

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 TP-190976

[PROPOSED] REPLY RE WAC 480-07-875  
PETITION TO AMEND ORDER

**I. INTRODUCTION**

1. Movant TOTE Maritime Alaska, LLC (“TOTE”) submits this reply memorandum in further support of its WAC 480-07-875 Petition to Amend Order. TOTE could not have anticipated that Puget Sound Pilots (“PSP”) and Staff would raise procedural arguments about the standards and regulatory provisions governing the issues of TOTE’s petition; or that Staff would propose alternative methodologies, or “options,” to redress the harm TOTE has experienced by PSP’s manipulation of its rates. The regulatory framework governing TOTE’s petition bears on, if not dictates, how TOTE’s arguments will be analyzed and the burdens it must sustain to prevail. TOTE addresses these procedural arguments and Staff’s proposed options herein.

## II. ARGUMENT

### *Governing Regulatory Standard of Petition*

2. TOTE brought this Petition under WAC 480-07-875, entitled “**Amendment, rescission, or correction of order**,” urging that as written, the Commission’s Final Order Rejecting Tariff Sheets; Authorizing and Requiring Compliance Filing , dated November 25, 2020 (“the Order”), as well as the revised tariff PSP filed pursuant to the Order, do not fulfill the Commission’s obligations under RCW 81.116.020.

3. PSP argues in its response that WAC 480-07-870, entitled **Rehearing**, and its more elaborate standards, should govern the Commission’s consideration of TOTE’s Petition. PSP’s Response at pp. 8 and 12. Staff also notes that TOTE’s Petition does not seek a WAC 480-07-870 rehearing and opportunity to submit new evidence. Staff Response at p. 1, fn. 3.

WAC 480-07-875 is designed for the circumstances at hand and should be applied, but if the Commission applies WAC 480-07-870 instead, relief to TOTE likely would be warranted after a costly rehearing for the same reasons readily apparent in the current record. No new evidence or analysis is needed to decipher the issues. There is no factual dispute. The current record is complete for purposes at hand.

4. PSP and Staff portray TOTE’s petition as a request to completely revamp the Order and PSP’s revised tariff. It is not, and that need not be within the relief granted. PSP argues that rates charged to all of its other pilotage service users would have to be increased if TOTE’s petition is granted. Were that true, this Petition might require the analysis of a fully reopened tariff modification proceeding. But it is not accurate. Correction of PSP’s rate methodology for TOTE would have no bearing on rates charged to other ratepayers, even though PSP’s actual revenues would be lowered to levels the Order contemplates and authorizes. The Order does not guarantee PSP minimum revenues; rather, it prescribes, in accordance with applicable WUTC

regulations, rate calculation methodologies based on economic arguments derived from data the parties presented. That process may result in PSP revenues being higher or lower than those derived from the test year. Market conditions always fluctuate, sometimes in service providers' favor during times of heavy service demand, and sometimes against their interests during economic downtimes, such as when a pandemic strikes.

5. TOTE submits that PSP should not be allowed to manipulate its rate methodologies so as to have a single ratepayer subsidize PSP's lowered revenues (caused by the pandemic). PSP seeks to do so and label TOTE's petition to avoid that circumstance a request for an entire new tariff modification proceeding. The Commission need not reopen last year's rate proceeding to fully analyze consequences of PSP's inaccurate submission and determine its impact across the board. The relief TOTE requests here would easily and expeditiously correct PSP's revised tariff to comport with the Order's determinations and what the Commission intended by it. Similarly, TOTE's proposed amendment would not involve "the creation of a new class of ratepayers" as Staff suggests (Staff Response at p. 6); rather, it would merely accommodate an existing class of ratepayers the current tariff does not.

6. TOTE requests simple correction of the consequences of PSP's admitted misrepresentation of data, whether or not it occurred by innocent mistake. What indisputably was not a mistake is PSP's alteration of the rate methodology it applies for TOTE's two vessels resulting in significantly higher rates. Both PSP's and Staff's positions are heavily predicated on TOTE being a PMSA member, such that it purportedly was a participant in last year's proceeding and missed its opportunity to raise the issues of its current Petition. TOTE refutes the significance of that membership in its opening brief, and leaves it to the Commission to determine whether last year's proceeding required PMSA and each of its members to comb

through a new tariff to isolate inconsistencies between tariff provisions (here, Item 300) and PSP's representations in its workpapers of the practical effects of the tariff modifications. Ironically, both PSP and Staff treat TOTE as a *de facto* participant in last year's proceeding, but both at least implicitly feel that TOTE should not have relied on the PSP's representations contained in the worksheets it submitted in that proceeding.

7. Lastly, PSP raises a host of purported logistical and accounting problems it ostensibly envisions with having TOTE's two vessels rated based on their GRT tonnage. These arguments inherently fail based on history: PSP rated TOTE's vessels based on GRT tonnage for some 18 years without issue. These contrived arguments do not substantiate PSP's position that a rehearing would be necessary to explore them.

8. For these reasons, the Commission should not interpret TOTE's petition as something more than it is. TOTE urges only that the Commission enforce its own Order by (1) prohibiting PSP from manipulating its rate methodology for TOTE's two vessels in a manner at odds with PSP's worksheet representations to the Commission and its practices since 2003; and (2) correcting errant tariff language so that it accommodates all users of PSP's services, here exclusively coastwise vessels. The circumstances and relief requested are consistent with the design of WAC 480-07-875 as an "Amendment, rescission, or correction of order," and do not rise to the level of an entirely new ratemaking and tariff modification proceeding.

9. Even should the Commission apply WAC 480-07-875, TOTE would succeed in demonstrating a rehearing is appropriate. Subsection (1) of WAC 480-07-875 would allow a rehearing if a petitioner demonstrates any one of the following:

- (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.

Since the Order's issuance, conditions changed inasmuch as PSP began charging TOTE rates higher than those it had charged since 2003 and which it confirmed it would charge in its worksheets. This resulted in financial harm to TOTE. The Commission did not contemplate PSP's action or the harm it would cause, as the rate calculations the Commission authorized in the Order were based on worksheet data projections which are lower than what PSP currently is collecting. This was neither contemplated nor intended by the Commission in the Order, or to the extent it was aware harm would arise, by TOTE. Good and sufficient cause exists for the Commission to redress circumstances caused by a service provider's submission of inaccurate data and a tariff that does not accommodate the particulars of a consumer of its services.

***Staff's Three Options***

10. Staff sees three routes the Commission could take in ruling on TOTE's Petition: (1) grant the Petition; (2) initiate a rulemaking to consider special contracting rules and facilitate PSP and TOTE entering into a special contract; and (3) (a) reject TOTE's proposed amendment, (b) have PSP correct its workpaper tonnage error with updated rate spread analysis, and (c) defer TOTE's rate class proposal until the next general rate case ("GRC"). Staff Response at p. 4. Staff urges Option 3, and PSP essentially concurs. TOTE submits that Option 1 would one be the most appropriate, expeditious and nonproblematic, but that Option 2 would be an adequate interim measure should the Commission agree that full investigation and analysis during the next GRC is needed to fully vet the circumstances and issues.
11. While recognizing the problematic deficiencies of PSP's submission in last year's proceeding, Staff urges that TOTE's Petition should be denied in favor of deferring further

investigation until the next GRC. Staff implies that TOTE should be forced to bear the financial consequences (\$762,237.76) of PSP's erroneous submissions (and that PSP should enjoy the windfall benefit of them) until the next GRC mainly because TOTE "could and should have discovered PSP's proposed Tonnage Charge shift ..." *Id.* at 3. Staff would have the Commission treat PSP's inaccurate data submission as inconsequential and easily correctible scrivener's errors. TOTE respectfully submits that PSP's worksheet data was a premise of the Order, and as such, is not subject to correction by mere clerical housekeeping. The damage would not be remedied by a revised worksheet.

12. Staff also conceives of the very practical notion that the Commission could apply principles of WAC 480-80-143, entitled **Special contracts for gas, electric, and water companies**, to allow TOTE and PSP to enter into a special contract for rates that would apply through the next GRC. *Id.* at pp. 8-9. However, Staff is disinclined toward this option because in its opinion, (1) TOTE could have participated in last year's proceeding and discovered PSP's errors; (2) such an arrangement would circumvent RCW 81.116.030(1) by allowing a prohibited change to a tariff, producing "an absurd outcome"; and (3) all interested parties would not participate in the separate contract.

13. TOTE has addressed the first point. As to the second and third points, a special contract would not "circumvent" RCW 81.116.030(1), and all interested parties have already participated to the extent necessary. In other words, a special contract would implement what the Commission all along intended based on conclusions it reached and thought it had implemented in the Order. The current *status quo* is not what the Commission intended by the Order. Last year's proceeding involved intricate economic arguments as to rate increases PSP claimed it needed as a result of evolving economic circumstances. After careful analysis of those economic

arguments, the Commission derived a rate scheme that would be equitable to all concerned, with significant focus on avoiding rate shock to any individual carrier. If the Commission takes no action in response to this Petition, PSP will succeed in deriving significantly higher revenue - \$762,237.76 from a single carrier - than the Commission intended. Allowing a service provider to derive higher revenues than the Commission concluded it was entitled to is the only “absurd result” the Commission should avoid.

14. Staff does raise a valid concern as to whether TOTE and PSP would agree to the terms of a special contract without Commission oversight. *Id.* at p. 8. The terms of that special contract should not have to be complex. It would provide only that TOTE’s two vessels, which PSP asserts are the only two exclusively coastwise vessels it services and knows of, be rated at their GRT tonnage through the time of the next GRC. However, PSP makes its position clear: it wishes to continue gouging higher rates from TOTE, and left to its own devices, would likely refuse any special contract term that alters that. TOTE submits that an appropriate Staff representative could mediate discussions within parameters set by the Commission as to what it expects the parties to achieve by way of a special contract.

### III. CONCLUSION

15. As PSP itself argues:

[T]he 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.

PSP Response at pp. 5-6. But PSP and Staff would have TOTE bear the financial brunt of PSP’s errors during this nascent process, all to PSP’s own economic benefit. TOTE submits that the

Commission can and should enforce its Order immediately and implement its determinations by fine tuning inequities that operations reveal.

16. At issue in this Petition is the integrity of Commission proceedings. Procedures for pilotage tariff modification are in their infancy, and Staff itself is unsure about the purpose of worksheet data a service provider submits to the Commission in support of its application for a rate increase (“Here, Staff requests the Commission clarify that the purpose of PSP’s workpapers was not to project the results of the proposed tariff operations ...” *Id.* at 13, fn. 34). TOTE submits that a party should be responsible for the accuracy of anything it submits to the Commission (or any other government agency), the same being essential to equitable and otherwise appropriate adjudication, with all interested parties entitled to rely on the record.
17. Pilotage tariff rate proceedings involve analysis of complex rights of numerous parties. If, as PSP would have it, the Commission ignores PSP’s erroneous worksheet data and allows PSP to derive significantly higher revenue than the Order authorizes, the door opens to future parties submitting inaccurate data without consequence. TOTE submits that this would be bad policy and at odds with WUTC’s mission as a governing and adjudicatory agency.
18. For these reasons and those presented in TOTE’s opening brief, this Petition should be granted either by way of the proposed tariff amendment or by a special contract between TOTE and PSP.

Dated this 12th day of November, 2021.

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