

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**In the Matter of the Petition of**

**DOCKET UE-061626**

**PUGET SOUND ENERGY, INC.**

**For a Declaratory Order on Schedule 74  
and the Schedule 74 Design Agreement  
between Puget Sound energy, Inc. and the  
City of Tumwater.**

**ANSWER OF COMMISSION STAFF  
TO PETITION FOR REVIEW OF  
PUGET SOUND ENERGY, INC.**

**October 4, 2007**

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## I. INTRODUCTION

1 The Staff of the Washington Utilities and Transportation Commission files this  
answer to Puget Sound Energy, Inc.'s ("PSE" or "the Company") Petition for Review of the  
Initial Declaratory Order on Motions for Summary Determination. At issue is the division  
of cost responsibility between PSE and the City of Tumwater ("City") to convert overhead  
electrical facilities to underground electrical facilities along Tumwater Boulevard  
("Tumwater Conversion Project").

2 The Company contests the holding of the Administrative Law Judge ("ALJ") that  
Schedule 74 requires the cost of conversion to be divided 40 percent and 60 percent,  
respectively, between the City and PSE.<sup>1</sup> It alleges that the ALJ violated several  
fundamental principles of real property law by ignoring an easement the Company received  
in 1981 from the Port of Olympia.

3 This case, however, is solely one of tariff interpretation. It does not require the  
Commission to decide the legal issues raised by PSE. With few exceptions that do not affect  
the result, the ALJ correctly interpreted and applied Schedule 74. Her Initial Declaratory  
Order should be affirmed by the Commission with the modifications discussed below.

## II. ARGUMENT

### A. The Initial Declaratory Order Correctly Applied Schedule 74 To The Undisputed Evidence

4 The general rule of Schedule 74 is that the cost to convert overhead electrical  
facilities to underground electrical facilities must be split between the Government Entity

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<sup>1</sup> *In the Matter of Puget Sound Energy, Inc.*, Docket UE-061626, Order 02, Initial Declaratory Order on  
Motions for Summary Determination (May 25, 2007) ("Initial Declaratory Order").

(40 percent) requesting the conversion and PSE (60 percent).<sup>2</sup> The Government Entity is required to pay 100 percent of the conversion costs only when the facilities are located:

1. "Outside of the Public Thoroughfare"; or
2. "[P]ursuant to rights not derived from a franchise previously granted by the Government Entity"; or
3. "[P]ursuant to rights not otherwise previously granted by the Government Entity".<sup>3</sup>

5 PSE has failed to demonstrate the existence of any one of these circumstances that would trigger 100 percent cost responsibility for the City and, thus, require the Commission to reverse the Initial Declaratory Order.

**1. The Company's Overhead Electrical Facilities Are Located Inside A Public Thoroughfare**

6 The City is responsible for the entire cost of the Tumwater Conversion Project if PSE's overhead facilities are located "outside" of a public thoroughfare. PSE's facilities are "outside" of a public thoroughfare if they are "situated beyond the enclosure, boundary or other limit" of the public thoroughfare.<sup>4</sup> That is not the case here.

7 Schedule 74 expressly defines a "Public Thoroughfare" as any one of the following:

Any municipal, county, state, federal or other public road, highway, or thoroughfare, or other *public right-of-way* or other public real property rights allowing for electric utility use.<sup>5</sup> (Emphasis added.)

The City demonstrated that all of PSE's overhead facilities are located inside the physical boundaries of the Tumwater Boulevard public right-of-way.<sup>6</sup> In fact, the Company's

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<sup>2</sup> Schedule 74, Original Sheet No. 74-a, section (b)(1).

<sup>3</sup> Schedule 74, Original Sheet No. 74-a, section (b)(2).

<sup>4</sup> *Webster's Third New International Dictionary* 1604 (1968).

<sup>5</sup> Schedule 74, Original Sheet No. 74-f, section e.

<sup>6</sup> City of Tumwater's Cross Motion for Summary Determination, Declaration of Jim Shoopman.

easement received from the Port of Olympia in 1981 is expressly subject to the physical boundaries of that right-of-way: “Grantee’s rights shall be exercised upon that portion of the Property (the ‘Right-of-Way’ herein)”.<sup>7</sup> Thus, the first exception in Schedule 74 that would make the City responsible for the entire cost of the conversion project is not available to PSE.

8           The Company admits that its overhead facilities are located within the Tumwater Boulevard public right-of-way.<sup>8</sup> It argues, however, that that fact is irrelevant because its easement is a private real property right.<sup>9</sup> Therefore, according to PSE, the easement is not a “public real property right allowing for electric utility use” under the alternative definition of “Public Thoroughfare” that the ALJ held was met.<sup>10</sup>

9           As discussed above, it is uncontested that PSE’s overhead facilities are located within, and are expressly subject to, the Tumwater Boulevard public right-of-way, which is a “Public Thoroughfare” under one of the definitions contained in Schedule 74. This eliminates one of the exceptions in Schedule 74 that would have made the City responsible for the entire cost of the conversion project. It is unnecessary for the Commission to determine whether or not PSE’s easement is a public real property interest that would meet the alternative definition of “Public Thoroughfare” found in Schedule 74.

## 2.     **The Company’s Overhead Electrical Facilities Are Located Pursuant To A Franchise Granted By The City**

10          A “franchise” is the contractual right of a utility to construct and operate facilities in city streets for the purpose of providing service to the general public, without which that

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<sup>7</sup> PSE’s Motion for Summary Determination, Declaration of James Williams, Exh. No. B at Exh. No. E.

<sup>8</sup> PSE Petition for Review at 14:25-27.

<sup>9</sup> PSE Petition for Review at 14-18.

<sup>10</sup> Initial Declaratory Order at ¶¶40-43.

authority would not exist.<sup>11</sup> The ALJ found that PSE is operating its electric facilities pursuant to rights derived from a franchise previously granted by the City. Therefore, PSE does not meet the second exception in Schedule 74 that would have required the City to pay 100 percent of the Tumwater Conversion project.<sup>12</sup>

11 The undisputed evidence supports the ALJ's finding. In 1985, the City offered the Company a franchise to construct, operate, repair and maintain electrical facilities within the City.<sup>13</sup> PSE accepted the franchise that same year.<sup>14</sup>

12 The franchise extended not only to rights-of-way and other public property within City limits at that time, but also to any roads that later came within City limits by annexation:

“Franchise Area” means: any, every and all of the roads, streets, avenues, alleys, highways, grounds and public places of the City as now laid out, platted dedicated or improved; and any, every and all roads, streets, avenues, alleys, highways, grounds and public places that may be laid out, platted, dedicated, or improved *within the limits of the City and as such limits may be hereafter extended.*<sup>15</sup> (Emphasis added.)

This extension of PSE's franchise rights to areas later annexed by the City is unqualified.

13 In 1987, the City passed an ordinance that annexed all property of the Port of Olympia, including the area that is now Tumwater Boulevard.<sup>16</sup> The day after the annexation, the Port transferred to the City by dedication deed that same property for public street right-of-way purposes.<sup>17</sup>

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<sup>11</sup> *Lakewood v. Pierce County*, 106 Wn. App. 63, 73-4, 23 P.3d 1 (2001); *Washington Water Power Co. v. Rooney*, 3 Wn.2d 642, 649-50, 101 P.2d 580 (1940).

<sup>12</sup> Initial Declaratory Order at ¶36.

<sup>13</sup> PSE's Motion for Summary Determination, Declaration of James Williams, Exh. No. B at Exh. No. A.

<sup>14</sup> PSE's Motion for Summary Determination, Declaration of James Williams, Exh. No. B at Exh. No. B.

<sup>15</sup> *Id.* at 1: Section 1.13.

<sup>16</sup> City of Tumwater's Cross Motion for Summary Determination, Declaration of Jim Shoopman at Exh. No. 2.

<sup>17</sup> City of Tumwater's Cross Motion for Summary Determination, Declaration of Jim Shoopman at Exh. No. 3.

14           The area annexed and owned by the City, thus, includes property that is now within the area of the Tumwater Conversion Project. Thus, by automatic operation of the franchise accepted by PSE, the Company's overhead facilities are located pursuant to rights granted by the City that PSE would not otherwise possess.

15           PSE does not contest the fact that the franchise authorizes the Company to locate its electric facilities within an area that includes the Tumwater Conversion Project.<sup>18</sup> Rather, the Company alleges that the ALJ ignored "dominant" operating rights PSE derived from its 1981 easement and erroneously concluded that PSE's rights within the conversion area derive "solely" from the franchise agreement.<sup>19</sup>

16           The allegation has no merit. The ALJ never concluded that the franchise is the *only* source of authority for PSE to locate facilities in the area covered by the Tumwater Conversion Project. She concluded only that the Company is operating pursuant to rights derived "from a franchise previously granted by the government entity."<sup>20</sup> Her conclusion is supported by the uncontested facts.

17           Her conclusion is also consistent with the plain language of Schedule 74, which does not require a franchise to be the exclusive source of a company's rights in determining the division of cost responsibility to convert overhead facilities to underground facilities. Thus, whether or not the 1981 easement is a dominant right is irrelevant to the tariff interpretation exercise before the Commission.

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<sup>18</sup> PSE's Motion for Summary Determination, Declaration of Kirstin S. Dodge in Support of Motion to Stay Proceedings, Exh. No. B at 13, ¶¶12-14.

<sup>19</sup> PSE Petition for Review at 13-14 and 19:26-30.

<sup>20</sup> Initial Declaratory Order at ¶36.



18 As it did before the ALJ, PSE cites the Commission's *City of Kent* decision as controlling authority in the Company's favor.<sup>21</sup> That litigation involved several cities that had complained about the allocation of underground conversion costs under PSE's then-existing tariff.

19 *City of Kent* provides little guidance and can be distinguished from the case at hand, as the ALJ correctly noted.<sup>22</sup> First, the easement involved in *City of Kent* for a conversion project in Federal Way was located on private property, rather than in a public right-of-way. Thus, PSE obtained operating rights from a private property owner, rather than from a government entity as it has in this case, whether that entity is the Port of Olympia or the City of Tumwater.

20 Moreover, Schedule 74 was not at issue in *City of Kent*. In fact, Schedule 74 was developed specifically to resolve the *City of Kent* litigation through a negotiated compromise that more fairly allocates the cost of underground construction between the Company and government entities.<sup>23</sup> One element of that compromise is the specific definition of "Public Thoroughfare" that is now in Schedule 74, but was absent from the tariff at issue in *City of Kent*. Another element of that compromise that was absent previously is the focus on governmental authority to place electrical facilities. Clearly, the division of cost responsibility for underground conversion has been impacted since that earlier case was decided.

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<sup>21</sup> PSE Petition for Review at 19-21, citing *City of Kent v. Puget Sound Energy, Inc.*, Docket Nos. UE-010778, *et al.*, Third Suppl. Order (Jan. 28, 2002).

<sup>22</sup> Initial Declaratory Order at ¶26.

<sup>23</sup> Schedule 74 was negotiated and adopted by the Commission in the Company's 2001 general rate case. *WUTC v. Puget Sound Energy, Inc.*, Docket Nos. UE-011570 and UG-011571, Twelfth Suppl. Order, Appendix A at Exhibit I (June 20, 2002).

21 Finally, as it has all along, the Company emphasizes the fact that when the  
Tumwater Conversion Project was in the planning stage, City employees agreed that the  
presence of PSE's easement required the City to bear the full cost of conversion under  
Schedule 74.<sup>24</sup> The City also agreed to the Company's interpretation of Schedule 74 when a  
similar easement was present in another project.<sup>25</sup>

22 The ALJ noted correctly that Schedule 74 has the force and effect of law.<sup>26</sup> The  
City's past practice and agreement with the Company are irrelevant to the Commission's  
determination of the requirements of that tariff regarding the division of cost responsibility  
for the Tumwater Conversion Project.

**3. The Company's Overhead Electrical Facilities Are Located Pursuant To  
Rights Granted By The City**

23 The easement the Company received from the Port of Olympia in 1981 contains the  
following express requirement:

The rights and obligations of the parties shall inure to the benefit of and be  
binding upon their respective successors and assigns.<sup>27</sup>

The ALJ relied upon this provision to conclude that PSE's right to operate in the conversion  
area derived from a right granted previously by the City. Thus, the third and final exception  
in Schedule 74 that would have made the City fully responsible for the Tumwater  
conversion project does not apply.<sup>28</sup>

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<sup>24</sup> PSE Petition for Review at 21-22.

<sup>25</sup> *Id.*

<sup>26</sup> Initial Declaratory Order at ¶¶28-9, citing *General Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986).

<sup>27</sup> City of Tumwater's Cross Motion for Summary Determination, Declaration of William Patton, Exh. No. 1 at Exh. No. E, item 7.

<sup>28</sup> Initial Declaratory Order at ¶36.

24 The Company disputes the ALJ's holding solely because the 1981 easement names the Port of Olympia as the "Grantor".<sup>29</sup> PSE's argument places form over substance and should be rejected. With the 1987 annexation and dedication deed, the City now stands, literally, in the shoes of the Port of Olympia. Any easement rights PSE holds to operate an electric utility within the conversion area derive from the City of Tumwater, which makes the City the "Government Entity" for purposes of determining the division of cost responsibility under Schedule 74. This reality should not be ignored merely because the original grantor of the easement was the Port of Olympia.

25 Indeed, the Project Design and Construction agreements entered by PSE and required by Schedule 74, both specifically name the City as the Government Entity and state that:

The Company is a public service company engaged in the sale and distribution of electric energy and, *pursuant to its franchise or other rights from the Government Entity*, currently locates its electric distribution facilities within the jurisdictional boundaries of the Government Entity.<sup>30</sup> (Emphasis added.)

Thus, the City's designation in these agreements does not merely clarify that the overhead conversion is being made at the request of a public entity.

26 Finally, the Company's argument is inconsistent with the terms of the 1981 easement itself. The "Grantee" named in the easement is PSE's predecessor, Puget Sound Power & Light Company. Thus, since PSE is the successor "Grantee" of the easement, the City must be the successor "Grantor" of the easement.

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<sup>29</sup> PSE Petition for Review at 18-19.

<sup>30</sup> City of Tumwater's Cross Motion for Summary Determination, Declaration of William Patton, Exh. No. 1 at Exh. No. F, item A and Exh. No. 2 at Exh. No. A, item A.

**B. Staff Concedes That RCW 35A.14.900 Does Not Extinguish PSE's Easement, But That Concession Does Not Require A Change To The Result Of The Initial Declaratory Order**

27 Before the ALJ, the City and Staff argued that the City's 1987 annexation of the area previously encompassed by the Port of Olympia automatically extinguished PSE's easement by operation of RCW 35A.14.900, which states that:

The annexation by any code city of any territory pursuant to this chapter shall cancel, as of the effective date of such annexation, any franchise or permit theretofore granted to any person, firm or corporation by the state of Washington, or by the governing body of such annexed territory, authorizing or otherwise permitting the operation of any public utility, including but not limited to, public electric, water, transportation, garbage disposal or other similar public service business or facility within the limits of the annexed territory, 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 ALJ accepted that argument.<sup>31</sup> The Company objects, stating that the Initial Declaratory Order contradicts the plain language of RCW 35A.14.900 and constitutes an unconstitutional taking if allowed to stand.<sup>32</sup>

28 Staff has reconsidered its position on the impact of RCW 35A.14.900. It is persuaded by the Company's argument that an easement does not fall within the plain language of the statute that extinguishes only a "franchise or permit" through annexation.

29 Staff's concession, however, does not alter its ultimate position that the ALJ correctly decided this case. PSE's electric facilities within the Tumwater Conversion Project are still located inside a public right-of-way, and pursuant to rights granted previously by the City by franchise and by easement. The Company cannot avail itself of any of the exceptions in Schedule 74 that would make the City responsible for 100 percent of the cost of conversion.

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<sup>31</sup> Initial Declaratory Order at ¶37.

<sup>32</sup> PSE Petition for Review at 9-12.

**C. The Company's Public Policy Arguments Do Not Warrant Reversal of the Initial Declaratory Order**

30 The Company argues that requiring it to contribute to the cost of underground conversion renders PSE's easements virtually worthless and may require the Company, ultimately at ratepayer expense, to purchase land in fee simple for the permanent location of its electrical facilities.<sup>33</sup> These same arguments were made before the ALJ and were rejected.<sup>34</sup>

31 The Company adds nothing to its public policy argument that would warrant acceptance now. The Initial Declaratory Order has no impact on the easements PSE holds on strictly private property. In other circumstances, the facts of a particular case must be examined to determine whether the cost of underground conversion must be shared by the Company and the Government Entity under Schedule 74's general rule or shouldered exclusively by the Government Entity under one of Schedule 74's exceptions.

32 Moreover, PSE's argument assumes that Schedule 74 is cast in stone. That is not the case. Like any tariff, the Company may propose to revise Schedule 74 if the existing tariff is deficient in any manner. Such a proposal may engender controversy. However, until Schedule 74 is changed, the Company is required by law to apply the terms of that tariff, as interpreted properly by the ALJ in her Initial Declaratory Order.<sup>35</sup>

33 The Commission should adopt the Initial Declaratory Order with the modifications recommended by Staff. Namely, the Commission should modify the Initial Declaratory Order to: (1) reverse the ALJ's ruling that RCW 35A.14.900 extinguishes PSE's easement within the Tumwater Conversion Project; and (2) find that the Company's overhead

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<sup>33</sup> PSE Petition for Review at 22-23.

<sup>34</sup> Initial Declaratory Order at ¶38.

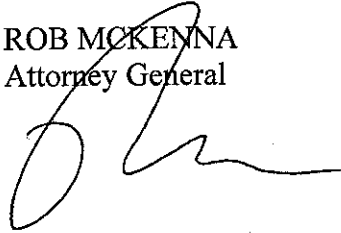
<sup>35</sup> RCW 80.28.080.

facilities are located inside a "Public Thoroughfare" irrespective of whether PSE's easement is a public or private real property right.

DATED this 4<sup>th</sup> day of October, 2007.

Respectfully submitted.

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