FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGU
BOARD OF PILOT COMMISSIONERS
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

BISCAYNE BAY PILOTS' RESPONSE IN OPPOSITION TO MOTIONS TO INTERVENE

Biscayne Bay Pilots, Inc. ("BBP") responds in opposition to Seaboard Marine Ltd.'s Motion to Intervene As Party and the Motion to Intervene as Party filed by 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. The Motions to Intervene should be denied as a final order in the above-styled proceeding has been entered, these entities (collectively referred to as "Miami Operators") never attempted to intervene in a timely manner, the time for appeal has passed, and there is no longer a "case" in which an interested party can intervene.[1] In support, BBP states as follows:

I. Background

1. BBP provides pilotage services in PortMiami pursuant to chapter 310, Florida Statutes.

2. The rate of pilotage is determined by the Pilotage Rate Review Committee (the "Committee"), which is the rate-setting arm of the Board of Pilot Commissioners (the "Board"),

[1] BBP responds to both Motions to Intervene in this response as they raise identical arguments.

pursuant to section 310.151, Florida Statutes. The Committee's rate-setting orders are not appealable to the Board. § 310.151(7), Fla. Stat.

3. The procedures for requesting a change in pilotage rates are set out in section 310.151, Florida Statutes, and chapter 61G14-22, Florida Administrative Code. To initiate the process a pilot, group of pilots, or any other person who is substantially affected by pilotage rates in a port may apply for a rate change in that port. § 310.151(2), Fla. Stat. Once the Department determines that the application is facially complete, the Committee notifies everyone who has previously requested notice of the filing of applications for the particular port and states how a copy of the application can be obtained. Fla. Admin. Cade R. 61G14-22.007(3).

4. The Committee schedules a public hearing where it evaluates the rate change request. Fla. Admin. Code R. 61G14-22.007(5). At this public hearing, the Committee hears from the applicants for a rate change and any members of the public who wish to comment or offer additional information. Generally, at the end of the public hearing the Committee votes on whether to modify the rates, and if so, what the modification should be. § 310.151(3), Fla. Stat.

5. The public hearing on the application is noticed in three different ways, and each type of notice is provided within 10 days of the application becoming facially complete. 61G14-22.007(5), Fla. Admin. Code. Notice of the hearing is mailed to each person who has formally requested notices of rate changes at the particular port, § 310.151(3), Fla. Stat., Fla. Admin. Code R. 61G14-22.007(5); notice is published in a newspaper of general circulation in the port area, Fla. Admin. Code R. 61G14-22.007(5); and notice is published in the Florida Administrative Register ("FAR"). Fla. Admin. Code R. 61G14-22.007(5).

6. The notice states that all interested parties may file an answer, an additional or alternative application, or any other applicable pleading or response within 30 days of publication.

Fla. Admin. Code R. 61G14-22.007(5). The notice also gives the actual date of the 30-day deadline. Finally, because there will be a public hearing held by a state agency, at least seven days before the public hearing a detailed agenda for the meeting and the supporting documents are made available on the Board's website and by mail if requested. § 120.525(2), Fla. Stat.

7. After the Committee votes on whether the rates will change and, if so, what they should be, a Notice of Intent ("NOI") containing the Committee's proposed rates is prepared and served on the applicants. § 310.151(4)(a), Fla. Stat. The NOI informs the applicants of the Committee's decision and that they have 21 days to request an administrative hearing. *Id.* The NOI is also published in the FAR and in a newspaper of general circulation in the port area and mailed to anyone who has formally requested notice of any rate change at the port. *Id.* Within 21 days after receipt of the NOI or publication of the notice, any person whose substantial interests will be affected by the Committee's proposed rates can request an administrative hearing. *Id.* The failure to timely request a hearing constitutes a waiver of any right to an administrative hearing and shall cause an order modifying rates to be entered. *Id.*

8. If an administrative hearing is requested, notice of the time, date, and location of the hearing is published in the FAR and a newspaper of general circulation in the port area. *Id.* Notice is also mailed to the applicant(s) and to any person who has formally requested notice of a rate change at the port. *Id.* An administrative proceeding is then conducted pursuant to sections 120.569 and 120.57, Florida Statutes. *Id.*

9. Here, the Florida Caribbean-Cruise Association ("FCCA") filed an application in March of 2014 to reduce the pilotage rates in PortMiami. After notices, hearings, and appeals related to the make-up of the Committee, BBP filed an alternative application for a rate increase in March of 2016. After additional litigation, the Committee met in a public meeting and voted to modify

rates on May 19, 2017. The NOI to modify the rates was entered on September 21, 2017, and both FCCA and BBP timely sought an administrative hearing pursuant to sections 310.151(4)(a) and 120.57, Florida Statutes.

10. Before the case proceeded to a hearing, however, the Administrative Law Judge ("ALJ") returned the case to the Committee to correct an error made by the Committee, and the Committee again published the NOI. During this time, the parties engaged in settlement discussions and ultimately reached agreement. This agreement was presented to the Committee in a properly noticed public meeting on April 27, 2018, and the Committee accepted the rates agreed upon in the settlement agreement. The Committee entered its final order in this case on May 9, 2018.

11. At no time during the four years of this case's pendency did Seaboard seek to intervene as a party. Instead, only after a final order has been entered and the time has passed for appeal, the Miami Operators belatedly seek to essentially re-open the case. In short, the Miami Operators are too late.

II. The Motion to Intervene Must Be Denied

12. It is well-established that "intervention will not be allowed after final judgment." *De Anza Corp. v. Hollywood Homeowners Ass'n, Inc.*, 443 So. 2d 462, 464 (Fla. 4th DCA 1984). The Florida Supreme Court has explained that "the general rule—universally—is that intervention may not be allowed after final judgment." *Dickson v. Segal*, 219 So. 2d 435, 437 (Fla. 1969). The Motions to Intervene do not set forth facts sufficient to establish the need for an exception to this general rule. The Miami Operators had ample opportunity to intervene in the rate proceedings while the proceedings were ongoing, but chose not to intervene. They cannot intervene now.

13. Moreover, the Committee lacks jurisdiction to re-open the case at this point. An agency has inherent or implied authority to rehear or reopen a cause to reconsider the action taken

when the proceeding is essentially a judicial one. *Reich v. Dep't of Health*, 868 So. 2d 1275, 1276 (Fla. 1st DCA 2004). "However, this power must be exercised before an appeal from the original order has been filed or before such an order has become final by the lapse of time to file a timely notice of appeal." *Id.* Rules 9.190(b)(1) and 9.110(c) require that any appeal of an agency final order must be filed within 30 days of the rendition of the order to be reviewed. The final order in this case was entered on May 9, 2018, and the 30-day deadline to file an appeal ended June 8, 2018, without anyone filing a notice of appeal. Thus, the Committee no longer has jurisdiction to grant the Motions to Intervene.

14. The Miami Operators suggest that the Committee can grant the Motions to Intervene because rule 28-106.208 of the Florida Administrative Code permits the Committee to grant an untimely motion to intervene for good cause shown. *Motions to Intervene*, p.2. That rule, however, is not applicable to the proceeding before the Committee.

15. Chapter 28-106, Part II of the Florida Administrative Code applies to hearings involving disputed issues of material fact, which are also governed by section 120.57, Florida Statutes. When a petition is filed disputing agency action that involves disputed issues of material fact, an agency is required to refer the petition to the Division of Administrative Hearings ("DOAH") with a request that an ALJ be assigned to conduct a hearing. Fla. Admin. Code R. 28-106.201(3).

16. Rule 28-106.205, cited in the Motion to Intervene, permits intervention in the DOAH proceeding under the terms of the rule. The Miami Operators did not move to intervene in the DOAH proceeding. As indicated in the Motions to Intervene, there was no "final hearing" at DOAH because the ALJ closed the case due to an error of the Committee and sent the case back to the Committee for further proceedings. Rule 28-106.205 was no longer applicable at this point.

17. The Motions to Intervene seem to suggest that somehow it was improper for the parties to engage in settlement discussions and present a settlement to the Committee. Section 120.57(4), Florida Statutes, however, expressly provides that "informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." (Emphasis added.) It was appropriate for the Committee to consider the settlement agreement in this case.

18. The Motions to Intervene also assert that the April 27, 2018, meeting notice was deficient in that it did not indicate that there would be a final hearing on April 27, 2018. The public meeting of the Committee was not a "final hearing" under the Uniform Rules of Procedure. It was a public meeting pursuant to section 310.151(3), Florida Statutes, in which the Committee considered whether to modify the rate. The Committee's notice was not deficient.

CONCLUSION

In sum, the Miami Operators sat on their right to intervene in the proceedings for four years. The Motions to Intervene should be denied as untimely because the time for appeal lapsed and the Committee no longer has jurisdiction to grant the Motions to Intervene.

Respectfully submitted on this 21st day of August, 2018,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed via email to the agency clerk at AGC.Filing@myfloridalicense.com and served by electronic mail on this 21st day of August, 2018, to the following:

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