

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,**

Complainant,

v.

PUGET SOUND ENERGY,

Respondent.

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**

**Docket UE-220066/UG-220067 and
UG-210918 (*consolidated*)**

**PUGET SOUND ENERGY'S REPLY
IN SUPPORT OF THE MOTION TO
STRIKE**

1. Puget Sound Energy ("PSE") replies to the Puyallup Tribe of Indians' (the "Tribe") Response to PSE's Motion to Strike (the "Response") to correct the record and provide important legal context for consideration of PSE's Motion to Strike ("Motion to Strike"). The Tribe's Response brings up new arguments and makes incorrect assertions.

BACKGROUND

2. On October 31, 2022, in Docket UG-220067 et al, the Tribe submitted its post-hearing brief ("Brief"). At this point in the procedural schedule, the record had closed, and any additional

documents require permission from the Commission for entry.¹ In the Brief, the Tribe requested the Commission take notice and included for consideration two appendices: Appendix A, which is a press release from Governor Inslee (“Press Release”) flipping his position on the Tacoma LNG facility; and Appendix B, which is an *amicus* brief filed by the Attorney General (“*Amicus* Brief”) challenging the way greenhouse gases were calculated in the SEIS for the Tacoma LNG project.² The Tribe alleged in its Brief that the Commission could take notice of “available government records” pursuant to ER 201.³ The appendices are new documents, not in the record, and the assertions by the Tribe about the appendices are new and unrelated to the determination of prudence. The Press Release and *Amicus* Brief are not official government decisions or records demonstrating an official action, instead they are advocacy documents.⁴

3. On November 7, 2022, PSE filed the Motion to Strike, citing the Commission’s rule for taking notice. On November 14, 2022, the Tribe filed its response to the motion to strike (the “Response”). In its Response, the Tribe asserted the Press Release is a policy statement under WAC 480-07-495.⁵ The Tribe also now claims PSE “opened the door” for including the *Amicus* Brief because PSE witness Ron Roberts stated “every environmental agency that’s been involved in the permitting has recognized that this facility has environmental benefits.”⁶ The Tribe then shifts its justification, claiming the *Amicus* Brief is meant to counter an alleged assertion that

¹ 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.”).

² Tribe’s Brief at 3:9-19, Appendices A-B.

³ Tribe’s Brief at 3 n. 1.

⁴ For example, the *Amicus* Brief is not submitted on behalf of any WA State agency.

⁵ Response at 4.

⁶ Response at 6.

PSE claimed there was “uniform government support for the project” due to environmental benefits.⁷

ARGUMENT

4. The Commission should reject the shifting justifications in the Tribe’s Response asking the Commission take notice of the Press Release and *Amicus* Brief.
5. The Tribe now asserts the appendices and accompanying assertions should be judicially noticed because the Press Release is a “policy statement” under WAC 480-07-495, and that the *Amicus* Brief is necessary to demonstrate the attorney general opposes the project “because of its environmental impacts.”⁸ The Tribe further argues PSE “opened the door” to include the appendices because PSE asserted the Tacoma LNG project reduced greenhouse gases and environmental agencies recognized these environmental benefits at the hearing.⁹ None of these arguments or statements of fact are supported by the law or the evidence offered at the hearing.

A. The Press Release is Not A Policy Statement

6. WAC 480-07-495 provides the types of documents for which the Commission may take notice. It states:

- (a) The commission may take official notice of:
 - (i) Any judicially cognizable fact, examples of which include, but are not limited to, the following:
 - (A) Rules, regulations, interpretive and policy statements, administrative rulings, and orders, exclusive of findings of fact, of the commission and other governmental agencies;

WAC 480-07-495(a) (emphasis added).

⁷ Response at 7.

⁸ Response at 4-7.

⁹ Response at 6.

7. While the Tribe claims the governor’s Press Release is a “policy statement,” contemplated in WAC 480-07-495, the Administrative Procedure Act (“APA”) provides helpful guidance countering this assertion. RCW 34.05.230 states that agencies are encouraged to advise the public of “current opinions, approaches, and likely courses of action by means of interpretive or policy statements.”¹⁰ The APA goes further to note, when an agency “issues an interpretive or policy statement, it shall submit to the code reviser for publication in the Washington State Register[.]” The Press Release was not submitted for publication, nor did it follow the formal procedures outlined in RCW 34.05.230. Accordingly, the Press Release is not a “policy statement” as the Tribe now claims.

8. The language in WAC 480-07-495 also aligns with the formality of procedures outlined in the APA. The phrase “of the commission and other governmental agencies” modifies the preceding words, including “policy statements.”¹¹ This indicates the term policy statement is not a simple random statement of policy or political position by any governmental official, but rather relates to a more formal process conducted by an agency. The accompanying phrases in the WAC similarly relate to formal proceedings made on behalf of government agencies and the commission, like rules, regulations, or administrative rulings.¹² The Commission regularly opens specific dockets to consider and issue policy statements providing direction to regulated companies as contemplated in the APA.¹³ For example, in Docket U-190531, the Commission issued a policy statement regarding the “Valuation of Public Service Company Property Used

¹⁰ RCW 34.05.230(1).

¹¹ WAC 480-07-495.

¹² WAC 480-07-495(1).

¹³ *See, e.g.*, Docket U-210595 (Policy Statement on Participatory Funding for Regulatory Proceedings); Docket U-210590 (Proceeding to develop a policy statement addressing alternatives to traditional cost of service rate making) Docket UE-111016 (Policy statement regarding processes for determining whether projects are 'Eligible Renewable Resources' under RCW 19.285 and WAC 480-109).

and Useful after Rate Effective Date” wherein the Commission solicited public comment, before issuing a final policy statement in the docket. Other Washington agencies issue interpretive statements to elucidate how the agency might interpret certain statutes to guide compliance, mirroring the requirements in the APA.¹⁴

9. The clear intention in the WAC, as aligned with the APA, is that the Commission may take official notice of types of documents that, like a policy statement, are related to a formal action by the Commission or governmental agency, regardless of whether it is posted on the governor’s website. The governor issuing a press release expressing a new personal political position on Tacoma LNG is not a “policy statement” under the WAC or the APA. The Press Release is not the type of document of “fact” for which the Commission regularly does, or should, take official notice.

B. PSE Did Not Open The Door and the *Amicus* Brief is Not Responsive or Relevant

10. The Tribe asserts PSE opened the door for including the *Amicus* Brief and the Press Release because of a statement by Mr. Roberts that “every environmental agency that’s been involved in the permitting has recognized that this facility has environmental benefits.”¹⁵ The Tribe provides no standard for when a party “opens the door” for another party to include new information in its post-hearing brief, and the Commission should reject this argument. The governor and attorney general are not environmental agencies, and their opinions are not responsive, nor are they relevant to the statement by Mr. Roberts. The Tribe uses this statement to incorrectly claim the attorney general’s opinion counters “PSE’s assertions at hearing about

¹⁴ See, e.g., WA Dept. of Health Interpretive Statement, No. OCHS-04-23-21 “Notice of Adoption Interpretive Statement” (Apr. 23, 2021).

¹⁵ Tribe’s Response at 6, quoting Transcript at 433:24–25, 434:5–7.

uniform government support for the project[.]”¹⁶ PSE has not made such broad statements because the opinions of various individuals in state government, elected or not, are not relevant to prudence unless associated with a formal action that relates to prudence. The Tribe does not connect or explain how the *Amicus* Brief shows the decision to construct Tacoma LNG was imprudent.

11. The Tribe also provides no citation for why Mr. Robert’s statement allows the Tribe to assert and include the appendices in the post-hearing Brief. The Tribe had ample opportunity to challenge any claims of environmental benefits. In fact, the Tribe already did just that in a procedurally proper manner with the Prefiled Response Testimonies of Gary Saleba, Exh. GSS-1T, and Ranajit Sahu, Exh. RXS-30T. The Tribe’s new assertions and statements, and inclusion of the *Amicus* Brief and Press Release for notice are procedurally improper because the record is closed. The taking of official notice must be requested before or during the hearing so that parties have an opportunity to respond.¹⁷

12. PSE did not “open the door” for the inclusion of the *Amicus* Brief and Press Release and the Commission should strike their inclusion as procedurally improper.

CONCLUSION

13. Introducing the Press Release and *Amicus* Brief in the post-hearing Brief is procedurally improper and taking notice of those documents and the accompanying assertions is not supported by the WAC or other Commission rule. The Commission should strike the Press Release, *Amicus*


¹⁶ Tribe’s Response at 7.

¹⁷ PSE Motion to Strike at 3-4 (noting RCW 34.05.452 states notice should occur “either before or during hearing” giving parties an opportunity to respond).

Brief, and the accompanying assertions from the record for the reasons set forth above and in PSE' Motion to Strike.

RESPECTFULLY SUBMITTED this 21st day of November, 2022.

PERKINS COIE LLP

By 
Sheree Strom Carson, WSBA #25349
Donna L. Barnett, WSBA #36794
Pamela J. Anderson, WSBA #37272
David S. Steele, WSBA #45640
Byron C. Starkey, WSBA #55545
Attorneys for Puget Sound Energy