

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

<p>WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,</p> <p>Complainant,</p> <p>v.</p> <p>PUGET SOUND PILOTS,</p> <p>Respondent.</p>	<p>DOCKET TP-190976</p> <p>ORDER 12 GRANTING PETITION; AMENDING FINAL ORDER 09</p>
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**BACKGROUND**

- 1 On November 11, 2020, the Washington Utilities and Transportation Commission (Commission) entered Order 09; Final Order Rejecting Tariff Sheets; Authorizing and Requiring Compliance Filing (Order 09) in the above-referenced docket. Order 09 was the final order in the first general rate case filed by Puget Sound Pilots (PSP) with the Commission.
- 2 On August 26, 2021, TOTE Maritime Alaska, LLC, (TOTE) filed a Petition for Amendment, Recission, or Correction of Order 09 (Petition) pursuant to Washington Administrative Code (WAC) 480-07-875. In its Petition, TOTE alleges that PSP has “taken advantage of unjust circumstances” to increase pilotage fees for two TOTE vessels (Midnight Sun and North Star) during the two years in which the new tariff rates apply, which created “rate shock” contrary to the intent of Order 09.<sup>1</sup> Specifically, TOTE alleges that PSP’s invoicing for the two vessels is now based on their international gross tonnage (IGT) as opposed to their regulatory, or domestic, gross register tonnage (GRT), which resulted in substantially higher service rates for TOTE’s two vessels than PSP had charged in previous years. TOTE further alleges that PSP represented in its testimony and workpapers that it would continue to assess rates for its two vessels based on GRT calculations.
- 3 TOTE requests the Commission require PSP to amend Item 300 of its tariff to calculate inter-harbor vessel movement tonnage rates for vessels that operate exclusively in

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<sup>1</sup> Petition, ¶1.

coastwise trades using GRT, and only assess rates based on IGT for vessels that operate wholly or partially in international trades.

- 4 On August 30, 2021, the Commission issued a Notice of Opportunity to Respond to Petition, which established a deadline of Friday, October 15, 2021, to respond to the Petition.
- 5 On October 15, 2021, the Commission received written responses from PSP, Pacific Merchant Shipping Association (PMSA), and Commission staff (Staff).
- 6 PSP opposes TOTE's Petition on multiple grounds. First, PSP argues that TOTE should not be permitted to complain about the outcome of PSP's general rate proceeding absent a showing that the issue TOTE cites in its Petition could not have been discovered through the exercise of reasonable diligence. PSP argues that TOTE should have known that PSP proposed to assess charges based on its vessels' IGT and sought to intervene in this proceeding. Second, PSP argues that TOTE failed to demonstrate why vessels engaged exclusively in domestic trade should be treated differently from those who engage in international trade. Third, PSP contends that TOTE seeks to have its ships' overall size disregarded because they contain unused space, which ignores the Commission's conclusion that the overall size of a vessel corresponds to relative risk. Finally, PSP asserts that TOTE's proposed amendment to Order 09 is contrary to the public interest because it would result in a discount to TOTE that would require rates for other customers to be increased to collect the Commission's authorized revenue requirement.
- 7 PMSA supports TOTE's Petition and recommends the Commission adopt TOTE's proposed changes to PSP's Tariff Item 300. PMSA argues that TOTE meets all of the threshold factors for rehearing because (1) it demonstrated that PSP changed its practices for calculating tonnage billed to TOTE's vessels, (2) the Commission did not anticipate PSP's changes to its billing practices and those changes have harmed TOTE, (3) the harm was not contemplated or intended, and (4) the evidence PSP submitted never mentioned any change in Gross Tonnage rate calculations such that the parties could have analyzed, anticipated, or evaluated the outcome PSP implemented. PMSA argues that TOTE's Petition is consistent with the Final Order, federal law, and PSP's previous tariff.
- 8 Staff recommends the Commission require PSP to provide updated workpapers correcting the record and to file a revised rate spread analysis, but recommends the

Commission consider the issues TOTE raises in PSP's next general rate case proceeding.<sup>2</sup> Staff also contends that the statutory language that limits the frequency of tariff filings applies to TOTE's Petition because TOTE seeks a substantial change to the existing tariff; that TOTE had multiple opportunities to participate in the rate proceeding but declined to do so; that it was unreasonable for TOTE to rely on PSP's workpapers as the basis for final rates; and that PSP's Commission-approved tariff clearly states that tonnage charges are based on IGT.

9 On October 21, 2021, TOTE filed a Request for an Extension of Time to File Request for Leave to File Reply. On November 1, the Commission entered Order 10 granting TOTE's request, and TOTE filed both a Motion for Leave to Reply and its Reply on November 12. On November 15, the Commission entered Order 11 granting TOTE's Motion and accepting its Reply.

10 In its Reply, TOTE argues that it properly filed its Petition, and argues that the standard for rehearing set forth in WAC 480-07-870 should not apply because no new evidence or analysis is needed to decide the issue, the record is complete, and there is no dispute over facts presented in the Petition. TOTE contends that even if WAC 480-07-870 does apply, the Petition is sufficient to satisfy its requirements.

11 TOTE supports Staff's proposal to consider a special contract as an interim measure but requests a Staff representative mediate discussions within parameters set by the Commission. Finally, TOTE argues that if no action is taken, PSP will continue to derive significantly higher revenues than the Commission intended.<sup>3</sup>

12 On December 20, 2021, the Commission issued a Notice Reopening the Record, Notice of Intent to Amend Final Order, and Notice of Bench Request (Notice). The Notice explained that that the 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 Order 09. The Commission determined it was appropriate to reopen the record to receive into evidence TOTE's Petition and the

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<sup>2</sup> Staff also proposes that the Commission could consider a special contract between TOTE and PSP, but that such an approach would require a rulemaking because WAC 480-80-143 only allows for consideration of special contracts for electricity, natural gas, and water companies. *See* Staff Response to Petition at 8: ¶ 12, 13.

<sup>3</sup> TOTE Reply at 6, 7: ¶ 13.

parties' responses and reply thereto, as well as supplemental information filed in support of PSP's compliance filing in this Docket.

- 13 The Notice further explained that the absence of the information identified in TOTE's Petition from the evidentiary record – as well as the responses and reply thereto – substantially interfered with the Commission's ability to evaluate PSP's proposed rate design. The Commission thus provided notice that it intends to amend Order 09 to address this deficiency by requiring PSP to track and defer the incremental difference between the IGT-based rates TOTE is currently paying and GRT-based rates for the two vessels at issue, and by requiring PSP to present the issue of Gross Tonnage rate calculation methodologies in its next rate case. The Notice authorized the parties to file responses to the Commission's proposed amendment by January 14, 2022.
- 14 Finally, the Notice included Bench Request No. 7 (BR-7), which required PSP to provide electronic copies of all workpapers it provided to Staff in support of PSP's January 12, 2021, compliance filing.
- 15 On December 23, 2021, PSP filed its response to BR-7.
- 16 On January 14, 2021, Staff, PSP, and TOTE filed responses to the Commission's Notice.
- 17 Staff supports the actions proposed in the Notice but requests the Commission clarify that PSP should track only the revenues for the two TOTE vessels at issue.
- 18 PSP requests clear and express findings of fact and conclusions of law related to the timeliness of TOTE's Petition, whether the Commission may adopt a new tariff within 12 months of a prior tariff, and the standards that should be applied to petitions to amend filed pursuant to WAC 480-07-875. PSP seeks further clarification related to the proposed deferral and additional specificity related to the potential options the Commission may consider for the future treatment of the revenue the Commission orders PSP to defer. PSP also requests the Commission correct other mistakes in the record that resulted in its underearning when it addresses vessel tonnage rate calculation methodologies in PSP's next general rate proceeding.
- 19 TOTE supports the Commission's proposed approach but requests the Commission order PSP to refund TOTE the overcharges it collected, which, it argues, caused rate shock for TOTE.

## DISCUSSION

- 20 As a preliminary matter, we find that TOTE's Petition was properly filed as a petition to amend the Commission's final order. WAC 480-07-875 provides that such petitions must comply with the requirements in the Commission's rules related to rehearing if the petitioner seeks to introduce new evidence, as TOTE does here.
- 21 WAC 480-07-870 requires that a petition for rehearing set forth sufficient grounds and include substantial evidence or an offer of proof to support the relief requested. Sufficient grounds for rehearing include changed circumstances since the Commission entered an order, harm to the petitioner resulting from the order that the Commission did not consider or anticipate when it entered the order, an effect of the order the Commission did not contemplate or intend, or any good and sufficient cause the Commission did not consider or determine in the order. For the reasons discussed below, we conclude that sufficient grounds exist to amend Order 09.
- 22 First, PMSA correctly observes that PSP, as the petitioner, should have described the proposed change to its rate design in testimony. WAC 480-160-120(3) requires any party that petitions to revise PSP's tariff to identify each tariff item to be changed, to fully describe the proposed change, and to include information or documents to support the proposed change. Neither PSP's witness testimony nor its underlying data identified any change to PSP's vessel tonnage rate calculation methodology,<sup>4</sup> and no witness explained the difference between using IGT and GRT to calculate rates. Absent that information, the Commission did not know, and could not have known, that there is more than one way to calculate vessel tonnage rates. PSP should have explicitly described the proposed change to its vessel tonnage rate calculation methodology in its direct testimony, provided reasons for the proposed change, and included supporting evidence. As the party with the burden of proof in this proceeding, PSP failed to comply with WAC 480-160-120.
- 23 Second, PSP provided exhibits and workpapers that used its previous methodology for calculating tonnage rates for the two TOTE vessels at issue.<sup>5</sup> The parties, and ultimately

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<sup>4</sup> PSP's claim that "the result TOTE seeks was previously adjudicated in favor of a tonnage charge based on IGT rather than registered tons" is misleading considering the stark absence of any discussion in Order 09 related to the merits of using IGT versus GRT to calculate vessel tonnage rates. (PSP Response, ¶7).

<sup>5</sup> See, e.g., Staff Response to Petition at 2: ¶ 2; Burton, Exh. WTB-11 lines 37, 127.

the Commission, relied on the incorrect information presented in the exhibits and workpapers to evaluate PSP's proposed rate design. We find that PSP's failure to identify its tariff change related to tonnage calculations, coupled with the calculation error in its exhibits and workpapers, substantially interfered with the Commission's ability to evaluate PSP's proposed rate design. The Commission did not consider the issue of Gross Tonnage rate calculation methodology in Order 09, let alone the significant increase in rates for the two TOTE vessels at issue, both of which produced an effect the Commission did not contemplate. These factors constitute sufficient grounds to amend Order 09.

- 24 Although PSP and Staff raise valid concerns about allowing parties that choose not to intervene to seek post-order relief, we find that the unique circumstances presented here warrant Commission action. Specifically, the record in this proceeding was insufficient and incomplete with respect to calculating Gross Tonnage rates, no party made the Commission aware of the deficiencies in the record at any earlier stage in this proceeding, and the Commission was unaware of these deficiencies until TOTE filed its Petition. Our decision is thus narrow.<sup>6</sup>
- 25 We also conclude that amending Order 09 is the most appropriate way to address the deficiencies and errors in the record at this stage of the proceeding. Updating PSP's workpapers to reflect IGT calculations for TOTE's two vessels, as Staff suggests, is not an appropriate remedy when the Commission has neither considered nor decided how Gross Tonnage rates should be calculated. In the future, parties should bring an error of this magnitude to the Commission's attention at the time it is discovered. In this instance, PSP was in the best position to understand the implications of the error and should have notified the Commission—not just Commission Staff—when the error was discovered at the compliance filing stage.
- 26 Finally, we decline PSP's request to further evaluate the Petition under WAC 480-07-830, which governs motions to reopen the record prior to the entry of a final order because TOTE is not a party to this proceeding and the time to consider any such motion has expired. In addition to these procedural infirmities, whether TOTE could have

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<sup>6</sup> Because our decision is limited to specific and unusual facts presented here, we decline PSP's request to elaborate on the general standards that should be applied to petitions to amend filed pursuant to WAC 480-07-875.

reasonably discovered the error is not relevant to our primary concern; that is, that the Commission was deprived of an opportunity to evaluate PSP's change to its rate design.

27 We thus grant TOTE's Petition and amend Order 09 as described below.

*Proposed Tariff Amendment*

28 We decline to adopt TOTE's proposed amendment to PSP's tariff at this juncture. Because the Commission has not yet considered the issue of vessel tonnage rate calculations, it would be premature to require PSP to revise its tariff until the Commission is able to thoroughly evaluate how IGT and GRT should be applied based on a fully developed evidentiary record. Additionally, as Staff observes in its Response, TOTE has not yet presented evidence or argument related to the risk of piloting its vessels. For these reasons, we agree with Staff that the Commission should consider and decide issues related to Gross Tonnage rate calculation, including the rates applied to TOTE's two exclusively coastwise vessels, in PSP's next general rate proceeding.

29 For this same reason, we need not and do not address here the parties' arguments related to how tonnage rates are calculated, or which tonnage rates should apply to the two vessels at issue. Instead, we require 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. We also require PSP to address how its proposed rate design is consistent with principles of rate shock and gradualism. Finally, we decline to initiate a rulemaking to address special contracting at this juncture.

*Deferral*

30 We require PSP to establish a regulatory liability account to defer, from the date of this Order forward until the rate effective date of PSP's next general rate case, the incremental difference between the revenues collected from TOTE for the Midnight Sun and North Star vessels under PSP's current tariff (which assesses tonnage charges based on IGT) and the amounts PSP would have collected from TOTE had tonnage charges been assessed based on GRT.<sup>7</sup>

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<sup>7</sup> This language addresses PSP's request to clarify that it should create a regulatory liability and Staff's request that the Commission clarify that only revenue related to the Midnight Sun and North Star vessels be deferred.

- 31 PSP requests the amended order “be more specific about the potential options it may consider for the future treatment of the revenue it will order PSP to defer.”<sup>8</sup> By way of guidance, deferrals are created to earmark assets and liabilities for consideration in a future proceeding. PSP, as well as any other party to the proceeding, should thus advocate for its preferred course of action in its next general rate case. As explained above, the Commission will determine at that time the appropriate ratemaking treatment for the deferred incremental revenue after it resolves the issues related to Gross Tonnage rate calculation, including determining which rates should apply to TOTE’s two vessels.
- 32 Finally, PSP requests that the Commission “expressly recognize that it will permit evidence of mistakes that impacted revenue collection to guide its decision regarding the treatment of deferred revenue.”<sup>9</sup> PSP’s proposal is inconsistent with Commission practice. If PSP has identified errors in its rate design and wishes to seek relief, it should file a well-supported accounting petition requesting authorization to create a regulatory asset account for the amounts it believes it has under-collected. PSP’s filing should conform to the requirements set out in WAC 480-07-370(3) and must demonstrate that the costs it seeks to defer are extraordinary and material. The Commission may consider the petition at its regularly scheduled open meeting after hearing from all interested persons. If the Commission grants the petition, the ratemaking treatment of the deferred regulatory asset will be determined in PSP’s next general rate case.

*Proposed Refund*

- 33 In its response to the Commission’s Notice of Intent to Amend Order 09, TOTE requests the Commission require PSP to refund to TOTE the incremental revenues it has collected to date. We deny TOTE’s request at this juncture because the Commission has not yet had the opportunity to receive testimony and evidence on vessel tonnage rate calculation methodologies in the context of a general rate proceeding. Accordingly, TOTE may petition to intervene in PSP’s next general rate case, at which time it may present testimony and evidence to support its request for a refund of the deferred incremental revenues associated with its two vessels.

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<sup>8</sup> PSP Response to Notice, ¶5.

<sup>9</sup> Para 11 response to notice – PSP.



*Changes to Order 09*

34 To effectuate the decisions set forth in this Order, we amend Order 09 as follows:

- Add new paragraph 361B between paragraphs 361 and 362:

We observe that PSP made changes to its Gross Tonnage rate calculation methodology in its tariff that it failed to identify and describe as required by Commission rules. Neither PSP's witness testimony nor its underlying data identified any change to PSP's vessel tonnage rate calculation methodology, and no witness explained the difference between using International Gross Tonnage (IGT) and Gross Register Tonnage (GRT) to calculate rates. Absent that information, the Commission did not know, and could not have known, that there is more than one way to calculate vessel tonnage rates.

Moreover, PSP presented, and the Commission relied upon, workpapers that identify incorrect rates for two vessels belonging to TOTE Maritime Alaska, LLC: Midnight Sun and North Star. To preserve these deficiencies and errors for resolution in PSP's next general rate proceeding, we require PSP to (1) identify and, from the date this Order is amended forward, defer in a regulatory liability account until the rate effective date of PSP's next general rate case the incremental difference between the revenues collected from TOTE for the vessels Midnight Sun and North Star under PSP's current tariff (which assesses tonnage rates based on IGT) and the amounts PSP would have collected from TOTE for these two vessels had tonnage charges been assessed based on GRT; and (2) to present for Commission consideration and determination in its next general rate case whether Gross Tonnage should be calculated using GRT or IGT, including for vessels operating exclusively in coastwise trade.

- Modify Finding of Fact (42):

(42) PSP's proposed tariff is easier to understand than the current tariff on its face, ~~appropriately allocates costs, and simplifies charges for ratepayers while avoiding rate shock.~~ but PSP failed to identify the proposed tariff change to its rate design related to Gross Tonnage rate calculation.

- Add new Finding of Fact (42A):

(42A) PSP's workpapers and exhibits misstated charges for two TOTE Maritime Alaska, LLC, vessels, Midnight Sun and North Star.

- Add new Finding of Fact (42B):

(42B) The Commission was deprived of any opportunity to evaluate Gross Tonnage calculation methodologies in this proceeding, and thus makes no determination related to the use of International Gross Tonnage or Gross Register Tonnage to calculate vessel tonnage rates.

- Add Conclusion of Law between Conclusion of Law 39 and 40:

(39A) PSP's failure to identify the proposed change to its rate design related to Gross Tonnage rate calculation violated WAC 480-160-120.

- Add new Conclusion of Law (39B):

(39B) The Commission preserves the issue of whether Gross Tonnage should be calculated using GRT or IGT, including for vessels operating exclusively in coastwise trade, for PSP's next general rate proceeding.

- Add new Conclusion of Law (39C):

(39C) PSP is required 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. PSP should also address how its proposed rate design is consistent with principles of rate shock and gradualism.

- Add new Conclusion of Law (39D):

(39D) PSP is required to identify and, from the date this Order is amended forward, defer in a regulatory liability account until the rate effective date of PSP's next general rate case the incremental difference between the revenues collected from TOTE Maritime Alaska, LLC, for the vessels Midnight Sun and North Star under PSP's current tariff (which assesses tonnage rates based on IGT) and the amounts PSP would have collected from TOTE Maritime Alaska, LLC, for these two vessels had tonnage charges been assessed based on GRT.

- Add to Section V. Order:

(4) Puget Sound Pilots is required to identify and, from the date this Order is amended forward, defer in a regulatory liability account until the rate effective date of PSP's next general rate case the incremental difference between the revenues collected from TOTE Maritime Alaska, LLC, for the vessels Midnight Sun and North Star under PSP's current tariff and the amounts PSP would have collected from TOTE Maritime Alaska, LLC, for these two vessels had tonnage charges been assessed based on Gross Register Tonnage.

(5) Puget Sound Pilots is required in its next general rate case to present for Commission consideration and determination whether Gross Tonnage should be calculated using Gross Register Tonnage or International Gross Tonnage, including for vessels operating exclusively in coastwise trade. PSP must also address how its proposed rate design is consistent with principles of rate shock and gradualism.

### ORDER

35 **THE COMMISSION ORDERS THAT:**

- 36 (1) TOTE Maritime Alaska, LLC's Petition to Amend Order 09 is GRANTED.
- 37 (2) Order 09 in Docket TP-190976 is amended as described in paragraph 34 of this Order.
- 38 (3) The Commission retains jurisdiction over the subject matters and parties to this proceeding to effectuate the terms of this Order.

Dated at Lacey, Washington, and effective February 2, 2022.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chair

ANN E. RENDAHL, Commissioner

JAY M. BALASBAS, Commissioner