

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

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

Docket No. TP-220513

PMSA'S OPPOSITION TO  
PSP'S MOTION IN LIMINE

1. Intervenor Pacific Merchant Shipping Association ("PMSA") respectfully requests that the Commission deny the motion brought by Puget Sound Pilots ("PSP") objecting to presenting as a cross-examination exhibit a 2021 memorandum ("Memo") written by PSP's outside consultant addressed to all PSP members regarding the implementation of the Final Order in the prior rate case.
2. PSP objects based on its claim that the Memo is protected by attorney-client privilege. The facts show otherwise. The Memo does not contain legal advice, it is not labeled as legal advice, it is not labeled as attorney-client communication, it is not labeled as privileged, and it is not attorney work product in the anticipation of litigation. Moreover, the consultant was not engaged as an attorney by PSP at the time of the Memo's drafting and distribution, and the consultant was specifically engaged at the time as a consultant to PSP. To the extent the scope of the consulting agreement between PSP and the consultant might have been helpful in this case, PSP withheld such information during discovery. PSP proformas submitted in this case demonstrate that only consulting services and not legal services have been rendered by the consultant during the timeframe that the Memo was produced. The Memo was

distributed generally to the broad PSP membership and not addressed to the immediate leadership of PSP, the party that now asserts the privilege. And, in any event, the contents of the Memo have been disclosed; therefore if a privilege had ever been intended or created by the parties, it has been subsequently waived. For all these reasons, PSP’s motion should be denied, and PMSA should be permitted to file the Memo as a cross-exhibit.

### I. STATEMENT OF RELEVANT FACTS

3. On November 25, 2020 the Commission issued Order 09, the “Final Order” in the prior pilotage rate case.<sup>1</sup> Among other things, Order 09 addressed the issue of how to handle the accounting of “comp days” by PSP. The implementation of Order 09, including the accounting of “comp days,” is an important and relevant issue in this case. Testimony and exhibits provided by the following witnesses, among others, address this issue: for PSP Capt. Carlson (Exh. IC-01T, IC-08T), Mr. Burton (Exh. WTB-05), Ms. Norris (Exh. JJN-01T, JJN-04T), and Mr. Valentine (Exh. BV-01T); for PMSA Capt. Moore (Exh. MM-01T); and, for UTC Staff Mr. Young (Exh. MY-01T).
4. In 2021, Mr. Walter Tabler, a consultant to PSP, produced a “Memorandum” addressed “To: Members of Puget Sound Pilots” with the subject line “Re: Comp Days under the UTC Accounting Rules.” A copy of the Memo is being provided for in camera review consistent with emailed guidance issued by Judge Howard to counsel for the parties on March 29, 2023. Exhibit A is reserved for the Memo.
5. The Memo contains no legal advice. Aside from a cursory three-sentence summary of

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<sup>1</sup> *Wash. Util. & Trans. Comm. v. Puget Sound Pilots*, TP-190976 (2020).

Order 09 in the opening paragraphs, the Memo contains no legal analysis. The Memo contains no legal citations aside from a handful of references to the “UTC Decision.”

6. The Memo is not labeled as legal advice, as privileged, or as confidential. The Memo is not produced on letterhead of an attorney or a law firm. Nothing in the Memo identifies the author as counsel to PSP or even as an attorney. An author “Biography” at the end of the Memo states that his status as counsel for PSP concluded in 2015 and that since then he has been a “consultant”—not counsel—to various pilot associations.
7. Coinciding with the time the Memo was authored, all “[w]ork and documents prepared by Walt Tabler of Tabler Consulting in 2021 regarding implementation of the UTC 2020 Order were prepared by Mr. Tabler in his capacity as **former** General Counsel and Executive Director of PSP during a period when PSP’s Executive Director position was not filled.” Exhibit B at 2 (PSP Response to UTC Staff DR No. 45) (emphasis added).
8. PSP list Walt Tabler and/or Tabler Consulting neither in information about its legal expenses in discovery to Staff (Exhibit C (PSP Responses to UTC Staff DR Nos. 4 and 5, together with responsive documents)) nor in its own proforma (Exhibit D (Exh. WTB-05 “Legal Exp” tab)). PSP instead listed Walt Tabler and Tabler Consulting as performing consulting services only in 2021 and 2022. Exhibit B at 1-2.
9. In Mr. Tabler’s own words regarding 2021 and 2022, “My work during these years included advising PSP on implementing changes suggested in the UTC’s 2020 rate order, organizational structure and the hiring of office staff and professionals. I also worked with PSP on post-Rate Order communications with UTC staff and commissioners.” Exhibit E (PSP Response to PMSA DR No. 243). He added, “In 2022, my consulting for PSP focused on the

issues addressed in my testimony in this rate case. Except for my testimony, I did not provide any consulting services to PSP related to the testimony of other witnesses.” *Id.* PSP President, Capt. Ivan Carlson confirmed “the use of Tabler Consulting to assist PSP in the implementation of the UTC 2020 order,” without claiming any legal advice or attorney-client privilege. Exhibit F (PSP Response to PMSA DR No. 571).

10. In discovery, PSP withheld documents about consulting by Mr. Tabler and Tabler Consulting for PSP, but not on the basis of attorney-client privilege. On January 10, 2023, PSP claimed no privilege whatsoever for Mr. Tabler’s response to a request for a description of his consulting work. Exhibit E. On January 27, 2023, PSP claimed his consulting documents “are proprietary and confidential to PSP and protected by the self-critical analysis privilege.”<sup>2</sup> Exhibit B at 2. It was only on March 22, 2023, after acknowledging that the Memo was already “in the possession of PMSA,” that PSP claimed attorney-client privilege in a DR response for the first time. Exhibit G (PSP Response to PMSA DR No. 658).

11. On March 28, 2023, PSP filed a motion objecting to PMSA’s presenting the Memo as evidence. PSP’s motion did not include any supporting declarations, and its only exhibit was an email thread between PSP’s and PMSA’s counsel. PSP did not offer the Memo for in camera review. On the next day, the Commission issued Order 06 setting the date for submitting written responses to PSP’s motion to April 3, 2023. The afternoon of March 30, 2023, without any motion for leave to do so, PSP presented declarations from Mr. Tabler and Capt. Carlson. Both claim the Memo was intended as legal advice.

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<sup>2</sup> With respect to the assertion of a “self-critical analysis privilege” by PSP, no such privilege exists under Washington law, as further discussed below.

12. Capt. Carlson’s declaration provides as an exhibit the email transmitting two documents to PSP members: (1) the Memo, which the email describes as “written by Walt Tabler one of our previous Executive Directors. It provides a historical look at the comp day system as well as a description of the difficulties moving forward with either methodology used to account for the comp days,” and (2) another memo “written by Blair Fassburg one of our attorneys for the UTC rate case. This memo describes the pros and cons of different methodologies for moving forward. The memo was presented to the BOD at our December board meeting.” Capt. Carlson’s email at no point refers to Mr. Tabler as attorney or the Memo as legal advice.

## II. RELEVANT LEGAL AUTHORITY

13. The party asserting attorney-client privilege bears the burden of showing it applies, which then “must be determined on a case-by-case basis.”<sup>3</sup> The privilege is applied narrowly because it “sometimes results in the exclusion of evidence otherwise relevant and material, and may thus be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts.”<sup>4</sup> Courts first determine as a question of fact whether the privilege exists.<sup>5</sup> An attorney’s legal conclusion that there was an attorney-client relationship does not suffice.<sup>6</sup> Nor is all advice provided by an attorney covered by the privilege: “there are many cases, in which an attorney is employed in transacting business, not properly professional, and where the same might have been transacted by another agent. In such case the fact that the agent sustains the

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<sup>3</sup> *VersusLaw v. Stoel Rives, LLP*, 127 Wn. App. 309, 332, 111 P.3d 866 (2005) (citation omitted).

<sup>4</sup> *Dietz v. Doe*, 131 Wn.2d 835, 843, 935 P.2d 611 (1997) (citations omitted).

<sup>5</sup> *Id.* (internal citations omitted).

<sup>6</sup> *Id.* (citations omitted).

character of an attorney, does not render the communications attending it, privileged; and they may be testified to by him, as by any other agent.”<sup>7</sup>

14. Even if an attorney-client relationship exists, the party asserting the privilege must also prove that it covers the specific communication as it applies only where the client’s purpose is to secure “primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.”<sup>8</sup> That is, “[t]he existence of the relation of attorney and client is not a privileged communication [in itself]. The privilege pertains to the subject matter, and not to the fact of the employment as attorney . . . .”<sup>9</sup> As a result, “[a] number of cases have denied the privilege because the lawyer was engaged in non-legal services.”<sup>10</sup>

15. In discovery, the responding party has certain duties in raising any privilege: “a party wishing to assert a privilege may not simply keep quiet about the information it believes is protected from discovery; it must either, reveal the information, disclose that it has it and assert that it is privileged, or seek a protective order.”<sup>11</sup>

### III. ARGUMENT

16. PSP has failed to meet its burdens of showing attorney-client privilege applies to the Memo. PSP provided no evidence supporting its motion, and its late submission of evidence (if accepted by the Commission) does not support the claim of attorney-client privilege. Other

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<sup>7</sup> *N. L. R. B. v. Harvey*, 349 F.2d 900, 906 (4th Cir. 1965) (internal quotations and citation omitted).

<sup>8</sup> *Id.* at 905.

<sup>9</sup> *Id.* at 904 (internal quotations and citation omitted).

<sup>10</sup> *Id.* at 905 n.3 (citing, e.g., *Grant v. United States*, 227 U.S. 74, 79, 33 S. Ct. 190, 57 L. Ed. 423 (1913) (dictum); *Lowy v. Comm’r of Internal Revenue*, 262 F.2d 809 (2nd Cir. 1959); *Pollock v. United States*, 202 F.2d 281 (5th Cir. 1953)).

<sup>11</sup> *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 695, 295 P.3d 239 (2013) (citations omitted).

evidence, including PSP's proformas excluding Mr. Tabler's work from PSP's "legal expenses" and discovery responses characterizing him merely as a "consultant," cannot be reconciled with PSP's motion. Nor can PSP's failure to assert attorney-client privilege when presented with initial inquiries by UTC Staff and PMSA for this information be reconciled with its claims of attorney-client privilege now. Either the privilege does not apply, or PSP's discovery responses were false; PSP cannot have it both ways.

17. As filed, PSP's motion alleges numerous factual claims but relies on no citations to the record of this case nor any supporting declarations or other evidence. The email exchange between PSP and PMSA counsel attached to the motion is not evidence of any of the facts in the underlying claim. With nothing but assertions, presumptions, and conclusory claims, PSP utterly failed to prove the facts necessary to establish that the content of the Memo was legal advice and that such advice was provided in the context of an attorney-client relationship existing at the time of its writing.

18. A direct evaluation of the Memo itself shows it is not of a legal nature, but in not providing the Memo to the Commission, PSP's motion attempted to create an illusion to the contrary. PSP's motion misleadingly calls the Memo "the Legal Memorandum," which might lead one to incorrectly assume the document is labeled "Legal Memorandum" rather than simply "Memorandum." The Memo is also addressed to all PSP members, not to PSP as an entity or to its officers or board. Even if PSP's claim of an attorney-client relationship could be established, and the subject matter requirement met for claiming privilege, the question remains of who could assert the privilege and if the client has waived the privilege by disclosing the Memo to others. By not providing access to the Memo, PSP short-circuited that evaluation

and foreclosed a review of the Memo which would show that it is precisely as Capt. Carlson described in his transmittal email: merely “a historical look at the comp day system as well as a description of the difficulties moving forward with either methodology used to account for the comp days”—not legal analysis or legal advice. PMSA now requests in camera review of the Memo to rebut PSP’s claims in its motion.

19. The late declarations cannot establish an attorney-client relationship at the time of the Memo as they are mere assertions to that effect. This inquiry is a question of fact that cannot be answered solely by unsupported allegations or claims. Moreover, the substantive evidence does not support those claims, including the proformas PSP filed with the Commission (Exhibit D), which establish that Mr. Tabler was a consultant, not PSP’s legal counsel.

20. This is consistent with all the facts PSP has asserted to Staff and PMSA throughout the course of discovery. Mr. Tabler’s work has been subject to discovery because (1) PSP’s costs in its proforma include his “consulting expenses,” and it is necessary to determine whether his services are likely to be necessary in the future or, if not, potentially removed from the recoverable expenses formula for projected costs of PSP; and (2) PSP has used his services for an issue of interest in this case, whether PSP has successfully implemented the efficiency measures that were recommended by Order 09. Both the cost recovery and content of the work by Mr. Tabler are directly relevant to the rate case here. That is why both UTC Staff and PMSA have requested in discovery details about the relationship between Mr. Tabler and PSP, including requests for copies of his work product and descriptions of the scope of his work. In discovery, when asked to describe Mr. Tabler’s consulting work, PSP never described his work as legal in nature.



21. PSP's exclusion of its payments to Mr. Tabler from its legal expenses is especially relevant given the magnitude of PSP's legal fees and their rampant growth are issues raised by rate-payers.<sup>12</sup> Moreover, legal fees may be subject to multi-year amortization and recapture of 3 years and 7 years, as ordered in Order 09. If Mr. Tabler's activities were truly legal in nature, but he conducted them as a consultant to avoid compounding an already controversial item of PSP spending, that would raise an entirely separate set of issues.

22. PSP did not fully disclose Mr. Tabler's work or the scope of his work, and PSP expressly objected to disclosing his work product, including the Memo, in responses to Staff and PMSA DRs in this case. Yet PSP never once alleged that these redactions, omissions, and withholdings were justified based on attorney-client privilege. To the contrary, PSP refused to identify work product documents to Staff ("PSP objects to providing these documents . . ." in Exhibit B at 2) based on a claim of a "self-critical analysis privilege." That claim has no relevance to attorney-client privilege and, in fact, is simply not a privilege that exists under Washington law at all.<sup>13</sup>

23. PSP's failure to comply with its discovery obligations is also grounds for denying PSP's motion. To facilitate fairness in the discovery process, "a party wishing to assert a privilege may not simply keep quiet about the information it believes is protected from discovery; it must either, reveal the information, disclose that it has it and assert that it is privileged, or seek

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<sup>12</sup> Moore, Exh. MM-1T at 43-50.

<sup>13</sup> RCW 5.60.060 (listing statutory privileges); ER 501-502 (listing privileges recognized by the evidence rules); *Fellows v. Moynihan*, 175 Wn.2d 641, 649, 285 P.3d 864 (2012) ("Statutes that create privileges restricting discovery are in derogation of the common law and the policy favoring discovery, and so must be strictly construed"). *See also Union Pac. R. Co. v. Mower*, 219 F.3d 1069, 1076 n.7 (9th Cir. 2000) (refusing to recognize any such privilege).

a protective order.”<sup>14</sup> PSP did none of these with respect to either the disclosure of the Memo or its claim that Mr. Tabler was acting as legal counsel for PSP. Not only did PSP “simply keep quiet” about these documents for which it now claims privilege, but it also waited to file this motion until eve of the final exhibits filing deadline in this case—thus keeping quiet as long as absolutely possible.

### CONCLUSION

24. The Memo neither satisfies the subject-matter requirement for attorney-client privilege nor has PSP shown an attorney-client relationship even existed with Mr. Tabler in 2021. Having failed to allege the privilege earlier, and having at all times in this case presented Mr. Tabler as a consultant in 2021 without any legal role, PSP cannot now claim otherwise, particularly without evidence to support its claim. The Commission should deny PSP’s motion on the basis that it was not substantially justified and permit PMSA to file the Memo as a cross-exhibit in this case.

Respectfully submitted this 31st of March, 2023.

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<sup>14</sup> *Cedell*, 176 Wn.2d at 695.