

BEFORE THE STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

Docket TP-220513

**PUGET SOUND PILOTS’
MEMORANDUM IN OPPOSITION
TO PMSA’S MOTION TO DISMISS**

I. Puget Sound Pilots (“PSP”) submit this response in opposition to PMSA’s Motion to Dismiss.

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INTRODUCTION

2. The Washington Utilities and Transportation Commission's ("UTC") November 25, 2020 Order 09 set out three tasks that PSP was required to complete before filing its next general rate case. These included:
 - (1) Establish full accrual accounting for callbacks, which was implemented as reported by PSP CPA Jessica Norris in her testimony and demonstrated by footnote 4 in PSP's 2021 audited financial statement.¹
 - (2) Conduct a thorough evaluation of the efficiency of PSP's pilot dispatch system, which ultimately involved substantial involvement from outside experts and resulted in the adoption of eight efficiency measures described in the testimony of PSP President Captain Ivan Carlson.² These measures were characterized as "robust and clearly in good faith" by fatigue risk management and efficiency expert Dr. Charles Czeisler.³
 - (3) Initiate stakeholder "discussions for the purpose of developing a plan to transition to a fully funded, defined-benefit retirement plan" that included "a comprehensive stakeholder evaluation and participation study."⁴
3. There is no dispute that PSP complied with the first two UTC directives concerning callback accounting and efficiency measures. In its motion to dismiss, PMSA argues that the pension-related stakeholder discussions that PSP was directed to conduct failed to comply with a broad directive to PSP to hold pension transition stakeholder discussions, the specifics of

¹ Norris, Exh. JJN-01T at 3.

² Carlson, Exh. IC-01T at 11-15.

³ Czeisler, Exh. CAC-01T at 82.

⁴ Order 09 ¶ 191.

which the UTC expressly declined to address, noting in Order 09: "We decline, however, to 'broker' the dialogue, as PMSA requests."⁵

4. The evidence submitted on this issue in PSP's June 29, 2022 general rate case, as supplemented by the declaration of PSP lead counsel Michael E. Haglund, clearly demonstrates that PSP fully complied with its obligation to hold comprehensive pension-related stakeholder discussions. Indeed, the best evidence of that compliance is that agreement on the precise form of a pension transition from unfunded to fully funded was in fact reached with two of the three non-PSP stakeholders.

STATEMENT OF FACTS

5. The record assembled by PSP in response to PMSA's motion to dismiss includes the following facts, which PMSA concedes must be presumed true for purposes of its motion to dismiss:
 - (1) Given its legal obligations to existing retirees and to all of PSP's currently working pilots, PSP engaged key experts, an actuary and a pension lawyer, to educate PSP regarding its legal obligations under its existing pension plan, whether and how a transition to a fully funded defined-benefit plan could be accomplished and the long-term costs of that transition compared to continuing PSP's pay-as-you-go pension plan.⁶
 - (2) Once PSP received and reviewed the actuarial and pension law analyses prepared by actuary Christopher Wood and pension lawyer Bruce McNeil, PSP was in a position to initiate the UTC-required stakeholder discussions with the knowledge that PSP could

⁵ *Id.* ¶ 192.

⁶ Haglund Decl. ¶¶ 8-9.

support either continuing the status quo pay-as-you-go pension plan or a transition to a fully funded defined-benefit plan.⁷

- (3) To facilitate an efficient series of stakeholder meetings, PSP in late January 2022 provided all stakeholders with census data for PSP retirees and working pilots, the PSP Pension Plan and on February 1, 2022 provided the actuarial cost projections for three different pension plan scenarios and the underlying actuarial methods and assumptions.⁸
- (4) In its January 28, 2022 letter to all stakeholders, PSP specifically noted that, because one or more stakeholders may wish to engage their own actuary and develop their own projections, the first of the stakeholder meetings was being scheduled for March 2, 2022, to give all stakeholders "over six weeks to examine the enclosed information and to perform their own analyses."⁹ PMSA did not engage an actuary until sometime in late May or early June 2022 approximately four months after it received PSP's January letter to stakeholders.¹⁰
- (5) Given the longstanding contentious relationship between PSP and PMSA, PSP's counsel recommended use of a skilled mediator to facilitate the negotiations between stakeholders rather than an actuary, whose typical skill set does not include facilitation of negotiations between parties.¹¹
- (6) After PMSA objected to utilizing Seattle mediator Lou Peterson for the stakeholder sessions and declined to suggest an alternate mediator, counsel for PSP and PMSA

⁷ *Id.*

⁸ *Id.* ¶¶ 8-9.

⁹ *Id.* ¶¶ 8.

¹⁰ *Id.* ¶ 12.

¹¹ *Id.* ¶ 10.

agreed to proceed with direct stakeholder discussions that did not involve any mutually agreeable facilitator.¹²

(7) Stakeholder meetings occurred on March 2, April 13 and April 26, 2022. An additional session set for May 11 with a back-up date of May 17 was canceled by PMSA because it needed more time to hire an actuary.¹³

(8) During the course of the three stakeholder meetings, PMSA refused to acknowledge that PSP owed a legal obligation to its retirees and each of its working pilots to make the pension payments promised in the PSP pension plan and had no authority to unilaterally modify the terms of the PSP pension plan.¹⁴

(9) At the April 26, 2022 stakeholder meeting, PSP's counsel raised the issue of former Executive Director and General Counsel Walt Tabler's \$70,000 per year pension, which was awarded after 12 years of service to PSP. PMSA, through its Vice President Mike Moore, refused to engage on the topic other than to say that whatever pensions PSP granted to its employees was a matter for PSP to decide.¹⁵

(10) Following the cancellation of the May stakeholder session by PMSA, PSP requested that PMSA provide its final position on any transition of the PSP existing pension to a funded pension no later than June 15, 2022. Mr. Moore responded the same day, disagreeing that PSP had any right to make such a request and including the following statement: "We obviously don't have any positions (final or preliminary) on any issues with specificity yet." In light of PMSA's incredible failure to adopt even a preliminary position on "any issue" months after PSP initiated the stakeholder process and the

¹² *Id.*

¹³ *Id.* ¶¶ 11-12

¹⁴ *Id.* ¶ 12.

¹⁵ *Id.* ¶ 13.

dilatory character of PMSA's approach to the stakeholder engagement process, PSP's counsel in a letter dated June 8, 2022 declared impasse in the negotiations between PSP and PMSA. The letter also left open the potential for future negotiations provided any such session was "preceded by an actual proposal from PMSA."¹⁶

- (11) During parts of April, May and June, 2022, PSP engaged in direct discussions with representatives of two other stakeholders, Pacific Yacht Management (“PYM”) and Northwest Marine Trade Association (“NMTA”). These negotiations ultimately resulted in a consensus agreement between these three parties on three points: (1) PSP's legal obligations to its retirees and all working pilots are legally enforceable obligations that should be funded through the tariff; (2) in order to maintain a competitive package of compensation and benefits attractive to top-flight mariner applicants, the existing PSP pension plan benefit accrual rate of 1.5% per year should remain in place for all future licensees; and (3) the UTC should approve a transition to a fully funded defined-benefit plan that replicates the existing PSP plan benefits using one of the two fully funded scenarios described in the testimony of PSP's pension lawyer and actuary.¹⁷
- (12) In the discussions between PSP, PYM and NMTA, which involved PSP Executive Director Charles Costanzo, PSP counsel Michael E. Haglund, PYM's Monique Webber and NMTA Vice President and Government Affairs Director Jay Jennings, it was agreed that both PYM and NMTA would confirm all three elements of their agreement with PSP either in writing or in testimony in this proceeding.¹⁸

¹⁶ *Id.* ¶ 15.

¹⁷ *Id.* ¶ 16.

¹⁸ *Id.*

STANDARD FOR DISMISSAL

6. PMSA correctly notes that its motion to dismiss filed pursuant to WAC 480-07-380(1) is governed by Washington civil rules CR 12(b)(6) and 12(c). PMSA further concedes that the Commission "should presume PSP's factual allegations are true and draw all reasonable inferences in PSP's favor."¹⁹
7. The legal standard governing PMSA's motion to dismiss presents an extraordinarily high bar which, on this record, PMSA cannot possibly meet. This was made abundantly clear by the Washington Supreme Court in *FutureSelect Portfolio Management, Inc. v. Tremont Group*, 180 Wash.2d 954 (2014), where the court declared:

All facts alleged in the complaint are taken as true, and we may consider hypothetical facts supporting the plaintiff's claim. Therefore, a complaint survives a CR12(b)(6) motion if *any* set of facts could exist that would justify recovery.

Id. at 962-63.

ARGUMENT

A. Order 09 Required PSP to Initiate Stakeholder Discussions Regarding a Pension Plan Transition, But Did Not Dictate the Format for Those Discussions

8. Between the Costanzo testimony and exhibits and the facts set out in the Haglund declaration, there is no question that PSP has assembled a record that fully supports each of the 12 facts set out in the Statement of Facts section of this memorandum. Those facts, which are presumed to be true and viewed in the light most favorable to PSP, leave no question that PSP satisfied Order 09's requirement by initiating and conducting a comprehensive stakeholder engagement process related to a potential transition of its existing unfunded pension plan to a fully funded defined-benefit plan. There also can be no question that the

¹⁹ PMSA Mo. to Dismiss at 15.

issue of the pension for PSP's former Executive Director and General Counsel was also raised during those stakeholder discussions.

9. Finally, not only did PSP comply with the UTC's directive in Order 09 with respect to PSP's pension and that of its former Executive Director, but those discussions produced agreement on the transition to a funded pension plan with a majority of the other stakeholders. The fact that PMSA believes that the process should have been approached differently and taken substantially longer is irrelevant. There is simply no legitimate basis on which to grant PMSA's motion to dismiss.

B. The Record Strongly Supports a Finding That PSP Fully Complied with Order 09's Prerequisites for Filing PSP's Next General Rate Case

10. PSP complied with each of the prerequisites to its filing of the pending general rate case, including adopting full accrual accounting for callbacks, examining its pilot dispatch system and implementing multiple efficiency measures and conducting stakeholder discussions regarding pension-related issues.
11. The PMSA argument that PSP somehow interfered with or was required to conduct the rate of return methodology workshop that is referenced in Order 09 is simply untrue. In its motion, PMSA claims without evidence that "PSP's refusal to set any schedule for the workshops seemingly frustrated the Staff timeline for conducting its stakeholder meetings."²⁰ In fact, Order 09 clearly allocated the responsibility for conducting that workshop to UTC staff as demonstrated by the following paragraph from the Order:

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

²⁰ PMSA Mo. to Dismiss at 8-9.

return methodologies used in utility rate setting to pilotage ratemaking. These 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.²¹

There is no basis for dismissing PSP's general rate case on the grounds that UTC staff has not yet conducted the rate of return workshop, which was not identified as a condition precedent to PSP's filing of a general rate case. Moreover, the utility of such a workshop is highly suspect because, as the UTC noted in Order 09, this methodology is inappropriate to a service-oriented professional organization of pilots "that distributes its income each year to member pilots."²²

CONCLUSION

12. Based on the clear and unequivocal record described above, PMSA's Motion to Dismiss should be denied.

Respectfully submitted this 18th day of July, 2022.

HAGLUND KELLEY LLP

s/ Michael E. Haglund

Michael E. Haglund, OSB No. 772030

Julie Weis, WSBA No. 43427

Eric E. Brickenstein, OSB No. 142852

HAGLUND KELLEY LLP

2177 SW Broadway

Portland, OR 97201

Telephone: (503) 225-0777

Facsimile: (503) 225-1257

Email: mhaglund@hk-law.com

jweis@hk-law.com

ebrickenstein@hk-law.com

Attorneys for Respondent Puget Sound Pilots

²¹ Order 09 ¶ 390.

²² Order 09 ¶ 67.

