BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND ENERGY, Respondent.	DOCKETS UE-220066 and UG-220067 POST-HEARING BRIEF OF THE PUYALLUP TRIBE OF INDIANS

I. INTRODUCTION

If rates are to go up in these uncertain times, they should not go up because of Puget Sound Energy's (PSE) liquefied natural gas facility constructed on the Tacoma Tideflats (Tacoma LNG). Some of the contested issues before the Utilities and Transportation Commission (UTC or Commission) in this case are complicated, but the question over the prudency of PSE's decision to build Tacoma LNG is not.

The Commission is being asked to determine, in full public view, that it was prudent for PSE to build a facility that presents a risk of catastrophic explosion, and pollutes the air, on the border of an Indian reservation. PSE seeks this determination so that it can force its ratepayers to pay for a substantial portion of that facility.

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The Puyallup Tribe of Indians (Tribe), Public Counsel, and The Energy Project oppose the settlement agreement at issue here (the Tacoma LNG Settlement) because PSE's investment in the facility is not prudent. Although the flaws in PSE's request are myriad, two overarching points militate against a prudency finding. First, PSE's chosen location, in a highly populated area where an Indian tribe and the surrounding community will bear all the associated burdens, contravenes the public interest, including principles of equity that, as the Commission recently recognized, the Commission must consider before finding prudency. *WUTC v. Cascade Natural Gas Corp.*, Dkt. UG-210755, Order 09, ¶ 58 (Aug. 23, 2022). Second, PSE fails to show that its investment in this facility was a prudent use of the funds it seeks to extract from ratepayers. This is because Tacoma LNG was not built to provide a resource to ratepayers; it was built so that PSE (through a recently-created affiliate entity) can profit by selling LNG to the marine vessel industry (and to other for-profit businesses in the future).

Accordingly, costs associated with Tacoma LNG should not be included in base rates or recouped in a tracker. Rather, the Commission should determine that Tacoma LNG fails the prudency test and rule that PSE may not recover the costs incurred in connection with Tacoma LNG from ratepayers.

II. BACKGROUND

The Puyallup Tribe of Indians is a federally recognized Indian tribe with the majority of its Reservation located in Tacoma and Fife, Washington. The Tribe's Reservation shares an airshed with Tacoma LNG. The Tribe intervened in this matter because of its familiarity with Tacoma LNG, and because Tacoma LNG's disparate negative impacts on the Tribe are relevant to the prudency questions before the Commission.

The Commission's proceedings have made one thing exceedingly clear: Washingtonians oppose not just the Tacoma LNG facility but also the Tacoma LNG Settlement presently before the Commission. On September 28, 2022, the Commissioners held a public hearing to receive comments from Washingtonians. Many commenters addressed Tacoma LNG, and *every single*

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person who did strongly opposed PSE's attempts to saddle ratepayers with the costs associated with the facility. Further, the Tribe is aware that the Commission received many hundreds (if not more) of written public comments articulating Washingtonians' overwhelming opposition to Tacoma LNG, and to rate hikes that would reimburse PSE for its decision to proceed with this ill-conceived project. *See* Exh. BR-3. Given that the UTC exists to serve Washingtonians and "regulate *in the public interest*," RCW 80.01.040(3) (emphasis added), the Tribe submits that the public's overwhelming opposition to Tacoma LNG, and to being saddled with the costs of constructing it, cannot be ignored here.

It also bears noting that Governor Inslee and the Attorney General have publicly stated that they do not support Tacoma LNG. Indeed, as the Tribe informed the Commission at the October 3, 2022 hearing, the Washington State Attorney General's Office (AGO) recently appeared as amicus in active litigation challenging Tacoma LNG's air permit because the AGO is concerned that Tacoma LNG's greenhouse gas (GHG) impacts are negative and significant. The Governor's public statement regarding Tacoma LNG and the AGO's publicly-available briefing concerning GHG issues are appended to this written closing statement.[1] Appendix A (Inslee announces opposition to two gas projects in Washington (May 8, 2019)); Appendix B (*Advocates for a Cleaner Tacoma, et al. v. Puget Sound Clean Air Agency, et al.*, Washington Court of Appeals Div. II No. 56938-8, Amicus Brief of the Attorney General of the State of Washington (July 1, 2022)).

A. Many "settling parties" do not take the position that the decision to build Tacoma LNG was prudent.

The fact that UTC Staff and a few private companies have chosen to settle with PSE does not counteract the strong public opposition to Tacoma LNG and to the Tacoma LNG Settlement. Far from expressing full-throated support of a prudency conclusion, many settling parties have

[1] The Commission may take judicial notice of publicly available government records. ER 201(b); *see also Jackson v. Quality Loan Serv. Corp.,* 186 Wn. App. 838, 844, 347 P.3d 487 (2015) ("court may take judicial notice of public documents if the authenticity of those documents cannot be reasonably disputed") (*citing Berge v. Gorton*, 88 Wash.2d 756, 763, 567 P.2d 187 (1977)).

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candidly stated that they did no work to assess the prudency of Tacoma LNG and/or that they are agreeing to prudency solely as a compromise within the larger settlement framework. *See* Exh. JB-4X; *see also* Exh. KCH-8X; *see also* Exh. AJK-18X. In a telling moment at the October 3, 2022 hearing, settling party AWEC emphasized to the Commissioners: "when we were looking at the Tacoma settlement, we weren't necessarily focusing on equity within that settlement." Tr. 432:5-7.

More, UTC Staff's participation in the settlement likewise does not show that it reached any conclusions as to the prudency of building Tacoma LNG. Staff candidly admitted that it has not completed its prudence review of the facility and still needs to perform "a better review." Tr. 477:9–11. Staff further clarified that its signing onto the settlement was "bargained for." Tr. 477:5-6. In short, although Staff joined the settlement, this was not because it has concluded the decision to build the plant was prudent.[2] Tr. at 477:5-8.

B. The parties opposing prudence provide superior and unrebutted evidence on the material issues.

Public Counsel's expert witness, Mr. Earle, also provided testimony as to how the record does not support the prudence of the decision to construct Tacoma LNG. The Tribe will not re-hash Public Counsel's positions on Tacoma LNG but will point out, here, that Mr. Earle's testimony is unrebutted on several issues material to the prudency determination.

Indeed, PSE did not even attempt to cross-examine Earle on any of his testimony concerning the imprudence of Tacoma LNG. Nor did PSE attempt to cross-examine the Tribe's witnesses regarding their unrebutted showing that the decision to construct Tacoma LNG was not a prudent one. The reasonable conclusion that the Commission can draw from PSE's *choice* to

[2] The Tribe is disappointed that Staff decided to join the Tacoma LNG settlement but understands that decision was driven by the fact that resource limitations prevented UTC Staff from adequately assessing the facility.

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not cross-examine these witnesses is that PSE could identify no basis to challenge their testimony, legally or factually.

Public Counsel also contends, correctly, that the siting of Tacoma LNG is greatly inequitable due to its impacts on the Tribe and adjacent community, which is already overburdened. Tr. 484-485. The Energy Project recognizes this as well, stating at hearing that Tacoma LNG presents an environmental justice issue. Tr. 490:7-491:13.

For its part, the Tribe provided the Commission with testimony from two witnesses, Dr. Sahu and Mr. Saleba, who were more qualified to testify in their respective areas of expertise than was PSE's *sole prudency witness*, Mr. Roberts. Dr. Sahu has over thirty years of applicable experience in the fields of environmental, mechanical, and chemical engineering, which includes expertise in assessing the generation of various air pollutants from industrial processes, including sources like the flare, vaporizer, and fugitive components at Tacoma LNG; quantifying such emissions; modeling the impact of such emissions on surrounding areas; determining the health risks associated with such impacts on surrounding populations and the environment; monitoring of air pollutants in ambient air; controlling air emissions via work practices; and assessments of accidental and non-routine risks posed by facilities. *See* Exh. RXS-30T at 7; *see also* Exh. RXS-2 (Resume of Ranajit (Ron) Sahu, Ph.D., CEM (Nevada)). Further, Dr. Sahu has been reviewing materials related to the Tacoma LNG project on behalf of the Tribe since 2018. *See* Exh. RXS-1T at 5-6.

Mr. Saleba has worked as an executive consultant on utility operations for more than 40 years and specializes in strategic and resource planning for utilities, including prudency reviews. *See* Exhibit GSS-1T at 4-5; *see also* Exh. GSS-2 (Saleba Resume). He has testified before this Commission on multiple occasions.

C. PSE's / Roberts' positions do not stand up to scrutiny.

Faced with evidence it could not rebut, PSE produced Mr. Roberts, who is simply not qualified to refute the testimony presented by witnesses on behalf of the parties who oppose the

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Tacoma LNG Settlement. *See e.g.,* Exh. RXS-30T at 6-7. Roberts' testimony adds little to the prudency issue before the Commission, particularly compared to the unrebutted testimony provided by the Tribe's highly-qualified economic and environmental experts. Further, his written testimony contains demonstrably false statements and did not hold up to cross-examination. *See Id.* at at 7-9.

Though he asserts that air pollution from Tacoma LNG will not cause or contribute to human health impacts in surrounding communities, Roberts holds no degrees related to air quality. Tr. 416:18-19. In fact, because he lacks the necessary expertise—at hearing, Roberts was unable to answer questions about where air pollutants emitted by Tacoma LNG come to rest. Tr. 416:20-417:23.

In contrast, the Tribe's witness, Dr. Sahu, is an expert on the matter and provided testimony that air pollution from Tacoma LNG, without question, will have impacts in the communities surrounding the facility. As an example, it is uncontroverted that Tacoma LNG is emitting carcinogens (including benzene, formaldehyde, naphthalene, and several polycyclic aromatic hydrocarbons (PAHs)) and other hazardous and toxic air pollutants into the Tribe's airshed. Exh. RXS-30T at 19. Dr. Sahu explained that "any non-zero concentration" of carcinogens in the air poses a risk of cancer in humans that breathe that air. *Id*. Roberts' incorrect assertion that the air pollution emitted by Tacoma LNG is somehow benign because the facility received an air permit is contrary to common sense and reflects that he lacks the necessary qualifications to provide such an opinion. *Id.* at 19-20.

Mr. Roberts' testimony was helpful, however, in establishing PSE's awareness of the dangers posed by Tacoma LNG. Cross-examination of Mr. Roberts established that his role at PSE requires him to stay informed regarding incidents and accidents at LNG facilities. Tr. 419:4-8. For example, Mr. Roberts testified that he was aware of the explosion at Plymouth LNG that occurred in 2014, before the 2016 and 2018 decision points that PSE identifies in this case. Tr. 419:15-18. Importantly, Mr. Roberts and PSE have presented no evidence distinguishing the risks

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posed by Tacoma LNG from those risks present at the Plymouth LNG facility (or at other LNG facilities where catastrophic accidents have occurred).

Additionally, Mr. Roberts actually helped establish the Tribe's position that Tacoma LNG is not really for ratepayers at all. Most notably, at the October 3 hearing, Roberts admitted that PSE would not have constructed the facility if it could not produce LNG meeting TOTE's requirements. Tr. 425:16-426:6.

Further, on cross-examination, Roberts acknowledged that the feed gas entering Tacoma LNG is already suitable for ratepayers, thus ratepayer gas does not need the pretreatment that Tacoma LNG provides. Tr. 424:21-425:6. Only PSE's contract with TOTE creates a requirement that Tacoma LNG produce LNG with a Methane Number of 80 or higher. Tr. 420:24-421:8; 424:1-9.[3] In other words, while some pretreatment is necessary for liquefaction (namely the removal of nitrogen, carbon dioxide, and water) all processing requirements and design considerations necessary to ensure the LNG produced at Tacoma LNG has a Methane Number of 80 or higher serve only PSE's for-profit operations.

Finally, the Commission should take note of Mr. Roberts' obvious bias, as a witness whose transparent goal is to maximize the benefits his company can extract from these proceedings. The Tribe exposed many instances in which his testimony was objectively and demonstrably incorrect. For example, he claims that the PCHB did not agree with any opinions offered by Dr. Sahu in the Tribe's challenge of the air permit for Tacoma LNG. Exh. RJR-30T at 65. However, the Tribe prevailed in part before the PCHB, and the PCHB specifically acknowledged that it relied on Dr. Sahu's testimony as its basis for ruling in the Tribe's favor and remanding the Tacoma LNG air permit to the Puget Sound Clean Air Agency (PSCAA). *See* Exh. RXS-30T at 17; Exh. RJR-32 at ¶¶ 142-144.[4]

[3] As Roberts acknowledged, there is no Methane Number requirement for PSE ratepayers. *See* Tr. 424:1-12.

[4] Mr. Roberts also wrongly suggests that the PCHB decision regarding the air permit issued to the Tacoma LNG facility resolved environmental justice issues, where (in response to PSE's motion to dismiss those

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III. ARGUMENT AND AUTHORITY

A. PSE's decision to construct Tacoma LNG on the border of the Tribe's Reservation was neither prudent nor in the public interest.

The Commission must consider the public interest with respect to PSE's rates, services, and practices. RCW 80.01.040(3). RCW 80.28.425(1) defines the public interest to include environmental health and GHG emissions reductions, health and safety concerns, economic development, and equity.

Contrary to these requirements, Tacoma LNG disproportionately impacts the health and safety of the Tribe and the surrounding community, is contrary to environmental justice, and reinforces structural inequities. PSE's investment in Tacoma LNG should not be found prudent because it does not serve the public interest.

1. The inequities flowing from PSE's decision to construct Tacoma LNG are an essential consideration in determining the prudence of that decision.

There is no single set of factors applied in the Commission's prudence analysis. *See e.g., WUTC v. The Wash. Water Power Co.,* Cause U-83-26, Fifth Supplemental Order at 15-16 (January 19, 1984). This analysis has generally focused on four factors: (1) the need for the resource;[5] (2) the company's evaluation of resource alternatives;[6] (3) the communication with and involvement of the company's board of directors in the decision-making process;[7] and (4) whether the company maintained adequate contemporaneous documentation to allow the Commission to evaluate the company's decision-making process.[8]

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issues) the PCHB explicitly declined to reach issues of environmental justice or disparate impacts, finding them outside of PCHB jurisdiction. *See* Exh. RJR-30T at 18 (citing Exh. RXS-32 at 36).

[5] *See WUTC v. Puget Sound Power & Light Co*., Docket UE-921262, et al., Nineteenth Supplemental Order at 11 (September 27, 1994).

[6] *See WUTC v. Puget Sound Energy, Inc.,* Docket UE-031725, Order 12 at ¶ 20 (April 7, 2004).

[7] *See id.*

[8] *See id.* at 20.

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Because this general rate case filing will occur after December 31, 2022, the Commission's review of PSE's decision-making process must consider the decision to construct the Tacoma LNG facility under the standards set forth in RCW 80.28.425. These standards include "the public interest" and whether the rates are fair, just, and reasonable. RCW 80.28.425(1). The Commission may consider various factors in its public interest analysis, including equity. *Id*.

In applying this standard, the Commission recently found instructive the Clean Energy Transformation Act's (CETA) statement of legislative intent. *WUTC v. Cascade Natural Gas Corp.*, Dkt. UG-210755, Order 09, ¶ 52 (Aug. 23, 2022) (citing RCW 19.405.010). CETA provides that the public interest includes the "reduction of burdens to vulnerable populations and highly impacted communities" and that in achieving this policy, "there should not be an increase in environmental health impacts to highly impacted communities." RCW 19.405.010(6).

The Commission also adopted the principles that the legislature announced when it established the Washington Office of Equity. *Cascade Natural*, *supra* Order 09 at ¶ 55. On those principles, the legislature instructed that equity requires: "developing, strengthening, and supporting policies and procedures that distribute and prioritize resources to those who have been historically and currently marginalized, including tribes"; eliminating the systemic barriers that are "entrenched in systems of inequality and oppression"; and "promoting dignity, honor, and respect for all people." RCW 43.06D.020(3)(a).

The Commission further adopted what it referred to as the "core tenets of energy justice." *Cascade Natural*, *supra* Order 09 at ¶ 56. These are:

- Distributional justice, which includes ensuring "that marginalized and vulnerable populations do not receive an inordinate share of the burdens";
- Procedural justice, which includes ensuring that decision-making is more inclusive, "recognizing that marginalized and vulnerable populations have been excluded from decision-making processes historically";

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- Recognition justice, which includes making efforts to reconcile "historic and ongoing inequalities"; and
- Restorative justice, which seeks to "disrupt and address distributional, recognitional, or procedural injustices, and to correct them through laws, rules, policies, orders, and practices."

Id.

The Commission explained that this equity lens must apply in all public interest considerations so that "the Commission's decisions do not continue to contribute to ongoing systemic harms." *Cascade Natural*, *supra* Order 09 at ¶ 58. To that end, it held that "regulated companies should inquire whether each proposed modification to their rates, practices, or operations corrects or perpetuates inequities." *Id*.

PSE might argue that this equity analysis should not apply to its attempt to pass the cost of building Tacoma LNG onto ratepayers because RCW 80.28.425(1) was enacted after PSE decided to build Tacoma LNG.[9] That argument—to the extent PSE is offering it—should be rejected, for (at least) two reasons.

First, long before PSE decided to build Tacoma LNG, the Commission required regulated companies to establish that their capital expenditures were "prudent" before allowing them to pass the costs onto ratepayers. *WUTC v. Puget Sound Energy, Inc.*, Dkt. UE-031725, Order 12 at ¶ 19 (Apr. 7, 2004); *WUTC v. The Wash. Water Power Co.*, Cause U-83-26, 5th Supp. Order at 15–16 (Jan. 19, 1984). And the Commission's legislative mandate has always been to regulate in the public interest. RCW 80.01.040(3). The Commission's decisions have identified many different factors that should be considered in this analysis and have repeatedly stressed that the factors

[9] The Commission issued Order 09 in the *Cascade Natural* matter on August 23, 2022, three days before Mr. Roberts testimony in support of the multiparty settlement (Exh. RJR-30T) was filed. Even though footnote 31 of Order 09 specifically puts PSE on notice that its pending multiyear rate plan is subject to the clarified prudency standard the Commission discusses in the Order, PSE and Mr. Roberts conspicuously ignore the equities analysis that has been adopted by the Commission and present no argument or evidence suggesting that the impacts of Tacoma LNG are equitable under that analysis. *See* Exh. RXS-30T at 12-13.

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identified are nonexclusive and that the specific factors to be considered will vary depending on the facts of each case. *See*, *e.g.*, *The Wash. Water Power Co.*, *supra*, 5th Supp. Order at 15–16 (applying thirteen factors and stating that "[a]dditional factors may be considered in subsequent cases as dictated by the facts"). The unique facts of this case include PSE building a facility that (1) has the potential to cause a catastrophic accident in a highly-populated area and (2) will emit carcinogens and other harmful contaminants into an Indian reservation. With or without a statute, it was incumbent on PSE to consider the prudency and public interest implications of building this facility in this location.

Second, regardless of what PSE believes was required in 2016, the legislature now requires the Commission to conduct a public interest analysis, and this Commission has determined that such analysis must include these equitable considerations. *Cascade Natural*, *supra* Order 09 at ¶ 58. PSE had no vested right to assume, in 2016, that the law would remain unchanged. There "is neither a vested right in an existing law which precludes its amendment or repeal nor a vested right in the omission to legislate on a particular subject." *Kellogg v. Nat'l R.R. Passenger Corp.*, 199 Wn.2d 205, 230–31, 504 P.3d 796 (2022) (quoting *Godfrey v. State*, 84 Wn.2d 959, 962–63, 530 P.2d 630 (1975)). No "one can have a vested right in any general rule of law or policy of legislation which entitles [them] to insist that it remain unchanged for [their] benefit." *Id*. at 231 (alterations in original) (quoting *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 452, 495 P.2d 657 (1972)). In other words, "there can be no vested right in legislation remaining unchanged." *Id*.; *see also United States v. Carlton*, 512 U.S. 26, 33–34, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (legislation is not a promise, and the fact that individuals may have relied on existing legislation to their detriment does not preclude even retroactive changes to the law).

Thus, when PSE chose to build Tacoma LNG, it ran the risk that the legal prerequisites for passing the costs onto ratepayers would change. Moreover, since at least 2004, Washington's Energy Facility Site Evaluation Council (EFSEC) has required an analysis of the equities when deciding whether to certify an energy facility site. *See* WAC 463-60-535. An application for

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certification must include, for example, a "description of whether or not any minority or low-income populations would be … disproportionately impacted." WAC 463-60-535(1)(e). PSE demonstrated its awareness of EFSEC's standards when it formally sought a determination that EFSEC lacked jurisdiction over Tacoma LNG and, thus, could play no role in determining whether PSE could build this facility on the border of the Tribe's Reservation. *See* Exh. GSS-5. Thus, when it chose Tacoma LNG's location, PSE was on notice that Washington law favors consideration of equitable principles when evaluating energy companies' decisions about where to site their facilities.

PSE might have assumed that avoiding EFSEC jurisdiction allowed it to build Tacoma LNG wherever it wanted, without consequences, even if the facility further burdens an already over-burdened community. But that callous assumption did not preclude either the legislature or this Commission from further developing the public interest analysis. *Kellogg*, 199 Wn.2d at 230–31. The Commission was therefore correct in ruling that equity must be considered in this case. *Cascade Natural*, *supra* Order 09 at ¶ 53.

Moreover, it is *undisputed* that PSE failed to consider the inequities that Tacoma LNG will cause as well as exacerbate. In response to Public Counsel Data Request No. 373, PSE explicitly admitted that it **did not** consider the burdens posed to vulnerable / highly impacted communities by Tacoma LNG. *See* Exh. RXS-16; *see also* Exh. GSS-1T at 12 (finding that PSE did not adequately consider the equity disparity caused by Tacoma LNG even though "[e]quity has been a long-standing and guiding principle from many years within the utility regulatory environment.").

PSE participated in a systemic injustice by ignoring already overburdened communities in its decisions regarding Tacoma LNG. The Commission must choose whether it will perpetuate that injustice. PSE's failure to consider, much less mitigate, the inequities discussed below should lead the Commission to conclude that construction of Tacoma LNG is not prudent or in the public interest.

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a. Tacoma LNG actively causes and contributes to adverse health impacts that inequitably affect the Tribe and neighboring communities.

The Puyallup Reservation largely envelops the Tacoma LNG facility, and significant Tribal cultural, environmental, and economic resources are located in close proximity to the facility. *See* Exh. GSS-6. Environmental health disparity tools, including EPA's EJSCREEN[10] and the Washington State Department of Health's Environmental Health Disparities Map,[11] indicate that the population situated near Tacoma LNG already suffer disproportionately high environmental burdens. *See* Exh. RXS-1T at 18; *see also* Exh. RXS-30T at 15; *see also* Exh. RXS-31 (Washington Department of Health, Washington Environmental Health Disparities Map Rankings for communities adjacent to the Tacoma LNG Facility). Environmental justice materials developed by PSCAA show that the airshed into which Tacoma LNG emits air pollutants—an airshed the facility shares with the Tribe—already has some of the highest levels of air pollution in PSCAA's jurisdiction. *See* Exh. RXS-1T at 18; *see also* Exh. RXS-15 (PSCAA map, Most Impacted Areas Central Pierce County).

There can be no legitimate dispute that Tacoma LNG will exacerbate these inequities. Dr. Sahu testified, based on his extensive experience examining health risks and impacts associated with air pollution, that emissions from Tacoma LNG contribute to disparate impacts and diminish the health and safety of those in its vicinity by releasing additional pollution to the airshed of already environmentally-overburdened adjacent communities. *See* RXS-30T at 15-16; *see also* Exh. RXS-1T at 16. Among other pollutants, the facility will emit several carcinogens; any concentration of carcinogens in the air poses a risk of cancer in humans who breathe that air. *See* Exh. RXS-30T at 19.[12] Further, many of the chemicals Tacoma LNG will emit into the airshed are

[10] See https://ejscreen.epa.gov/mapper/

[11] *See* https://www.doh.wa.gov/DataandStatisticalReports/EnvironmentalHealth/WashingtonTrackingNetworkWTN/InformationbyLocation/WashingtonEnvironmentalHealthDisparitiesMap

[12] In fact, in the proceedings before the PCHB, PSE's witness, Dr. Libicki, admitted that Tacoma LNG will emit carcinogens (like benzene), which is the crux of the concern expressed in Dr. Sahu's testimony to this

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persistent and bioaccumulative and, therefore, will remain in the environment for generations and accumulate through the food chain. RXS-1T at 20-21.[13]

To the extent PSE tries to suggest that PSE's Clean Air Act permit somehow prevents Tacoma LNG from harming the surrounding community, that contention is incorrect and baseless. PSE *needed* the Clean Air Act permit *because* Tacoma LNG will pollute the air. *See* RCW 70A.15.1070, .2210. As Dr. Sahu's unrebutted testimony explains, a determination that Tacoma LNG will comply with the requirements of the Clean Air Act cannot be construed to mean that its emissions to an overburdened airshed are benign.[14] RXS-30T at 16-20. It is undisputed that, locally, levels of pollutants—criteria pollutants, hazardous and toxic air pollutants (HAPs and TAPs), and volatile organic compounds (VOCs)—will increase as a result of Tacoma LNG's operations. Exh. RXS-1T at 17-18.[15] The Tribe's witnesses established the fact of this pollution, and its disparate impacts on the Tribe, through well-supported and largely unrebutted testimony.

In addition to Dr. Sahu's testimony, Mr. Saleba also testified that Tacoma LNG has a disproportionately adverse impact on the Tribe. *See* Exh. GSS-1T at 11-12. Noting that impacts

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Commission. *See* Appendix C at pg. 2493, lns. 3-23. The Tribe has included this excerpted Libicki cross-examination testimony here as Appendix C out of an abundance of caution. Judge Howard has not yet ruled on the Tribe's October 17, 2022, motion to strike PSE's Exhibit RJR-31R (Prepared Direct Testimony of Dr. Shari Beth Libicki on Behalf of Puget Sound Energy, Inc.) or on the admissibility of the Tribe's proposed Exhibit RJR-38X (Complete Libicki Cross-Examination Transcript, PCHB No. P19-087c (4/27/2021). Appendix C, attached here, is a single excerpted page from the PCHB hearing transcript containing Dr. Libicki's cross-examination that the Tribe submitted as proposed Exhibit RJR-38X with its motion to strike. PSE does not appear to object to admission of this material—it is part of the Libicki cross-examination that PSE proposed be included in the record in its response to the Tribe's motion to strike. *See* PSE's Response to The Puyallup Tribe's Motion to Strike PSE's Exhibit RJR-31R at ¶ 11 (October 24, 2022).

[13] This is one of the issues that has not been studied but likely would be in the Health Impact Assessment discussed below.

[14] These findings remain subject to an active appeal. The Tribe and a number of environmental organizations have appealed that portion of the PCHB decision affirming PSE's air permit, and that appeal is currently before the Court of Appeals, Division Two, in Case Number No. 56938-8-II.

[15] And the increase may well be drastic, as PSE has signaled its intent to produce more than 250,000 gallons of LNG in the near future. This means more waste gas being combusted in the enclosed ground flare and, ultimately, more toxic pollutants being emitted into the air tribal members breathe. Exh. RXS-1T at 18-21.

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on disadvantaged communities are an important consideration in rate cases, Mr. Saleba concluded that the inequities presented by the decision to construct Tacoma LNG had not been adequately considered, and that failure precludes a determination that the decision to build Tacoma LNG was prudent. Exh. GSS-1T at 12.

In contrast, Mr. Roberts admitted on cross-examination that he is not qualified to opine on whether carcinogens released by Tacoma LNG would impact neighboring communities. He is a mining engineer who holds no advanced degrees related to air quality. Because he lacked expertise, Roberts conceded—before the Commissioners—that he could not testify as to the fate and transport of carcinogens emitted from Tacoma LNG. Tr. 416:20-417:23; 416:18-19.

PSE was aware of the equity issues that Tacoma LNG presents no later than 2015 (when the City of Tacoma issued its Final Environmental Impact Statement (FEIS)). Indeed, it presumably knew about these issues long before, given that (1) it has been known for decades that air pollution causes adverse health impacts to nearby communities and (2) there had been catastrophic accidents at LNG facilities before 2015, including the 2014 explosion at the Plymouth LNG facility located along the same (Williams) pipeline as Tacoma LNG. Exh. GSS-1T at 15. Nonetheless, PSE acknowledges that it chose to ignore those inequities, and the impacts of the facility on adjacent communities, during its decision to construct Tacoma LNG. *See* Exh. RXS-13 (Public Counsel Data Request No. 373).

b. <u>Tacoma LNG inequitably impacts the Tribe, which bears the burden of an undefined and unmitigated risk of a catastrophic accident at the facility.</u>

PSE chose to ignore the inequitable safety risks that Tacoma LNG presents to the surrounding community when it chose the facility location—and PSE continues to ignore those risks today. Through Roberts' testimony, PSE contends that Tacoma LNG was built to be safe and code-compliant but, as the Tribe showed, that does not even begin to resolve the prudency question. *See* Exh. RXS-30T at 22-25. In fact, the FEIS for Tacoma LNG specifically identifies

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safety risks as one of the "impacts" that the facility presents. *See* Exh. RXS-33 (FEIS Section 3.5 – Health and Safety).[16]

Dr. Sahu's unrebutted testimony explains that "even permitted, code-compliant facilities pose the risk of a catastrophic explosive event," and describes accidents that have occurred at similar permitted, "code compliant" LNG facilities. Exh. RXS-1T at 22-23; *see also* Exh. RXS-30T at 13, 23-24. For example, a recent explosion at a "code-compliant"[17] LNG facility in Texas created a 450-foot-high fireball. *See* Exh. RXS-1T at 22-23; *see also* Exh. RXS-23 (Shutdown Extended of Fire-Damaged Texas LNG Export Site, Engineering News-Record (June 20, 2022)).

Closer to home, a 2014 explosion at the "code-compliant" Plymouth LNG facility in Kennewick, Washington could be felt by people living three to six miles from the plant and sent pieces of steel shrapnel weighing 250 pounds flying 300 yards, damaging buildings and equipment, and puncturing one of the facility's LNG storage tanks. *See* Exh. GSS-7; *see also* Exh. RXS-34. That incident released an LNG vapor cloud that caused the evacuation of employees and residents **within two miles of the facility**. The explosion also shut down traffic on the nearby Columbia River, parts of Highway 14, and nearby rail lines. *Id.* Emergency responders at the scene could not immediately enter the facility to address the leak due to safety concerns, and LNG releases from the facility continued at the facility for over 24 hours. *Id.* The UTC served as the Principal Investigator for the subsequent Failure Investigation Report and is thus familiar with the details of the Plymouth accident. Exh. GSS-7 (Failure Investigation Report – Liquefied Natural Gas (LNG) Peak Shaving Plant, Plymouth, Washington (4/28/2016)).

The Tribe also demonstrated that PSE's safety claims are belied by the fact that the siting and safety review for Tacoma LNG did not even look at catastrophic accidents or worst-case scenarios at the facility. *See* Exh. RXS-30T at 22-25. On this, the UTC itself recognized the shortcomings in PSE's siting and safety analysis. Specifically, the record contains a UTC

[16] Notably, PSE did not appeal this finding of the FEIS.

[17] As the UTC knows—if the facility were not code compliant, it would not be able to lawfully operate.

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document (prepared by Staff) from 2018 regarding the status of Tacoma LNG, acknowledging deficiencies in the safety review process and stating that "the existing regulatory process has a few fundamental flaws regardless of ones [sic] position on a project." Exh. RXS-36. Importantly, one of the flaws identified by UTC Staff is that the "design spills" process used to calculate facility mitigation measures based on the estimated consequence and impact of an accident does not include a "worst case" analysis. *Id.*

Tracking the concerns expressed by UTC Staff, Dr. Sahu provided unrebutted testimony that without a complete analysis of all reasonably-anticipated risks, regulators cannot consider whether mitigation of such risks is even possible. Exh. RXS-30T at 25. But ultimately, there is no serious dispute as to whether Tacoma LNG presents a safety risk to the surrounding community. It does, and UTC Staff has acknowledged that it does. The record contains ample evidence of catastrophic accidents at other methane liquefaction facilities like Tacoma LNG. PSE (through Mr. Roberts' testimony) fails to acknowledge these accidents, much less address why similar catastrophes could not occur at Tacoma LNG. *See id.* at 22-25. This is because, as UTC Staff has acknowledged, PSE cannot promise the public that no such accident will occur (particularly when a worst-case scenario has not even been studied).

Tacoma LNG presents unknown and unmitigated risks to the public because the facility was not designed (or permitted) based on the consideration of worst-case scenarios. The construction of Tacoma LNG adjacent to the Puyallup Tribe's Reservation was not prudent because PSE has not shown, and cannot show, that the Tribe is safe from injury or loss of life if something goes wrong at Tacoma LNG.

c. <u>Tacoma LNG poses additional existential threats and burdens to be suffered by the Tribe given PSE's stated desire to sell LNG to be transported by rail.</u>

PSE has stated its aspirations to sell LNG that will be transported from Tacoma LNG by railcar. *See* Exh. RXS-30T at 26; *see also* Exh. RXS-37; *see also* Exh. RXS-38. If PSE's aspiration

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is realized, the scope and intensity of Tacoma LNG's health and safety impacts on the Tribe will increase significantly. *See* Exh. RXS-30T at 26-28.

Transportation of LNG by rail was generally prohibited during the design, review, permitting, and construction of Tacoma LNG. However, in July 2020, the Pipeline and Hazardous Materials Safety Administration (PHMSA) promulgated a rule amending hazardous materials transportation regulations to allow for the bulk transportation of LNG by rail. 85 Fed. Reg. at 44995.

As Dr. Sahu's unrebutted testimony shows, the safety risks that the transportation of LNG by rail poses to the Tribe cannot be overstated. *See* Exh. RXS-30T at 26-28. This is also notably demonstrated by the fact that the PHMSA rule requires the evacuation of a one-mile radius around any incident involving LNG. *See* 85 Fed. Reg. at 45021. The Tribe's Reservation is crisscrossed by railroad tracks that run both east/west and north/south, and its members' homes, as well as important cultural and natural resources are located along those tracks. Exh. RXS-30T at 26-27; Exh. GSS-6 (map of area surrounding the Tacoma LNG facility). As the maps provided by the Tribe's witnesses show, rail cars will need to use these tracks to reach Tacoma LNG to load LNG, and then again traverse the Tribe's reservation to transport the LNG elsewhere.

An accident involving a train carrying LNG within the Reservation would have devastating impacts on the Tribe. *See* Exh. RXS-30T at 27-28 (describing the substantial risks associated with rail accidents involving combustible fuels). And, as Dr. Sahu also pointed out, train accidents are unfortunately common. *See id.* at 27. Further, beyond the safety risks, the increased rail traffic in the Tribe's Reservation means more air pollution (from diesel-powered trains) to be suffered, disproportionately by the Tribe, as that pollution will not be widely dispersed. *See id.* at 28. Neither PSE nor any regulatory agency (including the PCHB) have assessed these impacts.[18]

[18] The health impacts associated with Tacoma LNG rail traffic could be considered in a health impact analysis, as it was for the Millennium Bulk Terminals project. *See* Millennium Bulk Terminals—Longview Health Impact Assessment, Cowlitz County and Washington State Department of Health (September 2018) at 3 ("Air quality would be worse in and around the proposed terminal and along the rail lines leading to the terminal. There would likely be an increase in the number and severity of some types of diseases related

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2. Tacoma LNG does not serve the public interest, and PSE has not established that Tacoma LNG is needed or that it is the best resource alternative for ratepayers.

Before the October 3, 2022 hearing, there was some dispute over whether Tacoma LNG can legitimately be characterized as a peak shaving facility constructed for ratepayers. The dispute was resolved at hearing when, on cross-examination, Mr. Roberts admitted that PSE would not have built Tacoma LNG if it could not produce liquefied natural gas that met TOTE's fuel quality requirements. Tr. 425:16-426:6. If Tacoma LNG were truly constructed as a peak shaving facility intended to benefit ratepayers, PSE would have been able to provide testimony under oath that it would have proceeded with the project regardless of whether it could produce LNG *with the Methane Number needed for non-ratepayer uses*. The decision to build Tacoma LNG was because of TOTE, not ratepayers. On this point, Dr. Sahu testified that the negative externalities related to Tacoma LNG increased the costs of designing, constructing, permitting, and operating the project and concluded that it was not reasonable or prudent for PSE to focus only on the purported benefits of the project while ignoring its negative externalities. *See* Exh. RXS-1T at 15-16.

Mr. Saleba, an expert utilities economist with decades of experience, provided unrebutted testimony (again, PSE did not even attempt to cross-examine him) concluding that the need for Tacoma LNG has not been established. *See* Exh. GSS-1T at 6-10. Mr. Saleba provided three primary reasons for his finding that PSE failed to establish a need for Tacoma LNG: (1) PSE's historical natural gas peak demands have been below its available resources at the time of the system peak for several years; (2) PSE has continually over-forecast its peak day demands; and (3) the long-term trend in natural gas utilization will continue to decrease as there has been a national goal for several years to reduce carbon emissions and the trend towards natural gas moratoriums belies PSE's assertion that new peaking capacity will be needed in the future. *See id.* at 6-10.

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to diesel emissions from locomotives, vessels, and equipment.") available at: https://www.co.cowlitz.wa.us/DocumentCenter/View/15122/MBTL-HIA---September-2018?bidId=

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Dr. Sahu provided testimony similar to Mr. Saleba's, finding that the tank size at Tacoma LNG is significantly oversized based on historic demand, and concluding that—based on the facts and reasonable inferences therefrom—the facility's primary (if not its only) purpose is to provide LNG to marine vessels. *See* Exh. RXS-1T at 10-13; *see also* Exh. RXS-30T at 29-30. Dr. Sahu also found that the costs incurred by PSE to redesign the facility to ensure the LNG produced at Tacoma LNG has a Methane Number of (at least) 80 do not serve the public interest. Exh. RXS-30T at 31-35. This is because they only satisfy PSE's obligation to provide LNG of a certain fuel quality to TOTE. *Id*.

In addition, PSE has not contested (because it cannot contest) the fact that no more than 2.2% of Tacoma LNG's end-product will go towards ratepayers. On this, Mr. Saleba provided unrebutted testimony that making ratepayers pay 43% when the benefit to them is 2.2% (at best) does not comport with cost causation principles or generally accepted regulatory precedents. Exh. GSS-1T at 14. Further belying Tacoma LNG's purported value to ratepayers, the Commission has received evidence suggesting that the peak shaving function of Tacoma LNG will be utilized for only 10 years of the facility's useful life.[19]

The Commission should not saddle Washington's ratepayers with the costs of an expensive project that will give them little, if any, benefit.

B. PSE must better identify and mitigate the impacts of Tacoma LNG before its prudence can be established.

The foregoing leaves no question that Tacoma LNG presents health and safety impacts to already-overburdened communities. Can those impacts be mitigated? At best, PSE has more work to do to before the Commission can credibly conclude that PSE's decision to construct Tacoma LNG was prudent.

[19] While PSE contests this statement within the Supplemental Environmental Impact Statement (SEIS), claiming it is in error—Mr. Saleba notes that PSE did nothing to correct this purported error and that it is incumbent on PSE to ensure that the agencies relying on the SEIS were operating with the correct information, particularly where PSE was the project proponent. *See* Exh. GSS-1T at 13-14.

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As discussed above, PSE misleadingly points to Tacoma LNG's air permit and the PCHB's related decision. Health and safety impacts cannot be mitigated without first being properly assessed. *See* Exh. RXS-30T at 21; *see also* Exh. GSS-1T at 15. Beyond the fact that an air permit concerns only air, the air permit analysis was performed on a pollutant-by-pollutant basis without consideration of the *cumulative* impacts of those pollutants. *See* RXS-30T at 19-20. Because PSE has avoided a full assessment of Tacoma LNG's impacts on the Tribe and the rest of the affected local community, the Commission should abstain from making a prudence determination until such an assessment is available to inform its analysis.

A Health Impact Assessment (HIA) is a process that helps support the review and analysis of potential health effects of a plant, project, or policy before it is built or implemented.[20] An HIA typically identifies both health impacts and related mitigation.[21] By identifying health effects, an HIA can inform mitigation and policy recommendations to increase positive health outcomes and minimize adverse health outcomes. For example, on November 27, 2018, Cowlitz County and the Washington State Department of Health issued a Health Impact Assessment for the Millennium Bulk Terminal–Longview, outlining the health effects that proposal would have on the residents of Longview, Cowlitz County. Notably, the environmental impact statement for the Millennium Bulk Terminal included a modeled cancer risk rate for new emissions associated with the facility, but a HIA was still performed. Exh. RXS-30T at 22.

In this instance, the Tribe's witnesses provided unrebutted testimony explaining why an HIA could be a useful tool to identify how PSE can mitigate the negative impacts and externalities

[20] Some governments in the state even have webpages devoted to HIAs. *See, e.g.,* https://kingcounty.gov/depts/health/environmental-health/healthy-communities/health-impact-assessment.aspx

[21] *See e.g.,* Millennium Bulk Terminals—Longview Health Impact Assessment, Cowlitz County and Washington State Department of Health, (September 2018) available at: https://www.co.cowlitz.wa.us/DocumentCenter/View/15122/MBTL-HIA---September-2018?bidId= (For example, this HIA evaluated a wide range of potential impacts associated with the proposed project, including air quality, economic health and prosperity, taxes and municipal budgets, economic resiliency, community health, traffic and mobility, recreational impacts, personal health, fisheries impacts, surfactants and human health, drinking water quality, and local food crops. *See* Section III at p.17).

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created by Tacoma LNG's presence and operation. *See id.* at 21-22; *see also* Exh. GSS-1T at 15. But ultimately, however credible information on these issues is developed, further information about the specific health impacts of Tacoma LNG is needed—so that they can be mitigated—before the Commission can determine that PSE's decision to build this facility in this location was a prudent one.

IV. CONCLUSION

This case arises from PSE's decision to build Tacoma LNG—a methane liquefaction facility that (1) emits carcinogens (and other pollutants) to the Puyallup Tribe's airshed and (2) presents risks of a catastrophic accident to those located near the facility, including the Tribe. This is precisely the type of injustice that the Commission must play a role in averting, as it expressly recognized in *Cascade Natural*.

PSE's requested ruling regarding Tacoma LNG prudency would fly in the face of that role. Distilled to its essence, the Tacoma LNG Settlement asks the Commission to perpetuate systemic injustice by rubber-stamping PSE's patently inequitable decision to foist the burdens of its facility onto a historically mistreated population. The Commission cannot grant PSE's request while also holding faithful to the equitable principles it espoused in *Cascade Natural*.

How the Commission resolves these important issues has significant implications for public confidence in this institution. The Commission has received overwhelming and unrebutted evidence that PSE's decision to build Tacoma LNG was not equitable, not prudent, and not in the public interest. To the contrary, PSE made its decision to build Tacoma LNG in an already-overburdened community so that it could limit the overhead costs of its for-profit sale of LNG to the marine vessel industry, completely disregarding the burden it imposes on neighboring communities who will bear the brunt of the health and safety risks that Tacoma LNG poses.

If PSE truly needed a peak shaving facility (a showing it has not made), it could have built one elsewhere, and there is no serious argument to the contrary. The Commission should not reward PSE's inequitable decision-making, or incentivize such decision-making in the future, by

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concluding, here, that Washingtonians are required to subsidize PSE's decision to build a facility like this next to an Indian Reservation.

The Commission should therefore reject the Tacoma LNG Settlement.

DATED this 31st day of October, 2022, at Seattle, Washington.

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Appendix A to Post-Hearing Brief of The Puyallup Tribe of Indians

Inslee announces opposition to two gas projects in Washington (May 8, 2019)

Publicly available at: https://www.governor.wa.gov/news-media/inslee-announces-opposition-two-gas-projects-washington

Washington Governor - Jay Inslee

Inslee announces opposition to two gas projects in Washington

May 8, 2019

Story

Gov. Jay Inslee today signed **a bill** banning hydraulic fracking for oil and natural gas within Washington state. Immediately following the signing, Inslee spoke with the media to discuss how the emerging science emphasizing the urgency of climate change and the environmental impacts of natural gas make clear the state's efforts and future investments in energy infrastructure should focus on clean, renewable sources rather than fossil fuels.

The governor said such thinking should apply to current proposals to construct significant, long-term new natural gas infrastructure in Washington state.

"We've always leaned on science to guide our efforts on climate change and the science is increasingly clear. The accelerating threat of climate change and the emerging science on the damaging impacts of natural gas production and distribution mean we must focus our full efforts on developing clean, renewable and fossil-fuel free energy sources. Being committed now to 100 percent clean electricity and signing a bill prohibiting fracking in Washington state, we want to be consistent to that spirit of progress.

"I cannot in good conscience support continued construction of a liquefied natural gas plant in Tacoma or a methanol production facility in Kalama. In the early days of both projects, I said they could help reduce greenhouse gas emissions as we transition to cleaner energy sources, but I am no longer convinced that locking in these multidecadal infrastructure projects are sufficient to accomplishing what's necessary. Science is continuing to emerge regarding the dwindling window for action and the significant methane leakage associated with gas production, and we don't have the luxury of a 50-year transition phase. The impacts of climate change are already coming to bear and scientists are saying that unless we reduce emissions by half over the next decade, we will reach an irreversible tipping point. There are emerging technologies that could make renewable gas a viable source of energy.

"I want to be clear that my stance on these projects does not change our state's regulatory process. As is the case with any project, our state agencies will comply with state and federal laws to ensure a rigorous and objective review of projects. Decisions on permit applications must also be made in accordance with state and federal law.

"But it's time for us to modernize and update the ways we weigh the costs and benefits of all fossil fuels, including natural gas. I'll be working with agency directors in the coming weeks to discuss the way forward.

"The age of consequences is upon us. We have to act based on clear science. Washington is embracing a clean energy future and the clean, healthy, sustainable jobs and benefits that come with it. We should be confident in our ability to build our clean energy economy while sustaining record economic growth and record numbers of good-paying construction and building jobs."

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Appendix B to Post-Hearing Brief of The Puyallup Tribe of Indians

***Advocates for a Cleaner Tacoma, et al. v. Puget Sound Clean Air Agency, et al*.,**
Washington Court of Appeals Div. II No. 56938-8, Amicus Brief of the Attorney General of the State of Washington (July 1, 2022).

NO. 56938-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Advocates for a Cleaner Tacoma, et al.,

Appellants,

v.

Puget Sound Clean Air Agency, et al.,

Respondents.

AMICUS BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON

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I. INTRODUCTION

As the State of Washington strives to meet the greenhouse gas emissions limits set by state law, policymakers should know which emissions assumptions are well-supported and which may be overly speculative or unrealistically optimistic. The Puget Sound Clean Air Agency had a statutory duty to conduct a thorough greenhouse gas emissions analysis preceding its Order of Approval to Construct the Tacoma Liquefied Natural Gas Project and to disclose any unreliability in its assumptions. Its Supplemental Environmental Impact Statement fell short of this duty by failing to disclose that three of its assumptions were speculative and lacked scientific certainty. First, it failed to disclose the uncertainty surrounding its assumption of a very low leak rate for methane between extraction at the wellhead and delivery at the Project. Second, it did not reveal the thin support for its assumption that the Project's marine fuel customers would all convert to liquefied natural gas from marine gas oil or diesel fuel (collectively,

marine gas oil). Third, it failed to reckon with the uncertainty in its assumption that current market conditions for marine gas oil would endure regardless of changes in technology.

By omitting the speculative nature of its assumptions, the Supplemental Environmental Impact Statement failed in its primary purpose under the State Environmental Policy Act: to ensure that Puget Sound Clean Air Agency made an informed decision on the Order of Approval. In turn, the Pollution Control Hearings Board erred in concluding that the Supplemental Environmental Impact Statement, despite these omissions, met the "rule of reason." Consequently, the Attorney General's Office files this brief in support of Petitioners' appeal.

II. IDENTITY AND INTEREST OF AMICUS

The Attorney General submits this brief as *amicus curiae* to ensure the integrity of greenhouse gas emissions analysis under the State Environmental Policy Act (SEPA), a critical step in agency understanding of the effects of decision-making

on climate change, and an essential step toward meeting the emissions limits in the Climate Commitment Act of 2021. That Act stated that "climate change is one of the greatest challenges facing our state and the world today, an existential crisis with major negative impacts on environmental and human health." It recognized the legislature had previously set and then updated state greenhouse gas emissions limits, and emphasized that "[m]eeting these limits will require coordinated, comprehensive, and multisectoral implementation of policies, programs, and laws, as other enacted policies are insufficient to meet the limits." RCW 70A.65.005(1)–(2). The effectiveness of any state law establishing limits on greenhouse gas emissions, however, depends on the reliability of projected and actual emissions figures. If SEPA analyses use unrealistically optimistic or unreliable greenhouse gas emissions figures, policymakers like the State and the Puget Sound Clean Air Agency (PSCAA) will be unable to meet the goals they set for themselves. Consequently, the Attorney General has a strong

interest in the thoroughness and reliability of greenhouse gas emission analyses. Moreover, the Attorney General has an interest in ensuring that state law, including SEPA, is interpreted and applied correctly and consistently. Where state law intersects with vital and urgent matters of public interest, such as SEPA analyses of climate impacts, the Attorney General has a clear interest in representing the State. This brief addresses only a narrow subset of the SEPA issues in this matter.

III. ISSUE OF CONCERN TO AMICUS

Whether SEPA requires an Environmental Impact Statement to thoroughly evaluate and disclose the uncertainty or speculative nature of its assumptions about greenhouse gas emissions?

IV. STATEMENT OF THE CASE

This brief relies on the Appellants' statement of the case.

V. ARGUMENT

The Supplemental Environmental Impact Statement (SEIS)[1] for the Tacoma Liquefied Natural Gas (LNG) Project failed to present an accurate analysis of the Project's greenhouse gas emissions by not disclosing that three of its key assumptions were speculative, and lacked scientific certainty: (1) the assumption that the Project's methane leak rate would be very low, (2) the assumption that newly available LNG will only displace marine gas oil currently in use, and not offer supplemental marine fuel and (3) the assumption that current market conditions for marine gas oil will endure for the foreseeable future regardless of changes in technology. These three failures rendered the SEIS insufficient, meaning that PSCAA did not have available the analysis necessary to make an informed decision. A thorough SEIS would have informed

[1] Administrative Record (AR) 22205 et seq. This Brief will refer to it as "SEIS," and to the "PSE Tacoma LNG Project GHG Analysis Final Report," AR22260 et seq., as "SEIS Appendix B."

the Agency that the Project risked a net harmful effect on greenhouse gas emissions–a particularly important understanding in light of the State's longstanding commitment to greenhouse gas limits under state law. See RCW 70A.45.020. The Pollution Control Hearings Board (PCHB) erred in concluding that the SEIS met the "rule of reason" despite these infirmities.

A. SEPA Requires a Thorough and Reliable Greenhouse Gas Emission Analysis

SEPA "may be the most powerful legal tool for protecting the environment of the state."[2] The legislature clearly identified four objectives of SEPA:

> (1) To declare a state policy which will encourage productive and enjoyable harmony between humankind and the environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and [to] stimulate the health and welfare of human beings; and (4) to enrich the understanding of the

[2] Washington Dep't of Ecology, *State Environmental Policy Act Handbook* at 5 (2018 Updates), available at https://ecology.wa.gov/DOE/files/4c/4c9fec2b-5e6f-44b5-bf13-b253e72a4ea1.pdf. (Handbook)

> ecological systems and natural resources important to the state and nation.

RCW 43.21C.010. SEPA, modeled after the National Environmental Policy Act (NEPA), "gives agencies the tools to allow them to both consider and mitigate for environmental impacts of proposals." Handbook at 6.

In short, SEPA "sets forth a state policy of protection, restoration and enhancement of the environment." *Polygon Corp v. City of Seattle*, 90 Wn.2d 59, 63, 578 P.2d 1309 (1978) (citing RCW 43.21C.020). One of the primary methods of implementing this policy is SEPA's requirement that covered agencies examine the environmental effects of decisions before they are made. This deceptively simple mandate—to look at environmental impacts before an agency leaps—produces better agency decisions and ensures public awareness and participation in those decisions. *See, e.g., Victoria Tower P'ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380 (1990) ("The primary function of an EIS is to identify adverse

impacts to enable the decision-maker to ascertain whether they require either mitigation or denial of the proposal.").

In the current climate crisis, an accurate assessment of a project's effect on global warming is particularly important. Accordingly, SEPA requires that agencies take a hard look at greenhouse gas emissions, so that they know the full implications of the decisions they face, and have the information necessary to mitigate environmental harms. Thus, for projects involving transportation, storage, or use of fossil fuels, the SEPA review must consider the lifecycle impacts of producing, transporting, and using such fuels. WAC 197-11-444(1)(b)(iii) (listing "climate" among elements of environment to be considered in SEPA); WAC 197-11-60(4)(c) (requiring consideration of lifecycle impacts). *See also, e.g., Columbia Riverkeeper v. Cowlitz Cty.*, No. 17-010c, 2017 WL 10573749 (Shoreline Hearings Bd. Sept. 15, 2017) (holding that the EIS for methanol project was invalid for failing to consider lifecycle GHG emissions).

Recognizing that it can be difficult to determine future environmental impacts precisely, SEPA regulations require that agencies fully disclose "scientific uncertainty concerning significant impacts." WAC 197-11-080(2), -330(3)(d). SEPA, then, allows an agency to proceed in the face of uncertainty—so long as it discloses the uncertainty.

This court reviews the PCHB's decisions, in part, to determine whether "[t]he agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d). In turn, the determination of whether an EIS is adequate is a question of law subject to *de novo* review. *PUD No. 1 of Clark County v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 157, 151 P.3d 1067 (2007) ("We review the facts on the record before the PCHB to determine if substantial evidence supports them and we review conclusions of law de novo"); *see also OPAL v. Adams Cty.*, 128 Wn.2d 869, 875, 913 P.2d 793 (1996). EIS adequacy refers to the legal sufficiency of the environmental data contained in the impact statement. *Klickitat Cty. Citizens*

Against Imp'd Waste v. Klickitat Cty., 122 Wn.2d 619, 632–3, 860 P.2d 390 (1993), *amended*, 866 P.2d 1256 (1994) (citing R. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § 14(a)(i) (4th ed. 1993)). Courts review the adequacy of an EIS under the "rule of reason," requiring a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Id.*

B. The Supplemental Environmental Impact Statement Failed to Disclose the Uncertainty of its Methane Leak Rate Assumption

The PCHB erred in concluding that the SEIS's "range of methane emission data" was reasonable under SEPA, because the SEIS failed to disclose the uncertainty of its assumptions.[3] The SEIS's bottom-line assessment of greenhouse gas impacts relies on its assumption that the gas the Project uses will be extracted and piped from British Columbia to Tacoma, using an impressively low "leak rate" – specifically, it assumes that less than one-third of one percent of the methane will leak between

[3] AR15678, ¶ 98.

the well and the Project.[4] This extraordinarily optimistic assessment of efficiency is significant because leaked methane has a very severe greenhouse gas impact. Unfortunately, however, the SEIS fails to disclose the severity of the uncertainty underlying its 0.32 percent leak assumption: it relies on a single study, and attributes the significant differences in leak rates to geophysical considerations and regulatory regimes, rather than the fact that its preferred study omits methane releases that are accidental or irregular, despite the availability of other, more thorough data. AR22374; AR19017.

To be sure, SEPA allows an agency to choose among experts, methods of analysis, or calculations so long as it has a sufficient reason for its choice.[5] But SEPA does not allow an agency to use a method of analysis and refuse to disclose its speculative nature, weaknesses, or lack of scientific support.

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[4] AR15674, ¶ 87.

[5] *See, e.g., City of Des Moines v. PSRC*, 98 Wn. App. 23, 36–37, 108 Wn. App. 836, 988 P.2d 27 (1999).

WAC 197-11-080(2) ("When there are gaps in relevant information or scientific uncertainty concerning significant impacts, agencies shall make clear that such information is lacking or that substantial uncertainty exists.").

It would not have been difficult for PSCAA to disclose this uncertainty. The Department of Ecology has shown the way in a final EIS for the Kalama Manufacturing and Marine Export Facility.[6] There, Ecology reviewed a number of potentially applicable leak rates, from 0.32 to 2.3 percent. That project is expected to use 99.4 percent British Columbia natural gas and 0.6 percent U.S. Rocky Mountain natural gas – substantially similar to the 100 percent British Columbia gas supply planned for the Tacoma LNG Project. Although Ecology concluded that a medium leak rate would be 1.46 percent (or more than four times PSCAA's assumed rate for

[6] AR17595 et seq. (Dep't of Ecology, *Kalama Manufacturing and Marine Export Facility Final Second Supplemental Environmental Impact Statement*, 2020).

the Tacoma LNG Project), it included a variety of emissions scenarios, including two low-emissions scenarios, a medium scenario, and a high scenario with their associated estimated methane emissions rates. It presented that information in the main body of the Second SEIS, alongside its analysis from a prior SEIS, like this:

Table 3.4-1. Upstream Methane Emission Rates from First and Second SEIS

First SEIS

Emissions	Units	Low	Baseline	High
Upstream Methane Emission Rate	Percent of Natural Gas Used	0.71	0.71	0.97

Second SEIS

Emissions	Units	Low Emissions Scenario 1	Low Emissions Scenario 2	Medium	High
Upstream Methane Emission Rate	Percent of Natural Gas Used	0.71	0.97	1.46	3

AR17636. Ecology further disclosed the uncertainty in a number of estimates, and explained the limitations in several applicable models.[7] The Tacoma LNG SEIS, however, did no

[7] AR17635 ("Due to this uncertainty, this study has included a fourth upstream methane emission rate of 3 percent defined as the 'high emission scenario'. This fourth emission rate estimate is significantly higher than the three values presented

such thing. Although an appendix lists various gas leakage rates—incidentally, demonstrating that PSCAA chose the lowest possible leak rate on the list[8]—it does not disclose the uncertainty and consequences of error in its choice. SEPA requires, though, that an agency fully disclose "scientific uncertainty concerning significant impacts."[9] The SEIS's appended list is not a sufficient substitute for an analysis that truly reckons with uncertainty. *See, e.g., Center for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1169 (9th Cir. 2003) (noting "that the agency must disclose responsible opposing scientific opinion and indicate its response in the text of the final statement itself"); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv*., 482 F. Supp. 2d 1248, 1255 (W.D. Wash. 2007) (holding that "relegation" of

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below … and provides a useful mechanism to explore how the uncertainty that exists in upstream methane emission rates can impact the overall GHG lifecycle emissions [for the project].").

[8] AR22373.

[9] WAC 197-11-080(2).

dissenting views to "the appendix was improper under NEPA").

A policymaker reading the SEIS would not be informed that it chose a methane leak rate with severe vulnerabilities, leading to a risk of significantly underestimating the project's greenhouse gas emissions. SEPA and its regulations require more.

C. The Supplemental Environmental Impact Statement Failed to Sufficiently Examine the Impacts of LNG Displacement of Marine Gas Oil

The PCHB erred in concluding that the SEIS reasonably assumed, in the face of substantial doubt, that all of the Project's LNG used by marine shipping would displace marine gas oil currently used.[10] The SEIS relied on the notion that every gallon of LNG from the Project in the marine market will result in an offsetting reduction in the use of marine gas

[10] AR15643 ¶ 15 ("As part of the SEIS and [Life Cycle Analysis], several assumptions were made, including: 100 percent of the project's LNG will displace conventional marine fuel."); AR15664 ¶ 70; *See also* AR22278.

oil. This assumption is important because, if greenhouse gasses from the Project fail to displace any portion of existing emissions from marine gas oil, then the Project's bottom-line greenhouse gas analysis is wrong, and understates the Project's greenhouse gas emissions.

This assumption, however, is unreliable, because the availability of LNG as a fuel may generate some demand for it from sources other than current marine gas oil users. Similarly, some new customers for marine gas oil may arise to use the newly unpurchased and available supply. In addition, some current users of marine gas oil may switch to a different fuel without the project at all. The SEIS should have evaluated these potential market effects, but the PCHB was satisfied that the assumption of perfect displacement of LNG-for-marine gas oil was reasonable.[11]

[11] AR15672 ¶ 84. An example of a dynamic market analysis and disclosure of uncertainty is Ecology's Kalama Manufacturing and Marine Export Facility Final Second

Under SEPA, an agency has the obligation to examine impacts of "reasonably foreseeable future actions." *Gebbers v. Okanogan County PUD No. 1*, 144 Wn. App. 371, 381, 183 P.3d 324 (2008). S*ee also* RCW 43.21C.031 (mandating preparation of an EIS for major actions having a probable significant environmental impact); WAC 197-11-782 (defining "probable" to mean "reasonably likely to occur" as opposed to being "remote or speculative"). As noted above, SEPA regulations also require that agencies fully disclose "scientific uncertainty concerning significant impacts." WAC 197-11-080(2).

The Agency's omission of this examination violates SEPA. As a general matter, the impacts considered under SEPA must be reasonably foreseeable, and not speculative, as the "perfect displacement" assumption is in the SEIS. But more specifically, the law does not permit an agency to avoid

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Supplemental Environmental Impact Statement, at AR17739–43.

an assessment of the effect of increased availability of a fuel source merely because the effect may be speculative. *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549–550 (8th Cir. 2003) (analyzing requirements under NEPA); *see also Kucera v. State*, 140 Wn.2d 200, 215 n.10, 995 P.2d 63 (2000) (discussing applicability of NEPA caselaw to SEPA analyses). Even if the precise *extent* of the effect is difficult to determine, the agency must consider the *nature* of the effect. *Mid States Coal. for Progress*, 345 F.3d at 549–50. In *Mid States*, the agency failed to take into account that the increased availability of a fuel source may have an effect on the demand for that source. *Id.* at 549 (noting that "the proposition that the demand for coal will be unaffected by an increase in availability and a decrease in price . . . is illogical at best"). Similarly, an agency may not assume that newly available fuel will substitute for previously available fuel on a 1:1 basis: "Even if we could conclude that the agency had enough data before it . . . we would still conclude this perfect

substitution assumption arbitrary and capricious because the assumption itself is irrational (i.e., contrary to basic supply and demand principles)." *WildEarth Guardians v. U.S. Bureau of Land Mgmt*., 870 F.3d 1222, 1234–1236 (10th Cir. 2017).

Moreover, insofar as the SEIS claims the benefits of newly available LNG fuel but avoids an analysis of the potential harms from continued consumption of marine gas oil, it fails the rule of reason. It is akin to taking the benefit of a doubt, but discounting its downside risk. *See, e.g., High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014) ("[I]t was nonetheless arbitrary and capricious to quantify the benefits of the lease modifications and then explain that a similar analysis of the costs was impossible when such an analysis was in fact possible and was included in an earlier draft EIS."); *see also Montana Envtl. Info. Center v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1097 (D. Mont. 2017).

This conclusion is reinforced by the Ninth Circuit's recent holding in *Center for Biological Diversity v. Bernhardt*, also in the context of the error of an agency's decision to ignore market effects of a new source of fuel. *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 739 (9th Cir. 2020). That court favorably discussed the Department of the Interior's process for discussing and disclosing uncertainty in assumptions: it "requires the agency to include a statement explaining that the information is lacking, its relevance, a summary of any existing credible evidence evaluating the foreseeable adverse impacts, and the agency's evaluation of the impacts based upon 'theoretical approaches or research methods generally accepted in the scientific community.'" *Id.* (citing 40 C.F.R. § 1502.22(b)(1)).

In sum, the SEIS was required to take a hard look at reasonably foreseeable consequences of the newly available fuel, and disclose uncertainty in its "perfect displacement" assumption. Because it did not do either, the SEIS was

insufficient under SEPA, and the PCHB erred in concluding otherwise.

D. The Supplemental Environmental Impact Statement Failed to Disclose the Uncertainty of its Assumption that Marine Transport Energy Technology Will Not Advance in the Future

Finally, the PCHB erred in concluding that the SEIS need not disclose the uncertainty behind its assumption that Alaska-bound transport would rely only on marine gas oil or LNG for the life of the Project.[12] This assumption amounted to a determination by the PCHB that "the marine industry as it exists today will remain unchanged of the next 40 years."[13]

An accurate assessment of energy sources for marine shipping require foresight into future supply, demand, fuel technology, and other market forces. While perfection is not required, an agency must make a "reasonable" effort to determine and disclose such impacts. *Sierra Club v. U.S. Dep't*

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[12] AR15672 ¶ 84 ("Based on the evidence presented, the Board finds the SEIS made a reasonable assumption ….").

[13] AR15669 ¶ 76. *See also* AR15672 ¶84.

of Energy, 867 F.3d 189, 198 (D.C. Cir. 2017) (holding that, in determining what effects are "reasonably foreseeable," an agency must "engage in reasonable forecasting and speculation"). Rather than make these reasonable efforts, the SEIS attempts to give an easy answer to the hard question: it assumes that, for the life of the Project, the only available fuel sources for TOTE Marine and similar ships will be marine gas oil or LNG. This allows the SEIS to compare its optimistic projection of LNG's future greenhouse gas impacts with a baseline of the diesel-powered present, not with a future without the Project. In other words, it imagines the emissions under "No Action" alternative to be the same as those at the present – even decades into the future. Where PSCAA makes such assumptions, they must be supportable, and it must disclose their uncertainty.[14] This it did not do.

[14] *See, e.g.*, WAC 197-11-080(2) (SEPA regulations requiring that agencies fully disclose "scientific uncertainty concerning significant impacts"); *Ctr. for Biological Diversity*, 982 F.3d at 738 (rejecting agency contention that there was no

Assuredly, SEPA does not command an agency to make guesses about the future. But just as SEPA does not permit rank speculation about future changes, it also does not permit one to assume without basis that current technology and economic conditions will remain static. In other words, one may not, on the one hand, claim that any assumptions about the future are speculative and therefore not permitted, and, on the other hand, assume that the future will be exactly what it is today. If, as here, the assumption of the perpetuation of the status quo is itself a speculative estimate, the agency must say so.

VI. CONCLUSION

If the State of Washington is to meet its statutory commitments to reduce greenhouse gas emissions, agencies must plainly disclose when their emissions assumptions are overly speculative or unrealistically optimistic. In approving the

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way to estimate "reasonably foreseeable" indirect effects of project); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 68 (USDC D.C.) (rejecting agency's position that quantifying GHG emissions would be too speculative).

Tacoma LNG's SEIS, the PCHB erroneously interpreted or applied SEPA. Therefore, the Attorney General's Office respectfully asks this court to reverse the Board, vacate the SEIS and the Notice of Approval, and remand to PSCAA to initiate a new SEPA analysis.

This document contains 3345 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 1st day of July, 2022.

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 1st day of July, I caused the Amicus Brief of the Attorney General of the State of Washington in the above-captioned matter to be electronically filed with the Washington State Appellate Courts' Portal, which automatically serves all parties of record. I also served a true and correct copy upon the parties herein as indicated below:

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SIGNED this 1st day of July, 2022, at Olympia, Washington.

Tricia Kealy

Tricia Kealy, Paralegal

Appendix C to Post-Hearing Brief of The Puyallup Tribe of Indians

Excerpt of Cross-Examination Testimony of Dr. Shari Libicki, PCHB No. P19-087C (Apr. 27, 2021)

POLLUTION CONTROL HEARINGS BOARD

FOR THE STATE OF WASHINGTON

ADVOCATES FOR A CLEANER TACOMA; SIERRA CLUB; WASHINGTON ENVIRONMENTAL COUNCIL; WASHINGTON PHYSICIANS FOR SOCIAL RESPONSIBILITY; STAND.EARTH; and THE PUYALLUP TRIBE OF INDIANS, Appellants, v. PUGET SOUND CLEAN AIR AGENCY, PUGET SOUND ENERGY, Respondents.	PCHB NO. P19-087C

VIDEOCONFERENCE HEARING

DAY 10

Pages 2330 - 2644

OLYMPIA, WASHINGTON

April 27, 2021

8:03 a.m.

REPORTED BY: CRYSTAL R. McAULIFFE, RPR, CCR 2121

if I'm not mistaken.

A. That's correct.

Q. Given all the work that you've done, do you understand that Tacoma LNG's flare will emit carcinogens to the airshed?

A. So in -- in our world, when we talk about toxics, we can talk about them two ways. We can talk about the single molecule, which is to say that there are definitely molecules of chemicals that have been classified as carcinogens or possible carcinogens in the exhaust of the flare.

The second way we talk about carcinogens is: What's the concentration? Because there are things in the air all around us that are carcinogens. And that's why we have the TAPs and the ASILs and the evaluation.

So the simple emissions of carcinogens -- of course we would like zero everywhere -- is not something we normally talk about.

Q. But will it?

A. There are -- so I'm going to use the benzene, which I think is either a suspected carcinogen or a known carcinogen. I'm not sure what the classification is. There is benzene in the exhaust.

Q. Did you write this sentence?

A. Did I write this sentence? I -- I certainly