

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

IN RE: APPLICATION FOR CHANGE OF
RATES OF PILOTAGE AT PORTS OF
JACKSONVILLE AND FERNANDINA BY ST.
JOHNS BAR PILOT ASSOCIATIONS AND
FERNANDINA PILOT, LLC

**CROWLEY’S MOTION TO DISMISS OR ALTERNATIVELY TO STAY THE RATE
REVIEW PROCEEDINGS**

Crowley Liner Services, Inc., Crowley Puerto Rico Services, Inc., Crowley Caribbean Services, LLC (“Crowley”), by and through the undersigned counsel, file this Motion to Dismiss or Alternatively to Stay the Rate Review Proceedings, and states as follows.

INTRODUCTION

When the St. John’s Bar Pilot Association filed its Revised Application with the Pilotage Rate Review Committee (“PRRC”), an appeal of the PRRC’s Final Order in Port Everglades was pending in the First District Court of Appeal (“First DCA”). The appeal challenges, *inter alia*, notice practices of the PRRC and the constitutionality of the PRRC’s make up, and seeks to vacate the current rates in Port Everglades. While the appeal was pending, the PRRC issued notices in this case with defects that mirror those challenged in the appeal. And the PRRC retains the composition that appellants argue is unconstitutional. Procedural defects in the instant rate review proceedings warrant dismissal, but these proceedings should at a minimum be stayed until the First DCA rules on the appeal.

RELEVANT PROCEDURAL HISTORY

I. Port Everglades

The Port Everglades rate review began in 2014 when two competing applications for rate change were filed. In August of 2018, the PRRC published a notice that stated the rates requested in the 2014 applications, but did not include the time, date, and place of the public hearing or the site visit to Port Everglades. Later, the PRRC issued a notice that included the time, date, and place of the public hearing and site visit but no statement of the rates requested in the 2014 applications. The PRRC issued its notice of intent to change the rates of pilotage at Port Everglades on January 22, 2019. Various impacted port users, including Crowley, filed petitions seeking, *inter alia*, referrals to the Department of Administrative Hearings. The petitions were denied on May 23, 2019. Timely appeals followed, and the case is currently pending before the First DCA (“Port Everglades Appeal”). *See* Case Nos. 1D19-2226, 1D19-2241, 1D19-2248 (consolidated).¹

II. Port Jacksonville and Port Fernandina

On October 1, 2019, the St. Johns Bar Pilot Association (the “Pilots”) filed a Revised and Updated Application for Change of Rates of Pilotage (“Revised Application”). The PRRC published notice of the Revised Application on November 22, 2019. The November 22nd Notice set forth the rates requested in the Revised Application but did not include the time, date, and place of the site visits to Port Jacksonville and Port Fernandina or the public hearing. On December 4, 2019, the PRRC published a notice that provided the dates, times, and places of the site visit of Port Jacksonville and the public hearing. However, the December 4th Notice did not include any date,

¹ Counsel for Appellees Port Everglades Pilots Association (the “PEV Pilots”) is also counsel for the St. John’s Bar Pilot Association in the instant matter. Counsel sought an extension of the deadline to file the PEV Pilots’ Response Brief to prepare for the public hearing in this case. As of the filing of this motion, the First DCA has not ruled on the requested extension of time.

time, or place for a site visit to Port Fernandina nor did it include a statement of the rates requested in the Revised Application.

ARGUMENT

These rate review proceedings should be dismissed for lack of jurisdiction due to the PRRC's failure to follow its own rules. Alternatively, these proceedings should be stayed in light of the Port Everglades Appeal.

I. Proceedings on the Pilot's Revised Application Should be Dismissed

“An administrative agency is bound by its own rules.” *Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Regulation*, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999) (citation omitted); *e.g., Marrero v. Dept of Prof'l Regulation, Bd. of Psychological Examiners*, 622 So. 2d 1109, 1112 (Fla. 1st DCA 1993). Here, the PRRC failed to comply with its rules, which requires dismissal of these proceedings.

The PRRC failed to comply with its rules as to notice, which state as follows:

The [PRRC] shall provide notice in the next available issue of the Florida Administrative Register [(“FAR”)] and in a newspaper of general circulation in the affected port area and by mailing such notice to each person or organization which has requested advance notice of hearings relating to rates of pilotage. **The notice shall state that an application for a change in the rates of pilotage has been filed with the [PRRC], state the affected port, contain a brief statement summarizing the requested change in rates of pilotage and state the time, date and place of the public hearing and site visit to the port to be conducted prior to the public hearing.**

Fla. Admin. Code R. 61G14-22.007(5) (emphasis added). Here, the November 22nd Notice did not state the time, date and place of the public hearing and site visit to Port Jacksonville and Port Fernandina. And the December 4th Notice did not include a brief statement summarizing the requested rate change in the Revised Application. The plain language of the rule indicates all of the information must be included in a single notice. Until the Revised Application is properly

noticed, the PRRC lacks the authority to change the rates of pilotage in Port Jacksonville and Port Fernandina.

Further, Crowley, through counsel in other rate review proceedings, has requested to receive notice of hearings related to rates of pilotage. However, the PRRC did not mail Crowley, through counsel, the November 22nd Notice or the December 4th Notice at or around the time of publication.² This is at odds with the language of the rule as well as statements made by Commissioners in prior rate review proceedings. *See, e.g.*, Tr. In re: Port Everglades dated Oct. 24, 2018 at 29:23–25 (Chairmen Wilkins, “[O]ur committee feels like it’s logical to hear from the cargo guys as well.”); Tr. Re. Port Everglades dated Oct. 25, 2018 (“Tr. Oct. 25, 2018”) at 10:25–11:4 (Commissioner Sola, “On the cargo, cargo I wish, you know, you’ve read the transcripts from Miami, and in Miami I was calling you out like the professor from Ferris Bueller; I was like cargo, cargo, cargo where are you.”). Indeed, according to the Investigation Committee’s (“IC”) report, no interested persons other than pilots attended the IC hearing and the IC received no feedback on the Pilots’ services. An investigation with no feedback or participation by any interested port operators is hardly an investigation at all. The universe of port and vessel operators is not large and it gets smaller when narrowed to those operators who have requested notice in the past. The PRRC erred by not providing notice to Crowley.

II. Alternatively, the Proceedings on the Pilot’s Revised Application Should be Stayed

These rate review proceedings should be stayed until the First DCA rules on the Port Everglades Appeal, which ruling may be dispositive to issues presented here. *See Indep. Fire Ins. Co. v. Arvidson*, 564 So. 2d 1254, 1255 (Fla. 4th DCA 1990).

² The notices were provided after a later public records request.

First, in the Port Everglades Appeal, the appellants (“PEV Appellants”) argued that PRRC’s notice was defective because, *inter alia*, the first notice described the requested rates but not the date, time, and place of the public hearing and site visit, and the second notice did not include a description of the requested rates. As noted above, the PRRC’s November 22nd Notice and December 4th Notice were similarly defective. Should the First DCA agree with the PEV Appellants that notice was defective, that ruling could control the similar notice issues here.

Second, the PEV Appellants challenged the Florida Statute Section 310.151’s composition of the PRRC as unconstitutional where active pilots are allowed to vote on rate increases for sister ports which, in turn, act as a basis for requested rate increases in their home ports.³ If the First DCA concludes that Section 310.151 is unconstitutional, that decision would control in these proceedings which are also conducted by the PRRC, composed pursuant to Section 310.151.

Third, unfunded retirement benefits, and the reasonableness, viability, and propriety of such benefits, should be front and center in these rate review proceedings. However, again, the First DCA’s ruling will be instructive as to how the PRRC is to deal with these anachronistic pension plans. Early in the Port Everglades rate review, the Florida Caribbean Cruise Associate (“FCCA”) rightly took issue with the PEV Pilots’ unfunded retirement benefits. Those concerns fell by the wayside when the PEV Pilots agreed to a collusive rate structure that would decrease the rates charged to FCCA members. The PRRC did not determine the value of these benefits as required by law. Issues concerning a pension plan similar to that used by the Pilots are currently pending before the First DCA. The PRRC should wait for a ruling from the First DCA before addressing the Pilots’ unfunded retirement benefits here.

³ That is exactly what happened here. Commissioner Seuter, a St. Johns Bar Pilot, was one of the most forceful supporters of the Port Everglades “settlement” rates. Now those rates – the subject of the pending appeal – are being used to justify large rate increase in his home port.

Fourth, the Pilots modeled their requested rates after the rate structure in Port Everglades. The Pilots compared Port Everglades to Port Jacksonville and Port Fernandina to justify the requested rates. However, if PEV Appellants succeed in their appeal, the Port Everglades rates may be vacated. Should this occur, Port Everglades' rates would not support the Pilots' rate request. And the rate change that is ultimately approved in Port Everglades, if any, could alter the determination of the reasonableness of the rates requested here. *See* Fla. Stat. § 310.151(5)(b)4 (requiring the PRRC to consider pilotage rates in other ports to determine whether the requested rate change will result in fair, just, and reasonable rates of pilotage).

Because the Port Everglades Appeal will likely control many legal issues in the instant rate review proceedings, these proceedings should be stayed pending a ruling by the First DCA.

CONCLUSION

The PRRC's failure to follow its own rules requires that these proceedings be dismissed. Alternatively, these proceedings should be stayed until the First DCA rules on the Port Everglades Appeal.

Date: January 17, 2020.

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