BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND ENERGY, Respondent.	DOCKETS UE-220066 and UG-220067 PUYALLUP TRIBE OF INDIANS' RESPONSE TO PUGET SOUND ENERGY'S MOTION TO STRIKE PORTIONS OF POST-HEARING BRIEF AND CROSS-MOTION TO STRIKE PORTIONS OF PUGET SOUND ENERGY'S POST-HEARING BRIEF DATED OCTOBER 31, 2022

I. INTRODUCTION

The Puyallup Tribe of Indians (Tribe) opposes respondent Puget Sound Energy's (PSE) motion to strike portions of the Tribe's written closing. PSE's motion focuses on Appendices A and B to the Tribe's post-hearing brief and relies on mischaracterizing the Tribe's purpose in offering those appendices.[1] The Tribe asked the Commission to take official notice of a straightforward and undisputed fact: that Governor Inslee and the attorney general have both expressed opposition to the Tacoma LNG project because of concerns about its environmental / greenhouse gas impacts. The Tribe asks the Commission to take notice of this fact because, at

[1] The Commission would be justified in disregarding PSE's Motion, or striking the motion in its entirety, because it is not signed by any PSE representative. *See* WAC 480-07-395(2).

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hearing, PSE misstated facts to the Commission—most notably, its claims regarding greenhouse gas benefits and the assertion that every government agency that had reviewed the project had supported it and proclaimed its environmental benefits. The fact that the governor and the attorney general have both opposed the project, precisely because of its environmental harms, is relevant to counteract PSE's attempts to leave the Commissioners with a false impression about governmental views on Tacoma LNG.

PSE now criticizes the Tribe for not asking the Commission to take notice of that fact earlier. But the Tribe could not have foreseen that PSE would try to create this deliberate misimpression of overwhelming governmental support for Tacoma LNG, when PSE knows the head of Washington's executive branch and the attorney general have publicly opposed it. It was PSE's attempt to leave the Commissioners with false impressions on (and after) October 3, that made this fact relevant and appropriate for official notice.

PSE also asks the Commission to strike footnote 2 to the Tribe's written closing, which states ***the Tribe's understanding*** of Commission Staff's motivations for joining the Tacoma LNG settlement. That understanding is a reasonable interpretation of the evidence and therefore entirely appropriate. PSE's Post-Hearing Brief (dated October 31, 2022), in contrast, is rife with controversial assertions for which PSE cites no evidentiary support—precisely what PSE decries about the Tribe's footnote 2. Therefore, if the Commission agrees with PSE's reasoning regarding footnote 2, the Commission must by the same reasoning strike various portions of PSE's Post-Hearing Brief, which are identified in the Tribe's Cross Motion below.

II. BACKGROUND

This matter concerns PSE's request to foist the cost of building the Tacoma LNG facility onto ratepayers, even though the facility's main (if not its only) purpose is to provide liquefied natural gas to the marine vessel industry, and even though the facility will emit carcinogens and other contaminants into an already-overburdened airshed.

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The Commission conducted a hearing on October 3, 2022, and the evidence focused on these issues to an appreciable degree. During that hearing, PSE introduced a new claim, not supported by any evidence: that every government entity that has reviewed the project had not only supported it but also extolled its environmental benefits.[2] For example, PSE's witness, Mr. Roberts, claimed that the project "has the side benefit of reducing greenhouse gases" and that "every environmental agency that's been involved in the permitting has recognized that this facility has environmental benefits."[3]

Not having anticipated that PSE would misrepresent facts in this way at the hearing, the Tribe's counsel tried to set the record straight for the Commissioners in oral closing argument. Counsel informed the Commissioners that there was not universal government support for Tacoma LNG and that the attorney general had raised concerns about the project's greenhouse gas impacts in ongoing litigation.[4] In its written closing, the Tribe then asked the Commission to take official notice of the fact that the governor and the attorney general have opposed this project because of their concerns about its environmental impacts. In support of its request for official notice, the Tribe attached Appendices A and B. These are both publicly available government documents. One is a press release posted on the governor's official website. The other is the attorney general's *amicus* brief that the Tribe's counsel discussed with the Commissioners at hearing.

III. ARGUMENT

The Commission should deny PSE's request to strike Appendices A and B and footnote 2 to the Tribe's written closing. Because the appendices are publicly available government documents, they are appropriate materials for official notice. The Tribe does not ask the Commission to adopt or accept the positions and arguments expressed in those documents. It merely asks the Commission to take official notice of the fact that, as evidenced by these

[2] PSE also perpetuates that misrepresentation in its written closing argument dated October 31, 2022.

[3] Transcript at 433:24–25, 434:5–7.

[4] Transcript at 485:17–25.

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documents, the governor and the attorney general have both expressed opposition to the Tacoma LNG project because of their concerns about Tacoma LNG's greenhouse gas impacts. As for footnote 2, the Tribe's understanding that resource limitations influenced Commission Staff's decision to join the settlement is a reasonable interpretation of Staff's admission that it has not completed its prudence review. PSE fails to show that striking any of these materials would be appropriate.

A. Appendices A and B are properly the subject of official notice.

PSE is mistaken when it claims that Appendices A and B do not present the type of facts of which the Commission may take official notice. The Commission may take official notice of "any judicially cognizable facts." RCW 34.05.452(5). By regulation, examples of this term include, but are not limited to, "interpretive and policy statements" and records "contained in government websites or publications." WAC 480-07-495(2)(a)(i)(A), -495(2)(a)(iv). At least twice, tellingly, PSE purports to paraphrase WAC 480-07-495, but omits the reference to "policy statements."[5] Governor Inslee's press release is a "policy statement" posted on a "government website" and therefore well within the examples of "judicially cognizable facts" provided in WAC 480-07-495. The attorney general's position that it opposes Tacoma LNG because of its greenhouse gas impacts, stated in a publicly available court filing, likewise fits among the nonexclusive examples of judicially cognizable facts.

Ignoring this straightforward interpretation of WAC 480-07-495, PSE offers at best a superficial analysis. It cites no authority at all for its conclusory assertion that the appendices "are not the type of record for which the Commission should take official notice."[6] It then briefly mentions ER 201, noting only that in another case, *Estate of McCartney by & through McCartney v. Pierce Cnty.*, 22 Wn. App.2d 665, 677, 513 P.3d 119 (2022), a court allowed "County public

[5] PSE's Motion at 4, 6–7 (emphasis added).

[6] PSE's Motion at 6–7.

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records, like Council resolutions and committee meeting records," under ER 201.[7] PSE fails to explain why the fact that the court took judicial notice of one type of document in that case could possibly mean this Commission cannot take judicial notice of a different type of government document here.

Notably, courts (including the United States Supreme Court) have held that materials like those comprising Appendices A and B are appropriate for judicial notice. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (taking judicial notice of court filings); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 199 n.18 (2008) (judicially noticing facts from Indiana Bureau of Motor Vehicles website). Indeed, in *McCartney*, the court explained that a court can "take judicial notice of public documents if their authenticity cannot be reasonably disputed." *McCartney*, 22 Wn.App.2d at 677 (citing *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725–26, 189 P.3d 168 (2008)). PSE raises no such authenticity dispute here (nor can it).

PSE also mentions a federal case that discussed "adjudicative facts," *Banks v. Schweiker*, 654 F.2d 637, 640–41, n. 3 (9th Cir. 1981). But *Banks* does not support PSE's position for two reasons. First, "adjudicative facts" is not the standard under RCW 34.05.452(5). Second, in the portion of *Banks* cited by PSE, the Ninth Circuit cited the Advisory Committee Notes to Federal Rule of Evidence 201. *Banks*, 654 F.2d at 640–41, n. 3. There, the Advisory Committee explained that adjudicative facts "are simply the facts of the particular case." Fed. R. Evid. 201, *Advisory Committee Notes* (1972). The Advisory Committee contrasted the term with "legislative facts," which are "those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *Id*. Here, the facts that both the governor and the attorney general have opposed Tacoma LNG because of its greenhouse gas impacts are among "the facts of the particular case" (*id*.) and therefore would satisfy the federal rules' standards for adjudicative facts under Rule 201.

[7] PSE's Motion at 7, n. 14.

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PSE tries to distinguish the governor's and the attorney general's oppositions to its project by claiming that they are opinions and argument, rather than facts.[8] But that contention takes the appendices out of context. As will be explained in the following section, the Tribe did not offer the appendices because it was asking the Commission to adopt opinions or arguments expressed therein. The Tribe offered Appendices A and B for the limited purpose of establishing a single, straightforward fact: that the governor and the attorney general have expressed opposition to the project in question because of its environmental impacts. This fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" and therefore appropriate for official notice. *McCartney*, 22 Wn. App.2d at 677 (quoting ER 201(b)).

B. PSE opened the door to Appendices A and B.

PSE also complains about the fact that the Tribe submitted these appendices with its written closing. While arguing that this submission was untimely, PSE ignores the fact that the Tribe's oral closing pointed out that governmental entities did not uniformly tout Tacoma LNG as environmentally beneficial, and specifically raised the attorney general's opposition to Tacoma LNG—after PSE opened the door to this evidence by making misleading assertions at hearing.

Specifically, PSE's witness, Mr. Roberts, claimed that the project "has the side benefit of reducing greenhouse gases" and that "every environmental agency that's been involved in the permitting has recognized that this facility has environmental benefits."[9]

In response to these claims to the Commissioners (provided after the Tribe had already completed its cross-examination), the Tribe asked the Commission to take official notice of the simple fact that the governor and the attorney general have opposed this project because of its greenhouse gas impacts. Appendices A and B are merely publicly-available materials from which this undisputed fact can be noticed.[10]

[8] PSE's Motion at 7, 11.

[9] Transcript at 433:24–25, 434:5–7.

[10] Moreover, PSE overstates its position that the evidentiary record is closed and that it will be prejudiced by not having the opportunity to respond to the appendices. The Commission's

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Finally, the Commission should also reject PSE's rather silly argument about page limits.[11] PSE cites no authority for the notion that the attorney general's 32-page *amicus* brief concerning Tacoma LNG should be added to the Tribe's 23 pages of post-hearing brief. Again, the Tribe is not asking the Commission to adopt the attorney general's arguments and has not argued that the Commission should reject the Tacoma LNG settlement because of flaws in a supplemental environmental impact statement. The Tribe submitted the attorney general's brief to establish one undisputed fact: that the attorney general expressed opposition to Tacoma LNG because of its greenhouse gas impacts—contrary to PSE's assertions at hearing about uniform government support for the project because of purported environmental "benefits." The appendix merely substantiates a point that the Tribe made to the Commissioners at the hearing.

C. PSE's claims of prejudice are meritless.

Equally devoid of merit are PSE's arguments about prejudice and unfairness. PSE claims, for example, that Appendix A and related statements in the Tribe's brief "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."[12]

As an initial matter, PSE does not appear to be giving the Commissioners, or the Commission, much credit. Although the Tribe has not participated in previous rates cases, it is difficult to believe that the Commissioners would be "influenced politically" by the fact that the governor and the attorney general stated positions concerning Tacoma LNG. PSE's "political influence" argument is also belied by PSE's own written closing argument, in which it repeatedly

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procedures contemplate that additional materials may be submitted after the hearing, and in fact that occurred in this case, with the Commission's bench requests to PSE. *See, e.g.*, Transcript at 437–39.

[11] PSE's Motion at 11.

[12] PSE's Motion at 6.

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tried to influence the Commission with unsupported statements about state agencies' support of the project and its purported benefits.[13]

Further, PSE cannot be heard to decry the Tribe's appropriate request for official notice, when PSE has flaunted the rules in these proceedings—and was allowed to contravene UTC precedent—with regard to the Shari Libicki testimony appended to the testimony of PSE's witness, Mr. Roberts. At hearing, the Tribe objected to Exhibit RJR-31 because admission of this evidence directly contravened Commission precedent (as well as evidentiary rules and principles of fundamental fairness). *See WUTC v. CenturyLink Communications, LLC*, Docket UT-181051, Order 06 at ¶ 20 (July 25, 2022) (declaring that "[t]he Commission rarely, if ever, allows an affidavit to be filed as an exhibit to a witness's testimony because doing so can deny other parties their rights to due process…").

Instead of excluding the improper evidence, the presiding judge ordered PSE to submit Dr. Libicki's *entire* testimony in the other matter. The Tribe then pointed out that such a submission would involve hundreds of pages of additional testimony, which raised "some pretty serious ER 403 concerns."[14] In dismissing that concern, the Presiding Judge stated:

> I'm not especially troubled in terms of a 403 issue or things along those lines. We don't have a jury. We sort through large amounts of information already.

Transcript at 412:20–23.

If the Commission is equipped to sort through large amounts of information—such that PSE's submission of hundreds of pages of testimony from a non-witness in this case is not troubling—the same standard should apply to Appendices A and B. The Commission is certainly equipped to sort through a 32-page amicus brief, and a website press release, and extract the straightforward and undisputed fact for which they are submitted—and not be troubled by the fact that there may be other information in those materials.

[13] Transcript at 433:24–25, 434:5–7; PSE's Post-Hearing Brief at ¶¶ 85, 119.

[14] Transcript at 411:21–22.

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The same point undermines PSE's relevance argument based on the dates of these materials.[15] The materials were offered as a follow-on to the Tribe's oral closing, substantiating what the Commissioners were told about governmental positions on Tacoma LNG. The dates are irrelevant, when the appendices were offered to counteract PSE's false narrative about uniform support for the project. But, to the extent the Commission believes the materials' dates of issuance have some impact on their relevance, the Commission is perfectly capable of taking note of those dates and deciding how much weight to give the materials.

In short, PSE has been allowed to submit voluminous potentially prejudicial and confusing materials, even where admission of that evidence contravened Commission precedent. PSE has submitted additional materials following hearing (in response to bench requests) despite the fact that the record was "closed." The Tribe's request that the Commission take official notice of two government documents in its written closing, for the purpose of establishing an undisputed fact that became relevant only during hearing is entirely appropriate.[16] The Commission should therefore deny PSE's request to strike Appendices A and B.

D. <u>Footnote 2 is supported by reasonable inferences.</u>

PSE also asks the Commission to strike footnote 2 to the Tribe's written closing.[17] The footnote in question states, in its entirety:

> 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.

Tribe's Post-Hearing Brief at 4, n. 2.

[15] PSE's Brief at 8–9

[16] Particularly when it followed misleading assertions that PSE made to leave the Commissioners with false impressions of Tacoma LNG's purported benefits and government support for the project.

[17] PSE's Motion at 11–12.

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Notably, the footnote is phrased as the Tribe's understanding of the situation. Contrary to PSE's assertions, that understanding is a rational inference from the evidence (and developments over the course of the case). Specifically, as the Tribe explained on the same page, Staff admitted that it had not completed its prudence review and still needed to perform a "better review."[18] A reasonable interpretation of why Staff would have joined a settlement, despite not having completed a review that it admits still needs to be done, is that resource limitations were affecting Staff's workload and decision-making. The Tribe's footnote 2 is thus a reasonable comment on the evidence. It is also notable that Commission Staff has not expressed any opposition to or disagreement with the Tribe's statement in footnote 2.

PSE's request to strike this footnote is thus properly rejected. Its one-page argument is directed entirely at laying out why it disagrees with the Tribe's interpretation of the evidence. PSE already had its opportunity to offer its own views based on the evidence. Its use of the present motion to continue commenting on the evidence is improper. The Commission should deny PSE's request to strike footnote 2.

IV. CROSS MOTION REGARDING PSE'S POST-HEARING BRIEF

To the extent the Commission is inclined to consider PSE's request to strike footnote 2 from the Tribe's post-hearing brief, however, the Commission should note that PSE's post-hearing brief (filed on October 31, 2022) is rife with controversial assertions of fact for which it cites no evidence and which are not supported by the record. And, unlike the Tribe's footnote 2, PSE did not couch these assertions as its understanding of the evidence, but rather baldly asserted them as fact. Therefore, if the Tribe's footnote 2 is stricken, then these statements in PSE's post-hearing brief must certainly be stricken, **and the Tribe hereby moves to strike them**.

While not attempting to list all of the many controversial and unsupported assertions in PSE's written closing, the Tribe highlights the following as some of the most egregious:

[18] Transcript at 477:5–6.

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Paragraph 4: PSE claims that the Tribe's arguments "have been largely rejected by each agency" and then claims that the Tribe is advancing the same arguments here. But PSE fails to identify any instance of any argument raised by the Tribe in these proceedings (which concern prudency) being rejected by another agency.

Paragraphs 16 & 113: PSE claims that "the Commission's prudence standard has remained generally the same for decades" and that this "is due, in part, to the investment community's need for certainty." PSE offers no citation for its assertion that the standard has not changed, likely because PSE knows the standard recently changed. *See WUTC v. Cascade Natural Gas Corp.*, Dkt. UG-210755, Order 09, ¶¶ 55–58 (Aug. 23, 2022). PSE likewise does not cite any evidence to support its claims about "the investment community." The notions about that community's need for certainty and how it would react to updated standards, as well as the theory that this is why the standard did not change for a long time, are simply assumptions that PSE offers—and are obvious attempts to politically sway the Commissioners—with no evidentiary support.

Paragraph 85: PSE claims that the findings of some unidentified "agencies" demonstrate "that the Tacoma LNG Facility will provide benefits to the communities surrounding the facility, including the Tribe." But PSE fails to identify what agency it believes found that the facility will provide benefits to any such communities.

Paragraph 90: PSE offers several assertions about its Board of Directors' decisions but fails to provide any citation for those assertions.

Paragraph 91: PSE makes several statements about Public Counsel's positions but provides no citations. The only citations in the entire paragraph are to the testimony of PSE's own witness.

For these reasons, if the Commission accepts PSE's position that any statement in a written closing that is not accompanied by a citation to evidentiary support must be stricken, then the Commission must strike the following portions of PSE's written closing: Paragraph 4, 2nd & 3rd sentences; Paragraph 16; Paragraph 85, 1st sentence; Paragraph 90, 4th & 6th sentences; Paragraph 91, 1st through 3rd sentences; and Paragraph 113, 5th through 8th sentences.

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V. CONCLUSION

PSE's misleading and incorrect assertions at hearing opened the door to the fact that the governor and the attorney general have expressed opposition to this project. The Tribe attempted to address PSE's incorrect assertions at hearing in its oral closing; Appendices A and B only substantiate the Tribe's remarks. Based on these publicly available government documents, the Commission can take official notice of the fact that the governor and the attorney general have expressed opposition to Tacoma LNG. All PSE's arguments for excluding these materials lack merit, especially when compared to the substantial leeway the Commission has given PSE in allowing it to submit improper evidence in contravention of UTC precedent.

Footnote 2 to the Tribe's written closing is a reasonable comment on the evidence. By comparison, PSE's written closing is riddled with false and unsupported assertions that should be stricken. PSE's motion should be denied on all counts, but if it is granted as to footnote 2, then the portions of PSE's written closing identified above must also be stricken.[19]

DATED this 14th day of November, 2022, at Seattle, Washington.

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[19] Although the rules permit PSE to file a response to the Tribe's cross motion, they do not permit PSE to file a reply in further support of its own motion. *See* WAC 480-07-375. Any response by PSE to the cross motion must be limited to addressing the Tribe's request to strike portions of PSE's closing. The Tribe intends to move to strike any improper mission creep in any subsequent PSE submissions.