

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
MOTION FOR THE UTC TO
SEEK BPC DETERMINATION

INTRODUCTION

1. Pursuant to WAC 480-07-375(4), Intervenor Pacific Merchant Shipping Association ("PMSA") opposes the motion brought by Puget Sound Pilots ("PSP") requesting this Commission seek a determination from the Board of Pilotage Commissioners ("BPC") regarding pilotage standards. What PSP requests is unnecessary and improper for this rate proceeding. PSP does not, and cannot, point to any authority to support the proposition that the Utilities and Transportation Commission ("UTC" or "Commission") should direct the BPC to provide any pronouncement on pilotage conditions under the BPC's authority or provide any opinion on the standards of review used by the UTC. PSP's motion should be categorically denied.
2. PMSA takes no position on the substance of the underlying determination that PSP seeks. The answer that would be sought from BPC has no bearing on the

decisions made by the Commission, will not impact any relevant facts in question in the present general rate case, and will not impact any argument, testimony, or exhibit submitted by PMSA in this case. To the extent that PMSA has positions in response to any claim made by PSP in its petition, or a claim derivative of that filing, those positions will be expressed in PMSA's response testimony, the preparation of which is pending and due this Friday, February 10.

STATEMENT OF RELEVANT FACTS

3. Less than a year and a half after new tariffs became effective on January 25, 2021,¹ PSP filed on June 29, 2022, a new general rate case and advocated for expediting the case schedule.² Noting that, among other findings, "PSP has submitted written testimony from 22 witnesses and more than 100 exhibits," the Commission placed the case on a normal schedule.³ Now, seven months into this case, and past the date that PSP had originally proposed that this entire general rate case be decided on an expedited schedule, PSP files this motion (nearly on the eve of the other parties' response testimony deadline) asking the Commission

¹ *Wash. Utils. & Transp. Comm'n v. Puget Sound Pilots*, Docket TP-190976, Letter from Mark L. Johnson (Jan. 22, 2021).

² *Wash. Utils. & Transp. Comm'n v. Puget Sound Pilots*, Docket TP-220513, PSP Petition (June 29, 2022) and PSP's Motion for Expedited Schedule (June 29, 2022).

³ *Wash. Utils. & Transp. Comm'n v. Puget Sound Pilots*, Docket TP-220513, Order 03, ¶ 35 (Aug. 26, 2022).

to “request assistance” from BPC in carrying out the Commission’s ratemaking duties.

4. The Commission may, as noted in its Order 03 in this case, “request assistance” from the BPC: “At the prehearing conference, the presiding administrative law judge asked whether the parties objected to the Commission designating the executive director and chair of the BPC as consultants, consistent with the Commission’s findings in PSP’s last general rate case.”⁴ The Order also notes, “No party objected to this proposal.”
5. Two PSP members serve as Board of Pilotage Commissioners,⁵ one of whom is presented by PSP as a witness in this case.⁶

ARGUMENT

A. Neither RCW 81.116.020(5) nor RCW 2.60.020 envision PSP’s Request.

6. As an initial matter, PSP’s reliance on RCW 81.116.020(5) is inappropriate and misleading. The Commission has, as set forth in Order 03 in this case, an established channel with BPC for consultations under RCW 81.116.020(5) to the extent the Commission needs information from the BPC. It is unclear whether PSP contemplates that the Commission would request information through this already

⁴ *Id.* at ¶ 43.

⁵ Board of Pilotage Commissioners, “About Us,” <https://pilotage.wa.gov/about-us.html> (listing commissioners and their positions, two of which are listed as “pilot”).

⁶ Exh. SB-01T.

established channel or a different one. To the extent PSP is advocating for a different means of requesting information from the BPC, it should have so stated at the prehearing conference. Nor does PSP state in its present motion why the established channel is inadequate.

7. Moreover, to the extent PSP requests any consultation different from that contemplated in Order 03, it is not the type of “assistance” envisioned in the statute. As the UTC made explicit in its Order in TP-1900976, it operates independently of the BPC and focuses on different matters from those in the BPC’s purview. For example, “Because the BPC is charged with determining the number of pilots necessary for safe, efficient pilotage service, the Commission should not determine a TAL for purposes of safety or fatigue management.”⁷ Further, the Commission emphasized it would not stray into questions subject to BPC’s purview: “The Commission is not charged with regulating the safety of marine pilotage or determining the number of authorized pilots, and is thus unable to resolve the parties’ disputes regarding the efficiency of PSP’s dispatch system, the appropriate TAL for pilots, and other workload issues.”⁸ As established in that case, the Commission should leave to the jurisdiction of the BPC all questions regarding marine safety, fatigue, and licensing issues as they do not pertain to the tariffs.

⁷ *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-190976, Order 09, ¶ 451 (Nov. 25, 2020).

⁸ *Id.* at ¶ 452.

8. PSP attempts to buttress its improper request by analogizing it to moving a federal court to certify a question involving a significant issue of state law to the Washington Supreme Court pursuant to RCW 2.60.020.⁹ This analogy is misleading. RCW 2.60.020 exists to permit federal court judges to ask open questions of state law when a resolution of that question is necessary to resolve a federal case.¹⁰ A relationship between a federal court and a state court—two jurisdictionally separate systems—is not at all analogous to that between two sister state agencies. It is nothing like it.

9. Moreover, even if the procedure had any relevance here, PSP’s question would not qualify as certifiable. The decision whether to certify a question to a state supreme court “rests in the sound discretion of the district court.”¹¹ “Even where state law is unclear, resort to the certification process is not obligatory.”¹² Mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit.¹³ Such motions to certify are routinely denied. Thus, PSP would fare no better even if it were moving a federal court to certify a question pursuant to RCW 2.60.020. Because PSP’s question regarding

⁹ Motion at ¶ 9.

¹⁰ *Convoyant LLC v. Deepthink, LLC*, 200 Wn.2d 72, 73, 514 P.3d 643 (2022).

¹¹ *Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1087 (9th Cir. 2003).

¹² *Riordan v. State Farm Mut. Auto. Ins. Co.* 589 F.3d 999, 1009 (9th Cir. 2009).

¹³ *See Massachusetts Bay Ins. Co. v. Walflor Indus., Inc.*, 383 F. Supp. 3d 1148, 1167 (W.D. Wash. 2019).

marine safety has no bearing on the issues before this Commission, PSP's analogy to RCW 2.60.020 fails.

B. PSP had other means to obtain the information it seeks.

10. As a matter of case management and Commission resources, it is appropriate to deny PSP's motion in order to avoid setting the precedent that any party can attempt to leverage actions by the BPC in proceedings before the Commission. If PSP is interested in what policy the BPC has on any topic, whether relevant to a rate proceeding at the UTC or not, it is free to ask the BPC at any time. If the BPC has created a policy on the topic, it would exist as a public record that PSP could request under the Public Records Act. If the BPC does not have a policy, any citizen can petition a state agency to consider a policy through agency action pursuant to RCW 34.05.330. Moreover, PSP is in a favored position here, as it has two members sitting on the BPC which can make a motion to calendar any policy item for consideration by the BPC. And, as can be inferred from the demonstration in Mr. Haglund's declaration, PSP can also ask legislators to pose questions to state agencies on its behalf.¹⁴ All of these avenues are available to PSP to seek answers to policy questions. None requires the UTC to engage in any respect.

¹⁴ See Motion at ¶ 2; Haglund Decl. Exh. A.

11. Moreover, PSP states that it seeks this action because “a marine-safety specific standard of review is warranted.”¹⁵ PSP’s request in this regard is unclear, but it makes this request in conjunction with a question that qualifies the statutory standard that rates must be fair, just, reasonable, and sufficient. To the extent that PSP seeks to qualify this statutory standard or establish an alternative standard for the present rate case, PSP has had ample opportunity to propose and suggest the application of such a standard of review prior to juncture in a pending rate case. PSP could have suggested this during the UTC’s rulemaking to establish the rules governing pilotage rate cases. PSP also could have suggested this in the initial rate case for pilotage (Docket TP-190976). PSP could have challenged the final decision in TP-190976 for lack of the application of such a standard. Or PSP could have submitted in its petition in this rate case evidence of what PSP now asks the Commission to obtain for PSP. PSP has taken none of these steps, and its inaction should not be rewarded.

12. Most importantly, it is unclear why the UTC should be asking the BPC to comment on the UTC’s own standards of review, much less why the UTC should defer to the BPC regarding the interpretation of the UTC’s own authorizing statute.

¹⁵ Motion at ¶ 3.

CONCLUSION

13. Denial of PSP's motion is appropriate because the requested action is procedurally unnecessary, improper, and without precedent. What PSP seeks is information that PSP can obtain and present on its own without requiring the Commission to issue a request to its sister agency. Moreover, regardless of the answer BPC would provide (if any), the marine safety information PSP seeks is of no relevance to the ratemaking proceedings before this Commission. And even if it were, the Commission should not defer the interpretation of its own standards of review to the BPC.

Respectfully submitted this 7th day of February, 2023.

FOX ROTHSCHILD LLP

s/ Michelle DeLappe

Michelle DeLappe, WSBA # 42184

1001 Fourth Ave., Suite 4400

Seattle, WA 98154-1065

(206) 389-1668

seasalt@foxrothschild.com

Attorneys for Pacific Merchant Shipping Association