

Exh. MM-43
Docket TP-220513
Witness: Michael Moore

**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
Captain Michael Moore
ON BEHALF OF
PACIFIC MERCHANT SHIPPING ASSOCIATION**

PSP Supplemental Response to PMSA DR No. 30

FEBRUARY 10, 2023

PMSA DATA REQUEST NO. 30: With respect to the work of the PSP Efficiency Committee described at Exh. IC-1T 11:23-12:2 as organized for the purpose of effectuating the UTC 2020 Order, please provide documentation of all organizing documents, agendas, and reports of the Efficiency Committee used to “examine our dispatch system, use of callbacks, level of on watch efficiency, use of meetings, etc.”

SUPPLEMENTAL RESPONSE TO PMSA DATA REQUEST NO. 30:

Regarding the establishment of a two-year rate plan at the conclusion of PSP’s seminal rate case, the Commission stated:

This two-year rate plan also provides PSP with an opportunity to increase its organizational efficiency, an important characteristic of well-run regulated utilities. . . . Our decision to implement a two-year rate plan thus reflects our expectation that PSP will create efficiencies to better use its current pilot staffing level.

Order 09 ¶ 103 (emphasis added).

In response to the Commission’s directive, PSP conducted a survey of individual pilots to evaluate the level of support for 27 potential efficiency measures. Individual pilots’ responses were then summarized in a report that reflects the percentage of responding pilots who support, may support, or do not support each measure. These documents – prepared by licensed professionals at the behest of their regulator – fall squarely within the self-critical analysis privilege that has been increasingly recognized by courts around the country as a crucial bulwark to protect the public welfare.

The self-critical analysis privilege is “grounded on the basic notion that ‘disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations or compliance with the law.’” Donald P. Vandegrift, Jr., *The Privilege of Self-Critical Analysis: A Survey of the Law*, 60 ALB. L. REV. 171, 176 (1996) (quoting *Sheppard v. Consol. Edison Co. of N.Y., Inc.*, 893 F.Supp. 6, 7 (E.D.N.Y.1995)). The privilege applies where non-disclosure is “essential to the free flow of information and . . . the free flow of information is essential to promote recognized public interests.” *Harding v. Dana Trans., Inc.*, 914 F.Supp. 1084 (D.N.J.1996). Courts around the country have recognized and applied the privilege for at least half a century. *See, e.g., Bredice v. Doctors Hospital Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff’d*, 479 F.2d 920 (D.C. Cir. 1973) (denying discovery of medical peer review papers); *Bracco Diagnostics, Inc. v. Amersham Health Inc.*, 2006 WL 2946469 at *3 (D.N.J. Oct. 16, 2006) (denying discovery of audit report generated to meet pharmaceutical regulatory requirements); *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 524-26 (N.D. Fla. 1994) (denying discovery of former landowner’s retrospective analysis of environmental practices).

Two key principles emerge from the robust body of case law applying the privilege. First, the privilege is at its apex where highly trained professionals are engaged in a critique of their own practices. *See Bredice v. Doctors Hospital Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff’d*, 479 F.2d 920 (D.C. Cir. 1973). Thus, as the court explained in the seminal *Bredice* case:

Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.

Id. (emphasis added).

Second, the privilege should be applied where the information at issue is created to comply with legal or regulatory requirements. See Jessica Brennan, Mike Zogby, & Tiffany Riffer, *Careful Consideration for Applying the Self-Critical Analysis Privilege in the Review of Internal Process Improvement*, 16 No. 3 IN-HOUSE DEF. Q. 14, 16 (2021).

Applying these principles in a matter of first impression, it is highly likely that a Washington appellate court would adopt the self-critical analysis privilege under the facts of this case. Like the discovery requests at issue in *Bredice*, PMSA DRs 30, 31, and 33 call for the self-evaluation of highly trained professionals prepared in response to an agency directive, regarding a matter of public interest. More importantly, the same concern that animated *Bredice* and other leading self-critical analysis cases – *i.e.*, that the threat of disclosure will chasten internal evaluation to the detriment of the public welfare – are present here in spades. For these reasons, it is very likely that a Washington appellate court would apply the self-critical analysis privilege to deny discovery.

Despite the strength of its objections, in the interest of compromise PSP is willing to produce the summary compilation of the results of a survey considering over 20 potential efficiency ideas developed in broad-ranging brainstorming sessions of the Efficiency Committee with the percentage of pilots who responded “yes,” “maybe,” and “no” to indicate their level of support regarding each idea. This document is sufficient to provide PMSA the information it needs in connection with this rate case, while addressing PSP’s most significant confidentiality concerns. Conversely, PSP is not willing to produce individual pilots’ responses because they are not necessary to PMSA’s evaluation of the levels of pilot support for proposed efficiency measures and would have a highly detrimental chilling effect on pilots’ willingness to participate in similar exercises in the future.

Moreover, even if the court declined to adopt the self-critical analysis privilege, the work product doctrine provides a second independent ground that protects the requested documents from disclosure. The Efficiency Committee was established at the advice of PSP’s counsel in response to Order 09. Likewise, counsel was closely consulted and engaged throughout the course of the Committees’ work efforts precisely because PSP’s self-evaluation was done in anticipation of its now-pending contested rate case. For this reason too, discovery of the requested documents is not appropriate and would very likely be denied.

Please confirm that this compromise is acceptable and PSP will promptly produce the summary compilation.

Efficiencies to Improve On Watch Pilot Rotation

Paragraph 103 from UTC Order: This two-year rate plan also provides PSP with an opportunity to increase its organizational efficiency, an important characteristic of well-run regulated utilities. As discussed below, we are concerned that PSP (1) does not efficiently distribute its workload, (2) presents its workload data in an inconsistent manner, and (3) pays its pilots equally despite significant disparities in individual pilot workloads. Accordingly, we are concerned that adopting Staff's proposal to fund 51.98 FTE pilots in the first year of the rate plan would have the unintended consequence of rewarding PSP's less-than-efficient operations. Our decision to implement a two-year rate plan thus reflects our expectation that PSP will create efficiencies to better use its current pilot staffing level. Based on the evidence in the record, we anticipate that the number of licensed pilots should increase in the second rate year. As Capt. Carlson indicated, PSP intends to have 52 licensed pilots by the end of 2021. Accordingly, we are satisfied that funding 52 FTE pilots in the second year of the rate plan based on PSP's projected number of pilots will not inadvertently reward inefficient management.

Efficiency measures that can be implemented more easily

1. Should PSP hold meetings in Port Angeles?

Yes	Maybe	No	Yes		Maybe		No	
96%	4%	0%	12	14	1	0	0	0
100%	0%	0%	12	12	0	0	0	0

2. Should the dispatchers cover the assignments first, with rested, on duty pilots, and not allow off duty pilots to choose assignments?

Yes	Maybe	No	Yes		Maybe		No	
81%	4%	15%	9	13	1	0	3	1
92%	4%	4%	12	10	0	1	0	1

3. Should outbound assignments and harbor shifts be dispatched from PA, with predictability built in, (for the Dispatchers) between 0600 – 1700? Could PSP do it around the clock?

Yes	Maybe	No	Yes		Maybe		No	
93%	0%	7%	11	14	0	0	2	0
100%	0%	0%	11	12	0	0	0	0

4. Should dispatchers have the ability, to move Pilots in rotation to prevent a 3 and out?

Yes	Maybe	No	Yes		Maybe		No	
52%	0%	48%	7	7	0	0	6	7
76%	14%	10%	8	8	1	2	0	2

5. Hold a ship for a minimal delay on the back end of a 3 and out, and the back end of a used Callback?

Yes	Maybe	No	Yes		Maybe		No	
96%	0%	4%	11	14	0	0	1	0
91%	0%	9%	10	11	0	0	1	1

6. Hold a ship for a minimal delay to prevent a 3 and out, and/or prevent hiring a Callback pilot?

Yes	Maybe	No	Yes		Maybe		No	
85%	12%	4%	11	11	0	3	1	0
92%	0%	8%	11	11	0	0	1	1

7. Should PSP listen more, to dispatchers for efficiency ideas?

Yes	Maybe	No	Yes		Maybe		No	
96%	4%	0%	12	14	1	0	0	0
100%	0%	0%	12	12	0	0	0	0

8. Are "just in case" repos always necessary?

Yes	Maybe	No	Yes		Maybe		No	
19%	33%	48%	3	2	3	6	7	6
19%	13%	69%	2	1	1	1	9	2

9. Should PSP discourage or possibly eliminate the use of Callback days during peak season days, (Thursday – Sunday)?

Yes	Maybe	No	Yes		Maybe		No	
7%	7%	85%	2	0	2	0	9	14
25%	13%	63%	3	1	0	2	1	9

10. Should PSP restrict the use of a Callback day during the peak season?

Yes	Maybe	No	Yes		Maybe		No	
0%	4%	96%	0	0	1	0	12	14
21%	4%	75%	4	1	0	1	8	10

11. Should PSP change the start time of a Callback day taken to begin after 10 hours of rest instead of next assignment?

Yes	Maybe	No	Yes		Maybe		No	
63%	7%	30%	7	10	1	1	5	3
88%	8%	4%	12	9	0	2	0	1

12. Should a Callback day used after a 3 and out begin after 10 hours of rest instead of next assignment?

Yes	Maybe	No	Yes		Maybe		No	
59%	11%	30%	7	9	1	2	5	3
92%	4%	4%	12	10	0	1	0	1

Efficiency measures that are potentially important but will require more time to implement

13. Would a regional check in system create more watch rotation efficiency?

Yes	Maybe	No	Yes		Maybe		No	
56%	37%	7%	7	8	6	4	0	2
53%	32%	16%	5	5	1	5	1	2

14. Would a more accurate check in or regional check in create more watch rotation efficiency between the hours of 2000 – 0400?

Yes	Maybe	No	Yes		Maybe		No	
37%	48%	15%	3	7	7	6	3	1
41%	35%	24%	3	4	1	5	2	2

15. When will PSP delay ships?

Yes	Maybe	No	Yes		Maybe		No	
85%	15%	0%	11	12	2	2	0	0
67%	13%	20%	2	8	1	1	1	2

16. Should PSP reduce travel time allotments (repos not included) at night between the hours of 2000 – 0400?

Yes	Maybe	No	Yes		Maybe		No	
48%	15%	37%	4	9	2	2	7	3
29%	24%	47%	2	3	1	3	2	6

17. Should Op-Rule 19 (Major Medical) be looked at and changed to – **no elective** MM be used between May to October?

Yes	Maybe	No	Yes		Maybe		No	
7%	0%	93%	1	1	0	0	12	13
64%	29%	7%	5	4	0	4	0	1

18. Are round trip Callback assignments necessary and, if so, being used efficiently and effectively?

Yes	Maybe	No	Yes		Maybe		No	
19%	58%	23%	2	3	7	8	3	3
42%	58%	0%	2	3	0	7	0	0

Efficiency measures that are a “heavy lift” or may require a study for effective efficiency

19. Should PSP move to “real time” check in?

Yes	Maybe	No	Yes		Maybe		No	
35%	15%	50%	3	6	3	1	6	7
50%	36%	14%	5	2	0	5	0	2

20. Would a staggered watch system rotation be more efficient than the current watch rotation system?

Yes	Maybe	No	Yes		Maybe		No	
46%	46%	8%	2	10	9	3	1	1
35%	53%	12%	2	4	4	5	1	1

21. Can PSP go back to round trip assignments on cruise ships?

Yes	Maybe	No	Yes		Maybe		No	
12%	35%	54%	1	2	5	4	6	8
27%	33%	40%	3	1	0	5	3	3

22. Should PSP eliminate respite for ETO in the months of May through September?

Yes	Maybe	No	Yes		Maybe		No	
0%	4%	96%	0	0	1	0	11	14
33%	20%	47%	4	1	1	2	2	5

23. Can PSP allow Pilots to make voluntary exceptions to our rest rules and then report the violation to the BPC?

Yes	Maybe	No	Yes		Maybe		No	
12%	0%	88%	0	3	0	0	12	11
7%	0%	93%	1	0	0	0	4	9

Efficiency measures that may increase efficiency, but are in line with a Callback discussion, not an on watch, rotation efficiency discussion.

24. Instead of PPW, should PSP assign pilots a certain number of extra days (3, or more?) to improve pilot use efficiency during peak times?

Yes	Maybe	No	Yes		Maybe		No	
28%	16%	56%	3	4	2	2	6	8
70%	20%	10%	5	2	0	2	1	0

25. Should pilots only earn one half of a Callback day when they are only assigned one harbor shift?

Yes	Maybe	No	Yes		Maybe		No	
23%	8%	69%	2	4	1	1	9	9
36%	14%	50%	4	1	0	2	2	5

26. Should PSP eliminate Op Rule 13 (respite granted for death), and require pilots to use banked Callback days?

Yes	Maybe	No	Yes		Maybe		No	
25%	0%	75%	2	4	0	0	8	10
71%	7%	21%	7	3	0	1	0	3

27. Should PSP pay pilots for Callbacks worked?

Yes	Maybe	No	Yes		Maybe		No	
5%	10%	85%	0	1	1	1	6	11
63%	13%	25%	3	2	0	1	1	1