BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND PILOTS, Respondent.	DOCKET TP-220513 PMSA'S MOTION TO STRIKE NON-REBUTTAL TESTIMONY

1. Under WAC 480-07-375(1)(d) and WAC 480-07-425(2), the Pacific Merchant Shipping Association (PMSA) moves to strike or limit testimony that Puget Sound Pilots (PSP) has improperly filed as rebuttal when it is not responsive to any other parties' evidentiary filings.

I. ISSUE PRESENTED

2. Presenting new issues and new information strays beyond the proper bounds of rebuttal and violates fundamental fairness as the other parties lack the opportunity to respond. PSP filed as rebuttal testimony that introduced new matters and that was not responding to any other party's testimony. Should the Commission strike such non-rebuttal testimony from the record?

II. RELIEF REQUESTED

3. PMSA respectfully asks the Commission to strike the following improper rebuttal testimony as consisting entirely of information that pertains to new matters not previously raised by any party: Costanzo, Exh. CPC-21T 2:1–6:5; Bendixen, Exh. SB-09T 7:20–8:10; Diamond, Exh. CLD-04T 2:18–7:3 and 10:16–

18:10; Johnson, Exh. AJ-03T 1:20-2:26; Jordan, Exh. DJ-03T 1:20-3:10; Carlson, Exh. IC-08T 19:21– 20:6 and 23:1–25; Nielsen, JN-03T 1:20-3:15; Titone, Exh. MJT-01T 5:4–9:25; and Tabler, Exh. WT-02T in its entirety.

III. STATEMENT OF FACTS

4. This motion relies on all the parties' testimony and other evidence and other pleadings filed to date in this matter.

5. PSP filed with the Commission a proposed increase to Puget Sound pilotage district tariffs to initiate this general rate case TP-220513 on June 29, 2022.

6. Commission Order 04 (Oct. 18, 2022) granted PSP's request to file supplemental testimony and exhibits, but stated, "It is unclear why this testimony was not provided earlier, as part of PSP's initial filing."[1] The Order explained, "issues within PSP's knowledge prior to June 29, 2022, . . . should have been included in PSP's initial filing pursuant to WAC 480-07-525" and, "to the extent PSP failed to satisfy this rule, the Commission would have been within its discretion to reject this general rate case."[2] The Order further added, "Going forward, PSP should be aware that such an extension or continuance is not normally possible in general rate cases and that, in a future case, such a motion to supplement the record may simply be denied as departing from Commission practice and rules."[3]

7. On November 23, 2022, the Commission issued a "Notice of Revised

[1] Order 04, ¶ 12.
[2] *Id.*
[3] *Id.* at ¶ 14.

Procedural Schedule," directing response testimony to be filed by February 10, 2023 and rebuttal testimony by March 3, 2023. PMSA, TOTE, and UTC Staff filed response testimony on February 10, 2023. On March 3, 6, and 7, PSP made its rebuttal filings from a total of 25 witnesses.

8. Of those rebuttal filings, portions of the testimony of eight PSP witnesses and the entire rebuttal testimony of one witness (as listed in Section II above) contain new and/or supplemental testimony that should have been included in PSP's initial filing, none of which was discussed in any testimony filed by PMSA, TOTE, or UTC Staff, and none of which cites any testimony by PMSA, TOTE, or UTC Staff. The testimony falls under the following categories:

9. **Response to Order 06:** Charles Costanzo, Exh. CPC-21T 2:1–6:5, which is Section II.A. "The Commission's Order 06 Recognizes a Standard That, Properly Applied, Is Consistent with the 'Best Achievable Protection' Standard," responds solely to a Commission Order, not to any evidence from other parties.

10. **New PSP proposals:** Capt. Sandy Bendixen, Exh. SB-09T 7:20–8:10, PSP introduces a new proposal to "authorize the Board of Pilotage Commissioners to make a tariff compliance filing that increases Tariff Item 380 Board of Pilotage Commissioners Training Surcharge." Capt. Ivan Carlson, Exh. IC-08T 19:21–20:6, introduces "another proposal regarding an automatic tariff adjuster" regarding Item 380 compliance filings. Item 380 automatic tariff adjuster for training surcharges was not discussed in any evidence from other parties.

11. **Proposed changes in methodologies for adjustments:** Michael Titone,

Exh. MJT-01T 5:4–9:25, which is Section II.B. "How to Implement PSP's Proposed Automatic Tariff Adjusters," describes proposed changes in methodologies for adjustments. It does not respond to or cite any evidence from other parties.

12. **Response to Data Requests:** Clayton Diamond, Exh. CLD-04T 10:16–17:5, which is Section II.E. "State Pilotage Licensure is a Crucial Component of Achieving the High Standard of Care that is Required of Maritime Pilots," is new and supplemental testimony on standards for federal pilotage licenses. It claims to respond to a "PMSA contention," (Exh. CLD-04T 13:21–24) but no such contention appears in PMSA's evidence filings; rather, Mr. Diamond purports to respond to PMSA Data Request 357 in his "rebuttal." (*id.* at 14:7–8).

13. **"Supplemental" rebuttal testimony:** Mr. Diamond, Exh. CLD-04T 17:11 identifies as supplemental to his initial testimony, Section II.F. "State-licensed Pilots are 'Assimilated to Public Officers' because a Pilot's Primary Responsibility is to Protect the Public Interest" (Exh. CLD-04T 17:6–18:10), regarding *Bisso v. Inland Waterways Corp.,* 349 U.S. 85, 93-94 (1955), which no party discussed. Similarly, Alysia Johnson, Exh. AJ-03T, at 1:13–18 identifies as supplemental to her initial testimony her testimony regarding the employment agreements of SubCom and its ships' officers (Exh. AJ-03T 1:20–2:26). Capt. Dan Jordan, Exh. DJ-03T, at 1:12–15, identifies as supplemental to his initial testimony Section II.A. "The Workload of the Columbia River Bar Pilots in its Comparability to Other West Coast Pilotage Grounds" (Exh. DJ-03T

1:20–3:10). Capt. Jeremy Nielsen, Exh. JN-03T, at 1:12–15, identifies as supplemental to his initial testimony Section II.A. "The Workload of the Columbia River Bar Pilots in its Comparability to Other West Coast Pilotage Grounds" (Exh. JN-03T 1:20–3:15).

14. **New Information:** Mr. Diamond's testimony at Exh. CLD-04T, 2:18–4:14, which is Section II.A. "Puget Sound Differs Substantially from the Waters of the Great Lakes," is entirely new information. No party submitted testimony comparing the Great Lakes and Puget Sound pilotage grounds. Mr. Diamond's testimony at Exh. CLD-04T, 4:15–7:3, which is Section II.B. "Maritime Pilots are Held to a 'Higher Standard of Care' in the United States," is also entirely new information. No party submitted testimony on standards of care for mariners under U.S. law. Capt. Carlson's testimony at Exh. IC-08T, 23:1–25, which is Section II.D., "A Refusal by the UTC to Adopt a Nationally Competitive Level of Pilot Compensation and Benefits and to Fully Fund PSP's Existing Pension Plan Will Be Devastating to Morale and Lead to the Departure of a Significant Share of PSP's Younger Pilots," is entirely new. No party submitted testimony on pilot morale. The entirety of the rebuttal testimony of Walter Tabler (Exh. WT-02T) is new. Its sole purpose was "to discuss the significant negative effects of the extraordinarily hostile attitude of the shipping industry in the Puget Sound toward the Puget Sound Pilots," which is outside the scope of any other party's evidence.

IV. STANDARDS OF COMMISSION CONSIDERATION

15. The Commission may consider a motion to strike testimony as an objection to the admission of proffered testimony; "[t]ypically, the Commission will grant a motion to strike, in whole or in part, or deny the motion."[4]

16. The Commission "routinely considers and rules on such motions as a practical means of resolving disputes over the admissibility of evidence before a hearing commences. This is done in the interest of gaining efficiency in the hearing process by not forcing parties to prepare discovery and cross-examination with respect to testimony that is irrelevant or otherwise inadmissible on its face."[5]

17. **T**he Washington Supreme Court has concluded the proper scope of rebuttal evidence is only evidence offered in reply to new matters; it should neither introduce new matters itself nor reiterate previously presented evidence:

> Rebuttal evidence is admitted to enable the plaintiff to answer new matter presented by the defense. *W.E. Roche Fruit Co. v. Northern Pac. R.R.,* 184 Wash. 695, 52 P.2d 325 (1935). Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence offered in reply to new matters. The plaintiff, therefore is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of defendant's case.[6]

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[4] *WUTC v. Puget Sound Energy*, Docket UE-170033, UG-170034 Order 07 (Aug. 25, 2017), at ¶ 6.
[5] *Id.* at ¶ 5.
[6] *Kremer v. Audette*, 35 Wn. App. 643, 647-648, 668 P.2d 1315 (1983) (quoting *State v. White*, 74 Wn.2d 386, 394-395, 444 P.2d 661 (1968)).

18. Other Washington courts have viewed the limited scope of rebuttal similarly: "Rebuttal documents are limited to documents which explain, disprove, or contradict the adverse party's evidence."[7] "Allowing [a] party to raise new issues in its rebuttal materials is improper because the [other] party has no opportunity to respond."[8]

19. As with its admonition of PSP's supplemental filing in this case, this Commission has emphasized in other cases the importance of not saving new proposals and information for rebuttal:

> The Commission has consistently given guidance, over many years, that a [company] that does not distribute to other parties its updated background material and work papers in time for the parties to present evidence on a major issue, fails to follow acceptable procedure. This being the Commission's practice, it is even less acceptable for a party to present an alternative request for relief for the first time at the rebuttal stage of a proceeding. It remains today a disfavored practice for a [company] to limit other parties' opportunity to examine a proposal by waiting until rebuttal to present it. The Commission expects the company to present its proposals in its direct case.[9]

20. In the prior pilotage rate case, the Commission similarly explained that it

> expects parties to include all relevant information in their initial filing. Submitting new information at the rebuttal phase is generally disfavored because it may prejudice other parties.

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[7] *White v. Kent Medical Center*, 61 Wn. App. 163, 168-169, 810 P.2d 4 (1991) (citations omitted).
[8] *Id.* at 168. *See also* 5A Wash. Prac., Evidence Law and Practice § 611.16 (6th ed.) (discussing the function of rebuttal and surrebuttal in court).
[9] *WUTC v. Avista Corp.*, UE-160228 and UG-160229, Order 04 (Oct. 10, 2016), at ¶12 (citing *WUTC v. Puget Sound Power & Light Co.*, U-89-2688-T and U-89-2955-T, Third Supplemental Order (1990), at ¶ 79) ("The Commission is concerned that the company waited to present its alternative rate design proposal until rebuttal. This tactic is unacceptable, since it severely limits the opportunity for other parties to examine the proposal. In future cases, the company will be expected to present its proposals in its direct case.").

> Although we do not reach that conclusion here, PSP (and indeed all parties) should be mindful of this expectation going forward.[10]

V. ARGUMENT

21. What PSP has done here, saving information it should have presented in its initial filing for the rebuttal stage, is a classic example of "sandbagging." Consider, for example, an ethics article published by the San Diego County Bar Association discussing the Ninth Circuit Court of Appeal's "incredulous judges" in an en banc hearing when a litigator for the U.S. Attorney purported to defend his behavior doing essentially the same thing the Assessor is attempting here: in a trial he "stray[ed] from the proper bounds of rebuttal argument by raising a new issue beyond the scope of defense counsel's argument," which is, in short, "sandbagging."[11] The article rightly concludes, "The concept of sandbagging is not complicated or nuanced—it is ethically and professionally wrong."[12] Washington courts and this Commission share this dim view of sandbagging behavior, as discussed above.

22. As noted in the prior pilotage rate case, at Order 06 ¶ 15, the Commission may strike testimony which is provided "at a late stage in the proceeding, which effectively prohibited other parties from responding," was "not timely filed and

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[10] *WUTC v. Puget Sound Pilots*, TP-190976 Order 08 (Aug. 7, 2020), at ¶ 23.
[11] Bryn Kirvin, *To Sandbag, or Not to Sandbag . . . ? 'Tis Nobler to Suffer the Slings and Arrows of Trial*, San Diego County Bar Assoc. Ethics in Brief (Apr. 14, 2014), https://www.sdcba.org/?pg=Ethics-in-Brief--4-14-2014.
[12] *Id.*

raised multiple issues that were irrelevant or immaterial to that proceeding." This describes the testimony that PMSA here asks the Commission to exclude.

23. Fundamental fairness dictates that PSP's rebuttal testimony should be stricken where it introduces entirely new components of its proposed tariff, makes new assertions and theories upon which to base its initial arguments, provides purely supplemental testimony which should have been part of its initial filing, and addresses issues which were not included in the testimony of PMSA, TOTE, or UTC Staff.

24. At this point, when no further opportunities to permit responsive testimony exist prior to hearing and there is limited time to provide the other parties with an opportunity for surrebuttal testimony, the only fair and practicable remedy is to strike the non-rebuttal testimony.

25. The Commission's action is particularly necessary because PSP's filing represents a significant pattern of improper rebuttal testimony that must be addressed and discouraged from happening again in the future. Several PSP witnesses openly admit that their "rebuttal" presents only new material intended to supplement PSP's initial filing. Others add entirely new subject matter and arguments including, for example, opining on Commission Order 06 issued a week after the filing of response testimony.

26. Further, by presenting voluminous rebuttal testimony, including the testimony of five entirely new witnesses (Messrs. Julien, McCarthy, Titone, Valentine, Wodehouse), most of which PMSA does not challenge here, just

weeks before the evidentiary hearing, PMSA, TOTE, and UTC Staff are already under a tight timeline to address numerous new data sources and conduct discovery prior to the cut-off date. The parties and the Commission are already challenged to analyze the information in these submissions. The parties face unmitigable prejudice if intended to process additional non-responsive evidence. Even a surrebuttal opportunity at this point would be too late to address this pattern. Finally, much of PSP's rebuttal filings, including several identified in this motion, were filed late.

27. At this late stage, fairness and practicability weigh in favor of excluding the rebuttal testimony that presents new material. To the extent that any of this new material was important, relevant, or necessary to PSP's case, the proper time to have presented this material was at the initial filing, or at the very least, in the PSP supplemental filing accepted in Commission Order 04 (Oct. 18, 2022). By submitting it now, PSP has deprived the parties of the right to present evidence in response. Admitting this rebuttal evidence will harm the record because counterbalancing evidence will be missing.

VI. CONCLUSION

28. PSP's pattern of sandbagging by filing new information and proposals as improper rebuttal filings should not be permitted. At this late date in the proceeding, the other parties have no opportunity to file answering testimony. As such, the Commission is left with an incomplete record for its decision. For

these reasons, PMSA asks the Commission to strike the testimony identified in this motion.

DATED this 14th of March, 2023.

Respectfully submitted,

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