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BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

DOCKETS UE-220066 and UG-220067

PUYALLUP TRIBE OF INDIANS’
MOTION TO STRIKE PUGET SOUND
ENERGY’S EXHIBIT RJR-31R

I. INTRODUCTION

1. Pursuant to WAC 480-07-375(1)(d), The Puyallup Tribe of Indians (Tribe) moves to strike Exhibit RJR-31r, the Prepared Direct Testimony of Dr. Shari Beth Libicki on Behalf of Puget Sound Energy, Inc. (PSE), submitted by PSE on October 11, 2022. While the Tribe has concerns that the admission of Exhibit RJR-31 sets a problematic precedent, the Tribe understands that Exhibit RJR-31 was admitted at the hearing on October 3. But RJR-31r raises a full suite of evidentiary problems, including the attachment of hearsay declarations of three additional witnesses to the hearsay testimony of Libicki that was appended to Ronald Roberts’ written testimony. Beyond hearsay problems, the new exhibit contains an addendum to Libicki’s testimony that is dated April 16, 2021, which is not even part of the Libicki testimony dated March 29, 2021, that was the source of the excerpts submitted as Exhibit RJR-31.

1 2. To avoid the issues created by PSE’s replacement exhibit, the Commission should strike
2 RJR-31r and allow the Tribe to submit the countervailing Libicki cross-examination testimony
3 associated with her excerpted statements contained in the original Exhibit RJR-31 that is already
4 in the record. If the Commission admits RJR-31r, however, fundamental fairness – and
5 Washington’s Rules of Evidence – require that the Tribe be allowed to present Libicki’s entire
6 cross-examination testimony as well as the cross-examination testimony of all the hearsay
7 witnesses that PSE is being allowed to inject into these proceedings.

8 3. The Tribe objected to the admission of Exhibit RJR-31 at the hearing on October 3, 2022.
9 The Tribe’s objected (1) because PSE submitted Libicki’s testimony as an attachment to the
10 prefiled testimony of Ronald J. Roberts without calling Libicki as a witness and (2) because PSE
11 submitted that testimony without even including the cross-examination testimony relevant to the
12 hearsay contents of Exhibit RJR-31.¹ The Tribe argued that, because Libicki was not made
13 available as a witness and the cross-examination testimony associated with her prepared statement
14 was not included, admission of her direct testimony through Exhibit RJR-31 does not comport
15 with Washington’s Rules of Evidence (ER), including ER 402, ER 703, and the evidentiary
16 principle of hearsay set forth in ER 802 as recently applied by the Commission.

17 4. Judge Howard denied the Tribe’s motion. However, he instructed PSE to file the full
18 version of the Libicki testimony as a replacement for Exhibit RJR-31 and directed the Tribe to
19 provide the transcripts containing Libicki’s associated cross-examination to the Commission.
20 Judge Howard rejected the Tribe’s offer to counter-designate only the Libicki cross-examination

21 _____
22 ¹ Judge Howard noted during the colloquy regarding the Tribe’s objection that the Tribe had submitted exhibits
23 containing testimony that, like Libicki’s testimony, would be objectionable. Beyond the fact that there was no
24 objection to the Tribe’s exhibits- the testimony contained within the Tribe’s exhibits is distinguished from and does
25 not raise the evidentiary issues associated with the testimony in Exhibit RJR-31. The testimony attached to Dr. Sahu’s
26 prewritten testimony is the 30(b)(6) deposition testimony of an adverse party, which is admissible under the rules of
evidence. *See Exh. RXS-24, Testimony of Matthew Stobart (Excerpt) (2/18/2021) (excerpt of Stobart’s 30(b)(6)
testimony on behalf of Puget Sound Energy); see also Exh. RXS-38, Excerpt (non-confidential) from J. Hogan
30(b)(6) testimony on behalf of PSE (1/17/2021); see also Exh. RXS-41, Excerpt of 30(b)(6) Deposition Testimony
of Matthew Stobart on behalf of CB&I (2/16/2021).* It would be incorrect to view the testimony submitted by the Tribe
as being equivalent to the Libicki testimony.

1 relevant to the excerpts of the Libicki testimony contained within Exhibit RJR-31 instead of
2 requiring PSE to replace Exhibit RJR-31.

3 5. To be clear, the Tribe is not seeking reconsideration of its prior objection to Exhibit RJR-
4 31. Instead, the Tribe respectfully requests that the Commission strike PSE's replacement exhibit,
5 Exhibit RJR-31r. Exhibit RJR-31r should be excluded because it exacerbates rather than resolves
6 the concerns that Judge Howard tried to address at hearing by requiring inclusion of Libicki's non-
7 excerpted testimony. PSE's new exhibit provides pages of hearsay within hearsay from three more
8 individuals that PSE did not make available at the hearing for cross examination. Further, the
9 contents of these individuals' declarations are not relevant to the portion of the Libicki testimony
10 referred to by Mr. Roberts. In addition to these declarations, PSE has appended an addendum to
11 the Libicki testimony that was prepared and filed with the Pollution Control Hearings Board
12 several weeks after the written testimony that Exhibit RJR-31 was excerpted from was filed.² The
13 information contained within the addendum is not relevant to the Libicki opinion cited in Roberts'
14 testimony, and there is no evidence that Roberts reviewed the addendum testimony contained in
15 Exhibit RJR-31r. *See* Exhibit RJR-30T. The Tribe recognizes PSE likely included the Libicki
16 addendum in an attempt to satisfy Judge Howard's direction that it submit the full Libicki
17 testimony- but the addendum is not part of the prepared statement referred to by Roberts and its
18 contents are not relevant to his testimony, so its inclusion in the record is improper.

19 6. Accordingly, the Tribe respectfully requests that the Commission strike Exhibit RJR-31r
20 and admit the excerpt of hearing transcripts containing Libicki's cross-examination before the
21 Pollution Control Hearing Board designed by the Tribe as relevant to the limited testimony within
22 Exhibit RJR-31. The relevant excerpt from Libicki's cross-examination testimony is attached
23 hereto as proposed Roberts cross-examination **Exhibit RJR-37X**.

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25 ² The prepared direct testimony of Dr. Libicki from which Exhibit RJR-31 was excerpted was initially filed with the
26 PCHB as Exhibit PSE-0650 on March 29, 2021. The Libicki addendum testimony that PSE has appended to Exhibit
RJR-31r was separately submitted several weeks later as Exhibit PSE-0373 on April 16, 2021.

1 7. In the alternative, if Exhibit RJR-31r is to be admitted, fundamental fairness requires that
2 the complete countervailing cross-examination testimony of Libicki, as well as the three other
3 witnesses whose declarations are attached to Exhibit RJR-31r, be included in the record so that it
4 contains all relevant testimony and not only the self-serving hearsay testimony included within
5 Exhibit RJR-31r. If the Commission admits Exhibit RJR-31r, the Tribe respectfully submits for
6 admission the full transcript of Libicki's cross-examination testimony and the transcripts
7 containing cross-examination testimony of the three additional PSE witnesses, which are attached
8 hereto as proposed **Exhibit RJR-38X** (complete Libicki cross-examination transcript); proposed
9 **Exhibit RJR-39X** (Ottersburg cross-examination transcript); proposed **Exhibit RJR-40X**
10 (Stobart cross-examination transcript); and proposed Exhibit **RJR-41X** (Kinner cross-examination
11 transcript).

12 **II. STANDARD**

13 8. Under WAC 480-07-495(1), all relevant testimony is admissible if the presiding officer
14 believes it is the best evidence reasonably obtainable, considering its necessity, availability, and
15 trustworthiness. When ruling on the admissibility of evidence, the presiding officer will consider,
16 but is not required to follow, the rules of evidence governing general civil proceedings in nonjury
17 trials before Washington superior courts.

18 9. Under the Washington Administrative Procedure Act, RCW 34.05.452, evidence,
19 including hearsay evidence, is admissible if in the judgement of the presiding officer it is the kind
20 of evidence on which reasonably prudent persons are accustomed to relying on in the conduct of
21 their affairs. RCW 34.05.452(1). The presiding officer shall refer to the Washington Rules of
22 Evidence (ER) as guidelines for evidentiary rulings. RCW 34.05.452(2). All testimony of parties
23 and witnesses shall be made under oath or affirmation. RCW 34.05.452(3).

24 10. ER 402 sets forth the bedrock principle that only evidence that is relevant is admissible.

25 11. ER 602 prevents a witness from testifying to a matter in the absence of sufficient evidence
26 to support a finding that the witness has personal knowledge of the matter.

1 12. ER 802 states that hearsay, a statement offered into evidence to prove the truth of the matter
2 asserted, is not admissible. ER 801 allows admission of evidence that would otherwise be hearsay—
3 if the declarant testifies at the hearing and is subject to cross examination concerning the statement.
4 Though the presiding officer is not bound by Washington’s Rules of Evidence, the Commission
5 recently addressed the admissibility of hearsay testimony inappropriately appended as an exhibit,
6 declaring that “[t]he Commission rarely, if ever, allows an affidavit to be filed as an exhibit to a
7 witness’s testimony because doing so can deny other parties their rights to due process ...”
8 *Washington Utilities and Transportation Commission v. CenturyLink Communications, LLC*,
9 Docket UT-181051, Order 06 at ¶ 20 (July 25, 2022). The Commission further explained that
10 “[o]nly if the affidavit provides facts that are or can be generally accepted as true should the
11 Commission accept it as evidence of those facts without making the affiant available for cross-
12 examination.” *Id.* At hearing, the Tribe argued this reasoning should be applied in the present
13 matter.

14 III. FACTS AND EXHIBIT DETAILS

15 13. Exhibit RJR-31 was included as the First Exhibit to the Prefiled Testimony of Ronald J.
16 Roberts on Behalf of Puget Sound Energy in Support of the Multiparty Settlement for Tacoma
17 LNG. *See* Exh. RJR-30T. Exhibit RJR-31 is a 28-page excerpt from Libicki’s 168-page prepared
18 testimony that PSE submitted to the Pollution Control Hearings Board in Docket No. P19-087c.
19 The exhibit consists of excerpted pages 1-5 (describing Libicki’s background and professional
20 experience) and pages 59-80 (discussing Libicki’s “Opinion 6”). Roberts’ testimony does not
21 reference or discuss any of the documents submitted to the PCHB as attachments to the Libicki
22 testimony that are now included in Exhibit RJR-31r. *See* Exh. RJR-30T.

23 14. Mr. Roberts’s testimony relies on Exhibit RJR-31 to show that “PSE’s expert, Dr. Sheri
24 Libicki, characterized the total emissions from the Tacoma LNG Facility to put in context the scale
25 of emissions associated with the facility.” Exh. RJR-30T at 38 (citing to Exh. RJR-31). Mr.
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1 Roberts' testimony includes a graph taken from Dr. Libicki's testimony and a one sentence
2 summary of Dr. Libicki's conclusion regarding emissions from the Tacoma LNG facility. *Id.*

3 15. As discussed above, the Tribe objected to admission of Exhibit RJR-31 and though Judge
4 Howard denied the objection, PSE was directed to file the full version of the Libicki testimony as
5 a replacement for Exhibit RJR-31 following the hearing. The Tribe was directed to provide the
6 transcripts containing Libicki's associated cross-examination to the Commission in response to
7 PSE's replacement exhibit. Those transcripts are attached hereto.

8 16. On October 11, 2022, PSE submitted replacement Exhibit RJR-31r to the Commission.
9 Exhibit RJR-31r is a 230-page document that contains the entirety of Dr. Libicki's initial 169-page
10 prepared direct testimony, the attachments to that testimony (including declarations of three other
11 PSE witnesses that were not present at the hearing), and an additional 22-page addendum from Dr.
12 Libicki that was not part of the statement that the original Exhibit RJR-31 was excerpted from.
13 Rather than resolving the Tribe's concerns about the Commission's admission of the testimony
14 within Exhibit RJR-31, PSE's submission of Exhibit RJR-31r exacerbates the issues at the core of
15 the Tribe's objection, is contrary to past practice before the Commission in *Washington Utilities*
16 *and Transportation Commission v. CenturyLink Communications, LLC*, Docket UT-181051, and
17 sets a troubling precedent for the Commission moving forward.

18 **IV. ISSUES**

19 17. *Whether the Commission should strike the portions of Exhibit RJR-31r containing the*
20 *declarations of three individuals that are attached to Libicki's testimony, where those witnesses*
21 *were not made available for cross-examination and their testimony is not relevant to the prepared*
testimony of the PSE witness to which Exhibit RJR-31r is attached?

22 18. *Whether the Commission should strike the portion of Exhibit RJR-31r containing an*
23 *addendum to Libicki's testimony that is dated April 16, 2021, when it is not even part of the Libicki*
24 *testimony dated March 29, 2021, that PSE attached to the Roberts testimony as RJR-31, and thus*
25 *not relevant to Mr. Roberts' testimony?*
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V. ARGUMENT

A. Exhibit RJR-31r should be excluded because it contains three declarations that are not relevant to Roberts' testimony and because those declarants were not made available for cross examination.

19. Though the Washington State Court Rules of Evidence are not binding on the Commission, both the Commission's rules and the Administrative Procedure Act direct the presiding officer to consider these rules when ruling on the admissibility of evidence. In fact, at hearing, the Rules of Evidence were applied as a basis for striking certain evidence proffered by CENSE.

20. Under ER 402, only relevant evidence is admissible. Here, where Attachments B, C, and D within Exhibit RJR-31r were not included in the original Exhibit RJR-31 or referred to in Roberts' testimony, the statements contained within those attachments are not relevant and thus not admissible under ER 402. Further, because none of the individuals whose statements are attached to Exhibit RJR-31r were made available for cross examination, the exhibit should be excluded under ER 802. As the Tribe pointed out at hearing, the Commission recently explained that it "rarely, if ever" admits an affidavit as an attachment to expert testimony without an opportunity for cross-examination. *Washington Utilities and Transportation Commission v. CenturyLink Communications, LLC*, Docket UT-181051, Order 06 at ¶ 20 (July 25, 2022).

21. Accordingly, the Commission should strike Exhibit RJR-31r based on the same standard it applied to the affidavit in the CenturyLink case, where it found that "while [the affiant] may be an expert on what he describes, his statements do not have a sufficient inherent indicium of reliability such that the Commission is willing to accept them without an opportunity for cross-examination." *Washington Utilities and Transportation Commission v. CenturyLink Communications, LLC*, Docket UT-181051, Order 06 at ¶ 21 (July 25, 2022). Admission of this material is contrary to the evidentiary rules and the Commission's prior ruling, and would set a troublesome precedent allowing parties to attach cherry-picked written testimony from witnesses in other proceedings while not producing them to testify before the Commission.

1 181051. The Tribe accepts Judge Howard’s determination that RJR-31 is admitted, but no
2 additional irrelevant, cherry-picked hearsay testimony should be admitted in these proceedings.

3 26. Exhibit RJR-31r should be stricken in its entirety because it does not cure the concerns
4 raised by the Tribe – in fact, it profoundly exacerbates them and further violates Washington’s
5 Rules of Evidence. If the Commission strikes Exhibit RJR-31r and limits the record to Exhibit
6 RJR-31, the Tribe submits as a proposed cross-examination exhibit the attached excerpts from the
7 transcripts of Libicki’s April 24, 2021, cross-examination before the Pollution Control Hearings
8 Board relevant to the excerpts of Libicki’s testimony contained within PSE’s original Exhibit RJR-
9 31:

- 10 • **Exhibit RJR-37X** – Excerpts of Libicki Cross-Examination Transcript, PCHB No. P19-
11 087c (4/27/2021) (responding to the excerpts from “Prepared Direct Testimony of Dr.
12 Shari Beth Libicki on Behalf of Puget Sound Energy, Inc.” in PSE’s original Exhibit
13 RJR-31).

14 27. If Exhibit RJR-31r is admitted, however, the Tribe must also be allowed to provide the
15 complete Libicki cross-examination transcript and meet the problems that PSE’s “revised” exhibit
16 raises by additionally submitting for inclusion into the record the cross-examination testimony of
17 PSE’s new/additional “hearsay within hearsay” witnesses. Such testimony is included in the
18 Tribe’s following proposed cross-examination exhibits:

- 19 • **Exhibit RJR-38X** – Complete Libicki Cross-Examination Transcript, PCHB No. P19-
20 087c (4/27/2021) (responding to “Prepared Direct Testimony of Dr. Shari Beth Libicki
21 on Behalf of Puget Sound Energy, Inc.” at pp. 180-185 of Exhibit RJR-31r).
- 22 • **Exhibit RJR-39X**– Ottersburg Cross-Examination, PCHB No. P19-087c (4/23/2021)
23 (responding to “Attachment B – Declaration of Eri Ottersburg” at pp. 180-185 of Exhibit
24 RJR-31r).
- 25 • **Exhibit RJR-40X** – Stobart Cross Examination, PCHB No. P19-087c (4/23/2021)
26 (responding to “Attachment C – Declaration of Matthew Stobart on Behalf of CB&I
Regarding Flaring Case 5” at pp. 187-194 of Exhibit RJR-31r).
- **Exhibit RJR-41X** – Kinner Cross-Examination, PCHB No. P19-087c (4/27/2021)
(responding to “Attachment D – Declaration of Dr. Laura Kinner” at pp. 196-208 of
Exhibit RJR-31r)

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DATED this 17th day of October, 2022, at Seattle, Washington.

OGDEN MURPHY WALLACE, P.L.L.C.

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