

**IN THE 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,

CASE NOS.: 1D19-2226,  
1D19-2241,  
1D19-2248

v.

DEPARTMENT OF BUSINES AND  
PROFESSIONAL REGULATION,  
PILOTAGE RATE REVIEW COMMITTEE, and  
FLORIDA CARIBBEAN CRUISE ASSOCIATION,

L.T. NO.: PRRC 2014-2

Appellees

v.

PORT EVERGLADES PILOTS ASSOCIATION,

Appellee/Cross-Appellant

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**ON APPEAL FROM A FINAL ORDER  
OF THE PILOTAGE RATE REVIEW COMMITTEE**

**PILOTAGE RATE REVIEW COMMITTEE'S  
CROSS-ANSWER BRIEF**

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## **STATEMENT OF THE CASE AND FACTS**

Mr. Pinsky, a non-attorney consultant for Balearia Caribbean, LTD (“Balearia”), sought guidance from staff of the Pilotage Rate Review Committee (“Committee”) about the process for addressing the Committee at a public hearing on the Port Everglades rate proceeding. R 686. The communication occurred via email. R 686. Mr. Pinsky subsequently appeared at the public hearing and addressed the Committee. At the public hearing he specifically asked about the timeframe for filing a petition and was informed that it was 21 days after publication. R 164. Although he never asked to receive a copy of Notice of Intent to Modify Rates (“Notice of Intent”) by email, Committee Staff included him on a mass email containing the Notice of Intent as an attachment. R 573-74. The text of the mass email was simply “FYI.” R 574.

Mr. Pinsky was not aware that that he received a copy of the Notice of Intent via email, R 687, but he was in communication with Committee Staff and received copies of the notices published in the Florida Administrative Register (“FAR”) and the Sun-Sentinel newspaper stating that interested persons had 21 days from the date of publication to challenge the Notice of Intent. R 688. The FAR notice was published on January 23, 2019, and Balearia timely filed its Petition on February 13, 2019. R 514.

The Port Everglades Pilots Association (“Pilots”) moved to dismiss Balearia’s Petition as untimely. R 549-54. The Committee, in its Final Order, determined that the Petition was timely filed. R 785-86. The Pilots cross-appealed that determination.

### **SUMMARY OF THE ARGUMENT**

While section 310.151(4)(a), *Florida Statutes*, provides that a petition can be filed within 21 days of receipt of email notification or publication, it does not specify that the 21 days is counted from the first notice received. The Committee properly determined that Balearia’s Petition was timely filed because it was filed within 21 days after publication of notice in the FAR. Furthermore, the email sent to Balearia by Committee Staff did not suffice as notice because Balearia never formally requested notice by email, as required by section 310.151(4)(a), *Florida Statutes*, and because the text of the email failed to state that method and timeframe for filing a Petition. Accordingly, The Committee’s decision was not a material error in procedure which impaired the fairness of the proceedings and the decision should be affirmed.

### **STANDARD OF REVIEW**

The standard of review is whether the Committee’s determination that Balearia’s Petition was timely filed was a material error in procedure which impaired the fairness of the proceedings. *See Hood v. Fla. Unemployment Appeals*

*Comm'n*, 72 So. 3d 273, (Fla. 1<sup>st</sup> DCA 2011) (determining that agency's decision, that petitions were untimely filed, did not constitute not a material error in procedure that affected the fairness of the proceedings), *see also* § 120.68(7)(c), *Fla. Stat.*

### **ARGUMENT**

Section 310.151(4)(a), *Florida Statutes*, specifies that notice of a proposed rate change is served differently on the applicants for the rate change than the non-applicants. Applicants “shall be given written notice, either in person or by certified mail.” §310.151(4)(a). Non-applicants are notified using three methods - publication in the FAR, publication in a newspaper of general circulation in the port area, and by mail “to any person who has formally requested notice of any rate change in the affected port.” §310.151(4)(a), Fla. Stat. As a matter of practicality, non-applicants who formally request notice of any rate change in the affected port receive that notice by email.

Regarding the timeframes for non-applicants to challenge a proposed rate modification, Section 310.151(4)(a), Florida Statutes, specifically provides:

Notice of the intent to modify the pilotage rates in that port shall also be published in the Florida Administrative Register and in a newspaper of general circulation in the affected port area and shall be mailed to any person who has formally requested notice of any rate change in the affected port area. Within 21 days after receipt or publication of notice, any person whose substantial interests will be affected by the intended committee action may request a hearing pursuant to the Administrative Procedure Act.

S 310.151(4)(a), *Fla. Stat.* (emphasis added). If an interested party receives notice by email first and then receives notice by publication, that entity has 21 days to respond after receipt of the emailed notice or 21 days to respond after publication. The text of the statute does not base timeliness on which notice was received first or last, and such a requirement should not be read into the statute. *See SWS Partnership v. Fla. Dep't of Corrections*, 567 So. 2d 1048, 1049 (Fla. 5<sup>th</sup> DCA 1990)(reversing agency's decision to dismiss a bid protest for being untimely filed).

In *SWS Partnership* the Court considered the following statutory language:

Any person who is affected adversely by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the bid tabulation or after receipt of the notice of the agency decision....

*Id.* (emphasis added). The bid tabulation was posted before notice was mailed to the SWS Partnership, a losing bidder. SWS filed a protest the day after it received the notice in the mail. The agency dismissed the protest because it was filed more than 72 hours after the posting of the bid tabulation. The Court reversed, finding “conspicuously absent” a requirement that the 72 hours was tied to which ever form of notice occurred first. *Id.*

Likewise, in section 310.151(4)(a), a requirement tying the 21 days to which form of notice is received first or last is “conspicuously absent.” *Id.* Balearia's

Petition was timely filed because it was received on February 13, 2019, 21 days after notice was published in the FAR. That it received the Notice of Intent through email prior to the publication in the FAR does not matter. *See id.*

Section 310.151(4)(a) allows notice to be provided by email when it is formally requested, but Balearia never did that. Furthermore, Balearia's representative was informed at a public hearing that notice would be published, and he communicated with Committee Staff to find out when notice would be published. In addition, the text of the email, which was simply "FYI," gave no indication of the significance of the attached Notice of Intent, making it difficult for a non-lawyer to deduce that the attachment served as a notice. In *City of St. Cloud v. Dep't of Env'tl. Regulation*, 490 So. 2d 1356, 1358 (Fla. 5<sup>th</sup> DCA 1986), the court determined that notice was not provided to the City when its engineer received a notice of intent attached to a cover letter that only provided instructions on publishing notice, not filing a petition. *Id.* The cover letter in *St. Cloud* is analogous to the email sent to Mr. Pinsky, which contained no instructions on filing a petition. Under these circumstances, the email did not provide notice to Balearia. *See id.*

The Pilots claim that the statute must be interpreted such that the 21 days runs from which ever notice is received first, or else entities could avoid reading the FAR or newspaper of general circulation and possibly receive notice much

later. First, the term “receipt” as used in section 310.151(4)(a), *Florida Statutes*, refers to someone who formally requested to receive notice by mailing, which Balearia did not do. Second, an entity cannot claim a lack of notice because it failed to check the FAR or newspaper. If that were the case, then administrative procedures which are only noticed by publication, for example rulemaking, could possibly be open to challenge until a substantially affected person receives actual notice. Fortunately, that is not the case and petitions are dismissed if they are not timely filed after publication, regardless of whether the notice was seen. *See e.g. Florida Pulp & Paper Ass'n Env'tl. Affairs, Inc. v. Dep't of Env'tl. Prot.*, 223 So. 3d 417, 419 (Fla. 1st DCA 2017), *State, Dept. of Health & Rehab. Services v. Alice P.*, 367 So. 2d 1045, 1052–53 (Fla. 1st DCA 1979), *see also, Accardi v. Dep't of Env'tl Prot.*, 842 So. 2d 992, 996 (Fla. 4<sup>th</sup> DCA 2002) (determining that petition challenging a permit to build a dock was timely filed when petitioners first observed the construction because they were not provided notice directly and notice was not published). When notice is published it is effective whether read or not, unless an entity is required to be served directly.

The text of section 310.151(4)(a), *Florida Statutes*, does not link the timeliness of a petition to the form of notice a petitioner received first, and the Pilots erroneously read such a requirement into the statute. Accordingly, Balearia's Petition was timely because it was filed within 21 days of the notice

published in the FAR. For this reason, the determination in the Final Order that Balearia's Petition was timely filed should be affirmed.

**CONCLUSION**

The determination in the Final Order that Balearia's Petition was timely filed should be affirmed.

Respectfully submitted this 15<sup>th</sup> day of April, 2020.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice was served by electronic mail on this 15<sup>th</sup> day of April, 2020 to:

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**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the foregoing brief is completed in Times New Roman, 14-point font, in compliance with 9.210(a)(2), Florida Rules of Appellate Procedure.

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