



February 1, 2019

Mr. Mark Johnson, Executive Director and Secretary
Washington Utilities & Transportation Commission
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**Docket TP-18042- REVISED Draft Rules Relating to Marine Pilotage Rate-setting
Comments of the Pacific Merchant Shipping Association Regarding CR-101**

Dear Executive Director Johnson:

On behalf of the Pacific Merchant Shipping Association (PMSA) and its members, thank you again for the opportunity to submit comments regarding the proposed rulemaking to implement SSB 6519 (Chapter 107, Laws of 2018). As you know, PMSA represents owners and operators of ocean carriers and oceangoing vessels doing business on the U.S. West Coast, including a majority of those plying Washington state waters as the customers of the compulsory Puget Sound pilotage monopoly.

PMSA appreciates the significant edits to the REVISED draft rules. In general, PMSA SUPPORTS this important rulemaking and we extend our appreciation to WUTC staff for incorporating a large number of the suggestions made by the major interested stakeholders in this process. Both PMSA and the Puget Sound Pilots (PSP) made major comments regarding rule structure and the majority of those comments are largely reflected in this revision. This version is cleaner, clearer, and stronger for it.

This letter is submitted with respect to the January 18, 2019 REVISED draft rules for marine pilotage rate-setting. We were pleased to submit our comments on the August 2018 version of the draft rules and to participate in the October workshop to review and discuss the draft, and we incorporate our previous comments by reference as appropriate.

PMSA respectfully suggests further refinements, deletions, and edits to the January 2019 REVISED draft proposed language of amendments to Chapter 480-07 WAC and new Chapter 480-160 WAC herein.

Specifically, we note and respectfully submit all of the following:

WAC 480-07-500 (5) – PMSA **SUPPORTS** the WUTC’s inclusion of “marine pilotage service” as subject to the scope of Chapter 480-07 in WAC 480-07-500 (1). However, PMSA **OPPOSES** the spot-inclusion of the phrase “or pilotage service provider” in subsection (5) which is in contrast to the consistent use of the general term “company” alone to describe the regulated party throughout the Chapter.

This qualifier phrase is unnecessary because use of the term “company” is ubiquitous throughout this Chapter to describe any of the numerous types of businesses subject to the General Rate Proceeding in WAC 480-07-500 (1). This added phraseology proposed for subsection (5) could create confusion or raise unnecessary questions as to consistency, intent, or scope of the requirements of a General Rate Proceeding with respect to marine pilotage. In addition, even within this set of draft regulations the usage of this additional qualifier phrase in subsection (5) is inconsistent with the balance of the amendments to the Chapter, as the additional phrase is specifically not included in subsection (4) of this section, nor in WAC 480-07-505 (1) and (2). This surplusage is not used to qualify the term “company” elsewhere in the Chapter whose terms would be applicable to marine pilotage or any other party in any other General Rate Proceeding.

The term “company” is not defined in Chapter 480-07, but its usage and application in the Chapter by the WUTC are clear and unambiguous. The current usage of the term “company” is consistent with the broadly inclusive definition of a “person” in WAC 480-07-340 (1)(a) as “any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character.” This is the term which is used by the WUTC to describe the companies which are parties to a rate-proceeding. We know the WUTC’s current application of the term “company” and WAC definition of “person” are lawful and appropriate because they are fully consistent with the legislative definitions which control this Title at RCW 81.04.010(3): a “Corporation” broadly “includes a corporation, company, association, or joint stock association”; and, a “Person” also “includes an individual, a firm, or copartnership.”

For the purposes of its application here, the Puget Sound Pilots organization would undoubtedly fit the typical usage of the phrase “company” under WAC 480-07 and the current WUTC definition of “person.” The Puget Sound Pilots organization would also inevitably fit under one or both of the statutory definitions of “corporation” and “person.” Likewise, it is just as clear that any one pilot licensee himself or herself (whether organized as an LLC, S corporation, sole proprietorship, or some other business form) could also fall under the “person” and “corporation” definitions in statute and participate as a “company” under the present usage of the

term in the WAC. This further demonstrates the benefit and strengths of the broad application of the terminology in current law.*

We, therefore, recommend deleting this phrase “or pilotage service provider” as potentially confusing surplusage. This section is plainly applicable to marine pilotage, and stands whole, in reliance on the WUTC’s existing use of the word “company” throughout the Chapter which is dispositive with respect to all current and potential future pilotage service provider businesses and business forms.

Recommended revision:

WAC 480-07-500

(5) “Less than statutory notice. The commission may grant requests to alter tariffs on less than statutory notice for good cause shown, in accordance with RCW 80.28.060 or 81.28.050. A company ~~or pilotage service provider~~ that seeks to implement general rate proceeding tariff changes on less than statutory notice must include with its filing a complete explanation of the reasons that support such treatment.”

- WAC 480-07-505 (4)(c) – PMSA **SUPPORTS** the WUTC’s inclusion of a general rate proceeding exemption for simple filings of new tariffs which merely reflect previously Commission-authorized adjustments to rates. However, this should apply to any automatic ministerial change, not only those which are temporal in nature. For instance, using a boarding fee set as a “boat fee” is a tariff item which could decrease ministerially because that charge last adjusted based on the actual expenses of that category, not because it is set to a formula based on duration or time.

Recommended revision:

WAC 480-07-505

(4)(c) “Filings to reflect any automatic ~~periodic or annual~~ adjustment to pilotage rates previously established and approved by the commission in a general rate proceeding;”

* Please note, PMSA (and, for that matter, the state and the public at-large) lacks complete and specific knowledge of the internal workings or private business affairs of, the Puget Sound Pilots organization as a business entity, a voluntarily formed group not mandated by state law. However, PSP either is or has been registered with the Washington State Department of Revenue as both an unincorporated Association [UBI # 600-347-866] and as a Partnership [UBI # 600-431-226], and generally represents itself in public as a professional association of independent licensees. Historically, it has also represented that individual state-licensed pilots provide pilotage service, not the Puget Sound Pilots organization – a proposition which is consistent with the language of the proposed WAC in this CR-101. If PSP or individual independent pilots have shared any information regarding its specific internal business relationships with WUTC staff as a substantive component of this rulemaking, PMSA would respectfully request that this information be shared with the public and stakeholders as part of this process.

- WAC 480-07-505 (4)(e) – PMSA **SUPPORTS** the 7/18/2018 version of this language as originally proposed by WUTC staff. PMSA **OPPOSES** the proposed revision to exempt from general rate proceedings “[a]ny filing to ... recover changes in state, local or federal taxes or fees applicable to pilotage services.”

General business taxes and fees are regular costs of doing business for pilotage services and they are already properly accounted for in the current tariff and would inevitably be anticipated in any General Rate Proceeding (WAC 480-07-525 (4)(o)) filing. The proposed language also differs materially from, and is much more problematic, than those similar terms which exist with respect to the imposition of new specified taxes on solid waste collection companies under WAC 480-07-505(3)(c) and utilities under WAC 480-07-505(2)(c).

Most problematically, this language is applicable to changes in actual taxes paid, not to changes in tax laws or statutory changes in rates or the imposition of new taxes directly applicable to this service in and of itself. This is a provision which we believe could be ripe for tremendous gamesmanship and may prompt tariff changes even without any external changes to tax laws (i.e. tax or fee increases) imposed on the pilots or their associated individual businesses.

For example, if individual pilots stopped making contributions to their SEP-IRA pre-tax, they would experience an increase in federal income tax. If that is subject to recovery here without further examination (triggering a rate increase without a General Rate Proceeding) could the pilots then conceivably just deposit the increased revenues post-tax in an alternative IRA? This then shifts the burden of taxation away from the present incidence on the pilot and gives them additional deferred income at the expense of the ratepayer – all without a General Rate Proceeding.

Or, for instance, when PSP’s B&O tax or pilots’ personal income taxes increase simply due to increases in additional revenues or net incomes earned, does a literal reading of this provision allow for unlimited annual increases in the tariff, allowing for a perpetual cycle of rate increases without any General Rate Proceedings? And, how would pilotage revenue be distinguished from income generated by pilots’ additional and alternative business endeavors?

Even if the language were corrected to refer to changes in tax *laws*, the extent of pilot choice in how each pilot reports taxes would still make this clause problematic. Realizing that a pilot service is not necessarily a single business entity, and can be made up of dozens of individual businesses and individuals, tax reporting may vary significantly depending on the type of the individual business entities chosen by the pilots. Whether they form entities with multiple pilots, the elections they make for federal tax reporting are changes based on individual pilots’ own choices.

PMSA believes that the language will inevitably allow these tax application questions and the tax treatment of the relationship between PSP and individual pilot licensees to lead directly to unforeseen and unexamined tariff increases which were never the subject of public inquiry and Commissioner review and well beyond the intent of the WUTC as expressed to-date in this rulemaking.

For example, the application of the language as proposed seems inclined to favor increases in the rates due to increases in taxes or fees. The tariff could be changed without a General Rate Proceeding in order to “recover” for changes in tax liabilities, but not for decreases in taxes which should lead to tariff reduction. Therefore, while neither the WUTC nor ratepayers can currently anticipate or control the types of provisions for how and by whom taxes can and will be paid internally by PSP or individual licensees, pilotage service providers may be able to act in ways that inflate taxable payments in an unexpected manner which may have exceptional consequences for the tariff.

Without greater understanding of the breadth and scope of the potential liabilities underlying these decisions, and with understanding that the potential consequences of tax liabilities exclusively based on individual pilot choices may be significant, the WAC should not allow for automatic rate increases from taxes paid without the benefit of a General Rate Proceeding.

Recommended revision:

WAC 480-07-505

(4)(e) “Any filing to collect tariff surcharges authorized by the legislature **or to recover changes in state, local or federal taxes or fees applicable to pilotage services.**”

Alternatively, if the WUTC believes that such a provision must remain in the WAC, then the language must be revised to apply only to changes in tax laws specific to the provision of pilotage services and not taxes which are general in nature, and create a two-way street so if pilotage costs decrease due to changes in the tax laws then a reduced tariff change will also not trigger General Rate Proceedings.

In addition, to respect the role of the WUTC to set rates independent of actions taken by the BPC, these provisions should affirmatively bifurcate these responsibilities and prevent the BPC from adjusting WUTC tariff rates by fiat. This is important given the below discussion regarding WAC 480-07-525(4)(n) (*see below*) and the option to approve adjustments ministerially pursuant to WAC 480-07-525(4)(c) (*see above*).

Alternative revision:

WAC 480-07-505

(4)(e) “Any filing to collect tariff surcharges authorized by the legislature **or to recover changes in state, local or federal taxes or fees applicable to pilotage services.**”

“(f) Filings for rate changes designed to increase or decrease pilotage rates only to recognize the costs a company incurs to comply with government actions that directly impact the company’s costs to provide pilotage services (e.g., changes to federal, state, or local fees, charges, or taxes directly applicable to the provision of pilotage services). For purposes of this subsection, neither changes in the laws regarding taxes of general applicability, including income or property taxes, nor any action taken by the board of pilotage commissioners shall be considered to be a government action that directly impacts a company’s costs to provide pilotage services, notwithstanding subsection (4)(c).”

- WAC 480-07-525 (4)(n) – PMSA **SUPPORTS** the WUTC’s inclusion of a provision to reflect adjustments to the number of licensed pilots by the Board of Pilot Commissioners, as this could be an important component of a ratesetting. However, PMSA **OPPOSES** the establishment of an independent process for the establishment of an “alternative minimum number of pilots” or “maximum safe assignment level” for state licensed pilots through a WUTC tariff item that would compete with those same designations which may be made independently by the BPC.**

This is a provision which deals with the split of authorities between the WUTC and the BPC. In our August comments, we expressed the need for a clear bifurcation between these two agencies’ separate and distinct roles. We also very much appreciate the Staff Response to our comment regarding the comity of respect between these two agencies in the Stakeholder Comment Summary that “Staff agrees with the comment and is evaluating the suggested changes.”

** Please note, PMSA does not advocate here that the WUTC should be constrained in its tariff decision-making by the determinations of the BPC with respect to the number of pilots licensed or the actual amount of work completed by licensed pilots. To the contrary, the WUTC may very well consider compensation per pilot or compensation per unit of work, such as an average per assignment or average per piloting hour, independent of the number of pilots licensed or the efficiency/inefficiency of PSP’s dispatching protocols. Indeed, we encourage a robust WUTC review of these types of factors as they will likely diminish gamesmanship around the questions of workload and the number of licensees that had typically plagued the former BPC processes. With respect to workload, the BPC is now engaged in a new data collection process. PMSA will continue to advocate at the BPC for a specific description of the fair, reasonable and safe workload for a full-time pilot and for a process which makes evidentiary findings with respect to the wide range of pilot assignments and pilot work arrangements which exist within the state-licensed pilotage system and private organizational preferences adopted by the PSP – most of which are currently treated as proprietary and subject only to limited public scrutiny and input.

This provision directly addresses this important bifurcation. As noted in our prior comments, SSB 6519 affirmatively reserved the determination of the number of licenses exclusively to the authority of the BPC. (RCW 88.16.035(d))

WAC 480-07-505 should reflect the mutual presumption of the proper execution of administrative duties consistent with bifurcation of duties under SSB 6519. The BPC must take all conclusions of WUTC re rates as fair, just, reasonable, and sufficient for the provision of pilotage services, and should not then change the number of pilots to distort rates or pilot income. The WUTC must likewise take all conclusions of the BPC regarding the determination of the number of pilots as necessary to optimize the operation of a safe, fully regulated, efficient, and competent pilotage service in each district, and not set rates based on a fictitious, alternative number of pilots.

PMSA understands that in some scenarios this type of evaluation could actually benefit ratepayers and could be an effective check by the WUTC on situations where pilots are asking for too much pay for too many licensees. Unfortunately, this section could also be viewed as unnecessarily opening a back door to second-guessing the decisions of the BPC on the number of licensees through WUTC at rate-hearings. We believe that this could lead to confusion about safety and workload, be inconsistent with SSB 6519, and should be studiously avoided.

In sum, while it might serve as an effective check-and-balance to the benefit of ratepayers at some point in time, we find no legal basis for the WUTC ratesetting process to become a forum to discuss a “rationale for an alternative minimum number of pilots and maximum safe assignment level for the district.” If either the ratepayers or the pilots believe that the current number of pilots or safe assignment levels are inadequate, these are issues which should be addressed directly to the Board.

Recommended revision:

WAC 480-07-505

(4)(n) “~~A detailed portrayal of the *The* number of pilots necessary to be licensed in the pilotage district of the state, to optimize the operation of a safe, fully regulated, efficient, and competent pilotage service.~~ At a minimum, work papers must provide the board of pilotage commissioners’ ~~process and factors to make such a~~ determination pursuant to WAC 363-116-065(2). ~~In the event the petitioner deviates from the determination of the board of pilotage commissioners under WAC 363-116-065(2) then it is incumbent upon the petitioner to provide work papers with the necessary calculations, factors, and rationale for an alternative minimum number of pilots and maximum safe assignment level for the district.”~~”

- WAC 480-160-016 (3), (9) & WAC 480-160-031 (2) – PMSA **OPPOSES** inclusion of a definition of “Grays Harbor pilots” or “Puget Sound Pilots” in the regulations. The term “Puget Sound Pilots” would codify authority in only one specific private entity, perhaps foreclosing alternative business arrangements in the future. As this is a term utilized only once, in WAC 480-160-031(2), we would further recommend that this section be amended with language such that a generic term for a pilotage group can provide the basis for the outcome sought without codifying the specific name of only one specific private company of pilots. The term “Grays Harbor pilots” is not in the proposed regulation, is unnecessary (given the role of the Port of Grays Harbor and the fact that these pilots are public employees), and it is plain on its face.

Recommended revisions:

WAC 480-160-016

~~(3) “Grays Harbor pilots” means Port of Grays Harbor employees licensed by the state to provide compulsory pilotage service in the Grays Harbor pilotage district.~~

...

~~(9) “Puget Sound Pilots” means an organization of independent marine pilots specially trained and licensed to board and guide ships such as oil tankers, cargo vessels, and cruise ships through the Puget Sound pilotage district.~~

WAC 480-160-031

~~(2) “A pilotage service provider is deemed in compliance with the requirements of WAC 480-160-031 (records retention), 480-160-036 (reporting requirements), and 480-160-101 (complaints) if the information required is provided by the Puget Sound Pilots or the Port of Grays Harbor an organization of licensed pilots or an employer on the pilotage service provider’s behalf.”~~

Alternatively, if the WUTC believes the definition of “Puget Sound Pilots” must remain in WAC 480-160-031, the definition should be revised to be as minimally descriptive of the private entity as necessary and avoid surplusage and redundancy.

Alternative revision:

WAC 480-160-016

(9) “Puget Sound Pilots” means an unincorporated organization of state-licensed pilots operating within independent marine pilots specially trained and licensed to board and guide ships such as oil tankers, cargo vessels, and cruise ships through the Puget Sound pilotage district.

- WAC 480-160-101 – PMSA **NOTES** a typographical/reproduction error in the REVISED draft rules. The phrase “pilotage service provider” has been properly amended and substituted into this section, but these amendments have not been notated with strikethroughs and underlines. No substantive revisions requested.

Again, PMSA is pleased to support this important rulemaking, participate in the development of this process, and looks forward to continuing to work with the WUTC on the creation of the most transparent, fair, and objective set of rate-setting provisions possible. Furthermore, we would like to thank the WUTC and its staff for the tremendous work in this matter on an expedited basis and for the consideration of all previous and current stakeholder comments and input.

Please feel free to contact PMSA at any time with questions, comments, or any additional follow-up to this letter regarding the rulemaking process, Docket TP-180402, or on any other matter related to the provision of compulsory state pilotage services. Our best contacts with respect to this matter are Capt. Mike Moore, PMSA Vice President, in our Seattle office at mmoore@pmsaship.com or (206) 441-9700 or, Ms. Michelle DeLappe, Garvey Schubert Barer PC, counsel to PMSA at mdelappe@gsblaw.com or (206) 816-1403, or to me directly at (510) 987-5000 or at mjacob@pmsaship.com.

Thank you for the consideration of our comments.

Respectfully submitted,



Mike Jacob
Vice President & General Counsel

cc: Jason Lewis, UTC
Michelle DeLappe, Garvey Schubert Barer, PC
Mike Moore, PMSA