

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET NO. TP-190976

**PUGET SOUND PILOTS' RESPONSE TO  
TOTE MARITIME ALASKA LLC'S  
PETITION TO AMEND ORDER**

PUGET SOUND PILOTS' RESPONSE TO TOTE  
MARITIME ALASKA LLC'S PETITION TO AMEND  
ORDER

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**OTHER AUTHORITIES**

[https://caribbeanbusinessreport.com/world/shipping-companies-haul-in-record-profits/;](https://caribbeanbusinessreport.com/world/shipping-companies-haul-in-record-profits/)  
[https://qz.com/2060904/ports-are-a-mess-but-shipping-company-profits-are-at-record-highs/;](https://qz.com/2060904/ports-are-a-mess-but-shipping-company-profits-are-at-record-highs/) [https://www.wsj.com/articles/maersk-posts-record-profit-steps-up-buyback-program-11620231653;](https://www.wsj.com/articles/maersk-posts-record-profit-steps-up-buyback-program-11620231653) [https://www.bloomberg.com/opinion/articles/2021-08-19/container-shipping-is-making-a-killing-this-year-but-will-we-have-christmas;](https://www.bloomberg.com/opinion/articles/2021-08-19/container-shipping-is-making-a-killing-this-year-but-will-we-have-christmas) .....21

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## I. INTRODUCTION

1 Pursuant to the Washington Utilities and Transportation Commission's ("Commission")  
Notice of Opportunity to Respond to Petition to Amend Order, Puget Sound Pilots ("PSP")  
files this Response to TOTE Maritime Alaska LLC's Petition to Amend Order ("Petition").

2 By its Petition, TOTE Maritime Alaska LLC ("TOTE") seeks to interject new issues of rate  
design well after the Commission entered Order 09 and the opportunity to appeal has passed.  
Despite its untimely filing, the relief TOTE seeks is to Amend Order 09 and the pilotage  
tariff for the Puget Sound Pilotage District in order to require that the tonnage charges  
imposed on its vessels be applied based upon gross register tons ("GRT"), rather than the  
international gross tonnage ("IGT") metric by which all other vessels are charged.

3 As TOTE acknowledges, the purpose of its request is to reduce the rates applicable to vessels  
engaged exclusively in domestic voyages by applying tonnage charges based upon GRT  
rather than IGT. Because no other vessel operators in the Puget Sound have been historically  
charged based upon their GRT, TOTE ultimately requests a unique discount in the pilotage  
tariff.

4 PSP opposes TOTE's request for preferential treatment for a number of procedural and  
substantive reasons. First, as a matter of procedure and policy, the Commission should not  
permit parties or pilotage customers that are unsatisfied with the outcome of general rate  
proceedings to complain about rates through post-hearing motions absent, at a minimum, a  
showing that the issue could not have been discovered through the exercise of reasonable  
diligence, or other circumstances that would justify a rehearing under WAC 480-07-870.

TOTE's Petition falls well short of that bar and it demonstrates that TOTE should have

known that the Commission-issued tariff would require PSP to charge TOTE based upon its vessels' IGT and sought to timely intervene.

5 TOTE also failed to demonstrate why vessels in exclusively domestic trade should be treated differently from ships engaged in foreign voyages. The uniform and consistent application of tonnage charges in the Commission's tariff ensures compliance with RCW 81.28.180, which ensures that customers receiving similar service are charged similarly. The Commission rejected Pacific Yacht Management's request for an alternative tariff for foreign-flagged recreational vessels and rejecting TOTE's request would be consistent with that result.

6 Additionally, the issues TOTE raises have been previously adjudicated in this docket. Despite the Commission's conclusions that the overall size of a vessel corresponds to relative risk and the skill of the pilot required to move the ship, TOTE seeks to have its ships' overall size disregarded because they contain space that cannot hold cargo. The Commission rejected similar arguments in Order 09. Thus, the result TOTE seeks was previously adjudicated in favor of a tonnage charge based on IGT rather than registered tons.

7 Further, the amendment proposed by TOTE is against the public interest because it would necessarily result in a discount to TOTE that would require rates for other customers to be increased in order to collect the Commission's authorized revenue requirement.

Consequently, the Commission should deny TOTE's Petition.

8 Finally, despite the inflammatory language in TOTE's Petition, PSP assures the Commission that it has and will continue to do its best to provide the Commission with accurate rate information.<sup>1</sup> PSP understands that TOTE is displeased with the tariff. But as required, PSP

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<sup>1</sup> See generally Exh. IC-1; Declaration of Capt. Ivan Carlson (describing pertinent events leading up to issuance of the tariff and TOTE's subsequent complaint regarding same).

is charging TOTE for vessel transits in accordance with the governing tariff, just as PSP does for all its pilotage customers.

## II. FACTUAL BACKGROUND

9 TOTE requests that the Commission amend Order 09 to include language requiring that Item 300 apply to vessels engaged in purely domestic voyages based upon their GRT rather than their IGT.

10 IGT (commonly referred to as “gross tonnage” or “GT”) is a measurement of “the moulded volume of all enclosed spaces” of the ship pursuant to the International Convention on Tonnage Measurement of Ships, 1969 (“International Convention”).<sup>2</sup> The International Convention, which was executed by the United States in October 1982, is an international standard intended to provide a uniform method for measuring a ship’s size. Congress adopted it, in part, because it provides a tonnage measurement system “that will truly reflect the size of the vessels.”<sup>3</sup>

11 This measurement system, commonly referred to as the “Convention System,” was intended to replace the “Regulatory System” as the primary system for measurement the size of ships.<sup>4</sup> Pursuant to federal law, the Convention System “applies to any vessel for which the application of an international agreement or other law of the United States to the vessel depends on the vessel's tonnage.”<sup>5</sup> Exceptions to this requirement include a number of vessels not at issue in this matter, including non self-propelled vessels, vessels of war,

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<sup>2</sup> See Exh. SM-2: Lloyd’s Register, Fairplay 2008, p. v.; see also 46 C.F.R. § 69.9 (definition of Gross Tonnage ITC, explaining that the measurement of a vessel under the International Convention on Tonnage Measurement of Ships, 1969 is frequently referred to as “gross tonnage” or “GT”).

<sup>3</sup> See discussion in *Kyoei Kaiun Kaisha, Ltd. v. M/V Bering Trader*, 795 F. Supp. 1046, 1051 (W.D. Wash. 1991).

<sup>4</sup> See Exh. SM-4; Coast Guard Simplified Measurement System, Tonnage Guide 1, p. 3.

<sup>5</sup> 46 U.S.C. § 14301(a); 46 C.F.R. 69.11(a)(1).

vessels of less than 79 feet in overall length, U.S. flagged vessels operating only on the Great Lakes, and US flagged vessels for which the keel was laid before January 1, 1986 and which do not engage on foreign voyages.<sup>6</sup>

12 “Gross Register Tonnage” means the measurement of a vessel under the Regulatory Measurement System (“Regulatory System”) and is typically referred to as “gross register tons” or “GRT.” The Regulatory System applies to vessels that are not required to be measured under the Convention System, but vessel owners subject to the Convention System have the option to seek an additional measurement under Regulatory System for the purpose of compliance with various federal laws that depend on the vessel’s tonnage.<sup>7</sup>

13 Although TOTE claims that it was not required to obtain certificates of its vessels’ IGT, it concedes that its vessels were measured for both IGT and GRT. In fact, Lloyd’s Register, a widely accepted resource and registry of vessel information, lists only the IGT for the *Midnight Sun* and *North Star* of 65,314.<sup>8</sup>

14 Because vessels’ GRT is frequently lower than their IGT,<sup>9</sup> TOTE’s request is tantamount to requesting that its vessels be charged \$100 per *mile* while vessels engaged in foreign voyages be charged \$100 per *kilometer*.<sup>10</sup> The natural result of TOTE’s request would thus be to reduce pilotage rates for service provided to one class of pilotage customers, those operating exclusively in domestic voyages (to the best of PSP’s knowledge, this includes only TOTE),

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<sup>6</sup> 46 C.F.R. 69.11(a)(2). Note that TOTE’s argument that only ships engaged in foreign voyages are subject to the Convention System is true, but this is strictly for vessels with a keel laid before 1986.

<sup>7</sup> 46 U.S.C. § 14305.

<sup>8</sup> Exh. SM-2.

<sup>9</sup> Kristina Chandler, *The International Tonnage Convention-A Realistic Pursuit of Uniformity in United States Domestic Vessel Measurement?*, 23 Tul. Mar. L.J. 183 (1998).

<sup>10</sup> Unlike the analogy here where both kilometers and miles measure distance, international gross tons and registered tons do not lend themselves to easy conversion because they do not measure the same volume of a ship. See Exh. SM-4; see also *Kyoei Kaiun Kaisha, Ltd.* 795 F. Supp. 1046 at 1051; and see generally [https://en.wikipedia.org/wiki/Gross\\_tonnage](https://en.wikipedia.org/wiki/Gross_tonnage).



but not to other vessels of a similar size that receive similar service. Indeed, TOTE’s vessels measure significantly fewer GRT than they do IGT, which means TOTE’s request would result in substantially lower rates to TOTE that would be charged to similarly sized foreign-flagged vessels.<sup>11</sup>

15 TOTE even acknowledges that IGT and GRT are not equivalent or even synonymous metrics for measuring the size of a ship. TOTE points out in its Petition that “the GRT applied in domestic measurements does not consider such [space not filled with cargo], while IGT measurements do.”<sup>12</sup> For example, due to the design of TOTE’s roll-on-roll-off ships, a different ship of the same overall size (measured in IGT) could have a significantly higher GRT than do TOTE’s ships. This is significant because the two ships may require similar handling skill and present the same overall risk, but TOTE seeks a pilotage rate reduction because, despite their size, its ship cannot carry the same amount of revenue-generating cargo.<sup>13</sup>

16 TOTE’s Petition comes months after the Commission concluded its first general rate proceeding to adjudicate rates for a pilotage tariff for the Puget Sound Pilotage District. Although the Commission’s policies for pilotage tariffs are still in their early stages and all parties were likely dissatisfied with some aspects of Order 09, the Commission expects PSP, the Pacific Merchant Shipping Association (“PMSA”) and the Commission Staff to conduct workshops and stakeholder session to address a number of outstanding issues. Many topics from the inaugural rate case will also undoubtedly be revisited in a future general rate proceeding. In other words, there is an existing process for continued discussion and

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<sup>11</sup> Exh. SM-1; Declaration of Stephan Moreno.

<sup>12</sup> TOTE’s Petition, ¶ 20.

<sup>13</sup> Exh. SM-1; Declaration of Stephan Moreno.

adjudication of differing positions that does not involve amending or otherwise reconsidering Order 09. Rather than participating in the inaugural rate proceeding or waiting until the next general rate proceeding, TOTE has elected to pursue an untimely challenge.

17 Soon after the effective date of the Commission’s tariff, TOTE attempted to short-pay PSP invoices. The amount TOTE remitted reflected a precise recalculation of charges based upon a clear understanding of the tariff but applying the tonnage charge based upon the GRT of its vessels rather than the IGT. After TOTE attempted to short pay multiple invoices, PSP’s President, Ivan Carlson, called Phil Morrell to determine why the invoices were not being paid in full.<sup>14</sup> That discussion did not resolve the issue.

18 In subsequent discussions between TOTE and PSP, TOTE recognized that PSP was correctly applying the pilotage tariff to TOTE’s vessels and acknowledged that PSP was legally required to charge tariff rates. Thus, TOTE ultimately paid PSP’s invoices.<sup>15</sup>

19 Despite that acknowledgement, TOTE also requested that PSP join it in an effort to amend Order 09. During lengthy and in-depth discussions as to substantive reasons why PSP could not support a special preferential rate for TOTE, PSP advised TOTE that the inadvertent work paper errors (which TOTE now calls “PSP’s deceptive filings”) had been discovered after Order 09 was issued and disclosed to the Commission Staff in an effort to correct them and their impacts on rate calculations before a tariff was published. What PSP also disclosed to TOTE, but TOTE fails to mention in its Petition, is that PSP was advised by Commission Staff that the record was closed and that the tariff rates must be calculated upon the same data that all parties relied upon.<sup>16</sup>

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<sup>14</sup> Exh. IC-1; Declaration of Ivan Carlson.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

20 Indeed, following the entry of Order 09, representatives of PSP and Commission Staff worked through numerous questions and issues necessary to prepare and submit PSP's compliance filing.<sup>17</sup> Following that lengthy process, in December 2020, PSP submitted a draft compliance filing for review by Staff. As part of its review and technical assistance, Staff advised PSP that its tariff rates fell short of the revenue requirement and conferred with PSP to review how rates were being calculated. During that process, PSP pointed out to Staff that it had corrected tonnages for vessels that were previously charged based on their GRT rather than IGT, an inadvertent error in work papers PSP discovered as it prepared its draft compliance filing.<sup>18</sup> The error affected only two vessels, the *Midnight Sun* and the *North Star* (the only two vessels previously charged based on GRT).<sup>19</sup> In response, Staff advised PSP that it could not revise hearing record data upon which all parties had relied. Commission Staff subsequently confirmed to PSP, after apparently conferring with the attorney general's office that PSP should submit its compliance filing calculated using the data in the hearing record. PSP followed Staff's guidance on calculating rates and its compliance filing was subsequently approved.<sup>20</sup>

21 Undeterred by this information, TOTE filed its Petition, which unjustifiably seeks to lay blame on PSP. TOTE's derogatory remarks aimed at PSP are false and should have no impact on the Commission's disposition of TOTE's Petition.

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<sup>17</sup> *Id.*

<sup>18</sup> Exh. IC-1; Declaration of Ivan Carlson.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

### III. LEGAL STANDARDS

22 TOTE filed its petition to amend Order 09 and grant it special rate relief pursuant to WAC 480-07-875. That rule authorizes the commission to alter, amend or rescind any order it has entered and requires the petitioner to comply with the requirements for a petition for rehearing in WAC 480-07-870. The rehearing standards require a petition to set forth sufficient grounds for rehearing the Commission's order, and be supported by substantial evidence. Sufficient grounds for rehearing include: (a) changed conditions since the Commission entered the order; (b) harm to the petitioner resulting from the order that the Commission did not consider or anticipate when it entered the order; (c) an effect of the order that the Commission or the petitioner did not contemplate or intend; or (d) any good and sufficient cause that the Commission did not consider or determine in the order.<sup>21</sup>

23 Although not directly implicated by TOTE's Petition, the Commission should also consider the standards applicable to a motion to reopen the record pursuant to WAC 480-07-830. Pursuant to that rule, if a party seeks to introduce new evidence after the close of the record, but prior to the entry of a final order, the party seeking to do so must show the evidence is essential to the decision and that it was unavailable and not reasonably discoverable with due diligence at the time of the hearing.<sup>22</sup>

### IV. ISSUE PRESENTED

24 Whether the Commission should amend its final order in a general rate proceeding to include a new rate design feature requested well after the deadline for any appeal, and which could

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<sup>21</sup> WAC 480-07-870(1).

<sup>22</sup> WAC 480-07-830.

have been addressed in the rate proceeding, purely because work papers mistakenly included erroneous data?

## V. DISCUSSION

### A. As a Matter Of Policy, Parties that Could But Chose Not to Intervene Should Not be Permitted to Pursue Post-Order Alternative Relief.

25 TOTE's Petition seeks the inclusion of a new component of Item 300 in the pilotage tariff for the Puget Sound Pilotage District that would apply tonnage charges to vessels engaged in exclusively domestic voyages based upon a different metric than vessels engaged in foreign voyages. Specifically, TOTE seeks to be charged based on its vessels' GRT rather than their IGT. Although the topic of vessels engaged in purely domestic voyages was not addressed in the general rate proceeding, rate design was a significant topic before the Commission. In fact, the Commission's Order 09 discussed the parties' positions and the Commission's determination on rate design over nearly 11 pages.<sup>23</sup> But the most salient point here is that the proposed tariff PSP effectively filed on November 20, 2019 included language in Item 300 that prominently and unambiguously applied tonnage rates solely upon a vessel's IGT.

26 As a member of the Pacific Merchant Shipping Association ("PMSA") and with a representative serving as a Commissioner of the Board of Pilotage Commissioners,<sup>24</sup> TOTE was in a position to be fully informed of the proposed tariff and had every opportunity to review it and consider how the newly proposed rate design would apply to TOTE's vessels. As a matter of policy, the Commission should be extremely cautious before considering a request for relief that would effectively incentivize PMSA members to seek two bites at the

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<sup>23</sup> Order 09, pp. 96-107.

<sup>24</sup> TOTE's witness, Phil Morrell, served as a Commissioner of the Board of Pilotage Commissioners at the time of PSP's filing on November 20, 2019.

apple, both by participating in the hearing through PMSA’s representation and then separately by pursuing individual interests through post-order petitions (presumably then supported by PMSA as an original party). Rejecting TOTE’s request here would also be consistent with previous Commission decisions denying parties opportunities for post-order alternative rate relief.<sup>25</sup>

**B. TOTE Failed to Demonstrate it is Entitled to Post-Order Relief.**

27 Beyond policy reasons, the Commission should deny TOTE’s request on procedural grounds because it failed to demonstrate it is entitled to post-order relief. TOTE filed its petition under the auspices of WAC 480-07-875, which authorizes the Commission to amend any previous order. As its grounds for seeking an amendment, TOTE makes a number of inaccurate assertions, contending that “PSP misrepresented during last year’s proceeding how it would calculate rates for TOTE’s vessels” and that the resulting rates are *ipso facto* “unfair and unjust.”<sup>26</sup> TOTE further incorrectly insists that all parties somehow “accepted and applied the GRT for TOTE’s two vessels”<sup>27</sup> and contends that “nothing in the revised tariff or last year’s proceeding explains or justifies PSP’s new rate calculation methodology.”<sup>28</sup> These unsupported grounds cannot demonstrate that the Commission should amend Order 09.

**1. TOTE Does Not Seek a correction of an Obvious Ministerial Error.**

28 Although WAC 480-07-875(2) authorizes the Commission to amend its orders to correct obvious or ministerial errors, TOTE’s petition presents no such obvious error. PSP applied

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<sup>25</sup> See *W.U.T.C. v. Avista Corp.*, Dkts UE-160228 and UG-160229 (Consolidated), Order 07, ¶¶ 46-47 (Feb. 27, 2017).

<sup>26</sup> TOTE’s Petition, ¶ 28-29.

<sup>27</sup> *Id.*, ¶ 32.

<sup>28</sup> *Id.*, ¶ 39.

the proposed tariff exactly as it was originally proposed: based upon vessels' IGT. No party proposed that the tariff be applied based upon GRT. Consequently, the change requested by TOTE cannot be considered a mere correction.

**2. The Commission Should Apply Similar Standards as it Does for Motions to Re-Open and Petitions for Rehearing**

29 Additionally, although the Commission has not previously articulated clear grounds upon which it will grant a petition to amend under WAC 480-07-875(1), it has been clear that it will not “not lightly disturb orders previously entered where no party or person can demonstrate patent error or a prejudicial violation of process.”<sup>29</sup> PSP has been unable to find any example of the Commission relying upon that authority to reconsider its orders and provide an alternative outcome based on a petition like TOTE's. In fact, most similar requests come in the form of motions to re-open and for reconsideration or petitions for rehearing. Thus, the Commission should be guided by the standards typically applied to those requests.

30 Pursuant to WAC 480-07-830, a party who seeks to re-open the record before an order is entered is required to demonstrate that the evidence it would present was unavailable and not reasonably discoverable with due diligence at the time of the hearing. The Commission should apply a similar standard and consider opposed petitions to amend only if, at a minimum, the petitioner can show that the issue it raises could not have been contemplated upon the exercise of reasonable diligence and addressed in the rate proceeding.

31 TOTE cannot meet even that low standard. TOTE representative Phil Morrell acknowledges he received a copy of the proposed tariff on November 25, 2019, but admittedly did not

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<sup>29</sup> *Washington State Dep't of Transp. v. Cent. Puget Sound Reg'l Transp. Auth. (Sound Transit), et al*, Dkts. TR-081229, TR-081230, TR-081231, TR-081232 (consolidated), Order 02, (Apr. 15, 2010).

review the entire document.<sup>30</sup> Had Mr. Morrell exercised reasonable diligence by reviewing the tariff, he would have discovered that Item 300 prominently provided that tonnage charges would be applied based upon a vessel's IGT. Consequently, TOTE should have known that TOTE's vessels would not be charged based upon their GRT and had ample opportunity to intervene and address its untimely argument.

32 Nor can TOTE demonstrate a right to relief if the Commission applies the standards for petitions for rehearing pursuant to WAC 480-07-870. Under that rule, a party seeking a rehearing is required to establish (a) changed conditions since the commission entered the order; (b) harm to the petitioner resulting from the order that the commission did not consider or anticipate when it entered the order; or (c) an effect of the order that the commission or the petitioner did not contemplate or intend.

33 TOTE does not genuinely contend any conditions have changed since the Commission entered its order. While it claims PSP made a change in "calculation methodology" after the tariff was approved, that theory is grounded on the fact that PSP applied the tariff as written after it was approved. If simply applying a new tariff item constitutes "changed circumstances," then every ratepayer could seek a rehearing after a general rate proceeding in which new tariff items are approved. This is not the "changed circumstances" the Commission intended when it drafted WAC 363-07-870.

34 Nor has TOTE shown that the result is one the Commission did not intend or anticipate. Beyond the obvious point that the Commission approved a tariff that expressly stated that Item 300 would apply based on IGT, the Commission actually adjudicated a similar issue,

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<sup>30</sup> Declaration of Phil Morrell, filed with TOTE's Petition.  
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siding against the premise TOTE advances here. A significant question posed to the Commission during the general rate proceeding was whether the predominant billing factor should be the time involved in serving a vessel, or the overall size of the ship. PSP contended that the overall size of the ship should serve as the primary rate determinant both due to the risk and skill involved in moving larger ships, and because of the larger revenue generating capacity of bigger ships and their economies of scale. The Commission ultimately concluded that rates should primarily be based on gross tonnage but expressly disagreed that greater profitability was a permissible consideration:

Although we do not accept Staff's tariff proposal, we agree with Staff and PMSA that that [sic] profitability of larger vessels should not justify imposing greater costs on those vessels. As Staff witness Sevall explains, Staff did not impose additional costs on larger vessels in light of their greater profitability because doing so "goes against one of the core principles in regulated rate setting." It is instead appropriate to charge vessels based on the principle of cost causation.<sup>31</sup>

35 Again, the primary reason TOTE seeks for its ships to be charged less than ships of a similar size is due to their ships' design, which reduces useable cargo space and, thereby, revenue generating capacity. But TOTE's ships present similar risk and require similar piloting skill as ships of a similar IGT.<sup>32</sup> Because the Commission determined that a ship's overall size is a factor upon which rates should be determined, but rejected the premise that a ships' profitability was an appropriate basis on which to set rates, TOTE is unable to demonstrate that the Commission did not intend the result about which now TOTE complains.

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<sup>31</sup> *Id.*, ¶ 362.

<sup>32</sup> Exh. SM-1; Declaration of Stephan Moreno.

**C. The Relief TOTE Seeks Should be Denied in any Context.**

**1. TOTE's Past Treatment Was an Exception, Not The Rule.**

36 Beyond all procedural deficiencies with TOTE's Petition, the Commission should also reject  
the substance of relief TOTE seeks.

37 First, TOTE incorrectly contends that past practice proves that PSP agrees it is improper to  
charge coastwise vessels based upon their IGT.<sup>33</sup> It is true that under the former BPC tariff  
TOTE was invoiced based upon its vessels' GRT, but not because it was improper to charge  
coastwise vessels based on IGT. Nor is it clear that the BPC tariff required that result. The  
BPC's pilotage tariff, published in WAC 363-116-300, applied a tonnage charge based upon  
a vessel's "gross tons." While the term "gross tonnage" is commonly used to refer to IGT,  
the BPC did not define "gross tons." Instead, the tariff provided that if a vessel is required to  
hold a certificate of its IGT, then tonnage shall apply based upon IGT.

38 As a consequence of the ambiguity created by that statement, PSP agreed to invoice TOTE  
based upon its GRT.<sup>34</sup> But contrary to TOTE's contention that this past practice demonstrates  
that any alternative is improper, TOTE was in fact the *only* American-flagged shipping  
company charged tonnage based on GRT under the former tariff.<sup>35</sup> And although TOTE may  
have been uniquely charged for GRT in the past, Item 300 in the Commission-approved tariff  
was drafted precisely; it plainly applies tonnage charges based upon IGT.

**2. The Preferential Treatment TOTE Seeks Likely Violates State Law.**

39 While ambiguity may have permitted preferential treatment for TOTE under the former  
tariff, common carriers subject to rate regulation by the Commission are prohibited from rate

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<sup>33</sup> Tote's Petition, ¶ 4.

<sup>34</sup> Exh. IC-1; Declaration of Ivan Carlson.

<sup>35</sup> *Id.*

discrimination under RCW 81.28.180. Pursuant to that statute, Washington prohibits companies that classify as common carriers from providing any special rate or charge any more or less for services rendered than they collect from anyone receiving like and contemporaneous service. It is not certain that pilots qualify as common carriers, but the ratesetting principle nonetheless appropriately applies here and requires that similarly situated customers be charged similarly. Thus, TOTE should be expected to show why its vessels should be treated differently than vessels engaged in foreign voyages. Because TOTE failed to show why it should be charged less for similar service compared with similarly sized vessels engaged in foreign voyages, the Commission should reject the proposal.

### **3. Introducing Multiple Tonnage Systems Would Invite Confusion and Billing Disputes.**

40 TOTE also seeks the inclusion of alternative tonnage rates in order to accommodate vessels engaged in domestic trade that might not have a certificate of IGT. While this raises a hypothetical problem with applying the existing tariff, PSP has yet to encounter a vessel requiring pilotage service that lacked a known measurement of its IGT.<sup>36</sup> This is likely for good reason; although TOTE claims it is not required to carry a certificate of its IGT, it does not claim its vessels are not subject to the Convention System.<sup>37</sup> In fact, the Convention System applies to all vessels over 79 feet in overall length, built after 1986, and that do not exclusively transit the Great Lakes.<sup>38</sup> TOTE's two vessels meet each of these requirements<sup>39</sup>

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<sup>36</sup> Exh. SM-1; Declaration of S. Moreno.

<sup>37</sup> The case TOTE cites, *Kyoei Kaiun Kaisha, Ltd.*, 795 F. Supp. 1046, is unique and not at all instructive as to the appropriateness of determining pilotage charges based upon IGT. That case addressed whether the Clean Water Act applied based upon the tonnage stated in a foreign vessel's tonnage certificate. The federal district court held that the Clean Water Act applied certificated tonnage regardless of the system used in the certificate. Because Item 300 was not narrowly drafted to apply based upon a tonnage certificate, the issue of certificated tonnage is a red herring. Item 300 clearly applies IGT.

<sup>38</sup> 46 U.S.C. § 14301(a); 46 C.F.R. 69.11(a)(1).

<sup>39</sup> Exh. SM-2.

and their IGT has been measured and is listed in Lloyd's Register.<sup>40</sup> Thus, there has never been a need to accommodate such vessels in the past and there is no known reason to address this issue now.

41 TOTE's proposal would also lead to messy and impractical results. As worded, TOTE's proposed tariff insertion would apply only to vessels engaged *exclusively* in domestic trade. But vessels engaged in domestic trade are not prohibited from engaging in foreign voyages; the potential for doing so is precisely why TOTE's vessels carry gross tonnage certificates.<sup>41</sup> Thus, applying TOTE's proposed language correctly would require PSP to investigate and track the transit history of every U.S. flagged vessel that calls on the Puget Sound. This burden is wholly unnecessary and expensive, and could potentially lead to mistakes and resulting billing disputes if PSP inadvertently applies the wrong tonnage charge.

42 Moreover, the application of GRT itself could be complicated in ways not addressed by TOTE. This is because there are in fact three systems of measurement to determine a domestic vessel's GRT. At the option of the vessel's owner (depending on whether the vessel meets certain criteria), domestic vessels may be measured based upon the Standard Regulatory Measurement System, the Dual Regulatory Measurement System, or the Simplified Regulatory Measurement System.<sup>42</sup> These differing measurement systems permit a vessel to be measured under multiple systems and receive multiple measurements of its GRT in order to comply with varying laws.<sup>43</sup> While the Coast Guard resolves this issue when applying certain safety regulations by applying the highest stated measurement of GRT,<sup>44</sup> it

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<sup>40</sup> Exh. SM-2.

<sup>41</sup> TOTE's petition, ¶ 46.

<sup>42</sup> 46 C.F.R. § 69.11; *see also* Exh. SM-4; Coast Guard Simplified Measurement System, Tonnage Guide 1.

<sup>43</sup> *See* Exh. SM-4, Tonnage Guide 1, p. 4, ¶ 6.

<sup>44</sup> *See* 46 CFR § 69.153(a).

would be simpler yet here to simply apply IGT, which includes only one measurement system and which has been known for every pilotage customer in the Puget Sound.

**4. IGT is a More Accurate Measure of a Ship's Size, and Thereby The Risk and Requisite Skill.**

43 TOTE's proposal also runs contrary to the rate design principles approved by the Commission in Order 09. There, the Commission ruled that the overall size of the vessel was an important factor in charging vessels based upon the risk and expertise required:

For pilots bringing a ship into harbor, larger vessels pose relatively greater risk and should thus pay proportionally more in tariff rates. Capt. Moreno credibly testifies that the largest vessels pose greater risks when entering the Puget Sound and require greater expertise. He identifies several factors that make larger vessels more difficult to maneuver safely in confined waters. Given this testimony, we are persuaded that the larger vessels reasonably pose greater risks.<sup>45</sup>

44 Once again, GRT does not measure a ship's overall size. Instead, as Mr. Morrell acknowledged, it excludes certain portions of the ship. Conversely, Congress adopted IGT as the primary system for measuring domestic ships because "it provides a genuine representation of the size of a vessel."<sup>46</sup> And as addressed by Capt. Moreno, IGT serves as an appropriate measure of a ship's overall size, and thus the skill required to move it.<sup>47</sup> Considering that the Midnight Sun and North Star exhibit similar risk factors as other vessels with similar IGT measurements, but may have a significantly smaller GRT, there is no rational basis for charging them based upon their GRT.<sup>48</sup>

45 Other jurisdictions (and state agencies) also rely upon IGT as an appropriate measure of a ship's size. For example, the Virginia State Corporation Commission ("VSCC") concluded it was appropriate to charge vessels based upon their IGT when it considered rate design issues

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<sup>45</sup> Order 09, ¶ 361.

<sup>46</sup> *Kyoei Kaiun Kaisha, Ltd.*, 795 F. Supp. at 1051; *See Chandler, supra* note 9.

<sup>47</sup> Exh. SM-1; Declaration of S. Moreno.

<sup>48</sup> *Id.*

in 2006. In that case, the issue before the VSCC was whether to apply the “ship units” or IGT. There, cruise ship operators and ro-ro operators (the same class of vessels as the Midnight Sun and the North Star) complained that use of IGT would increase their charges because their vessels include significant non-revenue generating space.<sup>49</sup> In rejecting those concerns the VSCC held:

The gross tonnage method will assure that all ships piloted in Virginia pay pilotage charges based on their physical size, and will also assure that all the costs incurred by the Association to provide pilotage services are allocated with reasonable fairness among all types of ships calling on Virginia ports. This method has the virtue of relative simplicity and is less likely to engender factual disputes concerning its application. We will therefore approve the Association's proposal to begin assessing pilotage charges based on a ship's gross tonnage as determined in accordance with the International Convention on Tonnage Measurement of Ships, 1969.<sup>50</sup>

46 Similarly, the Board of Pilotage Commissioners relies exclusively upon IGT in determining the size of ships a newly licensed pilot is permitted to move.<sup>51</sup> Consequently, there is ample reason for the Commission to impose tonnage charges based upon IGT.

**5. TOTE's Proposal Would Create Rate Spread Issues or Raise Rates for Other Customers.**

47 Additionally, TOTE's proposed amendment presents insurmountable rate spread challenges that would either necessitate an impermissible discount or that rates for all other vessels be increased. This is because it is nearly impossible to charge vessels based upon differing measurement systems and still apply charges fairly based upon their overall size. Unlike converting kilometers to miles, GRT cannot be converted into IGT for billing purposes (and

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<sup>49</sup> Exh. SM-3; *Application of J. William Cofer on Behalf of Himself & All Other Licensed Branch Pilots in the Commonwealth of Virginia Who Are Members of the Virginia Pilot Ass'n*, PUE-2006-00046, 2006 WL 2713047, Final Order (Va. S.C.C. Sept. 11, 2006).

<sup>50</sup> *Id.* at p. 5.

<sup>51</sup> WAC 363-116-082.

vice versa).<sup>52</sup> Thus, there is no fair way to establish a rate that results in appropriately equivalent charges.

48 And while PSP seeks no advantage from work paper errors, the inclusion of a preferential rate for TOTE would lead to increased rates for other customers (either now or in the future). This is because if tonnage charges applied to TOTE's vessels' GRT, the revenue requirement allocated to the tonnage charge would thus be divided by a smaller denominator, resulting in higher rates for all other vessels. And should other U.S. flagged vessel operators similarly claim to be engaged exclusively in domestic voyages, this would compound the effect, driving future rates higher.<sup>53</sup> Consequently, TOTE's request would require that it and similarly situated vessels benefit at the expense of other pilotage customers.

**6. TOTE misunderstands ratemaking principles like rate shock, the purpose of work papers, and the burdens of the rate proponent**

49 Finally, the Commission should reject TOTE's rhetoric regarding the pertinence of work papers, the potential for rate shock, and the PSP's burden as a rate proponent. As to the former, TOTE persistently argues that it should be entitled to an amended order because PSP somehow "misled" the Commission and TOTE through its work papers. This is not so. Work papers supply the Commission and parties with documentation to support the calculations used to prepare tariff filings; they are not a representation to ratepayers of new rates. Work paper errors are not uncommon, and PSP's failure to update the tonnages for TOTE's vessels, to state them in IGT, was unintentional. If every workpaper error could lead to an amended order, no rate proceeding would ever be final.

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<sup>52</sup> See Chandler, *supra* note 9, at 200.

<sup>53</sup> There are other US flagged vessel operators that hire pilots in the Puget Sound. PSP does not know whether they operate exclusively in domestic voyages. Exh. SM-1; Declaration of Stephan Moreno.

50 Nor should the Commission offer relief to TOTE based on the premise that it is subject to rate shock. TOTE's principal contentions here are that it is subject to rate shock because its rates increased by more than the Commission-authorized revenue adjustment of 2.7% in the first year and 1.3% in the second year,<sup>54</sup> and that the Commission specifically sought to avoid rate shock for smaller vessels' like TOTE's.<sup>55</sup> As to the first point, TOTE's argument misunderstands the difference between an increase in the revenue requirement and the impacts of rate design on the actual rates to be charged to customers. As opposed to a uniform rate increase across all charges in the previous tariff, the new Commission-approved tariff features new elements and a different rate design than the former BPC-approved tariff. Thus, the charges to pilotage customers could not have been intended by the Commission to change proportionately to the increase in revenue.

51 Most significantly, the new tariff's tonnage charge declines as ships get larger where the former tariff increased charges for larger ships:

We likewise agree with Capt. Moreno that the tariff allows for a "truing up" of pilotage charges for different vessel sizes. As Capt. Moreno explains, vessels have continued to increase in size, and the current tariff tends to overcharge larger vessels because it was implemented prior to recent advances in shipbuilding. The current tariff in fact provides for an inclining tonnage rate, with per gross ton charges increasing as vessels move up in size categories. PMSA witness Capt. Moore makes a similar observation, explaining that the continuous increase in ship sizes results in increasing revenue per vessel assignment. PSP's proposed tariff strikes a reasonable balance, charging larger vessels more but abandoning the inclining gross tonnage charges that resulted in larger vessels being overcharged.<sup>56</sup>

The result of the adjustment described is that the tonnage charge to larger vessels decreased while the overall charges to smaller vessels necessarily increased by more than 2.7%.

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<sup>54</sup> TOTE's Petition, ¶ 21.

<sup>55</sup> *Id.* at ¶ 16.

<sup>56</sup> Order 09 at ¶ 358.



Consequently, nothing about a substantial increase in rates for certain vessels was an unexpected consequence of the Commission's Order.

52 TOTE also misses the point when it comes to the Commission's concern about rate shock to smaller vessels. While TOTE accurately quotes Order 09,<sup>57</sup> it takes the Commission's quote out of context by implying that the Commission opposed any sizeable increase on smaller vessels. The pertinent discussion in Order 09 addressed whether to adopt Staff's recommendation that 60% of the revenue requirement be derived from the Service Time charge, which applies equally to all vessels regardless of size, or to collect 60% of the revenue requirement from the Tonnage Charge.<sup>58</sup> The Commission was concerned with Staff's rate design because it would lead to increases on some vessels by as much as 234%<sup>59</sup> and would not attribute sufficient cost to larger vessels, which pose greater risks and require greater piloting skill.<sup>60</sup> But the Commission's order did not limit the amount that the resulting rates could increase for any size or class of vessels as TOTE suggests. Instead it merely agreed that 60% of the revenue requirement should be collected from the Tonnage Charge. Thus, nothing about the Commission's order prohibits the result about which TOTE now complains.

53 TOTE's arguments about a windfall to PSP resulting from an error also should be disregarded. As addressed by Staff in an email to Capt. Michael Moore, the Commission relied upon Exh. SS-3r when it issued Order 09, and despite mistakes included there, all

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<sup>57</sup> TOTE's Petition. at ¶ 16 (quoting Order 09, ¶ 358).

<sup>58</sup> Order 09 at ¶¶ 351 – 360.

<sup>59</sup> *Id.* at ¶ 359.

<sup>60</sup> *Id.* at ¶¶ 360-361.

parties must live with the results.<sup>61</sup> Similarly, while the Commission’s order authorized a 2.7% increase to PSP, all parties were well aware of the impacts of the ongoing COVID-19 pandemic on PSP’s revenue collection. At a time when shipping company profits have reached record levels,<sup>62</sup> PSP projects that it will not earn its revenue requirement in 2021.<sup>63</sup> Consequently, TOTE cannot seriously contend that PSP will receive any amount of windfall revenue simply because TOTE no longer receives preferential rates.

54 Nor should the Commission consider the argument that PSP was obligated to raise the merits of charging IGT vs. GRT in its testimony. Here, TOTE attempts to shift the burden to PSP to have raised TOTE’s new proposal based on nothing more than the fact that PSP did not file its tariff in legislative format in accordance with WAC 480-160-110. But PSP *did* address the application of IGT in testimony (Exh.SM-2T), and the Commission previously concluded that reflecting changes to what amounted to an entirely new tariff would have been meaningless and granted PSP an exemption from the rule:

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 purposes underlying regulation, and applicable statutes.” Here, we agree with Burton 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 tariff to the current tariff, the party may simply refer to the current tariff at WAC 363-116-300.<sup>64</sup>

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<sup>61</sup> Exh. MM-1. Notably, other mistakes with Exh. SS-3r previously addressed by PSP provided ratepayers with advantages. Rather than re-litigating these issues, PSP and the ratepayers should be expected to live with the results.

<sup>62</sup> <https://caribbeanbusinessreport.com/world/shipping-companies-haul-in-record-profits/>;  
<https://qz.com/2060904/ports-are-a-mess-but-shipping-company-profits-are-at-record-highs/>;  
<https://www.wsj.com/articles/maersk-posts-record-profit-steps-up-buyback-program-11620231653>;  
<https://www.bloomberg.com/opinion/articles/2021-08-19/container-shipping-is-making-a-killing-this-year-but-will-we-have-christmas>.

<sup>63</sup> Exh. IC-1; Declaration of Ivan Carlson.

<sup>64</sup> Order 09, ¶ 374.

Moreover, under TOTE's theory, any time a rate proponent fails to address a concern of a ratepayer in its initial filing, that issue would become the appropriate subject of an untimely post-order petition for relief. Because rate proponents cannot anticipate every objection of ratepayers, due process requires ratepayers to timely intervene and raise their arguments in response. Because TOTE failed to intervene after being provided ample opportunity to do so, its Petition should be denied.

## VI. CONCLUSION

55 TOTE's Petition seeks to restore preferential rate treatment that its two vessels once received. But nothing TOTE presents demonstrates a justifiable basis upon which to upend the Commission's order and resulting tariff. No law requires that TOTE's vessels be charged based upon their GRT, nor does the law countenance the type of special rate that TOTE requests here. And while the elimination of a discount may have resulted in new rates that TOTE did not anticipate, TOTE's lack of anticipation resulted purely from its failure to timely read the tariff. Consequently, the Commission should deny TOTE's Petition.

56 DATED this 15th Day of October, 2021.

RESPECTFULLY SUBMITTED,

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