

TO: Members of the Board of Pilot Commissioners

October 20, 2020

FROM: Dennis Eagan, Board Counsel

RE: Agenda Item 16, October 22, 2020 Board Meeting

Item 16 on the Board's October 22 meeting agenda is a discussion of pilot revenue losses due to reduction in vessel traffic caused by the COVID -19 pandemic and the Board's role, if any, in responding to the situation. Various possible courses of action by the Board are set forth in the agenda item. One of these is "Board initiation of an investigative hearing of pilotage rates limited to consideration of a temporary surcharge or other temporary rate increase and seeking presentation of evidence on that issue by persons directly affected by pilotage rates, possibly leading to a Board recommendation to the Legislature."

This memo sets forth how such a Board-initiated investigation of pilotage rates might proceed and differentiates between such a Board-initiated rate investigation and rate investigations that are initiated by petition from a party "directly affected by pilotage rates." The memo also discusses, in line with the agenda item, how the Board might wish to limit the scope of a Board-initiated rate investigation to consideration of temporary rate increases.

## **1. The Board acts as a neutral investigator of pilotage rates**

Both the Harbors and Navigation Code and the Board's regulations empower the Board to investigate pilotage rates.

Section 1200 of the Code empowers the Board to "review pilotage expenses and establish guidelines for the evaluation and application of these expenses regarding its recommendations for adjustments in rates." Section 1202 of the Code requires that "hearings for the purpose of investigating pilotage rates" shall be conducted by the Board in accordance with the Open Meeting Act.

Section 236(a) of the Board's regulations states: "The Board's role in the setting of pilotage rates is to hold public hearings to investigate such rates and make recommendations to the Legislature."

The Board's "investigative" role regarding pilotage rates sets it apart from persons "directly affected by pilotage rates," who may seek a rate investigation by petition. In rate investigations sought by petition, a petitioner and any opposing parties argue for particular rate adjustments, up or down. In contrast, the Board's role is that of a neutral

factfinder. It considers the respective factual presentations, evaluates the competing arguments, and then makes a decision on what, if any, recommendation to make to the Legislature concerning a rate adjustment. Section 236(j) of the regulations provides:

(j) Following the presentation of evidence in support of any in response to the petition for a rate hearing, any additional evidence requested by the Board, any evidence submitted in rebuttal, and the closing arguments of the parties, if any, the Board shall proceed with deliberation, including a review and evaluation of all the evidence received at the hearing and a determination of what pilotage rate change, if any, is warranted by the evidence. . . .

And under section 236(k) of the regulations, the process is completed by submission of a recommendation to the Legislature:

(k) Upon completion of its deliberation . . . , the Board shall submit its findings and recommendations, supported by a transcript of the proceedings, to the Secretary of the Senate and the Chief Clerk of the Assembly.

This neutral Board investigative role would not be altered should the Board choose to “[conduct] a duly noticed rate hearing on its own motion” under the last clause of section 236(a) of the regulations. As discussed below, the Board’s role would be one of soliciting factual input and suggestions for Board action from the pilots and other parties directly affected by pilotage rates, then reaching a decision on the evidence and the arguments presented. If, in the Board’s view, the evidence warranted a recommendation to the Legislature for a rate adjustment, it would forward that recommendation. In other words, the Board’s role in a Board-initiated rate investigation would be essentially the same as it would be in a rate investigation initiated by petition.

In both types of rate investigation, the Board functions similarly to a legislative investigative committee, where the question is: Is there a problem that requires a legislative resolution and, if so, what resolution should be recommended to the Legislature?

## **2. The Board may limit the scope of its investigation to consideration of possible temporary rate increases**

Whether initiated by petition or on the Board’s own initiative, a rate investigation may be limited in scope.

Section 1200 of the Code empowers the Board to establish guidelines governing formulation of its recommendations to the Legislature for adjustment in pilotage rates. The Board’s guidelines are contained in section 236(f) of the regulations, which sets forth a non-exclusive listing of factors that may be considered by the Board in deciding whether to submit a rate-adjustment recommendation to the Legislature.

Petitioners seeking a rate investigation may focus their petition on some, but not necessarily all, of the factors listed in section 236(f) of the regulations. Section 1201 of the Code provides that parties directly affected by pilotage rates may petition the Board for a public hearing “on *any* of the matters set forth in Section 1200.” (Italics added.) Further, section 1201 requires the Board, within prescribed time limits, to call for public hearings “for the purpose of obtaining information and data *relating to the issues raised in the petition.*” (Italics added.)

Similarly, were the Board to initiate a rate investigation itself, it could identify a limited set of issues that it wished to explore. It could, for instance, indicate at the outset that it wished to receive information and data on such matters as (1) the amount of pilot revenue reduction and future projected revenues, (2) the ongoing costs of conducting pilot operations and future projected costs, (3) the effect on the pilots’ business of revenue losses in the face of continued costs, (4) whether revenue losses will or may degrade the pilots’ ability to provide pilotage services, (5) the current and projected volume of vessel traffic, (6) the net return to pilots sufficient to attract and hold pilots, and (7) estimates of when vessel traffic could be expected to return to normal levels.

The Board could also seek the views of the pilots and other parties directly affected by pilotage rates concerning whether a temporary rate increase was warranted and, if so, the form that any such increase should take—for example, a temporary surcharge or a temporary increase in some or all existing pilotage fees.

### **3. In a Board-initiated rate investigation, the Board could borrow the procedures that govern rate investigations initiated by petition**

The procedures set forth in section 236 of the regulations are prescribed for rate investigations that have been initiated by petition; they do not expressly apply to rate investigations initiated by the Board itself under the last clause of section 236(a), which says that nothing in section 236(a) relating to petitions for a rate hearing by parties directly affected by pilotage rates precludes the Board itself from undertaking a rate investigation on its own initiative.

Those procedures can readily be adapted, however, to rate investigations initiated by the Board. For instance, the Board could require all parties to respond to the issues identified by the Board by submitting written evidence and proposals to the Board at least 30 days prior to the date set by the Board for a hearing (see § 236(c)) and to submit responses to those initial submissions at least 10 days prior to the hearing date (see § 236(d)). Similarly, the provisions of section 236(g), which provide for a prehearing meeting to refine the issues, determine the number of witnesses, and otherwise promote efficient conduct of the hearing, could be applied to a Board-initiated hearing with like salutary effect. And, as with rate hearings initiated by petition, those parties “proposing a rate adjustment [would] have the burden of proving by a preponderance of the evidence that a change in the rates is justified.” (See § 236(c).)

**4. Under this method of proceeding, the Board would not itself be a petitioner, nor would it have any burden of proof at the hearing**

As outlined above, the parties would be responsible for developing and submitting evidence and proposals in response to a solicitation by the Board. In simply requesting information, data, and proposals, the Board would not be seeking any preconceived outcome—this in contrast to rate hearings initiated by petition, where the parties at the outset identify their rate-adjustment goals. Instead, the Board’s role would be a neutral one of reviewing the submissions of the parties and deciding whether to make a rate-adjustment recommendation to the Legislature based on the evidence submitted.

To be clear then, as outlined above, this is not a situation where the Board would be “petitioning itself” for a rate adjustment. Nor would the Board, given its neutral investigative role, be freighted with any “burden of proof” at its hearing; it would simply be acting as a factfinder in furtherance of a possible recommendation to the Legislature, not as an advocate for a particular outcome.