

**BEFORE THE  
WASHINGTON 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 No. UG-151663**

**MOTION TO STRIKE PORTIONS OF STAFF BRIEF ON  
ISSUES OF LAW AND FACT OR IN THE ALTERNATIVE  
MOTION TO FILE REPLY BRIEF AND REPLY BRIEF OF  
PUGET SOUND ENERGY**

**DECEMBER 2, 2015**

**PUGET SOUND ENERGY**

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## **MOTION TO STRIKE**

1. Pursuant to Washington Administrative Code (“WAC”) 480-07-375(d), Puget Sound Energy (“PSE”) hereby moves to strike certain portions of the Brief on Issues of Law and Fact filed by Staff in the referenced docket (“Staff Brief”). PSE is including a list of the portions of the Staff Brief that should be stricken in Attachment A hereto. The portions of the Staff Brief detailed on Attachment A should be stricken because they do not pertain to the issue the parties were requested to brief or are not supported by the evidence and therefore cannot be relied upon in deciding the jurisdictional question currently at issue in this proceeding.

2. In the event the Presiding Officer declines to grant PSE’s motion to strike, in the alternative and pursuant to WAC 480-07-375(1)(b), PSE hereby seeks leave to file a response to the Staff Brief and is including its reply brief as Attachment B. If PSE’s motion to strike is not granted, due process requires that PSE be given an opportunity to respond to the broad allegations and unsupported claims made in the Staff Brief in order to clarify the record upon which the decision regarding the threshold jurisdictional issue will be made. This Motion brings into issue the following rules or statutes: RCW 80.01.060; WAC 480-07-375; WAC 480-07-390; WAC 480-07-495(1).

### **I. INTRODUCTION**

3. PSE filed a Petition for (i) approval of a special contract for liquefied natural gas (“LNG”) service with Totem Ocean Trailer Express, Inc. (“TOTE”), and (ii) a declaratory order approving the methodology for allocating costs between regulated and non-regulated LNG

services.<sup>1</sup> An initial prehearing conference was held on September 8, 2015, and technical conferences were held in September and October.

4. A second prehearing conference was held on October 13, 2015. At that conference, the parties reported to the Administrative Law Judge that they were

working to resolve issues of law and policy that raise threshold questions, the resolution of which could be determinative. The parties agreed to continue seeking common ground and to either report success in this regard, or to file simultaneous briefs on November 20, 2015, stating their respective positions on these issues that do not involve contested facts.<sup>2</sup>

5. During the prehearing conference, these threshold issues were introduced by Counsel for Staff as dealing "...with questions of the jurisdiction of the Commission to -- you know, to -- or the necessity, probably better to say, of the Commission to approve PSE's entry into this new enterprise."<sup>3</sup> Counsel for Staff stated further that he had discussed with the parties "...the question of whether the service proposed for TOTE is jurisdictional to the Commission [or whether it is] really another -- a different kind of service".<sup>4</sup> With regard to the character of the service PSE proposes to provide to TOTE, Counsel for Staff stated again that the question is whether the parties could come to an agreement and avoid filing "...a motion to dismiss based on some concerns we may have about the Commission's jurisdiction in this area."<sup>5</sup>

6. Counsel for Public Counsel stated that Public Counsel sees the same issues as Staff and identified, among other things, the issue of whether the service PSE proposes to provide to

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<sup>1</sup> Petition of Puget Sound Energy, Inc. for Commission Approval of a Special Contract for Providing LNG Service and a Declaratory Order Approving a Cost Allocation Methodology, dated August 11, 2015, filed in Docket No. UG-151663 ("PSE Petition").

<sup>2</sup> *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, Order 03 at ¶ 3 (Oct. 15, 2015) ("Order 03"). The due date for filing the briefs was moved to November 24, 2015.

<sup>3</sup> Oshie, TR. 44: 16-20.

<sup>4</sup> Oshie, TR. 45:20-23.

<sup>5</sup> Oshie, TR. 46:24-47:11.

TOTE is a regulated service.<sup>6</sup> Counsel for PSE concurred that although PSE has filed for a regulated service, parties had raised policy issues regarding that request and if it becomes an issue of whether the Commission has jurisdiction, that legal issue with a policy basis could be addressed through filing a statement of facts and law with briefing on the issue.<sup>7</sup>

7. The Administrative Law Judge opined that it sounded like at this stage the issues are policy and legal issues and not factual issues. He pointed to the 2000/2001 time frame and early telecommunications cases in which “threshold jurisdictional issues” were taken up first and suggested using that approach here.<sup>8</sup> This resulted in the parties agreeing to see if they could develop a common position on the threshold jurisdictional issues or instead, have one round of briefing on their respective positions.<sup>9</sup> These understandings were described in Order 03 as “issues of law and policy that raise threshold questions” and “issues that do not involve contested facts” that would either be resolved by the parties or the subject of simultaneous briefs.<sup>10</sup>
8. Shortly after the October 13 technical conference, the parties had numerous exchanges of a Consolidated Joint Statement of Issues, Stipulations of Fact and Stipulated Exhibit List and held one conference call to discuss the draft document. On November 19, 2015, Public Counsel filed a motion requesting an extension of time to file “their legal memoranda regarding jurisdiction.” On November 23, the Northwest Industrial Gas Users (“NWIGU”) informed the Commission that they were not taking a position on and would not be filing a brief on the threshold issues identified in Order 03. The parties were not able to agree on the statement of

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<sup>6</sup> ffitich, TR. 48: 22- 49: 2.

<sup>7</sup> Kuzma, TR. 59, lines 11-25.

<sup>8</sup> Moss, TR. 60:13- 61: 15.

<sup>9</sup> Moss, Oshie, ffitich, Kuzma, TR. 64:17-25 and 65:6-8.

<sup>10</sup> See, note 2, *infra*.

issues and stipulated facts, therefore PSE, the Commission Staff and Public Counsel filed simultaneous briefs.

9. Consistent with the agreement made at the October 13 technical conference and Order 03, PSE identified the threshold issue in the PSE Brief as the following:

Can the Commission exercise jurisdiction, pursuant to Title 80 RCW, over sales of liquefied natural gas by PSE to TOTE pursuant to the TOTE Special Contract?<sup>11</sup>

10. Consistent with the agreement made at the October 13 technical conference and Order 03, Public Counsel identified the following threshold issue in the Public Counsel Memorandum of Law Regarding Jurisdiction (the “Public Counsel Brief”):

Is the Commission granted 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.<sup>12</sup>

Public Counsel states further that its “issue” is a threshold question.

11. Rather than defining the issue consistent with the parties’ agreement and Order 03, Staff clearly ignored the Order and presented the following “Relief Requested by Staff” in the Staff Brief on Issues of Law and Fact (“Staff Brief”):

A Commission determination that it declines to exercise jurisdiction over PSE’s contract with TOTE, and allows PSE to form a subsidiary consistent with the applicable merger requirements in order to promote the development of LNG without creating unnecessary regulatory barriers to non-regulated parties.<sup>13</sup>

The “Relief Requested by Staff” goes way beyond the type of policy, legal and threshold jurisdictional issues that were discussed in the October 13 technical conference and contemplated by Order 03. In addition, the Relief Requested by Staff goes well beyond the two issues PSE

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<sup>11</sup> PSE Brief at ¶ 2.

<sup>12</sup> Public Counsel Brief at ¶ 16.

<sup>13</sup> Staff Brief at ¶ 3.

presented in its Petition. As PSE demonstrates herein, significant portions of the Staff Brief should be stricken. If the Administrative Law Judge declines to strike the portions of the Staff Brief as requested, PSE seeks leave to file a responsive brief to address the myriad issues presented by Staff's Brief. This would be consistent with the Administrative Law Judge's comments at the October technical conference that if "something comes really out of left field" a party can ask leave to file a reply.<sup>14</sup> The entirety of Staff's Brief is certainly something that came out of left field.

## II. MOTION TO STRIKE

### A. **The Portions of the Staff Brief that PSE is Requesting be Stricken Are Not Relevant to the Threshold Jurisdictional Question Posed for Briefing and Should Be Stricken**

12. PSE has created a table that describes the portions of the Staff Brief that (i) are outside the limited scope of the issues the parties were requested to brief, or (ii) are not supported by the evidence. The table is included as Attachment A. Some portions of the Staff Brief are included in both categories. These portions of the brief are not relevant and therefore cannot be relied upon in deciding the jurisdictional question currently at issue in this proceeding.

#### 1. **Portions of the Staff Brief Are Outside the Limited Scope of the Briefing**

13. The Staff Brief addresses matters well beyond the threshold jurisdictional question posed for briefing such as "allowing" PSE to form a subsidiary to promote the development of LNG. There is nothing in the PSE Petition or in any of its responses to discovery that indicate PSE is considering anything other than providing the LNG service to TOTE as a regulated service. The portions of the Staff Brief that are outside the limited scope of the briefing should be stricken.

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<sup>14</sup> Moss, TR. 65:1-4.

14. It is clear that all parties and the Administrative Law Judge understood the scope of the issues introduced by Counsel for Staff at the October 13 conference as basically whether the Commission has jurisdiction to regulate the LNG service PSE proposes to provide to TOTE and if it does have jurisdiction whether it should be exercised. The comments regarding the threshold legal and policy issues made by Public Counsel, the Administrative Law Judge and PSE, as well as Counsel for Staff all point to this basic jurisdictional issue. The scope of the briefing required by Order 03 is narrow and any order on the briefs should cover only that narrow jurisdictional issue.

**2. Portions of the Staff Brief Are Not Supported by Evidence**

15. The Staff Brief also includes considerable information and “facts” that are not supported by evidence. For example, the Staff Brief claims that the commercial relationship evidenced by the TOTE Special Contract bears little relationship to a regulated service. The Staff Brief points to a number of provisions in the TOTE Special Contract that purportedly “effectively divorce TOTE from PSE’s as-filed tariffs.” However, many comments in the Staff Brief regarding the TOTE Special Contract indicate that Staff misunderstands the provisions and its negative characterizations of the provisions are not supported. For example, the Staff Brief incorrectly suggests that section 2.3.1(c) of the TOTE Special Contract caps the price paid by TOTE for LNG when in fact the provision actually limits PSE’s cost exposure.<sup>15</sup> As another example, the Staff Brief erroneously states that the TOTE Special Contract requires PSE to deliver LNG fuel to TOTE from sources other than the Tacoma LNG Facility and that PSE is required to source and deliver an alternative supply of LNG to TOTE until January 1, 2021.<sup>16</sup> In fact, the agreement requires the parties to cooperate in good faith to secure an interim supply and PSE is

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<sup>15</sup> Staff Brief at ¶ 26.

<sup>16</sup> Staff Brief at ¶¶ 22-23.

allowed, but not required, to serve TOTE from alternative sources if the Tacoma LNG Facility is not available. Moreover, the Commission's rules explicitly provide for special contracts (WAC 480-80-143) and establish the relationship between service under a special contract and a utility's tariffs. WAC 480-80-010, *et seq.*

16. In addition, considerable portions of the Staff Brief are based upon the position that distribution of LNG as transportation fuel is a competitive enterprise rather than a monopoly.<sup>17</sup> Setting aside the question of the relevance of these portions of the brief, there is nothing in the record of this proceeding that addresses whether the distribution of LNG as transportation fuel is a competitive enterprise. Neither is there any evidence in the proceeding that the Commission regulates only monopolies and not entities engaged in competitive enterprises. Moreover, there are references throughout the Staff Brief to PSE "refining" natural gas and to LNG as a highly "refined" product.<sup>18</sup> To be clear, all natural gas delivered by Northwest Pipeline to PSE has previously been refined; PSE will produce LNG by liquefying natural gas. These are just three examples of portions of the Staff Brief that are not supported by evidence. As shown in Attachment A, the Staff Brief is filled with similar unsupported information and purported "facts", all of which should be stricken.

**B. Failure to Strike the Portions of the Staff Brief as Requested Would Violate PSE's Due Process Rights**

17. PSE has a due process right to an order on the threshold legal, policy and jurisdictional issues that is based on the applicable law as applied to the relevant facts.<sup>19</sup> If the portions of the Staff Brief are not stricken as requested by PSE, the order will be based on purported "facts" and

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<sup>17</sup> Staff Brief at ¶¶ 35-49.

<sup>18</sup> Staff Brief at ¶¶ 5, 52, 56, 66.

<sup>19</sup> "In all jurisdictions, the rate making authority is required to gather facts upon which to base an order affecting rates, and from those facts make findings which support the order entered." *State ex rel. Pac. Tel. & Tel. Co. v. Dep't of Pub. Serv.*, 19 Wn.2d 200, 215, 142 P.2d 498, 507 (1943).

information that is beyond the scope of the jurisdictional issues and not supported by evidence. It would be reversible error to answer the threshold legal, policy and jurisdictional questions to be addressed in the briefs based on facts that are beyond the scope of the questions at issue or are not supported by evidence.

18. Although PSE raised two issues in its Petition, Order 03 required parties to file briefs on the threshold question of whether the Commission has jurisdiction to consider PSE's first request regarding approval of the TOTE Special Contract. There are two parts to this threshold jurisdictional question: (i) whether the Commission *can* exercise jurisdiction over the TOTE Special Contract, and (ii) whether the Commission *should* exercise jurisdiction over the TOTE Special Contract. However, the first part is the only part of the threshold jurisdictional question at issue in the briefing required by Order 03. It is possible that certain of the issues raised in the Staff Brief may be relevant to the second part of the question, whether the Commission should exercise jurisdiction over sales of LNG by PSE to TOTE. It would be premature to allow those portions to remain in the universe of documents and information relied upon to make the decision on the first part of the questions, whether the Commission can exercise its jurisdiction over the TOTE Special Contract.

**C. The Commission's Procedural Rules Support Striking the Portions of the Staff Brief PSE is Requesting Be Stricken**

19. The Commission's rules regarding irrelevant evidence provide support for striking the irrelevant information in Staff's Brief. WAC 480-07-490 provides that "[i]f irrelevant matter would unnecessarily encumber the record, the document shall not be received in evidence ...." In addition, WAC 480-07-495 provides that "[t]he presiding officer may exclude evidence that is *irrelevant, repetitive, or inadmissible*, whether or not a party objects to the evidence." (emphasis added). Although a brief is not "evidence", the same policy that underlies the Commission's

rules that allow for excluding irrelevant or inadmissible evidence would apply to portions of the Staff Brief filed in response to Order 03. Indeed, the Commission's rule for briefs requires that portions "of the record relied upon" be cited. WAC-480-395(1)(c)(iv) In order to be included in the record, the information would have had to be admitted in evidence. Therefore, irrelevant or inadmissible information included in a brief should be excluded. Moreover, as described above, the due process concerns raised by the offending portions of the Staff Brief require that those portions be stricken.

20. The Commission's procedural rules governing the filing of pleadings and motions require verification of the information provided in the brief. WAC 480-07-395(2) Although the Staff Brief may not be considered a pleading, the declaration of David C. Gomez was filed in support of the Staff Brief. As described above, considerable portions of the Staff Brief are not supported by the evidence PSE submitted in its initial filing. The Gomez declaration, however, addresses only a single issue concerning the bidding process related to providing LNG to TOTE for its marine vessels. The Staff Brief is filled with unsupported "facts" for which no verification has been offered. Consistent with WAC 480-07-395(2), the information PSE seeks to have stricken from the Staff Brief should not be accepted and instead should be stricken.

### **III. MOTION FOR LEAVE TO FILE REPLY BRIEF**

21. Pursuant to WAC 480-07-375(1)(d), PSE hereby seeks leave to file a reply brief in response to the Staff Brief filed on November 24, 2015. This motion is offered in the alternative and need only be acted upon if PSE's Motion to Strike is not granted. This motion is also consistent with discussions in the October 13 conference regarding having only one round of briefing and the Administrative Law Judge's comment that if "something really comes out of left

field,” a party could seek leave to reply.<sup>20</sup> Although it is likely that none of the parties expected that circumstance to present itself, it has; PSE is therefore availing itself of the remedy provided by the Commission’s rules in the event its Motion to Strike is not granted. PSE’s reply brief is being filed herewith as Attachment B.

22. The briefs required by Order 03 were filed simultaneously. PSE therefore does not have an opportunity to respond to the statements in the Staff Brief that go beyond the jurisdictional issue or are not supported by evidence. Due process requires that in the event PSE’s Motion to Strike is not granted, PSE must have the opportunity to respond to the arguments made in the Staff Brief.

23. Absent striking portions of the Staff Brief, PSE respectfully submits that being permitted to reply to the Staff Brief is the minimum the Commission can do to prevent the decision making on the threshold jurisdictional issue from being tainted and prevent prejudice to other parties.

#### **IV. CONCLUSION**

24. For the reasons set forth above, PSE respectfully requests that: (i) its Motion to Strike Portions of the Staff Brief be granted; or (ii) in the alternative that is Motion Seeking Leave to File a Reply be granted and its Reply Brief be accepted. The proposed Reply Brief is being filed concurrently herewith.

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<sup>20</sup> Moss, TR.:65:1-4.

DATED this 2nd day of December, 2015.

**Respectfully submitted**

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