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**DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION**

**BOARD OF PILOT COMMISSIONERS  
PILOTAGE RATE COMMITTEE**

**APRIL 29, 2019**

**9:00 A.M. - 10:47 A.M.**

**THE HYATT PLACE ORLANDO AIRPORT  
5435 FORBES PLACE  
ORLANDO, FLORIDA**

**REPORTED BY:**

**JANE HENEGHAN, COURT REPORTER  
NOTARY PUBLIC/STATE OF FLORIDA**

**BOARD MEMBERS PRESENT:**

COMMISSIONER ROBERT BENSON, CHAIR  
COMMISSIONER CHRIS OATIS, VICE-CHAIR (NOT PRESENT)  
COMMISSIONER DAVID WILKINS  
COMMISSIONER SHERIF ASSAL  
COMMISSIONER CAROLYN J. KURTZ  
COMMISSIONER BRIAN SEUTER  
COMMISSIONER GALEN DUNTON (NOT PRESENT)

**OTHER PARTIES PRESENT:**

ED TELLECHEA, CHIEF ASSISTANT ATTORNEY GENERAL  
DONNA MCNULTY, BOARD COUNSEL  
KRISTA B. WOODARD, EXECUTIVE DIRECTOR  
MANDIE ACKERMANN, INCOMING EXECUTIVE DIRECTOR  
ANNE W. AHRENDT, GOVERNMENT ANALYST I  
JORDAN COHEN, ESQUIRE (WICKER SMITH)  
DAN RUSSELL, ESQUIRE (DEAN MEAD)  
RILEY DAVIS, ESQUIRE (AKERMAN LLP)  
TOM PANZA, ESQUIRE (PANZA MAURER & MAYNARD)  
TARA PRICE, ESQUIRE (HOLLAND & KNIGHT)

**COURT REPORTER:**

Jane Heneghan, American Court Reporting  
ReportingOrlando@aol.com  
407-896-1813

\* \* \* \* \*

P R O C E E D I N G S

APRIL 29, 2019

9:00 a.m.

CHAIRMAN BENSON: Good morning. I have  
9:00 o'clock. Okay. I have 9:01 on April 29th,  
2019.

Welcome to the Pilotage Rate Review  
Committee meeting. We'll start off with the  
roll call, please.

MS. AHRENDT: All right. Commissioner  
Assal.

COMMISSIONER ASSAL: Here.

MS. AHRENDT: Commissioner Kurtz.

COMMISSIONER KURTZ: Here.

MS. AHRENDT: Commissioner Seuter.

COMMISSIONER SEUTER: Here.

MS. AHRENDT: Commissioner Wilkins.

COMMISSIONER WILKINS: Here.

MS. AHRENDT: Commissioner Oatis. (No  
response.)

Mr. Chair, is Commissioner Oatis excused?

CHAIRMAN BENSON: Yes, he is.

MS. AHRENDT: Commissioner Benson.

CHAIRMAN BENSON: Here.

Okay. Start up with a couple housekeeping

1 items before we get into the procession.

2 First of all, we do not have any  
3 microphones in the room. So if you are asked to  
4 speak, please speak up and speak to the Court  
5 Reporter there. We'll try to do the same. And  
6 I've asked her to interrupt us the first time at  
7 least to keep everybody -- if in fact, something  
8 becomes -- if she didn't catch the comment or  
9 what have you, to make sure that the minutes of  
10 this meeting are as complete as possible.

11 Secondly, ask everyone to turn off your  
12 cell phones or get them on vibrate. If you have  
13 to take a call, we understand that, but please  
14 leave the room.

15 Third, in terms of the restrooms, out and  
16 to the left.

17 And lastly, I've asked Counsel Donna  
18 McNulty to start this meeting off with a little  
19 bit of framing of what we're here to do and  
20 specifically talk a little bit about the format  
21 which we've talked in detail in the last couple  
22 weeks.

23 So with that, Counsel McNulty.

24 MS. MCNULTY: Thank you. And good morning  
25 everybody. I am Donna McNulty. I am the new

1 Board Counsel for the Pilotage Rate Review  
2 Committee.

3 As everybody knows, a Notice of Intent to  
4 Modify the Port Everglades Rate was filed on  
5 January 22nd, 2019 and it was published in the  
6 newspaper on January 24th, 2019. Petitions for  
7 Hearing were filed by Crowley, King Ocean,  
8 Balearia and Seacor.

9 Motions to Strike or in the alternative to  
10 determine that no disputed issues of material  
11 fact were filed by the FCCA and the Port  
12 Everglades Pilots.

13 There were other responsive petitions and  
14 motions filed as well.

15 So basically, the process for this meeting  
16 will be as follows. First, there will be a  
17 discussion or motion to determine whether all  
18 petitions were timely filed. Then, we're going  
19 to have the committee consider the petitions and  
20 responses on the merits. And what we envision  
21 is to have each of the Petitioners have 15  
22 minutes apiece to present their case. And then  
23 the Applicants will also have 15 minutes to  
24 present their response or case.

25 Then, the Rate Review Committee will

1 deliberate without interjection of the  
2 Petitioners or the Applicants. They may respond  
3 to specific questions of each of the  
4 commissioners, but it's really for deliberations  
5 of the commissioners themselves.

6 Fourth is a reminder that this commission  
7 is not here to reargue this case. The purpose  
8 of this meeting is to determine whether there  
9 are specific disputed issues of material fact.  
10 And if so, then to refer the matter to the  
11 Division of Administrative Hearings. If the  
12 matter is referred to the Division of  
13 Administrative Hearings, there will be an  
14 evidentiary hearing regarding the identified  
15 disputed issues of material fact. After such  
16 evidentiary hearing, the Administrative Law  
17 Judge would issue a recommended order which  
18 would be considered by the Rate Review  
19 Committee.

20 If the commission determines there are no  
21 disputed issues of material fact, a final order  
22 would be issued and that order could be  
23 appealed.

24 So with that, I turn it over to  
25 Commissioner Benson.

1           CHAIRMAN BENSON: Okay. Thank you.

2           We'll just go by order of the agenda  
3 because also our material is formatted that way.  
4 So we'll start off with Crowley, if they have a  
5 representative that would like to come up and  
6 take your 15 minutes.

7           MR. COHEN: Sure. Good morning,  
8 commissioners. Jordan Cohen with Wicker Smith  
9 on behalf of Petitioners Crowley and King Ocean.

10          I appreciate the Chair affording us 15  
11 minutes. Frankly, I'm not sure that I need it.

12          CHAIRMAN BENSON: Okay. No obligation to  
13 go that long.

14          MR. COHEN: Yeah, yeah. First good news of  
15 the day, right?

16          I appreciate the statements by Ms. McNulty.  
17 I agree in large part with what was -- what's  
18 been kind of set forth procedurally. And I  
19 agree that the matter at hand is pretty narrow.  
20 It's not my intent to, at least not today, to  
21 argue or re-litigate anything that was dealt  
22 with last October in Ft. Lauderdale.

23          We believe our Petition -- well, I guess  
24 the first issue on timely filing. I don't  
25 believe there is any dispute that the Petition

1 that was submitted on behalf of Crowley and King  
2 Ocean was timely filed. I believe the excellent  
3 lawyers representing the FCCA and the Port  
4 Everglades Pilots would have objected had they  
5 believed it was untimely since they did raise  
6 every other objection under the sun. And they  
7 did not argue that. So, I don't think there is  
8 any question that we're properly here.

9 I appreciated the opportunity to comment  
10 and participate, albeit in a limited fashion, at  
11 the hearing last October as an interested party.

12 I think our position here is a little  
13 different today. I think the statute is pretty  
14 clear that my clients, as interested parties at  
15 the Port, users of pilotage services, have an  
16 absolute right to file a petition identifying  
17 what we believe to be disputed issues of  
18 material fact.

19 And again, another area of agreement, Ms.  
20 McNulty, believe all that the committee should  
21 and can frankly can do this morning is an up or  
22 down vote. Have there been issues of material  
23 fact identified. I believe the answer to that  
24 is pretty clear.

25 We identified three issues of fact in our

1           Petition. The first issue of fact was the  
2           finding -- and it's -- it's an implied finding  
3           but it's more than an implied finding. The  
4           finding that the committee made regarding the  
5           costs of performing a handle. And as the  
6           committee may recall, there was some testimony,  
7           not subject to cross-examination, but there was  
8           some testimony at the hearing last October where  
9           it was proffered that there was a \$721 average  
10          cost to perform a handle. And I recall sitting  
11          through that testimony and being a little  
12          somewhat mystified in terms of where that was  
13          coming from. Because while I felt they had a  
14          good handle -- no pun intended -- on the  
15          information and proffer contained in the FCCA's  
16          application, the information and proffer  
17          contained in the Port Everglades Pilots'  
18          application, and the discussion contained within  
19          the Investigative Committee report, I had  
20          absolutely no recollection of seeing any sort of  
21          proffer of an average cost per handle, much less  
22          this highly specific claim of \$721.

23                 After the hearing, I went back to my office  
24                 and wanted to make sure I hadn't missed  
25                 anything. And looked back over the detailed and

1 voluminous applications that had been submitted  
2 by FCCA and the Pilots in 2014 and I didn't see  
3 where I had missed anything.

4 So I submitted a public records request and  
5 said we want to see all of the information that  
6 was considered at the hearing. And the response  
7 -- I'm paraphrasing -- was I'm working to get  
8 that together, I've received some materials from  
9 the lawyer for FCCA, I should be receiving  
10 materials from the lawyer for Port Everglades  
11 Pilots. I scratched my head. And I said, well,  
12 to me, shouldn't this be part of the record?  
13 Shouldn't this have been part of the record  
14 before the hearing was even convened in October?

15 And again, I'm not trying to relitigate  
16 anything. These are issues -- these are  
17 arguments -- for a different forum. But I was  
18 struck by the fact, and I think it speaks  
19 directly to how and why that finding of what the  
20 costs was is absolutely in dispute. I mean to  
21 me there is no question that this is something  
22 that should be sent to DOAH. And ultimately  
23 what we received, we received voluminous  
24 submissions. And as the commissioners there  
25 will recall, there were some binders that were

1 provided to the commissioners only, not part of  
2 an application, not part of the Investigative  
3 Committee report, not part of the public record.  
4 But there were some binders with some  
5 supplemental materials that had been provided  
6 before the hearing. And apparently that's where  
7 the \$721 figure comes from and it's page 15 of  
8 the Pilots' supplemental submission. It's a one  
9 page sheet and it's a summary of the 2017  
10 Compiled Income Tax Basis Statement. It has a  
11 line item for operating expenses. It has  
12 literally two entries for costs. Officers'  
13 salary, this was a composite, officers' salary,  
14 health insurance, pension plan contribution --  
15 I'll come back to the pension plan in a minute  
16 -- tax depreciation. That's it. They added a  
17 figure for depreciation. Say okay, total costs  
18 5.7 million divided by 8,000 handles, so we've  
19 got an average cost of \$720.68.

20 None of this was discussed in any detail.  
21 None of this was truly evaluated by the  
22 commission. And I would submit interested  
23 parties, the public, no one had an opportunity  
24 to evaluate this before the hearing. Why?  
25 Because it had never been provided or made part

1 of the public record.

2 Now, the response -- and Counsel, they are  
3 capable, they can speak for themselves -- but as  
4 I read it, the response that's been advanced by  
5 the FCCA and the Pilots is, but wait a minute  
6 here, the NOI doesn't actually expressly adopt  
7 this 721 dollar figure. So this is not quote a  
8 material fact.

9 Let me say two things in response to that.  
10 Number one, and we cite law for it, I believe  
11 Balearia does as well. The issue is not whether  
12 or not a specific fact is expressly stated in  
13 the four corners of an NOI. That's not the  
14 test. The test is whether or not the fact was  
15 quote, material. And I would submit there can  
16 be no serious suggestion that the cost per  
17 handle was not a material consideration of the  
18 commission.

19 Now how do I say that. One, that we cite  
20 to it in our Petition, if you look at the  
21 transcript, there were commissioners --  
22 including at the time Commissioner, now Chair  
23 Benson -- who specifically talked about the cost  
24 and how that was such -- that was such a  
25 concern. This concern that the pilots had been

1 providing piloted services and had been losing  
2 money. I think, I think the proffer was on like  
3 47 percent of the handles. It's in the NOI too.  
4 Now, does the NOI say \$721 per handle? No. But  
5 what does it say? This is page 12 of the NOI.  
6 While the committee recognizes that certain  
7 smaller cargo carriers will see an increase in  
8 the cost of services provided by the Port  
9 Everglades Pilots, it notes that the existing  
10 rate has for several years been, quote, at or  
11 below cost for such carriers. They continue,  
12 while the new formula continues to allow some  
13 smaller carriers to receive piloted services,  
14 quote, below costs, it does reduce to some  
15 degree the discount previously enjoyed.

16 I would submit it is literally impossible  
17 for the committee to have made findings as part,  
18 as part of its decision. This is your NOI.  
19 That services had been provided below cost  
20 without having first made a determination what  
21 that cost was. And as we have outlined in our  
22 Petition, when you juxtapose this one page  
23 summary -- again, was never part of the actual  
24 public record -- but this one page summary.  
25 Page 15 of the supplemental materials. And when

1           you compare that to the actual Investigative  
2           Report, which the committee adopted almost  
3           wholesale, there are huge discrepancies. The  
4           operating expense figure, \$6.8 million, this was  
5           more than \$400,000 more than the figures that  
6           are set forth in the Investigative Report. How  
7           or why that discrepancy exists none of us know.  
8           We'll learn at DOAH, but today none of us know.  
9           When we look at this one page summary, the  
10          treatment of the pension plan is totally  
11          contrary to the findings in the Investigative  
12          Report which were adopted by the committee in  
13          the NOI that these pension issues are a benefit,  
14          they are not a cost. So to me it's clear that  
15          this is a disputed issue of material fact.

16                 Two other facts that we raise. I'll take  
17                 them in reverse order.

18                 The pension issue. I know former Chair  
19                 Wilkins expressed serious concern and  
20                 reservations about the manner in which the  
21                 pilots were treating their unfunded pension  
22                 obligations. And in the Investigative Report,  
23                 Mr. Law said this is really difficult to work  
24                 through. And I believe he assigned an estimated  
25                 value of approximately \$45,000.

1           And setting aside whether that's a benefit,  
2           which is the position that the FCCA has  
3           consistently advocated, or a cost, which I think  
4           is what the Pilots are advocating, the value of  
5           that needs to be established. We would submit  
6           that just having some sort of range or heuristic  
7           is insufficient.

8           But in order to determine what constitutes  
9           fair, just and reasonable compensation, the  
10          committee first needs to determine what is the  
11          compensation. To the extent that this unfunded  
12          pension benefit is a material part of that  
13          compensation, we believe that the committee had  
14          an obligation to make a finding.

15          And again, I'm not here today to argue what  
16          number should be assigned to that. All I'm  
17          saying is the value of that benefit and the fact  
18          that we take issue with this kind of adoption of  
19          a \$45,000 estimate, which I think Mr. Law kind  
20          of conceded was a rough estimate at best, that  
21          is a disputed fact that should go to DOAH.

22          The third issue that we raised -- and there  
23          was some, in some of the briefing -- well, is  
24          this truly a material fact or not. But the  
25          third issue we raised was the fact that -- and I

1 believe the committee did it under, kind of  
2 under the guise, and I don't mean that in a  
3 pejorative way, but under the guise of kind of  
4 other factors -- this suggestion, and I would  
5 submit this was the biggest part of the FCCA's  
6 presentation last October. And it's something  
7 that on this, at least on this one point, they  
8 have been consistently arguing this for years.  
9 The FCCA's position that they have been paying  
10 more than their fair share. Right. And we saw  
11 there were some pretty graphs. Again, none of  
12 it was actually part of the public record. None  
13 of it was actually in their actual application.  
14 But there were some graphs that were shown to  
15 the commission last October. Number of handles  
16 on an absolute basis, on a proportional basis,  
17 and then they would look at the actual fees that  
18 they were charged. And they argued, you know,  
19 we're paying more than our fair share. Right?  
20 As our ships have organically gotten larger --  
21 their business decision -- our rates have been  
22 increased to a point where now we're paying more  
23 than our fair share.

24 Well, what does that really mean? To me,  
25 it is really impossible to understand that

1 argument as something other than what's set  
2 forth in the statute. Well actually it's a rule  
3 -- 61G14-22.006(4) -- which talks about the  
4 requirements when an interested party, not the  
5 Pilots, when an interested party wants to come  
6 forward and request a rate change based on  
7 financial hardship. It's in your own rules. So  
8 your rules contemplate that an interested party  
9 can come forward. Cruise, cargo, day cruise,  
10 whoever, and can say we believe these rates are  
11 not fair as applied to us. But the only way  
12 that your own rules authorize such an argument  
13 is doing it through the vehicle of a petition  
14 claiming a financial hardship. I would submit  
15 it is -- and in doing that, there are very  
16 particular requirements in terms of the type of  
17 proffer and the types of disclosures that need  
18 to be made. The FCCA didn't do that. I would  
19 submit they can't do that. The reason I advance  
20 this argument is, it is our position that your  
21 own statute, your own rules, does not authorize  
22 for an interested party to come forward and not  
23 to argue writ large, the rates are not fair,  
24 just and reasonable. And to be clear, what does  
25 fair, just and reasonable mean? The primary

1 consideration is to ensure that the pilots are  
2 receiving sufficient compensation so that public  
3 safety is being afforded. So that users have  
4 the right to safe, effective ingress and egress  
5 from the port. That's what fair, just and  
6 reasonable means.

7 I'll wrap up in a moment. Thank you. So  
8 much for 15 minutes.

9 CHAIRMAN BENSON: Yeah. You have another  
10 30 seconds. We're at 16 minutes.

11 MR. COHEN: Yeah. Thank you, Commissioner.  
12 Thank you, Chair.

13 But the -- what this committee is not  
14 supposed to do is to have an interested party  
15 come forward and say, I'm losing, they're  
16 winning, you need to change the playing field.  
17 You need to pick winners and losers. You're not  
18 supposed to do that, respectfully.

19 Now, an interested party comes forward and  
20 says, these rates are causing a financial  
21 hardship to me. That's a cognizable claim.  
22 Your rules authorize that and talk about that.

23 CHAIRMAN BENSON: Okay. Mr. Cohen, I'm  
24 going to cut you off.

25 MR. COHEN: Thank you, Chairman.

1 MR. BENSON: Okay. We'd like to call up  
2 the representative for Seacor, please.

3 MR. RUSSELL: Good morning.

4 MR. BENSON: Good morning.

5 MR. RUSSELL: My name is Dan Russell. I am  
6 a lawyer with the Dean, Mead law firm. We are  
7 based in Orlando, but my office is in  
8 Tallahassee.

9 Mr. Cohen covered a lot of ground on his  
10 Petition and I think on the Petitions generally.  
11 There have been 17 different pleadings in this  
12 case so far in addition to a several hundred  
13 page NOI and the related documents there. So I  
14 won't cover what is surely thousands of pages of  
15 material at this point.

16 I would really like to kind of get hyper  
17 focused on two issues. The second bullet there  
18 on the back is the response that we filed. And  
19 after all the motion practice back and forth, we  
20 kind of just wanted to back up. And the purpose  
21 of this document was to highlight to the group  
22 that a lot of what lawyers do is not recreating  
23 the wheel. And we certainly aren't in the wheel  
24 recreation business at my firm. What we like to  
25 do is go see what have others done in the past.

1           What's worked. Cite to that case law and use it  
2           as our benefit if it points in our direction and  
3           I think in this matter it certainly does.

4           What we cite in this response -- and it's  
5           probably easy to get lost in the weeds of all  
6           these pleadings -- but in this document we cite  
7           a handful of cases from DOAH and from different  
8           District Courts of Appeal where petitions just  
9           like ours that may have disputed issues of  
10          material fact just like ours were forwarded to  
11          DOAH. That was the purpose of that document. I  
12          think we laid it out pretty cleanly.

13          The second issue that I want to highlight  
14          and to the extent I am telling you guys  
15          something you already know, that's fine. I  
16          think it's just important to highlight it. If  
17          we are forwarded to DOAH and the Administrative  
18          Law Judge makes a determination that there is no  
19          disputed issue of material fact, that the judge  
20          loses jurisdiction and we just come back to the  
21          board and I believe you go to the final order  
22          phase assuming there isn't an appeal at some  
23          point therein. Not like there wouldn't be an  
24          appeal if we don't go to DOAH in the first  
25          place. I just highlight that to say that going

1 to DOAH doesn't necessarily mean you stick. The  
2 judge could in fact sua sponte bounce us out at  
3 that time. So unless there's any questions,  
4 just wanted to highlight that pleading we'd  
5 filed.

6 I didn't want to re-plow Mr. Cohen's field.  
7 He certainly covered that material very well.  
8 And also give you just sort of the operational  
9 side of DOAH and how that would have worked in  
10 case that hadn't been covered previously.

11 Thank you.

12 CHAIRMAN BENSON: Thank you very much.

13 Okay. The representative from Balearia, please.

14 MR. DAVIS: Good morning. How is everyone?  
15 My name is Riley Davis. I am with the law firm  
16 of Akerman LLP, located in its Tallahassee  
17 office.

18 First of all, at the very beginning, I will  
19 adopt what Crowley and the other party has  
20 already alleged as far as disputed issues of  
21 material fact. We have stated some of the same  
22 things in our Petition and I won't belabor that  
23 fact.

24 I would like to start off though with one  
25 point as to what, in my mind, this proceeding is

1 about today and where it goes.

2 Number one, your job today as I see it, is  
3 to make a determination as to whether or not any  
4 of the petitions filed state any kind of  
5 disputed issues of material fact where this body  
6 should refer the petitions to the Division of  
7 Administrative Hearings. That part is very  
8 clear.

9 What my concern is though is that your  
10 counsel at the very beginning of the proceeding  
11 made a comment to the effect that if you  
12 determine that there are no disputed issues of  
13 material fact, then this matter goes to final  
14 order. I very vehemently disagree with that  
15 particular statement. Basically what happens  
16 under the Administrative Procedure Act and  
17 indeed under your own rules, is that if you  
18 determine that these petitions do not state  
19 disputed issues of material fact, then you in  
20 effect end up with an informal proceeding. This  
21 is under 120.57(2) of the Florida Statutes. The  
22 formal proceeding where you would refer it to  
23 DOAH is under 120.57(1).

24 To further bolster that position, your own  
25 Notice of Intent to Modify the Rates

1 specifically states in your Notice of Rights  
2 that you can either have a 120.57(1) or a  
3 120.57(2) proceeding.

4 In addition, your own rules say that. And  
5 so you do have a statute that seems to indicate  
6 that the matter should be referred to DOAH if  
7 there are disputed issues of fact. Or if not,  
8 that this body should in effect enter a final  
9 order. But that's contrary to Chapter 120.  
10 It's contrary to your own rules. And it's  
11 contrary to what you have stated in your notices  
12 published with the Administrative Registry as  
13 well as the Sun Sentinel. And I wanted to make  
14 sure that the committee understands what our  
15 position is on that. There will be a hearing of  
16 some sort. If you go to an informal hearing  
17 there is still evidentiary matters that are  
18 raised. If in fact disputed issues of material  
19 fact end up coming up in that proceeding then it  
20 gets referred to DOAH. If not, you end up  
21 entering a final order based on whatever is --  
22 materializes at that informal, what we call an  
23 informal hearing. It's still basically a  
24 mini-trial, you're just not before a Division of  
25 Administrative Law Judge. So I wanted to bring

1 that up and make that -- you know -- very clear.

2 In our case, we have another issue that has  
3 to be resolved. And that is the issue was  
4 raised as to whether or not Balearia Caribbean  
5 actually filed its Petition for Hearing timely.  
6 I think we are the only one of the three  
7 Petitioners that that issue was raised.

8 In the case of Seacor, they had never  
9 appeared before the body and did not receive any  
10 kind of e-mail one way or the other. They filed  
11 and timely filed their Petition before this body  
12 based on receipt of the information, or the  
13 notice, through the Administrative Register.

14 The -- Crowley filed their Petition within  
15 ten days of January 22nd when the e-mail was  
16 sent out by the clerk of this body to those  
17 people that she had on her e-mail list.

18 So what we did is, Mr. Pinsky -- and I've  
19 alleged this in the Petition -- Mr. Pinsky  
20 appeared at one of your later hearings and was  
21 put on the public portion of the agenda. He  
22 made a few comments, maybe lasted five minutes  
23 or so, and because of some e-mails that he had  
24 sent to the -- I think Anne Ahrendt -- or  
25 otherwise his name got put on the list of people

1 to receive, you know, information, notices,  
2 whatever. Mr. Pinsky did not ever request  
3 formally to be placed on any e-mail list or  
4 otherwise to receive notices, et cetera.  
5 Mr. Pinsky is not a lawyer. He represents he is  
6 a consultant in our law firm representing  
7 Balearia and he was trying to advocate on their  
8 behalf at that hearing he appeared. But that  
9 was it. He did and we did in a reply, you know,  
10 admit that he did receive it. He never saw it.  
11 He didn't realize, you know, what it was.  
12 Didn't know he was going to receive anything  
13 like that. If you look at the notice itself, at  
14 the big long list of names on it. Then right  
15 under those names, but jammed right into the  
16 names, is the subject line that says Notice of  
17 Intent to Modify rates. Then it just simply  
18 says FYI. Now, I will submit to you that that  
19 is not the appropriate kind of notice that you  
20 receive to provide an opportunity for a party to  
21 participate in an administrative proceeding.

22 The courts disfavor that kind of notice.  
23 What this body should have done is, if you were  
24 going to do this the correct way, you know the  
25 names and so forth of every entity that is

1 actually using the Port. That is involved with  
2 Port Everglades. You could send actual specific  
3 notices to them. But you didn't do that. You  
4 just had this FYI. But because Mr. Pinsky  
5 received an e-mail that he wasn't even aware he  
6 was going to get, didn't know he got, didn't  
7 know there was a notice, didn't know what  
8 potential legal ramifications there were in  
9 receipt of that notice, he actually went and  
10 tried to find out when the matter was published  
11 in the Administrative Registry. And that's the  
12 date that we ended up going with. We actually  
13 received notice through the -- getting the  
14 documents from this agency showing that the  
15 Administrative Registry, there was a publication  
16 in the Administrative Registry, on January 23rd  
17 and there was a publication in the Sun Sentinel  
18 on January 24th. We filed our Petition within  
19 21 days of January 23rd, which is the date that  
20 the notice was filed in the Administrative  
21 Registry.

22 I want to really emphasize that the courts  
23 disfavor trying to, in effect, maintain an  
24 agency to maintain that a party has waived its  
25 rights to administrative hearings based on the

1 fact that he didn't timely file.

2 Now clearly if we had filed -- you know --  
3 ten days later than the February 13th, for  
4 example, okay then, that would be not much  
5 question to that. We're just one day, you know,  
6 in that scenario. For this body to take the  
7 position that a person who is not a lawyer, who  
8 appeared at a public meeting, made a very brief  
9 talk for five minutes, you know, that he somehow  
10 got on an e-mail list. That is a very  
11 innocuous, confusing e-mail. Doesn't say  
12 anything. Doesn't say there is notice -- you  
13 know -- your rights may be waived, et cetera.  
14 To say that they have somehow untimely filed.  
15 Seacor, for example, did not participate to my  
16 knowledge in any proceeding before this agency  
17 and did not get on an e-mail, you know, list.  
18 And so they filed on January -- on February  
19 13th, just like we did. And of course they have  
20 no, you know, no problem. And you can see kind  
21 of, the unfairness of all of this. But I just  
22 want to emphasize that I think that the most  
23 prudent decision that this body can make is to  
24 in effect, you know, say that we did in fact  
25 timely file the Petition under the

1           circumstances.

2           The -- as far as the disputed issues of  
3 material fact are concerned, I would of course  
4 adopt what -- I think I've already said this to  
5 some extent. I would adopt what has already  
6 been stated about the disputed issues of  
7 material fact. But we have -- we have a problem  
8 from the standpoint that from what we can tell  
9 so far the Investigative Committee and then the  
10 committee, the Rate Committee, didn't really  
11 fully evaluate and consider the issue with these  
12 small vessels. Balearia is a ferry service that  
13 goes in and out of the Port Everglades every  
14 day. We have a 183 percent increase simply  
15 because of the fact that -- and by the way in my  
16 Petition I said 300 percent -- I didn't  
17 calculate that right. I think it's around 182  
18 or 183 percent increase. We went from like \$334  
19 to \$975 and that adds up over the course of a  
20 year when in fact we go in and out of the Port  
21 Everglades, you know, every day.

22           So that's very significant and basically  
23 what has happened is that the committee has made  
24 a determination that because the cruise lines  
25 made a decision to increase the size of their

1 vessels that they somehow, you know, are  
2 incurring too much of the cost, you know, of the  
3 pilotage, you know, rates. Well, they made the  
4 decision to have the big cruise lines. But even  
5 if that's right, to in effect end up with  
6 increase of 183 percent there is no way that  
7 that can end up being, you know, in my mind,  
8 adjudged to be fair, reasonable and just, you  
9 know, under those circumstances. Somehow the  
10 committee has to factor all of this in. And  
11 basically what ended up happening is the small  
12 vessels ended up under the plan that ended up  
13 being adopted. Ended up with the brunt, you  
14 know, of the increase. And that, I think, just  
15 as a matter of law cannot be fair, just or, you  
16 know, reasonable.

17 Thank you.

18 CHAIRMAN BENSON: Thank you. Okay. Let's  
19 continue and we'll call up the representative  
20 from FCCA, please.

21 MR. PANZA: Thank you very much. Thank you  
22 all. My name is Tom Panza. I represent FCCA  
23 and I'll try and make these remarks, certainly  
24 stay within the 15 minutes, but I'll try and  
25 make them as short as possible.

1           If we could handle the issue of -- if I  
2           could bring up the issue of the attorney who was  
3           here, just, for Balearia, in front of me. He  
4           talked about a Section 120.57(2) hearing. Your  
5           statute -- I would draw your attention to  
6           Statute 310.151(4) (a), which is the operative  
7           section. That operative section specifically  
8           states that if the committee concludes that the  
9           Petitioner has raised a disputed issue of  
10          material fact, the committee shall designate a  
11          hearing which shall be a formal proceeding  
12          before an Administrative Law Judge assigned by  
13          the Division of Administrative Hearings pursuant  
14          to 120.569 and 120.571, unless waived by all  
15          parties. If the committee concludes that the  
16          Petitioner has not raised disputed issues of  
17          material facts and does not designate the  
18          Petition for Hearing, that decision shall be the  
19          final agency action, or final agency action for  
20          the purposes of 120.68. Therefore, in my  
21          opinion, there is no 120.57(2) hearing, which is  
22          considered to be the informal hearing. I don't  
23          believe the statute calls for that and I believe  
24          the only thing the statute allows you to do is  
25          to look at if there are disputed issues of

1 material fact. Which in this case, we believe  
2 there are not.

3 The argument that was made by counsel  
4 starting off with Crowley, was the -- we'll  
5 start off with those arguments -- was the cost  
6 of handling. And if I could just go back one  
7 moment, the board's position, or the board's  
8 charge is to be a quasi-legislative body, not a  
9 quasi-judicial body. And there is a very large  
10 distinction. Quasi-legislative body is a body  
11 that will go and set a policy and look in the  
12 future as to what all of these 12 criteria mean,  
13 how they will affect the industry, what will in  
14 essence should be a fair and just rate based  
15 upon those factors. A court would look at  
16 everything that you had in the underlying  
17 record, look for the accuracy of what happened  
18 in the underlying record. There would be  
19 cross-examination. There would be all of the  
20 rest of the things that you would associate with  
21 a normal hearing.

22 This board's responsibility is not that.  
23 This board's responsibility is  
24 quasi-legislative. To go ahead and look at  
25 these policy issues to go ahead and look at

1 this. What, as an overview, or as an overlay,  
2 before I get into the specific arguments made by  
3 counsel. What counsel is asking you to do is to  
4 go and determine that there's these material  
5 issues of fact. These were findings that the  
6 board made. Or maybe they weren't findings that  
7 the board made. These were issues that came up  
8 in front of the board, but they weren't a  
9 finding of fact. A finding of fact would be --  
10 an example would be -- as an example would be,  
11 let's look at the depth of the port and the  
12 testimony and the board relied as part of their  
13 final order that the port depth was 22 feet.  
14 When in fact it was 42 feet. And they ruled  
15 that it was 22 feet and therefore it created a  
16 tremendous hazard and that was the causation for  
17 why you should give a particular increase.  
18 That's a material disputed issue of fact. It  
19 was wrong. Here, if we look at what the issue  
20 is, for instance the \$721 average cost. The  
21 board took that into consideration. I don't  
22 believe -- I read the entire transcript before I  
23 came up here -- I didn't find anyplace where the  
24 board made a finding of the \$721. And if you  
25 look at the criteria under Statute 310, that

1           were -- 310.151, and we look under B, under  
2           section 5(b), which has the 12 criteria in  
3           there.

4           Criteria number two states a determination  
5           of the average net income of pilots in the port.  
6           There is no mention of the cost. It talks about  
7           the average income for pilots. And that's  
8           exactly what the board looked at in this  
9           particular instance.

10          So the \$721, whether it was more, whether  
11          it was more than the cost, less than the cost,  
12          whatever it was, and created these other  
13          companies getting a larger or smaller subsidy,  
14          is really irrelevant. The issue that this was  
15          -- the board decided this case on -- was ship  
16          characteristics. That's what they decided this  
17          on. They didn't decide it on the cost of the  
18          pilots per handle. That wasn't what this was  
19          the basis of. So they developed a formula. And  
20          in the formula, wherever a ship found itself,  
21          that's where it found itself. So there is no  
22          material basis whatsoever for the \$721. That  
23          was an issue that came up. There was no  
24          adoption of that as part of the record.  
25          Therefore, it's not a material fact and it's

1 certainly not a fact in dispute.

2 The pension benefit. There was no finding  
3 on the pension benefit whatsoever. The statute  
4 also talks about that the board can look at the  
5 pension benefits along with all of the other  
6 costs that the board looks at. Then the board  
7 puts its legislative hat on and says I'm looking  
8 at the pension. I'm looking at the cost of boat  
9 repairs. I'm looking at the cost of the shifts,  
10 the way the pilots do that. I'm looking at the  
11 cost of workers' comp. I'm looking at operating  
12 expenses of the pilots. I'm looking at all of  
13 these factors. But there's nothing in the  
14 statute that says that you have to have the  
15 exact cost of the pension. That's just one of  
16 the characteristics that you're looking at. So  
17 you looked at it. There was no requirement to  
18 make a finding on that, nor did you make a  
19 finding on that. And the mere fact that they  
20 have a contention that Crowley or Seacor or  
21 Balearia has a contention that these are wrong.  
22 So what? The board itself determined these are  
23 what they wanted to rely upon. This was not a  
24 factual finding in that particular sense. It  
25 wasn't a quantitative finding nor was there a

1 requirement for it to be. And the fact that  
2 they indicated that the cruise ships were saying  
3 they paid more than their fair share. The  
4 cruise ships as part of this formula, looked at  
5 a formula as -- the board looked at a formula as  
6 how they were going to fairly and justly  
7 dispense the costs, the fees, the tariffs, to  
8 all of the ships in whatever size they fit. And  
9 then how much would the pilots get in return.

10 There is no argument about someone getting  
11 more than their fair share or not more than  
12 their fair share. It's up to this board to  
13 decide what's fair and equitable for the whole  
14 industry based upon those sizes of the ships.

15 Further, and one important point that I  
16 really want to raise here, is the fact that not  
17 one of the three companies that has gotten up  
18 here this morning to testify ever intervened,  
19 ever came into any of the proceedings. For  
20 those of you who have been on the board some  
21 time, knew that we have been at these  
22 proceedings quite long. That these proceedings  
23 have been vociferous. That these proceedings  
24 have been argumentative at times, have been  
25 adversary at times, and have been collaborative

1 at times depending upon what the particular  
2 issue was. But they never came into the  
3 proceedings.

4 Had they wanted to come into the  
5 proceedings and argue that and develop a set of  
6 facts or develop whatever they wanted to, they  
7 certainly could have. In fact, the board went  
8 the extra step and gave them the opportunity to  
9 come in at the final hearing and gave them, I  
10 think, over an hour, several hours, whatever it  
11 was, to argue their case as to why they didn't  
12 feel that these proceedings were fair, just and  
13 reasonable. Or at least the rates were fair,  
14 just and reasonable. So, they can't come in now  
15 and look at this and say that we have 187  
16 percent raise. There is no disputed issue of  
17 fact. They don't like that. That happens to be  
18 the fact. They don't care for that particular  
19 issue, but it's not a disputed issue of fact.  
20 Anybody can take out their calculator and figure  
21 out its 187 percent. Where's the disputed issue  
22 of fact? Everybody can take out what Mr. Law  
23 said about \$45,000 for the pension. That's what  
24 it is. There's no disputed issue of fact there.  
25 And the cost for the pilots, this is what was

1       said at the hearing. There's no disputed issue  
2       of fact. No one came in with any other facts.  
3       The board decided to listen to those particular  
4       facts. There was nothing disputed about it.

5               So they can't come in now and argue -- and  
6       what some of the arguments are is nothing more  
7       than the law -- that this is unjust. That we're  
8       paying more than what we should pay. That we're  
9       getting 187 percent increase. None of that is a  
10       disputed issue of fact.

11               This board is here for a very narrow issue.  
12       That issue is to look at -- and I use a very  
13       simple example like I did. Was the depth of the  
14       port 22 feet or 42 feet and this is what they  
15       ruled on.

16               That's the type of fact we're talking about  
17       that would be in dispute. These are all  
18       judgments. These are all left up to your own  
19       professional policy board member judgments.  
20       These are not facts that are in dispute. These  
21       are -- these are absolutely value judgments.  
22       You think the pilots should have been made -- or  
23       should have received this amount of money. You  
24       think the shipping industry should have paid  
25       this amount of money based on the material that

1       you heard. That was as simple as that. There  
2       are no disputed issues of fact whatsoever. No  
3       matter how much they try and make 187 percent  
4       into something, it's not disputed. There is no  
5       disputed issue of fact.

6                What there is, is they don't like the  
7       result. There's a big difference in not liking  
8       the result or saying that you had to go through  
9       -- there's no regulation or law that said that  
10      you had to go and do a forensic analysis of the  
11      cost of what it costs the pilots per handle.  
12      There's nothing like that. You accepted the  
13      material you received. And I say it's  
14      testimony, but it wasn't under oath. But you  
15      received that material. And you made a value  
16      judgment based upon that material.

17               They were allowed to give you material. No  
18      different than what we gave. Wasn't under oath.  
19      Wasn't anything else. They could give you  
20      whatever they wanted to. And then you make a  
21      value judgement. Just like the legislature does  
22      or any other legislative body.

23               With that I'll close and thank you very  
24      much for your time. And we would ask that you  
25      deny all three petitions and that you enter a

1 final order. Thank you very much and I  
2 appreciate it.

3 CHAIRMAN BENSON: Thank you. Okay. We'll  
4 invite the Pilots, please.

5 MS. PRICE: Good morning Chairman Benson  
6 and fellow commissioners. My name is Tara Price  
7 and I'm an attorney from Holland & Knight,  
8 representing the Port Everglades Pilots  
9 Association.

10 To begin, I would like to speak on the  
11 Pilots Association's Motion to Dismiss the  
12 Petition for Hearing filed by -- on February  
13 11th filed by Crowley Liner Services and King  
14 Ocean.

15 We are here today to ask that you dismiss  
16 the Petition for Hearing because it fails to  
17 identify any disputed issues of material fact.

18 Although Petitioners have purported to list  
19 three disputed issues of material fact, in  
20 reality, Petitioners' complaints are nothing  
21 more than legal disputes about this committee's  
22 power.

23 Now, it is a basic principle of Florida  
24 administrative law that a petitioner must allege  
25 disputed issues of material fact to be entitled

1 to a formal administrative hearing.

2 Counsel for Crowley and King Ocean today  
3 argued that it need not have specifically  
4 mentioned the disputed material facts in its  
5 Petition. It is now inviting this committee to  
6 go on a journey to search for facts related to  
7 the legal issues the Petitioners have raised.  
8 But this is not the standard.

9 Furthermore, the fact that the Petitioners  
10 asserts that disputed issues of material fact  
11 exist, does not create disputed issues of  
12 material fact. Rather, it is this committee's  
13 responsibility to review the Petitions for  
14 Hearing and the committee has the authority to  
15 determine whether the Petitioners have raised  
16 any disputed issues of material fact in their  
17 Petition.

18 The Pilots Association respectfully asserts  
19 that when this committee reviews the Petition  
20 for Hearing it will not find a single disputed  
21 issue of material fact.

22 Black's Law Dictionary defines a material  
23 fact as a fact that is significant or essential  
24 to the matter at hand. Sorry, to the issue or  
25 matter at hand, or a fact that makes a

1 difference in the result to be reached in a  
2 given case. The problem here is that  
3 Petitioners have failed to identify issues that  
4 are even facts, let alone material facts.

5 As we argued in our Motion to Dismiss,  
6 Petitioners' second and third allegations are  
7 not even factual disputes. Petitioners state  
8 they dispute this committee's determination that  
9 the Cruise Association is paying too much on a  
10 per handle basis as a result of its members'  
11 business decision to operate fewer, larger  
12 vessels. Very simply, this committee's  
13 determination that an entity is paying too much  
14 is not a fact that can be developed at an  
15 administrative hearing. Moreover, Petitioners  
16 are not disputing whether the committee actually  
17 made this determination. Their argument is that  
18 it was inappropriate for the committee to make  
19 this determination. This is not a fact, let  
20 alone a material one.

21 Petitioners also state that they are  
22 disputing the committee's decision not to  
23 determine the exact value of the Pilots'  
24 unfunded retirement plan. The Petition contains  
25 no factual allegations supporting or explaining

1 this statement. Petitioners' Memorandum of Law  
2 contains one sentence that states in a  
3 conclusory fashion that the committee is  
4 obligated to make this determination. But there  
5 is nothing in Section 310.151 which requires  
6 that this committee determine the exact value of  
7 the Pilots' unfunded retirement plan. Once  
8 again, this is a legal argument, not a factual  
9 dispute.

10 Finally, we'd like to address Petitioners'  
11 first alleged disputed issue of material fact.  
12 Which again, is nothing more than a legal  
13 argument dressed up as a factual one.  
14 Petitioners state that they dispute that the  
15 Pilots incurred an average per handle cost of  
16 \$721. An examination of Petitioners' Memorandum  
17 of Law, however, reveals that at its core,  
18 Petitioners dispute decisions that this  
19 committee made about how to calculate the total  
20 operating expenses. Petitioners' argument is  
21 that certain items were included as an expense  
22 that Petitioners believe should not be  
23 considered expenses. This is a legal argument  
24 about which items should be considered expenses  
25 under Section 310.151(5) (b) (3) and not a factual

1           dispute about the numbers themselves.

2           But even if Petitioners could be considered  
3 as raising an issue of fact here, it is  
4 certainly not a material one. Section 310.151  
5 contains a list of numerous factors that the  
6 committee should consider when determining  
7 whether a rate change will result in fair, just  
8 and reasonable rates.

9           Chief among these considerations is that  
10 this committee should consider the public  
11 interest in promoting and maintaining efficient,  
12 reliable and safe piloting services. In  
13 addition, Section 310.151(5)(b) contains a list  
14 of 11 enumerated factors, including that the  
15 committee should consider the reasonable  
16 operating expenses of the pilots.

17           What Petitioners do not acknowledge is that  
18 Section 310.151(5)(b)(12) states that this  
19 committee should also give consideration to any  
20 other factors that the committee deems relevant  
21 in determining a just and reasonable rate.

22           Thus it could not be an error for the  
23 committee to consider the unfunded retirement  
24 plan as an expense. Because this committee is  
25 required to give consideration to any factor it

1           deems relevant. As such, any dispute  
2           Petitioners have about the per handle costs  
3           cannot be material.

4           To conclude, Petitioners are not entitled  
5           to a formal administrative hearing as none of  
6           the alleged disputed issues of material fact are  
7           factual disputes or material in nature. And so  
8           in that regard we request that you dismiss the  
9           Petition pursuant to Section 310.151(4) (a).

10           With regard to Balearia, we ask that you  
11           dismiss the Petition for Hearing because it was  
12           not filed within the mandatory 21 day window  
13           under state law. This 21 day window is not  
14           optional. Petitions that are not timely filed  
15           are required to be dismissed pursuant to Section  
16           310.151(4) (a), Section 120.569(2) (c), Rule  
17           28-106.111(4) and the case law.

18           This is a clear case of waiver. This  
19           committee held a meeting on January 18th, 2019,  
20           which was attended by representatives from  
21           several interested parties. One of those  
22           representatives is Mr. Richard Pinsky, who is  
23           employed by Akerman, which represents Balearia.  
24           Mr. Pinsky asked to speak on Balearia's behalf  
25           and addressed this committee at the January 18th

1 meeting in opposition to the proposed rate  
2 change.

3 After the January 18th meeting, this  
4 committee filed a Notice of Intent to modify the  
5 Port Everglades rate of pilotage with the Agency  
6 Clerk on January 22nd. In addition, committee  
7 staff e-mailed a copy of the notice to numerous  
8 interested parties, including Mr. Pinsky who had  
9 spoken to the committee on Balearia's behalf  
10 just four days earlier.

11 Thus Mr. Pinsky received actual written  
12 notice and pursuant to Sections 310.151 and  
13 120.569 and Rule 28-106.111, Balearia had 21  
14 days from January 22nd to file its Petition,  
15 which would have been February 12th, 2019.

16 Instead, an attorney with the Akerman law  
17 firm filed a Petition on Balearia's behalf one  
18 day too late, February 13th, 2019. As such,  
19 Balearia's Petition is untimely and must be  
20 dismissed.

21 Just a couple of other comments I'd like to  
22 add is that in addition, Balearia has argued  
23 that it was entitled to receive written notice  
24 through either in person, certified mail or  
25 publication. That is not what the statute

1 requires. Section 310.151(4) (a) requires only  
2 that the applicant receive written notice in  
3 person or certified mail. Moreover, although  
4 people can request that the committee put them  
5 on a list to provide them with formal written  
6 notice, Balearia never requested to receive this  
7 notice in person or via certified mail. Thus,  
8 at best, Balearia was in the same situation as  
9 any other person who believes that their  
10 interests may be affected and who under Section  
11 310.151(4) (a) has 21 days from receipt or  
12 publication of the notice. The 21 day window  
13 clearly begins from the date of actual receipt,  
14 which in this case is January 22nd, 2019. The  
15 statute does not say receipt of publication  
16 notice as Balearia has mistakenly alleged.

17 Moreover, Balearia has conceded that Mr.  
18 Pinsky received the notice in his e-mail and  
19 whether he read it or not is immaterial.  
20 Balearia also admits that Mr. Pinsky had not  
21 only represented Balearia at the hearing on  
22 January 18th, but also continued to represent  
23 Balearia afterward because he had been in  
24 contact with this committee in an attempt to  
25 learn when the committee had issued the notice.

1           Furthermore, the fact that Mr. Pinsky is  
2 not an attorney is immaterial as the Florida  
3 Administrative Code authorizes non-lawyers to  
4 serve as qualified representatives in formal  
5 administrative hearings. Mr. Pinsky was  
6 Balearia's chosen representative at the January  
7 18th meeting and beyond. He works for the same  
8 law firm that filed Balearia's untimely Petition  
9 and therefore, Balearia has waived its right to  
10 request an administrative hearing on the  
11 committee's rate change determination.

12           So we thus request that you dismiss the  
13 Petition. But to the extent the committee  
14 declines to do that because it is untimely, the  
15 Pilots Association also adopts and incorporates  
16 the arguments raised by the Florida Caribbean  
17 Cruise Association.

18           With regard to Seacor, the Pilots  
19 Association adopts and supports the arguments  
20 that have been made today and in their papers by  
21 the Florida Caribbean Cruise Association.

22           We'd like to ask that our motions and  
23 exhibits accompanying be considered and moved  
24 for the record. And with that, thank you very  
25 much for allowing me to address you here today.

1 UNIDENTIFIED SPEAKER: Thank you.

2 Chair, any rebuttal?

3 CHAIRMAN BENSON: No. No rebuttal at this  
4 time. What we're going to do is take -- I have  
5 10:00 o'clock on the nose. We're going to take  
6 a 20 minute break and we'll come on back.

7 (A break was had.)

8 CHAIRMAN BENSON: It's 10:20.

9 The next item of business is we're going to  
10 move to public comment and we're going to give  
11 any party that's here today an opportunity to  
12 speak up to five minutes. Person, excuse me.  
13 But not anyone that has spoken up to this point  
14 in time. So the various participants have  
15 already spoken. Fifteen minutes was the  
16 allotted time. But anybody else that wishes to  
17 speak if you want to come up front and identify  
18 yourself, you have about five minutes to speak  
19 on anything that is relevant to this proceeding.

20 (No response.)

21 Okay. So now we will move into  
22 deliberations and what I suggest is we go  
23 through the Petitions, look at the statements or  
24 disputed issues of material fact as to whether  
25 there are any, and then we'll take a motion by

1 petition.

2 MS. MCNULTY: Before we do that, I think we  
3 should address the Petition to Strike Balearia's  
4 Petition. Whether it was timely filed.

5 CHAIRMAN BENSON: Okay. I thought we were  
6 going to do that after Balearia. But I mean --  
7 I have to -- but that's fine. That's fine. Why  
8 don't we speak to that. Do you want to cite  
9 that?

10 MS. MCNULTY: All right. Members, I would  
11 point you to Section 310.151(4) (a) Florida  
12 Statutes which basically says that after -- once  
13 the Notice of Intent was filed, a petition would  
14 be timely if it was filed within 21 days after  
15 receipt or publication of the notice. And to  
16 any person whose potential interests are  
17 affected.

18 In this case, I believe that the Balearia  
19 Petition was timely filed in that it went by  
20 that publication date. Because it says or, my  
21 recommendation to you, is to allow it to be  
22 considered. Because it comports with your  
23 statutory requirement. This is a little bit  
24 different than the normal process. Normally,  
25 it's just within 21 days after receipt. But

1 your statute has this caveat to allow for  
2 publication.

3 CHAIRMAN BENSON: Okay. So, given  
4 Counsel's input, our Counsel's input on this  
5 item, I'll entertain a motion as to whether or  
6 not to accept the Balearia.

7 COMMISSIONER WILKINS: I'll make a motion  
8 to accept it.

9 CHAIRMAN BENSON: Motion by Commissioner  
10 Wilkins. A second?

11 COMMISSIONER ASSAL: I'll second it.

12 CHAIRMAN BENSON: Second by Commissioner  
13 Assal. Any comments? (No response.)

14 All those in favor? (Commissioners  
15 responded.)

16 CHAIRMAN BENSON: Okay. Accepted  
17 unanimately. Thank you.

18 Okay. Let's -- I apologize for the  
19 awkwardness there, jumping right into the  
20 Crowley Petition, but let's go to the Crowley  
21 Petition. There are three items in the Petition  
22 itself and we'll speak to each one and then  
23 we'll entertain a motion as to how to proceed.

24 Comments from the Commissioners?

25 COMMISSIONER KURTZ: Yes. I have just a

1           few general comments that may apply to more than  
2           just this. But after listening to what everyone  
3           said and having read the material, at the Rate  
4           Review we made a motion to accept the material  
5           presented as fact. So by saying that the amount  
6           per handle or the implication that there is  
7           something not quite correct, I disagree with.  
8           Because we kind of went over that already at the  
9           Rate Review and we voted to accept the binder  
10          that's been put into question again. We voted  
11          to accept that as fact. That the time for  
12          falsehood and suspicions was over. And that,  
13          you know, we were to get on with it. So, that's  
14          the first thing.

15                 And then we were counselled every step of  
16          the way by our Board Attorney. Any time there  
17          was a question about whether we were doing  
18          something correctly or not. Because I think we  
19          all felt it was important to understand what the  
20          correct thing was to do, whether or not we  
21          agreed with it. And so we were counselled along  
22          the way.

23                 And then the third thing. I didn't know  
24          until today that Mr. Pinsky isn't a lawyer. He  
25          presented himself as, you know, I'm Mr. Pinsky

1 and I'm from Akerman, which is a big law firm.  
2 And I don't think he ever told us that he wasn't  
3 an attorney. So I find -- I found that sort of  
4 confusing and surprising this morning.

5 So those are just my comments on what I've  
6 heard.

7 CHAIRMAN BENSON: Just overall.

8 COMMISSIONER KURTZ: Overall.

9 CHAIRMAN BENSON: Okay.

10 COMMISSIONER KURTZ: And I wanted to get  
11 out there before we got too specific.

12 CHAIRMAN BENSON: It's now on record.

13 COMMISSIONER KURTZ: Thank you.

14 CHAIRMAN BENSON: Okay. Why don't we start  
15 with the first item, which is the \$721 per  
16 handle and whether or not we agree it's a  
17 material fact based on the comments of all over  
18 there, along with our review of all the filings  
19 that we've seen.

20 Commissioner Wilkins.

21 COMMISSIONER WILKINS: Similar to  
22 Commissioner Kurtz's general comments, I had a  
23 couple.

24 As it related to the issues of fact, I felt  
25 the same way as that we went through a

1 systematic process to find what are the key  
2 criteria that -- of factual data that we would  
3 allow into the record.

4 And when we look at these particular  
5 issues, you know, I was very vocal on the  
6 pension issue. And my concerns with the pension  
7 and the fact that it's not, you know, industry  
8 standard, and, you know, rather extremely  
9 expensive in relation to what normal business  
10 practices are. But it was, we accepted the fact  
11 of what it was and we understood the number I  
12 felt like. So I felt like we understood that.

13 The cost of handle thing, I'm sure I don't  
14 remember that being a fact. It was just a  
15 mathematical calculation dividing costs by  
16 number of handles. So that was a fun fact but  
17 it wasn't one of our facts that I thought  
18 factored into, you know, our material facts.

19 I mean, you know, you can take all kinds of  
20 math, and many people did in the hearing,  
21 dividing by different kind of criteria and  
22 coming up with interesting points of view on  
23 different things. So I never really had an  
24 issue there.

25 And then the FCCA issue on fair share. I

1 didn't really get that whole point either. You  
2 know, we have the right to, certain different  
3 costs to, you know, different types of vessels  
4 and different configurations. So I don't -- we  
5 never -- we never had any statements of fact  
6 about fair share. What's that type of thing.

7           So, the only issue I had, which, you know,  
8 I voiced significant concerns with, was I didn't  
9 think we understood as a committee the true  
10 impact on small vessels. We didn't have that  
11 kind of analysis presented to us. We had some  
12 testimony sort of on the back end that was  
13 explaining, you know, this is going to hurt me  
14 personally. But we as a group had never  
15 analyzed different derivatives of small vessels'  
16 costs and impacts and that type of thing. And  
17 that therefore, quite frankly, that's why we're  
18 here, you know, is because, you know, those were  
19 the concerns that were raised. But in terms of  
20 the facts that we were presented, I felt like we  
21 as a committee all understood what those were  
22 and people made their decisions based on that.

23           MS. MCNULTY: This is Donna McNulty.

24           For framing this conversation and  
25 discussion, what you're looking at is the

1 analysis of what are the disputed issues of  
2 material fact that you relied upon in making  
3 this determination. And, you know, key is  
4 looking at your Notice of Intent and the --  
5 what's spelled out in there. Like one of the  
6 commissioners mentioned, lots of facts came to  
7 fruition during your two-day hearing and the  
8 lead up to that with your Investigative  
9 Committee Report. But what is it that this  
10 committee did to rely upon when it looked at the  
11 12 factors and made its ultimate conclusion as  
12 to what the rate structure ought to be.

13 And keep in mind there's a difference  
14 between a finding of fact versus your -- when  
15 you put on your quasi-legislative hat -- and  
16 determine what is a policy.

17 CHAIRMAN BENSON: Right.

18 MS. MCNULTY: So I'm just going to throw  
19 that out there while you're making your  
20 determination of whether or not any of these  
21 items are disputed issues of material fact.

22 So just to frame your discussion a little  
23 bit.

24 CHAIRMAN BENSON: So we proceed to the  
25 three items that are identified in Crowley's

1           Petition, the \$721, FCC paying too much, and the  
2           issue of the pension fund. And Commissioner  
3           Seuter to you, is there anything here that you  
4           see, based on how that's been framed up and the  
5           definition of material fact that --

6           COMMISSIONER SEUTER: Well, during  
7           deliberation I felt like we did consider all  
8           aspects of the Investigative Report. And  
9           specificity, page 67. I remember looking at  
10          this at the time and I look at it right now, and  
11          it clearly indicates that retirement benefits,  
12          operating expenses, retirement benefits and  
13          fringe benefits are all listed under expenses to  
14          come up with the total operating expense. You  
15          take that divided by the number of handles and  
16          it comes up with, depending on which number of  
17          the expenses, there may be a small difference,  
18          but it comes up around the \$721 amount. It's  
19          not derived out of thin air.

20          CHAIRMAN BENSON: Uh-huh.

21          COMMISSIONER SEUTER: There was some  
22          tangible numbers that we were looking at. And  
23          that's where I came up with my understanding of  
24          cost per handle. It was -- it's there in black  
25          and white in the Investigative Report.

1 MS. MCNULTY: But how --- my question to  
2 the committee is when you're looking at the  
3 Notice of Intent, where in your Notice of  
4 Intent?

5 CHAIRMAN BENSON: It's not in there at all.

6 MS. MCNULTY: I mean, what is -- what's the  
7 factor or where is it that causes it to become a  
8 material fact related to the decision of, you  
9 know, the decision of this committee.

10 COMMISSIONER SEUTER: Yeah. I just don't  
11 view that as background -- we didn't come up  
12 with that.

13 CHAIRMAN BENSON: I think it was mentioned  
14 earlier that there was a lot of material that we  
15 covered over the proceeding and what have you.  
16 But if we look at the Notice of Intent, which  
17 identifies specifically the decision and some of  
18 the considerations and what have you, the cost  
19 per handle and what have you, is not in that.  
20 And I think as we looked at, you know,  
21 particularly mindful for me was the cost of the  
22 pilotage in Ft. Lauderdale being so much lower  
23 than the other ports and everything else, and  
24 you know, income and stuff. There was an  
25 incredible amount of information that we went

1 through. But specifically we're looking at this  
2 721 and I guess the issue is, do we have -- is  
3 there a dispute there that the 721 factored into  
4 our determination to make these particular rates  
5 and whether it was lower or higher or what have  
6 you.

7 COMMISSIONER KURTZ: I don't think that was  
8 a main factor --

9 MR. BENSON: No, I don't either.

10 COMMISSIONER KURTZ: -- in the decision  
11 that we made or that I made certainly. I can  
12 only speak for myself.

13 CHAIRMAN BENSON: Right. And for me at  
14 that point.

15 Commissioner Assal?

16 COMMISSIONER ASSAL: I think that we've  
17 gone over the numbers and like you said before,  
18 both parties came to us with a lot of numbers  
19 and before we deliberated or discussed we went  
20 over these numbers and articulated them on a  
21 couple of dates. I think some of the concerns  
22 that the Petitioners today are coming in after  
23 what we've already done. When if there was a  
24 concern it should have been done before. And  
25 then we could have heard everyone or other

1 numbers or other consensus at that time.

2 We based it based upon the information that  
3 was handed to us for those two days. The  
4 Pilots, FCCA, with the charts and graphs and all  
5 the colors and I think looking at Port  
6 Everglades I believe if I recall hasn't gotten  
7 an increase in 17 years or something like that.  
8 And I think that some of the Petitioners had no  
9 problem with an increase, even up to 100 percent  
10 increase if I recall in the meeting. You know,  
11 we can only deal with what's dealt with us.  
12 Right? What's presented at that time. We felt  
13 it was a fair amount if you look at times past.  
14 I think we're -- I'm not going to second guess  
15 the decision that I've already made in the past.  
16 I felt strong about it and I think we should  
17 just move forward.

18 CHAIRMAN BENSON: Okay. Well, we made a  
19 decision at that time and then we all felt  
20 comfortable with it. We've given the  
21 Petitioners and the Applicants additional time  
22 and there's been 17 additional pilots.

23 So I think now we're at a point where we  
24 have to make another decision. Do we stand with  
25 that decision? Do we feel that there are no

1 disputes of material fact in this first Petition  
2 or does someone feel that there is a dispute of  
3 a material fact in this first Petition --

4 COMMISSIONER ASSAL: Well then, Chair, we  
5 might as well start again. That means we're  
6 going to reopen it and start again.

7 CHAIRMAN BENSON: No. No, no, no, no.  
8 We're just -- we're just looking at where we are  
9 right now. I'm not suggesting we open up a  
10 whole can of worms.

11 MS. MCNULTY: And I would like to be clear.  
12 If one of the three items in the first Petition,  
13 or all three items, whichever want -- if you  
14 believe anything is a disputed issue of material  
15 fact. Hypothetically, if you thought there were  
16 two, only those two would be referred to the  
17 Division of Administrative Hearing. The other  
18 one would not. If you believe there, you know,  
19 there are zero, then there wouldn't be any that  
20 would be referred to the Division of  
21 Administrative Hearing. So your determination  
22 is whether or not what's raised in each  
23 individual hearing constitutes a disputed issue  
24 of material fact. And what I would again  
25 suggest doing is look at your actual Notice of

1 Intent, what this committee ultimately relied  
2 upon in making its determination to modify the  
3 Port Everglades rates.

4 Again, you know, lots of material came in.  
5 What is the actual material facts relied upon in  
6 making your determination.

7 CHAIRMAN BENSON: So to my fellow  
8 commissioners, do we feel that of these three  
9 items there are any disputed issues of material  
10 fact?

11 COMMISSIONER KURTZ: I do not. Do we want  
12 -- how do you want to do -- are you --

13 (CROSSTALK)

14 CHAIRMAN BENSON: We're going to do it by  
15 Petition. Ultimately, we're going to look for a  
16 motion that we either do not find any disputed  
17 issues of material fact and we can then deny the  
18 Petition or we do in fact find this particular  
19 item and we would refer it to the DOAH.

20 Do you want to make a motion?

21 COMMISSIONER KURTZ: I just want to make  
22 sure to get the wording right, Donna.

23 MS. MCNULTY: I mean, if you believe --  
24 believe there are no -- you'd like to -- excuse  
25 me --

1 CHAIRMAN BENSON: Sorry. Sorry.

2 MS. MCNULTY: Do you believe there are any  
3 disputed issues of material fact?

4 COMMISSIONER KURTZ: I do not.

5 MS. MCNULTY: So then you would so move  
6 that there are no disputed issues of material  
7 fact in the Crowley Petition would be the  
8 motion.

9 COMMISSIONER KURTZ: Okay. I make a motion  
10 to say what she just said.

11 MR. TELLECHEA: So moved, is all you need  
12 to say.

13 COMMISSIONER KURTZ: So moved.

14 CHAIR BENSON: We we have a second?

15 COMMISSIONER SEUTER: Second.

16 CHAIRMAN BENSON: Any additional  
17 discussion?

18 COMMISSIONER WILKINS: So when we vote on  
19 this do they -- do the Petitioners still have  
20 the option to appeal to DOAH then?

21 MS. MCNULTY: They would have the option to  
22 appeal to a District Court of Appeal after a  
23 final order, assuming that there are no disputed  
24 issues of material fact for the other petitions.

25 COMMISSIONER WILKINS: For the other

1 petitions --

2 MS. MCNULTY: I mean, if there are no  
3 disputed issues of material fact related at all  
4 to any of the Petitions. But for example, if  
5 you found another Petitioner had a disputed  
6 issue of material fact but Crowley did not,  
7 Crowley would have the option of intervening in  
8 a DOAH proceeding. If it went to DOAH. If  
9 there were no disputed issues of material fact  
10 from any of the Petitions, a final order would  
11 be rendered and then that order could be  
12 appealed to a District Court of Appeals.

13 COMMISSIONER WILKINS: Yeah. Okay. So  
14 their --

15 MS. MCNULTY: There are --

16 COMMISSIONER WILKINS: Their course would  
17 be an appeal.

18 CHAIRMAN BENSON: Yes.

19 COMMISSIONER WILKINS: Okay. All right.

20 CHAIRMAN BENSON: Any other discussion?  
21 (No response.)

22 Okay. Anne, do you want to take the roll  
23 in terms of votes?

24 MS. AHRENDT: Okay. Commissioner Kurtz?

25 COMMISSIONER KURTZ: Yes.

1 MS. AHRENDT: Commissioner Seuter?

2 COMMISSIONER SEUTER: Yes.

3 MS. AHRENDT: Commissioner Wilkins?

4 COMMISSIONER WILKINS: Yes.

5 MS. AHRENDT: Commissioner Benson?

6 CHAIRMAN BENSON: Yes.

7 Okay. Thank you.

8 MS. MCNULTY: Is that all?

9 MS. AHRENDT: Excuse me, Commissioner  
10 Assal?

11 COMMISSIONER ASSAL: Yes.

12 CHAIRMAN BENSON: Excuse me. Okay. Thank  
13 you.

14 Let's move on to the Seacor Petition. Page  
15 47 of 552 in our materials. I'll give you a  
16 moment to read through those.

17 UNIDENTIFIED SPEAKER: All right. What was  
18 the page number again?

19 CHAIRMAN BENSON: Forty-seven of 552.  
20 There are seven items listed. And open it up  
21 for discussion.

22 Open it up for discussion or I'll start.  
23 Your choice. I don't see any facts here in  
24 terms of what the dispute is. I think there are  
25 statements whether the proposed increase is in

1 the public interest and what have you. But I  
2 don't see in terms of an Administrative Hearing  
3 any of these items where we determined this  
4 particular amount when in fact the reality is  
5 that it should be a different amount.

6 COMMISSIONER WILKINS: Chair.

7 CHAIRMAN BENSON: Yes, Commissioner.

8 COMMISSIONER WILKINS: I mean, I would  
9 concur with your point. You know, the  
10 implication of the facts that we looked at last  
11 time increases their rate to 187 percent. I  
12 didn't do the math, but I assume they did and  
13 that that's correct. So that was the  
14 implication of what the committee did. Right?  
15 So it's not disputing the fact.

16 CHAIRMAN BENSON: Mm-hmm.

17 COMMISSIONER WILKINS: Yeah. So I agree  
18 with your point.

19 CHAIRMAN BENSON: Okay. Additional input?  
20 Anyone with a motion? Commissioner Kurtz?  
21 Do you want to do the second one?

22 COMMISSIONER KURTZ: Am I the motion maker?  
23 Okay. Let's see if I can get this right  
24 again.

25 Make a motion to -- is it just to deny this

1 Petition as presented? Would that cover it?

2 MS. MCNULTY: Yes. Because there are no  
3 disputed issues of material --

4 COMMISSIONER KURTZ: Because there are no  
5 issues of -- disputed issues of material fact.  
6 Make that motion.

7 CHAIRMAN BENSON: Okay. Second?

8 COMMISSIONER ASSAL: Yes.

9 CHAIRMAN BENSON: Second by Commissioner  
10 Assal. Any additional discussion? (No  
11 response.) Anne, want to call the roll, please?

12 MS. AHRENDT: Okay. Commissioner Assal?

13 COMMISSIONER ASSAL: Yes.

14 MS. AHRENDT: Commissioner Kurtz?

15 COMMISSIONER KURTZ: Yes.

16 MS. AHRENDT: Commissioner Seuter?

17 COMMISSIONER SEUTER: Yes.

18 MS. AHRENDT: Commissioner Wilkins?

19 COMMISSIONER WILKINS: Yes.

20 MS. AHRENDT: Commissioner Benson?

21 CHAIRMAN BENSON: Yes. Thank you.

22 Okay. The last Petition is from Balearia.  
23 We previously made a motion to accept this  
24 Petition based on the timeliness of the filing.

25 UNIDENTIFIED SPEAKER: Could you give me

1 the page number again?

2 UNIDENTIFIED SPEAKER: It's 354.

3 CHAIRMAN BENSON: Take a moment to look at  
4 that. Okay. Commissioners, any discussion on  
5 this? You have an opportunity -- yes?

6 COMMISSIONER WILKINS: Chair. So this one  
7 is the -- is three points on material facts in  
8 dispute -- is what we're --

9 CHAIRMAN BENSON: Evaluating.

10 COMMISSIONER WILKINS: -- evaluating.  
11 Yeah. Okay. So I felt like we did evaluate  
12 those. I mean, obviously there was concern in  
13 the room and some commissioners felt like there  
14 should have been adjustments for those. But I  
15 felt like we had the facts in front of us to  
16 make that decision and the committee voted  
17 verbally. So I don't think there was new facts  
18 presented here that we didn't know at the time.

19 CHAIRMAN BENSON: Okay. Additional input?  
20 Or move to a motion?

21 COMMISSIONER SEUTER: I'll make a motion  
22 Chairman --

23 CHAIRMAN BENSON: Yes, Commissioner Seuter.

24 COMMISSIONER SEUTER: -- to deny this  
25 Petition as presented as there are no disputed

1 issues of material fact.

2 CHAIRMAN BENSON: Is there a second?

3 COMMISSIONER KURTZ: I'll second.

4 CHAIRMAN BENSON: Second by Commissioner  
5 Kurtz. All those in -- any additional  
6 discussion? (No response.)

7 All those in favor? I'm sorry.

8 MS. AHRENDT: Commissioner Assal?

9 COMMISSIONER ASSAL: Yes.

10 MS. AHRENDT: Commissioner Kurtz?

11 COMMISSIONER KURTZ: Yes.

12 MS. AHRENDT: Commissioner Seuter?

13 COMMISSIONER SEUTER: Yes.

14 MS. AHRENDT: Commissioner Wilkins?

15 COMMISSIONER WILKINS: Yes.

16 MS. AHRENDT: Commissioner Benson?

17 CHAIRMAN BENSON: Yes.

18 Okay. We've already had opportunity for  
19 public comment. Is there any old business we  
20 need to deal with? (No response.)

21 Seeing none, any new business? (No  
22 response.)

23 Okay. The only additional item that we  
24 have is I need to entertain a motion to order --  
25 or to enter a final order based on what we've

1 just gone through.

2 COMMISSIONER WILKINS: Can you explain sort  
3 of the process from here?

4 CHAIRMAN BENSON: Counsel?

5 MS. MCNULTY: Assuming that you will direct  
6 me to issue a final order -- any party, any  
7 entity that's substantially affected may file an  
8 appeal of your decision. So an order will be  
9 entered and it will set forth what transpired  
10 today as well as adopting as a final order your  
11 Notice of Intent.

12 COMMISSIONER SEUTER: What is the window in  
13 which they may -- they must apply for that  
14 appeal. Is there --

15 MS. MCNULTY: Yes. It will be set forth  
16 and it's usually -- and once the order is  
17 rendered and filed they'll have, I believe, 30  
18 days.

19 COMMISSIONER SEUTER: After which then that  
20 order is final?

21 MS. MCNULTY: Then they cannot appeal.

22 COMMISSIONER SEUTER: Okay.

23 COMMISSIONER KURTZ: And if it's found that  
24 their -- that our decision is not correct.

25 Let's say we move to a final order today and

1           then there's an appeal made and then it's found  
2           that there was something done.  What happens?  
3           Is that a new hearing?  Like, what happens if  
4           that doesn't --

5           MS. MCNULTY:  A lot of things could happen.  
6           But, I mean, it could be that the appellate  
7           court would determine that maybe perhaps you  
8           should have gone to the Division of  
9           Administrative Hearings, in which case they  
10          would remand that portion back and refer it to  
11          DOAH.  Whatever -- if that's what they  
12          determined.

13          CHAIRMAN BENSON:  Okay.  So we'll need a  
14          motion to enter a final order.

15          COMMISSIONER KURTZ:  I'll make a motion to  
16          move to a final order.

17          CHAIRMAN BENSON:  Second?

18          COMMISSIONER WILKINS:  Second.

19          CHAIRMAN BENSON:  Any other questions or  
20          comments?  (No response.)  Anne.

21          MS. AHRENDT:  Commissioner Assal?

22          COMMISSIONER ASSAL:  Yes.

23          MS. AHRENDT:  Commissioner Kurtz?

24          COMMISSIONER KURTZ:  Yes.

25          MS. AHRENDT:  Commissioner Seuter?

1 COMMISSIONER SEUTER: Yes.

2 MS. AHRENDT: Commissioner Wilkins?

3 COMMISSIONER WILKINS: Yes.

4 MS. AHRENDT: Commissioner Benson?

5 CHAIRMAN BENSON: Yes.

6 Okay. That will conclude our activities  
7 for today. I personally want to thank the  
8 commissioners along with everyone who  
9 participated here and certainly counsel to my  
10 right who is helping us navigate through this  
11 and spent a lot of time making sure that this  
12 was a productive process. So thank you very  
13 much. We are adjourned.

14 (The meeting was adjourned at 10:47 a.m.)

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**C E R T I F I C A T E**

STATE OF FLORIDA )

COUNTY OF SEMINOLE )

I, JANE HENEGHAN, Court Reporter, certify that I was authorized to and did report the aforementioned April 29, 2019 Department of Business and Professional Regulation, Board of Pilot Commissioners, Rate Review Committee meeting, and that the transcript is a true and complete record of my notes and recordings.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I financially interested in the outcome of the foregoing action.

DATED this 1st day of June, 2019.

*Jane Heneghan*

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JANE HENEGHAN, Court Reporter  
Notary Public, State of Florida  
(electronic signature)