

Hon. Melinda Young
Oral Argument: 05/22/2020
and 08/14/2020
(Webex) 9:00 a.m.

BEFORE THE KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON

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

Petitioner

No. 19-2-33800-8 SEA

REPLY BRIEF OF PETITIONER
CENSE

v.

City of Bellevue, a Washington municipal
corporation,

Respondent

Puget Sound Energy, Inc.,
Additional Party

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- 25
- 26
- 27
- 28

1 **1. INTRODUCTION AND SUMMARY.**

2 Though long on weight, the decision of the City of Bellevue to approve the 3.3
3 miles of electric transmission line is fatally flawed. It was made without allowing
4 CENSE access to the historical data on actual flows of electricity on the Eastside,
5 critical to the central issue of “need” for the project. The deliberate segmenting of the
6 proposal by creating the separate “South Bellevue Segment” in order to eliminate
7 comment and opposition to the project violated established legal precedent. Even if
8 segmenting is somehow accepted, the City never subjected PSE’s new south segment
9 to required review under Bellevue codes. Finally, the actual project submitted by PSE,
10 its South Bellevue Segment, was never considered either as the principal project or as
11 an alternative in the environmental impact statements prepared for the project, violating
12 of a central tenet of SEPA.

13 For these reasons, the decision of the City approving the South Bellevue
14 Segment should be reversed and remanded.

15 **2. ADDITIONAL BACKGROUND AND FACTUAL SETTING.**

16 Both the PSE and City briefs contain extended factual discussions. Most of the
17 pertinent factual information has been provided in CENSE’s opening brief and will not
18 be repeated here. Some factual claims in the PSE and City briefs merit a brief
19 response.

20 The PSE brief refers to PSE as the “company” at 1/5,¹ stating “PSE” is
21 headquartered in Bellevue, Washington and has provided power for many years.

22 ¹ Citation to the brief in this matter will be by page and line number; page 1, line 5 is referenced as
23 “1/5.”

1 However, they fail to disclose that PSE is owned entirely by foreign interests, including
2 three Canadian pension funds, the Alberta Investment Management Corporation, the
3 British Columbia Investment Management, OMERS Administrative Corporation
4 (Canada) and by PGM Vermogensbeheer B.V. (Holland). AR 12285.

5
6 PSE also states that the “Eastside’s” population has been growing, with that
7 “growth expecting to continue at a rate of approximately 2-2.4% annually through
8 2024.” Brief at 3/20-21. This is apparently intended to show that the demand for
9 electricity continues to increase and increase over time, correlating with population
10 growth. This is not the case.

11
12 As required by RCW 19.280.030 and WAC 480-100-238, private electric
13 companies such as PSE must periodically submit an “Integrated Resource Plan” to the
14 Washington Utilities and Transportation Commission (WUTC) for review. RCW
15 19.280.030(1) sets minimum requirements for the IRPs, including “an assessment of
16 commercially available conservation and efficiency resources” (Subsection (b)) and “a
17 comparative evaluation of renewable and nonrenewable generating resources,
18 including transmission and distribution delivery costs, and conservation and efficiency
19 resources using "lowest reasonable cost" as a criterion (Subsection (d)). But the first of
20 these criteria is:
21

22 (a) A range of forecasts, for at least the next ten years or longer, of projected
23 customer demand which takes into account econometric data and customer
24 usage;

25 PSE submitted its most recent IRP in 2017 and the WUTC staff provided comments
26 (revised) on the document on June 19, 2018, after the application was submitted for the
27
28

1 Energize Eastside project (September, 2017). See AR 1121 to 1138, Appendix A
2 hereto. The WUTC comments on the plan were more contemporaneous than three
3 studies relied upon by the City that were prepared between 2012 and 2015. Brief at
4 9/7-9. WUTC staff comments, referencing PSE’s own material, show a different picture
5 of load growth and demand than that promoted by the City and PSE:
6

7 Annual average energy growth is negative (-0.3 percent) for the first 10 years of
8 the IRP, but increases to 1.1 percent per year from 2027 to 2037. Peak demand
9 growth is also flat for the first 10 years, but ticks up to 1.1 percent in the second
half of the plan.

10 AR 1123 (emphasis supplied). The report went on to discuss load growth:

11 *f. Load Growth and the Effects of Conservation*

12 PSE’s forecasted increase in its annual energy and peak load growth over its
13 20-year planning horizon are due entirely to growth forecasted in the second half
14 of the 20-year plan. As Staff notes in its comments, historically, PSE’s load
15 forecasts have been overly optimistic. This was highlighted in a study by the
16 Lawrence Berkeley National Laboratory of utility average annual growth rate of
energy (AAGR). [FN omitted]

17 *Figure 2: PSE’s projected and actual average annual growth rate of electric energy*

18 Period	PSE Projected AAGR	PSE Actual AAGR
19 2006-2014	1.75%	-0.19%
2012-2014	1.90%	-1.19%

20
21 The 2017 IRP projects flat to negative annual growth for the first ten years of the
Plan when there is project aggressive energy conservation.

22 AR 1132 (emphasis supplied). The WUTC staff report, based on PSE’s own
23 information, shows that not only were PSE’s forecasts “overly optimistic,” but that
24 during the same periods actual electrical usage was declining. As will be discussed
25 herein, the question of need is a dispositive criteria for the instant proposal.
26
27
28

1 **3. APPLICABLE STANDARDS OF REVIEW.**

2 This case involves the interpretation of local Bellevue ordinances, principally
3 BMC 20.20.255 ("Section 255"), and the requirements of the State Environmental
4 Policy Act, RCW 43.21C, together with the SEPA Rules found at WAC chap. 197-11.²
5 CENSE's Opening brief at pages 10-12 discussed relevant standards of review, which
6 will not be repeated here, though a brief reply to respondents' briefs is in order.
7

8 In the present case, the Hearing Examiner interpreted provisions of the Bellevue
9 Municipal Code, in particular Section 255. Both the City and PSE claim the
10 interpretation by the Hearing Examiner is entitled to substantial weight.
11

12 To establish that an interpretation is entitled to substantial weight, there must be
13 a showing of agency policy:

14 If an agency is asserting that its interpretation of an ambiguous statute is entitled
15 to great weight it is incumbent on that agency to show that it has adopted and
16 applied such interpretation as a matter of agency policy. It need not be by formal
17 adoption equivalent to an agency rule, but it must represent a policy decision by
18 the person or persons responsible. Nothing here establishes such an agency
19 policy, and nothing shows any uniformly applied interpretation. The evidence
20 establishes that the application and "interpretation" here was nothing more than
21 an isolated action by the Department. Therefore, even if we were to assume for
the sake of argument that the statute was ambiguous, and thus the Hama Hama
analysis applicable, the Department has not established an agency
interpretation entitled to great weight. Instead, it attempts to bootstrap a legal
argument into the place of agency interpretation.

22 *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549, (1992).

23 In the present case, there was no demonstration that the interpretation of Section 255
24

25 ² CENSE acknowledges that permit approvals are also required in both Newcastle and Renton for the
26 south part of Energize Eastside. See Footnote 9, page 13 of PSE's brief. Though PSE could have
27 submitted a permit application to the state Energy Facilities Siting Evaluation Council (EFSEC) under its
28 authority to approve the entire Energize Eastside project (RCW 80.50.060(3)), it has chosen to seek
individual municipal permits.

1 by either Bellevue city staff or the Hearing Examiner was a matter of policy. Indeed, it
2 appears this is the first time the City has applied Section 255 to any permit application.

3 Further:

4
5 The settled rule of this court is that a statutory interpretation by an agency is not
6 binding and will not be approved if inconsistent with the statute or its underlying
policy.

7 *Weyerhaeuser Co. v. Cowlitz County*, 109 Wn.2d 363, 372. 745 P.2d 488 (1987)
8 (emphasis supplied). As previously noted, our courts “construe a municipal ordinance
9 according to the rules of statutory interpretation.” *Ellensburg Cement Prods., Inc., v.*
10 *Kittitas County*, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014). As discussed herein, the
11 decisions made by the City are at odds not only with established policy to protect
12 residential areas from the adverse impacts of electrical facilities, but with the
13 accompanying policy that permitting for such facilities be open and transparent.
14

15 Indeed, our Courts do not hesitate to step in where, referencing environmental
16 statutes: “The result would be frustration rather than fulfillment of the legislative intent
17 inherent in these acts.” *Merkel v. Port of Brownsville*, 8 Wn.App. 844, 851. 509 P.2d
18 391 (1973). See Appendix B hereto.

19
20 As will be demonstrated herein, the City has misinterpreted and misapplied
21 provisions of city code and state law.

22 **4. THE HEARING EXAMINER FAILED TO REQUIRE THE APPLICANT TO**
23 **PROVIDE BACKGROUND INFORMATION CRITICAL TO ASSESSING**
24 **COMPLIANCE WITH BELLEVUE CODES.**

25 Both the City and PSE make clear in their briefs that the *raison d’etre* of PSE’s
26 transmission proposal is to address concern regarding “peak demand” for electricity on
27
28

1 the Eastside. As the City says:

2 “Demand is expressed in kilowatts or megawatts (kw or MW) and represents
3 usage at a single point in time, much like a car’s speedometer shows miles per
4 hour at a precise moment in time. (Deleting citations). As required by the
5 National Electric Reliability Corporation (NERC), PSE’s determination of need
6 for the Project is based on peak demand period, that is, *spikes in demand* due to
winter cold snaps or summer heat waves, for example. (Deleting citations). PSE
must plan to meet peak demand to avoid blackouts.

7 Brief at 10/23 to 11/2 (emphasis supplied). Similarly, PSE makes claims that “multiple
8 studies projected that the demand for electricity would exceed the capacity of the
9 backbone of the Eastside’s transmission system as early as the winter of 2017, 2018
10 and the summer of 2018.” Brief at 7/Footnote 6. PSE goes on to say that “summer
11 peak demand for power in 2017 did exceed our forecast summer peak demand for
12 2018” and said so again in August 2018. *Id.* The City places emphasis on a letter
13 written by Mr. Koch of PSE in June, 2018 (AR 5545) expressing concern over peak
14 demand. However, despite referencing its forecasts, PSE has never provided the actual
15 winter and summer peak electrical flow data for the Eastside area. As described
16 above, the WUTC, in reviewing PSE’s IRP, has concluded that peak demand will be flat
17 or declining in the coming years.

20 The City essentially asserted that meeting peak demand was a matter of life and
21 death:

22 If a system cannot meet peak demand, power outages affect everyone, including
23 residential uses and critical support services like the hospitals, nursing homes,
24 fire departments and police stations identified in the Stantec Report. AR
000026, 001872.

25 Brief at 11/11-12.

27 As noted above, PSE has routinely been “overly optimistic” in its forecasts of the

1 future demand for electricity, as described by its regulator, the WUTC. Indeed, WUTC
2 describes that PSE was forecasting aggressive growth, when actual consumption was
3 declining, with differences between the two exceeding three percent per year for the
4 period 2012-2014. AR 1123.

5
6 Based on the foregoing, prior to the hearing CENSE asked PSE to provide the
7 *actual* peak loads for the system over the past six years to ascertain whether the
8 “speedometer” actually displayed what PSE said it did. CENSE asked for actual peak
9 usage for the various substations found on the Eastside for a single point in time. AR
10 1145. As Mr. Lauckhart described in his request, the substation data was recorded by
11 PSE and readily available. AR 1147/11. Because the data covered substations with a
12 large number of individual services, there were no concerns regarding invasion of
13 privacy of individual electric consumers. *Id.*

14
15 Instead of readily turning over the information to confirm its growth predictions,
16 PSE objected. The objection did not relate to the reliability of the data (which, as stated
17 above, was regularly collected and essentially a business record) but rather that it, and
18 only it, gets to decide whether the requirement of the code to demonstrate need has
19 been satisfied. PSE continues these objections here. At page 28 of its brief, PSE says
20 that once its engineer has reached a conclusion on need, “it has discharged
21 (successfully audited) duty to demonstrate need in compliance with the regulations of
22 the agency with authority to set transmission reliability standards.” But then PSE goes
23 on to say:
24
25

26 Neither CENSE nor the City, or by extension the Hearing Examiner, are charged
27 with performing all the calculations required by federal regulations for needs
28 assessment. The information sought by CENSE is accordingly not required for

1 the Hearing Examiner to discharge his duties.

2 *Id.* The response is essentially “it’s none of your business” and we alone get to decide
3 the issue of need.

4
5 However, Bellevue has made need the centerpiece of its regulation of electric
6 facilities like Energize Eastside; indeed, its “Decision Criteria” in Section 255.E.3
7 requires that: “The applicant shall demonstrate that an operational need exists to
8 require the location or expansion at the proposed site” to secure approval of an
9 electrical utility facility on a sensitive site. When the Bellevue City Council amended
10 its comprehensive plan to make the very transmission line location at issue here a
11 “sensitive site” in new map UT7, the comprehensive plan explained that:

12
13 Map UT7 identified planned electrical facilities that have the potential to create
14 significant incompatibilities with Bellevue neighborhoods.

15 (Bellevue Comprehensive Plan page 131; see Appendix C, Excerpt from Utility Element
16 of Bellevue Comprehensive Plan). In that same paragraph, the Comprehensive Plan
17 states:

18 The early screening represented in Figure UT7 identified a list of facilities that
19 will require special regulatory siting scrutiny. This is intended to increase
20 transparency of the siting process for Puget Sound Energy and the public, while
also ensuring the utility’s ability to meet system needs.

21 (Emphasis supplied). PSE’s claim (Brief at 28/10-17) that neither the City, the Hearing
22 Examiner nor CENSE “are charged with performing all the calculations required by
23 federal regulations for needs assessment” essentially says any decisions regarding
24 need are vested in the applicant itself, eliminating “transparency” in the siting process.
25 However, Section 255 itself says that for proposals on “sensitive sites,” such as the
26 project before the Court, “the applicant shall . . . comply with all applicable decision
27
28

1 criteria. . . .” Section 255.C.1.c.

2 But if PSE thought the inquiry into need was beyond the purview of the City,
3 and that it was somehow preempted by other regulations, it needed to challenge the
4 regulations when they were adopted:
5

6 The language in the GMA is clear and unequivocal. Comprehensive plans and
7 development regulations, including their amendments, are presumed valid upon
8 adoption. RCW 36.70A.320(1). Should a party wish to challenge adopted
9 plans or regulations, it must petition the growth board for review. RCW
10 36.70A.280(1).³

11 *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 174, 322 P.3d 1219 (2014).
12 Failure to challenge regulations immediately after their adoption⁴ means they are
13 presumed valid; PSE cannot refuse to supply information regarding need and cannot
14 claim it is the sole arbiter of this criterion for project approval.

15 Next PSE, but not the City, claims that the Bellevue Hearing Examiner does not
16 have the authority to compel the production of information or documents. Brief at 25-
17 26. The established Rules of Procedure of the Hearing Examiner provide that the
18 Examiner has the authority to issue subpoenas for the attendance of witnesses and/or
19 the production of documents. See CENSE Opening Brief at 16/21-26. PSE argues
20 that the Examiner has overstepped his authority by adopting this rule contrary to BMC
21 3.68.250.D. However, PSE ignores the broad authority granted to the Examiner to
22 “prescribe rules and regulations concerning procedures for hearings and other
23 proceedings, subject to confirmation by the city council. . . .” BMC 3.68.250.D. PSE
24

25 ³ Challenges to comprehensive plans and/or development regulations must be filed within 60 days of
26 the date the adopting ordinance is published. RCW 36.70A.290(2).

27 ⁴ Section 255, regulating electrical facilities, was adopted by Bellevue Ordinance 5805 in March,
28 2009. See Attachment B to CENSE’ Opening Brief.

1 fails to distinguish between subpoenas for documents and persons, both of which may
2 be necessary “to assure and expand principles and due process in public hearings. . .”
3 as provided in BMC 3.68.200.
4

5 In addition, there is no basis to charge the Hearing Examiner with exceeding his
6 powers when the rules are published well before the hearings in question. As noted in
7 BMC 3.68.250, rules are subject to confirmation by the city council and PSE offers no
8 evidence that the rules were not confirmed in accordance with the city’s process.
9

10 The adopted and published Hearing Examiner Rules of Procedure must be
11 considered valid by this court.

12 In summary, basic data concerning actual electric energy use are not only
13 relevant to, but essential to evaluate whether the Energize Eastside project is
14 “needed” under the terms of Section 255. The failure of the City to order production of
15 this basic information demonstrates that it failed to follow the prescribed process for
16 review, its decision is an erroneous interpretation of the law, not supported by
17 substantial evidence and is a clearly erroneous application of the law to the facts
18 under LUPA, RCW 36.70c.130(1)(a),(b),(c) and (d). Reversal and remand is required
19 under RCW 36.70C.140.
20

21 **5. THE CITY’S DECISION FAILED TO COMPLY WITH THE CRITERIA OF**
22 **SECTION 255.**

23 5.1 Approval of only one piece of the Energize Eastside proposal violates
24 established rule against segmentation of a single project.

25 At pages 21-35 of its opening brief, CENSE described why the decision of the
26 City failed to comply with the terms of Section 255. The simple and fundamental failure
27 is that PSE and the City illegally segmented the single Energize Eastside project into
28

1 two parts and thereafter never gave serious consideration to the actual segment PSE
2 applied for, the truncated 3.3 mile South Bellevue Segment. The City brief at 30-39
3 and PSE's at 30-36 contend the City's decision making was consistent with city
4 regulations.
5

6 The fundamental premise of respondents' arguments is that the Court should
7 essentially disregard the contention that the only action before the City is the 3.3 mile
8 South Bellevue Segment and should instead shift its attention to the entire "Energize
9 Eastside" project. Indeed PSE begins its section of the brief on this subject by saying
10 that:
11

12 The Energize Eastside Project is a 16-mile transmission system project to
13 addresses (sic) an existing transmission deficiency throughout the Eastside. . . .
14 Brief at 30/3-5. PSE goes on to say that the whole project - 16 miles - is essential to
15 resolving perceived energy deficiencies on the Eastside (if there are any- see pages
16 2-3 above). If this is true, why is the project divided into two parts? The official
17 explanation from PSE is that, to protect customer reliability, "PSE must ensure that
18 electricity continues to flow to the Lakeside substation from at least the north or the
19 south at all times." Brief at 13/13-15. PSE says this problem is tied to permitting as
20 follows:
21

22 As a consequence of these practical limitations, PSE has designed its
23 construction and permitting approach to provide a consistent source of
24 electricity to the Lakeside substation during all phases of the transmission line
25 upgrade. Id. During the construction of the south phase, the Lakeside
26 substation will be served from the north and likewise, once the south phase is
27 complete, it will be served from the upgraded south portion while the north half
28 is constructed. In practical terms, this means applying separately for Bellevue
south permits (and permits from the cities of Renton and Newcastle) prior to
permitting the north end permits from Bellevue and Redmond.

1 Brief at 13/1-9. But why are two permits necessary to building one line? What indeed
2 are these “practical terms?” A single unified permit would allow constructing the whole
3 (16 mile) line, with PSE divvying up its construction as it sees fit, south-north, north-
4 south, or any other way they like. The “practical terms” are served by a single permit.
5

6 The additional “practical term” is timing. Both PSE and the City contend that
7 there are very serious concerns with the failure to complete the project; the City says :

8 If a system cannot meet peak demand, power outage affect everyone, including
9 residential and the critical support services like the hospitals, nursing homes,
10 fire department and police stations in the STantec Report. AR 000026,001872.

11 Brief at 11/10-11. The support of these “critical support services” indicates it is
12 imperative to move as rapidly as possible to finish the electrical infrastructure.

13 However, when, PSE posted on its website in August, 2017, that it was
14 intending to file a permit application for only the South Bellevue Segment, but not
15 proceed with the longer north segment, CENSE immediately filed a letter with the City
16 objecting to the segmentation of the project and requested Bellevue and other cities
17 “to decline to accept piecemeal permits for this project.” Letter of August 31, 2017, AR
18 13259. As noted in that letter, when PSE filed this permit, they said: “we anticipate
19 submitting permits for the northern portion later this year.” AR 13260. The City of
20 Bellevue overruled CENSE’s objection and accepted the South Bellevue Segment
21 permit application on September 8, 2017. City brief at 11/13. Later in September,
22 2017, PSE stated it “anticipates submitting permits for the north portion in Bellevue
23 and Redmond in late 2017-early 2018.” AR 13689. Even though these objections
24 had been raised and PSE had stated its intention to apply for the remainder of the
25 northern line, in December, 2017, PSE said that it didn’t even have a timetable for
26
27
28

1 applying for the north part of the project. AR 1107. When CENSE filed its motion to
2 the Hearing Examiner to combine permit review for the two segments in February,
3 2019, PSE admitted in the PSE Response in Opposition to Motion to Continue and
4 Consolidate Hearings, AR 970, that it had no plans prepared for the north segment,
5 referring at AR 984 to ¶¶17-20 of its included declaration by PSE 's "Director of
6 Electrical Operations" Dan'l Koch, where he stated:
7

8 PSE has not yet completed an application for the transmission segment running
9 from the proposed Richards Creek substation north and cannot accurately
10 estimate the timing of this additional submittal until additional work permitting
11 the Project's south half is complete.

12 Given that PSE estimates it will only take nine months to build the entire south
13 segment down to Renton (AR 6866), including its new Richards Creek substation, it is
14 difficult to accept continuing claims that the project is urgently needed when PSE has
15 not even bothered to apply for the north line.

16 Indeed the "practical terms" mentioned by PSE are much more about permitting
17 strategy than project construction.⁵ By segmenting the project into two parts, it gains a
18 major advantage in project permitting.

19 First, it eliminates dealing with opposition to the project along the north segment
20 in its initial permitting. As described in the CENSE notebook, the north segment is 5.1
21 miles in length and traverses a route that is almost exclusively residential in character.
22 AR 13956-13965. By limiting its first permit to just the shorter South Bellevue
23 Segment, it shuts off opposition to the project that may come from persons and
24

25
26
27 ⁵ As described at page 7, footnote 3 of CENSE's Opening Brief, PSE includes all costs on this project
28 in its customer rate base and is allotted a 9.8% return on its investment. PSE is a for-profit company
intended to provide steady returns to foreign institutional investors.

1 organizations along the north segment.

2 Indeed, the route that PSE proposes to the north, but has carefully not applied
3 for, runs through the jurisdictional area of the *East Bellevue Community Council*
4 (EBCC), which is a “community municipal corporation.” See discussion in CENSE’s
5 Opening Brief at pages 28-30.
6

7 The EBCC is described in *City of Bellevue v. East Bellevue Community Council*,
8 138 Wn.2d 937, 944-45, 983 P.2d 602, (1999):

9 RCW 35.14 provides that a community council elected by qualified voters
10 residing within the service area governs a community municipal corporation.
11 RCW 35.14.020. These elected officials have a significant role in determining
12 land use regulations within the community municipal corporation.

13 As the court notes, the approval/disapproval authority is not limited to zoning and
14 comprehensive plans:

15 The statute additionally grants such authority with regard to conditional use
16 permits, special exceptions and variances, subdivision ordinances, subdivision
17 plats and planned unit developments.

18 138 Wn.2d at 945 (emphasis supplied). The current application is for a conditional use
19 permit, which is within EBCC’s purview. See Section 255.C.1. The whole purpose of
20 the creation of community councils is to allow residents control of local land use
21 decisions:

22 The obvious purpose of the statute is to place final decision-making power in
23 the community council where land use regulations affecting property within its
24 jurisdiction are concerned. RCW 35.14.040 provides a community council with
25 authority to independently determine whether to approve or disapprove land
26 use legislation affecting territory within its jurisdiction, in keeping with the
27 Legislature’s intent to allow local level decision-making.

28 *Id.* (emphasis supplied). As the Court makes clear, the EBCC does not have to show
the City’s decisions were illegal in some respect, it acts as an independent decision-

1 maker. 138 Wn.2d at 964.

2 The City of Bellevue effectively supports the bifurcation and the shutting off of
3 the legal rights of the EBCC, together with the rights of residents in the EBCC
4 jurisdictional area.⁶ In response to the concerns expressed in CENSE's opening brief
5 that the segmentation of the project prevents EBCC from effectively reviewing the
6 Energize Eastside project, the City slams the door:
7

8 However, PSE's CUP for the South Bellevue Segment is not within EBCC's
9 jurisdiction; the EBCC does not have permitting authority over this land use
10 decision; and the City cannot force a land use review process that is
11 inconsistent with state law and City Code based on CENSE's opposition to the
12 Project.

12 Brief at 39/1-5.

13 In short, mission accomplished for PSE and the City: divide what is admittedly a
14 single project into two parts so everyone north of the new Richard's Creek Substation
15 (some 5.1 miles) is out of the project discussion.
16

17 This leads to the second defect in segmentation of the project. On page 7 of its
18 brief, the City cites the section of the FEIS discussing "Construction Phasing and
19 Schedule." Brief at 7. The cited section states:

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

23 Brief at 7/8-9 (emphasis supplied). In short, by the time the "north phase" comes up for
24

25 ⁶ As might be expected, the City often bristles with another decision maker in its realm, as evidenced
26 by the litigation between it and the EBCC described herein. Though the City is a party here by virtue of it
27 being the entity that made the land use decision at issue (RCW 36.70C.040(2)(a)), it has become an
28 aggressive defender, even an advocate, of PSE's project, offering a likely preview of its review when the
North Segment is submitted for approval.

1 compliance with Section 255 (code-required permit application, public comments, staff
2 review and public hearings), PSE will have the South Bellevue Segment completely
3 built and “energized” (transferring electricity). Not only will the physical structures
4 (substation and lines) be built, but there will be a massive monetary investment in
5 place.⁷ The City supports claims that PSE will certainly finish the project and there is
6 no evidence that “PSE has abandoned the project.” Indeed, the City identifies that the
7 Richards Creek substation (part of the South Bellevue Segment) “is the ‘driving piece’
8 of PSE’s CUP proposal and will ‘step down’ bulk electricity to provide service
9 throughout the Eastside.” PSE will certainly be arguing that it cannot turn back or
10 consider another alternative in the face of its large financial investment.

11
12
13 Third, the City confirms that the City has decided, in the proceeding for the
14 South Bellevue Segment alone, that the Section 255 criteria are met for the entire
15 Energize Eastside project. In the introduction to its brief, the City makes clear that it
16 has concluded it is passing on the entire project; at page 9, lines 7-9, the City states:

17
18 Between 2012 and 2015, PSE and the City commissioned three studies that
19 confirmed PSE’s stated need for the Energize Eastside project.

20 Under the rubric of approving just the South Bellevue Segment segment, PSE and the
21 City have passed judgment on the whole project.

22 And yes, after the South Bellevue Segment is built, and PSE finally gets around
23 to filing a permit application for the north segment, a staff report will be issued, notice
24 for comments sent to the residents along the 5.1 mile line inviting them to a public
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26
27 ⁷ As described in Footnote 3, page 7, of its opening brief, PSE has spent \$55,000,000 on the project
28 through 2017, even before any physical work has been undertaken. Unlike private land developers PSE
can ask all these costs be repaid by its customers by adding the cost to the rate base. *Id.*

1 hearing duly set and presided over by a local Bellevue official, but will the process be
2 fair? Will the public hearing be meaningful? Will it meet the fundamental test of
3 fairness set forth in *Smith v. Skagit County*, 75 Wn.2d 715, 740, 453 P.2d 832 (1969)?
4

5 A public hearing must, to be valid, meet the test of fundamental fairness, for the
6 right to be heard imports a reasonable expectation of being heeded. Just as a
7 hearing fair in appearance but unfair in substance is no fair hearing, so neither
8 is a hearing fair in substance but appearing to be unfair.

9 (Emphasis supplied). Given the issuance of the permit for the South Bellevue
10 Segment, its likely completion (at substantial expense), and significant monetary
11 investment, will a participant in the hearing for the north segment feel that she or he
12 has “a reasonable expectation of being heeded” when she or he attends the public
13 hearing?

14 Indeed, these significant issues were the basis for the decision of the Court of
15 Appeals in *Merkel v. Port of Brownsville*, 8 Wn.App. 844, 509 P.2d 390 (1973), as
16 discussed in CENSE’s opening brief at pages 32-35. In *Merkel*,⁸ the court prohibited
17 work on the uplands area before the issuance of permits under the Shorelines
18 Management Act, chap. 90.58 RCW. The court concluded that “there is nothing in the
19 record before us to indicate that the contemplated construction has ever been
20 anything but one project.” 8 Wn.App. at 850. The City readily confirms that “the
21 Energize Eastside project is a single project . . .” Brief at 37/24. In the present case,
22 not only is Energize Eastside one project, but PSE says “building the south segment
23 alone” would leave customers “at risk of unplanned outages.” Brief at 39/3-9.
24

25 The “segments” of the Energize Eastside system proposal are far more
26

27 ⁸ A full copy of the *Merkel* decision is attached for the Court’s ready reference at Appendix B.
28

1 interrelated than the marina and uplands project were in *Merkel*. Nonetheless,
2 respondents claim *Merkel* does not apply to the present facts. They are incorrect.

3
4 First, the City claims because it and PSE have (allegedly) complied with SEPA,
5 there are no segmentation issues present: “SEPA prohibits the practice of conducting
6 environmental review of later segments until construction begins.” Brief at 37/12-13.
7 That was exactly the argument explicitly rejected in *Merkel*; there the Port claimed it
8 had complied with SEPA and could move forward with its project:

9
10 It is the position of the Port of Brownsville that SEPA governs the entire project
11 and that, once having complied with its provisions, the Port may proceed to cut
12 the trees and clear the uplands without regard to whether or not the permits
13 required by SMA have been issued. The Port argues that because no
14 objections have been raised to the revised environmental impact statement,
15 there is nothing further for it to do.

16 8 Wn.App. at 850. This argument was decisively rejected by the *Merkel* court:

17 To accept the Port's argument would require us to close our eyes to the obvious
18 interrelation of this project upon the wetlands and adjacent uplands areas.
19 There is nothing in the record before us to indicate that the contemplated
20 construction has ever been anything but one project.

21 *Id.*

22 Second, PSE claims, admitting their intentional segmentation, that “land use
23 permitting” is not subject to rules against segmenting a single project for review. PSE
24 Brief at 31-34. The City makes a similar argument in its brief at page 37-39. The
25 argument is based on the proposition that because *Merkel* dealt with compliance with
26 the Shorelines Management Act, the deficiency discussed in *Merkel* does not apply to
27 other land use permitting, such as permitting under Section 255. This is also incorrect.

28 As *Merkel* confirmed, the Shorelines Management Act “establishes a permit

1 system” to “control” development within the shoreline zone. 8 Wn.App. at 849. The
2 permit system is regulated by “master programs” adopted by local government. *Id.* At
3 the time of the litigation the defendant Port of Brownsville had “not obtained all of the
4 permits required by the SMA.” 8 Wn.App. at 850.

6 In Bellevue, the City adopted special regulations controlling electrical utility
7 facilities, explaining that “it is important to insure that new and expanding electrical
8 facilities are sensitive to neighborhood character.” Ordinance 5802 (Attachment A to
9 CENSE’s opening brief). The purpose of the Ordinance was:

11 to balance two equally important objectives: (1) protection of residential
12 neighborhoods from incompatible electrical facilities, and (2) the needs of Puget
13 Sound Energy to provide sufficient electrical energy to service the growing
demand of Downtown Bellevue and other commercial areas;

14 Ordinance 5802, page 1.⁹ On the same date it adopted Ordinance 5802 in March
15 2008, the City also adopted Ordinance 5805 (Attachment B to CENSE’s opening
16 brief), putting in place regulations requiring a conditional use permit for new electrical
17 facilities, including transmission. A goal of the new regulation of PSE’s energy facilities
18 was:

20 3. To process permits and approvals for utility facilities in a fair and timely
21 manner and in accord with development regulations which encourage
predictability.

22 Ordinance 5802, page 2. Further:

23 For new or expanding Electrical Utility Facilities proposed on sensitive sites as
24 described by Figure UT.5a of the Utilities Element of the Comprehensive Plan,

26 ⁹ During the hearing, CENSE presented a careful analysis of the significant impacts to scenic and
27 visual resources along the South Bellevue Segment prepared by Dean Apostol. AR 13910 to 13947. Mr.
28 Apostol has 38 years of experience in scenic resource assessment and is the author of several books on
the subject. AR 13916.

1 the applicant shall obtain conditional use permit approval under Part 20.30B
2 LUC, . . .

3 Ordinance 5805 at page 8.

4 As seen, the SMA and Section 255 are both ordinances regulating land use.
5 Both have specific land use permit requirements, a substantial development permit for
6 the SMA in *Merkel* and a conditional use permit for transmission facilities under
7 Section 255. Both regulate important public purposes, SMA to protect shores as
8 “among the most valuable and fragile of (the state’s) natural resources” under RCW
9 90.58.020 (cited in *Merkel* at 8 Wn.App. at 849) and Section 255 “to insure that new
10 and expanding electrical facilities are sensitive to neighborhood character.” There is
11 no basis to distinguish between prohibitions against segmentation under the SMA, as
12 discussed in *Merkel*, and prohibitions against segmentation for electric facilities
13 regulated under Section 255. The *Merkel* decision was based on the relationship
14 between the “segments”: “*The coercive effect the construction of one segment would*
15 *have upon the other is obvious.*” 8 Wn.App. at 851. So too the “coercive effect” that
16 construction of the South Bellevue Segment would have on the north segment is
17 obvious, as described at pages 13-14 herein.

18 The claim that PSE should be able to segment its single project is not only
19 contrary to the mandate of *Merkel*, but also to the sound policy of transparent and
20 consistent land use planning. The City’s decision has failed to follow the prescribed
21 process for review, is an erroneous interpretation of the law and is not supported by
22 substantial evidence and is a clearly erroneous application of the law to the facts
23 under LUPA, RCW 36.70c.130(1)(a),(b),(c) and (d).
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1 5.2 If the segmentation is appropriate, then the South Bellevue Segment has
2 not met standards of Section 255.

3 PSE and the City essentially “want to have their cake and eat it too.” First, they
4 claim that though the Energize Eastside proposal is a single proposal, they can
5 separate/segment it into distinct parts for permitting, as described above. This is
6 based on the proposition that PSE wants to “construct” the project in two stages, but
7 except for a vague reference to “practical terms” PSE and the City fail to provide a
8 coherent reason why a single permit application impacts PSE’s construction
9 objective.¹⁰ As explained in this section, the permitting, construction and energization
10 of just the South Bellevue Segment will create a “fait accompli” for residents along the
11 north line (including EBCC) when PSE and the City finally get around to processing
12 that permit in their neighborhood, denying them opportunity for fair participation in the
13 public review process.

14 Second, in a wholly circular argument, the PSE and the City contend they don’t
15 have to subject the South Bellevue Segment to the careful analysis required by
16 Section 255 - “operational need,” the “location selection heirarchy,” or that its location
17 be “a consequence of needs or demands” from customers in the area - because they
18 already did all that when they considered the whole Energize Eastside proposal. The
19 argument is made with a straight face, even though it has been nearly three years
20 since they applied for the South Bellevue Segment and even now PSE “doesn’t know”
21 when they will get around to finishing, much less, applying for, the north segment in
22
23
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26 ¹⁰ As described in Footnote 11 at page 28 of CENSE’s Opening Brief, from a construction standpoint,
27 the north segment consists of less than fifty poles, requiring digging a hole for each, setting the pole in its
28 foundation and stringing lines to the next pole. See Footnote 10, page 27.

1 Bellevue.

2 Third, PSE claims that the South Bellevue Segment by itself will not meet
3 regulatory standards and its construction alone “would leave significant portions of
4 Eastside customers (north of Richards Creek substation to the Sammamish
5 substation) at risk of unplanned outages.” Brief at 39/6-9 (emphasis supplied). The
6 City joined in by saying “all of PSE’s witnesses were genuinely concerned that the
7 current PSE system could soon be forced to use rolling blackouts to address problems
8 arising from peak demand on existing substations and power lines.” Brief at 32/23-24
9 to 33/1-2 (emphasis supplied). However, when PSE rolled out the South Bellevue
10 Segment as a separate project in August, 2017, it explained:

13 PSE will soon submit permit applications for the southern portion of the project.
14 PSE’s plan is to build and energize the new Richards Creek South Bellevue
15 Segment in Bellevue and upgrade the transmission line in south Bellevue,
16 Newcastle and Renton by summer 2018. We anticipate submitting permits for
17 the north portion later this year.

17 We need to build Energize Eastside in two construction phases to keep the
18 backbone of the existing transmission system on line and serving customers. By
19 having the southern portion in service by next summer, we can avoid the need
20 for rolling blackout plans. Once we’ve energized the south portion of the project,
21 we will begin work on the northern portion.

20 AR 013259 (emphasis supplied). It was plainly this recognition that the South Bellevue
21 Segment alone would solve PSE’s most pressing “rolling blackout” problem that
22 resulted in the Bellevue Staff concluding in its Report:

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

1 independently.

2
3 AR 1424 (emphasis added).

4 While the City and PSE claim they have studied the South Bellevue Segment
5 under the terms of Section 255, their citations do not support it. For example, at page
6 9 of the City’s brief, it contends that “PSE and the City commissioned three studies
7 that confirmed PSE’s stated need for the Energize Eastside project” and that there
8 were yet two other studies supporting the need for the project. But these studies
9 (reviewing the entire Energize Eastside project) preceded PSE’s application for the
10 South Bellevue Segment segment by years. Moreover, a lengthy reference to the
11 Stantec report, found at pages 9-10 of its brief, does not mention - or even
12 acknowledge - the existence of a “South Bellevue Segment.”

13
14 PSE has made a conscious and voluntary decision to apply only for the South
15 Bellevue Segment. Nothing in Bellevue codes, especially Section 255, permits PSE to
16 avoid demonstrating full compliance with existing code for its application. The City’s
17 decision has failed to follow the prescribed process for review, is an erroneous
18 interpretation of the law and is not supported by substantial evidence and is a clearly
19 erroneous application of the law to the facts under LUPA, RCW
20 36.70c.130(1)(a),(b),(c) and (d).

21
22
23 5.3. Conclusion Regarding Compliance with Section 255.

24 To avoid criticism and opposition, PSE divided its single Energize Eastside
25 proposal in Bellevue into two parts, applying for only the short 3.3 mile South Bellevue
26 Segment. This parsing out violated established precedents against segmentation and
27

1 requires reversal. If arguendo, processing only the South Bellevue Segment under
2 Bellevue codes is somehow acceptable, then PSE must demonstrate that segment
3 complies with all pertinent provisions of Bellevue codes. The record demonstrates it
4 has not met this burden.
5

6 **6. THE ENVIRONMENTAL IMPACT STATEMENTS PREPARED FOR THE**
7 **PROPOSAL WERE INADEQUATE AND INSUFFICIENT BECAUSE THEY DID**
8 **NOT CONSIDER THE SOUTH BELLEVUE SEGMENT.**

9 In its opening brief, CENSE demonstrated that the environmental impact
10 statements prepared for the proposal were inadequate because they did not consider
11 the actual project applied for, i.e. the 3.3 mile South Bellevue Segment. See Opening
12 Brief at 36-38.

13 Both PSE (Brief at 36-49) and the City (at 39-43) say they did all that was
14 required by SEPA and that the South Bellevue Segment received due consideration.
15 They point to the size of material submitted. However, this argument fails because the
16 South Bellevue Segment was never considered as the project under review, nor as an
17 alternative.
18

19 They claim that the South Bellevue Segment was considered because the FEIS
20 said that the project would be built in phases. PSE says it did a “two phase draft
21 assessment of the project.” Brief at 39/24. However, that “assessment” never
22 considered the shorter South Bellevue Segment and no citation to the record is
23 provided for this statement. On page 40 at lines 3-9 of its brief, PSE discusses
24 various alternatives, and provides a lengthy citation, but a review of these pages
25 discloses no consideration of a short segment, whether called the South Bellevue
26
27
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1 Segment or something else. And yes, as PSE says on page 40 at lines 10-15, there
2 were fourteen "routing alternatives" considered, but all of them were for the whole 16-
3 18 mile project; nowhere was there a discussion of a shorter South Bellevue Segment
4 configuration. To press the point, the City has provided the court with excerpts from
5 the record attached to its brief, apparently offered to demonstrate just how thorough
6 the consideration of the South Bellevue Segment was. Included in Part 4 of those
7 "excerpts" from the record is the "Alternate Siting Analysis," AR 1535 to 1566. CENSE
8 invites the Court to read these pages and attempt to locate where there is substantive
9 discussion of the South Bellevue Segment, outside of its physical description at AR
10 1539. The Court will quickly find that all falls back to the 16-18 miles transmission line.
11 The South Bellevue Segment was, and is, an orphan in the permitting process.
12

13
14 Should the environmental impact statements have considered and analyzed the
15 3.3 mile the South Bellevue Segment? Yes, for the basic and fundamental reason that
16 it was the actual subject of the permit under review. Yes, because it was a project that
17 could, in Bellevue Staff's own words, "function independently." Yes, because, in
18 PSE's own words: "By having the southern portion in service by next summer, we can
19 avoid the need for rolling blackout plans."
20

21 The project under consideration in the City review is the South Bellevue
22 Segment. However, it never received individual review or consideration in the
23 environmental impact statements. Because of this deliberate omission, the
24 environmental review for the proposal is incomplete and inadequate.
25

26 //
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1 **7. CONCLUSION.**

2 As requested in CENSE’s opening brief, the Court should reverse the decision
3 of the City of Bellevue and remand for the following reasons.
4

5 First, the City failed to allow CENSE and other interested citizens access to
6 basic information concerning actual consumption of electricity on the Eastside,
7 necessary to refute claims that there is an actual need for the project. A remand and
8 direction to the City to require PSE to provide this information is appropriate under
9 RCW 36.70C.140.
10

11 Second, the City improperly allowed PSE to segment the single Energize
12 Eastside project into two parts, denying the public fair opportunity to address the
13 totality of project impacts. Reversal and remand to the City with direction to consider
14 the entire 16-18 mile project under a single permit should be ordered. If *arguendo*, the
15 project review is appropriate even with a separated portion, the decision of the City
16 should be reversed because the South Bellevue Segment did not meet the code
17 requirements of Section 255.
18

19 Third, the Court should determine that the environmental impact statements
20 prepared were deficient under SEPA because they failed to consider and analyze the
21 South Bellevue Segment, as the project being reviewed, or as an alternative.
22 Reversal and remand is necessary to correct this deficiency.
23

24 Respectfully submitted this 19th day of May, 2020.

25
26 /s/
27 J. Richard Aramburu, WSBA #466
28 Law Offices of J. Richard Aramburu, PLLC

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DECLARATION OF DELIVERY

I am an employee in the Law Offices of J. Richard, PLLC, over eighteen years of age and competent to be a witness herein. On the date below I arranged delivery of the foregoing document by efileing with and eserving through King County Superior Court to parties of record, addressed as follows:

Loretta Lopez
13419 NE 33rd Lane
Bellevue WA 98005
llopez@mstarlabs.com

Warren Halverson
13701 NE 32nd PI
Bellevue WA 98005
whalvrsn1@frontier.com

Norm Hansen
3851 136th Ave NE
Bellevue WA 98005
hansennp@aol.com

Larry G. Johnson, Attorney for CSEE
Attorney at Law
8505 129th Ave SE
Newcastle, WA 98056
larry.ede@gmail.com

Attorneys for PSE
Erin L. Anderson, Sara A. Leverette
Van Ness Feldman LLP (PSE attorneys)
719 Second Avenue, Suite 1150
Seattle, Washington 98104-1728
eanderson@vnf.com,
sleverette@vnf.com

City of Bellevue
Matthew B. McFarland, WSBA# 51675
Assistant City Attorney
Bellevue City Attorney's Office
450 110th Avenue N.E.
P. O. Box 90012
Bellevue, WA 98009
Tel: (425) 452-6829 Fax: (425) 452-7256
mmcfarland@bellevuewa.gov

Any party not on eservice will be emailed at the address listed for them above.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED: This 19th day of May, 2020.

/s/
Carol Cohoe