

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,
Complainant,
v.
PUGET SOUND PILOTS,
Respondent.

Docket TP-220513

**REBUTTAL TESTIMONY OF
BRUCE J. McNEIL
ON BEHALF OF PUGET SOUND PILOTS**

MARCH 3, 2023

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1 **I. IDENTIFICATION OF WITNESS**

2
3 **Q: Please state your name and position.**

4 A: My name is Bruce J. McNeil. I am an attorney specializing in pension law with the Leech
5 Tishman law firm, working out of the firm's Washington DC office.

6 **II. PURPOSE OF TESTIMONY**

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

8 A: My testimony rebuts that of PMSA actuary Christopher Noble in which he states:
9 "Significant obstacles to the maintenance of a tax-qualified multiple-employer defined benefit
10 pension plan for the Puget Sound Pilots are not adequately addressed in the testimony of Mr.
11 Wood and Mr. McNeil." Exh. CN-1T at 3-4. Mr. Noble has no expertise in pension law and his
12 multiple concerns regarding the potential to transition PSP's unfunded pay-as-you-go pension
13 plan to a fully funded Multiple Employer Defined Benefit Pension Plan have no merit.

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16 **Q: Please identify the books and articles that you have written and your pension law**
17 **experience demonstrating that you have the expertise to reach such clear and unequivocal**
18 **opinions regarding the use of a Multiple Employer Defined Benefit Pension Plan to**
19 **accomplish the transition of PSP's existing unfunded pay-as-you-go pension plan to a fully**
20 **funded defined benefit plan that replicates the precise benefits promised to all PSP retirees**
21 **and working pilots.**

22
23 A: I regularly advise clients on a wide variety of issues with respect to tax-qualified retirement
24 plans, including defined benefit pension plans and defined contribution plans (e.g., profit sharing
25
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1 plans, profit sharing plans that include section 401(k) provisions, money purchase pension plans,
2 and section 403(b) plans),

3 I have nearly 40 years of experience drafting and amending defined benefit pension plans,
4 defined contribution plans, section 457(b) plans, section 457(f) plans, nonqualified deferred
5 compensation arrangements, equity arrangements, split-dollar life insurance arrangements, COLI,
6 and other forms of executive compensation.

7 I was formerly an attorney with the Employee Plans Technical and Actuarial Division of
8 the Internal Revenue Service. My responsibilities included reviewing defined benefit pension
9 plans and defined contribution plans to determine whether the plan documents satisfied the
10 applicable requirements under section 401(a) of the Internal Revenue Code of 1986, as amended
11 (the "Code"), then issue favorable Opinion Letters with respect to the master or prototype plan
12 documents or Determination Letters with respect to individually designed plan documents.

14 I have authored or co-authored over 40 published books regarding employee benefit plans. The
15 books include several editions of "The Pension Answer Book," published by Panel Publishers;
16 several editions of "401(k) Plans: A Comprehensive Guide," published by John Wiley & Sons,
17 Inc.; several editions of the "Individual Retirement Account Answer Book," published by Wolters
18 Kluwer; several editions of "Tax-Sheltered Annuities under §403(b) and Nonqualified §457
19 Plans," published by the RIA Group; and at least 28 editions of "Nonqualified Deferred
20 Compensation Plans," published by Thomson Reuters/West Publishing.

22 I am also the Editor-in-Chief of the Journal of Pension Planning & Compliance and the Journal of
23 Deferred Compensation, quarterly publications published by Wolters Kluwer and distributed
24 nationally.

1 **Q: In your opinion, are there any legal impediments to a smooth transition of PSP's**
2 **existing pay-as-you-go defined-benefit pension plan to an ERISA-qualified Multiple**
3 **Employer Defined Benefit Pension Plan that provides exactly the same retirement benefits**
4 **to retirees as PSP's existing unfunded pension plan?**

5 A: No. Implementation of this transition will require the issuance of two determination
6 letters, one from the Internal Revenue Service and one from the US Department of Labor. Based
7 upon my discussions with the key personnel in both of these agencies who will be in charge of
8 considering issuance of those determination letters, I am confident that both will be issued.

10
11 **Q: Have you prepared drafts of the letters to be submitted both to IRS and the**
12 **Department of Labor?**

13 A: Yes. Both letters are straightforward and should be approved. Exh. BM-05 is a draft of
14 the letter requesting a favorable determination from IRS that the Puget Sound Pilots Association
15 Multiple Employer Defined Benefit Pension Plan satisfies the tax qualification requirements of
16 section 401(k) of the Internal Revenue Code. Exh. BJM-06 is a draft of the letter requesting an
17 advisory opinion from the US Department of Labor regarding two questions: (1) whether the
18 Puget Sound Pilots Association may be considered an "employer group or association" so that it
19 constitutes an "employer" within the meaning of section 3(5) of ERISA; and (2) whether an
20 individual Puget Sound Pilot, a self-employed individual who forms a limited liability company
21 treated as a partnership, that receives earned income for services performed as a pilot, may be
22 considered to be a "working owner" and an "owner-employee" under the relevant sections of the
23 Internal Revenue Code and qualifies both as an employer and an employee of the trade or
24 business for purposes of the requirements in section 2510.3-55(b) of the Internal Revenue Code.

1 **Q: Does the letter to IRS list the documents that must be enclosed with the request for a**
2 **favorable determination?**

3
4 A: Yes. Five enclosures are required submissions with the letter. These include: (1) a
5 completed IRS Form 8717, which reflects that the filing fee was submitted electronically; (2) a
6 completed IRS Form 5300, "Application for Determination for Employee Benefit Plan," along
7 with the attachment required by Line 17 of the form; (3) a completed IRS Form 2848, "Power Of
8 Attorney"; (4) a copy of the Puget Sound Pilots Association Multiple Employer Defined Benefit
9 Pension Plan; and (5) a copy of the Puget Sound Pilots Association Trust Agreement.
10

11
12 **Q: In your original testimony, you indicated that the costs involved with securing these**
13 **determination letters included the \$2,700 IRS filing fee and legal costs to prepare the**
14 **required enclosures, including the new PSP pension plan and trust agreement, of**
15 **approximately \$55,000. BJM-1T at 10. Can you confirm that these figures are accurate?**

16 A: Yes. I have confidence in those estimates.
17

18
19 **Q: Do you agree that a tax-qualified multiple-employer plan established by the Puget**
20 **Sound Pilots ("PSP") would be subject to section 413(c) of the Internal Revenue Code (the**
21 **"Code") as it applies to plans created after 1988, and that each pilot would be a participating**
22 **employer in the plan?**

23 A: Yes. The final regulations issued by the U.S. Department of Labor regarding the
24 establishment of a multiple employer plan ("MEP") permit certain "working owners" without
25 employees to participate in a MEP sponsored by an employer group or an association. The term
26

1 “working owner” would include a self-employed individual as determined under section 401(c) of
2 the Code, which provides rules for when a self-employed individual may participate in a tax-
3 qualified plan under section 401(a) of the Code. Section 401(c) generally treats partners in a
4 partnership and members in a limited liability company (“LLC”) treated as a partnership as
5 employees. Each pilot would form the same type of corporate structure under section 401(c) and
6 become participating employers in a MEP sponsored by the Puget Sound Pilots Association.

7 Section 413(c) of the Code and section 1.413-2 of the Treasury Regulations provide for the
8 application of the rules under the Code to a multiple employer plan. Under the section 413(c) rules,
9 some provisions under the Code apply as if all employees of each employer that participates in the
10 plan are employed by a single employer; this is because the plan is a single plan.
11

12 The funding and deduction rules that apply to a MEP changed for post-1988 plans under
13 the Technical and Miscellaneous Revenue Act of 1988 (“TAMRA”). A MEP established after
14 1988 must be funded as if each participating employer is funding a separate plan pursuant to
15 section 413(c)(4)(A). The Conference Committee Report for TAMRA explains a special provision
16 under which, in meeting the funding rules under section 412 of the Code, a defined benefit plan
17 established after 1988 may be treated as a single plan. The rule applies if the plan’s method for
18 determining required contributions provides that any employer must contribute at least the amount
19 it would if it maintained a separate plan.
20

21
22 **Q: Do you agree with Mr. Noble's concern that a Form 5500 would need to be filed**
23 **with IRS annually for each participating employer as if that employer maintained a**
24 **separate pension plan?**
25
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1 A: No. A multiple employer plan is required to file only one Form 5500 series return each
2 year. The Form 5500 for a defined benefit plan must be filed with a Schedule SB and an enrolled
3 actuary must determine the funding levels and sign the Schedule B. Section 103(g) of the
4 Employee Retirement Income Security Act of 1974, as amended (“ERISA”) requires Form 5500
5 annual reports filed for multiple employer plans to include an attachment identifying participating
6 employers and providing an estimate of the contributions of each employer each year.

7 The instructions for the 2021 Form 5500 as revised to implement an amendment to section
8 103(g) in the Setting Every Community Up for Retirement Enhancement Act of 2019 (“SECURE
9 Act”) require a multiple employer pension plan to report the information for participating
10 employers on an attachment to Form 5500 that lists each participating employer in the plan during
11 the plan year, identified by (i) name, (ii) employer identification number, and (iii) include a good
12 faith estimate of each employer’s percentage of the total contributions made by all participating
13 employers during the year.
14

15
16 **Q: Under the pension plan design that you contemplate for the Puget Sound Pilots**
17 **Association Multiple Employer Defined Benefit Pension Plan, will either the limit on**
18 **compensation that may be taken into consideration in a tax-qualified defined benefit plan**
19 **under section 401(a)(17) of the Internal Revenue Code or the limit on benefits that may be**
20 **provided by such a plan under section 415(b) preclude the payment of the benefit levels**
21 **promised to retirees in PSP’s existing pension plan?**
22

23 A: As explained below, there is a simple and easily calculated method to avoid any issues
24 involving the compensation limit under section 401(a)(17) and, given PSP’s current and requested
25
26

1 levels of distributable net income in this rate case, there is no issue with the maximum annual
2 pension benefit, which is \$330,000 for 2023.

3 The annual pension benefit currently paid to a retiree would be affected under a funded
4 tax-qualified defined benefit MEP by imposing the compensation limit under section 401(a)(17)
5 of the Code on the determination of the annual pension benefit amount payable to a pension plan
6 participant under section 415(b), which is \$265,000 for 2023. The three year average used under
7 section 415(b) would be subject to the compensation limit under section 401(a)(17), which is
8 \$330,000 for 2023. For example, assume a 2023 retiree has an average distributable net income
9 (“DNI”) of \$410,000 for the highest three years of service prior to retirement after 25 years of
10 service and the current accrual factor of 1.5%, which would produce an annual benefit of \$153,750
11 (\$410,000 x 25 x 1.5%). The benefit limited by the compensation limit under section 401(a)(17)
12 would produce an annual benefit of \$123,750 (\$330,000 x 25 x 1.5%). However, if the accrual
13 factor were increased, the annual benefit of \$153,750 could be produced with the compensation
14 limit under section 401(a)(17) (e.g., \$330,000 x 25 x 1.864 = \$153,780).

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17 **Q: Based on your experience, will the costs of administering the PSP Multiple Employer**
18 **Pension Plan be costly?**

19
20 **A:** In my experience, no. PSP will have to establish a group of trustees to administer the plan,
21 which will involve engaging a financial firm with experience in managing pension funds to invest
22 the funds that will be remitted by PSP on a monthly basis to the pension trust fund. PSP will also
23 need to engage an actuary to prepare the annual form 5500 and to perform the actuarial analysis
24 required to establish the necessary tariff charge to fund the pension for the next calendar year. In
25 my opinion, Mr. Wood’s projection that the pension plan would generate an average investment
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1 earnings level of 5% net of investment costs is a reasonable and conservative projection. It is also
2 my opinion that Mr. Wood's projection that the annual actuarial costs would run between \$15,000
3 and \$20,000 is also a reasonable estimate for those services.
4

5 **Q: Based upon the pension plan design that you contemplate for the Puget Sound Pilots**
6 **Association Multiple Employer Defined Benefit Pension Plan, which will replicate the**
7 **benefits for the existing pay-as-you-go pension plan, what occurs when a pilot retires? Would**
8 **that pilot continue to be treated as a participating employer in the PSP Multiple Employer**
9 **Pension Plan?**

10
11 A: The liability for the retired pilot would be determined under the MEP based upon the annual
12 benefit payable with respect to the pilot, the actuarial gains and losses, and the mortality tables for
13 the retired pilot, and the contributions required with respect to the participating employer for the
14 pilot could be frozen.

15 **III. CONCLUSION**

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17 **Q: Does this conclude your testimony?**

18 A: Yes.
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