

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET No. TP-190976

PMSA’S MOTION TO STRIKE
REBUTTAL TESTIMONY

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I. INTRODUCTION

1. Pursuant to WAC 480-07-375(1)(d), the Pacific Merchant Shipping Association (PMSA) files this motion to exclude (1) direct testimony that Puget Sound Pilots (PSP) filed as rebuttal testimony and (2) testimony with information that the Commission's Staff and PMSA requested in discovery but never received.

II. ISSUES PRESENTED

2. This motion presents two issues:
 - (1) Rebuttal testimony is to reply to matters presented by the other parties. When rebuttal presents new matters, it is untimely direct testimony. The Commission's procedural rules allow it to limit the evidentiary record to address such issues. PSP has filed rebuttal testimony that introduces new matters not presented in any party's testimony. Should the Commission strike such testimony from the record?
 - (2) The Commission's procedural rules allow it to sanction a party that fails to comply with the discovery rules by limiting that party's evidence. In discovery, Staff and PSMA requested but never received information that PSP has now filed as part of its rebuttal testimony. Should the Commission strike that evidence from the record?

III. RELIEF REQUESTED

3. PMSA respectfully asks the Commission to strike testimony contained in Exhibit RL-1T (Dr. Robert Leachman), Exhibit GQ-5T (Capt. George Quick),

and Exhibit IC-4Tr (Capt. Ivan Carlson), to the extent that they present (1) new matters not raised previously by any party or (2) information that Staff and PMSA asked PSP for in discovery but did not receive. The specific portions that PMSA requests be excluded are:

Dr. Leachman (Exhibit RL-1T)

- The most appropriate course, given that his entire purpose is to discuss new matters, is to strike his testimony in its entirety.
- At the very least, the following portions should be struck:
 - 2:5, starting with “discuss the impact of new tariffs,” to 2:7, ending with “the Ports of Seattle and Tacoma and”
 - 2:10 to 8:18, relating to his market impact study model and its application to the original PSP tariff increase proposal
 - 17:1 to 25:24, relating to the application of his market impact study model and its application to the original PSP tariff increase proposal

Capt. Quick (Exhibit GQ-5T)

- 1:20-21, “as comparative pilot pay in my view is one of the most critical criteria by which pilotage rates are established nationally”
- 2:4, “typically used in pilotage ratemaking”
- 2:12, “it is the generally accepted method of determining pilotage rates nationally”
- 3:8 to 3:14, regarding an assertion of a national methodology for ratesetting

- 3:22 to 3:23, “That Mr. Ramirez’s proposed methodology is lacking in any accepted national pilot ratemaking adherence.”
- 12:20 to 13:15, regarding a comparison of compensation and workload factors

Capt. Carlson (Exhibit IC-4Tr)

- 42:17-43:16, presenting selective, unaudited PSP financial data from 2020

IV. EVIDENCE RELIED UPON

4. PMSA relies on the prefiled testimony contained in Exhibit RL-1T (testimony of Dr. Robert Leachman), Exhibits GQ-1T and GQ-5T (testimony of Capt. George Quick), and Exhibit IC-4Tr (testimony of Capt. Ivan Carlson), PSP’s response to Staff Data Request No. 11 (Exhibit A to this motion), PSP’s responses to PMSA Data Request Nos. 46-48 (Exhibit B to this motion), and other pleadings and evidence in the record.

V. STATEMENT OF FACTS

5. PSP filed with the Commission a proposed increase to Puget Sound pilotage district tariffs with testimony on November 19, 2019. After their petitions to intervene were granted,¹ PMSA and Pacific Yacht Management (PYM) each filed responsive testimony, as did the Commission’s Staff. On July 13, 2020, PSP filed rebuttal testimony from several witnesses, including Dr. Leachman (Exhibit RL-1T), Capt. Quick (Exhibit GQ-5T), and Capt. Carlson (Exhibit IC-

¹ *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-190976, Order 01 (Nov. 21, 2019) and Order 03 (Jan. 31, 2020).

4T). On July 17, 2020, PSP filed revised rebuttal testimony for Capt. Carlson (Exhibit IC-4Tr).

6. PMSA has conferred with PYM about this motion, and PYM does not oppose the motion. PMSA has not been able to confer with Staff counsel regarding this motion.

A. Dr. Leachman’s Rebuttal Testimony.

7. Dr. Leachman has not presented testimony previously in this proceeding. He has appeared as a rebuttal witness only. In his own words, the purpose of his testimony “is to discuss the impact of” PSP’s proposed tariffs “on international container volumes through the Ports of Seattle and Tacoma.”² Further, he states that his testimony “responds to the testimony of PMSA . . . to the extent it seeks to implicate increased pilotage charges in Puget Sound as a material factor in the relative decline of Puget Sound port competitiveness.”³ Dr. Leachman does not name any witness or cite any specific testimony to which his testimony responds.

8. Dr. Leachman’s testimony focuses on one matter: a market impact study that he developed to analyze the international container market. No party’s testimony—not that of PSP in its direct testimony, nor Staff, PYM, or PMSA—discussed a market impact study relating to PSP’s tariff proposal. In fact, PMSA submitted testimony specifically noting that review of any consumer or market

² Leachman, Exh. RL-1T 2:5-7.

³ *Id.* at 2:7-9.

impact analysis from PSP was impossible because PSP had not submitted any such evidence:

Q: Were you able to review testimony in the PSP submission that analyzed the consumer and market impacts that would occur as a result of the cost increases which would result from the proposed increases in the PSP tariff?

A: No. The PSP did not include a market impact study in its submission.⁴

No other witness in this proceeding mentioned this subject at all. PYM presented testimony discussing the economic impacts of PSP's proposed tariffs on the private yacht market, but not on the international container market, and nothing about a market impact study.⁵

9. Two pages of Dr. Leachman's testimony discuss the historic "relative decline of Puget Sound port competitiveness."⁶ PMSA had submitted testimony discussing the undisputed decline in competitiveness of Puget Sound seaports.⁷ But PMSA's testimony did not discuss that decline in connection with any specific historic pilotage charges in the Puget Sound. Nor did it isolate the existing pilotage charge as a material factor in the current decline. Nor did it attempt to quantify the role of historic increased pilotage charges in the decline. No testimony filed by Staff or PYM discusses this matter at all.

10. Testimony PSP filed in November discussed the cost of pilotage in the Puget Sound as "an infinitesimal percentage of total port call and terminal charges"

⁴ Ramirez, Exh. JCR-1Tr2 at 15:20-23.

⁵ Webber, Exh. MW-1T.

⁶ Leachman, Exh. RL-1T at 14:17-16:19.

⁷ Moore, Exh. MM-1Tr at 114:7-120:15.

where the “overall basket of charges assessed port users,” includes “cargo handling equipment, fuel, labor stevedoring, lines, berthing, etc.”⁸ PMSA filed testimony responding that (1) pilotage customers were sensitive to excessive pilotage costs, (2) the relative size of pilotage costs to overall port costs was significant, and (3) other ports that compete with the Puget Sound have identified having a lower pilotage tariff than the Puget Sound as a source of competitive advantage.⁹

11. All of PMSA’s testimony was presented from the perspective of pilotage customers (i.e., oceangoing vessels). Dr. Leachman testified exclusively from the perspective of “beneficial cargo owners,” not the pilotage customers, based on a hypothetical situation: “if such costs were passed through as surcharges to beneficial cargo owners.”¹⁰ No witness for any party had considered the impact on beneficial cargo owners before Dr. Leachman’s testimony. Nor had PSP proposed a surcharge to beneficial cargo owners as part of its proposed tariff.

B. Capt. Quick’s Rebuttal Testimony.

12. PSP filed testimony from Capt. Quick in its original tariff filing, and has now filed rebuttal testimony by him. In contrast to Dr. Leachman’s testimony, Capt. Quick referred to specific witnesses and specific topics in their testimony in explaining the purpose of his rebuttal testimony.¹¹ But in that very explanation, he included a novel concept that no other party—not even his own direct

⁸ Styrk, Exh. LS-1T 5:18-21.

⁹ Moore, Exh. MM-1Tr at 120:16-124:18

¹⁰ Leachman, Exh. RL-1T 25:5-6.

¹¹ Quick, Exh. GQ-5T at 1:14-21.

testimony in this proceeding—ever introduced: the “criteria by which pilotage rates are established nationally.”¹² His testimony goes on to discuss the novel concept of a “generally accepted method of determining pilotage rates nationally.”¹³

13. Though Capt. Quick’s direct testimony discusses with specificity numerous criteria, elements, and factors used in ratesetting processes in various states, it never asserts the existence of a national ratesetting methodology.¹⁴ Regarding public availability of basic data regarding pilot compensation, Capt. Quick testified that most states do not publish this information.¹⁵ Other PSP witnesses confirmed that pilot financial data nationally is opaque, not transparent, and not capable of being readily described and evaluated.¹⁶

14. In response to a discovery request from Staff for the basis for Capt. Quick’s statements regarding the setting of pilot “income ranges nationally,” PSP did not claim that any national ratesetting methodology existed.¹⁷ Rather, it replied that “the trend” for setting pilot rates was that “automatic CPI adjustments and increasing size and tonnage of ships that form the rate base has lead [sic] to increasing compensation and fewer current rate cases that would tend to yield substantial information.”¹⁸

¹² *Id.* at 1:21-22.

¹³ *Id.* at 2:12, 3:10, 3:22.

¹⁴ Quick, Exh. GQ-1T at 11:1 – 15:23, 17:3-25.

¹⁵ *Id.* at 16:7-14

¹⁶ vonBrandenfels, Exh. EVB-1T at 19:14-17; Carlson, Exh. IC-1T at 17:9-16.

¹⁷ PSP Response to UTC Data Request No. 11 (Exhibit A to this motion).

¹⁸ *Id.* (Exh. A-1).

15. Similarly, in response to a discovery request from PMSA for a list of state pilot associations whose compensation levels Capt. Quick was familiar with, PSP did not claim that any national ratesetting methodology existed.¹⁹ Rather, PSP responded that Capt. Quick was familiar with “some criteria used by the various ratesetting bodies and various distinctions therein” for the listed “states, ports, and/or harbors,” but that his “familiarity also is not necessarily predicated on explicit publicly available documents and data or necessarily established by writings.”²⁰ PSP elaborated, “there is relatively little published information on individual net pilot compensation and even with published comparable rate information such as that provided in PSP’s filing in November, pilot compensation in all jurisdictions will understandably fluctuate based on variations in traffic levels, ship profiles, pilot complement and operating expenses.”²¹ Regarding PSP’s reference in this response to information it filed in November, nothing intimated the existence of any national ratesetting methodology or policy. And PSP characterized the information that it filed in November, and produced in response to discovery, as “the only known publicly available information on state pilot compensation for comparable pilotage groups.”²²

16. Specifically referring to Capt. Quick’s original testimony, PMSA also asked PSP to produce in discovery “copies of all documents reflecting the ‘feedback

¹⁹ PSP Response to PMSA Data Request No. 46 (Exhibit B-1 to this motion).

²⁰ *Id.*

²¹ *Id.*

²² PSP Response to PMSA Data Request No. 47 (Exhibit B-2 to this motion).

from various pilot associations around the country as to basic outlines of their compensation ... and working conditions,' as referenced at Exh. GQ-1T p. 1 lines 18-20.”²³ PSP objected and explained that one reason PSP would not produce such documents was because “the value to the Commission in receiving into evidence such potential documents would be non-existent” and, further, that the feedback and his opinion were not necessarily “document-based.”²⁴

17. In his rebuttal testimony, Capt. Quick quantified and provided a chart he had created to show the number of pilots, pilot workload, “Time on Task,” DNI and “\$ per hour.”²⁵ According to the testimony, the chart (1) reflects feedback provided to him by individual pilotage groups (some “privately”), (2) shows relative pilot workloads and compensation for pilotage work, and (3) sets forth “factors to demonstrate how the workloads and incomes compare for available pilotage districts.”²⁶ Capt. Quick testified that he agreed that “the information available [will] assist [the Commission] in demonstrating the comparability of workloads and compensation.”²⁷

C. Capt. Carlson’s Rebuttal Testimony.

18. One portion of Capt. Carlson’s rebuttal testimony presents selective, unaudited financial data from PSP from 2020.²⁸ This is beyond the period covered in PSP’s financial data in PSP’s November filing. Until this rebuttal

²³ PSP Response to PMSA Data Request No. 48 (Exhibit B-3 to this motion).

²⁴ *Id.*

²⁵ Quick, Exh. GQ-5T at 13:1-10.

²⁶ *Id.* at 12.

²⁷ *Id.* at 12:14-16.

²⁸ Exh. IC-4Tr at 42:17-43:16.

testimony, the periods of the financial data discussed and analyzed in witness testimony filed by Staff and PMSA included (1) the 2018 PSP Audited Financials,²⁹ (2) prior year PSP financial data provided by the Board of Pilotage Commissioners Annual Reports and other resources,³⁰ and (3) *projections* for the first half of 2019 in PSP’s test year. In one instance an exhibit presented by Staff witness Danny Kermode provided a *hypothetical* journal entry for 2019 financials.³¹ At no point has PSP submitted 2019 PSP audited financials in this proceeding, though this portion of Capt. Carlson’s seems to be based in part on them. Capt. Carlson introduced this more recent financial data in the context of discussing the pandemic’s effect on PSP. But PSP’s direct testimony stated that it was not “factoring in any prospect of economic declines” into its rate filings, “despite facing the very real prospect that shipping volume and the rate base will correspondingly decline.”³²

VI. ARGUMENT

19. Particularly in this case of first impression with respect to the Commission’s determination of pilotage tariffs, and as supported by WAC 480-07-495(1), the Commission has broad authority to admit any evidence that may assist in its evaluation of the issues.³³ Yet compelling circumstances exist here to exclude

²⁹ Exh. JN-04.

³⁰ Royer, Exhs. JR-5r, JR-8r, and JR-16r.

³¹ Exh. DPK-4.

³² Quick, Exh. GQ-1T at 18:1-7.

³³ *Wash. Utils. & Transp. Comm’n v. Puget Sound Pilots*, Docket TP-190976, Order 06 (July 21, 2020).

certain rebuttal testimony to preserve the integrity of the evidentiary record in this proceeding.

A. Because they present new matters on rebuttal, the Commission should exclude Dr. Leachman’s testimony, portions of Capt. Quick’s rebuttal testimony, and one part of Capt. Carlson’s rebuttal testimony.

20. In the rebuttal phase of this proceeding, PSP has filed testimony about a new market impact study, new ratesetting methodologies, and new financial data. As such, PSP springs entirely new components of its proposal on the other parties at a point when no further opportunities for responsive testimony exist. Given the proximity of the hearing and the extensive and highly technical nature of the new material presented in rebuttal, this problem cannot be adequately addressed by providing the other parties with an opportunity for surrebuttal testimony. The only fair and practicable remedy at this point is to exclude the new material presented in PSP’s rebuttal.

21. Generally, rebuttal evidence is admissible to allow a response to new material presented by other parties; it should not be treated as an opportunity to present evidence that ought to have been presented in the case-in-chief.³⁴ For example, Rule 26(a)(2)(D) of the Federal Rules of Civil Procedure allows rebuttal evidence to be admitted if it “is intended solely to contradict or rebut evidence on the same subject matter.” The Commission has limited the evidentiary record in other proceedings pursuant to WAC 480-07-375(1)(d), including where the party seeking a tariff revision improperly filed new

³⁴ See 5A Wash. Prac., Evidence Law and Practice § 611.16 (6th ed.) (discussing the function of rebuttal and surrebuttal in court).

material as rebuttal testimony.³⁵ Though the line between rebuttal within the same subject matter as the response testimony and introduction of new material may at times be difficult to define with precision, the rebuttal testimony in question here presents unmistakably new material that should have been filed as direct testimony.

22. First, Dr. Leachman's rebuttal testimony focuses on a market impact study, which is new material. It does not respond to any other parties' witnesses. Even his discussion of the competitiveness impacts of PSP's proposal is new because it is wholly from the perspective of beneficial cargo owners. All analysis to this point has been from the perspective of pilotage customers. Because his testimony presents only new material, it should have been filed as direct testimony. There is no proper reason that PMSA can discern for PSP's having reserved it for rebuttal. Filing it as direct testimony would have allowed Staff, PMSA, and PYM to analyze and respond to Dr. Leachman's highly technical information. Had PMSA been presented with that opportunity in November, it would have filed evidence that would reveal flaws in the analysis. Indeed, PMSA filed testimony specifically commenting on the impossibility of reviewing a PSP market impact study because PSP had not filed one. By presenting one so close to the evidentiary hearing date, PSP has deprived the other parties of any opportunity to provide responsive evidence. Even a surrebuttal opportunity at this point would be too late in the proceeding to address this new market study

³⁵ See, e.g., *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-160228 and UG-160229 (Consolidated), Order 04 (Oct. 10, 2016).

adequately. The entire testimony of Dr. Leachman should therefore be excluded as untimely direct testimony.

23. Second, in his rebuttal testimony, Capt. Quick presents for the first time the notion of a “generally accepted method of determining pilotage rates nationally.” This is presented as a method by which Capt. Quick purports to critique response testimony filed by Staff and PMSA. But no testimony to this point has claimed the existence of any national ratesetting methodology. And Capt. Quick had ample opportunity to present this concept in his direct testimony, thus providing other parties with an opportunity to provide answering testimony on this point. Similarly, the chart that Capt. Quick provided in rebuttal is the type of material that should have been presented in his direct testimony. There is no proper reason to have reserved it for rebuttal. Obligations to disclose this concept and the information in the chart also existed in the discovery context, as discussed below. By filing this information as rebuttal, PSP has left the other parties without recourse to submit any countervailing evidence.

24. Lastly, Capt. Carlson’s rebuttal testimony presents new financial data. This is problematic for a number of reasons. The data reflects unaudited, selective components of what appears to be PSP’s latest financial data after the test period on which PSP based its tariff filings. In rebuttal, Capt. Carlson is presenting evidence from a completely different time period than that which was analyzed by Staff or the parties. A core and foundational purpose of tariff proceedings is to evaluate existing and well understood financial data, apply

that data to a formulaic approach, and project a reasonable revenue requirement. For this reason, PSP had submitted in November a financial review of its test period and test period projections with its work papers along with the latest full calendar year audited financials. PMSA and Staff relied on these financial documents to determine and explain their positions with respect to PSP's proposals and projections. Capt. Carlson's last-minute presentation of unaudited, partial financial data is not only unfair to the other parties, but it also risks harming the record in this proceeding. New data, even if vetted, would potentially require extensive recalculation of previously submitted testimony. And there is now no opportunity to present the revised testimony or surrebuttal that would be necessary. As it is, the data is not vetted, and there is insufficient opportunity at this stage to engage in much discovery to investigate it. Nor is the exercise of comparing unaudited financials with audited financials one that would necessarily be useful for this proceeding, particularly where only portions of unaudited financial records are produced, without the context of complete records. In short, new financial records should not be introduced into a ratemaking proceeding during the rebuttal phase.

25. Given the upcoming evidentiary hearing, fairness and practicability weigh in favor of excluding the rebuttal testimony that presents new material. The proper time to have presented this material was in November, and by doing so in July, PSP has deprived the parties of the opportunity to present evidence responding to this testimony. Though the parties might be able to partially

address some of the concerns through a last-minute data requests and through cross-examination of PSP's witnesses, the admission of this rebuttal evidence will still harm the record because counterbalancing evidence will be missing.

B. Additional grounds for excluding the portions of Capt. Quick's rebuttal testimony exist because they present information on rebuttal that Staff and PMSA requested in discovery but never received.

26. The identified portions of Capt. Quick's rebuttal testimony should be excluded for an additional reason: the information submitted now as evidence was requested of PSP in discovery but never received. Under WAC 480-07-425(2), one of the sanctions for a failure to comply with the discovery rules is to strike the testimony and evidence. Exclusion of evidence is a proper remedy for a party's failure to produce the underlying information when requested in discovery.³⁶ The other parties should have had access to the information when it was requested, not for the first time as part of PSP's rebuttal testimony.

27. PSP should not be allowed to duck the production of specific data and the underlying documents in discovery where their production would allow for the examination of related claims—and then to introduce the very information sought as rebuttal. Here both the Staff and PMSA asked for variations of the same information regarding the claims made by Capt. Quick in his direct testimony that he held a repository of national data about average pilot compensation and workload. More specifically, when Staff requested the basis for Capt. Quick's statements regarding income ranges nationally, he should

³⁶ See, e.g., *Wash. Utils. & Transp. Comm'n v. U S West Communications, Inc.*, Docket No. UT-950200, 11th Suppl. Order (Jan. 3, 1996).

have disclosed at that point that there was, in his opinion, a national ratesetting methodology. Similarly, when PMSA asked for the state pilot associations whose compensation levels Capt. Quick was familiar with, he professed only familiarity with “some criteria” used in different jurisdictions; he should have disclosed at that point the national ratesetting criteria he expounds upon in his rebuttal testimony. When PMSA requested documents reflecting data and feedback from pilot associations as to pilot compensation and workload, PSP should have disclosed the existence of a national ratesetting methodology.

28. Instead, PSP claimed in response to PMSA that compiling such information would be unduly burdensome, that the information was not necessarily ever committed to writing or “document-based,” and that the value of any “potential documents” would be “non-existent.” None of these requests were restricted to public information. Rather, they sought any information Capt. Quick based his opinion on. Yet in discovery PSP also objected or withheld information based on the paucity of ratesetting cases that would yield information, the general unavailability of published information, the discussion in PSP’s November filings as providing “the only known publicly available information.”

29. Nevertheless, what Capt. Quick refused to do for purposes of discovery he has done for his rebuttal testimony. He gathered his data, committed it to writing if it was not previously so available (which strains both credulity and fidelity to the requirement to supplement incomplete responses to data requests

under WAC 480-07-405(8)), and organized it in a highly detailed and specific chart with his summaries of pilot compensation and workload in his rebuttal testimony.³⁷ The chart contains precisely the type of pilot workload and compensation information the parties sought in discovery—information that the Commission would, according to PSP’s discovery, find of no value—though Capt. Quick’s rebuttal testimony has now asserted it would “assist” in deliberations. Only because of Capt. Quick’s rebuttal testimony did PSP’s failure to comply with its discovery obligations become clear.

30. Not only is this a sanctionable under the discovery rules, but it also results in the unfair and untimely introduction of additional direct testimony without the opportunity for response. These facts weigh strongly in favor of exclusion of this specific evidence as an appropriate sanction for such conduct during discovery. It is a particularly apt sanction given PSP’s initial assessment of the evidence as not being of value to the proceeding anyway.

VII. CONCLUSION

31. PSP’s use of rebuttal testimony for these three witnesses is improper on several levels: it presents a new market impact study, proposes new methodologies for reviewing ratesetting, introduces unaudited and partial financial data beyond the period covered by any previous testimony, and submits information requested but not received by Staff and PMSA in discovery. At this late date in the proceeding, the other parties have no opportunity to properly vet the testimony and file answering testimony. As such, the

³⁷ Quick, Exh. GQ-5T at 13:1-10.

Commission is left with an incomplete record for its decision. For these reasons, and to discourage parties from filing testimony in rebuttal that should be filed in direct, PMSA respectfully asks the Commission to exclude the testimony identified in this motion.

DATED this 21st day of July, 2020.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Michelle DeLappe", written over a horizontal line.

Michelle DeLappe, WSBA No. 42184
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