

BEFORE THE STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

Docket TP-220513

**RESPONDENT PUGET SOUND
PILOTS' RESPONSE IN
OPPOSITION TO PMSA'S SECOND
MOTION TO STRIKE**

(Oral Argument Requested)

MEMORANDUM

I. INTRODUCTION.

1. Intervenor Pacific Merchants Shippers' Association's ("PMSA") motion to strike testimony from no less than nine of PSP's rebuttal witnesses should be denied. The challenged testimony responds to evidence and arguments raised by witnesses presented on behalf of PMSA and Commission Staff. PMSA's motion is nothing more than a transparent attempt to prevent the Commission from considering relevant evidence that directly contradicts PMSA's opposition on multiple fronts.

II. BACKGROUND.

2. Respondent Puget Sound Pilots ("PSP") filed this general rate case on June 29, 2022. PSP's initial filing was supported by over 500 pages of testimony from 21 witnesses.
3. On February 10, 2023, intervenors PMSA and TOTE Maritime Alaska LLC and UTC Staff each filed comprehensive response testimony. PMSA Witness Captain Michael Moore, in

particular, filed nearly 300 pages of testimony opposing virtually every issue raised in PSP’s initial filing.

4. On March 3, 2023, PSP filed over 300 pages of rebuttal testimony from 25 witnesses. PSP’s rebuttal witnesses’ testimony responds directly to the testimony and issues raised by the intervenors and Commission Staff in their respective responses.
5. On March 14, 2023, PMSA moved to strike testimony from nine of PSP’s rebuttal witnesses, including the following: 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. LEGAL STANDARD.

6. Rebuttal evidence is “[e]vidence offered to disprove or contradict the evidence presented by an opposing party.” EVIDENCE, Black’s Law Dictionary (11th ed. 2019). The purpose of rebuttal is to “explain, disprove, or contradict the adverse party’s evidence.” *White v. Kent Med. Ctr., Inc.*, P.S., 61 Wash. App. 163, 169, 810 P.2d 4, 8 (1991). Evaluating the admissibility and scope of rebuttal evidence is committed to the Commission’s sound discretion. *State v. White*, 74 Wash. 2d 386, 395, 444 P.2d 661, 667 (1968) (“Frequently true rebuttal evidence will, in some degree, overlap or coalesce with the evidence in chief.”).

IV. ARGUMENT.

7. PMSA asks the Commission to summarily strike testimony from nine of PSP’s rebuttal witnesses. But for all its cries of “sandbagging” and conclusory assertions of “prejudice,” PMSA does not identify a single section of PSP’s witness testimony that is not firmly within

the scope of appropriate rebuttal.¹ Rather, each specific portion of testimony that PMSA moves to strike responds directly to arguments and issues raised in PMSA and UTC Staff's response testimony. Each PSP rebuttal witness's testimony and the opposing party testimony to which the witness responds is identified and discussed in turn below.

A. PSP Executive Director Charles P. Costanzo's Testimony Responds to PMSA and Commission Staff's Testimony Regarding the Legal Standard that Applies to Rate-Setting in this Rate Case.

8. PMSA moves to strike rebuttal testimony of PSP's Executive Director Charles Costanzo that is contained at CPC-21T 2:1-6:5. That section of Mr. Costanzo's testimony addresses the legal standard that applies to this proceeding and responds directly to PMSA Witness Captain Moore's testimony at Exh. MM-1T 8:20-9:15, and UTC Staff witness Jaclynn Simmons' testimony at Exh. JNS-1T 4:13-17, that the Commission should apply its traditional "service model" rate-setting methodology without regard to the unique aspects of pilotage or the relevant environmental statutes, including the applicability of the best achievable protection or "BAP" standard. Mr. Costanzo's testimony also addresses the Commission's Order 06 (entered on February 17, 2023), which contradicts Captain Moore's and Ms. Simmons' testimony regarding applicability of the service model methodology and further supports PSP's position that the standard of protection required by Washington's environmental statutes must be considered in determining the rates that are necessary to fund a pilotage system that provides the highest level of protection of Washington's waters and natural resources that are held in public trust.
9. In short, Mr. Costanzo's testimony responds directly to arguments raised by opposing parties and addresses new authority (*i.e.*, Order 06) that rebuts PMSA's and UTC Staff's positions

¹ Paragraph 21 of PMSA's brief accuses the "Assessor" of sandbagging. There is no "Assessor" party to this rate case.

regarding the applicable legal standard. Mr. Costanzo's testimony is plainly admissible rebuttal.

B. Captain Sandy Bendixen's Rebuttal Testimony Responds to PMSA's DEI Expert and Captain Moore's DEI Funding Proposal.

10. PMSA moves to strike rebuttal testimony of Puget Sound Pilot and BPC Commissioner Captain Sandy Bendixen at Exh. SB-09T 7:20-8:10. Captain Bendixen's rebuttal testimony addresses PSP's proposal regarding the need for the Commission to authorize the Board of Pilotage Commissioners to make a tariff compliance filing that increases or decreases Tariff Item 380, the BPC's Training Surcharge without the need for a formal rate case proceeding. This testimony responds directly to the testimony of PMSA DEI expert Kathleen Nalty who emphasizes that factors other than compensation are critical to the effectiveness of a DEI program designed to diversify a workforce. Nalty, Exh. KN-1T 11:13-13:12.

Because the BPC is in charge of the training program for all licensees who ultimately become members of PSP, it is important that PSP's major regulatory agency have the capability to fund the resources necessary for an effective DEI program involving state-licensed maritime pilots in Washington. Captain Bendixen, in her capacity as both a BPC Commissioner and chair of its training committee, is responding to the suggestions made by Ms. Nalty in a manner that will enhance the BPC's capability to develop the most effective DEI component of its pilot trainee recruitment and training processes. This is clearly within the scope of the issue raised by this PMSA witness. This testimony also responds directly to PMSA's recommendation that PMSA and PSP jointly fund a DEI program. Moore, Exh. MM-1T, 277:3-278:2. In PSP's view, authorizing the BPC to increase (or decrease) its pilot recruitment/training program funding as necessary will be far more effective than relying on

two regular combatants in pilotage rate cases to agree on how that finding should be put in place.

C. Clay Diamond's Rebuttal Testimony Responds to Pilotage Risk Issues.

11. PMSA next moves to strike the rebuttal testimony of APA Executive Director and General Counsel Clay Diamond, Exh. CLD-04T 2:18-7:3 and 10:16-18:10. The first section of Mr. Diamond's testimony at issue, Exh. CLD-04T 2:18-7:3, addresses differences between Puget Sound and the Great Lakes and the second, Exh. CLD-04T 10:16-18:10, addresses the standard of care to which maritime pilots are held in the United States. These topics were the subject of Data Request Nos. 351 and 357 issued by PMSA to Mr. Diamond on December 29, 2022. Copies are attached as Exhibits A and B, respectively. In fact, Mr. Diamond's response to DR 351 is included in his rebuttal testimony almost verbatim at Exh. CLD-04T 2:18-4:14 and the same is true as to his response to DR 357, which is found at Exh. CLD-04T 4:15-7:3.

No doubt because PMSA did not find these answers helpful, the issues were not directly addressed in PMSA's opposition testimony. However, any issue raised in the discovery process that bears on an issue in this rate case should be fair game for inclusion in rebuttal testimony. Indeed, it is impossible to argue that PSP was sandbagging or that there is any prejudice when the challenged components of Mr. Diamond's rebuttal testimony were included in Data Request responses three weeks before PMSA filed its responsive testimony. This is especially the case where, as here, PSP's position advanced by multiple witnesses that the risks of pilotage are "persistent and growing" is challenged by PMSA witnesses who contend that there has been no significant change in the risk profile for pilotage either in the years running up to the previous rate case or since the issuance of Order 09 in November

2020. Moore, Exh. MM-1T 118:8-136:20, Metcalf, Exh. KJM-1T 17:20-18:26. Mr. Diamond's testimony on these issues is clearly appropriate rebuttal.

D. Chief Mate Alicia Johnson's Testimony is Appropriate Rebuttal.

12. PMSA also moves to strike the testimony of Chief Mate Alicia Johnson at Exh. AJ-03T 1:20-2:26. Chief Mate Johnson's testimony addresses her experience with maritime officers' schedules and compensation. Chief Mate Johnson's testimony responds directly to testimony from the PMSA contending that DNI for PSP should be reduced by 15% and that this DNI be further reduced by over \$900,000 in known and measurable pension costs, \$1.8 million in medical insurance costs, plus the costs of license defense and lost income insurance as well as the annual \$6500 license fee paid by each pilot to the BPC. Given all of the risks, as laid out in the testimony of multiple PSP witnesses, there is no question that there should be a substantial gap between the wages of seagoing masters or captains and the net compensation of a maritime pilot. Chief Mate Johnson's testimony is appropriate rebuttal.

E. Columbia River Bar Pilot Captain Dan Jordan's Testimony Responds to PMSA's Pilot Group Comparability Arguments.

13. PMSA next moves to strike the testimony of Columbia River Bar Pilot Captain Dan Jordan at Exh. DJ-03T 1:20-3:10. Captain Jordan's testimony addresses workload comparability among West Coast pilot groups. Captain Jordan's testimony responds directly to PMSA witness Captain Moore's testimony contained at Exh. MM-1T 184:9-201:6, in which PMSA disputes the comparability of the Puget Sound Pilots to other major pilotage grounds on the West Coast. Captain Jordan's testimony is appropriate rebuttal.

F. PSP President Captain Ivan Carlson's Testimony is Proper Rebuttal.

14. PMSA next moves to strike the rebuttal testimony of PSP President Captain Ivan Carlson at Exh. IC-08T 19:21-20:6 and 23:1-25. The first section of Captain Carlson's testimony that is

at issue, Exh. IC-08T 19:21-20:6, supports Captain Bendixen's proposal that the Commission "should authorize the Board of Pilotage Commissioners in this rate proceeding to utilize 30-day compliance filings to increase the pilot training surcharge as needed." Like Captain Bendixen's testimony, Captain Carlson is responding directly to PMSA's recommendation that the PMSA and PSP be ordered to establish a DEI fund on a 50/50 basis. The far better alternative is PSP's proposal to provide the BPC with ready access to increasing or decreasing its pilot recruitment/training surcharge to advance this State's DEI initiatives.

15. The second section of Captain Carlson's testimony at issue, Exh. IC-08T 23:1-25, addresses the devastating effect on morale and significant risk of departure of younger pilots that will result if the Commission fails to approve nationally competitive levels of pilot compensation and benefits for PSP. This testimony responds directly to PMSA's remarkable position that DNI for PSP should be reduced by the Commission from the current \$410,075 to \$346,391, Exh. MM-1T 17:3-9, and Mr. Young's testimony that DNI remain unchanged at \$410,075, Exh. MY-6.

G. Columbia River Pilots President Captain Jeremy Nielsen's Testimony Responds Directly to PMSA's Pilot Group Comparability Testimony.

16. Next, PMSA moves to strike the testimony of Columbia River Pilots President Captain Jeremy Nielsen at JN-03T 1:20-3:15. Captain Nielsen's testimony addresses pilots' workload and comparability among West Coast pilotage grounds. Like the testimony of Columbia River Bar Pilot Captain Dan Jordan, Captain Nielsen's testimony responds directly to the testimony of PMSA Witness Captain Moore, which devotes 17 pages to disputing PSP's comparability to other West Coast pilotage grounds. Exh. MM-1T 184:9-201:6. The testimony is clearly appropriate rebuttal.

H. The Testimony of Michael Titone Regarding Tariff Auto-Adjusters is Proper Rebuttal.

17. PMSA next moves to exclude the testimony of Michael Titone at Exh. MJT-01T 5:4-9:25.

Mr. Titone's testimony addresses the implementation of PSP's proposed automatic adjusters. The testimony responds directly to the opposition testimony of UTC Staff witness Michael Young to all but one of PSP's automatic tariff adjusters, Exh. MY-11T 10:1-22:4, and to Captain Moore's testimony rejecting all of these proposals, Exh. MM-1T 201:8-214:20.

I. The Testimony of Walt Tabler Responds Directly to PMSA's Extreme Positions on Pilot Compensation and the PSP Pension.

18. Lastly, PMSA moves to strike the rebuttal testimony of Walt Tabler, Exh. WT-02T, in its entirety. Mr. Tabler's testimony addresses the significant negative effects of the hostility of the shipping industry in Puget Sound – specifically, PMSA led by its Vice President Captain Moore – to the Puget Sound Pilots. PMSA, through the testimony of Captain Moore, takes multiple extreme positions including, for example, that PSP's already comparatively low pilot income be further reduced in this rate case and PMSA's adamant opposition to funding the PSP pension in the tariff, Exh. MM-1T 17:3-9 and 219:18-248:18. In order to explain and give context to Captain Moore's testimony, it is critical for the Commission to understand the history of the parties' relationship, in which the PMSA-led shipping industry has operated consistently as a bad faith actor for almost two decades. Mr. Tabler's testimony provides that explanation, and demonstrates PMSA's lack of credibility on the pilot compensation and pension issues in this rate case. The testimony is well within the scope of appropriate rebuttal.

J. PMSA's Proposed Sanction of Striking Testimony is Inappropriate and Unnecessary.

19. As explained above, all of PSP's witnesses' challenged testimony is well within the scope of rebuttal. But even if the Commission were inclined to agree that some portion of the testimony is not responsive to PMSA and/or Commission Staff's evidence, the Commission should still decline to strike the evidence. The Commission has broad discretion to determine what evidence it will consider and what weight to afford that evidence. Here, the evidence that PMSA seeks to exclude is relevant and will assist the Commission in setting appropriate pilotage rates.
20. PMSA's claim that it will be prejudiced if PSP's rebuttal evidence is admitted is clearly wrong. In fact, PMSA offers no explanation for what prejudice it will supposedly suffer if the evidence is admitted, beyond a conclusory (and unintelligible) statement that "[t]he parties face unmitigable prejudice if intended to process additional non-responsive evidence."² PMSA also does not (and cannot) explain how it is supposedly prevented from responding to PSP's rebuttal testimony, when it will have a full opportunity to cross-examine PSP's witnesses at the April hearing and will have additional opportunities to respond in its post-hearing briefing.
21. Striking PSP's rebuttal evidence would needlessly truncate the record and impair the Commission's factfinding. PMSA has offered the Commission no sound reason to take that drastic step, and the Commission should decline to do so.

² PMSA ¶ Mot. to Strike, 26.

V. CONCLUSION.

22. PSP's rebuttal witness testimony is appropriate and admissible. Excluding the evidence is unwarranted and would needlessly impede the Commission's factfinding. PMSA's motion to strike should be denied.

Respectfully submitted this 21st day of March, 2023.

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