

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

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

Docket TP-220513

**PUGET SOUND PILOTS'**

**POSTHEARING REPLY BRIEF**

**May 12, 2023**

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## I. INTRODUCTION.

1. Based on one of the most comprehensive records in U.S. pilotage rate case history, the Washington Utilities & Transportation Commission ("Commission" or "UTC") has the opportunity to position the State of Washington as a national leader in pilotage regulation on four fronts: (1) adopting a safety-focused ratemaking standard that mandates funding of a world-class pilotage system for Puget Sound; (2) reestablishing the Puget Sound Pilots ("PSP") as a top tier U.S. pilot group with nationally competitive net income and benefits; (3) becoming the first U.S. pilot group regulator to both control and reduce the continually increasing costs of a pay-as-you-go pilot group pension plan by ordering a transition to a fully funded defined-benefit plan; and (4) adopting a set of automatic tariff adjusters designed to maintain rate stability and reduce the frequency of contested general rate cases.
2. Based upon the record and the parties' posthearing briefs, the Commission faces a clear choice: continue to substantially underfund Washington's compulsory pilotage system and its first line of defense against oil spills and other casualties by accepting the extreme positions of PMSA and Staff; or build on the precedents from the largely state law-based body of U.S. pilotage law by adopting a ratemaking standard tailored to achieve the safety-focused objectives of Washington's compulsory pilotage system. In other words, with the outcome of this case, pilotage ratemaking in Washington either moves backwards in a manner that bears no resemblance to the Legislature's vision when it transferred pilotage ratesetting to the UTC or advances to a nation-leading, cutting-edge regulatory position that embraces the best practices that informed the Legislature's extraordinary action in 2018.

## II. A PILOTAGE-SPECIFIC RATEMAKING STANDARD IS REQUIRED.

3. Neither the PMSA nor Staff questions the importance of Washington's compulsory pilotage system to its legislatively declared safety functions "to prevent the loss of human lives, loss of

property and vessels, and to protect the marine environment."<sup>1</sup> Moreover, neither of these parties contests the unequivocal conclusion of a Canadian pilotage system cost benefit analysis that pilotage "is the strongest single safety measure that can be employed to reduce the risk of maritime accidents."<sup>2</sup> Nevertheless, PMSA and Staff reflexively point to the record-impaired discussion in Order 09 analogizing the pilotage ratesetting standard of review to that applicable to a public utility where, in the pilotage context, "the customers are the shippers . . . and the company is PSP and its member pilots."<sup>3</sup> Staff goes so far as to argue that the Commission "is tasked with protecting the interests of a much more limited set of the public – ratepayers," over 90% of whom are extremely well-heeled foreign shipowners.<sup>4</sup>

4. To the contrary, in a pilotage rate case, the Commission is tasked with the responsibility of developing and ultimately applying a standard of review that conforms the generic language "fair, just, reasonable, and sufficient" to the specific safety-focused objectives of the Pilotage Act. Indeed, the Commission just recently acknowledged in Order 06 that the pilotage ratemaking standard must be premised on statutes such as RCW 88.16.005 of the Pilotage Act, "which emphasize the importance of pilotage and the protection of the natural environment."<sup>5</sup>
5. Ultimately, the Commission in this case must pronounce a pilotage-specific standard of review and, to do so consistent with first principles of administrative law, must interpret vague or ambiguous statutory language in a way that adheres to the legislative intent underlying the Pilotage Act.<sup>6</sup> In developing this standard, which requires the UTC to make a

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<sup>1</sup> RCW 88.16.005.

<sup>2</sup> KAE Exh. KAE-3 at 19.

<sup>3</sup> Order 09 at ¶ 43.

<sup>4</sup> Staff Post-Hearing Br. at ¶ 18.

<sup>5</sup> Order 06 at ¶ 21.

<sup>6</sup> As the preeminent treatise on administrative law notes in its discussion of statutory construction and administrative law, two bedrock principles must inform agency decisions: (1) "Every agency decision must be anchored in the language of one or more statutes the agency is charged to implement."; and (2) "The agency charged with PUGET SOUND PILOTS' POSTHEARING REPLY BRIEF

policy choice in defining a standard of review that both respects and adheres to clearly expressed legislative intent, two observations are appropriate.

6. First, no state among the 24 coastal states in the United States with substantial volumes of commercial vessel traffic has been more vigorous than Washington in pursuit of a "zero spills" policy. No state other than Alaska has imposed a requirement that U.S. flagged oil tankers must take a state-licensed pilot.<sup>7</sup> Washington not only leads the nation in its commitment to oil spill prevention as the only state to require oil tankers to use the combination of both state-licensed pilots and tug escorts, which the legislature declared was done "to decrease the likelihood of oil spills,"<sup>8</sup> but also paved the way for other states to enact tug escort requirements in defending its regulatory scheme in two cases before the U.S. Supreme Court.<sup>9</sup> In rejecting a federal preemption challenge to a Massachusetts law requiring tug escorts of oil tankers in sensitive Buzzards Bay, the First Circuit relied on Washington's pioneering efforts in both cases to expand state authority to address risks "unique" to local waters.<sup>10</sup>
7. With its one-of-a-kind in the U.S. combination of state-licensed pilots and escort tugs for oil tankers, Washington has enacted what a major study concluded is the best available protection against oil spills, driving that risk down to near zero.<sup>11</sup> Washington's leadership in enacting this country's most stringent and comprehensive battery of oil spill prevention statutes should inform the UTC's formulation of a safety-focused standard of review for pilotage rate cases.

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responsibility to administer the statute gives it meaning by adopting a rule or adjudicating a case." Pierce, *Administrative Law Treatise*, Vol. I at 155 (5<sup>th</sup> ed. 2010).

<sup>7</sup> RCW 88.16.180; AS § 08.62185(a).

<sup>8</sup> RCW 88.16.170.

<sup>9</sup> In *United States v. Locke*, 529 U.S. 89, 120 S. Ct. 1135, 146 L.Ed.2d 69 (2000), and *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S. Ct. 988, 55 L.Ed.2d 179 (1978), Washington defeated federal preemption arguments against its tug escort requirements for oil tankers in Puget Sound. Massachusetts and California have since adopted similar requirements. M.G.L c. 21M, §§ 1, 6 Cal. Gov. Code § 8670.17.2.

<sup>10</sup> *United States v. Massachusetts*, 493 F.3d 1, 13 (1st Cir. 2007) (citing *Locke*, 529 U.S. at 113).

<sup>11</sup> *MARINE PILOTAGE IN CANADA: A COST BENEFIT ANALYSIS* (2017), Exh. KAE-3 at 17-22.

8. Second, the public commentary from environmental groups, educators and responsible members of the shipping industry is overwhelmingly in favor of using a safety-first/zero spills "best achievable protection" approach to funding Washington's compulsory pilot system.
9. Rather than attempt, as Staff and PMSA advocate, to shoehorn a pilotage system ratemaking standard into the longstanding standard applicable to public utilities, the Commission must recognize the singularly unique character of pilotage and adopt a standard of review that emphasizes safety and mandates tariff funding that maximizes the accident-prevention capability of the compulsory pilotage system in Washington. Doing so is not only necessary to conform to the legislative intent underlying the Pilotage Act, but consistent with the policies of other maritime states including Oregon, which by statute declares that the "primary consideration" of its pilotage regulator, the Oregon Board Maritime Pilots, "is public safety."<sup>12</sup> When safety, accident prevention and "zero oil spills" are the informing principles of a pilotage-specific standard of review, it is no surprise that the Oregon Board of Maritime Pilots consistently sets target net income for the state's pilot groups at competitive levels, and in 1999 approved a substantial tariff increase for the Columbia River Bar pilotage ground to fund a state-of-the-art combination helicopter/fast aluminum, jet-powered pilot boat transportation system, that accounts for over half of tariff revenue.<sup>13</sup>
10. After receiving input from stakeholders post-Order 09 that the UTC's ratesetting process seek consistency with the "legislative intent of the Pilotage Act," the Commission noted in its 2021 report to the Legislature that it was "premature to gauge the impact of the Commission's process and Order 09" on this issue "after only one contested rate case" and recommended that the parties address the issue "in PSP's next general rate case" through "fact-based arguments

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<sup>12</sup> ORS 776.115(2).

<sup>13</sup> Jordan, Exh. DJ-1T at 14-16.

and witness testimony."<sup>14</sup> Despite vigorous opposition from both Staff and the PMSA, PSP has done just that. For perspective, the Oregon agency applying a safety-focused standard in regulating a truly world-class pilotage system on Washington's major river system (in terms of its pilots, their compensation, state-of-the-art equipment and low callback levels) requires tariffs funding over 60 pilots in two pilot groups handling less than half of Puget Sound's traffic for more than triple<sup>15</sup> the per vessel cost of the current UTC tariff funding PSP, all without loss of ship calls to what are primarily Washington ports. Is this a status quo that the Commission and the BPC (in its advisory role to the UTC) wish to maintain?

### **III. THE TARIFF SHOULD FUND NATIONALLY COMPETITIVE NET INCOME AND BENEFITS.**

11. Determining the appropriate level of net income for PSP is significantly impacted by the standard of review, which is where the UTC's regulatory rubber meets the road of application to specific facts. If the standard is focused on funding a best-in-class pilotage system to match Washington's staunch commitment to environmental protection, then the answer is obvious: PSP's members should be earning a nationally competitive level of distributable net income ("DNI") and benefits. For DNI, that figure should be at least the median of the publicly available income data for the 12 groups excluding PSP, which is \$574,087.<sup>16</sup> As to benefits, the per pilot sum of \$62,493, which includes medical and other insurance benefits, plus license, training and portable pilot unit expense, should be approved.
12. The PMSA and Staff positions are both punitive and badly misinformed. The PMSA rejects PSP's voluminous pilot income comparability data on the grounds that it was not supported by financial statements for every pilot group,<sup>17</sup> while ignoring the fact that exhibits supporting 10

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<sup>14</sup> UTC Legislative Report on Establishing Marine Pilotage Tariffs dated June 29, 2021 at 19, UTC website.

<sup>15</sup> Exh. KAE-4T at 3-5.

<sup>16</sup> Lough Exh. DL-25T at 6.

<sup>17</sup> PMSA Initial Br. at ¶ 21.

of the 13 pilot groups in compensation expert David Lough's table include extensive financial and income information.<sup>18</sup> PMSA then seizes on the Commission's use in Order 09 of a five-year average of PSP net income to derive a first year DNI of \$400,855 as an established formula that, with the Covid-impacted low traffic years of 2020 and 2021, dictates a 15% reduction of DNI to \$346,391 in year 1.<sup>19</sup>

13. For its part, Staff's recommendation that Order 09's second year DNI of \$410,075 should be continued is based upon no analysis whatsoever. Devoting less than one page of its brief to the single biggest cost issue in this case, Staff argues: "Given the sufficiency of the DNI currently embedded in rates, the Commission should leave it unchanged." With no analysis of DNI in its written testimony and lead regulatory analyst Mike Young admitting in cross-examination that he only "scanned" the extensive pilot income comparability data in the record and did not analyze it,<sup>20</sup> Staff's position should be given no consideration. Indeed, considering that Staff counsel objected to questioning Mr. Young about income comparability,<sup>21</sup> it takes enormous audacity to suggest that DNI be left "unchanged." That is particularly true where Staff failed to consider either PSP's dead last pay status among the 12 peer pilot groups for which public data was available or the effects of inflation in 2021-22.

14. In pushing its punitive DNI proposal, PMSA claims that the 2021 pilot trainee examination shows that, even with the drop in DNI to an historic low of \$204,080 in 2020, it "is reasonable to conclude that the attractiveness of Puget Sound was maintained or increased in 2021."<sup>22</sup> But PMSA relies on just one cherry-picked statistic – the number of sign-ups for the exam – while ignoring much more relevant data demonstrating the opposite conclusion: that the Puget

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<sup>18</sup> Lough, Exh. DL-6-26.

<sup>19</sup> PMSA Initial Br. at ¶ 23.

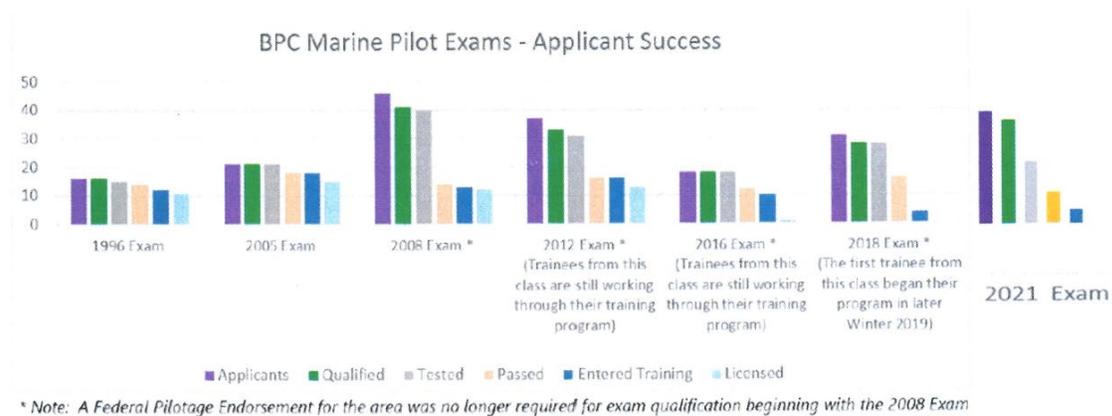
<sup>20</sup> Tr. at 829:22-830:5.

<sup>21</sup> Tr. at 831:4-15.

<sup>22</sup> PMSA Initial Br. at ¶ 17.

Sound pilotage district's reputation as a place to pursue a pilotage career took a beating in 2020-21 and that status will not be reversed unless the UTC approves a nationally competitive level of net income and benefits in this rate case.

15. Displayed below is chart data produced by the Board of Pilotage Commissioners ("BPC")<sup>23</sup> showing the following statistics for the seven pilot trainee exams since 1996: applicants; qualified applicants; simulator exam takers; and passing candidates. Also displayed below are the percentage differences between total applicants and those determined to be qualified, total qualified applicants, those who actually took the simulator exam and those who passed.



	2018		2021	
Applicants	31		40	
Qualified	28	90.3%	37	92.5%
Tested (simulator)	20	71.4%	22	59.5%
Passed	16	80.0%	11	50.0%

16. The claims by PMSA and Staff that this data demonstrates that PSP and the BPC have no "attract and retain" issues cannot be squared with the facts. As PSP pointed out in opening statement, applicants for the April 2021 exam were aware of PSP's bad outcome in Order 09 and the result was an unprecedented drop in the percentage of qualified applicants who passed

<sup>23</sup> BPC 2021 Annual Report, JR-6 at 19 (2021 exam); BPC 2018 Annual Report at 15 (2018 exam), BPC website. PUGET SOUND PILOTS' POSTHEARING REPLY BRIEF

the written exam and thus qualified to take the simulator exam. In 2018, 20 of 28 applicants (71.4%) took the simulator exam. In 2021, only 22 of 37 applicants (59.5%) proceeded to that evaluation. And, most significantly, the passage rate of those test-takers declined dramatically from 80% (16 of 20) in 2018 to just 50% (11 of 22) in 2021, resulting in a nearly one-third reduction in the size of PSP's trainee waitlist. The inescapable conclusion to be drawn from this data is clear: due to the substantial underfunding of the Puget Sound pilotage district, elite mariners are electing not to take the exam and, as the passage rate reveals, the exam is attracting more candidates of lesser skill. Without question, PSP's underfunded tariff is hurting recruitment of top candidates, a fact further corroborated by the decisions of two successful 2021 trainee applicants to pursue training in Grays Harbor for substantially higher pay.<sup>24</sup>

17. PMSA's dismissive suggestion that, despite "historically low pilot income" in 2020, existing pilots "did not retire in droves" is badly misinformed.<sup>25</sup> What is relevant is Captain Carlson's testimony that morale within PSP's pilot corps "is in the tank" and five PSP members are exploring the opportunity to move to other districts including one pilot going to Florida this fall "to look at different groups down there to decide where he's going to test."<sup>26</sup> As to DNI and benefits, PSP is not only at the bottom of its peer pilot groups, but the long-term impacts of continuing this bottom dweller status on both the quality of the pilot trainee applicant pool and retention of experienced current licensees could ultimately prove disastrous. Port Captain John Malone of Schuyler Line Navigation Company was clearly correct in his public comment that although he values cost savings as a businessman, he nonetheless supports PSP's rate case precisely because, "the professional mariner side of me expects that a lower

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<sup>24</sup> Royer, Exh. JR-6 at 19; Ryan Leo letter dated March 24, 2023, MM-87X at 1.

<sup>25</sup> PMSA Initial Br. at ¶ 16.

<sup>26</sup> Tr. at 352:9-12; 354:2-8.

rate [of compensation] will bring applicants with lower standards as the better ship handlers will opt for bigger ports and money."<sup>27</sup>

18. Finally, the PMSA position that PSP's low net income compared to 12 peer pilot groups has no effect on the pilot corps diversification efforts of both PSP and BPC contradicts the record and defies common sense. The evidence is overwhelming that a large income difference between pilotage career opportunities is a significant driver for potential applicants. Indeed, no less than six elite mariners who are either female or from underrepresented groups testified that PSP's diversification efforts would not be successful without nationally competitive pay and benefits.<sup>28</sup> Two of these witnesses cited compensation as one of the reasons each elected to pursue a career on the Columbia River Bar pilotage ground rather than the Puget Sound pilotage district.<sup>29</sup>

#### **IV. PSP'S PENSION: FULL TARIFF FUNDING MUST CONTINUE AND THE UTC SHOULD ORDER A TRANSITION TO A FUNDED DEFINED-BENEFIT PENSION.**

19. Both the PMSA and Staff advocate a "freeze" of tariff funding for PSP's pension at the \$5.25 million level approved in Order 09, which would impose a \$1.15 million cost on PSP in year 1. This translates to \$20,535 per pilot and only grows from there. Staff urges this result despite its key witness acknowledging that PSP's pension costs are "known and measurable" and that he has no reason to question PSP's audited pension costs of \$5.5 million in 2021 and \$6.0 million in 2022.<sup>30</sup>

20. Remarkably, the directly on-point holding of the *Pacific Telephone & Telegraph*<sup>31</sup> case had no impact on these parties' positions. PMSA simply ignores the case entirely and Staff argues

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<sup>27</sup> Capt. John J. Malone III, Schuyler Line Navigation Company letter dated April 14, 2023 at 1.

<sup>28</sup> Bendixen, Exh. SB-9T at 1:16-2:5; Dempsey, Exh. DDD-4T at 2:13-3:13; McIntyre, Exh. ALM-1T at 7:18-8:5; ALM-5T at 6:14-7:10; Johnson, Exh. AJ-3T at 3:6-19; Julien, Exh. CJ-1T at 8:7-9:3; Wodehouse, Exh. KW-1T at 6:21-7:12.

<sup>29</sup> Julien, Exh. CJ-1T at 6:7-8:5; Wodehouse, Exh. KW-1T at 4:17-6:19.

<sup>30</sup> Tr. at 825:9-826:16.

<sup>31</sup> *State ex rel. Pacific Telephone & Telegraph Co. v. Department of Public Service*, 19 Wash.2d 200 (1943).

that the independent contractor status of PSP's member pilots "places the pilots outside the realm" of a holding applicable to the public service company employee pension plan at issue in *Pacific Telephone*.<sup>32</sup> This argument is nothing more than a classic last resort legal gambit: try to confine obviously controlling adverse precedent to its facts by urging a distinction without a difference. In the face of contrary binding precedent, PMSA and Staff's proposal to substantially cut tariff funding for a pension plan that, was reasonable when adopted and continues to be a known and measurable legal obligation of PSP, amounts to an irresponsible invitation to the Commission to commit clear reversible error.

21. The only serious pension-related question in this rate case is whether the Commission will follow through on its strong Order 09 policy commitment to require the transition of PSP's pay-as-you-go or farebox pension to a fully funded defined-benefit pension plan. Considering the superb legal and actuarial work performed by PSP's pension law expert Bruce McNeil and actuary Christopher Wood, who served as the actuary for all parties in the transition of unfunded pilot group pension plans in Oregon to funded defined contribution plans in 1995, the path to implementing a funded pension plan is clear and relatively simple: convert PSP's unfunded pension plan to a Multiple Employer Plan that provides "substantially identical" benefits.<sup>33</sup> Obtaining the green light to implement this elegant solution to a pension plan transition involves securing just two determination letters, one from IRS and the other from the U.S. Department of Labor. And, as Mr. McNeil acknowledged in answering a question from Commissioner Doumit, PSP has already obtained "a provisional opinion, if you will" that positive responses will be received from both agencies.<sup>34</sup>

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<sup>32</sup> Staff Post-Hearing Br. at ¶ 36.

<sup>33</sup> McNeil, Exh. BJM-1T at 5:3-6.

<sup>34</sup> Tr. at 448:6-15.

22. Despite the clarity of Mr. McNeil's testimony and his expertise, PMSA argues that there is significant legal "uncertainty" regarding "whether PSP can lawfully act as an 'employer' for purposes of a Defined Benefit Multiple Employer Plan."<sup>35</sup> In fact, Mr. McNeil is not only unequivocal in the comprehensive legal opinions expressed in his testimony on this point, but he drafted a letter to the Department of Labor requesting an advisory opinion on specific questions that he has researched opens in the first paragraph with the following question:

Pursuant to ERISA Procedure 76-1, this is a request made on behalf of the Puget Sound Pilots Association for an advisory opinion concerning: (i) whether the Puget Sound Pilots Association may be considered to be an "employer group or association" so that it constitutes an "employer" within the meaning of section 3(5) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), for purposes of establishing and maintaining a tax-qualified multiple employer defined benefit pension plan under 29 C.F.R. section 2510.3-55(b), 84 Fed. Reg. 37508 (published on July 3, 2019, effective September 30, 2019);<sup>36</sup>

23. PMSA also argues that there are no estimates of ratepayer costs, which is simply not the case.

The updated cost projections provided by actuary Christopher Wood, which are based upon the current DNI of \$410,075, show that, in the event the Commission ordered a transition effective January 1, 2025, the cost of the pay-as-you-go component of the PSP pension system would drop from an estimated \$6.0 million in 2025 to \$4.95 million and that an additional \$5.1 million would be needed to fund the new MEP defined benefit plan.<sup>37</sup> Mr. Wood also notes that the cost of the pension plan transition for existing licensees associated with an increase in DNI would be "directly proportionate" to the cost projection in the record utilizing \$410,075 as the current DNI.<sup>38</sup>

24. In other words, if the Commission approves a 40% increase in DNI from \$410,075 to PSP's requested national median of \$574,087, the defined-benefit plan pension costs in Mr. Wood's

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<sup>35</sup> PMSA Initial Br. at ¶ 82.

<sup>36</sup> McNeil, Exh. BJM-6 at 1, (emphasis added).

<sup>37</sup> Wood, Exh. CRW-9 at 1.

<sup>38</sup> Wood, CRW-6T at 1-22.

projection are directly scalable and would increase by 40%. If the pension plan transition is approved with DNI set at \$574,087, the projected 2025 cost changes from \$5.1 to \$7.14 million, a sum that pales by comparison to the more than \$100 million in savings over 50 years. Moreover, phasing in this additional cost in 2025 is reasonable, clearly prudent as previously determined in Order 09 and economically insignificant as proven by shipping economist Ken Eriksen's unrebutted testimony.

25. Because of the time necessary to secure the two agency determination letters, which could take as much as one year, PSP recommends that the Commission order the transition of PSP's pay-as-you-go pension plan to a fully funded defined-benefit pension plan effective January 1, 2025. If the two approvals are issued by mid-2024, there will be more than adequate time to prepare the plan documents and implement the transition utilizing a 30-day compliance filing to establish the tonnage-based rate necessary to fund the pension plan transition.

#### **V. MULTIPLE AUTOMATIC ADJUSTERS SHOULD BE ADOPTED.**

26. With the exception of an annual cost-of-living adjustment, which Staff supports, both PMSA and Staff oppose all four of PSP's proposed tariff adjusters for new licensees/retirees, annual traffic and two pension-related adjusters. Staff advances a hidebound and misinformed view that a tariff true-up mechanism "subverts contrary bedrock principles of ratemaking."<sup>39</sup> However, while the need for a pilotage-specific standard of review is critical for the reasons discussed above and in PSP's opening brief, even Order 09 recognized the disconnect between its public service company precedent and a marine pilotage tariff with respect to the applicability of a rate of return ("ROR") or the "ratemaking concept of a return on equity" to a pilot organization.<sup>40</sup> After noting that "PSP is more appropriately understood as a professional organization that distributes its net income each year to member pilots" and, with unrecorded

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<sup>39</sup> Staff Post-Hearing Br. at ¶ 63.

<sup>40</sup> Order 09 at ¶ 67.

liabilities accounted for, had "a negative equity balance," the Commission held that this "renders the ROR variable in the [revenue requirement] formula irrelevant."<sup>41</sup>

27. The fact that the UTC has the authority to adopt all manner of automatic adjusters in a pilotage tariff is not open to serious question. Unlike the statutes governing UTC ratemaking authority in contexts other than pilotage, which do not expressly mention automatic adjusters,<sup>42</sup> the 2018 legislation transferring pilotage ratemaking authority from the BPC to the UTC explicitly references the potential for a petitioner to propose "a tariff with an annual or periodic adjustment mechanism."<sup>43</sup> This is no doubt a direct result of the state-funded report to the Legislature identifying automatic tariff adjusters as a pilotage ratesetting "best practice."<sup>44</sup> Moreover, in its June 2021 report to the Legislature on establishing its first marine pilotage tariffs, the UTC noted both its authority to use "automatic adjusters and formulaic mechanisms in setting tariff rates" and that Order 09 "includes an automatic increase of 2.3%" in DNI in year 2.<sup>45</sup>
28. Each of PSP's proposed automatic adjusters will promote rate stability and reduce the need for expensive, time-consuming general rate cases. Staff's objections that these are "anathema to ratemaking principles"<sup>46</sup> ignores the purpose of true-up mechanisms in pilotage tariffs. As pointed out previously, a traffic-based adjuster was used annually to adjust PSP's tariff (with industry support) in 2001-05 and has existed for many years on the Columbia River Bar pilotage ground, utilizing a quarterly adjuster. There is no need to incorporate average vessel tonnage, which has been relatively flat in recent years,<sup>47</sup> into the formula for the annual traffic

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<sup>41</sup> *Id.*

<sup>42</sup> RCW 81.77.160, 81.108.040.

<sup>43</sup> RCW 81.116.030(2)(c).

<sup>44</sup> Royer, Exh. JR-23 at 73.

<sup>45</sup> UTC Legislative Report on Establishing Marine Pilotage Tariffs dated June 29, 2021 at 17, UTC website.

<sup>46</sup> Staff Post-Hearing Br. at ¶ 62.

<sup>47</sup> Exh. IC-15. Average vessel tonnage in 2020, 2021, and 2022 was 49,991, 50,663 and 51,093, respectively, a very narrow band.

adjuster for the Puget Sound pilotage tariff. In the event conditions change significantly, with average tonnage going up or down materially, an adjustment to the traffic-based annual adjuster could be made in a single-issue rate case.

29. Regarding the new licensee/retiree adjuster, PMSA argues that this mechanism, which is now in place in Louisiana, is "particularly egregious" and "impermissibly blurs the jurisdiction between the Commission and BPC."<sup>48</sup> It would do nothing of the sort. The BPC's authority to establish the authorized number of pilots to safely and efficiently provide pilot services in Puget Sound is exercised only episodically and is decided on the merits of the relevant workload data, rest rules and other factors. Tariff funding of those positions is solely the province of the UTC. This automatic adjuster in no way undermines the bifurcated character of regulatory responsibility for Washington's pilotage system. To the contrary, it accommodates that system by addressing the regulatory lag that would financially impact either PSP or its customers depending on the circumstances. Right-sizing the revenue requirement to the number of licensed pilots simply implements an appropriately formulaic approach to a component of pilotage tariff ratesetting.
30. The same policy – taking advantage of formulaic adjusters to true-up a tariff and reduce the need for rate cases – strongly supports adoption of PSP's two proposed pension tariff adjusters, using the same approach as multiple jurisdictions to annually project and collect via a tonnage-based surcharge the funds necessary to fund pension costs. In PSP's case, provided the UTC orders the transition of PSP's unfunded pension plan to a fully funded pension plan, two virtually identical formulaic annual tariff adjusters will be needed: one for the run-out of the pay-as-you-go pension plan, which would terminate when the last beneficiary passes on; and a second to fund the new PSP Multiple Employer Plan defined-benefit pension plan.

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<sup>48</sup> PMSA Initial Brief at ¶ 103.

## VI. SECONDARY ISSUES.

### A. TOTE Maritime's Request for Preferential Rates Should be Rejected.

31. From the filing of its August 26, 2021 petition for reconsideration of Order 09 through its posthearing brief in this rate case, TOTE has repeatedly sought to muddy the waters of an extraordinarily straightforward issue in hopes of misleading the Commission into granting it a discriminatory rate discount that no other PSP customer – foreign or domestic – receives.
32. TOTE's original petition was predicated on claims that its ORCA ships are "smaller vessels" that sail exclusively coastwise and were therefore not required to have a GT ITC measurement. Neither claim was true. In fact, at well over 800-feet in length, the ORCA ships are required by federal law to have a GT ITC measurement.<sup>49</sup> TOTE's ships also sail internationally to British Columbia, where TOTE pays pilotage based on GT ITC.<sup>50</sup> And TOTE witness Captain Loftfield conceded that whether a ship sails coastwise or internationally is completely irrelevant to that ship's risk profile.<sup>51</sup>
33. TOTE's cries of "rate shock" are also blatantly false. Rate shock is "the need of an affected class of customers to bear required increases gradually."<sup>52</sup> Far from presenting no evidence on this issue, PSP's expert economist Ken Eriksen explained in detail that rate shock simply does not exist in this context because the cost of pilotage is negligible relative to the massive commercial value of shipping voyages.<sup>53</sup> TOTE did not dispute Mr. Eriksen's testimony, did not cross-examine him, and presented no evidence that it would suffer any hardship if made to pay the same non-discriminatory rates as every other PSP customer.

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<sup>49</sup> Tr. at 385:22-24.

<sup>50</sup> Tr. at 286:6-15; Exh. PM-4X.

<sup>51</sup> See Tr. 301:18-302:4.

<sup>52</sup> *Washington Utilities & Transp. Comm'n. v. Washington Natural Gas Co.*, No. UG-940034, 1995 WL 356416 (Apr. 11, 1995) (emphasis added).

<sup>53</sup> Exh. KAE-1T at 39:8-42:4; Exh. KAE-5T at 12:12-14-12.

34. Lastly, Ms. Dubs' accounting of the incremental difference in revenue is not "undisputed."

Rather, Ms. Dubs wrongly includes more than 100 pilotage assignments that predate TOTE's August 2021 petition, in contravention of Order 13.<sup>54</sup> The correct accounting for the years 2021 and 2022 is contained in PSP's response to Bench Request 5. The issue is ultimately a moot point because the evidence in this rate case is unequivocal that TOTE is not entitled to a discriminatory rate discount and the deferred revenue should be distributed to PSP.

**B. Other Issues.**

**1. PSP is not guessing regarding the projected number of pilots.**

35. PMSA characterizes PSP's proposal to use 56 pilots in calculating the revenue requirement as an "unsubstantiated guess" and urges use of its own version of "average assignment level" ("AAL") to argue that only 54.9 pilots should be funded.<sup>55</sup> PMSA's position should be rejected for three reasons. First, the Commission in Order 09, while making reference to Staff's AAL calculation, actually relied on the testimony of Captain Carlson to fund the actual number of 50 licensees in year one and 52 in year two in order to institute "a realistic gradual increase from the number of current working pilots in the first year to Staff's recommended number in year two, progressing towards the number of licensed pilots the BPC has identified."<sup>56</sup> Here, the current number of licensees is undisputed at 53 and PMSA has offered no evidence to show that PSP's projection of licensure dates for trainees currently in the BPC training pipeline is inaccurate.

36. Second, PMSA's attempt to sow confusion on this issue by referencing other metrics used to derive meaningful per pilot statistics should be ignored. Examples are the annual data sets tracking the number of fit for duty pilots or full-time working pilots (excluding partial years

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<sup>54</sup> TP-190976, Order 13 at ¶¶ 20-21.

<sup>55</sup> PMSA Initial Br. at ¶ 40.

<sup>56</sup> Order 09 at ¶ 85.

associated with retirements) used to generate meaningful workload or net income statistics. The record is clear regarding the different metrics on which these FTE statistics are calculated, which do not match the number of licensees.

37. Third, given the compelling need to reduce PSP's excessive callback levels, which present a safety hazard, PSP and BPC are making every effort to reach the authorized level of 56 FTE as soon as possible. The best evidence is that this will be achieved in 2023.

**2. Staff's accusation of obstruction by PSP has no basis in fact.**

38. In its brief, Staff claims that PSP "obstructed Staff's efforts to audit its filings," but provides no evidentiary support for this accusation.<sup>57</sup> In fact, PSP timely responded to 836 Data Requests in this case, 772 from PMSA, 55 from Staff and nine from TOTE. In a number of instances, PMSA objected to the adequacy of a PSP response, but all issues were worked out between counsel and PMSA filed no motion to compel in this case. Staff, in contrast, never raised any issue either by telephone or email concerning a PSP response to any of its DR's. Notably, Staff introduced eight of PSP's responses to UTC DR's into the record, none of which show any lack of responsiveness on the part of PSP.<sup>58</sup> If Staff had a discovery issue, it was required to confer and, if that was unsuccessful, to file a motion to compel.

**3. PSP has fully complied with Order 09's directives regarding callbacks.**

39. PMSA's suggestion that PSP is not accruing callbacks as a liability and reserving cash for that liability is simply not true. As of May 1, 2021, callback days were funded at a rate of \$1198 per callback day and that figure was increased to \$1620 per callback as of May 1, 2022. As callback days are used, the accrued funds are distributed in the month the comp day is taken and those funds are used to reduce the accrued callback expense on a day-for-day basis.

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<sup>57</sup> Staff Post-Hearing Br. at ¶ 15.

<sup>58</sup> Exh. WB-25X-32X.

PMSA's contention that PSP admitted that "callbacks existed on paper only"<sup>59</sup> is directly contradicted by the testimony of auditor Jessica Norris and PSP's 2021 and 2022 audits.<sup>60</sup>

**4. PSP's operating cost increases since 2018 are known, measurable, audited and reasonable.**

40. PMSA's blanket criticism of PSP's operating expenses focuses on an overall 53.5% increase over four years and fails to make the detailed arguments against specific expenses that are necessary for meaningful UTC review. By far, the biggest contributor to the increases is the rising cost of the PSP pension plan, which has been in place for decades and fully funded in the tariff. It is also worth noting that the Consumer Price Index for the Seattle-Tacoma-Bellevue region experienced inflation of 7.6% in 2021 and 8.4% in 2022 for a total of 16% in those two years.<sup>61</sup> Fuel prices increased by a much greater percentage in that period. These unforeseen factors were the major reasons for the increases in PSP operating cost, not profligate spending.

**5. PSP's transportation costs are reasonable.**

41. Considering the significant spike in fuel costs in 2021-22, it should be no surprise that transportation costs increased in those years. Further, PMSA's contention that the inclusion of pilot commute costs to and from vessel assignments is "inconsistent with IRS rules" is simply not true. Given the large geography of the Puget Sound pilotage district and the unpredictability of where a particular assignment will begin, PSP's pilots understandably utilize their home as the transportation start or end point on some jobs. The tax rules cited by PMSA address the lack of tax deductibility for commuting costs and have nothing to do with tariff-funded reimbursement of transportation expenses to individual PSP pilots.

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<sup>59</sup> PMSA Initial Br. at ¶ 77.

<sup>60</sup> Norris, Exh. JJN-1T at 3, Exh. JNN-2 at 14; Exh. MM-80X at 15.

<sup>61</sup> U.S. BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX—APRIL 2023  
[https://www.bls.gov/regions/west/news-release/consumerpriceindex\\_seattle.htm](https://www.bls.gov/regions/west/news-release/consumerpriceindex_seattle.htm).

42. Order 09 put in place a transportation charge per vessel that was designed to generate funds to cover the actual costs of pilot transport to and from vessel assignments. Where a pilot utilizes their own vehicle, the only charge is for the IRS-allowed mileage reimbursement. Where other forms of transport are used, the actual cost paid by a pilot is reimbursed or a direct billing from a transportation vendor is paid by PSP. With respect to the Green Car Club fleet, the company captures only its costs consistent with its status as a nonprofit entity. Neither PMSA nor Staff has produced any evidence to the contrary. The modest increase in transportation expense requested by PSP, which was disclosed in detail and reviewed by Staff, should be approved.

**6. PSP's legal fees are reasonable.**

43. State-licensed maritime pilots are the most heavily regulated workforce in the United States. No other category of workers is subject to having their compensation and benefits established by a state agency. For PSP, the regulatory regime for pilots in Washington is the most complicated in the nation, with authority split between the BPC and UTC. Given the practice in states with a pilotage commission to hold monthly meetings that often address either legal issues directly or matters with significant legal consequences, it is standard operating practice for major U.S. pilot groups to involve legal counsel in preparing for and attending those meetings. Obviously, PSP's legal costs in the last four years have spiked due to the need to litigate two major general rate cases before the UTC, which should abate following this rate case. However, the test year general legal expense of \$335,903, an increase commensurate with inflation since the Order 09 approved level of \$283,382,<sup>62</sup> should be approved. As to the \$1,783,415 in projected rate case expense,<sup>63</sup> which includes \$370,000 in UTC fees, the depth

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<sup>62</sup> Order 09 at ¶ 286.

<sup>63</sup> WTB-05.

of PSP's record presented through 26 witnesses shows this sum to be clearly reasonable and that it should be amortized over three years.

7. **PSP complied with all UTC rules regarding work papers and projected assignments.**

44. PSP filed the required work papers supporting its rate filing.<sup>64</sup> There is no lack of compliance with WAC 480-07-525(4)(s) as suggested by PMSA. As to the requirement in WAC 480-07-525(4)(m) that PSP's rate filing include "projected changes in vessel assignments," PSP pointed out in response to Bench Request No. 4 exactly where this projection was made. PMSA's criticism that this projection was not submitted with labeling or in a different format is simply form over substance.<sup>65</sup> There is no lack of compliance and certainly no prejudice to the parties.

**VII. CONCLUSION.**

45. Based upon the extensive record developed in this rate case, the Commission should adopt a pilotage-specific standard of review and fund a tariff sufficient to reestablish the Puget Sound Pilots as one of this country's best-in-class pilot organizations.

DATED this 12<sup>th</sup> day of May, 2023.

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<sup>64</sup> WTB-05, WTB-07 and PSP Work Papers filed July 14, 2022.

<sup>65</sup> PMSA Initial Br. at ¶ 87.