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DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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GRAYS HARBOR ENERGY LLC,

Plaintiff/Appellant

v.

GRAYS HARBOR COUNTY,

Defendant/Respondent

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ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT  
(Hon. Richard D. Hicks)

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**REPLY BRIEF OF APPELLANT**

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**I.**  
**INTRODUCTION**

The primary issue before this Court is the proper characterization of GHE's property. Two alternative—but equally correct—approaches apply. The common law of this state requires that only GHE's land is to be classified as real property and the remainder is personal property. Statutory law (RCW 84.12) provides that the land and buildings are real property and the remainder is personal. Under either approach, the BTA and the trial court should be reversed.

**II.**  
**ARGUMENT IN REPLY**

**A. The County's Restatement Of The Case Is Materially Incomplete And Therefore Misleading.**

The County presents what it describes as a "Restatement of the Case." See Brief of Respondent ("County's Brief") at 1-7. Several of the fact statements set forth in that restatement are materially incomplete and therefore misleading.

- First, the County states that the "property at issue in this appeal" is a "twenty-two acre facility" consisting "of a partially constructed combustion turbine electric energy generating facility." County's Brief at 1 (citing AR 821; CP06 94). This statement omits that the power plant was also "functionally inoperable" throughout the tax periods at issue. AR 821-22; CP06 94-96. The plant could not generate

power, nor could it without completing installation and assembly of all required mechanical and electrical equipment. AR 822-23; CP06 95-96.

- Second, the County acknowledges that the consideration for the power plant paid by Invenergy (“IGH”) to Duke on the date of closing (March 24, 2005), as set forth in the parties’ purchase and sale agreement (“PSA”), was \$21 million. Compare County’s Brief at 2-3 with AR 415; CP06 126. The County then observes that the PSA called for additional cash payments (known as “contingent payments”) “upon the occurrence of specified contingent events”. County’s Brief at 3 (citing AR 415-18; CP06 126-29). The County goes on to state that IGH also “assumed certain contract debt obligations.” County’s Brief at 3 (citing AR 424-25, 469; CP06 135-36, 180). From these facts the County asserts that the “true purchase price” for the power plant “includes more than \$42 million in direct cash payments” plus the assumption of a number of “debt obligations,” for a supposed “total consideration” of between \$113 and \$116 million. See County’s Brief at 3-4.

This attempt to inflate the amount paid for the plant cannot withstand scrutiny. First, IGH did not assume any debt. IGH did assume certain “material contracts” pursuant to Section 4.13 of the PSA. AR 424-25; CP06 135-36. (These contracts were listed in Schedule 4.13 of the PSA (AR 466-69; CP06 177-180) a copy of which is attached as Exhibit A of the Appendix to this brief.) But these contracts did not include any debt

instruments or any other financial obligations. As for the “certain contingent payments”: The County failed to advise the Court that the record reflects that when construction did resume (in January 2007), the “contingent payments” made to Duke totaled only \$12 million (AR 117-19), making the “total consideration” at most \$33 million—not the \$113 to \$116 million figure claimed by the County.<sup>1</sup>

- Third, the County acknowledges that the Washington State Energy Facilities Site Evaluation Council (“EFSEC”) and the Initial Site Restoration Plan (“ISRP”) for this project require “the site to ‘be restored to its original vacant industrial land status’ in the event that GHE terminates or abandons its present electrical facility” but then goes on to state that the “ISRP . . . does not mandate termination of the project . . . at any point in time.” County’s Brief at 5-6 (citing AR 625-44; CP06 335-354). This statement implies that the site restoration requirements only kick in if the plant is terminated or abandoned while in partial completion or deferred construction status. In fact, the requirement for site restoration is present whenever the project is terminated, whether during construction,

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<sup>1</sup> The County points to a Duke press release, stating that the “total sales proceeds and tax benefits for this transaction will be approximately \$116 million.” See County’s Brief at 4 (citing AR 1134) (emphasis added). But the “tax benefits” Duke attributes as “sale proceeds” were actually its own losses and write-downs from the sale of the project. There is no basis for attributing “tax benefits” received by a seller due to losses or write-downs on the sale of assets to be part of the consideration paid by the buyer for the assets.

after construction is completed, or any time thereafter including at the end of the plant's useful life.<sup>2</sup>

**B. The BTA's Decision Is Not Entitled To Deference.**

GHE urged this Court to give no weight to the BTA determination that all of GHE's property was real, because "[w]hile the BTA is presumed to have special expertise in the tax area, it has no special expertise in distinguishing real property from personal property, and therefore no deference is due to the BTA's characterization determinations." GHE's Brief at 28 (citing Seattle Building and Construction Trades Council, et al., v. Apprenticeship and Training Council, et al., 129 Wn.2d 787, 799, 920 P. 2d 581 (1996)). The County counters that the BTA's decision "is just the type of agency interpretation that should be given weight by the court" because the BTA has "special expertise in applying property tax statutes to distinguish real property from personal property, warranting great deference to its characterization determinations." County's Brief at 10-11 (citing Western Ag Land Partners v. Department of Revenue, 43 Wn.App. 167, 171, 716 P.2d 310

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<sup>2</sup> The ISRP states that the expected ("planned") useful life of the power plant project is only 30 years. AR 629; CP06 339. While the ISRP acknowledges that "with proper maintenance, and periodic upgrades, a longer project life is anticipated" (*id.*), it goes on to state that "[a]ny future use of the site will be an industrial or commercial activity consistent with the planned uses for the Satsop Development Park[.]" and that "[d]emolition or removal of equipment and facilities will occur to the extent necessary . . . to recycle the site for future use." AR 629-630; CP06 339-340 (emphasis added). Only infrastructure, foundations, or buildings "that may be useable for future users may remain." AR 630; CP06 340. Moreover, under the "Final Restoration Plan" required by the ISRP, the turbine generators are expressly anticipated to be removed (most likely to be sold after reconditioning in the used equipment market). AR 635; CP06 345.

(1986)). It is true that characterization issues come up all the time in property tax cases. But there is nothing about characterization of property that is peculiar to the field of tax. To the contrary, characterization comes up in many different contexts besides tax. See, e.g., Ballard v. Alaska Theater Co., 93 Wash. 655, 161 P. 478 (1916) (whether certain furnishings were “trade fixtures” and removable at the conclusion of a lease); Chase v. Tacoma Box Co., 11 Wash. 377, 39 P. 639 (1895) (action to foreclose a real estate mortgage); Cherry v. Arthur, 5 Wash. 787, 32 P. 744 (1893) (action to restrain removal of certain sawmill equipment). Further, the property tax statutes (RCW 84.04.080, .090), upon which the County so heavily relies, refer one to the common law. Thus the County, the Department of Revenue and the BTA all are required to look to the common law, which is a special province of the courts, not of any particular government agency. The issue of the property’s characterization therefore is not one that is peculiarly within the provenance of the BTA, and the BTA’s determination in this respect should not be given any deference.<sup>3</sup>

The County also seems to be arguing that deference to the BTA is proper because the characterization question here is a mixed question of law and fact. But the facts here are not in dispute, only the legal

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<sup>3</sup> Division III in Western Ag did state summarily that the BTA’s characterization decision was entitled to deference. But Division III went on to find the BTA’s interpretation to be “inconsistent” and for that reason “not conclusive.” See Western Ag, 43 Wn.App. at 171.

conclusion to be drawn from those facts. Accordingly, this Court may freely substitute its judgment for that of the BTA on this purely legal question, which turns on the application of the judge-made rules of the common law.

C. **The Presumption That All Property Is Real, When Land And Affixed Property Rests With One Owner, Is Both Inapplicable And Has Been Conclusively Rebutted Here.**

The County argues there is a threshold presumption that “when the annexation is made by the owner of the real property, the item annexed is a fixture.” County’s Brief at 11 (citations omitted). The County is right about the presumption, but wrong that it resolves the case in the County’s favor.

First, the presumption does not apply because GHE does not own the underlying ground. The record establishes that the Washington Public Power Supply System (now known as “Energy Northwest”) transferred the entire Satsop site to the Grays Harbor Public Development Authority (“PDA”), except for this 22 acre site upon which Energy Northwest was to build a gas-fired combustion turbine energy generation facility. AR 646. The Site Transfer Agreement contained a provision that if WPPSS or a successor (here, GHE through Duke):

... does not begin construction of an energy generation facility on the CT Property within ten (10) years of the Effective Date of the Transfer Agreement, [the PDA] may request any time thereafter that Transferor [Energy Northwest/Duke/GHE] immediately transfer fee simple ownership of such property . . . *provided that*, Transferor shall be under no obligation to transfer the CT Property

if it has demonstrated an active interest in and need for the property by providing [the PDA] with a copy of either (i) a marketing program for the property, including current funding, goals and assigned personnel for its development; or (ii) a documented expression of third-party interest in developing an[d] energy generation facility on the property.

In any case, if Transferor does not begin construction of an energy generation facility on the CT Property within twenty (20) years of the Effective Date of the Transfer Agreement, Transferor shall promptly transfer fee simple ownership of such property . . . to [the PDA] by warranty deed . . . .

AR 647 (bracketed inclusions and emphasis added).

In other words, GHE has something less than fee simple absolute title; it gets to occupy the land and exclude everyone else—including the PDA, which got all of the other surrounding lands from WPPSS—as long as GHE complies with the conditions of the Site Transfer Agreement. During the first 20 years, GHE must build and operate a power plant. If it doesn't, the property must be transferred to the PDA and any GHE property and equipment on the site would have to be removed. If GHE does build and commence operations, the terms and conditions of the ISRP kick in. They require removal of all equipment and facilities, including the buildings but excluding only infrastructure useful for non-power generating uses at the ultimate termination of the project. Either way, all “improvements” must eventually go, rendering them incapable of ever becoming a permanent accession to the freehold, and the presumption relied on by the County simply has no application.

Second, even if applicable, the presumption has been amply rebutted. The first prong of the common law test as to whether a chattel has become a fixture is whether “it is actually annexed to the realty.” Glen Park Associates v. Department of Revenue, 119 Wn.App. 481, 487, 82 P.3d 664 (2003). The power generation equipment here does not satisfy this first prong. This issue—and this case—can and should be resolved by a straightforward application of the holding of the Washington Supreme Court in Department of Revenue v. Boeing, 85 Wn.2d 663, 538 P.2d 505 (1975). At issue there was whether “fixed assembly jigs” constituted fixtures for purposes of a manufacturing tax credit. See 85 Wn.2d at 664. Boeing had built a manufacturing and assembly plant for the 747 airplane. Id. The assembly jigs were specially designed for the 747, were used to hold large parts of the aircraft “steady and in alignment,” and could not be used in assembly of any other airplane. Id. The jigs weren’t built into the floor, but were bolted to the floor or to the concrete foundations arising from the floor. Id. They could be disassembled and removed without damaging the building, and “Boeing ha[d] moved similar, although smaller, jigs from plant to plant in previous aircraft assembly projects.” Id. at 665. The Supreme Court held that the fixed assembly jigs were personal property rather than fixtures, stating that “we do not think that the totality of the circumstances can reasonably be

construed to indicate an intent by Boeing for the jigs to be a permanent accession to the freehold.” *Id.* at 670-671.

This holding should control the outcome in this case. Like the jigs in Boeing, the power generation equipment here is modular, merely bolted to concrete foundations and can be disassembled and removed without damage to the underlying real property. AR 528-29, 531, 537-540; CP06 246-47, 258, 260-62, 266-68. GHE’s parent has moved similar power plants and equipment from one location to another and there is an active market for used turbines. AR 822; CP06 95. These undisputed facts demonstrate that the power generation equipment at issue in this case is no more annexed to the realty than were the jigs at issue in Boeing. The Supreme Court’s conclusion in that case is “on all fours” for the legal conclusion that should be drawn here: that “the totality of the circumstances can[not] reasonably be construed to indicate an intent by [GHE] . . . for the [power generation equipment] to be a permanent accession to the freehold.” See 85 Wn.2d at 670.

As the Boeing decision so well illustrates, when determining whether the affixor intends to make an article a permanent accession to the freehold, courts look to the “circumstances surrounding annexation, including the nature of the articles affixed, the annexor’s situation in relation to the freehold, the manner of annexation, and the purpose for which it was made.” Western Ag, 43 Wn.App. at 173. Courts evaluate

“the actual essentiality of the articles to the accustomed use or operation of the premises” to determine intent so that “the more essential the article’s contribution to the real property’s lasting use or operation, the more likely it will become part of the realty.” R. Powell and P. Rohan, *Powell on Real Property* § 57.05[5][c] at p. 57-45 (2000). Division III found the requisite intent to enrich the freehold in Western Ag because the nature and purpose of the center pivot irrigation systems (“CPIS”) in that case were central to the use of the underlying land as farmland. 43 Wn.App. at 174.

The question common to all fixture characterization disputes is whether the purpose is to enhance the business being conducted at the site, or to enhance the value and utility of the underlying real property. As the Supreme Court explained in Chase v. Tacoma Box Co., 11 Wash. 377, 39 P. 639 (1895):

We do not think that mere adaptability of machinery to use in the business which happens to be conducted upon the realty itself is of itself enough to give the character of realty to the machinery. To constitute machinery and apparatus fixtures, it is not alone sufficient that they be placed in the shop or factory with the intent that they should remain there for permanent use, but the intent must be to make them a permanent accession to the freehold.

Chase, 11 Wash. at 385 (emphasis added). This principle was recently expressly applied by Division III in Union Elevator & Warehouse Co., Inc. v. State ex rel. Dep’t of Transp., 144 Wn.App. 593, 183 P.3d 1097 (2008), involving the characterization of grain elevator machinery. The Court of Appeals stated that “the machinery was certainly crucial to

operating the [grain] elevator, but the testimony established that it was just as suitable in most of its other facilities.” Union Elevator, 144 Wn.App. at 605. The court also noted that “the machinery is designed to be broken down into parts and easily moved.” Id. at 606. The court concluded that the machinery should be characterized as personal property, and that conclusion is equally appropriate here: The undisputed evidence was that all power generation equipment can be moved from one location to another; that power generation equipment, including the large GE turbines, is designed to be modular and easily moved; and all of this can be done without damaging the land. AR 827; CP06 107.

To buttress its contrary contention, the County relies on a number of cases. The first is Chase v. Tacoma Box Co., 11 Wash. 377, 39 P. 639 (1895), a case also relied on by GHE. The County quotes a passage in Chase taken from another case, Cherry v. Arthur, 5 Wash. 787, 788, 32 P. 744 (1893), in which the Supreme Court stated that if “a building [is] erected for a definite purpose . . . whatever is built into it to further those objects becomes a part of it, even though there be no permanent fastening.” County’s Brief at 12. But the County has provided an incomplete statement of the Cherry quotation in Chase, which actually continued as follows:

“But mere furniture, although some fastening may be necessary to its advantageous use, is removable. Peculiarly subject to this rule are machines which can be used in one place as well as another,

and which add nothing to the building, though they may be advantage to the business conducted there.”

Chase at 384 (quoting Cherry at 788) (emphasis added).

The County cites several other cases where it contends “machinery or equipment has been found to be an improvement to realty or a fixture.” County’s Brief at 14-15, citing Parrish v. Southwest Washington Production Credit Assn., 41 Wn.2d 586, 250 P.2d 973 (1952); Strong v. Sunset Copper Co., 9 Wn.2d 214, 114 P.2d 526 (1941); Reeder v. [Smith], 118 Wash. 505, 203 P. 951 (1922); and Western Ag (*supra*). All of these cases are inapposite, because they all involve businesses that arise out of the land itself.

In Parrish, the land in question was, similar to Western Ag, a cranberry farm or bog. The question, again similar to Western Ag, was whether “the watering and sprinkling system, including pipelines . . . sprinkler heads, pumps, motors, frames, power poles and wiring and transformers” were real or personal property. Parrish at 975. The Court of Appeals upheld the trial court’s finding of the requisite intent, because the watering and sprinkling system was “designed and constructed to make the particular land a commercial cranberry bog.” Parrish, at 975. This result is entirely consistent with the later Western Ag decision, where both courts decided that the land itself was the business, and the equipment at issue therefore was determined to have been annexed.

Strong and Reeder are variations on the same theme, with the focus on mining instead of agriculture. In Strong, the court accepted “the trial court’s determination of the nature of the equipment” which “was intended to constitute permanent improvements and, . . . they constitute a part of the realty.” 9 Wn.2d at 229-230. The equipment was used in the operation of mines, and the “lands were patented mining claims” which ““were ready for the work of production, [and] which could not be accomplished without these annexations that were installed as a part and parcel of mining real estate.”” Id. at 230 (quoting Reeder v. Smith, 118 Wash. 505, 508, 203 P. 951, 952 (1922)). Likewise in Reeder, the articles were buildings and mining equipment “for the purpose of operating the mines.” Reeder at 506. The court there found that the property was of a “permanent nature” because it “tended to increase the value of the property as a mine.” Reeder at 510 (quoting Siegloch v. Iroquois Mining Co., 106 Wash. 632, 181 Pac. 51 (1919)). These mining equipment cases are no more apposite than the farming equipment cases for determining whether GHE’s electric power generation equipment should be deemed a fixture. The conclusion must be that GHE’s equipment is no more a fixture than were the jigs at issue in Boeing; to the extent it even applies, the presumption has been conclusively rebutted.

**D. The County's Out-of-State Authorities Are Inapposite And Not Binding On This Court.**

The County cites out-of-state authorities to bolster its contention that power generation equipment is real property under the common law test. See County's Brief at 20-23, citing Consolidated Edison Co. of New York, Inc. v. City of New York, 44 N.Y.2d 536, 378 N.E.2d 91 (1978); Overhead Electric Co. v. State Bd. of Equalization, 227 Cal.App. 3d 1230, 278 Cal.Rptr. 112 (1991); and Boston Edison Co. v. Board of Assessors of Boston, 401 Mass. 1, 520 N.E.2d 483 (1988). Each of these cases is distinguishable from GHE's facts, and none of them are binding on this Court.

- In Consolidated Edison, the County notes that “four barge-mounted gas turbine power plants were . . . classified, for tax purposes, as structures ‘affixed’ to land” and classified as real property. County's Brief at 21. However, the New York Legislature specifically defined real property for tax purposes to include:

[b]uildings and other articles and structures, substructures and superstructures erected upon, under or above the land, or affixed thereto, including bridges and wharfs and piers.

Consolidated Edison at 541 (quoting subdivision 12(b) of section 102 of the New York Real Property Tax Law). The court found that the power plant fell within this provision:

Surely power plants and fuel reservoirs of the type here considered fall within the familiar connotation of structures; no one would doubt that if erected on the land such facilities both in physical

description and functional purpose would be within the easy reach of the real estate assessment rolls.

*Id.*

- In Overhead Electric, the court ruled that an uninterruptible power system (“UPS”) installed in a building by an electrical contractor was a fixture. 227 Cal.App. 3d at 1233. Like Consolidated Edison, this case was resolved by specific code sections—specifically, California Code of Regulations, title 18, section 1521, subdivisions (a)(5), (a)(6) and Appendix C. *Id.* at 1233-34. The court found that the “UPS systems and generators were intended to provide accessory power to the facility in order to maintain full security lights in case of power failure.” *Id.* at 1235. Clearly, the UPS was integral to the building just as the electrical system itself (wire, lighting fixtures, conduit, etc.) is integral and necessary to the proper use of a building. As such, the California court was actually drawing the same distinction as have our state’s courts.

- In Boston Edison, there were again specific statutory definitions in play. See 401 Mass. at 8, n. 8, citing G.L. c. 59, § 3, as appearing in St.1913, c. 636, and repealed by St.1978, c. 580, § 16 (real estate included “all land within the commonwealth and all buildings and other things erected thereon or affixed thereto”) for years 1977, 1978, and 1979; G.L. c. 59A, § 2, inserted by St.1978, c. 580, § 38, and repealed by St.1980, c. 261, § 16 (real estate included “all land and all buildings and improvements thereon or affixed thereto”) for the year 1980; and G.L. c.

59, § 2A (1986 ed.) (inserted by St.1979, c. 797, § 11 (real estate refers to land “and all buildings and other things thereon or affixed thereto”) for years after 1980. The court in Boston Edison deferred to the Board of Assessor’s determination, given that the Board “had discretion to tax the plant either in the personal property category . . . or as real estate”. 520 N.E. 2d at 488.

The general rule in Washington is that courts of this state are not bound by decisions of courts in other states on matters involving taxation, because of the fact that these decisions too often turn on the specific and distinctive language of the tax statute at issue. See First American Title Insurance Company v. Department of Revenue, 98 Wn.App. 882, 888, n. 20, 991 P.2d 120 (2000), aff’d, 144 Wn.2d 300, 27 P. 3d 604 (2001). The Supreme Court has repeatedly admonished that, because other state courts may have been interpreting different statutory language, it is error to rely on out-of-state case law without examining the statutory language underlying the decision. See Nordstrom Credit, Inc v. Dep’t of Revenue, 120 Wn.2d 935, 942, 845 P. 2d 1331 (1993); King County Water District v. Tax Commission, 58 Wn.2d 282, 287, 362 P. 2d 244 (1961). The County’s use of out-of-state authorities all too aptly illustrates the reason for this rule, as each of the County’s authorities turns out to be the product of statutory language peculiar to that court’s jurisdiction.

**E. RCW 84.12's Property Characterization Rule Does Apply To Intra-County Utilities Like GHE.**

There is no question the Legislature has the power to classify all property for purposes of taxation, provided only that the classifications do not impinge on the constitutional requirement of uniformity. See Art. 7, § 1; see also, Libby, McNeill & Libby v. Ivarson, 19 Wn.2d 723, 730, 144 P.2d 258 (1943) (“In classifying property for taxation or exemption therefrom, the legislature has wide discretion”); Bates v. McLeod, 11 Wn.2d 648, 654-55, 120 P.2d 472 (1941) (“In the matter of classifying the subjects of taxation, the legislature has a very wide discretion. While all taxes upon persons in the same class should be equal and uniform, the question of what persons shall constitute the class is one primarily for the legislature to determine, and its determination cannot be interfered with by the courts unless clearly arbitrary and without any reasonable basis”). In RCW 84.12 the Legislature has set forth a definition of “electric light and power company” (RCW 84.12.200(4)) that includes “any person” (RCW 84.12.200(4)) (emphasis added) engaging in any of the enumerated activities. “Washington courts have consistently interpreted the word ‘any’ to mean ‘every’ and ‘all.’” Cerrillo v. Esparza, 158 Wn.2d 194, 203, 142 P. 3d 155 (2006) (quoting Stahl v. Delicor of Puget Sound, Inc., 148 Wn.2d 876, 844-45, 64 P. 3d 10 (2003)). The use of the word “any” in the definition thus demonstrates a legislative intent not to limit the definition to just one class of utilities. In addition to the all-encompassing nature of

the definition of “electric light and power company,” the Legislature has also statutorily classified their property: land and buildings are real property and everything else is personal property (RCW 84.12.280).<sup>4</sup> The Legislature again has made no provision for the exclusion of any subgroup of utilities from this classification.

The County nonetheless insists that RCW 84.12 applies only to inter-county utilities.<sup>5</sup> The question then becomes why there should be a potentially different approach to the characterization of the property of electric light and power companies, depending on whether their property happens to be located within one county or more than one county. In fact, it would be irrational to have a result where an intra-county power plant is classified entirely as real property by the county assessor one day and the next day—simply due to a change in ownership of the plant that makes it into an inter-county utility—the provisions of RCW 84.12.280 suddenly kick in and the property is reclassified as personalty.<sup>6</sup>

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<sup>4</sup> The classification statute reads in pertinent part “. . . all of the operating property other than lands and buildings of electric light and power companies . . . shall be assessed and taxed as personal property.” RCW 84.12.280.

<sup>5</sup> Inter-county utilities are taxpayers with plants, equipment and/or facilities located in more than one county. On the other hand, an intra-county utility is one whose property is located entirely in one county. A list of inter-county public utility/electric light and power companies is in the record at AR 759-761 and CP06 529-531

<sup>6</sup> Hypothetically, if GHE sold its power plant to Puget Sound Energy, an inter-county utility (see CP06 530-31), upon this change of ownership, the plant would be subject to RCW 84.12 under the County’s argument. See GHE’s Brief at 54, n. 36. And while GHE’s plant has not been sold, a similar intra-county power plant was sold to Puget subsequent to GHE and the County filing their briefs, specifically, on July 28, 2008, Puget purchased a 125MW power plant in Sumas, Washington from Sumas Cogeneration Co. See Appendix, Exhibit B. This formerly intra-county power plant was assessed by

To support such a result, the County relies on the general property tax statutes that define real and personal property, ignoring that these general property tax statutes actually point to the common law to resolve any disputes over the characterization of property as real or personal, see RCW 84.04.080, .090, and that the application of the common law leads to the conclusion that all of GHE's property except only the land is to be classified as personal property. Moreover, even if the general property tax statutes supported the County's position, the rules of statutory construction say that specific statutes trump general statutes. E.g., Estate of Black, 153 Wn.2d 152, 164, 102 P. 3d 796 (2004) ("When more than one statute applies, the specific statute will supersede the general statute") (citing Hallauer v. Spectrum Props., Inc., 143 Wn.2d 126, 146, 18 P. 3d 540 (2001)). Accordingly, RCW 84.12.280 should be applied instead of RCW 84.04.080 and 84.04.090.

The County points to certain provisions within RCW 84.12, which it says makes all of RCW 84.12 applicable only to inter-county utilities. See County's Brief at 24-25, n. 14. But the definition (RCW 84.12.200(4)) and classification (RCW 84.12.280) provisions are

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the Whatcom County assessor prior to the sale. See Appendix, Exhibit C. Now that Puget owns the power plant it will become part of Puget's property that is centrally assessed by DOR under RCW 84.12. See AR 760-61; CP06 530-31. Assuming the Whatcom County assessor classified all property, including the power generation equipment, as real property, such property would—under the County's approach—become personal property on July 28, 2008, merely because of Puget's acquisition of the plant. This result would be patently irrational, yet would also be compelled by the County's theory.

not so limited. The County also notes that “GHE filed no annual reports with DOR as required by RCW 84.12.230” and asserts that “[t]his would seem to indicate that GHE itself did not consider it to be subject to chapter 84.12 RCW.” County’s Brief at 24-25, notes 13, 15. But the only taxpayers required to file annual reports with DOR are inter-county utilities, and GHE is admittedly not an inter-county utility. Even the County’s own witness from the DOR stated that GHE was not required to file annual reports, because GHE’s “facility does not and has not produced electrical power” and will not be required to file annual reports until electric power is “transported . . . outside Grays Harbor County.” CP06 737. What matters to the outcome here is the Legislature’s classification system, and that system is not limited—as is the annual report requirement—to inter-county utilities.

The County is left with trying to gin up a constitutional crisis supposedly created by applying the Legislature’s classification system to intra- as well as inter-county utilities. In fact, there is no constitutional problem created by applying the Legislature’s classification system to intra-county utilities. If anything, the County’s interpretation actually would create the constitutional problem, because under it the Legislature would be read to be saying that like inter- and intra-county utility property should be treated differently. In Northwestern Improvement Company v. Henneford, 184 Wash. 502, 510-11, 51 P. 2d 1083 (1935), the Supreme

Court acknowledged the practical necessity of DOR assessing inter-county utilities to assure uniformity, equality, and fair apportionment. Why should these considerations be thrown out the window when individual counties are assessing intra-county utilities? Applying the characterization statute (RCW 84.12.280) across-the-board to intra- and inter-county utilities assures that any and all utilities will be treated equally and uniformly.

The County nonetheless argues that:

GHE's interpretation will result in unconstitutionally creating separate classes of real property within Grays Harbor County. One example of this disparate assessment and valuation of real property occurs where RCW 84.12 is applied to GHE's real property, requiring operating property of all companies thereunder be assessed annually, rather than on the four-year cycle utilized by the County Assessor under authority of RCW 84.41.030.

County's Brief at 28. RCW 84.12.280 classifies the operating property of public utilities like GHE. It says land and buildings are real property and all other property is personal. Real property is assessed on a four-year cycle in Grays Harbor County and personal property is assessed annually. The same valuation cycles would apply to a hypothetical manufacturing plant next door to GHE. It is true that any centrally assessed power plant also hypothetically located on the other side of GHE will have its real and personal property assessed annually by DOR, but "[u]niformity and equality in all respects can never be exactly attained, and all that legislation has hitherto been able to accomplish, or perhaps ever will be

able to achieve, is to approximate that end.” Northwestern Imp. Co. v. Henneford, 184 Wash. 502, 511, 51 P. 2d 1083 (1935) (quoting Ames v. People, 26 Colo. 83, 56 P. 656, 664 (1899)). What matters is not the frequency of the assessment, but that the same rule of characterization is applied whenever the assessment takes place. GHE’s approach assures that the same rule is applied, while the County’s authorities mandate that materially different approaches will be applied, and for no good reason.

The County finally argues that “RCW 84.12 recognizes just one class of real property (‘electric light and utility’) within the territorial limits of the authority levying the tax (DOR statewide).” County’s Brief at 29. But this argument flies in the face of the holding in Inter Island Telephone Company, Inc. v. San Juan County, 125 Wn.2d 332, 336, 883 P.2d 1380 (1994), that “a separate class of property for uniformity purposes does not exist merely because property of like character may be within the valuation jurisdiction of a separate entity.”<sup>7</sup>

**F. The Sale From Duke To IGH Was At Arm’s-Length.**

The County contends that the sale of the power plant from Duke to IGH was not “arms length” because Duke was under economic distress to

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<sup>7</sup> Once this Court resolves the characterization issue—under either the common law or RCW 84.12, or both—the parties will then know what property is subject to assessment and taxation during the assessment years (2004-2005) and tax years (2005-2006) at issue. Under WAC 458-12-342(1), “new construction” is subject to assessment based on its “true and fair value as of July 31st each year regardless of its percentage of completion.” And new construction is defined in the rule to mean “only . . . real property.” *Id.* This means that only the property of GHE characterized as real property by this Court will be subject to assessment and taxation during those years.

complete the sale. See County's Brief at 35-40. There is absolutely no evidence in the record to support this claim, and the County cites none either. The evidence that is in the record shows that Duke was a large, diversified, multi-billion dollar public company. AR 820; CP06 92. In January 2004, Duke's "management announced a change in strategic and corporate strategy" "and a divestiture of its many power generating facilities, one of which was the partially completed Grays Harbor Project." AR 822. Duke publicly offered the property for sale in August 2004. AR 499-502. The offering statement declared that Duke was to obtain "fair value for these assets." AR 499. It then established an "outline" or schedule for the "divestiture process." AR 499-500. Duke hoped to reach a "definitive agreement[] with the winning bidder" no later than December 17, 2004. AR 500. The Purchase and Sale Agreement with IGH was executed as of December 27, 2004. AR 408. This process hardly sounds as if Duke was in "distress".<sup>8</sup>

The County relies on Division III's recent decision in Washington Beef, Inc. v. County of Yakima, 143 Wn.App. 165, 177 P 3d 162 (2008), to support its contention that the sale was not arm's-length, but that case is clearly distinguishable. The County points to the court's finding of a "distress situation" due to "declining sales in Japan, reduced capital from

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<sup>8</sup> The BTA made no findings regarding its conclusion that the sale from Duke to IGH was not arm's-length. All the BTA did was make the summary assertion that "[t]he sale is not an arm's-length transaction (sale) under RCW 84.40.030" while offering no supporting facts or reasons for this conclusion. AR 52.

its Japanese owners, a tightening of the market for slaughter-ready cattle due to new Canadian processing plants, and a labor strike.” County’s Brief at 37-38 (quoting Washington Beef, 143 Wn.App. at 175-76). But these factors had more to do with economic obsolescence issues at the time of the sale rather than whether the sale was at arm’s length. More significantly, the court found that the buyer, AgriBeef, “had a presale partnership with Washington Beef” and AgriBeef “was also a creditor of Washington Beef.” Washington Beef at 176. Here, IGH had no relationship with Duke prior to its purchase of GHE. The court also noted that “Washington Beef did not make a vigorous attempt to find other purchasers.” *Id.* at 179. That also is not the case here; Duke put out an offering statement (AR 499-502), anyone was free to bid on the plant, and Duke sold the plant to IGH at the best price given the market conditions. There is simply no evidence whatsoever that this was not an arm’s length sale, and the BTA’s contrary finding cannot be upheld.<sup>9</sup>

### III.

#### CONCLUSION

This Court should reverse both the BTA and Superior Court and rule that GHE is an “electric light and power company” under

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<sup>9</sup> Under RCW 84.40.030 the “true and fair value of real property for taxation purposes . . . shall be based upon [among other factors and appraisal methodologies] . . . (1) Any sales of the property being appraised . . . with respect to sales made within the past five years.” A finding by this Court that the sale from Duke to IGH was arm’s-length would allow the Assessor to consider the sale for purposes of the 2006 through 2010 assessments, and possibly the 2005 assessment, as well.

RCW 84.12.200(4) and its property should be classified under RCW 84.12.280. Alternatively, this Court should rule that GHE's property, other than land, is personal under the common law of this state. Finally, this Court should conclude that the sale from Duke to IGH was made at arm's length based on the undisputed evidence.

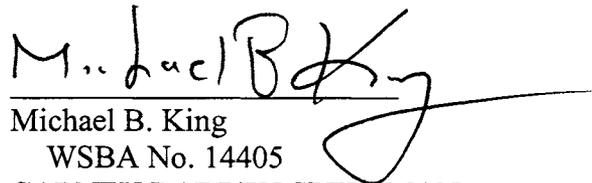
RESPECTFULLY SUBMITTED, this 17<sup>th</sup> day of September,

2008



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*Attorneys for Plaintiff/Appellant  
Grays Harbor Energy LLC*

No. 37163-4-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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GRAYS HARBOR ENERGY LLC,

Plaintiff/Appellant

v.

GRAYS HARBOR COUNTY,

Defendant/Respondent

---

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT  
(Hon. Richard D. Hicks)

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**DECLARATION OF SERVICE**

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COURT OF APPEALS  
BY: [Signature] CLERK

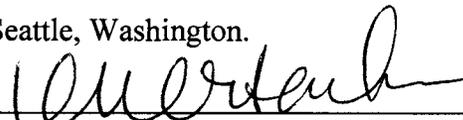
**DECLARATION OF SERVICE**

I certify that I served a copy of the foregoing Reply Brief of Appellant on the date set forth below via United States Mail, postage prepaid, on the Respondent's counsel of record, as follows:

James G. Baker  
Senior Deputy Prosecuting Attorney  
Grays Harbor County Prosecuting Attorney's Office  
102 W. Broadway, Room 102  
Montesano, WA 98563

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17 day of September, 2008 at Seattle, Washington.

  
\_\_\_\_\_  
Kristi Hartman

# APPENDIX

## INDEX

- Exhibit A** “Material Contracts” Part 4.13 to December 27, 2004 Purchase and Sale Agreement (AR 177-180)
- Exhibit B** Puget Sound Energy Press Release, “Puget Sound Energy completes purchase of Sumas power plant” (July 28, 2008)
- Exhibit C** Whatcom County Assessor Property Tax Listings for Sumas Cogeneration Company LP

# **EXHIBIT A**

## Part 4.13

### Material Contracts

#### Section A: Contracts

The following disclosures are made with respect to Section 4.13(a). Amounts due and owing under the Contracts in Sections A and B as of the Closing Date are for the account of Seller except to the extent that the Agreement requires proration of payment or reimbursement of any such amount between Seller and Purchaser.

1. Exhibit B to the Transfer Agreement, Satsop Site Real and Personal Property, between Grays Harbor County, Port of Grays Harbor, Public Utility District No. 1 of Grays Harbor County and Washington Public Power Supply System, dated February 26, 1999, as amended by the Satsop Transfer Amendatory Agreement between Energy Northwest; Grays Harbor County, Public Utility District No. 1 of Grays Harbor County and the Port of Grays Harbor (collectively, Satsop Redevelopment Project); and Grays Harbor Public Development Authority ("PDA"), dated January 27, 2000.
  - a. Assignment between Energy Northwest and Company dated December 5, 2001.
2. Letter dated January 18, 2001 from Energy Northwest to PDA requesting consent to the assignment and transfer of assets to Company.
3. Letter dated March 2, 2001 from Company to PDA acknowledging the provisions of the CT Site Transfer Agreement and accepting the rights and obligations of a transferee.
4. Consent to Assignment and Assumption between Energy Northwest and Company dated April 25, 2001.
5. Purchase Agreement, between Company and Energy Northwest dated January 11, 2001, including Purchase Agreement Execution Certification of Melvin N. Hatcher, Assistant General Counsel for Energy Northwest dated January 15, 2001 (Energy Northwest Contract No. X-42062); provided, however, that the Company will not be required to pay the fee described in Section 6.1(c) of the foregoing agreement.
6. Supplemental Agreement Regarding Satsop Project between Company and Energy Northwest dated December 5, 2001.
7. Letter dated January 8, 2001 between Energy Northwest and Bonneville Power Administration ("BPA").
8. Letter Agreement dated October 25, 2001 between BPA and Energy Northwest.
9. Letter Agreement dated October 31, 2001 among Energy Northwest, BPA and Company.
10. Letter Agreement dated November 21, 2001 among Energy Northwest, BPA and Company.

11. Development Services Agreement between Company and Energy Northwest dated January 15, 2001 (Energy Northwest Contract No. X-42063); provided, that Energy Northwest is not currently performing services under the foregoing agreement except as to Support Request Documents 2, 7 and 10, as amended.
12. Support Request Document No. 02 dated February 1, 2001, Licensing and General Support for Satsop Combustion Turbine Project, pursuant to Development Services Agreement No. X42063 between Company and Energy Northwest.
  - a. Amendment No. 4 to Support Request Document No. 2 dated October 29, 2004, Licensing and General Support for Satsop Combustion Turbine Project, pursuant to Development Services Agreement No. X42063 between Company and Energy Northwest.
13. Support Request Document No. 7 dated March 19, 2002 regarding contract between United States Geological Survey and Energy Northwest for a river monitoring station pursuant to Development Services Agreement No. X42063 between Company and Energy Northwest.
  - a. Amendment No. 1 to Support Request Document No. 7 dated September 18, 2003, pursuant to Development Services Agreement No. X42063 between Company and Energy Northwest.
  - b. Amendment No. 2 to Support Request Document No. 7 dated October 13, 2004, pursuant to Development Services Agreement No. X42063 between Company and Energy Northwest.
14. Support Request Document No. 10 dated October 29, 2004, Provide Project Superintendent Services for Grays Harbor Energy Facility, pursuant to Development Services Agreement No. X42063 between Company and Energy Northwest.
15. Grant of Power Purchase Options from Company to Energy Northwest dated December 5, 2001.
16. Lease and Operating Agreement dated September 18, 2002 between Company and PDA.
17. Water Supply Agreement between Company and PDA dated September 18, 2002.
18. Site Security Contract between Fluor Constructors International, Inc. and Pacific Coast Security for or in connection with the Grays Harbor Energy Facility of Company dated September 11, 2001.
19. Contract Modification No. 1 dated August 28, 2002 to the Site Security Contract.
20. Letter dated November 6, 2002 from Fluor Constructors International, Inc. assigning the Site Security Contract to Company effective December 1, 2002 (includes consent of Pacific Coast Security to the assignment).
21. Contract Modification No. 2 dated November 26, 2002 to the Site Security Contract.
22. Contract Modification No. 3 dated December 18, 2002 to the Site Security Contract.

23. Letter Agreement dated June 10, 2003 between Pacific Coast Security and Company modifying the Site Security Contract ("Modification 4").
24. Letter Agreement dated June 24, 2004 between Pacific Coast Security and Company modifying the terms of the Site Security Agreement ("Modification 5").
25. Maintenance Agreement between Company and University Mechanical Contractors, Inc. dated December 20, 2002 (this agreement has expired; Company is seeking renewal).
26. Amendment dated February 4, 2003 to the Maintenance Agreement between Company and University Mechanical Contractors, Inc.
27. Letter Agreement dated November 20, 2003 between Company and University Mechanical Contractors, Inc.
28. Commercial Lease Agreement No. 2001-14 between PDA and Company dated September 5, 2001.
29. Amendment No. 1 dated September 30, 2002 to Lease No. 2001-14 between Company and PDA.
30. Amendment No. 2 dated effective as of December 1, 2003 to Lease No. 2001-L14 between Company and PDA.
31. Lease No. 2002-L13 between PDA and Company dated January 8, 2003.
  - a. Amendment #1 dated effective as of December 27, 2004 to Commercial Lease Agreement No. 2002-L13 between Company and PDA.
32. EFSEC Site Certification Agreement between the State of Washington and Energy Northwest, Satsop Power Plant Site, as amended (see Section 1 of Part 4.16(a) of the Schedules).
33. Purchase Order No. 30392-AO dated December 11, 2002 issued by Company to William Scotsman, as amended to date.
34. Purchase Order No. 30389-AO dated December 12, 2002 issued by Company to Stangland Construction Inc.
35. Purchase Order No. 30447-AO dated November 5, 2003 issued by Company to York International Corporation.
36. Purchase Order No. 30399-AO dated December 16, 2002 issued by Company to Airgas.
37. Purchase Order No. 30470-AO dated January 12, 2004 issued by Company to Fireguard Extinguisher Service.
38. Purchase Order No. 30405 dated January 7, 2003 issued by Aberdeen Sanitation Harbor Disposal.
39. Purchase Order No. 30406-AO dated January 7, 2003 issued by Company to West Coast Portables, as amended to date.

40. Limited Liability Company Agreement of Company entered into by Seller as the sole member, dated October 16, 2000.
41. First Amendment to the Limited Liability Company Agreement of Company, to be effective April 2, 2003.
42. Purchase Order No. 30417-AO dated March 4, 2003 issued by Company to Machinery Power & Equipment Co.

**Section B. Full Force and Effect.**

The following disclosures are made with respect to Sections 4.13(c) and (d):

1. The following Aalborg and Erie Power Technology, Inc. ("EPTI") agreements (collectively, the "Aalborg/EPTI Agreements") do not fit within the definition of Material Contracts. Nonetheless, Seller discloses that, with respect to the following agreements, the counterparty has filed for bankruptcy:
  - a. Purchase Order No. 30127-A0 dated December 4, 2001 between Aalborg Industries, Inc. and Seller for heat recovery steam generators.
  - b. Written confirmation dated August 6, 2002 that Seller has assigned to Company all of its rights, title and interest in equipment and services pursuant to Purchase Order No. 30127-A0.
  - c. Purchase Change Order No. 30127-A1 dated February 13, 2003 between Aalborg Industries, Inc. and Seller.
  - d. Purchase Change Order No. 30127-A2 dated July 29, 2003 between EPTI and Seller.
2. With respect to the Purchase Orders and contracts listed as Material Contracts in Section A above that have expired by their terms, goods and/or services continue to be provided and are being paid on a month-to-month basis.
3. York International Corporation has been performing warranty work on the chillers at the Project site under Purchase Order No. 30447-AO dated November 5, 2003.
4. The option to purchase permanent water rights under Section 10 of the Water Supply Agreement dated September 18, 2002 between the Company and PDA is no longer in effect, since the Company did not make the 2003 option fee payment and notice of expiration of the option was given by a letter dated June 3, 2004 from PDA's counsel to Company.

# **EXHIBIT B**



## Newsroom

### **Puget Sound Energy completes purchase of Sumas power plant 125-megawatt facility will help PSE meet customers' growing electricity demands**

BELLEVUE, Wash. (July 28, 2008)— Puget Sound Energy [utility subsidiary of Puget Energy (NYSE: PSD)] today announced that it has completed the purchase of a 125-megawatt (MW) power plant in northwest Washington to help the company meet its customers' steadily growing electricity demands.

The utility bought the natural-gas-fired power plant in Sumas, Wash., from Sumas Cogeneration Co., a subsidiary of National Energy Systems Co., based in Kirkland, Wash.

"This acquisition not only gives our customers another efficient, clean-burning source of power right here in our service territory, but the plant comes already connected to PSE's power-transmission grid and has direct pipeline access to the region's natural gas supply," said Kimberly Harris, PSE executive vice president and chief resource officer.

The approximately \$30 million transaction also gives PSE part ownership in a 3.7-mile pipeline that brings natural gas to the Sumas plant from the main Canadian gas-transmission pipeline into Washington state.

Built in 1993 near the U.S.-Canada border north of Seattle, the power plant is a combined-cycle cogeneration facility, capable of generating electricity using both a natural gas cycle and a steam cycle.

A growing customer base and the expiration of large purchased-power contracts in coming years are driving PSE's need to acquire a large amount of new power supplies. The utility estimated in 2007 that it will need approximately 2,600 average-megawatts (aMW) of new electricity supply by 2027 – roughly equivalent to the power load of two cities the size of Seattle.

With the Sumas transaction, PSE has acquired more than 830 MW of new power-supply capacity over the past three years. These acquisitions include the development of two large PSE wind facilities in Eastern Washington, the purchase of a 277-MW gas-fired combined-cycle power plant in Goldendale, Wash., and the long-term purchase of 50 MW of wind power from a wind facility in north-central Oregon. PSE also has constructed the Northwest's largest solar-power generating facility, a 500-kilowatt (KW) demonstration project located at PSE's Wild Horse Wind and Solar Facility near Ellensburg.

PSE continues to pursue other cost-effective power-supply resources, Harris said. The efforts include the utility's recently announced plan for installing approximately 50 MW of additional generating capacity to PSE's 229-MW Wild Horse facility. The utility also is considering various power-supply bids submitted by outside companies under a January 2008 "request for proposals" by PSE.

Conservation is another key element of PSE's long-range energy-supply strategy. The utility anticipates that it will, in essence, acquire more than 500 aMW of added power supply over the next two decades through expanded energy-efficiency services to customers. A power-demand reduction of that size would avert the need to build two medium-sized natural gas-fired power plants.

#### **Contact**

Roger Thompson, 888-831-7250

#### **About Puget Sound Energy**

Washington state's oldest and largest energy utility, with a 6,000-square-mile service area stretching across 11 counties, PSE serves more than 1 million electric customers and 735,000 natural gas customers, primarily in Western Washington. PSE meets the energy needs of its growing customer base through incremental, cost-effective energy efficiency, procurement of sustainable energy resources, and far-sighted investment in the energy-delivery infrastructure. PSE employees are dedicated to providing great customer service to deliver energy that is safe, reliable, reasonably priced, and environmentally responsible.

# **EXHIBIT C**



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## 400403 327510 0000

Site address: 601 W FRONT ST  
 Legal Description: LOT 2 SUMAS COGENERATION SHORT PLAT  
 AS REC BOOK 25 SHORT PLATS PG 84

Owner: SUMAS COGENERATION COMPANY LP  
 335 PARKPLACE #G110  
 KIRKLAND WA 98033-6238

Taxpayer: SUMAS COGENERATION COMPANY LP

### Property Characteristics

	Assessed Value	Total Acres		
Land:	413,650	7.03		
Imp:	0			
Total:	413,650			
Land Use:	9130 INDUSTRIAL			
Tax Dist:	660 SUMAS 506 L		F/P?	N
Zoning:	INDUSTRIAL		F/P Ac:	.00
Tax Status:	TAXABLE		Exempt Prog:	



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## 400403 325450 0001

Site address: 601 W FRONT ST

Legal IMPROVEMENTS ONLY-COGENERATION PLANT

Description:

Owner: SUMAS COGENERATION CO LP  
 ATTN BRUCE THOMPSON SR VP  
 335 PARKPLACE CENTER #110  
 KIRKLAND WA 98033-6238

Taxpayer: SUMAS COGENERATION CO LP

### Property Characteristics

	Assessed Value	Total Acres
Land:	0	.00
Imp:	45,000,000	
Total:	45,000,000	

Land Use:	4812 ELECTRIC GENERATION PLANTS		
Tax Dist:	660 SUMAS 506 L	F/P?	N
Zoning:	INDUSTRIAL	F/P Ac:	.00
Tax Status:	TAXABLE	Exempt Prog:	



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