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

FLORIDA-CARIBBEAN CRUISE  
ASSOCIATION,

Petitioner,

DCA Case No. 1D16-2391  
LT Case No.: PRRC 2014-1

v.

BISCAYNE BAY PORT PILOTS,

Respondent.

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**REPLY TO PILOTS' RESPONSE TO ORDER TO SHOW CAUSE**

Pursuant to this Court's May 31, 2016 order, the Florida-Caribbean Cruise Association ("FCCA") hereby files this reply to the Biscayne Bay Port Pilots' ("BBP") response to this Court's order to show cause, and states as follows:

**I. Overview of Issues Related to Disqualification Motions.**

1. The FCCA's petition for writ of prohibition outlines the procedural background and history, the relevant case law on agency head disqualification, and the detailed factual background giving rise to this petition in pages one through nine. The FCCA will not restate those issues again in this reply, and would respectfully direct this Court to those sections of its petition if it has any questions regarding the procedure or background of this matter.

2. With respect to issues pertaining to BBP's attempt to disqualify

Commissioners Carlos Trueba, Louis Sola, and Sherif Assal, the FCCA has set forth its arguments extensively in response to BBP's motions to disqualify and petition for writ of prohibition in Case No. 1D 16-2388. If this Court has any questions regarding those arguments, the FCCA would respectfully direct this Court to the FCCA's Response to the Order to Show Cause in that matter.

## **II. Disqualification of Commissioner Kurtz.**

3. With respect to Commissioner Kurtz, BBP takes inconsistent positions. On one hand, BBP argues in its petition for writ of prohibition in Case No. 1D 16-2388, that Commissioner Trueba's statements regarding proposed legislation relating to pilotage are sufficient to warrant his disqualification, and on the other hand BBP argues that Commissioner Kurtz's statements regarding the *exact same* legislative proposal at the *exact same* hearing are insufficient to warrant disqualification. BBP cannot have it both ways.

4. BBP's response contains statements which illuminate the hypocrisy of BBP's mutually exclusive positions on Commissioners Kurtz and Trueba. BBP argues that Commissioner Kurtz was merely carrying out her duties as a member of the Board of Pilot Commissioner's Legislative Committee, and to suggest Commissioner Kurtz should be disqualified for carrying out those duties is "ludicrous, particularly as the proposed legislation had nothing to do with any specific application to change pilotage rates at any port." *BBP Response*, p. 14.

BBP argues that this Court must recognize “the practical recognition of the numerous roles played by the agency as well as the agency head...” *Id.*

5. This statement makes no sense in light of BBP’s position that Commissioner Trueba should be disqualified for statements he made, at the *exact same* Legislative Committee meeting, on the *exact same* legislative proposal, and demonstrates BBP’s desire to apply preferential standards to pilots over the remaining members on the Board and Rate Review Committee, and the industries they represent. *See FCCA Appendix, Composite Ex. 1, “B”*, pp. 47-59. If it is *ludicrous* to suggest that Commissioner Kurtz should be disqualified for statements she made during a Legislative Committee meeting on the FHPA’s legislative proposal, then why isn’t BBP’s attempt to disqualify Commissioner Trueba for engaging in the exact same activity equally ludicrous? BBP provides no answer.

6. BBP’s statement also underscores the very reason why Commissioner Trueba should not be disqualified, as BBP recognizes that the legislative proposal “had nothing to do with any specific application or any port.”<sup>1</sup> While BBP acknowledges the proposal had nothing to do with any port or rate application, and that BBP’s application was not even in formation at the time of the meeting, BBP

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<sup>1</sup> BBP states that “[a]t the time of the January 2016 Legislative Committee meeting, neither Commissioner Kurtz nor anyone else could have known what BBP might include in any possible rate change application, as no decisions had been made and nothing had been drafted.” *BBP Response*, pp. 14-15, fn. 5 (emphasis added).

claims that Commissioner Trueba's statements about the legislative proposal show bias against BBP's application. BBP cannot hold Commissioner Kurtz to one standard – arguing that she cannot be biased in favor of the application and its CPI proposal because it was not even in formation – and then hold Commissioner Trueba to a completely different standard in seeking his disqualification.

7. BBP attempts to distinguish Commissioner Trueba's statements, arguing that his comments regarding the fees and handles at PortMiami showed bias or prejudice, and that Commissioner Kurtz did not make any specific statement regarding PortMiami. This argument does not hold water. As laid out extensively in the FCCA's response to BBP's petition in Case No. 1D 16-2388, Commissioner Trueba's statements, at most, make a factual reference to the fees and calls at PortMiami, and indicate that Commissioner Trueba cannot support the CPI legislative increase proposal until the rate making structure is more equitable. There is no reference to any applicant, any application, or anything in these statements showing bias or prejudice. **FCCA Appendix, Composite Ex. 1, "B"**, pp. 50-52.

8. To the contrary, Commissioner Kurtz strongly advocated for BBP in the prior rate hearing at PortMiami, and for the FHPA's CPI proposal, arguing:

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.**

**FCCA Appendix, Composite Ex. 1 "B", p. 59, lns. 1-24 (emphasis added).**

Although BBP's application was not filed at the time of the Legislative Committee meeting, Commissioner Kurtz's statements were heavily in favor of the CPI increase, which she clearly had firsthand knowledge of, and much more strongly warrant her disqualification than Commissioner Trueba. This is particularly true in light of the fact that Commissioner Trueba is not part of the FHPA, had no involvement in developing the CPI proposal, and has no vested interest in seeing the CPI legislative proposal or the CPI proposal in BBP's application pass or fail. To the contrary, BBP and its pilots, and Commissioner Kurtz, are all members of the FHPA, and all stand to benefit from a CPI increase codified in Chapter 310. It is not coincidental that BBP, as a member organization of the FHPA, seeks a CPI increase in its application and the FCCA cannot reasonably, objectively believe that Commissioner Kurtz will vote against BBP's CPI increase request (*see FCCA*

**Appendix, Composite Ex. 1, “C”**, p. 2), when Commissioner Kurtz and BBP are both members of the FHPA, have both pursued the same legislative agenda to increase rates by the CPI, and Commissioner Kurtz has made statements strongly in support of the CPI increase request. The FCCA has a reasonable, well-founded fear that Commissioner Kurtz has prejudged BBP’s application, at least to the extent it contains a request for a CPI increase, and that Commissioner Kurtz cannot objectively adjudicate this issue at the final hearing. See Williams v. Balch, 897 So. 2d 498 (Fla. 4th DCA 2005) (“Disqualification is required when litigants demonstrate a reasonable, well-grounded fear that they will not receive a fair and impartial trial or that the judge has pre-judged the case.”)

9. Moreover, this Court stated in Verizon Business Network Services, Inc. v. Department of Corrections, 988 So. 2d 1148, 1151 (Fla. 1st DCA 2008) that “[t]he constitutional guarantee of due process require that judicial decisions be reached by a means that ‘preserves *both the appearance and reality of fairness.*’” Id. (quoting Sparks v. State, 740 So. 2d 33, 36 (Fla. 1st DCA 1999)) (emphasis added). There is no basis in reality to believe that Commissioner Kurtz is truly an objective and disinterested participant in the rate review proceedings, or that BBP does not have a special advantage in influencing Commissioner Kurtz’s decision with respect to BBP’s application at the final rate hearing. Port Everglades Pilots Ass’n v. Florida Caribbean Cruise Ass’n, 177 So. 3d 952, 956 (Fla. 1st DCA 2015)

(stating that “the decision maker must not allow one side in the dispute to have a special advantage in influencing the decision.”) (*quoting* Cherry Communication v. Deason, 652 So. 2d 803, 805 (Fla. 1995)). BBP would like this Court to believe that because Commissioner Kurtz is a pilot from a port other than PortMiami, she is unbiased, or has the appearance of being unbiased. This is simply not the case in terms of appearances or reality, and Commissioner Kurtz should have granted the FCCA’s motion to disqualify.

### **III. Disqualification of Remaining Port Pilot Commissioners**

10. Contrary to BBP’s claim, the FCCA is not attempting to compare the membership of the port pilots on the Committee to former Commissioner Burke and Miguez’s relationship to the FCCA. In fact, the FCCA believes that the relationship among pilots and pilot organizations that make up the FHPA shows equally as much, if not more, bias than was perceived by BBP when Commissioners Burke and Miguez sat on the Committee.

11. BBP would like this Court to ignore reality. To believe that everyone on the Committee is biased against the pilots, but that the pilots on the Committee are wholly objective, totally unbiased, unimpeachable, and only capable of providing fair and objective opinions on rate change applications that don’t contain a shred of favoritism towards other pilots and pilot organizations. You couldn’t find a better piece of fiction at Barnes & Noble.

12. It takes no more than five minutes at any Committee meeting to understand where the pilots' allegiances lie, and the FCCA's fears are not subjective. BBP erroneously argues that the FCCA's statements regarding Commissioner Ulrich were "attacks" that are "completely irrelevant" to the motion to disqualify. *BBP Response*, pp. 19-20. That is incorrect. The FCCA has no intent of disparaging Commissioner Ulrich. The statements outlined by the FCCA were to provide this Court with context regarding the realities of the Pilotage Rate Review Committee, and how it operates in reality, rather than theory.

13. The same holds true for Commissioner Kurtz. Commissioner Kurtz's statement provide this Court a window into the Committee's operations and the realty of the pilots' relationship among themselves, their aggressive defense of each other on the Committee, and the advancement of other pilots and pilot organizations' interests. A simple reading of the statements made by pilot commissioners at the hearing makes clear that these are not statements of impartial participants seeking to reach the truth of the matter (see **FCCA Appendix, Ex. 1**, pp. 11-13; **Composite Ex. 1, "A"**, p. 567, lns. 18-25; p. 603, lns. 2-11; p. 609, ln. 19 – p. 611, ln. 4; p. 626, lns. 18-23), but rather are individuals who have prejudged the case and aggressively pursue the agenda of other pilots. While the FCCA does not disagree with BBP that judges are not required to abstain from making comments or forming mental impressions or opinions during the course of

a case (*see Mobil v. Trask*, 463 So. 2d 389, 391 (Fla. 1st DCA 1985)), the statements made by pilot commissioners go far beyond forming an opinion or mental impression, and easily rise to the level of being an advocate for BBP. Commissioner Kurtz called the FCCA's application, and the arguments therein, "punitive" and "insulting," and argued that the FCCA was "manipulating facts". These are not simply mental impressions or opinions, but rise to the level of hostility towards the FCCA and a clear bias against the FCCA's pursuit of a pilotage rate reduction at PortMiami. Judicial decisions must be reached in a manner which preserves both the "appearance *and reality of fairness.*" Verizon Business Network Services, Inc., 988 So. 2d at 1151. BBP's response is centered upon the notion that Commissioner Kurtz appears to be a fair decision-maker because she is a pilot at port other than PortMiami, but Commissioner Kurtz's statements and FHPA membership demonstrate not only a lack of the appearance of fairness, but a clear lack of fairness in reality.

14. BBP also argues that the FCCA is unhappy with a legislative scheme allowing for two pilots on the Rate Review Committee, which is a statement not lacking in irony. The FCCA has not sought to disqualify a pilot from the Committee until the filing of the underlying motions in this matter. To the contrary, BBP has filed, at a minimum, *six* motions to disqualify members from the maritime industry, and *two* motions to disqualify Commissioner Trueba. It is BBP,

not the FCCA, who takes issue with the legislative scheme. BBP is currently seeking to disqualify Commissioner Louis Sola and Sherif Assal from the Committee based solely on business relationships they have with the FCCA, business relationships that are the very foundation that make them qualified to sit on the Committee. *See* Fla. Stat. §310.151(1)(b) (requiring the Committee to include two individuals “who are actively involved in a professional or business capacity in the maritime industry, marine shipping industry, or commercial passenger cruise industry.”) (emphasis added).<sup>2</sup> At the same time, BBP seeks to disqualify these two individuals for their business relationships, and without showing any facts of bias or prejudice by Commissioners Sola and Assal. For BBP to criticize the FCCA for being unhappy with the legislative scheme for the Committee’s make-up is inconsistent with its own actions.

15. The relationship of the pilots around the state, and on the Committee, is so much more than a business relationship. It’s a brotherhood, a tightknit group of individuals who participate in a statewide organization to advance their legislative interests through unified lobbying efforts. It’s a group who has a direct financial interest in seeing rates at sister ports in Florida remain as high as possible, so not to support rate reductions at their ports. Pilots at one port have a vested, unquestionable, financial interest in seeing that pilots at other ports are not harmed

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<sup>2</sup> Again, the FCCA’s response to these arguments is laid out extensively in its response to the order to show cause in that case.

in any manner. Each pilot's involvement in the FHPA demonstrates the uniform agenda that all pilots and pilot organizations across the state pursue. **FCCA Appendix, Composite Ex. 1, "E"**. The FHPA's website states that the organization is designed to "coordinate all efforts and represent all members at the state level." *Id.* (emphasis added), and the whole organization is only made up of 97 pilots, including a Board of Directors that is comprised of one captain from each of the eleven member associations, including from BBP. **FCCA Appendix, Composite Ex. 1, "F"**. The other commissioners appointed to the Committee have no such relationship among one another, or to any entity seeking a rate change before the Committee. Yet BBP continues to pretend as though all other commissioners are biased and that the pilots on the Committee are totally objective, disinterested observers of the rate change applications at other ports, which is absurd. Ultimately, it is not whether BBP believes its pilots are truly impartial, objective participants in the rate review proceedings, but rather "what feeling resides in the movants mind and the basis for such feeling." Charlotte County v. IMC Phosphates Co., 824 So. 2d 298, 300 (Fla. 1st DCA 2002). In the mind of the FCCA, there is absolutely no basis in reality for believing that the pilots on the Committee are capable of being impartial and objective towards the FCCA, and not biased in favor of BBP or any pilot organization before them.

16. Unlike BBP, however, the FCCA understands that the statutory

scheme is intended to provide representation from different and neutral standpoints, including the pilots, the maritime payer industry and citizens of the state. BBP is living a fantasy where it wants to have pilots on the Committee who can advance the interests of other pilot organizations, but everyone else on the Committee must have no connection, no relationships, and take no action whatsoever that could even remotely suggest that the individual could consider lowering pilotage rates. The fact that section 310.151(1)(b) calls for port pilots to participate on the Pilotage Rate Review Committee does not mean that those pilots are impugned from being disqualified when bias or prejudice is demonstrated, as is the case here. “[T]he right to appear before an impartial tribunal is a fundamental tenet of the constitute guarantee of due process,” (*see* Verizon Business Network Services, Inc., 988 So. 2d at 1151) and the FCCA cannot be forced to participate in pilotage rate change proceedings in front of a committee which consists of pilots with open bias and hostility towards the FCCA, regardless of the statutory call for pilot participation on the Committee.

WHEREFORE, the Florida-Caribbean Cruise Association respectfully requests that this Honorable Court enter an order GRANTING the FCCA's 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 11th day of July, 2016, upon the following:

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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(1).