Exh. CLD-01T
Witness: Clayton L. Diamond

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, **Complainant,** **v.** **PUGET SOUND PILOTS,** **Respondent.**	**Docket TP-**

TESTIMONY OF

CLAYTON L. DIAMOND

ON BEHALF OF PUGET SOUND PILOTS

JUNE 29, 2022

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TABLE OF CONTENTS

EXHIBIT LIST		
Exhibit No.	**Description**	**Page Referenced**
CLD-02	Biography of Clayton L. Diamond	2
CLD-03	American Pilot Association List of Pilot Groups	5

I. INTRODUCTION

Q: Please state your name, education background, occupation and work address.

A: My name is Clayton L. Diamond. I graduated from the U.S. Coast Guard Academy with a bachelor's degree. I also received a master's degree from Rensselaer Polytechnic Institute and a Juris Doctor from Case Western Reserve University School of Law. During law school, I earned the award for "Highest Proficiency in Admiralty Law." In addition, I was a Fellow at the Massachusetts Institute of Technology Center for International Studies. I am an attorney, licensed in Ohio and the District of Columbia, and am a member of the Maritime Law Association of the United States. I am the Executive Director – General Counsel for the American Pilots' Association. My work address is 499 South Capitol St, S.W., Suite 409, Washington, DC 20003.

Q: Please describe the type of work you performed during your career with the U.S. Coast Guard.

A: During my twenty-year Coast Guard career, I attained the rank of Commander. I served aboard three Coast Guard cutters, including as a deck watch officer responsible for conning and navigating the ship, navigator responsible for planning all aspects of the ship's port and ocean transits, and culminating with service as commanding officer, where I was responsible for the safe operation of the vessel, training of the crew and execution of all assigned missions. During my time afloat, I sailed on the Atlantic and Pacific Oceans, the Bering and Caribbean Seas and carried out Coast Guard missions of maritime law enforcement, migrant interdiction and search and rescue. I was also a navigation and leadership instructor at the U.S. Coast Guard Academy.

I also served as a Coast Guard Judge Advocate General (JAG). I was assigned as Principal Assistant Legal Officer and later as Acting Legal Officer for the Ninth Coast Guard District, which encompasses the U.S. Great Lakes and the eight Great Lakes States. In this capacity, I advised the District Commander (a Coast Guard admiral) and unit commanding officers on carrying out all Coast Guard missions. While assigned to the Ninth District, I was appointed a Special Assistant U.S. Attorney for the Northern District of Ohio.

In addition, following the September 11th terrorist attacks, I was the first Coast Guard JAG assigned to support the Department of Defense's (DoD) Military Commissions, where I served as a Special Advisor to the DoD General Counsel and assisted in preparing prosecution cases for terror suspects in U.S. custody.

As a JAG, I also served as Coast Guard Liaison to the U.S. State Department, where I was legal advisor to U.S. delegations attending meetings at the International Maritime Organization (IMO). During this time, I worked on issues related to the international regulation of ship navigation, mariner credentialing, piracy and marine environmental protection.

My final assignment in the Coast Guard was as Legislative Counsel in the Office of Congressional Affairs. In this assignment I was the primary Coast Guard liaison to Congress on matters related to Coast Guard authorization and other legislative issues.

Finally, while a Coast Guard JAG, I also served on the adjunct faculty of the Defense Institute for International Legal Studies where I conducted maritime law seminars for foreign military officers in Asia, Africa, and Europe.

My complete biography is Exhibit CLD-02.

Q: What did you do after retiring from the Coast Guard?

A: Upon retiring from the Coast Guard in 2008, I was hired by the American Pilots' Association to serve as Deputy Director-Associate General Counsel. I served in this position until January 2021, when I was promoted to Executive Director-General Counsel.

Q: Please describe the work and operations of the American Pilots Association.

A: The American Pilots' Association (APA), a non-profit organization, has been the national association of the piloting profession since 1884. All of the more than 1,200 State-licensed pilots working in the coastal ports and approaches of the 24 coastal States in the United States, as well as all of the U.S. registered pilots operating in the Great Lakes system under authorization by the U.S. Coast Guard, belong to APA member pilot groups. These pilots handle well over 90 percent of large ocean-going vessels moving in international trade in the waterways of the United States. Their role and official responsibility is to protect the safety of navigation and the marine environment in the waters for which they are licensed.

APA is recognized by local, state, federal, and international authorities as a national organization with the objective of enhancing maritime piloting standards in the United States and as a leading advocate of navigation safety and marine environmental protection practices. In recognition of the fact that state-licensed pilots are critical to the safe, environmentally responsible, and efficient movement of vessels in and around bays, rivers, harbors, ports and coastal approaches in this country, APA regularly communicates with, and facilitates discussion among, federal, state, and local regulatory authorities and local pilot associations with the aim of continually improving the safety and efficiency of the system.

The APA has formal MOUs with both the U.S. Coast Guard and the National Oceanic and Atmospheric Administration (NOAA).

Q: Please describe the work you do with the American Pilots Association.

A: As APA General Counsel, I represent pilots and the piloting profession before the U.S. Congress, federal agencies, and State and local legislative and administrative bodies. I also advise pilot groups and pilotage authorities on operations, practices, business structures, and oversight of pilots and pilotage systems. I also advise individual pilots on federal credentialing matters, including issues related to federal first class pilot endorsements. In addition, I serve as a private sector advisor and subject matter expert on U.S. Delegations to the International Maritime Organization. As Executive Director, I am the APA's chief operating officer and am responsible for managing APA's budget, staff, office operations, membership services, and all other administrative activities.

Q: Based on your education, background and experience would you consider yourself an expert in pilotage law and regulation, pilot group operations, pilot training, and piloting practices?

A: Yes, I would.

Q: How many groups of maritime pilots in the U.S. are members of the APA?

A: The APA consists of 50 groups or associations of maritime pilots, which, as mentioned above, includes State-licensed pilots and U.S.-registered Great Lakes pilots.

Q: How many State-licensed pilots are members of APA-affiliated pilot groups in the U.S.? What percentage of licensed maritime pilots in the U.S. does this represent?

A: There are approximately 1,200 pilots in APA-member pilot groups. The only significant groups of pilots in the U.S. that are not members of the APA are the Los Angeles Pilots and the Jacobsen Pilots in Long Beach. While the APA maintains cooperative relationships with these two pilot groups, because neither group is comprised of state-licensed pilots, they are ineligible for APA membership. The Los Angeles Pilots are municipal employees of the port, and the Jacobsen Pilots in Long Beach are employees or shareholders of a private company, Jacobsen Pilot Service, Inc., which holds an exclusive franchise from the port to provide pilotage services. A list of APA member pilot groups and the two significant non-member groups referenced above is Exhibit CLD-03. This list also provides a number of pilots in each group as of March 2022

II. HISTORY OF STATE PILOTAGE SYSTEM

Q: Please provide a brief history of the state pilotage system in the US.

A: The central feature of pilotage regulation in the U.S. is that States, not the federal government, play the central role. This system of State primacy reflects a judgment made by the first U.S. Congress that pilotage is best regulated at the State or local level. The legislation putting this judgment into effect, the Lighthouse Act of 1789, has been reaffirmed by Congress and courts many times in the intervening two plus centuries. The U.S. Supreme Court declared that Congress' decisions with respect to pilotage oversight as demonstrated by the Lighthouse Act "leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and

experience, and conformed to local wants." As a result of this Act, the U.S. system is principally a "State Pilot System", with States being primarily responsible for oversight of pilotage. The legislative direction of the Lighthouse Act of 1789 and the current statutory framework for pilotage in the U.S. is set out in Title 46, Chapter 85 of the U.S. Code.

For a complete review of the history and development of the pilotage system in the U.S., I would refer you to a law review article I co-authored. See Paul Kirchner and Clayton Diamond, *Unique Institutions, Indispensible Cogs, and Hoary Figures: Understanding Pilotage Regulation in the United States*, 23 U.S.F. Mar. L.J. 168 (2011).

Q: How many states have adopted pilotage statutes?

A: Each of the twenty-four (24) coastal States have adopted pilotage statutes. In addition, since it was not feasible (and probably not legally possible due to the unique maritime setting of the Great Lakes where the internal waters of Canada and the U.S. abut) for each individual Great Lakes State to impose its own State regulated pilotage system on the Great Lakes, Congress adopted a compulsory pilotage statute for the U.S. waters of the Great Lakes. This federal statute, originally adopted as the Great Lakes Pilotage Act of 1960 and now codified in title 46 of the U.S. Code, Chapter 93, incorporated key elements of state pilotage statutes and was intentionally patterned after the State pilotage systems around the country.[1]

1."A basic pattern similar to that of State pilotage systems…has been followed in provisions of the bill for the creation of a pool or pools by a voluntary association or associations of U.S. registered pilots to provide arrangements and facilities necessary for the efficient dispatching of vessels and the rendering of pilotage services required by the bill." *Great Lakes Pilotage Act: Hearing on S. 3019 Before the S. Merchant Marine and Fisheries Subcomm. of the Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. (1960) (Statement of Ivan B. White, Deputy Assistant Secretary of State).

Q: Is pilotage compulsory in those 24 coastal states?

A: Yes. While the coastal State pilotage laws use varying statutory language (e.g., take, employ, engage, or use a pilot; be conducted, controlled, or navigated by a pilot; be under the direction and control of a pilot; etc.), each coastal State has made its pilotage compulsory. This is often referred to as "State compulsory pilotage." Washington State pilotage statutes use the phrase "shall employ a pilot" to impose its compulsory pilotage requirement.

Q: How would you describe the purpose of the State Pilot System in the U.S.?

A: The purpose of the State Pilot System is to put in place the best qualified and trained people with the necessary equipment and infrastructure to provide and maintain the highest quality 24/7/365 nondiscriminatory pilotage service to protect the States' waterways and marine environment and ensure the safe and efficient movement of maritime commerce. The most important component of the State Pilot System is the State laws that compel vessels to take a State-licensed pilot and identify the specific vessels to which the "compulsory pilotage" requirement applies. Other components of the State Pilot System are in place to support the compulsory pilotage requirement.

It is also important to point out that by requiring a vessel to take a State-licensed pilot, the State is impliedly assuring that the vessel will receive a fully trained and properly equipped pilot who possess superior skill and experience, and that the public's paramount interests in protecting the marine environment will be served. This is an important responsibility that States cannot take lightly.

Q: What types of vessels are required to take a State-licensed pilot in State pilotage waters?

A: Pilotage of international trade vessels in the U.S. (i.e., non-U.S. flag vessels entering/departing U.S. ports, or U.S. flag vessels sailing to/from a non-U.S. port), which accounts for more than 90% of all large ocean-going traffic moving in U.S. waters, is governed by the 24 U.S. coastal States through comprehensive pilotage regulation systems. While in State pilotage waters, these vessels are required to be under the direction and control of a State-licensed pilot.

Q: With respect to maritime transportation in the U.S. and throughout the world, what role do pilots play?

A: The "role of the pilot" is a very important issue to the APA. In 1997, the Board of Trustees of the APA adopted the following as the official statement of the piloting profession on the role of the compulsory State pilot and the relationship between the pilot and the master and bridge crew of a vessel. This statement has guided the profession and pilotage regulators ever since. Below is the full text of this APA statement:

> Navigation of a vessel in U.S. pilotage waters is considered to be a shared responsibility between the pilot and the master/bridge crew. The compulsory state pilot directs the navigation of the vessel subject to the master's overall command of the vessel and the ultimate responsibility for its safety. The master has the right, and in fact the duty, to intervene or to displace the pilot in circumstances where the pilot is manifestly incompetent or incapacitated or the vessel is in immediate danger ("in extremis") due to the pilot's actions. With that limited exception, international law requires the master and/or the officer in charge of the watch to "cooperate closely with the pilot and maintain an accurate check on the ship's position and movement."
>
> State-licensed pilots are expected to act in the public interest and to maintain a professional judgment that is independent of any desires that do not comport with the needs of maritime safety. In addition, licensing and regulatory

> authorities, state and federal, require compulsory pilots to take all reasonable actions to prevent ships under their navigational control from engaging in unsafe operations. Because of these duties, a compulsory state pilot in the U.S. is not considered a member of the "bridge team." Nevertheless, a pilot is expected to develop and maintain a cooperative, mutually supportive working relationship with the master and the bridge crew in recognition of the respective responsibility of each for safe navigation.

This statement was the product of an APA-sponsored effort – an effort that included consultation with, and input from, representatives of shipmasters and ship owners and operators, maritime lawyers, navigation safety and human factor experts, and officials of the U.S. Coast Guard, the National Transportation Safety Board, the Federal Maritime Commission and State pilotage authorities.

The objective of this effort was to develop a concise description of the pilot's role and the relationship of the pilot and the master that would accurately reflect both: (1) what actually happens on the bridge of a ship in pilotage waters, and (2) U.S. pilotage law on the subject. The statement has been used in the training of State pilots; it has been cited with approval on many occasions by State pilotage authorities, the Coast Guard, and the National Transportation Safety Board. The statement is well-known throughout the maritime industry and confirms the high expectations and heavy responsibilities placed upon State-licensed pilots.

Q: How would you characterize the challenges of serving as a maritime pilot?

A: Being a pilot presents immense personal and professional challenges. It can take years, even decades, to become a fully licensed State pilot. This initially involves serving aboard merchant ships or tugboats for long stretches of time, often away from home and family, just to earn the merchant mariner credentials necessary to compete for the chance to

be selected to serve as a pilot apprentice. Once accepted to an apprentice or training program, the individual can spend years serving as an apprentice pilot before receiving a full State pilot license.

After earning his or her state pilot license, every time a pilot reports to a ship to go to work he or she knows a single moment of inattentiveness could have devastating consequences. Because pilots are correctly considered to be at the top of the mariner profession, they are correspondingly held to a higher standard than other mariners. The highest standard, in fact. Pilots understand this and know that one incorrect – or even suboptimal – decision during a piloting assignment could lead to a potentially catastrophic vessel casualty with loss of life, damage to the marine environment and/or hundreds of millions of dollars in damages. Pilots are fully aware that such a casualty could spell the end of their career, state disciplinary and license actions, federal and state civil penalties, uninsurable damages claims in civil suits, criminal charges, and ruinous legal fees.

Admiral Brian Salerno, a retired U.S. Coast Guard officer who was responsible for overseeing the service's marine and navigation safety missions and current official with the Cruise Lines International Association (the largest cruise industry trade association), while in the Coast Guard, described pilots as follows:

> Each day, pilots are asked to take all sizes and types of vessels through narrow channels in congested waters where one miscalculation could mean disaster. They are trained, highly professional individuals, whose judgments must be spot-on for the hundreds of decisions they must make at every turn to bring a vessel safely to its berth or out to sea.

Paul G. Kirchner, *A Career as a Ship Pilot*, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, THE COAST GUARD JOURNAL OF SAFETY & SECURITY AT SEA, Fall 2008, at 9.

A pilot's life is also not convenient. A pilot can be dispatched to a ship on any day, at any time, and in any weather condition. Pilots work irregular hours and on weekends, holidays, and family occasions. Unlike so many people today, pilots don't have the option to "work from home."

A career as a pilot is not just challenging and inconvenient, it can also be dangerous. Many who are not in and around the profession on a regular basis don't always appreciate the serious physical risks associated with piloting. In the United States eight pilots and a ninth person — a pilot boat operator — have died during pilotage operations in the past sixteen years. Pilots are also killed in the line of duty with alarming regularity all over around the world. While those of us in positions of responsibility in the piloting community, and those – like this commission, with a degree of regulatory oversight – must do everything we possibly can to ensure the best equipment and safety precautions are in place, the simple fact is piloting is a dangerous profession.

Q: Within the realm of maritime law, has the US Supreme Court weighed in on the safety function of pilotage service in the US?

A: Yes. In one example, the U.S. Supreme Court has described a pilot's services as follows:

> In order to avoid invisible hazards, vessels approaching and leaving ports must be conducted from and to open waters by persons intimately familiar with the local waters. The pilot's job generally requires that he go outside the harbor's entrance in a small boat to meet incoming ships, board them and direct their course from open water to the port. The same service is performed for vessels leaving the port. Pilots are thus indispensable cogs in the transportation system of every maritime economy. Their work prevents traffic congestion and accidents which would impair navigation in and to the ports. It affects the safety of lives and cargo, the cost and time expended in port calls, and, in some measure, the competitive attractiveness of particular ports.

Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 at 557-8.

Q: Is there any federal regulation of maritime pilots in the US?

A: Yes, while the 24 coastal states have the preeminent role in the regulation of pilotage in the U.S., in more than 230 years since passage of the Lighthouse Act of 1789, Congress has carved out a limited role for the federal government with respect to pilotage. Federal pilotage regulations, administered by the U.S. Coast Guard, apply only to certain U.S. flag vessels sailing between ports or places in the U.S. This small segment of shipping in the U.S. is required to be under the direction and control of an individual with a Coast Guard-issued first class pilot endorsement (FCPE).

In addition, as already discussed, due to impracticability and legal issues, the federal government (U.S. Coast Guard), not the applicable states, regulates pilotage on the Great Lakes.

Q: Please describe the role of the U.S. Coast Guard and pilotage regulation in the U.S.

A: As discussed above, the federal pilotage requirements administered by the U.S. Coast Guard apply directly only to individuals holding a FCPE and serving the relatively small number of U.S.-flag coastwise seagoing vessels operating in the domestic maritime trade. Unlike the comprehensive oversight of state pilotage, where state authorities not only license pilots and oversee their professional activities (including training and continuing education), but also strive to ensure that each port in the state has a reliable, expert pilotage operation, and that all vessels that require a pilot will be provided – without delay or discrimination – a

trained, competent, fully-prepared, and well-rested pilot, the federal regulations on pilotage are limited. Federal statutes and regulations[2] do set out rudimentary requirements for a FCPE (i.e., minimum age of 21, annual physical examination, proficiency with electronic navigation, experience aboard a vessel in some capacity (including as an "observer"), small number of trips of the pilotage area,[3] one-time written examination, sketch of the pilotage area, etc.), but a FCPE may be issued to an individual who has had no prior training as a pilot and who has not demonstrated any piloting or even basic conning skills.

Q: Can you summarize the overlap between the state and federal pilotage systems?

A: As a matter of state law, regulation or policy, all state-licensed pilots in the U.S. must also hold FCPEs. This not only authorizes state-licensed pilots to pilot U.S. flagged coastwise vessels, but also serves an additional purpose. While state training, certification, and recency standards are far more stringent than any federal requirements, the FCPE does provide some benefit in that it serves as a national *minimum* standard. Obtaining a FCPE is either an entry level requirement for acceptance into a state pilot training/apprenticeship program, or obtaining the FCPE is one of the many requirements that must be met during these multi-year training programs. As a result, state-licensed pilots are subject not only to state licensing regulations, but also federal regulations. In addition to professional requirements, due to the critical role State-licensed pilots play in maintaining navigation

[2] Specifically, Title 46, Chapter 71 of the U.S. Code (USC) and Title 46, Part 11 of the Code of Federal Regulations (CFR).

[3] In order to obtain a FCPE, the Coast Guard requires the applicant to make between 12-20 roundtrips of the pilotage area (46 C.F.R. § 11.705). Under the various state training and certification requirements, apprentice or trainee pilots are only certified for licensure after undergoing apprenticeships and extended periods of route specific training, which can include hundreds or even thousands of roundtrips of the pilotage area, under the guidance of experienced pilots. This hands-on training is supplemented with classroom and simulator instruction.

safety and marine environmental protection, pilots are also subject to stringent medical review and fitness standards. Medical fitness requirements are imposed at both the federal and state level.

In the U.S., federal law requires holders of FCPEs to undergo an annual physical examination so that the Coast Guard can decide as to whether the individual is medically fit.[4] Since state pilots also hold FCPEs, the federal medical fitness standards apply. The coastal states have taken varied approaches to the medical fitness issue. Since state-licensed pilots, as holders of FCPEs, must participate in the Coast Guard's medical fitness program, some states accept this medical fitness certification for State licensing purposes. Other states accept the Coast Guard's medical fitness determination but impose their own requirements in addition to federal standards. There are also states that, while acknowledging the federal medical standards, have state medical standards that are wholly separate from any federal requirements. The combination of Coast Guard and state medical fitness requirements ensure that state-licensed pilots are subject to the most stringent physical and medical "fit for duty" standards in the U.S. maritime industry.

III. REGULATION OF US PILOT GROUPS.

Q: Does the American Pilots Association maintain a list of APA-member pilot groups in the U.S. and the number of licensed pilots in each group?

A: Yes we do. See Exhibit CLD-03.

[4] 46 U.S.C. § 7101(e)(3) and 46 CFR § 11.709.

Q: Looking at Exhibit CLD-03, how many licensed pilots are there in the US?

A: There are approximately 1,200 pilots in APA-member groups. I should point out that this number varies slightly from month to month as pilots retire and new trainee pilots earn their State pilot licenses. However, 1,200 is a figure that we generally use when asked for the number of pilots in APA-member pilot groups.

Q: From Exhibit CLD-03, it appears that there is one pilot group per waterway/pilotage district in the U.S. Is that the case and, if so, what is the historical approach to organizing a pilot organization in the U.S.?

A: Yes, this is the case throughout the country. Although the typical state pilot is considered a self-employed professional, pilots around the country are organized into local pilot associations. As explained in more detail below, local associations play a vital role in ensuring safe and efficient pilotage for a given port or waterway.

Despite the clear advantages of pilot associations, there was a time when state pilots did not work together. Throughout much of the 1800s, pilots in the U.S. actively worked against each other, focusing on their individual business interests rather than on the overall quality and reliability of pilotage in their port. During this time, "the piloting profession in America was a free-for-all, hit or miss affair and hundreds of pilots were independent free lancers…." *See* Roger Clancy, *Ships, Ports, and Pilots: A History of the Piloting Profession*, at 57 (1984).

Pilots – or sometimes individuals with little training and poor equipment who called themselves pilots – would literally race one another far out to sea and offer approaching ships their pilotage services. This period was aptly characterized as the "mad race to the sea," and

saw independent pilots working under the "grudgingly implied understanding that the first one to get to a ship and climb aboard was entitled to the job of guiding her in…." *Id*. at 57. It was a dangerous reality during this era that "anyone could sail out from the harbor; accost an incoming vessel and, claiming the requisite skill and knowledge, be hired to bring the vessel into port." *Interport Pilots Agency, et al. v. New Jersey Board of Commissioners of Pilots*, No. Mon-C-385-91 (N.J. Super. Ct. Ch. Div. April 16, 1997), at 11.

This intense competition to be the first to "speak"[5] a vessel led many pilots and those who crewed pilot boats to take unnecessary risks and fall victim to the stormy seas. This uncoordinated competitive environment not only placed pilots and pilot boat crews in peril, but also negatively impacted both the quality and reliability of pilotage.

Because the person who managed to "speak" the vessel first generally got the pilot job, regardless of qualifications, "very often, ships and their cargoes and passengers were placed in jeopardy" and "[g]roundings, delays, ship damage, cargo losses, lawsuits, criminal actions, and even bad collisions and loss of life were prevalent." Clancy, *supra*, 57-58. Also, since pilots were competing for business and income, larger ships and ships carrying more valuable cargo (both of which commanded a higher pilotage fee) would naturally garner most of the attention from pilots, who were engaged in an intense battle for pilotage fees. Smaller ships or those carrying cargo of lesser value, which were still dependent on local pilot expertise to get safely into and out of port, would often be left wanting for pilotage services.

[5] To "speak" a vessel refers to the offer by a pilot to provide his or her pilotage services. *See*, *The Mascotte*, 39 F. 871 (S.D. Fla. 1889).

According to a 1942 report by the U.S. Coast Guard, this "cut-throat competition" on the part of individual pilots proved to be "unprofitable, wasteful, unsafe, and inefficient."[6] This uncoordinated, chaotic, and unsafe piloting system was also described as follows:

> During much of the 19th century, individual pilots were struggling against each other in a mad race at sea to gain the first incoming ship. Certainly, no one could fail to sympathize with those who lost the senseless race with miles of travel at sea expended for naught and with loss of time, effort and capital. More important, however, was the effect of such a practice upon the service itself. In many instances, individual pilots raced together for one ship while other ships, trying to ride out the storms and inclement weather, signaled frantically for a pilot, but to no avail. Many a good vessel faced disaster off our harbors while vainly signaling for a pilot.

Ernest A. Clothier, *State Pilots in America: Historical Outline with European Background*, at 29 (2d. ed. 1979).

Fortunately, this situation did not last. A positive change to how pilots operated began to take place in the early 1880s "through the formation and development of pilot associations, regulated under law." Clancy, *supra*, at 59. The introduction of pilot associations not only enhanced the reliability and quality of pilotage and increased critical support and but also dramatically improved business efficiencies, but pilot associations also played a large role in improving the training of pilots. The pilot association "took on the form of a guild to provide training for new members"[7] that generally included lengthy apprenticeships. These local pilot associations, "working together with governing authorities, helped meld together a unified program of piloting activities under government regulation." Clancy, *supra*, at 58.

[6] *Id*. at 7.
[7] *Id*. at 11-12.

Maritime business interests supported this movement toward the formation of local pilot associations. The 1942 U.S. Coast Guard report recounted:

> It appears that the shipping interests, as well as the insurance and other commercial interests of the ports encouraged the pilots in the formation of these associations since it was apparent to them that better organization of pilotage…would serve to expedite the movement of shipping and to make it safer.[8]

Similarly, a study by the U.S. Department of Commerce also found that shipping, port, and insurance interests encouraged the pilots to form into local associations:

> The advantages of a well-organized pilotage system were as apparent to these interests as to the pilots themselves, for the commerce of the port was not only facilitated and expedited but made much safer by reason of the better organization of the pilot system.[9]

Because pilots had considerable incentive to join together into associations and this movement was widely supported by all aspects of the shipping industry, associations continued to develop throughout the 19th and 20th centuries.

Q: What are the historic functions of a pilot group in the United States?

A: Piloting is a professional service provided by an individual and, as I previously noted, the typical State pilot is considered a self-employed professional. As discussed above, however, State-licensed pilots in ports around the country are organized into local pilot associations. Local associations play a vital role in ensuring safe and efficient pilotage for a given port. Collectively, associations are key to the effectiveness of the state compulsory pilotage system nation-wide. A modern, safe, efficient, and reliable pilotage operation

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[8] *A Report on Pilotage in the United States*, by the Commandant, U.S. Coast Guard, November 1942, at 7-8

[9] Grosvenor M. Jones, *Pilotage in the United States*, Department of Commerce Special Agents Series No. 136, pp. 28 and 29. 1917, Washington, DC Government Printing Office.

requires such things as pilot boats/crews, dispatchers, administrative support, training programs, radios, safety gear and sophisticated electronic navigation equipment. Through the association, the pilots share the significant overhead costs and administrative burdens of a modern pilotage operation, achieving economies of scale and enhancing efficiency and reliability.

Associations facilitate essential joint activities such as administering the pilot rotation and dispatch systems; conducting, evaluating, and improving pilot training; identifying the best use of navigation technology (both existing and emerging); ensuring the safety and efficiency of pilot boat operations; assisting in the coordination of harbor traffic, and carrying out the myriad administrative and accounting functions and support services necessary for a modern, efficient pilotage operation.

Also, a fundamental and common principle in the various comprehensive pilotage regulatory and oversight systems put in place by the coastal states in the U.S. is to ensure that each ship that requires a pilot – regardless of its size, type, or cargo – receives a trained, competent, properly equipped, and well-rested pilot without delay. Pilot associations are key to meeting those responsibilities.

Q: Has this approach to organizing the business of a pilot group been addressed by the U.S. Supreme Court?

A: Yes, it has. *Guy v. Donald*, 203 U.S. 399 (1906), is perhaps the most well-known U.S. Supreme Court decision in pilotage law and certainly the one most important to pilotage operations today. As discussed more fully below, the rule of pilot association immunity from vicarious liability established by the Court in *Guy* has played a pivotal role in the

development of the modern pilotage system in the United States, as well as the formation of single pilot associations for each major port, waterway or pilotage district. It continues today to be a central feature of pilotage in this country. In the 116 years since the decision, the *Guy* rule has been repeatedly upheld and broadly applied.

Guy involved a ship piloted by a Virginia pilot that collided with another vessel. After paying damages to the other ship, the owner of the piloted ship sought to hold the Virginia Pilot Association and its members liable for his payment of damages. In deciding this case, the Court used as its test the general agency principle that one person cannot be made to answer for the torts of another if "he could not select, could not control, and could not discharge the guilty man."

Applying that test, the Court found: "So far as appears, the Virginia Pilot Association had no one of the three powers which we have mentioned." *Id*. at 407. The Court concluded that the Virginia Pilot Association could not be held liable for the pilot's alleged negligence.

The *Guy v. Donald* decision created what is now recognized in U.S. maritime law as an unambiguous rule of pilot association immunity from vicarious liability for negligence in the performance of piloting services by one its member pilots. Since *Guy*, there has been "an unbroken line of authorities" that supports the maritime law principle that "a pilots' association and its other members are not responsible for any faults by a member rendering pilotage service." *Liv General v. Pilots' Association for Bay & River Delaware*, 254 F. Supp. 447, 450 (D. Del. 1966).

While federal courts have unanimously applied the clear holding of *Guy*, these courts have also taken a broad view of the holding by focusing – in some cases, exclusively – on the personal, independent nature of a pilot's work and the resultant fact that an association does

not direct or control the way a pilot carries out the actual duties of piloting a vessel. Taking note of the image painted by the Supreme Court of the futility of assembled pilot association members shouting through a "speaking trumpet," courts since 1906 have recognized and emphasized the plain fact that when a ship takes a compulsory pilot, it is taking "a man, not an association." *The Manchioneal*, 243 F. 801, 807 (2d Cir. 1917).

In summary, the meaning of *Guy*, as it has been applied by courts over the past century, is clear. Irrespective of how a pilot association opts to organize itself under the laws of its State, or if the association exercises some control in choosing, training, or assigning pilots, neither a pilot association nor its member pilots are liable for the negligence of another member pilot. This is so because of the independent nature of a pilot's work and the fact that pilot associations have no ability to control the way a pilot carries out his or her duties while aboard a ship. The *Guy* rule is a judicially created broad grant of immunity from vicarious liability for pilot associations and their members in consideration of the unique circumstances of the piloting profession.

The reason the *Guy* decision is so important to the State Pilot System and the development of local pilots' associations is that the movement of large vessels carrying valuable or hazardous cargo within narrow and restricted waterways carries with it serious risk of accident and the potential for substantial damages, including the loss of the lives, damage or loss of cargo, and serious harm to the marine environment. The financial costs of such consequences can be tens of millions if not hundreds of millions of dollars and far exceeds the assets of a typical pilot. It is well settled that "a pilot may be held liable to third parties for damages caused by his negligence" and "may be held liable for damages to the

vessel he was piloting,"[10] and sufficient liability insurance – at the time of *Guy* and now – is either not available at any price or available only at a price that is prohibitive in relation to the fee earned for a pilotage job. For an individual pilot, a protection against ruinous civil damages is a traditional, if unspoken, reluctance of injured parties, including both piloted ships and third parties, to seek damages from the pilot.[11]

Although under the general maritime law pilots may be held liable for their own negligence, suits against pilots have generally not been sought because "the pilot is usually without sufficient financial resources to make it worthwhile to attempt to pursue recovery." Alex L. Parks & Edward V. Cattell, *The Law of Tug, Tow, and Pilotage*, 1011 (3d ed. 1994).[12] If a pilot's association could be held liable for a member's negligence, however, a plaintiff's decision as to whom to sue would be much different. The collective assets of the association – including the assets of each of its members – may well be sufficient to warrant a suit against the association. Without the *Guy* rule, this increased liability exposure would far outweigh the benefits to the individual pilot of joining with others into an association.

Without *Guy*, therefore, it would not have been in the interests of pilots to form into associations. Dangerous competition would have continued, each pilot would have had to provide his or her own pilotage support infrastructure, no economies of scale would have been achieved, little investment in new technology and improved training and operations

[10] *See Gulf Towing Co., Inc. v. Steam Tanker, Amoco*, NY, 648 F. 2d 242 (5th cir. 1981) and *Bethlehem Steel Corp. v. Yates*, 438 F.2d 798 (5th Cir. 1971), respectively.

[11] In addition, for compelling public policy reasons, ten of the 24 coastal States have provisions in their statutes that limit the civil liability of pilots caused by negligence in the performance of piloting services. Washington State is one of these States. *See* WASH. REV. CODE § 88.16.118.

[12] In addition, since the ship itself is responsible for damages or injuries caused by pilot negligence (*see The China v. Walsh*, 74 U.S. (7 Wall.) 53 (1868)), there is little value in the ship pursuing a claim against the pilot and an injured third party can make a claim against the ship.

would have been made, and pilotage very well could have remained, as the U.S. Coast Guard characterized it, "unprofitable, wasteful, unsafe, and inefficient."

Q: In the 24 coastal states with their own pilotage systems, how are pilot groups regulated?

A: Generally, State-licensed pilots in the U.S. are regulated and overseen by a pilot commission – a governmental entity that is part of a State or local governmental agency or a port authority. In Washington State, this body is called the Washington State Board of Pilot Commissioners. In my opinion, a pilot commission is the single most important component of a State system for the regulation of pilotage. Ultimately, the success of such a system will depend upon the performance of the pilot commission. The interests of pilots, the shipping industry, the public and the state are all served by a strong, effective pilot commission.

Pilot commissions vary widely from State to State in their composition, authority and powers, legal status, and other features. Many of the most dissimilar commissions perform equally well. As a result, there is not a consensus on an "ideal" commission or board. In this, as in many aspects of state pilotage, local conditions should dictate, and what works well in some places may not always work as well elsewhere.

While the make-up of pilot commissions varies, most have a divided membership (i.e., no membership category has a plurality) composed of representatives of ship operators, port interests, environmental groups, pilots, government agencies, independent finance experts, and the public. Among other oversight functions, commissions generally administer tests and screening examinations, select/approve individuals for admission to pilot training

programs, oversee the apprenticeship process, issue licenses, set (or recommend) pilotage rate levels, and review/ratify continuing education requirements necessary for recertification.

Q: Do pilotage States limit the number of licenses issued?

A: Yes they do.

Q: Why is that?

A: Every Coastal state limits the number of pilot licenses that it issues.[13] This is a key component of the states' economic regulation of pilotage and a consequence of the determination by the states that the interests of navigation safety are best served by independent, public service pilotage.

Limiting the number of pilot licenses issued also ensures that pilots receive the "right" amount of work. The right amount of work is enough work so that each pilot remains current in his or her experience over a broad range of vessel types, geographic locations, weather conditions, etc. The right amount of work is also not so much work that a pilot will be fatigued. Determining the right amount of work and the number of pilots that should be licensed is an important component of a state's pilotage oversight and rate setting functions.

In some States, the pilot numbers are set in the pilotage rate decision itself. In other States, pilot numbers are set independently based on safety considerations but then used as part of the rate calculations. In any event, in my opinion, the establishment of the number of pilots and the setting of pilot rates are necessarily connected issues and must be dealt with in a coordinated manner.

[13] This violates neither the 14th Amendment nor antitrust laws. Olsen v. Smith, 195 U.S. 332, 344-5 (1904).

Q: Does the U.S. Coast Guard do the same in its regulation of pilots on the Great Lakes?

A: Yes, it does and for the same reasons I outlined above.

Q: In the 24 pilotage states, how are pilotage rates established?

A: Each of the 24 coastal states set and regulate the rates that pilots may charge for their services. In most states pilotage rates are set by the pilot commission or by a subcommittee or panel made up of members of the commission. In one state, rates are set by a special purpose body called a pilotage fee commission. In a small number of States, rates are set by the legislature, and in a few other States proposed rates are determined by the pilot commission but then must be approved by the legislature. In a handful of States, including Washington State, pilotage rates are set by public utility commissions.

Regardless of the rate-setting method, the goal of pilotage rate-setting in the public interest should be to ensure that necessary funding, personnel, resources, training, equipment, and infrastructure are in place to support the highest quality, modern, safe, efficient, and reliable pilotage systems.

Q: In your opinion, what is the purpose of pilotage rate-setting?

A: It is my view that the primary purpose of pilotage rate-setting is to protect the public interest in safeguarding lives, shipping, port facilities and the environment from the consequences of maritime casualties. To ensure a modern, efficient, safe, and reliable compulsory pilotage operation is maintained, the system must be funded to ensure that fully

trained, properly equipped and the most capable pilots are made available to ships 24 hours a day, throughout the year. Although piloting is a personal service provided by a highly trained and experienced individual, pilotage operations are unavoidably capital intensive. The pilot association to which state-licensed pilots belong must have sufficient resources available to maintain the optimal number of pilots on their rolls, robust training programs, modern and safe pilot boats with well-trained crews, communications networks, dispatch services, rotation systems, support services, and increasingly today, sophisticated electronic navigation equipment. Putting in place a rate structure that fully and consistently supports this pilotage system is an investment in navigational safety and environmental protection and is an absolute imperative that will help to dramatically lower the likelihood of a major environmental or marine casualty disaster.

Q: In those states where pilotage rates are set by a commission, are there criteria that are typically considered?

A: Yes.

Q: Can you provide examples of those criteria?

A: Yes, I can. I will provide three examples, one each from the U.S. West Coast, East Coast and Gulf Coast. These examples are both geographically diverse and representative of pilotage rate-setting approaches taken by States in which pilotage rates are set by the pilot commission.

Oregon:

Oregon Board of Maritime Pilots – Chapter 856, Division 30, Ratemaking Procedures

856-030-000

The Board shall for each pilotage ground, establish a rate structure that provides for efficient, economical, and competent pilotage services and fair compensation for pilotage services and expenses:

(1) In determining the number of pilot positions needed and fair compensation for services and expenses, the Board shall consider:

(a) The amount of activity, including number of vessels, number of pilot assignments, size of vessels by gross registered tonnage (GRT), length, and draft;

(b) Any change in the amount of activity since the last rate order;

(c) The public interest in prompt and efficient service;

(d) The professional skills and experience required of a pilot and the difficulty and inconvenience of providing the service, including time necessary to perform the service;

(e) Evidence of compensation for comparable maritime professions, including other state regulated pilotage associations;

(f) Evidence of the economic and market conditions existing both locally and within the region of any pilotage association used for the purpose of comparison;

(g) Total gross and net income for the pilots' group since the last rate order, or as directed by the Board, including sources of income by tariff category; and

(h) Individual amounts paid to pilots since the last rate order, or as directed by the Board, which may be shown as both gross and adjusted gross income, as reported for tax purposes.

(2) For the purposes of subsection (1)(e) above, the Board shall at a minimum consider evidence of the compensation and benefits provided to pilots in pilotage associations serving Puget Sound and San Francisco.

(3) In determining compensation for expenses the Board shall consider evidence of appropriate expenses related to the provision of pilotage services as shown by records of the pilots' group, and verified by an independent audit.

(4) In receiving evidence on any financial or economic issue, the Board or its hearings officer may require parties to submit independently audited or other financial records in order to hold all parties to a comparable standard of proof.

Florida:

Florida Statute, Chapter 310, Sec. 310.151

(3) The committee shall investigate and determine whether the requested rate change will result in fair, just, and reasonable rates of pilotage.

(5)(a) In determining whether the requested rate change will result in fair, just, and reasonable rates, the committee shall give primary consideration to the public interest in promoting and maintaining efficient, reliable, and safe piloting services.

(b) The committee shall also give consideration to the following factors:

1. The public interest in having qualified pilots available to respond promptly to vessels needing their service.

2. A determination of the average net income of pilots in the port, including the value of all benefits derived from service as a pilot. For the purposes of this subparagraph, "net income of pilots" refers to total pilotage fees collected in the port, minus reasonable operating expenses, divided by the number of licensed and active state pilots within the ports.

3. Reasonable operating expenses of pilots.

4. Pilotage rates in other ports.

5. The amount of time each pilot spends on actual piloting duty and the amount of time spent on other essential support services.

6. The prevailing compensation available to individuals in other maritime services of comparable professional skill and standing as that sought in

pilots, it being recognized that in order to attract to the profession of piloting, and to hold the best and most qualified individuals as pilots, the overall compensation accorded pilots should be equal to or greater than that available to such individuals in comparable maritime employment.

7. The impact rate change may have in individual pilot compensation and whether such change will lead to a shortage of licensed state pilots, certificated deputy pilots, or qualified pilot applicants.

8. Projected changes in vessel traffic.

9. Cost of retirement and medical plans.

10. Physical risks inherent in piloting.

11. Special characteristics, dangers, and risks of the particular port.

12. Any other factors the committee deems relevant in determining a just and reasonable rate.

Louisiana:

Louisiana Revised Statutes

TITLE 34 — Navigation and shipping

RS 34:1121 — Pilotage fee commission; composition

PART V. PILOTAGE FEE COMMISSION

§1121. Pilotage Fee Commission; composition

A. The Pilotage Fee Commission shall exist to establish pilotage fees.

§1122. Fees and charges

B.(1) Pilotage fees and rates shall provide for all ordinary and necessary operating and administrative costs and expenses, including but not limited to the cost of, replacement of, and reasonable return on investment of pilot stations, administrative offices, furniture and fixtures, communication equipment and facilities, vessels, launches and other required vehicles of transportation and the expenses of

maintaining and repairing same, other transportation expenses, the expense of maintaining necessary employees, operating materials, consumables and services, pensions, pension plans, hospitalization, disability compensation, taxes and licenses, life insurance, license insurance, trade promotions when requested to participate by industry or any port, required continuing education, legal expense, accounting expense, professional dues, administrative and professional publications, state pilot commissions, state and federal requirements, and fair average annual compensation for a state ship pilot, in comparison to regulated state ship pilotage in other United States ports.

C.(1) In determining such fees and rates, the pilotage fee commission may give due regard to, but shall not be limited to:

(a) Consideration of the length, draft, dimensions, and tonnage of the vessels to be piloted.

(b) The difficulty and inconvenience of the particular service and the skill and additional expertise required to render it.

(c) The public interest in maintaining safe, efficient, and reliable pilotage service.

(d) The piloting time required; the distance traveled of the vessels to be serviced; the travel time required and distance traveled to and from vessels; the method of travel and travel cost required to and from vessels; the time devoted by pilots to making themselves available when needed; the time required to be on station or on call while both on and off station; the length of time duty requires the pilot's absence away from home; the difficulty of the particular service including working conditions; risk factors of the route; inconvenience and living conditions; the skill and additional expertise required to render the particular service; the length of the training, experience, or apprenticeship program; and the number of trips the pilot is required to ride light.

(e) Any other factor relevant to the determination of reasonable and just fees and rates, including those factors previously considered and determined by

the Louisiana Supreme Court, and the national average pilotage cost per mile for state regulated pilots operating in United States ports.

Q: When a pilot provides service to a vessel, what is the relationship of the pilot to the vessel and the vessel operator?

A: While providing compulsory pilotage, a state-licensed pilot should develop and maintain a cooperative working relationship with the vessel interests but is empowered to act independently in carrying out his or her duties.

It is my opinion that a compulsory pilotage requirement is by far the most effective mechanism available to a state to protect its marine environment and maintain navigational safety, while at the same time responsibly facilitating waterborne commerce. State compulsory pilotage is effective because it places on the bridge of a ship a highly trained individual who is an expert in all aspects of local navigation, isolated from the economic pressures facing shipping companies, fully empowered to direct the navigation of the ship, and whose primary responsibility is to protect the interests of the state that issues the license.

Some protection is offered by a state having rules telling a ship what to do or not to do in its pilotage waters, but it is much more effective to require a ship to be under the direction and control of a local navigation expert whose ultimate responsibility is to protect the public interest.

Although a state pilot is not a government employee, the pilot performs what is effectively a public service. In the State Pilot System, a pilot can exercise judgment that is independent from the economic interests of the ship owners, is answerable only to the state that licenses and regulates him/her and has as a sole objective to protect State waters by preventing ships from engaging in unsafe operations. In that respect, the principal customer

of the pilot's service should not be seen as the ship or ship owner, but rather the state, its citizens and the public interests.

A critical component of piloting is judgment. There is a natural conflict of interest between a vessel owner's economic needs and the public's paramount interest in the safe and environmentally responsible movement of maritime commerce. It is in the public's best interests for the pilot's judgment to be independent and free of economic consideration of the ship owner. A pilot often must decide between different courses of action that may put safety at odds with business interests. For example, whether a ship should proceed in heavy fog, whether a ship should wait for a particular tide or current, or whether one route or maneuver should be used rather than another that might take more time. State pilots are empowered and expected – by both their oversight authorities and the citizens – to exercise informed independent judgment in making these types of decisions and to resist any economic pressures the ship may be under.

Q: In establishing pilotage rates, should a pilot be viewed strictly as a service provider like a garbage hauler?

A: No. With no disrespect meant towards sanitation workers, this is an inapt comparison. A state-licensed compulsory pilot is a highly trained and experienced professional who must be available 24/7/365, in all types of weather, to board ships from all over the world carrying all manner of cargo to carry out his or her duties of protecting the State's interests by directing the navigation of massive merchant ships through the most difficult and dangerous leg of any vessel's voyage. A state compulsory pilotage requirement carried out by these men and women is not merely another "service" to the ship.

Compulsory pilotage should instead be viewed as navigation safety regulation and this regulation is vital to protecting a state's marine environment and to ensuring the safe movement of maritime commerce in a state's ports.

Q: In your opinion, who are the primary customers of a pilot's service in Puget Sound or elsewhere on US navigable waters?

A: The paramount responsibility of every State pilot, including those with the Puget Sound Pilots, is to protect the public interest by facilitating the safe, efficient, and environmentally responsible movement of vessels in state waters. As I said earlier, in that respect the principal customer of the pilot's service is not the vessel or the vessel's owner or operator, but rather the state, its citizens and its public interest.

Q: Has the US Supreme Court adopted this position: that pilots are independent and primarily responsible to the state?

A: Yes. In Bisso v. Inland Waterways Corp., 349 U.S. 85, 93-94 (1955), for example, the U.S. Supreme Court stated:

> Pilots hold a unique position in the maritime world and have been regulated extensively both by the State and Federal Government. Some state laws make them public officers, chiefly responsible to the state, not to any private employer. Under law and custom they have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. Their fees are fixed by law and their charges must not be discriminatory. As a rule no employer, no person, can tell them how to perform their pilotage duties.

Q: Has Congress recognized the importance of a state pilot's independence from the vessel and vessel operator?

A: Yes. 46 U.S.C. 8502(g)(2) provides that a federal pilot (e.g., the holder of a U.S. Coast Guard first class pilot endorsement) on a vessel subject to the federal pilotage requirement in Prince William Sound, Alaska, must also be a pilot licensed by the State of Alaska who is not a member of the crew of the vessel. This federal statute that requires a coastwise vessel subject to federal pilotage jurisdiction to use a state-licensed pilot was put in place following the disastrous Exxon Valdez oil spill in Prince William Sound.

As stated in the U.S. House of Representative Report that accompanied the passage of this legislation, "The requirement that this pilot not be a member of the crew should add a degree of independence and also ensure that the pilot is not in the employ of the tanker operator or owner." H.R. REP. NO. 101-653, at 143 (1990).

Q: Earlier, you described the typical criteria used to set fair, reasonable, and sufficient pilotage rates for state-licensed pilotage groups, specifically in Oregon, Florida and Louisiana. Has the US Coast Guard adopted a set of criteria to guide its pilotage ratemaking on the Great Lakes?

A: Yes. The U.S. Coast Guard ratemaking methodology for Great Lakes pilotage is outlined in 46 CFR § 404.101 through § 404.,110. This methodology is consistent with the state methodologies I have described (e.g., considering necessary expenses, required number of pilots, pilot compensation, necessary working capital, etc.). The Coast Guard also recently published a succinct statement as to the overall purpose of pilotage ratemaking. This statement, which appeared in the Federal Register Notice of March 30, 2022, reads as follows:

> The purpose of this rule is to issue new pilotage rates for the 2022 shipping season. The Coast Guard believes that the new rates will continue to promote

> our goals, as outlined in 46 CFR 404.1, promoting safe, efficient, and reliable pilotage service; facilitating commerce throughout the Great Lakes and St. Lawrence Seaway; protecting the marine environment; and generating sufficient revenue for each pilotage association to reimburse its necessary and reasonable operating expenses, recruit qualified mariners, retain experienced United States Registered Pilots, support staffing model goals in accordance with National Transportation Safety Board (NTSB) recommendations regarding pilot fatigue, and provide appropriate revenue to use for improvements.

Q: Have you reviewed the Washington Utilities and Transportation Commission ('WUTC") Order 09 issued on November 25, 2020 setting out a standard of review for the foundational rate proceeding involving marine pilotage in Washington?

A: Yes.

Q: Do you agree with the Commission's conclusion that the "ultimate goal is to set rates that are fair to customers and to the Company's shareholders" and that "in this context, the shippers are the customers… and the company is PSP and its member pilots."?

A: No, I respectfully disagree.

Q: Please explain.

A: As I stated several times in this testimony, I believe it is important for state pilotage oversight and rate-setting authorities to keep in the forefront of their thinking and policymaking that the principal customer of the pilot's service is not the vessel or the vessel's owner or operator, but rather the state and its public interest.

The goal of pilotage rate-setting is to ensure a modern, efficient, safe, and reliable pilotage operation is maintained in the Puget Sound pilotage districts. To accomplish this,

the pilotage system must be funded to ensure that the most capable pilots, who are fully trained and properly equipped are made available to ships 24 hours a day, 7 days a week, 365 days a year. A pilot association must have sufficient resources available to maintain robust training programs, modern and safe pilot boats with well-trained crews, communications networks, dispatch services, rotation systems, support services, and sophisticated electronic navigation equipment. This can only be accomplished if sufficient resources are provided through the rate-setting process.

I will always urge pilotage rate-setting authorities to remember that compulsory pilotage is a public service (not simply a business) and should not be viewed as just another expense to the shipping industry. Compulsory pilotage is navigation safety regulation. In fact, compulsory pilotage is the most effective form of navigation safety regulation available to a state government. It is so effective because it places on the bridge of foreign flagged vessels a highly skilled mariner with unmatched knowledge of the local waterways and expert shiphandling skills who is insulated from commercial pressures (due to his or her independence from the ship and its master) and who can therefore exercise informed independent judgement.

Again, the principal customer of state compulsory pilotage is the state, it's citizens, the public interest, *not* the ship and it's business interests.

Q: Have you had the opportunity to review the testimony of PSP executive director Charles Costanzo concluding that Washington law requires the application of the "best achievable protection" standard to pilotage regulation?

A: Yes, I have reviewed Mr. Costanzo's testimony, including his conclusion regarding Washington State's "best achievable protection" and its applicability to Washington State pilotage regulation and oversight.

Q: What are your thoughts regarding Mr. Costanzo's legal analysis supporting that conclusion?

A: I concur with Mr. Costanzo's conclusion and supporting analysis regarding Washington State's "best achievable protection" standard as this concept relates to Washington State's system of compulsory pilotage.

In his testimony, Mr. Costanzo explains that regarding protecting Washington State's natural resources and marine environment, one of the State Oil Spill Prevention and Response Act's (OSPRA) underlying policy objectives is: "*To maintain the best achievable protection that can be obtained through the use of the best achievable technology and those staffing levels, training procedures, and operational methods that provide the greatest degree of protection achievable.*" My earlier testimony – that a compulsory pilotage system that is comprised of the very best men and women, who have gone through the highest quality pilot training and who are using the finest available equipment and operational practices is the most effective mechanism available to a state to protect its marine environment and other public interests from the threats posed by large commercial vessels plying its waters – is aligned fully with this OSPRA's policy objective.

I believe it should be a coastal state's policy – and a policy of the highest order – to put in place not merely an adequate pilotage operation, but rather a world-class pilot operation that protects the state's ports, waterway infrastructure and marine environment to

the maximum extent possible. Such a pilotage system, to meet the "best achievable protection" standard, must be fully and sufficiently funded to ensure that best trained, properly equipped and the most capable pilots are made available to ships 24 hours a day, seven days a week, throughout the year.

Q: Have you had the opportunity to review the testimony of PSP witness Ken Ericksen of SP Global examining whether pilotage rates in the US are a significant economic factor in where ocean-going vessels call?

A: Yes.

Q: Do you agree with Mr. Ericksen's conclusion that pilotage rates essentially play no role in where ocean-going vessels call? Please explain.

A: Yes, I do. In my 20-year U.S. Coast Guard career and my 14 years with the APA working on state compulsory pilotage issues, I have never seen evidence that a single ship, container, ton of grain, or gallon of product has ever been diverted from a port due to pilotage rates.

Q: What are the benefits, to both pilots and the public, of a retirement plan for a State pilot group.

A: There are several compelling reasons why a pilot group should have some type of reasonable retirement program for its members. It is, of course, a common business practice for companies and professional associations to maintain retirement programs. This is

universally recognized as a normal and usual cost of doing business. For a regulated service organization, it is considered an associated expense of providing the organization's service.

For a pilotage operation, a group retirement program has benefits in addition to those that are purely financial. Although piloting is an individual service, a retirement plan helps maintain a sense of group cohesion and connection among the association members. It reinforces the important idea that each pilot has a stake in the success of the pilot association and pilotage operations.

A reasonable retirement plan also helps to attract and retain high caliber individuals looking for a long-term piloting career. This can be especially true for plans in which length of service is linked to the eligibility for benefits and the amount of those benefits. In this respect, it encourages stability in pilot groups. Given the investment that the State and the pilot group each makes in new pilots, it is in their joint interest to have pilots stay for their entire careers.

Q: Based on your knowledge of the types of pilot group pensions throughout the US, how would you describe the type of pension plan in place at virtually all the major US pilot groups in the US?

A: To my knowledge, every state pilot retirement program is funded in some fashion through the regulated rate system. As with the diversity of plans, there are different funding mechanisms. What is common to all, however, is the underlying judgment by the rate-setting body that a retirement plan is a reasonable and necessary feature of an efficient, reliable, and professional pilotage system. In this respect, pilotage authorities consider a group retirement plan as not just "allowable" but rather "required" and something that should be ensured

through the rate-setting process. It is sound public policy and is consistent with a state's responsibility to set rates at levels that will provide the revenues needed for a modern, safe, efficient, and reliable pilotage operation that is necessary to protect and promote the public interest.

Q: Are you familiar with the use of automatic annual adjusters to pilotage tariffs in the U.S.?

A: Yes, I am.

Q: What is your opinion regarding the use of automatic adjusters by state pilotage regulators?

A: I am a proponent of using automatic adjusters in the pilotage rate-setting area. Many industries in the public and private sector use automatic rate adjusters to periodically adjust compensation and rates, and the use of these adjusters is certainly not uncommon in setting and adjusting pilot rates. This makes sense because pilotage-related expenses are affected, as are the expenses of most businesses, by economy driven inflation from year to year.

Q: Have you examined the automatic tariff adjusters requested by PSP in this rate case related to annual traffic, new licensee or new retiree, capital costs and cost-of-living?

A: Yes, I have.

Q: With respect to an annual cost-of-living adjustment, what is the major benefit to a pilotage system?

A: To avoid frequent, expensive, and often contentious "rate cases" or to avoid the need for large rate increases when rates are adjusted too infrequently (which can result in "sticker shock" for rate payers), a number of pilotage rate setting bodies have included automatic annual inflation adjustments or COLAs to the pilotage rate-setting process.

Traditionally, pilots seek fee increases at varying frequencies through their applicable rate-setting authority. These rate increase requests can be made for a variety of reasons, including but not limited to maintaining pilot compensation at levels consistent with prevailing professional standards, paying for extensive training, adding additional pilots due to shipping traffic increases, and making major capital infrastructure investments such as pilot boats, docks, pilot stations and offices. Including an automatic COLA in the pilot rate structure can greatly reduce the number of rate increase requests and eliminate unnecessary "sticker shock" for shipping interests. An automatic COLA results in predictable and modest rate adjustments, which benefit all parties.

Q: How would you describe the importance of regular meetings within an individual pilot group serving a particular pilotage ground in the United States?

A: I believe it is critical that members of a pilot group get together, in-person, and on a regular basis. As I said earlier, it is important to the overall success of pilotage operations for pilots to join into local associations, and it is also important that a sense of cohesion and connection is established and maintained among the association members. Regular meetings can help to attain this important goal. Every pilot association within the APA holds regular

meetings at least several times a year to discuss not only the business aspects of their pilot group, but more importantly key operational, training, and technical matters.

While pilotage is a personal service provided by a highly skilled licensed professional, it is still vitally important for pilots who work on the same pilotage waters to meet to discuss new or evolving pilot practices, developments in training approaches, emerging navigation and communications technologies, changes to the port's dredged channels and aids to navigation, upgrades/degradations of pier facilities, expected types and volumes of vessel traffic expected in the port, etc.

I also want to point out another important point about the State Compulsory Pilotage System as it relates to the necessary cohesion of member pilots. The value of a state compulsory pilotage system is not merely that one ship entering or departing a port is under the direction and control of a highly skilled and experienced state-licensed pilot. It is also the fact that ALL large commercial vessels moving in that port area are under the direction and control of state-licensed pilots from the same pilot association who routinely work together, train together, share piloting practices and strategies with each other, and generally work as a cohesive team. This team concept results in a "safety net" being placed over the entire port or pilotage district and reinforces the importance of the need for, and value of, regular meetings of individuals within a pilot association.

Q: Are there regular meetings of pilot groups on a regional, national, and international basis?

A: Yes, there are.

Q: Please describe the purpose of these meetings and their function within the pilotage system serving not only ports and waterways within the United States, but throughout the world.

A: Pilots associations' attendance at various APA regional and national meetings, as well as attendance at biennial meetings held by the International Maritime Pilot Association (IMPA), is directly related to the completion of their assigned missions, is essential to the operation of a professional pilotage association in this country and is vital to the provision of safe, efficient, effective, and modern pilotage services.

APA serves the vital role as the national clearinghouse for local pilot groups regarding legal requirements, piloting best practices, navigation technologies, training matters, and other invaluable information. The cost of gathering that sort of information (especially in the quantity and quality of that provided by a national organization like the APA) would be enormous if left to each individual pilotage association. As such, APA plays a crucial role and is necessary to the provision of an efficient, effective, modern, and professional national pilotage system.

APA is recognized as the national trade association for the maritime piloting profession with a focus on strengthening pilot standards nationwide. Indeed, the Coast Guard recognizes the APA as a leading advocate of navigational safety, marine environmental protection, and maritime security, as well as an active participant in efforts to maintain and enhance the effectiveness of pilotage in the United States. The Coast Guard recognition of the value and effectiveness of the APA is evidenced by the service entering into formal partnership agreements with the APA. Specifically, the APA and Coast Guard have a cooperative agreement to "promote vessel safety and to prevent damage to the

environment from commercial vessels," as well as a separate memorandum of agreement to "cooperate in enhancing the security of the ports and waterways of the United States." The APA is also recognized by the National Oceanic and Atmospheric Administration (NOAA) as a key partner in advancing this agency's mission and is in the process of renewing our longstanding partnership agreement to "promote safe navigation."

APA is also involved with several important Coast Guard-sponsored or Coast Guard-supported advisory bodies. The APA actively participates in harbor safety committees, locally and at the national level. Furthermore, the APA actively participates in several U.S. Coast Guard federal advisory committees, including the National Navigation Safety Advisory Council, the National Merchant Personnel Advisory Committee, the National Merchant Mariner Medical Advisory Committee and the Great Lakes Pilotage Advisory Committee.

The APA has also been instrumental in the development and approval of Bridge Resource Management (BRM-P) courses at maritime training centers that are tailored specifically for pilots. Pilot associations around the country routinely take part in this BRM-P training and it enhances their pilotage services substantially. Further, APA's Navigation & Technology Committee, which is made up of dozens of pilots from groups around the country, has also developed "Guidelines for Courses in the Operational Use of Electronic Chart Display and Information Systems for Marine Pilots" and promulgated best practices for the use of portable pilot navigation systems (PPNS) and other emerging navigation technologies, as well as for the conduct of Master-Pilot Exchanges.

In addition to working with U.S. agencies and advisory committees to advance marine safety, security, and environmental stewardship through the promotion of

professional marine pilotage, APA also represents the piloting profession by advancing these same interests at the international level. A representative of the APA serves as a member of U.S. delegations to all meetings of key committees and subcommittees at the International Maritime Organization (IMO). The reason APA representatives are selected by the U.S. government to serve on delegations to the IMO is to provide expertise and advice to U.S. officials not only on pilotage matters, but also on navigational safety, maritime security, and marine environmental protection.

With the above as background, I will now turn back to APA regional, national and – via IMPA – international meetings. APA organizes regular regional and national meetings of both the leaders of the various pilot associations around the country, as well as pilots not in formal leadership roles. APA is comprised five geographic regions – North Atlantic, South Atlantic, Gulf, West Coast and Great Lakes – and an annual meeting is held for each of these regions. In addition, every other year, APA holds a national convention that is attended by hundreds of pilots from APA-member groups. At these meetings, guest speakers from local, state, and federal government agencies, as well as elected officials, speak to pilots about various piloting and navigational safety related issues, as well as broader public policy topics.

APA staff passes along to meeting attendees information that we have obtained from our dealings with government agencies, Coast Guard advisory committees and international organizations. Additionally, APA officers and pilots from groups throughout the country share their experiences and lessons learned about matters such as training, technologies, and operational piloting practices. Finally, at these meetings, various policy positions and

guidance are developed and distributed that positively impact compulsory pilotage nationwide.

Also, it is by way of membership in the APA that local pilot associations, including Puget Sound Pilots, have access to the expertise and professional information of the International Maritime Pilots' Association (IMPA). The mission of IMPA is quite like the APA in that this international organization has as its objective "promoting professional standards of pilotage worldwide." Like APA, IMPA conducts a biennial gathering of its worldwide membership. At this biennial "congress", IMPA invites leaders from international organizations, like the IMO, as well as legal, regulatory, academic, policy and operational experts in fields related to pilotage, piloting, navigation safety and marine environmental protection. Those U.S. pilots who can attend the IMPA Congress as part of the APA delegation benefit not only from the formal presentations, but also from the opportunity to network with pilots and pilot oversight officials from around the world.

The pilots that can attend the various APA and IMPA meetings are then able to bring the information back to their respective pilot associations and share it with the other pilots in their group. This sharing of information frequently occurs at the regular meetings of the local pilot association.

Q: What is your opinion regarding the importance of pilot group regulators like the UTC authorizing funding in the tariff serving the Puget Sound Pilotage District for PSP pilots to attend regional, national, and international maritime pilot meetings?

A: For the reasons outlined above, it is my opinion that pilot attendance at regional, national, and international meetings of the piloting profession is directly related to provision

of safe, efficient, effective, and modern pilotage services. As such, funding for a reasonable number of pilots within a pilot group to attend these meeting should be recognized as "necessary" and "reasonable" expenses for the association. Most pilot oversight authorities around the country do, in fact, recognize this expense and do fund attendance at these types of meetings.

IV. CONCLUSION

Q: Does this conclude your direct testimony?

A: Yes it does.