BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND ENERGY, Respondent.	DOCKET UG-230393 COMMISSION STAFF'S RESPONSE TO PSE'S MOTION TO STRIKE

I. INTRODUCTION

1 Puget Sound Energy (PSE) asks the Commission to strike portions of the testimony of Puyallup Tribe of Indians witness Rajanit Sahu and Public Counsel witness Robert Earle, contending that a previous Commission order, Order 24 in Dockets UE-220066 and UG-220067, renders that testimony immaterial. As relevant to this response, PSE contends that the Commission determined in Order 24 that recent legislative amendments incorporating equity and environmental considerations into the public interest standard do not apply retroactively, and thus does not apply when reviewing the prudency of construction and operation costs for PSE's Tacoma LNG facility. Because that argument stretches Order 24 far beyond what its text or underlying principles will support, the Commission should reject it.

II. STATEMENT OF FACTS

2 PSE filed its most recent general rate case in 2022. The Commission ultimately disposed of all issues raised by PSE's filing by entering Order 24 to adopt three settlements

entered into by various combinations of parties to the case.[1]

3 One of the settlements contained terms related to PSE's Tacoma LNG.[2] As relevant here, the LNG settlement (1) contained the parties' agreement that PSE acted prudently with regard to the LNG facility up through September 22, 2016, but retained for all parties the right to challenge PSE's costs in later proceedings,[3] and (2) allowed PSE to defer operations and maintenance costs, the return of, and the return on, the LNG facility for later recovery through a tracker mechanism.[4]

4 Public Counsel and the Puyallup Tribe of Indians opposed the adoption of those terms.[5] The Commission nevertheless adopted the LNG settlement,[6] and, in doing so, declined to apply the provisions in CETA and RCW 80.28.425 incorporating equitable and environmental health considerations factor into any determination of the public interest.[7]

5 PSE recently filed proposed tariff pages, creating the tracker mechanism through which it is supposed to recover Tacoma LNG costs. Public Counsel, the Puyallup Tribe of Indians, and the Commission's staff all filed response testimony, with each of those parties contesting PSE's recovery of some or all of the deferred costs.[8] PSE subsequently filed this motion in limine[9] seeking to exclude portions of the testimony of Drs. Sahu and Earle on the

[1] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Dockets UE-220066, UG-220067, & UG-210918, Order 24 (Dec. 22, 2022) (Order 24).
[2] Order 24 at Appx. C.
[3] Order 24 at Appx. C. at 4 ¶ 18.B.
[4] Order 24 at Appx. C. at 4 ¶ 18.A, 5 ¶ 18.D.
[5] Order 24 at 95 ¶ 327. The Energy Project also opposed the LNG settlement, and several other parties took no position on it. *Id.*
[6] Order 24 at 132 ¶¶ 448-50
[7] *E.g.*, Order 24 at 126 ¶ 427.
[8] See generally, Sahu, Exh. RCS-1T; Earle, Exh. RLE-1T, Erdahl, Exh. BAE-1T.
[9] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Dockets UE-170033 & UG-170034, Order 07, 2 ¶ 5 (Aug. 25, 2017).

basis that both raised issues that the Commission had already decided against Public Counsel and the Puyallup Tribe.[10]

III. ARGUMENT

6 PSE asks the Commission to exclude some of the testimony offered as irrelevant. The Commission should reject that argument to the extent that PSE contends Order 24 precludes application of the public interest as defined in RCW 80.28.425 to operations costs for the Tacoma LNG facility – PSE should operate the LNG facility prudently, meaning in accordance with all applicable laws, including RCW 80.28.425, when applied prospectively.

7 In Order 24, the Commission set out what it considered the parties to have placed before it with regard to the prudence of PSE's decisions concerning the Tacoma LNG plant. Specifically, the Commission stated that:

> [a]s an initial matter, we observe that the Tacoma LNG Settlement is not precise regarding the prudency determination the Settling Parties request from the Commission. The Settlement provides that the Settling Parties 'accept a determination that the decision to build the regulated portion of the Tacoma LNG Facility was prudent, thus PSE has met its threshold prudence requirement to demonstrate that the investment can be provisionally included in rates in a tracker.' In the interest of precision, we construe the Settlement as requesting a determination that the decision of PSE's Board of Directors to build the Tacoma LNG Facility on September 22, 2016, was prudent. In its post-hearing [b]rief, PSE requests a determination that the '*decision to build* the regulated portion of the Tacoma LNG Facility was prudent.' Staff also suggests that the Settlement preserves the parties' ability to review certain *construction* costs in the future. Taken together, we read the Settlement and the Settling Parties' post-hearing briefs as indicating an agreement that the Settling Parties are stipulating to the prudency of the Company's actions up through the initial decision to build the LNG Facility on September 22, 2016, but that the Settlement allows the parties to review the prudency and reasonableness of

[10] *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Docket UG-230393, Puget Sound Energy's Motion to Strike Portions of the Testimony of Ranajit Sahu, 15 ¶ 27 (Sept. 27, 2023) (Motion to Strike Sahu' Testimony); *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Docket UG-230393, Puget Sound Energy's Motion to Strike Portions of the Testimony of Witness Robert L. Earle, 8 ¶ 16 (Sept. 27, 2023) (Motion to Strike Earle's Testimony).

> costs incurred after that point. We accordingly focus our prudency review on the initial decision to build the facility.[11]

8 The Commission consistently returned to this framing of the issues when discussing the Tacoma LNG settlement and the various challenges to it. It looked at whether PSE prudently decided to build the Tacoma LNG facility based on the facts known to PSE on September 22, 2016[12] given the law in place at the time PSE made the decision to move forward.[13] To that last point, the Commission stated that "[w]hile RCW 80.28.425 expands the public interest standard to include issues such as equity and environmental health, we recognize that this law must be applied to prudency going forward but should not be applied retroactively."[14]

9 To the extent that PSE argues that the Commission has already decided that RCW 80.28.425's amendments to the public interest standard do not apply retroactively, and thus to its review of the Tacoma LNG's facility's construction and operating costs,[15] PSE sweeps with too broad a brush. The Commission did determine that PSE had acted prudently up until September 22, 2016. And its analysis also strongly hinted that it would not apply the equity and environmental justice mandates of the Clean Energy Transformation Act[16] and

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[11] Order 24 at 114-15 ¶ 393 (second and third alterations in original; internal citations omitted).
[12] *E.g.*, Order 24 at 123-24 ¶ 419 ("[b]ecause the Tacoma LNG Settlement only indicates an agreement among the Settling Parties regarding the decision to build the facility, we do not proceed further.");
[13] *E.g.*, Order 24 at 126 ¶ 426 ("we find that it would be unreasonable and inappropriate to reject the Settlement's threshold prudency determination to construct the facility in light of later statutes that did not exist at the time."), 132 ¶ 418 ("[t]he Commission should not reject the Settlement or disallow recovery of the facility on the basis of later changes to law or public policy.").
[14] Order 24 at 126 ¶ 427.
[15] *E.g.*, Motion to Strike Sahu's Testimony at 15 ¶ 27 ("The Tribe's Testimony again requests the Commission to apply RCW 80.28.425 retroactively when evaluating the prudence and construction and operation costs of the Tacoma LNG Project"); Motion to Strike Earle's Testimony at 8 ¶ 16 ("Public Counsel's Testimony requests the Commission to apply the expanded standard in RCW 80.28.425 when evaluating the prudency of construction and operation costs of the LNG Facility.").
[16] *See generally* LAWS OF 2019, ch. 288.

RCW 80.28.425[17] retroactively when reviewing costs incurred before then.[18] But PSE incurred some of the costs here after CETA and RCW 80.28.425 became effective.[19] And it should go without saying that the Commission does not face a retroactivity problem when it applies a law to events occurring after the law becomes effective.[20] Staff, accordingly, asks the Commission reject PSE's overly broad reading of Order 24: if PSE does not act reasonably as it operates (or contracts for the operation of) the LNG facility, the parties retain the right under the LNG settlement and Order 24 to challenge related costs.

IV. CONCLUSION

The Commission should reject PSE's argument that Order 24 forecloses the parties' rights to challenge costs incurred by PSE due to operation of the Tacoma LNG Facility.

DATED this 4th day of October 2023.

Respectfully submitted,

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[17] LAWS OF 2021, ch. 188, § 2(1).
[18] *E.g.*, Order 24 at 126 ¶¶ 426-27.
[19] CETA became effective on May 7, 2019. *See generally* LAWS OF 2019, ch. 288. RCW 80.28.425 became effective on July 25, 2021. *See generally* LAWS OF 2021, ch. 188.
[20] *See in re Flint*, 174 Wn.2d 539, 547, 277 P.3d 657 (2012) ("[p]rospective application of a statute occurs when the event that triggers or precipitates operation of the statute takes places after it enactment. Prospective application can be found even if the triggering event originates in a situation that existed before the statute was enacted.") (internal citation omitted).