

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET TP-190976

COMMISSION STAFF RESPONSE TO
TOTE MARITIME ALASKA, LLC'S
PETITION FOR AMENDMENT,
RESCISSION, OR CORRECTION OF
ORDER 09

I. INTRODUCTION AND FACTS¹

1 On November 25, 2020, the Washington Utilities and Transportation Commission (Commission) issued Order 09 (Final Order), resolving all contested issues regarding the Puget Sound Pilots' (PSP) proposed Puget Sound Pilotage District Tariff.² On January 22, 2021, the Commission issued an acceptance letter, acknowledging that PSP's compliance tariffs met the requirements of the Final Order and stating that the Final Tariff Sheets would become effective on January 25, 2021. Seven months later, TOTE Maritime Alaska, LLC (TOTE) filed the instant Petition to Amend, Rescind, or Correct Order 09 (Petition), requesting that the Commission amend its Final Order to revise the pilotage tariff rate design approved by the Commission by adding additional language to Item 300 of the Puget Sound Pilotage District Tariff.³

2 TOTE's requested amendment concerns the rates charged for pilotage service by PSP. Under the current tariff, charges for pilotage service are based in part on a vessel's international

¹ As an initial matter, the Commission should reject TOTE's characterizations of Staff's opinions, analyses, and review at hearing. TOTE was not a party to the adjudication and Staff will present its views in the instant response.

² *Puget Sound Pilots v. Wash. Utils. & Transp. Comm'n*, Docket TP-190976, Order 09 (Final Order).

³ TOTE Maritime Alaska, LLC's Petition for Amendment, Rescission, or Correction of Order 09 in Dkt 190976 (Petition) at 3. Staff notes that TOTE has not requested that the Commission reopen the record to receive new evidence pursuant to WAC 480-07-870.

gross tonnage (IGT).⁴ Two of TOTE's vessels, the Midnight Sun and the North Star, possess International Tonnage Certificates (ITC) listing the vessels' tonnage as 65,314 tons, however both vessels have a regulatory (domestic) gross register tonnage (DGT) of 35,825 tons.⁵ As a part of its case in chief, PSP submitted workpapers with vessel movement details, which were used in part to develop a rate spread analysis for distributing the revenue requirement across the different charges included in the tariff. PSP's workpaper entries for the Midnight Sun and North Star contain the vessels' DGT (35,825 tons) instead of the vessels' IGT (65,314 tons), even though PSP's proposed tariff only measured tonnage based on IGT.⁶ Under the prior pilotage tariff, PSP had been billing TOTE based on its two vessels' DGT, rather than their IGT.⁷ Based on Item 300 of the effective pilotage tariff, PSP has begun billing TOTE's vessels based on their IGT, resulting in higher bills for service to TOTE, relative to past bills.⁸ According to TOTE, the two vessels will pay approximately \$762,238 more in pilotage fees based on their IGT as opposed to their DGT under the year 1 and year 2 Puget Sound Pilotage District Tariffs approved by the Commission.⁹

3 In order to mitigate the rate increase for its two vessels, TOTE has proposed amending the effective Puget Sound Pilotage District Tariff Item 300 from its current language below:

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.

⁴ See, Docket TP-190976, Puget Sound Pilotage District Tariff, Item 300.

⁵ Petition at 1, 4.

⁶ See, e.g., Burton, Exh. WTB-11.

⁷ Collier, Exh. AC-1.

⁸ Petition at 6, 8.

⁹ Decl. of Collier at 4. See also, Collier, Exh. AC-1 (showing a bill for service under the prior tariff for the Midnight Sun with a tonnage calculation of 35,825 tons and a tonnage charge of \$ 1,456.16 and comparing that to a bill for service under the effective tariff for the North Star with a tonnage calculation of 65,314 tons and a tonnage charge of \$4,301.50).

To the following language:

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 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' [DGT].¹⁰

TOTE argues in part that its proposed amendment is appropriate because: (1) TOTE could not have reasonably discovered PSP's proposed tariff change to measured tonnage based solely on IGT, (2) the Commission expressed a desire to avoid rate shock in the Final Order, and (3) there may be other vessels now or in the future that do not have an IGT measurement.¹¹ TOTE maintains that it could not have reasonably discovered the proposed tariff change to measure tonnage based on IGT in part because the workpapers submitted by PSP erroneously listed TOTE's vessels' tonnage in terms of DGT, rather than IGT, even though PSP's proposed tariff included a tonnage rate for only IGT. Consequently, TOTE alleges that "without any notice to ratepayers and after the Order was final, PSP altered its [tonnage calculation] methodology."¹²

4 Although Staff believes that the tonnage issue identified by TOTE warrants further discussion, Staff maintains that such discussion should be had in the context of the next Puget Sound Pilotage District general rate case (GRC). Insofar as TOTE could have and should have reasonably discovered PSP's proposed Tonnage Charge shift and TOTE's proposed amendment implicates several policy determinations not considered by the Commission during the adjudication, the Commission should decline to adopt TOTE's proposed amendment. Moreover, TOTE has not requested that the Commission reopen the hearing record to receive new evidence, and even if it had, the Commission should decline to do so because resolution of the tonnage

¹⁰ Petition at 3.

¹¹ Petition at 11, 14.

¹² Petition at 5.

issue requires more process than simply submitting evidence to the record insofar as the issue is likely to be contested and would likely involve a second adjudication. Finally, to adopt TOTE's proposed amendment would violate the statutory limitation on filing new pilotage tariffs with an effective date that is within 12 months of the effective date of the tariff currently in effect.¹³

Rather, the Commission should adopt a limited amendment that directs PSP to: (1) update its workpapers so that TOTE vessels' tonnage properly reflects their IGT, and (2) file an updated rate spread analysis incorporating that correction.

II. ARGUMENT

A. **The Commission Should (1) Decline To Adopt TOTE's Proposed Tariff Amendment, (2) Require PSP To Provide Updated Workpapers Correcting The Error Identified By TOTE And File A Corresponding Revised Rate Spread Analysis Incorporating The Correction, And (3) Defer Consideration Of TOTE's Issue Until The Next GRC**

5 The Commission has at least three options available to it to resolve TOTE's Petition. First, the Commission could adopt TOTE's suggested tariff amendment. Second, the Commission could initiate a rulemaking to determine whether to adopt special contracting rules for pilotage and explore whether PSP and TOTE could enter into a special contract for a separate tonnage rate for TOTE's vessels. Third, the Commission could (1) reject TOTE's proposed amendment, (2) amend the Final Order to require PSP to correct the tonnage error in its workpapers so that the TOTE vessels' tonnage reflects IGT rather than DGT and file a corresponding updated rate spread analysis, and (3) defer consideration of TOTE's rate class proposal until the next GRC.¹⁴ The Commission should choose the third option.

¹³ RCW 81.116.030(1).

¹⁴ By extension, the Commission could also simply reject TOTE's Petition and defer consideration of TOTE's rate class proposal until the next GRC with no further amendment.

1. The Commission should reject TOTE’s proposed amendment because the amendment conflicts with RCW 81.116.030(1).

6 Under RCW 81.04.210, the Commission may at any time “rescind, alter or amend any order,” issued by it after providing proper notice and an opportunity to be heard. However, RCW 81.116.030(1) also states that “Any person with a substantial interest may file with the commission a revised tariff with an effective date no earlier than thirty days from the date of filing and no earlier than one year following the effective date [of] the tariffs in effect at the time of filing were established.”

7 A general statutory provision normally yields to a more specific statutory provision, and courts generally give preference to the more specific and more recently enacted statute when resolving apparent conflicts between statutes.¹⁵ Furthermore, statutes should be construed to avoid absurd results because the legislature presumably did not intend such results.¹⁶ While these two statutes do not facially conflict, Staff submits that a sufficiently substantive amendment of an effective pilotage tariff is indistinguishable from the filing of a new pilotage tariff, which would conflict with RCW 81.116.030(1) if amended within 12 months of the effective date of the effective tariff. Stated another way, the Commission should not authorize through its amendment powers under RCW 81.04.210 what RCW 81.116.030(1) expressly prohibits because it would produce an absurd result.¹⁷ Given that the Commission has approved a two-year rate plan for the Puget Sound Pilotage District, January 25, 2023, is the earliest effective date of any new proposed pilotage tariff.

8 To avoid this potential conflict when evaluating whether to amend an effective pilotage tariff less than 12 months after the effective date, Staff suggests that the Commission consider

¹⁵ *Western Plaza, LLC v. Tison*, 184 Wn.2d 702, 712 (2015).

¹⁶ *Spokane County v. Dep’t. of Fish and Wildlife*, 192 Wn.2d 453, 458 (2018).

¹⁷ Like the Ship of Theseus, the potential tension between these two statutes creates a question as to whether the amended tariff should be considered the same tariff or a new tariff.

the standard that courts use to issue nunc pro tunc orders to determine whether an amendment is so substantive that it amounts to a new tariff filing. Although applied in a different context, the standard nonetheless provides a useful tool for the Commission in evaluating how to exercise its authority after the close of a pilotage GRC during the period when a new effective pilotage tariff is statutorily prohibited. As the Washington State Supreme Court has explained:

A nunc pro tunc order allows a court to date a record reflecting its action back to the time the action in fact occurred.

...

A retroactive entry is proper only to rectify the record as to acts which did not occur, not as to acts which should have occurred. A nunc pro tunc order records judicial acts done at a former time which were not then carried into the record. A nunc pro [tunc] order may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken. Thus, for example, a nunc pro tunc order is not appropriate to reopen a matter that was previously closed in order to resolve substantive issues differently. Instead, a nunc pro tunc order is generally appropriate to correct only ministerial or clerical errors, not judicial errors. A clerical or ministerial error is one made by a clerk or other judicial or ministerial officer in writing or keeping records.

...

In deciding whether an error is “judicial” or “clerical” a reviewing court must ask itself whether the judgment, as amended, embodies the trial court’s intention, as expressed in the record at trial.¹⁸

9 Under the standard proposed above, the Commission should reject TOTE’s proposed amendment because the amendment is not clerical or ministerial. Rather, TOTE’s proposed amendment involves the creation of a new class of ratepayers that was not raised by any party to the adjudication. Therefore, the Commission should decline to adopt TOTE’s proposed amendment because it would conflict with RCW 81.116.030(1). Rather, the Commission should defer consideration of TOTE’s issue until the next Puget Sound Pilotage District GRC.

10 Furthermore, adopting TOTE’s proposed rate class amendment months after the conclusion of the adjudication runs counter to the legislative intent underpinning the transfer of

¹⁸ *State v. Hendricks*, 165 Wn.2d 474, 478-79 (2009) (internal citations and quotations omitted).

pilotage rate-setting authority to the Commission. TOTE's proposed amendment raises a host of additional factual and policy questions regarding the broader impact of the amendment as to other pilotage ratepayers, including how new terms in the amendment should be defined, whether other existing vessels may also fall within the new rate class, whether the proposed class results in rate discrimination or unreasonable preference, and whether it is equitable to shift costs from TOTE onto other ratepayers. This concern is heightened in part by the fact that TOTE's proposed amendment represents a departure from the language that was included under the former Board of Pilotage Commissioners (BPC) tariff.¹⁹

11 Finally, as the Commission noted in the Final Order, "The Final Report and Recommendation to the [Washington State Joint Transportation Committee] indicated that transferring rate-setting authority to the Commission was the 'single most effective' action the Legislature could take to improve the rate-setting process and that '[a]ll parties will benefit from a process that is **rules-based, enforceable, predictable, rigorous, and transparent.**'"²⁰ Given the Legislature's emphasis on the value of the Commission's rate-setting procedures, Staff contends that authorizing a substantive change to the pilotage tariff outside the context of a full adjudication tends to undermine, rather than validate, the Legislature's faith in the Commission's process.

¹⁹ Compare WAC 363-116-300 ("For vessels where a certificate of international gross tonnage is required, the appropriate international gross tonnage shall apply.") with Petition at 3 ("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 coastwide trades shall be based on such vessel's regulatory gross register tonnage.").

²⁰ Final Order at 11, ¶ 41 (emphasis added) (quoting Kermode, Exh. DPK-6 at 13). See also, Kermode, Exh. DPK-6 at 13 ("The UTC process provides the structure, rules, expertise, and rigor necessary to achieve an analytically driven rate-setting process.").

2. The Commission could explore whether special contract procedures under WAC 480-80-143 should be extended to pilotage, however such action would require a rulemaking.

12 The Commission could initiate a rulemaking to consider adopting the special contract procedure detailed in WAC 480-80-143 to apply to pilotage. If an agreement between PSP and TOTE can be reached regarding the rates for TOTE's vessels, then it may be possible to mitigate the rate shock currently experienced by TOTE relative to its prior bills under the former BPC tariff. Although the Commission has not yet promulgated special contract rules for transportation companies, the Commission retains the statutory authority to apply a similar process to common carrier service, including pilotage service.²¹ Staff suggests that the approval of a pilotage special contract could parallel the approval process for gas, electric, and water special contracts as provided in WAC 480-80-143.

13 In the event that the Commission does adopt substantially similar rules in the pilotage context, a special contract, if agreeable to TOTE and PSP, and appropriate under the Commission's standard for special contracts, would allow the Commission to authorize a rate for TOTE other than the published tariff's rate, while deferring the ultimate policy question of whether a separate classification should be included in the Puget Sound Pilotage District Tariff until the next pilotage GRC. At the conclusion of the next GRC, the special contract could expire and give way to the new tariff approved by the Commission after adjudication. However, Staff is unable to speculate as to whether the contracting process would ultimately be successful. Moreover, the process of initiating and completing a rulemaking, even if expedited, would require expending additional time and resources to properly consider the issue. Therefore, while

²¹ See, WAC 480-80-143 (citing RCW 80.01.040 and 80.04.160 as statutory authority to promulgate special contract rules for gas, electric, and water companies). To the extent that the Commission relied on its general powers and rulemaking authority under Title 80 to promulgate special contract rules for gas, electric, and water companies, the Commission could similarly rely on its general powers under Title 81 to authorize a similar process for transportation companies through rulemaking. See, RCW 81.01.010.

the Commission could initiate a rulemaking to consider pilotage special contracts, Staff recommends that the Commission reject this option given the associated costs and uncertainties, including the uncertainty as to whether TOTE should be the beneficiary of a special exception in this context.

3. The Commission should adopt a limited, ministerial amendment to the Final Order directing PSP to correct the workpaper error identified by TOTE and to file an updated rate spread analysis based on the correction.

14 Given the concerns with adopting TOTE's amendment and the uncertainty regarding a potential special contract described above, the Commission should reject TOTE's proposed amendment, direct PSP to correct the tonnage for TOTE's vessels in its workpapers to reflect IGT, update its rate spread analysis, and defer consideration of TOTE's proposed new rate class until the next GRC. As explained further below, TOTE had ample opportunity to discover PSP's proposed tariff rate change and several means available to it to participate in the hearing. Additionally, adopting TOTE's proposed amendment would circumvent RCW 81.116.030(1) by allowing a change in the tariff that would otherwise be prohibited if presented as a wholly new tariff proposal, resulting in an absurd outcome. Furthermore, adopting a substantive change to the pilotage tariff without the benefit of a full adjudication and vetting by all interested parties, conflicts with the legislative intent behind the shift of rate-setting authority to the Commission, which emphasized rigorous analysis, predictability, transparency, and process. Therefore, if the Commission chooses to amend the tariff, it should limit amendment to a ministerial correction of the PSP workpaper error regarding the tonnage of TOTE's vessels.

15 A limited amendment correcting the workpaper error and a corresponding update to the rate spread analysis incorporating the correction would satisfy the test proposed above because such an amendment is more akin to a ministerial record-keeping error that flowed through an applied model, rather than a substantive revision. That is, given that the Commission-approved

tariff only contained a tonnage rate regarding IGT, Staff interprets the Commission’s tariff analysis to be premised on the understanding that the data in PSP’s workpapers reflected the same units (international gross tonnage) that are reflected in the tariff tonnage billing provisions (international gross tonnage). If so, then correcting the workpaper entries and updating the rate spread analysis that relied on those workpapers would revise the tariff so that it comports with the original intent of the Commission when it promulgated the Final Order, and nothing more. More fundamentally, Staff’s proposed amendment does not involve changing any of the substantive modeling or policy analysis; it merely represents a correction to inputs that were utilized in the model that developed pricing for the different rate classes included in the Commission-approved tariff.

16 Consequently, the Commission should determine that Staff’s suggested amendment satisfies the amendment standard proposed above because the amendment corrects a clerical or ministerial error as opposed to raising a new substantive policy issue that was not raised during the adjudication. As such, the Commission should amend the Final Order to direct PSP to change the TOTE vessels’ tonnage from DGT to IGT in its workpapers and file an updated rate spread analysis and tariff prices incorporating the results of that correction.

B. TOTE Could Have Raised The Tonnage Charge Issue While The Adjudication Was Ongoing

1. TOTE should have availed itself of the many opportunities to participate in the rate proceeding.

17 The issue identified by TOTE underscores the importance and benefit of active participation in Commission rate-setting proceedings by potentially affected ratepayers or their representatives. Given that this adjudication was the inaugural Puget Sound Pilotage District rate-setting for the Commission, initiated in the wake of legislative change, it is not unreasonable

to expect that TOTE would have made its concerns known as the entity that would most likely be impacted by such a change. TOTE could have raised the tonnage issue during the adjudication in several ways.

18 First, TOTE could have coordinated with the Pacific Merchant Shipping Association (PMSA) to raise the issue. While TOTE states that it was not represented by PMSA, it nonetheless could have urged PMSA to further clarify any potential ambiguity regarding the proposed Tonnage Charge or asked PMSA to sponsor a TOTE witness that could have discussed the issue. Second, TOTE could have submitted a comment letter to the docket, articulating its concerns about the proposed change to tonnage calculation.²² Third, TOTE could have intervened in the proceeding and raised its concern as a separate formal party, similar to Pacific Yacht Management, which was allowed to intervene despite the fact that the intervention deadline had passed.²³ Had TOTE successfully intervened, it would have been able to engage in discovery and issue data requests to PSP to clarify any ambiguity about how billing would function under PSP's proposed tariff.²⁴

2. TOTE could have reasonably discovered the Tonnage Charge issue based on PSP's filed tariff and testimony.

19 As referenced above, TOTE distinguishes itself from PMSA, stating that "PMSA did not formally represent TOTE's individual vessel interest in last year's proceeding any more than it did its other approximately 60 members encompassing thousands of vessels and vessel

²² Pacific Yacht Management (PYM), Northwest Marine Trade Association, and S3 Maritime each submitted comments to the Docket during the adjudication. *See also*, RCW 81.116.030(3). PYM also ultimately filed for later intervention in the case, which the Commission granted, and filed testimony, testified at hearing, and submitted a brief.

²³ *See generally*, *Puget Sound Pilots v. Wash. Utils. & Transp. Comm'n*, Docket TP-190976, Order 03.

²⁴ Staff further notes that Philip Morrell, the vice president of commercial marine operations of TOTE Services, LLC, and a former Commissioner on the BPC, was present during the April 18, 2019, BPC meeting where Commissioner Balasbas discussed the UTC's rate-setting process, including the possibility of intervention by interested parties. Board of Pilotage Commissioners Meeting Minutes, April 18, 2019. The Commission may take official notice of the BPC's minutes. WAC 480-07-495(2).

sailings.”²⁵ TOTE notes that it was not a party to the adjudication and this Petition is TOTE’s first formal action in Docket UT-190976. However, even as a non-party, the revisions to the tariff rate design could have and should have been discovered and raised by TOTE.²⁶

20 The record does not support TOTE’s claim that it had no reason to suspect PSP would alter billing practices for TOTE’s vessels under the revised pilotage Tariff Item 300.²⁷ TOTE acknowledges that the Board of Pilotage Commission Staff provided PSP’s tariff filing and supporting workpapers to TOTE in November of 2019.²⁸ PSP’s proposed Year 1 tariff, filed with the Commission on November 20, 2019, reflects the following language under Item 300:

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.**²⁹

The Item 300 language in PSP’s proposed tariff is *identical* to the language in PSP’s currently approved tariff. Conversely, the term “gross domestic tonnage,” appears nowhere in PSP’s proposed or current tariff.

21 PSP references its proposed transition to measuring the Tonnage Charge using IGT in its filed testimony. In his response testimony, Captain Stephan Moreno stated: “Again, all of these risk factors are associated with the size of the vessel, and size is best addressed in the tariff

²⁵ Petition at 17.

²⁶ TOTE argues in part that if the removal of the clause “[f]or vessels where a certificate of international gross tonnage is required, the appropriate international gross tonnage shall apply,” was “intended to have substantive effect, it would have been the subject of extensive briefing and/or hearing testimony.” Petition at 14. However, TOTE has not identified any other vessel that was substantially impacted in a manner similar to TOTE’s vessels, suggesting that if any party with a substantial interest were to raise the issue, that party would have been TOTE. As explained above, TOTE states that it was not formally represented by PMSA and that PMSA “could not reasonably include analysis of every impact that revised tariff terms might have on each PMSA member.” Petition at 17. It was TOTE’s responsibility to identify, raise, and address the issue at the relevant time.

²⁷ See, Petition at 5.

²⁸ Petition at 6; Decl. of Morrell at 2-3.

²⁹ Burton, Exh. WTB-08 at 11 (emphasis added).

through a greater emphasis on International Gross Tonnage. . . .”³⁰ Additionally, Captain George Quick stated in his response testimony that “there has been an **internationally applicable tonnage measurement system** that bases vessel tariffs on the size of a ship and which recognizes that such a charge basis is a fair way to allocate various port costs, including pilotage fees to users.”³¹

22 Moreover, TOTE’s reliance on PSP’s workpapers as the basis for its assumption that TOTE’s vessels would have their tonnage calculated based on DGT is unreasonable. WAC 480-160-090 states “No pilotage service provider shall charge, collect, or receive, and no person, firm, corporation, or association shall pay for pilotage or other services performed that is any greater, less, or in a different amount, directly or indirectly, **than the rates or charges approved by the commission.**”³² Similarly, WAC 480-160-100(3) states “All regulated pilotage service providers **must comply** with the rates, terms, conditions, and all other requirements **in the applicable tariff.**”³³ Therefore, in the absence of references to the proposed (and now current) tariff, TOTE’s assumptions regarding the ultimate effect of the tariff revision are unreasonable, because all pilotage service must comply with the terms of the effective tariff.³⁴

23 TOTE further argues that it did not anticipate the shift to IGT from DGT in part because PSP has historically charged TOTE’s vessels based on their DGT under the prior BPC tariff.³⁵

³⁰ Moreno, Exh. SM-2T at 9:19-22.

³¹ Quick, Exh. GQ-5T at 5:10-13 (emphasis added).

³² (emphasis added).

³³ (emphasis added).

³⁴ TOTE does not appear to claim that the proposed or final tariff language for Item 300 is unclear or ambiguous. Rather, TOTE challenges the need for such revision. *See*, Petition at 8 (“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.”) and 13 (“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.”). However, debate over the soundness of a policy shift is distinct from a claim that a party could not have reasonably predicted the ultimate effect of such a policy shift based on the proposed tariff language. Here, Staff requests the Commission clarify that the purpose of PSP’s workpapers was not to project the results of the proposed tariff operations, but rather to provide a foundation for developing a rate spread analysis that would be applied to the various charges described in the proposed tariff.

³⁵ Petition at 2.

However, it appears that while TOTE's proposed amendment would result in its two vessels being charged based on their DGT, it does so in a manner that is different from the prior BPC-approved Puget Sound Pilotage District Tariff.³⁶ Given that TOTE appears to maintain ITCs for the two vessels at issue in its Petition, it appears that TOTE's vessels could have been charged at the IGT rate even under the prior BPC-approved tariff.³⁷

24 Finally, the Commission should decline to consider TOTE's arguments regarding PSP's proposed tariff format because the Commission has already addressed that issue in the Final Order. In its Petition, TOTE argues that it failed to raise the tonnage issue because PSP did not comply with the tariff marking requirements, arguing that in the absence of the notation required by Commission rules it could not "scrutinize an entirely new tariff format for any and all modifications over earlier iterations without the extrinsic aids PSP provided in its testimony."³⁸ First, this argument cuts against TOTE's claim that it had no reason to expect that tariff items would be different, because a wholesale revision of the tariff format should have reasonably indicated that components within the tariff may also be changed. Second, the Commission previously addressed this issue:

We grant PSP an exemption from the requirements of WAC 480-160-110 and WAC 480-07-525(2) on our own motion. Pursuant to WAC 480-07-110, the Commission may, in response to a request or on its own motion, grant an exemption from its own rules when "consistent with the public interest, the purpose underlying regulation, and applicable statutes." Here, we agree with [PSP] that it would serve little purpose to require PSP to file its proposed tariff in legislative format. **To the extent a party wishes to compare PSP's proposed**

³⁶ See, fn. 19.

³⁷ See, Petition at 16-17 ("By happenstance, the two TOTE vessels have [international tonnage certificates (ITCs)] even though they are not engaged in foreign voyages. A reason for this appears to be TOTE's participation in [the United States Maritime Administration]'s Voluntary Intermodal Sealift Agreement (VISA) program at the time the vessels were constructed. By participating in VISA, the vessels become 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.") (emphasis added).

³⁸ Petition at 11-13, 18.

tariff to the current tariff, the party may simply refer to the current tariff at WAC 363-116-300.³⁹

As such, the Commission should determine that TOTE could have and should have reasonably discovered the tonnage billing change in PSP's proposed tariff.

3. The Commission should reject TOTE's conclusory arguments regarding PSP's application of Tariff Item 300.

25 As part of its Petition, TOTE argues that PSP's application of Tariff Item 300: (1) results in unfair rates and rate shock; (2) is not justified by the record at hearing; (3) is unreasonable because it departs from past practice and does not accommodate vessels that do not have an IGT measurement requirement; and (4) produces excess revenue.⁴⁰ As an initial note, TOTE does not appear to allege that PSP is improperly applying Tariff Item 300, but rather has raised several policy arguments regarding the tariff's rate design, which was adopted by the Commission in its Final Order. As discussed above, insofar as TOTE could have discovered PSP's proposed change to the Tonnage Charge, TOTE should have raised these arguments during the adjudication.

26 The Commission should reject TOTE's argument that Item 300 is not justified by the record developed during the adjudication. Although there was an error in PSP's workpapers that listed the TOTE vessels' tonnage in DGT rather than IGT, the workpapers reflect historical data used to develop a rate spread analysis, separate and apart from the development of rate classes. Stated another way, even if there were no workpaper error, a vessel's tonnage would almost certainly still be calculated based on IGT because no party to the rate case proposed an alternative measurement. Similarly, Staff disagrees with TOTE's assertion that PSP's application

³⁹ Final Order at 111, ¶ 374 (emphasis added). Staff further suggests that the Commission's reasoning applies with equal force to WAC 480-160-120, regarding formatting requirements for proposed changes to the pilotage tariff, even though that rule is not expressly mentioned in the Final Order.

⁴⁰ Petition at 11.

of Tariff Item 300 is inconsistent with Staff's analysis. Staff's ultimate recommendation regarding the compliance tariff was based on the record that was developed during the adjudication. Moreover, Staff's review of PSP's compliance filing with respect to the tonnage issue occurred after the time for reconsideration or clarification had lapsed.

27 Staff also takes issue with TOTE's argument that PSP is earning revenue in excess of what the Commission deemed sufficient to meet PSP's needs, because the determination of the revenue requirement is distinct from the process of distributing the revenue requirement across the various tariff classes (i.e., rate spread analysis). To the extent that TOTE's argument is based on the tonnage error in PSP's workpapers, the error would not have affected how much revenue PSP was projected to earn overall, but would have affected the distribution of costs within the existing tariff tonnage classes.

28 The Commission should also reject TOTE's claim that PSP's Tonnage Charge is unreasonable because it deviates from past practice and does not provide a rate for vessels without an IGT measurement. TOTE's argument regarding historical practices fails to acknowledge that in its rate case, PSP was deliberately attempting to simplify the Puget Sound Pilotage District Tariff design.⁴¹ Additionally, while Staff is concerned about potential future scenarios where a vessel requires pilotage service but does not have an IGT measurement, TOTE has not identified any vessels that are likely to fall into this category. As such, this harm is currently speculative, distinct from TOTE's circumstances, and could be remedied in a future rate case.

29 Although TOTE's argument regarding rate shock may have modest merit, the argument presents a policy issue that is best resolved as part of a full-blown adjudication, with additional

⁴¹ Final Order at 105, ¶ 357.

process beyond a mere reopening of the record. As TOTE points out, the Commission expressed concern in the Final Order about “rate shock for smaller vessels.”⁴² Implicit in TOTE’s claim that it is experiencing undue rate shock is the premise that TOTE’s vessels at issue in this case should be considered smaller vessels (i.e., measured based on their DGT) rather than larger vessels (i.e., measured based on their IGT). This premise, in turn, relates in part to the Commission’s discussion of cost causation and the Commission’s policy determination that the tariff “appropriately charges [] larger vessels for creating greater risks relative to smaller vessels.”⁴³ However, TOTE has not presented evidence or argument as to whether its two vessels are more or less risky to pilot, let alone whether such characteristics are uniformly present throughout its newly proposed rate class. Additionally, TOTE has not explained whether and how its newly proposed rate class complies with the Commission’s statutory prohibitions against rate discrimination and unreasonable preference for common carriers.⁴⁴ Furthermore, at this juncture, Staff is unable to express an informed opinion about the potential policy impact of TOTE’s proposed amendment without engaging in substantial additional investigation. As such, the Commission should defer consideration of this argument until the next Puget Sound Pilotage District GRC.

III. CONCLUSION

30 To clarify, Staff does not contend that the issue raised by TOTE does not have merit or warrant further analysis. On the contrary, Staff believes that the issue deserves further, future consideration and discussion, but maintains that it should occur in the context of a full pilotage GRC with all of the benefits of Commission process, rather than as part of a motion to amend a

⁴² Final Order at 106, ¶ 359.

⁴³ Final Order at 107, ¶ 361.

⁴⁴ RCW 81.28.180; RCW 81.28.190.

final order months after the case has concluded. As a sophisticated and well-informed party, TOTE had the opportunity to discover the tonnage issue and to participate in the adjudication to raise this issue but chose not to do so. The Commission should: (1) reject TOTE's Petition, (2) direct PSP to make a limited amendment to its workpapers so that TOTE's vessels reflect their IGT tonnage and to file an updated rate spread analysis and tariff incorporating the results of the correction, and (3) defer consideration of TOTE's policy argument until the next GRC.

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Respectfully submitted,

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