

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

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

Docket TP-220513

**PUGET SOUND PILOTS’ REPLY IN  
SUPPORT OF PSP’S MOTION FOR  
THE UTC TO SEEK BPC  
DETERMINATION**

**I. INTRODUCTION**

1. RCW 81.116.020(3) requires the Washington Utilities and Transportation Commission (“UTC” or the “Commission”) to set rates that are “fair, just, reasonable and sufficient for the provision of pilotage services.” This statutory mandate nonetheless leaves unaddressed the follow-on question: What standard applies to the “provision of pilotage services” under Washington law? The answer to this question is crucial to the disposition of this general rate case because it informs the Commission’s decision as to what pilotage rates are “sufficient” under RCW 81.116.020(3).
2. Puget Sound Pilots’ (“PSP”) position on this issue – set out in detail in the testimony of Executive Director Charles Costanzo – is that Washington law requires the provision of pilotage services to meet the “best achievable protection” (“BAP”) standard. Therefore, to pass muster under RCW 81.116.020(3), pilotage rates must be sufficient to sustain a pilotage program that meets the BAP standard. Among other things, this requires funding pilot

compensation at a nationally competitive level in order to attract a diverse group of top candidates from within a small group of qualified mariners.

3. The fact that Washington law demands an elite pilotage system designed – and sufficiently funded – to maximize protection of the State’s waterways should not be controversial.

However, based on recently filed testimony, there is no question that both Commission staff and the PMSA contend that the applicable rate-setting standard for pilotage services is rates that are "fair, just, reasonable, and sufficient," a very general and fundamentally vague rule of thumb or standard. In response to a question regarding the "Commission's role in setting pilotage rates, UTC Staff testimony offers the following answer:

The Commission ensures that rates charged by pilots are fair, just, reasonable, and sufficient, meaning that it basically balances customers' needs for fair rates for a service they must purchase with the pilots' interest in fair compensation for services provided.<sup>1</sup>

PMSA concurs with this description of the rate-setting standard, testifying that it supports the Commission's legal conclusions for these "terms of art."<sup>2</sup> From PSP's perspective, the core issue here is whether the statutory standard – "fair, just, reasonable, and sufficient" – must be informed by and conform to BAP principles in order to meet the Pilotage Act's statutory mandate for Washington's compulsory pilotage system. The parties’ disagreement is material, because the Commission cannot accurately determine appropriate rates under RCW 81.116.020(3) without first making a threshold finding as to the level of protection and performance that the Legislature demands from the State’s compulsory pilotage system.

4. In order to address disagreement about whether the provision of pilotage services in Washington is subject to the BAP standard, PSP moved the Commission to consult its sister agency, the Washington Board of Pilotage Commissioners (“BPC”). This request that will

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<sup>1</sup> Exh. JNS-1T at 4.

<sup>2</sup> Exh. MM-1T at 9.

assist the UTC in its adjudication of this rate case. The BPC is the controlling authority on this disputed issue and the UTC can only benefit from seeking its guidance. That is true regardless of the weight that the UTC ultimately assigns to this issue in its final order.

5. Moreover, RCW 81.116.020(5) expressly provides for the requested process, stating that: “In exercising duties under this section, the commission may: (a) Request assistance from the board.” In other words, the Legislature understood that UTC’s jurisdiction over pilotage ratemaking was likely to raise issues for which consultation with the BPC on regulatory matters would aid the Commission’s decision making. That is precisely the case here. There is simply no possible downside to the Commission requesting guidance from the BPC regarding the applicability of the BAP standard in aid of the Commission’s duty to set rates that are “sufficient for the provision of pilotage services.”
6. Given what PSP believes to be the uncontroversial nature of its motion, PSP was surprised by the Commission Staff (“Staff”) and PMSA’s vigorous opposition. These parties’ objections fall into two categories: (1) substantive objection that determining the regulatory standard that applies to pilotage is irrelevant to ratemaking; and (2) procedural objection that PSP’s motion is untimely. Neither category of objection is well-founded, and each is addressed briefly below. The key point, however, is that the requested process is expressly provided for in the legislative mandate (RCW 81.116.020(5)) and can only serve to benefit the Commission’s decision-making. For this fundamental reason, PSP’s motion should be granted.

## II. STATEMENT OF FACTS

7. On June 29, 2022, PSP filed its general rate case with testimony from five witnesses opining that the "best achievable protection" standard is applicable to the funding of Washington's compulsory pilotage system. On October 20, 2022, the PMSA submitted a data request to PSP requesting that PSP admit that the Commission had already adopted a ratemaking standard in Order 09 in Docket TP-190976 that was different than the BAP standard.<sup>3</sup> PSP denied that BAP was inapplicable as the standard that should guide the Commission's rate making decisions in this case.<sup>4</sup>
8. On or about October 28, 2022, PSP became aware that four Washington legislators had posed questions to the Department of Ecology regarding the applicability of BAP to both DOE and BPC.<sup>5</sup> Ecology answered the legislators' questions in a letter dated November 18, 2022, stating that BAP governed DOE's operations as well as BPC's development of tug escort rules, but the agency deferred to the BPC "on the question of whether BAP principles govern the approach to the State pilotage system."<sup>6</sup> PSP first became aware of DOE's November 18, 2022 letter on January 3, 2023 and filed this motion less than four weeks later.<sup>7</sup>
9. BPC's work developing tug escort rules pursuant to the Reducing Threats to Southern Resident Killer Whales by Improving the Safety of Oil Transportation Act ("Act") is described in an Interagency Agreement ("IAA") between DOE and BPC.<sup>8</sup> Costanzo Decl. Ex. A. BPC's project-specific responsibilities include implementation of tug escort requirements for Rosario Strait, identifying and defining the geographic waterway zones

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<sup>3</sup> Haglund Decl. ¶ 7 and Ex. E.

<sup>4</sup> *Id.* Ex. E.

<sup>5</sup> Costanzo Decl. ¶ 2.

<sup>6</sup> Haglund Decl. Ex. D.

<sup>7</sup> Costanzo Decl. ¶ 3.

<sup>8</sup> *Id.* at Ex. A.

subject to tug escort requirements, a post-implementation analysis of tug exports, completing a synopsis of changing vessel traffic trends and conducting a tug escort rulemaking. As part of its process to implement the Act's tug escort requirements, BPC developed an Implementation Plan<sup>9</sup>, an FAQ<sup>10</sup> and an Interpretive Statement<sup>11</sup> defining statutory terms.

### III. ARGUMENT

#### A. The Legal Standard that Governs the Provision of Pilotage Services Under Washington Law is Relevant to Ratemaking.

10. In its opposition, Staff argues that granting PSP's motion would not assist the Commission and would instead "transform this proceeding into a forum for litigation about the safety aspects of pilotage." Staff claims that this is because determining the regulatory standard that applies to pilotage falls under the jurisdiction of BPC, not UTC.<sup>12</sup>
11. Staff is correct, of course, that BPC is the authority that determines the appropriate regulatory standard for the provision of pilotage services. But Staff draws the wrong conclusion from this premise. Specifically, rather than encouraging litigation in this rate case over aspects of pilotage within BPC's jurisdiction, requesting guidance from BPC regarding the appropriate regulatory standard will resolve an important area of disagreement and narrow the scope of litigation.

As explained above, to determine what rates are sufficient under RCW 81.116.020(3), the Commission needs to know what is required of the program that is to be funded. For example, significant portions of pilot training, for which expenses have been submitted as an approved expense in the instant rate case, are not statutorily mandated but rather undertaken as a best

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<sup>9</sup> *Id.* at Ex. B.

<sup>10</sup> *Id.* Ex. C.

<sup>11</sup> *Id.* Ex. D.

<sup>12</sup> PMSA makes essentially the same argument. PMSA Opp. ¶ 7 ("Commission should leave to the jurisdiction of the BPC all questions regarding marine safety, fatigue, and licensing issues as they do not pertain to the tariffs.").

practice. It is unclear under the presently undefined “fair, just, reasonable, and sufficient” standard whether non-mandated pilot training is a defensible expense. If Washington law requires just minimal competence or sufficient competence in the provision of pilotage, then perhaps this best-practice training is unnecessary. Conversely, if Washington law requires its pilotage system, as an integral aspect of its “best achievable protection” marine environmental protection scheme, then this type of best practices training is consistent with the obligations imposed by statute. As another example, if Washington law requires just minimal competence in the provision of pilotage, then funding the pilotage system at a level that is sufficient to attract a diverse group of top national pilot candidates would perhaps be unnecessary. Conversely, if Washington law requires an elite pilotage system designed to maximize protection of the State’s waterways, then funding pilot compensation at a nationally competitive level is essential.

12. Significantly, the Commission expressly anticipated the need to address issues of this type in its 2021 report to the Legislature, stating at that time that “the parties [should] consider the degree to which the Commission has successfully implemented the Pilotage Act through its processes in PSP’s next general rate case. This will give parties an opportunity to present fact-based arguments and witness testimony regarding this issue.”<sup>13</sup>

13. PSP has done exactly that by submitting detailed testimony from multiple witnesses explaining that the current lack of sufficient funding is hindering its ability to (for example) consistently attract a diverse group of top national candidates that are critical to PSP’s ability to consistently meet the standard for pilotage services required by the Pilotage Act. PSP has also put forth evidence as to the funding that is necessary to maintain a pilotage system that

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<sup>13</sup> Haglund Decl. Ex. B at 19.

consistently provides pilotage services that meet the BAP standard. Good practice, common sense, and the Commission's stated intent to ensure its rates promote the policy of the Pilotage Act all counsel strongly in favor of requesting BPC's guidance as to whether BAP is the relevant standard for pilotage services that "sufficient" rates must provide for.

14. In addition, given the BPC's many years of experience with regulatory issues under the Pilotage Act, it is only appropriate that the Commission give deference to a sister administrative agency's "specialized knowledge and expertise," *Nw. Alloys, Inc. v. Dep't of Natural Resources*, 10 Wn. App. 2d 169, 184 (2019), particularly in the context of the agency's "construction of a statute it administers." *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"). *See also Wash. State Nurses Ass'n*, 93 Wash.2d at 121 (further explaining that a statute's construction is guided by "the legislative purposes behind its enactment," as informed by consideration of "the problem that the statute was intended to solve"). BPC's guidance as to whether BAP is the relevant standard for the provision of pilotage in Washington therefore will provide essential information to the Commission in this proceeding, information the Commission and the parties should welcome given the State's undisputed desire to reduce the risk of oil spills and protect people and natural resources in Washington.

**B. PSP's Motion is Timely and Procedurally Proper.**

15. Staff argues that PSP's motion should be denied as untimely but cites no authority that supports its position. Rather, Staff cites *U.S. v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) for the general proposition that "a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Olano* was

discussing the blackletter principal that an appellate court has “limited power to correct errors that were forfeited because not timely raised in district court.” *Olano* is not applicable to the situation here.

16. PSP made its motion during the discovery period more than two months before the scheduled hearing. No rule required PSP to bring its motion at an earlier time. In fact, the deadline for *dispositive* motions – which are far more complex and burdensome – does not run in this case until March 5.<sup>14</sup> There is no basis in the applicable rules or case law to support the claim that PSP’s motion is untimely.
17. Nor will granting PSP’s motion “disrupt the orderly disposition” of this rate case.<sup>15</sup> Indeed, PMSA states explicitly in its own opposition to PSP’s motion that “[t]he answer that would be sought from BPC . . . will not impact any argument, testimony, or exhibit submitted by PMSA in this case.”<sup>16</sup>
18. Lastly, PMSA asserts a related procedural argument that PSP’s motion is improper because “PSP has had ample opportunity to propose and suggest the application of such a standard of review prior to juncture in a pending rate case” and that PSP “could have submitted in its petition in this rate case evidence of what PSP now asks the Commission to obtain for PSP.”<sup>17</sup> But PSP *did* do exactly that in its initial filing, which includes extensive evidence in support of its position that the BAP standard should inform the Commission’s determination of rates that are sufficient for the provision of pilotage services. The relief requested in the pending motion is simply that the Commission ask BPC whether PSP’s position that BAP

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<sup>14</sup> See WAC 480-07-380(b) (motion for summary determination must be filed at least 30 days before hearing unless ordered otherwise).

<sup>15</sup> Staff Opp. ¶ 9.

<sup>16</sup> PMSA Opp. ¶ 2.

<sup>17</sup> *Id.* ¶ 11.

applies to pilotage is consistent with that agency’s interpretation of its enabling statute, as specifically provided for in RCW 81.116.020(5).

#### **IV. CONCLUSION**

19. To set rates that are sufficient for the provision of pilotage services, the Commission needs to know the standard that the provision of pilotage services must meet in order to satisfy the requirements of the Pilotage Act. PSP raised this issue directly in its initial filing, and PMSA has signaled through its data requests that “adequacy” rather than BAP is the standard that applies. Rather than reserve this matter to be disputed by the parties at the upcoming evidentiary hearing, the more appropriate and efficient path is to ask BPC – the agency with authority to interpret its enabling statute – for relevant guidance.
20. Because the PSP’s motion is timely and the requested relief will aid the Commission’s analysis and decision-making, the motion should be granted.

Respectfully submitted this 13th day of February, 2023.

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