

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

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

Docket No. TP-220513

PACIFIC MERCHANT SHIPPING
ASSOCIATION'S RESPONSE TO
REQUEST FOR CLARIFICATION
OF FINAL ORDER 08

I. INTRODUCTION

1. Pursuant to the October 10, 2023 Notice of Opportunity to Respond, the Pacific Merchant Shipping Association (PMSA) files this response in opposition to Puget Sound Pilots' (PSP) "Request for Clarification of Final Order 08" ("PSP's Request"). The Commission should deny PSP's Request and affirm Final Order 08. Final Order 08 in this matter is unambiguous in requiring compliance with the directives in Final Order 09 that PSP had not complied with, and PSP's Request is legally, procedurally, and substantively improper.

II. BACKGROUND

2. Under Commission rules, a "motion for clarification" must be filed within ten days of the service of the final order.¹ Commission regulations further allow for scheduling "an order clarification conference . . . at a party's request" with the

¹ WAC 480-07-835(1). (PSP has not made a motion for clarification under WAC 480-07-835, and if it had, such a motion would not have been timely.)

purpose “to clarify the final order when parties disagree about its meaning or requirements.”² The purpose of such a clarification conference is to provide “the parties and commission with the opportunity to: (a) Explore and resolve any disagreements or lack of understanding about the meaning of, or requirements in, the final order so that parties can accurately prepare any compliance filings; or (b) identify and make technical changes to reconcile the application of principle to data, resolve inconsistencies, or correct patent error.”³ Such a request is limited in scope: “An order clarification conference is not a forum for discussing or challenging the evidentiary, legal, or policy decisions in the order. Parties may pursue those remedies through a petition for reconsideration or other means.”⁴

3. The moving party in a pilotage rate case bears the burden to prove that the current rates are not fair, just, reasonable, and sufficient.⁵ In this general rate case,⁶ the Commission considered facts, testimony, and evidence regarding the application of Final Order 09 in the prior PSP rate case.⁷ Final Order 09 in the prior case concluded in part that the PSP retirement system was “fiscally unsound and vulnerable to changing economic conditions,” and it ordered PSP to meet several specific procedural requirements in conjunction with other

² WAC 480-07-840(1).

³ *Id.*

⁴ WAC 480-07-840(2).

⁵ RCW 81.116.030(5).

⁶ *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-220513, Final Order 08 (Aug. 10, 2023) (hereinafter “Final Order 08”).

⁷ *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-190976, Final Order 09 (Nov. 25, 2020) (hereinafter “Final Order 09”).

stakeholders in order “to develop a plan to transition” to a future retirement plan.⁸ The Commission in this case found that PSP failed to comply with Final Order 09 with respect to engaging stakeholders, discussing whether active pilots should be required to contribute to the retirement fund, and developing and reporting on the transition plan.⁹

4. Staff testified that the Commission should not approve the PSP pro forma adjustment in part because of the failure of discussions meant that the proposed costs were not known and measurable. And, until an agreement was reached in those discussions, Staff proposed leaving the pension plan in place as approved in Final Order 09 of the prior rate case.¹⁰ PMSA agreed with the Staff recommendation, reasoning that since PSP had not addressed basic questions as directed by Final Order 09 “these conversations should continue before more new and additional costs” were approved in this rate case.¹¹ PSP did not provide any response testimony or briefing argument specifically addressing either the Staff proposal or PMSA’s concurrence with Staff’s proposal.

5. With respect to the continuation of the requirements of Final Order 09 in this case, the Commission ultimately determined in Final Order 08 the following:

202 Commission Determination. PSP should seek approval of its proposed MEP from the IRS and Department of Labor. We otherwise reserve ruling on the prudence of the MEP or any automatic adjuster to recover its costs until those costs are known and measurable. **PSP**

⁸ Final Order 08 at 47 ¶ 165.

⁹ Final Order 08 at 54-56 ¶¶ 204-206.

¹⁰ Young, Exh. MY-1T at 22:15 – 23:2.

¹¹ Moore, Exh. MM-63T at 19:18-25.

may continue to recover the costs of its retirement plan in rates based on the costs approved in Final Order 09 with a reduced pro forma retirement expense adjustment.

203 The rate-setting process provides PSP, like other regulated entities, the opportunity to recover prudently incurred expenses. **Further, like in other regulated industries, the Commission expects companies to comply with Commission orders. In Final Order 09, the Commission determined that PSP’s current, pay-as-you-go pension plan was fiscally unsound and vulnerable to changing economic conditions.** 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.”

204 **The Commission therefore continued PSP’s pay-as-you-go retirement plan but ordered PSP to initiate discussions with interested parties to develop a plan to transition to a fully funded, defined-benefit retirement plan.** The Commission required parties to also discuss addressing “whether active pilots should be required to contribute directly to PSP’s retirement fund.” The parties were also required to discuss the issue of retirement payments to PSP’s former executive director. 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.” PSP was required to submit a comprehensive interested persons evaluation and a participation study at the conclusion of the process.

...

206 Before we fully discuss the proposed MEP, we comment on the procedural history of this case and the way this issue developed. **Although Final Order 09 contemplated a series of workshops, concluding in reports that would be included in PSP’s next general rate case, PSP failed to comply with Final Order 09 in several respects.** 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.

207 PSP witness Costanzo argues that the association had “no obligation to engage in an unnecessarily long and unproductive stakeholder process with PMSA,” and Costanzo argues, along with other PSP witnesses, that pension costs must be included in tariff rates. **Yet PSP is not free to disregard the Commission's order without seeking clarification, review, or appealing the decision. Final Order 09 remained final and binding on PSP.**

208 Because “[t]he Commission rarely exercises its discretion to reject a company's case entirely and conclude that existing rates should remain in effect,” we decline to dismiss PSP's case outright. **Yet this is a material issue that has affected the development of the record. The Commission does not have the benefit of work products or reports from the workshops that would help inform our decision in this Order. PSP should also be aware that the Commission may choose to issue penalties or reject a rate case filing for such behavior in the future.**

...

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 compliance with its orders. We expect PSP to comply with Final Order 09 and the decisions in this Order.**¹²

6. PSP now seeks clarification of the Commission's decision to allow PSP to continue to recover the costs of its retirement plan on the basis of the findings of Final Order 09 and in compliance with Final Order 09.

III. ARGUMENT IN OPPOSITION TO REQUEST

A. Final Order 08's direction to PSP to continue to recover costs and comply under Final Order 09 is unambiguous.

7. The moving party seeking a change in the pilotage rates bears the burden of proof and unless and until the Commission issues an Order to the contrary pilotage rates, and the conditions contingent to their making, must be considered controlling and applicable and remain effective. Here, this means that, to the extent that PSP failed to carry its burden of proof with respect to Final Order 09, the provisions of that order remain controlling and presumptively correct and in place unless explicitly revised by Final Order 08. Final Order 08, in noting PSP's failure

¹² Final Order 08 at 54 ¶ 202 – 59 ¶ 218 (emphasis added, citations omitted).

to comply with the requirements of Final Order 09, in no way excused PSP from complying with those requirements going forward.

8. First, Final Order 08 needs no clarification; the Commission is patently unambiguous in its determination that PSP should continue to treat its retirement plan obligations consistent with the conditions of approval in Final Order 09.

9. This is true both with respect to the benefit to PSP of its recovery of costs and PSP's obligations to follow the directions in Final Order 09. These are consistently and precisely stated in Final Order 08 at ¶ 202 ("PSP may continue to recover the costs of its retirement plan in rates based on the costs approved in Final Order 09") and ¶ 218 ("We expect PSP to comply with Final Order 09 and the decisions in this Order.").

10. That PSP has failed to meet these Final Order 09 compliance obligations, including the requirement to meet with stakeholders prior to proposing and in the contemplation of future additional retirement plan revisions, is restated at ¶ 216 ("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."). And the Commission concluded that such compliance requirements are material to a decision at ¶ 208 (" . . . this is a material issue that has affected the development of the record. The Commission does not have the benefit of work products or reports from the workshops that would help inform our decision in this Order. PSP should also be aware that the Commission may choose to issue penalties or reject a rate case filing for such behavior in the future.").

11. PSP claims it is confused by Final Order 08’s simple continuation of the obligation conditions of Final Order 09 because ¶ 218 is written “in the present tense,” which it finds to be “inconsistent with the clear thrust of Final Order 08.”¹³ This claim by PSP is unfounded. The use of the present tense in ¶ 218 is entirely consistent with the present tense application of the initial, principle application of Final Order 09 in the Commission Determination on this subject, at ¶ 202: “PSP may continue to recover the costs of its retirement plan in rates based on the costs approved in Final Order 09”

12. If PSP is to continue to benefit from the recovery of costs as approved in Final Order 09, it should continue to be obliged to comply with the conditions upon which that cost recovery was based. That is precisely what the Commission concluded at ¶ 216.

B. PSP has not properly requested a clarification conference.

13. PSP does not seek any application of the purposes allowed for seeking a clarification conference under WAC 480-07-840. And, to the extent that PSP makes arguments seeking to change the substance of Final Order 08 or discuss arguments challenging the plain language of the Final Order 08, this is expressly disallowed by WAC 480-07-840.

14. Though a clarification conference is “to clarify the final order when parties disagree about its meaning or requirements,”¹⁴ a disagreement alone is not

¹³ PSP’s Request at ¶ 8.

¹⁴ WAC 480-07-840(1)

enough. The Commission's rules specify and limit the purposes, scope, and applicability of a clarification conference. While PSP has identified a disagreement amongst the parties, it has failed to identify any purposes of the requested clarification conference that square with those allowed under the Commission's rules.

15. First, WAC 480-07-840(1)(a) allows the parties to explore disagreements “so that parties can **accurately prepare any compliance filings**” (emphasis added). PSP has not addressed how the accuracy of any compliance filings subject to Final Order 08 might be compromised by the disagreement over whether it must meet its stakeholder and reporting obligations under Final Order 09. Thus WAC 480-07-840(1)(a) cannot be a foundation for a clarification conference.

16. Second, WAC 480-07-840 (1)(b) allows the parties to explore disagreements in order to “**identify and make technical changes** to reconcile the application of principle to data, resolve inconsistencies, or correct patent error” (emphasis added). PSP has not proposed any technical changes in its Request. Thus WAC 480-07-840(1)(b) is similarly not a foundation for a clarification conference.

17. Moreover, PSP's Request has violated the limitations of the scope of a clarification conference described in WAC 480-07-840(2). PSP's Request clearly is “**discussing or challenging** the evidentiary, legal, or policy decisions in the order,” which is improper at this stage because a party seeking such “remedies” should do so “through a petition for reconsideration or other means” (emphasis added).

18. Finally, PSP has already petitioned for reconsideration in this case on the very subject matter for which it now seeks a clarification conference (the failure of PSP

to follow the instructions of the Commission in Final Order 09 of the prior rate case). The window for any further petition for reconsideration has closed. PSP should not be allowed a back-door avenue to any further reconsideration of Final Order 08.

IV. CONCLUSION

19. Final Order 09 contained clear directives that PSP failed to comply with. PSP's Request is a renewed effort to circumvent its obligations to comply with those directives. But Final Order 08 in no way excused PSP from complying with those directives; on the contrary, the Commission expressly stated its expectation that PSP must comply with Final Order 09. Those directives are completely compatible with Final Order 08. Moreover, PSP's Request is legally insufficient under the Commission's rules. PMSA asks the Commission to deny PSP's Request to schedule a clarification conference and affirm the contents of Final Order 08 as requiring PSP to carry out the directives it failed to comply with in Final Order 09.

Respectfully submitted this 11th of October, 2023.

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