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88454-7

DISTRICT COURT OF APPEAL OF FLORIDA  
THIRD DISTRICT

<b>FILED</b>	
Department of Business and Professional Regulation	
Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	6/8/2018
File #	

CASE NO: 3D \_\_\_\_\_

FRS - FAST RELIABLE  
SEAWAY, LLC., and  
ANTILLEAN MARINE  
SHIPPING, CORP., BETTY K  
AGENCIES (USA), L.L.C. GOD  
ISABLE SHIPPING, LLC, and  
RIVERT TERMINAL SERVICES,  
INC.

Petitioners

v.

BOARD OF PILOT  
COMMISSIONERS  
OF THE STATE OF FLORIDA,  
DEPARTMENT OF BUSINESS  
AND PROFESSIONAL  
REGULATION; FLORIDA  
CARIBBEAN CRUISE  
ASSOCIATION; and BISCAYNE  
BAY PILOTS, INC.

Respondents

From the Pilotage Rate Review  
Committee of the Board of Pilot  
Commissioners, Dept. of Business  
and Professional Regulation

No. PRRC 2014-1

**RECEIVED**

**JUN 08 2018**

**DBPR Agency Clerk**

**PETITION FOR WRIT OF CERTIORARI**

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Attorney for Petitioners FRS – Fast Reliable Seaway, LLC; Antillean Marine  
Shipping, Corp, Betty K. Agencies (USA), L.L.C., God is Able Shipping LLC and  
River Terminal Services, Inc.

Wicker Smith O'Hara McCoy & Ford, P.A.  
515 E. Las Olas Boulevard  
Suntrust Center, Suite 1400  
Fort Lauderdale, FL 33301

**PETITION FOR WRIT OF CERTIORARI**

COMES NOW, the Petitioner, FRS – Fast Reliable Seaway, LLC and Antillean Marine Shipping, Corp., by and through undersigned counsel, pursuant to Florida Rule of Appellate Procedure Rule 9.100, and hereby files this Petition for Writ of *Certiorari*, and in support thereof states as follows:

**INTRODUCTION**

Petitioners are challenging a Final Order of the Board of Pilot Commissioners (“the Board”) that changed the formula for pilotage rates for all foreign-flagged vessels navigating PortMiami. Without adequate notice or opportunity for interested entities to be heard, and in violation of applicable statutes and administrative requirements, the Board agreed to a secretly negotiated rate change for pilotage with no advance notice to the companies that patron the PortMiami pilots. Petitioners, foreign-flagged shipping companies, are non-parties to the administrative proceedings who were directly, specially, and immediately impacted by the Final Agency Action. In summary, the Committee of the Board that sets the port pilots

rates after years of public process and advance notice decided to change the PortMiami pilot rates to amounts and by factors never previously noticed.

This Petition stems from a Final Order (Appx 1-7) that was adopted on April 27, 2018 and publicly filed for the first time on May 9, 2018. The Final Order approves a Settlement Agreement signed on April 25/26, 2018. (Appx 5-7). The pilotage rates set forth in the Settlement Agreement and adopted in the Final Order were **never previously published** as required by Florida Administrative Code. *See* Fla. Admin. Code Ann. r. 61G14-22.007(5).

The impact on the Petitioners of this rate change is severe. It was only on January 30, 2018 via the Florida Administrative Register that the Pilotage Rate Review Committee gave “Notice of Intent to Modify the Port of Miami Rate of Pilotage.” (Appx 65-66) These rates were made effective as of October 1, 2017. (*Id.*) Then, with no advance warning, a new pilotage rate went into effect in May 2018.

#### **I. Basis for Invoking the Jurisdiction of the Court**

Petitioners file this Petition pursuant to Fla. R. App. P. 9.100 and seek this Court’s jurisdiction pursuant to Article 5 § 4(b) of the Florida Constitution, providing district courts of appeal with jurisdiction to issue writs of certiorari. “Certiorari is a common law writ which issues in the discretion of the court to an inferior tribunal to review its action and determine whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential

requirements of law in cases where no remedy will lie by appeal.” *State ex rel. Boyles v. Fla. Parole and Probation Com’n*, 436 So. 2d 207, 209 (Fla. 1st DCA 1983).

Here, the lower tribunal, the Board, departed from the essential requirements of law when it issued a rate change without providing procedural due process and without a providing notice of its consideration of a privately negotiated settlement agreement that substantially modified the previously published rate change.

Courts recognize that a failure to provide due process is a departure from the essential requirements of law. *K.G. v. Fla. Dept. of Children and Families*, 66 So. 3d 366 (Fla. 1st DCA 2011); *North Broward Hosp. Dist. v. Durham*, 991 So. 2d 967, 968 (Fla. 4th DCA 2008) (court “departed from the essential requirements of law” when it entered ruling “without adequate notice and an opportunity to be heard....”). A tribunal also departs from the essential requirements of the law if it fails to apply the correct law. *Dept. of Transp. v. Baird*, 992 So. 2d 378, 381 (Fla. 5th DCA 2008). The May 9, 2018 Order fails on both bases.

Certiorari is further appropriate because there is no remedy for Petitioners by appeal. They were not parties to the proceedings below and, therefore, they do not currently have an automatic right to appeal. Florida Statute section 120.68, which governs judicial review for final agency action, allows a “party” to appeal. Because Petitioners were not parties below, they do not currently have standing to directly appeal the May 9, 2018 order. Therefore, the appropriate vehicle for review is a

petition for writ of certiorari. *Boyles*, 436 So. 2d at 210 (because petitioners were not parties before the Parole and Probation Commission, they could seek certiorari review of Commission order which affected their interests).

“[A] nonparty whose rights are directly affected by an order may obtain review of that order by certiorari even though that person or entity was not a party in the lower tribunal.” 2 Fla. Prac., Appellate Practice § 10:3 (2017 ed.) (*citing Ahlers v. Wilson*, 867 So. 2d 524 (Fla. 1st DCA 2004) (employer’s former owner, who was not a party to a workers’ compensation proceeding, had the right to seek certiorari review of an order requiring it to pay workers’ compensation benefits); *Boyles, supra*).

The *Boyles* court recognized that “[a] person need not necessarily be a party to a proceeding in order to obtain certiorari review if he has sufficient interest in the subject matter of the order.” 436 So. 2d at 210. *See also Ahlers*, 867 So. 2d at 526 (“to obtain certiorari review . . . a petitioner need not be a party to the proceeding if he or she has an interest in the subject matter which would entitle him or her to such review.”).

Here, Petitioners certainly have a “sufficient interest” in the subject matter of the Order to entitle them to seek certiorari relief. Petitioners all operate vessels that regularly navigate the PortMiami. (Appx 75-79) Because these vessels are foreign-flagged, they must contract with the Biscayne Bay Pilots, Inc., which is the sole

organization for harbor pilots for vessels transitioning in the PortMiami. The May 9, 2018 pilotage rate change requires the Petitioners to pay new, excessive rates which they did not have adequate notice of and opportunity to challenge. Specifically, the un-noticed rate change set a new fee for tonnage, resulting in a decrease, but then set a new rate for draft, resulting in an increase, and then added entirely new charges – length and beam – resulting in further increases. (Appx 75-79) The net effect for Petitioner FRS – Fast Reliable Seaway, LLC, for example, is that from the October, 2017 rate change to the May, 2018 rate change, there is a \$451.92 *increase* per sailing (inbound and outbound movement). (Appx 75-79). By changing the rate that Petitioners are required to pay, the May 9, 2018 order directly and negatively impacts Petitioners.

As the *Ahlers* case, *supra*, establishes, an order that has a direct economic impact on a petitioner creates the type of “interest” sufficient to seek certiorari review. This same interest would have entitled Petitioners to intervene as parties in the proceedings below. *See* Fla. Admin. Code Ann. R. 28-106.205 (persons “whose substantial interest will be affected” may seek to intervene).<sup>1</sup> It is only because Petitioners did not receive adequate notice of the proceedings below, that they did

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<sup>1</sup> Had Petitioners received adequate notice, they would have intervened in the proceedings below as parties before the final order was entered. Now that Petitioners have learned of the final order, they have moved to intervene in the proceedings below, which motion is still pending. (Appx 335-38).

not intervene. Petitioners have thus established the second part of the inquiry – “no remedy will lie by appeal.”

## **II. Facts on Which Petitioners Rely**

### **a. The pilots are a regulated industry and Petitioners must operate using a pilot.**

The port pilot industry is regulated by the Florida Department of Business and Professional Regulation (“DBPR”). §310.091, Fla. Stat. The DBPR, which is the agency charged with licensing and regulating businesses and professionals in Florida, has established the Board of Pilot Commissioners to issue licenses to and regulate harbor pilots. § 310.001-310.185, Fla. Stat.; *see* Fla. Admin. Code Ann. r. 61G14-11. One of the responsibilities of the Board is to review the pilotage rates of Florida ports and to consider applications for increases or decreases of those rates. §§ 310.001-310.185; 310.0015(3); 310.151, Fla. Stat.

The Petitioners, FRS – Fast Reliable Seaway, LLC, Antillean Marine Shipping, Corp., Betty K Agencies (USA), L.L.C., God is Able Shipping LLC, and River Terminal Services, Inc., all operate vessels in the PortMiami and Miami River that must have a state licensed pilot or certified deputy pilot because they are exempt. § 310.141(1), Fla. Stat. Each of Petitioners as shown by the exemplar invoices issued to FRS – Fast Reliable Seaway, LLC (Appx 75-79) and Corp., Betty K Agencies (USA), L.L.C. (Appx 332-34) were charged pilotage rates before October 2017, after the adoption of October 2017 modified rates, and now as of May 2018 modified

rates by un-noticed settlement. Each Petitioner's cost to navigate with the pilots has significantly increased by the adoption of the May 2018 rates.

**b. Competing applications for rate change were filed.**

On March 18, 2014, the Florida Caribbean Cruise Association ("FCCA") filed an application to the Pilotage Rate Review Committee ("the Rate Committee") of the Board requesting a 25% decrease in the pilotage rates for all passenger vessels calling on the Port of Miami. (Appx 10, 84-97) At the time, the following pilotage rates applied: \$17.433 per foot of draft (depth of the ship) and \$0.0364 Gross Registered Tonnage (GRT). (Appx 86) Thus, the twenty-five percent reduction requested by the FCCA would mean rates of \$13.075 per foot of draft and \$0.0273 GRT. (Appx 86)

On March 24, 2016, the Biscayne Bay Pilots ("BBP") filed a competing application to the PRRC. (Appx 98-106) The BBP application requested annual 6% increases over the 2002 rates for five years for all vessels, an annual Consumer Price Index ("CPI") adjustment (plus or minus) beginning in year two, and a subsequent indefinite CPI adjustment after year five. (Appx 99) While the FCCA application requested a decrease in the PortMiami pilotage rates, the BBP application requested an increase in those rates. (Appx 10, 84-97; 99)

**c. Notice was given of an intent to modify the PortMiami pilotage rates.**



After more than two years of litigation between the FCCA and the BBP in both the Rate Committee and the First District Court of Appeals of Florida, the Rate Committee and the Board scheduled public investigative hearings from May 16 to 19, 2017. (Appx 23) These public investigative hearings were properly noticed in the Florida Administrative Register (“FAR”) on February 6, 2017, as follows:

Notice of Meeting/Workshop Hearing

**DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION**

**Board of Pilot Commissioners**

The Board of Pilot Commissioners/Pilotage Rate Review Committee announces a public meeting to which all persons are invited.

**DATES AND TIMES:** May 16, 2017, 2:30 p.m.; May 17, 2017, 9:00 a.m.; May 18, 2017, 9:00 a.m.; May 19, 2017, 9:00 a.m.

**PLACE:** Hyatt Regency Miami, 400 SE 2nd Avenue, Miami, FL 33131-2197

**GENERAL SUBJECT MATTER TO BE CONSIDERED:** A petition for a change in the rates of pilotage charged by the licensed state pilots and certified deputy pilots at the Port of Miami has been filed with the Pilotage Rate Review Committee, pursuant to Section 310.151, Florida Statutes and Chapter 61G14, Florida Administrative Code.

The last rate change (increase) granted for the Port of Miami was April 1, 2002. The committee intends to consider the requested rate changes for the Port of Miami wherein applications were filed by two separate parties, the Florida-Caribbean Cruise Association and the Biscayne Bay Pilots, and will be considered simultaneously on the dates and times noticed.

The Committee’s site visit to the Port of Miami will occur on Tuesday, May 16, 2017, 3:00 p.m. at 2911 Port Boulevard, Miami, FL 33132.

All interested parties may file an answer, an additional or alternative application, or any other applicable pleading or response, including all documentation in support thereof within thirty (30) days of this publication. Therefore, any answer, an additional or alternative application, or any other applicable pleading or response, including all documentation in support thereof must be filed by close of business on March 10, 2017.

A copy of the application for the rate change and for a copy of the investigative committee’s report (when available) may be obtained by contacting: the Board of Pilot Commissioners/Pilotage Rate Review Committee, 2601 Blair Stone Road, Tallahassee, FL 32399, (850)717-1982.

A copy of the agenda may be obtained by contacting: The Board of Pilot Commissioners/Pilotage Rate Review Committee, 2601 Blair Stone Road, Tallahassee, FL 32399, (850)717-1982.

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this workshop/meeting is asked to advise the agency at least 7 days before the workshop/meeting by contacting: The Board of Pilot Commissioners/Pilotage Rate Review Committee, 2601 Blair Stone Road, Tallahassee, FL 32399, (850)717-1982. If you are hearing or speech impaired, please contact the agency using the Florida Relay Service, 1(800)955-8771 (TDD) or 1(800)955-8770 (Voice).

If any person decides to appeal any decision made by the Board with respect to any matter considered at this meeting or hearing, he/she will need to ensure that a verbatim record of the proceeding is made, which record includes the testimony and evidence from which the appeal is to be issued.

For more information, you may contact: The Board of Pilot Commissioners/Pilotage Rate Review Committee, 2601 Blair Stone Road, Tallahassee, FL 32399, (850)717-1982.

(Appx 38, 63-64) During the May 2017 investigative hearings, the Rate Committee considered the FCCA’s application for a pilotage rate decrease and the BBP application for a pilotage rate increase and made its decision on how to modify the pilotage rates. (Appx 23-37) The Rate Committee did not provide the relief that

either party sought; rather, it made its own decision based on its review of the evidence presented. (Appx 34-36) Those evidentiary findings were never disturbed or amended.

On September 21, 2017, the Rate Committee issued a Notice of Intent to Modify the Port of Miami Rate of Pilotage. (Appx 23-37). Through this Notice, the Committee announced its decision that the modified pilotage rates would become effective on October 1, 2017.<sup>2</sup> (Appx 35) Additionally, pursuant to section 120.57(1), Florida Statutes, this Notice provided the opportunity for FCCA and BBP to formally appeal the Committee decision before an Administrative Law Judge of the Department of Administrative Hearings (“DOAH”). (Appx 36)

On October 12, 2017, the FCCA and the BBP separately filed petitions for a DOAH hearing. (Appx 107-331). On January 22, 2018, the Administrative Law Judge determined that he did not have jurisdiction and relinquished jurisdiction to the Rate Committee for further proceedings. (Appx 5) Specifically, the judge found that the Committee had “proceeded to provide the Notice to interested parties required by section 310.151(4) without, obviously, informing such persons as to the intended agency action, thus defeating the purpose of the notice.” (Appx 80)

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<sup>2</sup> Significantly, this Notice, and therefore the modified rates and effective date of October 1, 2017, were not published in the FAR for the public and non-parties to see (Appx 38-40).

Then, on January 30, 2018, effective October 1, 2017, the Board and the Rate Committee provided a detailed public notice in the FAR of the rate changes that had been proposed at the May 2017 investigative hearings:

Miscellaneous

**DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
Board of Pilot Commissioners**

**Pilotage Rate Review Committee Notice of Intent to Modify the Port of Miami Rate of Pilotage**

To all interested parties, the Pilotage Rate Review Committee has determined that as of October 1, 2017 the rates of pilotage at Port Miami are MODIFIED to the following:

1. Draft Charges apply to all vessels at \$17.433 per draft foot with an 18-foot minim, for the first 28 feet and \$23.325 per foot for each foot above 28 feet;
2. The following tonnage rates apply:
  - a. A tonnage charge of \$0.0386 per Gross Registered Ton (GRT) with a 5,000 GRT minimum, applied to the first 70,000 GRT;
  - b. A tonnage charge of \$0.0364 per Gross Registered Ton (GRT) shall be applied for each additional Ton at or above 70,001 GRT, up to 79,999 GRT;
  - c. a tonnage charge of \$0.0251 per Gross Registered Ton (GRT) shall be applied for each additional Ton at or above 80,000 GRT, up to 129,999 GRT;
  - d. a Tonnage charge of \$0.0163 per Gross Registered Ton (GRT) shall be applied for each additional Ton at or above 130,000 GRT;
3. At the discretion of the Biscayne Bay Pilots an additional pilot may be assigned to any neo-panamax vessel calling on Port Miami with the commensurate result that said vessel shall be charged a double pilotage fee. In no case, may more than two pilots be assigned to handle any neo-panamax vessel;
4. Detention of pilots – 25% of accessed pilotage fee per hour after the first one half hour. In no case, may a delay in departure caused by a medical emergency or force majeure be considered a detention;
5. Cancellation of pilots – 25% of accessed pilotage fee;
6. Harbor Control Charge-\$100 per transit.
7. All other existing rates will remain unchanged.

A complete copy of the Notice of Intent to Modify Rates issued in this cause may be obtained by contacting the Executive Director of the Committee at Department of Business and Professional Regulation, 2601 Blair Stone Road, Tallahassee, Florida 32399.

**NOTICE OF HEARING RIGHTS**

You may seek review of this Order, pursuant to Sections 120.569 and 120.57, Florida Statutes, by filing a petition with the Executive Director of the Committee at Department of Business and Professional Regulation, 2601 Blair Stone Road, Tallahassee, Florida 32399, within 21 days of the publication of this Order. If you dispute any material fact upon which the Committee's decision is based, you may request a hearing before an administrative law judge pursuant to Section 120.57(1), Florida Statutes; your petition must contain the information required by Rule 28-106.201, Florida Administrative Code, including a statement of the material facts which are in dispute. If you do not dispute any material fact, you may request a hearing before the Committee pursuant to Section 120.57(2), Florida Statutes; your petition must include the information required by Rule 28-106.301, Florida Administrative Code.

Pursuant to Section 120.573, Florida Statutes, you are hereby notified that mediation pursuant to that section is not available.

Unless a proper WRITTEN request for a hearing is received on or before the above-stated deadline or if a request for hearing is made, but the request is subsequently withdrawn, this Notice shall become a **FINAL ORDER**.

(Appx 38, 65-66) The above public notice of the proposed rate changes afforded interested persons an opportunity to object to the rate changes by petitioning the DBPR within 21 days. (Appx 66)

**d. PortMiami pilotage rates were then changed to different rates with no notice.**

Thereafter is when the Board and the Rate Committee public notice becomes inadequate. On March 22, 2018, the Board published the following public notice in the FAR for a public meeting to be held on April 27, 2018:

Notice of Meeting/Workshop Hearing

**DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION**

**Board of Pilot Commissioners**

The Board of Pilot Commissioners announces a public meeting to which all persons are invited.

DATE AND TIME: April 27, 2018, 8:00 a.m.

PLACE: Hyatt Place Orlando Airport, 5435 Forbes Place, Orlando, Florida 32812, (407)816-7800

GENERAL SUBJECT MATTER TO BE CONSIDERED: The Probable Cause Panel, if required (portions of which may be closed to the public) will convene at 8:00 a.m. The General Board business meeting will commence at 9:00 a.m. The Pilotage Rate Review Committee Meeting will follow the General Board meeting.

A copy of the agenda ~~may be obtained~~ by contacting: Board of Pilot Commissioners, 2601 Blair Stone Road, Tallahassee, FL 32399, (850)717-1982.

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this workshop/meeting ~~is asked~~ to advise the agency at least 5 days before the workshop/meeting by contacting Board of Pilot Commissioners, 2601 Blair Stone Road, Tallahassee, FL 32399, (850)717-1982. If you are hearing or speech impaired, please contact the agency using the Florida Relay Service, 1(800)955-8771 (TDD) or 1(800)955-8770 (Voice).

If any person decides to appeal any decision made by the Board with respect to any matter considered at this meeting or hearing, he/she will need to ensure that a verbatim record of the proceeding ~~is made~~, which record includes the testimony and evidence from which the appeal is to be issued.

For more information, you may contact Board of Pilot Commissioners, 2601 Blair Stone Road, Tallahassee, FL 32399, (850)717-1982.

(Appx 38, 69-70). The March 22, 2018 notice does not notify the public of any intent to further modify the proposed rate changes that were detailed in the January 30, 2018 public notice. The public agenda for April 27, 2018 meeting does not contain a detailed rate change proposal or indicate that new/different rates were subject to approval; it is vague.

**A G E N D A**

**BOARD OF PILOT COMMISSIONERS**

**The Hyatt Place Orlando Airport**

**5435 Forbes Place**

**Orlando, FL 32812**

**407.816.7800**

**April 27, 2018**

**9:00 a. m.**

**AMENDED**

**GENERAL BOARD BUSINESS**

- **DELIBERATION AND DETERMINATION OF ACCEPTANCE OF SETTLEMENT STIPULATION BETWEEN PARTIES FOR CHANGE IN RATE OF PILOTAGES FOR PORT MIAMI. (Committee Members Discussion Only.)**
- **PETITIONS/MOTIONS**
  - i. Biscayne Bay Pilots Petition
  - ii. Florida Caribbean Cruise Association

(Appx 73-74) Indeed, the agenda raises more questions than answers.

Why does neither the notice of March 22, 2018, nor the amended agenda for the April 27, 2018 meeting (immediately above) publicly announce any specific proposed pilotage rate changes that would be different than the rates proposed at the May 2017 investigative hearings and publicly noticed on January 30, 2018? How could the agenda that was available to the public when the March 22, 2018 public notice was released (or at the very latest, seven days before April 27, per §120.525(2), Fla. Stat.) call for the deliberation and determination on a settlement stipulation that had not happened yet, but rather would be discussed in private on April 26?

The original agenda is only slightly different. (Appx 71-72) Further, the content of the original agenda featured below, made available at some time before the amended agenda, raises even more questions:

**REPORTS**

- Chair's Report – Commissioner Kurtz
- Deputy Pilot Advancement Committee Report-Commissioner Phipps
  - i. Approval of February 26, 2018 Committee Minutes
  - ii. Approval of March 27, 2018 Committee Minutes
  - iii. Approval of the April 23, 2018 Committee Minutes
- Board Attorney's Report – Marlene Stern
- Executive Director's Report-Krista Woodard
  - i. Financial Reports as of December 31, 2017
  - ii. Compliance Report as of March 31, 2017
  - iii. 2018 Deputy Pilot Examination Statistics

BOPC Meeting April 27, 2018

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(Appx 71) How could an agenda made publicly available on March 22, 2018 (or, again, at the latest seven days before April 27, 2018 per § 120.525(2), Fla. Stat.) contemplate the approval of Committee Minutes that were not made until April 23, 2018? Also, according to the pagination stamped on the bottom of the agenda (“1 of 273”) there are apparently 273 pages to the document. Is this document an agenda of 273 pages? Or, is this a report consisting of 273 pages, which introduces the agenda on pages 1 and 2, that was created after the April 27, 2018 meeting and thus not publicly available when the March 22, 2018 public notice was released?

Notwithstanding the foregoing, the detailed rate changes to be effective May 2018 were never announced to the public in the FAR or in the agendas to the April 27, 2018 meeting. (Appx 38, 69-70; 71-72; 73-74) In fact, both the amended and the original agendas regarding the May 2018 PortMiami pilotage rate change state in parentheses “Committee Members Discussion Only.” (Appx 71-72; 73-74) Presumably, this is the discussions about PortMiami pilotage rates that went into

effect after the April 27, 2018 meeting, but were held in secret. (Appx 1-3; 38, 69-70; 71-72; 73-74)

No publication before the April 27, 2018 meeting announced any intent to change the PortMiami Pilotage rates that had been publicly noticed on January 30, 2018, to the settlement rates that were then approved on April 27, 2018. (Appx 38, 65-66, 1-3) The PortMiami pilotage rates approved on April 27 were secretly discussed by the FCAA and BBP and then agreed to by stipulation the day before on April 26, 2018.

**FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
PILOTAGE RATE REVIEW COMMITTEE**

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

Case No.: PRRC 2014-1

**SETTLEMENT AGREEMENT**

THIS SETTLEMENT AGREEMENT (the "Agreement"), is entered this 26 day of April, 2018, by and between Petitioners Florida-Caribbean Cruise Association ("FCCA") and Biscayne Bay Pilots, Inc. ("BBP") (each a "Party" and together, the "Parties").

(Appx 5-6) Exhibit A of the Settlement Agreement shows the pilotage rates that the FCAA and BBP stipulated to on April 26, 2018:

EXHIBIT A

The following modifications shall be made to pilotage rates in PortMiami:

1. The formula for calculating pilotage rates shall be modified  
 from:  $(\text{Draft Rate} * \text{Draft} + \text{GT Rate} * \text{GT})$   
 to:  $(\text{LOA Rate} * \text{LOA} + \text{Beam Rate} * \text{Beam} + \text{Draft Rate} * \text{Draft} + \text{GT Rate} * \text{GT} + \text{Harbor Control Fee})$

2. The initial rates in dollars per foot shall be:

	Vessels of less than 10,000 GT	Vessels of 10,000 GT or greater
LOA Rate:	0.75000	1.00000
Beam Rate:	3.75000	5.00000
Draft Rate:	22.50000	30.00000
GT Rate:	0.01125	0.01500

Harbor Control Rate: \$100 per transit

3. Additional fees shall be:
  - Detention Of Pilot: 25% of pilotage fee per hour after the first one half hour. In no case may a delay in departure caused by a medical emergency or force majeure be considered a detention.
  - Cancellation Of Pilot: 25% of pilotage fee
  - Late Payment Charge: 1.5% per month after 30 days from date of invoice submission
  - Neo-Panamax Charge: At the discretion of the Biscayne Bay Pilots, an additional pilot may be assigned to any Neo-Panamax vessel calling on PortMiami with the commensurate result that said vessel shall be charged a double pilotage fee.
4. The draft rate for vessels with a draft of 31.0 feet or greater shall increase by 6.0% each year for 10 years starting on the anniversary date one year following the effective date of this order.  
  
 All other rates shall increase by 2.0% each year for 10 years starting on the anniversary date one year following the effective date of this order.

(Appx 7) On April 27, 2018, the Rate Committee adopted the pilotage rates that the FCCA and BBP settled on and stipulated to on April 26, 2018. (Appx 1-22) In its Final Order of May 9, 2018, the Committee publicly announced the pilotage rates stipulated to privately on April 26, 2018 and adopted by the Committee publicly on April 27, 2018:

THIS MATTER came before the Pilotage Rate Review Committee (hereinafter referred to as the "Committee") pursuant to Sections 120.569 and 120.57, Florida Statutes, at a duly-noticed public meeting in Orlando, Florida on April 27, 2018, for consideration of the Notice of Intent to Modify the Port of Miami Rate of Pilotage filed in the above-styled matter, petitions for administrative hearing involving disputed issues of material fact filed by the Florida Caribbean-Cruise Association (FCCA) and Biscayne Bay Pilots Inc. (BBP), and a subsequently filed proposed Settlement Stipulation agreement entered into between the parties.



(Appx 1). As the Exhibit A of the Settlement Agreement (which is included in the May 9, 2018 Final Order) shows, the new rates differ greatly from the earlier proposed rate changes of January 30, 2018, and from the original rates. (Appx 7; 66; 86)

**e. The secret PortMiami Pilotage rate change has a real, direct, and adverse impact.**

The following invoices illustrate the radical difference.

4/1969

**Biscayne Bay Pilots**  
2911 Port Boulevard Miami, FL 33132 (305) 374-2791  
<http://www.bbpiots.com>

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<p><b>SAN GWANN</b> And Owners c/o Fast Reliable Seaways, LLC 1001 North America Way, Suite 215 Miami, FL 33132, USA</p>	<p><b>Invoice: 269496</b> For Service(s) on: 9/4/17</p> <p>Invoice Amount: 670.12 Payments: 0.00</p>
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Payment due upon receipt of invoice.

Description	Quantity	Unit	Unit Fee	Amount
Standard Inbound	2,500.00	Tons	0.0364	91.00
	14.00	Feet	17.4330	244.06
Standard Outbound	2,500.00	Tons	0.0364	91.00
	14.00	Feet	17.4330	244.06

(Appx 75)

The above invoice for services on September 4, 2017, shows the original pilotage rates of \$0.0364 GRT for tonnage and \$17.4330 per foot of draft. (*Id.*) The invoice also shows that the ship is charged equal inbound and outbound fees, resulting in a total of \$670.12 due. (*Id.*)<sup>3</sup>

<sup>3</sup> The inbound pilotage invoice for Petitioner Betty K Agencies (USA), LLC shows the same standard rate being applied to it as being applied to Petitioner FRS – Fast Reliable Seaway, LLC. (Appx 332)

Compare those rates and final amount due to the proposed rates that became effective on October 1, 2017, and were publicly noticed on January 30, 2018:

**Biscayne Bay Pilots**  
2911 Port Boulevard — Miami FL 33132 — (305) 374-2791  
<http://www.bbpilots.com>

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**SAN GWANN**  
And Owners  
c/o Fast Reliable Seeways, LLC  
1001 North America Way, Suite 215  
Miami, FL 33132, USA

Invoice: **271144**  
For Services On: 12/30/2017  
Invoice Amount: 606.79

**Amount Due: \$606.79**  
Payment due upon receipt of invoice.

Service Description	Quantity	Unit	Unit Fee	Amount
<b>Inbound</b>				
GRT Tier 1	5,000.00	Tons	0.0386	193.00
Draft Tier 1	18.00	Feet	17.4330	313.79
Harbor Control Fee	1.00	Fee	100.0000	100.00
				<b>606.79</b>

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**SAN GWANN**  
And Owners  
c/o Fast Reliable Seeways, LLC  
1001 North America Way, Suite 215  
Miami, FL 33132, USA

Invoice: **271159**  
For Services On: 12/31/2017  
Invoice Amount: 606.79

**Amount Due: \$606.79**  
Payment due upon receipt of invoice.

Service Description	Quantity	Unit	Unit Fee	Amount
<b>Outbound</b>				
GRT Tier 1	5,000.00	Tons	0.0386	193.00
Draft Tier 1	18.00	Feet	17.4330	313.79
Harbor Control Fee	1.00	Fee	100.0000	100.00
				<b>606.79</b>

(Appx 76-77) The above invoices for services on December 30 and 31, 2017, show that the tonnage has increased from \$0.0364 to \$0.0386 with a 5,000 GRT minimum, resulting in an increase from the original rate fee of \$182 (\$91 for inbound and \$91 for outbound) to \$386 (\$193 for inbound and \$193 for outbound), a \$204 increase. The draft unit fee of \$17.4330 for the 18-foot minimum results in inbound charge of \$313.79 and outbound charge of \$313.79, totaling \$627.58 per sailing, which is a \$137.88 increase per sailing ((313 x 2) - (244.06 x 2)). Together with the new harbor control fee of \$100, the amount due is \$606.79 per movement or \$1,213.58 per

sailing, which is a \$543.46 increase from the original rates. Or, in other terms, an 81% increase<sup>4</sup>.

The May 2018 secretly approved rate thus makes it even more expensive to sail in and out of the PortMiami. As the following invoice reflects, although the tonnage fee decreased, the draft fee increased and the Board established new fees for beam and length:

<b>Biscayne Bay Pilots</b> 2911 Port Boulevard — Miami FL 33132 — (305) 374-2791 <a href="http://www.bbpiLOTS.com">http://www.bbpiLOTS.com</a>					
<b>SAN GWANN</b> And Owners c/o Fast Reliable Seaways, LLC 1001 North America Way, Suite 215 Miami, FL 33132, USA			Invoice: <b>273726</b> For Services On: <b>6/1/2018</b> Invoice Amount: <b>832.75</b>		
<b>Amount Due: \$832.75</b> Payment due upon receipt of invoice.					
Service Description	Quantity	Unit	Unit Fee	Amount	
<b>Inbound</b>					<b>832.75</b>
GRT (Fee per 1,000 tons)	5,000.00	Tons	11.2500		56.25
Draft	18.00	Feet	22.5000		405.00
Length	167.00	Feet	0.7500		125.25
Beam	39.00	Feet	3.7500		146.25
Harbor Control Fee	1.00	Fee	100.0000		100.00
***					
<b>Biscayne Bay Pilots</b> 2911 Port Boulevard — Miami FL 33132 — (305) 374-2791 <a href="http://www.bbpiLOTS.com">http://www.bbpiLOTS.com</a>					
<b>SAN GWANN</b> And Owners c/o Fast Reliable Seaways, LLC 1001 North America Way, Suite 215 Miami, FL 33132, USA			Invoice: <b>273741</b> For Services On: <b>6/2/2018</b> Invoice Amount: <b>832.75</b>		
<b>Amount Due: \$832.75</b> Payment due upon receipt of invoice.					
Service Description	Quantity	Unit	Unit Fee	Amount	
<b>Outbound</b>					<b>832.75</b>
GRT (Fee per 1,000 tons)	5,000.00	Tons	11.2500		56.25
Draft	18.00	Feet	22.5000		405.00
Length	167.00	Feet	0.7500		125.25
Beam	39.00	Feet	3.7500		146.25
Harbor Control Fee	1.00	Fee	100.0000		100.00

<sup>4</sup> The same analysis applied to Petitioner Betty K Agencies (USA), L.L.C as the minimum tonnage for its inbound movement went up to 5,000 GRT, the draft rate of 18-feet, and a harbor control fee added. (Appx 333)

(Appx 78-79) The tonnage fee has gone down from \$193 to \$56.25 but the draft fee has gone up from \$313.79 to \$405, per movement. Additionally, two entirely new fees now contribute to the price increase, the length fee of \$125.25 and the beam fee of \$146.25. Together with the harbor control fee, which has remained at \$100, the total amount due is \$832.75 per sailing, up from the \$606.79 amount due on December 30, 2017. The pilotage fees effective May 2018 cost \$832.75 per movement or \$1,665.50 ( $832.75 \times 2$ ) per sailing. Thus, between October 2017 and May 2018, without notice, the total cost to sail in the PortMiami increased by \$451.92 ( $(832.75 \times 2) - (1,213.58)$ ), a 37% increase from October 2017<sup>5</sup>.

### **III. Nature of the Relief Sought.**

Petitioners seek a writ of certiorari quashing the May 9, 2018 Final Order.

### **IV. Argument**

#### **A. The Board violated procedural due process when it entered the May 9, 2018 Order.**

Petitioners seek relief because the final agency action lacked fundamental due process. “[T]he fundamental principle of due process of law demands notice and an opportunity to be heard before final judgment.” *Cavalier v. Ignas*, 290 So. 2d 20, 21

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<sup>5</sup> Petitioner Betty K Agencies (USA), L.L.C. is also subject to the minimum tonnage for its inbound movement of 5,000 GRT, a draft rate of 18-feet, a harbor control fee added, and incurred new beam fees and length fees. The result is a \$302.46 increase per movement between the October 17 rates and May 2018 rates. (Appx 334)

(Fla. 1974). Due process is violated when a lower tribunal addresses issues that were not raised in the proceedings and orders relief with no prior notice. *Dep't of Transp. v. Baird*, 992 So. 2d 378, 381–82 (Fla. 5th DCA 2008).

The Administrative Procedure Act (“APA”) governs proceedings to change pilotage rates. Pursuant to the APA, the Board of Pilot Commissioners is an “agency head” because it is responsible for taking final agency action on applications to change pilotage rates. *See* § 310.151(4)(a), Fla. Stat. (2014). “‘Committee’ means the Pilotage Rate Review Committee established under this [Fla. Stat. § 310.151] as part of the Board of Pilot Commissioners.” § 310.151(1)(a)(1), Fla. Stat. “‘Board’ means the Board of Pilot Commissioners.” *Id.* at (2). The Committee is charged with overseeing an application for rate change.

Pilotage rates for PortMiami are subject to strict administrative processes and before a rate change is allowed it must be publicly noticed. The Committee is required to “investigate and determine whether the requested rate change will result in fair, just, and reasonable rates of pilotage pursuant to rules prescribed by the committee.” *Id.* at (3).

The Florida statutes provide explicit instructions regarding the timing, contents, and publication of notices of rate changes and the scope of the required hearings:

In addition to publication as required by law, notice of a hearing to determine rates shall be mailed to each person who has formally

requested notice of any rate change in the affected port area. The notice shall advise all interested parties that they may file an answer, an additional or alternative petition, or any other applicable pleading or response, within 30 days after the date of publication of the notice, and the notice shall specify the last date by which any such pleading must be filed. [...] The committee shall conclude its investigation, conduct a public hearing, and determine whether to modify the existing rates of pilotage in that port within 60 days after the filing of the completed application, except that the committee may not be required to complete a hearing for more than one port within any 60-day period. Hearings shall be held in the affected port area, unless a different location is agreed upon by all parties to the proceeding.

*Id.*

... Notice of the intent to modify the pilotage rates in that port shall also be published in the Florida Administrative Register and in a newspaper of general circulation in the affected port area and shall be mailed to any person who has formally requested notice of any rate change in the affected port area. ... If an administrative hearing is requested pursuant to this subsection, notice of the time, date, and location of the hearing shall be published in the Florida Administrative Register and in a newspaper of general circulation in the affected port area and shall be mailed to the applicant and to any person who has formally requested notice of any rate change for the affected port area.

*Id.* at (4)(a). When determining the rates, the Committee is required to consider: “Special characteristics, dangers, and risks of the particular port” and “Any other factors the committee deems relevant in determining a just and reasonable rate.” *Id.* at (5)(b)(11-12).

The process for seeking a change in pilotage rate is a public process, requiring public hearings. *See* § 310.151(3), Fla. Stat. (2014); Fla. Admin. Code R. 61G14–22.007. In addition to the statutes, the Florida Administrative Code sets forth explicit rules regarding notice and hearing:

The Board shall provide notice in the next available issue of the Florida Administrative Register and in a newspaper of general circulation in the affected port area and by mailing such notice to each person or organization which has requested advance notice of hearings relating to rates of pilotage. The notice shall state that an application for a change in the rates of pilotage has been filed with the Board, state the affected port, contain a brief statement summarizing the requested change in rates of pilotage and state the time, date and place of the public hearing and site visit to the port to be conducted prior to the public hearing. The notice shall also include instructions for obtaining a copy of the application and a copy of the investigation committee's report to the Board when it becomes available. The notice shall advise all interested parties that they may file an answer, an additional or alternative application or any other applicable pleading or response, including all documentation in support thereof submitted within 30 days after the date of publication of the notice and the notice shall specify the last date by which any such pleading must be filed. Such publication and mailing of notice shall occur at least forty-five days prior to the hearing.

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(8) The Board shall conclude its investigation, conduct a public hearing, and determine whether to modify the existing rates of pilotage in that port within 60 days after the filing of the completed application, except that the Board may not be required to complete a hearing for more than one port within any 60-day period.

(9) The public hearings shall be held in the affected port area, unless a different location is agreed upon by all parties to the proceeding.

*See Fla. Admin. Code Ann. r. 61G14-22.007(5), (8-9).* In addition,

... Notice of the intent to modify the pilotage rates in that port shall also be published in the next available Florida Administrative Register and in a newspaper of general circulation in the affected port area and shall be mailed to any person who has formally requested notice of any rate change in the affected port area. The published notice may be in the form of a summary of the intended agency action rather than the complete written order of intended agency action.

*See Fla. Admin. Code Ann. r. 61G14-22.010.*

Here, the meeting where final agency action was taken and the May 2018 Order was adopted, by approving of the April 25/26, 2018 Settlement Agreement, was a regular board meeting. § 310.042(2), Fla. Stat. (“Said board shall hold one or more regular meetings each year at some convenient place in the state on such date or dates as the board may select. Special meetings may be called by a majority of the board. The secretary of the board shall give written notice of all regular and special meetings to all pilots in addition to any other persons required by law to be notified.”). There was no notice of a “special” meeting or a “final” hearing taking place on April 27, 2018, only that “The Pilotage Rate Review Committee Meeting will follow the General Board meeting.” *See* Fla. Admin. Code Ann. r. 61G14-22.007; Fla. Admin. Code Ann. r. 28-106.208; Fla. Admin. Code Ann. r. 61G14-22.007(5), (8-9). The Committee made a rate change anyway. Worse, for Petitioners, the change was an unnoticed rate increase.

Between 2014 and May 2018, five notices appeared in the Florida Administrative Register indicating that the PortMiami pilotage rates could change. (Appx 40, 43-44; 39, 51-52; 38, 63-64; 38, 61-62; 38, 65-66). Of those five notices, two reflect a rate decrease being considered, (Appx 40, 43-44; 39, 51-52) The two notices after that indicate, only, that two different rate change applications were being considered at the same time with no indication that a decrease or increase was being considered. (Appx 38, 63-64; 38, 61-62) Only one notice indicated that a new



formula was being considered for the PortMiami pilotage, but it did not express whether this formula would result in a rate increase or decrease. (Appx 38, 65-66) That Notice, published January 30, 2018, reflected new rates effective October 1, 2017 (*i.e.*, the Notice of rate change was published after the rates became effective). Thereafter, with no advance warning, another increase was considered and adopted for PortMiami pilotage on April 27, 2018 during the Pilotage Rate Review Committee Meeting. (Appx 1-3). The Notice for this April 27 meeting, which was published on March 22, 2018, failed to indicate that a second rate increase was coming effective May 2018 after the January 2018 Notice. (Appx 38, 69-70) The May 2018 rate change/increase was the result of the Committee approving a Settlement Agreement entered on April 25/26, 2018. (Appx 1-7) The lack of notice before the rate increase effective May 2018 is why the Petitioners bring this action.

The Rate Committee knows their notice obligations when considering a rate change. The DOAH order closing its file acknowledged these notice obligations:

... the Pilotage Rate Review Committee (Committee) had never determined whether to modify the existing pilotage rates, as required by section 310.151(3) (second sentence from end). The Committee had conducted the investigation and conducted the public hearing, as also required by section 310.151(3), but had proceeded to provide the notice to interested parties required by section 310.151(4) without, obviously, informing such persons as to the intended agency action, thus defeating the purpose of the notice.

The parties jointly agreed that this defect deprives the Division of Administrative Hearings (DOAH) of jurisdiction. It is necessary for DOAH to relinquish jurisdiction to the Committee, so it may continue

to perform its statutory obligations that it must perform before determining that a party with substantial interests has raised a material fact that necessitates a formal hearing.

*See* DOAH Order Closing Files for Lack of Subject Matter Jurisdiction, Jan. 22, 2018 (Appx 80-81) The Rate Committee must advise persons with substantial interests at stake of the intended agency action and the notice must reflect the Committee's determination that it intends to modify the existing pilotage rates, as required by section 310.151(3).

Here, the Rate Committee, once again, failed to issue notice of its intent to modify the existing pilotage rates at any time after the January 30, 2018 publication in the FAR, thereby defeating the purpose of the two subsequent notices on February 5, 2018 and March 22, 2018 that only indicate that the Rate Committee is meeting. (Appx 38, 67-68; 38, 69-70) Because the notices that preceded the May 2018 Final Order provide no information about the intent to modify existing pilotage rates as published January 30, 2018 and in effect since October 1, 2017, the May 2018 Final Order is statutorily defective, lacking the fundamental due process element of notice. *See e.g.* § 310.151(3), Fla. Stat.

The brief history concerning this pilotage rate change for PortMiami shows that the Committee is able to afford procedural due process on an intended pilotage rate change when it suits the Committee. Evidently, it did not suit the Committee to give notice and an opportunity to be heard when the Committee, the Pilots and the

FCCA decided to change the formula for pilotage rates for all foreign-flagged vessels navigating PortMiami in late April of 2018. The Committee gave no notice that it would be adding a length charge, adding a beam charge, or increasing the rate for draft from October 2017 to May 2018 (no draft charge existed before October 2017)<sup>6</sup>, while reducing the rate for tonnage<sup>7</sup>. (Appx 2-3, 7)

**B. The Final Order is Unconstitutional because the Commission failed to notice its consideration of the settlement of the PortMiami pilotage rates that substantially modified the previously published rate change.**

The due process concerns apply equally when the Committee is considering a settlement (informal disposition under § 120.57(4), Fla. Stat.). *See Manatee County v. Florida Pub. Employees Relations Comm'n*, 387 So. 2d 446, 449 (Fla. 1st DCA 1980) (“It is necessary, therefore, for the administrative agency to take into account due process considerations when dealing with stipulations or agreements of the adversarial parties submitted during the course of administrative hearings.”). Here, the May 2018 compromise PortMiami Pilotage Rate was not put forth by any of the FAR notices as required.

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<sup>6</sup> The change in draft is most perplexing. The minimum draft fee is now 18 feet. A vessel cannot navigate the Miami River with a draft in excess of 16 feet.

<sup>7</sup> The May 2018 rate change increased the pilotage fees for all vessels by adding a beam and length charge and increased the rate all smaller vessels would pay by setting the minimum for tonnage 5,000, *i.e.*, more smaller vessels are paying the cost of bigger ships.

When the May 2018 PortMiami pilotage rates were adopted the rates were inconsistent with the rates determined and announced after the Committee completed its fact-finding process. The October 2017 rates came about after proper notice of intent to modify the rates were published and interested persons, such as the Petitioners, were permitted to object through a public process. The May 2018 PortMiami pilotage rates are akin to what the Court cautioned against in *Manatee County v. Florida Pub. Employees Relations Comm'n*, stating “when the issues have been narrowed by stipulation and a party thereby lulled into responding to evidence adduced over his objections outside the issues, such evidence may not be used to his detriment.” *Id.* (internal citations omitted).

Here the Petitioners were lulled into accepting the October 2017 PortMiami Pilotage rates after years of public litigation between the FCCA and BBPA. The October 2017 PortMiami Pilotage rates were duly noticed in advance and then opened for public comment. But, the October 2017 PortMiami Pilotage rates would not last. It was only after the objection period for those rates expired on February 20, 2018 that the FCCA, BBP and the Rate Committee came to a “compromised” rate structure that was not set forth in the FAR or during a meeting with any advance notice that there was a different set of PortMiami Pilotage rates being considered. The May 2018 PortMiami Pilotage were adopted under the as-noticed guise of “The Pilotage Rate Review Committee Meeting [that] follow[ed] the General Board

meeting” at “9:00 a.m.” on “April 27, 2018.” (Appx 38, 70) The items on the agenda for the April 27, 2018 meeting were equally mundane: a “Committee Members Discussion Only” about “Acceptance of Settlement Stipulation between Parties for Change in Rate of Pilotage for PortMiami.” (Appx 71-72; 73-74)

Such vague notice does not comply with Florida Law as it fails to give any indication that the as-noticed and in-effect pilotage rates for PortMiami are actually subject to change. § 120.525(1), Fla. Stat. (“The notice shall include a statement of the general subject matter to be considered.”); Fla. Admin. Code Ann. r. 61G14-22.010 (“The published notice may be in the form of a summary of the intended agency action rather than the complete written order of intended agency action.”); § 120.525(2), Fla. Stat. (“The agenda shall contain the items to be considered in order of presentation.”); Fla. Admin. Code Ann. r. 28-102.002(1)(a) (“The agenda shall state with specificity the items that will be considered at a meeting, hearing, or workshop. All matters involving the exercise of agency discretion and policy-making shall be listed and summarized on the agenda. ...”); *Fla. Att’y Gen. Op.* 2002-08 (2002) (“The agenda shall state with specificity the items which will be considered at a meeting, hearing, or workshop. All matters involving the exercise of agency discretion and policy-making shall be listed and summarized on the agenda. ...”). Therefore, before the Committee could adopt as final agency action modified rates from those set forth on January 30, 2018 and in effect since October 2017 the

Rate Committee (and the Board) needed to publish notice in the FAR identifying the rates of the “Settlement Stipulation between Parties for Change in Rate of Pilotage for PortMiami” as such rates impacted more than the parties to the “Settlement Stipulation.”

The approved Chapter 120 procedure for an administrative agency entering into a rate settlement by the Florida Supreme Court in *Citizens of State v. Florida Pub. Serv. Com'n*, 146 So. 3d 1143 (Fla. 2014) was not followed in this instance. In *Citizens*, the Supreme Court agreed that the following procedure satisfied due process:

On March 26, 2012, the Commission provided notice of a hearing on August 20 that fully complied with section 120.569, which requires fourteen days' advance notice. On August 15, 2012, the Commission was presented with a joint motion to approve the settlement agreement. Although Florida Administrative Code rule 28–106.204(1) provides that “[w]ritten motions will normally be disposed of after the [seven day] response period has expired,”—Citizens indicated this would be a sufficient amount of time to prepare a response and oral argument on the merits—the Commission issued a second order revising the order establishing procedure indicating that it would schedule a hearing at the conclusion of the evidentiary hearing to discuss the settlement agreement. On August 31, 2012, the Commission announced on the record that it would reconvene on September 27, 2012, to discuss the settlement issues. Notably, section 120.569(2)(b) does not require that notice be given in writing, although the rule dictates that notice be reasonable. Thus, the September 27, 2012, hearing was properly noticed and provided Citizens with more time than required pursuant to section 120.569(2)(b) and Florida Administrative Code rule 28–106.204(1). Then, on October 3, 2012, after the Commission determined there were supplemental issues of disputed fact and more than fourteen days before the next hearing, the Commission issued a written order providing notice and the procedures for the submission of

evidence on November 19–21. Citizens and all other parties were able to request data and present evidence during these hearings. On November 21, 2012, more than fourteen days before the next conference, the Commission provided notice of an agenda conference on December 13, 2012, to reach a decision on the settlement agreement. Thus, Citizens' due process rights were not violated because it received proper notice and was fully represented in all hearings.

*Citizens*, 146 So. 3d at 1162. Here but unlike *Citizens*, the Committee did not issue an “order establishing [a] procedure indicating that it would schedule a hearing [...] to discuss the settlement agreement.” *Id.* In *Citizens* the Commission approved the settlement after “announc[ing] on the record that it would reconvene on September 27, 2012, to discuss the settlement issues.” *Id.* Additionally, the Florida Supreme Court recognized that the Commission “provided Citizens with more time than required pursuant to section 120.569(2)(b) and Florida Administrative Code rule 28–106.204(1).” *Id.* Section 120.569(2)(b) requires notice be issued 14 days in advance. Here the notice published before the April 27, 2018 meeting gave no indication that settlement of the modification of the PortMiami Pilotage rates would be considered. (Appx 38, 70) Additionally, the agenda and the amended agenda did not identify the dates they were published. (Appx 71-72; 73-74) The agenda and the amended agenda also reflect that the discussion of the settlement would be done in private (“Committee Members Discussion Only”) in violation of section 286.011, Florida Statutes. (Appx 71-72; 73-74) Further, there is no record of a motion to approve by settlement modification of the PortMiami Pilotage rates and in turn the Committee

setting that motion for public hearing. Moreover, section 120.525(2) requires that agendas be published on the agency's website. There is no record of the agendas being on the agency website. See <http://www.myfloridalicense.com/DBPR/harbor-pilots/pilotage-rate-review/>; <http://www.myfloridalicense.com/DBPR/harbor-pilots/board-meeting-information/>, last visited June 7, 2018. Rather, the notices in the FAR require the agenda to be obtained by requesting them via phone or U.S. Mail. (Appx 44, 52, 62, 64, 70) In sum, the Committee did not provide for adequate due process as set forth in Chapter 120 or the *Citizens* opinion.

**CONCLUSION**

Wherefore, Petitioners, FRS – Fast Reliable Seaway, LLC, Antillean Marine Shipping, Corp., Betty K Agencies (USA), L.L.C., God is Able Shipping LLC, and River Terminal Services, Inc., respectfully request that this Court grant a writ of certiorari quashing the May 9, 2018 final order and for such other relief as this Court deems just.

Respectfully submitted,

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CASE NO.

By: /s/ Jordan S. Cohen  
Jordan S. Cohen, Esquire  
Florida Bar No. 551872  
Alyssa Reiter, Esquire  
FBN: 715034

AReiter@wickersmith.com

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a copy hereof has been filed via eDCA and served via electronic service and U.S. Mail on this 8<sup>th</sup> day of June, 2018, to **Thomas F. Panza**, Panza, Maurer & Maynard, P.A., Bank of America Building, Third Floor, 3600 North Federal Highway, Fort Lauderdale, FL 33308, [TPanza@panzamaurer.com](mailto:TPanza@panzamaurer.com); **Donna E. Blanton**, Radey Law Firm, 301 South Bronough, Suite 200, Tallahassee, Florida 32301, [dblanton@radeylaw.com](mailto:dblanton@radeylaw.com); **Clark R. Jennings**, Assistant Attorney General, Administrative Law Section, PL-01 The Captitol, Tallahassee, Florida 32399-1050, [clark.jennings@myfloridalegal.com](mailto:clark.jennings@myfloridalegal.com); **Robert Peltz**, The Peltz Law Firm, 10220 SW 141<sup>st</sup> Street, Miami, FL 33176, [rpeltzlaw@gmail.com](mailto:rpeltzlaw@gmail.com); and **Krista Woodard**, Division of Professions, Board of Pilot Commissioners, 2601 Blair Stone Road, Tallahassee, Florida 32399-0791, [Krista.Woodard@myfloridalicense.com](mailto:Krista.Woodard@myfloridalicense.com).

/s/ Jordan S. Cohen

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Inc.

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**CERTIFICATE OF COMPLIANCE**

WE HEREBY CERTIFY that this document complies with the requirements of Fla. R. App. P. 9.100. This document is being submitted in Times New Roman 14-point font.

/s/ Jordan S. Cohen

Jordan S. Cohen, Esquire

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