

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

IN RE THE MATTER OF

TOTE MARITIME ALASKA, LLC'S
PETITION FOR AMENDMENT,
RESCISSION, OR CORRECTION OF
ORDER 09 IN DKT 190976

DOCKET

WAC 480-07-875 PETITION TO AMEND
ORDER

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I. INTRODUCTION

1. Movant TOTE Maritime Alaska, LLC (“TOTE”) petitions the Commission, pursuant to WAC 480-07-875, for Amendment, Rescission, or Correction of the Commission’s Order 09 entitled FINAL ORDER REJECTING TARIFF SHEETS; AUTHORIZING AND REQUIRING COMPLIANCE FILING (DKT TP-190976), dated November 25, 2020 (the “Order,” Exh. 1). As a result of false factual premises Puget Sound Pilots (“PSP”) represented to the Commission in last year’s tariff modification proceeding, the Order establishes parameters for PSP’s revised tariff that are not “fair, just, reasonable, and sufficient for the provision of pilotage services” as required by RCW 81.116.020. PSP has taken advantage of unjust circumstances it created to increase pilotage fees for two TOTE vessels by an estimated \$762,237.76 during the two years in which the Order authorizes PSP tariff rate increases. As such, the revised tariff contravenes the Order’s premises and conclusions, and by PSP’s actions under it, imposes “rate shock” the Order was specifically designed to avoid.

II. SUMMARY OF PETITION

2. TOTE operates two roll-on-roll-off vessels, MIDNIGHT SUN and NORTH STAR, for which it utilizes PSP pilotage services in exclusively coastwise operations. At issue is PSP’s invoicing for these vessels since the Commission authorized an incremental increase in PSP’s tariff structure by the Order. Specifically, in January 2021, PSP began invoicing TOTE for pilotage services for the two vessels based on their international gross tonnage (“IGT”), as opposed to their regulatory (domestic) gross register tonnage (“GRT”). This has resulted in substantially higher service rates for the two vessels than PSP had charged TOTE for many years prior to the tariff revision, as well as substantially higher PSP revenues than what the Commission expected by the incremental rate increases it authorized in the Order.

3. Revised Tariff Item 300 provides that PSP pilotage rates be calculated based on the assisted vessel's IGT. Coast Guard regulations and international norms require a vessel which undertakes international voyages to be measured for IGT and obtain an international tonnage certificate ("ITC"). Vessels operating exclusively in coastwise trades do not undertake international voyages, and need not have ITCs. In addition to TOTE's two vessels at issue, other coastwise vessels PSP services may likewise not require or have ITCs.
4. It is improper for a tariff to require that pilotage-service rate calculations provided to domestic coastwise vessels be derived solely from international tonnage metrics. PSP and TOTE have long understood and agreed this to be the case. PSP has calculated its rates for TOTE's coastwise vessels based on their GRT tonnage since the vessels were launched in 2003. Indeed, PSP supported its request to the Commission for tariff rate increases during last year's proceeding with worksheets that showed revenue derived from GRT calculations for TOTE's two vessels during the test period, as well as in the tariff it drafted and proposed to comply with the Order. The Commission, in accord with UTC Staff, based its rate increase determinations, in part, on PSP's representations that it would continue to derive revenues based on GRT calculations for TOTE's two vessels during the years projected in PSP's *pro formas*. TOTE had no reason to suspect PSP would alter its billing practices for the two vessels after the Order's issuance, as it relied on PSP's worksheets and Staff analysis in refraining from protesting any increased rates during last year's proceeding.
5. The Commission calculated and authorized in the Order specified revenue increases based on its analysis of PSP's justified needs in the context of data in PSP's petition, exhibits, test period data, worksheets and its proposed revised tariff. However, PSP's increased invoicing to TOTE would now produce an estimated \$762,237.76 in additional revenue during the revised

tariff's two-year period above the ceiling the Order authorized based on the test period. The unexpected use of a higher tonnage level also imposes on TOTE "rate shock," i.e., suddenly increased rates at substantially higher levels, a result the Order is designed to avoid as unfair, unjust and unreasonable.

6. PSP's revised Tariff Item 300, entitled "Inter-Harbor Vessel Movements," provides as follows: "All inter-harbor vessel movement shall be assessed a Tonnage Charge and a Service Time Charge. The Tonnage Charge shall be based on the Vessel's International Gross Tonnage." TOTE requests that the Order be amended to direct that the final sentence of Item 300 provide as follows:

The Tonnage Charge shall be based on the Vessel's International Gross Tonnage for vessels that operate wholly or partially in international trades. The Tonnage Charge for vessels operating exclusively in coastwise trades shall be based on such vessels' regulatory gross register tonnage.

III. FACTUAL BACKGROUND

A. *Tariff Revision Proceeding and the Order*

7. This section sets forth operative conclusions and analyses the Order adopted after last year's tariff revision proceeding. Additional points about the Order and its underlying proceedings are raised and addressed in the Legal Argument section below.
8. On November 20, 2019, PSP filed with the Commission a proposed revised tariff which initiated last year's tariff-increase proceeding. Had the Commission accepted PSP's three-year proposed tariff revision, PSP revenues derived from applying the revised tariff to PSP's test period would have increased to \$43,112,701, or 26.4%, in the first year; \$46,625,286, or 8.1%, in the second year; and \$47,718,001, or 2.34%, in the third year based on the test period assignment and vessel particulars. Exh. WTB-1Tr of Witness Weldon T. Burton at p. 14 (Exh. 2 hereto).

9. TOTE’s vessels at issue have GRT tonnage of 35,825 tons and IGT tonnage of 65,314. Declaration of Philip Morrell (“Morell Declaration”). In last year’s proceeding, PSP submitted worksheets for all vessels it serviced during the twelve-month test period. Those worksheets contained the following tonnage and revenue data for TOTE’s two vessels, and UTC Staff applied this same tonnage to build the schedules for a proposed tariff and to evaluate the tariff PSP submitted in compliance with the Order:

<i>Vessel Name</i>	<i>From</i>	<i>To</i>	<i>Gross Tonnage</i>	<i>Current PSP Tariff</i>	<i>Current Total Tariff</i>	<i>Tonnage Charge</i>	<i>Pilot Boat Charge</i>	<i>Transportation Charge</i>	<i>BPC Trainee</i>	<i>BPC SILA</i>	<i>Proposed PSP Tariff</i>	<i>BPC Pass Through</i>	<i>Total Proposed PSP & BPC Tariff</i>
NORTH STAR	TATOT-LD	PS	35,825	3,820.66	3,971.66	2,821.37	348	198.37	171	16	5,328.54	187	5,515.54
MIDNIGHT SUN (1)	PS	TATOT-LD	35,825	3,820.66	3,971.66	2,821.37	348	198.37	171	16	5,328.54	187	5,515.54
MIDNIGHT SUN (1)	TATOT-LD	PS	35,825	3,820.66	3,971.66	2,821.37	348	198.37	171	16	5,001.74	187	5,188.74

Year One.

<i>Vessel Name</i>	<i>From</i>	<i>To</i>	<i>Gross Tonnage</i>	<i>Current PSP Tariff</i>	<i>Current Total Tariff</i>	<i>Tonnage Charge</i>	<i>Pilot Boat Charge</i>	<i>Transportation Charge</i>	<i>BPC Trainee</i>	<i>BPC SILA</i>	<i>PSP Proposed Tariff</i>	<i>BPC Pass Through</i>	<i>Total Proposed PSP & BPC Tariff</i>
NORTH STAR	TATOT-LD	PS	35,825	\$3,820.66	\$3,971.66	3,075.23	348	198.37	171	16	5,751.00	187	5,938.00
MIDNIGHT SUN (1)	PS	TATOT-LD	35,825	\$3,820.66	\$3,971.66	3,075.23	348	198.37	171	16	5,751.00	187	5,938.00
MIDNIGHT SUN (1)	TATOT-LD	PS	35,825	\$3,820.66	\$3,971.66	3,075.23	348	198.37	171	16	5,396.10	187	5,583.10

Year Two.

Revenue Calculation Years 1 and 2, DKT 01.02-11 and 12, 19097-Exhs.- WTB-11 and 12, Proposed Tariff (114277784.1) (collectively, Exh. 3 hereto), redacted to show relevant data for the subject vessels only (spelling errors in the original). These are three examples from the 204 otherwise identical instances per year in which PSP submitted these vessels’ data.

10. PSP’s tables show that tonnage rates for both TOTE vessels were, and would continue to be, calculated based on their 35,825 GRT tonnage, producing rates consistent with that tonnage metric since the vessels were launched in 2003, and with no mention of their IGT tonnage.

11. By the Order, the Commission rejected the high level of revenue increases PSP’s proposed revised tariffs would generate, and instead authorized a two-year tariff in accordance with its determinations regarding justified revenue requirements based on the test period

assignment and vessel particulars. The increases amounted to \$35,882,859 in year one and \$36,308,428 in year two derived from PSP's submitted test-period data, representing revenue increases of approximately 2.7% in the first year and an additional 1.3% in the second year.

Order at pp. i and 6.

12. UTC Staff, the Pacific Merchant Shipping Association ("PMSA") and Pacific Yacht Management disputed PSP's claimed needs for higher revenues in response to PSP's request for tariff revision. The Order's limited authorization of higher rates reflected the Commission's conclusions about the extent of fair and justified revenue needs (resulting from higher expenses, pilot benefits and other economic obligations). The Commission derived the incremental revenue increases based in part on exhibits and worksheets PSP submitted for the test period, as well as Staff's analyses and exhibits derived from PSP's worksheets.

13. PSP acknowledges that it services both international and domestic traffic:

Pilot Association Revenue

Pilotage revenue is based upon applying the pilot organization's tariff to the appropriate vessel traffic. Vessel traffic in most pilotage areas includes *foreign trading ship activity and domestic coastal movements*. *In both international and domestic coastwise trade*, traffic may include cargo ships, service vessels, cruise and passenger ships and ferries, some military ship traffic, and offshore energy service and other ship traffic [emphasis added].

Exh. JR-10 (Exh. 4 hereto) at p. 6.

14. The Order does not mention or contemplate new or different treatment for coastwise vessels as compared with preceding years. Nothing in the Order, and nothing PSP submitted to the Commission in support of its request for tariff rate increases, mentioned any amendment to the methodology of rate calculation for TOTE's two vessels at issue. Yet, without any notice to ratepayers, and after the Order was final, PSP altered its methodology concurrently with implementation of the revised tariff in January 2021.

15. PSP removed the clause “[f]or vessels where a certificate of international gross tonnage is required the appropriate international gross tonnage shall apply” from Item 300 in its revised tariff. This does not justify its precipitous increase of pilotage fees for TOTE’s coastwise vessels. PSP submitted no *pro forma* or other analysis of the increase; and its submitted worksheet data represented there would be no change in the methodology of tonnage rate calculation for TOTE’s coastwise vessels. The Board of Pilotage Commission staff provided to TOTE PSP’s submission, including the worksheet data, demonstrating that PSP was not proposing rate increases based on IGT instead of GRT calculations for TOTE’s two vessels. Morrell Declaration. Subsequently, PMSA provided TOTE calculations showing that PSP’s proposed first-year increase would be 39.5% based on the PSP worksheets using GRT. *Id.* PMSA opposed this increase, and the Commission rejected it. Yet now, TOTE is experiencing a 56.9% increase in pilotage costs (comparing the old tariff’s last invoice applying GRT with the new tariff’s first invoice applying IGT). See PSP invoices, copies of which are attached as Exh. AC-1 to the Declaration of Alyson Atalie Collier (“Collier Declaration”).

16. The Commission emphasized tonnage as the guiding factor of rates, noting in its Order on p. 106: “We decline to adopt Staff’s proposed tariff, which would place more weight on the Service Time charge and less weight on the Gross Tonnage charge. We are primarily concerned that Staff’s proposal would result in rate shock for smaller vessels.” Significantly, TOTE’s two vessels are “smaller vessels,” with the functional capacity of 1,360 twenty-foot equivalent units (“TEUs”). See Morrell Declaration.

17. Citing earlier UTC precedent, the Order states the following at p. 12:

“In any general rate proceeding, the Commission’s ultimate goal is to set rates that are *fair* to customers [here, TOTE] and to the Company’s shareholders [the pilots]; *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 [PSP] to cover its expenses and attract necessary capital on reasonable terms” [emphasis in the original].

As demonstrated below, PSP’s unexplained and precipitous increase of its charges for TOTE’s two vessels surreptitiously defeats these policy goals and is at odds with the Order’s spirit and letter.

18. Importantly, Staff tested and verified PSP’s data for TOTE’s two vessels as part of its generation of calculations and recommendations. Staff submitted as Exh. SS-3 part 2 (pp. 1 and 114)(Exh. 5 hereto) its comments on vessel spreadsheets that provide as follows:

Invoices [sic] tested by staff are highlighted. ***Staff Determines the historical information is accurate for the purpose of this filing and can be used to determine staff’s proposed rates.*** State Determined from testing 95 invoices that the new rates may cause PSP to overearn [sic] when a 2nd pilot is assigned, as their proposed price out doesn’t calculate an increase in revenue when a 2nd pilot is assigned, but the tariff has a rate for when a 2nd pilot is assigned [emphasis added].

As TOTE vessel MIDNIGHT SUN is highlighted at line 637, Staff clearly considered this specific vessel in offering its opinion.

19. Indeed, PMSA explored the tonnage issue with Staff during last year’s proceeding, and Staff submitted testimony which served as a premise of the Order. PMSA Vice President Michael Moore, who testified in last year’s proceeding, inquired about this issue with Staff on several occasions. Declaration of Michael Moore (“Moore Declaration”) and attached exhibits. Staffer Scott Sevall advised Moore in an email exchange that addressed tonnage errors for two vessels in PSP’s worksheets as follows: “The main concern from PSP’s point of view was that the invoices for pilotage service to that ship were going to increase more than what the ship would expect.” Email string March 18-22, 2021, a copy of which is attached to the Moore Declaration as Exh. MM-3. Thus, PSP’s concerns that the ship would not expect the increases of

the magnitude it did were justified, and it appears no one, including TOTE, could reasonably have expected it.

B. *Economic Effect of Rate Calculation Based on IGT Tonnage*

20. TOTE's two vessels are Orca class roll-on-roll-off vessels which contain large volumes of "exempted space," or space not filled with cargo. The GRT applied in domestic measurements does not consider such dead space, while IGT measurements do. Consequently, the vessels at issue have much larger IGT measurements than GRT measurements, and the resulting rate differentials are significant. Morrell Declaration.

21. The Collier Declaration demonstrates how calculation of pilotage rates based on the two vessels' IGT instead of their GRT tonnage creates added pilotage fees of \$378,411.84 in year one and \$383,825.92 in year two for a total of \$762,237.76 in the two-year revised tariff period. This is significant not just because of the obvious "rate shock" it imposes on TOTE, but also because it upsets the 2.7% (year one) and 1.3% (year two) incremental increases the Order authorized based on revenue considerations.

22. The \$378,411.84 windfall PSP has devised would result in a 3.8% increase of its revenues in year one using test-period vessel activity, which is 40% above the 2.7% the Order indicated. It also amounts to 175% of the tonnage fees PSP's worksheets indicated based on GRT, and which TOTE expected would be the case based on years of experience with PSP. The \$383,825.92 increase in year two compounds this. Collier Declaration.

C. *History of PSP's Rate Calculations*

23. PSP offers no valid explanation as to why it altered its tonnage calculation methodology as reflected in its worksheets and billing practices for TOTE's vessels. It has calculated its rates for those vessels based on their GRT tonnage since they were launched in 2003, even though both vessels have had ITCs since their construction. This demonstrates PSP's understanding that

IGT measurements are not appropriate metrics for the calculation of pilotage rates for these coastwise vessels, and that TOTE's vessels do not require IGT. The circumstances have not altered with the revised tariff's change in the rates calculated by vessel tonnage.

24. One logical and concerning explanation of why PSP drastically increased TOTE's rates for the two vessels subsequent to the Commission's issuance of the Order is that PSP seeks to collect by illegitimate rate increases revenue from TOTE which the Commission refused to authorize. The Commission authorized only a small fraction of the rate increases PSP requested in its initial proposed tariff. By increasing rates for these two vessels beyond what the Commission intended, PSP unfairly imposes on a single carrier, TOTE, the burden of a 40% increase to the total overall pilotage "revenue increase of approximately 2.7 percent in the first year" and a near doubling of the "additional 1.3 percent in year two."

IV. LEGAL ARGUMENT AND AUTHORITY

A. *Relief Requested*

25. TOTE requests that the Commission clarify and/or modify the Order so that it directs that Tariff Item 300 provide that pilotage services for exclusively coastwise vessels such as TOTE's will be rated based on their GRT, and not IGT, tonnage. This can be accomplished by modifying PSP's revised Tariff Item 300, entitled "Inter-Harbor Vessel Movements." Item 300 currently provides as follows: "All inter-harbor vessel movement shall be assessed a Tonnage Charge and a Service Time Charge. The Tonnage Charge shall be based on the Vessel's International Gross Tonnage." TOTE requests that the Order be amended to direct that the final sentence of Item 300 provide as follows:

The Tonnage Charge shall be based on the Vessel's International Gross Tonnage for vessels that operate wholly or partially in international trades. The Tonnage Charge for vessels operating exclusively in coastwise trades shall be based on such vessels' regulatory gross register tonnage.

A definitional provision as to the term “coastwise trade” in Item 110, “Definitions,” might also be advisable.

B. *Statutory and Regulatory Bases of Request for Relief*

26. Under RCW 81.116.020, entitled **Pilotage services—Tariffs—Commission shall establish—Duties**, “(1) The commission shall establish in tariffs the rates for pilotage services provided under chapter 88.16 RCW” and ... “(3) ... shall ensure that the tariffs provide rates that are fair, just, reasonable, and sufficient for the provision of pilotage services.”
27. WAC 480-07-0875, entitled “**Amendment, rescission, or correction of order,**” provides in pertinent part as follows:
- (1) Amendment or rescission. The commission ... may act in response to a petition, to alter, amend, or rescind any order that the commission has entered. ... The commission may take the action it has proposed or grant the petition only after providing:
 - (a) Notice of the petition or proposed commission action to the affected public service company or companies and to all parties in the underlying proceeding; and
 - (b) An opportunity for parties to respond in writing or at a hearing consistent with due process.
28. TOTE submits that Item 300, as written, is not “fair, just, reasonable, and sufficient” for its intended purpose of setting PSP’s rates based on tonnage. It does not contemplate or provide rates for vessels operating in coastwise trades with U.S. regulatory tonnage measurements. The revised tariff, per PSP’s practices under it for TOTE’s two vessels, inherently conflicts with revenue parameters the Commission established by the Order.
29. The revised tariff is derived from PSP’s unfair, unjust and unreasonable practice of misrepresenting during last year’s proceeding how it would calculate rates for TOTE’s two vessels, which deceived the Commission, its Staff, PMSA and TOTE. This *ipso facto* renders it unfair and unjust.

30. The revised tariff is unreasonable in that, at least by PSP's interpretation and application of it, it imposes on TOTE rate shock by the precipitous increase of rates for two vessels by significant amounts.

C. PSP's Deceptive Filings

31. PSP's application of Item 300 for TOTE's two coastwise vessels (1) results in unfair rates and "rate shock," a consequence the Order seeks to avoid; (2) is not justified by the record developed in the rate proceeding (inasmuch as it is at odds with PSP's worksheets and inconsistent with Staff's analysis); (3) is not reasonable in that it deviates from PSP's and TOTE's history of rate calculation and the fact that dedicated coastwise vessels need not have ITCs (the international tonnage convention not being designed to impose certification requirements on coastwise vessels); and (4) would produce additional revenue that exceeds what the Commission deemed sufficient to meet PSP's needs.

32. All concerned in last year's proceeding accepted and applied the GRT tonnage for TOTE's two vessels. PSP documented and proposed it; Staff analyzed and made recommendations based on it; the Commission applied it to determine rates that would amount to the levels of increased revenue it concluded PSP had justified; and UTC Staff and PMSA considered and evaluated GRT tonnage to determine whether the revised tariff complied with the Order. Staff and PMSA ensured that PSP's filed tariff sheets comported with the Order's parameters based on the GRT tonnage PSP represented.

33. At issue in last year's proceeding was PSP's violation of WAC 480-160-110 and 120. Under WAC 480-160-110, entitled, **Tariffs—Changes must be identified**, a public service seeking to amend its tariff is subject to the following requirement:

Each change in rates, charges, terms, or conditions in a tariff must be clearly identified by including the appropriate code symbol immediately to

the left of the material being changed. Symbols to indicate the type of changes are:

Code Symbol	Used to indicate:
(R)	Reductions in rates or charges
(I)	Increases in rates or charges
(C)	Changes resulting in neither increases nor decreases
(N)	New rates, terms, or conditions
(W)	Wording changes

34. Under WAC 480-160-120, entitled **Changing commission-published tariff—Puget Sound pilotage district:**

- (3) Proposed changes must:
 - (a) Be made on the appropriate page(s) of the existing tariff using the commission’s tariff template.
 - (b) Identify the tariff item to be changed.
 - (c) Fully describe the proposed change.
 - (d) State clearly the reason(s) for the proposed change.
 - (e) Include any information or documents that justify the proposed change.
 - (f) Provide name, title, address, telephone number, and email address of the person or entity proposing the changes.

35. PMSA raised during last year’s proceeding PSP’s failure to comply with WAC 480-160-110 and 120 by its Motion for Summary Determination filed on July 13, 2020. PSP opposed the motion by its Answer in Opposition dated August 3, 2020 (“PSP’s Opposition,” Exh. 6).

36. PSP urged that it had complied “with WAC 480-160-120’s requirement that the changes be fully described; which description was painstakingly supplied in the prefiled testimony of Capt. Stephan Moreno (PSP’s Opposition at pp. 1-2).” Similarly, PSP argued that:

As to its ministerial obligations under WAC 480-160-110 and 120, in its initial filing also, PSP presented its proposed changes to the existing BPC tariff in two primary narrative places, through the prefiled testimony of witnesses Weldon Burton and Stephan Moreno and quantitatively, in Exhibits WTB-8 through 10. Mr. Burton provided prefiled testimony (Exh. WTB-1Tr) which, among other things, explained that PSP's submitted tariff proposed wholesale changes to the tariff rates established by rule by the Board of Pilotage Commissioners, both in a new format and rate design. (PSP's Opposition at p. 4)

But neither PSP witness's testimony mentions the application of IGT versus GRT tonnage for the calculation of rates for exclusively coastwise vessels; or the deletion of the clause "[f]or vessels where a certificate of international gross tonnage is required, the appropriate international gross tonnage shall apply." Had PSP complied with WAC 480-160-110 and 120 by presenting its intention to calculate rates for TOTE's vessels differently, TOTE would have been alerted and raised its opposition.

37. The Administrative Law Judge ultimately denied PMSA's motion on various (mostly procedural) grounds by the ORDER 08 DENYING MOTION FOR SUMMARY DETERMINATION; DENYING MOTION TO STRIKE REBUTTAL TESTIMONY dated August 7, 2020 (Exh. 7). Importantly, that Order states: "We decline to dismiss PSP's general rate case on the grounds that PSP failed to explain the reasons for its proposed tariff revisions. PSP provided testimony explaining deficiencies with the current tariff and reasons to support its proposed tariff changes" (p. 4).

38. Again, no PSP testimony addressed the issues of the instant petition, about which neither the Commission, its Staff, PMSA nor TOTE was aware at the time. Nor could they reasonably have been aware.

D. Item 300

39. Nothing in the revised tariff or last year's proceeding explains or justifies PSP's new rate calculation methodology for coastwise vessels such as TOTE's. PSP offered no proposed *pro*

forma adjustment for TOTE’s coastwise vessels, and recognized the importance of avoiding rate shock by proposing incremental rate adjustments over a three-year period.

40. Again, PSP removed the clause “[f]or vessels where a certificate of international gross tonnage is required, the appropriate international gross tonnage shall apply,” which was in earlier iterations of the pilotage tariff set by the state. However, that clause’s absence does not dictate that international certification requirements inapplicable to coastwise vessels must or should be considered in rate determination. If its removal was intended to have substantive effect, it would have been the subject of extensive briefing and/or hearing testimony. Transcripts and materials from last year’s proceeding show it was not even mentioned.

E. *International Gross Tonnage*

41. Revised Tariff Item 300, as proposed by PSP for all three years, entitled **Inter-Harbor Vessel Movements**, provides as follows in the final revised tariff: “All inter-harbor vessel movement shall be assessed a Tonnage Charge and a Service Time Charge. The Tonnage Charge shall be based on the Vessel’s International Gross Tonnage.”

42. PSP’s revised tariff potentially does not accommodate exclusively coastwise vessels. True, most vessels PSP services engage in foreign trade. But because coastwise vessels, which might not require or have ITCs, may need or desire PSP’s services, the tariff should provide appropriate rate calculation mechanisms for them. No definition of gross register tonnage or other domestic metric is in the tariff’s “Definitions” section (Item 110). The Definitions section provides as follows for “International gross tonnage”:

The highest stated figure of the overall size of the vessel in Lloyd’s Register (also known as “Lloyd’s Registry of Ships”), if available, or the certifiably correct figure determined in accordance with the International Convention on Tonnage Measurement of Ships, 1969, if not stated in Lloyd’s Register. The International Gross Tonnage for vessels engaged in towing shall be the combined gross tonnage of the towing vessel and the vessel(s) being towed.

43. By this definition, not all vessels must have an ITC, specifically, vessels operating exclusively in coastwise trades. Various industry, regulatory and legislative sources distinguish vessels operating in international voyages which require ITCs, from coastwise vessels which do not. Most significantly, the International Convention on Tonnage Measurement of Ships, 1969, pursuant to which ITCs are issued, applies only “with respect to the determination of tonnage of ships *engaged on international voyages* [emphasis added].”

44. Other sources are in accord. For example, 49 CFR §69.69(a), entitled **Tonnage Certificates**, provides as follows: “On request of the vessel owner, the authorized measurement organization must issue an International Tonnage Certificate (1969) as evidence of the vessel’s measurement under this subpart for a vessel that is 24 meters (79.0 feet) or more in registered length, *will engage on a foreign voyage*, and is not a vessel of war [emphasis added].” 46 U.S.C. §14303, entitled **Tonnage Certificate**, provides that “[a]fter measuring a vessel under this chapter, the Secretary shall issue, on request of the owner, an International Tonnage Certificate (1969) and deliver it to the owner or master of the vessel. For a vessel to which the [International Convention on Tonnage Measurement of Ships] does not apply, the Secretary shall prescribe a certificate to be issued as evidence of a vessel’s measurement under this chapter.” The Coast Guard’s Navigation & Vessel Inspection Circular NVIC 11-93 specifies that an ITC “must be carried on board any U.S. flag vessel (whether self-propelled or not) that is greater than 79 feet in convention length and *that is engaged on a foreign voyage* [emphasis added].” WAC 363-116-0751 and RCW 88.16.090, addressing pilot licensing, make separate references to GRT and ITC tonnage for purposes of pilot qualification.

45. The U.S. District Court for the Western District of Washington has recognized the significance of the International Convention on Tonnage Measurement of Ships’ applicability to

international vessels only. In *Kyoei Kaiun Kaisha, Ltd. v. M/V Bering Trader*, 795 F. Supp. 1046, 1049 (W.D. Wash. 1991), the court noted that “[t]he driving force behind the conference at which the Tonnage Convention was passed, however, was the need to establish some uniformity in tonnage measurement in order to uniformly apply other international regulations that were dependent on a vessel’s tonnage.” Finding that the extent of a vessel operator’s liability under the Clean Water Act should be measured by its domestic, and not international, tonnage, it further ruled as follows:

In addition to setting out the uniform measurement system, the remaining text of the convention speaks primarily in terms of each nation setting up a system by which to issue international tonnage certificates to vessels registered in that nation and in terms of what kinds of vessels are to be governed by the convention. The Tonnage Convention does not speak directly to use of the convention tonnage measurement system in the application of contracting nations’ domestic laws. That appears to be within the province of each contracting nation under its obligation to “give effect” to the convention. However, that does not mean that the convention must be given effect with respect to the application of domestic laws if the government has not chosen to do so.

Thus, the government’s arguments that either the 1986 implementing legislation or the Tonnage Convention require the use of the convention tonnage measurement to determine the extent of defendants’ liability under the CWA are unpersuasive. They in no way overcome the clear language of the Coast Guard regulations in 33 C.F.R. § 130.3(b) specifying that the tonnage on the certificate of registry is the appropriate tonnage measurement to use. Furthermore, the court concurs with defendants’ that inequities would arise from permitting the government to assess liability based on a higher tonnage measurement than that upon which its regulations permit vessel owners to obtain insurance under. ...

Id. at 1053.

46. By happenstance, the two TOTE vessels have ITCs even though they are not engaged in foreign voyages. A reason for this appears to be TOTE’s participation in MARAD’s Voluntary Intermodal Sealift Agreement (VISA) program at the time the vessels were constructed. By participating in VISA, the vessels became available for government use in the event of military

necessity, which might entail foreign voyages. The VISA program required vessel owners to obtain ITCs, but TOTE's coastwise vessels would not have been subject to that requirement had TOTE not voluntarily participated in VISA.

47. But other coastwise vessels PSP services might not have ITCs. In that instance, calculation of pilotage fees under Item 300 would be impossible. This is an unfair, unjust and unreasonable circumstance the Commission should correct given that PSP's tariff serves as a public offering of pilotage services an array of consumers with differing circumstances might consider and accept.

F. *PSP's Expected Response Position*

48. TOTE expects PSP to oppose this petition by arguing that (1) PMSA represented TOTE in last year's proceeding, such that TOTE had and missed its chance to dispute PSP's revised tariff; (2) PSP's deletion of the clause "[f]or vessels where a certificate of international gross tonnage is required the appropriate international gross tonnage shall apply" should have alerted PMSA, and therefore TOTE, to PSP's intentions; and (3) PSP's removal of the clause Item 300 is unambiguous and mandatory under UTC tariff regulations as written. The Commission should reject these contentions.

49. PMSA did not formally represent TOTE's individual vessel interests in last year's proceeding any more than it did its other approximately 60 members encompassing thousands of vessels and vessel sailings. PMSA's opposition to PSP's proposed tariffs was on an organizational level, on behalf of vessel owners and operators generally, that could not reasonably include analysis of every impact that revised tariff terms might have on each PMSA member.

50. In its Answer in Opposition to PMSA's Motion for Summary Determination cited above, PSP itself argued heavily that it should not be subject to UTC regulations requiring specificity in

proposed tariff revisions because “all changes” in its proposed revised tariff composed a complete revamp of its earlier tariff, employing vastly different approaches to rate computation on a macro level, which “were thoroughly explained through prefiled testimony and exhibits”:

WAC 480-160-110 and 120 mirror similar tariff filing rules the Commission has adopted for transportation industry tariffs. These rules exist to permit the ready identification and understanding of changes submitted to existing *Commission*-formatted tariff pages. Historically, changes to tariffs have been typically highlighted through legislative format and letters which signal whether the change made is an increased rate, decreased rate, change, new rate, or wording change. These shorthand change notations are intended to denote changes at a glance. In the case of PSP’s proposed tariff, this was the first time such a tariff had been submitted in a proposed Commission-formatted tariff. It contains all new language and rates, which reduces significantly the number of individual tariff charges included in the current tariff. For instance, noting changes to over 400 existing items would clearly not serve the ease of reference purpose and actually would have accomplished just the opposite. Thus, ***the intent of these new tariff rules is best served by exactly the presentation PSP made – a new tariff with all changes thoroughly explained through prefiled testimony and exhibits*** rather than mere tariff-page notations and/or legislative style strikeouts as now demanded by PMSA [emphasis added].

PSP’s Opposition at 12-13. For these same reasons, neither Staff nor PMSA and its members could scrutinize an entirely new tariff format for any and all modifications over earlier iterations without the extrinsic aids PSP provided in its testimony. Thus, PMSA and its members, including TOTE, reviewed the practical economic and operational effects PSP represented would result from its new tariff, i.e., the worksheets that presented specific tonnage and service-hour rate data for each vessel. Morell Declaration.

51. PMSA witness Michael Moore summarized this very circumstance with his testimony in last year’s proceeding:

... PSP’s Petition proposes numerous wholesale revisions and rewrites of the present tariff structure without adequate explanation. Some of these revisions may have merit individually, like reducing upper tonnage rates, but it is impossible to determine from the testimony how and why PSP would seek to increase charges at one rate on some vessels while others may change at completely different rates at different times for different

years. The rate of increase on numerous vessels is significant. Moreover, given the wholesale revision and hundreds of non-identified changes, it is facially impossible for PMSA, the UTC, or the public to divine if there are some revisions which should be isolated as solely tied to rate increases and others which are meant to solely be structural revisions; all are part of a tariff meant to result in significant increases in pilot revenues. PMSA would welcome a tariff revision and restructuring process which includes all stakeholders with the goal of creating a tariff which is simpler, less opaque, and directly related to the costs of services. For such a process to be fair and inclusive we recommend that the Commission direct such a process which is revenue neutral.

Testimony of Michael Moore, Exh. 8, at p. 9. PSP offered no compelling response to this testimony.

52. Neither PMSA, nor TOTE, nor the Commission and its Staff, noted any effect of the deleted clause in Item 300, because the economic data PSP proposed for its revenue, as encompassed in its worksheets, suggested no issue related to the deleted clause existed.

V. CONCLUSION

53. This issue arises in the infancy of the Commission's regulation of PSP, and as a result of PSP's first petition for tariff rate increases. Given the Commission's nascent experience with PSP and its tariff, it is not surprising that the Order, the Commission's first, requires fine tuning in light of circumstances not properly presented to the Commission in last year's proceeding.
54. The Commission's regulations and procedures requiring detailed representations in worksheets serve a fundamental purpose in the process of a service provider revising its public tariff. A significant element of the Commission's mission is to ensure that proceedings toward any proposed tariff modification are fair and transparent so as to best serve the public interest. In this instance, PSP itself created a circumstance wherein TOTE could not reasonably have determined that rates for two of its vessels would increase drastically and suddenly. PSP should not be allowed to profit by its submission to the Commission of false data in support of its

proposed tariff rate increase. TOTE should not suffer significantly higher pilotage rates for having relied on PSP's false data.

55. The current circumstance and its unfairness can be remediated easily and equitably by amendment of Item 300 as requested. This would reduce the rate shock TOTE has experienced and would otherwise continue to experience; and restore PSP's revenue levels to those the Order contemplated and authorized. The Commission should take this action.

56. PSP cannot credibly argue that TOTE or PMSA could reasonably have deciphered that PSP's surreptitious elimination of the clause "[f]or vessels where a certificate of international gross tonnage is required the appropriate international gross tonnage shall apply," or any other tariff modification, would result in rate calculation for TOTE's vessels being derived from IGT and not GRT tonnage. TOTE is entirely blameless. PMSA provided, and TOTE considered, the only data it reasonably could interpret, i.e., PSP's worksheets presenting vessel tonnage and rate calculation data. TOTE justifiably relied on that data.

57. The Commission should grant this petition accordingly, and issue a revised Order directing amendment of PSP's tariff.

Dated this 26th day of August, 2021.

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