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

BISCAYNE BAY PILOTS, INC.,

Petitioner,

Case No.: 1D16-2388
LT. No.: PRRC2014-1

v.

FLORIDA-CARIBBEAN CRUISE
ASSOCIATION,

Respondent.

**BISCAYNE BAY PILOTS, INC.'S REPLY TO RESPONSE OF FLORIDA-
CARIBBEAN CRUISE ASSOCIATION**

Pursuant to this Court's Order of May 31, 2016, Petitioner Biscayne Bay Pilots, Inc. ("BBP" or "the Pilots") files this Reply to the Response to Order to Show Cause filed by Respondent Florida-Caribbean Cruise Association ("FCCA"). In support, BBP states:

1. The factual background and legal basis for BBP's requested relief are set forth in BBP's Petition for Writ of Prohibition and accompanying Appendix filed on May 24, 2016. Without repeating that information here, BBP continues to rely on the arguments in its Petition.

2. FCCA makes much in its Response of the resignation of Commissioners Louis Sola and Sherif Assal from their Platinum membership in

FCCA around the time they were appointed to the Board of Pilot Commissioners (“BOPC”). According to FCCA, because Commissioners Sola and Assal are no longer members of FCCA, they cannot be equated with the “applicant” for a rate decrease in the rates of pilotage at PortMiami. Response, ¶ 2. FCCA misses the point. Both Commissioners were active Platinum members of FCCA at the time they sought appointment to the BOPC.¹ As noted in BBP’s Petition at pages 15-16, Platinum Membership in the FCCA costs \$25,000 per year and is intended to cultivate close relationships among cruise line executives and those who do business with them. Petition, p. 4 and **Petition Appendix, Exhibit K.** Commissioner Assal was a member of FCCA for 12 years. Petition, p. 16. Commissioner Sola resigned from FCCA on December 3, 2015, the day before he was appointed to the BOPC. Commissioner Assal resigned his FCCA membership on January 6, 2016, retroactive to January 1, 2016, approximately one month after he was appointed to the BOPC. Petition, p. 2, n.1. FCCA’s suggestion that their recent resignations absolve Commissioners Assal and Sola of all bias in favor of the organization they recently served as active members strains credibility. Indeed, Commissioner Assal attended an FCCA event as recently as June of 2016, even though he resigned his membership

¹ By virtue of their membership on BOPC, Commissioners Assal and Sola also serve on the Pilotage Rate Review Committee (“Rate Review Committee”), the entity that considers requests for changes in the rates of pilotage. § 310.151(1)(b), Fla. Stat.

six months earlier. **Reply Appendix, Composite Exhibit 1** (photos of Commissioner Assal at an FCCA event in June, 2016; photo of Commissioner Assal from his personal, public Facebook page). Attendance at such an event hardly suggests a neutral Commissioner who can objectively consider FCCA's application.

3. FCCA also misrepresents BBP's Petition by stating that BBP "failed to address" the Commissioners' resignation from FCCA. Response, ¶ 2. This is simply incorrect. Petition, p. 2, pp. 15-18, pp. 29-30. Indeed, BBP argued that the recent resignations of the Commissioners merely reflect that they (or the appointing entity or FCCA) were cognizant of the previous proceedings in this Court and hoped the new Commissioners could avoid the fate of previous Commissioners affiliated with FCCA who either resigned from the BOPC or were disqualified from hearing FCCA's application through litigation in this Court. *Id.*, p. 30. *See Biscayne Bay Pilots, Inc. v. Fla. Caribbean-Cruise Ass'n*, 160 So. 3d 559 (Fla. 1st DCA 2015) (*Biscayne Bay Pilots I*); *Port Everglades Pilots Ass'n v. Florida-Caribbean Cruise Ass'n*, 170 So. 3d 952 (Fla. 1st DCA 2015) (*Port Everglades Pilots*); *Biscayne Bay Pilots, Inc. v. Fla. Caribbean-Cruise Ass'n*, 177 So. 3d 1043 (Fla. 1st DCA 2015) (*Biscayne Bay Pilots II*).

4. BBP reasonably fears that it will not receive a fair hearing from Commissioners Assal and Sola, who until recently were members of the very applicant seeking a decrease in the rate of pilotage for passenger vessels in

PortMiami. As this Court stated in *Biscayne Bay Pilots I*, the test for legal sufficiency of a petition for writ of prohibition is:

whether the facts alleged would prompt a reasonably prudent person to fear that they would not obtain a fair and impartial hearing. It is not a question of how the [agency head] actually feels, but what feeling resides in the movant's mind and the basis for such feeling. The [agency head] may not pass on the truth of the allegations of fact, and countervailing evidence is not admissible.

160 So. 3d at 562 n.5, quoting *Charlotte Cnty. v. IMC-Phosphates Co.*, 824 So. 2d 298, 300 (Fla. 1st DCA 2002)). There's no factual dispute about these Commissioners' prior membership in FCCA or about resignations that were conveniently timed with their appointment to the BOPC. Such facts would prompt any prudent person to question whether they could receive a fair and impartial hearing before the Rate Review Committee. Members of BBP believe that they cannot.

5. FCCA also argues that Commissioners Assal and Sola are not biased because their substantial interests will not be directly affected by a change in the rates of pilotage in PortMiami. Response, pp. 4-6. While it is correct that this Court in *Biscayne Bay Pilots I* noted that the only way FCCA had standing to file an application for a rate change in PortMiami was because its cruise line members' substantial interests were directly affected by pilotage rates, this Court did not hold

that only those entities whose substantial interests are affected could be biased or prejudiced within the meaning of section 120.665, Florida Statutes.²

6. Rather, the Court in all three 2015 pilotage cases reiterated that bias or prejudice pursuant to section 120.665 exists when “a reasonably prudent person” would “fear that he or she will not obtain a fair and impartial hearing.” *Port Everglades Pilots*, 170 So. 3d at 955; *Biscayne Bay Pilots II*, 177 So. 3d at 1044-45; *Biscayne Bay Pilots I*, 160 So. 3d at 562, n.5. That is the relevant test applicable in this proceeding.

7. Similarly, FCCA argues that Commissioners Assal and Sola are not employees of FCCA’s member cruise lines and, therefore, under the precedent of the 2015 pilotage cases, they cannot be biased or prejudiced in favor of FCCA and against the pilots. Response, pp. 6-12. Again, FCCA misconstrues the import of the 2015 cases, which reiterate the “reasonably prudent person” standard for assessing bias or prejudice. In the *Port Everglades Pilots* and *Biscayne Bay Pilots II* cases, the Court found the pilot associations had a reasonable fear that they would not

² The Court was necessarily dealing in the 2015 pilotage cases with the factual situation presented at that time. The challenged Commissioners were high-level employees of the cruise line members of FCCA. Citing longstanding cases involving associational standing under the Florida Administrative Procedure Act (“APA”), the Court noted that the cruise lines were the “de facto” parties to the proceeding and it was only through its members that FCCA had standing to seek the rate decrease. *E.g.*, *Biscayne Bay Pilots I*, 160 So. 2d at 560, n.2. The Court did not hold or even imply that only persons or entities that could be parties to a rate change proceeding could be biased or prejudiced.

obtain a fair and impartial hearing because the Commissioners were employed by members of FCCA, who were “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). Those were the facts of that case. Here, although Commissioners Assal and Sola are not employees of FCCA’s member cruise lines, they have paid \$25,000 per year for the privilege of FCCA membership and cultivating close relationships with FCCA member line CEOs, presidents and executives. **Petition Appendix, Exhibit K**; *see also* **Reply Appendix, Composite Exhibit 2** (2016 articles discussing the advantages of Platinum Membership and resulting business opportunities through attendance at FCCA’s Platinum Association Membership Advisory Council conferences). The second article included in the exhibit provides: “The PAMAC Conference has sparked this synergy through one-on-one meetings between Platinum Members and executives of their choice; presentations of Platinum Members’ latest developments for the executives and other members to learn about and from; and networking functions between members and executives, including sit-down dinners cooking up business relationships.” **Reply Appendix, Composite Exhibit 1**.

8. Commissioners Assal and Sola were members of FCCA at the time they applied to be on the BOPC (and the Rate Review Committee), and their recent

resignations do nothing to suggest that they are no longer biased or prejudiced in favor of the organization they previously served. As recently resigned Platinum members of FCCA, Commissioners Assal and Sola are a part of the Applicant entity, just as much as Commissioners Miguez and Burke were.

9. FCCA repeatedly misstates BBP's arguments in its Response, perhaps most egregiously when it alleges that "[a]ccording 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." Response, pp. 12-13. This is not BBP's position. As stated in the Petition, BBP does not seek to disqualify Commissioners Assal and Sola because they are involved in the maritime industry. Section 310.151, Florida Statutes, contemplates that two members of the Committee must come from that industry, the marine shipping industry, or commercial passenger cruise industry. Rather, it is their Platinum Membership in the Applicant itself, FCCA, which demonstrates bias, prejudice, or interest. Surely maritime industry appointees to the Rate Review Committee could have been found who were not Platinum Members of FCCA and who did not pay significant sums of money to cultivate close relationships with top cruise line executives.

10. While disparaging the Pilots and their motives, FCCA also swipes at the statutory scheme governing piloting in chapter 310, which was established by

the Legislature, and which is not at issue in this case. *See* Response, ¶ 18 (“[W]hile BBP is beholden to no one given its statutory monopoly over piloting and the guaranteed income it provides for all pilots throughout the state . . . the rest of the world operates under normal capitalistic pressures”); Response, ¶ 19 (“It is clear that BBP would prefer for there to be no maritime representation on the Committee”). For whatever reason, FCCA simply cannot understand that the Pilots continue to object to FCCA members serving on the very committee that will hear FCCA’s request for a reduction in the rates of pilotage in PortMiami. As to Commissioners Assal and Sola, that is BBP’s objection, and nothing more. BBP has no complaint with the statutory scheme in chapter 310, although FCCA makes clear that it does. *See* Case No. 1D16-2391, FCCA’s Reply to Pilots’ Response to Order to Show Cause, ¶ 16 (“[T]he 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.”).

11. Concerning Commissioner Trueba, FCCA attempts to suggest that his comments at the Legislative Committee meeting in January 2016 were not directly related to the current rates of pilotage in PortMiami and were not based on arguments he heard from FCCA at the Rate Review Committee’s hearing on FCCA’s application in the summer of 2014. Response, pp. 16-24. As explained in BBP’s

Petition, Commissioner Trueba specifically referenced the pending case in PortMiami at the Legislative Committee meeting and repeatedly stated that he believes the existing pilotage rates in PortMiami are unfair. His comments echo statements made in FCCA's application, which is premised on the idea that the cruise lines pay "exorbitant" and "unreasonable" pilotage fees when passenger vessels account for much less of the Pilots' work, but much more of the Pilots' fees than cargo and container vessels. Petition, p. 21 and **Appendix, Exhibit M.** Commissioner Trueba's comments at the Legislative Committee meeting left no doubt that he has already decided this case and accepted, without hearing any evidence, the fundamental premise of FCCA's rate decrease application, i.e., that there is an alleged inequity in the rates charged in PortMiami for passenger vessels verses cargo vessels. His comments demonstrate that he has already made up his mind to support FCCA's application for a rate decrease before the hearing has even begun. Thus, he has prejudged the case, and the Pilots are entitled to a writ of prohibition concerning his participation in the consolidated pilotage rate proceedings involving PortMiami. *See, e.g., Wargo v. Wargo*, 669 So. 2d 1123, 1124-25 (Fla. 4th DCA 1996) ("A judge may form mental impressions and opinions during the course of presentation of evidence, as long as she does not 'prejudge the case.'") (quoting *Brown v. Pate*, 577 So. 2d 645, 647 (Fla. 1st DCA 1991)); *Williams v. Balch*, 897 So. 2d 498, 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.”).

12. FCCA also errs by equating Commissioner Trueba’s comments at the Legislative Committee meeting to those of Commissioner Kurtz. Response, pp. 17-23. Commissioner Kurtz never commented on specific allegations in FCCA’s application, nor did she comment on specific elements of BBP’s competing application for a rate increase, which was not filed until two months after the Legislative Committee meeting. She was commenting only on a proposal by the Florida Harbor Pilots Association (“FHPA”) to suggest support of legislation relating to a regular increase in the rates of pilotage based on the Consumer Price Index. Moreover, FCCA is disingenuous when it states that Commissioner Kurtz “*agreed* with Commissioner Trueba’s statements.” Response, ¶ 24 (emphasis in the original). Any reading of the Legislative Committee transcript will show only that Commissioner Kurtz agreed with Commissioner Trueba’s statement that the current process for adjustments in pilotage rates “is flawed,” and nothing more. **Appendix, Composite Exh. L.** She certainly did not accept or agree with Commissioner Trueba’s endorsement of the fundamental premise of the FCCA application.

13. Moreover, FCCA grossly misstates BBP’s position when FCCA argues that BBP attempts to stifle discussion by the Legislative Committee of any legislative proposal that may be similar to some element of a future rate change

application that has not even been filed. Response, ¶ 29. That is simply false. What BBP objects to are the comments of Commissioner Trueba concerning the pending rate case involving PortMiami, where he endorsed the primary argument made in FCCA's application, i.e., that cruise ships are treated inequitably under the current rate structure in comparison with cargo ships. Petition, pp. 20-21.

14. Regarding Commissioner Trueba's absences, BBP acknowledged in its Petition that this issue may not be cognizable in this case, which is premised on bias, prejudice, or interest pursuant to section 120.665, Florida Statutes. Petition, p. 24, n.14. Nonetheless, the subject of Commissioner Trueba's absences was included in the request that he disqualify himself, so it has been addressed. FCCA's argument that Commissioner Trueba did not miss 50 percent of meetings within a 12-month period – but rather, that he missed 50 percent within twelve months and a day – is creative, but not persuasive. Response, pp. 24-26. Commissioner Trueba missed the meetings on both October 2 and October 3, 2014. Although these were treated as one meeting by the BOPC staff, other two-day meetings were treated as separate meetings. Petition, p. 23; **Appendix, Composite Exhibit D**. If Commissioner Trueba's absence on October 2, 2014, is discarded from the calculation, he still has missed 50 percent of all meetings between October 3, 2014, and October 2, 2015, which is a 365-day period. Thus, his membership on the BOPC is void pursuant to section 455.207(3), Florida Statutes.

15. Finally, FCCA completely misconstrues BBP's arguments concerning the impact on the Pilots if a writ of prohibition is not granted. Response, pp. 26-29; Petition, pp. 32-35. First, BBP does not make an argument concerning irreparable harm, as none is required. Petition, p. 32 (“[This Court’s cases concerning issuance of writ of prohibition in disqualification cases do not require a showing of irreparable harm”). BBP’s point in discussing the potential impact on the Pilots was to emphasize the importance of issuance of a writ of prohibition, as opposed to waiting until after all administrative litigation concerning the competing rate applications is concluded and addressing the issue on direct appeal. § 120.68(1), Fla. Stat.; *Biscayne Bay Pilots I*, 160 So. 3d at 564 (Benton, J., concurring in the judgment but suggesting that the issues raised relating to bias and prejudice could be decided on review of final agency action). Recognizing that the Court in *Biscayne Bay Pilots I* asked numerous questions about the practical aspects of immediate implementation of a rate change as described in section 310.151(4)(b), Florida Statutes, the Pilots deemed it worthy of a brief discussion in their Petition. Contrary to the assertions of FCCA in Paragraph 38 of its Response, BBP is not arguing that a writ of prohibition should be issued “regardless of whether the Commissioners are biased or prejudiced.” Rather, BBP is arguing that a writ of prohibition should be granted because Commissioners Assal, Sola, and Trueba are biased or prejudiced.

For the reasons expressed, BBP respectfully requests that this Court issue the requested writ of prohibition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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