

BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET TP-220513

PMSA'S MOTION TO DISMISS

*1* Under WAC 480-07-375, WAC 480-07-380, and WAC 480-07-525, Intervenor<sup>1</sup> Pacific Merchant Shipping Association (PMSA) moves to dismiss without prejudice the filings by Puget Sound Pilots initiating a general rate case and seeking an interim rate increase (the “PSP Petitions”).

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<sup>1</sup> PMSA is concurrently filing with this motion its Petition to Intervene.

## INTRODUCTION

2 PMSA's motion presents a single issue:

The last general rate case for Puget Sound pilotage tariffs culminated in an order mandating specific prerequisites before PSP could file its next general rate case. PSP has not satisfied these prerequisites. Should the Commission dismiss the PSP Petitions until PSP satisfies the prerequisites?

3 The Commission should dismiss the PSP Petitions given PSP's failure to satisfy what Order 09 established as prerequisites to the next general rate case for Puget Sound pilotage tariffs.<sup>2</sup> PSP's request for an interim rate increase should be subject to the same prerequisites. Only with evidence of compliance with Order 09 should PSP be allowed to refile its petition.

## STATEMENT OF FACTS

4 This motion relies on testimony and exhibits PSP filed in the instant case, certain filings in the prior case (Docket TP-190976), and the Commission's *Legislative Report on Establishing Marine Pilotage Tariffs* (June 29, 2021). An accompanying declaration attaches the relevant pages from PSP's filed evidence.

5 In 2019, the Commission adopted rules to describe the necessary components of general rate proceeding filings.<sup>3</sup> These rules require the petitioner to file all testimony and exhibits to be presented in the petitioner's direct case and allow

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<sup>2</sup> *Wash. Utils. & Transp. Comm'n v. Puget Sound Pilots*, Docket TP-190976, Order 09 (November 26, 2020).

<sup>3</sup> *Wash. Utils. & Transp. Comm'n, In re Amending WAC 480-07 and Adopting WAC 480-160 Relating to Marine Pilotage Rate-Setting Authority*, Docket TP-180402, General Order R-596 (May 3, 2019).

the Commission to reject a filing that fails to meet the minimum requirements, without prejudice to the petitioner’s right to refile its request satisfying the requirements.”<sup>4</sup>

6       After a thorough proceeding on the Puget Sound pilotage tariff, the Commission issued in Docket TP-190976 its final order, Order 09, approving a tariff increase and mandating certain procedural and substantive prerequisites to be satisfied before the initial filing of the next general rate case.

7       These included three requirements to conduct workshop processes to plan to transition PSP’s retirement plans, address a former PSP employee’s retirement payments, and discuss the potential use of rate of return methodologies in future rate cases:

- Order 09, ¶¶ 191–193:<sup>5</sup>

*191.* We . . . order PSP to initiate discussions for the purpose of developing a plan to transition to a fully funded, defined–benefit retirement plan, as well as full accrual accounting. By way of guidance, the retirement plan discussions should include, as PSP proposes, a comprehensive stakeholder evaluation and a participation study. We further require the discussions to address whether active pilots should be required to contribute directly to PSP’s retirement fund.

*192.* We decline, however, to “broker” the dialogue, as PMSA

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<sup>4</sup> WAC 480-07-525.

<sup>5</sup> *See also* Order 09, Conclusions of Law, at ¶ 463 (“(20) PSP should be required to initiate discussions as described in paragraphs 191 through 193 of this Order to develop a plan to transition to a fully funded, defined-benefit retirement program and full accrual accounting. Any agreements, recommendations, or contested issues that arise from the workshops, and PSP’s responses thereto, should be included in PSP’s initial filing in its next general rate case.”).

requests. The discussions should be conducted as workshops facilitated by a mutually acceptable third party with expertise in retirement planning, such as an actuary, and should be concluded prior to PSP's next general rate case. To maintain fairness and avoid any appearance of preapproval, the Commissioners will not participate in the workshops but will evaluate any final recommendations proposed for review and approval. Specifically, any agreements, recommendations, or contested issues that arise from the workshops, and PSP's responses thereto, should be included in PSP's initial filing in its next general rate case.

193. We also deny PMSA's request to require PSP's participation study to consider outcomes other than a defined-benefit plan. The workshop participants, rather than the Commission, should determine the scope and breadth of the study. PMSA is welcome to advocate for the inclusion of other retirement options in PSP's study, but we are not persuaded that prescribing its contents at this juncture, without the benefit of initial stakeholder discussions, would be appropriate or productive.

- Order 09, ¶ 195:

195. Finally, because we require the parties and stakeholders to engage in further discussions and bring forward proposed solutions at a later date, we decline to exclude from rates the \$70,000 annual retirement payment for PSP's former executive director and instead direct the parties to address this issue during the required workshops.

- Order 09, ¶ 390:<sup>6</sup>

390. We do, however, agree with PMSA that PSP, Staff, and other stakeholders should conduct a Staff-led technical workshop to address rate of return methodology in the context of setting rates for pilotage service. Such a workshop should include a discussion on developing an appropriate revenue requirement and TDNI, and an analysis of the feasibility of applying rate of return methodologies used in utility rate setting to pilotage ratemaking. These

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<sup>6</sup> See also Order 09, "Conclusions of Law," at ¶ 493. ("(50) PSP, Staff, and other stakeholders should conduct a Staff-led technical workshop to address rate of return methodology in the context of setting rates for pilotage service.")

workshops should occur on the same timeline as the stakeholder participation in the Commission’s report to the Legislature because the outcome of those discussions will likely inform the Commission’s findings.

8 With respect to the prerequisite requirement of Order 09, ¶ 191 that, “[b]y way of guidance, the retirement plan discussions should include, as PSP proposes, a comprehensive stakeholder evaluation and a participation study,” the Commission incorporated by reference PSP’s own proposal. The description of this PSP proposal is included in PSP’s initial post-hearing brief.<sup>7</sup>

9 UTC Staff reported these same requirements as prerequisites to the next general rate case in its report to the legislature on the marine pilotage ratemaking process and outcomes.<sup>8</sup>

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<sup>7</sup> *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-190976, Initial Post–Hearing Brief of Puget Sound Pilots ¶ 116 (Sept. 10, 2020) (“Mr. Kermode identified both the size and makeup of the PSP ‘PayGo’ plan as a major, if not the major issue in this proceeding, both presently and prospectively. PSP similarly believes, along with callbacks, there is no more significant accounting issue in the ratesetting transition to the UTC. **Thus, only a comprehensive and broad-ranging universal stakeholder evaluation and participation study, informed as well by knowledgeable specialists in the pension and retirement field, is required before any alternative to PSP’s current plan before any change is considered. Indeed, PSP believes the continuing viability, stability and ultimately, safety, of our marine pilotage system depends on that vital collaborative process.**”) (emphasis added).

<sup>8</sup> *Wash. Utils. & Transp. Comm’n, Legislative Report on Establishing Marine Pilotage Tariffs* 12–13 (June 29, 2021) [hereinafter *Legislative Report*] (“In addition to the authorized increase in revenue and a corresponding increase in tariff rates, the Commission required the parties to participate in two separate collaborative efforts. First, the Commission ordered PSP to initiate discussions among parties for the purpose of developing a plan to transition to a fully funded, defined-benefit retirement plan and to implement full accrual accounting for

10 On June 29, 2022, PSP filed notice of a new general rate case and a petition for an interim rate increase with “an automatic tariff adjuster” requested for a mere six weeks later.

11 PSP submitted testimony of three individuals addressing various aspects of the management and potential changes to the PSP retirement system and Order 09, ¶¶ 191–193, 195, 390: Mr. Costanzo (Exh. CPC-01T), Mr. McNeil (Exh. BJM–01T), Mr. Tabler (Exh. WST–01T), and Mr. Wood (Exh. CRW–01T) (together with related exhibits, the “Pension Testimony”).

12 The Pension Testimony omits the following required by Order 09:

- (1) A description of the completion of a “comprehensive stakeholder evaluation and a participation study.”
- (2) A copy of a “comprehensive stakeholder evaluation and a participation study.”

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retirement expenses.[ ] The order sets the expectation that PSP will conduct a comprehensive stakeholder process, including a series of workshops facilitated by a mutually acceptable third-party, and requires PSP to include any agreements, recommendations, or contested issues arising from this process in the initial filing in its next general rate case.

Second, the Commission ordered the UTC’s Regulatory Services Staff to lead a technical workshop for parties and other stakeholders on rate of return rate-setting methodology in the context of pilotage services. . . . The workshop will include a discussion about developing an appropriate revenue requirement and total distributable net income, and an analysis of the feasibility of applying rate of return methodologies used in utility company rate setting to pilotage ratemaking. The order directed the parties to conduct the workshop on a similar timeline to the retirement plan workshop to inform the Commission findings reported here. However, due to the complexity of the issues in both technical workshops and participants’ varying schedules, this has not yet occurred, but is tentatively scheduled for completion by the end of the 2021.”).

- (3) Evidence that discussions occurred to address whether active pilots should be required to contribute directly to PSP's retirement fund. On the contrary, the Pension Testimony demonstrates that PSP focused exclusively on tariff-funded contributions to retirement.<sup>9</sup>
- (4) Final recommendations or proposals or descriptions of the recommendations or proposals that arose from workshop agreements, recommendations, or contested issues.
- (5) Responses by PSP to contested issues that were identified in workshops.
- (6) An explanation of how workshop participants determined the scope and breadth of the retirement participation study, including what retirement options were included or rejected upon advocacy of stakeholder parties during the development of PSP's study.
- (7) A showing that the required workshops addressed the annual retirement payments for PSP's former executive director.<sup>10</sup>
- (8) Evidence that a Staff-led technical workshop occurred to address rate of

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<sup>9</sup> Costanzo, Exh. CPC-12 at 3 ("As stated by PSP representatives at both the March 2 and April 13 stakeholder sessions, PSP is committed to seeking full funding in the pilotage tariff for the Puget Sound pilotage district for the pension benefits promised to retirees and to all working pilots at the time of initial licensure.").

<sup>10</sup> Costanzo, Exh. CPC-05 at 1. The only evidence on this question included in the PSP Petition is the testimony provided by the pension recipient; it does not include evidence of any discussions with stakeholders, required workshop evaluations, or provide any exhibits to support any testimonial claims. *See* Tabler, Exh. WST-01 at 5:22–6:9.

return methodology and its feasibility in the context of pilotage ratemaking.

13 Fifteen months after Order 09, and only four months before its filings in this case, PSP initiated discussions to develop a plan to transition to a fully funded, defined-benefit retirement plan with an initial meeting it set for March 2, 2022.<sup>11</sup> But PSP never proposed a workshop calendar and rejected PMSA’s proposal to use the initial meeting to set a schedule of workshops.

14 As noted in its report to the legislature, UTC Staff was waiting in mid-2021 to conduct its stakeholder meetings on the same timeline as the retirement stakeholder workshops as required by Order 09.<sup>12</sup> PSP’s refusal to set any schedule for the workshops seemingly frustrated the Staff timeline for conducting its

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<sup>11</sup> Costanzo, Exh. CPC-05 at 1 (“On behalf of the Puget Sound Pilots (PSP), the purpose of this letter is to begin the process of initiating stakeholder discussions regarding the development of a plan to transition from PSP’s current pay-as-you-go or farebox retirement program to a fully funded, defined benefit retirement plan and to implement full accrual accounting for retirement expenses. To facilitate this transition, the Washington Utilities and Transportation Commission in its November 25, 2020 Order 09 directed PSP to conduct a number of workshops addressing these issues prior to the filing of PSP’s next general rate case.”); *id.* at 3 (“ . . . we are scheduling the first of the stakeholder meetings for March 2, 2022 . . . ”); Costanzo, Exh. CPC-08 at 1 (“ . . . this letter confirms that the first stakeholder meeting to consider a possible transition of the Puget Sound Pilots’ pension from an unfunded pay-as-you go or farebox system to a fully funded, defined benefit retirement plan is scheduled for March 2, 2022 . . . . ”); Costanzo, Exh. CPC-11 at 1.

<sup>12</sup> *Legislative Report, supra* note 9, at 13 (“The order directed the parties to conduct the workshop on a similar timeline to the retirement plan workshop to inform the Commission findings reported here. However, due to the complexity of the issues in both technical workshops and participants’ varying schedules, this has not yet occurred, but is tentatively scheduled for completion by the end of the 2021.”).



stakeholder meetings.

15       The Pension Testimony provides no evidence of the engagement of a mutually acceptable third party with expertise in retirement planning, such as an actuary, facilitating any workshops, or that PSP was agreeable to the engagement of the services of such a person. PSP never sought any stakeholder input on who might serve in that role. Rather, PSP hired its own actuary without providing any opportunity for stakeholder input.<sup>13</sup> When PSP initiated the stakeholder process, it intended other parties to engage separate actuaries rather than a single mutually acceptable actuary.<sup>14</sup>

16       Instead of a workshop-style process run by a mutually acceptable actuary, PSP proposed a formal mediation and went so far as to select a formal mediator of its own choosing to facilitate discussions.<sup>15</sup> PSP did so without consulting with other stakeholders.<sup>16</sup> There is no evidence the mediator had any expertise in

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<sup>13</sup> Costanzo, Exh. CPC-05 at 2 (“Over the last several months, PSP has worked closely with a highly qualified actuary to develop the information necessary for meaningful stakeholder participation in these workshops.”).

<sup>14</sup> Costanzo, Exh. CPC-05 at 3 (“We recognize that studying the potential to transition the PSP pay-as-you-go pension system to a defined benefit plan is complicated and requires a high level of transparency to facilitate meaningful discussions between the stakeholders. . . . We anticipate sending those materials out early next week. Recognizing that one or more stakeholders may wish to engage their own actuary to review the information and develop their own projections . . .”).

<sup>15</sup> Costanzo, Exh. CPC-05 at 3 (“Finally, to facilitate the discussions on March 2, we [PSP] have asked a very well-regarded Seattle mediator . . . to conduct this stakeholder meeting and not only to preside at any subsequent session, but to attempt to mediate a mutually agreeable resolution of this issue.”).

<sup>16</sup> *Id.*

retirement planning, such as actuarial experience.

17 PMSA objected to the formal mediation process and instead recommended an informal initial meeting of the parties to discuss the process.<sup>17</sup>

18 PSP withdrew its proposal of formal mediation for the initial meeting and instead proposed a substantive meeting which featured the presentation of the findings and conclusions by “PSP’s actuary” and an agenda omitting any discussion of designating a mutually acceptable third party to facilitate pension discussion workshops.<sup>18</sup>

19 PMSA proposed using the initial meeting to plan the workshop process:<sup>19</sup>

As for the first meeting, we propose scaling it back to focus on following the UTC Order. In our view, this should be a meeting to plan workshops, not an actual workshop. I appreciate your letter a few workdays before a first meeting but also need to point out that there has not been agreement to proceed with a PSP hired actuarial analysis . . .

For this first meeting, we propose discussing how to conduct “a series of workshops facilitated by a mutually agreeable third party . . .” and how we will go about identifying “. . . agreements, recommendations, or contested issues that arise from the workshops. . .” (quotes from UTC Order). If the mutually agreeable third party is an actuary we all agree to, great, but if not, we’d have to arrive at an agreement about that as well.<sup>20</sup>

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<sup>17</sup> Costanzo, Exh. CPC-11 at 1 (“Based upon my discussion with [PMSA General Counsel] Mike Jacob, it was clear that PMSA did not think use of a third-party facilitator such as a mediator was necessary and that we should simply proceed with discussions involving the various stakeholders.”).

<sup>18</sup> Costanzo, Exh. CPC-08 at 1–2.

<sup>19</sup> Costanzo, Exh. CPC-11 at 1–2.

<sup>20</sup> Costanzo, Exh. CPC-08 at 1–2; Costanzo, Exh. CPC-11 at 1–2 (“An exchange of the baseline set of perspectives would logically be the subject of a first

20 PSP refused to discuss or consider identifying a mutually acceptable third party to facilitate a series of workshops and instead dictated an agenda featuring PSP's actuary.<sup>21</sup>

21 Given PSP's objection to holding workshops with a mutually acceptable facilitator, PMSA agreed to a series of meetings without one; however, after two sessions in April without the benefit of a mutually acceptable facilitator or actuary, PMSA decided by May that it would need to hire its own actuary to properly evaluate PSP's retirement proposals.<sup>22</sup>

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workshop in the series which would help map out issues of agreement/disagreement setting the stage for follow-on workshops along with sufficient time for parties to properly and professionally prepare.”).

<sup>21</sup> Costanzo, Exh. CPC-11 at 1 (“Given all of the work that has gone into planning this initial PSP Pension stakeholder meeting, we are not willing to scale it back to a meeting to plan a series of workshops. It is worth noting that the Puget Sound Pilots were assigned the responsibility in the UTC order ‘to initiate discussions for the purpose of developing a plan to transition to a fully funded, defined-benefit retirement plan.’ As part of the process to ‘facilitate this transition,’ PSP was required to conduct ‘a comprehensive stakeholder evaluation and participation study,’ which is exactly what PSP is doing . . . .

As explained in my letter of February 24, at this first workshop PSP actuary Tiff Wood will make a presentation regarding the Milliman 50-year cost projections and the actuarial assumptions . . . .”).

<sup>22</sup> Costanzo, Exh. CPC-14 at 2 (“We have now had three stakeholder sessions, which occurred on March 2, April 13 and 26. An additional session was set for May 11 with the back-up date of May 17, but the session was canceled by PMSA because it needed more time to line up an actuary.”); Costanzo, Exh. CPC-15 at 2, n. 1 (“At this initial [March 2] meeting, PMSA clearly conveyed the need to lay out a workshop process based on the UTC Order, including the need to use a third-party actuary and a mutually agreed upon approach to workshops. PSP informed PMSA that it preferred to continue to use the work of its hand-picked actuary, as opposed to utilizing a mutually agreed upon actuary as directed by the UTC Order in follow-on meetings. PMSA participated in those secondary discussions with the PSP actuary. As a result of those discussions, PMSA

22 Before hiring a second actuary, PMSA inquired further of PSP if it would like to hire a mutually acceptable actuary, but PSP declined; PMSA provided PSP with updates of its actuarial search and hiring progress, and at no time during this period did PSP object to these efforts by PMSA to acquire its own actuarial assistance (nor could it given that separately hired actuaries are what PSP had proposed when initiating the process).<sup>23</sup>

23 PMSA hired an actuary to evaluate PSP's actuary's work product.<sup>24</sup> On June 6, 2022, PMSA sent PSP production-related questions generated by PSMA's actuary for the PSP actuary.<sup>25</sup>

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indicated it would need to engage with its own actuary to conduct due diligence and review of the PSP actuarial study and its assumptions.”).

<sup>23</sup> Costanzo, Exh. CPC-15 at 2, n. 1 (“PMSA asked PSP if it would like to collaborate and mutually engage with a new actuary, consistent with the UTC Order, and PSP declined. Moreover, PSP did not object to PMSA moving forward with its own actuary as a component of the workshop process in the April meetings. PMSA has kept PSP abreast of its need for additional time to acquire qualified and timely deliverable actuarial services when rescheduling the May meetings. At no time in reply to these notifications by PMSA did PSP give any indication to PMSA that it would view our pursuit of actuarial due diligence as either an ‘impasse’ or ‘a strategy of delay and [refusal] to negotiate in good faith.’”); Costanzo, Exh. CPC-05 at 3.

<sup>24</sup> Costanzo, Exh. CPC-15 at 2 (“PMSA has solicited actuaries, interviewed actuaries, and contracted with an actuary; we are now in a period where we need to allow the actuary a reasonable time to produce an actuarial report; this will be followed by a period of time necessary for PMSA to review the actuary's work product before starting workshops to try and reach consensus on next steps and a final report to the UTC.”).

<sup>25</sup> Costanzo, Exh. CPC-13 at 2 (“Our [PMSA] actuary would like to collect some information – his suggestions to us are listed below. Can you respond to us with your thoughts and hopefully our actuary can get through the work in a thorough and timely fashion.”).

24 In reply, PSP “insist[ed] on PMSA providing its final position on any transi-  
tion of the PSP existing pension to a funded pension no later than June 15.”<sup>26</sup>

25 PMSA responded that very same day (June 7) expressing surprise at PSP’s  
“unexpected and not realistic” deadline of having final positions on June 15, given  
that PMSA did not have positions on “issues with specificity yet” because “we still  
need to have our [PMSA and PSP] actuaries communicate about baseline analyt-  
ical issues.”<sup>27</sup>

26 The next day, June 8, PSP asserted an “impasse” and accused PMSA of a  
“strategy of delay” and a refusal to “negotiate in good faith.”<sup>28</sup> PSP concluded that  
continuing the workshop process would be a “waste of time”:

Given the obvious impasse with PMSA on pension–related issues,  
PSP must concentrate on the preparations for its next general rate  
case. In our view, PSP has made a good faith effort to engage with  
stakeholders on the pension issues as requested by the UTC. PMSA  
has not. While we remain willing to provide information at your

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<sup>26</sup> Costanzo, Exh. CPC-13 at 1 (“We [PSP] are available to have a wrap-up stakeholder session at any time next week. However, considering that this process began last fall and has included multiple sessions, its time to wrap things up and report to UTC on what appears to be agreement on how to handle the benefits owing to existing retirees, but disagreement on what sort of pension benefits PSP working pilots and future licensees should receive.”).

<sup>27</sup> Costanzo, Exh. CPC-15 at 4 (“And this raises a practical matter moving forward – putting aside this timing and actuarial issue – if PSP has a draft Report, we would expect it to be shared ahead of time. It is important that if PSP is looking for stakeholders to review it and sign off on a ‘Final’ position Report, that you have circulated that draft with us ahead of time. . . . I think it would be productive to just say now that moving forward we would expect everyone to share such drafts of a proposed Report with everyone in plenty of time for everyone to edit, wordsmith, share versions, and discuss at Workshop sessions prior to setting a date to ask people to agree to a ‘final position.’”).

<sup>28</sup> Costanzo, Exh. CPC-14 at 2–3.

request consistent with the [actuarial communication] protocols listed in the first paragraph of this letter and to engage in meaningful negotiations provided any such session is preceded by an actual proposal from PMSA, we see no need to schedule a further session with PMSA in light of the clear impasse between the parties. Further, we believe it would be a waste of time to attempt to draft some sort of joint stakeholder report to the UTC regarding our negotiations. Between letters and emails, the record is quite clear and each party is free to submit a report to the UTC as it sees fit.<sup>29</sup>

27 PMSA responded the following day that no impasse existed, confirmed it was “in a period of actuarial due diligence” and “proceeding in good faith and fidelity with the UTC workshop process,” expressed its intention is “to follow the UTC Order currently in place and to engage in workshops,” invited PSP to return to a workshop process, restated its position of “endeavoring to stay within the scope of the Order’s proscribed workshop process and also conduct its own actuarial review in response to PSP’s independent process,” and asked PSP for “a modicum of time during the current workshop period to do the same type of analysis that took PSP the better part of an entire calendar year.”<sup>30</sup>

28 The Pension Testimony claims an “agreement” exists between PSP and Pacific Yacht Management and Northwest Marine Trade Association.<sup>31</sup> But PSP

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<sup>29</sup> *Id.*

<sup>30</sup> Costanzo, Exh. CPC-15 at 1 (“We [PMSA] do not believe that a collaborate effort to follow the UTC Order is a ‘waste of time.’ PMSA is committed to a workshop process whose goal is to issue as work product a joint report which clearly delineates where parties agree and disagree about facts and potential proposals and next steps as described by the UTC Order. If PSP returns to discussions, we would welcome the opportunity to work together to draft such a report as the primary outcome of the pension workshops.”).

<sup>31</sup> Costanzo, Exh. CPC-01T at 9:7–23.

provides neither the copy of any agreement, nor any report from a workshop detailing the terms of any agreement, nor any recommendations or summary of contested issues that arose from the workshops with PSP's responses thereto.

29 The Pension Testimony claims PMSA is “focused on an unfair process–related argument, repeatedly complaining that PSP started the stakeholder sessions with its own ‘hand–picked actuary’ rather than jointly engaging that actuary with other parties.”<sup>32</sup> The Pension Testimony offers no explanation as to why using a mutually acceptable facilitator to host the workshops would be “unfair.”

### STANDARD FOR DISMISSAL

30 A party may make a dispositive motion to dismiss pursuant to WAC 480-07-375(1)(a) and WAC 480-07-380(1). Under WAC 480-07-380(1), as with Washington civil rules CR 12(b)(6) and 12(c), a party may move for dismissal if the pleadings and evidence fail to state a claim upon which the Commission may grant relief.

31 Judicial standards for dismissal under CR 12(b)(6) apply: If PSP can prove no set of facts to justify its petition, dismissal is proper.<sup>33</sup> The Commission should presume PSP's factual allegations are true and draw all reasonable inferences in PSP's favor; if the claims are legally insufficient under PSP's proffered facts, the

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<sup>32</sup> *Id.* at 10:7–10:10.

<sup>33</sup> *Trujillo v. Northwest Trustee Services*, 183 Wn.2d 820, 830, 355 P.3d 1100 1105 (2015); *see also Haberman v. WPPSS*, 109 Wn.2d 107, 120, 74 P.2d 1032 (1987) (amended for other reasons).

case should be dismissed.<sup>34</sup>

32        Though a motion to dismiss would generally be converted into a motion for summary judgment if it requires considering matters beyond the face of the pleadings, taking judicial notice of public documents, or considering other information if the “basic operative facts are undisputed and the core issue is one of law” is still consistent with deciding the motion as a motion to dismiss.<sup>35</sup>

33        Because PMSA relies on PSP’s own alleged facts and the Commission’s report to the legislature, this motion should be decided as a motion to dismiss.

### ARGUMENT

34        Order 09 required PSP to satisfy multiple procedural and substantive steps before filing its next general rate case. Because PSP fails to demonstrate it satisfied any of these prerequisites, the Commission should dismiss the PSP Petitions. This applies to both PSP Petitions: PSP cannot bypass the Commission’s requirements through interim rate changes with a “automatic tariff adjuster.”<sup>36</sup>

**A. Order 09 established procedural and substantive prerequisites that had to be met before the next general rate case could be initiated.**

35        Order 09 mandated that PSP conduct a workshop process to develop a plan to transition PSP’s retirement plans (¶¶ 191–193), address former PSP employee

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<sup>34</sup> *FutureSelect Portfolio Mgmt. Inc. v Tremont Gp. Holdings, Inc.*, 180 Wn.2d 954, 963, 331 P.3d 29 (2014).

<sup>35</sup> *Jackson v. Quality Loan Service Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487 (2015); *Trujillo*, 183 Wn.2d at 827 n.2.

<sup>36</sup> Petition of Puget Sound Pilots for Interim Rate Relief ¶ 19 (June 29, 2022).



retirement (¶ 195), and discuss the potential inclusion of rate of return methodologies in future rate cases (¶ 390).

36 These prerequisites are both procedural and substantive: “we require the parties and stakeholders to engage in further discussions **and** bring forward proposed solutions at a later date.”<sup>37</sup>

37 Procedurally, the discussions were to be held in “required workshops.”<sup>38</sup> Though at times using “should” to discuss the procedural requirements (“These discussions should be conducted as a series of workshops facilitated by a mutually agreeable third-party, such as an actuary, and should be concluded prior to PSP’s next general rate case.”),<sup>39</sup> the Order was not making mere suggestions. Their inclusion as conclusions of law confirm their mandatory nature: for instance, “**PSP should be required to initiate discussions as described in paragraphs 191 through 193** of this Order to develop a plan to transition to a fully funded, defined-benefit retirement program and full accrual accounting.”<sup>40</sup> Moreover, “[a]ny agreements, recommendations, or contested issues that arise from the workshops, and PSP’s responses thereto, should be included in PSP’s initial filing in its next general rate case.”<sup>41</sup> Requirements framed as conclusions of law are mandatory, not suggestions that the parties may disregard.

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<sup>37</sup> Order 09, ¶ 195 (emphasis added).

<sup>38</sup> *Id.* at ¶ 195.

<sup>39</sup> *Id.* at p. ii.

<sup>40</sup> *Id.* at ¶ 463 (emphasis added).

<sup>41</sup> *Id.*

38 In referring to “the UTC directive in Order 09 to engage with stakeholders” as  
a “UTC mandate on this issue,” the Pension Testimony recognizes that these re-  
quirements are not discretionary.<sup>42</sup>

39 When the UTC Staff reported its summarization of these requirements of Or-  
der 09 to the Legislature, Staff emphasized these were not discretionary sugges-  
tions when it described that “the Commission required the parties to participate in  
two separate collaborative efforts.”<sup>43</sup>

40 The central components of the required workshops outlined by the Commis-  
sion for all three discussion areas were similar: for the two required pension dis-  
cussions, the workshops were to be facilitated by a mutually acceptable third  
party (Order 09, ¶ 192) and, for rate of return methodology discussion, the work-  
shops were to be facilitated by UTC Staff (Order 09, ¶ 390).

41 Substantively, the Order requires reporting the outcomes of the workshops  
regarding the pilot pension to the Commission. For instance, as part of “PSP’s  
initial filing in its next general rate case,” Order 09, ¶ 192 requires a report in-  
cluding “[s]pecifically, any agreements, recommendations, or contested issues  
that arise from the workshops, and PSP’s responses thereto.”

42 As UTC Staff reported to the legislature, “The order directed the parties to  
conduct the workshop [addressing rate of return methodology] on a similar

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<sup>42</sup> Costanzo, Exh. CPC-01T at 7:13–17.

<sup>43</sup> Legislative Report, *supra* note 9, at 12.

timeline to the retirement plan workshop to inform the Commission findings reported here.”<sup>44</sup>

43 The Commission established these prerequisites because of their importance to future Puget Sound pilotage ratesetting.

**B. PSP failed to meet these prerequisites for filing its next general rate case.**

44 PSP has provided no evidence that it met the procedural and substantive prerequisites of Order 09 regarding pilot retirement and rate of return evaluation workshops.

45 Even when accepting all facts PSP has asserted in the light most favorable to PSP, PSP has not met these prerequisites:

- PSP cannot and does not provide any evidence of agreements, recommendations, or contested issues, or PSP’s responses to the same, or any evidence of workshops completed with a mutually agreeable third party or actuary. This is because PSP has refused to initiate workshops with a mutually agreeable third party or actuary.
- PSP cannot and does not provide any evidence of addressing the retirement payments to PSP’s former executive director because none of that work product has yet been completed and discussions have not occurred in workshops.

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<sup>44</sup> *Legislative Report, supra* note 9, at 13 (regarding technical workshops required under Order 09, ¶ 390).

- PSP cannot and does not provide any evidence of technical workshops to address rate of return methodology because none of that work product has yet been completed by UTC staff and no timeline for holding workshops has been established.

46       Regarding the requirements of Order 09 ¶ 191, the PSP Petitions do not provide testimony that demonstrates that PSP’s “retirement plan discussions” included the preparation of any “comprehensive stakeholder evaluation and a participation study.”

47       Regarding the requirements of Order 09 ¶ 191, the PSP Petitions do not include in any exhibit a copy of a “comprehensive stakeholder evaluation and a participation study.”

48       Regarding the requirement under Order 09 ¶ 191 that “the discussions [must] address whether active pilots should be required to contribute directly to PSP’s retirement fund,” the PSP Petitions demonstrate that PSP engaged in no such discussions. Instead, PSP has focused exclusively on funding retirement with tariffs.<sup>45</sup>

49       Regarding the requirements of Order 09 ¶ 192 that “discussions should be conducted as workshops facilitated by a mutually acceptable third party with expertise in retirement planning, such as an actuary,” PSP’s evidence shows that PSP never engaged the services of a mutually acceptable third party, such as an

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<sup>45</sup> Costanzo, Exh. CPC-05 at 1; *see also* Carlson, Exh. IC-01T at 31:7-10.

actuary, to facilitate the prerequisite workshops, and that PSP never intended to do so. Instead, PSP unilaterally hired its own actuary, prior to the initiation of the workshop process, without allowing parties to determine if the actuary would be a mutually acceptable third party to facilitate the workshop process.<sup>46</sup> When initiating the stakeholder process, PSP’s intention was to require other parties to engage separate actuaries rather than a mutually acceptable third-party actuary.<sup>47</sup> PSP never intended to engage in a workshop-style process run by a mutually acceptable third-party actuary, as PSP instead affirmatively and unilaterally selected a formal mediator of its own choosing “to facilitate discussions.”<sup>48</sup> There is no evidence that the formal mediator chosen by PSP had any “expertise in retirement planning,” as Order 09, ¶ 192 requires.<sup>49</sup> Finally, PSP admits its choice of a facilitator was not mutually agreeable: it reports that PMSA objected to PSP’s proposed formal mediation process as premature without an informal meeting of the parties first.<sup>50</sup>

50 PSP concedes that it had no intention of complying with requirements to initiate a workshop process with a mutually agreed upon facilitator under Order 09 ¶ 192 as it viewed PMSA’s request for a workshop consistent with the Order and “jointly engaging” an actuary subjected PSP to an “unfair process-related

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<sup>46</sup> *Id.* at 2.

<sup>47</sup> *Id.* at 2–3.

<sup>48</sup> *Id.* at 3.

<sup>49</sup> *Id.*

<sup>50</sup> Costanzo, Exh. CPC-11 at 1.

argument.”<sup>51</sup>

51 Further regarding the requirements of Order 09 ¶ 192 that “discussions should be conducted as workshops facilitated by a mutually acceptable third-party with expertise in retirement planning, such as an actuary,” the Pension Testimony demonstrates that PSP actively frustrated efforts by other stakeholders to conduct the workshops facilitated by a mutually acceptable third party with expertise in retirement planning as described by Order 09 ¶ 192.

52 Further regarding the requirements of Order 09 ¶ 192, the position by PSP not to work with PMSA to produce a joint report on agreements, recommendations, or contested issues because it was a waste of time is facially inconsistent with the requirement that PSP should include “any final recommendations proposed for review and approval” and “[s]pecifically, any agreements, recommendations, or contested issues that arise from the workshops, and PSP’s responses thereto” in its initial filing of the next general rate case.

53 Regarding the requirements of Order 09 ¶ 193, by refusing to engage with PMSA in a workshop format and by dictating the agendas for meetings, not allowing input on the choice of actuary, and originally proposing to frame its process as only a formal mediation, PSP has frustrated the ability of “workshop participants” to collaborate in “determin[ing] the scope and breadth of the study” as

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<sup>51</sup> Costanzo, Exh. CPC-01T at 10:6–11.

required by the Order.

54        Regarding the requirements of Order 09 ¶ 195, PSP does not demonstrate that the parties have addressed during the required workshops “the \$70,000 annual retirement payment for PSP’s former executive director” as required. The only testimony on this subject submitted is the pension beneficiary’s testimony that he finds his own pension to be “fair and reasonable.”<sup>52</sup>

55        Regarding the requirements of Order 09 ¶ 390, PSP does not demonstrate “Staff–led technical workshop to address rate of return methodology in the context of setting rates for pilotage service” or the related “analysis of the feasibility of applying rate of return methodologies used in utility rate setting to pilotage ratemaking” occurred as required prior to the initial filing of the next general rate case.

56        PSP alleges that it can avoid the required workshop processes because it has “no obligation to engage in an unnecessarily long and unproductive stakeholder process with PMSA.”<sup>53</sup> PSP presents no evidence that it has given a fair chance to the stakeholder process and that the process has been unnecessarily long or unproductive. PSP’s version of the stakeholder process has been extremely short. The only basis for judging the reasonableness of the time for a stakeholder process is PSP’s own private process, which apparently lasted an entire year. PSP

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<sup>52</sup> Tabler, Exh. WST-01T at 6:1–9.

<sup>53</sup> Costanzo, Exh. CPC-01T at 11:12–13.

then further delayed initiation of the stakeholder process by choosing to propose its own formal mediation process with its own unilaterally selected mediator instead of following Order 09 and agreeing to setting up a workshop format for conversations and working to hire a mutually agreeable third party to facilitate the stakeholder process. With respect to a timeline, PSP's last-minute insistence on ending the stakeholder process on June 7 and finally resolving all issues by June 15 (with no other notice) is unreasonable.

57 PSP claims as grounds for not holding workshops that PMSA did not engage its own actuary for “over three months,” and that, based on that, “PSP stands by its position that it fully complied with the UTC mandate and will not be scheduling any further meetings.”<sup>54</sup> This does not square with the facts in the PSP Petitions. When PMSA suggested a workshop process, PSP's response was to insist on proceeding with meetings solely with PSP's actuary. When PMSA offered to find a mutually agreeable actuary to facilitate future workshops, PSP did not agree, obliging PMSA to begin its own actuary search. Then, the day after PMSA contacted PSP to ask how PMSA's actuary could obtain specific information from PSP and PSP's actuary to conduct an independent analysis, PSP responded by insisting PMSA's final position would be required only one week later. PSP then shut down all communications and refused to schedule any further meetings. Obliging PMSA to hire its own actuary and then shutting down discussions

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<sup>54</sup> *Id.* at 10:14–24.



because PMSA hired an independent actuary, is exactly the type of situation which Order 09 sought to avoid by suggesting that the parties find a mutually acceptable third-party actuary to host its workshops.

58 PSP defends its declaring an “impasse” in its allegedly “good faith effort to complete the stakeholder engagement process” by pointing to a petition with 23 witnesses and over 2,000 pages of exhibits.<sup>55</sup> The number of witnesses and length of attachments to exhibits have no bearing on whether PSP should follow Order 09’s requirements. This non sequitur does not justify PSP’s failure to engage in workshops with a mutually agreeable facilitator or actuary.

59 PSP has failed to meet the basic requirements for proposing a revision to the existing pilotage tariffs. Given the gaps in PSP’s proposal and evidence, proceeding with the remaining parts of a general rate case would only waste the time and resources of all involved. PSP has not presented a petition with a claim upon which the Commission may grant relief. As the “Commission may reject a filing that fails to meet these minimum requirements, without prejudice to a petitioner’s right to refile its request” pursuant to WAC 480-07-525, dismissal without prejudice is proper.

60 In dismissing the PSP Petitions, the Commission should reinforce the requirements to work with other stakeholders, including PMSA, to complete the workshops as set forth in Order 09 (including conclusions of law for which PSP never

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<sup>55</sup> *Id.* at 11:1–11.

sought reconsideration or judicial review). Only after that process, when PSP has the testimony and exhibits necessary to demonstrate the completion of these tasks, may it refile its petition.

## CONCLUSION

61 PSP has filed its petitions prematurely. PSP failed to follow the Commission's directives in Order 09 for the processes that must occur, and the substantive reports required before PSP files its next general rate case. Nor can PSP bypass the requirements of Order 09 and of the general rate case process by filing for interim rate increases with an automatic tariff adjuster. Instead of the workshop process established in Order 09, PSP unilaterally picked a formal mediation format and unilaterally selected a mediator. PSP unilaterally selected its actuary. PSP unilaterally asserted meeting agendas. PSP unilaterally decided when to initiate discussions and refused to set a schedule for workshops. PSP then unilaterally decided when to end discussions. When asked to proceed in a collaborative workshop process with a mutually agreed-upon third-party mediator or actuary, PSP unilaterally dismissed this as a "waste of time." PSP's collective actions are inconsistent with Order 09.

62 PSP has presented no evidence to demonstrate its completion of the prerequisite processes and the related substantive reports, the completion of which was a requirement of the adoption of the current tariff. For all these reasons, PMSA respectfully requests that the Commission grant this motion and dismiss the PSP

Petitions without prejudice and with a right to refile once PSP can establish it is in compliance with Order 09.

Respectfully submitted this 7th day of July, 2022.

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