BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

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

THE PUYALLUP TRIBE OF INDIANS'
REPLY BRIEF

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I. INTRODUCTION

Public policy is evolving. The legislature has expressly embraced the principles of environmental justice and energy equity through its passage of multi-year rate case legislation[1]—the Clean Energy Transformation Act (CETA)[2]—and other actions demonstrating the importance of equity in the public interest.[3] Additionally, the Commission recognized its mandate to consider the equities when it adopted the principles of energy equity.[4] It is time for the Commission's prudency analysis to deliver on its promise to "apply an equity lens in all public interest considerations going forward,"[5] including in its prudency analysis for the costs claimed by PSE in this proceeding.

In its post-hearing brief, PSE invites the Commission to ignore both its statutory mandate and its adoption of these standards and, in defiance of the legislative policy they embody, discharge its regulatory duties in a way that perpetuates the very harms that the legislature has instructed it to mitigate.

In other words, this case presents an inflection point for the Commission. The Commission may view itself "primarily as an economic regulator," but it is not applying the full scope of economic tools if it chooses to ignore or discount the externalities of the Tacoma LNG Project (Project). It is time for the Commission to evolve, as the legislature has mandated, and this case is an opportunity for it to do so. Even if the Commission opts to ignore what the legislature has directed, it cannot ignore the Tribe's positions concerning equity because those are firmly based in economics. Externalities, including negative externalities, are an economic concept. The "economic regulator" should recognize the merit in the Tribe's positions.

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[1] RCW 80.28.425.

[2] Chapter 19.405 RCW.

[3] For example, establishment of the Office of Equity through Chapter 43.06D RCW.

[4] *See* Docket UG-210755, Order 09 at ¶ 56.

[5] Docket UG-210755, Order 09 at ¶ 58 (emphasis added).

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II. ARGUMENT

A. It is not fair, just, or reasonable to increase rates to cover PSE investments that were imprudently incurred and do not meet a ratepayer need.

The Commission's inquiry in this proceeding is whether the rates and charges proposed by PSE to recover its investments in the Tacoma LNG Project are in the public interest and are fair, just, reasonable, and sufficient. If the Commission cannot make the threshold finding that rates and charges proposed by a utility are fair, just, and reasonable, it cannot grant the utility's request.

The threshold prudency determination in Order 24/10 deferred the Commission's review of the prudency of costs incurred by PSE at the Project. Those costs were placed in the tracker for appropriate consideration during this proceeding. The holdings of Order 24/10 apply to only the Commission's threshold decision; they do not control the prudency analysis in this proceeding or determine how the public interest standard will be applied in that analysis.[6] The Commission can, and should, use this proceeding as an opportunity to protect ratepayers by denying PSE's recovery of Project costs where the Company has failed to make a showing that those costs were incurred in the public interest.

B. Application of the new public interest standard to this matter is not retroactive; the legislature intended the standard to apply to all multiyear rate plans filed on or after January 1, 2022.

PSE's arguments regarding retroactive application of the public interest standard[7] are immaterial when the legislature indicated the standard applies to all multi-year rate cases filed on or after January 1, 2022.[8] Beginning on that date, the Commission's consideration of a proposal "is subject to the same standards applicable to other rate filings made under this title, including the

[6] Statements that go beyond the instant case do not control subsequent decisions. *See, e.g., Cohens v. State of Virginia*, 19 U.S. 264, 399 (1821) ("…general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

[7] *See* Initial Brief of Puget Sound Energy at Sections II(B) and (C).

[8] *See* RCW 80.28.425(1).

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public interest and fair, just, reasonable, and sufficient rates."[9] And in determining the public interest, the Commission "may consider such factors including, but not limited to, environmental health and greenhouse gas emissions reductions, health and safety concerns, economic development, and equity, to the extent such factors affect the rates, services, and practices of a gas or electrical company regulated by the commission."[10]

If a statute's meaning is plain on its face, the plain meaning is to be given effect as an expression of legislative intent. *See e.g., Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10 (2002). There is no ambiguity regarding the date on which the legislature intended the current public interest standard to go into effect. On the statute's plain language, its applicability to a case is not based on project commencement, permit issuance, or construction completion. Rather its applicability is triggered by the filing date, and the filing date of this case unquestionably brings it within the legislative mandate.

To the extent that PSE believes applying that mandate to the Project raises due process issues,[11] that contention is incorrect and irrelevant in any event—such arguments are best directed to the legislature and the courts. The statutorily-created Commission needs to follow its governing statutes.[12] The public interest standard set forth at RCW 80.28.425(1) must be applied to the Commission's determination of whether PSE's Project costs were incurred in the public interest. Failure to do so would perpetuate the structural inequities the Commission has professed it seeks to end.

The Commission's analysis needs to consider the long-term effects of PSE's decisions regarding the Project.[13] The Tacoma LNG facility is expected to operate for decades, and its

[9] *Id.*

[10] *Id.*

[11] Initial Brief of Puget Sound Energy at ¶ 13.

[12] An administrative agency must be strictly limited in its operations to those powers granted by the legislature. *Cole v. Washington Utilities & Transp. Comm'n*, 79 Wn.2d 302, 306, 485 P.2d 71, 74 (1971)

[13] Order 24/10 at ¶ 425 (citing Used and Useful Policy Statement at ¶ 20).

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impacts to the Tribe and surrounding communities will extend for generations. And the Commission's decision on how to proceed here will have significant repercussions beyond the Tacoma LNG Project. If environmental health and greenhouse gas emissions reductions, health and safety concerns, economic development, and equity are not part of the public interest standard applied to PSE's Project costs, the Commission would set a precedent that the current standard cannot be applied to any project that was in process prior to legislation. Because utility projects are often developed over several years, there are likely many projects that commenced work prior to the statutory effective date, and such a precedent could preclude application of the current public interest standard to all of them.

The Commission is not being asked to retroactively apply the public interest standard to the Project, as this proceeding addresses whether PSE made prudent long-term decisions when incurring costs for the Project. To accomplish that goal, the Commission's inquiry must consider and balance the Project's current and future impacts in light of the full scope of public interest factors set forth by the legislature.

C. <u>An economic analysis is incomplete where relevant externalities are not considered.</u>

PSE argues that factors such as environmental health and greenhouse gas emissions reductions, health and safety concerns, economic development, and equity are not relevant considerations for the Commission in its role as "primarily an economic regulator."[14] However, these factors are exactly the type of externalities that are considered in an economic analysis.

Externalities are an economic concept describing the side effects or consequences of industrial or commercial activities that affect other parties without being reflected in the costs of the goods or services involved.[15] Externalities can be positive or negative depending on the specific

[14] *See* Initial Brief of Puget Sound Energy at Section II(B).

[15] *See* Exh. RXS-1T at 19:20-26.

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benefits or disbenefits.[16] As such, the Project's impacts on environmental health, human health and safety, economic development, and equity—all externalities—are properly considered in the Commission's economic analysis. To the extent the Commission's past practice was to exclude such externalities from its consideration, the legislature's explicit acknowledgment of these public interest factors is an indication that they can no longer be ignored. The Tribe is not arguing that the Commission should no longer be an "economic regulator"—quite the opposite.

D. Costs in the tracker cannot be approved until the Commission determines their short- and long-term prudence.

When it adopted the principles set forth in Chapter 43.06D, which established the Washington State Office of Equity,[17] the Commission committed to: developing, strengthening, and supporting policies and procedures that distribute and prioritize resources to those who have been historically and currently marginalized, including tribes; eliminating systemic barriers that have been deeply entrenched in systems of inequality and oppression; and working to achieve procedural and outcome fairness, promote dignity, honor, and respect for all people.[18]

The Commission's threshold prudency determination regarding PSE's September 22, 2016 decision to construct the Project in Order 24/10 did not eliminate the requirement that PSE demonstrate that the specific costs incurred at the Project were incurred prudently and in the public interest. In fact, the purpose of placing Project costs in the tracker was to ensure PSE would not recover any of those funds from ratepayers unless and until they were fully vetted and approved by the Commission during the current proceeding. In that context, PSE's claim that "there is no

[16] An externality is defined as "a consequence or side effect of one's economic activity, causing another to benefit without paying or to suffer without compensation." EXTERNALITY, Black's Law Dictionary (11th ed. 2019).

[17] *See* Docket UG-210755, Order 09 at ¶ 55 ("By this Order, we adopt the principles spelled out in that statute, and commit to ensuring that systemic harm is reduced rather than perpetuated by our processes, practices, and procedures.").

[18] *See* RCW 43.06D.020(3).

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reasoned basis to limit the recovery of the deferral" [19] is wishful thinking that is contradicted by the record before the Commission.

E. PSE knew, or should have known, that it was imprudently investing in a project the public opposed and did not need.

PSE's decision to move forward with construction during pendency of the permitting process was at its own risk and driven by PLNG needs, not ratepayer needs, as demonstrated by the fact the facility has not been used for peak shaving thus far.[20] PSE argues that the Commission cannot apply the current public interest standard based on the date of facility completion.[21] However, if PSE had followed the law, the facility would not have been built and operating by February 2022. PSE stated in its May 22, 2017 permit application for the Tacoma LNG Facility, that "an NOC application must be filed and an Order of Approval issued by the PSCAA prior to beginning construction of any emitting unit absent the applicability of an exemption."[22] However, the Puget Sound Clean Air Agency's (PSCAA) response dated June 21, 2017 notified PSE that the NOC application was incomplete and corrected PSE's understanding of the applicable regulation, explaining that "an NOC is required for the entire facility and not just the specific emission points as described in the application."[23] PSE continued construction of the Tacoma LNG facility fully aware of the fact that such actions were prohibited by PSCAA regulations.[24] The NOC permit was not issued until December 10, 2019.[25]

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[19] Initial Brief of Puget Sound Energy at ¶ 39.

[20] *See* Section II(E)(2) *supra.*

[21] Initial Brief of Puget Sound Energy at ¶ 5.

[22] Notice of Construction Application Supporting Information Report, May 22, 2017 at § 3.2, publically available at https://pscleanair.gov/DocumentCenter/View/2684/PSE-TacomaLNG-NOCApplication?bidId=.

[23] PSCAA NOC Application No. 1186 Incomplete Letter, June 21, 2017, publicly available at: https://pscleanair.gov/DocumentCenter/View/2685/PSE-TacomaLNG-NOCApplication-IncompleteLetter?bidId= (emphasis added).

[24] As Mr. Roberts' testimony acknowledges, "On December 10, 2019, PSCA issued the air permit needed to operate the facility and a notice to proceed with construction." Exh. RJR-1T at 27:9-11 (emphasis added).

[25] *See* Exh. BAE-7.

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The Commission should not allow PSE to make an end-run around the applicable public interest standard based on the Project's completion date. If PSE did not construct Tacoma LNG during a period it was legally prohibited from doing so, the Project would not have been commissioned by February 2022. The risk of unlawful construction is PSE's to bear and the associated costs cannot be shifted to ratepayers.

1. PSE ignored public opposition and evolving energy policy.

The Tribe fully agrees with Public Counsel's overview of the ongoing public opposition to the Project.[26] As Public Counsel astutely notes, "the Commission has taken public comments from members of the public about the LNG Project at every major PSE public comment hearing since and including Docket UG-151663."[27] Accordingly, both PSE and the Commission have been on notice for many years regarding the public interest and equity issues that the Project raises. PSE's knowing refusal to consider equity in developing the Project is a relevant factor that weighs against allowing PSE to recover its claimed Project costs.

2. PSE has not shown that the Tacoma LNG Facility has been used for its regulated purpose.

The Commission should reject PSE's claim that by providing natural gas to customers, the Project has met customers' needs.[28] The purpose of constructing the Project, as described by PSE, is to "meet the needs of PSE's natural gas customers on the coldest days."[29] The Project has not yet been necessary for that purpose.[30] As explained in Mr. Earle's testimony on behalf of Public Counsel, there has been no actual ratepayer need for the Project to provide vaporized LNG to PSE's distribution system.[31] On the days that PSE used the vaporizer to provide natural gas to ratepayers, the Company always had available pipeline gas resources to serve ratepayer demand.

[26] *See generally* Post-Hearing Brief of Public Counsel at Section IV.
[27] Post-Hearing Brief of Public Counsel at ¶ 43.
[28] Initial Brief of Puget Sound Energy at ¶ 30.
[29] Initial Brief of Puget Sound Energy at ¶ 38.
[30] *See* Exh. RXS-35T at 4-13; *see also* Post-Hearing Brief of Public Counsel at Section III(A)(2).
[31] *See* Exh. RLE-1T at 16:12-18:3.

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Demand during those vaporization days was on average 44 percent below the resources available to PSE without the Project, and the day of highest demand was 29 percent below the level where peak shaving to address excess demand would be necessary to serve ratepayers.[32] For the Project to be found prudent and in the public interest, PSE must first show that the Project was needed to meet ratepayer needs, and that it is used and useful.[33] The record shows existing resources have been available to serve ratepayer needs without utilizing the Project. The ratepayer need for the Project has not been demonstrated through PSE's performative use of the facility during periods of non-peak demand.[34]

Because PSE cannot show that the Project is necessary to meet ratepayer demand, the Company now attempts to move the goalposts by redefining what "peak shaving" means, arguing that "it would be a mistake to limit the definition of peak shaving use to situations that meet 'design day' criteria."[35] The Commission should dismiss PSE's attempt to characterize its "use" of the vaporizer during low-demand days as peak shaving; the Company has not provided credible or convincing evidence the Project has been used for its regulated purpose.

F. PSE Should Not Be Allowed to Recover Deferred Costs

1. The Tacoma LNG facility is not operating in the public interest.

All the parties' briefs, except PSE's, recognize the serious public interest and equity problems posed by the Project. Recognizing that the Project perpetuates environmental inequities and overburdens the surrounding communities, Public Counsel argues on behalf of the public for full disallowance based on the Project's failure to meet the public interest.[36] Staff notes that the

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[32] *See* Exh. RLE-1T at16:12-21.

[33] *See WUTC v. Puget Sound Power & Light Co*., Docket UE-921262, et al., Nineteenth Supplemental Order (September 27, 1994); *see also In re the Comm'n Inquiry into the Valuation of Pub. Serv. Co. Property that Becomes Used and Useful after Rate Effective Date*, Docket U-190531, Policy Statement, (Jan. 31, 2020).

[34] The Tribe agrees with Public Counsel's analysis regarding PSE's purported "use" of the facility. *See* Post-Hearing Brief of Public Counsel at Section III(A)(2).

[35] Initial Brief of Puget Sound Energy at ¶ 32-34.

[36] *See* Post-Hearing Brief of Public Counsel at Section III.

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areas surrounding the facility bear heavy socio-environmental burdens and suggests that "the Commission should use whatever tools it can bring to bear to minimize the environmental burdens that can result from the facility's operations."[37] The concerns raised by Public Counsel and Staff echo those presented by the public. Customers submitted 765 written comments to the Commission and Public Counsel expressing concern and opposition to the Project, and 29 attendees offered oral comments in opposition to the Project and related rate increase at the November 1, 2023 public comment hearing.[38] When determining whether PSE's costs are prudent and in the public interest, the Commission should give significant weight to the voice of the public and the entities representing the public interest.

a. Numerous permit violations further prove that the Project causes direct harm to surrounding communities.

Based on its Post-Hearing Brief, PSE has apparently decided to pretend that it has not committed significant violations of its air permit. Because these violations further establish that Tacoma LNG directly impacts the surrounding community, and thus implicates the public interest and equity issues in this proceeding, the Commission should not follow suit.

At hearing, Dr. Sahu rejected the notion that these violations are not "a big deal."[39] Rather, he provided testimony that Tacoma LNG's direct venting of toxic waste gases was "unsafe" and disproportionately impacted the Tribe and others located near the facility.[40] That testimony is unrebutted, and Staff as well as Public Counsel have further recognized the significance of the Project's emissions for purposes of this proceeding.[41]

[37] Post-Hearing Brief of Commission Staff at ¶ 5 and ¶ 6.

[38] *See* Offer of Public Comment Exh. No. BR-8, UTC Comment Matrix and PCU Tally (filed Nov. 29, 2023); *see also* Post-Hearing Brief of Public Counsel at ¶¶ 53-59.

[39] Hearing Transcript at 133.

[40] Hearing Transcript at 133-134.

[41] *See* Post-Hearing Brief of Public Counsel at Section III(D); *see also* Post-Hearing Brief of Commission Staff at ¶ 74-75.

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Dr. Sahu explains that Tacoma LNG's direct venting translated into emissions at a rate 100 times higher than the level PSCAA contemplated when it made its permitting decision.[42] PSE's Post-Hearing Brief has nothing to say in response to this testimony either. Carbon monoxide provides a useful example as to why short but intense bursts of pollutants to the ambient air are a problem (and notably, Tacoma LNG emits carbon monoxide). High levels of carbon monoxide can be lethal in just a few minutes of exposure, which is why people are told not to run their car while the garage door is closed.

The Commission has also been provided with important evidence and testimony illustrating the disconnect between what PSE has represented to decision makers and the "reality" of what ultimately comes to pass.[43] In other words, beyond the fact that its arguments are belied by the record, the record shows that PSE simply lacks credibility.

The Tribe agrees with PSE that this proceeding is "not the forum to relitigate" the technical matters addressed during permitting for the facility, and it has not sought to do so.[44] However, by implying that PSCAA addressed the scope of environmental externalities discussed in the Tribe's testimony, and that the PCHB made findings regarding those externalities, PSE's position mischaracterizes the scope of the air permit and the PCHB review of that permit.

The Tribe only pointed to air permitting to demonstrate PSE's own public acknowledgment that Tacoma LNG pollutes the air (which is why it needed an air permit in the first place).[45] The Tribe is not re-litigating anything decided by the PCHB—those issues are now before the Court of Appeals and the PCHB may soon be reversed in any event.

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[42] *See* Exh. RXS-35T at 12:10-13; *see also* Hearing Transcript at 135-136.

[43] *See e.g.*, Hearing Transcript at 137; *see also* Exh. RXS-1T at 22 (discussing the range of Toxic Air Pollutants (TAPs) and Hazardous Air Pollutants (HAPs) emitted by the facility); *see also* Tribe's Post-Hearing Brief at 8:11-9:19 (describing the volume of VOCs, benzene, and hexane estimated to have been emitted by the Project during the periods of flare bypass documented in NOVs issued to PSE by PSCAA, and describing PSE's representations to the PCHB that use of the flare bypass would "rarely or never occur.").

[44] *See* Initial Brief of Puget Sound Energy at ¶¶ 9 & 84.

[45] *See, e.g.*, Exh. RXS-1T at 10:13-11:2.

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As Dr. Sahu explained to Staff's counsel at hearing, the externalities related to the Project that have been raised by the Tribe in this proceeding were not reached by the PSCAA.[46] Further, the Pollution Control Hearings Board (PCHB) made no determination regarding issues of equity, disparate impacts and/or environmental justice. The PCHB explicitly noted that its decision dismissing these issues—pursuant to a PSE motion to dismiss them *for lack of jurisdiction*—was "not a comment on environmental justice principles implemented or being implemented" because the PCHB lacks jurisdiction to consider "broad principles of environmental justice."[47] Because the environmental justice impacts of the Project were not reached by PSCAA or the PCHB, the consideration of the relevant public interest factors in this proceeding will not result in the Commission retrospectively second-guessing the determinations of other, more specialized environmental health agencies.[48]

b. <u>The mitigation projects that PSE points to are, by definition, not "benefits to the surrounding community."</u>

PSE's claim that the Tacoma LNG facility "provides a variety of benefits to the surrounding environment" is without merit.[49] The actions that PSE conducted were required as mitigation to offset the unavoidable harms associated with the Project.[50]

All of the "overall benefits to the surrounding area" that PSE references are associated with mitigation requirements.[51] This is highlighted by PSE's reference to the findings of the Shorelines

[46] Hearing Transcript at 131:11-132:13.

[47] *See* Exh. RXS-24 at 36:3-37:2.

[48] *See* Initial Brief of Puget Sound Energy at ¶ 11 (quoting Order 24/10 at ¶ 427).

[49] Initial Brief of Puget Sound Energy at ¶ 84.

[50] The Shorelines Hearings Board noted, for example, that during permitting for the Project the National Marine Fisheries Service (NMFS) found the Project would adversely affect "Essential Fish Habitat", and provided the Army Corps of Engineers suggested a suggested conservation recommendation "to avoid, mitigate or offset the impact of the proposed action." EXH RJR-14 at 10:8-12.

[51] *See* Initial Brief of Puget Sound Energy at ¶ 84-85; *see also* Exh. RJR-14 at 49:3-5 (SHB affirming the Shoreline Substantial Development Permit associated with the Project with conditions, "as limited by the Stipulation and mitigated for under the In-Water Mitigation Plan for Tacoma LNG.")

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Hearings Board decision, which stated only that the Revised Mitigation Plan achieved "no net loss of ecological functions."[52] "No net loss" is different from "an overall benefit."

Mitigation does not provide an incremental benefit; by definition, mitigate means "to make less severe or intense; to make less harmful, unpleasant, or seriously bad."[53] And mitigation requirements may be imposed upon an applicant "only to the extent attributable to the identified adverse impacts of its proposal."[54] Because the mitigation performed by PSE was necessary to offset the negative impacts of the project—it provided no net benefit to the environment or the surrounding communities.[55]

Additionally, and perhaps more importantly, the purported "benefits" PSE points to in no way mitigate the negative externalities (externalities that are also expressly recognized by Staff and Public Counsel), which are before the Commission in this case. That is, the work that PSE points to did nothing to mitigate the air pollution and/or risks of a catastrophic accident that Tacoma LNG presents. Nor does the work described do anything to mitigate the impacts of an accident involving a train transporting LNG from the Tacoma LNG facility. The Commission's analysis should not credit the Project for providing overall benefits to the surrounding area.

c. <u>The Project's inequitable negative externalities weigh against a finding that PSE's costs were incurred in the public interest.</u>

The Tribe has presented testimony and evidence showing that there are a number of negative externalities associated with the Project, including disparate health and environmental impacts to the Tribe and other already overburdened "highly-impacted" communities. The

[52] *See* Initial Brief of Puget Sound Energy at ¶ 85 (citing Exh. RJR-9, SHB Finding of Fact 51 at 32:2-8.)

[53] MITIGATE, Black's Law Dictionary (11th ed. 2019).

[54] WAC 197-11-660(1)(d).

[55] For example, the SEPA regulations state that that mitigation measures "shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal" *See* WAC 197-11-3-660(1)(b).

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Commission must consider these environmental externalities associated with the costs to be adjudicated in this proceeding.

The Tribe agrees with Staff's position that the Commission should minimize the environmental burdens associated with the Project.[56] However, Staff's suggestion that the Commission accomplish this by requiring that PSE "(1) renegotiate the contract with the facility's third-party operator to incent compliance with the facility's air quality permit, and (2) copy the Commission whenever it reports permit violations to the PSCAA" comes up short. This is because the measures that Staff proposes do little (if anything) to alleviate the environmental health burdens that Tacoma LNG presents. Though the Clean Energy Transformation Act (CETA) applies to electrical utilities, the Commission has recognized that "its objective and language are instructive to the Commission's regulatory work generally."[57] One of the principles of CETA is that "there should not be an increase in environmental health impacts to highly impacted communities."[58] The Commission has committed "to ensuring that systemic harm is reduced rather than perpetuated" by its processes, practices, and procedures.[59] To meet this goal, the Commission needs to do more than what is proposed by Staff.

If the Commission is serious about addressing inequity by alleviating the Project's impacts, it must recognize that health and safety impacts cannot be mitigated or meaningfully addressed without first being properly assessed. Because PSE has avoided a full assessment of Tacoma LNG's impacts on the Tribe and the rest of the affected local community, the Commission cannot properly make (and should abstain from making) a prudence determination until such an assessment is available to inform its decision.

[56] *See* Staff Post-Hearing Brief at ¶ 5.
[57] Docket UG-210755, Order 09 at ¶ 52.
[58] RCW 19.405.010(6).
[59] Docket UG-210755, Order 09 at ¶ 55.

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A Health Impact Assessment (HIA) is a process that helps support the review and analysis of potential health effects of a plant, project, or policy before it is built or implemented.[60, 61] An HIA typically identifies both health impacts and related mitigation.[62] By identifying health effects, an HIA can inform mitigation and policy recommendations to increase positive health outcomes and minimize adverse health outcomes.[63] For example, on November 27, 2018, Cowlitz County and the Washington State Department of Health issued a Health Impact Assessment for the Millennium Bulk Terminal–Longview, outlining the health effects that proposal would have on the residents of Longview, Cowlitz County.[64] Notably, the environmental impact statement for the Millennium Bulk Terminal included a modeled cancer risk rate for new emissions associated with the facility, but a HIA was still performed.[65]

In this instance, the Tribe's witnesses provided unrebutted testimony explaining why an HIA could be a useful tool to identify how PSE can mitigate the negative impacts and externalities created by Tacoma LNG's presence and operation.[66] To the Tribe's knowledge, there is nothing precluding the Commission from requiring a HIA as part of its decision in this case. Indeed, a HIA would go far in aiding the Commission to make defensible decisions on the public interest and equity issues before it.

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[60] Exh. RXS-1T at 31.

[61] Some governments in the state even have webpages devoted to HIAs. *See, e.g.*, https://kingcounty.gov/depts/health/environmental-health/healthy-communities/health-impact-assessment.aspx

[62] *See e.g.*, Millennium Bulk Terminals—Longview Health Impact Assessment, Cowlitz County and Washington State Department of Health, (September 2018) available at: https://www.co.cowlitz.wa.us/DocumentCenter/View/15122/MBTL-HIA---September-2018?bidId= (For example, this HIA evaluated a wide range of potential impacts associated with the proposed project, including air quality, economic health and prosperity, taxes and municipal budgets, economic resiliency, community health, traffic and mobility, recreational impacts, personal health, fisheries impacts, surfactants and human health, drinking water quality, and local food crops. *See* Section III at p.17).

[63] Exh. RXS-1T at 31.

[64] Exh. RXS-1T at 32.

[65] Exh. RXS-1T at 32.

[66] *See* Exh. RXS-1T at 31-32.

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Alternatively, the Commission could order a Supplemental Environmental Impact Statement (SEIS) pursuant to its SEPA authority, see WAC 480-11-020 & -030, to facilitate its prudency determination by assessing and quantifying Tacoma LNG's health impacts on the surrounding community. Analogously, the Puget Sound Clean Air Agency ordered a SEIS because it needed more information on Tacoma LNG's greenhouse gas impacts before making its permitting decision.[67] But ultimately, however credible information on these issues is developed, further information about the specific health impacts of Tacoma LNG is needed—so that they can be mitigated—before the Commission can determine that PSE's investments in building this facility in this location were prudent.

2. The "cost causation" allocation methodology applied by PSE for the four-mile pipeline segment improperly inflates ratepayers' purported "need" to use the pipeline.

PSE asserts that its allocation methodology for the four-mile pipeline "is based on cost causation."[68] As discussed by Public Counsel and Commission Staff in their opening briefs,[69] PSE's allocation of pipeline costs should be rejected because the share assigned to ratepayers greatly exceeds the relative benefit the pipeline provides to the Project's regulated operations.

It is first important to recognize that PSE's decision to site the Tacoma LNG Facility adjacent to the TOTE property—instead of close to the interstate pipeline and a connection to the existing PSE gas distribution system—was based on the needs of PLNG.[70] An alternate site could have greatly reduced PSE's need to invest in an expensive new pipeline for ratepayers, which would have resulted in PLNG assuming the costs associated with any transmission pipeline necessary to deliver LNG to its maritime customer.[71] Any cost causation analysis regarding the

[67] *See* Exh. RJR-1T at 19:8-11.

[68] *See* Initial Brief of Puget Sound Energy at 19.

[69] *See* Post-Hearing Brief of Commission Staff at Section III(B); *see also* Post-Hearing Brief of Public Counsel at Section III(C).

[70] *See* Exh. RXS-1T at 20:15-21:2 and 47:16-23; *see also* Exh. RXS-35T at 7:15-8:12.

[71] *See* RXS-1T at 20:15-21:2; *see also* RXS-35T at 7:15-8:12.

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pipeline must recognize that PSE's siting decision was made to benefit PLNG, and that costs associated with the non-regulated portion of the Project should not be borne by ratepayers.[72]

Further, the Company's "cost causation" methodology incorrectly inflates ratepayer "need for the pipeline by assuming that it is necessary to send boil-off gas from the storage tank at the Tacoma LNG Facility into the PSE distribution system at times the facility is not liquefying natural gas. This justification for allocating pipeline costs to ratepayers fails to consider the fact that PSE incurred costs on two other features at the Tacoma LNG Facility that eliminate the ratepayer need for the outbound pipeline (except during periods of true peak shaving). Boil-off gas can be fed back into the liquefaction train to be re-liquefied and returned to the storage tank, or it can be routed to the ground flare for destruction. Because two alternatives are available to address the boil-off gas without calling on use of the outbound transmission line, PSE's decision to deliver the boil-off gas to customers cannot be justification for the allocation of a large share of the pipeline costs to ratepayers.

3. PSE's post-hearing briefing fails to establish that its legal costs are prudent or recoverable.

PSE has not presented a record sufficient for the Commission to determine that its legal costs are prudent or properly allocated. The crux of PSE's position is that it should receive all of its claimed legal fees and costs because it largely prevailed in permit challenges thus far.[73] Respectfully, that is not the standard; prevailing in litigation does not entitle a party to each and every cost it claims, particularly where (as here) litigation is ongoing. The Tribe has already established that PSE has not made an adequate record regarding cost reasonableness. It would be a dereliction of duty to make ratepayers foot the bill for PSE's litigation decisions and tactics, which included using upwards of ten attorneys to litigate a single permit appeal, on this record.

But beyond PSE's failure to demonstrate the reasonableness of the legal fees and costs that it seeks to hang on ratepayers, the position in its brief fails for the additional reason that PSE has

[72] *See* Exh. RXS-35T at 8:20-9:9.

[73] Initial Brief of Puget Sound Energy at ¶ 58-60.

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not even established that the litigation in which it prevailed has a nexus to ratepayers. The Tribe will illustrate the problem with one of the "three" pieces of litigation in which PSE prevailed against the Tribe: PCHB No. 16-120C. That case before the PCHB focused on infrastructure related to the for-profit (Puget LNG) aspect of the Tacoma LNG Project, not on anything for ratepayer benefit. This fact is demonstrated by the PCHB's Order on Motions, resolving the case in PSE's favor. *See Puyallup Tribe of Indians, Appellant v. State of Washington, Department of Ecology; Puget Sound Energy, Inc.; Port of Tacoma, Respondents*, 2018 WL 7349360, at *5. ("The focus of this case has been the removal of 24 creosote-treated piles and installation of 48 new steel piles to build the LNG fueling pier in the Blair Waterway.").

As the Commission knows, the LNG fueling pier in the Blair Waterway is not a project component that exists for ratepayers. Is PSE seeking to recoup from ratepayers fees and costs that it incurred for PCHB No. 16-120C? If so, why should ratepayers be responsible for any portion of those costs when that case focused on issues that concerned only PLNG? Based on the record and Ms. Free's testimony, we do not know the answer to basic but critical questions like these (let alone the reasonableness of the costs and fees PSE incurred in this case or any other). In short, PSE has not met its burden regarding legal fees and costs; its request for reimbursement should be rejected *in toto*.

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IV. CONCLUSION

The Tribe has demonstrated that Tacoma LNG fails the Commission's prudence evaluation and the public interest standard. Indeed, the Commission has received overwhelming and unrebutted evidence on this. Additionally, the Commission should disallow PSE's legal expenses related to Tacoma LNG as unsupported by sufficient evidence.

If the Tacoma LNG Project was truly the benign and beneficial undertaking that PSE describes, the Tribe would have no reason to oppose it. The Tribe has told the Commission why it opposes Tacoma LNG and asks that the Commission hear and address the Project's inequities.

DATED this 21st day of December 2023, at Seattle, Washington.

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By: _*/s/ Andrew S. Fuller*_ _____

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