

## 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

COMMISSION STAFF RESPONSE TO  
PUGET SOUND ENERGY, INC.'S  
MOTION TO STRIKE

### I. Overview

1 Commission Staff (“Staff”) opposes Puget Sound Energy Inc.’s (“PSE” or “Company”) motion to strike portions of Staff’s brief. Among its more than six-pages-long table of requests, PSE’s motion asks the Commission to strike Staff’s understanding of relevant facts, the lack of monopoly power in the LNG market, and several topic or concluding sentences with which PSE disagrees. PSE’s motion also appears to request that the Commission strike several sentences due to the Company’s perception that Staff omitted or used an overly-general footnote citation.

2 PSE’s request that the presiding officer in this case perform what is effectively a law review exercise is both unnecessary and wasteful. This Commission should not expend its limited time and resources going through six-plus pages of sentence-by-sentence and paragraph-by-paragraph disputes with Staff’s arguments.<sup>1</sup> The Commission has the legal authority and expertise to evaluate the overall credibility and relevance of evidence.

3 The evidence relied upon by Staff to craft its arguments is both relevant and material to the issue of jurisdiction. In fact, Staff’s brief is built upon the existing record in this case, and

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<sup>1</sup> Appendix A to PSE’s motion is a table of all paragraphs, sentences, or portions there of that PSE wants stricken. The table is over six pages long.

PSE's responses to formal Discovery Requests. The Commission can and should use its discretion and judgment to decide the threshold jurisdictional questions in this case. By following PSE's lead, the Commission would be constricted to whether it *can* exercise jurisdiction over PSE's marine fuel agreement with TOTE. There is no need to limit the Commission's review on this threshold issue.

4           The real question is whether the Commission *should* assume jurisdiction over PSE's agreement with TOTE. Whether the Commission *can or should* exercise jurisdiction over PSE's LNG service to TOTE is fundamentally the same question. To reach its recommendation, Staff approached the jurisdictional question by simply applying the facts as presented by PSE to the law. PSE's motion would remove such analysis, implying that the Commission should only engage in a "law review" type study of the Commission's general authority. This narrow review preferred by PSE would shed little light on the core questions specifically raised in this case.

5           Any Commission decision is bounded by the facts and the law. To ignore either would subject the Commission to possible appeal. In this case, Staff used the applicable facts presented by PSE, and applied the laws it believes applicable to PSE's filing. In the end, striking portions of Staff's brief is unhelpful, a misuse of the presiding officer's valuable time, and contrary to law.

## II. ARGUMENT

### A.     **The Commission Holds Broad Authority To Decide The Relevance of Evidence**

6           The Commission has wide discretion in admitting evidence.<sup>2</sup> The rules of evidence serve only as guidelines, and the Commission often has authority to allow any relevant evidence.<sup>3</sup> The

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<sup>2</sup> See RCW 34.05.452.

<sup>3</sup> See WAC 480-07-495. To illustrate the Commission broad authority with regard to evidence, the Administrative Procedure Act ("APA") explicitly permits the admission of hearsay evidence. In fact, RCW 34.05.452(1) states "[e]vidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs."

Commission also has the specialized expertise to read, review, and verify parties' evidence in Title 80 and Title 81 proceedings.<sup>4</sup> When in question, the presiding officer is empowered to exclude evidence that is irrelevant, repetitive, or inadmissible.<sup>5</sup>

7 Under the circumstances, the Commission has no obligation to strike any reference or argument contained in Staff brief. PSE's substantive arguments go to the relevance and credibility of the information presented by Staff. Decisions as to both relevance and credibility are within the discretion of the presiding officer. More importantly, even though the Commission has discretion to exclude irrelevant information, the evidence PSE disputes is absolutely relevant. In fact, the vast majority of PSE's motion disputes information the Company itself presented in its filing. The Company may disagree with Staff's reading of that information, but PSE does not have the general right to strike argument or conclusions with which it disagrees.

8 The standard for reliance upon evidence before the Commission is whether a reasonably prudent person would do so.<sup>6</sup> Here, the facts and background relied upon by Staff to support its filing are contained in the very documents that PSE included in its pre-filed testimony or otherwise provided the parties pursuant to formal Discovery Requests. In most circumstances, documents and exhibits such as these are used by the Commission to inform and support its decisions. Staff simply asks the Commission to consider this material in light of the testimony filed and the applicable law. It is entirely appropriate for the Commission to do so under any evidentiary standard.

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<sup>4</sup> See RCW 34.05.461(5).

<sup>5</sup> See WAC 480-07-495(1). See also, *David and James Stevens et al. v. Rosario Utils.*, Docket No. UW-011320, Third Supplemental Order, at 1-7 (July 12, 2002); *AT&T Communications of the Pac. Northwest Inc. v. Verizon Northwest Inc.*, Docket No. UT-020406, Fifth Supplemental Order (Feb. 21, 2003).

<sup>6</sup> See RCW 34.05.461(4). "Findings [of fact] shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible at civil trial."

**B. PSE's Motion Misstates The Law; The Commission Owes No Obligation To Strike Staff's Brief.**

9 PSE's motion to strike throws several legal theories at the Commission. PSE first cites the limited scope of the briefing in this case, then questions the credibility behind portions of Staff's brief. It then cites the Company's own due process rights, and, lastly, discusses the Commission's procedural rules in WAC 480-07-490 and WAC 480-07-395. The Company concludes that the law requires the Commission to strike portions of Staff's brief. PSE is wrong on all counts.

10 First, the applicable provisions of law are found in the Administrative Procedure Act ("APA").<sup>7</sup> Under RCW 34.05.437(1), a presiding officer "shall give all parties full opportunity to submit and respond to pleadings, motions, objections, and offers of settlement." Thus, if the Commission does find Staff's brief blurs into a pleading, the law only requires PSE an opportunity to reply. The pleadings provision in the Administrative Procedure Act does not require the Commission to strike Staff's brief.

11 Second and as noted above, the Commission has the statutory authority and the specialized expertise to evaluate the credibility of evidence. Without question, the Commission can assess the evidence presented and determine the appropriate weight to afford that evidence.

12 Further, RCW 34.05.452(1) states the Commission "*shall* exclude evidence that is excludable on constitutional or statutory grounds" but "*may* exclude evidence that is irrelevant, immaterial or unduly repetitious." (Emphases added).<sup>8</sup> Thus, among its various theories, only the Company's due process claim could require the Commission to exclude evidence in Staff's brief.

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<sup>7</sup> RCW 34.05.437 and RCW 34.05.452(1)

<sup>8</sup> In relevant part, Commission rules (WAC 480-07-495(1) second ¶) reiterate this APA standard.

13 PSE's due process claim, however, relies on the assertion that Staff's brief contains "facts that are beyond the scope of the questions at issue or are not supported by evidence." Therefore, the Company's due process argument is based on disputes over 1) relevance ("facts beyond the scope of the questions at issue") and 2) credibility ("not supported by evidence"). As noted above, credibility and relevance are not constitutional questions in the administrative setting. Credibility goes to the weight afforded to the evidence and relevance is a question squarely within the presiding officer's discretion under RCW 34.05.452(1). PSE's due process claim is thus overstated and incorrect.

### III. THE INFORMATION IN STAFF'S BRIEF IS RELEVANT

14 Although the applicable law gives the Commission discretion to exclude irrelevant evidence, the evidence PSE challenges is clearly relevant. To Staff, the evidence presented will actually aid the Commission in addressing the issues in this case. While PSE has challenged the weight of the evidence, Staff sees no legal basis to challenge its consideration by the Commission.

15 The standard for reliance upon evidence before the Commission is whether a reasonably prudent person would do so.<sup>9</sup> Here, the facts and background relied upon by Staff to support its filing were included by PSE in its pre-filed testimony or in responses to formal Discovery Requests. Staff is simply asking the Commission to consider this material in light of the testimony filed and the applicable law.

### IV. CONCLUSION

16 To make its decision, Staff encourages the Commission to carefully review PSE's contract with TOTE, and make its own decision as to the meaning of the agreement's plain and

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<sup>9</sup> See RCW 34.05.461(5). "Findings [of fact] shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible at civil trial."

unambiguous words.<sup>10</sup> There is no need for the Commission to employ the parol evidence rule to add clarity to the plain meaning of the words used by PSE and TOTE.<sup>11</sup> Staff accepted the agreement's language as a clear expression of the parties' intent.<sup>12</sup>

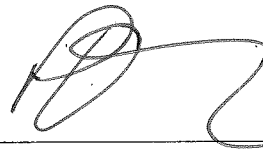
17           Upon its review, the Commission should determine that the evidence relied upon by Staff is absolutely relevant to the question of whether the Commission should exert its jurisdiction over PSE's sales of LNG to TOTE. This is the context presented by this stage of the proceeding, and the context in which the Commission should consider the threshold issues presented by the parties.

18           Said succinctly, the Commission should deny PSE's motion to strike the parts of Staff's brief with which it disagrees. Alternatively, the Commission could hold the question of jurisdiction until the record in this matter has closed. Either way, the issue is now or will be presented and prepared for disposition.

DATED this 10<sup>th</sup> day of December 2015.

Respectfully submitted,

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<sup>10</sup> Further, the Commission should also review and consider PSE's response to Discovery Request 02. In this series of documents, the Company describes its plans, intentions, and market and risk assessments.

<sup>11</sup> The parol evidence rule applies to written contracts to safeguard the terms of the contract. The courts assume by the parol evidence rule that contracts contain the terms and provisions that the parties specifically intended and lack those provisions that the parties did not want. *See also Berg v. Hudesman*, 115 Wn 2d 157, 801 P.2d 222; 1990 Wash. LEXIS 168 (1990).

<sup>12</sup> This is a contract developed by two corporate entities that have demonstrated the skills and legal support necessary to express their intent in a binding agreement.