

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' MOTION
REQUESTING THAT THE UTC
SEEK A DETERMINATION FROM
THE BPC REGARDING THE
POLICY STANDARD GOVERNING
FUNDING OF WASHINGTON'S
PILOTAGE SYSTEM**

I. INTRODUCTION.

I. Pursuant to RCW 81.116.020(5), the Puget Sound Pilots ("PSP") move the Washington Utilities and Transportation Commission ("Commission" or "UTC") to request assistance from the Washington Board of Pilotage Commissioners ("BPC") in carrying out the UTC's duty to establish a tariff in this rate proceeding that provides "rates that are fair, just, reasonable and sufficient for the provision of pilotage services."¹ Specifically, the UTC should seek a determination from the BPC on the question whether the statutory standard "best achievable protection" ("BAP"), which the Washington Legislature declared in RCW 90.56 is the standard to achieve the State's "goal of achieving zero oil spills," also applies to the BPC's safety-driven approach to regulation of the state pilotage system.

¹ RCW 81.116.020(3) (emphasis added).

2. In a recent letter responding to four Washington legislators essentially posing this question, the Washington Department of Ecology ("Ecology" or "DOE") through its Spill Prevention, Preparedness, and Response Program Manager Carlos Clements, stated that Ecology has incorporated BAP into its regulations and that the BPC, in fulfilling its statutory obligation to adopt rules for tug escorts of oil tankers in Puget Sound, is required to design those rules "to achieve BAP as defined in RCW 88.46."² However, with respect to the question whether BAP applies to the BPC's "broad responsibility to oversee the state's pilotage system," DOE stated that this "is beyond Ecology's authority" and, as a result, "we defer to the BPC on the question whether BAP principles govern the approach to the state pilotage system."³
3. This Commission should seek the BPC's determination of this question — whether BAP applies to Washington's pilotage system — for three reasons. First, in a section of its June 29, 2021 report to the Legislature entitled "Consistency With Pilotage Act," this Commission noted that it was "premature to gauge the impact of the Commission's process and Order 09 on successful implementation of the Pilotage Act after only one contested rate case" and recommended that the parties address this issue "in PSP's next general rate case."⁴ Second, in Order 09, the Commission repeatedly confirmed BPC's primary jurisdiction over all aspects of pilotage with the exception of rate-setting. Pilotage is so different from the UTC's other regulated industries that a marine-safety specific standard of review is warranted. Close coordination and mission alignment between the BPC and Ecology's oil spill prevention program demonstrate the need to obtain BPC's view if the UTC is to fulfill its obligation to

² Haglund Decl. Ex. A at 1.

³ *Id.*

⁴ *Id.* Ex. B at 19.

establish rates that are "sufficient for the provision of pilotage services." Third, the issue is clearly ripe for decision in this case. No less than five PSP witnesses, including two with highly relevant legal expertise, have submitted testimony on this issue and the Pacific Merchants Shipping Association's ("PMSA") opposition is clearly telegraphed in a Data Request that is Exhibit E to the declaration of Michael E. Haglund filed herewith. Each of these three grounds strongly supporting the granting of this motion are addressed in turn below.

II. THREE REASONS STRONGLY SUPPORT THE UTC SECURING A DETERMINATION FROM THE BPC REGARDING THE STANDARD THAT SHOULD GOVERN FUNDING OF WASHINGTON'S PILOTAGE SYSTEM.

A. Referring the BAP Question for Determination by the BPC Will Fulfill a Commitment Made by the Commission in its 2021 Report to the Legislature.

4. There is no question that this Commission has the authority to ask the BPC to weigh in on the applicability of BAP to this state's pilotage system. RCW 81.116.020(5) states explicitly that, in exercising its statutory rate-setting duties regarding pilotage, the UTC may "[r]equest assistance from the board" with the term "Board" explicitly defined in RCW 81.116.010(1) to mean the Washington Board of Pilotage Commissioners. This issue was not addressed in Order 09, which was ultimately the source of comments from multiple stakeholders following the November 25, 2020 issuance of Order 09. In an April 1, 2021 letter directly addressing the UTC's tariff-setting process for pilotage, the Washington Environmental Council noted:

Now that the tariffs have been moved to the UTC, we urge the UTC to continue the Pilot Commission's practice of using the tariff setting process to promote the safety agenda of the Pilotage Act. The role of the UTC is typically to protect ratepayers from excessive rates and provide a reasonable economic return to the service

provider. It is different here. The role of rate setting in pilotage is to promote the safety goals of the Pilotage Act. In setting the tariff, UTC is telling the shipping industry what it must pay to maintain the pilotage system that has been created to protect the people, communities, and natural resources of the state of Washington from the risks introduced by shipping. As pointed out in RCW 81.116.020, the job of the UTC is not only to set fair and just reasonable rates, but also to provide funds “sufficient for the provision of pilotage services.”⁵

5. In response to the above and other comments, the Commission made a commitment in its June 29, 2021 comprehensive "Legislative Report on Establishing Marine Pilotage Tariffs" to address issues related to ensuring that pilotage rate-setting by the UTC was consistent with the Pilotage Act in this second PSP general rate case. The entirety of this section of the Commission's 2021 report to the Legislature is quoted below:

CONSISTENCY WITH PILOTAGE ACT

Although not specifically required by RCW 88.16.005, several stakeholders expressed a desire for the Commission, through the rate-setting process, to seek consistency with the policies and legislative intent of compulsory pilotage in the Pilotage Act. The Act identifies the need for highly skilled and licensed pilots to ensure against the loss of life, damage to property, and harm to the environment, and to ensure Washington continues to be a competitive market for waterborne commerce from other ports and nations.

The guiding principle of establishing fair, just, reasonable, and sufficient rates is consistent with the Pilotage Act’s legislative declaration and policy intent. Further, the Commission is mindful that the Legislature only transferred rate-setting authority, reserving all other regulation of marine pilotage to the BPC. In Order 09, the Commission carefully distinguished between its role as the rate-setter and the role of the BPC as the safety regulator. Nonetheless, it is premature to gauge the impact of the Commission’s process and Order 09 on successful implementation of the Pilotage Act after only one contested rate case. The Commission recommends that the parties consider the degree to which the Commission has successfully implemented the Pilotage Act through its processes in PSP’s next general rate case. This will give parties an opportunity to present fact-based arguments and witness testimony regarding this issue.⁶

⁵ *Id.* Ex. A at 1.

⁶ *Id.* Ex. B at 19 (footnote omitted).

6. In Order 09, the UTC relied on its long established utility service model approach to rate-setting, defining fair, just, reasonable and sufficient rates in the pilotage context as follows:

In any general rate proceeding, the Commission’s ultimate goal is to set rates that are *fair* to customers and to the Company’s shareholders; *just* in the sense of being based solely on the record developed in a rate proceeding; *reasonable* in light of the range of possible outcomes supported by the evidence; and *sufficient* to meet the needs of the company to cover its expenses and attract necessary capital on reasonable terms. In this context, the customers are the shippers – represented by PMSA and PYM – and the company is PSP and its member pilots. Because the pilots are the equivalent of PSP’s owners and shareholders, the ability to attract “necessary capital on reasonable terms” relates to PSP’s ability to attract and retain pilots to perform essential pilotage service in the Puget Sound pilotage district. We apply these guiding principles in the context of pilotage rate setting in this Order.⁷

7. PSP witness Clayton L. Diamond, who has broad experience with pilotage regulation throughout the United States in his capacity as Executive Director and General Counsel of the American Pilots’ Association, addresses in his testimony the major difference between maritime pilots and the service providers that the UTC has historically regulated and the importance of a safety-based policy standard governing pilotage rate-setting. An excerpt of Mr. Diamond’s testimony is quoted below:

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

⁷ Order 09 ¶ 43.

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 (OSPR) 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.⁸

8. In a letter dated October 28, 2022, four members of the Washington State Legislature wrote to the Department of Ecology seeking "the agency's opinion regarding whether BAP principles govern our approach to our state pilotage system."⁹ Carlos Clements, DOE's Program Manager for Spill Prevention, Preparedness and Response, answered the legislators' questions in a letter dated November 18, 2022. After noting that the tug escort rules that BPC is developing pursuant to RCW 88.16.260 "must be designed to achieve BAP," Mr. Clements stated:

⁸ Exh. CLD-01T at 32-38.

⁹ Haglund Decl. Ex. C.

RCW 88.16 is the chapter of law that established BPC to oversee pilotage in Washington state. RCW 88.16.010 established Ecology as a member of the Board. However, the application of best achievable protections to the BPCs broader responsibility to oversee the state's pilotage system is beyond Ecology's authority. As a result, we defer to the BPC on the question of whether BAP principles govern the approach to the state pilotage system.¹⁰

A copy of Ecology's letter was provided to PSP on January 3, 2023.¹¹

9. It is also worth noting that PSP's motion is analogous to what occurs from time to time in federal court cases where state law governs and there is a significant issue of state law in the case that has not been decided within the state court system. Although the Supreme Court in that state has discretion whether to consider a legal question certified to it by a federal court, the question is almost always taken up by the Supreme Court in that state. That authority is vested in the Washington Supreme Court in RCW 2.60.020. Where, as here, the BPC has primary jurisdiction over the question whether BAP applies generally to its regulation of the pilotage system in Washington, it is clearly appropriate for the Commission to seek the assistance of the BPC on a highly relevant question pursuant to the Commission's authority under RCW 81.116.020(5).

B. The Commission Recognized the Primary Jurisdiction of the BPC on Safety Issues in Order 09.

10. The UTC in Order 09 made repeated reference to the role of the BPC as the primary regulator of pilotage with the UTC's only role being rate-setting. Most significantly, the Commission confirmed the BPC's primary jurisdiction over all aspects of pilotage with the exception of rate-setting in two explicit findings of fact quoted below:

(2) The BPC is generally charged with the administration and enforcement of

¹⁰ *Id.* Ex. D.

¹¹ *Id.* at ¶ 6.

the Washington Pilotage Act, including establishing a comprehensive pilot training program, issuing pilot licenses, and determining the number of pilots necessary to be licensed in each pilotage district to optimize the operation of a safe, fully regulated, efficient, and competent pilotage service in each district.

- (3) Effective July 1, 2019, the Legislature transferred the BPC's jurisdiction over rate-setting to the Commission. The Commission is charged with determining the rates for pilotage services and ensuring that the tariffs provide rates that are fair, just, reasonable, and sufficient for the provision of pilotage services. The Legislature did not transfer the BPC's jurisdiction over training, licensure, or other aspects of the Pilotage Act to the Commission.¹²

11. Given these clear findings, there should be no question regarding the advisability of the UTC seeking the assistance of the BPC on the standard that should govern the funding of the pilotage system in Washington.

C. The Applicability of BAP as the Governing Standard in this Rate Case has been Squarely Presented in the Testimony of Five PSP Witnesses and Will Certainly be Opposed by the PMSA.

12. In its general rate case filing on June 29, 2022, a total of five PSP witnesses addressed the applicability of the BAP standard to the UTC's rate-setting process that produces the tariff funding of the pilotage system for the Puget Sound Pilotage District. A list of those witnesses and the pages of their testimony devoted to BAP is set out below:

1. Charles P. Costanzo, Exh. CPC-01T, 11-33.
2. Captain Ivan Carlson, Exh, IC-01T, 4-9.
3. Clayton L. Diamond, Exh. CLD-01T, 32-38.
4. Captain Dan Jordan, DJ-01T, 12-16.

¹² Order 09 at ¶¶ 400, 401.

5. Captain Deborah D. Dempsey, DDD-01T, 5-6.

13. The statutory foundation for the BAP testimony of all five PSP witnesses is summarized briefly below.

14. The protection of Washington's ecology and natural resources through the prevention of oil spills is a bedrock principle of Washington law and policy in a state that for decades has assumed a national leadership role on this critically important subject. The State's duty to prevent oil spills arises from its fiduciary role as protector of the public trust. As the Legislature explained in Washington's nation-leading Oil and Hazardous Substance Spill Prevention and Response Act ("OSPRA"):

Washington's navigable waters are treasured environmental and economic resources that the state cannot afford to place at undue risk from an oil spill.

Therefore:

The state has a fundamental responsibility, as the trustee of the state's natural resources and the protector of public health and the environment to prevent the spill of oil.¹³

15. The Legislature has also rightly found that when it comes to oil spills, prevention is far more cost effective than cleanup:

The legislature finds that prevention is the best method to protect the unique and special marine environments in this state. The technology for containing and cleaning up a spill of oil or hazardous substances is at best only partially effective. Preventing spills is more protective of the environment and more cost-effective when all the response and damage costs associated with responding to a spill are considered. Therefore, the legislature finds that the primary objective of the state is to achieve a zero spills strategy to prevent any oil or hazardous substances from entering waters of the state.¹⁴

¹³ RCW 90.56.005(3)(c)(d).

¹⁴ RCW 90.56.005(2).

16. The legal standard that Washington applies to laws intended to prevent oil spills is “best achievable protection,” which is defined as follows:

“Best achievable protection” means the highest level of protection that can be achieved 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. The director’s determination of best achievable protection shall be guided by the crucial need to protect the state’s natural resources and waters, while considering: (a) The additional protection provided by the measures; (b) The technological achievability of the measures; and (c) The cost of the measures.¹⁵

17. There can be little doubt that PMSA will oppose the adoption of BAP as the standard that should inform UTC rate-setting for a Washington pilotage ground. This opposition is clearly signaled in PMSA Data Request No. 118 directed to PSP Executive Director Charles P. Costanzo, one of PSP's principal witnesses on the BAP issue who has significant past experience with maritime law as General Counsel and Vice President of the Pacific Region for the American Waterways Operators, a 250-member national trade association for the U.S. tugboat and barge industry. In Data Request No. 118, PMSA asks PSP to admit that the UTC’s rate-setting standard for a pilotage ground was adopted as set forth in paragraph 43 of Order 09. The full text of the data request and PSP’s response is quoted below:

PMSA DATA REQUEST NO. 118: Admit that, as adopted in ¶ 43 of Final Order 09 in the prior PSP Rate Case, TP-190976, the Commission stated,

In any general rate proceeding, the Commission’s ultimate goal is to set rates that are fair to customers and to the Company’s shareholders; just in the sense of being based solely on the record developed in a rate proceeding; reasonable in light of the range of possible outcomes supported by the evidence; and sufficient to meet the needs of the company to cover its expenses and attract necessary capital on reasonable terms. In this context, the customers are the shippers – represented by PMSA and PYM – and the company is PSP and its member pilots. Because the pilots are the equivalent of PSP’s owners and shareholders, the ability to attract “necessary

¹⁵ RCW 88.46.010(1).

capital on reasonable terms” relates to PSP’s ability to attract and retain pilots to perform essential pilotage service in the Puget Sound pilotage district. We apply these guiding principles in the context of pilotage rate setting in this Order.

RESPONSE: PSP admits that Final Order 09 in the prior PSP Rate Case, TP-190976 is a duly adopted order of the Commission that speaks for itself. PSP denies any interpretive intent by PMSA including without limitation any implication that the ultimate goal or guiding principles of a pilotage rate proceeding exclude adequately funding the pilotage system at a level that is sufficient to meet the best achievable protection standard. To the contrary, PSP’s ability to consistently recruit and retain a diverse corps of top pilot candidates from within a small national pool (i.e., PSP’s ability to attract “necessary capital”) is a fundamental component of providing the best achievable protection that Washington law requires and that is inherent in the term “essential pilotage service.”¹⁶

18. As demonstrated above, this issue is ripe for decision and should be the subject of a question referred by the Commission to the BPC.

III. CONCLUSION.

19. For the reasons set forth above, the Commission should promptly issue a letter to the BPC requesting a determination of whether the BAP standard applies generally to the BPC's regulation of pilotage in Washington. Assuming that this motion is granted by the end of February, the matter could be considered at the BPC's regular monthly meeting in March, which is scheduled to occur on March 16, 2023.

Respectfully submitted this 1st day of February, 2023.

HAGLUND KELLEY LLP

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¹⁶ Haglund Decl. Ex. E.

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