Exh. CLD-04T
Witness: Clayton L. Diamond

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, **Complainant,** **v.** **PUGET SOUND PILOTS,** **Respondent.**	**Docket TP-220513**

REBUTTAL TESTIMONY OF
CLAYTON L. DIAMOND
ON BEHALF OF PUGET SOUND PILOTS

MARCH 3, 2023

Haglund Kelley, LLP
2177 SW Broadway
Portland, OR 97201
Tel: (503) 225-0777 / Fax: (503) 225-1257

TABLE OF CONTENTS

EXHIBIT LIST		
Exhibit No.	**Description**	**Page Referenced**
CLD-05	APA 2022 Summary of Pilot Group Pension Plans	20

I. IDENTIFICATION OF WITNESS

Q: Please state your name and occupation.

A: My name is Clayton L. Diamond. I am the Executive Director – General Counsel for the American Pilots' Association.

Q: Why do you consider yourself to be an expert in pilotage law, policy and oversight, pilotage rates and the pilotage rate-setting?

A: I have been involved with pilotage and pilotage rate-setting for more than 30 years. While I was an afloat officer in the Coast Guard, I periodically used the services of State-licensed pilots. While I was Principal Assistant Legal Officer and Acting Legal Officer for the Ninth Coast Guard District (which encompasses the Great Lakes), I routinely reviewed and commented on proposed rates for the U.S. Great Lakes pilotage system. Since I joined the American Pilots' Association (APA) in 2008, I have closely monitored virtually every rate setting proceeding that has taken place, attended numerous pilotage rate setting hearings, provided privileged legal advice to pilot groups regarding pilotage rates, and have drafted testimony for various rate-setting proceedings. I have been involved in rate-setting proceedings in all regions of the country (Northeast, Southeast, Gulf, West Coast/Alaska/Hawaii, and the Great Lakes) and before all manner of rate-setting bodies, including Public Utilities Commissions, Utilities and Transportation Commission, state legislatures, pilot commissions, pilot rate review committees, pilotage fee commissions, etc.

II. PURPOSE OF TESTIMONY

Q: What is the purpose of your testimony?

A: My rebuttal testimony addresses the following topics:

1. From the standpoint of pilotage regulation, Puget Sound differs substantially from the waters of the Great Lakes;
2. Maritime pilots are held to a higher standard of care compared to ordinary mariners in the United States;
3. The rationale for APA's support of statutory limits on civil liability claims against pilots;
4. The standard practice for pilotage tariffs to fund license defense and lost income insurance;
5. State pilotage licensure is a crucial component of achieving the high standard of care that is required of maritime pilots;
6. State-licensed pilots are "assimilated to public officers" because a pilot's primary responsibility is to protect the public interest;
7. There are objective standards by which a State can assess the quality of its pilots, trainees and equipment; and
8. Regulatory agencies have a duty to provide tariff funding for long-standing pilot group retirement plans.

A. Puget Sound Differs Substantially from the Waters of the Great Lakes.

Q: Please describe why the waters of the Great Lakes ordering Canada and the United States are a unique maritime setting with respect to pilotage regulation that differs substantially from pilotage in Puget Sound where U.S. waters also abut Canadian waters.

A: It is not difficult to distinguish the Great Lakes-St. Lawrence Seaway System from the Straits of Juan de Fuca as it relates to pilotage. The Straits of Juan de Fuca and the Great Lakes-St. Lawrence Seaway System are vastly different in size and how they impact the imposition of a

compulsory pilotage system. The Straits of Juan de Fuca, where U.S. and Canadian internal waters do indeed abut, is less than one hundred miles in length and, more importantly Washington State pilotage waters are on the U.S. side of the border. As a result, there are no significant legal or diplomatic barriers to Washington State imposing a compulsory pilotage system in accordance with 46 U.S.C. § 8501. Washington State has indeed done so through the Wash. Rev. Code § 88.16.

The Great Lakes-St. Lawrence Seaway System, on the other hand, is over 1,000 miles long and the U.S. – Canadian border runs through the entire system, including through the center of the St. Lawrence, Detroit, and St. Mary's River, as well as Lakes Ontario, Erie, Huron, and Superior. To make a transit through this system, vessels subject to compulsory pilotage necessarily must cross back and forth over the U.S.-Canadian border dozens and dozens of times. As a result, and since it would not be possible for ships to be continually switching between U.S. and Canadian pilots during the transit through the system, to have an efficient pilotage system U.S. and Canadian pilots must each be authorized to pilot ships in both countries' pilotage waters. Therefore, a pilotage system covering all the U.S. waters of the Great Lakes would necessarily involve consultations and formal agreements with the Government of Canada and would have significant foreign policy implications. Furthermore, since the U.S. Constitution (Article I, Section 10, Clause 1) does not permit states to "enter into any Treaty, Alliance, or Confederation" with another country, the comprehensive Great Lakes pilotage system was consequently put in place by the federal government.

These foreign policy implications were articulated by Deputy Assistant Secretary of State Ivan B. White during a 1960 hearing discussing the Great Lakes Pilotage Act of 1960. Specifically, Secretary White stated during his testimony, "The foreign relations aspects of this bill are very

important. Aside from any other considerations, the fact that United States-Canadian boundary waters are involved creates a practical necessity of having pilotage systems in the respective waters of these two countries which can be coordinated with each other." Secretary White went on to testify, "In the course of the development of the bill, constructive discussions took place between United States and Canadian officials. These discussions resulted in general agreement on desirable legislation as well as on other requirements for coordination between the two countries to provide for compatible systems of Great Lakes pilotage." *See Great Lakes Pilotage Act: Hearing on S. 3019 Before the S. Merchant Marine and Fisheries Subcomm. of the Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. (1960) (Statement of Ivan B. White,).

In conclusion, as I previously stated, as a result of the unique nature of the Great Lakes-St. Lawrence Seaway System, from practical, diplomatic, and constitutional law perspectives, a federal as opposed to state-by-state approach was required for the unique setting of the Great Lakes region.

B. Maritime Pilots are Held to a "Higher Standard of Care" in the United States.

Q: From the standpoint of maritime law, please describe the standard of care to which mariners are held in the United States.

A: The standard of care expected for a mariner under U.S. law is whether a mariner's actions or omissions were that which a reasonable and prudent mariner of the same station would have taken under the same circumstances. *See, e.g.*, 46 C.F.R. §5.29.

As can be gleaned from any Torts treatise, the application of the "reasonable and prudent mariner" standard can vary based on the level of the mariner's training and skill. Courts will determine negligence by comparing a particular mariner to the reasonable standard of behavior for a mariner of "the same station."

This means that an Able Seaman (AB) would be held to the standard of what a reasonable and prudent AB would do or not do under similar circumstances. A licensed Third Mate would be held to a higher standard than an AB; namely a Third Mate would be expected to meet the standard of a reasonable and prudent Third Mate. This same reasoning carries through that a Second Mate is held to a higher standard than a Third Mate; a Chief Mate is held to a higher standard than a Second Mate; and a Master is held to a higher standard than a Chief Mate.

Q: How would you describe the "higher standard of care" to which maritime pilots are held in the United States?

A: As discussed above, the standard of care expected of mariners in the U.S. varies depending upon the skills, training and knowledge possessed by the mariner. Pilots are viewed as having reached the highest skill levels in the maritime sector. Because of this, as a matter of general law of negligence in the U.S., pilots are held to a higher legal standard than an average mariner because of their specialized training, knowledge, skill.

Pilots are commonly referred to as being at the very top of the mariner profession. In the Fall 2008 edition of PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, THE COAST GUARD JOURNAL OF SAFETY & SECURITY AT SEA, Rear Admiral Brian M. Salerno, the senior Coast Guard official responsible for navigation safety, has described the highly developed skills and degree of care expected of pilots:

> Each day, pilots are asked to take all sizes and types of vessels through narrow channels in congested waters where one miscalculation could mean disaster. They are trained, highly professional individuals, whose judgments must be spot-on for the hundreds of decisions they must make at every turn to bring a vessel safely to its berth or out to sea.

Another example of the commonly held view about the skill level of pilots can be found in an article that appeared on the Women Offshore website. This article included a passage that read, "A maritime pilot is the pinnacle of the maritime industry, a navigational expert for a port of call."

Similarly, an article on gCaptain (a widely read and credible maritime website in the U.S.) authored by the Executive Director for the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisan, stated, "Many consider piloting the pinnacle of maritime jobs." Other state pilotage oversight authorities have made similar statements about the highly developed level of skill required to be a compulsory pilot. The website for the Oregon Board of Maritime Pilots states, "The piloting profession is widely considered the pinnacle of a maritime career." Most significantly for this rate proceeding, the 2021 Annual Report for the Washington State Board of Pilotage Commissioners makes the statement that completion of its training program will allow "qualified mariners to reach the pinnacle of the maritime profession: pilot."

> As a result of this recognized standing pilots have earned, the U.S. Supreme Court has made clear that compulsory pilots are held to a high degree of care. "The **character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean**." *Atlee v. Packet Company,* 88 U.S. 389, 396 (1874). (emphasis added) The Supreme Court in Atlee stressed that pilot licensing standards and the value of human lives and cargo entrusted to ships under compulsory pilotage justified **this rigorous and high standard of care when compared to other mariners**. (emphasis added)

Another example of courts clearly spelling out the highest degree of care standard to which pilots are held, is the U.S. Court of Appeals for the Fifth Circuit referring to the standard of care expected of pilots as "**an unusually high standard of care**." *Bunge Corp. v. M/V FURNESS BRIDGE*, 558 F.2d 790, 798 n.6 (5th Cir. 1977) (emphasis added).

Other courts have made clear pilots are held to a higher degree of care than the average mariner due to the "pilot's knowledge of local conditions, the very reason that his hiring is required." *Osprey Ship Management Inc. v. Foster*, 387 F. App'x 425, 432 (5th Cir. 2010).

C. The American Pilots' Association Supports Statutory Limits on Civil Liability Claims.

Q: Please describe why the American Pilots' Association supports statutory limits on civil liability claims against state-licensed pilots where pilot negligence was a factor in a marine casualty.

A: The APA supports these statutory provisions that allocate pilot liability in the event of a marine accident (but for simple negligence only, not gross negligence, reckless misconduct, etc.), as do the legislatures in ten of the twenty-four coastal states, including Washington State.

Washington State recognized the necessity of its statutory limit on civil liability as follows:

> The preservation of human life and property associated with maritime commerce on the pilotage waters of this state is declared to be in the public interest, and the limitation and regulation of the liability of pilots licensed by the state of Washington…is necessary to such preservation and is deemed to be in the public interest.

Wash. Rev. Code § 88.16.115

The reason APA, Washington State, and these other states support pilot liability allocation provisions is that unbridled exposure to the enormous liability associated with navigating exceptionally large vessels through congested pilotage waters could serve as a hindrance to states' efforts to attract and maintain sufficient numbers of qualified pilots and could therefore threaten states' ability to maintain effective compulsory pilotage systems.

The economic reality of a pilot's liability exposure today is that the potential damages from a marine accident can be thousands of times – even hundreds of thousands of times – greater than the compensation the pilot receives for an assignment and substantially greater than the typical

personal resources of the pilot. Even a minor oil spill can result in damages of millions of dollars. Without some protection against potentially ruinous civil suits, and considering the unavoidable physical dangers involved in piloting (around the world, most every year, marine pilots are killed or seriously injured on the job), recruitment of top-notch maritime professionals into the piloting ranks, and retention of these individuals as state-licensed pilots, can be challenging.

As a result, statutory provisions dealing with pilot liability have been in place in a number of states for decades and are being considered by other states with growing frequency. Presently, 10 of the 24 coastal states have some form of statutory mechanism to limit or allocate the civil liability of compulsory marine pilots. These limitation of liability statutes cover more than 60% of all state-licensed pilots in the United States. Statutory provisions limiting or allocating liability for pilot negligence: (1) are common and important components of a state's comprehensive pilotage regulatory system; (2) are economically efficient; (3) do not eliminate a third party's ability to recover damages resulting from pilot negligence; and (4) are not a disincentive to professionalism in pilot performance.

The significant number of states that have adopted statutes allocating or limiting civil liability for damages caused by pilot error have recognized that there is no economic justification for exposing pilots to ruinous civil liability. The legislatures in these states have concluded that unlimited and unrestrained civil liability for pilots is economically inefficient and imposes unnecessary costs on the shipping industry. In the absence of a statutory device to limit the pilot's liability exposure, pilots may be compelled to recover through their pilotage fees either (1) the expense of insurance premiums for liability coverage in meaningful amounts to cover the unlimited liability exposure of all of the pilotage assignments that may occur during the insurance policy

term (if such insurance coverage is even commercially available) or (2) compensation that would reflect the magnitude of the pilot's uninsured, unlimited liability exposure.

It is well-settled maritime law that a vessel is responsible in rem for damages caused by pilot negligence.[1] As a result, it is a longstanding maritime standard that insurance policies for sea-going vessels cover damages from accidents that occur while the vessel is under pilotage.[2] Vessel owners, therefore, already pay for insurance that covers damages caused by a pilot's errors in the performance of pilotage duties. If pilots are forced to seek pilotage fees that cover adequate insurance premiums or produce compensation commensurate with unlimited civil liability exposure, and commercial shipping interests had to pay such pilotage fees, ship owners would be paying, in effect, double insurance. This is economically inefficient and introduces unnecessary costs to the maritime industry.

Unlimited liability exposure does not provide any meaningful added measure of deterrence to substandard pilotage. Even without civil liability exposure, a pilot faces a host of potentially serious administrative, regulatory, and criminal sanctions for negligence, misconduct, or violations of statutes and regulations. Federal and state licensing authorities may revoke or suspend a pilot's license and, in the process, deny the pilot an opportunity to practice his or her profession and otherwise earn a living. The Coast Guard and various other regulatory entities can also assess substantial civil penalties and fines related to marine casualties. There are also a number of federal statutes that prescribe criminal penalties – including fines and imprisonment – for conduct leading to a maritime accident, particularly an accident resulting in an oil spill.

[1] *The China v. Walsh*, 74 U.S. (7 Wall.) 53 (1868).
[2] *Kane v. Hawaiian Indep. Refinery, Inc*., 690 F.2d 722, 725 (9th Cir. 1982).

D. It is Standard Practice to Fund License Defense and Loss of Income Insurance that is a Necessary Component of a State-licensed Pilot's Insurance Portfolio.

Q: Do you consider license defense and loss of income insurance to be important components of the portfolio of insurance coverages for state-licensed pilots?

A: Yes, definitely.

Q: Is it standard practice on the part of pilotage regulators in the United States to fund license defense and loss of income insurance for pilots in the tariff that funds pilotage services?

A: Yes. Given the high level of legal liability risk to which maritime pilots are exposed, it is well understood by the pilot commission regulators throughout the United States that the costs of these two insurance coverages are appropriate and reasonable expenses incurred by pilot groups and should be funded through the tariff.

E. State Pilotage Licensure is a Crucial Component of Achieving the High Standard of Care that is Required of Maritime Pilots.

Q: How would you describe the "minimum standard" that the U.S. Coast Guard requires for the issuance of its first class pilot endorsement for FCPE?

A: As discussed in more detail below, the U.S. Coast Guard has described that the federal pilotage licensing scheme serves as a "minimum standard." Rear Admiral Henry Bell, then Chief of the Coast Guard's Office of Merchant Marine Safety, said at a 1979 conference when referring to the federal pilot license, "[A federal pilot license] does not guarantee that he is capable of doing anything at all….[a]ll the license does is get a man in the door. It allows him to say, 'Yes, **I have met the minimum standards**.'" (emphasis added).

All states require a formal apprentice program as the basis to certify candidates for eventual licensure as a state-licensed pilot. The length of apprentice programs can vary among the 24 coastal states. For example, for mariners with advanced credentials, apprenticeships can run anywhere from one to three years. In Puget Sound, for example, the training program can be up to 3 years. For mariners with lesser maritime experience and more junior mariner credentials, apprentice programs can be as long as seven years.

In any event, in the state pilot system, future pilots learn their craft under the tutelage of fully licensed and experienced pilots. Since pilots must be intimately familiar with local waters, navigational peculiarities, and local regulations, as well as know how to handle different types/sizes of ships and be able to conduct themselves on ships with bridge teams coming from all over the world, an intensive "on-the-job" training program is vital.

Time has shown that the skills required of a pilot are best developed, and then mastered, through locality-specific, "hands-on" apprentice training. Pilot apprenticeship programs include numerous instructional trips over an extended period (which captures different types of vessels and seasonal weather) through pilotage waters with an experienced pilot. Depending on the level of experience of the pilot trainee, the number of trips can range from hundreds to thousands. In Puget Sound, for example, trainees typically complete well over three hundred trips over the vast pilotage ground and under the supervision of experienced pilots before earning his or her state pilot license. The number of trips must be enough to ensure the pilot trainee becomes proficient at all different pilotage runs, on all different types of vessels, and under all types of weather conditions. In my opinion, there is simply no substitute for this experience.

Apprentice programs generally are progressive in nature, with apprentices gradually taking a greater and greater role. Initially, an apprentice will mostly observe, but over time, the apprentice

will take on a more substantial role and will eventually conduct the navigation of the vessel under the senior pilot's guidance. As the apprenticeship program draws to an end, the apprentice – under the watchful eye of the mentoring pilot – is handling the largest vessels that enter the pilotage waters.

In addition to a rigorous apprentice program, intensive classroom study is also a common feature of State pilot training programs. Classroom topics generally required before an individual is certified to become a fully licensed State pilot include basic, advanced, and emergency ship handling, radar and electronic navigation, fatigue, and bridge resource management training tailored for marine pilots. This required classroom work is supplemented with state-of-the-art bridge simulator and manned ship model training.

State licensed pilots, like other licensed professionals, are also required to complete a minimum number of continuing education units or credits during specified periods in order to maintain their state licenses.

Unlike the comprehensive certification, training/apprenticeship and licensing regimes of the States just discussed above, the federal regulations governing the issuance of a FCPE are very limited. Federal statutes and regulations[3] do set out rudimentary requirements for a federal first class pilot endorsement. For example, the federal pilot regulations require a minimum age of 21, annual physical examination, proficiency with electronic navigation, experience aboard a vessel in some capacity, small number of trips (12-20) of the pilotage area (but these trips can be made as an "observer"[4] who is not in any way participating in, or even attentive to, the navigation or conning of the ship; and these trips can be made over the period of a few days or weeks on a single

[3] Specifically, Title 46, Chapter 71 of the U.S. Code (USC) and Title 46, Part 11 of the Code of Federal Regulations (CFR).

[4] 46 C.F.R. § 11.705(b)

vessel), one-time written examination (usually multiple choice), sketch of the pilotage area, etc. It is critical to point out, however, a FCPE may be issued to an individual who has had no prior training as a pilot and who has not demonstrated any piloting or even basic conning skills.

The regulatory requirements for the holder of a FCPE to maintain proficiency and a current working knowledge of the waters and routes to which the federal license applies is also extremely limited. There are no continuing education or training requirements for those holding a federal license, and there is only one re-familiarization standard (the holder of a federal pilot license is required to transit the particular pilotage route just once every 5 years).[5]

Q: What is the current size of the US commercial ocean-going shipping fleet consisting of vessels exceeding 1000 gross tons?

A: According to the U.S. Maritime Administration (MARAD), the number of ocean-going commercial ships exceeding 1,000 gross tons in the U.S. merchant fleet is considerably less than two hundred vessels. MARAD estimates that only 1.5% of U.S. waterborne imports or exports are carried on vessels of domestic registry. By contrast, the International Chamber of Shipping estimates that there are over 50,000 merchant ships trading internationally.

Q: Do you agree with the PMSA contention that "individual seaports and states may insure were comprehensive, reliable, and expert pilotage operations composed of federally licensed pilots without the creation of a state-licensing requirement"?

[5] 46 C.F.R. § 11.713.

A: I strongly disagree with this assertion. Under U.S. law, federally licensed pilots are only authorized to pilot U.S.-flagged coastwise vessels (e.g., vessels transiting between two ports or places in the U.S.). *See* 46 U.S.C. § 8502. Conversely, per 46 U.S.C. § 8501, all foreign flag vessels and all U.S. flag vessels sailing on "register" (that is sailing between a foreign port or place and a U.S. port or place) must be under the direction and control of state-licensed pilot.

So, while federally licensed pilots are authorized to provide pilotage services to the small number of U.S.-flagged coastwise vessels calling at a port (see previous response to PMSA DATA REQUEST NO. 357 2)), as a matter of law these holders of FCPEs are not authorized to provide pilotage to the vast majority of large ocean-going ships calling at U.S. ports (which are foreign flag vessels or U.S.-flag vessels sailing on register). In any estimation, for the reasons discussed above, a pilotage operation composed only of federally licensed pilots would not be a "comprehensive, reliable, and expert" pilotage system for a port.

Below is a more complete discussion of the pilotage system in the U.S.

The central feature of pilotage regulation in the U.S., including certification and licensure, is that States, not the national or federal government, play the central role. This system of State primacy reflects a judgment made by the first U.S. Congress that pilotage is best regulated at the State or local level. The legislation putting this judgment into effect, the Lighthouse Act of 1789,[6] has been reaffirmed by Congress and courts many times in the intervening two centuries. The U.S. Supreme Court declared that Congress' decisions with respect to pilotage oversight "leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems

[6] Section 4 of this Act states, "That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

of regulation, drawn from local knowledge and experience, and conformed to local wants."[7] As a result of this legislation, the U.S. system is principally a "State Pilot System," with States being primarily responsible for oversight of pilotage.

Over the past 234 years Congress has, however, carved out a limited role for the federal government with respect to pilotage.[8] Federal pilotage regulations, administered by the U.S. Coast Guard (USCG), apply only to certain U.S. flag vessels sailing between ports or places in the U.S. This small segment of shipping in the U.S. is required to be under the pilotage of an individual with a USCG-issued federal pilot endorsement.

Pilotage of international trade vessels in the U.S. (i.e., non-U.S. flag vessels entering/departing U.S. ports, or U.S. flag vessels sailing to/from a non-U.S. port), which accounts for about 95% of all large ocean-going traffic moving in U.S. waters, is governed by the 24 U.S. coastal States through comprehensive pilotage regulation systems. While in State pilotage waters, these vessels are required to be under the direction and control of a state-licensed pilot.

Q: In your opinion, are the national standards for federally licensed pilots administered by the US Coast Guard adequate for the provision of safe vessel operations?

A: While, as I indicated in my original testimony, federal pilotage standards have a role in the overall pilotage system in the U.S., state training, certification, and recertification requirements for pilots are far more stringent than those put in place by the federal government. This is an

[7] *Cooley v. Board of Wardens of the Port of Philadelphia,* 53 U.S. 299 (1852).
[8] For the general statutory framework establishing the division between State and federal pilotage responsibilities, see Title 46, Chapter 85 of the U.S. Code.

important point considering, as discussed above, that the vast majority of the large ocean-going vessels moving in U.S. waters are under the direction and control of state-licensed pilots.

The U.S. Coast Guard's view of the role the federal pilot endorsement is intended to play and how it compares to the comprehensive state pilotage licensing systems was perhaps best summed up in comments by Rear Admiral Henry Bell, who I mentioned earlier. RADM Bell stated, "This is precisely the philosophy behind the federal license. **It is not intended to guarantee, in any way, that the holder can walk aboard, and perform like a first class pilot. It does not guarantee that he is capable of doing anything at all….[a]ll the license does is get a man in the door. It allows him to say, 'Yes, I have met the minimum standards**.'" (emphasis added).

Admiral Bell went on to say, "it has never been the government's intention to try to make the license reflect competence….**The federal licensing program is not intended to achieve the ends that many of the state pilots' associations are designed to achieve** for their own people in their own area." See pages 113-114 of the Proceedings: Symposium on Piloting and VTS Systems, September 12, 1979, The National Research Council, Marine Transportation Research Board (emphasis added).

It is also significant to point out that it is common for vessels that are not required to use the services of a state-licensed pilot (e.g., U.S. naval vessels and U.S. flag coastwise vessels) to voluntarily opt to do so rather than use the services of the holder of a FCPE. In my opinion, this is in large part due to the recognition that state training, certification, and recertification requirements for pilots are far more stringent than those put in place by the federal government.

Q: Why do you consider the operations of a pilot group to be "capital-intensive?"

A: I think my answer was clear. A modern, safe, efficient, and reliable pilotage operation requires capital expenditures on necessary items and programs such as pilot boats/crews, dispatchers, administrative support, training programs, radios, safety gear and sophisticated electronic navigation equipment.

F. State-licensed Pilots are "Assimilated to Public Officers" because a Pilot's Primary Responsibility is to Protect the Public Interest.

Q: In your original testimony, you referenced the U.S. Supreme Court decision in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 93-94 (1955) as supporting the conclusion that state having licensed pilots in Washington are "public officers, chiefly responsive to the state." Please explain your position more fully.

A: As a general matter, I am of the opinion that state-licensed pilots perform what is a public service and they are "assimilated to public officers." Although the state-licensed pilots in the U.S. are not government employees, these professionals perform what is, in large measure, a public service function. My opinion is that a pilot's primary responsibility is to protect the interests of the citizens, the waterways and the marine environment of the state in which they are licensed. The U.S. Supreme Court in *Bisso* makes several assertions that support this opinion.

> "Pilots hold a unique position in the maritime world and have been regulated extensively both by the State and Federal Government. Some state laws make them public officers, chiefly responsible to the State, not to any private employer. **Under law and custom they have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer**. Their fees are fixed by law and their charges must not be discriminatory. As a rule no employer, no person, can tell them how to perform their pilotage duties." *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 93-94 (1955) (internal footnotes omitted) (emphasis added).

The *Bisso* court went on to quite clearly state, "Reliance is placed on the unique position of pilots in the maritime world and the extensive regulation to which they are subjected: **they are**

assimilated to public officers." *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 119 (1955) (emphasis added).

In addition to the pronouncement in *Bisso*, that pilots are "assimilated to public officers," the preamble to the Washington State pilotage statute concisely summarizes the value and the important public interests benefits provided by state pilots. "The legislature finds and declares that it is the policy of the state of Washington to prevent the loss of human lives, loss of property and vessels, and to protect the marine environment of the state of Washington through the sound application of compulsory pilotage provisions in certain of the state waters." Wash. Rev. Code § 88.16.005

G. <u>There are Objective Standards by which a State can Assess the Quality of its Pilots, Trainees, and Equipment.</u>

Q: Describe how and by what standards a state can objectively assess whether one of its state-licensed pilots is among "the very best men and women"?

A: The purpose of the State Pilot System is to put in place the best qualified and trained people with the necessary equipment and infrastructure to provide and maintain the highest quality 24/7/365 nondiscriminatory pilotage service to protect the States' waterways and marine environment and ensure the safe and efficient movement of maritime commerce. The most important component of the State Pilot System is the state laws that compel vessels to take a state-licensed pilot and identify the specific vessels to which the "compulsory pilotage" requirement applies. Other components of the State Pilot System are in place to support the compulsory pilotage requirement.

It is also important to point out that by requiring a vessel to take a state-licensed pilot, the state is impliedly assuring that the vessel will receive a fully trained and properly equipped pilot who possess superior skill and experience, and that the public's paramount

interests in protecting the marine environment will be served. This is an important responsibility that States cannot take lightly.

Q: Describe how and by what standards a state can objectively assess whether it is employing "the highest quality pilot training."

A: I believe the explanation provided by the Washington State Board of Pilot Commissions of its Pilot Exam, Training Program and Licensure processes in their 2021 Annual Report, as well as the provisions laid out in the Washington State pilotage statute and pilotage regulations under the Washington Administrative Code (e.g., regulations covering qualifications of pilots, examination of pilots, pilot training program, licensing of pilots, simulator evaluations, etc.), provide an excellent answer to this question.

Q: Describe how and by what standards a state can up to actively assess whether its state-licensed pilots or utilizing the "finest available equipment."

A: In order to make this determination, the Washington State Board of Pilot Commissions should ask the state licensed pilots in the state to provide information on the process and due diligence the pilots undertook in making these important equipment procurement decisions. The provision of this type of information is a common part of the state pilotage rate setting process.

H. Regulatory Agencies have a Duty to Provide Tariff Funding for Long-standing Group Retirement Plans.

Q: In your opinion, could the regulatory agency in a state with the responsibility for pilotage rate-setting refuse to provide tariff funding for a long-standing group retirement plan for a pilot group in that state?

A: In my opinion, the answer is no. In any state where the pilot group provides a defined-benefit group retirement plan, which is very common and recognized as an entitlement of working pilots and retirees as well as a legitimate expense that must be funded in the pilotage tariff, it is my opinion that it would be inappropriate, unfair and likely unlawful for a pilotage regulator to fail to provide tariff funding for those retirement plan obligations.

Q: Over the years, has the APA try to maintain a summary listing of the types of retirement plans provided by state-licensed pilot groups throughout the United States?

A: Yes. We have maintained such a list for over a decade and most recently updated it in February, 2022. A copy of this most recent summary, which includes data that the total of 25 U.S. pilot groups have made available to the APA, is Exh. CLD-05.

III. CONCLUSION

Q: Does this conclude your rebuttal testimony?

A: Yes, it does.