

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET NO. TP-190976

**POST-HEARING REPLY BRIEF OF PUGET SOUND PILOTS**

**September 25, 2020**

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## I. INTRODUCTION AND SUMMARY

- 1 PSP's initial brief articulated just how its proposed tariff and supporting elements establish rates that are fair, just, reasonable and sufficient and, importantly, consistent with the public interest of supporting a safe, efficient and reliable pilotage service for the Puget Sound pilotage district. In this Reply Brief, PSP will address arguments made by Commission Staff and intervenors Pacific Merchant Shipping Association ("PMSA") and Pacific Yacht Management ("PYM") in their initial briefs. In defending its proposed tariff, PSP addressed many of the arguments raised by Staff and PMSA in their respective initial briefs and those arguments will not be repeated here.<sup>1</sup>
- 2 Staff's initial brief raises concerns about the standards for judicial review and arguments regarding the division of jurisdiction between the Commission and the Board of Pilotage Commissioners ("BPC"). PSP addresses below why its proposal is supported by substantial evidence and the most rational basis upon which the Commission should issue its order approving PSP's proposed tariff. PSP will also address material flaws in Staff's additional analysis regarding pilot income, the economic basis for funding a number of pilots independent from the BPC's staffing decisions, and PSP's transportation expenses.
- 3 Maintaining its familiar refrain, PMSA proposes that the Commission reject PSP's tariff filing in favor of attrition and prejudicial delays in decision making, wait for new studies not offered in evidence, seek input from PMSA-aligned parties that did not appear in this proceeding, and second-guess all managerial decisions within the expertise of PSP without evidence of actual inefficiency or abuse. The Commission should reject these various imprudent invitations.
- 4 The Commission should enter specific findings that neither Staff nor PMSA's proposals establish rates that are fair, just, reasonable and sufficient because they fail to consider objective standards by which to measure the value of pilotage service. It should also find that Staff applies arbitrary standards to their proposed adjustments to PSP's transportation expenses and to PSP's vessel depreciation schedules. Finally, as noted, the Commission should approve PSP's proposed tariff

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<sup>1</sup> E.g., PSP will not repeat its arguments in support of necessary funding the vital role served by the Vice President as a second operational/administrative pilot supporting the President and ensuring consistency in PSP's operations.

and adopt its proposed ratesetting methodology to guide the parties' evidentiary presentations in future proceedings.

## II. PSP'S TDNI PROPOSAL SHOULD BE APPROVED

### A. Staff failed to support its proposal for Distributable Net Income

5 As outlined in both direct and cross-examination testimony and on brief, Staff recommends the Commission establish a Distributable Net Income goal ("DNI") based upon pilots' average historic earnings during a period featuring both a legislative rate freeze and a black box ratesetting methodology that ultimately led to the legislature's transfer of ratesetting authority. In support of its position it offers two basic arguments: (1) CPI adjustments to prior earnings were supported by a Coast Guard ratesetting order;<sup>2</sup> and (2) the presumption that prior rates were reasonable when established.<sup>3</sup> Yet a review of the basis for Staff's position demonstrates its arguments lack merit.

#### *i. Coast Guard decisions actually bolster PSP's proposal rather than Staff's*

6 To start, when questioned at the hearing about other ratesetting jurisdictions that use an average of historic earnings to establish prospective rates, Staff was unable to do so, and instead argumentatively answered "[w]hat RCW in Washington requires us to[?]"<sup>4</sup> In its brief, Staff now asserts that it found support for its proposed historic-average methodology in an isolated ratesetting order of the Coast Guard, which sets pilotage rates for American Great Lakes pilots. But Staff's reliance upon the Coast Guard ratesetting methodology in 2020 fails to consider the history of Coast Guard ratesetting orders, some of which were addressed in PSP's Initial Brief, which overwhelmingly support PSP's proposal and undercut Staff's argument.

7 The principal flaw in Staff's reliance upon Coast Guard ratesetting orders is that it did not merely set rates in a vacuum of information regarding the sufficiency of pilot income. Instead, in 2016 the Coast Guard set out to increase Great Lakes pilots' income to attract new pilots and retain the existing workforce.<sup>5</sup> As part of that goal, it abandoned the benchmark it had been using, a union

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<sup>2</sup> Staff's Initial Brief, ¶ 45.

<sup>3</sup> *Id.* at ¶ 46.

<sup>4</sup> Sevall, TR. 644: 20.

<sup>5</sup> Great Lakes Pilotage Rates—2016 Annual Review and Changes to Methodology, 81 Fed. Reg. 11908 (Mar. 7, 2016).

contract (the “AMOU Contract”), and relied instead upon the earnings of Canadian Great Lakes pilots after applying a 10% upwards adjustment. However, as Staff noted, the applied adjustment applied was successfully appealed to the federal District Court.<sup>6</sup> Staff’s rendition of that appeal, however, fails to address material facts and distinctions in suggesting that any consideration of PSP’s proposal would lead to an arbitrary result.

8 First of all, it was not the use of Canadian Great Lakes pilots as a comparator that was overturned. Instead, the Coast Guard’s rationale in applying a 10% upward adjustment to that amount “apparently stood entirely on the ‘statements made at the 2014 GLPAC [Great Lakes Pilot Advisory Committee] meetings’ that it originally referenced in the NPRM [Notice of Proposed Rulemaking]” rather than evidence or reasoned judgment.<sup>7</sup> Thus, unlike PSP’s proposal here, the Coast Guard appears to have relied on its own internal metrics derived at a Coast Guard Committee Meeting, not a live hearing, and apparently failed to consider arguments made by the stakeholders in the formal rulemaking process.

9 Then in 2018, rather than applying a new rationale for its adjustment, the Coast Guard abandoned its attempt to rely upon the income earned by pilots in another country, and returned to use of the AMOU Contract. By then, however, AMOU Contracts had been deemed proprietary and an updated version was no longer available for the Coast Guard’s reliance. Thus, in reaching its 2018 revenue requirement, the Coast Guard applied a new formula and an inflation adjustment to the previous 2015 AMOU Contract amounts.<sup>8</sup> Indeed, rather than supporting Staff’s attempt here to avoid use of a comparator to objectively determine pilot income sufficiency, the Coast Guard’s inflation adjustment was just one part of its overall quest to insure the Great Lakes pilots were adequately compensated for their work:

While we have considered the argument that it would be more efficient to pay pilots less or have fewer of them to generate lower shipping rates, we believe the effect on safety and reliability warrant a multiplier of 270. In the past, when compensation levels were lower, the pilot associations asserted that they had trouble attracting

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<sup>6</sup> *American Great Lakes Pilots Port Association v. Zukunft*, 296 F. Supp.3d 27 (D.C. Cir. 2017).

<sup>7</sup> *Id.* at 46.

<sup>8</sup> Great Lakes Pilotage Rates—2018 Annual Review and Revisions to Methodology, 83 Fed. Reg. 26162 (Jun. 5, 2018).



and retaining qualified pilots, and we believe offering higher compensation will help the pilot associations attract and retain higher numbers of more experienced pilots. Furthermore, we continue to note that the Great Lakes pilots' target compensation is within the range compensation of other U.S. pilotage associations (although we note we are still gathering data as to how the compensation and tariff levels of other U.S. pilotage associations are set).<sup>9</sup>

That same process was then repeated in the 2019 and 202 rate orders Staff relies upon to support its methodology. Thus, because the Coast Guard did not in fact rely upon historic earnings to establish rates, Staff's proposal lacks even the limited support it articulated.

*ii. Past earnings cannot support sufficient prospective rates*

10 As noted, Staff also maintains that its historic-average DNI proposal is supported by the presumption that rates were reasonable when established.<sup>10</sup> Although the filed-rate doctrine is undisputed in its validity, rather than supporting the perpetuation of a realized rate of return, the rule merely precludes customers from demanding a refund when a company's profits exceed its authorized rate of return.<sup>11</sup> More significantly, Staff's proposal also violates a significant corollary to that rule, which prevents the consideration of prior earnings in establishing a prospective return. Specifically, the US Supreme Court has long held that neither past losses or excesses profits may be relied upon to sustain the sufficiency of prospective rates.<sup>12</sup> Because the BPC set rates in a black box, it is impossible to know whether PSP earned more or less than any authorized return in the historic period relied upon by Staff. And because Staff's proposal lacks any objective measure of the value of pilotage services by which to now establish the appropriate return to PSP's members for their contributions of labor, its proposal inherently violates this long-held principle requiring that rates and the rate of return be established objectively on a prospective basis in each successive rate proceeding.

11 In fact, there is at least one relatively recent instance in which the Commission did not update its rate of return determination, opting instead to rely upon a previous ratemaking index as Staff

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<sup>9</sup> *Id.* (emphasis added).

<sup>10</sup> Staff's Initial Brief, ¶¶ 45-46.

<sup>11</sup> *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 387, 52 S. Ct. 183, 185, 76 L. Ed. 348 (1932).

<sup>12</sup> *Bd. of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31-32, 46 S. Ct. 363, 366, 70 L. Ed. 808 (1926)(internal citations omitted). Staff cites to a more recent decision for the same premise in its Initial Brief, at p. 12, n. 57, yet fails to apply it consistently in its arguments.

proposes here. Although the Commission surely had procedural justifications for accepting the prior determination as valid in that limited tariff update circumstance, upon review, the Superior Court remanded the case to the Commission for further consideration of more contemporary market-based evidence for the rate of return.<sup>13</sup> As noted by the Commission in its Final Order on Remand...

The Court determined that the Commission, having expressed the point that “the record on the issue [of return on equity] in this case lacks the depth and breadth of data analysis, and the diversity of expert evaluation and opinion on which the Commission customarily relies in setting return on equity,” should not have left the previously approved rate of return on equity in place and should instead have required the submission of additional evidence on this issue.<sup>14</sup>

12 Staff’s proposed methodology here not only leaves in place the results of BPC’s black box ratesetting methodology without consideration of Capt. Quick’s expert evaluation and opinions, and without analysis and consideration of the income earned by other state-regulated pilots, they propose the Commission do so in perpetuity. If the Commission is not permitted to rely upon a recent Commission rate-of-return determination in lieu of contemporary market-based comparators even in limited procedural circumstances, it surely is not permitted to approve Staff’s proposal and thereby reject market-based evidence of appropriate pilot income as a permanent feature of its ratesetting methodology here.

*iii. Lack of pilot attrition does not support adequacy of rates*

13 Staff and PMSA also posit that relying upon the prior net income to pilots is appropriate due to a lack of attrition by pilot members of PSP.<sup>15</sup> As noted by PSP in its initial brief, the Maryland PSC previously rejected a similar argument made by the Maryland PSC staff, finding that it to be an unfair position.<sup>16</sup> Pilots make a tremendous multi-year investment to earn a pilotage district-specific state pilot’s license. This investment, comprised of opportunity cost (foregone salary as the Master of a US-flagged vessel) and the actual costs of taking the pilotage exam, is considerable, and should not be so casually disregarded in considering the seldom occurrence of a pilot

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<sup>13</sup> *In re: Puget Sound Energy*, Dkts. UE-121697 and UE-130137 (consolidated), Order 15, ¶¶ 9 - 14 (Jun. 29, 2015).

<sup>14</sup> *Id.* at ¶ 14.

<sup>15</sup> Staff’s Initial Brief, p. 24, n. 105.

<sup>16</sup> *Re Ass’n of Maryland Pilots*, 76 Md. P.S.C. 498 (Md. P.S.C. Sept. 16, 1985).

abandoning one pilotage district for another.<sup>17</sup> But pilot candidates who have not yet made that investment may opt to train and become licensed elsewhere. Thus, in assessing attrition in the context of income sufficiency, the Commission should acknowledge that multiple candidates have opted to train to become pilots in San Francisco instead of the Puget Sound.<sup>18</sup> The Commission should also ensure that pilot income is sufficient to attract high quality candidates. As Capt. Carlson noted, 43% of ferry Captains that have entered the training program since 2008 failed to complete it.<sup>19</sup> Increasing pilot income will incentivize a more robust pool of candidates to take the exam, which should ensure that the top examinees are more likely to successfully become pilots in the Puget Sound.

**B. Staff's critiques of PSP's DNI proposal fall short**

*i. Staff argues PSP's proposal is arbitrary by ignoring more relevant evidentiary standards in favor of a single inapplicable ruling on an unrelated issue*

14 Staff also insists that the Commission should reject Capt. Carlson's rationale for PSP's DNI proposal. There, Capt. Carlson testified that PSP's proposal is within the range of incomes earned by other pilotage districts and below the average of the range. While making this argument, Staff relies upon the standards for judicial review of Commission orders under the Administrative Procedures Act, but fails to demonstrate their applicability to PSP's proposal.

15 As addressed briefly by Staff, the Commission's ratesetting authority has been interpreted by Washington courts to be broad, and within that broad range it has substantial discretion to select the appropriate rate-making methodology which will not be set aside absent a clear abuse of discretion.<sup>20</sup> As a result of that far-reaching discretion, Courts will not find a Commission ratesetting determination to be arbitrary or capricious where there is room for two opinions so long as the Commission's decisions are reasoned and give due regard to the attendant facts or circumstances.<sup>21</sup> When selecting a methodology for determining a rate of return, so long as the

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<sup>17</sup> Exh. SM-1T. 5: 1-3; 6: 12 – 7: 11.

<sup>18</sup> Exh. EVB-1T. 22: 20 – 23: 8.

<sup>19</sup> Exh. IC-4Tr. 39: 13 – 15.

<sup>20</sup> *Wash. Att'y Gen.'s Office v. Wash. Utils. & Transp. Comm'n*, 4 Wash. App. 2d 657, 682 (2018).

<sup>21</sup> *US W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wash. 2d 48, 69 (1997).

ultimate rate falls within a zone of reasonableness, the Commission's decision will not be disturbed on appeal.<sup>22</sup>

16 There are two pertinent ratemaking principles that should also inform the Commission in approving PSP's proposal. First, the Commission should consider the "zone of reasonableness." In review of a F.E.R.C. order, the D.C. Circuit Court of Appeals held that it is appropriate to select the mid-point<sup>23</sup> of the "zone of reasonableness" because it affords equal weight to each position and represents a rational basis for selecting a particular value within the zone, adding that a departure from the mid-point is arbitrary absent some reasoned basis.<sup>24</sup> Similarly, the Commission has frequently calculated a reasonable rate of return by first assessing the returns obtained by appropriate proxy groups to establish the "zone of reasonableness" and then selecting the mid-point or otherwise applying a rationale for approving basis points that deviate from the mid-point.<sup>25</sup> Second, the Commission importantly adheres to the regulatory principle of gradualism, which PSP again supports here.

17 Relying upon the only detailed pilot earnings information supplied by any party,<sup>26</sup> the Commission should apply a similar "zone of reasonableness" methodology, as alluded to in PSP's Initial Brief, to approve PSP's proposal. Considering the range of state-regulated pilot incomes set forth in Exh. IC-3, the mid-point would be \$541,923.50. Yet, adopting rates that would permit PSP pilots to earn the mid-point income level would undoubtedly raise significant concerns about rate shock. PSP had already contemplated potential rate shock justifying the formulation of its original proposed rate plan, and thus in this proceeding, PSP sought to reasonably request a lower value in the range. Accepting that movement of PSP pilots' income closer to the mid-point of national pilot income should occur gradually, the Commission's well-reasoned decision would be supported by

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<sup>22</sup> *People's Org. for Wash. Energy Res. v. Wash. Util. & Transp. Comm'n*, 104 Wash. 2d 798, 811, 711 P.2d 319, 327 (1985); *US W. Commc'ns, Inc. v. Wash. Util. & Transp. Comm'n*, 134 Wash. 2d 74, 117, 949 P.2d 1337, 1359 (1997), as corrected (Mar. 3, 1998).

<sup>23</sup> A simple average of the two boundaries of the range.

<sup>24</sup> *Tennessee Gas Pipeline Co. v. F.E.R.C.*, 926 F.2d 1206, 1213 (D.C. Cir. 1991).

<sup>25</sup> See, e.g. *In re: Puget Sound Energy*, Dkts. UE-121697 and UE-130137 (consolidated), Order 15, ¶¶ 142 - 144 (Jun. 29, 2015).

<sup>26</sup> See Exh. IC-3, which is further supported by Exhs. IC-25(a)-(p), 26(a)-(h), GQ-5T. 13, and Exh. SS-12X,

substantial evidence and previously-approved ratesetting principles.

*ii. PSP's proposal is supported by substantial evidence that Staff inexplicably failed to investigate until one day after the discovery cut-off*

18 Rather than giving the information supplied by PSP due regard and proposing its own “zone of reasonableness” for pilot income, Staff effectively dismissed and disregarded any need to review comparative pilotage pay and doubled down instead on defending Mr. Sevall’s use of historical averages. Mr. Sevall never really attempts to address why, for instance, the publicly available pilotage income data set forth in Capt. Carlson’s Exh. IC-3 in November was not pertinent or at least meriting some substantive analysis, and never explained why Staff did not follow up on the details produced by PSP to Staff on February 3, 2020,<sup>27</sup> later filed in Exhibits IC-25(a)-(p) and IC-26(a)-(h). Indeed, rather than thoroughly investigating commonly-used pilotage ratesetting methodologies or considering comparable income to use as a DNI benchmark, Staff interjected their rhetorical rejection of such an endeavor at the hearing noted above: “what RCW in Washington requires us to[?]”

19 Staff also now unfairly critiques PSP’s evidentiary submission as incomplete despite its long delays investigating the details of pilot income PSP produced in discovery.<sup>28</sup> In fact, as noted by Capt. Carlson, when asked in discovery what factors Staff believed relevant for comparison, Mr. Sevall replied “Staff has not taken a position on whether and what conditions are relevant for comparison purposes.”<sup>29</sup> Indeed, Staff apparently did not determine what factors it deemed to be relevant until at or near the procedural discovery cutoff, and despite the fact that Staff never supplemented its contentions about comparability to PSP consistent with WAC 480-07-405, it then served the data requests it now complains could not be completely answered by PSP on the day

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<sup>27</sup> See Exh. 3 to PSP’s Response to PMSA’s Motion to Strike of August 3, 2020 (PSP Response to Staff Data Request No. 25).

<sup>28</sup> PSP produced extensive and detailed records to all parties on February 3, 2020 in response to Staff Data Request No. 25. Without first following up to seek additional details that it now complains were incomplete, Staff then offered response testimony on May 27, 2020 rejecting the comparability of other districts “on their face” (Exh. SS-1T). Staff took no position as to what factors should be considered in a comparability standard on June 5, 2020 (Exh. IC-24, Staff Response to PSP Data Request No. 5), but never supplemented its response at all. In fact, Staff only followed up with new data requests after rebuttal and cross-answering testimony were filed. (Exh. IC-34X).

<sup>29</sup> Exh. IC-24 (UTC Staff Response to PSP Data Request No. 5 dated June 5, 2020).

after the discovery deadline, which required a continuance of that deadline for Staff's benefit.<sup>30</sup> Considering that Staff's data requests were served less than two weeks before the hearing, it should come as no surprise that PSP was not able to obtain all of the additional information Staff apparently finally considered to be relevant more than seven months after PSP initiated this proceeding.

20 Staff's insistence that income information be subject to Staff audit or any other form of rigorous analysis is also inconsistent with both prior Commission orders that require surveys of comparable compensation levels, not auditable books and records from numerous other jurisdictions or organizations.<sup>31</sup> Nevertheless, PSP's evidentiary presentation did supply thoroughly substantial evidence on which the Commission may now appropriately rely. Capt. Quick's expert testimony in Exh. GQ-1T, Section IV provides legal as well as financial support on the relevance of comparative pilotage pay in national pilotage ratesetting. Additionally, his uncontroverted testimony that pilot income nationally is in the range of \$550,000 to \$600,000 suggests the \$500,000 figure advanced in PSP's DNI recommendation and acknowledged by Capt. Carlson is not in any way arbitrary or unreasonable.

21 Despite Staff's and PMSA's concerted attempts to diminish it, George Quick's testimony on comparative pilotage pay is statistically supported and refuted only by conclusory characterizations by Staff and PMSA denying comparability without any supporting data or articulation of inaccuracy. Indeed, specifically unlike the Coast Guard in the case relied upon by staff in attempt to bolster its "incomplete" or lack of relevance mantra, PSP consistently relied on "the best available data" and updated methodological constructs.<sup>32</sup> Neither staff nor PMSA proffer any contravening showing or evaluation, merely threshold dismissals.<sup>33</sup>

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<sup>30</sup> See Order 07.

<sup>31</sup> Staff also disregards ratesetting principles acknowledging that not every aspect of ratesetting is susceptible to precise mathematical formulas. See *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 690, 43 S. Ct. 675, 678, 67 L. Ed. 1176 (1923).

<sup>32</sup> See e.g., Exh. GQ-5T, 12, 13.

<sup>33</sup> PMSA even goes so far as to refer to TDNI as a "novel metric" without support, despite the fact that using different names, the same general concept has been relied upon across the nation, including the Board of Pilotage Commissioners. See, e.g., Exh. MM-64X (BPC Minutes Dec. 1986 and Jan. 1987)(establishing tariff funding based

22 In fact, PMSA seeks to avoid any objective measure of pilot income sufficiency by arguing that only pilotage districts in Washington should be considered,<sup>34</sup> knowing full well that there is no comparable pilotage district in Washington. Grays Harbor, the only other state-regulated pilotage district in Washington, is a geographically small district with minimal shipping traffic that relies upon a port-pilotage model like Los Angeles, wherein pilots are government employees rather than pilot association members who bear all the entrepreneurial risk of a revenue shortfall. Pilots there are not expected to invest capital and do not bear any operating expenses. Thus, it cannot serve as a valid comparator for establishing the fair value of labor supplied by PSP pilots. Yet, even the two Grays Harbor pilots' 2019 average net income, exclusive of benefits, of over \$426,000 well exceeded income to PSP pilots, despite performing just 114 assignments per pilot on average.<sup>35</sup> Thus, even PMSA's typical goal-post moving arguments here do not actually support its unremitting drumbeat against a tariff increase.

23 Considering that neither Staff's nor PMSA's proposals adhere to Commission precedent or follow well-established pilotage ratesetting principles, the Commission should instead approve PSP's DNI proposal of \$500,000 per Full Time Equivalent.

**III. PSP'S PROPOSED ASSIGNMENT LEVEL SHOULD BE APPROVED**

24 In determining the Total Distributable Net Income ("TDNI") PSP and Staff (and to a lesser degree, PMSA too) agree that the Commission should multiply the DNI by a number derived from dividing the projected number of assignments by a workload unit (the "Assignment Level"). Regardless of the name applied to the resulting number (e.g., "Implied Pilots" as Staff proposes and the number of "FTEs" as PSP proposes) the result will inherently deviate from the number of actual pilots licensed by the BPC. Thus, the question before the Commission is the appropriate standard by

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upon number of pilots derived by dividing projected assignments by an assignment level, and establishing a targeted net income per pilot).

<sup>34</sup> PMSA's Initial Brief, ¶ 54 (contending that no out-of-state pilotage grounds should be considered comparable).  
<sup>35</sup> See 2019 BPC Annual Report, produced in response to Bench Request 4, p. 12 (229 total assignments were worked by two pilots in 2019), p. 37 (Wages and Incremental Duty Pay (payment for Callback Jobs) paid to two Grays Harbor Pilots in 2019 totaled \$852,416). Similar net income per far longer assignment (PMSA's preferred metric) for PSP would result in \$439,236 per FTE at 118 assignments per pilot as proposed by PSP or \$533,783 per Implied Pilot at 143.4 assignments per pilot as proposed by Staff.

which to determine the value of pilot labor.

25 As addressed in PSP’s Initial Brief and the testimony of Dr. Khawaja, PSP’s proposed assignment level is designed to determine the number of assignments a pilot would work if each pilot worked only while on-watch. Because the number of assignments a pilot is available to work on-watch depends on a variety of factors, including the timing of erratic and constantly changing vessel arrival and departure times, and the non-revenue activities in which pilots are engaged to ensure PSP is providing a competent and reliable pilotage service, the results of Dr. Khawaja’s simulation thus ensures that *all* of a pilot’s contributions to PSP are fairly considered in establishing the number of assignments an FTE should work.

26 Moreover, PSP’s FTE assignment level ensures that the DNI amount is compared fairly to the net income earned by other pilots, which is typically earned with minimal off-watch work. For example, Capt. Nielsen testified that Columbia River Bar Pilots (“COLRIP”) work a total of 40 callback assignments per year,<sup>36</sup> compared to PSP’s 1,300 plus in 2018 and 2019. COLRIP pilots also worked just 99 assignments per pilot in 2018. Thus, PSP’s FTE proposal ensures that income comparisons are made on a fairer and more consistent basis.

**A. The BPC’s authority is fully acknowledged in PSP’s proposal, but total deference to the BPC is unwarranted in establishing rates that are fair, just, reasonable and sufficient**

*i. Objective economic ratesetting requires that work is valued in conjunction with decisions regarding the number of pilots licensed*

27 Conversely, Staff proposes that its “Target Assignment Level” be adopted based upon the five-year average of actual assignments per pilot as a matter of deference to the BPC, and insists that Callbacks should be ignored in establishing a workload unit as an inefficiency somehow created by PSP. These arguments defy logic and ultimately request that the Commission ignore the way in which pilotage services have long-been provided. As discussed here, Staff’s proposal cannot result in rates that are fair, just, reasonable and sufficient because they do not place value on any of the off-watch Callbacks that pilots perform, or the significant non-revenue activities pilots must contribute to ensure a competent, efficient and reliable pilotage service.

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<sup>36</sup> Exh. JJN-1T. 3: 7 – 11.



28 Staff's principal argument in favor of its proposed assignment level, and against PSP's, is that Staff claims it appropriately defers to the BPC's authority to establish the number of licensed pilots needed to optimize the operation of a safe, fully regulated, efficient and competent pilotage service. PSP agrees that the authority of the BPC to establish the number of licensed pilots and establish fatigue management policies should be respected by the Commission in this proceeding; however, so too equally must be the Commission's responsibility to set rates that are fair, just, reasonable and sufficient. PSP believes that its proposal respects the authority of both agencies, while Staff's proposal would go too far, and impair fair and objective economic ratesetting decisions by the UTC.

29 Understanding why Staff's proposal limits appropriate economic considerations in valuing pilot labor may best be understood in the context of Danny Kermode's cashier analogy.<sup>37</sup> There, Mr. Kermode explained that "[t]he store's management will set the number of cashiers to promptly serve the store's average number of customers; however, when there is a surge, other qualified employees are called up to handle the times when the number of customers checking out is above average."<sup>38</sup> In that example, the store had already hired additional workers who could cover peak capacity and were available and being paid for their work. It would be fair to assume the store was paying more for that excess labor, but also had the managerial choice of using fewer employees and simply paying its off-duty workers overtime to come in and work additional hours during times of peak demand. In either situation, the store had the choice of paying more and staffing to the peak or paying more in the form of overtime. And in neither situation would the store have had the option of refusing to pay the cost of additional labor. Moreover, if the company were regulated by the Commission, so long as its choices were reasonable the Commission would include the labor expense in rates regardless of whether the company chose to hire more employees or simply pay overtime to fewer employees.

30 Applying the analogy to PSP, rather than staffing to peak demand, pilots here actually work

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<sup>37</sup> Exh. DPK-1T. 13.

<sup>38</sup> *Id.* 13: 1 – 6.

“overtime” by performing Callback Assignments. But instead of a managerial decision made by PSP, this is a decision made by the BPC with full knowledge of PSP’s callback system and with PMSA’s consistent insistence that pilots be mandated to work Callbacks.<sup>39</sup> Yet out of supposed deference to the BPC’s authority to make the decision as to whether to staff to the peak or rely on overtime,<sup>40</sup> Staff proposes that the Commission treat pilots differently in rates and opt to do what the store could not: rely on off-watch pilots without any increase in the revenue requirement to pay for that work. As Dr. Khawaja described Staff’s proposal, it expects pilots to work Callbacks for free.<sup>41</sup>

31 Precluding fair compensation to pilots as a result of the BPC’s managerial decision to staff well below peak demand levels will not result in rates that are fair, just, reasonable and sufficient, nor is it in the public interest. As discussed in PSP’s initial brief, working long hours without adequate compensation diminishes safety and leads to attrition of pilots through early retirements.<sup>42</sup> Conversely, PSP’s assignment level fully recognizes both the value of labor, and the BPC’s authority to establish the number of pilot licenses.

***ii. Relying upon an “assignment level” as a metric for funding hardly overrides the BPC’s authority to establish the number of licensed pilots***

32 Staff’s argument regarding the jurisdiction of the BPC also ignores the nature of an “assignment

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<sup>39</sup> See Exh. IC-13 (BPC July 2019 Minutes)(the impacts of the number of pilots on Callbacks were discussed at length at the 065 Hearing); Exh. IC-15 (Puget Sound Pilot Fatigue Study)(NASA discusses concerns about Callbacks with respect to the number of pilots needed to move ships in its report that was submitted to the BPC); Exh. MM-85X (PMSA argues that pilots are legally obligated to perform Callbacks as a condition of compulsory pilotage).

<sup>40</sup> Staff has offered shifting justification for excluding Callback compensation in its proposal. Mr. Kermode initially suggested that because pilots are owners, they do not earn overtime and should be required to take on the burdens and obligations that come with ownership. Exh. DPK-1T. 16: 14 – 17. This insistence though unfortunately violates Commission precedent which provides that owners should not be required to be paid less for their services simply because they are owners. *WUTC v. Rainier View Water Co., Inc.*, Dkt. UW-010877, 6<sup>th</sup> Supp. Order, ¶¶ 49 – 53 (Jul. 12, 2002)(an owner providing services to a regulated company should not be required to be paid less simply because she or he is an owner).

<sup>41</sup> Exh. SK-3T. 9: 9 – 11. It should also be noted that it does not matter whether PSP distributes the “overtime” pay to all pilots or to just the one who worked it as Staff and PMSA consistently argue. See, e.g., PMSA’s Initial Brief, ¶ 58. Whether one pilot or all pilots receive the additional “overtime” income is not the problem here. The issue with Staff’s proposal is that it would inexplicably and unfairly have other pilots pay for the overtime rather than ratepayers as Danny Kermode admitted at the hearing. Kermode, TR. 570: 25 – 571: 23.

<sup>42</sup> See *Am. Great Lakes Ports Ass’n v. Schultz*, 962 F.3d 510, 513-14 (D.C. Cir. 2020)(“The Coast Guard found that the prior ratesetting undercompensated pilots, which resulted in pilot shortages and threats to vessel safety”).

level” in the revenue requirement methodology. In reality, neither party is proposing a number of actual individual pilots that should be licensed nor the actual number of assignments each licensed pilot would work. Nor does either party propose that funding be based upon an actual number of licensed pilots or the number of pilots authorized by the BPC. Instead, both propose that a formula be applied to determine the number by which the DNI amount should be multiplied to establish the TDNI. Thus, neither party’s actual proposal strictly adheres to the licensing or workload decisions of the BPC, nor should they.

33 Respecting the distinct authorities of the Commission and the BPC requires that economic ratemaking decisions be made largely in isolation of the licensing decisions of the BPC in order to insure that the BPC does not retain vestiges of de facto ratesetting authority through the ability to establish the number of licensed pilots. As discussed above, the licensing decisions of the BPC have direct impacts on the operations of PSP by determining whether to staff to peak demand or rely on Callbacks, and those operational facts underlie PSP’s proposed ratemaking methodology. In that context, the BPC’s licensing and fatigue management decisions also remain undisturbed and are fully respected by ratemaking decisions.

*iii. The number of licensed pilots can only serve as a floor for funding levels*

34 PMSA, for its part, makes the unsupported argument that only the number of actually licensed pilots should be funded in the revenue requirement. PSP and Staff agree that the BPC’s number of licensed pilots should serve as a floor for the number to be funded to ensure that the overall compensation level does not become inherently insufficient.<sup>43</sup> However, there is no other economic basis for adherence to that number. Instead, a workload metric should be used in the ratesetting methodology in order to define the unit of work that should earn the DNI amount. Without that metric, the income each licensed pilot would earn on average would be divorced from the amount of work performed, resulting in an arbitrary return on pilots’ services. As PSP fully addressed in its initial brief, funding only the number of licensed pilots would unfairly disregard

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<sup>43</sup> Staff’s Initial Brief, p. 6, n. 24.

fluctuations in the workload of pilots from year-to-year. And if PSP were to file a proposed tariff in a year in which fewer pilots are actually licensed than in other years with a similar number of vessel assignments, the result of funding only the number of licensed pilots would be an arbitrary reduction in the revenue requirement. Thus, establishing fair, just, reasonable and sufficient pilotage rates actually requires that the Commission make an independent and objective determination of the unit of work that should earn an FTE pilot's DNI amount.

*iv. Using the authorized number of pilots as a cap would prevent objective economic ratemaking*

35 Staff also now proposes for the first time that the number of pilot licenses authorized by the BPC serve as a ceiling on the results of number of FTE pilots to be funded. This proposal promotes the same flawed concept as PMSA's position: it would create an artificial cap on income, and would require pilots to perform additional assignments for free. For example, if assignments were to return to historic levels in the 8,000s,<sup>44</sup> even Staff's proposed Assignment Level of 143.4 would suggest a need to fund as many as 58 "Implied Pilots." If, however, there were only 48 licensed pilots, and the BPC maintained a number of authorized pilot licenses at 56 because it would be unrealistic to actually license 58 pilots in the near future, Staff apparently argues that the additional work performed should not receive funding in a revenue requirement. This result would be unfair and arbitrary. Consequently, Staff's proposal to cap the number by which DNI should be multiplied is inherently flawed and should be rejected.

36 Yet another reason the BPC's authorized number of pilots should not serve as a cap on funding is that a number of BPC Commissioners were clear that they adopted the number of 56 pilot licenses under a "wait and see approach." In other words, because the training program is not capable of licensing new pilots rapidly, these Commissioners wanted to license new pilots and continue to assess the number of pilots needed as the number of licensees reached a number closer to the initial number approved of 56.

37 Indeed, both the "wait and see" approach and the rejection of a new Target Assignment Level in

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<sup>44</sup> Exh. IC-27.

favor of a study to determine a total workload were discussed by BPC Commissioners in great detail during the July 2019 meeting of the Board of Pilotage Commissioners and documented in the minutes for that meeting.<sup>45</sup> For example, the two public BPC Commissioners, Commissioner Kiley and Commissioner Farrell, shared the view that the BPC should move gradually and consider the speed at which trainees could complete the training program in determining the number of licenses to be authorized:

Commissioner Kiley responded that he believed their study and recommendation could be a possible target, but that the Board should move gradually toward that, if they go for that at all, to allow for additional consideration of traffic and the speed at which a trainee could complete the training program.

...

Commissioner Farrell added that he agreed with Commissioner Kiley's views. He said there was no action needed prior to the end of the year given that the existing slots couldn't be filled until at least then.<sup>46</sup>

38 And the vote to refer the "Target Assignment Level" (which Commissioner Kiley noted was "just a target") to the Fatigue Management Committee for further consideration of a total workload metric was unanimous.<sup>47</sup> Had the BPC Commissioners been willing to increase the number of pilot licenses as licensed pilots numbers increased, their determination to establish the number of licenses at 56 should not serve as an impediment to economic ratesetting decisions that fund more than 56 FTE pilots.

v. ***Fatigue management rules cannot be ignored in ratesetting and do not establish inefficiency***

39 Staff also contend that Fatigue Management should be ignored in ratesetting. Staff's principal argument here is nothing more than a strawman, asserting that PSP's proposed methodology is designed to manage and avoid pilot fatigue and should not be accepted for that reason. Again, PSP does not suggest that using an assignment level of 118 in the ratesetting methodology will directly impact the assignments performed by individual pilots, nor does it argue that increased funding will guarantee better rest for pilots. Yet, fatigue management rules adopted at the end of 2018

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<sup>45</sup> Exh. IC-13 (July 2019 Minutes)

<sup>46</sup> *Id.* at 10.

<sup>47</sup> *Id.* at 11.

unquestionably impacted the number of assignments pilots can perform while on-watch. Thus, it was perfectly appropriate for Dr. Khawaja to consider their impacts when using 2018 data (the most recent year of data that was available when Dr. Khawaja performed his analysis in 2019) to project future workloads.

40 Moreover, as acknowledged by the Coast Guard and addressed in PSP's Initial Brief, setting sufficient funding levels for pilots can indeed have positive impacts on pilot fatigue and safety.<sup>48</sup> Thus, there are important safety and fatigue considerations that the Commission should not ignore when approving PSP's overall ratesetting methodology.

**B. Callbacks rightly should impact the overall assignment level used to determine the number of FTEs to fund in rates**

41 Both Staff and PMSA critique the reliance upon Callbacks in establishing an assignment level by which to determine the number of FTE pilots to fund in rates, but for different reasons. As is discussed below, each of their arguments should be soundly rejected and PSP's proposal approved.

42 Staff assumes PSP proposes to include funding for previously earned Callback Days through the setting of an assignment level.<sup>49</sup> Like Staff's argument regarding fatigue management, Staff seriously mischaracterizes PSP's position. As PSP has repeatedly addressed, only the Callback assignments that are projected to be worked during the rate year were considered in establishing the assignment level of 118. Instead, as PSP has explained and reiterated, it proposed to continue funding for the accumulated Callback Days burned by pilots prior to retirement by the same method relied upon by the BPC. As documented in the 2001 MOU and in BPC minutes between 2000 and 2005, it funded Callback Days burned prior to retirement by adding additional pilots to the total by which the Target Net Income was multiplied.<sup>50</sup> PSP proposes this method continue now, but this funding mechanism will not be necessary for Callback Days earned after PSP's

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<sup>48</sup> *Schultz*, 962 F.3d at 513.

<sup>49</sup> Staff's Initial Brief, p. 11.

<sup>50</sup> See Exh. WT-2 (2002 Memorandum of Understanding); Exh. MM-58X (BPC Minutes May 2005); Exh. MM-59X (BPC Minutes May 2000). Staff also erroneously asserts that PSP is seeking to be paid twice for the same work because the Callback liability because it could not charge more than the tariff rates. Staff's Initial Brief, ¶ 21. This also misstates reality and PSP's position. The revenue requirement that established BPC-established tariff rates never included any accrued Callback liability, thus it was never funded until the Callback Days were burned.

proposed tariff is approved because PSP's proposed methodology expressly funds Callback Days when they are earned. Thus, Staff's argument misses the mark here.

43 PMSA's argument against considering Callbacks in determining a funding level is that it allegedly "overstates TDNI for the same amount of work."<sup>51</sup> This statement is not supported by evidence and instead relies solely upon the idea that "fictitious pilots" should not be funded. PMSA's assertions are illogical and serve to do nothing more than seek to devalue pilots' labor to facilitate PMSA interests in lower pilotage rates. As has been addressed by PSP throughout this proceeding, and extensively in its initial brief, the revenue requirement must fairly compensate the contributions of pilotage service PSP's members make by ensuring that pilots earn sufficient income for *all* of their contributions of labor. Pilots are expected to provide pilotage service, including operational and administrative duties that benefit a variety of stakeholders, during their average 181 days in rotation. Any additional work performed as a result of the BPC's staffing decisions should not be artificially devalued merely to serve PMSA's pecuniary interests.

44 Should the Commission ignore Callbacks and accept PMSA's unilateral opinion that Callbacks are simply part of a pilot's expected workload, it would mean that the Commission refused to consider a pilot's time on-watch as their full-time workload and considered pilots to provide value only on days where pilots perform assignments. Yet, as addressed by Capt. Carlson in rebuttal, pilots have many other responsibilities that consume their time. Due to the erratic and fluid nature of shipping schedules they must meet through "Board on Arrival" service, pilots spend a significant number of hours on-call, are detained for large periods of time at the pilot station in Port Angeles. They also perform vital operational and administrative work in meetings, and obtain mandatory training. Despite not generating revenue, PSP could not provide a pilotage service without these contributions of service from pilots.

45 These invaluable non-revenue activities were recognized by the BPC in its 2015 Policy Statement and are considered under WAC 363-116-065 when determining the number of pilots to license.

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<sup>51</sup> PMSA's Brief, ¶ 17.

Pilots' non-revenue activities are also expressly recognized in the context of pilotage ratesetting in a number of other states. For example, days on call and at the pilot station are factors expressly considered by pilotage ratesetting authorities in both Florida and Louisiana.<sup>52</sup> And when an industry representative in the Great Lakes attempted to argue that pilots should be compensated only for days they are expected to work, the Coast Guard expressly rejected that argument, ruling:

The industry commenters suggest that, like AMO mates, Great Lakes pilots should be compensated only for days that they are actually expected to work, and thus that the aggregate daily wage be multiplied by 200, rather than 270. This calculation would mean that Great Lakes pilots would receive zero compensation for being "on call" during those additional 70 days of the season. On the other hand, we recognize that multiplying the aggregate daily wage by 270 means that Great Lakes pilots would receive full compensation for days on call, even if the system is designed so that they are not expected to work for those days.<sup>53</sup>

46 Similarly, pilots contribute valuable services to vessels, various stakeholders in the Puget Sound region, and to PSP through their operational and administrative duties, which are performed both on and off-watch. PMSA would have the Commission now ignore the value of these services that are expressly acknowledged as considerations in establishing pilotage rates in multiple states.<sup>54</sup>

47 Consequently, the Commission should reject the arguments of Staff and PMSA and approve Dr. Khawaja's recommendation of funding each FTE based upon 118 assignments, giving full recognition to the pilot's traditional day-for-day work schedule and the corresponding number of assignments that can be worked in that time.

**C. The Commission should also reject PMSA's unfounded, self-serving contentions regarding PSP's workload**

48 The Commission should also reject each of PMSA's assertions regarding PSP's internal management decisions. PMSA has levied these slanted opinions repeatedly without supporting analysis, and despite the fact that PSP has clearly refuted them with actual evidence, PMSA persists.<sup>55</sup> Commission decisions must rest on substantial evidence and not the conclusory

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<sup>52</sup> La. Stat. Ann. § 34:1122(C)(1)(d); *See, e.g., S. Fla. Cargo Carriers Ass'n, Inc. v. State, Dep't of Bus. & Prof'l Regulation*, 738 So. 2d 391, 401 (Fla. Dist. Ct. App. 1999); Exh. IC-25(1), p. 31.

<sup>53</sup> Great Lakes Pilotage Rates—2018 Annual Review and Revisions to Methodology, 83 Fed. Reg. 26162.

<sup>54</sup> *See* 7 CCR 236(e)(11); Fla. Stat. Ann. § 310.151(5)(b)(4); Exh. SS-10X (Oregon Board of Marine Pilots Order 10-01).

<sup>55</sup> And while PMSA was permitted to offer its opinions, self-serving statements like those offered are typically given no evidentiary weight. *See W.W. Conner Co. v. McCollister & Campbell*, 9 Wn.2d 407 (1941).



positions of a third party with no first-hand knowledge of or experience in actual pilot operations.

*i. Individual pilots do not control their own workloads; on-watch workloads are the result of a traditional watch schedule modified for seasonal traffic, and traffic peaks*

49 PMSA initiates its unfounded critiques of pilot workloads by reiterating its ill-conceived contention that PSP's watch schedule is inefficient and that individual pilots have broad discretion in determining their own workloads.<sup>56</sup> PMSA failed to support these charges with any probative evidence. First, PMSA conveniently forgets that the BPC, and not PSP, controls the number of licensed pilots.<sup>57</sup> Second, PSP works a similar "day for day" work schedule as other pilot groups, with modifications to help cover seasonal traffic.<sup>58</sup> If PMSA (or Staff for that matter) contends some alternative 181-day work schedule would improve efficiency, it should be expected to support its position through data analysis rather than the mere *ipse dixit* opinions of Capt. Moore.<sup>59</sup> Instead, Capt. Moore supplied zero analysis to support PMSA's allegation.<sup>60</sup>

50 Additionally, as addressed by Capt. Carlson in his rebuttal testimony and Capt. von Brandenfels at the hearing, pilots do not have a choice of what assignment they receive. PSP adheres to a strict rotation system by which pilots return to the bottom of the dispatch board once they complete an assignment, and are dispatched to their next assignment in order.<sup>61</sup> Moreover, pilots are not permitted to refuse an assignment except for fatigue or health reasons. In fact, PSP's Bylaws provide a reduction in compensation and for a potential penalty if a pilot refuses an assignment on a scheduled work day.<sup>62</sup> Thus, pilots are plainly not free to work whenever they choose.

51 PMSA's claims also rest upon the fact that pilots are free to trade assignments and use previously earned Callback Days to take off scheduled work days and erroneous assertions that PSP has no

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<sup>56</sup> PMSA's Initial Brief, p. 28.

<sup>57</sup> RCW 88.16(1)(b)(d); WAC 363-116-065.

<sup>58</sup> Exh. EVB-1T. 7: 22 – 8: 9; Exh. JJN-1T. 3: 3 – 6; Exh. IC-25(l), p. 31 of 303; Exh. SS-11X (p. 8)(evidence regarding day-for-day schedules). Exh. IC-4Tr. 17: 18 – 18: 2 (PPW days alleviate Callbacks in the cruise season).

<sup>59</sup> A clearly biased party-representative who has consistently opposed all general rates increases for PSP since 2006. Moore, TR. 500: 23 – 502: 1.

<sup>60</sup> PMSA attempted to excuse its unsupported opinions as a shortcoming in PSP's record keeping and discovery responses. But PSP produced detailed dispatch records (the same data was filed in Exh. IC-40X (tab "jhr 2016-2019")) upon which PMSA could have supplied any analysis of its choosing. It simply chose not to provide any.

<sup>61</sup> Von Brandenfels, TR. 98: 9 – 21.

<sup>62</sup> Exh. EVB-5X.

ability to measure pilots' workloads.<sup>63</sup> As noted, PSP has produced extensive dispatch records reflecting the assignments, repos, trainings, meetings and other non-revenue activities of pilots.<sup>64</sup> Additionally, while trades certainly permit pilots to exchange one assignment for another, they hardly reduce the aggregate workload of pilots. Instead, they merely permit two pilots to "swap" assignments, leaving each with the same workload as before the switch. And contrary to PMSA charges, the Callback system has not permitted pilots to work whenever they want. Instead, they have resulted in pilots working *all the time*. As has been discussed in great detail in this proceeding, the number of earned Callback Days has been growing at a rapid pace because there are simply insufficient pilots to permit pilots the use of their earned benefit. Exh. IC-4Tr. 36: 3 – 37: 11.

52 The severe pilot shortage under which pilots have been operating<sup>65</sup> has resulted in PSP pilots being called back to work at a rate unprecedented in the last 25 years.<sup>66</sup> During the past two years, Callback Days earned have far outpaced the number of Callback Days used or burned. This is dramatically highlighted in Exh. IC-6, which reflects that the number of Callback Days earned have far outpaced the number of Callback Days "taken."<sup>67</sup> For example, in 2018, pilots worked 1,384 Callback jobs earning 1,194 Callback Days, while only 715 Callback Days were used to take off a scheduled work day. The disparity in 2019 was even greater.<sup>68</sup> Thus, rather than permitting pilots to sit back and do nothing as Capt. Moore has disrespectfully claimed,<sup>69</sup> it is more than apparent that the Callback system has resulted in increased work without corresponding benefit.

53 In fact, PMSA now contends that the primary benefit a Callback Day provides should be taken away by PSP through "workload management." To support this premise it argues that the Callback system is self-perpetuating. While it is true that a pilot who uses an earned Callback Day for fatigue or to spend time with his or her family may be replaced by an off-duty pilot to meet the ever-

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<sup>63</sup> PMSA's Initial Brief, ¶ 64.

<sup>64</sup> See Exh. IC-40X.

<sup>65</sup> Exh. IC-1T. 7: 19 - 8: 20; Exh. IC-4Tr. 16: 9 – 17: 17.

<sup>66</sup> See Exh. IC-6.

<sup>67</sup> Callback Days "taken" are those used throughout the year by pilots who are not retiring.

<sup>68</sup> Exh. IC-6.

<sup>69</sup> Exh. MM-1Tr. 64: 26 – 65: 4.

changing order times and unpredictable peaks of vessel traffic,<sup>70</sup> this is not the result of inefficiency but the rather severe pilot shortage which has led to a situation in which nearly 19% of all assignments are performed as Callbacks.<sup>71</sup> And because PMSA also advocates against any funding for Callback jobs, what it really insists is that pilots be legally mandated to work without any form of compensation at all. Such a premise would undoubtedly ensure confiscatory rates.

54 Moreover, as noted by Capt. Carlson, PSP actually has undertaken multiple efforts to control the size of its Callback liability by removing PPW payback<sup>72</sup> and capping the number of Callback Days a pilot could accumulate at 60 and applying an expiration date to all others.<sup>73</sup> However, when it became apparent that PSP would not have a sufficient number of pilots to move ships without delays in 2018, it faced the difficult choice of either permitting ships to be delayed or removing the cap and expiration date to eliminate any urgency in the use of Callback Days. As expected, however, the results of that action were to exacerbate the cumulative Callback Day liability.

*ii. PMSA once claimed Callbacks demonstrated an efficiency and were funded only in the distant future*

55 PMSA's transparent motive here is perhaps best highlighted by PMSA's own words. In its 2006 Tariff Submission to the Board of Pilotage Commissioners, Capt. Moore acknowledged not only the benefits the Callback system provides to industry, but admitted what it now denies, that pilots do not receive funding for Callback Days until well into the future:

The use of comp days provides an opportunity to staff below peak demand if done reasonably. It makes good sense and provides a "win/win" situation. When looking at the dollars involved, we believe that comp day incentives are already substantial. However, we are looking at ways that the comp day system could be restructured to potentially move the incentives from the distant future to the immediate present. At the same time, we anticipate that the Commission will be looking more deeply into workload and comp days when determining methodologies for setting pilot levels.<sup>74</sup>

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<sup>70</sup> Indeed, not only are order times changed more than once per assignment on average (See Exh. IC-1T. 9 - 14), peak traffic days have no pattern or predictability (see Exh. MM-70X, p. 6).

<sup>71</sup> Exh. IC-6.

<sup>72</sup> PPW, or Peak Period Worker, is a system by which PSP scheduled pilots on cruise ship sailing days to cover seasonal demand increases. To implement this practice, in 2005, PSP added three days to the watch schedule per pilot that were once paid back in the offseason. PSP removed the payback to help limit Callbacks. Exh. IC-4Tr. 17: 18 - 18: 2.

<sup>73</sup> Exh. IC-1T. 10: 22 - 11: 13; Carlson, TR. 368: 25 - 371: 13.

<sup>74</sup> Exh. IC-5, p. 18.

Consistent with this statement, PMSA has long argued that pilots should be required to accept Callback assignments.<sup>75</sup> Now, in an attempt to avoid the inclusion of that long-accumulating liability in rates, PMSA asserts that Callbacks are the result of inefficiency rather than the form of efficiency that Capt. Moore once acknowledged them to be, and which Mr. Kermode also acknowledged in his initial testimony.<sup>76</sup> This evolving convenient PMSA opinion is nothing more than a transparent attempt to have it both ways.<sup>77</sup>

*iii. PMSA also now places safety second to efficiency in order to avoid tariff increases*

56 Next, PMSA asserts that meetings are the primary culprit of pilot inefficiency and should preclude the funding of Callbacks.<sup>78</sup> While PMSA has repeatedly argued that pilots should just move ships and ignore their operational responsibilities, it blatantly ignores that the BPC has long considered these responsibilities in setting the number of licensed pilots pursuant to WAC 363-116-065 as noted above.

57 PMSA's arguments regarding pilots' meeting attendance also incorrectly assume that the PSP holds meetings that are superfluous and wasteful of pilots' time. Yet, as Capt. Carlson testified, these meetings are vital to the continued operation of PSP and the perpetuation of its mission to protect the safety of persons, property and the environment of the Puget Sound.<sup>79</sup> Thus, PMSA apparently contends whenever PSP is shorthanded it should forego even safety-related meetings, BPC meetings, and all others. Such a myopic approach to managing the functions of PSP would surely lead to decreased safety in the Puget Sound.

58 PMSA also uses meetings to highlight its assertion that pilots could work 160 assignments on watch without violating rest rules.<sup>80</sup> While it is true that a single isolated pilot with no operational or administrative responsibilities worked that number of assignments, Capt. Carlson thoroughly

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<sup>75</sup> See Exh. MM-76X (arguing that Callbacks are legally required as a component of compulsory pilotage).

<sup>76</sup> Exh. DPK-1T.13: 7 - 8.

<sup>77</sup> So too is PMSA's bewildering argument that funding Callbacks would violate the United States Constitution's Tonnage clause, which by the very cases cited by PMSA has been consistently interpreted to prevent only discrimination on interstate vessel traffic via a state tax on the size of a vessel entering its waters from another state.

<sup>78</sup> PMSA's Initial Brief, p. 31.

<sup>79</sup> Exh. IC-4T. 23: 19 - 24: 15; Exh. EVB-1T. 15: 7 - 16: 4.

<sup>80</sup> *Id.* p. 32.

refuted this metric as an accurate measure of pilot workload<sup>81</sup> and even Capt. Moore acknowledged that his single workload example could not be sustained safely by all pilots.<sup>82</sup> Moreover, evidence regarding the work performed by a single pilot does not meet PMSA's own standards for reliability in data analysis, which according to PMSA requires the evaluation of multiple years' data.<sup>83</sup> The Commission should apply PMSA's standards for Dr. Khawaja's analysis to its own argument and reject its reliance upon a single outlier from one year as an inherently unreliable assessment of the sustainability of pilot workloads.

59 PMSA also demonstrates myopia in the context of its arguments regarding rest periods. Not only did PMSA refuse to support extended rest periods unless pilots were essentially mandated to work additional hours,<sup>84</sup> PMSA also accuses PSP of inventing "fictitious rest periods to apply to pilots before meetings."<sup>85</sup> While no rest period before a meeting exists in any rule, the practical application of rest rules necessarily requires that PSP dispatchers plan around meetings to ensure that pilots obtain legislatively-mandated rest. As Capt. Carlson discussed at the hearing, if its dispatchers did not plan for meetings in assigning pilots, they could well work on duty in excess of 20 continuous hours, risking a catastrophic pilot-fatigue induced incident in the Puget Sound.<sup>86</sup>

60 For all of these reasons, the Commission should outright reject PMSA's self-serving arguments and adopt Dr. Khawaja's recommendation regarding the number of assignments by which to determine the FTE workload for determining the Total Distributable Net Income.

#### **IV. TREATMENT OF OPERATING EXPENSES UNDER A HISTORIC TEST YEAR**

61 With respect to its operating expenses, PSP made many of its responsive arguments to Staff and

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<sup>81</sup> Exh. IC-4Tr. 25: 21 – 34: 11.

<sup>82</sup> Moore, TR. 513: 7 – 16.

<sup>83</sup> See PMSA's arguments in opposition to consideration of Dr. Khawaja's Callback reduction analysis. PMSA's Initial Brief, p.36-37. It should also be noted that PMSA wholly mischaracterized Capt. Carlson's testimony there. Capt. Carlson was not sure whether the data and fields in Exh. IC-39X had been created by Dr. Khawaja or NASA, but did not question its accuracy. See Carlson, TR. 367: 2 – 4.

<sup>84</sup> See Exh. MM-96X (2018 Fatigue Policy Letter).

<sup>85</sup> PMSA's Initial Brief, p. 31-32.

<sup>86</sup> Carlson, TR. 372: 17 – 374: 5. It should also be noted that PMSA's position regarding consideration of rest for administrative responsibilities of navigational officers would violate federal statutory rest periods applicable to federal pilots set forth in 42 USC § 8104(n).

PMSA's positions in its initial brief and will not repeat them here.<sup>87</sup> Yet new and previously rejected theories require some response.

**A. PMSA inappropriately rejects traditional ratemaking principles yet again**

62 To start, PMSA repeats its rejected premise that PSP must overcome an evidentiary presumption against a rate increase.<sup>88</sup> In transferring pilotage ratesetting authority to the Commission, the Legislature intended for the Commission to apply traditional ratesetting principles to the pilotage ratesetting process.<sup>89</sup> As PSP addressed above, that requires contemporary and objective market-based analysis of pilot compensation to establish prospective rates in each successive rate filing. Thus, there is no basis whatsoever to PMSA's ill-founded premise that PSP must overcome such a presumption here.

63 Moreover, in rejecting the historic test-year approach, which Capt. Moore initially recommended the Commission do at the hearing,<sup>90</sup> PMSA continues to make arguments based upon stale expenses preceding the historic test period by more than a decade.<sup>91</sup> Consequently, PMSA's general ratesetting theories cannot possibly result in rates that are fair, just, reasonable and sufficient and should be rejected.

**B. There is no way to determine what depreciation expenses were funded in a black box**

64 In defense of its proposed adjustment to PSP's depreciation schedules in which Staff applies different depreciation methods to the *Puget Sound* and the *Juan de Fuca*, Staff argues that PSP should have been required to show the amount of depreciation expenses that were included in the pilotage rates in effect.<sup>92</sup> While Staff acknowledged that rates were set in a black box, its premise cuts both ways. By Staff's latest rationale, because the BPC's black box ratemaking does not conclusively establish depreciation allowance in their current and previous tariffs, PSP could also

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<sup>87</sup> For example, PSP need not brief once again that taxes and regulatory fees are permissible operating expenses in response to PMSA's baseless assertion that PSP is seeking to "profit from the gender discrimination lawsuit". PMSA's Initial Brief, ¶ 46.

<sup>88</sup> See Order 08.

<sup>89</sup> See Exh. DPK-6. (JTC Report).

<sup>90</sup> Moore, TR. 464: 15 – 465: 20.

<sup>91</sup> See, e.g. PMSA's Initial Brief, ¶¶ 40, 50.

<sup>92</sup> Staff's Initial Brief, ¶ 53.

theoretically ask the Commission to allow it to recover depreciation expense through the remainder of any prospective period in which PSP operates the *Puget Sound* and the *Juan de Fuca* in regulated pilotage service. Thus, the black box on which Staff relies actually favors neither outcome and the Commission should reject Staff's depreciation adjustment defense as arbitrary, unreasonable and inconsistent.

**C. PSMA's untimely proposed adjustment to legal expenses should be rejected**

65 Unlike Staff, who recognized that legal fees incurred by rate-regulated service companies serve the public interest, PMSA belatedly requests in its brief a specific adjustment to PSP's legal fees never raised in its general complaints about legal fees in its testimony. PMSA's request serves as nothing more than a transparent attempt to micromanage PSP's use of legal counsel.<sup>93</sup> While PMSA may elect to rely on laypersons to present its legal arguments as Capt. Moore does repeatedly in his pre-filed testimony, it is not up to PMSA to decide if and when PSP requires legal counsel.

66 PMSA's proposed adjustment is also untimely and inconsistent with the Commission's traditional ratesetting approach. Specifically, PMSA's proposed adjustment was advanced for the first time in its brief.<sup>94</sup> Thus, it is proposed out of sequence and should not be considered for that reason alone. Moreover, the Commission should apply its historic test year approach here, and exclude cumulative expense information spanning multiple years preceding the test period as stale and unhelpful to determining rate year expense.<sup>95</sup> Because PSP's legal expenses apart from regulated rate proceedings have grown in recent years and are likely to continue in the future, there is no basis for its proposed adjustment and the Commission should reject PMSA's belated attempt at retroactive ratemaking and approve PSP's test year legal expenses.

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<sup>93</sup> PMSA made this clear when it founded its complaints upon PSP's use of legal counsel at a regulatory matters before the BPC. *See* Exh. MM-42T. 35: 2 – 6.

<sup>94</sup> While PMSA complained about legal expenses, it never requested any specific adjustments. Exh. MM-42T. 34: 15 – 35: 18.

<sup>95</sup> Even Capt. Moore eventually testified at the hearing that PMSA recommended the Commission apply a historic test year in determining expenses in the revenue requirement. Moore, TR. 533: 13 – 534: 3.

**D. PSP's transportation expense charge should be approved and a reversion to the prior allowance system rejected**

67 PSP will not repeat its arguments in defense of its Transportation Expense Charge (“TEC”) proposal here. Yet PMSA makes yet another new proposal in its initial brief, suggesting that the Commission preserve the existing TEC charge in both structure and amount.<sup>96</sup> PMSA’s primary thrust here is the suggestion that the proposal might not be consistent with IRS reimbursement rules and that pilots might profit from a TEC because they could use less expensive modes of transportation following approval of the proposed charge. The Commission must make decisions on substantial evidence, not the unfounded and contradictory suspicions of a biased intervenor. PMSA has done nothing to show that PSP’s proposed TEC would be based upon any violation of IRS rules,<sup>97</sup> and if PMSA is concerned with pilots profiting from the TEC, why does it reject a cost-of-service based model in favor of preserving a system that is based on estimates rather than receipts, and which it argues already provides compensation to pilots rather than an expense reimbursement?<sup>98</sup> Moreover, if PMSA expected the Commission to accept its erroneous assertion that transportation service providers distribute revenues to pilots, it should have obtained and presented evidence rather than unsubstantiated innuendo. Instead, the only evidence regarding this supposed distribution to pilots came from PSP’s Executive Director Linda Styrk, who directly denied the premise that pilots receive a double payment.<sup>99</sup> Thus, the Commission should also reject PMSA’s unseemly and unfounded allegations and approve PSP’s proposed TEC as well as Mr. Burton’s pro forma adjusted transportation expense amount.

**V. PROTECTION OF WATERBORNE COMMERCE**

68 As PMSA noted, the Pilotage Act does indeed provide that it is the intent of the Legislature not to jeopardize Washington’s position as an able competitor for waterborne commerce.<sup>100</sup> While this

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<sup>96</sup> PMSA’s Initial Brief, ¶¶ 28 - 33

<sup>97</sup> Pilots are independent contractors who are frequently incorporated. Exh. EVB-1T. 14: 5 – 7; Exh. EVB-5X (PSP Bylaws, Section 2.2). And it is up to them, not PMSA, to determine the appropriate tax implications of their transportation reimbursements.

<sup>98</sup> Exh. MM-42T. 6: 10 – 21.

<sup>99</sup> Styrk, TR. 253: 2 – 13. And when PMSA’s cross-examination met resistance on this point, PMSA immediately changed topics rather than pursuing it further and risking disproving its own surmise. PSP contends that no evidence of a double payment exists.

<sup>100</sup> RCW 88.16.005.



provision was never explicitly referenced in RCW 81.160, it is certainly reasonable for the Commission to consider PMSA's arguments regarding the potential impacts on the State. But in doing so, the Commission must make rational decisions supported by substantial evidence. In this circumstance, PMSA's arguments must be wholly disregarded because it failed to supply anything other than the subjective viewpoints of its members and certain port representatives' hearsay statements. In fact, when cross-examined, Capt. Moore agreed there is no specific link between pilotage fees and market share, testifying "...there's not a specific link to a specific cost, but it's to the whole basket of costs that it gets involved in a port competitiveness."<sup>101</sup> PMSA failed to submit evidence demonstrating "the whole basket of costs" and how in that context, if at all, raising pilotage rates would could impact shipping volumes. Moreover, other than through studies of elasticity of shipping demand, which Dr. Leachman's testimony conclusively demonstrates will not be impacted by PSP's proposed rates, the Commission has not been presented with any methodology by which to assess the impacts of the rates it establishes. Thus, the Commission should find PMSA failed to meet its burden of proof in establishing that PSP's proposed rates are so high that they will adversely impact the State.

## VI. RATE DESIGN AND RATE PLANS

69 Although PSP has addressed many of its responsive arguments on rate design in its initial brief not to be repeated here, PMSA raises three points that require response. First, PMSA argues that the ability to pay should not be considered in establishing rates. To the contrary there are a number of non-cost of service factors that the Commission should consider in establishing rates in the public interest, including the value of service and public need.<sup>102</sup> With respect to the Megayachts that are subject to compulsory pilotage, which PYM represents, they frequently require as much of PSP's time to service as any other vessel. Thus, unless demonstrated that higher rates would prevent their ability to call on the Puget Sound, there is no basis upon which to provide preferential rates.<sup>103</sup>

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<sup>101</sup> Moore, TR. 520:19 - 520:21; *See also* Exh. MM-84X.

<sup>102</sup> Goodman, S.L., *the Process of Ratemaking*, pp. 928-30.

<sup>103</sup> PSP would also note here that PMSA's "righteous indignation" expressed in its Initial Brief at footnote 129, regarding questions to PYM's representative should not be seriously entertained. The document properties for PYM's original Petition to Intervene indicate that it was authored by PMSA's counsel, "mdelappe." Enough said.

70 Second, PMSA argues that it is inappropriate to round hourly service times up to the nearest hour. This practice is a common feature of hourly tariff charges and is reasonable because it increases invoice predictability. Moreover, should the Commission decide to reduce the interval to which charges are rounded up, it will also serve to increase the underlying hourly rate, since the priceout itself relied upon rounded intervals.<sup>104</sup> The Commission should reject these eleventh-hour arguments and approve PSP's tariff.

71 Finally, PMSA contends that rate increases on the smallest ships should be phased in if Staff's rate design is approved. PMSA did not propose any specific rate plan in evidence and on that basis alone its proposal should be rejected.<sup>105</sup> Moreover, because the Commission is limited to adjusting PSP's proposed tariff no more than annually by RCW 88.16.055, PSP now believes, partially in light of the current extraordinary environment, that should the Commission take any action other than approving its proposed tariff, no rate plan should be adopted and the full amount of PSP's revenue requirement, as determined by the Commission, should be implemented in the initial year with PSP's proposed rate design to ensure that increases are applied to vessel sizes in a ratio more consistent with the existing tariff. This will ensure that no class of customers is impacted so disproportionately as would occur under Staff's rate design.

## VII. PMSA'S RECOMMENDATIONS SHOULD BE REJECTED

72 At the heart of many of PMSA's concluding gratuitous recommendations to the Commission is the unwavering desire by PMSA for regulators to overreach their regulatory authority and become an advocate for ratepayers rather than objective adjudicator.<sup>106</sup> If PMSA desires to present evidence and argument to the Commission for adjudication, general rate proceedings provide it precisely that opportunity.<sup>107</sup> Because, however, PMSA here asks that the Commission substitute

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<sup>104</sup> See column S in PSP's Workpapers, files labeled "Revenue Calculation Year 1 Proposed Tariff.xlsx", "Revenue Calculation Year 2 Proposed Tariff.xlsx", and "Revenue Calculation Year 3 Proposed Tariff.xlsx."

<sup>105</sup> PMSA also argues for exclusion of PSP's ordering rules from the tariff for the first time after the record has been closed. PMSA's Initial Brief ¶¶ 34 – 35. PSP's ordering rules are not subject to Commission regulation, but such rules are frequently included in tariffs. Here, because by statute the Commission cannot update the tariff more frequently than annually it is logical to incorporate by reference ordering rules published elsewhere.

<sup>106</sup> PMSA's "recommendations" commence in its Initial Brief at p. 41.

<sup>107</sup> And all viewpoints and evidence that PMSA would have the Commission consider should be expressed on the record and under oath rather than in some amorphous, unilateral and unstructured Staff investigation as PMSA

its judgment for that of PSP's Board of Directors, it instead requests the Commission to overstep its statutory authority.

73 In fact, Courts have repeatedly rejected the premise that regulators are clothed with authority to substitute their judgment for that of the regulated company. The United States Supreme Court expressed that general rule as follows:

The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses, unless there is an abuse of discretion in that regard by the corporate officers.<sup>108</sup>

Following this principle, a number of Courts have observed that regulatory commissions are not empowered to substitute their judgment for that of the regulated company absent a clear abuse or inefficiency by the Company.<sup>109</sup> Consequently, the Commission should decline PMSA's invitation to determine for PSP the type, kind and nature of administrative personnel required,<sup>110</sup> whether it should fund retirement benefits for its employees, the specific medical benefits procured, or any other of PMSA numerous overreaching requests.

### **VIII. REQUEST FOR RELIEF**

74 For all of the foregoing reasons and those set forth in PSP's Initial Post-Hearing Brief, only its proposal will arrive at rates consistent with traditional ratesetting principles, those of national pilotage ratesetting criteria, and which avoids reliance, as advocated by Staff, on historic averages lacking requisite updates and necessary metrics which comprise the operational underpinnings of PSP's pilotage service. Therefore, PSP again asks the Commission to approve PSP's proposed tariff and authorize it to become effective on or before December 4, 2020.

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proposes.

<sup>108</sup> *Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 289, 43 S. Ct. 544, 547, 67 L. Ed. 981 (1923)(internal citation omitted).

<sup>109</sup> *See, e.g., Peoples Cab Co. v. Pennsylvania Pub. Util. Comm'n*, 639, 137 A.2d 873, 879 (1958); *Colorado-Ute Elec. Ass'n, Inc. v. Pub. Utilities Comm'n of State of Colo.*, 760 P.2d 627, 639 (Colo. 1988).

*Nat'l Ass'n of Broadcasters v. F.C.C.*, 740 F.2d 1190, 1219 (D.C. Cir. 1984).

<sup>110</sup> Specifically, PMSA requests the Commission to perform a "job task analysis with a focus on the administrative capacities and practices of PSP."

DATED this 25th day of September, 2020.

RESPECTFULLY SUBMITTED,

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