

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

)	
In the Matter of the Petition of	)	DOCKET UG-151663
PUGET SOUND ENERGY)	
for (i) Approval of a Special Contract	)	ORDER 04
for Liquefied Natural Gas Fuel Service)	
with Totem Ocean Trailer Express, Inc.	)	DENYING MOTION TO STRIKE;
and (ii) a Declaratory Order Approving	)	GRANTING MOTION TO FILE
the Methodology for Allocating Costs	)	REPLY BRIEF; PROVISIONALLY
Between Regulated and Non-regulated	)	DETERMINING JURISDICTIONAL
Liquefied Natural Gas Services	)	QUESTION; ESTABLISHING
	)	FURTHER PROCESS INCLUDING
	)	BRIEFING AND ORAL ARGUMENT
)	
	)	(Supplemental Briefs Due January 15,
	)	2016)
)	
	)	(Oral Argument Set for January 29,
	)	2016, at 9:30 a.m.)
.....)	

MEMORANDUM

I. Background

1 This docket concerns a proposal by Puget Sound Energy (PSE or the Company) to develop at the Port of Tacoma an LNG facility capable of receiving nearly 21,000 Decatherms per day (Dth/day) of natural gas from which it can produce approximately 250,000 gallons of LNG when liquefying at nameplate capacity.¹ The facility will be capable of storing approximately 8 million gallons of LNG.² PSE identifies three functions the facility is planned to perform:

¹ PSE Brief ¶ 10; PSE Petition ¶ 13. According to PSE witness Riding, “PSE’s largest gas supply resource is transported on firm pipeline capacity on Williams-Northwest Pipeline with a total of 532.9 MDth/day of capacity to PSE’s service territory. About half of the gas supply moved on NWP capacity is from British Columbia and about half of the gas supply is from Alberta and the Rockies.” Riding, Exh. No. CR-1HCT at 4:8-12.

² PSE Petition ¶ 13.

- The Tacoma LNG Facility would supply fuel to Totem Ocean Trailer Express, Inc. (TOTE), under a contract PSE entered with TOTE on October 27, 2014.
- The Tacoma LNG Facility would provide fuel for sales to other marine vessels or other purchasers.
- The Tacoma LNG Facility would serve as a peaking resource for PSE's core natural gas customers.³

PSE proposes that the first and third functions should be treated as part of the Company's regulated business, the first meeting the needs of a single customer, TOTE, under a "special contract" and the third providing capacity to meet core retail natural gas customers' peak requirements at tariffed rates.⁴ PSE proposes that the second function would be a separate, unregulated business.

- 2 With respect to the Company's proposal to supply fuel to TOTE, PSE discusses in its Petition that:

TOTE is a shipping company that transports approximately 30 percent of all consumer goods shipped to Alaska. TOTE operates two Orca class ships between the Port of Tacoma and the Port of Anchorage on a regimented schedule of sailings departing from Tacoma every Wednesday and Friday evening. TOTE selected PSE pursuant to a competitive bidding process to provide LNG as marine fuel for use in two Tacoma, Washington-based Orca class cargo ships. PSE therefore determined to construct an LNG storage facility at the Port of Tacoma (the "Tacoma LNG Facility"). PSE will provide TOTE with fuel for ships that are being converted from diesel to cleaner-burning natural gas. Using LNG will allow TOTE to exceed new, stricter emission standards in the maritime shipping industry.⁵

PSE entered into a contract with TOTE dated October 27, 2014.⁶

³ See PSE Petition ¶¶ 11, 30, 32-33.

⁴ According to PSE: "This peaking resource would allow PSE to avoid purchasing 365-day pipeline capacity to meet a few days of peak demand that may only occur once every few winters." PSE Brief ¶ 17 (citing PSE witness Garratt, Exh. No. RG-1CT at 9:19 – 10:23).

⁵ PSE Brief ¶ 6 (internal citations to PSE witness Garratt, Exh. No. RG-1CT omitted).

⁶ PSE Brief ¶ 1.

- 3 Concerning the Company’s proposal to provide fuel for sales to other marine vessels or other purchasers, it is not entirely clear but it does not appear that any such customers have been identified at this time. PSE discusses that such sales would be from “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).”⁷
- 4 PSE explains that its proposed use of the Tacoma LNG facility to provide peak capacity for its current natural gas service to retail natural gas customers located in its service territory in western Washington is an alternative discussed in the Company’s 2013 Integrated Resource Plan (IRP), which “demonstrated that PSE would have a need for peaking resources beginning in 2017.”⁸ PSE states that the LNG facilities’ use for peak shaving should “be regulated as part of the bundled distribution service PSE currently provides” and that “[t]here is no reason for this activity to be treated any differently than PSE’s current operation of [its] Gig Harbor LNG Satellite Plant.”⁹

II. Procedural History

- 5 On August 11, 2015, PSE filed with the Washington Utilities and Transportation Commission (Commission) a Petition for Approval of a Special Contract for Liquefied Natural Gas Fuel Service with TOTE, and a Declaratory Order Approving the

⁷ PSE Petition ¶ 30.

⁸ *Id.* ¶ 7. PSE’s 2013 IRP states that PSE was “considering development of a mid-scale LNG liquefaction and storage facility to serve the growing demand for LNG as a marine and vehicle transportation fuel.” The Company’s IRP suggests “the possibility of enhancing the design of the facility to substantially increase storage capacity and add vaporization equipment” so the facility could serve in addition as “a peaking resource for the PSE gas system.” The enhanced design was planned at that time to allow for diversion of the 20,000 Dth/day of natural gas required to meet “the daily liquefaction requirements of LNG transportation customers” and the vaporization of up to 30,000 Dth/day of stored LNG, to meet peak demands on PSE’s gas distribution system by providing up to 50,000 Dth/day of peak-day supply. PSE would keep transportation customers whole on peak days by supplying them with stored LNG.

PSE’s discussions of plant operations in its Petition in this docket are consistent with those in its IRP, but provide for expanded storage vaporization capacity. According to the Petition: “[the facility] will require nearly 21,000 Dth/day of natural gas when liquefying at nameplate capacity. Approximately 2,000 Dth/day will be used for the peaking resource and up to 19,000 Dth/day will be used to supply TOTE fuel sales and any other fuel sales.” PSE Petition ¶ 13. However, “[t]he Tacoma LNG Facility will be capable of injecting 66,000 Dth/day of vaporized natural gas and diverting up to 19,000 Dth/day of natural gas into PSE’s distribution system to provide 85,000 Dth/day of peak-day supply.” *Id.* ¶ 7.

⁹ PSE Petition ¶ 43.

Methodology for Allocating Costs between Regulated and Non-regulated Liquefied Natural Gas Services.

- 6 The Commission convened a prehearing conference in this docket at Olympia, Washington on September 8, 2015, before Administrative Law Judge Dennis J. Moss. Commission Staff, the Public Counsel Unit of the Office of Attorney General (Public Counsel), and the Northwest Industrial Gas Users (NWIGU) appeared and will continue to participate as parties.¹⁰ The Commission adopted a preliminary procedural schedule including technical conferences on September 18 and 21, and October 8, 2015. The parties agreed to reconvene in prehearing to discuss their progress on the afternoon of October 13, 2015.
- 7 Counsel for PSE, Staff, Public Counsel, and NWIGU each commented favorably during the second prehearing conference on the progress made during the three technical conferences and in additional communications, including discovery, during the September and early October time frame. The parties reported that they had identified and were working to resolve issues of law and policy that raise threshold questions concerning the Commission's jurisdiction, 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 issues that do not involve contested facts.
- 8 The Commission entered Order 03, its second prehearing conference order, on October 15, 2015. Order 03 stated that if issues remained after November 20, 2015, that could not be resolved on stipulated facts, then the Commission would establish early dates for response and rebuttal testimony, if needed, considering a planned January 29, 2016, hearing date.
- 9 PSE, Staff, and Public Counsel, following a short continuance granted in response to a request by Public Counsel, filed briefs on November 24, 2015. NWIGU filed a letter with the Commission on November 23, 2015, stating the organization elected not to brief "the threshold matters identified in the Prehearing Conference Order (Order 03)."

¹⁰ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See*, RCW 34.05.455. Public Counsel's is a statutory party. The Commission granted NWIGU's unopposed Petition to Intervene.

10 PSE filed on December 3, 2015, its “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.”

11 In this Order, the Commission denies PSE’s Motion To Strike, grants PSE’s alternative Motion To File Reply Brief, rules provisionally on the question whether the Commission can exercise jurisdiction over the subject matter of PSE’s Petition that initiated this docket, and establishes further process including opportunities for supplemental briefing and oral argument.

III. PSE’s Motion to Strike or In the Alternative To File Reply Brief

12 PSE filed its December 3, 2015, Motion to Strike under WAC 480-07-375(d), which provides:

(d) *Evidentiary motions.* Motions related to evidence are requests to limit or add to the record in a proceeding. Examples of motions related to evidence are motions to strike, motions in limine, and motions requesting authority to file supplemental or additional testimony.

Briefs are required to include argument, citations to authority, and citations to the record. Briefs cite to evidence, but they are not themselves evidence. A motion to strike portions of a brief under the authority PSE cites accordingly is procedurally inappropriate and we deny PSE’s motion to strike.

13 The procedurally appropriate filing under the circumstances that concern PSE, as the Company presents in the alternative, is a motion to file a reply brief. This is a procedural motion allowed, as PSE recognizes, under WAC 480-07-375(1)(b). A motion to file a reply brief, accompanied as here by a reply brief, provides an adequate opportunity for a party to respond to statements in an opponent’s brief that it considers to be inappropriate for one reason or another. In this case, PSE argues significant portions of Staff’s brief “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.”¹¹ Because we agree with PSE that Staff’s brief, in some respects, goes beyond what the Commission contemplated in setting the threshold question of jurisdiction for briefing, we grant its motion to file a reply brief. In addition, we accept Appendix A to PSE’s motion to strike as a useful reference in connection with its reply brief. Appendix A provides specific references to the portions of Staff’s brief

¹¹ PSE Motion ¶ 1.

that PSE argues are inappropriate and states the bases for the Company's arguments with respect to each. The stated bases in Appendix A are that particular arguments by Staff are either "beyond the scope of the briefs" or "not supported by the evidence." We will not parse through Staff's brief to identify in which instances we agree with PSE and in which instances we disagree. It is sufficient to observe that we are mindful of each as we consider Staff's brief and PSE's Reply.

14 Consistent with its arguments in its motion to strike, as summarized Appendix A to that motion, PSE introduces its arguments in reply to Staff's brief, in part, as follows:

On November 24, PSE, Public Counsel and Staff filed briefs. Each of PSE's and Public Counsel's Brief focused on the threshold jurisdictional question contemplated by Order 03—whether the Commission can exercise jurisdiction, pursuant to Title 80 RCW, over sales of liquefied natural gas ("liquefied natural gas" or "LNG") by PSE to TOTE pursuant to the TOTE Special Contract. Portions of the Staff Brief on Issues of Law and Fact ("Staff Brief") are (i) outside the limited scope of the issues contemplated by Order 03, (ii) not supported by evidence, or (iii) involve asserted facts that PSE would contest in the proceeding. PSE is therefore filing this Reply Brief to address claims made in the Staff Brief that are outside the scope of the issues the parties were requested to brief, clarify the record, and correct errors.¹²

PSE argues that the only question at issue at this stage of the proceeding is:

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?¹³

¹² PSE Reply Brief ¶ 3.

¹³ PSE Reply Brief ¶ 7 (citing PSE Brief ¶ 2).

PSE also appears to find Public Counsel's statement of the issue to be on the mark, as follows:

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.¹⁴

We agree that as circumstances have evolved and revealed themselves to us, these alternative statements of the issue appropriately define the limits of what we should consider and decide at this juncture.

In fairness to Staff, the issue, or issues to be briefed were not discussed with sufficient clarity during the October 15, 2015, prehearing conference or stated definitively in Order 03 as PSE now argues, and we now recognize. This is because it was unclear at the time of the conference whether the parties would be able to stipulate to a set of facts on which the parties could rely to go beyond the narrow question whether the Commission *can* exercise jurisdiction under RCW Title 80 over sales of liquefied natural gas by PSE to TOTE as set out in PSE's contract with TOTE.¹⁵ While Staff's brief captures the narrow question whether we *can* exercise jurisdiction, Staff also casts a broader net and presents arguments on the question whether we *should* exercise jurisdiction over PSE's contract with TOTE. Staff asks for:

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.¹⁶

As we now perceive the posture of this case, we find that Staff's arguments in its brief rely in part on statements of fact that may be contested and thus require the opportunity for further process and the development of a more robust record. We do not consider these arguments here. Instead, we limit our discussion to the narrow legal issue posited

¹⁴ *Id.* (citing Public Counsel Brief ¶ 16).

¹⁵ Thus, we do not agree with PSE's assertion that "[t]he Staff Brief exceeds the scope of the type of policy, legal and threshold jurisdictional issues discussed at the prehearing conference on October 13, 2015, and contemplated by Order 03." PSE Reply Brief ¶ 8.

¹⁶ *Id.* (quoting Staff Brief ¶ 3).

by PSE and Public Counsel, and consider Staff's brief to the extent its arguments are pertinent to this issue.¹⁷

IV. Discussion and Determination of Threshold Issue

- 15 Considering both PSE's and Public Counsel's individual statements of the threshold issue, we think it is useful to restate it here as a two-part question:

Does the Commission have general jurisdiction under Title 80 RCW to regulate sales of liquefied natural gas by gas companies for use as transportation fuel? If so, can the Commission exercise its jurisdiction over sales of liquefied natural gas by PSE to TOTE pursuant to the TOTE contract as requested in PSE's Petition for approval of a special contract for liquefied natural gas fuel service with TOTE?

The short, direct answers are "yes" to the first question and "no" to the second question.

A. Does the Commission have general jurisdiction under Title 80 RCW to regulate sales of liquefied natural gas by gas companies for use as transportation fuel?

- 16 All three parties' address in their briefs the statutory framework that defines our jurisdiction generally, and specifically, with reference to PSE's contract with TOTE. We agree that this is the right approach to answering the question presented. PSE argues:

PSE is a "gas company" as defined in RCW 80.04.010. Liquefied natural gas is "natural gas" as defined by WAC 480-90-023 in its liquid rather than gaseous state due solely to a refrigeration process. The Commission has jurisdiction over sales of natural gas by gas companies under Title 80 RCW. Therefore, it should be beyond dispute that the Commission has jurisdiction over sales of LNG by PSE to TOTE pursuant to the TOTE Special Contract.¹⁸

¹⁷ We note our agreement with Staff's observation in its Response to Puget Sound Energy, Inc.'s Motion To Strike that many of the facts on which Staff relies were presented by the Company in its filing (Staff Response ¶ 8). It is on such facts that we rely in this Order, taking PSE's statements of fact in its Petition and in its witnesses' testimony as true for purposes of our consideration here. While these facts may be subject to objection, or contested, in an evidentiary hearing, taking them as true for purposes of considering the threshold issue of jurisdiction cannot be said to infringe on PSE's due process rights.

¹⁸ PSE Brief ¶ 1.

Staff argues that “the Commission would have to broadly interpret its enabling statutes to include LNG service” and “cautions against reading the statutes so broadly as to include LNG.”¹⁹ Staff acknowledges that PSE is a “gas company” as defined in our statutes,²⁰ and concedes that “the Commission could construe LNG to be a *form* of natural gas,”²¹ but disputes PSE’s contention that LNG delivered for use as fuel for TOTE’s marine vessels is natural gas based on its argument, among others, that RCW 80.04.010(15), read with other statutes, limits the Commission authority to regulate natural gas to such “gas used *for light, heat or power.*”²² Staff’s legal analysis leads it to the conclusion that our statutes “cannot be logically construed to include marine propulsion as being within the commonly understood frameworks of ‘light, heat or power.’”

17 Public Counsel begins its statutory analysis with the observation that “[i]n determining jurisdiction, the starting point is the principle that “an agency possesses only those powers granted by statute.”²³ Public Counsel acknowledges “that PSE meets the statutory definition of ‘gas company’ as a general matter,” observing further that “[t]he 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.”²⁴

18 Public Counsel argues, however, that whether PSE can be considered a “gas company” under Title 80 RCW is “less clear with respect to the provision of LNG as a marine fuel.”²⁵ Along the same lines of analysis as Staff, Public Counsel argues that “[i]n 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.*”²⁶ Contrasting the undefined use of “power” in Title 80 RCW to the use of “motive power” in Title 81

¹⁹ Staff Brief ¶ 33.

²⁰ *Id.* ¶ 51.

²¹ *Id.* ¶ 52 (emphasis added by Staff).

²² *Id.* (emphasis added by Staff); *see also Id.* ¶ 53.

²³ Public Counsel Brief ¶ 18 (citing *In Electric Lightwave, Inc.*, 123 Wn.2d 530, 536-537, 869 P.2d 1045 (1994)).

²⁴ *Id.* ¶ 25 (citing *Wash. Utils. & Transp. Commission v. PSE*, Dockets UE-111048/UG-111049, Order 08 ¶ 514).

²⁵ *Id.* ¶ 26.

²⁶ *Id.* (citing RCW 80.04.101(15) (emphasis added by Public Counsel)).

RCW and other statutes,²⁷ Public Counsel posits that “the term is most reasonably read to mean electrical power, rather than motive power for vehicles.”²⁸ Public Counsel argues:

The legislature has consistently employed the term “motive power” when 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.’”²⁹

- 19 We determine that the Commission’s general jurisdiction under Title 80 RCW includes the authority, under appropriate circumstances, to regulate sales of liquefied natural gas by gas companies for use as transportation fuel.
- 20 The Commission’s jurisdiction over gas companies, and the commodities they sell for various uses, is broad. WAC 480-90-023 defines gas as “any fuel or process gas, whether liquid petroleum gas, manufactured gas, natural gas, or any mixture of these.”³⁰ “Natural gas” means “a mixture of gaseous hydrocarbons (chiefly methane) and nonhydrocarbons that occur naturally in the earth.”³¹ LNG is pretreated natural gas that has been cooled to -260 degrees Fahrenheit and converted to a liquid state for ease of storage or transport. The Commission’s jurisdiction does not depend on the state of the matter (*i.e.*, liquid or gaseous) when it is transported, stored, or delivered to a customer. For example, we regulate propane, which is transported and delivered to some PSE customers in a liquid state, stored at their premises in that state, then gasified by their consumer-owned gas

²⁷ *Id.* ¶ 29. Public Counsel offers as examples references to 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).

²⁸ *Id.* ¶ 27.

²⁹ *Id.* ¶ 29 (citing *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))).

³⁰ WAC 480-90-023.

³¹ *Id.* The reference to “occur[ring] naturally in the earth” in the definition of “natural gas” in WAC 480-90-023 distinguishes natural gas from manufactured gas, which is also defined in WAC 480-90-023 as “gas produced artificially by any process.” Cooling natural gas to a liquid state is not a process for producing “artificial” gas. The liquefied natural gas is still natural gas.

appliances that restore it to a gaseous state at standard atmospheric pressure.³² Moreover, and directly to the point, the Commission has for some time regulated LNG that PSE stores in its Gig Harbor Facility for regasification and delivery to customers in that part of its service territory.

Nor do we think the limitation in our statute to gas used for light, heat or power forecloses our exercise of jurisdiction over LNG used for transportation fuel by marine or terrestrial vehicles. Public Counsel's argues incorrectly that specific references to "motive power" in Title 81 RCW and in other statutes unrelated to the Commission's statutory purpose mean that the use of "power" in Title 80 RCW must exclude motive power and pertain only to electricity. To the contrary, the term "power" encompasses all forms of power, including electric power and motive power. A common definition of power is "energy that is produced by mechanical, electrical, or other means and used to operate a device."³³ The combustion of natural gas in an engine that gives motive force to a vehicle, whether from a compressed natural gas (CNG) storage device or a liquefied natural gas (LNG) storage device³⁴ meets this definition of power.³⁵ In other words, "power" includes "motive power" and other forms of power. The use of "motive power" in Title 81 RCW and in other statutes thus reflects the legislature's intent in those laws to define a subset relative to the broader meaning of the word "power" used in other statutes without qualification, as in Title 80 RCW.

Our analysis is borne out by legislation amending Title 80 RCW with specific reference to CNG and LNG. RCW 80.28.290 became effective in 1991. It states:

The commission shall identify barriers to the development of refueling stations for vehicles operating on compressed natural gas, and shall develop policies to remove such barriers. In developing such policies, the commission shall consider providing rate incentives to encourage natural

³² Schedule 53.

³³ Oxford online dictionary at <http://www.oxforddictionaries.com/definition/english/power> .

³⁴ The volume of natural gas in its native state at standard atmospheric pressure and temperature is too great to use it directly to fuel any type of engine that is practical for a marine or terrestrial vehicle. CNG occupies less than one percent of the volume natural gas occupies at standard atmospheric pressure. LNG occupies about 1/600th the volume of natural gas in a gaseous state.

³⁵ We note in this connection that the Commission exercises jurisdiction over CNG that is provided by PSE to fuel natural gas motor vehicles. *In the Matter of the Revision to Tariff WN U-2, Natural Gas Service of Puget Sound Energy Designating a New Schedule No. 54, Optional Gas Compression Service*, Docket UG-140721, Order 01 (July 24, 2014).

gas companies to invest in the infrastructure required by such refueling stations.

Thus, for more than two decades we have had express authority and express obligations with respect to natural gas in a state other than its state in nature, and for use as fuel for vehicles (*i.e.*, for motive power). Also in 1991, the legislature enacted RCW 80.28.280 that, among other things, states:

The legislature also finds that well-developed and convenient refueling systems are imperative if compressed natural gas is to be widely used by the public. The legislature declares that the development of compressed natural gas refueling stations are in the public interest.

The legislature recently amended RCW 80.28.280 to include LNG. The currently effective statute states:

- (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 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.

Thus, insofar as LNG facilities owned by PSE are concerned, the legislature has placed an affirmative duty on the Commission to protect public entity purchasers of LNG for use as marine fuel from rate discrimination or undue preferences which is required generally

by our statutes³⁶ and practices as we regulate the rates, terms, and conditions of service provided by gas companies such as PSE. Whether the Commission can regulate more specifically PSE's proposed sales of LNG to TOTE from the facility it plans to build at the Port of Tacoma is the second part of our inquiry, discussed and resolved below.

B. Can the Commission exercise its jurisdiction over sales of liquefied natural gas by PSE to TOTE pursuant to the TOTE contract as discussed in PSE's Petition?

21 Whether "any person or corporation is conducting business subject to regulation under [Title 80 RCW] . . . is a question of fact to be determined by the commission."³⁷ Our determination above that LNG for use as marine fuel is subject to our general jurisdiction does not answer the question whether PSE is proposing to conduct the business of sales and delivery of LNG as marine fuel in a way that triggers our authority. The key question remaining, insofar as jurisdiction over the TOTE contract is concerned, is whether the LNG service PSE proposes to provide to TOTE is a "public service."

22 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."

Under RCW 80.04.010(23), a "gas company" is a "public service company" subject to Commission jurisdiction.

23 The Commission previously has discussed the point that the Commission's regulatory authority "is predicated upon the proposition that the service rendered is public service."³⁸ As the Washington Supreme Court stated in *Inland Empire*, "[a] corporation

³⁶ See RCW 80.28.090 (unreasonable preference prohibited) and RCW 80.28.100 (rate discrimination prohibited).

³⁷ RCW 80.04.015 ("The commission may consider any and all facts that may indicate the true nature and extent of the operations or acts.")

³⁸ *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 (2014 Interpretive Statement) ¶ 55 (July 30, 2014).

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.”³⁹

24 In its 2014 Interpretive Statement in Docket UE-112133, the Commission identified several factors that Washington courts use to analyze the “public service” requirement. Central to this is the question whether the service is offered generally to the public or is offered selectively.⁴⁰

25 The Washington Supreme Court has said that:

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.⁴¹

26 The facts in this instance, as described by PSE, do not establish that PSE proposes to hold out the service it will provide to TOTE to all shippers within the requirements of Title 80 RCW. In fact, PSE proposes to offer the unsubscribed capacity of the Tacoma LNG Facility (*i.e.*, the capacity not required to meet peak shaving demands and sales to TOTE of LNG as marine fuel) as non-regulated service.⁴² It appears, then, that PSE does not presently intend to offer LNG for marine fuel as a regulated service that will be held out to the public.

27 RCW 80.28.110 provides that:

Every gas company...engaged in the sale and distribution of gas...shall, upon reasonable notice, furnish to all persons and corporations who may

³⁹ *Inland Empire Rural Elec. v. Dep't of Pub. Serv.*, 199 Wash. 527, 537, 92 P.2d 258 (1939)). See also *West Valley Land Co., Inc. v. Nob Hill Water Ass'n*, 107 Wn.2d 359, 729 P.2d 42 (1986).

⁴⁰ 2014 Interpretive Statement ¶ 59.

⁴¹ *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)).

⁴² PSE Petition ¶ 11.

apply therefor and be reasonably entitled thereto, suitable facilities for furnishing and furnish all available gas... services...as demanded[.]

Thus, if PSE is offering LNG as marine fuel as a public service it has an obligation to serve on a non-discriminatory basis, on demand, all marine shippers that request such service. PSE's filing does not establish facts to show that it is holding out to provide LNG service to all customers who are reasonably entitled to service. To the contrary, the facts that PSE has provided show that TOTE will be served under the terms of a unique contract specifically tailored to meet its needs. It appears that no other customers are engaged to take LNG marine fuel service from PSE at this time. Moreover, PSE makes no representations regarding the terms and conditions under which it would serve other customers, whether in tariff or under special contracts. PSE says only that the unsubscribed capacity of the Tacoma LNG facility would be offered to non-TOTE third parties at non-regulated prices.⁴³ We can only conclude that PSE "offers to serve only particular individuals of its own selection,"⁴⁴ namely TOTE, rather than offering to serve the public as a class.

28 Other factors may be considered when determining whether a particular service is a public service, but where it is clear that the service is not being offered generally to the public and, to the contrary, is offered selectively to a single customer, or to select companies the service provider is free to accept or reject, we cannot find that the service is dedicated or devoted to a public use. We determine, therefore, that PSE's service to TOTE as presently proposed is not within the Commission's jurisdiction to regulate.

V. The Need for Additional Process

29 In other cases our discussion and determinations above might bring our inquiry to an end. In this instance, however, we conclude that the legislative finding in RCW 80.28.280 that the development of liquefied natural gas vessel refueling facilities is in the public interest requires that we take our inquiry further. In addition, we recognize that while the Commission's core function in regulating gas and electric companies is as an economic regulator, we also have authority in certain circumstances, such as in reviewing integrated resource plans, and a responsibility, to consider externalities, including environmental costs and benefits, affected by our decisions.⁴⁵ Given the direction of the legislature in

⁴³ PSE witness Garratt, Exh. No. RG-1CT, at 29:3-6.

⁴⁴ *W. Valley Land Co.*, *supra*, n. 38.

⁴⁵ See RCW 19.280.030; RCW 19.280.020(11). In reviewing whether a utility's integrated resource plan meets statutory requirements, the Commission must determine whether utilities have identified resources to meet the projected load at the "lowest reasonable cost", which must

this connection, we are confident there are significant environmental benefits to having LNG marine fueling facilities available and wish to explore their development within the scope of our authority.

- 30 While the structure of the business PSE proposes, as described in its Petition and accompanying submittals in this docket, is one over which we cannot lawfully assert our jurisdiction, we make that determination here provisional and will carry the question forward with the case for the time being. We accordingly will afford the parties two additional formal opportunities to explore the question of jurisdiction specifically, and the proposed project more generally, to learn whether there may be alternative business models with structures that would fall under the Commission's jurisdiction if this is somehow critical to the success of this project.⁴⁶ Parties may file supplemental briefs by January 15, 2016, to address this question.
- 31 In addition, we will use the currently scheduled date of January 29, 2016, to hear oral argument and engage with the parties to discuss the subject of jurisdiction. We also wish to use this opportunity to hear PSE's plans with respect to the approach and timing it

consider "resource cost, market-volatility risks, demand-side resource uncertainties, resource dispatchability, resource effect on system operation, the risks imposed on the utility and its ratepayers, public policies regarding resource preference adopted by Washington state or the federal government, *and the cost of risks associated with environmental effects including emissions of carbon dioxide.*" Emphasis added.

⁴⁶ We note that PSE's Petition and Brief both are very tentative on the questions of Commission jurisdiction over LNG as a commodity and delivery of LNG as a service. The Company does not argue that its sales of, or the delivery of, LNG are squarely within the Commission's jurisdiction. Indeed, quoting PSE witness Garrett's pre-filed testimony in this docket, PSE states in its Petition that "PSE could seek to offer sales of LNG to TOTE as a non-regulated service, but PSE's core gas customers would not receive some of the benefits of regulated fuel sales to TOTE, including, for example, the short-term contract premium to be paid by TOTE under the TOTE Special Contract." PSE Petition ¶ 32 (citing Garratt, Exh. No. RG-1CT at 31: 9-17).

PSE argues that the LNG facilities' use for peak shaving should "be regulated as part of the bundled distribution service PSE currently provides" and that "[t]here is no reason for this activity to be treated any differently than PSE's current operation of the Gig Harbor LNG Satellite Plant." PSE Petition ¶ 43. The Company argues in addition that "the delivery by PSE of LNG to a container ship as contemplated under the TOTE Special Contract *could* also be regulated by the Commission as part of PSE's distribution service." *Id.* ¶ 44 (emphasis added). Yet, PSE asserts "[a]t the same time, the LNG services other than peak-shaving and those to be provided under the TOTE Special Contract *can* be provided as non-regulated services." *Id.* (emphasis added). PSE offers no explanation of how we could legally treat its sales and delivery of LNG to fuel TOTE's container ships as jurisdictional while simultaneously treating such sales and delivery of LNG to fuel other container ships, other marine vessels, or into a tank truck for delivery to other industrial end-users as non-jurisdictional.

anticipates with respect to the need to resolve the important question whether this project truly represents the least cost alternative for the Company to gain the peak shaving capacity its 2013 IRP indicates PSE will need beginning in 2017. In addition, we wish to learn more concerning PSE's proposed cost allocation methodology and, beyond that, how PSE proposes to recover its costs in rates. One major concern we have is how we might find and ensure the appropriate balance of risks between shareholders and ratepayers for a project of this magnitude.

NOTICE

32 **THE COMMISSION GIVES NOTICE THAT parties may file supplemental briefs by January 15, 2016, to address whether there may be alternative business models with structures that would fall under the Commission's jurisdiction. Such argument should consider whether other factors considered in the Commission's 2014 Interpretive Statement, such as the presence or absence of monopoly and the presence or absence of a need for consumer protection, need to be analyzed even if the business is structured so as to be offered to the public generally. To the extent a party identifies a model, or models, that legally could be subject to our jurisdiction, they should address, among other things, the question whether the Commission *should* regulate LNG sold as an end-use commodity such as vehicular fuel.⁴⁷**

33 **THE COMMISSION GIVES FURTHER NOTICE THAT it will conduct hearing proceedings on January 29, 2016, at 9:30 a.m. in the Commission's Hearing Room 206 to hear oral argument on the subject of jurisdiction and to discuss with the parties additional subjects such as those outlined in the body of this order.⁴⁸**

ORDER

34 **THE COMMISSION ORDERS THAT** The question of the Commission's jurisdiction with respect to PSE's proposed LNG facility at the Port of Tacoma, albeit provisionally

⁴⁷ We note in this connection that the FERC, in recent orders, has largely disavowed jurisdiction over LNG and LNG facilities, not only under the so-called vehicular fuel exemption, but on other, broader bases as well. *See, e.g., Shell U.S. Gas & Power, LLC*, Docket No. RP14-52-000, Order on Petition for Declaratory Order, 148 FERC ¶ 61,163 (September 4, 2014); *Pivotal LNG, Inc.*, Docket No. RP14-732-000, Order on Petition for Declaratory Order, 148 FERC ¶ 61,164 (September 4, 2014).

⁴⁸ This will not be an evidentiary hearing. However, we anticipate a fairly wide-ranging discussion in colloquy between the parties and the bench that may provide direction to the extent we find it appropriate to establish further process.

decided here on the narrow facts presented, will be carried with the case pending further process, as indicated in the body of this Order and the Notices contained in this order.

Dated at Olympia, Washington, and effective December 18, 2015.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

ANN E. RENDAHL, Commissioner

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.