

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

PUGET SOUND PILOTS,

Respondent.

DOCKET TP-190976

ORDER 08

DENYING MOTION FOR
SUMMARY DETERMINATION;
DENYING MOTION TO STRIKE
REBUTTAL TESTIMONY

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.

1. PMSA's Motion for Summary Determination

3 On July 13, 2020, PMSA filed a Motion for Summary Determination (Motion for Summary Determination). First, PMSA argues that PSP has not met the statutory requirement to prove that its existing rates are not fair, just, reasonable, and sufficient. According to PMSA, PSP must prove that the existing rates are unfair, unjust, unreasonable, and insufficient to satisfy this burden. PMSA further asserts that, even if the Commission accepted the facts that PSP offers as true, PSP "has presented no evidence to rebut the statutory presumption in favor of the existing tariff."¹

4 Second, PMSA argues that PSP failed to file proposed tariff changes in the manner required by WAC 480-160-110 and WAC 480-160-120. Specifically, PMSA contends that PSP's filing is insufficient because the proposed tariff fails to identify, describe, or

¹ PMSA Motion for Summary Determination ¶ 31.

explain the changes it proposes to make to the existing tariff. PMSA argues that these errors alone provide sufficient reason to reject PSP's filing.

- 5 On August 3, 2020, PSP filed its Answer in Opposition to PMSA's Motion for Summary Determination (Response to Motion for Summary Determination). With respect to PMSA's first argument, PSP submits that PMSA failed to meet its burden to demonstrate that no genuine issues of material fact remain in dispute. To the contrary, PSP argues that multiple issues, including determining the appropriate rate-setting methodology and its supporting calculations, require resolution by the Commission.
- 6 With respect to PMSA's second point, PSP argues that PMSA "simplistically elevates form over substance with respect to PSP's compliance with WAC 480-160-110."² PSP argues that, because its proposed tariff contains all new language, making changes to the existing tariff in legislative format as required by Commission rules would be "entirely meaningless."³ PSP further argues that WAC 480-160-110 and WAC 480-160-120 exist to "permit the ready identification and understanding of changes submitted to existing *Commission*-formatted tariff pages."⁴ Because the proposed tariff contains all new language and rates that significantly reduce the number of individual tariff charges, PSP contends that it has satisfied the rule by submitting a new tariff and explaining proposed changes in pre-filed testimony and exhibits.
- 7 On August 3, 2020, Commission staff (Staff) filed its response to PMSA's Motion for Summary Determination. First, Staff argues that PMSA has not demonstrated that PSP's alleged filing deficiencies prejudice any party. Staff further contends that the Commission has other, less severe means to address any formatting errors, such as requiring PSP to refile its proposed tariff to comply with the requirements of WAC 480-160.
- 8 Second, Staff disagrees with PMSA's position that the current tariff is presumptively fair, just, reasonable, and sufficient in the context of a general rate proceeding. Staff argues that PMSA failed to identify any legislative history suggesting that the legislature evaluated the current rates as part of its transfer of pilotage rate-setting authority to the Commission, and that PMSA misinterprets the "fair, just, reasonable, and sufficient" standard. Finally, Staff argues that the record presents several factual disputes material to

² PSP Response to Motion for Summary Determination ¶ 3.

³ *Id.* ¶ 8.

⁴ *Id.* ¶ 26.

pilotage rates that require resolution, and that such factual disputes preclude summary determination.

2. PMSA's Motion to Strike

9 On July 22, 2020, PMSA filed a Motion to Strike Rebuttal Testimony (Motion to Strike), alleging that PSP impermissibly offers new evidence on rebuttal. PMSA requests the Commission strike portions of witness testimony to the extent that such testimony raises new issues not addressed previously by any other party, or to the extent that it presents information that Staff and PMSA requested, but did not receive, through discovery. Specifically, PMSA argues that PSP witness Dr. Robert Leachman offers testimony related to the market impact on beneficial cargo owners, a topic that no other party has addressed; that Captain George Quick introduced the novel topic of criteria for setting pilotage rates nationally for the first time on rebuttal, despite failing to provide such information through discovery; and that Captain Ivan Carlson presents “selective, unaudited financial data from PSP from 2020,” which is beyond the period covered in PSP’s initial filing.⁵

10 On July 29, 2020, PSP filed its Response in Opposition to PMSA’s Motion to Strike Rebuttal Testimony (Response to Motion to Strike). PSP argues that its rebuttal witnesses appropriately responded to other witness testimony. For example, PSP argues that Dr. Leach’s testimony responds to PMSA witness Captain Michael Moore, who opined that PSP rates place Washington state ports at a competitive disadvantage. PSP further argues that PMSA did not request the evidence discussed by Captain Quick—specifically, workload information and rate-setting methodologies—and that this information should not be stricken to remedy a violation of discovery rules that PSP denies occurred.

DISCUSSION AND DECISION

1. PMSA’s Motion for Summary Determination

11 We deny PMSA’s Motion for Summary Determination. Even if PSP did not file its proposed tariffs in the manner required by WAC 480-160-110 and WAC 480-160-120, we agree with Staff that less severe measures exist to address this deficiency. Moreover, we find that the record presents genuine issues of material fact that require resolution, and thus conclude that the case should proceed to hearing.

⁵ PMSA’s Motion to Strike ¶ 18.

12 As a general matter, WAC 480-07-380 provides that a party may move for summary determination of one or more issues if the pleadings filed in the proceeding, taken together with any properly admissible evidence, 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. We address PMSA's arguments in turn.

a. PSP's filing complies with the requirements of RCW 81.116.

13 PMSA first submits that PSP failed to explain why the existing tariff is not fair, just, reasonable, and sufficient, as required by statute.⁶ PMSA argues that PSP's approach "has been to act as though there is no existing tariff that already forms a baseline."⁷

14 Pursuant to RCW 81.116.030(2)(b), the interested person proposing a revised pilotage tariff must provide a description of why the existing tariff *is not* fair, just, reasonable, and sufficient. The interested person must also explain why the revised tariff *is* fair, just, reasonable, and sufficient.⁸ These statutory provisions do not create an elaborate set of burdens. As Commission rules indicate, the interested person should "state clearly" the reasons for the proposed tariff change.⁹

15 We decline to dismiss PSP's general rate case on the grounds that PSP failed to explain the reasons for its proposed tariff revisions. PSP provided testimony explaining deficiencies with the current tariff and reasons to support its proposed tariff changes. For example, PSP witnesses testify that current pilotage rates may not be sufficient to attract capable, qualified pilots to the Puget Sound.¹⁰ PSP also provides testimony concerning the organization's financial statements and accrued liabilities.¹¹ PSP provides testimony from Weldon Burton, CPA, describing a historical test year with pro-forma adjustments.¹² Further, PSP provides evidence discussing the impact of historical tariffs on both the organization and pilot income, as well as the reasoning behind its proposed

⁶ PMSA Motion for Summary Determination ¶¶ 22-23.

⁷ *Id.* ¶ 22.

⁸ RCW 81.116.030(2)(b) (incorporating RCW 81.116.020(3)).

⁹ WAC 480-160-120(3)(d).

¹⁰ *E.g.*, Exhibit EVB-1T at 22:22-23:8.

¹¹ *E.g.*, Exhibit LS-1T.

¹² *See generally* Exhibit WTB-1T.

revenue requirement and associated tariff. We accordingly find that PSP provided sufficient evidence to raise genuine issues of material fact.

- 16 We also reject PMSA's argument that the legislature created a presumption that PSP's existing tariff is fair, just, reasonable, and sufficient, and that this presumption justifies summary determination.¹³ As Staff notes, when the legislature granted the Commission jurisdiction over pilotage rates, it determined only that PSP's tariffs would continue until changed by the Commission¹⁴ but made no separate finding that the existing rates are fair, just, reasonable, and sufficient.¹⁵ PSP's direct case is thus sufficient to survive PMSA's Motion for Summary Determination.

b. Any failure by PSP to identify tariff changes in accordance with WAC 480-160 may be addressed in the Commission's Final Order.

- 17 PMSA argues that PSP failed to comply with Commission rules that govern tariff revisions,¹⁶ and that PSP conceded as much.¹⁷ WAC 480-160-110 provides for the method of identifying tariff changes, and WAC 480-160-120 provides general requirements for filing proposed tariff changes in the Puget Sound pilotage district. Because this argument may be construed as raising two distinct issues, we address each rule separately.
- 18 PMSA's argument that PSP fails to sufficiently explain its proposed tariff changes, as required by WAC 480-160-120(3)(d), essentially duplicates PMSA's statutory argument, addressed above.¹⁸ We reject this argument on the same grounds. Genuine issues of material fact remain, and summary determination is therefore inappropriate.
- 19 Indeed, despite claiming that PSP errs by focusing solely on the proposed tariff, PMSA has not alleged that PSP violated WAC 480-07-525. This rule sets forth the Commission's specific requirements for supporting documentation in a general rate proceeding for marine pilotage services in Puget Sound. Among other items, WAC 480-

¹³ See PMSA Motion for Summary Determination ¶ 22.

¹⁴ Staff's Response to PMSA's Motion for Summary Determination ¶ 8.

¹⁵ Laws of 2018, Chapter 107.

¹⁶ PMSA Motion for Summary Determination ¶¶ 23, 24.

¹⁷ *Id.*

¹⁸ See *supra* ¶¶ 12-13.

07-525 requires that the interested person file information showing a test period, with actual and pro forma adjustments, and a calculation of the revenue impact of the proposed tariff revisions. If PSP complies with the specific requirements of WAC 480-07-525, it is unclear how PSP errs by focusing solely on the proposed tariff.¹⁹

20 To the extent that PMSA argues that PSP failed to file proposed tariff changes using the correct formatting or clerical notations, we agree that PSP's filing does not conform to Commission rules. For instance, PSP did not clearly identify changed language with the codes provided in WAC 480-160-110. PSP's own witness anticipated this issue.²⁰ Because we determine that these clerical deficiencies are unrelated to any material facts at issue in this proceeding, we conclude that summary determination is not an appropriate remedy. The Commission may grant PSP an exemption from its rules,²¹ or may require a compliance filing after the Commission's final order in the case.²² Given these alternatives, we exercise our discretion to defer consideration of any clerical deficiencies in the proposed tariff until the Commission enters its final order in this docket.

2. PMSA's Motion to Strike

21 We deny PMSA's Motion to Strike. As we observed in Order 06 Denying PSP's Motion to Strike, this is a case of first impression for the Commission. Any evidence that may assist us in our evaluation should thus be admitted and accorded weight based on its relevance and reliability. WAC 480-07-495(1) provides:

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.

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

¹⁹ Even if PSP failed to meet these requirements, WAC 480-07-525 states that the Commission would reject the filing without prejudice to PSP's right to refile.

²⁰ Exhibit WTB-1Tr, p. 4: 9-20.

²¹ See WAC 480-07-110.

²² See WAC 480-07-880.

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 PMSA's arguments in turn.

22 PMSA first argues that Dr. Leach's market impact study is "new material" that "does not respond to any other parties' witnesses."²³ Although PMSA is correct that Dr. Leach's study presents new information, his testimony neither prejudices any party nor violates Commission rules. The Washington Pilotage Act is concerned not only with protecting loss of life and property, but preserving "Washington's position as an able competitor for waterborne commerce"²⁴ The parties, including PMSA, have accordingly focused on how PSP pilotage rates impact the competitiveness of Puget Sound compared to other ports.²⁵ Dr. Leach's market impact study is directly responsive to these claims, including claims made by PMSA witness Captain Moore.²⁶

23 While PMSA implies that it is prejudiced by Dr. Leach providing a market impact study in rebuttal testimony, there was no requirement that PSP provide this study as part of its direct case.²⁷ Furthermore, PMSA was aware that competitiveness is a relevant issue in the case, and PMSA had a full opportunity to present testimony addressing the impact of pilotage rates on market competition. We remind PSP, however, that the Commission 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. Although we do not reach that conclusion here, PSP (and indeed all parties) should be mindful of this expectation going forward.

²³ PMSA Motion to Strike ¶ 22.

²⁴ RCW 88.16.005.

²⁵ *See, e.g.*, Moore, Exh. MM-1Tr at 121:20-22 (asserting that increased pilotage rates would impact the competitiveness of Puget Sound ports).

²⁶ We reject PMSA's assertion that Dr. Leach's discussion of "beneficial cargo owners" rather than pilotage customers introduced a new issue or somehow caused PMSA prejudice. This is a distinction without a material difference. Dr. Leach's testimony is responsive and focused on the recurring issue of Puget Sound's competitiveness.

²⁷ *See* WAC 480-07-525 (filing requirements for general rate cases in the Puget Sound pilotage district).

- 24 PMSA next argues that Captain Quick provides new testimony on rebuttal regarding a “generally accepted method of determining pilotage rates nationally.”²⁸ In his direct testimony, Captain Quick discussed national methods for setting pilotage rates and provided an overview of various factors and how they may vary.²⁹ In the rebuttal testimony PMSA cites, Captain Quick responds directly to Staff witness Danny Kermode, indicating that he agrees with Staff’s methodology.³⁰ Because such testimony is within the permissible scope of rebuttal and will likely be useful to the Commission, we decline to strike it. We observe, however, that including Captain Quick’s description of a national rate-setting methodology in direct testimony would have been preferable. Again, PSP should include all relevant information in its direct case whenever practicable.
- 25 We similarly decline to strike a chart in Captain Quick’s rebuttal testimony on the basis of alleged discovery violations.³¹ A review of the data requests and responses referenced in PMSA’s Motion to Strike and presented in PSP’s Response to Motion to Strike shows no evidence of any violation of the Commission’s discovery rules. PSP credibly represents that the workload information relied upon in Captain Quick’s chart was not requested in prior data requests, and that the only information PSP did not produce in discovery was obtained from third parties shortly before Captain Quick’s rebuttal testimony was prepared.³² We note that PSP requested essentially the same third-party information from PMSA, and that PMSA objected on several grounds.³³
- 26 We also decline to strike rebuttal testimony from PSP witness Captain Carlson, who provided financial data from 2020. PMSA argues that this financial data reflects unaudited, selective financial data that may require other parties to perform extensive recalculations.³⁴ We accept PSP’s representation that Captain Carlson’s testimony is not offered to supplement the test period or to introduce new information for the purposes of

²⁸ PMSA Motion to Strike ¶ 13, 23 (citing Exhibit GQ-5T at 2:12, 3:10, 3:22).

²⁹ Exhibit GQ-1T p. 11-17.

³⁰ Exhibit GQ-5T at 2:2-15.

³¹ PMSA Motion to Strike ¶ 26.

³² PSP Response to Motion to Strike ¶ 46 (citing Exhibit 1, Declaration of Captain Quick).

³³ PMSA Response to Motion to Strike ¶ 47.

³⁴ PMSA Motion to Strike ¶¶ 18, 24 (citing Carlson, Exh. IC-4Tr at 42:17-43:16).

evaluating PSP's revenue requirement.³⁵ PSP explains that Captain Carlson's discussion of 2020 financial data is responsive to testimony offered by Captain Moore related to the economic impacts of the COVID-19 pandemic, and is offered for purpose of demonstrating the economic risks that pilots assume. Although we decline to strike Captain Moore's testimony on this issue, we share PMSA's concerns about relying on unaudited financial data from 2020. To clarify, the Commission does not accept this financial data as part of PSP's direct case for the purposes of establishing its revenue requirement.

ORDER

27 **THE COMMISSION ORDERS THAT** Pacific Merchant Shipping Association's July 13, 2020, Motion for Summary Determination and July 22, 2020, Motion to Strike Rebuttal Testimony in Docket TP-190976 are DENIED.

Dated at Lacey, Washington, and effective August 7, 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.

³⁵ PSP Response to Motion to Strike ¶ 24.