

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND ENERGY, Respondent.	DOCKETS UE-220066 and UG- 220067 (<i>Consolidated</i>) ORDER 23
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 UG-210918 ORDER 09 GRANTING PUGET SOUND ENERGY'S MOTION FOR LEAVE TO REPLY; GRANTING PUGET SOUND ENERGY'S MOTIONS TO STRIKE IN PART; DENYING IN PART

BACKGROUND

- 1 On January 31, 2022, Puget Sound Energy (PSE or Company) filed with the Washington Utilities and Transportation Commission (Commission) revisions to its currently effective Tariff WN U-60, Tariff G, Electric Service, and its currently effective Tariff WN U-2, Natural Gas. The Commission initiated an adjudication in consolidated Dockets UE-220066 and UG-220067.
- 2 On February 28, 2022, the Commission convened a virtual prehearing conference before administrative law judge Michael S. Howard.

- 3 On March 3, 2022, the Commission entered Order 03, Prehearing Conference Order and Notice of Hearing. The Commission adopted a procedural schedule for this proceeding and noticed an evidentiary hearing for October 3, 2022, and October 4, 2022. The Commission granted petitions to intervene from the Puyallup Tribe of Indians (Puyallup Tribe or Tribe) and the Coalition of Eastside Neighbors for Sensible Energy (CENSE), among others.
- 4 On October 31, 2022, the majority of the parties to this consolidated proceeding, including PSE, the Puyallup Tribe, and CENSE, filed post-hearing briefs.
- 5 On November 7, 2022, PSE filed a Motion to Strike Portions of the Puyallup Tribe of Indian's Post-Hearing Brief (PSE's Motion to Strike Portions of the Tribe's Brief). PSE requests the Commission strike page 3:9-19, Appendix A, and Appendix B, arguing that these portions of the Tribe's Brief improperly refer to new evidence and are irrelevant, prejudicial, and violate Commission rules and procedures. PSE argues that the Tribe's request for "judicial notice" of the appendices should be denied. PSE also requests the Commission strike footnote 2 of the Tribe's Brief because it argues facts not in evidence. PSE's specific arguments are discussed in greater detail below.
- 6 On November 8, 2022, PSE filed a Motion to Strike Portions of CENSE's Post-Hearing Brief (PSE's Motion to Strike Portions of CENSE's Brief). PSE argues that the Commission should strike paragraph 2 on page 1; paragraph 3 on pages 1-2; paragraph 7 on page 3; paragraph 18 on page 6; paragraph 22 on page 8; and paragraph 29 on pages 10-11 of CENSE's Brief as being improperly included in a post-hearing brief, lacking evidentiary support, and circumventing Commission rules and procedures.
- 7 On November 14, 2022, CENSE filed an Opposition to PSE's Motion to Strike Portions of CENSE's Brief. CENSE's specific arguments are discussed below.
- 8 That same day, on November 14, 2022, the Puyallup Tribe filed a Response to PSE's Motion to Strike Portions of the Tribe's Brief. The Tribe included with this filing a Cross-Motion to Strike Portions of PSE's Post-Hearing Brief Dated October 31, 2022 (Cross-Motion to Strike Portions of PSE's Brief). The Tribe's specific arguments in response to, and in support of, these respective motions are discussed below.
- 9 On November 21, 2022, PSE filed a Response to the Tribe's Cross-Motion to Strike Portions of PSE's Brief. PSE argues that the Tribe violated Commission rules by including its cross-motion in the body of its response to PSE's own motion. PSE also argues that the Tribe's cross-motion is meritless.

10 That same day, November 21, 2022, PSE filed a Motion for Permission to Reply to the Puyallup Tribe of Indian's Response to the Motion to Strike (Motion for Leave to Reply). PSE attached its proposed Reply (Reply) to its motion.

DISCUSSION

11 We first discuss PSE's Motion for Leave to Reply. Then we discuss each of the three motions to strike filed by the parties.

PSE's Motion for Leave to Reply

12 Pursuant to WAC 480-07-370(5), a party must not file a reply without permission from the Commission, which the Commission will grant only upon a showing of good cause.

13 We agree that PSE has shown good cause for filing its proposed Reply and accept PSE's Reply for consideration. As PSE explains, the Tribe raises new arguments in its response to PSE's Motion to Strike Portions of the Tribe's Brief. These include asserting that a press release included as Appendix A to the Tribe's Brief is a "policy statement" within the meaning of Commission rules and arguing that PSE opened the door to submitting the amicus brief included as Appendix B to the Tribe's Brief. Because the Tribe provides additional justifications for its request for official notice in its response, we find that PSE has shown good cause for leave to file its Reply.

PSE's Motion to Strike Portions of the Tribe's Brief

14 We grant PSE's motion in part and deny it in part. We strike Appendix A and Appendix B from the Tribe's Brief, along with the references thereto. We decline to strike footnote 2 to the Tribe's Brief.

15 Pursuant to RCW 34.05.452(5), official notice may be taken of any judicially cognizable facts, technical or scientific facts within the agency's specialized knowledge, and codes or standards adopted by governmental bodies or national recognized associations. The statute further states: "Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed and the sources thereof, including any staff memoranda and data, and they shall be afforded an opportunity to contest the facts and material so noticed."¹

¹ RCW 34.05.452(5). *Accord* WAC 480-07-495(2)(c) ("The presiding officer will afford parties an opportunity to contest facts and material of which the commission takes official notice.").

- 16 PSE first requests that the Commission strike page 3, lines 9-13 and Appendix A of the Tribe's Brief, which is a webpage screenshot of a May 8, 2019, press release from the Governor discussing his signing of a bill banning hydraulic fracking. 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 changed 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."
- 17 We agree with PSE that page 3, lines 9-13, and Appendix A of the Tribe's Brief should be stricken. The Tribe had ample opportunity to submit this press release into the record earlier in this proceeding. This press release predated the filing of the Tribe's testimony, yet the Tribe chose to include this material in its Brief after the record closed,² when PSE did not have any opportunity to respond. This press release is clearly intended to sway the Commission by pointing to the personal opinions of the Governor, which is inappropriate under the circumstances. To suggest otherwise is denying the obvious.
- 18 In its Brief, the Tribe suggests that the Commission may take judicial notice of publicly available government records and of public records if the authenticity of those documents cannot be reasonably disputed.³ This may be true in some circumstances. But RCW 34.05.452(5) requires the Commission to provide notice to the other parties before taking official notice. The same statute also limits official notice to certain, less controversial matters, such as codes and standards adopted by nationally recognized associations. In the press release in Appendix A, the Governor admits his changed personal stance does not change the regulatory process, and that he changed his position after construction on the project was well underway. This press release is plainly not appropriate for official notice, particularly when there is no opportunity for the other parties to respond. Failing to acknowledge this controlling precedent is not persuasive.
- 19 In its response, the Tribe suggests that PSE misrepresented the facts at the hearing to suggest that there was universal governmental support for the Tacoma LNG Facility. We observe, however, that the cited portion of PSE witness Ronald J. Roberts's testimony does not make such a broad claim and is instead focused on *environmental agencies* involved in *permitting*.⁴ Neither Appendix A of the Tribe's Brief, nor Appendix B,

² Pursuant to WAC 480-07-830(1), the record closes on the last day of the evidentiary hearing unless the Commission orders otherwise.

³ Tribe's Brief n. 1.

⁴ See Roberts, TR 433:24-25, 434:5-7.

provide the position of *environmental agencies* involved in *permitting* the facility. We therefore do not agree that PSE misrepresented any facts in such a way that would justify the Tribe's later request for official notice.

20 Moreover, to the extent that the Tribe has concerns with Roberts's testimony, it had ample opportunity to conduct discovery, file testimony, and to cross-examine Roberts at the hearing. Requesting official notice of controversial evidence after the record closes is not the appropriate method for impeaching Roberts on this issue.

21 We also agree with PSE that this press release is not the type of information that is suitable for judicial notice under WAC 480-07-495. The Tribe suggests, however, the press release in Appendix A is a "policy statement" within the meaning of WAC 480-07-495. We agree with PSE's arguments in its Reply that this position is incorrect and should be rejected. The Tribe's argument on this issue is implausible on its face. A press release is not comparable to the examples listed in Commission rule.⁵ The Tribe provides little justification for such a construction of the term "policy statement," which departs from the normal use of this term in administrative law.

22 To the extent that the Tribe suggests we take official notice of either the Governor's or the Attorney General's mere *position* on the Tacoma LNG Facility, we question why exactly the Commission would take official notice of such matters. The Governor himself acknowledges that his personal position does not determine the outcome of the regulatory process.

23 PSE next requests that we strike page 3, lines 13-19, and Appendix B of the Tribe's Brief, where the Tribe requests that the Commission take "judicial notice" of an amicus brief filed by the Washington Attorney General in a pending appeal of the Tacoma LNG Facility's Supplemental Environmental Impact Statement (SEIS).

24 We agree with PSE that page 3, lines 13-19, and Appendix B of the Tribe's Brief should be stricken for many of the same reasons. This amicus brief argues for a specific position in pending litigation. The Attorney General is also appearing in this proceeding through the division the Public Counsel Unit, which is able to speak for itself. The advocacy position of the Attorney General in another appeal is not directly relevant to any issue in

⁵ See WAC 480-07-495(2)(a)(i)(A) ("Rules, regulations, interpretive and policy statements, administrative rulings, and orders, exclusive of findings of fact, of the commission and other governmental agencies.").

this proceeding. It does not represent a “judicially cognizable” fact that is appropriate for official notice.

25 Furthermore, this amicus brief was available to the Tribe since July 1, 2022. Taking official notice of this amicus brief would be improper and contrary to Commission rules. To the extent the Tribe suggests that Appendix B responds to Roberts’s testimony at the hearing, we have considered and rejected that argument as unpersuasive.

26 We next discuss PSE’s request that the Commission strike an assertion in the Tribe’s Brief regarding Staff’s litigation position. The Tribe asserts in footnote 2 of its Brief that Staff joined the Tacoma LNG Settlement due to resource limitations.⁶ PSE argues that this statement is unsupported, lacks any citation to the evidence, and only serves to prejudice PSE and other parties to the Settlement.

27 Although we observe that the Tribe’s statement is not supported by a citation to any evidence in the record, we are wary of attempting to draw fine distinctions in regard to what counsel may argue in post-hearing briefs. The parties are already engaging in an unusual degree of motions practice at this point in the proceeding, and further litigation around the phrasing of parties’ arguments should generally be discouraged. We observe that the Commission may consider counsel’s arguments and give them weight to the extent that they are supported by the evidence. It is counsel’s responsibility, though, to establish the credibility of their positions by reference to specific evidence and legal authority.

The Tribe’s Cross-Motion to Strike Portions of PSE’s Brief

28 If the Commission strikes footnote 2 of its Brief, the Tribe requests that the Commission also strike several statements in PSE’s Brief.

29 Pursuant to WAC 480-07-375(2), written motions must be filed separately and may not be submitted in the body of a pleading. We agree with PSE that the Tribe failed to follow Commission rules by including its cross-motion in the body of its response. We decline to grant the Tribe an exemption from this rule. The Tribe did not request any such exemption, and we are already tasked with considering and striking the Tribe’s requests

⁶ Tribe’s Brief n. 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.”).

for official notice of controversial evidence after the record closes. The Tribe's Cross-Motion to Strike Portions of PSE's Brief should therefore be denied.

30 Furthermore, because the Commission declines to strike footnote 2 of the Tribe's Brief, we find it unnecessary to rule on the Tribe's cross-motion or to address PSE's arguments in response beyond the procedural issue noted above. The Tribe does not appear to request that the Commission strike portions of PSE's Brief if the Commission declines to strike this footnote.

PSE's Motion to Strike Portions of CENSE's Brief

31 PSE requests that the Commission strike several portions of CENSE's Brief. CENSE opposes PSE's motion but argues that several paragraphs of its brief, addressing its prudence recommendation, remain unchallenged.

32 PSE first requests that the Commission strike paragraph 2 on page 1, and paragraph 29 on pages 10-11, where CENSE makes certain claims about the CEII process and its communications with PSE. We agree with PSE that CENSE relies on extra-record evidence and that paragraph 2 on page 1, and paragraph 29 on pages 10-11, should be stricken. Although the presiding administrative law judge will normally allow the parties leeway in closing arguments, CENSE makes specific assertions in this paragraph that rely on emails and communications that are not in the record. This is problematic and not appropriate for a post-hearing brief. CENSE does not provide any citation to record evidence that would convince us otherwise.

33 PSE next argues that the Commission should strike paragraph 3 on pages 1-2, where CENSE argues that PSE had a conflict of interest in paying for the Newcastle report, had the report edited, and suggests that the Energize Eastside project was initially estimated to cost \$43 million. PSE argues these statements are unduly prejudicial and unsupported by any citation to the record. In response, CENSE argues that differences between the language in the draft and the final Newcastle Synapse report support its assertion that PSE paid for the report and had a conflict of interest.

34 We agree with PSE on this issue and paragraph 3 is stricken. Although the parties should be granted some leeway, CENSE does not identify any basis for its assertions such as PSE "had Synapse edit the report." This is a specific, controversial claim that requires more than merely pointing to differences in wording between a draft and final report. In addition, CENSE does not identify any basis for its assertion that the Energize Eastside project was estimated to cost only \$43 million.

35 PSE also argues that the Commission should strike paragraph 7, on page 3, where CENSE suggests that Energize Eastside is “being pursued for the economic benefit of PSE and its foreign owners.” Although CENSE does not directly cite to evidence to support this claim, this is essentially a conclusion based on CENSE’s position that Energize Eastside is not required, and it falls within the permissible range of arguments that parties may make in closing arguments or post-hearing briefs. We decline to strike this comment. The Commission may give it consideration to the extent it is based on the evidence.

36 PSE argues that the Commission should strike paragraph 18 on page 6, where CENSE asserts without basis that PSE failed to conduct a stakeholder process and violated TPL-001. Because CENSE argues that this comment is supported by Lauckhart’s testimony, specifically RL-1T at 12:1-5, we decline to strike this comment from CENSE’s Brief.

37 PSE next argues that the Commission should strike paragraph 22 on page 8, where CENSE asserts that there is a risk of explosion due to the proximity of Energize Eastside to Olympia Pipeline’s distribution system. Because CENSE has made this claim in its prefiled testimony,⁷ we decline to strike this comment from CENSE’s Brief.

ORDER

38 THE COMMISSION ORDERS That:

39 (1) Puget Sound Energy’s Motion for Leave to Reply is GRANTED.

40 (2) Puget Sound Energy’s Motion to Strike Portions of the Tribe’s Brief is GRANTED in part, and DENIED in part, subject to the conditions discussed in paragraphs 10 through 23 of this Order.

41 (3) The Puyallup Tribe of Indian’s Cross-Motion to Strike Portions of PSE’s Brief is DENIED.

42 (4) Puget Sound Energy’s Motion to Strike Portions of CENSE’s Brief is GRANTED in part, and DENIED in part, subject to the conditions discussed in paragraphs 26 through 32 of this Order.

DATED at Lacey, Washington, and effective November 22, 2022.

⁷ See Lauckhart, Exh. RL-1T at 20.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ Michael S. Howard
MICHAEL HOWARD
Administrative Law Judge

**NOTICE TO PARTIES: This is an Interlocutory Order of the Commission.
Administrative review may be available through a petition for review, filed within
10 days of the service of this Order pursuant to WAC 480-07-810.**