

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ACL BAHAMAS LIMITED AND INDIAN)
RIVER TERMINAL, INC.,)
)
Petitioners,)
)
vs.)
)
DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
PILOTAGE RATE REVIEW COMMITTEE,) Case No. 10-2335
)
Respondent,)
)
and)
)
THE FLORIDA STATE PILOTS)
ASSOCIATION, INC.; AND FORT)
PIERCE PILOTS ASSOCIATION,)
)
Intervenors.)
)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case before W. David Watkins, Administrative Law Judge of the Division of Administrative Hearings in Vero Beach, Florida on April 26-28, 2011, and by telephone on August 23, 2011.

APPEARANCES

For Petitioner: J. Michael Pennekamp, Esquire
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For Intervenor: Warren Husband, Esquire
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Tallahassee, Florida 32302
(Florida State Pilots Association)

For Intervenor: Captain William Wetzel
620 Colonial Drive
Vero Beach, Florida 32962
(Ft. Pierce Pilots Association)

STATEMENT OF THE ISSUE

Whether the application of the Fort Pierce Pilots Association for an increase in the pilotage rates for the Port of Fort Pierce should be granted in whole or in part, or denied.

PRELIMINARY STATEMENT

On or about March 30, 2009, the Fort Pierce Pilots Association (FPPA) submitted an application to the Department of Business and Professional Regulation, Pilotage Rate Review Board (Board) seeking an increase in the pilotage rates for the Port of Fort Pierce.

On March 31, 2010, the Board issued a decision granting in part and denying in part the application for a rate increase. The FPPA did not challenge the Board's decision to approve a rate increase that was less than the rate applied for. However,

ACL Bahamas Limited (ACL) and Indian River Terminal, Inc. (IRT) timely filed a Petition for Formal Administrative Hearing challenging the Board's decision to allow a pilotage rate increase at the Port of Fort Pierce pursuant to sections 310.151(4), 120.569, and 120.57(1), Florida Statutes.

The Board forwarded ACL's and IRT's petition to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge, and DOAH took jurisdiction of the matter pursuant to sections 310.151(4)(a), 120.569 and 120.57(1).

On July 1, 2010, Petitioners filed an unopposed motion to amend their petition and accordingly, Petitioners' amended petition was accepted for filing by Order of July 6, 2010. On July 20, 2010, the Florida State Pilots Association (FSPA) filed a petition for leave to intervene, which was granted on July 29, 2010.

Chapter Law 2010-255, which became effective on July 1, 2010, made substantial changes to the administrative body responsible for setting pilotage rates at each of Florida's deep water ports. Pursuant to this legislation, the initial Respondent in this matter, the Pilotage Rate Review Board, was essentially abolished and replaced by a new Pilotage Rate Review Committee, which comprises of seven specified members of the Florida Board of Pilot Commissioners ("Committee").

See Ch. 2010-255, § 5, at 9, Laws of Fla. Any matters pending before the Pilotage Rate Review Board as of July 1, 2010, were transferred for further action to the Committee. See id. at § 6, at 14.

Chapter Law 2010-225 effectively created a "Type Two Transfer" of the duties and activities of the Board to the Committee. Section 20.06(2), provides in pertinent part that when an executive branch agency is reorganized in this manner:

Such a transfer does not affect the validity of any judicial or administrative proceeding pending on the day of the transfer, and any agency or department to which are transferred the powers, duties, and functions relating to the pending proceeding must be substituted as a party in interest for the proceeding.

On August 2, 2010, the undersigned granted the Committee's motion to substitute the Committee for the predecessor Board. This proceeding was then set for hearing and continued several times on joint motions filed by the parties and separately filed by the Respondent Committee and Petitioners, to allow time for additional discovery and settlement discussions. On January 25, 2011, the FPPA was granted intervenor status in this proceeding. The final hearing was scheduled for April 26-28, 2011. Prior to the hearing, the parties filed a joint prehearing stipulation and an amended joint prehearing stipulation; however, the parties were unable to stipulate to any undisputed facts.

At the commencement of the final hearing Petitioners limited their disputed issues of material facts to eight subject areas in the former Board's factual findings set forth in the Notice of Intent. All of the subject areas designated by Petitioners involve material facts set forth in the former Board's Notice of Intent and fall within one or more of the mandatory factors to be considered as set forth in section 310.151(5)(b), by the Committee in deciding any application for a change in rates of pilotage. The subject areas are:

- a. The pilot's boat related expenses;
- b. The pilot's time spent on piloting and on other essential support services;
- c. The comparable maritime employment to that of a pilot;
- d. The prevailing compensation in the maritime industry as to those comparable jobs;
- e. The projected changes in the vessel traffic at the port;
- f. The need for a rate increase to attract or retain a pilot at the Ft. Pierce port;
- g. The pilot's gross revenue, revenue per handle, net income and expenses; and
- h. The comparative port data that is in the investigative committee report.

At the hearing, Petitioners presented the testimony of Sal Litrico and offered into evidence Exhibits 1, 7 and 50.

Subsequently, Petitioners filed the transcript of the proceedings held on August 23, 2011, and by motion dated September 19, 2011, offered into evidence the e-mails of Captain William Wetzel that were produced after the conclusion of the hearing in April 2011. Respondent and Intervenor FSPA filed a joint response in opposition to the admission of the Wetzel e-mails. By Order dated September 27, 2011, Petitioners' motion to introduce the e-mails was denied because it was filed nearly four weeks after the conclusion of the final hearing, and the record was closed as of August 23, 2011.

Respondent and Intervenors FPPA and FSPA presented the testimony of Captain George Quick, Commander Galen Dunton, Captain William Wetzel and Richard Law, CPA. Respondent's Exhibits 1 through 8, 12, 13, 14, 16, 18, 19 and 28 were received into evidence. Intervenor FPPA's Exhibit 1 was admitted into evidence. The parties agreed that the deposition testimony of Capt. William Messer be admitted in lieu of his live testimony.

Near the conclusion of the final hearing, Petitioners asserted that in responding to a discovery request, Captain Wetzel had failed to produce all of his e-mails relating to the pilot boat purchased by the FPPA. The undersigned ordered, sua sponte, that Captain Wetzel review all of his e-mails to determine whether all responsive documents had been produced to

Petitioner, and if not, to immediately provide them to Petitioner. It was further ordered that should additional e-mails be produced by Captain Wetzel, Petitioner would be given an opportunity to cross-examine Captain Wetzel about them. Accordingly, the hearing was adjourned in the afternoon of April 28, 2011, and was concluded via telephone on August 23, 2011.

A six-volume transcript of the proceedings was filed with DOAH on August 29, 2011. A one-volume transcript of the hearing held on August 23, 2011, was filed on September 20, 2011. The parties timely filed proposed findings of fact and conclusions of law which have been considered in preparing this Recommended Order.

All citations are to Florida Statutes (2010) unless otherwise indicated.^{1/}

FINDINGS OF FACT

Based on the testimony and documentary evidence presented at the hearings on April 26- 28 and August 23, 2011, and on the entire record of this proceeding, the following findings of fact are made:

The Parties

1. Petitioner ACL is the largest user of the Port of Fort Pierce (the Port). ACL operates three vessels on a regular "liner" schedule operating six days per week from the Port to a

few foreign ports. Approximately 95 percent of the vessel traffic at the Port is generated by these three vessels. ACL is affected by the rates of pilotage set for the Port since it is required by chapter 310, Florida Statutes, to utilize and compensate a state-licensed pilot each time one of its vessels enters or departs the Port. The rates that must be paid by ACL are established by Respondent, Department of Business and Professional Regulation, Pilotage Rate Review Committee. Accordingly, ACL is substantially affected by and has standing to maintain this challenge to the former Board's preliminary decision set forth in the Notice of Intent.

2. Petitioner IRT owns the terminal at the Port, as well as warehouses, offices and equipment at the Port. The pilotage rate increase preliminarily approved by the Board in the Notice of Intent will make the pilotage rates at the Port higher for the small vessels which can utilize the Port than the rates these same size vessels would pay at the Port of Palm Beach, Port Canaveral and/or Port Everglades. This is significant because IRT competes to attract new business from vessel owners and/or operators whose vessels call on South Florida. Accordingly, IRT is substantially affected by and has standing to maintain this challenge to the Board's preliminary decision set forth in the Notice of Intent.

3. The Pilotage Rate Review Committee (formerly the Pilotage Rate Review Board), Department of Business and Professional Regulation (DBPR), is a state agency created by section 310.151, Florida Statutes. It is established as part of the Board of Pilot Commissioners, and consists of seven members. With regard to an application for a change in pilotage rates, the Committee must investigate and determine whether a rate change will result in fair, just and reasonable rates of pilotage pursuant to chapter 310, Florida Statutes, and rules implementing those provisions. The decisions of the Committee however, are made independent of the Board of Pilot Commissioners, and are not appealable to the Board of Pilot Commissioners.

4. Intervenor Fort Pierce Pilots Association (FPPA) is an association of harbor pilots with one member, William Wetzel, LLC. Captain William Wetzel is, in turn, the sole member of William Wetzel, LLC and is the state-licensed pilot for the Port. The FPPA, through Captain Wetzel and occasionally a cross-licensed pilot from the Port of Palm Beach, perform the pilotage services at the Port.

5. The Florida State Pilots Association, Inc. (FSPA) has a business address in Tallahassee, Florida. FSPA is a voluntary organization representing the interests of Florida's 97 state-licensed harbor pilots, who participate in the FSPA through the

11 local pilot associations that serve Florida's deepwater ports.

The Piloting Profession

6. Chapter 310, Florida Statutes, sets forth a comprehensive body of regulation addressing the practice of piloting in this state. The purpose of such regulation, as elsewhere in the country, is to ensure the efficient movement of maritime commerce while guarding against vessel incidents that could injure persons and property, as well as the state's economy and environment. From this standpoint, the most dangerous part of any sea voyage for the ship and for the public at large is when the ship is moving into or out of port.

7. In the maritime industry, the crew of a vessel, which is employed by the ship's owner or operator, is under significant pressure to bring that vessel into and out of port efficiently and without delays. In light of the risks posed if those economic interests were to override public safety, Florida, and every other state with a significant maritime industry, requires vessels to utilize the services of an independent state-licensed pilot. The pilot is a mariner with many years of experience who is thoroughly familiar with every facet of a particular port and who has the skills necessary to maneuver a wide variety of ships. Because the pilot is not employed by the vessel owner, the pilot can exercise independent

judgment, free from the pressures normally associated with the ship's business operations.

8. The value added by the pilot in terms of safety is widely recognized throughout the maritime industry, as evidenced by the fact that even ships calling on U.S. ports for which a pilot is not required by state law, i.e., U.S.-flagged vessels, routinely use the services of the port's state-licensed pilots.

9. The risks faced by pilots are unique. Pilots are transferred from their pilot boat out at sea onto and off of large moving vessels. Once the pilot boat maneuvers alongside the vessel, the pilot typically boards the ship by stepping from the pilot boat onto a ladder hanging from the ship's side. Unfortunately, pilots are frequently injured and sometimes killed in the course of this dangerous transfer, particularly in bad weather. One expert in the piloting profession testified that over the course of a 30-year career, a pilot has a one-in-20 chance of being killed in a boarding accident.

10. Once on board, the pilot must familiarize himself or herself with the ship's navigational equipment, performance characteristics, and mechanical condition. The pilot conducts a conference with the ship's master, during which the two exchange technical information on the ship, as well as details of the planned passage.

11. If the vessel is fit for the transit, the pilot then "takes the conn," assuming navigational control of the vessel and directing the ship's movements by giving verbal commands on steering and engine power to the ship's crew. The crew will have varying levels of maritime experience and often speak little or no English.

12. The pilot must deal with a wide variety of ships and equipment. The vast majority of ocean-going vessels are flagged in foreign countries rather than the U.S., thus avoiding a great deal of regulation, as well as taxation.

Piloting Selection and Training

13. A mariner wanting to become a state pilot in Florida must await an opening declared by the state's Board of Pilot Commissioners in one or more ports where he or she has an interest in serving. If the mariner is determined to have sufficient experience and qualifications, the next step in the process of deputy pilot selection is successful completion of a very difficult written examination, designed and administered by the State of Florida.

14. This comprehensive two-day examination encompasses International & Inland Rules of the Road, Seamanship & Shiphandling, Federal & State Pilotage Laws, and port-specific Chart Work & Local Knowledge, and requires the candidate to reproduce from memory a complete and accurate chart of the port

and its channels. These examinations are extremely difficult, and candidates will have typically spent several months and hundreds of hours in preparation. Only about 20 percent of those who sit for the exam will pass.

15. The examination, however, is not one where the applicant is only required to achieve a minimum score to demonstrate basic competency. Rather, in Florida, the goal of the deputy pilot candidate is to achieve the top score among all candidates taking the exam. This is because the DBPR Secretary will be presented with a list of the top five scores on the exam and will typically appoint as the deputy pilot the person scoring highest.

16. Once the DBPR Secretary has selected a deputy pilot to fill an opening at a Florida port, the deputy is issued a 12-month temporary certificate. The temporary certificate becomes permanent when the deputy has proven suitable in all respects for continued training as a state pilot. Once in receipt of the temporary certificate, the deputy pilot then begins a minimum two-year training program at the port, as approved and monitored by the Board of Pilot Commissioners.

17. Under the supervision of the fully licensed pilots of the port, this training program allows the deputy pilot to initially handle smaller vessels of limited size and tonnage, with gradual increases in size and tonnage over time. While in

training, the deputy earns only a portion of what a full pilot would earn. The Board of Pilot Commissioners approves each deputy pilot's advancement to a higher level in the training program, after thorough review of the records and the recommendations of the local pilots in the port. Some deputy pilots "wash out" of training and fail to complete the program, never becoming pilots.

18. Upon completion of all training, the deputy pilot must pass yet another rigorous exam administered by the state before he or she can be appointed and licensed by DBPR as a full state pilot for the specific port in which the deputy pilot has trained.

The Rate Application and Review Process

19. On or about March 30, 2009, the FPPA submitted an application (the Application) to the former Board, requesting an increase in pilotage rates at the Port. The Application sought an increase in the rates of pilotage at the Port over a four-year period, as follows: 157% in year one, 13.9% in year two, 16.7% in year three and 18.7% in year four. The total requested increase from year one to year five was 206%, from a \$150.00 minimum fee before the Application, to a \$608.00 minimum fee after the final requested year four rate increase.

20. As prescribed by statute and the Committee's rules, two contract consultants were assigned to be the Investigative

Committee. One consultant, Richard Law, is a CPA, and has served as an investigative consultant on pilotage rate proceedings for DBPR for 16 years. The other consultant, Galen Dunton, is a retired Coast Guard commander with 18 years of experience as an investigative consultant for DBPR in pilotage matters.

21. The Investigative Committee made its initial visit to the Port on July 10, 2009. During this process of investigation, several interested persons provided comments in opposition to the requested rate increase. Following the investigation, the Investigative Committee submitted its findings to the former Board on September 8, 2009.

22. The FPPA requested the following pilotage rate increases in its application:

		<u>Year 1</u>	<u>Year 2</u>	<u>Year 3</u>	<u>Year 4</u>
<u>Draft Charge</u> (min. of 10 feet)	\$12.50	\$26.60	\$30.25	\$35.20	\$41.20
<u>Tonnage</u> (min. of 1667 GT)	\$.015	\$.060	\$.0685	\$.080	\$.098
	_____	_____	_____	_____	_____
<u>Total Min. Fee</u>	\$150.00	\$386.00	\$439.50	\$512.00	\$608.00
<u>% Increase</u>		157%	13.9%	16.7%	18.7%

23. On December 11, 2009, at a Board public meeting, a number of interested persons provided comments and testimony in opposition to and in support of, the requested change in rates.

Captain Wetzel, as well as representatives of both Petitioners, addressed the Board.

24. The Investigative Committee included in its Report findings and comments relating to each of the criteria enumerated in section 310.151(5), Florida Statutes (2009). The Board reviewed the Investigative Committee's findings and the statutory criteria and approved the requested rate increase for Year 1 only. The increases requested for Years 2, 3 and 4 were denied. The statutory criteria reviewed by both the Investigative Committee and the Board (now Committee) consisted of the following:

(5) (a) In determining whether the requested rate change will result in fair, just, and reasonable rates, the board shall give primary consideration to the public interest in promoting and maintaining efficient, reliable, and safe piloting services.

(b) The board shall also give consideration to the following factors:

1. The public interest in having qualified pilots available to respond promptly to vessels needing their service.

2. A determination of the average net income of pilots in the port, including the value of all benefits derived from service as a pilot. For the purposes of this subparagraph, "net income of pilots" refers to total pilotage fees collected in the port, minus reasonable operating expenses, divided by the number of licensed and active state pilots within the ports.

3. Reasonable operating expenses of pilots.
4. Pilotage rates in other ports.
5. The amount of time each pilot spends on actual piloting duty and the amount of time spent on other essential support services.
6. The prevailing compensation available to individuals in other maritime services of comparable professional skill and standing as that sought in pilots, it being recognized that in order to attract to the profession of piloting, and to hold the best and most qualified individuals as pilots, the overall compensation accorded pilots should be equal to or greater than that available to such individuals in comparable maritime employment.
7. The impact rate change may have in individual pilot compensation and whether such change will lead to a shortage of licensed state pilots, certificated deputy pilots, or qualified pilot applicants.
8. Projected changes in vessel traffic.
9. Cost of retirement and medical plans.
10. Physical risks inherent in piloting.
11. Special characteristics, dangers, and risks of the particular port.
12. Any other factors the board deems relevant in determining a just and reasonable rate.

(c) The board may take into consideration the consumer price index or any other comparable economic indicator when fixing rates of pilotage; however, because the consumer price index or such other comparable economic indicator is primarily related to net income rather than rates, the

board shall not use it as the sole factor in fixing rates of pilotage.
§ 310.151(5), Fla. Stat.

25. On March 31, 2010, the Board issued a Notice of Intent to approve in part and deny in part the application by FPPA to increase the pilotage rates at the Port. In its decision, the Board determined findings of fact with respect to each of the criteria listed in section 310.151(5), Florida Statutes.

26. In granting the FPPA's requested rate increase for the first year the Board approved the following charges at the Port, effective May 1, 2010:

1. A draft charge of \$26.60 per draft foot, measured up to the next 1/10th foot, with a minimum charge for ten (10) feet; i.e., \$266.00;
2. A tonnage charge of \$.0600 per Gross Registered Ton (GRT) with a minimum charge for 2000 GRT, i.e., \$120.00;
3. Docking/undocking fees are eliminated;
4. Shifting rates are increased as follows:
Same Slip - \$250.00
Different Slip - \$386.00
5. A towed barge charge of .0300 per GRT with no minimum charge.

27. Pursuant to section 310.151(5)(a), the Committee "shall give primary consideration to the public interest in promoting and maintaining efficient, reliable, and safe piloting services" when dealing with a requested pilotage rate change. However, the Board is also required to consider additional

specific factors in determining whether to approve or deny a requested rate change.

Statutory Pilotage Rate Review Criteria

A. The public interest in having qualified pilots available to respond promptly to vessels needing their service. (section 310.151(5)(b)1, Florida Statutes)

28. In its Notice of Intent, the Board accepted the findings of the Investigative Committee as reflected on page C-1 of the Investigative Committee Report. Among other things, the Investigative Committee observed with respect to this criterion:

The pilots are essential to the safe movement of vessels within the pilotage waters of the State. In addition to their navigation and supervisory skills, they must be knowledgeable of local weather, hazards, silting, speed and direction of currents, and timing and direction of tidal movements. They provide development of safety and operational guidelines for the port operation and participate in the process of port and professional regulations.

29. Petitioners assert that this record does not support a finding that the use of a state-licensed pilot at the Port is "essential" to safety at the port. Petitioners argue that the captains of ACL's three small vessels have more experience entering and exiting the Port than does Captain Wetzels, and that the use of a state-licensed pilot, although mandated by law, does not increase safety for ACL's vessels, the Port, or the public at large. Petitioner's contention in this regard is rejected. As noted above, harbor pilots must not only possess

excellent navigational skills, they must also be knowledgeable of a host of constantly-changing variables that affect the safe transit of vessels within their home port. Moreover, even if the current captains of ACL's three vessels have more experience entering and exiting the Port than does Captain Wetzel, there is no assurance that those same captains will continue in the employ of ACL in the future.

30. The record of the hearing held before DOAH does not contain any evidence to form a basis for findings of fact different from, or in addition to, the facts relied on by the Board in its Notice of Intent with respect to this criterion.

B. A determination of the average net income of pilots in the port, including the value of all benefits derived from service as a pilot. For the purposes of this subparagraph, "net income of pilots" refers to total pilotage fees collected in the port, minus reasonable operating expenses, divided by the number of licensed and active state pilots within the ports. (section 310.151(5)(b)2, Florida Statutes)

31. There are approximately 1,200 state-licensed harbor pilots in the United States. The average compensation for a state-licensed pilot nationally is about \$400,000.00 per year. However, state regulatory boards do not set pilot compensation, they set pilotage rates. Thus, a pilot's compensation depends upon how much revenue is generated by the vessel traffic in that port, net of operating expenses. The pilot in a small port like Ft. Pierce would not be expected to make the same amount as a

pilot in a larger port, such as Miami or Tampa. In these larger ports, large draft and tonnage vessels generate higher pilotage fees and this revenue supplements the cost of bringing in smaller vessels. In Ft. Pierce, that is not possible because of the physical limitations of the Port, which will not accommodate large vessels. Higher minimum rates therefore have to be set in Ft. Pierce because of the small size of the vessels, and to compensate a Palm Beach pilot (cross-licensed for Ft. Pierce) for making the two-hour plus drive to Ft. Pierce to handle a vessel if the Ft. Pierce pilot is unavailable for some reason.

32. In its Notice of Intent, the Board accepted the findings of the Investigative Committee, as reflected on page C-2 of the Investigative Committee Report, as corrected at the public hearing, which set the pilot's net income for years 2007 and 2008 at \$112,800.00 and \$92,700.00 respectively. In the "Analysis and Decision" section of the Notice of Intent, the Board also stated:

Further, the pilots are charged with maintaining or securing adequate pilot boats, office facilities and equipment, and other equipment and support services necessary for a modern, dependable piloting operation. Although the Pilot currently has an arrangement with the Port's largest user regarding the use of a converted crew boat, the evidence presented to the Board shows that in some aspects this assignment has been less than satisfactory. The Board opines that an increase in pilotage rates sufficient to permit the Pilot to procure an

adequate pilot boat and/or secure such services is warranted.

(Notice of Intent, p. 10, 11)

33. Compared to the typical piloting operation in which the pilots in a port provide their own pilot boat to ferry them to and from transiting ships, the Investigative Committee determined that Captain Wetzel's operating expenses were very low, since ACL had been providing the pilot boat in Ft. Pierce.

34. In its Notice of Intent, the Board approved the first year schedule of rate increases only, specifically noting that the increase was intended in part to address the unsatisfactory pilot boat arrangement between FPPA and ACL:

Based upon these findings, the Board determines that the proposed three-year schedule of rate increases sought by the Pilot should not be granted in its entirety at this time. The Board finds that a more modest increase to account for the progressively higher operating costs, inflation, and to permit the Pilot to obtain or secure pilot boat services, will provide fair, just and reasonable rates, and will continue to ensure that sufficient back-up pilots will be available to serve Fort Pierce. Accordingly, the Board approves the requested first-year schedule of increase only.

(Notice of Intent, p. 12)

35. The FPPA application projected the pilot boat as an expense of \$325,000.00, with annual depreciation of \$32,500.00. After the issuance of the Board's decision in March 2010, granting only the first year of the FPPA's requested rate

increase, circumstances dictated that the FPPA purchase a less expensive pilot boat than the one anticipated in the FPPA rate application.^{2/} Specifically, when Captain Wetzel began to look for a suitable pilot boat, he was significantly hindered by the pending challenge to the Board's decision. Pursuant to section 310.151(4) (b), the difference between the old rate and the new rate for each vessel movement was being deposited into an escrow account pending resolution of the Petitioners' challenge, so the increased cash flow could not be relied upon by a lender to secure the loan necessary to obtain the desired \$325,000.00 boat. Captain Wetzel and the Petitioners discussed the possibility of continuing to use the *Kacey Lynn* (owned by I.R.T) as a pilot boat, but negotiations were unsuccessful. Captain Wetzel then had to obtain his own pilot boat and settle on getting a much less expensive one that will not be as durable or long-lived as necessary. Ultimately, FPPA purchased a temporary pilot boat from Ameracat for about \$92,000.00 and it was delivered to Captain Wetzel in mid-May 2010. As noted, the evidence established that the type of pilot boat purchased by Captain Wetzel will have a shorter lifespan than a typical pilot boat, because it will not be able to withstand the banging and pounding that occurs when a pilot boat comes alongside a commercial vessel.

36. In order to purchase the Ameracat pilot boat, Captain Wetzel had to withdraw money from his retirement account so he could pay cash for the boat.

37. Petitioners do not take issue with the Board's decision that an increase in pilotage rates in Ft. Pierce is warranted so that Captain Wetzel can procure an adequate pilot boat. However, they contend that Captain Wetzel's decision to purchase a pilot boat that cost significantly less than the one contemplated in the Application results in undue income to Captain Wetzel, which should result in the rates being decreased to reflect reduced expenses, including the boat's purchase price, maintenance costs and interest expense.

38. As will be discussed in greater detail infra, FPPA's projected costs as set forth in the Application were accurate at the time submitted. The evidence of record does not support a finding that Captain Wetzel intended to mislead the Board in the projected cost of \$325,000.00 for a pilot boat, or that he does not intend to purchase a more durable replacement once the escrowed funds from the approved rate increase are released. Rather, given the circumstances of the administrative challenge to the rate increase, Captain Wetzel acted reasonably and of necessity in purchasing a less expensive, temporary pilot boat.

39. Petitioners' contention that Captain Wetzel's purchase of a pilot boat costing less than the one projected in his rate

application will result in undue income to Captain Wetzel (justifying elimination or reduction in the approved rates) is not supported by the greater weight of evidence in this record, and is rejected.

40. The record of the hearing held before DOAH does not contain evidence sufficient to form a basis for findings of fact different from, or in addition to, the facts relied on by the Board in its Notice of Intent with respect to this criterion, except as specifically set forth in the preceding paragraphs.

C. Reasonable Operating Expenses of Pilots (section 310.151(5)(b)3, Florida Statutes)

41. In its Notice of Intent, the Board accepted the findings of the Investigative Committee shown on pages C-2 and C-3 of the Report. The record of the hearing held before DOAH does not contain evidence sufficient to form a basis for findings of fact different from, or in addition to, the facts relied on by the Board in its decision with respect to this criterion, except as specifically set forth in the following paragraphs.

42. Prior to the rate increase under challenge in this proceeding, the pilotage rates in effect at the Port were unchanged since their initial adoption in 1980 -- a minimum draft and tonnage charge of \$150.00 plus a docking/undocking fee of \$60.00, for a total minimum pilotage fee of \$210.00. In late

2007, ACL stopped having the pilot perform docking and undocking of ACL's vessels and discontinued payment of the corresponding \$60.00 fee to the pilot, reducing the effective minimum pilotage fee for ACL and most other vessels to \$150.00.

43. A rate increase application in 2003 filed by the previous Ft. Pierce pilot was withdrawn, based upon an informal, unwritten agreement that Petitioners would provide an old crew boat formerly used on the Great Lakes (the *Kacey Lynn*) to ferry the pilot to and from vessels at no cost, dropping the \$75.00 fee previously charged to the pilot for each use of the crew boat.

44. At that time, the Port was primarily being served by cross-licensed pilots from other ports, as the permanent pilot in Ft. Pierce was injured and unable to continue working. In light of the circumstances, the cross-licensed pilots were not eager to invest in a pilot boat and other infrastructure, so use of the *Kacey Lynn*, while not ideally suited for safely transferring the pilot to or from a transiting ship, was a useful accommodation while a new permanent pilot was sought for Ft. Pierce. For non-ACL vessels, IRT billed the owners of some of those vessels from \$75.00 up to \$150.00 for the use of the *Kacey Lynn* to ferry the pilot to or from a ship. In the only other Florida port in which the pilots do not provide their own

pilot boats, Pensacola, the pilot is ferried to and from transiting ships by a tug company that charges \$400.00 per trip.

45. As set forth in its application, FPPA's projected pilot boat cost of \$325,000.00 with \$32,500.00 per year depreciation is reasonable, especially when compared to the costs of pilot boats serving other ports. Credible testimony established that a pilot boat in a major port would cost \$1.2 million to \$2 million, with annual maintenance costs typically at 5% of the purchase price. The pilot association in Jacksonville, Florida, recently spent \$1.2 million on a pilot boat, while pilots in Miami purchased a pilot boat several years ago for approximately \$600,000.00. More recently, the Miami pilots association rebuilt two of their pilot boats at a cost of approximately \$350,000.00.

46. In comparison to the cost of pilot boats in other ports, FPPA's projected operating costs as set forth in its application are relatively conservative. As noted above, Captain Wetzels purchase of a temporary pilot boat (with correspondingly lower operating expenses) for use during the pendency of this administrative challenge does not render the projected operating expenses in the application unreasonable.

D. Pilotage Rates in Other Ports (section 310.151(5)(b)4, Florida Statutes

47. In the Notice of Intent, the Board accepted the findings of the Investigative Committee as reflected on pages C-4 through C-7 of the Investigative Committee Report. The record of the hearing held before DOAH does not contain evidence sufficient to form a basis for findings of fact different from, or in addition to, the facts relied on by the Board in its Notice of Intent with respect to this criterion, except as specifically set forth in the following paragraphs.

48. Petitioners assert that Table 4 on page C-6 of the Investigative Committee Report understates the FPPA's revenue per handle hour by overstating the FPPA's average "handle time." "Handle time" is generally defined as the time "that the pilot takes the conn to the time he relinquishes it", i.e., the time that the pilot is actually directing the guidance of the navigation of a vessel.

49. According to Petitioners, the average handle time for pilots operating in the Port is closer to 30 minutes per handle than the 1.5 hours per handle used by the Investigative Committee. When a handle time of 30 minutes per handle is applied, Petitioners argue, the FPPA is currently earning \$370.00 per handle hour, rather than the \$123.00 per handle hour shown in the Investigative Committee Report.^{3/}

50. There is evidence in this record that until recently, there has not been a statewide standard for measuring handle times. Although the Board of the Florida State Pilots Association recently adopted a definition, the data appearing in Table 4 of the Investigative Committee Report relies upon older historical data (2007 and 2008), which in some cases may be outdated due to the change in the size of ships using various ports.^{4/} As such, it would be inappropriate to compare the Ft. Pierce revenue per handle hour using a handle time of 30 minutes without also updating the handle times of the other ports used in the comparison.

51. Approval of the Year 1 rate increase would not create a competitive disadvantage at the Port. The pilotage fee is a very small and relatively insignificant factor in the overall decision on whether to bring a ship into a particular port. In light of the considerable operating costs of a commercial vessel, the \$175.00 difference between the new minimum pilotage fee in Ft. Pierce and the lower minimum pilotage fee in Palm Beach (the closest competing port) would not be significant enough to warrant shifting a subject vessel from Ft. Pierce to Palm Beach.

E. The amount of time each pilot spends on actual piloting duty and the amount of time spent on other essential support services. (section 310.151(5)(b)5, Florida Statutes

52. In the Notice of Intent the Board accepted the findings of the Investigative Committee as reflected on pages C7 and C8 of the Investigative Committee Report. The record of the hearing held before DOAH does not contain any evidence to form a basis for findings of fact different from, or as a supplement to, the facts relied on by the Board in its decision with respect to this criterion, except as specifically set forth in the following paragraphs.

53. Time spent on actual piloting duty includes handle time, transit time to and from the vessel, and administrative time related to that handle. Time spent on other essential support services generally involve matters pertaining to the port in question, e.g., dealing with the Coast Guard on port security or safety issues, dealing with the Army Corp of Engineers regarding the ship channel, etc.

54. In its Report, the Investigative Committee considered "handle time" to be the time the pilot is actually engaged in traveling to a ship, piloting the ship, and returning to home port, i.e., dock to dock. The Investigative Committee did not attempt to verify the historical data regarding handle time but did utilize a shorter figure of 1.5 hours per handle.^{5/} No compelling evidence was presented that indicates that this 1.5 hour handle time figure was grossly incorrect.

55. While ACL operates a "liner service" with a published schedule that its ships adhere to most of the time, actual arrival and departure times for ACL ships frequently vary from this schedule. Moreover, the pilot must be available to respond to vessels requiring his assistance 24-hours a day, seven days a week. Although the Petitioners argue that actual handle time might make a part-time job for the Ft. Pierce pilot, it does not matter if it is an hour or two hours, it is still a huge time commitment throughout each week to be available and on call to serve the needs of the port. The Investigative Committee also observed:

The schedule varies for each day of the week. On Mondays, Wednesdays and Fridays he must "mobilize" early in the mornings to meet vessels arriving at 7:00 A.M. and then re-mobilize later in the afternoon to handle the 5:00 P.M. departures. Consequently, the two-step mobilizations increase his daily time requirements by an amount greater than the average handle times. The schedule also requires additional standby time between some of the back-to-back handles.
(Investigative Committee Report, P. C-7)

F. The prevailing compensation available to individuals in other maritime services of comparable professional skill and standing. (section 310.151(5)(b)5, Florida Statutes)

56. In its Notice of Intent, the Board accepted the findings of the Investigative Committee, reflected on page C-8 of the Investigative Committee Report, supplemented as follows:

As was discussed in the Port Everglades Order, supra, the Board accepts the proposition that the pre-pilot career path is the same for persons who remain as senior bridge officers on American-flagged ships and for those who become pilots. As was noted in the Port Everglades Order, however, pilots are not employees but are rather professional consultants and self-employed business persons who take the risks and accept the benefits of such status.

In addition, section 310.151(5)(b)6, F.S., sets the wage rate of "comparable professions" as the floor for pilot income - not the ceiling. As was also noted in the Port Everglades and Tampa Orders, the Board has accepted that the wage rate of senior masters on American-flagged ships varies greatly and, thus, the Board can find no specific number to use as the only acceptable "floor" for pilot compensation.

The Board, thus, uses the range of masters' salaries as a range of "floors" on pilots' income to be applied depending on the amount of vessel traffic at a port, the characteristics of a port, and the need for pilotage services at a port. Thus, a pilot's berth at the major ports, such as the Port of Tampa Bay, Port Everglades, Miami, Jacksonville or Palm Beach would be considered as akin to the most prestigious, responsible, and highly paid masters' berths (Master, Mates and Pilots scale - c. \$220,000.00 - \$230,000.00 per year) while lesser ports, with correspondingly lesser amounts of traffic and need for pilotage services would have a lower "floor" for income.

Nonetheless, the Board also finds that the pilotage rates need to be sufficient to ensure that licensed pilots remain willing and financially able to serve the ports of this State. As reflected in the Report of

the Investigative Committee, the current Pilot's schedule has grown to a full-time position, with no backup pilot available. Thus, the Pilot must rely on cross-licensed pilots from Palm Beach for backup, who currently earn substantially more at their home port. Accordingly, the Board finds that the rates must be increased sufficiently to continue to attract cross-licensed pilots to serve as back up at

Fort Pierce, and eventually, if traffic warrants, candidates for a deputy pilot position.

(Notice of Intent, pages 7, 8)

57. The record of the hearing held before DOAH does not contain evidence sufficient to form a basis for findings of fact different from, or in addition to, the facts relied on by the Board in its Notice of Intent with respect to this criterion, except as specifically set forth in the following paragraphs.

58. While background as a master or mate is useful, a pilot must possess superior close-quarter ship handling skills and the ability to handle a wide variety of vessels. Foreign licensed mariners are not allowed to become a pilot in Florida.

59. There was contradictory evidence on the prevailing annual compensation for masters serving on US-flagged ships of comparable skill and standing to Florida state-licensed pilots, ranging from \$143,000.00 - \$181,000.00 (inclusive of wages and benefits) to \$300,000.00 for union personnel. However, it is significant that these are salaried positions that do not

require the employee to invest in infrastructure or training, or to directly participate in the economic risks of the business.

60. Petitioners argue that there are other maritime industry positions, in addition to master of a U.S.-flagged vessel, which are comparable in professional skill and standing as that of a Florida state-licensed pilot. Specifically, Petitioners assert that masters and deck officers of inland vessels and U.S.-flagged integrated tug and barge units (ITBs) require a comparable level of professional skill and standing. Petitioners' witness on this issue opined that the master of an "upper end" inland vessel (e.g., jumbo barge) would make a salary ranging from \$116,000.00 to \$131,000.00, while a deck officer would make less than \$100,000.00. Similarly, the annual salary for the master of a "premier" ITB would range from \$106,000.00 to \$132,000.00, while senior mates would have total compensation of less than \$100,000.00.

61. Generally, pilots receive about 50% more in total compensation than masters on US-flagged ships. This disparity is necessary in order to motivate the most desirable professional mariners (a master or chief mate with 10-12 years of experience) to leave their current maritime employment, including giving up valuable pension benefits, to take on the risks of self-employment as a pilot. This career change entails significant physical risks, civil and criminal liability risks

in the event of accidents, investment in infrastructure, management of a business, etc. While Petitioner may be correct that masters and deck officers in other maritime industries are generally compensated less than state-licensed pilots, those employees bear none of the risks of self-employment.

62. The pool of professional U.S. mariners qualified to move into the pilot career path is relatively small -- a little over 2,000, and ports across the U.S. compete against each other to attract the best individuals to piloting. Indeed, ports within Florida compete with each other for the best qualified candidates.

63. While large Florida ports historically would have had 20-30 applicants for a pilot opening, the number of applicants for even large ports like Miami and Jacksonville has decreased in the last 4-5 years. Most recently there were only 11 mariners testing for two openings at Jacksonville and eight mariners testing for three openings in Miami.

64. The pilot in a small port like Ft. Pierce would not be expected to receive the same compensation as the master of a large container ship (or a pilot in a large Florida port like Tampa or Miami), but the compensation must still be high enough to attract and retain a qualified pilot and to pay for cross-licensed pilots as back-up. Pilots in the port of Palm Beach, where each of the five pilots recently worked about 600 handles

per year (similar to the number of pilot handles in Ft. Pierce), netted annual income of approximately \$150,000.00. Even in a best case scenario, Captain Wetzel's net income would only match those of Palm Beach pilots, and it is more likely that, due to increased expenses, it will still fall below that level even with the approved rate increase.

G. The impact rate change may have in individual pilot compensation and whether such change will lead to a shortage of licensed state pilots, certificated deputy pilots, or qualified pilot applicants. (section 310.151(5)(b)7, Florida Statutes)

65. In the Notice of Intent, the Board accepted the findings of the Investigative Committee as reflected on page C-9 of the Investigative Committee Report. The record of the hearing held before DOAH does not contain any evidence to form a basis for findings of fact different from, or in addition to, the facts relied on by the Board in its Notice of Intent with respect to this criterion.

66. At the hearing before the former Board, Petitioners disputed the need for any pilotage rate increase to enable the FPPA to purchase and operate its own pilot boat. As of the time of the administrative hearing, the pilot had already purchased a temporary pilot boat, and Petitioners assert that the increase approved by the former Board should be reduced to cover the expenses relating to the pilot boat actually purchased, and operating such boat, but not provide for an increase in net

revenue (compensation) to the pilot. For the reasons stated in paragraphs 34-40 above, the Petitioners' contention in this regard is rejected as not supported by the greater weight of the evidence.

67. In addition, the undersigned notes that the operating expense projections contained in the Application were merely that. . . projections. Moreover, the expense projections, including the \$325,000.00 expenditure for a pilot boat, were expressly predicated upon approval of the rate increases requested in the application.^{6/} Although an applicant must certify that the statements contained in a pilotage rate change application are true and correct when made, expense projections set forth in an application are not binding on the applicant, and the Board (now Committee) has no authority to compel the expenditure of specific funds identified in an application. Given the Board's denial of the requested rate increases (with the exception of Year 1) it was not unreasonable for Captain Wetzel to refrain from making the specific expenditures projected in the application, particularly for a \$325,000.00 pilot boat. As noted above, the projections when made were reasonable, but changed circumstances necessitated adjustment of those expenditures. In the Notice of Intent, the Board did not " earmark " a specific portion of the revenue increase for the purchase of a pilot boat, but rather recognized the need for "a

modest increase to account for the progressively higher operating costs, inflation, and to permit the Pilot to obtain or secure pilot boat services . . ." (Notice of Intent, p. 12)

H. Projected changes in vessel traffic. (section 310.151(5)(b)8, Florida Statutes)

I. Cost of retirement and medical plans. (section 310.151(5)(b)9, Florida Statutes)

J. Physical risks inherent in piloting. (section 310.151(5)(b)10, Florida Statutes)

K. Special characteristics, dangers, and risks of the particular port. (section 310.151(5)(b)11, Florida Statutes)

L. Any other factors the board deems relevant in determining a just and reasonable rate. (section 310.151(5)(b)12, Florida Statutes)

M. The board may take into consideration the consumer price index or any other comparable economic indicator when fixing rates of pilotage; however, because the consumer price index or such other comparable economic indicator is primarily related to net income rather than rates, the board shall not use it as the sole factor in fixing rates of pilotage. (section 310.151(5)(c), Florida Statutes)

68. The record of the hearing held before DOAH does not contain any evidence sufficient to form a basis for findings of fact different from, or in addition to, the facts relied on by the Board in its Notice of Intent with respect to the criteria set forth in 310.151(5)(b)8-12, and 310.151(5)(c), above.

69. Taken in its entirety, the evidence presented by the Petitioners, Respondent and Intervenors in this proceeding with respect to the statutory factors set forth in section 310.151(5)(b) and (c), yielded findings of fact in addition to

those found by the Board in its Notice of Intent. There was not sufficient credible and persuasive evidence presented by the Petitioners to support any findings of fact materially contrary to the findings of the Board in its Notice of Intent.

CONCLUSIONS OF LAW

70. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 120.569, 120.57(1), and 310.151(4) (a) Florida Statutes.

71. It is appropriate at this point to discuss the truncated authority of a DOAH administrative law judge in proceedings involving the setting of rates of pilotage in the ports of this state. In section 310.151, the legislature created the Pilotage Rate Review Committee as part of the Board of Pilot Commissioners, established its composition, gave it the authority to adopt rules to implement the duties conferred on it in the section, and established a procedure by which applications for pilotage rate changes shall be filed, considered, and resolved by the Committee. The Committee is given the authority to "investigate and determine whether the requested rate change will result in fair, just, and reasonable rates of pilotage pursuant to rules prescribed by the committee." § 310.151(3), Fla. Stat.

72. Once the Committee has held a hearing, made a decision on the application for a rate change, and reduced its decision to writing, either the applicant or a person whose substantial interests will be affected by the decision may request a hearing "pursuant to the Administrative Procedures Act."

§ 310.151(4)(a), Fla. Stat. This section also provides, in pertinent part:

If the committee concludes that the petitioner has raised a disputed issue of material fact, the committee shall designate a hearing, which shall be conducted by formal proceeding before an administrative law judge assigned by the Division of Administrative Hearings pursuant to ss. 120.569 and 120.57(1), unless waived by all parties. If the committee concludes that the petitioner has not raised a disputed issue of material fact and does not designate the petition for hearing, that decision shall be considered final agency action for purposes of s. 120.68.

73. Pursuant to the rulemaking authority delegated to it in section 310.151(1)(d), the former Board enacted Florida Administrative Code Rule 61E13-2.012, which provides as follows:

Since the determination of the actual rate of pilotage to be imposed at any port is a quasi-legislative act, the resolution of any disputed issue of material fact by a hearing officer assigned by the Division of Administrative Hearings shall not result in a recommendation from the hearing officer [now administrative law judge] as to the appropriate rate to be imposed at any port area in question. The hearing officer's [now administrative law judge's] recommendation shall only extend to

resolving disputed issues of material fact which result from a party's disputing the underlying facts upon which the Board has suggested intended rates for the port area in question.
(Emphasis added.)

The validity of this rule was upheld in Pilotage Rate Review Board v. S. Fla. Cargo Carriers Ass'n, Inc., 738 So. 2d 406 (Fla. 3d DCA 1999).

74. The correctness of the judgments of the Board in weighing the facts and in balancing the considerations set forth in the statutory criteria is an issue that cannot be resolved by a DOAH administrative law judge. Rather, the act of setting rates of pilotage is quasi-legislative, as opposed to an executive or quasi-judicial act. See S. Fla. Cargo Carriers Ass'n, Inc. v. Dep't of Bus. & Prof'l Reg., Pilotage Rate Review Bd. & Port Everglades Pilots' Ass'n, 738 So. 2d 391 (Fla. 3d DCA 1999).

75. The FPPA, as the applicant for a rate increase, has the burden of proving to the Committee by a preponderance of the evidence that it is entitled to a pilotage rate increase at the Port. See Dep't of Banking & Fin., Div. of Sec. & Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Dep't of Trans. v. J.W.C. Co., Inc., 396 So. 2d 778, 787, (Fla. 1st DCA 1981).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Pilotage Rate Review Committee consider the additional facts established by the evidence presented at the hearing before the Division of Administrative Hearings in determining, in accordance with its interpretation of its statutory mandate, its expertise, and the appropriate policy considerations, whether the decision on the PFFA Pilotage Rate Increase Application in the Port of Ft. Pierce, filed March 30, 2009, will result in fair, just, and reasonable pilotage rates at the Port of Ft. Pierce.

DONE AND ENTERED this 31st day of January, 2012, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of January, 2012.

ENDNOTES

^{1/} Although the 2008 Florida Statutes were in effect at the time the FPPA submitted its application for a rate increase, the 2010 edition of the Florida Statutes are applicable in this proceeding since the issue is whether the application should be granted or denied. See Lavernia v. Dep't of Prof'l Reg., Bd. of Med., 616 So. 2d 53, 53-54 (Fla. 1st DCA 1993).

^{2/} During the Board meeting held by teleconference on January 11, 2010, Captain Wetzel learned that the Board had approved the requested first year rate increase only.

^{3/} Assuming a handle time of 30 minutes as urged by Petitioners, revenue of \$370.00 per handle hour would place Ft. Pierce's revenue per handle hour the fourth lowest of the eleven ports compared.

^{4/} At the time the Board rendered its decision on the rate request, it was fully aware of the possibility that some of the handle times used in the Investigative Committee analysis might be outdated or inaccurate. The Investigative Committee specifically advised the Board of this possibility in its Report:

The investigative committee has asserted in past Board Meetings, that the "historical" handle times have not been corroborated by an independent study. On occasion, when the pilot organization provides the investigative committee with more accurate handle times, we will update the "historical" handle times to more current or accurate times. Meanwhile, some of the "historical" handle times that are presented in various parts of the investigative committee's report may not be accurate, so the Board should be aware of the potential for misleading analyses when using "historical" versus "actual" handle times.

(Investigative Committee Report, P. B-1)

^{5/} In its Report, the Investigative Committee noted the following:

Page six of the Application, Part 8(b) provides information regarding the actual time spent on actual piloting duty versus other essential support and standby time. This part of the application presents a "historical" actual pilots time of 2.5 hours per handle, whereas on page 9, part 10, the application presents 1.25 hours for most of the small vessels - which make up 90% of total handles, and occasionally 2.0 hours for larger ships and for unusual weather conditions. Using a weighted average, the pilot agreed that a 1.5 hour handle time would be a fair estimate of average handle time.

^{6/} The FPPA Application states "[T]he purchase of a suitable boat depends entirely upon the rate increase being approved." FPPA Application, at P. 10.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.