

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKETS UE-220066, UG-220067  
and UG-210918 (*consolidated*)

STAFF'S MOTION IN LIMINE TO  
PRECLUDE CENSE FROM CROSS-  
EXAMINING STAFF WITNESS JOEL  
NIGHTINGALE

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In the Matter of the Petition of

PUGET SOUND ENERGY

For an Order Authorizing Deferred  
Accounting Treatment for Puget Sound  
Energy's Share of Costs Associated with the  
Tacoma LNG Facility

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**I. INTRODUCTION**

1 CENSE seeks to cross-examine Staff witness Joel Nightingale about his response testimony concerning the Energize Eastside project currently being built by Puget Sound Energy (PSE). But Mr. Nightingale did not testify in support of the settlement containing terms disposing of the dispute over Energize Eastside; he instead provided his response testimony in support of Staff's litigation position, a position no longer at issue in these proceedings. The Commission should, accordingly, grant this motion in limine and preclude CENSE from cross-examining Mr. Nightingale under the plain text of WAC 480-07-740(3)(c)(i).<sup>1</sup>

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<sup>1</sup> The presiding ALJ requested that the parties submit evidentiary objections by September 28, 2022. Staff filed this motion early in the morning on September 29, 2022. Staff apologizes for the motion's belated submission, but notes that no party suffered any significant prejudice from the delay.

## II. RELIEF REQUESTED

2 Staff respectfully requests that the Commission grant its motion in limine and  
preclude CENSE from performing any cross-examination of Staff witness Mr.  
Nightingale at the settlement hearing duly noted for October 3, 2022.

## III. STATEMENT OF FACTS

3 PSE filed these consolidated general rate cases in January 2022.<sup>2</sup> The  
Commission suspended PSE's filings and set these matters for adjudication.<sup>3</sup>

4 Staff, Public Counsel, and various intervenors filed response testimony in July  
2022. Staff's case included testimony from Joel Nightingale concerning PSE's Energize  
Eastside project.<sup>4</sup>

5 In August 2022, PSE and a number of parties reached a settlement to resolve  
many of the issues raised by PSE's filings, including the issues raised by PSE seeking  
rate inclusion for the Energize Eastside project.<sup>5</sup> Staff was a signatory to that agreement.<sup>6</sup>

6 Staff later filed testimony by Betty Erdahl in support of the settlement.<sup>7</sup> But Staff  
submitted no testimony from Mr. Nightingale, and he thus provided no testimony to  
support adoption of the relevant settlement, nor did he support adoption of the other two  
settlements reached in these dockets.

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<sup>2</sup> *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Dockets UE-220066 & UG-220067, Order 01, at 1 ¶ 1 (Feb. 10, 2022).

<sup>3</sup> *Id.* at 3 ¶ 16.

<sup>4</sup> *See generally* Nightingale, Exh. JBN-1T.

<sup>5</sup> *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Dockets UE-220066, UG-220067, & UG-210918, Settlement Stipulation and Agreement on Revenue Requirement and All Other Issues Except Tacoma LNG & PSE's Green Direct Program, 9 ¶ 23.m (Aug. 26, 2022).

<sup>6</sup> *Id.* at 1 ¶ 1.

<sup>7</sup> *See generally*, Erdahl, Exh. BAE-1T.

7 CENSE subsequently estimated that it would question Mr. Nightingale for 10  
minutes at hearing.<sup>8</sup> Staff and CENSE were unable to resolve a dispute about that request.

#### IV. STATEMENT OF ISSUES

8 Should the Commission grant Staff’s motion in limine and preclude CENSE from  
cross-examining Mr. Nightingale, who did not provide testimony in support of the  
settlement at issue?

#### V. ARGUMENT

9 The Commission’s rules prescribe CENSE’s rights for purposes of opposing the  
settlement at issue, and those rules deny CENSE the right to cross examine Mr.  
Nightingale. The Commission should, accordingly, preclude CENSE from performing  
any such cross examination.

10 As noted, the Commission’s procedural rules govern its consideration of any  
settlement.<sup>9</sup> Those rules require, as relevant here, every party supporting a settlement to  
“offer to present one or more witnesses to testify in support of the settlement agreement  
and to answer questions concerning the agreement’s details, costs, and benefits.”<sup>10</sup>

11 Parties opposing settlement have specified rights. These include “the right to  
cross-examine witnesses supporting the settlement.”<sup>11</sup> But they do not include the right to

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<sup>8</sup> *Wash. Utils. & Transp. Comm’n v. Puget Sound Energy*, Dockets UE-220066, UG-220067, & UG-210918, CENSE Cross-Exhibit List (Sep. 23, 2022).

<sup>9</sup> WAC 480-07-740.

<sup>10</sup> WAC 480-07-740(3)(b).

<sup>11</sup> WAC 480-07-740(3)(c)(i).

cross examine witnesses who do not so testify.<sup>12</sup> The failure to specify such a right while enumerating others implies that no such right exists.<sup>13</sup>

12 CENSE seeks here to cross-examine a witness that it has no right to cross-examine, and the Commission should deny it the ability to do so. Staff did not offer to present Mr. Nightingale to testify in support of the settlement; and he did not, in fact, so testify. Ms. Erdahl did. CENSE may permissibly cross examine her about the contents of that testimony. But it may not cross Mr. Nightingale about testimony not concerned with the settlement.

13 The Commission has in previous PSE settlement hearings precluded parties from cross examining settlement witnesses about testimony offered in support of a party's litigation position. In 2017, a party opposing the settlement resolving PSE's GRC sought to cross-examine a PSE settlement witness about matters discussed in PSE's direct testimony.<sup>14</sup> The presiding administrative law judge forbade it from doing so, stating that

The direct testimony that PSE filed on this subject, as on others and as other parties filed on a variety of subjects, is something that we consider when we evaluate the Settlement Agreement.

It is not, however, something that is subject to cross-examination today. We don't have the witness here, we don't need the witness here. It speaks for itself, is the way we talk about prefiled direct testimony in a case that has settled among most of the parties and which one party opposes. And of course you have put forward your witnesses' testimony on this subject matter and you can refer to whatever the direct testimony of other witnesses on this subject says, but we don't really have any need for cross-examination with respect to it because PSE is no longer supporting the ROE that Dr. Morin testified. They're supporting the settlement ROE

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<sup>12</sup> See WAC 480-07-740(3)(c).

<sup>13</sup> *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969) ("where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim expression unius est exclusion alterius – specific inclusions exclude implication.") see *Port of Tacoma v. Sacks*, 19 Wn. App. 2d 295, 304, 495 P.3d 866 (2021) (courts "apply the same principles used to interpret statutes" when "interpret[ing] agency regulations.").

<sup>14</sup> *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Dockets UE-170033 & UG-170034, Barnard, Tr. at 593:12-594:8 (Sep. 29, 2017).

which is 9.5. and so his testimony may be relevant to that as we consider whether to approve that, but that's the extent of it.

The presiding ALJ later emphasized that cross examination of a settlement witness about a party's litigation position strayed into "forbidden territory" that he would not allow.<sup>15</sup>

14           There is no meaningful difference between what the party opposed to settlement tried in 2017 and what CENSE attempts to do here. CENSE is attempting to cross-examine one of Staff's litigation witnesses about Staff's litigation position. But Staff no longer supports that position, and the Commission does not "really have any need for cross-examination with respect to it."<sup>16</sup> CENSE is thus straying into "forbidden territory."<sup>17</sup> The Commission should recognize as much and deny it the opportunity to do so.

## VI. CONCLUSION

15           The Commission should grant Staff's motion in limine and prevent CENSE's impermissible cross-examination of Mr. Nightingale.

DATED this 29th day of September 2022.

Respectfully submitted,

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<sup>15</sup> *Id.* at 594:12-13.

<sup>16</sup> *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Dockets UE-170033 & UG-170034, Barnard, Tr. at 594:12-13.

<sup>17</sup> *Id.* at 594:12-13.