

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of:

PUGET SOUND ENERGY, INC.

for (i) Approval of a Special Contract for Liquefied Natural Gas Fuel Service with Totem Ocean Trailer Express, Inc. and (ii) a Declaratory Order Approving the Methodology for Allocating Costs Between Regulated and Non-regulated Liquefied Natural Gas Services

DOCKET UG-151663

PUBLIC COUNSEL
MEMORANDUM OF LAW
REGARDING JURISDICTION

CONFIDENTIAL

****CONFIDENTIAL INFORMATION
HIGHLIGHTED IN GRAY****

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. On August 11, 2015, Puget Sound Energy (PSE) filed a Petition for (i) Approval of a Special Contract for Liquefied Natural Gas (LNG) Service with Totem Ocean Trailer Express, Inc., and (ii) a Declaratory Order Approving the Methodology for Allocating Costs Between Regulated and Non-Regulated Liquefied Natural Gas Services (Petition). The Petition was accompanied by testimony regarding the LNG project and request, including a copy of the LNG Fuel Supply Agreement (TOTE Special Contract).
2. An initial Prehearing Conference was held on September 8, 2015. The discovery rules were made available to the parties. Technical conferences were held in September and October. At a second Prehearing Conference on October 13, 2015, the parties reported to the Administrative Law Judge that they would continue to work to resolve issues, and would present resolved issues or file simultaneous briefs on threshold issues, by November 20, 2015. The filing date for simultaneous briefs was extended to November 24, 2015.

3. The parties have not reached a resolution regarding the threshold question of Commission jurisdiction over the proposed LNG service. Accordingly, pursuant to Order 03, Public Counsel is filing this brief stating its legal position on the threshold jurisdictional question.

II. SUMMARY OF THE FACTS

4. The PSE filing contains an extensive set of factual assertions on a range of issues beyond the instant jurisdiction issue. The parties attempted to arrive at a set of stipulated facts for purposes of briefing the jurisdictional issue, but were not successful. For purposes of determining the Commission's jurisdiction over PSE's proposed sales of LNG, the relevant facts are narrow and straightforward. This brief relies on PSE-filed materials and PSE's responses to discovery. For purposes of the brief, the facts recited are not contested.

5. The following is a summary of the facts relevant to the legal decision regarding jurisdiction.

6. Totem Ocean Trailer Express ("TOTE") is a shipping company that transports consumer goods to Alaska. TOTE operates two Orca class ships between the Port of Tacoma and the Port of Anchorage.¹

7. TOTE selected PSE, pursuant to an open and competitive bidding process, to provide LNG as a marine fuel for use in the two ships based at the Port of Tacoma.² In order to provide LNG as a marine fuel, PSE will construct an LNG Facility at the Port of Tacoma.³ The proposed Tacoma LNG Facility would be capable of dispensing LNG to TOTE via marine loading facilities located on the water and via a tanker truck loading system.⁴

¹ Confidential Testimony of Roger Garratt, Exh. No. RG-1CT, at 6:10-11.

² Confidential Testimony of Clay Riding, Exh. No. CR-1CT, at 14:1-2.

³ Garratt, Exh. RG-1CT, at 10:14-16, and Petition, at 5:6.

⁴ Garratt, Exh. No. RG-1CT, at 10:15-18.

8. The proposed Tacoma LNG Facility site would be connected to PSE's North Tacoma high pressure system with approximately four miles of new 16-inch pipe. This would allow the facility to receive gas from PSE's natural gas distribution system.⁵ PSE will supply TOTE the natural gas required for production of LNG in an amount sufficient to satisfy TOTE's marine transportation needs.⁶

9. As a result of a competitive bidding process conducted by TOTE, on October 27, 2014, PSE entered into an LNG Fuel Supply Agreement with TOTE (the "TOTE Special Contract").⁷ The TOTE Special Contract can be found in Exhibit No. CR-4C filed by PSE in this docket. PSE would make LNG fuel sales from the proposed Tacoma LNG Facility to TOTE, subject to the terms and conditions set forth in the TOTE Special Contract. The marine transportation fuel required by TOTE would be provided at a price negotiated by TOTE and PSE resulting from PSE's bid package and not under PSE's natural gas tariff.⁸

10. TOTE would not take transportation service under PSE's transportation tariff. Rather, it would pay for one hundred percent (100%) of the firm interstate pipeline cost to provide service under the LNG Fuel Supply Agreement between PSE and TOTE.⁹ PSE expects to procure firm pipeline capacity and natural gas supply for the proposed Tacoma LNG Facility consistent with the LNG Fuel Supply Agreement between PSE and TOTE.¹⁰

11. The total projected capital budget for the proposed Tacoma LNG Project is approximately \$364.2 million (not including Allowance for Funds Used During Construction

⁵ Testimony of Larry E. Anderson, Exh. No. LEA-1T, at 4:6-9.
⁶ Riding, Exh. No. CR-1CT, at 23:4-24:7.
⁷ Garratt, Exh. No. RG-1CT, at 6:6-8.
⁸ Riding, Exh. No. CR-4C.
⁹ Riding, Exh. No. CR-1CT, at 23:23-24:3.
¹⁰ Riding, Exh. No. CR-1CT, at 23:21-23.

("AFUDC").¹¹ This amount includes: (i) the total projected capital budget for the Tacoma LNG Facility of approximately \$310.7 million, including, (a) the projected budget of \$13.6 million (not including AFUDC) for the facility's development phase, and (b) the projected budget of \$297.1 million (not including AFUDC) for the facility's construction phase; and (ii) the total projected capital budget for the Distribution Upgrades of approximately \$53.5 million (not including AFUDC).¹²

12. PSE proposes three separate uses for the Tacoma LNG Facility: (i) fuel sales to TOTE under the LNG Fuel Supply Agreement ("TOTE Special Contract") between PSE and TOTE; (ii) non-regulated fuel sales to customers other than TOTE for regional maritime, heavy duty trucking, and industrial customers; and (iii) as a peaking resource for PSE's core natural gas customers.¹³ Only the first category, item (i), is at issue here.

13. PSE has not entered into any other contracts for the sale of LNG to a customer under its proposed regulated service.¹⁴

14. The initial term of the TOTE Special Contract between PSE and TOTE is 10 years, beginning on January 1, 2019, and terminating on December 31, 2028.¹⁵ TOTE has the unilateral right to extend the TOTE Special Contract in five-year increments with 18 months' notice.¹⁶

¹¹ Garratt, Exh. No. RG-1CT, at 27:10-11.

¹² Garratt, Exh. No. RG-1CT, at 27:11-19. *See*, Exh. No. RG-3C for additional detail.

¹³ Garratt, Exh. No. RG-1CT, at 3:6-15. *See also*, at 9:17-10:18.

¹⁴ Garratt, Exh. No. RG-1CT, at 29:1-12. PSE states it will offer the unsubscribed capacity (i.e., the capacity not associated with either peak shaving or sales to TOTE) as non-regulated services to non-TOTE third parties at non-regulated prices.

¹⁵ Riding, Exh. No. CR-1CT, at 14:7-9.

¹⁶ Riding, Exh. No. CR-1CT, at 14:9-11.

15. In addition to the TOTE Special Contract between PSE and TOTE, PSE would provide LNG to TOTE under an LNG Interim Supply Agreement.¹⁷ PSE is not seeking Commission approval of the Interim Supply Agreement.¹⁸

III. LEGAL ARGUMENT

A. Statement of the Issue.

16. Is the Commission granted the jurisdiction to regulate sales of liquefied natural gas by gas companies for use as transportation fuel, in particular the sales of LNG to TOTE for use as marine fuel under the TOTE Special Contract.

17. This is a threshold question. If the Commission finds that it does not have jurisdiction, it need not reach the question of contract approval as requested by PSE. For the reasons discussed in this memorandum, Public Counsel concludes that the LNG service proposed in the TOTE Special Contract does not constitute a regulated natural gas service in Washington and is therefore not jurisdictional.

B. Analysis.

1. The Commission is an agency of limited jurisdiction.

18. In determining jurisdiction, the starting point is the principle that "an agency possesses only those powers granted by statute."¹⁹ The authority of the Commission is found in its enabling legislation in RCW Titles 80 and 81. The Commission is authorized to determine if a person is subject to its jurisdiction.²⁰ The Commission recently conducted an analysis of its jurisdictional authority in a policy docket regarding third party owners of net-metering

¹⁷ Riding, Exh. No. CR-1CT, at 22:3-28.

¹⁸ PSE Response to Staff Data Request No. 008.

¹⁹ *In Electric Lightwave, Inc.*, 123 Wn.2d 530, 536-537, 869 P.2d 1045 (1994).

facilities.²¹ The analysis used by the Commission in that docket is an appropriate framework for this case.

2. The Commission has jurisdiction generally over natural gas companies and services.

19. RCW 80.01.040 states that: “The utilities and transportation commission shall: ... (3) Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in *the business of supplying any utility service or commodity to the public* for compensation.”²²

20. Several relevant definitions contained in RCW 80.04.010 address the scope of the Commission’s power to regulate utility service.

21. Under RCW 80.04.010(23), a “public service company” subject to Commission jurisdiction is defined to include: “*every gas company, electrical company, telecommunications company, wastewater company, and water company. Ownership or operation of a cogeneration facility does not, by itself, make a company or person a public service company.*”²³

22. Under RCW 80.04.010(14), a “gas company” includes: “every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receiver appointed by any court whatsoever, and every city or town, *owning, controlling, operating or managing any gas plant within this state.*”²⁴

²⁰ RCW 80.04.015. *United & Informed Citizens Advocates Network v. Wash. Utils. & Transp. Comm’n*, 106 Wn.App 605, 611, 24 P.3d 471 (2001).

²¹ *In the Matter of Amending and Repealing Rules in WAC 480-108 Relating to Electric Companies—Interconnection With Electric Generators*, Docket UE-112133, Interpretive Statement Concerning Commission Jurisdiction and Regulation (Interpretive Statement).

²² RCW 80.04.040 (emphasis added).

²³ RCW 80.04.010(23) (emphasis added).

²⁴ RCW 80.04.010(14) (emphasis added).

23. RCW 80.04.010(15) defines "gas plant" to include: "all real estate, fixtures and personal property, owned, leased, controlled, used or to be used for or in connection with the transmission, distribution, sale or furnishing of natural gas, or the manufacture, transmission, distribution, sale or furnishing of other type gas, for *light, heat or power*."²⁵

24. As the Commission noted in its Interpretive Statement, "Washington courts interpreting and applying these statutes in a variety of contexts read into this definitional maze the principle that "[r]egulation by the [Commission] is predicated upon the proposition that the service rendered is public service."²⁶ As the Washington Supreme Court stated in *Inland Empire*, "[a] corporation becomes a public service corporation, subject to regulation by the [Commission] only when, and to the extent that, its business is dedicated or devoted to a public use."²⁷

25. Accordingly, the Commission must address two questions to determine whether it has jurisdiction: (1) does PSE meet the definition of a gas company under RCW 80.04.010(14); and (2) are there factors indicating that the LNG service which PSE intends to offer to TOTE is a public service?²⁸

3. PSE does not clearly meet the definition of a gas company with respect to the proposed LNG service.

26. Certainly there is no dispute that PSE meets the statutory definition of gas company as a general matter. The Company owns and operates gas plant, conducting business as a distribution company providing retail natural gas service for sale to residential, commercial, and industrial customers in Washington.²⁹

²⁵ RCW 80.04.010(15) (emphasis added).

²⁶ Interpretive Statement ¶ 55.

²⁷ *Inland Empire Rural Elec. v. Dep't of Pub. Serv.*, 199 Wash. 527, 537, 92 P.2d 258 (1939).

²⁸ Interpretive Statement ¶ 56.

²⁹ *Wash. Utils. & Transp. Commission v. PSE*, Dockets UE-111048/UG-111049, Order 08 ¶ 514.

27. The answer is less clear with respect to the provision of LNG as a marine fuel, however. To be jurisdictional, a “gas company” must operate “gas plant” for the “sale or furnishing” of “natural gas” for “light, heat, or power.”³⁰ In the context of proposed LNG service, the issue is whether PSE is selling “natural gas” and whether it is engaged in the sale of “natural gas...for...power.”³¹
28. The term “power” is not defined in Title 80 and Public Counsel has not identified any Washington court decisions defining the term. In the context of Title 80, however, the term is most reasonably read to mean electrical power, rather than motive power for vehicles.³²
29. The uses of “power” throughout Title 80 and of “motive power” in other statutes show that “power” in the context of regulated natural gas services means natural gas used for creating electric power only. References to “light, heat, or power” throughout Title 80 consistently refer to the transmission or furnishing of electricity in buildings.³³
30. In contrast, other Washington statutes use “motive power” in reference to vehicles and related matters. The term “motive power” appears in Title 81, the Commission’s transportation enabling statute.³⁴ Other examples include RCW 46.04.414, 630, 640, 47.04010 (defining trains, trolleys, trailers, and other vehicles) and RCW 79A.60.010 (defining recreational vehicles for use on public lands). The legislature has consistently employed the term “motive power” when

³⁰ The definition of “gas plant” also includes plant used to manufacture, transmit, distribute, sell, or furnish, “other type gas” for light, heat, or power.

³¹ RCW 80.04.101(15) (emphasis added).

³² The term “power” has been commonly used in utility company names including Puget Sound Power & Light Company, Pacific Power, and Washington Water Power as a reference to electrical energy. The inclusion in Title 80 of the term “power” predates the inclusion of the LNG or CNG references in Title 80.

³³ RCW 80.28.030 (voltage in wastewater systems); RCW 80.28.150 (gas, water, and electric meters); RCW 80.54.010 (electricity transmission).

³⁴ RCW 81.64.010 (limiting construction of railways where the “motive power is any power other than steam”).

referring to vehicles and transportation, suggesting that “power” in relation to natural gas services strictly means uses for electrical energy. The Commission must interpret the various terms and sections of RCW Titles 80 and 81 to produce a harmonious statutory scheme: “The purpose of reading statutory provisions *in pari materia* with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provisions ‘as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.’”³⁵

31. On the other hand, even if the Commission concludes that the term “power” includes motive power (fuel to power marine vessels), PSE’s activities *could* be jurisdictional, but are not necessarily, depending on further analysis. In other words, even if the service appears to be within the Commission’s jurisdiction based on the definitional analysis, the Commission must determine if the LNG service provided to TOTE is a public service.

32. This is the approach the Commission took in its analysis of its jurisdiction over third-party net-metering. The Commission concluded that its determination that the companies in question met the definition of “electric company” under RCW 80.01.040 was not enough to establish jurisdiction. The Commission stated, “in order to determine that a company is subject to our jurisdiction we must also find that the service it provides is a public service.”³⁶ Similarly in this case, even if the Commission concludes that PSE meets the definition of a gas company, it must still determine if PSE’s proposed provision of LNG as a marine fuel is a public service.

³⁵ See, e.g., *State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980) (quoting *State v. Wright*, 84 Wash.2d 645, 650, 529 P.2d 453 (1974)).

³⁶ Interpretive Statement ¶ 58.

4. Three main factors indicate whether the service provided is a public service.

33. The Commission has identified three factors which are used by Washington courts to analyze the "public service" requirement, that is, to determine whether the facilities in question are dedicated to a public use. The three questions identified which courts ask include: (1) is the service offered to the public; (2) is a monopoly present; and (3) are consumers in need of protection?³⁷ Each of these is discussed below.

a. PSE's proposed regulated LNG marine service is not offered to the public.

34. In order to constitute a regulated service, sales of LNG by PSE must be "held out" to the public that may be served in a non-discriminatory manner (i.e., all vessels using LNG as vehicle fuel). The PSE-TOTE Special Contract does not constitute a regulated service unless the Commission determines that PSE is holding out sales of LNG as a maritime fuel to all members of the public that would utilize LNG, on a non-discriminatory basis. As explained by Washington Supreme Court:

A corporation becomes a public service corporation, subject to regulation by the department of public service, only when, and to the extent that, its business is dedicated or devoted to a public use. The test to be applied is whether or not the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility; or whether, on the contrary, it merely offers to serve only particular individuals of its own selection.³⁸

To the extent that PSE is holding out sales of maritime fuel to the public, rather than selectively to TOTE, the nature of the LNG sales would meet the *West Valley/Inland Empire* test. In

³⁷ Interpretive Statement ¶ 59.

³⁸ *W. Valley Land Co., Inc. v. Nob Hill Water Ass'n*, 107 Wn.2d 359, 365, 729 P.2d 42 (1986) (quoting *Inland Empire Rural Elec. v. Dep't of Pub. Serv.*, 199 Wash. 527, 537, 92 P.2d 258 (1939)).

discussing this test, the Commission stated: "Accordingly, a company that serves the public as a class is more likely to dedicate its facilities to public use."³⁹

35. It does not appear from the description of the LNG project in the filing that PSE would hold out the service to all shippers on a non-discriminatory basis upon demand, on comparable terms and conditions. In its Petition, PSE describes the Tacoma LNG project as including:

regulatory approvals to provide ... (i) ... additional peaking capability for PSE's core gas customers [and] (ii) the operation of the Tacoma LNG Facility to provide LNG to TOTE for use as a marine fuel; and commercial contracts to sell LNG to non-TOTE customers for use as fuel as a non-regulated service.⁴⁰

The Petition goes on to state that "PSE is proposing to offer non-regulated and regulated fuel sales from the Tacoma LNG Facility" as follows:

(i) offer the already subscribed capacity of the Tacoma LNG facility (i.e. the capacity associated with peak-shaving and sales to TOTE of LNG as marine fuel as regulated services and (ii) offer the unsubscribed capacity of the Tacoma LNG Facility (i.e. the capacity *not* associated with either peak shaving or sales to TOTE of LNG as marine fuel) as non-regulated service.⁴¹

These descriptions very explicitly limit the proposed regulated marine fuel service to the TOTE Special Contract. All other LNG fuel sales will be conducted as non-regulated services. Under PSE's own description of the service, there does not appear to be a regulated service that will be held out to the public.

36. A corollary to the offering of a service to the public is the utility's obligation to serve, reflected in Washington statute, RCW 80.28.110, which provides that:

³⁹ Interpretive Statement ¶ 60. The Interpretive Statement analyzes the definition of electric company which covers any entity operating "any electric plant for hire" in Washington. The statutory definition of gas company does not include the phrase "for hire." This does not appear to be a material difference since the definition of gas plant includes plant used in the "sale" of natural gas.

⁴⁰ Petition ¶ 11.

⁴¹ Petition ¶ 30.

Every gas company...engaged in the sale and distribution of gas...shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto, suitable facilities for furnishing and furnish all available gas... services...as demanded[.]

The obligation to serve is an integral component of the holding-out requirement and an indicator that a service is offered "for hire." PSE does not expressly state in its filing that it is taking on the obligation to serve on demand all marine shippers with LNG fuel service on a non-discriminatory basis. PSE's filing does not clearly establish facts to show that it is holding out to provide LNG service to all customers who are reasonably entitled to service. The facts that PSE has provided show that: (1) the only current customer, TOTE, will be served pursuant to a unique contract specifically tailored to meet its needs; (2) that no other customers are engaged to take LNG marine fuel service from PSE; and (3) PSE makes no representations regarding the terms and conditions, whether in tariff or special contract, under which it would serve other customers.⁴² On this evidence the Commission can fairly conclude that PSE "offers to serve only particular individuals of its own selection"⁴³ rather than offering to serve the public as a class.⁴⁴

b. PSE's filing does not establish the existence of market power or a monopoly for LNG marine fuel.

37. The second factor to be considered is whether a monopoly is present. This issue examines whether PSE has market power with regard to the LNG marine fuel service, or whether

⁴² In addition to the cited Petition language, PSE testimony states that the unsubscribed capacity of the Tacoma LNG facility would be offered to non-TOTE third parties at non-regulated prices. Garratt, Exh. No. RG-1CT, at 29:3-6.

⁴³ *W. Valley Land Co., Inc. v. Nob Hill Water Ass'n*, 107 Wn.2d 359, 365, 729 P.2d 42 (1986) (quoting *Inland Empire Rural Elec. v. Dep't of Pub. Serv.*, 199 Wash. 527, 537, 92 P.2d 258 (1939)).

⁴⁴ If LNG sales are jurisdictional, as PSE asserts for the TOTE Special Contract, then they would be subject to an obligation to serve. The obligation would also apply to the non-regulated service that PSE proposes and would preclude that service being provided as non-regulated.

there is competition in the market for the service. As the Commission observed in the

Interpretive Statement:

The theoretical underpinning of utility regulation is that the regulated company is a natural monopoly, and it is more efficient for a monopoly to provide the service than the competitive market. In the absence of robust competition to ensure fair rates, we are more likely to find that the service is a public one.⁴⁵

38. In order for the Commission to regulate the PSE-TOTE sales of LNG, the market for LNG as marine fuel in Washington must not be competitive. That is, the market for LNG sales must, at least currently, display the properties of a natural monopoly where regulation is a substitute for the price-setting mechanisms of competitive markets.

Governmental oversight, such as provided by the Commission, prevents utilities such as PSE from exercising monopoly power, with regulation substituting for competition as the determiner of price. Thus, in its most basic form, the regulatory compact is that utilities have an obligation to provide all customers in their territory with safe and reliable service in return for the regulator's promise to set rates that will compensate the utility for the costs incurred to meet that obligation.⁴⁶

While the legislature specifically stated that development of LNG markets was in the public interest,⁴⁷ it did not make a legislative finding that the market for LNG is not competitive and should be regulated by the Commission as a natural monopoly (see discussion of statute below).

The Commission must, therefore, make such findings in order to regulate the PSE-TOTE Special Contract sales. The facts contained in PSE's filing, and in responses to discovery, do not support a conclusion that a monopoly for LNG marine fuel exists in Washington.⁴⁸

⁴⁵ Interpretive Statement, ¶ 61.

⁴⁶ *In the Matter of the Petition of Puget Sound Energy For An Accounting Order Approving the Allocation of Proceeds of the Sale of Certain Assets to Public Utility District No. 1 of Jefferson County*, Docket UE-132027, Order 04, ¶ 15 (Sep. 11, 2014).

⁴⁷ RCW 80.28.280.

⁴⁸ This brief assumes *arguendo* that the relevant market for analyzing the level of competition is the LNG marine fuel market in Washington. There is a strong argument to be made, however, that the relevant market is the

39. PSE does not assert as a basis for regulatory jurisdiction that its LNG marine fuel service has the characteristics of a monopoly.⁴⁹ PSE's filing in this docket includes a "Market Assessment of Liquefied Natural Gas as a Distributed Fuel in Washington State,"⁵⁰ which *inter alia*, examines the competitive conditions in the market area.⁵¹ The study concludes that "PSE should expect significant competitive and cooperative interests from other LNG and other fuel suppliers both regionally and nationally."⁵² The study lists and describes potential market participants and their activities, including Shell, BP, Clean Energy, motor fuel providers and marine fuel distributors. All these firms are large, well-capitalized energy firms with broad expertise and participation in energy markets. Their participation indicates that barriers to entry to the market for LNG marine fuels are not substantial from their perspective.⁵³

40. PSE stated several times in presentations to its Board of Directors that it has and can further develop competitive advantages associated with its regulated business model and cost of capital and that by developing, owning, and operating a liquefaction and storage facility for

entire marine fuel market. Operators of commercial vessels have a range of choices for fuel and are not required to use LNG. It may also be more appropriate to examine a broader geographic area. The maritime industry operates regionally, nationally and internationally. The extent to which LNG marine fuel is available from other suppliers at other West Coast ports, including British Columbia ports would be relevant factor in such an analysis.

⁴⁹ Petition ¶¶ 40-45.

⁵⁰ Melissa F. Bartos, Exh. No. MFB-3C (September 19, 2012) and Exh. No. MFB-4C (January 2015).

⁵¹ Prior to these studies, PSE also provided its Board of Directors with a Liquefied Natural Gas strategic Assessment in May 2012. The stated purpose of this strategic assessment was "to assess potential liquefied natural gas (LNG) business opportunities for PSE." This outlined "the market situation for LNG and how PSE might exploit opportunities in its own service territory." The report provided "insight into the current drivers and barriers to LNG adoption, key competitive players, end use markets, and potential PSE business models." See, PSE Response to Public Counsel Data Request No. 002, at 25. Additionally, the document included in Exh. Nos. MFB-3C and MFB-4C were also provided to the Board of Directors.

⁵² Bartos, Exh. No. MFB-3C at 28.

⁵³ *Id.*, at 28-29. In addition, as shown in PSE's Response to Public Counsel Data Request No. 002, PSE reported to its BOD on the "Competitive Atmosphere" the LNG facility would be operating in, and that they believe the proposed Tacoma facility will be "competitively situated" both in the near term and the outer years of the project's life. (p. 149.) The Company further discussed potential competitors, and the company's competitive position. (pp. 150-151.)

anchor tenants would help the company capture future market growth.⁵⁴ If there were no competitive market for LNG, PSE would not need be discussing how to further develop these “competitive advantages” over third parties.⁵⁵

41. It is also significant that PSE participated in competitive bidding to obtain the TOTE Special Contract.⁵⁶ This fact alone is strong evidence of competition for the service, indicating that from the point of view of the customer/purchaser, TOTE, competitive alternatives were available in the market.⁵⁷

42. Moreover, there do not appear to be any network economies of scale associated with the LNG manufacturing facilities that would be characteristic of a natural monopoly. The LNG facility is a single facility, not a network covering all or part of the service territory. While it is served by PSE’s distribution network, any non-regulated LNG supplier could locate a manufacturing and supply facility anywhere on PSE’s distribution network and offer the service. Indeed, this could still occur if PSE went forward with this proposal.⁵⁸

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⁵⁴ PSE Response to Public Counsel Data Request No. 002, at 7, 11, and 18.

⁵⁵ *Id.*

⁵⁶ Riding, Exh. No. CR-1CT, at 14:1-2.

⁵⁷ It is also relevant that PSE plans to offer its non-TOTE LNG vehicle fueling service as a non-regulated service. While it is not PSE’s decision to determine whether a service is or is not subject to regulation as a legal matter, the fact that it is proposing to operate a non-regulated LNG fuel service is an additional indicator that a competitive market exists.

⁵⁸ *See*, PSE Response to Public Counsel Data Request No. 002. In information provided to its Board of Directors, PSE indicated that Shell is currently working to develop a separate LNG facility at the Port of Tacoma. (p. 282.) Also, PSE considered a possible business model that would have left the provision of distribution and commodity to third-party LNG suppliers, but, in addition to being less financially rewarding than ownership of LNG facilities, PSE believed there was a risk of bypass where a third party liquefier would be likely to procure its own commodity and may construct its own interconnecting pipeline, and would leave the rewards of future growth to a third party.” (p. 18.)

c. Consumers need for protection.

43. Under this factor, the question is: “If the consumers of the company are at the mercy of the company’s shareholders to provide an essential service, it is more appropriate for the Commission to regulate the company?”⁵⁹ The same reasoning applies to regulation of a service.

44. As discussed above, LNG marine fuel is not an essential service over which PSE has a monopoly. In this case, TOTE is a large and sophisticated customer with alternatives which it pursued through the RFP. Where two large and sophisticated entities enter into a negotiated and individualized transaction, this is a factor cutting against treating the service as regulated.⁶⁰ This is not a situation where a standard tariff establishes terms of service across a broad class of customers. As noted above, on the facts contained in the current filing, TOTE is the only customer for the proposed regulated LNG marine fuel service.

C. RCW 80.28.280 Does Not Confer Jurisdiction On The Commission.

a. LNG policy statement – RCW 80.28.280.

45. Liquefied natural gas marine fueling was addressed by the Washington legislature in 2014, with legislative findings that included, *inter alia*, that LNG vessel refueling facilities are “in the public interest.” The legislation, codified in RCW 80.28.280, states in full:

(1) The legislature finds that compressed natural gas and liquefied natural gas offers [offer] significant potential to reduce vehicle and vessel emissions and to significantly decrease dependence on petroleum-based fuels. The legislature also finds that well-developed and convenient refueling systems are imperative if compressed natural gas and liquefied natural gas are to be widely used by the public. *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.* Except as provided in subsection (2) of this

⁵⁹ Interpretive Statement ¶ 62.

⁶⁰ Interpretive Statement ¶ 64.

section, nothing in this section and RCW 80.28.290 is intended to alter the regulatory practices of the commission or allow the subsidization of one ratepayer class by another.

(2) When a liquefied natural gas facility owned by a natural gas company serves both a private customer operating marine vessels and the Washington state ferries or any other public entity, the rate charged by the natural gas company to the Washington state ferries or other public entity may not be more than the rate charged to the private customer operating marine vessels.⁶¹

46. This new statute must be considered in determining the extent of the Commission's jurisdiction over LNG service. First it should be noted that section (1) of the statute does not limit the provision of LNG service to natural gas companies regulated by the Commission. The section is silent on the issue as well as on whether there is a competitive market or a monopoly for LNG services. While the statute refers to an LNG facility owned by a "natural gas company," that is a regulated company, it does not expressly declare that the LNG service provided is a regulated service.

47. The mandatory language contained in subsection (2) could be read as suggesting that the Commission may have some implied or discretionary authority to regulate rates for LNG, limited to a case where the Washington state ferries or other public entity allege that PSE is charging the ferry system more than the rate charged to TOTE. Subsection (1) of the statute states: "Except as provided in subsection (2) nothing in this section and RCW 80.28.290 is intended to alter the regulatory practices of the commission or allow the subsidization of one ratepayer class by another." As a result, even if the provision is read to confer any regulatory authority, such authority would only extend to the specific fact situation identified in the

statute.⁶² Statutory exceptions like the unique provision on LNG prices for state ferries are construed narrowly in order to maintain the legislative intent of the general statutory provisions.⁶³

The statute is a direct prohibition on a specific form of rate discrimination and does not expressly mention the Commission. The statute could have said: "In setting rates for LNG marine fuel service, the Commission shall ensure that the rate charged by the natural gas company to the Washington state ferries etc." to clearly authorize the Commission to act as the rate regulator. The legislature chose not to use such language. When it adopted the provisions regarding LNG, the legislature could have amended the definitions in RCW 80.01.040 to include LNG service. The fact that it did not do so can be considered in interpreting RCW 80.28.280 jurisdictional purposes.

b. The legislature chose to tax LNG fuels sales as a manufacturing process and not as a utility service.

48. In enacting the amendment to RCW 80.28.280 to add the reference to LNG, the legislature clarified that sales of LNG were not to be subject to the public utility excise tax, but would be taxed as a transportation fuel. As the Senate Report on the bill explained:

Liquefied natural gas and compressed natural gas that are sold or used as transportation fuel are exempt from state and local PUTs [{"public utility taxes"}] and the state use tax. Liquefied natural gas and compressed natural gas that are exempt from PUT are subject to the state B&O tax at the manufacturing rate of 0.484 percent of the gross receipts of the business activity. Local B&O taxes on liquefied natural gas and compressed natural gas that are sold or used as transportation fuel are limited to the rate that is in place for the sale of tangible personal property, or 0.2 percent if the jurisdiction does not impose a B&O tax on

⁶² *In re Electric Lightwave*, 123 Wn.2d at 537 (discussing limits on agency authority outside express authorization)

⁶³ See *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999) (narrowly construing exceptions to water-rights relinquishment statute).

the sale of tangible personal property. Transportation fuels include fuels used in motor vehicles, vessels, locomotives, and railroad cars.⁶⁴

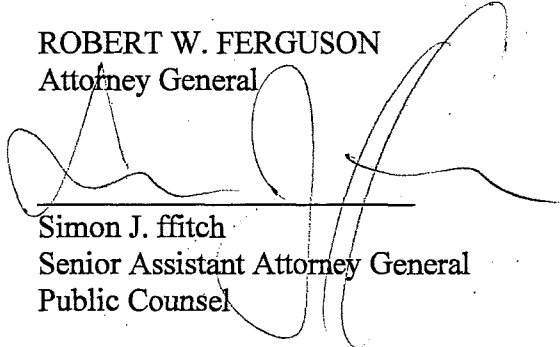
This is further evidence that the inclusion of LNG in Title 80 is not a determination by the legislature that the provision of LNG is a regulated service.

IV. CONCLUSION

49. For the foregoing reasons, Public Counsel recommends that the Commission determine that the proposed LNG marine fuel service under the TOTE Special Contract is not a jurisdictional service under RCW Title 80. By making this recommendation, Public Counsel is not taking a position against the Tacoma LNG Facility. As the legislature has noted, LNG has environmental benefits and is in the public interest. The legal analysis herein is not a statement regarding PSE's provision of LNG as a non-regulated marine fuel service.

50. DATED this 24th day of November, 2015.

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⁶⁴ Washington Senate Comm. on Transportation, Senate Bill Report SB 6440, at 2 (Feb. 5, 2014). Senate Reports are not legislative history. This quotation is provided to show the specific tax treatment chosen.

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