

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET TP-220513

ORDER 09

DENYING PETITION FOR  
RECONSIDERATION

**BACKGROUND**

- 1 On August 10, 2023, the Washington Utilities and Transportation Commission (Commission) entered Final Order 08, Rejecting Tariff Sheets, Authorizing and Requiring Compliance Filing (Final Order 08), resolving all disputed issues in the general rate case filed by Puget Sound Pilots (PSP).
- 2 On August 21, 2023, PSP filed a Petition for Reconsideration of Final Order 08 (Petition). PSP seeks reconsideration of the Commission's conclusion of law number 17, disallowing \$451,219 in expenses. This amount reflected half of PSP's pro forma adjustment for the costs of continuing the association's pay-as-you-go retirement plan.
- 3 In its Petition, PSP argues that Final Order 08 is unfair and that there is no basis for disallowing a known and measurable expense on the grounds of noncompliance with a final order. PSP argues that the Commission's decision amounts to an improper penalty in excess of the \$1,000 per-violation limitation on penalties set forth in RCW 81.04.387. PSP argues further that there is no evidence that the association failed to account for offsetting costs in proposing this adjustment.
- 4 On August 23, 2023, the Commission issued a Notice of Opportunity to Respond to Petition for Reconsideration. The Commission required any responses to be filed by September 1, 2023, and the Commission indicated that it would rule on the Petition by September 22, 2023.
- 5 On August 28, 2023, Pacific Merchant Shipping Association (PMSA) filed a Response to the Petition. PMSA argues that PSP's Petition is insufficient and fails to set forth its

challenge with the requisite amount of detail. PMSA argues further that Final Order 08 noted that the Commission had the right to reject PSP's case in its entirety or to reduce the recovery of expenses in light of compelling circumstances. PMSA submits that the assessment of a penalty is clearly distinguishable from an order exercising the Commission's rate-setting authority. Even if the Commission erred in finding that PSP failed to account for offsetting factors, PMSA argues that this was only a secondary basis for the Commission's decision. PSP does not challenge several other findings in the order regarding PSP's noncompliance with a Commission order, withholding of information in response to data requests, and PSP's failure to fully consider potential limitations on its proposed multiple employer plan (MEP).

6 On August 29, 2023, Commission staff (Staff)<sup>1</sup> filed a Response to the Petition. Staff submits that the Commission has broad authority to determine fair, just, reasonable, and sufficient rates. Staff argues that PSP cites no authority for the proposition that the exercise of rate-making authority amounts to a penalty and that the Commission was clearly engaged in rate-making when it denied half of PSP's pro forma adjustment.

7 Staff argues that it is PSP's burden to establish that it accounted for offsetting factors. Staff also argues that the Commission's decision was justified given PSP's noncompliance:

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.<sup>2</sup>

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<sup>1</sup> In formal proceedings such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

<sup>2</sup> Staff Response ¶ 16.

## DISCUSSION

- 8 We agree with Staff and PMSA that PSP’s Petition should be denied. PSP does not challenge the Commission’s finding that it failed to comply with Final Order 09 in several respects, which affected the development of the record in this proceeding. The Commission does not accept PSP’s arguments that the Commission’s exercise of ratemaking authority amounted to a penalty or that the Commission erred in finding that PSP failed to account for offsetting factors.
- 9 In PSP’s first general rate case before the Commission, the Commission determined that PSP’s current, pay-as-you-go pension plan was fiscally unsound and vulnerable to changing economic conditions.<sup>3</sup> In contrast, a fully-funded, defined benefit plan would “provide security and confidence in the long-term viability of the promised retirement benefits to current and future pilots.”<sup>4</sup> The Commission therefore continued PSP’s pay-as-you-go retirement plan but ordered PSP to, among other requirements, initiate discussions with interested parties to develop a plan to transition to a fully funded, defined-benefit retirement plan.<sup>5</sup> The Commission required parties to also address “whether active pilots should be required to contribute directly to PSP’s retirement fund.”<sup>6</sup> The parties were also required to discuss the issue of retirement payments to PSP’s former executive director.<sup>7</sup> The Commission held that these discussions should be “facilitated by a mutually acceptable third-party with expertise in retirement planning, such as an actuary, and should be concluded prior to PSP’s next general rate case.”<sup>8</sup> PSP was required to submit a comprehensive interested persons evaluation and a participation study at the conclusion of the process.<sup>9</sup>
- 10 In the case at hand, the Commission found that “PSP failed to comply with Final Order 09 in several respects.”<sup>10</sup> The Commission explained:

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<sup>3</sup> *WUTC v. Puget Sound Pilots*, Docket TP-190976, Final Order 09 Rejecting Tariff Sheets; Authorizing and Requiring Compliance Filing ¶ 194 (November 25, 2020) (Final Order 09).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* ¶ 191.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* ¶ 194.

<sup>8</sup> *Id.* ¶ 192.

<sup>9</sup> *See id.* (using the term “comprehensive stakeholder evaluation”).

<sup>10</sup> Final Order 08 ¶ 206.

Instead of hiring a mutually acceptable third-party, PSP hired its own actuary and selected a mediator of its own choosing before consulting with PMSA and other interested parties. Instead of discussing whether active pilots should be required to contribute directly to the retirement fund, as required by Final Order 09, PSP refused to discuss whether individual pilots should be required to directly contribute to their own retirement plan. And PSP failed to include any comprehensive interested party evaluation or participation study in its rate case. PSP's non-compliance with Final Order 09 influences our decision for both the proposed MEP and the recovery of test year pro forma retirement expense.<sup>11</sup>

- 11 The Commission declined to reject PSP's case outright or assess penalties, but it emphasized that PSP's noncompliance was a "material issue that has affected the development of the record."<sup>12</sup> The Commission also expressed concern that PSP's withholding of information in response to data requests indicated that testimony from its witnesses McNeil and Wood were not subject to the "vetting and questioning that would occur in the normal course of a litigated rate case."<sup>13</sup>
- 12 The Commission therefore held that only one-half of PSP's proposed pro forma adjustment for pension expenses should be allowed into rates until the association's next general rate case, observing that 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."<sup>14</sup>
- 13 Although PSP argues that the Commission's decision on this issue was "unfair" and that there was "no basis" for disallowing known and measurable expenses,<sup>15</sup> PSP does not challenge the Commission's findings that PSP failed to comply with Final Order 09 in several respects. PSP does not challenge, either, the Commission's finding that PSP's noncompliance was a "material issue that has affected the development of the record."<sup>16</sup>

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<sup>11</sup> *Id.* (internal citation omitted).

<sup>12</sup> *Id.* ¶ 208.

<sup>13</sup> *Id.* ¶ 209.

<sup>14</sup> *Id.* ¶¶ 217-18 (citing *WUTC v. Puget Sound Power & Light Co.*, Cause No. U-85-53 Second Suppl. Order (May 16, 1986) ("The respondent already had accounting services available; the fee appears to be excessive for the services rendered. One half of the fee will be allowed.")).

<sup>15</sup> Petition ¶ 3.

<sup>16</sup> Final Order 08 ¶ 208.

The Commission therefore maintains its conclusion that only one half of PSP's proposed pro forma adjustment should be allowed into rates given this noncompliance and its effect on the record in this proceeding. As Staff argues in its response, "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."

14 We reject PSP's argument that the Commission's finding on this issue amounted to an improper penalty in excess of the \$1,000 per violation limit set forth in RCW 81.04.387. The Commission's finding was an express exercise of ratemaking authority in a final order resolving a general rate case.<sup>17</sup> The Commission's finding was clearly distinguishable from a penalty as a matter of procedure and form.

15 The Commission's finding was also distinguishable from a penalty as a matter of *substance*. As the Commission explained, PSP's noncompliance with Final Order 09 did not merely represent an abstract disregard for a Commission order but was a "material issue that has affected the development of the record."<sup>18</sup> There was a clear nexus between the Commission's findings regarding PSP's noncompliance in paragraphs 206-209 and the decision to allow only one-half of PSP's proposed adjustment in paragraphs 217-18 of the Order. Because the Commission's finding was premised on a close consideration of how PSP's noncompliance affected the development of the record, it is not persuasive to suggest that the Commission's exercise of ratemaking authority was, in substance, merely a penalty.

16 PSP's argument would also lead to absurd restrictions on the Commission's ratemaking authority. PSP's argument also implies that the Commission's only course of action for protecting ratepayers in the face of an insufficient record, shaped by a party's willful noncompliance with a Commission order, would be to assess per violation penalties. This would incentivize further noncompliance with Commission orders by limiting PSP's and other parties' exposure to negative consequences. However, when a party undermines the lawful ratemaking process and disregards final Commission orders, that party risks a finding that those costs will be disallowed to protect ratepayers.

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<sup>17</sup> Final Order 08 ¶¶ 217-18.

<sup>18</sup> *Id.* ¶ 208.

17 We also address PSP’s argument that there was no evidence that the association failed to account for offsetting factors.<sup>19</sup> This was merely a secondary basis for the Commission’s decision. But we agree with Staff’s observation that the burden remains on the interested party proposing the tariff revisions to establish that it has accounted for offsetting costs. The Commission did not have the benefit, either, “of work products or reports from the workshops that would help inform our decision in this Order.”<sup>20</sup> This was a relevant factor for the Commission to consider. In past cases, the Commission has “rejected pro forma adjustments for wage increases when there is insufficient evidence that the utility has accounted for offsetting factors.”<sup>21</sup>

**ORDER**

**THE COMMISSION ORDERS That Puget Sound Pilot’s Petition is DENIED.**

DATED at Lacey, Washington, and effective September 12, 2023.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chair

ANN E. RENDAHL, Commissioner

MILTON H. DOUMIT, Commissioner

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<sup>19</sup> See Petition ¶ 4.

<sup>20</sup> Final Order 08 ¶ 208.

<sup>21</sup> *WUTC v. Cascade Natural Gas Corp.*, Docket UG-200568 Final Order 05 ¶ 207 (May 18, 2021) (internal citation omitted).