

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET TP-220513

STAFF'S RESPONSE TO PSP'S
PETITION FOR
RECONSIDERATION

I. INTRODUCTION

I Puget Sound Pilots (PSP) seeks reconsideration of the Commission's decision to allow PSP to pro form into its revenue requirement only half of the amount it requested for pension costs in its most recent general rate case.¹ PSP alleges that the Commission's decision is "unfair and should be reversed for two reasons," namely that the Commission imposed an unlawful penalty and improperly applied the offsetting factors standard to prevent it from recovering what it characterizes as known and measurable costs.² The first argument betrays a profound misunderstanding of the difference between ratemaking and penalties; the second improperly reverses the burden of proof. Neither does much to undermine the fact that the decision at issue here is a well-grounded, legally tenable exercise of the Commission's ratemaking discretion. The Commission should, accordingly, deny PSP's petition.

¹ *Wash. Utils. & Transp. Comm'n v. Puget Sound Pilots*, Docket TP-220513, Order 08 (Aug. 10, 2023) (hereinafter "Order 08").

² *Wash. Utils. & Transp. Comm'n v. Puget Sound Pilots*, Docket TP-220513, Respondent Puget Sound Pilots' Petition for Reconsideration of Final Order 08, 1-3 ¶¶ 3-6 (Aug. 21, 2023) (hereinafter "Petition").

II. BACKGROUND

2 The decision at issue has some roots in the final order (Order 09) in PSP’s last general rate case.³ There, the Commission “determined that PSP’s current pay-as-you-go pension plan was fiscally unsound and vulnerable to changing economic conditions” and it ordered PSP “to . . . initiate discussions with interested parties to develop a plan to transition to a fully funded, defined benefit retirement plan” before PSP filed its next rate case (the one currently before the Commission).⁴ The Commission provided specific expectations for these discussion, including: (1) the use of a mutually accepted facilitator, (2) that topics of discussion would include whether active pilots should be required to pay directly into the pension fund and whether PSP’s former executive director should be eligible for pension payments, and (3) that the talks would conclude with PSP submitting a “comprehensive interested persons evaluation and a participation study” summarizing what was discussed and what the parties’ positions were.⁵

3 The discussions ordered by the Commission did not go as expected. PSP did not work with other parties to hire a mutually agreeable facilitator, but instead selected its own preferred actuary and mediator and presented its choices to the parties as a fait accompli.⁶ It refused to “discuss whether individual pilots should be required to directly contribute to their own retirement plan,” despite the Commission’s direction.⁷ And it ultimately did not submit any “comprehensive interested party evaluation or participation study in its rate case.”⁸

³ *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-190976, Order 09 (Nov. 25, 2020) (Order 09).

⁴ Order 08 at 47 ¶ 165.

⁵ Order 08 at 54-55 ¶ 204.

⁶ Order 08 at 55-56 ¶ 206.

⁷ Order 08 at 55-56 at ¶ 206.

⁸ Order 08 at 56 ¶ 206.

4 Despite failing to comply with the Commission’s order, PSP nevertheless filed this rate case. In it, PSP sought to pro forma roughly \$900,000 in pension costs into rates.⁹ Staff and intervenor Pacific Merchant Shipping Association (PMSA) urged the Commission to deny that pro forma adjustment. On behalf of Staff, witness Mike Young argued that the Commission should not approve the pro forma adjustment because the costs at issue were not known and measurable. Specifically, he testified that:

. . . the Commission has directed PSP and PMSA to enter into mediated discussions to determine a new direction for pilot pensions. Until agreement has been reached, any costs included would be based on estimates or projections and estimates and projections that probably would not have much of a grounding in fact.¹⁰

5 With regard to the pro forma pension adjustment, the Commission ultimately reasoned that:

216 We share many of Staff’s and PMSA’s concerns with this pro forma adjustment. As we have observed in this Section, PSP failed to comply with Final Order 09 in several respects. PSP did not discuss whether member pilots should be required to contribute to the retirement plan; it did not select a mutually agreeable facilitator for the retirement workshops; and it did not prepare a comprehensive interested parties evaluation. In essence, PSP seeks to recover increased retirement plan costs that it was ordered to, and failed to, properly discuss with interested persons before filing this rate case.

217 Furthermore, while PSP’s retirement costs may be considered known and measurable the Commission in its discretion determines that a portion of the pro forma retirement expense adjustment should not be allowed into rates because of PSP’s non-compliance with Final Order 09. PSP also fails to account for offsetting factors which is an important consideration when proposing and evaluating pro forma adjustments.

218 For these reasons, we conclude that one-half of PSP’s pro forma retirement expense adjustment should be allowed into rates, or approximately \$450,000, until PSP’s next general rate case. The Commission retains broad discretion to allow recovery of expenses to result in fair, just, reasonable, and sufficient rates, and under compelling circumstances, unreasonable or excessive expenses may simply be reduced. Further, the Commission exercises its authority to require

⁹ Young, Exh. MY-1T at 22:13.

¹⁰ Young, Exh. MY-1T at 22:16-20.

compliance with its orders. We expect PSP to comply with Final Order 09 and the decisions in this Order.

6 PSP now seeks reconsideration of the Commission’s decision to allow it to pro form
only half the requested pension amount into rates.

III. ARGUMENT

A. The Commission’s Ratemaking Authority

7 For pilotage services, the Commission must establish tariff rates that are “fair, just,
reasonable, and sufficient.”¹¹ The Commission has long interpreted that phrase to mean “rates
that are fair to customers and to the Company’s owners; just in the sense of being based solely
on the record developed in a rate proceeding; reasonable in light of the range of possible
outcomes supported by the evidence; and sufficient to meet the needs of the Company to cover
its expenses and attract necessary capital on reasonable terms.”¹²

8 The Commission generally sets rates using a modified historical test year because such
a test year captures not only costs and revenues with certainty, but also the relationship
between those things.¹³ This modified-historical test year is, however, simply a starting point
for the ratemaking process. The Commission may allow restating adjustments to eliminate
distortions to test year ratemaking inputs, and pro forma adjustments to recognize post-test
year expenses or revenues. These adjustments are within the Commission’s broad authority to
accept or reject with the “fair, just, reasonable, and sufficient” standard guiding the exercise of
that discretion.¹⁴

¹¹ RCW 81.116.020(3).

¹² *Wash. Utils. & Transp. Comm’n v. Avista Corp.*, Dockets UE-200900, UG-200901, & UE-200894, Order 08, 10-11 ¶ 23 (Sept. 27, 2021).

¹³ *Wash. Utils. & Transp. Comm’n v. Avista Corp.*, Dockets UE-160228 & UG-160229, Order 06, 47 ¶ 80 (Dec. 15, 2016); *Wash. Utils. & Transp. Comm’n v. Pac. Power & Light Co.*, Dockets UE-140762, UE-140617, UE-131384 & UE-140094, Order 08, 71-72 ¶ 168 (Mar. 25, 2015).

¹⁴ See *Avista Corp.*, Dockets UE-160228 & UG-160229, Order 06, at 48 ¶ 82.

B. Reconsideration by the Commission

9 The Commission allows “any party” to “petition for reconsideration of a final order” to “request that the [C]ommission change the outcome with respect to one or more determinations in” that final order.¹⁵ A petitioner “must demonstrate errors of law, or of facts not reasonably available to the petitioner at the time of entry of the final order” to warrant reconsideration.¹⁶

C. Final Order 08’s Treatment of the Pro Forma Pension Costs did not Impose an Unlawful Penalty

10 As noted, PSP first argues that the Commission, by disallowing the pension costs, imposed an unlawful penalty.¹⁷ The Commission should reject this argument given that PSP offers no legal authority holding that the exercise of a public service commission’s ratemaking discretion can amount to a penalty. There’s good reason for that failure: ratemaking and the imposition of penalties differ, and the decision at issue here clearly falls on the ratemaking side of those distinctions, meaning that PSP fails to show a legal error justifying reconsideration.

11 Ratemaking involves the exercise of legislative power to fix the maximum rates for businesses affected with the public interest.¹⁸ It involves the prescribing of the rates that such businesses may charge their customers,¹⁹ and, thus governs payment for service made by customers to those entities.²⁰

¹⁵ WAC 480-07-850(1)(a). The Commission’s rules forbid a response.

¹⁶ *In re Application of Avista Corp., In re Application of PacifiCorp, In re Application of Puget Sound Energy*, Docket Nos. UE-991255 & 991262, Fourth Supplemental Order, at 9 ¶ 40 (April 21 2000).

¹⁷ Petition at 1-2 ¶ 3. PSP alleges that the penalty was unlawful both because the Commission imposed a penalty in excess of that authorized by law; see RCW 81.04.380, .387; and because the Commission failed to follow the necessary process. See RCW 81.04.110. Petition at 1-2 ¶ 3.

¹⁸ *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 405-07, 34 S. Ct. 612, 58 L. Ed. 1011 (1914).

¹⁹ RCW 81.116.020.

²⁰ See *Avista Corp.*, Dockets UE-200900, UG-200901 & UE-200894, Order 08, at 10-11 ¶ 23.

12 The imposition of penalties, in contrast, involves the exercise of judicial or quasi-judicial powers.²¹ It involves (as is relevant here) the compulsory payment by a jurisdictional public service company of an amount of money for the violation of the public service laws or a Commission rule or order.²²

13 Here, the Commission clearly²³ engaged in ratemaking, not the imposition of penalties. Order 08's treatment of PSP's pro forma pension costs affected PSP's revenue requirement, the value that the rates the Commission establishes in tariff are designed to recover,²⁴ and thus ultimately concerns payments made to PSP by its customers. Order 08 does not compel any payment to the state by PSP for violations of state law. PSP's argument is meritless, if not frivolous.

D. Final Order 08's Treatment of the Pro Forma Pension Costs Reflected Well-Established Commission Ratemaking Principles

14 PSP next contends that the Commission improperly rejected half of the proposed pro forma pension amount by (1) applying the offsetting factors standard, or (2) denying PSP's recovery of what the pilots characterize as known and measurable costs.²⁵ But the decision reached in Order 08 is consistent with the Commission's rules and longstanding Commission practice, meaning that PSP again fails to show a legal error justifying reconsideration.

15 PSP first contends here that "the suggestion that disallowing \$451,219 in pension expenses is justified by PSP's failure to 'account for offsetting factors' is not consistent with

²¹ See *Rody v. Hollis*, 81 Wn.2d 88, 93, 500 P.2d 97 (1972).

²² RCW 81.04.405 ("[a]ll penalties recovered under this title shall be paid into the state treasury and credited to the public service revolving fund.").

²³ Staff tries to rarely use this word in briefing so that when it is put on paper, it has meaning. This is a case where the Commission should give the term its plain and ordinary meaning.

²⁴ Order 09 at 16 ¶ 58.

²⁵ Petition at 1-3 ¶ 3-6.

the record.”²⁶ This is because, according to PSP, “the record contains no evidence to support a conclusion that PSP failed to consider offsetting costs.” But PSP has matters backwards: it bore the burden of showing the pro forma adjustment would result in fair, just, reasonable, and sufficient rates.²⁷ A key component of such a showing is the consideration of offsetting factors.²⁸ As PSP points to nothing in the record on reconsideration to show consideration of those factors, the Commission should deny the petition.

16 Regardless, the Commission grounded its decision on the pro forma costs in its ratemaking discretion, with PSP’s failure to consider offsetting costs only a secondary reason for its decision.²⁹ As noted above, the Commission interprets the “fair, just, reasonable, and sufficient standard” to measure “reasonable[ness]” in terms of the range of options supported by the evidence.³⁰ It should follow that a party’s actions to limit the record or the range of options in violation of a Commission order, coupled with a proposed adjustment by that party, can render rates based on that adjustment unreasonable. PSP engaged in exactly that kind of behavior here: the Commission ordered it to build a record that would include a report containing a full discussion of pension-related issues. PSP failed to do so; indeed, it willfully refused to do so. And then it proposed a pro forma adjustment closely related to its misconduct, namely a pro forma adjustment involving pension costs. The Commission should affirm that accepting PSP’s pro forma adjustment as proposed would produce unreasonable rates given PSP’s misconduct and accordingly, deny the petition.

²⁶ Petition at 2 ¶ 4.

²⁷ WAC 480-07-540.

²⁸ WAC 480-07-510(3)(c)(ii); *Wash. Utils. & Transp. Comm’n v. Puget Sound Energy, Inc.*, Dockets UE-090704 & UG-090705, Order 11, 12 ¶ 27 (Apr. 2, 2010) (noting the importance of the consideration of offsetting factors).

²⁹ See Order 08 at 59 ¶ 217 (“PSP *also* fails to account for offsetting factors, which is an important consideration when proposing and evaluating pro forma adjustments.”) (emphasis added).

³⁰ *Avista Corp.*, Dockets UE-200900, UG-200901 & UE-200894, Order 08, at 11 ¶ 23.

IV. CONCLUSION

17 PSP fails to show any legal error. The Commission should deny its petition for reconsideration.

Respectfully submitted, this 29th day of August 2023.

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