BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, **Complainant,** **v.** **PUGET SOUND ENERGY,** **Respondent.**	**Docket UG-230393**

REPLY BRIEF OF PUGET SOUND ENERGY

December 21, 2023

PUGET SOUND ENERGY

TABLE OF CONTENTS

Page

PUGET SOUND ENERGY

TABLE OF AUTHORITIES

Page(s)

STATUTES

WASHINGTON STATE COURT CASES

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION ORDERS

OTHER WASHINGTON AGENCY ORDERS

NON-WASHINGTON STATE AUTHORITIES

I. INTRODUCTION

1. The Commission should approve the relief requested in this case and allow the costs of the Tacoma LNG Facility to be recovered in rates. As the evidence demonstrates, these costs were prudently incurred.

II. ARGUMENT

A. PSE Should Be Allowed to Recover Deferred Costs

2. Commission Staff's position seems to be that although there were extraordinary circumstances justifying deferral of the Tacoma LNG Facility costs, those same circumstances are not sufficiently extraordinary to justify recovery of the full deferral, including the full return. Commission Staff's position is wrong for several reasons.

1. The magnitude and unusual nature of the investment qualifies as extraordinary

3. The investment is extraordinary—a $243 million plant (regulated portion) that has the capacity to provide natural gas service to PSE's customers in a variety of circumstances: on the coldest winter days; when other pipeline curtailments occur; and to benefit customers through economic dispatch, when gas prices are high.[1] The expected in-service date for the Tacoma LNG Facility changed over time and was hard to predict or to time with a general rate case due in part to delays caused by permitting and myriad appeals by the Tribe —all so far unsuccessful.[2] Thus, as has been the case with other large expenditures, recovery of the deferral is appropriate, including the deferred return on the rate base.[3]

4. Commission Staff cites to a PacifiCorp case, with wholly different facts and legal posture, in a misguided effort to support its theory that PSE's request to recover its full deferral is not extraordinary.[4] In that case, PacifiCorp requested a hydropower deferral and recovery for

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[1] *See* Roberts, Exh. RJR-11T at 18:15-20:4.
[2] *See* Roberts, Exh. RJR-1T at 18:3-18, 19:4-12, 27:3-30:3; Exh. RJR-11T at 51:4-52:14.
[3] *See, e.g., WUTC v. Puget Sound Energy,* Docket UE-111048 Order 08 ¶ 322 (May 7, 2012) (allowing recovery of deferred costs for Lower Snake River wind farm deferred in Docket UE-100882); *WUTC v. Puget Sound Energy,* Dockets UE-090704 and UG-090705 Order 11 (Apr. 10, 2010) (allowing recovery of deferred costs including a deferred return for Mint Farm generating station and Wild Horse Expansion).
[4] Post-Hearing Brief of Commission Staff at ¶ 21 (citing *Wash. Utils. & Transp. Comm'n v. Pac. Power & Light Co*., Dockets UE-140762, UE-140617, UE-131384, UE-140094, Order 08, ¶¶ 245, 251 (Mar. 25, 2015)).

increased power costs caused by declines in hydro generation due to abnormally dry weather conditions. The Commission rejected PacifiCorp's requested deferral and recovery noting that the current conditions were not abnormally dry, the increased power costs PacifiCorp requested for recovery were much lower than originally projected—$2.4 million—and the company had failed to implement a power cost adjustment as instructed by the Commission.[5]

5. None of the PacifiCorp factors are at issue in this case. Here, the amount of the deferral is significant: $29.0 million, including $18.9 million for the deferred return and $10.1 million for deferred O&M and depreciation from February 2022 to December 2022.[6] Moreover, PSE's request does not disregard a prior Commission order as arguably occurred in the PacifiCorp case.

6. Surprisingly, Commission Staff claims that "the LNG Facility is not an unusual project,"[7] and cites to the *PacifiCorp* case in support of this criteria for deferral and recovery.[8] The work that went into Docket UG-151663, laying the foundation for the Tacoma LNG Facility and this proceeding, was unprecedented. The parties worked together throughout 2015 and 2016 to develop a plan to allow for this dual-use facility.[9] The Tacoma LNG Facility was a least cost resource for peak needs of PSE's customers because of the unique idea to use the LNG facility to both store liquefied gas for peak shaving needs and combine it with a vessel refueling service that would reduce greenhouse gases.[10] The parties agreed to amend PSE's merger commitments to allow PSE to create an unregulated subsidiary to provide the marine fueling service.[11] Moreover, the Puget Sound Clean Air Agency ("PSCAA") made the unprecedented decision to

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[5] *See Wash. Utils. & Transp. Comm'n v. Pac. Power & Light Co*., Dockets UE-140762, UE-140617, UE-131384, UE-140094, Order 08, ¶¶ 121, 266-267, 273-75 (Mar. 25, 2015).
[6] *See* Free, Exh. SEF-3 at 4,6, and 8 column (b).
[7] Post Hearing Brief of Commission Staff at ¶ 22.
[8] Post-Hearing Brief of Commission Staff at ¶ 21 (citing *Wash. Utils. & Transp. Comm'n v. Pac. Power & Light Co*., Dockets UE-140762, UE-140617, UE-131384, UE-140094, Order 08, 104 ¶ 245, 107 ¶ 251 (Mar. 25, 2015))
[9] *See In the Matter of the Petition of Puget Sound Energy, Inc. for (1) Approval of a Special Contract for Liquefied Natural Gas Fuel Service wth Totem Ocean Trailer Express, Inc., and (ii) a Declaratory Order Approving the Methodology for Allocating Costs between Regulated and Nonregulated Liquefied Natural Gas Services*, Docket UG-151663, Order 10 ¶¶ 23-42, (Oct. 31, 2016) (Hereafter "Docket UG-151663") (describing bifurcated proceeding, use of independent mediator, and numerous hearings and briefings).
[10] *See* Docket UG-151663, Order 10 ¶ 19.
[11] *See* Docket UG-151663, Order 10 ¶¶ 12, 48-50.

require a supplemental environmental impact statement that included a Life-Cycle Analysis of project-related greenhouse gases; this, along with numerous appeals of permitting decisions, delayed the project[12] and made it difficult to time the in-service date with an ongoing rate case. To the extent the Commission wishes to allow recovery of deferrals for "unusual" projects, the Tacoma LNG Facility falls squarely within that standard.

2. PSE's underearning further supports recovery of the deferral

7. Further justifying the need for the deferral and its full recovery is the fact that PSE has been underearning its authorized return on equity. The Commission has identified earnings erosion as an extraordinary circumstance.[13] While Commission Staff tries to deflect from this supporting fact—claiming it to be retroactive ratemaking—Commission cases show it is not.[14] The use of deferred accounting to track costs is a well-established exception to the prohibition on retroactive ratemaking.[15] Moreover, Ms. Free's testimony simply demonstrates that the underearning projected to occur without deferral and recovery,[16] has in fact occurred.[17] This is one more factor in the extraordinary circumstances analyses. PSE was not requesting the Commission to retroactively change the rate relief from the recent general rate case. Because a deferred accounting petition was filed and granted, it cannot be retroactive ratemaking.[18]

3. Customers have benefitted from deferred returns

8. Commission Staff also ignores the instances where a deferred return has been used to benefit customers, in situations that were not expressly authorized by statute. For example, PSE treated its Treasury Grants and monetized Production Tax Credits (a payable to customers) in a manner consistent with the deferral methodology set forth in RCW 80.80.060(6), which allows

[12] *See* Roberts, Exh. RJR-1T at 18:3-18, 19:4-12, 27:3-30:3; Exh. RJR-11T at 51:4-52:14.
[13] *WUTC v. Puget Sound Energy,* Docket UE-190529 *et al.* Order 08 ¶ 441 (July 8, 2020).
[14] *See, e.g., WUTC v. Puget Sound Pilots*, Docket TP-190976, Order 14 ¶ 24 (April 11, 2022) (citing *In re the Petition of PacifiCorp*, Docket UE-020417 Third Suppl. Order (Sept. 27, 2002)).
[15] *See id.*
[16] Accounting Petition at ¶ 13.
[17] *See* Free, Exh. SEF-4Tr at 3:17-4:9.
[18] *See, e.g., WUTC v. Puget Sound Pilots*, Docket TP-190976, Order 14 ¶ 24 (April 11, 2022) (citing *In re the Petition of PacifiCorp*, Docket UE-020417 Third Suppl. Order (Sept. 27, 2002)).

for a return on the balance.[19] The Commission has authorized recovery of deferred returns where it was not expressly authorized by statute, both for the benefit of customers and the company.[20]

4. The Tacoma LNG Facility is consistent with the Legislature's declared public interest

9. Finally, it bears repeating that the Legislature has declared that the development of liquefied natural gas vessel refueling facilities is in the public interest, and this public interest remains codified in law.

> The legislature declares that the development of compressed natural gas and liquefied natural gas motor vehicle refueling stations and vessel refueling facilities are in the public interest.[21]

10. In 2016, the Commission understood its role in promoting this public interest and encouraged parties to work together to find a way to meet it:

> The Commission, however, recognizing that the potential benefits of an LNG project that could serve PSE's core customers' peaking needs and promote the Legislature's stated finding in RCW 80.28.280 that the development of liquefied natural gas vessel refueling facilities is in the public interest, expressly provided the parties an opportunity to explore further whether there might be alternative business models with structures that would fall under the Commission's jurisdiction. . . .
>
> Given the direction of the legislature in this connection, the Commission recognized that there are significant environmental benefits to converting highly-polluting bunker oil-fueled ships to LNG and expressed its desire to explore their development within the scope of Commission authority.[22]

11. Commission Staff seeks to minimize this public interest declaration by the Legislature and supported by the Commission, by comparing RCW 80.28.280 to another statute, RCW 80.28.360, which expressly allows an incentive rate of return for capital expenditures for electric

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[19] *See* Free, Exh. SEF-4Tr at 10:8-14 (citing *WUTC v. Puget Sound Energy,* Docket UE-130617 *et al.*, Order 06 ¶¶ 28-31 (Oct. 23, 2013); *WUTC v. Puget Sound Energy,* Docket UE-170033 and UG-170034, Order 08 and Appendix B at ¶ 117 (citing to Exh. KJB-17T at 90-91 for RCW 80.80.060 deferred accounting treatment agreed to by the parties.).

[20] *See* Free, Exh. 4Tr at 9:3 – 10:14.

[21] RCW 80.28.280(1).

[22] Docket UG-151663 Order 10 ¶¶ 115, 116; *see also* ¶ 32 (recounting the Commission's conclusion that because of the legislative finding in RCW 80.28.280 that the development of LNG vessel refueling stations are in the public interest, the Commission should provide further public process to consider the matter).

vehicle supply equipment.[23] Commission Staff argues that the lack of such language in RCW 80.28.280 somehow vitiates the public interest claim. That point is irrelevant; PSE is not seeking an incentive rate of return in this case.

12. Moreover, Staff's argument that RCW 80.28.280 does not explicitly direct utilities to build marine-LNG fueling stations[24] ignores the obvious. Part V of Engrossed Substitute Senate Bill 6440 (2014), which contains the language ultimately codified in RCW 80.28.280, is titled "Utility Law Change." And RCW 80.28.280 was codified in Title 80, RCW, which governs public utilities; and in Chapter 28, which expressly applies to gas, electrical, and water companies. In short, the Legislature has announced to the Commission and regulated gas companies that the development of LNG vessel refueling facilities is in the public interest. PSE, the Commission, Commission Staff, Public Counsel, and AWEC[25] acted on that legislative direction and found a way to accomplish the public interest while also benefitting PSE's customers with a least cost peaking resource.

13. Commission Staff's attempts to downplay the relevance of this state public policy interest are surprising and frankly inconsistent with the previous positions and actions of Commission Staff, Public Counsel, and other parties that worked diligently with PSE for nearly a year in 2015 and 2016 to find a way to both meet the public interest of providing LNG marine fueling stations while also providing peak shaving service for the benefit of PSE's customers.[26] Ultimately, these parties developed a proposed structure for the Tacoma LNG Project that both met the public policy interest declared by the legislature—liquefied natural gas vessel refueling facilities—while also providing peak shaving service to PSE's customers. All parties reached agreement on a proposal to change the marine fueling from a regulated service, as PSE had

[23] Post-Hearing Brief of Commission Staff at ¶¶ 24-31.
[24] Post-Hearing Brief of Commission Staff at ¶ 28.
[25] Both the Northwest Industrial Gas Users and the Industrial Customers of Northwest Utilities were parties to Docket UG-151663. They have since joined together to form the Alliance of Western Energy Consumers ("AWEC"), a party to this case that has not opposed PSE's tracker.
[26] Docket UG-151663 Order 10 ¶ 117 (noting testimony that Staff put more than 1,500 hours of effort in the case and other parties no doubt devoted similar levels of resources to the parties' collective efforts).

originally proposed, to a non-regulated service offered by a to-be-created non-regulated affiliate of PSE—Puget LNG. But it was PSE that spearheaded those efforts, and to deny PSE's involvement in furthering the State's public interest through the construction of this facility does a disservice to the work in which all parties engaged.

14. Finally, the language in RCW 80.28.280 that "nothing in this section . . . is intended to alter the regulatory practices of the commission" does not negate PSE's request, as Commission Staff seems to claim. As discussed above, the Commission has the authority to grant recovery of the deferral, including a deferred return. Indeed, even Staff acknowledges the Commission's ability to do so by supporting recovery of the deferred return beginning January 2023.

B. The Tacoma LNG Facility is Used and Useful

15. The Tacoma LNG Facility was placed in service in February 2022 and was available to serve PSE's customers at that time. Having the Tacoma LNG Facility available and capable of being used when the need arises, is a benefit to customers.[27] Thus, the plant was used and useful in February 2022.[28]

16. Commission Staff proposes a novel approach to the used and useful standard, which the Commission should reject. Commission Staff's interpretation of RCW 80.04.250 to support its misguided approach is not consistent with Commission jurisprudence and will only lead to prolonged and contentious litigation over what percentages of plant in service are used and useful. The Commission's current standard for used and useful is clear and should not be gamed.

17. Commission Staff's argument to decrement the used and useful portion of the Tacoma LNG Facility in 2022 relies on a faulty understanding of the ability of the Tacoma LNG Facility to be used for peak shaving purposes. As discussed in PSE's Initial Brief, in February 2022, the

[27] *See WUTC v. Puget Sound Energy*, Docket UE-220066 et al., Order 24/10 at ¶ 405 (December 22, 2022) (capacity is by itself, a used and useful resource for customers").
[28] *See People's Org. for Wash. Energy Resources v. WUTC*, 101 Wn.2d 425, 430 (1984) ("employed for service in Washington and capable of being put to service.").

Tacoma LNG Facility was able to provide the full capacity that had been anticipated for the plant from the early design of the facility.[29]

18. Commission Staff's argument that the Tacoma LNG Facility was able to provide only 81 percent of the capacity it was built to provide until 2023 conflates the facts. When PSE developed the Tacoma LNG Facility it was expected to inject only 50,000 Dth per day into the Tacoma distribution system due to a limitation on the North Tacoma Gate Station ("NTGS") outlet pressure. Peak delivery capacity would have been 69,300 Dth per day: 50,000 Dth per day injected to the Tacoma distribution system and 19,300 Dth per day diverted to other gate stations on the PSE distribution system. PSE anticipated increased demand on the Tacoma distribution system that would be met by installing the Bonney Lake lateral (and lowering the outlet pressure at the NTGS), which would allow injection of 66,000 Dth per day from Tacoma LNG into the Tacoma distribution system for a total peaking capability of 85,300 Dth per day.[30]

19. That is not what occurred. In January 2022 as part of plant commissioning, PSE tested the Tacoma LNG Facility and the vaporization equipment was able to vaporize at a rate of just over 2,750 Dth per hour (equivalent to 66,000 Dth per day).[31] As Mr. Roberts explained, this is what a peaking plant does – shave the peak hourly demand. Therefore, the hourly utilization rate of 2,750 Dth was never limited by the outlet pressure at NTGS.[32] Since it went into service in February 2022, the Tacoma LNG Facility has been able to provide the full 85,000 Dth per day by injecting the equivalent of 66,000 Dth per day (2,750 Dth per hour) to the Tacoma distribution system and diverting 19,300 Dth per day to other gate stations on the PSE system.[33]

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[29] Initial Brief of Puget Sound Energy at ¶¶ 27-28.
[30] *See* Roberts, Exh. RJR-11T at 6:14-7:16.
[31] *See* Roberts, Exh. RJR-11T at 5:14-19.
[32] *See* Roberts, Exh. RJR-11T at 9:4-17.
[33] *See* Roberts, Exh. RJR-11T at 8:16-9:3.

20. Commission Staff cites no Washington Commission precedent for the decrement it seeks to impose on PSE's used and useful plant, where, as here, the Tacoma LNG Facility is located in Washington and only serves Washington customers. Instead, Commission Staff relies on out of state cases with different statutes, different commission policy, and different factual situations. For example, in *North Carolina Utilities Commission v. Carolina Water Service, Inc. of North Carolina*,[34] post-test year additions for sewer and water service did not adequately reflect matching revenues and costs and therefore were not used and useful.[35] Moreover, one of the storage tanks at issue was built to not only serve customers of the utility but also customers in two new subdivisions outside the utility's service area, thus justifying a determination of what part of the storage tank was used and useful for the utility's customers.[36] The North Carolina commission also indicated that it did not put all the water and sewer expansions in rate base because developers who required a main extension to serve a new subdivision had not provided capital for the plant additions.[37] Such a methodology is more akin to Washington's line extension policy, requiring an analysis of whether the applicants for utility service who required a main extension provided capital for the plant additions. These facts differ materially from PSE's case.

21. The *Kansas Gas & Electric Company v. State Corporate Commission* case involved the Wolf Creek nuclear power plant that experienced a six-fold increase in construction costs.[38] In light of public concerns about Wolf Creek, Kansas passed statutes that expressly allowed the Commission to determine the reasonable value of "all or whatever fraction or percentage of the

[34] *North Carolina Utilities Commission v. Carolina Water Service, Inc. of North Carolina* 401 S.E. 2d 353 (1991).
[35] *See id.* at 356.
[36] *See id.* at 355.
[37] *See id.* at 357.
[38] *Kansas Gas & Electric Company v. State Corporate Commission*, 720 P.2d 1063, 1069 (1986).

property" of any public utility which is used and required to be used in its service to the public.[39] RCW 80.04.250 contains no such language addressing "all or whatever fraction or percentage of the property" when referring to the used and useful standard.

22. Finally, *Illinois Power Company v. Illinois Commerce Commission,*[40] cited by Commission Staff, has a convoluted set of facts and procedural history, but there can be no doubt that the Illinois approach to used and useful plant differs from Washington. Prior to 1986, the Illinois commission utilized a wide variety of criteria to determine used and useful plant including need, economic dispatch, economic reasonableness, enhanced system reliability, capacity used to serve ratepayers, units are used to carry out the purposes of the utility, excess reserve margin, and providing low fuel costs.[41] A statute enacted in 1986 expressly required the Commission to consider excess capacity as related to the utility's historic and projected peak and to make equitable adjustments upon a finding of excess capacity."[42]

23. In contrast to the facts and statutory schemes above, the Washington Supreme Court has defined used and useful property as property "employed for service in Washington and capable of being put to use for service."[43] The Commission's Used and Useful Policy Statement ("Policy Statement") provides additional guidance on how the used and useful standard should be considered in the context of a multiyear rate plan:

> The Commission's longstanding interpretation of the property valuation provision of RCW 80.04.250 is that property or plant additions must be used and useful to serve Washington customers to be included in rates. *"Used" means that the investment (plant) is in service, and "useful" means that a company has demonstrated that its investment benefits Washington ratepayers.*[44]

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[39] *See id.* at 1073.
[40] *Illinois Power Company v. Illinois Commerce Commission,* 626 N.E.2d 713 (1993).
[41] *See Business and Professional People for Public Interest v. Illinois Commerce Commission, 585 N.E.2d 1032, 1053-54 (1991).*
[42] *See id.* at 1051.
[43] *People's Org. for Wash. Energy Resources v. WUTC*, 101 Wn.2d 425, 430 (1984) (emphasis omitted).
[44] *In the Matter of the Commission Inquiry into the Valuation of Public Service Company Property that Becomes Used and Useful after Rate Effective Date*, Docket U-190531 at ¶ 26 (January 31, 2020) (emphasis added) (citing *Wash. Utils. & Transp. Comm'n v. PacifiCorp d/b/a Pac. Power & Light Co.*, Docket UE-130043, Order 05, 31 ¶ 79 (Dec. 4, 2013)).

24. There is no discussion in the Policy Statement of dividing up a plant that is employed for service solely in Washington and capable of being put to use to serve customers, and declaring only a percentage of the plant used and useful. The Commission's standard is clear and easy to apply: plant that is in service and benefits Washington ratepayers is used and useful.

25. Moreover, Commission Staff's interpretation of RCW 80.04.250 is inconsistent with Commission precedent to the extent Commission Staff suggests that the statute allows percentages of a given plant to come into service over the course of a multiyear rate plan. The Commission does not allow plant to be recovered in rates until it is in service—used and useful. The fact that the revised statute now allows the property to go into rates for up to 48-month after the rate effective period simply expands the period by which plant can be put into rates once that plant goes into service. The statute does not support carving otherwise useful plant into percentages nor allowing plant into rates in a piecemeal manner. The Commission has not endorsed such a view of RCW 80.04.250 or of the used and useful standard. The Commission should decline to adopt this approach, which seems destined to spawn litigation.

C. PSE's Costs for the Four-Mile Pipeline Segment Were Prudent and Properly Allocated

26. Like PSE, Commission Staff and Public Counsel would directly assign to PSE the cost difference between a 12-inch pipeline and the 16-inch four-mile pipeline that was needed for PSE deliveries from the Tacoma LNG Facility to its distribution system.[45] Commission Staff and Public Counsel argue the remaining common costs (the cost of a 12-inch pipeline) should be allocated based on use of the four-mile pipeline for deliveries from Tacoma LNG on only 10 days per year.[46] Public Counsel also argues the common costs could be split using allocation percentages established in Docket UG-151663.[47]

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[45] Initial Brief of PSE at ¶¶ 50-51; Post-Hearing Brief of Commission Staff at ¶ 59; Earle, Exh. RLE-1CT at 39:9-13.
[46] Post-Hearing Brief of Commission Staff at ¶ 60 (660,000 ÷ 66,000 = 10); *see also* Erdahl, Exh. BAE-1CT at 24:14-16; Post-Hearing Brief of Public Counsel at ¶ 35; *see also* Earle, Exh. RLE-1CT at 29:6-12 and 30:14-19.
[47] Post-Hearing Brief of Public Counsel at ¶ 35.

27. In response to Bench Request No. 001, Attachment A, PSE showed that gas was delivered from the Tacoma LNG Facility on more than 240 days in the 12-month period from November 2022 through October 2023. Yet, Staff and Public Counsel continue to base their allocations of the common costs of the four-mile pipeline on the false assumption that deliveries from the Tacoma LNG Facility are limited to 10 days per year. On that basis alone, the Commission should reject the Commission Staff's and Public Counsel's proposals and accept PSE's proposal. In addition, Public Counsel uses the wrong allocation percentages when arguing that the common costs could be allocated based on percentages approved in Docket UG-151663. The common cost allocation percentages approved in Docket UG-151663 are 57 percent to Puget LNG and 43 percent to PSE, not the 90 percent /10 percent suggested by Public Counsel.[48]

28. Commission Staff argues that the remaining common costs cannot be directly assigned because they are shared, and that boil-off gas ("BOG") is irrelevant to cost allocation. [49] Contrary to Commission Staff's argument, the common costs can be directly assigned here because, as conceded by Commission Staff and Public Counsel,[50] use of the bi-directional four-mile pipeline for deliveries *to* Tacoma LNG can be traced directly to PSE and Puget LNG, and its use for deliveries *from* Tacoma LNG can be traced directly to PSE. Moreover, BOG is not irrelevant to the cost allocation nor was it offered as a substitute for peak shaving. Deliveries of BOG prove that the air permit restriction on use of the vaporizer to 240 hours per year does not limit PSE's use of the four-mile pipeline to 10 days per year. Commission Staff's and Public Counsel's allocation methods are significantly flawed because they use neither direct assignment nor peak and average. PSE's Exh. WFD-6 shows that under a broad range of assumed annual operations, use of the peak and average methodology validates the results of PSE's use of the Commission-preferred direct assignment methodology.

[48] Docket UG-151663 Order 10 at ¶¶ 61, 111; *see also* Roberts, Exh. RJR-1T at 16 Table 3.
[49] Post-Hearing Brief of Commission Staff at ¶ 67 and ¶ 69, respectively; see also Tribe's Post-Hearing Brief at 17:9-11 (delivery of boil-off gas does not meet the definition of peak shaving).
[50] Post-Hearing Brief of Commission Staff at ¶¶ 58-59; Earle, Exh. RLE-1CT at 30:9-13.

29. Public Counsel's argument that PSE developed two new theories to support its allocation of the common costs is not accurate. In the first instance, the concept of BOG is not "new." PSE included a meter for BOG as part of the distribution facilities needed for the Tacoma LNG Project from the very beginning.[51] Nor is PSE's exclusive right to use the four-mile pipeline when it is needed for peak shaving "new." As shown in response to Bench Request 002, PSE's exclusive right to inject gas into the PSE distribution system is inherent in PSE's right to operate as a gas company in Washington and that exclusive right was explicitly included in the Gas Supply Service Agreement between PSE and Puget LNG and the Puget LNG Schedule 87T Transportation Service Agreement.

30. The Tribe refers to BOG as a waste stream and inexplicably suggests it can be "directed to the flare…".[52] The Tribe is wrong; BOG is natural gas in vapor form, not waste. Indeed, when the liquefier is operating, BOG is directed into the liquefier and if liquefaction is not occurring PSE uses BOG to serve its gas customers, reducing its need to purchase gas that day.[53]

D. PSE's Legal Costs Were Prudent and Properly Allocated and the Commission Should Reject Public Counsel's and The Tribe's Arguments to Disallow Legal Costs

31. The Tribe and Public Counsel's arguments challenging legal fees should be rejected. The allegations are broad, unsupported by the record, and request the Commission establish new precedent. The Tribe and Public Counsel both fail to identify with any particularity which costs should be disallowed. PSE on the other hand has shown that it properly allocated legal costs associated with the LNG Project to the appropriate capital accounts,[54] and its outside legal expenses, primarily driven by an aggressive strategy of the Tribe to challenge almost every permit, combined with the complexity of the proceedings, were prudent.[55]

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[51] *See* Exh. WFD-3 (including costs of the BOG meter in distribution upgrades).
[52] Tribe's Post-Hearing Brief at 17:12-13.
[53] *See* Roberts, Exh. RJR-11T at 33:15- 34:11.
[54] *See* Free, SEF-4Tr at 14:13-19, 17:4-11, 21:13-16.
[55] *See* Roberts at Exh. RJR-1T at 27:5-29:7, see also Exh. RJR-11T at 50:12-53:3.

1. The Tribe's Lodestar Methodology is Unprecedented for Cost Recovery and its Cases Inapplicable.

32. The Tribe first asserts PSE's legal costs should be disallowed in their entirety based on the civil ligation "lodestar" methodology.[56] The lodestar methodology is a method for determining recovery of legal fees by one party to a litigation against another—normally the losing party—in a single civil court proceeding.[57] This is not a court proceeding where PSE, as the prevailing party, is asking another party to pay its attorneys' fees. Rather, as is the procedure for bringing plant into rates, PSE is asking the Commission to include capitalized costs of the Tacoma LNG Facility in rates. Legal fees are but one small part of the overall capitalized cost of the Tacoma LNG Facility, which PSE has presented in this case.[58] Navigating complex permitting processes, and defending those permits against legal challenges, are necessary costs for a utility constructing a resource.[59] There are no Commission cases where the Commission has required a utility to present the burdensome lodestar analysis to include legal costs in rates as part of the capitalized project. This methodology would require utilities to produce every billing record, for every proceeding involving outside legal counsel. In civil litigation, this is feasible because the request for legal fees is usually tied to a single proceeding. In the ratemaking context, for a specific project, there could be dozens of litigated proceedings.

33. Contrary to the Tribe's assertion, PSE provided ample evidence regarding the prudence of its legal expenses.[60] For example, PSE Witness Ron Roberts explained the complexity and

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[56] Tribe's Post-Hearing Brief at 27.
[57] *See Okeson v. City of Seattle*, 130 Wn.App. 814, 828, 125 P.3d 172, 180 (2005), as amended (Dec. 22, 2005) (holding lodestar method is appropriate when determining statutory attorney fees award but percentage recovery is a proper method in other cases for the prevailing party in other civil litigations).
[58] *See* Exh. SEF-4Tr at 14:5-23:2; *see also* Exh. RJR-1T at 27:5-29:7; Exh. RJR-11T at 50:12-55:17; Exh. Roberts RJR-8C (reports to PSE Board of Directors) at 28:9, 29:6, 30:5, 70 n. 1 and 2, 90 n. 1 and 3, 94, 98:5, 100:13, 102 n. 1 and 2, 117 n. 1 and 2, 121, 125 n. 1, 149, 158, 160; *see also* Exh. RJR-9 SHB No. 16-002 at 1:10-2:4, 13:2-15; Exh. RJR-15 PCHB Decision 11448 at 1:12-5:7; Exh. RJR-16 PCHB Decision 11447 at 1:12-5:12; *compare* Earle, Exh. RLE-12 (monthly accounting of legal fees) *with* Free Exh. SEF-3.
[59] *WUTC v. Puget Sound Energy*, Dockets UE-170033 and UG-170034, Order 08 (Dec. 5, 2017) (approving settlement and finding costs prudent for eight capital projects, the construction costs of which included legal and permitting costs).
[60] *See* Roberts, Exh. RJR-1T at 27:3-29:7; Roberts, Exh. RJR-11T at 50:9-55:17; Free, Exh. SEF-4Tr at 14:3-23:13; *supra* note 58.

depth of the PSCAA permit litigation which was a major source of legal costs.[61] PSE witness Susan Free explained how PSE appropriately charged legal costs to the Tacoma LNG Project.[62] The Tribe's arguments targeting Ms. Free's testimony ignore the simple fact that PSE attorneys, rather than accountants, monitor outside counsel costs.[63] Ms. Free consulted with PSE attorneys and confirmed the costs were reasonable given the complexity of the litigation, a fact that was also explained by Mr. Roberts.[64] Notably missing from the Tribe's argument, and similarly Public Counsel's, is a claim that these fees were (1) not actually incurred, nor (2) that given the extensive litigation, the amount spent was imprudent. The Tribe instead argues in its Brief for the first time in this proceeding, the Commission should adopt the lodestar methodology that is used to award attorneys' fees in civil litigation court proceedings. None of these arguments identify a PSE litigation expense that was imprudently incurred in defending the permits to construct the least cost resource for PSE's customers. The Tribe, the party responsible for a disproportionate amount of the legal challenges and legal expenses for the Tacoma LNG Facility, cannot identify which legal cost PSE incurred that should be disallowed. This is not a case where PSE engaged in unnecessary litigation; these costs were necessary to defend the permits needed to construct the Tacoma LNG Facility.

34. Finally, the Tribe incorrectly argues PSE's legal fees should not be included in plant costs because they are "non-recurring" costs.[65] The Tribe points to an Avista case where legal fees associated with a single litigation were disallowed in the test-year of a general rate case.[66] That case[67] is inapposite of the case here where PSE properly recorded the legal fees associated with the Tacoma LNG Project in a capital account.[68] The Tribe similarly points to a PSE case

[61] *See* Roberts, Exh. RJR-1T at 27:17-28:14; Roberts, Exh. RJR-11T at 50:9-55:17.
[62] *See* Free, Exh. SEF-4Tr at 14:13-19, *see also* Free, TR 101:2-24; 117:23-118:6.
[63] Free, TR 111:20-25, 116:19-118:21.
[64] Free, TR 116:19-117:11; 117:21-118-6; 119:2-13.
[65] Tribe Brief at 29.
[66] Tribe Brief at 29 *citing Washington Utilities & Transp. Comm'n,* 204 P.U.R.4th 1 (Sept. 29, 2000).
[67] The Commission removed the expenses for Avista's 1991 Firestorm litigation from the test year for system wide legal expenses.
[68] *See* Free, Exh. SEF-4Tr at 14:13-19.

where the Commission reduced a consultant fee as unrepresentative of future ongoing *operating* expenses.[69] The legal fees in this proceeding are directly associated with the Tacoma LNG Facility and PSE is not requesting the fees be included in a test year to support operating costs. The Tribe further points to a REC sales case, where certain costs were disallowed because the Commission previously directed the company to bear all risks associated with a project if the company wanted to avoid passing the benefits on to ratepayers, which included the litigation at issue.[70] In contrast, PSE's legal costs were properly allocated among PSE and Puget LNG according to the methodology approved in Docket UG-151663.[71]

2. Public Counsel's Recommendations Should be Rejected.

35. Public Counsel's argument for an audit of PSE's legal costs should be rejected.[72] Public Counsel incorrectly claims PSE did not track legal costs because of how certain costs from 2013-2016 were presented and other costs were sequenced.[73] Although the Commission determined PSE's decision up to the decision to build was prudent, which would encompass these pre-2017 legal costs, PSE responded to Public Counsel's concern by explaining how the costs were tracked and how PSE monitors outside legal expenses.[74] Public Counsel still relies on assertions related to the apparent timing of when internal costs were incurred even though PSE witness Susan Free explained those assumptions were unfounded.[75] Public Counsel argued PSE attorneys were not monitoring proceedings because expenses did not get charged for certain months, citing this as proof that work was not being done.[76] This is a misinterpretation of the data which showed when the hours worked were *recorded in* the accounting system, not when the work was

[69] Tribe Brief at 29-30 *citing Washington Utilities & Transp. Comm'n*, 239 P.U.R.4th 95 (Feb. 18, 2005).
[70] Tribe Brief at 29, *citing 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).
[71] *See* Free, Exh. SEF-4Tr at 17:9-11, 21:13-16, 22:16-23:1.
[72] Public Counsel Brief at 12-16.
[73] Public Counsel Brief at 13-15.
[74] *See* Free Exh. SEF-4Tr at 14:3-23:13.
[75] See Free Exh. SEF-4Tr at 17:12-20:4.
[76] Public Counsel Brief at 14-15.

actually performed.[77] Similar to many capital projects, the time when costs are recorded in the accounting system might be different from when the work was completed. Public Counsel also argues, without support, that costs were not properly allocated.[78] Legal costs, like all other capital costs, were properly allocated between PSE and Puget LNG.[79]

36. Public Counsel also puts forth an unsubstantiated and flawed argument alleging numerical anomalies (rather than actual anomalous recordkeeping) to argue for an audit.[80] The Commission should reject this argument. PSE witnesses Susan Free and John Taylor explained why Public Counsel's testimony is not based in fact because the legal costs were actually incurred.[81] Despite months of discovery, Public Counsel did not identify a single document that shows an instance of improper recordkeeping. Public Counsel's demand for a general, wide-ranging audit, is unsupported, outside the scope of this proceeding, and should be rejected.

E. The Tacoma LNG Facility is in the Public Interest

37. The arguments proffered by the Tribe and Public Counsel that the Tacoma LNG Facility is not in the public interest should be rejected.[82] As PSE addressed in its initial brief, the Commission determined that RCW 80.28.425 "should not be applied retroactively" and that it would be "unjust and unreasonable to extensively incorporate information available only through hindsight into the prudency determination related to construction that occurred in 2016."[83] The Commission got it right in GRC Order 24/10; it is primarily an economic regulator and while it *may* consider other factors, the Commission should defer to other agencies with expertise in environmental and air quality matters to avoid duplicative regulatory review or mandates.

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[77] *Compare* Free Exh. SEF-4Tr at 20:1, Table 1 (internal legal hours costs by month) *with* Free Exh. SEF-4Tr at 20:3, Table 2 (internal legal hours time entered).
[78] Public Counsel Brief at 16.
[79] *See* Free, Exh. SEF-4Tr at 17:9-11, 21:13-16, 22:16-23:1.
[80] Public Counsel Brief at 14-16.
[81] *See* Free, Exh. SEF-4Tr at 14:13-19, 21:15-22:3; Taylor, Exh. JDT-8T at 23:2-25:5.
[82] Public Counsel Brief at 18-26; Tribe Brief at 17-23.
[83] Order 24/10 at ¶ 427-428.

1. The Commission Should Again Reject the Public Interest and Environmental Externality Arguments Made By The Tribe and Public Counsel.

38. PSE's initial brief addressed the public interest arguments raised by the Tribe and Public Counsel, which would apply the updated standard to the Tacoma LNG Facility even though it went into effect after the facility was constructed but before it went into service.[84] PSE established the need for a peaking resource, it constructed the Tacoma LNG Facility before the updated standard was effective, and the alternative to the Tacoma LNG Facility was a substantially more expensive pipeline.[85] It would not have been in the public interest for PSE to pursue the more expensive pipeline option, at a potentially greater environmental cost, after the Tacoma LNG Facility was built. The Tribe and Public Counsel argue that PSE was on notice that there might be changes to the public interest standard and ran the risk of unforeseen changes to the law.[86] But prudency evaluations are based on what was known at the time decisions were made, not on hindsight.[87] If the Commission does apply the updated RCW 80.28.425 public interest standard to the Tacoma LNG Facility, even though the facility was almost completely constructed before the revised standard was enacted, it should not do so in a vacuum that ignores the next least-cost alternative or other benefits of the Tacoma LNG Facility. Pursuing the least cost peaking resource is a factor that should weigh in favor of the public interest.

39. Public Counsel and the Tribe primarily rely on the testimony of Dr. Sahu to support their public interest argument.[88] As PSE addressed in its initial brief, Dr. Sahu restates many of the same arguments he made in the 2022 GRC and makes claims that were regularly rejected in other proceedings.[89] The environmental externalities alleged by Dr. Sahu are contrary to the

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[84] Initial Brief of PSE at ¶ 82.
[85] Roberts, Exh. RJR-1T at 22:8-12; as shown in PSE's Initial Brief at ¶¶ 14, 17-35, 62-80, PSE met all 4 prongs of the prudence standard in constructing the Tacoma LNG Facility. Moreover, contrary to Commission Staff's argument regarding redesign of the preliquefaction equipment, PSE has shown the redesign benefitted all customers. *See* Initial Brief of Puget Sound Energy at ¶ 18.
[86] Tribe Brief at 21-23.
[87] *WUTC v Puget Sound Energy*, Docket UE-031725, Order 12 ¶ 19 (Apr. 7, 2004).
[88] Public Counsel Brief at 20-23.
[89] *Compare* Sahu Exh. RXS-1T at 21:3-26:4, with 2022 PSE GRC Sahu Exh. RXS-1T at 17:9-21:9; *see* Roberts, Exh. RJR-15, at 34, 58 and 77-83 (PCHB Order at ¶¶ 54, 105, 148-160) (rejecting Sahu's claims regarding externalities, hazardous pollutants, and volatile organic compounds); Roberts, Exh. RJR-11T at 40:4-50:8.

findings of the PSCAA or the PCHB, and he ignores the other benefits of the facility.[90] The PSCAA and the PCHB, both agencies with expertise in these issues, determined that air emissions from the Tacoma LNG Facility are consistent with requirements that account for human health and the environment.[91] The Commission previously rejected many of the arguments regarding environmental externalities and allegations of a risk of catastrophic accident and should do so again.[92] Public Counsel and the Tribe also overlook the environmental benefits of the Tacoma LNG Project to the surrounding waterway and community.[93]

40. Public Counsel also points to public comments received in this docket as evidence of the public interest.[94] PSE takes customer input seriously, and it engaged in extensive public outreach.[95] But, none of the comments identified by Public Counsel demonstrate the costs incurred in constructing the facility were imprudent. Nor do these comments made by a very small fraction of PSE's customer base demonstrate the public interest necessarily aligns with disallowing recovery on a peaking resource that is needed and is the lowest cost.

41. The Tribe also argues the Notices of Violations ("NOVs"), which are subject to the regulations and decisions of the PSCAA, warrant Commission action.[96] The Tribe makes unsupported assertions regarding the emissions associated with the NOVs.[97] PSE is cooperating with PSCAA, the agency tasked with monitoring PSE's compliance, and most of the NOVs were a result of PSE proactively self-reporting. As the Tribe concedes, the amount of emissions released from these events is not known, and when events do occur, personnel diligently work to reduce the extent of any possible bypass by shutting down the liquefier to reduce flow and relight the flare as quickly and safely as possible.[98] PSCAA has the authority and expertise to evaluate

[90] *See* Roberts, Exh. RJR-11T at 42:3-44:15.
[91] *See* Roberts, Exh. RJR-1T at 45:13-17.
[92] Order 24/10 at ¶¶ 427-436.
[93] *See* Roberts, Exh. RJR-1T at 44:1-45:17; Roberts, Exh. RJR-11T at 40:4-44:2.
[94] Public Counsel Brief at ¶¶ 53-59 (approximately 800 individuals or entities provided comments, with some identifying as PSE electric customers; PSE has almost 900,000 gas customers and 1.2 million electric customers).
[95] *See* Roberts, Exh. RJR-11T at 27:3-11.
[96] Tribe Brief at 8-11.
[97] Tribe Brief at 8-11.
[98] Exhibit RJR-18X at 2040:6-10 ("We think the liquefier would be shut down – if you can't get the flare re-lit, the

the circumstances, and the tools available to take enforcement actions based on its evaluation of the record.[99] Disallowing cost recovery as the Tribe and Public Counsel suggest, despite the plant being used and useful and absent a Commission process to evaluate potential violations, unnecessarily risks disproportionate and disparate regulatory outcomes.

2. The Contract to Operate the LNG Facility Already Contains Environmental Considerations and the Commission Should Avoid Duplicative Reporting Requirements.

42. Staff argues the Commission should require PSE to renegotiate its operations contract, conduct performance audits, and concurrently report potential violations to the Commission.[100] These recommended requirements are unnecessary, premature, and unrelated to the prudency of costs. First, PSE's contract with the Tacoma LNG Facility operator contains metric-based performance measures. Environmental factors are in the contract and if the operator fails to meet these measures, its overall payment will be reduced, and it may even be required to pay PSE. [101] The contract already contains provisions similar to Staff's recommendation and additional revision is unnecessary given the facility has been operating for less than two years.

43. Second, Staff's argument that PSE should conduct a monthly audit and concurrently report potential violations to the Commission is a significant overreach. The PSCAA is the agency tasked with monitoring compliance with the air permit and the Commission should not impose additional reporting requirements. When PSE self-reports potential violations, PSCAA and PSE exchange information regarding whether a violation has in fact occurred, and PSCAA evaluates the information. The Commission should allow PSCAA to proceed with its regulatory role and not impose additional obligations that may be duplicative of the PSCAA process.[102]

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liquefier is shut down, I would say within five minutes. The waste gas flows are reduced to kind of a trickle within, probably one minute.").

[99] For example, the PSCAA has the authority to issue fines in the most extreme circumstances of up to $ 44,994 per violation, per day.

[100] Staff Brief at 28-29.

[101] *See* Roberts, Exh. RJR-11T at 36:1-37:19.

[102] If the Commission prefers notification, PSE recommends notification only if a penalty is issued. This allows PSCAA to conduct its oversight processes and limits Commission notification only to actual penalties.

F. PSE's Design Day Standard Is Not Outdated

44. Public Counsel's repeated claims that PSE's use of the design day standard to determine its gas resource need should result in disallowance of all post-September 2016 costs are baseless.[103] In Order 24/10, the Commission found that "PSE reasonably relied on its forecasts for gas demand…" and arguments challenging PSE's forecasting methods were "unpersuasive."[104] The Commission also endorsed PSE's design day standard[105] and agreed that PSE "appropriately based planning decisions on its design day standard[.][106] Mr. Roberts testified that PSE used the same load forecasting methods and techniques throughout the post-2016 time-period when it was developing and constructing the Tacoma LNG Facility,[107] and that PSE incorporated weather sensitivity in the analyses in its 2021 IRP which resulted in no change to the needed resource alternatives.[108] PSE provided evidence to rebut all of Public Counsel's claims concerning the design day standard.[109] Repeating those false claims doesn't make them any more persuasive than the first time they were made.

III. CONCLUSION

45. PSE respectfully requests the Commission allow PSE to recover in rates the costs of the Tacoma LNG Facility as set forth in PSE's evidence in this case.

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Respectfully submitted

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[103] Earle, Exh. RLE-1CT at 8:13-15:9; *see also*, Post-Hearing Brief of Public Counsel at ¶¶ 13-21.
[104] Order 24/10 at ¶ 394; *see also id*. ¶¶ 395-399.
[105] *See* Order 24/10 at ¶ 395.
[106] Order 24/10 at ¶ 419.
[107] *See* Roberts, Exh. RJR-1T at 14:12-14.
[108] See Roberts, Exh. RJR-11T at 14:3-8
[109] *See* Roberts, Exh. RJR-11T at 10:4-17:7, *see also* Initial Brief of Puget Sound Energy at ¶¶ 66-69.