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DIVISION II

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STATE OF WASHINGTON

No. 49347-1-II

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COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

KING COUNTY,

Appellant,

v.

WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION, a Washington state agency, and
PUGET SOUND ENERGY,

Respondents.

RESPONDENT PUGET SOUND ENERGY'S RESPONSE BRIEF

Donna L. Barnett, WSBA No. 36794
DBarnett@perkinscoie.com

PERKINS COIE LLP
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Telephone: 425.635.1400
Facsimile: 425.635.2400

Attorneys for Respondent Puget Sound
Energy

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I. INTRODUCTION

The Maloney Ridge Line is an aging, 8.5-mile electric distribution line that extends through remote areas of the Cascade Mountains. Appellant King County is one of four customers who receive electrical service on the Maloney Ridge Line. This appeal originates from a declaratory action wherein King County and other users of the Maloney Ridge Line petitioned the Washington Utilities and Transportation Commission (“WUTC” or “Commission”) to order respondent Puget Sound Energy (“PSE”) to pay for replacement of the Maloney Ridge Line. The WUTC Administrative Law Judge (“ALJ”) issued an order to the contrary: King County and the other petitioners should pay the vast majority of costs for replacement of the Maloney Ridge Line. Upon a request for reconsideration, the Commission issued a separate order affirming and adopting the ALJ’s order. King County and BNSF Railway Company (“BNSF”) appealed both the Commission’s and the ALJ’s orders, and the Thurston County Superior Court affirmed them. Now King County is the only remaining petitioner that still challenges the orders, and it has appealed the Commission’s Order 04.

The Commission’s order should be affirmed and upheld. It is consistent with the Commission’s broad ratemaking authority and its well-established rate-setting policies and principles. The order protects PSE

customers from having to pay an unreasonable subsidy of approximately \$5,000,000, and the order places payment responsibility on the appropriate cost-causing party.

II. FACTUAL COUNTERSTATEMENT

The Maloney Ridge Line is approximately 8.5 miles long, with single-phase 15 kilovolt (“kV”) underground and overhead facilities located in a remote section of the Snoqualmie National Forest.¹ PSE constructed the Maloney Ridge Line pursuant to an Agreement Relating to the Extension of Electrical Service, dated September 23, 1971, between PSE and the General Telephone Company of the Northwest, Inc. (“GTE”), wherein GTE requested PSE to extend electric power to serve GTE’s microwave station.²

Through the above-referenced agreement, GTE paid PSE to construct the Maloney Ridge Line, and GTE agreed to pay all costs to maintain the line.³ Had GTE not agreed to pay for construction, maintenance, and repair, then the line would not have been economically feasible and would never have been built.⁴

¹ AR000426, lines 2-8.

² AR000597, lines 3-9.

³ AR000598, lines 6-11.

⁴ AR000672, lines 18-20.

Over the years, three additional entities executed separate agreements (“Service Agreements”) substantially the same as GTE’s agreement.⁵ PSE now serves a total of four customers on the Maloney Ridge Line.⁶ There are no customers on the Maloney Ridge Line except for those taking service pursuant to the Service Agreements, and any new resident on Maloney Ridge must execute a Service Agreement to receive service from the Maloney Ridge Line.⁷ In other words, the only way a customer can receive power on the Maloney Ridge Line is contractually. Through the Service Agreements, King County and the other users agreed to pay all operating costs for the Maloney Ridge Line, which include all costs to keep the line in good operating condition.⁸

This contractual arrangement is outside the ordinary manner in which PSE usually provides electrical distribution service. Ordinarily, PSE may connect a new user to existing electric facilities pursuant to one of its Commission-approved tariffs.⁹ However, the practical and

⁵ AR000597, line 16- AR000598, line 3. *See also* AR000619-31.

⁶ BNSF, King County, Frontier and Maloney Ridge Users Association. AR000597, line 16-AR000598, line 3. The Maloney Ridge Users Association is made up of BNSF, Verizon Wireless, New Cingular Wireless PCS, LLC, and the Bonneville Power Administration. AR000171.

⁷ AR000628.

⁸ AR000626-27.

⁹ AR000602. *See also* AR00647-66.

economic realities of the Maloney Ridge Line distinguish it from the rest of PSE's electric distribution system.¹⁰

The 8.5 miles containing the Maloney Ridge Line is steep, rugged, mountainous terrain that includes boulders, creeks and rivers and that is subject to rock and landslides.¹¹ Its elevation means it is covered in heavy snowpack several months out of each year, and access is usually limited to the months from July through September.¹² Not only is the Maloney Ridge Line difficult to access, its terrain contributes to maintenance and repair costs.¹³ Rockslides and other rock movement are common on the steep slopes of Maloney Ridge, and these can cause direct damage to, and degradation of, the cable.¹⁴ Additionally, shifts in the terrain (including rock and landslides) expose the cable to dig-ins and rock damage.¹⁵ When a fault occurs and is identified, a crew must dig to the location of the fault before repairing it. This may involve a backhoe or hand-digging, if a backhoe cannot reach the location.¹⁶ During the winter, repair and maintenance often involve using special equipment like a snowcat.¹⁷

¹⁰ AR000603, lines 1-5.

¹¹ AR000755, line 20, through AR000756, line 21.

¹² AR000755, line 20, through AR000756, line 21.

¹³ AR000427, lines 5-6.

¹⁴ AR000756, lines 16-20.

¹⁵ *Id.*

¹⁶ *Id.*, lines 13-16.

¹⁷ *Id.*

Some of the equipment used to identify the location of a fault is audio; therefore, snow, rain or other weather conditions can impair a lineman's ability to identify the location of the fault.¹⁸

Over the years, the Maloney Ridge Line has deteriorated and its reliability has decreased, while costs for repairs have increased.¹⁹ Understandably, King County and other Maloney Ridge Line users requested that PSE replace the Maloney Ridge Line.²⁰ PSE provided at least seven repair alternatives and recommended one that was significantly less expensive than replacing the entire line, but King County rejected all such options and demanded that PSE replace the entire 8.5 miles with a new line,²¹ at a cost of approximately \$5,300,000.²²

King County admits that it is contractually obligated to pay for maintenance of the Maloney Ridge Line.²³ "Maintenance" is defined to include "the furnishing of all necessary manpower, materials, and equipment to keep the Distribution System in operating condition."²⁴ However, King County does not view replacement as the same as maintenance, even if replacement is necessary to keep the line in operating

¹⁸ *Id.*, lines 9-13.

¹⁹ AR000440.

²⁰ AR000449.

²¹ AR000461, AR000464, AR000467, and AR000428.

²² AR000587.

²³ AR000365, lines 16-17.

²⁴ AR000614; *see also* AR000623 and AR000626.

condition. Instead, King County believes that PSE should replace the line and pass the costs on to all retail electric customers.²⁵ Further, King County wants these other customers to pay for future operation and maintenance of the Maloney Ridge Line.²⁶ But PSE's obligation to provide safe and reliable service does not require PSE to completely replace the line at the expense of other PSE customers.²⁷

A. Applicable Tariffs

PSE's tariffs at issue in this appeal are (1) Schedule 80, the General Rules and Provisions of PSE's Electric Tariff G ("Schedule 80"), (2) Schedule 85 to PSE's Electric Tariff G ("Schedule 85"), and Schedule 24 to PSE's Electric Tariff G ("Schedule 24").²⁸ Schedule 80 contains PSE's general rules, which apply to all electric customers, regardless of whether they take pursuant to a special contract or a filed tariff.²⁹ Schedule 85 provides the terms and conditions that govern how PSE will extend and construct new or modify existing electric distribution

²⁵ AR000450.

²⁶ *Id.* ("Multi-customer lines comprise Puget's distribution network, and network costs (including capital, operating and maintenance costs) should be recovered by Puget through its retail rates generally applicable to retail customers like the six of us.")

²⁷ AR000644.

²⁸ AR000237-38.

²⁹ AR000644. *See also* AR000601, lines 3-8.

facilities.³⁰ Schedule 24 sets the rate to be charged to nonresidential customers who receive electric distribution service, like King County.³¹

Today, customers who require a new line or a line extension to connect to nonresidential electric distribution would typically apply for service pursuant to Schedule 85 and be charged the rate in Schedule 24.³² Schedule 85 requires the customer to pay all costs for installation of a new line or line extension, less a small margin allowance.³³ Once a line is installed pursuant to Schedule 85, repair and maintenance would be PSE's responsibility. However, at the time the Maloney Ridge Line was installed, paragraph 13 of Schedule 85 stated:

ECONOMIC FEASIBILITY - The Company shall not be required to construct any distribution extension under this schedule if such extension is, in the reasonable judgment of the Company, economically unfeasible. Service may however, be provided to customers on terms which require payment of an amount sufficient to justify the company's investment in facilities.³⁴

PSE refused to install the Maloney Ridge Line pursuant to Schedule 85 because the revenue generated by GTE was insufficient to support the

³⁰ AR000647-66.

³¹ AR000598, lines 14-21.

³² *Id.*

³³ AR000606, lines 13-17. Note that if the line is a modification under Schedule 85, a customer is not entitled to a margin allowance. See AR000606, lines 20-22.

³⁴ AR000642.

investment necessary to construct the line.³⁵ Instead, the line was installed and maintained pursuant to the first Service Agreement with GTE.³⁶

The economic feasibility provision is no longer in Schedule 85, but it is in Schedule 80, which applies to any and all service. “The Company shall not be required to provide service if to do so would be economically unfeasible.”³⁷ Both WUTC Staff and PSE performed multiple economic feasibility studies as part of the declaratory action.³⁸ The studies found that it is economically unfeasible for PSE to replace the Maloney Ridge Line. Specifically, PSE found that any amount greater than \$335,000 was economically unfeasible.³⁹

B. Procedural Statement

King County, along with four other companies who use the Maloney Ridge Line, filed a petition with the Commission seeking a declaratory order requiring PSE’s customers to pay the costs of replacing the Maloney Ridge Line.⁴⁰ After an evidentiary hearing and briefing, the ALJ issued Order 03 requiring King County and the other users to pay all replacement costs exceeding \$335,000 and all costs for maintenance and

³⁵ AR000603, lines 1-5.

³⁶ *Id.*

³⁷ AR000644.

³⁸ AR000428, AR000790, AR000813, AR000852.

³⁹ AR000950.

⁴⁰ AR000025.

operation of the line.⁴¹ King County and the other petitioners requested an administrative review of Order 03 from the Commission, and the Commission issued Order 04, affirming and adopting the findings and conclusions in Order 03.⁴² The Commission agreed with the ALJ that the Maloney Ridge Line is not a part of PSE's electric distribution system.⁴³ The Commission found that all costs to replace, repair, operate or maintain the Maloney Ridge Line should be shouldered by the customers who use it, not the other PSE ratepayers: "The general body of Schedule 24 customers does not cause any of the Maloney Ridge costs and should, therefore, bear none of those costs."⁴⁴

King County and BNSF sought judicial review of Orders 03 and 04 in Thurston County Superior Court. They did not challenge any Findings of Fact set forth in Order 04.⁴⁵ After briefing and oral arguments, the trial court issued findings of fact and conclusions of law affirming Orders 03 and 04.⁴⁶ The court found that the Maloney Ridge Line and the conditions of service to its customers are unique.⁴⁷ It further found that the Commission did not act unreasonably or arbitrarily and

⁴¹ Order 03; AR000248-51.

⁴² Order 04; CP 40.

⁴³ Order 04; CP 43 at ¶ 17.

⁴⁴ CP 48.

⁴⁵ CP 152.

⁴⁶ CP 150-54.

⁴⁷ CP 152.

capriciously in finding that the Maloney Ridge Line is not part of PSE's distribution system.⁴⁸ The court also agreed with the Commission that it was not an error of law or arbitrary and capricious to apply a fact-specific analysis to determine that the petitioners must pay all replacement costs that exceed \$335,000 and all maintenance and operation costs of the Maloney Ridge Line.⁴⁹

III. SUMMARY OF THE ARGUMENT

King County requests an order requiring PSE's ratepayers to cover all costs related to replacing the Maloney Ridge Line, an aging electric distribution line that has never served more than four customers, 1) King County, 2) BNSF, 3) Frontier Communications, and the 4) Maloney Ridge Users Association. In response to a petition for declaratory order, the Commission applied a fact-based analysis and found that all costs that exceed \$335,000 should be borne by the customers who use the line. The Commission's ruling was affirmed by the Thurston County Superior Court and is supported by Washington statutes, Commission rules, PSE's tariffs and Commission precedent. For these and the reasons set forth below, the Commission's order should be affirmed.

⁴⁸ CP 153 at ¶ 17.

⁴⁹ CP 153.

IV. ARGUMENT

A. The Standard of Review Calls for Deference to the Commission Because This Conflict Is an Issue Regarding Rates

A court may grant relief from an agency order in an adjudicative proceeding only in the limited circumstances set forth in RCW 34.05.570(3). The burden of demonstrating the invalidity of agency action is on the party asserting invalidity.⁵⁰ An agency's action is "arbitrary and capricious" under RCW 34.05.570(3)(i) "only if it 'is willful and unreasoning and taken without regard to the attending facts or circumstances.'"⁵¹ "[W]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous."⁵² A court will not set aside a discretionary agency decision absent a clear showing of abuse.⁵³ "The Commission's findings of fact are reviewed under a substantial evidence standard."⁵⁴

⁵⁰ CP 151 (citing RCW 34.05.570(1)(a)).

⁵¹ *Willman v. WUTC*, 154 Wn.2d 801, 806, 117 P.3d 343 (2005) (citation omitted).

⁵² *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002) (citation omitted).

⁵³ *U.S. W. Commc'ns v. WUTC*, 134 Wn.2d 74, 105, 949 P.2d 1337, 1353 (1998).

⁵⁴ *Id.* at 86.

“The Commission has broad generalized powers in making rate-setting decisions, which are often highly technical.”⁵⁵ The Washington legislature has delegated ratemaking power to the WUTC in “very broad terms” and “basically just direct[s] the WUTC] to set those rates which [it] determine[s] to be just and reasonable.”⁵⁶ “[C]ourts are not at liberty to substitute their judgment for that of the Commission in rate cases and . . . within a fairly broad range, regulatory agencies exercise substantial discretion in selecting the appropriate ratemaking methodology.”⁵⁷

The ultimate legal question is whether the rates and charges adopted by the Commission are fair, just, reasonable, and sufficient.⁵⁸ “The power to fix the rates of a utility is a legislative power, thus limiting [the court’s] inquiry to whether the record justifies the findings and conclusions of the body to which the legislature delegates power.”⁵⁹ The court gives “substantial deference to a regulatory agency’s judgment about how best to serve the public interest.”⁶⁰ “[I]t is well settled that [courts]

⁵⁵ *Id.*

⁵⁶ *People’s Org. for Wash. Energy Res. v. WUTC*, 104 Wn.2d 798, 808, 711 P.2d 319 (1985).

⁵⁷ *U.S. W. Commc’ns*, 134 Wn.2d at 86.

⁵⁸ *People’s Org. for Wash. Energy Res.*, 104 Wn.2d at 808.

⁵⁹ *Att’y Gen.’s Office v. WUTC*, 128 Wn. App. 818, 827, 116 P.3d 1064 (2005) (rejecting ratemaking challenge brought by Public Counsel and Industrial Customers of Northwest Utilities).

⁶⁰ *Id.* at 824.

must give ‘due deference . . . to the specialized knowledge and expertise of an administrative agency.’”⁶¹

B. The Service Agreements, PSE’s Tariffs, Commission Rules, and Commission Precedent Each Require King County to Pay Maloney Ridge Line Costs

The Commission applied its broad ratemaking authority and determined that requiring PSE’s customers to pay for replacement would result in rates that would fail to meet the fair, just, reasonable, and sufficient standard. The Commission did this by applying a fact-based analysis, which is supported by Commission precedent and which complies with the Service Agreements, PSE’s tariffs, and Commission rules.

King County is careful to describe the work it is requesting as only a “replacement” because the Service Agreements, PSE’s tariffs and Commission rules expressly direct King County to pay for such work if it is described as a new line,⁶² an addition,⁶³ a change,⁶⁴ a modification,⁶⁵ a repair,⁶⁶ an extension,⁶⁷ or even general work necessary “to keep the

⁶¹ *Nw. Sportfishing Indus. Ass’n v. Dep’t of Ecology*, 172 Wn. App. 72, 91, 288 P.3d 677 (2012) (citation omitted).

⁶² WAC 480-100-123.

⁶³ *Id.*

⁶⁴ AR000606, line 23-AR000607, line 2.

⁶⁵ AR000606, lines 20-22; *see also* Sch. 85, beginning on AR000647.

⁶⁶ *See* AR000623 and AR000626.

⁶⁷ *See* AR000647.

System in good operating condition.”⁶⁸ But regardless of the term King County uses, it is undisputed that it is asking PSE’s customers to suffer a rate increase to cover approximately \$5,000,000 in costs to construct and install a new distribution line through the Cascades to deliver electricity for King County’s use.

1. Service Agreements

GTE paid all costs for installation of the Maloney Ridge Line pursuant to the Service Agreement executed in 1971.⁶⁹ By executing the same Service Agreement in 1995, King County was granted service on the Maloney Ridge Line in exchange for its agreement to pay its share of all operating costs on the line, including all repair and maintenance costs and costs for all labor, materials, and equipment “to keep the System in good operating condition.”⁷⁰ The Service Agreement also obligates King County to pay its share of removal costs if and when the line is removed. “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.”⁷¹ The Service Agreements expressly direct the customers, beginning with GTE and including King County, to pay all costs for installation, repair, maintenance, and removal of the Maloney Ridge Line.

⁶⁸ *Id.*

⁶⁹ AR000471-76.

⁷⁰ AR000487-88.

⁷¹ AR000486.

The parties to the Service Agreements obviously intended that the customers using the line would pay all costs related to the line from cradle to grave, including replacement if necessary to maintain service. King County states that the Maloney Ridge Line needs to be replaced in order to maintain service.⁷² But it attempts to avoid paying replacement costs even though it is contrary to the plain language and the intent of the Service Agreements. “Repair” includes “replacement” when, as in this case, replacement is necessary to keep the line operating. Other jurisdictions agree. When a Georgia utility faced the question of whether repair includes replacement, the court looked to the common definition of repair to find that it unambiguously did: “The common definition of “repair” is very broad in scope and includes in its meaning “to make good” by replacing a structure in poor condition.”⁷³

The Commission could have relied solely on the Service Agreements’ language, but it went further, beyond the Service Agreements and supporting case law. The Commission examined PSE’s tariffs, Commission regulations, and Commission orders to determine the appropriate cost recovery.⁷⁴ The Commission is clearly within its authority to do so.

⁷² AR000449-451.

⁷³ *Parris Props., LLC v. Nichols*, 305 Ga. App. 734, 738, 700 S.E.2d 848 (2010) (citation omitted).

⁷⁴ AR000244-247.

2. PSE's Tariffs

a. Schedule 80

PSE has an obligation to serve pursuant to RCW 80.28.010, which states in part, "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." However, this obligation is not absolute or unconditional. A utility company may refuse to serve a customer under several specific conditions, one of which is if such service is economically unfeasible.⁷⁵

Schedule 80 contains the General Rules and Provisions that pertain to all services that PSE provides, including Schedule 24, Schedule 85, and the Service Agreements.⁷⁶ The Service Agreements also expressly incorporate Schedule 80.⁷⁷ King County for the first time claims that PSE in some way blindsided King County when it asked the Commission to find that Schedule 80's economic feasibility provision applied to replacement of the Maloney Ridge Line. "The Maloney Ridge Line customers had no way of knowing that the WUTC would turn to the

⁷⁵ See also WAC 480-100-123, Refusal of service, and AR000623 and AR000626, Recital B.

⁷⁶ AR000625 and AR000628.

⁷⁷ AR000486.

wholly inapplicable “economic feasibility language in Section 9 of the Schedule 80 to resolve this case.”⁷⁸ This argument is invalidated by the administrative record. PSE stated that Section 9 of Schedule 80 applied to resolve this case at its first opportunity, in its Statement of Fact and Law filed less than one month after the petitioners filed their Petition for Declaratory Order in June 2014.⁷⁹

PSE's Electric Tariff G provides that in such a case, PSE is not obligated to provide service. ‘The Company shall not be required to provide service if to do so would be economically unfeasible’. PSE's Electric Tariff G, Schedule 80-d(9).⁸⁰

King County next argues that paragraph 9 of Schedule 80 does not apply to the Maloney Ridge Line because it refers only to “new” or “additional” service. King County infers a restriction that simply does not exist in Section 9 of Schedule 80. King County identifies one part of one provision of the Refusal of Service section and incorrectly applies it to a separate and independent provision. Yes, PSE may refuse to serve a new customer or it may refuse to provide additional service, but that does not mean that PSE may only refuse new or additional service.

⁷⁸ Appellant’s Opening Brief at 29-30.

⁷⁹ See AR001048 at ¶ 8.

⁸⁰ *Id.*

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.⁸¹

⁸¹ AR000635.

As the tariff expresses above, PSE may refuse service for a number of reasons, such as when a customer has not obtained necessary protective devices or complied with necessary codes, when a customer's equipment creates a hazard, and when "providing service" would be economically unfeasible. To infer that PSE may refuse service only for new or additional customers would distort the obvious intent of Schedule 80's Refusal of Service section. For example, under King County's interpretation, PSE would be forced to continue to serve an existing customer even if PSE became aware that the customer had installed hazardous equipment that put people in danger. This result is absurd and is not supported by the clear language of Schedule 80. The Refusal of Service's economic feasibility provision makes no reference to new or additional service, and it is clearly a separate reason that applies to any service. The Commission, which is tasked with interpreting utility tariffs, agrees.

In Order 03, the ALJ expressed concerns about application of the economic feasibility provision because he considered the whole concept of economic unfeasibility overly broad and ambiguous, such that the lawfulness of PSE's tariff might be called into question.⁸² Therefore, he did not rely solely on the economic feasibility provisions and instead considered economic feasibility as one factor in a fact-specific analysis. The Commission affirmed Order 03 and specifically upheld the fact-based

⁸² AR000242 at ¶ 17.

inquiry, but it pointed out that “the lawfulness of PSE’s tariff provision is not an issue in this case” and, “[t]herefore, the economic feasibility standard remains a part of PSE’s tariff.”⁸³ Accordingly, regardless of whether or not PSE’s economic feasibility requirement may be amended or replaced in some future proceeding, it is unquestionably valid today and has the full force and effect of law.⁸⁴ Further, contrary to King County’s claim, the Commission was correct to consider economic feasibility as a factor in the Commission’s determination of cost allocation.

The ALJ’s ruling in Order 03 underscores the importance of the economic feasibility analysis in the context of the Commission’s ratemaking methodology.

[T]he Commission establishes PSE’s rates for service based on the average costs the Company incurs to provide that service to a customer within a particular class. Such averaging, however, requires that a reasonable relationship exist between costs and rates. If the Company’s costs to service a particular customer vary too much from the class average, equitable cost sharing among similarly situated customers becomes unreasonable cross-subsidy.⁸⁵

It is the Commission’s role to determine if PSE appropriately applied the economic feasibility provision, and the Commission decides when cost sharing becomes an unreasonable subsidy. The Commission determined that an unacceptable subsidy begins at costs exceeding \$335,000.

⁸³ AR000337 at ¶ 25 (citing *Gen. Tel. Co. of Nw., Inc. v. City of Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986)).

⁸⁴ *Gen. Tel. Co. of Nw., Inc.*, 105 Wn.2d at 585.

⁸⁵ AR000246 at ¶ 31.

Regardless of whether the economic feasibility provision alone is dispositive, it is certainly appropriate for the Commission to consider economic feasibility in determining cost allocation, as it did here.

King County does not challenge the Commission's finding that \$335,000 is the point at which the ratepayer's responsibility ends and King County's begin. In fact, King County challenges no factual finding in Order 04.⁸⁶ King County challenges only the application of the economic feasibility concept itself. However, it is clearly within the domain of the Commission to determine when equitable cost sharing becomes unreasonable cross-subsidy.

b. Schedule 85

The Commission did not err when it found that PSE's Schedule 85 did not require PSE to pay replacement costs. First, Schedule 85 is not applicable to the Maloney Ridge Line because Schedule 85 expressly excludes replacement of facilities that were not installed under Schedule 85. The Ownership of Facilities subsection of Schedule 85 states:

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

⁸⁶ CP 152.

electric distribution facilities that were not installed by or for the Company under this schedule.⁸⁷

The Maloney Ridge Line was installed under a service agreement, not Schedule 85. The parties to the 1995 Service Agreement (King County and PSE) defined the Maloney Ridge Line as its own, separate “System.”⁸⁸ Then the parties recited that the line was constructed under an agreement, not Schedule 85. “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.”⁸⁹ The Service Agreement includes its own Ownership of Facilities provision.⁹⁰ The Service Agreement even explains *why* the Maloney Ridge Line was not installed under Schedule 85: because it was economically unfeasible.⁹¹ Because the Maloney Ridge Line was installed pursuant to the original Service Agreement and not Schedule 85, the Service Agreement’s Ownership of Facilities section applies, not Schedule 85’s. Because the Maloney Ridge Line operates pursuant to the Service Agreement and not Schedule 85, the Service Agreement’s payment provision applies, not Schedule 85’s.

⁸⁷ AR000658 (emphasis added).

⁸⁸ AR000626, Recital B.

⁸⁹ AR000626, Recital C.

⁹⁰ *Id.* at ¶ 2.

⁹¹ AR000627 at ¶ 4.

But even if the line were installed under Schedule 85, that schedule's Ownership of Facilities subsection applies only to ownership – not payment responsibility. The Ownership of Facilities provision is silent with regard to paying for replacement facilities. The Commission reviewed the tariff and stated that it could not interpret such silence to mean that PSE intended to pay for replacement of all electric distribution facilities.⁹² King County next argues that even if Schedule 85's Ownership of Facilities provision is ambiguous with regard to cost recovery, such ambiguity should be interpreted against PSE. King County is incorrect, and this general rule of contract interpretation does not apply to Commission-approved tariffs. A tariff is within the Commission's field of expertise and, as such, the Court affords significant deference to the Commission's interpretation of tariff language.⁹³ The Commission interpreted the tariffs and found that the ownership provision in Schedule 85 did not extend to obligate PSE to pay for replacement of the Maloney Ridge Line.

It is ironic that King County requests the Court to infer from Schedule 85 an obligation to pay replacement costs when the tariff is silent as to replacement costs,⁹⁴ but King County argues against that same inference in the Service Agreements, where the parties' intentions are

⁹² AR000243 at ¶ 21.

⁹³ *US W. Commc'ns, Inc.*, 134 Wn.2d at 86.

⁹⁴ Appellant's Opening Brief at 21 (arguing that "responsible" should be interpreted to include "payment responsibility").

clear. The Service Agreements obligate the users of the Maloney Ridge Line to pay all costs related to installation,⁹⁵ operation,⁹⁶ and removal⁹⁷ of the line. King County expressly agreed to pay all costs necessary to keep the system in good operating condition.⁹⁸ The intent of the parties is clear: PSE would not construct a remote distribution line that was economically unfeasible, so it appropriately refused. King County and other parties promised to pay all costs related to the line if PSE would construct and maintain it. PSE agreed. To carve out the obligation to pay for replacement when replacement is necessary to keep the line in good operating condition contradicts the language of the Service Agreement and the intent of the parties.

3. Commission Rules and Decisions

The Commission's fact-specific evaluation is supported by Commission rules and case law, and such analysis is within the Commission's broad ratemaking authority. Regarding Commission rules, WAC 480-100-123, contemplates a case-by-case review of a utility's proposal to refuse service. King County attempts to exclude itself from WAC 480-100-123 on the basis that the Maloney Ridge Line replacement

⁹⁵ AR000614.

⁹⁶ AR000627 at ¶ 4.

⁹⁷ AR000628 at ¶ 8.

⁹⁸ AR000626-27.

is not technically a “new” or “additional” line.⁹⁹ King County’s parsing of words is not appropriate here because WAC 480-100-123 provides a “catch all” provision, whose language “should be left flexible and open” to ensure that questions like this one are brought to the Commission for resolution in light of its ratemaking authority.¹⁰⁰ “Obligation to serve issues, when they arise and cannot be resolved otherwise, should be brought to the commission for resolution.”¹⁰¹ That is exactly what King County did when it filed its Petition for Declaratory Order with the other petitioners. The Commission then applied the fact-specific analysis provided in WAC 480-100-123, and the Commission ruled against petitioners.

The Commission’s fact-specific analysis is also supported by case law. The ALJ found a Verizon case illustrative and applied the same analytical framework that the Commission used there.¹⁰² That is, the Commission identified and evaluated certain factors to determine who should be responsible for costs to install a service extension. The factors identified in our case are (1) the nature of the facilities, (2) the economics

⁹⁹ See Appellant’s Opening Brief at 38-39.

¹⁰⁰ Gen. Order No. R-495, Docket No. UE-990473, Wash. St. Reg. 01-24-076 at ¶ 15.

¹⁰¹ *Id.* at ¶ 25.

¹⁰² AR000244, citing *In re Petition of Verizon Northwest Inc.*, Docket UT-011439, Twelfth Supp. Order (WUTC, April 2003).

of replacing the line, and (3) the customer impact.¹⁰³ After a thorough analysis, the ALJ found, and the Commission affirmed, that the Maloney Ridge Line users “should bear all costs to replace the line that exceed the investment amounts PSE would recover through the rates it will receive for providing service over that line.”¹⁰⁴

Applying a fact-based analysis to determine the appropriate recovery of the costs of providing electric service is also wholly supported by the Commission’s long-standing cost-causer, cost-payer principle. “Customers who do not cause costs should not be responsible for paying them, even if it is only a few cents.”¹⁰⁵ “It is reasonable and consistent with the general principles of regulatory rate design for the ‘cost causers’ to be the ‘cost payers.’”¹⁰⁶ There is no doubt that the users of the Maloney Ridge Line are the causers of Maloney Ridge Line replacement costs and, as such, King County is misguided to ask the Court to shift those costs to other customers.

¹⁰³ See AR000245 at ¶¶ 25-26.

¹⁰⁴ See AR000245 at ¶ 26.

¹⁰⁵ AR000247 at ¶ 32.

¹⁰⁶ *WUTC v. Summit View Water Works, LLC*, No. UW-110107, Order 05, 2011 WL 5822170, slip op. at 5 (WUTC Nov. 14, 2011). See also *WUTC v. Tenino Tel. Co.*, No. U-83-62, 1984 WL 1022554, slip op. at 21 (WUTC May 14, 1984) (“The Commission also believes in the philosophy that cost causers should bear the costs they cause.”).

C. King County Asks for an Unreasonable Subsidy

1. King County Is Not Similarly Situated with Other Customers

King County correctly states that RCW 80.28.100 requires electric companies to charge the same rates to all similarly situated customers.¹⁰⁷ But King County is not, and has never been, similarly situated with other Schedule 24 customers. King County uses this rate discrimination statute as a sword to attempt to require other customers to subsidize the Maloney Ridge Line. The ALJ rejected this argument in Order 03, concluding that PSE is not violating RCW 80.28.100 by applying replacement costs to the four customers of the Maloney Ridge Line. King County now attempts to apply a municipal case to support a claim that customers in the same rate class must be treated equally.¹⁰⁸ The municipal case applies a different test for discrimination than the Commission does, however. The Commission's test is not whether the party is in the same rate class, but whether there are "undue or unreasonable" preferences made to customers that are "similarly situated."¹⁰⁹ Often the customers will be in the same class, but that is not determinative.

¹⁰⁷ See Appellant's Opening Brief at 43.

¹⁰⁸ See Opening Brief at 22, lines 5-11 (citing *Rustlewood Ass'n. v. Mason County*, 96 Wn. App. 788, 794, 981 P.2d 7 (1999)).

¹⁰⁹ *In re PacificCorp.*, No. UE-981627, 1999 WL 1295972, at 12 (WUTC, Oct. 14, 1999)

[T]o substantiate a discrimination claim under RCW 80.28.100 against a power company . . . , the complainant must prove that the service to the other consumers was given “under the same or substantially similar circumstances and conditions,” or that the charges to which it was subjected were not just, fair, reasonable, and sufficient, as compared with the rates charged the other consumers.¹¹⁰

What matters are the factual “circumstances and conditions” of the alleged discriminated-against party and whether the rates provided were just, fair, reasonable and sufficient based on those circumstances. Order 03 confirmed this standard: “The statute requires PSE to charge the same rates for ‘a like or contemporaneous service . . . under the same or substantially similar circumstances or conditions.’”¹¹¹

RCW 80.28.100 protects against discrimination against certain customers by charging them a different rate than others that receive “like service under substantially similar circumstances.”¹¹² Even the authority cited by King County supports PSE’s position in this regard: “A comparison of rates may be persuasive and may be controlling, but only when it is also shown that the conditions are comparable and that the rates used for comparison are just, fair, reasonable, and sufficient.”¹¹³ Further,

¹¹⁰ *Id.*, slip op. at 12 (citing *State ex rel. Model Water & Light Co. v. Dep’t of Pub. Serv.*, 199 Wash. 2d, 90 P.2d 243 (1939)).

¹¹¹ AR000240 at ¶ 11.

¹¹² RCW 80.28.100.

¹¹³ *Cole v. WUTC*, 79 Wn.2d 302, 311, 485 P.2d 71 (1971) (quoting *State ex rel. Model Water & Light Co.*, 199 Wash. at 36. *WUTC v. Puget Sound*

not all discrimination is forbidden, only “unjust” discrimination. If a difference in rates is based upon a reasonable and fair difference in conditions that equitably and logically justify a different rate, the discrimination is not unjust.

2. The Maloney Ridge Line Is Not Part of PSE’s System

Here, PSE has clearly and consistently treated King County and the other customers on the Maloney Ridge Line differently than other Schedule 24 customers even though they are in the same class.

At no time did PSE formally or informally incorporate the line into the system it uses to provide service to its larger customer base. The line has always been a separate facility dedicated to Petitioners, not a part of PSE's distribution system.¹¹⁴

This is the ALJ’s and Commission’s finding of fact, based on written and oral testimony.¹¹⁵ King County did not challenge any findings of facts in Order 03 or Order 04. Unchallenged findings of fact become verities on appeal.¹¹⁶ Accordingly, it is inappropriate for King County to raise an objection to the finding now. Further, upon judicial review, Judge Mary

Power & Light Co., No. UE-960299, Sixth Supp. Order, 1996 WL 601392, at *1 (WUTC. Aug. 1, 1996) (“The utility also must demonstrate that a special contract does not result in discrimination between customers receiving like and contemporaneous service under substantially similar circumstances, and that the special contract provides for the recovery of all costs associated with the provision of the service.”).

¹¹⁴ AR000245-46 at ¶ 28.

¹¹⁵ *Id.*

¹¹⁶ *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Sue Wilson separately found that (1) the Maloney Ridge Line is unique and (2) the Commission did not act unreasonably or arbitrarily and capriciously in finding that the Maloney Ridge Line is not part of PSE's distribution system.¹¹⁷

Even if the Court chooses to review the ALJ's, Commission's and Judge's findings, such findings are reasonable, are based on substantial evidence, and are not arbitrary and capricious. PSE has always treated the Maloney Ridge Line users separately from other customers, and the Maloney Ridge Line itself remains physically and financially separate from PSE's general distribution system. There is no evidence supporting the claim that the Maloney Ridge Line was somehow absorbed into PSE's general system, but there is extensive evidence to the contrary. It was installed separately and has been operated separately from PSE's distribution since its construction. The Service Agreement defines and refers to the line as an independent "System." No facts suggest that the Maloney Ridge Line has ever been assimilated into PSE's general distribution system, and no facts support replacement of the line when its installation, repair, maintenance, operation, and removal are all undisputedly outside PSE's system. As the Commission found, "Nothing

¹¹⁷ CP 152-53.

has changed in the relationship of these dedicated facilities that are not part of the Company's general distribution system to the other customers who take service under Schedule 24."¹¹⁸ King County's only basis for recovery rests in a finding that it is the same as any other customer taking service under Schedule 24, but such a finding contradicts over twenty years of undisputed factual evidence.

Finally, the regulation King County cites to support its claim that the Maloney Ridge Line is part of PSE's full system (WAC 480-100-388) is simply a description of electrical facilities and does not provide any obligation to replace such facilities or pay for their replacement. As the Commission ruled, "the Maloney Ridge Line has never been and is not now part of PSE's general distribution system."¹¹⁹

V. CONCLUSION

For the foregoing reasons, the Commission's orders setting the cost recovery for replacement of the Maloney Ridge Line should be affirmed. The orders are supported by sufficient evidence and fall squarely within the Commission's broad ratemaking authority. Washington statutes, Commission rules, the Service Agreements, PSE's tariffs, and case law all support separate but consistent findings that obligate King County to pay

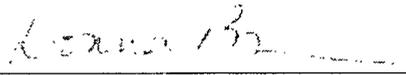
¹¹⁸ Order 04, AR000337.

¹¹⁹ Order 04, AR000328.

for replacement of the Maloney Ridge Line. Additionally, these independent findings confirm the broad and long-standing ratemaking principles applied by the Commission to set just, fair, reasonable and sufficient rates.

RESPECTFULLY SUBMITTED this 17th day of November,
2016.

PERKINS COIE LLP

By: 
Donna L. Barnett, WSBA No. 36794
DBarnett@perkinscoie.com
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Telephone: 425.635.1400
Facsimile: 425.635.2400

Attorneys for Respondent Puget Sound
Energy

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KING COUNTY

Petitioner,

v.

WASHINGTON UTILITIES AND
TRANSPORTATION
COMMISSION and PUGET SOUND
ENERGY,

Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2016, I caused the following documents to be served on the following party(s) in the manner(s) described below:

- (1) Puget Sound Energy's Response Brief; and
- (2) Certificate of Service.

<p><u>Attorneys for Petitioners King County, BNSF Railway</u> Kari Vander Stoep Benjamin Mayer Gabrielle E. Thompson K&L Gates LLP 925 Fourth Avenue, Suite 2900 Seattle, WA 98104-1158 Phone: (206) 623-7580 Fax: (206) 623-7022 Email: kari.vanderstoep@klgates.com ben.mayer@klgates.com gabrielle.thompson@klgates.com</p>	<p><input type="checkbox"/> via Overnight Mail <input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via hand-delivery <input type="checkbox"/> via Facsimile <input checked="" type="checkbox"/> via email</p>
<p><u>Attorneys for Staff</u> Christopher M. Casey, Assistant AG Julian Beattie, Assistant AG Office of the Attorney General Utilities and Transportation Division 1400 S. Evergreen Park Dr. S.W. P.O. Box 40128 Olympia, WA 98504-0128 Phone: (360) 664-1189 Phone: (360) 664-1225 Fax: (360) 586-5522 Email: ccasey@utc.wa.gov Email: jbeattie@utc.wa.gov</p>	<p><input type="checkbox"/> via Overnight Mail <input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via hand-delivery <input type="checkbox"/> via Facsimile <input checked="" type="checkbox"/> via email</p>

DATED: 11/17/16

PERKINS COIE LLP

By: Donna Barnett
Donna L. Barnett, WSBA No. 36794
DBarnett@perkinscoie.com
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Telephone: 425-635-1400
Facsimile: 425-635-2400

Attorneys for Respondent
Puget Sound Energy