

Exh. CN-4
Docket TP-220513
Witness: Christopher Noble

**BEFORE THE STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

Docket No. TP-220513

**EXHIBIT TO TESTIMONY OF
Christopher Noble
ON BEHALF OF
PACIFIC MERCHANT SHIPPING ASSOCIATION**

PSP Responses to PMSA's Data Request Nos. 471-545 Pilot Retirement

FEBRUARY 10, 2023

PUGET SOUND PILOTS' RESPONSES TO PMSA DATA REQUESTS Nos. 471-545

DATE PREPARED: January 6, 2023 DOCKET: TP-220513 REQUESTER: Pacific Merchant Shipping Association ("PMSA")	WITNESS: PILOT RETIREMENT RESPONDER: PUGET SOUND PILOTS DATE: January 23, 2023
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PMSA DATA REQUEST NO. 471: Regarding Exh. BJM-01T 2:3–4:12, where Mr. McNeil discloses that he was asked by his client PSP to offer testimony “to provide a legal opinion” and then he discloses a summary of this legal opinion in his testimony at the request of his client PSP, please provide a copy of the full, original legal opinion offered to PSP by Mr. McNeil “regarding the enforceability” of the PSP retirement plan.

NB: Though a request for a copy of the legal advice provided would typically be subject to a claim of attorney-client privilege, in this instance the client specifically requested that its lawyer disclose the legal opinion in his testimony and filed that testimony in this case. Therefore, any privilege claim with respect to this legal opinion has been affirmatively waived.

RESPONSE:

PSP objects to providing any legal opinions on the grounds of attorney-client privilege, which was never waived.

PMSA DATA REQUEST NO. 472: Regarding Exh. BJM-01T 3:2–4, which states “Section 402(a)(1) of ERISA provides that an employee benefit plan shall be established and maintained pursuant to a written instrument,” please respond to each of the following:

- 1) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not an employee benefit plan. If denied, please provide a basis for the denial.
- 2) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not an employee benefit plan which complies with ERISA. If denied, please provide a basis for the denial.
- 3) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not an employee benefit plan established and maintained subject to ERISA. If denied, please provide a basis for the denial.
- 4) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not an employee benefit plan which provides participants or a beneficiary receiving benefits under the plan with a summary plan description or SPD as required by ERISA. If denied, please provide a basis for the denial.
- 5) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not an employee benefit plan which pays pension benefit guarantee premiums to the Pension Benefit Guaranty Corporation as required by ERISA. If denied, please provide a basis for the denial.
- 6) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not an employee benefit plan which files an annual financial report with the U.S. Department of Labor, including a Form 5500, as required by ERISA. If denied, please provide a basis for the denial.
- 7) Admit that, if participants in the “Amended Retirement Program of Puget Sound Pilots” are unable to get a copy of an annual report, they cannot obtain a copy of the report by writing to the U.S. Department of Labor, Employee Benefits Security Administration, as required by ERISA. If denied, please provide a basis for the denial.
- 8) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not administered by a plan fiduciary as required by ERISA. If denied, please provide a basis for the denial.
- 9) Admit that participants in the “Amended Retirement Program of Puget Sound Pilots” do not have the right to sue for benefits and breaches of fiduciary duty under ERISA. If denied, please provide a basis for the denial.
- 10) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not an employee benefit plan which guarantees payment of certain benefits if a defined plan is terminated through the Pension Benefits Guaranty Corporation pursuant to ERISA. If denied, please provide a basis for the denial.
- 11) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not an employee benefit plan which deposits contributions into a plan fund pursuant to the requirements of ERISA. If denied, please provide a basis for the denial.
- 12) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not an employee benefit plan which provides a right to an employee to all benefits that have been earned at the time of a plan termination under ERISA. If denied, please provide a basis for the denial.

- 13) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not an employee benefit plan which keeps plan assets separate from the employer’s business assets as required by ERISA. If denied, please provide a basis for the denial.
- 14) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not an employee benefit plan which provides that retirement assets will not be at risk in the event of a bankruptcy because pilot retirement funds are not held in trust or invested in an insurance contract pursuant to approved practices under ERISA such that these funds will not be subject to a creditors’ claim on retirement plan funds in the case of a PSP bankruptcy. If denied, please provide a basis for the denial.
- 15) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not an employee benefit plan which has an enrolled actuary determine funding levels and sign a Schedule SB to Form 5500 as required by ERISA. If denied, please provide a basis for the denial.

RESPONSE:

PSP objects to this Data Request on the grounds of undue burden and expense and because PMSA has ample opportunity to obtain this information through its own expert pension attorney and/or actuary. WAC 480-07-400 (3), which governs the scope of discovery, states that a party must not seek discovery that is “obtainable from some other source that is more convenient, less burdensome or less expensive.” Further, this regulation specifies that a discovery request “is inappropriate when the party seeking discovery has had ample opportunity to obtain the information the party seeks or the discovery is unduly burdensome or expensive, taking into account the needs of the adjudicative proceeding, limitations on the parties’ resources, scope of the responding party’s interest in the proceeding, and the importance of the issues at stake in the adjudicative proceeding.” PMSA has had more than ample opportunity to engage its own pension and actuarial experts to address pension-related issues in this rate proceeding. With respect to PSP’s pension experts, the request seeks information protected by the attorney-client and/or work product privileges.

PMSA DATA REQUEST NO. 473: Further regarding Exh. BJM-01T 3:2–4, which states “Section 402(a)(1) of ERISA provides that an employee benefit plan shall be established and maintained pursuant to a written instrument,” please respond to each of the following:

- 1) Please describe the business form you consider the Puget Sound Pilots to be operating under.
- 2) Admit that individual pilot members of Puget Sound Pilots are not employees of Puget Sound Pilots. If denied, please describe your understanding of the employer-employee relationship between PSP members of PSP.
- 3) Admit that individual pilot members have no partnership interest in Puget Sound Pilots. If denied, please describe your understanding of the partnership between members of PSP.
- 4) Admit that individual pilot members of Puget Sound Pilots are voluntary members of an unincorporated association. If denied, please describe your understanding of the relationship between members of PSP.
- 5) Admit that Puget Sound Pilots remits payments of net income to the individual pilot members of Puget Sound Pilots in their capacity as owners of their own individual corporations or other form of business entity. If denied, please describe your understanding of the relationship between PSP and the individual business entities owned by PSP members.
- 6) Admit individual pilot members of PSP are not members of a union or beneficiaries under a collective bargaining agreement. If denied, please provide a copy of the union membership and collective bargaining agreement of PSP members.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 474: Regarding Exh. BJM-01T 2:16–21, did you review any other documents to support your legal analysis other than the two documents mentioned in this portion of your testimony? If so, please disclose.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 475: Further regarding Exh. BJM-01T 2:16–21, prior to issuing your legal opinion, did you review the PSP partnership tax return, including Schedule K and all related Schedule K-1s, regarding its treatment of the “Amended Retirement Program of Puget Sound Pilots”?

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 476: Regarding Exh. BJM-01T 3:8–11, which cites *Kemmerer v. ICI Americas Inc.*, 70 F.3d 281 (3d Cir. 1995), please respond to all of the following:

- 1) Admit that the decision in *Kemmerer* concluded that the case arose under ERISA because it dealt with the question of whether an employer had “breached the terms of the executive deferred compensation plan that it offered to its highly compensated employees.” *Kemmerer* at 284.
- 2) Admit that the *Kemmerer* case involved an “employee pension benefit plan” that was established by an employer and specifically held that “top hat plans clearly are subject to ERISA.” *Id.* at 286.
- 3) Admit that *Kemmerer* held that “despite the exemption of top hat plans from many of ERISA’s regulations, ERISA’s enforcement provision clearly permits participants in top hat plans, as well as other covered plans, to bring civil actions ‘to enforce the substantive provisions of the Act or to recover benefits due to otherwise enforce the terms of the plan.’” *Id.* at 286-87.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 477: Regarding Exh. BJM-01T 3:12–15, which cites *In re New Valley Corp.*, 89 F.3d 143, 150 (3d Cir. 1996), please respond to all of the following:

- 1) Admit that the *New Valley* case arose under ERISA because it dealt with the claims of “former executives and highly paid personnel of Western Union Corporation (‘Western Union’) who participated in two top hat plans designed to provide deferred retirement income and other retirement benefits to a select group of employees.” *New Valley* at 146.
- 2) Admit that *New Valley* explained that “top hat plans represent a special category of benefit plans created under ERISA to provide these types of benefits to select employees.” *Id.* at 146.
- 3) Admit that *New Valley* relied on *Kemmerer* for the proposition that, as a result of top hat employee plans being exempt from nearly all of ERISA’s substantive provisions, “top hat plans are covered only by ERISA’s enforcement provisions.” *Id.* at 149.
- 4) Admit that *New Valley* concluded all of the following (*id.* at 148):

As a threshold matter, we have little difficulty concluding that ERISA provides the framework for our analysis. ERISA’s coverage extends broadly to include all employee benefit plans. *See Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 929 (3d Cir.1985). The SEB and Girardin Plans are clearly ERISA plans. *See* 29 U.S.C. § 1002(3) (defining “employee benefit plan”); *Miller v. Eichleay Engineers, Inc.*, 886 F.2d 30, 33 n. 7 (3d Cir.1989).

Finding ERISA applicable, however, is only an initial step. The far more important determination is to locate the SEB and Girardin Plans within ERISA’s landscape. Both plans at issue are top hat plans, a fact that has crucial implications for this case. “A top hat plan is a ‘plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly trained employees.’ 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1).” *Miller*, 886 F.2d at 34 n. 8; *see also* 29 U.S.C. §§ 1002(36), 1003(b). The elements of this definition make the top hat category a narrow one. Not only must the plan be unfunded and exhibit the required purpose, it must also cover a “select group” of employees. This final limitation has both quantitative and qualitative restrictions. In number, the plan must cover relatively few employees. In character, the plan must cover only high level employees. Because of these limitations, top hat plans form a rare sub-species of ERISA plans, and Congress created a special regime to cover them.

- 5) Admit that *New Valley* cited *Kemmerer* such that “[a]fter concluding that top hat plans were subject to ERISA, we turned to contract principles to resolve the dispute. *Id.* at 287. Examining the contract as a whole, we found a unilateral contract which created vested rights in those employees who accepted the offer it contained by continuing in the company’s employment until retirement.” *New Valley*, 89 F.3d at 150.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 478: Further regarding Exh. BJM-01T 3:8–16, please respond to all of the following:

- 1) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not a plan offered to only highly compensated employees by an employer. If denied, state the basis for the denial.
- 2) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not an executive deferred compensation plan or “top hat plan.” If denied, state the basis for the denial.
- 3) Admit that “Amended Retirement Program of Puget Sound Pilots” has not been identified as a “top hat plan” under its own provisions. If denied, state the basis for the denial.
- 4) Admit that “Amended Retirement Program of Puget Sound Pilots” has not filed a “Top Hat Plan Letter” with the U.S. Department of Labor which includes a declaration by an employer that it maintains the plan primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. If denied, state the basis for the denial.
- 5) Admit that the “Amended Retirement Program of Puget Sound Pilots” is not a plan offered to a select group of management employees or highly trained employees. If denied, state the basis for the denial.
- 6) Admit that in your legal opinion regarding the enforceability of the “Amended Retirement Program of Puget Sound Pilots” your analysis did not first conclude that the PSP retirement plan was a top hat plan subject to ERISA prior to your application of federal common law contract principles. If denied, state the basis for the denial and identify where in your analysis you first concluded that the PSP retirement plan is a top hat plan subject to ERISA.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 479: Regarding Exh. BJM-01T 3:17–22, describing pilots “who have signed the documentation when each pilot is first licensed to accept and support the PSP pension plan,” please provide a copy of this “documentation” which is signed by newly licensed pilots in which they “accept and support the PSP pension plan.”

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 480: Regarding Exh. BJM-01T 2:8–4:12, admit that you have provided no opinion as to the enforceability of the “Amended Retirement Program of Puget Sound Pilots” under state contract law.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 481: Regarding Exh. BJM-01T 2:8–4:12, please clarify your testimony by admitting that it is your opinion that the “Amended Retirement Program of Puget Sound Pilots” is enforceable under ERISA because the interpretation and enforcement of employee benefit plans arises under a body of federal common law regarding contracts. If denied, please precisely restate your opinion and any legal citation(s) upon which it rests.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 482: Regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, admit that the “fully-funded defined benefit retirement plan” could be subject to benefit accrual restrictions under IRC § 436(e) in years six and beyond of the plan’s existence and that such restrictions could potentially prevent the full accrual of benefits in the plan and prevent payment of the full benefit to pilots retiring in year six. If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 483: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, admit that a defined benefit plan subject to the IRC § 401(a)(17) limits compensation that may be taken into account in determining plan benefits. If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 484: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, 8:8–21, admit that Internal Revenue Code § 413(c)(4)(A) requires that each employer in a multiple employer defined benefit plan “shall be treated as maintaining a separate plan for purposes of section 412” regarding minimum funding requirements. If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 485: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, 8:8–21, admit that there is a risk of a pilot failing to make required contributions mitigated under a multiple employer plan, and that the consequences of a single pilot failing to make required contributions falls on the entire plan. If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 486: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, and specifically at 9:1–4, admit that IRC § 413(c) requires actuarial analyses for each participating employer to demonstrate satisfaction of the funding requirements under §§ 412 and 430, as well as to demonstrate the deductibility of contributions under § 404. If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 487: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, and specifically at 9:1–4, admit that IRC § 413(c) requires the filing of a Form 5500 for a MEP with a separate Schedule SB signed by an actuary attesting to the actuarial demonstration of compliance with IRC §§ 412 and 430 for each participating employer. If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 488: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, admit that the instructions for the Form 5500 require that the information requested in the Schedule SB must be annually provided for each participating employer as if that employer maintained a separate plan. If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 489: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, admit that if Schedule SB information is to be provided for each participating employer, then each participating employer will need to have an annual allocation of the assets in the plan trust, including an allocation of the investment earnings and plan-related expenses paid by the trust, as well as attribution of the contributions to, and benefit payments from, the trust. If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 490: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, if a minimum required contribution is calculated for each participating employer, please describe approximately what the range of required contributions would be for current pilots in the first year of the plan if past service is not included in the plan.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 491: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, if a minimum required contribution is calculated for each participating employer, please describe approximately what the range of required contributions would be for current pilots in the first year of the plan if past service is included in the plan.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 492: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, and specifically at 9:1–2, please describe in the PSP proposed transition plan which participating employer, if any, in a MEP is responsible for contributions for currently retired pilots. If none, please identify who or what entity is responsible for contributions for currently retired pilots.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 493: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, if the limits on compensation in a tax-qualified defined benefit plan under IRC § 401(a)(17) and on benefits that may be provided by such a plan under IRC § 415(b) are applied, please describe approximately how these limits would change the difference between the projections with a new tax-qualified plan and the projection of the current plan.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 494: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, if the full benefits provided by the current PSP unfunded plan are provided using a tax-qualified plan with the same benefit formula and a non-qualified excess plan to make up the benefits not allowed in the qualified plan, please describe approximately the number of pilots that would accrue benefits in the non-qualified plan.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 495: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, admit that Internal Revenue Bulletin 2011-52 provides authoritative guidance that the funding-based restrictions on benefit accruals under IRC § 436(c) must be applied separately to each participating employer in a post-1988 plan subject to IRC § 413(c). If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 496: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, if you admit that IRC § 436(c) restrictions apply to each participating employer separately in response to DR 495, further admit it is likely that if prior service is included in plan benefits, then some but not all participating employers would be subject to these restrictions in year 6 of the plan and beyond (in the absence of contributions exceeding the statutory minimum). If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 497: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, if the plan’s actuary develops the allocation of assets required for the minimum funding calculations based on information contained in trust statements, please describe approximately what the level of actuarial fees would be to complete the actuarial information for a Form 5500 filing in year 6, reflecting the application of the limitations and restrictions discussed above and the need to attach Schedule SB information for each participating employer.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 498: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, admit that PSP’s projections do not reflect an explicit assumption for plan-related expenses and rather only project that the rate of return on plan assets is net of all expenses paid by the trust. If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 499: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, admit that expected plan-related expenses to be paid from the trust must be added to the minimum required contribution. If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 500: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, if admitted that expected plan-related expenses to be paid from the trust must be included in the minimum required contribution in DR 499, please describe qualitatively, with an estimated order of magnitude, the effect on the projections you provided of reflecting actuarial fees and PBGC premiums as plan-related expenses included in required contributions, particularly in the early years of the plan when plan assets would be relatively small.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 501: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, admit that when a pilot retires, that that pilot would need to continue to be treated as a participating employer and may continue to have required contributions to the plan.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 502: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, if your response to DR 501 denies that a retired pilot would continue to be treated as a participating employer, please describe how the liabilities for that pilot and the funding amortization amounts for that pilot would be treated in the Schedule SB attachments.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 503: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, if your response to DR 501 admits that a retired pilot would continue to be treated as a participating employer, admit that the pilot’s survival from one year to the next may create a loss that may need to be amortized into that employer’s minimum required contribution if that employer’s funding target is not fully funded. If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 504: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, please describe whether you are familiar with any defined benefit plan in which a retiree may have required contributions.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 505: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, admit that the failure to make the required contribution by any one participating employer would be a potentially disqualifying event for the entire plan. If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 506: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, if admitted that minimum required contributions for each participating employer are a requirement for qualification of the entire plan in response to DR 505, please describe how the plan might deal with the situation that would arise if a participating employer (current or retired pilot) chooses not to make required contributions.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 507: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, if a participating employer were spun-off from the plan, please describe whether the plan assets allocated to the spin-off would be determined by the assets allocated to that employer in the Schedule SB attachment, or by applying the priority categories, methods and assumptions of ERISA § 4044.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 508: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, please describe approximately what percentage of the benefits provided by the proposed plan would be covered by PBGC maximum guaranteed benefit for existing pilots.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 509: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, please describe whether benefits above the PBGC maximum guaranteed benefit would have any protection beyond the ability of the trust to make payments when due.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 510: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, please describe the legal steps and processes that will be utilized for transitioning the current PSP Retirement Plan and its current benefits to the new ERISA-compliant plan under the proposal.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 511: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, please describe the costs associated with the legal steps and processes that will be utilized for transitioning the current PSP Retirement Plan and its current benefits to the new ERISA-compliant plan under the proposal.

For example, the current defined benefits of the PSP Retirement Plan are not protected under ERISA because PSP has not paid premiums to the Pension Benefit Guaranty Corporation (PBGC) for such protections. Describe how and at what cost, PBGC premiums will be charged against the plan for any outstanding unpaid or back-dated premiums in order to provide future coverage and whether there is a payment horizon for making such premiums current under the MEP.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 512: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, please describe the specific plan-related expenses for the new plan for existing retirees (including actuarial, audit, trustee, administrator, and PBGC premium costs).

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 513: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, please describe who is proposed to be the “back stop” for unforeseen costs, delays, or funding obligations for the transition that may not be accounted for in the PSP transition plan.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 514: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, please describe who the trustee and/or fiduciary would be for the multiple employer plan for existing retirees and for current PSP Members.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 515: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, please describe whether under PSP’s plan before-tax contributions can provide sufficient levels of contributions necessary to replicate the benefit amounts promised in the current unfunded PSP pension plan. If not, please describe why not.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 516: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, please describe how “benefits substantially identical to the benefits provided to PSP retirees under the current unfunded pension plan” can be provided in a defined benefit plan subject to the IRC § 401(a)(17) limits on compensation that may be taken into account in determining plan benefits.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 517: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, please describe how differences between pilots’ minimum required contributions would be handled in a defined benefit Multiple-Employer Plan.

For example, the minimum required contribution for a pilot age 64 with 33 years of service would exceed \$400,000 if the defined benefit MEP pays the full benefit in the current Retirement Plan, but the required contribution for a new pilot who is much younger would be less than \$40,000.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 518: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, please describe how PSP proposes, if it does at all, to ensure that a plan trustee or fiduciary has experience with the creation or maintenance of an actual multiple employer plan subject to IRC § 413(c).

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 519: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, please describe the assumptions and estimates used in your projections for plan-related expenses (i.e., actuarial, auditing, trustee, administrator, and PBGC premiums), investment expenses for the tax-qualified defined benefit plan, and expenses required to be included in minimum required contributions for the plan.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 520: Further regarding the retirement transition issue at Exh. BJM-01T 4:13–10:19, 5:4–22 the testimony describes a multi-step process that involves requesting a determination letter confirming tax-qualified plan status and an advisory opinion from the U.S. Department of Labor regarding PSP as a plan sponsor to authorize PSP for adoption of a Defined Benefit MEP under § 3(5) of ERISA. Please reply to each of the following:

- 1) Admit that the reference at 5:6–9 to “recently issued final regulations interpreting the term ‘employer’ for purposes of section 3(5) of ERISA” is a reference to the recent rule interpretations at 84 FR 37508 (<https://www.federalregister.gov/documents/2019/07/31/2019-16074/definition-of-employer-under-section-35-of-erisa-association-retirement-plans-and-other>). If denied, please provide a citation and a copy of the final regulations referenced.
- 2) Admit that the regulations adopted by the U.S. Department of Labor in 84 FR 37508 specifically disclaim the availability of an MEP to a Defined Benefit application and specifically apply the new MEP to a Defined Contribution MEP at new § 2510.3-55 “Definition of Employer” (“persons may act as an employer within the meaning of section 3(5) of the Act in sponsoring a multiple employer Defined Contribution pension plan (hereinafter “MEP”)”).
- 3) Admit that the regulations adopted by the US Department of Labor in 84 FR 37508 specifically disclaim the availability of an MEP to a Defined Benefit application and specifically apply the new MEP to a Defined Contribution MEP at 37512 (“The final rule is also limited to defined contribution plans, as defined in section 3(34) of ERISA. The final rule does not cover welfare benefit plans or other types of pension plans. . . . [T]he final rule is limited to defined contribution plans because the Department believes that consideration and development of any proposal covering other types of pension and welfare benefit plans or other persons or organizations as plan sponsors would benefit from public comments and additional consideration by the Department.”).
- 4) Admit that the regulations adopted by the U.S. Department of Labor in 84 FR 37508 specifically disclaim the availability of an MEP to a Defined Benefit application and specifically apply the new MEP to a Defined Contribution MEP at 37526 (“Thus, under the final rule, working owners without employees can join an ERISA-covered MEP or they can sponsor a defined contribution plans covering only themselves, which are (and historically have been) outside the coverage of title 1 of ERISA.”).

RESPONSE:

Regarding subparts (1) through (4), PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 521: Regarding Exh. CRW-01T 1:13–16, please describe the “funded pension system” for Oregon pilot groups which replaced the pay-as-you-go pension plans with which you had experience.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 522: Regarding Exh. CRW-01T 1:13-16, please describe your experience with the creation or maintenance of an actual multiple employer plan subject to § 413(c) of the Internal Revenue Code.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 523: Regarding Exh. CRW-01T 2:19, please describe the assumptions used in your projections for plan-related expenses (i.e. actuarial, auditing, trustee, administrator, and PBGC premiums), investment expenses for the tax-qualified defined benefit plan, and whether such expenses are required to be included in minimum required contributions for the plan and if they been included in your projections.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 524: Regarding Exh. CRW-01T 3:21–25, and specifically 4:13, please describe whether the savings are attributable to investment earnings on the larger contributions in early years, and whether there are any savings in present value of costs.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 525: Regarding Exh. CRW-01T 4:3–8, regarding references to “risk to retirees” due to some extraordinary circumstances, please describe the nature of this risk and how a fully funded pension plan eliminates this risk.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 526: Regarding Exh. CRW-01T 4:9–11, regarding references to the “long-term” investment returns and “long-term” cost, please reply to all of the following:

- 1) Please define “long-term” versus “short-term.”
- 2) Please describe the short-term investment returns and short-term costs.
- 3) Please describe the short-term risks of pre-funding future long-term benefits.
- 4) Please demonstrate how the projections of long-term levels of investment returns can be affected by the various kinds of volatility that investment markets experience, particularly if market returns are below average in the early years of the plan.

RESPONSE:

Regarding subparts (1) through (4), PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 527: Regarding Exh. CRW-01T 4:26–5:3, please describe the standard by which one determines whether an individual has retirement funds that are “sufficient for the life of the pilot and his or her surviving spouse.”

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 528: Further regarding Exh. CRW-01T 4:26–5:3, please admit that to determine whether an individual has retirement funds that are “sufficient for the life of the pilot and his or her surviving spouse” requires an evaluation of all of the various retirement funding streams held by the individual pilot and his or her surviving spouse. If denied, please state the basis for the denial.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 529: Further regarding Exh. CRW-01T 4:26–5:3, regarding retirement funds that are “sufficient for the life of the pilot and his or her surviving spouse” please respond to all of the following:

- 1) Describe average contributions of deferred income payments to the PSP retirement plan per working pilot per year.
- 2) Describe average individual pilot SEP-IRA contributions or other self-employment defined contribution plan pre-tax contributions per working pilot per year.
- 3) Describe average of any other individual pilot retirement pre-tax and post-tax contributions per working pilot per year.
- 4) Describe average Social Security/self-employment payments per working pilot per year.
- 5) Describe average payments into equity for the PSP share-in/share-out plan per working pilot per year.
- 6) Describe average compensation payments from the PSP retirement plan to retired pilots per retired pilot per year.
- 7) Describe average individual pilot SEP-IRA benefits payable to retired pilots per retired pilot per year.
- 8) Describe average of any other individual pilot retirement pre-tax and post-tax benefits payable to retired pilots per retired pilot per year.
- 9) Describe average Social Security/self-employment benefits paid to retired pilots per retired pilot per year.
- 10) Describe average payments to retired pilots out of equity from the PSP share-in/share-out plan per retired pilot per year.
- 11) Describe average payments to retired pilots from any other pre-PSP employment or retirement plan proceeds per retired pilot per year.

RESPONSE:

Regarding subparts (1) through (11), PSP objects on the same basis as set forth in response to Data Request 472 and on the further ground that PSP has no access to the information requested from individual pilots.

PMSA DATA REQUEST NO. 530: Further regarding Exh. CRW-01T 4:26–5:3, please describe if you conducted any analysis of the existing retirement profiles of individual Puget Sound Pilot members to determine whether individual pilots were managing funds which were sufficient for the life of the pilot.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 531: Regarding Exh. CRW-01T 5:4, 5:12–21, please describe the risks that the pilots, as a group, may experience longer life spans than those in your underlying mortality assumptions and disclose whether your assumptions reflect the consideration that highly compensated people, such as the pilots in this instance, may tend to live longer than the average person.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 532: Regarding Exh. CRW-01T 5:4, 5:12–21, please describe the risks that the pilots, as a group, may have spouses which experience longer life spans than those in your underlying mortality assumptions and disclose whether your assumptions reflect consideration of whether the pilots tend to have second or third spouses of significantly lower age than the average person and, if so, if this was reflected in your assumptions.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 533: Regarding Exh. CRW-01T 5:12–13, please provide any documentation for the assertion that the actuarial community in the United States in the 1990s did not have an adequate understanding of the application of the concepts of mortality and lifespans.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 534: Regarding Exh. CRW-01T 6:3–6, please respond to all of the following:

- 1) Describe legally and quantitatively the “limits on the amounts of annual contributions” referenced.
- 2) Describe quantitatively the “pension benefit that equals that promised to participants in the PSP pension plan.”
- 3) Describe quantitatively the “substantial” short fall in the difference between these amounts.
- 4) Describe whether participant compensation for PSP members exceeds the limit in the Internal Revenue Code for compensation for a Defined Benefit under IRC § 401(a)(17).
- 5) Describe whether the total PSP Retiree benefits provided exceed the limits under IRC § 415(b) for any retiree.

RESPONSE:

Regarding subparts (1) through (5),PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 535: Regarding Exh. CRW-01T 6:8–7:9, admit that the scenario described in this testimony does not include any specific analysis applicable to any individual Puget Sound Pilot or to Puget Sound Pilots, generally. If denied, please identify in your testimony any reference to analysis done of PSP individual pilot retirement benefits.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 536: Further regarding Exh. CRW-01T 6:8–7:9, admit that the situation described is based on an assumption of an identical “final average earnings formula.” If denied, please describe the relative average earnings of a pilot prior to beginning his or her pilotage career compared to the average earnings of a pilot after beginning his or her pilotage career.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 537: Further regarding Exh. CRW-01T 6:8–7:9, please describe the typical retirement package held by a Puget Sound Pilot member associated with benefits provided by his or her previous career with a previous employer prior to joining PSP.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 538: Further regarding Exh. CRW-01T 6:8–7:9, please provide all of the following unless this information has already been provided in response to PMSA DR 529, in which case please so refer:

- 1) Describe average contributions of deferred income payments to the PSP retirement plan per working pilot per year.
- 2) Describe average individual pilot SEP-IRA contributions or other self-employment defined contribution plan pre-tax contributions per working pilot per year.
- 3) Describe average of any other individual pilot retirement pre-tax and post-tax contributions per working pilot per year.
- 4) Describe average Social Security/self-employment payments per working pilot per year.
- 5) Describe average payments into equity for the PSP share-in/share-out plan per working pilot per year.
- 6) Describe average compensation payments from the PSP retirement plan to retired pilots per retired pilot per year.
- 7) Describe average individual pilot SEP-IRA benefits payable to retired pilots per retired pilot per year.
- 8) Describe average of any other individual pilot retirement pre-tax and post-tax benefits payable to retired pilots per retired pilot per year.
- 9) Describe average Social Security/self-employment benefits paid to retired pilots per retired pilot per year.
- 10) Describe average payments to retired pilots out of equity from the PSP share-in/share-out plan per retired pilot per year.
- 11) Describe average payments to retired pilots from any other pre-PSP employment or retirement plan proceeds per retired pilot per year.

RESPONSE:

Regarding subparts (1) through (11), PSP objects on the same basis as set forth in response to Data Request 472 and on the further ground that PSP has no access to the information requested from individual pilots.

PMSA DATA REQUEST NO. 539: Further regarding Exh. CRW-01T 6:8–7:9, please admit that your testimony is hypothetical in that it does not support the specific conclusion that the Puget Sound Pilot retirement plan is inadequate with respect to any one or number of members of PSP member pilots with respect to the potential that a pension-related losses that may occur when a mariner makes a mid-career move. If denied, please provide a reference to the specific analysis applicable to any individual Puget Sound Pilot or to a group of member pilots of PSP.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 540: Regarding Exh. BJM-01T 1:15–23, please provide all of the following:

- 1) Describe and identify the specific books and articles, if any, which you have authored that discuss the specific question of treatment of a non-ERISA-regulated defined benefit plan for members of an unincorporated association.
- 2) Describe and identify the specific books and articles, if any, which you have authored that discuss the specific question of the establishment of multiple employer defined benefit plan under ERISA.
- 3) Please provide copies the relevant excerpts of the books and/or articles described and identified.
- 4) Please describe whether the books and/or articles described and identified were subject to peer review.

RESPONSE:

Regarding subparts (1) through (4), PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 541: Regarding Exh. BJM-01T 9:17–23, please disclose the details regarding “discussions this year with representatives of the IRS and Department of Labor,” including the names of the representatives and the dates of the discussions, and identify and provide copies of any public documents discussed or referenced by the representatives of the IRS and/or Department of Labor during the discussions upon which your opinions are based.

RESPONSE:

PSP objects on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 542: Regarding Exh. BJM-01T, Exh. BJM-02, and Exh. BJM-03, which is the full extent of the evidence provided by Bruce McNeil, please admit that additional documents were provided by Bruce McNeil to PSP in 2021 regarding the basis for the PSP decision to transition to a fully funded Multiple Employer Plan sponsored by PSP. If denied, please admit alternatively that the extent of the work product produced for PSP with respect to this matter is contained in the testimony of this case.

NB: Though a request for a copy of the legal advice provided would typically be subject to a claim of attorney-client privilege, in this instance the client specifically requested that its lawyer disclose the legal opinion in his testimony and filed that testimony in this case. Therefore, any privilege claim with respect to this legal opinion has been affirmatively waived. Specifically, with respect to this testimony, the advice by counsel to PSP was affirmatively disclosed and described in the testimony of PSP Executive Director at Exh. CPC-01T 7:23–8:12 as the engagement of a “pension law expert” necessary “to address two fundamental” questions which were identified as being provided by “pension attorney Bruce McNeil,” and further that such “answers to these very important questions” were provided to PSP in 2021 prior to the initiation of the stakeholder process.

RESPONSE:

PSP objects to this Data Request on the further ground that it seeks information that is subject to the attorney-client privilege.

PMSA DATA REQUEST NO. 543: Further regarding PMSA DR 542, if so admitted, please describe what additional documents were provided by Bruce McNeil to PSP in 2021 regarding the basis for the PSP decision to transition to a fully funded Multiple Employer Plan sponsored by PSP, and provide copies of the same.

NB: Though a request for a copy of the legal advice provided would typically be subject to a claim of attorney-client privilege, in this instance the client specifically requested that its lawyer disclose the legal opinion in his testimony and filed that testimony in this case. Therefore, any privilege claim with respect to this legal opinion has been affirmatively waived. Specifically, with respect to this testimony, the advice by counsel to PSP was affirmatively disclosed and described in the testimony of PSP Executive Director at Exh. CPC-01T 7:23–8:12 as the engagement of a “pension law expert” necessary “to address two fundamental” questions which were identified as being provided by “pension attorney Bruce McNeil,” and further that such “answers to these very important questions” were provided to PSP in 2021 prior to the initiation of the stakeholder process.

RESPONSE:

PSP objects to this Data Request on the grounds that it seeks information that is subject to the attorney-client privilege.

PMSA DATA REQUEST NO. 544: Regarding Exh. CRW-01T, Exh. CRW-02, Exh. CRW-03, Exh. CRW-04, and Exh. CRW-05, which is the full extent of the evidence provided by Christopher Wood, please admit that additional documents were provided by Christopher Wood to PSP in 2021 regarding the basis for the PSP decision to transition to a fully funded Multiple Employer Plan sponsored by PSP. If denied, please admit alternatively that the extent of the work product produced for PSP with respect to this matter is contained in the testimony of this case.

NB: With respect to this testimony, the presentation of this actuarial service to PSP was affirmatively disclosed and described in the testimony of PSP Executive Director at Exh. CPC-01T 7:23–8:12 as the engagement of “an actuary” necessary “to address two fundamental” questions which were identified as being provided by “actuary Christopher Wood,” and further that such “answers to these very important questions” were provided to PSP in 2021 prior to the initiation of the stakeholder process.

RESPONSE:

PSP objects to this Data Request on the same basis as set forth in response to Data Request 472.

PMSA DATA REQUEST NO. 545: Further regarding PMSA DR 544, if so admitted, please describe what additional documents were provided by Christopher Wood to PSP in 2021 regarding the basis for the PSP decision to transition to a fully funded Multiple Employer Plan sponsored by PSP, and provide copies of the same.

NB: With respect to this testimony, the presentation of this actuarial service to PSP was affirmatively disclosed and described in the testimony of PSP Executive Director at Exh. CPC-01T 7:23–8:12 as the engagement of “an actuary” necessary “to address two fundamental” questions which were identified as being provided by “actuary Christopher Wood,” and further that such “answers to these very important questions” were provided to PSP in 2021 prior to the initiation of the stakeholder process.

RESPONSE:

PSP objects to this Data Request on the same basis as set forth in response to Data Request 472.

CERTIFICATE OF SERVICE

I further certify that on January 23, 2023, I provided an official electronic file containing Puget Sound Pilots' Responses to PMSA Data Requests Nos. 471-545 via e-Mail to the following parties:

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<p>Courtesy Service: president@pspilots.org mmoore@pmsaship.com mjacob@pmsaship.com ccostanzo@pspilots.org kmceachern@hk-law.com</p>	
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Signed at Portland, Oregon this 23rd day of January, 2023.

s/ Kathleen G. McEachern
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