BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

CITY OF KENT, Petitioner, v. PUGET SOUND ENERGY, INC., Respondent.	DOCKET NO. UE-010778 (Consolidated)
CITY OF AUBURN, CITY OF BREMERTON, CITY OF DES MOINES, CITY OF FEDERAL WAY, CITY OF LAKEWOOD, CITY OF REDMOND, CITY OF RENTON, CITY OF SEATAC, AND CITY OF TUKWILA, Petitioners, v. PUGET SOUND ENERGY, INC., Respondent.	DOCKET NO. UE-010911 (Consolidated) CITIES' REPLY TO PSE'S RESPONSE TO MOTIONS FOR SUMMARY DETERMINATION AND CROSS-MOTION FOR SUMMARY DETERMINATION

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The City of Auburn, City of Bremerton, City of Des Moines, City of Federal Way, City of Lakewood, City of Redmond, City of Renton, City of SeaTac, and City of Tukwila ("Cities") submit this Reply to Puget Sound Energy' PSE Response to Motions For Summary Determination And Cross Motion For Summary Determination ("PSE Response").

I. Introduction

Schedule 71 sets for the terms and conditions under which Puget Sound Energy ("PSE" or "the Company") is required to perform underground conversion. In its Response, PSE disregards the plain language of the tariff and contends that underground conversion is subject to the raft of onerous conditions set out in its "Form Agreement." PSE should not be permitted to graft unreasonable requirements onto the tariff by terms dictated in its "Form Agreement."

It is hornbook law that a utility with monopoly power and an obligation to serve the public is not permitted to coerce a party into executing an unfavorable contract for service. "As a general rule, public utilities have the right to enter into contracts . . . so long as such contracts are not unconscionable or oppressive and do not impair the obligation of the utility to discharge its public duties." 73B C.J.S. Public Utilities § 5 at 137. Similarly, "a public utility owes a duty to its customers to provide service subject only to *reasonable* rules and regulations." *Oliver v. Hyle*, 513 P.2d 806, 809 (Or. App.1973) (emphasis in original).

The Cities urge the Commission to grant summary determination based upon the plain language of Schedule 71. There is no genuine issue as to any material fact, and the

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Cities are entitled to a summary determination in their favor as a matter of law. *See* WAC 480-09-426(2); CR 56(c).

II. Argument In Reply

A. Legal Standards And The Scope Of The Proceeding.

1. Standard For Interpreting Schedule 71

The Cities and Puget Sound Energy ("PSE" or "the Company") generally agree that the issue is the proper interpretation of Schedule 71. PSE Response at 6. The Cities and PSE also agree that the "plain language" of Schedule 71 controls resolution of this dispute. PSE Response at 5. Finally, the Cities and PSE agrees that Schedule 71 "does not explicitly state that cities must pay for operating rights." PSE Response at 13.

The Cities and PSE, however, strongly disagree on the correct interpretation of Schedule 71. The Cities contend that Schedule 71 does not require municipalities to pay for private easements for PSE's use and possession. Schedule 71 does not give PSE the option to refuse to perform underground conversion when equipment and materials are available. Schedule 71 does not permit PSE to force municipalities to agree to objectionable, coercive contracts as a condition of underground conversion.

There is also a heated factual dispute about the past history of PSE's agreements and practices on underground conversion and how this history bears on the meaning of Schedule 71. The Cities and PSE agree, however, that the dispute about PSE's historical position is not material. PSE Response at 4-5. Both the Cities and PSE thus agree that the case may be resolved on summary determination.

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2. The Commission Has Authority To Interpret Schedule 71 Consistent With PSE's Franchises And With The Washington Constitution.

PSE attempts to create a disagreement where none exists by asserting that the Commission does not have authority to issue a ruling based on PSE's franchises or on the Washington constitution. PSE Response at 7-9. The Cities are not asking the Commission to interpret either PSE's franchises or the Washington Constitution. However, the Commission's interpretation of Schedule 71 must comply with state law, and the Cities do seek an interpretation of Schedule 71 that is consistent with PSE's franchise obligations and the constitutional prohibitions on gifts of public funds.

There can be no doubt that the Commission has authority to construe Washington law and its Constitution to the extent necessary to insure that tariffs under its jurisdiction are consistent with state law. *See City of Auburn v. QWEST Corp.*, 247 F.3d 966, *as amended*, 2001 WL 823718, at * 8 (9th Cir. July 10, 2001); *People's Org. for Wash. Energy Resources v. WUTC*, 101 Wn.2d 425, 434, 679 P.2d 922 (1984) (tariff may not set terms that conflict with statute); *National Union Ins. Co. v. Puget Sound Power & Light*, 94 Wn. App. 163, 173-75, 972 P.2d 481 (1999) (tariff purporting to absolve utility from liability should not be interpreted in conflict with statutes). "It is well settled . . . that tariffs are read to be consistent with preexisting statutory law, and cannot repeal or supersede a statute." *Auburn v. QWEST*, 2001 WL 823718, at * 8.

B. PSE May Not Force Cities To Agree To Reimburse PSE For The Costs Of Private Easements As A Condition Of Converting Its Facilities To Underground.

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1. PSE's Duty To Convert Its Facilities Underground Is Mandatory And Not Contingent Upon The Cities' Agreement To Provide Private Easements.

PSE blatantly refuses to proceed with underground conversion for street projects unless Cities agree to provide private easements. PSE Response at 10. In addressing the issue, PSE incorrectly charges that the Cities "blur" the distinction between relocation and underground conversion. PSE Response at 9.[1] To the contrary, PSE's obligation to perform underground conversion under Schedule 71 – like its duty to relocate to accommodate a street project – is mandatory, not voluntary. Schedule 71 expressly provides that subject to the availability of equipment and materials, PSE "will remove" its overhead facilities and "will provide" an underground system. Schedule 71, § 2 (emphasis added).

Municipal ordinances and PSE's franchises also mandate that the Company convert to underground when so directed. The Bremerton ordinance granting a franchise to PSE is typical:

> If . . . the city shall direct Puget to underground Facilities (of 15,000 volts or less) within the Franchise area, such undergrounding shall be accomplished and arranged subject to and in accordance with applicable schedules and tariffs on file with the Washington Utilities and Transportation Commission.

[1] In fact, it is PSE that creates the "blur" when convenient. In the SeaTac dispute, PSE argues that allocation of the costs of underground conversion under Schedule 71 for Phase II of the SeaTac 170th South project depends upon whether – in PSE's judgment – the street improvement also require "relocation" of its overhead facilities.

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Stipulated Exhibit No. 2, § 6 (emphasis added). *See also* Stipulated Exhibit No. 3, § 4 (Des Moines); No. 4 § 15.1 (Federal Way); No. 5, § 5.2 (Renton); No. 6, § 5 (SeaTac).[2]

As PSE admits, Cities "have long been held to have authority to require at least some undergrounding on public streets." PSE Response at 74. The Washington Legislature granted code cities specific authority to require placement of electric wires and related facilities underground:

> Every code city shall have authority to permit and regulate under such restrictions and conditions as it may set by charter or ordinance and to grant nonexclusive franchises for the use of public streets, bridges or other public ways, structures or places above or below the surface of the ground for . . . poles, conduits, tunnels, towers and structures, pipes and wires and appurtenances thereof for transmission and distribution of electrical energy, signals and other methods of communication. . and other private and publicly owned and operated facilities for public service.

RCW 35A.47.040 (emphasis added).

The courts have also recognized the common law duty of utilities to relocate to underground when so directed. *Edmonds Gen. Tel. Co*., 21 Wn. App. 218, 226 (1978). *See also*: *U S West Communications, Inc. v. City of Longmont*, 948 P.2d 509 (Colo. 1997) (undergrounding reasonable exercise of police power on aesthetic and safety grounds); *Northern States Power Co. v. City of Oakdale*, 588 N.W. 2d 534 (Minn. Ct. App. 1998) (undergrounding of electric distribution lines reasonably related to prevention of safety

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[2] PSE appears to argue that the Commission may not take notice of the franchises in resolving this dispute. *See* PSE Response at 7. The Cities have not asked the Commission to "issue any order in this proceeding based on PSE's franchises," *id*., nor have they sought Commission interpretation of franchises. However, the Commission may take administrative notice of the franchise ordinances, particularly here, where PSE does not challenge their existence or content.

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hazards); *Central Maine Power Co. v. Waterville Urban Renewal Authority*, 281 A.2d 233 (Maine 1971) (undergrounding of electric wires in urban renewal area upheld on safety grounds); *Redevelopment Authority of Oil City v. Woodring*, 445 A.2d 724 (Penn. 1982); *Kahl v. Consolidated Gas, Electric Light & Power Co.*, 90 A.2d 754 (Md. App. 1948) (zoning ordinance requiring electric power lines to be located underground held valid exercise of police power); *Arizona Public Service Co. v. Town of Paradise Valley*, 610 P.2d 449 (Ariz. 1980) (power to require undergrounding implied by statute authorizing cities to regulate location height of structures); *Appeal of Bell Telephone Co. of Pennsylvania*, 10 A.2d 817 (Penn. 1940) (undergrounding ordinance within city's power to protect public safety); *State ex rel. Cleveland Electric Illuminating Co*, 159 N.E. 2d 756 (Ohio 1959), adhered to on reconsideration, 162 N.E.2d 125 (1959), appeal dismissed, 362 U.S. 457 (1960) (ordinance requiring undergrounding not unreasonable regulation related to health, safety, welfare).

The fact that Schedule 71 deals only with underground conversion rather than aerial relocation, therefore, does not render PSE's obligation to perform underground conversion voluntary. PSE's argument that the Cities "blur" the distinction between underground conversion and relocation is misguided and should be rejected.

2. Schedule 71 Does Not Require Cities To Provide Private Easements to PSE.

Schedule 71 by its plain terms does not require Cities to buy private easements for PSE. PSE concedes that "Schedule 71 does not explicitly state that cities must pay for operating rights." PSE Response at 13. Where the language of a tariff is "plain, free from

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ambiguity, and devoid of uncertainty," the meaning must be derived from the plain wording of the tariff. *People's Org. for Wash. Energy Resources v. WUTC*, 101 Wn. 2d 425, 429-30, 679 P.2d 922 (1984).

Notwithstanding the plain meaning of Schedule 71, PSE continues to insist that it has no obligation to perform underground conversions unless the Cities provide or pay for "operating rights," by which it means private easements.[3] PSE Response at 11-17. According to PSE, Section 4 "insulates" the Company from paying for operating rights. PSE Response at 14.

Section 4 does not require Cities to provide private easements. Section 4 explicitly applies to "owners of real property," who must provide, at their expense, space and legal rights to their property. Businesses and home owners – not Cities – are the "owners of real property" who must supply Section 4 "Operating Rights" to PSE on private property. Section 4 thus may "insulate" PSE from paying private parties for operating rights. A similar distinction between municipalities and property owners appears in Section 3, which requires PSE to enter into an undergrounding contract either with "the municipality having jurisdiction of the Conversion Area or the owners of all real property to be served …" Schedule 71, § 3(a) (emphasis added).

[3] In contrast to Schedule 71, PSE's new "Form Agreement" defines "operating rights" to include all property within a conversion area "owned or not owned by the City." The subsequent section continues: "The cost to the Company of obtaining any such space and rights on any property other than the rights-of-way shall be reimbursed in full by the City." *See* PSE Response at 17.

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Cities supply any necessary "Operating Rights" for use of public property by granting a franchise to use the public rights-of-way. PSE's own guidelines agree: "A large percentage of Puget Sound Energy's system is located on public road rights-of-way. Operating rights for most of this system are in the form of franchises." Stipulated Exhibit No. 20, PSE's Standard §0300.8000 - Easements, p. 4 of 5 (1997) (emphasis added).

Notwithstanding its own standards, PSE argues that "[i]f the 'operating rights' that are the subject of Section 4 were nothing more than franchise rights, then Section 4 would be superfluous." PSE Response at 15. To the contrary, Section 4 sets for the mechanism for PSE to acquire operating rights from private land owners. Section 4 allows PSE to obtain the same legal rights to use the property of private property owners as it receives from Cities to use public property – the rights-of-way – under its franchises. Section 4 thus is not "superfluous," but, as the Cities have consistently maintained, it has little – if any – application to municipalities.

PSE impliedly concedes that the Cities are not the property owners referred to in Section 4 by suggesting that it is in the Cities' interests 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 … or reimbursing PSE for such payments." PSE Response at 2 (emphasis added). The Cities may indeed voluntarily take such "steps" to prevent project delays, but nothing in Section 4 obligates Cities to pay for private easements.

The May 21, 1984 Agreement between PSE and Kent recognizes that historically, PSE assumed Section 4 "operating rights" would be obtained from private property

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owners, not municipalities. While the Agreement provides that PSE is not required to pay for any such operating rights, Paragraph 8 of makes it clear that the owners of "privately owned property" – not the City of Kent – are required to grant the necessary operating rights. Paragraph 8 provide in part:

> "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 therefore."

Dec. of G. Zeller, Ex. A, p. 4 of 5 (emphasis added.

Since Schedule 71 does not support its contention that Cities must provide private easements, PSE cites a provision from Schedule 80 that states that PSE "shall not be required to connect with or render service to an applicant unless and until it has all necessary operating rights …" PSE Response at 12. The quoted passage, however, is irrelevant because the Cities are not requesting a new connection or service, but the undergrounding of established lines.

3. PSE May Locate Its Facilities On Private Easements Obtained At PSE's Expense.

PSE contends that "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." PSE Response at 16. This is patently untrue. Although the Cities prefer that PSE, like other utilities, locate its equipment and facilities in the public rights-of-way, the Cities are not trying to force PSE to place all its facilities on the rights-of-way. If PSE wants to

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place its facilities on its own private easements, it can do so, but PSE must pay for these easements.

C. PSE's Arguments For Placing Equipment On Private Property Rather Than Public Rights-of-way Are Not Sound.

1. Safety And Operational Reasons

PSE argues that the decision as to which facilities should be placed on private property is within the Company's "sole discretion." PSE Response at 25. Cities do not dispute the need for adequate clearances and setbacks for electrical equipment. In fact, the Cities cited relevant engineering standards and guidelines in their Motion for Summary Determination. *See, e.g.,* Motion at 24.

PSE's professed concern for operational and safety issues, however, is inconsistent with the Cities' repeated agreement to provide sufficient space in the public rights-of-way for PSE's equipment. If PSE needs additional space to provide proper clearances and setbacks, the Cities have agreed to and have acquired necessary additional property. Where space is really at issue, the Cities will buy public rights-of-way to accommodate utility facilities. *See, e.g.,* Declaration of Maiya I. Andrews ("Andrews Decl."), ¶ 6-7.

With no explanation, however, PSE simply states that the Cities' agreement to provide adequate space on the public rights-of-way is "not satisfactory." PSE Response at 27. PSE actually complains when Cities do purchase public rights-of-way for its use and, in some cases, has refused to use available rights-of-way. For example, PSE's Mike Copps testified that he did not place PSE's facilities on private easements on the Federal Way project on South 312th because the City "had gone out and bought up the rights to

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the entire frontage of the conversion." Declaration of Mike Copps ("Copps Decl."), ¶ 7. Similarly, Andy Lowrey complained that on Phase I of the South 320th Street conversion, PSE could not use private easements because Federal Way had purchased "exclusive landscaping frontage easement along a significant portion of the conversion route." Declaration Of Andy Lowrey ("Lowrey Decl."), ¶ 24. On one Federal Way project, PSE actually refused to relocate its facilities on public rights-of-way, even though space was available, and insisted that a private landowner pay its relocation costs. Declaration of Cary Roe In Support Of Cities' Reply ("Reply Roe Decl.") ¶ 24.

PSE also raises the excuse that placement of its facilities on planting strips or sidewalks might create delays in obtaining permits for traffic control in the rights-of-way. Declaration of Lynn F. Logen ("Logen Decl."), ¶ 7. To the contrary, Cities provide such permits in a matter of days or, in case of emergency, Cities permit immediate access. Reply Roe Decl., ¶ 25.

PSE fails to submit any credible evidence to show why its equipment cannot be placed on public rights-of-way. In fact, PSE's evidence suggests that much of its equipment already is located on public rights-of-way. As mentioned above, PSE's guidelines state that a "large percentage" of its system is located on public rights-of-way. Stipulated Exhibit No. 20, PSE's Standard §0300.8000 - Easements, p. 4 of 5 (1997). The notes Marine View Drive underground conversion project, which PSE attached to the declaration of Mike Copps, strongly suggest that at lease some of PSE's equipment was placed on public rights-of-way shared with other utilities. The utility trench for PSE's equipment was "below the sidewalk." Copps Decl., Ex. C, p. 22 of 41. PSE requested

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"space between their conduit and that of other utilities" and complained of a "pole conflict." *Id.*, p. 9 of 41. There was at least one other "pole foundation conflict" with telephone facilities. *Id.*, p. 31 of 41.

Private easements are sometimes not even the most convenient location for electric facilities. Rights-of-way, unlike private property, permit design flexibility because they are not occupied by buildings. Reply Roe Decl., ¶ 9. Andy Copps' observations also suggest that underground placement on the rights-of-way, perhaps under the sidewalks, may the best location in some cases. Mr. Copps states:

> Cities have also made it harder for PSE to place its facilities on private property because they have widened sidewalks so much. That can cause a problem with pull vaults being located on private property because the conduit is forced into an angle, which reduces pulling distance. Also, building end up being right up against sidewalks, leaving little space for transformers.

Copps Decl., ¶ 10. "Widened sidewalks" would seem to be a suitable location for underground equipment when space limits the availability of private easements.

The Cities do not presume to infringe upon PSE's "discretion" as to where to place its electric facilities. However, PSE has failed to present credible safety or operational reason why its equipment cannot be located on public property. PSE's arguments for private easements rather appear to be an excuse to force Cities to purchase private easements for PSE's exclusive use and possession.[4]

[4] PSE claims the Cities incorrectly characterize its easements as "exclusive" because PSE's easement form allows the property owner to use the easement. PSE Response at 26-27. PSE also states that it voluntarily allows other utilities to use its easements. Decl. Of A. Lowrey ¶ 20. From the Cities' perspective, however, these easements are "exclusive" unless the City has the right to offer space to telecommunications and other

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2. Cost Reasons

PSE points out that installation and relocation of underground systems are more costly than overhead systems. PSE Response at 28-29. The Cities do not disagree, but it must be noted that Schedule 71 already takes into consideration that differential by requiring municipalities to share in the costs of underground conversion. When overhead (rather than underground) relocation is required, PSE must pay 100 per cent of the relocation costs. *City of Auburn v. QWEST Corp.*, 247 F.3d 966, *as amended,* 2001 WL 823718 (9th Cir. July 10, 2001). When relocation underground is required, the Cities share 30 to 70 per cent of the total costs of the project. Schedule 71, § 3.

PSE argues that if underground facilities are placed in public rights-of-way, Cities would have no "economic incentive to ensure that the underground facilities are initially placed such that they will not require immediate relocation." PSE Response at 30. This argument is spurious. "Least cost " planning (PSE Response at 31) benefits both PSE and the Cities. Since the Cities share the costs with PSE on a pro rata basis, the Cities have exactly the same economic incentive as PSE to make sure underground facilities are placed efficiently.

PSE's argument that placement on private easements reduces the need for relocation because the facilities are "out of the way of the public streets" is simply wrong. PSE Response at 31. PSE has repeatedly agreed to place cable and conduit in the public rights-of-way. *See, e.g.* Stipulated Fact No. 7. In order to connect the cable and conduit

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utilities. It is customary for telecommunications, gas, and electric utilities to share the public rights-of-way. *See* Declaration of James Morrow.

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to the rest of the electrical system, pad-mounted transformers and related equipment must be located near the streets and other public rights-of-way regardless of whether the Cities or PSE owns the easement. Equipment located on public rights-of-way is as much "out of the way of the public street" as equipment located on PSE's private easements.

Finally, PSE's arguments that Schedule 71 provides a "subsidy" to Cities or that Avista's tariff requires entities requesting conversion to pay 100 per cent of the costs are irrelevant. One could argue just as well argue that the Cities provide a "subsidy" to PSE's ratepayers by bearing the costs of trenching, restoration, surveying, and paying 30 to 70 per cent of the remaining costs. The Avista tariff does not appear to apply to municipalities at all, but rather only to "Customers." *See* Avista Corp. WN U-28, Schedule 51. The Avista tariff, moreover, does not require the Customer to pay 100 per cent of conversion costs, but rather provides an "Allowance" or credit depending upon the size of load. *Id.* Regardless of what Avista's tariff provides, Schedule 71 – which PSE adopted and the Commission approved – requires PSE and Cities to share in the costs of underground conversion.

Schedule 71 does <u>not</u> require cities to buy private, exclusive easements in order to shield PSE from relocation cost obligations it bears under franchises and state law. The Cities already share in the costs of underground conversion. The Commission should not increase this burden by adopting PSE's untenable interpretation of the tariff.

D. PSE May Not Require Cities To Pay The Costs Of Relocating Its Underground Facilities In The Future As A Condition Of Its

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Agreement To Place Facilities On Rights-of-way Rather Than On Private Property.

PSE poses the unfounded contention that Cities can be forced to agree to pay for future relocation costs as a condition of PSE's agreement to place its facilities on public rights-of-way. PSE Response at 33-37. Schedule 71 authorizes no such shift of the costs of relocation from PSE to the Cities.

Even though not authorized by Schedule 71, however, Cities in some cases have agreed to mitigate the cost of relocation of underground facilities for a specified period of years. However, the period must be reasonable and must coincide with the life of the street improvement. *See,* Declaration of Thomas Gut in Support of Cities' Reply ("Reply Gut Decl."). Voluntary agreement to set reasonable limits consistent with long term planning should not be confused with PSE's attempt to force Cities to bear all the costs of future relocation of underground facilities in perpetuity.

Ironically, PSE complains that provisions on future relocation are intended to make sure that Cities "plan ahead" to avoid future relocation of underground facilities. Logen Decl., ¶ 22.[5] Cities already engaged in extensive long-term planning for street improvements and PSE could mitigate its relocation costs by participating in the Cities' long-term public planning processes. City street projects which involve underground conversion go through two comprehensive planning processes. First, Cities develop a

[5] Mr. Logen's charge that because of Cary Roe's "false assurances," PSE was exposed to hundreds of thousands of dollars in relocation costs of underground facilities in Federal Way is simply not true. *See* Decl. Of L. Logen, ¶¶ 24-25. In fact, Cary Roe, Federal Way's Public Works Director, personally sat down with PSE's engineers to identify ways to prevent unnecessary relocations. Reply Decl. Of C. Roe, ¶¶ 20-21.

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capital improvement programs listing all improvements expected over the next 20 years. In addition, Cities are required by statute to adopt updated comprehensive 6 year transportation plans, which include all projects to be constructed within 6 years. PSE could participate in these plans, and such participation is essential if the Cities are to design street projects to reduce the need for relocation of underground utilities. At least in Federal Way, however, PSE has not joined in the planning process, either by obtaining copies of the City's plans or commenting on them in person or in writing. Reply Roe Decl., ¶¶ 10-12.

PSE's argument that municipalities are somehow "prohibited" from passing on underground relocation costs is equally specious. PSE Response at 31. As PSE well knows, RCW 35.21.860 pertains to franchise fees, not relocation costs. State statutes and common law, PSE's franchise agreements with the Cities, and Schedule 71 all obligate PSE to pay all or part of the costs of underground relocation. Cities are certainly not prohibited from passing on PSE's share of such costs.

As the Cities pointed out in their Motion, the long-established rule in Washington (and every other jurisdiction) is that a utility must pay relocation costs. *Auburn v. Qwest*, 2001 WL 823718, at *9 (9th Cir. July 10, 2001) (applying Washington law); *Washington Natural Gas Co. v. City of Seattle*, 60 Wn.2d 183, 186, 373 P.2d 133 (1962); *Granger Tel. & Tel. Co. v. Sloane Bros., Inc.*, 96 Wn. 333, 334, 165 P. 102 (1917) ("[A] city has no right directly or indirectly to burden itself or its citizens with the cost of removing and replacing of . . . electric light poles.").

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PSE wants to escape this universal rule by locating its underground facilities on private property. *See, e.g.* PSE Response at 34-35. Perhaps not coincidentally, PSE initiated its policy on placement of its electric facilities on private easements paid for by the Cities shortly after the district court decision in *Auburn v. Qwest*, which confirmed the financial obligation of Washington utilities to pay relocation costs. *See* Reply Roe Decl., ¶¶ 7-8.

Regardless of PSE's motives, the Cities agree that absent franchise terms to the contrary, PSE is entitled to place its equipment on private easements at its own expense. However, PSE's demand that the Cities pay for private easements so PSE can avoid the costs of necessary relocation is outrageous. If PSE wants private easements to protect it from future relocation costs, then PSE should pay for those easements. *See* Reply Roe Decl., ¶ 8. The Cities are guardians of the public funds and cannot agree to purchase easements to assist PSE in escaping the burden of relocation costs. There is no basis in Schedule 71 for shifting this responsibility to the Cities, and the Cities urge the Commission to reject PSE's arguments to the contrary.

E. PSE's Interpretation Of Schedule 71 Is Not Consistent With PSE's Historical Application Of The Tariff.

1. PSE's New "Form Agreement" Is Significantly Different Than Prior Underground Conversion Agreements.

PSE refers to the underground conversion agreements attached to the declaration of Lynn Logen in an attempt to show that they have "long contained" the same terms as its "Form Agreement." PSE Response at 37-30. PSE insists that the "fundamental requirements placed on cities have not changed." PSE Response at 38. Even PSE,

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however, concedes that the "Form Agreement" is "far more detailed (and repetitive) than earlier agreements." *Id.*

In reality, the "Form Agreement" would impose significant new and onerous terms on the Cities. For example, the "Form Agreement" provides for the first time:

> 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 no limited to, vaults for junctions, vaults for pulling cable, transformers and associated vaults, and switches and associated vaults, to be installed on private property.

Declaration of T. Gut, Ex. B, p. 3 of 11. Not one of the underground conversion agreements attached to Mr. Logen's declaration has a word about where cable, conduit, vaults, pad-mounted facilities, transformers, or any other equipment are to be located.

In addition, the "Form Agreement" provides that when real property owners are not participants in an underground conversion, "the cost of obtaining such Operating Rights on privately owned property shall be reimbursed in full by the City." *Id.*, p. 8 of 11. Unlike the current "Form Agreement," the historical agreements track Schedule 71 in that they require private homeowners and business – not the Cities – to pay the cost of underground service from the main distribution system. The agreements require "owners of real property" to provide space at their expense for underground facilities located on "privately owned property" and to grant necessary "operating rights." Although most of the agreements state that PSE will not be required to pay for easements, they do not specify what will occur if the owners of private property refuse to provide easements. *See, e.g.* Logen Decl., Ex. A, ¶ 8. As a practical matter, in the past PSE and the Cities

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worked together to make sure that any necessary easements were obtained. For example, the project notes for the Marine View Drive project in Des Moines state that the City may need to "go to condemnation" to get easements or may offer "assistance on a couple of parcels." Copps Decl., Ex. C, pp. 4, 9 of 41. In no event, however, were Cities saddled with the contractual obligation to buy easements for all of PSE's pad-mounted equipment.

At most, some of the agreements require Cities to pay a pro rata share of easement costs along with other project costs. For example Paragraph 8 of some agreements states: "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." *See, e.g.* Lowrey Decl., Ex. V. Paragraph 5 provides for the City to pay 30 per cent of the project costs. *Id.* Another agreement states similarly that if it is necessary for PSE to purchase any easements, they will become part of the "project costs." Logen Decl., Ex. C, ¶ 9.

Unlike PSE's new "Form Agreement," however, nothing in <u>any</u> of these prior agreements gave PSE the right to insist upon placing its pad-mounted facilities on private easements or force Cities to pay the full cost of private easements. Such terms have not been "long contained" in PSE's underground conversion agreements, but rather they represent PSE's new and onerous policy of compelling Cities to pay for private property for PSE's use.

2. Historical Conversions Do <u>Not</u> Demonstrate That PSE Is Entitled To Force Cities To Purchase Private Easements For PSE.

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In its Response, PSE also attempts to show the "historical application" of Schedule 71. PSE Response at 46-53. The history, however, does not establish that PSE is entitled to insist upon placement of its equipment on private easements at the Cities' expense. To the contrary, PSE historically, with few exceptions, has not required Cities to pay for private easements.

Clearly on recent underground conversion projects, PSE has attempted to place its equipment on private easements. The extent to which PSE observes this practice, however, is not so clear. Andy Lowrey admitted he placed a switch in the rights-of-way on Phase I of SeaTac's South 170th Street project, and he placed PSE's facilities on rights-of-way on Phase I of Federal Way's South 320th Street conversion. Lowrey Decl., ¶¶ 14, 24. Greg Zeller admitted that in April 2000, "some project managers had drifted away from PSE's standards with respect to placing PSE's facilities such as vaults, transformers and switches on private property on easements." Declaration of Greg Zeller ("Zeller Decl."), ¶ 9. PSE did not dispute that its equipment on the Federal Way South 348th Street project, including a vault, were installed on the rights-of-way or that the majority of its facilities on the South 320th Street project were placed on the rights-of-way. Reply Roe Decl., ¶¶ 13, 16.

Regardless of whether PSE has located its equipment on private easements, PSE did not try to coerce the Cities into paying for those easements until recently. The change in PSE's policy on payment for private easements apparently crystallized in mid-2000. Greg Zeller indicates that some time after April 2000, he and Lynn Logen began working together to make the underground conversion agreement "more explicit." Zeller Decl., ¶

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16. About that time, Mr. Zeller "put his foot down" and insisted that the Cities agree to absorb the costs of easements before PSE would perform underground conversions. *Id.* ¶ 17. In July 2000, PSE issued its "Rate Schedule Interpretation E-71-3" setting out the new interpretation of Schedule 71 and private easements.

Prior to that time, PSE generally placed its equipment on public rights-of-way or paid for its own private easements, and Cities did not provide private easements except on rare occasions. *See e.g.*, Declaration of Cary Roe, ¶ 4. Cities occasionally provided incentives to land owners to supply easements to PSE in order to prevent costly delays in street improvement projects. For example, the City of SeaTac once extended a water line to a private property owner in exchange of an easement grant to PSE in order to avoid the costs of project delay. Declaration of Thomas Gut, ¶ 18.

At other times, Cities gave easements to PSE under unusual or peculiar circumstances. For example, City of Renton purchased a lot for the underground conversion project on Main Avenue South. Part of the lot was used to widen the street, and part of the parcel was to be sold as surplus. Since a portion of the lot was not needed for rights-of-way and was not included within PSE's franchise area, Renton granted to PSE an easement on the lot for its electrical facilities. Instead of using the easement, however, PSE built its facilities on another piece of the lot and demanded that the City reimburse PSE. The City has never agreed to pay for this private easement, and expects PSE to reimburse the City for the cost of the easement. Declaration of Thomas G. Boynes, ¶¶ 4-5.

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The only examples PSE submitted demonstrate the type of unusual circumstances in which Cities made such concessions about private easements. *See,* Lowrey Decl., Ex. P (SeaTac agreement to provide easements for service to Alaska Airlines "as a matter of mutual expediency"); Copps Decl., Ex. B (Des Moines agreement to provide parking to landowner in exchange for PSE easement); Lowrey Decl., Ex. M (SeaTac agreement to extend water line to property owner in exchange for PSE easement); Lowrey Decl., ¶¶ 4-7 (Renton grant of easement to PSE under unusual circumstances).[6]

However, these are isolated incidents. PSE should not be allowed to bootstrap these odd events into a "history" of Schedule 71. PSE's misreading of the past does not constitute sound legal support either for its new "Form Agreement" or its current demand that Cities pay for private easements.

F. PSE's Interpretation Of Schedule 71 To Require Cities To Pay The Cost Of Private Easements Violates The Washington Constitution.

PSE's Response fails to refute the inescapable conclusion that interpreting Schedule 71 to require municipalities to provide private easements for PSE's exclusive use and possession is in clear derogation of Article 8, Sections 5 and 7 of the Washington Constitution. *See* PSE Response at 60-66.[7] Those constitutional provisions preclude the

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[6] PSE also cited at least one instance where a City supposedly agreed to pay for an easements that did not happen. On a Federal Way project, a landowner – not Federal Way – apparently told PSE that the City would pay for an easement. Reply Decl. Of C. Roe, ¶ 14. PSE apparently buried the cost of the easement in an invoice under the guise of "additional nights and weekend work." *Id.*

[7] PSE's Response is 80 pages in length in violation of the Commission's rules. WAC 480-09-770. Accordingly, the Cities have separately moved to strike pages 61 to 80 of PSE's Response. The Cities address the issues raised on these pages without waiving any of the issues raised in its motion to strike.

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lending of credit by the State. Here, the constitutional violation is clear: PSE wants the Cities to either (1) purchase private easements and then give title to those easements to PSE for PSE's exclusive use and possession, or (2) "reimburse PSE for PSE's costs to obtain such easements." *See* PSE Response at 2, 10. The Washington State Supreme Court has spoken on the unconstitutionality of either scenario: "[P]ayment by the state of the cost of relocating the utility facilities . . . violates the direct and positive mandates of . . . Art. 8, section 5 of the state constitution." *Hwy. Com. v. Pac. NW Bell Tel. Co.*, 59 Wn.2d 216, 224, 367 P.2d 605 (1961).

1. The Purchase Of Private Easements By The Cities To Be Given To PSE, Or Reimbursing PSE For Its Own Purchase Of Such Easements, Constitute An Unconstitutional Loan Of Credit Under The Washington Constitution.

PSE's discussion contributes confusion on the issue of the unconstitutional lending of credit for the Commission.[8] Article VIII, Section 7 of the Constitution provides:

> *Credit Not To Be Loaned. 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*, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

WASH. CONST. Art. VIII, § 7 (emphasis added). Article 8, Section 5 contains a similar prohibition: "The credit of the state shall not, in any manner be given or loaned to, or in

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[8] The Cities' Motion may have contributed to this confusion by characterizing the constitutional question as a "gift of public funds" issue. The authorities cited by the Cities were related to the prohibition against lending of credit, which arises from the identical constitutional provision as the gift of public funds.

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aid of, any individual, association, company or corporation." These two sections are interpreted "identically." *Citizens for Clear Air v. City of Spokane*, 114 Wn. 2d 20, 38, n. 7, 785 P.2d 447 (1990).

"The constitution clearly specifies that the sole purpose for which a municipality may loan its credit is `the necessary support of the poor and infirm.'" *Lassila v. Wenatchee*, 89 Wn.2d 804, 810, 576 P.2d 54 (1978). Obviously, PSE is not the "poor and infirm," so the only issue is whether a lending of credit occurs by having the Cities purchase easements and then give title to those easements to PSE, or by reimbursing PSE for the costs of obtaining such easements directly. The Washington Supreme Court's decisions in lending of credit cases make clear that "lending of credit" takes many different forms, and both arrangements proposed by PSE violate the Constitution.

The Washington State Supreme Court has "traditionally interpreted article 8, section 7, very strictly. . . ." *U.S. v. Town of Bonneville*, 94 Wn.2d 827, 835, 621 P.2d 127 (1980) (*declined to follow on other grounds in King County v. Washington State Boundary Review Bd*., 89 Wn.2d 804, 576 P.2d 54 (1978)). For example, the State Supreme Court struck down the sale of property that had been purchased by the City of Wenatchee as part of a redevelopment with the intention of reselling it to specific individuals who planned to construct a theatre. *Lassila*, 89 Wn.2d at 806-808. "Purchase of property by a municipality with an intent to resell it to a private party is prohibited by Const. art. 8, section 7." *Id*. See also *Paine v. Port of Seattle*, 70 Wn. 294, 126 P. 628, 127 P. 580 (1912). PSE's proposal that the Cities purchase private easements, then hand over title to those easements to PSE, is indistinguishable from *Lassila*. Similarly,

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reimbursement by the Cities for a direct purchase of private easements by PSE results in a lending of credit as the Cities would contract with PSE to guarantee repayment prior to PSE's easement purchase.

The *Lassila* Court clarified the distinction between a gift of public funds and a lending of credit. "The fact that the City received value on resale does not negative the unconstitutionality of that *loan of credit*. Receipt of value merely assures that the City did not make an unconstitutional *gift* of public funds, which is an entirely different matter." *Lassila*, 89 Wn.2d at 811 (emphasis in original). The Court has "repeatedly held that a loan of money or credit by a municipality to a private party violates Const. art. 8, section 7 regardless of whether it may serve a laudable public purpose." *Id*. at 811.

Indeed, the State Supreme Court has long been unimpressed by the argument that a resulting public good somehow makes a lending of credit constitutional.

> The section of the constitution last quoted, in most express terms, prohibits a county from giving any money, property or credit to, or in aid of, any corporation, except for the necessary support of the poor and infirm. "If the framers of the constitution had intended only to prohibit counties from giving money or loaning credit for other than corporate or public purposes, they would doubtless have said so in direct words. That agricultural fairs serve a good purpose is not questioned, but the constitution makes no distinction between purposes, but directly and unequivocally prohibits all gifts of money, property, or credit to, or in aid of, any corporation, subject to the exception noted."

Port of Longview v. Taxpayers, 85 Wn.2d 216, 231, 533 P.2d 128 (1974) (quoting *Johns v. Wadsworth*, 80 Wn. 352, 354, 141 P. 892 (1914)). Similarly, the State Supreme Court articulated the public policy concerns which the lending of credit constitutional provision is designed to address:

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> The financing of private enterprises with public funds is foreign to the fundamental concepts of our constitutional system To permit such encroachment upon the prohibitions of the Constitution would bring about, as experience and history have demonstrated, the ultimate destruction of the private enterprise system.

Port of Longview v. Taxpayers, 85 Wn.2d at 227 (quoting *State ex rel. Beck v. York*, 164 Neb. 223, 82 N.W.2d 269 (1957)).

Thus, the public good that may result from the undergrounding has no constitutional significance in this lending of credit by the Cities. Indeed, the Cities would not even receive payment from PSE for the easements, unlike the City of Wenatchee that received payment and a public benefit, yet still failed to pass constitutional muster. Whether the Cities purchase the easements or reimburse PSE for its purchase of the easements makes no difference, both result in unconstitutional lending of credit.

As noted in the Cities' Motion, the Washington Supreme Court has decided that PSE's attempt to have the Cities pay for PSE's easements is unconstitutional. *Hwy. Com. v. Pac. NW Bell Tel. Co.*, 59 Wn.2d 216, 367 P.2d 605 (1961). *See* Motion, pp. 17-18. In that case, the Court examined who must pay for relocation costs of utility facilities. The Court specifically stated that it was examining this issue under Article 8, section 5 of the Constitution: "The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation." *Id*. at 223. Thus, the Court examined whether the State's payment of such relocation costs was an unconstitutional lending of credit. *Id*. at 223-224. The Court determined that it did. "[P]ayment by the state of the cost of relocating the utility facilities . . . violates the direct and positive mandates of . . . Art. 8, section 5 of the state constitution." *Id.* at 224.

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PSE's attempts to evade the clear dictates of this case are unavailing. First, PSE asserts that *Hwy. Com. v. Pac. NW Bell* was determined before *GTE v. City of Bothell*, 105 Wn.2d 579, 716 P.2d 879 (1986). *See* PSE Response at 67. This distinction is irrelevant. *GTE v. Bothell*, as noted in PSE's Response, is a gift of public funds case, not a lending of credit case, and therefore involves a different standard and analysis. *Id*. at 63. Consequently, that case does not apply here. Second, PSE attempts to argue factual differences between the case before the Commission and *Hwy. Com. v. Pac. NW Bell*. Those factual distinctions are of no import. Indeed, the State Supreme Court did not rely on its factual setting in quickly determining that the State's absorption of the relocation costs constituted an unconstitutional lending of credit. *Id.* at 223-224.

In short, PSE is unable to distinguish either *Lassila* or *Hwy. Com. v. Pac. NW* Bell, both of which are directly on point. Any scenario offered by PSE that results in the Cities' purchase of private easements for PSE's exclusive use is an unconstitutional lending of credit.

G. If Schedule 71 Applies To Phase II Of the South 170th Street Project, SeaTac Must Pay Only 30% Of The Total Cost Of Underground Conversion.

If the Commission determines that Schedule 71 applies to Phase II of the South 170th Street Project at all, SeaTac's share of the costs of underground conversion would be 30% of the total costs. The SeaTac South 170th Street project will widen the existing two-lane street from approximately 24 feet to 36 feet, adding at least one full lane. PSE agrees that SeaTac is adding "one full lane" in the improvements. *See* PSE Response at 68. Likewise, PSE has not raised an allegation that 170th is not arterial.

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There are eight poles involved in the 170th Street underground conversion. Under the current design for the street improvement project, if the poles were to remain in their present position, two of PSE's existing poles would be located in the new roadway and six would be located in the sidewalk more than six inches from the street side of the curb. *See* PSE Response at 70. Under these circumstances, if Schedule 71 applies at all, SeaTac should pay only 30% of the costs of the conversion because the existing "overhead system is required to be relocated due to addition of one full lane or more to an arterial street or road." Schedule 71, § 3(b)(1).

PSE contends that SeaTac would pay 30% of only one quarter of the total cost of the conversion because only one quarter of the poles of the existing overhead system are "required to be relocated due to addition of one full lane or more to an arterial street or road" under Section 3(b)(1), but that SeaTac must pay 70% of three quarters of the total cost of the conversion because three quarters of the poles are not "required to be relocated due to addition of one full lane or more to an arterial street or road." PSE bases its contention on the fact that three quarters of the poles would not be in the driving surface or within six inches of the curb of the widened street. *See* PSE Response at 70.

Schedule 71 does not speak in terms of individual poles. It states, quite clearly, that where PSE's overhead system must be relocated due to addition of a full lane to an arterial, the Cities' costs are 30% of the project. There is no basis in the text of Schedule 71 for the parsing of costs pole-by-pole. Assuming for the sake of argument that Schedule 71 applies to the SeaTac project, Section 3 must be read to place only 30% of the cost

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responsibility on SeaTac because relocation of the overhead system is required due to the addition of one full lane or more to an arterial street or road.

PSE relies on its own "Rate Schedule Interpretation E-71-3" for its novel interpretation of Schedule 71. *See* PSE Response at 69. The "Rate Schedule Interpretation," which was issued by Steve Secrist in July 2000, should be given no weight whatsoever in the resolution of the dispute before the Commission. The "Rate Schedule Interpretation" is inadmissible, self-serving hearsay. ER 802.[9] that has not been filed with or approved by the Commission. PSE's own testimony demonstrates that the "Rate Schedule Interpretation" of the Schedule 71 is not governed by the tariff, but was concocted after the fact. Andy Lowrey states: "Before RSI E-71-3 was issued, I typically applied the 30% cost sharing to Schedule 71 projects if a lane was being added and the existing poles would be in the lane or sidewalk after the conversion." Lowrey Decl., ¶ 29. Mr. Lowrey apparently never considered – nor did anyone else at PSE – that poles were "required to be relocated" under Schedule 71 only if the poles would end up in the sidewalk more than six inches from the curb.

PSE did not apply this pole-by-pole approach in the past. Andy Lowrey explains away the inconsistent treatment of Phase II of the South 170th Street project by saying that he looked at the plans through a magnifying glass and incorrectly counted the number of inches between the poles and the street. Lowrey Decl., ¶ 30. In fact, in a previous SeaTac

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[9] The "Rate Schedule Interpretation" is inadmissible hearsay because it is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

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project on Des Moines Memorial Drive South between South 188th Street and South 192nd Street, PSE assigned the City 30 % of the costs even though the utility poles would have remained in the sidewalk and more than six inches from the curb. Reply Declaration of Thomas Gut ("Reply Gut Decl."), ¶ 4. The underground conversion agreement for this project was executed in December 2000, several months after PSE's "Rate Schedule Interpretation," was issued. Reply Gut Decl., Ex. A.

PSE claims that NESC 231.B sets forth the standard for when equipment in the right-of-way is to be relocated. *See* PSE Response at 71-72. The NESC standard, however, by its own terms merely sets out the minimum possible distance from the curb for pole location. *See* PSE Response at 71 ("In no case shall such distance be less than 150mm (6 in).")

As discussed in the Cities' Motion, determinations about relocation of equipment in the public rights-of-way must be made by the municipal authorities that hold the rights-of-way in trust for the public. PSE concedes as much in brief. *See* PSE Response at 72 ("SeaTac is free to decide whether it wants any or all of the poles along South 170th Street to be relocated … so long as that decision is consistent with proper exercise of SeaTac's police powers and its franchise with PSE.").[10]

[10] PSE accuses the Cities of improper argument on this point, stating that "[i]t 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." The issue under Section 3, however, is whether an overhead system is required to be relocated due to a lane addition, an issue upon which the Cities' authority over the rights-of-way directly bears.

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On South 170th Street, the City of SeaTac determined that PSE's poles must be relocated. If the poles remained in their current location, they would obstruct safe pedestrian traffic even if the system were not converted to underground. Declaration of Thomas Gut Decl., ¶ 8. Under these circumstances, SeaTac's share of conversion costs under Schedule 71 is 30 per cent, and the Cities request summary determination as a matter of law in their favor.

H. Schedule 71 Applies To Underground Conversion Of Facilities Located On PSE's Property Adjacent To And Along The Rights-Of-Way On The Federal Way 23rd Avenue South/South 320th Street Project.

At the intersection of 23rd Avenue South and South 320th Street in Federal Way, some of PSE's existing overhead facilities along the 320th Street portion are located on PSE easements outside the public right-of-way. Refusing to convert overhead facilities located on PSE's easements to underground under Schedule 71, PSE contends that "Schedule 71 does not apply to facilities located on private property." PSE Response at 3.

Schedule 71 does not support PSE's contention. Schedule 71 is available for underground conversion "in those portions of municipalities which are zoned and used for commercial purposes (and in such other areas of such municipalities which have electrical load requirements which are comparable with developed commercial areas)." The availability of Schedule 71 is not limited to "municipal rights-of-way" or "municipally-owned property."

PSE claims that "municipalities do not have authority to require PSE to convert its overhead facilities that are located on private property to underground without just

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compensation." PSE Response at 75. To support this sweeping proposition, PSE cites three cases. None of the three are Washington decisions, and none apply takings principles to underground conversion. Indeed, in *Duquesne Light Co. v. Monroeville*, the Supreme Court of Pennsylvania harmonized a borough's statutory authority to define undergrounding districts with the regulatory jurisdiction of the PUC. 298 A.2d 252 (Pa.1972). The court did not invalidate the municipality's statutory power and expressly refused to examine the question of "whether the enforcement of the ordinance is a taking of property without due process of law." *Id*. at 254, n. 3. *See also In re Pub. Serv. Elec. & Gas Co.*, 173 A2d 233 (N.J. 1961) (New Jersey borough did not have authority under state law to require undergrounding of high voltage transmission lines); *Union Elec. Co. v. Crestwood*, 499 S.W.2d 480 (Mo. 1973) (ordinance requiring underground construction of all new distribution and high voltage transmission lines held invalid).[11]

PSE also argues that its facilities along 23rd Avenue South span less than two city blocks. PSE Response at 75. PSE's comparison of the SeaTac South 170th Street Project to the Federal Way project -- which covers a Conversion Area much larger than two blocks – is facile and should be disregarded. The SeaTac project involved two separate Conversion Areas, one in a predominantly commercial area and one in an exclusively residential area. In that case, Schedule 71 applies to the commercial Conversion Area and Schedule 70 applies to the residential Conversion Area.

[11] PSE also cites and discusses authority holding that owners of easements or proscriptive rights may not be disturbed in those rights by the owner of the servient estate. *See* PSE Response at 75. These cases are only relevant to PSE's rights as against property owners holding the underlying fee estate upon which PSE easements rest, not to

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In the Federal Way project, there is only one Conversion Area. The portion of 23rd Avenue South at issue is only one part of a single Conversion Area. If the Commission determines that Schedule 71 applies to this project, Schedule 71 must apply to the entire Conversion Area.

III. Conclusion

In its Response, PSE insults the Cities with groundless, vitriolic allegations. PSE claims that Cities are trying to obtain "total control" over the location of its facilities. Response at 1. PSE accuses City staffs of "serious intimidation and pressure." Declaration of A. Lowrey ¶ 17. PSE officials charge the Cities with making "continuous threats" and "getting away with more than should have." Declaration of L. Logen, ¶¶ 33,35. PSE accuses the Cities of making a "cynical attempt to undermine Schedule 71." PSE Response at 60.

PSE's overblown rhetoric should be ignored. The Cities do not want to "undermine" Schedule 71, but rather to have it enforced according to its terms. The Cities do not want to "control" the location of PSE's facilities, but rather to manage the public rights-of-way responsibly. The Cities are not in a position to intimidate a powerful public utility like PSE and do not want to do so; rather, the Cities want to negotiate with PSE on a fair and level playing field.

Regardless of PSE's accusations, this case is not about "whether PSE can be forced to install underground facilities in public rights-of-way." PSE Response at 37. The issue here is simply whether PSE can refuse to perform underground conversions

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municipalities.

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under Schedule 71 unless Cities agree to PSE's unreasonable and inconsistent contract terms. There are no genuine issues as to any material fact, and the Cities urge the Commission to enter summary determination in their favor as a matter of law.

DATED this 18th day of September, 2001.

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By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the CITIES' REPLY TO PSE'S RESPONSE TO MOTIONS FOR SUMMARY DETERMINATION AND CROSS-MOTION FOR SUMMARY DETERMINATION filed by the Cities of Auburn, Bremerton, Des Moines, Federal Way, Lakewood, Redmond, Renton, SeaTac, and Tukwila, upon all parties of record in this proceeding, via facsimile, followed by U.S. mail, as follows:

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