

FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
BOARD OF PILOT COMMISSIONERS
PILOTAGE RATE REVIEW COMMITTEE

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In re: Application for a Change in Rates
Of Pilotage, filed by the Florida
Caribbean-Cruise Association, and
Alternative Application for a Change in
Rates of Pilotage for PortMiami, filed by
Biscayne Bay Pilots, Inc.

**RESPONSE TO MOTION AND SUGGESTION TO COMMISSIONER TRUEBA
THAT HE DISQUALIFY HIMSELF FROM PILOTAGE RATE PROCEEDINGS
INVOLVING THE FLORIDA-CARIBBEAN CRUISE ASSOCIATION AND
BISCAYNE BAY PILOTS**

COMES NOW, the Florida-Caribbean Cruise Association (“FCCA”) by and through its undersigned counsel and pursuant to Rule 28-106.204, Florida Administrative Code, hereby files this Response to the Biscayne Bay Pilot’s Motion and Suggestion to Commissioner Trueba That He Disqualify Himself from Pilotage Rate Proceedings Involving the Florida-Caribbean Cruise Association and Biscayne Bay Pilots, and states as follows:

1. The Biscayne Bay Pilot’s (“BBP”) Motion to Disqualify Commissioner Trueba is another step in BBP’s campaign to minimize non-pilot representation on the Rate Review Committee and undermine the statutory requirements of Chapter 310. BBP has gone to such lengths to manufacture reasons to seek disqualification of non-pilot members that if BBP’s allegations can form the basis for disqualification, then it has inadvertently set forth genuine grounds for disqualification of port pilot members of the Committee as well.

I. The Statements Made By Commissioner Trueba Are Not Sufficient To Warrant Disqualification.

2. BBP’s motion to disqualify Commissioner Trueba for statements made at the January 21st Legislative Committee meeting cannot form the basis for disqualification. BBP

unreasonably assumes that Commissioner Trueba's statement that he would not currently support *a legislative change to the piloting statutes* means that Commissioner Trueba is unable to objectively consider specific rate change applications at PortMiami. This is not an objective, well-founded fear, and BBP's motion must be denied.

3. Prior to Commissioner Trueba's statements, an attorney for the Florida Harbor Pilots Association ("FHPA") outlined a legislative proposal that would incorporate a cost of living increase, based on the Consumer Price Index ("CPI"), into Chapter 310 and would provide for automatic adjustments to pilotage rates based on inflation as set by the CPI. See Motion and Suggestion to Disqualify Commissioner Trueba, Ex. B, p. 48, ln. 5 – p. 50, ln. 14. Counsel for the FHPA repeatedly used the word "inflation" in outlining the proposal.

4. Commissioner Trueba made his statements in response to the FHPA's legislative proposal. The first statement made by Commissioner Trueba outlined in BBP's motion¹ does not mention any pilot association or any rate change application. Commissioner Trueba simply stated that he does not believe the current rate setting methodology to be "equitable" or "fair," that the process results in "haphazard" rates being charged to ships, and that until rates are charged in a more equitable manner, he could not support the legislative proposal of a CPI *inflation* increase. Commissioner Trueba's statements show no bias or prejudice towards any pilot association or any pending rate change application, they simply reference the legislative proposal.

¹ Mr. Trueba: I'm – I am trying to – I think the way in which revenue is charged to the, to the ships, is haphazard. It's – its – and it might be the best way that we use, that, that we have to charge your clients. But until that is discussed, and it's equitable, until that regular charge is equitable, or until you go to some cost reimbursement methodology in charging your fees I cannot support a, a rate increase. Now once that's established, and that discussion is had, and, and, and the rate setting, the rates itself are fair, then I would, I would support an inflation, and, and.

5. In fact, Commissioner Trueba's statements regarding the problematic nature of the rate setting process were echoed by Commissioner Kurtz, a port pilot, when she stated:

So, you know, again, I, you know, **I agree with Commissioner Trueba that the process is flawed**, and, and we, you know, we do need to do something.

Motion and Suggestion to Disqualify Commissioner Trueba, Ex. B, p. 59, lns. 13-16

(emphasis added). If Commissioner Trueba's statements about the rate setting process being inequitable warrant disqualification, then, at a minimum, Commissioner Kurtz – who *agreed* with Commissioner Trueba's statements – would also be subject to disqualification.

6. The second statement made by Commissioner Trueba, which specifically references PortMiami,² also cannot form the basis for disqualification. In the first part of the statement, Commissioner Trueba points out that the revenue collected from piloting cruise ships accounts for a majority of the pilots' revenue despite the fact that cruise ships are a minority of the pilot's handles. This is a statement of fact. It may be a fact that BBP finds unpleasant and would prefer not be mentioned, but it shows no bias or prejudice whatsoever.

7. In the second part of his statement, Commissioner Trueba goes on to say that he cannot support the legislative proposal to "index" the rates or use an automatic CPI "inflation" until rates are charged in a more equitable manner. While Commissioner Trueba used statistics from PortMiami as an example of how the rate making process leads to inequitable rates, he made no statements directed in any way regarding any pending rate

² Mr. Trueba: And I'll go – I'll go to a Miami hearing, in essence, the, the cruise industry is paying for some 65 percent of revenue based on 33, or 30 something percent of handles. I – I can't – I can't understand that. That means the shipping industry is, is having 65 percent of the handles, and just go at 33 percent of the revenue. I think there's something inequitable in that rate itself. So if you index that, that rate, because essentially that's what you're doing, in what how you're charging these different ships, then I cannot support that. That's in Miami. I don't know about the rest of the ports, I mean, but until that is resolved, I cannot support an inflation.

change application at PortMiami, or whether he supports either the FCCA or BBP. Commissioner Trueba's statements were purely regarding whether he could support a *legislative change* to include a CPI inflation.

8. Although one component of BBP's alternative application for a rate change is the request for CPI adjustments moving forward, Commissioner Trueba was not commenting on any requests made by BBP in their application, but on the proposed legislative change placed before the Committee. In fact, BBP's rate increase application was not filed for more than *two months after* Commissioner Trueba made his statements, on March 24, 2016. Moreover, Commissioner Trueba stated that as long as rates can be applied in an equitable manner, he would consider the legislative proposal for a CPI adjustment. It is a totally unfounded assumption on the part of BBP to believe that Commissioner Trueba's desire for equity in the pilotage rates means he automatically supports the FCCA's rate decrease request and opposes BBP's rate increase request. Equity in the rates could equally be achieved by increasing rates for certain vessels as it could be by decreasing rates for certain vessels. The desire for equity does not indicate bias or prejudice towards any party. To the contrary, the fact that Commissioner Trueba suggested he wanted rates applied in an equitable manner specifically shows he wants fairness all-around. The FCCA would like to think BBP wants exactly what Commissioner Trueba suggested - equity and fairness.³

³ Interestingly, no mention was made regarding Commissioner Trueba's comment that the Legislative Committee should look to the Florida Department of Transportation statutes which provide a basis for an overhead rate multiplier and consider using something similar for a cost recovery model. Motion and Suggestion to Disqualify Commissioner Trueba, Ex. B, pp. 45-46. This comment indicates Commissioner Trueba's open-mindedness about rate changes and the process as a whole. He is suggesting that the Committee look at alternative ways for determining rates. These suggestions cannot be ignored in determining Commissioner Trueba's objectivity.

9. The unreasonableness of BBP's disqualification request is further made clear when the context of the Board's Legislative Committee meeting, and the issues being discussed, are considered. The FHPA set forth, for the Board's consideration, a proposed legislative change that would include automatic, annual CPI inflation adjustments to pilotage rates in the State. It is the Board's responsibility, as a collegial body and agency head, to discuss the pros and cons, the benefits and drawbacks, of such a proposal. If Board members cannot weigh in, in favor of, or against, or express appreciation or concerns over a proposal without fear that those statements will subject them to disqualification in unrelated Pilotage Rate Review Proceedings, Board members will be paralyzed from acting in the capacity required. The fact that BBP's rate application, which was filed two months after the Legislative Committee meeting, also includes a request for CPI adjustments should not prevent the Commissioners from discussing whether they would support a legislative proposal to amend the piloting statutes to include automatic CPI adjustments to rates for all ports. In fact, if BBP's motion is granted, it could very well serve to stifle the very conversation that the Legislative Committee is designed to evoke.

10. Even Commissioner Kurtz weighed in on whether she thought the FHPA's legislative proposal was a good one, stating:

I just want to address what Commissioner Assal just said, is, yes, it would be automatic 1 or 2 or 3 percent, but what happens is pilot groups don't go for increases often, it's 10 years, 15 years, because it's such a **cumbersome and expensive process** to go through. **So really to save everybody time and money I think the effort was just to make it smaller and more frequent to avoid the kind of, you know, procedure we went through at the last one, that it's almost, it's a year and a half and it's still not resolved.**

So, you know, again, I, you know, I agree with Commissioner Trueba that the process is flawed, and, and we, you know, we do need to do something. I think

this is a real effort to minimize the impact. Actually, well, like I can't, because it's a specific thing, but, you know, **pilot rates are flat basically, because we don't get increases, and there's just no other way to recover money that were putting out. So that, that's what is behind it. You know, it's not that we just want this automatic raise every year. That's really not the case.**

Motion and Suggestion to Disqualify Commissioner Trueba, Ex. B, p. 59, lns. 1-24. Clearly, Commissioner Kurtz is supportive of the CPI inflation proposal, and she discusses the merits and purpose of the proposal with firsthand knowledge of why the proposal was set forth (“*So that, that's what is behind it.*”). If Commissioner Trueba's statements purportedly demonstrate bias or prejudice, then it is impossible for the FCCA not to have an objective, reasonable belief that, based on these statements, Commissioner Kurtz will support BBP's rate increase application or, at the very least, the CPI inflation adjustment contained therein, and oppose the FCCA's rate decrease request. Commissioner Kurtz also makes statements which are clearly regarding PortMiami, but not by name (“[P]ilot groups don't go for increases often, it's 10 years, 15 years...” “*Actually, well, like I can't, because it's a specific thing, but, you know, pilot rates are flat basically, because we don't get increases...*”), and which show that the Commissioner supports many of the arguments set forth by BBP in its rate increase application.⁴ Commissioner Jacoma, although he does not sit on the Rate Review Committee for the PortMiami hearing, also argued in favor of the proposal claiming it would be “unfair” not to give a CPI adjustment, and thus showing his favoritism towards BBP (his own pilot organization) and its rate increase proposal.⁵

⁴ BBP's rate increase application argues that it has not sought a rate increase in 16 years, that its revenues and rates are flat, and that its expenses are increasing which requires an increase to rates to recover these costs. These are all statements echoed by Commissioner Kurtz.

⁵ “Once a rate is changed, it takes 18 months before somebody can come back from that port and ask for a change. So the potential exists today that you could have a port where the pilots are seeing double-digit inflation who can't have their rate adjusted for quite a period of time, and that would be

11. Finally, it is histrionic for BBP to claim that Commissioner Trueba's comments "make clear that he has already accepted the *fundamental premise of FCCA's rate decrease application* and is favorably disposed to granting the rate reduction requested by the FCCA, and, further, that he will not be in a position to impartially evaluate BBP's alternative application for a rate increase." Motion and Suggestion to Disqualify Commissioner Trueba, p. 3 (emphasis added). Commissioner Trueba made no statements indicating bias or prejudice towards either party or their rate change applications. Moreover, the FCCA's rate decrease *application is 419 pages and alleges a multitude of reasons (e.g., unsupported and inflated operating expenses, improper consideration of millions of dollars in retirement payments as an expense, significantly decreased workloads overall, port complexity, etc.)*, which it believes justify a rate decrease. It is unsupported rhetoric from BBP to claim that the inequity in revenues and workloads between cruise and non-cruise line vessels constitutes the "fundamental premise" of the FCCA's application.

12. Commissioner Trueba's statement regarding the FHPA's legislative proposal cannot reasonably be construed as any specific bias or prejudice towards the FCCA or BBP. BBP has failed to set forth an objective, well-founded fear that Commissioner Trueba will not objectively render a judgment on the FCCA's and BBP's rate change applications, and its motion for disqualification should be denied.

II. Commissioner Trueba Did Not Miss Fifty Percent Of Meetings As Alleged By BBP Based On Attendance Records

13. BBP's request that Commissioner Trueba be disqualified for allegedly missing fifty percent of meetings within a twelve month period must be denied because it is based on

quite unfair to that particular port." Motion and Suggestion to Disqualify Commissioner Trueba, Ex. B, p. 53, Ins. 8-15.

a fundamental miscalculation of what constitutes a twelve month period, and because BBP has no authority under section 455.207 to seek disqualification.

14. BBP argues that Commissioner Trueba missed the following Board of Pilot Commissioner Meetings from October 2, 2014 to October 2, 2015:

- October 2 - 3, 2014: Excused absence
- December 18, 2014: Absent
- January 22, 2015: Present
- March 15, 2015: Present
- April 23, 2015: Present
- June 2, 2015: Present
- July 1, 2015: Present
- July 13, 2015: Excused absence
- August 12, 2015: Present
- September 17, 2015: Excused absence
- October 1, 2015: Excused absence
- October 2, 2015: Excused absence

According to BBP, because Commissioner Trueba missed six of the above twelve Board meetings constituting a 50% absence rate, his membership on the Board is void under Florida Statute §455.207(3). The fundamental flaw in BBP's argument is that section 455.207(3) states that the fifty percent absences must be "**within any 12 month period,**" and BBP alleges that Commissioner Trueba missed fifty percent of meetings "for the time period of *October 2, 2014 to October 2, 2015...*" BBP Motion and Suggestion to Disqualify Commissioner Trueba, p. 7, ¶14 (emphasis added). *October 2, 2014 to October 2, 2015 is not a twelve month period*, it is twelve months and a day. Twelve months, or 365 days, would be from October 2, 2014 to October 1, 2015. To include the absence on October 2, 2015 would be to account for absences over a period of *366 days, not 365 days*, and cannot constitute sufficient grounds to void membership under Florida Statute §455.207(3). Assuming the facts as alleged by BBP are true, for the period of *October 2, 2014 to October 1, 2015*,

Commissioner Trueba missed, at most, five of the eleven meetings held, which does not constitute fifty percent of all Board meetings during that time. On this basis alone, the absence requirement for voiding membership is not met.

15. Finally, nothing in section 455.207 gives BBP the right to seek disqualification of a Board member. Section 120.665, for example, provides parties with the right to seek disqualification of an “agency head” by filing a suggestion with the agency that the agency head be disqualified. Section 455.207, however, does not provide a right for individuals to seek disqualification of Board members. While DBPR would have the right, if statutory conditions existed, to void Commissioner Trueba’s membership and fill the spot if it deemed necessary, nothing in the statute gives BBP the right to seek disqualification on such grounds.

WHEREFORE, the Florida-Caribbean Cruise Association respectfully requests that Commissioner Trueba **DENY** BBP’s Motion and Suggestion to Disqualify.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by

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