

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

TOTE MARITIME ALASKA, LLC'S  
RESPONSE TO COMMISSION'S  
PROPOSED AMENDMENT

**I. INTRODUCTION**

1. Pursuant to the Commission's Notice Reopening the Record; Notice of Intent to Amend Final Order dated December 20, 2021 ("Commission's Notice"), movant TOTE Maritime Alaska, LLC ("TOTE") submits this response to the proposed amendment. TOTE agrees with the Commission's analysis and intended approach, but asks that the Commission order Puget Sound Pilots ("PSP") to refund to TOTE overcharges it collected, and might collect in the future, from TOTE based on its revised pricing methodology since January 2021.

**II. ARGUMENT**

2. The Commission's Notice states the Commission's conclusion that TOTE's "Petition and the responses thereto raise new issues related to the methodology PSP uses to calculate Gross Tonnage that were neither presented to, nor considered and resolved by, the Commission in its Final Order." On that basis, "the Commission determines it is appropriate to reopen the record in this proceeding to receive into evidence TOTE's Petition and the parties' responses and reply thereto, as well as supplemental information filed in support of PSP's compliance filing in this Docket."

3. The Commission's Notice states the Commission's intention as follows:

[T]o amend the Final Order to address this deficiency by: (1) requiring PSP to identify and, from the date of the amended Final Order forward, defer until the rate effective date of PSP's next general rate case the incremental difference between the revenues collected from TOTE under PSP's current tariff (which assesses tonnage charges on IGT) and the amounts PSP would have collected from TOTE had tonnage charges been assessed based on GRT; and (2) requiring PSP in its next general rate case to present for Commission consideration and determination whether Gross Tonnage should be calculated using GRT or IGT, including for vessels operating exclusively in coastwise trade.

TOTE agrees with the Commission's analysis and proposed course of action.

4. However, as of this writing, PSP has forced TOTE to pay PSP \$346,877.52 in invoiced pilotage fees above what it would have charged had it calculated rates based on the two vessel's IGT in accordance with PSP's worksheets and other representations presented during the 2020 rate proceeding (including invoiced sums billed but not yet paid). Second Declaration of Alyson Atalie Collier and attached table. TOTE requests that the Commission order PSP to refund to TOTE this amount plus any additional overcharges which PSP might collect from TOTE before the Commission rules, plus lawful interest.

5. The same logic dictating that PSP "defer ... the incremental difference between the revenues collected from TOTE under PSP's current tariff ... and the amounts PSP would have collected from TOTE had tonnage charges been assessed based on GRT" until a determination in the next general rate case based on submissions by all impacted parties dictates that the Commission should also order PSP to refund to TOTE those incremental differences which PSP has collected heretofore.

6. Research of WUTC's agency decisions does not reveal an instance wherein the Commission addressed whether a regulated service provider must refund overcharges

which are facially in conformance with an existing tariff when the Commission has found irregularities in how that existing tariff was established. However, RCW 81.04.230, entitled **Overcharges—Refund**, provides as follows:

When complaint has been made to the commission that any public service company has charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, and the same has been investigated and the commission has determined that the overcharge allegation is true, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, whether such overcharge was made before or after the filing of said complaint, with interest from the date of collection of such overcharge.

PSP’s existing tariff, in relevant regard, does not constitute a “lawful rate in force at the time such charge was made,” as its pricing for the two vessels at issue was not “lawful.” Rather, it was derived from a “methodology PSP uses to calculate Gross Tonnage that [was] neither presented to, nor considered and resolved by, the Commission in its Final Order.” In other words, if the Commission has determined that PSP’s current pricing methodology is based on irregularities during the 2020 proceeding sufficient to prompt the Commission to order PSP to discontinue it in favor of the earlier methodology, then the Commission has *ipso facto* determined that the current tariff giving rise to PSP’s improper methodology is unlawful.

7. A refund would not constitute a prohibited “retroactive ratemaking,” which “... prohibits the Commission from authorizing or requiring a utility to adjust current rates to make up for past errors in projections.” *In the Matter of the Application of Puget Sound Energy for Authorization Regarding the Deferral of the Net Impact of the Conservation Incentive Credit Program, Schedule 125, & Subsequent Recovery Thereof Through Schedule 120, Conservation Rider*, No. UE-010410, 2001 WL 34797261, at \*2 (Nov. 9, 2001), citing *Town of Norwood, Mass. v. FERC*, 53 F.3d 377, 381 (D.C. Cir. 1995). PSP’s improper methodology is not driven by an error in

projection, and a refund would not be an adjustment to a current rate. As the Commission has observed:

The evil in retroactive rate making as thus understood is that the consumer has no opportunity prior to receiving or consuming the service to learn what the rate is or to participate in a proceeding by which the rate is set. The Commission agrees that retroactive rate making, as thus understood, is extremely poor public policy and is illegal under the statutes of Washington State as a rate applied to a service without prior notice and review.

*In the Matter of the Application of Puget Sound Energy for Authorization Regarding the Deferral of the Net Impact of the Conservation Incentive Credit Program, Schedule 125, & Subsequent Recovery Thereof Through Schedule 120, Conservation Rider, No. UE-010410, 2001 WL 34797555, at \*2 (Nov. 9, 2001).* Here, there is no such concern from the perspective of either TOTE or PSP.

8. Without a refund, TOTE will experience the “rate shock” the Commission sought to avoid in the Final Order to which it now proposes amendment. Indisputably, \$346,877.52 in added pilotage costs for the operation of two vessels during a 12-month period is a significant increase that can and should be avoided.

### **III. CONCLUSION**

9. For the reasons stated above and in its earlier petition materials, TOTE agrees with the Commission’s proposed course of action, but requests that the Commission refund to TOTE overcharges PSP has collected, and will collect, from TOTE by its revised pricing methodology.

Dated this 14th day of January, 2022.

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