

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

BISCAYNE BAY PILOTS, INC.,

Petitioner,

v.

FLORIDA CARIBBEAN-CRUISE
ASSOCIATION,

Respondent.

PETITION FOR WRIT OF PROHIBITION

Pursuant to rules 9.030(b)(3) and 9.100, Florida Rules of Appellate Procedure, Petitioner Biscayne Bay Pilots, Inc. (“BBP” or “the Pilots”) files this Petition for Writ of Prohibition seeking review of two orders entered by members of the Pilotage Rate Review Committee (“Rate Review Committee”). These orders of Commissioners Thomas Burke and Enrique Miguez, rendered on April 24, 2015, and April 21, 2015, respectively, reflect that the commissioners decline to disqualify themselves from participating in a proceeding initiated by Respondent Florida Caribbean-Cruise Association (“FCCA”) to reduce the rates of pilotage for passenger vessels in PortMiami by 25 percent. These orders were entered in response to BBP’s Motion and Suggestion to Disqualify Commissioners Burke and Miguez (“Motion to Disqualify”). A copy of Commissioner Burke’s order is at

Exhibit A to the Appendix, and a copy of Commissioner Miguez’s order is at **Exhibit B to the Appendix**. A copy of the Pilots’ Motion to Disqualify is at **Exhibit C to the Appendix**.

The orders of Commissioners Burke and Miguez were entered following this Court’s opinion in Case No. 1D14-3974, *Biscayne Bay Pilots, Inc. v. Florida Caribbean-Cruise Association*, 2015 WL 1546085, April 8, 2015. That opinion denied the Pilots’ petition for writ of prohibition seeking review of the Rate Review Committee’s order denying the Pilots’ Motion to Disqualify on the grounds that “[w]ithout a written order from the individual commissioners, we do not have jurisdiction to review their decisions. . .,” but “without prejudice to the Pilots’ right to seek review of the written orders entered by the commissioners.” *Id.* at *4.

I. Basis for Invoking the Jurisdiction of the Court

The Pilots’ Motion to Disqualify 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 the pending request by FCCA to reduce the rates of pilotage for cruise ships calling on PortMiami by 25%. § 310.151(4), (7), Fla. Stat. The basis for this 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. This Court has found that a petition for writ of prohibition is the appropriate action for challenging an agency head’s decision to deny a motion filed pursuant to section 120.665. *Charlotte County v. IMC-Phosphates Co.*, 824 So. 2d 298, 300 (Fla. 1st DCA 2002); *Bay Bank & Trust Co. v. Lewis*, 634 So. 2d 672, 678 (Fla. 1st DCA 1994).

Additionally, if Commissioners Burke and Miguez are permitted to vote¹ on

¹ As discussed below, the Rate Review Committee cast a preliminary vote on FCCA’s Application at a hearing on August 1, 2014, in the same proceeding where BBP’s motion for disqualification of Commissioners Burke and Miguez was denied by the Rate Review Committee. 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 Appendix, Exhibit D* (transcript of the July 31-August 1, 2014, hearing at p. 591, lines 14-25; p. 592, lines 1-25; p. 593, 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 has been rendered, and another vote by the Rate Review Committee is required before any proposed agency action exists.

Moreover, once this vote is finalized, it will result only in preliminary agency action that is subject to administrative review via a hearing pursuant to section 120.57(1) assuming the Rate Review Committee finds that the petition for hearing asserts disputed issues of material fact. *Cf. Boca Raton Artificial Kidney Ctr., Inc. v. Fla. Dep’t of Health & Rehab. Servs.*, 475 So. 2d 260, 261-62 (Fla. 1st DCA 1985) (finding that the issuance of a certificate of need was a preliminary agency action subject to administrative review). *See also* § 310.151(4)(a), Fla. Stat. (stating that the Rate Review Committee shall designate a hearing conducted by an ALJ pursuant to section 120.569 and 120.57(1) if the Rate Review Committee concludes that the petitioner has raised a disputed issue of material fact). The purpose of a hearing conducted by an ALJ at the Division of Administrative Hearings (“DOAH”) is to “aid in the formulation of final agency action.” *Id.* at

FCCA’s pending application, the Pilots will be irreparably harmed, as section 310.151(4)(b) states 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 a writ of prohibition, the Pilots have no appropriate and adequate means of preventing Commissioners Burke and Miguez from participating in the FCCA proceeding and voting on FCCA’s application. Thus, this petition for writ of prohibition is appropriately filed in this Court.

II. Prior Appellate Proceeding

As referenced above, this Court previously issued a written opinion concerning a petition for writ of prohibition seeking review of the Pilots’ Motion to Disqualify. As explained in the opinion, the full Rate Review Committee considered the Pilots’ Motion to Disqualify at a meeting on July 31, 2014, and ultimately entered a written order denying that motion. *Id.* at *2. *See Appendix, Exhibit E.* Commissioners Burke and Miguez also orally declined at that meeting

262. After the DOAH proceeding, the case will return to the Rate Review Committee for final agency action. *See* § 310.151(4)(a), Fla. Stat.; § 120.57(1)(k). In addition to the Rate Review Committee’s initial vote on the rate decrease, BBP is entitled to have a fair and impartial review of both a request for a DOAH hearing and a recommended order from DOAH. BBP’s due process rights will be violated if Commissioners Burke and Miguez take part in those decisions.

to disqualify themselves, but orders from the individual commissioners were not rendered at that time. *Id.* See also **Appendix, Exhibit D**, pp. 34-52.

The Pilots promptly sought review of the Rate Review Committee's order in this Court. The Court initially treated the Pilots' petition as one seeking review of non-final agency action pursuant to section 120.68(1), Florida Statutes. *Id.* However, in the Court's opinion denying the petition, the Court concluded that "prohibition is the appropriate remedy to review the order in this case." *Id.* Thus, the Court treated the petition as it was originally filed: a petition for writ of prohibition. *Id.*

In its opinion, this Court determined that the full Rate Review Committee did not have the authority to rule on the Pilots' Motion to Disqualify two of the Committee's members, holding instead that such authority rested with the individuals to whom the motion was directed. *Id.* at *3. Because the individual commissioners had not filed written orders memorializing their oral rulings on the Motion to Disqualify, the Court found that the petition was premature, and the Court did not have jurisdiction to review the Commissioners' oral decisions. *Id.* at *4. Thus, the Court denied the petition without prejudice to the Pilots' right to seek review of written orders entered by the individual commissioners. *Id.*

The orders signed by Commissioners Burke and Miguez make clear that they were entered as a result of this Court's opinion. Commissioner Burke's order

states: “In the interest of efficiently moving this case forward, I will now treat the Motion as one to disqualify myself and Commissioner Miguez individually.”

Appendix, Exhibit A. Commissioner Miguez’s order contains identical language, except that he references himself and Commissioner Burke. **Appendix, Exhibit B.**

III. Facts Relied on by the Petitioner

The Rate Review Committee, which is subject to the APA, is a lower tribunal headquartered in Tallahassee that is ultimately subject to this Court’s appellate jurisdiction. § 120.68, Fla. Stat. Respondent FCCA 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. **Appendix, Exhibit F** (pages 1 and 2 of FCCA’s submitted Application). BBP is an association of harbor pilots that performs the pilotage services at PortMiami. BBP consists of pilots licensed by the State of Florida in accordance with chapter 310, Florida Statutes.

On or about March 18, 2014, FCCA filed an Application for a Change in Rates of Pilotage (“FCCA’s Application”) with the Rate Review Committee. FCCA’s Application seeks a 25% decrease in the rates of pilotage for passenger vessels calling on PortMiami. The requested decrease would apply only to passenger vessels; rates for cargo and container vessels would remain the same. The Rate Review Committee approved BBP’s intervention in the proceeding

concerning FCCA's Application at its hearing on July 31, 2014. **Appendix, Exhibit D**, p. 4, lines 16-25; p. 5, lines 1-9.²

A. Statutory Framework

Chapter 310, Florida Statutes, governs pilots, piloting, and pilotage in the waters, harbors, and ports of Florida. Section 310.141 requires that, except in certain narrow circumstances, all vessels shall have a licensed state pilot or deputy pilot on board to direct the movements of the vessel when entering or leaving ports of the state or when underway on the navigable waters of the state's bays, rivers, harbors, and ports. Section 310.011 creates a 10-member Board of Pilot Commissioners ("Board"), appointed by the Governor, "to perform such duties and possess and exercise such powers relative to the protection of the waters, harbors, and ports of this state as are prescribed and conferred on it in this chapter." In addition to other responsibilities, the Board determines the number of pilots in each

² The Pilots had standing to intervene in the proceeding both because their substantial interests are affected by the proposed decrease and as a matter of statutory right. Section 310.151(3) requires the Rate Review Committee to publish notice of any request for a change in rates of pilotage. The statute also provides that such notice "shall advise all interested parties that they may file an answer, an additional or alternative petition, or any other applicable pleading or response, within 30 days after the date of publication of the notice, and the notice shall specify the last date by which any such pleading must be filed." The Rate Review Committee published the appropriate notice in the Florida Administrative Register, and the Pilots filed a response in opposition to the FCCA Application on June 13, 2014.

port (section 310.061) and disciplines licensed pilots when appropriate (section 310.101).

Although the Board has numerous statutory responsibilities, it is not responsible for setting the rates of pilotage in each port. Rather, that is the responsibility of the Rate Review Committee, which consists of seven members, all of whom are also members of the Board. § 310.151(1)(b), Fla. Stat. The membership of the Rate Review Committee consists of:

[T]wo board members who are licensed state pilots actively practicing their profession, who shall be appointed by majority vote of the licensed state pilots serving on the board; two board members who are actively involved in a professional or business capacity in the maritime industry, marine shipping industry, or commercial passenger cruise industry; one board member who is a certified public accountant with at least 5 years of experience in financial management; and two board members who are citizens of the state.

§ 310.151(1)(b), Fla. Stat.

Applications for a change in rates of pilotage may be filed by “[a]ny pilot, group of pilots, or other person or group of persons whose substantial interests are directly affected by the rates established by the committee” § 310.151(2), Fla. Stat. The Rate Review Committee is charged with investigating an application for a change in the rates of pilotage and conducting a public hearing on the application. § 310.151(3), Fla. Stat.

Once the Rate Review Committee makes a decision on an application, the Rate Review Committee is required to issue 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.*

Within 21 days after receipt or publication of the notice, any person whose substantial interests will be affected by the intended Rate Review 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 Rate Review Committee concludes that the petition does not raise a disputed issue of material fact, the Rate Review 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.*

Contrary to usual procedures involving proposed agency action under the APA, the Rate Review 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. Because this

immediate effectiveness is unusual and departs from the typical agency “norm,” the statute provides that, 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.*³

If an administrative hearing on the Rate Review Committee’s proposed change in rates is heard by an ALJ at DOAH, the ALJ enters a recommended order, which is then considered by the Rate Review Committee, which enters the final order. §§ 120.569, 120.57(1), 310.151(4), Fla. Stat. Decisions of the Rate Review Committee regarding rates are not appealable to the Board. § 310.151(7), Fla. Stat. Thus, the Rate Review Committee’s entry of final order pursuant to section 310.151 proceedings is “final agency action” that is then subject to appellate review by this Court or another appropriate District Court of Appeal. § 120.68(1), Fla. Stat.

³ There was discussion at oral argument in the prior appellate proceeding as to whether section 310.151(4)(b) applies in circumstances involving a rate decrease, as opposed to a rate increase. The Court’s majority opinion does not address this issue. The plain language of the statute makes no distinction between circumstances involving a rate increase and a rate decrease.

B. Proceedings Before the Rate Review Committee on FCCA's Application

Following receipt of FCCA's Application for a rate decrease, in accordance with requirements of section 310.151(3) and its implementing rules, the chair of the Rate Review Committee appointed an Investigation Committee to review the information presented in FCCA's Application. The Investigation Committee (consisting of two outside consultants) held a public hearing in Miami on May 12, 2014, and subsequently accepted written comments from interested parties. The Pilots appeared at the Investigation Committee's public hearing and also submitted a written response to FCCA's Application to the Investigation Committee on May 27, 2014. Other users of PortMiami also appeared at the Investigation Committee hearing and submitted written comments. The Investigation Committee ultimately submitted a report to the Rate Review Committee analyzing FCCA's Application, but the report did not take a position on whether the requested rate decrease should be granted.

The public hearing on FCCA's Application was scheduled for July 31 and August 1, 2014, in Miami. The public hearing was noticed in the Florida Administrative Register on May 12, 2014. At the time the notice was published, the seven-member Committee consisted of two pilots, John Fernandez (Biscayne Bay) and David Ulrich (Port Everglades); a CPA, Carlos Trueba (Committee chair); two public members, Robert Swindell and Cliff Walters; and two

representatives of the cruise line industry, John Fox (a former Vice President and current consultant for Royal Caribbean Cruises, Ltd.) and Stephen Nielsen (a Vice President with Princess Cruises).⁴

On June 13, 2014, BBP filed a Motion and Suggestion to Disqualify Commissioners Nielsen and Fox, pursuant to section 120.665, Florida Statutes. **Appendix, Exhibit G.** That motion, among other things, noted that the employer of Commissioner Nielsen and former employer of Commissioner Fox were members of the applicant entity, FCCA. Moreover, the motion explained that Commissioner Nielsen is one of the members of FCCA's Executive Committee and that he has served as a director of the Florida Cruise Association, Inc.

⁴ On May 28, 2014, Commissioner Fernandez advised the Rate Review Committee staff that he would recuse himself from the proceeding concerning FCCA's Application, as he is a member of the BBP. In an email, Commissioner Fernandez wrote:

On advice of counsel, I am going to recuse myself from sitting on the Pilotage Rate Review Committee (PRRC) deliberations of the FCCA rate reduction application hearing that will take place here in Miami in July. Please activate the alternate committee member, Capt. Kurtz, so that she can clear her schedule to participate in this important hearing. I am recusing myself from the PRRC only on the FCCA application as it pertains to the Biscayne Bay Pilots.

Appendix, Exhibit H. Commissioner Fernandez was replaced on the Committee at the FCCA hearing by Commissioner Carolyn Kurtz, who is a pilot from Tampa Bay and also a member of the Board.

(“FCA”), since at least the mid-1990s. FCA does business as FCCA. *See Appendix, Exhibit G*, at ¶ 17 and its referenced attachments. The motion also noted that Commissioner Fox served for many years as a director of FCA and continues to be involved with the FCCA Foundation. *Id.* at ¶ 19. Additionally, the motion noted Commissioner Fox’s position as director of the Florida Alliance of Maritime Organizations, Inc. (“FAMO”), a lobbying organization created to challenge the entire piloting framework created by the Legislature. *Id.* at ¶ 20. The motion argued that Commissioners Nielsen and Fox were biased and prejudiced and should be disqualified from participating in the proceeding concerning FCCA’s application.

No meeting of the Committee was ever noticed to address the BBP motion to disqualify Commissioners Nielsen and Fox, and it was never ruled on. On July 16, 2014, more than a month after the motion was filed and approximately two weeks before the scheduled public hearing, BBP filed an Emergency Motion requesting a ruling on the Motion and Suggestion to Disqualify Commissioners Nielsen and Fox. **Appendix, Exhibit I.** That Emergency Motion also was never ruled on.

The same day the Emergency Motion was filed, the Governor issued a press release stating that he had appointed Thomas Burke and Enrique Miguez to the Board of Pilot Commissioners. **Appendix, Exhibit J.** Burke was identified as the

Vice President of Risk Management for Royal Caribbean Cruises, Ltd. Miguez was identified as the Vice President and Deputy General Counsel for Carnival Corporation. According to the press release, Burke and Miguez were appointed to fill “vacant” seats. *Id.*

The following morning counsel for BBP filed a public records request for documents associated with the appointments and any resignation letters that may have created vacancies on the Board. Resignation letters dated June 30, 2014, from former Commissioners Nielsen and Fox were produced. **Appendix, Composite Exhibit K.** Additionally, the applications of Commissioners Burke and Miguez, bearing a facsimile date and time just a few hours before the issuance of the press release, were produced.⁵ **Appendix, Composite Exhibit M.**⁶

⁵ Also produced in response to public records requests was a memorandum from the then-Executive Director of the Board of Pilot Commissioners, Dan Biggins, to Tim Vaccaro, Deputy Secretary of the Department of Business and Professional Regulation. That memorandum, dated June 23, 2014, discusses BBP’s motion to disqualify Commissioners Nielsen and Fox and includes the following statement: “Board counsel intends to strongly advise that Commissioner Stephen Nielsen recuse himself due to the direct ties to the petitioner—FCCA. Counsel further will recommend that Commissioner John Fox consider recusing himself as the best course of action.” *See Appendix, Exhibit L.*

⁶ Notably, on June 23, 2014, FCCA sought a 15-day extension of time to file a response to BBP’s Motion and Suggestion to Disqualify Commissioners Nielsen and Fox. That request was granted by an order of the Committee chair. **Appendix, Composite Exhibit N.** However, no response was ever filed by FCCA. The apparent reason for FCCA’s lack of response to BBP’s motion became clear once the new appointments were announced; FCCA was apparently

By virtue of their appointments to the Board to replace Commissioners Nielsen and Fox, Commissioners Burke and Miguez became members of the Committee. § 310.151(1)(b), Fla. Stat. On July 24, 2014, BBP filed a Motion and Suggestion to Disqualify Commissioners Burke and Miguez and Request for Continuance of Public Hearing. The Motion to Disqualify was filed pursuant to section 120.665, Florida Statutes, and asserted that Commissioners Burke and Miguez should be disqualified for bias, prejudice, or interest because they are employed by members of FCCA – the very applicant that is seeking a reduction in pilotage rates for passenger vessels calling on PortMiami. **Appendix, Exhibit C.** FCCA filed a response to the motion on July 29, 2014. **Appendix, Exhibit O.** No meeting of the Committee was scheduled to hear the motion, and it was heard on the first day of the scheduled public hearing.⁷ **Appendix, Exhibit D**, p. 34, lines

orchestrating the resignations of Commissioners Nielsen and Fox and their replacements with Commissioners Burke and Miguez. Neither Commissioners Fox nor Nielsen needed to be replaced before the scheduled rate hearing; section 120.665(1) states that “if a quorum remains after the individual is disqualified, it shall not be necessary to appoint a substitute.” The resignations of Commissioners Nielsen and Fox left five members on the seven-member Rate Review Committee.

⁷ BBP’s original motion to disqualify Commissioners Fox and Nielsen was filed almost seven weeks before the scheduled hearing on FCCA’s Application in accordance with section 120.665, which provides that such motion be filed “within a reasonable period of time prior to the agency proceeding.” (Emphasis supplied). The Motion to Disqualify Commissioners Burke and Miguez was filed as soon as reasonably possible after BBP learned of the series of events that led to the resignations of former Commissioners Nielsen and Fox and the appointment of Commissioners Burke and Miguez.

25; p. 35, lines 1-25; p. 36, lines 1-25; p. 37, lines 1-25; p. 38, lines 1-25; p. 39, lines 1-25; p. 40, lines 1-25; p. 41, lines 1-25; p. 42, lines 1-25; p. 43, lines 1-14; p. 45, lines 4-25; p. 46, lines 1-25; p. 47, lines 1-25; p. 48, lines 1-25; p. 49, lines 1-5.⁸ As discussed previously, the motion was denied by the full Rate Review Committee, and Commissioners Burke and Miguez proceeded to participate in the public hearing. *Id.* at p. 52, lines 3-12.

The following day, the Committee voted 4-3 to approve FCCA's rate decrease request, with Commissioners Burke and Miguez voting with the majority. *Id.* at p. 630, lines 6-20. The Committee's counsel, Clark Jennings, advised that he would convene a second meeting of the Committee at some point in the future so that Committee members could review and consider a written notice that Mr. Jennings intends to prepare setting forth the reasons for the Committee's vote. *Id.* at p. 591, lines 14-25; p. 592, lines 1-25; p. 593, lines 1-20. That meeting has not yet occurred. Nor has Mr. Jennings prepared any written notice for consideration by the Committee. Thus, Commissioners Burke and Miguez have not yet cast a vote on the "written notice" that will serve as a point of entry to the applicant and

⁸ BBP orally withdrew the portion of its motion seeking continuance of the public hearing, given that the Committee and all parties had traveled to Miami for the two-day hearing and were prepared to proceed. **Appendix, Exhibit D**, p. 43, line 25; p. 44, lines 1-25; p. 45, lines 1-2. The Pilots specifically reserved the right to seek appropriate review of the Committee's decision concerning disqualification. *Id.* at p. 41, lines 2-7.

other substantially affected persons or entities to challenge the proposed agency action of the Committee in an administrative hearing. § 310.151(4)(a), Fla. Stat.

IV. Nature of the Relief Sought

The Pilots seek a decision from this Court concluding that the Motion and Suggestion to Disqualify Commissioners Burke and Miguez was facially sufficient, that Commissioners Burke and Miguez should have disqualified themselves, and that all actions that they took following the filing of the motion are void. As a result, the Pilots request that this Court grant the petition for writ of prohibition and quash the orders of Commissioners Burke and Miguez declining to disqualify themselves. The Pilots also request that Commissioners Burke and Miguez be prohibited from participating in the meeting to consider the “written notice” concerning a decision on FCCA’s Application and in all other proceedings concerning FCCA’s Application.

V. Argument in Support of the Petition and Appropriate Citations of Authority

Commissioners Burke and Miguez should be disqualified from participating in any proceedings associated with FCCA’s Application because they are employed as senior executives by the two largest members of FCCA – the very applicant that is seeking a reduction in pilotage rates for passenger vessels calling on PortMiami. 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 demonstrates that he has been employed by Royal Caribbean for 12 years. Commissioner Miguez's application shows that he has been employed by Carnival for 18 years.

Appendix, Composite Exhibit M. Commissioner Burke is the Vice President of Risk Management for Royal Caribbean. Commissioner Miguez is the Vice President and Deputy General Counsel for Carnival. 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.

The employers of Commissioners Burke and Miguez, Royal Caribbean and Carnival Cruise Lines, are key players in the FCCA organization. Micky Arison, the chairman of Carnival Corporation, and Adam Goldstein, the President & CEO of Royal Caribbean International, serve on the four-member Executive Committee of FCCA. Mr. Arison chairs that Executive Committee. **Appendix, Exhibit P.** Moreover, Carnival and Royal Caribbean and the subsidiary cruise lines that they

own account for more than 81% of the vessels operated by FCCA members. **Appendix, Composite Exhibit Q** (excerpt from FCCA’s website identifying ships of member cruise lines and excerpt of Securities and Exchange Commission filing for Carnival Corporation and Carnival plc). Commissioners Burke and Miguez are among the top executives at their companies, which are among the most influential members of FCCA, the applicant for the rate decrease. By virtue of their employment in these capacities alone, they must be presumed to be biased in favor of the FCCA proposal.

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).⁹

“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. *Cf. Cagan v. Bd. of Real Estate*, 409 So. 2d 48, 49 (Fla. 5th DCA 1982) (explaining that the Board of Real Estate was the agency head that disciplined real estate professionals).

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*, 634 So. 2d at 678. 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.” *IMC-Phosphates*, 824 So. 2d at 300. “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.* The court in *IMC-Phosphates* also noted that “an

⁹ Section 310.151(1)(c), which governs the Rate Review 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.”

impartial decision-maker is a basic component of minimum due process in an administrative proceeding.” *Id.* at 300-301 (quoting *Cherry Communications, Inc. v. Deason*, 652 So. 2d 803, 804-05 (Fla. 1995)).

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), this Court 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. 1st DCA 1999)).

In *Mobil v. Trask*, 463 So. 2d 389, 390 (Fla. 1st DCA 1985), this Court reviewed a petition for writ of prohibition seeking to preclude a deputy commissioner from presiding over proceedings regarding a workers’ compensation claim. This Court stated that “a petition for writ of prohibition is an appropriate vehicle to prevent judicial action when a judge or deputy commissioner has improperly denied a motion to disqualify.” *See also Sutton v. State*, 975 So. 2d 1073, 1076-77 (Fla. 2008) (“[N]otwithstanding that prohibition is generally

available only to prevent courts from acting when there is no jurisdiction to act . . . prohibition is also clearly recognized as the proper avenue for immediate review of whether a motion to disqualify a trial judge has been correctly denied.”¹⁰; *Carrow v. The Fla. Bar*, 848 So. 2d 1283, 1285 (Fla. 2d DCA 2003) (“An order denying a motion to disqualify a trial judge is reviewed by a petition for writ of prohibition.”).

The Florida Supreme Court has explained that in cases involving disqualification of a presiding officer, courts have “implicitly recognized” that a party would not have an adequate remedy through direct appeal at the conclusion of a trial. *Sutton*, 975 So. 2d at 1077. The Court explained that a ruling on a motion to disqualify should be immediately reviewable because the same judge who is allegedly biased rules on the motion. *Id.* “Thus, this ruling should be immediately reviewable because it could be erroneously denied in numerous situations in which a trial by that biased judge should have been avoided altogether.” *Id.*

¹⁰ 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. This Court, in the prior appellate proceeding, also analogized the Pilots’ motion to disqualify Commissioners Burke and Miguez to a motion to disqualify an appellate judge. *Biscayne Bay Pilots*, 2015 WL 1546085, at *3.

Prohibition is the only adequate remedy to protect BBP's due process rights to have FCCA's rate decrease application heard by a fair and impartial, quasi-judicial tribunal.¹¹

A person ruling on a motion to disqualify must grant the motion if it is facially sufficient. *See State ex rel. Bank of Am. v. Rowe*, 118 So. 5, 8 (Fla. 1928) (holding that the judge should state on the record his disqualification when facts are legally sufficient to show that a judge is prejudiced). "Courts have repeatedly held that a judge who is presented with a motion for disqualification 'shall not pass on the truth of the facts alleged nor adjudicate the question of the disqualification.'" *Lee Memorial Health Sys. v. State, Agency for Health Care*

¹¹ BBP is aware that the Third District Court of Appeal has upheld a rule of the Board of Pilot Commissioners stating that the ultimate determination of pilotage rates is a quasi-legislative act. *Pilotage Rate Review Bd. v. S. Fla. Cargo Carriers Ass'n, Inc.*, 738 So. 2d 406 (Fla. 3d DCA 1999). *See* R. 61G14-22.012, Fla. Admin. Code. However, this rule was recently invalidated by an Administrative Law Judge ("ALJ") at the Division of Administrative Hearings ("DOAH"). The ALJ found that the rule is an invalid exercise of delegated legislative authority in violation of sections 120.52(8)(b), (c), (e), and the flush left provision of that statute. *See Biscayne Bay Pilots et al. v. Florida Dep't of Bus. & Prof. Reg. et al.*, DOAH Case No. 14-5036RX (Final Order, March 20, 2015).

Moreover, the structure of section 310.151, Florida Statutes, undoubtedly infuses the Committee's decision-making process concerning pilotage rates with quasi-judicial procedures. For example, entities whose substantial interests are affected by the Committee's decisions on pilotage rates have an opportunity to seek an administrative hearing at DOAH pursuant to sections 120.569 and 120.57(1), Florida Statutes. § 310.151(4)(a), Fla. Stat. Such APA proceedings are unquestionably quasi-judicial. Thus, the Rate Review Committee is a quasi-judicial tribunal, and the relief sought through this petition for a writ of prohibition is appropriate.

Admin., 910 So. 2d 892, 893 (Fla. 1st DCA 2005) (quoting *Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978)). Here, the Motion to Disqualify Commissioners Burke and Miguez set forth legally sufficient facts that the Commissioners were biased, and the Motion to Disqualify should have been granted.

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.”). Given that Commissioners Burke and Miguez are employees of the applicant entity members, the Pilots reasonably fear that these commissioners have prejudged the application.

Importantly, BBP does not seek to disqualify Commissioners Burke and Miguez simply 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 as senior executives by

members of the Applicant itself, FCCA, which demonstrates bias, prejudice, or interest.¹²

Notably, Commissioner Fernandez, the BBP pilot who serves on the Rate Review Committee, recused himself from the committee's consideration of the FCCA application. 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.

In fact, as the majority opinion in the prior appellate proceeding noted, the FCCA has standing as an association only because its members have a substantial

¹² BBP would have no objection to Commissioners Burke and Miguez serving on the Rate Review Committee if the application had been filed by cruise lines that do not employ them. For example, if 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. As such, the employers of Commissioners Burke and Miguez were in a position to directly influence the FCCA application, both with respect to the substantive terms of the proposed decrease and to the strategy and timing employed in advancing the proposal. Thus, service on the Committee by these two employees of the largest principals and members of the applicant entity presents an inherent conflict of interest.

The issue of bias, interest, or prejudice also could have been avoided had Commissioners Nielsen and Fox been replaced with representatives of the maritime industry or marine shipping industry, as section 310.151(1)(b) permits, as opposed to representatives of the commercial passenger cruise industry.

interest that is directly affected by the rates established by the Rate Review Committee. *Biscayne Bay Pilots*, 2015 WL 1546085, *6, n.2. Only a person (or group of persons) “whose substantial interests are directly affected by the rates established by the committee” can apply to the Rate Review Committee for a change in rates. § 310.151(2), Fla. Stat. For an association to have standing in an administrative proceeding, it must demonstrate that a substantial number of its members have substantial interests that are being determined in a particular proceeding. See *Fla. Home Builders Ass’n v. Dep’t of Labor & Emp’t Sec.*, 412 So. 2d 351, 353-54 (Fla. 1982) (establishing the associational standing test in a rule challenge); *Farmworker Rights Org., Inc. v. Dep’t of Health*, 417 So. 2d 753 (Fla. 1st DCA 1982) (extending the associational standing test to hearings under section 120.57(1) determining a party’s substantial interest). Thus, the members of the association, including the cruise lines that employ Commissioners Burke and Miguez, are de facto parties to the rate change proceeding.

Commissioners Burke and Miguez work as Vice Presidents for companies that, in essence, filed the application for the rate decrease. Thus, absent the issuance of a writ of prohibition from this Court, high-ranking executives of the de facto parties seeking the rate decrease will be part of the decision-making body that will decide whether the pilotage rate at PortMiami will be decreased for cruise ships. These facts are sufficient to show a well-founded fear that the Pilots will not

receive a fair and impartial consideration of their position from Commissioners Burke and Miguez. BBP has a reasonable fear that Commissioners Burke and Miguez have “prejudged” FCCA’s Application and are prepared to ultimately vote in favor of the requested 25% reduction in pilotage rates for PortMiami, as they did orally at the public hearing on August 1, 2014.

FCCA complained in the prior appellate proceeding that if Commissioners Burke and Miguez are disqualified, the make-up of the Rate Review Committee will be unfair because the maritime industry, marine shipping industry, or commercial passenger cruise industry will not be represented as contemplated by section 310.151(1)(b). This need not be the case, however, as section 120.665(1) explicitly provides that “[i]f the disqualified individual was appointed, the appointing power may appoint a substitute to serve in the matter from which the individual is disqualified.” (Emphasis added.) The statute clearly permits, although it does not require, a substitute to be appointed to decide a particular matter. The substitute replaces the disqualified individual for the matter only, not the tenure of the person’s appointment.¹³

¹³ For example, when this Court determined that the Secretary of the Department of Environmental Protection had to be disqualified from a matter pursuant to section 120.665, *see Charlotte Cnty. v. IMC-Phosphates Co.*, 824 So. 2d 298, 301 (Fla.1st DCA 2002), the Governor on remand appointed a person to serve as the substitute agency head for the purpose of rendering a final order in the case. *Manasota-88, Inc. v. IMC Phosphates Co.*, DOAH Case No. 01-1080 (DEP Final Order Nov. 22, 2002).

For the reasons expressed, BBP respectfully requests that this Court issue the requested writ of prohibition.

Respectfully submitted,

s/ Donna E. Blanton
Donna E. Blanton (948500)
Radey Law Firm
301 South Bronough, Ste. 200
Tallahassee, Florida 32301
dblanton@radeylaw.com
Telephone: 850-425-6654

And

Robert Peltz (220418)
The Peltz Law Firm
10220 SW 141st Street
Miami, Florida 33176
rpeltzlaw@gmail.com
Telephone: 786-732-7219