

BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUNDS PILOTS,

Respondent.

DOCKET TP-220513

TOTE MARITIME ALASKA, LLC'S POST  
HEARING BRIEF

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## I. INTRODUCTION

1. TOTE Maritime Alaska, LLC (“TOTE”) submits herewith its post-hearing brief. Testimony and evidence adduced at the hearing demonstrate conclusively that Puget Sound Pilots (“PSP”) has improperly overcharged TOTE for pilotage services since January 2021 in amounts that are undisputed; that TOTE is entitled to a refund of all such overcharges, as PSP’s rates to TOTE should be based on the subject vessels’ domestic Gross Registered Tonnage (“GRT”), and not International Gross Tonnage (“IGT”); and in any event, PSP’s rates should not be increased precipitously in a way that would create the “rate shock” the Commission has always intended to avoid.
2. Based on the Commission’s prior rulings in Docket TP-190976, including Order 12 and Order 13, three substantive issues remain for determination:
  - 1) Does the level of “risk” in piloting TOTE’s two vessels at issue, MIDNIGHT SUN and NORTHSTAR, entitle PSP to increase the pilotage fees to be calculated for them and, if so, to what extent is such risk quantifiable?
  - 2) Does any evidence or argument suggest that PSP’s precipitous increase of its fees for TOTE’s two vessels does not violate the Commission’s principles of “rate shock” and gradualism?
  - 3) Is TOTE entitled to a refund of the higher rates it has paid, and will pay, since January 2021 as a result of PSP’s improper methodology in calculating rates?

## II. TOTE’S PETITION AND ORDER 12 GRANTING SAME

3. On November 11, 2020, the Commission entered Order 09; Final Order Rejecting Tariff Sheets; Authorizing and Requiring Compliance Filing (“Order 09”) in docket TP-190976. Pursuant to Order 09, PSP implemented its current tariff which included a revised Item 300, entitled “Inter-Harbor Vessel Movements,” which provided that “All inter-harbor vessel

movement shall be assessed a Tonnage Charge and a Service Time Charge. The Tonnage Charge shall be based on the Vessel's International Gross Tonnage." PSP had deleted the clause "[f]or vessels where a certificate of international gross tonnage is required the appropriate international gross tonnage shall apply" from the Item 300 in its earlier tariff ("The tariffs established by the board prior to July 1, 2019, shall remain in effect and be deemed pilotage tariffs set by the commission until such time as they are changed by the commission pursuant to this chapter." RCW 81.116.050).

4. On August 26, 2021, TOTE filed its Petition for Amendment, Recission, or Correction of Order 09 (Petition) pursuant to Washington Administrative Code (WAC) 480-07-875 in docket TP-190976. On February 2, the Commission issued its Order 12 Granting Petition; Amending Final Order 09 ("Order 12") in docket TP-190976. The Commission ruled as follows in Order 12:

In its Petition, TOTE alleges that PSP has "taken advantage of unjust circumstances" to increase pilotage fees for two TOTE vessels (Midnight Sun and North Star) during the two years in which the new tariff rates apply, which created "rate shock" contrary to the intent of Order 09. Specifically, TOTE alleges that PSP's invoicing for the two vessels is now based on their international gross tonnage (IGT) as opposed to their regulatory, or domestic, gross register tonnage (GRT), which resulted in substantially higher service rates for TOTE's two vessels than PSP had charged in previous years. TOTE further alleges that PSP represented in its testimony and workpapers that it would continue to assess rates for its two vessels based on GRT calculations.

5. Order 12 at para. 2. The Commission further ruled as follows:

TOTE requests the Commission require PSP to amend Item 300 of its tariff to calculate inter-harbor vessel movement tonnage rates for vessels that operate exclusively in coastwise trades using GRT, and only assess rates based on IGT for vessels that operate wholly or partially in international trades.

6. Order 12 at para. 3. The Commission further ruled as follows:

We find that PSP's failure to identify its tariff change related to tonnage calculations, coupled with the calculation error in its exhibits and workpapers, substantially interfered with the Commission's ability to evaluate PSP's proposed rate design. The Commission did not consider the issue of Gross Tonnage rate calculation methodology in Order 09, let alone the significant increase in rates for the two TOTE vessels at issue, both of which produced an effect the Commission

did not contemplate. These factors constitute sufficient grounds to amend Order 09.

7. Order 12 at para. 23. The Commission further ruled as follows:

We require PSP to establish a regulatory liability account to defer, from the date of this Order forward until the rate effective date of PSP's next general rate case, the incremental difference between the revenues collected from TOTE for the Midnight Sun and North Star vessels under PSP's current tariff (which assesses tonnage charges based on IGT) and the amounts PSP would have collected from TOTE had tonnage charges been assessed based on GRT.

8. Order 12 at para. 30. The Commission amended this portion of Order 12 to require that PSP establish and maintain the regulatory account from the date of TOTE's petition, August 26, 2021 by its Order 13 dated February 24, 2022. The Commission further ruled as follows in Order 12:

... TOTE requests the Commission require PSP to refund to TOTE the incremental revenues it has collected to date. We deny TOTE's request at this juncture because the Commission has not yet had the opportunity to receive testimony and evidence on vessel tonnage rate calculation methodologies in the context of a general rate proceeding. ...

9. Order 12 at para. 33. The Commission further ruled as follows:

We decline to adopt TOTE's proposed amendment to PSP's tariff at this juncture. Because the Commission has not yet considered the issue of vessel tonnage rate calculations, it would be premature to require PSP to revise its tariff until the Commission is able to thoroughly evaluate how IGT and GRT should be applied based on a fully developed evidentiary record. Additionally, as Staff observes in its Response, TOTE has not yet presented evidence or argument related to the risk of piloting its vessels. For these reasons, we agree with Staff that the Commission should consider and decide issues related to Gross Tonnage rate calculation, including the rates applied to TOTE's two exclusively coastwise vessels, in PSP's next general rate proceeding.

10. Order 12 at para. 28. The Commission further ruled as follows:

For this same reason, we need not and do not address here the parties' arguments related to how tonnage rates are calculated, or which tonnage rates should apply to the two vessels at issue. Instead, we require PSP in its next general rate case to present for Commission consideration and determination whether Gross Tonnage should be calculated using GRT or IGT, including for vessels operating exclusively in coastwise trade. We also require PSP to address how its proposed rate design is consistent with principles of rate shock and gradualism. ...

11. Order 12 at para. 29.

### III. TESTIMONY AND EVIDENCE SUPPORT TOTE'S PETITION

#### 1) *TOTE indisputably experiences "rate shock"*

12. TOTE and PSP presented testimony as to "whether Gross Tonnage should be calculated using GRT or IGT, including for vessels operating exclusively in coastwise trade." Disregarding the Commission's requirement that PSP address the issue, PSP presented no testimony as to "how its proposed rate design is consistent with principles of rate shock and gradualism." Thus, the Commission should accept as conceded that TOTE has experienced, and without the relief requested in its petition would continue to experience, the "rate shock" the Commission sought to avoid in Order 09.

13. Regardless, it cannot be disputed that TOTE experiences rate shock by PSP's new fee methodology. As explained in TOTE's original petition supported by The Collier Declaration, the increased fees are some 175% of those TOTE previously paid and the calculations within PSP's work papers. TOTE is not surprised by PSP's silence on the issue.

#### 2) *TOTE's accounting as to PSP's overcharges is undisputed*

14. TOTE presented at the present GRC hearing the following testimony from its accounting supervisor, Alyson Atalie Dubs:

Based on PSP's calculation of pilotage fees for the two vessels based on their IGT between January 25, 2021 and the present, PSP has invoiced TOTE, and TOTE has paid or will pay PSP, \$719,255.28, in higher pilotage fees than PSP would have charged had PSP calculated those fees based on the two vessels' GRT.

15. The table attached to Ms. Dubs' testimony as Exhibit AD-2 details this accounting, which was current through February 10, 2023. PSP offered no counter-testimony to Ms. Dub's statements, and did not cross examine Ms. Dubs. Thus, Ms. Dub's testimony about the quantum of PSP's overcharges should be accepted as conceded. TOTE can and will update its accounting of the

overcharges at the appropriate time, i.e., through the time when the Commission issues its rulings on the current GRC.

3) ***“Risk” associated with TOTE’s vessels***

16. In its August 26, 2021 petition, TOTE requested that the Commission order that PSP tariff Item 300 be revised to provide as follows:

The Tonnage Charge shall be based on the Vessel’s International Gross Tonnage for vessels that operate wholly or partially in international trades. The Tonnage Charge for vessels operating exclusively in coastwise trades shall be based on such vessels’ regulatory gross register tonnage.

17. In Order 12, the Commission declined to consider granting this relief because “TOTE has not yet presented evidence or argument related to the risk of piloting its vessels.” At the present GRC’s hearing, the parties presented testimony regarding operational aspects of TOTE’s vessels, summarized below, which demonstrated that TOTE’s two vessels are less “risky” and difficult to pilot than other vessels which PSP services for reasons related to how their tonnage is calculated, and based on other vessel characteristics.

18. Preliminarily, the risk issue should be analyzed in the context of the “absolute risk” and “relative risk” dichotomy as the Commission addressed it in Order 09 as follows:

***To be clear, we agree with PMSA that risk should not be a factor in raising rates.*** Vessel incidents that occur while under pilot control in the Puget Sound have been decreasing over time, despite the continually increasing size of the largest ships. Pilot ladders have also received additional scrutiny in recent years. Capt. Moore testifies that there is “no debate” that newer vessels have incorporated several innovations that contribute to increased safety. ***We are not faced with evidence that absolute risk is increasing for pilots in the Puget Sound, which would justify greater compensation. However, in terms of pilotage rate design, it is appropriate to attribute costs to the vessels based on relative risks*** [emphasis added].

19. Order 09 at para. 360. See also testimony of Capt. Michael Moore at Exh. MM:1T; pp. 118-20. As Capt. Moore concludes and demonstrates, nothing in the record suggests there has been any change in either relative or absolute risk in the pilotage of vessels since the last GRC. *Id.* at 121.

20. Nothing in the record supports a conclusion that PSP's **overall** revenues should have been increased beyond the revenue requirement set by the Commission under Order 09 as a result of the determination of the "risk" allocated to TOTE's vessels. Again, the Commission has determined that PSP should not be allowed to increase its overall revenue based on "absolute risk." But increasing its overall revenue beyond the revenue requirement set by the Commission is precisely what PSP does by changing the methodology of fee assessment for TOTE's vessels. If PSP is permitted to increase revenues for TOTE's vessels based on a determination that they are as, or more, "risky" to operate as other vessels PSP services, PSP's overall revenues would increase. This clearly is not a simple application of "relative risks" by PSP, as PSP did not concurrently decrease its revenues from other vessels when increasing revenues from TOTE's. In other words, PSP does not argue that revenues from TOTE should be based on a determination of the relative risk its vessels presents as compared to other vessels for an ultimate determination of how set revenues will be derived; rather, PSP seeks to increase its overall revenue by demonstrating its absolute risk is ostensibly higher as a result of its services to TOTE's vessels. Thus, because PSP does not demonstrate, or even contend, that its overall revenues will remain constant should its revenues for TOTE's vessels be increased, the adjustment should not be allowed regardless of the Commission's findings as to risk.

21. The hearing testimony demonstrated clearly that the "risk" of piloting one vessel as compared to another is complicated and not easily quantifiable, at least not measurably. All relevant witnesses confirmed that any number of vessel characteristics and other factors

determine how “risky” a vessel is to pilot. In that light, testimony and evidence demonstrate that TOTE’s vessels are certainly no “riskier” to pilot than other vessels PSP services, and at least by several metrics, are less risky. As to TOTE’s vessels, Capt. Eric Loftfield testified:

The Orca vessels respond quicker and are easier to maneuver than other vessels of similar size. They have twin screws with multiple ways to deliver power and steering. These ship design features are far superior to single screw, single engine vessels which dominate deep draft vessel designs today. The Orca Class design provides not only more control under normal operations, but also provides options to maintain control in the case of a propulsion or steering failure. These are important safety features that significantly reduce risk by greatly reducing the possibility of a total loss of either steering or propulsion compared to a typical deep draft vessel design.

22. When asked “[w]ould you say the risk of maneuvering an Orca Class vessel is greater or less than a similar sized vessel,” Capt. Loftfield responded, “[I]ess, as the Orca class vessels have a very high power to weight ratio. It makes for quicker transits, better handling and more precise maneuvering with shorter pilotage times.” Loftfield Testimony at paras. 11 and 12.
23. PSP’s witness Capt. Eric Klapperich agreed “that there are many vessel characteristics and operational features that will dictate the -- how difficult or risky [vessels] to pilot” and that “[e]ach vessel has different characteristics that go into the difficulty of gauging the risk of their piloting.” Klapperich cross examination; Hearing Transcript 4/5/23 at p. 238. He further agreed that “maneuverability is a key factor in the risk of piloting.” *Id.*
24. GRT measurements will indeed generate lower tonnage than will IGT measurements for vessels of equal length and breadth because, as TOTE’s witness Phillip Morrell explained, “[t]hese are Orca class roll-on-roll-off vessels which contain large volumes of ‘exempted space,’ or space not filled with cargo,” and “[t]he GRT applied in domestic measurements does not consider such dead space, while IGT measurements do.” Morrell testimony at para. 6. PSP’s witness Phillip Essex testified that “GRT is supposed to represent the overall size of the vessel,

less certain spaces that are exemptible,” and that “[f]rom GRT, you subtract other spaces to get to net tonnage. That’s the number that’s supposed to represent the cargo-carrying capability of the vessel in cubic feet.” Essex cross examination; Hearing Transcript 4/6/23 at p. 376. Mr. Essex confirmed that his opinions regarding IGT and GRT measurements were limited to “cubic dimensions,” and that he does not “consider weight an aspect of size or volume ... when it comes to measurement, regardless of the measurement system used.” Consequently, he has “no opinion about how a vessel’s weight impacts the risk of piloting it ...” *Id.* at 379-80.

25. When cross examined about his statement that “[t]he bottom line is that larger ships are more difficult to pilot and present greater risk,” Capt. Klapperich clarified that “by ‘larger,’” he meant “larger in length, width, and height” ... as “measured in feet or meters ...” *Id.* at 239. He confirmed that as “as a general matter, the heavier vessel with a deeper draft is more difficult and risky to pilot than the lighter draft one is, all else being equal.” *Id.* at 241. He agreed “that these two TOTE vessels typically are much lighter in the volume of cargo that they are transporting than vessels of equal size, that is equal length and width that PSP typically services.” *Id.* at 247. Lastly, Capt. Klapperich agreed that “[i]f you’re trying to assess the level of risk or difficulty in piloting a vessel, ... a significant consideration [is] how maneuverable it is and how easily it handles.” *Id.* at 254.

26. True, TOTE’s vessels have the width and length of other vessels PSP services and for which PSP assesses fees based on IGT tonnage, such that allocated tonnage of the latter is higher than the former under the GRT standard. But the analysis does not end there. The GRT methodology exempts open spaces. TOTE’s vessels are RO-ROs which by their nature do not accommodate tightly packed shipping containers, or bulk/tanker cargo with no open air. Thus, the exempt spaces on TOTE’s vessels are significant because exempted space results in lighter

loaded vessel weight, and therefore shallower draft and greater maneuverability. This results in lighter loaded vessel weight, and therefore shallower draft and greater maneuverability. In that light, the lower IGT tonnage is a more accurate metric of pilotage “risk” than is GRT for vessels of equal length and width. Mariners might – and do – debate the significance of numerous other factors that are in the record, but quite clearly, the notion that uniform GRT or IGT methodology alone will gauge the comparative risk of piloting vessels is wholly unsupported.

27. Also of note is the Commission’s following observation in Order 09 through PSP’s own witness: “...Capt. Moreno argues that larger vessels present a greater risk of harm because they carry more fuel, have larger mass with more potential kinetic energy, and, in the case of tankers, carry petroleum products that could spill in the event of an accident.” Order 09 at para. 344. But as Captain Moore demonstrated in his testimony at MM-63T pp. 27-33 and exhibit MM-69, TOTE’s vessels are “primarily ... Liquefied Natural Gas (“LNG”) fuels [which] are safe and cleaner than diesel fuel, LNG is not regulated in the same manner as diesel fuel, and LNG is not stored the same as diesel fuel on board.” MM-63T at pp. 28-29. As LNG-fueled vessels are less risky in terms of oil spill and other environmental risks, Capt. Moreno’s testimony as cited in Order 09 as a basis for the determination of relative risks presented by vessels of varying size supports a determination that TOTE’s vessels are less risky to operate.

#### **IV. SUMMARY OF FACTS AND RELIEF REQUESTED**

28. PSP has now had every opportunity to address the issues raised in TOTE’s original August 26, 2021 petition with attention to specific points as the Commission directed by Orders 12 and 13. The following has now been established by Commission determination and/or the absence of any argument, evidence or testimony from PSP:

1) In its last GRC, PSP filed work papers for all vessels it serviced during the twelve-month test period. Those work papers contained GRT tonnage and revenue data for

TOTE's two vessels. Relying on and applying these work papers and GRT for TOTE's vessels, Staff built the schedules for a proposed tariff and evaluated the proposed revised tariff compliance filing which PSP submitted after the Commission issued Order 09. PSP's work papers showed that tonnage rates for both TOTE vessels were, and would continue to be, calculated based on their 35,825 GRT tonnage, producing rates consistent with that tonnage metric since the vessels were launched in 2003, and with no mention of their IGT tonnage.

2) PSP modified the language in its revised tariff Item 300, entitled "Inter-Harbor Vessel Movements," which provided that "All inter-harbor vessel movement shall be assessed a Tonnage Charge and a Service Time Charge. The Tonnage Charge shall be based on the Vessel's International Gross Tonnage." PSP had deleted the clause "[f]or vessels where a certificate of international gross tonnage is required the appropriate international gross tonnage shall apply." PSP did not identify this change during the last GRC and did not present evidence or testimony in support of this change during the last GRC.

3) In January 2021, PSP began invoicing for TOTE's two vessels based on their 65,314 IGT as opposed to their 35,825 GRT tonnage.

4) "PSP's failure to identify its tariff change related to tonnage calculations, coupled with the calculation error in its exhibits and workpapers, substantially interfered with the Commission's ability to evaluate PSP's proposed rate design. The Commission did not consider the issue of Gross Tonnage rate calculation methodology in Order 09, let alone the significant increase in rates for the two TOTE vessels at issue, both of which produced an effect the Commission did not contemplate."

5) In this GRC, PSP presented no testimony as to "how its proposed rate design is consistent with principles of rate shock and gradualism." Thus, TOTE indisputably has

experienced, and without the relief requested in its petition would continue to experience, the “rate shock” the Commission sought to avoid in Order 09.

6) The Commission ruled in Order 12 that “[b]ased on PSP’s calculation of pilotage fees for the two vessels based on their IGT between January 25, 2021 and the present, PSP has invoiced TOTE, and TOTE has paid or will pay PSP, \$719,255.28, in higher pilotage fees than PSP would have charged had PSP calculated those fees based on the two vessels’ GRT.” The table attached to Ms. Dubs’ testimony as Exhibit AD-2 details this accounting, which was current through February 10, 2023.

29. Disputed in the current GRC only is the extent to which risk associated with pilotage of TOTE’s vessels compares to the risk of other vessels PSP services. TOTE submits that evidence and testimony adduced during the hearing compels the following findings:

1) PSP’s overall revenues should not be increased by a determination of the “risk” allocated to TOTE’s vessels, as the Commission has determined that PSP should not be allowed to increase its overall revenue based on “absolute risk.” If PSP is permitted to increase revenues for TOTE’s vessels based on a determination that they are as “risky” to operate as other vessels PSP services, PSP’s *overall* revenues would increase. This is not a simple reallocation of revenue through comparative “relative risk” in this case, as PSP does not contend that revenues from other vessels should be decreased by the amounts that TOTE’s vessels payments are increased.

2) The “risk” of piloting one vessel as compared to another is not measurably quantifiable, and any number of vessel characteristics and other factors determine how “risky” one vessel is to pilot as compared to others.

3) TOTE's vessels have the width and length of other vessels PSP services and for which PSP assesses fees based on IGT tonnage, such that allocated tonnage of the latter is higher than the former under the GRT standard.

4) The GRT methodology exempts open spaces. TOTE's vessels are RO-ROs which by their nature do not accommodate tightly packed shipping containers, or bulk/tanker cargo with no open air, and therefore have significant exempt spaces. This results in lighter loaded vessel weight, and therefore shallower draft and greater maneuverability. In that light, the lower IGT tonnage is a more accurate metric of pilotage "risk" than is GRT for vessels of equal length and width.

5) Uniform GRT tonnage assessment would not gauge the comparative risk of piloting vessels.

30. Accordingly, TOTE requests the following relief in response to its petition to intervene in this GRC:

1) That Item 300 in PSP's tariff should be amended to provide as follows:

The Tonnage Charge shall be based on the Vessel's International Gross Tonnage for vessels that operate wholly or partially in international trades. The Tonnage Charge for vessels operating exclusively in coastwise trades shall be based on such vessels' regulatory gross register tonnage.

2) Whether or not Item 300 is amended in the manner requested or otherwise, PSP's fees charged to TOTE should be consistent with principles of gradualism and not produce "rate shock." Accordingly, PSP's charges to TOTE since January 2021 should be refunded retroactively, and adjusted going forward to reasonable ranges.

3) PSP should refund to TOTE the \$719,255.28, in higher pilotage fees than PSP would have charged had PSP calculated those fees based on the two vessels' GRT through

February 10, 2023, plus whatever sum PSP collects from TOTE in such higher fees since February 10, 2023.

- 4) Such other and further relief as the Commission deems proper.

## **V. CONCLUSION**

31. In the prior GRC, the Commission did not consider the issue of gross tonnage rate calculation methodology, or authorize a significant increase in rates for TOTE's vessels, as PSP failed to address the issue or provide evidence and testimony to justify such a change. As a result, TOTE petitioned the Commission for a refund and an amendment to the pilotage tariff on the basis that GRT, and not IGT, was the correct basis for a charge for domestic vessels. The Commission deferred consideration of the refund and amendment of the pilotage tariff until this GRC, and directed consideration of specific issues. In this GRC, PSP seeks an increase in revenues based on an assertion of absolute risk, which the Commission prohibited in the prior GRC; PSP did not address all of the issues the Commission directed; and PSP did not make a compelling case for TOTE's vessels posing specific risks based on their size. To the contrary, evidence and testimony demonstrated that TOTE's vessels were less risky due to their being more maneuverable, lighter in the water, and use of LNG as an alternative fuel. Thus, all relief requested in TOTE's original petition should be granted, including a full refund of overcharges and amendment to the tariff language.

Dated this 28<sup>th</sup> day of April, 2023.

By: */Steven W. Block*

Steven W. Block, WSBA No. 24299

BlockS@LanePowell.com

LANE POWELL PC

1420 Fifth Avenue, Suite 4200

P.O. Box 91302

Seattle, Washington 98111-9402

Telephone: 206.223.7000

Facsimile: 206.223.7107

Attorneys for TOTE Maritime Alaska, LLC