IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D19-2226, 1D19-2241, 1D19-2248
L.T. NO. PRRC 2014-2

SEACOR ISLAND LINES, LLC, BALERIA CARRIBEAN, LTD, CROWLEY LINER SERVICES, INC., KING OCEAN SERVICES, LTD, AND KING OCEAN AGENCY, INC.,

Appellants,

vs.

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF PILOT COMMISSIONERS, PILOTAGE RATE REVIEW COMMITTEE, AND THE FLORIDA CARIBBEAN CRUISE ASSOCIATION,

Appellees,

and

PORT EVERGLADES PILOTS ASSOCIATION,

Appellee/Cross-Appellant.

ON APPEAL FROM A FINAL ORDER OF THE BOARD OF PILOT COMMISSIONERS, PILOTAGE RATE REVIEW COMMITTEE

REPLY BRIEF OF SEACOR ISLAND LINES, LLC

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PRELIMINARY STATEMENT

Citations will be listed as follows: the record on appeal (R. at ___), SEACOR Island Lines LLC's ("SEACOR") Initial Brief (SEACOR Brief at ___), and the Answer Briefs of the Pilotage Rate Review Committee ("PRRC"), Port Everglades Pilots Association ("PEP"), and the Florida Caribbean Cruise Association ("FCCA"), respectively, as (PRRC Brief at ___), (PEP Brief at ___), and (FCCA Brief at ___).

ARGUMENT

I. The PRRC was incorrect in determining that SEACOR's Petition did not raise disputes of material fact

The PEP and FCCA set up a series of straw man arguments in alleging that SEACOR has not raised disputes of material fact. The PEP asserts that whether a proposed rate is "fair, just, and reasonable" is "not a fact that can be developed by an administrative law judge [("ALJ")]." (PEP Brief at 38). In support of that contention, the PEP cites to the holding in *S. Florida Cargo Carriers Ass'n, Inc. v. State, Dept. of Bus. & Prof'l Regulation*, that an ALJ may not engage in rate making. 738 So. 2d 391, 392-393 (Fla. 3d DCA 1999). Similarly, the FCCA argues that the fairness of a rate is not an "underlying fact" which may be disputed at a formal hearing. (FCCA Brief at 43-44).

SEACOR agrees that ALJs may not engage in ratemaking and, if afforded a formal hearing, would not ask one to do so. Rather, SEACOR would ask the ALJ to, based on the evidence before him or her, make the following factual determinations:

- whether the proposed rate is "fair, just, and reasonable," as discussed in statute,
- whether the proposed rate is "within the public interest," as discussed in statute, and
- whether the proposed rate is needed to "maintain or secure adequate pilot boats, office facilities and equipment, dispatch systems, communication equipment and other facilities, and equipment and support services necessary for a modern, dependable piloting operation."

The other disputed factual issues raised in SEACOR's Brief would also be pertinent to the fairness and appropriateness of the proposed rate. After the ALJ makes findings to that effect, the matter would go back to the PRRC to determine what action it wished to take. If the PRRC pressed forward with this rate despite adverse findings from the ALJ, then SEACOR would be in position to raise to this Court whether, based on the record established at the Division of Administrative Hearings ("DOAH"), the PRRC's determination was based on competent, substantial evidence. *See Gulf Power v. Florida Public Serv. Com'n*, 453 So. 2d 799, 803 (Fla. 1984). At this point, however, all SEACOR is seeking is the opportunity to take this matter to DOAH and develop the record necessary for this matter to properly run its course.

The FCCA's assertion in this regard is impossible to square with the completely contrary position it took when seeking to challenge a previous PRRC proposal. In *Florida Caribbean Cruise Association v. Dept. of Bus. and Prof. Reg., Pilotage Rate Review Committee,* DOAH Case No. 17-5789, the FCCA (represented by the same counsel as in this case) sought a formal hearing at DOAH to oppose a rate modification at the Port of Miami. The FCCA concluded the substantive portion of its Petition, which the PRRC referred to DOAH, with the following:

> Finally, to the extent the Report is adopted, the FCCA disputes the factual findings made with respect to the statutory factors for setting pilotage rates, and believes that different factual findings and conclusions are more appropriate and that those findings will result in a difference [sic] pilotage rate change than that implemented by the PRRC.

Id., Petition for Formal Administrative Hearing (Filed Oct. 12, 2017).

The FCCA's view of whether a proposed rate's fairness may be challenged appears to hinge on the FCCA's opinion of the rate itself. If the FCCA does not agree with a proposed rate, then an ALJ should consider whether another rate would be more appropriate. If the FCCA supports the proposal, then DOAH has no such authority. Quite clearly, this is not how the law works. Either the fairness of a rate is a factual issue or it is not. The case law cited in SEACOR's initial brief, and the FCCA's arguments when it disagreed with a proposed rate, shows that it is.

Further, despite their insistence that only the "underlying facts" may be challenged, the PEP and FCCA also argue that SEACOR's allegations regarding

exactly such underlying facts may not be considered. In its Petition, SEACOR alleged as issues of disputed fact that its pilotage rate would rise 187 percent, the matter of how much would be added to its operating costs, and whether an "unreasonable burden" would be placed on its operating expenses. (R. at 239-240). These are, quite clearly, all underlying factual matters which would bear on whether the proposed rate fits the statutory factual requirements.

The PEP and FCCA seek to simply concede that SEACOR is being financially harmed and then use this concession to deny SEACOR a hearing. (PEP Brief at 39-40; FCCA Brief at 42-43). Both of those parties would clearly decry that position if it was ever directed at them. Further, as SEACOR argued in its Initial Brief, this concession at least calls into question whether the proposed rates are fair, just, or reasonable. (SEACOR Brief at 25). None of the Appellees responded to that argument in their Answer Briefs. If oral argument is granted in this matter, SEACOR believes the PEP and FCCA should be required to explain how they would respond if the PRRC were to ever adopt a rate that it agreed caused either party substantial harm and then denied them the right to a DOAH hearing based on that agreement. To the extent the PEP and FCCA would fight such clearly harmful action, that should

tell the Court all it needs to know about whether these arguments should be given any weight.[1]

The PEP argues further that SEACOR "misconstrues" the public interest factor because it applies only to the interests of pilots. (PEP Brief at 39). SEACOR agrees that this provision is focused on the pilots and the importance of their services. In fact, it is the PEP that misconstrues this provision by failing to account for the interconnected relationship between pilots, their customers, and those who use the ports. SEACOR supported one of the original proposed rates (the one from the PEP) because it accomplished this statutory goal. However, if the proposed rate in question puts carriers such as SEACOR out of business, then it could harm the state's ability to ensure safe piloting services and make qualified pilots available. This is because the pilots will lose a portion of their customer base (and, therefore, their pay) without such entities using the port. Some small carriers could also choose to forgo using a pilot, costing the pilots money and putting the safety of all of those who use Port Everglades at risk. All of this would have to be fleshed out at a formal hearing in order to determine whether this rate truly meets the statutory public interest bar.

[1]To the extent the PEP and FCCA are actually taking the position that the PRRC is so powerful that it can deny parties a formal hearing by agreeing it is harming them, that argument is so self-injurious to the PEP and FCCA that they likely do not even have standing to raise it.

The PEP and FCCA's arguments regarding SEACOR's seventh dispute of material fact[2] ring especially hollow. The FCCA calls this a "value judgment[3]" of the PRRC, and the PEP deems it a "policy-infused determination.[4]" However, that issue deals with the factual matter of whether this proposed rate is needed to secure specific items and services. It is as much a matter of dollars and cents as values and policy. Further, whether a pilotage increase is needed at all is not in question. Rather, the question is whether **this specific proposed rate constructed in this specific way** is necessary to accomplish these goals. If another rate (such as the PEP proposal which SEACOR supported) could have achieved this in a better or more equitable fashion, then that would certainly be an area the ALJ could explore in a recommended order and the PRRC could then consider. Either way, no party can reasonably dispute that a formal hearing would shed light on this factual dispute.

The PEP's attempts to distinguish this matter from the previous rate challenges that the PRRC referred to DOAH also fail. The PEP begins by stating that those matters "involved different proceedings with different factual findings."

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[2]"Whether the proposed rate increase is needed to maintain or secure adequate pilot boats, office facilities and equipment, dispatch systems, communication equipment and other facilities, and equipment and support services necessary for a modern, dependable piloting operation." (R. at 239-240).

[3](FCCA Brief at 43).

[4](PEP Brief at 38).

(PEP Brief at 40). This is true of every case. If the fact that a case was based on a different factual record was, in and of itself, sufficient to distinguish it, then there would be no such thing as legal precedent. The PEP then asserts that there is no telling whether those petitions were referred "based on the same alleged disputed facts that SEACOR identified." *Id.* Once again, this is always true. There is no legal requirement that an agency identify which dispute of fact led it to refer a petition to DOAH. In that vein, the distinctions the PEP attempts to draw are meaningless.

There is no material, legal distinction between those two petitions and SEACOR's. Both of those petitions (one filed by a pilots group and the other by a cruise line) alleged that a proposed rate would have an adverse effect on them and sought a formal hearing on that basis. Both asserted that the fairness of the rate was a fact in dispute. There is no evidence of the PRRC stating otherwise. Instead, the PRRC forwarded both Petitions to DOAH. The PRRC does not attempt to show a distinction between those Petitions and SEACOR's in its Answer Brief (or even address this issue at all). In that light, SEACOR's disputed facts should be viewed as materially equivalent to the ones raised in those petitions.

For the forgoing reasons, SEACOR's Petition raised disputes of material fact and should have been referred to DOAH for a formal administrative hearing. The PRRC's Final Order concluding otherwise should be reversed.

II. In the alternative, Florida law required that SEACOR be given the chance to amend its Petition

The FCCA and PEP argue that SEACOR has waived the argument that it must be allowed to amend its Petition. (PEP Brief at 42-43, FCCA Brief at 27-28). Neither cites to any case which has ever held that this particular right may be waived. It appears, based upon the undersigned's research, that no such case exists.

On the contrary, even in extreme cases of repeated noncompliance, case law makes clear that the right to amend a petition is not waived. In *Brookwood Extended Care Ctr. of Homestead, LLP v. Agency for Healthcare Admin*, a party filed an insufficient petition and was provided with an opportunity to amend by the agency. 870 So. 2d 834, 837 (Fla. 3rd DCA 2003). However, the party refused and instead demanded that its petition be considered sufficient. *Id.* After the agency once again provided an opportunity to amend, the party simply filed another petition "virtually identical to its first bare bones petition." *Id.* at 838. At that point, the agency issued a final order and the party appealed. *Id.* The Court took the party to task in its opinion, but still provided it with the opportunity to amend its petition, reasoning that the party was legally entitled to this since only one dismissal had truly taken place. *Id.* It is not clear from *Brookwood* that the Appellant even sought that particular relief, as it seemingly stuck to the argument that its original petition was sufficient even throughout the appeal. However, the Court allowed it to amend regardless.

W. Frank Wells Nursing Home v. State, Agency for Health Care Admin. also conclusively rebuts the FCCA and PEP's argument that the opportunity for amendment cannot be sought at the appellate level. 979 So. 2d 339 (Fla. 1st DCA 2008). In that case, the agency dismissed a petition with prejudice without offering the opportunity to amend. *Id.* at 341. The dismissed party then asked the appellate court to afford it that opportunity. *Id.* at 340. The Court obliged, holding that the party was legally entitled to an opportunity to amend. *Id.* at 342.

In light of *Brookwood* and *W. Frank Wells*, it is impossible to argue that SEACOR waived its right to amend its Petition. In *Brookwood*, the party not only did not request the chance to amend, it twice refused the opportunity it was offered to materially do so. Still, the appellate court held that they should be given another opportunity to amend their petition. In this case, SEACOR was never given the chance to amend. As the FCCA concedes:

> After the PRRC determined no disputed issues of fact were raised, the PRRC directed its counsel to prepare a final order for issuance…The PRRC gave no indication it intended to provide SEACOR an opportunity to amend as opposed to issuing the final order.
>
> (FCCA Brief at 27).

The record backs up this concession. Immediately after voting to dismiss all Petitions for failure to raise disputes of material fact, the PRRC voted to enter a final order to that effect. (R. at 779-782). The FCCA states that it took 21 days for the PRRC to enter its Final Order (therefore, it argues, providing SEACOR "ample"

time to seek amendment of its Petition). (FCCA Brief at 27-28). However, it actually took the PRRC 21 days to **draft** the final order it had already voted to enter. For all legal purposes, the matter was final and no amendment was allowed at the point of the board vote.

Much like *W. Frank Wells*, the PRRC simply rejected SEACOR's Petition and moved on. SEACOR's only opportunity to seek amendment was, therefore, through this appeal. SEACOR should not be punished for the PRRC's zeal to finalize this new rate without affording SEACOR this statutory right.

The plain wording of the statute in question also disproves any waiver argument. Pursuant to section 120.569(2)(c), Florida Statutes, one of an agency's obligations when dismissing a petition is to "state the deadline for filing an amended petition if applicable."[5] This makes clear that an agency must both affirmatively offer the opportunity to amend and provide a timetable for when that amendment must be completed. The Final Order in this case does no such thing. (R. at 784-788). There is no reasonable argument that the Final Order comports with this statute.

The PRRC takes a different tact in its Brief, arguing that section 120.569(2)(c), Florida Statutes, only protects those who have submitted facially

[5]The only exception to this would be in instances where the defect in the petition cannot be cured. To take that position in this case, one would have to argue that it would be impossible to raise a dispute of fact. As discussed in footnote 7 below, that cannot reasonably be the case.

insufficient petitions. (PRRC Brief at 35). As the PRRC deemed SEACOR's Petition to be facially sufficient but substantively lacking, SEACOR is afforded no opportunity to amend. In other words, SEACOR should be punished for being too compliant with the pertinent rules of procedure. This is, by any measure, an odd position.

Once again, the PRRC cites to no case law to support this argument and, once again, binding precedent conclusively rebuts its position. In *W. Frank Wells*, the agency did not dismiss the petition because of a facial deficiency. Instead, it based the dismissal upon the substantive argument that the agency action the party sought to challenge was not subject to a hearing pursuant to section 120.57, Florida Statutes. *Id. at 341.* That Court relied upon *Menorah Manor, Inc. v. Agency for Health Care Admin.*, in which a petition was dismissed on the basis that the disputed facts listed were not sufficient to show the party's standing. 908 So. 2d 1100, 1104 (Fla. 1st DCA 2005). Although the Court agreed the facts alleged did not meet the necessary threshold, it held that the petitioner was entitled to amend the substantive allegations in its petition to try and remedy this. *Id.* at 1104-1105. This is not the only time this Court has held that parties may amend their petitions when the substantive facts or allegations pled do not support that party's standing. *See Manasota-88 v. State, Dept. of Environmental Reg.*, 417 So. 2d 846, 847 (Fla. 1st DCA 1982). The PRRC's position simply cannot be squared with these holdings.

Further, the PRRC concedes that the hearing rights afforded in section 310.151(4)(a), Florida Statutes, must be "understood in context" of the Administrative Procedure Act ("APA"). (PRRC Brief at 18).[6] In fact, the pilotage rate statute specifically incorporates the requirements of section 120.569, Florida Statutes (including those regarding amendment of petitions). Therefore, the case law cited above requiring that administrative litigants be given the chance to amend is directly applicable to this area of the law.

No party can reasonably dispute that SEACOR has been harmed in this situation. In fact, the Appellees all seem to concede it. Further, no party can reasonably state that SEACOR did not at least attempt to allege disputes of material fact.[7] Yet, despite all this, the Appellees seek to block any point of entry for

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[6]In response to the argument of other parties that they are entitled to an informal administrative hearing regarding the proposed rate, the PRRC cites to case law standing for the proposition that agency action can be taken outside the confines of the APA in the event there are "countervailing indications of legislative intent." (PRRC Brief at 15). However, the PRRC does not advance this argument or cite to this law as a reason to deny SEACOR the opportunity to amend its Petition. Therefore, it is clear that the PRRC agrees that this provision of the APA applies to rate proceedings.

[7]The FCCA appears to argue that there is no set of factual disputes that SEACOR could have alleged, even upon amendment, that would have entitled it to a DOAH hearing. (FCCA Brief at 27) ("the FCCA believes amendment would have been futile given that the PRRC's final order sets forth the rates that the PRRC to be in the public interest as a whole."). The idea that a proceeding involving a number of different parties, most of which hold widely varying positions and interests, could not possibly lead to **any** material factual disputes is difficult to comprehend. Further, this would mean that the proposed rate at issue was completely unchallengeable in

SEACOR to challenge the proposed rate. This is directly contrary to the purpose of the amendment requirement of section 120.569(2)(c), Florida Statutes. The entire aim of the APA is to "ensure due process and fair treatment of those affected by administrative actions." *S.J. v. Thomas* 233 So. 3d 490, 501 (Fla. 1st DCA 2017), *citing Pro Tech Monitoring, Inc. v. State, Dep't of Corr.*, 72 So. 3d 277, 279 (Fla. 1st DCA 2011). This goal cannot be accomplished if agencies are allowed to deny affected parties their hearing rights based on alleged one-time, deficiencies in their otherwise timely and compliant petitions. Therefore, SEACOR must, at a minimum, be afforded the opportunity to amend its Petition.

CONCLUSION

For the foregoing reasons, SEACOR respectfully requests this Court reverse the Final Order and instruct the PRRC to either (a) refer SEACOR's Petition to DOAH for a formal administrative hearing or (b) provide SEACOR the opportunity to amend its Petition.

RESPECTFULLY SUBMITTED this 15th day of April 2020.

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any fashion. This rate is agency action, not some divine mandate. There is no precedent in the history of Florida law for such action being beyond any form of judicial or administrative review. Basic due process requires otherwise.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.2100(a)(2).

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