BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, **Complainant,** **v.** **PUGET SOUND ENERGY,** **Respondent.**	**Docket UE-220066/Docket UG-220067 and UG-210918 (consolidated)** **PUGET SOUND ENERGY'S MOTION TO STRIKE PORTIONS OF THE PUYALLUP TRIBE OF INDIANS' POST-HEARING BRIEF**
In the Matter of the Petition of **PUGET SOUND ENERGY** **For an Order Authorizing Deferred Accounting Treatment for Puget Sound Energy's Share of Costs Associated with the Tacoma LNG Facility**	

I. INTRODUCTION

1. Pursuant to WAC 480-07-375, Puget Sound Energy ("PSE") hereby submits this motion to strike portions of the Puyallup Tribe of Indians' ("Tribe") post-hearing brief submitted on October 31, 2022 ("Tribe's Brief"). Specifically, PSE requests the Commission strike page 3:9-19, Appendix A, and Appendix B because they are new evidence improperly included in the

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Tribe's Brief after the evidentiary record has been closed, are irrelevant, prejudicial, and violate Commission rules and procedures. Further, the Tribe's request for "judicial notice" of the appendices should be denied for the reasons set forth herein. Additionally, PSE requests the Commission strike footnote 2 of the Tribe's Brief as it argues facts not in evidence.[1]

II. BACKGROUND

2. The Tribe was authorized to intervene in this proceeding to address the narrow topic of the Tacoma LNG project. Over the course of the proceeding, the Tribe filed three pieces of testimony and fifty-one exhibits, and cross-examined PSE witness Ron Roberts.[2] The procedural schedule in this case required all settlement response testimony to be submitted by September 9, 2022 and all cross examination exhibits along with the final exhibit list to be submitted by September 26, 2022.[3] The settlement evidentiary hearing was held on October 3, 2022 and the evidentiary record closed on October 4, 2022.[4] The procedural schedule provided for a single post-hearing brief to be filed by each party, on October 31, 2022.

3. The Tribe's Brief requested the Commission take judicial notice of two documents purporting to show political opposition to the Tacoma LNG project, which are attached as appendices to the Tribe's Brief, and are not in the evidentiary record:

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[1] There are other Commission rule violations in the Tribe's Brief that would justify striking the brief in its entirety. These include the failure to include a Table of Contents and a Table of Authorities. *See* WAC 480-07-395(1)(c)(iv)(vi). Procedural equity requires that the Tribe and its outside counsel be required to follow the Commission's rules and be held to the same standards as other parties.

[2] *See generally* Dkts. UE-220066, UG-220067, and UG-210918.

[3] Dkts. UE-220066, UG-220067, and UG-210918 (Consolidated), Order 20/06 (Appendix A) (Aug. 22, 2022).

[4] Dkts. UE-220066, UG-220067, and UG-210918 (Consolidated), Fourth Notice of Potential Ex Parte Communication, November 7, 2022 at 2 ("Furthermore, unless the Commission orders otherwise, the record in this proceeding closed on October 4, 2022, with the conclusion of the evidentiary hearing.").

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1) **Page 3, Lines 9-13, Appendix A**: a press release on the governor's webpage, dated May 8, 2019, detailing how Governor Inslee signed a bill banning hydraulic fracking within Washington State and containing quotes from a speech where the governor stated he had flipped his position on the Tacoma LNG project (and another infrastructure project) although his "stance on these projects does not change our state's regulatory process" which involves "a rigorous and objective review of a project."

2) **Page 3, Lines 13-19, Appendix B**: a 32-page *amicus* brief dated July 1, 2022, submitted by the Washington State Attorney General's office, in the Attorney General's elected capacity and not on behalf of any state agency, in a pending Court of Appeals case regarding the air permit for the Tacoma LNG facility issued by the Puget Sound Clean Air Agency and upheld by the Pollution Control Hearings Board.

As discussed herein, the Commission should deny the Tribe's request for "judicial notice" and strike these appendices, and the text discussing them, from the Tribe's Brief.

4. The Tribe's Brief further suggests that Commission Staff's ("Staff") decision to join the Tacoma LNG settlement is primarily due to resource limitations.[5] This statement is speculative and is entirely unsupported by evidence in the record. As such, it should be stricken from the Tribe's Brief.

III. ARGUMENT

5. The Tribe is attempting to evade established Commission procedure by supplementing the evidentiary record with new evidence provided as appendices to the Tribe's Brief. The Tribe could have sought to include these documents as exhibits to its testimony during the evidentiary stage of the proceeding, before post-hearing briefing, but it did not do so. Filing supplemental information is disfavored when a party improperly presents the information outside the

[5] Tribe's Brief n. 2.

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procedural schedule and uses post-hearing briefs to supplement the evidentiary record.[6] Furthermore, any evidentiary material submitted after a hearing record has closed will not be considered by the Commission.[7]

6. The Administrative Procedure Act, RCW 34.05.452, sets forth the standard for official notice, and WAC 480-07-495 generally follows the statute. The Tribe ignores both the statute and Commission rule in its request for "judicial notice." The Commission may take official notice of certain judicially cognizable facts, like rules, regulations, administrative rulings, or other records; technical or scientific facts within the agency's specialized knowledge; codes and standards that have been adopted by state or federal agencies; and governmental records.[8] The appendices attached to the Tribe's Brief meet none of these criteria as discussed in more detail below. Moreover, other parties must be afforded an opportunity to contest the "noticed" fact, which has not occurred.[9] Typically, this is done before or during the hearing. This process aligns with the Administrative Procedure Act, which requires that if a judicially cognizable fact is to be noticed, the parties must be "notified **either before or during** hearing" of the material "noticed and the sources thereof" so that parties are "afforded an opportunity to contest the facts and material so noticed."[10] ER 201, the rule of evidence relied upon by the Tribe, will usually only

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[6] *In re Application E-18527 of United Parcel Service, Inc., for extension of authority under Common Carrier Permit No. 16295* Order M. V. No. 128995 (Jan. 6, 1984) (granting motion to strike a statistical compilation and analysis appended to post-hearing briefs as improperly presented after the close of the record, irrelevant, and because it was not subject to verification or cross-examination).

[7] *In Re Gte Nw., Inc.*, Docket No. U-89-3031-P, Second Supplemental Order (July 23, 1990) (striking a footnote and attachment related to bond yields changes after the hearing that were included in a post-hearing brief because "material submitted after a hearing record has closed will not be considered.").

[8] RCW 34.05.452(5); WAC 480-07-495(2).

[9] WAC 480-07-495.

[10] RCW 34.05.452 (emphasis added).

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apply to "facts concerning the immediate parties--who did what, where, when, how, and with what motive or intent[.]"[11] Finally, the Commission has wide discretion to strike briefings, testimony, or other material that is not relevant to the underlying proceeding or otherwise is improperly submitted and has repeatedly rejected attempts to bring in new evidence in a final brief.[12]

A. Page 3, Lines 9-13, and Appendix A of the Tribe's Brief Should Be Stricken Because They Are Not in the Record and Do Not Meet the Requirements for Official Notice.

7. The Tribe attempts to belatedly include Appendix A in the record. This is a webpage screenshot of a press release posted on the governor's webpage, dated May 8, 2019, detailing how Governor Inslee signed a bill banning hydraulic fracking within Washington State. The press release also contains quotes from a statement made by the governor after the signing of the bill, where the governor announced he had flipped his position on the Tacoma LNG project, although his "stance on the[] project[] does not change our state's regulatory process" which involves "a rigorous and **objective** review of projects."[13] The Tribe uses Appendix A to argue that the governor does not support the Tacoma LNG project. The governor's position on the Tacoma LNG project is not relevant to the Commission's decision in this case, and the language

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[11] *See* Fed. R. Evid. 201 (Notes of Advisory Committee on Proposed Rules) (explaining the scope of judicially cognizable facts).

[12] *See, e.g., In re Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For an Order Authorizing Proposed Transaction,* Docket U-072375, Order 06 (November 5, 2008)(refusing to take official notice of new evidence provided in reply brief noting due process requires that the record be closed); *WUTC v. Clarkston Gen. Water Supply, In*c, Docket No. U-84-46, (Apr. 14, 1985) (striking update provided by the company as late-filed exhibits); *Worldcom fka MFS Intelenet of Washington, Inc. v. GTE Northwest Incorporated*, Docket No. UT-980338, 3rd Suppl. Order (May 12, 1999) (striking report in reply brief as testimony, because the parties had no opportunity to review the material and consider or examine its assumptions, or otherwise had any meaningful opportunity to address it.); *In Re Gte Nw., Inc.*, Docket No. U-89-3031-P, Second Supplemental Order (July 23, 1990).

[13] Tribe's Brief, Appendix A (emphasis added).

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in the Tribe's Brief along with the press release run the risk of unnecessarily and significantly prejudicing PSE and parties to the Tacoma LNG Settlement.

1. The press release is a political statement that is not relevant to the prudence of the Tacoma LNG Facility.

8. The press release is a political statement that is not relevant to the matters at issue in this case. General rate cases are adjudicative proceedings, not political ones. The press release contained in Appendix A is irrelevant to whether PSE's decision to proceed with Tacoma LNG was prudent. It is not a binding action by the executive branch; rather it expresses the governor's personal opinion, which he candidly admits has fluctuated over time. Attempting to admit into the record press releases of non-parties to show political support, or lack thereof, opens the floodgates for the inclusion of similar documents, which primarily serve as advocacy statements and are irrelevant to the facts and the legal standard before the Commission —whether the decision to construct the Tacoma LNG Facility was prudent. The statements in the Tribe's Brief and Appendix A are unnecessarily prejudicial to PSE as an attempt to influence the Commissioners' decisions based on politics rather than an objective evaluation of the prudence of the Tacoma LNG Facility.

2. The webpage press release is not the type of document for which official notice should be taken.

9. The webpage press release is not the type of document for which official notice should be taken. WAC 480-07-495 allows the Commission to take official notice of a "judicially cognizable fact" like rules, regulations or other governmental records; technical or scientific facts; codes or standards; or records in government websites or publications. Quotes of personal support or opposition in a press release on a webpage are not the type of record for which the

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Commission should take official notice. Nor is a webpage press release the type of document that would be allowed under ER 201; those documents are typically official governmental records, like meeting minutes, or committee materials and reports.[14] Furthermore, the statement by the governor is not an "adjudicative fact" because it is not a fact "concerning the immediate parties[,]" rather it is a third-party political opinion.[15]

3. The Tribe's inclusion of the webpage press release is an improper attempt to supplement the evidentiary record.

10. The Tribe's attempt to include the statement and the webpage press release should be stricken because the evidentiary record has closed and PSE and the other parties to the Tacoma LNG Settlement would be prejudiced by including new evidence in the record through post-hearing briefs. As the Commission has previously stated when rejecting a request to take official notice of new evidence in a final brief: "There is a point at which due process requires that the record be closed so that the parties are not having to respond repeatedly to 'new' evidence and so that the Commission can do its job."[16] The Commission has a specific procedure for taking official notice of facts in WAC 480-07-495(2), which contemplates notice to be taken

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[14] *See e.g.*, *Est. of McCartney by & through McCartney v. Pierce Cnty.*, 22 Wash. App. 2d 665, 677, 513 P.3d 119, 127 (2022) (allowing County public records, like Council resolutions and committee meeting records that were hyperlinked).

[15] *Banks v. Schweiker*, 654 F.2d 637, 640-42, n. 3 (9th Cir. 1981) (noting adjudicative facts are facts between the parties and the other party is given the opportunity to introduce contrary evidence).

[16] *In re Joint Application of Puget Holdings LLC and Puget Sound Energy, Inc., For an Order Authorizing Proposed Transaction,* Docket U-072375, Order 06 (November 5, 2008).

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before or during the hearing.[17] Here, the record closed on October 4,[18] and the Commission should strike this late filed evidence.

4. The 2019 date of the webpage press release militates against allowing it into evidence.

11. The governor's press release is dated May 8, 2019, which is important for two reasons. First, the press release has been available to the Tribe to submit as evidence since the start of the case; in fact, it was available for more than two years before this case was filed. If the Tribe thought this worthy of including in evidence, it could have submitted it in July or September 2022 with its prefiled testimony, which would have provided PSE and other parties an opportunity to respond. This is not a situation where new evidence becomes available after the evidentiary hearing that should be allowed into the record on brief because it was not previously available. Second, the governor's change of mind on the Tacoma LNG Facility, as set forth in the press release, was made approximately three years after the initial decision was made to move forward with construction of Tacoma LNG, and approximately a year after PSE re-evaluated its decision in 2018. In other words, the governor's decision to withdraw his support for the Tacoma LNG Facility occurred after construction was well underway[19] and after the point

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[17] WAC 480-07-495(2)(c) requires the presiding officer to notify parties of information for which the commission takes official notice and must afford parties an opportunity to contest facts and material.

[18] Dkts. UE-220066, UG-220067, and UG-210918 (Consolidated), Fourth Notice of Potential Ex Parte Communication, November 7, 2022 at 2 ("Furthermore, unless the Commission orders otherwise, the record in this proceeding closed on October 4, 2022, with the conclusion of the evidentiary hearing.").

[19] Roberts, Exh. RJR-3 at 53-54 (noting construction activities began in late 2016), 69-70 (noting PSCAA FSEIS was issued in March 2019 and it concluded Tacoma LNG would result in a net decrease in greenhouse gas emissions, PSE could then commence with construction of portions of the project that had been delayed due to delay in issuance of the permit); see also, Exh. RJR-5C at 1837-44 (PSE management reported to the PSE Board in November 2018 on construction of non-emitting portions of the project, procurement 93.8% complete and fabrication 99.7% complete).

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in time the decisions were made by PSE to move forward with the project, which is the time frame the Commission considers when evaluating prudence.[20]

B. Page 3, Lines 13-19, and Appendix B Should Be Stricken Because They Are Not in the Record and Do Not Meet the Requirements for Official Notice.

12. The Tribe's Brief also asserts the Attorney General has publicly stated he does not support the Tacoma LNG project, and points to an *amicus* brief filed by the Attorney General in a pending appeal of the SEIS.[21] The Tribe attempts to include the *amicus* brief in the record and requests the Commission take "judicial" notice of the document.[22] An *amicus* brief in a wholly separate proceeding, arguing a political position, and submitted after the record closes should not be admitted into the record The statements on page 3, at lines 13-19, and Appendix B should be stricken from the record.

1. The Tribe's inclusion of the *amicus* brief is irrelevant and an improper attempt to supplement the evidentiary record, which prejudices PSE.

13. Similar to Appendix A, the *amicus* brief submitted as Appendix B to the Tribe's Brief has been available to the Tribe since July 1, 2022 and could have been submitted by the Tribe in July or September as part of its prefiled case. The Tribe was aware of the *amicus* brief when it was initially filed, as the Tribe was served with the brief.[23] Including the *amicus* brief as Appendix B to the Tribe's Brief is improper because PSE does not have the opportunity to respond to the

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[20] *WUTC v Avista Corp.,* Dockets UE-200900 et al., Order 08/05 ¶ 267 (Sept. 27, 2021) (holding the Commission can consider whether the Company's decision was prudent at the time it was made, in light of what the Company knew or reasonably should have known at that time).
[21] Tribe's Brief at 3:13-19, Appendix B.
[22] *Id*.
[23] Tribe's Brief, Appendix B certificate of service at 3-4.

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allegations and legal arguments therein, regardless of relevance. The deadline to submit exhibits and testimony was September 9, 2022,[24] and the evidentiary record closed on October 4. Allowing the out-of-time inclusion of an *amicus* brief, filed in the appeal of a different proceeding, into this record is outside the procedural schedule, muddles the record, raises due process concerns, and violates the principle of finality and the need to close the evidentiary record.

14. Notably, the *amicus* brief is not filed on behalf of any state agency and instead appears to be submitted by the Attorney General's office in its political capacity. The *amicus* brief is a legal advocacy document, opining on issues of law not before the Commission. A wide range of state and local governmental agencies have filed legal briefs supporting the permitting decisions related to Tacoma LNG, including agencies which the Attorney General's office represents.[25] PSE did not submit every legal brief from these agencies in part because they are not relevant but also because the issue was not raised in testimony. By waiting until post-hearing briefing to address these points, the Tribe prejudices PSE because PSE is denied an opportunity to respond to the allegations and statements by providing opposition documents countering the legal positions proffered in the *amicus* brief.

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[24] Dkts. UE-220066, UG-220067, and UG-210918 (Consolidated), Order 20/06 (Appendix A) (Aug. 22, 2022).
[25] For example, the Attorney General's Office representing the Department of Ecology filed multiple briefs in support of the permits granted to Tacoma LNG in the Tribe's appeal of Water Quality Certification Order No. 13764 and the Coastal Zone Consistency for Corps Reference No. NWS-2014-128-WRD. *See Puyallup Tribe v. Washington State Pollution Control Hearings* Board *et. al.*, Pierce County Superior Court Case No. 18-2-06632-3 (2018).

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2. The *amicus* brief is not the type of document for which the Commission should take official notice.

15. The statements in the Tribe's Brief and the *amicus* brief are not the type of cognizable facts for which official notice may be taken. The Tribe's Brief requests the Commission take "judicial" notice of the fact that the Attorney General opposes the SEIS issued for the Tacoma LNG project. But support or opposition to a project based on a legal brief in a wholly separate proceeding is not the type of cognizable fact normally accorded weight by Commission rules, the Administrative Procedure Act, or ER 201.[26] A cognizable fact relates to an issue between the parties, that has bearing on the case, and is typically an official government record, decision, or fact that otherwise cannot be disputed. An *amicus* brief by its very nature is argument, not a cognizable fact.[27] Further, the Commission should not allow the Tribe to circumvent the 30-page limit for the Tacoma LNG brief by submitting a 23-page post-hearing brief opposing the Tacoma LNG project and appending a 32-page *amicus* brief from a separate proceeding opposing the SEIS that was issued for the Tacoma LNG Facility.

C. The Tribe's Statement About Staff's Intentions Should Be Stricken.

16. The Tribe's Brief also asserts the primary reason Commission Staff signed on to the LNG Settlement was due to resource limitations.[28] This is not supported in the record, lacks citation to any testimony or hearing transcript, and only serves the purpose of prejudicing PSE and other

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[26] WAC 480-07-495(2)(c) (requiring opportunity to contest facts and material noticed); RCW 34.05.452 (APA requiring notice to occur either before or during hearing); *Est. of McCartney by & through McCartney v. Pierce Cnty.*, 22 Wash. App. 2d 665, 677, 513 P.3d 119, 127 (2022) (allowing County public records, like Council resolutions and committee meeting records that were hyperlinked under ER 201).
[27] *Id*.
[28] Tribe's Brief n. 2.

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parties to the Tacoma LNG Settlement. The Tribe's Brief discusses Staff's position and cites to Tr.477:5-11 where Staff discussed the value of the tracker in the LNG Settlement.[29] Notably, the Tribe provides no citation for the proposition that Staff joined the LNG Settlement due to resource limitations.

17. This statement should be stricken because it is asserting a point in brief that is not in evidence, and it improperly prejudices PSE and other parties to the Tacoma LNG Settlement by implying the Commission should discount the weight of Staff joining the LNG Settlement despite having no factual basis. The Tribe had the opportunity to cross examine a witness from Staff to elucidate testimony in support of this theory. It declined. Rather than use the settlement evidentiary hearing to explore this issue with a witness from Staff, the Tribe makes the assertion without support in the record and deprives PSE the opportunity to challenge the assertion because the record and discovery in the proceeding have closed. The unsupported statement should be stricken from the Tribe's Brief

IV. CONCLUSION

18. The Tribe's Brief makes assertions that are not supported in the record, are irrelevant to the underlying prudence determination for Tacoma LNG, and are procedurally improper. The Commission should deny the Tribe's request to take "judicial notice" of these documents, and the Commission should strike the Tribe's Brief at footnote 2, page 3:9-19 and Appendices A and B.

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[29] Tr. 477:3-11 noted Staff supported moving costs "to a tracker" so Staff can "review them at the end of the rate year when all those costs are known and measurable."

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RESPECTFULLY SUBMITTED this 7th day of November, 2022.

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