

**FLORIDA DEPARTMENT OF BUSINESS  
AND PROFESSIONAL REGULATION**

**PILOTAGE RATE REVIEW COMMITTEE**

<b>FILED</b>	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	10/17/2014
File #	

In re: Application for a Change in  
Rates of Pilotage, filed by the Florida-  
Caribbean Cruise Association.

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**PORT EVERGLADES PILOTS ASSOCIATION'S MOTION  
TO DISQUALIFY COMMISSIONERS BURKE AND MIGUEZ  
OR, IN THE ALTERNATIVE, TO STAY THE PROCEEDING**

Pursuant to Section 120.665, Florida Statutes, the Port Everglades Pilots Association (the "Association") moves for disqualification of Commissioners Burke and Miguez from this proceeding or, in the alternative, for a stay of this proceeding pending a decision on the merits in *Biscayne Bay Pilots, Inc. v. Florida-Caribbean Cruise Association*, No. 1D14-3974 (Fla. 1st DCA).

**INTRODUCTION**

Commissioners Burke and Miguez are senior executives of two of the principal cruise lines that comprise the Florida-Caribbean Cruise Association (the "FCCA")—the same entity that filed the present application for rate reduction. Because the Association reasonably fears that it will not receive a fair and impartial hearing, the Commissioners must be disqualified.

In the alternative, the Committee should stay this proceeding pending a decision by the First DCA in *Biscayne Bay Pilots*. The First DCA has issued an order to show cause and entered a temporary stay of an analogous proceeding initiated by the FCCA with respect to PortMiami. It stands to reason that, for the same reasons, the Committee should stay this proceeding as well.

## **BACKGROUND**

On July 29, 2014, the FCCA filed an application for a decrease in the rates of pilotage for vessels calling on Port Everglades.

Four months earlier, on March 18, 2014, the FCCA filed a similar application for a decrease in the rates of pilotage charged for vessels calling on PortMiami. Biscayne Bay Pilots, Inc. (“BBP”), an association of pilots that perform pilotage services at PortMiami, intervened.

On July 24, 2014, BBP filed a motion to disqualify Commissioners Burke and Miguez pursuant to Section 120.665, Florida Statutes. The motion asserted that Commissioners Burke and Miguez are senior executives of two of the largest members of the FCCA—the entity that filed the application—and that Commissioners Burke and Miguez should be disqualified from the proceeding on account of “bias, prejudice, or interest.” *See* § 120.665, Fla. Stat. (2014).

At the hearing on the FCCA’s application, the Committee denied BBP’s motion and, by a 4-to-3 vote, approved the requested rate decrease. Commissioners Burke and Miguez were among the Committee’s single-member majority. The Committee will in the future reconvene for a vote on the written notice intended to formalize the Committee’s decision to approve the rate decreases.

On September 2, 2014, BBP filed a Petition for Writ of Prohibition in the First DCA, seeking a writ prohibiting Commissioners Burke and Miguez from participating in proceedings concerning the FCCA’s application with respect to PortMiami. On September 5, 2014, the First DCA converted the Petition for Writ of Prohibition into a petition seeking review of non-final agency action and ordered the FCCA to show cause why the petition should not be granted.

BBP filed two motions to stay this Committee’s further consideration of the FCCA’s application—first with this Committee and then in the First DCA. *See* Ex. A. On October 1,

2014, the First DCA stayed further proceedings by this Committee pending this Committee's consideration and disposition of BBP's pending motion to stay. *See* Ex. B. Under the First DCA's order, if the Committee denies the motion to stay, the temporary stay will remain in effect for an additional ten days, during which BBP may seek review of the denial of its motion.

### ARGUMENT

Because Commissioners Burke and Miguez are senior executives of two of the largest cruise lines that comprise the FCCA—the entity that filed the application to decrease the rates of pilotage for vessels calling on Port Everglades—Commissioners Burke and Miguez should be disqualified from further proceedings on that application. In the alternative, rather than render an invalid decision, the Committee should stay this proceeding pending a decision on the merits by the First DCA.

An impartial decision-maker “is a basic component of minimum due process in an administrative hearing.” *Charlotte Cnty. v. IMC-Phosphates Co.*, 824 So. 2d 298, 300-01 (Fla. 1st DCA 2002). To this end, Section 120.665(1), Florida Statutes, provides that “any individual serving alone or with others as an agency head may be disqualified from serving in any agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause.” “Agency head” is defined broadly to mean “the person or collegial body in a department or other government unit statutorily responsible for final agency action.” § 120.52(3), Fla. Stat. (2014).

A movant makes a legally sufficient showing under Section 120.665 if “the facts alleged would prompt a reasonably prudent person to fear that they will not obtain a fair and impartial hearing.” *IMC-Phosphates Co.*, 824 So. 2d at 300; *accord Pelham v. Sch. Bd. of Wakulla Cnty.*, 451 So. 2d 1004, 1005 (Fla. 1st DCA 1984). The question is not “how the judge actually feels,

but what feeling resides in the movant's mind and the basis for such feeling." *IMC-Phosphates Co.*, 824 So. 2d at 300. If a Commissioner is disqualified, then the Governor may appoint a substitute to serve in the affected proceeding, or, if a quorum remains after disqualification, the Committee may proceed absent the appointment of a substitute. § 120.665(1), Fla. Stat. (2014).

Here, a reasonably prudent person would fear that the proceedings will not be fair and impartial. As in the PortMiami proceeding, the FCCA has filed an application to decrease rates of pilotage. Commissioners Burke and Miguez are senior executives of two of the largest cruise-line members of the FCCA. Commissioner Burke has been employed by Royal Caribbean Cruises, Ltd., for more than eleven years, and now serves as its Vice President of Risk Management. Commissioner Miguez has been employed by Carnival Corporation for more than seventeen years and now serves as its Vice President and Deputy General Counsel. Carnival and Royal Caribbean are prominent members of the FCCA, which consists of fifteen member cruise lines operating more than 100 vessels in Floridian, Caribbean, and Latin American waters.

A reasonably prudent person would not consider Commissioners Burke and Miguez to be sufficiently insulated from "bias, prejudice, or interest" to be objective members of the Committee. A reasonably prudent person would fear that Commissioners Burke and Miguez will protect the interests of their companies—and the savings that their companies would enjoy if the application were granted—rather than predicate their decisions on an objective assessment of the evidence. The First DCA's show-cause order and temporary stay of proceedings on the application to reduce rates of pilotage at PortMiami are at least indications that the close nexus between Commissioners Burke and Miguez and the FCCA would prompt a reasonably prudent person to fear that the decision-maker is not (as due process requires) impartial.

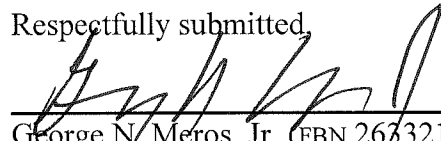
In the alternative, the Committee should stay this proceeding pending the First DCA's decision on the merits in *Biscayne Bay Pilots*. *Biscayne Bay Pilots* raises the precise question raised in this motion: whether Section 120.665 disqualifies Commissioners Burke and Miguez from participating in a proceeding on an application filed by the FCCA. Thus, the Committee should stay this proceeding and await the First DCA's decision before it proceeds to consider the FCCA's application in this case. If the Committee were to grant the application and, after the decreased rates takes effect, the First DCA were to hold that Commissioners Burke and Miguez should have been disqualified, the Committee's invalid decision would cause irreparable harm.

**Certificate of Conference**

Counsel for the Association has conferred in good faith with counsel for the FCCA with respect to the relief sought in this motion. The FCCA opposes the motion.

**WHEREFORE**, the Port Everglades Pilots Association respectfully moves for disqualification of Commissioners Burke and Miguez or, in the alternative, for a stay pending a decision on the merits in *Biscayne Bay Pilots, Inc. v. Florida-Caribbean Cruise Association*, No. 1D14-3974 (Fla. 1st DCA).

Respectfully submitted,



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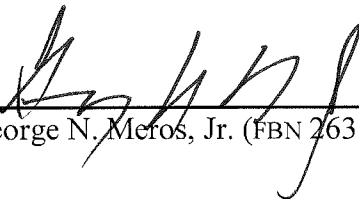
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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was served on October 17, 2014, by electronic delivery upon the following counsel:

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**FLORIDA DEPARTMENT OF BUSINESS  
AND PROFESSIONAL REGULATION,  
PILOTAGE RATE REVIEW COMMITTEE**

In re: Application for a Change in Rates  
of Pilotage, filed by the Florida-  
Caribbean Cruise Association

Case No.: PRRC 2014-A  
First DCA Case No. 1D14-3974

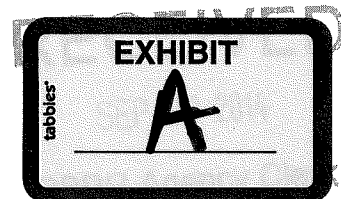
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**MOTION FOR STAY PENDING APPELLATE REVIEW**

Pursuant to rule 9.190(e)(2)(A), Florida Rules of Appellate Procedure, Intervenor Biscayne Bay Pilots, Inc. (“BBP” or “the pilots”) files this Motion for Stay Pending Appellate Review and states:

1. On September 2, 2014, BBP filed a Petition for Writ of Prohibition with the First District Court of Appeal seeking review of an Order of the Pilotage Rate Review Committee that was rendered on August 27, 2014. That Order (attached as **Exhibit A**) denied BBP’s motion to disqualify Commissioners Burke and Miguez for bias, prejudice, or interest because they are employed by members of the Florida-Caribbean Cruise Association – the very applicant that is seeking a reduction in pilotage rates for passenger vessels calling on PortMiami. A copy of BBP’s petition filed with the First District Court of Appeal (minus exhibits) is attached as **Exhibit B**.

2. On September 5, 2015, the First District Court of Appeal entered an Order converting BBP’s Petition for Writ of Prohibition to a Petition Seeking Review of Non-Final Agency Action, in accordance with rule 9.190(b)(2), Florida Rules of Appellate Procedure. The Court’s Order is attached as **Exhibit C**.



3. The Court's Order also established a briefing schedule in connection with BBP's petition. The Court directed respondents to show cause, on or before October 3, 2014, why the petition for review of non-final agency action should not be granted. BBP may reply to the response within 20 days thereafter. *See Exhibit C*.

4. Rule 9.190(e)(2)(A), Florida Rules of Appellate Procedure, provides that a motion for stay pending appellate review may be filed with the lower tribunal, i.e., the Pilotage Rate Review Committee ("Rate Review Committee"). Factors to be taken into account when considering whether a stay should be granted include the likelihood of success on the merits and the likelihood of harm should a stay not be granted. *See Perez v. Perez*, 769 So. 2d 389, 391 n.4 (Fla. 3d DCA 1999).<sup>1</sup>

5. As discussed below, BBP's petition meets both of these tests. Additionally, a stay conserves the agency's resources and is in the public interest, as further action on FCCA's application will be a nullity and wasted effort if the First District Court of Appeal agrees with BBP and rules that Commissioners Burke and Miguez should have been disqualified. As discussed in more detail below, the Rate Review Committee cast a preliminary vote on FCCA's application at its hearing on August 1, 2014, in the same proceeding where BBP's motion for disqualification of Commissioners Burke and Miguez was denied. That preliminary vote is not final, as the Rate Review Committee must have a second meeting to review a written Notice of Intent that will be prepared by the Rate Review Committee's attorney. *See Exhibit D* (excerpt

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<sup>1</sup> Very little case law interprets the stay provision of rule 9.190, which governs stays in administrative appeals, and was first adopted in January 1, 2001. *See Ludwig v. Dep't of Health*, 778 So. 2d 531, 533 (Fla. 1<sup>st</sup> DCA 2001). Cases interpreting rule 9.310, the general appellate rule concerning stays, frequently cite the standard articulated in *Perez*. *See, e.g., Mitchell v. State*, 911 So. 2d 1211, 1219 (Fla. 2005); *Tampa Sports Auth. v. Johnston*, 914 So. 2d 1076, 1079 (Fla. 2d DCA 2005); *Sepich v. Papadopoulos*, 2014 WL 2880212 \*1, n.6 (Fla. 3d DCA June 25, 2014).



of transcript of the July 31-August 1, 2014, hearing at p. 598, lines 14-25; p. 599, lines 1-25; p. 600, lines 1-20 where the Rate Review Committee's attorney explained the procedures concerning the Rate Review Committee's decision-making process). That second meeting has not yet been scheduled; thus, no order from the Rate Review Committee concerning the decision on FCCA's application for rate reduction has been rendered, and another vote by the Rate Review Committee is required before any proposed agency action exists.

6. This Motion for Stay seeks to prevent the Rate Review Committee from holding its second meeting on the FCCA application and from taking any other action in this case until after the appellate court has issued a decision concerning BBP's petition seeking review of the Committee's order denying the motion to disqualify Commissioners Burke and Miguez.

#### **Likelihood of Success on the Merits**

7. BBP is likely to succeed on the merits of its petition. The pilots' motion was filed pursuant to section 120.665, Florida Statutes, which provides for the disqualification of an "agency head" for "bias, prejudice, or interest." The Rate Review Committee is the "agency head," pursuant to the Florida Administrative Procedure Act ("APA"), for purposes of considering a pending request by FCCA to reduce the rates of pilotage for cruise ships calling on PortMiami by 25 percent. § 310.151(4), (7), Fla. Stat. The basis for BBP's petition is that Commissioners Burke and Miguez – two members of the collegial Rate Review Committee – are employees and senior executives of two of the largest members of the entity that filed the application, FCCA.

8. The first page of FCCA's application for a reduction in pilotage rates states: "Applicant is a not-for-profit trade organization composed of 15 member cruise lines operating more than 100 vessels in Floridian, Caribbean and Latin American waters. Applicant represents

close to every cruise line company that either calls on PortMiami throughout the year or calls PortMiami home, including Carnival Cruise Lines, Celebrity Cruises, Costa Cruises, Crystal Cruises, Disney Cruise Line, MSC Cruises, Norwegian Cruise Line, Princess Cruises, and Royal Caribbean." (Emphasis supplied.) Commissioner Burke's application to the Board of Pilot Commissioners demonstrates that he has been employed by Royal Caribbean for more than 11 years. Commissioner Miguez's application shows that he has been employed by Carnival for more than 17 years. Both men obviously are senior executives of members of the applicant entity and, as such, cannot be considered as objective Committee members who will make a decision based on the evidence presented, as opposed to what is in the best interest of their employers.

9. Section 120.665 explicitly recognizes that even when the Florida Code of Ethics does not require a public officer to refrain from participating in a particular proceeding, there are times when an "agency head" should nonetheless be disqualified because of "bias, prejudice, or interest." Section 120.665(1) provides:

Notwithstanding the provisions of s. 112.3143, any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding. If the disqualified individual was appointed, the appointing power may appoint a substitute to serve in the matter from which the individual is disqualified. If the individual is an elected official, the Governor may appoint a substitute to serve in the matter from which the individual is disqualified. However, if a quorum remains after the individual is disqualified, it shall not be necessary to appoint a substitute.

(Emphasis supplied).<sup>2</sup>

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<sup>2</sup> Section 310.151(1)(c), which governs the Committee and its consideration of changes in pilotage rates, references section 112.3143, which is part of the Florida Code of Ethics for public officials. Section 310.151(1)(c) provides: "Committee members shall comply with the disclosure requirements of s. 112.3143(4) if participating in any matter that would result in special private gain or loss as described in that subsection."

10. “Agency head” is defined in the APA as “the person or collegial body in a department or other government unit statutorily responsible for final agency action.” § 120.52(3), Fla. Stat. The Rate Review Committee is responsible for final agency action regarding rates. *See* §§ 310.151(4)(a) and (7), Fla. Stat. Thus, the Rate Review Committee is an “agency head” subject to section 120.665.

11. As the party seeking disqualification of Commissioners Burke and Miguez, BBP is required to demonstrate “just cause” why they should be disqualified. *See Bay Bank & Trust Co. v. Lewis*, 634 So. 2d 672, 678 (Fla. 1st DCA 1994). The standard for showing bias or prejudice pursuant to section 120.665 is “whether the facts alleged would prompt a reasonably prudent person to fear that they will not obtain a fair and impartial hearing.” *Charlotte Cnty. v. IMC-Phosphates Co.*, 824 So. 2d 298 (Fla. 5th DCA 2002). **“It is not a question of how the [agency head] actually feels, but what feeling resides in the movant’s mind and the basis for such feeling.”** *Id.* (Emphasis supplied). The court in *IMC-Phosphates* also noted that “an impartial decision-maker is a basic component of minimum due process in an administrative proceeding.” *Id.* at 300-01, (quoting *Cherry Communications, Inc. v. Deason*, 652 So. 2d 803, 804-05 (Fla. 1995)).

12. Other cases also emphasize the importance of an impartial decision-maker. In *Verizon Business Network Services, Inc. v. Department of Corrections*, 988 So. 2d 1148, 1151 (Fla. 1st DCA 2008), the First District Court of Appeal found that the Secretary of the Department of Corrections was not impartial as to the outcome of administrative proceedings and that a neutral third party should prepare the agency’s final order. The opinion reasoned:

[T]he right of every litigant to appear before an impartial tribunal is a fundamental tenet of the constitutional guarantee of due process. . . . The constitutional guarantee of due process requires that judicial decisions be reached by a means that ‘preserves both the appearance and reality of fairness.’

*Id.* (quoting *Sparks v. State*, 740 So. 2d 33, 36 (Fla. 1<sup>st</sup> DCA 1999)).

13. Case law discussing when a presiding officer is biased often focuses on whether that presiding officer has “prejudged” a particular case. *See, e.g., Wargo v. Wargo*, 669 So. 2d 1123, 1124-25 (Fla. 4th DCA 1996) (“A judge may form mental impressions and opinions during the course of presentation of evidence, as long as she does not ‘prejudge the case.’”) (quoting *Brown v. Pate*, 577 So. 2d 645, 647 (Fla. 1st DCA 1991)); *Williams v. Balch*, 897 So. 2d 498, 498 (Fla. 4th DCA 2005) (“Disqualification is required when litigants demonstrate a reasonable, well-grounded fear that they will not receive a fair and impartial trial or that the judge has pre-judged the case.”).<sup>3</sup>

14. Importantly, BBP does not seek to disqualify Commissioners Burke and Miguez because they are associated with the commercial passenger cruise industry. Section 310.151 contemplates that two members of the Committee may come from that industry. Rather, it is their employment by members of the Applicant itself, FCCA, which demonstrates bias, prejudice, or interest.<sup>4</sup> Notably, Commissioner Fernandez, the BBP pilot who serves on the Rate

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<sup>3</sup> Although the standards for disqualification of judges may not be identical to the standards for disqualification of an agency head pursuant to section 120.665 (see discussion in *Bay Bank & Trust*, 634 So. 2d at 678), the court in *IMC-Phosphates Co.* relied on the established standards for disqualification of judges in establishing the legal standard for disqualification pursuant to section 120.665 and determining that the head of a state agency needed to be disqualified from entering the final order in an administrative proceeding. 824 So. 2d at 300.

<sup>4</sup> BBP would have no objection to Commissioners Burke and Miguez serving on the Committee if the application had been filed by cruise lines that do not employ them. For example, if Costa Cruises, Disney Cruise Line, Norwegian Cruise Line, or any other cruise line that does not employ committee members had filed the application, BBP would not be seeking to disqualify Commissioners Burke and Miguez. But the application has been filed by the cruise line association, which includes Royal Caribbean and Carnival. Thus, these two Committee members are employed by members of the applicant entity, which presents an inherent conflict of interest.

Review Committee, recused himself from the FCCA rate decrease proceeding. Just as Commissioner Fernandez was presumed to have a conflict of interest concerning the rates of pilotage in the port where he works, no reasonable person would expect Commissioners Burke and Miguez to vote against the interests of their employers – Royal Caribbean and Carnival – in a proceeding that has the potential of saving their employers substantial amounts of money in that port. Thus, BBP has a well-founded fear that it will not receive a fair and impartial decision from the Committee, and it is reasonable to assume that Commissioners Burke and Miguez have “prejudged” the FCCA application and are prepared to ultimately vote in favor of the requested 25 percent reduction in pilotage rates for PortMiami, as they did orally at the public hearing on August 1, 2014. These facts demonstrate that BBP is likely to prevail on the merits of its petition that is pending before the First District Court of Appeal.

#### **Likelihood of Harm**

15. If Commissioners Burke and Miguez are permitted to vote on FCCA’s pending application, the pilots will be irreparably harmed, as section 310.151(4)(b) requires that any proposed agency action of the Rate Review Committee concerning rates becomes immediately effective, even if the substantially affected party seeks a hearing at the Division of Administrative Hearings (“DOAH”). Other than seeking review of the Committee’s ruling on the disqualification motion in the First District Court of Appeal, the pilots have no appropriate and adequate means of preventing Commissioners Burke and Miguez from participating in the next phase of the FCCA proceeding and voting on the FCCA’s application.

16. This next phase is expected to result in the Committee’s issuance of a “written notice” stating that the Committee intends to modify the pilotage rates in the port where the change was requested. § 310.151(4). Fla. Stat. (Emphasis supplied). Such notice must be

provided to an applicant either in person or by certified mail and also published in the Florida Administrative Register and in a newspaper of general circulation in the affected port area. *Id.*

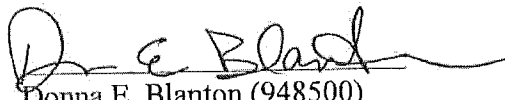
17. Within 21 days after receipt or publication of the notice, any person whose substantial interests will be affected by the intended Committee action may request a hearing pursuant to the APA. *Id.* In accordance with usual practices under the APA, section 310.151(4)(a) provides that if the petition requesting a hearing raises a disputed issue of material fact, the hearing will be conducted by an Administrative Law Judge (“ALJ”) at DOAH pursuant to sections 120.569 and 120.57(1), Florida Statutes, unless waived by all parties. If the Committee concludes that the petition does not raise a disputed issue of material fact, the Committee’s decision shall be considered final agency action for purposes of an appeal to a District Court of Appeal pursuant to section 120.68. *Id.*

18. Contrary to usual procedures involving proposed agency action under the APA, the Committee’s proposed rate determination is not stayed and is immediately effective even if the applicant or a substantially affected person or entity requests an administrative hearing. § 310.151(4)(b), Fla. Stat. However, pending entry of a final order in the proceeding, the pilots in the subject port are required to deposit in an interest-bearing account all amounts received that represent the difference between the previous rates and the proposed rates. *Id.* Such amounts ultimately upheld following the administrative litigation are distributed after entry of the final order. *Id.*

19. Because of the immediate impact of the Rate Review Committee’s decision on FCCA’s application for a rate decrease, it is imperative that this Motion for Stay Pending Appellate Review be granted to avoid the likelihood of harm to the pilots.

For the reasons expressed, BBP respectfully requests that this Committee grant the Motion for Stay Pending Appellate Review.

Respectfully submitted,



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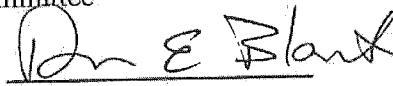
**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing was served this 9<sup>th</sup> day of September, 2014, via

email to the following:

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October 01, 2014

CASE NO.: 1D14-3974  
L.T. No.: PRRC 2014-A

Biscayne Bay Pilots, Inc.

v.

Florida Caribbean-Cruise  
Association

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Appellant / Petitioner(s),

Appellee / Respondent(s)

**BY ORDER OF THE COURT:**

Upon consideration of petitioner's motion for stay filed September 12, 2014, and the responses thereto, further proceedings concerning the application to reduce pilotage rates are temporarily stayed pending consideration and disposition of the motion for stay filed in the lower tribunal.

If that motion is denied, the temporary stay shall remain in effect for a period of ten days following rendition of the lower tribunal's order denying a stay, in order to permit the filing of a motion for review pursuant to Florida Rule of Appellate Procedure 9.310(f). If such a motion is filed within ten days of rendition of the lower tribunal's order denying a stay, the temporary stay shall continue in effect pending this court's consideration and disposition of the motion for review.

The motion for extension of time filed September 11, 2014, is granted, and time for filing of the movant's response to the order to show cause of September 5, 2014, is extended to and including October 21, 2014.

**I HEREBY CERTIFY** that the foregoing is (a true copy of) the original court order.

Served:

Thomas F. Panza  
Donna E. Blanton

Teresa L. Mussetto, A. A. G.  
Marlene K. Stern, a. A. G.

Clark R. Jennings  
Robert Peltz

cc

  
\_\_\_\_\_  
JON S. WHEELER, CLERK

