

BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET TP-190976

INITIAL BRIEF ON BEHALF OF  
PACIFIC MERCHANT SHIPPING ASSOCIATION

September 10, 2020

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## I. INTRODUCTION

1. Intervenor Pacific Merchant Shipping Association (PMSA) submits this brief on behalf of Puget Sound pilotage ratepayers who operate ocean-going vessels, as well as service providers such as marine terminal operators, shipping agents, tug companies, bunker providers, and other PMSA members.
2. The Commission should reject the proposed tariff Puget Sound Pilots (PSP) filed with the Commission to increase the tariffs set forth in WAC 363-116-300, as adopted by the Board of Pilotage Commissioners (BPC) and confirmed as the current tariff by the Legislature.<sup>1</sup> PSP has not met its burden of proof under RCW 81.116.030(5) to show that the current tariff is “not fair, just, reasonable, and sufficient.”
3. Commission Staff has recommended a revised tariff that, with some modifications, would update the current tariff and lay a good foundation for future pilotage tariff proceedings. With these modifications, and other directions as suggested by Staff and PMSA for improvements to move forward, the Staff recommendation should be adopted.

## II. THE COMMISSION SHOULD ADOPT THE RECOMMENDATION OF COMMISSION STAFF WITH MODIFICATIONS

4. PMSA agrees with the recommendation of Commission Staff, with revisions and clarifications to ensure fairness, transparency, and accountability in applying the ratesetting formula to PSP’s pilotage monopoly. The Commission actions that PMSA recommends are to adopt (a) Staff’s recommended Revenue

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<sup>1</sup> RCW 81.116.050.

Requirement formula, with modifications (b) Staff's recommended tariff restructuring, with modifications, and (c) Staff's treatment of certain PSP expenses and rejection or modification of other PSP expenses.

**A. Staff's recommended Revenue Requirement formula should be accepted, with four modifications.**

5. PMSA proposes that Staff's recommended formula be adopted with the following modifications: (1) separate pilot compensation expenses from operating expenses in the formula; (2) include a metric for rate of return in the formula consistent with formulas for other industries the Commission regulates; (3) base the formula's Total Distributed Net Income (TDNI) on the actual number of pilots licensed by the BPC or, alternatively, on an implied number based on a historical "Average Assignment Level"); and (4) establish a measure of accountability to ensure consistent and proper application of the TDNI metric in the formula.
6. The modifications suggested by PMSA would not fundamentally change the calculations of Staff or the outcome of the application of the Revenue Requirement formula as intended by Staff. Rather, the PMSA modifications would enhance transparency about pilot compensation, clarify how the formula might be applied in different financial circumstances, remove confusion with respect to BPC decisions regarding the number of pilots, and align the formula with other UTC ratemaking processes.

**1. PSP should report pilot compensation separately from operating expenses.**

7. Staff's recommendation for adoption of a new Revenue Requirement formula includes all Expenses as "Exp = General and Operating Expenses (including taxes other than income."<sup>2</sup> PMSA asks for a separate accounting of "Pilot Compensation Expenses" apart from traditional "General and Operating Expenses" within the formula. The Pilot Compensation Expense category would include all direct compensation payments made to pilots by methods other than TDNI or an ROR, including the following: individual pilot business expenses, transportation cost reimbursements, medical benefits, and pilot deferred compensation benefits. This will not change the Staff-recommended formula outcome. PMSA does not propose to exclude recovery of Pilot Compensation Expenses from the Revenue Requirement formula, only to distinguish them from regular Operating Expenses. This change would help ensure clarity within one factor of the formula where a company of partners that makes decisions about what payments of income and reimbursements are made to themselves could, therefore, impact and affect another factor in the formula (Net Income). In that respect, Pilot Compensation Expenses are not typical Operating Expenses. Adding a separate category of expenses is not unlike adding separate categories for interest expenses and depreciation expenses, which distinguishes these very fundamentally different charges from other regular recoverable Operating Expenses.

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<sup>2</sup> Kermodé, Exh. DPK-1T 7:12-18.



8. This modification will provide transparency in pilot overhead versus how PSP members choose by private agreement to compensate and reimburse themselves. This clarification will reduce the potential for future confusion in ratesetting regarding pilot compensation. It will also allow for the Commission and the public to know what total compensation for pilots actually is under a tariff, thus avoiding the potential for future gamesmanship or intra-category adjustments. It is most essential that the Commission build what transparency it can into the first year of the new tariff because this year will be foundational for all future comparisons and ensure that the most available data possible for all future tariff years to provide apples-to-apples comparisons.

9. The accounting breakdown of Expenses into Operating Expenses and Pilot Compensation Expenses prior to assessing individual pilot net income would be an accounting methodology very similar to that required by the Oregon Board of Maritime Pilots in the Columbia River as expressed in the Columbia River Pilots financial documents.<sup>3</sup> As demonstrated in that accounting, the provision of this additional level of transparency is easy to accomplish and will result in adequately tracked total pilot compensation over time.

**2. The formula should include a rate of return metric.**

10. As described by Staff, the Rate of Return consideration is technically already included in its formula. But given the status of PSP's finances under Staff's proposed accrual accounting base, the negative equity in this business

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<sup>3</sup> Carlson, Exh. IC-25b at 9 (2018 Columbia River Financial Statements); Nielsen, TR. 271:23 - 274:17.

essentially renders the term moot, thus it was excluded.<sup>4</sup> PMSA asks that this factor be expressly included in the formula, and then treated appropriately per Staff's accounting methodology. This is a transparency modification that would also be an acknowledgement of this term as traditionally included in all of the other similarly cited UTC formulas.<sup>5</sup> It also provides a tangible basis for a regulated entity to rid itself of an accrued negative equity and begin to earn a fair return on its investments in the business.

11. Including ROR in the proposed formula will not change the Staff recommended outcome, assuming that the Commission accepts the current equity under the GAAP accounting methodology recommended by Staff.<sup>6</sup> PMSA supports GAAP accounting and its application to the Revenue Requirement formula. However, because PSP prefers to use its current modified basis of accounting,<sup>7</sup> it is even more important to be clear that ROR is a factor in the Revenue Requirement formula, as the treatment of equity could be a major variable between these two approaches.<sup>8</sup>

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<sup>4</sup> Kermode, TR. 585:21-586:9.

<sup>5</sup> *POWER v. Utils. & Transp. Comm'n*, 104 Wn.2d 798, 808-809, 711 P.2d 319 (1985).

<sup>6</sup> Kermode, Exh. DPK-1T at 3:20-4:2, 16:4-6.

<sup>7</sup> Norris, Exh. JN-6T at 4:17-5:2.

<sup>8</sup> Should the Commission require GAAP accounting, see Section IV below regarding the need to require PSP to calculate ROR in future ratemaking proceedings.

**3. Total Distributed Net Income should be based on the actual number of pilots licensed or an implied number based on a historical “Average Assignment Level.”**

12. Staff’s recommended TDNI calculation is based on an “Implied Pilot Count.”<sup>9</sup>

In adopting this recommendation, Staff did not choose to use an “Actual Pilots” accounting to determine the TDNI. PMSA believes that TDNI should be based on an “Actual Pilots” calculation.

13. Reliance on the actual number of pilots licensed at the time of a Commission decision reduces speculation, enhances ease of application of the tariff formula, and negates potential issues with respect to the relationship between the Commission and BPC. Using the actual number of pilots will always reflect the most precise number of pilots working vessels and providing pilotage services. The use of an actual number at the time of tariff adoption will never be too low compared to actual (potentially yielding a rate that would be a windfall to customers) or too high compared to actual (potentially yielding a rate that would be a windfall to pilots). Using the actual number of pilots will eliminate arguments over variability, fairness, or accuracy in a methodology for determining TDNI.

14. The Staff recommendation for use of the “implied number” of pilots is also acceptable, but only if based on Staff’s stated methodology and if the Commission clarifies the methodology to avoid potential unintended confusion between the Commission’s historical actual average assignment level accounting and the BPC’s standard Target Assignment Level (TAL). Using

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<sup>9</sup> Kermode, Exh. DPK-1T at 10:3-12.

Staff's recommended computation of a historical "standard assignment level" and then relating that back to projected vessel traffic has merit as the assignment levels have historically been fairly stable.

15. However, Staff's terminology in referring to a "TAL" of 143.4 is confusing and inconsistent with its methodology.<sup>10</sup> 143.4 is not a historical average of the BPC's "TAL," which has been set at 145 for many years. Rather, what Staff calculates here is an historic "Average Assignment Level" based on an average of the last five years of the actual assignment levels. This is in contrast to the BPC's future-looking "Target Assignment Level," which estimate future pilot assignment levels.<sup>11</sup> PMSA agrees with the Staff recommendation that an historical average assignment level representing actual work completed should be calculated independently of the BPC TAL as these assignment levels are set and analyzed for very different purposes. Further, PMSA and Staff agree on respecting the Legislative boundaries in authority set between the UTC and the BPC.<sup>12</sup> Using an independent calculation of an average assignment level also avoids possible assertions that de facto changes to the tariff could be made through actions at the BPC.

16. If an implied number of pilots rather than an actual number of pilots is used, this calculation of the actual historical average of the last five years' actual assignment levels as described by Staff calculations is the correct metric to use.

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<sup>10</sup> Sevall, Exh. SS-1T 8:8-18; Sevall, Exh. SS-2r2, Sch. 2.1, L5.

<sup>11</sup> Carlson, Exh. IC-12 at 3.

<sup>12</sup> Kermode, Exh. DPK-3T at 7:8-16.

For clarity's sake, the Commission should label this methodology based on actual historical levels an "Average Assignment Level" or "AAL" to avoid confusion with the BPC's "TAL."

17. Consistent with that, PMSA agrees with Staff that the TDNI should not be calculated on a theoretical construct of PSP's desired number of non-existent pilots. Both the "projected pilots" and "approved pilots" metrics, which require either speculation of the number of actual pilots ("projected") or a funding of non-existent pilots ("approved"), potentially create an impermissible result of "an overstated TDNI."<sup>13</sup> The basis for Staff's rejection for usage of an "applied" number of pilots in TDNI is, consistently, the same basis upon which Staff rejected PSP's proposal for funding future callbacks by assuming a large fictitious number of additional non-existent pilot licensees: it overstates TDNI for the same amount of work.
18. The Staff-recommended TDNI also appropriately limits PSP to one non-working pilot position (PSP's president), consistent with the BPC, and Staff recommends against extending this status to PSP's vice president.<sup>14</sup> PMSA supports this recommendation and requests that the Commission specifically identify the position of the PSP president as the sole non-working licensed pilot.

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<sup>13</sup> Kermode, Exh. DPK-1T at 11:10.

<sup>14</sup> Sevall, Exh. SS-6T at 4:4-20.

**4. A measure of accountability should be adopted to ensure consistent and proper application of Total Distributed Net Income.**

19. The Commission should use Revenue Per Assignment (“RPA”) as an affirmative evaluation tool to measure average changes in the burdens imposed on vessels by the pilotage system. RPA is a pure metric of what an average ship will pay for pilotage per task performed. RPA does not vary on the pilotage supply side (i.e., with the number of pilots or the individual workloads of pilots) or on the pilotage demand side (i.e., with the business cycle or the competitiveness of Puget Sound ports), although it will still reflect significant changes in the mix of vessel types and sizes calling in Puget Sound. The isolation of these variables and stand-alone value of this metric makes it a good tool to compare the relative value of the work performed under the tariff over time. Looking forward, this metric will also allow evaluating the current tariff (and previous tariffs) with the new tariff once implemented.

20. TDNI is a novel metric. In contrast, RPA is an independent, customary benchmark for assessing the real average cost to ratepayers of a proposed tariff. The BPC regularly calculates RPA to include in its regular reports<sup>15</sup> and has included RPA as a common term used by stakeholders when evaluating tariff revenues independently from changes in supply or demand.<sup>16</sup>

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<sup>15</sup> Royer, Exh. JR-9r.

<sup>16</sup> Carlson, Exh. IC-12 at 3.

21. RPA can be expressed as a function of the Staff-recommended Revenue Requirement formula.<sup>17</sup> Given this compatibility, Staff has acknowledged that the Revenue Per Assignment metric could be a good tool for evaluating the changing impact of the tariff over time.<sup>18</sup> PMSA asks that the Commission formally do the same in its approval of the Staff recommendation.

**B. Staff's recommended restructuring of the tariff should be accepted with four adjustments.**

22. PMSA agrees with Staff and PSP on the need to more fairly structure the tariff to reduce the tonnage penalty for the largest ships while still charging larger ships more than smaller ships for the same services.<sup>19</sup> Other aspects of the Staff's restructuring of the tariff should be revised as follows: (1) revise the pilot hourly rates to apply to actual bridge hours rather than rounded-up bridge hours or, alternatively, require both upward and downward rounding; (2) maintain the current transportation tariff charges; (3) strike or clarify the proposed incorporation of PSP Ordering Rules; and (4) phase tariff increases in over several years to prevent rate shock for smaller vessels.

**1. Pilot hourly rates should be applied to actual hours or to hours rounded down as well as up.**

23. PSP has proposed that vessels always pay hourly rates to pilots that are always rounded up to the next full hour no matter how small the fraction of

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<sup>17</sup> Kermodé, Exh. DPK-8X (UTC Response to PMSA Data Request 9).

<sup>18</sup> Kermodé, TR. 588:14-21 (“[RPA] could be a type of benchmark in which going forward you can see what’s going on looking at the heartbeat of the situation, yes.”).

<sup>19</sup> Moore, Exh. MM-1Tr at 139:25-140:12.

time.<sup>20</sup> This is unnecessary and unfair. It can be easily avoided by using actual hours. However, the calculation of pilot hourly rates in Staff's recommended tariff adopts the PSP-proposed convention of always rounding up to the next full hour. This should be revised to apply the tariff only to either actual job hours or to a traditional rounded hours convention. PMSA does not propose this to change the total revenue generated but rather to achieve a fairer outcome.

24. Rounding time up in all instances would result in unnecessary confusion and discrepancies between the Commission, the BPC, and other datasets. As made obvious in this evaluation process, where PSP has made job hours an important component of many of its arguments regarding multiple potential other factors impacting pilotage, artificially inflated numbers may have unanticipated impacts. By contrast, actual PSP hours are well documented, historically applicable and comparable; they are a regular component of the suite of information that is regularly collected by the PSP dispatch system, and PSP has reported these actual hours in its working papers.<sup>21</sup> Not only are actual hours just as easily accessible in PSP's data, but they also require no additional manipulation of data to report or to bill, thus eliminating a potential source of error and confusion both in billing and by customers when making payment.

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<sup>20</sup> Burton, Exh. WTB-8 at 11 (Item 300, "Service Time Charge") ("Service Time Charges for Inter-Harbor Vessel Movements shall consist of an hourly charge commencing at Order Time and concluding at the time the pilot Steps Ashore, rounded up to the nearest hour, with a two-hour minimum charge, at the following rate: \$326.80 per hour.").

<sup>21</sup> Burton, Exh. WTB-11 (compare Column G "Hours" with Column S "Job Hours").



25. No evidence or authority has been cited by PSP to support its assertion of a data rounding convention in the tariff. If the Commission nevertheless prefers to use a rounding convention, a traditional 0.5 rounding convention should be implemented instead of rounding upward in all instances. In the traditional rounding convention, anything less than 0.5 hour is rounded down, and anything equal or greater than 0.5 hour is rounded up. Over time this produces a smoothing effect. It is also fairer for ratepayers who would benefit just as often as the pilots from the rounding, instead of the rounding benefiting only the pilots.

26. Under Staff's adoption of the PSP proposal to always round up to the next full hour, a job that takes 2 hours and 59 minutes would be charged as three hours, whereas a job that takes two minutes longer, at 3 hours and 1 minute, would be charged as four hours. For that latter job, a 3 percent time increase results in a 33 percent increase in charge. Thus, with the practice of always rounding up, marginal job duration differences can result in drastically different charges under the tariff. When a de minimis increase in job duration would yield a 33 percent increase in the tariff charge, the result is unfair for any ratepayer subject to that increased charge. Such a result should be studiously avoided. Actual hours or a traditional rounding convention would be much fairer to all parties.

**2. Maintain the current transportation tariff charges.**

27. Since at least 1964, transportation charges under the pilotage tariff have been based on taxi fares from the pilot office (not an individual pilot's home) to

the vessel.<sup>22</sup> PSP acknowledges that this has never been controversial.<sup>23</sup> Staff has determined that the existing expenses are reasonable.<sup>24</sup> PMSA agrees that the current approach has been stable, transparent, well-understood, reasonable, and compensatory for decades. The intent has been to provide PSP a fair level of reimbursement, not to create another source of profits.

28. PSP, however, has proposed a dramatic departure from the current treatment of transportation charges. PSP's proposal is for a unified average charge for any vessel location based on reimbursing pilots for their transportation costs from home,<sup>25</sup> as opposed to from a pilot business location, quantified based on a "three month cost of service study of transportation expenses in 2019" (hereafter called the "transportation study").<sup>26</sup> The PSP proposed change to transportation charges would increase revenues through higher ratepayer costs. Some questionable accounting and evidence suggests it could result in an additional source of profit to pilots. While Staff did disallow some portion of the costs sought for recovery regarding transportation, which PMSA agrees with, PMSA disagrees with the Staff recommendation to adopt the PSP suggested structural change to the transportation charge. The Commission should continue the current transportation charge. The current

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<sup>22</sup> Styrk, Exh. LS-6X at 9 (PSP Response to PMSA Data Request 385).

<sup>23</sup> Styrk, TR. 250:23-25.

<sup>24</sup> LaRue, TR. 607:23 - 608:2 ("transportation expenses as they are, are reasonable, and no adjustment in our opinion is necessary").

<sup>25</sup> See, e.g., Burton, Exh. WTB-19X at 15 (invoices from Fife Maritime, Inc., showing transportation from "Home").

<sup>26</sup> Styrk, Exh. LS-1T at 3:11.

charge is easy to administer, well understood, and provides fairness amongst vessels.

29. The existing tariff imposes set charges against every vessel dependent on a formula which is calculated based on the distance between (1) the port or terminal where the vessel is calling from and (2) PSP's Seattle office or the PSP pilot station in Port Angeles.<sup>27</sup> This charge is not designed to recover any commuting costs of individual pilots from their homes; such costs would necessarily vary widely based on where pilots choose to reside. PMSA objects to any system which essentially subsidizes pilots' private decisions to move their place of residence further away from their waterfront workplace and add time to their commute to a port terminal or the pilot station. Under the current tariff, each vessel knows what it will be billed every time it receives pilotage service. And it is fair as vessels requiring more pilot travel for service (as measured from a neutral office location) pay a higher charge than vessels requiring less pilot travel for service. The amount billed is intended to be a compensatory approximation of the additional expense to a pilot associated with being dispatched various distances to service vessels. Applying the current transportation charge involves virtually no additional PSP staff time to administer. Continuation of these existing charges is presumptively fair, just,

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<sup>27</sup> Burton, Exh. WTB-31X at 3 (PSP Response to PMSA Data Request 67) ("PSP invoices vessel owners at the completion of a voyage at rates prescribed by WAC 363-116-300. One of those rates is a transportation charge for moving a pilot from a business location to the ship of return. There are 17 locations within Puget Sound where the charges apply.").

reasonable, and sufficient since there is no evidence to the contrary in the record.

30. PSP's proposed new system of centralized reimbursement and systemwide averaging of transportation charges will necessarily be much more costly to vessels because (1) it was based on a pilot's commute costs no matter where the individual pilot chooses to reside, (2) it is no longer tethered to taxi fares, and (3) it will likely result in greater administrative overhead and review as a result of requiring an evaluation and reimbursement of each individual receipt from individual pilots and a wide array of transportation providers. Going forward, these changes to the transportation system would unfairly increase costs to vessels in the tariff.

31. In addition, one of the principles of the Staff recommendation regarding the PSP transportation reimbursement charge was to align transportation expenses in a manner consistent with IRS rules regarding transportation.<sup>28</sup> IRS rules do not typically allow a deduction for commuting costs, but the rules regarding commuting can vary on multiple bases and fact patterns.<sup>29</sup> None of these variables have been discussed by Staff or PSP. In short, PSP has not adequately

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<sup>28</sup> LaRue, Exh. AMCL-15X (UTC Response to PMSA Data Request 53) (" Staff's position is that transportation costs should always be based on actual costs, however, it is a common accounting method used by both regulated and unregulated businesses that an allowance be derived based on actual costs to simplify the tracking, accounting, and recording of those costs. The accounting method is similar to allowances provided by the Internal Revenue Code in relation to the deduction of travel costs for tax purposes.").

<sup>29</sup> Internal Revenue Service, "Publication 463: Travel, Gift, and Car Expenses"; see also *Saunders v. Commissioner*, 104 T.C.M. (CCH) 74, T.C. Memo. 2012-200.

explained why it believes there should be a change in the compensatory transportation charge, and Staff has not adequately explained the basis for acquiescing to the change.

32. In addition to the concerns discussed above, the receipts from PSP's transportation study evidence at least one way in which PSP members may be engaged in undisclosed self-dealing and earning profits on tariff revenues that are intended to be only compensatory. PSP pays transportation revenues to at least one pilot-owned entity as a service-provider.<sup>30</sup> Some of the PSP transportation study involved pilots' hiring very expensive services from third parties during the three-month test period.<sup>31</sup> This resulted in a higher "average cost" for transportation, establishing the PSP basis for a much higher transportation charge in a revised tariff. If implemented, PSP members would then be able to pocket a percentage of the increase by using their own pilot-owned company to transport pilots at a much lower cost than the revised tariff charge, which was based mostly on more expensive options. Without clear disclosure of such activities by PSP and an opportunity for careful evaluation, which has not occurred here, the new transportation proposal must be rejected. As further discussed in Section IV below, PMSA recommends that a full

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<sup>30</sup> Burton, Exh. WTB-20X at 73; Styrk, TR. 252:8 - 253:13 (regarding the Green Car Club).

<sup>31</sup> See Burton, Exh. WTB-19X to Exh. WTB-32X. *E.g.*, Burton, Exh. WTB-19X at 15-30 (invoices from Fife Maritime, Inc., with one-way transportation from, for example, Gig Harbor to the Port of Tacoma (approximately 15 miles) for \$90, or from Port Angeles to Port Orchard (approximately 80 miles) listed as taking 5.5 hours and charged at \$302.50, all with a "Fuel Surcharge" and mandatory 20-percent "Gratuity" added).

performance audit of this expense category precede any further increases of the transportation charge.

33. Accordingly, PMSA requests that the Commission adopt the current provisions of WAC 363-116-300 under the heading of “Transportation to Vessels on Puget Sound” as a substitute for the revised tariff provisions for Staff’s recommended “Item 340 – Transportation Charge.”<sup>32</sup>

**3. Strike or clarify the proposed incorporation of PSP’s ordering rules.**

34. Under proposed Section 2 regarding “Rules and Regulations” of the new tariff, PSP proposes to incorporate by reference a privately adopted set of rules published and approved solely by PSP regarding the practices required to order a pilot: “Item 210 – Procedure for Ordering a Pilot.”<sup>33</sup> However, PSP has not clarified in its testimony which of its many private procedures it intends to incorporate by reference into the tariff in proposed Item 210 or specified the document to be referenced at this website address. Furthermore, PSP has not explained how it intends to implement these rules, when and in what manner it may subsequently revise them, under what authority it would do so, and how or in what manner these provisions will be enforced, or even whether they are enforceable by either the BPC or this Commission. More problematic still, PMSA is unaware of any “Rules” or “Regulations” having been publicly reviewed

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<sup>32</sup> Sevall, Exh. SS-3, Sch. 3.1.

<sup>33</sup> Burton, Exh. WTB-08 at 9, Item 210. (“For information regarding how to order service from Puget Sound Pilots, please refer to Puget Sound Pilots’ website located at <https://www.pspilots.org/dispatch-information/order-a-pilot/>.”).

and adopted by the BPC or this Commission with respect to pilot ordering rules.<sup>34</sup> Staff does not address PSP’s proposed Section 2 in its testimony.

Accordingly, Section 210 is not included in the Staff-recommended tariff.<sup>35</sup>

35. If the Commission were to find it appropriate to include a procedure for ordering a pilot in the tariff, it must not defer the creation of a tariff item to a reference to an uncontrolled third party website. Instead, the published tariff should definitively and unambiguously establish what the rules are. To ensure such clarity, PMSA also requests that each of the remaining Items in proposed “Section 2 – Rules and Regulations” cite an existing statute or regulation. For instance, Item 200 should cite WAC 363-116-170; Item 220 should cite WAC 480-160-190; and so forth.

**4. Tariff increases should be phased in over several years.**

36. One of the beneficial impacts of the Staff-recommended tariff is that it addresses the unfair aspects of the tonnage penalty and makes them less unfair. However, as a result, the proposed rates would also result in some exceptionally large and unprecedented increases on a percentage basis for some of the vessels with the lowest payments under the current tariff.<sup>36</sup> PMSA, PSP and PYM have all recommended phasing tariff increases in over multiple years to avoid rate

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<sup>34</sup> Note that the “Ordering a Puget Sound Pilot” document (von Brandenfels, Exh. EVB-8X), which is only a document which “consists of pages published in ‘Puget Sound Pilots Tides & Currents’ (von Brandenfels, Exh. EVB-10X (PSP Response to PMSA Data Request 80)), is not consistent in scope or content with the referenced PSP webpage proposed for incorporation by reference in proposed Section 210.

<sup>35</sup> Sevall, Exh. SS-3, Sch. 3.1.

<sup>36</sup> Moore, Exh. MM-45; Moore, Exh. MM-42T at 29:3-11.

shock for the smallest ratepayers. Staff, however, have not included any phase-in. If the Commission approves Staff's tariff restructuring, the new tariff should be phased in over multiple years in order to ease the most dramatic increases in rates on the smallest vessels.

**C. Staff's recommendations regarding recovery of PSP expenses should be accepted but with several exceptions.**

37. The Commission should adopt Staff's recommendations on recovery of all reasonable expenses PSP incurs that are essential to pilotage services. PMSA has no dispute with most expense items presented by PSP or the Staff recommendation. For instance, all parties concur with the recovery of costs associated with the pilot station, pilot boats, and fuel. But changes to the Staff recommendation are needed to (1) limit PSP's recovery of excessive legal fees, (2) limit increases to pilot medical expenses, and (3) prevent PSP from passing self-insurance premium charges for gender discrimination liability to ratepayers. Also, as discussed in subsection B above, the Commission should continue the current tariff's treatment of transportation charges rather than adopting the new scheme proposed by PSP.

**1. PSP should not be allowed to recover excessive legal fees.**

38. Staff addresses two pools of legal costs in their recommendation for unique treatment: costs related to this ratesetting proceeding and costs not related to this proceeding. First, regarding legal fees associated with this proceeding, without endorsing these expenses as reasonable, PMSA nonetheless concurs with Staff on recovery of these estimated costs over a recovery periods of three



years and seven years. This is the baseline ratesetting proceeding establishing the policies and precedents that will guide pilotage ratesetting for years to come. These are expenses that will produce a residual value that will last for a significant period of time beyond just the next year or several years. Further, they are expenses that will not need to be replicated in the future. A multi-year expense recovery such as this is within the Commission's authority and is appropriate.

39. However, PSP's regular legal fees unrelated to this proceeding are inexplicably excessive. This is especially so for an entity that (outside of this proceeding) is facing no new or extraordinary regulatory scrutiny and that is not pressing or defending any significant litigation. When an entity's legal costs have spiked in a manner suggesting an exorbitant cost, "the Commission does analyze professional costs and must critically weigh whether they have been prudently incurred," and in doing so "must balance the interests of the shareholders" and "the interests of the ratepayers" such that the final revenue requirement only includes "costs prudently incurred."<sup>37</sup> In such circumstances, it is appropriate for the Commission to take action to limit recovery of excessive costs.

40. When compared to PSP's historical legal expense levels, the present non-UTC related legal expenses incurred by PSP are exorbitant. From 2005 through 2017, the period of time prior to the initiation of UTC rulemaking and

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<sup>37</sup> *Wash. Utils. & Transp. Comm'n v. Waste Control, Inc.*, Docket TG-140560, Order 12, Initial Order Rejecting Tariff Filing, &c. at ¶71 (2015).

ratemaking, PSP's attorney fees ranged from \$4,665 per year to \$95,458 per year, with an average of \$41,956.<sup>38</sup> Staff calculated a reduced recovery amount for all "general legal expenses included in test period" of 2018-2019 of \$283,382.<sup>39</sup> Thus, the general legal expense for the test period is 675% of PSP's typical non-UTC related average annual legal costs.

41. PMSA asks that the Commission limit recovery of non-UTC related legal expenses to 50 percent of all charges that exceed those incurred in 2017, which was the last year of PSP legal expenses prior to the initiation of UTC-related legal expenses.<sup>40</sup> For the period in question, this would result in total recoverable non-UTC related legal expenses for PSP of \$189,420.<sup>41</sup>

42. PMSA believes its request results in a fair, just, reasonable and sufficient tariff outcome. The recoverable amount would allow PSP to recover from ratepayers the entire amount of its regular legal costs and then to share equally between itself and its customers the balance of its excessive general legal costs. This recovery amount for general legal costs is in addition to the full collection of all UTC-related legal fees over the Staff recommended amortization periods.

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<sup>38</sup> Moore, Exh. MM-1Tr at 112; Moore, MM-28r.

<sup>39</sup> LaRue, Exh. AMCL-6; LaRue, Exh. AMCL-2, Sch. 1.2, (y) ("Staff, R-20, Adjust per books to General Legal").

<sup>40</sup> See *Wash. Utils. & Transp. Comm'n v. Waste Control, Inc.* at ¶62 (acknowledging some expenses reflect "legitimate costs and should be included in rates" and setting a limit of "a 50 percent recovery for costs").

<sup>41</sup> Recovery of 50% of the 2018-19 test year general legal expense over and above the prior year highest expenditure on general legal expenses = [(\$283,382 - \$95,548) x 0.50] + \$95,548 = \$189,420.

**2. PSP should limit increases in pilot medical expenses.**

43. Nearly all PSP members are enrolled in a nationally managed MM&P sponsored health plan for pilots. Presumably, this national plan would be the same or similar to the sponsored health plan offered to pilots in other pilotage grounds cited by PSP as comparable (and for which PSP normalized health plan contributions, implying an equivalency).<sup>42</sup> Yet comparing the PSP medical insurance costs with those of the Columbia River Pilots reveals a significantly higher cost for PSP. Staff recommends a pilot medical insurance cost of \$1,711,128 for PSP,<sup>43</sup> which at the Staff's implied pilot count of 51.98 pilots would equal \$32,919 per pilot per year; whereas the Columbia River Pilots' financials demonstrate a total medical insurance payment of \$1,002,202 for 45.69 pilots,<sup>44</sup> which is a total of \$21,935 per pilot per year. So medical insurance costs per pilot are 50 percent higher in the Puget Sound. This disparity requires examination, particularly when PSP is participating in a plan extended to pilots nationwide. Without a performance audit or analysis of the value of the PSP medical coverage versus alternative coverage arrangements, it is impossible to assess whether this item is excessive or reasonable. And without an ability to evaluate these costs, the current recoverable amount should not be further increased.

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<sup>42</sup> Carlson, Exh. IC-26.

<sup>43</sup> LaRue, Exh. AMCL-2, Sch 1.1, Line 38 "Insurance – Medical Pilots."

<sup>44</sup> Carlson, Exh. IC-26b at lines 10, 16.

**3. PSP should continue to cover its own share of self-insurance premium charges for gender discrimination liability.**

44. There are two charges imposed by the Legislature to cover the state’s costs associated with the liability in a lawsuit lost by the BPC.<sup>45</sup> The lawsuit involved gender discrimination in the administration of the pilot training program.<sup>46</sup> One of the charges is a \$16 per vessel payment collected directly from vessels.<sup>47</sup> The other charge is a \$150,000 annual payment to be made by PSP.<sup>48</sup> Both charges are payable to the BPC through June 30, 2021.<sup>49</sup> These charges were divided by the Legislature as to be levied separately on both pilots and vessels for 6 years, and the tariff was held for three years in part so pilots couldn’t expense their portion of the state-required out-of-pocket commitment as “expenses.”<sup>50</sup>

45. PSP is now attempting to pass its share of insurance charges through its proposed tariff.<sup>51</sup> By skirting the legal structure of the directed payments, which was meant to divide this liability amongst pilots and vessels, PSP is now proposing vessels pay twice for this liability: once through legislatively-imposed surcharge that will remain in effect and then again through a higher tariff. This is particularly inappropriate given that the vessels played absolutely no role whatsoever in the underlying gender discrimination.

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<sup>45</sup> Laws of 2019, ch. 416, §108 (Exh. MM-52X at 5).

<sup>46</sup> Moore, Exh. MM-1Tr at 109:15-25.

<sup>47</sup> Laws of 2019, ch. 416, §108 (Exh. MM-52X at 5).

<sup>48</sup> *Id.*

<sup>49</sup> WAC 363-116-301.

<sup>50</sup> Styrk, Exh. LS-1T 4:1-13; Moore, Exh. MM-1Tr 109:14-110:15.

<sup>51</sup> Burton, Exh. WTB-1T 11:20-25 (“... as reflected also in WAC 363-116-301 as mandated in SHB 1160, \$150,000 must be deposited into the self-insurance liability fund earmarked at the BPC in July 2020,” which is an amount of “expenses PSP proposed to be funded by tariff revenues”).

46. Staff approved this expense for inclusion in the Staff pro forma and did not reduce this amount through an adjustment.<sup>52</sup> PMSA believes it is highly inappropriate for PSP to ultimately profit from the gender discrimination lawsuit by eliminating its liability to the detriment of ratepayers. The Commission should commit to continuing all self-insurance charges as originally split by the Legislature between pilots and customers per the original legislative direction and so long as vessels are obligated to maintain a specific surcharge for this purpose.

### **III. THE COMMISSION SHOULD REJECT PSP'S PROPOSED TARIFF**

47. In adopting the Staff recommendation, the Commission would be rejecting much of PSP's proposed tariff. This is appropriate because PSP has not carried its burden under RCW 81.116.030(5) "to show that the [current] tariff rates are not fair, just, reasonable, and sufficient." As discussed in PMSA's motion for summary determination, PSP has generally ignored this burden as irrelevant.<sup>53</sup> The Commission, in deciding on PMSA's motion, identified possible issues of fact that precluded summary determination at that time—the most significant of which was PSP's claim that PSP is unable to recover its expenses under the current tariff.<sup>54</sup> Subsequent evidence in this proceeding confirms that this claim

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<sup>52</sup> LaRue, Exh. AMCL-2, Sch. 1.1, Line 64 ("Senate Bill 5096: \$150,000").

<sup>53</sup> *Wash. Utils. & Transp. Comm'n v. Puget Sound Pilots*, Docket TP-190976, PSMA's Motion for Summary Determination (July 13, 2020).

<sup>54</sup> *Wash. Utils. & Transp. Comm'n v. Puget Sound Pilots*, Docket TP-190976, Order 08 (Aug. 7, 2020).

is not true. The evidence does not support any changes to the current tariff beyond those recommended by Staff.

48. PSP's proposal also lacks merit because it requests tariff increases based on factors that should not be included in the ratesetting formula. These faulty factors involve (1) comparisons with other pilotage grounds; (2) PSP internal management decisions regarding workload pooling; (3) issues such as the number of licensed pilots, TAL, and safety that are under the jurisdiction of the BPC, not the UTC; and (4) ratepayers' potential profitability or ability to pay tariffs. PMSA agrees with Staff that these factors are not relevant to the ratesetting formula and should be disregarded in this proceeding.

**A. PSP has shown increased profits since 2015 under the current tariff. Its claim of not being able to recover its expenses is not true.**

49. One of the primary factual issues identified by the Commission in this proceeding is based on PSP's claim that it is "unable to recoup" its expenses under the current tariff due to a "four plus year period of rate freezes."<sup>55</sup> If PSP total revenue truly could not cover the expenses necessary for pilotage services under the current tariff, this would of course justify a tariff modification. The reality, however, is very different.

50. When questioned about this claim, PSP's Executive Director Linda Styrk was unable to point to any specific evidence for this claim.<sup>56</sup> Nor could she refute in any way the financial analysis PMSA presented. That analysis shows that,

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<sup>55</sup> Styrk, Exh. LS-1T at 4:19-23.

<sup>56</sup> Styrk, TR. 244 - 249.

while PSP’s expenses increased, its increase in revenues under the existing tariff outpaced that growth (even at reduced pilot workloads due to a reduction in vessel traffic).<sup>57</sup> PSP’s 2018 audited financials and its 2018/2019 test year data were the latest financial data available at the time PSP made its tariff revision filing—and at the time Ms. Styrk originally testified that PSP was “unable to recoup” its expenses. As the following table shows, whether comparing PSP’s 2015 audited financials<sup>58</sup> with its 2018 audited financials<sup>59</sup> or with its 2018/2019 test year data,<sup>60</sup> PSP profits increased under the current tariff. This growth occurred despite continued decline in vessel traffic and significant increases in legal expenses PSP incurred in 2018 and 2019 (as discussed in Section II above).

PSP FINANCIALS	2015	2018	2018-19 TEST YEAR
REVENUE	\$32,881,003	\$33,996,799	\$34,109,940
EXPENSES	\$12,218,992	\$12,470,372	\$13,283,371
PROFIT	\$20,662,011	\$21,526,427	\$20,826,569
PROFIT INCREASE OVER 2015		\$864,416	\$164,558

Given that PSP has actually increased its profitability under the current tariff when compared to 2015, PSP’s claim that it has not been able to recoup its expenses is unfounded.

<sup>57</sup> Moore, Exh. MM-17r; Moore, Exh. MM-4r.

<sup>58</sup> Royer, Exh. JR-8r at 7 (2015 PSP Financial Statement).

<sup>59</sup> Norris, Exh. JN-04 at 7 (2018 PSP Financial Statement).

<sup>60</sup> Norris, Exh. JN-05 at 6 (Special Purpose Financial Statement for the 12 Months Ended June 30, 2019).

**B. PSP’s flawed comparisons with other pilotage grounds should not factor into the ratesetting formula.**

51. PSP has similarly failed in its attempts to point to pilot compensation elsewhere as grounds for increasing tariffs in the Puget Sound. The Commission also specifically pointed to this argument by PSP regarding the ability to attract new pilot trainees as a possible factual issue for this proceeding.<sup>61</sup> However, the evidence undermines PSP’s arguments for using comparisons to other pilotage grounds as a basis for setting Puget Sound tariffs.

52. As Capt. Stephan Moreno made clear on cross-examination, in 29 years of piloting, he is aware of only ten pilots out of approximately 1,200 nationwide who have left their pilotage district for another, and three of those (including himself) left to move *to* the Puget Sound.<sup>62</sup> PSP presented no evidence of any trainee or pilot leaving the Puget Sound to work in another pilotage ground specifically because of compensation concerns.

53. What other pilots in other pilotage grounds reportedly earn should also not factor into the Puget Sound tariff. As PSP’s own witnesses testified, other pilotage grounds are often opaque and guarded about their revenue, expense, workload, and pilot compensation data.<sup>63</sup> Moreover, there are many factors that can affect compensation differences. Differences in pilot workload systems, rotation schedules, benefits, public reporting of financial and workload data, legal oversight, training requirements, and licensing regimes all make

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<sup>61</sup> *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-190976, Order 08 (Aug. 7, 2020).

<sup>62</sup> Moreno, TR. 412:11-19.

<sup>63</sup> von Brandenfels, Exh. EVB-1T at 19:16-17; Exh. GQ-1T at 16:7-14.



meaningful comparisons very difficult. The physical and environmental differences and varying navigational challenges which exist between pilotage grounds further complicates efforts to compare pilot workloads and pilot compensation. For example, Capt. James Nielsen of the Columbia River Pilots was clear that, aside from weather, the *only* similarity between the Columbia River and Puget Sound pilotage grounds is the basic skill set required of pilots.<sup>64</sup>

54. Even if reliable and directly comparable compensation data were available, nothing indicates that other jurisdictions determine pilot compensation levels with the level of evidentiary rigor and analysis that the legislature sought when it moved Washington's pilotage ratesetting process to this Commission. This Commission should follow the lead of the Oregon Board of Maritime Pilots Order 10-01, which PSP presented as evidence in this case: that order firmly rejected income data from out-of-state pilotage grounds as not comparable.<sup>65</sup> This accords with evidence presented by PMSA.<sup>66</sup> In the end, PMSA agrees with Staff that trying to analyze compensation in other pilotage grounds in this proceeding would be an exercise in futility as the pilotage grounds are facially incompatible and revenue data are not verifiable.<sup>67</sup>

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<sup>64</sup> Nielsen, TR. 274:18 - 278:22.

<sup>65</sup> Sevall, Exh. SS-10X at 10.

<sup>66</sup> Moore, Exh. MM-1Tr at 129-131.

<sup>67</sup> Sevall, Exh. SS-1T at 14:14-15:11.

**C. PSP internal management decisions regarding workload pooling should not affect the ratesetting formula.**

55. PSP has broad discretion in how it manages pilots' revenues and workload pooling. As long as pilots comply with statutory rest requirements and provide state-mandated services, pilots can individually or collectively make choices about rotations, dispatch systems, "callbacks," trading of days, and other decisions about pilot availability and assigning pilots to specific vessel movements. To manage these decisions, pilots in the Puget Sound have opted to create an association where all pilots in the Puget Sound agree amongst themselves on these decisions and bar each other from competing with PSP.<sup>68</sup> As part of that collective arrangement, PSP has a monopoly where all vessels subject to Washington's Pilotage Act are required to hire a pilot from PSP for pilotage in the Puget Sound, and PSP must ensure service to all vessels that require it.<sup>69</sup>
56. As a result of the agreement of its members to pool its revenues, PSP collects all tariffs for pilotage services in the Puget Sound. The pooled revenues, after expenses, are then equally distributed to each pilot who for the year is a member in good standing on the PSP roster (i.e., for each pilot who is "on duty" as that term is used in PSP's organizational documents).<sup>70</sup> No matter how much

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<sup>68</sup> von Brandenfels, Exh. EVB-1T at 14:10-23; von Brandenfels, Exh. EVB-5X at 22-23 (PSP Bylaws § 20).

<sup>69</sup> von Brandenfels, Exh. EVB-1T at 14:10-23; von Brandenfels, Exh. EVB-10X at 1 (PSP Response to UTC Data Request 1); von Brandenfels, TR. 97:18 - 98:8.

<sup>70</sup> Norris, Exh. JN-04 at 26; Norris, TR. 220 - 225.

work the individual pilots contribute, each receives an equal share of PSP profits.<sup>71</sup>

57. A key feature of this workload pooling arrangement is that PSP institutes and manages a watch rotation which includes all of its members (except PSP's president). According to PSP operational rules, any pilot who fails to follow the work when assigned in rotation is subject to a fine.<sup>72</sup> PSP organizes this collective workload pooling through a central dispatching function.<sup>73</sup>

58. When an individual pilot works an assignment, PSP collects the tariff from that assignment and distributes the corresponding profit to the pilot who performed the work and to all the other pilots who did not perform the work, including pilots who were performing no work that day at all.<sup>74</sup> And yet, PSP has presented testimony in this proceeding asserting that some pilots work "for free"<sup>75</sup> and that pilots should be compensated for "overtime" whenever a pilot accepts an assignment on a day that pilot was not on watch (i.e., a "callback").<sup>76</sup> These mischaracterizations underlie the bulk of PSP's proposed tariff increase. PSP claims that including significant additional funding for fictional future pilots in its TDNI formula would pay for future comp days and somehow eliminate future callbacks.

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<sup>71</sup> Norris, TR. 220 - 225.

<sup>72</sup> von Brandenfels, Exh. EVB-6X at 25.

<sup>73</sup> Carlson, Exh. IC-1T at 3:21-4:8.

<sup>74</sup> Norris, Exh. JN-04 at 26; Norris, TR. 220 - 225.

<sup>75</sup> Khawaja, Exh. SK-3T at 9:11, 11:16-18.

<sup>76</sup> Norris, Exh. JN-6T at 4:14-16.

59. But PSP's argument of "callback liabilities" is a fiction created by PSP's own internal accounting and workload decisions; it is not a function of the tariff. As required by law, PSP has charged for all pilotage service provided, and "bad debts" are "miniscule."<sup>77</sup> Therefore, vessels are paying for the services provided at the time that they are provided. And under PSP's own internal pooling rules, each pilot receives a part of the proceeds of that vessel movement under the PSP pooling agreement whether they are working or not. No pilot has remained unpaid as a result of this arrangement, working or not.

60. PMSA agrees with Staff's assessment that vessels have already paid this tariff for services performed in the past and that the tariff should not be increased to have to pay twice for the same service due to some internal mechanism whereby PSP creates false vessel "liabilities."<sup>78</sup> Furthermore, PSP has proposed no change that would actually reduce the number of future callbacks; as PSP has proposed changes to the rates only. No changes in the tariff would affect the PSP workload pooling agreement that results in callbacks. Only improved management of workload by PSP can remedy that.

61. PSP has acknowledged that it has been failing to meet its obligations to provide timely service to all vessels.<sup>79</sup> PSP argues that its failure to provide timely pilotage to vessels is a basis for increasing tariffs and places the blame

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<sup>77</sup> Norris, Exh. JN-12X at 16 (PSP Response to PMSA Data Request 417).

<sup>78</sup> Kermode, Exh. DPK-1T at 19:14-16.

<sup>79</sup> Carlson, Exh. IC-1T at 7.

for this on a “pilot shortage.”<sup>80</sup> The evidence shows, on the contrary, that the delays and callbacks are due to the inefficiency of PSP’s own workload pooling arrangements. For instance, though PSP claims to have a “strict” rotation,<sup>81</sup> pilots who are on watch can take “comp days” at any time without approval from PSP.<sup>82</sup> PSP also treats pilots who attend meetings as though they were fulfilling vessel assignments.<sup>83</sup> And PSP routinely “assigns” on-watch pilots to meetings and even creates fictitious rest periods to apply to pilots before meetings.<sup>84</sup> PSP does so even when the comp days and meetings (and pre-meeting rest periods) mean there will not be enough pilots in the rotation to adequately serve vessels on many days.<sup>85</sup> PSP’s internal decisions about meetings are at odds with the treatment of meetings in the PSP bylaws, operating guidelines, BPC policy guidance documents and reporting requirements, regulations, and the BPC TAL; for each of these purposes, meetings are not “assignments”—a fact that PSP admits.<sup>86</sup> As evidenced by Capt. Carlson’s responses to questions from the Commission, many of the meetings are for internal PSP matters, and some are purely administrative matters that should be handled by PSP professional staff, not licensed pilots.<sup>87</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> Carlson, Exh. IC-4Tr at 20:19-24.

<sup>82</sup> TR. at 343:4-22 (testimony of Capt. Carlson).

<sup>83</sup> Carlson, Exh. IC-42X (PSP response to PMSA Data Request 507).

<sup>84</sup> Carlson, Exh. IC-42X, (PSP response to UTC Data Request 28).

<sup>85</sup> Carlson, Exh. IC-4Tr at 26:6-10, 27:7-10; Carlson, Exh. IC-42 at 46 (PSP Response to PSMA Data Request 507).

<sup>86</sup> Carlson, TR. 299 - 305.

<sup>87</sup> Carlson, TR. 392 - 397.

When a pilot does not participate in meetings and focuses instead on moving vessels, it is possible to complete more than 160 assignments in rotation without violating any rest rules (not to mention additional assignments while not on watch).<sup>88</sup> PSP itself indicates that the pilot who achieved this level of assignment work while in rotation was only able to do so because he did not participate in PSP administrative functions, ostensibly during his on-watch time while in rotation.<sup>89</sup>

62. PSP itself provided a vivid example of the problems caused by how it treats “comp days” and meetings. On August 6, 2018, PSP had 21 pilots on watch but had only 11 on-watch pilots available to move vessels, thus resulting in having to call back off-watch pilots to cover the pilotage service needs that day.<sup>90</sup> Eight of the on-watch pilots were unavailable because they chose to take a comp day or were resting in advance of a meeting they planned to attend the following day.<sup>91</sup> This and other examples indicate that PSP’s decisions in how it manages pilot availability and assignments is what results in its “callback liability,” not a shortage in the number of total licensees.

63. According to PSP, it does not quantify or track how many pilots are available to pilot vessels on any given day and PSP does not have a ready database with

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<sup>88</sup> Carlson, Exh. IC-40X at Line 84 (“2018 Total Time on Watch,” Pilot “B1D8,” Number of Assignments “161”).

<sup>89</sup> Carlson, Exh. IC-4Tr at 28:20-24.

<sup>90</sup> Carlson, Exh. IC-42X at 3-6 (PSP Response to UTC Data Request 28).

<sup>91</sup> *Id.*

records which track daily pilot availability.<sup>92</sup> Though PSP recognizes that delays occur due to a lack of pilots available in rotation, it lacks the data to report or analyze how many pilots were actually available to work at any particular time and what workload or rotation practices contributed to the delay. Because it does not track this, PSP cannot assert either an analysis of the cause of the delays and callbacks or any data-based solution to the problem.

64. For purposes of ratesetting proceedings, the bottom line is this: PSP can choose how to manage its workload and assignment decisions within the constraints of the law, but ratepayers should not have to suffer higher tariffs as a result of inefficiencies in how PSP makes these internal management decisions. Nor should PSP's internal accounting for callbacks, which it believes creates a deferred compensation "liability" amongst the pilots, result in charges against vessels that did not enjoy the benefit of the past pilotage services that generated the callback. Those past services were already paid for by the vessels that received the services, and no future tariff revenue should be generated as an additional charge simply because PSP decided to convert it into a unique form of unfunded deferred compensation in its own accounting. In the meantime, PSP could eliminate this problem of its own making by improving pilot availability, but it has not to-date instituted the management controls

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<sup>92</sup> Carlson, Exh. IC-42x (PSP response to PMSA Data Request 496) ("this data request is unduly burdensome... [t]o identify those who are on-duty less those who are unavailable at any one time, PSP would have to review multiple daily records and compile a new spreadsheet in which the number is calculated on a daily basis. Doing so would require no less than a week's time for a single person to compute, if not more.").

necessary to restrict pilots from choosing when they prefer to not work either when on-watch or off-watch. PSP also does not track pilot availability and thus, as it cannot measure pilot rotation, including when PSP has limited pilot availability, it cannot efficiently manage its rotation.

65. PMSA agrees with Staff that the PSP callback system does not and cannot create the basis for a tariff increase: “there is no obligation to fund call back liabilities further than the amount already received for services” because “the revenue [was] earned when the pilot accepted the callback assignment and the service was performed.”<sup>93</sup>

66. Moreover, since PSP already received the revenue for the callback assignment, any additional charge would violate the Tonnage Clause of the U.S. Constitution.<sup>94</sup> When a charge against vessels in international or interstate commerce for the privilege of entering, trading in, or lying in a port is not for services actually provided to the vessel, the charge is unconstitutional.<sup>95</sup>

**D. Matters under BPC jurisdiction, such as the number of licensed pilots, TAL, and safety, should not factor into ratesetting.**

67. PSP’s claims that a shortage of licensed pilots exists and that the Commission should fund more pilots than currently exist—and even more than are authorized by the BPC—appears to be an improper attempt to involve this Commission in an area that is firmly within the BPC’s jurisdiction. The same is true for PSP’s arguments for setting a tariff based on drastically lower expected

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<sup>93</sup> Kermode, DPK-1T at 19:3-6.

<sup>94</sup> U.S. Const. art. I, §10, cl. 3.

<sup>95</sup> *Polar Tankers Inc. v. City of Valdez Alaska*, 557 US 1 (2009); *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm’n*, 296 US 261, 265 (1935).



average pilot assignment levels from the TAL set by the BPC. Similarly, PSP's efforts to increase the tariff based on safety considerations also strays into territory within the purview of the BPC, not the ratesetting process.

**1. Reduced assignment levels should be rejected as a basis for increasing the tariff.**

68. As mentioned above, PSP bases its DNI in the revenue requirement formula on a future number of fictional pilots.<sup>96</sup> The sole evidence and rationale PSP presents for this is the testimony of Dr. Sami Khawaja on a model regarding callbacks in which he opines that pilotage services should be based on a different “unit” than the BPC TAL of 145 assignments annually.<sup>97</sup> His testimony on this point is unclear. At first he refers to a unit of 118 “assignments”; later he explains that he means 118 days on watch, whether the pilot performs any piloting work that day or not; still later he reverts to saying the unit is “118 assignments in a year” without knowing “what that translates to in terms of days on-watch” or even hours, though he seems to believe pilots should be paid by some unit of time, not by tasks.<sup>98</sup>

69. While Dr. Khawaja himself stressed the importance of performing a multiyear analysis as universal for good forecasting,<sup>99</sup> For his callback simulation model, Dr. Khawaja's dataset was a spreadsheet for 2018.<sup>100</sup> Dr.

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<sup>96</sup> Khawaja, Exh. SK-1T at 9:12-17.

<sup>97</sup> *Id.*; Khawaja, TR. 185:21-23.

<sup>98</sup> Khawaja, TR. 185:19 - 188:19.

<sup>99</sup> Khawaja, Exh. SK-3T at 6:18-21; Khawaja, TR. 172:9 - 173:6.

<sup>100</sup> Carlson, Exh. IC-39X; Exh. IC-42X at 24 (PSP Response to PMSA Data Request 220).

Khawaja said it was “not possible” to review more than one year of data;<sup>101</sup> yet PSP disclosed at the hearing that it uses central dispatching software that has all pilot dispatch records from 2016 to present.<sup>102</sup> In response to Bench Request No. 1, PSP has now produced a report for the 2018/19 test year that looks very similar to 2018 single-year dataset relied upon by Dr. Khawaja.<sup>103</sup> Given these facts, it is unclear why additional years of data were not possible to review. As Dr. Khawaja himself acknowledged, multiple years of data are essential for accurate projections. Without that, his opinion on what the unit of pilotage work is not reliable. Further undermining its credibility was the data itself: Capt. Carlson, PSP’s Vice President, questioned the accuracy of the dataset’s very first entry in reporting a duty duration of more than nine hours for a job that took less than five hours.<sup>104</sup>

**2. Pilotage risks should also be rejected as a basis for increasing the tariff.**

70. PSP’s submissions in this proceeding have also included a number of references to risks involved in pilotage. For example, PSP presents testimony that generally describes the personal risks of the job of pilotage to pilots.<sup>105</sup> No one disputes that this is a profession that presents inherent risks, like those faced by maritime law enforcement and other mariners. The only question

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<sup>101</sup> Khawaja, TR. 182:10-18.

<sup>102</sup> Carlson, TR. 367:5-8.

<sup>103</sup> “BR1 - PSP dispatch records 7-1-18 through 6-30-19.xlsx” and the attachment Bates stamped PSP\_007939.

<sup>104</sup> Carlson, TR. 362:20 - 365:3; Carlson, Exh. IC-39X (tab “workload and recalls,” compare cells Y2 and AC2).

<sup>105</sup> von Brandenfels, Exh. EVB-1T at 6-11.

before the Commission is whether the risks have significantly changed such that the new tariff should reflect them. PSP does not, however, claim any increase in personal risk of injury for pilots. And PMSA has provided extensive evidence demonstrating that, if anything, the introduction of newer and more modern vessels and an enhanced focus on pilot ladder safety measures has marginally reduced personal risks of injury for pilots.<sup>106</sup>

71. PSP also discusses the risk of vessel incidents. Similarly, this is a risk that has always existed in pilotage everywhere. Again, there is no evidence of any material change involving risks of vessel incidents while under pilotage in the Puget Sound. On the contrary, 14 years of BPC incident data, from 2005 to 2018, indicate that the risks of vessel incidents while under pilot control in the Puget Sound have been decreasing over time.<sup>107</sup> As discussed by PMSA and agreed to by PSP, the introduction of a number of measures have contributed to this reduction of risk: additional tugs and tug assistance, newer and more modern vessels with redundant propulsion and steering systems, and universal pilotage usage of Portable Pilot Units, for example.<sup>108</sup> For both risk of personal injury and risk of vessel incidents, PSP has neither identified nor quantified any material change. As a result, there is no basis for utilization of risk factors to adjust the tariff in the record. The PSP claims should therefore be rejected as a basis for a tariff increase.

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<sup>106</sup> Moore, Exh. MM-1Tr at 81-85.

<sup>107</sup> Moore, Exh. MM-1Tr at 85-90; Moore, Exh. MM-25r.

<sup>108</sup> Moore, Exh. MM-1Tr at 79-81; Moreno, TR. 415:3-15.

**E. Ratepayers' profitability or ability to pay tariffs should not affect ratesetting.**

72. PSP also claims that ratesetting should consider ratepayers' ability to pay based on the profitability or potential for profitability of some of the ratepayers, such as container vessels.<sup>109</sup> This is highly inappropriate and against public policy, as adamantly explained by Staff.<sup>110</sup> Ratesetting in any industry should be based on a revenue requirement formula—not on customer financial data.<sup>111</sup> Even if this were a valid claim, PSP proposes no methodology for including such information in the tariff.

73. Nor should the idea that some ratepayers might have the capacity in some years to pay higher tariffs operate as even a subjective factor for increasing the tariff in this proceeding. As a policy consideration under the Pilotage Act,<sup>112</sup> industry competitiveness factors must be viewed across the many markets served by our numerous ports and the factors will vary from ship type to ship type and from commodity to commodity, and what might not be relevant in a present market might be relevant to future market considerations, all within the same rate proceeding. None of those dynamics were analyzed here.

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<sup>109</sup> Quick, Exh. GQ-1T at 14:2-4 (“the heightened responsibility and skill level that enhances economies of scale and profitability should be recognized in rates and pilot compensation”).

<sup>110</sup> Sevall, TR. 661:15-20.

<sup>111</sup> See Ramirez, Exh. JCR-6 (UTC Response to PMSA Data Request 6).

<sup>112</sup> RCW 88.16.005 (“It is the further intent of the legislature not to place in jeopardy Washington’s position as an able competitor for waterborne commerce from other ports and nations of the world, but rather to continue to develop and encourage such commerce.”).

74. In its original filing, PSP presented only one unsupported argument on the subject of competitiveness.<sup>113</sup> Mindful of the policy under the Pilotage Act that the state take actions to maintain competitiveness, PMSA presented evidence showing that costs do matter to pilotage customers.<sup>114</sup> Pacific Yacht Management (PYM) presented testimony that made this same point: even luxury yachts that function as “floating hotels” operate with “very tight budgets.”<sup>115</sup> Like many businesses, they manage their expenses, including pilotage tariffs, very carefully.<sup>116</sup>

75. Nor does PSP’s report produced on rebuttal<sup>117</sup> address the absence of any evidence to the contrary. PSP’s rebuttal report relates only to the elasticity of demand by cargo owners in the containerized trades, with no analysis whatsoever of how the tariff affects the competitiveness of Puget Sound ports with respect to their direct customers—the vessel owners themselves who are subject to pilotage fees. PSP’s rebuttal report has no application in this hearing. The report attempts to ascertain what a cargo owner is willing to pay for a container shipment as a proxy to answering the question of what an ocean carrier should pay a pilot. This is like focusing on what a customer at a grocery store is willing to pay for a box of Oreos in order to determine what the trucking rate to deliver products to the grocer’s distribution center should be.

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<sup>113</sup> Styrk, Exh. LS-1T at 5:17-21.

<sup>114</sup> Moore, Exh. MM-1Tr at 114-124; Moore, Exh. MM-32r; Moore, Exh. MM-33r; Moore, Exh. MM-34r; Moore, Exh. MM-35r.

<sup>115</sup> Webber, TR. 546.

<sup>116</sup> *Id.*

<sup>117</sup> Leachman, Exh. RL-1T.

76. PMSA agrees with the Commission that the Pilotage Act is applicable and relevant to pilotage ratesetting and considerations of port competitiveness must be viewed with the state’s policy goal of not jeopardizing waterborne commerce in mind. The only evidence directly addressing the question of port competitiveness in this process was submitted by PMSA, and it makes clear that under the current tariffs the Northwest Seaport Alliance (NWSA) believes that “pilotage costs, while not the most expensive element of the supply chain, are a significant part of port call costs which continue to be a point of concern to the NWSA and to our customers.”<sup>118</sup>

#### **IV. RECOMMENDATIONS FOR AN IMPROVED NEW TARIFF AND A BETTER FOUNDATION FOR FUTURE TARIFFS**

77. Of the opportunities presented to the Commission in this initial ratesetting process, two of the most important are establishing measured, clear, and well defined policies, standards, and principles, and directing foundational stakeholder reviews, studies, and discussions of what best practices and improvements can improve performance, efficiency, and transparency. This is a time to lay the best foundation possible for future tariffs based on the record in this proceeding. As nothing is perfect the first time through, the Commission’s decision should also provide direction for improving accountability and transparency for the public and for the ratepayer customers of the pilotage monopoly on the Puget Sound. Doing so will lay an even stronger foundation for future pilotage ratesetting.

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<sup>118</sup> Moore, Exh. MM-34r.

78. The Commission Staff and PMSA have made several recommendations for laying such a foundation. PMSA respectfully requests that the Commission order PSP, Staff, and stakeholders to continue to address issues of pilot staffing, pilot retirement, pilot expenses and administrative review, competitiveness, rate of return methodology, and yacht exemptions in a manner conducive to improving future ratemaking.
79. Regarding pilot staffing, Staff has suggested the possibility of “a queuing study that could actually design a staffing [system] that fits the pilotage demand of the Puget Sound.”<sup>119</sup> PSP’s “strict” rotation system delivers significant job opportunities to pilots who are focused on providing services, but it also suffers from the tremendous inefficiencies and inexactitude in the management of workload and watchstanding policies and its inability to track and monitor actual pilot availability. Given this situation, PMSA wholeheartedly embraces Staff’s suggestion of a queuing study. With the right incentives in place, the pilotage corps can become safer, more efficient, and better for the state, ports and ratepayers, all while being just as lucrative (if not more so) for the pilots by working smarter, without needing to raise rates. A queuing study would be a good place to start those conversations.
80. Regarding pilot retirement, Staff has suggested that the Commission address the unsustainability of the current PSP unfunded, pay-go, defined benefit retirement system through an Order that would require “discussions to

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<sup>119</sup> Kermode, TR. 582:10-13.

develop a plan that will provide a transition to a fully-funded, defined benefit retirement plan,” that would also address “benefits to current and future pilots,” and ideally “include some discussion of the reestablishment of retirement fund contributions by active pilots.”<sup>120</sup> The purposes of this plan would be to ensure retirement payments “at the lowest costs” and to “provide security and confidence in the long-term viability of the promised retirement benefits.”<sup>121</sup> PMSA agrees. Moreover, all stakeholders should be able to participate in these discussions, and PMSA looks forward to doing so.

81. PMSA respectfully suggests that Staff’s recommendation to transition to a funded “defined benefit retirement plan” is too narrow of a charter for this discussion. The Commission should broaden the focus to finding the best outcomes for funding pilot retirements. Those might include a transition to and/or recognition of funded alternative retirement plans that might represent retirement goals that are more sustainable than a defined benefit plan, equally acceptable, and more suitable for independent contractors. PSP members have many retirement options at their disposal, many of which they already exercise in addition to the PSP Retirement Program.<sup>122</sup> Expanding the discussion to include looking at both fully funded defined benefit plan benefits and other potentially sustainable retirement vehicles would behoove all parties.

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<sup>120</sup> Kermode, Exh. DPK-1T at 24:15-21.

<sup>121</sup> *Id.*

<sup>122</sup> Moore, Exh. MM-1Tr at 97:8-99:9.



82. In addition to supporting Staff recommendations, PMSA suggests several additional considerations: a review of PSP expenses and administrative practices in a performance audit, establishment of a policy statement regarding the application of the Pilotage Act, and direction on presentation of a Rate of Return by PSP.
83. The Commission’s decision in this case should require completion of a performance audit of PSP expenses and administrative practices before consideration of another pilotage tariff petition can occur. With respect to expenses, the performance audit should include all of those categories for which the tariff was proposed to be adjusted by Staff in its pro-forma and restating adjustments, including Transportation, Attorney Fees, Charitable Organizations & Sponsorships, Travel & Entertainment, and Consulting Fees.<sup>123</sup> It should also include PSP’s medical plan expenses since PSP is paying premiums into a national plan for pilots, but its expenses are approximately 50 percent higher than those reported by Columbia River Pilots who are eligible for the same medical plan.<sup>124</sup> The performance audit should also consider the ongoing post-retirement pension expenses for a retired PSP executive director who had already participated in a fully funded plan as a PSP employee.<sup>125</sup>

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<sup>123</sup> LaRue, Exh. AMLR-2r, Sch. 1.2, R-17, R-18, R-19, R-21, PF-1, PF-2, PF-3.

<sup>124</sup> Norris, Exh. JN-04; Carlson, Exh. IC-26b.

<sup>125</sup> Burton, Exh. WTB-03 at 2:40 (formula including ‘Fiscal Period Ended 6-19’R75, where the referenced cell, for “Account: 52250-009 Pension, Tabler,” shows an annual payment of \$69,502).

84. Of all of the expense categories, the transportation charge in the tariff, as discussed in some detail above in Section II, has been in place for over 55 years without controversy. Yet PSP proposes a complete overhaul with virtually no analysis or serious rationale from a set charge per port to an across-the-board average. While Staff has reduced the dollar figure asked by PSP based on its review of the actual charges submitted, it has nevertheless agreed to a fundamental recalculation methodology for this expense. PMSA is concerned that under the new system PSP would fold generated revenues into general revenue and then determine how to manage reimbursement or distributions of such revenue to pilots, some of which appear to already be receiving undisclosed additional distributions of transportation revenues as owners of a transportation provider. No change to the transportation charge should occur until after the completion of a full and thorough performance audit and an evaluation of whether such an approach is fair to all ratepayers.

85. A second component of the performance audit should be a job task analysis with a focus on the administrative capacities and practices of PSP. The pilots have made their alleged incapacity to meet their administrative needs a substantial cornerstone of this petition, including their request for the assignment of the Vice President position to do administrative tasks. The PSP organization is small, the business model is not complex, and the management of day-to-day operations is governed by rules which have for the most part been around for decades. This is a working environment that should not need an

extensive, expensive, or expansive executive management team. Instead of expanding more administrative tasks to more licensees, the performance audit should focus on how to maximize the productivity and efficiency of the completion of the shared administrative tasks of the President and Chief Executive Officer and the Executive Director and if necessary by PSP support staff.

86. A performance audit that includes a full analysis of expenses and a job task analysis might require an enhancement of the tariff to cover the costs of an investigation fee. PMSA would support such an enhancement if necessary given the importance of such an audit as a source of solid information for future ratesetting.

87. As enunciated by the Commission previously, “the Washington Pilotage Act is concerned not only with protecting loss of life and property, but preserving ‘Washington’s position as an able competitor for waterborne commerce,’” and “[t]he parties, including PMSA, have accordingly focused on how PSP pilotage rates impact the competitiveness of Puget Sound compared to other ports.”<sup>126</sup> Given the importance of competitiveness in ratesetting, we would like to facilitate a specific process for input from the actual seaports in the Puget Sound into this process through a public participation hearing in future ratemaking calendars. An Order affirming the relevancy of the Pilotage Act, including efficiency and competitiveness, could direct the evaluation of

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<sup>126</sup> *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-190976, Order 08 at ¶ 22 (Aug. 7, 2020) (citing RCW 88.16.005).

potentially applicable process improvements and direct Staff to reach out directly to the public seaports serving the Puget Sound to ask how their expertise on competitiveness can be given a voice in future ratesetting.

88. Regarding Rate of Return calculations in the Revenue Requirement formula, PMSA agrees with Staff that the Commission should require PSP comply with GAAP accounting for future ratesetting. However, if PSP intends to continue to prepare an analysis of its finances under its modified accounting standards, then the Commission should require that PSP include an ROR calculation. If the PSP modified accounting standard is utilized, then ROR must be a relevant consideration given that (1) PSP's audited financials reflect its claimed positive equity; (2) there remains a required payout structure included in the PSP bylaws which creates a return on equity; and (3) PSP members are therefore compensated not only in exchange for their labor but also as partners earning a return on their equity contributions to the enterprise.<sup>127</sup> An expert analysis of ROR, such as that presented by PMSA which accepted the PSP financials and their modified accounting methodology at face value, would be warranted if PSP does not full comply with GAAP accounting. PMSA's analysis demonstrated that PSP membership has more than adequate ROR under its current framework when one compares the required equity payments under its bylaws

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<sup>127</sup> Ramirez, Exh. JCR-1Tr at 9; TR. at 437:15-21 (testimony of J. Ramirez).

and compares those payments for equity out to equity in.<sup>128</sup> PSP must analyze that same data if it refuses GAAP accounting and its attendant clarity.

89. With respect to the exemption requests by PYM, the Commission should order PSP to work with UTC Staff, BPC Staff, and PYM to address the concerns of these specialized vessels. If PSP truly believes that it is in the midst of a pilot shortage despite a decreasing workload, then it should proactively seek to work with PYM to eliminate the jobs where risk is appropriately mitigated without use of a pilot, that take the greatest amount of time, and which make the smallest of contributions to the overall revenues of the system. Unfortunately, PSP's views of PYM's issues were exposed during the hearing when it was alleged by PSP counsel that the individual wealth of the owners of the vessels that are the clients of PYM is a legitimate basis for ratemaking.<sup>129</sup> As noted by Staff, this is against public policy.

## V. CONCLUSION

90. In 2018, the Legislature moved the pilotage ratesetting process from the BPC to the Commission.<sup>130</sup> As part of that legislation, the BPC's existing tariff

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<sup>128</sup> Ramirez, Exh. JCR-1Tr at 17 (“...the fair and reasonable rates of return on investment in the transportation industry ranged from 13% to 35%. The PSP rates of return on investment ranged from 61% to 62%. Based on my analysis, and in my opinion, the PSP rates of return exceeded fair and reasonable rates of return.”).


<sup>129</sup> In cross-examining Ms. Webber, PSP's counsel also made a completely unwarranted attack on PYM and attempted to impugn PMSA's integrity by alleging that PMSA was writing or directing PYM's testimony. PSP has not produced any evidence that would serve as any basis for what it claimed was a “rumor” to that effect. PSP has not apologized to PYM or PMSA for that baseless accusation.

<sup>130</sup> Laws of 2018, ch. 107.

under WAC 363-116-300 was deemed to have been set by the Commission and remains in place as the existing tariff under RCW 81.116.050 until such time as a moving party proves by a preponderance of the evidence that the existing tariff is not fair, just, reasonable and sufficient. RCW 81.116.030(5). PSP has not met its burden of proof. Commission Staff has nevertheless recommended an alternative tariff that, with the modifications described above, would be fair, just, reasonable, and sufficient. Future tariff-setting processes would also benefit from the Commission's providing additional direction to stakeholders and Staff, as described above, as part of its decision in this proceeding. PMSA thus respectfully requests that the Commission adopt the Staff recommendation with these modifications and additions.

Respectfully submitted this 10th day of September, 2020.

**FOX ROTHSCHILD LLP**



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