

No. 49347-1-II

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COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

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King County,

Appellant,

v.

Washington Utilities and Transportation Commission, a Washington state  
agency, and Puget Sound Energy,

Respondents.

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APPELLANT KING COUNTY'S OPENING BRIEF

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## INTRODUCTION

This Court should reverse the Washington Utilities and Transportation Commission's ("WUTC" or "Commission") Order 04 because it contains errors of law, is arbitrary and capricious, and sanctions Puget Sound Energy's ("PSE" or "Company") attempts to dodge its duty to serve. Order 04 requires King County and certain other PSE customers to pay to replace the Maloney Ridge Line, an aging electric distribution line, owned solely and exclusively by PSE, that provides electricity for the delivery of essential 911 emergency and safety communications services to remote areas of the Mount Baker-Snoqualmie National Forest. The plain language in controlling tariffs and agreements expressly requires PSE to pay to replace the line, just as, when necessary, it pays to replace electric distribution lines serving other similarly situated customers. The Court should stop PSE from shirking its responsibilities by reversing Order 04 and requiring PSE to pay to replace the Maloney Ridge Line.

## ASSIGNMENTS OF ERROR<sup>1</sup>

1. The WUTC committed an error of law and acted arbitrarily and

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<sup>1</sup> This is an Administrative Procedure Act ("APA") appeal in which no new issues were raised and no new evidence was presented at the trial court level. Assigning error to actions of the superior court is thus not necessary. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 632, 869 P.2d 1034 (1994) (because "we are conducting our review on the administrative record . . . assignment of error to the superior court findings is not necessary").

capriciously when it ordered King County and other PSE customers served by PSE's Maloney Ridge Line to pay to replace the line. (Order 04, CP 48-49, ¶¶ 27-29 (Order nos. 1-3), and related portions of Memorandum Section in Order 04; Order 03, CP 35-36, ¶¶ 52-55 (Findings and Conclusions nos. 15 and 16, Order nos. 1 and 2).)

2. The WUTC committed an error of law and acted arbitrarily and capriciously, and inconsistent with its own precedent, by applying the economic feasibility language in paragraph 9 of PSE's tariff Schedule 80 to determine PSE's Maloney Ridge Line customers must pay to replace the line. (Order 04, CP 46, 48-49, ¶¶ 25, 28 (Order no. 2), and related portions of Memorandum Section in Order 04; Order 03, CP 34, ¶ 48 (Findings and Conclusions no. 11).)
3. The WUTC committed an error of law and acted arbitrarily and capriciously by finding that the Maloney Ridge Line, owned solely and exclusively by PSE, is an adjunct to, and not part of, PSE's distribution system. (Order 04, CP 46-47, 49, ¶ 28 (Order no. 2), and related portions of Memorandum Section in Order 04; Order 03, CP 34, ¶ 47 (Findings and Conclusions no. 10).)
4. The WUTC committed an error of law and acted arbitrarily and capriciously by ruling that the Service Agreements and PSE's tariff

Schedules 80 and 85 do not require PSE to pay to replace the Maloney Ridge Line. (Order 04, CP 48-49, ¶¶ 25, 28 (Order no. 2), and related portions of Memorandum Section in Order 04; Order 03, CP 34, ¶ 45 (Findings and Conclusions no. 8).)

5. The WUTC committed an error of law and acted arbitrarily and capriciously by undertaking a fact-specific analysis to determine who should pay to replace the Maloney Ridge Line. (Order 04, CP 48-49, ¶¶ 25, 26, 28 (Order no. 2), and related portions of Memorandum Section in Order 04; Order 03, CP 34-35, ¶¶ 46-51 (Findings and Conclusions no. 9-14).)
6. The WUTC committed an error of law and acted arbitrarily and capriciously, and discriminated against PSE's Maloney Ridge Line customers, in violation of RCW 80.28.090 and RCW 80.28.100, by ordering those customers to pay to replace the line when PSE pays to replace electric distribution lines serving similarly situated customers under PSE's Schedule 24. (Order 04, CP 48-49, ¶¶ 25-29 (Order nos. 1, 2, and 3), and related portions of Memorandum Section in Order 04; Order 03, CP 34-36, ¶¶ 43-55 (Findings and Conclusions nos. 6-16; Order nos. 1 and 2).)

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Do the Service Agreements and the plain language of PSE's tariff Schedule 85 require PSE to pay to replace the Maloney Ridge Line?  
(Assignments of Error 1 and 4.)
2. Did the WUTC improperly rely on the economic feasibility language in paragraph 9 of PSE's tariff Schedule 80 to determine that PSE's Maloney Ridge Line customers must pay to replace that line?  
(Assignments of Error 1, 2, and 4.)
3. Did the WUTC commit an error of law, act arbitrarily and capriciously, and/or contrary to its own precedent by applying a fact-based analysis, applicable only to new or additional service, and not to the replacement of electric distribution lines, to determine that King County and other PSE customers served by the Maloney Ridge Line must pay to replace that line? (Assignments of Error 1 and 5.)
4. Did the WUTC commit an error of law, act arbitrarily and capriciously, and/or violate RCW 80.28.090's and RCW 80.28.100's prohibitions on discriminatory treatment when it ordered PSE's Maloney Ridge Line customers to pay to replace the line, when PSE pays to replace electric distribution lines of similarly situated customers under Schedule 24? (Assignments of Error 1 and 6.)

5. Did the WUTC commit an error of law or act arbitrarily and capriciously when it concluded that the Maloney Ridge Line, owned solely and exclusively by PSE, is not part of PSE's distribution system? (Assignments of Error 2, 3, and 5.)

## **STATEMENT OF THE CASE**

### **A. Factual Statement**

1. The Maloney Ridge Line Provides Electricity Essential to 911 Emergency and Other Safety Services.

The Maloney Ridge Line, owned solely and exclusively by PSE, is an 8.5 mile underground electric distribution cable in the Mount Baker-Snoqualmie National Forest that furnishes electricity for 911 emergency, law enforcement, and other safety communications to a remote corridor of Highway 2 near Stevens Pass. *See, e.g.*, AR000754, lines 17-18; AR000041-42, ¶¶ 2-7, 10. The electricity provided by the line makes it possible for King County and non-party railroad and telecommunications companies to provide these life-saving services to residents, employees, and customers. AR000041-42, ¶¶ 2-7, 10.

King County depends upon the electricity delivered by the Maloney Ridge Line to ensure timely and adequate provision of emergency and rescue services to its residents. AR000041-42, ¶¶ 2-10. The line connects to the County's emergency radio services at the

Sobieski Communications Facility. AR000041, ¶ 2.<sup>2</sup> Through its connection to the Sobieski Communications Facility, the Maloney Ridge Line enables emergency response agencies, including the Snohomish County Emergency Radio System and the King County Sheriff’s Office, to serve vast areas of King and Snohomish counties. AR000041, ¶¶ 3-4. The line allows vital “interoperability and mutual aid communications [between] dozens of police and fire agencies within King County, and with state and federal law enforcement agencies.” AR000042, ¶ 5. The line is also critical “to coordinated area communications and responses during times of crisis . . . for the two million residents of King County and 700,000 residents of Snohomish County,” including “with respect to large scale events requiring crowd control, high profile criminal trials, vehicle pursuits, joint law enforcement operations, [and] disasters such as flooding, large storms, mud slides, and earthquakes.” AR000042, ¶¶ 6-7.

BNSF, a railroad company, and several telecommunications companies, including Frontier, Verizon, and AT&T, also count on PSE’s line to provide emergency service transmissions in the area.<sup>3</sup> AR000043-

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<sup>2</sup> “The Sobieski Communications Facility is one of the communications towers for the King County 800 MHz Emergency Radio System, providing vital 911 radio communications.” AR000041, ¶ 2.

<sup>3</sup> Frontier Communications Northwest, Inc.; Verizon Wireless; and New Cingular Wireless PCS, LLC were also petitioners in the WUTC proceeding. BNSF was a petitioner in the Thurston County Superior Court proceeding.

50.<sup>4</sup> The Maloney Ridge Line allows BNSF to power multiple facilities, including “a self-support lighted microwave tower and multi-use building,” used for safety purposes on its rail system, including in the remote wilderness of the national forest. *See* AR000043, ¶¶ 3-4. The Maloney Ridge Line enables Frontier (and other telecomm companies) to provide emergency communications in the event of an avalanche or other emergency at the Stevens Pass Ski Resort and residential community. AR000045-46, ¶¶ 4-6. “The Washington State Department of Transportation also relies on Frontier’s radio tower [which is connected to the Maloney Ridge Line], especially in winter months when it is clearing snow from U.S. Highway 2, . . . [to] protect[] drivers from dangerous road conditions.” AR000046, ¶ 5.

2. PSE Established—and Maintains Sole and Exclusive Ownership of—the Maloney Ridge Line.

On September 23, 1971, PSE’s predecessor, Puget Sound Power & Light,<sup>5</sup> entered into an Agreement Relating to Extension of Electrical Service (“GTE Agreement”) with the General Telephone Company of the

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<sup>4</sup> *See also, e.g.*, AR000045, ¶ 2; AR000047, ¶ 3; AR000049, ¶¶ 3-4 (electricity from the Maloney Ridge Line is integral to the continued operation of radio towers, cellular communications equipment, and ancillary support equipment that provide vital telecommunications services throughout the Highway 2 corridor).

<sup>5</sup> For consistency’s sake and ease of reading, King County refers to both PSE and Puget Sound Power & Light as “PSE” unless the context requires otherwise.

Northwest, Inc. (“GTE”). AR000034-40.<sup>6</sup> Pursuant to that agreement, PSE furnished and installed the Maloney Ridge Line, while GTE paid the costs to install and maintain the Maloney Ridge Line. AR000034-37, §§ 1, 3, 5. The GTE Agreement gave PSE the right to serve additional customers from—and vested PSE with sole and exclusive ownership of—the Maloney Ridge Line. AR000037-38, §§ 6, 9. Subsequent service agreements (“Service Agreements”) between PSE and its Maloney Ridge Line customers confirm PSE’s sole and exclusive ownership of the line.<sup>7</sup>

3. PSE Entered into Service Agreements to Connect Additional Customers, including King County, to the Maloney Ridge Line Pursuant to PSE’s Electric Tariff G, Schedule 85.

In the 1990s, twenty years after PSE put the Maloney Ridge Line into service, PSE began providing service to new customers from its line, including King County, BNSF, and various telecommunications companies. PSE entered into a Service Agreement with each new customer that defines the parties’ respective obligations.

The King County Service Agreement supersedes the GTE Agreement making it “null and void”, AR000032, § 11; makes the County responsible for the costs of repairing and maintaining the line, AR000030-31, §§ 3, 4; confirms the Maloney Ridge Line is PSE’s “*sole and*

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<sup>6</sup> See also AR000030, Recitals C.

<sup>7</sup> See, e.g., AR000478, ¶ 2; AR000481, ¶ 2; AR000487, ¶ 2.

*exclusive* property,” AR000030, § 2 (emphasis added); is silent as to replacement; and subjects the agreement to Schedule 85, AR000030, Recital B; AR000030, § 1; AR000031, §§ 4, 6; and AR000032, § 10. It is “subject to the General Rules and Provisions (Schedule 80) of [PSE’s] Electric Tariff G and to Schedule 85 of such Tariff, as such Schedules may be revised from time to time upon approval of the [WUTC]. *Any conflict between this Agreement and [PSE’s] Schedules 80 and 85 shall be resolved in favor of such tariff provisions.*” AR000032, § 10 (emphasis added). PSE entered into similar Service Agreements with BNSF<sup>8</sup> and various telecommunications companies.<sup>9</sup>

4. PSE Serves its Maloney Ridge Line Customers through Schedule 24.

All customers on the Maloney Ridge Line “take power through PSE’s Schedule 24.” AR000825, lines 4-5.<sup>10</sup> King County and PSE’s other customers served by the Maloney Ridge Line “have for many years and continue today to pay Schedule 24 rates that help fund capital *replacements* for other parts of the PSE system . . .” AR000367, lines 3-5 (emphasis added).<sup>11</sup> Replacement costs for electric distribution lines are

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<sup>8</sup> AR000571

<sup>9</sup> See, e.g., AR000478, ¶ 2; AR000481, ¶ 2; AR000487, ¶ 2.

<sup>10</sup> See also Order 04, CP 40, ¶ 7.

<sup>11</sup> *Id.* (“Schedule 24 rates include an allocated part of the fixed and variable costs of PSE’s general distribution system and commodity costs (*i.e.*, power costs).”).

ordinarily recovered through the general rates paid pursuant to that schedule. *See* AR000186, ¶ 15 n.20.<sup>12</sup>

5. Schedule 85 Requires PSE to Pay to Replace Electric Distribution Lines, like the Maloney Ridge Line.

Schedule 85 obligates PSE to pay to replace line extensions. It “sets forth the circumstances, terms and conditions under which *the Company is responsible for the ownership, installation, maintenance, repair or replacement of electric distribution facilities . . .*” AR000647 (emphasis added). Schedule 85 provides that PSE “*shall own, operate, maintain and repair all electric distribution facilities installed by or for [PSE] under this schedule, including replacement* of such facilities if necessary so long as such replacement is not inconsistent with this schedule or a contract governing such facilities.” AR000658, Sheet No. 85-k, § 1(A) (emphasis added).

6. The Maloney Ridge Line Needs to be Replaced.

The Maloney Ridge Line has suffered incremental deterioration and decreases in reliability since its inception. *See, e.g.*, AR000834, lines

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<sup>12</sup> *See also* AR000598, lines 19-21 (“Schedule 24 recovers the costs of providing electric service, including power costs and recovery of the costs of the transmission and distribution systems through the kWh charge.”); AR000380, lines 18-22 (“The increases in PSE’s invested capital costs for distribution projects are included in its general rate cases, and allocated across all rate classes including Schedule 24 . . . [A]pproximately 42.5% of the revenue requirement allocated to Rate Schedule 24 relates to distribution cost of service.”).

19-21. In recent years, the line has experienced more extensive degradation that has resulted in frequent, costly repairs. *See, e.g.*, AR000829, lines 21-22.<sup>13</sup> Put “simply,” the line is “reaching the end of its useful life.” AR000756, lines 9-10.<sup>14</sup> It experiences increasingly frequent failures and repeated interruptions in service, “sometimes for prolonged periods of time,” threatening the ability of emergency responders to provide prompt, life-saving assistance. *See* AR000357, lines 7-8.<sup>15</sup> Replacement has become urgent and unavoidable in order for King County, BNSF, the telecommunications companies, and various local, state and federal agencies to be able to continue to provide efficient and reliable emergency services from the Maloney Ridge Line.

## **B. Procedural Statement**

### 1. PSE’s Maloney Ridge Line Customers Petitioned the WUTC for an Order Requiring PSE to Pay to Replace the Line.

King County, along with BNSF and the telecommunications companies served by the Maloney Ridge Line, filed a petition in June 2014 with the WUTC seeking a declaratory order that PSE is obligated to pay to replace the line. Order 04, CP 39, ¶ 1.

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<sup>13</sup> Repair costs in 2012, resulting from sixteen power outages that year, and in 2013 exceeded \$200,000. AR000427, lines 8-9; *see also* Order 04, CP 41, ¶ 8; AR000449, ¶ 2.

<sup>14</sup> *See also* CP 152, Order Affirming Final Agency Action of the Washington Utilities and Transportation Commission, ¶ 7 (“The Maloney Ridge Line, originally built in 1971, has reached the end of its useful life and needs to be replaced.”).

<sup>15</sup> *See also* AR000449, ¶ 2.

After an evidentiary hearing and briefing, the Administrative Law Judge (“ALJ”) issued Order 03 requiring PSE to replace the Maloney Ridge Line upon request from the line’s customers subject to the following conditions: the customers on the line must pay all costs to replace the line exceeding \$335,000 and all costs to operate and maintain the line. Order 03, CP 35, ¶ 54. The ALJ concluded PSE must pay \$335,000 of the replacement costs because that is how much PSE “calculated it will recover [] of its costs for the line through the rates [the line’s customers] will pay over the anticipated useful life of that facility.” Order 03, CP 33, ¶ 37.

Order 03 found the Service Agreements “do not address which party must pay the costs to replace the line.” Order 03, CP 25, ¶ 12. The ALJ interpreted the language of PSE’s Schedules 80 and 85 as also not specifying “whether PSE or the customer is responsible for the costs to replace electric distribution facilities because that will be determined based on the circumstances of each case.” Order 03, CP 29, ¶ 23. The ALJ’s interpretation focused on the fact that Schedule 85 does not include the words “payment” or “cost” in stating that PSE is responsible for owning, operating, maintaining, repairing, and replacing facilities. Order 03, CP 28-29, ¶¶ 21-22. The ALJ then applied a “fact-specific analysis,”

analyzing the nature of the Maloney Ridge Line, the economic feasibility of replacing the line, and the impact on customers, to conclude that PSE's Maloney Ridge Line customers must pay to replace its line. Order 03, CP 29-36, ¶¶ 24-55.

King County and the other Maloney Ridge Line customers sought administrative review of the ALJ's Order 03 from the WUTC. AR000254-78. The WUTC issued Order 04 denying the petition for administrative review and adopting the findings and conclusions in Order 03. Order 04, CP 48-49, ¶¶ 27-29.

Order 04 found the Maloney Ridge Line is not part of "PSE's general distribution system[.]" Order 04, CP 43, ¶ 15. Without reference to PSE's exclusive ownership and control of the line, Order 04 stated that "while the line may physically be part of PSE's distribution system in engineering terms, it has never been part of PSE's distribution system in financial terms and no part of its costs are recovered in Schedule 24 rates, or any other tariffed rate." *Id.* Thus, it concluded, the line "is not a part of PSE's distribution system insofar as the determination of responsibility for the costs of its replacement is concerned, or for any other purpose." Order 04, CP 44, ¶ 17.

With respect to the tariffs, Order 04 stated: "We find merit in the

analyses in Order 03 concerning the applicability and meaning of PSE's Tariff G Schedules 80 and 85. We agree that the tariff alone is not dispositive of the question of who must pay if the Maloney Ridge Line is replaced." Order 04, CP 48, ¶ 25. Order 04 adopted Order 03's findings and conclusions. Order 04, CP 49, ¶ 28.

2. Thurston County Superior Court Affirmed WUTC Order 04.

King County and BNSF filed a Petition for Review under the APA in Thurston County Superior Court. After briefing and oral argument the trial court affirmed the WUTC's ruling.

3. Regulatory Framework.

*a. Applicable Statute—Chapter 80.28 RCW.*

Chapter 80.28 RCW establishes the duties of electrical utilities regarding rates, services, and facilities for the distribution of electric services. RCW 80.28.010. The statute requires such utilities to file tariff schedules for rates and charges, contracts and agreements, and rules and regulations. RCW 80.28.050. Discrimination amongst similarly situated customers is prohibited. RCW 80.28.100.

*b. Applicable Regulations—Electrical Companies, Chapter 480-100 WAC.*

Chapter 480-100 WAC implements Chapter 80.28 RCW. WAC 480-100-001. The regulations require "[e]ach electric utility [to] file, as

part of its tariff, a distribution line extension rule setting forth the conditions under which it will extend its facilities to make service available to an applicant.” WAC 480-100-033. The rules limit the circumstances under which a utility may refuse service to applicants and customers. WAC 480-100-123.

### **SUMMARY OF ARGUMENT**

Schedule 85 requires PSE to repair, maintain, and replace the Maloney Ridge Line. Although PSE transferred its repair and maintenance obligations to its customers through the Service Agreements, PSE did not transfer its obligation to pay to replace the line. By ignoring the plain language of Schedule 85, and instead conducting an unprecedented and out-of-context fact-based analysis that grafts inapplicable and questionable “economic feasibility” language from Schedule 80, the WUTC committed an error of law, acted arbitrarily and capriciously and inconsistent with its own precedent, and discriminated against King County and PSE’s other Maloney Ridge Line customers when it ordered those customers to pay to replace the line.

At best, PSE and the WUTC essentially argue that PSE made a drafting error in Schedule 85 and the Service Agreements, which allow PSE to resort to a fact-based analysis that supposedly permits the

Company to circumvent its duty to serve its Maloney Ridge Line customers. This line of thinking is fundamentally at odds with the legal landscape and framework of public utility law and the APA.

The Court should reverse the WUTC's erroneous interpretation of PSE's tariffs and require PSE to pay to replace the Maloney Ridge Line.

## **ARGUMENT**

### **A. Standard of Review.**

“In reviewing an administrative decision, the appellate court stands in the same position as the superior court.” *Morrison v. Dep't of Retirement Sys.*, 67 Wn. App. 419, 425, 835 P.2d 1044 (1992). “Appellate review of an administrative decision is made on the record of the administrative tribunal itself, not on that of the superior court.” *Kellum v. Dep't of Ret. Sys.*, 61 Wn. App. 288, 291, 810 P.2d 523 (1991).

An administrative order must be reversed if the “agency erroneously interpreted the law or if an agency’s decision is arbitrary or capricious.” *W. Wash. Operating Eng'rs Apprenticeship Comm. v. Wash. State Apprenticeship & Training Council*, 130 Wn. App. 510, 517-18, 123 P.3d 533 (2005) (reversing and remanding ALJ’s decision finding engineering apprenticeship standards were reasonably consistent with existing programs). “An agency order is arbitrary or capricious if it is

willful, unreasoning, and issued without regard to or consideration of the surrounding facts and circumstances.” *Id.* at 523 (internal quotation marks omitted).<sup>16</sup> The Court “review[s] an agency’s legal determinations under the ‘error of law’ standard, which allows [it] to substitute [its] view of the law for the agency’s.” *Puget Soundkeeper All. v. Pollution Control Hearings Bd.*, 189 Wn. App. 127, 136, 356 P.3d 753 (2015). “Under this standard, [the court] generally review[s] the agency’s application of the law to a particular set of facts de novo.” *Id.* “If the agency has erroneously interpreted or applied the law, [the court] overturn[s] its decision.” *Terry v. Emp’t Sec. Dep’t*, 82 Wn. App. 745, 749, 919 P.2d 111 (1996) (internal quotation marks omitted).

**B. The WUTC Erroneously Interpreted the Plain Language of Schedule 85 and the Service Agreements, which Requires PSE to Pay to Replace the Maloney Ridge Line.**

1. Schedule 85 Requires PSE to Pay to Replace the Line.

Tariffs have the force and effect of state law. *Gen. Tel. Co. of the Nw., Inc. v. City of Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986). As such, “standard principles of statutory construction apply to the interpretation of [a] tariff.” *Nat’l Union Ins. Co. of Pittsburgh v. Puget Sound Power & Light*, 94 Wn. App. 163, 171, 972 P.2d 481 (internal

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<sup>16</sup> See also *Towle v. Wash. State Dep’t of Fish & Wildlife*, 94 Wn. App. 196, 210, 971 P.2d 591 (1999) (finding deputy director’s interpretation of “extenuating circumstances” in licensing statute implemented by the Department to be arbitrary and capricious).

quotation marks omitted), *review denied*, 138 Wn.2d 1010 (1999). When a tariff’s language “is plain and unambiguous, its meaning must be derived from the words themselves without judicial construction or interpretation.” *Id.* If the language is ambiguous, then interpretation is an issue of law to be decided by the court. *Id.* In such a case, the court’s role is to “look to the public utilities statutory and regulatory scheme as a whole to ascertain the WUTC’s intent” in approving the tariff. *Id.* at 173. It is also generally accepted that “[i]f the tariff as filed is doubtful or ambiguous, any doubt should be resolved against the party causing such tariff to be put into effect.” *N. Pac. Ry. Co. v. Sauk River Lumber Co.*, 160 Wn. 691, 693-94, 295 P. 926 (1931).<sup>17</sup> Like statutes, when different words are used in the same tariff, they are presumed to have different meanings. *See Ass’n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 353, 340 P.3d 342 (2015).

*a. The plain language of tariff Schedule 85 obligates PSE to pay to replace the Maloney Ridge Line.*

Tariff Schedule 85 “sets forth the circumstances, terms and

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<sup>17</sup> *See also, e.g., Adams v. N. Ill. Gas Co.*, 211 Ill.2d 32, 69, 809 N.E.2d 1248, 284 Ill. Dec. 302 (2004) (“[B]ecause the utility company drafts a tariff, it is generally accepted that language in a tariff, especially exculpatory language, is to be strictly construed against the utility company and in favor of the customer.”); *Uncle Joe’s Inc. v. L.M. Berry & Co.*, 156 P.3d 1113, 1118 (Alaska 2007) (“Numerous authorities in other jurisdictions indicate that when a tariff is ambiguous it should be construed like a contract and thus favorably to the customer and against the drafter.”).

conditions under which [PSE] is *responsible for the ownership, installation, maintenance, repair or replacement of distribution facilities* . . .” AR000647 (emphasis added). With respect to existing electric lines,

Schedule 85 states:

The Company *shall*<sup>[18]</sup> own, operate, maintain and repair all electric distribution facilities installed by or for the Company under this schedule, including *replacement* of such facilities if necessary so long as such replacement is not inconsistent with *this schedule* or a contract governing such facilities.

AR000658, Sheet No. 85-k, § 1(A) (emphasis added). In other words, the Company must replace distribution facilities except where to do so would be inconsistent with Schedule 85 or a contract. PSE, as the tariff drafter, gave itself this obligation. As discussed further in Section B.2 below, the Service Agreements do not assign PSE’s *replacement* duties to the Maloney Ridge Line customers. Accordingly, under the plain language of Schedule 85 and the Service Agreements, *replacement* is governed by that tariff and the obligation rests with PSE.

PSE’s obligations under Schedule 85 include *paying to replace* electric distribution lines. As stated by PSE Tariff Supervisor Lynn Logen:

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<sup>18</sup> “The use of the word ‘shall’ imposes a mandatory duty.” *Waste Mgmt. of Seattle, Inc.*, 123 Wn.2d at 629.

Q. . . . So ignoring this case, in general, if you have to replace a distribution line that's been in service, that serves customers, *is replacement of that line governed by your line extension policy [Schedule 85]?*

A. *Yes. To some extent it is, yes.*

Q. "To some extent it is." What does that mean?

A. *The timing and whether it is replaced or there is some other action taken, it is not dictated in the tariff. The Schedule 85 simply says we will maintain lines that are installed under Schedule 85.*

Q. So if you've got a group of residential customers that have been served for 25 years and the distribution lines need to be replaced, that's going to be covered under your line extension policy, or is that done just as a matter of replacing infrastructure, which you do as a matter of course under a capital improvement plan?

A. *There's the general obligation under our line extension policy, but the timing and everything else of those replacements and whether or not they are replaced is decided by our engineering group, which tracks outages, frequency and duration of outages, and evaluates all distribution circuits on the system.*

Q. So your line extension policy applies to the whole system at all times?

A. Yes, except when there is a special agreement.

Appx. 149-50 (Logen, TR. 46:1-47:2) (emphasis added).<sup>19</sup>

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<sup>19</sup> See also Appx. 148 (Logen, TR. 45:21-25) ("Q. . . . [I]n general is replacement of a distribution line on Puget's system governed by your line extension policies [Schedule 85]? A. Yes, it is, . . . "); Appx. 155 (Logen, TR. 51:1-2) ("Schedule 85 also applies to modifications to an existing line.").

This testimony is consistent with the meaning of “responsible,” *the term PSE used in Schedule 85 to describe its own replacement obligations*: “[t]he quality, state, or condition of being answerable, or accountable,” in other words, “liability” for some thing or act. *Black’s Law Dictionary*, 1506 (10th ed. 2014) (definition of “responsible”).<sup>20</sup> In turn, liability means the “quality, state, or condition of being legally obligated or accountable,” including for “financial or pecuniary” obligations. *Id.* at 1053 (definition of “liability”).<sup>21</sup> Responsible is thus a comprehensive term that broadly describes what one is accountable for in a particular situation.

In the proceedings below, PSE and the WUTC attempted to circumvent the plain meaning of “responsible” by concluding that if the term was not modified by a specific payment obligation, then it could not be interpreted to include payment responsibility. Order 04, CP 46, ¶ 21 (“As Order 03 correctly observes, this subsection does not mention payment responsibility and it would be inappropriate to interpret that silence to reflect PSE’s intent to pay all costs associated with these activities.” (internal quotation marks omitted)).<sup>22</sup>

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<sup>20</sup> See also *Webster’s Third New Int’l Dictionary*, 1935 (Philip B. Gove et al., eds., 1966) (definition of “responsible”) (“creditable or chargeable with the result . . . liable”).

<sup>21</sup> *Id.* at 1302 (definition of “liable”) (“bound or obligated according to law or equity”).

<sup>22</sup> See also, e.g., Order 03, CP 28-29, ¶ 21 (“This subsection does not mention payment responsibility, and we do not interpret that silence to reflect PSE’s intent to pay all costs

In the context of Schedule 85, however, responsible is not a vague or ambiguous term in need of qualifiers—e.g., “cost,” “physically,” “oversee,” etc.—for a full understanding of what it means to be responsible to replace the Maloney Ridge Line. *See N. Pac. Ry. Co.*, 160 Wn. at 694 (“In interpreting a tariff, the terms used, when they are not defined therein, should be taken in the sense in which they are generally understood and accepted commercially.”). Rather, responsible means all those things—responsibility for the costs to replace, physically replacing, and overseeing replacement—unless altered by conditions in a customer contract. AR000658, Sheet No. 85-k, § 1(A) (“The Company shall . . . *replace*[] facilities if necessary so long as such replacement is not inconsistent with this schedule or a contract governing such facilities.”). Per the terms of Schedule 85, PSE is responsible for, among other things, paying to replace, physically replacing, and overseeing replacement of the Maloney Ridge Line. The plain language of Schedule 85, written by PSE, confirms this obligation. And, to the extent PSE’s omission of terms like “costs” or “pay” create ambiguity in Schedule 85, that ambiguity should be construed against PSE. The Court can thus resolve this case on the plain language of Schedule 85 alone. PSE must pay to replace the line.

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associated with these activities.”).

b. *Where PSE intends to transfer cost responsibility under Schedule 85, it says so in express language.*

In limited circumstances that do not apply to the Maloney Ridge Line because it does not serve mobile home parks, manufactured housing communities, or multi-family residential structures, Schedule 85 makes customers responsible for the cost of service line replacements. In those situations, PSE uses express terms to shift the obligation to its customers.

For example, in Additional Terms of Service, Schedule 85 states:

With respect to underground Service Lines at mobile home parks or manufactured housing communities in which the individual park residents do not own the property on which their individual mobile or manufactured homes are located and in the case of Multi-Family Residential Structures, ***the park/community property owner or Multi-Family Residential Structure owner shall be responsible for ownership and operation of all new and existing underground Service Lines . . . and for all costs for installation, maintenance, repair and replacement thereof***

...

AR000658, Sheet No. 85-k, § 1(B)(i) (emphasis added). This cost-shifting provision then states: “*provided that* [PSE] shall be responsible for existing underground Service Lines [it] installed prior to May 1, 2006.” *Id.*<sup>23</sup> In the event the parties cannot agree on when a line was installed, either may perform the work “without waiving the ability . . . to later show that the other is ***responsible to pay the costs of such work.***” AR000659,

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<sup>23</sup> See also AR000655, § 2(a) (Non-Residential Underground Service Lines provision with substantially similar language).

Sheet No. 85-1, § 1(B)(i)(c) (emphasis added).

Like the language PSE used in subsection 1.A. of Schedule 85, the proviso in 1.B.(i)—“*provided that* [PSE] shall be responsible for existing underground Service Lines [it] installed prior to May 1, 2006”—does not include a “cost” or “payment” qualifier to accompany its use of the word “responsible.” That is because, consistent with the language of Schedule 85 and PSE witness Lynn Logen’s testimony, PSE has the general obligation—responsibility—to pay to replace existing lines. Thus there was no need for PSE to add superfluous terms like “cost” or “pay” to accompany its use of the term “responsible” in that provision. In addition, if PSE were not obligated to pay the costs to maintain, repair, and replace certain lines in subsection 1.B.(i) because “cost” does not modify “responsible” in that provision, then 1.B.(i)(c) would be unnecessary as PSE would have no duty to pay for anything.

Contrary to the WUTC’s and PSE’s contortions of the plain language PSE used in Schedule 85 to describe its and its customers’ respective replacement obligations, the tariff’s customer cost provisions confirm that Schedule 85 obligates PSE to pay to replace the Maloney Ridge Line. Unlike the service lines that serve mobile home parks, manufactured housing communities, or multi-family homes, Schedule 85

provides no cost-shifting for replacement of the Maloney Ridge Line.

2. PSE Did Not Transfer its Replacement Obligations to its Maloney Ridge Line Customers in the Service Agreements.

The Service Agreements require the Maloney Ridge Line customers to repair and maintain the line but not replace it. “The touchstone of contract interpretation is the parties’ intent.” *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). The focus is on the language of the contract, as opposed to the separate intention of a party that contradicts the actual terms used. *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). Courts cannot rewrite the parties’ contract by adding terms or language. *Id.* at 510 (refusing to rewrite the terms of the parties’ agreement). And the meaning of a contract’s plain language “cannot be added by implication.” *Blume v. Bohanna*, 38 Wn.2d 199, 202, 228 P.2d 146 (1951). Because contract construction is a question of law, a court should not defer to an agency’s interpretation. *See Puget Soundkeeper Alliance*, 189 Wn. App. at 136 (“We review an agency’s legal determinations under the ‘error of law’ standard, which allows us to substitute our view of the law for the agency’s.”); *Wis. End-User Gas Ass’n v. Pub. Serv. Comm’n of Wis.*, 218 Wis.2d 558, 565, 581 N.W.2d 556 (Wis. Ct. App. 1998) (“[A]n agency’s construction of a contract is

subject to de novo review . . .”), *review denied*, 220 Wis.2d 365 (Wis. 1998).<sup>24</sup>

The Service Agreements shift PSE’s repair and maintenance responsibilities to the Maloney Ridge Line customers, *but not the Company’s replacement obligations*. AR000031, § 4.<sup>25</sup> They use specific language requiring the Maloney Ridge Line customers to pay the costs necessary to *repair* and *maintain* the line. *Id.* They are silent, however, as to which party is responsible to *replace* the line and replacement cannot be added by implication.<sup>26</sup> Because the Service Agreements do not shift PSE’s replacement obligation to the Maloney Ridge Line customers, and because those agreements are governed by Schedule 85,<sup>27</sup> the parties are bound by what Schedule 85 says about *replacement*, *i.e.*, *PSE retains its Schedule 85 obligations to pay for and replace the Maloney Ridge Line*.

### 3. Schedule 80 Does Not Allow PSE to Shift its Replacement Obligations to its Maloney Ridge Line Customers.

After disregarding the clear replacement language in Schedule 85,

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<sup>24</sup> See also, *e.g.*, *Mid La. Gas Co. v. FERC*, 780 F.2d 1238, 1243 (5th Cir. 1986) (“Contract construction . . . is a question of law. Although there may be room to defer to the views of the agency where the understanding of the problem is enhanced by the agency’s expert understanding of the industry, agency interpretation on such questions is not conclusive . . . We thus need not defer to the Commission’s interpretation, but can review it freely.” (internal quotation marks omitted)).

<sup>25</sup> See also, *e.g.*, AR000572, § 4.

<sup>26</sup> See, *e.g.*, Order 03, CP 25, ¶ 12 (“The [Service Agreements] do not address which party must pay the costs to replace the line.”); *id.*, CP 26, ¶ 13 (“Replacement, by its nature, is distinct from operating, repairing, or maintaining an existing line.”).

<sup>27</sup> AR000032, § 10; AR0000573, § 10.

Orders 03 and 04 employed Schedule 80's economic feasibility language and a fact-based analysis, adapted from rules and precedent in wholly different contexts, to conclude that PSE does not have an obligation to pay for the replacement of the Maloney Ridge Line.<sup>28</sup> The WUTC applied this ad hoc, fact-based analysis only because it found ambiguities in Schedule 85 that do not exist. The application of such a test is inappropriate because (i) it is no longer viable under Commission precedent; (ii) Section 9 of Schedule 80 applies to new or additional service; and (iii) Schedule 85 applies specifically to electric distribution lines and replacements of those lines, whereas Schedule 80 is a more generally applicable tariff.

*a. The Commission acted arbitrarily and capriciously when it applied an economic feasibility test that under its own precedent is no longer viable.*

In 2001, when it adopted the fact-based analysis in WAC 480-100-123 (also discussed in Section C.3 below), the WUTC struck down the prior provision's economic feasibility language because those "terms are too general and vague to be useful." *In re Adopting and Repealing Rules in Chapter 480-100 WAC Relating to Rules Establishing Requirements for Electric Companies*, UE-990473, Order No. R-495, Order Adopting and

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<sup>28</sup> That is to say, a regulation (WAC 480-100-123) applicable to new or additional service and a Commission order (*In re Petition of Verizon Nw., Inc.*, UT-011439, Twelfth Supp. Order, 2003 WL 24122603 (WUTC, Apr. 2003)) applicable to requests for extensions of wireline telephone services.

Repealing Rules Permanently, at ¶ 25 (WUTC, Dec. 3, 2001). Even in this case the Commission stressed its unease with Schedule 80's "economic feasibility" provision because it could lead to arbitrary and unjust results, e.g., the very results the WUTC and PSE are advocating for here:

[T]he concept of 'economic unfeasibility' is overly broad and ambiguous. The Commission eliminated this term from the refusal of service rule, at least in part, because the language is 'too general and vague to be useful.' *Taken to its extreme, a test of economic feasibility could be used to deny or terminate service to any individual customer if the revenues PSE receives do not exceed the Company's calculations of the costs it incurs to serve that particular customer. Such a result is fundamentally inconsistent with the regulatory principle of averaging costs and demand among customer classes when establishing the rates that apply to that class. PSE cannot refuse service to an individual customer solely because the costs to serve, or the revenues the Company receives from, that customer vary from the class average.*

Order 03, CP 27, ¶ 17 (emphasis added).<sup>29</sup>

Despite its own precedent of rejecting it, and commentary in this case clearly articulating the problems with the economic feasibility test, the WUTC employed that analysis. This error exemplifies the arbitrary and capricious nature of Orders 03 and 04. *See Whatcom Cty. v. W. Wash.*

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<sup>29</sup> *See also* Order 04, CP 48, ¶ 25 ("We share the two concerns discussed in Order 03 in relation to Schedule 80, General Rules and Provisions, Section 9, which states in relevant part, 'The Company shall not be required to provide service if to do so would be economically unfeasible.'").

*Growth Mgmt. Hearing Bd.*, 186 Wn. App. 32, 67, 344 P.3d 1256 (finding board acted inconsistent with its own rules when absent explanation it took official notice of documents without notifying or affording parties an opportunity to contest those materials), *review granted*, 183 Wn.2d 1008 (2015); *Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn. App. 84, 95, 982 P.2d 1179 (1999) (holding agency acted arbitrarily and capriciously where it specifically acknowledged its action was inconsistent with state law), *review denied*, 143 Wn.2d 1018 (2000).<sup>30</sup>

Order 04 attempted to justify the inclusion of the economic feasibility prong in its fact-based analysis by arguing that “[t]he lawfulness of PSE’s [economic feasibility] tariff provision . . . is not before us,” and “[t]herefore, the economic feasibility standard remains a part of PSE’s tariff.” Order 04, CP 48, ¶ 25 (footnotes omitted). The Commission essentially charged the Maloney Ridge Line customers with a duty to challenge inapplicable and invalid tariff provisions, such as Schedule 80, at the outset of the WUTC proceeding when the only relevant issues appeared to be an interpretation of the Service Agreements and Schedule 85. The Maloney Ridge Line customers had no way of

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<sup>30</sup> See also, e.g., *Kittitas Cty. v. E. Wash. Growth Mgmt. Hearing Bd.*, 172 Wn.2d 144, 174, 256 P.3d 1193 (2011) (RCW 34.05.570(3)(h) necessitates consistency in agency rulings); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687 (9th Cir. 2007) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed . . .”).

knowing that the WUTC would turn to the wholly inapplicable “economic feasibility” language in Section 9 of Schedule 80 to resolve this case. This is the very definition of arbitrary, capricious, and unfair agency action.

Regardless, throughout this proceeding the Maloney Ridge Line customers have clearly and unambiguously objected to the application of the economic feasibility language in Section 9 of Schedule 80. This includes at the beginning of the proceeding, when King County and the other Maloney Ridge Line customers did not include Schedule 80, in their Petition for Declaratory Order before the WUTC, among the laws and tariffs applicable to resolution of this dispute:

Petitioners request the Commission issue an order applying and interpreting RCW 80.28.010, Schedule 85 of PSE’s Electric Tariff G, certain Service Agreements between PSE and its customers served on the Maloney Ridge Line, and the parties’ respective obligations thereunder, in light of the facts presented herein, and provide such other and further ratepayer relief as the Commission may deem necessary and appropriate under the circumstances.

AR000007, at ¶ 7. By omitting Schedule 80, and numerous other tariffs and laws, the Maloney Ridge Line customers were necessarily saying it does not apply in this case. King County contends, and has argued throughout, that Schedule 80 is not applicable here.

Instead it was PSE that interjected Schedule 80 into this

proceeding.<sup>31</sup> King County and the other Maloney Ridge Line customers have challenged the applicability of Schedule 80, and its economic feasibility language, ever since PSE suggested it be used to resolve this dispute.<sup>32</sup>

The WUTC's faulty logic—charging King County and PSE's other Maloney Ridge Line customers with a duty to challenge an invalid provision from an inapplicable section of Schedule 80—crystallizes the arbitrary and capricious nature of the WUTC's actions in this case.<sup>33</sup> It is not a satisfactory explanation for the WUTC's application of the economic feasibility test in contravention of its own precedent. Notwithstanding its acknowledgement that use of the economic feasibility test is inconsistent with its own decisions and regulations—indeed, in spite of that fact—the Commission applied the test. In effect, the WUTC pulled a fast one on

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<sup>31</sup> See, e.g., Appx. 147 (Logen, TR. 29:1-9).

<sup>32</sup> AR000217 (“PSE Cannot Refuse Service Based on Economic Feasibility Under Schedule 80.”); AR000309, ¶ 7 (“PSE’s ‘economic unfeasibility’ provision in Schedule 80 is inconsistent with Commission rules and the Commission has already determined that the concept of ‘economic unfeasibility’ is ambiguous and too vague to be useful.”); AR000311, ¶ 12 (“Even if the ‘economic feasibility’ provision in Schedule 80 were enforceable, it pertains to only *new* customers seeking to connect to PSE or applicants seeking additional service.”). When PSE and the WUTC brought Schedule 80 into the superior court proceedings, King County and BNSF again strenuously objected to its application. See, e.g., CP 141, Petitioners King County and BNSF Railway Company’s Reply Brief at 5.

<sup>33</sup> See *Skokomish Indian Tribe*, 97 Wn. App. at 95 (holding agency acted arbitrarily and capriciously where it specifically acknowledged its action was inconsistent with state law); *Whatcom Cty.*, 186 Wn. App. at 67 (finding board acted inconsistent with its own rules when without explanation it took official notice of two documents without notifying opposing party or affording it an opportunity to contest the materials).

PSE's Maloney Ridge Line customers, and attempts to do so again here. For this reason alone, the Court should find the Commission's actions in this case constitute unlawful and arbitrary and capricious agency action.

*b. Schedule 80's economic feasibility provision applies only to requests for new or additional service, not existing service.*

The plain language in Section 9 of Schedule 80, upon which the WUTC and PSE rely, permits PSE to consider economic feasibility only—if ever—when new or additional service is being requested. It does not authorize PSE to consider economic feasibility in the context of replacing existing electric distribution lines, such as the Maloney Ridge Line.

Section 9, entitled “Refusal of Service,” describes the circumstances in which the “Company may refuse to connect an applicant for service or may refuse to render additional service to a Customer.” AR000644, § 9. Accordingly, the circumstances in which PSE may refuse service relate to situations in which PSE is being asked to provide *new* or *additional service*,<sup>34</sup> not replace an existing electric distribution line.

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<sup>34</sup> See, e.g., AR000644, § 9, ¶ 2 (“The Company may refuse to serve an applicant or a Customer if, in its judgment, said applicant’s or Customer’s installation of wiring or electrical equipment is hazardous, or of such character that satisfactory service cannot be provided.”); *id.*, ¶ 5 (“The Company shall not be required to connect with or render service to an applicant unless and until it has all necessary operating rights, including rights-of-way, easements, franchises, and permits.”). Common among the provisions in Section 9 is the concept that PSE can refuse new service to a new customer or additional service to an existing customer under certain circumstances.

The economic feasibility provision in Section 9 cannot be read in isolation. *Segura v. Cabrera*, 184 Wn.2d 587, 593, 362 P.3d 1278 (2015) (“In giving effect to the legislature’s intent, we look to the statute’s plain and ordinary meaning, reading the enactment as a whole, harmonizing its provisions by reading them in context with related provisions.”). When read together with the plain language of the other provisions in Section 9, it is clear that PSE can only consider economic feasibility, if ever, when deciding whether to provide new or additional service. *See, e.g., In re Camelot Square Mobile Home Park*, UT-960832, UT-961341, UT-961342, 1998 WL 971888, Fifth Suppl. Order (WUTC, Aug. 18, 1998) (rejecting utility’s argument customers were responsible for providing trench and conduit for replacement of service lines under tariff provision; holding that provision relied upon by utility “on its own terms applies only to new construction;” and adopting interpretation of tariff provision that “makes sense of all parts of the tariff and applies it in a straight-forward manner that is consistent with the clear language of the tariff”).

Moreover, that construction not only harmonizes the entirety of Section 9, it is also consistent with PSE’s statutory duty to provide service to its customers.<sup>35</sup> Read otherwise, the provision would authorize PSE—

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<sup>35</sup> *See People’s Org. for Wash. Energy Res. v. Wash. Utils. & Transp. Comm’n (POWER)*, 104 Wn.2d 798, 822, 711 P.2d 319 (1985) (utilities operating under Title 80

in dereliction of its statutory duty—to refuse to continue to provide existing service to existing customers anytime PSE determined that eliminating service would maximize the Company’s profit. Such a construction is contrary to not only PSE’s duty to serve its customers, but also Section 9’s plain language. It should be rejected.

*c. Schedule 80’s general economic feasibility language does not trump Schedule 85’s more specific language.*

Where tariff provisions are in potential conflict, courts apply the provision applicable to the specific situation at hand. *See Citoli v. City of Seattle*, 115 Wn. App. 459, 483, 61 P.3d 1165 (2002) (describing disagreement over application of PSE’s utility tariff as “somewhat silly”), *review denied*, 149 Wn.2d 1033 (2003).<sup>36</sup>

In *Citoli*, PSE shut off gas service to a customer for a week while protestors occupied the upper floors of the customer’s office building. 115 Wn. App. at 467-70. The customer sued PSE alleging the Company had breached its tariff obligations by interrupting his gas service without providing proper notice under Rule 14 of PSE’s tariff. *Id.* at 481-82. Rule

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RCW have duty to provide service to customers, including duty to “make reasonable provision for the continuing availability of its product or services in order to meet reasonably expected future demand”).

<sup>36</sup> *See also Waste Mgmt. of Seattle, Inc.*, 123 Wn.2d at 630 (“A specific statute will supersede a general one when both apply.”) (citations omitted). *See also, e.g., Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) (“To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute.”), *cert. denied*, 532 U.S. 920 (2001).

14, a force majeure provision, provided that PSE would not be liable for losses or damages resulting from an act or omission caused by certain events, including civil disturbances. *Id.* The rule also provided that “[t]he party asserting force majeure shall promptly notify all other affected parties,” and the notice should describe the basis for its assertion, the expected duration, and the steps the party expects to take to remedy the force majeure. *Id.* at 482. The customer argued PSE breached Rule 14 because it failed to promptly notify him about the gas shutoff, including why and for what duration the utilities would be inoperative and the steps PSE would take to remedy the situation. *Id.*

PSE argued Rule 14 was inapplicable and instead Rule 12 of the tariff should apply. *Id.* at 482-83. In the case of an emergency, Rule 12 allowed PSE to interrupt service to make necessary alterations or repairs without notice to the customer. *Id.* at 481. PSE argued Rule 12 expressly applied to emergency situations, whereas Rule 14 includes some events outside of the Company’s control, but that do not constitute “emergencies,” such as strikes, lockouts, and binding orders of the court. *Id.* at 482-83. PSE also argued the rules should be read together and that Rule 14 provides the steps the Company must take when a force majeure event occurs outside an “emergency” context, whereas Rule 12 allows

PSE to respond immediately when an emergency situation arises that requires suspension of service. *Id.* at 483.

The Court of Appeals held Rule 14 applied:

It would be short sighted to rule that Rule 14 only applies outside the emergency context when ***the rule itself clearly refers to earthquakes, wars, fires, floods, insurrections and other emergency situations.*** Rule 12 simply states that when gas service must be interrupted for the purpose of making necessary alterations or repairs, the company will give customers reasonable advance notice and will endeavor to arrange such interruptions so as to inconvenience customers as little as possible—unless an emergency requires immediate shutdown without notice—and in either event, such interruptions do not constitute a breach of contract. ***Rule 14 obviously applies to the interruption of gas service in this case [because the takeover of the building] was a ‘civil disturbance’ that was ‘not reasonably within the control of’ [PSE]. . . . Moreover, [PSE] shutoff the gas when ordered to do so by ‘governmental authority.’***

115 Wn. App. at 483 (emphasis added).

Here, Schedule 80 contains PSE’s general rules and provisions, including those applicable to PSE’s “refusal of service” where an applicant requests to connect to PSE’s service or where a current customer requests additional service. AR000644.<sup>37</sup> This is the section containing the economic feasibility language upon which PSE and the WUTC rely.

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<sup>37</sup> AR000644, Sheet No. 80-d, § 9 (“Refusal of Service - The Company may refuse to connect an applicant for service or may refuse to render additional service to a Customer when such service will adversely affect service being rendered to other Customers or where the applicant or Customer has not complied with state, county, or municipal codes or regulations concerning the rendition of such service.”).

Schedule 85, on the other hand, applies specifically to the replacement of electric distribution lines—the exact situation here. AR000647, Sheet No. 85 (“*This Schedule 85 also sets forth the circumstances, terms and conditions under which the Company is responsible for the ownership, installation, maintenance, repair or replacement of electric distribution facilities . . .*” (emphasis added)). Schedule 85 applies and requires PSE to replace the Maloney Ridge Line. Notwithstanding the WUTC’s and PSE’s attempts to tangle this dispute up in Schedule 80’s inapplicable and irrelevant economic feasibility provision, this Court can resolve this case solely upon Schedule 85’s plain language.

**C. The WUTC Improperly Applied a Fact-Based Analysis.**

Although the Court can resolve this case solely upon the grounds that Schedule 85 requires PSE to pay to replace the Maloney Ridge Line, the WUTC also committed numerous additional errors and acted arbitrarily and capriciously and inconsistent with its own precedent when it applied a fact-based analysis to determine who must pay to replace the Maloney Ridge Line because (i) the fact-based analysis is applicable only in unrelated contexts and (ii) the line *is* part of PSE’s distribution system.

1. The Fact-Based Analysis in WAC 480-100-123 Applies to New or Additional Service Only.<sup>38</sup>

Despite the plain language of Schedule 85, the WUTC attempted to justify its application of a fact-specific analysis in this case on the language of WAC 480-100-123 and the WUTC order adopting it. Both the rule and the order adopting it are clear: the fact-based analysis applies only to *new* or *additional* services—not the replacement of existing lines. *See* WAC 480-100-123 (describing when electric utility may refuse to provide new or additional service); *In re Adopting and Repealing Rules*, UE-990473, Order No. R-495, at ¶ 25 (observing the rule’s language permits the refusal of new or additional service in certain circumstances). The regulation delineates the circumstances in which PSE may and may not refuse to provide new or additional services. *See* WAC 480-100-123(1), (2), & (5) (circumstances under which utility may refuse); WAC 480-100-123(3)-(4) (circumstances under which a utility may not refuse). The Maloney Ridge Line is an existing line governed by Schedule 85.

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<sup>38</sup> The WUTC also purported to engage in a fact-based economic inquiry borrowed from its decision, in a wholly different context, in *In re Petition of Verizon Nw., Inc.*, UT-011439, Twelfth Supp. Order, 2003 WL 24122603 (WUTC, Apr. 2003). In that case, Verizon asked the WUTC for a waiver of its obligation to provide service to applicants requesting telephone line extensions under WAC 480-120-071. *Id.* at \*1. That regulation vested the WUTC with the authority to undertake a fact-specific analysis where a telephone company sought permission to deny an applicant’s request for an extension of wireline telephone services. *Id.* at \*3. Unlike the regulations governing telephone line extensions, PSE’s line extension tariff Schedule 85, does not call for a fact-specific analysis. Instead, the plain language of the tariff dictates issues regarding costs to replace existing electric lines and makes PSE responsible to replace the Maloney Ridge Line.

Replacement of the line is outside the scope of WAC 480-100-123. Thus, PSE must pay to replace the line.

2. Even Under a Fact-Based Analysis, PSE Must Pay to Replace the Line Because it is Part of PSE’s Distribution System.

Despite the conclusions in Order 03 and 04, the Maloney Ridge Line is not “adjunct to” or “separate from” PSE’s “general” distribution system. *See* Order 04, CP 43, ¶ 15.<sup>39</sup> Rather, the line is part of PSE’s “full system.”<sup>40</sup> By its very nature a “*line extension*” is an addition to, and not separate from, an existing distribution system. *See* WAC 480-100-033 (“Each electric utility must file, as a part of its tariff, a distribution line extension rule setting forth the conditions under which it will *extend its facilities* to make service available to an applicant.” (emphasis added)). Further, PSE required its Maloney Ridge Line customers, including King County, to agree in their Service Agreements that PSE had, and would retain, “*sole and exclusive*” ownership and control of the line.<sup>41</sup> PSE—not its Maloney Ridge Line customers—had the right to determine which new customers could connect to the line.<sup>42</sup>

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<sup>39</sup> *See also* Order 03, CP 34, ¶ 47 (“The Maloney Ridge Line is dedicated to serving Petitioners and is an adjunct to, not part of, PSE’s distribution system.”).

<sup>40</sup> WAC 480-100-388 (an electric company’s full system includes “all equipment and lines necessary to serve retail customers whether for the purpose of generation, transmission, distribution or individual service”).

<sup>41</sup> *See, e.g.*, AR000030, ¶ 2 (“The [Maloney Ridge Line] shall at all times remain the sole and exclusive property of [PSE].”).

<sup>42</sup> AR000030, Recitals D (“Pursuant to the Prior Agreements, [PSE] may connect

The line is part of PSE's distribution system.

This conclusion is consistent with the fact the Maloney Ridge Line was built as an extension of PSE's distribution system pursuant to Schedule 85, PSE's tariff setting forth the conditions under which the Company will extend the facilities of its full system. AR000573, § 10 (the Service Agreements are "subject to ... ***Schedule 85 of such Tariff, as such Schedule[ ] may be revised from time to time . . . Any conflict between this Agreement and [PSE's] Schedule[ ] . . . 85 shall be resolved in favor of such tariff provision[.]***" (emphasis added)).<sup>43</sup> As explained by WUTC Staff Witness David Nightingale, line extensions do indeed become part of PSE's full system:

Q. Is it your understanding that in [PSE]'s system there is a distinction between its general distribution systems and any line extension customers?

A. ***In general, no. Most line extensions are done within the distribution system,*** if there's a distribution system, if there's a distribution extension required to get there.<sup>44</sup>

In addition, the GTE Agreement describes PSE's system as "presently terminating" at a certain point. AR000034-35, § 1. As a result of the GTE Agreement, PSE's system was expanded when the Maloney

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additional customers to the System."). See also AR000032, ¶ 7 (addition of new customers provision).

<sup>43</sup> See also AR000260, ¶ 7 n.4 (citing 1994 GTE Service Agreement, AR000620, and WUTC Staff Data Request No. 007. AR000734); AR000034. Recitals ¶ C (GTE "has requested [PSE] to ***extend*** single phase electric service . . . and [PSE] is willing to ***extend*** such service under the following terms and conditions." (emphasis added)).

<sup>44</sup> AR000260, ¶ 7 (emphasis added).

Ridge Line extending “along Foss River Road to Maloney Lookout Road and along Maloney Lookout road to a transformer” was added, and the system then terminated at the end of the new line. *Id.* No language in the GTE Agreement even hints at the possibility that PSE would someday take the position the Maloney Ridge Line was not part of PSE’s distribution system.

Replacement of such facilities falls within PSE’s general obligations under Schedule 85 and is treated as an investment in PSE’s full system, the costs of which are collected in generally applicable rates. *See* Appx. 149-50 (Logen, TR. 46:1-47:2) (PSE’s obligation to replace lines under Schedule 85); Appx. 153-54 (Logen, TR. 48:20-49:17) (margin allowance to recover capital costs).<sup>45</sup> Such costs are not allocated to specific customers served by those facilities, unless an agreement with the customer dictates otherwise. Here, the Service Agreements carve out costs for *repair* and *maintenance*, making the Maloney Ridge Line customers responsible for those costs. *Replacement* costs, on the other hand, are subject to Schedule 85. In short, the Maloney Ridge Line is not

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<sup>45</sup> *See also* Testimony of King County’s Witness Michael P. Gorman, AR000362, lines 24-27, AR000363, line 1 (“Funding replacement of the Maloney Ridge Line, as part of PSE’s regular capital investment program with replacement costs to be added to PSE’s rate base, is consistent with PSE tariffs and rules. Further, PSE has not negotiated any different obligations under the tariffs and rules with respect to replacement of that line.”); AR000369, lines 10-11 (“Capital investments, including replacement distribution capital investments, are included in PSE’s rate base.”).

an “adjunct” to PSE’s distribution system. Rather, it is part of that system and it is PSE’s obligation to pay to replace the line.

3. The Commission Compounded its Error by Revitalizing an Invalid Economic Feasibility Test from WAC 480-100-123 that Promotes Favoritism and Produces Unjust Results.

As discussed in Section B.3.a above, the WUTC previously struck down the economic feasibility test because those “terms are too general and vague to be useful.” *In re Adopting and Repealing Rules*, UE-990473, Order No. R-495, at ¶ 25. The ALJ and Commission in this case elaborated on the unfairness likely to result from such a provision: “[t]aken to its extreme, a test of economic feasibility could be used to deny or terminate service to any individual customer if the revenues PSE receives do not exceed the Company’s calculations of the costs it incurs to serve that particular customer.”<sup>46</sup>

The WUTC doubled-down on its error of employing a fact-based analysis designed only for requests for new or additional service by including the previously rejected economic feasibility prong in its fact-based analysis. This compound error exemplifies the arbitrary and capricious nature of Orders 03 and 04. For the same reasons discussed above in Section 3.B.a, the Court should find the WUTC acted illegally

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<sup>46</sup> Order 03, CP 27, ¶ 17. *See also* Order 04, CP 48, ¶ 25.

and arbitrarily and capriciously.

**D. PSE and the WUTC Unlawfully Discriminated Against PSE's Maloney Ridge Line Customers.**

RCW 80.28.090 and RCW 80.28.100 prohibit PSE from conferring any undue preferences or advantages on, and/or discriminating against, similarly situated customers by any special rate, charge, or other method. *Cole v. Wash. Utils. & Transp. Comm'n*, 79 Wn.2d 302, 311, 485 P.2d 71 (1971). Once a utility establishes customer rate classifications, it must treat all members of a class equally and thus cannot charge what is in essence a higher rate to a subset of customers in a class. *Rustlewood Ass'n v. Mason Cty.*, 96 Wn. App. 788, 794, 981 P.2d 7 (1999) ("Under RCW 36.94.140, the County cannot charge the Rustlewood residents what is in essence a higher rate than it charges the Hartstene Pointe residents while they are in the same rate class.").<sup>47</sup> The Court can resolve this case upon this ground alone.

1. PSE Put its Maloney Ridge Line Customers on Schedule 24 and Never Suggested They Would be Treated Differently than other Schedule 24 Customers When it Came Time to Replace the Maloney Ridge Line.

PSE's Maloney Ridge Line customers, including King County, are Schedule 24 customers. AR000825, lines 4-5. PSE must treat them on the

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<sup>47</sup> See also *Cole*, 79 Wn.2d at 310 ("Rate classifications premised on reasonable differences in conditions and costs are an accepted part of utility rate making.").

same basis and terms as other members of their Schedule 24 customer class. *See Cole*, 79 Wn.2d at 311. As recognized in Order 04, “Schedule 24 rates include an allocated part of the fixed and variable costs of PSE’s general distribution system and commodity costs (*i.e.* power costs).” Order 04, CP 40, ¶ 7.<sup>48</sup> PSE admitted in its briefing and oral argument below that “[t]he [Maloney Ridge Line customers’] payment of Schedule 24 rates cover costs of PSE’s basic distribution system” and “the Schedule 24 rates cover the basic distribution system up to the point of the [Maloney Ridge Line] line extension.” AR000175.<sup>49</sup>

PSE and the WUTC fail to recognize that Schedule 85 provides that replacement costs for distribution line extensions benefiting other Schedule 24 customers—but providing no distribution service to the Maloney Ridge Line customers—are allocated through Schedule 24 rates. AR000367, lines 3-5 (Gorman Testimony: PSE’s Maloney Ridge Line customers “have for many years and continue today to pay Schedule 24

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<sup>48</sup> AR000379, lines 2-5 (Gorman testimony: “Rate Schedule 24 had an allocated cost of service of \$245 million based on PSE’s cost of service study, of which approximately \$104.5 million was for distribution costs, or 42.5% of Schedule 24 bills. The remainder was for production and transmission cost of service.”).

<sup>49</sup> PSE’s witness Lynn Logen also acknowledged that PSE’s rules generally do not provide for any customer contribution-in-aid-of-construction regarding the replacement of an existing distribution line except in limited circumstances, which King County contends do not apply in this case because the Service Agreements do not cover replacement, it is not requesting new or additional service, and it is not requesting a change in service. AR000671-72.

rates that help fund capital replacements for other parts of the PSE system from which [they] derive no benefit.”).<sup>50</sup> Yet PSE and the WUTC would have customers on other parts of the system pay nothing for replacement of the Maloney Ridge Line.

PSE’s Maloney Ridge Line customers are similarly situated to other customers who have secured a line extension under Schedule 85. Like those customers, the first customer on the Maloney Ridge Line, GTE, paid to install the line.<sup>51</sup> PSE generally pays to replace existing lines under Schedule 85 unless a special agreement calls for a different result. *See* Appx. 151-52 (Logen, TR. 46:19-47:2) (PSE’s general obligation under line extension policy includes replacement); Appx. 156-59 (Nightingale, TR. 80-83) (explaining general practice of replacing distribution facilities as necessary to serve current customers). The Service Agreements require the Maloney Ridge Line customers to pay to repair and maintain the line, but not replace it. Thus, like all other

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<sup>50</sup> The discrimination caused by the Orders is significant. PSE estimates the cost to replace the Maloney Ridge Line is \$5.3 million, \$5 million of which the Orders assign to the four customers that receive service through the Maloney Ridge Line, King County included. Order 03, CP 31, ¶ 32. On the other hand, King County and PSE’s other Maloney Ridge Line customers presented evidence that if PSE were to recover the cost of replacement through Schedule 24 rates, as it does for similar line extension replacements, the impact would be a 0.2 percent rate increase for Schedule 24 customers. *Id.*, ¶ 30.

<sup>51</sup> *Compare* AR000036, ¶ 5 (“[GTE] shall pay all [PSE’s] actual costs incurred in constructing the” Maloney Ridge Line), *with* AR000681, lines 8-9 (“With regard to new installations, Schedule 85 requires the applicant to pay 100 percent of the costs less a margin allowance.”).

customers who have obtained line extensions under Schedule 85, they are entitled to replacement of the line at PSE's expense.

2. The Line's Customers are Not in a Separate Rate Class.

PSE has not put its Maloney Ridge Line customers in a rate class other than Schedule 24. If PSE thought the Maloney Ridge Line customers should be treated differently with respect to the allocation of costs for the replacement of electric distribution lines, it was incumbent upon the Company to create a separate rate classification through language in their contract or tariff. Although it contracted away its duty to pay to repair and maintain the line, PSE did not contract away its responsibility to pay to replace the line. The Company also retained "sole and exclusive" ownership of the line.<sup>52</sup> An aspect of ownership is an expectation and duty to replace. *Cf. Wash. Hydroculture, Inc. v. Payne*, 96 Wn.2d 322, 328-29, 635 P.2d 138 (1981) (finding, in the context of landlord-tenant law, that a tenant was not obligated to *rebuild* even though lease had a covenant requiring the tenant to repair and maintain the leased property). Because PSE made clear in the Service Agreements that it retains ownership and control of the line (including the right to add new customers), and because PSE did not contractually transfer its Schedule 85

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<sup>52</sup> *See, e.g.*, AR000574, § 2 (the Maloney Ridge Line "shall at all times remain the *sole and exclusive* property of" PSE (emphasis added)).

duty to pay to replace the line, the Maloney Ridge Line customers must be treated like other Schedule 24 customers with respect to replacement.

**E. PSE’s Duty to Serve Requires it to Pay to Replace the Line.**

“Utilities such as [PSE] which operate under Title 80 RCW have statutory responsibilities in connection with assuring that an adequate supply of electric power will be available to their customers.” *People’s Org. for Wash. Energy Res. v. Wash. Utils. & Transp. Comm’n (POWER)*, 104 Wn.2d 798, 822, 711 P.2d 319 (1985). A utility’s duty to serve encompasses the “attendant obligation to plan and make reasonable provision for the continuing availability of its products or services in order to meet reasonably expected future demand . . .” *Id.* By contracting for the line extension and agreeing to own and operate it, PSE held itself out as the provider for the area and assumed a duty to serve. *See Yakima Cty. Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 381-82, 858 P.2d 245 (1993) (by holding itself out as willing to supply services to an area and entering into agreement for those services, municipal utility may incur duty to provide those services).

PSE and the WUTC contended below that the Maloney Ridge Line customers should pay to replace the line because they are the “cost

causers.”<sup>53</sup> In doing so, they relied on an irrelevant ratemaking principle to eviscerate PSE’s duty to serve. *See N. Pac. Ry. Co.*, 160 Wn. at 695 (rejecting railroad company’s attempt to introduce evidence regarding impacts on its revenue; “[i]t must be remembered that this is a proceeding to recover for an overcharge and not a rate making proceeding”). As a general principle of course, one goal of utility ratemaking<sup>54</sup> is to allocate costs to customers who cause those costs. One way to do this in the context of line replacement would have been to provide by tariff or contract that each customer will pay its own replacement costs. That is not what PSE did in Schedule 24, Schedule 85, and the Maloney Ridge Line Service Agreements. Rather, the WUTC and PSE belatedly singled out the Maloney Ridge Line customers to cover the costs to replace the line, without any notice to those customers. PSE’s refusal to replace this particular line on the same terms as other lines violates its duty to serve.

PSE cannot now elude its replacement obligations simply because it believes it would be too expensive to live up to those responsibilities. Adopting that logic would eviscerate PSE’s duty to serve and allow the Company to pick and choose which customers to drop and which to keep,

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<sup>53</sup> *See, e.g.*, CP 87, 103, Brief on Behalf of the Washington Utilities and Transportation Commission at 1, 17; CP 124-25, Intervenor Puget Sound Energy’s Reply Brief at 12-13.

<sup>54</sup> This is not a ratemaking case. Ratemaking principles are thus not relevant. *See N. Pac. Ry. Co.*, 160 Wn. at 695.

all with an eye toward maximizing its own profit. PSE has a duty to serve its customers, including those on the Maloney Ridge Line.

**F. PSE’s Replacement of the Maloney Ridge Line Would be Fair and Reasonable.**<sup>55</sup>

If PSE pays to replace the Maloney Ridge Line there will be no unfair rate increase for its Schedule 24 customers. Rates need not be mathematically precise; a “rate decision [will] be affirmed if it [falls] within the ‘zone of reasonableness’.” *POWER*, 104 Wn.2d at 811. Similarly, according to the end-result doctrine, rates can be determined by any method, so long as they “enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed.” *Id.* (internal quotation marks omitted). The Schedule 24 increase necessary to replace the Maloney Ridge Line is the very definition of reasonable—the rate impact would be a mere 0.2 percent.<sup>56</sup> Spread across Schedule 24 equally, this amount would not result in unjust discrimination and is well within the zone of

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<sup>55</sup> Ratemaking principles are not relevant here because this is a tariff and contract interpretation—not a ratemaking—case. *See id.* (rejecting railroad company’s attempt to introduce evidence regarding impacts on its revenue: “[i]t must be remembered that this is a proceeding to recover for an overcharge and not a rate making proceeding”). Nevertheless, because PSE and the WUTC interjected ratemaking principles below, King County addresses the reasonableness of requiring Schedule 24 customers to pay to replace the line.

<sup>56</sup> Order 03, CP 31, ¶ 30; AR000847 (“[T]he revenue requirement increase to schedule 24 customers would be 0.2 percent assuming that the 5.3 million was applied to schedule 24 customers.”).

reasonableness for rates. Moreover, PSE's Maloney Ridge Line customers would expect to—and do—share in the costs of replacing lines serving other Schedule 24 customers, just as those customers should share in the costs of replacing this line.

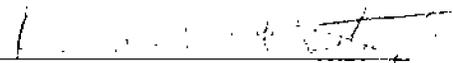
### CONCLUSION

The Court should reverse Order 04 and order, or direct the WUTC to order, PSE to pay to replace the Maloney Ridge Line. PSE's responsibility to do so is clear and unambiguous in Schedule 85.

DATED this 23rd day of September, 2016.

Respectfully submitted,

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## APPENDIX

### TO APPELLANT KING COUNTY'S OPENING BRIEF

Document Title	Pages
Agreement Related to Extension of Electrical Service, dated September 23, 1971, by and between Puget Sound Power & Light Company and General Telephone Company ("GTE Agreement")	1-7
Service Agreement, dated March 29, 1995, by and between Puget Sound Power & Light Company and King County ("King County Service Agreement")	8-11
Puget Sound Energy Electric Tariff G, Schedule 85, Sheet No. 85	12
Puget Sound Energy Electric Tariff G, Schedule 85, Sheet No. 85-k	13
Puget Sound Energy Electric Tariff G, Schedule 80, Sheet No. 80-d	14
RCW 80.28.010	15-16
RCW 80.28.050	17
RCW 80.28.090	18
RCW 80.28.100	19
WAC 480-100-001	20
WAC 480-100-033	21
WAC 480-100-123	22
WAC 480-100-388	23
<i>Adams v. N. Ill. Gas Co.</i> , 211 Ill.2d 32, 809 N.E.2d 1248, 284 Ill. Dec. 302 (2004)	24-52
<i>Mid La. Gas Co. v. FERC</i> , 780 F.2d 1238 (5th Cir. 1986)	53-62
<i>Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.</i> , 477 F.3d 668 (9th Cir. 2007)	63-82
<i>Uncle Joe's Inc. v. L.M. Berry and Co.</i> , 156 P.3d 1113 (Alaska 2007)	83-91

<i>Wis. End-User Gas Ass'n v. Pub. Serv. Comm'n of Wis.</i> , 218 Wis.2d 558, 581 N.W.2d 556 (Wis. Ct. App. 1998), <i>review denied</i> , 220 Wis.2d 365 (Wis. 1998)	92-97
<i>In re Adopting and Repealing Rules in Chapter 480-100 WAC Relating to Rules Establishing Requirements for Electric Companies</i> , UE-990473, Order No. R-495, Order Adopting and Repealing Rules Permanently (WUTC, Dec. 3, 2001)	98-106
<i>In re Camelot Square Mobile Home Park</i> , UT-960832, UT-961341, UT-961342, 1998 WL 971888, 5th Suppl. Order (WUTC, Aug. 18, 1998)	107-130
<i>In re Petition of Verizon Nw., Inc.</i> , UT-011439, Twelfth Supp. Order, 2003 WL 24122603 (W.U.T.C. Apr. 2003)	131-146
Testimony of PSE Witness Lynn Logen, TR. 29:1-9	147
Testimony of PSE Witness Lynn Logen, TR. 51:1-2	148
Testimony of PSE Witness Lynn Logen, TR. 46:1-47:2	149-150
Testimony of PSE Witness Lynn Logen, TR. 46:19-47:2	151-152
Testimony of PSE Witness Lynn Logen, TR. 48:20-49:17	153-154
Testimony of PSE Witness Lynn Logen, TR. 51:1-2	155
Testimony of WUTC Staff Witness David Nightingale, TR. 80-83	156-159

AGREEMENT RELATING TO  
EXTENSION OF ELECTRICAL SERVICE

AGREEMENT made this 23 day of SEPTEMBER, 1971  
by and between PUGET SOUND POWER & LIGHT COMPANY ("Puget") and  
GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC. ("General Tel.").

RECITALS

A. General Tel. owns and operates a microwave station  
("Microwave Station") on Maloney Ridge and located in Section 36,  
Township 26 North, Range 11 East, W.M., in King County, Washington.

B. Puget is a public service corporation engaged in  
the business of distributing electrical energy in the vicinity of  
General Tel.'s Microwave Station.

C. General Tel. has requested Puget to extend single  
phase electric service to the Microwave Station, and Puget is  
willing to extend such service under the following terms and con-  
ditions.

AGREEMENTS

The parties hereto agree as follows:

1. Installation. Puget will furnish and install a  
single phase primary electrical distribution system ("Distribution

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**KC APPENDIX PAGE 1**

System") from Puget's Existing Facilities (presently terminating at Pole No. 15, approximately seven miles from the Microwave Station) along Foss River Road to Maloney Lookout Road and along Maloney Lookout Road to a transformer located at the Microwave Station. Puget will use its best efforts to complete the Distribution System during the construction months of the summer of 1971. The Distribution System shall be constructed underground in areas where it is located on property belonging to the United States of America.

2. Rights of Way. Installation of the Distribution System is contingent upon the ability of Puget to acquire necessary rights of way along Foss River Road and Maloney Lookout Road between Puget's Existing Facilities and the transformer at the Microwave Station site, and General Tel. will cooperate with Puget in securing all necessary rights of way for the Distribution System. If the rights of way secured are revocable or in any other way less than perpetual, Puget reserves the right to terminate service to the Microwave Station upon the termination and nonrenewal of any necessary right of way. If Puget is terminating service, it shall remove the Distribution System and General Tel. shall pay all Puget's actual costs incurred in such removal. The cost of all renewals of such rights of way shall be borne by General Tel.

3. Maintenance. The Distribution System from the primary metering point (to be located along the Distribution System approximately 3,500 feet from Puget's Existing Facilities) to the transformer

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at the Microwave Station site shall be maintained only by Puget or a contractor selected by it and the actual cost of such maintenance shall be borne by General Tel. and shall be invoiced by Puget to General Tel. Maintenance as used herein shall include the furnishing of all necessary manpower, materials, and equipment to keep the Distribution System in operating condition.

4. Excuse of Performance and Excusable Delay. Puget shall be excused from performing any of its obligations hereunder to the extent that such performance is prohibited by causes beyond the control of Puget including, without limitation, acts of God, adverse weather, and lack of necessary rights of way, and to the extent that any cause beyond the control of Puget, including without limitation the foregoing, delays performance by Puget of any of its obligations hereunder, Puget shall have no liability to General Tel. for such delay and General Tel. hereby waives the right to make any claim for delay against Puget occasioned by such causes.

5. Payment for Installation. General Tel. shall pay all Puget's actual costs incurred in constructing the Distribution System from Puget's Existing Facilities to the transformer at the Microwave site. These costs include without limitation costs of engineering, surveying, and acquiring rights of way, and also include the costs of labor, supervision, materials, equipment, and overhead expense. Upon completion of the installation of the Distribution System, Puget will invoice the actual costs of the installation to General Tel. If performance by Puget is prohibited by any cause beyond

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Puget's control as set out in paragraph 4, General Tel. shall pay Puget's costs incurred up to the time further performance by Puget is prohibited.

6. Right to Serve Additional Customers. Puget reserves the right to serve customers in addition to General Tel. from the Distribution System and may provide such service without refunding to General Tel. any portion of the original cost of installation paid by General Tel. (*See addendum following page 6*)

7. Metering. General Tel.'s use of primary power shall be metered at the primary metering point to be located along the Distribution System approximately 3,500 feet from Puget's Existing Facilities and General Tel. shall therefore be responsible for the use of all power lost in transmission between the primary metering point and the Microwave Station site.

If Puget serves additional customers from the Distribution System beyond General Tel.'s primary metering point, those customers' use of power shall be primary metered at the points along the Distribution System at which their service is taken. General Tel. shall pay for the difference between the quantity of electricity used as indicated by the meter at the primary metering point and the sum of the quantities of electricity used as indicated by the primary meter(s) of any additional customers.

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8. Payment for Electrical Power. General Tel. shall pay for electric power furnished through the Distribution System at the rates set out in Puget's rate Schedule 30, Tariff I, as it may be amended, on file with the Washington Utilities and Transportation Commission, provided, however, that the minimum annual charges for said electrical power shall be \$1,300 and in case of any increase in the rate of personal property taxes of the State of Washington levied against the property of Puget including the Distribution System, the minimum annual charge shall be increased proportionately. If Puget serves additional customers from the Distribution System beyond the primary metering point, Puget may bill General Tel. on an estimated basis for the difference between the quantity of electricity used as indicated by the meter at the primary metering point and the sum of the estimated quantities of electricity used by the additional customers. Such billings shall be adjusted when weather and seasonal conditions permit the reading of the meters of the additional customers.

9. Ownership of the Distribution System. The Distribution System shall be and remain the sole and exclusive property of Puget.

10. Termination by General Tel. If General Tel. requests the discontinuance of electric service of the Microwave Station, Puget shall have the option to remove the Distribution System or any part thereof within a reasonable time following the effective date of such discontinuance of service. In the event that Puget

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elects to remove all or part of the distribution system, General  
Tel. shall pay all Puget's actual costs incurred in such removal.

11. Miscellaneous. This Agreement and the parties'  
rights and obligations hereunder shall be construed and inter-  
preted in all respects in accordance with the laws of the State  
of Washington and this Agreement shall be binding on the parties'  
successors and assigns.

EXECUTED as of the day and year first above written.

PUGET SOUND POWER & LIGHT COMPANY

By *[Signature]*  
Title Vice President

GENERAL TELEPHONE COMPANY OF  
THE NORTHWEST, INC.

By *[Signature]*  
Title Its Vice President-Operations Staff

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KC APPENDIX PAGE 6

ADDENDUM TO:  
AGREEMENT RELATING TO  
EXTENSION OF ELECTRICAL SERVICE

This Addendum is hereby made a part of said Agreement and cancels paragraph number 6 and replaces said paragraph with the following:

6. Right To Serve Additional Customers. Puget reserves the right to serve customers in addition to General Tel. from the Distribution System. Puget will arrange with potential customers a reasonable and equitable construction cost to be reimbursed to General Tel. for the cost incurred for the original line extension covered by this Agreement with the exception of the Forest Service which will be permitted one service connection from this Distribution System with no reimbursement to General Tel. This service will be located approximately 600 feet southeast of General Tel.'s Microwave Station. Reimbursements under this agreement will be limited to period not exceeding five (5) years after date the system is energized.

PUGET SOUND POWER & LIGHT COMPANY

By *J. G. Elt*

Title Vice President

Date September 23, 1971

GENERAL TELEPHONE COMPANY OF THE  
NORTHWEST, INC.

By *Roger P. Vello*

Title Its Vice President - Operations Staff

Date September 23, 1971

000040

## SERVICE AGREEMENT

This Agreement, dated as of this 29 day of MARCH, 1995, by and between the parties signing below ("Customer" or "Customers") and PUGET SOUND POWER & LIGHT COMPANY, a Washington Corporation ("Puget").

### RECITALS

A. Puget is a public service company engaged in the sale and distribution of electricity.

B. Pursuant to the economic feasibility provisions (paragraph 13) of its Electric Tariff G, Schedule 85, Puget constructed a single phase primary voltage electrical distribution system ("System") to serve the area known as Maloney Ridge ("Maloney Ridge") located in Section 36, Township 26 North, Range 11 East, W.M., in King County, Washington. The System extends from the primary metering point which is approximately 3,500 feet from Pole No. 15, along Foss River Road to Maloney Lookout Road to Maloney Ridge.

C. The System was originally constructed under an agreement dated September 23, 1971 ("Prior Agreement") between Puget and the General Telephone Company of the Northwest, Inc. ("GTE") to serve a GTE microwave station. Subsequent agreements dated April 21, 1994 with GTE and dated June 2, 1994 with King County were also signed. All these agreements shall be known as "Prior Agreements".

D. Pursuant to the Prior Agreements, Puget may connect additional customers to the System.

E. Puget wishes to establish the terms and conditions under which additional customers will be connected to the System.

### AGREEMENT

1. Scope of Agreement. This Agreement governs the operation of the System and the recovery of the costs associated therewith. Electrical service provided by Puget to Customers shall be governed by the terms and provisions of Puget's Electric Tariff G.

2. Ownership of System. The System shall at all times remain the sole and exclusive property of Puget.

3. Repair and Maintenance of System. Puget shall be responsible for repairing and maintaining the System, including the furnishing of all necessary labor, materials, and equipment to keep the System in good operating condition.

**000030**

4. Operating Costs. As authorized by the economic feasibility provisions (paragraph 13) of Schedule 85 of Puget's Electric Tariff G, the Customers agree that all operating costs in connection with the System will be shared among the Customers. The share paid shall be determined as shown by the following examples:

For the first customer beyond the primary metering point, that customer's share shall be equal to the operating costs incurred on the portion of the line starting at the primary metering point up to that customer's point of delivery (the "First Portion") divided by the number of customers being served by the First Portion of the line (all customers would share in the first portion of the line).

The second customer beyond the primary metering point will share equally in the operating costs of the First Portion of line as described above, plus share equally in the operating costs from the first customer's point of delivery to the second customer's point of delivery (the "Second Portion") divided by the number of customers being served by the Second Portion of the line.

The final customer on the line would share equally in the operating costs of all portions of the line divided by the number of customers being served by each portion of the line.

Operating costs shall include any repair and maintenance costs incurred by Puget pursuant to Section 3 above, and costs in connection with securing or maintaining operating rights.

5. Payment of Operating Costs. During January of each year, Puget shall determine the operating costs incurred during the preceding calendar year. Puget shall invoice each Customer an amount equal to such share of operating costs as determined in paragraph 4 above, as of the preceding December 31. Amounts so invoiced by Puget shall be due and payable within thirty (30) days of Customers' receipt of the invoice. A customer no longer receiving electrical service from Puget though the System may, upon thirty (30) days notice to Puget, terminate its participation under this Agreement and any further obligation with respect to payment of operating costs; provided, however, that if such Customer reconnects to the System and becomes a party to this Agreement within one (1) year thereafter, such Customer shall pay its share of operating costs as if such Customer had remained a party to this Agreement.

6. Default. The parties agree that payment of operating costs to Puget is authorized by Schedule 85, paragraph 13 of Puget's Electric Tariff G. Upon failure of any Customer to pay to Puget amounts billed in accordance with Section 5 above, Puget may pursue any of the remedies available to it under the General Rules and Provision (Schedule 80) of its Electric Tariff G and the regulations for failure by customers to pay for electrical service including, but not limited to, disconnection of electrical service.

**000031**

7. Addition of New Customers. Additional residents within Maloney Ridge may become parties to this Agreement and thereafter be served from the System. A prospective new customer shall provide Puget a properly notarized letter indicating its desire to become a party to this agreement and indicating its willingness to abide by the terms and conditions of this Agreement. Such letter shall thereupon be attached to this Agreement and such party shall become a Customer under this Agreement. Such new customer shall pay a share of operating costs as determined in paragraphs 4 and 5 above, irrespective of the date electric service is initiated. Each customer receiving service from the System shall become a party to this agreement as a condition of receiving electrical service.

8. Removal of System. The parties expressly acknowledge that the operating rights for the System are not perpetual. If the rights of way are revocable or in any other way less than perpetual, Puget reserves the right to terminate service to Maloney Ridge upon the termination and nonrenewal of any necessary right. If Puget terminates service, it shall remove the System. Each Customer shall pay an equal share of Puget's actual costs incurred in such removal. Amounts so invoiced by Puget shall be due and payable within thirty (30) days of Customers' receipt of the invoice.

9. Metering for Electrical Service. Customers shall provide suitable facilities, according to Puget's standards and the General Rules and Provisions, (Schedule 80) of Puget's Electric Tariff G, for installation of secondary voltage metering for the purpose of billing for electricity used. Puget shall install and read meters and, if necessary, may estimate readings during periods of adverse weather conditions.

10. Applicability of Other Provisions. This Agreement is subject to the General Rules and Provisions (Schedule 80) of Puget's Electric Tariff G and to Schedule 85 of such Tariff, as such Schedules may be revised from time to time upon approval of the Washington Utilities and Transportation Commission. Any conflict between this Agreement and Puget's Schedules 80 and 85 shall be resolved in favor of such tariff provisions.

11. Prior Agreement. Upon agreement of GTE and King County to this Agreement, the Prior Agreement and the Prior Agreements shall become null and void.

King County

By: *Danna R Nolan*  
Name: Danna R Nolan  
Its: \_\_\_\_\_  
Date: 3/22/95

Puget Sound Power &  
Light Company

By: *Wayne H. Hopman*  
Name: Wayne H. Hopman  
Its: General Manager - North King  
Date: March 29, 1995

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Eighth Revision of Sheet No. 85  
Canceling Seventh Revision  
of Sheet No. 85

WN U-60

**PUGET SOUND ENERGY**  
**Electric Tariff G**

**SCHEDULE 85**  
**LINE EXTENSIONS AND SERVICE LINES**

The Company will extend and construct new or modify existing electric distribution facilities upon written (or verbal, at the discretion of the Company) request based upon the terms and conditions outlined in this tariff. The Company will evaluate the request to identify any required Customer or Applicant payments based upon the following formula (each element of the formula is as further described in this schedule):

	Primary Voltage Line Extension Costs (including Transformation Cost)
+	Secondary Voltage Line Extension Costs
+	Exceptional Transmission & Substation Costs
-	Margin Allowance
<hr/>	
=	Line Extension Cost
+	Service Line Costs
=	Total Cost to Customer or Applicant

This Schedule 85 also sets forth the circumstances, terms and conditions under which the Company is responsible for the ownership, installation, maintenance, repair or replacement of electric distribution facilities, including facilities on the Customer's or Applicant's side (the load side) of the Point of Delivery.

**Definitions**

Applicant – Any person, partnership, firm, corporation, municipality, cooperative organization, governmental agency, etc., who or which is requesting any service under this schedule from the Company. The Applicant may or may not be or become a Customer. For purposes of the General Rules and Provisions contained in this tariff, Applicant shall be included within the term Customer.

Design Costs – Costs include, but are not limited to, costs to produce an estimate of costs, or for engineering, surveying, pre-construction coordination, and for reviewing plans and proposals. (N)  
(N)

Margin Allowance – The amount the Company will contribute toward construction costs for new or modified electric distribution facilities as described in this schedule.

Multi-Family Residential Structure – A structure containing two or more single-family dwelling units, including duplexes, triplexes, condominiums and apartment buildings; provided that for purposes of the charges for transformation, Multi-Family means a structure of five or more units.

Non-Residential – Service to commercial, industrial or lighting (excluding street lighting circuitry) Customers/Applicants and recreational facilities, or to multi-family residential structures (whether through one meter for the structure or individual meters for each unit), mobile home parks or manufactured housing communities in which the individual park/community residents do not own the real property on which their individual mobile or manufactured homes are located (whether through one meter for the park or individual meters for each mobile/manufactured home).

Issued: November 22, 2006  
Advice No.: 2006-31

Effective: December 23, 2006

Issued By Puget Sound Energy

By:

Tan DeBoer Tom DeBoer

Title: Director, Rates & Regulatory Affairs

First Revision of Sheet No. 85-k  
Canceling Original  
Sheet No. 85-k

WN U-60

**PUGET SOUND ENERGY**  
**Electric Tariff G**

**SCHEDULE 85**  
**LINE EXTENSIONS AND SERVICE LINES**  
(Continued)

(T)

**Additional Terms of Service**

(M)(K)

1. A. **OWNERSHIP OF FACILITIES:** The Company shall own, operate, maintain and repair all electric distribution facilities installed by or for the Company under this schedule, including replacement of such facilities if necessary so long as such replacement is not inconsistent with this schedule or a contract governing such facilities. Other than as provided in section 1.B., below, the Company shall not own and shall have no responsibility to operate, maintain, repair or replace any electric distribution facilities that were not installed by or for the Company under this schedule.

(C)  
(M)  
(N)

B.(i) With respect to underground Service Lines at mobile home parks or manufactured housing communities in which the individual park residents do not own the property on which their individual mobile or manufactured homes are located and in the case of Multi-Family Residential Structures, the park/community property owner or Multi-Family Residential Structure owner shall be responsible for ownership and operation of all new and existing underground Service Lines (as well as service entrance equipment including meter bases, pedestals and enclosures) and for all costs for installation, maintenance, repair and replacement thereof, *provided that* the Company shall be responsible for existing underground Service Lines that the Company installed prior to May 1, 2006, as determined and as qualified below:

(K)

(a) For underground electric facilities constructed prior to October 21, 1977, there shall be a presumption that the Company installed the Service Lines. This presumption can be overcome if PSE can show that the Company did not install the Service Line that needs repair. PSE shall bear the burden of proving that it did not install the Service Line. Where PSE has records showing that it did not install the Service Line or can show that a Service Line is labeled with a "UL®" (Underwriters Laboratories, Inc.®) designation or similar marking, this is sufficient to prove that the Service Line was not installed by the Company, as neither PSE nor its predecessors install or installed "UL®" designated facilities.

(K)

(b) For underground electric facilities constructed on or after October 21, 1977, there shall be a presumption that the property owner installed the Service Lines. This presumption can be overcome if the property owner can show that the Company in fact installed the Service Line that needs repair. The property owner shall bear the burden of proving installation by the Company.

(N)(K)

(M) Transferred from Sheet No. 85-i

(K) Transferred to Sheet No. 85-n and 85-o Respectively

Issued: July 28, 2006

Effective: August 1, 2006

Advice No.: 2006-19

By Authority of the Washington Utilities and Transportation Commission in Docket Nos. UE-051828 & UE-051966  
Issued By Puget Sound Energy

By:

Tom DeBoer

Tom DeBoer

Title: Director, Rates & Regulatory Affairs

WN U-60

Fourth Revision of Sheet No. 80-d  
Canceling Third Revision  
of Sheet No. 80-d

**PUGET SOUND ENERGY**  
**Electric Tariff G**

**SCHEDULE 80**  
**GENERAL RULES AND PROVISIONS**  
(Continued)

8. ACCESS TO PREMISES - The Company, its agents and employees shall have the right of ingress to or egress from the Premises of the Customer at all reasonable hours as may be necessary for meter reading, performance of necessary maintenance, testing, installation, or removal of its property. In the event the Customer is not the owner of the Premises occupied, he shall obtain all such permissions from the owner thereof. (M)

9. REFUSAL OF SERVICE - The Company may refuse to connect an applicant for service or may refuse to render additional service to a Customer when such service will adversely affect service being rendered to other Customers or where the applicant or Customer has not complied with state, county, or municipal codes or regulations concerning the rendition of such service.

The Company may refuse to serve an applicant or a Customer if, in its judgment, said applicant's or Customer's installation of wiring or electrical equipment is hazardous, or of such character that satisfactory service cannot be provided.

The installation of proper protective devices on the applicant's or Customer's premises at the applicant's or Customer's expense may be required whenever the Company deems such installation necessary to protect its property or that of its other Customers.

The Company shall not be required to connect with or render service to an applicant unless and until it has all necessary operating rights, including rights-of-way, easements, franchises, and permits.

The Company may refuse to connect service to a master meter in any new building with permanent occupants when: there is more than one dwelling unit in the building or property; the occupant of each unit has control over a significant portion of electric energy consumed in each unit; and the long-run benefits of a separate meter for each customer exceed the cost of providing separate meters.

The Company shall not be required to provide service if to do so would be economically unfeasible.

10. CUSTOMER'S LOAD AND OPERATIONS - For single and three phase service, the Customer shall provide adequate protection for equipment, data, operations, work and property under his control from (a) high and low voltage, (b) surges, harmonics, and transients in voltage, and (c) overcurrent. For unidirectional and three-phase equipment, the Customer shall provide adequate protection from "single phasing conditions," reversal of phase rotation, and phase unbalance.

(M) Transferred from Sheet 80-c

Issued: July 28, 2006

Effective: August 1, 2006

Advice No.: 2006-19

By Authority of the Washington Utilities and Transportation Commission in Docket Nos. UE-051828 & UE-051966  
Issued By Puget Sound Energy

By: Tom DeBoer Tom DeBoer Title: Director, Rates & Regulatory Affairs

**RCW 80.28.010****Duties as to rates, services, and facilities—Limitations on termination of utility service for residential heating.**

(1) All charges made, demanded or received by any gas company, electrical company, wastewater company, or water company for gas, electricity or water, or for any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient. Reasonable charges necessary to cover the cost of administering the collection of voluntary donations for the purposes of supporting the development and implementation of evergreen community management plans and ordinances under RCW **80.28.300** must be deemed as prudent and necessary for the operation of a utility.

(2) Every gas company, electrical company, wastewater company, and water company shall furnish and supply such service, instrumentalities and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable.

(3) All rules and regulations issued by any gas company, electrical company, wastewater company, or water company, affecting or pertaining to the sale or distribution of its product or service, must be just and reasonable.

(4) Utility service for residential space heating shall not be terminated between November 15 through March 15 if the customer:

(a) Notifies the utility of the inability to pay the bill, including a security deposit. This notice should be provided within five business days of receiving a payment overdue notice unless there are extenuating circumstances. If the customer fails to notify the utility within five business days and service is terminated, the customer can, by paying reconnection charges, if any, and fulfilling the requirements of this section, receive the protections of this chapter;

(b) Provides self-certification of household income for the prior twelve months to a grantee of the department of commerce, which administers federally funded energy assistance programs. The grantee shall determine that the household income does not exceed the maximum allowed for eligibility under the state's plan for low-income energy assistance under 42 U.S.C. 8624 and shall provide a dollar figure that is seven percent of household income. The grantee may verify information provided in the self-certification;

(c) Has applied for home heating assistance from applicable government and private sector organizations and certifies that any assistance received will be applied to the current bill and future utility bills;

(d) Has applied for low-income weatherization assistance to the utility or other appropriate agency if such assistance is available for the dwelling;

(e) Agrees to a payment plan and agrees to maintain the payment plan. The plan will be designed both to pay the past due bill by the following October 15th and to pay for continued utility service. If the past due bill is not paid by the following October 15, the customer is not eligible for protections under this chapter until the past due bill is paid. The plan may not require monthly payments in excess of seven percent of the customer's monthly income plus one-twelfth of any arrearage accrued from the date application is made and thereafter during November 15 through March 15. A customer may agree to pay a higher percentage during this period, but shall not be in default unless payment during this period is less than seven percent of monthly income plus one-twelfth of any arrearage accrued from the date application is made and thereafter. If assistance payments are received by the customer subsequent to implementation of the plan, the customer shall contact the utility to reformulate the plan; and

(f) Agrees to pay the moneys owed even if he or she moves.

(5) The utility shall:

(a) Include in any notice that an account is delinquent and that service may be subject to termination, a description of the customer's duties in this section;

(b) Assist the customer in fulfilling the requirements under this section;

(c) Be authorized to transfer an account to a new residence when a customer who has established a plan under this section moves from one residence to another within the same utility service area;

(d) Be permitted to disconnect service if the customer fails to honor the payment program. Utilities may continue to disconnect service for those practices authorized by law other than for nonpayment as provided for in this subsection. Customers who qualify for payment plans under this section who default on their payment plans and are disconnected can be reconnected and maintain the protections afforded under this chapter by paying reconnection charges, if any, and by paying all amounts that would have been due and owing under the terms of the applicable payment plan, absent default, on the date on which service is reconnected; and

(e) Advise the customer in writing at the time it disconnects service that it will restore service if the customer contacts the utility and fulfills the other requirements of this section.

(6) A payment plan implemented under this section is consistent with RCW **80.28.080**.

(7) Every gas company and electrical company shall offer residential customers the option of a budget billing or equal payment plan. The budget billing or equal payment plan shall be offered low-income customers eligible under the state's plan for low-income energy assistance prepared in accordance with 42 U.S.C. 8624(C)(1) without limiting availability to certain months of the year, without regard to the length of time the customer has occupied the premises, and without regard to whether the customer is the tenant or owner of the premises occupied.

(8) Every gas company, electrical company, wastewater company, and water company shall construct and maintain such facilities in connection with the manufacture and distribution of its product, or provision of its services, as will be efficient and safe to its employees and the public.

(9) An agreement between the customer and the utility, whether oral or written, does not waive the protections afforded under this chapter.

(10) In establishing rates or charges for water service, water companies as defined in RCW **80.04.010** may consider the achievement of water conservation goals and the discouragement of wasteful water use practices.

[ 2011 c 214 § 11; 2008 c 299 § 35; 1995 c 399 § 211. Prior: 1991 c 347 § 22; 1991 c 165 § 4; 1990 1st ex.s. c 1 § 5; 1986 c 245 § 5; 1985 c 6 § 25; 1984 c 251 § 4; 1961 c 14 § 80.28.010; prior: 1911 c 117 § 26; RRS § 10362.]

#### NOTES:

**Findings—Purpose—Limitation of chapter—Effective date—2011 c 214:** See notes following RCW **80.04.010**.

**Short title—2008 c 299:** See note following RCW **35.105.010**.

**Purposes—1991 c 347:** See note following RCW **90.42.005**.

**Findings—1991 c 165:** See note following RCW **35.21.300**.

**RCW 80.28.050****Tariff schedules to be filed with commission—Public schedules.**

Every gas company, electrical company, wastewater company, and water company shall file with the commission and shall print and keep open to public inspection schedules in such form as the commission may prescribe, showing all rates and charges made, established or enforced, or to be charged or enforced, all forms of contract or agreement, all rules and regulations relating to rates, charges or service, used or to be used, and all general privileges and facilities granted or allowed by such gas company, electrical company, wastewater company, or water company.

[ 2011 c 214 § 15; 1961 c 14 § 80.28.050. Prior: 1911 c 117 § 27; RRS § 10363.]

**NOTES:**

**Findings—Purpose—Limitation of chapter—Effective date—2011 c 214:** See notes following RCW 80.04.010.

*Duty of company to fix rate for wholesale power on request of public utility district: RCW 54.04.100.*

**RCW 80.28.090****Unreasonable preference prohibited.**

No gas company, electrical company, wastewater company, or water company may make or grant any undue or unreasonable preference or advantage to any person, corporation, or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[ 2011 c 214 § 18; 1961 c 14 § 80.28.090. Prior: 1911 c 117 § 30; RRS § 10366.]

**NOTES:**

**Findings—Purpose—Limitation of chapter—Effective date—2011 c 214:** See notes following RCW 80.04.010.

**RCW 80.28.100****Rate discrimination prohibited—Exception.**

No gas company, electrical company, wastewater company, or water company may, directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, electricity, wastewater company services, or water, or for any service rendered or to be rendered, or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like or contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

[ 2011 c 214 § 19; 1961 c 14 § 80.28.100. Prior: 1911 c 117 § 31; RRS § 10367.]

**NOTES:**

**Findings—Purpose—Limitation of chapter—Effective date—2011 c 214:** See notes following RCW 80.04.010.

*Reduced utility rates for low-income senior citizens and other low-income citizens: RCW 74.38.070.*

## **WAC 480-100-001**

### **Purpose.**

The legislature has declared that operating as an electric utility in the state of Washington is a business affected with the public interest and that such utilities should be regulated. The purpose of these rules is to administer and enforce chapter **80.28** RCW by establishing rules of general applicability and requirements for:

- Consumer protection;
- Financial records and reporting;
- Electric metering; and
- Electric safety and standards.

[Statutory Authority: RCW **80.01.040** and **80.04.160**. WSR 01-11-004 (Docket No. UE-990473, General Order No. R-482), § 480-100-001, filed 5/3/01, effective 6/3/01.]

**WAC 480-100-033****Distribution line extension tariff.**

Each electric utility must file, as a part of its tariff, a distribution line extension rule setting forth the conditions under which it will extend its facilities to make service available to an applicant.

[Statutory Authority: RCW **80.01.040** and **80.04.160**. WSR 01-11-004 (Docket No. UE-990473, General Order No. R-482), § 480-100-033, filed 5/3/01, effective 6/3/01.]

## WAC 480-100-123

### Refusal of service.

(1) An electric utility may refuse requests to provide service to a master meter in a building with permanent occupants when all of the following conditions exist:

- (a) The building or property has more than one dwelling unit;
- (b) The occupants control a significant part of the electricity used in the individual units; and
- (c) It is cost-effective for the occupants to have the utility purchase and install individual meters considering the long-run benefits of measuring and billing each occupant's electric use separately.

(2) The utility may refuse to provide new or additional service if:

- (a) Providing service does not comply with government regulations or the electric industry accepted standards concerning the provision of service;
- (b) In the utility's reasonable judgment, the applicant's or customer's installation of wiring or electrical equipment is considered hazardous or of such a nature that safe and satisfactory service cannot be provided;
- (c) The applicant or customer does not comply with the utility's request that the applicant or customer provide and install protective devices, when the utility, in its reasonable judgment deems such protective devices are necessary to protect the utility's or other customers' properties from theft or damage;
- (d) After reasonable efforts by the responsible party, all necessary rights of way, easements, approvals, and permits have not been secured; or
- (e) The customer is known by the utility to have tampered with or stolen the utility's property, used service through an illegal connection, or fraudulently obtained service and the utility has complied with WAC 480-100-128(2), disconnection of service.

(3) An electric utility may not refuse to provide new or additional service to a residential applicant or residential customer who has a prior obligation. A prior obligation is the dollar amount, excluding deposit amounts owed, the utility has billed to the customer and for which the utility has not received payment at the time the service has been disconnected for nonpayment. The utility must provide service once the customer or applicant has paid all appropriate deposit and reconnection fees. This subsection does not apply to customers that have been disconnected for failure to honor the terms of a winter low-income payment program.

(4) The utility may not refuse to provide service to an applicant or customer because there are outstanding amounts due from a prior customer at the same premises, unless the utility can determine, based on objective evidence, that a fraudulent act is being committed, such that the applicant or customer is acting in cooperation with the prior customer with the intent to avoid payment.

(5) The utility may refuse to provide new or additional service for reasons not expressed in subsections (1) and (2) of this section, upon prior approval of the commission. The commission may grant the request upon determining that the utility has no obligation to provide the requested service under RCW 80.28.110. Prior to seeking commission approval, the utility must work with the applicant or customer requesting service to seek resolution of the issues involved.

(6) Any applicant or customer who has been refused new or additional service may file with the commission an informal complaint under WAC 480-07-910, Informal complaints; or a formal complaint under WAC 480-07-370, Pleadings—General.

[Statutory Authority: RCW 80.01.040 and 80.04.160. WSR 03-24-028 (General Order R-510, Docket No. A-010648), § 480-100-123, filed 11/24/03, effective 1/1/04; WSR 01-24-076 (General Order No. R-495, Docket No. UE-990473), § 480-100-123, filed 12/3/01, effective 1/3/02.]

## **WAC 480-100-388**

### **Electric service reliability definitions.**

"Electric service reliability" means the continuity of electric service experienced by retail customers.

"Reliability statistic" means a number, which may include multiple components (for example, service interruptions, customers, and hours), that measures electric service reliability.

"Baseline reliability statistic" means a number calculated by the utility measuring aspects of electric service reliability in a specified year that may be used as a comparison for measuring electric service reliability in subsequent years.

"Sustained interruption" means an interruption to electric service that has a length of duration specified by the electric utility, but in any case not less than one minute.

"Power quality" means characteristics of electricity, primarily voltage and frequency, that must meet certain specifications for safe, adequate and efficient operations.

"Full-system" means all equipment and lines necessary to serve retail customers whether for the purpose of generation, transmission, distribution or individual service.

"Major event" means an event, such as a storm, that causes serious reliability problems, and that meets criteria established by the utility for such an event.

[Statutory Authority: RCW **80.01.040**. WSR 01-08-009 (Docket No. UE-991168, General Order No. R-478), § 480-100-388, filed 3/22/01, effective 4/22/01.]

KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Hiatt v. Western Plastics, Inc., Ill.App. 2  
Dist., December 29, 2014

211 Ill.2d 32

Supreme Court of Illinois.

Christy ADAMS, Special Adm'r of the Estate  
of Janice Adams, Deceased, Appellee,

v.

NORTHERN ILLINOIS GAS COMPANY, Appellant.

No. 94748.

|  
April 1, 2004.

|  
Rehearing Denied May 24, 2004.

### Synopsis

**Background:** Special administrator of estate of gas customer who died as a result of a natural gas explosion and fire at her home brought a wrongful death suit against natural gas company and owner of home. The Circuit Court, Cook County, Sophia Hall, J., granted summary judgment in favor of gas company. Estate appealed. After modifying its opinion, the Appellate Court reversed and remanded, 333 Ill.App.3d 215, 266 Ill.Dec. 411, 774 N.E.2d 850. Gas company petitioned for leave to appeal.

**Holdings:** Upon grant of petition, the Supreme Court, Freeman, J., held that:

[1] gas company that had knowledge of appliance connector danger owed customer a duty to warn her of such danger, and

[2] liability limitation provision in gas company's tariff did not abrogate duty.

Affirmed.

Garman, J., dissented and filed an opinion in which Fitzgerald and Thomas, JJ., joined.

### West Headnotes (44)

#### [1] Judgment

~ Nature of summary judgment

Purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists.

115 Cases that cite this headnote

#### [2] Judgment

~ Presumptions and burden of proof

In determining whether a genuine issue as to any material fact exists so as to preclude summary judgment, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent.

124 Cases that cite this headnote

#### [3] Judgment

~ Absence of issue of fact

A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts.

75 Cases that cite this headnote

#### [4] Judgment

~ Nature of summary judgment

#### Judgment

~ Necessity that right to judgment be free from doubt

The use of the summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit; however, it is a drastic means of disposing of litigation and, therefore, should be allowed only when the right of the moving party is clear and free from doubt.

63 Cases that cite this headnote

**[5] Appeal and Error**

-~ Cases Triable in Appellate Court

In appeals from summary judgment rulings, review is de novo.

47 Cases that cite this headnote

**[6] Negligence**

-~ Elements in general

To prevail in an action for negligence, the plaintiff must establish that the defendant owed a duty of care, that the defendant breached that duty, and that the plaintiff incurred injuries proximately caused by the breach.

22 Cases that cite this headnote

**[7] Negligence**

-~ Duty as question of fact or law generally

**Negligence**

-~ Negligence as question of fact or law generally

**Negligence**

-~ Proximate Cause

The existence of a duty is a question of law for the court to decide; however, the issues of breach and proximate cause are factual matters for a jury to decide provided there is a genuine issue of material fact regarding those issues.

8 Cases that cite this headnote

**[8] Negligence**

-~ Necessity and Existence of Duty

**Negligence**

-~ Breach of Duty

There can be no recovery in tort for negligence unless the defendant has breached a duty owed to the plaintiff.

5 Cases that cite this headnote

**[9] Negligence**

-~ Relationship between parties

Duty is a question of whether the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.

10 Cases that cite this headnote

**[10] Negligence**

-~ Necessity and Existence of Duty

In determining whether a duty exists, a court looks to certain relevant factors, including: (1) the reasonable foreseeability that the defendant's conduct may injure another; (2) the likelihood of an injury occurring; (3) the magnitude of the burden of guarding against such injury; and (4) the consequences of placing that burden on the defendant.

7 Cases that cite this headnote

**[11] Gas**

-~ Care required in general

Gas is a dangerous substance or commodity when it is not under control.

1 Cases that cite this headnote

**[12] Gas**

-~ Nature and grounds of liability

A gas company is not liable as an insurer for injuries sustained as the result of the escape of gas; rather, the company is liable for its negligence in permitting the gas to escape.

Cases that cite this headnote

**[13] Gas**

-~ Care required in general

A gas company must exercise a degree of care to prevent the escape of gas from its pipes commensurate with or proportional to the level of danger which it is the company's duty to avoid.

Cases that cite this headnote

**[14] Gas**

~ Care required in general

While a gas company must exercise the requisite degree of care so that no injury occurs in the distribution of gas while it is under the company's control, such responsibility is limited to the time the gas is in the company's own pipes.

Cases that cite this headnote

**[15] Gas**

~ Defects, acts or omissions causing injury

Where a gas company does not install the pipes or fixtures on a customer's premises, and does not own them and has no control over them, the company is not responsible for their condition or for their maintenance, and as a result is not liable for injuries caused by a leak therein of which the company had no knowledge.

Cases that cite this headnote

**[16] Negligence**

~ Necessity and Existence of Duty

A person's duty can extend no further than the person's right, power, and authority to implement it.

3 Cases that cite this headnote

**[17] Gas**

~ Inspection

Gas company employees do not have the right to enter the premises of their customers to inspect pipes or fixtures except upon the license or permission of the owner.

Cases that cite this headnote

**[18] Gas**

~ Care required in general

The consumer, by application for gas service, assumes the burden of inspecting and maintaining the pipes and fittings on the

consumer's property in a manner reasonably suited to meet the required service.

Cases that cite this headnote

**[19] Gas**

~ Defects, acts or omissions causing injury

The gas company has the right to assume that the customer's interior system of pipes and fittings is sufficiently secure to permit the gas to be introduced with safety.

Cases that cite this headnote

**[20] Negligence**

~ Knowledge or notice

In a negligence action, knowledge of the facts out of which the duty to act arises is essential; in order that an act or omission may be regarded as negligent, the defendant must have knowledge, or ought to have known from the circumstances, that the allegedly negligent act or omission endangered another.

2 Cases that cite this headnote

**[21] Gas**

~ Defects, acts or omissions causing injury

The common law rule of no duty of a gas company with respect to a consumer's pipes or fittings is premised on the gas company's lack of knowledge or notice of a gas leak.

1 Cases that cite this headnote

**[22] Gas**

~ Defects, acts or omissions causing injury

Where it appears that a gas company has knowledge that gas is escaping in a building occupied by one of its consumers it becomes the duty of the gas company to shut off the gas supply until the necessary repairs have been made although the defective pipe or apparatus does not belong to the company and is not in its charge or custody.

1 Cases that cite this headnote

**[23] Gas**

~ Care required in general

Whenever a gas company is in possession of facts that would suggest to a person of ordinary care and prudence that an appliance of a customer is leaking or is otherwise unsafe for the transportation of gas, the company has a duty to investigate, as a person of ordinary care and prudence similarly situated and handling such a dangerous substance would do, before it continues to furnish additional gas.

Cases that cite this headnote

**[24] Gas**

~ Care required in general

The duty to exercise reasonable diligence to inspect or shut off the gas supply is measured by the likelihood of injury; circumstances may be such as to require a gas company to investigate immediately and shut off the gas supply until repairs are made.

Cases that cite this headnote

**[25] Gas**

~ Care required in general

Knowledge that would impose on a gas company a duty to investigate a gas leak in an appliance on a customer's premises is not limited to actual knowledge, but may include constructive knowledge or notice; it is sufficient if the gas company received facts which would have made the defects known to an ordinary prudent person.

1 Cases that cite this headnote

**[26] Gas**

~ Nature and grounds of liability

The rule in Illinois as to the liability of a gas company is such company is responsible for a customer's pipe if it has knowledge of a leak or of a possible defect therein.

Cases that cite this headnote

**[27] Products Liability**

~ Care required

**Products Liability**

~ Component parts

**Products Liability**

~ Foreseeable or intended use

When a party can reasonably foresee that its product will be used as an integral component of a defective and unreasonably dangerous product, there is a duty upon that party to undertake corrective action to alleviate, if possible, the hazard; the duty is simply to use reasonable care in dealing with the hazard, including a duty to warn.

1 Cases that cite this headnote

**[28] Gas**

~ Care required in general

Natural gas company owed customer a common law duty of reasonable care to warn of danger associated with brazed gas appliance connector; company had actual knowledge that the sulfides in gas corroded brazed connectors, ultimately causing a gas leak.

1 Cases that cite this headnote

**[29] Public Utilities**

~ Regulation of Charges

A "tariff" is a public document setting forth services being offered, rates and charges with respect to services, and governing rules, regulations, and practices relating to those services.

8 Cases that cite this headnote

**[30] Public Utilities**

~ Regulation of Charges

A public utility tariff is usually drafted by the regulated utility, but when duly filed with the Illinois Commerce Commission, it binds both the utility and the customer and governs their relationship. S.H.A. 220 ILCS 5/9-102.

5 Cases that cite this headnote

**[31] Public Utilities**

~ Regulation of Charges

Once the Illinois Commerce Commission approves a public utility tariff, it is a law, not a contract, and has the force and effect of a statute. S.H.A. 220 ILCS 5/9–102.

3 Cases that cite this headnote

**[32] Public Utilities**

~ Regulation

A liability limitation tariff provision provides the source for, and determines the nature and extent of, a public utility's service obligations to its customers.

1 Cases that cite this headnote

**[33] Carriers**

~ Rates of freight

The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff; it does not serve as a shield against all actions based in state law.

1 Cases that cite this headnote

**[34] Public Utilities**

~ Regulation

Where a utility tariff speaks to a specific duty, the tariff may be controlling; however, where the tariff does not address a particular situation, the common law applies and a common law duty analysis must be applied.

1 Cases that cite this headnote

**[35] Gas**

~ Defects, acts or omissions causing injury

Limitation of liability provision in natural gas tariff that stated that the customer was

responsible for maintaining all gas utilization equipment on customer's premises did not abrogate gas company's common law duty to warn customer of a gas leak in a customer's gas appliance if the company had knowledge of such a leak or knowledge that the appliance was unsafe for transporting gas, where the tariff did not expressly disavow the common law duty.

2 Cases that cite this headnote

**[36] Public Utilities**

~ Regulation of Charges

Although a utility tariff is not a legislative enactment, its interpretation is governed by the rules of statutory construction.

Cases that cite this headnote

**[37] Statutes**

~ Intent

The cardinal rule of interpreting statutes, to which all other canons and rules are subordinate, is to ascertain and give effect to the intent of the legislature.

2 Cases that cite this headnote

**[38] Statutes**

~ Presumptions, inferences, and burden of proof

Although a court should first consider the statutory language, a court must presume that the legislature, in enacting a statute, did not intend absurdity or injustice.

3 Cases that cite this headnote

**[39] Municipal Corporations**

~ Construction and operation

**Statutes**

~ Reason, reasonableness, and rationality

A statute or ordinance must receive a sensible construction, even though such construction qualifies the universality of its language.

3 Cases that cite this headnote

**[40] Public Utilities**

- Nature and extent in general

Utility rate regulation is one of legislative control and is not a judicial function.

Cases that cite this headnote

**[41] Public Utilities**

- Constitutional and statutory provisions

The Public Utilities Act is in derogation of the common law; accordingly, the Act is to be strictly construed in favor of persons sought to be subjected to its operation, and thus, the statute is to be strictly construed in favor of the utility company. S.H.A. 220 ILCS 5/9-102.

6 Cases that cite this headnote

**[42] Public Utilities**

- Regulation of Charges

Because the utility company drafts a tariff, it is generally accepted that language in a tariff, especially exculpatory language, is to be strictly construed against the utility company and in favor of the customer.

2 Cases that cite this headnote

**[43] Statutes**

- Liberal or strict construction

A court cannot construe a statute in derogation of the common law beyond what the words of the statute expresses or beyond what is necessarily implied from what is expressed.

9 Cases that cite this headnote

**[44] Statutes**

- Common or civil law

In construing statutes in derogation of the common law, a court will not presume that an innovation thereon was intended further than

the innovation which the statute specifies or clearly implies.

11 Cases that cite this headnote

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**Opinion**

Justice FREEMAN delivered the opinion of the court:

Plaintiff, Christy Adams, as special administrator of the estate of Janice Adams, **\*\*1253 \*\*\*307** brought a wrongful-death action in the circuit court of Cook County against Northern Illinois Gas Company (NI-Gas). The circuit court granted NI-Gas' motion for summary judgment. The appellate court reversed the grant of summary judgment in favor of NI-Gas and remanded the cause for further proceedings. 333 Ill.App.3d 215, 266 Ill.Dec. 411, 774 N.E.2d 850. We allowed NI-Gas' petition for leave to appeal (177 Ill.2d R. 315(a)), and now affirm the appellate court.

**BACKGROUND**

The record contains the following pertinent evidence. Since 1971, Janice Adams (decedent) resided in a house located at 1294 Greenbay Avenue in Calumet City. Decedent's mother, Lucia Georgevich, bought the house, but decedent paid the mortgage and the utilities. Various appliances in the house, including a range, were fueled by natural gas.

\*37 On the evening of December 7, 1995, decedent arrived home, opened a door, and stepped inside. The house exploded and was engulfed in flames, causing her death.

First at the scene was the Calumet City fire department. Assistant chief Dan Smits and fire investigator Joe Ratkovich investigated the cause and origin of the explosion. Smits saw the fire and saw that the walls of the house had been blown out. He observed the body of decedent just inside what had been an entrance to the house. Smits inspected the gas meter, gas piping, and gas appliances and directed that all those items be removed and preserved.

The Calumet City fire department determined that the cause of the explosion and fire was the failure of the flexible brass gas connector that connected the kitchen range to the gas supply. The brand name of the connector was "Cobra." Failure of the connector permitted a large amount of natural gas to escape and accumulate in the house. When decedent entered the house and turned on an electric light, a small spark from the switch ignited the gas. The Illinois State Fire Marshall, the United States Bureau of Alcohol, Tobacco and Firearms, and the private fire investigator employed by the homeowner's insurance carrier also investigated the explosion and all agreed that it was caused by the failure of the gas connector to the range.

Plaintiff, one of decedent's daughters, brought a wrongful-death action in a two-count, first amended complaint. Count II named NI-Gas as a defendant.<sup>1</sup> Plaintiff alleged that NI-Gas "knew that Cobra brand natural gas appliance connectors were defective and prone to failure resulting in natural gas leaks and explosions." Plaintiff alleged that NI-Gas "had a duty to warn its customers, including plaintiff's decedent, about the existence of Cobra brand \*38 natural gas appliance connectors and the dangers of natural gas leak, explosion and fire associated with these connectors." Plaintiff alleged that NI-Gas breached this duty to warn in that NI-Gas: failed to provide (a) any or (b) adequate \*\*1254 \*\*\*308 warning; (c) used an ineffective means to inform customers; (d) failed to initiate an inspection program to identify and remove Cobra brand natural gas appliance connectors from customer homes and businesses; and (e) failed to properly inspect decedent's home "to cause the removal of the aforesaid Cobra brand connector."

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Count I named Georgevich as a defendant. Plaintiff alleged that Georgevich owed decedent "a duty of ordinary care to insure the aforesaid premises was reasonably safe for occupancy;" and that Georgevich breached this alleged duty by (a) failing "to inspect and/or cause the inspection of the aforesaid premises for fire safety and prevention;" and (b) permitting the occupancy of the house "when not reasonably safe to do so." Georgevich filed an unopposed motion for summary judgment against plaintiff. Georgevich contended that she had no duty of care with respect to decedent's house. She argued that although she owned decedent's house, it was in decedent's exclusive possession and control. The circuit court granted the motion.

The record includes the depositions of several opinion witnesses, including Charles Lamar, Wayne Genck, Norman Breyer, and Edward Karnes. Their testimony adduced the following additional evidence.

The connector in this case was manufactured by the Cobra Hose Company, which has been out of business since 1979. Made as early as 1953, Cobra connectors were widely used in Illinois and other states. The Cobra connector essentially was a corrugated flexible brass tube with threaded brass connectors at each end that connect a gas appliance to the hard pipe gas source. The threaded connectors were telescoped and fastened to the ends of the corrugated brass tube by a process known as brazing. The compound used in the brazing process is composed of phosphorized brazing alloys containing a substantial portion of phosphorous and a high percentage of copper.

\*39 It is undisputed that natural gas, in its original state, is odorless. The chemical ethyl mercaptan, which is a sulfur component, is added as an odorant to give natural gas its distinctive smell. In addition to sulfur that is intentionally added, natural gas itself produces sulfur compounds through intrinsic chemical reactions. By law, NI-Gas is required to supply odorized gas to its customers as a safety precaution, so that customers more easily can detect a gas leak. The natural gas that NI-Gas supplied to decedent was as the law required it to be.

However, when sulfur is added to natural gas, as in the present case, a chemical reaction begins to occur between the phosphorous brazing alloy and the sulfur. This chemical reaction causes the brazed joint to corrode and deteriorate. Over time, the deterioration of the brazed

joint results in its separation from the corrugated tube and the consequent release of natural gas into the home. Even the naturally occurring sulfides in the gas are sufficient to cause the brazed connector eventually to fail.

In 1968, the American National Standards Institute (ANSI)<sup>2</sup> revised its standards on gas connectors and banned phosphorous brazing. ANSI's Z21 subcommittee on connectors is the committee that has jurisdiction over all domestic standards for natural gas ranges, furnaces, water heaters, and connectors. The Z21 specifications were modified to warn that the use of brazing compounds that contain phosphorous can result in a brittle joint and can be deadly.

<sup>2</sup> The American National Standards Institute (ANSI) "is a voluntary membership organization that develops consensus standards nationally for a wide variety of devices and procedures." *Thatcher v. TWA*, 69 S.W.3d 533, 536 (Mo.App.2002); accord *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill.2d 260, 269, 266 Ill.Dec. 892, 775 N.E.2d 964 (2002).

The record contains evidence that NI-Gas was aware of the potential danger in homes using Cobra connectors. \*40 In May 1976, NI-Gas' supervisor of Research Services reported to the Z21 subcommittee that the "sudden, mysterious separation of brass connectors and their brazed-on end fittings has been a concern of gas utility people for several years." In a letter dated December 14, 1979, the United States Consumer Product Safety Commission informed \*\*1255 \*\*\*309 the American Gas Association (AGA) that Cobra connectors allegedly caused a number of fires in homes. According to the letter, while some jurisdictions did not allow the installation of Cobra connectors, many such connectors "may still be in service, and therefore may be susceptible to creating a significant hazard to the occupants of those residences equipped with such connectors." On December 19, the president of the AGA sent a letter to all its member companies, including NI-Gas, stating that the Commission had notified AGA that Cobra connectors had an increasing potential to fail over time.

The record also includes copies of "Consumer News" notices that NI-Gas sent to its customers. The August/September 1978, June/July 1980, summer/fall 1981, and December 1981 notices indicated that an old connector could crack, creating an unsafe condition, when the

appliance was moved. The December 1981, January 1985, May 1986, and June 1987 notices warned: "The U.S. Consumer Product Safety Commission has warned that certain appliance connectors manufactured prior to 1968 may be unsafe. If you are concerned, do not try to move the appliance to inspect the connector. Instead, call a qualified service agency of NI-Gas to make the inspection."

Also, NI-Gas knew that failed Cobra connectors were determined to have caused many explosions and fires within its service area, including Aurora, Evanston, and Rockford. In the 1970s there were a series of fires in the Village of South Holland associated with brazed connectors. Wayne Kortum, a volunteer firefighter in South Holland and a NI-Gas employee, informed NI-Gas \*41 supervisors at the Glenwood district office, the district that includes the decedent's home, about the connectors involved with these fires. Thereafter, Kortum attended a general meeting at the Glenwood office where NI-Gas supervisors informed him and other service employees that there were problems with brazed connectors and that the service employees should look for these connectors in customers' homes.

In November 1984, NI-Gas representatives participated in a meeting with officials from the Village of Skokie. The Skokie fire department had determined that several fires and an explosion in the Village were related to brazed connector failures. Carol Anderson, one of the NI-Gas attendees, testified that in the 1980s she was aware that brazed connectors were a hazard. According to John Agosti, a Skokie fire official, NI-Gas represented that it would notify its service and construction personnel about replacing brazed connectors. In turn, these employees would warn the NI-Gas customers with whom they came in contact.

Charles Henry, a trained NI-Gas serviceman, testified in a deposition as follows. NI-Gas instructed its service employees on the potential danger of Cobra connectors. When a NI-Gas employee encountered a brazed connector, the employee was required to tag the connector and advise the customer that the connector needed to be replaced as soon as possible.

Decedent's ex-husband, Leonard Adams, testified in a deposition as follows. He had observed NI-Gas employees read the gas meter in the utility room of

decedent's home on occasion, but they did not examine anything in the house other than the meter. In 1978 or 1980, after having a new clothes drier installed by the appliance retailer, a gas leak was detected. Decedent telephoned NI-Gas. A NI-Gas employee came to the house and checked the gas pipe between the meter and the clothes \*42 drier. The employee discovered \*\*1256 \*\*\*310 that the pipe was leaking and tightened it; he did not do anything else.

NI-Gas moved for summary judgment against plaintiff. NI-Gas contended that it did not owe decedent a legal duty to warn her that her Cobra connector was potentially hazardous because decedent owned the connector and not NI-Gas. The circuit court granted NI-Gas' motion for summary judgment against plaintiff.<sup>3</sup>

<sup>3</sup> NI-Gas also brought a contribution claim against Georgevich. If found liable to plaintiff, NI-Gas sought contribution from Georgevich in such amount that was attributable to Georgevich's relative fault. Georgevich subsequently moved for summary judgment on NI-Gas' contribution claim against her. After granting NI-Gas' motion for summary judgment against plaintiff, the circuit court ruled that Georgevich's motion for summary judgment on NI-Gas' contribution claim was moot.

Plaintiff appealed. Initially, the appellate court, with one justice dissenting, affirmed the grant of summary judgment in favor of NI-Gas, holding that NI-Gas did not owe decedent a legal duty. However, the appellate court modified its opinion upon denial of plaintiff's petition for rehearing. In its modified opinion, the appellate court, *inter alia*, reversed the grant of summary judgment in favor of NI-Gas. The appellate court held, "as a matter of law, that a utility company that has actual knowledge of a dangerous condition associated with the use of its product has a responsibility to its customers to warn them of that danger." 333 Ill.App.3d at 224, 266 Ill.Dec. 411, 774 N.E.2d 850.

This court allowed NI-Gas' petition for leave to appeal. 177 Ill.2d R. 315(a). We subsequently granted the People's Gas Light and Coke Company *et al.* leave to submit an *amicus curiae* brief in support of NI-Gas. See 155 Ill.2d R. 345.

## ANALYSIS

[1] This matter is before us on the grant of summary judgment in favor of NI-Gas. The purpose of summary \*43 judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists. *Happel v. Wal-Mart Stores, Inc.*, 199 Ill.2d 179, 186, 262 Ill.Dec. 815, 766 N.E.2d 1118 (2002); *Gilbert v. Sycamore Municipal Hospital*, 156 Ill.2d 511, 517, 190 Ill.Dec. 758, 622 N.E.2d 788 (1993). Summary judgment is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2002).

[2] [3] [4] [5] In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts. The use of the summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit. However, it is a drastic means of disposing of litigation and, therefore, should be allowed only when the right of the moving party is clear and free from doubt. *Gilbert*, 156 Ill.2d at 518, 190 Ill.Dec. 758, 622 N.E.2d 788 (and cases cited therein); accord *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill.2d 107, 113-14, 208 Ill.Dec. 662, 649 N.E.2d 1323 (1995). In appeals from summary judgment rulings, review is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill.2d 90, 102, 180 Ill.Dec. 691, 607 N.E.2d 1204 (1992).

\*\*1257 \*\*\*311 [6] [7] Plaintiff alleged negligence on the part of NI-Gas. To prevail in an action for negligence, the plaintiff must establish that the defendant owed a duty of care, that the defendant breached that duty, and that the plaintiff incurred injuries proximately caused by the breach. *Espinoza*, 165 Ill.2d at 114, 208 Ill.Dec. 662, 649 N.E.2d 1323; *Ward v. K mart Corp.*, 136 Ill.2d 132, 140, 143 Ill.Dec. 288, 554 N.E.2d 223 (1990). The existence of a duty is a question of law for the court to decide; however, the issues of breach \*44 and proximate cause are factual matters for a jury to decide (*Thompson v. County of Cook*,

154 Ill.2d 374, 382, 181 Ill.Dec. 922, 609 N.E.2d 290 (1993)), provided there is a genuine issue of material fact regarding those issues (*Espinoza*, 165 Ill.2d at 114, 208 Ill.Dec. 662, 649 N.E.2d 1323).

In this case, the sole inquiry before us concerns the existence of a legal duty. Plaintiff asserts that NI-Gas owed decedent a duty to warn her that Cobra connectors were potentially hazardous. NI-Gas denies that it had such a duty because decedent owned the connector and not NI-Gas.

[8] [9] [10] There can be no recovery in tort for negligence unless the defendant has breached a duty owed to the plaintiff. *Boyd v. Racine Currency Exchange, Inc.*, 56 Ill.2d 95, 97, 306 N.E.2d 39 (1973); accord *LaFever v. Kemlite Co.*, 185 Ill.2d 380, 388, 235 Ill.Dec. 886, 706 N.E.2d 441 (1998). Duty is a question of whether the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. In determining whether a duty exists, a court looks to certain relevant factors, including: (1) the reasonable foreseeability that the defendant's conduct may injure another, (2) the likelihood of an injury occurring, (3) the magnitude of the burden of guarding against such injury, and (4) the consequences of placing that burden on the defendant. *Happel*, 199 Ill.2d at 186–87, 262 Ill.Dec. 815, 766 N.E.2d 1118; *Ward*, 136 Ill.2d at 140–41, 143 Ill.Dec. 288, 554 N.E.2d 223; *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill.2d 507, 526, 111 Ill.Dec. 944, 513 N.E.2d 387 (1987). In support of their respective positions, the parties invoke two sources of law: (1) the common law, and (2) NI-Gas' tariff on file with the Illinois Commerce Commission.

#### I. Common Law

American consumers have been using gas as fuel for illumination or heat for over a century. Courts from across the nation, including Illinois courts, long ago considered the factors in determining the existence of a duty with respect to the duties that gas distributors owe \*45 to their customers concerning escaping gas. The common law, which is always heedful of realities when it formulates rules to govern conduct (*Graham v. North Carolina Butane Gas Co.*, 231 N.C. 680, 684–85, 58 S.E.2d 757, 761 (1950)), has established the following principles.

[11] [12] [13] Gas is a dangerous substance or commodity when it is not under control. *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill.2d 446, 450, 207 N.E.2d 305 (1965); *McClure v. Hoopston Gas & Electric Co.*, 303 Ill. 89, 97, 135 N.E. 43 (1922); accord *Suiter v. Ohio Valley Gas Co.*, 10 Ohio St.2d 77, 78, 39 O.O.2d 65, 225 N.E.2d 792, 793 (1967); *Bellefui v. Willmar Gas Co.*, 243 Minn. 123, 126, 66 N.W.2d 779, 782 (1954); *Graham*, 231 N.C. at 684, 58 S.E.2d at 761. However, a gas company is not liable as an insurer for injuries sustained as the result of the escape of gas. Rather, the company is liable for its negligence in permitting the gas to escape. \*\*1258 \*\*\*312 *Pappas v. Peoples Gas Light & Coke Co.*, 350 Ill.App. 541, 548, 113 N.E.2d 585 (1953); accord *Bellefui*, 243 Minn. at 126, 66 N.W.2d at 782; *Graham*, 231 N.C. at 685, 58 S.E.2d at 761; 27A Am.Jur. 2d *Energy & Power Sources* § 368, at 278 (1996); 38A C.J.S. *Gas* § 119, at 143 (1996). Expressions of the degree of care that a gas company must exercise range from “reasonable” (see, e.g., *Graham*, 231 N.C. at 685, 58 S.E.2d at 761) to “high” (see, e.g., *McClure*, 303 Ill. at 97, 135 N.E. 43). This variety of expression simply means that a gas company must exercise a degree of care to prevent the escape of gas from its pipes commensurate with or proportional to the level of danger which it is the company's duty to avoid. *Metz*, 32 Ill.2d at 450, 207 N.E.2d 305; *Cosgrove v. Commonwealth Edison Co.*, 315 Ill.App.3d 651, 654–55, 248 Ill.Dec. 447, 734 N.E.2d 155 (2000); accord *Lewis v. Vermont Gas Corp.*, 121 Vt. 168, 182, 151 A.2d 297, 306 (1959); *Doxstater v. Northwest Cities Gas Co.*, 65 Idaho 814, 826–27, 154 P.2d 498, 504 (1944); *Bellefui*, 243 Minn. at 126, 66 N.W.2d at 782; 27A Am.Jur.2d *Energy & Power Sources* § 373, at 281 (1996); 38A C.J.S. *Gas* § 120, at 145–46 (1996); L. Tellier, \*46 Annotation, *Liability of Gas Co. for Injury or Damage Due to Defects in Service Lines on Consumer's Premises*, 26 A.L.R.2d 136, 146 (1952).

[14] While a gas company must exercise the requisite degree of care so that no injury occurs in the distribution of gas while it is under the company's control, such responsibility is limited to the time the gas is in the company's own pipes. *Doxstater*, 65 Idaho at 827, 154 P.2d at 504 (collecting cases). In Illinois, the seminal example of the common law rule pertaining to gas distribution in a consumer's pipes and fixtures is *Clare v. Bond County Gas Co.*, 356 Ill. 241, 190 N.E. 278 (1934).

In *Clare*, the plaintiff opened a shop and hired a plumber to install a gas stove for heat. After the installation, she noticed an offensive odor that irritated her eyes and gave her a headache. She notified the gas company. The president of the gas company visited the shop several times and made suggestions to remedy the situation. His suggestions were followed, but the problem continued. The smell was so strong in the closet where the gas meter was located that the plaintiff kept the door to the closet closed. Several weeks after the unsuccessful attempts to locate the source of the problem, a friend of the plaintiff was looking for a screwdriver. He lit a match to help him look for it in the dark closet. He opened the closet door and an explosion occurred. It was subsequently discovered that the gas pipe that ran beneath the floor contained holes caused by rust. The gas that escaped from the pipe had accumulated in the closet. *Clare*, 356 Ill. at 241–43, 190 N.E. 278. Appealing a judgment in favor of plaintiff, the gas company contended that “there was no evidence in the record to warrant the finding that it [the gas company] had notice and knowledge that the pipes were leaking and gas was escaping into the building; that without such notice or knowledge there was no duty incumbent upon it to shut off the gas supply.” *Clare*, 356 Ill. at 243, 190 N.E. 278.

[15] \*47 Reversing the judgment in favor of plaintiff, *Clare* relied on established common law: “In the absence of notice of defects it is not incumbent upon a gas company to exercise reasonable care to ascertain whether or not service pipes under the control of the property owner or the consumer are fit for the furnishing of gas.” *Clare*, 356 Ill. at 244, 190 N.E. 278. Where a gas company does not install the pipes or fixtures on a customer's premises, and does not own them and has no control over them, the company is not responsible for their condition or for their maintenance., \*\*1259 \*\*\*313 and as a result is not liable for injuries caused by a leak therein of which the company had no knowledge. *Clare*, 356 Ill. at 244, 190 N.E. 278 (collecting cases). *Clare* looked to the common law as evolved up to that time and today continues to accord with our understanding of the common law rule. Accord *Oliver v. Peoples Gas Light & Coke Co.*, 5 Ill.App.3d 1093, 1099, 284 N.E.2d 432 (1972); accord *Bellefui*, 243 Minn. at 126, 66 N.W.2d at 782 (discussing rule in context of gas appliances); *Doxstater*, 65 Idaho at 827–28, 154 P.2d at 504, quoting *Kelley v. Public Service Co. of Northern Illinois*, 300 Ill.App. 354, 362, 21 N.E.2d 43 (1939); 27A Am.Jur.2d *Energy & Power Sources* §§ 394, 395 (1996) (stating rule in context of appliances); 27A

Am.Jur.2d *Energy & Power Sources* § 403 (1996) (stating general rule); 38A C.J.S. *Gas* § 123, at 151–53 (1996); 26 A.L.R.2d at 156.

[16] [17] [18] [19] Courts reason that a person's duty can extend no further than the person's right, power, and authority to implement it. Gas company employees do not have the right to enter the premises of their customers to inspect pipes or fixtures except upon the license or permission of the owner. *Clare*, 356 Ill. at 244, 190 N.E. 278. The consumer, by application for gas service, assumes the burden of inspecting and maintaining the pipes and fittings on the consumer's property in a manner reasonably suited to meet the required service. The company has the right to assume that the customer's interior system of pipes and \*48 fittings is sufficiently secure to permit the gas to be introduced with safety. *Clare*, 356 Ill. at 244–45, 190 N.E. 278 (collecting cases); accord *Bellefui*, 243 Minn. at 126–27, 66 N.W.2d at 782–83; *Graham*, 231 N.C. at 685, 58 S.E.2d at 761; *Moran Junior College v. Standard Oil Co. of California*, 184 Wash. 543, 552, 52 P.2d 342, 346 (1935); 27A Am.Jur.2d *Energy & Power Sources* § 403 (1996).

[20] [21] Courts also reason that, in a negligence action, knowledge of the facts out of which the duty to act arises is essential. In order that an act or omission may be regarded as negligent, the defendant must have knowledge, or ought to have known from the circumstances, that the allegedly negligent act or omission endangered another. *Weber v. Interstate Light & Power Co.*, 268 Wis. 479, 482, 68 N.W.2d 39, 41 (1955). Accordingly, the common law rule of no duty of a gas company with respect to a consumer's pipes or fittings is premised on the gas company's lack of knowledge or notice of a gas leak. See, e.g., *Clare*, 356 Ill. at 244, 190 N.E. 278 (stating rule with proviso of gas company's lack of knowledge or notice); *Bellefui*, 243 Minn. at 129, 66 N.W.2d at 784 (“the duty, by reason of actual or constructive notice of some dangerous condition, must arise before the gas company can be found negligent for its failure to inspect or shut off the gas supply”).

[22] [23] [24] [25] Considering the requirement of the gas company's knowledge or notice of a gas leak, the exception to the common law rule is evident:

“Where it appears that a gas company has knowledge that gas is escaping in a building occupied by one of its consumers it becomes the duty of the gas company to

shut off the gas supply until the necessary repairs have been made although the defective pipe or apparatus does not belong to the company and is not in its charge or custody.” *Clare*, 356 Ill. at 243–44, 190 N.E. 278.

Accord *Graham*, 231 N.C. at 685, 58 S.E.2d at 761–62 (citing *Clare* ); \*49 27A Am.Jur.2d *Energy & Power Sources* § 413, at 309–10 (1996); 38A C.J.S. *Gas* § 123, at 153–54 (1996); 26 A.L.R.2d at 150. In the \*\*1260 \*\*\*314 specific context of gas appliances, courts have gone so far as to impose on a gas company that has knowledge of a gas leak a duty to inspect:

“[W]henever a gas company is in possession of facts that would suggest to a person of ordinary care and prudence that an appliance of a customer is leaking or is otherwise unsafe for the transportation of gas, the company has a duty to investigate, as a person of ordinary care and prudence similarly situated and handling such a dangerous substance would do, before it continues to furnish additional gas. The duty to exercise reasonable diligence to inspect or shut off the gas supply is measured by the likelihood of injury. Circumstances may be such as to require a gas company to investigate immediately and shut off the gas supply until repairs are made. The nature of the notice may also affect the extent of inspection necessary.” *Bellefiuil*, 243 Minn. at 128–29, 66 N.W.2d at 783–84.

It is clear that the knowledge that would impose on a gas company this duty is not limited to actual knowledge, but may include constructive knowledge or notice. It is sufficient if the gas company received facts which would have made the defects known to an ordinary prudent person. For example, *Clare* was rendered in the context of the gas company's denial of “notice or knowledge.” (Emphasis added.) *Clare*, 356 Ill. at 243, 190 N.E. 278. Further, this court expressly—and correctly—stated the common law rule with the accepted proviso of a gas company's lack of knowledge (*Clare*, 356 Ill. at 243, 190 N.E. 278 (“Where it appears that a gas company has knowledge”)) or notice (*Clare*, 356 Ill. at 244, 190 N.E. 278 (“In the absence of notice”). See *Mrdalj v. Public Service Co. of Northern Illinois*, 308 Ill.App. 424, 430, 31 N.E.2d 978 (1941); *Kelley*, 300 Ill.App. at 362, 21 N.E.2d 43; *Kilmer v. Browning*, 806 S.W.2d 75, 83 (Mo.App.1991); *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746, 751 (Minn.1980); *Fore v. United Natural Gas Co.*, 436 Pa. 499, 504–05, 261 A.2d 316, 318–19 (1970); *Bellefiuil*, 243 Minn. at 128–29, 66 N.W.2d at 783–84.

[26] \*50 Further, *Clare* was directed not only to actual gas leaks, but also to defects. *Clare*, 356 Ill. at 244, 190 N.E. 278 (“In the absence of notice of *defects*” (emphasis added)). “The rule in Illinois as to the liability of a gas company is such company is responsible for a customer's pipe if it has knowledge of a leak *or of a possible defect therein*.” (Emphasis added.) *Oliver*, 5 Ill.App.3d at 1099, 284 N.E.2d 432; accord *Bellefiuil*, 243 Minn. at 128–29, 66 N.W.2d at 783–84 (speaking of a customer's gas appliance that “is leaking *or is otherwise unsafe* for the transportation of gas” (emphasis added)); 27A Am.Jur.2d *Energy & Power Sources* § 413, at 310 (1996) (stating “that if a gas company has notice of a leak or *defect in pipes or lines owned or controlled by a consumer*, it is under a duty to notify the consumer and see that the leak or defect is repaired, or shut off the gas”).

This common law rule and corresponding exception serve the concept that a gas company is not an insurer for any injury sustained as a result of escaping gas, but rather is liable only for its negligence. “To apply any other rule would make the gas supplier an insurer if anything went wrong with any of the appliances over which it had no control.” *Wilson v. Home Gas Co.*, 267 Minn. 162, 172, 125 N.W.2d 725, 732 (1964).

As the appellate court in this case recognized, Illinois courts have not addressed a gas company's duty to warn its customers of the possible deterioration of the customer's fixtures when they are damaged, in part, due to the gas product itself. \*\*1261 \*\*\*315 333 Ill.App.3d at 220, 266 Ill.Dec. 411, 774 N.E.2d 850. However, addressing the same facts as in this case, two decisions from other jurisdictions recognize that gas companies who have notice of the danger caused by sulfides in their gas coming in contact with brazed connectors owe common law tort duties: *Lemke v. Metropolitan Utilities District*, 243 Neb. 633, 502 N.W.2d 80 (1993), and \*51 *Halliburton v. Public Service Co. of Colorado*, 804 P.2d 213 (Colo.App.1990). We agree with the appellate court that these cases are instructive. 333 Ill.App.3d at 220–22, 266 Ill.Dec. 411, 774 N.E.2d 850.

In *Lemke*, a gas explosion destroyed the home of Lorraine and Kenneth Lemke and severely injured Lorraine. *Lemke*, 243 Neb. at 634–37, 502 N.W.2d at 82–84. The trial court found that the cause of the explosion was a Cobra connector, which failed due to the interaction of

the phosphorous brazing alloy and the gas. Although there was evidence that the Metropolitan Utilities District (MUD) installed thousands of Cobra connectors in the homes of MUD customers, there was no evidence that MUD installed the Cobra connector to the plaintiff's gas range. The court entered judgment in favor of plaintiffs. *Lemke*, 243 Neb. at 642, 502 N.W.2d at 86.

Appealing from the judgment, MUD contended "that it had no duty to notify its customers concerning a potential hazard from Cobra connectors, especially a customer who may not have purchased the connector from MUD." *Lemke*, 243 Neb. at 648, 502 N.W.2d at 90. The Nebraska Supreme Court rejected this contention.

The *Lemke* court reviewed its past statements of the earlier-discussed common law principles. The court concluded:

"Because a gas company has a nondelegable duty to exercise due care regarding natural gas supplied to a customer, a gas company's duty of care not only pertains to the company's distribution of gas through its pipelines, but extends to distribution through a customer's service line or gas appliance that the company knows, or should know, is unsafe for conducting or using gas." *Lemke*, 243 Neb. at 651, 502 N.W.2d at 91.

The court noted, as the record in this case shows, that the American Gas Association warned all of its members, including MUD, that Cobra connectors presented a danger in the distribution of natural gas. The court reasoned:

\*52 "When MUD received information about the dangerous condition or potential hazard involving Cobra connectors but did not disseminate this critical information to its customers who were using gas appliances with Cobra connectors, MUD effectively exerted control in a situation that could eventually culminate in injury to customers who continued to use gas supplied by MUD." *Lemke*, 243 Neb. at 648, 502 N.W.2d at 89.

According to the court, that information

"placed MUD on notice that its customers who had gas appliances with Cobra connectors would be endangered when the connector separated from a gas service line

or appliance. Consequently, when MUD became aware that the distribution of gas through a Cobra connector presented a risk of injury to customers, MUD had the duty to use due care, such as issuance of a warning, to protect customers \* \* \*." *Lemke*, 243 Neb. at 652, 502 N.W.2d at 92.

As in *Lemke*, NI-Gas' superior knowledge of the risks pertaining to Cobra connectors begat a duty of due care, such as issuing a warning to its customers.

In *Halliburton*, the Public Service Company of Colorado, similar to NI-Gas here, knew at least since the 1970s that a large \*\*1262 \*\*\*316 number of brazed connectors failed because of the interaction of the brazed connector and the sulfides in the gas. The court cited four reasons to impose a duty on the gas company to inspect plaintiff's brazed connector: (1) the relatively insignificant amount of time and expense that defendant would have expended to evaluate the connector and take corrective action; (2) two service calls at plaintiff's home after the gas company knew of this hazard, which affected approximately 45,000 homes in the Denver area; (3) the likelihood of the connector failing and possibly causing an explosion unless corrective action were taken; and (4) defendant's expertise in dealing with such problems. The court continued: "The most compelling reason, however, for imposing a duty upon defendant is that its product, natural gas, which contained the corrosive ethyl mercaptan, was a \*53 substantial factor in causing the deterioration of the connector tube." (Emphasis in original.) *Halliburton*, 804 P.2d at 216.

[27] At oral argument, plaintiff expressly clarified that the extent of NI-Gas' duty of reasonable care in this case should be to warn its customers of the dangers presented by its gas coming in contact with the brazed connectors. Thus, while no issue exists in this case regarding a duty to inspect every connector, we agree with the following from *Halliburton*: "When a party can reasonably foresee that its product will be used as an integral component of a defective and unreasonably dangerous product, there is a duty upon that party to undertake corrective action to alleviate, if possible, the hazard." *Halliburton*, 804 P.2d at 216. The duty is simply to use reasonable care in dealing with the hazard, including a duty to warn. *Halliburton*, 804 P.2d at 216-17. We agree with the appellate court that, "while not controlling, *Halliburton* is also instructive." 333 Ill.App.3d at 222, 266 Ill.Dec. 411, 774 N.E.2d 850.

*Halliburton* and *Lemke* acknowledged the common law rule of a gas company's lack of duty toward a customer's equipment absent knowledge of a defect, but recognized that the gas suppliers in those cases had knowledge of the danger of their product being in contact with brazed connectors. Those cases also noted that the danger in question was not one normally associated with the product and consumers were not in a position to be aware of the danger without adequate warnings. Since the gas companies helped create the danger and had superior knowledge of the hazard, they owed a responsibility to their customers with respect to that danger.

We consider *Halliburton* and *Lemke* to represent a reasoned adaptation of the common law to address the exigency presented by brazed connectors. We recognize that “[t]he growth and adaptation of the common law to our contemporary concerns should not impose impractical \*54 burdens or impossible duties.” *Hensley v. Montgomery County*, 25 Md.App. 361, 367, 334 A.2d 542, 545–46 (1975). However, it is equally clear that “[r]easonable care is not a standard beyond the reach of any enterprise.” *Weinberg v. Dinger*, 106 N.J. 469, 494, 524 A.2d 366, 379 (1987).

[28] In the present case, as in *Halliburton* and *Lemke*, there is no dispute that NI–Gas had actual knowledge of the danger. NI–Gas knew that sulfides in the gas corroded brazed connectors, ultimately causing the connectors to leak gas; it was only a question of when the connector would fail. Based on its superior knowledge and the fact that it helped to create the dangerous condition, we hold that NI–Gas owed a common law duty of reasonable care with respect to the brazed connectors.

\*\*1263 \*\*\*317 This holding is directed exclusively to the element of duty and is limited to the evidence contained in the present record. We repeat plaintiff's clarification at oral argument that NI–Gas' duty of reasonable care in this case consists only of warning and not inspection. We express no opinion as to the adequacy of NI–Gas' conduct in this case. It is for the trier of fact to determine whether NI–Gas' conduct met the standard of care required of it under the circumstances. Based on our disposition of this issue, we do not discuss other tort theories raised by the parties.

## II. Tariff

NI–Gas and supporting *amici* contend that NI–Gas' tariff on file with the Illinois Commerce Commission “is the sole source” of its duties to its customers. NI–Gas points to the following provision of its tariff on file with the Commission at the time of the explosion:

“Equipment Furnished and Maintained by Customer.

All gas utilization equipment, piping, and vents furnished by the Customer shall be suitable for the purposes hereof and shall be installed and maintained by the \*55 Customer at all times in accordance with accepted practice and in conformity with requirements of public health and safety, as set forth by the properly constituted authorities and by the Company.

The Company assumes no responsibility in connection with the installation, maintenance or operation of the Customer's equipment and reserves the right to discontinue service if such equipment is in unsatisfactory condition.”

NI–Gas contends that the plain language of this provision bars imposition of a duty in this case.

[29] [30] [31] A tariff is a public document setting forth services being offered; rates and charges with respect to services; and governing rules, regulations, and practices relating to those services. *North River Insurance Co. v. Jones*, 275 Ill.App.3d 175, 185, 211 Ill.Dec. 604, 655 N.E.2d 987 (1995). The Public Utilities Act requires public utilities such as NI–Gas to file tariffs with the Illinois Commerce Commission. 220 ILCS 5/9–102 (West 1994). A tariff is usually drafted by the regulated utility, but when duly filed with the Commission, it binds both the utility and the customer and governs their relationship. See *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 267 Kan. 760, 765, 986 P.2d 377, 381 (1999). Once the Commission approves a tariff, it “is a law, not a contract, and has the force and effect of a statute.” *Illinois Central Gulf R.R. Co. v. Sankey Brothers, Inc.*, 67 Ill.App.3d 435, 439, 23 Ill.Dec. 749, 384 N.E.2d 543 (1978), *aff'd*, 78 Ill.2d 56, 34 Ill.Dec. 328, 398 N.E.2d 3 (1979).

Illinois law in this area originates in federal law. In *Western Union Telegraph Co. v. Esteve Brothers & Co.*, 256

U.S. 566, 571–72, 41 S.Ct. 584, 586, 65 L.Ed. 1094, 1097–98 (1921). The United States Supreme Court considered the legal effect of tariffs filed pursuant to the Interstate Commerce Act:

“The Act of 1910 [36 Stat. 539, 544] introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the act the \*56 companies had a common-law liability from which they might or might not extricate themselves according to views of policy prevailing in the several states. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the \*\*1264 \*\*\*318 whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed.”

Accord *In re Illinois Bell Switching Station Litigation*, 161 Ill.2d 233, 249, 204 Ill.Dec. 216, 641 N.E.2d 440 (1994) (Miller, J., specially concurring); *J. Meyer & Co. v. Illinois Bell Telephone Co.*, 88 Ill.App.3d 53, 57, 42 Ill.Dec. 942, 409 N.E.2d 557 (1980) (both citing *Esteve Brothers*, 256 U.S. 566, 41 S.Ct. 584, 65 L.Ed. 1094).

The United States Supreme Court has described the federal filed-rate doctrine as follows: “The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.” *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227, 118 S.Ct. 1956, 1965, 141 L.Ed.2d 222, 236 (1998), quoting *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163, 43 S.Ct. 47, 49, 67 L.Ed. 183, 187 (1922). The filed-rate doctrine serves two goals: prevention of price discrimination among rate payers, and

preservation of the role of regulatory agencies in deciding reasonable rates for public utilities and services. *Fax Telecommunicaciones, Inc. v. AT & T*, 138 F.3d 479, 489 (2d Cir.1998); *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 19 (2d Cir.1994); *Qwest Corp. v. Kelly*, 204 Ariz. 25, 35, 59 P.3d 789, 799 (2002) (and cases cited therein); *Lovejoy v. AT&T Corp.*, 92 Cal.App.4th 85, 99, 111 Cal.Rptr.2d 711, 721 (2001).

Tariff provisions, such as NI-Gas' tariff, are usually referred to as liability limitations. See, e.g., *Illinois Bell Switching Station Litigation*, 161 Ill.2d at 247, 204 Ill.Dec. 216, 641 N.E.2d 440 (Miller, \*57 J., specially concurring); *Danisco*, 267 Kan. at 768, 986 P.2d at 383. Liability limitations reflect: the status of public utilities as regulated monopolies whose operations are subject to extensive restrictions; the requirements of uniform, nondiscriminatory rates; and the goal of universal service, achieved through the preservation of utility prices that virtually all customers can afford. *Illinois Bell Switching Station*, 161 Ill.2d at 249, 204 Ill.Dec. 216, 641 N.E.2d 440 (Miller, J., specially concurring). The underlying theory of liability limitations is that, because a public utility is strictly regulated, its liability should be defined and limited so that it may be able to provide service at reasonable rates. A reasonable rate is in part dependent on a rule limiting liability. *Illinois Bell Switching Station*, 161 Ill.2d at 244–46, 204 Ill.Dec. 216, 641 N.E.2d 440 (and cases cited therein); *Danisco*, 267 Kan. at 769, 986 P.2d at 384 (collecting cases). The goal is “to secure reasonable and just rates for all without undue preference or advantage to any. Since that end is attainable only by adherence to the approved rate, based upon an authorized classification, that rate represents the whole duty and the whole liability of the company.” *Western Union Telegraph Co. v. Priester*, 276 U.S. 252, 259, 48 S.Ct. 234, 235, 72 L.Ed. 555, 565 (1928), quoting *Esteve Brothers*, 256 U.S. at 572, 41 S.Ct. at 586, 65 L.Ed. at 1097.

[32] To be sure, in an action for negligence, the issue of a legal duty is generally distinguished from the issue of liability for breach of that duty. See, e.g., *Thompson*, 154 Ill.2d at 382, 181 Ill.Dec. 922, 609 N.E.2d 290. However, a “plaintiff cannot prevail against a defendant who is under no duty and equally cannot prevail against a defendant who is immune and to that extent the two concepts are the same.” 1 D. Dobbs, *Law of Torts* § 225, at 576 (2001). Illinois courts have long held that \*\*1265 \*\*\*319 a tariff provision such as the one at issue

in this case provides the source for, and determines the nature and extent of, a public utility's service obligations \*58 to its customers. *Illinois Bell Switching Station*, 161 Ill.2d at 248, 204 Ill.Dec. 216, 641 N.E.2d 440 (Miller, J., specially concurring); *J. Meyer & Co.*, 88 Ill.App.3d at 55, 42 Ill.Dec. 942, 409 N.E.2d 557; *Sarelus v. Illinois Bell Telephone Co.*, 42 Ill.App.2d 372, 374–75, 192 N.E.2d 451 (1963).

[33] “Nonetheless, all state law causes of action are not necessarily precluded.” *Pink Dot, Inc. v. Teleport Communications Group*, 89 Cal.App.4th 407, 416, 107 Cal.Rptr.2d 392, 398 (2001). As explained in *Adamson v. WorldCom Communications, Inc.*, 190 Or.App. 215, 222, 78 P.3d 577, 582 (2003):

“The filed-rate doctrine bars only an action that seeks to vary the terms of an applicable tariff. [Citation.] Thus, the effect of a tariff on a particular claim depends on the nature of the claim and the specific terms of the tariff. If the claim is one that implicates the provisions of a tariff, then the tariff controls according to its terms, which may either limit relief available or bar a claim entirely. But if the claim is unrelated to the tariff, then the claim is not limited or barred. In other words, merely because a tariff exists does not necessarily mean that a claim is barred.”

In the context of the federal filed-rate doctrine, we are reminded: “In order for the filed rate doctrine to serve its purpose, therefore, it need pre-empt only those suits that seek to alter the terms and conditions provided for in the tariff.” *Central Office*, 524 U.S. at 229, 118 S.Ct. at 1966, 141 L.Ed.2d at 237 (Rehnquist, C.J., concurring). Further:

“The tariff does not govern \* \* \* the entirety of the relationship between the common carrier and its customers. For example, it does not affect whatever duties state law might impose \* \* \*. The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff. It does not serve as a shield against all actions based in state law.” *Central Office*,

524 U.S. at 230–31, 118 S.Ct. at 1966–67, 141 L.Ed.2d at 238 (Rehnquist, C.J., concurring).

Illinois law accords with this reasoning.

\*59 In 1921, the General Assembly enacted the Public Utilities Act (Ill.Rev.Stat.1921, ch. 111 <sup>2</sup>/3, par. 1 *et seq.*). This court has described the legislative intent of the Act as follows:

“The Public Utilities Act [citation], under which the Commerce Commission regulates all public utilities, was enacted to assure the provision of efficient and adequate utility service to the public at a reasonable cost. Because unrestrained competition prior to adoption of the Act had often resulted in the financial failure of many utilities, the Act adopted a policy of regulated monopoly to assure that utilities would be able to earn a reasonable rate of return on their investment and thus would be able to provide the required service.” *Local 777, DUOC, Seafarers International Union of North America v. Illinois Commerce Comm'n*, 45 Ill.2d 527, 535, 260 N.E.2d 225 (1970) (and cases cited therein).

This court also has observed: “it cannot be doubted that the Public Utilities Act supersedes the common law liability of the carrier *so far as rates and unreasonable discrimination are concerned.*” (Emphasis added.) *Terminal R.R. Ass'n of St. Louis v. Public Utilities Comm'n*, 304 Ill. 312, 317, 136 N.E. 797 (1922). This court recognized: “The law is well settled in this State that the matter of rate regulation \*\*1266 \*\*\*320 is essentially one of legislative control. The fixing of rates is not a judicial function \* \* \*.” *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 55 Ill.2d 461, 469–70, 303 N.E.2d 364 (1973), quoting *Produce Terminal Corp. v. Illinois Commerce Comm'n ex rel. Peoples Gas Light & Coke Co.*, 414 Ill. 582, 589, 112 N.E.2d 141 (1953).

However, this court in *Pioneer Hi-Bred Corn Co. of Illinois v. Northern Illinois Gas Co.*, 61 Ill.2d 6, 329 N.E.2d 228 (1975), applied the established common law duty analysis as explained in *Clare* to the defendant utility, which is the same defendant utility in this case. *Pioneer Hi-Bred*, 61 Ill.2d at 12–14, 329 N.E.2d 228. In *Pioneer Hi-Bred*, plaintiff customer brought an action against NI-Gas to recover damages for an explosion and fire due to the failure of plaintiff's gas- \*60 fueled equipment. Plaintiff alleged, *inter alia*, common law negligence. The

trial court refused plaintiff's proffered jury instruction that NI-Gas was negligent in that it failed to inspect the plaintiff's equipment. The jury found for NI-Gas. The appellate court reversed, holding that the trial court erred in refusing plaintiff's proffered jury instruction. This court reversed the appellate court and affirmed the judgment in favor of NI-Gas. Citing *Clare*, this court held that NI-Gas did not have a duty to inspect plaintiff's equipment and, therefore, plaintiff's proffered instruction was erroneous. *Pioneer Hi-Bred*, 61 Ill.2d at 13-14, 329 N.E.2d 228.

We presume that the court in *Pioneer Hi-Bred* was not unaware of the federal filed-rate doctrine as explained in the above-cited *Priester* and *Esteve Brothers* decisions from the United States Supreme Court. Additionally, according to NI-Gas, the tariff at issue in this case has been on file with the Commission "[s]ince at least 1955."

However, despite this court's prior decisions interpreting the Public Utilities Act and recognizing that rate regulation is not a judicial function, despite prior decisions from the United States Supreme Court establishing the federal filed-rate doctrine, and despite the existence of the *specific tariff in this case*, this court applied the established common law duty analysis to NI-Gas. Neither this court nor NI-Gas believed that this tariff precluded a common law analysis in a negligence action for personal injury.

[34] Similarly, this court in *Metz* applied the common law doctrine of *res ipsa loquitur* to the defendant utility. *Metz*, 32 Ill.2d at 448-52, 207 N.E.2d 305. Why did the appellate court and this court in each of these cases fail to mention the Public Utilities Act, the filed-rate doctrine, or any particular tariff? Because Illinois courts have recognized that where a utility tariff speaks to a specific duty, the tariff may be controlling; however, where the tariff does not address a \*61 particular situation, the common law applies and a common law duty analysis must be applied.

For example, in *Sarelas*, the defendant telephone company, due to a clerical error, disconnected one of the extensions of the plaintiff's office telephone for 2 1/2 hours. The plaintiff sued the telephone company and its president for damages, alleging that defendant owed him a duty of continuing service, and that defendant violated this duty by interrupting service. The trial court dismissed plaintiff's complaint. *Sarelas*, 42 Ill.App.2d at 373-74, 192 N.E.2d 451.

On appeal, the appellate court held that the defendant's duty to plaintiff was based on the tariff that the defendant filed with the Illinois Commerce Commission. In so holding, the court reasoned:

\*\*1267 \*\*\*321 "[T]he extent to which defendants owed plaintiff 'a legal duty' is determined by the particular provisions of the tariff on file with the commission; there is no contract in this case on which plaintiff can rely, *nor are his allegations of a breach of duty sufficient to constitute a claim in tort*. He complains simply of the disconnection of his telephone extension, and claims a breach of duty which arises either from the tariff or not at all." (Emphasis added.) *Sarelas*, 42 Ill.App.2d at 375, 192 N.E.2d 451.

In *Sarelas*, since the plaintiff could not plead a breach of duty sufficient to constitute a claim in tort, his duty was defined by the tariff. *Sarelas* clearly leaves open the existence of common law duties had the plaintiff been able to plead them.

More recently, in *Cosgrove*, our appellate court, applying a common law analysis, reinstated negligence and *res ipsa loquitur* counts against NI-Gas. *Cosgrove*, 315 Ill.App.3d at 654-57, 248 Ill.Dec. 447, 734 N.E.2d 155. The court concluded: "NI-Gas is 'subject to liability in tort' " pursuant to section 2 of the Joint Tortfeasor Contribution Act. *Cosgrove*, 315 Ill.App.3d at 658, 248 Ill.Dec. 447, 734 N.E.2d 155, quoting 740 ILCS 100/2 (West 1998).

Indeed, Illinois case law reveals that Illinois courts have long applied common law principles to defendant \*62 utilities subsequent to the 1921 enactment of the Public Utilities Act and despite the existence of tariffs filed with the Illinois Commerce Commission. See, e.g., *Metz*, 32 Ill.2d 446, 207 N.E.2d 305; *Clare*, 356 Ill. 241, 190 N.E. 278; *Cosgrove*, 315 Ill.App.3d 651, 248 Ill.Dec. 447, 734 N.E.2d 155; *Oliver*, 5 Ill.App.3d 1093, 284 N.E.2d 432; *Mrdalj*, 308 Ill.App. 424, 31 N.E.2d 978. Thus, whether NI-Gas' tariff bars plaintiff's cause of action depends on the nature of plaintiff's lawsuit and the meaning of the tariff's language.

In this case, NI-Gas contends that the appellate court's decision "cannot stand" in light of *Illinois Bell Switching Station*. We disagree, finding that case to be distinguishable. In *Illinois Bell Switching Station*, a telephone switching station caught fire, allegedly due to

the negligent or willful failure of Illinois Bell to take fire prevention measures. The fire left many customers without telephone service for about a month. The customers filed a class action to seek to recover economic losses incurred due to that loss of service. Illinois Bell argued that its filed tariff defined the limits of its liability for interruptions in service. The class plaintiffs contended that the tariff should not bar their claims because the tariff was against public policy and conflicted with provisions of the Public Utilities Act. *Illinois Bell Switching Station*, 161 Ill.2d at 242–43, 204 Ill.Dec. 216, 641 N.E.2d 440.

In holding that the tariff controlled in that case, this court found no duty on which to base the class plaintiffs' claims. This court initially noted that Illinois Bell was nowhere charged with the duty to provide completely uninterrupted service. Rather, its duty was to provide adequate, efficient, and reliable service, which is not tantamount to infallible service. Temporary disruptions may occur without reducing Bell's service to a level less than adequate, efficient, or reliable. Further, this court held that the exculpatory language in Bell's tariff properly limited claims from disruption of service to a rebate of the costs for the missed service, and concluded \*63 that the tariff's provision, which limited Bell's liability in the event of a service disruption, was not contrary to the Act. *Illinois Bell Switching Station*, 161 Ill.2d at 243–44, 204 Ill.Dec. 216, 641 N.E.2d 440.

Unlike *Illinois Bell Switching Station*, where no duty existed on the part of Illinois Bell, we have concluded in this case \*\*1268 \*\*\*322 that NI–Gas owed a duty to plaintiff. Further, in *Illinois Bell Switching Station*, the class plaintiffs contended that the tariff applied, but conflicted with the Public Utilities Act. However, in this case, plaintiff contends that NI–Gas' tariff, as written, does not apply to her claim, an issue that was never addressed in *Illinois Bell Switching Station*.

[35] Turning to the NI–Gas tariff provision in this case, it is evident that the tariff essentially codifies the common law rule that a gas company has no duty with respect to a consumer's gas pipes and fittings, based on the consumer's responsibility for maintaining his or her own equipment and the company's lack of control and knowledge. See, e.g., *Clare*, 356 Ill. at 243–45, 190 N.E. 278 (stating common law rule). However, NI–Gas contends that the tariff provision eliminates the common law *exception* to this rule. According to NI–Gas, the tariff provision

absolves it from any duty with respect to a consumer's pipes and equipment even if it has knowledge that a customer's appliance is leaking or is otherwise unsafe for the transportation of gas. See, e.g., *Bellefeuille*, 243 Minn. at 128–29, 66 N.W.2d at 783–84 (stating common law exception).

We agree with the appellate court's rejection of this contention. 333 Ill.App.3d at 223, 266 Ill.Dec. 411, 774 N.E.2d 850. NI–Gas' position is untenable for several reasons.

Initially, allowing this cause of action to proceed would not contravene the above-stated policies underlying liability limitations. Plaintiff is not seeking rate preferences that are not accorded to other NI–Gas customers; she is not seeking to enforce “side agreements” which vary from our interpretation of the tariff. \*64 Rather, if proved, awarding damages on plaintiff's claim would neither discriminate against other NI–Gas customers nor involve the court in tariff setting. See, e.g., *Lovejoy*, 92 Cal.App.4th at 101, 111 Cal.Rptr.2d at 723; *Day v. AT & T Corp.*, 63 Cal.App.4th 325, 336, 74 Cal.Rptr.2d 55, 62 (1998).

[36] [37] [38] [39] “Although a utility tariff is not a legislative enactment, its interpretation is governed by the rules of statutory construction.” *Bloom Township High School v. Illinois Commerce Comm'n*, 309 Ill.App.3d 163, 174, 242 Ill.Dec. 892, 722 N.E.2d 676 (1999); accord *Danisco*, 267 Kan. at 772, 986 P.2d at 385. The cardinal rule of interpreting statutes, to which all other canons and rules are subordinate, is to ascertain and give effect to the intent of the legislature. *McNamee v. Federated Equipment & Supply Co.*, 181 Ill.2d 415, 423, 229 Ill.Dec. 946, 692 N.E.2d 1157 (1998); *Illinois Bell Switching Station*, 161 Ill.2d at 246, 204 Ill.Dec. 216, 641 N.E.2d 440. Although a court should first consider the statutory language, a court must presume that the legislature, in enacting a statute, did not intend absurdity or injustice. *McNamee*, 181 Ill.2d at 423–24, 229 Ill.Dec. 946, 692 N.E.2d 1157; *State Farm Fire & Casualty Co. v. Yapejian*, 152 Ill.2d 533, 540–41, 178 Ill.Dec. 745, 605 N.E.2d 539 (1992); *Illinois Crime Investigating Comm'n v. Buccieri*, 36 Ill.2d 556, 561, 224 N.E.2d 236 (1967). “A statute or ordinance must receive a sensible construction, even though such construction qualifies the universality of its language.” *Illinois Bell Switching Station*, 161 Ill.2d at 246, 204 Ill.Dec. 216, 641 N.E.2d 440.

[40] Specifically, as earlier noted, rate regulation is one of legislative control and is not a judicial function. Therefore, the right to review the conclusion of the Commission acting under authority delegated by the legislature is accordingly limited. This deference to the judgment of the Commission is especially appropriate in \*\*1269 \*\*\*323 the area of setting rates. *Illinois Bell*, 55 Ill.2d at 469–70, 303 N.E.2d 364 (and cases cited therein).

Applying these principles to the tariff provision at issue in this case, we conclude that the Commission did \*65 not intend to completely immunize NI–Gas with respect to a gas leak of which it has notice. It must be remembered:

“Public utilities do not enjoy a general tort immunity; they owe a duty of care to the general public. Thus, if a utility company recognizes that its conduct under certain circumstances creates an unreasonable risk of harm to another, it has a duty to take reasonable precautions to prevent that risk of harm from occurring.” 64 Am.Jur.2d *Public Utilities* § 14, at 456 (2001).

Remembering that gas is a dangerous substance and commodity (*Metz*, 32 Ill.2d at 450, 207 N.E.2d 305; *McChure*, 303 Ill. at 97, 135 N.E. 43), the far-reaching consequences of NI–Gas' interpretation of this tariff provision are readily apparent. In effect, NI–Gas argues that if it had omitted language regarding duty and liability from its tariff, it would owe no duty whatsoever to anyone under any circumstances. The Commission's own decisions and orders belie such an unreasonable contention. See *Nordine v. Illinois Power Co.*, 32 Ill.2d 421, 428, 206 N.E.2d 709 (1965) (observing that orders and decisions of the Illinois Commerce Commission are public records “and as such we take judicial notice of them”).

For example, in *Citizens Utilities Co. of Illinois*, No. 94–0481, 1995 WL 612576 (Illinois Commerce Comm'n September 13, 1995), the utility company (CUCI) filed with the Commission a revised tariff which proposed, *inter alia*, changes to its conditions of service. Regarding one such condition, the Commission observed: “CUCI proposes sweeping language for its fire protection service which would absolve it from any liability for damages of any nature to persons or property caused by fire. The Commission agrees with Staff's criticism of this proposal.”

Indeed, the Commission has rejected the very argument that NI–Gas makes before this court. In *Teleport Communications Group, Inc.*, No. 96–AB–001, 1996 WL 769745 (Illinois Commerce Comm'n November 4, 1996), Teleport Communications Group, Inc. (TCG), filed a petition for \*66 arbitration with the Commission, seeking arbitration of the disputed portions of an interconnection agreement with Ameritech.

One disputed provision in the agreement required each party to indemnify the other against losses suffered by customers of the ultimate service provider. Ameritech's proposal would require Ameritech and TCG each to limit its liability, in the event of a transmission delay or defect, to an amount equivalent to the proportionate charge to the end user customer for the period of service during which the delay or defect occurred.

TCG responded that it should not be required to include a limitation of liability provision in contracts with its customers. The Commission noted that TCG's intention was “to assign the responsibility for loss to the party that has the ability to control or prevent the loss from occurring in the first place.” Further, TCG viewed Ameritech's proposal as “insulating Ameritech from any harm caused by its actions. Ameritech would have no liability or responsibility to TCG or its customers, even if they are harmed by grossly negligent or deliberate wrongdoing.” TCG believed that “Ameritech's position would give Ameritech the right to dictate, unilaterally, an important aspect of TCG's relationship with its customers.” The Commission noted that its staff believed that Ameritech's \*\*1270 \*\*\*324 proposal was “improper and should not be adopted.”

The Commission rejected Ameritech's proposed indemnity provision, disagreeing with Ameritech's portrayal of its risks. The Commission reasoned that any claim against Ameritech by a TCG customer would have to be founded on contract or tort. The evidence showed that Ameritech did not anticipate having a contractual relationship with TCG's end users. Thus, the Commission reasoned, a TCG customer could not maintain a successful lawsuit against Ameritech based on a contract claim.

\*67 The Commission continued as follows:

“With respect to tort claims against Ameritech, the Illinois Supreme Court has spoken authoritatively

on this very point. The Court in *In Re Illinois Bell Switching Station Litigation* \* \* \* reaffirmed the Moorman doctrine. This doctrine stands for the proposition that under the common law purely economic damages are generally not recoverable in tort actions. Three exceptions were articulated (1) where the plaintiff has sustained damage resulting from a sudden or dangerous occurrence (2) where the plaintiff's damages are the proximate result of a defendant's intentional, false representation and (3) where the plaintiff's damages are a proximate result of a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions. The Court held that a tort claim for economic damages incurred from a loss of service arising from a fire at an Illinois Bell switching station was precluded in the absence of any exceptions to the Moorman doctrine.

The Commission believes that the Moorman doctrine provides Ameritech with ample protection in the vast majority of situations it has identified in the record.

In its Brief \* \* \* Ameritech maintains that the Proposed Arbitration Decision overlooks the substantial exposure to direct damages in tort left open by the Moorman doctrine. Essentially, Ameritech turns to potential claims for personal injury and property damage to demonstrate its exposure. Providing telecommunications services is not an inherently dangerous activity and it is difficult to imagine many scenarios in which Ameritech's provision of interconnection services will put third parties at risk. Even if such situations do arise, the public interest does not require that we attempt to insulate either party from the effects of its own improper conduct. *We believe that it is entirely appropriate that a telecommunications carrier remain responsible for personal injury or property damage which results from its own negligence or willful misconduct. Moreover, as Staff noted there is no general rule or policy which allows the Commission to grant utilities limitations on liability for personal injury and property damage.* This is particularly true with respect to utilities' conduct toward individuals \*68 who are not customers of the utility under tariff." (Emphasis added.)

The Commission concluded: "There is potential that [Ameritech's] proposal would shield Ameritech from responsibility for actions far beyond what is intended by

the Commission's discretionary approval of limitations of liability in Ameritech's tariffs."

We agree with the Commission. The Commission stated: (1) it is entirely appropriate that a utility remain responsible for personal injury or property damage that results from its own negligence or willful misconduct, and (2) there is no general \*\*1271 \*\*\*325 rule or policy that allows the Commission to grant utilities limitations on liability for personal injury and property damage. Although the dispute in *Teleport* involved Ameritech's relationship with third parties, *i.e.*, TCG customers, the Commission's general statement of the public interest clearly refers also to a utility's relationship with its own customers.

These administrative decisions are examples of the Commission's rejection of the theory of absolute immunity that NI-Gas now proposes. We do likewise.

Additionally, if this tariff provision were a private contract, it would not be interpreted as permitting NI-Gas to absolve itself of any duty to its customers. See *Reeder v. Western Gas & Power Co.*, 42 Wash.2d 542, 551, 256 P.2d 825, 830 (1953) (stating that "it would be unreasonable and against public policy to approve such a contractual limitation on the duty to inspect in cases where the facts themselves suggest a duty to inspect"). Although a utility tariff is considered as a statute and not as a contract, we cannot interpret the tariff provision that NI-Gas wrote to completely absolve it of any duty in this regard, when we would not so interpret the same provision in a contract that NI-Gas wrote. See *Bloom Township High School*, 309 Ill.App.3d at 175, 242 Ill.Dec. 892, 722 N.E.2d 676.

[41] [42] Also, this court has held that the Public Utilities Act is in derogation of the common law; accordingly, the Act \*69 is to be strictly construed in favor of persons sought to be subjected to its operation. *Barthel v. Illinois Central Gulf R.R. Co.*, 74 Ill.2d 213, 220-21, 23 Ill.Dec. 529, 384 N.E.2d 323 (1978). "Thus, the statute is to be strictly construed in favor of the utility company." *Tucker v. Illinois Power Co.*, 232 Ill.App.3d 15, 29, 173 Ill.Dec. 512, 597 N.E.2d 220 (1992). However, because the utility company drafts a tariff, it is generally accepted that language in a tariff, especially exculpatory language, is to be strictly construed against the utility company and in favor of the customer. See, *e.g.*, *Pink Dot*, 89 Cal.App.4th at 415, 107 Cal.Rptr.2d at 397; *Krasner*

v. *New York State Electric & Gas Corp.*, 90 A.D.2d 921, 921–22, 457 N.Y.S.2d 927, 929 (1982); *State Farm Fire & Casualty Co. v. Southern Bell Telephone & Telegraph Co.*, 245 Ga. 5, 7, 262 S.E.2d 895, 897 (1980).

**[43]** **[44]** Further, a court cannot construe a statute in derogation of the common law beyond what the words of the statute expresses or beyond what is necessarily implied from what is expressed. In construing statutes in derogation of the common law, a court will not presume that an innovation thereon was intended further than the innovation which the statute specifies or clearly implies. *Russell v. Klein*, 58 Ill.2d 220, 225, 317 N.E.2d 556 (1974); *Cedar Park Cemetery Ass'n v. Cooper*, 408 Ill. 79, 82–83, 96 N.E.2d 482 (1951); *Illinois–American Water Co. v. City of Peoria*, 332 Ill.App.3d 1098, 1105, 266 Ill.Dec. 277, 774 N.E.2d 383 (2002) (“Although the [Public Utilities] Act is in derogation of the common law and is to be strictly construed in favor of those sought to be subjected to its operation, the Act will not be extended any further than what the language of the statute absolutely requires by its express terms or by clear implication”). Illinois courts have limited all manner of statutes in derogation of the common law to their express language, in order to effect the least—rather than the most—change in the common law. See, e.g., *Bush v. Squellati*, 122 Ill.2d 153, 119 Ill.Dec. 366, 522 N.E.2d 1225 (1988) (interpreting Ill.Rev.Stat.1985, ch. 40, par. 607(b)); *Bagcraft \*70 Corp. v. Industrial Comm'n*, 302 Ill.App.3d 334, 235 Ill.Dec. 736, 705 N.E.2d 919 (1998) (interpreting 820 ILCS 305/11 (West 1996)).

**\*\*1272 \*\*\*326** For example, in *Barthel*, the plaintiffs brought a statutory cause of action against the defendant railroad seeking damages for personal injuries and wrongful death. Plaintiffs alleged that the railroad violated several regulations pertaining to the safety of railroad crossings. Relying on a strict and literal interpretation of the statutory language, the plaintiffs argued that the statute abrogated the common law defense of contributory negligence. As observed in *Barthel*:

“They [plaintiffs] argue that the cause of action, being a creature of the statute, bears no relation to the common law concepts of negligence and contributory negligence, and they conclude that since the statute does not provide that contributory negligence shall be a defense, it imposes strict liability on the utility for any violation.” *Barthel*, 74 Ill.2d at 220, 23 Ill.Dec. 529, 384 N.E.2d 323.

The *Barthel* court rejected this argument. Noting that the Act is in derogation of the common law, the court reasoned that tort principles would not be deemed abrogated unless it plainly appears that the intent of the statute is to do so. This court held that the statute did not abrogate the common law defense of contributory negligence, and that this common law defense was available to the railroad. *Barthel*, 74 Ill.2d at 220–21, 23 Ill.Dec. 529, 384 N.E.2d 323.

In this case, applying the exact reasoning as applied in *Barthel*, we must conclude that NI–Gas' tariff did not abrogate the common law exception to the rule of a gas company's nonliability. Just as the statute in *Barthel* did not abrogate a common law defense, NI–Gas' tariff does not abrogate the common law exception. This rule of statutory construction cannot be used to provide common law doctrines to assist defendants, but withhold common law doctrines that assist plaintiffs.

Specifically, courts in other jurisdictions have avoided interpretations of utility tariffs that would abrogate the \*71 common law. For example, in *National Food Stores, Inc. v. Union Electric Co.*, 494 S.W.2d 379 (Mo.App.1973), the Missouri Court of Appeals found that the defendant electric utility owed a common law duty to plaintiff utility customer. *National Food Stores*, 494 S.W.2d at 381–83. The court then rejected the utility's contention that its filed tariff immunized it from common law liability for damages. The court strictly construed the tariff, and found that the plaintiff's allegations fell outside of the tariff's ambit. Acknowledging the tariff, the court emphasized: “the crucial point is that [the utility] cannot divorce itself from the consequences of its own failure to use ordinary care to avoid harm to its consumers.” *National Food Stores*, 494 S.W.2d at 384. See also *Satellite System, Inc. v. Birch Telecom of Oklahoma, Inc.*, 51 P.3d 585, 588 (Okla.2002) (holding that Oklahoma legislature had not expressed intent that filed-tariff doctrine abolished common law fraud claim against utility); *State Farm*, 245 Ga. at 6–7, 262 S.E.2d at 896–97 (holding that utility tariff's limitations period did not abrogate general state law); *Hall v. Consolidated Edison Corp.*, 104 Misc.2d 565, 568–70, 428 N.Y.S.2d 837, 840–41 (1980) (holding that tariff did not relieve defendant utility company from its common law tort liability for termination of electrical service); *Kroger Co. v. Appalachian Power Co.*, 244 Va. 560, 563, 565, 422 S.E.2d 757, 759–60 (1992) (interpreting utility tariff in accord with common law rule, observing

that tariff would not shield utility company from “all liability in providing power to a customer beyond the delivery point”).

As we earlier observed, the tariff provision in this case essentially codifies the common law rule that a gas company has **\*\*1273 \*\*\*327** no duty with respect to a consumer's gas pipes and fittings, based on the consumer's responsibility for his or her equipment, and the company's lack of knowledge and control. Absent express language that **\*72** disavows the common law exception based on notice, we cannot say that it was eliminated by the tariff provision. See, e.g., *Bush*, 122 Ill.2d at 161–62, 119 Ill.Dec. 366, 522 N.E.2d 1225 (holding that the statutory provision “cannot, by its silence,” be construed to change the applicable common law); *Bagcraft Corp.*, 302 Ill.App.3d at 340, 235 Ill.Dec. 736, 705 N.E.2d 919 (holding that without “ specific language directing application” of a statutory provision to a scenario governed by the common law, “we cannot conclude that the legislature intended to abrogate an entire body of case law”). We note that our appellate court long ago rejected a gas company's invocation of the Public Utilities Act as a defense to its common law duty. See *Mrdalj v. Public Service Co. of Northern Illinois*, 308 Ill.App. 424, 430, 31 N.E.2d 978 (1941) (holding where gas company had been notified of odor of gas prior to explosion which killed property owner, gas company could not defend on ground that Public Utilities Act prohibited company from shutting off gas to make inspection, since where gas company has knowledge that gas is escaping in a building occupied by consumer it is gas company's duty to shut off gas supply until necessary repairs have been made). Based on the above-stated principles of statutory interpretation, this is precisely the situation “for the General Assembly and not this court” to abrogate NI–Gas' common law duty. See *Bush*, 122 Ill.2d at 162, 119 Ill.Dec. 366, 522 N.E.2d 1225.

We hold that NI–Gas' tariff provision did not absolve the company of its common law duty owed to plaintiff. While a gas company is not an insurer for *any* injury sustained as the result of escaping gas, the company is nonetheless liable for its negligence. See *Pappas*, 350 Ill.App. at 548, 113 N.E.2d 585.

#### CONCLUSION

Based on the present record, we have concluded solely that NI–Gas owed a duty to warn in this case. Accordingly, there remains a genuine issue of material fact as to whether NI–Gas breached this duty and, if so, whether **\*73** this breach proximately caused plaintiff's injuries. Summary judgment was thus improper. See *Happel*, 199 Ill.2d at 198, 262 Ill.Dec. 815, 766 N.E.2d 1118. Therefore, we affirm the judgment of the appellate court, which reversed the circuit court's grant of summary judgment and remanded the cause for further proceedings.

*Affirmed.*

Justice GARMAN, dissenting:

I respectfully dissent. I believe that our analysis should begin and end with the tariff filed by NI–Gas and approved by the Illinois Commerce Commission. As a result, I do not think it necessary to reach the question whether the common law governing the duties of gas companies should be expanded to recognize a duty to warn of the risk that a connector neither owned nor installed by the company may deteriorate from exposure to the odorant that must, by law, be added to the natural gas delivered by NI–Gas to its customers.

The General Assembly enacted the Public Utilities Act (Act) in 1921. An Act concerning public utilities, 1921 Ill. Laws 702, approved June 29, 1921, eff. July 1, 1921. Then, as now, the policy of the state is expressed in the Act:

“It is therefore declared to be the policy of the State that public utilities shall continue to be regulated effectively and comprehensively. It is further declared **\*\*1274 \*\*\*328** that the goals and objectives of such regulation shall be to ensure

(a) \* \* \* that:

(iv) tariff rates for the sale of various public utility services are authorized such that they accurately reflect the cost of delivering those services and allow the utilities to recover the total costs prudently and reasonably incurred[.]” 220 ILCS 5/1–102(a)(iv) (West 1994).

In return for the protections provided, the Act imposes certain duties upon the utilities it regulates:

“Every public utility shall furnish, provide and maintain such service instrumentalities, equipment and facilities as \*74 shall promote the safety, health, comfort and convenience of its patrons, employees and public and as shall be in all respects adequate, efficient, just and reasonable.

All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

Every public utility shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto, suitable facilities and service, without discrimination and without delay.” 220 ILCS 5/8–101 (West 1994).

In addition, regarding the duties of public utilities to providing services and facilities, the Act requires that:

“Every public utility subject to this Act shall provide service and facilities which are in all respects adequate, efficient, reliable and environmentally safe and which, consistent with these obligations, constitute the least-cost means of meeting the utility's service obligations.” 220 ILCS 5/8–401 (West 1994).

This court has long acknowledged that the “policy established by legislation for the regulation of public utilities is to provide the public with efficient service at a reasonable rate by compelling an established public utility occupying a given field to provide adequate service and at the same time to protect it from ruinous competition.” *Illinois Power & Light Corp. v. Commerce Comm'n*, 320 Ill. 427, 429–30, 151 N.E. 236 (1926). More recently, this court reiterated: “The Public Utilities Act [citation], under which the Commerce Commission regulates all public utilities, was enacted to assure the provision of efficient and adequate utility service to the public at a reasonable cost.” *Local 777 v. Illinois Commerce Comm'n*, 45 Ill.2d 527, 535, 260 N.E.2d 225 (1970). See also *Bloom Township High School v. Illinois Commerce Comm'n*, 309 Ill.App.3d 163, 175, 242 Ill.Dec. 892, 722 N.E.2d 676 (1999).

The Act requires the utility to file a tariff with the Illinois Commerce Commission. 220 ILCS 5/9–102 (West 1994). The tariff “plays an integral role” in allowing the \*75 utility to meet the expectations of the General Assembly. *In re Illinois Bell Switching Station Litigation*, 161 Ill.2d 233, 244, 204 Ill.Dec. 216, 641 N.E.2d 440 (1994). The

liability limitations contained in an approved tariff serve the public policies of establishing uniform affordable rates and providing universal service by limiting the utility's exposure to liability. Thus, although the tariff may be seen as stating the terms of the contract between the utility and its customers, it is more than a mere contract between buyer and seller. There is a third party to the transaction—the state, which as a matter of public policy has chosen to limit the liability of utilities in return for regulation of their rates. As this court has noted:

“ \* “The theory underlying [decisions upholding the right of regulated utilities to \*\*1275 \*\*\*329 limit their liabilities] is that a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges, shall likewise be regulated and limited as to its liabilities. In consideration of its being peculiarly the subject of state control, its liability is and should be defined and limited.” [Citation.] There is nothing harsh or inequitable in upholding such a limitation of liability when it is thus considered that the rates as fixed by the commission are established with the rule of limitation in mind. Reasonable rates are in part dependent upon such a rule.” *Illinois Bell Switching Station*, 161 Ill.2d at 245–46, 204 Ill.Dec. 216, 641 N.E.2d 440, quoting *Waters v. Pacific Telephone Co.*, 12 Cal.3d 1, 7, 523 P.2d 1161, 1164, 114 Cal.Rptr. 753, 756 (1974), quoting *Cole v. Pacific Telephone & Telegraph Co.*, 112 Cal.App.2d 416, 419, 246 P.2d 686, 688 (1952).

The tariff limits liability by narrowly defining the duties undertaken by the utility and disclaiming any additional duties. The majority acknowledges our prior case law, which requires that any duty other than those specifically imposed upon the utility by the Act itself must be found in the tariff:

“Illinois courts have long held that a tariff provision such as the one at issue in this case provides the source for, and determines the nature and extent of, a public \*76 utility's service obligations to its customers.” 211 Ill.2d at 57–58, 284 Ill.Dec. at 318–19, 809 N.E.2d at 1264–65, citing *J. Meyer & Co. v. Illinois Bell Telephone Co.*, 88 Ill.App.3d 53, 55, 42 Ill.Dec. 942, 409 N.E.2d 557 (1980), and *Sarelas v. Illinois Bell Telephone Co.*, 42 Ill.App.2d 372, 374–75, 192 N.E.2d 451 (1963).

See also *Illinois Bell Switching Station*, 161 Ill.2d at 248, 204 Ill.Dec. 216, 641 N.E.2d 440 (Miller, J., specially concurring).

As the majority also acknowledges, Illinois law on the subject of tariffs has its roots in federal law, specifically, the federal “filed-rate doctrine.” 211 Ill.2d at 56, 284 Ill.Dec. at 318, 809 N.E.2d at 1264. Although this doctrine is no longer in effect in the federal courts (see *Tempel Steel Corp. v. Landstar Inway Inc.*, 211 F.3d 1029, 1030 (7th Cir.2000) (noting that the ICC Termination Act, 109 Stat. 803 (1995), abolished the tariff filing requirement and the filed-rate doctrine)), it is still a useful starting point for any analysis of the legal effect of a utility tariff filed and approved pursuant to state law.

In *Western Union Telegraph Co. v. Esteve Brothers & Co.*, 256 U.S. 566, 41 S.Ct. 584, 65 L.Ed. 1094 (1921) (cited in 211 Ill.2d at 57, 284 Ill.Dec. at 317–18, 809 N.E.2d at 1263–64), the issue was whether the plaintiff/customer was “without assent in fact, bound as matter of law by the provision limiting liability, because it is a part of the lawfully established rate.” *Esteve Brothers*, 256 U.S. at 570, 41 S.Ct. at 586, 65 L.Ed. at 1097. The Court held that “limitation of liability was an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service rendered.” *Esteve Brothers*, 256 U.S. at 571, 41 S.Ct. at 586, 65 L.Ed. at 1097. As the majority notes, the federal act at issue in *Esteve Brothers*:

“introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the act the companies had a common law liability from which they might or might not extricate themselves according to views of policy prevailing in the several states. \* \* \* Uniformity demanded that the **\*\*1276 \*\*\*330** rate represent the whole duty and the whole liability of the **\*77** company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed.” *Esteve Brothers*, 256 U.S. at 571–72, 41 S.Ct. at 586, 65 L.Ed. at 1097–98.

Later, in *Western Union Telegraph Co. v. Priester*, 276 U.S. 252, 48 S.Ct. 234, 72 L.Ed. 555 (1928), the Court

stated that once the Interstate Commerce Commission approved a tariff, the “established rates \* \* \* became the lawful rates and the attendant limitation of liability became the lawful condition upon which messages might be sent.” *Priester*, 276 U.S. at 259, 48 S.Ct. at 235, 72 L.Ed. at 565. “What had previously been a matter of common law liability, with such contractual restrictions as the states might permit, then became the subject of federal legislation to secure reasonable and just rates for all without undue preference or advantage to any. Since that end is attainable only by adherence to the approved rate \* \* \* that rate ‘represents the whole duty and the whole liability of the company.’ ” *Priester*, 276 U.S. at 259, 48 S.Ct. at 235, 72 L.Ed. at 565, quoting *Esteve Brothers*, 256 U.S. at 572, 41 S.Ct. at 586, 65 L.Ed. at 1097. In response to plaintiff’s argument that the company’s tariff could not limit its liability for “gross negligence,” the Court concluded: “We may not disregard a lawful exercise of the regulatory power which has made no distinction between degrees of negligence, nor may we, upon any theory of public policy, annex to the rate as made conditions affecting its uniformity and equality.” *Priester*, 276 U.S. at 260, 48 S.Ct. at 236, 72 L.Ed. at 565.

More recently, the Court stated that the “ ‘rights as defined by the tariff cannot be varied or enlarged by *either contract or tort* of the carrier.’ ” (Emphasis added.) **\*78** *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227, 118 S.Ct. 1956, 1965, 141 L.Ed.2d 222, 236 (1998), quoting *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163, 43 S.Ct. 47, 49, 67 L.Ed. 183, 187 (1922). The majority quotes this language, but overlooks the significance of the mention of torts as well as contracts. 211 Ill.2d at 56, 284 Ill.Dec. at 317–18, 809 N.E.2d at 1263–64.

The General Assembly, by enacting the Public Utilities Act and creating the Illinois Commerce Commission with the power to approve tariffs filed by public utilities, has made clear the public policy of the State, which is to hold public utilities to those duties expressly set out in the Act and the approved tariffs, and to preclude the judicial recognition of additional duties on the basis of common law reasoning. Thus, the majority is correct that whether the tariff bars plaintiff’s cause of action “depends on the nature of plaintiff’s lawsuit and the meaning of the tariff’s language.” 211 Ill.2d at 62, 284 Ill.Dec. at 321, 809 N.E.2d at 1267.

### Nature of the Lawsuit

The majority correctly states that “all state law causes of action are not necessarily precluded” by the existence of a filed and approved tariff. 211 Ill.2d at 58, 284 Ill.Dec. at 319, 809 N.E.2d at 1265, quoting *Pink Dot, Inc. v. Teleport Communications Group*, 89 Cal.App.4th 407, 416, 107 Cal.Rptr.2d 392, 398 (2001). The nature of a lawsuit may place it outside the scope of the tariff’s limitation of liability provisions.

Thus, although *Pink Dot* acknowledged that Teleport’s liability for gross negligence was limited by the applicable tariff, \*\*1277 \*\*\*331 *Pink Dot* argued that its claims against Teleport for breach of contract, fraud, willful misconduct, intentional interference with economic relations, and unfair competition were not barred. *Pink Dot*, 89 Cal.App.4th at 412, 107 Cal.Rptr.2d at 395. This argument was supported by a state statute providing that “All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of the law, whether willful or \*79 negligent, are against the public policy of the law.” *Pink Dot*, 89 Cal.App.4th at 413–14, 107 Cal.Rptr.2d at 396, quoting Cal. Civ.Code § 1668 (1994). Further, the Teleport’s tariff was “silent as to the required liability for any willful misconduct, fraud, or violations of law,” although it did contain “clauses intended to limit [its] liability to its customers for damages caused by its conduct.” *Pink Dot*, 89 Cal.App.4th at 414, 107 Cal.Rptr.2d at 396–97. In the end, *Pink Dot* stands for the unremarkable proposition that when a state statute expressly precludes such a limit, a tariff’s \$10,000 limit on liability cannot “eliminate [the utility’s] liability for willful misconduct, fraud or violations of law by merely omitting the acknowledgment of such liability from its tariff.” *Pink Dot*, 89 Cal.App.4th at 414, 107 Cal.Rptr.2d at 397.

In *Adamson v. WorldCom Communications, Inc.*, 190 Or.App. 215, 78 P.3d 577 (2003) (quoted in 211 Ill.2d at 58, 284 Ill.Dec. at 319, 809 N.E.2d at 1265), plaintiff’s claim for unfair trade practices was not barred where the tariff limited the defendant’s liability “unless such damages are a result of Company’s willful misconduct.” *Adamson*, 190 Or.App. at 222, 78 P.3d at 582.

The tariff at issue in the present case expressly states that NI–Gas “assumes no responsibility in connection with the installation, maintenance or operation” of the customer’s equipment. Plaintiff has not cited either a state statute (as in *Pink Dot*) or language of the tariff (as in *Adamson*) that precludes the limitation of liability claimed by NI–Gas. Nor has she brought a claim for fraud, negligent driving of a vehicle owned by the utility, or other tortious conduct of the sort that would place it outside the scope of the limitation of liability clause of the tariff. Thus, the duty claimed by plaintiff must be found to exist on the basis of the language of the tariff, or not at all.

### \*80 Construction of the Tariff

The Act is in derogation of the common law. *Illinois Bell Switching Station*, 161 Ill.2d at 240, 204 Ill.Dec. 216, 641 N.E.2d 440. The majority acknowledges that, as a result, the Act it is to be strictly construed in favor of persons sought to be subjected to its operation, that is, in favor of the utility. 211 Ill.2d at 68–69, 284 Ill.Dec. at 325, 809 N.E.2d at 1271. As the majority also notes, once the tariff is approved by the Commission, it has the force of law. 211 Ill.2d at 56, 284 Ill.Dec. at 317, 809 N.E.2d at 1263 (citing *Illinois Bell Switching Station*, 161 Ill.2d at 244, 204 Ill.Dec. 216, 641 N.E.2d 440, and *Illinois Central Gulf R.R. Co. v. Sankey Brothers, Inc.*, 67 Ill.App.3d 435, 439, 23 Ill.Dec. 749, 384 N.E.2d 543 (1978) (stating that “[a] tariff is a law, not a contract, and has the force and effect of a statute”), *affirmed*, 78 Ill.2d 56, 34 Ill.Dec. 328, 398 N.E.2d 3 (1979)). Further, the majority states that interpretation of the tariff is governed by the rules of statutory construction. 211 Ill.2d at 55, 284 Ill.Dec. at 323, 809 N.E.2d at 1269.

Nevertheless, the majority, citing cases from California, New York, and Georgia, states that the language of the tariff, especially any exculpatory language, should be strictly construed against the utility, based on the canon of construction of *contracts* \*\*1278 \*\*\*332 that *contract terms* should be construed against the drafter. 211 Ill.2d at 69, 284 Ill.Dec. at 325, 809 N.E.2d at 1271. Although it may be “generally accepted” (211 Ill.2d at 69, 284 Ill.Dec. at 325, 809 N.E.2d at 1271) in some jurisdictions that a tariff should be construed as a mere contract, there is also contrary authority. The courts of Washington and Oregon, for example, apply the standard principles of statutory construction to the interpretation of a tariff.

including applying the rule of construction that the court is to ascertain the drafters' intent when they promulgated the language. See, e.g., *National Union Insurance Co. v. Puget Sound Power & Light*, 94 Wash.App. 163, 171, 972 P.2d 481, 484 (1999); *U.S. West Communications, Inc. v. City of Longmont*, 924 P.2d 1071, 1079 (Colo.App.1995).

Even in a jurisdiction in which the “construe against the drafter” canon is applied to public utility tariffs, it has been said that “a strict construction against a tariff’s \*81 author is not justified where the construction would ignore a permissible and reasonable construction which conforms to the intentions of the framers of the tariff.” *Info Tel Communications, LLC v. U.S. West Communications, Inc.*, 592 N.W.2d 880, 884 (Minn.App.1999).

This court has never held that a public utility tariff should be construed against the utility that drafted the language. There are valid arguments to be made on both sides because the tariff has characteristics of both contract and statute. This court may in some future case be called upon to decide whether ambiguous language in a tariff should be construed in favor of or against the drafting utility. This is not such a case. The language at issue is unambiguous. NI-Gas “assumes no responsibility in connection with the installation, maintenance or operation” of the customer's equipment. Our duty is to apply the plain meaning of these words, in light of the underlying purpose of the Act, which is to provide citizens of Illinois with utility service at reasonable rates and, as a necessary part of that scheme, to limit the liability of utility companies.

The majority also suggests that the tariff provision should not be given effect because, if it “were a private contract, it would not be interpreted as permitting NI-Gas to absolve itself of any duty to its customers.” 211 Ill.2d at 68, 284 Ill.Dec. at 325, 809 N.E.2d at 1271. This statement misses the point in several respects. First, it defies logic to say that a tariff should be enforced under the same rules as a private contract. The entire concept of a tariff is that it supercedes any contract between the utility and the individual customer. Indeed, the utility is forbidden from privately contracting around the terms of the tariff. Second, the Act and the tariff do not permit the utility to absolve itself of “any duty.” They permit, indeed they require, that the utility undertake precisely defined duties to its customers. Finally, unlike a private company, a public utility \*82 cannot adjust its prices to

compensate for increased exposure to liability when the courts recognize a new common law duty.

For example, in *Sarelas* the plaintiff claimed that Illinois Bell Telephone owed him a duty of continuing service, which it violated by interrupting his service for 2 ½ hours as the result of a clerical error. The appellate court noted that “in the case of an ordinary corporation this would be nothing of which to complain, for in general a corporation is entitled to refrain from doing business with its customers unless it is otherwise bound by contract; but a utility is different. It has a duty to its subscribers that goes beyond that of an ordinary corporation. However, *this duty has but one source*, the tariff, which in this \*\*1279 \*\*\*333 instance is on file with the Illinois Commerce Commission.” (Emphasis added.) *Sarelas*, 42 Ill.App.2d at 374, 192 N.E.2d 451. Thus, the court observed, “the extent to which defendants owed plaintiff ‘a legal duty’ is determined by the particular provisions of the tariff on file with the commission; there is no contract \* \* \* on which plaintiff can rely, nor are his allegations of a breach of duty sufficient to constitute a claim in tort.” *Sarelas*, 42 Ill.App.2d at 375, 192 N.E.2d 451. In the end, a breach of duty by the utility “arises either from the tariff or not at all.” *Sarelas*, 42 Ill.App.2d at 375, 192 N.E.2d 451.

Following the mandate to construe the Act strictly in favor of the regulated utility, the court in *Barthel v. Illinois Central Gulf R.R. Co.*, 74 Ill.2d 213, 23 Ill.Dec. 529, 384 N.E.2d 323 (1978), held that section 73 of the Act, which allows the utility to be held liable for certain acts and omissions, did not abrogate the common law defense of contributory negligence because it did not plainly appear that the intent of the statute was to impose strict liability. *Barthel*, 74 Ill.2d at 221, 23 Ill.Dec. 529, 384 N.E.2d 323. See also *Tucker v. Illinois Power Co.*, 232 Ill.App.3d 15, 29, 173 Ill.Dec. 512, 597 N.E.2d 220 (1992) (construing Act as not authorizing award of punitive damages in action for \*83 negligent termination of gas service in below freezing weather when plaintiff would not have been entitled to punitive damages under common law theory of liability).

The majority purports to apply the “exact reasoning” of *Barthel* (211 Ill.2d at 70, 284 Ill.Dec. at 326, 809 N.E.2d at 1272), when it concludes that just as the statute in *Barthel* did not abrogate a pre-existing common law defense, the tariff at issue here “does not abrogate the common law exception.” 211 Ill.2d at 70, 284 Ill.Dec. at 326, 809 N.E.2d at 1272. Plaintiff, however, does not seek to hold NI-

Gas liable under an *existing* exception to the common law rule that gas companies have no duty with regard to the fixtures and equipment of their customers. She seeks to expand the existing exception to recognize an *entirely new duty* to warn.

The majority observes that NI–Gas has had opportunities in the past to assert that the tariff precludes imposition of a duty, yet has not done so. 211 Ill.2d at 55, 284 Ill.Dec. at 319–20, 809 N.E.2d at 1265–66. This observation is not persuasive for two reasons. First, simple logic dictates that a party's decision to raise a particular issue or assert a particular defense in one litigation has no preclusive effect in later litigation with an entirely different party. Second, the cases cited by the majority are inapposite. In *Pioneer Hi–Bred Corn Co. of Illinois v. Northern Illinois Gas Co.*, 61 Ill.2d 6, 329 N.E.2d 228 (1975), the plaintiff's theory of liability was that NI–Gas negligently performed an inspection. There was no leak or defect in the plaintiff's equipment. Rather, NI–Gas employees purportedly inspected plaintiff's equipment for the specific purpose of determining the proper pressure for the delivery of gas to the plaintiff's premises. *Pioneer Hi–Bred*, 61 Ill.2d at 9, 329 N.E.2d 228. Previously, in *Clare*, this court had noted that a gas company has no duty to inspect the pipes or fixtures belonging to a customer in the absence of notice of a defect. *Clare*, 356 Ill. at 244, 190 N.E. 278. Indeed, the gas company has no right to “go upon the premises of one of its customers for the purpose of \*84 inspecting his pipes or other fixtures except upon the invitation, license or permission of the owner.” *Clare*, 356 Ill. at 244, 190 N.E. 278. In *Pioneer Hi–Bred*, as in *Clare*, a gas company employee was invited to enter the plaintiff's premises for the purpose of making an inspection. The inspections served different purposes: in *Clare*, to determine the \*\*1280 \*\*\*334 source of an offensive odor; in *Pioneer Hi–Bred*, to calculate the proper pressure for the delivery of gas. In *Clare*, the gas company was not liable for the eventual damages and injuries because the evidence showed that the inspection, which was not “negligently or unskillfully made,” did not reveal the source of the leak. *Clare*, 356 Ill. at 245, 190 N.E. 278. In *Pioneer Hi–Bred*, the gas company might have been held liable for negligently conducting an inspection had the plaintiff proven that an inspection actually took place. *Pioneer Hi–Bred*, 61 Ill.2d at 13–14, 329 N.E.2d 228. This court agreed with NI–Gas that the trial court properly refused to give the requested instruction on negligent inspection to the jury, because the tendered instruction

assumed a fact in dispute—that there had actually been an inspection. *Pioneer Hi–Bred*, 61 Ill.2d at 13–14, 329 N.E.2d 228. The majority's statement that “[n]either this court nor NI–Gas believed that this tariff precluded a common law analysis in a negligence action for personal injury” in *Pioneer Hi–Bred* (211 Ill.2d at 59, 284 Ill.Dec. at 320, 809 N.E.2d at 1266), although true, is irrelevant. The common law duty asserted in *Pioneer Hi–Bred* had already been recognized in *Clare*.

The majority also points to this court's decision in *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill.2d 446, 207 N.E.2d 305 (1965), as further support for its statement that “where a utility tariff speaks to a specific duty, the tariff *may be controlling*; however, where the tariff does not address a particular situation, the common law applies and a common law duty analysis must be applied.” (Emphasis added.) 211 Ill.2d at 61, 284 Ill.Dec. at 320, 809 N.E.2d at 1266. When a tariff speaks to a specific duty, as in this case, it *is* controlling. The majority \*85 asks why the appellate court failed to mention the tariff in this case. 211 Ill.2d at 62, 284 Ill.Dec. at 320, 809 N.E.2d at 1266. *Metz* involved an explosion that occurred as a result of a defect *in the gas main*, which is the responsibility of the gas company both under the tariff and at common law. Thus, the answer to the majority's question is obvious—the tariff was irrelevant to the gas company's alleged negligence to properly maintain *its own equipment*.

The majority is determined to ignore our obligation to determine whether NI–Gas has a duty to warn by looking at the plain language of the tariff, even if that plain meaning departs from the manner in which the common law may have developed in the decades since the Act was adopted and the tariff was approved, or the way in which we would decide the question today. I accept, *arguendo*, the majority's statement that “it is evident that the tariff essentially codifies the common law rule that a gas company has no duty with respect to a consumer's gas pipes and fittings.” 211 Ill.2d at 63, 284 Ill.Dec. at 322, 809 N.E.2d at 1268. Thus, I do not dispute the majority's conclusion that the tariff “did not abrogate the common law exception to the rule of a gas company's nonliability.” 211 Ill.2d at 70, 284 Ill.Dec. at 326, 809 N.E.2d at 1272. That exception, however, applies only when the gas company has actual or constructive knowledge of a gas leak or a defect on the premises of the individual customer.

NI-Gas had neither actual nor constructive notice of a gas leak in the Adams' home. At most, NI-Gas was aware that some Cobra connectors might still be in use in its service area, and that these connectors could fail after prolonged exposure to the odorant that NI-Gas is required, by law, to add to natural gas. This does not constitute a "a gas leak of which it has notice." 211 Ill.2d at 65, 284 Ill.Dec. at 323, 809 N.E.2d at 1269.

**\*\*1281 \*\*\*335** The majority even admits that recognizing a duty to warn on the facts of this case would not be based on the common law as it existed at the time the tariff was filed **\*86** and approved some fifty years ago. It would, instead, be a "reasoned adaptation" of the preexisting common law. 211 Ill.2d at 53, 284 Ill.Dec. at 316, 809 N.E.2d at 1262. Our prior case law does not permit such "reasoned adaptation" of the common law when it would alter the terms of the applicable tariff.

The majority's conclusion that "allowing this cause of action to proceed would not contravene" the public policy of this state regarding liability limitations contained in public utility tariffs (211 Ill.2d at 63, 284 Ill.Dec. at 322, 809 N.E.2d at 1268) is similarly flawed. Although plaintiff does not seek a rate preference or enforcement of a "side agreement," she is seeking to impose liability in tort in excess of that permitted by the tariff. Exposure to liability in tort bears a direct relationship to rate setting. See *Illinois Bell Switching Station*, 161 Ill.2d at 245, 204 Ill.Dec. 216, 641 N.E.2d 440.

*Meyer* is cited by the majority (211 Ill.2d at 57-58, 284 Ill.Dec. at 319, 809 N.E.2d at 1265) for the proposition that the tariff "provides the source for, and determines the nature and extent of, a public utility's service obligations to its customers." The *Meyer* plaintiffs installed an alarm system on their premises and connected it to the defendant's equipment at a junction box located on a telephone pole. Burglars disconnected the alarm at the junction box and made off with hundreds of thousands of dollars worth of property from the plaintiffs' warehouse. The issue on appeal was whether the defendant utility owed a duty to the plaintiffs "under the circumstances as alleged." As in the present case, the circumstances in *Meyer* included a connection between the customer's equipment and the utility's equipment. That connection failed and plaintiffs suffered damages as a result. Citing *Sarelas*, the appellate court stated, "It has been established that the source of any duty of Illinois Bell, as a public

utility, to its subscribers is only in the tariff as filed." *Meyer*, 88 Ill.App.3d at 55, 42 Ill.Dec. 942, 409 N.E.2d 557. The portions of the tariff dealing with customer-provided equipment and systems plainly stated that:

**\*87** "[W]here such equipment or system is connected to Company facilities the responsibility of the Company shall be limited to the furnishing of facilities suitable for exchange telecommunications service or \* \* \* the Company shall not be responsible for (1) the through transmission of signals generated by the customer-provided equipment or system, or for the quality of, or defects in, such transmission \* \* \*." *Meyer*, 88 Ill.App.3d at 55, 42 Ill.Dec. 942, 409 N.E.2d 557.

Thus, the appellate court found that the "plain language of this provision exculpates [the telephone company] from liability." *Meyer*, 88 Ill.App.3d at 55, 42 Ill.Dec. 942, 409 N.E.2d 557. The court affirmed the trial court's dismissal of the complaint because "the tariff is the sole source of any duty owed by defendant to plaintiffs" and the plaintiffs had failed to establish a duty thereunder. *Meyer*, 88 Ill.App.3d at 56, 42 Ill.Dec. 942, 409 N.E.2d 557.

Further, the *Meyer* court found "a reasonable basis for treating this public utility differently from private corporations and for limiting its liability to subscribers in the rendering of its service." *Meyer*, 88 Ill.App.3d at 57, 42 Ill.Dec. 942, 409 N.E.2d 557. The Act requires that all rates and charges imposed by a public utility be just and reasonable and, to achieve this end, such rates and charges are fixed by a state agency. "Without the **\*\*1282 \*\*\*336** limitations on liability set forth by the tariff, defendant would be uniquely vulnerable to claims based on signal transmission defects which may result from a variety of causes, adversely affecting its ability to fulfill the public need for reasonable telephone service charges. This would be particularly true of *defects* in the transmission of signals *originating from customer-provided equipment over which the company could have little control.*" (Emphases added.) *Meyer*, 88 Ill.App.3d at 57, 42 Ill.Dec. 942, 409 N.E.2d 557.

In addition to *Sarelas* and *Meyer*, the majority also cites *North River Insurance Co. v. Jones*, 275 Ill.App.3d 175, 211 Ill.Dec. 604, 655 N.E.2d 987 (1995) (211 Ill.2d at 55, 284 Ill.Dec. at 317, 809 N.E.2d at 1263), as a source for the definition of a tariff: "A tariff is a public document setting forth services being offered, rates and charges with **\*88** respect to services and governing rules,

regulations and practices relating to those services.” *North River*, 275 Ill.App.3d at 185, 211 Ill.Dec. 604, 655 N.E.2d 987, citing Black’s Law Dictionary 1306 (5th ed.1979). However, the majority fails to note the holding of *North River*. The tariff filed by the defendant utility, Illinois Bell Telephone, described the terms and conditions under which it would provide service, including the limitation of liability provision, which had been in effect for “the past 50 years.” *North River*, 275 Ill.App.3d at 185, 211 Ill.Dec. 604, 655 N.E.2d 987. Once such a tariff is implemented, the court held, the utility is “forbidden from deviating from its terms. It is the filed tariff that defines the scope of duty owed by [the utility]. The source of any duty of [the utility], as a public utility to its subscribers, is only in the tariff as filed.” *North River*, 275 Ill.App.3d at 185, 211 Ill.Dec. 604, 655 N.E.2d 987 (citing *Meyer*, 88 Ill.App.3d at 55, 42 Ill.Dec. 942, 409 N.E.2d 557, and *Sarelas*, 42 Ill.App.2d at 375, 192 N.E.2d 451).

Thus, I conclude that the appellate court in the present case originally reached the correct result when it concluded that *Illinois Bell Switching* was dispositive and held that NI–Gas owed no duty to plaintiff’s decedent. The overwhelming weight of authority from both this court and our appellate court supports this result. Plaintiff has identified no language in the tariff or in the Act from which the duty she claims can be said to arise. Indeed, the plain language of the tariff expressly disclaims any such duty.

Even if the common law exception imposing a duty based on actual or constructive knowledge of a leak or defect in the customer’s equipment is deemed to be incorporated into the tariff, it cannot reasonably be said that the tariff also incorporates any change in the common law of duty that the courts of this state subsequently make. To do so would be to engage in bootstrapping of the most egregious kind. In effect, tariffs would not have the effect of statutes. Rather, they would become mere restatements of the common law, subject to change over \*89 time as the common law of negligence evolves. This is precisely the situation that the legislature sought to avoid.

The majority responds to this statement by citing *Bush v. Squellati*, 122 Ill.2d 153, 119 Ill.Dec. 366, 522 N.E.2d 1225 (1988), for the proposition that it is for the General Assembly, not this court, to abrogate NI–Gas’ common

law duty. 211 Ill.2d at 69, 284 Ill.Dec. at 327, 809 N.E.2d at 1273. *Bush* is inapposite. The issue was whether the maternal grandparents of a child who was adopted by other relatives on the maternal side of the child’s birth family had standing to seek court-ordered visitation. This court found no statutory basis for standing and noted that it was for the legislature to “expand grandparental visitation \*\*1283 \*\*\*337 rights.” Subsequent legislative efforts to do so have met with constitutional barriers. See *Wickham v. Byrne*, 199 Ill.2d 309, 263 Ill.Dec. 799, 769 N.E.2d 1 (2002). *Bush* hardly offers support for the majority’s conclusion that the tariff does not *already* shield NI–Gas from liability under these facts.

### Conclusion

The death of Janice Adams was tragic. It is a further tragedy that the entity likely to blame for the defect that caused her death is no longer in business. That unfortunate fact, however, is not a sufficient basis for this court to ignore the public policy of this state as expressed in the Act and the plain language of the tariff with regard to limits of liability.

In sum, this court should be guided by our holding in *Illinois Bell Switching Station*, 161 Ill.2d at 244, 204 Ill.Dec. 216, 641 N.E.2d 440, that the exculpatory language in the tariff, which has been “accepted for decades by the General Assembly, is neither in contravention of the Act passed by that same body, the rules passed by the Commission (an agency of that body), nor against public policy.” The plain language of the tariff, which not only does not impose a duty to warn of hazards associated with pipes and fixtures installed and owned by the customer, but also expressly disclaims any \*90 such liability, should be given effect by this court. I would affirm the judgment of the circuit court, granting summary judgment in favor of the defendant, NI–Gas.

Justices FITZGERALD and THOMAS join in this dissent.

### All Citations

211 Ill.2d 32, 809 N.E.2d 1248, 284 Ill.Dec. 302

780 F.2d 1238  
United States Court of Appeals,  
Fifth Circuit.

MID LOUISIANA GAS COMPANY, Petitioner,  
v.  
FEDERAL ENERGY REGULATORY  
COMMISSION, Respondent.

Nos. 82-4470, 83-4413.  
|  
Jan. 21, 1986.

Natural gas pipeline company petitioned for review of orders of the Federal Energy Regulatory Commission prohibiting the pipeline company from pricing part of its company-owned production in accordance with rate structures set forth in Natural Gas Policy Act. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) pipeline company did not bargain away its right to reprice its pipeline production by failing to specifically preserve that right in settlement agreement, and (2) Commission's suspension of effective date of pipeline company's tariff sheets for statutory maximum of five months on ground that Commission needed time to review pipeline company's proposal and to determine how best to go about allowing pipeline industry to recover Natural Gas Policy Act rates was not impermissible.

Reversed and remanded.

West Headnotes (2)

**[1] Gas**

- Contracts

Natural gas pipeline company which entered into settlement approved by Federal Energy Regulatory Commission regarding proposed rate increase pricing its "old" pipeline production on cost-of-service basis did not bargain away its right to reprice its pipeline production by failing to specifically preserve that right in the settlement agreement; absent integrated document purporting to govern all relationships between the parties, such silence would not be taken to indicate relinquishment

of pipeline company's valuable statutory right to reprice its company-owned production at Natural Gas Policy Act rates, which was not at issue in the rate case settled under § 4 of the Natural Gas Act. Natural Gas Policy Act of 1978, §§ 2-602, 15 U.S.C.A. §§ 3301-3432; Natural Gas Act, § 4, 15 U.S.C.A. § 717c.

11 Cases that cite this headnote

**[2] Gas**

- In General: Amount and Regulation

Federal Energy Regulatory Commission's suspension of effective date of pipeline company's tariff sheets for statutory maximum of five months, on ground that the Commission needed time to review pipeline company's proposed method for implementing judicial ruling that any production attributable to an interstate pipeline's own properties was entitled to "first sale" pricing treatment under Natural Gas Policy Act and to determine how best to go about allowing the pipeline industry to recover such rates, was not impermissible. Natural Gas Policy Act of 1978, §§ 2-602, 15 U.S.C.A. §§ 3301-3432; Natural Gas Act, § 4(e), 15 U.S.C.A. § 717c.

5 Cases that cite this headnote

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\*1239 Petition for Review of Orders of The Federal Energy Regulatory commission.

Before GARZA, HIGGINBOTHAM and DAVIS,  
Circuit Judges.

**Opinion**

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Mid Louisiana Gas Company petitions for review of several orders issued by the Federal Energy Regulatory Commission (FERC) prohibiting it from pricing part of its company-owned production in accordance with the rate structure set forth in the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301–3432. Persuaded that Mid Louisiana is not barred from recovering NGPA prices, we reverse.

I

A

Mid Louisiana Gas Company is an interstate natural gas pipeline. Approximately forty percent of the natural gas it sells to its customers is produced by Mid Louisiana from its own properties. Prior to the enactment of the NGPA in 1978, FERC was charged, under the Natural Gas Act (NGA), 15 U.S.C. §§ 717–717w, with ensuring that producers set “just and reasonable” rates for interstate sales of natural gas. *Id.* § 717c(a). *See Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954).

Pursuant to this authority, FERC established a two-tiered system of pricing a pipeline's own production. “Old” pipeline production, i.e., most gas produced from wells drilled on or before January 1, 1973 or from leases acquired on or before October 7, 1969, was priced on a cost-of-service basis. *See* Order No. 98, Pricing of Pipeline Production Under the Natural Gas Act, 45 Fed.Reg. 53,901 (1980). A pipeline's cost-of-service, which incorporated its exploration and production costs, was determined in general rate cases under section 4 of the NGA, 15 U.S.C. § 717c, and if deemed “just and reasonable” by the Commission, was included in the pipeline's rate base. This rate base, multiplied by an appropriate rate of return, defined the rates a pipeline could charge its jurisdictional customers. Once established, these rates could ordinarily be increased only

by filing for another general rate change under section 4 of the NGA.

In contrast, “new” pipeline production, i.e., gas produced from post-January 1, 1973 wells or post-October 7, 1969 leases, was “parity” priced at the same area or nationwide rates applicable to non-pipeline (independent) interstate producers. Unlike cost-of-service rates, these area rates could be changed semi-annually to reflect fluctuations in the cost of production; the mechanism for these adjustments was the purchased gas adjustment clause (PGA) of the tariff.<sup>1</sup>

<sup>1</sup> PGA proceedings authorized under § 154.38 of the Commission's regulations, 18 C.F.R. § 154.38, enable pipelines to track certain costs, such as well-head purchases and certain pipeline and affiliate production rates, and to adjust their rates semi-annually to reflect these costs without undergoing a general section 4 rate proceeding.

The NGPA, enacted in 1978, dramatically altered FERC's regulatory authority over sales of gas by producers. While leaving intact the Commission's jurisdiction to police the prices a pipeline could charge its customers, the NGPA defrocked the Commission of its authority to set most of the prices paid for the production of natural gas. The NGPA defines several categories of natural gas production, establishes maximum prices that can be charged for “first sales”<sup>2</sup> in some categories, schedules increases \*1240 in future first sales price limits, and removes some ceiling prices altogether.

<sup>2</sup> Section 2(21)(A) of the NGPA, 15 U.S.C. § 3301(21)(A), defines a first sale as “any sale of any volume of natural gas—(i) to any interstate pipeline or intrastate pipeline; (ii) to any local distribution company; (iii) to any person for use by such person;” or (iv) any sale which precedes any of these sales, or (v) which follows such sales, where defined as such to avoid circumvention of maximum lawful prices. Section 2(21)(B), 15 U.S.C. § 3301(21)(B), provides that the sales just described do not include “the sale of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof, unless such sale is attributable to volumes ... produced by such ... pipeline, or local distribution company, or any affiliate thereof.”

Section 601 of the NGPA, 15 U.S.C. § 3431, coordinates that Act with the NGA. Section 601(b)(1)(A), 15 U.S.C. §

3431(b)(1)(A), deems any amount paid in any “first sale” “just and reasonable” for purposes of sections 4 and 5 of the NGA, 15 U.S.C. §§ 717c, 717d, if that amount does not exceed the applicable statutory ceiling price or the gas is deregulated. An interstate pipeline is guaranteed a passthrough of these purchased gas costs in NGA section 4 rate proceedings, unless the “amount paid was excessive due to fraud, abuse, or similar grounds.” 15 U.S.C. § 3431(c).

With the NGPA in place, a question soon arose over whether NGPA prices applied to pipeline as well as to independent production. Beginning with Order No. 58 in November 1979, FERC issued a series of orders and interim regulations that effectively prohibited a pipeline from pricing its company-owned production at NGPA rates. FERC held that the intracorporate transfer of company-owned gas from a production to a distribution facility did not qualify as a “first sale” eligible for NGPA pricing; instead, such production remained subject to NGA jurisdiction, which continued cost-of-service pricing for the pipeline’s “old” gas.<sup>3</sup>

<sup>3</sup> See Order No. 58, 44 Fed.Reg. 66,577 (1979); Order No. 98, 45 Fed.Reg. 53,091 (1980); Order No. 102, 45 Fed.Reg. 67,083 (1980). For a discussion of Order No. 58 and its progeny, see *Mid-Louisiana Gas Co. v. F.E.R.C.*, 664 F.2d 530, 533–34 (5th Cir.1981), *aff’d in part and vacated in part sub. nom. Public Serv. Comm’n of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 103 S.Ct. 3024, 77 L.Ed.2d 668 (1983).

A number of pipeline producers, Mid Louisiana at the forefront, then sought review of these Commission orders. This court, in *Mid-Louisiana Gas Co. v. F.E.R.C.*, 664 F.2d 530 (5th Cir.1981) (“*Mid-La. I*”), vacated the Commission orders, holding that any production attributable to an interstate pipeline’s own properties was entitled to “first sale” pricing treatment under the NGPA. *Id.* at 538. On certiorari, the Supreme Court agreed with us, stating: “The Commission’s position is contrary to the history, structure, and basic philosophy of the NGPA. Like the Court of Appeals, we conclude that [FERC’s] exclusion of pipeline production is ‘inconsistent with the statutory mandate [and would] frustrate the policy that Congress sought to implement.’” *Public Serv. Comm’n of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 103 S.Ct. 3024, 3037, 77 L.Ed.2d 668 (1983) (“*Mid-La. II*”) (citations omitted).<sup>4</sup>

<sup>4</sup> The Supreme Court vacated *Mid-La. I*, however, and remanded to allow the Commission, rather than the court, to determine where such “first sale” occurs. *Mid-La. II*, 103 S.Ct. at 3037. In August 1984, FERC adopted our position, in *Mid-La. I*, 664 F.2d at 538, that the intracorporate transfer is the point of “first sale.” Order No. 391, (pending rehearing), Production Under Section 2(21) of the Natural Gas Policy Act of 1978, 49 Fed.Reg. 33,849 (1984).

## B

While these issues oozed through administrative and judicial channels, many pipelines entered into Commission-approved settlements of their general section 4 rate proceedings. The interpretation of one such settlement is at issue here.

On June 13, 1980, while Mid Louisiana’s application for rehearing of Order No. 58 was pending before the Commission, the company filed revised tariff sheets in Docket No. RP80–113 to implement a general increase in its jurisdictional rates of \$124,075 per year. These tariff sheets priced Mid Louisiana’s “old” gas on a cost-of-service basis. On July 9, 1980, FERC accepted the proposed tariffs for filing, suspended their effectiveness for five months, and set the matter for hearing.<sup>5</sup> Before the hearing date, however, Mid Louisiana, FERC, and Gulf States Utilities Company, \*1241 a major customer of Mid Louisiana and an intervenor here, negotiated a settlement of this rate proceeding. As in Mid Louisiana’s proposed tariff sheets, this Stipulation and Agreement, approved by the Commission on April 3, 1981, priced Mid Louisiana’s “old” pipeline production on a cost-of-service basis.

<sup>5</sup> Under Section 4 of the NGA, the Commission is empowered to “enter upon a hearing concerning the lawfulness” of the proposed rate increase. At such hearing, the pipeline bears the “burden of proof to show that the increased rate or change is just and reasonable.” 15 U.S.C. § 717c(e).

On December 22, 1981, Mid Louisiana requested that the Commission reopen the proceedings in Docket No. RP80–113 for the limited purpose of revising an inaccurate sales volume figure used in calculating the settlement rates. After an informal settlement conference, Mid Louisiana, the Commission, and intervenors Gulf States Utilities Company and Mississippi Valley Utilities Company,

all agreed on Mid Louisiana's proposed amendment. Pursuant to this agreement, Mid Louisiana filed a motion with the Commission seeking revision of the original settlement's sales volume provisions. In its transmittal letter accompanying the motion, Mid Louisiana expressed its intent not to seek certain rate changes prior to January 1, 1983. In that same letter, however, the company stated that it intended "to file and make effective prior to January 1, 1983: rate changes pursuant to the PGA provisions of its FERC Gas Tariff ... and rate changes exclusively to recover NGPA prices for company owned production." On April 29, 1982, FERC granted Mid Louisiana's unopposed motion to amend the settlement.

This court issued its mandate in *Mid-La. I* on March 2, 1982. One week later, Mid Louisiana filed revised tariff sheets with FERC, Docket No. RP82-51-000, seeking to amend its tariff PGA clause to permit the pipeline to recover NGPA rates for all its production<sup>6</sup> and to reduce its base tariff rates to reflect the costs of service attributable to pipeline production. In its transmittal letter, Mid Louisiana requested that FERC waive its thirty day notice requirement, in order to make the proposed tariff sheets effective as of the *Mid-La. I* mandate. Gulf States and Mississippi Valley intervened, opposing the proposed waiver. On April 8, 1982, FERC issued an order suspending the effective date of Mid Louisiana's proposed tariff sheets in Docket No. RP82-51-000 for five months and setting the matter for hearing. FERC explained that the revised tariffs "may be unjust, unreasonable, unduly discriminatory or otherwise unlawful" and that the Commission needed "additional time to assess the impact of *Mid-La. I* on Mid La's rates." On May 10, 1982, Mid Louisiana applied for rehearing of the Commission's suspension order, arguing that suspension was incompatible with this court's mandate in *Mid-La. I*.

<sup>6</sup> Apparently, Mid Louisiana was unable to recoup NGPA prices without such a tariff change because its PGA clause, at the time of settlement, defined "purchased gas costs" as the cost of gas purchased from others.

While this application for rehearing was still pending, Mid Louisiana, on July 1, 1982, made two additional rate filings with the Commission. In Docket No. RP82-118-000, it filed new tariff sheets requesting an increase in its jurisdictional rates, to become effective August 1, 1982. At the same time, the company filed its semi-annual PGA adjustment, Docket No. TA82-2-15-000,

submitting two alternative tariff sheets. One of the tariffs, with a proposed effective date of August 1, 1982, continued cost-of-service treatment for Mid Louisiana's company-owned production. The other alternative, with a proposed effective date of August 2, 1982, reflected NGPA pricing for this production in accordance with *Mid-La. I*. On July 30, 1982, FERC issued an order in the general rate case, Docket No. RP82-118-000, accepting Mid Louisiana's tariff for filing, but suspending its effective date until January 1, 1983. FERC simultaneously issued an order in the PGA proceeding, Docket No. TA82-2-15-000, that permitted the lower cost-of-service tariff to become effective on August 1, 1982 and the higher NGPA alternative to take effect on August 2. In accepting the NGPA alternative, FERC stated that there were issues outstanding regarding NGPA pricing of pipeline production and directed that they be consolidated for \*1242 resolution with those in Docket No. RP82-51-000. On August 2, 1982, Mid Louisiana began collecting applicable NGPA rates for all company-owned production.

On November 12, 1982, FERC issued an order in Docket No. RP82-51-000, denying Mid Louisiana rehearing of the Commission's April 8, 1982 suspension order. The Commission also rejected the proposed tariff sheets filed in that docket and directed the pipeline both to return to cost-of-service pricing for its company-owned production and to refund its customers the NGPA excess Mid Louisiana had collected beginning August 2, 1982. The Commission based its denial of NGPA prices on the 1981 settlement agreement in Docket No. RP80-113. Mid Louisiana had bargained away its right to reprice its pipeline production, FERC reasoned, by failing to specifically preserve that right in the settlement agreement itself. Mid Louisiana was thus precluded from recouping NGPA prices for its pipeline production for the term of the settlement, which FERC concluded expired on January 1, 1983—the effective date of the general rate increase in Docket No. RP82-118-000. Mid Louisiana immediately petitioned this court for review of the Commission orders prohibiting it from repricing its "old" pipeline production at NGPA rates for the settlement's duration.<sup>7</sup>

<sup>7</sup> Mid Louisiana initially petitioned for review of FERC's orders of April 8 and November 12, 1982. Fearing that these orders might not yet be final, the pipeline later applied to FERC for rehearing of the November order. After the Commission denied

this application for rehearing. Mid Louisiana again sought judicial review. The pipeline's two petitions for review have been consolidated here on appeal.

## II

The dispositive issue in this case is whether the 1981 Commission-approved settlement between Mid Louisiana and its customers should be read to preclude Mid Louisiana from repricing its "old" pipeline production according to the rates allowable under the NGPA. FERC does not deny that Mid Louisiana has the statutory right to price all of its company-owned production at NGPA rates, a right confirmed in *Mid-La. I* and *Mid-La. II*. Instead, FERC maintains that under the *Mobile-Sierra* doctrine, Mid Louisiana relinquished that right in the settlement of its 1981 section 4 general rate case and was therefore contractually barred, for the settlement term, from seeking rate increases to recover those prices. See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956); *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, 76 S.Ct. 368, 100 L.Ed. 388 (1956).<sup>8</sup>

<sup>8</sup> The *Mobile-Sierra* doctrine prohibits a pipeline from filing for unilateral rate increases inconsistent with private contractual arrangements with its customers. See *Pennzoil Co. v. F.E.R.C.*, 645 F.2d 360, 373-74 (5th Cir.1981), *cert. denied*, 454 U.S. 1142, 102 S.Ct. 1000, 71 L.Ed.2d 293 (1982).

## A

Commission-approved voluntary settlements like that in Docket No. RP80-113 allow both the Commission and the regulated entity "to avoid the delays and uncertainties of litigation." *Texas Gas Transmission Corp. v. F.P.C.*, 441 F.2d 1392, 1394 (6th Cir.1971). As such, they should be encouraged, rather than discouraged. *Texas Eastern Transmission Corp. v. F.P.C.*, 306 F.2d 345, 347 (5th Cir.1962), *cert. denied*, 375 U.S. 941, 84 S.Ct. 347, 11 L.Ed.2d 273 (1963).

[O]ne sure way to discourage voluntary settlements is for the Commission, at the behest of one party or the other, or the ubiquitous intervenors, to read into contracts things which are simply

not expressed or not there, out of the thoroughly commendable (and understandable) feeling that unless that is done the result is not as good as it ought to have been.... Consequently, both in its substantive provisions and in the terminology sought to memorialize the undertaking, the parties ought to be able to accept the contract as drafted, executed and approved. It should stand for what it says.

*Id.*, 306 F.2d at 348.

In determining what a settlement says or does not say, general principles of contract \*1243 interpretation apply. See *Mitchell Energy Corp. v. F.P.C.*, 519 F.2d 36, 40 (5th Cir.1975); *Texas Eastern*, 306 F.2d at 347. The Commission argues that its status as an administrative agency requires us to accord substantial deference to its interpretation of the settlement. Contract construction, however, is a question of law. Although there may be room to defer to the views of the agency "where the understanding of the problem is enhanced by the agency's expert understanding of the industry," agency interpretation on such questions is not conclusive. *Coca-Cola Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 608 F.2d 213, 222 (5th Cir.1979); see also *Cincinnati Gas & Elec. Co. v. F.E.R.C.*, 724 F.2d 550, 554 (6th Cir.1984); *Columbia Gas Transmission Corp. v. F.P.C.*, 530 F.2d 1056, 1059 (D.C.Cir.1976). But cf. *Consolidated Gas Supply Corp. v. F.E.R.C.*, 745 F.2d 281, 291 (4th Cir.1984), (interpretation by federal agency entitled to deference) (*dictum*), *cert. denied*, 105 S.Ct. 2702, 86 L.Ed.2d 718 (1985). Here, the Commission relies solely on the language of the settlement agreement itself, rather than on any technical or factual expertise. We thus "need not defer to the Commission's interpretation, but can review it freely." *Cincinnati Gas & Elec.*, 724 F.2d at 554.

In construing a settlement agreement, a court must place itself in the position of the parties at the time of execution and attempt to divine their intent. It must read the contract in light of the then existing regulatory framework, *Texas Eastern Transmission*, 306 F.2d at 347, as well as "the instrument itself, its purposes, and the circumstances of its execution and performance." *Pennzoil Co. v. F.E.R.C.*, 645 F.2d 360, 388 (5th Cir.1981), *cert. denied*, 454 U.S. 1142, 102 S.Ct. 1000, 71 L.Ed.2d 293

(1982). See also *Mobil Oil Corp. v. F.P.C.*, 570 F.2d 1021, 1025 (D.C.Cir.1978); *Mitchell Energy*, 519 F.2d at 41; *Texas Gas Transmission*, 441 F.2d at 1395. With these hornbook principles in mind, we turn to the settlement at issue here.

B

We start with the language of the contract itself. It is undisputed that Mid Louisiana, in settlement of the section 4 rate case, agreed on a dollar amount it would charge its customers. It is also clear that Mid Louisiana agreed in some detail as to how that rate was to be computed. The agreement plainly shows that Mid Louisiana's company-owned production was priced on a cost-of-service basis. FERC maintains that by using this pricing method, Mid Louisiana unambiguously agreed to price its old pipeline production on a cost-of-service basis. Because Mid Louisiana failed to specifically and expressly reserve its right to reprice that production should it prevail in the pending *Mid-La.* controversy, FERC concludes that the pipeline "must by law be deemed to have given up that right."

Mid Louisiana suggests that FERC's interpretation of the settlement indirectly disregards, or at least postpones, the effect of this court's mandate in *Mid-La. I*. The company argues that it expressly preserved its statutory right to reprice its old gas in the settlement itself. Article I of the 1981 settlement provides that "Mid Louisiana's pipeline production is priced at Natural Gas Policy Act (NGPA) rates or priced on a cost-of-service basis." Mid Louisiana urges that this language gave it the right to price its pipeline production according to whichever method was ultimately held proper.<sup>9</sup> Article IX, which recognized Mid Louisiana's right to make "PGA filings and filings pursuant to this Stipulation and Agreement,"<sup>10</sup> the pipeline \*1244 continues, gave it the right to make appropriate rate or tariff changes under section 4 of the NGA to recover NGPA prices allowed by Article I and *Mid-La. I*. Finally, Mid Louisiana directs us to the "General Reservations" clause in Article XI of the agreement. This clause provides that "except as expressly stated herein, no party shall be deemed to have approved, accepted, agreed, or consented to any rate-making or tariff principle or any method of cost of service determination ... underlying or supposed to underlie any of the rates, refunds, or future adjustments to rates provided herein."

The pipeline company argues that this language clearly preserved its rights with respect to issues unaddressed in the settlement. FERC, of course, maintains that this provision is inapplicable because Article I "expressly stated" that the pre-existing pricing scheme for pipeline production would continue to be applied.

9 The Commission claims the language in Article I was merely a "bland recitation" of the existing pricing scheme for all of Mid Louisiana's pipeline production, both old and new.

10 Article IX provides:

This Stipulation and Agreement, upon approval by the Commission, shall be effective as of the date of such approval and shall terminate on the date that a rate change filing by Mid Louisiana under Section 4 of the Natural Gas Act, other than PGA filings and filings pursuant to this Stipulation and Agreement, is made effective, or on the effective date of any change in rates resulting from a rate proceeding instituted after the date hereof by the Commission with respect to Mid Louisiana's jurisdictional rates, whichever shall occur first, except as otherwise provided for in Articles IV, V, VI and VII.

C

[1] We are unpersuaded that these provisions of the settlement agreement were specific enough to constitute express references to Mid Louisiana's right to reprice its pipeline production in the event that it prevailed in the *Mid-La.* litigation. Nevertheless, we cannot agree with the Commission that by utilizing cost-of-service pricing in settling its section 4 rate case, Mid Louisiana also gave up its right to reprice its "old" gas. The purpose of the settlement agreement, as well as the administrative background and circumstances attending its execution, lead us to conclude that Mid Louisiana's statutory right to reprice its company-owned production at NGPA rates was simply not at issue in the settled section 4 rate case. Absent an integrated document purporting to govern all relationships between the parties, such silence will not be taken to indicate relinquishment of a valuable right. *Mobil Oil*, 570 F.2d at 1025; *Texas Gas Transmission*, 441 F.2d at 1396.

Though the settlement in Docket No. RP80-113 was negotiated in a period of legal uncertainty regarding a

pipeline's rights under the NGPA, Mid Louisiana was nevertheless bound by effective Commission regulations when it filed its proposed tariff sheets in that rate proceeding. *See Ecce, Inc. v. F.P.C.*, 526 F.2d 1270, 1274 (5th Cir.), *cert. denied*, 429 U.S. 867, 97 S.Ct. 176, 50 L.Ed.2d 147 (1976); *Jupiter Corp. v. F.P.C.*, 424 F.2d 783, 791 (D.C.Cir.1969), *cert. denied*, 397 U.S. 937, 90 S.Ct. 944, 25 L.Ed.2d 118 (1970). One such regulation, Order No. 58, required that "old" company-owned production be priced on a cost-of-service basis. Had Mid Louisiana and its customers not reached a settlement, the pipeline's rates would have been set by the Commission after a hearing, utilizing cost-of-service pricing for company-owned "old" gas. The rates ultimately settled upon were not transfigured by the happenstance that they were arrived at through an agreement, rather than through government action. In basing its rates on its cost-of-service, Mid Louisiana was simply adhering to Commission regulations that were binding at that time.

FERC's position rests on a view of the settlement agreement as a completely integrated document attempting to govern all relationships and resolve all issues between the parties. FERC would thrust the burden on the regulated entity, in settling a section 4 rate case, to make provision for everything, including safeguards against every unknown, but conceivable, contingency. That, however, is not the nature of a settlement. *See Texas Eastern Transmission*, 306 F.2d at 357. Settlements "pertain only to those issues which they specifically resolve, ... they cannot be construed as having general application even to arguably analogous issues which the agreement does not purport to cover." *Texas Gas Transmission*, 441 F.2d at 1396.

\*1245 Here, the introduction to the Stipulation and Agreement described the settlement as "resolving all issues in this docket" (emphasis added). It is plain that only certain discrete issues relating to computation of Mid Louisiana's jurisdictional rates were actually at issue and resolved in the 1981 agreement. The bulk of the settlement was devoted to determining the proper dollar figures for cost of service items, rate of return, and depreciation. The "General Reservations" clause in Article XI further reflects the non-global nature of the settlement, which reached only those issues "expressly stated [t]herein."

It is equally plain that the settling parties did not intend that all their disputes be resolved in Docket No. RP80-

113. Although the pipeline production pricing issue was not subject to negotiation, it certainly was subject to review. The validity of Order No. 58 was being hotly contested by Mid Louisiana and other pipelines at the time this settlement was consummated. The Commission and Mid Louisiana's customers were well aware of this pending litigation and of the pipeline's stance in it.

The implausibility of the Commission's interpretation is also illustrated by the economics of the case. Mid Louisiana estimates that the difference between NGPA pricing and cost-of-service pricing of its pipeline production for the settlement period approaches \$9 million. Even when one allows for the uncertainty of economic predictions, it boggles the imagination to suppose that Mid Louisiana tacitly agreed to relinquish its right to a claim of this order of magnitude in return for a \$124,000 increase in jurisdictional rates. Common sense tells us that not even the uncertainty of prevailing in *Mid-La. I* could explain such an enormous and unexpressed surrender.

Our conclusion that the settlement was silent on and inapplicable to the issue in the *Mid-La.* litigation is further reinforced by the conduct of the settling parties themselves. In its transmittal letter accompanying its motion to amend the 1981 settlement, Mid Louisiana stated its intent to "file ... rate changes exclusively to recover NGPA prices for company-owned production." This motion was unopposed; neither FERC nor the pipeline's customers objected to the statement of intent as contrary to the original settlement. After *Mid-La. I*, Mid Louisiana sought to amend its PGA tariff to recover NGPA rates for all its production. FERC suspended the proposed tariff's effective date on the ground that it "may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful." Again, no specific objection was made that the proposed tariff would violate the 1981 settlement. Nor did Mid Louisiana's jurisdictional customers object on the basis of the settlement. Their complaint, rather, was aimed at Mid Louisiana's proposed waiver of the tariff notice requirements. FERC subsequently accepted the pipeline's alternative PGA filing, which reflected NGPA prices for "old" gas, noting only that there were issues outstanding regarding NGPA pricing to be resolved in a consolidated proceeding. Gulf States, a party to the 1981 settlement, merely requested that implementation of *Mid-La. I* be deferred pending Supreme Court review. In short, it

was not until November 1982, after Mid Louisiana had begun collecting NGPA rates, that the 1981 settlement was thought to preclude Mid Louisiana from repricing its pipeline production under the NGPA. If, as FERC now contends, Mid Louisiana had intentionally bargained away this right in settlement of the 1981 rate case, that agreement surely would have been raised earlier in objection to the pipeline's obvious attempt to take advantage of our decision in *Mid-La. I*. Cf. *Mobil Oil*, 570 F.2d at 1025 (lack of objection a circumstance reflecting parties' intent).

The Commission and Mid Louisiana were apparently "acting as private parties often do in making stipulations or negotiating contracts: as narrowing areas of disagreement and settling immediate issues between themselves without litigation, leaving other issues to be resolved in another forum." *Texas Gas Transmission*, 441 F.2d at 1395. That Mid Louisiana did not \*1246 expressly and specifically reserve the then-merely-potential right to take advantage of *Mid-La. I* does not imply that it had agreed to relinquish that right. See *Texas Gas Transmission*, 441 F.2d at 1395. The 1981 settlement simply did not speak to the NGPA issue then pending before this court in *Mid-La. I*. We refuse to "deem" that Mid Louisiana's silence regarding its right to recover NGPA prices should it ultimately prevail in the *Mid-La.* litigation constituted a waiver of that very valuable right. To do so would read into the contract something that simply is not there. See *Texas Eastern Transmission*, 306 F.2d at 348.

#### D

The Commission relies heavily on the recent decision in *Consolidated Gas Supply Corp. v. F.E.R.C.*, 745 F.2d 281 (4th Cir.1984), *cert. denied*, 472 U.S. 1008, 105 S.Ct. 2702, 86 S.Ct. 2702 (1985). There, the Fourth Circuit reviewed two rate settlement agreements between a pipeline company and FERC, both of which were negotiated at a time when the *Mid-La.* issue was "very much in dispute." 745 F.2d at 287. In the first settlement, the pipeline specifically reserved the right to contest the applicability of NGPA rates to its "old" production. In the second agreement, however, it failed to make a similar reservation. After *Mid-La. I*, FERC allowed the pipeline to collect NGPA prices for the period covered by the first settlement. It disallowed recovery for the term of

the second agreement, reasoning that the pipeline had failed to preserve its statutory rights. The Fourth Circuit affirmed.

We find *Consolidated* distinguishable from the present case. That *Consolidated* expressly preserved the pricing issue in its first settlement, but not in the second, undoubtedly influenced the Fourth Circuit's holding. The court stated that "the reservation in one and the lack of reservation in the other spring forth and compel the conclusion that the hope of NGPA pricing for the ... period [of the second settlement] had been discarded by [*Consolidated*], presumably in return for another benefit or other benefits." 745 F.2d at 291. Here, by contrast, there was no such midstream deletion of language to indicate that the pipeline had "discarded" the right it so vigorously claimed from the inception of the NGPA.

The Fourth Circuit, however, indicated that the language of the second settlement "standing alone was probably enough to support [its] result." *Id.* In contrast to Mid Louisiana's settlement, though, the agreement in *Consolidated* was held to be an "integrated contract," which purported to resolve "all of the cost of service issues and the PGA issues" "except for certain reserved issues *as specified in [the ] agreement.*" 745 F.2d at 288 & n. 16 (emphasis in 4th Circuit opinion). In contrast, the stated purpose of Mid Louisiana's settlement was to resolve "all issues in *this docket.*" No mention was made of cost-of-service as an "issue." Moreover, the "General Reservations" clause claimed to reserve, not "resolve," all issues "except those stated herein." We deal here with a non-global instrument that cannot be "deemed" to have waived an unmentioned, and at that time unexercisable, right.

#### E

In sum, then, the 1981 settlement agreement did not contemplate the relinquishment of the *Mid-La.* right to price pipeline production at NGPA rates. The settlement in Docket No. RP80-113 did not preclude Mid Louisiana from making appropriate filings to recover applicable NGPA rates in the event that its *Mid-La.* challenge succeeded. The Commission thus erred in preventing Mid Louisiana from recovering NGPA rates for its "old" pipeline production for the period between August 2, 1982

and January 1, 1983, the period encompassed in the orders under review.

### III

Mid Louisiana asserts that its tariff sheets in Docket No. RM82-51-000 were filed, on March 9, 1982, for the sole purpose of implementing this court's March 2 mandate in *Mid-La. I*. The pipeline company \*1247 argues that the Commission abused its discretion under section 4 of the NGA in suspending the effective date of those tariff sheets for the statutory maximum of five months (until August 2, 1982). See 15 U.S.C. § 717c(e).

Our power to review FERC rate suspensions is very narrow. Generally, a court "may not review a Commission decision as to whether or not to suspend a rate, at least as long as the agency complies with its statutory obligation to give a reason, and in no other way oversteps the bounds of its authority." *Exxon Pipeline Co. v. United States*, 725 F.2d 1467, 1470 (D.C.Cir.1984) (footnote and citations omitted). Although FERC must articulate reasons for a suspension and its length that will "enable a court to determine whether the [Commission's] decision was reached for an impermissible reason or for no reason at all," we cannot "take the next step and review the merits of a given case." *Id.* at 1473 (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 573, 95 S.Ct. 1851, 1860-61, 44 L.Ed.2d 377 (1975)).

[2] We cannot say that FERC's articulated reasons for suspending Mid Louisiana's tariff failed this test. The pipeline's filing proposed a method for implementing *Mid-La. I*,<sup>11</sup> but FERC stated that it needed time to review that proposal and determine how best to go about allowing the pipeline industry to recover NGPA rates.<sup>12</sup> We do not find that reason "impermissible," and thus do not overturn the Commission's suspension.

<sup>11</sup> Mid Louisiana's March tariff sought to implement *Mid-La. I* by amending the definition of "purchased gas costs" to include pipeline production and by reducing its base rates to eliminate costs of service attributable to that production.

<sup>12</sup> In suspending Mid Louisiana's March rate filings, FERC acknowledged that it was bound by the unstayed mandate in *Mid-La. I*. It contended,

however, that it had "the discretion to determine the appropriate procedures to implement the *Mid-La.* decision, and ... determine when these rates can be collected." A five month suspension, it explained, was necessary for "adequate review" of the complex factual and legal issues specific to Mid Louisiana, as well as *Mid-La. I*'s "broad industry-wide ramifications." See FERC Order Denying Rehearing, Vacating Hearing and Requiring Refund (Nov. 12, 1982).

We do note, however, that the Commission has never denied that Mid Louisiana, after *Mid-La. I* and *Mid-La. II*, has the statutory right to collect NGPA rates for its "old" pipeline production. The Commission is authorized to "undo what is wrongfully done by virtue of its order" when that order has been overturned by a reviewing court. *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229, 86 S.Ct. 360, 364, 15 L.Ed.2d 284 (1965); *Iowa Power and Light Co. v. United States*, 712 F.2d 1292, 1297 (8th Cir.1983), cert. denied, 466 U.S. 949, 104 S.Ct. 2150, 20 L.Ed.2d 536 (1984). Cf. *Tennessee Valley Municipal Gas Ass'n v. F.P.C.*, 470 F.2d 446, 452 (D.C.Cir.1972) (petitioner "must be put in the same position that it would have occupied had the [Commission] error not been made"). We note further that our holding today speaks only to the orders *sub judice*. We do not decide whether Mid Louisiana has the right to retroactive recovery of NGPA rates for the period from December 1, 1978, the effective date of the NGPA, to August 2, 1982, the effective date of the instant Commission orders.<sup>13</sup>

<sup>13</sup> Mid Louisiana indicates that it may file to recover NGPA rates for the period between the effective date of the NGPA and our *Mid-La. I* mandate. Although this issue is not before us, we note that in *Kentucky West Virginia Gas Company v. F.E.R.C.*, 780 F.2d 1231 (5th Cir.1986), a case decided this day, FERC permitted a pipeline to recover NGPA rates for its company-owned production from the effective date of the NGPA.

### IV

In view of our holding that the 1981 settlement agreement did not bar Mid Louisiana from repricing its pipeline production, we need not reach the pipeline's remaining contention that the Commission erred in determining the termination date of that settlement.

rates from August 2, 1982 forward, without prejudice to Mid Louisiana's right to seek retroactive recovery of the applicable NGPA rates as of that Act's effective date.

\*1248 V

Because the orders under review are contrary to the NGPA and to this court's mandate in *Mid-La. I.* and because the orders cannot be sustained under the *Mobile-Sierra* doctrine, we REVERSE and REMAND to the Commission to permit Mid Louisiana to recover NGPA

REVERSED AND REMANDED.

**All Citations**

780 F.2d 1238

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Distinguished by Modesto Irr. Dist. v. Gutierrez, 9th Cir.(Cal.),  
August 20, 2010

477 F.3d 668

United States Court of Appeals,  
Ninth Circuit.

NORTHWEST ENVIRONMENTAL  
DEFENSE CENTER, Public Employees for  
Environmental Responsibility; Northwest  
Sportfishing Industry Association, Petitioners,  
Northwest Power and  
Conservation Council, Intervenor,

v.

BONNEVILLE POWER  
ADMINISTRATION, Respondent.  
Confederated Tribes and Bands of the  
Yakama Indian Nation, Petitioner,

v.

Bonneville Power Administration, Respondent.

Nos. 06-70430, 06-71182.

|

Argued and Submitted Sept. 12, 2006.

|

Filed Jan. 24, 2007.

### Synopsis

**Background:** Environmental groups and others petitioned for judicial review of actions of federal power marketing agency that operated dams on river in transferring to two contractors the functions of fish passage center (FPC), which provided technical assistance and information on matters related to passage of salmon and steelhead through river and its tributaries to wildlife agencies, Indian tribes, and general public.

**Holdings:** The Court of Appeals, Gould, Circuit Judge, held that:

[1] subject matter jurisdiction existed over petitions for review;

[2] agency acted contrary to law when agency concluded, based solely on committee report language, that it was bound to transfer FPC's functions to contractors; and

[3] agency's decision to transfer FPC's functions to contractors was arbitrary and capricious.

Petition for review granted.

West Headnotes (24)

#### [1] Federal Courts

~ Jurisdiction

Court of Appeals considers challenges to its subject matter jurisdiction de novo.

Cases that cite this headnote

#### [2] Electricity

~ Environmental considerations in general

Pursuant to its original and exclusive subject matter jurisdiction over challenges to final actions and decisions taken under Northwest Power Planning and Conservation Act by federal power marketing agency, or the implementation of such final actions, Court of Appeals had subject matter jurisdiction over petitions for review challenging both agency's solicitation of contractors to take over functions of fish passage center (FPC) and its transfer of FPC's functions to selected contractors, given that solicitation was part of process that led to agency's admittedly final actions in selecting contractors and transferring FPC's functions. Pacific Northwest Electric Power Planning and Conservation Act, § 9(e)(5), 16 U.S.C.A. § 839f(e)(5).

1 Cases that cite this headnote

#### [3] Environmental Law

~ Organizations, associations, and other groups

Administrative Procedure Act (APA) gave Court of Appeals the equitable power to set aside action of federal power marketing agency in transferring functions of fish passage center (FPC) to contractors if court determined that agency's action was arbitrary, capricious, or contrary to law, and therefore court had ability to redress claimed injuries required for environmental groups and others to have Article III standing to seek judicial review. U.S.C.A. Const. Art. 3, § 2, cl. 1; 5 U.S.C.A. § 706(2)(A).

5 Cases that cite this headnote

[4] **Federal Civil Procedure**

-- In general;injury or interest

**Federal Civil Procedure**

-- Causation;redressability

To have Article III standing to challenge agency action, petitioners must satisfy three-part test under which petitioners must have suffered an injury in fact which is both (1) concrete and particularized and (2) actual or imminent, petitioners must show a causal connection between their injury and the conduct complained of, and it must be likely, as opposed to merely speculative, that petitioners' injury will be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[5] **Contracts**

-- Rewriting, remaking, or revising contract  
Court will not create new obligations that do not exist within the four corners of a contract.

Cases that cite this headnote

[6] **Contracts**

-- Rewriting, remaking, or revising contract  
In a contract case between two private parties, court's remedial power is limited to enforcing the obligations to which the private parties agreed.

Cases that cite this headnote

[7] **Administrative Law and Procedure**

-- In general;judgment

When a public law has been violated, court is not bound to stay within the terms of a private agreement negotiated by the parties, and may exercise its equitable powers to ensure compliance with the law.

Cases that cite this headnote

[8] **Equity**

-- Grounds of jurisdiction in general

When the public interest is involved, court's equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.

2 Cases that cite this headnote

[9] **Equity**

-- Grounds of jurisdiction in general

Unless Congress provides otherwise, courts of equity may go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.

Cases that cite this headnote

[10] **Administrative Law and Procedure**

-- In general;judgment

Court of Appeals, as a court of equity conducting judicial review under Administrative Procedure Act (APA), has broad powers to order mandatory affirmative relief, if such relief is necessary to accomplish complete justice. 5 U.S.C.A. § 551 et seq.

1 Cases that cite this headnote

[11] **Statutes**

-- Reports and analyses

Congressional committee report language unconnected to the text of an enacted statute has no binding legal import.

Cases that cite this headnote

**[12] Electricity**

Environmental considerations in general Federal power marketing agency acted contrary to law when, based solely on language in congressional committee reports that was unconnected to text of enacted statute, agency concluded that it was bound to transfer functions of fish passage center (FPC) that it funded to contractors, contrary to dictates of Northwest Power Planning and Conservation Act; since committee reports were not subject to process outlined in United States Constitution for altering legal duties of persons outside the legislative branch, agency could not give reports binding effect. U.S.C.A. Const. Art. 1, § 7, cl. 2; 5 U.S.C.A. § 706(2); Pacific Northwest Electric Power Planning and Conservation Act, §§ 2(3), 4(d) (2), (h)(10)(A), 5(d)(3), 6(b, c), 16 U.S.C.A. §§ 839(3), 839b(d)(2), (h)(10)(A), 839c(d)(3), 839d(b, c).

Cases that cite this headnote

**[13] Statutes**

Particular Kinds of Legislative History Legislative history, untethered to text in an enacted statute, has no compulsive legal effect.

Cases that cite this headnote

**[14] Statutes**

Legislative History Principles in legislative history that have no statutory reference point and do not purport to explain any part of an enacted law do not carry the force of law, and thus do not bind anyone, including administrative agencies.

Cases that cite this headnote

**[15] Administrative Law and Procedure**

Annulment, vacation or setting aside of administrative decision

It is "contrary to law," for purposes of provision of Administrative Procedure Act (APA) empowering courts to set aside an agency decision that is contrary to governing law, for an agency to conclude that it is legally bound by language in a congressional committee report. 5 U.S.C.A. § 706(2).

Cases that cite this headnote

**[16] Statutes**

Plain, literal, or clear meaning; ambiguity

When legislative history is tied directly to statutory language and that language is ambiguous, the legislative history may permissibly inform judgment about interpreting ambiguous statutory terms.

Cases that cite this headnote

**[17] Statutes**

Particular Kinds of Legislative History

When legislative history is not tied to any statutory text, court should give it no weight.

Cases that cite this headnote

**[18] Constitutional Law**

Nature and scope in general

**Constitutional Law**

Encroachment on Executive

If Congress wishes to alter the legal duties of persons outside the legislative branch, including administrative agencies, it must use the process outlined in the United States Constitution. U.S.C.A. Const. Art. 1, § 7, cl. 2.

Cases that cite this headnote

**[19] Administrative Law and Procedure**

Theory and grounds of administrative decision

Court may only sustain an agency's action on the grounds actually considered by the agency.

8 Cases that cite this headnote

**[20] Administrative Law and Procedure**

~ Theory and grounds of administrative decision

**Administrative Law and Procedure**

~ Arbitrary, unreasonable or capricious action; illegality

**Administrative Law and Procedure**

~ Clear error

Under arbitrary and capricious standard of review established by Administrative Procedure Act (APA), agency must cogently explain why it has exercised its discretion in a given manner, and, in reviewing that explanation, court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. 5 U.S.C.A. § 706(2).

12 Cases that cite this headnote

**[21] Administrative Law and Procedure**

~ Arbitrary, unreasonable or capricious action; illegality

An agency decision is "arbitrary and capricious," within meaning of Administrative Procedure Act (APA), if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 5 U.S.C.A. § 706(2).

8 Cases that cite this headnote

**[22] Administrative Law and Procedure**

~ Stare decisis: estoppel to change decision

An agency is entitled to change its course when its view of what is in the public's interest

changes; however, an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion, it may cross the line from the tolerably terse to the intolerably mute.

13 Cases that cite this headnote

**[23] Administrative Law and Procedure**

~ Theory and grounds of administrative decision

In reviewing agency action, court must look to agency's reasoning in making its decision, and not to other reasons for its decision that agency might marshal before the court.

8 Cases that cite this headnote

**[24] Electricity**

~ Environmental considerations in general  
Decision of federal power marketing agency to transfer functions of fish passage center (FPC) that it funded to two contractors was arbitrary and capricious under Administrative Procedure Act (APA), given that decision was departure from agency's two-decades-old precedent and agency did not provide reasoned analysis for its change in course, or show how it determined that transfer of FPC's functions was exercise of its authority consistent with fish and wildlife program adopted by interstate compact agency and with purposes of Northwest Power Planning and Conservation Act. 5 U.S.C.A. § 706(2); Pacific Northwest Electric Power Planning and Conservation Act, § 4(h)(10)(A), 16 U.S.C.A. § 839b(h)(10)(A).

5 Cases that cite this headnote

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On Petition for Review of a Final Action of the Bonneville Power Administration.

Before MICHAEL DALY HAWKINS, BARRY G. SILVERMAN, and RONALD M. GOULD, Circuit Judges.

### Opinion

\*672 GOULD, Circuit Judge.

Salmon and steelhead<sup>1</sup> are two of the great natural resources of the Columbia River. Their continued existence has been threatened by the construction of dams to capture a third great natural resource of the Columbia River, its water power. As these dams were constructed, the number of salmon and steelhead migrating up the Columbia River to reproduce at its headwaters dropped. At one time, an estimated ten to sixteen million adult fish returned to the Columbia River basin each year. Today, only about one million fish return for spawning that is essential to the species' survival in the Columbia River system.

1 A steelhead is a rainbow trout which has spent part of its life at sea. Alaska Dep't of Fish & Game, *Steelhead Trout*, <http://www.adfg.state.ak.us/pubs/notebook/fish/steelhd.php> (last visited Jan. 17, 2007).

In response to declining salmon and steelhead runs, Congress passed the Northwest Power Planning and Conservation Act of 1980. The Act created the Northwest Power and Conservation Council, an interstate compact agency, and directs the Council to prepare programs to protect and enhance the fish and wildlife of the Columbia River basin while also assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply. The Act also instructs the Bonneville Power Administration, the federal agency that operates the dams on the Columbia River, to use its authority in a manner consistent with the programs developed by the Council.

In 1982, the Council called for the creation of what would eventually become the Fish Passage Center. The Fish Passage Center provides technical assistance and information to fish and wildlife agencies, Indian tribes, and the general public on matters related to juvenile and adult salmon and steelhead passage through the Columbia River and its tributaries. Since 1987, the Bonneville Power Administration has funded the Fish Passage Center, and the Fish Passage Center has gathered, analyzed, and publicly-disseminated data regarding fish passage. The Bonneville Power Administration has used this information, in consultation with fisheries and Indian tribes and in conjunction with its control over water flow past the dams, to help improve the survival rates of fish migrating up and down the Columbia River.

In light of language in two 2005 congressional committee reports, however, the Bonneville Power Administration decided to transfer the functions performed by the Fish Passage Center to Battelle Pacific Northwest Laboratory and Pacific States Marine Fisheries Commission. In this consolidated case, Northwest Environmental Defense Center, Public Employees for Environmental Responsibility, Northwest Sportfishing Industry Association, and the Confederated Tribes and Bands of the Yakama Nation (collectively, "petitioners") petition for review of the Bonneville Power Administration's action transferring the functions of the Fish Passage Center to Battelle Pacific Northwest Laboratory and Pacific States Marine Fisheries Commission and creating a new model Fish Passage Center ("new model").

I

A

Created by the Bonneville Project Act of 1937, 16 U.S.C. §§ 832–832m, the Bonneville Power Administration (“BPA”) is a federal agency within the Department of Energy. BPA sells and transmits wholesale electricity from thirty-one federal hydroelectric \*673 plants, one non-federal nuclear power plant in Hanford, Washington, and other non-federal power plants in the Columbia River basin. About BPA Home, [http://www.bpa.gov/corporate/About\\_BPA/](http://www.bpa.gov/corporate/About_BPA/) (last visited Jan. 17, 2007). BPA’s customers include federal agencies, public and private utility companies, and direct service industrial customers. *See Kaiser Aluminum & Chem. Corp. v. BPA*, 261 F.3d 843, 845 (9th Cir.2001). BPA does not receive annual appropriations, as is the case with most federal agencies. Rather, the revenue that BPA obtains from its sales and transmission of electricity is deposited in the Bonneville Power Administration fund (“BPA fund”). 16 U.S.C. § 838i(a). BPA then uses the fund to finance its operations. *Id.* § 838i(b).

As a self-financing power marketing agency, BPA must set its prices high enough to cover its costs. *Indus. Customers of Nw. Utilities v. BPA*, 408 F.3d 638, 641 (9th Cir.2005); *Ass’n of Public Agency Customers, Inc. v. BPA*, 126 F.3d 1158, 1164 (9th Cir.1997) [hereinafter *APAC*]. BPA must also sell power to consumers “at the lowest possible rates.” 16 U.S.C. § 838g. At the same time, BPA must be environmentally conscious, supporting energy conservation and protecting the fish and wildlife of the Columbia River basin. *APAC*, 126 F.3d at 1164; *see, e.g.*, 16 U.S.C. § 839b(h)(10)-(11) (providing that BPA must use the BPA fund and its statutory authority in a manner that protects and enhances fish and wildlife).

In 1980, to assist BPA in balancing its responsibilities to provide low-cost energy while protecting fish and wildlife, Congress passed the Pacific Northwest Power Planning and Conservation Act (“Northwest Power Act” or “Act”), Pub.L. No. 96–501, 94 Stat. 2697 (1980) (codified at 16 U.S.C. §§ 839–839h). The Act authorized state governments to form what is now called the Northwest Power and Conservation Council (“Council”),

an interstate compact agency<sup>2</sup> comprised of members from Idaho, Montana, Oregon, and Washington. 16 U.S.C. § 839b(a)(2)(B); *see Seattle Master Builders Ass’n v. Pac. Nw. Elec. Power & Conservation Council*, 786 F.2d 1359, 1366 (9th Cir.1986) (upholding the constitutionality of the Council). Each state has agreed to participate in the Council. *see Idaho Code* § 61–1201; *Mont.Code Ann.* § 90–4–401; *Or.Rev.Stat.* § 469.803; *Wash. Rev.Code Ann.* § 43.52A.010, and has enacted legislation authorizing its governor to appoint two members to the Council. *see Idaho Code* § 61–1202; *Mont.Code Ann.* § 90–4–402; *Or.Rev.Stat.* § 469.805; *Wash. Rev.Code Ann.* § 43.52A.030.

<sup>2</sup> For a landmark discussion of the use of the Compact Clause, article I, section 10, clause 3 of the Constitution, to permit agreements by states on a regional basis, including the need to do so to promote sound development of electrical power and conservation of natural resources, *see Felix Frankfurter & James M. Landis, The Compact Clause of the Constitution—A Study In Interstate Adjustments*, 34 *Yale L.J.* 685 (1925).

The Act charges the Council with two tasks fundamental to this case: (1) preparing and periodically reviewing a regional conservation and electric power plan to aid BPA in acquiring and developing power resources (“Power Plan” or “Plan”) and (2) preparing and periodically reviewing a program to protect, mitigate, and enhance fish and wildlife (“Fish and Wildlife Program” or “Program”). 16 U.S.C. § 839b(a)(1).

The current composition of the Council reflects the varied constituencies it serves. The Council is chaired by an expert in natural resource economics. Many Council members are former business persons or practicing attorneys. Indian tribes and \*674 fishing enthusiasts are also represented on the Council. Four of the eight current Council members have served as state senators or state representatives in the Pacific Northwest.<sup>3</sup>

<sup>3</sup> For biographical information on the Council’s current members, *see Council Members*, <http://www.nwcouncil.org/contact/members.asp> (last visited Jan. 17, 2007).

The Council submits each project proposed for funding under its Fish and Wildlife Program for review by the Independent Scientific Review Panel, an eleven-member

panel of independent scientists appointed by the Council from the recommendations of the National Academy of Scientists. *See id.* § 839b(h)(10)(D). The Act obliges BPA to consult with state fish and wildlife agencies and Indian tribes in carrying out its responsibilities under the Act. *See id.* § 839b(h)(11)(B). In short, the Act “establishes an innovative system of cooperative federalism under which the states, within limits provided in the Act, can represent their shared interests in the maintenance and development of a power supply in the Pacific Northwest and in related environmental concerns.” *Seattle Master Builders*, 786 F.2d at 1366.

## B

Section 839b(h)(10)(A) of the Act explains how the views of the Council guide BPA's actions. It provides:

The Administrator [of BPA] shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this chapter and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan, if in existence, the program adopted by the Council under this subsection, and the purposes of this chapter.

16 U.S.C. § 839b(h)(10)(A). In other words, the Act requires BPA's fish and wildlife protection, mitigation, and enhancement actions to be consistent with (1) the Council's Power Plan; (2) the Council's Fish and Wildlife Program; and (3) the purposes of the Act.<sup>4</sup> Section 839b(h)(10)(A) is thus referred to as the Act's “consistency requirement.”

<sup>4</sup> In 16 U.S.C. § 839, Congress listed the purposes of the Act: (1) to encourage electricity conservation and the development of renewable resources in the Pacific Northwest; (2) “to assure the Pacific Northwest of an adequate, efficient, economical, and reliable power

supply”; (3) to allow the States, local governments, and citizens of the Pacific Northwest (including fish and wildlife agencies and Indian tribes) to participate in the development of regional energy conservation plans, plans for renewable resources, and plans for environmental protection and enhancement; (4) to ensure that BPA's customers cover the costs necessary to meet the region's electricity needs; (5) to ensure that non-federal entities continue to regulate, plan, conserve, supply, and distribute electricity; and (6) “to protect, mitigate and enhance the fish and wildlife ... of the Columbia River and its tributaries.”

The Council adopted its first Fish and Wildlife Program in 1982. Since 1982, the Council has reviewed and reformulated its Program five times. The current version of the Program was adopted in 2000 (“2000 Program”) and amended in 2003 by the Mainstem Amendments (“2003 Amendments”).

In preparing the 2000 Program, the Council consulted with the Pacific Northwest's fish and wildlife agencies, Indian tribes, and other interested members of the public, as required by the Act. *See id.* § 839b(g). After considering these parties' recommendations, the Council prepared \*675 a draft Program and conducted a public comment period before preparing the final version of the 2000 Program. The Program “expresses goals and objectives for the entire [Columbia River] basin based on a scientific foundation of ecological principles.” *Nw. Power & Conservation Council, Columbia River Basin Fish and Wildlife Program* 9 (2000) [hereinafter 2000 Program], available at <http://www.nwcouncil.org/library/2000/2000-19/ FullReport.pdf>. These objectives apply to all fish and wildlife projects implemented in the basin. *Id.* The objectives crucial to this case include mitigating the adverse effects to salmon and steelhead caused by the Columbia River's hydropower system and ensuring sufficient populations of salmon and steelhead for both Indian tribal-trust and treaty-right fishing and non-tribal fishing. *Id.* at 16. A goal of the Program is to increase total adult salmon and steelhead runs on the Columbia River from about one million annually today to an average of five million annually by 2025. *Id.* at 7, 17.

## C

The Fish Passage Center (“FPC”) has been a part of the Council's Fish and Wildlife Program since 1982. Originally called the Water Budget Center, it consisted of

two managers who oversaw the annual water budget the Council adopted as part of the Program. The water budget provided for additional releases of water from federal dams each spring to facilitate the migration of juvenile salmon and steelhead to the Pacific Ocean. The Water Budget Center's two managers recommended to federal agencies how they could use the water budget to improve the survival rate of fish passing through the dams during their downstream migration. *See Pub. Utility Dist. No. 1 v. BPA*, 947 F.2d 386, 389 (9th Cir.1991) (discussing FPC's oversight of the annual water budget contained in the 1987 Program).

The FPC's responsibilities under the Program have expanded considerably since its days as the Water Budget Center. The Council's 1987 Program provided that BPA "shall fund the establishment and operation of a Fish Passage Center." The Council envisioned that the FPC would assist the dams' fish passage managers in planning and implementing a smolt<sup>5</sup> monitoring program, developing and implementing flow and spill requests, and monitoring and analyzing research results to assist in implementing the water budget and spill planning.

<sup>5</sup> A smolt is a juvenile salmon in the stage where it becomes covered with silvery scales and first embarks on its journey to salt water. *See* John V. Byrne, *Salmon Is King—Or Is It?*, 16 *Env'tl. L.* 343, 352–53 (1986).

The Council's 2000 Program "continues the operation of the Fish Passage Center." 2000 Program, *supra*, at 28. The 2003 Amendments to the Program elaborate on the Council's vision of the FPC's role, stating that "[t]he mainstem plan calls for the continued operation of the Fish Passage Center," and listing specific tasks the Council expects the FPC to perform in helping implement the water management measures in the Council's Fish and Wildlife Program. *Nw. Power & Conservation Council, Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program 27* (2003) [hereinafter 2003 Amendments], available at <http://www.nwcouncil.org/library/2003/2003-11.pdf>.

The 2003 Amendments provide that "[t]he primary purpose of the [FPC] is to provide technical assistance and information to fish and wildlife agencies and [Indian] tribes in particular, and the public in general, on matters related to juvenile and \*676 adult salmon and steelhead passage through the mainstem hydrosystem." *Id.* The 2003

Amendments require the FPC to (1) plan and implement a smolt monitoring program; (2) gather, organize, analyze, store, and make widely-available monitoring and research information about fish passage and the implementation of water management and fish passage measures contained in the Council's Program; (3) provide technical information to assist fish and wildlife agencies and Indian tribes requesting the federal dams to spill water; and (4) provide technical assistance to ensure the recommendations for river operations avoid conflicts between anadromous<sup>6</sup> and resident fish. *Id.* at 27–28.

<sup>6</sup> An anadromous fish lives in the sea but breeds in freshwater. *See* 50 C.F.R. § 401.2(g) (defining anadromous fish as "[a]quatic, gill breathing, vertebrate animals bearing paired fins which migrate to and spawn in fresh water, but which spend part of their life in an oceanic environment"); *see also* Convention for the Conservation of Anadromous Stocks of the North Pacific Ocean, art. II.1, annex pt. I, Feb. 11, 1992, T.I.A.S. No. 11,465 (classifying the following species as anadromous fish: chum salmon, coho salmon, pink salmon, sockeye salmon, chinook salmon, cherry salmon, and steelhead trout); 16 U.S.C. §§ 5001–12 (implementing the Convention).

To carry out these responsibilities, the FPC monitors more than twenty dams and fish traps; collects data on chinook, steelhead, coho, shad, sockeye, pink salmon, and lamprey; and monitors river conditions, including temperature, dissolved gases, fish hatchery releases, and dam flows and spills. The FPC makes information it gathers available on its website. Fishery managers and Indian tribes use this information to make flow and spill requests to BPA and the operators of the dams, who, by controlling the water flow past the dams, can improve the survival rates of fish migrating downstream.<sup>7</sup>

<sup>7</sup> Fish migrating down the stream of a dammed river encounter a series of dangers. The fish must navigate the reservoir of standing water maintained behind the dam. The standing water slows the migration of the fish and exposes the fish to predators. After navigating the reservoir, the fish must then pass the dam safely. Fish may pass a dam by being spilled over the dam, by passing through the turbines of the dam, or by being transported around the dam. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 788–89 (9th Cir.2005). The data gathered by

the FPC is used to measure the success that fish have passing dams.

From the administrative record it appears that the FPC operates independently of BPA and the Council. However, nothing in the record indicates that the FPC is a distinct legal entity. BPA funds the FPC through grants administered by master contracts with the Pacific States Marine Fisheries Commission ("Pacific States"). BPA specifies tasks for the FPC to perform in annual statements of work within BPA's master contract with Pacific States.

#### D

Conflict between environmental and energy interests in the Columbia River basin has on occasion played out in the courtroom, as shown in BPA-related cases decided by us. *See, e.g., Confederated Tribes of the Umatilla Indian Reservation v. BPA*, 342 F.3d 924 (9th Cir.2003); *Nw. Env'tl. Def. Ctr. v. BPA*, 117 F.3d 1520 (9th Cir.1997); *Nw. Res. Info. Ctr., Inc. v. Nw. Power Planning Council*, 35 F.3d 1371 (9th Cir.1994) [hereinafter, *NRIC*]; *Nw. Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv.*, 25 F.3d 872 (9th Cir.1994). In this case, however, an issue over how to balance fish survival and recovery with the inexpensive production of hydropower was raised in the legislative committee process.

\*677 In June 2005, the United States Senate Appropriations Subcommittee on Energy and Water Development issued its report on House Resolution 2419, the resolution that would become the Energy and Water Development Appropriations Act of 2006 ("2006 Appropriations Act"). The subcommittee report stated that BPA "may make no new obligations from the Bonneville Power Administration Fund in support of the Fish Passage Center" because "there are universities in the Pacific Northwest that already collect fish data for the region" and can carry out the FPC's responsibilities "at a savings to the region's ratepayers." S.Rep. No. 109-84, at 179 (2005).

On November 19, 2005, Congress passed the 2006 Appropriations Act. Pub.L. No. 109-103, 119 Stat. 2247 (2005). The 2006 Appropriations Act makes no reference to the FPC. The Conference Committee Report of the Congress accompanying the Act, however, states that

The Bonneville Power Administration may make no new obligations in support of the Fish Passage Center. The conferees call upon Bonneville Power Administration and the Northwest Power and Conservation Council to ensure that an orderly transfer of the Fish Passage Center functions (warehouse of smolt monitoring data, routine data analysis and reporting and coordination of the smolt monitoring program) occurs within 120 days of enactment of this legislation. These functions shall be transferred to other existing and capable entities in the region in a manner that ensures seamless continuity of activities.

H.R.Rep. No. 109-275, at 174 (2005) (Conf.Rep.).

On December 8, 2005, in response to the committee reports, BPA issued a "Program Solicitation for Key Functions previously performed by the Fish Passage Center" ("Program Solicitation"). The Program Solicitation states that "[i]n November 2005, the U.S. Congress passed legislation (House Report 109-275), which forbids BPA from making additional obligations in support of the Fish Passage Center." The Program Solicitation further states that "BPA has decided to implement this requirement thru [sic] the issuance of this Program Solicitation."

BPA received five responses to its Program Solicitation. On January 26, 2006, BPA announced, in a press release, its decision to award contracts for the functions formerly performed by the FPC to Battelle Pacific Northwest National Laboratory ("Battelle") and Pacific States.<sup>8</sup> The new model divides between Battelle and Pacific States a number of the functions that had been wholly the responsibility of the FPC. According to the press release, under this new model, Pacific States will "coordinate implementation of the Smolt Monitoring Program, manage the real-time database of the monitoring program and related data, and perform routine analysis and reporting of that data." On the other hand, Battelle will "serve a coordinating function, relying on experts in the field to provide in-depth analysis of the data." Battelle

executed its contract with BPA on February 28, 2006, and Pacific States executed its contract on March 16, 2006.

8 Pacific States is the entity that now contracts with BPA to receive the grants that Pacific States in turn uses to fund the operations of the FPC. *See supra* at 677.

## E

Northwest Environmental Defense Center, Public Employees for Environmental Responsibility, and Northwest Sports-fishing Industry Association (collectively, "NEDC") filed a petition for review with \*678 us on January 23, 2006 and an amended petition for review on February 6, 2006, challenging BPA's decision to transfer the functions of the FPC to Pacific States and Battelle, alleging that the transfer of the functions of the FPC ran afoul of BPA's duties under the Northwest Power Act. The Confederated Tribes and Bands of the Yakama Nation ("Yakama") filed a petition for review on March 3, 2006, also challenging BPA's decision to transfer the functions of the FPC.

On March 17, 2006, we granted the petitioners' request for a stay pending our review of BPA's action. We ordered BPA to "continue, pending resolution of [the petition for review] and/or further order of the court, its existing contractual arrangement to fund and support the Fish Passage Center under the existing terms and conditions." On April 7, 2006, we consolidated NEDC's petition with the petition filed by Yakama.

The petitioners ask us to set aside BPA's decision to transfer the functions of the FPC and to use our equitable authority to order BPA to fund the FPC. Before we address the merits of their petitions for review, we must determine whether we have jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

## II

[I] BPA raises two challenges to our jurisdiction. First, BPA argues that we lack statutory jurisdiction to adjudicate the petitioners' challenge to BPA's decision to transfer the functions of the FPC because BPA's December 8, 2005 Program Solicitation is not a "final

action" of BPA. *See* 16 U.S.C. § 839f(e)(5) (permitting judicial review of "final actions" of BPA and the Council). Second, BPA asserts that the petitioners do not have standing to challenge BPA's action in this case because a decision in favor of the petitioners will not be likely to redress the petitioners' injury, as required for us to exercise jurisdiction under Article III of the United States Constitution. We consider these challenges to our subject-matter jurisdiction de novo. *Indus. Customers of Nw. Utils.*, 408 F.3d at 644.

## A

[2] The Northwest Power Act vests us with original and exclusive subject-matter jurisdiction over challenges to "final actions and decisions taken pursuant to [the Act] by the Administrator [of BPA] or the Council, or the implementation of such final actions." 16 U.S.C. § 839f(e) (5). We have interpreted § 839f(e)(5)'s judicial review provision "with a broad view of this Court's jurisdiction." *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 925 (9th Cir.2002) (internal quotation omitted).

BPA argues that we lack jurisdiction over the petitioners' challenge to the December 8, 2005 Program Solicitation because the Program Solicitation was not a "final action." But in its brief BPA concedes that its January 26, 2006 decision, selecting the successors to the FPC, is a final agency action subject to judicial review under § 839f(e) (5). While BPA's issuance of the Program Solicitation alone might not have been a final action subject to our review, BPA's initial decision to create a new model Fish Passage Center and to issue the Program Solicitation was part of the process BPA used to set its course, leading to what BPA concedes was its final action transferring the functions of the FPC to Pacific States and Battelle. Because both NEDC's and Yakama's petitions for review directly challenge the January 26, 2006 final action, and BPA's December 8, 2005 action was simply a part of the process that led to BPA's final action, \*679 we have statutory jurisdiction over both NEDC's and Yakama's petitions for review.

## B

[3] [4] BPA next argues that we lack Article III jurisdiction over these petitions for review. To have constitutional standing to challenge BPA's action, the petitioners must satisfy a familiar three-part test established by the Supreme Court. First, the petitioners must have suffered an "injury in fact" which is (a) concrete and particularized and (b) actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Second, the petitioners must show a causal connection between the injury and the conduct complained of. *Id.* Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561, 112 S.Ct. 2130 (internal quotations omitted). BPA argues that the petitioners have failed to satisfy the final element of the test, claiming that the remedy that the petitioners seek is beyond our authority.

The petitioners ask that we set aside BPA's final action transferring the functions of the FPC to Pacific States and Battelle and order BPA to continue the FPC's funding until it can reconsider, in accordance with any opinion of this court, its decision to transfer the functions of the FPC. BPA contends that we have no authority to order BPA to fund the FPC, making it impossible for us to redress any injury suffered by the petitioners and leaving the petitioners without standing. BPA points out that it funded the FPC through an annual grant that expired and was renewed every year. BPA argues that to order it to continue to fund the FPC requires us to force BPA to contract against its will, an action beyond the authority of the judiciary.

[5] [6] The cases BPA relies on are cases stating the unremarkable proposition of contract law that a court will not create new obligations that do not exist within the four corners of a contract. *See Imperial Fire Ins. Co. of London v. Coos County*, 151 U.S. 452, 462, 14 S.Ct. 379, 38 L.Ed. 231 (1894) (rejecting jury instructions contrary to the unambiguous language of an insurance policy); *City of New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79, 91, 12 S.Ct. 142, 35 L.Ed. 943 (1891) (refusing to construe a decision of the Louisiana Supreme Court as creating a new contract between the parties); *Jaeger v. Canadian Bank of Commerce*, 327 F.2d 743, 745 (9th Cir.1964) (stating that courts have no power to make new contracts); *Peterson v. Noots*, 255 F. 875, 880 (9th Cir.1919) (refusing to read additional provision into a liquidated damages clause where the liquidated damages

clause was unambiguous). In a contract case between two private parties, our remedial power is no doubt limited to enforcing the obligations to which the private parties agreed. *See* 25 Richard A. Lord, *Williston on Contracts* § 67:30 (4th ed.2006) (stating that a court, in granting equitable relief "is curtailed to the extent that it must generally act within the framework of the contract").

[7] This case presents a different situation. Rather than asking us to remedy a violation of private law (e.g., a breach of contract), the petitioners ask us to remedy the violation of a public law—the Administrative Procedure Act ("APA")<sup>9</sup>—by contending \*680 that BPA acted arbitrarily, capriciously, and contrary to law in transferring the functions of the FPC. *See* 5 U.S.C. § 706(2)(A); *see also* 16 U.S.C. § 839(f)(e)(2) (directing that courts review final actions of BPA under the APA). When a public law has been violated, we are not bound to stay within the terms of a private agreement negotiated by the parties, and may exercise our equitable powers to ensure compliance with the law. *See Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir.1995) ("The court's decision to grant or deny injunctive or declaratory relief under[the] APA is controlled by principles of equity.").

9 Public law is the body of law regulating relations between private parties and the government and regulating the structure and operation of the government itself. *See Black's Law Dictionary* 1267 (8th ed.2004). Public law consists of the fields of constitutional law, criminal law, and administrative law. *Id.*

[8] [9] Moreover, "[w]here the public interest is involved, 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" *United States v. Alisal Water Corp.*, 431 F.3d 643, 654 (9th Cir.2005) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946)). Unless Congress provides otherwise, "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *United States v. Coca-Cola Bottling Co. of L.A.*, 575 F.2d 222, 228 (9th Cir.1978) (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 383, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965)).

For example, in *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1109 (9th Cir.1982), the FTC sought a permanent

injunction under the Federal Trade Commission Act. In comparing the scope of the equitable powers of federal courts in private law matters versus public law matters, we wrote:

“Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its] jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. Power is thereby resident in the District Court, in exercising [its] jurisdiction, to do equity and to mould each decree to the necessities of the particular case.”

*Id.* at 1112 (quoting *Porter*, 328 U.S. at 398, 66 S.Ct. 1086) (citation and internal quotation omitted). We concluded that, in the absence of congressional directive, federal courts retain broad equitable powers in public law matters, including the “authority to grant any ancillary relief necessary to accomplish complete justice.” *Id.* at 1113. We thus affirmed the district court's injunction freezing the assets of certain defendants. *Id.*

[10] Section 706(2) of the APA gives us the equitable power to “set aside” BPA's action transferring the functions of the FPC, if we determine that BPA's action was arbitrary, capricious, or contrary to law. See 5 U.S.C. § 706(2)(A); *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Dep't of Energy*, 232 F.3d 1300, 1305 (9th Cir.2000) (holding that, under the APA, a court has authority to order rescission of a contract for sale if the federal agency “acted in excess of statutory authority or without observance of the procedures required by law”). As shown by our prior order mandating that BPA continue to fund the FPC until we rule on the merits of the petitions for review, this court, as a court of equity conducting judicial review under the APA, has broad powers to order “mandatory \*681 affirmative relief,” <sup>10</sup> *Adams v. Witmer*, 271 F.2d 29, 38 (9th Cir.1958), if such relief is “necessary to accomplish complete justice,” *H.N. Singer, Inc.*, 668 F.2d at 1113. Stated another way, if we conclude that BPA violated the APA by acting arbitrarily,

capriciously, or contrary to law, we have the ability and indeed the juristic duty to remedy BPA's violation. Viewed in this light, we are confident that we retain the power to require BPA to fund the FPC, at least for a period of time in which BPA can reconsider its action in accordance with our opinion. Because we have the power to redress the injury suffered by the petitioners if they prevail on their legal theory, we hold that, under *Lujan*, the petitioners have standing to pursue their petitions for review.

10 In *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004), the Supreme Court held that, when a party seeks redress because an agency has failed to act, a court may only require the agency to perform non-discretionary actions that the agency is required by law to undertake. *Norton* is distinguishable from the instant case because *Norton* dealt with the power of courts to “compel agency action unlawfully withheld” under 5 U.S.C. § 706(1). The petitioners here do not seek redress for agency inaction under § 706(1), but rather challenge a final agency action under the § 706(2) and the Northwest Power Act.

### III

As we discussed above, the Northwest Power Act dictates that our review of BPA's final agency action is governed by § 706 of the APA, 5 U.S.C. § 706. 16 U.S.C. § 839f(e)(2). Under the APA, we must set aside BPA's action if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); see *NRIC*, 35 F.3d at 1383. The petitioners contend that BPA violated the APA in two ways. First, the petitioners contend that BPA acted “not in accordance with law” by transferring the functions of the FPC based on its belief that language in a committee report had a binding legal effect on the agency. Second, the petitioners argue that BPA acted arbitrarily and capriciously because it did not employ a rational decision-making process in deciding to transfer the functions of the FPC to Pacific States and Battelle. We address those arguments in turn.

### A

The petitioners first contend that BPA's decision to transfer the functions of the FPC was “not in accordance with law,” 5 U.S.C. § 706(2), because BPA gave legally-

binding effect to a passage of legislative history. BPA counters by asserting that it engaged in the rational decision-making process that the APA requires by observing the language contained in the congressional committee reports regarding the 2006 Appropriations Act and implementing the directives in the reports.

1

Though the text of the 2006 Appropriations Act itself made no reference to the FPC, its accompanying conference committee report stated that “[t]he Bonneville Power Administration may make no new obligations in support of the Fish Passage Center.” H.R.Rep. No. 109–275, at 174 (2005) (Conf.Rep.). The committee report language also instructed BPA and the Council “to ensure an orderly transfer of the Fish Passage Center functions ... within 120 days of enactment of this legislation.” *Id.* The report issued by the Senate Appropriations Subcommittee on Energy and Water Development on House Resolution 2419, the resolution that would become the 2006 Appropriations Act, contained similar language, indicating that \*682 BPA “may make no new obligations from the Bonneville Power Administration Fund in support of the Fish Passage Center.” S.Rep. No. 109–84, at 179 (2005).

It is an understatement to say that BPA gave great weight to these reports; more accurate is the observation that BPA slavishly deferred to what it thought the reports commanded. As one example, BPA’s Program Solicitation states that “[i]n November 2005, the U.S. Congress passed legislation (House Report 109–275), which forbids BPA from making additional obligations in support of the Fish Passage Center.” A September 20, 2005 email written by a Vice President of BPA, Gregory K. Delwiche, also reflects BPA’s view of the importance of the Senate subcommittee report. Michelle DeHart, Manager of the FPC, had asked Delwiche his thoughts on the future of the FPC. After Delwiche responded that he would have to wait and see “how this is playing out in our nation’s capitol [sic],” DeHart replied, “I was really not thinking about talking about the language [in the subcommittee report] but in getting an idea from you as to what your thinking was on the Fish Passage Center in the future.” Delwiche responded:

“[T]he reason the language is important is that what my thinking is on the Fish Passage Center really isn’t relevant, what’s relevant is what the direction from Wash DC [sic] is. We are merely the implementer of guidance from back there.”

Delwiche again indicated his belief that BPA had no choice but to follow the committee report language in a declaration filed in our court, characterizing the language in the committee reports as “unambiguous Congressional direction.” Delwiche explained BPA’s decision to transfer the FPC by stating that “I did not think that, as an Executive Branch agency, accountable to Congress, BPA could ignore this unambiguous Congressional direction.” Finally, in BPA’s brief, BPA states that it interpreted the conference committee report as “the unambiguously expressed will of the Congress.”

[11] In summary, BPA treated the committee report language as if the language placed a legal obligation on BPA to transfer the functions of the FPC. However, as we explain in the next section, committee report language unconnected to the text of an enacted statute has no binding legal import, and it was contrary to law for BPA to base its decision to transfer the FPC on its belief that “the U.S. Congress passed legislation (House Report 109–275) ... forbid[ding] BPA from making additional obligations in support of the Fish Passage Center.”

2

[12] [13] The APA empowers us to set aside an agency decision that is contrary to governing law. 5 U.S.C. § 706(2); *see Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir.2005). The case law of the Supreme Court and our court establishes that legislative history, untethered to text in an enacted statute, has no compulsive legal effect. It was thus contrary to law for BPA to conclude, from committee report language alone, that it was bound to transfer the functions of the FPC.

In *Shannon v. United States*, 512 U.S. 573, 579, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994), the petitioner, a criminal defendant, argued that the district court erred by failing to instruct the jury about the consequences of finding him

not guilty by reason of insanity. The petitioner argued that Congress, in enacting the Insanity Defense Reform Act of 1984 (“IDRA”), intended to require that district courts instruct the jury as to the consequences of \*683 an insanity acquittal. *Id.* at 583, 114 S.Ct. 2419. The text of IDRA was silent on the matter. *Id.* at 580, 114 S.Ct. 2419; *see* 18 U.S.C. § 4242(b) (stating that “the jury shall be instructed to find ... the defendant—(1) guilty; (2) not guilty; or (3) not guilty only by reason of insanity”). In support of his argument that IDRA required the district court to instruct the jury about the consequences of an insanity acquittal, the petitioner in *Shannon* pointed to language in the Senate Report on IDRA, which stated that “[t]he Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity.” *Shannon*, 512 U.S. at 583, 114 S.Ct. 2419 (internal quotation omitted).

**[14]** The United States Supreme Court refused to give weight to this passage of legislative history unattached to the text of IDRA: “We are not aware of any case ... in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute.” *Id.* The Court emphasized that the passage of legislative history Shannon identified “[did] not purport to explain or interpret any provision of the IDRA.” *Id.* The Court concluded by stating that “ ‘courts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point.’ ” *Id.* at 584, 114 S.Ct. 2419 (alterations in original) (quoting *Int’l Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 712 (D.C.Cir.1987)); *see also Abrego v. Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir.2006) (per curiam) (holding that statutory silence, “coupled with a sentence in a legislative committee report untethered to any statutory language,” did not bring about a change in governing law). The Supreme Court thus made clear that principles in legislative history that have no statutory reference point and do not purport to explain any part of an enacted law do not carry the force of law. As such, they do not bind *anyone*—administrative agencies included.

**[15]** **[16]** **[17]** *Shannon* is not the only case illustrating that it is contrary to law for an agency to conclude that it is legally bound by language in a congressional committee report. In *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 646, 125 S.Ct. 1172, 161

L.Ed.2d 66 (2005), the Secretary of Health and Human Services argued that unambiguous statutory language, when paired with conflicting legislative history, rendered a statute ambiguous. The Court held that the statute was not ambiguous, stating that “[t]he relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding.” *Id.* at 646, 125 S.Ct. 1172 (citing *Lincoln v. Vigil*, 508 U.S. 182, 192, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993); *UAW v. Donovan*, 746 F.2d 855, 860–61 (D.C.Cir.1984) (Scalia, J.); *Blackhawk Heating & Plumbing Co. v. United States*, 224 Ct.Cl. 111, 622 F.2d 539, 552 & n. 9 (1980)); *see also Lincoln*, 508 U.S. at 192, 113 S.Ct. 2024 (“[I]ndicia in committee reports and other legislative history as to how ... funds should or are expected to be spent do not establish any legal requirements on [an] agency.” (internal quotation omitted)).<sup>11</sup>

<sup>11</sup> The utility of legislative history stands on a different footing when it is tied directly to statutory language and that language is ambiguous. In such a case, the legislative history may permissibly inform judgment about interpreting ambiguous statutory terms. For example, in *Northwest Forest Resource Council v. Glickman*, we stated, “a congressional conference report is recognized as the most reliable evidence of congressional intent because it ‘represents the final statement of the terms agreed to by both houses.’ ” 82 F.3d 825, 835 (9th Cir.1996) (quoting *Dep’t of Health & Welfare v. Block*, 784 F.2d 895, 901 (9th Cir.1986)). However, in that case, the statutory language was not silent on the relevant issue. *See id.* Here, by contrast, the passage of legislative history in question is unrelated to any provision of the statute that Congress has enacted. When legislative history is not tied to any statutory text, we properly should give it no weight. *See Abrego*, 443 F.3d at 683 (“[C]onsideration of legislative history is appropriate where statutory language is ambiguous. Ambiguity, however, is at least a necessary condition. In this instance, the statute is not ambiguous. Instead, it is entirely silent as to the burden of proof on removal.” (citations omitted))

\*684 **[18]** The principle that committee report language has no binding legal effect is grounded in the text of the Constitution and in the structure of separated powers the Constitution created. Article I, section 7, clause 2 of the Constitution is explicit about the manner in which Congress can take legally binding action.<sup>12</sup> Members of Congress cannot use committee report language to

make an end run around the requirements of Article I. If Congress wishes to alter the legal duties of persons outside the legislative branch, including administrative agencies, it must use the process outlined in Article I. *See INS v. Chadha*, 462 U.S. 919, 952, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); *see also Clinton v. City of New York*, 524 U.S. 417, 439–40, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (holding that “the power to enact statutes may only be exercised in accord with a single, finely wrought and exhaustively considered, procedure” outlined in Article I (internal quotation omitted)). BPA acted contrary to law by treating committee report language—language that was not subjected to the bicameralism and presentment requirements of Article I—as imposing upon BPA a legal duty to transfer the functions of the FPC. Because the committee reports in this case were not subject to the “finely wrought” process in Article I, BPA erred by giving the reports binding effect.

12 Article I, section 7, clause 2 of the United States Constitution provides:

Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States: if he approve: he shall sign it: but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Treating legislative reports as binding law also undermines our constitutional structure of separated powers, because legislative reports do not come with the traditional and constitutionally-mandated political safeguards of legislation. As noted above, legislative

reports are not acts of law satisfying the precise requirements of Article I, which were devised by the Framers to ensure separation of powers and a careful legislative process. By contrast, legislative reports may in some cases be written by an individual legislator, congressional staffers, or even lobbyists.<sup>13</sup> \*685 Giving binding effect to passages in legislative reports may thus give binding legal effect to the unchecked will of a lone person, and that is not what our Constitution envisions.

13 The Supreme Court has cautioned:

[L]egislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

*Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546. —, 125 S.Ct. 2611, 2626, 162 L.Ed.2d 502 (2005).

Judge Kozinski has likewise observed:

Reports are usually written by staff or lobbyists, not legislators; few if any legislators read the reports; they are not voted on by the committee whose views they supposedly represent, much less by the full Senate or House of Representatives; they cannot be amended or modified on the floor by legislators who may disagree with the views expressed therein.

*Wallace v. Christensen*, 802 F.2d 1539, 1560 (9th Cir.1986) (en banc) (Kozinski, J., concurring).

Committee reports often contain “what some committee members wanted in the bill, but did not get,” and are often written before the bill is drafted, *Puerta v. United States*, 121 F.3d 1338, 1344 (9th Cir.1997), or after a bill is passed, *Lao v. Wickes Furniture Co., Inc.*, 455 F.Supp.2d 1045, 1051 (C.D.Cal.2006) (refusing to give weight to committee report issued ten days after the passage of a law).

The statements of BPA Vice President Delwiche illustrate how BPA's reliance on legislative history undermined separation of powers in this case. Delwiche said that BPA, the agency he led, was “an Executive Branch agency, accountable to Congress.” It is certainly true that Congress through legislation may direct how BPA shall operate. But an executive branch agency which views itself as subservient to a sentence in a legislative report

undermines the distribution of authority in our federal government in which every exercise of political power is checked and balanced.

BPA's treatment of legislative history as binding law also frustrated the statutory design of the Northwest Power Act. Rather than adhering to the Act's carefully-tailored requirement that BPA take actions consistent with the guidance provided by the Plan and Program crafted by the Council as well as the purposes of the Act, BPA simply gave conclusive weight to what might have been the view of a lone legislator, staffer, or lobbyist. That the Council, and guidance from it, derives from political and expert representatives from four Pacific Northwest states, affected Indian tribes, and groups with interest in fisheries only intensifies BPA's error in relying so heavily on congressional report statements that might have been penned by a single legislator or single lobbyist, and that do not satisfy Article I's requirements and do not have force of law. The Act contemplates a participatory process in which the varied constituencies of the Pacific Northwest advise BPA on how it should exercise its discretion. By following congressional committee report language as if it were mandatory law, BPA ignored the opinions of those individuals and groups directly affected by its policy choices and circumvented the unique structure of cooperative federalism created by the Act.

Delwiche incorrectly believed that the dominant factors in his decision about the continued operation of the FPC were statements in legislative history, untied to the legislative commands of Congress, when, to the contrary, his agency's organic statute, the Northwest Power Act, states that one of its purposes is to allow the States, local governments, and citizens of the Pacific Northwest (including fish and wildlife agencies and Indian tribes) to participate in the development of regional energy conservation plans, plans for renewable resources, and plans for environmental \*686 protection and enhancement. 16 U.S.C. § 839(3).<sup>14</sup>

<sup>14</sup> In *NRIC*, 35 F.3d at 1388, we recognized that the Council must give "due weight" to views of fishery managers, state and federal wildlife agencies, and Indian tribes in formulating the Fish and Wildlife Program. See 16 U.S.C. § 839b(h)(7). It follows with stronger logic that when the final Fish and Wildlife Program, the product of a collaborative process, calls for the continued operation of the FPC, BPA cannot

then disregard the Council's view without giving the Council's view due weight. The Northwest Power Act requires BPA to act in a manner *consistent* with the Fish and Wildlife Program. *Id.* § 839b(h)(10)(A).

The Act also requires BPA to exercise its authority in a manner consistent with the Council's Fish and Wildlife Program. *see id.* § 839b(h)(10)(A), the most recent version of which called for the continued operation of the FPC. Indeed, the Act makes no secret that BPA's actions "shall be consistent with the [Council's Fish and Wildlife] plan and any amendment thereto," *id.* § 839b(d)(2), as the Act recites the consistency requirement numerous times, *see id.* §§ 839b(h), 839c(d)(3), 839d(b)-(c). Possibly, BPA could exercise some discretion to depart from its prior practice of funding the FPC in accordance with the Council's Fish and Wildlife Program, if such a departure was necessary for BPA to comply with its statutory obligation to use its authority in a manner consistent with the Council's Power Plan or purposes of the Act. But no nice question of balancing potentially conflicting obligations is presented when BPA adopts a slavish adherence to a sentence in a legislative committee report.

[19] We may only sustain an agency's action on the grounds actually considered by the agency. As the Supreme Court explained in *SEC v. Chenery Corp.*, 318 U.S. 80, 95, 63 S.Ct. 454, 87 L.Ed. 626 (1943), "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." In other words, the APA obliges us to set BPA's action aside unless the record demonstrates that, because BPA considered some other basis for its action, BPA's decision to transfer the functions of the FPC was not arbitrary, capricious, or contrary to law. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.").

## B

BPA argues that, even if language in the congressional committee reports did not provide a rational basis for its

action transferring the functions of the FPC, its decision can be upheld as a reasonable application of the Act's requirement that it exercise its authority in a manner consistent with the Council's Fish and Wildlife Program. BPA contends that it carefully considered the issues before it and therefore we should let stand its decision to transfer the functions of the FPC. The petitioners contend, by contrast, that BPA never considered the consistency provision of the Act in deciding to transfer the functions of the FPC and insufficiently analyzed the issues before it. Thus, petitioners urge that BPA acted arbitrarily and capriciously.

1

[20] Before further evaluating BPA's decision to transfer the functions of the \*687 FPC to Pacific States and Battelle, we outline the principles governing the scope of our review under the arbitrary and capricious standard of § 706(2) of the APA. The Supreme Court has explained:

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made."

*Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)); see *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 806 (9th Cir.2005). That is, an agency must "coherently explain why it has exercised its discretion in a given manner," and "[i]n reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *State Farm*, 463 U.S. at 43, 48, 103 S.Ct. 2856 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys.*, 419 U.S. 281, 285, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)).

[21] An agency decision is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed

to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856.<sup>15</sup>

15 "Some courts have held that agency action is arbitrary and capricious if 'the agency has not really taken a "hard look" at the salient problems and has not genuinely engaged in reasoned decision-making.'" *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir.1992) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C.Cir.1970)). Accordingly, some commentators have suggested that our task in reviewing agency action under § 706(2) of the APA is to "look[ ] closely at whether the agency has taken a hard look at the question" before it. 33 Charles Alan Wright & Charles H. Koch, Jr., *Federal Practice and Procedure* § 8335 (2006) (emphasis omitted), though other commentators decline to adopt the "hard look" phraseology, see 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.4 (4th ed. 2002) ("In order to avoid judicial reversal of its action as arbitrary and capricious, an agency must engage in 'reasoned decisionmaking,' defined to include an explanation of how the agency proceeded from its findings to the action it has taken."). Because the Supreme Court has never explicitly embraced the "hard look" approach to judicial review under the arbitrary and capricious standard of the APA, cf. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 695 n. 9, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980) (Marshall, J., dissenting) (stating that the arbitrary and capricious "inquiry is designed to require the agency to take a 'hard look' " at the issues before it), we adhere to the Supreme Court's explicit guidance in *State Farm* that an agency must coherently explain its actions and demonstrate a rational connection between the facts it found and the choice it made.

[22] In this case, BPA departed from its long-standing practice of funding a unitary Fish Passage Center and transferred the FPC's functions to two separate entities. An agency is entitled to change its course when its view of what is in the public's interest changes. However, "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the \*688 intolerably mute." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970) (footnotes omitted), quoted in *State Farm*, 463 U.S. at 57,

103 S.Ct. 2856; *see also Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973) (plurality opinion) (“Whatever the ground for the [agency's] departure from prior norms, ... it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.”); *W. States Petroleum Ass'n v. EPA*, 87 F.3d 280, 284 (9th Cir.1996) (stating that an agency “must clearly set forth the ground for its departure from prior norms”).

[23] Moreover, in reviewing BPA's action, we must look to BPA's reasoning in making its decision to transfer the functions of the FPC, and not to other reasons for its decision that BPA might marshal before us. As the Supreme Court has explained, we “may not accept appellate counsel's post hoc rationalizations for agency action,” *Burlington Truck Lines*, 371 U.S. at 168, 83 S.Ct. 239, and we “may not supply a reasoned basis for the agency's action that the agency itself has not given.” *Bowman Transp., Inc.*, 419 U.S. at 285–86, 95 S.Ct. 438 (citing *Chenery*, 332 U.S. at 196, 67 S.Ct. 1575).<sup>16</sup>

<sup>16</sup> BPA argues that its interpretation of the Northwest Power Act and its decision to transfer the functions of the FPC are entitled to substantial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), *Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380, 389, 104 S.Ct. 2472, 81 L.Ed.2d 301 (1984), and their progeny in our court, *see, e.g., APAC*, 126 F.3d at 1164. Perhaps BPA might be entitled to deference in this case if it was actually interpreting the Act, one of its organic statutes. However, as we discuss in the next section, there is scant evidence in the record that BPA, in deciding to transfer the functions of the FPC, was interpreting the Act's provision that it exercise its authority in a manner consistent with the Council's Fish and Wildlife Program, *see* 16 U.S.C. § 839b(h) (10)(A), or was interpreting any other provision of the Act.

2

[24] In arguing that it sufficiently assessed the issues before it, BPA defends its decision as the outcome of “a public process within the confines of the 120–day transition period set by Congress.” However, the

administrative record does not show that BPA, as required by *State Farm*, considered the relevant facts and used a rational process to decide to transfer the functions of the FPC to other entities. Apart from the evidence in the record reflecting BPA's incorrect belief that it was required to follow the congressional committee report language, there is no evidence showing how BPA decided to transfer the functions of the FPC and to issue the December 8, 2005 Program Solicitation. This failure presents itself in high relief in light of the Council's program calling for the continued operation of the FPC. So far as the record is concerned, we have no explanation for why BPA would abandon the FPC in the face of its inclusion in the Council's Program, beyond the mistaken belief of BPA that statements in legislative reports were mandatory and foreclosed the continued funding of the FPC.

As evidence of the decision-making process BPA used to decide to award the contract for the functions formerly performed by the FPC to Pacific States and Battelle, BPA points to a PowerPoint slide from a presentation dated January 26, 2006, the same day BPA issued a press release announcing that it decided to transfer the FPC's functions to Pacific States and Battelle. In the slide BPA \*689 prepared, each bidder received an “X” for each of eight specified tasks<sup>17</sup> BPA determined the bidder could satisfactorily perform. In other words, a bidder who BPA concluded could perform all eight tasks satisfactorily would receive eight Xs, a bidder who could perform four of the eight tasks satisfactorily would receive four Xs, and so on. But there is no evidence in the record of how BPA determined whether a bidder would get an X or be left blank for each specified task. And even if the PowerPoint presentation did contain evidence of a rational decision-making process, it is uncertain whether BPA actually relied on that process in making its decision to transfer the functions of the FPC to Pacific States and Battelle because the PowerPoint slide was prepared on January 26, 2006, the very same day BPA announced it decided to award Pacific States and Battelle the contracts to perform the functions formerly performed by the FPC.

<sup>17</sup> The specified tasks were: database management; routine analysis and reporting; coordination of the smolt monitoring program; miscellaneous additional technical tasks; expanded, non-routine analysis; independent technical review; policy oversight and guidance; and coordination with other contractors.

As further purported evidence of the process which led BPA to decide to transfer the functions of the FPC to Pacific States and Battelle, BPA presents a memorandum comparing the functions of the FPC with the functions of the new model. However, the memorandum giving this comparison was drafted on March 13, 2006, a month and a half after BPA awarded the contracts for the functions formerly performed by the FPC to two other entities. BPA thus could not have relied on this memorandum in deciding to transfer the functions of the FPC and in awarding the contracts to Pacific States and Battelle.

BPA also indicated, in a letter to the Yakama tribe and a similar letter to five members of the Pacific Northwest's congressional delegation, that it believed the Program Solicitation complied with its duty, under the Act, to "mitigate the impact on salmon and steelhead in a manner consistent with the Program." But again, the letter does not reflect any rational decision-making process that BPA relied upon to conclude that transferring the functions of the FPC was in accord with its statutory duty to use its authority in a manner consistent with the Council's Fish and Wildlife Program.

In *Confederated Tribes*, 342 F.3d at 933, we held that BPA provided a reasoned explanation for its decision that implementing certain biological opinions was consistent with BPA's statutory mandate to treat fish and wildlife equitably with power because the record elaborated BPA programs, decisions, and opinions reflecting how BPA gave equitable treatment to fish and wildlife. By contrast, in this case, the only reference in the administrative record to the Act's consistency requirement is the letter from BPA to Yakama and the similar letter from BPA to five members of the Pacific Northwest's congressional delegation baldly asserting that BPA is transferring the functions of the FPC to comply with its statutory mandate to protect fish and wildlife consistent with the Program. But the record does not show the process, if there was one, that BPA used to determine that its decision to transfer the functions of the FPC was consistent with BPA's statutory mandate to use its authority in a manner consistent with the Council's Fish and Wildlife Program. Because the 2003 Amendments to the Council's Program describe the functions \*690 the FPC should perform, BPA's record of decision should have shown reasons for its decision to transfer the FPC's functions elsewhere and how this would be consistent with the Council's Fish and Wildlife Program.

This case is more similar to *State Farm* than it is to *Confederated Tribes*. In *State Farm*, the Supreme Court held that the National Highway Traffic Safety Administration's ("NHTSA") decision to rescind a rule requiring automobile manufacturers to include passive restraints in their cars was arbitrary and capricious because the NHTSA provided "no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion." " *State Farm*, 463 U.S. at 48, 103 S.Ct. 2856 (alteration in original) (quoting *Burlington Truck Lines*, 371 U.S. at 167, 83 S.Ct. 239). Just as the NHTSA had the authority to use its discretion to rescind the passive restraint rule in *State Farm*, so too BPA possibly may have the ability rationally to conclude that the continued operation of the FPC in its present state was no longer in the public interest, after giving due weight to the Act's requirement that its actions be consistent with what the Council said in the Program and Plan, and the purposes of the Northwest Power Act. "But an agency changing its course must supply a reasoned analysis...." *Id.* at 57, 103 S.Ct. 2856 (internal quotation omitted). BPA has not cogently explained its decision to transfer the functions of the FPC, and the record does not indicate that that decision was the output of a rational decision-making process. Instead, BPA departed from its two-decade-old precedent without supplying a reasoned analysis for its change of course.<sup>18</sup> BPA's decision to transfer the functions of the FPC was arbitrary and capricious.<sup>19</sup>

18 In its brief, BPA argues that it consulted with various fishery managers, one scientist, and the public in making its decision to transfer the functions of the FPC. BPA asserts that, in deciding which proposals to accept, it "consulted with tribal, state and federal fisheries managers"; "provided a forum in which to hold public discussion and debate on this issue"; "considered and largely followed the recommendations" of a group of Indian tribes and an association of fisheries; ensured that the Program Solicitation complied with the 2003 Amendments to the Fish and Wildlife Program; "followed the general principles from the U.S. National Academies scientific reporting process" in preparing the technical services agreement with the entities replacing the FPC; obtained "expert scientific review of the proposals" from the former executive director of the Columbia Basin Fish and Wildlife Authority; and "relied on the advice provided in letters from

members of the Northwest congressional delegation, as well as the report language and the Program amendments." However, as we discussed, it does not appear from the record that BPA actually relied upon any of these rationales in deciding to transfer the functions of the FPC, and BPA may not justify its decision to our court based on these post-hoc rationalizations for its action. See *Burlington Truck Lines*, 371 U.S. at 168, 83 S.Ct. 239.

19 BPA argues that its decision to transfer the functions of the FPC complies with its substantive obligation to exercise its authority "in a manner consistent with the plan, ... the program adopted by the Council ..., and the purposes of [the Northwest Power Act]," 16 U.S.C. § 839b(h)(10)(A), even though the 2000 Program and the 2003 Amendments "call [ ] for the continued operation of the Fish Passage Center." 2003 Amendments, *supra*, at 27. Because we hold that BPA's decision to transfer the functions of the FPC was not the output of a reasoned decision-making process, as the APA requires, we need not determine whether, on a proper record with factual determinations and an adequate explanation of a rational connection between facts determined and action taken, a decision of BPA to transfer the functions of the FPC is consistent with the Council's Fish and Wildlife Program and with the Plan and the objectives of the Northwest Power Act.

\*691 IV

The United States Supreme Court has declared that we must require that an agency "cogently explain why it has exercised its discretion in a given manner." *State Farm*, 463 U.S. at 48, 103 S.Ct. 2856. The only explanation shown in BPA's record for why it transferred the functions of the FPC was that it was responding to congressional committee report language that BPA believed created a binding obligation on it. That is not a cogent explanation because BPA acted contrary to law in concluding that congressional committee report language carried the force of law and bound BPA to transfer the functions of the FPC. Because BPA has not shown a rational basis for its decision to transfer the functions of the FPC to Pacific States and Battelle, we grant the petition for review. We hold that BPA's decision to transfer the functions of the FPC to Pacific States and Battelle was arbitrary, capricious, and contrary to law. We set aside BPA's decision to transfer the functions of the FPC to Pacific States and Battelle and order that BPA continue its existing contractual arrangement to fund and support the FPC unless and until it has established a proper basis for displacing the FPC.

**PETITION FOR REVIEW GRANTED.**

**All Citations**

477 F.3d 668, 07 Cal. Daily Op. Serv. 858, 2007 Daily Journal D.A.R. 1109

156 P.3d 1113  
Supreme Court of Alaska.

UNCLE JOE'S INCORPORATED,  
Appellant and Cross-Appellee,

v.

L.M. BERRY AND COMPANY, d/b/a The Berry  
Company, Appellee and Cross-Appellant.

Nos. S-11516, S-11545.

|  
April 6, 2007.

|  
Rehearing Denied May 15, 2007.

### Synopsis

**Background:** Telecommunications provider's customer brought action against publisher of telephone directory and yellow pages, alleging negligence, gross negligence, and defamation arising out of errors in listing in the directory and advertisement for pizzeria in the yellow pages, and seeking compensatory and punitive damages. The Superior Court, Third Judicial District, Anchorage, Sen K. Tan, J., denied customer's motion for partial summary judgment, granted publisher's cross-motion for partial summary judgment, denied customer's motion to compel, and entered stipulated judgment awarding customer nominal damages. Customer appealed and publisher cross-appealed.

**Holdings:** The Supreme Court, Matthews, J., held that:

[1] exculpatory clauses in tariffs should be strictly construed against the utility and in favor of the customer;

[2] exculpatory tariff filed by telecommunications provider did not extend to protect publisher;

[3] award of attorney fees and costs to publisher would be vacated; and

[4] publisher's contention that it was protected by yellow pages liability limitation clause was moot.

Affirmed in part, vacated in part, reversed in part, and remanded.

West Headnotes (6)

### [1] Public Utilities

~ Regulation

Exculpatory clauses in tariffs should be strictly construed against the utility and in favor of the customer; all the reasons for disfavoring such clauses in contracts also apply to tariffs, in that tariff exculpatory clauses alter the normal rule that an entity is responsible for the consequences of its negligent conduct, they are imposed on a take-it-or-leave-it basis, without the possibility of negotiation, they benefit the typically economically stronger utility, and, as they are also drafted by the utility, it is fair to construe uncertain language against the utility whose imprecise draftsmanship has created the uncertainty.

1 Cases that cite this headnote

### [2] Telecommunications

~ Directories and numbers

Exculpatory tariff filed by telecommunications provider, disclaiming liability on part of provider arising from errors or omissions in telephone directories, did not extend to protect contract publisher of directory for damages arising from the omission of customer's name in its "white pages" listing; the tariff would be strictly construed against the provider, and publisher was not mentioned either by name or by description in the tariff.

Cases that cite this headnote

### [3] Appeal and Error

~ As to damages and costs

Upon reversal and remanding of trial court's judgment in favor of telephone directory publisher, in action brought by customer, seeking to recover damages allegedly arising from the omission of its name in directory

“white pages” listing, award of attorney fees and costs would be vacated, given that publisher was not prevailing party.

Cases that cite this headnote

**[4] Appeal and Error**

-~ Agreements and stipulations

Customer waived for appellate review the issue of trial court's denial of its motion to compel production, on appeal from stipulated judgment in favor of telephone directory publisher in customer's action for damages, where stipulated judgment reserved the right to appeal only summary judgment order, not the denial of the motion to compel.

1 Cases that cite this headnote

**[5] Appeal and Error**

-~ On consent, offer, or admission

Parties generally cannot appeal stipulated judgments; in a civil case, at most, a party may appeal from a stipulated judgment where the stipulation expressly reserves an issue for appeal.

1 Cases that cite this headnote

**[6] Appeal and Error**

-~ Review of specific questions in general

On appeal from stipulated order awarding customer \$10 in nominal damages from publisher of telephone directory, arising from error in customer's advertisement in the yellow pages, publisher's contention that it was protected by yellow pages liability limitation clause was moot, given that under the clause publisher would still be liable for the cost of the ads, and the nominal damages awarded customer were less than the amount paid for the ad.

Cases that cite this headnote

**Attorneys and Law Firms**

\*1114 Jeffrey J. Jarvi, Anchorage, for Appellant and Cross-Appellee.

Douglas S. Parker, Dennis J. Efta, Preston Gates & Ellis, LLP, Anchorage, for Appellee and Cross-Appellant.

Before: BRYNER, Chief Justice, MATTHEWS, EASTAUGH, FABE, and CARPENETI, Justices.

*OPINION*

MATTHEWS, Justice.

Uncle Joe's, Inc., appeals and L.M. Berry and Company cross-appeals in a case arising from errors in entries for Uncle Joe's Pizzerias in both the White and Yellow Pages of the 2002–2003 Anchorage telephone directory. Uncle Joe's challenges the grant of summary judgment to Berry on the interpretation of an exculpatory tariff, the superior court's refusal to order Berry to produce attorney-client communications, and the award of attorney's fees and costs to Berry. Berry appeals from an order on summary judgment declaring the limitation of liability provision in its pre-printed order form for Yellow Pages advertisements invalid. We reverse the superior court's decision on the effect of the tariff. This requires that the award of attorney's fees also be vacated. Uncle Joe's discovery argument is moot as is Berry's argument regarding the limitation of liability clause.

**The White and Yellow Pages Directory Errors**

Uncle Joe's operates five pizzerias in Anchorage. It is primarily a take-out and delivery business relying heavily on the promotion of its name and telephone number. Berry publishes telephone directories for telephone companies throughout the United States. Berry contracted with Alaska Communications Systems (ACS) in the mid-1990s to publish Anchorage telephone directories. By 2002 the ACS directory was used by eighty-six percent of customers in the area.

An error in Uncle Joe's listing appeared in the 2002–2003 White Pages Directory published by Berry. The address and telephone number for each of Uncle Joe's five pizzeria outlets was listed, but the name “Uncle Joe's Pizzeria” was omitted. Without the business name, Uncle Joe's

information was listed under the name "Uncle George the Clown." As a result, Uncle Joe's claims that it lost revenues of \$435,153.64 between June 1, 2002, and June 1, 2003, and was forced to lay off three employees and relocate its corporate office to the home of its president.

A minor error concerning Uncle Joe's also appeared in an advertisement in the 2002–2003 Yellow Pages Directory, also published by Berry. Uncle Joe's advertisement was published with the graphic designer's digital watermark still included, resulting in a faint cross within a circle design appearing in the middle of the advertisement. Uncle Joe's had ordered the Yellow Pages advertisement on Berry's Directory Advertising Order, which contained standard terms and conditions pre-printed on the reverse side. Section 8 of these conditions limits the liability of both ACS and Berry for errors in printed advertisements to "the amount paid by the advertiser for said item of advertising" and further applies the limitation of liability "to any and all claims whether in contract, tort, strict liability or otherwise, and to any loss of business, profits, or additional advertising costs incurred."

#### Proceedings

Based on these errors, Uncle Joe's filed suit against Berry under theories of negligence, gross negligence, and defamation. \*1115 seeking compensatory and punitive damages. Subsequently, Uncle Joe's filed a motion for partial summary judgment. In this motion Uncle Joe's sought a ruling that Berry's affirmative defense that its liability is limited by the provisions of an exculpatory tariff filed by ACS<sup>1</sup> lacked merit. Similarly, the motion challenged Berry's affirmative defense that its liability is limited by section 8 of the conditions in its Yellow Pages order form. Berry cross-moved for summary judgment on both affirmative defenses, seeking dismissal of Uncle Joe's claims. While these motions were pending and as trial approached, Uncle Joe's made a motion to compel the production of documents that Berry had withheld from discovery under the attorney-client privilege. Uncle Joe's argued that the fraud exception to the attorney-client privilege required production of the documents. Uncle Joe's theory was that Berry had been deceiving Alaska customers by using the limitation of liability clause in its Yellow Pages order form while knowing that such clauses had been ruled invalid in *Municipality of Anchorage v. Locker*.<sup>2</sup> This deceit, Berry argued, amounted to fraud under the fraud exception to the attorney-client privilege

and thus the documents in question were not shielded by the privilege.

1 The exculpatory tariff provided:

Errors—No liability arising from errors or omission [sic] in the making up or printing of its directories shall be attached to Alaska Communications Systems except in the case of charge listings. After reasonable notice is provided in writing to Alaska Communications Systems in connection with these, its liability shall be limited to a refund at the monthly rate for each listing.

2 723 P.2d 1261 (Alaska 1986).

In an order dated April 22, 2004, the superior court denied Uncle Joe's motion for partial summary judgment concerning the tariff and granted Berry's cross-motion for summary judgment on that issue. The court denied Berry's cross-motion for summary judgment concerning the Yellow Pages liability limitation clause and implicitly granted Uncle Joe's motion for partial summary judgment on that issue.

On April 26, 2004, the superior court denied Uncle Joe's motion to compel, ruling that the "civil fraud exception does not apply in this case."

On May 14, 2004, the parties stipulated to a final judgment, which provided that Uncle Joe's would recover nothing from Berry for its claims based on the omission of Uncle Joe's name from the White Pages and that Uncle Joe's "shall recover from [Berry] nominal damages in the amount of \$10.00 for [Uncle Joe's] negligence claim based on the 2002–2003 ACS Anchorage Yellow Pages." The stipulation left for adjudication the question of the award of fees and costs and provided as follows with respect to appeals: "This order shall constitute an appealable final judgment; specifically, all rulings made in the Court's Order dated April 22, 2004, shall be appealable by either party." The stipulation was "so ordered" by the superior court.

Subsequent to entry of the stipulated judgment, Berry moved for an award of attorney's fees and costs based on an offer of judgment that it had made pursuant to Civil Rule 68 that Uncle Joe's had not accepted. The court granted Berry's motion and awarded attorney's fees of \$54,266 and costs of \$5,056 to Berry.

Uncle Joe's now appeals from the court's ruling of April 22, 2004, that the exculpatory tariff applied to Berry, from the court's refusal to require the production of attorney-client communications, and from the award of attorney's fees and costs to Berry. Berry cross-appeals, claiming that the court erred in its order of April 22, 2004, when it ruled that the limitation of liability clause in the Yellow Pages order form was invalid.

#### The April 22, 2004 Decision of the Superior Court

The superior court's decision with respect to whether the exculpatory clause of the tariff applied to Berry was as follows:

Uncle Joe's argues that the Tariff Advice only applies to ACS and not to the Berry company. Berry on the other hand contends that the focus should be on the activity regulated and not the entity that performs the function. It is undisputed \*1116 that ACS does not publish its own telephone directory. Instead, ACS has had a longstanding relationship with the Berry company as the publisher of its directories. It is also undisputed that the [Regulatory Commission of Alaska (RCA) ] is aware of this relationship and that ACS does not publish its own directories. This issue is substantially similar to the one presented in *Municipality of Anchorage v. Locker*, 723 P.2d 1261, 1262 (Alaska 1986)[.] where Yellow Pages advertisers whose ads were published incorrectly sued the telephone utility and its publisher for damages. In *Locker*, the Court treated the publisher as the utility's agent. *Id.* at 1261, fn. 1. In *Simpson v. Phone Directories Co.*, [82 Or.App. 582,] 729 P.2d 578 (Or.App.1986), the court drew a distinction between the regulated service of published phone listings as opposed to unregulated phone listings. Where the listing is regulated, limited liability was imposed. This court

finds that the publication of the White Pages is governed by the RCA and imposes limited liability on Berry. Accordingly, Berry is subject to the limited liability protection contained in Tariff Advice 416–120.

The court's decision with respect to the liability-limiting provision of the Yellow Pages order form was as follows:

However, this liability limitation only applies to statutorily required services, *i.e.*, the alphabetical listings. As the Alaska Supreme Court stated in *Locker*:

Yellow Pages advertisements are not a telecommunication service. To apply the tariff provision to such advertisements we would imply that [the RCA] could regulate the Yellow Pages. We decline to imply such regulatory authority. The administrative regulations explicitly make publication of the Yellow Pages optional.

*Id.* at 1264.

The next question, then, is whether Berry's contract for Yellow Pages advertising with Uncle Joe's will shield it from liability for the alleged mistake in the 2002/2003 ACS Yellow Pages. When presented with a similar question, the Court in *Locker* answered in the negative, reasoning that the contract entered into between the utility—then ATU—and its advertisers was unconscionable. *Id.* at 1266–1267.

Berry invited this court to overrule *Locker*. At the time the Alaska Supreme Court decided *Locker*, the court was aware that it was adopting the minority position. Although some of the jurisdictions relied on in *Locker* have since changed to the majority position, it is not the place of this court to disregard clearly decided Alaska law.

Further, the factors that led the Court in *Locker* to conclude that publication of Yellow Pages is affected with a public interest have not changed: Yellow Pages still serve the public, and Yellow Pages advertising still provides an affordable way for small businesses to advertise. Courts are permitted to give heightened scrutiny to businesses that hold themselves out as willing to provide such services. Accordingly, Berry, as a provider of a public service, may not shield itself from its own negligence. Whether or not a duty was breached

and the amount of damages, if any, are questions for a jury to decide.

Therefore, this court concludes that Plaintiff's damages for the omission of its name from the regular listings are limited by tariff, while any provable damages as a result of the blemish in the Yellow Pages are not so limited.

**The Exculpatory Clause in the  
Tariff Does Not Apply to Berry**

Uncle Joe's argues that the tariff does not extend to Berry because exculpatory and limitation of liability clauses are disfavored in Alaska and are strictly construed against the drafter. One consequence of the rule of strict construction is that ambiguities in exculpatory clauses will, where reasonably possible, be resolved against the drafter. Uncle Joe's argues that this rule applies to tariffs and that the tariff in this case is ambiguous with respect to whether it applies to Berry because it mentions only ACS, not those with whom ACS contracts.

Berry argues that the exculpatory tariff does apply to Berry even though it does not refer to Berry by name or description. In ¶1117 support of this position Berry argues that in *Municipality of Anchorage v. Locker*,<sup>3</sup> this court treated the liability of the telephone company's contract publisher "the same" as the liability of the telephone company. Berry also argues that the RCA has jurisdiction over the White Pages publication and that a tariff should be construed like a statute, rather than strictly against the drafter. Berry contends that exposing contract publishers to liability for mistakes would subject them to inordinate expenses, which ultimately would be borne by telephone customers in the form of elevated rates. Berry concludes:

<sup>3</sup> 723 P.2d 1261, 1262 n. 1 (Alaska 1986).

In view of the statutory framework under which the RCA operates and the related policy concerns, [the court] interpreting the ACS Tariff should determine if the Tariff is consistent with and reasonably necessary to carry out the purposes of the statutory provisions, and whether the [Tariff] is reasonable and not arbitrary. (Quotations and citation omitted.)

The tariff explicitly applies only to "Alaska Communications Systems." It does not purport to apply to entities with which ACS contracts. Thus, under a literal

application of the tariff, only ACS is exculpated from liability arising from errors or omissions in its directories. Only if the tariff is to be broadly read could contractors with ACS also be brought within the coverage of the tariff. We believe that either a literal reading—in which the tariff applies only to ACS—or a broadened reading—in which the tariff also applies to entities that print ACS directories under contract with ACS—is reasonably possible. In this sense, then, the tariff is ambiguous.

Uncle Joe's is correct that in a non-tariff contractual setting this court has held that exculpatory language should be narrowly construed. Our case law teaches that the law disfavors—and sometimes positively forbids<sup>4</sup>—contractual exculpatory clauses.<sup>5</sup> As we stated in *Bank of California v. First American Title Insurance Co.*:

<sup>4</sup> We have indicated that exculpatory provisions are prohibited, as distinct from being merely narrowly construed, where they are imposed on consumers by a business affected with the public interest. Thus, in *Bank of California v. First American Title Insurance Co.*, we held that a title company's effort to disclaim liability for negligence was ineffective because "[a] title company is engaged in a business affected with the public interest and cannot, by an adhesory contract, exculpate itself from liability for negligence." 826 P.2d 1126, 1130 (Alaska 1992) (quoting *White v. Western Title Ins. Co.*, 40 Cal.3d 870, 221 Cal.Rptr. 509, 710 P.2d 309, 315–16 (1985)). In support of the same proposition we also cited *Locker*, 723 P.2d at 1265–66, giving the following parenthetical explanation: "[E]xculpatory clauses are unconscionable where 'circumstances indicate a vast disparity of bargaining power coupled with terms unreasonably favorable to the stronger party.'" *Bank of Cal.*, 826 P.2d at 1130.

<sup>5</sup> See *Ledgends, Inc. v. Kerr*, 91 P.3d 960 (Alaska 2004); *Bank of Cal.*, 826 P.2d at 1130; *Dresser Indus. v. Foss Launch & Tug Co.*, 560 P.2d 393, 395–96 (Alaska 1977).

[A]s a general rule, contractual limitations on liability for negligence must be "clearly set forth." *Dresser Indus. Inc. v. Foss Launch & Tug Co.*, 560 P.2d 393, 395 (Alaska 1977). "If the defendant seeks ... to escape responsibility for the consequences of his negligence, then [the disclaimer] must so provide, clearly and unequivocally, as by using the word "negligence" itself."

" *Kissick v. Schmierer*, 816 P.2d 188, 191 (Alaska 1991).<sup>[6]</sup>

<sup>6</sup> 826 P.2d at 1130.

In *Kissick* we stated that an agreement purporting to exculpate the drafter from liability for negligence or tortious conduct is not effective unless the agreement is "clear, explicit and comprehensible in each of its essential details."<sup>7</sup>

<sup>7</sup> 816 P.2d at 191.

There are a number of reasons why contractual exculpatory clauses are disfavored and strictly construed. First, they alter the normal rule that a party is responsible in damages for its negligent conduct.<sup>8</sup> Second, they are typically imposed on a take-it-or-leave-it basis, rather than negotiated.<sup>9</sup> Third, the party benefitting from the clause is usually much stronger economically than the party left without legal recourse.<sup>10</sup> Fourth, the party benefitting from the clause usually has drafted it, and it is regarded as fair to construe ambiguities against the party that is responsible for them.<sup>11</sup>

<sup>8</sup> *E.g., Valhal Corp. v. Sullivan Assocs.*, 44 F.3d 195, 202 (3d Cir.1995) (holding exculpatory clauses are disfavored and strictly construed since parties should not be lightly permitted to shed their liability for negligence).

<sup>9</sup> *See, e.g., Kissick*, 816 P.2d at 191 (holding that exculpatory provisions should be strictly construed when found in contracts of adhesion).

<sup>10</sup> *E.g., Locker*, 723 P.2d at 1265 (holding that the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services).

<sup>11</sup> *E.g., RESTATEMENT (SECOND) OF CONTRACTS* § 206 cmt. a (1981) (stating that construing ambiguities against the drafter discourages them from surreptitiously including terms to which the non-drafting party did not agree).

Here, the clause is contained in a tariff rather than in a contract. The question is whether the rule of strict construction that we have applied in a contractual setting applies to tariffs.

Tariffs in Alaska, as in most other jurisdictions, are drafted by the utility. They become applicable unless rejected by the RCA within forty-five days after they are filed.<sup>12</sup> Tariffs control the terms and conditions under which a utility offers its services to the public.<sup>13</sup> Tariffs containing liability limitations or exculpatory provisions are thus like contracts containing similar provisions in at least two respects. They purport to govern the relationship between the parties, and they are drafted unilaterally by the party seeking the benefit of the provision.

<sup>12</sup> AS 42.05.361(c).

<sup>13</sup> AS 42.05.371.

Numerous authorities in other jurisdictions indicate that when a tariff is ambiguous it should be construed like a contract and thus favorably to the customer and against the drafter. As the Supreme Court of Illinois has recently stated: "[B]ecause the utility company drafts a tariff, it is generally accepted that language in a tariff, especially exculpatory language, is to be strictly construed against the utility company and in favor of the customer."<sup>14</sup> This rule is widely recognized.<sup>15</sup> We think that it should be applied in Alaska.

<sup>14</sup> *Adams v. N. Ill. Gas Co.*, 211 Ill.2d 32, 284 Ill.Dec. 302, 809 N.E.2d 1248, 1271 (2004).

<sup>15</sup> *See, e.g., Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 811 (9th Cir.1982) ("As the carrier is the tariff's author, ambiguities in its language must be strictly construed against the carrier."); *Norfolk & W. Ry. Co. v. B.I. Holser & Co.*, 629 F.2d 486, 488 (7th Cir.1980) ("[T]he tariff should be construed strictly against the carrier since the carrier drafted the tariff; and consequently, any ambiguity or doubt should be decided in favor of the shipper."); *Cont'l Can Co. v. United States*, 272 F.2d 312, 315 (2d Cir.1959) (holding "[a]mbiguity should be resolved against the carrier where the tariff, having been written by the carrier, is vulnerable against the carrier if the tariff's meaning is ambiguous") (quotations omitted); *United States v. Interstate Commerce Comm'n.*, 198 F.2d 958, 966 (D.C.Cir.1952) ("Since the tariff is written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier."); *Nat'l Telecomms. Ass'n v. Am. Tel. & Tel. Co.*, 1997 WL 466556, at \*4 (S.D.N.Y.1997) ("A tariff between a carrier and its customer is a contract and as such is to be interpreted according to general

principles of contract law. Under general principles of contract law, I must resolve ambiguities in the tariff language against the carrier and in favor of the customer.”) (citations omitted); *Pink Dot, Inc. v. Teleport Commc'ns Group*, 89 Cal.App.4th 407, 107 Cal.Rptr.2d 392, 397 (2001) (“The rule has been stated many times that if there is an ambiguity in a tariff any doubt in its interpretation is to be resolved in favor of the [nondrafter and against the utility.]”); *S. Pac. Co. v. U.S. Steel Corp., Consol. W. Steel Div.*, 229 Cal.App.2d 94, 40 Cal.Rptr. 135, 139 (1964); *Transmix Corp. v. S. Pac. Co.*, 187 Cal.App.2d 257, 9 Cal.Rptr. 714, 719 (1961) (“Tariffs are strictly construed....”); *State Farm Fire & Cas. Co. v. S. Bell Tel. & Tel. Co.*, 245 Ga. 5, 262 S.E.2d 895, 897 (1980) (referring to tariffs, the court stated: “Prepared by [the utility], they must be strictly construed in favor of the customer. If a contract is of doubtful meaning, it is to be construed against the party who drew it. Generically, the Tariff must be viewed as a contract between [the utility] and its customers, affirmed on behalf of the latter by the Public Service Commission.”) (quotations and citation omitted); *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 343 (Iowa 2005) (“If a tariff is ambiguous, we strictly construe the language of a tariff against the drafter, the utility.”); *Marriott Corp. v. Chesapeake & Potomac Tel. Co. of Md.*, 124 Md.App. 463, 723 A.2d 454, 460 (1998) (“In the event of an ambiguity, a tariff, like any other contract, must be strictly construed against the drafting party.”); *Info Tel Commc'ns, LLC v. U.S. W. Commc'ns, Inc.*, 592 N.W.2d 880, 884 (Minn.App.1999) (“[I]n interpreting a tariff ... where there is ambiguity, the tariff language should be construed strictly against its author....”); *Krasner v. N.Y. State Elec. & Gas Corp.*, 90 A.D.2d 921, 457 N.Y.S.2d 927, 929 (1982) (“[T]ariffs of a public utility are considered as part of the contract between the customer and the utility.... The tariff attempts to limit defendant's liability for its own negligence and such exculpatory clauses are strictly construed against the party seeking exemption from liability. Such strict construction is even more necessary in view of defendant's superior bargaining position.”) (citations omitted); *Josephson v. Mountain Bell*, 576 P.2d 850, 852 (Utah 1978) (“[Tariffs] should be construed strictly against the utility....”).

\*1119 [1] We adopt the rule that exculpatory clauses in tariffs should be strictly construed against the utility and in favor of the customer because all the reasons for disfavoring such clauses in contracts also apply to tariffs. Tariff exculpatory clauses alter the normal rule

that an entity is responsible for the consequences of its negligent conduct; they are imposed on a take-it-or-leave-it basis, without the possibility of negotiation; they benefit the typically economically stronger utility; and, as they are also drafted by the utility, it is fair to construe uncertain language against the utility whose imprecise draftsmanship has created the uncertainty.

Berry relies heavily on one case, *Waters v. Pacific Telephone Co.*, which declined to follow a rule of strict construction in connection with a liability-limiting clause in a tariff.<sup>16</sup> In *Waters* the California Supreme Court held that a liability-limiting clause in a tariff should be enforced in a negligence claim even though it did not specify that it applied to cases of negligence on the part of the utility. The court so held because the California Public Utilities Commission had adopted a policy of limiting the liability of telephone utilities for acts of ordinary negligence and relied on the validity of liability-limiting clauses in setting rates.<sup>17</sup> In addition, the court noted that subsequent to the events that led to the filing of the *Waters* case, the Public Utilities Commission issued a rule requiring telephone utilities to adopt a standard form limitation of liability provision in their tariffs.<sup>18</sup> No similar situation exists in Alaska.

<sup>16</sup> 12 Cal.3d 1, 114 Cal.Rptr. 753, 523 P.2d 1161 (1974).

<sup>17</sup> *Id.* at 754, 759, 523 P.2d at 1162, 1167.

<sup>18</sup> *Id.* at 757–58, 523 P.2d at 1165–66.

Berry does not argue that the RCA has adopted a policy of limiting the liability of utilities for acts of negligence or, more pertinent to the present case, limiting the liability of entities that contract with utilities. Further, unlike the California commission, the RCA now requires that utilities publish in online tariffs a statement that any limitation of liability clause does not prevent a court from “determining the validity of the limitation of liability provision, or of any exculpatory clause, under applicable law.”<sup>19</sup> The RCA thus, far from approving and requiring the inclusion of limitation of liability clauses as in *Waters*, has recognized that limitation of liability provisions and exculpatory clauses included in tariffs might not be valid or enforceable and that questions concerning their validity are subject to judicial determination.<sup>20</sup>

19 3 Alaska Administrative Code (AAC) 52.367(c)(6) provides:

(c) A registered entity's online tariff must include a table of contents and a section for setting out notices of any proposed tariff revisions, and must set out in plain language a statement of the following:

...

(6) a statement that any limitation of liability provision in the online tariff is subject to the following:

(A) a registered entity may not disclaim liability for its own gross negligence or willful misconduct;

(B) inclusion of a limitation of liability provision in a registered entity's online tariff does not prevent a court of competent jurisdiction from

(i) determining the validity of the limitation of liability provision, or of any exculpatory clause, under applicable law; or

(ii) adjudicating negligence and consequential damage claims.

20 Although 3 AAC 52.367 did not become effective until 2003 and the acts giving rise to the present case took place in late 2001 and 2002, the regulation is evidence that the RCA has not adopted a policy holding that liability-limiting or exculpatory clauses are either essential or necessarily valid.

Berry's reliance on the fact that in *Locker* this court noted that we would treat the utility's contract publisher of the Yellow Pages directory the same as the utility does \*1120 not mean that the tariff in this case protects Berry. In *Locker* the tariff in question was similar to that in this case. It provided that there would be no liability to the utility arising from errors in its directories except for charge listings and in charge listings its liability should be limited to a refund of the monthly rate paid. The error complained of in *Locker* was an error in the Yellow Pages, a charge listing. We decided, despite the language of the tariff, that the tariff did not apply to the Yellow Pages because the RCA lacked the power to "regulate classified advertisements."<sup>21</sup> The tariff therefore did not apply to protect either the utility or the directory publisher. We had no occasion to decide the question presented here, which is, assuming that the tariff protects the utility, does it also protect the publisher with which the utility contracts. *Locker* thus is not helpful to Berry's position.

21 *Locker*, 723 P.2d at 1264.

Berry's argument that the tariff should apply to it because otherwise telephone rates will increase resembles an argument that was made and rejected in *Locker*. There the utility argued that the limited liability clause should be considered part of its tariff "because such limitation directly affects the rates it charges. Without such a limitation, it asserts, the overall rates for its service might increase. Therefore, [the utility] reasons, the [RCA] properly accepted the tariff limiting Yellow Pages liability under its authority to regulate overall rates."<sup>22</sup> We did not take issue with the proposition that not applying the clause could have an effect on the utility's revenues and costs and thus influence rates. But we held that any such effect was not in itself sufficient to require application of the tariff to Yellow Pages advertising: "A mere tangential effect upon overall rates will not suffice to limit categorically [the utility's] liability for negligence."<sup>23</sup>

22 *Id.*

23 *Id.*

[2] Here, similarly, imposing liability on Berry for negligent mistakes made in publishing a directory might ultimately mean that it is more costly or less profitable for ACS to issue telephone directories. But this is only a possibility. Under the existing contract between ACS and Berry the risk of publishing errors is allocated to Berry, and Berry is required to carry liability insurance to guard against such errors. ACS and Berry have therefore already taken steps to guard against liability for publishing errors. They have presumably also already absorbed the costs associated with these steps. The possibility that there will be increased costs to ACS resulting from not applying the tariff to Berry that will ultimately affect rates seems here to be not only tangential, as in *Locker*, but distinctly speculative.

For these reasons we conclude that a rule of strict construction should be employed to construe the exculpatory tariff. When such a rule is employed it is clear that the exculpatory tariff does not protect Berry. As already noted, Berry is not mentioned either by name or by description in the tariff. With reference to Berry, therefore, the tariff is not an instrument in which "the intent to release a party from liability for future negligence" is "conspicuously and unequivocally expressed."<sup>24</sup>

24 *Moore v. Hartley Motors, Inc.*, 36 P.3d 628, 633 (Alaska 2001) (quoting *Kissick v. Schmierer*, 816 P.2d 188, 191 (Alaska 1991)). Further, the tariff does not explicitly disclaim liability due to negligence, either of ACS or other entities, as required by our case law. See *Moore*, 36 P.3d at 633; *Kissick*, 816 P.2d at 191.

#### Other Issues

[3] Because as the case now stands Berry is not the prevailing party, the award of attorney's fees and costs must be vacated.

[4] [5] Uncle Joe's has waived the right to appeal the superior court's refusal to compel production of attorney-client communications. Parties generally cannot appeal stipulated judgments.<sup>25</sup> In a civil case, at most, a \*1121 party may appeal from a stipulated judgment where the stipulation expressly reserves an issue for appeal.<sup>26</sup> The stipulated judgment here reserves the right to appeal only the April 22, 2004 summary judgment order, not the April 26, 2004 denial of the motion to compel. Without an indication that the parties intended to reserve the right to appeal this order, this court will not consider it.

25 See, e.g., *Legge v. Greig*, 880 P.2d 606, 607–09 (Alaska 1994) (no right to appeal from voluntary dismissal following an adverse ruling where neither the opposing party nor the superior court agreed to appealability); *Singh v. State Farm Mut. Auto. Ins. Co.*, 860 P.2d 1193, 1197 (Alaska 1993) (“[A] right to appeal is waived by stipulating to judgment.”).

26 *Legge*, 880 P.2d at 608–09; cf. *Pratt & Whitney Can., Inc. v. Sheehan*, 852 P.2d 1173, 1174–75 (Alaska 1993) (considering on appeal, without discussing appealability, a strict liability claim that Pratt had not contested in a stipulated judgment where Pratt

expressly reserved the right to appeal this claim); *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316 (Alaska 1982) (allowing, without discussing appealability, appeal of a stipulated preliminary injunction that the parties expressly reserved for appeal).

[6] Berry's contention that the court erred in refusing to enforce the Yellow Pages liability limitation clause is moot. A case is moot if the party bringing the action would not be entitled to any relief even if it prevailed.<sup>27</sup> If Berry prevailed on this claim, it would still be liable under its contract with Uncle Joe's for the cost of the ads. The nominal damages awarded Uncle Joe's by stipulation, \$10, are less than the amount Uncle Joe's paid Berry for the ad. Therefore, even if the limitation of liability clause were valid the award to Uncle Joe's would be sustained and Berry would be entitled to no relief.

27 *O'Callaghan v. State*, 920 P.2d 1387, 1388 (Alaska 1996) (citing *Maynard v. State Farm Mut. Auto. Ins. Co.*, 902 P.2d 1328, 1329 n. 2 (Alaska 1995)).

#### Conclusion

For the reasons stated, the judgment of the superior court dismissing Uncle Joe's claim with respect to the error in the White Pages is REVERSED and the award of costs and attorney's fees to Berry is VACATED. The judgment awarding Uncle Joe's nominal damages for an error in the Yellow Pages is AFFIRMED. This case is REMANDED to the superior court for further proceedings consistent with this opinion.

#### All Citations

156 P.3d 1113

KeyCite Yellow Flag - Negative Treatment

Distinguished by Racine Harley-Davidson, Inc. v. State, Div. of Hearings and Appeals, Wis.App., December 22, 2004

218 Wis.2d 558

Court of Appeals of Wisconsin.

WISCONSIN END-USER GAS ASSOCIATION and American National Can Company, Petitioners-Respondents, v. PUBLIC SERVICE COMMISSION OF WISCONSIN, Respondent-Appellant. †

† Petition to review denied.

No. 97-1465.

Submitted on Briefs March 3, 1998.

Opinion Released April 8, 1998.

Opinion Filed April 8, 1998.

Association of natural gas users and natural gas utility's interruptible service customer sought review of Public Service Commission's (PSC) denial of their petition for adjustment in penalty tariff imposed for unauthorized use of gas during a period of interruption. The Circuit Court, Waukesha County, James R. Kieffer, J., reversed PSC's determination, and ordered natural gas utility to refund tariff in excess of \$2.00 per therm. PSC appealed. The Court of Appeals, Snyder, P.J., held that: (1) appropriate standard of review in construing tariff contract was de novo, and (2) natural gas utility was only authorized to collect the \$2.00 per therm penalty which was plainly specified in ambiguous contract provision.

Affirmed.

West Headnotes (10)

[1] Gas

-~ Scope of review and trial de novo  
Appropriate standard of review for assessment of a penalty tariff, an issue

of contract interpretation, was de novo; although Court of Appeals owed Public Service Commission (PSC) great deference in matters of statutory interpretation and rate setting, it has as much expertise as PSC, if not more, in construing contracts.

5 Cases that cite this headnote

[2] Administrative Law and Procedure

-~ Law questions in general

Ordinarily reviewing courts do not defer to the decisions of administrative agencies when considering pure questions of law.

Cases that cite this headnote

[3] Administrative Law and Procedure

-~ Law questions in general

Administrative agency's construction of a contract is subject to de novo review by Court of Appeals.

4 Cases that cite this headnote

[4] Gas

-~ Contracts

Based on ambiguity in pipeline tariff setting penalty at "two dollars (\$2.00) per therm, or 2 times the pipeline penalty, whichever is greater," for unauthorized use of gas during a period of interruption, natural gas utility was only authorized to collect the \$2.00 per therm penalty which was plainly specified in contract.

2 Cases that cite this headnote

[5] Public Utilities

-~ Regulation of Charges

Public utility can only assess charges which are set forth in a properly filed tariff; language of the tariff itself governs the relations between the utility and its customers.

Cases that cite this headnote

**[6] Public Utilities**

-~ Regulation of Charges

"Filed rate doctrine" forbids a regulated utility from receiving compensation for its services unless those rates have been properly filed with the appropriate regulatory authority. W.S.A. 196.22.

Cases that cite this headnote

**[7] Contracts**

-~ Existence of ambiguity

Words or phrases in a contract are "ambiguous" when they are reasonably susceptible of more than one meaning.

2 Cases that cite this headnote

**[8] Public Utilities**

-~ Regulation of Charges

When a penalty tariff is assessed, any question of a customer's rights or obligations must be determined under the tariffs as they existed at the time.

Cases that cite this headnote

**[9] Administrative Law and Procedure**

-~ Primary jurisdiction

"Primary jurisdiction" is a doctrine of comity: the decision for a court in a case involving a question of primary jurisdiction is not whether the court has jurisdiction but whether it should exercise its discretion to retain jurisdiction.

1 Cases that cite this headnote

**[10] Evidence**

-~ What constitutes contract excluding parol evidence in general

Public Service Commission's (PSC) docket information, which allegedly provided basis for its tariff penalty provisions for unauthorized use of natural gas, was never part of agreement with customers, and, thus, was inadmissible as parol evidence of what

PSC intended to embody in its written contract.

2 Cases that cite this headnote

**Attorneys and Law Firms**

**\*\*557 \*561** On behalf of the respondent-appellant, the cause was submitted on the brief of Robert J. Mussallem, Chief Counsel, Natural Gas Division, and Steven Levine, Legal Counsel, Public Service Commission of Wisconsin.

On behalf of the petitioners-respondents, the cause was submitted on the brief of Niles Berman and Janet L. Kelly of Wheeler, Van Sickle & Anderson, S.C. of Madison.

Before SNYDER, P.J., and BROWN and ANDERSON, JJ.

**Opinion**

SNYDER, Presiding Judge.

The Public Service Commission of Wisconsin (PSC) appeals from a circuit court order finding that a penalty tariff imposed for the unauthorized use of gas during a period of interruption was ambiguous on its face and that the PSC's subsequent interpretation was erroneous. The PSC now asserts that: (1) we should give "great deference" to its reasonable interpretation of Wisconsin Electric Power Company-Gas Operations' (WEP-GO) assessed penalty tariff; (2) it has the **\*\*558** authority to interpret tariffs "in the public interest"; (3) its order was lawful and fully in accord with applicable statutory and administrative code directives; and (4) its order fully comports with its other decisions imposing penalty tariffs for the unauthorized use of gas.

As an initial matter, we conclude that the appropriate standard of review in this instance is de novo. Although we owe the PSC great deference in matters of statutory interpretation and rate setting, the question presented is whether a contract is ambiguous. We have **\*562** as much expertise as the PSC in matters of contract interpretation, and we will apply a de novo standard of review to this issue. The PSC concedes that the contract language is ambiguous. We conclude that the ambiguity must be construed in favor of the parties against whom the penalty was assessed, Wisconsin End User

Gas Association and American National Can Company (collectively, WEUGA). We therefore hold that the PSC's determination "erroneously interpreted" the contract language, *see* § 227.57(5), STATS., and we affirm the circuit court's decision.

WEUGA is an association of sixty enterprises which use natural gas in their operations. American National Can is a member of WEUGA and is a customer of WEP-GO. WEP-GO is a local gas distribution company. Large natural gas customers, such as those which make up WEUGA, have the option of electing a lower priority of local delivery service, termed "interruptible" service. A customer which elects interruptible service agrees to cease using gas on what are termed "constraint days" so the needs of higher priority customers may be met. However, an interruptible service customer retains the ability to use unauthorized gas on such days, subject to a penalty tariff.

In January and February 1996, WEP-GO issued constraint day restrictions during a period of extremely cold weather. Certain WEUGA members, including American National Can, used unauthorized gas. As a result, WEP-GO assessed penalty tariffs. The tariffs were assessed based on the following language in the contract between the parties:

*Penalty Clause*

The customer will be required to pay a penalty of two dollars (\$2.00) per therm, or 2 times the pipeline \*563 penalty, whichever is greater, for all unauthorized use of gas during a period of interruption or curtailment of service ordered by the company.

WEP-GO interpreted this language to mean that it was required to charge twice the available pipeline penalty tariff if it exceeded \$2.00 per therm, even though in this instance it was not actually charged any penalty by its pipeline suppliers. The penalty WEP-GO imposed averaged \$17.58 per therm. WEUGA members which were assessed this penalty seek to have it reduced to the \$2.00 per therm penalty included in the penalty clause of the contract. The members construe the language to mean that the \$2.00 per therm tariff is applicable unless WEP-GO *actually incurred* a higher penalty from its suppliers.

WEUGA petitioned the PSC for this adjustment, but the PSC denied that request. However, on review the circuit court reversed the PSC and ordered it to require WEP-GO

to refund to its customers any tariff amounts collected in excess of the \$2.00 per therm penalty outlined above. The PSC was also ordered to redraft its tariff to clearly state that unauthorized use penalties at pipeline penalty rates will be imposed irrespective of whether the utility itself incurs pipeline penalties. The PSC now appeals.

*Standard of Review*

[1] An initial question raised by the parties concerns the appropriate standard of review. The PSC argues that its interpretation of the contract language should be afforded "great deference" because the imposition of penalties for the unauthorized use of natural gas implicates "significant policy values." WEUGA claims that this issue is primarily a question of law and thus \*564 should be reviewed *de novo*. Because the scope of our review underpins our analysis of the penalty imposed, and our ultimate decision is largely driven by the degree of deference owed, *see Barron Electric Cooperative v. Public Service Commission*, 212 Wis.2d 752, 756, 569 N.W.2d 726, 729 (Ct.App.1997), we \*\*559 begin with consideration of the appropriate standard of review.

The interpretation of a contract is a question of law which is subject to *de novo* review. *See Borchardt v. Wilk*, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct.App.1990). However, when agency review is undertaken there are three levels of deference afforded conclusions of law and statutory interpretation. *See Sauk County v. WERC*, 165 Wis.2d 406, 413, 477 N.W.2d 267, 270 (1991). "Great weight" is the first and highest amount of deference given to agency interpretations. *See id.* This standard is the one generally applied in the review of agency determinations and has been described as follows:

"[I]f the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation ... the agency's conclusions are entitled to deference by the court. Where a legal question is intertwined with factual determinations or with value or policy determinations or where the agency's interpretation and application of the law is of long standing, a court should defer

to the agency which has primary responsibility for determination of fact and policy.”

*Id.* (quoted source omitted). This is the standard which the PSC argues is appropriate because it claims that its determination of the appropriate penalty assessment \*565 is “intertwined ... with value or policy determinations.” *See id.*

A second level of review is a midlevel standard, the “due weight” or “great bearing” standard. *See id.* This is used if the agency's decision is “very nearly” one of first impression. *See id.* at 413-14, 477 N.W.2d at 270. Finally, for questions that are “clearly one of first impression” in which the agency has “no special expertise or experience” the least deferential standard, de novo review, is applied. *See id.* at 414, 477 N.W.2d at 270-71.

[2] [3] The assessment of a penalty tariff in this case is not an issue of statutory interpretation; rather, it is an issue of contract interpretation. Ordinarily reviewing courts do not defer to the decisions of administrative agencies when considering pure questions of law. *See Wisconsin Dep't of Transp. v. Office of the Comm'r of Transp.*, 135 Wis.2d 195, 198, 400 N.W.2d 15, 16 (Ct.App.1986). Matters of contract interpretation come before this court with frequency, and it is an area of law in which we have a great deal of experience and expertise. Furthermore, the construction of contract terms is circumscribed by specific rules of law. On these bases, we conclude that an agency's construction of a contract is subject to de novo review by this court.

The PSC nonetheless argues for a deferential standard, claiming that in this instance its decision is “so intertwined with value and policy determinations that [it is] entitled to deference by the courts.”<sup>1</sup> *Id.* at 199, 400 N.W.2d at 16. \*566 However, a basic tenet applied by a reviewing court when construing a contract is “not to make contracts or to reform them, but to determine what the parties contracted to do: not necessarily what they intended to agree to, but what, in a legal sense, they did agree to, as evidenced by the language they saw fit to use.” *Miller v. Miller*, 67 Wis.2d 435, 442, 227 N.W.2d 626, 629 (1975) (quoted source omitted). In this area this court has as much expertise as the PSC, if not more.

1 The PSC claims that the issue before us is one of “the interpretation of public utility tariffs.” We disagree. At issue is the construction of ambiguous language in a contract between a utility company and some of its customers. The construction of a contract is a question of law in which we are well versed.

#### *Construction of the Contract*

[4] We turn then to the language of the contract which set the rate for the penalty tariff to be imposed in the case of the unauthorized use of natural gas. That agreement provided:

The customer will be required to pay a penalty of two dollars (\$2.00) per therm, or 2 times the pipeline penalty, whichever is greater, for all unauthorized use of gas during a period of interruption or curtailment of service ordered by the company.

The PSC concedes that the above language is ambiguous. It is not clear on its face whether \*560 the phrase “2 times the pipeline penalty” means “2 times the applicable pipeline penalty” or “2 times the assessed pipeline penalty.” Ambiguity exists if a contract provision is reasonably susceptible to more than one interpretation. *See Kohler Co. v. Wixen*, 204 Wis.2d 327, 335, 555 N.W.2d 640, 644 (Ct.App.1996). The ambiguity outlined above underscores the arguments of both sides. \*567 The PSC interprets the tariff as not requiring the local distribution company to actually experience inadequate supplies and incur a penalty itself in order to charge double the pipeline penalty. WEUGA argues that unless the utility is penalized by its pipeline suppliers, a higher penalty than \$2.00 per therm cannot be imposed.

[5] [6] It is a well-settled rule of contract construction that ambiguous terms in contracts are to be construed against the maker or drafter of the contract. *See Dairyland Equip. Leasing, Inc. v. Bohlen*, 94 Wis.2d 600, 609, 288 N.W.2d 852, 856 (1980). A utility can only assess charges which are set forth in a properly filed tariff. The language of the tariff itself governs the relations between the utility and its customers. *See Prentice v. Title Ins. Co.*, 176 Wis.2d 714, 721, 500 N.W.2d 658, 660 (1993). Section 196.22, STATS., provides:

No public utility may charge, demand, collect or receive more or less compensation for any service performed by it within the state, or for any service in connection therewith, than is *specified* in the schedules for the service .... [Emphasis added.]

This section is a statutory expression of the filed rate doctrine. See *GTE North, Inc. v. Public Serv. Comm'n.* 176 Wis.2d 559, 569, 500 N.W.2d 284, 288 (1993). This doctrine forbids a regulated utility from receiving compensation for its services unless those rates have been properly filed with the appropriate regulatory authority. See *id.* The key word in the above statute is “specified.” See § 196.22. The PSC concedes that its contract with WEUGA which purports to specify the applicable penalty tariff is ambiguous.

[7] \*568 Words or phrases in a contract are ambiguous when they are reasonably susceptible of more than one meaning. See *Patti v. Western Mach. Co.*, 72 Wis.2d 348, 351-52, 241 N.W.2d 158, 160 (1976). In the contract at issue, the pipeline penalty of “two dollars (\$2.00) per therm, or 2 times the pipeline penalty, whichever is greater.” is ambiguous. If the phrase is construed to mean that the customer’s penalty tariff will depend upon the amount actually assessed and collected by a pipeline supplier, then in this instance the pipeline penalty was zero, and the utility would be required to assess the \$2.00 per therm as a penalty.

It has been recognized in other jurisdictions that

[t]ariffs are written by the carriers. It is presumed that they have used all the words necessary to protect their own interests. Therefore, it is the rule, followed by the courts and the Commission, in doubtful cases, to adopt that interpretation of the tariff which is most favorable to the shipper.

*Indiana Harbor Belt R. Co. v. Jacob Stern & Sons*, 37 F.Supp. 690, 691 (N.D.Ill.1941); see also *United States v. Gulf Ref. Co.*, 268 U.S. 542, 546, 45 S.Ct. 597, 69

L.Ed. 1082 (1925). We agree and hereby apply this rule of construction in this case.

[8] Neither side disputes WEP-GO’s assessment of some penalty tariff; at issue is the amount of tariff that can be imposed pursuant to the penalty clause. We conclude that based on the ambiguity in the drafting of the penalty provision, WEP-GO is only authorized in this instance to collect the \$2.00 per therm penalty which is plainly specified in the contract. This comports with the rule of *Indiana Harbor*, as well as with the rule of law that when a penalty tariff is assessed, \*569 any question of a customer’s rights or obligations “must be determined under the tariffs as they existed at the time.” See *GTE North, Inc. v. Public Serv. Comm’n.* 169 Wis.2d 649, 670, 486 N.W.2d 554, 562 (Ct.App.1992), *rev’d on other grounds*, 176 Wis.2d 559, 500 N.W.2d 284 (1993). Recognizing that we are required to determine “not necessarily what [the parties to a contract] intended to agree to, but what, in a legal sense, they did agree to .....” see *Miller*, 67 Wis.2d at 442, 227 N.W.2d at 629 (quoted source omitted), and coupling that \*\*561 with WEP-GO’s failure to specify when the tariff doubling the pipeline penalty rate would be imposed, see § 196.22, STATS., leads us to conclude that in this instance WEP-GO was permitted recovery of only the \$2.00 per therm penalty.

[9] As outlined at the beginning of this opinion, the PSC claims that its penalty assessment is lawful and that it has the authority “to interpret tariffs in the public interest.” It argues that it is given the authority to interpret tariffs “under the doctrine of primary jurisdiction.” Primary jurisdiction is a doctrine of comity; the decision for a court in a case involving a question of primary jurisdiction is not whether the court has jurisdiction but whether it should exercise its discretion to retain jurisdiction. See *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis.2d 400, 420, 491 N.W.2d 484, 491 (1992). In this case, the PSC has already had an opportunity to construe WEP-GO’s contract with WEUGA and the doctrine of primary jurisdiction is not implicated.<sup>2</sup> The issue before us is \*570 the construction of a contract, written by the utility, which purports to outline the applicable penalties which the utility must assess. See *supra* note 1.

<sup>2</sup> The PSC notes that the primary jurisdiction doctrine is based “on a judicial refusal to interpret questions of the meaning of agency rules and tariffs until they have

been construed by the supervising agency." It then analogizes this case as falling within that doctrine. However, the PSC has had an opportunity to construe the contract provisions and we have subsequently determined that the PSC's construction is subject to de novo review. We do not need to consider the question of primary jurisdiction.

[10] Finally, the PSC argues that its "interpretation of the unauthorized use penalty provision is consistent with [its] underlying orders which gave rise to this tariff provision ...." However, the evidence contained in the PSC's docket will not be considered because it is parol evidence. "When the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written ... agreement ...." *Dairyland Equip. Leasing*, 94 Wis.2d at 607, 288 N.W.2d at 855 (quoted source omitted). Even if parol evidence becomes part of the record, the court must disregard it. *See id.* In this case, the PSC docket

information was never part of an agreement with any of its customers and it will not be considered as evidence of what the PSC intended to embody in its written contract.

Based on our de novo review, we conclude that the PSC's interpretation of its contract assessing the penalty tariff did not comport with established rules of contract construction. Because the PSC has "erroneously interpreted a provision of law." *see* § 227.57(5), STATS., we affirm the circuit court's decision. We hold that the contract was ambiguous as to which penalty tariff would be applied in this instance, and therefore the penalty which is clearly specified, \$2.00 per therm, must be assessed.

\*571 Order affirmed.

#### All Citations

218 Wis.2d 558, 581 N.W.2d 556

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

In the Matter of )  
Adopting and Repealing Rules in ) DOCKET NO. UE-990473  
 )  
Chapter 480-100 WAC ) GENERAL ORDER NO. R-495  
 )  
Relating to Rules establishing ) ORDER ADOPTING AND  
requirements for electric companies ) REPEALING RULES  
 ) PERMANENTLY  
..... )

1     **STATUTORY OR OTHER AUTHORITY:** The Washington Utilities and  
Transportation Commission takes this action under Notice WSR #01-11-147, filed  
with the Code Reviser on May 23, 2001. The Commission brings this proceeding  
pursuant to RCW 80.01.040 and RCW 80.04.160.

2     **STATEMENT OF COMPLIANCE:** This proceeding complies with the Open  
Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act  
(chapter 34.05 RCW), the State Register Act (chapter 34.08 RCW), the State  
Environmental Policy Act of 1971 (chapter 43.21C RCW), and the Regulatory  
Fairness Act (chapter 19.85 RCW).

3     **DATE OF ADOPTION:** The Commission adopts this rule on the date that this  
Order is entered.

4     **CONCISE STATEMENT OF PURPOSE AND EFFECT OF THE RULE:** RCW  
34.05.325 requires that the Commission prepare and provide to commenters a concise  
explanatory statement about an adopted rule. The statement must include the  
identification of the reasons for adopting the rule, a summary of the comments  
received regarding the proposed rule, and responses reflecting the Commission’s  
consideration of the comments.

5     The Commission often includes a discussion of those matters in its rule adoption  
order. In addition, most rulemaking proceedings involve extensive work by  
Commission Staff that includes summaries in memoranda of stakeholder comments,  
Commission decisions, and Staff recommendations in each of those areas.

6     In this docket, to avoid unnecessary duplication, the Commission designates the  
discussion in this Order as its concise explanatory statement, supplemented where not  
inconsistent by the Staff memoranda presented at the adoption hearing and at the  
open meetings where the Commission considered whether to begin this rulemaking  
and whether to adopt the specific language proposed by Staff. Together, the  
documents provide a complete but concise explanation of the agency’s actions and  
the agency’s reasons for taking those actions.

7       **REFERENCE TO AFFECTED RULES:** This Order repeals and adopts the following sections of the Washington Administrative Code:

**WAC 480-100-056 Refusal of service.**

*Repealed, subject addressed in WAC 480-100-123.*

**WAC 480-100-116 Responsibility for delinquent accounts.**

*Repealed, subject addressed in WAC 480-100-123.*

**WAC 480-100-123 Refusal of service.**

*New section that combines WAC 480-100-056 and WAC 480-100-116.*

8       **PREPROPOSAL STATEMENT OF INQUIRY:** The Commission filed a Preproposal Statement of Inquiry (CR-101) on April 7, 1999, at WSR #99-08-105.

9       **ADDITIONAL NOTICE AND ACTIVITY PURSUANT TO PREPROPOSAL STATEMENT:** The Preproposal Statement of Inquiry advised interested persons that the Commission was considering entering a rulemaking on rules relating to electric companies to review them for content and readability pursuant to Executive Order 97-02, with attention to the rules' need, effectiveness and efficiency, clarity, intent and statutory authority, coordination, cost, and fairness. The review included consideration of whether substantive changes or additions were required.

10       The Commission also informed persons of the inquiry into this matter by providing notice of the subject and the CR-101 to all persons on the Commission's list of persons requesting such information pursuant to RCW 34.05.320(3) or who appeared on lists of interested persons in Docket No. UE-990473. Pursuant to the notice, the Commission:

- Held four interested person/stakeholder meetings.
- Created inter-institutional discussion and drafting subgroups to prepare initial rules drafts.
- Developed draft rules using the information gathered from stakeholders.
- Circulated three working drafts to stakeholders for comment.
- Updated drafts to incorporate comments received.

11       **NOTICE OF PROPOSED RULEMAKING:** The Commission filed a supplemental notice of Proposed Rulemaking (Supplemental CR-102) on May 23, 2001, at WSR #01-11-147.

12       **MEETINGS OR WORKSHOPS; ORAL COMMENTS:** Before filing the notice of Proposed Rulemaking, the Commission held four workshops at its headquarters in Olympia on June 3, June 24, October 14-15, 1999, and May 25, 2000. Representatives from the following companies, agencies and organizations attended all or some of the workshops: Avista Utilities (Avista), Puget Sound Energy (PSE),

Northwest Natural Gas (NW Natural), Office of Public Counsel (Public Counsel), PacifiCorp, Cascade Natural Gas (Cascade), The Energy Project, Energy Advocates, Cost Management Services, the Energy Office of the Department of Community, Trade, and Economic Development, International Brotherhood of Electric Workers, and the Washington State Building Code Council. During the workshops, attendees provided oral comments about all the sections under review. Most of the discussions focused on consumer related issues, including refusal of service, prior obligation, and disclosure of private information. The Commission incorporated in its rules many of the suggestions offered by various stakeholders.

- 13 **COMMENTERS (WRITTEN COMMENTS):** The Commission received written comments, and in some cases, several rounds of written comments from Avista, Cascade, Mr. Jay Lei, Northwest Industrial Gas Users (NWIGU), NW Natural, PacifiCorp, Public Counsel, PSE, The Boeing Company (Boeing), The Energy Project, TrizecHahn Office Properties, Ltd., and Washington Health Care Association. The Commission accepted many of the proposals contained in these written comments.
- 14 **RULEMAKING HEARINGS:** The Commission originally scheduled this matter for oral comment and adoption under Notice WSR #01-11-147 at 9:30 a.m., at a rulemaking hearing scheduled during the Commission's regularly scheduled open public meeting on Wednesday, June 27, 2001, at the Commission's offices in Olympia, Washington. The Notice also provided interested persons an opportunity to submit written comments to the Commission. The Commission continued the rule adoption hearing on June 27, July 11, July 25, and August 8, 2001. On September 12, 2001, Chairwoman Marilyn Showalter, Commissioner Richard Hemstad, and Commissioner Patrick J. Oshie considered the rule proposal for adoption, pursuant to notice during the Commission's regularly scheduled open public meeting. The Commission heard oral comments from representatives of PSE, Boeing, Public Counsel, NWIGU, Avista, and Htech.
- 15 **SUGGESTIONS FOR CHANGE THAT ARE REJECTED:** The Commission rejected PSE's and PacifiCorp's proposals to include language in WAC 480-100-123 regarding "economic feasibility" and "adverse impacts" from WAC 480-100-056 as reasons for refusal of service, or to provide examples of economic feasibility and adverse impacts. The Commission does not believe that the rule language should contain specific examples of reasons to refuse service. The language should be left flexible and open, consistent with the language in RCW 80.28.110. Instead the Commission includes conditions in subsections (1) and (2) under which a utility may refuse to provide service, and provides a "catch all" in subsection (5) that would require a utility to file for Commission approval if the utility proposes to refuse service to a customer for reasons other than those listed in subsections (1) and (2).
- 16 The Commission also rejected the proposals of Cascade, NW Natural, and PacifiCorp to eliminate or specify the number of prior obligations a residential customer or applicant can incur in one calendar year before a utility may refuse

service. The Commission believes that more accurate data about the use and consequences of prior obligation is needed to support a substantial change to this rule.

17 **COMMISSION ACTION:** After considering all of the information regarding this proposal, the Commission repealed and adopted the rules as proposed in the Supplemental CR-102 at WSR #01-11-147 with the changes described below.

18 **CHANGES FROM PROPOSAL:** The Commission adopted the proposal with the following changes from the text noticed at WSR #01-11-147:

19 **Subsection (2)(d).** The Commission revised this subsection and made it more general to include all possibilities in response to PacifiCorp’s concern that the proposed language implied that the utility is responsible for securing all rights-of-way, easements, and other permits. Most utilities’ line extension tariffs address the responsibility of the applicant to obtain the necessary rights-of-way and easements. It is not the Commission’s intent to make the utility responsible for actually obtaining, paying for, or holding all rights-of-way, easements, approvals, and permits. up to the customer’s point of attachment. The rule simply recognizes that if all necessary rights-of-way, easements, approvals, and permits are not in place, after reasonable efforts to secure them, the utility may not be required to provide service.

20 **Subsection (3).** Based on the comments of Public Counsel and The Energy Project concerning prior obligations, the Commission determined that for the present it will restate the existing rule, which does not limit the number of prior obligations a residential customer or applicant can incur before a utility may refuse service. The Commission believes that more accurate data about the use and consequences of prior obligation is needed to support a substantial change to this rule.

21 Subsection (4). The Commission revised this subsection to address NWIGU’s request that the Commission extend the applicability of this subsection beyond residential applicants and customers. In NWIGU’s opinion, to limit this subsection to residential applicants or customers only creates an inequitable obligation on all other customers. The Commission agrees that this subsection should not be restricted to residential applicants or customers and extends the applicability of subsection (4) to all applicants and customers.

22 **Subsection (5).** The Commission replaced the existing subsection (3) with this subsection to address the concerns expressed by TrizecHahn Office Properties, Ltd. and Boeing’s request that the Commission repeal this subsection’s original language that permitted a utility to refuse new or additional service if “such service will adversely affect service being rendered to other customers” or if to provide service would be “economically unfeasible,” in order to preclude a utility from having discretion to refuse service with no effective recourse for the potential customer.

23 Boeing suggested that revision of the existing rule was needed for two reasons. First, revision was necessary for the continued vitality of the economy in Washington.

Boeing commented that the obligation of electric utilities to serve has been critical to economic development in the state because it has contributed to the region's dependable supply of low-cost electric power. According to Boeing, if utilities are permitted to refuse new or additional service, this source of economic strength would be imperiled. Second, Boeing believes that the current Refusal of Service rule is inconsistent with the statutory and common law obligation of an electric utility to provide service: RCW 80.28.010(2); *National Union Insurance Co. v. Puget Sound Power & Light Co.*, 94 Wn. App. 163; 972 P.2d 481 (1999). Boeing commented that the Commission has jurisdiction to require an electric utility to provide service. *In re Tanner Elec. Co.* 1991 Wash. UTC LEXIS 17 (WUTC 1991). Contrary to these principles, according to Boeing, the current rule could give a utility untrammelled discretion to refuse service with no opportunity for Commission oversight and no redress for a customer denied service.

- 24 Boeing asserts that the obligation to serve is a well established principle in utility regulation. The utility has the opportunity to earn a reasonable rate of return and, in exchange, it has the obligation to serve. The presumption should be that the utility has the obligation to serve unless there are reasonable exceptions. The exceptions included in the revised rule fall in the zone of reasonableness.
- 25 The Commission observes that existing language in the rule permits a utility to refuse new or additional service if "such service will adversely affect service being rendered to other customers" or if to provide service would be "economically unfeasible." These terms are too general and vague to be useful. Commission resolution of obligation to serve issues is likely to be based on fact-specific analysis. So resolution of such issues is not amenable to the prescriptive language of a rule. Obligation to serve issues, when they arise and cannot be resolved otherwise, should be brought to the Commission for resolution.
- 26 The Commission has removed the original subsection (3) language that permitted a utility to refuse new or additional service if "such service will adversely affect service being rendered to other customers" or if to provide service would be "economically unfeasible." The revised rule includes conditions in subsections (1) and (2) under which a utility may refuse to provide service, and provides a "catch all" in subsection (5) that would require a utility to file for Commission approval if the utility proposes to refuse service to a customer for reasons other than those listed in subsections (1) and (2).
- 27 The Commission also revised subsection (5) and added subsection (6) to address the process issues raised by Public Counsel, PSE, TrizecHahn Office Properties, Ltd., Boeing, and Mr. Jay Lei. Subsection (5) requires the utility to work with the customer requesting service to resolve the issues before coming to the Commission. Subsection (6) informs applicants and customers about options available under Chapter 480-09 WAC, the Commission's procedural rules.

28        **STATEMENT OF ACTION; STATEMENT OF EFFECTIVE DATE:** In reviewing the entire record, the Commission determines that WAC 480-100-056 and WAC 480-100-116 should be repealed, and WAC 480-100-123 should be adopted to read as set forth in Appendix A, as a rule of the Washington Utilities and Transportation Commission, to take effect pursuant to RCW 34.05.380(2) on the thirty-first day after filing with the Code Reviser.

**ORDER**

29        THE COMMISSION ORDERS That:

30        WAC 480-100-056 and WAC 480-100-116 are repealed, and WAC 480-100-123 is adopted to read as set forth in Appendix A, as a rule of the Washington Utilities and Transportation Commission, to take effect on the thirty-first day after the date of filing with the Code Reviser pursuant to RCW 34.05.380(2).

31        This Order and the rules set out below, after being recorded in the register of the Washington Utilities and Transportation Commission, shall be forwarded to the Code Reviser for filing pursuant to chapters 80.01 and 34.05 RCW and chapter 1-21 WAC.

DATED at Olympia, Washington, this 3rd day of December, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

32        MARILYN SHOWALTER, Dissenting:

- 33 I cannot agree with the majority's decision to adopt the so-called "prior obligation rule," WAC 480-100-123(3). Under this rule, a residential customer who has been disconnected for failing to pay prior bills (i.e., who has a "prior obligation") is entitled to be reconnected and to receive electric service upon payment of a deposit and reconnection fee. The underlying amounts owed for prior service need never be paid to receive future service. The rule applies to any residential customer regardless of income or other circumstances. Further, the rule allows an unlimited number of prior defaults and disconnections over an unlimited number of months or years with unlimited amounts owing.
- 34 The most basic principle underlying all commerce is that people must pay for the goods or services they receive, and cannot expect to continue to receive those goods or services if they have not paid their bills. This universal principle is as important to the operation of public service companies as it is in the broader world. Utilities are obligated to provide service in return for compensation from customers that is fair, just, reasonable and sufficient. In short, the company must serve, but in return, the customer must pay--or at least, that is what our general rule *should* provide.
- 35 Not surprisingly, there appear to be no other jurisdictions with a rule like the one being adopted. Some jurisdictions require the prior obligation to be paid in full before the utility must reconnect (e.g., Seattle City Light, Snohomish Public Utility District, Tacoma Power, Clark Public Utility District). Others allow thirty days (e.g., the state of Oregon, but only once—after a second disconnection for nonpayment, all overdue obligations must be paid in full before reconnection is required). Others allow a longer period for full payment, but these provisions are limited to low-income customers and/or seasonally related to allow winter service to continue pending full payment. All jurisdictions, as far as I know, ultimately require full payment of prior amounts owed as a condition of the right to receive continued service.
- 36 An entirely valid concern is the plight of low-income customers who have difficulty paying their energy bills. The rule adopted by the majority, however, is not tailored to them (since it has no means test) and even appears to discriminate against them, as I will discuss shortly.
- 37 There are several programs devoted to low-income needs, all of which I support. Most broadly, there are state and federal income-assistance (welfare) programs. More specifically, there are state and federal programs that provide money to help low-income customers pay their electric and gas bills. These programs are outside the direct purview of this commission.
- 38 There are two state statutes, however, that relate more directly to our regulatory authority to address the needs of low-income customers. RCW 80.28.010, the "winter moratorium" law, prohibits defaulting low-income customers from being disconnected during the winter months (November 15 through March 15) if they agree to pay their bills in full by the following October 15. This law only makes

sense if it is premised (reasonably) on the existence of a general requirement to pay one's bills in order to continue to receive service, to which the law provides a circumscribed exception. The rule being adopted, however, negates this premise. As a result, the winter moratorium law is far more demanding of participating low-income customers (they must ultimately pay their bills) than the adopted rule is for all customers (who need never pay their bills). Moreover, the rule actually excludes from its protection anyone who defaults while participating in the winter moratorium program, so it actually discriminates against those low-income customers who are naïve enough but also responsible enough to agree to pay their bills under that program.

39 A second law, RCW 80.28.068, allows public service companies to propose, and the Commission to approve, discounted rates for low-income customers. The costs of the discount are borne by the other ratepayers. The Commission is not authorized to order a discounted rate on its own initiative; it can only respond to a proposal by the company. This law, too, only makes sense if the legislature assumes (reasonably) that without it, all ratepayers, including low-income ratepayers, will otherwise be paying a uniform residential rate. But the rule being adopted has no income test and allows unlimited amounts to go unpaid--in effect creating a much deeper discount than would ever be achieved under the low-income discount law.

40 The rule raises other fairness questions. Those who take advantage of the rule receive its "discount," but those in identical (or worse) circumstances who do manage to pay their bills will not. The majority says it wants more data to evaluate the effects of the rule. But the data being collected will not tell us the income levels or personal circumstances of those who use the rule. Nor will the data tell us the income levels or personal circumstances of those who do *not* use the rule.

41 Of course, in one sense the rule is "fair" in that all residential ratepayers are entitled to take advantage of it. But if large numbers of people were to stop paying their bills and yet continue to receive service, the resulting costs would cut into the revenue requirements of the utility and drive up costs for the rest of the ratepayers. So the rule is not sustainable if used on a broad basis. Regardless of whether the current, similar rule has been broadly or sparingly used, a rule like the one being adopted poses too much risk of misuse or broad use, especially in the absence of any well-articulated purpose. I believe in programs and policies that focus clearly on the needs of those who are unable to pay their energy bills, but the rule adopted here has a much more diffuse focus and potentially more diffuse and unsound effects.

42 The general principle that one is obligated to pay for the services one receives is deeply understood and fundamental to a functioning economy. Instead of abandoning and undermining this principle, our rules should reinforce it, and carve out exceptions to it carefully and fairly.

43 For these reasons, I respectfully dissent.

MARILYN SHOWALTER, Chairwoman

*Note: The following is added at Code Reviser request for statistical purposes:*

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, amended 0, repealed 0; Federal Rules or Standards: New 0, amended 0, repealed 0; or Recently Enacted State Statutes: New 0, amended 0, repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, amended 0, repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 1, amended 0, repealed 2.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 1, amended 0, repealed 2.

Number of Sections Adopted using Negotiated Rule Making: New 0, amended 0, repealed 0; Pilot Rule Making: New 0, amended 0, repealed 0; or Other Alternative Rule Making: New 0, amended 0, repealed 0.

1998 WL 971888 (Wash.U.T.C.)  
Slip Copy

Re Camelot Square Mobile Home Park

Docket No. UT-960832  
Docket No. UT-961341  
Docket No. UT-961342  
5th Suppl. Order

Washington Utilities and Transportation Commission

August 18, 1998

Before Levinson, chairman, and Hemstad and Gillis, commissioners.

BY THE COMMISSION:

**SUMMARY**

*PROCEEDINGS:* On June 19, 1996, Camelot Square Mobile Home Park filed a formal complaint against U S WEST Communications Inc. (U S WEST or Company). On October 23, 1996, Camelot Square Mobile Home Park filed an amended complaint; Belmor Mobile Home Park and Skylark Mobile Home Park filed nearly identical complaints on the same day.<sup>1</sup> The Parks alleged that buried telephone cable at the Parks has deteriorated, and that U S WEST had announced that the cable needs to be replaced, but would not repair or replace the cable until the Parks provide access to a trench or provide conduit. U S WEST answered alleging that the Parks were required to provide access. The complaints were consolidated by Commission order dated November 22, 1996. Hearings were held on December 16, 1996, and June 10-11, 1997. Briefs were filed on August 1, 1997, and simultaneous response briefs were filed on August 22, 1997.

<sup>1</sup> The three mobile home parks will be referred to in this order as 'the Parks.'

The Initial Order entered November 25, 1997, determined that U S WEST should provide trenching and all facilities including, without limitation, buried service wire and conduit to replace all buried service wire located at the Parks, and should restore petitioners' property to the same condition it was in prior to replacement of the buried service wire by December 31, 1997.

U S WEST petitions for administrative review, arguing that the Parks did not carry their burden of proof; that U S WEST's tariff requires the park owners to provide the trenching and conduit in which U S WEST places its cable; that the Commission may only answer the tariff interpretation question posed by the complaint, and has no authority to order affirmative relief; that U S WEST's tariff is just and reasonable; and that it cannot be ordered to replace the service cable at the Parks immediately or to restore the park's property to its prior condition.

The Parks' answer supports the Initial Order. They argue that U S WEST admitted that all of its buried service wire located at the Parks needs to be replaced, and that U S WEST refuses to perform the necessary repair until the Parks provide access to a trench and conduit, despite the fact that U S WEST's tariff requires U S WEST to make that repair.

The Commission Staff's answer also supports the Initial Order. They argue that U S WEST flatly ignores the definition of 'facilities' contained in its tariff, and that certain tariff exceptions relied upon by U S WEST are not applicable in this situation. The Commission Staff also supports the Initial Order's proposed conclusions that the Commission has the authority to determine whether U S WEST's practices are unreasonable, unjust, or unlawful; that the Commission

is authorized to order refunds; and that the Commission is authorized to require U S WEST to replace the facilities at the Parks.

*COMMISSION:* The Commission affirms and adopts the Initial Order. U S WEST should provide all facilities including, without limitation, trenching, buried service wire, and conduit to replace all buried service wire located at Camelot Square Mobile Home Park, Skylark Village Mobile Home Park, and Belmor Mobile Home Park, and should restore petitioners' property to the same condition it was in prior to replacement of the buried service wire by September 30, 1998.

*PARTIES:* The petitioners, Camelot Square Mobile Home Park, Skylark Mobile Home Park, and Belmor Mobile Home Park (the Parks) were represented by Walter H. Olsen, Jr., attorney, Seattle. The respondent, U S WEST was represented by Lisa A. Anderl, attorney, Seattle, and Kirsten Dodge, attorney, Bellevue. The staff of the Washington Utilities and Transportation Commission (Commission Staff), was represented by Shannon E. Smith, Assistant Attorney General, Olympia.

## **MEMORANDUM**

### **I. BACKGROUND**

This matter arises from complaints filed against U S WEST by Camelot Square Mobile Home Park, Skylark Village Mobile Home Park and Belmor Mobile Home Park. The present dispute arose after U S WEST decided to improve service quality, and to reduce the number of individual customer repairs at the Parks, by replacing the service cable U S WEST had previously installed at the Parks. U S WEST informed the Parks of its proposal, and asked the Parks to provide trenching and conduit to support the replacement of U S WEST's service cable.

The question at issue is whether U S WEST's current tariff requires U S WEST or the Parks to provide the portion of trench and conduit serving U S WEST's customer in the Parks that will be located within the Parks' property lines.

Each park filed a separate complaint against U S WEST. The complaints were consolidated by the Commission by order dated November 22, 1996. In essence, the Parks alleged that buried telephone cable at the Parks has deteriorated and that U S WEST will not repair (or replace) the cable until the Parks provide access to a trench or provide conduit. Petitions at ¶ 5. The Parks further alleged that U S WEST, by requiring the Parks to provide access to a trench or conduit before it will repair or replace the cable, is violating the Company's tariff, and the statutes and rules governing telecommunications companies in the state of Washington. *Id.* at ¶¶ 6-12.

U S WEST admitted that it had determined that the buried service cable at each of the Parks needs to be replaced, and had asked each park to provide the trench or conduit. U S WEST claimed that it is not required to repair or replace the telephone cable until the Parks provide access to a trench or conduit. U S WEST's position is that the property owner must provide "support structures," such as trenching, conduit or poles, for placement of U S WEST facilities on private property whether it be for new construction or for maintenance. U S WEST claims that tariff language supporting its position has existed since 1961.

Commission Staff did not agree with U S WEST's interpretation of its tariff. Commission Staff argued that according to its tariff, U S WEST is required to repair and maintain the telephone facilities within the Parks, which includes the excavation of a trench and placement of conduit if necessary to effectuate the repair.

### **II. INITIAL ORDER**

The Initial Order entered November 25, 1997, determined that U S WEST should provide trenching and all facilities including, without limitation, buried service wire and conduit to replace all buried service wire located at Camelot Square

Mobile Home Park, Skylark Village Mobile Home Park, and Belmor Mobile Home Park, and should restore petitioners' property to the same condition it was in prior to replacement of the buried service wire by December 31, 1997.

The Initial Order analyzed the following issues and recommended the following answers:

1. Is U S WEST responsible for trenching and conduit to repair and maintain buried service wire that was designed, engineered, installed, and maintained by U S WEST. *Yes.*
2. Does U S WEST's new construction tariff (Section 4.6.A.2.f) apply to the repair and maintenance of existing buried service wire at the Parks? *No.*
3. Does U S WEST's building space and electric power supply tariff (Section 2.5.2.C) apply to the repair and maintenance of buried service wire at the Parks? *No.*

### ***III. PETITION FOR ADMINISTRATIVE REVIEW***

U S WEST petitioned for administrative review on December 15, 1997, arguing that the Parks did not carry their burden of proof: that U S WEST's tariff requires the park owners to provide the trenching and conduit in which U S WEST places its cable; that the Commission may only answer the tariff interpretation question posed by the complaint, and has no authority to order affirmative relief; that U S WEST's tariff is just and reasonable; and that it cannot be ordered to replace the service cable at the Parks immediately or to restore the Parks' property to its prior condition.

The Parks answered on December 26, 1997, supporting the Initial Order. They argue that U S WEST has admitted that all of its buried service wire located at the Parks needs to be replaced; that U S WEST refuses to perform the necessary repair until the Parks provide access to a trench and conduit, despite the fact that U S WEST has historically provided trenching to repair its buried service wire at each of the Parks; that there is no basis in U S WEST's tariff for its refusal to provide trenching and conduit; and that whenever U S WEST was confronted with the plain language of its tariff that requires U S WEST to access and repair its own facilities, U S WEST defined and adopted a new, self-serving term that is not in the tariff. The Parks also indicated that they concur with the Commission Staff answer, but for the portion which concludes that a request for additional service would be 'new construction.'<sup>2</sup>

<sup>2</sup> Because the decision as to whether a request for additional service would be 'new construction' is not required to decide these matters, the Commission will not make that decision in this order.

The Commission Staff answered on December 26, 1997, supporting the Initial Order. They argue that U S WEST flatly ignores the definition of 'Facilities' contained in its tariff; that a tariff provision relied upon by U S WEST applies only to new construction and not to repair and maintenance; that another section relied upon by U S WEST applies only to situations within buildings; that U S WEST's duty to repair and maintain its facilities is not dependent on property ownership; that U S WEST's line extension and land-developer tariffs support the conclusion that U S WEST is responsible for repair and maintenance of the facilities at the Parks; that U S WEST's duty to provide the trenching and conduit for purposes of repair and maintenance is not determined by the public or private nature of the property; that if U S WEST were allowed to charge customers for repair and maintenance it would result in double recovery; that the Commission has the authority to interpret U S WEST's tariff; that U S WEST is legally required to provide trenching and conduit necessary to make repairs; that the Commission has the authority to determine whether U S WEST's practices are unreasonable, unjust, or unlawful; that the Commission is authorized to offer refunds; and that the Commission is authorized to require U S WEST to replace the facilities at the Parks.

#### IV. RELEVANT STATUTES AND REGULATIONS

U S WEST is required to provide certain minimum levels of service as defined by Washington law. These requirements include the following:

1. **RCW 80.04.040(3):** Regulate in the public interest, as provided in the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities; including, but not limited to, electrical companies, telecommunications companies, and water companies.

2. **RCW 80.36.080:** The service so to be rendered to any person, firm, or corporation by any telecommunications company shall be rendered and performed in a prompt, expeditious and efficient manner and facilities, instrumentalities and equipment furnished by it shall be safe, kept in good condition and repair, and its appliances, instrumentalities and service shall be modern, adequate, sufficient and efficient.

3. **RCW 80.36.090:** Every telecommunications company shall, upon reasonable notice, furnish to any persons and corporations who may apply therefor and be reasonably entitled thereto suitable and proper facilities and connections for telephonic communication and furnish telephone service as demanded.

4. **WAC 480-120-500(1):** The facilities of telecommunications companies shall be designed, constructed, maintained, and operated to ensure reasonable continuity of service, uniformity in the quality of service furnished, and the safety of persons and property.

5. **WAC 480-120-520(8):** All reported interruptions of telecommunications services shall be restored within two working days, excluding Sundays and holidays, except interruptions caused by emergency situations, unavoidable catastrophes, and force majeure.

6. **WAC 480-120-525(2):** Each local exchange company shall adopt maintenance procedures and employee instructions aimed at achieving efficient operation of its system so as to permit the rendering of safe, adequate, and continuous service at all times. Effective maintenance shall include, but not be limited to, keeping all facilities in safe and serviceable repair.

Federal regulations applicable to U S WEST allow any item of property subject to plant retirement accounting to be capitalized and depreciated, and the cost of the property to be retired can be determined by the average cost of 'such items as poles, wire, cable terminals, conduit, and booths.' 47 C.F.R. Section 32.2000(f)(3)(ii)(A).

Federal instructions for balance sheet accounts regarding buried cable, applicable to U S WEST, provide that 'the cost of trenching for and burying cable in conduit' should be included in a buried cable balance sheet account. See, 47 C.F.R. Section 32.2423(a).

#### VII. STATEMENT OF JURISDICTION AND AUTHORITY

The Commission has authority to regulate the facilities and practices of a utility pursuant to RCW 80.01.040(3). *General Telephone v. Bothell*, 105 Wn.2d 579, 583, 716 P.2d 879 (1986). Specifically, RCW 80.01.040(3) provides that Commission shall:

[r]egulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activity; including, but not limited to, electrical companies, gas companies, irrigation companies,

telecommunications companies, and water companies.

Pursuant to that authority, the Commission promulgated WAC 480-120-076, which allows each telephone utility to set forth terms in its tariff for providing underground facilities. *General Telephone v. Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986). Once a utility's tariff is filed and approved, it has the force and effect of law. *General Telephone*, at 585 (citing *Moore v. Pacific Northwest Bell*, 34 Wn. App. 448, 455, 662 P.2d 398 (1983)).

The Commission has jurisdiction to apply and interpret relevant statutes and to issue appropriate orders. *Tanner Elec. Co-op. v. Puget Sound Power & Light*, 128 Wn.2d 656, 665, 911 P.2d 1301 (1996). The Commission may '[m]ake such rules and regulations as may be necessary to carry out' its duties. RCW 80.01.040(4). The Commission also may 'make and issue interpretive and policy statements when necessary to terminate a controversy or to remove a substantial uncertainty as to the application of statutes or rules of the Commission.' *Tanner Elec.*, at 666 (citing WAC 480-09-200(1) [emphasis in opinion]).

RCW 80.36.140 proscribes 'unjust or unreasonable' practices in the provision of telephone services and authorizes the Commission, after a hearing, to order changes in company practices. *Moore v. Pacific Northwest Bell*, 34, Wn. App. 448, 451, 662 P.2d 398 (1983). RCW 80.36.140 reads, in pertinent part:

Whenever the Commission shall find, after a hearing had upon its own motion or upon complaint ...that the rules, regulations or practices of any telegram company or telephone company affecting such rates, charges, tolls, rentals or service are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of law, or that such rates, charges, tolls or rentals are insufficient to yield reasonable compensation for the service rendered, the Commission shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and enforced, and fix the same by order as provided in this title.

Whenever the Commission shall find, after such hearing that the rules, regulations or practices of any telegraph company or telephone company are unjust or unreasonable, ...the Commission shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities and services to be thereafter installed, observed and used, and fix the same by order or rule as provided in this title.

#### VIII. APPLICABLE TARIFFS

U S WEST filed its current tariff on August 11, 1994. Section 2 of U S WEST's tariff provides the general regulations and conditions governing the offering of telecommunications service to its customers. Section 2 contains eight subsections: each subsection addresses a different area of telecommunications service related to the initial offering of service, and the subsequent repair and maintenance of service.

U S WEST's tariff describes its responsibility for facilities in Section 2.4. U S WEST's liability for 'Maintenance and Repair' of existing facilities is defined in subsection 2.4.2. Subsection 2.4.2.A provides U S WEST with the right to enter and leave the customer's premises during normal business hours for any purpose reasonably connected with the furnishing of telephone service. Subsection 2.4.2.C provides that a U S WEST customer who negligently damages a buried service line is responsible for the damage. Subsection 2.4.2.C of U S WEST's tariff WN U-31 provides:

C. Use of Facilities

The customer is responsible for loss of or damage to any facilities furnished by the Company unless the customer proves that such loss or damage was caused by the negligent or intentional misconduct of others or was otherwise due to causes beyond the customer's control. If it becomes necessary to bill for recovery of damages, the estimated cost for replacing such facilities will apply.

Section 4.6.A.2.f falls under the headings 'Other Construction or Conditions,' 'New Construction,' and 'Buried Construction.' It states:

The property owner is responsible for the installation, maintenance and repair of the trench or conduit utilized for the Company facilities to provide service within the owner's private property.

WN U-31, Section 4.6.A.2.f.

Section 2.5.2.C, under the heading 'Building Space and Electric Power Supply,' assigns various responsibilities with regard to the provision of electrical power to U S WEST's facilities. It states:

Any existing or new structures or work required to support telephone services on the customer's premises shall be provided at the expense of the customer. Such structure or work may include the placement or use of trenching, conduit and/or poles to support telephone services provided on the customer's premises.

WN U-31, Section 2.5.2.C.

The term 'premise' is defined in the tariff as:

The space occupied by a customer in a single building or in connecting buildings on continuous property. The space may be a dwelling unit, other building, or a legal unit of real property such as a lot on which a dwelling unit is located subject to the local telephone company's reasonable and nondiscriminatory standard operating practices. For the purposes of the Intra-premises network cable and wire in 2.8, premises may also include space occupied by a customer in multiple buildings.

Section 4.6.A.1.a of WN U-31 under the headings 'Other Construction or Conditions' and 'New Construction' reads:

If a supporting structure is required on the property of the applicant, it will be the applicant's responsibility to provide the structure. The structure must meet Company standards. Upon acceptance, the ownership vests in the Company.

Section 2.5.2.D, which is under the heading 'Building Space and Electric Power Supply,' and assigns various responsibilities with regard to the provision of electrical power to U S WEST's facilities states:

It is the customer's responsibility to provide the premises and space satisfactory to the Company, for placement of all equipment and facilities necessary for the furnishing of service. Installation and maintenance beyond the Company's protected network facilities will be the responsibility of the customer or others requesting such work.

A demarcation point is 'the point of interconnection between the Company's regulated telecommunications facilities and terminal equipment, protective apparatus or wiring at a premises.' WN U-31, Section 2.1.

### ***VIII. ISSUES PRESENTED***

- A. Who are U S WEST's customers?
- B. Does the definition of 'facility' in U S WEST's tariff include trenching and conduit?
- C. Does U S WEST's new construction tariff exception (Section 4.6.A.2.f) apply to the repair and maintenance of existing buried service wire at the Parks?
- D. Does U S WEST's building space and electric power supply tariff exception (Section 2.5.2.C) apply to the repair and maintenance of buried service wire at the Parks?
- E. If U S WEST were allowed to charge customers for repair and maintenance, would it result in double recovery?
- F. Does the Commission have the authority to provide the relief sought by the Complainants?
- G. May the Commission order U S WEST to refund costs of trenching and conduit provided by other customers?

### ***IX. COMMISSION DISCUSSION AND DECISION***

The Initial Order contains 58 findings of fact. U S WEST has challenged 48 of the findings: all but findings 1, 2, 3, 4, 5, 14, 26, 39, 45, and 47. These challenges relate to a few key findings, which will be discussed below.

#### ***A. Who Are U S WEST's Customers?***

This complaint was brought by the Parks against U S WEST. The complaints were made after U S WEST had received several contacts from U S WEST customers who live in the Parks complaining about the quality of their telephone service. Instead of providing repairs to its customers, U S WEST contacted each of the Parks and demanded that they provide trenches and conduit to U S WEST, so that U S WEST could provide long-term repairs to its customers. U S WEST had initially designed the telecommunications systems providing service to the Parks, and had installed service wire to serve its customers without use of conduit. It is this system that needs repairs so extensive that U S WEST has determined that the best course is extensive repairs, including new conduit and service wires.

Some of the portions of its tariff relied upon by U S WEST speak to the duties of property owners, or owners of premises. A number of the portions of the tariff relied upon by U S WEST speak to the duties of customers of U S WEST. U S WEST has asked the Commission to attribute the duties imposed upon customers to the Parks. It argues that to do otherwise would not make sense. Indeed, it would make sense only given U S WEST's theory of this case, which is that it

can impose duties owed by it upon the Parks. Finally, some portions of the tariff refer to applicants. A 'customer' is '[a] person or legal entity who has applied for, been accepted, and is receiving service.' WN U-31, Section 2.1. An 'applicant' is '[a]n individual or legal entity making application to the Company for service except as defined in 4.2.1.B.1'*Id.*

The Parks argue that the only sense in which they are U S WEST's customers in this matter is that their individual offices in the Parks are customers of U S WEST. They point out that when the definition of 'premises' in the tariff did not fit U S WEST's argument, the Company unilaterally defined the term 'customer premises' and argued that this term applied to the Parks. Under this theory, U S WEST posits that the Parks are U S WEST's 'customer' and it is their 'premises' that require repair.

It is true that the Parks do own some of the utility systems on their property: the cable television and water/sewer distribution systems are built, owned, and maintained by the Parks. Other utility services, however, such as electricity, telephone, and natural gas distribution systems are built, owned, and maintained by the utility companies providing those services.

The Commission Staff points out in its answer that, as argued by U S WEST, other Commission-regulated utilities' tariffs do contain language similar to the language in U S WEST's tariff. They note that the issue is one of tariff interpretation, however, and that the record confirms that GTE has indicated that its interpretation is that its customers are responsible for the provision of support structure upon initial installation, but once facilities are installed, the responsibility for all work associated with repair and maintenance, including support structure, rests with the company. Exhibit T-81, pp. 5-6.

#### *Commission Decision*

U S WEST has a duty to provide service to its customers. RCW 80.36.080; WAC 480-120-500(1); WAC 480-120-525(2). The customers who need telecommunications service and are the focus of this proceeding are the residents of the Parks. It is these individuals who have accounts with U S WEST to provide service. It is these individuals on whose behalf U S WEST proposes to perform major maintenance by placing new cable in the Parks — this time in conduit. These individuals are currently receiving inadequate service which must be improved; this was admitted by U S WEST. The mission of the Commission is to protect consumers and to ensure that an efficient telecommunications system is available to them. The references in U S WEST's tariff to customers must be read as referring to the individual residents of the Parks.

#### *B. Does the Definition of 'Facility' in U S WEST's Tariff Include Trenching and Conduit?*

The parties agree that U S WEST is responsible for repair and replacement of its facilities. However, they differ in how they define 'facilities', and disagree whether the term 'facilities' includes provision of conduit and trenching.

The definition of 'facilities' relied upon by U S WEST was provided by Company witness Teresa Jensen. Ms. Jensen defines 'facilities' as:

The material, generally copper cable, that furnishes service from U S WEST central office to the customer's premise. What I'm referring to as the facility is the wire that literally goes from the office that provides them dial tone to the customer's point of demarcation.

TR 277-78<sup>3</sup>. Later in her testimony, Ms. Jensen included switching equipment and fiber, metallic, and copper technology in her definition of facilities; TR 353. U S WEST suggests that including 'conduit' in the definition of 'facilities' would render the term 'structure' in the tariff redundant and nonsensical.

<sup>3</sup> This order will refer to transcript pages by indicating TR and listing the page numbers.

The definition of 'facilities' in U S WEST's tariff is:

Supplemental equipment, apparatus, wiring, cables, and other materials and mechanisms necessary to or furnished in connection with telephone service.

WN U-31, Section 2.1, 1st Revised Sheet 7.

The Commission Staff and the Parks argue that conduit falls within this definition as 'supplemental equipment,' 'apparatus' or 'other materials' furnished in connection with telephone service. The Commission Staff also notes that many items individually defined in U S WEST's tariff also are included in the definition of 'facilities'<sup>4</sup>. These include: 'carrier access line,' 'drop wire,' 'exchange access line,' 'terminal loop,' 'toll line,' 'trunk line,' and 'extended line.' Staff contends that it is unlikely that all of these terms in the tariff are 'redundant and nonsensical.'

<sup>4</sup> Either one.

#### *Commission Decision*

The Initial Order describes 'facilities' and 'support structures' in Finding of Fact No. 5. This finding's description of 'facilities' is narrower than the one included in U S WEST's tariff. The Commission will modify this finding to reflect the definition in U S WEST's tariff. The term 'facilities' is used in Commission statutes and rules. See, RCW 80.01.040(3), 80.36.080, 80.36.090, and 80.36.140; and WAC 480-12-500 and 480-120-525. The definition provided by Ms. Jensen is much narrower than the meaning the legislature or Commission would apply to the term.

The legislature has defined 'facilities' as:

[L]ines, conduits, ducts, poles, wires, cables, cross-arms, receivers, transmitters, instruments, machines, appliances, instrumentalities and all devices, real estate, easements, apparatus, property and routes used, operated, owned or controlled by any telecommunications company to facilitate the provision of telecommunications service.

RCW 80.04.010. Thus, the requirement in RCW 80.36.090 that U S WEST 'shall provide and maintain suitable and adequate buildings and facilities' clearly means that U S WEST must provide and maintain conduit, ducts, and poles in addition to wires.

U S WEST argues that two special sections of its tariff would act to excuse it from responsibility for repair and maintenance of the buried service wire at the Parks.

*C. Does U S WEST's New Construction Tariff Exception (Section 4.6.A.2.f) Apply to the Repair and Maintenance of Existing Buried Service Wire at the Parks?*

Section 4.6.A.2.f of the U S WEST tariff falls under the headings 'Other Construction or Conditions,' 'New Construction,' and 'Buried Construction.' It states:

The property owner is responsible for the installation, maintenance and

repair of the trench or conduit utilized for the Company facilities to provide service within the owner's private property.

WN U-31, Section 4.6.A.2.f.

U S WEST argues that this section means that the Parks, not U S WEST, are responsible for repair of the buried service wire that serves U S WEST's customers who are residents in the Parks. The Company claims that replacement of entire units of cable or other facilities is 'new construction' as that phrase is used in Section 4.6. It argues that the Park's and Commission Staff's interpretation of the tariff would render meaningless the requirement in the section that the property owner is responsible for 'maintenance and repair' of trench or conduit, and that if the property owner is only responsible for trenching and conduit at initial provision of the dial tone, there would never be a time when the property owner was required to maintain or repair the conduit or trenching.

The Parks argue that the language in this section applies only to 'New Construction' and would not apply to the repair and maintenance of U S WEST's buried service wire that was installed and maintained without the Park's participation.

Commission Staff agrees with the Parks. It argues that this section only applies when a customer is seeking new or additional service, rather than repair of existing service, citing Exhibit T-71, at 10. Staff argues that this language was adopted as a result of the Minimum Point of Presence (MPOP) case, Docket No. UT-920474. *Id.* Staff witness Mary Taylor testified:

The language [in Section 4.6.A.2.f] is intended to address situations where existing support structure is unusable. The language only applies to new construction specifically when a customer requests new or additional services which would require the installation of additional facilities, such as when existing facilities at a premise are at capacity. The intent of the language was that if the customer's existing support structure was unusable, the customer would be responsible for repairing the structure or providing a new structure for termination of the new facilities. This language was not meant to be applied to repair situations.

*Id.*

Commission Staff points out that U S WEST's tariff nowhere defines replacement of existing facilities as 'new construction.'

#### ***Commission Decision***

U S WEST'S New Construction Tariff (Section 4.6.A.2.f) does not apply to the repair and maintenance of existing buried service wire at the Parks. As labeled by U S WEST and placed in the tariff, the section on its own terms applies only to new construction. This is not a case where the Parks are ordering additional service that require new conduit or trenching to add new services.

Instead, the Parks are responding to U S WEST's determination that its buried cable should be replaced, and that conduit and trenching are now required. The Commission Staff's interpretation of the tariff makes sense of all parts of the tariff and applies it in a straight-forward manner that is consistent with the clear language of the tariff. That interpretation is adopted in the instant Order.

*D. Does U S WEST's Building Space and Electric Power Supply Tariff Exception (Section 2.5.2.C) Apply to the Repair and Maintenance of Buried Service Wire at the Parks?*

The second section of its tariff relied on by U S WEST as a clear requirement that the property owner, not U S WEST, is responsible for provision of trenching and conduit is Section 2.5.2.C, which is under the heading 'Building Space and Electric Power Supply,' and assigns various responsibilities with regard to the provision of electrical power to U S WEST's facilities. It states:

Any existing or new structures or work required to support telephone services on the customer's premises shall be provided at the expense of the customer. Such structure or work may include the placement or use of trenching, conduit and/or poles to support telephone services provided on the customer's premises.

WN U-31, Section 2.5.2.C.

U S WEST's position is that Section 2.5.2.C does not limit the customer's responsibilities to support structures within buildings. Section 2.5 of the tariff sets forth the 'Responsibilities of the Customer.' Section 2.5.2 is the only subsection within Section 2.5., and U S WEST claims it would not make sense for customers to only have responsibilities within buildings. Sections 2.5.2.B, 2.5.2.C, and 2.5.2.D all refer to the customer's premises. U S WEST argues that if section 2.5.2 is limited to a customer's responsibilities within buildings, rather than within property boundaries, the definition of premises as being a 'continuous property' or 'legal unit of property' is rendered meaningless.

U S WEST also asserts that the history of Section 2.5.2 demonstrates that the meaning of the section is not intended to be limited by its title. It provides a history of the section that varies somewhat from that provided by Commission Staff. Although it agrees that current Section 2.5.2 was given the title 'Building Space and Electric Power Supply' at the time of its most recent adoption, it argues that the Park's and Commission Staff's arguments should not be accepted.

U S WEST extends its argument to claim that the Parks, and not the U S WEST customers within the Parks, are responsible for providing trenching and conduit. It argues that this is true because the tariff language would otherwise render the tariff useless or meaningless in the situation it faces in this complaint. U S WEST also claims that the definition of premises extends to the 'legal unit of property' on which the customer is located, and that tenants in the Parks neither own nor control the property on which they are located.

The Parks argue that this section only applies to providing electrical power to U S WEST's facilities in building spaces, and would not apply to buried service wire at the Parks. The Parks note they are customers of U S WEST only in the sense that their offices in the Parks receive dial tone from U S WEST. U S WEST provides phone service to a large number of customers in each park.

The Parks note that the term 'customer premises' is not defined in the tariff, and that U S WEST appears to rely on the definition of 'premises' in WN U-31, Section 2.1 to argue that Section 2.5.2.C applies to the Parks. The term 'premise' is defined in the tariff as:

The space occupied by a customer in a single building or in connecting buildings on continuous property. The space may be a dwelling unit, other building, or a legal unit of real property such as a lot on which a dwelling unit is located subject to the local telephone company's reasonable and nondiscriminatory standard operating practices. For the purposes of the Intra-premises network cable and wire in 2.8, premises may also include space

occupied by a customer in multiple buildings.

The Parks claim that their residents do not live in a single premises as defined in the tariff.

The Parks also argue that, if the section applies at all, it must be applied to individual residents, rather than the Parks. Individual lots in the Parks constitute 'a legal unit of real property' as that term is used in the definition of 'premises.' See, *Aldrich v. Olson*, 12 Wn. App. 665, 667, 531 P.2d 825 (1975) (citing *Conaway v. Time Oil Co.*, 34 Wn.2d 884, 210 P.2d 1012 (1949)). See also, the Mobile Home Landlord-Tenant Act, chapter 59.20 RCW. The Parks argue that their residents have exclusive possession of their 'legal unit of property' just as any housing development, and U S WEST should similarly be required to provide trenching and conduit to install its buried service wire up to the resident's lot.

Commission Staff argues that Section 2.5.2.C does not require U S WEST's customers to excavate the trench or provide conduit to repair the Company's existing facilities. Staff asserts that this tariff provision applies only to installation and repair of facilities within buildings. Exhibit T-71, p. 4. This is so, first, because the section falls within the general heading 'Building Space and Electrical Power Supply.' Staff argues the tariff heading must necessarily limit application of the tariff sections to the subject matter of the heading. U S WEST's tariff WN U-31 is over 700 pages long, and tariff headings are an important tool in reading tariffs because they allow anyone reading the tariff to know the subject matter to which the language applies. Staff traces the history of this particular tariff section, and argues that this language was deliberately placed under its current heading.

According to Commission Staff, the language in Section 2.5.2.C was approved with the understanding that it would be applied in three situations. First, where a customer requests service within a building, and a support structure does not exist. Second, where new or additional service is requested within a building and the existing support structure is unusable. Finally, if the Company's facilities are inaccessible, such as enclosed within a wall, the owner is responsible for opening the wall and providing the Company with access.

Commission Staff claims that U S WEST changed the language in Section 2.5.2 as a result of the Company's discussions with Staff during the MPOP case. Staff provided a copy of an E-mail message from U S WEST witness Teresa Jensen to Commission Staff witness Mary Taylor indicating that this filing was intended to modify U S WEST's IntraBuilding Wire and Cable Tariff, and that the language did not reflect new policy, but rather clarified existing tariff language found in Section 4.6.A.1.a.

Commission Staff further relies on language in section 4.6.A.1.a of WN U-31 under the headings 'Other Construction or Conditions' and 'New Construction' which reads:

If a supporting structure is required on the property of the applicant, it will be the applicant's responsibility to provide the structure. The structure must meet Company standards. Upon acceptance, the ownership vests in the Company.

Staff claims that this tariff section supports the position that while new construction is subject to a requirement to provide conduit or trenching, the ongoing repair of that structure is the responsibility of U S WEST. Staff notes that the section addresses the responsibilities of applicants, not customers, and notes that the U S WEST tariff distinguishes between the two. Because this section applies to applicants, it bolsters the Staff argument that current customers need not provide trenching or conduit for the maintenance, repair, or replacement of existing service.

*Commission Decision*

U S WEST concedes that the residents of the Parks are its customers TR 214. Each manufactured home is a 'structure that houses the customer' for purposes of the definition of 'building' and 'premises' as those terms are applied in Section 2.5.2.C. U S WEST's Building Space and Electric Power Supply Tariff (Section 2.5.2.C) does not apply to the repair and maintenance of buried service wire at the Parks. As labeled by U S WEST and placed in the tariff, the section on its own terms applies only to customer's responsibilities to provide support structure within buildings. The tariff is clear on its face. If the history of the tariff is examined, the history provided by Commission Staff more clearly accounts for the placement of the language, and the meaning agreed upon between Staff and U S WEST shown by the E-mail message from Teresa Jensen to Mary Taylor.

The Parks are correct that each residential lot is a legal unit of real property, as that term is used in the U S WEST definition of premises, and that each individual manufactured home would be considered a building for purposes of Section 2.5.2.C. However, Section 2.5.2.C would not apply in any event because the facilities requiring repair are not within the buildings. U S WEST has the same responsibility to serve the needs of its customers in the Parks as it has to serve those in other residential developments.

*E. If U S WEST Were Allowed to Charge Customers for Repair and Maintenance, Would It Result in Double Recovery?*

U S WEST challenges the Initial Order's conclusion that U S WEST's costs for performing repairs of its buried service wire are included in its rates, and should not be charged to customers. It claims that the only support for this conclusion is reference by the Parks to certain general accounting rules. U S WEST also claims that it rarely provides trenching or conduit on private property or bills customers for such costs, and claims that the only evidence in the record is that U S WEST does not in fact recover the costs of providing support structures on private property in its rates, citing rebuttal testimony by Ms. Jensen.

The Commission Staff argues that the duty to repair and maintain facilities owed by U S WEST is not dependent on whether the facilities are located on public or private property. It claims that U S WEST is able to point to only a few places in its tariff where property ownership is important, and that none of those examples are relevant in these proceedings. Staff then argues that U S WEST's claim that it is not obligated to for repair and maintenance on private property is meaningless because the tariff does not define the Company's repair and maintenance obligations on this distinction.

Commission Staff witness Thomas Spinks testified that U S WEST's costs of installing, operating, and maintaining its plant and equipment are fully included in its current rates. Exhibit T-85, p. 5. Staff goes on to state that U S WEST's claim that Mr. Spinks did not testify that U S WEST is recovering these costs in its rates is wholly incorrect. U S WEST petition, p. 44; TR 432-434.

*Commission Decision*

Contrary to U S WEST's assertions, there is testimony by Mr. Spinks in the record which supports the Initial Order's determination that recovery by U S WEST of the trenching and conduit costs would provide double recovery to the Company. The Commission gives greater weight in this determination to Mr. Spinks' expert testimony on this point. Ms. Jensen's qualifications do not appear to include detailed training or experience in working with the categories of accounts in the Company's books and records. The Commission also agrees with the Commission Staff that U S WEST's duty to repair and maintain facilities owned by U S WEST is not dependent on whether the facilities are located on public or private property. To allow U S WEST to require the Parks to pay the costs of trenching and conduit for maintenance of its facilities would result in double recovery by the Company, and will not be allowed.

*F. Does The Commission Have The Authority To Provide The Relief Sought By The Parks And The Commission Staff?*

U S WEST argues that the Commission does not have the authority to issue a declaratory order or interpretative policy statement in these proceedings; that there is no requirement under Washington law that U S WEST provide trenching or conduit on private property; and, that the Commission does not have authority in these proceedings to determine whether U S WEST's tariff is unjust, unreasonable, or unlawful, or to order U S WEST to change its tariff.

U S WEST does not argue that the Commission does not have authority to interpret and apply U S WEST's tariff, but argues that the Commission may not do so in these proceedings. U S WEST concedes that the Parks have asked for a declaratory order or interpretative and policy statement in this proceeding, but argues that the proceeding should be limited to one which interprets its tariff. U S WEST also argues that the Park's refusal to provide U S WEST with trenching and conduit negates U S WEST's obligation to install new facilities at the Parks.

U S WEST also argues that the Commission does not have authority in these proceedings to determine whether U S WEST's tariff is 'unreasonable,' 'unjust,' or 'unlawful' or to order U S WEST to clarify inartfully written portions of its tariff which have been misconstrued by the Company. The portions of the Initial Order which U S WEST challenges in this portion of its petition describe U S WEST 'interpretations,' 'applications,' or 'practices'; those actions are described as 'unreasonable, or 'unlawful.' The Initial Order proposes that the tariff should be clarified, so that these unreasonable or unlawful interpretations, applications, or practices will cease. See, U S WEST petition, P. 52.

Finally, U S WEST argues that the Commission may not order U S WEST to replace the service wire at the Parks immediately, or to restore the property to its prior condition. U S WEST argues that all of the service wire at all of the Parks may not need to be replaced. It also argues that there is no authority for this portion of the Initial Order.

The Parks argue that the purpose of having a tariff is to let the public and other interested parties know what the ground rules are, because they are presumed to know the contents of the tariff. They claim that to facilitate the public's understanding, there needs to be certainty and clarity in the tariff. They go on to claim that U S WEST's unilateral definitions and interpretations of its tariff are inconsistent with the purpose of having a tariff, because, as evidenced by this proceeding, U S WEST changes its definitions and interpretations as necessary to retroactively justify its actions and practices. The Parks argue that U S WEST attempts to muddle clear provisions of its tariff that do not apply to repair and maintenance of existing buried service wire. They claim that U S WEST's actions contradict the plain language of its tariff, and that U S WEST attempts to unilaterally define its own liability with terms that are not in the tariff.

The Commission Staff argues that the complaints raised general issues of tariff interpretation, and that the Commission has the authority to address these general issues. Staff notes that the Initial Order emphasized RCW 80.01.040(3), which authorizes the Commission to

[r]egulate in the public interest, as provided in the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities; including, but not limited to, electrical companies, telecommunications companies, and water companies[:]

and that the Supreme Court has interpreted this statute as conferring on the Commission 'broad authority to regulate the practices of public utilities.' *Tanner Elec. Co-op. v. Puget Sound Power & Light*, 128 Wn.2d 656, 911 P.2d 1301 (1996).

*Commission Decision*

U S WEST concedes that the Parks have asked for a declaratory order or interpretative and policy statement in this proceeding. RCW 80.36.140 authorizes the Commission, upon complaint, to find that the practices of a telephone company are unreasonable and to determine the just, reasonable, proper, adequate and efficient rules, practices, and facilities the company should provide and to fix the same by order. The Commission does so in this proceeding.

RCW 80.36.080 requires U S WEST to keep its facilities safe, and in good condition and repair. WAC 480-120-500(1) requires that the facilities of telecommunications companies shall be designed, constructed, and maintained to ensure reasonable continuity of service and uniformity in the quality of service furnished. WAC 480-120-525(2) requires U S WEST to adopt maintenance procedures and employee instructions aimed at achieving efficient operation of its system so as to permit the rendering of safe, adequate, and continuous service at all times. Effective maintenance shall include, but not be limited to, keeping in safe and serviceable repair.

The Commission determines in this decision that U S WEST has not met the duties imposed in the statute and rules. It has not maintained the facilities that serve its customers in the Parks in good condition and repair. It has not maintained its facilities in the Parks to ensure reasonable continuity of service and uniform quality of service. It has not adopted maintenance procedures which provide safe, adequate, and continuous service at all times for its customers who reside in the Parks. U S WEST itself determined that the facilities in the Parks should be replaced in order to provide adequate service. It has not done what it has determined needs to be done to provide adequate service to its customers.

The Commission interprets the Initial Order to require the Company to repair and replace the portion of the service wire at the Parks that U S WEST itself has identified as needing such repair. An unreasonable period of time has passed since those determinations were made, and the repairs need to be made now.

The Commission has the authority to issue an order regarding the lawful interpretation of U S WEST's tariff. When the Commission interprets the tariff, that interpretation will apply not only to the Parks, but to all other similar situations.

*G. May The Commission Order U S WEST To Refund Costs Of Trenching And Conduit Provided By Other Customers ?*

U S WEST argues that the Commission does not have authority to order U S WEST to refund any trenching or conduit costs. The Company claims that RCW 80.04.230 provides only that the Commission, after investigation and hearing, may order a utility to 'pay the complainant the amount of the overcharge so found.' It also argues that even if the Commission had any authority to order U S WEST to provide refunds, there has not been any investigation or hearing conducted as to the amount of any overcharge.

The Commission Staff argues that the Commission is authorized by RCW 80.04.230 to refund to customers all payments made to U S WEST for trenching or conduit resulting from maintenance, repair, or replacement of the Company's facilities. It argues that the investigation and hearings in this matter have established that the 'lawful rate' for such trenching or conduit is zero, and that any amount paid to the Company would be excessive and subject to refund.

The Commission Staff also argues that the Commission also should require U S WEST to refund the amounts paid by customers to third-party contractors who provided trenching or conduit necessary for the maintenance, repair, or replacement of the Company's facilities. It argues that in this situation the Company holds all of the cards: the customer needs to have phone service replaced, the Company will not repair service unless a trench is opened, and the customer is required to pay in order to restore telephone service.

*Commission Decision*

The Commission will order U S WEST to refund amounts paid to it within the past two years for trenching and conduit for maintenance, repair, or replacement of facilities which were not damaged by the customer. The Commission has already found that keeping such monies would result in double recovery by U S WEST. The Commission also agrees with the Commission Staff's weighing of the equities, and belief that U S WEST should repay the amounts paid to third-party vendors by its customers who hired such vendors to provide trenching and conduit for maintenance, repair, or replacement of facilities which were not damaged by the customer. The Commission, however, is an administrative agency. It does not have equitable powers, which reside in the Superior Court. It will not order such refunds, but encourages the Company to make such refunds, if requested. The cost of defending a class-action or claim action before a court that has equity jurisdiction would not appear to be a justified expense.

With the modifications described in the text of the instant Order, the Commission adopts the findings and conclusions of the Initial Order as its own.

*FINDINGS OF FACT*

- 1. The Washington Utilities and Transportation Commission is an agency of the state of Washington vested by statute with authority to regulate telecommunications companies.**
- 2. U S WEST Communications, Inc. is engaged in the business of furnishing telecommunication services within the state of Washington, and, as such, is a public service company subject to regulation by the Washington Utilities and Transportation Commission.**
- 3. On June 19, 1996, Camelot Square Mobile Home Park filed a complaint against U S WEST claiming that U S WEST was failing to provide repair of its telephone facilities. On October 23, 1996, Camelot Square Mobile Home Park filed an amended complaint. Skylark Village Mobile Home Park and Belmor Mobile Home Park filed nearly identical complaints on the same day. The three complaints raise substantially similar allegations regarding whether U S WEST or the Park owners are responsible for providing the trenching and conduit on the Parks' property for replacement of the deteriorating service cable.**
- 4. In 1995 and 1996, after experiencing an increased volume in service calls at the Parks, U S WEST proposed to replace existing, deteriorated service cable at the Parks with new service cable. U S WEST requested that the Parks provide trenching and conduit on the Parks' property for placement of the new service cable. In sum, the allegations in the complaints are that buried telephone cable at the Parks has deteriorated and that U S WEST will not repair (or replace) the cable until the Parks provide access to a trench or provide conduit.**

**5. The definition of 'facilities' in U S WEST's tariff is:**

Supplemental equipment, apparatus, wiring, cables, and other materials and mechanisms necessary to or furnished in connection with telephone service.

This definition includes conduit and trenching because they are supplemental equipment or apparatus or other materials and mechanisms necessary or furnished in connection with telephone service. Conduit and trenching are also facilities within the definition of facility in RCW 80.04.010.

- 6. U S WEST's tariff, WN U-31, does not provide that the customer is responsible to provide trenching, access to trenching and conduit in situations where the Company's facilities need to be maintained, repaired, or replaced.**

7. WN U-31, Section 2.5.2.C applies only to installation and repair of Company facilities within buildings. It does not apply to the maintenance and repair of Company facilities that are not located within a building.

8. WN U-31, Section 4.6.A.2.f applies only with respect to new construction. It does not apply to the maintenance and repair of existing Company facilities.

9. Pursuant to the Section 4.2, all line extensions are owned and maintained by U S WEST.

10. Pursuant to the Land Developer Agreement ('LDA') tariff, Section 4.4.1, the Company effectively takes ownership of the facilities placed and is responsible for maintenance and repair of the facilities.

11. Section 2.4.2.C makes U S WEST responsible for loss or damage to its facilities unless the loss or damage was caused by the negligence or intentional misconduct of the customer.

12. U S WEST has no authority in its tariff, state law or Commission rules to charge for trenching in excess of 300 feet in maintenance and repair situations.

13. That facilities needing repair are located on private property, as opposed to public or private right of way, is irrelevant to the determination that U S WEST is responsible for the costs of trenching and conduit involved in the maintenance and repair of U S WEST's facilities.

14. Petitioner Camelot Square Mobile Home Park (Camelot Square) is located at 3001 South 288th, Federal Way, Washington 98003.

15. Camelot Square is a community of 400 manufactured housing lots. Residents lease a legal unit of real property from Camelot Square that is individually identified in the lease by a lot number and description of the lot's physical dimensions. Residents own their manufactured home that is placed on their leased lot. Residents are responsible for all maintenance of their lot and manufactured home. Residents request telephone and utility service directly from the service providers who provide and maintain service to the point of entry into the residents' manufactured homes.

16. U S WEST's predecessor in interest, Pacific Northwest Bell, designed, engineered, and installed buried service wire at Camelot Square in 1967. The service wire was buried by U S WEST's predecessor without conduit. Since 1967, U S WEST or its predecessor has accessed and maintained the buried service wire located at Camelot Square.

17. In 1974, a new addition was added to Camelot Square and new underground utilities were installed by Pacific Northwest Bell, Puget Power, and Washington Natural Gas.

18. No service provider other than U S WEST has requested that Camelot Square provide trenching or conduit.

19. U S WEST never required Camelot Square to provide trenching or conduit to replace buried service wire from 1967 to 1995.

20. In 1995 and 1996, U S WEST received numerous repair calls from residents of Camelot Square concerning their telephone service. U S WEST has determined that the buried service wire located at Camelot Square needs to be replaced. Camelot Square has made demand on U S WEST to replace the buried service wire. However, U S WEST refuses to replace the buried service wire until Camelot Square provides trenching and conduit for U S WEST.

21. In refusing to repair the buried service wire at Camelot Square, U S WEST relies on the following provisions of U S WEST's Washington State Tariff for Exchange and Network Services:

(a) *Section 4.6.A.2.f*:

The property owner is responsible for the installation, maintenance and repair of the trench or conduit utilized for the Company facilities to

provide service within the owner's private party.

(b) *Section 2.5.2.C:*

Any existing or new structures or work required to support telephone service on the customer's premises shall be provided at the expense of the customer. Such structure or work may include the placement or use of trenching, conduit, and/or poles to support telephone services provided on the customer's premises.

**22. Camelot Square had no control over how the buried service wire was installed. If Camelot Square had initially installed the buried service wire, it could have installed conduit or taken other measures to protect the buried service wire from deterioration. Because the Park had no control over how the buried service wire was installed, and was not allowed to participate in its maintenance over time, the need to replace the buried service wire is due to causes beyond Camelot Square's control.**

**23. Unless the buried service wire is replaced, residents of Camelot Square will continue to experience problems with their telephone service.**

**24. U S WEST's records confirm that it provided trenching to repair, maintain, and replace buried service wire ('BSW') at each of the communities on the following occasions:**

Date	Petitioner	Description
6/2/94	Camelot	U S WEST repaired BSW.
4/14/95	Camelot	U S WEST repaired BSW.
10/16/95	Camelot	U S WEST repaired BSW.
1/28/96	Camelot	'BSW REPAIRED.'
1/31/96	Camelot	U S WEST repaired BSW.
2/14/96	Camelot	U S WEST repaired BSW.
9/16/96	Camelot	'REPR BSW REPL SNI REPR TEA.'
8/27/96	Camelot	'BSW REPAIRED.'
8/28/96	Camelot	U S WEST repaired BSW.
11/20/96	Camelot	'BSW REP.'
11/25/96	Camelot	'DEF BSW CT2YBK REFERRED.'
2/6/97	Camelot	U S WEST 'REPAIRED BSW AT TERMINAL.'

**25. A demarcation point is the point of interconnection between U S WEST's regulated telecommunications facilities and terminal equipment, protective apparatus or wiring at a premises. The demarcation point for each resident at Camelot Square is the point of entry into each resident's manufactured home.**

**26. Petitioner Skylark Village Mobile Home Park (Skylark Village) is located at 800 — 29th Street S.E., and 3225 'M' Street S.E., in Auburn, Washington.**

**27. Skylark Village is a community of 400 manufactured housing lots. Residents lease a legal unit of real property from Skylark Village that is individually identified in the lease by a lot number and description of the lot's physical dimensions. Residents own their manufactured home that is placed on their leased lot. Residents are responsible for all maintenance of their lot and manufactured home. Residents request telephone and utility service directly from the service providers who provide and maintain service to the point of entry into the residents' manufactured homes.**

**28. U S WEST's predecessor in interest, Pacific Northwest Bell, designed, engineered and installed buried service wire at Skylark Village in 1959. The service wire was buried by U S WEST's predecessor without conduit. Skylark Village retains its business records since 1975. Since 1975, U S WEST or its predecessor has accessed and maintained the buried service wire located at Skylark Village.**

**29. In 1978, a new addition was added to Skylark Village and new underground utilities were installed by Pacific Northwest Bell, Puget Power, and Washington Natural Gas. In 1987, a new addition was added to Skylark Village and new underground utilities were installed by Pacific Northwest Bell, Puget Power, and Washington Natural Gas.**

**30. No service provider other than U S WEST has requested that Skylark Village provide trenching or conduit.**

**31. U S WEST never required Skylark Village to provide trenching or conduit to replace buried service wire from 1975 to 1995.**

**32. In 1995 and 1996, U S WEST received numerous repair calls from residents of Skylark Village concerning their telephone service. U S WEST has determined that the buried service wire located at Skylark Village needs to be replaced. Skylark Village has made demand on U S WEST to replace the buried service wire. However, U S WEST refuses to replace the buried service wire until Skylark Village provides trenching and conduit for U S WEST.**

**33. In refusing to repair the buried service wire at Skylark Village, U S WEST relies on the following provisions of U S WEST's Washington State Tariff for Exchange and Network Services:**

*(a) Section 4.6.A.2.f:*

The property owner is responsible for the installation, maintenance and repair of the trench or conduit utilized for the Company facilities to provide service within the owner's private party.

*(b) Section 2.5.2.C:*

Any existing or new structures or work required to support telephone service on the customer's premises shall be provided at the expense of the customer. Such structure or work may include the placement or use of trenching, conduit, and/or poles to support telephone services provided on the customer's premises.

**34. Skylark Village had no control over how the buried service wire was installed. If Skylark Village had initially installed the buried service wire, it could have installed conduit or taken other measures to protect the buried service wire from deterioration. Because the Park had no control over how the buried service wire was installed, and was not allowed to participate in its maintenance over time, the need to replace the buried service wire is due to causes beyond Skylark Village's control.**

**35. Unless the buried service wire is replaced, residents of Skylark Village will continue to experience problems with their telephone service.**

36. U S WEST never required Skylark Village to provide trenching or conduit from 1975 to 1995 to repair buried service wire. In mid-summer, 1994, U S WEST installed new buried service wire from Space A-1 to Space B-7, which is approximately 200 feet. U S WEST provided its own trenching to access and repair the buried service wire.

37. In the spring of 1995, the resident of Space B-17 experienced problems with his telephone service. U S WEST installed a temporary line on top of the ground initially, but subsequently provided its own trenching to install new buried service wire.

38. In December 1995, the residents of Space Nos. E-6, E-12, E-24, E-28, and E-30 experienced problems with their telephone service. U S WEST installed a temporary service line to restore service to Space Nos. E-6, E-12, E-24, E-28, and E-30. The temporary service line was still in place as of March 4, 1997.

39. On December 7, 1995, Skylark Village filed an informal complaint against U S WEST with the Washington Utilities and Transportation Commission.

40. In January 1996, the resident of Space 38 in Skylark Village II experienced problems with her telephone service. U S WEST provided its own trenching to access and replace approximately 100 feet of buried service wire.

41. In February 1996, the resident of Space E-7 experienced problems with his telephone service. As a temporary remedy, U S WEST installed a temporary service line above the ground initially to restore service. In April 1996, U S WEST returned to Space E-7 and provided its own trenching to install new buried service wire.

42. U S WEST's records confirm that it provided trenching to repair, maintain, and replace buried service wire ('BSW') at each of the communities on the following occasions:

Date	Petitioner	Description
1/20/95	Skylark	U S WEST 'CUT OVER TO NEW BSW RMVD GRD LAY.'
12/26/95	Skylark	U S WEST referred a repair to the Buried Service Wire department of U S WEST.
4/16/96	Skylark	U S WEST repaired BSW.

43. U S WEST has a perpetual easement at Skylark Village which provides U S WEST 'with the right to place, construct, operate and maintain, inspect, reconstruct, repair, replace and keep clear underground communication lines with wires, cables, fixtures and appurtenances attached thereto as [U S WEST] may from time to time require, upon, across, over and/or under the [property].'

44. A demarcation point is the point of interconnection between U S WEST's regulated telecommunications facilities and terminal equipment, protective apparatus or wiring at a premises. The demarcation point for each resident at Skylark Village is the point of entry into each resident's manufactured home.

45. Petitioner Belmor Mobile Home Park (Belmor) is located at 2101 South 324th Street, Federal Way, Washington, 98003.

46. Belmor is a community of 400 manufactured housing lots. Residents lease a legal unit of real property from Belmor that is individually identified by a lot number and description of the lot's physical dimensions.

Residents own their manufactured home that is placed on their leased lot. Residents are responsible for all maintenance of their lot and manufactured home. Residents request telephone and utility service directly from the service providers who provide and maintain service to the point of entry into the residents' manufactured home.

47. U S WEST's predecessor in interest, Pacific Northwest Bell, installed buried service wire at Belmor in 1967. The service wire was buried by U S WEST's predecessor without conduit. Since 1967, U S WEST or its predecessor has accessed and maintained the buried service wire located at Belmor.

48. In 1995 and 1996, U S WEST received numerous repair calls from residents of Belmor concerning their telephone service. U S WEST has determined that the buried service wire located at Belmor needs to be replaced. Belmor has made demand on U S WEST to replace the buried service wire. However, U S WEST refuses to replace the buried service wire until Belmor provides trenching and conduit for U S WEST.

49. In refusing to repair the telephone cable at Belmor, U S WEST relies on the following provisions of U S WEST's Washington State Tariff for Exchange and Network Services:

(a) *Section 4.6.A.2.f*:

The property owner is responsible for the installation, maintenance and repair of the trench or conduit utilized for the Company facilities to provide service within the owner's private party.

(b) *Section 2.5.2.C*:

Any existing or new structures or work required to support telephone service on the customer's premises shall be provided at the expense of the customer. Such structure or work may include the placement or use of trenching, conduit, and/or poles to support telephone services provided on the customer's premises.

50. Belmor had no control over how the buried service wire was installed. If Belmor had initially installed the buried service wire, it could have installed conduit or taken other measures to protect the buried service wire from deterioration.

Because the Park had no control over how the buried service wire was installed, and was not allowed to participate in its maintenance over time, the need to replace the buried service wire is due to causes beyond Belmor's control.

51. Unless the buried service wire is replaced, residents of Belmor will continue to experience problems with their telephone service.

52. U S WEST never required Belmor to provide trenching or conduit to replace buried service wire from 1966 to 1995.

53. During the summer of 1995, U S WEST provided its own trenching to access and replace the buried service wire for Space Nos. 150 through 165. U S WEST also provided its own trenching to access and replace the buried service wire behind the row of homes from Space Nos. 183 through 254.

54. In October 1995, the resident of Space 71 lost phone service and called U S WEST for repair. As a temporary remedy, U S WEST installed a new service line above ground and behind Space Nos. 71, 72, and 73 to regain service to Space 71. Similarly, the resident of Space 227 lost phone service and U S WEST installed a new service line above ground and behind Space Nos. 227, 228, and 229.

55. On January 9, 1997, the resident of Space 159 contacted U S WEST to request another service line for a modem to his computer. As a temporary remedy, U S WEST installed a temporary service line above ground from the back yard of Space 158 to Space 159. On January 13-14, 1997, U S WEST provided trenching to install the new buried service wire for Space 159.

**56. U S WEST's records confirm that it provided trenching to repair, maintain, and replace buried service wire ('BSW') at each of the communities on the following occasions:**

Date	Petitioner	Description
8/25/94	Belmor	U S WEST prepared drawings and installed 300 feet of trenching and conduit.
9/8/95	Belmor	U S WEST 'REPAIRED BSW.'
1/2/96	Belmor	U S WEST 'REPAIRED BSW.'
2/8/96	Belmor	'DEF BSW.'
2/11/96	Belmor	U S WEST 'REPAIRED BSW INSTALLED SNI.'
7/8/96	Belmor	U S WEST 'REPAIRED BSW.'
10/3/96	Belmor	U S WEST 'LOC & REPR DEF BSW.'
12/13/96	Belmor	'BSW BAD/REPAIRED/CTTN67002.'
12/14/96	Belmor	'BSW BAD/REPAIRED/CTTN67002.'
12/28/96	Belmor	U S WEST 'LOCATED AND REPAIRED OPEN IN BSW.'
1/14/97	Belmor	U S WEST provided its own trenching to install a new service line for Space No. 159.

**57. U S WEST has a perpetual easement to serve Belmor which provides U S WEST 'with the right to place, construct, operate and maintain, inspect, reconstruct, repair, replace and keep clear communication lines with wires, cables, fixtures and appurtenances attached thereto, as [U S WEST]. may from time to time require, upon, across, over and/or under the [property].'**

**58. A demarcation point is the point of interconnection between U S WEST's regulated telecommunications facilities and terminal equipment, protective apparatus or wiring at a premises. The demarcation point for each resident at Belmor is the point of entry into each resident's manufactured homes.**

***CONCLUSIONS OF LAW***

**1. The Washington Utilities and Transportation Commission has jurisdiction over the parties and subject matter of this proceeding.**

**2. The Commission has the lawful authority to interpret U S WEST's tariff.**

3. U S WEST's interpretation and application of its tariff to require customers to be responsible for trenching and conduit necessary to repair the Company's facilities is not supported by its tariff.
4. U S WEST's interpretation and application of its tariff to require customers to be responsible for trenching and conduit necessary to repair the Company's facilities is unreasonable and unlawful.
5. The Commission has authority to correct U S WEST's unlawful and unreasonable interpretation of its tariff by requiring U S WEST to file language to clarify its tariff to ensure that customers are not held responsible for trenching and conduit necessary to repair the Company's facilities.
  6. The Commission has authority to require U S WEST to issue refunds to customers who paid U S WEST directly for trenching performed and conduit provided by the Company in the case of maintenance, repair or replacement of U S WEST's facilities.
7. Pursuant to WAC 480-120-500(1), U S WEST is required to provide buried service wire and conduit that are designed, constructed, maintained, and operated to ensure reasonable continuity of service, uniformity in the quality of service furnished, and the safety of persons and property at Camelot Square, Skylark Village, and Belmor.
  8. Pursuant to WAC 480-120-525(2), U S WEST is required to adopt maintenance procedures and employee instructions aimed at achieving efficient operation of its system so as to permit the rendering of safe, adequate, and continuous service at all times at Camelot Square, Skylark Village, and Belmor, including without limitation, keeping all facilities in safe and serviceable repair.
    9. As provided in Section 2.4.2.C of the Tariff, petitioners are not responsible for the damage to the buried service wire that was installed at petitioners properties by U S WEST and maintained by U S WEST without the petitioners' input or participation.
    10. Section 2.5.2.C of the Tariff does not apply to the replacement of U S WEST's existing buried service wire that was installed at petitioners' properties by U S WEST and maintained by U S WEST without the petitioners' input or participation.
11. U S WEST has misapplied its tariff to require petitioners to provide trenching and conduit for U S WEST's buried service wire, and has adopted an 'unjust and unreasonable' practice in violation of RCW 80.36.140.

**ORDER**

THE COMMISSION ORDERS:

1. U S WEST shall provide the trenching and all facilities including, without limitation, buried service wire and conduit to replace all buried service wire located at Camelot Square, Skylark Village, and Belmor, and shall restore petitioners' property to the same condition it was in prior to replacement of the buried service wire by September 30, 1998.
  2. U S WEST shall file amendments to its tariff clarifying that customers are not responsible for providing the Company with access to a trench or for providing conduit in situations where the Company's facilities need to be repaired, replaced or maintained.
  3. U S WEST shall provide to the Commission the names of all customers who have been asked to provide access to a trench or conduit, for maintenance, repair or replacement, within the past two years.
  4. U S WEST shall refund to customers all payments made to U S WEST for trenching or conduit resulting from maintenance, repair, or replacement of the Company's facilities within the past two years.

DATED at Olympia, Washington, and effective this 18th day of August 1998. NOTICE TO PARTIES:

This is a final Order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration if filed within ten days of the service of this Order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-09-820(1).

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2003 WL 24122603 (Wash.U.T.C.)  
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In the Matter of the Petition of VERIZON NORTHWEST INC., For Waiver of WAC 480-120-071(2)(a).

UT-011439

Washington Utilities and Transportation Commission

April, 2003

TWELFTH SUPPLEMENTAL ORDER

***Synopsis:** The Commission grants Verizon's petition for a waiver of WAC 480-120-071(2)(a) of the requirement to extend service to two locations in Verizon's Bridgeport exchange. The Commission affirms its orders joining Qwest and RCC as parties but now dismisses Qwest and RCC as parties to the proceeding. The Commission finds moot Qwest's motion to strike portions of Staff's Response Brief.*

**ORDER GRANTING VERIZON PETITION FOR WAIVER OF WAC 480-120-071(2)  
(A) AND DISMISSING QWEST AND RCC AS PARTIES TO THE PROCEEDING**

**\*1 Nature of the Proceeding:** Docket No. UT-011439 is a petition by Verizon Northwest Inc. (Verizon), seeking a waiver of the requirement to extend wireline service under WAC 480-120-071<sup>1</sup> to the Taylor location and the Timm Ranch, located in Verizon's Bridgeport exchange in Douglas and Okanogan counties respectively.

<sup>1</sup> A copy of WAC 480-120-071 is attached to this Order as Appendix A.

**Procedural history:** The matter was heard upon due and proper notice to all interested parties before the Commissioners and Administrative Law Judge Theodora Mace on January 22 to 24, 2003.

**Appearances:** Judith Endejan, Attorney, Graham & Dunn, Seattle, Washington, represents Verizon. Gregory Trautman, Assistant Attorney General, Olympia, Washington, represents staff of the Washington Utilities and Transportation Commission (Commission Staff or Staff). Douglas N. Owens, attorney, Seattle, Washington, represents Qwest Corporation (Qwest). Brooks Harlow, attorney, Seattle, Washington, Miller Nash LLP, represents RCC Minnesota, Inc. (RCC).

**I. PROCEDURAL HISTORY**

Verizon is a telecommunications carrier that provides wireline telecommunications services in the State of Washington, subject to the jurisdiction of the Washington Utilities and Transportation Commission. Regulated intrastate telecommunications carriers such as Verizon are obligated to extend service pursuant to the provisions of WAC 480-120-071 ("line extension rule")<sup>2</sup>. The rule in its current form went into effect January 1, 2000.<sup>3</sup> This is the first contested case to test the waiver provisions of the new line extension rule.

<sup>2</sup> WAC 480-120-071 requires companies to extend service to "reasonably entitled" applicants within 18 months of a request. Under the rule, an "extension of service" is an extension of distribution plant beyond the company's existing distribution plant. The rule provides for voluntary cross-boundary extensions of service; allocation of construction costs between applicant and company; a means by which the company may recover some of its share of construction costs from other ratepayers; and a provision allowing companies to request a waiver of the requirement to extend service.

<sup>3</sup> *Order Amending and Adopting Rule Permanently*. General Order No. R-474. Docket No. UT-991737 (“Order R-474”).

On January 22, 2002, the Commission convened a prehearing conference in this docket at Olympia. The parties agreed to a schedule of proceedings that allowed them to address the question of whether or not Qwest should be made a party, as well as a schedule for evidentiary hearings.

On May 31, 2002, the Commission entered its Third Supplemental Order granting Commission Staff's motion to join Qwest as a party to the proceeding and establishing a revised schedule for hearing.

\*<sup>2</sup> On July 10, 2002, the Commission granted Qwest's motion to join RCC as a party and further revised the schedule of proceedings.

Evidentiary hearings took place before Chairwoman Marilyn Showalter, Commissioner Richard Hemstad, Commissioner Patrick J. Oshie and Administrative Law Judge Theodora M. Mace in Olympia on January 22, 23, and 24, 2003.

Verizon, Qwest, RCC and Commission Staff filed opening briefs on March 6, 2003. Commission Staff, Qwest and RCC filed response briefs on March 27, 2003. Verizon filed its response brief on March 28, 2003. Qwest and RCC filed reply briefs on April 3, 2003.

On April 3, 2003, Qwest also filed a Motion to Strike Portions of Staff's Response Brief. On April 10, 2003, Staff filed its response to the Motion.

## II. MEMORANDUM

**Background.** The issues now before the Commission are: 1) whether Verizon should be granted a waiver of the requirement to extend service to the Timm Ranch and the Taylor location; 2) whether Qwest and RCC should remain parties; and 3) if Qwest and RCC remain parties and Verizon is granted a waiver, whether either Qwest or RCC should be required to extend service.

WAC 480-120-071(2)(b) states that telecommunications companies that file tariffs with the Commission must extend service, upon application, to occupied premises. Verizon's waiver application requests that the company be relieved from providing service extensions to two different locations within its service territory, citing WAC 480-120-071(7)(a). This subsection of the rule provides that the Commission may determine whether an exchange company should be relieved of the obligation to provide service.

In its post-hearing Reply Brief, Verizon asserts that the Commission also has authority to grant the company a waiver of the extension requirement under the provisions of WAC 480-120-015(1). That provision addresses general exemptions from rules included in chapter 480-120 WAC.

**Discussion.** The first location for which Verizon seeks a waiver is called the Taylor location on the record.<sup>4</sup> At the Taylor location, in Verizon's Bridgeport Exchange in Douglas County, the applicants, including Mrs. Kay Taylor, live in three houses along Hayes Road, in a box canyon, approximately 14 miles from the town of Bridgeport. Mrs. Taylor requested service from Verizon on December 7, 2001. Other applicants in the canyon are Wendy Shomler and Ann Nichols. Three additional households located in the canyon have not, to date, requested service. Verizon asserts it would have to construct over 17 miles of new facilities to provide service to this location.

<sup>4</sup> Commission Staff also refers to this as the Hayes Road location.

The second location, the Timm Ranch, consists of five residences along Timm Road on the Timm Ranch, in the portion of the Bridgeport exchange located in Okanogan County, bordering on the Columbia River. Mr. Ike Nelson initiated the first service

request from this location on June 15, 2002. Verizon has received four other service requests from Billie Timm, Robert Timm, Brad Derting and Darrell Shannon. *Exhibit 171D at 9; Exhibit 121 T at 3-4*. Mr. Nelson is also constructing a new house on the ranch for himself. One of his sons will live in the old house. *Exhibit 171D at 13*. Mr. Nelson's family owns Timm Brothers Inc., which for 50 years has operated the 10,000-acre cattle ranch. The family also rents up to 100,000 acres for ranch purposes. *Exhibit 121 T at 4*. Verizon states it would have to construct approximately 30 miles of fiber cable to serve this location.

#### A. SHOULD VERIZON'S REQUEST FOR A WAIVER OF THE LINE EXTENSION RULE BE GRANTED?

\*3 Subsection (7)(a)<sup>5</sup> of the line extension rule gives the Commission authority to determine “whether any applicant for service is not reasonably entitled to service.” In determining “reasonable entitlement,” the Commission may consider the seven factors listed in subsection (7)(b)(ii) and “such other information that it may consider necessary to a proper determination.” The seven factors are:

<sup>5</sup> Subsection (7)(a) allows for a waiver of the subsection (2)(b) requirement that service be extended to occupied premises. Subsection (7)(b) permits petitions for waiver of subsection (3)(a) and allows a company to build an extension but charge the applicants for all or part of it, if shifting the cost to other ratepayers is found unreasonable.

- The total direct cost of the extension;
- The number of customers to be served;
- The comparative price and capabilities of radio communications service or other alternatives available to customers;
- Technological difficulties and physical barriers presented by the requested extensions;
- The effect on the individuals and communities involved;
- The effect on the public switched network;
- The effect on the company.

As is evident from the language of subsection (7)(a), this list is non-exclusive and non-mandatory. It is a list of factors likely to be at issue in a line extension, but not all of these factors will be significant in every case, and there may be other factors, not listed, that will be relevant in a particular case. The fundamental task before the Commission is to consider and weigh all relevant factors, in order to determine, under the rule and under RCW 80.36.090, whether an applicant is “reasonably entitled” to service from the local exchange company. We begin by considering the listed factors, as they apply to each location.

##### 1. The total direct cost of the extension.

The line extension rule defines an extension of service as an extension of distribution plant to a location outside any municipal boundary and where no distribution plant of the extending company exists at the time an extension is requested. The extension must be constructed at the request of one or more applicants, and extend more than 1/10 of a mile. *WAC 480-120-071(1)*.

The rule further defines the “cost of service extension” as “the direct and indirect costs of the material and labor to plan and construct the facilities including, but not limited to, drop wire, permitting fees, rights-of-way fees, and payments to subcontractors, and does not include the cost of reinforcement, network upgrade or similar costs.” *WAC 480-120-071(1)*.

The rule contains no definition of the cost of reinforcement, but Commission Staff defines the cost as the expenditure required to shore up existing facilities in order to allow the company to construct an extension. *Exhibit 131T at 13*.

\*4 Verizon explains that, historically, line extension construction costs were allocated between the company and the customer so that the customer requesting an extension would bear a significant share of the costs. This allocation reflected a desire to avoid subsidies to individual customers by other existing customers. Under the new line extension rule, customers pay maximum initial and final payments of no more than 20 times their basic monthly service rate. *WAC 480-120-071(3)*. The company shoulders the rest of the cost but, under the rule, can request recovery of its direct and indirect costs by means of filing a tariff to include a service-extension element on terminating access charges. *WAC 480-120-071(4)*.

**a. Timm Ranch.** Verizon states that it would have to extend its facilities 30 miles to reach the Timm Ranch, requiring installation of fiber optic cable and signal boosters. *Exhibit 1T at 7*. Approximately 23 miles of the construction would be along a dirt road and would constitute the longest loop in Verizon's Washington service territory with no other customers. *Id. at 10*. Verizon estimated the cost to build these facilities at \$881,497 or a per-customer cost of \$176,299.<sup>6</sup> *Id. at 5*. The facilities would serve the residences of each of the five applicants.

<sup>6</sup> Appendix B to this Order is a chart summarizing the cost testimony in the record. Verizon contends there are only five applicants at the Timm Ranch.

Staff estimates that the total direct cost to Verizon for building the Timm Ranch extension would be \$737,612, which Staff derives by excluding \$143,825 in reinforcement costs from Verizon's cost estimate. *Exhibit 131T at 14*. Staff calculates the per-customer cost for the Timm Ranch to be approximately \$123,000, based on the five current applications, plus the potential for service to the house soon to be built by Ike Nelson.

**b. Taylor Location.** Verizon estimates that it would cost \$329,839 to extend service to the Taylor location or a per-customer cost of approximately \$110,000.<sup>7</sup> *Exhibit 1T at 3, 5; Exhibit 3*. The company would have to lay copper cable for 15 miles along Highway 17 and two miles along Hayes Road in the canyon. Verizon contends that actual costs may be higher than the estimate because of the basalt rock in the area that might require the use of a backhoe or rock saw. *Exhibit 1T at 5-6*.

<sup>7</sup> Verizon argues that there are only three actual applicants for service at the Taylor location. Verizon's cost estimates include facilities that could potentially serve six households in the canyon. *T 130*.

Staff estimates that it would cost Verizon \$165,015 to construct service to the Taylor location, derived by excluding \$164,824 from Verizon's cost estimate for reinforcement costs. Staff's per-customer cost is \$27,500, based on the fact that Verizon sized its estimate to accommodate six potential customers.

\*5 **c. Total Cost and Cost Considerations.** Verizon's estimate of the total cost to serve the two locations is \$1.2 million, or, \$150,000 per-customer. Staff estimates the total cost at \$902,687, or \$75,228 per-customer.

Verizon contends that its estimated cost is disproportionately high by any measure. Although Staff disputes the inclusion of reinforcement costs in deciding what is the appropriate direct cost, Verizon points out that Staff does not dispute the accuracy of the cost estimate itself. *T 618*. Verizon further complains that no Staff witness provided any guidance to the Commission as to what cost level would be too high, though clearly the line extension rule contemplates that some limit might be appropriate.

Verizon presented the testimony of Dr. Carl Danner to identify the overarching cost considerations that would help in determining the appropriate cost ceiling to be applied in line extension requests. Dr. Danner testified that the cost to society as a whole for these extensions is far greater than any offsetting benefit to the individual subscribers. Building such extensions uses up resources that could be used to provide service to a greater number of customers. It is economically reasonable, according to

Dr. Danner, to expend such resources only when the product is more valuable than what is achieved by consuming them. *Exhibit 30T at 6, 12*. Dr. Danner also testified that the value of adding these customers to the network, also termed the “externality value,” would be small compared to the cost of adding them. *Id at 8-9; T 262-263*. Dr. Danner suggested that even a \$15,000-20,000 limit would be too high a cost for such extensions.

Verizon states that evidence of the low value of wireline service to these applicants is demonstrated by the fact that, ten years ago, when the applicants originally expressed an interest in obtaining wireline service, they were not willing to pay the costs of construction, which, at that time, were between \$23,000 and \$40,000. *Exhibits 565 and 566; Exhibits 171D at 13 and 172D at 16*. Verizon argues that nothing in the record allows a determination that the extensions would create \$150,000 of value for each applicant in this case.

Verizon compares the per-customer costs of these extensions to the average cost-per-customer of extensions built so far under the new rule -- \$10,000. *T 193*. The average length of line extensions built under the new line extension rule is 7,500 feet. *Exhibit 7T at 9*. The length of the Timm extension is 142,300 feet. The length of the Taylor extension is 42,600 feet. *Exhibit 4*. Verizon claims that the total cost of the extensions in this case equals 40% of its 2002 construction budget for the Wenatchee District.<sup>8</sup> *Exhibit 1T at 9*. The sheer length of the circuits involved invites higher maintenance costs. *Id. at 12-14*. When the facilities wear out, replacement costs will also be extremely costly. Moreover, Verizon is concerned that if demand for service at these locations lessens or disappears, all or part of the \$1.2 million in construction costs would be stranded investment.

<sup>8</sup> Verizon's Wenatchee District covers approximately 4,500 square miles in north central Washington, extending from Wenatchee to the Canadian border. The District consists of twenty exchanges with a total of approximately 78,000 access lines. *Exhibit 1T at 1*.

\*6 Verizon further argues that the Commission should consider the total cost of construction, including reinforcement costs, because these would be the actual costs incurred by the company. Verizon disputes the Staff's position that reinforcement costs must be excluded from that consideration.

Verizon argues that it has not received any recovery in basic rates for reinforcement costs for line extensions such as those at issue in this case. Basic rates are intended to recover the costs of “normal reinforcement” related to typical extensions. Verizon estimates that the \$309,000 in reinforcement that Staff excludes could build 30 average line extensions. *Verizon Opening Brief at 18*.

Commission Staff points out that Verizon's calculation of cost-per-customer at these locations is overstated because Verizon undercounts the number of customers or potential customers. Staff believes it appropriate to divide the cost by the number of households that would be able to take service. *Staff Response Brief at 3*. On that basis the customer count would be six at each location. Staff further asserts that the proper cost estimates per-customer -- \$27,500 at the Taylor location and \$123,000 at the Timm Ranch -- are either below or on a par with the per-customer costs of other line extensions Verizon has constructed under the rule, such as the Cedar Ponds extension in the Sultan exchange. *Exhibit 214C*;<sup>9</sup> *Exhibit 215; Staff Opening Brief at 28*.

<sup>9</sup> During the hearing, Verizon stated that the numbers in the “Total” column on the last page of Exhibit 214C were not confidential. *T 149*.

Commission Staff also defends the exclusion of reinforcement costs from the Verizon cost estimates. Staff argues that Order R-474 adopting the new line extension rule provided the context for concluding that reinforcement costs should not be considered in the waiver factors. *Order R-474 at ¶22*. According to Staff, the order indicated that each local exchange carrier must maintain, reinforce, and improve its network and that it receives funding for these efforts in its authorized rates. *Id. at ¶27*. If cost recovery for performance of these activities is inadequate, the carrier can request a rate increase. Staff asserts that reinforcement costs are considered a part of the company's ongoing business operations. *Id. at ¶43*.

Commission Staff contends that Verizon has failed to forecast growth at the Taylor and Timm locations and has failed to adequately reinforce its network in north central Washington. An example of this is the difficulty of customers in that area to obtain second lines from Verizon. *Exhibit 545 ¶2.1*. Staff further points out that Verizon says its facilities west of Foster Creek Ranch, near the Taylor location, are “at exhaust,” or 100% in use. Thus, Verizon would have to reinforce up to Foster Creek in order either to construct a line extension or to serve one more applicant at Foster Creek Ranch.

\*7 Staff claims that Verizon does not state that it lacks funds for reinforcement. *T169*. Staff contends that Verizon believes the money it has received from ratepayers for reinforcement would be a loss to shareholders if invested in reinforcement. Staff argues that the Commission rejected the claim that a carrier should only be required to serve where it has an existing plan to add additional capacity in the near future or where it makes business sense to do so.<sup>10</sup>

<sup>10</sup> *WUTC v. U S West Communication, Inc.*, Docket No. UT-961638, Fourth Supplemental Order Rejecting Tariff Filing, January 16, 1998 at 15-21. (“*Fourth Supplemental Order*”).

Staff also argues that, in addition to reinforcement dollars Verizon receives in rates, Verizon also receives high-cost, or universal service, funding on a per-access-line basis in high-cost areas. Customers in high-cost areas receive supported service because the federal and state governments have determined that below-cost service should be provided in order to enhance universal service.<sup>11</sup> This funding includes a “fill” factor to allow for spare capacity to meet current demand plus an additional allowance for growth. *Docket No. UT-980311(a) Tenth Supplemental Order at ¶257*. Staff claims that Verizon receives such support based on the number of inhabited households served by Verizon at the time the Commission entered the Tenth Supplemental Order in that case. *Id. at 26-28; Exhibit 131T at 14*. Because households at the Taylor location and the Timm Ranch were inhabited at the time of the Tenth Supplemental Order in Docket No. UT-980311(a), Staff claims Verizon receives high-cost support specifically for extending service to the Taylor location and the Timm Ranch. Staff argues that to allow Verizon to recover reinforcement costs under these circumstances would constitute allowing the company a double recovery.

<sup>11</sup> 47 USC 254; RCW 80.36.300; *WITA v. WUTC* (Wash. Sup. Ct.) (March 6, 2003 Slip Opinion).

Staff disputes the effect of the Taylor and Timm Ranch extensions on the Wenatchee District construction budget. Staff maintains that Verizon has sufficient flexibility in its budgeting process to allow construction of the extensions, since for 2000 it overspent its budget by \$19 million. *Exhibit 111T at 2*. Moreover, Verizon would be able to recoup its construction costs, less reinforcement, within one year under the rule.

Finally, Staff contends that because Verizon requested a line extension rule waiver under subsection (7)(a), rather than under subsection (7)(b), the Commission should not give primary weight to the cost of a line extension in deciding this case. Staff suggests that a waiver under (7)(a) means that applicants are not reasonably entitled to service whether they pay any or all of the cost of service. Under (7)(b), construction would still be required but Verizon could charge an applicant the direct cost if the Commission found it unreasonable to recover the cost from ratepayers under subsection (4) of the rule. Staff claims that a waiver under (7)(a) might deny service to future purchasers of property. The total direct cost and the number of customers served plays a far more important role in considering the seven waiver factors under (7)(b) than under (7)(a) because the issue is who should bear the cost of what is built.

\*8 Verizon contends that the reinforcement costs Staff excludes would only arise because of the Timm Ranch and Taylor location line extensions. *T 199-202*. Verizon points out that Staff states it would allow Qwest to recover reinforcement costs if Qwest built the Timm Ranch extension, because Qwest could not have planned to serve that location. However, Verizon asserts that neither did Verizon plan to serve that location. Also, with regard to the capacity of Verizon's facilities to the Foster Creek Ranch, Verizon contends it has technologies available, when actual cable is at exhaust, to allow it to expand capacity without reinforcement if there is plant within a certain distance of a central office. Foster Creek is within the required distance; the

Taylor location is not. Thus, Verizon would need to expend money for reinforcement to extend service to the Taylor location that would not be required to expand existing service to Foster Creek.

Verizon claims that the requested line extensions would not serve “normal demand,” because they represent applications that arose as a result of the new line extension rule. The new rule resulted in increased demand and increased costs for such construction. In 2001 Verizon built 85 projects under the new rule. *T 192*. These increased costs could not have been factored into ratemaking that occurred prior to the new rule. *T 266*. Verizon argues that rates set in 1999 to recover the revenue requirement at that time could not have taken into account the effect of the new rule which became effective in 2000. Verizon further argues that the cost models used and rates set in the universal service docket, UT-980311(a), merely constituted a reallocation of existing revenue levels that were established based on embedded costs, and did not create any new money for network improvement or extension. *Exhibit 32T at 17-19*. Verizon argues it would not obtain any additional universal service recovery as a result of the new line extensions. *T 453*.

Verizon rejects Staff's contention that the company should construct these extensions because it has already built more-expensive line extensions such as Cedar Ponds, for which Verizon sought recovery under the new rule. Verizon asserts that the company built the Cedar Ponds extension prior to the new rule, and under pressure from Staff, Verizon only requested recovery for Cedar Ponds under section (4) of the new rule because Staff suggested it do so. Verizon also notes that its experience with the Pontiac Ridge extension demonstrates that Staff's method of counting customers at each location in this case is suspect. Verizon built the Pontiac Ridge extension based on 44 applications for service, but now serves only 37 lines there. *Exhibit 7T at 15*.

## **2. Number of customers to be served.**

As discussed above, Verizon and Staff have divergent views about the proper method of counting number of customers to be served at each location. Verizon counts only the number of actual applications—eight—for the two locations. Staff counts twelve—the number of potential customers at both locations.

## **3. The comparative prices and capabilities of radio communications service or other alternatives.**

\*9 Verizon argues that both the Timm Ranch and the Taylor location applicants have access to wireless or radio communications services. The availability of such services makes the provision of wireline service, if not superfluous, certainly not as urgent a need as Staff portrays. At the Timm Ranch, Ike Nelson has radiophone service at his residence which functions like a wireline phone. He extends a line to a residence across the Columbia River, which gives him a dial tone from Qwest's Coulee Dam exchange. *Exhibit 1T at 5; Exhibit 171D at 25*. All of the applicants at the Timm Ranch have Verizon Wireless service but they are unable to receive signal at their homes. They have to drive some 2-3 miles to get a signal. *Exhibit 171D at 23*. Mr. Nelson pays \$65 per month for the two wireless phones he has from Verizon Wireless. *Id. at 24*.

At the Taylor location, the Taylor residence has stationary cell service from Americell Communications, which provides a connection to emergency services. *Exhibit 172D at 22*. Mrs. Taylor also has wireless service from AT&T, which she uses in conjunction with her business. The Taylors pay \$8,000 per year for their wireless service, which includes business use. *Id. at 41-42*. Mrs. Taylor co-owns a janitorial service in Grand Coulee, 28 miles from her home. The Taylors also have DirecTV satellite service available to them at \$79 per month. *Id. at 5-13*.

RCC has installed phone cell<sup>12</sup> service at both the Taylor residence and the Nelson residence on a trial basis. RCC's tests showed that both the Taylor and Shomler residences receive phone cell signal through RCC at the Taylor location. The Ike Nelson and Bob Timm residences receive signal at the Timm Ranch. Although RCC installed the service gratis at the Taylor and Nelson residences for purposes of testing it for this case, it normally costs \$1,200 to install. *Exhibit 91T at 11; T 307-308; Exhibit 171D at 15*.

12 A phone cell is a “hybrid cellular system packaged with a dial tone emulator. It uses a base station that receives the cellular signal like a typical cell phone, then converts that signal into a noncellular signal like a standard telephone line.” *Exhibit 91T at 6.*

Staff contends that the wireless alternatives available to the applicants do not provide “reasonably comparable service at a reasonably comparable price compared to wireline in the area.” *WAC 480-120-071(2)(c)*. None of the wireless services used by the applicants is as reliable as landline. The Timm Ranch applicants cannot obtain wireless signal at their residences. The radiophone at the Nelson residence is subject to the risk of lightning damage. Mr. Nelson must make a 140-mile trip to troubleshoot problems with the line. *Exhibit 131T at 20; 171D at 25.* The Taylors' wireless service suffers from static on the line. *Exhibit 172D at 22, 33.* Staff asserts that the quality of their wireless service may have been an issue in the death of Mrs. Taylor's father-in-law when she failed initially to reach 911 by using her wireless phones. *Exhibit 140T.*

\*10 Staff points out that RCC phone cell service would not be adequate because it would not serve all the applicants at each location. *Exhibits 91T at 8-9; 101T at 5.* Also, the industry standard for the RCC service is more lenient than wireline. *Exhibit 91T at 3.* For example, at the Timm Ranch, there has been sporadic trouble and static on the line. *Exhibit 309.* Staff also mentions that none of the applicants have requested service from RCC.

Verizon responds that it is a myth that existing wireless service is not a reasonable substitute for wireline. There is no evidence that either Mrs. Taylor or Mr. Nelson would give up their wireless service if wireline were installed. In fact, at the ranch, wireless would be beneficial for calling while out on the ranch property, whereas wireline cannot serve that function. Nor was there any evidence that any of the applicants could not afford the wireless service they purchased. Finally, comparing the price of wireline with the price of wireless presents difficulties due to the variability of wireless calling plans, which often include the ability to make unlimited long distance calls for a flat monthly fee.

#### **4. Technological difficulties and barriers presented by the requested extensions.**

Verizon contends that the distances involved and the nature of the terrain in the areas to be served present various technological difficulties and barriers. Verizon predicts that it would require 4,300 man-hours of work to construct the extensions due to these conditions. *Exhibit 1T at 11-13.* The existence of basalt rock would make excavation difficult, and possibly more expensive than original estimates. The presence of the Columbia River would require Verizon to serve the Timm Ranch out of the Brewster exchange, even though the ranch is in the Bridgeport exchange. *T 132, Exhibit 1T at 7.* The residences at the ranch are situated along a dirt country road not maintained in winter. Lack of winter maintenance would increase the personnel required to detect problems. There are potential hazards from bad weather, vandalism, wildfire, mechanical breakdown, damage from wild animals and livestock. Even though these types of conditions exist throughout the Wenatchee district, most extensions are not as lengthy as the ones proposed here.

Staff says that Verizon has not shown that there are any barriers different from those commonly faced in the Wenatchee district. *T 130-132.* Staff notes that Verizon complains about unplowed roads, yet the company places cross-country wire at various locations in Washington. *131T at 26.* Staff contends that a new rule, *WAC 480-120-440*, which will become effective July 1, 2003, will give telephone companies more time to repair outages and will alleviate some of the pressure on Verizon regarding maintenance of the extensions in this case. Finally, Staff claims that although the proposed Timm Ranch loop would be 23 miles long without other customers, there are thousands of loops in Washington that are 20 to 40 miles in length. *Exhibit 111T at 3; T470.* On cross examination, however, Staff witness Shirley indicated that he knew of no other loops in Washington which stretched for 23 miles without any customers. *T 563.*

#### **5. The effect on individuals and communities involved.**

\*11 Verizon suggests that one effect of building line extensions for the applicants in this case is that they will experience a financial windfall and their property values will increase significantly. Verizon contends the Taylors have lived at their current

location for 28 years without wireline. The evidence shows that their wireless service enables them to maintain contact with their community of interest, Grand Coulee, where Mrs. Taylor has her business.

Verizon claims that wireline would provide an additional benefit to Timm Bros. Inc., because the primary use of the line extension would be for ranch business. *Exhibit 171D at 26*. Verizon notes that the line extension rule definition of “premises” includes farmhouses, but does not include predominantly commercial or industrial structures. *WAC 480-120-071(1)*. Verizon contends that a line extension to the Timm Ranch would create a subsidy to the already substantial commercial cattle operation located there. Furthermore, a grant of the waiver would not have a negative effect—the ranch has been successful with the type of telecommunications service it has procured to date. Several individuals have lived there for some time and all built and retained their connections to communities nearby and to the larger world of cattle ranching. *Exhibit 171D at 24*.

Finally, Verizon observes that the nearby Nespelem Valley Electrical Cooperative provides a \$1,500 credit towards extension of an electrical line. After that, the customer must pay \$7 per foot toward the construction costs.

Staff responds that just because the Taylor and Timm Ranch applicants have been without wireline service for many years does not mean they would not benefit from that service. To say that they moved to a rural area with no expectation of having wireline service is true of everyone who applies for an extension. Mrs. Taylor would benefit by a more reliable connection to 911 because she frequently cares for her grandchildren. Her current service was unable to provide her with a timely connection to 911 when her father-in-law died. *Exhibit 172D at 29-30; T 568*.

As for Mr. Nelson, wireline would help him both personally and in his business; would provide access to the internet; would allow him contact with his children in college. *Exhibit 171D at 25-26*. He would be able to participate more fully in the community. *Exhibit 590; T 717*. The line extension definition of “premises” deliberately includes farmhouses because they are to some extent both business premises and residences. As Staff witness Duft pointed out, the location of a ranch or farm is dictated by the nature of its activities and the blending of business and personal is required.

Verizon contends that ratepayers and Verizon should not subsidize a large-scale agricultural operation like the Timm Ranch on the basis that it can't be located in a populous or urban area. Verizon points out that numerous commercial enterprises are place-bound and still would not be eligible for subsidized line extensions.

#### **6. The effect on the public switched network.**

\*12 Verizon argues that eight new customers would add only a de minimus value to other subscribers on the network at a disproportionately high cost. *T 262-263*. The extraordinary costs involved would deplete resources to maintain the existing network and to expand the network in response to projected demand and growth. *T 201*.

Staff questions whether this criterion refers to the proper use of funds to maintain and build the network, or to technical interference in the network caused by an extension of service. If the latter, Verizon has offered no evidence to indicate that the extensions should not be built. Staff argues that the marginal cost of adding an individual customer will often be greater than the marginal benefit. The state and federal government have recognized the need for subsidized service in high cost areas.

#### **7. The effect on the company.**

Verizon states that it has complied with the new line extension rule as evidenced by its construction of 85 line extensions since the rule became effective. Verizon points out that prior to the new rule, Verizon constructed one or two line extensions per year. *T 192*. Although the new rule has increased the number of extensions, Verizon has kept pace. However, Verizon contends that the extraordinary cost of the requested extensions in this case caused it to file for a waiver, due to the potential adverse effect of the projects on ratepayers and the company.

As noted above, Verizon objects to the fact that 40% of its Wenatchee District construction budget for 2002 would be absorbed by the projects. Verizon further objects to the exclusion of \$309,000 in what Staff terms reinforcement costs from the amount it would recover under the rule. *T 200-201; Exhibit 217C; Exhibit 7T at 7-8*. Verizon argues that it would not recover these reinforcement costs in basic rates or through universal service funding. *Bench Request Exhibit 800*.<sup>13</sup> If the potential customers at the Taylor or Timm Ranch location drop their wireline service, or fail to make applications in the numbers Staff predicts, Verizon will end up with stranded investment. Verizon claims it is making less than a 2% rate of return currently and cannot afford to absorb either the reinforcement costs proposed by Staff or the stranded investment that may result from these projects.

<sup>13</sup> Bench Requests 800 and 801 are admitted in evidence.

Staff reiterates its arguments that Verizon's reinforcement costs, as Staff defines them, should not be considered as a factor in whether to grant a waiver. Verizon chose not to invest in developing facilities in north central Washington, making reinforcement a necessity in order to extend service to the two locations at issue here. The Commission has rejected past requests by carriers to be relieved of the duty to extend service based on "business reasons." *Docket No. UT-961638*. Verizon already receives in base rates cost recovery for reinforcement expenses. *Exhibit 131T at 13*. Verizon also receives \$33 million in high-cost funding that includes support for the construction of these two specific projects. *UT-980311(a); Exhibit 131T at 14*.

## **8. Discussion and Decision.**

\***13** Based on its review of all relevant factors, the Commission grants Verizon's request for a waiver. Relative to the number of customers, the cost of each project, including future maintenance costs, is extraordinarily high. The Commission does not adopt Staff's view that the company's reinforcement costs must be ignored in coming to a final decision. Subsection (7)(a) of the rule permits the Commission to consider other matters necessary to reach a decision about granting a waiver. In this case, Verizon would be required to make significant expenditures to improve its existing facilities so as to make them capable of accommodating the proposed line extensions. Absent the line extension requests, there is no evidence Verizon would need to make such expenditures.

Verizon witness Danner's testimony convincingly calls into question the value of adding so small a number of customers to the network, whether it be Staff's count of twelve or Verizon's count of eight, compared to the cost in money and resources that would be expended, and in light of available alternatives. Staff's argument that Verizon and Qwest have both constructed similarly costly extensions under the new rule begs the question whether extensions of such high cost should be permitted under the rule. The provisions of the rule clearly contemplate that, in conjunction with other factors, some cost level might prove too high. Staff's refusal to acknowledge any realistic figure that might be "too high" is inconsistent with the "reasonableness test" of RCW 80.36.090 and WAC 480-120-071(7).

Commission Staff's argument that Verizon's waiver request under Subsection (7)(a) precludes giving substantial weight to the cost of a project is unpersuasive. Subsection (7)(a) clearly anticipates Commission discretion to consider cost and to give cost the weight proper to achieve a balance of all the factors involved in reaching a decision.

The Commission is also persuaded that the comparative price and capabilities of the available alternative technologies dictate in the direction of a waiver in this case. Commission Staff's argument that wireless service cannot be considered unless it provides "reasonably comparable services at reasonably comparable prices" compared to wireline is incorrect. The requirement Staff cites is derived from section (2) of the line extension rule and pertains to the circumstance of a company required to extend service that undertakes to provide that service through a service or financial agreement with a wireless company. The language of the section (7) waiver provision only indicates the Commission may consider the comparative price and capabilities of wireless or other alternatives in deciding whether to grant a waiver. Staff's view here begs the question of what is reasonable in the first instance. There is no provision of federal or state law that prescribes that every location and every potential customer,

no matter how remote or expensive to reach by wireline, is entitled to wireline service. We do not read the “reasonableness” test of our state law, RCW 80.36.090, to be inconsistent with a requirement for “reasonably comparable services at reasonably comparable prices.”

\*14 Considering the effects of a waiver on the individuals involved, it is of course true that wireline would give them an additional mode of communication. But in view of the communications alternatives available to them, and the comparative costs discussed above, we find that the advantages of wireline do not outweigh other, counterbalancing factors. Nor do we think the nearest communities will be significantly affected.

However, the Commission is persuaded that there would be a potentially significant adverse effect on the company and other ratepayers if a waiver is not granted. A denial of the waiver would send the signal that extraordinarily costly line extensions to serve few customers are warranted under the new rule. This in turn would make it increasingly difficult for carriers to devote resources to their existing network and would create an unreasonable increase in the subsidies paid by other ratepayers. It would increase maintenance costs and burdens for which carriers either would not obtain cost recovery or would have to seek recovery from other ratepayers. It would increase the possibility of stranded investment if other alternative technologies, such as wireless, erode wireline business.

Nothing in the language of this subsection, or of the rule as a whole, would preclude later applications for service from residents at the Taylor location or the Timm Ranch if circumstances change from those presented in this case. If circumstances change, for example, more residents move into the area, or cost-saving innovations develop, a future line extension may prove to be appropriate. For now, however, taking into consideration and carefully balancing all relevant factors, we find that Verizon's waiver request is appropriate.

Accordingly, we grant Verizon's request to waive WAC 480-120-071(2)(a), with respect to both the Taylor and Timm Ranch locations.

#### **B. SHOULD VERIZON BE GRANTED A WAIVER OF THE LINE EXTENSION REQUIREMENT UNDER WAC 480-120-015?**

In light of the Commission's determination to grant Verizon a waiver under the more specific waiver provision relating to line extensions, the Commission need not address Verizon's request for relief under the general waiver provision.

#### **C. SHOULD THE COMMISSION DISMISS QWEST AS A PARTY TO THE PROCEEDING? SHOULD THE COMMISSION REQUIRE QWEST TO SERVE THE TIMM RANCH?**

Commission Staff initially sought to join Qwest because Staff viewed Qwest as a potential alternative provider of service to the Timm Ranch. Staff argued that Qwest's facilities are nearer the Timm Ranch than Verizon's facilities. In the event Verizon were granted a waiver, Staff asserted that, if Qwest were a party, the Commission could examine whether Qwest might serve the Timm Ranch, which would involve redrawing the exchange boundaries between Verizon and Qwest.

Over Qwest's objection in this case, the Commission granted Staff's motion and joined Qwest as a party to the proceeding, noting that:

\*15 While it is not clear whether and how this authority should be invoked in this proceeding, Qwest has a significant stake in the outcome since it bears a common exchange boundary with Verizon near the Timm Ranch, its facilities are closer to the Timm Ranch than Verizon's and Staff alleges that Qwest's costs to extend service to the Timm Ranch would be less than Verizon's. Thus, to protect its interests under Civil Rule 19, *supra*, Qwest is properly made a party to this proceeding. *Third Supplemental Order at 7.*

In Commission Staff's original motion to join Qwest, Staff stated that: "Staff may ultimately recommend that the Commission adjust the Qwest and Verizon exchange area boundaries...and may also recommend that the Commission require Qwest to provide service to the Nelson property." *Motion of Staff to Join Qwest as a Party Respondent at 2*. However, no formal motion was made by any party to redraw the boundaries. In light of the evidence amassed thus far, we decline, on our own motion, to initiate a boundary revision, as Qwest's costs appear to be on the same order of magnitude as Verizon's. For purposes of evaluating Verizon's request for waiver, it was necessary and appropriate for Qwest to be joined and provide evidence. For that reason, we re-affirm our decision to join Qwest and deny Qwest's motion to vacate the Third Supplemental Order. Qwest has no further obligations in this docket, however, and we now dismiss Qwest from the proceeding.

**D. SHOULD THE COMMISSION DISMISS RCC AS A PARTY TO THIS PROCEEDING AND FUTURE SIMILAR PROCEEDINGS?**

Similar to Qwest, RCC was a necessary party at the outset of and during this hearing. Just as Qwest did, RCC provided valuable information and arguments regarding the issues in this case of first impression and was an integral part of the proceeding. However, no party, nor the Commission, seeks any further action be taken by RCC. Therefore, RCC is now dismissed from the proceeding. It is premature to take any action on RCC's request that it not be joined to future proceedings under the line extension rule's waiver provisions.

**E. SHOULD THE COMMISSION GRANT QWEST'S MOTION TO STRIKE PORTIONS OF STAFF'S RESPONSE BRIEF?**

Since Qwest has been dismissed from the case, Staff's Response Brief (even considering the contested portions) with respect to Qwest is moot, as is Qwest's motion to strike.

**III. FINDINGS OF FACT**

Having discussed in detail both the oral and documentary evidence concerning all material matters inquired into, and having previously stated findings and conclusions based thereon, the Commission now makes the following summary of the facts. The portions of the preceding detailed findings and the discussion pertaining to the ultimate facts are incorporated herein by this reference.

(1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate rates, rules, regulations, practices, accounts, securities, and transfers of public service companies, including telecommunications companies that have reached the appropriate jurisdictional threshold.

\*16 (2) On January 1, 2000, WAC 480-120-071, the Commission's current rule relating to service extensions, became effective.

(3) WAC 480-120-071(7) gives the Commission the authority to waive the requirement that a service extension be constructed.

(4) WAC 480-120-015 gives the Commission authority to grant exemptions from any rule in the chapter based on a showing of undue hardship.

(5) Verizon is a public service company subject to the jurisdiction of the Commission.

(6) Qwest is a public service company subject to the jurisdiction of the Commission.

(7) On May 31, 2002, the Commission joined Qwest as a party to the proceeding.

(8) RCC is a Commercial Mobile Radio Service (CMRS) provider authorized by the Commission on August 14, 2002 to be an Eligible Telecommunications Carrier (ETC) serving the exchange areas material to this case.

(9) On July 10, 2002, the Commission joined RCC as a party to the proceeding.

(10) Verizon is the local exchange carrier whose exchange boundaries currently include both the Timm Ranch and the Taylor location.

(11) Qwest's current exchange boundaries do not encompass either the Timm Ranch or the Taylor location.

(12) The Commission's authority to prescribe exchange boundaries for telecommunications companies under its jurisdiction is contained in RCW 80.36.230.

(13) On December 7, 2001, Kay Taylor requested that Verizon extend wireline service to her residence on Hayes Road in Verizon's Bridgeport Exchange.

(14) Since December 7, 2001, two additional residents on Hayes Road have requested that Verizon extend service to them.

(15) On June 15, 2002, Ike Nelson requested that Verizon extend wireline service to his residence at the Timm Ranch in Verizon's Bridgeport Exchange.

(16) Since June 15, 2002, four other applicants have requested that Verizon extend service to them at the Timm Ranch.

(17) The total cost estimate for a Verizon extension of wireline service to the Taylor location on Hayes Road is \$329,839.

(18) Verizon would have to install 17 miles of copper cable to extend service to the Taylor location.

(19) The total cost estimate for a Verizon extension of wireline service to the Timm Ranch applicants is \$881,497.

(20) Verizon would have to install 30 miles of facilities to extend service to the Timm Ranch.

(21) The per-customer cost for Verizon's Taylor location extension is \$27,500.

(22) The per-customer cost for the Timm Ranch extension is \$123,000.

(23) The total cost estimate for Qwest to provide service to the Timm Ranch applicants is \$811,920.

(24) The average cost of new line extensions built by Verizon under WAC 480-120-071 is \$10,000.

(25) The cost estimate for RCC to build additional communications towers to serve both locations is between \$400,000 and \$1.5 million.

\*17 (26) Verizon and Qwest would each be able to recover part of their costs of construction by means of a temporary access charge tariff pursuant to provisions of WAC 480-120-071.

(27) RCC, since it is not a wireline carrier, would not be able to recover any of its cost of construction pursuant to the new line extension rule.

- (28) Wireless telephone service is available at both the Taylor location and the Timm Ranch.
- (29) Kay Taylor pays approximately \$8,000 per year for wireless phone service from two different wireless companies and part of that cost is associated with her business use of the phone.
- (30) Ike Nelson pays approximately \$65 per month for the wireless phone service he receives.
- (31) Both Mrs. Taylor and Mr. Nelson have access to emergency services through use of their current wireless phone alternatives.
- (32) RCC installed phone cell devices at both the Taylor residence and the Nelson residence.
- (33) RCC phone cell service costs approximately \$1,200 per installation.
- (34) RCC phone cell devices receive a signal acceptable in the CMRS industry at two residences in the Taylor location and at two residences on the Timm Ranch.
- (35) Verizon and Qwest would each experience increased maintenance expenses to service the line extensions to each location.
- (36) Verizon's extension to the Timm Ranch would involve building a 23-mile loop, which would have no other customers, the longest of its kind in Washington.
- (37) The construction costs that Verizon or Qwest could not recover under the new rule represent funds that could potentially be used to connect a larger number of customers to the network.
- (38) The construction costs to build extensions to the Taylor location and the Timm Ranch will deplete Verizon's ability to provide maintenance service and network upgrades for other customers.
- (39) Taking into consideration all the factors identified in the line extension rule waiver provisions, the Taylor location applicants and the Timm Ranch applicants are not, at this time, reasonably entitled to Verizon wireline service.
- (40) No party requests that the Commission order RCC to build new facilities to provide service to the applicants in this case.

#### IV. CONCLUSIONS OF LAW

Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the following provides summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Order are incorporated by this reference.

- (1) The Washington Utilities and Transportation Commission has jurisdiction over the parties to, and subject matter of, this proceeding.
- (2) The Commission has authority to grant a waiver of the requirement that a telecommunications company extend service to an applicant.
- (3) Verizon's request for a waiver under WAC 480-120-015 is moot.

\*18 (4) The eight applicants in this case are not reasonably entitled to service from Verizon. The Commission should grant Verizon's waiver request.

(5) Qwest should be dismissed as a party to this proceeding.

(6) RCC should be dismissed as a party to this proceeding.

(7) The Commission should retain jurisdiction over the subject matter of and the parties to the proceeding to effectuate the provisions of this Order.

#### V. ORDER

Based on the above findings of fact and conclusions of law, the Commission enters the following Order.

(1) The Commission has jurisdiction over the subject matter of and the parties to this proceeding.

(2) Verizon's petition for a waiver under WAC 480-120-071(2)(a) is granted.

(3) Qwest's motion to vacate the Commission's Third Supplemental Order and Fifth Supplemental Orders is denied.

(4) Qwest is dismissed as a party to this proceeding.

(5) RCC is dismissed as a party to this proceeding.

Dated at Olympia, Washington, and effective this \_\_\_\_ day of April, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

**NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).**

#### APPENDIX B

##### UT-011439 Analysis of Cost Estimates

Party Proposing	Taylor	Timm Ranch	Total
Verizon/Ruosch	\$329,839	\$881,497	\$1.2 million
March 2, 2002 at 5	(17 miles)	(30 miles)	
(Verizon costs)	3 customers	5 customers	
	\$110,000/customer	\$176,000/customer	\$150,000/customer

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Qwest/Hubbard		\$811,920	\$811,920
July 5, 2002 at 5			
(Qwest's costs)			
RCC/Huskey	\$150,000-	\$250,000	
91T at 10-11	\$1 million	\$500,000	\$1.5 million
(RCC's costs)			
Staff (Verizon)	\$165,015	\$737,672	\$902,687
131T at 14	(excl. \$164,824 reinf.)	(excl. \$143,825 reinf.)	
(Verizon's costs)	6 customers	6 customers	
	\$27,500/customer	\$123,000/customer	
Staff		\$435,365	\$435,365
(Qwest's costs)		(excl. \$376,556 reinf.)	

**Other Cost Analysis**

**Danner Threshold:** **\$10,000-15,000**

**Cost per mile of construction:**

- |  |                   |
|--|-------------------|
| 1) Verizon historic ave. cost of construction/buried cable | \$31,710 per mile |
| 2) Timm Ranch buried cable line extension cost             | \$29,383 per mile |
| 3) Historic cost for aerial line                           | \$25,805 per mile |
| 4) Nelson aerial line cost estimate                        | \$19,402 per mile |

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1 Q Okay. I would like to ask you a question  
2 about Paragraph 10 of the service agreement. The way  
3 that I understand your testimony is that Schedules 80  
4 and 85 are the primary tariffs that cover the Maloney  
5 Ridge customers; is that correct, in addition to the  
6 service agreement?

7 A In addition to the service agreement,  
8 Schedules 80 and 85 are -- Schedule 80 would apply;  
9 Schedule 85 applies in certain situations.

10 Q Okay. And Puget or its predecessor entered  
11 into these agreements as a way to modify those tariffs  
12 to cover the unique circumstances associated with this  
13 line?

14 A Yes, that was the reason for entering into the  
15 agreements, is the unique situation.

16 Q Okay. And does Paragraph 10 state what was to  
17 occur in the event that there is a conflict between  
18 the service agreement and the tariffs?

19 A Yes, it states that any conflict between this  
20 agreement and Puget's Schedules 80 and 85 shall be  
21 resolved in favor of such tariff provisions.

22 Q Okay. So in your testimony, which is  
23 Exhibit 18, LFL-1T, you indicate that Puget interprets  
24 the service agreements to include replacement costs;  
25 is that correct?

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1 electric facilities. You cite that as authority for  
2 charging the Maloney Ridge customers the cost of the  
3 line; is that correct?

4 A I cite that as one of the options if the  
5 Commission decides the service agreements do not  
6 apply.

7 Q And are the customers moving the location of  
8 their facilities?

9 A No, they are not.

10 Q Okay. Would the customer load be the same  
11 before and after the replacement of the line?

12 A To the best of my knowledge, yes.

13 Q Okay. And would the voltage be the same?

14 A Yes.

15 Q Okay. Can you turn to LFL-13.

16 A (Complies.)

17 Q So this response indicates that the Maloney  
18 Ridge line was originally constructed as a line  
19 extension; is that correct?

20 A That's correct.

21 Q So ignoring this proceeding, in general is  
22 replacement of a distribution line on Puget's system  
23 governed by your line extension policies?

24 A Yes, it is, absent any kind of an agreement  
25 such as we have in this case.

**KC APPENDIX PAGE 148**

1 Q I'm sorry, maybe I misunderstood you. So  
2 ignoring this case, in general, if you have to replace  
3 a distribution line that's been in service, that  
4 serves customers, is replacement of that line governed  
5 by your line extension policy?

6 A Yes. To some extent it is, yes.

7 Q "To some extent it is." What does that mean?

8 A The timing and whether it is replaced or there  
9 is some other action taken, it is not dictated in the  
10 tariff. The Schedule 85 simply says we will maintain  
11 lines that are installed under Schedule 85.

12 Q So if you've got a group of residential  
13 customers that have been served for 25 years and the  
14 distribution lines need to be replaced, that's going  
15 to be covered under your line extension policy, or is  
16 that done just as a matter of replacing  
17 infrastructure, which you do as a matter of course  
18 under a capital improvement plan?

19 A There's the general obligation under our line  
20 extension policy, but the timing and everything else  
21 of those replacements and whether or not they are  
22 replaced is decided by our engineering group, which  
23 tracks outages, frequency and duration of outages, and  
24 evaluates all distribution circuits on the system.

25 Q So your line extension policy applies to the

**KC APPENDIX PAGE 149**

1 whole system at all times?

2 A Yes, except when there is a special agreement.

3 Q Okay. So is replacement of the Maloney Ridge  
4 line governed by Schedule 85?

5 A It's governed by the special agreement.

6 MR. STOKES: I have nothing further,  
7 Your Honor.

8 JUDGE KOPTA: Thank you, Mr. Stokes.

9 Mr. Oshie, do you have any questions?

10 MR. OSHIE: No, Your Honor.

11 JUDGE KOPTA: I have a couple.

12

13 E X A M I N A T I O N

14 BY JUDGE KOPTA:

15 Q Mr. Logen, would you turn to Exhibit LFL-10?

16 A (Complies.)

17 Q As I understand it, this is the model that you  
18 used, or output of the model that you used to  
19 determine how much of a revenue requirement you would  
20 need to recover a particular investment?

21 A That's correct.

22 Q And you use this model by feeding into it, for  
23 lack of a better term, the amount of the investment,  
24 and the output is the calculation of the revenue  
25 requirement?

**KC APPENDIX PAGE 150**

1 Q I'm sorry, maybe I misunderstood you. So  
2 ignoring this case, in general, if you have to replace  
3 a distribution line that's been in service, that  
4 serves customers, is replacement of that line governed  
5 by your line extension policy?

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19 A There's the general obligation under our line  
20 extension policy, but the timing and everything else  
21 of those replacements and whether or not they are  
22 replaced is decided by our engineering group, which  
23 tracks outages, frequency and duration of outages, and  
24 evaluates all distribution circuits on the system.

25 Q So your line extension policy applies to the

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1 whole system at all times?

2 A Yes, except when there is a special agreement.

3 Q Okay. So is replacement of the Maloney Ridge  
4 line governed by Schedule 85?

5 A It's governed by the special agreement.

6 MR. STOKES: I have nothing further,  
7 Your Honor.

8 JUDGE KOPTA: Thank you, Mr. Stokes.

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19 determine how much of a revenue requirement you would  
20 need to recover a particular investment?

21 A That's correct.

22 Q And you use this model by feeding into it, for  
23 lack of a better term, the amount of the investment,  
24 and the output is the calculation of the revenue  
25 requirement?

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1 A That's correct.

2 Q Did you use the \$8.1 million input in this  
3 exhibit or the 5.3?

4 A I used the 8.1.

5 Q So if you fed in 5.3, it would be different?

6 A That's correct.

7 Q Can you calculate -- can you use 5.3 as an  
8 input?

9 A Yes.

10 Q Okay. As a bench request, I am asking you to  
11 rerun this model using the \$5.3 million figure that  
12 you gave us this morning, as the actual investment  
13 amount.

14 A All right.

15 Q Okay. And the other set of questions I have  
16 are in your opening testimony, LFL-1T, Page 11,  
17 specifically beginning with the text on Line 15, where  
18 you are discussing a margin allowance. Would you  
19 explain to me what a margin allowance is?

20 A A margin allowance is the amount under our  
21 line extension policy. It is based on the estimated  
22 kilowatt hours to be used by the customer to be  
23 connected, or customers, and we subtract that amount  
24 from the cost of the job. This is so that customers  
25 in effect don't double-pay for their distribution

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1 services.

2 Q And the petitioners in this case, if you were  
3 to reconstruct the line, would they be entitled to  
4 this margin allowance?

5 A If the Commission found that the service  
6 agreements don't apply, and if Schedule 85 does apply  
7 specifically as a line extension, then, yes, it would  
8 be eligible for the margin allowance.

9 Q And how is the margin allowance calculated?

10 A There is -- based on Schedule 24, in Schedule  
11 85 there is a table. It says Schedule 24, so many  
12 cents per kilowatt hour, based on your estimated  
13 kilowatt hours for a year.

14 Q So this is not a calculation specific to this  
15 particular line extension, but is one based on what  
16 you have in the tariff?

17 A That's correct.

18 Q Have you done any calculation on what the cost  
19 would be for this to be an economic project?

20 A I have not.

21 Q Is that something that could be done?

22 A Yes, I would think it could be.

23 Q I'm just interested in the delta between how  
24 much it would cost and still be an economic project  
25 versus what the actual cost is.

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1           A    Schedule 85 also applies to modifications to  
2           an existing line.

3                    MS. BARNETT:  No further questions, Your  
4           Honor.

5                    JUDGE KOPTA:  All right.  Thank you,  
6           Mr. Logen.  You are excused.  We appreciate your  
7           testimony.

8                    Who is next?

9                    MR. BROOKS:  I believe it will be  
10          Mr. Sanders.

11                   JUDGE KOPTA:  All right.  
12                    You might as well stay standing.  Raise your  
13          right hand.

14  
15          JASON M. SANDERS,    witness herein, having been  
16                                    first duly sworn on oath, was  
17                                    examined and testified as follows:

18  
19                    JUDGE KOPTA:  Thanks.  You may be  
20          seated.

21                    Ms. Barnett.

22                    D I R E C T  E X A M I N A T I O N

23          BY MS. BARNETT:

24                    Q    Good morning, Mr. Sanders.

25                    A    Good morning.

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1           A    They are customers under Schedule 24, which is  
2           a separate -- it's a separate piece from the line  
3           extension piece, and they are normal customers in that  
4           sense.

5           Q    Okay. So in addition to Schedule 85 that we  
6           just talked about, your testimony indicates, I think,  
7           that Schedule 80 applies to this line.

8           A    Yes.

9           Q    Would you agree with that?

10          A    Yes.

11          Q    So Schedule 80 applies?

12          A    Uh-huh.

13          Q    So looking back at your testimony, your  
14          opening testimony, which is DN-1T, Page 9 -- actually,  
15          I'm sorry. So Exhibit 51, Page 9, you quote language  
16          that says, PSE shall not be required to provide  
17          service if not economically feasible.

18          A    Excuse me, I'm not at your location.

19          Q    You state --

20          A    What's the page?

21          Q    On Page 9.

22          A    9. Which lines?

23          Q    Well, you state the -- you state the  
24          economically -- economic feasibility provisions of  
25          Schedule 85 on Page 18 and 19.

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1 A Lines 18 and 19?

2 Q Yes.

3 A Okay.

4 Q That's 85. But I think we heard previously  
5 that the language that used to be in 85 regarding  
6 economically feasible, that's been taken out, and  
7 that's now included in the broader language in  
8 Schedule 80?

9 A That's correct.

10 Q So looking at that language, does Schedule 80  
11 apply to all customers?

12 A Yes.

13 Q Okay. And would the economic feasibility test  
14 apply to current customers?

15 A Yes.

16 Q So assuming that there is no service agreement  
17 in place, can Puget refuse service to current  
18 customers in a rural area if a substation serving them  
19 needs to be replaced, and the load is too small to pay  
20 for that replacement, therefore resulting in the  
21 remaining ratepayers of that class incurring costs to  
22 replace that substation? Can Puget say we're not  
23 going to replace that substation, and let those  
24 customers go, just wait until it fails and say you are  
25 no longer customers, absent a service agreement?

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1           A    Absent a service agreement, I would -- I mean  
2           that's not the case before us, but I would -- I would  
3           be surprised if that was normally their practice. I  
4           mean once you have established as -- you know, your  
5           distribution system, absent a special agreement like  
6           we have here, that typically there is no incentive for  
7           people to, you know, not maintain the system it  
8           needs -- you know, as necessary.

9           Q    Well, that language applies to all customers,  
10          right?

11          A    Yes.

12          Q    So theoretically Puget can say this -- these  
13          residential customers over here are imposing costs on  
14          all the other residential customers, that's not  
15          economic to serve them, and we can no longer serve  
16          them.

17          A    Well, that's not the way the systems work and  
18          get maintained. I mean there's -- PSE has a process  
19          by which they evaluate all their distribution lines  
20          and -- and -- for what needs to be updated when, and  
21          they have a ranking system, and they invest every year  
22          in capital replacements, upgrades, what have you, so  
23          that that would not become an issue if they are doing  
24          their job appropriately.

25          Q    But that language either applies to all

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1 customers or it doesn't. Does it apply to all  
2 customers?

3 A Maybe I'm not understanding your question.

4 Q Can Puget refuse service to current customers  
5 if it is not economically feasible?

6 A The economic feasibility I believe applies  
7 only to new customers. I don't think it applies to  
8 existing customers, but I don't know for sure about  
9 that.

10 Q So it only applies to new customers?

11 A I believe so.

12 Q So is a customer that's been served for 40  
13 years a new customer?

14 A Now you are outside of what -- then the  
15 special agreement comes into play in this case, so it  
16 is not that situation.

17 Q So let's turn to your exhibit -- let's turn to  
18 Exhibit LFL-15, which is the advice filing 2012-029.

19 A Yes.

20 Q Sorry, I'm getting there.

21 (Pause in the proceedings.)

22 Q And then you can also reference your  
23 testimony, DN-1T at Page 13. So here you quote  
24 language from Schedule 80 that -- and this, in your  
25 view, I think justifies imposing these charges on the

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PROOF OF SERVICE

Dawnelle Patterson declares as follows:

1. I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto.

2. On the 23rd day of September, 2016, I caused a true and correct copy of the foregoing document to be delivered to the following in the manner indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED September 23, 2016 at Seattle, Washington.

  
\_\_\_\_\_  
Dawnelle Patterson, Senior Practice  
Assistant

**K&L GATES LLP**

**September 23, 2016 - 10:10 AM**

**Transmittal Letter**

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