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

Biscayne Bay Pilots, Inc.

Appellant / Petitioner(s)

CASE NO: 1D16-2388
LT. No.: PRRC2014-1

v.

Florida Caribbean-Cruise Association

Appellee / Respondent(s)

_____ /

FLORIDA-CARIBBEAN CRUISE ASSOCIATION'S RESPONSE TO ORDER TO SHOW CAUSE WHY PETITION FOR WRIT OF PROHIBITION SHOULD NOT BE GRANTED

The Florida-Caribbean Cruise Association ("**FCCA**") hereby files this response to this Honorable Court's May 31, 2016 order to show cause why the Biscayne Bay Pilots' petition for writ of prohibition should not be granted, and in support thereof states as follows:

1. As it relates to Commissioners Louis Sola and Sherif Assal, BBP's petition for writ of prohibition is based upon motions for disqualification that contort the statutory requirements in Chapter 310 regarding the composition of the Pilotage Rate Review Committee and misapply this Court's previous decisions in Biscayne Bay Pilots, Inc. v. Florida-Caribbean Cruise Association, 160 So. 3d 559 (Fla. 1st DCA 2015) and Biscayne Bay Pilots, Inc. v. Florida-Caribbean Cruise Association,

177 So. 3d 1043 (Fla. 1st DCA 2015). With respect to BBP's motion to disqualify Commissioner Carlos Trueba, not only does the statute addressing Board membership fail to provide BBP with a cause of action to remove a Board member, but the statute addresses absences from Board meetings over a one-year timeframe, and BBP's motion, on its face, relies on a period of over one year. BBP's motions to disqualify were properly denied by Commissioners Sola, Assal, and Trueba.

I. BBP's Motion To Disqualify Commissioners Assal and Sola.

2. BBP's motion to disqualify Commissioner Assal and Commissioner Sola, as well as its petition for writ of prohibition, relies upon the incorrect factual assertion that Commissioners Assal and Sola are "members" of the FCCA. *BBP Petition*, p. 17 ("Commissioner Assal is an actual member of the FCCA…"); *see* Appendix to BBP Petition ("*BBP Appendix*"), Ex. D, p. 11, p. 42.[1] What BBP's motions failed to address is that Commissioner Assal and Sola's employers hold no trade organization membership with the FCCA, as Commissioner Assal resigned membership as of January 1, 2016, and Commissioner Sola as of December 3, 2015. *BBP Appendix*, Ex. E, p. 177, p. 202. Thus, BBP's claim that Commissioner Assal and Sola are "members" of the FCCA – and that this purported membership

[1] The page numbers cite to the Bates-stamp number in the BBP Appendix, for the Court's ease of reference. All documents the FCCA cites to in this response are contained in BBP's Appendix, and in the interests of economy, efficiency and preserving resources, the FCCA is not reproducing those documents in a separate appendix to this response.

"means that BBP will not receive a fair hearing" from Commissioner Assal and Sola (*BBP Appendix*, Ex. D, p. 16, p. 47) – is incorrect.[2]

3. Because the entire foundation of BBP's motions to disqualify rested upon the assertion that Commissioner Assal and Sola are members of the FCCA and thus *de facto* parties to the FCCA's rate decrease application (a woefully incorrect assertion, as addressed below), and because Commissioner Assal and Sola hold no membership in the FCCA, and are not employees of cruise lines that would be impacted by a pilotage rate change, BBP's motion to disqualify was properly denied. Accordingly, the bias or prejudice BBP fears from such *de facto* participation, or membership in the FCCA, ceases to exist.

4. BBP makes the unsupported claim, for the first time in its petition for writ of prohibition, that:

> The fact that Commissioners Assal and Sola resigned as Platinum Members of FCCA about the time they were appointed to the Rate Review Committee is not relevant. Their resignations only show that they (or the appointing entity or FCCA) were cognizant of the previous proceedings involving Commissioners Nielsen, Fox, Miguez, and Burke and hoped that these new commissioners could avoid the same fate.

[2] The final hearing for the rate change applications at PortMiami was initially scheduled for June 1 – 3, 2016. However, no actions were taken in the underlying matter, which was stayed pending the outcome of this appeal and in the related case pending with this Court with Case No. 16-2391.

BBP Petition, p. 30. The second part of this statement is pure speculation by BBP, as BBP alleged no facts in its motions regarding why the Commissioners resigned their membership, but it is the first part of this statement that is perplexing.

5. BBP's motion to disqualify, and its petition for writ of prohibition, repeatedly emphasize that the Commissioners are allegedly members of the FCCA, and that their "actual membership" in the FCCA mandates disqualification. *BBP Petition*, pp. 17-18 ("Commissioner Assal is an actual member of the FCCA…Commissioner Sola is an actual member of the FCCA"). Yet, when acknowledging that the Commissioners are not FCCA members, and have not been members for over six to seven months, BBP dismisses their *lack of membership* as being "not relevant." BBP cannot have it both ways. If the Commissioners' purported "*actual membership*" is the foundation of their request for disqualification, then its fails to stand that the Commissioners' *non-membership* in the FCCA cannot be relevant to the disqualification issue. Rather, because BBP's motions to disqualify are founded upon the false premise that the Commissioners are FCCA members, their motions to disqualify were factually incorrect and properly denied by the Commissioners.

A. Commissioners Assal and Sola Are Not Employees Of FCCA Member Lines and Have No Substantial Interest In Pilotage Rates.

6. Regardless of the Commissioners' membership status in the FCCA, the fundamental foundation of BBP's motion to disqualify the Commissioners is

based on an intentional distortion of the facts and misapplication of the previous Pilotage Rate Review Committee disqualification cases heard by this Court. Applied correctly, those cases make clear that disqualification of Commissioners Assal and Sola is not warranted, and that no foundation for a reasonable fear of bias or prejudice exists.

7. In its petition for writ of prohibition, BBP addressed the past disqualification of Commissioners Burke and Miguez from the Pilotage Rate Review Committee. *BBP Petition*, pp. 13-15. In those cases, this Court clearly outlined why Commissioners Burke and Miguez were disqualified from participating in prior Pilotage Rate Review proceedings pertaining to the FCCA's application at PortMiami, stating:

> While FCCA is the named party in the rate-reduction application, its member cruise lines, including Burke's and Miguez's employers, are the *de facto* parties. Biscayne Bay Pilots I, 160 So. 3d at 560 n2. (explaining that "section 310.151(2), Florida Statutes, only allows groups whose 'substantial interests are directly affected by the rates set by the committee' to apply for a rate change").

Biscayne Bay Pilots, Inc. v. Florida Caribbean-Cruise Ass'n, 177 So. 3d 1043, 1044-45 (Fla. 1st DCA 2015) (emphasis added), and:

> Although the Cruise Association is the named party in the underlying proceeding, the cruise lines that are members of the association (including Royal Caribbean and Carnival) are the *de facto* parties because section 310.151(2), Florida Statutes, only allows groups whose "substantial interests are directly affected by the rates set by

> the committee" to apply for a rate change and Florida Home Builders Association v. Department of Labor and Employment Security, 412 So.2d 351 (Fla. 1982), and its progeny make clear that a trade association's standing to participate in an administrative proceeding is based on the fact that its members' substantial interests are being affected by the agency action at issue.

Biscayne Bay Pilots, Inc. v. Florida Caribbean-Cruise Ass'n, 160 So. 3d 559, 560 (Fla. 1st DCA 2015) (emphasis added). In finding that Commissioners Burke and Miguez should have been disqualified, this Court ultimately stated that "BBP's 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, Inc., 177 So. 3d at 1045 (*quoting* Port Everglades Pilot Ass'n v. Fla.-Caribbean Cruise Ass'n, 170 So. 3d 952, 956-57 (Fla. 1st DCA 2015) (emphasis added).

8. BBP disregards multiple substantial differences between the factual circumstances in the Biscayne Bay Pilots cases and those presented here. In the Biscayne Bay Pilots cases, this Court found it critical that the cruise lines were the *de facto* applicants in the rate change proceedings because only their "substantial interests are directly affected by the rates set by the Committee." Thus, because the cruise lines were the *de facto* applicants, and because two senior executives of the

de facto applicant cruise lines sat on the Committee, and because the Committee was considering the *de facto* applicant cruise lines' rate change application, this Court held that a reasonably prudent person could fear that the senior executives would not render an impartial judgment.

9. The circumstances here differ in *every single respect*. Commissioner Assal and Sola are not employees of any of the *de facto* applicant cruise lines here. As BBP acknowledges:

> Commissioner Assal is employed by United Stevedoring of America, Inc…and American Guard Services, Inc…United Stevedoring of America provides terminal management, stevedoring, agency, and ground services to the cruise industry…American Guard Services provides security services to the cruise ship industry, among others.
> …
> Evermarine was founded in 2005 by Commissioner Sola and is one of the largest yacht dealers in Florida, California, the Republic of Panama, and South America.

BBP Appendix, p. 12, fn. 1; p. 43, fn. 1; *BBP Petition*, p. 16, fn. 9; p. 18, fn. 10. While Commissioners Burke and Miguez were employees of *de facto* applicants, Commissioners Assal and Sola are not. While Commissioners Burke and Miguez's employers – Royal Caribbean and Carnival – have substantial interests directly affected by the pilotage rates set by the Committee, and therefore have standing to seek pilotage rate changes at PortMiami, United Stevedoring of America, American Guard Services, and Evermarine have no substantial interest in pilotage rates, nor would they have standing to pursue a pilotage rate change. While Royal

Caribbean and Carnival had an application for a rate decrease pending before their own high ranking employees on the Committee, American Guard Services, United Stevedoring, and Evermarine do not. Thus, despite BBP's attempt to claim that the circumstances here mirror those with Commissioners Burke and Miguez, there is literally not a single material fact between the two cases that is the same.

10. BBP's attempt to equate Commissioners Assal and Sola to former Commissioners Burke and Miguez is further misguided based on BBP's claim that Commissioner Assal and Sola's "membership in FCCA means that he, like Commissioners Burke and Miguez, is the applicant itself…" *BBP Appendix*, p. 16, p. 47. BBP's statement is incorrect, misleading and, in essence, rests on a game of semantics. BBP attempts to equate the cruise line "members" of the FCCA that are the *de facto* applicants in the PortMiami proceedings, with the different level memberships that individuals or businesses interested in the cruise line industry can hold with the FCCA. Many individuals or entities can hold associate or platinum associate memberships with the FCCA, but that membership does not turn those individuals into parties with substantial interests in pilotage rates set under section 310.151, so as to make them applicants, or *de facto* applicants, to the present rate change proceedings.[3] In fact, the FCCA website that BBP relies upon

[3] The FCCA offers both an associate and associate platinum membership. *BBP Appendix*, p. 282. If an individual from Oklahoma who is a cruising enthusiast pays to be an associate member of the FCCA, does the Oklahoman automatically

for the "Platinum Associate Membership" information states that it is the "mandate of the Florida-Caribbean Cruise Association's Member Lines to increase the proactive collaboration *between the cruise industry and cruise tourism partners* [and that] organizations are invited to join the FCCA's Associate Membership Program." *BBP Appendix*, p. 282 (emphasis added). There is clearly a distinction between the cruise industry "member lines" that make up the FCCA –who are *de facto* applicants of any rate change proceeding pursued by the FCCA – and the cruise tourism organizations that "collaborate" with the FCCA through the membership programs.

11. The FCCA website further makes it clear that the associate and platinum associate memberships are nothing more than trade organization memberships, giving these members access to things like advertising and marketing discounts, a commemorative plaque, and complimentary cruise cabins, complimentary registration, preferred seating, and private receptions at the "FCCA Conference and Trade Show." *Id.* These are standard benefits of a trade organization membership, which only underscores the fact that being an associate

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become a *de facto* member of any rate change proceedings sought by the FCCA in Florida? The answer to that question would, obviously, be no. The Oklahoman does not own any vessels that call on PortMiami, does not pay pilotage rates, and is not substantially affected by pilotage rate changes. Yet, according to BBP, the Oklahoman would be considered a *de facto* applicant of the FCCA, no different than Carnival, Norwegian, or Royal Caribbean Cruise lines. This is an absurd conclusion, yet it is exactly the conclusion reached by BBP in seeking to disqualify Commissioners Assal and Sola.

or platinum associate member of the FCCA is nothing more than a trade organization membership, and is not equivalent to being an FCCA member cruise line, as BBP attempts to argue.

12. For BBP's motion to hold water, it would have to be determined that United Stevedoring, American Guard Services, and Evermarine are either "member cruise lines" of the FCCA, or *de facto* applicants to the FCCA's rate change application, no different than Royal Caribbean or Carnival. This is a position that even BBP must know is frivolous. American Guard Services, United Stevedoring, and Evermarine's are not cruise lines, and whatever the outcome of the rate change proceedings at PortMiami, these entities' substantial interests are not directly or indirectly affected by the pilotage rates at PortMiami in any way, shape, or form, nor do BBP's motions contain such allegations.

13. BBP's motion and its petition for writ of prohibition also focus on a statement from the FCCA's website which states that Platinum membership in the FCCA gives Platinum members "direct access to the cruise industry" and to "cultivate close relationships with FCCA Member Line CEOs, presidents and executives…" *BBP Appendix*, p. 12, pp. 42-43. This statement is intended by BBP to insinuate and suggest that that Commissioner Assal and Sola's membership in the FCCA have lead them to be biased or prejudiced towards the FCCA and against any pilot organization. The flaw in BBP's argument is that it is nothing

more than rank speculation. BBP alleged no facts demonstrating that Commissioner Assal or Sola ever had access to cruise executives, has ever met a cruise executive, has ever developed any type of relationship with a cruise executive, has ever had a discussion with a cruise executive (let alone one about pilotage rates), or that any such meetings or discussions would lead BBP to fear that Commissioner Assal or Sola cannot adjudicate a rate change application in an unbiased manner. BBP's implication is nothing short of speculation piled on top of speculation, and is inadequate in showing a reasonable basis for fear of bias or prejudice. Moore v. State, 820 So. 2d 199, 206 (Fla. 2002) ("[A] movant's subjective fears or speculation are not reasonably sufficient to justify a well-founded fear of prejudice." (citing Arbelaez v. State, 775 So. 2d 909 (Fla. 2000); 5-H Corp. v. Padovano, 708 So. 2d 244, 248 (Fla.1997); Fischer v. Knuck, 497 So.2d 240, 242 (Fla.1986)); Shuler v. Green Mountain Ventures, Inc., 791 So. 2d 1213, 1215 (Fla. 5th DCA 2001) (stating that the facts and reasons given for disqualification "must tend to show personal bias or prejudice.") (*citing* State v. Shaw, 643 So. 2d 1163, 1164 (Fla. 4th DCA 1994) (emphasis added). The mere membership in a support trade organization cannot cause this fear of bias or prejudice in BBP consistent with the standards required by law for disqualification.

14. Finally, in BBP's motions to disqualify in the Biscayne Bay Pilots cases, BBP constantly stated its purported fear was that no Rate Review

Committee member would ever vote for a rate change that would be financially detrimental to his or her employer. Here, as BBP is well aware, Commissioner Assal and Sola's employers have *zero* financial interest in the rates being set at PortMiami, and the fear expressed by BBP previously is non-existent. Whether Commissioners Assal and Sola vote for a rate decrease, for a rate increase, or for no rate change at all, their employers are not impacted, directly or indirectly, in any manner, nor is their employment. BBP's strained attempt to draw a parallel between the previous disqualification cases and the current circumstances is not based on actual facts, but a misinterpretation and misapplication of the actual facts as they exist today. Because BBP's motion has no foundation in accurate facts, it must be dismissed. D.H. ex rel. J.R. v. Dep't of Children & Families, 12 So. 3d 266, 270 (Fla. 1st DCA 2009) ("A verified motion for disqualification must contain an actual factual foundation for the alleged fear of prejudice.") (*quoting* Fischer v. Knuck, 497 So. 2d 240, 242 (Fla. 1986)).

B. BBP Seeks to Disqualify The Commissioners Based On The Very Criteria That Qualify Them To Sit On the Rate Review Committee.

15. Finally, BBP's motions are in direct disregard of the statutory requirements for formation of the Pilotage Rate Review Committee, as set forth in section 310.151, Fla. Stat.

16. According to BBP, no employee of any cruise, container, cargo, or other vessel calling on PortMiami can sit on the Rate Review Committee to

adjudicate the FCCA's and BBP's applications. Because BBP's rate increase application applies to *all* vessel types, not only cruise lines (see *BBP Petition*, p. 9; *BBP Appendix*, p. 310), BBP believes every employee of those lines would be biased or prejudiced because their employers would stand to financially gain or detriment from any rate change.

17. Now that two, non-cruise line, business professionals have been appointed to the Committee – two professionals who have *no vested, financial, or other factually based interest in the rates being set*, and who are "actively involved…in the maritime industry, marine shipping industry, or commercial passenger cruise industry" as is contemplated by section 310.151 – BBP claims they are biased because of their very "active involvement" in the industry. BBP's petition even suggests that Commissioner Assal is biased or prejudiced due to his "close ties" with the international cruise industry, as his business relationship with the cruise industry is described in his application questionnaire. *BBP Petition*, p. 16. Yet, it is Commissioner Assal's very disclosure of this business relationship on the gubernatorial appointment application *that qualified him under the statutory criteria in section 310.151 to sit on the Rate Review Committee* as a person "actively involved" in a business or professional capacity in the industry. According to BBP, however, the very criteria that qualify Commissioner Assal to

sit on the Committee also requires his disqualification from the Committee, which is an absurd result.

18. Moreover, while BBP is beholden to no one given its statutory monopoly over piloting and the guaranteed income it provides for all pilots throughout the state, for the rest of the world that operates under normal capitalistic pressures, building relationships – including through belonging to a variety of trade associations – is frequently the foundation of any lasting business relationship. Trade and professional organization involvement helps businesses develop a better understanding of the industry, identify the services needed by the industry, operate more efficiently, and understand the pulse of the industry and business trends in order to successfully operate and forecast the business environment. For professionals in any area of business, active involvement in the profession, and its organizations, is critical to lasting success. It is reasonable to assume that when the Legislature created the statutory framework requiring individuals who are "actively involved" in a business capacity in the industry to sit on the Committee, the Legislature believe these individuals would be, in fact, *actually involved* in the industry in the way that any ordinary business or professional would be. This active involvement is exactly what gives individuals an understanding of the maritime business culture and environment, rather than requiring members to have a background in some unrelated industry (car sales,

healthcare, banking, *etc*.). BBP believes that commissioners should be actively involved in a business capacity in the industry, just so long as they don't actively do business in the industry. Unfortunately for BBP, that is an absurd result and not what the statute contemplates.

19. It is clear that BBP would prefer for there to be no maritime representation on the Committee, despite there being two pilots on the Committee who have far more interest in the rates being set than any maritime industry member, and who are clearly biased against any applicant seeking a rate decrease. While BBP argues that it does not seek to disqualify Commissioners Sola and Assal because they are involved in the maritime industry, that is the exact basis alleged by BBP for disqualification. Section 310.151 requires the Committee to have two "actively involved" professionals in the "maritime, marine shipping industry, or commercial passenger cruise industry". Commissioner Assal and Sola are exactly such members. The statutory requirements must be given meaning, and BBP's motions to disqualify were properly denied.

II. BBP's Motion To Disqualify Commissioner Trueba.

20. Commissioner Carlos Trueba correctly denied BBP's motion to disqualify for numerous reasons, and BBP's petition should be denied as it relates to Commissioner Trueba as well.

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

21. 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 was properly denied.

22. 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 across the state based on inflation as set by the CPI. Counsel for the FHPA repeatedly used the word "inflation" in outlining the proposal. *BBP Appendix*, p. 136, ln. 5 – p. 138, ln. 14.

23. Commissioner Trueba made his statements in response to the FHPA's legislative proposal, and in the context of a lengthy discussion about the rate setting process in the State of Florida. *See BBP Appendix*, pp. 127-152. The first statement made by Commissioner Trueba outlined in BBP's motion does not

mention any pilot association or any rate change application.[4] Commissioner Trueba simply stated that he does not believe the current rate setting methodology is "equitable" or "fair," that the process results in "haphazard" rates being charged, and that until rates are charged more equitably, he *could not support the legislative proposal of a CPI inflation increase*. Commissioner Trueba's statements were made as part of a much larger discussion regarding how pilotage rates are set in Florida, and showed no bias or prejudice towards any party or any pending rate change application. They simply referenced the FHPA's legislative proposal, and the Legislative Committee's role is, presumably, to discuss the framework in Chapter 310 and potential ways to improve upon the statutory scheme. BBP attempts to take this statement out of context and claim it is pertinent to BBP's or FCCA's rate change application, which is simply not the case.

24. 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:

[4] 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. *BBP Appendix*, p. 66.

> 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.**

BBP Appendix, p. 147, lns. 13-16 (emphasis added). If Commissioner Trueba's statement about the rate setting process being inequitable warrants disqualification, then, at a minimum, Commissioner Kurtz – who *agreed* with Commissioner Trueba's statements – would also be subject to disqualification.

25. The second statement made by Commissioner Trueba, which references PortMiami,[5] 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 pilots' work. 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, and does nothing to indicate that Commissioner Trueba has reached a final decision on the issue of whether the FCCA's or BBP's rate change applications should be granted or denied. *See* Mobil

[5] 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. *BBP Appendix*, p. 66.

v. Trask, 463 So. 2d 389, 391 (Fla. 1st DCA 1985) (denying a motion to disqualify a deputy commissioner where the remarks made by the commissioner were insufficient to "indicate that the deputy had made a final decision" on the issue of compensability of a workers' compensation claim).

26. In the second part of his statement, Commissioner Trueba states 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 change application at PortMiami, or whether he supports either the FCCA or BBP. 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, and there is simply nothing to demonstrate that Commissioner Trueba pre-judged either application based on these statements.

27. 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 BBP's totally unfounded assumption 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. For example, if Commissioner Trueba believes that rates are inequitable because cargo lines pay too little in fees based on the workload they present, one potential solution would be to raise the fees for cargo lines. This is a solution that would be favorable to BBP. 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 demonstrates that he wants fairness all-around. The FCCA would like to think BBP wants exactly what Commissioner Trueba suggested - equity and fairness.[6]

28. The unreasonableness of BBP's disqualification request is further made clear when the context of the Board's Legislative Committee meeting, and

[6] 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. *BBP Appendix*, pp. 133-134. This comment not only indicates Commissioner Trueba's open-mindedness about rate changes and the process as a whole, but also provides necessary context to the discussion the Committee was having, which was regarding the pilotage rate setting process. He is suggesting that the Committee look at alternative ways for determining rates. These suggestions cannot be ignored in determining Commissioner Trueba's objectivity.

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, in one of its roles as a collegial body and agency head, to discuss the pros and cons, the benefits and drawbacks, of such a proposal. BBP has not demonstrated a sufficiently reasonable fear that Commissioner Trueba is not impartial based on these statements, particularly in light of the fact that the Board was discussing, at length, potential alternatives to the current rate making structure, as it has done many times in the past. *BBP Appendix,* pp. 127-152.

29. If Board members cannot weigh in, in favor of, or against, or express appreciation or concerns over a legislative proposal or potential rate making structure without fear that those statements will subject them to disqualification in unrelated 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 statutes to include automatic CPI adjustments to rates for all ports. BBP's motion seeks to stifle the very conversation the Legislative Committee is designed to evoke.

30. 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.**

BBP Appendix, p. 147 lns. 1-24 (emphasis added). Clearly, Commissioner Kurtz was 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, and are sufficient for disqualification in this context, then it is impossible for the FCCA not to have an objective, reasonable belief that Commissioner Kurtz's statements demonstrate that she 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.[7] Commissioner Jaccoma, 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.[8]

31. 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." *BBP Appendix*, p. 3 (emphasis added). Commissioner Trueba made no statements indicating bias or prejudice towards either party or their rate change applications.

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[7] 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. 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.

[8] "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 quite unfair to that particular port." *BBP Appendix*, p. 141, lns. 8-15.

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, non-factual 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.

32. 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 failed to set forth an objective, well-founded fear that Commissioner Trueba would not objectively render a judgment on the FCCA's and BBP's rate change applications, and Commissioner Trueba properly denied the motion to disqualify.

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

33. BBP's request that Commissioner Trueba be disqualified for allegedly missing fifty percent of meetings within a twelve month period was also properly denied because it is based on a fundamental miscalculation of what constitutes a twelve month period, and because BBP has no authority under section 455.207 to seek disqualification of a Board member.

34. BBP's motion alleged 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

BBP Appendix, pp. 70-71. According to BBP, because Commissioner Trueba missed six of the above twelve Board meetings constituting a 50% absence rate, his membership on the Board was void under Florida Statute §455.207(3). *BBP Appendix*, p. 70.

35. 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 Appendix*, p. 70, ¶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, and Commissioner Trueba properly denied BBP's motion.

36. 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 may have the right, if statutory conditions existed, to void Commissioner Trueba's membership, nothing in the statute gives BBP the right to seek disqualification on such grounds. Commissioner Trueba properly denied BBP's motion for disqualification.

III. BBP's Irreparable Harm Argument Is Irrelevant To Whether Disqualification Is Required

37. Near the end of BBP's petition, in pages 32 through 34, BBP argues that a writ of prohibition should be granted because BBP would suffer irreparable

harm if a petition is not granted. This argument is not only irrelevant to the issues in front of this Court, but difficult to understand.

38. The FCCA agrees with BBP that the operationalization of the escrow provision in section 310.151(4)(b) is viewed differently by the parties. How the escrow provision applies in practice, however, is entirely irrelevant to the issue of whether Commissioners Sola, Assal and Trueba should be disqualified from the proceedings. BBP appears to be arguing that, regardless of whether the Commissioners are biased or prejudiced, this Court should not allow the Committee to move forward with the rate setting process required by statute, and should issue a writ of prohibition so that BBP does not suffer irreparable harm by virtue of the escrow provision's operation should a validly-comprised Committee vote to decrease pilotage rates. If BBP believes the statutory framework in section 310.151 is inequitable, should be changed, or has other flaws, it must pursue those issues in the legislative forum or through other legal proceedings, but to argue the validity of the escrow provision – which is an issue not raised in the proceedings below and not the subject of the instant appeal – in these proceedings is improper.

39. BBP also argues that any rate decrease effectuated by the Committee would cause irreparable harm because it would result in "an immediate drop in operating revenues and income, despite [the pilots] statutory responsibility to continue to provide the highest quality, 24/7 piloting services to all ships entering

and leaving PortMiami, as well as to maintain the infrastructure necessary to provide that service." *BBP Petition*, pp. 32-33. BBP claims that this harm would not be remedied by appeal to DOAH or entry of a final order by the Committee. *Id*. BBP set forth no factual basis for showing irreparable harm below and, again, the escrow provision is not relevant to the instant proceedings and has no bearing on whether Commissioners Assal, Sola and Trueba should be disqualified from the proceedings. BBP's attempt to prohibit the FCCA from having a final hearing in front of the Committee and effectuating any rate change resulting from that hearing as provided by Chapter 310 because of its concerns over the operation of the escrow provision is improper.[9]

40. Finally, not only did BBP fail to set forth any facts below demonstrating irreparable harm, but BBP's complaints of irreparable harm are questionable on their face, as pilots in the BBP organization make a minimum of $330,000 a year, and the notion that BBP would be irreparably harmed by a

[9] Finally, at the very end of BBP's petition, in pages 34-35, BBP argues that its petition should be granted because it would be inequitable to compel a party to participate in proceedings where the impartiality of the decision-maker is suspect. This argument is, again, confusing. The rate change proceedings in this matter have been stayed pending the outcome of this appeal. Ultimately, if this Court grants BBP's petition for writ of prohibition, then BBP will not have to litigate the final hearing in front of decision makers it views as biased or prejudiced. Conversely, if this Court finds that BBP's motions for disqualification are legally insufficient, then BBP must litigate the rate change applications before those decision-makers after resolution of this matter and the stay is lifted.

temporary rate decrease during the pendency of a DOAH appeal is unrealistic. BBP pilot salaries could be reduced by $120,000 a year, per pilot[10], and BBP pilots would still be making $200,000 per year, which is far more than an overwhelming majority of citizens in the State of Florida.

WHEREFORE, the Florida-Caribbean Cruise Association respectfully requests that this Honorable Court enter an order DENYING the Biscayne Bay Pilots' Petition for Writ of Prohibition.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by e-mail on this 27th day of June, 2016, upon the following:

[10] There are 18 pilots at PortMiami. Reducing salaries by $120,000 a year per pilot would account for $2.1 million dollars. $2.1 million is far more financially then the effect of any rate decrease the FCCA is seeking. Even if the maximum 25% was granted, it would amount to a decrease in total fees of around $1.6 million.

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CERTIFICATE OF COMPLIANCE

Respondent, FCCA, hereby certifies that this response utilizes Times New Roman, 14 point font, and complies with the requirements of Florida Rule of Appellate Procedure 9.100(l).