#### BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET NO. TP-190976

PUGET SOUND PILOTS' MOTION IN LIMINE/MOTION TO STRIKE TO EXCLUDE UNQUALIFIED EXPERT OPINION TESTIMONY

*I* Pursuant to WAC 480-07-375(d), Puget Sound Pilots ("PSP") file this Motion in Limine/Motion to Strike to Exclude Prefiled Testimony in order to exclude irrelevant and otherwise inadmissible testimony and evidence.

## I. INTRODUCTION AND SUMMARY

2 PSP files this Motion in Limine and Motion to Strike to exclude prefiled opinion testimony offered by Michael Moore on behalf of Pacific Merchant Shipping Association ("PMSA") in order to gain efficiency in the hearing process by avoiding the need at the hearing resolving disputes on the admissibility of evidence and to identify topics offered in response to testimony for which rebuttal may not be necessary. This motion is made because PMSA offers impermissible legal argument in the form of legal opinion testimony through an unqualified witness, as well as voluminous but unhelpful and irrelevant "expert" opinion testimony form a witness who is admittedly unqualified under ER 702. Put simply, PMSA witness Michael Moore offered 157 pages of testimony that consists largely of amateur opinion testimony on a wide variety of technical and scientific subjects, including the fields of law, economics, statistical analysis, financial and accounting issues, scheduling and dispatch efficiency, ship handling and pilot fatigue. Although PMSA will undoubtedly claim these challenges go merely to the weight

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of the evidence, because if not appropriately limited, cross-examination of Mr. Moore's voluminous testimony could take longer than the Commission has scheduled for the entire hearing in this proceeding, the Commission should strike unqualified opinion testimony on legal, technical and scientific subjects now to permit an efficient hearing.

## **II. STATEMENT OF ISSUES**

3 Should the Commission strike portions of the response testimony of Michael Moore containing opinion testimony on technical or scientific subjects because they are offered without adequate qualification or foundation?

### **III. EVIDENCE RELIED UPON**

- 4 This motion is supported by the record in this matter, including the Testimony of Michael Moore on Behalf of Pacific Merchant Shipping Association, Exhibit MM-01, as well as the following responses to data requests:
  - PMSA Responses to PSP Data Request No. 127, 128, 133, 135 139, 141, 142, 155, 156, 157, 166, 167, 170, 174, 175.
  - PSP Response to PMSA DR 86.

## **IV. AUTHORITY**

5 The Commission considers motions in limine and/or motions to strike prefiled testimony to resolve disputes about the admissibility of evidence before a hearing commences by striking in whole or in part the prefiled testimony before it is offered into the record at the hearing.<sup>1</sup> This

<sup>&</sup>lt;sup>1</sup> Order 07, In re Puget Sound Energy, Docket UG-170034 (Aug. 25, 2017)

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practice is permitted to avoid the need for discovery, cross-examination or rebuttal of testimony that is irrelevant or otherwise inadmissible on its face.<sup>2</sup>

- 6 Pursuant to WAC 480-07-495, the Administrative Law Judge should consider the rules of evidence in considering the admissibility of evidence.
- 7 ER 702 provides "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise" Applying ER 702, the Commission has excluded opinion testimony from witnesses who lacked the necessary knowledge, skill, experience, training or education.
- Applying ER 702, the Commission may grant a motion to strike or motion in limine to exclude legal opinion testimony.<sup>3</sup> The Commission may also exclude testimony in the nature of an expert opinion for which the expert is not qualified under ER 702.<sup>4</sup>
- 9 To the same extent as a witness's qualification to testify, the Commission should further consider whether opinion testimony is conclusory or offered without adequate foundation. The Washington Supreme Court has held that it is an abuse of a trial court's discretion to admit expert opinion testimony that is conclusive, speculative or otherwise lacking an adequate foundation.<sup>5</sup>

<sup>&</sup>lt;sup>2</sup> Order 07, *In re Puget Sound Energy*, ¶ 6.

<sup>&</sup>lt;sup>3</sup> Id. <sup>4</sup> Id.

<sup>&</sup>lt;sup>5</sup> Walker v. State, 121 Wash 2d 214, 218, 848 P2d 721, 723 (1993)(" It is an abuse of discretion to admit [expert opinion] testimony if it lacks an adequate foundation."); *Safeco Ins. Co. v. McGrath*, 63 Wash App 170, 177, 817 P2d 861, 865 (1991)(" It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.")

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#### V. ANALYSIS

PMSA filed response testimony on May 27, including Exhibit MM-01, consisting of 157 pages 10 of prefiled testimony. Mr. Moore's curriculum vitae was filed as Exhibit MM-02. There, Mr. Moore describes his education, including a Master of Marine Affairs, a B.S. in Mathematical Sciences, and an "Executive Certificate" received for a three-month course from the Graduate School of Business Administration at the University of Washington. He also describes his career, which consists entirely of his service for the Coast Guard and the Puget Sound Steamship Operators Association and the PMSA. Nowhere in his c.v. does Mr. Moore identify an advanced degree or any experience in economics, statistical analysis, financial and accounting issues, scheduling and dispatch efficiency, or fatigue. Absent such qualification, Mr. Moore is nothing more than a lay witness. And while the opinions of lay witnesses may be admissible to assist the finder of fact on such matters as are rationally based on the perception of the witness under ER 701, under ER 702, they may not be offered on scientific, technical or other specialized knowledge. Unfortunately, Mr. Moore's sprawling testimony is riddled with legal opinions and argument, statements of Mr. Moore's personal beliefs, and his unfounded lay opinions regarding economic, accounting, financial, staffing and dispatch efficiency, ship handling, and pilot fatigue.

#### A. Legal Opinions

11 As noted, the Commission will strike legal argument offered in the form of legal opinion testimony. Such arguments should be reserved for post-hearing briefing to avoid the need for cross-examination of legal positions in the hearing. Even should the Commission consider testimony addressing legal questions, Mr. Moore admits that he lacks any qualification to provide opinion testimony under ER 702 outside of the scope of maritime safety, marine affairs,

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navigational safety and the regulation of licensed mariners.<sup>6</sup> Instead, PMSA claims that his opinions should be admitted because they are alleged to be "helpful, necessary, available and trustworthy."<sup>7</sup> While expert opinions offered within the scope of their expertise on technical or scientific subjects may be helpful to the Commission, opinion testimony offered on legal issues, and especially that testimony offered outside of Mr. Moore's area of qualification is not.<sup>8</sup>

- Mr. Moore possesses no legal education or experience and is not licensed to practice law in any jurisdiction.<sup>9</sup> Despite the utter absence of legal expertise, Mr. Moore proffered a number of legal opinions regarding the adequacy of evidence, his conclusions regarding the sufficiency of the current tariff, the legislature's intent, and the appropriate interpretation of statutes and regulations. Regardless of their merits or Mr. Moore's veracity, these legal arguments are also largely irrelevant as evidence and fail to offer facts to the Commission upon which it may adjudicate PSP's tariff.
- 13 Mr. Moore's testimony commences with multiple critiques of whether PSP has met its burden of proof and offering his opinion regarding the quality and sufficiency of the evidence submitted:

First, PSP has not proven its case for any increases in the tariff rates charged to vessels for the provision of state compulsory pilotage.<sup>10</sup>

PSP's projections of the need for additional pilots, as well as its logic for why a rate increase is necessary to pay for an increase in the number of pilots and increased non-essential expenses, are faulty, speculative, conclusory, and unproven.<sup>11</sup>

<sup>&</sup>lt;sup>6</sup> See PMSA Response to PSP Data Request No. 127 (PMSA contends that Mr. Moore is qualified to opine on certain maritime safety topics, but that his opinion testimony was not otherwise proffered under ER 702). <sup>7</sup> *Id.* 

<sup>&</sup>lt;sup>8</sup> See Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha, 126 Wash 2d 50, 102, 882 P2d 703, 731 (1994), as amended (Sept. 29, 1994), as clarified on denial of recons (Mar. 22, 1995)"An expert must stay within their area of expertise.").

<sup>&</sup>lt;sup>9</sup> PMSA Response to PSP Data Request No. 133, (disclaiming that Mr. Moore possess a law degree) <sup>10</sup> Exhibit MM-01, p. 8, lines 12 – 13.

<sup>&</sup>lt;sup>11</sup> *Id.* at p. 9, lines 2-9.

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Whether PSP has met its burden of proof is a legal argument that PMSA is free to make in its post-hearing briefing, but it is not one Mr. Moore is qualified to offer as opinion evidence, nor is it one the Commission needs Mr. Moore's assistance deciding.

- 14 Next, Mr. Moore attempts to testify both as to the ultimate legal issue to be determined by the Commission in this proceeding, as to his opinion regarding the effect of legislation on the authority of the Commission to establish a new pilotage tariff and as to the legal standards applicable to the proponent of a pilotage tariff in Washington:
  - Q: Is the current tariff is fair, just, reasonable, and sufficient?

A: It is fair, just, reasonable, and more than sufficient. Since the Washington State Legislature has determined that the only way in which the UTC may enact a tariff is to "ensure that the tariffs provide rates that are fair, just, reasonable and sufficient for the provision of pilotage services," (RCW 81.116.020(3)), and because any "tariffs established by the board [of pilotage commissioners] prior to July 1, 2019 shall remain in effect and be deemed pilotage tariffs set by the commission until such time as they are changed by the commission," (RCW 81.116.050), the Legislature has adjudged the current tariff to be treated as fair, just, reasonable, and sufficient for the provision of pilotage services until proven otherwise by a Petitioner to the UTC.<sup>12</sup>

This Commission has previously determined that such ultimate legal conclusion testimony is impermissible.<sup>13</sup> Moreover, as the finder of fact, the Commission is not aided in any way by Mr. Moore's lay opinions regarding the standards by which it should adjudicate PSP's tariff filing. Such an argument should be made in briefing, and not in testimony.

15 The witness goes on to make a number of legal arguments about how the Commission and the

Board of Pilotage Commissioners should exercise their respective legislative authorities:

<sup>&</sup>lt;sup>12</sup> *Id.* at p. 11, line 23 - p. 12, line 7. Mr. Moore made similar arguments, which should be stricken on p. 152, lines 14 (commencing with "This is exactly..." to line 16.

<sup>&</sup>lt;sup>13</sup> Order 07, *In re Puget Sound Energy*,  $\P$  6.

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Q: Do the BPC and UTC have an obligation to prevent inefficiency in the tariff itself?

A: Yes. The Board has duties to ensure efficiency in the pilotage system and in setting the number of pilots under the Pilotage Act. RCW 88.16.035. Likewise, the UTC must set rates for the efficient delivery of a regulated service and should not set rates supporting inefficiency. If PSP subsequently chooses to act privately in an inefficient manner, PSP should not then turn around and claim that the current tariff is unfair or unreasonable based on its own decisions on how to allocate workload and subsequently divide moneys generated by the tariff.<sup>14</sup>

Mr. Moore makes similar arguments regarding the appropriate interpretation of UTC rules as

well as the UTC and BPC' respective duties towards each other as it relates to establishing

pilotage tariffs:

Q: Should the UTC set a tariff based on an assumption that it needs to underwrite the income of 11 new pilots that do not exist and at a Target Assignment Level of 118 assignments per year?

A: No. The regulations adopted by UTC for the purposes of governing this tariff setting process do not account for ghost pilots or some other theoretical number of non-existent licensees. Instead, to the extent that the UTC considers the number of pilots it should only take notice of the actual number of licensed pilots set by the BPC, consistent with WAC 480-07-525(4)(n), respecting that Board's determinations with respect to their obligation under the Pilotage Act to set a number of pilots capable of providing an efficient pilotage service. Under this authority, the BPC reaffirmed in July 2019 that the Target Assignment Level is 145 (Exh. SK-1T-9).

•••

As this is the first time proceeding through this process, the UTC and BPC must work together to respect the legal bifurcation of their duties and also jealously guard their own authorities to ensure efficiency, competitiveness, transparency, and accountability. The state's policy goals, vessel safety, and fairness to ratepayers are not served if either the UTC or BPC even inadvertently devolve their powers to one another.<sup>15</sup>

<sup>14</sup> *Id.* at p. 58, lines 10 - 18.

<sup>&</sup>lt;sup>15</sup> *Id.* at p. 73, lines 8 – 16; p. 73, line 23 – p. 74, line 2.

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These statements do not supply any facts to support the decision the Commission will reach in this proceeding. Instead his statements merely offer legal argument that invite cross-examination on purely legal matters.

- 16 A number of arguments were also offered as testimony with respect to the lawfulness of tariff applications and whether ratepayers are "liable" for certain PSP costs and expenses. While PMSA is certainly entitled to challenge whether those costs or expenses should be funded in rates, it is instead arguing whether a particular party is legally liable to pay certain obligations, which is improper legal opinion testimony.<sup>16</sup>
- 17 Mr. Moore further offers unqualified opinions regarding the impact various state laws may have on the obligations of PSP and the State of Washington to fund the pension program under which

retired Puget Sound Pilots receive benefits:

Q: Is the State of Washington funding or obligated to fund the private PSP Retirement Program?

A: No, the Legislature has specifically and explicitly taken steps to preclude the state from taking any liability for the private obligations regarding retirement entered into by PSP. Pursuant to RCW 81.116.020, while the UTC "may consider pilot retirement expenses" as an element of the tariff, which includes consideration of funded SEP IRA plans "under no circumstances shall the state be obligated to fund or pay for any portion of retirement payments for pilots or retired pilots."

Q: Are there any protections in law for the beneficiaries of an existing private PSP Retirement Plan?

A: Yes, the Legislature has specifically taken steps to ensure that if PSP presents the costs of a retirement plan to the state at the time a tariff is adopted as a basis for setting the rate then it must distribute benefits according to that plan. RCW 88.16.055.

<sup>16</sup> *Id.* at p. 64, line 20 – p. 66, line 3.

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Q: Does that rule make the state responsible for reimbursing the specific costs of a pilot retirement plan in a tariff?

A: No, this statute only ties the hands of the active pilot members of PSP, not the State.<sup>17</sup>

Mr. Moore goes on to proffer his legal opinions regarding the nature of the pension:

Q: Is there any indication that the PSP Retirement Program should be treated as a public retirement plan?

A: No, if this were a public retirement plan then it would be governed by public rules and administered and overseen by the Washington State Department of Retirement Systems, meetings regarding administration of the plan would be given through public notice, the public would be allowed to comment on the administration of the plan, all records regarding the plan would be subject to regular public scrutiny, and funding requirements and accounting obligations applicable to public plans would need to be followed. None of those conditions exist here.<sup>18</sup>

Again, these statements do not offer evidence to assist the Commission adjudicate PSP's tariff

proposal. Instead they are merely the legal arguments of a lay witness that PMSA would be

better served saving for its legal brief.

18 Next, Mr. Moore offers his opinions regarding the nature, purpose and the ability of PSP to

recover in rates certain taxes imposed by the legislature to fund self-insurance premiums paid by

the Board of Pilotage Commissioners to the State of Washington:

Q: What are the Self-Insurance Charge Payments?

A: These are charges imposed on the BPC by the Legislature to cover state costs associated with the liability attendant to a gender discrimination lawsuit. In order to pay the state back and to cover the BPC in the future, self-insurance charges are being levied on pilots and on vessels. These charges were divided by the Legislature and PSP for 6 years and the tariff was frozen so pilots couldn't expense their portion of the state-required out-of-pocket commitment and attempt to get tariff increases due to increasing these "expenses". Engrossed Substitute House Bill No. 1160, Section 108 (2017). WAC 363-116-301, the section implementing this surcharge, is in effect through June 30, 2021, and already

<sup>&</sup>lt;sup>17</sup> *Id.* at p. 109, lines 13 – 26, p. 110, lines 1-5.

<sup>&</sup>lt;sup>18</sup> *Id.* at p. 110, lines 13 – 23.

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directs the collection of an additional surcharge for the purposes of recouping the costs of the self-insurance premiums.

Q: Why is PMSA opposed to this proposed charge?

A: By attempting to pass along the PSP share of insurance charges by increasing the tariff, PSP is attempting to skirt the structure of RCW and WAC directed payments.<sup>19</sup>

These statements are once again mere legal arguments, which PMSA is welcome to address in post-hearing briefs, but which have no place in testimony.

- Finally, in multiple pages, spanning Exhibit MM-1, p. 125 line 20 through p. 128, line 23, Mr.
   Moore authored a multi-page treatise addressing why, in his belief, the Commission should consider provisions of the Pilotage Act (RCW 88.16) regarding competition for waterborne commerce in adjudicating this proceeding. Regardless of the merits of such an argument, it is precisely that. The Commission will not benefit from receiving Mr. Moore's legal arguments in testimony and it should be stricken from the record.
- 20 Because legal opinions offered in the form of testimony are impermissible, and Mr. Moore lacks the qualification to offer legal opinion testimony under ER 702, PSP moves to strike the following provisions of Exhibit MM-01:

Page/Lines
p. 8, lines 12 – 13
p. 9, lines 2-9
p. 11, line 23 – p. 12, line 7
p. 152, lines 14 (commencing with "This is exactly" to line 16

<sup>&</sup>lt;sup>19</sup> *Id.* at p. 120, line 24 through p. 121, line 20.

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p. 58, lines 10 – 18
p. 73, lines 8 – 16; p. 73, line 23 – p. 74, line 2
p. 64, line 20 – p. 66, line 3.
p. 109, lines 13 – 26, p. 110, lines 1-5
p. 110, lines 13 – 23
p. 120, line 24 - p. 121, line 20
p. 125 line 20 - p. 128, line 23

## B. <u>Unqualified Economic, Statistical Analysis, Financial, Accounting, Pilot</u> <u>Fatigue, Scheduling and Dispatch Efficiency Opinions</u>

21 Mr. Moore also dedicates voluminous pages of prefiled testimony and exhibits to discuss his amateur and unfounded conclusions in the fields of economics, statistical analysis, financial matters, accounting, pilot fatigue, and dispatch and scheduling efficiency. Once again, Mr. Moore denies that expert qualifications are necessary to opine on matters in technical or scientific fields at the Commission and offers these opinions as nothing more than the positions of PMSA as a ratepayer.<sup>20</sup> While as the representative of certain ratepayers, PMSA's positions on its opposition to or support (should that ever exist) for PSP's proposals should be welcome, when it offers opinions in technical or scientific fields to support those positions, the qualifications and foundations of such opinions should be subjected to no less scrutiny than any other witness's testimony would be. Here, some of Mr. Moore's discussion of historic data might be useful to the Commission as the foundation for some other witness's expert opinions,

<sup>&</sup>lt;sup>20</sup> See PMSA Responses to PSP Data Request No. 127, 135, 166, and 170.

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but Mr. Moore himself attempts to draw conclusions based on that evidence to support PMSA's positions.

- 22 Mr. Moore also failed to support his lay opinions in these technical and scientific fields with any foundational data or analysis, much less a reliable foundation supported by experts in those fields.
- 23 The deficiencies in support for his economic analysis are stark. When asked to produce any academic literature, journals, studies, treatises or other academic publications supporting his economic opinion that "The Average Revenue per Vessel Move is the most direct, simple, and accurate expression of the application of tariff rates to pilotage service provided to a vessel when it requires to be moved," Mr. Moore admitted there are no such documents to support his testimony.<sup>21</sup> A similar response was given when asked for such support for his opinions on the subject he termed "industry economics" or the "metrics for evaluating pilots revenues per unit of work" he espoused in testimony.<sup>22</sup>
- 24 When asked for published information to support his future pilotage revenue growth assertions, like announcements from shipping companies regarding future sailing schedules and new ship construction information, he admitted that no such information was available to support his opinions.<sup>23</sup>
- 25 Mr. Moore opined in pre-filed testimony about his opinion that "so long as average revenues per assignment are increasing and the average number of pilot assignments is flat or decreasing, pilots are earning more while working less" in Exhibit MM-01, p. 44 lines 6 7. When asked

<sup>&</sup>lt;sup>21</sup> PMSA Response to PSP Data Request No. 137.

<sup>&</sup>lt;sup>22</sup> PMSA Response to PSP Data Request No. 138.

<sup>&</sup>lt;sup>23</sup> PMSA Responses to PSP Data Requests No. 141 – 142.

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for documents to establish a *causal* relationship between the two metrics, Mr. Moore claimed that the statement was merely a "formulaic truism" and an expression of basic logic.<sup>24</sup> While the Commission is unlikely to be misled by these conclusory arguments that Mr. Moore levies against the current tariff, it also will not benefit from their inclusion in the record because they will not assist it adjudicate the proposed tariff before it now.

<sup>26</sup> Mr. Moore's efficiency arguments were similarly unsupportable. For example, when asked in discovery what analysis PMSA performed to support Mr. Moore's stated opinion that "the PSP watch system is inefficient," Mr. Moore replied in pertinent part "PMSA has not performed any formal analysis of the PSP watch schedule and notes that it is not PMSA's responsibility to implement the Pilotage Act requirements around optimization and efficiency nor to design specific watch schedules and dispatch policies."<sup>25</sup> After attempting to support his conclusory and unsupported opinion by offering a number of additional conclusory arguments, Mr. Moore completed his data request response by making the misleading claim that such an analysis would be impossible:

Finally, PMSA would further note that it is impossible for any member of the public – or PSP for that matter – to truly analyze and evaluate efficiency in the context of pilot availability because, according to PSP there is no such record which demonstrates "the actual available number of on duty pilots" (PSP Response to PMSA DR No. 86).<sup>26</sup>

Mr. Moore's assertion that such an analysis would be impossible actually demonstrates why his conclusory opinion should not be admitted – he claims it cannot be supported.<sup>27</sup>

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<sup>&</sup>lt;sup>24</sup> PMSA Response to PSP Data Request No. 149.

<sup>&</sup>lt;sup>25</sup> PMSA Response to PSP Data Request No. 167.

<sup>&</sup>lt;sup>26</sup> Id.

<sup>&</sup>lt;sup>27</sup> Contrary to Mr. Moore's assertions about PSP's response to DR 86, however, PSP produced information about the number of pilots in rotation for each watch period from January 1, 2018 through December 31, 2019.<sup>27</sup> In fact, PSP also produced in supplemental data request responses dispatch data with over 43,000 lines of pilot workload

- Mr. Moore makes similar excuses for his failure to support his opinion that new mandatory rest rules were "not significant or material for many reasons."<sup>28</sup> When asked for all support for this opinion, Mr. Moore merely referred to his conclusory testimony and once again made the inaccurate representation that PSP claimed no records exist by which the analysis could ever be performed.<sup>29</sup> Mr. Moore also attempts to support his opinion there by noting that he was also relying upon his opinion that PSP's watch schedule is inefficient.<sup>30</sup> As addressed above, Mr. Moore admitted that he didn't conduct any formal analysis of the watch schedule, claiming it was impossible to do so. Mr. Moore cannot logically piggyback off of one baseless and conclusory opinion to support another.
- 28 Similar excuses were made for why Mr. Moore could not demonstrate, as he testified, that ship delays were caused by staffing management, efficiency issues, or "'less productive pilots' unwillingness to make themselves available."<sup>31</sup>
- 29 Many more of Mr. Moore's opinions were unsupported by any analysis or reliable foundation. Although PSP will not be exhaustively addressing each of Mr. Moore's unqualified and unfounded opinion testimony in briefing, because Mr. Moore's admits he lacks any education, experience, skills or training in the requisite fields, and Mr. Moore's responses to data requests

data for the years 2016 - 2019. What did not exist to produce was something far more specific requested in DR 86: "in a searchable spreadsheet format, the actual available number of on-duty pilots each day and the reasons for onduty pilots not being available for duty each day from 2018 to present." Thus, even Mr. Moore's excuse for failing to support his conclusory unqualified opinion is baseless.

<sup>&</sup>lt;sup>28</sup> Exhibit MM-01, p. 100: 11-13.

<sup>&</sup>lt;sup>29</sup> See PMSA Responses to PSP Data Request No. 156, 157 and 174.

<sup>&</sup>lt;sup>30</sup> See PMSA Response to PSP Data Request No. 155 ("With respect to the actual number of assignments that pilots are safely performing and capable of safely performing, PMSA's testimony is explicit in its opinion that such delays are much more likely a function of an inefficient callback and watch standing systems than any change in the statutory minimum").

requirement regarding pilot rest periods.

<sup>&</sup>lt;sup>31</sup> See PMSA Response to PSP Data Request No. 175.

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demonstrate his opinions are unsupported by a reliable foundation, PSP also moves to strike the following provisions of Exhibit MM-01:

Page/Lines	Basis
p. 12: 19 – p. 13: 2.	ER 702. Mr. Moore lacks the qualification to opine upon the best or most appropriate economic measure of the application of tariff rates to pilotage services.
p. 16: 18 - p. 18: 1; p. 18: 18 - 20; p. 19: 14 - 18; p. 20: 14 - 24; p. 21: 9 16; p. 22: 1 - 20.	ER 702. Mr. Moore admits he has no expertise in economics or statistics to demonstrate his qualification under ER 702 to proffer opinions regarding the meaning or cause of historic statistical trends in tariff revenue collection under the current tariff (which is also irrelevant to PSP's proposed tariff).
p. 26: 7 – 26.	ER 702. Mr. Moore offers conclusions regarding, among other topics, the "best metrics for evaluating pilotage revenues per unit of work" in the field he terms to be "industry economics" despite admitting his lack of qualification in the field. He also offers irrelevant analysis of the historic revenues under the current tariff rather than PSP's proposed tariff.
p. 27: 10 – 16 (commencing with the words "Average Revenue Per Bridge Hour" and ending with the words "service and rest").	ER 702. Mr. Moore offers opinions and conclusions regarding the benefits of using the metric "Average Revenue Per Bridge Hour" in analysis of pilot revenue and workload, but lacks qualification to do so. Once again, he is also offering irrelevant analysis of the current tariff rather than the proposed tariff.
p. 30: 1 – 6.	ER 702.
p. 30: 14 – 18.	ER 702. Mr. Moore offers opinions regarding the sufficiency of revenue under the current tariff (rather than the proposed tariff) to cover

	expenses incurred by PSP without financial or accounting expertise.
p. 31: 8 – 15; p. 32: 15 – p. 33: 21; p. 34: 6 - p. 36: 10.	ER 702. Mr. Moore discusses metrics by which he believes net income, revenue and expense should be analyzed in comparison to each other to assess the sufficiency of revenues under the existing tariff (rather than the proposed tariff). Not only is this irrelevant, Mr. Moore lacks qualification under ER 702.
P. 42: 3 – 23	ER 702. Mr. Moore offers opinions regarding purported statistical correlations and their significance regarding pilot workload.
p. 44: 3 – p. 45: 7.	ER 702. Mr. Moore offers opinions regarding purported statistical analysis of pilot workload and correlations to average revenue per assignment.
p. 48: 1 - 9.	ER 702. Mr. Moore offers opinions regarding scheduling efficiency.
p. 49: 9 – 25.	ER 702. The witness offers opinions outside of his area of expertise regarding the level of fatigue of pilots based on a lack of reported incidents. Not only is this subject outside of Mr. Moore's claimed areas of expertise, it is based on insufficient information to draw the conclusion offered.
p. 50: 9 – 17.	ER 702. Mr. Moore admittedly lacks any expertise to offer opinions regarding the number of pilots that would be needed to complete a particular number of assignments.
P. 51: 19 – p. 52: 11; p. 52: 19 – p. 53: 15.	ER 702. Mr. Moore is offering opinion testimony regarding the theoretical methodologies he applies to analyzing the revenue-generating capacity of the current (rather than proposed) tariff. He lacks qualification under ER 702 and this testimony is irrelevant and unhelpful to the Commission.

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p. 57: 26 – p. 58: 9; p. 58: 19 – p. 60: 7.	ER 702. The witness is offering opinion testimony regarding the technical subjects of scheduling efficiency and pilotage operations and what consideration the Commission should give workload when it comes to setting rates, which are topics wholly outside of his claimed areas of expertise.
<ul> <li>p. 62: 18 – p. 64: 7;</li> <li>p. 69: 6 (commencing with "Or, worse still,") – 9;</li> <li>p. 70: 11 – p. 71: 8.</li> </ul>	ER 702. Once again, Mr. Moore is offering conclusions about the meaning and impact of his inexpert statistical analysis and economic considerations of work schedules.
p. 24: 24 (commencing with "A pilot that is health") – p. 68: 2 (ending with "…they had worked.")	ER 702. Mr. Moore is offering conclusions regarding the appropriate workload of pilots and the efficiency of pilots' work schedule.
p. 71: 9 – 20; p. 71: 26 – 73: 3.	ER 702. Mr. Moore is offering his critiques of and offering his own economic analysis, despite being unqualified to do so.
<ul> <li>p. 99: 7 – 12 (ending with "been implemented.");</li> <li>p. 100: 8 – p. 102: 8.</li> </ul>	ER 702. Unqualified conclusion regarding the impacts of fatigue management rules on pilot availability which is unsupported by any analysis. <i>See</i> PMSA Responses to PSP Data Request No. 155 and 156.

# VI. CONCLUSION/PRAYER FOR RELIEF

30 For the reasons addressed above, and to avoid the further protraction, exacerbation and

distraction of this proceeding that would occur by responding to and cross-examining the witness

as to this this improper testimony, PSP seeks to exclude the identified statements of Michael

Moore.

PUGET SOUND PILOTS' MOTION IN LIMINE/MOTION TO STRIKE TO EXCLUDE UNQUALIFIED EXPERT OPINION TESTIMONY - 17

DATED this 25<sup>th</sup> day of June, 2020.

#### RESPECTFULLY SUBMITTED,

By <u>/s/ Blair I. Fassburg</u> Blair I. Fassburg, WSBA # 41207 <u>bfassburg@williamskastner.com</u> David W. Wiley, WSBA #08614 <u>dwiley@williamskastner.com</u>

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PUGET SOUND PILOTS' MOTION IN LIMINE/MOTION TO STRIKE TO EXCLUDE UNQUALIFIED EXPERT OPINION TESTIMONY - 18

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## CERTIFICATE OF SERVICE

I further certify that on June 25, 2020, I provided an official electronic file containing the

foregoing documents via E-Mail to the following parties:

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Signed at Seattle, Washington this 25<sup>th</sup> day of June, 2020.

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PUGET SOUND PILOTS' MOTION IN LIMINE/MOTION TO STRIKE TO EXCLUDE UNQUALIFIED EXPERT OPINION TESTIMONY - 19