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## P R O C E E D I N G S

JUDGE MOSS: Good afternoon. A familiar cast of players from this morning. We are convened for oral argument on pending motions and cross-motions for summary determination in two consolidated cases styled City of Kent against Puget Sound Energy, Docket No. UE-010778, a petition for declaratory relief. The second proceeding is Cities of Auburn, Bremerton, Des Moines, Federal Way, Lakewood, Renton, SeaTac, and Tukwila against PSE, Docket No. UE-010911, a complaint and petition for declaratory relief.

Most of you were with us this morning either participating or observing. We will take appearances, and we will proceed directly into the oral argument. While we have allocated time as follows: City of Kent, 20 minutes; City of Auburn, 20 minutes; PSE, 30 minutes, City of Kent and City of Auburn, each 10 minutes rebuttal time. We will follow the process that we followed this morning with questions from the Bench when and as they come up, and I will do as I did this morning and try to balance the time among the parties fairly consistent with the idea that the two sides should have approximately equal time, so we will follow that procedure. So let's go ahead and take appearances; for the City of Kent.

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1           MR. CHARNESKI: Michael Charneski, attorney  
2 at law, outside counsel for the City of Kent, and also  
3 here today are Roger Lubovich, Kent's city attorney;  
4 Tom Brubaker, the deputy city attorney; and Mark  
5 Howlett, the project engineer on the Pacific Highway  
6 job.

7           JUDGE MOSS: Ms. Arnold for the multicities.  
8           MS. ARNOLD: Carol Arnold, Preston Gates and  
9 Ellis, and with me here today are representatives from  
10 the Cities of Tukwila, Des Moines, Bremerton, Federal  
11 Way, Renton, SeaTac, and Auburn.

12           JUDGE MOSS: PSE.

13           MS. DODGE: Kirstin Dodge with Perkins Coie,  
14 Puget Sound Energy. With me is Puget's tariff  
15 consultant, Lynn Logan. We didn't bring along  
16 ratepayers from Concrete, Mount Vernon, or other areas  
17 that don't underground, but perhaps we should have.

18           JUDGE MOSS: For Commission staff.

19           MS. TENNYSON: Mary M. Tennyson, senior  
20 assistant attorney general, for Commission staff.

21           JUDGE MOSS: I had suggested the City of Kent  
22 would go first. Is that agreeable?

23           MR. CHARNESKI: We had discussed previously,  
24 and Ms. Arnold will go first, and I will follow both  
25 opening and rebuttal.

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1 JUDGE MOSS: Go ahead, Ms. Arnold.

2 MS. ARNOLD: I would like to focus first on  
3 the issue of private easements and then move briefly to  
4 the issue of contracts under Section 3 of Schedule 71  
5 and conclude with the so-called 70-30 issue.

6 The issue of private easements has come up  
7 very recently. It first sprang up in early 2000 when  
8 Puget announced to the cities that they expected the  
9 cities to purchase private easements for Puget's  
10 exclusive possession and exclusive use and exclusive  
11 control. They expected the cities to purchase these  
12 easements even if there was public right-of-way  
13 available for their use, and they expected the cities  
14 to pay 100 percent of the cost of those private  
15 easements.

16 JUDGE MOSS: Let me stop you. Is it your  
17 understanding that it's Puget's position today those  
18 would be exclusive-use easements? I thought I  
19 understood that Puget acknowledges they would not be  
20 exclusive.

21 MS. ARNOLD: From the cities' perspective,  
22 those are exclusive easements. The cities'  
23 right-of-way are managed for the benefit of all the  
24 utilities, so if the cities juggle the  
25 telecommunications, the gas lines, the water lines, the

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1 sewer lines, and the electric lines on the public  
2 right-of-way.

3 Now, if Puget has a private easement, Puget  
4 has the right to allow some other utility to use its  
5 easement, but from the cities' perspective, the city  
6 doesn't have control, so Puget has exclusive control of  
7 it regardless of whether they let other utilities use  
8 it or not. So from Puget's perspective, it's not  
9 exclusive. From the cities' perspective, the city  
10 doesn't have control, so it is exclusive.

11 JUDGE MOSS: Thank you.

12 CHAIRWOMAN SHOWALTER: I've got a question on  
13 that. At least in some of the instances, I think  
14 Puget is saying because we don't have to provide  
15 undergrounding in the first place -- we only have to  
16 locate overhead -- then that's Option A, relocating  
17 overhead. Now, if you want an Option B, then here are  
18 our conditions. In other words, if we don't have to do  
19 it in the first place, then we can put on conditions.

20 It would be different if you had to do Option  
21 B to begin with, so I'm interested in that issue. If  
22 they are obligated to do it to begin with, then it  
23 seems to me Puget cannot put -- we'll either say  
24 conflicting or overly onerous or other conditions on  
25 it. If they aren't obligated to do it to begin with,

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1 then arguably, they could put some pretty stiff  
2 obligations on it. Do you agree with that  
3 characterization?

4 MS. ARNOLD: No, I don't agree with that  
5 characterization, and that kind of an underlying theme  
6 I think you will find in everything we are talking  
7 about today. I will address it when I talk about the  
8 contract issue, because it's Puget's position that we  
9 don't have to underground unless you sign a contract  
10 that has the terms and conditions that we want, and the  
11 cities strongly disagree with that.

12 Now, the franchises that Puget has with the  
13 cities, and mind you, Puget occupies the city  
14 right-of-way for free. They don't pay for that, but  
15 they do have franchise agreements with the cities, and  
16 what the franchises say almost across the board --  
17 there are a couple of different ones -- they say that  
18 Puget Sound Energy will place its facilities  
19 underground when directed pursuant to its tariffs at  
20 the UTC. So we kind of go around in a circle.

21 CHAIRWOMAN SHOWALTER: Right. But are you  
22 saying Puget is simply obligated to provide the  
23 undergrounding in the public right-of-way so they can't  
24 say, We won't do it in the public right-of-way or --  
25 I'm just trying to get what the difference in the

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1 issues is. It seems to me they are saying, We really  
2 don't have to do this to begin with --

3 MS. ARNOLD: That's what they are saying.

4 CHAIRWOMAN SHOWALTER: -- therefore, we can  
5 put whatever terms we want to as a condition on our  
6 discretion to provide it. So getting back to your  
7 position of they don't have the choice, they are  
8 obligated to do this, what is the essence of your  
9 justification for that position?

10 MS. ARNOLD: There is no question that they  
11 are obligated under their franchise agreements to go  
12 underground. Now, do the cities have authority to  
13 require a utility to put its facilities underground?  
14 Yes, they do. Under Washington law they do. The City  
15 of Edmonds case clearly says in the public  
16 right-of-way, the city does have the authority to  
17 require a utility to place its facilities underground.  
18 The cities police powers in this respect are very  
19 broad, and there is no doubt that they do.

20 JUDGE MOSS: But Puget could choose in the  
21 case where it's required to relocate to relocate to an  
22 overhead on a private easement, couldn't it? The City  
23 of Edmonds case goes to the question of whether if we  
24 are talking about city right-of-way, we are talking  
25 about placing facilities or facilities that are in



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1 right-of-way and keeping them in right-of-way, and the  
2 city has the right to enforce some underground, but if  
3 it's just a question of relocation, does Puget have the  
4 option in your view to relocate to an overhead location  
5 if it's on a private easement?

6 MS. ARNOLD: Puget can relocate its  
7 facilities to a private easement that it pays for.

8 CHAIRWOMAN SHOWALTER: In your view, is the  
9 choice that Puget must relocate, they can relocate  
10 underground according to the terms of the tariff on the  
11 right-of-way, or if they want to, go and negotiate on  
12 private land and overhead; that's a choice?

13 MS. ARNOLD: No, I don't think that's a  
14 choice. They can choose to put their facilities on  
15 private property, their own property, or an easement  
16 they negotiate with someone else, but when the cities  
17 direct them to place their facilities underground, they  
18 must go underground. There is no doubt the cities have  
19 that authority. In fact, the statute that Ms. Tennyson  
20 passed out this morning shows us that the cities do  
21 have that authority. They can require private  
22 landowners to put their facilities underground or be  
23 disconnected.

24 Section 2 of Schedule 71, which I put up on  
25 the board there for everyone to refer to so that we

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1 have it in front of us, does not have a word in there  
2 about private easements. It does say that the Company  
3 will provide an underground distribution system and  
4 will remove its overhead facilities. It's not, may do  
5 so if they choose to do so. It's, the Company will  
6 provide and will remove. It's mandatory language in  
7 Section 1, and I don't think anybody disputes that;  
8 that once the terms and conditions are met, and the  
9 terms and conditions are availability of equipment,  
10 availability of materials. There is two provisos that  
11 I don't think are relevant here that the Company will  
12 underground.

13 JUDGE MOSS: The other aspects of the tariff  
14 have to be satisfied as well, don't they.

15 MS. ARNOLD: You bet, and that's what I'm  
16 getting to next. Puget is hanging their hat on  
17 Section 4 of the tariff, operating rights, and as I  
18 said, I'm going to get to the contract issue later, but  
19 I'm going to address operating rights first.

20 The tariff says, and it said this all along,  
21 the owners of real property within the conversion area  
22 shall at their expense provide space for all  
23 underground electric facilities, which in the Company's  
24 judgment shall be installed on the property of said  
25 owners. In addition, said owners shall provide to the

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1 Company adequate legal rights for the construction and  
2 so forth of all electric facilities installed by the  
3 Company pursuant to this schedule. All were in a form  
4 satisfactory to the Company, and I'll get to that also  
5 in a minute.

6 On its face, the Section 4 on operating  
7 rights does not say a word about cities having to buy  
8 private easements for Puget. What it says is that the  
9 owners of real property within the conversion area  
10 shall provide space. The cities are not owners of real  
11 property. The cities hold the streets, hold the public  
12 rights-of-way in trust for the public, but the city  
13 cannot, for example, alienate or sell the public  
14 property at will just because they see a good deal  
15 coming down the road. They have to follow statutory  
16 procedures, and they can only sell property if it's  
17 surplusd to their needs. The cities are not owners of  
18 real property.

19 So to the extent that Section 4 applies to  
20 cities, what it means is, according to Puget's own  
21 guidelines, is the city provides operating rights to  
22 Puget in the form of franchises. The blowup that's  
23 before you is from Puget's own standards. We have the  
24 1997 version in front of us, and it's called  
25 "easements," and it says a large percent of Puget Sound

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1 Energy's system is located on public road  
2 rights-of-way. Operating rights for most of the system  
3 are in the form of franchises. So to the extent that  
4 the cities need to provide operating rights to Puget,  
5 they provide them in the form of a franchise. They  
6 allow them to use the public rights-of-way, and there  
7 is no question that the cities are willing to let Puget  
8 use the public rights-of-way, and there is no question  
9 that the cities are willing to accommodate Puget's  
10 design requirements within the public rights-of-way.  
11 Puget designs the underground systems, and the cities  
12 make room for that system on the public rights-of-ways.  
13 If they need 10-foot clearances, the cities give them  
14 10-foot clearances.

15 Many of the people here today are engineers,  
16 and they will tell you the engineering guidelines tell  
17 us what kind of clearances are needed and tell us where  
18 these facilities go. If there is not room, every city  
19 in this room has agreed to purchase additional  
20 right-of-way, so the question is not, are the cities  
21 refusing to allow Puget operating rights. That's not  
22 the question.

23 CHAIRWOMAN SHOWALTER: Let's grant your point  
24 that you are prepared to provide city rights-of-way  
25 wherever needed. Now let's just say that Puget decides

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1 in its judgment that it needs for some reason to go  
2 onto private property. At that point, you can do two  
3 things. Well, the private property owner may decide to  
4 pay up or to allow the arrangement. If the private  
5 property owner didn't, then you would have the ability  
6 to condemn, or the third alternative, and I think  
7 that's why we are here, is you would say this is  
8 unreasonable. Puget, you should not be insisting that  
9 you go over onto the private property. Does that get  
10 at our dispute here? In other words, are you  
11 contesting Puget's judgment or are you --

12 MS. ARNOLD: I don't see how the cities could  
13 be said to be contesting Puget's judgment. If Puget  
14 needs additional space for its clearances, the cities  
15 are willing to buy the additional space, and I don't  
16 think that -- the cities don't run the electrical  
17 system. Most cities don't even have an electrical  
18 engineer. The cities are guided by Puget's electrical  
19 needs, and they will make space available for their  
20 electrical needs.

21 JUDGE MOSS: How does that address the  
22 question in the tariff itself in Section 4 where it  
23 says, The owners of real property within the conversion  
24 area shall at their expense provide space for all  
25 underground electrical facilities, which in the

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1 Company's judgment shall be installed on the property  
2 of said owners. In other words, it seems to give Puget  
3 the right to exercise its judgment to decide the  
4 particular facilities should be on private property  
5 easements, and that may be driven by the Company's  
6 interest in not having the city be able to thereafter  
7 effects its operations with respect to that equipment.

8 MS. ARNOLD: There is different ways that  
9 undergrounding can take place under Schedule 71.  
10 Either a private landowner can request undergrounding  
11 or a municipality can request undergrounding, and if a  
12 private entity requests undergrounding, the private  
13 landowner must then provide space for the facilities.

14 JUDGE MOSS: Are you saying that Puget does  
15 not have the right to exercise its judgment under  
16 Section 4 if a city requests underground?

17 MS. ARNOLD: I'm not sure that I understand  
18 the question --

19 JUDGE MOSS: If a city requests  
20 undergrounding, and Puget comes back to the city and  
21 says, In our judgement, X,Y,Z facilities should be  
22 located on private easements on property owned by  
23 people in the conversion area, is it your position that  
24 PSE has no right to do that?

25 MS. ARNOLD: PSE can put its facilities

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1 anyplace it wants to, but if the owners of real  
2 property within the conversion area want the conversion  
3 to take place on their property, then they must provide  
4 space, which in Puget's judgment shall be installed on  
5 the property of said owners.

6 Now, that doesn't say anything at all about  
7 public right-of-way, and when the cities require  
8 undergrounding on the public right-of-way, that doesn't  
9 even apply. That doesn't come into play because they  
10 are not owners of real property. The dispute is if  
11 we've got public right-of-way, the cities will make  
12 room for whatever facilities in the Company's judgment  
13 need to be installed. If in the Company's judgment you  
14 need to install a transformer, the cities make public  
15 right-of-way available for that purpose.

16 Now, the question comes up, why can't the  
17 cities just give Puget the right-of-way? If they want  
18 private easements in their own name for whatever  
19 reason, why don't the cities just give it to them?  
20 There is a number of reasons. One reason is that the  
21 tariff doesn't require it, but the other reason is that  
22 the cities cannot give away public property. They  
23 cannot lend credit to a private company. They cannot  
24 give public funds to a private entity.

25 CHAIRWOMAN SHOWALTER: Unless they get

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1 compensation.

2 MS. ARNOLD: Unless they get compensation,  
3 and I'll just give you one example, and this is an  
4 example that's in the record for the City of Renton.  
5 The City of Renton undertook a street-widening project  
6 on Main Street, and to do so, they had to buy a piece  
7 of property because that's where the street was going  
8 to be widened. The property was oddly situated, and  
9 the sum of the property was surplused to the city's  
10 needs, so the city provided an easement to Puget to put  
11 their underground facilities on, and they actually gave  
12 them this easement to do that for that purpose. Puget  
13 said, No, we don't want that one. We want to put our  
14 facility someplace else on private property, which they  
15 did, and they are now billing the City of Renton for  
16 it.

17 So if I'm reading your question right, the  
18 question is, why didn't the city just pay them for this  
19 other easement they wanted instead? The answer is that  
20 there is no consideration for that. First of all, the  
21 city is paying Puget under Schedule 71 to do the  
22 undergrounding, so Puget is already getting  
23 consideration for what they are doing. Secondly, the  
24 city gave them right-of-way to use for that purpose.  
25 They have already given that to Puget. That's the



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1 consideration for Puget doing the undergrounding.  
2 There is no consideration for this above and beyond  
3 what has already been paid.

4 CHAIRWOMAN SHOWALTER: This gets back to what  
5 the tariff requires. If the tariff already requires  
6 Puget to do this undergrounding in the public  
7 right-of-way, that's the end of the matter. The tariff  
8 mandates that the tariff provides the reimbursement  
9 rate. However, if the tariff does not require it, and  
10 in its discretion Puget does not have to do it, then it  
11 would seem to me there would be consideration because  
12 the city is getting the benefit of you undergrounding,  
13 which it otherwise is not entitled to, and that would  
14 be a form of consideration. So I just think it comes  
15 back to what does this tariff require Puget to do  
16 versus what does it leave to their discretion?

17 MS. ARNOLD: That is Puget's argument that  
18 giving us private property is an inducement for us to  
19 do the underground conversion. I think that is the way  
20 Puget argues it. But Puget does have the obligation.  
21 There is no question whatsoever under the franchise  
22 agreement that when the city says, You need to place  
23 your facilities underground that Puget already has the  
24 obligation to do that, and if you give somebody  
25 consideration for something that they already have the

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1 duty to do, it's not good consideration. If I give  
2 somebody \$500 so they don't break into my car, that's  
3 not good consideration because they already have the  
4 duty to not break into my car.

5 CHAIRWOMAN SHOWALTER: But the franchise  
6 agreement is an obligation to provide undergrounding  
7 subject to the tariffs. I still say we ought to get  
8 back to the tariffs and analyze why it does or doesn't  
9 obligate Puget in this instance to provide  
10 undergrounding in the public right-of-way.

11 MS. ARNOLD: The Commission, of course, must  
12 construe the tariff in a manner that's consistent with  
13 the law, and to the extent that the tariff is construed  
14 to require the cities to give public property to Puget  
15 without consideration, that's an unlawful  
16 interpretation of the statute. So the tariff must be  
17 construed in terms of what the law requires.

18 I think that I see the direction of these  
19 questions is leading up to the contract issue, so I'm  
20 going to turn to that now. Section 3 of the tariff  
21 says that the Company and either the municipality  
22 having jurisdiction or the owners of real property,  
23 which gets us back to that term, "owners of real  
24 property," which appears in the "operating rights"  
25 section, and I said owners of real property are not

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1 cities, and I think this section makes that clear  
2 because it talks about the municipality or the owners  
3 of real property, so that owners of real property in  
4 Section 4, the operating rights section, isn't cities.  
5 It's private property owners.

6           Anyway, Section 3 says the Company and the  
7 municipality shall enter into a written contract for  
8 the installation of such systems, which contract shall  
9 be consistent with the schedule and shall be in a form  
10 satisfactory to the Company. The term "form  
11 satisfactory to the Company," does not by its very  
12 terms mean a contract that imposes a whole set of terms  
13 that are not present in Schedule 71.

14           CHAIRWOMAN SHOWALTER: But don't you agree  
15 that it's going to have some terms that aren't there?  
16 We talked about this earlier this morning, but union  
17 provisions or whether this is done in day or night,  
18 various other things which we will clearly say are not  
19 in the tariff but probably beyond the scope of the  
20 tariff, do you agree that the Company can contract  
21 about that?

22           MS. ARNOLD: I do agree, but I was really  
23 disturbed by an answer that Counsel gave this morning  
24 to the question, Do you think that the tariff needs to  
25 be interpreted according to reasonable commercial

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1 standards, and the answer was no. I agree that there  
2 may be reasonable commercial terms in this agreement  
3 that we are talking about in Schedule 3 that are not  
4 set out in the tariff, like use of union labor, for  
5 instance, or you will pay within 30 days, commercial  
6 terms, but what we are talking about here are terms  
7 that are so objectionable to the cities that the cities  
8 believe are unlawful.

9 For instance, they are making the cities  
10 agree in advance that they will buy them private  
11 easements before they sign the contract, and I'm not  
12 making these facts up. Before they will do the design  
13 work, before they will even order the conduit to put  
14 underground, they are making the cities sign a 14-page  
15 agreement that contains terms such as, you will buy  
16 private easements for us if we decide we need them.  
17 That is not a contract that's consistent with this  
18 schedule.

19 CHAIRWOMAN SHOWALTER: I guess I'll ask the  
20 question, does that provision conflict with the  
21 schedule?

22 MS. ARNOLD: It doesn't conflict with it any  
23 more than if I went to the gas station and bought gas,  
24 and the gas station owner said, Now you have to pay me,  
25 and I said, Well, I'm not going to do that unless you

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1 check my transmission. Then I will pay you for the  
2 gas. That's not inconsistent, I guess, with buying gas  
3 to make him check my transmission before I pay him, but  
4 you can't impose terms that are way, way beyond the  
5 basic scope of agreement. This is an agreement to  
6 perform underground conversion, more or less, under the  
7 terms of Schedule 71, with the exception of a few  
8 additional reasonable commercial terms that might be  
9 added.

10 CHAIRWOMAN SHOWALTER: But the gas station  
11 example does, I would say, conflict; that is, if the  
12 price is \$1.39 a gallon and you bought a gallon, then  
13 you owe the money for the gallon. So the question is,  
14 are those terms and prices in the tariff and you don't  
15 need to look further, or are there this some kind of  
16 range of permissible things that Puget can insist on in  
17 a contract that don't conflict with the tariff? When  
18 does it conflict; when doesn't it?

19 MS. ARNOLD: It conflicts when it's so far  
20 beyond the scope of the agreement contemplated by  
21 Section 3 that it is way beyond the scope of it.  
22 Section 3 is to provide a written contract for the  
23 installation of systems. Now, any reasonable  
24 commercial terms need to be in that agreement that have  
25 to do with the installation of such systems, like when

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1 are you going to pay, who gets to approve, who is going  
2 to design the system, will there be interest if you pay  
3 late, are you going to use union labor to do it and so  
4 forth.

5 But conditions that go way beyond those  
6 reasonable commercial conditions have no place in a  
7 Section 3 contract, and really, this is the answer to  
8 Judge Moss's question, Does Puget have to underground,  
9 and they are saying, We don't have to underground  
10 because you won't sign an agreement that's in a form  
11 satisfactory to us. The agreement that they are  
12 presenting to the cities is literally a 14-page, I  
13 think it's single-space agreement, that contains terms  
14 and conditions way beyond anything mentioned in  
15 Schedule 71.

16 JUDGE MOSS: Let's focus on that piece, and  
17 let's get back to the earlier question about Section 4.  
18 There is no dispute, I think, that Section 4 gives  
19 Puget the right to exercise its judgment to determine  
20 that certain facilities in undergrounding projects  
21 should be located on private property.

22 MS. ARNOLD: I don't agree with that.

23 JUDGE MOSS: Then tell me what it is about  
24 Section 4 or anything else in this tariff that strips  
25 Puget of the ability to exercise its judgment?

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1 MS. ARNOLD: I don't disagree that Puget has  
2 the judgment as to how to design the system and how  
3 much space they need, but I do disagree that Section 4  
4 gives them the right to decide at the city's expense  
5 that they are going to place those facilities on  
6 private property --

7 JUDGE MOSS: Put aside the city's expense.  
8 Doesn't Section 4 say the owners of real property  
9 within the conversion area shall at their expense  
10 provide space for all underground electrical  
11 facilities, which in the Company's judgment shall be  
12 installed on the property of said owner. Doesn't Puget  
13 have the right to make that judgement?

14 MS. ARNOLD: I agree.

15 JUDGE MOSS: If they make that judgement,  
16 don't the parties agree that there is nothing in this  
17 rate schedule that says either Puget or the cities have  
18 to pay for that? Aren't the parties in agreement on  
19 that?

20 MS. ARNOLD: Correct --

21 JUDGE MOSS: Let's go back to the earlier  
22 point which you agreed to, which is if the terms of  
23 this rate schedule are not satisfied, then what  
24 happens?

25 MS. ARNOLD: Let me answer your first

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1 question first. If my clients were not a group of  
2 cities here, if my client was a land developer who was  
3 doing property development in one of these cities on  
4 private property, and the land developer went to Puget  
5 and said, We've got some of these old overhead  
6 facilities. They really look nasty. I want a  
7 first-class development here. I want you to put those  
8 underground, Puget would have every right in the world  
9 so say, All right, we are going to need X feet here and  
10 X feet here. That's private property --

11 JUDGE MOSS: The tariff is clear what happens  
12 then.

13 MS. ARNOLD: -- those are owners of real  
14 property. The cities are not owners of real property,  
15 and this doesn't apply to the cities.

16 JUDGE MOSS: That begs the question. That's  
17 part of the element of the question is do the parties  
18 agree that there is nothing in this tariff that fits  
19 the circumstances you find yourself in? There is  
20 nothing here that obligates either the city or Puget to  
21 pay for these private property rights addressed in  
22 Section 4, but there is also nothing in here that  
23 strips Puget of its ability to exercise its judgment  
24 just because it's a city requesting undergrounding.

25 So the question then becomes, Well, if Puget



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1 doesn't have to pay for them, and you don't have to pay  
2 for them, then what does Puget do? Does Puget have  
3 some obligation to underground anyway even though the  
4 terms of the tariff are not satisfied?

5 MS. ARNOLD: Puget has a right to put their  
6 facilities on private property if they want to.

7 JUDGE MOSS: But answer my question.

8 MS. ARNOLD: That doesn't mean the cities  
9 have an obligation to buy that property for them.

10 JUDGE MOSS: That's just talking to the  
11 elements of my question. My question is when you are  
12 at loggerheads, which you are, and clearly then some  
13 term of the tariff is not satisfied, does Puget have a  
14 continuing obligation to underground in that  
15 circumstance?

16 MS. ARNOLD: I have to go back to Puget's own  
17 statement about what kind of operating rights the  
18 cities must give. Operating rights for most of the  
19 system are in the form of franchises. Now, if Puget's  
20 franchise had expired and was at loggerheads with the  
21 city, Puget then might be entitled. That's not before  
22 us today, but might be entitled to say, We are not  
23 going to underground until you renew our franchise. I  
24 would agree with that, and I don't think there is any  
25 question about that.

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1                   COMMISSIONER HEMSTAD:  Didn't Ms. Arnold say  
2 earlier that the city is prepared to buy whatever  
3 property is required so the undergrounding can occur  
4 within city right-of-way.

5                   MS. ARNOLD:  That's correct.

6                   COMMISSIONER HEMSTAD:  So Puget is not  
7 foreclosed from proceeding it.  Its only wish is  
8 apparently not to go that route but wants to place its  
9 facilities on private property with an easement.

10                   MS. ARNOLD:  That's correct.

11                   CHAIRWOMAN SHOWALTER:  So then that brings me  
12 back to the same issue.  Does Puget have the discretion  
13 under the tariff to decide that even though the city is  
14 very willing to allow the right-of-way to be used and  
15 even though the city is very willing to condemn some  
16 more property, does the tariff allow Puget to say, I'm  
17 sorry.  It's not what I want to do because you might be  
18 forcing me to relocate later, and I don't want to pay  
19 those costs.

20                   MS. ARNOLD:  The answer is no.

21                   CHAIRWOMAN SHOWALTER:  This is probably a  
22 better question addressed to Puget.

23                   MS. ARNOLD:  No, Puget doesn't have the right  
24 to say, No, we will not when the tariff says the  
25 company will remove its overhead and will install an

00098

1 underground.

2 JUDGE MOSS: I'm looking at the clock, and  
3 unless Mr. Charneski wishes to cede a portion of his  
4 time to Ms. Arnold, you will have to wrap up pretty  
5 quickly.

6 MS. ARNOLD: Let me say a quick word about  
7 the 70-30 dispute, and I don't want to eat into  
8 Mr. Charneski's time.

9 The dispute is over Section 3, which provides  
10 for cost sharing between the city and Puget. The  
11 tariff says that if the overhead facilities are  
12 required to be relocated due to the addition of one or  
13 more lanes to the street, then Puget will pay 70  
14 percent and the city will pay 30 percent. Under other  
15 circumstances, the city pays 70 percent. For instance,  
16 if the street is not being widened by more than one  
17 lane, the city pays 70 percent and Puget pays 30  
18 percent.

19 There is the position that Puget is taking in  
20 SeaTac, and I think that this is going to be a concern  
21 to other cities also, and I would remind the Commission  
22 and the judge that this argument for SeaTac only  
23 applies if Schedule 70 doesn't apply, but the argument  
24 is of broader interest than just SeaTac.

25 Puget's position is, and you will have to

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1 excuse my crude drawing here, but what I understand  
2 they are saying, if this is the street where the cars  
3 are and this is the curb -- curbs are six inches wide  
4 -- and Puget is saying as a result of the  
5 street-widening, the pole would end up within this  
6 six-inch stretch, then it is required to be relocated,  
7 and then the city only pays 30 percent and Puget pays  
8 70 percent. But if after the street-widening is  
9 completed the pole is more than six inches from the  
10 street edge of the curb, then it doesn't need to be  
11 relocated, and therefore, even though there is an  
12 addition of one more lane, then it doesn't need to be  
13 relocated so Puget is only going to pay 30 percent.

14 The problem with this interpretation is if  
15 you are left with a pole that's six inches from the  
16 traffic surface, it is a traffic hazard. It violates  
17 the traffic requirements, and the engineers probably  
18 are cringing at my statement of all this, but the  
19 traffic rules require, I think, a foot and a half  
20 between the curb and a pole, so that's a problem. Also  
21 the pole could end up in the sidewalk obstructing the  
22 sidewalk.

23 So the city here has really got to be the one  
24 that decides if this pole needs to be relocated, and in  
25 this circumstance, it definitely needs to be relocated

00100

1 because it's too close to the street. So if a project  
2 ends up with a pole right here or anyplace that's  
3 obstructing either the sidewalk or the street and one  
4 or more lanes is being added, the city should then pay  
5 30 percent rather than 70 percent. (Witness  
6 indicating.)

7 CHAIRWOMAN SHOWALTER: So on the language, if  
8 the overhead system is required to be relocated due to  
9 the addition of one whole lane, you would say it is due  
10 to the addition of one full lane because it ended up  
11 with the pole too close to the road.

12 MS. ARNOLD: Yes.

13 COMMISSIONER HEMSTAD: Where are you reading  
14 from?

15 CHAIRWOMAN SHOWALTER: I'm reading from  
16 Section 3(b)(1) in the second clause there. So, for  
17 example, if the city had a 100-foot right-of-way and  
18 the pole was sitting out at 90 feet from the road and  
19 you expanded by one lane and it was still 50 feet from  
20 the edge of the road, I gather there would be an  
21 argument that it didn't need to be relocated due to the  
22 expansion of one lane, but in this case, it does need  
23 to be.

24 MS. ARNOLD: There would be an argument  
25 there, and even there, it's not clear to me that as

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1 long as there is one addition of one lane, even if the  
2 pole was 50 feet away, you might have an argument that  
3 that's a 30 percent for the cities too, but that is not  
4 the facts that are here. This the facts that are here,  
5 the six inches.

6 CHAIRWOMAN SHOWALTER: But it raises the  
7 issue does "required to be relocated" relate solely to  
8 the electric system, and no, it doesn't need to be  
9 relocated because the pole is still there, fine, or  
10 does "require to be relocated" also encompass the  
11 city's needs too.

12 JUDGE MOSS: Recognizing we are probably  
13 cutting into your rebuttal time and not Mr. Charneski's  
14 time, is the basic argument then that it's the city's  
15 right to decide whether the pole needs to be relocated?

16 MS. ARNOLD: Yes.

17 JUDGE MOSS: Let's turn to Mr. Charneski.

18 MR. CHARNESKI: The city of Kent raised two  
19 issues in addition to the issue about who pays for a  
20 private property easement when an owner demands payment  
21 for it. Those issues relate to number one, all of the  
22 other attendant costs that are incurred by PSE, even  
23 when they get an easement for free, and also the costs  
24 of relocating in the future utilities that are placed  
25 in right-of-way today as part of an underground

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1 conversion project.

2 But I want to go back for a moment or two. I  
3 don't want to beat a dead horse, but this private  
4 easement horse is not dead. A couple points: The  
5 question has been asked up, down, and sideways, is PSE  
6 obligated to underground or not? If so, where does  
7 that obligation come from, and the answer is absolutely  
8 clear. The obligation comes from your tariff, Schedule  
9 71, Section 2, which says that subject to availability  
10 of equipment and materials, the Company will  
11 underground. That is the obligation.

12 A companion question, Section 4, does PSE  
13 have the discretion to put its equipment outside of  
14 right-of-way if it wishes. The answer there, and there  
15 will be a difference of opinion here between my client,  
16 the City of Kent, and others, the answer there is  
17 Section 4 pretty clearly indicates PSE has the  
18 discretion to put its equipment where it wants. Under  
19 Section 2, it must underground, but under Section 4, if  
20 it decides for its own reasons that it wants to put  
21 equipment on private property, it can do so, but it has  
22 to pay.

23 CHAIRWOMAN SHOWALTER: On the first question,  
24 "it must underground," supposing the conditions under 2  
25 obtained -- a city was refusing to pay or refusing to

00103

1 enter into a contract to pay, don't all the terms of  
2 the contract of the tariff have to be met before Puget  
3 is obligated to provide undergrounding?

4 MR. CHARNESKI: The terms of the tariff have  
5 to be met, and as PSE has conceded in writing, neither  
6 Schedule 71 nor any other rate or tariff obligates the  
7 city to purchase private easements for PSE. They have  
8 conceded that in writing. As Judge Moss pointed out,  
9 the question arises because, in fact, the parties are  
10 now at loggerheads, but let's look at how the  
11 loggerheads came about.

12 The history of all of this is very important.  
13 Getting back to this Section 4, it indicates that PSE  
14 will exercise some measure of discretion in deciding  
15 when, where, and if to put equipment on private  
16 property. What goes into that decision? It's amply  
17 clear from the record in this case that PSE is very,  
18 very concerned about potential costs of future  
19 relocation of any equipment that it installs. Here,  
20 therefore, is the decision that PSE needs to make when  
21 deciding whether or not to put equipment in  
22 right-of-way or to go outside of right-of-way.

23 If PSE puts equipment inside of right-of-way,  
24 then in the City of Kent, for example, Kent's franchise  
25 says that when you have equipment within right-of-way,



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1 within our franchise area, if you have equipment in the  
2 right-of-way and we ask you to move, you have to move  
3 at your expense. It's also abundantly clear from the  
4 record in this case that when equipment is located on  
5 private property and it has to be moved, then the party  
6 requesting the move pays for the relocation.

7 So here's the choice: In a circumstance like  
8 Pacific Highway or any other case, PSE has this simple  
9 choice. They have right-of-way available free of  
10 charge under the franchise grant from the city in which  
11 they are doing business. They can avail themselves of  
12 that space free of charge, but if they do so, they  
13 subject their shareholders to a potential economic  
14 risk. If they avail themselves of the free  
15 right-of-way, they subject their shareholders to at  
16 least a potential that the equipment they place there  
17 might at some point in the future have to be relocated  
18 and that PSE would pay.

19 On the other hand, PSE doesn't have to put  
20 equipment in right-of-way. Section 4 contemplates an  
21 exercise of discretion about whether to do that or not,  
22 and here's the decision: If PSE wants to invest its  
23 corporate funds to acquire an asset, it may do so, and  
24 in this case, that asset is a private property right, a  
25 private easement, and the benefit of that asset is

00105

1 this: If they decide to invest their corporate funds  
2 for the benefit of their shareholders by requiring a  
3 private easement on which they put equipment, then they  
4 have just purchased protection. They've purchased  
5 protection against the possibility that they would ever  
6 again have to foot any bill, any expense related to the  
7 relocation of that equipment.

8 Now, what has been done in practice? Here we  
9 are arguing about the cost of acquiring a private  
10 easement, but the record shows very clearly that it is  
11 a rare occasion on which PSE has to pay any property  
12 owner for an easement. PSE has submitted declarations  
13 from Mr. Corbin, Mr. Copps, Mr. Zeller, and Mr. Lowrey,  
14 and those declarations establish that by and large, PSE  
15 is successful in obtaining easements it wants free of  
16 charge.

17 Next question is -- now we get to the  
18 loggerheads -- what do you do if a private property  
19 owner says, No, I'm not going to give it to you for  
20 free. I want a little something for it. We know from  
21 the declaration submitted by PSE that they want to get  
22 it for free, and they generally succeed, but we also  
23 know from their declarations that if they don't get it  
24 for free there are a couple of things that can happen.  
25 A lot of times, as we see from those declarations, they

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1 will go to a city and say, Can't you help us out?  
2 Can't you talk to these folks? But we also know that  
3 if that fails, what they do is they typically redesign  
4 the project so they don't have to get that easement.  
5 They redesign the project so they can find another  
6 property and another easement that they can get for  
7 free. Why would PSE go through that exercise? Why  
8 have they for 31 years, for the most part, gone through  
9 that exercise? Because they know that Section 2  
10 obligates them to underground.

11 PSE for the better part of 31 years never  
12 asked a city to sign an agreement that said, If you  
13 want undergrounding, you have to promise up front to  
14 buy for us a private easement for every single piece of  
15 PSE equipment other than cable and conduit, but that's  
16 what they are asking for now. We know they are asking  
17 for that because provisions in the underground  
18 conversion agreement say, We will put everything, every  
19 piece of equipment, other than cable and conduit, on  
20 private easements. That's what they want to do now.

21 But again, for the better part of 31 years  
22 that your Schedule 71 has been in effect, they have  
23 never asked cities to make that kind of promise in  
24 order to have an underground conversion take place.  
25 They have never refused to do an underground

00107

1 conversion. Why? Because they know it's mandatory.  
2 It's mandatory under the plain language of Section 2.  
3 So in that situation where the parties are at  
4 loggerheads, the decision to be made is an investment  
5 decision by PSE. We will go back into right-of-way,  
6 and by doing so, we may potentially face a relocation  
7 cost in the future; although, as a practical matter on  
8 "Pac" Highway, nothing is going to happen out there for  
9 20 or 30 years or much longer than that, probably, if  
10 ever, but it's the principle that's important here.

11 So they can make the decision, We will go  
12 ahead and put in right-of-way and we face a potential  
13 risk, or we will invest our funds, minimal funds as  
14 they appear to be, to go outside of right-of-way and  
15 get a private easement and buy for our shareholders  
16 protection against any possibility we could be forced  
17 to move in the future at our expense.

18 JUDGE MOSS: Let me stop you there and ask  
19 you about the practical realities that you just alluded  
20 to. If it's a practical reality that PSE will not be  
21 asked to relocate these underground facilities a second  
22 time in 20 years or 30 years or whatever, is it an  
23 acceptable condition for PSE to insist on in the form  
24 of a contract that the city agree that if within 20  
25 years PSE has to move the facilities again that the

00108

1 city will pay for that?

2 MR. CHARNESKI: There are two parts to that  
3 answer. The first part is that if one were to look at  
4 the probabilities of future relocation and the cost of  
5 doing so, one could form an opinion, which I can't here  
6 today, as to whether that would be reasonable. But the  
7 second part is, any promise to pay for future  
8 relocation is not, in fact, required under the existing  
9 Schedule 71, and that, in fact, leads to the other  
10 issue raised by the City of Kent.

11 JUDGE MOSS: I'm saying this would be a  
12 contract condition that would be arguably consistent  
13 with Schedule 71. I recognize there is no language in  
14 71 that covers the circumstance of the hypothetical I  
15 described. I'm asking you if it is your opinion that  
16 it would be both consistent with Schedule 71 and  
17 consistent with principles of commercial reasonableness  
18 that if the practicalities are, as you described them,  
19 that it's highly unlikely these things will have to be  
20 relocated, it would be unreasonable for PSE to say,  
21 Fine, let's put that in writing, and if six months from  
22 now it turns out that your assessment of the  
23 practicalities is wrong and you are asking us to  
24 move these things at great expense, you pick up the  
25 tab, not us.

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1           MR. CHARNESKI: In fact, it's not consistent  
2 with Schedule 71, and the reason I say that is this:  
3 Schedule 71 has the force and effect of the state  
4 statute. It should be a document to which the planners  
5 and engineers and budget folks and cities and towns and  
6 counties in PSE's service areas can turn to find out  
7 what obligations are.

8           I will say this. It may very well be that on  
9 a city-by-city, case-by-case basis, various cities may  
10 decide to enter into that sort of an agreement with  
11 PSE. They may decide to negotiate that sort of  
12 agreement with PSE, but here's the rub: PSE doesn't  
13 want to negotiate those things. PSE's underground  
14 conversion agreement is what it is, all of it's 10, 12,  
15 or 14 pages long, and PSE doesn't say, We would like to  
16 have discussion with you on these various points. What  
17 PSE says is, You have to sign this agreement, and if  
18 you don't sign this agreement, we are not even going to  
19 start design work on your underground conversion  
20 project.

21           If I may slide now into that very specific  
22 relocation issue, that's one of the other problems with  
23 the underground conversion agreement, and I want to put  
24 up some language here for you. Judge Moss, you just  
25 referenced a 20-year requirement. There are two

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1 provision sections in the underground conversion  
2 agreement that relate to future relocation costs. One  
3 of them is Section 13, and essentially, Section 13 says  
4 that in the course of putting cable and conduit into  
5 right-of-way as part of your job, we will do that, but  
6 you have to agree now that you will pay if any of that  
7 is moved over the next 20 years; otherwise, we are not  
8 obligated to underground. That's the gist of what  
9 Section 13 says, and the reason I referred there to  
10 cable and conduit is that we know from other provisions  
11 of the underground conversion agreement that the only  
12 thing they intend to put in right-of-way is, in fact,  
13 cable and conduit.

14           But then there is the question of all the  
15 other equipment. There is another provision by which  
16 they state they will install cable and conduit within  
17 rights-of-way but will require all other facilities to  
18 be installed on private property. That is a blanket  
19 requirement in their underground conversion agreement  
20 that obviously has nothing to do with whether there is  
21 ever a particular need to go outside right-of-way or  
22 not. It's a blanket requirement, and yet, PSE says,  
23 Even though we are going to put everything on private  
24 property, we might decide for reasons of our own, we  
25 might decide under Section 1(e) that we want to put

00111

1 some of that equipment within right-of-way after all.  
2 Some of the equipment other than the cable is conduit.  
3 They might decide that, for example, for economic  
4 reasons, and they say that, We, PSE will not agree to  
5 underground, despite the mandatory language in Section  
6 2 of Schedule 71, we, PSE, will not agree to  
7 underground unless you agree up front that for all  
8 eternity, you will pay for any equipment that we put in  
9 right-of-way, the right-of-way that you granted us for  
10 nothing pursuant to the franchise.

11 This turns everything on its head, and by  
12 that, I mean this: Getting back to that investment  
13 decision that PSE makes, you've given us right-of-way  
14 for free. We can go there, but we face a potential for  
15 relocation costs in the future, so therefore, we might  
16 instead invest in private easements to protect our  
17 shareholders from that potential risk. This turns  
18 everything on its head. Let's look at the sum total of  
19 what they are asking for here. Number one, you the  
20 cities have to buy us a private easement for every  
21 piece of PSE equipment other than cable and conduit.  
22 Number 2, with respect to that cable and conduit for  
23 which you are already providing the trenching and the  
24 restoration pursuant to Schedule 71, we've also got the  
25 discretion here that we may decide that we put other



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1 equipment not on private easement but within your  
2 right-of-way, but the synthesis is this: We, PSE, will  
3 not do any underground conversion in a commercial area  
4 within our service area unless you, the city, agree up  
5 front, here and now today before any design work is  
6 even done, you have to agree that in the future, if any  
7 piece of equipment inside or outside of right-of-way is  
8 ever moved, you will pay, and that's absurd. (Witness  
9 indicating.)

10 CHAIRWOMAN SHOWALTER: I just observe that  
11 the issue is not just Puget's shareholders but other  
12 ratepayers as well.

13 MR. CHARNESKI: Keeping those ratepayers in  
14 mind is equally absurd, but the reason it's absurd is  
15 that Schedule 71 does not even address the topic of  
16 future hypothetical costs of relocating utilities.  
17 This commission could offer a one-million-dollar reward  
18 for anyone who could come in with an interpretation of  
19 Schedule 71 consistent with this notion that you won't  
20 have underground conversion unless you promise to pay  
21 for all of these things that PSE is demanding. You  
22 could offer that reward and the money would be safe  
23 because no reasonable person based upon the language of  
24 the controlling tariff could possibly come up with that  
25 interpretation.

00113

1                   CHAIRWOMAN SHOWALTER: I think what we are  
2 here to do is interpret the statute and not to cast  
3 dispersions on people who have made other  
4 interpretations. You should keep your rhetoric down.

5                   What is your interpretation or what is the  
6 limit, in your view, of the terms consistent with this  
7 schedule and in a form satisfactory to the Company? It  
8 clearly allows some kind of leeway. There is something  
9 that can be in the contract other than what's in the  
10 tariff, and the judgment about what is in that contract  
11 needs to be satisfactory to the Company, so what is  
12 that range of items?

13                  MR. CHARNESKI: I can give an example. When  
14 we put our lawsuit together, the city considered the  
15 fact that most of what appears in the underground  
16 conversion agreement does not appear in the tariff, and  
17 we did not want to come to the Commission or burden PSE  
18 with coming to the Commission to try and work out  
19 agreement on the many, many provisions in the  
20 underground conversion agreement that do not appear in  
21 Schedule 71, and speaking for Kent, I think Kent and  
22 PSE, if we can get over these bigger issues of cost of  
23 easements and relocation in the future and these sorts  
24 of things, then it becomes necessary to sit down, as  
25 the parties did for 31 years, and talk about getting

00114

1 the project built.

2           Examples were brought up earlier. For  
3 example, coordinating the construction timing so that  
4 union regulations, for example, would be implicated, or  
5 dealing with the notion of temporary service provision,  
6 things like that that historically over the years have  
7 been addressed by the parties, but that's a far cry  
8 from not a contract negotiation context but instead,  
9 the presentation of a form agreement, the promise for  
10 which the city must promise to do everything in order  
11 to have a project go forward, particularly where there  
12 are cost issues, relocation that I just mentioned, that  
13 are not even touched upon in the tariff. The parties  
14 should be able to look to the tariff for guidance as to  
15 what's required if they decide to proceed with an  
16 underground conversion. As Ms. Arnold said, there are  
17 some things that are so far afield, basically, that you  
18 can't connect them up to the tariff. Relocation costs  
19 would be one of them.

20           Now, let's assume for the moment that 35  
21 years from now there is a relocation. Isn't it the  
22 most sensible thing to say that the relocation costs  
23 involved in that project 35 years from now really ought  
24 to be governed by whatever tariff is in place 35 years  
25 from now or whatever franchise provisions are in effect

00115

1 35 years from now, because that subject, relocation  
2 costs, is simply not touched upon in Schedule 71.

3           There was only one other issue we had. It  
4 related to who pays costs if and when a property owner  
5 gives the easement for free. 70 percent of that issue  
6 has been resolved. PSE conceded that Kent's point as  
7 briefed was well taken but then suggested that, Well,  
8 you are basically right that Schedule 71 doesn't  
9 require you to pay all of the engineering and attorney  
10 and survey and related costs in getting these  
11 easements, but couldn't we instead lump these in as  
12 project costs and you could pay 30 percent? That's  
13 basically where that issue stands now, and speaking for  
14 Kent, the answer is no. For all of the reasons that we  
15 weren't obligated to pay 100 percent, neither are we  
16 obligated to pay 30 percent, and for that, I'll stand  
17 on the briefing.

18           JUDGE MOSS: But PSE is also not obligated to  
19 pay anything under Section 4; right?

20           MR. CHARNESKI: Getting back to Section 4,  
21 Section 4 does not explicitly state that in a  
22 circumstance where a property owner refuses to give an  
23 easement for free that PSE must pay that property owner  
24 for the easement, but again, we know from practice, as  
25 illustrated by the many declarations that PSE has

00116

1 submitted, that their practice has been then to utilize  
2 their resources to go back to target a different  
3 property owner and obtain an easement for free from  
4 some other property owner, or alternatively, to go  
5 ahead and put the equipment back in right-of-way.  
6 That's been a fallback position as well.

7 JUDGE MOSS: The point I'm trying to get to  
8 is, and I think it's consistent with your argument,  
9 there are certainly things that should appear, even  
10 must appear, in the contract that are not specifically  
11 addressed. You mentioned the unions, for example, and  
12 so we get back to this question, which at least is  
13 important if not central, by what do we measure the  
14 degree of discretion that PSE has flowing from such  
15 language as, "shall be in a form satisfactory to the  
16 Company"?

17 For example, if you entered into one of these  
18 undergrounding operations, and PSE incurred \$500,000 in  
19 expense in relocating some overhead facilities to  
20 underground within the right-of-way, is it commercially  
21 reasonable for PSE to protect itself through the  
22 contract language if it turns out six months later that  
23 the city says, Oh, by the way, we've decided to dig  
24 this street up, and you've got to relocate all your  
25 underground facilities yet again." Is it reasonable

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1 for PSE to include something in the form of a contract  
2 that says, In that event, the city will pay for that  
3 relocation, and PSE will not incur these costs a second  
4 time?

5 MR. CHARNESKI: I think absolutely it's the  
6 case that there will be provisions in the contract that  
7 don't appear in Schedule 71, and secondly, it is  
8 reasonable for them to negotiate with the city for some  
9 protection against the sorts of things that you've just  
10 raised.

11 JUDGE MOSS: So six months might be  
12 reasonable, but 20 years is not.

13 MR. CHARNESKI: 20 years, I would say, is  
14 certainly not reasonable. Six months probably would  
15 be, but I think more fundamentally, since there is no  
16 specific requirement in the tariff, I think the parties  
17 ought to sit down and negotiate on a case-by-case basis  
18 rather than having PSE decide unilaterally that a  
19 particular period will apply and refusing to do  
20 underground conversion unless that particular period  
21 stated in the agreement is acceptable.

22 JUDGE MOSS: But in the absence of the  
23 parties being able to get together and negotiate and  
24 come to a reasonable accomodation on such things, what  
25 standard should the Commission apply in deciding

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1 whether a term in the form of contract is or is not  
2 reasonable and consistent with the tariff; what  
3 standard should we use?

4 MR. CHARNESKI: I think you've got to use a  
5 reasonable commercial standard, but I don't think  
6 Schedule 71 or the facts and issues in this case  
7 require that you do much of that. Nobody has asked the  
8 Commission to go through the underground conversion  
9 agreement with a fine-tooth comb and give a yea or nay  
10 to the various provisions that are in there. Instead,  
11 I seem to recall that both Ms. Dodge and I have agreed  
12 in the past that if we get over these main issues, for  
13 example, private easements, we expect our clients to be  
14 able to sit down and negotiate the other things and  
15 move on with these projects.

16 JUDGE MOSS: That's the risk of asking for an  
17 adjudicated result, isn't it? Somebody wins and  
18 somebody loses, so the question is, since it's brought  
19 to us in that posture and we must decide it, what's the  
20 standard?

21 MR. CHARNESKI: Nobody has asked the  
22 Commission in any request for relief to rule upon  
23 whether the underground conversion agreement as a whole  
24 is consistent or not or is acceptable or not pursuant  
25 to Schedule 71. There were specific issues raised by

00119

1 the parties. Obviously, those issues will have to be  
2 ruled on.

3 JUDGE MOSS: And those are stated. There are  
4 issues raised by the parties in their issues list that  
5 was presented that asks whether specific things are  
6 consistent with the tariff or not.

7 MR. CHARNESKI: For example, the relocation  
8 issue I just addressed, but the City of Kent's position  
9 is not that you need to determine whether something is  
10 consistent with or contradicted by. The question is  
11 this: Can PSE require, can PSE condition the very  
12 undergrounding project itself on the requirements that  
13 themselves do not appear in Schedule 71. The parties  
14 should be able to negotiate to move a project forward  
15 if they can get over those few issues that have been  
16 raised in the pleadings, private easements, for  
17 example.

18 COMMISSIONER HEMSTAD: Surely, your very  
19 strong incentive on the parties to come to an agreement  
20 as to what should be included as the particulars added  
21 to the contract or the precise language of the tariff.  
22 I suppose if you or in the future someone else or some  
23 other city can't agree with the utility on some issue,  
24 I suppose you would be back in front of us for an  
25 interpretation of that.



00120

1           MR. CHARNESKI: That could be, but for your  
2 comfort, I would remind the Commission that for the  
3 better part of 31 years, things worked relatively  
4 smoothly until these new provisions about easement  
5 cropped up.

6           COMMISSIONER HEMSTAD: My point is there is a  
7 forum to resolve the dispute if the parties themselves  
8 can't agree.

9           MR. CHARNESKI: Absolutely.

10          JUDGE MOSS: Ms. Dodge?

11          MS. DODGE: Thank you. I'm not sure about  
12 Kent at this point, but certainly the other cities are  
13 attempting to fundamentally change their relationship  
14 with Puget and their place within the Washington legal  
15 system in their filings and in their arguments. In  
16 particular their relationships vis-a-vis this  
17 commission. They are essentially trying to micromanage  
18 Puget's system design and standards. They are trying  
19 to supplant the Commission as regulators of Puget's  
20 system. They are also trying to obtain benefits for  
21 their local citizens within their cities at the expense  
22 of Puget's broader customer base.

23           We've gone over Section 4 quite a bit in the  
24 questioning, and I think it is clear that it leaves to  
25 the Company's judgment which underground facility

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1 should be located on private property. The cities  
2 can't force Puget to install facilities in their  
3 rights-of-way. Kent clearly agrees with that. It's  
4 never argued that Puget must place its facilities in  
5 the rights-of-way. It's simply saying that if Puget  
6 wants to do that, Puget should pay, and that's fine.  
7 We can have that tariff argument and we are.

8         It's far more troubling that the other  
9 cities, they started out seeming to argue that Puget  
10 must place its facilities in the right-of-way. Then in  
11 their reply, they seem to back off of that and said at  
12 least three times in their reply brief and also in  
13 their reply declarations that they can't force Puget  
14 into the right-of-way, and on argument, I'm not sure  
15 what the answer is at this point; whether they claim  
16 they can push Puget in the right-of-way or not, and  
17 it's extremely important that this commission issue an  
18 order declaring that they cannot force Puget into the  
19 right-of-way.

20         Whether facilities go in a right-of-way or on  
21 private property is clearly something that has been  
22 left by this commission in Schedule 71 to the Company's  
23 judgment. I think the paperwork that's been submitted  
24 by Puget illustrates why that is fair, just, and  
25 reasonable and just makes a lot of sense. It's a

00122

1 complicated thing to design these systems. Every  
2 conversion is going to have different facts on the  
3 ground. The Company does have to take into account  
4 cost considerations and so forth.

5 It's been raised a couple of times the  
6 question of commercial reasonableness, and I don't  
7 believe commercial reasonableness is the standard. The  
8 standard for which facilities can be put on private  
9 property or not is the Company's judgment. Now, that  
10 judgment is not confined by commercial reasonableness.  
11 It's confined by a lot of other things; by the National  
12 Electric Safety Code, which it's required to follow; by  
13 the statute that requires that it maintain and install  
14 and operate its facilities in a safe and efficient  
15 manner. It's also required to, with an eye towards its  
16 ratepayers, engage in least-cost planning. So there  
17 are a number of things that constrain the Company's  
18 judgment in that regard, but I don't think it's right  
19 to say commercial reasonableness. Who is commercial?  
20 I would say that all of those standards define what's  
21 commercially reasonable for an electric company.

22 CHAIRWOMAN SHOWALTER: What about just the  
23 word "reasonable"? Your judgment can't you arbitrarily  
24 exercised; would you agree with that? If there were  
25 some dispute that came to us about whether Puget was

00123

1 reasonably exercising its judgment here or unreasonably  
2 exercising its judgment, do you think there is at least  
3 some arena in which we could say, Puget, you've gone  
4 too far. That's not reasonable.

5 MS. DODGE: I'm not sure that's the case. I  
6 certainly haven't seen anything that suggests that  
7 standard exists. I would say the facts show that the  
8 Company has been reasonable over 30-plus years, so I  
9 don't now that's a real concern --

10 COMMISSIONER HEMSTAD: That wasn't the  
11 question.

12 MS. DODGE: I have not seen anything that  
13 indicates, and I don't believe there is a limitation on  
14 judgment --

15 COMMISSIONER HEMSTAD: So what if somebody  
16 argues that underground electrical facilities includes  
17 capacity to provide telecommunications services? Would  
18 that be within the realm of the Company's judgment?

19 MS. DODGE: The tariff provides for placement  
20 of underground electrical facilities, which in the  
21 Company's judgment shall be installed on the property  
22 of the owners. So the tariff itself limits the kind of  
23 facilities.

24 COMMISSIONER HEMSTAD: All I'm saying is that  
25 then becomes -- if the Company were to assert -- I'm

00124

1 trying to think of a hypothetical -- we want to put an  
2 easement on something, so telecommunications services  
3 because that's an electrical transmission, would that  
4 be allowed within the Company judgment?

5 MS. DODGE: I don't see why not --

6 COMMISSIONER HEMSTAD: You don't have to  
7 answer it, but the point is if there were a dispute  
8 about that, there are some parameters beyond which the  
9 Company judgment is not going to be accepted, and some  
10 a forum, a court or this body here, will ultimately  
11 have the opportunity, if there were a dispute, to make  
12 that determination that you've gone too far.

13 MS. DODGE: Certainly, the Commission has the  
14 ability to revisit tariffs, to see whether they are  
15 fair, just, and reasonable on some complaint --

16 COMMISSIONER HEMSTAD: Or as they are being  
17 applied.

18 MS. DODGE: Sure. In that sense, there is  
19 going to come a point where you make that  
20 determination. That is not where we are today.

21 CHAIRWOMAN SHOWALTER: I guess what I would  
22 like to get at, I think the issue of whether Puget is  
23 simply obligated to provide undergrounding in the  
24 right-of-way, assuming that costs have been taken care  
25 of and you can't point to anything particularly

00125

1 dangerous, whatever, the question is, who has the  
2 leverage here? Because if the cities have the  
3 leverage, then you cannot insist on a raft of things to  
4 try to satisfy you.

5           If they don't have the leverage, if the  
6 tariff itself gives you a fair amount of discretion as  
7 to what you want to do, then you've got the leverage  
8 and can provide a raft of conditions. So I want to get  
9 back to that question of, I guess, why -- here's a  
10 tariff that is about undergrounding in municipal  
11 rights-of-way and private property, so --

12           MS. DODGE: No. This is about undergrounding  
13 in municipal rights-of-way -- well, for facilities that  
14 exist currently in overhead is the ones that are on  
15 rights-of-way that are covered by Schedule 71. That is  
16 one of the issues in dispute, whether it extends to  
17 facilities located on private property or not.

18           CHAIRWOMAN SHOWALTER: I wasn't even getting  
19 to that. There are cities and there are other people  
20 even on the rights-of-way. There is allusions to  
21 private property owners here, but what I'm trying to  
22 get at is, would you at least agree that Schedule 71  
23 obligates Puget to provide undergrounding if every  
24 condition here is met, including any reasonable  
25 judgment you might want to exercise about private or

00126

1 public?

2           Supposing this is a street that runs solely  
3 through city property, a huge city park or something,  
4 but there is no private property nearby. That's a good  
5 example, so in that example, do you have a right to  
6 say, I don't want to do this, or do you have the right  
7 to say, I insist that the pad be here and some other  
8 facility be there, but you've got to do it?

9           MS. DODGE: Let's me answer in a couple of  
10 steps. The source of Puget's obligation to underground  
11 is the tariff. If the tariff conditions are met, Puget  
12 must underground. There is no independent source of  
13 authority for cities to order Puget to underground.  
14 That's what GTE Bothell was about. A city cannot by  
15 ordinance overcome a tariff. The Commission has  
16 preempted that subject matter, and there is a tariff  
17 that is the law that is in effect, and the cities can't  
18 by ordinance say, We don't care about the tariff. You  
19 are going underground. That's why the franchises say,  
20 We will defer to the tariff for undergrounding. So the  
21 tariff is the only source of authority that mandates  
22 that Puget underground.

23           If all the conditions of the tariff are met,  
24 the system is going underground. That's clearly an  
25 obligation. The reason we are here today is that we

00127

1 have a difference of opinion about what the tariff  
2 requires, and with respect to the question about a  
3 right-of-way running through city property, the city  
4 may be a property owner in an area, in which case it  
5 sits in the shoes of owners of real property within a  
6 conversion area, and we've seen that in a couple of  
7 examples in the paperwork that Puget provided.

8         If the city owns property, it's one of the  
9 property owners that may be on the line to provide  
10 easements, and in many cases they have. So they are  
11 not always owners of real property, and we've conceded  
12 that we are not trying to make municipalities somehow  
13 be shoe-horned into this owners of real property within  
14 Section 4, but that's not what Puget's position depends  
15 on. If they are an owner of real property, if they own  
16 in fee a piece of property in the area, they are a  
17 property owner under Section 4. Otherwise, they are  
18 not, and then the question is, have the space and  
19 rights been provided that in Puget's judgment ought to  
20 be provided for this conversion to go forward.

21         Now, one thing I did want to touch on briefly  
22 is that those cities have questioned whether under  
23 Schedule 80 Puget is required to connect with or render  
24 service if the necessary operating rights have not been  
25 provided, and they claim that Schedule 80 is



00128

1 irrelevant because they are not requesting new  
2 connection or service, but that first of all, even if  
3 Schedule 80 applied only to new service, which I don't  
4 think is the case, in the case of an underground  
5 conversion, they are requesting a new service. The  
6 service is to convert some portion of the system that  
7 is now overhead to underground. That's the service.  
8 It's new. It hasn't been done before, so even under  
9 their view of Schedule 80, I believe Schedule 80 still  
10 applies.

11 On the topic of relocation, the place in the  
12 tariff where this relocation obligation is located is  
13 exactly in the portion that provides the facilities  
14 which in the Company's judgment shall be installed on  
15 the property of said owners. If it is left to the  
16 Company's judgment, which it clearly is, which  
17 facilities to put on private property and which to put  
18 on easement, the Company's judgment is going to be  
19 affected by a varieties of factors, including is there  
20 significant risk to the Company of having to relocate  
21 these facilities at significant cost in the future.

22 If the Company can be protected in some way  
23 from some of those relocation costs, it's far more  
24 likely to determine that, Okay, we don't have these  
25 huge relocation costs coming down the pike. We will

00129

1 put more of our facilities on the right-of-way. That  
2 will be fine, and this 20-year provision has been in  
3 the underground conversion agreement at least as early  
4 as the 1990's.

5 It's also consistent with the reply material  
6 that was the reply declaration of Tom Gut, which  
7 pointed out that city road improvement projects have a  
8 design life of 20 years, so this isn't some kind of  
9 onerous burden. I think for Kent as well they  
10 indicated that, Well, about 20 years is just about  
11 right. You wouldn't expect to have to do anything  
12 within that period of time. So this 20-year  
13 requirement is not an onerous burden. It does protect  
14 the Company and its ratepayers to some degree from  
15 future relocations, and that's where you run into  
16 situations where, Okay, cable and conduit, not worried  
17 about it. Put it in the right-of-way. A lot of times,  
18 you can leave conduit in place, abandoned if you have  
19 to. You don't have to dig it up and move it. If there  
20 is some kind of road work, you can put in "J" boxes.  
21 There are a lot of things you can put in to  
22 right-of-way, particularly if you can protect them from  
23 that future relocation.

24 The in perpetuity clause, that 1(e), this  
25 particular provision was designed to enable the Company

00130

1 to work with customers to have conversions go forward  
2 if you ran into serious problems with getting the  
3 rights that Puget wanted or the protection it felt it  
4 needed, and we've provided specific examples. A switch  
5 cabinet costs \$82,000 to relocate. It is reasonable  
6 and well within the Company's judgment to say, No  
7 landowner in this area will provide anyone with any  
8 easement at any cost. We will put the switch cabinet  
9 in the right-of-way, but if we have to dig it up and  
10 move it, City, you are going to have to pay, and the  
11 cities have said, Gee, under the circumstance, that  
12 makes sense. So that's the kind of circumstance you  
13 are talking about where you may locate something in the  
14 right-of-way with that kind of significant protection.

15 The basic system design is done, typically,  
16 at the time an underground conversion agreement is  
17 signed, so if their particular concern is going in  
18 about what you are going to put on right-of-way versus  
19 easement, those can be addressed. Adjustments can be  
20 made, and the provision also speaks specifically to it  
21 not being physically or economically feasible to obtain  
22 rights on private property. So again, those are  
23 circumstances where no one will give you an easement at  
24 any price, and you are faced with a hugely expensive  
25 switch cabinet relocation in the future.

00131

1 (Recess.)

2 JUDGE MOSS: Ms. Dodge, go ahead. I think  
3 you had a little more.

4 MS. DODGE: A couple other things on  
5 relocation before I move on from that. Kent has  
6 suggested that we just wait and see what the tariff  
7 says and what the franchises say and whatever else 35  
8 years in the future before you address any relocation  
9 issues. The problem with that is the relocation issues  
10 affect Puget's judgment about whether it makes sense to  
11 put facilities on private property or in the  
12 right-of-way, so that issue can't be divorced from  
13 Puget's judgment on that question.

14 The cities in their reply briefs also  
15 suggested the way to address this is Puget should just  
16 get involved in the 20-year CIP process or the  
17 five-year TIP process, but that would not resolve the  
18 issue. At the time plans are accrued by city counsels,  
19 it's my understanding that there are no engineering  
20 plans available where you could see in detail exactly  
21 what the effect of an improvement would be and that  
22 those are developed only after a project is funded. So  
23 if Puget were to consult during this CIP or TIP  
24 process, it may be aware that generally, there may be a  
25 street improvement in the future here, but it wouldn't

00132

1 have sufficient detail to design around that.

2 By contrast, if a city has this potential  
3 relocation cost on its own, it's the one that designs  
4 the street improvement plan, the details, so if it has  
5 no relocation obligation, it has no incentive to say,  
6 Gee, if we adjust by six inches here, then we won't  
7 have to relocate this electric system, and they may  
8 make that decision if they are going to bear some cost  
9 consequence for that decision. If they don't bear any  
10 consequences, they may just as well say, We don't care.  
11 It's Puget's nickel, and we'll just design it the way  
12 we want without worrying about the effect on their  
13 electric system.

14 JUDGE MOSS: Would a five- or 10-year  
15 requirement accomplish the same goal in PSE's  
16 perspective in terms of giving an incentive?

17 MS. DODGE: I don't think so because the  
18 useful life of these facilities is quite long, and the  
19 likelihood of something being changed in five years is  
20 obviously much lower than 10 years or 15 years, so --

21 JUDGE MOSS: PSE has found 20 years  
22 reasonable in the past, hasn't it?

23 MS. DODGE: Yes. So what you would be faced  
24 with is not much protection if you just had a five-year  
25 or 10-year. That would be a significant concern.

00133

1                   One thought on the underground conversion  
2 agreement, the idea that Puget should negotiate each  
3 one, is a difficult concept when you are talking about  
4 Puget's nondiscrimination obligation. There is a  
5 reason that Puget tries to work out a form agreement  
6 that will cover the full range of situations that might  
7 occur in a conversion, and then it says to cities, Here  
8 is our underground conversion agreement.

9                   The cities tend to want to see this as, This  
10 is our project. Let's sit down and negotiate it. It's  
11 very difficult for Puget to do that and not open itself  
12 up to discrimination claims, and then we will be back  
13 in front of the Commission, and what are we going to  
14 say? City X had better negotiators than City Y. I'm  
15 not sure that's the right answer about where you  
16 ultimately came out in the term of an underground  
17 conversion agreement. Puget has taken cities' comments  
18 into account. It's obviously evolved. It's an  
19 agreement over time, but at any given time, its  
20 agreement is its agreement, and I think it's not always  
21 pleasant for the cities to feel like it's a  
22 take-it-or-leave-it proposition, but Puget is  
23 constrained because it needs to treat everybody in  
24 similar circumstances similarly.

25                   COMMISSIONER HEMSTAD: Let me ask you about

00134

1 that. We've now had extensive experience on the  
2 telecom side of our operations, negotiated agreements  
3 to interconnect between the incumbents' company and the  
4 new competitors. Under those arrangements, the details  
5 are bargained for between the two companies, analogous  
6 here to the Company and the city, and there may be  
7 similar agreements, but there can be substantial  
8 variations among them. Of course, they ultimately  
9 affect consumers of telephone services, and that's not  
10 considered discriminatory in that environment. Why  
11 can't there be peculiar discriminant local  
12 circumstances that appear to justify a variation?

13 MS. DODGE: I think on the telecom side,  
14 you've got specific statutes that enable that process  
15 and those differences. That's a significant  
16 difference, I think.

17 COMMISSIONER HEMSTAD: That's true.

18 MS. DODGE: Theoretically, could you put a  
19 system in place that provided for individual  
20 negotiations? Perhaps. I think it's clear that each  
21 conversion does have its own specific factual  
22 situations. That's a little bit why sometimes the form  
23 agreement gets a bit cumbersome, because it's meant to  
24 include a variety of circumstances that may not be  
25 applicable with respect to a particular conversion.

00135

1           But I think there is a significant concern  
2 that if you were to go down the road towards that  
3 process, at what point is it reasonable or are there  
4 different circumstances, and at what point is it just  
5 someone is a better negotiator than another.

6           CHAIRWOMAN SHOWALTER: In the case of  
7 interconnection agreements with telecommunications, we  
8 approve the contracts, the agreements, so they need to  
9 be consistent with the public interest, anyway. I  
10 don't know the answer. Do we approve contracts between  
11 cities and Puget?

12           MS. DODGE: No. I wanted to speak just for a  
13 minute about the historical information that's been  
14 provided. The cities and Puget agree that you don't  
15 necessarily need to even get to that, and that's the  
16 bulk of the paper that's in front of the Commission,  
17 looking at the historical situation. The tariff says  
18 what it says; that it must be complied with.

19           Now, to the degree that you want to look back  
20 historically, Puget has provided agreements back to  
21 1982 that shows that it interpreted Schedule 71 to  
22 require easements to be provided at no cost to Puget as  
23 a condition of the conversion going forward. At least  
24 by 1988, Puget's underground conversion agreement  
25 stated, Puget will make reasonable efforts to obtain



00136

1 those easements, but the cities must reimburse Puget.

2 This is not an interpretation that the  
3 Company has cooked up over the last year or two and now  
4 is trying to force on cities. It's interesting that in  
5 Kent's reply materials, we were provided with a number  
6 of contracts actually going back another decade, back  
7 to 1972 through 1979, and those all in Section 7 have  
8 the same requirement that it states the city recognizes  
9 that the procurement of such operating rights is a  
10 prerequisite to release this conversion project for  
11 construction. That's 1972 through 1979, all of those  
12 agreements.

13 It's also, I think important for the  
14 Commission to note that despite what may look like a  
15 lot of factual disputes around this issue, I think when  
16 you look at it closely, you don't have factual disputes  
17 so much as some pretty broad statements, such as,  
18 Puget's never required this before, countered with very  
19 specific written agreements, examples, declarations of  
20 conversations with people, letters that were sent,  
21 agreements that were signed. The broad statement,  
22 Puget has never required this before, is not sufficient  
23 to overcome summary determination when it's met with  
24 this very specific, detailed evidence that Puget has  
25 provided.

00137

1           In one particular case, there is this  
2 interesting factual dispute, the South 348th Street in  
3 Federal Way, where Puget submitted some file notes with  
4 some back and forth with the city on whether the city  
5 would pay for easement or not, and in the reply,  
6 Mr. Row in his declarations states, This doesn't say  
7 the city agreed. It just said Puget wants to charge  
8 the city. I think the material thing there is Puget  
9 understood that the city should be charged, and maybe  
10 the city didn't agree at that time, but that was  
11 Puget's understanding of its own tariff, and that's  
12 going back to 1994.

13           Looking just briefly at constitutional  
14 issues, I just wanted to respond briefly to some of the  
15 arguments that were made on reply that Puget hasn't had  
16 an opportunity to address. The cities argued  
17 strenuously in their motion that providing easements  
18 for Puget would be a gift of public funds, and we've  
19 argued and shown, No, when the tariff says easements  
20 will be provided, that's part of the consideration for  
21 an underground conversion going forward, and we spelled  
22 all that out with a number of cases in the response.

23           On reply, the cities say, Well, we didn't  
24 actually mean it's a gift of public funds. What we  
25 meant is it's a lending of credit. If you look at the

00138

1 lending of credit cases, those are cases where the city  
2 has loaned money to somebody or purchased property with  
3 the intent of reselling it to a private party. In  
4 every case, there is financing arrangements going on,  
5 and that's what lending of credit is. Just as a  
6 factual matter, there is no lending of credit when  
7 either Puget purchases an easement and the city  
8 reimburses Puget or when the city pays a property owner  
9 directly to provide an easement to Puget. There is no  
10 funding whatsoever being provided to Puget.

11 Just briefly on the SeaTac 170th Street, if  
12 Schedule 71 applies, the six-inch standard is National  
13 Electric Safety Code standard, which Puget is required  
14 to follow. This dispute isn't about whether those  
15 poles will be relocated or not. The city can decide  
16 that it wants the poles to be relocated and they will  
17 be relocated. The question is, what does "required to  
18 be relocated" do to a lane addition mean with respect  
19 to Puget's tariff, and that tariff is focused on the  
20 electric system? You could have different standards in  
21 different cities. There is a county standard. There  
22 is a lot of different ways to look at whether a pole  
23 should be relocated or not, and Puget needs to apply  
24 this tariff across its entire service territory, so  
25 when it's faced with wanting to apply its tariff

00139

1 consistently throughout the service territory, it's  
2 perfectly appropriate and I think a responsible thing  
3 for the Company to do to sit down and develop an  
4 internal standard to hand out to employees and say,  
5 Here is how you are going to apply the tariff, and it's  
6 got these questions and answers that are supposed to  
7 help walk people through applying. It's consistent to  
8 everybody.

9         The question, is Well, exactly what does that  
10 mean, does that "require to be relocated" mean? Puget  
11 has to follow the NESC. It provides a standard. It's  
12 an absolutely rational, reasonable, not arbitrary way  
13 of interpreting the tariff.

14         CHAIRWOMAN SHOWALTER: I have a couple of  
15 questions. One is just, what is the default? In your  
16 view, if a city is widening a road by more than one  
17 lane and the overhead wires must be relocated but the  
18 city and Puget cannot agree on a contract, or maybe  
19 Puget thinks something has to be on private property --  
20 I don't know what -- but if you fail to come to an  
21 agreement on undergrounding, what happens in your view?  
22 What will happen in these cases if no contracts are  
23 signed?

24         MS. DODGE: Then you look at whether Puget is  
25 required to do a relocation under the terms of the

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1 franchise, and in many cases, Puget will be required to  
2 do so.

3 CHAIRWOMAN SHOWALTER: So let's say it's  
4 required to do a relocation; then what?

5 MS. DODGE: Then the poles are moved to new  
6 overhead locations.

7 CHAIRWOMAN SHOWALTER: So in your view, if  
8 Puget is required to relocate and you don't reach  
9 agreement under Tariff 71, as governed by 71, however  
10 that is operative, then the alternative, the default is  
11 overhead wires.

12 MS. DODGE: Yes. Just to add to that, this  
13 isn't really about whether these wires are going  
14 underground or not. It's about how much SeaTac pays  
15 for that, because it's either 30 or 70, but Puget  
16 hasn't said, If we don't come to terms whether it's 30  
17 or 70, we won't do the undergrounding. That's not  
18 what's happened.

19 CHAIRWOMAN SHOWALTER: But that 30-70 split  
20 terms on whether the poles are required to be  
21 relocated; right?

22 MS. DODGE: Right.

23 CHAIRWOMAN SHOWALTER: But I'm positing they  
24 are required to be relocated; that the road widening  
25 requires the wires to be relocated, but you in the

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1 exercise of your judgment --

2 MS. DODGE: You are positing under the city's  
3 standards --

4 CHAIRWOMAN SHOWALTER: I'm positing under my  
5 hypothetical example. I'm saying if there is a street  
6 which is being widened, and because it is being widened  
7 by more than one lane -- the poles are in the middle of  
8 a lane -- something is going to have to be done, but  
9 you have a form contract that in your judgment complies  
10 with 71, and the city won't sign it because they don't  
11 want to do that, then the default is, in your view, the  
12 poles are moved on an overhead basis.

13 MS. DODGE: Yes.

14 CHAIRWOMAN SHOWALTER: And if that somehow  
15 lands in the middle of a sidewalk or a store, you've  
16 got to confront that, I guess, as you would any other  
17 time you have to move a pole?

18 MS. DODGE: Yes.

19 CHAIRWOMAN SHOWALTER: The other question is  
20 there is an example here of a piece of property, and  
21 I'm forgetting it, but I think it's a private segment  
22 that's close to another segment. The issue has to do  
23 with what a conversion area is.

24 MS. DODGE: Federal Way, the 320th street?

25 CHAIRWOMAN SHOWALTER: I think so.

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1 MS. DODGE: There a number of poles located  
2 along 320th South in Federal Way that sit on private  
3 easement. This is similar to the discussion we had  
4 this morning about the poles in Clyde Hill, but here  
5 the question is, does Schedule 71 apply to underground  
6 relocation of these poles of 320th Street or not. It's  
7 clearly a commercial area, and Puget has fully briefed  
8 that and provided the background in terms of the case  
9 law and its property rights issue which forms the  
10 context in which Schedule 71 was filed.

11 In Schedule 71, like Schedule 70, the tariff  
12 refers to public streets, public streets. So there is  
13 a foundation in the tariff for that understanding of  
14 the tariff, but in addition to that, again, it comes  
15 down to the property rights question. Puget's own  
16 easement, it has a right to remain where it is or to  
17 decide whether to underground or not, and Schedule 71  
18 is not meant to handcuff the Company, that it has to  
19 give up those property rights whenever the terms and  
20 conditions of Schedule 71 are met.

21 CHAIRWOMAN SHOWALTER: So your position is  
22 for that private segment, Schedule 71 does not apply,  
23 but for the other portion, Schedule 71 does apply.

24 MS. DODGE: The difficulty with respect to  
25 the Federal Way 320th Avenue South project is there is

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1 a small leg kind of turns the corner that's less than a  
2 block long that sits on 23rd Avenue South. That does  
3 not sit on private easement.

4 CHAIRWOMAN SHOWALTER: So the portion that  
5 would fall under Schedule 71, strictly speaking, is  
6 less than one block long.

7 MS. DODGE: Yes.

8 CHAIRWOMAN SHOWALTER: So therefore, in your  
9 view, it doesn't meet the definition of a conversion.

10 MS. DODGE: Yeah. It doesn't meet the  
11 two-block requirement of Section 2.

12 CHAIRWOMAN SHOWALTER: And the private  
13 portion simply isn't in Schedule 71.

14 MS. DODGE: Right. That's all I had.

15 JUDGE MOSS: Then let's have our rebuttal,  
16 and we will follow the same order. Ms. Arnold?

17 MS. ARNOLD: Thank you. First of all, I  
18 would like to clear up any misunderstanding. The  
19 cities are not trying to force or require Puget to  
20 place its facilities on public right-of-way. They have  
21 agreed to make public right-of-way available to  
22 accommodate Puget's facilities, and even under Puget's  
23 interpretation of Section 4, if the cities were owners  
24 of real property, all the owners of real property are  
25 required to do is to provide space for all underground



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1 facilities which in the Company's judgment shall be  
2 installed on the property of said owners. So even if  
3 the cities were the property owners, the cities have  
4 agreed to make space available on public right-of-way.

5           However, if Puget chooses in order to avoid  
6 future relocation costs to place its facilities on  
7 private property, it's the city's position that Puget  
8 should pay for that property.

9           CHAIRWOMAN SHOWALTER: And that's because you  
10 say that in the Company's judgment phrase, clause, does  
11 not extend as far as allowing them to decide that  
12 that's why they want to place the facilities on private  
13 property.

14           MS. ARNOLD: That's correct, Your Honor,  
15 because it says the owners shall provide space for the  
16 facilities. Now, if they have some reason for wanting  
17 some different space, then they should pay for that.

18           CHAIRWOMAN SHOWALTER: But it's space which  
19 in the Company's judgment shall be installed on the  
20 property, so the question gets back to how far does the  
21 range of Puget's judgment extend when they are deciding  
22 where they want to relocate their facilities.

23           MS. ARNOLD: It extends to the space  
24 necessary for the electrical facilities, and the cities  
25 are not trying to second-guess Puget. If they need 10

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1 feet of clearance, then the cities will provide them  
2 with 10 feet of clearance.

3 CHAIRWOMAN SHOWALTER: I'm trying to get back  
4 to the range of Puget's judgment. You are saying the  
5 range of Puget's judgement is really limited to  
6 physical necessity, not the financial.

7 MS. ARNOLD: Correct.

8 CHAIRWOMAN SHOWALTER: So you don't think  
9 they can take into account financial risk in deciding  
10 whether or not to insist on going on private property  
11 versus municipal?

12 MS. ARNOLD: They can take that into  
13 consideration as part of the management of their  
14 company, and if they feel they are at less risk, then  
15 certainly, but I don't think the law allows the cities  
16 to take that into consideration, and I don't think it  
17 allows Puget to take that into consideration.

18 CHAIRWOMAN SHOWALTER: By "the law," do you  
19 mean this tariff or some other law?

20 MS. ARNOLD: Both, but the tariff  
21 specifically.

22 The second point is related to this:  
23 Ms. Dodge mentioned or someone mentioned leverage. Who  
24 has the leverage here, and the implication was that  
25 somehow it's the cities that have leverage, which is

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1 incorrect. The cities on its street projects are under  
2 fairly narrow time deadlines because their funding  
3 expires if they don't complete a project within a  
4 certain amount of time.

5 In addition to that, once they start a  
6 project, which actually did happen in SeaTac, they  
7 start bulldozing the streets, the public's tolerance  
8 for street improvements is on a pretty short string  
9 these days because there is so much traffic congestion  
10 anyway. Once a project is started, a city really has  
11 virtually no leverage to bargain with Puget on the  
12 terms and conditions that they will do the  
13 undergrounding, and the undergrounding can delay a  
14 project, and if Puget won't even order the materials  
15 until the city has signed a contract, the city has very  
16 little leverage --

17 CHAIRWOMAN SHOWALTER: I use the term, and I  
18 really meant under Tariff 71 itself. Either you can  
19 view it as something that binds Puget that requires  
20 them to provide underground utilities with a very  
21 limited range of discretion, in which case they don't  
22 have much leverage, or you can look at this as very  
23 strong from the Company's point of view and weak from  
24 the city's point of view that, yes, it's about  
25 undergrounding, but subject to fairly wide discretion

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1 of the Company, in which case in these instances they  
2 have the leverage. That's what we have to decide.

3 MS. ARNOLD: Commissioner Hemstad made the  
4 analogy to the telecommunications interconnection  
5 agreement, which is interesting because that statutory  
6 scheme allows the parties to negotiate, and if they  
7 can't reach a satisfactory resolution, they can come to  
8 the Commission, and the Commission decides it, and I  
9 think they have further appeal in the court. It's all  
10 set up, which is probably a good system, but there is  
11 no such system like that here short of doing what the  
12 cities did in this case. There is nobody to resolve  
13 these disputes on a very short-term basis.

14 Moving on to the question of what are  
15 reasonable terms and conditions under Schedule 3, one  
16 of the problems that we bring to the Commission is that  
17 Puget has tried to impose a whole slew of conditions,  
18 and the cumulative effect of these has created a  
19 problem because Puget won't start the project or start  
20 the design until the city agrees to all of these, so  
21 even a minor dispute could hold up a project.

22 Puget certainly should not be allowed to  
23 insist upon conditions that the city really can't under  
24 the law be required to agree to as a condition of  
25 performing the project, and the example is this

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1 provision that the city will pay for any future  
2 relocations. One of the contracts that Puget offered,  
3 and I think it's to SeaTac and I think it's in the  
4 record, didn't have any 20-year limit at all. It was  
5 that the city in perpetuity will agree to pay for any  
6 relocation if Puget places its facilities on public  
7 right-of-way.

8 Now, some of the cities have agreed to 20  
9 years in circumstances where it's very unlikely that  
10 they are going to widen the street, and we all should  
11 notice that undergrounding actually prevents the  
12 necessity for relocation, because once the facilities  
13 are under the street or the sidewalk, they can in many  
14 cases widen the street and put improvements on the  
15 street. They can certainly resurface it without  
16 touching the underground facilities, but that said, the  
17 cities in some cases where it's reasonable can  
18 voluntarily agree that they won't have Puget relocate  
19 doesn't mean that Puget should be allowed to put that  
20 as a condition of relocation. There is a difference  
21 between voluntarily agreement to a reasonable term and  
22 a drop-dead provision, We will not do this unless you  
23 agree to either pay for any relocations or never to  
24 make us relocate again.

25 JUDGE MOSS: This gets us back to the

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1 language in the first section, the contract section,  
2 which I guess in 71 is 3(a), and speaks to a contract  
3 that's in a form satisfactory to the Company, and I  
4 believe I just heard you acknowledge that a 20-year  
5 condition would be a reasonable condition that cities  
6 have previously agreed to on various occasions.

7 COMMISSIONER HEMSTAD: Ms. Arnold wasn't  
8 saying that it's automatically reasonable. I think she  
9 was saying it depends upon the circumstances.

10 JUDGE MOSS: That it may be reasonable.

11 MS. ARNOLD: Under some circumstances, yes.

12 JUDGE MOSS: The question is then if it is  
13 reasonable under the circumstances, and whether this  
14 commission or somebody else has to decide whether it's  
15 reasonable or not in particular circumstances where the  
16 parties can't agree, if the city refuses to sign such a  
17 contract that has a reasonable term in it, does that  
18 relieve PSE from the obligation to underground?

19 MS. ARNOLD: I guess in that case if there  
20 were really that type of impasse, the parties would  
21 have no recourse but to come to the Commission and ask,  
22 Is this reasonable.

23 JUDGE MOSS: That's the question we are  
24 asked, essentially, to decide in this case, and you are  
25 contending this is unreasonable. I'm hypothesizing a

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1 situation where it's not unreasonable for PSE to insist  
2 on this contract term where the city exercises its own  
3 right and judgment and discretion not to enter into  
4 such a contract. That seems to mean that Provision  
5 3(a) of Schedule 71 and not therefore satisfied, does  
6 that relieve PSE from the obligation it would otherwise  
7 have to underground?

8 MS. ARNOLD: There is a whole spectrum of  
9 what's reasonable and what's not reasonable. For  
10 instance, if the --

11 JUDGE MOSS: Assume it's reasonable.

12 MS. ARNOLD: Let's say the city refused to  
13 agree to pay at all. They refused to sign a contract  
14 that they would pay for their share of the  
15 undergrounding. I would agree with you Puget would not  
16 have an obligation to underground.

17 JUDGE MOSS: What about my question, my  
18 hypothetical?

19 MS. ARNOLD: If your hypothetical is that  
20 Puget says, We will not underground under these  
21 circumstances unless the city waives its right --

22 JUDGE MOSS: You are changing my  
23 hypothetical, Ms. Arnold. My hypothetical is that PSE  
24 has come to you with a contract with respect to a  
25 specific project, and one of the terms in that contract

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1 is that the city will agree that if there is a further  
2 relocation within 20 years, the city will pay for it.  
3 The city says, We are not signing that. PSE says,  
4 Fine, we are not undergrounding. Is PSE within its  
5 rights under Schedule 71?

6 MS. ARNOLD: No.

7 JUDGE MOSS: Why not?

8 MS. ARNOLD: Because there is nothing in  
9 Schedule 71 that says a city has to give up that right.

10 JUDGE MOSS: There is something in Schedule  
11 71 that says the contract has to be in a form  
12 satisfactory to the Company, and I have assumed in my  
13 hypothetical that the term you are insisting on is  
14 reasonable.

15 CHAIRWOMAN SHOWALTER: Wait a minute. But  
16 reasonable is not the same as what is within Schedule  
17 71. It begs the question of what is the leeway that  
18 Puget has? It can't insist on anything that is wildly  
19 unreasonable, even if it's within Schedule 71. There  
20 may very well be things that are very reasonable for  
21 Puget to request, but if the city doesn't agree because  
22 71 doesn't require it, the city can refuse, and  
23 nevertheless, Puget has to do undergrounding.

24 So what we are here about is what is that  
25 leeway? That is, what is the range of discretion of



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1 only reasonable things? What is the range that Puget  
2 has to insist on a contract provision, and Puget says  
3 it's a wide range. It's a substantial discretion.  
4 The city says if you can't find it there in the tariff,  
5 Puget can't insist on it, and that's what we have to  
6 decide.

7 MS. ARNOLD: That is correct. If it's not in  
8 the tariff, Puget can't insist on it. The tariff says  
9 that the city has to pay for part of it. That's  
10 something that the city has to do, and if the city  
11 refuses to sign an agreement to that effect, I would  
12 agree with you that Puget doesn't have to go forward,  
13 but when Puget comes forth with the term that's not in  
14 Schedule 71, that's in excess of it, then there is a  
15 dispute there, but Puget has got to go forward under  
16 the terms of the tariff.

17 CHAIRWOMAN SHOWALTER: But you've conceded  
18 that with labor issues and other things that there are  
19 areas that Puget could insist on before going forward.  
20 If a city said, I'm not going to sign any contract  
21 other than one that says undergrounding will be  
22 provided, and it's a 70-30 split, period. That's the  
23 contract. Go ahead, Puget. Do you say in that  
24 situation there is nothing outside this contract that  
25 Puget can insist on outside this tariff?

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1 MS. ARNOLD: If there was a dispute over --  
2 what was your hypothetical; whether union labor would  
3 be used?

4 COMMISSIONER HEMSTAD: Isn't the answer to  
5 that if there were a dispute, one or the other parties  
6 could look to remedies either in the courts or this  
7 commission to make that determination? Wouldn't that  
8 follow? I'm really asking that as a question.

9 MS. ARNOLD: Absolutely.

10 COMMISSIONER HEMSTAD: There has to be some  
11 forum by which the dispute will be resolved if the  
12 parties cannot themselves agree.

13 MS. ARNOLD: That's right.

14 CHAIRWOMAN SHOWALTER: Isn't that kind of  
15 right where we are? We haven't got the contract in  
16 front of us, but in effect by interpreting this tariff,  
17 we may not have to decide every particular, but we  
18 won't be very helpful unless we outline somewhat the  
19 range of Puget's discretion, lawful discretion under  
20 the tariff, and certainly one item that's going to come  
21 at us if we don't decide it is this issue of relocation  
22 costs or financial factors or things other than  
23 physical location, I guess.

24 MS. ARNOLD: Yes, I agree with Ms. Dodge  
25 on -- when she said that if the Commission can decide

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1 these big issues right now, and the big issues, I think  
2 we all agree, are two. One is can Puget refuse to  
3 underground unless the cities agree to buy private  
4 easement. That issue has got to be resolved. The  
5 other big contract issue that I think does need to be  
6 resolved before we can move forward is can Puget refuse  
7 to underground until the cities agree involuntarily to  
8 pay all future relocation costs? Those are the two big  
9 issues.

10 Now, if the parties in the future have  
11 disputes over whether union labor should be used or  
12 whether there should be overtime or other  
13 commercial-type disputes, I'm sure that we'll be back  
14 and ask you to resolve those, but really, these are the  
15 two big issues. The history, I agree with Kirstin, is  
16 not particularly material to the Commission's decision  
17 here, but the one thing that can be derived from this  
18 long history is that Puget has not until the last year  
19 and a half or so insisted that the cities sign  
20 contracts in advance agreeing to buy private easements  
21 for all of their facilities except for cable and  
22 conduit. That is something new, and that's why the  
23 cities are here, and that's really the sticking point I  
24 think that is before us. This issue of relocation is a  
25 contract issue that's come up. There is not a word in

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1 the tariff about that, but the law is very clear that a  
2 utility has the obligation to relocate its facilities.  
3 It's the common law.

4 The legislature can change that, as they did  
5 in the case of telecommunications. The statute on  
6 telecommunications now says that they can't be required  
7 to relocate within a five-year period, but the common  
8 law of the state is that a utility must relocate its  
9 facilities on a public right-of-way when it's directed  
10 to do so, and the Ninth Circuit just recently held that  
11 in the U S West case that that is the case in spite of  
12 a tariff to the contrary. So that is not something  
13 that the cities can agree in advance as a blanket  
14 matter that Puget will never have to relocate if they  
15 put their underground facilities on public right-of-way  
16 under certain circumstances, and it might be reasonable  
17 and they are willing to do so, but it can't be  
18 something that's holding the whole project hostage.

19 CHAIRWOMAN SHOWALTER: But all parties want  
20 us to decide is under Schedule 71, does Puget have the  
21 discretion to insist that the cities immunize them from  
22 relocation costs and will the city provide at the  
23 city's expense the easements.

24 MS. ARNOLD: The cities want you to decide  
25 that too. We are saying that it absolutely cannot be

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1 decided in Puget's favor because that is just not the  
2 law. Puget is responsible for relocating when it's  
3 told to do so.

4 CHAIRWOMAN SHOWALTER: I have a question on  
5 the phraseology, I guess, on whether the cities have to  
6 buy the private easements. Is it that the cities have  
7 to buy them or Puget doesn't have to pay it? In other  
8 words, is the issue really that Puget says, I don't  
9 care how you get this to me, but we aren't paying, or  
10 is it Puget insisting that the city pay some money for  
11 it?

12 MS. ARNOLD: If I have to decide, I would say  
13 that it's the city will not be obligated to pay for  
14 those. What happens when Puget can't get them  
15 privately has over the years been worked out on a  
16 case-by-case basis. I think it was SeaTac, the SeaTac  
17 gave some property owner an extension to his water line  
18 which he wanted, so he gave the easement, so it does  
19 work out.

20 These are actually very small pieces of  
21 property we are talking about, but as I said before,  
22 the cities are agreeable in every case to purchase  
23 whatever easement is necessary for Puget's use. It's  
24 just that the cities want to own that, want to have  
25 control over that easement.

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1                   JUDGE MOSS: I think we'd better move on to  
2 Mr. Charneski.

3                   MR. CHARNESKI: Three issues briefly: The  
4 question for whom is Schedule 71 strong or not strong,  
5 who has the leverage, the city's have the leverage  
6 because as written, Schedule 71 imposes a very clear  
7 obligation on Puget to underground that's not only in  
8 Section 2, which says they will underground subject to  
9 certain conditions which they concede are met on the  
10 Pac Highway project, but let's also look at Section 3.

11                   Section 3 has been quoted, specifically the  
12 references to consistent with this schedule and in a  
13 form satisfactory to the Company. By its terms, that  
14 relates specifically to financial arrangements. The  
15 financial arrangements that are talked about in Section  
16 3 are the financial arrangements for the underground  
17 conversion. A provision that requires a blanket period  
18 of protection against future relocation costs doesn't  
19 have anything to do with the financial arrangements for  
20 the underground conversion.

21                   I think that the historical practice is, in  
22 fact, relevant, and as to the relocation provision, PSE  
23 has submitted a declaration from Mr. Logan to which are  
24 attached five underground conversion agreements between  
25 Kent and PSE, and not one of those five underground

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1 conversion agreements mentions the words "relocation."  
2 None of them pertain in any way to relocation costs.  
3 It appears that PSE would like to institute a tariff  
4 that would include some sort of blanket protection  
5 against future relocation costs. PSE is certainly free  
6 to propose such a tariff, and if there is to be a  
7 blanket provision as opposed to a negotiated provision  
8 that parties may or may not see fit to enter into, then  
9 guidance on that, you would have to inquire deeply as  
10 to what would be reasonable, but the guidance is that  
11 mentioned by Ms. Arnold; that the telecommunications  
12 statute has a five-year period.

13 Bottom line, Section 3 pertains only to the  
14 financial arrangements for the underground conversion  
15 project for which the agreement is being entered into.  
16 Second -- actually, I'll make this my final point, back  
17 to history -- Ms. Dodge quoted from a City of Kent  
18 agreement the fact that the City of Kent has submitted  
19 six underground conversion agreements from the 1970's,  
20 and as she correctly pointed out, in Paragraph 7 of  
21 each of those agreements, the following sentence  
22 appears: "The city recognizes that the procurement of  
23 such operating rights is a prerequisite to release this  
24 conversion project for construction." The sentence  
25 that immediately follows that in every one of those

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1 agreements reads: "Puget shall use its best efforts to  
2 obtain the same, close quote.

3           Now, one final point, getting back to Section  
4 3 for a moment, who is obligated to do what, Section  
5 3(b) says -- namely, the underground conversion  
6 contract we've been talking about -- the contract shall  
7 obligate said municipality or property owners to do the  
8 following: That it obligates the city in certain ways.  
9 You are going to pay 70 percent or 30 percent depends  
10 on the facts, provides all trenching, restoration, and  
11 it provides for payment to the Company certain terms,  
12 30-day period, so on and so forth. Those are the ways  
13 in which the municipality can be obligated.

14           Section 4, operating rights, pertains to  
15 obligations on the other party involved here, property  
16 owners. Nothing here obligates the city to pick up the  
17 property owner's obligation in the event the property  
18 owner does not fulfill it. So if the property owner  
19 does not fulfill it, you get back to the decision made  
20 by PSE, the investment choice. We go to right-of-way  
21 at no charge, or if we are worried about future  
22 relocation costs, we invest in private easement and  
23 protect our shareholders that way. Thank you.

24           CHAIRWOMAN SHOWALTER: Just on the last point  
25 though, if Puget has the right to exercise judgment to



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1 go to the private route and the private owners don't  
2 want to provide space at their own expense, then what?  
3 Then are we back to the same old problem of what is the  
4 default?

5 MR. CHARNESKI: For the better part of 31  
6 years, it wasn't a problem, and for the better part of  
7 31 years, the mechanism was, and this is spelled out in  
8 PSE's declarations, they would typically redesign so  
9 they wouldn't need that easement. They would instead  
10 get an easement from someone else who would be willing  
11 to provide it for free. It's a matter of being  
12 obligated, and the fact that they would go through that  
13 redesign effort to get it elsewhere is evidence that  
14 they were, in fact, obligated and thus went to the  
15 trouble.

16 The other thing is if push came to shove and  
17 they really needed it, PSE, like the municipality, has  
18 a power of condemnation, but the obligation to  
19 underground is clearly spelled out in Section 2.

20 MR. STERBANK: Your Honor, would the  
21 Commission indulge a brief comment from one of the  
22 cities? I realize it's a bit extraordinary, but there  
23 have been a couple of questions posed which I don't  
24 think have been answered, and on behalf of Federal Way,  
25 I would like to take 30 seconds because I think I can

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1 answer one of the questions.

2 (Discussion off the record.)

3 JUDGE MOSS: Why don't you come up to the  
4 microphone, and the Bench will hear you briefly.

5 Please make your appearance.

6 MR. STERBANK: My name is Bob Sterbank. I'm  
7 the city attorney for the City of Federal Way. The  
8 questions that were being asked by Chairwoman Showalter  
9 and Judge Moss had to do with who has the leverage and  
10 what is the default answer, what happens if there is no  
11 contract, and we are in full agreement with the City of  
12 Kent that Section 2 provides the obligation to  
13 underground when those conditions are met and  
14 stipulated that the conditions for undergrounding on  
15 Pac Highway projects have been met.

16 So I would submit that the default answer is  
17 that PSE must underground even in the absence of a  
18 contract, but that is not the end of the story. It's  
19 not an all-or-nothing proposition, because as  
20 Mr. Charneski has pointed out, there are various  
21 obligations that the cities bear that are outlined in  
22 the tariff, and if there is something that the cities  
23 have not done, have not signed the contract, won't  
24 agree to pay the 70 or 30 percent, whatever the matter  
25 is, PSE can then come to this board with a complaint

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1 and ask for an order requiring the cities to pay or do  
2 the acts that have not been done or can go to the  
3 Superior Court and get an order requiring the private  
4 property owner to provide the operating rights as is  
5 provided for in the tariffs since the tariff has the  
6 operation of law, but the key is that PSE may not use  
7 those obligations as leverage to stop the cities'  
8 projects or to not underground, and I think that is the  
9 answer is that when the matter comes forward, PSE  
10 proceeds with the project, does the undergrounding. If  
11 there is a dispute -- Mr. Charneski pointed out for 30  
12 years, most of those have been worked out, but in the  
13 unlikely event there would be one, this commission is  
14 the primary forum for resolution of those disputes, and  
15 PSE also has condemnation authority it can exercise.  
16 That's my answer to the questions. I appreciate the  
17 board forgiving me the opportunity to address it.

18 MS. DODGE: Might I briefly respond?

19 JUDGE MOSS: If we are going to be  
20 unorthodox, we might as well go all the way.

21 MS. DODGE: I was going to suggest that were  
22 the Company to come to this commission with a complaint  
23 against a city, likely the first thing you would hear  
24 that you have no authority to order them to do  
25 anything. The argument presented also fails to take

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1 into account Schedule 80, the refusal of service  
2 provision, that we've heard very little about today.

3           There is a reason that the tariff gives the  
4 Company leverage, as in refusing to provide service,  
5 because how else are you going to deal with private  
6 persons, cities, whoever else are not within the  
7 Commission's authority. The Company is regulated by  
8 the Commission; that tariffs are looked at and approved  
9 as being fair, just, and reasonable, and they are the  
10 law, and if people are not complying with the law, then  
11 Puget has no obligation under these tariffs to provide  
12 the service.

13           MS. ARNOLD: Your Honor, could I make one  
14 last sur surrebuttal?

15           JUDGE MOSS: Go ahead.

16           MS. ARNOLD: I think what Mr. Sterbank is  
17 saying reflects the incredible frustration that these  
18 people here today have experienced over the past year.  
19 They have literally had bulldozers in the streets, and  
20 Puget says, We are not going to order a conduit. We  
21 are going to order overground poles because you won't  
22 sign our agreement, and this commission is entrusted  
23 with the public interest, and the public interest  
24 requires that projects move forward on an expeditious  
25 basis, and if there is a short answer to, Is there any

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1 condition under which Puget can refuse to do the  
2 underground, it should be interpreted very, very  
3 narrowly with the understanding that this literally  
4 affects every member of the traveling public who lives  
5 in that area, and once it starts on Highway 99, it's  
6 going to be really serious if these projects can't move  
7 forward on time, and I think that's the impetus for  
8 this group being here and Mr. Sterbank's remarks.

9 JUDGE MOSS: Speaking of that frustration,  
10 and since we are being a little unorthodox, maybe I'll  
11 be a little unorthodox too and put to you the question,  
12 isn't it the case, in fact, that none of these projects  
13 is currently being held up by any of this dispute; that  
14 those that became critical in a timing sense PSE agreed  
15 to go ahead, and the parties executed some conditional  
16 contract that depends on the outcome of the proceedings  
17 in terms of who pays what?

18 MR. STERBANK: Only after we came to this  
19 commission.

20 MS. ARNOLD: There is an interim agreement  
21 for the South 170th project. I think with Federal Way,  
22 they agreed to temporarily put up an aerial, so they  
23 are just not going forward with the undergrounding.

24 MR. STERBANK: We could not get an agreement  
25 in writing; although ultimately, arrangements were made

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1 and we are able to proceed with the project, but we  
2 could not get a written commitment as to how that would  
3 take place.

4 CHAIRWOMAN SHOWALTER: I'll make the closing  
5 comment that we appreciate the expression of  
6 frustration, but to me all it means is it's important  
7 for us to decide the issue. The frustration itself is  
8 not determinative of the issue.

9 JUDGE MOSS: I think that comes close to  
10 concluding our business for the day. We appreciate all  
11 the argument we've heard and responsiveness on the part  
12 of counsel to the questions the Bench has had. We  
13 will have the transcript from our proceedings, this one  
14 and the one we had this morning, in a couple weeks.  
15 The Commission will want an opportunity to deliberate  
16 and, of course, will render its decision through a  
17 written order in due course.

18 At the outset of these proceedings -- it  
19 seems like sometime ago now -- I've offered to you all  
20 the services of a mediator if that was something that  
21 you felt would advance the ball in some fashion. I  
22 don't believe you have availed yourself of those  
23 services, but I just wanted to state they are still  
24 available to you. All you have to do is let me know,  
25 and I will see what arrangements can be made to assist

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1 you in that fashion.

2 COMMISSIONER HEMSTAD: I would just make the  
3 comment I appreciate the quality and professionalism of  
4 the arguments made here today. I'm very impressed with  
5 the skill of the attorneys here.

6 JUDGE MOSS: With that, we will be off the  
7 record. Thank you.

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9 (Oral argument concluded at 4:10 p.m.)

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