decl. ¶ 9.

## B. Schedule 74's Control of Conversions

Underground conversion of PSE's overhead electrical facilities is a highly desirable but expensive undertaking that requires a uniform approach to cost allocation. *See City of Kent*, 2002 Wash. UTC LEXIS, at *11 (distinguishing relocation of overhead electrical facilities to another overhead location versus the "more involved and costly undertaking" of underground conversion). It is for that reason that the WUTC promulgated schedules addressing the cost allocation issue in connection with PSE's 2001 General Rate Case



Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

("GRC"). In the 2001 GRC, cities within PSE's service area intervened and complained about the cost of underground conversion and the perceived unevenness of cost allocations.[3]

There is no dispute that one outcome of the GRC was a compromise on the cost of underground conversion in the form of Schedule 74, which replaced former Schedule 71. Declaration of Barry Lombard in support of PSE's Motion for Summary Determination ("Lombard Decl.") ¶ 5; Declaration of Kirstin S. Dodge in Support of Motion to Stay Proceedings ¶¶ 1-6. Schedule 74 specifically applies to underground conversion projects for governmental entities and it allocates 100% of the cost of conversion to a city if PSE's operating rights are not based on a franchise or if PSE's operating rights were not "granted" by the City requesting the conversion:

> b. The Design Agreement and the Construction Agreement shall:
>
> (1) except as otherwise provided in Section 2.b(2), obligate the Government Entity to pay the Company 40% of the total Cost of Conversion and the Company to pay 60% of the total Cost of Conversion;
>
> (2) **obligate the Government Entity to pay (i) 100% of the total Cost of Conversion for conversion of that portion**, if any, of the existing overhead distribution system located, as of the date on which the Government Entity provides the notice referred to in Section 4.a or the date on which the Government Entity commences acquisition or condemnation of real property to facilitate construction of any public improvements related to the conversion project, whichever occurs first, (A) outside of the Public Thoroughfare or **(B) pursuant to rights not derived from a franchise previously granted by the Government Entity or**

[3] The cities were Auburn, Bellevue, Bremerton, Burien, Maple Valley, Kent, Des Moines, Federal Way, Redmond, Renton, SeaTac, and Tukwila.



Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

**pursuant to rights not otherwise previously granted by the Government Entity . . . .**

Schedule 74(2)(b)(1) & (2) (emphasis added); Lombard Decl. ¶ 6 & Exhibit 1.

## C. The Easement and Franchise Agreement at Issue

In 1981, PSE obtained an easement from the Port of Olympia ("Port") that covers the entire Tumwater Project area. Initial Order ¶ 4. It is undisputed that the Port granted, conveyed, and warranted to PSE a 10-foot-wide perpetual easement for the construction, operation, maintenance, repair, replacement, and enlargement of electrical facilities ("PSE Easement" or "Easement"). *Id.* The ALJ specifically found that the Easement provides for termination only in the event PSE ceases to use the Easement area and certain abandonment criteria are met. *Id.* The Easement was duly recorded in Thurston County on or about December 8, 1981. Botts Decl. ¶ 10.

On or about June 15, 1985, the City granted to PSE a franchise to, among other things, construct, operate, repair, and maintain electrical facilities within the rights of way and other public places of the City as then-existing or subsequently extended (the "Franchise" or "Franchise Agreement"). Initial Order ¶ 5. Approximately two years later, the Port transferred to the City by dedication deed certain property, including the property within the area covered by the PSE Easement. *See* City Complaint; City of Tumwater's Motion for Summary Determination ¶¶ 22-23.[4] There is no dispute that, at the time of the transfer, the PSE Easement had been duly recorded for more than five years and was recognized by the City as an existing encumbrance to the property. *See* Eaton Dep., at 24:1-

[4] In general, PSE does not take issue with the ALJ's summary of facts in paragraphs 4-10, nor with the findings of facts. Paragraph 6 and the first sentence of paragraph 36 of the Initial Order, describing the transfer of property from the Port to the City, however, are somewhat inaccurate. According to the City, it annexed certain property owned by the Port on January 20, 1987. On January 21, 1987, the Port transferred authority over Tumwater Boulevard to the City by deed. In any event, it appears to be undisputed that the Port is the "grantor" of the Easement and the City is the "successor" to the Port.



**Perkins Coie** LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

24, 25:22-26:14 (stating that Mr. Eaton speaks for the City), 90:5-19 (recognizing that the PSE Easement gave PSE rights that preexisted the Port's transfer to the City).

**D. The Tumwater Boulevard Widening Project**

PSE and the City began discussions regarding the expansion of Tumwater Boulevard (formerly known as Airdustrial Way) in early 2003. After conducting a rights review, PSE notified the City that, because it had the Easement on the land covered by the Tumwater Project, the cost of conversion would be borne by the City. Eaton Dep. at 87:9-18, 90:5-19 & Exhibit 8; Lombard Decl. ¶ 8 & Exhibit 3. As the ALJ found, for the next two and half years, the City acquiesced to PSE's view of the cost allocation. In fact, the City ultimately issued a Notice to Proceed that called for the City to pay 100% of conversion costs, and it issued a September 9, 2005, memorandum confirming the City's belief that it was obliged to pay 100% of the costs. Initial Order ¶ 8; *see also* Eaton Dep. at 108:5-119:25, 110:10-21, 112:23-113:25, 116:13-117:25, 121:1-122:3, 124:12-24, 125:16-19, 142:14, 145:14 & Exhibits 11-13, 15, 21. In that September 9, 2005, memorandum, the Public Works Committee recommended that the City Council authorize the Mayor to sign agreements obligating the City to pay 100% of the underground conversion costs. Eaton Dep. at 148:1-150:25 & Exhibit 22 (Public Works Committee's September 9, 2005, meeting minutes recommending authorization to execute the Schedule 74 Underground Conversion Construction Agreement requiring the City to pay 100% of the costs).

It was not until September 20, 2005, that the former City Attorney pulled the Public Works Committee recommendation memorandum from the City Council meeting agenda. Eaton Dep. at 151:15-152:21 & Exhibit 23. Then, at a Tumwater Project meeting in October 2005, the City notified PSE for the first time that there was an issue regarding the



Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

cost of the Tumwater Project. Declaration of Amy Tousley in Support of PSE's Motion for Summary Determination ("Tousley Decl.") ¶¶ 8-9.[5]

## IV. ARGUMENT

Central to the issues before the Commission are the nature and scope of easements and franchises and the various rights that pass to PSE from either. An easement is a property right, a conveyance of interest in land from the grantor to the grantee that can only be extinguished or altered under certain conditions and, under Washington law, must be made by deed. RCW 64.04.010, .175; *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). On the other hand, franchises are contracts and do not grant proprietary interests. *See Gen. Tel. Co. of Nw. Inc. v. City of Bothell*, 105 Wn.2d 579, 584, 716 P.2d 879 (1986); *City of Kent*, 2002 Wash. UTC LEXIS, at *10; 12 Eugene McQuillin, *The Law of Municipal Corporations* § 34.2 (3d ed. 2006). A franchise is essentially a grant by a municipality to an individual or corporation to do something on a city's land it would not normally be able to do, such as erect electrical facilities. *Wash. Water Power Co. v. Rooney*, 3 Wn.2d 642, 649-50, 101 P.2d 580 (1940) (citing Eugene McQuillin, *The Law of Municipal Corporations* § 1740 (2d ed.)); *see also In re Petition of Algonquin Gas Transmission Co.*, 2 Misc. 2d 997, 157 N.Y.S.2d 748, 750 (N.Y. Sup. Ct. 1956) ("The grant of a franchise does not carry with it an interest in land. It is a privilege which may be granted and acquired without involving the ownership of land. On the other hand, an easement is essentially an interest in land.").

---

[5] Ironically, there is no dispute that, while the Tumwater Project cost litigation was under way, the City moved forward with another street construction project involving the same PSE Easement on Henderson Street ("Henderson Project"). On the Henderson Project, the City identified the PSE Easement, and not the Franchise Agreement, as the basis of PSE's operating rights, and did not hesitate to pay 100% of the relocation costs—even after the former City Attorney initiated litigation in this case. Initial Order ¶ 8 n.7; *see also* Eaton Dep. at 163:22-172:7 & Exhibits 26-27 (Henderson Project Relocation Agreement based on PSE Easement operating rights and paid invoice to PSE for 100% of the related costs); Tousley Decl. ¶ 10.



**Perkins Coie** LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

## A. Error #1 — An Easement Cannot Be Extinguished by City Annexation Under RCW 35A.14.900

Paragraphs 35 and 37 of the Initial Order erroneously conclude that the PSE Easement was extinguished under RCW 35A.14.900 by the City's annexation of the property formerly owned by the Port. While acknowledging that "the term 'easement' is not found in the statutory language," Initial Order ¶ 34, the ALJ nevertheless ruled that it is "reasonable to conclude that the Port's easement is the type of permission granted by a government entity that would be extinguished upon annexation under RCW 35A.14.900," Initial Order ¶ 37. The Initial Order not only contradicts the plain language of RCW 35A.14.900, it implicates the doctrine of unconstitutional takings.

### 1. The plain language of the statute does not support the Initial Order

There is no basis in either the plain language of the statute or in case law for such a conclusion, and it is unreasonable for the WUTC to assume statutory language that does not exist. RCW 35A.14.900 authorizes cities in Washington to cancel franchises or permits whenever they annex the land where those franchises or permits operate:

> The annexation by any code city of any territory pursuant to this chapter shall cancel . . . any franchise or permit theretofore granted to any person, firm or corporation . . . authorizing or otherwise permitting the operation of any public utility, . . . but the holder of any such franchise or permit canceled pursuant to this section shall be forthwith granted by the annexing code city a franchise to continue such business within the annexed territory for a term of not less than seven years from the date of issuance thereof . . . .

The word "easement" does not appear in the statute and is not referred to in any known legislative history. *See id.* In considering a statute, courts must "assume that the legislature means exactly what it says," *Morgan v. Johnson*, 137 Wn.2d 887, 891-92, 976 P.2d 619 (1999) (internal quotation marks and citation omitted), and should "give words . . . their



Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

plain and ordinary meaning," *State v. Keller*, 98 Wn. App. 381, 383, 990 P.2d 423 (1999), *aff'd*, 143 Wn.2d 267, 19 P.3d 1030 (2001). "When words in a statute are plain and unambiguous, statutory construction is not necessary, and [courts] must apply the statute as written unless the statute evidences an intent to the contrary." *Enterprise Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 552, 988 P.2d 961 (1999).

Even if it were permissible to look beyond the plain language of the statute, because there is a clear distinction between permits, franchises, and easements, it is not reasonable to assume that where the legislature referenced franchises and permits, it also intended to include easements. While an easement is a possessory interest in land, both franchises and permits are something less. 36 Am. Jur. 2d *Franchises From Public Entities* §§ 1-2 (2001); *Texas & P. Ry. Co. v. City of El Paso*, 85 S.W.2d 245, 249 (Tex. 1935). A franchise is a grant of a contractual right to use the land in a way that one normally would not be able to do, and does not grant an interest in the land. *Gen. Tel. Co.*, 105 Wn.2d at 584; *In re Algonquin Gas Transmission Co.*, 2 Misc. 2d 997, 157 N.Y.S.2d 748, 750 (1956) ("There exists a clear distinction between a franchise and an easement. [A franchise] is a privilege which may be granted and acquired without involving the ownership of land. On the other hand, an easement is essentially an interest in land.") (citations omitted); *Artesian Water Co. v. State, Dep't of Highways & Transp.*, 330 A.2d 432, 440-41 ("Unlike an easement, however, a franchise ordinarily does not create an interest in land, even though the use of the franchise requires the occupancy of land."); *Texas & P. Ry. Co.*, 85 S.W.2d at 249 (same). Similarly, a "permit" is "[a] certificate evidencing permission; a license." *Black's Law Dictionary* 1176 (8th ed. 2004).

Because a franchise or license conveys no compensable property interest, the disturbance, removal, or relocation of facilities or structures originally constructed under



**Perkins Coie** LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

such authority is neither a "taking" in the constitutional sense nor a damaging of property. *See Artesian Water Co.*, 330 A.2d at 440-41 (Del. Super. Ct. 1974) (citing 2 *Nichols on Eminent Domain*, § 585; 26 Am. Jur. 2d *Eminent Domain* § 181; *City of Grand Prairie v. Am. Tel. & Tel. Co.*, 405 F.2d 1144 (5th Cir. 1969)). As discussed more fully below, an easement, however, is a possessory interest in land and termination of an easement by statute raises questions of a unconstitutional takings without just compensation. Accordingly, it is even more important that the annexation statute is read as it is written, so that it only applies to franchises or permits.

**2. Automatic extinguishment of the PSE Easement without compensation constitutes an unconstitutional taking**

If the Initial Order's ruling in paragraph 37 is allowed to stand, then the City's use of RCW 35A.14.900 to extinguish the PSE Easement constitutes an impermissible taking under federal and state constitutional law.

The Takings Clause of the Fifth Amendment provides that private property shall not "'be taken for public use, without just compensation.'" U.S. CNST. amend. V; *Burton v. Clark County*, 91 Wn. App. 505, 515, 958 P.2d 343 (1998). It applies to the states through the Due Process Clause of the Fourteenth Amendment. The Washington State Constitution affords similar protection. *See* WSH. CNST. art. I, § 16 ("No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner . . . ."); *Orion Corp. v. State*, 109 Wn.2d 621, 657, 747 P.2d 1062 (1987).

"A governmental taking executed without the formal procedures of eminent domain is called an inverse condemnation." *Showalter v. City of Cheney*, 118 Wn. App. 543, 548, 76 P.3d 782 (2003) (citing *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871



Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

(1998). A governmental entity that takes or damages a private property right for public use without formal proceedings and without paying just compensation has committed a taking under the law of inverse condemnation.[6] *Id.*

A categorical, "facial" takings challenge exists where a regulation (1) affects a "'total taking'" of all economically viable use of property; (2) results in an actual physical invasion on the property; (3) destroys a fundamental attribute of ownership (such as the right to possess, exclude others, or dispose of property); or (4) was employed to enhance the value of publicly held property. *Manufactured Hous. Communities of Wash. v. State*, 142 Wn.2d 347, 355, 13 P.3d 183 (2000); *Guimont v. Clarke*, 121 Wn.2d 586, 594, 854 P.2d 1 (1993) ("*Guimont I*"). If the property owner can establish a categorical taking and the government cannot rebut the claim, no further analysis is required and the owner is entitled to just compensation. *Guimont v. City of Seattle*, 77 Wn. App. 74, 81, 896 P.2d 70 (1995).

Under the Initial Order's interpretation, the statute would simply extinguish the Easement, and thus completely destroy PSE's possessory interest in the land, without either formal process or just compensation. Such an application of the statute would constitute a categorical taking—a result not intended by the legislature. *See also Guimont I*, 121 Wn.2d at 602. Accordingly, PSE respectfully requests that the Commission correct this error of law and find that the PSE Easement was not extinguished by the annexation under RCW 35A.14.900.

---

6 "Regulatory takings claims are analyzed under the law of inverse condemnation, that is, the body of case law establishing when a government action will be judged after the fact to have been an exercise of eminent domain power requiring payment of just compensation." 24 Heller Ehrman White McAuliffe, Wash. Prac., *Environmental Law and Practice*, § 21.1 (West 1997).



**Perkins Coie** LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

## B. Error #2 — A Contract Cannot Supersede a Recorded Property Right

Paragraphs 44-45 of the Initial Order erroneously conclude that the Franchise Agreement is superior to the Easement. The Port granted, conveyed, and warranted to PSE the Easement for the construction, operation, maintenance, repair, replacement, and enlargement of electrical facilities. The Easement provides that the rights and obligations of the parties are binding on their respective successors and assigns. Thus, when the Port transferred to the City property that was subject to the PSE Easement, the Easement was transferred as well. In addition, because the Easement has been recorded since 1981, it was known or should have been known to the City as an existing encumbrance of the property at the time the Port transferred the property to the City. "When an instrument involving real property is properly recorded, it becomes notice to all the world of its contents." *Strong v. Clark*, 56 Wn.2d 230, 232, 352 P.2d 183 (1960).

Accordingly, as a property right, the Easement exists until such time as PSE consents to extinguish or alter the Easement right. "Easements established by a dedication are property rights that cannot be extinguished or altered without the approval of the easement owner or owners, unless the plat or other document creating the dedicated easement provides for an alternative method or methods to extinguish or alter the easement." RCW 64.04.175. No such alternative method is provided for in the Easement.

The grant of the franchise itself could not operate to extinguish the Easement. "'There exists a clear distinction between a franchise and an easement. . . . [A franchise] is a privilege which may be granted and acquired without involving the ownership of land. On the other hand, an easement is essentially an interest in land.'" *In re Algonquin Gas Transmission Co.*, 157 N.Y.S.2d at 750 (citation omitted); *accord Artesian Water Co.*, 330 A.2d at 440 ("Unlike an easement, however, a franchise ordinarily does not create an interest



**Perkins Coie** LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

in land, even though the use of the franchise requires the occupancy of land."); *Texas & P. Ry. Co.*, 85 S.W.2d at 249 (same). For the Franchise to supersede the Easement, the Franchise would have to evidence *intentional* abandonment of the PSE Easement. Restatement (First) of Property § 504 Abandonment (1944) ("An easement may be extinguished by an *intentional* relinquishment thereof indicated by conduct respecting the use authorized thereby.") (emphasis added). It is undisputed that no such intention has ever been expressed by PSE. Accordingly, the PSE Easement represents a dominant interest in the land, which cannot be superseded by contract.

### C. Error #3 — The PSE Easement Is Not a "Public Real Property Right"

Throughout the conclusions of law, the Initial Order inexplicably finds that the PSE Easement is a "public" instead of a "private" real property right. In paragraph 37, it erroneously states that "PSE operates under a public real property right under Schedule 74." In paragraphs 39-43, it erroneously conflates the PSE Easement (which is on a public thoroughfare) with public real property rights.[7] In paragraph 61, the Initial Order erroneously concludes that "PSE's facilities in the Tumwater Boulevard street improvement project are operated pursuant to the franchise granted it by the city of Tumwater in 1985 and pursuant to other public real property rights."

#### 1. There is no legal or factual basis for opening PSE's private property rights to the public

There is no statutory or common law basis for the conclusion that PSE's private property rights in the Easement is now public. Private easements are distinguished from public easements in that a public easement, or a public right a way, gives the general public

[7] The ALJ thus found that the PSE Easement is on a public thoroughfare under Section 2.b(2)(A). PSE maintains that the "public thoroughfare" question is irrelevant, because PSE falls under the exceptions set forth in Section 2.b(2)(B), which has nothing to do with "public thoroughfare."



Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

a right of passage. *See Motoramp Garage Co. v. City of Tacoma*, 136 Wash. 589, 591, 241 P. 16. 17 (1925). *See also* 17 William B. Stoebuck & Jason W. Weaver, Wash. Prac., *Real Estate: Property Law* § 2.2 (distinguishing private easements held by landowners of streets in subdivision as different from and in addition to whatever rights of passage the general public may have). For example, the public trust doctrine establishes public easements for the general public's access to beaches. *Orion Corp.*, 109 Wn.2d at 638-42. Nothing in this record suggests that any party in the litigation or the Port has ever expected PSE's electrical facilities to be open and accessible to the public—like beachfront property—and there is no legal authority for such a conclusion.

**2. PSE has an easement in gross that the courts have deemed private property**

Generally, easements held by utility companies are considered easements in gross. *See, e.g.*, 17 William B. Stoebuck & Jason W. Weaver, Wash. Prac., *Real Estate: Property Law* § 2.2 (utility companies hold easements in gross). An easement is in gross when it is not created to benefit or when it does not benefit the possessor of any tract of land in his use of it as such possessor. *Winsten v. Prichard*, 23 Wn. App. 428, 430, 597 P.2d 415 (1979). Washington courts have held that, because a right in gross is personal to the grantee, *Cowan v. Gladder*, 120 Wash. 144, 206 P. 923 (1922), an easement in gross to a corporation does not carry a common right to each stockholder or to the public, *United States v. Johnson*, 4 F. Supp. 77, 78 (W.D. Wash. 1933).

Easements in gross are limited to the purpose of creation—as expressly stated in the easement—and enjoyment may not be extended to the public by implication. *Id.* For example, in *Johnson*, the conveyance to the United States of an easement and right of way in gross gave the United States a personal interest in the grantor's land for governmental



Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

purposes. It did not create a right of way for the general public because "[t]he easement clearly was merely to provide an accessory to the governmental machinery for a function in its capacity as such, and was expressly limited to the United States as an entity or those acting in its behalf." *Id.* That is, a right clearly apparent "may not be extended by implication and convert the private way to a public highway." *Id.*; *see also Boyle v. Burk*, 749 S.W.2d 264, 266 (Tex. App.–Fort Worth 1988) (holding appellee could adversely possess land subject to private easement right by utility because such easement did not render land dedicated to "public" use).

Likewise, in *Delmarva Power & Light Co. of Md. v. Eberhard*, 230 A.2d 644 (Md. 1967), the Maryland Court of Appeals addressed whether an easement held by a public utility company is a "public" easement. Holding that a public easement means a "public way" or "an easement that gives members of the public a right of passage over a road or street," the *Delmarva* court distinguished easements held by public utilities. The court ruled that "[e]asements held by a public utility or a public service corporation which are devoted to public use undoubtedly have analogies to, and points of similarities with, the public easements we have enumerated but they have significant differences, too."[8] *Id.* at 646. The court found that an easement owned by "utilities privately operated for profit even though publicly supervised" is a private easement, and not one for public use. *Id.* at 647. The court relied on an earlier Maryland case which found that easements held by the gas company are private, whether the easement is on the street or on private land. *Id.*

[8] Thus, while the generation and distribution of power may be a "public use" that allows electric companies to condemn land under the law of eminent domain where necessary, *see* RCW 80.32.060, where PSE owns an easement on which it places its electrical facilities, the *easement* is not for public use.



**Perkins Coie** LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

### 3. The clear intent of the Port was to grant PSE a private easement for the location of PSE's electrical facilities

Importantly, these cases from Washington and elsewhere illustrate that, even if utilities provide some public purpose or benefit, that fact does not render an easement held by a utility "public"; rather, the courts examined the nature of the easement itself. *See Lawson v. State*, 107 Wn.2d 444, 449, 730 P.2d 1308 (1986) ("[U]nder Washington law, when an easement is granted to a railroad through a private conveyance, the easement is not a 'perpetual public easement.' Instead, the particular deeds conveying the right of way must be interpreted to determine the scope and duration of the easement granted."). An examination of the Easement shows that it is unreasonable to interpret PSE's Easement as granting the public access to its electrical facilities.

The Port granted, conveyed and warranted to PSE a 10-foot-wide perpetual easement for the "right to construct, operate, maintain, repair, replace and enlarge one or more electric transmission and/or distribution lines over and/or under the Right-of Way together with all necessary or convenient appurtenances thereto." Declaration of Jim Shoopman in Support of City of Tumwater's Cross-Motion for Summary Determination ("Shoopman Decl."), Ex. A. The undisputed intent of the Easement was to grant PSE the ability to place electrical equipment as a necessary part of its function as a private utility company. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) ("The intent of the original parties to an easement is determined from the deed as a whole. If the plain language is unambiguous, extrinsic evidence will not be considered.") (citation omitted). The PSE Easement is like the easement in *Johnson*, where the United States—but not the general public—was granted an easement that expressly provided a right of way to the United States and those acting on its behalf. Like the government's easement in *Johnson*, the PSE



**Perkins Coie LLP**
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Easement in gross is a private, personal property right and not accessible to the general public. Accordingly, it was error for the ALJ to find that PSE's Easement was a "public" property right.

**D. Error #4 — The City Is Not the "Grantor" of the PSE Easement**

In paragraph 36, the Initial Order erroneously concludes that "PSE's argument—that its right to operate in the conversion area is derived from a right not previously granted by the government entity—fails, because Tumwater, though it did not grant the original Easement, has become the successor-in-interest to the Port of Olympia, a government entity, which did." By implication, the Initial Order suggests that the City is now effectively the "grantor" of the PSE Easement for purposes of the language in Section 2.b(2)(B) of Schedule 74.

While the City is a *successor* to the Easement, it unquestionably was not the original grantor. Initial Order ¶¶ 4, 6. The Easement itself defines the "grantor" as the Port and simply declares that "[t]he rights and obligations of the parties shall inure to the benefit of and be binding upon their respective successor and assigns." Shoopman Decl., Ex. 1. Under the plain language of the Easement, the "grantor" and "successor" are distinct entities, with the benefits and obligations passing from one to the other. Otherwise, if the City simply was the "grantor" by virtue of its ownership of the property, there would be no need to ensure that the benefits and burdens of the Easement passed to successors. *See, e.g., Stewart v. Beghtel*, 38 Wn.2d 870, 873-74, 234 P.2d 484 (1951) (recognizing distinction between grantor and successors in case having to do with restrictions contained a deed, explaining that the right of reverter was preserved "to the grantor personally, but also to . . . successors"); *Carr v. Burlington N., Inc.*, 23 Wn. App. 386, 597 P.2d 409 (1979) (recognizing grantors and successors as distinct legal entities).



Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

The City, of course, must argue that it is the "grantor," because, as a successor, it cannot avoid the exception set forth in Section 2.b(2)(B). Section 2.b(2)(B) obligates "the Government Entity" to pay 100% of the conversion cost if the project is located on property where PSE's operating rights are "pursuant to rights not derived from a franchise previously granted by the Government Entity or pursuant to rights not otherwise previously granted by *the* Government Entity." (Emphasis added.) Section 2.b(2)(B) thus expressly references "the Government Entity," in initial caps, which is a term that is used throughout Schedule 74 to refer to *the* Government Entity requesting the conversion. In sum, the City itself, while the successor to the Easement, is not the grantor. As a consequence, the City did not previously grant the Easement, and the grantor exception contained in Section 2.b(2)(B) requires the City to pay 100% of the conversion costs.

### E. Error #5 — The PSE Easement Operating Rights Are "Rights Not Derived from a Franchise Previously Granted by the Government Entity"

The Initial Order ignores the operating rights on the Tumwater Project that PSE derived from the Easement and erroneously concluded that PSE's rights derived solely from the Franchise Agreement. Initial Order ¶ 36. If the Initial Order had not ignored the Easement, the inescapable conclusion would have been that the Easement provided PSE with operating rights that are independent of and superior to the Franchise Agreement. *See* Section IV.B, *supra*. This error is highlighted by the Initial Order's misapplication of the *City of Kent* decision and its disregard of the parties' course of performance, which directly supports PSE's position.

#### 1. The *City of Kent* decision holds that an easement is a superior operating right

The Initial Order erroneously distinguishes and disregards *City of Kent* simply because it involved an easement held on private property, as opposed to City property.



Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Nothing in the text or history of Schedule 74 makes a distinction between easements held on private land and easements held on city property, nor does real property law support such a distinction. *See* Section IV.C, *supra*.

In *City of Kent*, the Commission faced a variety of issues related to underground conversion costs that were litigated by numerous cities in the context of Schedule 74's predecessor, Schedule 71. 2002 Wash. UTC LEXIS, at *5-7.[9] Like the City of Tumwater in this case, the cities in the *City of Kent* litigation had PSE franchise agreements and insisted that PSE pay all the costs for underground conversion. *Id.* at *9-12. One of the issues addressed by the Commission was the City of Federal Way's request that PSE convert its overhead facilities to underground facilities at PSE's expense, even though the electrical facilities at issue were located on a PSE easement. *Id.* at *27-28. In that case, PSE argued that it was not obliged to convert overhead facilities that were located on its private easements to underground facilities and would only do so if the requesting party paid 100% of the cost. PSE also argued that, as the owner of easement rights, it had complete control over its facilities within the scope of the easement and that a municipality did not have the authority to require PSE to convert its overhead facilities to underground facilities without compensation. *Id.* at *28-29.

The Commission agreed with PSE and found that the City of Federal Way was "not in a position to require any change—relocation or undergrounding—to PSE's existing facilities." *Id.* at *32. The Commission then ruled that, "[s]ince PSE could not be required to relocate the subject facilities, and bear the costs associated with relocation to new overhead facilities, it would not be reasonable to conclude that Schedule 71 requires PSE to

---

[9] In addition to the City of Kent, the other cities involved in the litigation were Auburn, Bremerton, Des Moines, Federal Way, Lakewood, Redmond, Renton, SeaTac, and Tukwila.



Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

bear the costs of relocation to underground facilities." *Id.* Finally, in its conclusions of law, the Commission ruled that "PSE is entitled to recover fully the costs it incurs in connection with the underground relocation of existing overhead electric distribution facilities that are located on private easements." *Id.* at *41-42 (Conclusion of Law #5).

In sum, the Commission has clearly recognized the primacy of the PSE Easement rights and has already issued an order in similar litigation that the municipality requesting underground conversion must pay 100% of the cost. As such, the Commission should follow its prior ruling in this case.

**2. The City's confirmation that it owes 100% of costs cannot be ignored**

The City's conduct with respect to the Tumwater Project is also relevant and should weigh in favor of PSE's interpretation of Schedule 74. While the ALJ correctly found that the City "went along with PSE's determination" from the beginning of the project in 2003 until October 2005, the Initial Order erroneously dismissed this evidence in paragraph 29.

PSE asserts that the City agreed with PSE initially because Section 2.b(2) of Schedule 74 unambiguously provides that the City must pay 100% of conversion costs where PSE's operating rights are pursuant to an easement. Where, as here, the City's conduct indicates that it, too, interpreted Section 2.(b)(2) of Schedule 74 as not applying when PSE's operating rights are derived from an easement, that conduct should be considered by the Commission. *Cf. Artesian Water Co.*, 330 A.2d at 443-44 (state's acquiescence to and continued performance under a franchise agreement with water utility indicated that franchise agreement applied to property at issue, despite ambiguity in agreement itself).

But, even if Section 2.b(2) is deemed ambiguous, the City's past admissions and the history of Schedule 74 support PSE's position. Indeed, the *City of Kent* decision explicitly



**Perkins Coie** LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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

**F. Error #6 — Public Policy Supports PSE's Interpretation of Schedule 74**

In paragraph 38, the Initial Order erroneously concludes that public policy does not support PSE's interpretation of Section 2.b(2)(B) of Schedule 74. As PSE pointed out in its Reply, to interpret Section 2.b(2)(B) as requiring PSE to contribute to the cost of conversion where it has operating rights pursuant to an easement renders PSE's easements virtually worthless. When PSE acquires easements, it relies on the fact that it cannot be asked to convert its facilities located on such easements without the government municipality that requests the conversion bearing the cost. If the Initial Order is upheld, PSE must reexamine its policy of acquiring easements and may ultimately be forced to purchase land in fee simple for the permanent location of electrical facilities. This would result in higher operating costs for PSE and could translate into higher rates for rate payers.

PSE does not invoke public policy lightly or to negate the express terms of Schedule 74, but rather to illuminate Schedule 74's intent and meaning as set forth in the Schedule itself and in *City of Kent*. Additionally, in raising the issue of public policy, PSE is mindful of RCW 80.28.010(1), which provides that PSE must charge rates that are "just, fair, reasonable and sufficient." But, by ignoring the history, intent, and policy behind Schedule 74, the Initial Order places PSE in a position where its operating costs could significantly



**Perkins Coie** LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

increase in a way not anticipated by PSE or the Commission. It is for exactly this reason that PSE petitions the Commission for review and correction of the Initial Order.

## V. CONCLUSION

For the reasons set forth above, PSE respectfully requests that the Commission correct the various erroneous conclusions in the Initial Order and issue a new order finding that the PSE Easement is a private property right that has not been extinguished or abandoned and is not superseded by the Franchise Agreement, and that the City must pay 100% of the conversion costs on the Tumwater Project pursuant to Schedule 74.

RESPECTFULLY SUBMITTED this 16th day of August, 2007.

**PERKINS COIE LLP**

By: James F. Williams

James F. Williams, WSBA No. 23613
Amanda J. Beane, WSBA No. 33070
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
Email: JWilliams@perkinscoie.com
Email: ABeane@perkinscoie.com

Attorneys for Puget Sound Energy, Inc.

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

| | |
|---|---|
| In the Matter of the Petition of,<br><br>PUGET SOUND ENERGY, INC.<br><br>For a Declaratory Order on Schedule 74 and the Schedule 74 Design Agreement between Puget Sound Energy, Inc. and the City of Tumwater. | No. UE-061626<br><br>CERTIFICATE OF SERVICE |

I hereby certify that on August 16, 2007 I caused true and correct copies of *Puget Sound Energy, Inc.'s Petition for Review of the Initial Declaratory Order on Motions for Summary Determination* and this *Certificate of Service* to be served on the following counsel of record, before the hour of 5:00 p.m., by hand delivery:

William H. Patton
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

Robert Cedarbaum
Assistant Attorney General
1400 S. Evergreen Park Drive S.W.
Olympia, WA 98504-0128

Andrea Montclair

Andrea Montclair