BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND PILOTS, Respondent.	DOCKETS TP-190976 COMMISSION STAFF'S RESPONSE TO PMSA'S MOTION FOR SUMMARY DETERMINATION

I. INTRODUCTION AND STATEMENT OF FACTS

1 On July 13, 2020, Pacific Merchant Shipping Association (PMSA) filed a motion for summary determination under WAC 480-07-380, arguing that the Washington Utilities and Transportation Commission (Commission) should reject the proposed tariffs filed by the Puget Sound Pilots Association (PSP) in Docket TP-190976. PMSA's argument presents two issues: 1) Whether PSP's proposed tariff format conforms to the Commission's rules regarding tariff revisions; and 2) whether PSP has made a threshold showing that the current Puget Sound Pilotage District tariff rates are not fair, just, reasonable, and sufficient.[1] Commission Staff (Staff) now offers the following response.

[1] In its motion for summary determination, PMSA discusses the fair, just, reasonable, and sufficient standard as a filing requirement and as an evidentiary requirement, citing to RCW 81.116.030(2) and RCW 81.116.030(5) respectively. Assuming these are distinct requirements, a showing that PSP has provided evidence suggesting the existing tariff rates are not fair, just, reasonable, and sufficient would similarly satisfy PSP's requirement to describe "why the existing tariffs are not fair, just, reasonable, and sufficient." RCW 81.116.030(2). Therefore, Staff has limited its response to addressing whether PSP has provided evidence that the existing tariff rates are not fair, just, reasonable, and sufficient, such that a genuine issue of material fact exists.

II. LEGAL STANDARD

2 The Commission authorizes motions for summary determination when "the pleadings filed in the proceeding, together with any properly admissible evidentiary support show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[2] The Commission authorizes those motions to avoid a needless expenditure of resources where a hearing is unnecessary because no material factual issues exist.[3] The Commission considers all evidence, and any reasonable inferences arising therefrom, in the light most favorable to the non-moving party when considering whether a material issue of fact exists.[4] However, where reasonable minds can reach only one conclusion, issues of fact become immaterial because the Commission may resolve them as questions of law.[5]

3 The party moving for summary determination bears the burden of showing the absence of a material issue of fact.[6] If the moving party satisfies its burden, then the non-moving party must present evidence demonstrating that material facts are in dispute.[7] The non-moving party must do so by "set[ting] forth specific facts showing that there is a genuine issue for trial" and may not rest on mere allegations in its pleadings.[8] If the non-moving party fails to make a sufficient showing to establish a material issue of fact as to an element for which it bears the burden of proof, the tribunal should grant the motion for summary determination.[9]

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[2] WAC 480-07-380(2)(a); *see also id.* (noting that the Commission considers the standards applicable to a motion for summary judgment made under Washington Civil Rule 56 when adjudicating a motion for summary determination).
[3] *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975).
[4] *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).
[5] *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985).
[6] *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).
[7] *Atherton Condo Ass'n*, 115 Wn.2d at 516.
[8] *LaPlante v. State*, 85 Wn.2d at 158.
[9] *Atherton Condo Ass'n*, 115 Wn.2d at 517.

III. ARGUMENT

A. The Commission Should not Dismiss PSP's Case Based on Tariff Formatting

4 PMSA argues that the Commission should dismiss PSP's filing in this docket due to PSP's failure to follow the formatting requirements contained in WACs 480-160-110 and 480-160-120.[10] Even assuming that PSP has not filed its proposed tariff in the correct format, summary determination and dismissal of PSP's case on this basis are not appropriate for two reasons.

5 First, PMSA has not argued that it was prejudiced by PSP's failure to file its proposed tariff in the proper format. When a court reviews a procedural error under the Administrative Procedure Act, "[t]he court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of."[11] While RCW 81.116.030(2)(d) requires PSP to include "[a]ny other information required by the commission by rule or order," the Commission may waive the application of its rules.[12] In the absence of any asserted prejudice by PMSA, the Commission should not dismiss PSP's case.

6 Second, the Commission has other, less severe means to address any formatting violation if it determines that the public interest requires such action. For example, the Commission could require PSP to refile its proposed tariff so that it conforms to the Commission's formatting requirements. This remedy would allow the Commission to address the error without restarting the present case, which has been proceeding for nearly 8

[10] PMSA Motion for Summary Determination at 14-15, ¶ 23-24.
[11] *K.P. McNamara Northwest, Inc. v. Dept. of Ecology*, 173 Wn. App. 104, 121 (2013)(internal citations omitted)
[12] WAC 480-07-110.

months and is less than a month away from the anticipated hearing dates. As such, the Commission should not dismiss PSP's case due to any tariff formatting errors.

B. Summary Determination is not Warranted because Genuine Disputes of Material Fact Remain that Must be Resolved by the Commission

1. Presumption Regarding Existing Rates

7 PMSA further argues that PSP has not met its burden to show that the existing Puget Sound Pilotage District tariff rates are not fair, just, reasonable, and sufficient.[13] Staff agrees that PSP, as the party that filed the proposed tariff, bears the burden to show that the existing rates "are not fair, just, reasonable, and sufficient." RCW 81.116.030(5). However, Staff does not agree that the Commission applies a presumption that the current tariff is fair, just, reasonable, and sufficient in the context of a rate-setting proceeding for two reasons.

8 First, although RCW 81.116.030 identifies which party bears the burden of proof, it does not direct the Commission to apply a presumption regarding the existing rates. While PMSA cites to RCW 81.116.050 as creating a legislative presumption that the existing pilotage rates are reasonable, a directive to maintain rates does not imply that those rates are indefinitely, presumptively reasonable.[14] PMSA does not identify any legislative history suggesting that the legislature undertook an evaluation of existing pilotage rates as part of its transfer of pilotage rate-setting authority from the Board of Pilotage Commissioners (BPC) to the Commission. Nor is it likely the legislature could have done so, given that the recent BPC rate-settings have been "black box" decisions that do not explain their reasoning.[15] Second, while courts have applied a presumption that existing rates are reasonable under the

[13] PMSA Motion for Summary Determination at 17, ¶ 27.
[14] RCW 81.116.050 states "[t]he tariffs established by the [BPC] prior to July 1, 2019, shall remain in effect and be deemed pilotage tariffs set by the commission until such time as they are changed by the commission pursuant to this chapter."
[15] Moore, Exh. MM-42T at 18:8-18.

"Filed Rate Doctrine," that doctrine is limited to circumstances where customers of a regulated utility challenge the reasonableness of a utility's rates. As explained by the Washington State Supreme Court:

> The "filed rate" doctrine, also known as the "filed tariff" doctrine, is a court-created rule to bar suits against regulated utilities involving allegations concerning the reasonableness of the filed rates. This doctrine provides, in essence, that any "filed rate"—a rate filed with and approved by the governing regulatory agency—is per se reasonable and cannot be the subject of legal action against the private entity that filed it. The purposes of the "filed rate" doctrine are twofold: (1) to preserve the agency's primary jurisdiction to determine the reasonableness of rates, and (2) to insure that regulated entities charge only those rates approved by the agency. These principles serve to provide safeguards against price discrimination and are essential in stabilizing prices. But this doctrine, which operates under the assumption that the public is conclusively presumed to have knowledge of the filed rates, has often been invoked rigidly, even to bar claims arising from fraud or misrepresentation.[16]

While such a presumption of reasonableness is appropriate in a civil litigation setting, the policy rationale for the presumption does not apply to a rate-setting proceeding before the rate-setting agency, insofar as the appropriate agency is exercising its rate-setting jurisdiction and expertise and the purpose of the proceeding is to request a change in rates. This is why the Commission routinely includes language in its suspension orders stating that all rates charged by a utility will face scrutiny in any general rate proceeding, not just those the utility wishes to change. Therefore, the Commission should determine that no presumption is applied to its review of whether existing rates are fair, just, reasonable, and sufficient.

2. Interpretation of RCW 81.116.030

9 PMSA further argues that to meet its burden under RCW 81.116.030(5), PSP must independently address each component of RCW 81.116.030(5) to prove that existing rates

[16] *McCarthy Finance, Inc. v. Premera*, 182 Wn.2d 936, 942 (2015) (quoting *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 331-32 (1998)).

should be changed.[17] Stated another way, PMSA argues that PSP must individually prove that the existing rates are not fair, not just, not reasonable, and not sufficient. The Commission should disagree and determine that the standard does not require an individual showing on each element.

10 When interpreting a statute, a court begins with the plain language, examining all the legislature has said in the statute and related statutes that disclose legislative intent about the provision in question.[18] A court will consider a statute within the context of the entire statutory scheme to determine the plain meaning of a statute.[19] Furthermore, in certain circumstances, "the conjunctive 'and' and the disjunctive 'or' may be substituted for each other if it is clear from the plain language of the statute that it is appropriate to do so."[20] Finally, a court will interpret a statute in a manner that avoids producing absurd results.[21]

11 RCW 81.116.030(5) states that "[t]he burden of proof to show that the tariff rates are not fair, just, reasonable, and sufficient is upon the person with a substantial interest that files the revised tariff." RCW 81.116.020(3) similarly states that "[t]he commission shall ensure that the tariffs provide rates that are fair, just, reasonable, and sufficient for the provision of pilotage service." Insofar as the Commission must ensure that the tariff rates satisfy all four elements of the fair, just, reasonable, and sufficient standard under RCW 81.116.020(3), then a showing by a party that a tariff lacks any of the four elements would trigger the Commission's obligation to change the rates. Moreover, if the Commission adopts PMSA's interpretation of the fair, just, reasonable, and sufficient standard, such that a party would need to make an independent showing that rates are "insufficient" in order to

[17] PMSA Motion for Summary Determination at 18, ¶ 29.
[18] *AllianceOne Receivables Management, Inc. v. Lewis*, 180 Wn.2d 389, 393 (2014).
[19] *Id*.
[20] *Bullseye Distributing LLC v. State Gambling Com'n*, 127 Wn. App. 231, 239 (2005).
[21] *Estate of Bunch v. McGraw Residential Center*, 174 Wn.2d 425, 433 (2012).

change rates, then it is difficult to imagine a circumstance where a party would be able to request a rate decrease. More specifically, even if rates were so high as to be unfair, unjust, and unreasonable, those rates would still be "sufficient" for a company to recover its expenses. As such, the Commission should interpret the fair, just, reasonable, and sufficient standard under RCW 81.116.030(5) to be disjunctive, rather than conjunctive, when read in the context of other related statutes and to avoid potentially absurd results.

3. Genuine Dispute of Material Fact

12 PMSA contends that taking the evidence in the record in the light most favorable to PSP, there is no genuine dispute of material fact regarding whether the existing tariff rates are fair, just, reasonable, and sufficient. The Commission should disagree.

13 The administrative record in this case presents several factual disputes material to pilotage rates that require resolution by the Commission. For example, PSP witness Styrk testifies that the current Puget Sound Pilotage District tariff rates are insufficient to recoup pilotage expenses that have been increasing since the freezing of the tariff.[22] PSP witnesses Captain vonBrandenfels and Captain Carlson also testify that current pilotage rates may not be sufficient to attract capable, qualified pilots to the Puget Sound, citing to two recent pilotage candidates who decided to enter the training program in San Francisco rather than the Puget Sound.[23] Furthermore, PSP witness Captain Moreno testifies to the policy rationale supporting PSP's revised tariff design, such as simplifying the tariff design and updating the tariff rates to be more proportional relative to the current tariff.[24] Although not stated expressly,[25] these arguments suggest that the current tariff design and rates are

[22] Styrk, Exh. LS-1T at 4:19-23.
[23] vonBrandenfels, Exh. EVB-1T at 22:22 – 23:8, Carlson, Exh. IC-4Tr at 38:13-21.
[24] Moreno, Exh. SM-1T at 7:22 – 8:14.
[25] PMSA suggests that the Commission cannot infer an argument implied by PSP's discussion of its proposed tariff. PMSA Motion for Summary Determination at 13-14, ¶ 21. However, under the summary judgment

insufficient, unfair, and unreasonable relative to the proposed tariff to the extent that the existing tariff is confusing and predicated on an understanding of vessel characteristics and traffic that is no longer accurate.[26] Finally, PMSA witness Ramirez testifies that based on his analysis of the current tariff, "PSP's rates of return exceed[] fair and reasonable rates of return," indicating that the current tariff rates are not fair and reasonable.[27] Consequently, the Commission should determine that genuine issues of material fact preclude summary determination.

IV. CONCLUSION

14 For the reasons stated above, the Commission should deny PMSA's motion for summary determination and proceed to a full adjudication on the merits.

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Respectfully submitted,

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standard, the Commission considers all of the evidence, and all reasonable inferences arising from the evidence, in the light most favorable to the non-moving party. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

[26] Although PMSA presents countervailing testimony on PSP's arguments mentioned above through its witness Captain Moore, his testimony is not so absolute as to compel a determination that there is no "genuine dispute" regarding the strength of PMSA and PSP's positions. See Moore, Exh. MM-1Tr at 9-20, 27-33, 68-78 and 100-102.

[27] Ramirez, Exh. JCR-1Tr at 13:18-21.