

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,  
Complainant,**

**v.**

**PUGET SOUND PILOTS,  
Respondent.**

**Docket TP-220513**

**REBUTTAL TESTIMONY OF  
SEAN MCCARTHY  
ON BEHALF OF PUGET SOUND PILOTS**

**MARCH 3, 2023**

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6 **EXHIBIT LIST**

<b>Exhibit No.</b>	<b>Description</b>	<b>Page Referenced</b>
SM-02	Powerpoint presentation regarding PSP insurances	3
SM-03	PSP Insurance Policy, 2022-23	3, 7
SM-04	Order, <i>Port of Kalama v. M/V SM MUMBAI</i> , et al, Case No. 3:20-cv-00621-IM (D. OR 2021)	8
SM-05	Answer and Third Party Complaint, <i>M/T LEVANT, et al. v. Henshaw</i> , Case No. 2:21-cv-01670-RSM (W.D. WA 2022)	8, 9
SM-06	Best’s Market Segment Report: “P&I Clubs in 2022 – An Even More Challenging Year”	9, 10
SM-07	Aon, “Protection & Indemnity Renewal 2022/23 Commentary”	10

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2  
3 **I. IDENTIFICATION OF WITNESS**

4 **Q: Please state your name, business and business address.**

5 A: My name is Sean McCarthy. I am a Senior Vice President at Durham and Bates Agencies,  
6 Inc., in charge of the Marine Practice. We are the oldest marine insurance brokerage firm in the  
7 Pacific Northwest with operations that began in 1907. We are headquartered in Portland, Oregon,  
8 1211 SW. 5<sup>th</sup> Ave., Suite 2800, Portland, Oregon 97204.

9  
10 **Q: Please describe your educational background and work history.**

11  
12 A: I earned a BA degree in English from Boston College. Following work as a yacht  
13 insurance broker on the East Coast for two years, I joined Durham and Bates in 1992, a company  
14 that has specialized in marine insurance since its founding in 1906. I have been with Durham and  
15 Bates for 31 years and currently serve as chairman of the Board of Directors. In my capacity as  
16 director of the Marine Practice, I coordinate insurance placements and provide risk management  
17 services for a wide variety of marine clients. These cover a broad range of major marine and  
18 marine-related companies in the Pacific Northwest, including blue-water shipping, terminal  
19 operators, chartering, marine pilots, large-scale cargo, heavy-lift operations and marine  
20 construction. Among our clients are Western Towboat, Schnitzer Steel, Manson Construction,  
21 CalPortland and multiple pilot groups.  
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1 **Q: Please describe your background and experience with marine insurance for state-**  
2 **licensed pilots.**

3 A: I have been involved in the placement of multiple insurance coverages for West Coast  
4 pilot groups for nearly 30 years. Within Durham and Bates, I was primarily responsible for the  
5 initial design and the ongoing development of our company's Marine Pilot insurance program.  
6 Our current pilot group clients include the Puget Sound Pilots, Columbia River Pilots, Columbia  
7 River Bar Pilots, Coos Bay Pilots and Southeast Alaska Pilots.  
8

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10 **II. PURPOSE OF TESTIMONY**  
11

12 **Q: What is the purpose of your testimony?**

13 A: My testimony addresses two areas:

- 14 1. The types of insurance coverages that pilot groups and individual pilots need to be  
15 adequately insured; and,  
16 2. The increasing risk of major casualties involving vessels under pilotage as  
17 demonstrated by record levels of casualty losses in the last three years.

18 **A. Given the Risk Profile, Both Pilot Groups and State-Licensed Pilots Need a**  
19 **Comprehensive Portfolio of Insurance Coverages.**

20  
21 **Q: From an overview perspective, please describe the types of insurance that pilot**  
22 **groups and their member pilots should carry.**

23 A: Given the risks, a pilot association and its members should carry insurance covering civil  
24 legal liability, civil legal defense, license protection and defense costs, loss of income, criminal  
25 defense, criminal fines and penalties and personal effects.  
26

1 **Q: In light of that broad range of coverages, do you make regular presentations to the**  
2 **West Coast pilot groups that are Durham and Bates' clients to make certain that the**  
3 **leadership of a pilot group and its members understand the types of insurance coverage**  
4 **being considered and the total costs?**

5 A: Yes. I generally use a PowerPoint presentation to explain each of the insurance coverages  
6 under consideration, the relationship of those coverages to whatever liability limits may exist  
7 within a particular state and examples to illustrate the importance of the different coverages in  
8 various situations that have occurred in the past. A copy of the PowerPoint presentation that I  
9 made to the Puget Sound Pilots in early 2022 is Exh. SM-02. A copy of the insurance policy for  
10 the Puget Sound Pilots that was issued for the period of February 28, 2022, through February 28,  
11 2023, is Exh. SM-03.

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13  
14 **Q: What is the liability limit under Washington law that applies to marine pilots when**  
15 **performing compulsory pilotage assignments?**

16 A: Under RCW 88.16.070, foreign flag oceangoing vessels are required to take a state-  
17 licensed pilot and the liability of that pilot is limited to the sum of \$5,000 for damages arising out  
18 of the negligence of the pilot. This limitation does not apply where the cause of the loss was the  
19 willful misconduct or gross negligence of the pilot.

20  
21  
22 **Q: Does this limitation of liability apply to all vessels served by members of the Puget**  
23 **Sound Pilots?**

24 A: No. While it applies to all foreign flag vessels that are required to take a pilot, which  
25 accounts for approximately 90% of all traffic in Puget Sound, the \$5,000 limitation of liability  
26

1 does not apply to US flag vessels operating exclusively on a coastwise endorsement, which  
2 includes all the oil tankers engaged in the trade between Alaska and Puget Sound. US fishing and  
3 recreational vessels are also exempt from the compulsory pilotage provisions of this statute.  
4

5 **Q: Do the oil tankers carrying oil produced in Alaska to refineries in Puget Sound**  
6 **engage a member of the Puget Sound Pilots to provide pilotage services?**

7 A: Yes. It is my understanding that all of the US flag oil tankers calling Puget Sound do hire  
8 pilots.  
9

10  
11 **Q: From an insurance risk perspective, what is the difference for a Puget Sound Pilot**  
12 **between a compulsory pilotage assignment for a foreign flag oil tanker and a voluntary**  
13 **pilotage assignment for a US flag oil tanker?**

14 A: That difference is substantial. For the foreign flag tanker, where the pilot is operating on  
15 his or her state pilotage license issued by the Washington Board of Pilotage Commissioners, there  
16 is a limit of \$5,000 in liability for pilot negligence that results in a loss or damages. For the US  
17 flag tanker, where the pilot is operating on his or her federal pilotage license issued by the US  
18 Coast Guard, the liability for pilot negligence is unlimited.  
19  
20

21 **Q: What level of civil legal liability and civil legal defense costs insurance coverage do**  
22 **the Puget Sound Pilots carry?**

23 A: PSP carries \$30 million in total coverage for civil legal liability and defense costs.  
24  
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1 **Q: In your opinion, why are license protection and defense insurance and loss of income**  
2 **insurance important categories of insurance for a marine pilot to carry?**

3 A: The state and federal pilot licenses that must be in place for every state-licensed pilot to  
4 perform their job are the foundation of a marine pilot's professional career. If that license is the  
5 subject of a proceeding that could lead to its suspension or revocation, the pilot needs legal  
6 protection in the form of capable defense counsel and protection against the sudden loss of  
7 monthly income in the event either the state or federal license is suspended for a period of time.  
8

9 **Q: What levels of coverage are provided in PSP's policy for license protection and**  
10 **defense insurance and loss of income insurance?**

11 A: Each of PSP's pilots has \$1 million of license protection and defense cost coverage and  
12 \$320,000 in loss of income coverage for a maximum of one year, which is \$26,667 per month.  
13  
14

15 **Q: Are these levels of coverage similar to those of the other pilot group clients served by**  
16 **Durham and Bates?**

17 A: The \$1 million in license protection and defense costs insurance is fairly standard among  
18 our pilot group clients. However, PSP's level of lost income insurance is lower than most of our  
19 pilot group clients. For example, the Columbia River Bar Pilots and Columbia River Pilots carry  
20 loss of income insurance at a level of \$500,000 for one year.  
21  
22

23 **Q: The Puget Sound Pilots' insurance policy also covers criminal acts defense costs up to**  
24 **a limit of \$1.5 million and \$300,000 in coverage for criminal acts fines and penalties. Please**  
25 **explain why this type of coverage is important for a marine pilot.**  
26

1 A: The best way to explain the importance of this coverage is to use the example of a pilot  
2 operating under his or her state license aboard a fully laden foreign flag bulk carrier who faces a  
3 situation where a Washington ferry loses power in the channel directly in front of the vessel being  
4 piloted. The pilot immediately orders the only available evasive maneuver to avoid colliding with  
5 the ferry. The ship avoids that collision, but runs aground as a result of the emergency maneuver  
6 and the grounding breaches the vessel's fuel tanks, resulting in a spill over 100,000 gallons of  
7 diesel fuel. In this scenario, the pilot did everything right, taking emergency action to avoid the  
8 potential loss of life that could occur in a collision with a ferry, but faces potential action against  
9 his or her license, potential civil liability associated with the oil spill cleanup and potential  
10 criminal proceedings arising from federal statutes that criminalize negligent conduct on a strict  
11 liability basis. For example, the Migratory Bird Treaty Act and Refuse Act imposes strict liability  
12 for negligence that results in the death of migratory bird species. State-licensed pilots also face  
13 potential exposure to criminal fines or penalties under the Seaman's Manslaughter Statute, the  
14 Marine Mammals Protection Act and the Endangered Species Act. Criminal acts defense  
15 coverage funds a pilot's legal defense in criminal proceedings arising from a pollution incident  
16 and criminal acts fines and penalties coverage covers potential criminal fines or penalties arising  
17 from such an incident.  
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22 **Q: Are there any limits on the availability of this type of insurance coverage where**  
23 **intentional or criminal acts are involved?**

24 A: Yes. This criminal acts defense, fines and penalties coverage has been developed to cover  
25 only those situations where negligent acts are being criminalized. As the insurance broker  
26

1 representing multiple pilot groups, we have carefully worked with the underwriters to develop  
2 policy language that carves out any coverage that would be contrary to federal or state law or the  
3 public policy of the state in which the pilot group is located. Every one of these pilot group  
4 policies includes language making the coverage inapplicable if it is determined by a court "to be  
5 contrary to the law or public policy in which the conduct giving rise to the imposed fine or  
6 penalty occurred or contravenes the law or public policy of the state which governs the liability of  
7 the insured." This provision in the PSP policy can be found in Exh. SM-03 at 7.

8  
9  
10 **Q: In your experience, how effective are liability limits like that of Washington where**  
11 **\$5,000 is a pilot's maximum liability exposure for negligence in the performance of a**  
12 **compulsory pilotage assignment for a foreign flag ship?**

13 A: Until quite recently, I would have said that these limits were very effective. However, the  
14 situation has changed significantly in the last several years. Both Washington and Oregon have  
15 statutory limits on the liability of a state-licensed pilot for damages arising out of negligence in  
16 the performance of a compulsory pilotage assignment. In Washington, that liability limit is  
17 \$5,000. In Oregon, it is \$250. In the last three years, there been two cases, one in federal court in  
18 Oregon and the other in federal court in Washington, in which the underwriters for the shipowner  
19 have sued the pilot and sought to avoid the statutory liability limit by alleging that acts of what  
20 many would consider to be ordinary negligence are actually gross negligence or willful  
21 misconduct. For nearly 30 years, I had never seen this tactic deployed by the underwriters for the  
22 foreign flag vessel involved in a casualty while the vessel was under compulsory pilotage.  
23 However, in each of these two cases, the pilot's civil legal liability coverage that includes defense  
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costs was critically important to covering the cost of defense and potentially contributing to any settlement.

**Q: What is your opinion regarding the significance of this development?**

A: I have two observations. First, this development underscores the importance of pilot groups and their members maintaining significant levels of civil legal liability and defense insurance coverage. The risk is real as demonstrated by these two cases. The Oregon case involved a Columbia River Pilot piloting a container ship on the Columbia River in April 2020. In the vicinity of the Port of Kalama's marina, the pilot was determined to have ordered the vessel to maintain a speed that was too fast under the circumstances and caused wake damage to the marina and recreational boats in that marina in excess of \$1 million. Although the Oregon Board of Maritime Pilots found pilot error due to ordinary negligence, suspended the pilot's license for 90 days and required additional training, the vessel's underwriters in defending the damages case brought by the Port of Kalama impleaded the pilot into the case by way of third party complaint alleging that the pilot's actions constituted gross negligence and willfull misconduct. The summary judgment opinion of the federal judge in the case, which is Exh. SM-04, adopted a very expansive interpretation of what could be considered gross negligence or willful misconduct that makes the line between ordinary negligence and gross negligence and/or willful misconduct difficult to determine with any precision. In April 2022, in connection with the litigation arising out of a significant casualty in Puget Sound in December 2019 caused in part by pilot error, the vessel interests defending against the Petrogas oil terminal's \$5.2 million claim for dock damages and lost revenue impleaded the PSP pilot, alleging that what should be considered ordinary negligence was in fact gross negligence. My second observation is that these developments have

1 not gone unnoticed by the underwriters who provide this coverage and the rates have risen as a  
2 result. A copy of the third party complaint filed in April 2022 is Exh. SM-05.

3  
4 **B. Pilotage Risk is Increasing As Vessels Grow Larger in Size and the Cost of  
5 Marine Casualties Escalates.**

6 **Q: In its testimony, the Pacific Merchant Shipping Association contends that there has  
7 been no material change in the risks faced by marine pilots in Puget Sound in the last  
8 several years. From your perspective in the marine insurance industry, do you agree?**

9 A: Certainly not. Oceangoing cargo vessels have been growing in size for centuries. In my  
10 opinion, the increasing size of each new generation of ship type – container, tanker, roll-on/roll-  
11 off and bulk carrier – creates more risk for the maritime pilot charged with directing a vessel's  
12 navigation in pilotage waters and that greater risk is reflected in a dramatic increase in the  
13 aggregate size of maritime casualty claims in the years 2020, 2021 and 2022 compared to earlier  
14 years. A number of factors are influencing this increasing claims cost trend. According to the  
15 Best's Market Segment Report dated February 15, 2022, reporting on the financial performance of  
16 international maritime protection and indemnity underwriters, generally referred to as P&I Clubs,  
17 there are three factors driving what is now three consecutive years in which a majority of the 13  
18 members of the International Group of P&I Clubs insuring approximately 90% of the world's  
19 ocean-going tonnage suffered substantial underwriting losses. Those factors, which continue to  
20 place upward pressure on claims costs, include: the increasing size of vessels, which adds  
21 complexity when they suffer a severe incident; an upward trend in shipowner liability limits; and  
22 technological advances allowing deep-water wreck removal. A copy of this report is Exh. SM-06.  
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26 A 2022 report by Aon, a leading global insurance brokerage firm with significant marine

1 insurance and P&I Club expertise, documenting the very poor claims performance of this sector  
2 and the resulting sizable increase in reinsurance rates is Exh. SM-07.

3  
4 **Q: Looking at each of these factors in turn, are you aware of an example where the**  
5 **increasing size of container ships has increased the cost of a claim involving that type of**  
6 **vessel?**

7 A: A good example of a situation where growth in vessel size increases risk of casualty in  
8 pilotage waters is the January 2019 casualty in Vancouver, British Columbia involving the M/V  
9 Ever Summit, a large container ship with a gross tonnage of 75,206. In this incident, the vessel's  
10 large overhang and the proximity of the gantry crane to the edge of the berth resulted in the ship's  
11 hull striking the berth and the crane, which caused the crane to collapse and fall onto the vessel.  
12 Details of this casualty are fully described in the Marine Transportation Safety Investigation  
13 Report issued by the Transportation Safety Board of Canada, which is an exhibit to the testimony  
14 of maritime safety expert Captain Mitchell Stoller. Exh. MSS-07. The damages in this casualty  
15 were estimated to be \$8 million. One of the report's "findings as to risk" noted: "If hazards  
16 associated with the increase in size of container vessels in relation to existing terminal  
17 infrastructure are not adequately mitigated, there is an increased risk of accidents while berthing  
18 these vessels."  
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23 **Q: When you refer to an upward trend in shipowner liability limits for what the Aon**  
24 **report refers to as “a worrying trend of governments trying to break limitation to which**  
25 **their country has signed,” what do you mean?**  
26

1 A: In this instance, the Aon report is referring to international conventions like the 1992 Civil  
2 Liability Convention, which enables shipowners in countries that have ratified the convention to  
3 limit their liability to an amount based on the tonnage of the ship. This convention includes some  
4 exceptions, but the primary exception is a shipowner's willful misconduct. However, in the event  
5 of a major casualty, there is now risk that the courts in countries that are signatories to the 1992  
6 Civil Liability Convention will either disregard the terms of the convention or interpret willful  
7 misconduct extremely broadly. For example, when the M/V Prestige sank off the coast of Spain in  
8 2002 and caused a massive oil spill of 17.8 million gallons of heavy fuel oil, the blame was  
9 placed on the captain and the shipowner for operating a 26-year-old structurally deficient oil  
10 tanker in Spanish waters. Total cleanup costs were estimated at \$2.5 billion. After years of  
11 litigation, the Spanish Supreme Court held the shipowner and underwriter, the London P&I Club,  
12 liable for a \$1 billion fine. The captain was convicted of reckless conduct and sentenced to two  
13 years in prison. This conviction was used as a basis for breaking the limitation of liability in the  
14 convention.  
15

16  
17 **Q: The third factor you referenced in the rising cost of oceangoing vessel claims is**  
18 **technological advances allowing deep-water wreck removal. Please explain further.**  
19

20 A: Until just the last decade or so, a vessel that was a total loss would just be left in place on  
21 the ocean floor. Now, however, advances in wreck removal technology make it possible, but very  
22 expensive, to remove a wrecked ship and jurisdictions throughout the world are universally  
23 insisting on that removal. For example, the removal of the M/V Costa Concordia just off the coast  
24 of Italy took over three years and cost in excess of \$1 billion. More recently, the vehicle carrier  
25 M/V Golden Ray, which capsized while under pilotage near Brunswick, Georgia in September  
26

2019, has cost over \$850 million to date, making it the second largest P&I claim of all time after  
1 the M/V Costa Concordia.  
2

3  
4 **Q: In your testimony, you referred to the insurance companies for shipowners as P&I  
5 Clubs. What does P&I stand for?**

6 A: P&I is an acronym that stands for "protection and indemnity." The underwriters for  
7 shipowners are insured through insurance companies universally referred to as P&I Clubs.  
8

9  
10 **Q: Based on your background and experience, can you explain the difference between  
11 general liability insurance policies and P&I policies?**

12 A: Yes. The difference is significant. With the general liability insurance policy, the  
13 insurance company must pay damages if the insured is found liable. With indemnity policies, on  
14 the other hand, an insured cannot sue the P&I Club for reimbursement unless the claim is brought  
15 for losses that were actually sustained and paid out to a claimant.  
16

17  
18 **Q: In a situation where a shipowner abandons a vessel following a casualty and refuses  
19 to pay the damages to clean up spilled oil and remove a wrecked vessel, do the parties  
20 injured by the oil spill or the presence of the wreck have any claim against the P&I Club  
21 insurance policy of that shipowner?**

22  
23 A: The answer is no because the P&I Club is only responsible for a loss actually paid to an  
24 injured party by the insured. That actual payment by the insured is a condition to the indemnity  
25 obligation on the part of the P&I Club.  
26

1 **Q: In 2022, the Washington Legislature passed legislation increasing the levels of**  
2 **financial responsibility for oceangoing vessels calling in Puget Sound. For oil tankers, that**  
3 **level of financial responsibility was increased to \$1 billion. However, the statute specifically**  
4 **exempts shipowners from posting a \$1 billion surety bond if that shipowner shows evidence**  
5 **of P&I Club insurance totaling \$1 billion or more. If a shipowner who suffers a major**  
6 **casualty causing a massive oil spill in Puget Sound elects to abandon the vessel involved and**  
7 **not pay any claims, will be \$1 billion dollars of P&I Club insurance be available to cover**  
8 **those claims?**

9  
10  
11 **A: Unfortunately not. In that circumstance, because the shipowner made no claims payments**  
12 **for spill cleanup or other damages, the P&I Club has no legal obligation to cover the loss.**

13  
14 **III. CONCLUSION**

15  
16 **Q: Does this conclude your testimony?**

17 **A: Yes.**  
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