

**BEFORE THE BOARD OF PILOT COMMISSIONERS FOR THE
BAYS OF SAN FRANCISCO, SAN PABLO, AND SUISUN**

In re the Petition of the SAN FRANCISCO)
BAR PILOTS for a change in Pilotage Rates.)

PRE-HEARING ORDER

On March 24, 2015, in compliance with section 236(g) of title 7 of the California Code of Regulations, a pre-hearing conference was held at the office of the Board of Pilot Commissioners. Present were RADM Francis X. Johnston, Board President, presiding; Raymond M. Paetzold, Esq., representing the San Francisco Bar Pilots; Conte C. Cicala, Esq., and Michael Jacob, Esq., representing the Pacific Merchant Shipping Association; Allen Garfinkle, Executive Director, and Roma Cristia-Plant, Assistant Director, of the Board of Pilot Commissioners; and Deputy Attorney General Dennis Eagan, Board Counsel.

Based on issues raised and discussion had at the conference, the following determinations will guide conduct of the rate hearing.

1. Numbering of Exhibits.

Evidentiary exhibits will be numbered with Arabic numerals in the order received, without regard to the party who offered the evidence. To date, the exhibits are as follows:

- Exhibit 1 Petition and Evidence in Support of Change in Pilotage Rates
- Exhibit 2 Response by Pacific Merchant Shipping Association in Opposition to the Petition; Submission of Written Evidence in Support of Response
- Exhibit 3 Consolidating Financial Statements for 2014 of the San Francisco Bar Pilots and San Francisco Bar Pilots Benevolent and Protective Association
- Exhibit 4 Section 237(d) Data for 2014 submitted by the San Francisco Bar Pilots to the Board of Pilot Commissioners
- Exhibit 5 SFBP-Industry Agreed Expense Projections, dated 3/24/2015. By stipulation between the parties, this exhibit substitutes for Exhibit (E) to the Declaration of Captain Peter McIsaac, which is an estimate of projected SFBP expenses from 2015 through 2019 and is part of the SFBP petition for a rate hearing.
- Exhibit 6 Revised Exhibits (A-1) through (A-8) to the Declaration of Captain Gregory Tylawsky, which contain bar-graph representations of the estimated total pilotage costs from sea to dock in Baton Rouge for seven typical vessels. Exhibit 6 corrects certain inaccuracies in the bar graphs as initially submitted.

2. Order of proceeding.

The hearing will proceed as follows:

- a. Each party will be afforded 10 minutes for an opening statement. PMSA's opening statement may be made, at its option, immediately following SFBP's opening statement or immediately preceding the PMSA presentation.
- b. Evidence requested by the Board shall be introduced, if not already included in the record.
- c. SFBP will make a presentation in support of its petition.
- d. PMSA will make a presentation in support of its opposition to the petition.
- e. Rebuttal by SFBP.
- f. Public comment.
- g. Upon request, rebuttal to public comments.
- h. Board members may ask questions of any witness and of counsel during their closing statements.
- i. Closing statements. There will be no post-hearing briefs.
- j. At the Board's option, it will deliberate on its decision immediately following closing statements or at a place and time to which the hearing will be continued.
- k. The Board will adopt findings and recommendations for submission to the Legislature at a meeting scheduled for Friday, April 10, 2015.

3. Witnesses.

SFBP stated that it may call the following witnesses in support of its petition:

- a. Captain Peter McIsaac, Port Agent, to testify about the subject matter set forth in his declaration, including pilotage service of SFBP, new or expanded service, first quarter 2015 revenues, and revenue projections.
- b. Captain David McCloy to testify about the subject matter set forth in his declaration, including navigation technology, ULCVs and the E-Pilot service, and Marine Operations.
- c. Captain Greg Tylawsky to testify about the subject matter set forth in his declaration, including pilotage costs and rates in comparable ports.
- d. Captain Steve Roberts to testify about the subject matter set forth in his declaration, including the Board's attempts to broaden the candidate pool for pilot trainees, the pilot trainee selection process and training program, and factors bearing on future selections of pilot trainees.
- e. Mark Cohen to testify regarding the subject matter set forth in his declaration, including cost of living differentials between comparable ports.
- f. Any other witnesses in rebuttal or necessary to impeach the testimony or evidence presented in opposition to the petition.

PMSA stated that it may call some or all of the following persons as witnesses:

- a. Conte Cicala and/or Mike Jacob to verify and authenticate PMSA submissions, to the extent necessary.
- b. A representative from the Western States Petroleum Association to testify concerning the impact of a rate increase on visits by wet-cargo vessels to ports within the pilotage grounds served by the San Francisco Bar Pilots.

- c. Rebuttal/reply witnesses necessary to respond to issues raised by SFBP at the hearing with respect to the petition.
- d. Anyone necessary to impeach the credibility or expert qualifications of SFBP witnesses.

4. Evidentiary objections.

PMSA submitted five evidentiary objections at the pre-hearing conference, as follows:

a. Objection to Declaration of Captain Steven Roberts on the ground that it violates the conflict of interest provisions of the Political Reform Act, specifically Government Code section 87406(d)(1) and related regulations of the Fair Political Practices Commission, sections 18746.1 and 18746.2 of title 2 of the California Code of Regulations. These provisions prohibit, for a period of one year after leaving office, certain types of appearances, for compensation, before an agency by a former member of the agency. *Disposition:* While the question is not free from doubt, the prudent course, both for former Commissioner Roberts and for the Board, is for his declaration to be withdrawn and for him not to testify before the Board at the rate hearing. It is so ordered.

b. Objection to Declaration of Captain Peter McIsaac on the ground that his appearance before the Board would violate the conflict of interest provisions of the Political Reform Act, specifically Government Code section 87100. That section prohibits a “public official” from making, participating in making, or in any way attempting to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. *Disposition:* The Board may consider Captain McIsaac’s declaration and he may testify before it. Captain McIsaac, the Port Agent, is not prevented from submitting evidence in this proceeding. The principal reason for this conclusion is that he is not a “public official.” Further, he is specifically required by the Board’s regulations to “represent pilots before the Board and its committees.” (Cal. Code Regs., tit. 7, § 218(d)(3).) Whether Captain McIsaac is a public officer is the subject of pending litigation in Sacramento Superior Court between the Board and PMSA.

c. Objection to all five declarations submitted by SFBP, on the ground that they are inadmissible under the hearsay rule. *Disposition:* The hearsay rule, set forth in section 1200 of the Evidence Code, applies to proceedings in the California courts, not to proceedings before administrative agencies. (Evid. Code, § 300 & Cal. Law Revision Com. com. [“The provisions of the code do not apply in administrative proceedings, legislative hearings, or any other proceedings unless some statute so provides or the agency concerned chooses to apply them.”].) The Board may therefore consider these declarations.

d. Objection to “all alleged evidence of income in other pilotage grounds (together with the alleged cost of living differentials between those other grounds and SF Bay).” This objection is grounded on the assertion that this evidence is not “in the public record or otherwise verifiable,” and also upon the asserted lack of sufficient additional information concerning work schedules or benefits that would allow for an “apples to apples” comparison. *Disposition:* Except as otherwise provided for in this Order, none of the evidence proffered by either party will be excluded. This is a quasi-legislative ratemaking hearing. It is in the Board’s interest not to foreclose consideration by it of any information arguably bearing on the issues before it for decision. Such information will carry with it varying degrees of weight and persuasiveness, according to its nature and source. The parties have available to them the use of direct testimony, cross-

examination, and argument to aid the Board in according appropriate weight to the various items of evidence brought before it.

e. Objection to “all alleged evidence of rates in other pilotage grounds (including charts and spreadsheets derived from same) as set forth, *inter alia*, in Exhibits A to D of the Tylawsky Declaration.” This objection is grounded on the assertion that this evidence is not “in the public record or otherwise verifiable.” *Disposition*: Except as otherwise provided for in this Order, none of the evidence proffered by either party will be excluded. This is a quasi-legislative ratemaking hearing. It is in the Board’s interest not to foreclose consideration by it of any information arguably bearing on the issues before it for decision. Such information will carry with it varying degrees of weight and persuasiveness, according to its nature and source. The parties have available to them the use of direct testimony, cross-examination, and argument to aid the Board in according appropriate weight to the various items of evidence brought before it.

SFBP did not make an evidentiary objection to the written evidence submitted by PMSA “for the reasons set forth in the Board’s Pre-Hearing Order for the 2011 Rate Hearing.” The reasons SFBP refers to are those set forth in the immediately preceding paragraphs.

5. Additional Evidence.

SFBP is directed to update its evidence concerning change in the consumer price indices between the 2011 rate hearing and the most recent 12-month period for which data is available.

6. Cross-Examination.

By stipulation at the last rate hearing, in 2011, cross-examination was allowed only of expert witnesses. At the rate hearing before that, in 2002, it appears that cross-examination was allowed as to all witnesses. PMSA maintains that due process of law requires that it be allowed to cross-examine all witnesses.

In neither quasi-legislative nor quasi-judicial administrative proceedings is cross-examination constitutionally compelled. (See, regarding quasi-judicial proceedings, Gov. Code, §§ 11445.10(b)(1), 11445.50; Evid. Code, § 300 & Cal. Law Revision Com. com. [“The (hearsay) provisions of the code do not apply in administrative proceedings, legislative hearings, or any other proceedings unless some statute so provides or the agency concerned chooses to apply them.”].)

Cross-examination of all witnesses will nonetheless be allowed at the rate hearing, provided it is consistent with expeditious completion of the hearing and the time limitations set forth below.

PMSA offered, if cross-examination was allowed, to drop its hearsay objection regarding the five SFBP declarations and to stipulate that each letter, article, and declaration submitted by the parties should be treated as if the author thereof had stated the contents thereof at the hearing. In light of this offer to stipulate and SFBP’s lack of evidentiary objections to the written evidence submitted by PMSA, this stipulation by PMSA is accepted. PMSA further stated that

one of SFBP's declarants, Mark Cohen, need not appear at the hearing. In light of this statement, SFBP said it would not call Mr. Cohen to testify, but would instead rely on his declaration.

7. Time Allowed for Presentation.

Because of the witness declarations already on file, the expectation is that live testimony by these same witnesses at the hearing will not consume a large amount of time, even with cross-examination. Given this expectation, the following time limits will be adhered to by the parties:

- a. Following its 10-minute opening statement, each party will be allowed a maximum of three hours to present its case.
- b. SFBP will be allowed a maximum of one-half hour for rebuttal.
- c. Each party will be allowed a maximum of one-half hour of cross-examination for each opposing witness.
- d. Each party will be allowed a maximum of one-half hour for its closing statement.

DATED:

 3/26/15
FRANCIS X. JOHNSTON
President