

BEFORE THE STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

Docket No. TP-220513

PMSA'S OPPOSITION TO
PSP'S PETITION FOR INTERIM
RATE INCREASE AND EXPE-
DITED CONSIDERATION

INTRODUCTION

1. Pursuant to WAC 480-07-370(4), Intervenor¹ Pacific Merchant Shipping Association ("PMSA") respectfully submits this response in opposition to the petition brought by Puget Sound Pilots ("PSP") for an interim rate increase ("Interim Petition").
2. PMSA has filed a separate motion to dismiss without prejudice PSP's concurrently filed general rate case in its entirety, including the Interim Petition. Pursuant to WAC 480-07-370(4), PMSA here files this response specific to the Interim Petition as a supplement to its motion to dismiss.
3. PSP has not proven or demonstrated the existence of any emergency or any other extraordinary circumstance or hardship justifying the extraordinary

¹ PMSA has previously filed a petition to intervene in this matter; that petition is pending.

remedy sought in the Interim Petition.

4. Despite citing as support an order denying an interim rate increase in *Pacific Northwest Bell*,² PSP's Interim Petition does not satisfy any of the requirements for interim rate increases established in that case.
5. PSP relies on the same body of evidence in its general rate case and its Interim Petition to advance contradictory factual assertions and theories. The Interim Petition asserts higher rates are necessary because PSP has attracted so many new pilot trainees to join its ranks that it has become an inequitable hardship. But in its general rate case, PSP seeks higher rates based on its claim that it cannot attract new pilot trainees to join its ranks. Both cannot be true. Because the extraordinary circumstances necessary for an interim rate increase do not exist, PMSA asks the Commission to deny PSP's Interim Petition.

STATEMENT OF FACTS

6. This response relies on the pleadings and papers in the instant case and in the prior general rate case (Docket TP-190976), including the Commission's Final Order³ in that case.
7. The tariff in the prior case became effective less than 18 months before PSP's

² *Wash. Utils. & Transp. Comm'n v. Pacific Northwest Bell Telephone Co.*, Cause No. U-72-30, Second Supplemental Order Denying Petition for Emergency Rate Relief (October 1972) [hereinafter *Pacific Northwest Bell Interim Order*].

³ *Wash. Utils. & Transp. Comm'n v. Puget Sound Pilots*, Docket TP-190976, Order 09 (November 26, 2020) [hereinafter *Final Order*].

latest filing of the instant case.⁴ The Interim Petition requests a substantial rate increase.

8. Without citing any evidence, the Interim Petition makes the following claims:
 - a. PSP argues rate increases are necessary to “fund a pilotage program that fairly compensates current pilots and is competitive in attracting and retaining the best candidates necessary” and “to at least ensure that current pilots’ hardship under the current tariff is not further exacerbated by the addition of unfunded pilots while the Commission adjudicates the now-pending general rate case.”⁵
 - b. PSP claims that the current tariff is unfair “based on the Commission’s projections that badly underestimated vessel traffic”⁶ and simultaneously claims it is unfair based on “the Commission’s significant overestimate of vessel traffic.”⁷
 - c. PSP further contends that the current tariff is unfair because the Commission made “a clear mistake that caused significant undue hardship to individual pilots and their families” when “the Commission expressly refused to factor the effects of the pandemic into PSP’s tariff.”⁸

⁴ *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-190976, Letter from Mark L. Johnson (Jan. 22, 2021).

⁵ Interim Petition at ¶ 3.

⁶ *Id.* at ¶ 8.

⁷ *Id.* at ¶ 8, n. 1.

⁸ *Id.* (citing Final Order, *supra* note 3, at ¶¶ 108–109).

- d. PSP also submits that the current tariff is unfair considering the profitability of PSP’s customers’ vessels during the pandemic.⁹
- e. PSP contends “[r]ates under the current tariff are grossly inequitable because they do not fund the actual number of full-time pilots that comprise PSP’s membership and therefore significantly reduce the individual pilots’ DNI below the level authorized by the Commission.”¹⁰
- f. The Interim Petition contends that, during the current economic climate, “PSP and its members have suffered greatly under the current tariff” because the tariff “has failed to generate revenue that even approaches the approved target DNI, let alone provide a competitively attractive level of compensation to new pilot candidates.”¹¹

9. In the work papers PSP submitted in support of this Interim Petition and the general rate case, PSP projects an estimated 7,442 pilot assignments for 2022.¹²

10. With respect to “Assignment Projections” in the prior rate case, PSP argued, “A five–year average may serve as a sufficiently accurate projection at times, but it will not be as accurate as an econometric analysis. Half of the time it will be too high, and half of the time it will [sic] too low.”¹³ With respect to COVID-19

⁹ *Id.*

¹⁰ *Id.* at ¶ 12.

¹¹ *Id.* at ¶ 16.

¹² PSP-WP IC-projected 2022 revenue and assignments-06-29-22.

¹³ *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-190976, PSP Initial Post-Hearing Brief ¶ 104 (Sept. 10, 2020).

impacts on vessel assignments, PSP argued in its last rate case,

As an additional matter of vessel assignment calculations, the Commission should refrain from any attempt to adjust these projections based upon the ongoing pandemic for a number of reasons. Indeed, rather than known and measurable, any adjustment will be highly speculative in nature as Staff and PSP agree.¹⁴

PSP further acknowledged in the prior rate case that “valid reasons exist to authorize a rate increased based upon historic shipping trends that should continue in the future”; the licensing of pilots should be viewed as a long-term proposition “rather than using short-term extraordinary events to guide that process”; and “in the event that shipping traffic continues at reduced levels, the pilots will naturally earn less than projected.”¹⁵

11. The Commission’s Final Order broadly considered the many arguments of the parties. In the end, it followed the Staff recommendation to base the number of pilots to fund in a formula based on an “average assignment level” and not just the Board’s number of authorized pilots.¹⁶ Thus, the Final Order adopted the average number of pilotage assignments calculated by UTC Staff of 7,310 assignments for the current tariff year of 2022.¹⁷ The Final Order was based on both the Staff–recommended average assignment level and PSP’s testimony regarding the actual anticipated licensing of pilots to determine a graduated increase in the

¹⁴ *Id.* at ¶ 105

¹⁵ *Id.* at ¶ 106.

¹⁶ Final Order, *supra* note 3, at ¶¶ 69–109.

¹⁷ *Id.* at ¶¶ 75, 85.

number of pilots to 50 licensees in 2021 and 52 licensees in 2022.¹⁸

12. The Commission’s Final Order approached the COVID-19 pandemic cautiously and consistently with the recommended positions of PSP and Staff. While acknowledging a decline in shipping traffic, the Commission nevertheless provided “a modest increase for PSP’s management to help maintain financial stability during the unprecedented conditions created by the COVID-19 pandemic.”¹⁹ “Additionally, we find that adjusting the number of pilots downward in year two due to the decline in vessel traffic related to the COVID-19 pandemic would be neither reasonable nor appropriate. . . . [N]o party advocates for adjusting pilotage rates to account for the impacts of the pandemic.”²⁰ Further, “no party has advocated to reflect the effects of the COVID-19 pandemic in revised vessel projections. Both PSP and Staff agree that it would be highly speculative to normalize the effects of the recent decline in shipping traffic,” noted the Commission, adding, “We agree. The pandemic occurred after the test year, which ended on June 30, 2019. It is difficult to predict how shipping will recover and over what timeframe, making any adjustments to the test year highly speculative.”²¹

13. The Commission’s Final Order rejected PSP’s argument that the profitability

¹⁸ *Id.* at ¶¶ 85, 102–104.

¹⁹ *Id.* at ¶ 102.

²⁰ *Id.* at ¶ 105.

²¹ *Id.* at ¶ 367.

of the pilots' customers' vessels was relevant and instead agreed with Staff and PMSA that "the profitability of larger vessels should not justify imposing greater costs on those vessels."²² The Final Order reasoned that tying rates to profitability "goes against one of the core principles in regulated rate setting.' It is instead appropriate to charge vessels based on the principle of cost causation."²³

14. The Commission's Final Order also disclaimed the notion that DNI is a promise or guarantee of pilot income based on the number of authorized pilots or an appropriate assignment level for pilots. Rather, the Commission set a rate "providing PSP 'an *opportunity*, given wise and efficient management, to earn that return'" and placed ultimate responsibility on PSP "to make prudent management decisions to earn the revenue requirement authorized by the rates the Commission sets."²⁴

15. PSP did not submit with its Interim Petition any proposed tariff sheets detailing interim rates or tariff provisions specifically proposed to be deleted, replaced, or inserted as required by WAC 480-07-525(2).

ARGUMENT

16. PSP's simultaneous submissions of this Interim Petition and its general rate case presents a "heads I win, tails you lose" proposition. Every issue related to

²² *Id.* at ¶ 362

²³ *Id.* at ¶ 362 (quoting testimony of UTC Staff member Mr. Sevall).

²⁴ *Id.* at ¶ 106 (quoting *Wash. Utils. & Transp. Comm'n v. Puget Sound Power & Light Co.*, Cause No. U-83-84, Order p. 57–58 (Sept. 28, 1984) (emphasis in original)).

pilot recruiting seemingly yields the same solution: a rate increase. According to the Interim Petition, a rate increase is necessary because of an increase in the number of trainees becoming new pilots; in its general rate case, PSP alleges that a rate increase is necessary because of an inability to increase the number of new trainees who are interested in becoming pilots.

17. All the while, PSP has failed to demonstrate why the anticipated ebb and flow in the number of pilot licensees constitutes an emergency justifying the extraordinary relief of an interim rate increase. This is a regular and anticipated occurrence and more properly addressed in the normal course of a general rate case.

18. Moreover, PSP appears to re-litigate the arguments it presented in the first general rate case, all of which the Commission addressed in its Final Order. These include the Commission's decision to use an average assignment level to set DNI, the treatment of COVID-19 impacts (which PSP now mischaracterizes as a "mistake"), and PSP's improper attempt to make the profitability of its customers a factor in rate-setting. The time for reconsideration of these issues in the Final Order has long passed. Re-litigation of these arguments cannot justify interim emergency proceedings.

19. PSP's Interim Petition does not meet the requirements for interim rate increases listed in the six conclusions in *Pacific Northwest Bell* listed in boldface in the discussion below.²⁵

²⁵ *Pacific Northwest Bell Interim Order*, *supra* note 2, at 13.

20. **Conclusion 1.** “This Commission has authority in proper circumstances to grant interim rate relief to a utility but this should be done only after an opportunity for adequate hearing.”²⁶ This restates the fundamental premise that the Commission has the legal authority to grant interim rate relief at its discretion, but only when presented with the “proper circumstances” as elaborated in the decision’s remaining five conclusions. If the Interim Petition does not establish such “proper circumstances” exist, then it is simply unnecessary to provide a petitioner with a hearing on the interim request.

21. **Conclusion 2.** “An interim rate increase is an extraordinary remedy and should be granted only where an actual emergency exists or where necessary to prevent gross hardship or gross inequity.”²⁷ PSP’s Interim Petition seeks to transmogrify the normal, regular, regulated, natural, and anticipated process by which the number of pilots the Board of Pilotage Commissioners licenses changes from time to time into an “emergency” worthy of “an extraordinary remedy.” PSP claims that the current tariff is “grossly inequitable” because it has 53 licensees at present while the Commission’s Final Order based the 2022 DNI on 52 licensees. The recent addition of one licensee, or even three licensees, is not an emergency. PSP’s claim also fails to provide any evidence showing how closely pilots are operating to the Final Order’s average assignment level per

²⁶ *Id.*

²⁷ *Id.*

pilot, without which it is impossible to conclude that any remedy is necessary or that the present situation is somehow grossly inequitable. Indeed, the Final Order encouraged PSP to improve its efficiency, possibly resulting in a greater average assignment level. Increased efficiency or workloads would hardly constitute a gross hardship.

22. PSP does not explicitly argue in its Interim Petition that the COVID-19 pandemic is an emergency deserving of an extraordinary remedy. But PSP lodges the criticism that “the Commission expressly refused to factor the effects of the pandemic into PSP’s tariff” and that this “was a clear mistake that caused significant undue hardship to individual pilots and their families.”²⁸ PSP confusingly claims this to be due simultaneously to an “overestimate of vessel traffic” and “the Commission’s projections that badly underestimated actual vessel traffic.”²⁹

23. In fact, PSP requested and endorsed the Commission’s position not to adjust the base year data downward to reflect the initial decline in vessel traffic because of the COVID-19 pandemic.³⁰ Staff concurred that such revisions would be speculative.³¹ No party advocated for revisions or provided evidence on which to base such revisions.³² But PSP now claims that the pandemic’s effect on vessel traffic

²⁸ Interim Petition at ¶ 8 at n. 1.

²⁹ *Id.*

³⁰ Final Order, *supra* note 3, at ¶ 367.

³¹ *Id.*

³² *Id.*

was “foreseeable” and “highly acute.”³³ Given that PSP at the time advocated for adopting a tariff based on the theory that it was necessary to fund 61.6 pilot positions, PSP unsurprisingly did not want to significantly reduce its future vessel traffic projections.³⁴ This was not a situation, as PSP now claims, where “the Commission expressly refused to factor the effects of the pandemic.”³⁵ To the contrary, the Commission agreed with PSP and Staff not to speculate as to the future effects of the pandemic given the lack of clear data in the record.

24. Nor was this a “mistake” by the Commission. While PSP now claims in hindsight that it is suffering a “significant undue hardship” because of a “mistake” by the Commission to have either “badly underestimated” or “significantly overestimate[d]” vessel traffic,³⁶ the facts are otherwise. UTC Staff estimated total annual vessel assignments for the current tariff period at 7,310, which the Commission applied to both tariff years.³⁷ PSP currently estimates that 2022 vessel assignments will total 7,442.³⁸ Thus, Staff estimates are very close to 2022 actual assignments, and PSP will exceed the staff estimate this year.

25. PSP’s other argument regarding COVID-19 is that its customers’ profits during this period are somehow relevant to the claimed “significant undue hardship”

³³ Interim Petition at ¶ 8, n. 1.

³⁴ Final Order, *supra* note 3, at ¶ 76, Table 1.

³⁵ Interim Petition at ¶ 8, n. 1.

³⁶ *Id.* at ¶ 8, n. 1.

³⁷ Final Order, *supra* note 3, at ¶¶ 75, 363, 485.

³⁸ PSP-WP IC-projected 2022 revenue and assignments-06-29-22.

experienced by PSP.³⁹ The Commission’s Final Order dismissed this argument as against Commission policy.⁴⁰ Nothing has changed that makes this proper grounds now for finding gross hardship or inequity.

26. **Conclusion 3.** “The mere failure of the currently realized rate of return to equal that approved as adequate is not sufficient standing alone to justify the granting of interim relief.”⁴¹ As noted in the Final Order, the Commission’s tariff does not guarantee PSP a level of revenue; instead, it generally provides an opportunity for PSP to generate revenues.⁴² The case quoted in the Final Order for this foundational concept provides powerful reasoning in its support:

A note on the concept and existence of the social and economic compact of utility regulation is necessary to in part help communicate the reasons for the decisions made by the Commission in this order. The social and economic compact of utility regulation begins with the premise that a regulated utility has an obligation to serve the public . . . This leaves the state of the law as a utility possesses an unending obligation to provide service to anyone within the service territory of that utility who demands service in accordance with approved tariffs.

However, in order for the social duty to serve to be viable, the compact must also provide for a utility to recover expenses it prudently undertakes to meet that obligation. This does not mean a guaranteed rate of return. The elements which determine a rate of return are another part of the compact. Understanding the dichotomy between the treatment of expenses prudently undertaken to provide service and providing a return on investment and that they are two

³⁹ Interim Petition at ¶ 8 at n. 1.

⁴⁰ Final Order, *supra* note 3, at ¶ 362.

⁴¹ *Pacific Northwest Bell* Interim Order, *supra* note 2, at 13.

⁴² Final Order, *supra* note 3, at ¶ 106.

separate matters is critical to the understanding of the regulatory compact and the operation of utilities.

In developing an authorized rate of return, the Commission deals with that portion of the compact which in essence provides the utility with a monopoly but in return takes away monopoly profits by using regulation as a substitute for competition. In doing so, the Commission determines a utility's rate base (the amount of investment which is to be attributed to serving the ratepayers) and develops an authorized rate of return which represents an opportunity, given wise and efficient management, to earn that return.⁴³

PSP is facially seeking to revise the current tariff solely on the grounds that it is not equal to that approved as adequate for its members. This does not meet the requirements for this type of emergency proceeding.

27. Moreover, to the extent that this third conclusion in *Pacific Northwest Bell* is intended to reflect not only operating revenues but also a specific “rate of return,” PSP and UTC Staff have not yet held the required workshops to identify rate of return methodologies to potentially be applied to pilotage, and PSP fails to show the current rate’s impacts on individual pilot equity in PSP.

28. **Conclusion 4.**

The Commission should review all financial indices as they concern the applicant, including rate of return, interest coverage, earnings coverage and the growth, stability or deterioration of each, together with the immediate and short term demands for new financing and whether the grant or failure to grant interim relief will have such an effect on

⁴³ *Wash. Utils. & Transp. Comm’n v. Puget Sound Power & Light Co.*, Cause No. U-83-84, Order p. 57–58 (Sept. 28, 1984).

financing demands as to substantially affect the public interest.⁴⁴

Regarding this requirement, the Interim Petition alleges that “PSP has an immediate and short term need for new financing. The need is immediate because PSP has already added a 53rd pilot and further additions are imminent.”⁴⁵ PSP has not asserted or produced any facts, evidence, or testimony discussing PSP’s financing of pilot net income or that PSP has financing needs which are based on the number of pilots which are licensed. There is no basis for claiming a change in the number of pilots affects PSP’s short term demands for financing. Further, PSP would need to demonstrate how and to what extent a rate change would substantially affect its financing demands, which it has not done.

29. **Conclusion 5.**

In the current economic climate the financial health of a utility may decline very swiftly and interim relief stands as a useful tool in an appropriate case to stave off impending disaster. However, this tool must be used with caution and applied only in a case where not to grant would cause clear jeopardy to the utility and detriment to its ratepayers and stockholders. That is not to say that interim relief should be granted only after disaster has struck or is imminent, but neither should it be granted in any case where full hearing can be had and the general case resolved without clear detriment to the utility.⁴⁶

PSP has made no arguments here which come close to meeting the high standards

⁴⁴ *Pacific Northwest Bell Interim Order, supra* note 2, at 13.

⁴⁵ Interim Petition at ¶ 15.

⁴⁶ *Pacific Northwest Bell Interim Order, supra* note 2, at 13.

set by this conclusion. PSP has not alleged any “impending disaster.” Its sole request is that it would like to offset the costs that may be borne by some of its pilots who may end up sharing revenue with other new pilots coming out of the training program. These costs are to be addressed in the general rate case where a full hearing on issues such as the number of pilots and average assignment levels, can occur. PSP does not allege any “clear detriment” to PSP other than its unsupported and specious argument that somehow not providing an interim rate increase at this time “risks lasting damage to PSP and the reputation of Washington’s pilotage system.”⁴⁷ This is hardly grounds to use a tool which should “be used with caution and applied only in a case where not to grant would cause clear jeopardy to the utility and detriment to its ratepayers and stockholders.” The fact that pilots may get paid less than they otherwise expected does not put the entire pilotage system in clear jeopardy. Nor is it clear how that would ever be a detriment to ratepayers. Rather, as previously mentioned, this presents issues and arguments that can and should be addressed in the normal course in a general rate case.

30. **Conclusion 6. “Finally, as in all matters, we must reach our conclusion with the statutory charge to the Commission in mind, that is to ‘Regulate in the public interest’ (RCW 80.01.040). This is our ultimate responsibility and a reasoned judgment must give appropriate weight to all**

⁴⁷ Interim Petition at ¶ 16.

salient factors.”⁴⁸ The most salient factor with respect to maintaining fealty to the public interest in economic regulation is consistency with the existing statutes, regulations, and orders that guide the Commission’s actions. The Final Order in the prior general rate case serves as ongoing binding guidance in this case for regulating in the public interest in the context of PSP’s tariffs. If PSP believed that the Final Order was outside of the scope of the Commission’s statutory or regulatory authority or promulgated in an arbitrary or capricious manner, it had the right to challenge the Final Order when it was issued. It did not do so. Now the Interim Petition attempts to re-litigate the arguments that the last rate hearing resolved. PSP improperly presumes that it has a right to do so in a type of proceeding reserved for extraordinary emergency events.

31. In sum, PSP has not carried its burden of proving the circumstances required under *Pacific Northwest Bell* for an interim request.

CONCLUSION

32. The Final Order in the prior general rate case present a reasoned judgment made in furtherance both PSP’s interest in fair compensation and the public’s interest to regulate the economics of the pilotage monopoly. As a final decision not challenged by any party or the public, it is presumptively correct and binding on both PSP’s Interim Petition and its concurrently filed general rate case. In the face of this presumption, PSP bears a heavy burden of justifying its claim that

⁴⁸ *Pacific Northwest Bell Interim Order*, *supra* note 2, at 13.

the Final Order was a “mistake” that “caused significant undue hardship” and “has produced outcomes that are decidedly not ‘fair, just, and reasonable.’” In fact, PSP presents none of the emergency circumstances required for a hearing on its interim request. As such, PSP’s Interim Petition should be denied.

Respectfully submitted this 19th day of July, 2022.

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