In the Matter Of:

BOARD OF PILOT COMMISSIONERS MEETING

PROCEEDINGS

January 23, 2015
PROCEEDINGS BOARD OF PILOT COMMISSIONERS MEETING

DATE: January 23, 2015
TIME: 9:00 a.m. to 9:49 a.m.
PLACE: Wyndham BayPoint Resort
        4114 Jan Cooley Drive
        Panama City, Florida

REPORTED BY: Rebecca Hughen

APPEARANCES:

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MEMBERS PRESENT: Clark Jennings, Robert Swindell,
Michael Flury, Daniel Biggins, Donald Shaw, John
Fernandez, Enrique Miguez, Brian Ramos, Thomas Burke,
James Winegart, David Ulrich, Carlos Trueba, Galen Dunton
MR. SWINDELL: Good morning. Welcome to the January 23rd meeting of the Florida Board of Pilot Commissioners, rate review committee meeting. It is January 23rd at 9:00 a.m., Central Standard Time. I would like to call the meeting to order. Could you please call the roll?

MR. SHAW: Commissioner Swindell?

MR. SWINDELL: Present.

MR. SHAW: Commissioner Burke?

MR. BURKE: Here.

MR. SHAW: Commissioner Fernandez?

MR. FERNANDEZ: Here.

MR. SHAW: Commissioner Miguez?

MR. MIGUEZ: Here.

MR. SHAW: Commissioner Ramos?

MR. RAMOS: Here.

MR. SHAW: Commissioner Trueba?

MR. TRUEBA: Here.

MR. SHAW: Commissioner Ulrich?

MR. ULRICH: Here.

MR. SHAW: Commissioner Winegart?

MR. WINEGART: Here.

MR. SWINDELL: I just want to make sure that all the rate review committee members have received the documentation that supports the
agenda for today. There was a filing from the Florida-Caribbean Cruise Association that came in late, but it was a separate document. Did everyone receive that, and have y'all had an opportunity to review the information?

THE PANEL: Yes.

MR. SWINDELL: Great. Commissioner Kurtz normally is an alternate for this board -- or this committee. Unfortunately had a family emergency and had to leave yesterday. The alternate-alternate is Commissioner Winegart, and he will be participating in items 4, 5 and 6 today. Commissioner Ulrich will be participating in items -- approval of the minutes, item 2 and item 3, the reconsideration of repeal of Rule 61G14-22.012.

The first item of business is the approval of the October 21st, 2014 minutes.

Is there a motion to approve as distributed?

MR. BURKE: So moved.

MR. SWINDELL: Mr. Burke, thank you.

Is there a second?

MR. MIGUEZ: Second.

MR. SWINDELL: Thank you, Commissioner Miguez.
MR. TRUEBA: My name does not appear under "members present", and I was present at the meeting, as evidenced in the minutes themselves. So if we could --

MR. SWINDELL: Thank you, Commissioner Trueba.

MR. TRUEBA: -- amend them to approve as amended --

MR. SHAW: I kept Commissioner Walters on there instead of you. I will amend that.

MR. SWINDELL: Okay. Thank you. So you will make that a Scrivener's change?

MR. SHAW: Yes.

MR. SWINDELL: Any other changes to the minutes?

So we will make a motion to approve the minutes as amended.

All those in favor signify by saying aye.

THE PANEL: Aye.

MR. SWINDELL: Oppose same sign.

Thank you.

The next item is the November 12th, 2014 minutes of the rate review committee.

Is there is a motion to approve?

MR. TRUEBA: Motion.
MR. SWINDELL: Is there a second?
MR. BURKE: Second.

MR. SWINDELL: Thank you, Commissioner Burke.
Any modifications or changes?
Hearing none. Motion to approve the minutes,
all those in favor signify by saying aye.

THE PANEL: Aye.

MR. SWINDELL: Oppose same sign.
Minutes of the 12th are approved.
Last item for minutes is the minutes of the
December 18th, 2014 conference call.
Is there a motion to approve?

MR. BURKE: So moved.

MR. SWINDELL: Okay. Commissioner Burke.
Second?

MR. RAMOS: Second.

MR. SWINDELL: Thank you Commissioner Ramos.
All those in favor signify by saying aye.

THE PANEL: Aye.

MR. SWINDELL: Oppose same sign.

Item 3 on the agenda is reconsideration of
repeal of Rule 61G14-22.012. I would like to
thank the representatives from both parties for
sending additional information. I thought that
was very well worded and clear to the board, but I
appreciate the clarity of your statements and the information you provided.

Seeing that the information was provided in writing and all of the members have had a chance to review, if there's questions the commissioners have of the counsels for either party, you are more than welcome to ask them questions, but at this point I'm not going to ask for presentations.

But is there a motion to repeal Rule 61G, I guess is the appropriate...

This is considered for discussion.

MR. FERNANDEZ: Yeah. What is the proper procedure if, you know, a vote is cast in one way, and then it's reversed?

MR. SWINDELL: Well, I think it's up for re- -- so it's a new day.

MR. FERNANDEZ: It's a new day.

MR. JENNINGS: Yeah, it's a new day. It was up for consideration -- pardon me. There was a motion to reconsider, which passed, and so now the matter is back on the table.

MR. FERNANDEZ: Okay. So still it's the advice of our counsel that this rule should be repealed?

MR. JENNINGS: Yes, sir.
MR. FERNANDEZ: Because there is no basis for the law?

MR. JENNINGS: Yes, sir. If -- Mr. Chairman, if I may? It would probably be best if I went into a little bit more detail than I did. The last time on the conference call I wasn't actually feeling my best that day.

MR. SWINDELL: If you could also just inform the committee of where the case stands at the appellate level as well, it would be good for you to do that as well. That it's on hold right now --

MR. JENNINGS: Yes, sir, the matter is currently held in abeyance at the Division of Administrative Hearings. When we advised the ALJ that this matter was coming back up for reconsideration, we requested that the abeyance for the stay continued to be in place and the ALJ agreed to that.

So depending on what you do today will determine whether or not this matter goes forward to the Division as a rule challenge. The challenge, of course has -- Ms. Blanton in her brief has provided a variety of reasons why she and her client believe that this rule should be
repealed.

Now, I have looked at the initial pleadings, and while I don't agree with a lot of the reasoning cited by Ms. Blanton in her brief, and I do take exception with some of the findings by Judge Rago many years ago in her rationale, I must say that there is one key point in her pleadings that does strike home, and that is regarding the way the statute -- the way Chapter 120 was modified in the late '90s.

And if you follow the history of those changes, you see that the legislature was engaged in some discussion with the executive branch, primarily over issues related to growth management and water, environment.

What had occurred over time is that various executive agencies had passed many rules dealing with road management and water management that the legislative branch thought it went a bit too far. And so they began to modify Chapter 120 to make it clear that there was more control by the legislative branch.

The first modifications were done by the legislature. Cases went up on appeal as a result of those changes in various capacities, and the
courts ruled -- candidly they tended to favor the agencies over what the members of the legislature thought should be done.

So the legislature came back in '99 and tightened up Chapter 120 even more. When they did that, they modified various portions of Chapter 120. The end result being that in order to promulgate a rule, one has to go to your practice act and point to specific statutory authority.

In other words, the legislature now wants, in order for you to have a rule, there has to be specific language in your act that says you can have a rule -- you have to have two parts actually. One, you have to have general making authority. Which you have. Any agency is going to have that. The Agency has the authority to promulgate rules. You have got that.

Then you have your act. In the past, prior to these changes, you could look at the act in total and say here's the intent of the legislature, they want us to engage in these types of activities. We're going to promulgate rules that modify, explain, expand what our act allows us to do.

The legislature said that's far too broad, we
want to be more specific. If you are going to have a rule, we want to be able to tell you, you have a rule to do X, Y or Z. Unfortunately as time went on, rules such as the one you have currently -- which I would like to refer to as notification rules, they are either repeating the statute and paraphrasing the statute itself, or paraphrasing case law to tell the world, instead of having to go and read the Southern Reporter, instead of having to go back and read the statutes, you look in the rules, and here are certain things that we all know to be true, and now you can read them in our rules.

This is one of those. This rule essentially paraphrases case law that says administrative law judge lacks the authority to establish rates because the establishment of rates is a quasi legislative action as opposed to a quasi judicial action.

That kind of rule was fine under the old paradigm. Unfortunately as the legislature tightened down the process to insure that the executive branch did not go beyond what the legislature wanted them to do, you now are not permitted to have such rules.
I have reviewed Chapter 310. I don't see anything specific that says you have the specific authority to have this particular rule. That doesn't mean that the underlying premise of the ALJ is lacking the authority to establish rates is untrue. I still believe quite comfortably that the ALJ has no authority to establish a rate. But that's a different issue. The issue with whether or not you have the specific authority in 310 to promulgate this particular rule.

There is some other ancillary matters dealing with whether or not you should reference Chapter 120 as part of your specific authority. I do tend to agree with Judge Rago, back in 1990 something, that you don't have that authority. But, beyond that, Judge Rago's rationale in her opinion back in '99, I would disagree with most of those.

But, again, let's get back to the primary point. Do you have specific authority in 310 to promulgate this rule? I don't see it. I have reviewed the pleadings from the FCCA, and while I agree with a lot of what is said there in the general premises that are promulgated, I did not see anything in there that said -- or point to a specific provision in 310 that I can go to and
say, yes, that says you can promulgate a rule to
deal with this issue, to establish this kind of a
procedural matter.

And so as a far more verbose way of saying
what I told you a month ago on the phone. But
that is my opinion, too. If someone asks me, can
I guarantee that were you to appeal this rule, and
were the matter to go to DOAH, and the
administrative law judge decided on their own to
change the rate, could I guarantee that when that
matter went up on appeal that we would prevail?
No. But I can't guarantee that when you walk out
that door, you are not going to get struck by
lightening, hit by a meteor, or run over by a bus.
That doesn't mean you have to shelter in place and
hide all your life. I mean, the probabilities are
low. There is a possibility.

I don't think any lawyer is going to
guarantee anything 100 percent, and if they do,
I -- well, I certainly wouldn't want to do that.
But I think your probability is pretty darn high
that you will prevail in this matter. I'm
comfortable with the law, and I have discussed
with Mr. Flury, Ms. Dern, and with other attorneys
in my shop, and we are all in consensus.
MR. SWINDELL: Thank you, Mr. Jennings. Any questions for either the committee's counsel or for the counsel for the peer party?

MR. MIGUEZ: A couple of questions. One, there hasn't been a court that has determined 310, correct? There hasn't been a court that has determined whether there is specific authority under 310 to promulgate this rule?

MR. JENNINGS: This issue has not come up before the courts at the -- yes, that's correct.

MR. MIGUEZ: This rule has been in existence since 1995. You have a Third Circuit Court of Appeal that enforced it, granted under a prior version of it. But we do have a court already saying that the rule is valid, granted under a different rule --

MR. JENNINGS: Correct.

MR. MIGUEZ: -- different language. Since then, you have had two administrative law judges look at rate review cases, and they both have followed the rule. They didn't question the rule.

MR. JENNINGS: Right.

MR. MIGUEZ: That standard was upheld. What we have is a First District Court of Appeal case on a different enabling statute, correct? Which
basically interpreted, I guess that's that manatee case.

MR. JENNINGS: Try to Save the Manatee, correct.

MR. MIGUEZ: Which dealt with a different statute, different language. So, therefore, I mean, that ruling doesn't provide any precedential value here because our statute is different.

So if we believe -- a commissioner believes that there is specific language under that 310, then they have every right to uphold the rule; is that not correct?

MR. JENNINGS: That's correct. I would make a couple of observations, if I may? Yes, this matter has come up subsequent to the changes of '99, and, no, no one has challenged the authority of the rule. But that's because no one has challenged the authority of the rule.

The ALJ did not sua sponte decide that the rule was invalid, and they could rely upon it. But then --

MR. MIGUEZ: But they could have --

MR. JENNINGS: -- no one in the process challenged it to bring it to the ALJ's attention in the first place.
MR. MIGUEZ: I agree, but if it is such a pressing issue, the judge could have raised it himself or herself, the court.

MR. JENNINGS: If they thought it were a pressing issue. Or -- but it also depends on the ALJ, some do and some don't.


MR. JENNINGS: Right. And as far as Save the Manatee, Save the Manatee basically establishes, in far better terms than I try to very roughly describe the process, that led us to where we are today with the administrative procedures act, and how it has become far more tight in its analysis.

So taking the analysis and the explanation in Save the Manatee, applying it to this rule, that's where I come to the opinion that you lack this specific authority.

But you are correct, no one to date has challenged 310, or this rule, citing Save the Manatee, and applying the principles established in that case to your particular rule.

MR. MIGUEZ: Okay. Thank you.

MR. SWINDELL: So if we do nothing today, this issue would continue to sit before DOAH?
MR. JENNINGS: Yes, sir, if you do nothing today, then the matter will proceed before the administrative law judge at the Division of Administrative Hearings. The parties have already agreed that oral argument will not be held, that the matter will simply be done through written submissions. The briefings will be submitted. And then the administrative law judge will rule as to whether or not the particular rule in question is valid.

And if they make a determination that the rule is not valid, the rule will be stricken. The -- which is the first negative impact. But if you are going to repeal it, or it's going to be stricken, what's the difference to you?

The other possible negative impact is one of attorneys' fees. Should the parties prevail, the party that has challenged the rule prevail and the rule is stricken, they can then petition for and receive attorneys' fees.

Now, the funny thing about fees is that the fees are not going to come from you as individual members, so you are fortunate there, but it will come from the board and the board funds.

And so you have got a group of pilots
challenging the rule, and if they prevail, and the rule is stricken, and then they go for fees, essentially they will be paying themselves fees because who pays the money that runs this board? It comes from the pilots. So whether or not they will ask for fees, I don't know. But that's something else to run through your mind.

MR. SWINDELL: Can that ALJ's decision then be appealed?

MR. JENNINGS: It can. It can indeed.

MR. SWINDELL: And who would make that decision whether to take it to appeal?

MR. JENNINGS: The board -- or the committee, rather.

MR. SWINDELL: Okay.

MR. RAMOS: And that's -- I'm sorry, that's a little bit too --

MR. FLURY: Whoever is the losing party.

MR. SWINDELL: The losing party.

MR. JENNINGS: Yeah. Yeah. And I extrapolated that the only reason they would be interested in appeal. But, yes.

MR. SWINDELL: Mr. Ulrich?

MR. ULRICH: Question for counsel. The -- you mentioned probability. I don't know if you
are able to provide this for the committee here, but if you had to guess, if this goes -- if we don't repeal this, this goes to the next stage, based on your interpretation of the law, is the judge -- is it a 50-50 chance? It is a 90 -- is it a slam dunk, you are sure when it gets to that level, it's going to -- I just feel like the fact that we are upholding -- I think everyone on this board wants to -- doesn't want to get this marred in the legal system, and if it's that clearcut, and we can fix this at this level, and not let it drag on somewhere else.

But are you able to give a ballpark like for those of us --

MR. JENNINGS: I would say it is more likely than not that based upon the principles established in the Save the Manatee that this rule will fall.

But, yeah, the other rationale cited in the pleadings, again, I think I could argue against almost every other item in the pleadings. But that really doesn't matter. I could win on every point but one, and if it's that one, then the rule will fall.

MR. FERNANDEZ: Just a comment. I don't
think anybody on the rate committee thinks that we are going to advocate the rates set in authority to the administrative law judge by repealing -- well, some people might think. I don't think we are advocating our right as a committee -- rate set committee to set rates by repealing this rule that has no basis for existing. So I don't understand the multiple meetings we have been having about this. I think we have been dragging it on way too long.

MR. ULRICH: I agree. I think it kind of took on an emotional charge when it was put before us, like, oh, this is taking your authority away from you. But I agree that this is -- this sounds like a housekeeping issue, and it's going to be --

MR. FERNANDEZ: One way or another it's going to go away, from listening to what your advice is, your sage advice so...

MR. JENNINGS: If nothing else, it has caused me to look more closely at all of your rules, and I may be coming back in the future with some other suggestions, but that's for -- that's for a later day.

MR. FERNANDEZ: Okay.

MR. SWINDELL: So we have had some general
discussion. I would like to get a motion on the table either to --

MR. FERNANDEZ: I have a question for you. Am I part of this vote for this thing, or is it --

MR. JENNINGS: Yes, sir.

MR. FERNANDEZ: Okay. All right. So I will make a motion that we repeal Rule 61G14-22.012, Florida Administrative Code.

MR. SWINDELL: Is there a second?

MR. ULRICH: I will second that motion.

MR. SWINDELL: Seconded by Mr. Ulrich.

Any additional discussion?

So if this motion fails today, the rule stays in place as is, and then it goes back to the Division of Administrative Hearings?

MR. JENNINGS: Yes, sir. Yes, sir.

MR. SWINDELL: Any other questions? Discussion?

All right. I will call the question -- we'll do a roll call vote, please.

MR. SHAW: Commissioner Burke?

MR. BURKE: No. Sorry, no, not in support of the motion.

MR. SHAW: Commissioner Fernandez?

MR. FERNANDEZ: Yes.
MR. SHAW: Commissioner Miguez?
MR. MIGUEZ: No.
MR. SHAW: Commissioner Ramos?
MR. RAMOS: No.
MR. SHAW: Commissioner Trueba?
MR. TRUEBA: No.
MR. SHAW: Commissioner Winegart? I'm sorry, Commissioner Ulrich?
MR. ULRICH: Yes.
MR. SHAW: Commissioner Swindell?
MR. SWINDELL: No.
MR. SHAW: Motion fails 5 to 2.
MR. SWINDELL: So it will go back to DOAH now?
MR. JENNINGS: It will go to DOAH, and we will see what the ALJ wishes to opine, and then you can decide if you wish to take any action or not.
MR. SWINDELL: Which would be ultimately to appeal that decision?
MR. JENNINGS: Assuming that the rule falls.
MR. SWINDELL: Right.
MR. JENNINGS: Yes, sir. If the rule is upheld, then of course there is still the opportunity for appeal, as Mr. Flury pointed out,
it would be from the petitioner.

MR. SWINDELL: Okay. Item 4 on the agenda is consideration of motion to intervene Port Everglades Pilots Association.

Do you want to tee it up for us, Mr. Jennings?

MR. JENNINGS: Yes, sir. I'm remotely trying to get to that, but if we can put a page number on that one.

MR. FERNANDEZ: 46.

MR. JENNINGS: Thank you.

Oh, Mr. Chairman, this motion to intervene was filed rather early in the process. Candidly I think this is a moot issue that the Port Everglades Pilot Association is now a party to this matter. So I'm not even certain why this is here before you today. They are a party.

However, just to cover our bases, and I believe I know the answer to that, but I would like to just place on the record and ask Mr. Panza, if he can, represent for his client that they have no objection to Port Everglades Pilots intervening in the everyday's process.

MR. PANZA: No, we have no objection. I mean, they were a party, they filed a competing
application, an alternative application.

MR. JENNINGS: I suppose, Mr. Chairman, just to make them feel good, we could have a vote on this to approve their motion to intervene, but I don't think it's really necessary, I think it's a moot issue.

MR. SWINDELL: Is there a motion to approve?
MR. MIGUEZ: So moved.
MR. SWINDELL: Thank you, Mr. Miguez.
MR. WINEGART: Second.
MR. SWINDELL: Seconded, Mr. Winegart.
Any further discussion?
All those in favor of the motion signify by saying aye.

THE PANEL: Aye.
MR. SWINDELL: Opposed same sign.
That's approved.
Next item is consideration of a motion to disqualify Commissioners Burke and Miguez from Port Everglades Pilots Association. And there was a response back from the Florida-Caribbean Cruise Association as well.

Clark?

MR. JENNINGS: Yes, sir. And, Mr. Chairman, do we wish to handle this as we did the earlier
matter and simply rely on the briefings filed and not hear from the parties?

MR. SWINDELL: Yeah, I think if -- as the discussion continues, if commissioners have questions of either represented parties, we will be more than welcome to answer those questions, but that would be my preference.

MR. JENNINGS: Thank you, Mr. Chairman.

Commissioners, what you have before you is a motion requesting that the rate review committee compel Commissioners Burke and Miguez to recuse themselves from the matter dealing with the Port Everglades rate change hearing.

I believe most of you were present when we dealt with Port Miami and a similar issue came up. And at that time, as you may recall, it was my opinion that, as a committee, you lack the authority to compel one of your own to recuse themselves from such a matter. At that time you voted -- you agreed with me, and you voted in that fashion.

That matter has been taken up on appeal to the district court, but the district court has yet to opine as to whether or not we were correct in our decision. Unless and until the district court
advises otherwise, my advice to you, once again, is that this committee lacks the authority to compel one of your own to recuse themselves.

And so with that, Mr. Chairman, we would need a motion whether or not to grant that portion of the motion.

MR. SWINDELL: So how can we word this? Because, you know, my feeling is that, you know, that's an individual decision on the commissioner's basis, and that your advice on this makes perfect sense to me. How do we craft a motion that says that we just -- do we just turn the motion down?

MR. JENNINGS: Deny the motion for lack of authority by the committee. The committee has no authority to -- excuse me -- to compel one of our own to recuse themselves, and, therefore, without that authority, the motion is denied. That portion of the motion.

There is a secondary part to this which asks Commissioners Burke and Miguez, assuming that the committee denies the general portion of whether or not they wish to recuse themselves, but we can get to that after we get -- address the issue as to whether or not the committee feels they have the
authority to compel recusal.

MR. SWINDELL: So assuming the committee denies, the conversation on the individual matter is moot to us, right?

MR. JENNINGS: It is, and at that point, then I will pose questions to Commissioners Burke and Miguez.

MR. SWINDELL: Okay. Is there a motion on this issue?

MR. TRUEBA: You need a motion to deny the motion?

MR. RAMOS: A motion to deny --

MR. SWINDELL: Yes, sir. Yes, sir. Yes, sir.

MR. RAMOS: I will second.

MR. TRUEBA: A motion to deny the motion.

MR. RAMOS: I will second.

MR. SWINDELL: Thank you, Commissioner Trueba. Thank you, Commissioner Ramos.

Any discussion on the motion? Again, it's a motion to deny the motion to disqualify Commissioners Burke and Miguez.

Let's call the roll on this one.

MR. SHAW: Commissioner Burke?

MR. BURKE: Yes, in favor.
MR. SHAW: Commissioner Fernandez?

MR. FERNANDEZ: No.

MR. SHAW: Commissioner Miguez?

MR. MIGUEZ: Yes.

MR. SHAW: Commissioner Ramos?

MR. RAMOS: Yes.

MR. SHAW: Commissioner Trueba?

MR. TRUEBA: Yes.

MR. SHAW: Commissioner Winegart?

MR. WINEGART: Yes.

MR. SHAW: Commissioner Swindell?

MR. SWINDELL: Yes.

So the motion to deny passes.

MR. JENNINGS: Yes, sir.

And now, Mr. Chairman, if I may pose the question to the two individual commissioners. Commissioner Burke, do you intend to recuse yourself in this matter?

MR. BURKE: I do not intend to recuse myself. In this matter --

MR. JENNINGS: Thank you, sir.

MR. BURKE: -- we have used two interchangeable words in this, "disqualify" and "recuse". I don't know if they are the same. I don't disqualify or recuse myself.
MR. JENNINGS: Thank you, sir.

Commissioner Miguez, do you intend to disqualify or recuse yourself in this matter?

MR. MIGUEZ: No.

MR. JENNINGS: Thank you.

MR. SWINDELL: Next item is item 5, consideration of motion to disqualify -- I'm sorry, item 6, consideration of Motion for Stay Pending Appellate Review, Port Everglades Pilots Association.

MR. MEROS: Mr. Chairman, this is George Meros, may I ask one -- make one request with regard to what just occurred on behalf of the Port Everglades Pilots?

MR. SWINDELL: What's your -- yeah, what's your request?

MR. MEROS: The request is an oral argument in the matter related to the Biscayne Bay Pilots, the primary question was not only is it the committee's responsibility or the individual's responsibility, but whether there are written orders for all of the entities requested to take some action.

So the Port Everglades Pilots would specifically request that the committee enter a
written order with regard to its vote, and then each commissioner enter a written order with regard to its decision.

Because, procedurally, the only thing the district court was really concerned about was whether or not technically there was a written order for which to appeal. The two commissioners enter a written order denying, the committee enters an order denying, then it is properly positioned for appeal.

If there is an absence of a written order, that technicality is at issue in the Miami case. And so I would specifically request three orders, one from the committee and one from each commissioner.

MR. JENNINGS: Mr. Chairman, may I address that?

MR. SWINDELL: Sure, please.

MR. JENNINGS: Yeah, Mr. Meros, you're absolutely right. And I was remiss in not having orders crafted for Commissioners Burke and Miguez at the Port of Miami matter. I was unaware that that was expected.

Having been apprized otherwise, orders will be -- written documents will be crafted regarding
both Commissioners Burke and Miguez.

MS. BLANTON: May I speak to that point as well concerning the orders in the Biscayne Bay Pilots that are on appeal as a procedural technical issue?

MR. SWINDELL: Well, is it -- if it's just that are orders going to be prepared for --

MR. JENNINGS: I could. If that -- is that your request, Ms. Blanton?

MS. BLANTON: Yeah, and the question is, Mr. Jennings, with the Chairman's permission, as Mr. Meros just pointed out, the focus in the oral argument we had a week ago was whether or not the order that was entered was the appropriate order or should there also have been orders entered by Commissioners Miguez and Burke recusing themselves. The court struggled with that quite a bit.

I realize there is a stay in place. The question I have is, if appropriate, I think orders going back to July 31st when Commissioners Miguez and Burke just said they -- similar to what they said today, they didn't disqualify themselves, perhaps those should be entered as well so that we can make sure we have the proper orders before the
appellate court.

MR. SWINDELL: Marlene, would you introduce yourself?

MS. STERN: My name is Marlene Stern, and in this matter I represent the Pilot Rate Review Committee as appellate counsel.

I don't think -- I'm not sure what Ms. Blanton was -- I don't think we can write orders, issue orders on the recusals from the Bay Pilots rate case unless a stay -- the stay is lifted.

Are you suggesting, I'm sorry, Ms. Blanton, that we can issue the orders without the committee taking any action on the stay?

MS. BLANTON: The committee is the one that entered the stay so --

MS. STERN: No, the court entered the stay.

MS. BLANTON: Incorrect, this committee entered the stay. And if the committee were -- that's correct --

MS. STERN: The committee did.

MS. BLANTON: -- the committee entered the stay. The court said if the committee didn't, the court would, but the committee did.

MS. STERN: Okay.
MS. BLANTON: So the committee entered the stay. So I think the committee could lift the stay for purposes of entering those orders --

MS. STERN: Yeah, okay.

MS. BLANTON: -- and then we can state the stay.

MS. STERN: Right. Okay, I agree. They just can't issue orders without doing anything with the stay.

MS. BLANTON: I understand.

MR. SWINDELL: Mr. Panza?

MR. PANZA: Thank you. I disagree. And the court has held in oral argument, I think it was last Monday, Tuesday, whatever it was, of last week, that case is framed, that case has been argued. What they are attempting to do now is to go back, what we would call, nunc pro tunc, go back to the original time, put something else in the record, I guess go back up to the appellate court and say to the appellate court, well, now we have got these other issues in the record.

The record is the record. The appeal is the appeal. The court heard the appeal. The only thing that is remaining over there is for the court to make a decision. So I don't think that
is the appropriate method at all. If the court felt that they needed to remand it back to have these orders done at some particular point, or that was a requirement, the court can do what the court chooses to do, and I am not going to sit here and second guess what the court may or may not do.

But to go back now and try and fix something, or try and do something, whether it fixes it or doesn't fix it, or whether that's what the court really meant, we are basing all of this on the arguments that were made by the judges -- or not arguments, but the questions and the dialogue by the judges, and I don't think it's appropriate. I mean, they have -- it's framed, it's done, it's over with. Whatever the court rules, if it's against us, it's against us. If it's against them, it's against them. That part is over with.

In the next go-round, or whatever the court rules, if there is a next go-round, then that might be appropriate. So I would object to it.

MR. SWINDELL: Thank you, Mr. Panza.

So your thoughts on this, Mr. Jennings? We will write the orders for the decision that was just made, but then how do you feel about going
back to the Biscayne Bay Pilots?

MR. JENNINGS: Well, I will defer to Ms. Stern. She is of the opinion that we should not. And so --

MS. STERN: Oh, I'm sorry --

MR. JENNINGS: Did I --

MS. STERN: Oh, okay. No. Yeah, I am of the opinion that we should let the appeal rest as it is now, yes.

MR. SWINDELL: Any questions for members of the committee?

I need my Juris Doctor degree.

MR. BURKE: I have a question, not being a lawyer. I mean, are we -- can we be compelled to do this? Are we compelled to actually -- the order itself, I'm assuming -- normally the order is signed by the Chairman for us to recuse ourselves. I'm assuming I would have to sign the order doing it?

MR. JENNINGS: Yes. If I may, Mr. Chairman?

MR. SWINDELL: Please.

MR. JENNINGS: In my mind -- let's go back to Port Miami, in the case there where I did not give you documents to sign where you recused yourself.

MR. SWINDELL: Or did not recuse yourself.
MR. JENNINGS: Or did not recuse yourself. In both cases, they failed to recuse themselves --

MR. BURKE: I would like to clarify one thing. You did provide us something. I don't remember what the technical document is that we had to fill out, but we did fill out something for that matter.

MR. JENNINGS: That was a form -- yes, sir, that's -- and I was going to go over it on this other matter. But that was a Form 8A. That -- that is a Commission on Ethics Form that I asked both you and Commissioner Miguez to complete, which you did. If for no other reason than because 310 1511 sub (c) requires you to do so. But I also did it simply because I was familiar with the Code of Ethics required that you do so. And I will ask you to do that again in regard to the matter that we just addressed.

MR. BURKE: Okay.

MR. JENNINGS: In my mind at the time, that was sufficient. I did not believe that a written order or written document from either you or Commissioner Miguez was necessary with regard to your specific decision not to recuse yourself from the matter. I crafted an order simply addressing
whether or not this committee had the authority to compel one of their own to recuse themselves. To me, your decision was personal. We had to deal with the Form 8As, but that was it.

Subsequent to that matter, fast forward, there is a hearing dealing with this issue in the First DCA. There is discussion about whether or not procedurally there should have been a document from each of you showing that you had decided not to recuse yourself, as opposed to just looking at the record here. And there is a record. So I thought it was unnecessary. Having discussed it with Ms. Stern, apparently the Public Service Commission routinely, when commissioners do not recuse themselves, they issue a document saying, I will not recuse myself.

So, going forward, it seems easier for everyone if there is a written document saying that you do or do not recuse yourself. And I will craft that for you. I will send it to you. I will ask you to review it. If you don't have any problem with the way it's worded, sign it, and return it to me. If you do have a problem, give me a phone call, and we will discuss what it says, and how we can change it to make you comfortable.
But apparently now the process is there should be a piece of paper memorializing your decision.

MR. BURKE: And my question here is if we decide not to do it, are we compelled to do so?

MR. JENNINGS: I will let Ms. Stern answer that because she is fidgeting in her chair.

MS. STERN: If you decide not to issue a written order of your own personal decision on disqualification, can you be compelled to do so? It's possible. I think that right now there could be something filed in an appellate court called a petition for writ of mandates that would -- that could, if granted, compel you to write an order.

MR. BURKE: Thank you.

MS. STERN: So it is possible.

MR. JENNINGS: Yeah. And that being said, Commissioner, to me, this is just another piece of paper. It does not hold you in harm's way. It doesn't do anything for you or against you. It is simply a piece of paper that memorializes a decision you have made on the record. It makes it a little bit easier for someone to point to a document and say here we are.

MR. SWINDELL: So our minutes are not sufficient?
MR. JENNINGS: Apparently not. I thought they were. I thought the actual transcript would be sufficient. But I guess it makes it easier if there is a piece of paper that someone can put in as Exhibit C that says, here it is, Commissioner Burke says he will not recuse himself.

MR. SWINDELL: Mr. Meros?

MR. MEROS: Mr. Chairman, if I may. I partially agree with Mr. Jennings, but, to some extent, I disagree. Because what the court has said, an appellate court's jurisdiction is based on written orders, not something in a transcript, not an oral statement. And, as a appellate, or as a party to an appeal, that party has a constitutional right under Florida law to an appeal. To the extent that there is any refusal to enter a one-page, one-word order saying "denied", then that potentially impacts our constitutional right to go into district court and get a decision on the matter. That's why I have requested that our constitutional rights be preserved to appeal, period.

MR. SWINDELL: Well, I think there is no argument that our committee counsel prepare those written orders. It's up to the individual members
if they choose to sign them or not. But we will
do what we have asked and make sure you have a
written order to work from.

MR. MIGUEZ: I'm sorry, point of
clarification?

MR. SWINDELL: Yes, Mr. Miguez.

MR. MIGUEZ: I think there is -- there is a
Port Everglades matter, which I guess was just
ruled upon, and then there is a Port of Miami. As
I understand counsel, one, the record has been
closed, the appeal has been heard, and they are
asking us to recreate, I guess, a record.

I also understand from counsel that we are
going to have to -- we have a stay on that Port of
Miami matter. So we really can't recreate a
record without lifting the stay, and then I guess
imposing the stay after we decide to recreate the
record. I don't know what the advice --

MR. SWINDELL: I think the advice is we leave
that case alone.

MR. MIGUEZ: -- is that we do nothing?

MR. JENNINGS: Correct, on Miami, we do
nothing.

MR. MIGUEZ: Okay.

MR. JENNINGS: The document I'm talking about
is simply for the Port Everglades matter.

MR. MIGUEZ: Fair enough, thank you.

MR. BURKE: I'm sorry, I thought we were going to be asked to do Port of Miami, also.

MR. JENNINGS: Oh, no, sir. No, sir.

MR. MIGUEZ: I think that's where the confusion came in.

MR. BURKE: My question was specifically to Port of Miami, sorry.

MR. MIGUEZ: Thank you.

MR. SWINDELL: You're welcome.

MR. BURKE: Thank you, Commissioner, for clarification.

MR. SWINDELL: Okay. Back to number 6, consideration of Motion for Stay Pending Appellate Review, filed by Everglades Pilots Association. And you have -- that's in the part two of your documentation for this committee meeting.

MR. JENNINGS: Any question for Mr. Meros? Because this is his request.

MR. SWINDELL: Do you have a question?

MR. JENNINGS: No, I said if there are any questions for Mr. Meros.

MR. SWINDELL: So Mr. Meros will be the --

MR. JENNINGS: Yes, sir.
MR. SWINDELL: -- representative for the Port Everglades.

Is there a motion to grant or deny the consideration of the motion?

MR. WINEGART: I make a motion to grant.

MR. SWINDELL: A motion to grant.

Is there a second?

MR. FERNANDEZ: Second.

MR. SWINDELL: Seconded by Commissioner Fernandez.

Discussion?

So, Clark, can you tee this one up for us, and let us non-attorneys know what this action will ultimately do?

MR. JENNINGS: In a -- let me see if I can consolidate this a bit, Mr. Chairman. Essentially what is being requested is that this matter -- the matter with Port Everglades be stayed, pending the appellate review, addressing the issue that we just dealt with. Again, as stated previously, the motion to request the committee to compel recusal. And then the motions to ask the individuals to recuse themselves are similar, if not identical, to the matter that was raised in the Port of Miami, that, as you have heard, is up on appeal.
The request is to stay any action with Port Everglades until the court addresses the matter with the Port of Miami. Because if the court says, Committee, you are incorrect, you do have the authority to compel, then we are back to square one. Similarly if the court says, Oh, Commissioner Burke, Commissioner Miguez should have recused themselves, again, we are back to square one.

So the issue is exactly the same, and what is being requested is that we hold up the process in Everglades until this general issue of recusals can be addressed by the court.

MR. SWINDELL: So it essentially would stop the entire rate review process until the appellate court makes its decision?

MR. JENNINGS: That is correct, sir.

MR. SWINDELL: So currently there is a motion on the floor to grant the Motion for Stay Pending Appellate Review.

Any questions from commissioners?

MR. JENNINGS: And, Mr. Chairman, of course I did not go into all of the legal argument created by Mr. Meros. You have read them, and if you have any questions, I suggest you direct them to Meros.
MR. SWINDELL: So the one follow-up could be if, you know, we do not grant this motion, we proceed to go through the rate setting process, if there is an issue with participation on the rate setting committee, we all go back to square one?

MR. JENNINGS: Yes, sir. And of course the parties making this motion could of course take this matter as an interrogatory appeal to the district court, also.

MR. SWINDELL: Okay. I don't see any questions, so the motion on the floor is to grant the Motion for Stay Pending Appellate Review.

Would you please call the roll?

MR. SHAW: Commissioner Burke?

MR. BURKE: No.

MR. SHAW: Commissioner Fernandez?

MR. FERNANDEZ: Yes.

MR. SHAW: Commissioner Miguez?

MR. MIGUEZ: No.

MR. SHAW: Commissioner Ramos?

MR. RAMOS: No.

MR. SHAW: Commissioner Trueba?

MR. TRUEBA: No.

MR. SHAW: Commissioner Winegart?

MR. WINEGART: Yes.
MR. SHAW: Commissioner Swindell?

MR. SWINDELL: No.

So the motion is denied to stay the pending appellate review.

Any new business before the rate review committee?

My only piece would be that we have dates tentatively set for the Port Everglades --

MR. SHAW: I have held off anything until this was voted on.

MR. SWINDELL: Okay.

MR. SHAW: Do we want to do mid-March'ish?

MR. SWINDELL: Yeah, I think we have looked at dates, March 12th and 13th possibly, if counsel could check your calendars.

MR. PANZA: That's for the hearing in --

MR. SWINDELL: Fort Lauderdale.

MR. PANZA: -- Fort Lauderdale, okay.

MR. SHAW: Are we going to do a two day or three day?

MR. SWINDELL: Well, I thought we would do Thursday and Friday.

MR. SHAW: So the 12th and 13th.

MR. SWINDELL: And if we could, I guess, include in the announcement that if we have to go
into Saturday, we would, but I, as your Chair, would drag you over hot coals to make me stay a third day. But I think we can get the matter decided in less than two days. So it will be a Thursday and Friday --

MR. JENNINGS: So we're looking at the 12th and 13th of March.

MR. SWINDELL: Is that when you were going to be traveling?

MR. JENNINGS: Perfect. It's perfect.

MR. SHAW: I will have to check with Commissioner Kurtz, too. From what I understand, she will be participating in that?

MR. JENNINGS: Yes.

MR. SHAW: Okay.

MR. SWINDELL: Mr. Panza, does that work for you?

MR. PANZA: Yeah, I believe that's fine.

MR. SHAW: Commissioner Swindell, are we looking at the port visit on the 11th, or that would also take place on the 12th?

MR. SWINDELL: The thought was that would take place on the -- hold on a second, let me -- the 12th. So ideally similar to what we did in Miami, we would do the port inspection the morning...
of the 12th, convene the meeting around noontime on Thursday, start committee deliberations on Thursday, and then continue over into Friday, if necessary. Similar type, probably do it --

MR. TRUEBA: The ground, the port on the pilot will be on Thursday morning?

MR. SWINDELL: Thursday morning, so maybe 9:30, 10:00. We will have to work on the time frames, give people time to do the port tour, get back to the hotel, and reconvene as close to noontime as we could, if that seems agreeable to everyone else?

Mr. Ramos, does that work for you?

MR. RAMOS: Yeah. Yeah.

MR. SWINDELL: So we will check with Commissioner Kurtz, and hopefully that works for her as well.

Mr. Meros, does that work for you?

MR. MEROS: Certainly not, Your Honor, we will be -- we will be appealing to the First DCA --

MR. SWINDELL: Okay.

MR. MEROS: -- to obtain a stay.

MR. SWINDELL: Got you, okay. But if that stay doesn't happen, does March 12th and 13th work
for you?

MR. MEROS: I would have to -- I would have
to find out. I have no idea. But I have a pretty
good idea of what the First DCA is going to do.

MR. SWINDELL: Okay. Thank you.

Just conceptually, the 12th and 13th.

I don't think there is any new business.

Old business, before the review committee?

Clark, anything we haven't taken care of?

MR. JENNINGS: No, sir.

MR. SWINDELL: All right. Seeing there is no
other business, it is 9:49, we will stand
adjourned.

(Hearing concluded)
CERTIFICATE OF REPORTER

STATE OF FLORIDA     )
COUNTY OF BAY       )

I, Rebecca Hughen, Court Reporter, do hereby certify that I was authorized to and did report the foregoing proceedings, and that the transcript is a true and correct record of the proceedings to the best of my ability.

Done and dated this 2nd day of February, 2015, at Bay County, Florida.

[Signature]
Rebecca Hughen