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DISTRICT COURT OF APPEAL, FIRST DISTRICT
STATE OF FLORIDA

SEACOR ISLAND LINES, LLC, BALEARIA CARIBBEAN, LTD., CROWLEY LINER SERVICES, INC., KING OCEAN SERVICES, LTD., and KING OCEAN AGENCY, INC., Appellants, v. DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF PILOT COMMISSIONERS, PILOTAGE RATE REVIEW COMMITTEE, AND FLORIDA CARIBBEAN CRUISE ASSOCIATION, Appellees, PORT EVERGLADES PILOTS ASSOCIATION, Appellee/Cross-Appellant. _____/	CASE NO. 1D19-2241, 1D19-2226, 1D19-2248, 1D19-2294 On appeal from the Pilotage Rate Review Committee, Case No.: PRRC 2014-2

APPELLANTS, CROWLEY LINER SERVICES, INC., KING OCEAN SERVICES, LTD., AND KING OCEAN AGENCY, INC.'S REPLY BRIEF

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ARGUMENT

I. Appellees Rely on Inapplicable Public Service Commission Case Law

All Appellees argue that the PRRC was empowered to disregard due process requirements based on a non-existent "settlement" exception, relying on public utilities jurisprudence involving the Public Service Commission ("PSC"). (*See, e.g.,* FCCA Br. at 6–10, 20 n.4)[1] Piloting services are not public utilities and the PRRC's rate setting process is nothing like the PSC's. Each agency is limited to the express authority conferred by statute. *WHS Trucking LLC v. Reemployment Assistance Appeals Comm'n*, 183 So. 3d 460, 462 (Fla. 1st DCA 2016). Each agency is required to follow its own rules. *See Marrero v. Dep't of Prof'l Regulation, Bd. of Psychological Examiners*, 622 So. 2d 1109, 1112 (Fla. 1st DCA 1993). A brief comparison of the agencies illustrates the vast differences in their rate-setting authority and procedures.

[1] The answer briefs of the Pilotage Rate Review Committee ("PRRC"), Port Everglades Pilots Association ("PEPA"), and the Florida Caribbean Cruise Association ("FCCA"), respectively, are cited as follows (PRRC Br. at ___), (PEPA Br. at ___), and (FCCA Br. at ___). Crowley Liner Services, Inc. ("Crowley"), King Ocean Services, Ltd, and King Ocean Agency Inc.'s ("King Ocean") initial brief is cited as (Cr. Br. at ___). "R" refers to the record on appeal; "SR" refers to the supplemental record on appeal; "2d SR" refers to the second supplemental record. Two transcripts – dated October 24, 2018 and October 25, 2018 – are included in the record and are referred to as "10/24 Tr" and "10/25 Tr."

The PSC's governing statutes are enshrined in Title XXVII, "Railroads and Other Regulated Utilities." The legislature plainly stated its intent that the PSC "shall perform its duties independently." § 350.001, Fla. Stat. The legislature delegated to the PSC broad authority to fix the rates of public utilities. *See, e.g.*, § 366.05(1)(a), Fla. Stat. ("[T]he [PSC] shall have power to prescribe fair and reasonable rates and charges[.]"); § 366.06(1) ("[T]he [PSC] shall have the authority to determine and fix fair, just, and reasonable [utility] rates[.]"). Unlike the PRRC, the PSC has the authority to change rates on its own initiative. *See* § 366.06(2) ("Whenever the [PSC] finds, upon request made **or upon its own motion**, that the [public utility's] rates. . . are unjust, unreasonable, unjustly discriminatory, or in violation of law . . . the [PSC] shall [after notice and hearing] determine just and reasonable rates to be thereafter charged for such service[.]" (emphasis added)). Unlike the pilotage rate procedures, there are no revised application requirements or an absolute right for "interested parties" to receive publication notice which, in turn, gives rise to an absolute right to file an alternative application. In fixing rates, the PSC has the discretion to consider a list factors "to the extent practicable." § 366.06(1).

The PRRC's statute is found in a different part of the Florida Statutes, Title XXII, "Port and Harbors." The legislature's grant to the PRRC is far more limited. Unlike the PSC, the PRRC's jurisdiction and rate-setting authority are tethered to a completed rate-change application. *See* § 310.151, Fla. Stat. (Cr. Br. at 18–20) The

PRRC's authority is limited to "determin[ing] whether the requested rate change will result in fair, just, and reasonable rates" by considering a list of mandatory factors, without any impracticability exception, and fixing such rates based on vessel characteristics alone. *See* § 310.151(3), (5) and (6). Importantly, the PRRC cannot "prescribe" or "determine" rates outside of a completed application. Indeed, the PRRC's authority to determine whether applied-for rate change(s) will result in fair, just and reasonable rates of pilotage in a particular port is plainly more narrow then the PSC's authority to "prescribe" or "determine" the rates on its own.

Had the legislature intended to grant the PRRC the same broad authority as the PSC, it would have done so. It did not. Had the PRRC sought to establish the same rules as the PSC – to the extent allowable under its more limited legislative grant – it could have done so. It did not. As discussed below, the Court should reject Appellees' attempt to graft the PSC's rate setting process on this PRRC proceeding.

II. The Revised Application Requirement Applied But Was Ignored to Appellants' Detriment

"**Any** changes or additions to the original application **must** be sent in the form of a revised application," which begins the application process anew. Fla. Admin. Code R. 61G14-22.007(4)(emphasis added). There are no exceptions to this mandate. Appellees' reference to the differential treatment of a purported "settlement" in a pilotage proceeding before a rate hearing has been held is manufactured from whole cloth. (FCCA Br. at 5–10; PEPA Br. at 51–54; *see* PRRC

Br. at 25–30). In truth, Appellees ask this Court to hold that an agency may ignore *any* of its rules to facilitate a purported settlement between two applicants during the agency investigation. This Court should reject Appellees' invitation and hold that an agency is bound to apply its own rules.

The 11th hour, half-measures employed by the PRRC's former staff counsel and the IC's accounting advisor were, respectfully, no substitute for Appellants' due process rights in the face of hostile Commissioners who viewed the Appellants as something less than "recognized parties." (*E.g.*, 10/24 Tr, 14:10–12, 152:2–12). Appellees' assertions that Crowley and King Ocean would have been welcome participants in their negotiations is contravened by the efforts taken to keep Crowley and King Ocean out of the rate-review proceedings. Appellants' due process rights were unquestionably violated where they (and other interested parties) were not afforded meaningful notice and the opportunity to formally intervene in the rate setting process including through filing alternative applications.

Appellees cite to *Citizens of State v. Florida Public Service Commission*, 146 So. 3d 1143 (Fla. 2014) and *Sierra Club v. Brown*, 243 So. 3d 903 (Fla. 2018) and argue that under these PSC cases "a rate-making settlement *must* be viewed as fundamentally distinct from a rate change application. A rate change application *originates* the proceedings, while a settlement . . . aims to *conclude* the proceedings." (FCCA Br. at 8; *see* PRRC Br. at 25; PEPA Br. at 51–52) No such concept or

distinction exists in the pilotage statute or the PRRC's binding rules. *See Marrero*, 622 So. 2d at 1112.

The PRRC defines "application" as "the documentation containing facts to support a request to modify rates in a port . . . as set forth in Rules 61G14-22.005 and 61G14-22.006, F.A.C." Fla. Admin. Code R. 61G14-22.001(2). *See also* R. 61G14-22.005 (criteria for completed application by pilots); R. 61G14-22.006 (criteria for non-pilots). This expansive definition is not limited to documents that "originate the proceedings."[2] By its plain terms, the PRRC's definition encompasses the 2018 Unpublished Rates, (R 1975), because that document supported a request to modify rates in Port Everglades as set forth in Rules 61G14-22.005(9) and 61G14-22.006(3). This definition also covers the supplemental information submitted by PEPA to support the new requested rate change. (SR 2544:10–2545:5) FCCA claims that the 2018 Unpublished Rates "was not a new or revised application" but omits any reference to the PRRC's definition of "application." (FCCA Br. at 19;[3] *see* PRRC Br. at 25 (calling the 2018 Unpublished Rates a "settlement" without

[2] Any document submitted to support a rate change request that does not meet all the criteria in Rules 61G14-22.005 and 61G14-22.006 shall be deemed an incomplete application and the PRRC must inform the applicant of the deficiencies. Fla. Admin. Code R. 61G14-22.007(3).

[3] FCCA also claims that the 2018 Unpublished Rates "was not submitted in lieu of the original applications." (FCCA Br. at 19) However, the NOI stated: "the two applicants [FCCA and PEPA] requested that the [PRRC] consider the negotiated proposed rate in lieu of the earlier disparate requests." (R 183). FCCA did not challenge this factual finding before the PRRC.

mentioning its definition of application); PEPA Br. at 51 (same)) And no Appellee explained how submitting documents that were expressly intended to change particular pages in the original application can be anything other than a change or addition to that application. (Cr. Br. at 14)

Faced with their blatant violations of Rule 61G14-22.007(4)'s clear directive, Appellees claim that following the Rule would be "inconvenient" or contrary to the concept of "settlements" because they would have the start the process again. (*E.g.*, PRRC Br. 26–27; FCCA Br. at 8) However, the rule requires restarting the process *inter alia* to protect the rights of interested parties (like Appellants) who are not yet parties to the proceeding. Material changes to applications during the investigative process – to promote a settlement or for any other purpose – always trigger the PRRC's revised application procedures. The PRRC is free to attempt to alter its rules, but until it does, it is obligated to follow its revised-application requirement.

Citizens and *Sierra Club* are not instructive. In stark contrast to the pilotage scheme, the PSC's rules did not require that changes to an application would constitute a "revised" application requiring fresh publication and notice within the investigative rate setting process. *Cf. Citizens,* 146 So. 3d at 1160 (citing Rule 25-6.140 (obligation to notify the PSC of a revised filing date) and Rule 25-6.043 (changes should be served on existing parties)). No PSC rule was violated by submitting the proposed settlement for PSC approval. *Id.* As such, the PSC was free

to consider the proposed settlement, in line with its broad authority to set rates and the general public policy in favor of settlement. *See id.* at 1150, 1160.[4] *Citizens* does not permit applicants to circumvent an agency's rules to submit a propose settlement; it simply permits settlement before the PSC when all PSC rules are followed. Here, unlike *Citizens*, the filing of a revised application is no mere "better practice," *id.* at 1160, because the plain language of the PRRC's rules required submission of a revised application in these circumstances.[5]

Assuming arguendo the *Citizens* line of cases are even procedurally relevant or instructive, those cases cannot be viewed in a vacuum. As discussed above, the PSC has expansive authority to independently set rates. *See Citizens*, 146 So. 3d at 1149–50.[6] Both cases involved public utility requests for across the board rate

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[4] *Citizens* also mentions that Section 120.57(4) favors settlements. However, Section 120.57(4) "does not apply to agency investigations preliminary to agency action." § 120.57(5), Fla. Stat. Here, FCCA and PEPA apparently agreed to the 2018 Unpublished Rates during the PRRC's investigation, as the investigation committee had the 2018 Unpublished Rates at its hearing on September 10, 2018. (R 1975; SR 2545:5–6) And the PRRC approved the 2018 Unpublished Rates at the Public Hearing, which necessarily also occurred "preliminary to agency action."

[5] The PRRC cites a PSC case claiming "[m]aking applications current without filing a new application is accepted." (PRRC Br. at 28) (citing *Citizens of State through Fla. Office of Pub. Counsel v. Fla. Pub. Serv. Comm'n*, No. 1D17-4425, 2019 WL 1142626, at *1 (Fla. 1st DCA Mar. 13, 2019)). However, the PRRC's binding rules render that case inapplicable here.

[6] Additionally, in *Citizens*, the parties were entitled to discovery on the proposed settlement. Here, Crowley and King Ocean were not entitled to discovery. PEPA and FCCA submitted information to the PRRC outside the public record and the

increases which were, ultimately, supported by certain intervenors. *Id.* at 1147; *Sierra Club*, 243 So. 3d at 906–07. This is nothing like what happened here where PEPA and FCCA submitted the 2018 Unpublished Rates in lieu of their original 2014 applications so that PEPA would receive a selective rate increase that was designed to decrease FCCA's rates, to be paid for by other rate payers like Crowley and King Ocean. As the PSC has the statutory authority to proscribe any rates it deems fair and reasonable, it follows that the PSC can consider any rates, including rates in a proposed across the board "settlement agreement." As discussed above, the PRRC has not been given such authority by statute and is limited to determining whether the rate change requested in the application will result in fair, just, and reasonable rates of pilotage, § 310.151(3), (5), and fixing such rate as pilotage at the port. Therefore, treating "settlements" as distinct from applications during the investigative process makes no sense within the PRRC paradigm because the PRRC cannot set rates outside a completed application.[7] Because of the difference in the

PRRC based its approval of the 2018 Unpublished Rates on PEPA's asserted $721 cost-per-handle which was never investigated or certified by the IC.

[7] The PRRC's expansive definition of "application" ensures that the PRRC operates at the zenith of its authority to review the rates within an application and determine whether to fix such rates in a port. Similarly, the limited grant of authority to review rates in an application is consistent with the PRRC's definition of public hearing, which "means the meeting of the [PRRC] held pursuant to Section 310.151(3), F.S., on an application for a change in a rate of pilotage resulting in intended agency action to grant or deny the application." Fla. Admin. Code R. 61G14-22.001(6).

statutes and rules governing the PSC and PRRC, case law regarding the PSC's authority under *its* statutes and rules are not applicable here.[8]

III. The PRRC was Required to Certify the Pilots' Cost per Handle

Crowley and King Ocean further argued that the PRRC improperly adopted the pilots' alleged $721 cost-per-handle, which was not investigated or certified by the PRRC's investigation committee ("IC") and impaired the correctness of the Final Order and fairness of the rate-review proceedings. (Cr. Br. at 25–28)[9]

A pilots' rate change application must include "a consolidated financial statement, statement of profit or loss, and balance sheet prepared by a certified public accountant [("CPA")] of the pilot or group of pilots and **all relevant information, fiscal and otherwise, on the piloting activities within the affected port area**." § 310.151(2), Fla. Stat. FCCA ignores the above emphasized portion of Section 310.151(2) and argues that the financial information prepared by the pilots' CPA is all that Section 310.151(2) requires. (FCCA Br. at 24) However, as stated by the

[8] Though *South Florida Cargo Carriers Ass'n, Inc. v. State, Department of Business & Professional Regulation*, 738 So. 2d 391 (Fla. 3d DCA 1999) noted that it found no distinction between utility cases and that case, *id.* at 393 n.1, its statement must be limited to the issue then before the court, whether the PRRC was required to accept the ALJ's recommendation that pilotage rates be decreased. *Id.* at 392 (answered in the negative). Here, the PRRC failed to send this case to DOAH so there is no ALJ recommendation in the record.

[9] Appellees did not challenge the arguments that using the uninvestigated and uncertified $721 cost-per-handle impaired the correctness of the Final Order and fairness of the rate-review proceedings.

FCCA, "certified financial statements are created following accounting standards (e.g., GAAP), and therefore may not provide a complete picture of all relevant financial information of a piloting organization." (*Id.*) Clearly, the legislature wanted the PRRC, and in turn, interested parties, to have a complete picture of "all relevant" financial information. § 310.151(2), Fla. Stat. And PEPA viewed the $721 cost-per-handle as highly relevant information which *it* interjected into this rate setting process to argue the existing rates were "unfair" because certain cargo vessels had been paying rates at below the pilots' cost-per-handle. This relevant financial information needed to be included in a revised application and investigated and certified by the IC, § 310.151(2), but it was not. (*See* PEPA Br. at 36 (noting that "the IC Report" did not include "a cost-per-handle calculation")).

Further, Appellees' argument that nothing limits pilots from presenting financial information—not included in the revised application—at the Public Hearing just ignores the language of Section 310.151(2) that requires "all relevant" financial information to be submitted in an application.[10] (FCCA Br. at 24; *see* PRRC Br. at 27–30) Because pilots were required to include "all relevant" financial information in an application, § 310.151(2), and the IC is required to investigate and certify the information presented in the application prior to the Public Hearing, R.

[10] FCCA cites to "Rule Chapter 69L-31" but that rule governs utilization and reimbursement disputes in worker's compensation cases and is inapposite here.

61G14-22.007(4), there should be no relevant financial information concerning an applicant that the IC did not investigate and certify to be presented at the Public Hearing. To hold otherwise would allow pilots to omit relevant-but-inaccurate financial information from a (revised) application to avoid the scrutiny of the IC, only to present it to the PRRC at the Public Hearing to support a rate change. The statute and rules do not allow such conduct.

IV. Cost Per Handle is a Disputed Issue of Material Fact

PEPA's primary argument for the rate change below was that it was losing money with each handle of certain cargo vessels. This necessarily requires comparing the revenue-per-handle with the claimed cost-per-handle of $721, which was improperly submitted to the PRRC outside a completed revised application or the public record. The PRRC accepted PEPA's factual representation and cost-per-handle was plainly significant to its decision.

Citing no case law, PEPA claims that the $721 cost-per-handle is a "legal" dispute rather than a factual one. (PEPA Br. at 36) It's not. PEPA claimed this represented its operational costs as a fact to support the requested rate change. Determining a regulated entity's operational costs, including what expenses should be considered as operational costs, is a question of fact. *See, e.g.*, *N. Fla. Water Co. v. City of Marianna*, 235 So. 2d 487, 489 (Fla. 1970) (remanding with instructions to make findings of fact regarding, *inter alia*, reasonable costs of operation);

Caulkins Indiantown Citrus Co. v. Nevins Fruit Co., 831 So. 2d 727, 733–34, 737–38 (Fla. 4th DCA 2002) (upholding jury's verdict where the jury found that interest on a loan was not an operating expense but certain employees' salaries were operating expenses).

PEPA also argues that the $721 cost-per-handle was not material because the NOI does not include a cost-per-handle calculation and such a calculation is not required by Section 310.151. (PEPA Br. at 36) Again, PEPA cites no authority to support its argument. And it failed to address *Tuckman v. Florida State University*, 489 So. 2d 133, 135 (Fla. 1st DCA 1986), which prohibits PEPA's narrow view of materiality. (Cr. Br. at 33–34) PEPA's unfounded contention should be rejected.

Appellees also appear to argue that the Court should defer to the PRRC's after-the-fact claim that the $721 cost-per handle was somehow not "material" to the rate-review decision. (*See* PEPA Br. at 36–37; FCCA Br. at 44) But it was. The public record of the PRRC's actual deliberations at the rate hearing definitively establish the materiality of this fact. (10/25 Tr, 14:18–23; Cr. Br. at 31–33) Further, the materiality of a fact is a question of law subject to *de novo* review, and the PRRC was obliged to take the Petition as true and determine if a material factual dispute was identified. (Cr. Br. at 30) It is uncontested that the PRRC failed to do so.[11]

[11] No Appellee argued that Crowley and King Ocean failed to state the proper standard of review or that the Court should not apply the standard here.

FCCA argues that because the PRRC determined that the rate change was fair and in the public interest, the $721 cost-per handle does not rise to the level of a disputed issue of material fact. (FCCA Br. at 44–45) However, again, the pilots' cost-per-handle was plainly material to PEPA's request for a rate change and the PRRC's decision. Further, asserting the "public interest" standard fails to comport with reality where the PRRC expressly approved the 2018 Unpublished Rates because it was fair from the "business perspective" of only the two "legitimate" parties to the case - PEPA and FCCA. (10/25 Tr, 18:7–12) And, as discussed above, the PRRC's binding rules foreclose treating the 2018 Unpublished Rates as a "settlement agreement" outside of the investigative rate setting process with its revised application and publication requirements.

V. Petitioners Were Entitled to a Section 120.57(2) Hearing

Crowley and King Ocean argued that the APA applies to this case and nothing in Section 310.151(4)(a) expressly precludes a hearing under Section 120.57(2), and the PRRC erred in failing to designate the Petition for a Section 120.57(2) hearing when it (erroneously) concluded that the Petition did not raise a disputed issue of material fact. APA safeguards cannot be abrogated in this manner.

Appellees argue that Section 310.151 bars a Section 120.57(2) hearing when only questions of law are challenged. They are incorrect. Section 310.151(4)(a) does not "expressly" preclude Section 120.57(2) hearings, (PEPA Br. at 45–46), because

there is no language in that provision stating that Section 120.57(2) hearings are not available. The remainder of Appellees' arguments merely ask this Court to find that the Legislature repealed the APA by implication. By pointing to constructions of Section 310.151(4)(a)'s text that, if controlling, would lead to the conclusion that Section 120.57(2) is barred, Appellees ignore the maxim that this Court should not find a statute repeals the APA by implication.

Appellees cite to *School Board of Palm Beach County. v. Survivors Charter Schools, Inc.*, 3 So. 3d 1220 (Fla. 2009) [hereinafter "*School Board*"] for the proposition that the APA does not apply when there are "counterviewing indications of legislative intent." (PRRC Br. at 15 (citing 3 So. 3d at 1232); *see* FCCA Br. at 34). In *School Board*, the Court found that the legislature intended to abrogate the APA "by providing a comprehensive, detailed statutory scheme that does not intend that the provisions of the APA be incorporated into" it. 3 So. 3d at 1233. Indeed, the decisions of the administrative bodies directed to hear charter schools' appeals were **expressly** exempted from the APA by statute. *Id.* at 1230. Here, the legislature did not create a detailed statutory scheme for appeals from the PRRC or expressly exempt the decisions of the PRRC from the APA. To the contrary, Section 310.151(4)(a) expressly invoked the APA as the mechanism for appeals of the PRRC's rate review decisions. *See School Board*, 3 So. 3d at 1232 ("[I]f the Legislature had expressly stated that the APA governs terminations under [the

statute], this case would not be before us."). Thus, the countervailing indications of legislative intent in *School Board* are absent here.

Appellees next turn to legislative history, citing SB 1060 Staff Analysis. (PRRC Br. at 17; PEPA Br. at 43, 47) However, the cited Staff Analysis does not mention Section 310.151(4)(a), Section 120.57(2), or speeding up the rate-review proceedings by barring any APA hearings. The Staff Analysis only discusses amending Section 310.151 to require proposed pilotage rates to become effective during an administrative appeal, *see* § 310.151(4)(b), Fla. Stat., which was intended to remove the incentive for port operators to appeal as a tactic to delay implementing the new rates. Staff Analyses at 4. Notably, the Staff Analysis mentions administrative appeals but never claimed that the legislature intended to curtail any right to any administrative hearing. If the legislature had intended to take the drastic step of precluding any aspect of an APA appeal as Appellees claim, the Staff Analysis surely would have mentioned it. Its silence is telling.

CONCLUSION

Crowley and King Ocean respectfully request this Court to vacate the Final Order and remand this case to the PRRC as stated in their initial brief. (Cr. Br. at 43–44).

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy hereof has been filed and electronically served via Florida ePortal on this 15th day of April, 2020, to all counsel on the attached service list.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this document complies with the requirements of Fla. R. App. P. 9.210(a)(2). This document is being submitted in Times New Roman 14-point font.

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