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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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CATHERINE LAKEY, a single woman; GERTHA RICHARDS, a single woman; MICHAEL HELSOP, a single man; TROY FREEMAN and CAROLINA AYALA de FREEMAN, husband and wife; PATRICK McCLUSKY and MICHELLE McCLUSKY, husband and wife; SHAHNAZ BHUIYAN and ANN RAHMAN, husband and wife; STEVE RYAN and NORA RYAN, husband and wife; KEVIN CORBETT and MARGARET CORBETT, husband and wife; KATHRYN McGIFFORD, a single woman; and JACQUELYN MILLER, a single woman,

*Petitioners,*

v.

PUGET SOUND ENERGY, INC., a Washington corporation; and  
CITY OF KIRKLAND, a Washington municipal corporation,

*Respondents.*

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**BRIEF OF *AMICUS CURIAE* OF PUBLIC UTILITY DISTRICT  
NO. 1 OF CLARK COUNTY, WASHINGTON; PUBLIC UTILITY  
DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON;  
THE WASHINGTON PUBLIC UTILITY DISTRICTS  
ASSOCIATION; AND THE CITY OF SEATTLE BY AND  
THROUGH ITS CITY LIGHT DEPARTMENT**

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. IDENTITY AND INTERESTS OF AMICI ..... 2

    A. Clark Public Utilities ..... 3

    B. Snohomish County PUD ..... 4

    C. The Washington Public Utility Districts Association..... 5

    D. Seattle City Light ..... 6

III. STATEMENT OF THE CASE ..... 6

IV. ARGUMENT..... 7

    A. The Lakeys’ Nuisance Claims Fail As A Matter of Law Because There is No “Reasonable Basis” To Fear EMF, Especially At The Levels Involved Here..... 7

    B. The Lakeys’ Nuisance Claims Must Be Dismissed Because A Nuisance Cannot Arise From a Legally Mandated Activity. .... 15

    C. PSE Is Using The Substation Property Reasonably, And No Nuisance Liability Arises From a Reasonable Use of Property. .... 19

CERTIFICATE OF SERVICE ..... I

**TABLE OF AUTHORITIES**

**Cases**

*Aubol v. City of Tacoma*, 167 Wash. 442, 9 P.2d 780 (1932) .....7, 14

*Bradley v. American Smelting & Ref. Co.*, 635 F. Supp. 1154 (W.D. Wash. 1986).....passim

*City of Moses Lake v. United States*, 430 F. Supp. 2d 1164 (E.D. Wash. 2006).....11

*City of Redding v. FERC*, Nos. 09-72775, 09-72789, 09-72791, 2012 WL 3641658 (9<sup>th</sup> Cir. Aug. 27, 2012) .....3

*Deaconess Hosp. v. Washington State Highway Comm'n*, 66 Wn.2d 378, 403 P.2d 54 (1965) .....17

*Everett v. Paschall*, 61 Wash. 47, 111 P. 879 (1910).....12, 13, 14

*Ferry v. City of Seattle*, 116 Wash. 648, 203 P. 40 (1922).....12, 13, 14

*Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978).....3

*San Diego Gas & Elec. Co. v. Covalt*, 13 Cal.4th 893, 920 P.2d 669, 55 Cal. Rptr. 2d 724 (1996).....passim

*Trail v. Civil Eng. Corps, U.S. Navy, Navy Facilities Eng'g Command*, 849 F. Supp. 766 (W.D. Wash. 1994) .....11

*Wilson v. KeyTronic Corp.*, 40 Wn.App. 802, 701 P.2d 518 (1985).....12

**Statutes**

RCW 35.92.050 .....6

RCW 54.16.040 .....3, 4

RCW 7.48.160 .....15, 17, 18

RCW 80.04.500 .....6

RCW Chapter 54.12 .....4

**Other Authorities**

Mandatory Reliability Standards for the Bulk-Power System, 139 FERC ¶ 61,097 (2012).....16

North American Electric Reliability Council, Technical Concepts Document: Balancing and Frequency Control (Part I), Nov. 9, 2009 ...16

Restatement (Second) of Torts § 821D .....8, 19

World Health Organization, “Electromagnetic Fields (EMF): What Are Electromagnetic Fields?” .....3

## I. INTRODUCTION

The electricity industry in Washington is unique because consumer-owned utilities (“COUs”) - as opposed to privately-owned utilities like Respondent Puget Sound Energy (“PSE”) (generally referred to as “investor-owned utilities” or “IOUs”) – provide service to over half the population of the state. To provide this essential service, amici (collectively, the “Washington COUs”) operate a wide variety of electric equipment, all of which, as a matter of physics, creates at least small electromagnetic fields (“EMFs”) as electric current passes through it. Because the imposition of liability on electric utilities based on unfounded fears of adverse effects from EMFs could substantially increase the costs of providing electric service, and complicate the construction of critical transmission facilities, the Washington COUs support PSE and urge this Court to reject nuisance liability for EMF exposure.

Petitioners Lakey *et al.* (collectively, “Lakeys” or “Plaintiffs”) concede that no scientifically reliable causal relationship between EMF exposure and human disease has ever been demonstrated. Instead, the Lakeys claim that they experience a reasonable fear of EMF produced by the PSE substation at issue in this case because health authorities generally conclude that the link between EMF exposure and human health effects has never been *disproven*. But the Lakeys’ theory fails because Washington courts have always required positive evidence of substantial harm to establish a nuisance. There is no reliable scientific evidence of

substantial harm, and no reasonable basis to fear EMF exposure, especially at the levels created by the PSE equipment at issue here.

In addition, the Washington COUs, like PSE, are legally compelled to provide electric power to their customers at a frequency of 60 Hertz (“Hz”). Under Washington law, a nuisance cannot arise from a legally required action. The Lakeys have failed to demonstrate that PSE operates its substation in way that is outside legal or industry norms.

The Lakeys cannot avoid this bar by claiming that a nuisance exists because PSE can relocate its electrical equipment. In order to provide electric service to their residential customers, all electric utilities must operate electrical equipment, including wires, meters, transformers, and substations on and near residences in order to provide electric service. Because this equipment cannot be moved to a different location away from residential customers, and because the equipment must by law be operated at 60 Hz, the Lakeys’ nuisance claims are barred as a matter of law.

## **II. IDENTITY AND INTERESTS OF AMICI**

Collectively, the Washington COUs represent nearly 1.4 million residential, commercial, industrial, irrigation, and other electric consumers across the state of Washington, ranging from the citizens of its largest city to some of its least populous and remote counties. Like PSE, the Washington COUs collectively operate tens of thousands of circuit-miles of electric lines, hundreds of substations, transformers, generators, and

other equipment.<sup>1</sup> This equipment is necessary to deliver electric power, which the courts have long recognized is “a necessity of modern life,” the loss of which may “threaten health and safety.”<sup>2</sup> Because EMF is produced by electrical currents, all this equipment necessarily produces low-frequency EMFs.<sup>3</sup> Unlike PSE, the Washington COUs are owned by the citizens of the communities they serve and operate under distinct legal and regulatory regimes. Like PSE, the Washington COUs and their citizen-owners face potentially unbounded liability should this Court allow this case to proceed based upon the theory propounded by the Lakeys.<sup>4</sup>

#### **A. Clark Public Utilities**

Clark Public Utilities (“Clark,” officially known as “Public Utility District No. 1 of Clark County, Washington”) is a Public Utility District (“PUD”) formed by a vote of the people of Clark County in 1938 to operate under Title 54 RCW. Under authority conferred by RCW 54.16.040, Clark provides electric service to 184,000 customers in Clark

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<sup>1</sup> See *San Diego Gas & Elec. Co. v. Covalt*, 13 Cal.4<sup>th</sup> 893, 920 P.2d 669, 677-78, 55 Cal. Rptr. 2d 724 (1996) (“*Covalt*”) (describing electric transmission and distribution systems and equipment).

<sup>2</sup> *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978).

<sup>3</sup> See generally World Health Organization, “*Electromagnetic Fields (EMF): What Are Electromagnetic Fields?*” (available at: <http://www.who.int/peh-emf/about/WhatisEMF/en/>).

<sup>4</sup> Although “it is a source of regular confusion among those who do not customarily reside in the world of regulated utilities,” the “public utilities” regulated by the WUTC are, in fact, privately-owned IOUs. *City of Redding v. FERC*, 9<sup>th</sup> Cir. Nos. 09-72775 *et al.*, Slip op. at n. 5 (issued Aug. 27, 2012). On the other hand, *amicus* are all public agencies, owned by the public they serve. The Lakeys’ discussion of Kirkland’s planning regulations compounds this semantic confusion by claiming that, under Kirkland’s zoning code, PSE is not a “public utility.” Lakeys Br. at 8. In fact, Kirkland defines a “Public Utility” to mean any company, whether privately-held or publicly-owned, that provides utility service, including electricity, to members of the public. Kirkland Zoning Code 5.10.745 (available at: [http://kirklandcode.ecitygov.net/CK\\_KZC\\_Search.html](http://kirklandcode.ecitygov.net/CK_KZC_Search.html)). PSE, therefore, is a “Public Utility” under this definition.

County. Like all PUDs, Clark is governed by an elected Board of Commissioners,<sup>5</sup> which has the “full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges, and price” of electricity sold by the PUD “free from the jurisdiction and control of the utilities and transportation commission, in all things.”<sup>6</sup> Hence, Clark, like all other Washington PUDs, is directly responsible to the citizens it serves through its elected Commissioners. Those citizens are the ultimate owners of all the utility’s assets and are ultimately responsible to pay all its costs. By contrast, PSE and other IOUs are owned by shareholders who may or may not be citizens of the communities they serve, and the rates, terms and conditions of IOU service are set by the WUTC.

In order to provide electric service to the citizens it serves, Clark operates a total of approximately 4,313 circuit-miles of electric lines, 48 substations, 6 switching stations, and more than 55,000 transformers, in its 521.3 square mile service territory. Clark also operates the River Road Generating Plant, a major electric generation facility.

#### **B. Snohomish County PUD**

Snohomish County PUD (“Snohomish,” officially known as “Public Utility District No. 1 of Snohomish County, Washington”) is, like Clark, a PUD formed under Title 54 RCW. Snohomish was formed by a vote of the people of Snohomish County in 1936 and, like Clark, is

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<sup>5</sup> See Chapter 54.12 RCW.

<sup>6</sup> RCW 54.16.040.

governed by an elected Board of Commissioners and is, through the democratic process, guided by the wishes of the citizens it serves.

Snohomish serves approximately 320,000 customers in 2,200 square miles of service territory in Snohomish County and on neighboring Camano Island. To provide electric service to its citizen-owners, Snohomish operates approximately 6,000 circuit-miles of electric lines and 85 substations. Snohomish also operates a number of generation facilities, the largest being the Henry M. Jackson Hydroelectric Project on the Sultan River in central Snohomish County.

**C. The Washington Public Utility Districts Association**

The Washington Public Utility Districts Association (“WPUDA”) represents 27 PUDs operating in the State of Washington, including 20 PUDs that provide electric service to Washington consumers across the State.<sup>7</sup> Like Clark and Snohomish, WPUDA’s members are PUDs formed under RCW Title 54 by a vote of the citizens of their respective counties. Each PUD is governed by the citizens it serves through Commissioners elected by those citizens. Together, WPUDA members serve more than 375,000 residential, 48,000 commercial, 9,600 irrigation, and 11,500 industrial and other customers. They own more than 27,000 miles of electric lines.

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<sup>7</sup> Clark and Snohomish are currently not members of WPUDA.

#### **D. Seattle City Light**

Seattle City Light (“SCL,” officially known as “The City of Seattle, City Light Department”) provides electric service to more than 400,000 residential, commercial and industrial customers in and around the City of Seattle. SCL operates under authority of RCW 35.92.050, which provides the City with “full authority to regulate and control the use, distribution, and price” of electric service. Like the PUDs, SCL is not subject to WUTC regulation.<sup>8</sup> SCL operates under the control of the citizens of Seattle, with rates, terms, and conditions of service set by the Seattle City Council.

SCL operates more than 2,800 miles of electric lines and 20 substations in its 131-square-mile service territory. SCL also operates several major generation projects, including five large hydroelectric projects on the Skagit and Pend Oreille Rivers.

### **III. STATEMENT OF THE CASE**

The Washington COUs adopt the statement of the case as set forth by Respondent PSE. In particular, we emphasize: (1) actual EMF exposures at the edges of Plaintiff’s properties closest to the substation are in the range of 7 to 10 milligauss (“mG”);<sup>9</sup> (2) the exposures are far below the public exposure limits recommended by the international organizations that have studied the scientific evidence concerning EMFs; and, (3) EMF

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<sup>8</sup> RCW 80.04.500.

<sup>9</sup> EMFs are measured in Gauss units. One mG is 1/1000 of a Gauss unit. *See Covalt*, 920 P.2d at 675.

exposures on the Lakeys' properties generally declined with the construction of the PSE substation at issue in this case, and further declines are expected in the future.<sup>10</sup>

#### IV. ARGUMENT

##### A. The Lakeys' Nuisance Claims Fail As A Matter of Law Because There is No "Reasonable Basis" To Fear EMF, Especially At The Levels Involved Here.

EMF cannot be detected by the human senses. Accordingly, there is no basis for a nuisance action based upon EMF creating a smell, sound, or other offensive sensory impact or physical discomfort. The only basis upon which the Lakeys can claim a nuisance, then, is that EMF causes a "reasonable fear" that reduces the value of their property.

Under Washington law, such "mental distress is compensable in nuisance only under limited circumstances."<sup>11</sup> First, the Lakeys must demonstrate that their fear is "well grounded" and "based upon facts", that there is a "reasonable apprehension of danger," and that there is a "reasonable probability of damage" from PSE's operations.<sup>12</sup> Second, the Lakeys must demonstrate either that their fear is "manifested by physical symptoms"<sup>13</sup> or that they have suffered "an actual or threatened invasion" of their "person or security."<sup>14</sup> The Lakeys' claims do not pass either bar.

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<sup>10</sup> PSE Br. 2-4, 13.

<sup>11</sup> *Bradley v. Am. Smelting & Ref. Co.*, 635 F. Supp. 1154, 1158 (W.D. Wash. 1986).

<sup>12</sup> *Aubol v. City of Tacoma*, 167 Wn. 442, 448-49, 9 P.2d 780 (1932).

<sup>13</sup> *Bradley*, 635 F. Supp. at 1158 (citing *Miotke v. City of Spokane*, 101 Wn.2d 307, 332, 678 P.2d 803 (1984); *Hunsley v. Girard*, 87 Wn.2d 424, 436, 553 P.2d 1096 (1976)).

<sup>14</sup> *Id.* (citing *Murphy v. City of Tacoma*, 60 Wn.2d 603, 620-21, 374 P.2d 976 (1962); *Wilson v. KeyTronic Corp.* 40 Wn. App. 802, 809-10-7010, 2d 518 (1985)).

The Lakeys' claim fails the first test because their fears have no "reasonable basis," and they therefore cannot demonstrate "actual and substantial damages," which are required for a plaintiff to recover nuisance damages under Washington law.<sup>15</sup> The Lakeys base their claim of fear on a body of scientific evidence which, they concede, demonstrates no "definitive cause-effect relationship" between EMF exposure and human disease.<sup>16</sup> Hence, the Lakeys' claim amounts to this: unless their fear of disease from some agent can be definitively *disproved*, they can state a claim for reasonable fear of that agent.

But this evidence on its face fails Washington's requirement that the proponent of a nuisance claim based upon "reasonable fear" must provide positive evidence demonstrating a reasonable probability of injury. And, for the reasons ably demonstrated by PSE, the Lakeys' injury case relies entirely on an expert witness who uses a flawed scientific methodology, cherry-picking selected results from the scientific literature that support his preconceived view while ignoring the vast majority of results that contradict that view. The Washington COUs, therefore, agree with PSE that this testimony must be rejected under the well-established standards governing scientific testimony.

Further, if adopted, the Lakeys' theory threatens to create liability for exposure to common substances like coffee and pickled vegetables.

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<sup>15</sup> *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 695, 709 P.2d 782 (1985); *see also id.* at 689 (for a private nuisance, there is no liability without significant harm" (quoting Restatement (Second) of Torts § 821D, comment d, at 102 (1979)).

<sup>16</sup> Lakeys' Opening Br. at 4.

These substances, like EMF, are classified as “possible carcinogens” because the link between these substances and cancer has never been definitively *disproven*.<sup>17</sup> In fact, a scientific conclusion that a substance does *not* cause cancer is surprisingly rare - the International Agency for Research on Cancer has classified only one substance as non-carcinogenic.<sup>18</sup>

The Lakeys’ claims also fail the second test, because they cannot prove either manifest physical symptoms or an invasion of their person or security. The Lakeys make no claim that the EMF exposure from PSE’s substation has caused any physical symptoms in any person exposed to that EMF. Hence, the Lakeys’ claim can survive only if their person or security has been invaded. Under Washington law, the record evidence fails to meet this test.

As the un rebutted record testimony demonstrates, the highest EMF exposures on the Lakeys’ properties nearest to PSE’s substation and powerlines are between 7 and 10 mG.<sup>19</sup> This is far below exposure limits recommended by authoritative international agencies. For example, the International Council on Non-Ionizing Radiation Protection recommends an exposure limit of 2,000 mG for the general public and 10,000 mG for occupational exposures.<sup>20</sup> Hence, *the highest* exposure experienced by

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<sup>17</sup> R/P Tr. 4/25 at 145.

<sup>18</sup> R/P Tr. 4/25 at 144-45.

<sup>19</sup> R/P Tr. 4/27 at 19, 22-23.

<sup>20</sup> R/P Tr. 4/27 at 8-12. The Institute of Electrical and Electronics Engineers recommends a much higher minimum exposure level, 9,000 mG for the general public. *Id.* at 9.

any Plaintiff would have to increase by a factor of 200 to reach the *lowest* recommended exposure limit, an exposure limit set with a safety factor of ten.<sup>21</sup>

Because the EMF exposures created by PSE are far below recommended public exposure standards,<sup>22</sup> the Lakeys cannot demonstrate an invasion of either their person or security that is actionable under Washington law. The principle is demonstrated by the U.S. District Court's decision in *Bradley v. American Smelting & Refining Co.*,<sup>23</sup> which, after a referral to this Court to clarify relevant Washington law,<sup>24</sup> dismissed a nuisance claim based upon a "reasonable fear" claim. In *Bradley*, plaintiffs brought suit against the owner of a copper smelter claiming that, by depositing particles of arsenic and cadmium on their land, the smelter had created a nuisance. Like the Lakeys here, the *Bradley* plaintiffs claimed that, although the arsenic and cadmium were imperceptible and produced no physical symptoms or discomfort, worries about possible health effects from exposure to these substances constituted a nuisance. The court rejected these claims, concluding that, because the concentrations of arsenic and cadmium in the plaintiffs' soil were below

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<sup>21</sup> *Id.* at 10-11.

<sup>22</sup> Unlike the cases discussed in the text, Washington imposes no legal limit on exposure to EMFs. In the absence of such a legally-mandated exposure threshold, the relevant Washington cases suggest that a nuisance case cannot be maintained for exposure to EMF at any level. For purposes of our argument, however, we assume that the exposure limits recommended by credible international institutions can substitute for legally enforceable exposure limits on hazardous substances, like arsenic, addressed in the Washington cases.

<sup>23</sup> 635 F. Supp. 1154.

<sup>24</sup> *See Bradley*, 104 Wn.2d at 678.

levels that would produce human health effects, there was no invasion of either the person or security of the plaintiffs, and their nuisance claim, therefore, failed as a matter of law.<sup>25</sup>

Similarly, the same court in *Trail v. Civil Eng'r Corps, U.S. Navy, Navy Facilities Eng'g Command*,<sup>26</sup> rejected a claim that leakage of more than 100 contaminants from the Navy's Manchester Fuel Depot onto neighboring properties created a fear-based nuisance, finding that the contaminants were "far below any level that would raise concerns under existing law."<sup>27</sup> Applying Washington nuisance law, the court rejected the nuisance claim because, although the lack of definitive evidence concerning the health effects of these substances "probably [did] not relieve [plaintiffs] of anxiety or emotional distress associated with their health concerns," emotional distress by itself cannot be the basis of a recovery in the absence of evidence of "ill health, physical discomfort, or health risk" resulting from the alleged contamination.<sup>28</sup> Similarly, in *City of Moses Lake v. United States*,<sup>29</sup> which involved contamination of Moses Lakes' domestic water supply by trichloroethylene ("TCE"), the court concluded that, under Washington law, Moses Lake could not maintain an action for nuisance based on its "worrie[s] about possible health risks" of TCE pollution because the TCE in its wells did not exceed safety

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<sup>25</sup> *Bradley*, 635 F. Supp. at 1158.

<sup>26</sup> 849 F. Supp. 766 (1994).

<sup>27</sup> *Id.* at 767.

<sup>28</sup> *Id.* at 768.

<sup>29</sup> 430 F. Supp. 2d 1164 (E.D. Wash. 2006).

thresholds established under the Federal Safe Drinking Water Act, and the presence of TCE, therefore, posed no “actual danger” to the citizens of Moses Lake.<sup>30</sup>

The Lakeys rely heavily on isolated quotes from two early cases of this Court, *Ferry v. City of Seattle*<sup>31</sup> and *Everett v. Paschall*,<sup>32</sup> to suggest that, even in the absence of credible scientific support for a causal relationship between EMF and harm to human health, they may bring a claim for nuisance based upon “reasonable fear.” The Lakeys go so far as to claim that “reasonable fear” may be based on nothing more than reports, no matter how incredible, turned up in an internet search.<sup>33</sup> But internet rumors cannot substitute for credible scientific or physical evidence to prove the Lakeys’ fears are reasonable and the cases relied upon by the Lakeys do not support their broad reading.

On the contrary, in *Ferry*, which involved a claim of nuisance based upon Seattle’s proposed construction of a reservoir in Volunteer Park directly above the plaintiffs’ residences, the record contained evidence that leakage from the proposed reservoir was inevitable, that the soil underlying the proposed dam was prone to slides and had failed in similar circumstances, that disasters had previously occurred from dam

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<sup>30</sup> *Id.* at 1183. In *Wilson*, 40 Wn.App., at 810, by contrast, the Court of Appeals found that an actionable nuisance had occurred where the plaintiffs’ well water was contaminated by 1-1-1 trichloroethane, a substance classified as “extremely hazardous” by the State of Washington, at levels found to be higher than acceptable by the U.S. Environmental Protection Agency.

<sup>31</sup> 116 Wash. 648, 203 P. 40 (1922).

<sup>32</sup> 61 Wash. 47, 111 P. 879 (1910).

<sup>33</sup> Plaintiff Reply Br. at 8.

failures, and that plaintiffs lived immediately downhill from the dam.<sup>34</sup>

Taken as a whole, this Court concluded, the record evidence “supports a reasonable expectation that disaster may happen,” with catastrophic consequences for the immediately adjacent property.<sup>35</sup>

Similarly, in *Paschall*, which involved claims that a tuberculosis sanitarium located in a residential neighborhood constituted a nuisance, the record demonstrated that tuberculosis caused one seventh of all deaths in the United States and that in the early twentieth century, when that case was decided, there was no known treatment for the disease.<sup>36</sup> By contrast, there has never been a documented case of EMF causing any instance of illness, much less a death, in the United States or anywhere else in the world.

In addition, the record in *Paschall* identified specific mechanisms by which tuberculosis could be spread to neighbors of the sanitarium -- by flies spreading germs from the sputum of sanitarium residents and by the failure of those residents to follow the strict sanitary protocols necessary to prevent spread of the disease.<sup>37</sup> By contrast, no mechanism has ever been identified by which EMF can be shown to cause human disease.<sup>38</sup> Accordingly, the *Paschall* plaintiffs demonstrated “more than a

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<sup>34</sup> *Ferry*, 116 Wash. at 663.

<sup>35</sup> *Id.*

<sup>36</sup> *Paschall*, 61 Wash. at 49-50.

<sup>37</sup> *Id.* at 53-54.

<sup>38</sup> PSE Br. At 6-8.

tendency to injury,” but evidence of “appreciable . . . tangible, actual, measurable, or subsisting” danger.<sup>39</sup>

Any doubt that a property owner’s fear may constitute a nuisance, without a reasonable basis for that fear, was erased by this Court’s decision in *Aubol v. City of Tacoma*,<sup>40</sup> decided a decade after *Ferry*. Relying on *Ferry*, Aubol, who owned property eight miles downstream from Tacoma’s Cushman Dam, claimed that the dam created a reasonable fear of damage to the property because of the threat of dam failure. This Court rejected Aubol’s claim, concluding that the property owner’s “apprehension that at some future time the dam may break and the impounded waters escape is an ill-defined fear. . . not based on any tangible reason,” and that the property owner could not demonstrate a “reasonable probability” that the dam would fail and damage his property.<sup>41</sup> This Court distinguished *Ferry* on the ground that the property owners there “dwelt within the shadow of the reservoir” and that they had provided evidence of the “probable breaking of the reservoir” based upon “the nature of the soil, the contour of the ground, and the prevalence of slides,” all of which demonstrated a “reasonable expectation that disaster would happen.”<sup>42</sup>

In short, the Lakeys’ claim fails because there is no reasonable scientific basis for fearing that exposure to EMF, especially at the levels

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<sup>39</sup> *Id.* at 52.

<sup>40</sup> 167 Wash. 442.

<sup>41</sup> *Id.* at 448-49.

<sup>42</sup> *Id.* at 449-50.

involved in this case, will cause any health effects. Washington law is clear that, in order to establish a link between exposure to an intangible agent like EMF and a “reasonable fear,” the Lakeys are required to demonstrate a clear causal relationship between EMF exposure produced by PSE’s substation and power lines, and human health effects. The Lakeys have failed to provide such evidence.

The Lakeys’ claim fails for a second reason. The undisputed record evidence demonstrates that PSE’s construction of the Kirkland substation actually *reduced* the EMF exposure of most Plaintiffs and that further reductions are expected.<sup>43</sup> The Lakeys’ basic claim -- that PSE’s actions resulted in increased EMF exposure that reduced their property values – is, therefore, a *non sequitur*.

**B. The Lakeys’ Nuisance Claims Must Be Dismissed Because A Nuisance Cannot Arise From a Legally Mandated Activity.**

As PSE correctly notes,<sup>44</sup> RCW 7.48.160 provides that nuisance claims are barred if an activity is “done or maintained under express authority of a statute.” PSE also correctly notes that it is required under a regulation adopted by the WUTC to provide electric service to its customers at 60 Hz, and that, because 60-Hz electric currents necessarily create 60-Hz EMFs, the Lakeys’ nuisance claim is barred.<sup>45</sup>

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<sup>43</sup> R/P Tr. 4/27 at 19, 22-23.

<sup>44</sup> PSE Br. at 21-22.

<sup>45</sup> See *City of Moses Lake*, 430 F. Supp. 2d at 1181 (dismissing nuisance claims for well water pollution as beyond Washington statute of limitations).

The 60 Hz requirement is not just a WUTC requirement, but has long been an industry standard enforced across North America.<sup>46</sup> It is now enforced under federal law. In 2005, Congress added Section 215 to the Federal Power Act, which makes compliance with reliability standards mandatory for all “users, owners and operators” of the nation’s bulk-power system.<sup>47</sup> Acting under this authority, the Federal Energy Regulatory Commission (“FERC”) in 2007 adopted mandatory frequency control regulations, setting forth a variety of requirements electric utilities and system operators must meet so that the entire North American electric system operates at the standard 60 Hz frequency, and that deviations from that standard are within technically acceptable bounds.<sup>48</sup> Thus, the requirement to maintain the operating frequency of the entire interconnected North American electric system at 60 Hz is now a mandatory standard, enforceable by FERC, which (unlike WUTC rules and most FERC regulations) covers IOUs and COUs alike.

Because electric service must by law be provided at 60 Hz, and EMFs are a necessary result of providing 60-Hz electricity, the Lakeys’ nuisance claims are barred. The Lakeys could only maintain this action against PSE if they produced evidence that PSE is conducting this legally

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<sup>46</sup> See *Covalt*, 920 P.2d at 675. See generally *North American Electric Reliability Council, Technical Concepts Document: Balancing and Frequency Control (Part I)*, Nov. 9, 2009) (available at [http://www.nerc.com/docs/oc/rs/NERC\\_Balancing\\_and\\_Frequency\\_Control\\_Part\\_1\\_9Nov2009\\_%28Revision2%29.pdf](http://www.nerc.com/docs/oc/rs/NERC_Balancing_and_Frequency_Control_Part_1_9Nov2009_%28Revision2%29.pdf)) (explaining how 60 Hz frequency is maintained across the North American electric system).

<sup>47</sup> 16 U.S.C. § 824o.

<sup>48</sup> See *Mandatory Reliability Standards for the Bulk-Power System*, 139 FERC ¶ 61,097 (2012) (describing initial adoption of mandatory frequency response standards in FERC Order No. 693 and subsequent refinements).

required activity in an improper or unusual manner that produces EMF exposure above that expected from normal electrical operations.

This Court's opinion in *Deaconess Hospital v. Washington State Highway Commission*<sup>49</sup> illustrates the principle. There, this Court rejected a claim that construction of a highway immediately adjacent to a hospital constituted a nuisance even though noise and fumes from highway traffic would render a significant part of the hospital unusable. Because the legislature had not only authorized construction of the highway, but mandated the particular route pursued by the Highway Commission, RCW 7.48.160 barred the nuisance action.<sup>50</sup> In light of the legislature's mandate, the hospital could not maintain a nuisance action based upon the location of the highway, but had to prove that the Highway Commission created a nuisance as a result of faulty design, improper maintenance, or some other deviation from standard highway construction and maintenance.<sup>51</sup>

Likewise, the Lakeys can maintain an action against PSE here only by demonstrating that PSE has operated the relevant facilities in a negligent or substandard manner that produces EMFs in substantially greater quantities than would otherwise be expected by lawful operation at 60 Hz. But the Lakeys have proffered no such evidence and the record demonstrates that there is nothing unusual about the EMFs produced by

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<sup>49</sup> 66 Wn.2d 378, 403 P.2d 54 (1965).

<sup>50</sup> 66 Wn.2d at 408.

<sup>51</sup> *Id.*

PSE's Kirkland substation, which are consistent with EMFs produced by other substations and are lower than EMF levels produced by the pre-existing substation.<sup>52</sup>

The Lakeys assert that their nuisance claim is not barred by RCW 7.48.160 because PSE could have located its facilities elsewhere.<sup>53</sup> This is incorrect. Delivery of electric power to residential users requires meters, transformers, substations, and wires to be placed within neighborhoods and installed in and near residences, so that a continuous circuit is formed between the source of electric generation and the residences or places of work of the consumers who use that electricity. In addition, electricity can be put to use inside the home only if wiring and electrical appliances are installed, all of which create EMFs. Accordingly, as the California Supreme Court correctly observed, "Keeping electric fields out of the home would mean keeping *any* electricity from coming into or being used in the home."<sup>54</sup> Because PSE is required to provide electric service to all customers in its service territory at 60 Hz and providing that service necessarily requires electric equipment to be installed in and near residences, PSE is acting to comply with a legal mandate and Lakeys' nuisance claims are, therefore, barred by RCW 7.48.160.

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<sup>52</sup> CP 29, 553.

<sup>53</sup> Plaintiff Reply Br. at 14-15.

<sup>54</sup> *Covalt*, 920 P.2d at 678 (*quoting* U.S. Evtl. Protection Agency, Questions and Answers about Electric and Magnetic Fields (1992)).

**C. PSE Is Using The Substation Property Reasonable, And No Nuisance Liability Arises From a Reasonable Use of Property.**

This Court has established that “in private nuisance an intentional interference with the plaintiff’s use or enjoyment is not itself a tort, and *unreasonableness of the interference is necessary for liability.*”<sup>55</sup> As discussed in the previous section, there is nothing unreasonable about PSE’s use of its property for a substation. On the contrary, the substation is necessary for PSE to provide one of the necessities of modern life to its retail consumers, including the Lakeys, and the evidence shows PSE has operated the substation well within accepted industry norms. Accordingly, no liability should be attached to PSE’s actions.

Any other conclusion would expose all electric utilities, IOUs and COUs alike, to potentially enormous liability for exposure to an agent, EMFs, that is ubiquitous and arises by necessity from delivery of electric current to every residence and business having electric service. EMF exposure has now been studied intensively for decades and this large body of scientific research does not provide a reliable scientific basis to conclude that EMF exposure causes any disease or illness.

As this Court warned in its seminal *Bradley* decision, allowing liability in such circumstances serve “[n]o useful purpose,” and instead will result in electric utilities and other critical industries being “harassed,” while “the litigious few would cause the escalation of costs to the

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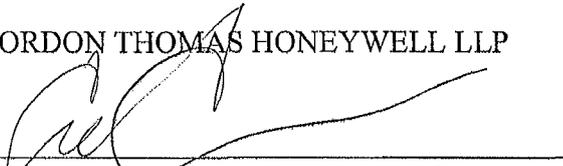
<sup>55</sup> *Bradley*, 104 Wn.2d at 695 (emphasis added) (citation omitted).

detriment of many.”<sup>56</sup> In balancing the essentially non-existent risks faced by the Lakeys with the benefits conferred upon society by the provision of electric service, this Court should conclude that the risks of harm from EMF exposure are so small that electric utilities and their customers should not be required to bear the burdens of such nuisance actions.<sup>57</sup>

Respectfully submitted this 18th day of September, 2012.

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By



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<sup>56</sup> *Bradley*, 104 Wn.2d at 692.

<sup>57</sup> *See Covalt*, 920 P.2d at 696.

## CERTIFICATE OF SERVICE

I, Karen Lang Crane, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on September 18, 2012, I caused a true and correct copy of the foregoing document to be served via email upon the following counsel of record in this case:

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Signed this 18<sup>th</sup> day of September, 2012 at Seattle, Washington.



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