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

THE FLORIDA-CARRIBEAN CRUISE ASSOCIATION'S RESPONSE TO MOTION FOR REHEARING AND CERTIFICATION

The Florida-Caribbean Cruise Association ("FCCA"), pursuant to Florida Rule of Appellate Procedure 9.330, hereby files its response to Crowley Liner Services, Inc., King Ocean Services, Ltd., and King Ocean Agency, Inc's (collectively

"Crowley") Motion for Rehearing and Certification of Question of Great Public Importance, and states as follows:

1. **Crowley's Motion for Rehearing is a Restatement of Previous Arguments**

Crowley's motion for rehearing is a re-argument of issues this Court already addressed and disposed of, and should therefore be denied. This Court outlined the standard for a motion for rehearing under Florida Rule of Appellate Procedure 9.330 in *Unifirst Corp. v. City of Jacksonville*, 42 So. 3d 247 (Fla. 1st DCA 2009):

> Florida Rule of Appellate Procedure 9.330(1) states that a motion for rehearing shall "state with particularity the points of law or fact in the court's decision that, in the opinion of the movant, the court has overlooked or misapprehended in its decision." This rule has been interpreted to mean that "[a] motion for rehearing shall not reargue the merits of the court's order." *Jacobs v. Wainwright*, 450 So.2d 200, 202 (Fla.1984).
>
> > Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.
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> *State ex rel. Jaytex Realty Co. v. Green*, 105 So.2d 817, 818– 19 (Fla. 1st DCA 1958); *see also Ayala v. Gonzalez*, 984 So.2d 523, 526 (Fla. 5th DCA 2008) (reiterating the court's view that the privilege to seek a rehearing is not "an open invitation for an unhappy litigant or attorney to reargue the same points previously presented, or to discuss the bottomless depth of the displeasure that one might feel ... as a result of having unsuccessfully sought appellate relief.").

Id. at 248 (emphasis added). Under this standard, Crowley's motion must fail as it is nothing more than a re-argument of the issue of whether the Port Everglades Pilot Association's ("PEPA") cost-per-handle was a disputed issue of material fact.

The $721 cost-per-handle issue was a centerpiece of Crowley's appeal – both in its brief and during oral argument – and is therefore a "matter already discussed in briefs and oral arguments and necessarily considered by the Court." *See Crowley Initial Brief*, pp. 26-27, 30-34; *FCCA Answer Brief*, pp. 35-38, 44-45. Moreover, while Crowley states that the issue was not directly addressed by this Court in its opinion, Crowley acknowledges that it is presumed the Court has considered this point. *Crowley's Motion for Rehearing and Certification of Question of Great Public Importance* ("*Crowley's Motion*"), p. 3. The FCCA believes this is particularly true given the emphasis Crowley placed on this issue in these proceedings.

Finally, regarding the substance of Crowley's argument that the $721 cost-per-handle was a disputed fact, the FCCA believes it unnecessary to restate arguments already set forth in its Answer Brief, and respectfully refers this Court to its Answer Brief should the Court deem it necessary to revisit this issue. *See FCCA Answer Brief*, pp. 35-38, 44-45. The FCCA must, however, dispute the claim in Crowley's motion that PEPA's "claimed losses [which are based on PEPA's cost-per-handle] were the basis for the PRRC implementing the new rate changes requested in the settlement (including deliberate rate increases on Appellants." *Crowley's Motion*, p. 4. The

portions of the hearing transcript Crowley cited plainly do not support this argument.[1] Accordingly, Crowley's motion for rehearing fails to meet the standards articulated in Florida Rule of Appellate Procedure 9.330 and *Unifirst Corp.*, and should be denied.

2. <u>Crowley's Motion for Certification Raises a Question That is Fundamentally Flawed and not of Great Public Importance.</u>

Crowley's motion for certification also must be denied as it is based on incorrect factual and legal interpretations by Crowley and does not raise a question of great public importance.

A. <u>Crowley's Proposed Question for Certification is Based on Incorrect Facts.</u>

The factual foundation for Crowley's proposed question for certification is fundamentally flawed, which alone warrants denial of the motion for certification.

Crowley's motion relies heavily on its newfound argument that the PRRC was prohibited from approving a settlement under section 120.57(4), Florida Statutes, in light of section 120.57(5), Florida Statutes.[2] Those statutes state, in full:

> (4) INFORMAL DISPOSITION.—Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.
> (5) APPLICABILITY.—This section does not apply to agency investigations preliminary to agency action.

[1] For example, Crowley cites to the October 25th final hearing transcript, page 10 at lines 11-13, which includes the following statement by a PRRC commissioner (lines 7-13 are included for context, lines 11-13 are underlined): "And I believe that the, the pilots have maybe got, you know, they always had fat cow coming in with the cruise ships so they didn't really <u>worry too much about the little guy, but there's no question that they've been subsidizing some of the smaller ships</u>."

[2] Crowley did not raise this argument in its briefing.

§§ 120.57(4);(5), Fla. Stat. In an attempt to shoehorn the below proceedings into the scope of section 120.57(5), Crowley now argues that the PRRC approved the settlement during an investigative phase and prior to taking final agency action. *Crowley's Motion*, pp. 5-7 (*see e.g.*, "The settlement at issue in this case was entered into before the NOI was issued and therefore during the investigation preliminary to agency action."). Crowley's position is incorrect.

The PRRC is a seven-member subset of the Board of Pilot Commissioners. § 310.151(1)(b), Fla. Stat. Upon receiving a pilotage rate change application, issuing the required notices, and giving interested parties the opportunity to respond, the PRRC is tasked with concluding an "investigation, conduct[ing] a public hearing, and determin[ing] whether to modify the existing rates of pilotage in that port…" § 310.151(3), Fla. Stat. The PRRC's determination must be publicly noticed in its notice of intent to modify the rates of pilotage ("NOI"). *Id*.

Under section 310.151, there is *no distinction* between the PRRC's final vote, or determination, at the public hearing and its NOI. The PRRC's vote taken at the public rate change hearing is its final, conclusive, and terminal substantive act taken as it relates to the pilotage rate at any particular port. The written notice of intent to modify the rates is exactly what it purports to be: *a written notice of the PRRC's final*

rate change determination made at the final public hearing.[3] Public issuance of the NOI is, in essence, a *procedural* function required by section 310.151 to memorialize the PRRC's final, substantive rate change determination and provide written notice of same. Crowley's argument that everything leading up to publication of the NOI – including the PRRC's final deliberations and vote – is purely investigative work preliminary to agency action, is simply illogical and inconsistent with section 310.151, Florida Statutes.

In that regard, Crowley's attempt to claim that the settlement agreement "was entered into before the NOI was issued…during the investigation preliminary to agency action" is meritless. As this Court held, the PRRC met the statutory requirements for conducting a rate change proceeding under section 310.151, Florida Statutes. *Seacor Island Lines, LLC v. Dep't of Bus. & Prof'l Regulation*, 1D19-2226, 2020 WL 6815831, at *1 (Fla. 1st DCA Nov. 20, 2020). At the conclusion of the proceeding, the PRRC made its final determination to adopt the proposed settlement as the final rate change for Port Everglades. That PRRC's determination was then memorialized into the NOI and published as required by section 310.151, Florida Statutes. Crowley's argument – raised for the first time in seeking rehearing – that the PRRC's final vote was an "investigative" act simply does not hold water.

[3] As Crowley is well aware, after the PRRC votes on its final rate change, the PRRC takes no further action to consider the rate change applications or positions of the parties, to deliberate regarding the appropriate rate, or to vote on or modify the rate.

Crowley's attempt to invoke section 120.57(5) by recharacterizing the PRRC's final agency determination as an investigative act preliminary to agency action is without merit. Because Crowley's question for certification rests upon a faulty factual and legal foundation, the motion for certification should be denied.

B. Crowley's Motion for Certification Contains Other Major Flaws.

Crowley's motion for certification is also subject to other flaws. First, Crowley argues that this Court's reliance on *Citizens of State v. Fla. Pub. Serv. Comm'n*, 146 So. 3d 1143 (Fla. 2014) was incorrect, because in *Citizens* the Florida Supreme Court found express statutory authority permitting settlement of the PSC cases, which does not exist in Chapter 310. A review of *Citizens* and the statutes at issue prove this argument meritless.

Crowley's attempt to distinguish *Citizens* fails to recognize that the statutes the Florida Supreme Court relied upon in finding that the PSC had authority to settle utility rate-making cases closely mirror, in relevant part, the pilotage rate-making statutes. The pertinent part of the *Citizens* case that Crowley refers to states:

> Pursuant to section 350.001, Florida Statutes, titled "Legislative intent," the Commission is an arm of the legislative branch and shall perform its duties independently. *See Pub. Serv. Comm'n v. Bryson,* 569 So.2d 1253, 1254 (Fla.1990) (noting that "the legislature granted the [Commission] exclusive jurisdiction over matters respecting the rates and service of public utilities."); *Chiles v. Pub. Serv. Comm'n Nominating Council,* 573 So.2d 829, 832 (Fla.1991) ("[R]ate-making by the [Commission] is a legislative function."). Further, section 366.04, Florida Statutes, provides the Commission with jurisdiction to regulate and supervise each public utility with respect to its rates and service, and prescribe a rate structure

> for all electric utilities. § 366.04(1)–(2), Fla. Stat. (2012); *see also* § 366.05(1) ("In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges...."). Thus, the plain language of the statutes clearly provides that the Commission independently determines rates of public utilities subject to the conditions set forth in chapter 366; the Commission's authority to fix fair, just, and reasonable rates pursuant to section 366.06(1), Florida Statutes, is not conditioned on the OPC's approval or absence of the OPC's objections.[4]
>
> Second, pursuant to section 120.57(4), Florida Statutes (2012), informal disposition of the rate proceeding may be made by stipulation, agreed settlement, or consent order "[u]nless precluded by law." Chapters 350 and 366, pertaining to the Commission and public utilities respectively, do not prohibit the Commission from approving a negotiated settlement to resolve a rate-making proceeding.

Id. at 1150. As the FCCA outlined in detail in its Answer Brief, these PSC statutes (§ 350.001, and § 366.04-366.06, Fla. Stat.) mirror the piloting statutes in Chapter 310 in terms of outlining the Legislature's control over rate-making and the power of the rate-making bodies to prescribe rates that are "fair, just and reasonable." *FCCA Answer Brief*, pp. 6-7; *see also* § 310.001, § 310.0015, § 310.151, Fla. Stat. Thus, if the enabling statues in the PSC cases are sufficient to provide the PSC with the statutory authority to informally resolve rate-making cases – as Crowley contends – then the relevant and nearly identical pilotage rate-making statutes must provide the PRRC with the same informal disposition authority. Moreover, like Chapter 350 and 366, nothing in Chapter 310 "preclude[s] by law" the informal disposition of a rate-making case under section 120.57(4), Florida Statutes.

Crowley's attempt to distinguish *Citizens* and argue that section 120.57(4) is inapplicable are incorrect legal arguments. Moreover, Crowley has failed to raise any issue of great public importance that warrants Florida Supreme Court review.

C. Crowley Fails to Raise any Question of Great Public Importance.

Crowley's motion makes various policy arguments, none of which give rise to a question of great public importance. Rather, Crowley's motion argues that, absent Supreme Court intervention, a series of various hypotheticals – none of which actually occurred in the matter below – could befall an unsuspecting Florida rate payer. Yet, all of the hypothetical harms predicted by Crowley can be vanquished by an affected party exercising their rights as provided by Florida law.

As a general matter, Crowley frames its question for certification as one impacting many Florida state agencies. *Crowley's Motion*, p. 5 ("This question is critically important not only in cases involving the PRRC, but in any case involving an agency that conducts investigations preliminary to agency action."). Yet, Crowley's motion does not point to any other specific agency, agency proceedings, or individuals that are affected by this apparent issue. Despite its attempt to frame its question broadly, Crowley's issue is one specific to Chapter 310 and Crowley's assertion, albeit incorrect, that the PRRC's final rate-making decision is an "investigative" act. The purported issue raised by Crowley is not one impacting or affecting any other Florida agency proceedings. Thus, while Crowley characterizes

the issue as having wide-ranging impact across the state, it is unclear who – exactly – would be harmed in the absence of Supreme Court review.

As it relates specifically to pilotage rate change proceedings, Crowley hypothesizes that, under the Court's opinion, future parties could file "misleading" rate change applications that do not "disclose the party's intentions", and then settle the proceeding "during the investigative phase" in an "undisclosed and unexpected way" *Crowley's Motion*, p. 7. This argument is not credible, is entirely speculative, and is not what occurred in the underlying proceedings. As discussed *supra*, the PRRC did not approve the proposed settlement "during the investigative phase" or in an "undisclosed or unexpected way." Rather, this Court found that the PRRC followed the rate change process prescribed in section 310.151, Florida Statutes.

Moreover, there is an exceedingly simple solution to preventing the hypothetical harm that Crowley complains of. Florida rate payers that are concerned about purportedly misleading rate change applications and the use settlements agreements in pilotage rate cases can simply avail themselves to the protections of section 310.151, Florida Statutes. That statute expressly requires the PRRC to publish notice of any filed rate change application, which must "advise all interested parties that they may file an answer, an additional or alternative petition, or any other applicable pleading or response…" § 310.151(3), Fla. Stat. If a rate-payer is concerned about their rights or interests being affected by a rate change proceeding, the rate-

payer *retains every right to fully-participate in the process as provided by law*. Such participation would remove any concerns about changing rate structures or not being privy to proposed settlement agreements.[4]

3. <u>Conclusion.</u>

The issues Crowley raises in its motion for rehearing were extensively briefed and argued before this Court, and which the FCCA believes this Court took into full consideration when issuing its order. Accordingly, Crowley has failed to establish rehearing is warranted, and their motion should be denied.

Crowley's motion for certification is inherently flawed and based on a purported factual structure that is not even present in the instant action. While Crowley claims the issue could impact multiple agencies and parties across the state, Crowley points to no other agencies or individuals potentially impacted by the issues raised. Crowley's motion also raises no unresolve question for resolution, but instead a series of legal arguments that are incorrect and contrary to well-established Florida law.

[4] Crowley continues to argue that it would be unfair for a party to file a rate change application with one rate – which Crowley may find acceptable – and later pursue a different rate. This is a fundamental misunderstanding of how pilotage rate change proceedings work (the PRRC *always retains* the authority to adopt any rate it deems fair, just and reasonable, regardless of what is contained in a rate change application), as well as how Florida agency proceedings occur. It is not uncommon that the relief requested in an original application to a state agency ultimately differs from the final relief afforded by the agency following agency proceedings. That is the reason why any party whose interests may be affected by the agency action are entitled to intervene or join in such proceedings.

Crowley has also failed to demonstrate the issue raised is one of great public importance, as Crowley's concerns could be easily alleviated by simply participating in the rate-change process, as expressly afforded by Florida statute and regulation.

WHEREFORE, the Florida-Caribbean Cruise Association respectfully requests that this Honorable Court **DENY** Crowley Liner Services, Inc., King Ocean Services, Ltd., and King Ocean Agency, Inc's Motion for Rehearing and Certification of Question of Great Public Importance.

Respectfully submitted this 22nd day of December 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all counsel of record this ____ day of _____, 2020, via electronic mail to:

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