

**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 14</p> <p>GRANTING EXEMPTION FROM WAC 480-07-850(3); DENYING PETITION FOR RECONSIDERATION</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 (TOTE’s August Petition) alleging that PSP’s invoicing for two TOTE 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 alleged that PSP represented in its testimony and workpapers that it would continue to assess rates for its two vessels based on GRT calculations. TOTE requested the Commission require PSP to (1) amend its tariff to require PSP to calculate tonnage charges for TOTE’s two vessels based on GRT and (2) refund to TOTE the difference the IGT-based rates it has collected to date and the GRT rates that TOTE argues should apply.
- 3 On February 2, 2022, the Commission entered Order 12 Granting Petition; Amending Final Order 09 (Order 12). The Commission found that TOTE demonstrated sufficient grounds to amend Order 09 because PSP failed to describe the proposed change to its rate

design in testimony, and PSP provided exhibits and workpapers that used its previous methodology for calculating tonnage rates for the two TOTE vessels at issue. The Commission declined to adopt TOTE's proposed amendment to PSP's tariff because the Commission has not yet considered the issue of vessel tonnage rate calculations and TOTE has not yet provided evidence or argument related to the risk of piloting its vessels. The Commission thus concluded that it will decide issues related to calculating gross tonnage rates in PSP's next general rate proceeding and preserved this issue by requiring PSP to establish a regulatory liability account to defer, from the date of Order 12 until the rate effective date of PSP's next general rate case, the incremental difference between the revenues collected from TOTE for the two vessels under PSP's current tariff and the amounts PSP would have collected from TOTE for GRT tonnage charges.

- 4 Finally, the Commission declined to require PSP to refund to TOTE the incremental revenues it has collected to date 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 case. The Commission advised TOTE it may petition to intervene in PSP's next general rate case, at which time it may present evidence to support its request for a refund of the deferred incremental revenues.
- 5 On February 11, 2022, TOTE filed with the Commission a Motion for Clarification or Reconsideration. In its motion, TOTE requested clarification related to the Commission's requirement that PSP defer the incremental difference between the two tonnage methodologies until PSP's next GRC.
- 6 On February 24, 2022, the Commission issued Order 13, Granting in Part and Denying in Part Petition for Reconsideration (Order 13). The Commission clarified that PSP would continue to bill TOTE vessels consistent with the tariff approved by the Commission in Order 09. The Commission also clarified its instructions to PSP regarding the deferral of revenues collected from TOTE vessels and the associated regulatory liability account. Finally, the Commission revisited its decision to require PSP to begin deferring the incremental difference in revenue collected from TOTE vessels beginning on the date Order 12 was entered. The Commission modified Order 12 to require PSP to defer the incremental difference in revenue at issue from the date of TOTE's August 26, 2021, Petition, forward.
- 7 On March 7, 2022, PSP filed a Petition for Reconsideration of Order 13 (Petition). PSP indicated it did not object to deferring the incremental difference in revenue until this issue is addressed in the organization's next general rate case. However, PSP argues that

the Commission entered Order 13 without providing PSP an opportunity to be heard as required by WAC 480-07-850 and WAC 480-07-875. PSP argues that Order 13 places a significant, inequitable burden on PSP and that it was less equitable to begin the deferral as of the date of Order 12 forward. PSP argues that it relied on Order 09 to defer the incremental difference in revenue to its members and that following Order 13 would upend the organization's audit process and preparation of 2021 tax returns. PSP submits that it should not be required to defer revenue prior to January 14, 2022, the date when PSP submits that TOTE first notified PSP of its intent to seek reimbursement. PSP argues that TOTE's August Petition only asked for prospective amendment of the tariff, rather than reimbursement of past payments. PSP argues that TOTE contributed to delay by requesting an extension of time for its reply. PSP submits that Order 13 would also require it to either "claw back" past distributions (including distributions to pilots who have since retired) or to require current pilots to set aside future income to cover past liabilities.

8 On March 14, 2022, the Commission issued a Notice of Opportunity to File Written Responses to PSP's Petition, due by March 29, 2022.

9 On March 29, 2022, TOTE filed a Response to Petition for Reconsideration (Response). TOTE argues that it began objecting to PSP's revised pricing methodology immediately upon receipt of the first PSP invoices under the new Commission-approved tariff. TOTE explains that it paid PSP's pilotage fees based on the vessels' GRT and had extensive discussions with PSP beginning in March 2021. TOTE argues that it did not suggest that it was appropriate for PSP to retain any portion of the projected increase in pilotage fees for its vessels (calculated to be \$762,237.76). TOTE further argues that it appropriately requested an extension of time to file its reply brief and that PSP, for its part, was delayed in responding to TOTE's communications in 2021. TOTE also notes that the Commission has approved "retroactive deferrals" in the past, citing a 2002 Commission case.¹

DISCUSSION

10 We deny PSP's Petition. Although a petition for reconsideration is deemed denied without further action from the Commission, PSP raises various procedural and equitable arguments that warrant discussion.

¹ *In Re the Petition of Pacificorp d/b/a Pac. Power & Light Co. for an Acct. Ord. Authorizing Deferral of Excess Net Power Costs.*, No. UE-020417, 2002 WL 32866434, at 2 (September 1, 2002).

11 WAC 480-07-850 provides that a party may petition for reconsideration of a final order and that such petition must identify each portion of the challenged order the petitioner contends is erroneous or incomplete; cite those portions of the record and each statute, Commission rule, or other law on which the petitioner relies to support its petition; and present a brief argument in support of the relief it requests.

12 **Opportunity to respond.** PSP argues that it was not provided sufficient due process when the Commission issued Order 13 before allowing PSP an opportunity to respond.

13 WAC 480-07-850(1)(c) provides that the Commission will not grant a petition for reconsideration without providing the other parties an opportunity to respond.²

14 We do not agree that PSP was deprived of any due process. While PSP is correct that it was not provided an opportunity to specifically respond to TOTE's February 11, 2022, Motion for Clarification prior the entry of Order 13, PSP has had ample opportunity to respond and be heard since the filing of TOTE's August Petition. For instance, PSP filed a Response on October 15, 2021. PSP responded to Bench Request No. 7 on December 23, 2021. PSP also filed a Response to the Commission's Notice of Intent to Amend Final Order on January 14, 2022. We thus find that PSP was neither prejudiced nor deprived of due process.

15 In order to ensure full compliance with Commission rules, however, we have accepted PSP's Petition for Reconsideration, provided the parties an opportunity to respond to PSP's Petition, and revisited our findings in Order 13.

16 **Exemption from WAC 480-07-850(3).** Because we are accepting PSP's Petition for consideration following an order granting reconsideration, we must grant PSP an exemption from Commission rules. Pursuant to WAC 480-07-850(3), no party may petition for reconsideration of an order on reconsideration. PSP would normally be barred from filing a petition for reconsideration of Order 13.

17 We find it appropriate and consistent with the public interest to grant PSP an exemption from this rule. 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." As we have observed, PSP was not provided a specific opportunity to respond to TOTE's

² Accord WAC 480-07-875(1).

February 11, 2022, Motion for Clarification prior to the entry of Order 13. While we do not believe that this oversight caused PSP any prejudice, we accept PSP's Petition for Reconsideration and grant it an exemption from Commission rules to ensure that PSP has another opportunity to be heard.

18 **PSP's requested amendment of Order 12.** PSP argues that the Commission should reverse Order 13 and revert to the prospective deferral requirement set forth in the original Order 12. In the alternative, PSP argues that the Commission should amend Order 13 to require PSP to defer the incremental difference in revenue from a date no earlier than January 14, 2022, onwards. We find these arguments unpersuasive.

19 We first address the legal implications of PSP's Petition and TOTE's Response. PSP objects to the "retroactive deferral" requirement established by Order 13,³ while TOTE counters that the Commission has approved retroactive deferrals in the past.⁴ Although we agree with TOTE that Order 13 is consistent with past Commission decisions approving deferred accounting petitions, our discussion begins instead with the Commission's authority to correct past orders.

20 The Commission has broad authority to correct past orders, such as this one, that are based on incorrect information or have unintended results. By statute, the Commission has authority to change earlier orders,⁵ to grant rehearing to address effects not contemplated by the Commission,⁶ to order refunds of overcharges,⁷ and to order reparations for past excess charges.⁸ Even when a rate setting authority does not have power to enter reparation orders, as the Commission does, the Supreme Court has held that the "agency, like a court, can undo what is wrongfully done by virtue of its order."⁹

21 Our remedy in Order 12, as amended by Order 13, seeks to address the consequences of relying on PSP's incorrect workpapers and exhibits submitted in the organization's first general rate case before the Commission. In Order 12, we observed that PSP did not

³ E.g., PSP Petition ¶ 16.

⁴ TOTE Response ¶¶ 8-9.

⁵ RCW 81.04.210.

⁶ RCW 81.04.200.

⁷ RCW 81.04.230.

⁸ See RCW 81.04.220.

⁹ *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 228 (1965).

identify or explain any change in its vessel tonnage methodology and that PSP failed to comply with WAC 480-160-120.¹⁰ PSP changed the single most important billing determinate in its tariff, the tonnage charge, without directly addressing this change in its testimony or explaining to the Commission that there were at least two ways of calculating a tonnage charge. We also observed that PSP provided the Commission with incorrect workpapers and exhibits, which “substantially interfered with the Commission’s ability to evaluate PSP’s proposed rate design.”¹¹ The Commission has broad authority to fashion a remedy to address the results of approving a change to the tonnage calculation, which caused unintended results, and the results of relying on this incorrect data, which failed to explain the impact of the new tonnage calculation. The Commission’s authority to correct its past orders is not contingent upon TOTE specifically requesting a refund or a deferral of past collected amounts.¹² Under the circumstances, the Commission would have been well within its authority to require PSP to defer the incremental difference in revenue from TOTE vessels from the date of Order 09 forward.

- 22 Setting these considerations aside for a moment, we also agree with TOTE that the Commission’s remedy in Order 13 is consistent with past Commission decisions approving deferred accounting petitions. As a general matter, the Commission sets rates on a prospective basis. The Commission will decline to adjust future rates to reflect past losses or profits:

The retroactive ratemaking concept is a set of principles that are corollaries to the filed rate doctrine. Put simply, when a regulatory authority approves rates for prospective application that provide for the recovery of costs incurred but not recovered through rates that were effective during the period of cost incurrence, such rates may be susceptible to a challenge that they violate prohibitions against retroactive ratemaking. In like fashion, if a utility avoids costs that are embedded in currently effective rates, and the regulatory authority establishes prospective

¹⁰ Order 12 ¶ 22.

¹¹ *Id.* ¶ 23.

¹² Regardless, the Commission at the very least had the authority to require deferral beginning as of the date of TOTE’s August 26, 2021, Petition. TOTE specifically argued that PSP should not profit from the “false data” it submitted to the Commission. TOTE’s August 26, 2021 Petition ¶ 54. Even though TOTE did not specifically request a deferral, TOTE identified the incorrect data submitted to the Commission and argued that PSP should not profit from it.

rates that are adjusted to reflect the costs avoided during the prior period, that, too, may be susceptible to a retroactive ratemaking challenge.¹³

23 These principles are intended to protect ratepayers. Otherwise, a ratepayer would not have an opportunity prior to receiving the service to learn what the rate is or to participate in a rate setting proceeding.¹⁴

24 Yet there are “equally well-established” exceptions to the prohibition on retroactive ratemaking.¹⁵ The Commission may, for example, require the use of deferred accounting to track costs incurred by a regulated company. This is “not considered a violation of the prohibition against retroactive ratemaking, but instead is recognized as a shift in the timing of the collection of the expense.”¹⁶ The Commission has therefore approved deferral accounting beginning on the date such authority was requested by a company.¹⁷

25 In Order 13, we amended Order 12 to require PSP to defer the incremental difference in revenue at issue from the date of TOTE’s August Petition forwards. We observed that “allowing TOTE to seek relief from the date its Petition was filed produces a more equitable result by preserving TOTE’s claim for relief from the date that it first asserted its interest and challenged the rates in PSP’s tariff.”¹⁸ Our finding was consistent with past Commission decisions concerning deferred accounting. Although TOTE did not specifically request deferred accounting treatment, TOTE argued that the tariff should be amended and that PSP “should not be allowed to profit by its submission to the Commission of false data.”¹⁹ It is clear that from the date of TOTE’s August Petition forward, the parties were litigating how to treat the incremental difference in revenue that arose from billing TOTE’s two vessels on the basis of IGT rather than GRT. It is not

¹³ *In re the Petition of PacifiCorp d/b/a Pacific Power & Light Company*, Docket UE-020417 Third Suppl. Order ¶ 23 (September 27, 2002).

¹⁴ *WUTC v. U S WEST Communications, Inc.*, Docket No. UT-970010, Second Supp. Order at 10 (November 7, 1997) (“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.”).

¹⁵ *In re the Petition of PacifiCorp d/b/a Pacific Power & Light Company*, Docket UE-020417 Third Suppl. Order ¶ 24 (September 27, 2002).

¹⁶ *Id.*

¹⁷ *Id.* ¶¶ 25-26.

¹⁸ Order 13 ¶ 20.

¹⁹ TOTE’s August 26, 2021, Petition ¶¶ 53-54.

credible for PSP to argue that the Commission’s order requiring deferred accounting was a surprise when TOTE sought prospective relief from the date of its August Petition forward.²⁰

26 Thus, the Commission was well within its authority to fashion this remedy. Ordering deferred accounting treatment from August 26, 2021, forward was consistent with past decisions approving deferred accounting petitions, and it did not violate any prohibition against retroactive ratemaking.

27 We next turn to PSP’s arguments that Order 13 was inequitable. These arguments fail under closer scrutiny.

28 PSP was aware that that it submitted incorrect evidence to the Commission shortly after Order 09 was issued on November 25, 2020. Captain Ivan Carlson notes that “[s]oon after the Commission entered Order 09,” he assisted with PSP’s compliance filing.²¹ Captain Carlson discovered that PSP had submitted incorrect information for TOTE’s vessels, the *Midnight Sun* and *North Star*, and discussed the issue with Commission Staff.²²

29 As we observed in Order 12, 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*.”²³ Nonetheless, PSP did not notify the Commission itself of this issue, and the Commission allowed the revised tariffs to take effect on January 22, 2021.

30 PSP acknowledges that it discussed billing disputes with TOTE over the following months. PSP describes TOTE attempting to “short-pay” PSP invoices shortly after the Commission tariff became effective.²⁴ Captain Carlson then discussed the issue with

²⁰ See PSP’s Petition ¶ 22 (arguing that PSP had “no reason to anticipate” that TOTE’s August 26, 2021 would require the refund of revenues collected).

²¹ PSP’s Response to TOTE’s Petition (October 15, 2021), Exhibit IC-1 Declaration of Capt. Ivan Carlson ¶ 4.

²² *Id.* ¶¶ 4-14.

²³ *Id.* ¶ 25 (emphasis added).

²⁴ PSP Response to TOTE Petition ¶ 17 (October 15, 2021). See also PSP Response to TOTE Petition (October 15, 2021), Exhibit IC-1 Declaration of Captain Ivan Carlson ¶¶ 16-17.

TOTE in March 2021.²⁵ The dispute remained unresolved between the parties for several months, and TOTE filed its Petition for Reconsideration in August of that same year.

31 PSP now argues that Order 13 is inequitable. PSP complains in its Petition that it has distributed revenue among pilots for calendar year 2021 and seeks to close out its auditing and tax preparation process. Yet PSP chose to distribute the revenues at issue for TOTE's vessels among its members at the end of each month in 2021.²⁶ PSP continued to distribute these revenues each month when its leadership had full knowledge that (1) by January 2021, the Commission relied on incorrect evidence pertaining to TOTE's vessels in Order 09; (2) by March 2021, TOTE disputed the change in vessel tonnage methodology; and (3) by August 2021, that TOTE petitioned the Commission for relief on a prospective basis.

32 Despite this ongoing litigation, PSP continued to distribute the incremental difference in revenue for the two TOTE vessels at issue to its members. PSP may not have appropriately planned, either, for how to reflect the ongoing dispute over TOTE's 2021 invoices in its financial statements.²⁷

33 When we consider these facts, PSP's proposed remedy appears unreasonable and unjust. PSP suggests that the Commission require it to defer revenues as of the date Order 12 was issued, on February 2, 2022, or failing that, January 14, 2022. This would be months after TOTE petitioned the Commission for relief, and *more than a year* after PSP learned that it submitted incorrect evidence for TOTE's vessels to the Commission. This would only serve to insulate PSP from its choices to distribute revenue in the face of ongoing litigation. It would allow PSP to profit from the incorrect evidence it submitted to the Commission for a full calendar year.

34 Therefore, we have considered PSP's Petition, but it does not change our decision in Order 13. The most just and reasonable result is to order deferred accounting from the date of TOTE's August 26, 2021, Petition forward.

²⁵ PSP Response to TOTE Petition (October 15, 2021), Exhibit IC-1 Declaration of Captain Ivan Carlson ¶ 17

²⁶ See PSP's Petition ¶ 26.

²⁷ See PSP's Petition, Declaration of Mark Hale ¶ 7 (stating that recalculating 2021 distributions to member pilots would "disrupt PSP's accounting process and create significant added expense" and that Order 13 would "substantially delay PSP's ability to prepare its 2021 financial statements and complete its audit and tax returns.").

ORDER

35 **THE COMMISSION ORDERS THAT Puget Sound Pilot's Petition is DENIED.**

Dated at Lacey, Washington, and effective April 11, 2022.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chair

ANN E. RENDAHL, Commissioner