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BEFORE THE KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON

Coalition of Eastside Neighbors for
Sensible Energy, a Washington non
profit corporation,

Petitioner

v.

City of Bellevue, a Washington municipal
corporation,

Respondent

Puget Sound Energy, Inc.,
Additional Party

No. 19-2-33800-8 SEA

OPENING BRIEF OF
PETITIONER CENSE

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1 **1. INTRODUCTION.**

2 Puget Sound Energy (“PSE”) has applied to the City of Bellevue to build and
3 operate a 3.3 mile electric transmission project from the south city limit north to a new
4 substation just north of Interstate 90 (I-90), referenced here as the “South Bellevue
5 Segment.” The proposal is a shorter version of PSE’s original plan to construct an 8.5
6 mile transmission line through the city and includes both new poles and high-tension
7 lines through long established residential areas in South Bellevue previously
8 designated by the City as a “sensitive site.”
9

10 The Coalition of Eastside Neighbors for Sensible Energy (CENSE), a
11 Washington non-profit corporation, was founded in 2014 to protect and preserve the
12 natural, environmental and residential values of Eastside neighborhoods, particularly
13 those in “sensitive sites” adjacent to the proposed PSE transmission lines. CENSE has
14 continuously participated in all available processes and proceedings regarding the
15 proposal.
16

17 Bellevue has adopted a unique ordinance that requires special and
18 individualized treatment for electric transmission proposals that pass through “sensitive
19 sites,” including those that traverse neighborhoods in which CENSE members reside.
20 Unlike typical zoning regulations that address just issues such as size, height and
21 appearance, the special ordinance adopted by the city requires a showing that the
22 proposal is needed and will provide useful service to those within the project area,
23 including detailed studies of both physical and technological alternatives, with special
24 provisions to avoid residential areas.
25
26
27
28

1 Ignoring the terms of the city's own ordinance and the State Environmental
2 Policy Act, the Bellevue Hearing Examiner and City Council approved the PSE
3 proposal. This approval should be reversed and remanded by this court for three
4 reasons.
5

6 First, though need for the project is the cornerstone of the application, neither
7 PSE nor the city would provide CENSE, or other interested citizens, with information
8 concerning the actual and projected usage of electricity in Eastside neighborhoods on
9 which to gage the allegation of need claimed by PSE.
10

11 Second, the City failed to consider and review the specific project at issue - the
12 3.3 mile South Bellevue Segment - under the criteria established by Section 255 of the
13 Bellevue Land Use code, instead accepting that the proposal was simply part of a
14 larger transmission line proposal.
15

16 Third, though voluminous, the environmental impact statements for the proposal
17 failed to consider the South Bellevue Segment, either as the project proposal or as a
18 reasonable alternative as required by SEPA.
19

20 Based on the foregoing, the court should reverse the land use decision made by
21 Bellevue and remand for further proceedings.
22

23 **2. REGULATORY AND PROJECT TIME LINE.**

24 Given the extended histories of both the regulatory background and proposal
25 background, the factual background of this proposal will be best considered as a time
26 line.
27

28 **2.1. Pre 2003.** PSE is a publicly owned company providing electricity and

1 natural gas to customers in Western Washington.

2 2.2. **Pre 2008.** The comprehensive plan of the City of Bellevue, in its utility
3 element, describes an existing electrical transmission line through the City. It identifies
4 an 18 mile proposal to connect two substations, Sammamish (in Redmond) to the north
5 and Talbot Hill (in Renton) to the south with potential new transmission lines. Under
6 the Bellevue land use code in effect at the time, the proposal would require a simple
7 conditional use permit.
8

9 2.3. **December 2007.** Puget Holdings, owner of PSE, files an application with
10 the Washington Utilities and Transportation Commission to transfer ownership to
11 private investors, which would result in PSE no longer being a publicly traded company.
12 AR 13650.
13

14 2.4. **March 3, 2008.** The Bellevue City Council adopts two ordinances relating to
15 PSE electrical system.
16

17 Ordinance 5802 (Attachment A hereto¹) amended the Utility Element of the
18 Bellevue Comprehensive Plan as it related to PSE transmission lines, providing new
19 text and changing maps describing the electric transmission system. It provided that “it
20 is important to insure that new and expanding electrical facilities are sensitive to
21 neighborhood character.” The Ordinance also included a new map (FIGURE UT.5a,
22 Att.A page 7) that identified the “Lakeside -Talbot 230 KV” as “Planned transmission
23 line upgrade to 230KV.” Figure UT.5a designated “Sensitive Sites” requiring special
24 review, however the area adjacent to the “Lakeside -Talbot 230 KV” line was not
25
26

27 ¹ The Court is request to take judicial notice of ordinances related to the project at issue here.
28

1 designated as a sensitive site.

2 Ordinance 5805 amended the Bellevue Land Use Code (“LUC”) consistent with
3 Ordinance 5802. See Attachment B. Ordinance 5805 enacted a new and unique set of
4 standards for new or expanded “electric utility facilities” that was codified in the LUC at
5 20.20.255 (hereinafter “Section 255”). The full text of Section 255 is found in
6 Attachment C to this brief. As will be discussed in more detail below, Section 255
7 distinguished between projects on “Sensitive Sites” and those not on sensitive sites.
8 Projects on non-sensitive sites required only an administrative conditional use permit,
9 while those on Sensitive Sites required compliance with the “Alternative Siting
10 Analysis” (“the ASA”) in Subsection D. The ASA required a) consideration of a
11 minimum of three alternative site options (with at least one in the district “primarily
12 served” by the project), b) consideration of whether the project was “needed” where the
13 facility was proposed, c) a detailed “location selection criteria” preferring non
14 residential areas, and d) a detailed analysis of the “range of technologies” considered
15 in the alternatives review. Section 255 specifically referred to Figure UT-5a of the
16 comprehensive plan, showing locations of PSE’s facilities.
17
18
19

20 2.5. **December, 2013.** PSE announces it will apply for permits to build an 8.5
21 mile 230 kV electric transmission line in Bellevue, as part of a 16 mile line connecting
22 the Talbot Hill and Sammamish substations.
23

24 2.6. **January 2015 - 2015.** PSE convenes a Community Advisory Group to
25 address community values. Its final report was made public in January, 2015 (AR
26 1875) and identified the project under consideration as follows:
27
28

1 The Energize Eastside project will build a new electric substation and higher
2 capacity (230 kV) transmission line on the Eastside. The new 230 kV
3 transmission line will extend from the existing Sammamish substation in
4 Redmond to the existing Talbot Hill substation in Renton, connecting with a new
5 substation site in between.

6 AR 1879. The South Bellevue Segment was not offered as an alternative during these
7 meetings.

8 **2.7. February 20, 2015.** PSE and the cities of Renton, Kirkland, Bellevue,
9 Newcastle and Redmond (“the cities”) sign an “Interagency Agreement” (See
10 Attachment F) for SEPA analysis for the PSE transmission line identified as the “most
11 viable solution type [which] was a combination of adding a new substation with a 230 kV
12 transformer and connecting it with the Talbot and Sammamish substation via a new 230
13 kV transmission line.” However, no application for said proposed transmission line was
14 filed, leaving the actual plan for the line undefined.

15 **2.8. August 3, 2015.** The Bellevue City Council passes Ordinance 6251 which
16 updates the Bellevue Comprehensive Plan. The updated plan amends the previous
17 Utilities Element by deleting Figure UT-5a. In its place, a new map of electric facilities
18 (Map UT7) was adopted which “shows the general locations and conceptual alignments
19 of Puget Sound Energy’s planned facilities together with the City’s sensitive siting
20 classifications.” See Attachment D. Significantly, the proposed PSE 230 kV
21 transmission line was changed from a non-sensitive site to “Sensitive Siting,” requiring
22 alternative siting analysis. The change in designation is described at page 131 of the
23 comprehensive plan:
24
25

26 Map UT7 identifies planned electrical facilities that have the potential to create
27 significant incompatibilities with Bellevue neighborhoods. It reflects an analysis
28

1 of planned facility locations and manner of expansion anticipated by Puget Sound
2 Energy's system plan. Such sensitivity factors as proximity to residential
3 neighborhoods, visual access, and expansion within or beyond an existing facility
4 border were considered in identifying potential incompatibilities. The early
5 screening represented in Figure UT7 identifies a list of facilities that will require
6 special regulatory siting scrutiny. This is intended to increase transparency of the
7 siting process for Puget Sound Energy and the public, while also ensuring the
8 utility's ability to meet system needs.

9 (Emphasis supplied.)

10 **2.9. January, 2016.** PSE and the cities issue the Phase 1, Draft Environmental
11 Impact Statement (EIS).² (AR 012465). The document considers only the full 16 mile
12 transmission line and does not mention a possible permit application for only a portion
13 of the line. Comments are solicited and submitted by agencies and private citizens,
14 including CENSE.

15 **2.10. March 14, 2016.** The comment period for the Phase 1 DEIS ends.

16 **2.11. May 8, 2017.** PSE and the cities issue the Phase 2 DEIS, which once again
17 considers only the full 16 mile transmission line and does not mention a possible permit
18 application for a shorter line. AR 11619. Again, comments are submitted by numerous
19 agencies, groups and individuals.

20 **2.12. June 21, 2017.** The comment period on the Phase 2 DEIS ends.

21 **2.13. September 8 , 2017.** PSE for the first time files an actual application for a
22 project. Instead of applying for the 18 mile transmission line - the exclusive object of
23 study since 2013 - the application is only for the short 3.3 mile South Bellevue
24

25
26 ² Preparing two draft impact statements before issuing a final impact statement is not contemplated
27 by the SEPA rules. Standard practice is that the final EIS will be issued within sixty days of the end of the
28 comment period for the DEIS. WAC 197-11-460(6).

1 Segment.³ AR 1.

2 2.14. **September, 2017.** PSE submits its “Alternate Siting Analysis” as required
3 by Section 255. AR 1535. In the introduction, the ASA says the project will be
4 “constructed in two phases,” which “will allow PSE to keep the existing 115 kV facilities
5 partially in service during construction.” AR 1539. However, the ASA itself does not
6 provide alternative siting review for the South Bellevue Segment, but only for the whole
7 16 mile project. Indeed the ASA states, at page 23, (AR 1561):

8
9 The ideal location for the new transformer is in close proximity to PSE’s existing
10 Lakeside 115 kV substation, which provides the connection to the existing 115 kV
11 electrical system that serves the surrounding distribution substations. The new
12 230 kV to 115 kV transformer is the principal component that will allow the
13 Eastside electrical system to reliably operate and meet Federal Planning
14 standards. To operate the new transformer it must be served by approximately 18
15 miles of new high-capacity electric transmission lines (230 kV) extending from
16 Redmond in the north and Renton to the south.

17 2.15. **September 17, 2017.** In response to questions regarding the permitting for
18 the remaining (5.2 mile) segment lying within the city of Bellevue (hereinafter the “North
19 Bellevue Segment”) PSE says: “PSE anticipates submitting permits for the north portion
20 in Bellevue and Redmond in late 2017-early 2018.” DSD 13689 (the North and South
21 Bellevue Segments are shown on maps in the FEIS, AR 6900, 6902, 6904, 7125, 7126).

22 2.16. **December 17, 2017.** In response to an email, PSE states “we do not have
23 a projected submittal date for the north elements of the project.” AR 1107.

24 2.17. **March, 2018.** The final EIS for the proposal is published. AR 6793. Once

25
26 ³ Unlike a private business, PSE may apply to the Washington Utilities and Transportation
27 Commission to include all costs in the rate base of the utility together with a 9.8% return on investment.
28 According to filings with the Federal Energy Regulatory Commission, PSE has spent approximately
\$55,000,000 on this project through 2017. AR 12311.

1 again the document does not discuss segmented permitting for the project and does not
2 discuss the South Bellevue Segment as a separate project or as an alternative.

3
4 2.18. **January, 2019.** Bellevue publishes its Staff Report (AR 1314) for the
5 upcoming hearings before the Bellevue Hearing Examiner on the South Bellevue
6 Segment, addressing at pages 86-103 comments received from the public. In response
7 to the questions concerning whether the South Bellevue Segment “would be functional if
8 only one segment were permitted without the other,” the City responded:

9 The south segment of the Project provides additional capacity that addresses the
10 Project need and could function whether or not the north segment is built. The
11 north segment would provide redundancy in the supply of 230 kV power to the
12 substation.

13 AR 1413 (page 100 of staff report).⁴ Similarly at page 111 (AR 1424), after stating that
14 PSE has chosen to build its project in phases; Bellevue stated:

15 PSE’s analysis supported and demonstrated that operationally, the Project must
16 include the 230 kV transmission lines connecting the Talbot Hill substation in the
17 south to a new transformer in central Bellevue. The full build out of the “Energize
18 Eastside” project will include a similar connection from the Sammamish
19 substation to the north to provide redundancy, but the south portion of the Project
20 that is the subject of PSE’s current proposal can function independently

21 ⁴ PSE ran a major public relations campaign to “sell” its transmission proposal. Described in CENSE
22 Notebook Subsection 5.6 (013821). PSE hired PRW Communications (from Madison, Wisconsin) and its
23 principal Mark Williamson to run this campaign. As reflected on his website, Mr. Williamson’s specialty
24 was utility infrastructure work. *Id.* As described in the Notebook, his website references his proffered
25 ability to overcome “significant opposition” to get permits for transmission projects. *Id.* Mr. Williamson’s
26 strategy is summarized on the website as follows:

27 These projects have been successful because they were approached from the beginning as
28 political campaigns.

“Electing transmission lines, power plants and pipelines to public office” is a metaphor we
use at PRW for approaching these projects as an elected candidate would.

Using election techniques - polling, town meetings, open houses, advertising, door-to-door
visits - can dramatically change the debate about a project’s merits. We bring first-hand
experience to bring the winning play book to these projects.

As described in the CENSE notebook, PRW placed dozens of ads in local newspapers promoting the
project, using “election techniques,” but none discussed that the South Bellevue Segment would have
independent functionality.

1 2.19. **February 4, 2019.** In light of the statements in the Staff Report above,
2 CENSE files a motion with the Bellevue Hearing Examiner requesting that the hearing
3 on the South Bellevue Segment be continued until it can be consolidated with the
4 application for the North Bellevue Segment. AR 1068. PSE opposes the motion. AR
5 970.
6

7 2.20. **February 12, 2019.** As permitted by the Bellevue Hearing Examiner rules,
8 CENSE files a motion with the Bellevue Hearing Examiner to compel PSE to provide
9 data on actual electricity usage in the service area for the South Bellevue Segment and
10 computer models related to “need” for the proposal. AR 1108. PSE opposes this
11 motion. AR 987.
12

13 2.21. **March 5, 2019.** The Bellevue Hearing Examiner denies the CENSE
14 motions to continue and consolidate with the north segment application and the request
15 to compel data on actual electric usage and modeling data. AR 1300. The Hearing
16 Examiner’s order does not provide findings or any supporting analysis.
17

18 2.22. **March 28, March 29, April 3, April 8, 2019.** The Bellevue Hearing
19 Examiner conducts a public hearing on the PSE proposal.
20

21 2.23. **June 25, 2019.** The Hearing Examiner issues his Decision approving
22 PSE’s South Bellevue Segment application. AR 850.
23

24 2.24. **July 9, 2019.** As provided by code, appeals of the Hearing Examiner’s
25 decision are filed by five parties, including CENSE. AR 128.
26

27 2.25. **October 16, 2019.** The Bellevue City Council conducts a closed record
28 hearing on the five appeals of the Hearing Examiner’s decision, consisting of oral

1 argument without new evidence. AR 271.

2 **2.26. November 14, 2019.** The Bellevue Council meets to discuss and
3 deliberate on the appeals and directs staff to draft an ordinance incorporating and
4 adopting the findings of fact and conclusions of law from the Hearing Examiner's
5 decision and approving PSE's conditional use permit application. TR.1170 at 1192-93.

7 **2.27. December 2, 2019.** The Bellevue City Council adopts Ordinance 6494 (AR
8 1-3) denying the appeals of CENSE and other appellants and determining that:

9 The City's Land Use Code does not require PSE to submit one CUP⁵ application
10 for both the North and South segments and that the only CUP application before
11 the Hearing Examiner was for the South Bellevue Segment.

12 **2.28. December 23, 2019.** CENSE files this Land Use Petition Act suit
13 challenging the City's decision.

14 **3. STANDARD OF REVIEW.**

15 As described herein, the Examiner's and Council's decisions contained several
16 errors of fact and law, requiring reversal under the Land Use Petition Act. LUPA sets the
17 standards for review of decisions under RCW 36.70C.130(1), indicating reversal is
18 appropriate where:
19

- 20 (a) The body or officer that made the land use decision engaged in unlawful
21 procedure or failed to follow a prescribed process, unless the error was harmless;
22 (b) The land use decision is an erroneous interpretation of the law, after allowing
23 for such deference as is due the construction of a law by a local jurisdiction with
24 expertise;
25 (c) The land use decision is not supported by evidence that is substantial when
26 viewed in light of the whole record before the court;
27 (d) The land use decision is a clearly erroneous application of the law to the
28 facts;

⁵ "CUP" is Conditional Use Permit. See AR 1.

1 Particularly as noted in Section 7 of this brief, the City made multiple
2 interpretations of the meaning of the State Environmental Policy Act (RCW chapter
3 43.21C) ("SEPA") and the SEPA Rules (WAC Chap. 197-11). However, because SEPA
4 is a state law:
5

6 [T]he hearing examiner's legal conclusions in this case are not entitled to any
7 deference under RCW 36.70C.130(1)(b) because they involve interpretations of
8 state law, rather than Tacoma city ordinances. Accordingly, we review the
9 hearing examiner's legal conclusions de novo, without any special deference.
10 *Quality Rock*, 139 Wash.App. at 133, 159 P.3d 1.

11 *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn.App. 17, 38, 252 P.3d
12 382 (2011).

13 In the present case, the City interpreted provisions of Bellevue city codes,
14 including Section 255, and the provisions of the Bellevue Comprehensive Plan.

15 Generally:

16 The interpretation of a municipal ordinance is a question of law reviewed de
17 novo. *Ellensburg Cement Prods., Inc., v. Kittitas County*, 179 Wn.2d 737, 743,
18 317 P.3d 1037 (2014). We construe a municipal ordinance according to the rules
19 of statutory interpretation. *Ellensburg Cement*, 179 Wn.2d at 743.

20 *Dep't of Transportation v. City of Seattle*, 192 Wn.App. 824, 837, 368 P.3d 251 (2016).

21 When the meaning of statutory code language is plain on its face, the court must give
22 effect to that plain meaning as an expression of legislative intent. *City of Spokane v.*

23 *Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). A municipal ordinance is
24 presumed to mean exactly what it says, and these regulatory provisions are given their
25 plain and ordinary meaning. See *Ockerman v. King County Dept. of Development and*
26 *Environmental Services*, 102 Wn.App. 212, 216, 6 P.3d 1214 (2000).

27 While RCW 36.70C.130(1) provides that some deference ought to be given to
28

1 the City's legal interpretations of its codes, such deference is limited:

2 ¶ 7 Under RCW 36.70C.130(1)(b), a court may overturn a land use decision that
3 is "an erroneous interpretation of the law, after allowing for such deference as is
4 due the construction of a law by a local jurisdiction with expertise." This standard
5 does not require a court to give complete deference, but rather, " 'such deference
6 as is due.'" *Ellensburg Cement*, 179 Wn.2d at 753 (quoting RCW
7 36.70C.130(1)(b)). We do not defer to an interpretation that conflicts with the
8 plain language of the grading code exemption. *Waste Mgmt. of Seattle v. Utils. &*
9 *Transp. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994)).

10 *Dep't of Transportation*, 192 Wn.App. at 838-39.

11 The record before the Court demonstrates that the City committed multiple errors
12 under the foregoing standards of RCW 36.70C.130(1), requiring remand or reversal
13 under RCW 36.70C.140.

14 **4. SECTION 255 REQUIRES AN APPLICANT TO DEMONSTRATE PROJECT
15 NEED, CONSIDER APPROPRIATE ALTERNATIVES AND TECHNOLOGIES,
16 AND PASS A "LOCATION SELECTION HIERARCHY" ALL TO PROTECT
17 RESIDENTIAL AREA.**

18 It is fair to say that Section 255, adopted in 2008, is a unique piece of land use
19 legislation. See Attachment C. Section 255 is narrowly focused.

20 First, it regulates a single activity, "electric utility facilities," which includes electric
21 substations and transmission lines. LUC 20.50.018(E Definitions).

22 Second, it regulates a single company, PSE, the holder of a monopoly franchise
23 to provide electricity to Bellevue and other Eastside communities.

24 Third, Section 255 was adopted at a time (2008) when PSE's plan for the new
25 transmission was not only known, but recorded in the Bellevue Comprehensive Plan as
26 a part of Ordinance 5802. See Attachment A. The redesignation of the line to "Sensitive
27 Siting" in the 2015 updated Bellevue Comprehensive Plan was made after
28

1 environmental review was already underway on the PSE proposal.

2 Fourth, Section 255 is very site specific, requiring review of the actual proposal
3 presented, including Alternative Siting Analysis.

4 The specific features and requirements of Section 255 establish criteria unique
5 for zoning regulations.

7 **4.1. "NEED" AND "RELIABILITY".**

8 Ordinarily in land use regulation, in Bellevue and elsewhere, the question of need
9 is not a zoning code criterion. For example, the zoning code does not require the
10 developer of a residential high-rise condominium or an office building to demonstrate
11 that the project is "needed", i.e. that there are insufficient apartments or office space to
12 meet "community need."⁶ However, for transmission lines covered by Section 255, the
13 code requires the applicant to prove its electrical facility is "needed" and that it will
14 improve electric reliability; this applies both on a site-specific and on a system basis.

15 Thus, one of the "Decision Criteria" in Section 255.E.3 is that:

16 *The applicant shall demonstrate that an operational need exists that*
17 *requires the location or expansion at the proposed site;*⁷

18 (Emphasis supplied.) Use of the term "requires" under the ordinary definition is to
19 "specify;" as Webster's Dictionary defines the term "require[d]" as to "impose a
20 compulsion or command ... to do something." WEBSTER'S THIRD INTERNATIONAL
21 DICTIONARY 1929 (1969). *Asche v. Bloomquist*, 132 Wn.App. 784, 794-95, 133 P.3d
22
23

24
25
26 ⁶ In deciding whether to prepare an environmental impact statement, decision makers "shall not
balance the beneficial aspects of a proposal outweigh its adverse impacts. . . . WAC 197-11-330(5)

27 ⁷ "Sites" in the case of transmission lines are linear, being the path of the transmission line.

1 475 (2006). This definition was confirmed in *Richards v. City of Pullman*, 134 Wn.App.
2 876, 882, 142 P.3d 1121 (2006). Accordingly, the code requires site specific analysis:
3 review of the application on a specific site. This requirement applies to all applications
4 for electrical utility facilities, not just applications on Sensitive Sites.
5

6 In the Alternative Siting Analysis required for Sensitive Sites, such as the South
7 Bellevue Segment, Section 255 drills down to the specifics of the application and the
8 zoning district in which it is located. Here special criteria apply based on zoning:
9

10 *For sites located within a Neighborhood Business Land Use District,*
11 *Residential Land Use District, and/or Transition Area (including the BelRed*
12 *Office/Residential Transition (BR-ORT), the applicant shall: . . .*

13 (Emphasis supplied.) This obligation follows from the objectives of both Ordinances
14 5802 and 5805 for the “*protection of residential neighborhoods from incompatible*
15 *electrical facilities. . .*” See Attachments A and B. Thus for proposals such as the South
16 Bellevue Segment, which passes through primarily residential neighborhoods within
17 Residential Land Use Districts, the following is required:

- 18 *i. Describe whether the electrical utility facility location is a consequence of needs*
19 *or demands from customers located within the district or area; and*
20 *ii. Describe whether the operational needs of the applicant require location of the*
21 *electrical utility facility in the district or area.*

22 The analysis is tailored to the zone. Is there a nexus between the location of the
23 facilities and the “need or demands” of the customers where the “facility” (here the
24 South Bellevue Segment transmission line) is located? Is there operational need that
25 requires the facility in the Residential area?

26 The “facility” here is the South Bellevue Segment, not the longer line that PSE
27 may someday construct. However, it is clear from the ASA itself, the South Bellevue
28

1 Segment was never considered as a standalone project as is required by the code.

2 **4.2. CONSIDERATION OF ALTERNATIVES, INCLUDING THE “LOCATION**
3 **SELECTION HIERARCHY.**

4 The companion criteria to the obligation (“require”) to consider when the needs of
5 the impacted population support the location of transmission lines in residential areas is
6 the obligation to consider alternatives found in Section 255.D; this is called the
7 “Alternative Siting Analysis,” referenced herein as the “ASA.” The ASA criteria clearly
8 state that this requirement is “[In addition to the requirements set forth in Part 20.30B
9 LUC, Part 20.25B LUC (if applicable) and the decision criteria and design standards set
10 forth in this section. . . . Thus the requirement to consider alternatives is separate and
11 independent of the focused need obligation found in Section 4.1 of this brief.
12

13
14 In the ASA, following on the other unique provisions of Section 255, Bellevue
15 established a “*location selection hierarchy*” in subsection D.2.d as follows:

16 *Identify a preferred site from the alternative locations considered for the proposed*
17 *new or expanding electrical utility facility. The following location selection*
18 *hierarchy shall be considered during identification of the preferred site alternative:*
19 *(i) nonresidential land use districts not providing transition, (ii) nonresidential*
20 *Transition Areas (including the BelRed Office/Residential Transition (BR-ORT),*
21 *and (iii) residential areas. The applicant may identify a preferred site alternative in*
22 *a Residential Land Use District or Transition Area (including the BelRed*
23 *Office/Residential Transition (BR-ORT) upon demonstration that the location has*
24 *fewer site compatibility impacts than a nonresidential land use district location.*

25 (Emphasis supplied.) The plain intent of this section is the protection of residential
26 areas. In supposed compliance with this section, PSE’s “preferred site,” the South
27 Bellevue Segment, is actually located almost entirely in residential neighborhoods, and
28 residential land use districts, south of I-90. See Phase 2 DEIS, page 3.1-39 (AR 11741).

In the present case, the application is only for the South Bellevue Segment, the

1 3.3 mile line running from the south Bellevue city limits to a proposed new substation
2 adjacent to the existing Lakeside substation, and excludes the remaining 5.2 miles of
3 transmission originally proposed. See page 2-5 of the Phase 2 DEIS (AR 11663). The
4 Bellevue City Council specifically found that the only application before it was for the
5 South Bellevue Segment, not a longer line that may be built later. AR 3.

7 **5. THE HEARING EXAMINER FAILED TO REQUIRE THE APPLICANT TO**
8 **PROVIDE SIGNIFICANT INFORMATION RELEVANT TO MANDATORY CODE**
9 **CRITERIA.**

10 As described above, the critical element of Section 255 compliance is the
11 question of “need.” There are two broad elements of need in the ordinance. First,
12 *“whether the operational needs of the applicant require location of the electrical utility*
13 *facility in the district or area, . . .”* Second, *whether an operational need exists that*
14 *requires the location or expansion at the proposed site; . . .* Both criteria require a
15 technical and specific showing of need.

16
17 When the South Bellevue Segment application was assigned to Bellevue Hearing
18 Examiner Gary McLean, CENSE filed a motion with the Examiner to compel PSE to
19 provide information regarding “operational need.” AR 1108. The motion was authorized
20 by a recent amendment to the Bellevue Hearing Examiner Rules Section 1.4 that stated:

21 B. Hearing Examiner Duties

22 The examiner shall have the duty to conduct fair and impartial hearings, to take
23 all necessary action to avoid delay in the disposition of proceedings, and to
24 maintain order. The examiner shall have all powers necessary to that end,
including the following:

- 25 1. To administer oaths and affirmations.
- 26 2. To issue subpoenas to compel witnesses to appear at the
hearing and/or the production of documents or materials.

27 (Emphasis supplied).

1 The motion to compel specified the documents requested to be produced in an
2 attachment. AR 1118-19. The requested documents included the actual data for electric
3 consumption for substations located in the City of Bellevue that would show whether the
4 “need” for electricity was really increasing in the community. The need for this data was
5 supported by the Declaration of Richard Lauckhart, an expert in power supply planning.
6 See his resume at AR 1148-51.
7

8 Of importance here is that all information concerning the actual consumption of
9 electricity in the area to be served by its proposed transmission line is controlled
10 exclusively by PSE. Because PSE is a privately held company, it is not subject to the
11 Washington Public Records Act, Chapter 42.56 RCW.
12

13 PSE’s objection to CENSE’s motion was not that typically found in discovery. PSE
14 did not argue the requested information did not exist, that it would be a hardship to
15 produce it, that the material was irrelevant, that it is publicly available or otherwise
16 objectionable. Rather PSE claimed that it was PSE that controlled the course of the
17 proceedings.
18

19 First, at page 13 (AR 999) of its response to CENSE’s motion at lines 21-23, PSE
20 said, referencing the upcoming public hearing before the Hearing Examiner:
21

22 In such a setting, there is no need for any order to compel PSE’s production of
23 evidence beyond which the company believes is adequate in order to proceed
with a Pre-Decisional hearing on their application.

24 (Emphasis supplied.)

25 Second, Adopting even a more imperious tone at page 16, lines 6-8 PSE claims
26 that:
27
28

1 The Hearing Examiner should decline the invitation to compel the disclosure of
2 data to be used to *displace PSE's analysis* of project need--which was confirmed
3 by the City and FERC as being consistent with federal planning standards--in a
4 Pre-decisional Hearing.

5 (Emphasis supplied.) These statements contend that PSE alone gets to decide whether
6 the criteria in the land use code are met because the City's required land use hearing is
7 merely an "information gathering" process (PSE response at 11, line 3) in which PSE is
8 the gatekeeper.

9 The Hearing Examiner's decision on these matters was a single page, without
10 analysis or explanation of his reasoning. AR 1300. The Examiner's ruling, limiting
11 information that is critical to meaningful participation in the public hearings required by
12 Section 255, should be reversed and remanded with direction to provide the necessary
13 information.
14

15 Because the PSE proposal is on a "sensitive site" that impacts residential
16 communities, a public hearing is required so that local residents can participate in the
17 decision making process. See LUC 20.35.337.A. The Hearing Examiner makes a
18 recommendation on the proposal after the public hearing pursuant to LUC 20.35.340.A:
19

20 **Criteria for Recommendation.**

21 The Examiner shall recommend approval or approval with conditions or
22 modification if the applicant has demonstrated that the proposal complies with the
23 applicable decision criteria of the Bellevue City Code. The applicant carries the
24 burden of proof and must demonstrate that a preponderance of the evidence
25 supports the conclusion that the application merits approval or approval with
26 modifications. In all other cases, the Hearing Examiner shall recommend denial of
27 the application.

28 Indeed the Section 255 "approval criteria" require at Subsection E.3 that:

1 The applicant shall demonstrate that an operational need exists that
2 requires the location or expansion at the proposed site;

3 Accordingly, the burden of proof falls on the applicant to demonstrate “operational need”
4 at a specific location. Nowhere in the code does it state that the demonstration of such
5 need is limited to information PSE decides is appropriate. If that were the case, then no
6 public hearing would be required.
7

8 Public hearings have long had a special place in Washington law, as far back as
9 1969, when our court said:

10 It is axiomatic that, whenever the law requires a hearing of any sort as a condition
11 precedent to the power to proceed, it means a fair hearing, a hearing not only fair
12 in substance, but fair in appearance as well. A public hearing, if the public is
13 entitled by law to participate, means then a fair and impartial hearing. When
14 applied to zoning, it means an opportunity for interested persons to appear and
15 express their views regarding proposed zoning legislation. *Schlagheck v.*
16 *Winterfeld*, 108 Ohio App. 299, 161 N.E.2d 498 (1958); *Braden v. Much*, 403 Ill.
17 507, 87 N.E.2d 620 (1949). The term 'public hearing' then presupposes that all
18 matters upon which public notice has been given and on which public comment
19 has been invited will be open to public discussion, and that persons present in
20 response to the public notice will be afforded reasonable opportunity to present
21 their views, consistent, or course, with the time and space available. Where the
22 law expressly gives the public a right to be heard--as distinguished from open
23 sessions of the Congress or state legislatures or lesser legislative bodies which,
24 although conducting their session in public, need not as a matter of law allow
25 public participation--the public hearing must, to be valid, meet the test of
26 fundamental fairness, for the right to be heard imports a reasonable expectation
27 of being heeded. Just as a hearing fair in appearance but unfair in substance is
28 no fair hearing, so neither is a hearing fair in substance but appearing to be
unfair.

23 *Smith v. Skagit County*, 75 Wn.2d 715, 740, 453 P.2d 832 (1969). The *Smith* decision
24 gave rise to what has been referenced as the “appearance of fairness” doctrine. Indeed,
25 the Rules of the Bellevue Hearing Examiner at Section 1.7.I indicate that “every party in
26 any proceeding before the examiner shall have a right to the following: . . . I. Any other
27
28

1 rights essential to a fair hearing.” This includes the following under Examiner Rule

2
3 1.11.D:

4 D. Submittal of Evidence

5 Except where mandatory pre-filing requirements were imposed or where
6 objections to the admissibility of certain evidence have been granted, any party
7 may seek to admit relevant evidence into the record during their direct,
8 cross-examination and/or rebuttal portions of the hearing, provided appropriate
9 foundation for such evidence has been presented by the offering party.

10 The Legislature has adopted Chapter 42.36 RCW, applying the appearance of
11 fairness doctrine to quasi-judicial land use decisions. RCW 42.36.110 expressly
12 provides that: “Nothing in this chapter prohibits challenges to local land use decisions
13 where actual violations of an individual's right to a fair hearing can be demonstrated.”

14 The Examiner bent to the wishes of the applicant, without observing the
15 fundamental rights of the public. Indeed, PSE objected to the introduction of “data to be
16 used to displace PSE’s analysis of project need.” But the very point of the public hearing
17 is to address issues of project need and the public is entitled to participate and raise
18 objections. The Examiner’s decision to limit the information available to the public
19 violates the codes and standards providing for a fair public hearing.

20 A hearing cannot be fair in fact, or in appearance, if the applicant gets to decide
21 what information is relevant to the proceeding and specifically is able to control the flow
22 of data and material that is contrary to its position, as PSE has here. Accordingly, the
23 denial of critical information to CENSE indicates that the hearing lacks minimal
24 requirements for a public hearing. Under RCW 36.70C.130(1)(a) the Examiner failure to
25 provide the requested information indicates he engaged in unlawful procedure and his
26 decision was an erroneous interpretation of the law. Pursuant to RCW 36.70C.140, the
27

1 decisions made by the City should be reversed and remanded to require the disclosure
2 of the critical “need” documentation.

3
4 **6. THE CITY’S DECISIONS FAILED TO COMPLY WITH SECTION 255.**

5 As described above, the City adopted Section 255 in 2008, but did not include
6 PSE’s proposed 230 kV transmission line as a “sensitive site” until it amended its
7 Comprehensive Plan in 2015. New Map UT7 (attached hereto as Attachment D, found at
8 page 139 of the Plan) documented the change for the PSE proposal.

9 As the 2015 Comprehensive Plan states at page 131, Map UT7:

10
11 identifies planned electrical facilities that have the potential to create significant
12 incompatibilities with Bellevue neighborhoods. It reflects an analysis of planned
13 facility locations and manner of expansion anticipated by Puget Sound Energy’s
14 system plan. Such sensitivity factors as proximity to residential neighborhoods,
15 visual access, and expansion within or beyond an existing facility border were
16 considered in identifying potential incompatibilities. The early screening
17 represented in Figure UT.7 identifies a list of facilities that will require special
18 regulatory siting scrutiny. This is intended to increase transparency of the siting
19 process for Puget Sound Energy and the public, while also ensuring the utility’s
20 ability to meet system needs.

21 Because the CP designates the proposal as one that involves “sensitive siting,”
22 compliance with Section 255 is required.

23 Beginning even before the adoption of Map UT7, PSE and the City began an
24 expensive and lengthy process of environmental review, including Phase 1 and Phase 2
25 Draft Environmental Impact statements (AR 12465 and AR 11619). Each was
26 accompanied by lengthy “scoping” periods that were convened to determine the content
27 of the DEISs. There were also numerous meetings of citizen advisory committees
28 convened to hear from the selected members of the public. See AR 1563-64.

Throughout the SEPA process, review was limited to the construction of the

1 entire 16 mile transmission line. On page 1-1 of the Phase 1 DEIS (AR 11637), the
2 question was asked: “What is the project that is being evaluated in this draft EIS?” The
3 answer was simple, and direct:
4

5 PSE is proposing to construct and operate a new 230 kV to 115 kV electrical
6 transformer served by approximately 18 miles of new high-capacity electric
transmission lines extending from Renton to Redmond.

7 There was no discussion that the permitting process would be bifurcated or segmented
8 into separate projects in Bellevue.

9
10 Nonetheless, during scoping for the Phase 1 DEIS, comments were received
11 regarding the possibility of disconnecting the overall line in central Bellevue to limit
12 electric load outside the Eastside, as a means to reduce the need for the project. At
13 page 2-51 (11206), the Phase 1 DEIS said such a gap in the lines was “not considered
14 viable for several reasons: . . .”; one was that:

15 Being interconnected also allows economies of scale for both transmission and
16 generation facilities. Finally, the solution could reduce the supply of power to the
17 Eastside, necessitating additional conservation, generation or storage beyond
18 that considered in the other alternatives in the EIS...

19 In the third bullet point on the same page, the Phase 1 DEIS said:

20 Disconnecting the north and south sections of the route at a central Bellevue
21 substation to prevent non-Eastside load from being carried on this line during
22 peak periods of demand on the Eastside would deprive the Eastside of power
23 supply needed during these (peak) periods. Separating the system in central
Bellevue from the regional grid would also not meet FERC mandatory reliability
standards.

24 *Id.*

25 Following a comment period for the Phase 1 DEIS, the Phase 2 DEIS was issued
26 in May 2017. AR 11619. The project description was carried over, *word-for-word*, from
27
28

1 the Phase 1 DEIS. See Fact Sheet, page 1 (AR 11630). On page 1-1, the “Energize
2 Eastside” project was further defined as follows:

3
4 PSE’s analysis concluded that the most effective solution was to add a 230-115
5 kV transformer within the center of the Eastside to relieve stress on the existing
6 230-115 kV transformers that currently supply the area. This would need to be
7 fed by new 230 kV transmission lines from the north and south. By having lines
8 from two different directions, a substation can continue to be supplied even if one
9 line goes down.

10 The project being studied was set: 230 kV transmission lines stretching from
11 Renton to Redmond, each connecting to a new substation (Richards Creek) in Bellevue.
12 The lines would transverse across Bellevue, from the north city limits to the south. But,
13 PSE had been coy about submitting an application. Though the Phase 1 and Phase 2
14 DEISs discussed only the entire Renton to Redmond line, there was no actual
15 application for that project.

16 Thus, to the surprise of all concerned, when PSE actually made its application in
17 Bellevue (September, 2017), it was only for a small part of the transmission line
18 proposed within the city: just the line running from the municipal boundary with
19 Newcastle to a new substation (Richards Creek), a length of almost 3.3 miles,
20 constituting of only about 37% of the line previously proposed within Bellevue (the
21 proposed north segment would be approximately 5.2 miles). AR 1465-1480.

22 In response to criticism that it was seeking a strategic advantage by retreating to
23 the more bite-size, easy-to-swallow South Bellevue Segment, to avoid opposition from
24 residents along the north line, PSE claimed that the application for the rest of the project
25 was coming along right away, saying on their website: "PSE anticipates submitting
26 permits for the northern portion in Bellevue and Redmond in late 2017–early 2018." But
27
28

1 at the end of 2017, PSE backtracked on permitting the North Bellevue Segment, and
2 stated that: "Currently, we do not have a projected submittal date for the northern
3 elements of the project." ⁸ As of February 2019, there has been no application for the
4 north segment and PSE's said it "cannot accurately estimate the timing of this
5 submittal." See Declaration of Dan'l Koch in Support of PSE's Response to CENSE
6 Motion to Continue and Consolidate Hearings before the Bellevue Hearing Examiner
7 (000114). Even in their brief before the Council, PSE stated "Applications for the North
8 Bellevue Segment have not yet been submitted." AR 99.

9
10
11 When the south segment was scheduled for hearing, the City staff report of
12 January, 2019, disclosed, for the first time, why PSE had applied only for the south
13 segment:

14 The south segment of the Project provides additional capacity that addresses the
15 Project need and could function whether or not the north segment is built. The
16 north segment would provide redundancy in the supply of 230 kV power to the
17 substation.

18 Staff Report at 100 (AR 1413). After describing PSE's segmentation of the project, the
19 Staff Report continues:

20 PSE's analysis supported and demonstrated that operationally the Project must
21 include 230 kV transmission lines connecting the Talbot Hill substation in the
22 south to a new transformer in central Bellevue. The full build out of the "Energize
23 Eastside" project will include a similar connection from the Sammamish
24 substation in the north to provide redundancy, but the south portion of the Project
25 that is the subject of PSE's current proposal can function independently.

26 (AR 1424, emphasis supplied.) Indeed, because there was no indication of changed
27 circumstances, it is clear that PSE (and the City of Bellevue) must have been aware that

28 ⁸ See December 17, 2018 email, City of Bellevue to Loretta Lopez, AR 250.

1 the north segment would provide only “redundancy” and that the south segment can
2 “function independently” since the date of PSE’s original application in 2013, but failed
3 to disclose that to the public. Staff did not identify which “PSE analysis” supports this
4 statement and none appears in the record.
5

6 As described above, Section 255 requires that PSE “shall comply” with certain
7 threshold issues for new EUFs like this transmission project. These include the
8 following:
9

10 1) Section 255.D.2.c requires a description of alternate sites, requiring that for
11 those within a “*Residential Land Use District*” the applicant “*shall describe whether the*
12 *electrical utility facility location is a consequence of needs or demand for customers*
13 *located within the district or area.*”

14 2) Section 255.D.2.d requires a “*location selection hierarchy*” be employed so that
15 a preferred site in a “*Residential Land Use District*” may be chosen only “*upon*
16 *demonstration that the location has fewer site compatibility impacts than a nonresidential*
17 *land use district location.*” Any conclusion that sites are not practical must include
18 “supporting information that justifies the conclusions reached. . .”
19

20 3) Section 255.E.3 requires that “*The applicant shall demonstrate that an*
21 *operational need exists that requires the location or expansion at the proposed site,*” and
22

23 4) Section 255.E.4 requires that “*The applicant shall demonstrate that the*
24 *proposed electrical utility facility improves reliability to the customers served and*
25 *reliability of the system as a whole, as certified by the applicant’s licensed engineer[.]*”
26

27 In the present case, the “proposed electrical utility facility” that is under review is
28

1 only the South Bellevue Segment, the truncated, dead-end line that is only 37% of the
2 original proposed line in Bellevue. More than 90% of the South Bellevue Segment is
3 located in “Residential Land Use Districts” that require close and careful consideration
4 by Section 255 under the Subsections discussed above. See Phase 2 DEIS at page 3.1-
5 39 (AR 11741) Notwithstanding the clear direction from the ordinance, substantially all
6 of the studies, reports and two draft environmental impact statements prepared by PSE,
7 including the ASA, do not analyze the South Bellevue Segment under the Section 255
8 criteria, indeed most of them do not even mention it.⁹ For example, Quanta’s 2015
9 Report, relied on by the Examiner (FOF 17, AR 000013), analyzes the full length of the
10 project from the Sammamish substation to the Talbot Hill substation. The FEIS quoted
11 Stantec:

12 PSE has concluded that the most effective and cost-efficient solution to meet its
13 objectives is to site a new 230 kV transformer in the center of the Eastside, which
14 would be fed by new 230 kV transmission lines from the north and south (Stantec,
15 2015).

16 AR 6816.

17 The justification offered for the failure to subject the South Bellevue Segment to
18 Section 255 review was explained by PSE in its appeal memo to the Bellevue City
19 Council at pages 2-3. PSE states it:

20 has designed a two-phased construction and permitting approach to provide a
21 consistent source of electricity to the Lakeside switching station during all phases
22 of the transmission line upgrade.

23
24
25
26 ⁹ PSE did prepare a “PSE South Bellevue Segment C.U.P. Analysis. AR 1912. However when that
27 “Analysis” addressed whether “an operational need exists that requires the location or expansion at the
28 proposed site,” there was no discussion of the South Bellevue Segment, only reference back to the
Sammamish to Talbot Hill line. AR 1937.

1 AR 100. The basis for the “two phased permitting approach?” PSE says that they need
2 to maintain power to the Lakeside substation at all times to keep the power on:
3

4 The project is expected to be built in phases, starting with the south end (from the
5 Talbot Hill substation to the proposed Richards Creek substation) being the first
6 phase, followed by the north phase as soon as design, permitting, and
7 energization of the south phase would allow.

8 *Id.* As discussed above, the project:

9 needs to be built in two construction phases to keep the Lakeside substation
10 energized, thereby keeping the transmission system on-line to serve customers.

11 *Id.*

12 It is understood that the linearity of electric lines requires construction that does
13 not unplug the circuit at both ends.¹⁰ But construction is not permitting and no reason is
14 presented as to why permitting must be in phases. More importantly, no reason is stated
15 why the construction phasing means that long time Bellevue code requirements for
16 analysis of pending projects should be scrapped.

17 The Hearing Examiner rejected concerns about the South Bellevue Segment in his
18 decision at Finding 47:

19 47. Opposition arguments that challenged the pending application as improper
20 segmentation”, “piecemealing”, an undisclosed last-minute change, a strategic
21 surprise, and the like, are factually incorrect. The Final EIS used to inform the
22 public and decision makers in reviewing the pending application fully discloses
23 that the South Bellevue Segment can function independently, and that the new
24 transmission line will be developed in phases. It also explains a public benefit
25 rationale for PSE’s proposed phased construction schedule for the Energize
26 Eastside Project – keeping the transmission system on-line to serve customers
27 during construction.

28 ¹⁰ In comparison with a large commercial building, the installation of the new transmission is relatively simple, digging a foundation for a new tower (1-3 days), setting the new tower (1 day) and stringing lines between the towers (1-2 days), as described in the Phase 2 DEIS at page 2-47. AR 11691.

1 AR 22.

2 The PSE plan is clearly stated by its counsel: the south phase is first, “followed by
3 the north phase as soon as design, permitting and energization of the south phase will
4 allow.” AR 99 at lines 17-18. The north phase comes only when the south phase is
5 done and, as PSE admits: “Applications for the North Bellevue Segment have not yet
6 been submitted.” *Id.* at 12.¹¹ Given the South Bellevue Segment was applied for nearly
7 three years ago (September 2017) doubt exists as to whether it will ever be built.
8

9 But even if PSE does intend to build the North Bellevue Segment, the bifurcated
10 permitting proposed, whether deliberate or not, means that the North Segment approval
11 will be a *fait accompli* for the hundreds of Bellevue residents that have homes and
12 businesses along its 5.2 mile length. With the time and money invested in the South
13 Bellevue Segment (and its new substation) the momentum to approve the North Bellevue
14 Segment will be irresistible.
15

16 Even during the Phase 2 DEIS, PSE recognized that it was facing problems with
17 approval of their preferred routing of a North Bellevue Segment because of the East
18 Bellevue Community Council (EBCC). EBCC is a community council established in 1969
19 as a part of annexation to the City. EBCC has the authority under RCW 35.14.040 to
20 overrule conditional use permits issued by the City within its jurisdiction. Indeed EBCC
21 had previously disapproved a different PSE transmission line within its jurisdictional area.
22 PSE sued EBCC, ultimately leading to an unpublished decision by Division I of the Court
23 of Appeals in *Puget Sound Energy v. East Bellevue Community Council*, Nos. 74464-0-1,
24
25

26
27 ¹¹ The North Bellevue Segment is proposed to have less than 50 new poles as shown at page A-8 and
28 A-9, of Appendix A to the Phase 2 DEIS (AR 12199).

1 74465-8-I (January 30, 2017). See Attachment E hereto.

2
3 Though the Court of Appeals granted PSE's appeal, and reversed EBCC's
4 disapproval, PSE also argued that EBCC's action was improper as to its jurisdictional
5 limits, claiming that: "the EBCC 'asserts the right to unilaterally affect the reliability of
6 power to Bellevue homeowners outside its territory' because the rejected transmission
7 line would have served parties outside EBCC's corporate territory." However, the Court
8 did not decide the issue, saying:

9
10 Because we hold that PSE has met its burden to show that the EBCC's resolution
11 is improper, we need not also decide whether the resolution violates the
12 geographical limitations of this statute. Accordingly, that is an issue left for
13 decision another day.

14 See page 21 of Attachment E.

15 When PSE published its Phase 2 DEIS, just five months after the Court of Appeals
16 decision, it expressed concern regarding EBCC's potential disapproval of its current
17 proposal, which also runs through EBCC's jurisdiction. PSE went so far as to design a
18 whole different route to avoid EBCC, saying:

19 **Route Options for the Bellevue Central Segment**

20 In addition to the Existing Corridor Option of the Bellevue Central Segment, PSE
21 has identified for environmental analysis two options that would bypass the East
22 Bellevue Community Council boundaries, recognizing that the EBCC could deny a
23 permit and thus delay or preclude PSE's preferred alternative. The two bypass
24 options would not require approval by the EBCC. If EBCC denied approval, PSE
25 would seek permit approval of one of the bypass options from the City of Bellevue.
26 The bypass options are not PSE's preferred alignment, but have been included for
27 analysis in the Phase 2 Draft EIS at PSE's request.

28 AR 11676. The circuitous "bypass" option is mapped at AR 11681. However, PSE now
appears to have abandoned the "bypass" option as it did not advance for consideration

1 in the FEIS. However, because the EBCC boundary along PSE's preferred route is only
2 a mile north of where the South Bellevue Segment ends, the argument concerning extra-
3 territorial effect of any future EBCC disapproval would again be ripe for judicial review.
4

5 Not only would fixing the northerly point of the South Bellevue Segment impact
6 EBCC, it would impact other residential communities along the North Bellevue Segment
7 (5.2 miles) who would have to face the end of a completed project aimed at them. Much
8 of the North Bellevue Segment is also located in "Residential Land Use Districts" as
9 shown on Phase 2 DEIS pages 3.1-24 to 3.1-27 (AR 11726-29).
10

11 The South Bellevue Segment requires careful review under Section 255 because
12 it has been identified as a project with independent utility. As described above, the City
13 of Bellevue Staff report states the South Bellevue Segment "addresses project need and
14 could function whether or not the north segment is built" stressing a few pages later that
15 "the south portion of the Project that is the subject of PSE's current proposal (the South
16 Bellevue Segment) can function independently." Moreover Bellevue Staff indicates that
17 the "north segment would provide redundancy in the supply of 230 kV power to the
18 substation," repeating the same finding later, "...similar connection from the Sammamish
19 substation in the north to provide redundancy."
20

21 As noted above, in all the years of study of the PSE proposal, there has never
22 been a recognition of the "independent/redundant" dichotomy now addressed in the Staff
23 Report, though Bellevue staff states "PSE's analysis supported and demonstrated" the
24 dichotomy.
25

26 These understandings further demonstrate that Bellevue erred in approving the
27
28

1 South Bellevue Segment without insisting that the specific proposal demonstrate
2 compliance with detailed standards of Section 255. The code unequivocally requires
3 examination of the site proposed for new electrical facilities. In this case, PSE made a
4 conscious choice to apply for only the South Bellevue Segment, not the longer segment
5 reviewed in environmental and land use documents. The city codes should not be read
6 to allow special treatment for PSE that would allow the South Bellevue Segment to avoid
7 Section 255 review.
8

9 This long established rule is set forth in *State ex rel. Ogden v. Bellevue*, 45
10 Wash.2d 492, 495, 275 P.2d 899 (1954):
11

12 The acts of administering a zoning ordinance do not go back to the questions of
13 policy and discretion which were settled at the time of the adoption of the
14 ordinance. Administrative authorities are properly concerned with questions of
15 compliance with the ordinance, not with its wisdom.

16 The *Ogden* case was also cited in *Eastlake Community Council v. Roanoke Associates,*
17 *Inc.*, 82 Wn.2d 475, 482, 513 P.2d 36 (1973) where, in describing the administration of
18 the Seattle zoning code, the court said:

19 The code is positive in its requirements and contains no exceptional procedures
20 like those employed here; hence, no city officer was authorized to permit its
21 violation. The duty of those empowered to enforce the codes and ordinances of
22 the city is to insure compliance therewith and not to devise anonymous
23 procedures available to the citizenry in an arbitrary and uncertain fashion.

24 In the present case, the City decided that PSE did not have to analyze the project before
25 it, the South Bellevue Segment, apparently because PSE had stated that it would – at
26 some indefinite time in the future – be filing for other permits to finish the larger proposal.

27 The ordinance in question was specifically adopted for electrical utility facilities on
28

1 “sensitive sites” to protect homeowners and residents in “Residential Land Use Districts”
2 whether along the North or South Bellevue Segment.
3

4 Of particular importance to CENSE is that if the much shorter South Bellevue
5 Segment “provides additional capacity that addresses the project need” then a careful
6 analysis of the “range of technologies” required by Section 255.D.3 could yield potential
7 technologies that may not have been effective for the longer line.

8 Further, the actions of the City result in the improper segmentation of the full
9 project within the City of Bellevue. As noted above, PSE states it intends to construct the
10 longer project, but is only applying for part of it now because it needs to build the project
11 in two construction stages. No exemption or exception exists in Section 255 for such
12 procedure. Indeed, Section 255 indicates PSE “shall demonstrate” its proposal
13 “improves reliability to the system as a whole” but it has only applied for about 37% of the
14 line that it says it wishes to build in Bellevue.
15

16 The process proposed by PSE, and accepted by Bellevue, violates the long
17 standing rule that segmentation of a single project into separate elements for project
18 approval is not permitted. In *Merkel v. Port of Brownsville*, 8 Wn.App. 844, 509 P.2d 390
19 (1973), the Port sought permits for the upland portion of a marina project for parking and
20 boat repair, but also required a permit under the Shorelines Management Act for the
21 waterfront portion of the project. The Court of Appeals entered injunctive relief that
22 prohibited work on the upland part of the project until the Shoreline Act permits (for the
23 waterfront portion) were processed.
24

25 The Port argued that it could proceed with the upland portion of the project:
26
27
28

1 It is the position of the Port of Brownsville that SEPA governs the entire project
2 and that, once having complied with its provisions, the Port may proceed to cut the
3 trees and clear the uplands without regard to whether or not the permits required
by SMA have been issued.

4 8 Wn.App. at 850. The Court rejected this contention:

5 There is nothing in the record before us to indicate that the contemplated
6 construction has ever been anything but one project. The question, therefore, is
7 whether the Port may take a single project and divide it into segments for
8 purposes of SEPA and SMA approval. The frustrating effect of such piecemeal
administrative approvals upon the vitality of these acts compels us to answer in
the negative.

9
10 8 Wn.App. 850-51.

11 In the present case, when the permit proceedings were occurring before the
12 Bellevue Hearing Examiner, CENSE made a motion to the Examiner to consolidate
13 review of the South Bellevue Segment and the North Bellevue Segment into a single
14 proceeding and postpone consideration of the South Bellevue Segment until permits
15 were filed for the North Bellevue Segment. AR 1108. PSE vigorously contested the
16 motion. AR 970. Ultimately, the Examiner denied the motion, though providing no
17 analysis or reasoning, and the hearing proceeded on the South Bellevue Segment only.
18 AR 1300.

19
20 The reasoning of *Merkel* is dispositive here. Indeed, PSE asserts that its
21 transmission project is a “single project,” but has divided it into two segments for review.
22 And, like *Merkel*, PSE has declined to apply for the North Bellevue Segment, even
23 though nearly three years have passed since its application for the South Bellevue
24 Segment. Indeed, PSE still has not said when the North Bellevue Segment application
25 might be filed.
26
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1 Like *Merkel*, the “coercive effect the construction of one segment would have upon
2 the other is obvious.” 8 Wn.App. at 851. PSE would construct and energize the South
3 Bellevue Segment before applying for the North Bellevue Segment. The residents along
4 the North Bellevue Segment would find themselves with a fully completed transmission
5 line – costing millions and millions of dollars – pointing right at them, fixing the beginning
6 point for the North Bellevue Segment.
7

8 PSE cannot have it both ways. The whole 8.5 mile project within the City must be
9 considered as the single project it is and the proposal to segment it into two must be
10 rejected. If this bifurcation is somehow acceptable, then the South Bellevue Segment
11 must be reviewed as the proposal, requiring full compliance with Section 255.
12

13 The City and PSE have engaged in “unlawful procedure or failed to follow a
14 prescribed process” under RCW 36.70C.130(1)(a), in this case the failure to follow the
15 procedures and requirements of Section 255. This failure follows from the city’s
16 “erroneous interpretation of the law,” here Section 255 under RCW 36.70C.130(1)(b). In
17 either case, the decision of the city should be reversed and remanded to require that the
18 South Bellevue Segment be carefully reviewed and analyzed pursuant to Section 255.
19

20 **7. ENVIRONMENTAL IMPACT STATEMENTS PREPARED FOR THE PROJECT**
21 **ARE INADEQUATE AND INSUFFICIENT BECAUSE THEY DID NOT CONSIDER**
22 **THE SOUTH BELLEVUE SEGMENT.**

23 Alternatives are at the heart of SEPA analysis and “reasonable alternatives” must
24 be evaluated in an EIS. A “reasonable alternative” is one that is capable of attaining or
25 approximating the proposal’s objective, but at a “lower environmental cost or decreased
26 level of environmental degradation.” See WAC 197-11-786. As stated in the premier
27
28

1 source on SEPA:

2 Open-minded, imaginative design and consideration of alternative courses of
3 agency action is crucial to SEPA's ultimate quest – environmentally enlightened
4 governmental decision making. Unless agencies venture beyond their traditional
5 modes of operation, the mere preparation of impact statements environmentally
6 analyzing customary agency conduct would be little more than costly ritual without
7 practical effect.

8 Richard Settle, The Washington State Environmental Policy Act, Section 14.01[2][b]
9 (2013).

10 As discussed above, the extensive environmental review prepared for the
11 proposal, though imposing in length, never considered the alternative of building the
12 South Bellevue Segment as a standalone proposal. This grew from the fact that the
13 South Bellevue Segment never materialized as a proposal until the application for it was
14 filed in September, 2017. Significantly, the comment and review period for the Phase 2
15 DEIS expired on June 21, 2017 (AR 11620), just weeks before the application for the
16 South Bellevue Segment was made in September, 2017. Accordingly, agencies and the
17 public were never aware during SEPA comment periods that PSE was planning to apply
18 for just the South Bellevue Segment.

19 SEPA requires careful consideration of alternatives:

20 The State Environmental Policy Act of 1971 (SEPA) directs that "alternatives to
21 the proposed action" be included in an EIS. RCW 43.21C.030(c)(iii). Under the
22 Washington Administrative Code, consideration by the County Council of
23 reasonable alternatives is mandatory. WAC 197-11-440(5)(b). SEPA rules define
24 "reasonable alternatives" as less environmentally costly action that "could feasibly
25 attain or approximate a proposal's objectives." WAC 197-11-786.

26 *King County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wn.2d 161,
27 182, 979 P.2d 374 (1999). The Court elaborated on the requirement to consider
28

1 alternatives at pages 183-84:

2 An alternative considered for purposes of an EIS need not be certain or
3 uncontested, it must only be reasonable. As stated above, under WAC
4 197-11-440(5)(b), a reasonable alternative is one that could feasibly attain or
5 approximate a proposal's objectives at a lower cost to the environment.

6 Because these issues implicate SEPA and the SEPA rules:

7 “Interpretation and application of the administrative code is a legal question that
8 we review de novo. *Girton v. City of Seattle*, 97 Wash.App. 360, 363, 983 P.2d
9 1135 (1999).

10 *Public Utility Dist. No 1 of Clark County v. Pollution Control Hearings Bd.*, 137 Wn.App.
11 150, 160, 151 P.3d 1067 (2007).

12 Thus, is the South Bellevue Segment a “reasonable alternative” that should have
13 been considered in the environmental impact statements? The short answer is yes, for
14 either of two fundamental reasons.

15 First, it was a “reasonable alternative” because it was actually selected by PSE as
16 the project that would be the subject of its application. PSE decided that it would apply
17 for that project, as opposed to the whole 18 mile proposal that was the subject of its
18 several impact statements, or even the entire 8.5 mile line within Bellevue. Notably,
19 PSE, as early as January, 2015, was asserting imminent need for the project, indicating
20 that “demand for reliable power on the Eastside will exceed capacity as early as the
21 winter of 2017/18” and that without substantial upgrades” there would be the “risk of
22 more disruptive and longer outages for as many as 60,000 customers.” AR 1879. Not
23 withstanding this expression, as late as the proceeding before the Bellevue Council in
24 late 2019, PSE stated: “Applications for the North Bellevue Segment have not yet been
25 submitted.” AR 99.
26
27
28

1 Second, as described above, the staff report for the South Bellevue Segment
2 stated:

3
4 The south segment of the Project provides additional capacity that addresses the
5 Project need and could function whether or not the north segment is built.

6 Per the staff report, this conclusion came, just as did the South Bellevue Segment
7 application itself, from PSE:

8 PSE's analysis supported and demonstrated that operationally, the Project must
9 include the 230 kV transmission lines connecting the Talbot Hill substation in the
10 south to a new transformer in central Bellevue. The full build out of the "Energize
11 Eastside" project will include a similar connection from the Sammamish substation
12 to the north to provide redundancy, but the south portion of the Project that is the
13 subject of PSE's current proposal can function independently.

14 (Emphasis supplied.) Is the South Bellevue Segment alone "a reasonable alternative"
15 that could feasibly attain or approximate a proposal's objectives" under WAC

16 197-11-440(5)(b)? Clearly, yes. In the words of the staff report, it would attain or
17 approximate a proposal's objective because: "it provides additional capacity that

18 addresses the Project need. . . ." Would the construction of the South Bellevue Segment
19 attain/approximate project objectives "at a lower cost to the environment?" Again, clearly

20 yes. If only the South Bellevue Segment were constructed, instead of the combined
21 project, it would eliminate 5.2 miles of transmission lines in Bellevue for the North

22 Bellevue Segment.

23 Even PSE, in its very first DEIS prepared by the City and PSE in January, 2016
24 emphasized the importance of properly defining a proposal:

25 As outlined in WAC 197-11-060(3)(a), it is the responsibility of the lead agency to
26 make certain that proposal this is the subject of environmental review is properly
27 defined. The process of defining the proposal includes an understanding of the
28 need for the project, to enable a thorough understanding the project's objectives

1 (see Section 1.8 of the Phase 1 Draft EIS) and technical requirements, and in
2 order to accurately identify feasible and reasonable project alternatives for
3 consideration in the EIS. As noted in WAC 197-11-060(3)(a)(iii), proposals should
4 be described in ways that encourage considering and comparing alternatives, and
5 agencies are encouraged to describe proposals in terms of objectives rather than
6 preferred solutions. An understanding of the need for the project helps in
7 clarifying the objectives that have been used to develop project alternatives.

8 FEIS pages 1-4 and 1-5 (AR 6815-16).

9 The complete consideration of alternatives is critical to SEPA review, allowing a
10 measured and deliberate selection of different courses of action that protect the
11 environment. The environmental impact statements prepared by PSE certainly are long
12 on length (and weight), but deficient in the most important question: consideration of the
13 alternative that PSE actually selected as its proposal, the South Bellevue Segment. The
14 court should determine that the environmental impact statement was insufficient for
15 failure to consider alternatives and remand for revision of the environmental documents
16 to fully consider the South Bellevue Segment.

17 **8. CONCLUSION.**

18 The land use decision approving PSE's South Bellevue Segment should be
19 reversed and remanded to the City under RCW 36.70C.140 for the following reasons.

20 First, the City cut off interested citizens from having a fair hearing by allowing PSE
21 to control the flow of information on the key Section 255 issue, whether the project is
22 needed.

23 Second, the City failed to actually analyze PSE's proposal, the South Bellevue
24 Segment, under Section 255, instead accepting the improper segmentation of the
25 proposal.

1 Third, the environmental impact statements for the proposal were deficient because
2 they failed to consider the South Bellevue Segment as either the project proposal or as a
3 "reasonable alternative" under SEPA.
4

5 The land use decision approving PSE's South Bellevue Segment should be
6 reversed and remanded under RCW 36.70C.140.

7 Respectfully submitted this 21st day of April, 2020.
8
9

10 /s/
11 J. Richard Aramburu, WSBA #466
12 Law Offices of J. Richard Aramburu, PLLC
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