

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

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
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File #	

CASE NO.: PRRC 2014-2

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 ASSOCIATION

**BALEARIA CARIBBEAN, LTD., REPLY TO THE FCCA MOTION TO STRIKE
BALEARIA CARIBBEAN, LTD'S PETITION FOR HEARING, OR IN THE
ALTERNATIVE TO DETERMINE THAT NO DISPUTED ISSUE OF MATERIAL
FACT EXIST**

Balearia Caribbean, Ltd. ("Balearia"), by and through its undersigned attorneys, reply in opposition to the FCCA's Motion to Strike Balearia's petition for hearing, or in the alternative that no disputed issues of material fact exist.

ISSUE
**WHETHER BALEARIA IS ENTITLED TO A HEARING UNDER 120.57 (1) OR 120.57
(2) TO CONTEST THE MODIFICATION OF RATES AS DETERMINED BY THE
PILOTAGE RATE REVIEW COMMITTEE ("COMMITTEE") IN IT'S ORDER
DATED JANUARY 18, 2019**

(1) This Notice of Intent to Modify Pilotage Rate dated January 18, 2019 and issued by the Committee, specifically recognizes that any substantially interested party who seeks to challenge the proposed modified rates may do so by seeking a 120.57 (1), Fla. Stat. hearing or a 120.57 (2) Fla Stat. hearing.

(2) Under section 120.57 (1) Fla Stat., the Committee would refer the petition for hearing to the Division of Administrative Hearings (DOAH) for fact determination. If the petition, in the judgment of the Committee, has not alleged the required disputed issues of material fact, then a

hearing regarding the petition will be conducted before the Committee pursuant to the provisions of 120.57 (2) Fla Stat. In lieu of the Committee conducting an informal hearing under 120.57(2), Fla Stat., the Committee could appoint a hearing officer (an attorney with the DBPR) to conduct the informal proceeding and make a recommendation to the Committee. *W. Frank Wells Nursing Home vs. State, Agency for Healthcare Admin.*, 959 So. 2d 339 (Fla. 1st DCA 2008); *Friends of the Hatchineha Inc. vs. State, Department of Environmental Regulation*, 580 So. 2d 267 (Fla. 1st DCA 1991). Although the disputed fact must be material to the proceedings before a formal adjudicatory proceeding is required, the disputed fact need not be a fact that the agency has cited as a ground for its action in order to entitle the party challenging the action to a formal hearing. *Tuckman vs. Florida State University*, 489 So. 2d 133 (Fla. 1st DCA 1986). Likewise, in considering the dismissal of a petition for a hearing involved with disputed issues of material fact, an agency must accept as true the factual allegations of the petition and may not consider any factual matters outside of the petition. *Save Our Creeks vs. State of Florida Fish and Wildlife Conservation Com'n.*, 112 So. 3d 128. (Fla. 1st DCA 2013).

The absence of disputed issues of material fact does not mean that no adjudicatory hearing may be held. *Village Saloon, Inc. vs. Division of Alcohol Beverages and Tobacco, Dept., of Business Regulation*, 463 So. 2d 278 (Fla. 1st DCA 1984). Rather the existence or nonexistence of disputed facts merely determines whether the hearing will be formal or informal. *Burleson vs. Department of Administration, Division of Personnel*, 410 So. 2d 581 (Fla 1st DCA 1982). A formal hearing is conducted by the Division of Administrative Hearings under section 120.57 (2), Fla Stat. An informal hearing is conducted under section 120.5 (2), Fla. Stat. by the affected agency.

As stated under section 120.569 (1) Fla. Stat., unless waived by all parties, section 120.57 (1) applies whenever the proceedings involve a disputed issue of material fact. Unless otherwise agreed, section 120.57 (2) applies in all other cases. Likewise, if a disputed issue of material fact arises during a proceeding under section 120.57 (2) then, unless waived by all parties, the proceeding under section 120.57 (2) shall be terminated and a proceeding under section 120.57 (1) shall be conducted.

Accordingly, the issue before the Committee is to determine whether or not the petition of Balearia, as well as the other petitions challenging the proposed pilotage rate increase, shall be considered in proceedings conducted under section 120.57 (1) or section 120.57 (2). In determining whether or not a section 120.57 (1) proceeding shall be conducted and the petition transferred to the Division of Administrative Hearings, the Committee must determine whether or not Balearia's petition, as well as the other petitions, raise disputed issues of material fact. The purpose of the hearing before the Committee is not to pre-judge the merits of the petitions. All allegations contained in the petitions are considered true.

FACTS IN DISPUTE

(3) Balearia disputes the following findings of the Committee:

(a) The Committee's finding that it would not make a determination as to the exact value of the pension fund, but would consider only the range presented.

(b) The finding by the Committee that the maritime industry has invested in the acquisition of substantially larger vessels over the last several years. Many of these larger vessels now call upon Port Everglades. This change in the general character of the cruise business model, excluding day cruises, as well as the introduction of large cargo vessels has resulted in a situation whereby fewer large vessels have generated a greater percentage of

pilotage fees relative to the number of handles required vis a vis the small cargo and day cruise industry.

(c) The finding that it would be unjust to expect the large shipping concerns to continue to underwrite one of the cost of port operations to the degree the current rate formula now commands.

(d) The finding by the Committee that smaller vessels, whether cargo or ferry or cruise, must bare more of the expense toward the payment of pilotage rates that results in pilotage rates of Balearia being increased 300%, which can have the effect of putting Balearia out of business.

(e) The finding by the Committee that the proposed modified rate structure is just, fair and reasonable.

These facts found by the Committee are clearly material facts and were used in a significant way by the Committee in its rate determination and modification.

WHEREFORE, Balearia requests that FCCA's Motion to Strike be denied and that Balearia's petition be transferred to the Division of Administrative Hearings for a formal hearing. In the alternative, an informal hearing be scheduled under 120.57(2), Fla. Stat. to consider Balearia's petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. Riley Davis, hereby certify that the foregoing petition was e-served this 15th, day of March served on the following parties:

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