

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET TP-220513

COMMISSION STAFF’S RESPONSE
TO PUGET SOUND PILOTS’
MOTION TO SEEK GUIDANCE
FROM THE BPC

I. INTRODUCTION

1 Seven months after filing this general rate case, and mere days before other parties to this case file response testimony, the Puget Sound Pilots move the Commission to seek legal guidance from the Board of Pilotage Commissioners (BPC). The Commission should deny the Pilots’ motion on procedural and substantive grounds because: (1) the Pilots forfeit their right to the requested relief by failing to timely ask for it, and (2) the guidance the Pilots ask the Commission to seek will not assist the Commission with setting rates in this matter.

II. RELIEF REQUESTED

2 Staff respectfully requests that the Commission deny the Pilots’ motion and decline to seek guidance from the BPC as to whether the “best achievable protection” (BAP) standard found in chapter 90.56 RCW informs the state pilotage act.

III. STATEMENT OF FACTS

3 The Pilots filed this general rate case (GRC) on June 29, 2022. In doing so, the Pilots submitted testimony from numerous witnesses. Five of them offered opinions about the “best achievable protection” standard found in Washington’s oil and hazardous spill

prevention and response act¹ and its applicability to the pilotage act.^{2,3}

4 By October of 2022, discovery in this matter had begun in earnest. On October 20,
2022, intervenor Pacific Merchant Shipping Association (PMSA) served the Pilots with a set
of data requests that included PMSA DR No. 118. That DR asked the Pilots to admit that the
Commission had stated its interpretation of the “fair, just, reasonable, and sufficient”
ratemaking standard in the pilotage context⁴ in Order 09 in Docket TP-190976.⁵

5 The Pilots now ask the Commission to request BPC assistance in determining
whether the “best available protection” standard found in Washington’s oil and hazardous
spill prevention and response act informs the interpretation and application of the
Washington’s pilotage act.

IV. STATEMENT OF ISSUES

6 Should the Commission request guidance from the BPC?

V. EVIDENCE RELIED UPON

7 Staff relies upon the declaration of Jeff Roberson, filed concurrently with this
motion, and the evidence on record in this docket.

VI. ARGUMENT

8 The Commission should deny the Pilots’ motion on both procedural and substantive
grounds. Procedurally, the Pilots have forfeited their right to the relief they seek by
unreasonably delaying seeking it. Substantively, the guidance the Pilots ask the Commission

¹ Chapter 90.56 RCW.

² Chapter 88.16 RCW.

³ Carlson, Exh. IC-1T at 4-9; Costanzo, Exh. CPC-1T at 11-33; Dempsey, Exh. DDD-1T at 5-6; Diamond, Exh. CLD-1T at 32-38; Jordan, Exh. DJ-1T at 12-16.

⁴ Decl. of Jeff Roberson at Attachment A at 3.

⁵ *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-190976. Order 09, 12 ¶ 42 (Nov. 25, 2020).

to seek will not assist the Commission adjudicate the Pilots' filing, but will instead invite the parties to contest whether staffing levels or equipment constitutes the "best achievable protection," contests that the BPC, not the Commission, should resolve.

A. The Commission Should Deny the Pilots' Motion Because Their Request for Guidance is Untimely

9 The Pilots' failure to seek the relief they ask for here earlier in this proceeding forfeits their right to ask for it. That is because "a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."⁶ The Pilots delayed requesting relief until long after the events that they now claim trigger the need for guidance, and granting the relief they seek now will likely disrupt the orderly disposition of their GRC.

10 With regard to the need for guidance from the BPC, the Pilots appear to claim that two things necessitated that guidance: (1) their own prefiled direct testimony, and (2) PMSA's service of DR No. 118. Each of those events occurred a significant period of time before the Pilots filed this motion.

11 As concerns the Pilots' testimony, assuming without deciding that it put the BAP standard at issue,⁷ the Pilots filed their direct testimony in June, more than seven months ago. Accordingly, to the extent that the Pilots believe that their testimony put the BAP standard at issue, it was at issue seven months ago. The Pilots therefore should have moved the Commission to seek guidance then rather than waiting until the eve of response testimony to file a motion.

⁶ *U.S. v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (internal quotation omitted).

⁷ And Staff does not believe that the BAP standard is at issue here, as discussed below in Section VI.B.

12 With regard to the DR, again, assuming without deciding that PMSA’s DR No. 118 put the BAP standard at issue,⁸ PMSA served the Pilots with that DR in October, more than three months ago. Again, the Pilots contend that the DR put the standard at issue, but it put the standard at issue three months ago. Again, the Pilots should have filed their motion at the time PMSA served the DR rather than waiting until just before the other parties filed their response testimony.

13 The Pilots’ belated assertion of their rights may substantially affect the procedural schedule set for this matter. If guidance is important enough to seek, it is important enough to wait for. That is why the federal courts routinely stay proceedings while waiting for an answer to a certified question. *E.g., Affil. FM Ins. Co. v. LTK Consulting Servs, Inc.*, 556 F.3d 920, 923 (Mem) (9th Cir. 2009). While the Pilots indicate that the BPC can address this matter at its regularly scheduled March 2023 meeting, they cannot promise that the BPC will provide an answer then, or guarantee the point at which the BPC will provide the Commission with its legal analysis. Given that the Commission is set to hear this matter on April 5 and 6, 2023, the Pilots’ delay likely means that the Commission will end up having to stay this proceeding and reset the date of hearing in order to receive the BPC’s guidance. The Commission should refuse to disrupt the duly adopted procedure schedule set here.

B. The Commission Should Deny the Motion Because the Guidance Sought by the Pilots will not Assist the Commission in Setting Rates in this Matter

14 The Commission should also deny the Pilots’ motion on substantive grounds. While the Commission may request “assistance” from the BPC,⁹ the guidance the Pilots seek

⁸ Again, Staff does not believe that the DR did so, for reasons explained below in Section VI.B.

⁹ RCW 81.116.020(5)(a); see also RCW 88.16.035(1)(e).

would not assist the Commission in setting rates here. It would instead transform this proceeding into a forum for litigation about the safety aspects of pilotage.

15 In 2018, the Legislature assigned the Commission with certain responsibilities concerning the state pilotage system. As the Commission has recognized, that extension of its jurisdiction created divided authority over the state pilotage system:¹⁰ the Legislature tasked the Commission with regulating pilotage rates,¹¹ but left the BPC with jurisdiction over the safety aspects of pilotage.¹² This divided authority arose from a recognition that the Commission, with its well-defined ratemaking standards, could provide a more transparent and objective ratemaking process than could the BPC.¹³

16 The Commission, pursuant to the Legislature’s mandate, must “establish in tariffs the rates for pilotage services provided under chapter 88.16 RCW.”¹⁴ As with other industries subject to the Commission’s regulatory jurisdiction, these rates must be “fair, just, reasonable, and sufficient.”¹⁵ This has generally meant rates based on expenditures prudently incurred during a test year, adjusted for certain known-and-measurable, out-of-period costs or revenues.¹⁶

17 As the Department of Ecology has recognized, for state agencies, the “best achievable protection” is a regulatory standard, not a ratemaking one.¹⁷ The Legislature used

¹⁰ *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-190976, Order 09, 24 ¶ 86 (Nov. 25, 2020) (hereinafter “Order 09”).

¹¹ RCW 81.116.020.

¹² See generally chapter 88.16 RCW.

¹³ Order 09 at 11 ¶ 41.

¹⁴ RCW 81.116.020(1).

¹⁵ RCW 81.116.020(3).

¹⁶ Order 09 at 15 ¶ 54-56; WAC 480-07-510(1), (3).

¹⁷ E.g., Decl. of Michael Haglund at Exh. D at 1 (“Ecology has incorporated BAP into our regulations, specifically 173-180 and 173-182 WAC.”); *id.* (“Ecology is assisting BPC with conducting an analysis of tug escorts and developing tug escort rules. The rules developed by BPC must be designed to achieve BAP as defined in RCW 88.46 RCW.”); RCW 90.56.200(1), (2)(j) (requiring Ecology, “by rule, to establish standards for spill prevention plans,” with such plans required to incorporate “measures that will provide the best

“best achievable protection” in this sense in the pilotage act, repeatedly tying the term to the BPC’s rulemaking authority.¹⁸ And, as it concerns the safe provision of pilotage services, what constitutes the “best achievable protection” is something that would, if applicable, fall within the BPC’s primary jurisdiction for definition, generally through standards adopted by rules.¹⁹

18 Where the Commission reviews costs incurred to comply with law within the primary jurisdiction of another agency or tribunal, it typically presumes those costs are prudently incurred and permits their inclusion in the regulated entity’s revenue requirement.²⁰ But it cannot do so here. The BPC has adopted no rules generally applicable to pilotage services that set standards for the best achievable protection. And the Pilots point to no costs incurred to meet those non-existent rules.

19 Given that the BPC has not yet defined “best achievable protection” (and may never do so if it decides that the standard does not generally apply to pilotage services), addressing the BAP standard in this proceeding will inevitably require the Commission to trespass on the BPC’s primary jurisdiction over safety matters. Any discussion about whether a cost was incurred pursuant to the BAP standard will necessarily involve whether the relevant staffing

achievable protection.”); RCW 90.56.2101(2) (requiring Ecology to update rules for “contingency plans to require . . . standards for best achievable protection for” specified situations); RCW 90.56.220(1) (requiring that Ecology” by rule shall adopt standards for onshore and offshore facilities . . . to ensure that the best achievable protection of public health is employed at all times.”); RCW 90.56.570 (Ecology “shall periodically evaluate and update planning standards . . . to ensure access to equipment that represents the best achievable protection to respond to a worst case spill”).

¹⁸ E.g., RCW 818.16.250(3)(a) (providing that “[a] rule adopted under this section must . . . [b]e designed to achieve best achievable protection as defined in RCW 88.46.010”); RCW 88.16.260(3)(c) (rules adopted by the BPC must “[b]e designed to achieved best available protection as defined by RCW 88.46.010.”).

¹⁹ Order 09 at 11 ¶ 40, 42; *see id.* at 24-25 ¶ 86, 27 ¶ 93, 32 ¶ 106.

²⁰ E.g., *Willman v. Wash. Utils. & Transp. Comm’n*, 154 Wn.2d 801, 806-08, 117 P.3d 343 (2005); *Willman v. Wash. Utils. & Transp. Comm’n*, 122 Wn. App. 194, 93 P.3d 909 (2004).

level, piece of equipment, or practice is the best achievable protection. But the BPC, not the Commission, should answer that question.^{21,22}

20 Accordingly, the Commission should refrain from wading into discussions about the best achievable protection by seeking BPC guidance and simply apply its traditional standards to the costs at issue in this proceeding. That is, after all, what the Legislature intended it to do.²³

C. The Grounds Offered by the Pilots to Justify Seeking Guidance Lack Merit

21 The Pilots nevertheless offer three grounds to justify seeking guidance from the BPC. None have merit.

22 The pilots first contend that seeking guidance from the BPC would fulfill a “commitment” made by the Commission in a report it submitted to the Legislature. The Commission made no such commitment. As the Pilots note, the Commission “recommend[ed] 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,” which would give them “an opportunity to present fact-based arguments and witness testimony regarding the issue.”²⁴ That invitation, for other parties to take certain actions, did

²¹ See *Willman*, 122 Wn. App. at 205-06 (“[t]he analysis amounts to a determination of the validity of the fee, a decision for which the WUTC admits it lacks the expertise and whose authority would at least be questionable.”); cf. *Willman*, 154 Wn.2d at 808 (explaining that the proper course for a party wishing to contest inclusion of a fee into the revenue requirement is to seek a determination about it from a tribunal with jurisdiction and institutional competence, and then bring that determination to the Commission).

²² For example, the Pilots seek to pro form into rates three positions for pilots not yet licensed by the BPC. They could readily argue that the Commission must pro form those positions into rates because of the BAP standard. See RCW 88.46.010(1) (making “staffing” levels an aspect of the BAP standard). But the Commission has already recognized that the BPC, not it, should determine how many pilots provide service and that any funding decisions it makes may impermissibly prejudice the issue for the BPC. *E.g.*, Order 09 at 24-25 ¶ 86, 28 ¶ 93, 32 ¶ 106; RCW 88.16.035(1).

²³ Order 09 at 11 ¶ 41.

²⁴ Decl. of Michael Haglund at Exh. B at 19.

not bind the Commission to any particular course of action and was in no sense a commitment.

23 The Pilots also contend that the Commission should seek guidance from the BPC because (1) it has recognized the BPC’s primary jurisdiction over safety matters, and (2) the BAP standard is at issue. BPC has these arguments backwards. As explained above, seeking guidance from the BPC can only invite the Commission to decide matters given to the BPC’s jurisdiction. The wiser course, and the course respecting the BPC’s jurisdiction, is to refrain from deciding matters related to the best achievable protection standard, leaving the BPC to decide whether²⁵ and how that standard applies generally to pilotage services.

VII. CONCLUSION

24 Commission Staff requests that the Commission deny the Pilots’ motion and decline to seek guidance from the BPC.

DATED this 7th day of February 2023.

Respectfully submitted,

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²⁵ There is a fairly compelling argument that the best achievable protection standard does not generally apply in the context of pilotage because the Legislature specifically told the BPC the narrow circumstances in which it wanted the standard applied. *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969) (expression unius est exclusion alterius); *see, e.g.*, RCW 88.16.250, .260. But Staff takes no position on the matter because it is not necessary to decide what is before the Commission.