

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
BOARD OF PILOT COMMISSIONERS
PILOTAGE RATE REVIEW COMMITTEE**

FILED	
Department of Business and Professional Regulation AGENCY CLERK	
CLERK	Ronda L. Bryan
Date	2/27/2019
File #	

IN RE: APPLICATION FOR A CHANGE IN RATES OF PILOTAGE FOR PORT EVERGLADES, FILED BY THE FLORIDA CARIBBEAN CRUISE ASSOCIATION, AND ALTERNATIVE APPLICATION FOR A CHANGE IN RATES OF PILOTAGE FOR PORT EVERGLADES, FILED BY PORT EVERGLADES PILOTS

CASE NO.: PRRC 2014-2

FCCA's MOTION TO STRIKE KING OCEAN AND CROWLEY LINER SERVICES' PETITION FOR FORMAL ADMINISTRATIVE HEARING, OR IN THE ALTERNATIVE TO DETERMINE NO DISPUTED ISSUES OF MATERIAL FACT EXIST

COMES NOW, the Florida-Caribbean Cruise Association and hereby files this, its Motion to Strike King Ocean and Crowley Liner Services' ("Cargo Entities") Petition for Formal Administrative Hearing, Or In The Alternative To Determine No Disputed Issues Of Material Fact Exist, and in support thereof state as follows:

On January 22, 2019, a Notice of Intent to Modify the Port Everglades Rate of Pilotage was issued by the Pilotage rate Review Committee ("PRRC"). Pursuant to that Notice, an interested party could seek review of the Order pursuant to Sections 120.569 and 120.57, Florida Statutes, by filing a petition with the Department of Business and Professional Regulation within 21 days of receipt of the Order. Further, if any interested party disputed any material facts upon which the PRRC's decision was based, that party could request a hearing before an administrative law judge pursuant to Section 120.57(1), Florida Statutes.

The Cargo Entities filed a petition for administrative hearing that fails to state disputed issues of material fact. As a result, the Cargo Entities' petition does not justify a section 120.57

hearing. In its petition, the Cargo Entities sets forth the following allegations of disputed issues of material facts. The Cargo Entities' petition states:

A statement of all disputed issues of material fact. If there are none, the petition must so indicate

a. Petitioners dispute the material fact that PEP incurred an average per-handle cost of \$721.

b. Petitioners dispute PRRC's determination that FCCA is paying "too much" on a per-handle basis as a result of its members' business decision to operate fewer larger vessels is a "material fact" for consideration when determining whether the requested rates will result in fair, just, and reasonable rates.

c. Petitioners dispute PRRC opting not to determine the values of the Pilots "pension fund."

See Petition, p. 3. None of these allegations constitute disputed issues of material fact, and the Cargo Entities' petition therefore should not be designated for a formal administrative hearing pursuant to section 310.151(4)(a), Florida Statutes.

I. The Cargo Entities Contention That The PRRC Made A Factual Finding That The Per Handle Cost is \$721 Is Incorrect.

The Cargo Entities' contention that the "per-handle cost" is a disputed issue of material fact is erroneous.

Foremost, during the two-day public hearing on this matter, the Cargo Entities did not contest the \$721 per handle fee as being incorrect or in dispute. More importantly, the PRRC, in making its findings of fact, never adopted the \$721 per handle figure as being a basis of for its proposed rate change, and it is therefore not a material fact that can be in dispute.

As a quasi-legislative hearing, the parties and members of the public offered extensive testimony, data and arguments into the record on a variety of issues they believed pertinent. A party's disagreement with the arguments posited by another party or member of the public does not turn that argument into a disputed issue of fact if the PRRC did not rely upon that fact in

reaching its final rate change decision. The record of the transcript reflects that the Committee never adopted the \$721 per-handle cost figure when approving its factual findings. As a result, this fact cannot be considered in dispute (as there is no proof it was ultimately relied upon) nor material (because it was not relied upon as a finding of fact in reaching the rate change decision). Thus, there is no basis for raising this issue as a disputed issue of fact entitling the Cargo Entities to a section 120.57(1) hearing.

II. The Cargo Entities' Contention That The PRRC Believed The FCCA Was "Paying Too Much" Is Not A Disputed Issue of Fact for Many Reasons.

Likewise, the Cargo Entities fail to allege any material fact with regard to allegation "b" above, that the PRRC allegedly determined "the FCCA is paying too much."

As with the \$721 cost per handle issue, the Cargo Entities' petition fails to demonstrate that the PRRC's fact-findings ever included a determination that "the FCCA is paying too much on a per-handle basis as a result of its members' business-decision to operate fewer, larger vessels." Not only did the FCCA never argue that it "made a business-decision to operate fewer larger vessels," but the PRRC never made any factual finding to that effect that could possibly be in dispute. The Cargo Entities are essentially disputing an opinion they believe was held by the PRRC, based on an argument never posited by the FCCA. It is not an issue of material fact.

Finally, even if the Cargo Entities' contention was accurate (which it is not), the issue of whether the FCCA is "paying too much" is not a disputed issue of fact that can be put before an administrative law judge for a determination. An administrative law judge could determine *how much* the FCCA is paying (which is not in dispute), but whether that amount is too much, too little, or just right is a discretionary determination that, as explained in detail below, falls solely within the quasi-legislative, rate-making authority of the PRRC.

A. The PRRC's Rate Making Function Gives It Sole Authority Over Economic Regulation and the Value Judgments That Come With It.

All four petitioners in this matter, Crowley, King Ocean, Seacor and Balearia err in claiming that purported value judgments of the PRRC are disputed factual issues.

As the FCCA has pointed out in multiple other pleadings before this Committee and other tribunals, the PRRC's rate-making function is a form of economic regulation that involves the balancing of competing interests and undertaking of value judgment determinations. The Rate Committee's primary function, as delineated in Florida Statute §310.151, is to regulate pilotage rates in Florida ports and to adopt administrative rules allowing the Rate Committee to carry out such function. The rate making function is quasi-legislative in nature.

The Third DCA addressed the nature of the PRRC's function in *South Florida Cargo Carriers Ass'n, Inc. v. State of Florida, Department of Business and Professional Regulation*, 738 So. 2d 391, 392-393 (Fla. 3d DCA 1999), *rev. denied* 766 So.2d 223 (Fla. 2000), stating that rate-making is quasi-legislative in nature:

It is enough to say that, largely for the reasons stated by the Board itself, and primarily on the authority of the Florida rate making decisions, see *Chiles v. Public Serv. Comm'n Nominating Council*, 573 So. 2d 829, 832 (Fla. 1991) (“[R]atemaking is, in our view, a legislative, rather than an executive or judicial, function...”); *Rosalind Holding Co. v. Orlando Utilities Comm'n*, 402 So. 2d 1209 (Fla. 5th DCA 1981), review denied, 412 So. 2d 469 (Fla. 1982); *City of Pompano Beach v. Oltman*, 389 So. 2d 283, 286 (Fla. 4th DCA 1980) (“Courts may not engage in rate making, since this is an unlawful incursion in the legislative arena.”), review denied, 399 So.2d 1144 (Fla. 1981); see also *Utilities, Inc. v. Florida Public Serv. Comm'n*, 420 So. 2d 331 (Fla. 1st DCA 1982), we agree with the Board that resolution of the ultimate issue in the case, the determination of fair pilotage rates, was conferred by the legislature upon it and not the ALJ.¹

The Rate Committee's rate making function has not changed since this Court's 1999 decision and continues to be quasi-legislative in nature.

¹ In 1999, the Pilotage Rate Review Committee was named the Pilotage Rate Review Board.

Since the Third DCA's reliance on *Chiles* in 1999, the Supreme Court of Florida re-affirmed *Chiles* in finding that the Public Service Commission's rate-making is a quasi-legislative function. *See Citizens of State v. Florida Pub. Serv. Com'n*, 146 So. 3d 1143 (Fla. 2014). In doing so, the Florida Supreme Court stated:

Further, **section 366.04, Florida Statutes, provides the Commission with jurisdiction to regulate and supervise each public utility with respect to its rates and service, and prescribe a rate structure for all electric utilities.** § 366.04(1)–(2), Fla. Stat. (2012); *see also* § 366.05(1) (“In the exercise of such jurisdiction, **the commission shall have power to prescribe fair and reasonable rates and charges....**”). Thus, the plain language of the statutes clearly provides that the Commission independently determines rates of public utilities subject to the conditions set forth in chapter 366; the Commission's authority to fix fair, just, and reasonable rates pursuant to section 366.06(1), Florida Statutes, is not conditioned on the OPC's approval or absence of the OPC's objections.

Id. at 1150 (emphasis added). The language in section 366.04, Florida Statutes, mirrors the language in Chapter 310, Florida Statutes, providing the Pilotage Rate Review Committee with authority to prescribe fair and reasonable rates in the public interest. § 310.151, Fla. Stat. (“**The committee shall 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.”); *see also* § 310.002, Fla. Stat. (“**‘Pilotage’ means the compensation fixed by the Pilotage Rate Review Committee...**”) (emphasis added).

The Legislature also made clear – in other sections of Chapter 310 – its intent to regulate piloting, and pilotage rates specifically, through the Board of Pilot Commissioners and Pilotage Rate Review Committee. In section 310.001, Florida Statutes, the Legislature stated its broad intent to regulate piloting to the fullest extent of its “congressional authority”:

Purpose.—The Legislature recognizes that the waters, harbors, and ports of the state are important resources, and it is deemed necessary in the interest of public health, safety, and welfare to provide laws regulating the piloting of vessels utilizing the navigable waters of the state in order that such resources, the environment, life, and property may be protected to the fullest extent possible. To

that end, **it is the legislative intent to regulate pilots, piloting, and pilotage to the full extent of any congressional grant of authority, except as limited in this chapter.**

(Emphasis added). The Legislature goes on to define pilotage rate setting as a form of express “economic regulation”:

The rate-setting process, the issuance of licenses only in numbers deemed necessary or prudent by the board, **and other aspects of the economic regulation of piloting established in this chapter** are intended to protect the public from the adverse effects of unrestricted competition which would result from an unlimited number of licensed pilots being allowed to market their services on the basis of lower prices rather than safety concerns. **This system of regulation benefits and protects the public interest** by maximizing safety, avoiding uneconomic duplication of capital expenses and facilities, and enhancing state regulatory oversight. The system seeks to provide pilots with reasonable revenues, taking into consideration the normal uncertainties of vessel traffic and port usage, sufficient to maintain reliable, stable piloting operations. Pilots have certain restrictions and obligations under this system, including, but not limited to, the following:

...
(b) Pilots may not unilaterally determine the pilotage rates they charge. Such **pilotage rates shall instead be determined by the Pilotage Rate Review Committee, in the public interest**, as set forth in s. 310.151.

§ 310.0015, Fla. Stat. The Legislature’s declaration that the “rate setting process” is a form of “economic regulation” only further makes clear that rate-setting is quasi-legislative in nature. Courts cannot, as far as the undersigned is aware, engage in formulating economic regulations.

The Third DCA has stated that, while judges **can analyze** economic regulations to determine how parties are benefitted or injured, judges **cannot balance competing interests in the formulation of economic regulation**. In *Silvio Membreno & Florida Ass'n of Vendors, Inc. v. City of Hialeah*, 188 So. 3d 13 (Fla. 3d DCA 2016), *review denied sub nom. Membreno v. City of Hialeah*, SC16-616, 2016 WL 3486427 (Fla. 2016), the Court stated:

A competent judge can certainly analyze an economic regulation and identify the way different parties and classes are benefitted or injured. **But absent fundamental rights or suspect classifications**, which provide at least a degree of constitutional direction, **the choice of how to balance competing economic interests is a policy question that is largely political in**

nature because no pre-existing neutral principles exist to govern the judge's decision. At the end of any such analysis, the judge is left with little more guidance than the very same subjective political convictions a person would use if he or she were voting as a legislator during a roll call or a citizen at the polls. **A decision of this sort may be well-intentioned, even admirable, but it is not judicial.** In the final analysis, the defect in *Lochner's* economic due process is that it bids a judge to replace legislative choices with judicial choices based on nothing more than what the judge believes is the public good.

Id. at 25. Rate-setting has been expressly defined as a form of economic regulation by the Legislature and requires precisely the balance of competing economic interests that are addressed by the rate setting criteria in section 310.151(5)(a), Florida Statutes.

Moreover, the Supreme Court of Florida has differentiated legislative and judicial action by stating that “legislative action results in the *formulation* of a general rule or policy, where judicial action results in the *application* of a general rule of policy.” *Bd. of Cty. Comm'rs of Brevard Cty. v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993). Additionally, it is important to note that while a “quasi-judicial act determines the rules of law applicable, and the rights affected by them, *in relation to past transactions*, [o]n the other hand, a quasi-legislative or administrative order prescribes what the rule or requirement of administratively determined duty shall be with respect to *transactions to be executed in the future* . . .” *Id.* This Court further provided a helpful analysis in *Silvio Membreno* in distinguishing between legislative and judicial action:

Legislative choices in economic regulations are not subject to courtroom fact finding because such laws “may be based on rational speculation unsupported by evidence or empirical data.”

Courts deal in findings of concrete facts concerning past events based on record evidence subject to strict standards of reliability, codified in the rules of evidence and procedure. So it is understandable that a court might attempt to import concepts of record-based fact finding into their review of the legislative process. But this attempt constitutes error. **While courts deal with record-based facts of past events, legislatures generally do not.**

When enacting laws, legislatures are not normally looking at the type of concrete facts found in courtrooms by judges and juries. **Consider a legislature debating**

whether to enact rent control. Does an emergency exist that justifies capping rents? The question of the existence of an emergency is not so much an empirical fact as a value judgment. Even the decision of what criteria to use to decide whether an emergency exists (e.g., rent for middleclass families, displacement in older neighborhoods, availability of affordable housing for the working poor, or the number of homeless) rests not on concrete facts, but on a community's attitudes and shared vision relating to that particular problem. **A situation viewed as perfectly acceptable in one community may be viewed as a crisis in another. The legislative choices in such matters are not driven by the sort of finding of historical facts regarding past events which occurs in a courtroom. They are based instead on legislative findings that are more akin to value judgments than judicial fact finding.** In our system of government, only democratically elected representative bodies are competent to form the sorts of legislative judgments upon which these legislative choices are based.

Silvio Membreno, 188 So. 3d at 26-27 (internal citations omitted; emphasis added). Not only does Chapter 310's express language make clear that the Rate Committee's function is quasi-legislative in nature, but the principles set forth in *Snyder* and *Silvio Membreno* provide further reinforcement.

Here, when the Rate Committee undertakes the economic regulatory process of setting pilotage rates at any particular Florida port, it is engaging in the formulation of a new rule or policy that applies to *future* pilotage rate transactions, not applying a rule or policy to *past* transactions. Rates set by the Committee are *only* applicable on a future basis and are *never* applicable to past pilot transactions. Furthermore, the Rate Committee absolutely *does not* "deal in findings of concrete facts concerning past events based on record evidence that is subject to strict standards of reliability, codified in the rules of evidence and procedure." *Id.* There is an investigation and presentation at a hearing, but *the parties do not – nor are they permitted to under Chapter 310 –* engage in sworn or unsworn discovery or depositions under oath, there is no record evidence, no direct or cross-examination at the hearing, no application of the rules of evidence or procedure, and none of the most basic requirements for a proceeding to be quasi-judicial. *See Dougherty ex rel. Eisenberg v. City of Miami*, 23 So. 3d 156, 161 (Fla. 3d DCA 2009) ("[Quasi-judicial proceedings, as we have stated, are those at which at least the parties must be allowed to present

evidence and cross-examine witnesses.”) (citing *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991)); *Bd. of County Com'rs of Manatee County v. Circuit Court of Twelfth Judicial Circuit In & For Manatee County*, 433 So. 2d 537, 538 (Fla. 2d DCA 1983) (stating that the Manatee County Board was acting in a quasi-legislative fashion when setting water and sewer rates that resulted from “a public hearing was held in which various persons made unsworn statements that were not subject to cross-examination.”); *Carillon Community Residential v. Seminol County*, 45 So. 3d 7 (Fla. 5th DCA 2010) (“Nevertheless, a party to a quasi-judicial hearing, by virtue of its direct interest that will be affected by official action, ‘must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts.’”). Thus, the proceedings have the hallmarks of being quasi-legislative, and lack even the bare minimums of quasi-judicial proceedings.

Ultimately, the Rate Committee is charged with reviewing the twelve statutory criteria in §310.151(5)(b), balancing the varied economic, safety, and operational interests of the pilots, the rate payers, and any other interested individuals or entities, and engaging in value judgments as to the appropriate rate of pilotage that best serves the public interest. These are value judgments that will apply to future pilotage rate transactions. In many ways, pilotage rate setting is analogous to the rent control hypothetical outlined by this Court in *Silvio Membreno*. In determining whether to change pilotage rates, the Rate Committee must “give primary consideration to the public interest in promoting and maintaining efficient, safe and reliable piloting services.” §310.151(3);(5)(a), *Fla. Stat.* The question of whether the public interest will be served by changing pilotage rates, like the question of whether an emergency existed to justify capping rent, is not an empirical fact, but a value judgment that can only be made by the Rate Committee. Moreover, the Rate Committee’s consideration of “[a]ny other factors the committee deems relevant in determining

a just and reasonable rate” further underscores the policy and value judgment-based nature of the Committee’s decision-making. *See* § 310.151(5)(b)(12), *Fla. Stat.* Finally, like in *Silvio Membreno*, pilotage rates that may be viewed as perfectly acceptable in one port community may be viewed as a crisis in another.

B. Petitioners’ Disputed Issues of Fact Are In-Fact Value Judgments Solely Within The PRRC’s Province.

This brings us back to the Cargo Entities’ argument that it is a disputed issue of material fact that the PRRC purportedly concluded that the “FCCA is paying too much.” That statement, even if true, does not constitute a disputed issue of material fact. The issue of what is “too much” or “too little” is not an empirical fact, but a value judgment based on various different factors and criteria. Based on the statutory authority and caselaw outlined above, it is the PRRC’s responsibility to balance competing interests and to make just those kinds of value judgments necessary to set pilotage rates. An administrative law judge cannot make that determination. As a result, the Cargo Entities’ allegation in paragraph b does not constitute a disputed issue of fact.

III. The Cargo Entities Contention That The PRRC Did Not Value The Pilots’ Pension Fund Is Not A Fact In Dispute.

Finally, the Cargo Entities’ argument that the PRRC did not value the Pilots’ pension fund fails to set forth any material facts that can be put before an administrative law judge for a factual determination.

The Cargo Entities’ petition fails to demonstrate that the PRRC allegedly did not determine the value of the pension fund, and there is no reference to any record evidence in the petition demonstrating such. Regardless, the Cargo Entities argue that the PRRC failed to determine the value of the pension fund under section 310.151, Florida Statutes. That is not a disputed issue of fact, it is, at best, a legal argument that the PRRC failed to fulfill its statutory obligations.

Moreover, the PRRC *is not statutorily required* to determine the precise amount of the

Pilots' retirement plan. Section 310.151(5)(b) states that the PRRC "shall also *give consideration* to the following factors," which include the cost of retirement and medical plans and the value of benefits derived from being a pilot. The PRRC was required only to "give consideration" to the Pilots' retirement plan; not precisely define the value of the plan. The Cargo Entities do not dispute that the PRRC "gave consideration" to the Pilots' retirement plan, only that the PRRC allegedly did not place a precise value on it. Even taking the Cargo Entities' allegation as true, it is unclear how the PRRC's alleged failure to perform a task it was never required to perform constitutes a disputed issue of material fact. The Cargo Entities' dissatisfaction with the PRRC's alleged decision not to precisely value the pension fund is not a disputed issue of fact.

Based on the above, the FCCA does not believe the Cargo Entities' have raised any disputed issue of material fact that warrants a section 120.57(1) hearing. As a result, the FCCA respectfully believes the PRRC should conclude no disputed issues of material fact exist, should not designate the petition for a final hearing, and should deem the order final agency action for the purposes of section 120.68, Florida Statutes. *See Fla. Stat.* 310.151(4)(a).

IV. The Cargo Entities Requested Relief Cannot Be Obtained Through A Section 120.57(1) Hearing to Resolve Disputed Factual Issues.

In paragraph VI, in their request for relief, the Cargo Entities seek the following relief:

Petitioners' respectfully request the PRRC to vacate the Notice, direct the PEP and the FCCA to file revised applications, allow Petitioners to intervene in the proceedings and submit an alternative application (or other appropriate filing), investigate and hold hearings on the consolidated alternative and revised applications, and fix pilotage in Port Everglades in a manner consistent with the limited grant of legislative authority provided in Section 310.151.

This request for relief is problematic for two reasons. First, resolution of a disputed issue of material fact (albeit the Cargo Entities have failed to raise one) does not give rise to the relief sought by the Cargo Entities. Even if an administrative law judge could make determinations on the three purported issues of material facts alleged by the Cargo Entities (which it cannot, based

on the arguments set forth herein), at best the PRRC would give consideration to those new facts and make a value judgment and economic determination of whether it warranted change the pilotage rates implemented. The relief sought by the Cargo Entities cannot be granted through the filing of a petition for administrative hearing.

Second, the FCCA feels inclined to again point out that the Cargo Entities deliberately elected not to participate in the Port Everglades rate change proceedings for over four years. Now, they are attempting to raise purported disputed issues of fact not just to ensure that this Committee's rate change order was based on all of the correct facts, but instead to throw out the entire proceedings that have taken place over the last 5 years and to start anew. Such an outcome would be highly prejudicial and detrimental to the FCCA and PEP, who have fully engaged in these proceedings in good faith for years, and there is simply no basis, either in law or in equity, to allow such an outcome to take place.

WHEREFORE, the FCCA respectfully requests that this Committee strike the Cargo Entities' Petition for Formal Administrative Hearing, or in the alternative make a determination that the petition raises no disputed issues of material fact exist, does not warrant a hearing under section 120.57, and deem the PRRCs' rate change order as final agency action for the purpose of section 120.68, Florida Statutes.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served by electronic delivery on
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