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

SEACOR ISLAND LINES LLC’S RESPONSE TO FCCA’S MOTION TO STRIKE SEACOR’S PETITION OR, IN THE ALTERNATIVE, TO DETERMINE THAT NO DISPUTED ISSUES OF MATERIAL FACT EXIST

COMES NOW, SEACOR Island Lines, LLC (“SEACOR”) and, through undersigned counsel, files this response to the Florida Caribbean Cruise Association’s (“FCCA”) Motion to Strike SEACOR’s Petition for Formal Administrative Hearing or, in the Alternative, to Determine that No Disputed Issues of Material Fact Exist (“Motion”). SEACOR requests that this Motion be denied and, in support thereof, states as follows:

1. Although the FCCA couches its Motion as primarily being a motion to strike, the FCCA advances no actual argument for why SEACOR’s Petition should be stricken. The FCCA makes no assertion that SEACOR missed a point of entry to challenge the administrative action at issue. Rather, the FCCA focuses solely on the “alternative” argument that SEACOR has failed to allege disputed issues of fact. Thus, without anything to actually respond to on why its Petition should be stricken, SEACOR will address only the material fact issue.

2. As the FCCA notes, the very first disputed material fact listed is “whether the proposed rate increase is fair, just and reasonable.” The FCCA argues that this is not sufficient
because it “simply restates” language in statute. What the FCCA fails to cite is any law or precedent standing for the proposition that this matters. The question of whether the rates are fair, just and reasonable is quite clearly one of fact. It requires a review of the proposed rates themselves, along with the factual circumstances that surround them and the way they will affect other parties. \(^1\) If this matter is referred to the Division of Administrative Hearings (“DOAH”), an Administrative Law Judge would make findings of fact pertinent to this determination. That this language appears in statute does not make this determination any less factual. The same is true for issues of fact number six and seven in SEACOR’s Petition, for which the FCCA raises the same argument.

3. In short, SEACOR’s Petition is in line with others that the Pilotage Rate Review Committee (“PRRC”) has previously referred to DOAH. In *ACL Bahamas Limited and Indian River Terminal, Inc. v. Department of Bus. And Prof. Reg., Pilotage Rate Review Committee*, DOAH Case No. 10-2335, a petition raising disputed issues of fact nearly identical to those alleged in SEACOR’s Petition was referred to DOAH. A copy of the petition from that case is attached as Exhibit A to this response. Further, in *Biscayne Bay Pilots, Inc. v. Department of Bus. And Prof. Reg., Pilotage Rate Review Committee*, DOAH Case No. 17-5790, the petitioners raised many of the same disputed issues of fact as SEACOR. That petition, which was also referred to DOAH, is attached as Exhibit B (*see specifically paragraph 31*). There is no reason for the PRRC to treat SEACOR differently from those it has historically referred for a formal hearing.

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\(^1\) The FCCA asserts later in its Motion that the PRRC is under no obligation to consider the effect of a rate change on other carriers. However, as previously stated, the PRRC must determine whether the proposed rates are fair, just and reasonable. It is possible that an ALJ could find that this factual determination can be made without any evidence regarding the effect of the rates on others who frequent the port. It is also possible that an ALJ would find the exact opposite. Either way, it is for a finder of fact to determine what evidence is relevant for this requirement.
WHEREFORE, SEACOR Island Lines, LLC respectfully requests that the Motion to Strike SEACOR’s Petition for Formal Administrative Hearing or, in the Alternative, to Determine that No Disputed Issues of Material Fact Exist be denied.

RESPECTFULLY SUBMITTED THIS 6th day of March, 2019.

/s/Daniel R. Russell
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic delivery on the 6th day of March, 2019 upon the following:

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STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
PILOTAGE RATE REVIEW BOARD

ATLANTIC CARIBBEAN LINE, INC. and
INDIAN RIVER TERMINAL COMPANY,

Petitioners,
v.

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
PILOTAGE RATE REVIEW BOARD.

Respondent.

PETITION FOR FORMAL ADMINISTRATIVE HEARING OF ATLANTIC
CARIBBEAN LINE, INC. AND INDIAN RIVER TERMINAL COMPANY

Atlantic Caribbean Line, Inc. ("ACL") and Indian River Terminal Company
("IRT") (collectively, "Petitioners"), by and through their undersigned counsel, pursuant to
Florida Statutes §§ 310.151(4)(a) and 120.57(1), hereby oppose and petition for a formal
administrative hearing to review the proposed pilotage rate increase for the Port of Fort Pierce
(sometimes referred to as the "Port") ordered by the three (3) sitting members of the Pilotage
Rate Review Board in its Notice of Intent to Approve in Part and Deny in Part the Port of Fort
Pierce Pilotage Rate Increase Application Filed by the Fort Pierce Pilots Association dated
March 23, 2010 ("Notice of Intent"), a copy of which is attached hereto as Exhibit "A." The
following information is provided in accordance with Florida Administrative Code 28-106.201:

1. Name of Affected Agency:

Florida Department of Business and Professional Regulation
Pilotage Rate Review Board
Northwood Center
1940 North Monroe Street
Tallahassee, Florida 32399
2. **Agency’s File or Identification Number:** Unknown

3. **Petitioners:**

   Atlantic Caribbean Line, Inc.
   1001 Harbor Street
   Fort Pierce, FL 34950
   Tel: (772) 465-7700

   Indian River Terminal Company
   18 Fishermans Wharf
   Fort Pierce, FL 34950
   Tel: (772) 465-7700

4. **Petitioners’ Counsel:**

   J. Michael Pennekamp, Esq.
   Fowler White Burnett, P.A.
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   1395 Brickell Avenue
   Miami, Florida 33131
   Tel: (305) 789-9200

5. **Explanation of How Petitioners’ Substantial Interests Will be Affected:**

   ACL’s substantial interests will be affected if the proposed pilotage rate increase is adopted, as follows:

   a. ACL, the largest user of the Port of Ft. Pierce, will be faced with an immediate 157% increase in its costs for pilotage services at the Port of Fort Pierce;

   b. In the highly competitive business market in which ACL operates, ACL will be unable to absorb or pass through to its shipping customers such an excessive and unjustified increase in the pilotage rate at the Port of Fort Pierce;

   c. ACL will likely be forced to reduce or terminate its liner shipping operations at the Port of Fort Pierce in favor of using other Florida ports where lower pilotage fees would apply to ACL’s three (3) vessels which now call at the Port of Ft. Pierce.
IRT’s substantial interests will be affected if the proposed pilotage rate increase is adopted, as follows:

a. IRT is the owner of a dock, warehouse space and office space at the Port of Ft. Pierce; and

b. A reduction or termination of ACL’s operations at the Port of Ft. Pierce will cause a significant decrease in IRT’s revenue, because: (1) ACL pays IRT, on a per-vessel basis, for ACL’s access and non-exclusive use of dockage, land, warehouse and office space at the Port of Ft. Pierce; and (2) ACL’s vessels calling at the Port of Ft. Pierce create other commercial opportunities for IRT to utilize its facilities and personnel at the Port and generate additional revenue for IRT.

6. When and How Petitioners Received Notice:

Petitioners, through their representative, received notice of the agency’s proposed action to increase the pilotage rates at the Port of Ft. Pierce, by Mr. Pennekamp’s receipt of the Notice of Intent, by U.S. Mail, on April 2, 2010 at his law firm’s office in Miami, Florida.

7. Concise Statement of Ultimate Facts Alleged:

a. This case arises from an application for a pilotage rate increase at the Port of Ft. Pierce ("Application") filed by the Ft. Pierce Pilots Association (an "association" consisting of a single pilot, Captain William Wetzel) ("Pilot" or "Ft. Pierce Pilot") in April 2009.

b. The Port of Ft. Pierce was virtually “dead” from an economic standpoint prior to 2003.

c. In 2003, there were approximately 182 handles at the Port of Ft. Pierce, and pilotage revenue of less than $45,000.00, which provided part-time employment for a single pilot at the Port.

d. There is no Port Authority in Ft. Pierce; therefore, there is no “driving force” by the city or county to develop the Port.

e. Unlike other Florida ports, there is no infrastructure at the Port of Ft. Pierce which is an expense for the Pilot to maintain.

f. The Port of Ft. Pierce competes for business primarily with its closest neighboring port to the South, the Port of Palm Beach, and also with Port Canaveral to the North.
g. As a result of substantial investments (in excess of $10 million) made by IRT and ACL in the Port of Ft. Pierce since 2003, the Port today is a profitable working port, which pumps millions of dollars into the local economy each year.

h. The investment and business operations by ACL and IRT (both private companies) at the Port of Ft. Pierce have created full-time employment for a pilot at the Port.

i. The Port of Ft. Pierce is a unique port. It is 100% privately owned and is one of the smallest of Florida’s 14 deepwater ports.

j. Due to the physical limitations of the Port of Ft. Pierce, the Port cannot accommodate the huge cruise lines or large shipping vessels that call at other Florida ports; only small vessels can utilize the Port.

k. ACL is the largest user of the Port of Ft. Pierce.

l. Over 90% of the vessel traffic at the Port of Ft. Pierce is generated by the scheduled weekly “liner service” of ACL’s three (3) vessels, the Christopher Dean, the Caribe Sun and the Caribe Sun.

m. ACL’s vessels call at the Port of Ft. Pierce at scheduled morning and/or evening times on Monday, Wednesday, Thursday and Saturday.

n. Over 90% of the pilotage revenue at the Port is paid by ACL.

o. IRT owns the terminal at the Port of Ft. Pierce, along with equipment and dockage and office space at the Port.

p. ACL commits to its customers in foreign ports to run a container vessel of a certain size to the Port of Ft. Pierce from the foreign port on a regularly scheduled basis, whether or not the vessel has a full, partial or empty load.

q. Like an airline or bus line, ACL’s “liner service” must operate in an efficient cost-conscious manner in order to offer competitive rates to its shipping customers and stay in business.

r. ACL’s captains, who bring ACL’s vessels into the Port of Ft. Pierce every week, are very knowledgeable about the Port, and are fully navigating their vessels in the Port without the assistance of a pilot, but ACL is required by statute to use a state-licensed pilot at the Port when their vessels enter or exit the Port.

s. When entering or exiting the Port of Ft. Pierce, ACL’s vessels are at all times under the control of ACL’s master; the Pilot only provides guidance.
t. In order for ACL to continue to offer a competitive shipping “liner service” at the Port of Ft. Pierce, it is imperative that the pilotage services at the Port, which are required by Florida law, be safely provided in the most efficient and cost-effective manner;

u. Since 2003, IRT has furnished the boat used by the Ft. Pierce Pilot, at no charge to the Pilot.

v. Since 2003, IRT also has provided, at no charge to the Fort Pierce Pilot, a boatman for the pilot boat, and all fuel and maintenance needed for the boat.

w. Because the Ft. Pierce Pilot has no expenses relating to the pilot boat, the Pilot’s expenses are very low in comparison to pilot expenses in other Florida ports.

x. The Pilot’s handle time for over 90% of the vessels that call at the Port of Ft. Pierce is approximately 1.25 hours.

y. There have been no pilot accidents or other safety incidents of any kind during piloting services at the Port of Ft. Pierce which have occurred with the Pilot’s use of the boat furnished by IRT.

z. During the seven-year period from 2003 to date, the Pilot, utilizing the boat furnished by IRT, has safely and efficiently provided piloting services at the Ft. Pierce.

aa. The Pilot’s Application sought a four-year increase in rates of pilotage as follows: 157% (Year 1); 13.9 % (Year 2); 16.7 % (Year 3) and 18.7 % (Year 4).

bb. In the Application, the Ft. Pierce Pilot stated his opinion that he should own and control his own pilot boat; and that he should be granted pilotage rate increases sufficient to enable him to own, operate and maintain his own pilot boat.

c. Florida law does not require any state-licensed pilot providing pilotage services at any Florida port to own his own pilot boat.

dd. There are state-licensed pilots operating in Florida, in addition to the Ft. Pierce Pilot, who do not own their own pilot boat.

ee. There was no evidence presented by the Ft. Pierce Pilot that the IRT boat he has been using for the last seven (7) years is unsafe or that he has suffered any injury on the job resulting from his use of the IRT boat.
ff. There was substantial opposition to the Pilot’s Application, by the Port owners, Port users and others dependent on Port operations for their livelihood.

gg. As set forth in the Notice of Intent, the three (3) members sitting as the Pilotsage Rate Review Board decided to grant the Ft. Pierce Pilot’s 157% rate increase application for Year 1 and deny the rate increases sought by the Pilot for Years 2, 3 and 4.

hh. The Pilot’s Application sought the pilotage rate increase primarily to allow the Pilot to buy, operate and maintain his own pilot boat.

ii. If the Ft. Pierce Pilot acquires and operates his own pilot boat with the proposed 157% rate increase, the Pilot’s total operating expenses will increase over eight-fold and there will be minimal, if any, increase in the Pilot’s net income.

jj. No new companies are projected to begin bringing new vessels into the Port of Ft. Pierce; the Port is too small to attract most vessels and the proposed pilotage rate increase, if adopted, will cause the Port to be too expensive to attract new business.

kk. The Port’s users are substantially the same as in 2003; the Port has not attracted new business to increase the vessels using the Port.

ll. The economic viability of the Port of Ft. Pierce is dependent upon ACL’s continuing its liner service to the Port.

mm. The pilotage rate increase approved by the Notice of Intent is a 157% increase over the current pilotage rate at the Port of Ft. Pierce.

nn. The proposed pilotage rate increase will make the Port of Ft. Pierce substantially more expensive for port users than the Port of Palm Beach or Port Canaveral.

oo. The increase in pilotage rate at the Port of Ft. Pierce will make it economically unfeasible for ACL to continue to operate its “liner service” to the Port.

8. Disputed Issues of Law:

Petitioners dispute the following issues of law:

a. That the Notice of Intent is valid because the current number and composition of the Pilotage Rate Review Board does not comply with Florida law. Florida Statutes § 310.151, which authorizes the Pilotage Rate Review Board (the “Board”) to determine pilotage rates, mandates
that the Board consist of seven (7) members and that the composition of the seven-member Board shall be as follows: one (1) former hearing officer, administrative law judge or former judge; one (1) person who is or has been licensed by the United States Coast Guard as an unlimited master, without a first-class pilot's endorsement; one (1) certified public accountant with at least 5 years' experience in financial management; one (1) person from the southern region of Florida; one (1) person from the central region of Florida; one (1) person from the northeastern region of Florida; and one (1) person from the northwestern region of Florida;

b. That the sitting 3-members of the Pilotage Rate Review Board (i.e. the Honorable Clarence T. Johnson, Michael R. Hugins and Steven Reynolds) (the "Sitting Pilotage Rate Review Board") have the authority under Florida Statutes § 310.151, or otherwise under Florida law, to enter any orders which determine pilotage rates, adopt any administrative rules to implement provisions of Florida Statutes § 310.151, or take any action whatsoever as the "Pilotage Rate Review Board" established by Florida Statutes § 310.151;

c. That the Sitting Pilotage Rate Review Board gave proper and sufficient notice of its January 11, 2010 telephone hearing regarding the Application by the Ft. Pierce Pilot's Association for a pilotage rate increase;

d. That the Sitting Pilotage Rate Review Board provided Petitioners with due process and complied with applicable administrative rules when it accepted for consideration the letter submitted by the Ft. Pierce Pilot on January 8, 2010 and did not provide ACL with an opportunity to consider and respond to the Pilot's submission (which ACL belatedly received from the Pilot by email at 10:45 p.m. on January 10, 2010), prior to holding the its January 11, 2010 hearing and vote on the Pilot's Application;

e. That, as a matter of law, the determination by the Sitting Pilotage Rate Review Board to increase pilotage rates by 157%, effective May 1, 2010, as set forth in the Notice of Intent is supported by substantial evidence and comports with the statutory mandate of Florida Statutes § 310.151(5)(a) that the "board shall give primary consideration to the public interest in promoting and maintaining efficient, reliable, and safe piloting services" (emphasis supplied);

f. That, as a matter of law, the Pilot's unsupported statements of opinion that he "needs" to own his own pilot boat to perform his piloting duties were a sufficient basis for the Sitting Pilotage Rate Review Board to grant the proposed exorbitant 157% pilotage rate increase for the Port of Ft. Pierce, as set in the Notice of Intent, where the economics of the Port cannot support such a rate increase and the evidence does not support the pilot's opinion that he "needs" to own his own pilot boat;
g. That, as a matter of law, the evidence before the Sitting Pilotage Rate Review Board was sufficient to support the decision to approve the proposed 157% single-year increase in piloting rates at the Port of Ft. Pierce;

h. That, as a matter of law, Florida Statutes § 310.151, is uniformly applied in decisions made on pilotage rate change applications even though the terms “actual piloting duty” and “amount of time spent on other essential support services” contained in § 310.151(5)(b)5 are undefined and the pilot’s data relating to same are not independently verified or consistently applied;

i. That, as a matter of law, the proposed pilotage rate increase set forth in the Notice of Intent should be upheld when it would make the Port of Ft. Pierce non-competitive with the other Florida ports that it competes with and thereby render IRT’s substantial investment in real and personal property at the Port of Ft. Pierce worthless and constitute a “taking” of IRT’s property by the State of Florida without just compensation; and

j. That Florida Statutes § 310.0015(3)(c), which provides that pilots “shall maintain or secure adequate pilot boats,” as a matter of law, was properly applied to justify a 157% increase in the pilotage rate for the Port of Ft. Pierce to enable the Pilot to purchase, operate and maintain his own pilot boat where neither safety considerations nor the economics of the Port support this expense.

9. Disputed Issues of Fact:

Petitioners dispute all material issues of fact, including but not limited to the following:

a. That the evidence supports the conclusion that the proposed pilotage rate increase for the Port of Ft. Pierce set forth in the Notice of Intent would result in “fair, just and reasonable rates of pilotage” for the Port, as required by Florida Statutes § 310.151(3);

b. That the evidence supports the conclusion that the proposed pilotage rate increase for the Port of Ft. Pierce set forth in the Notice of Intent would serve the “public interest in promoting and maintaining efficient, reliable, and safe piloting services,” as required by Florida Statutes § 310.151(5)(a);

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1 The Notice of Intent adopted the findings of the Investigative Committee as to the factors in Florida Statutes § 310 151(5)(b). Therefore, most references herein are to the applicable pages of the Investigative Committee's Report.
c. That the evidence supports the finding at page 10 of the Notice of Intent that the Pilot’s use of the pilot boat furnished by IRT was “less than satisfactory;”

d. That the evidence supports the finding at pages 10 and 11 of the Notice of Intent that “an increase in pilotage rates sufficient to permit the Pilot to procure an adequate boat and/or secure such services, is warranted;”

e. That the evidence supports the conclusion that the arrangement of the Ft. Pierce Pilot using a pilot boat furnished by IRT at no charge to the Pilot is detrimental to the consideration of the “public interest in having qualified pilots available to respond promptly to vessels needing their service” at the Port of Ft. Pierce. (F.S. § 310.151(5)(b)1);

f. That the evidence supports the conclusion that the projected increase in the expenses of the Ft. Pierce Pilot over eight-fold from current expenses of the Pilot, as set forth in the Application and in the Investigative Committee’s Report, which expenses are for the purchase, operation and maintenance by the Pilot of his own pilot boat, will enhance the “public interest in having qualified pilots available to respond promptly to vessels needing their service” at the Port of Ft. Pierce. (F.S. § 310.151(5)(b)1);

g. That the evidence as to the “average net income” of the Ft. Pierce Pilot supports the proposed pilotage rate increase based on the piloting services performed at the Port. (F.S. § 310.151(5)(b)2);

h. That the proposed piloting rate increase will result in “reasonable operating expenses” for the Ft. Pierce Pilot. (F.S. § 310.151(5)(b)3);

i. That a vehicle expense ($7,000 as set forth at page C-3 of the Investigative Committee Report) is a “reasonable operating expense” for the Ft. Pierce Pilot, as such expense is unrelated to piloting duties;

j. That the Port of Ft. Pierce is comparable to the ports reviewed at pages C-4 through C-7 of the Investigative Committee Report and adopted at page 6 of the Notice of Intent in that, inter alia, the analysis compares “apples to oranges” because of the smaller vessel size of the Port of Ft. Pierce compared to the other ports; an inaccurate handle time of 1.5 hours is assigned to the Port of Ft. Pierce; and the analysis (which focuses only on rates) does not include any analysis of the higher expenses of the pilots at the other ports. (F.S. § 310.151(5)(b)4);

k. That the proposed rate increase set forth in the Notice of Intent is justifiable when the finding of the Investigative Committee Report in Table 3, at page C-5, establishes that the rate increase would make the Port of Ft. Pierce non-competitive in comparison to the two ports with which it competes (Palm Beach and Port Canaveral) because the small vessel and large vessel rates for the Port of Ft. Pierce would (with the rate
increase) greatly exceed the rates at these competing ports. (F.S. § 310.151(5)(b)4);

l. That the evidence supports the findings in the Notice of Intent as to “the amount of time” the Ft. Pierce Pilot “spends on actual piloting duty and the amount of time spent on other essential support services.” (F.S. § 310.151(5)(b)(5) and/or that the evidence supports the findings as to the 1.5 hours “Handle Time” and/or the hours of “Total Daily Time” set forth at page C-7 and C-8 of the Investigative Committee Report, which were adopted as findings in the Notice of Intent;

m. That the proposed pilotage rate increase is warranted so that the net income earned by the Ft. Pierce Pilot is “equal to or greater than that available to such individuals in comparable maritime employment.” (F.S. § 310.151(5)(b)6);

n. That the proposed rate increase is necessary to attract and/or retain the services of a state-licensed pilot at the Port of Ft. Pierce. (F.S. § 310.151(5)(b)7);

o. That the projected pilotage rate increase is justified based on projected vessel traffic for the Port of Ft. Pierce, and that the Ft. Pierce Pilot should be insulated from economic downturns by increasing pilotage rates in the current economy. (F.S. § 310.151(5)(b)8);

p. That the findings in the Notice of Intent are accurate as to the Pilot’s revenue and net income;

q. That ACL earns $14 million in annual gross revenue, as set forth at page C-10 of the Investigative Committee Report; and

r. That the findings in the Notice of Intent reflect a proper analysis of the evidence regarding the factors set forth in F.S. § 310.151(5)(b) 9 – 11.

10. Specific Rules and Statutes:

Florida Statutes § 310.151, and all rules and statutes referenced herein and in the Notice of Intent.

11. Relief Sought:

Petitioners request the following relief:

a. That this Petition be granted;
b. That this matter be referred to the Division of Administrative Hearings and assigned to an administrative law judge to conduct a hearing pursuant to Florida Statutes § 120.57(1);

c. That the administrative law judge so assigned conduct a formal administrative proceeding pursuant to Florida Statutes §§ 120.59 and 120.57 and make such factual determinations and conclusions of law as shall be necessary, and file a recommended Order with Respondent as required by Florida Statutes, Chapter 120, which concludes that the Notice of Intent is invalid or should be reversed in its entirety, and further concludes that the Application of the Ft. Pierce Pilot should be denied in its entirety; and

d. That such administrative law judge shall award each Petitioner its attorneys’ fees and costs associated with this action and shall order such other and further relief as may be just and proper.

Respectfully submitted,

[Signature]

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Counsel for Petitioners
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this ___________ day of April, 2010 by Federal Express Mail (overnight delivery) upon: Robyn Barineau, Executive Director, Pilotage Rate Review Board, Department of Business and Professional Regulation, Northwood Centre, 1940 North Monroe Street, Tallahassee, FL 32399-0750, and by U.S. Mail upon: William J. Wetzel, c/o Fort Pierce Pilots Association, 620 Colonial Drive, Vero Beach, Florida 32952.

Sandra I. Tart

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FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REG.
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’ PETITION FOR AN ADMINISTRATIVE HEARING INVOLVING DISPUTED ISSUES OF MATERIAL FACT

Pursuant to sections 120.569 and 120.57(1), and 310.151(4), Florida Statutes, and rule 28-
106.201, Florida Administrative Code, the Biscayne Bay Pilots, Inc. (“BBP” or “the Pilots”) file
this Petition for an Administrative Hearing Involving Disputed Issues of Material Fact. In support,
the Pilots state:

I. Procedural Background

1. On September 21, 2017, the Pilotage Rate Review Committee (“PRRC” or “committee”) entered a Notice of Intent to Modify the Port of Miami Rate of Pilotage (“Notice”), which imposes numerous changes in the rates that the Pilots must charge their customers. See Notice, attached as Exhibit A. Entry of the Notice followed a three-day hearing of the PRRC in Miami on May 17, 18, and 19, 2017, and a follow-up conference call by PRRC members on August 31, 2017.

2. The hearing covered two separate applications for a change in the rates of pilotage in PortMiami. In March of 2014, the Florida Caribbean Cruise Association (“FCCA”) filed an application seeking a 25 percent decrease in the rates of pilotage in PortMiami for passenger vessels only. The FCCA is the association that represents the cruise lines that call on PortMiami and many other ports throughout the world. A hearing on FCCA’s application was held in late July

[Exhibit B]
and early August 2014, but no decision was ultimately reached by the committee because of litigation between FCCA and BBP concerning the composition of the PRRC. *Biscayne Bay Pilots, Inc. v. Fla. Caribbean-Cruise Ass’n*, 160 So. 3d 559, 562 (Fla. 1st DCA 2015) (*Biscayne Bay Pilots I*); *Biscayne Bay Pilots, Inc. v. Fla. Caribbean-Cruise Ass’n*, 177 So. 3d 1043, 1044 (Fla. 1st DCA 2015) (*Biscayne Bay Pilots II*). Because the First District Court of Appeal ultimately concluded that two PRRC members were biased or prejudiced against BBP and could not serve, a new hearing was required to be held. *See id.*

3. In conjunction with the published notice of a new hearing on FCCA’s application, BBP in March of 2016 filed an alternative application for a change in pilotage rates. BBP’s application sought a six percent increase in pilotage rates for each of the next five years, as well as an annual cost-of-living adjustment based on the Consumer Price Index (“CPI”). The Pilots’ application also requested an increase in the minimum charge for draft from 14 feet to 18 feet; a harbor control surcharge of $100 (one way) for each vessel; a revision to the way cancellation and detention charges are calculated; and authority for the use of a second pilot on Neo-Panamax vessels. The Pilots had not had a rate increase in PortMiami since the last rate modification was approved in 2002. *See Notice*, p. 4.

4. The proceedings were consolidated in accordance with section 310.151(3), Florida Statutes. As provided in section 310.151(3) and rule 61G14-22.007, Florida Administrative Code, the PRRC directed its Investigative Committee to review both applications. *See Notice*, p. 3. The Committee consisted of Commander Galen Dunton, a retired United States Coast Guard officer who is a consultant to the Department of Business and Professional Regulation (“DBPR”), and Richard H. Law, a Certified Public Accountant (“CPA”) who also is a consultant to DBPR. Following public hearings in Miami, the Investigative Committee issued its report on May 1, 2017.
The report provided factual information about both applications and analyzed each of the statutory factors the PRRC is required to consider when a change is requested in the rates of pilotage. § 310.151(5), Florida Statutes. The report did not, however, recommend that either application be granted or denied or that any particular change in rates be adopted by the PRRC. A copy of the report is attached as Exhibit B.

5. The PRRC ultimately did not provide the relief sought by either party. Instead, the PRRC proposed that the Pilots be allowed a one-time rate increase of six percent for all vessels up to 70,000 Gross Registered Tons ("GRT"). Rates for vessels between 70,001 and 80,000 GRT would not change. Rates for vessels larger than 80,000 GRT would dramatically decrease, with a 35 percent decrease for those vessels between 80,001 and 129,999 GRT; and a further 35 percent decrease for vessels larger than 129,999 GRT. See Exhibit A, p. 12. As a result of these changes and others ordered by the PRRC, the pilotage rates in PortMiami as of October 1, 2017,¹ are as follows:

a. Draft charges apply to all vessels at $17.433 per draft foot with an 18-foot minimum, for the first 28 feet and $23.325 per foot for each foot above 28 feet;

b. A tonnage charge of $0.0386 per GRT with a 5,000 GRT minimum, applied to the first 70,000 GRT;

c. A tonnage charge of $0.0364 per GRT applied for each additional ton at or above 70,001 GRT, up to 79,999 GRT;

¹ As more fully discussed below, when the PRRC revises rates of pilotage in a port, those rates become immediately effective, even if a party whose substantial interests will be affected by the change seeks an administrative hearing challenging the rates. § 310.151(4)(b), Fla. Stat. During the pendency of the hearing, the pilots are required to deposit in an interest-bearing account all amounts received that represent the difference between the previous rates and the proposed rates. Id.
d. A tonnage charge of $0.0251 per GRT applied for each additional ton at or above 80,000 GRT, up to 129,999 GRT;

e. A tonnage charge of $0.0163 per GRT applied for each additional ton at or above 130,000 GRT.

6. As more fully discussed below, these rates do not result in fair, just, and reasonable rates of pilotage, as required by sections 310.151(3), and (5), Florida Statutes.

II. Statutory and Regulatory Background

7. Chapter 310, Florida Statutes, governs pilots, piloting, and pilotage in the waters, harbors, and ports of Florida. Section 310.141 requires that, except in certain narrow circumstances, all vessels shall have a licensed state pilot or deputy pilot on board to direct the movements of the vessel when entering or leaving ports of the state or when underway on the navigable waters of the state’s bays, rivers, harbors, and ports. Section 310.011 creates a ten-member Board of Pilot Commissioners ("BOPC"), appointed by the Governor, "to perform such duties and possess and exercise such powers relative to the protection of the waters, harbors, and ports of this state as are prescribed and conferred on it in this chapter." In addition to other responsibilities, the BOPC determines the number of pilots in each port (section 310.061) and disciplines licensed pilots when appropriate (section 310.101).

8. Although the BOPC has numerous statutory responsibilities, it is not responsible for setting the rates of pilotage in each port. Rather, that is the responsibility of the PRRC, which consists of seven members, all of whom are also members of the BOPC. § 310.151(1)(b), Fla. Stat.

The membership of the Rate Review Committee consists of:

[T]wo board members who are licensed state pilots actively practicing their profession, who shall be appointed by majority vote of the licensed state pilots serving on the board; two board members who are actively involved in a professional or business capacity in the maritime industry, marine shipping
industry, or commercial passenger cruise industry; one board member who is a certified public accountant with at least 5 years of experience in financial management; and two board members who are citizens of the state.

§ 310.151(1)(b), Fla. Stat. The latter three board members shall not be involved in, or have any financial interest in, the piloting profession, the maritime industry, the marine shipping industry, or the commercial passenger cruise industry. § 310.011(1), Fla. Stat.

9. Applications for a change in rates of pilotage may be filed by “[a]ny pilot, group of pilots, or other person or group of persons whose substantial interests are directly affected by the rates established by the committee . . . .” § 310.151(2), Fla. Stat. The PRRC is charged with investigating an application for a change in the rates of pilotage and conducting a public hearing on the application. § 310.151(3), Fla. Stat. The PRRC is required to consider specific factors listed in section 310.151(5) to determine “whether the requested rate change will result in fair, just, and reasonable rates.” §§ 310.151(3) and (5), Fla. Stat. Section 310.151(5) provides as follows:

(5)(a) In determining whether the requested rate change will result in fair, just, and reasonable rates, the committee shall give primary consideration to the public interest in promoting and maintaining efficient, reliable, and safe piloting services.

(b) The committee shall also give consideration to the following factors:
1. The public interest in having qualified pilots available to respond promptly to vessels needing their service.
2. A determination of the average net income of pilots in the port, including the value of all benefits derived from service as a pilot. For the purposes of this subparagraph, “net income of pilots” refers to total pilotage fees collected in the port, minus reasonable operating expenses, divided by the number of licensed and active state pilots within the ports.
3. Reasonable operating expenses of pilots.
4. Piloting rates in other ports.
5. The amount of time each pilot spends on actual piloting duty and the amount of time spent on other essential support services.
6. The prevailing compensation available to individuals in other maritime services of comparable professional skill and standing as that sought in pilots, it being recognized that in order to attract to the profession of piloting, and to hold the best and most qualified individuals as pilots, the overall compensation accorded pilots should be equal to or greater than that available to such individuals in comparable maritime employment.
7. The impact rate change may have in individual pilot compensation and whether such change will lead to a shortage of licensed state pilots, certificated deputy pilots, or qualified pilot applicants.
8. Projected changes in vessel traffic.
9. Cost of retirement and medical plans.
10. Physical risks inherent in piloting.
11. Special characteristics, dangers, and risks of the particular port.
12. Any other factors the committee deems relevant in determining a just and reasonable rate.

(c) The committee may take into consideration the consumer price index or any other comparable economic indicator when fixing rates of pilotage; however, because the consumer price index or such other comparable economic indicator is primarily related to net income rather than rates, the committee shall not use it as the sole factor in fixing rates of pilotage.

10. The committee is required to fix rates of pilotage based upon the following vessel characteristics: length; beam; net tonnage, gross tonnage, or dead weight tonnage; freeboard or height above the waterline; draft or molded depth; or any combination of such vessel characteristics or any other vessel characteristics. § 310.151(6), Fla. Stat.

11. Once the PRRC makes a decision on an application, the committee is required to issue a “written notice” stating that the committee intends to modify the pilotage rates in the port where the change was requested. § 310.151(4), Fla. Stat. It is this Notice, rendered on September 21, 2017, that is the basis for this petition.

12. Within 21 days after receipt or publication of the notice, any person whose substantial interests will be affected by the intended PRRC action may request a hearing pursuant to the Administrative Procedure Act (“APA”). Id. In accordance with usual practices under the APA, section 310.151(4)(a) provides that if the petition requesting a hearing raises a disputed issue of material fact, the hearing will be conducted by an Administrative Law Judge (“ALJ”) at the Division of Administrative Hearings (“DOAH”) pursuant to sections 120.569 and 120.57(1), Florida Statutes, unless waived by all parties. If the PRRC concludes that the petition does not
raise a disputed issue of material fact, the decision shall be considered final agency action for purposes of an appeal to a District Court of Appeal pursuant to section 120.68. *Id.*

13. Contrary to usual procedures involving proposed agency action under the APA, the PRRC’s proposed rate determination is not stayed and is immediately effective even if the applicant or a substantially affected person or entity requests an administrative hearing. § 310.151(4)(b), Fla. Stat. Because this immediate effectiveness is unusual and departs from the typical agency “norm,” the statute provides that, pending entry of a final order in the proceeding, the pilots in the subject port are required to deposit in an interest-bearing account all amounts received that represent the difference between the previous rates and the proposed rates. *Id.* Such amounts ultimately upheld following the administrative litigation are distributed after entry of the final order. *Id.*

14. If an administrative hearing on the PRRC’s proposed change in rates is heard by an ALJ at DOAH, the ALJ enters a recommended order, which is then considered by the PRRC, which enters the final order. §§ 120.569, 120.57(1), 310.151(4), Fla. Stat. Decisions of the PRRC regarding rates are not appealable to the BOPC. § 310.151(7), Fla. Stat.

15. Before 2015, the PRRC had a rule that purported to limit the role of the ALJ in an administrative hearing at DOAH. The earlier rule, 61G14-22.012, Florida Administrative Code, provided in relevant part:

Since the determination of the actual rate of pilotage to be imposed at any port is a quasi-legislative act, the resolution of any disputed issue of material fact by a hearing officer assigned by the Division of Administrative Hearings shall not result in a recommendation from the hearing officer as to the appropriate rate to be imposed at any port area in question. The hearing officer’s recommendation shall only extend to resolving disputed issues of material fact which result from a party’s disputing the underlying facts upon which the Board has suggested intended rates for the port area in question.
16. In 2014, rule 61G14-22.012 was challenged by BBP; Port Everglades Pilots, Inc., d/b/a Port Everglades Pilots Association; and the Florida State Pilots Association. FCCA intervened in the proceeding. Judge June McKinney entered a Final Order on March 20, 2015, finding the rule constituted an invalid exercise of delegated legislative authority in violation of sections 120.52(8)(b), (c), (e), and the flush left provision of section 120.52. See Biscayne Bay Pilots, Inc. et al. v. Board of Pilot Commissioners, et al., DOAH Case No. 14-5036RX. Judge McKinney specifically found that “Respondents' position that a legislative delegation to PRRC of quasi-legislative authority prohibits DOAH from recommend(ing) rates is rejected.” Id., p. 17, ¶ 34. Among other Conclusions of Law, the ALJ found that the rule was an invalid exercise of delegated legislative authority “by impeding the ability of DOAH to conduct a full de novo review of agency action .... Id., p. 19, ¶ 38.

III. Agency Affected

17. The agency affected is the PRRC, a committee created by section 310.151, Florida Statutes, as a subset of the BOPC. Both the PRRC and the BOPC are under the auspices of DBPR.

IV. Identity of Petitioner and Petitioner's Counsel

18. The Petitioner is BBP, an association of harbor pilots that performs the pilotage services at PortMiami. BBP consists of pilots licensed by the State in accordance with chapter 310, Florida Statutes. For purposes of this proceeding, BBP’s contact information shall be that of undersigned counsel.

19. BBP is represented by Donna E. Blanton of the Radey Law Firm, 301 S. Bronough Street, Suite 200, Tallahassee, Florida 32301. Ms. Blanton’s telephone number is 850-425-6654; her facsimile number is 850-425-6694; and her email address is dblanton@radeylaw.com.
V. Substantial Interests

20. BBP's substantial interests are affected by the PRRC's decision to revise the rates of pilotage in PortMiami. BBP specifically challenges the PRRC's decision to reduce the rates of pilotage by 35 percent for ships of 80,000 GRT up to 129,999 GRT, and by an additional 35 percent for ships at or in excess of 129,999 GRT. BBP also challenges the PRRC's decision to grant only one six percent increase in rates, as opposed to the six percent annual rate increase for five consecutive years, as proposed by the Pilots. Moreover, BBP challenges the PRRC's refusal to annually adjust rates by the Consumer Price Index, as requested by the Pilots. BBP disputes that the rate changes proposed by the PRRC will result in fair, just, and reasonable rates, as required by section 310.151, Florida Statutes.

VI. Notice of Agency Decision

21. BBP was advised by email of the Notice of Intent to Modify the Port of Miami Rate of Pilotage on September 21, 2017, the same day the Notice was filed with the Agency Clerk at DBPR.

VII. Disputed Issues of Material Fact

22. As previously noted, the Pilots have not had an increase in rates since 2002. See Notice, p. 4. Although an application for a rate increase was submitted in 2009, it was voluntarily dismissed by the Pilots because of the economic recession. Id. As the Investigative Committee found, the Pilots' key assertions in support of the rate increase in their application are as follows:

- The Pilots' 51.3 percent increase in operating costs exceeds the change in CPI (from December 1998 to December 2015) of 44.3 percent by 7 percent;

- Health insurance premiums have increased 91.5 percent from 2002 to 2015;

- The Pilots' employee salaries have increase by 41.4 percent;
• The Pilots have not historically charged a harbor control fee, although they perform harbor
control services in PortMiami, and other ports routinely charge such fees;

• The increased cost of living in the Miami-Fort Lauderdale area (especially the cost of
housing), along with the decrease in pilot income, makes PortMiami less attractive to
deputy pilots.

Exhibit B, p. 5.

23. Additionally, the Pilots put on a full day of evidence at the hearing in May of 2017
in support of their proposed rate increase. Among the relevant testimony was that the proposed six
percent increase in the rates of pilotage for five years would essentially restore the Pilots’ income
to the level it was in 2003. The proposed CPI adjustments were simply intended to keep the Pilots’
income adjusted for inflation and prevent the need for coming back to the PRRC regularly for
extremely expensive rate increase proceedings.

24. Moreover, testimony was provided that pilotage revenue in PortMiami from 2003-
2016 has been essentially flat, but that expenses have risen dramatically. In fact, Captain Chris
Marlow testified that pilot net income in PortMiami has gone from $372,000 in 2003 to $282,000
today.

25. This testimony is inconsistent with the findings in the Investigative Committee
Report, which were adopted by the PRRC, concluding that the average net income for the Pilots
is between $396,170 and $411,170 per year for 2015, including benefits. Notably, the Investigative
Committee imputes as income to the Pilots the value of their unfunded retirement benefit, which
is estimated to be between $30,000 and $45,000. Exhibit B, p. 9. The Pilots dispute that the
retirement benefit should be included in net income, and provided testimony at hearing from a
CPA that imputing the benefit as income is inappropriate.
26. FCCA argues in its application – and argued at the hearing – that rates for passenger vessels should be reduced dramatically because cruise ships have gotten larger over the years, resulting in higher pilotage income simply because of the size of the ships. The PRRC essentially accepted this evidence on page 11-12 of the Notice, stating:

The Committee recognizes that over the last several years the cruise industry has invested in the acquisition of substantially larger vessels. Many of these larger vessels now call upon the Port of Miami. This change in the character of the cruise business model has resulted in a situation whereby the cruise industry has generated a greater percentage of pilotage fees relative to the number of handles required vis-à-vis the cargo industry. Restated, although the cruise industry does not comprise the majority of the pilot handles at the Port of Miami, due to current rate formulaisy, it generates the majority of the pilot revenue.

27. BBP put on contrary evidence, however, noting that pilotage fees are passed on to passengers and showing that smaller ships actually pay a higher pilotage fee per passenger than do larger ships. Because of economies of scale, the larger ships carrying more passengers pay much lower per passenger pilotage rates than do the smaller cruise ships, which carry few passengers and market their favorable “space ratio” in order to attract passengers willing to pay higher prices for more luxurious accommodations and amenities.

28. The Pilots also disputed at hearing the contention of FCCA and the committee that the number of large cruise ships has increased as significantly as FCCA claimed. Rather, the size of cruise ships calling on PortMiami is fairly evenly spread from very small to very large, and no justification exists for granting huge rate decreases for ships that are 80,000 GRT or greater.

29. The actual factual findings of the PRRC in support of its hybrid rate increase/rate decrease are somewhat hard to ascertain, given that the committee relied heavily in its Notice on findings in the Investigative Committee Report, which was prepared weeks before the hearing and only evaluated the proposed 25 percent decrease for passenger vessels proposed by FCCA and the alternative rate increase proposed by BBP, neither of which were adopted. See Exhibit B.
Moreover, the Investigative Committee Report includes very few “findings” per se; rather, it is essentially factual information relating to the competing applications and to each statutory factor the committee is required to consider. See Exhibit B.

30. Notably, the Notice does not reference a single evidentiary exhibit offered by BBP nor any specific testimony offered by BBP’s witnesses. Only one FCCA exhibit is referenced on page eight on the Notice. Both FCCA and BBP put on cases that lasted essentially a full day each, but the committee’s Notice is virtually silent as to the relevance of the evidence it heard. Instead, the committee crafted its own new rate structure in deliberations on the final day of the hearing without input from either of the parties, and with little explanation for its rationale. Notably, Mr. Law, the CPA and primary author of the Investigative Committee Report, warned committee members during those deliberations that the proposed rates had been prepared extremely quickly with little analysis and could lead to unintended consequences. See Transcript, Vol. III, p. 62, May 19, 2107 (excerpted page attached as Exhibit C).

31. Nonetheless, BBP has identified a number of disputed issues of material fact, in addition to those discussed above, based on the decision of the committee and those findings of the Investigative Committee that are contrary to evidence put on at the hearing by BBP. Listed below are disputed issues of material fact identified by BBP. The Pilots reserve the right to add additional issues of disputed material fact\(^2\) as they become known during discovery.

a. Whether the rate structure proposed by the PRRC in the Notice results in fair, just, and reasonable rates;

\(^2\) Some issues may be characterized as mixed questions of fact and law.
b. Whether FCCA is substantially affected by the rate increase proposed by the BBP, given that pilotage rates are passed on to cruise line passengers and not paid by the cruise lines themselves;

c. Whether the committee gave “primary consideration to the public interest in promoting and maintaining efficient, reliable, and safe piloting services,” in making its decision, as required by section 310.151(5)(a), Florida Statutes;

d. Whether the committee erred by failing to grant BBP’s request for annual rate adjustments based on the CPI;

e. Whether the Investigative Committee and the PRRC appropriately added back $30,000 to $45,000 in the Pilots’ unfunded retirement benefit to calculate the net income of pilots;

f. Whether the Investigative Committee and the PRRC correctly valued average net pilot income at between $396,170 and $411,170 per year;

g. Whether the committee appropriately considered the pilotage rates in other ports, as required by statute;

h. Whether the committee erred by accepting and adopting the information in FCCA Exhibit O, entitled “202 Hours Per Week, Every Week?” when considering the amount of time each pilot spends on actual piloting duty versus the amount of time spent on other essential support services;

i. Whether the committee took into account testimony from BBP witnesses Captain George Quick and Paul Kirchner that average pilot income throughout the country is approximately $500,000;
j. Whether the average pilot income in the Investigative Committee Report and adopted by the committee ($400,000 to $410,000 in 2012) is accurate;

k. Whether the committee, which adopted the Investigative Committee Report’s findings on page 53, engaged in “careful quantitative analyses . . . before any rate discounts, based on size of vessels are considered,” as recommended in the report.

l. Whether the committee accurately or appropriately assessed the impact of large cruise ships on pilotage fees and income, vis a vis the cargo industry;

m. Whether the committee took into account that pilotage fees are passed along to cruise line passengers and not paid by the cruise lines themselves;

n. Whether the committee recognized and took into account that per passenger pilotage fees are greater on small cruise ships than on large cruise ships;

o. Whether the committee erred by failing to adopt BBP’s requested six percent rate increase for each of the next five years;

p. Whether the rate discounts proposed for ships at 80,000 GRT to 129,999 GRT and the further discounts for ships at or above 130,000 GRT are arbitrary or capricious; and

q. Whether the committee ignored the testimony of BBP witnesses that the rate discounts in PortMiami will lead to a shortage of licensed state pilots, certified deputy pilots, or qualified pilot applicants.

VIII. Ultimate Facts Alleged

32. Ultimate facts alleged are that the rates adopted by the PRRC in its Notice dated September 21, 2017, are not fair, just, and reasonable, as required by section 310.151, Florida Statutes. The rates requested by the Pilots in their application of March 24, 2016, would result in fair, just, and reasonable rates.
IX. Specific Rules and Statutes Requiring Reversal or Modification of the Agency's Proposed Action

33. The specific rules and statutes that require modification of the PRRC's proposed agency action are sections 310.151, 120.569, and 120.57(1), Florida Statutes; and rule chapters 61G14-22 and 28-106, Florida Administrative Code. The way the alleged facts relate to the specific statutes and rules identified has been discussed elsewhere in this petition.

X. Relief Requested

34. The Pilots respectfully request that the ALJ enter a Recommended Order finding that the rates of pilotage proposed by the PRRC would not result in fair, just, and reasonable rates, as required by section 310.151, Florida Statutes. The Pilots further request the ALJ enter a Recommended Order finding that the rates requested by BBP in its application of March 24, 2016, would result in fair, just, and reasonable rates, and that the pilotage rates in PortMiami be modified by the PRRC to reflect the rates requested by the Pilots in that application.

Respectfully submitted,

[Signature]

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CERTIFICATE OF SERVICE

I certify that the original of this pleading was filed with the Agency Clerk and the Executive Director at the Department of Business and Professional Regulation and that a true copy was served this 12th day of October, 2017, via email to the following:

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