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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

FLORIDA-CARIBBEAN CRUISE
ASSOCIATION,

Petitioner/Appellant,

Case No.: 1D16-2391
LT. No.: PRRC2014-1

v.

BISCAYNE BAY PORT
PILOTS,

Respondent/Appellee.

_____ /

PILOTS’ RESPONSE TO ORDER TO SHOW CAUSE

Pursuant to this Court’s Order of May 31, 2016, directing Respondent Biscayne Bay Pilots, Inc. (“BBP” or the “Pilots”) to show cause why the Petition for Writ of Prohibition filed by the Florida-Caribbean Cruise Association (“FCCA”) should not be granted, BBP files this response and states:

FCCA’s Petition has two parts. First, it specifically seeks to disqualify Commissioner Carolyn Kurtz, a harbor pilot from the Tampa Bay Pilots Association, from participating in pending proceedings before the Pilotage Rate Review Committee (“Rate Review Committee”) involving the rates of pilotage in PortMiami. FCCA Petition, p. 10, ¶ 20. More generally, and without offering any factual basis for the request, FCCA also asks that the Court “enter an order prohibiting all port pilots on the Board of Pilot Commissioners from sitting on the

Rate Review Committee due to their bias against the FCCA and in favor of BBP.”
Id. Both requests are contrary to statute and established case law, and FCCA’s Petition for Writ of Prohibition should be summarily denied.

First, it is important to note that FCCA’s petition is just one of two Petitions for Writ of Prohibition now pending in this Court in connection with the pilotage rate proceedings in PortMiami. On May 24, 2016, the Pilots also filed a petition seeking review of three orders entered by members of the Rate Review Committee. Unlike the petition of the FCCA, which seeks a blanket disqualification of all pilots without setting forth any allegations with regard to any specific pilot other than Commissioner Kurtz, the BBP petition is based upon specific facts giving rise to a reasonable objective fear of bias for each of the three Commissioners. The orders of Commissioners Sherif Assal, Louis Sola, and Carlos Trueba reflect that the commissioners declined to disqualify themselves from participating in the rate proceedings, despite the Pilots’ arguments that the commissioners were biased and prejudiced against the Pilots within the meaning of section 120.665, Florida Statutes. The Pilots’ petition, pending in Case No. 1D16-2388, can be found in the **Appendix, Exhibit 1.**¹

¹ Only the petition is included in Appendix, Exhibit 1. The appendix to the petition is voluminous and is already on file with this Court in Case No. 1D16-2388 and presumably can be accessed electronically by the Court and its staff through that case number.

Second, although FCCA seeks a writ of prohibition prohibiting all five pilots serving on the Board of Pilot Commissioners (“BOPC”) from participating in the Rate Review Committee’s consolidated cases, orders from only three pilots have been entered. These are the orders entered by Commissioners Kurtz and James Winegeart, the BOPC pilots designated to serve on the Rate Review Committee, and the order entered by Commissioner Michael Jaccoma. *See* Appendix to FCCA Petition (“FCCA Appendix”), Exhibits 2-4. Commissioners Kurtz and Winegeart denied FCCA’s disqualification motions, and Commissioner Jaccoma granted the motion.² *Id.* Because the remaining two pilot members of the BOPC have not entered orders in response to FCCA’s motion to disqualify them, the question of their service on the Rate Review Committee in connection with the pilotage rate proceedings is not properly before this Court. Without written orders from the individual commissioners, this Court does not have jurisdiction to review their decisions. *See Biscayne Bay Pilots, Inc. v. Florida Caribbean-Cruise Ass’n*, 160 So. 3d 559, 564-65 (Fla. 1st DCA 2015) (*Biscayne Bay Pilots I*); *Owens v. State*, 579 So. 2d 311, 312 (Fla. 1st DCA 1991) (“Without a signed written order the threshold requirement for

² Commissioner Jaccoma is a member of BBP and a pilot working in PortMiami. Accordingly, he recused himself from participating in the rate proceedings involving his home port. He does not serve on the Rate Review Committee.

an appeal cannot be met because without the written signed order there is nothing to appeal.”).

I. Procedural Background

FCCA generally recounts in its petition the procedural background of the competing pilotage rate change proceedings in PortMiami beginning in March of 2014. FCCA Petition, pp. 1-5, ¶¶ 1-11. *See also Appendix, Exhibit 1*, pp. 6-15 (BBP’s discussion of procedural history). An understanding of this Court’s recent opinions relating to that procedural history also is important, which are not addressed in any detail in FCCA’s petition.

In 2015, this Court decided three cases involving the Rate Review Committee and FCCA, which filed applications in 2014 to reduce the rates of pilotage for passenger vessels by 25% in both PortMiami and Port Everglades. All three cases construed section 120.665, the same statute at issue in this petition and in BBP’s pending petition in Case No. 1D16-2388. In the first case, *Biscayne Bay Pilots I*, BBP sought review through a petition for writ of prohibition of an order from the full Rate Review Committee declining to disqualify former Commissioners Thomas Burke and Enrique Miguez, who were senior executives of cruise line members of FCCA. Although Commissioners Burke and Miguez had orally declined to disqualify themselves, orders from the individual commissioners had not been rendered. 160 So. 3d at 560-61. This Court initially treated the Pilots’ petition as one

seeking review of non-final agency action pursuant to section 120.68(1), Florida Statutes. *Id.* at 562. However, in its opinion, the Court concluded that “prohibition is the appropriate remedy to review the order in this case.” *Id.*

The Court then determined that the full Rate Review Committee did not have the authority to rule on the Pilots’ Motion to Disqualify two of the Committee’s members, holding instead that such authority rested with the individuals to whom the motion was directed. *Id.* at 563. Because the individual commissioners had not filed written orders memorializing their oral rulings on the Motion to Disqualify, the Court found that the petition was premature, and the Court did not have jurisdiction to review the commissioners’ oral decisions. *Id.* at 564. Thus, the Court denied the petition without prejudice to the Pilots’ right to seek review of written orders entered by the individual commissioners. *Id.*

While *Biscayne Bay Pilots I* was pending, the Port Everglades Pilots filed a motion seeking the disqualification of Commissioners Burke and Miguez for the same reasons expressed by the Biscayne Bay Pilots. Following denial of those motions by the commissioners, the Port Everglades Pilots also sought review of the orders in this Court through a petition for writ of prohibition. *Port Everglades Pilots Ass’n v. Florida-Caribbean Cruise Ass’n*, 170 So. 3d 952, 953 (Fla. 1st DCA 2015). Meanwhile, following the entry of orders from Commissioners Burke and Miguez denying the Biscayne Bay Pilots’ motion, BBP again filed a petition for a writ of

prohibition. *Biscayne Bay Pilots, Inc. v. Fla. Caribbean-Cruise Ass'n*, 177 So. 3d 1043, 1044 (Fla. 1st DCA 2015) (*Biscayne Bay Pilots II*).

In both the *Port Everglades Pilots* opinion and in *Biscayne Bay Pilots II*, this Court held that the Pilots' motion for disqualification should have been granted because "a reasonably prudent person would fear that he or she would not obtain a fair and impartial proceeding before Committee members who are senior executives of the *de facto* parties that initiated the proceeding and whose rate change application is awaiting the Commissioners' decision." *Biscayne Bay Pilots II*, 177 So. 3d at 1045, quoting *Port Everglades Pilots*, 170 So. 3d at 956-57.

II. Statutory Background

Chapter 310, Florida Statutes, governs pilots, piloting, and pilotage in the waters, harbors, and ports of Florida. Section 310.141 requires that, except in certain narrow circumstances, all vessels shall have a licensed state pilot or deputy pilot on board to direct the movements of the vessel when entering or leaving ports of the state or when underway on the navigable waters of the state's bays, rivers, harbors, and ports. Section 310.011 creates the ten-member BOPC, appointed by the Governor, "to perform such duties and possess and exercise such powers relative to the protection of the waters, harbors, and ports of this state as are prescribed and conferred on it in this chapter." In addition to other responsibilities, the BOPC

determines the number of pilots in each port (section 310.061) and disciplines licensed pilots when appropriate (section 310.101).

Although the BOPC has numerous statutory responsibilities, it is not responsible for setting the rates of pilotage in each port. Rather, that is the responsibility of the Rate Review Committee, which consists of seven members, all of whom are also members of the BOPC. § 310.151(1)(b), Fla. Stat. The membership of the Rate Review Committee consists of:

[T]wo board members who are licensed state pilots actively practicing their profession, who shall be appointed by majority vote of the licensed state pilots serving on the board; two board members who are actively involved in a professional or business capacity in the maritime industry, marine shipping industry, or commercial passenger cruise industry; one board member who is a certified public accountant with at least 5 years of experience in financial management; and two board members who are citizens of the state.

§ 310.151(1)(b), Fla. Stat. (Emphasis supplied). The latter three board members shall not be involved in, or have any financial interest in, the piloting profession, the maritime industry, the marine shipping industry, or the commercial passenger cruise industry. § 310.011(1), Fla. Stat.

Applications for a change in rates of pilotage may be filed by “[a]ny pilot, group of pilots, or other person or group of persons whose substantial interests are directly affected by the rates established by the committee” § 310.151(2), Fla. Stat. The Rate Review Committee is charged with investigating an application for a change in the rates of pilotage and conducting a public hearing on the application. §

310.151(3), Fla. Stat. The Rate Review Committee considers certain factors listed in the statutes to determine “whether the requested rate change will result in fair, just, and reasonable rates.” *Id.* & § 310.151(5), Fla. Stat.

Once the Rate Review Committee makes a decision on an application, the Rate Review Committee is required to issue a “written notice” stating that the Committee intends to modify the pilotage rates in the port where the change was requested. § 310.151(4), Fla. Stat. (emphasis supplied). Such notice must be provided to an applicant either in person or by certified mail and also published in the Florida Administrative Register and in a newspaper of general circulation in the affected port area. *Id.*

Within 21 days after receipt or publication of the notice, any person whose substantial interests will be affected by the intended Rate Review Committee action may request a hearing pursuant to the APA. *Id.* In accordance with usual practices under the APA, section 310.151(4)(a) provides that if the petition requesting a hearing raises a disputed issue of material fact, the hearing will be conducted by an Administrative Law Judge (“ALJ”) at the Division of Administrative Hearings (“DOAH”) pursuant to sections 120.569 and 120.57(1), Florida Statutes, unless waived by all parties. If the Rate Review Committee concludes that the petition does not raise a disputed issue of material fact, the Rate Review Committee’s decision

shall be considered final agency action for purposes of an appeal to a District Court of Appeal pursuant to section 120.68. *Id.*

Contrary to usual procedures involving proposed agency action under the APA, the Rate Review Committee's proposed rate determination is not stayed and is immediately effective even if the applicant or a substantially affected person or entity requests an administrative hearing. § 310.151(4)(b), Fla. Stat. Because this immediate effectiveness is unusual and departs from the typical agency "norm," the statute provides that, pending entry of a final order in the proceeding, the pilots in the subject port are required to deposit in an interest-bearing account all amounts received that represent the difference between the previous rates and the proposed rates. *Id.* Such amounts ultimately upheld following the administrative litigation are distributed after entry of the final order. *Id.*³

If an administrative hearing on the Rate Review Committee's proposed change in rates is heard by an ALJ at DOAH, the ALJ enters a recommended order, which is then considered by the Rate Review Committee, which enters the final order. §§ 120.569, 120.57(1), 310.151(4), Fla. Stat. Decisions of the Rate Review

³ There was discussion at oral argument in *Biscayne Bay I* as to whether section 310.151(4)(b) applies in circumstances involving a rate decrease, as opposed to a rate increase. The Court's majority opinion does not address this issue. The plain language of the statute makes no distinction between circumstances involving a rate increase and a rate decrease.

Committee regarding rates are not appealable to the BOPC. § 310.151(7), Fla. Stat. Thus, the Rate Review Committee's entry of final order pursuant to section 310.151 proceedings is "final agency action" that is then subject to appellate review by this Court or another appropriate District Court of Appeal. § 120.68(1), Fla. Stat.

III. FCCA's Motion to Disqualify Commissioner Kurtz and Other Pilots

Commissioner Kurtz, a pilot from the Tampa Bay Pilots Association, and Commissioner Winegeart, a pilot from the St. Johns Bar Pilots Association, serve on the Rate Review Committee as the "two board members who are licensed state pilots actively practicing their profession, who shall be appointed by majority vote of the licensed state pilots serving on the board." § 310.151(1)(b), Fla. Stat. Neither of these pilots works in PortMiami, and neither is a member of BBP. Thus, they do not stand to benefit from, or be hurt by, any change in the rates of pilotage in PortMiami, which is the subject of the consolidated hearing previously scheduled for June 1-3, 2016, and now in abeyance.⁴

Nonetheless, FCCA asserts that by virtue of their profession as pilots, they – and all other pilot members of the BOPC – are inherently biased and prejudiced against FCCA and that the statutory membership requirements of the Rate Review Committee should therefore be ignored. Such a position is contrary to the plain

⁴ The other pilots who serve on the BOPC are Commissioner Jaccoma, from PortMiami, and two pilots from Port Everglades, Commissioners Bruce Cumings and Cheryl Phipps.

language of section 310.151(1)(b), which calls for two pilot members on the Rate Review Committee and constitutes a legislative determination that mere employment as a pilot is not grounds for disqualification from that committee.

Commissioner Winegeart has been a member of the Rate Review Committee for less than two months. **Appendix, Exhibit 2**, p. 6. FCCA makes absolutely no factual allegations concerning his alleged personal bias except to say that no pilots should be allowed to serve on the Rate Review Committee because all pilots allegedly “pursue a uniform agenda as it relates to pilotage rates across the state” FCCA Petition, p. 21, ¶ 34. In fact, no specific reference is made to Commissioner Winegeart whatsoever in the FCCA petition except to note that he is a member of the Rate Review Committee. *Id.*, p. 10, ¶ 19. Simply suggesting that all pilots, no matter where they work or what personal views they may hold, are biased and prejudiced against FCCA is insufficient to result in disqualification of a decisionmaker.

A petitioner’s “subjective fears” are not sufficient to support a motion for disqualification; a motion for disqualification must contain “an actual factual foundation for the alleged fear of prejudice.” *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986). The fear of bias must be objectively reasonable, and the facts and reasons given for disqualification “must tend to show personal bias or prejudice.” *Shuler v. Green Mountain Ventures, Inc.*, 791 So. 2d 1213, 1215 (2001) (emphasis

supplied). FCCA has not even attempted to make any such showing as to Commissioner Winegeart, and its request that he be disqualified should be rejected as legally insufficient.

Concerning Commissioner Kurtz, FCCA quotes her discussion of the arguments and evidence during the course of deliberations at the now-invalidated rate hearing on FCCA's application in 2014 to suggest that she demonstrated bias and prejudice against the FCCA. FCCA Petition, p. 11, ¶¶ 23-26. Long-established case law concerning judges provides that comments made by a decision-maker during the course of a proceeding do not provide a basis for disqualification. *E.g.*, *Mobil v. Trask*, 463 So. 2d 389, 391 (Fla. 1st DCA 1985) ("A judge is not required to abstain from forming mental impressions and opinions during the course of the presentation of evidence."); *Brown v. Pate*, 577 So. 2d 645, 647 (Fla. 1st DCA 1991) (prior judicial determination by a judge may not serve as a basis for disqualification); *Gieseke v. Grossman*, 418 So. 2d 1055, 1056 (Fla. 4th DCA 1982) ("It is well established that respondent's adverse judicial rulings alone may not be the basis for disqualification of a judge for bias or prejudice.").

Thus, it is simply irrelevant how Commissioner Kurtz voted in the now-invalidated 2014 proceeding, what motions she made, what comments she made in discussing the evidence, or questions she asked during the course of that proceeding. In its underlying motion, FCCA makes much of the fact that Commissioner Kurtz

moved to deny the FCCA application for a rate decrease at the 2014 hearing and that another pilot seconded the motion. Her motion, her votes, and her questions and comments are not a valid basis for disqualification. She was simply doing what any member of the Rate Review Committee was charged by law with doing, i.e., making a determination of the issues based upon the evidence and testimony presented. *Moore v. State*, 820 So. 2d 199, 206 (Fla. 2002).

FCCA also attacks Commissioner Kurtz for her comments at a meeting of the BOPC's legislative committee meeting in January 2016 concerning a proposal by the Florida Harbor Pilots Association ("FHPA") to amend Florida Statutes to authorize a pilots' association to request an annual increase in the rates of pilotage to cover inflation. FCCA Petition, pp. 15-16, ¶ 27. Absolutely nothing in her comments relates either to FCCA's pending application for a rate decrease or BBP's subsequent request for a rate increase, which had not even been filed at the time of the Legislative Committee meeting. FCCA Petition, p. 4, ¶ 9 (noting the Pilots' alternative petition was filed on March 24, 2016, more than two months after the Legislative Committee meeting). Instead, she was commenting on proposed legislation relating to pilotage, which is the purpose of the BOPC's Legislative Committee.

Contrary to the assertions of FCCA, there is no objective basis for one to conclude that Commissioner Kurtz's comments about the legislative proposal show

any bias against FCCA. She does not mention FCCA or any cruise line. FCCA Petition, p. 15, ¶ 27. Rather, she simply notes that pilots only seek rate increases every 10 or 15 years because of the expense and difficulty of the process. She suggests that smaller, annual cost-of-living increases would be a more efficient approach to adjusting pilotage rates. Notably, consideration of the Consumer Price Index is a permissible statutory factor in setting rates of pilotage. § 310.151(5)(c), Fla. Stat.

In considering whether an agency head should be disqualified pursuant to section 120.665, Florida Statutes, “the practical recognition of the numerous roles played by the agency as well as the agency head (investigator, prosecutor, adjudicator, and political spokesman) must be weighed against a reasonable fear on the part of the movant that it will not receive a fair and impartial hearing.” *Charlotte Cnty. v. IMC-Phosphates Co.*, 824 So. 2d 298, 300 (Fla. 1st DCA 2002). Suggesting that Commissioner Kurtz should disqualify herself because she commented on proposed legislation as part of her duties as a member of the BOPC’s Legislative Committee is ludicrous, particularly as the proposed legislation had nothing to do with any specific application to change pilotage rates in any port.⁵

⁵ FCCA suggests that because BBP’s rate application includes an annual cost-of-living adjustment provision that Commissioner Kurtz’s comments on the proposed legislation somehow disqualify her from participating in the hearing on BBP’s application. At the time of the January 2016 Legislative Committee meeting, neither Commissioner Kurtz nor anyone else could have known what BBP might

Commissioner Kurtz's comments at the Legislative Committee meeting are fundamentally different from those of Commissioner Carlos Trueba at the same meeting, who specifically referenced the pending case in PortMiami and repeatedly stated that he believes the existing pilotage rates in PortMiami are unfair. **Appendix, Exhibit 1**, pp. 18-22. Commissioner Trueba's comments left no doubt that he has already decided, without hearing any evidence, the fundamental premise of FCCA's rate decrease application, i.e., an alleged inequity in the rates charged in PortMiami for passenger vessels verses cargo vessels. **Appendix, Exhibit 1**, p. 19 (quoting excerpts from the FCCA application). Commissioner Trueba's comments at the Legislative Committee included the following exchanges:

Mr. Trueba: I – I mean I object to any, to any indexing based on the current rate that we have. I'm – I'm –

The Chair: Which – who is we when you say we have?

Mr. Trueba: I'm – I'm trying to – I think the way in which revenue is charged to the, to the ships, is haphazard. It's – it's – 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.

include in any possible rate application, as no decisions had been made and nothing had been drafted. Moreover, the annual cost-of-living increase is just one of many elements of BBP's application. FCCA Petition, p. 4, n.1 (describing the elements of BBP's rate increase application).

The Chair: Commissioner Jaccoma.

Commissioner Jaccoma: Well, any rate that is set currently was set by a board or a committee is supposed to be fair, so.

The Chair: And I think it's been what, 12 years since we've had a rate change.

Mr. Trueba: 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 on handles. I – I can't – I can't understand that. That means that 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, in that rate itself.

(Emphasis supplied). *Id.* (quoting the transcript from the Legislative Committee meeting). **Appendix, Exhibit 3** (relevant transcript pages).⁶ Commissioner Trueba was then admonished by the Rate Review Committee's general counsel not to discuss pending cases. *Id.* In contrast, Commissioner Kurtz did not mention any specific rate application or address existing rates in any port. She simply commented on the time rate hearings take and her view that the proposed legislation would result in improved efficiency and fairness.

Disqualification of a decision maker, such as a judge or an agency head, is not appropriate unless "a disinterested observer may conclude that the (agency) has in some measure adjudged the facts as well as the law of a particular case in advance

⁶ Commissioner Trueba's comments are remarkably similar to statements made in the FCCA rate application. **Appendix, Exhibit 1**, p. 19.

of hearing it.” *Port Everglades Pilots Ass’n v. Florida-Caribbean Cruise Ass’n*, 170 So. 3d 952, 956 (Fla. 1st DCA 2015) quoting *Seiden v. Adams*, 150 So. 3d 1215, 1220 (Fla. 4th DCA 2014) (internal citations omitted). Nothing in Commissioner Kurtz’s comments at the Legislative Committee suggests that she has prejudged the case scheduled for June 1-3, as she was not discussing that case. The same cannot be said for Commissioner Trueba.

In arguing that all pilot members of the BOPC should be prohibited from serving on the Rate Review Committee, contrary to section 310.151(1)(b), FCCA emphasizes that all pilot associations are members of the FHPA, which advocates on behalf of pilots both in the legislative and executive branches of government. FCCA Petition, pp. 20-22, ¶¶ 33-35.⁷ The point is irrelevant, however, in that the FHPA is not a party to the consolidated case involving PortMiami. FCCA apparently is trying to equate the pilots’ membership in FHPA with the membership of former Commissioners Thomas Burke and Enrique Miguez in FCCA. The First District Court of Appeal found that the members of FCCA (such as the employers of Commissioners Burke and Miguez) constituted the applicant itself and that it would be improper for an applicant to sit in judgment of its own application. *Port*

⁷ Unsurprisingly, the cruise industry also employs lobbyists. Ten lobbyists are registered on behalf of the Cruise Lines International Association (“CLIA”) to lobby both the legislative and executive branches of government. <https://floridalobbyist.gov/LobbyistInformation/GetLobbyistPrincipal>

Everglades Pilots, 170 So. 3d at 956; *Biscayne Bat Pilots II*, 177 So. 3d at 1045.

FHPA is not a party to any pending rate case, so the pilots' membership in that association is unlike the membership of Rate Review Committee members in FCCA, which has applied for a decrease in the rates of pilotage for passenger vessels in both PortMiami and Port Everglades.

Without citing any specifics whatsoever, FCCA argues that membership in FHPA should disqualify all pilots from hearing the pilotage rate cases involving PortMiami because the organization engages in "unified advocacy efforts" on behalf of pilots. FCCA Petition, p. 18, ¶ 30. Given that FHPA is not a party to the pilotage rate cases, FCCA's vague assertions that membership in FHPA somehow causes all pilots to be biased against FCCA are baseless and should be rejected.

FCCA also attacks the pilots because they have designated an alternate member of the Rate Review Committee to serve when a regular pilot member of the Committee cannot serve. FCCA Petition, p. 18-19, ¶¶ 30-31. The primary purpose for designating an alternate is so that a commissioner will not be put in a conflict of interest situation when an application is filed concerning rates in the port where that pilot works.⁸ This situation arose in connection with the 2014 hearing on FCCA's

⁸ Notably, pursuant to section 310.151(1)(b), the two pilot members of the Rate Review Committee are "appointed by majority vote of the licensed state pilots serving on the board." Thus, the Legislature gave the pilots serving on the BOPC the sole authority to determine which of them should serve on the Committee.

application, when then-Rate Review Committee member John Fernandez, who works as a pilot with BBP, recused himself from the hearing involving Port Miami. *Id.*, ¶ 31. Commissioner Kurtz, then the alternate Rate Review Committee member, was asked to serve in Captain Fernandez’s place, as she is a pilot in Tampa Bay, and would not be affected by the FCCA application. This was done with the knowledge and input of the Rate Review Committee’s general counsel in order to avoid a conflict of interest yet still adhere to the statutory requirement relating to the makeup of the Rate Review Committee. FCCA’s Appendix to Petition, Composite Ex. 1, “D,” pp. 4-5. While FCCA sees something wrong with the pilots seeking to avoid a conflict of interest, FCCA fought bitterly through multiple court proceedings to keep Commissioners Burke and Miguez on the Rate Review Committee, even though they were part and parcel of FCCA itself.

Regardless of the FCCA’s objections to the identification of an alternate pilot, the issue is irrelevant in the upcoming case involving PortMiami, as neither pilot member of the Rate Review Committee serves PortMiami. There is no need to designate an alternate pilot to serve on the Committee in this case.

Finally, in its efforts to discredit the Pilots in any way possible, FCCA attacks former Commissioner David Ulrich, who was a pilot member from Port Everglades, but whose term on the BOPC has expired. He left the BOPC earlier this year. In Paragraph 32 of its Petition (page 19), FCCA states: “Mr. Ulrich exhibited

significant prejudice against the FCCA and in favor of the pilots, his arguments at times toeing the line of outright hostility.” The attacks on former Commissioner Ulrich were even more extensive in FCCA’s underlying motion to disqualify the pilot members of the BOPC, running the better part of two pages, and even included a false statement that he had been “removed” from the BOPC, when his term had simply expired and he had not applied for reappointment. FCCA Appendix, Composite Exhibit 1, p. 11, ¶ 18.

Because Commissioner Ulrich is no longer on the BOPC (and therefore, not on the Rate Review Committee), arguments about him are completely irrelevant, given that Commissioner Ulrich will not be hearing the consolidated rate change proceedings involving PortMiami. Moreover, his comments regarding the evidence and arguments presented were made in the course of deliberations during the 2014 hearing on FCCA’s application and, therefore, could not serve as a basis for disqualification even if he were still on the Rate Review Committee. *E.g., Mobil v. Trask*, 463 So. 2d at 391; *Brown v. Pate*, 577 So. 2d at 647; *Gieseke v. Grossman*, 418 So. 2d at 1056.

FCCA’s Petition further illustrates what has been apparent since FCCA filed its rate decrease application more than two years ago: FCCA dislikes the legislatively determined role for pilots both in the state’s deep-water ports and on the Rate Review Committee. FCCA would have Commissioners Kurtz and

Winegeart disqualify themselves from the hearing involving PortMiami simply because FCCA does not respect the Legislature's determination that two pilots should serve on the Rate Review Committee. FCCA has cited literally no facts to suggest that Commissioner Winegeart is biased, and all of the allegations concerning Commissioner Kurtz are meritless, for the reasons stated above. Moreover, efforts by FCCA to disqualify other pilots serving on the BOPC (Commissioners Cumings and Phipps from Port Everglades) should be rejected because, in addition to being meritless, no written orders from those pilots are in the record.

For the reasons expressed, FCCA's Petition for Writ of Prohibition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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