BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND ENERGY, Respondent.	DOCKETS UG-230393 THE PUYALLUP TRIBE OF INDIANS' POST-HEARING BRIEF

I. INTRODUCTION

The Puyallup Tribe of Indians (Tribe) intervened in this matter to aid the Commission in arriving at a just outcome. Despite Puget Sound Energy's (PSE or Company) attempts to obfuscate the record, there are a number of undisputed facts central to the Utilities and Transportation Commission's (Commission) handling of the issues before it.

PSE made the affirmative decision to site a methane liquefaction facility that pollutes the air and poses a risk of catastrophic explosion, the Tacoma LNG facility (Tacoma LNG), on the border of the Tribe's Reservation. PSE knew the facility would pollute and pose safety risks, and PSE knew that the Tribe and others situated near the facility did not want Tacoma LNG built on their doorstep. PSE proceeded anyway. Washingtonians, including Governor Inslee, voiced their opposition to the facility. PSE proceeded anyway.

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Tacoma LNG is now built, operating, and emitting toxic pollution to the airshed that it shares with the Tribe. In this proceeding, PSE asks this Commission to add insult to injury by forcing ratepayers to foot an appreciable portion of its sizeable bill for the Tacoma LNG Project (Project). The Commission should refuse PSE's invitation and, instead, disallow its post-September 22, 2016 costs associated with Tacoma LNG for the following reasons.

First, PSE overstated the ratepayer need for the Project and has not demonstrated that the Company's investments in the Project are prudent over the life of the facility. Second, PSE failed to show that ignoring the equities associated with its choice of a site for Tacoma LNG and moving forward with construction of the Project in the face of vocal public opposition and changing public policy regarding fossil fuel projects was prudent. Third, significant Project costs were incurred solely for the benefit of PLNG's for-profit operations and provide no benefit to ratepayers. And finally, PSE fails to carry its burden of proof to show that specific Project costs were reasonable and appropriate.

II. BACKGROUND

The purpose of this proceeding is to examine the prudency and reasonableness of costs that were incurred by PSE after its September 22, 2016 decision to build the Project.[1] Because the Commission's threshold determination in Order 24/20 considered only the information that was available to PSE on September 22, 2016, the Commission must now consider whether it continued to be reasonable and prudent for PSE to incur costs on the Project in the face of significant public opposition and as public policy regarding fossil fuel projects shifted.

The Puyallup Tribe of Indians is a federally recognized Indian tribe with most of its Reservation located in Tacoma and Fife, Washington. The Tribe's Reservation shares an airshed with Tacoma LNG, and the Tribe has vocally opposed the Tacoma LNG Project (Project) for years. Through that process, the Tribe has developed substantial information about the Project; its

[1] Order 24/10 at ¶ 393.

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evolution over the course of design, permitting, and construction; and its impacts on the Tribe and its members.

The Tribe is before the Commission to share information and analysis regarding: (1) the Project's disparate impacts on the Tribe and other environmental justice communities; (2) Tacoma LNG's limited public benefit to ratepayers; (3) Project features and processes, and whether the associated costs incurred by PSE were reasonable and necessary to provide peak shaving services to PSE's ratepayers; and (4) why costs claimed by PSE should be denied by the Commission because they are unsupported by the record.

The Project disproportionately burdens the Tribe and its members, and PSE has been aware of this fact for many years. Those burdens should be given significant weight in the Commission's prudency determination. The Tribe has consistently called for additional analysis and mitigation of the risks posed by Tacoma LNG. Instead of addressing these concerns, which have been expressed by the Tribe and the public for years, PSE has ignored—and has urged the Commission to ignore—the negative externalities and related inequities that Tacoma LNG poses to those unlucky enough to live near the facility.

Now that Tacoma LNG is operating, the negative externalities that were predicted by the Tribe can no longer be dismissed as insignificant or theoretical, nor can PSE or the Commission somehow claim that an air permit prevents them. The numerous Notices of Violation (NOV) issued to PSE for violations of the Tacoma LNG air permit validate the Tribe's longstanding concerns regarding the health and safety risks posed by the Project. While the Commission has noted that it considers itself to primarily be an economic regulator, these facts go to the heart of the equity considerations the Commission has professed to have adopted and ought not be ignored.

The Project provides little benefit to ratepayers. PSE provided two reasons for developing the Tacoma LNG Project: (1) to meet its ratepaying customers' peak demand at times when the supply of pipeline gas is insufficient (peak shaving), and (2) to sell LNG to private customers

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through Puget LNG (PLNG), PSE's for-profit subsidiary.[2] To date, the ratepayer need that PSE projected for the Project has not materialized. The Project has not been necessary to satisfy ratepayer demand for natural gas, and its operations have benefited only PLNG.

A. The Inequities of the Project Were Well Known by September 2016.

As set forth in the Commission's Order 24/10 in WUTC Dockets UE-220066, UG-220067, and UG-210918 (Consolidated Dockets), this proceeding is a continuation of the Commission's prudency analysis regarding PSE's Tacoma LNG Project.[3] Under the Consolidated Dockets, the Parties broadly presented evidence and arguments addressing the overall prudency of the Tacoma LNG Project; however, Order 24/10 provided only a threshold prudency determination addressing PSE's actions up until the PSE Board of Directors' decision to construct the facility on September 22, 2016.[4] As Staff recently explained at the evidentiary hearing, "all the settlements for the rate case did was defer these issues [the prudency of PSE's post-September 2016 Project costs] to this proceeding."[5]

PSE admitted during the Consolidated Proceedings that it did not consider the inequities associated with the Project in its decision making.[6] This is the case even though PSE was aware that the Tribe and citizens of Tacoma had significant concerns about the risks and negative externalities posed by the Project. The Company chose to ignore the inequities associated with the Project because even though such inequities harm the public interest—PSE apparently did not believe they would be factored into the Commission's prudency determination.

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[2] *See* Roberts, Exh. RJR-1CT at 17:9-19, *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Dockets* UE-220066, UG-220067, and UG-210918 (consol.) (filed Jan 31, 2022).

[3] Wash. Utils. & Transp. Comm'n v Puget Sound Energy, Dockets UE-220066, UG-220067 and UG-210918 (consol.) Order 24/10 (hereinafter "Order 24/10") (Dec. 22, 2022).

[4] As noted by Public Counsel, one reason the Commission deferred its prudency analysis regarding PSE's post-September 16, 2022 Project costs was that UTC Staff had not yet completed its prudence review. *See* Order 24/10 at ¶ 381.

[5] Evidentiary Hearing Transcript (Nov. 6, 2023) (hereinafter "TR") at 32:1-3.

[6] *See* Order 24/10 at ¶ 386.

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Public opposition to the Tacoma LNG facility is overwhelming, and PSE's customers object to having their rates increased to reimburse the Company for an ill-advised, expensive and harmful investment from which ratepayers expect to see little or no benefit. On November 1, 2023, the Commissioners held a hearing to receive public comments from Washingtonians. Many commenters addressed Tacoma LNG, and every single commenter strongly opposed PSE's attempts to saddle ratepayers with the costs associated with the facility. Further, the Tribe is aware that the Commission received a large volume of written public comments articulating Washingtonians' overwhelming opposition to Tacoma LNG.[7, 8] Public opposition to the Project is not new. For years, PSE and the Commission have been aware of public opposition to Tacoma LNG via (inter alia) public opposition expressed in Commission hearings dating back to 2016.

The public outcry against the Project is aligned with relevant public policy. The legislature has prioritized equity and environmental justice through passage of the Clean Energy Transformation Act and by promulgation of a revised public interest standard under RCW 80.28.425(1) that includes environmental health and greenhouse gas emissions reduction, health and safety, economic development, and equity—to the extent that such factors affect the rates, services, and practices of the regulated utility. Further, Governor Inslee publicly stated that he does not support Tacoma LNG after September 2016 but before PSE built the facility and commenced operations.[9] Washington's Attorney General has similarly opposed the facility; indeed, the Attorney General's Office went so far as appearing as amicus in active litigation challenging Tacoma LNG's air permit because the AGO is concerned that the facility's greenhouse

[7] *See* Offer of Public Comment Exh. No. BR-8, UTC Comment Matrix and PCU Tally (filed Nov. 29, 2023).

[8] The Commission heard similar comments at the public hearing conducted under the consolidated dockets. *See* Exh. BR-3, from the consolidated WUTC Dockets UE-220066, UG-220067, and UG-210918.

[9] *See* Exh. RXS-30.

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gas impacts are negative and significant.[10] A decision from the Court of Appeals in that matter is imminent.

Because the UTC exists to serve Washingtonians and "regulate in the public interest,"[11] the Commissioners should give significant weight to statewide policies regarding equity and the public's overwhelming opposition to: (1) being subjected to the negative externalities associated with the Project; (2) being saddled with the costs of constructing and operating a facility that primarily benefits PSE shareholders; and (3) being financially responsible for costs that PSE has not shown to be incurred prudently and in the public interest.

B. The Tribe has Provided Incontrovertible Evidence of the Project's Disparate Impacts and Unnecessary Costs.

To assist the Commission, the Tribe presented written and oral testimony from Dr. Ranajit Sahu.[12] Dr. Sahu has worked and taught in the fields of environmental, mechanical, and chemical engineering for more than thirty years.[13] Dr. Sahu has extensive experience with the quantification of facility emissions; modeling the impacts of such emissions on surrounding areas; determining the health risks associated with exposing surrounding populations and the environment to air pollutants; and monitoring of air pollutants in ambient air. And with regard to safety concerns, Dr. Sahu has, over the course of his career, assessed the accidental and non-routine risks posed by fossil fuel facilities.[14] In addition to his consulting work, Dr. Sahu has taught university-level courses regarding air pollution and air pollution controls, risk assessments, and hazardous waste management for over twenty years.[15]

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[10] Exh. RXS-31.

[11] RCW 80.01.040(3).

[12] Exh. RXS-1T; Exh. RXS-35T.

[13] *See* Exh. RXS-2.

[14] *See* Exh. RXS-1T at 6-8; *see also* Exh. RXS-2.

[15] *Id.* at 7

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Dr. Sahu is the only witness before the Commission with such experience. Dr. Sahu's expertise in assessing the generation of various air pollutants from industrial processes applies to his review of the significant sources of air emission at Tacoma LNG, which include the facility's flare, its vaporizer, and fugitive emissions (leaks of gaseous volatile compounds) from the thousands of components comprising the facility.

Dr. Sahu first began reviewing materials related to the Project in 2018, including thousands of documents produced to the Puyallup Tribe by PSE, by PSE's vendors and consultants, and by government agencies that have been involved in the permitting and commissioning of the Project.[16] In other words, Dr. Sahu's testimony is well-informed.

1. Emissions from the Project cause and contribute to human health impacts that disproportionately fall on the Tribe and surrounding highly-impacted communities.

Dr. Sahu's testimony presents a concept that should be self-evident: permitted pollution is still pollution.[17] This is important to the Commission's prudency analysis because tools developed by the Washington Department of Health show that the airshed into which Tacoma LNG emits its carcinogens (and other pollutants) is already degraded and over-burdened by pollution—even before the Tacoma LNG facility began operating.[18] And the Tacoma LNG air permit application acknowledges that a host of Toxic Air Pollutants (TAPs) and Hazardous Air Pollutants (HAPs) will be emitted from the facility.[19] Tacoma LNG's emissions are making an already degraded airshed worse from a health standpoint, and PSE cannot credibly contend that the Tacoma LNG

[16] *Id.* at 8-9.

[17] *See* Exh. RXS-1T at 28.

[18] *See* Exh. RXS-1T at 28.

[19] *See* Exh. RXS-1T at 22 (for example, the following pollutants will be emitted above specified regulatory threshold levels: 7,12-dimethylbenz(a)anthracene; benzene; formaldehyde; hydrogen sulfide; arsenic; beryllium; cadmium; manganese; and vanadium); *see also* Exh. RXS-13 (PSE Notice of Construction Application for Tacoma LNG (5/22/2017)) at 3-6 to 3-7 and Table 7.

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facility does not diminish the health of people in its vicinity through emissions of pollutants to the air.[20]

a. Any dispute over Tacoma LNG's negative externalities and disparate impacts is resolved by the PSCAA NOVs before the Commission in this proceeding.

On May 12, 2023, the Puget Sound Clean Air Agency (PSCAA) issued numerous Notices of Violation (NOVs) to the Tacoma LNG facility for violations of its air permit.[21] These NOVs document significant violations of permit conditions.[22] These permit violations include multiple instances of bypass events, in which waste gases that should have been flared were instead released directly to the atmosphere without flaring; such bypass events significantly increase the facility's total actual emissions.[23]

As Dr. Sahu explains in his Cross-Answering Testimony, the air permit anticipates (because the air permit requires) that the flare at Tacoma LNG will destroy over 99% of the toxic air pollutants in the waste gases.[24] This high level of destruction efficiency is necessary for the Tacoma LNG facility to remain in compliance with its permitted emission thresholds. When the flare is bypassed and Tacoma LNG waste gases are released directly to the atmosphere, the facility's emissions are approximately 100 times higher than when the flare is properly operated. Thus, each minute of a bypass event at the Tacoma LNG facility emits the equivalent of 100 minutes of emissions during flaring.[25]

Because we do not know the details of the waste gas composition released during Tacoma LNG's permit-violating flare bypass events, it is impossible to know the exact quantity of HAPs

[20] *See* Exh. RXS-1T at 30.

[21] Exh. RXS-35T at 11; Exh. RXS-37 (containing PSCAA-issued NOVs and PSE response to PSCAA); *see also* Exh. RXS-38 (table summarizing NOVs issued by PSCAA to Tacoma LNG on May 12, 2023).

[22] Exh. RXS-35T at 11

[23] Exh. RXS-35T at 12.

[24] This 99% destruction efficiency is one of the reasons that PSCAA permitted the facility as a "minor source" under the Clean Air Act.

[25] Exh. RXS-35T at 12.

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and TAPs those events released to the Tribe's airshed. However, the releases can be estimated by considering the total time of the flare bypass events along with the flare's hourly potential to emit. PSE provided information about potential emissions from the enclosed ground flare burners in its NOC application, which provides hourly emission rates of various pollutants for five gas compositions.[26] The PSCAA NOVs issued for flare bypass events document 394 minutes (over six- and one-half hours) that waste gases were released without flaring.[27] Using the emission rates PSE presented as Cases 1 and 5 in the NOC Application to calculate the potential emissions during 394 minutes of flare bypass events, these violations would result in a release of between 1,970 and 6,764 pounds of VOCs, between 1.12 and 4.1 pounds of benzene, and between 11.8 and 43.3 pounds of hexane.[28]

It concerns the Tribe, and should concern the Commission (as a tribunal to which PSE is making representations about the facility), that during the permitting process PSE repeatedly stated to the Pollution Control Hearings Board that use of the flare bypass would rarely or never occur.[29] For example, Matthew Stobart, an employee of Chicago Bridge & Iron testifying on behalf of PSE before the Pollution Control Hearings Board, minimized concerns about the impacts of the bypass, stating that "…we hope that it never gets used. It might get used over a couple times over the lifetime of the facility."[30] In other words, Tacoma LNG has not been the clean-operating facility that PSE claimed it would be, and the Commission should be skeptical of any representations PSE has made about the facility's impacts to the surrounding community.

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[26] *See* Exh. RXS-13 at 7-11 (Tables B-4 through B-8).

[27] *See* Exh. RXS-37.

[28] *See* Exh. RXS-13 at 7 (Table B-4 lists potential emissions of 3 lbs/hour of VOCs, 1.7E-03 lbs/hour of benzene, and 1.8E-02 lbs/hr of hexane for PSE's "Case 1"); see also Exh. RXS-13 at 11 (Table B-8 lists potential emissions of 10.3 lbs/hour of VOCs, 6.3E-03 lbs/hour of benzene, and 6.6E-02 lbs/hr of hexane for PSE's "Case 5").

[29] *See e.g.,* Exhs. RJR-18X and RJR-19X.

[30] Exh. RJR-18X; *see also* RJR-19X (PSE counsel relying on Mr. Stobart's testimony in response to the Tribe's concerns that the Tacoma LNG facility would violate enforcement permit conditions.)

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In addition to the flare bypass events, NOVs were issued to the Tacoma LNG facility for its failure to maintain the required minimum temperatures for various flaring conditions—which are pre-requisites for ensuring that the flare is properly destroying toxic air pollutants at the required efficiency.[31] There have been at least eleven violations of the PSCAA air permit requirement that the flare maintain minimum temperatures.[32] In each such instance, the flare was operated in a manner that would not have destroyed contaminants to the degree required—resulting in the Tacoma LNG facility emitting more of these contaminants than PSE had asserted would occur.[33]

In addition to permit violations associated with operation of the flare, PSE also received NOVs for failure to collect the required quantity of valid monitoring data—which is essential to verify compliance with permit requirements; and at least one instance of clearly violating the quantity of VOC emissions (including harmful air toxics) allowed by the permit.

Each of the air permit conditions are intended to be protective, so these violations all have negative impacts which are felt most significantly by those living or working nearby.[34] Violating the permit limit for VOCs directly results in more emissions and more impacts to the Tribe and surrounding communities.[35] Violation of the permit requirements regarding the collection of sufficient quantities of valid monitoring data means that there are greater periods of time in which no one knows the amount of pollutants being emitted into the local airshed.[36] Tacoma LNG could have been violating its permit during these times and nobody would know.[37]

[31] Exh. RXS-35T at 12.
[32] Exh. RXS-38.
[33] Exh. RXS-35T at 12-13.
[34] Exh. RXS-35T at 13.
[35] Exh. RXS-35T at 13.
[36] Exh. RXS-35T at 13.
[37] Exh. RXS-35T at 13-14.

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Viewed together, the NOVs issued to Tacoma LNG demonstrate two facts relevant to the Commission's prudency analysis. First, that PSE misrepresented the facility's impacts to tribunals in the past, including when it said the flare bypass would likely never be used. Second, as should now be clear to the Commission, this facility pollutes the air. The fact that it has a permit is not preventing pollution or protecting the Tribe from it. [38]

2. The Project presents inequitable risks associated with the potential for a catastrophic accident adjacent to the Tribe's land and resources.

The negative externalities created by the Project extend beyond the ongoing addition of pollutants to the Tribe's airshed; it also presents significant safety risks that include the potential for explosions or other catastrophic events. All methane liquefaction facilities present an inherent risk of catastrophic explosion; and for Tacoma LNG, that risk was even disclosed in the facility's Environmental Impact Statement.[39]

As the Commission knows, there have been numerous accidents and catastrophic events at liquefaction facilities in the United States and across the world, including the 2014 explosion at the Plymouth LNG facility, which the Commission is familiar with because it is located here in Washington State.[40] Like Tacoma LNG, the facilities where such incidents have occurred were subject to safety evaluations; thus even permitted, code-compliant facilities pose the risk of a catastrophic event.[41]

Regarding the unquantified safety risks associated with Tacoma LNG, Dr. Sahu explains that a number of potential accidents were not considered in the design and permitting process. The regulatory analysis looked only at higher probability/low-consequence scenarios and ignored the more concerning high-consequence scenarios.[42] For example, Dr. Sahu notes that the Tacoma

[38] Exh. RXS-35T at 13.
[39] *See* Exh. RXS-18.
[40] Exh. RXS-1T at 33.
[41] Exh. RXS-1T at 33-34.
[42] Exh. RXS-1T at 35.

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LNG facility "presents a large target to any number of bad actors in the US and abroad,"[43] meaning it is a soft target for terrorism that is located in a highly-populated area. Despite such risks, the Tribe is not aware of any worst-case scenario risk analysis performed for the Tacoma LNG facility.

Additionally, though UTC Pipeline Safety Staff performed the analysis necessary to determine Tacoma LNG complied with PHMSA requirements—that analysis was not intended to establish that the facility does not pose a risk of catastrophic accident. And in that context, UTC staff acknowledged that even the "design spill" scenario that PSE modeled for the facility does not represent all reasonably anticipatable risks posed by the facility.[44] The "design spill" is a standardized scenario in which a small-quantity spill and its low consequences are analyzed, but does not account for all potential risks presented by methane liquefaction facilities, including those that are more significant in volume and duration – and which would have far greater consequences.[45] Without information about the true scope of Project impacts, regulators cannot consider whether mitigation of those impacts is necessary and possible. The Tribe has presented uncontroverted evidence that the Project poses such risks, and PSE has not established that high-consequence scenarios cannot occur.

PSE's responses to the PSCAA NOVs indicate that venting occurred at the bypass to alleviate unsafe operations at the flare.[46] Further, PSE's witness Mr. Roberts acknowledged that the facility's operations pose safety risks on cross examination. During a discussion of the releases of unburned waste gases to the atmosphere via the flare bypass, Mr. Roberts explained that PSE could not commit to removing or disabling the flare bypass because it is a safety feature of the plant that is there for a reason, and that doing so would cause a safety issue.[47]

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[43] Exh. RXS-1T at 34.

[44] *See* Exh. RXS-25 at 2.

[45] Exh. RXS-1T at 35.

[46] *See* Exh. RXS-37.

[47] TR at 60:19-61:12.

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In short, based on the record before it and common sense, the Commission cannot credibly conclude that Tacoma LNG does not pose safety risks to the neighboring community. The externalities exist and should not be ignored in this proceeding.

C. Substantial portions of the Tacoma LNG facility are unnecessary to provide peak shaving service to PSE customers.

The Project's design was driven by the need to accommodate the needs and specifications of PLNG's marine fueling customers. PSE cannot be allowed to recoup costs from ratepayers unless those costs are for facilities that are needed and necessary to provide service to ratepayers. Section III(C)(2) of Dr. Sahu's testimony discusses the aspects of the Project that are unnecessary to satisfy ratepayer needs.[48]

For example, PSE's decision to site the Tacoma LNG facility was based on the ability to conveniently and seamlessly deliver LNG to PLNG's maritime fuel customer at the adjacent TOTE facility. This decision required the construction of an expensive four-mile pipeline to deliver feed gas to the LNG facility, and then to transport any vaporized LNG back through that four-mile pipeline to be introduced into PSE's distribution system for ratepayers during periods of peak shaving.[49]

Additionally, PSE incurred significant costs in the design and construction of equipment and processes to ensure the fuel produced for PLNG meets a certain quality, despite the fact that no additional treatment is necessary for pipeline gas to be delivered to PSE's ratepayers.[50] It is generally necessary to remove moisture and CO_2 from feed gas prior to its liquefication to prevent those constituents from fouling the liquefaction system.[51] However, it is not necessary to remove heavy hydrocarbons (e.g., ethane, propane, butane, and pentane) from feed gas to produce LNG.[52]

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[48] Exh. RXS-1T at 43-47.
[49] Exh. RXS-1T at 47.
[50] Exh. RXS-1T at 48.
[51] Exh. RXS-1T at 44.
[52] Exh. RXS-1T at 44.

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During its redesign of the facility, once PSE decided to remove heavy hydrocarbons during pretreatment to ensure it could meet the necessary marine fuel specifications, it had multiple options as to how to dispose of those heavy hydrocarbons. Rather than dispose of TLNG's process waste in a manner releasing virtually no emissions, PSE chose to flare TLNG's process waste, releasing pollutants into an already-burdened airshed.

The decisions PSE made during the redesign of the facility, which was only necessary to satisfy the needs of PLNG's business, resulted in an investment in additional pretreatment equipment that provides no benefit to PSE ratepayers. PSE's attempt to frame the removal of heavy hydrocarbons as a benefit to ratepayers[53] should be rejected. PSE does not perform pretreatment to address the Wobbe index of pipeline gas before it is distributed to customers. The Commission should dismiss PSE's claim that the removal of heavy hydrocarbons from the relatively small volume of gas the Project may provide during peak shaving provides a legitimate benefit to ratepayers.

III. ARGUMENT

The Commission should disallow all Project costs that were incurred by PSE after September 22, 2016.

Section A below explains why those costs were not incurred prudently. Specifically, those costs were incurred solely for the benefit of PSE's marine fueling business—and since it was commissioned, Tacoma LNG has benefitted only PSE's for-profit subsidiary. The customer demand projected by PSE has not materialized, and the Project has not been used for peak shaving, the resource need articulated by PSE as its public interest rationale for constructing the Project. Further, the Project is inequitable because it imposes heavy burdens—including air pollution and the risk of catastrophic harm—on its neighbors. Thus, the Project is actively causing disparate

[53] *See* RXS-28, PSE Response to Public Counsel Data Request No. 28; *see also* RXS-29, PSE Response to Public Counsel Data Request No. 28.

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impacts to the Tribe and surrounding community despite not having performed any peak shaving operations to benefit ratepayers.

Section B explains, in the alternative, that PSE has not carried its burden of justifying certain cost items. For example, most of the construction at issue was necessary only for the development of PSE's for-profit marine-fueling business and had no relation to building capacity to benefit ratepayers. Further, PSE has failed to satisfy its burden of showing that legal fees and costs it incurred in relation to the Project are reasonable or appropriately borne by ratepayers. Thus, even if the Commission allows PSE to recoup some of its claimed costs from ratepayers, these categories must be excluded.

A. The Commission Should Protect Ratepayers from Bearing Costs that are Not Prudent and in the Public Interest by Disallowing All Project Costs.

PSE's investment in Tacoma LNG should be found not prudent and all Project costs incurred by PSE after September 22, 2016 should be disallowed. At least two overriding factors preclude a prudency finding here. The first is the fact that PSE failed to demonstrate credible ratepayer need for this project. PSE oversells Tacoma LNG's benefits to ratepayers and is now attempting to overburden ratepayers with unnecessary costs associated with the facility's construction and operations. The second is that this project was not in the public interest. The Commission must consider the public interest with respect to its regulation of rates, services, and practices.[54]

To protect the public interest, the Commission may consider factors such as environmental health and GHG emissions reductions, health and safety concerns, economic development, and equity.[55] In derogation of the public interest, the Project disproportionately impacts the health and safety of the Tribe and other highly-impacted communities, is contrary to environmental justice, and reinforces structural inequities while providing little or no benefit to ratepayers. Because the

[54] RCW 80.01.040(3).

[55] RCW 80.28.425(1).

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Project's negative externalities significantly outweigh its benefits to the public, PSE's investment in Tacoma LNG should be found not prudent and all Project costs incurred by PSE after September 22, 2016 should be disallowed.

1. PSE overstated the ratepayer need for the Project and has not demonstrated that the investment is prudent over the life of the facility.

Although there is no single set of factors applied in the Commission's prudence analysis,[56] one important factor is the need for the resource.[57] PSE failed to establish that such a need existed here.

The Commission should disregard PSE's claims that the Project has provided a benefit to ratepayers because, as discussed by Public Counsel, the purported ratepayer use of the Project has been performative and unnecessary.[58]

In its threshold decision, the Commission noted that *capacity* is, by itself, a used and useful resource "when it is supported by credible forecasts for customer demand."[59] However, it also signaled that PSE would need to make a showing that its projected need for the Project's peak shaving capacity was in fact credible, noting that the Commission will consider the "extent to which the Facility was used as a peak shaving resource" in its deferred prudency analysis.[60]

PSE's use of the Project to deliver gas to customers on days when adequate pipeline gas resources were available does not establish that the Project capacity is used and useful as a peak shaving resource. The Tribe and Dr. Sahu agree with Public Counsel's witness Dr. Earle that

[56] *See e.g., WUTC v. The Wash. Water Power Co.,* Cause U-83-26, Fifth Supplemental Order at 15-16 (January 19, 1984).

[57] *See WUTC v. Puget Sound Power & Light Co*., Docket UE-921262, et al., Nineteenth Supplemental Order at 11 (September 27, 1994).

[58] *See* Post-Hearing Brief of Public Counsel, Docket UG-230393 (12/8/2023) at ¶¶ 22-26.

[59] Order 24/10 at ¶ 405.

[60] Order 24/10 at ¶ 405.

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PSE's use of the vaporizer was a manufactured situation performed to give the Commission reason to believe the Project was responding to customer demand.[61]

PSE similarly overstates and misrepresents the need for ratepayer use of the four-mile transmission pipeline in the context of non-peak shaving deliveries of boil-off gas into its customer distribution system during times Tacoma LNG is not conducting liquefaction.[62] In response to testimony from Staff and Public Counsel arguing against PSE's proposed pipeline allocation, PSE witness Donohue testified that it is appropriate for ratepayers to cover the costs of the outbound share of the pipeline based on the use of the outbound pipeline for both peak shaving and to deliver boil-off gas to ratepayers.[63] Mr. Donohue's argument, and PSE's proposed allocation of pipeline costs is inappropriate because the public purpose of the Project is to provide a peak shaving resource. The delivery of boil-off gas does not meet the definition of peak shaving. Further, outbound use of the pipeline is unnecessary for the disposal of boil-off gas because that waste stream can be directed to the flare, or reliquefied and returned to the storage tank. Instead of utilizing its existing investments to address the boil-off gas, PSE has manufactured a "use" for the boil-off gas stream to justify its proposed allocation of an inappropriate share of pipeline costs to ratepayers.

2. PSE Failed to Show that Building Tacoma LNG was in the Public Interest.

Another important factor is the public interest.[64] As the Commission has acknowledged, because PSE's GRC filing occurred after December 31, 2022, it was the legislature's intent that the Commission would review PSE's decision to construct the Project and its recovery of Project-related costs under the standards set forth in RCW 80.28.425.[65] These standards include "the public

[61] *See* Exh. RLE-1CT at 17:18–20; *see also* Exh. RXS-35T at 7.

[62] *See* Exh. WFD-5T at 5:5-10 (referencing "PSE's firm right to call on outbound capacity for peak-shaving or boil-off gas delivery to the outbound function.").

[63] *See e.g.,* Exh. WFD-5T at 4:14-5:15.

[64] RCW 80.28.425(1).

[65] *See WUTC v. Cascade Natural Gas Corp*., Dkt. UG-210755, Order 09, ¶ 53 at FN 31.

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interest" and whether the rates are fair, just, reasonable, and equitable.[66] This factor weighs heavily against a prudency finding.

a. By Statute, and the Commission's Own Commitments, the Commission Must Consider Equity in its Analysis.

The Commission considers many factors in its public interest analysis, including equity,[67] and it has embraced the Clean Energy Transformation Act's (CETA) statement of legislative intent.[68] CETA provides that the public interest includes the "reduction of burdens to vulnerable populations and highly impacted communities" and that in achieving this policy, "there should not be an increase in environmental health impacts to highly impacted communities."[69]

The Commission has also adopted the principles that the legislature announced when it established the Washington Office of Equity.[70] On those principles, the legislature instructed that equity requires: "developing, strengthening, and supporting policies and procedures that distribute and prioritize resources to those who have been historically and currently marginalized, including tribes"; eliminating the systemic barriers that are "entrenched in systems of inequality and oppression"; and "promoting dignity, honor, and respect for all people."[71] To this end, the Commission has committed to considering energy justice and equity throughout its decision-making so that its "decisions do not continue to contribute to ongoing systemic harms."[72] And to reduce inequities and to promote the public interest, the Commission has incorporated into its decision-making the "core tenets of energy justice", a four-tiered framework for the evaluation of energy projects, which considers:[73]

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[66] RCW 80.28.425(1).

[67] *Id*.

[68] *See WUTC v. Cascade Natural Gas Corp.*, Dkt. UG-210755, Order 09, ¶ 52 (Aug. 23, 2022) (citing RCW 19.405.010).

[69] RCW 19.405.010(6).

[70] *Cascade Natural*, *supra* Order 09 at ¶ 55.

[71] RCW 43.06D.020(3)(a).

[72] *Cascade Natural, supra* Order 09 at ¶ 58.

[73] *Cascade Natural*, *supra* Order 09 at ¶ 56.

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- Distributional justice, which includes ensuring that marginalized and vulnerable populations do not receive an inordinate share of the burdens;
- Procedural justice, which includes ensuring that decision-making is more inclusive, recognizing that marginalized and vulnerable populations have been excluded from decision-making processes historically;
- Recognition justice, which includes making efforts to reconcile historic and ongoing inequalities; and
- Restorative justice, which seeks to disrupt and address distributional, recognitional, or procedural injustices, and to correct them through laws, rules, policies, orders, and practices.[74]

While the Commission may view itself "primarily as an *economic* regulator,"[75] it has the authority, and an obligation, to apply these principles of equity and energy justice to its determination of the prudency of the costs incurred by PSE.

b. PSE must demonstrate that its investments are prudent and in the public interest throughout the life of the Project.

The Commission recognizes that an equity lens is foundational to its review of "all requests, proposals, and recommendations" and has repeatedly stated that it is committed to applying an equity lens in all public interest considerations going forward.[76] The Commission has held that "regulated companies should inquire whether each proposed modification to their rates, practices, or operations corrects or perpetuates inequities."[77] To meaningfully apply that equity lens to the Project—which will impact the Tribe and surrounding communities for decades—the

[74] *See id.*

[75] Final Order 24/10 at ¶ 427.

[76] *See e.g.,* Order 24/10 at ¶ 421 (quoting *WUTC v. Cascade Natural Gas Corporation*, Docket UG-210755 Order 09 ¶ 58 (August 23, 2022)).

[77] Order 24/10 at ¶ 57 (quoting *WUTC v. Cascade Natural Gas Corporation*, Docket UG-210755 Order 10 ¶ 58 (August 23, 2022).

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Commission must consider the prudency of PSE's expenditures both in light of what it knew at the time those costs were incurred as well as over the life of the investment.[78]

In the Consolidated Dockets, the Commission appeared concerned about fully applying the current public interest standard to its analysis of the Project. It acknowledged that the facts surrounding the Project presented difficult questions about how to apply an equity lens while also applying the Commission's long-standing principles of ratemaking.[79] In approving a profoundly limited settlement in Order 24/10, the Commission justified disregarding the inequities associated with the Company's decisions for the Project by holding that PSE's decision to construct the facility, made in September 2016, should not "retroactively" be held to the current public interest standard because that standard evolved during the pendency of the Tacoma LNG Project.[80]

The Commission did not hold, however, that the Project is not subject to the current public interest standard. Instead, the Commission limited its approval and adoption of the Amended Settlement Stipulation and Agreement on Tacoma LNG (Tacoma LNG Settlement) to the "prudency of the Company's actions up through the initial decision to build the Tacoma LNG Facility on September 22, 2016."[81] This limited decision deferred the Commission's review of "the prudency and reasonableness of costs incurred" after September 22, 2016, to the current proceeding.[82]

In its examination of whether, in the context of the full life of the Project, PSE prudently incurred costs for the construction and operation of the Project, the Commission must not ignore its legislative mandate or disregard its commitment to considering equities and addressing ongoing systemic harms.

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[78] Order 24/10 at ¶ 425 (citing Used and Useful Policy Statement at ¶ 20).
[79] Order 24/10 at ¶ 421.
[80] Order 24/10 at ¶ 427.
[81] Order 24/10 at ¶ 393.
[82] Order 24/10 at ¶ 393.

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c. The Inequities Associated with Tacoma LNG Militate Against a Finding that the Costs Incurred by PSE are Prudent or in the Public Interest Over the Life of the Project.

In Order 24/10, the Commission made a threshold determination that PSE's initial decision to construct the Tacoma LNG facility on September 22, 2016 was prudent, but it deferred any determination as to the prudence of PSE's recovery of costs and the appropriate rate of return on its investment.

PSE has argued that this equity analysis should not apply to its attempt to pass the cost of building Tacoma LNG onto ratepayers because RCW 80.28.425(1) was enacted after PSE decided to build Tacoma LNG. That argument—to the extent PSE is offering it—should be rejected, for two reasons.

First, long before PSE decided to build Tacoma LNG, the Commission required regulated companies to establish that their capital expenditures were "prudent" before allowing them to pass the costs onto ratepayers. *WUTC v. Puget Sound Energy, Inc.*, Dkt. UE-031725, Order 12 at ¶ 19 (Apr. 7, 2004); *WUTC v. The Wash. Water Power Co.*, Cause U-83-26, 5th Supp. Order at 15–16 (Jan. 19, 1984). And the Commission's legislative mandate has always been to regulate in the public interest. RCW 80.01.040(3). The Commission's decisions have identified many different factors that should be considered in this analysis and have repeatedly stressed that the factors identified are nonexclusive and that the specific factors to be considered will vary depending on the facts of each case. *See*, *e.g.*, *The Wash. Water Power Co.*, *supra*, 5th Supp. Order at 15–16 (applying thirteen factors and stating that "[a]dditional factors may be considered in subsequent cases as dictated by the facts"). The unique facts of this case include PSE building a facility that (1) has the potential to cause a catastrophic accident in a highly-populated area and (2) will emit carcinogens and other harmful contaminants into an Indian reservation. With or without a legislative mandate, it was incumbent on PSE to consider the prudency and public interest implications of building this facility in this location.

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Second, regardless of what PSE believes was required in 2016, the legislature now requires the Commission to conduct a public interest analysis, and this Commission has determined that such analysis must include these equitable considerations. *Cascade Natural*, *supra* Order 09 at ¶ 58. PSE had no vested right to assume, in 2016, that the law would remain unchanged. There "is neither a vested right in an existing law which precludes its amendment or repeal nor a vested right in the omission to legislate on a particular subject." *Kellogg v. Nat'l R.R. Passenger Corp.*, 199 Wn.2d 205, 230–31, 504 P.3d 796 (2022) (quoting *Godfrey v. State*, 84 Wn.2d 959, 962–63, 530 P.2d 630 (1975)). No "one can have a vested right in any general rule of law or policy of legislation which entitles [them] to insist that it remain unchanged for [their] benefit." *Id*. at 231 (alterations in original) (quoting *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 452, 495 P.2d 657 (1972)). In other words, "there can be no vested right in legislation remaining unchanged." *Id*.; *see also United States v. Carlton*, 512 U.S. 26, 33–34, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (legislation is not a promise, and the fact that individuals may have relied on existing legislation to their detriment does not preclude even retroactive changes to the law).

Thus, when PSE chose to build Tacoma LNG, it ran the risk that the legal prerequisites for passing the costs onto ratepayers would change. Moreover, since at least 2004, Washington's Energy Facility Site Evaluation Council (EFSEC) has required an analysis of the equities when deciding whether to certify an energy facility site. *See* WAC 463-60-535. An application for certification must include, for example, a "description of whether or not any minority or low-income populations would be … disproportionately impacted." WAC 463-60-535(1)(e). PSE demonstrated its awareness of EFSEC's standards when it formally sought a determination that EFSEC lacked jurisdiction over Tacoma LNG and, thus, could play no role in determining whether PSE could build this facility on the border of the Tribe's Reservation. Thus, when it chose Tacoma LNG's location, PSE was on notice that Washington law favors consideration of equitable principles when evaluating energy companies' decisions about where to site their facilities.

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PSE might have assumed that avoiding EFSEC jurisdiction gave it a license to ignore the burdens it was foisting on an already over-burdened community. But that callous assumption did not preclude either the legislature or this Commission from further developing the public interest analysis. *Kellogg*, 199 Wn.2d at 230–31.

Moreover, the need to consider equity became increasingly apparent following PSE's 2016 decision to build Tacoma LNG, as opposition from the Tribe and the general public grew. The notion that a company can act prudently by ignoring a project's impacts on the surrounding community, despite vociferous public outcry, simply because its decision to build the project was made a few years before the legislature explicitly mandated a consideration of such impacts, contravenes basic principles of justice and the very definition of the word "prudent." The Commission was therefore correct in ruling that equity must be considered in this case. *Cascade Natural*, *supra* Order 09 at ¶ 53.

And it is beyond reasonable dispute that Tacoma LNG's impacts are inequitable. During its relatively short period of operation, the Tacoma LNG facility has caused exactly the type of harm the Tribe has long warned against. As highlighted by PSCAA's Notices of Violation, Tacoma LNG's air emissions are negatively impacting the airshed that it shares with the Tribe and other highly-impacted communities. Dr. Sahu's uncontroverted testimony establishes that these disparate impacts are inequitable, and PSE's costs incurred creating that inequity were not prudent and should be disallowed in their entirety.

B. PSE fails to carry its burden of proof regarding specific costs.

The Commission cannot allow PSE to recover any costs from ratepayers unless and until PSE has carried its burden of showing they were incurred prudently. PSE has failed to show that certain specific costs meet that standard. As discussed in Section III(B)(1) below, the Commission must deny all costs incurred by PSE to design, construct, and operate Project features that provide no benefit to ratepayers. For example, PSE cannot recoup the costs of any construction required only for PSE's for-profit marine-fueling business.

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Section III(B)2 discusses why PSE has failed to satisfy its burden of showing that legal fees and costs it incurred in relation to the Project are reasonable or appropriately borne by ratepayers. Even if the Commission allows the Company to recoup some Project costs from ratepayers, these categories must be excluded.

1. Costs incurred solely to meet the requirements of PLNG or its customers cannot be borne by ratepayers.

The dual use aspect of the Project and its funding require that the Commission closely scrutinize all costs PSE seeks, to ensure ratepayers are not improperly subsidizing the for-profit operations of PLNG. As discussed below and *supra* in Section II.C, many Project costs incurred by PSE were for the benefit of PLNG and not ratepayers.

a. Facility modifications to meet marine fuel quality requirements increased costs and negative externalities while providing no benefit to ratepayers.

In its response to a Staff data request, PSE admitted that if the facility were used only for liquefication and LNG storage later to be vaporized to meet peak shaving, a redesign of the facility would not have been necessary.[83] PSE found this redesign was necessary to produce the quality of gas necessary for its marine fueling business due to changes in the composition of pipeline gas.[84] This admission led Staff to conclude that the redesign was not intended to serve the interests of PSE's ratepayers. The Tribe agrees with Staff's conclusion that the Commission should deny PSE's recovery of the costs of the facility redesign.

However, as set forth in Dr. Sahu's testimony, the scope of increased costs associated with the redesign exceeds the $500,000 acknowledged by Staff.[85] This is because the redesign was followed by construction and operation of extra pretreatment processes.[86] During the redesign, PSE decided to remove heavy hydrocarbons through additional pretreatment processes that occur

[83] *See* Exh. BAE-5.

[84] *See* Exh. RJR-8C at 15.

[85] *See* Exh. RXS-35T at 9-10.

[86] *See* Exh. RXS-1T at Section III(C)(2).

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following the removal of moisture and CO_2 from the feed gas.[87,88] Because this decision was driven by the needs of PLNG and the additional process and operations provide no benefit to ratepayers, the Commission should also deny the recovery of any costs incurred by PSE in the construction and operation of the additional pretreatment processes.

In addition to the costs associated with the construction and equipment and operation of the extra pretreatment process, PSE's redesign created another issue—how to dispose of the heavy hydrocarbons removed during processing. The extra pretreatment step creates an extra waste gas stream that contains numerous heavy hydrocarbons and sulfur compounds (which are harmful to human health and the environment).[89] PSE decided to dispose of this waste gas through the construction of a complex and unique flare.[90] The complexity of the flare has resulted in increased Project costs, as Mr. Roberts acknowledged at the evidentiary hearing, it was necessary for PSE to bring in outside experts to address flare operations, and the Company has "thrown a lot of resources at it both internal and external" including bringing in "many consultants, experts in the field to work on the flare itself."[91] Not only did PSE's decisions made during the redesign increase Project costs, but those decisions also increased Tacoma LNG's emissions of harmful pollutants to surrounding communities. Tacoma LNG's permit application acknowledges that a host of Toxic Air Pollutants and Hazardous Air Pollutants are emitted by the facility.[92]

Furthermore, PSE's response to the NOVs demonstrate that the facility redesign—and PSE's decision to construct a complex and unique flare—have contributed to numerous instances

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[87] *See id.* at 44.

[88] The Commission should not be misled by PSE's attempt to conflate pretreatment removal of moisture and CO_2 from the feed gas stream, which is necessary for liquefication, and the heavy hydrocarbon removal process, which is conducted only to achieve a desired quality of LNG for marine fueling uses. *See* Exh. RXS-1T at 44.

[89] *See* Exh. RXS-1T at 45.

[90] *See* Exh. RXS-1T at 45; *see also* Exh. RXS-35T at 10.

[91] TR 62:2-10.

[92] *See* Exh. RXS-1T at 22.

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where gases were directed to a diversion vent and released directly to the airshed rather than being directed to the flare for destruction.[93]

In sum, PSE's decision to remove and flare heavy hydrocarbons created an excessive waste stream, which required PSE to design, construct, and operate extraordinary facility design features necessary dispose of that waste. As such, the resulting increase in Project costs and facility air emissions associated with the ground flare are a result of the needs of PLNG customers, not ratepayers.[94] The costs associated with pretreatment, including Tacoma LNG's flare, are driven by PLNG's for-profit marine fueling operations. Accordingly, it is inappropriate for ratepayers to be forced to bear any costs associated with pretreating the already pipeline-quality gas that comes into the facility or flaring the waste created by that pretreatment. The Commission should deny all costs associated with the facility redesign and also all costs associated with the construction and operation of the extra pretreatment equipment and the complex ground flare made necessary by that extra equipment.

2. On this Record, the Commission Cannot Legitimately Require Ratepayers to Reimburse PSE's Legal Fees and Costs.

Whether a party is seeking legal costs from a court or from this Commission, costs incurred in litigation must be reasonable.[95] In Washington, there are well-accepted ways of determining the reasonableness of legal fees and costs. Here, PSE has failed to demonstrate that its legal fees and costs are reasonable. Indeed, cross examination of Susan Free demonstrated that the Commission does not even have a record *by which it can assess* the reasonableness of the legal costs that PSE seeks to hang on ratepayers.

The burden of demonstrating that legal fees are reasonable is on the fee applicant. *Scott Fetzer Co. v. Weeks,* 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). In assessing reasonableness,

[93] *See* Exh. RXS-37T at 60-61 (describing "Flare Controls Resolution").

[94] *See* Exh. RXS-1T at 46.

[95] Notably, in this context, the same Rules of Professional Conduct requirements apply as in any other, including the rules governing legal fees. If anything, ratepayers are innocent third parties who deserve more protections than do litigants held responsible for an opposing party's legal fees and costs.

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"[c]ourts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought" and "should not simply accept unquestioningly fee affidavits from counsel." *Mahler v. Szucs,* 135 Wn.2d 398, 434–35, 957 P.2d 632, 966 P.2d 305 (1998), overruled on other grounds by *Matsyuk v. State Farm Fire & Cas. Co*., 173 Wn.2d 643, 272 P.3d 802 (2012)

In Washington, a determination of reasonable attorney fees typically begins with a calculation of the "lodestar," which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Mahler,* 135 Wn.2d at 433–34. Such must comply with the ethical rules for attorneys, including the general rule that a lawyer shall not charge an unreasonable fee. RPC 1.5; *Fetzer,* 122 Wn.2d at 149–50.

Whether or not the Commission uses the lodestar method to determine the reasonableness of the fees and costs PSE incurred, there still needs to be a sufficient record demonstrating their reasonableness (and a reviewing court will almost certainly require one). As an example, in *Fetzer,* the Washington Supreme Court reversed an award of fees where "a total of 481.49 hours—the equivalent of almost 3 months of uninterrupted legal work by one attorney—was awarded, with no examination of the actual reasonableness of these hours." *Fetzer,* 122 Wn.2d at 152, 859 P.2d 1210. In protecting ratepayers from unsupported fee requests, the Commission has recognized these principles. *See Washington Utilities & Transp. Comm'n*, 239 P.U.R.4th 95 (Feb. 18, 2005) ("Here the evidence is sparse and will support no more than what we allow.").

A decision allowing a recoupment of fees unsupported by an adequate record will be remanded. *See Mahler,* 135 Wn.2d at 435; *Eagle Point Condo. Owners Ass'n v. Coy,* 102 Wn. App. 697, 715–16, 9 P.3d 898 (2000). Further, a tribunal allowing a party to recoup legal fees and costs "must do more than give lip service to the word 'reasonable'." *Berryman v. Metcalf*, 177 Wn. App. 644, 658, 312 P.3d 745 (2013). Indeed, failure to ascertain whether fees and costs are "duplicative or unnecessary" constitutes "reversible error." *Id*. at 658–59.

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a. PSE has failed to demonstrate that its legal fees and costs related to the Tacoma LNG Project are reasonable and appropriate.

In the present matter, PSE has woefully failed to demonstrate that the legal fees and costs for which it seeks reimbursement were reasonable and appropriate.[96] In fact, following the cross-examination of PSE's primary witness on legal costs and fees, Ms. Free, it is not clear what exactly comprise the fees and costs underlying PSE's reimbursement request. For example, Ms. Free was unable to articulate whether PSE seeks reimbursement of legal fees only, or if it also asks ratepayers to pay for the expert witnesses that PSE hired.[97] The Commission cannot legitimately assess the reasonableness of a reimbursement request without knowing what is being reimbursed.

Indeed, cross-examination showed Ms. Free's testimony that "PSE's legal fees related to the Tacoma LNG Project are reasonable and appropriate" to be completely hollow. Ms. Free could not articulate the difference between reasonable and unreasonable fees.[98] Ms. Free could not even identify the pieces of litigation from which the fees emanate, much less what those cases involved, the number of attorneys representing PSE in those matters and/or what rates those unknown attorneys charged for their work.[99] When asked the market rate for environmental attorneys in western Washington during the relevant years, Ms. Free was unable to provide the Commission with that information.[100]

Ms. Free's "reasonable and appropriate" testimony is further belied by the fact that she was not the one who reviewed or approved legal bills from outside counsel, nor could she identify who performed that review or what it consisted of.[101] However, the Commission should note that Ms. Free did state that she was not aware of PSE ever disputing a bill that it received from outside

[96] As such, the Commission need not search for reasons to give "little weight" to Dr. Sahu's or Mr. Earle's testimony on this issue.
[97] *See* TR at 99:21-100:7.
[98] *See* TR 100:15-101:24; *see also* TR 102:7-102:21.
[99] *See* TR 104:9-104:13; *see also* 114:11-115:15.
[100] *See* TR 113:9-19.
[101] *See* TR 111:20-112:4.

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counsel.[102] That testimony is significant because the monthly legal spend that PSE claims in this matter was enormous—indeed, PSE contends that it was billed in excess of $1 million in certain months.[103, 104]

The record is similarly deficient regarding the Company's "internal" fees, and PSE fails to make the necessary showing that claimed "internal" fees for in-house counsel are reasonable and appropriate. Ms. Free confirmed that its internal legal costs were those incurred by PSE's in-house counsel.[105] However, she was unable to identify the scope of those claimed costs or testify as to whether such "internal costs" were restricted to attorneys.[106]

In short, the record does not establish the reasonableness of PSE's legal fees and costs. Accordingly, the Commission cannot legitimately foist them onto ratepayers.

b. Even if PSE had demonstrated that its legal fees and costs were reasonable, they are still PSE's responsibility.

Even if the Commission determines that PSE's legal costs were reasonable—which determination would be reversible pursuant to RCW 34.05.370(e) and (i)—ratepayers are not responsible for them because litigation fees and costs are non-recurring expenses. *See Washington Utilities & Transp. Comm'n*, 204 P.U.R.4th 1 (Sept. 29, 2000) (disallowing litigation fees and costs: "We will follow the general rule against including out-of-period, non-recurring expenses in rates."); *see also Amended Petition of Puget Sound Energy, Inc. for an Ord. Authorizing the Use of the Proceeds from the Sale of Renewable Energy Credits & Carbon Fin. Instruments*, 282 P.U.R.4th 303 (May 20, 2010) (reducing REC sales premium "by the $4.6 million in litigation costs for which PSE's shareholders should be held accountable"); *Washington Utilities & Transp.*

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[102] *See* TR 112:5-8.

[103] Failing to protect ratepayers from responsibility for such excessive costs creates a perverse incentive for utilities to do controversial things and take a scorched earth approach to defending them in litigation.

[104] *See* Exh. RLE-12, Attachment A (PSE Response to Public Counsel Data Request No. 26).

[105] *See* TR 99:9-14.

[106] *See* TR 99:21-100:7.

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Comm'n, 239 P.U.R.4th 95 (Feb. 18, 2005) ("Based on the evidence, including discussion at hearing, it appears to us that the amount of the Deloitte fee is not representative of the level of ongoing expense PSE might reasonably be expected to incur. The consulting assignment in this instance concerned a matter more complicated and contentious than what the Company might expect to encounter on a year in and year out basis.").

c. Because PSE's legal costs and fees are properly rejected, the Tribe agrees with PSE that an audit is unnecessary.

Because PSE has failed to make the requisite showing that its legal fees and costs are reasonable and appropriate, the inquiry is over—this Commission cannot legitimately make ratepayers responsible for PSE's exorbitant legal costs. Accordingly, there is no need to perform the audit that Public Counsel urges.

IV. CONCLUSION

Because PSE cannot satisfy the Commission-established standards to meet its burden of showing that the costs incurred by PSE for the Tacoma LNG project were reasonable, appropriate, and in the public interest, the Commission should find that PSE's post-September 22, 2016 decisions regarding the Project were not prudent and disallow PSE from recovering its investments in the Tacoma LNG Project.

DATED this 8th day of December, 2023, at Seattle, Washington.

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