

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of
PUGET SOUND ENERGY,
Grant of License To Use Property for
Recreational Purposes

Docket U-_____
PUGET SOUND ENERGY'S PETITION FOR
A DECLARATORY ORDER

I. INTRODUCTION

1. Puget Sound Energy (PSE") submits this petition to the Washington Utilities and Transportation Commission ("WUTC" or "Commission") for an order declaring that PSE may grant a license to the King County Department of Natural Resources and Parks ("King County") or other entities to allow the use of PSE's transmission corridors for public recreation purposes. King County has requested to use PSE's transmission corridors for public recreation, including as a hiking, horseback riding, and biking trail, and PSE wishes to grant a license to King County for this use. The subject property is located in King County, and a map and legal description of the property are attached hereto as Attachment A. PSE requests that the Commission issue an order pursuant to WAC 480-07-930 declaring that 1) PSE may grant a license for use of PSE land for public recreation, and 2) no accounting treatment is necessary because PSE is not transferring any interest in real property. As discussed herein, the Commission should issue a declaratory order because PSE faces uncertainty that necessitates resolution, an actual controversy exists, the uncertainty adversely affects PSE, and no measurable adverse effects to others will arise from the order requested.

2. The following rules or statutes may be brought into issue by this Petition:

RCW 34.05.240, RCW 80.01.040(3), RCW 80.12.020, WAC 480-143-120, and WAC 480-07-930.

3. PSE relies on the Declaration of Joel Schleppe, filed herewith, for the following facts:

II. BACKGROUND AND STATEMENT OF FACTS

4. PSE currently owns approximately 14 miles of right of way corridor in King County known as the Interurban South Link 115-kV right of way. *See* Declaration of Joel Schleppe (“Schleppe Decl.”) at ¶ 4, filed herewith. King County has requested that PSE allow King County rights to provide County-managed public use of these corridors for recreational use. *See id.* PSE would like to make recreational use of these properties available to the public, only to the extent consistent with, and subordinate to, current and future utility uses, by granting a license to King County to maintain and permit public use of public recreational trails for recreation use. *See id.*

5. In the past, PSE has granted long-term easements to entities such as King County to maintain public trails along PSE's rights of way for recreational purposes. *See id.* at ¶ 5. For example, with respect to the Puget Sound Electric Railway Right of Way, PSE granted King County an easement in 1977 for a 25 year term to permit public access and recreational use. *See id.* Additionally, in 2002, PSE filed an application with the Commission requesting authorization to make a gift to the State of Washington (by conveying and quitclaiming fee title to right of way to the State) for recreation use, reserving to PSE easement rights for its utility purposes. *See id.* In that proceeding PSE proposed giving the State fee title to the real property while retaining an easement for PSE's utility needs. *See id.* Because PSE intended to donate fee title to the property to the State, PSE proposed to calculate the gain of the transaction based on the net charitable contribution tax benefits PSE would receive for the donation to the State. *See id.* However, WUTC Staff recommended that PSE's proposed transfer be treated as a sale for rate purposes,

rather than a donation, with the net gain based on fair market value of the property being transferred. *See id.* and Exh. A thereto. In light of WUTC Staff's proposed accounting treatment of the gift, PSE ultimately declined to make the donation to the State. *See id.*

6. Utility corridors are natural pathways for hiking, biking, horseback riding and other types of trails. *See id.* at ¶ 6. PSE routinely receives requests for access to its real property for public recreation use, including the request from King County that is at issue in this petition. PSE also periodically sees evidence that informal trails have been established without any formal authorization. *See id.* PSE believes that it is neither necessary nor desirable to transfer property rights in order to provide public access to PSE's rights of way for recreation purposes, in part because it is possible that PSE could lose its recreational immunity under RCW 4.24.200 if it receives economic benefits for allowing others to use its land.¹ Regardless, there is uncertainty surrounding PSE's grant of a license for recreation purpose and the manner in which other parties may seek to have such a license treated for ratemaking purposes in future proceedings. Therefore, PSE requests a declaratory order to provide certainty regarding PSE's ability to grant a license to King County for managed, public, recreational use of PSE's transmission corridor for the property described above, as well as other similar requests PSE has received and is likely to receive in the future.

III. DISCUSSION

A. Commission Approval of the License is Unnecessary.

7. The Commission should issue an order declaring that no approval is needed for PSE to grant King County a license to provide a trail and authorize public use of PSE's utility

¹ The recreational immunity statute allows the public to use PSE's transmission corridors without PSE or its customers assuming any liability for the use. *See* RCW 4.24.200 ("[A]ny public or private landowners . . . who allow members of the public to use [their lands] for the purposes of outdoor recreation . . . without charging a fee . . . shall not be liable for unintentional injuries to such users."). If PSE receives remuneration for the grant of the license, it is possible that injured trail users would argue that PSE had waived or vitiated its recreational immunity under the statute. *See Ducey v. United States*, 713 F.2d 504, 511 (9th Cir. 1983) (voiding recreational immunity where owner receives economic benefit from allowing others the recreational use of the property).

property for recreational purposes, provided such uses are subordinate to, and do not interfere with or limit, PSE's use of such rights of way for utility purposes. RCW 80.12.020 requires PSE to seek Commission approval before selling or transferring a property interest:

No public service company shall sell, lease, assign or otherwise dispose of the whole or any part of its franchise, properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public . . . without having secured from the commission an order authorizing it to do so. . . .

Similarly, WAC 480-143-120 states:

A public service company may not complete a transfer of property necessary or useful to perform its public duties unless the company first applies for, and obtains, commission approval. Transfers include sale, lease, assignment of all or part of a public service company's property . .

A grant of a license or permit to use private property is not a transfer of property or property right.

“A license authorizes the doing of some act or series of acts on the land of another without passing an estate of the land and justifies the doing of an act or acts which would otherwise be a trespass.”²

Unlike an easement, a license is revocable and nonassignable and does not exclude possession by the owner of the servient estate.³ Since PSE is not transferring a property right, there is no obligation to obtain approval from the Commission pursuant to RCW 80.12.020.

8. Moreover, any such license would provide that authorized recreational uses would at all times be subordinate to present and future utility needs. Therefore, the uses authorized by such a license would neither be necessary or useful to PSE in its utility operations, nor interfere with PSE's use of the rights of way for such operations. Since the uses authorized are "surplus" to PSE's utility needs, PSE's authorization to a county to provide a trail for such compatible uses is not a transfer of property necessary or useful to perform PSE's public duties.

² *Conaway v. Time Oil Co.*, 34 Wn.2d 884, 893, 210 P.2d 1012 (1949).

³ *Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956).

B. No Accounting Order is Necessary.

9. PSE plans to grant the license to King County free of charge. PSE will not receive any financial gain or incur any loss as a result of the transaction. PSE's investment in the right of way will not be affected by the public's use of the property for recreational purposes on terms that at all times provide that recreational use is subordinate to utility operational requirements. PSE will continue to operate its transmission lines as it has in the past, prior to the grant of the license, and will be able to rebuild, enlarge, reconstruct, relocate, or abandon them and other utility facilities, all as circumstances warrant. Accordingly, PSE is not requesting an order authorizing accounting treatment associated with this grant of a license to use land, and no ratemaking treatment is necessary now or in PSE's next general rate case.

IV. APPROPRIATENESS OF DECLARATORY ORDER

10. By authority of WAC 480-07-930 and RCW 34.05.240(1), the Commission may enter a declaratory order upon a showing:

- (a) That uncertainty necessitating resolution exists;
- (b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
- (c) That the uncertainty adversely affects the petitioner;
- (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and
- (e) That the petition complies with any additional requirements established by the agency under subsection (2) of this section.⁴

The declaratory order requested by PSE meets these requirements, as set forth below.

⁴ The Commission has not established additional requirements under RCW 34.05.240(1)(e), but rather requires that petitions for declaratory order comply with the remaining subsections of RCW 34.05.240(1). *See* RCW 34.05.240(2).

11. **Uncertainty Necessitating Resolution:** The uncertainty to be resolved by this Petition is twofold: 1) whether PSE has the right to grant a license to an entity for the public use of PSE land for recreational purposes without seeking Commission approval pursuant to RCW 80.12.020 and WAC 480-143-120, and 2) whether PSE must treat such grant as transfer of a property right for accounting purposes and credit value for the license to customers, even though PSE is receiving no financial gain for the grant of the license. These questions require interpretation and application of Washington law and the Commission's rules. RCW 80.12.020 prohibits a public service company from selling, leasing, assigning or otherwise disposing of its properties, which are necessary or useful in the performance of its duties to the public, without first securing Commission authorization. PSE interprets RCW 80.12.020 to be inapplicable to a grant of a license for the use of land, in which PSE would retain all property rights. Additionally, PSE will receive no financial benefit from the grant of this license. However, there is uncertainty as to how the Commission, Commission Staff and other parties would treat this grant of a license in future proceedings and whether this grant of a license constitutes a transfer of property under RCW 80.12.020 and WAC 480-143-120. Interpretation and application of the statute and rule cited above are within the Commission's jurisdiction.

12. **Actual Controversy Arising From the Uncertainty Such That a Declaratory Order Will Not Be Merely an Advisory Opinion:** The petition presents an actual controversy because PSE is currently being asked to allow use of its transmission corridors for recreational purposes, and PSE intends to grant a license for such use provided that the Commission issues the declaratory order requested. The Commission will not be providing "merely an advisory opinion" but will provide direction on an actual controversy that exists at this time.

13. **The Uncertainty Adversely Affects the Petitioner:** The uncertainty surrounding PSE's ability to grant a license for the recreational use adversely affects PSE. If PSE grants a license to King County for recreational use of its easement corridors, and other parties later challenge such a grant in a rate case or other proceeding, PSE faces the potential of adverse rate

treatment for the grant of the license, or assessment of penalties if the Commission considers the grant of a license to be a transfer of property that requires Commission approval.

14. **The Adverse Effect of Uncertainty on the Petitioner Outweighs any Adverse Effects on Others or on the General Public That May Likely Arise From the Order**

Requested: Resolution of the questions raised in this petition will not result in any adverse effect to others or the general public. No person is harmed by a Commission determination clarifying that the grant of a license is not a transfer of property and that PSE may allow its property to be used for recreational purposes. On the contrary, resolution of the controversy and clarity for future transactions will benefit the public.

V. RELIEF REQUESTED


15. For the foregoing reasons, PSE respectfully requests that the Commission enter an order declaring that:

A. No further Commission action or approval is needed for PSE to grant to King County, or other entities in the future, a license to provide a trail and authorize public use of PSE's utility property for recreational purposes, provided such uses are subordinate to, and do not interfere with or limit, PSE's use of such rights of way for utility purposes.

B. No ratemaking treatment is necessary for a grant of a license to use PSE land for recreation purposes when PSE will receive no financial gain for the grant of the license.

Respectfully submitted this 19th day of January, 2018.

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