BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of PUGET SOUND ENERGY, INC. For a Declaratory Order on Schedule 74 and the Schedule 74 Design Agreement between Puget Sound Energy, Inc. and the City of Tumwater	No. UE-061626 CITY OF TUMWATER'S ANSWER TO PUGET SOUND ENERGY'S PETITION FOR REVIEW OF INITIAL ORDER

I. Introduction

1. The fundamental fact in this proceeding is that Puget Sound Energy's (PSE) overhead facilities in Tumwater Boulevard were always located on a public thoroughfare. PSE repeatedly attempts to ignore this fact in its petition for review. In doing so, PSE misinterprets the underlying policy and issues that led to the Commission's adoption of Schedule 74. PSE likewise misinterprets both Washington case law and case law from other jurisdictions.

II. The Initial Order upholds Commission policy

A. Schedule 74 reduced PSE's cost sharing percentage in many instances

2. PSE claims that it is unfair for it to pay 60 percent of the costs of conversion from overhead to underground resulting from a city's road-widening project. Further, PSE claims that

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this unfairness will spread to other areas outside the City of Tumwater (City). Yet if cost sharing for conversion requests was really unfair to the utility, the Commission would never have adopted any cost sharing requirement for PSE in response to a government's request for conversion to underground service. But it did.

3. When the Commission adopted Schedule 74, it modified its cost sharing formula in response to contentious issues litigated before the Commission between PSE and Kent and other cities regarding previous tariffs that provided for either a 70/30 or 30/70 cost sharing split depending on the adjacent zoning. The previous arguments about "residential" vs. "commercial" zoning were eliminated. Schedule 74 adopted a standard 60/40 formula regardless of the zoning. As a consequence, after June of 2002, the percentage of PSE's shared costs for conversion in the many residential zones throughout PSE's service area was reduced. This outcome is certainly not unfair to PSE.

B. Schedule 74 protects PSE's preexisting rights only on private property

4. In addition to the persistent zoning controversy, the issue of PSE facilities on private property was also addressed in the litigation leading up to the adoption of Schedule 74. A major issue in the *Kent* and *Clyde Hill* proceedings was whether PSE would have to share in the costs of conversion when PSE facilities were located on private streets or when they were located on private property outside the existing public right of way at the time the road project was begun. In those circumstances, Schedule 74 does not require PSE to share in the cost of conversion requested by a government entity. But those are not the circumstances here.

5. PSE both misinterprets the controversy that led to the changes made in Schedule 74 and ignores the inclusion of a previously lacking definition of "public thoroughfare" in that

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Schedule. PSE would like the Commission to believe that its view of the former litigation with Kent and other cities answers the controversy with the City of Tumwater, but it does not. The issues in the *Kent*[1] and *Clyde Hill*[2] proceedings dealt with two basic issues of private property that are not at issue in this case.

6. First, in *Clyde Hill*, PSE challenged the right of the city to obtain any cost sharing from PSE because the city was not asking for conversion on a public right of way. PSE pointed out that the "streets" in this exclusive enclave were actually not public streets at all, but rather private drives owned and maintained by the adjacent property owners, not the City of Clyde Hill. In that case the Commission agreed with PSE, and under Schedule 74 cost sharing is not called for when streets are not owned or controlled by a public agency and therefore are not a "public thoroughfare" as now defined in the tariff.

7. Second, as part of the controversy in *Kent*, PSE argued that it should not have to share in any costs of conversion when its facilities were located on private property outside the right of way at the time a road project is begun or at the time the city acquired additional right of way specifically for the purpose of widening the public street. Schedule 74 likewise clarified this issue in PSE's favor, providing that PSE will not have to share conversion costs when its facilities are on private property outside the previously existing public right of way.

8. Neither situation occurs here. Tumwater Boulevard (formerly "Airdustrial Way") has always been a "public thoroughfare," and PSE facilities subject to conversion have always been in the public right of way encompassed by the Tumwater Boulevard Widening Project.

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[1] *City of Kent v. Puget Sound Energy, Inc.*, Docket Nos. UE-010778 and UE-010911.
[2] *City of Clyde Hill v. Puget Sound Energy, Inc.*, Docket No. UE-011027.

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C. Schedule 74 emphasizes that public thoroughfares are public property

9. The Commission incorporated a critical definition of "public thoroughfare" in Schedule 74 that had been absent from prior Schedules 70 and 71. "Public Thoroughfare" is defined as

> "Any municipal, county, state, federal or other public road, highway, or throughway, or other public right-of-way or other public real property rights allowing for electric utility use."

10. The key to this definition is the fact that it applies to public rights of way – whether that public right of way be in the form of a road, highway or other right of way or other public real property rights allowing for electric use. Tumwater Boulevard has always been a public right of way controlled first by the Port of Olympia and then by the City. PSE facilities subject to conversion on Tumwater Boulevard have always been in that "public thoroughfare," whether informally or by formal authorization, including "other real property rights" allowing for electric utility use.

11. The fact that public control was the key to this definition and its application in Schedule 74 is highlighted in the transcript of hearing cited in the City's cross motion for summary determination.[3] In the course of asking a number of questions to clarify the definition of "Public Thoroughfare" in the new schedule, Chairwoman Showalter asked PSE's representative, Kimberly Harris, about the difference between a "private drive" and a "public thoroughfare." The following exchange took place:[4]

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[3] *WUTC v. Puget Sound Energy*, Docket Nos. UE-011570 and UG-011571, Transcript of Proceedings, Vol. XVI, June 14, 2002.
[4] *Id.*, Record of Proceedings, June 14, 2002, at 1979:

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CHAIRWOMAN SHOWALTER: . . . and I just wondered if that's – that private street I'm mentioning is one, or is that private street just the same as my backyard, supposing the wires go behind my house, through my back yard?

MS. HARRIS: I understand that this is not very clear, reading this. I believe though that if it is a private drive, then it is not a public road thoroughfare.

CHAIRWOMAN SHOWALTER: So the word public in the definition doesn't mean members of the public get to walk down the road. It's not like a private easement or a – well it refers to ownership, an ownership by a government. Am I right on that?

MS. HARRIS: Yes.

12. And, later in the same day, an exchange between Commissioner Hempstead and PSE's attorney, Markham Quehrn, focused on the fact that ownership by a government may include governments other than a city or county, including a port district:[5]

MR. QUEHRN: . . . So the idea here is to create a nexus between the concept of a municipality, county, or other governmental entity and authority over public thoroughfares.

CHAIRWOMAN SHOWALTER: Who is there other than a municipality or a county that might have authority over public thoroughfares?

MR. QUEHRN: State Department of – DOT, Department of Transportation, is one.

COMMISSIONER HEMPSTEAD: Port district would be another. At the airport, for example, would have control over the –

MR. QUEHRN: Would have control over port property, to some extent.

COMMISSIONER HEMPSTEAD: Over the public thoroughfare.

MR. QUEHRN: I don't know if I want to concede that one, but comment acknowledged. I thing that's potentially one, but I'd obviously look at the enabling authority to answer that question.

[5] *Id.*, Record of Proceedings at 1989-90.

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13. Despite PSE's equivocation, Commissioner Hempstead was right. Port Districts are municipal corporations under Washington law. "The legislature has created port districts expressly as 'municipal corporations,' thereby classifying them in the same fashion as cities and towns, public utility districts and other similar public agencies." *State ex. rel. O'Connell v. Port of Seattle*, 65 Wn.2d 801, 803, 399 P.2d 623 (1963), citing RCW 53.04.060 and Art. 11, § 10, Washington constitution.

14. Furthermore, the issue in *Kent* and *Clyde Hill* was the status of easements on private property not any claimed rights on public property. This fact is highlighted by the discussion of PSE's attorney Kirstin Dodge in answer to Chairwoman Showalter's questions about the distinction between public thoroughfares (previously undefined in Schedules 70 and 71) and PSE easements on private property:[6]

> CHAIRWOMAN SHOWALTER: . . . Is undergrounding required to be performed under Schedule 70 in these private areas? [referring to private drives in Clyde Hill]
>
> MS. DODGE: No it is not. The tariff speaks of public thoroughfares, and the legal landscape surrounding the filing and approval of the tariff is one in which the Company is not required to do anything with its facilities that are on the private property on its own easements.

[6] *City of SeaTac v. Puget Sound Energy*, Docket No. UE-010891, and *City of Clyde Hill v. Puget Sound Energy*, Docket No. UE-011027, Transcript of Oral Argument, October 11, 2001, at 132-33; parenthetical reference and emphasis added.

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15. In contrast to the circumstances addressed in the *Clyde Hill, Kent* and *SeaTac* proceedings before the Commission in 2001 and 2002, the Puget Sound Power and Light Company (now PSE) facilities on Tumwater Boulevard were always located in a public right of way. This fact is "graphically" demonstrated by Exhibit 10 to the declaration of Jim Shoopman – PSE's own schematic drawing of the existing overhead facilities to be removed in Tumwater Boulevard. The line of poles to be removed are all within the existing right of way, not outside it. Further, Exhibit 4 to Shoopman's declaration shows that the Puget facilities in Airdustrial Way were already located there in 1981 before the easement from the Port of Olympia was recorded. This fact is likewise demonstrated on PSE's drawing (Shoopman, Exhibit 10). The box on the lower left of the drawing identifies the installation date of various poles. Poles 3,4,5, 8 and 9 are shown to have been installed by PSE in the right of way either in 1974 or 1977. Those poles were thus already in "Airdustrial Way" either seven or four years before PSE obtained any formal permission to be in the Port of Olympia's public right of way.

III. PSE's focus on the term "easement" ignores Washington utility law.

16. PSE fundamentally ignores the leading Washington Supreme Court decision defining the responsibility of any utility to accommodate a road improvement project at its own expense, regardless of whether the authorization for the utility to be in the public right of way is in the form of a franchise, permit or "easement":

> In the instant case, whether respondent's right to use the streets of the city of Vancouver for its electrical distribution system is termed a franchise or a privilege, it is subject to the express provision that it will remove and relocate these facilities "whenever the removal thereof shall be deemed for the public convenience" or "in making any other improvements by the City of Vancouver.
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> The great weight of authority supports the following rule:

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> "In the absence of an express and definite provision to the contrary, a utility company maintains its structures and rights in a public street subject to the paramount right of the city to use its streets for all proper governmental purposes. A grant, franchise, easement or other right accorded to a utility company by public authority, to maintain structures in public streets, is at all times subject to the police power of the sovereign, and unless expressly agreed to otherwise in the franchise, the company must, at its own expense, make such changes as the public convenience and necessity require, and it is bound to alter, remove, relocate, support and maintain a structure, when necessary for the city's carrying out a function in the interest of public health, safety or welfare. . ."

State v. Public Utility District No. 1 of Clark County, 55 Wn.2d 645, 649-50, 349 P.2d 426 (1960), (quoting Charles S. Rhyne, *Municipal Law* 512 (1957); emphasis added; (requiring the PUD to relocate its existing electric facilities to accommodate a state highway project)).

17. Less than a year ago, the Washington Supreme Court again reiterated that basic common law rule. The Supreme Court once again included "easement" as one of the types of authority covered by the rule requiring utilities to accommodate a municipal transportation project at their own expense. *Scoccolo Construction, Inc. v. Renton*, 158 Wn.2d 506, 516-17, 145 P.3d 371 (2006), citing *State v. Public Utility District No. 1 of Clark County*. In *Scoccolo*, PSE was held to be an agent of the City of Renton as a utility that is required to move its facilities at its own expense to accommodate a road construction project. As a consequence, the City of Renton was found liable for the construction delays caused by PSE under the public policy established by RCW 4.24.360, declaring a "no damages for delay" provision in construction contracts void as a matter of public policy if the city has control over the circumstances that led to the delay.

18. The Commission's initial order is thus correct in finding that RCW 35A.14.900 automatically cancels any public authorization to be in a public thoroughfare upon annexation. The statute uses "franchise or permit" generically, as did the Supreme Court in *State v. Public*

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Utility District No. 1 of Clark County and in *Scoccolo*, stating that it applies to franchises or permits". . . authorizing or otherwise permitting the operation of any public utility. . ." (RCW 35A.14.900; emphasis added.) By whatever name it is a government provided authority to be in the public thoroughfare that is cancelled and transferred automatically upon annexation.

19. On August 2, 2007, the Washington Supreme Court once again defined a franchise as a government grant of permission to use streets for utility purposes. "A franchise is 'the right of a public utility to make use of the city streets for the purpose of carrying on the business in which it is generally engaged, that is, of furnishing service to members of the public generally.'" *Burns v. Seattle*, ____Wn.2d ____, 164 P.3d 475, 483 (2007); citations omitted. In *Burns*, the Supreme Court upheld payments by Seattle City Light to various suburban cities in which Seattle City Light provides retail electric service as a lawful business agreement to pay those cities for their pledge to refrain from creating their own competing municipal electric utility during the term of the franchise. The *Burns* court rejected class action plaintiff claims that the payments were barred by RCW 35.21.860(1) which provides that "[n]o city or town may impose a franchise fee or any other fee or charge of whatever nature or description upon the light and power distribution business. ..." The Supreme Court reasoned that despite the presence of the term "of whatever nature" in the statute, it could not have been meant to prohibit any agreements between an electric utility and a city that reflected the proprietary nature of the utility. Seattle's payments to prevent the creation of a competing utility did not reflect a payment by the utility to the suburban cities acting in their governmental capacity to allow use of the streets. "The meaning of words in a statute is not gleaned from those words alone but from "all the terms and provisions of the act in relation to the subject of the legislation, the nature of

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the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another." *Burns,* ____Wn.2d at _____, 164 P.3d at 484; citation omitted. The *Burns* later underscored this principle by holding that the payments were not for permission to use the streets, but for an independent business reason. "In undertaking a plain language analysis, we avoid interpreting a statute in a manner that leads to unlikely, strained or absurd results. . . A more reasonable interpretation is that the legislature intended the language to encompass any governmental charge, but not proprietary charges independent from the right to use the streets." *Id.,* ____Wn.2d at _____, 164 P.3d at 486.

20. In its Initial Order, the Commission employed the same principles of statutory interpretation enunciated by the *Burns* court by interpreting RCW 35A.14.900 to achieve "the general object to be accomplished." The Commission applied the statute to governmental permission to use public streets by whatever name, including "easement." The Commission thereby avoided a strained reading of the statute which would be required to exclude "easement," when the Washington Supreme Court had earlier included "easement" in the lexicon of terms used to describe governmental authority for utilities to use public streets. *State v. Public Utility District No. 1 of Clark County*, 55 Wn.2d at 649.

IV. PSE likewise misinterprets cases from outside Washington

A. The *Grand Prairie* case is prime example

21. The 5th Circuit case cited by PSE is emblematic of PSE's misconception of the nature of the prior litigation at the Commission in *Kent* and *Clyde Hill*, and its misapplication of case law outside Washington. *City of Grand Prairie v. AT&T*, 405 F.2d 1144 (5th Cir. 1969). In fact, the circumstances of this case represent precisely the private property issue that was

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litigated in the *Kent* proceedings and addressed by Schedule 74. The City therefore attaches a copy of the *Grand Prairie* case as Exhibit A for the convenience of the Commission.

22. In *Grand Prairie*, the Court of Appeals required the city to pay for relocation and additional undergrounding of the AT&T lines because the lines had been located on private property before the city expanded and before any street was constructed in the area. In fact, the telephone lines had originally been placed in conduit under private farm land located some distance from the city. 405 F.2d at 1145. The point is: these lines were first located on a private easement outside any existing public street.

23. In deciding in favor of AT&T, the 5th Circuit Court of Appeals fist reiterated the basic law of utility obligation to relocate as enunciated by the Texas Supreme Court:

> "[T]he City relies upon the general rule that utilities are required to remove or relocate their facilities at their own expense from public highways and streets where necessary for improvement for public use and convenience. This principle was recognized by the Supreme Court of Texas in *State of Texas v. City of Austin*, 160 Tex. 348, 331 S.W.2d 737 (1960) and is generally accepted as the prevailing view. This doctrine is based upon the principle that when a state or municipal corporation grants to a utility the right to install facilities such as telephone poles, lines, conduits and cables on the right of way of a public highway or street, there is an implied condition that the facilities shall not interfere with the public use, either at the time they are placed in position or thereafter. If the highway or street is improved by widening or change of grade, the utility must relocate its facilities at is own expense". Nichols' *The Law of Eminent Domain*, (3d ed. 1963) §§ 5...85, 12.22.
>
> *Grand Prairie*, 405 F.2d at 1146.

24. The 5th Circuit Court then addressed the facts before it and explained why the general rule did not apply. "In the instant case, the telephone companies did not locate their facilities on the right of way of a public street by permission of the municipal corporation. Here the facilities were located in a private easement acquired long prior to the planning, laying out and construction of the street." *Id.*, 405 F.2d at 1146; emphasis added.

25. The issue in *Grand Prairie* was thus the same issue as in the *Kent* and *Clyde Hill* litigation before the Commission. The AT&T facilities in Grand Prairie – like the PSE facilities

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in Clyde Hill and parts of Kent – were located on private property that had never been made part of a public street. These are not the facts in Tumwater Boulevard. The Puget Sound Power and Light Company (later PSE) facilities were always located in the public right of way. This fact is "graphically" demonstrated by Exhibit 10 to the declaration of Jim Shoopman – PSE's own schematic drawing of the existing overhead facilities to be removed in Tumwater Boulevard. The line of poles to be removed are all within the right of way, not outside it. Further, Exhibit 4 to Shoopman's declaration shows that the Puget facilities in Airdustrial Way were already located there in 1981 before the easement from the Port of Olympia was recorded. The box on the lower left of the PSE drawing (Shoopman, Exhibit 10) likewise documents this fact by listing the installation date of various poles. Pole numbers 3,4, 5, 8, and 9 of the line of poles to be removed are were first installed by Puget Sound Power and Light in either1974 or 1977, years before formal permission to be in the Port of Olympia right of way was ever obtained.

26. These facts are in stark contrast to *Grand Prairie* and the principles enunciated in that case by the 5th Circuit Court. The facts are likewise in stark contrast to the *Kent* and *Clyde Hill* proceedings at the Commission which led to the adoption of Schedule 74. In *Grand Prairie, Kent*, and *Clyde Hill* utility facilities were located (1) on private property and (2) on property that was off the right of way. Here, the PSE facilities have from their inception been located (1) on public property and (2) within a public right of way.

B. The *Algonquin* case from New York is also misrepresented

27. Similarly, PSE also mischaracterizes the import of the *Algonquin* case from the State of New York. *In re Algonquin Gas Transmission Company*, 157 N.Y.S.2d 748, 2 Misc.2d 997 (1956). First, PSE ignores the fact that the under the river be easement there was neither within nor affected the public right of way in Hudson River transportation. Second, PSE fails to make the Commission aware of subsequent New York precedent that criticizes the *Algonquin* decision and upholds local franchise tax authority over buried pipelines.

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28. *Algonquin* involved the issue of whether a city's franchise tax could apply to Algonquin's natural gas pipeline running under the Hudson River pursuant to an easement below the riverbed obtained from the State of New York. The trial court[7] held that the pipeline was liable for the franchise tax, because permission to cross under the river was not a franchise, but rather a property right in the form of an easement granted by the State of New York in land under the riverbed. While PSE relies on this case for its recitation of the classic definition of an easement as a "dominant estate imposed on a servient estate,"[8] it fails to draw the Commission's attention to the crucial distinction the *Algonquin* court drew between the State acting as land owner and the State acting as sovereign. Yet the court based its decision on this crucial distinction. The court pointed out that the State (thorough a special statute) has the right to sell or allow easements on State property that is not used for transportation, but that control over the navigable waters of the Hudson "is linked with the powers of the sovereign." *Algonquin*, 157 N.Y.S.2d at 750. Accordingly the court held that "The granting of the right to build a bridge across the Hudson River is a franchise, for it is predicated on the rights inhereing in the State of New York as the result of sovereignty. The granting of rights in the real estate in the bed of the Hudson River, on the other hand, is not an attribute of sovereignty and therefore not a franchise. It is an easement that exists without the trappings of sovereignty." 157 N.Y.S.2d at 750-51.

29. Not only does PSE misread the *Algonquin* case itself, but it ignores subsequent New York court decisions about the issue. Nearly twenty years after *Algonquin*, the New York courts addressed a parallel challenge to a franchise tax on a liquid petroleum pipeline running under water to Staten Island. In that case the New York court came to a different conclusion than the *Algonquin* court and upheld a tax on underwater pipelines as a legitimate "franchise" tax. *Colonial Pipeline Company v. State*, 366 N.Y.S.2d 949, 81 Misc.2d 696 (1975). The *Colonial Pipeline* court first pointed out that the State of New York itself, subsequent to

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[7] In the State of New York, trial courts are labeled "Supreme Court," while the State's highest Court is called the "Court of Appeals."
[8] 157 N.Y.S.2d at 750.

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Algonquin, had come to realize the threat to the river of under riverbed pipelines and had passed legislation in 1960 asserting State authority over those pipelines. *Colonial Pipeline*, 366 N.Y.S. at 953-54. In addition, the *Colonial Pipeline* court focused on the many bridge cases in the State of New York that and emphasized that "The rationale of the bridge cases previously referred to becomes most pertinent in the determination of whether petitioner received a franchise to convey its oil in and through Staten Island or solely a property right to construct physical facilities. . ." 366 N.Y.S. at 954. Based on those bridge cases, the *Colonial Pipeline* court held that government permission to site the pipeline was in fact a franchise. Quoting a previous opinion of Chief Judge Cardozo of New York's highest court, the *Colonial Pipeline* court noted "The truth, indeed, is that a bridge, however placed across a navigable stream is a potential interference with navigation . . . as to preclude its construction by force of common right or without the license or approval of the appropriate agencies of government." *Colonial Pipeline,* 366 N.Y.S. at 954, citing *People, ex rel. Lehigh Val. Ry. Co. v. State Tax Comm.* 247 N.Y. 9, 12, 159 N.E. 703 (1928). Thus it is the interference – potential or immediate – with navigation or transportation that makes government permission to use its property "under whatever name they may be called" a franchise. *Colonial Pipeline,* 366 N.Y.S. at 952; emphasis added; citations omitted.

C. Washington law follows the principles of *Colonial Pipeline*

30. More than ten years before Judge Cardozo enunciated the principle of sovereign franchise in New York, the Washington Supreme Court stated the same principle with respect to telephone poles required to be repaired or moved at the utility's expense in Washington. *Granger Tel. and Tel. Co. v. Sloane Bros.*, 96 Wash. 333, 165 P. 102 (1917). The Supreme Court in fact found that Wahkiakum County had no authority to grant a utility a right to be in the highway without qualification: "It cannot be reasonably argued that the county authorities may grant the right to occupy a highway to the exclusion of the public or the exclusion of the right of the county authorities to improve the highway so that it may be used by the public." *Granger*, 96

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Wash. at 334. The *Granger* court further cited the "almost uniformly" held principle "that a gas or water company laying its mains and service pipes under the streets of a municipality acquires no vested right to an undisturbed location, but holds subject to the paramount right of the public to make such changes in the surface and subsoil of the street as may be required by the public interest; and hence any damage inflicted without negligence on the owner of the mains and pipes in the prosecution of a public improvement under the direction of the authorities is, in the absence of an express statute or an express contract allowing recovery, damnum absque injuria." 96 Wash. at 334-35; citation omitted.

31. The Washington legislature in 1937 went on to reflect this uniform principle in statute. Now codified in RCW 36. 55.060(4), the statute requires that any utility granted permission to be in a county road must relocate at its own expense. Ch. 187 §38, Laws of 1937. In Washington, as in New York, the right to be in a pubic thoroughfare, is a government franchise right under whatever name it may be called – whether that be a "grant, franchise, easement or other right." *State v. Public Utility District No. 1 of Clark County*, 55 Wn.2d 645, 649-50, 349 P.2d 426 (1960), (quoting Charles S. Rhyne, *Municipal Law* 512 (1957); emphasis added; *Scoccolo Construction, Inc. v. Renton*, 158 Wn.2d at 516-17 Indeed the Washington Supreme Court in August of this year again emphasized that "A city acts in a governmental capacity in issuing a franchise." *Burns v. Seattle*, ____Wn.2d at_____, 164 P.3d at 483.

D. Municipal law treatises support the same principles

32. Eugene McQuillin, *The Law of Municipal Corporations*, like Rhyne, is another treatise on municipal law that is often relied on in Washington Court decisions. For example McQuillin was cited a number of times in *Burns v. Seattle*, ____Wn.2d at _____, 164 P.3d at 482. And like Rhyne, McQuillin also addresses the issue of who is responsible for relocation expenses in a public right of way and the issue of the annexation of previously unincorporated areas where a private development is annexed. McQuillin notes that in contrast to the standard rule of utility responsibility for the costs of relocation, "However, where a utility's easement

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rights antedates the public's right in the property, the right of the utility is generally paramount and the public can displace the utility only by paying compensation." 12 Eugene McQuillin, *The Law of Municipal Corporations* § 34:92 (3rd Ed., 2006 revised volume at 327); emphasis added; citing one case from New Jersey. *Sussex Rural Electric Cooperative v. Township of Wantage*, 217 N.J.Super. 481, 526 A.2d 259 (1987).

33. In *Sussex*, the court ruled that the town was required to pay for the relocation of utility infrastructure to accommodate a road widening project because the utility had private property rights that preceded public rights in the street. The electric utility lines had been put in a private development before that development became part of the town. The court found that contrary to the town's contention, "that whether the utility lines were initially placed along public or private rights of way is of critical significance." *Sussex*, 217 N.J.Super. at 487. Later the New Jersey Court, citing to the *Grand Prairie* case as well as other precedent noted that "The fact remains the lines were placed when the public had no interest in the roads." 217 N.J.Super. at 491. Yet here, the public has always had an interest in the roads. The PSE lines on Tumwater Boulevard were always on a public road controlled by a Washington municipal corporation.

34. Just prior to the Commission's adoption of Schedule 74, a Superior Court judge in King County relied on the *Sussex* case to rule in favor of a utility's right to require payment for relocating from a private street in a parallel situation to *Clyde Hill* where the roads were private, not public roads. Judge Lukins emphasized that "As the court noted in *Sussex*, '. . .whether the utility lines were initially placed along a public or private rights of way is of critical importance.'" *City of Federal Way vs. Dana Plaza LLC*, King County Cause No. 01-2-08746-1 KNT at 4; emphasis in original. (A copy of Judge Lukin's decision is attached as Exhibit B.)

35. *Nichols on Eminent Domain*, a treatise cited by PSE in its petition, likewise states the same principles: "Charters, franchises, statutory grants and permits allowing public ways to be used as utility locations are subservient, expressly or by implication, in the exercise of governmental functions to public travel and to the paramount police power." "The attitude taken

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by most courts when public use requires the removal of utilities is that such use is a privilege and no compensation is due the utility company that must move its facilities." But this is not necessarily the case when the utility facilities were located on private property with private easements before it was a street. "Where a utility company has installed facilities pursuant to privately granted easements prior to the existence of a street, the utility company does not bear the cost of relocating the pre-existing facilities. . ." *Nichols on Eminent Domain*, §15.04(2); emphasis added.

V. No city employee and no utility can alter a Commission tariff

36. In its petition for review PSE persists in arguing that its position must prevail because City employees had earlier voiced agreement with PSE and had acted on that belief. But a city employee's misunderstanding cannot change a tariff. A tariff adopted by the Commission is the equivalent of law. It cannot be negotiated or changed by contract. *Gen. Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585, 719 P.2d 879 (1986). So whatever the City employees thought at first, those discussions can neither change nor affect the tariff. A Commission tariff is binding on the utility just as much as on customers or other entities affected by the tariff. "Unless the commission otherwise orders, no change shall be made in any rate or charge or in any form of contract or agreement or in any rule or regulation relating to any rate, charge or service or in any general privilege or facility which shall have been filed and published by a gas company, electrical company or water company. . ." RCW 80.28.060. Published rates must be applied by the utility. RCW 80.28.020. For PSE to apply a different rate, even if a customer agreed, would unlawful rate discrimination. RCW 80.28.100.

VI. Conclusion

37. The Commission's Initial Order of May 25, 2007 upheld both the specific provisions of Schedule 74 and the public policy that led to its adoption. It is PSE that is attempting to evade its own tariff provisions by misinterpreting the Commission proceedings that preceded the adoption of Schedule 74 and by misinterpreting case law from jurisdictions outside

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Washington. PSE facilities in Tumwater Boulevard have always been located in a public thoroughfare, not on private property. PSE's contention that the City is required to pay 100 percent of conversion costs for Tumwater Boulevard, based on Schedule 74, Section 2.b(2)(i), conflicts both with the plain meaning of that Section and with the definition of "Public Thoroughfare." The Initial Order is correct in all respects:

37.1 In the Project Design Agreement, PSE acknowledges that "The Company . . . pursuant to its franchise or other rights from the Government Entity, currently locates its electric distribution facilities within the jurisdictional boundaries of the Government Entity."

37.2 "Public Thoroughfare" as defined in Schedule 74, means "Any . . . public road, highway, or throughway, or other public right-of-way or other public real property rights allowing for electric utility use."

37.3 The easement from the Port of Olympia is a public grant of authority to locate its facilities in public right of way and on public property, and therefore on a "Public Thoroughfare."

37.4 PSE's franchise agreement with the City has no reservation of rights, and covers all City right-of-way within the city limits of Tumwater in 1985 and within the future limits of the City as those limits may later be extended.

37.5 PSE's permission from the Port of Olympia to operate and provide electric service within the Port's airport property was automatically extinguished upon annexation of the Port property into Tumwater.

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37.6 At the point of annexation, the City's franchise terms were in turn automatically extended to cover the Port's airport property pursuant to the terms of the franchise agreement.

37.7 Further, under the terms of the easement itself, if PSE is the successor to Puget Sound Power & Light Company as "grantee," then the City is the successor to the Port of Olympia as the "grantor" of those rights.

38. Accordingly, the City respectfully asks the Commission to affirm its Initial Order.

RESPECTFULLY SUBMITTED this 4th day of October, 2007.

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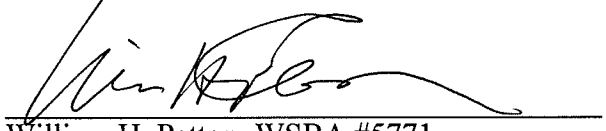

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EXHIBIT A

City of Grand Prairie v. American Tel. & Tel. Co. C.A.Tex. 1969.

United States Court of Appeals Fifth Circuit.
CITY OF GRAND PRAIRIE, Appellant,
v.
AMERICAN TELEPHONE AND TELEGRAPH COMPANY et al., Appellees.
No. 25884.

Jan. 2, 1969.

Telephone companies brought action against city to recover expense of relocating cables and facilities as required by city. The United States District Court for the Northern District of Texas, Sarah Tilghman Hughes, J., rendered judgment for the telephone companies, and the city appealed. The Court of Appeals, Harry Phillips, Circuit Judge, held that where telephone companies acquired two easements through farmlands located some distance from city to maintain underground cables and other fixtures, and a number of years later lands were annexed by city, and pursuant to ordinance city required telephone companies to relocate cables because they were under new street, and telephone companies did so, city was liable to telephone companies for expense of relocation.

Affirmed.

West Headnotes

[1] Highways 200 ⚿88

200 Highways
200V Title to Fee and Rights of Abutting Owners
200k88 k. Use of Highway for Other Public Purposes. Most Cited Cases

Municipal Corporations 268 ⚿688

268 Municipal Corporations
268XI Use and Regulation of Public Places, Property, and Works
268XI(A) Streets and Other Public Ways
268k679 Grant of Rights to Use Street for Purposes Other Than Highway
268k688 k. Effect on Subsequent Exercise of Power of Municipality. Most Cited Cases
Generally, utilities, such as telephone companies, are required to remove or relocate their facilities at their own expense from public highways and streets where necessary for improvement for public use and convenience.

[2] Highways 200 ⚿88

200 Highways
200V Title to Fee and Rights of Abutting Owners
200k88 k. Use of Highway for Other Public Purposes. Most Cited Cases

Municipal Corporations 268 ⚿688

268 Municipal Corporations
268XI Use and Regulation of Public Places, Property, and Works
268XI(A) Streets and Other Public Ways
268k679 Grant of Rights to Use Street for Purposes Other Than Highway
268k688 k. Effect on Subsequent Exercise of Power of Municipality. Most Cited Cases
Where state or municipal corporation grants utility, such as telephone company, right to install facilities on right-of-way of public highway or street, there is implied condition that facilities shall not interfere with public use, either at time they are placed in position or thereafter, and if highway or street is improved by widening or change of grade, utility must relocate its facilities at its own expense.

[3] Eminent Domain 148 ⚿271

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k271 k. Recovery of Damages. Most Cited Cases
Where telephone companies acquired two easements through farmlands located some distance from city to maintain underground cables and other fixtures, and a number of years later lands were annexed by city, and pursuant to ordinance city required companies to relocate cables because they were under new street, and companies did so, city was liable to companies for expense of relocation. Vernon's Ann.Tex.St.Const. art. 1, § 17; U.S.C.A.Const. Amend. 14.

[4] Eminent Domain 148 ⚿303

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k301 Damages and Amount of Recovery
148k303 k. Compensation for Property Taken or for Injury. Most Cited Cases
Where telephone companies acquired two easements through farm lands located some distance from city to maintain underground cables and other fixtures, and a number of years later lands were annexed by city, and pursuant to ordinance city required companies to relocate cables because they were under new street, and companies did so, and companies sued city for expense of relocating cables and facilities, costs of relocation and reconstruction were appropriate measure of damages. Vernon's Ann.Tex.St.Const. art. 1, § 17; U.S.C.A.Const. Amend. 14.

[5] Interest 219 ⚿39(1)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(1) k. In General. Most Cited Cases
Where telephone companies acquired easements through farm lands to maintain underground cables and other fixtures, and later lands were annexed by city, and pursuant to ordinance city required companies to relocate cables, and companies did so under agreement with city that companies would do so at their own expense but reserved right to claim reimbursement, court did not err in rendering judgment for interest from date of relocation of cables and facilities. Vernon's Ann.Tex.St.Const. art. 1, § 17, U.S.C.A.Const. Amend. 14.

***1144** Jerry D. Brownlow, Grand Prairie, Tex., for appellant.
***1145** Edward F. Barnicle, Jr., Kansas City, Mo., H. P. Kucera, Ford Hall, J. H. Hand, Strasburger, Price, Kelton, Martin & Unis, Dallas, Tex., for appellees.

Before GEWIN, PHILLIPS[FN*] and GOLDBERG, Circuit Judges.

FN* Judge Harry Phillips of the Sixth Circuit, sitting by designation.

PHILLIPS, Circuit Judge:
Can a Texas home rule city under its police power require a telephone company to lower underground conduits and cables at the expense of the utility in order to construct a public street, when the cables are located on an easement purchased and owned by the telephone company long prior to the opening of the street? This is the question before us on this appeal.

District Judge, Sarah T. Hughes answered this question in the negative and rendered summary judgment in favor of plaintiffs-appellees, American Telephone & Telegraph Company and Southwestern Bell Telephone Company, against the City for $31,154.51 which was the cost incurred by the telephone company in relocating the conduits and cables. The District Court held that the easements owned by the telephone companies were property rights protected by Article 1, § 17, of the Constitution of Texas, Vernon's Ann.St. and the Fourteenth Amendment of the Constitution of the United States, that these property rights could not be defeated without the payment of just and fair compensation, and that the appropriate measure of damages was the cost of relocating and reconstructing the facilities. We affirm.

Jurisdiction is based upon diversity of citizenship.

On March 6, 1929, the telephone companies acquired two easements through farm lands located some distance from the City. The instruments conveying the easements granted the right to construct, operate and maintain underground conduits, cables, manholes and other fixtures and appurtenances to be buried to such depth as not to interfere with the ordinary cultivation of the land.

The telephone companies installed conduits in 1929 at a minimum depth of from 24 to 30 inches below the surface. In the conduits were put three telephone cables, known as the Dallas-El Paso cables. The cables and circuits installed in the right of way easements were used wholly for long distance communication services and not for local service to patrons residing in the area of the City of Grand Prairie.

The lands through which these easements were acquired were annexed into the City on May 15, 1961. Subsequent to the annexation the City became

the owner of a right of way across the property which contained the conduits. The purpose of the acquisition was to construct a public street named Marshall Drive.

On June 23, 1964, the City adopted an ordinance regulating the construction and maintenance of underground utilities and requiring that they be located so as to cause minimum interference with the public use of streets. The ordinance contains this provision:

'In the event the City or its duly authorized representative shall elect to alter, construct or change the grade of, any street, alley or other public way, any person, firm or corporation subject to the terms of this ordinance, upon reasonable notice by the City, shall remove, re-lay and relocate its poles, wires, cables, underground conduit, manholes and other fixtures at its own expense.'

Pursuant to this ordinance the City gave notice to the telephone company either to remove its conduits, cables or man holes or to lower them to a sufficient depth so that the City could proceed with the construction of Marshall Drive.

The telephone companies refused to comply with this demand at their own expense, asserting that the City was liable***1146** for the costs of relocation and reconstruction. In order to avoid delay in the paving of the street the parties entered into a written agreement to the effect that telephone companies would proceed to lower the installations but would reserve the right to claim reimbursement for the costs of relocation, to be determined by a court of competent jurisdiction.

[1][2] In support of its position that the City is not liable for the costs of relocation and that these costs are the lawful obligation of the telephone companies, the City relies upon the general rule that utilities are required to remove or relocate their facilities at their own expense from public highways and streets where necessary for improvement for public use and convenience. This principle was recognized by the Supreme Court of Texas in State of Texas v. City of Austin, 160 Tex. 348, 331 S.W.2d 737 (1960) and is generally accepted as the prevailing view. This doctrine is based upon the principle that when a state or municipal corporation grants to a utility the right to install facilities such as telephone poles, lines, conduits and cables on the right of way of a public highway or street, there is an implied condition that the facilities shall not interfere with the public use, either at the time they are placed in position or thereafter. If the highway or street is improved by widening or change of grade, the utility must relocate its facilities at its own expense. Nichols', The Law of Eminent Domain, (3d ed. 1963) §§ 5.85, 12.22.

[3] In the instant case, the telephone companies did not locate their facilities on the right of way of a public street by permission of the municipal corporation. Here the facilities were located in a private easement acquired long prior to the planning, laying out and construction of the street. We agree with the holding of the District Judge that the general rule as stated in the City of Austin case has no application here.

A closely analogous Texas case is Magnolia Pipe Line Co. v. City of Tyler, 348 S.W.2d 537 (Tex.Civ.App.1961), application for writ of error refused. Magnolia had acquired two pipe line easements in 1931 for the construction and operation of a pipe line for the transportation of crude oil. The pipe line was buried in the easement promptly and at a proper depth. At that time the lands through which the easement ran were in a wooded rural area. In 1953 the lands were annexed into the corporate limits of the City of Tyler. The City paved a street over the pipe line, necessitating the lowering of the pipe line. The City insisted that Magnolia must bear the costs of lowering and encasing the pipe line under the pavement.

The Texas court held that the City was liable for the costs of relocation, saying:

'Magnolia's pipe line easement is property in the constitutional sense. 12 Am.Jur. p. 787, Sec. 157.

'An easement is an interest in land for which the owner is entitled to compensation as much so as if the land to which the easement is appurtenant were taken.29 C.J.S. Eminent Domain § 105, p. 910; McLennan County v. Sinclair Pipe Line Company, Tex.Civ.App., 323 S.W.2d 471, wr. ref., n.r.e.; Panhandle Eastern Pipe Line Co. v. State Highway Comm. of Kansas, 294 U.S. 613, 55 S.Ct. 563, 79 L.Ed. 1090;Buckeye Pipe Line Co. v. Keating, 7 Cir., 229 F.2d 795;Forest Lawn Lot Owners Ass'n v. State, Tex.Civ.App., 248 S.W.2d 793;City of LaGrange v.

Pieratt, 142 Tex. 23, 175 S.W.2d 243.'348 S.W.2d at 540.

The Court reached the following conclusion:

'Here the pipe line easements were private easements acquired by Magnolia about 30 years ago and the pipe line was constructed under rural ***1147** wooded farm land and did not cross under any existing highway, road or street, and no public utility franchise of any character was involved. While undoubtedly the police power of a city is vast, as outlined by the cases cited by appellee in its excellent brief, it is also clear that such power must be validly exercised. Since the pipe line easements were never dangerous to the public until the same were invaded by the City, and the dangerous conditions were proximately caused by the invasion of such easements by the City, we hold that the City under such circumstances could not in the guise of its police power take or damage Magnolia's easements without paying Magnolia adequate compensation therefor under Art. 1, Sec. 17, of our State Constitution, and under the Fourteenth Amendment of the United States Constitution.'348 S.W.2d at 543.

Citing this decision as authority, Nichols', The Law of Eminent Domain, § 15.22 (Supp.1968 at 258) added the following paragraph:

'Where, however, the utility facilities were installed pursuant to privately granted easements prior to the existence of the street, the public service corporation cannot be charged with the cost of relocating its pre-existing facilities. Indeed, for such interference, it may also recover the damage to its easement.'

The Texas Court of Civil Appeals held to the same effect in Sinclair Pipe Line Co. v. State of Texas, 322 S.W.2d 58 (1959) and McLennan County v. Sinclair Refining Co., 323 S.W.2d 471 (1959), application for writ of error refused, no reversible error. In these cases the owner of previously acquired pipe line easements was held to be entitled to reimbursement for the costs of lowering the pipe necessitated by the construction and improvement of farm to market roads.

In Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U.S. 613, 55 S.Ct. 563, 79 L.Ed. 1090 (1935), the Supreme Court held that a Kansas statute authorizing the State Highway Commission to order a pipe line company to relocate and make changes in its pipe and telephone lines, which then were located on a private right of way, deprived the company of its property without due process of law in violation of the Fourteenth Amendment.

The case of State of Tennessee v. United States, 6th Cir. 1958, 256 F.2d 244,[FN1] applied the distinction between the obligation of a telephone company to relocate at its own expense facilities located on the right of way of a public highway and the right of the utility to reimbursement for costs of relocating facilities situated on its own private easement. This was an eminent domain action to require the removal or relocation of telephone poles and lines for the purpose of widening an existing highway and establishing a scenic parkway approaching Gatlinburg, Tennessee, and the Great Smoky Mountains National Park. Some of the telephone lines and poles were located on the existing right of way. Others were located on private property off the existing highway. The Court held that where the telephone lines originally were installed on the right of way under a permissive grant by the State of Tennessee, and the lines obstructed the necessary widening and improvement of the highway, the State retained, under its police power, the right to require the telephone company to remove and relocate the telephone lines at the expense of the utility company. As to those lines which were located originally outside the highway right of way and on an easement over privately owned land taken for improvement ***1148** and construction of the scenic highway, judgment was awarded in favor of the telephone company for costs of relocation.

> FN1. Judge Potter Stewart, then a judge of the Court of Appeals for the Sixth Circuit and now Associate Justice of the Supreme Court of the United States, was a member of the panel deciding this case.

The decision of the Supreme Court of Texas in State of Texas v. City of Austin, 331 S.W.2d 737 (1960), supra, which is relied upon by appellant, is no authority for the proposition that the municipal corporation can require relocation at utility expense of telephone cables on an easement owned by the utility. In that case the Court upheld the validity of a statute providing that the State of Texas shall bear the costs of relocation of utility facilities necessitated by the improvement of any highway established as a part of the National System of Interstate and Defense

Highways, provided such relocation is eligible for federal participation. This decision recognizes that, except for the Texas statute, utilities would be required to bear the entire costs of relocating facilities previously placed on the right of way of a public street or highway. The issue presented in the present case was not involved in that litigation.

[4][5] The City further contends that the District Court erred in holding that damages included the cost of relocation of the facilities in question and in allowing interest at six per cent from the date the telephone companies completed the relocation of the facilities at their own expense. We hold that the District Court was correct in allowing the costs of relocating and reconstructing the facilities as the appropriate measure of damages. See McLennan County v. Sinclair Refining Co., 323 S.W.2d 471, supra. We further hold that the District Court did not err in rendering judgment for interest from the date of completion of the relocation and reconstruction.

All other contentions made by the City have been considered and found to be without merit.

Affirmed.

C.A.Tex. 1969.
City of Grand Prairie v. American Tel. & Tel. Co.
405 F.2d 1144

END OF DOCUMENT

EXHIBIT B

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

FOR THE COUNTY OF KING

CITY OF FEDERAL WAY,

Petitioner

vs.

DANA PLAZA. LLC, a Washington limited liability company, *et al.*,

Respondents

No. 01-2-08746-1 KNT

MEMORANDUM OPINION

THIS MATTER comes before the court on the Motion of the Lakehaven Utility District (the "District") for Relocation Damages. The Petitioner was represented by Larry Smith of Graham & Dunn and the District was represent by Blair Burroughs of Lawler Burroughs & Baker, P.C.

The issue presented by the Motion is simply stated: If a utility easement is within private property before the condemnation and in the public right of way after the condemnation, does the condemnee have the right to seek relocation damages for costs incurred in moving its improvements where the relocation is a direct result of the construction of the right of way improvements?

Discussion

The parties are in basic agreement that, if the utility improvements are located in a public right of way at the time of the condemnation, the condemnee does not have the right to seek relocation damages. Similarly, if relocation is required, but the easement remains on private property, there is no right to seek relocation damages. There is also agreement that

future, possible relocation of the utilities following condemnation is not a proper subject for relocation damages. What remains for decision is the hybrid case where the relocation is immediately required after the easement has "moved" from private property to the public right of way by virtue of the condemnation.

We start with the general principle that "... public utility companies operating under a franchise must bear the cost of removing and of relocating their facilities, as it is made necessary by highway improvements." *State v. Public Util. Dist. No. 1 of Clark County*, 55 Wn.2d 645, 650-51, 349 P.2d 426 (1960). In the narrow issue presented to the court, however, the utility company was not operating under a franchise. Rather, its right antedates the public's right – the private landowner granted the right to the utility company to locate its facilities on private property before the city exercised its right of eminent domain.

The decision in *City of Grand Prairie v. American Telephone and Telegraph Co.*, 405 F.2d 1144 (5th Cir. 1969) is instructive. Initially, the telephone company acquired easements through farm lands located some distance from a city. The instruments conveying the easements granted the right to construct, operate and maintain underground conduits, cables, manholes and other fixtures and appurtenances to be buried to such depth as not to interfere with the ordinary cultivation of the land.

The telephone company installed conduits and placed telephone cables in the conduits. The lands through which these easements were acquired were eventually annexed into an adjoining city and, subsequent to the annexation, the city became the owner of a right of way across the property which contained the conduits. The purpose of the right of way acquisition was to construct a public street.

The city then gave notice to the telephone company either to remove its conduits, cables or manholes or to lower them to a sufficient depth so that the city could proceed with the construction of the public street. The telephone company demanded reimbursement for the costs of relocation. The city refused to provide compensation.

In affirming the trial court's decision that the telephone company was entitled to relocation compensation, the court of appeals concluded:

> In support of its position that the City is not liable for the costs of relocation and that these costs are the lawful obligation of the telephone companies, the City relies upon the general rule that utilities are required to remove or relocate their facilities at their own expense from public highways and streets where necessary for improvement for public use and convenience. This principle was recognized by the Supreme Court of Texas [citing case] and is generally accepted as the prevailing view. This doctrine is based upon the principle that when a state or municipal corporation grants to a utility the right to install facilities such as telephone poles, lines, conduits and cables on the right of way of a public highway or street, there is an implied condition that the facilities shall not interfere with the public use, either at the time they are placed in position or thereafter. If the highway or street is improved by widening or change of grade, the utility must relocate its facilities at its own expense. Nichols', The Law of Eminent Domain, (3d ed. 1963) §§ 5.85, 12.22.
>
> In the instant case, the telephone companies did not locate their facilities on the right of way of a public street by permission of the municipal corporation. Here the facilities were located in a private easement acquired long prior to the planning, laying out and construction of the street. We agree with the holding of the District Judge that the general rule ... has no application here. 405 F.2d at 1146.

A New Jersey court reached a similar conclusion in finding, on similar facts, that whether the utility lines were initially placed along public or private rights of way is of critical significance. If initially placed on a private right of way, the utility was entitled to relocation costs and otherwise it is not. *Sussex Rural Electric Cooperative v. Township of Wantage*, 526 A.2d 259, 261-62 (N.J. Super. A.D. 1987). *See also Panhandle Eastern Pipe Line Co. v. State Highway Commission*, 294 U.S. 613, 55 S. Ct. 563, 79 L.Ed. 1090 (1935); *State of Tennessee v. United States*, 256 F.2d 244 (6th Cir. 1958).

The commentators also are in agreement:

> Where a utility company has installed facilities pursuant to privately granted easements prior to the existence of a street, the utility company does not bear the cost of relocating the pre-existing facilities and can, in fact, recover damages for the taking of the

easement. *Nichols on Eminent Domain*, § 15.04[2], p. 15-33 (rev. 3d Ed. 2001].

The city argues it has already paid for the loss of the District's property right (its easement) when it purchased the fee, leaving it to the owners of the various "sticks" to sort out the apportionment. If the District's facilities remain in place following the condemnation, the city's argument is correct. That argument, however, does not address the situation where not only does the utility lose its easement, for which it will receive compensation, but it's improvements are now within the public right of way and it is required to move its facilities to accommodate the street project. No compensation has been provided for those costs and to argue that the relocation occurred after the city owned the property, so that the *Public Util. Dist. No. 1* rationale applies, simply misses the point. As the court noted in *Sussex*, "... whether the utility lines were initially placed along a public or private rights of way is of critical importance." 526 A.2d at 262 (emphasis supplied).

No Washington case speaks directly to this point and Petitioner is correct that *North Spokane Irrigation District v. County of Spokane*, 86 Wn.2d 599, 547 P.2d 859 (1976) addresses a different issue. *Highline Dist. v. Port of Seattle*, 87 Wn. 2d 6, 548 P.2d 1085 (1976), however, while primarily addressing statute of limitations issues, does suggest that measures of compensation to public utilities in a condemnation case are not necessarily limited to the traditional valuation mechanisms. Absent controlling authority, the rationale expressed by the commentators and courts in other jurisdictions is persuasive and is not contrary to Washington law or the compensation principles underlying that law.

Lastly, during oral argument the city also raised the proposition that the defendant was obtaining an economic benefit from moving from a mere easement to the expanded right of a free franchise holder in the city's right of way. That argument, however, goes to the question of the amount of compensation and not to the right to seek relocation damages in the first instance.

Conclusion

In short, with respect to those utility improvements that were initially placed on private property and are now in the right of way, the District is not barred from seeking relocation costs so long as they are caused by the construction of the road that required the condemnation in the first instance. Future, possible relocations are speculative and do not result from the subject eminent domain procedure, so no relocation costs are appropriate. Relocation costs of those utilities that were in the public right of way at the time of the condemnation are not recoverable.

In light of the court's decision, it is appropriate to continue the case as to the District, and any other public utilities claiming similar relocation damages, to a date following completion of the project. The District shall also provide the Petitioner with a detailed breakdown of costs actually incurred as a result of the relocation of utilities on the formerly private property. Lastly, the District shall have the obligation of notifying other public utilities that are parties to the above-captioned action regarding this Memorandum Opinion and shall either submit a motion or agreed order regarding the new trial date.

An appropriate order consistent with this opinion shall be submitted by the District.

DONE IN OPEN COURT this 15th day of February, 2002.

Terry Lukens
Judge

IT IS ORDERED that moving party is required to provide a copy of this order to all parties who have appeared in the case.