

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET TP-220513

REPLY BRIEF OF COMMISSION STAFF

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I. INTRODUCTION

1 Puget Sound Pilots (PSP) is seeking rate relief, and Staff has already explained why its
request is unjustified. In reply, Staff addresses the arguments made against its recommendations
by PSP and the Pacific Merchant Shipping Association (PMSA), as well as PSP's response to
Staff's claims about the obstructionist tactics PSP has deployed in this litigation.

II. ARGUMENT

2 Staff contests with either PSP and PMSA, or with both, (1) the applicable legal standard,
(2) the distributed net income (DNI) appropriate for PSP's members, (3) the number of pilots to
fund during the rate year, (4) PSP's medical insurance costs, (5) PSP's pension costs, and (6)
PSP's litigation conduct. Staff addresses those issues in that order.¹

A. The Applicable Legal Standard

3 PSP continues to urge the Commission to abandon the determination it made in Order 09
about the proper standard to apply to any request for rate relief in the context of pilotage rates,
contending that the Commission should apply the "best achievable protection" standard found in
Washington's Vessel Oil Spill Prevention and Response Act when determining what constitutes

¹ PSP spends a significant amount of its briefing addressing the benefits of compulsory pilotage, issues with foreign flagging practices, and concerns about oil spills and pilot safety, among other things. *E.g.*, Puget Sound Pilots' Posthearing Opening Brief (hereinafter "PSP's Br.") at 6 ¶ 14 – 14 ¶ 32. Staff concurs with PMSA's contention that those are all "patently irrelevant to the setting of pilotage rates in Puget Sound." Initial Brief of Pacific Merchant Shipping Association (hereinafter "PMSA's Br.") at 49 ¶ 99. Nothing the Commission does here can amend or repeal the laws requiring specified ship operators to employ a pilot in the Puget Sound. *See Green River Cmty. Coll. Dist. No. 10 v. Higher Ed. Personnel Bd.*, 95 Wn.2d 108, 112, 622 P.2d 826 (1980). Nor can anything it does here change the treaties, statutes, and common law governing the ownership or flagging of vessels. *Cole v. Wash. Utils. & Transp. Comm'n*, 79 Wn.2d 302, 306, 485 P.2d 71 (1971) (agencies possess only the powers delegated by the Legislature); *see* Titles 80 & 81 RCW (lacking any delegated power over marine shipping companies or vessel flagging). And the Commission has no regulatory jurisdiction over the prevention of oil spills or the licensure, training, or safety of PSP's members: the Department of Ecology and the Board of Pilotage Commissioners (BPC) largely share authority over the prevention of oil spills, *see generally* chapter 88.46 RCW; RCW 88.16.250, .260, and the BPC holds exclusive regulatory authority over the licensure and training of pilots.¹ *See generally* chapter 88.16 RCW; *Wash. Utils. & Transp. Comm'n v. Puget Sound Pilots*, Docket TP-190976, Order 09, at 11 ¶ 42 (Nov. 25, 2020) (hereinafter "Order 09"). The Commission should stay clear of the issues PSP raises that fall outside its regulatory ambit and focus instead on what is properly within its authority, namely the setting of pilotage rates.

fair, just, reasonable, and sufficient rates.² Staff addressed this issue on brief³ and confines itself here to answering PSP’s contentions that: (1) “it is important to acknowledge the public commentary that the Commission has received” on the topic,⁴ and (2) the Commission must set DNI at a level that is “sufficient to attract the best candidates to the BPC-administered pilot training programs . . . to retain those individuals as Puget Sound Pilots.”⁵

4 PSP’s first argument here suffers from two fundamental flaws. Initially, even if the Commission treats the public comments as testimony, that testimony is irrelevant. “The meaning of a statute’s terms is a question of law,” and “the question is” thus “not one amenable to resolution based upon trial testimony.”⁶ The answer to whether the pilotage act incorporates the “best achievable protection” standard thus cannot be found in the comments PSP cites.

5 But, regardless, the Commission does not treat public commentary as testimony. The Commission admits public comments as illustrative exhibits that indicate public support, or a lack thereof, for a rate filing.⁷ They are not substantive evidence, and the Commission should ignore PSP’s attempts to treat them as such.⁸

6 PSP’s second argument fares no better. The governing statutes require the Commission to set rates that are “sufficient” for the realization of Washington’s pilotage goals.⁹ As Staff has noted, the rates currently in effect have provided the BPC with a deep pool of acceptable

² PSP’s Br. at 14 ¶ 33 – 16 ¶ 38.

³ Staff’s Br. at 6 ¶ 16 – 10 ¶ 26.

⁴ PSP’s Br. at 3 ¶ 7.

⁵ PSP’s Br. at 16 ¶ 38.

⁶ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 814, 828 P.2d 540 (1992).

⁷ WAC 480-07-498(1).

⁸ 5 Karl B. Tegland & Elizabeth A. Turner, WASHINGTON PRACTICE: EVIDENCE LAW & PRACTICE, § 402.41 (6th ed. Supp. Aug. 2022) (“[b]y definition, evidence that is only illustrative is not substantive evidence in the case.”); see 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS; CIVIL, WPI 6.06 (7th ed. Supp. Apr. 2022).

⁹ RCW 81.116.020(3).

candidates for its training program.¹⁰ There is, accordingly, no shortage of trained or trainable pilots, and the pilots that emerge from the BPC's training program are elite and possessed of an admirable record of preventing spills.¹¹ Put otherwise, the rates that the Commission has set are sufficient for the provision of adequate pilotage services without the consideration of the best achievable protection standard urged by PSP.

B. DNI

7 Staff recommends that the Commission continue in force the DNI ordered in PSP's last rate case, or \$410,075. Both PSP and PMSA take issue with that proposal. Staff addresses the arguments of each in turn.

8 PSP faults Staff for declining to engage with its comparability analysis.¹² Staff did not do so for a simple reason: the Commission in Order 09 required that any party seeking a specified DNI based on a comparability analysis must "at a minimum, provide financial statements for each of the pilot associations included in the comparability analysis."¹³ PSP failed to do this.¹⁴ Given the necessity of those financial statements to PSP's attempts to carry its burden, Staff determined that parsing PSP's comparability evidence was futile and focused its efforts elsewhere.¹⁵ The Commission should do much the same, determine that PSP failed to carry its burden of proof, and decline to adjust DNI based on the comparability study.

9 PSP also asks the Commission to determine, as a matter of law, that "any major state-

¹⁰ Post-Hearing Brief of Commission Staff (hereinafter "Staff's Br.") at 10 ¶ 28 (citing Royer, Exh. JR-6 at 19).

¹¹ Staff's Br. at 10-11 ¶ 28 (citing Klappernich, TR. at 145:-7-147:7).

¹² PSP's Br. at 2 ¶ 4.

¹³ Order 09 at 46 ¶ 149.

¹⁴ See generally Lough, Exh. DL-07; Lough, Exh. DL-08; Lough, Exh. DL-09; Lough, Exh. DL-10; Lough, Exh. DL-11; Lough, Exh. DL-12; Lough, Exh. DL-13; Lough, Exh. DL-14; Lough, Exh. DL-15; Lough, Exh. DL-16; Lough, Exh. DL-17; Lough, Exh. DL-18; Lough, Exh. DL-19; Lough, Exh. DL-20; Lough, Exh. DL-21; Lough, Exh. DL-22; Lough, Exh. DL-23.

¹⁵ Young, TR. at 853:9-855:16.

licensed pilot group of 15 or more pilots whose regulator establishes the authorized number of licensees should be presumed comparable.”¹⁶ By requiring PSP to submit the financial statements when engaging in a comparability analysis, the Commission signaled that it viewed comparability as a matter of fact not susceptible to resolution as a matter of law. It should adhere to that view and reject PSP’s argument; as Staff witness Young suggested at hearing, comparability turns on very specific factual similarities and differences.¹⁷

10 Finally, PSP asks the Commission to establish “an income parity principle” when setting rates for the pilots serving the Puget Sound and Grays Harbor pilotage districts.¹⁸ It should not. While the Commission should strive to treat similarly situated groups similarly,¹⁹ PSP fails to show that the two groups are similarly situated.²⁰ Among other differences, PSP has a far larger group of pilots;²¹ PSP’s pilots operate as an unincorporated partnership,²² but the Grays Harbor pilots are municipal employees;²³ and PSP acknowledges that the workload of the two groups is not readily comparable.²⁴ The groups are situated differently, and should receive different treatment.²⁵

11 PMSA objects to the DNI used by Staff to make its recommendation, claiming that the Commission should apply the methodology used to set the DNI in PSP’s last rate case.²⁶ The

¹⁶ PSP’s Br. at 22 ¶ 52.

¹⁷ See Young, TR. at 855:5-16.

¹⁸ PSP’s Br. at 22 ¶ 53.

¹⁹ *Stericycle of Wash., Inc. v. Wash. Utils. & Transp. Comm’n*, 190 Wn. App. 74, 93, 359 P.3d 894 (2015).

²⁰ E.g., Young, TR. at 836:1-10.

²¹ Compare Norris, TR. at 787:12-788:9 (counting between 52 and 56 pilots on PSP’s roster) with Moore, TR. at 590:2-16.

²² Burton, Exh. WTB-01T at 2:22-26.

²³ See Moore, Tr. at 610:19-611:9, 613:17-23.

²⁴ PSP’s Br. at 33 ¶ 72 (“the Grays Harbor pilots are a small pilot group with fluctuating but relatively low traffic levels when compared to Puget Sound on a per pilot basis, which makes a workload comparison to PSP impractical.”).

²⁵ Cf. *Stericycle*, 190 Wn. App. at 93.

²⁶ PMSA’s Br. at 11-12 ¶ 25.

Commission in PSP’s first rate case wrote on a blank slate – it had never set pilotage rates before and it had never determined an appropriate DNI. But it has now done so, and in doing so it determined that authorizing a DNI of \$410,075 would produce fair, just, reasonable, and sufficient rates.²⁷ PMSA and Staff appear to agree that PSP failed to justify changes to its DNI.²⁸ Accordingly, the Commission should simply leave the DNI set at a rate already determined to contribute to fair, just, reasonable, and sufficient rates.²⁹

C. The Number of Funded Pilots

12 Staff recommended that the Commission fund 56 pilots. PMSA objects to that recommendation, faulting what it refers to as Staff’s “acquiescence to PSP’s proposed number of pilots.”³⁰ Staff disagrees with that characterization but has no objection to PSP’s recommendation for the number of funded rate-year pilots.

13 While PMSA alleges that Staff did not calculate “its own number of pilots,”³¹ the evidence it cites in support of its argument shows otherwise. Staff averaged the average number of assignments per month, and then used that number and the projected number of rate year vessel movements to calculate the number of pilots to fund.³² The number worked out to slightly more than 56 pilots, but Staff used 56 given that the BPC has limited the number of licensees to 56.³³

14 Having said that, Staff agrees with PMSA that both Staff’s and PMSA’s number of pilots are consistent, or largely consistent, with Order 09.³⁴ PMSA applies the methodology used in

²⁷ Order 09 at 122-23 ¶ 462.

²⁸ See PMSA’s Br. at 7 ¶ 15.

²⁹ Cf. RCW 81.116.030(5).

³⁰ PMSA’s Br. at 18 (subheading d).

³¹ PMSA’s Br. at 18 ¶ 41.

³² Staff’s Response to Bench Request No. 12, Attachment 3, Tab 12-month P&L.

³³ See Staff’s Response to Bench Request No. 12, Attachment 3, Tab 12-month P&L.

³⁴ Moore, Exh. MM-63T at 10:14-11:13.

Order 09 to calculate the total number of pilots in each of the rate years, with the result that it advocates for 54.9 pilots in Rate Year One, 55 in Year Two, and 56 in year Three.³⁵ That methodology, and PMSA’s resulting numbers, reflect a focus on the five-year historical average assignment level; staff’s number focuses on the test-year average assignment level. Given the closeness in methodology and the closeness in result, Staff is comfortable with either its or PMSA’s for the number of funded pilots.

D. Medical Benefits

15 PSP contends that “consistent with Staff’s recommendation, tariff funding of medical benefits for PSP’s pilot corps should be restored. . . . And, as Staff conceded at hearing, the benefit should not be considered part of DNI or the more commonly used term ‘target net income.’” The Commission should be clear on two things: (1) Staff recommends, as it has since PSP’s first rate case, requiring the pilots to pay medical expenses through DNI, and (2) Staff did not concede what PSP now claims that it did.

16 While on the stand, Staff witness Young testified about PSP’s DNI and medical expense. In full, the exchange reads:

Q. On your exhibit, which is the sole place where you deal with DNI, on that tabulation which is MY-9 – if we could pull that back up – you recommend that the medical insurance premiums of \$1.88 million be included in DNI; correct?

A. Yes.

Q. Isn’t that completely inconsistent with the language the Commission used in Order 09 that DNI is distributable net income? If you add the cost of medical insurance, which is a benefit, to DNI, you’re not increasing distributable net income, are you?

A. Well, the – the direct answer to your question is no, but I believe that the directive in Order 09 from the commission was that the pilots should be paying their own medical premiums. If we do not include this cost as part of the DNI calculation, then it would’ve removed that expense out of the

³⁵ Moore, Exh. MM-1T at 17:3-9.

equation entirely, which then would have eaten into each pilots' individual income.

Q. So PSP appreciates Staff recommending that this cost be recovered in the tariff, but let me ask you this question. The universal approach of other state regulators of pilot groups is to use the term "target net income" to be defined as the amount of income that net income that the pilot is supposed to have after all expenses, benefits included, are covered by the tariff.

Would you agree that it would be appropriate to consider changing DNI to target net income so that there's – there can be an apples-to-apples comparison with other jurisdictions in the United States where that is the predominant term?

A. Yeah. I'm not an expert on the, you know, terminology. If that's the correct term, that's – that should be the correct term then.³⁶

17 Put otherwise, Staff supports "tariff funding" for the pilots' medical expense only in the sense that Staff supports a tariff that generates net income that the pilots may then use to pay medical benefits.³⁷ Staff did not concede or otherwise back away from that recommendation during cross-examination.³⁸ Nor did Staff witness Young concede that the Commission should revamp its terminology; he instead testified that requiring the pilots to pay medical insurance costs out of net income was not inconsistent with Order 09³⁹ and that he was not an expert in the correct terminology.⁴⁰

18 PSMA urges the Commission not to accept Staff's medical insurance adjustment based on concerns about PSP receiving a windfall.⁴¹ Staff addressed this argument in its opening brief,⁴² but made an error in doing so. Staff's adjustment used the DNI ordered by the Commission in Rate Year Two of Order 09's rate plan, rather than the DNI ordered for Rate

³⁶ Young, TR. at 842:12-843:14.

³⁷ Young, Exh. MY-1 at 23:16-24:8.

³⁸ Young, Tr. at 842:6-24.

³⁹ Young, Tr. at 842:12-24; *see* Order 09 at 17 ¶ 61 (adopting the use of the term DNI), 76 ¶ 254 (requiring PSP's pilots to pay medical insurance out of DNI distributions).

⁴⁰ Young, Tr. at 842:25-843:14.

⁴¹ PMSA's Br. at 22-23 ¶ 51.

⁴² Staff's Br. at 14 ¶ 40.

Year One as stated in Staff's brief. But the Rate Year Two DNI was simply the Rate Year One DNI modified by a one-time adjustment for inflation.⁴³ That error does nothing to create the kind of windfall PMSA worries about – again, Staff moved the entirety of PSP's medical expense over as an adjustment to PSP's DNI, so there are no concerns about incremental movements that would double credit PSP.

E. Pension Costs

19 PSP contends that Staff's pension recommendation is unreasonable because (1) it would disallow what PSP claims amounts to nearly \$1.2 million in costs,⁴⁴ and (2) because Washington Supreme Court precedent requires the inclusion of those costs in rates.⁴⁵ Staff addresses here only the first of those arguments given that it has already addressed the second on brief.

20 While PSP argues about the amount of the costs at issue, it does not contest the underpinnings of Staff's recommendation for disallowing the pro forma adjustment. As Staff has explained, it recommends freezing PSP's pension costs at the level approved in Order 09 based on longstanding Commission precedent concerning pro forma changes,⁴⁶ which requires that any such change must be known and measurable.⁴⁷ PSP's pro forma pension costs are not known and measurable for two reasons. First, PSP refused to give Staff (and PMSA) the data needed to verify its claims.⁴⁸ Second, the Commission ordered PSP and other interested parties to participate in workshops on the future of PSP's pension. Those workshops have not yet borne fruit, leaving the future structure of PSP's pension unclear. As Staff witness Young put it, “[u]ntil agreement has been reached, any costs included would be based on estimates or

⁴³ Order 09 at 122-23 ¶ 462.

⁴⁴ PSP's Br. at 42 ¶¶ 88-89.

⁴⁵ PSP's Br. at 41 ¶ 87.

⁴⁶ Staff's Br. at 12 ¶ 33.

⁴⁷ Order 09 at 15 ¶ 56.

⁴⁸ Young, TR. at 854:23-855:4.

projections and estimates and projections that would probably not have much of a grounding in fact.”⁴⁹

F. The Automatic Adjustment Mechanisms

21 PSP seeks five automatic adjustment mechanisms. It does not offer much in the way of justifications for the first, third, fourth and fifth mechanisms on brief, and Staff will not repeat the arguments against each made in its opening brief.

22 PSP does offer a new justification for the mechanism that automatically adjusts its revenue requirement for changes in the number of licensed pilots. PSP contends that it has a “significant safety-based rationale” to support “adoption of this automatic adjuster,”⁵⁰ specifically that the adjustment mechanism will somehow increase the number of licensed pilots and thus reduce pilot fatigue through fewer callback assignments.⁵¹ That claim is unsupported. The number of pilots funded by the Commission is not related to the number of PSP pilots providing service: it could fund 50 extra pilots and there would be no change in PSP’s operations. That is because the BPC regulates the number of pilots and the licensure thereof, and any change in the number of callbacks performed by PSP’s members will arise from BPC action, not any tariff rider approved by the Commission.⁵² In that light, PSP’s tariff adjustment mechanism has no effect on safety.

G. PSP’s Litigation Conduct

23 After Staff filed its opening brief, PSP, by email, sought permission to respond to a paragraph in it through reopening the record to allow PSP to submit an affidavit explaining its litigation conduct attached to each of its responses to Staff’s data requests. The ALJ declined to

⁴⁹ Young, Exh. MY-1T at 22:17-20.

⁵⁰ PSP’s Br. at 50 ¶ 102.

⁵¹ PSP’s Br. at 50 ¶¶102-03.

⁵² Order 09 at 11 ¶42.

reopen the record, but reminded PSP that it could address the paragraph in reply. Staff assumes that PSP will address the issue, and therefore it does the same.

24 In the paragraph at issue, Staff noted that no regulated transportation company has ever obstructed its investigation into the reasonableness of a rate filing in the way that PSP has.⁵³ PSP took issue with that statement, claiming that Staff had failed to support its allegation and had ambushed PSP. While Staff did not cite the record in support of that statement, the record very much reflects Staff's allegation and also belies PSP's claim of an ambush. Staff discussed the issue of PSP's obstruction at length in its opening testimony.⁵⁴ PSP was aware enough of the issue that it filed rebuttal testimony about it.⁵⁵ And the Commissioners themselves heard a lengthy cross of PSP witness Burton on the subject.⁵⁶

III. CONCLUSION

25 The Commission should adopt Staff's recommendations and approve a revenue requirement increase as proposed by Staff.

Respectfully submitted, this 12th day of May, 2023.

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⁵³ Staff's Br. at 5 ¶ 15.

⁵⁴ Young, Exh. MY-1T at 5:7-15; Young Exh. MY-2; *see* Young, Exh. MY-1T at 6:8-12. PMSA had similar issues, and verified Staff's claims about PSP's unwillingness to provide data in cross-answering testimony. Moore, Exh. MM-63T at 4:21-5:3.

⁵⁵ Burton, WTB-08T at 6:1-8.

⁵⁶ Burton, TR. at 705:25-709:25.