

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,
Complainant,

v.

PUGET SOUND PILOTS,
Respondent.

Docket TP-190976

PETITION FOR RECONSIDERATION OF
ORDER 13

I. PRELIMINARY STATEMENT

1. Pursuant to WAC 480-07-850, Puget Sound Pilots (“PSP”) respectfully submits this Petition for Reconsideration of Order 13. Specifically, PSP requests that the Commission reconsider paragraphs 20 through 22 of that Order, which require PSP to defer the incremental difference in revenue collected from TOTE Maritime Alaska, LLC (“TOTE”) retroactively to August 26, 2021.
2. This Petition is appropriate because the Commission granted in part TOTE’s February 11, 2022, Motion for Clarification or Reconsideration without providing PSP notice or an opportunity to respond as required by WAC 480-07-875 and WAC 480-07-850.¹ As a result, the Commission’s conclusion that requiring PSP to defer revenue retroactively would be “more equitable” was made without the benefit of a full record or consideration of the significant undue hardship that the Commission’s ruling imposes on PSP and its current and former members.
3. Order 13 is inequitable and should be reconsidered because it puts PSP in an untenable position. To fund the required retroactive deferral, PSP must either: (1) claw back distributions previously made to its current and former members; or (2) reserve future revenues sufficient to fund the amount of the deferral applied retroactively. Either approach would be highly problematic.
4. Clawing back distributions that have already been paid to PSP’s current and former members is simply not practicable. Therefore, to comply with Order 13 PSP would most likely reserve future

¹ See Order 13 Granting in Part and Denying in Part Petition for Reconsideration.

revenues from distribution. Though somewhat more logistically feasible, this approach would be grossly unfair to PSP's newer members, who would suffer a significant income reduction to fund a retroactive liability that accrued before they joined PSP and from which they received no benefit. Moreover, deferring revenue retroactive to last year would upend PSP's 2021 accounting and tax preparation process—which is already well underway—causing significant delay and added expense.

5. To avoid this harsh result, the Commission should reverse Order 13 and revert to the prospective deferral requirement contained in Order 12. In the alternative, the Commission should amend Order 13 to require PSP to defer revenue to a retroactive date no earlier than January 14, 2022—the date on which TOTE first notified PSP (and the Commission) of its intent to seek reimbursement of the incremental difference in revenue.² This approach would achieve greater equity by balancing TOTE's interest in preserving its claim for reimbursement of the incremental difference in revenue from the date TOTE first requested that relief with PSP's reasonable reliance on Order 9 when it authorized distributions to its current and former members that included the incremental difference in revenue collected from TOTE.

II. APPLICABLE AUTHORITIES

6. In support of this Petition, PSP relies on WAC 480-07-850 and 480-07-875, the cases cited herein, and the declarations of Mark Hale and Ivan Carlson filed herewith.

III. BACKGROUND

7. On November 11, 2020, the Commission entered Order 9, which was the final order in the first general rate case filed by PSP. Among other things, Order 9 authorized PSP to collect revenue

² Compare Petition to Amend Order, ¶ 25 (requesting prospective amendment of the tariff) with TOTE Maritime Alaska, LLC's Response to Commission's Proposed Amendment, ¶ 4 (requesting refund of the incremental difference in revenue).

for pilotage based on a piloted vessel's international gross tonnage ("IGT") without regard to whether the vessel is engaged in international or exclusively coastwise commerce.

8. In reliance on Order 9, PSP collected (and distributed) revenue for pilotage of TOTE's vessels, the MIDNIGHT SUN and the NORTH STAR, based on those vessels' IGT.³
9. On August 26, 2021, TOTE filed a Petition to Amend Order 9. That Petition requested that the Commission prospectively amend PSP's tariff to calculate pilotage for vessels engaged exclusively in coastwise commerce based on gross registered tonnage ("GRT") rather than IGT.⁴
10. Following notice and the timely submission of authorized responses by PSP, Staff, and the PSMA, on October 21, 2021, TOTE requested a continuance of the deadline to file a motion for leave to file a reply. Thereafter, on November 12, 2021, TOTE filed a reply in support of its petition. As a practical matter, TOTE's requests delayed the Commission's consideration of its Petition by several weeks.
11. On February 2, 2022, the Commission entered Order 12. That Order declined to adopt TOTE's proposed amendment to PSP's tariff but ordered PSP to defer the incremental difference in revenue collected from TOTE effective as of the date of the Order.⁵
12. On February 11, 2022, TOTE filed a Motion for Clarification or Reconsideration of Order 12, which the Commission construed as a Petition for Reconsideration under WAC 480-07-850.
13. On February 24, 2022, the Commission entered Order 13 granting in part and denying in part TOTE's Motion for Clarification or Reconsideration of Order 12. Order 13 requires PSP to defer revenue in a regulatory liability account retroactive to August 26, 2021.⁶ The Commission based its decision on a finding that retroactive deferral would produce a "more equitable result by

³ It is undisputed that PSP has correctly invoiced TOTE under the existing pilotage tariff.

⁴ Petition to Amend Order, ¶ 25

⁵ Order 12, ¶ 30.

⁶ Order 13, ¶ 20.

preserving TOTE's claim for relief from the date that it first asserted its interest and challenged the rates in PSP's tariff."⁷

14. The Commission entered Order 13 without notice or an opportunity for PSP to respond, as required by WAC 480-07-875(1)(a), (b) and WAC 480-07-850(1)(c). As a result, PSP was denied an opportunity to be heard on a critical issue affecting its substantive rights.

IV. ARGUMENT

15. PSP is confident that when the Commission considers the matter based upon a full evidentiary record, there will be no question that charging pilotage fees consistently to all vessels based on their IGT is appropriate and that TOTE should not receive a substantial discount merely because its vessels are engaged in coastwise commerce. Nevertheless, PSP does not object to prospective deferral of the incremental difference in revenue pending the Commission's determination of the substantive issue of assessing pilotage to all vessels based on IGT during PSP's next rate case.

16. PSP does, however, object to the retroactive deferral requirement contained in paragraphs 20 through 22 of Order 13 on procedural and substantive grounds and requests reconsideration on both bases.

17. Order 13 amends Order 12 (and, by extension, Order 9) to impose new duties on PSP.

Accordingly, WAC 480-07-875(1)(a), (b) required the Commission to give notice and afford PSP an opportunity to be heard consistent with due process. Likewise, WAC 480-07-850(1)(c) expressly states that the Commission "will not grant a petition for reconsideration without providing other parties an opportunity to respond to the petition." Despite these requirements, the Commission entered Order 13 without notice and an opportunity for PSP to respond, in violation of PSP's due process rights.⁸ Standing alone, the violation of PSP's right to notice and a hearing requires reconsideration of the Order.

⁷ *Id.*

⁸ PSP did not respond *sua sponte* to TOTE's Motion for Clarification or Reconsideration because WAC 480-07-850(1)(c) specifically prohibits a response unless the Commission has authorized it in a procedural schedule.

18. The violation of PSP's due process rights was not harmless error. Rather, Order 13 places a significant burden on PSP based on equitable judgments made by the Commission without the benefit of a full record, and without considering: (1) the reasonableness of PSP's reliance on Order 9 when it collected and distributed the incremental difference in revenue before the entry of Order 12 on February 2, 2022; (2) TOTE's role in delaying the Commission's adjudication of its Petition and failure to request reimbursement of revenue in its August 2021, Petition; and (3) the significant undue hardship that Order 13 imposes on PSP and its current and former members. Collectively, these considerations demonstrate that requiring PSP defer revenue retroactively to the date TOTE first challenged Order 9 is *less* equitable than Order 12's original requirement that revenue deferral begin on the date of that Order. At minimum, equity requires that Order 13 be amended to establish a retroactive date not earlier than January 14, 2022.
19. Had the Commission issued a notice of its intent to amend Order 12 and permitted PSP to respond as required by rule, PSP would have exercised its opportunity to be heard. That is because Order 13 requires PSP to retroactively defer revenue from a prior tax year in a manner that will upend PSP's audit process and substantially prejudice PSP's current and former members.
20. Each of the three factors identified in paragraph 18 above support finding that Order 13 is inequitable and should be reconsidered. First, there is no question that PSP reasonably relied on Order 9 when it distributed the incremental difference in revenue collected from TOTE prior to the Commission's February 2, 2022, entry of Order 12.
21. The pilotage tariff then in effect unambiguously authorized PSP to collect pilotage revenue calculated based on all vessels' IGT, and PSP invoiced TOTE in strict accordance with the tariff. Under these facts, PSP was plainly justified in its belief that lawfully collected revenue would not be subject to a recalculation or claw back.

22. Moreover, TOTE's August 2021, Petition to Amend sought only a prospective amendment to the tariff.⁹ At that time, TOTE *did not* seek reimbursement of past payments or an order for PSP to defer future revenue. PSP therefore had no reason to anticipate that TOTE's Petition might require reimbursement of revenue collected from TOTE such that PSP should modify its ordinary distribution practices to account for that contingency. The reasonableness of PSP's conduct during the time between TOTE's Petition and the entry of Order 12 is a significant factor that should be considered in assessing the fairness of the retroactive deferral requirement contained in Order 13.
23. Second, the Commission should also consider TOTE's conduct in determining whether the equities support applying revenue deferral retroactively. When TOTE filed its Petition to Amend in August 2021, TOTE *could have* requested reimbursement or deferral of the incremental difference in revenue. Had TOTE done so, it would have at least put PSP on notice that it might proactively withhold a portion of its members' distributions to avoid an accounting disruption. But TOTE's Petition to Amend did not request the relief that the Commission ultimately ordered, leaving PSP no reason to suspect that its members' distributions might be subject to *post hoc* adjustment.¹⁰
24. Compounding this problem, TOTE significantly extended the time between filing its Petition to Amend and the issuance of Order 12, first by requesting a continuance of the deadline to file a motion for leave to reply, and then filing a reply that was irrelevant to the Commission's decision. For this reason too, the equities do not favor requiring PSP to defer revenue retroactively to the date of TOTE's petition.
25. Lastly, and most important, the Commission should balance the concern for preserving TOTE's claim as described in paragraph 20 of Order 13 against the hardship that an unanticipated

⁹ See TOTE's Petition to Amend, ¶ 25.

¹⁰ TOTE did belatedly request reimbursement in its January 14, 2021, response to the Commission's proposed amendment. See TOTE Maritime Alaska, LLC's Response to Commission's Proposed Amendment, ¶ 4.

retroactive adjustment would impose on PSP. In that regard, it is significant that the Commission is not simply ordering deferral of operating revenue for a regulated corporation, which might reduce profit for its shareholders but would not necessarily impact the wages of its employees.

26. PSP is a voluntary association that makes monthly distributions to its members. In virtually all (if not all) cases, these distributions are the primary source of pilots' income. With minor exceptions, distributions are calculated based on pooled monthly revenue less pooled monthly expenses. Thus, when the Commission notified PSP that Order 12 would require prospective revenue deferral, PSP had a fair opportunity to account for that regulatory liability by excluding that revenue from its members' distributions.
27. Order 13 is different and, unlike Order 12, places PSP in an untenable position. That is because in fair reliance on Order 9 PSP has already distributed the revenue that Order 13 requires it to defer.
28. As stated in the declaration of PSP president Ivan Carlson, since August 26, 2021, four pilots have retired from PSP and two new pilots have obtained the required licensure and become PSP members.¹¹ As a result, unless the Commission reverses Order 13, PSP will be forced to implement one of two options to accommodate the ordered retroactive liability described in the declaration of its CPA Mark Hale.¹² First, PSP could attempt to claw back the retroactively deferred revenue from the members, including retirees, that received a distribution before the retroactive deferral was ordered. Second, PSP could require current pilots, including new licensees, to set aside future income to fund the liability. Neither option would create an equitable or just result.
29. The first option—clawing back past distributions that may have been spent or placed in illiquid investments by active and retired pilots—is simply not practicable.¹³ The second option would

¹¹ Declaration of Ivan Carlson, ¶ 3.

¹² Declaration of Mark Hale, ¶ 5.

¹³ Hale Decl. ¶ 6.

require newer pilots to subsidize from their income a regulatory liability that they did not create or benefit from.¹⁴

30. This impracticability and unfairness to individual pilots is compounded by the burden that retroactive deferral would impose on PSP as a whole. PSP has already closed its 2021 accounting books and its annual audit by Shannon & Associates is well underway.¹⁵ At this late stage, the retroactive adjustment imposed by Order 13 would upend PSP's preparation of financial statements and its 2021 tax returns.

31. PSP, its members, and the Board of Pilotage Commissioners all depend on PSP's audited financial statements for multiple reasons.¹⁶ As a practical matter, if Order 13 is not reconsidered, PSP will incur additional expense and delay as it recalculates months of financial information, revises its financial statements, and its auditors start again.¹⁷

V. CONCLUSION

The Commission should reverse Order 13 and revert to the *status quo ante* of Order 12. In the alternative, the Commission should amend Order 13 to require deferral retroactive to January 14, 2022, which is the first date that TOTE requested reimbursement (retroactive or otherwise) of the incremental difference in revenue collected by PSP. Such a result would mitigate the harshest effects of Order 13 and reflect a fairer balancing of the parties' respective interests.

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Respectfully submitted this 7th day of March, 2022.

HAGLUND KELLEY LLP

s/ Michael E. Haglund

Michael E. Haglund

¹⁴ *Id.*

¹⁵ *Id.* ¶ 7.

¹⁶ *E.g.*, the Board of Pilotage Commissioners relies upon PSP's financial statements to generate its annual report.

¹⁷ Hale Decl. ¶ 7.

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