

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET TP-220513

ORDER 06

GRANTING MOTION FOR LEAVE  
TO REPLY; DENYING MOTION  
REQUESTING THAT THE  
COMMISSION SEEK A  
DETERMINATION FROM THE  
BOARD OF PILOTAGE  
COMMISSIONERS

**BACKGROUND**

- 1 On June 29, 2022, Puget Sound Pilots (PSP) filed with the Washington Utilities and Transportation Commission (Commission) revisions to its currently effective Tariff No. 1. PSP characterizes its filing as a general rate case.
- 2 On August 26, 2022, the Commission entered Order 03, Prehearing Conference Order; Notice of Hearing (Order 03). Order 03 granted petitions to intervene filed by Pacific Merchant Shipping Association (PMSA) and TOTE Maritime Alaska, LLC (TOTE).
- 3 On February 1, 2023, PSP filed a Motion Requesting that the Commission Seek a Determination from the Board of Pilotage Commissioners (BPC) Regarding the Policy Standard Governing Funding of Washington’s Pilotage System (Motion). PSP specifically requests that the Commission request a determination from the BPC as to whether the “best achievable protection” standard set forth in RCW chapter 90.56 also applies to the BPC’s regulation of pilotage. This standard is concerned with Washington state’s policy for preventing oil spills. PSP notes that pursuant to RCW 81.116.020(5) the Commission may request assistance from the BPC. PSP submits that Commission ratemaking should be consistent with BPC safety regulation, that pilotage is particularly affected by the public interest, and that four members of the legislature have asked the Department of Ecology for an opinion as to whether the “best achievable protection” standard governs the regulation of the state pilotage system. PSP notes that in Final Order

09 in Docket TP-190976,<sup>1</sup> the Commission recognized that the BPC is generally charged with determining the number of authorized pilots and the training, licensure, and other safety regulations related to pilotage. Finally, PSP argues that the issue of whether the “best achievable protection” standard applies to this case is squarely raised by its own testimony and that it will be opposed by PMSA.

- 4 On February 7, 2023, Commission staff (Staff) filed a Response to PSP’s Motion. Staff observes that PSP’s motion is filed seven months after the filing of its general rate case, three months after the response to a relevant data request by PMSA, and only days before the February 10, 2023, deadline for filing response testimony. Staff argues that PSP has forfeited its right to request this relief by unreasonably delaying its decision to seek it. Staff argues that if a determination is important enough to request, then it could warrant resetting the hearing date and delaying the proceeding. Staff also argues that the “best achievable protection” standard is a regulatory safety standard, which is not directly relevant to ratemaking. Staff suggests that attempting to address the “best achievable protection” standard in this proceeding would require the Commission to intrude on the BPC’s jurisdiction. Staff observes that the BPC has not yet defined the “best achievable protection” standard in the context of pilotage and that this standard is incorporated into Department of Ecology regulations.
- 5 That same day, February 7, 2023, PMSA filed a Response to PSP’s Motion. PMSA notes that it takes no position on the underlying issue of the “best achievable protection” standard, but submits that this issue has no bearing on the Commission’s decision in this proceeding. PMSA notes that it may also address this issue in its response testimony. PMSA argues that PSP has not demonstrated that the Commission’s planned method for requesting assistance from the BPC, as set forth in Order 03, is inadequate. PSP argues that its request for a determination from the BPC is not an appropriate request for assistance as contemplated by statute and that this situation should not be compared to a federal court certifying a question to the Washington Supreme Court. PMSA argues further that PSP could request any existing BPC policy and that PSP has two members sitting on the BPC who could move for such a determination during a BPC meeting.
- 6 On February 14, 2023, PSP filed a Motion for Leave to Reply in Support of PSP’s Motion for the UTC to Seek BPC Determination (Motion for Leave to Reply). PSP argues that Staff and PMSA raise new arguments that the “best achievable protection” standard is irrelevant, and that PSP’s motion is untimely. PSP attaches a proposed Reply

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<sup>1</sup> *WUTC v. PSP*, Docket TP-190976, Final Order 09 (Nov. 25, 2020) (Final Order 09).

in Support of PSP’s Motion (Reply). In its Reply, PSP argues that the “core issue” is whether the statutory standard of “fair, just, reasonable, and sufficient” rates must be informed by and conform to “best achievable protection” principles. PSP argues that it only recently became aware of a November 2022 Department of Ecology letter and filed this Motion only four weeks later. PSP provides materials describing the BPC’s rulemaking focused on tug-escorts. PSP argues that requesting a determination from the BPC will narrow, rather than expand, the scope of litigation. PSP defends its request for a determination from the BPC, noting that the agency would be asked to interpret the statute it administers and would bring its expertise to the issue. PSP argues as well that there is no basis for denying its Motion as untimely.

## **DISCUSSION**

### **A. PSP’s Motion for Leave to Reply**

7 As an initial matter, we grant PSP’s Motion for Leave to Reply. Pursuant to WAC 480-07-370(5)(a), the Commission will permit a reply for good cause. A party should file the motion for a reply within five business days of the response, and it should attach the proposed reply to its motion.<sup>2</sup> Given the novel issues at stake, we find that PSP has demonstrated good cause for its Reply. We accept and consider PSP’s Reply in arriving at our decision in this Order.

### **B. PSP’s Motion**

8 We next address PSP’s Motion, which requests that the Commission seek a determination from the BPC as to whether the “best achievable protection” standard applies to the BPC’s regulation of pilotage.

9 In Final Order 09, the Commission distinguished between its jurisdiction as a rate-setting authority and the BPC’s various responsibilities in regulating pilotage. The Commission concluded:

Thus, the Commission is charged with determining the rates for pilotage services. The Commission “shall ensure that the tariffs provide rates that are fair, just, reasonable, and sufficient for the provision of pilotage services.” The Legislature did not transfer the BPC’s jurisdiction over

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<sup>2</sup> WAC 480-07-370(5)(b).

training, licensure, or other aspects of the Pilotage Act to the Commission. These issues are still properly brought before the BPC.<sup>3</sup>

- 10 Although the two state agencies have separate areas of jurisdiction, the Commission is allowed to “[r]equest assistance” from the BPC as it carries out its ratemaking function.<sup>4</sup> In Order 03, the Commission designated the executive director and chair of the BPC as consultants, consistent with the Commission’s findings in PSP’s last general rate case.<sup>5</sup> No party objected to this proposal.<sup>6</sup>
- 11 PSP’s Motion raises significant questions about the underlying merits of this case. This includes questions regarding the sufficiency of pilot compensation and the appropriate level of training for pilots. It also includes arguments as to how the Commission should consider pilotage rates in light of the “best achievable protection” standard. These underlying questions are appropriately reserved for the Commissioners themselves who are charged with the final decision in this rate case. Regardless of the outcome of this Order, and any discussion in this Order, these issues cannot be resolved and addressed today.
- 12 This Order is instead concerned with PSP’s specific request that the Commission seek a determination from the BPC. After considering PSP’s Motion, the parties’ responses, and PSP’s Reply, we agree with Staff and PMSA that this Motion should be denied. PSP has not demonstrated a need for requesting assistance from the BPC outside of the means designated in Order 03.
- 13 We share Staff’s and PMSA’s concerns that this Motion should have been brought earlier, but we do not rely on this as a basis for denying the Motion. As Staff notes, PSP raised the issue of the “best achievable protection” standard in its initial filing in June 2020.<sup>7</sup> If PSP submits that the BPC determination on this issue is necessary, it is unclear why this Motion was not filed earlier. At this relatively late stage, there is no guarantee that the BPC would render such a determination before the close of the record in this

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<sup>3</sup> Final Order 09 ¶ 42 (internal citations omitted).

<sup>4</sup> RCW 81.116.020(5)(a).

<sup>5</sup> Order 03 ¶ 43.

<sup>6</sup> *Id.*

<sup>7</sup> *See, e.g.,* Diamond, Exh. CLD-01T at 32-38.

proceeding. PMSA also observes that PSP is represented on the BPC, and one of its representatives could have moved for such a determination at a BPC meeting.

- 14 We are not persuaded that the timing of this Motion was justified by the November 2022 Department of Ecology (Ecology) letter cited in PSP’s Reply. Even though Ecology opined that the “best achievable protection” standard applied to the development of tug-escort rules, PSP had already raised the issue of the “best achievable protection” standard in its initial filing. The Department of Ecology letter regarding tug-escort rules appears to be focused on a relatively narrow application of this standard, and it did not suddenly introduce this issue into the case.
- 15 Nevertheless, we do not rely on delay as a basis for denying PSP’s Motion. There is no rule in WAC chapter 480-07 that forbids the Motion. We merely discuss these timing concerns to make the parties aware, as a general matter, that reserving such motions may contribute to delay or make it difficult for the Commission to fully address issues raised in those motions.
- 16 Moving on to the merits of PSP’s Motion, we question the relevance and appropriateness of asking the BPC to interpret statutes affecting its jurisdiction. This suggests that one state agency would ask for, and then defer to, another state agency’s interpretation of a purely legal question. There are several reasons why this would be problematic or unwarranted in this case.
- 17 There is no doubt that RCW 81.116.020(3) sets forth the standard for “fair, just, reasonable, and sufficient” rates for pilotage services. The application of broad ratemaking standards involves an exercise of judgment in light of the specific facts of each case. But it cannot be credibly maintained that the legal standard controlling this proceeding is in doubt. The determination of a purely legal question is not necessary to the resolution of this proceeding.
- 18 Furthermore, we are not persuaded that the BPC’s interpretation of the “best achievable protection” standard would necessarily require deference, as argued in PSP’s Reply. *See, e.g., Wash. State Nurses Ass’n v. Bd. of Med. Exam’rs*, 93 Wash.2d 117, 121 (1980) (explaining that the “[t]he construction placed upon a statute by the agency charged with its administration is entitled to considerable weight”). RCW chapter 90.56, which contains this standard, appears primarily concerned with *Ecology*, rather than the BPC. To the extent the parties wish to argue about the significance of Ecology’s interpretation of this standard, these arguments may be presented to the Commission in post-hearing briefing.

19 We observe that the Pilotage Act was amended to incorporate the “best achievable protection” standard into the development of tug-escort rules.<sup>8</sup> This statutory language is clear on its face. It is not necessary to request a determination from the BPC on this issue.

20 Even if the BPC found that the “best achievable protection” standard was more broadly relevant to its regulation of pilotage, it is not clear that this would have any *direct* impact on the Commission’s ratemaking. It remains PSP’s burden to prove the need for any rate increases before the Commission, regardless of how the BPC interprets this safety standard. The prudence of any costs would be appropriately considered in light of all of the facts and the applicable law, which would include any environmental protection statutes relevant to pilotage.

21 The distinction that PSP attempts to draw between ratemaking premised on “minimal competence” without the “best achievable protection” standard and ratemaking premised on an “elite” system required by the standard is not reasonable given other statutes, such as RCW 88.16.005, which emphasize the importance of pilotage and the protection of the natural environment.

22 The “best achievable protection” standard would arguably have an *indirect* impact on ratemaking to the extent the BPC may decide to authorize additional pilots or make other relevant findings that would require PSP to provide a different level of service. Final Order 09 provides relevant guidance:

The BPC is charged with determining the number of pilots necessary for safe, efficient pilotage service, and the Commission is charged with setting rates for these pilotage services. Accordingly, we do not determine a TAL for purposes of safety or fatigue management, as these issues fall squarely within the BPC’s purview. As PMSA recommends, we use the term “average assignment level” to make clear that we reference Staff’s number only for purposes of rate-setting.<sup>9</sup>

23 However, we are not presented with any evidence that the BPC has issued rules or made decisions premised on the “best achievable protection” standard. It appears that the BPC’s tug-escort rulemaking is still pending. It remains to be seen how the BPC might apply this standard in the context of training requirements, authorizing additional pilots,

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<sup>8</sup> See Laws of 2019, ch. 289.

<sup>9</sup> Final Order 09 ¶ 86 (internal citation omitted).

or other issues that might affect PSP's cost of service. Requesting a determination from the BPC at this time may provide a general legal conclusion, but it would be unlikely to clarify how the application of the standard affects the costs of the pilotage system.

24 Put simply, there is no doubt that the Commission is charged with determining fair, just, reasonable, and sufficient rates for pilotage services. Ratemaking supports the pilotage system as trained, licensed, and authorized by the BPC. Safety issues should be properly considered by the BPC first, before the Commission is able to properly consider their implications for pilotage rates. There is little justification for requesting the BPC's opinion on a purely legal question without knowing how the BPC would adjust the actual number of funded pilots or other concrete issues within its jurisdiction. The implications of exactly how the BPC might implement this standard in its regulation of pilotage remain to be seen.

### ORDER

25 THE COMMISSION ORDERS That:

26 (1) Puget Sound Pilot's Motion for Leave to Reply is GRANTED,

27 (2) Puget Sound Pilot's Motion is DENIED.

DATED at Lacey, Washington, and effective February 17, 2023.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

*/s/ Michael S. Howard*  
MICHAEL HOWARD  
Administrative Law Judge

**NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.**