

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET TP-190976

ORDER 06

DENYING MOTION IN  
LIMINE/MOTION TO STRIKE

**BACKGROUND**

- 1 On November 19, 2019, Puget Sound Pilots (PSP) filed with the Washington Utilities and Transportation Commission (Commission) its initial proposed tariff. On November 21, 2019, the Commission entered Order 01, suspending the tariff filing and setting the matter for adjudication.
- 2 On December 17, 2019, the Commission entered Order 02, Prehearing Conference Order; Notice of Hearing (Order 02). As relevant here, Order 02 granted Pacific Merchant Shipping Association's (PMSA) petition to intervene and established a procedural schedule.
- 3 On June 25, 2020, PSP filed a Motion in Limine/Motion to Strike to Exclude Unqualified Expert Testimony (Motion).
- 4 Specifically, PSP's Motion alleges that PMSA witness Captain Michael Moore offers impermissible legal opinion testimony related to: (1) whether PSP has met its burden of proof, (2) liability for certain PSP costs and expenses, (3) funding of the private PSP retirement program, (4) recovery of self-insurance charge payments, and (5) legislative policy on competition for waterborne commerce. PSP argues that Captain Moore gives legal opinions concerning the ultimate issue in the case insofar as he offers opinions about whether PSP's current rates are fair, just, reasonable, and sufficient, and provides his interpretation of Commission rules. PSP further alleges that Captain Moore gives opinion testimony on a number of technical and scientific subjects despite being unqualified under Evidence Rule (ER) 702 to provide such testimony. For example, PSP

challenges Captain Moore's assertion that the PSP watch schedule is inefficient, or that ship delays are caused by staffing management or "less productive pilots' unwillingness to make themselves available."<sup>1</sup> PSP argues that the Commission should strike these and numerous other statements as unqualified expert testimony.

5 On June 26, 2020, the Commission issued a notice to the parties setting a July 8, 2020, deadline to respond to PSP's Motion.

6 On July 8, 2020, PMSA filed its Response in Opposition to PSP's Motion (Response).

7 PMSA argues in its Response that the Commission has broad discretion to consider and admit all relevant evidence in this proceeding, and that the Commission may consider, but is not required to follow, the Washington Rules of Evidence. To the extent the Commission considers the Rules of Evidence, PMSA argues that Captain Moore's testimony is relevant to the issues in this case, responsive to testimony offered by other witnesses, and that Captain Moore has the knowledge and experience necessary to testify on the issues presented by this proceeding.

### DISCUSSION AND DECISION

8 We deny PSP's Motion. As a preliminary matter, we observe that this is a case of first impression for the Commission. As of July 1, 2019, the Commission was granted broad authority by the Legislature to determine whether the rates charged for harbor pilotage services are fair, just, reasonable, and sufficient.<sup>2</sup> In carrying out this duty, particularly for the first time, we conclude that any evidence that may assist us in our evaluation should be admitted and accorded weight based on its relevance and reliability.

9 WAC 480-07-495(1) provides that:

All relevant evidence is admissible if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness. The presiding officer will consider, but is not required to follow, the rules of evidence governing civil proceedings in nonjury trials before Washington superior courts when ruling on the admissibility of evidence.

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<sup>1</sup> PSP Motion to Strike ¶ 28, citing PMSA's Response to PSP's Data Request No. 175.

<sup>2</sup> RCW 81.116.020(3).

The Commission thus has broad discretion to consider any evidence it deems relevant, and, equally, to reject any evidence it deems irrelevant. At this juncture, the Commission need only determine whether any portion of that testimony is so demonstrably irrelevant to the disputed issues that the Commission would not admit it into evidence if it were offered. We address PSP's arguments in turn.

**A. Legal opinions**

- 10 PSP first alleges that Captain Moore gives unqualified legal opinion testimony. PMSA counters that the Commission has broad discretion to admit and consider evidence, and that Captain Moore's testimony is generally relevant and responsive to PSP witness testimony.
- 11 We decline to strike Captain Moore's testimony on these grounds. The Commission does not bar non-lawyer witnesses from addressing regulatory issues within their area of expertise. This is particularly true when the witness is discussing the application of the law to the facts of the case at hand.<sup>3</sup> Given Captain Moore's extensive career in the U.S. Coast Guard, experience with regulating pilot licensees, and his position at PMSA — which included testifying as the lead industry representative on behalf of PMSA in rate proceedings before the Board of Pilotage Commissioners for more than a decade — striking his opinion testimony related to relevant regulatory issues would be unwarranted.
- 12 Moreover, PMSA's point that PSP's witness offers similar opinion testimony on these same regulatory issues is well taken. PMSA correctly observes that witnesses appearing before the Commission routinely include their interpretations of how Commission rules and governing statutes apply to their testimony. In fact, testimony in ratemaking proceedings focuses almost exclusively on each witness's opinion of how Commission rules and standards should be interpreted and applied.
- 13 Finally, we specifically reject PSP's claim that PMSA *admits* that Captain Moore is an unqualified witness.<sup>4</sup> PMSA responded to a data request stating that Captain Moore was qualified to opine on certain maritime safety topics but that his testimony was not offered

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<sup>3</sup> See *Worldcom, Inc., v. GTE Northwest, Inc.*, Docket UT-980338 Order 02 (Feb. 03, 1999) (“Contrary to GTE's contention, the issues involved are not strictly questions of law, but require application of the law to the particular circumstances of this case.”).

<sup>4</sup> See Motion ¶¶ 2, 11.

under ER 702.<sup>5</sup> PMSA also denies admitting that Captain Moore was unqualified.<sup>6</sup> We thus reject PSP’s characterization of PMSA’s position. By way of guidance to the parties, we note that the Commission did not, and does not, instruct parties to qualify expert witnesses under ER 702.

**B. Testimony on the ultimate legal issue in the case**

- 14 We reject PSP’s argument that Captain Moore improperly gives testimony on the “ultimate legal issue” in this case. It would serve little purpose for the Commission to strike testimony simply because a witness offers an opinion about whether a proposed tariff is fair, just, reasonable, and sufficient. As noted above, the Commission routinely hears opinion testimony from witnesses on this issue.
- 15 PSP cites an interlocutory Commission order to support its proposition that opinion testimony on the “ultimate legal issue” in this case is inadmissible.<sup>7</sup> In that order, the Commission struck testimony concerning “inherently” legal issues on the basis that the testimony was immaterial and “largely irrelevant.”<sup>8</sup> The facts upon which the Commission based its decision in that order, however, are readily distinguishable from the facts presented here. In that case, the testimony at issue was offered by an attorney witness at a late stage in the proceeding, which effectively prohibited other parties from responding. Additionally, the testimony was not timely filed and the witness raised multiple issues that were irrelevant or immaterial to that proceeding.
- 16 By contrast, Captain Moore’s testimony addresses the same issues that PSP’s witnesses address; namely, how pilotage rates are set. Captain Moore’s testimony is thus appropriately offered as responsive testimony, and its contents are relevant to this proceeding. Moreover, PSP has an adequate opportunity to file rebuttal testimony and to cross-examine Captain Moore about his opinions.
- 17 Although PSP is welcome to challenge the admissibility of Captain Moore’s testimony at hearing, the parties are advised that the Commission will err on the side of including, rather than excluding, testimony and evidence that will aid in its evaluation of the issues

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<sup>5</sup> See Motion 5, n. 6.

<sup>6</sup> Response ¶ 20.

<sup>7</sup> See PSP, Motion to Strike ¶ 14 (citing *WUTC v. Puget Sound Energy*, Docket UE-170033, UG-170034 Order 07 (Aug. 25, 2017)).

<sup>8</sup> *Puget Sound Energy*, Docket UE-170033, ¶¶ 6-8.

in this case, and will thus accord weight to testimony and evidence in lieu of excluding it entirely. We agree with PMSA that in a case of first impression such as this one, following this approach is particularly critical to ensuring our decision is based on a complete record comprised of the best evidence available.

**C. Opinion testimony on the sufficiency of the current tariff, revenue per vessel move, and other issues**

- 18 PSP next argues that Captain Moore gives unqualified opinion testimony “in the fields of economics, statistical analysis, financial matters, accounting, pilot fatigue, and dispatch and scheduling efficiency.”<sup>9</sup> PMSA responds that the Commission has broad discretion to admit evidence, and that even if the Rules of Evidence applied, Captain Moore’s testimony is relevant and supported by his experience.<sup>10</sup>
- 19 We decline to strike Captain Moore’s testimony on these issues. As a quasi-judicial body, the Commission may consider opinion testimony alongside other evidence in the record without strictly applying the Rules of Evidence.<sup>11</sup> As noted above, the Commission should admit the “best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness.”<sup>12</sup> Captain Moore’s testimony satisfies this standard.
- 20 First, PSP challenges Captain Moore’s opinions regarding the adequacy of the current tariff, among other points.<sup>13</sup> While PSP argues that Captain Moore gives “irrelevant” opinions regarding the current tariff rather than the proposed tariff,<sup>14</sup> the statute places the burden of proof on PSP to show that the current tariff rates are *not* fair, just, reasonable, and sufficient.<sup>15</sup> Accordingly, it is entirely permissible for Captain Moore to argue that

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<sup>9</sup> Motion ¶ 21.

<sup>10</sup> *E.g.*, Response ¶¶ 6, 17.

<sup>11</sup> *See, e.g., DOT v. Inlandboatmen’s Union*, 103 Wn. App. 573, 581 (Wash. Ct. App. 2000) (upholding the Marine Employee’s Commission’s reliance on opinion testimony on maritime practices alongside other evidence in the record).

<sup>12</sup> WAC 480-07-495(1).

<sup>13</sup> Motion ¶¶ 23-27.

<sup>14</sup> Motion 15.

<sup>15</sup> *See* RCW 81.116.030(5).

the current tariff need not be revised. On its face, it is not evident that any of the challenged testimony is irrelevant to this proceeding or is otherwise inadmissible.

21 We also consider the “availability” of relevant testimony pursuant to WAC 480-07-495(1). PSP challenges Captain Moore’s opinions regarding the use of Average Revenue per Vessel Move, metrics for evaluating pilot revenues per hour of work, and future pilotage revenue.<sup>16</sup> PSP also challenges Captain Moore’s opinions regarding pilotage watch schedules.<sup>17</sup> We recognize that marine pilotage is a specialized subset of the marine transportation industry, and that some of the most relevant, helpful opinion testimony will likely be provided by captains, licensed pilots, and port officials. For example, PSP offers testimony from Captain George Quick on the appropriate level of pilot compensation, risk management, fatigue management, and the basis for assessing pilotage charges.<sup>18</sup> PSP also offers testimony from licensed pilot and Vice President Ivan Carlson on the efficiency of watch schedules and comparisons of harbor pilot incomes.<sup>19</sup> Accordingly, it appears that the best available opinion testimony comes from individuals within the marine transportation industry, as evidenced by both PSP’s and PMSA’s witness lists.

22 Finally, we consider the trustworthiness of the testimony at issue pursuant to WAC 480-07-495(1). PSP objects, *inter alia*, to Captain Moore’s use of measures such as Average Revenue per Vessel Move,<sup>20</sup> arguing that he is unable to produce academic literature, treatises, or other publications supporting his opinion.<sup>21</sup> We disagree with PSP’s assertion that Captain Moore’s lack of citations to academic literature on this issue warrants striking his opinion from the record. Captain Moore has extensive, relevant experience in the marine transportation industry, which includes managing commercial ports and vessel movements.<sup>22</sup> His calculations for Average Revenue per Vessel Move are set forth in his testimony and supporting exhibits.<sup>23</sup> This opinion is explained transparently and offered

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<sup>16</sup> Motion ¶¶ 23-24.

<sup>17</sup> *Id.* ¶ 26.

<sup>18</sup> Exhibit GQ-1T at 3-7, 13-14.

<sup>19</sup> Exhibit IC-1T at 4, 18.

<sup>20</sup> Motion ¶ 23.

<sup>21</sup> *Id.*

<sup>22</sup> Exhibit MM-2 (Curriculum vitae).

<sup>23</sup> Exhibit MM-1T at 13; Exhibit MM-3.

by an individual with relevant industry experience. Accordingly, there is no basis to strike it from the record as an untrustworthy, prejudicial lay opinion. To the extent PSP disputes Captain Moore's opinions on issues such as Average Revenue per Vessel Move, PSP may file rebuttal testimony, cross-examine Captain Moore at the evidentiary hearing, or address the issue in post-hearing briefing.

**ORDER**

23 **THE COMMISSION ORDERS THAT** Puget Sound Pilots' June 25, 2020, Motion in Limine/Motion to Strike Unqualified Expert Testimony in Docket TP-190976 is DENIED.

Dated at Lacey, Washington, and effective July 21, 2020.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

*/s/ Michael Howard*  
MICHAEL HOWARD  
Administrative Law Judge

**NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.**