

October 5, 2020

BOPC RECEIVED
10/5/2020

Board of Pilot Commissioners for the Bays
Of San Francisco, San Pablo & Suisun
660 Davis St.
San Francisco, CA 94111
Delivered via Electronic Mail

Re: BOPC Consideration of Self-Initiated Rate Hearing (Item #3, October 7, 2020)

Dear Members of the Board,

The state Board of Pilot Commissioners should not self-initiate a rate hearing to recommend changes to the pilotage tariff for the San Francisco Bay.

At the last meeting of the Board in September, the Agenda included an item to discuss market trends and what impacts the ongoing pandemic may be having on port volumes and vessel traffic in the San Francisco Bay. That conversation never actually occurred, instead the focus turned to what the Board could possibly do to change the tariff on its own accord to increase pilot revenues – even without a formal petition or request from the San Francisco Bar Pilots or ratepayers to change the pilotage tariff.

As a result, the Board now finds itself in a special meeting with a specific item asking the question of whether or not it should initiate a rate hearing, even though nobody has asked for the Board to pursue one and there is neither a staff report to describe how one would occur nor recommendation as to why one should occur.

A Self-Initiated Rate Hearing Has No Clear Process and Would Be Unprecedented

Section 236 of the Board Regulations (7 CCR § 236) describe how a Petition for a change to the current pilotage tariff should be procedurally received, scheduled, and addressed and what substantive provisions must be included in a rate request, what considerations of policy should be addressed, and what evidentiary thresholds must be met.

Apart from one sentence in paragraph (a), which is a reservation of rights to the Board to take action on a tariff change recommendation *sua sponte*, there are no other references to the reasons why the Board would take such an action or how the Board would take such an action or the breadth and scope of the authority reserved and to what means or ends such authority should be implemented by the Board. There are simply no other definitions, no procedures, no explanations, or any other references to such an action in the regulation other than the reservation of rights to take such an action.

It should come as no surprise, as a result, that the self-initiation of a tariff change recommendation is a step that no prior Board has taken under Section 236 (a). To act to initiate this process now, especially over the objections of ratepayers and without any formal request by the pilots, would be truly extraordinary and be an unprecedented act.

No Ministerial Obligation or Demonstrable Need for Self-Initiation of Rate Hearings

PMSA acknowledges that the current COVID pandemic which has roiled global maritime supply chains has also resulted in impacts to the pilots. PMSA also acknowledges that such impacts have included large reductions in revenues that may result in additional pressure on the bottom line of SF Bar Pilots and result in a desire to put off expenses and other spending in order to preserve profitability and pilot partnership distributions. Indeed, such acknowledgement and concern was the basis for our desire to maintain discussions with SFBP to ensure continued operations, to try and negotiate a short-term cash flow management assistance package, and to offer new revenue sources and no-cost bridge financing to SFBP at the end of the summer; offers of cash-flow relief and new revenues which were subsequently rejected by the pilots.

However, none of these factors – changes in international shipping activity, reductions in pilot revenues, or a lack of successful private negotiations on tariff changes – obligate the Board to self-initiate a rate hearing process.

In fact, there are no bases in law which would create a ministerial obligation to self-initiate a rate hearing. The only time in which the Board has a ministerial obligation to initiate a rate hearing is when it receives a petition from an interested party. And, no such request or petition has been received in this case.

While the pilots' level of assignments and related tonnage has decreased during 2020, such a decrease in revenues associated with lower levels of traffic does not create a demonstrable need for a rate hearing either. Pilots are not employees of the State of California, they are private businesspeople who establish their own business association, by laws, and partnership distribution rules amongst themselves. They are not guaranteed a salary or a rate of return and are owed nothing from the state other than a fair tariff which establishes an opportunity for the pilot monopoly to be profitable.

Under the current tariff, in 2020 with the current vessel volumes and tonnage, the San Francisco Bar Pilots are profitable.

The Board Must Consider Vessel Traffic and Demand Trends in Setting the Number of Pilots

When “determining the number of pilots needed,” the board “shall take into consideration” under statutory requirement “the industry’s current economic trends, fluctuations in the number of vessel calls, the size of vessels, and whether the need for pilotage is increasing or decreasing.” Harb. & Nav. Code §1170.1.

These primary considerations of the Board when evaluating the number of pilot licenses to make available are the exact issues which have been the subject of concern as a result of the COVID pandemic -- fluctuations in vessel calls, tonnage across the bar, and the trend of forecasted decreases in future vessel traffic. These are all required considerations of a hearing to change the number of licensees. While changes in rates are derivative of numerous factors, of which several of these industry trends and also the number of pilots are included (see Harb. & Nav. Code §1203), they are the principal or primary tool for changing the number of pilots as necessary to reflect changes in vessel trends.

No Staff Report, Input, or Recommendation Exists on this Item

As of Monday, October 5th at 4pm, the only three Board Meeting Documents listed and available to the public for this Agenda Item were “3-1 Rate Setting Statutes and Regulations, 3-2 SFBP Income Statement from 2019 SFBP Audited Financial Statements, 3-3 SFBP 2019_2020 Billing Data.” None of these Board Meeting Documents included a Board Staff Report, Input, or Recommendation on this item. Other than selecting these particular documents to be presented with this Agenda Item (none of which provide any commentary on the Agenda Item posed to the Board), Staff has provided no documentary opinion to the public or to Boardmembers which would explain a basis upon which the Board should or could proceed.

If the Board Moves Forward With Self-Initiated Rate Recommendations at this Time, It Will Confirm Board Bias for Rate Increases for Pilots

The Board of Pilot Commissioners is a body which includes interested members in rates – namely the commissioners of the Board who are pilots are essentially voting on whether or not to increase payments to themselves – and when it acts at their urging this is not an arm’s length, disinterested act by 3rd party regulators. If the Board takes action to self-initiate a rate hearing process on the stated basis of a desire to increase revenues for pilots, at the urging of or with the support of the pilots on the Board, it will confirm the Board’s bias for pilot rate increases.

In the past this bias would manifest itself in the Board’s actions on rates such that the pilots on the Board would participate in choosing a rate to recommend to the Legislature, and that rate increase would be voted on first, and then Staff would be tasked with cherry-picking the facts from the record to support the rate increase the Board had chosen secondarily (instead of evaluating the evidence first, determining which claims the petitioner had carried over its burden of proof, and then apply those facts to a specific basis for a change in rates). Such practices are demonstrable of papering-over of an arbitrary and capricious decision at best, but in every respect confirm the rate bias in favor of pilots serving on the Commission over the interests of ratepayers.

At this point in time, without evaluating the statutory requirements of adjustments in the number of pilots first or contemporary with the consideration of tariff changes, with no guidance of any Staff Report, without a factual basis or a ministerial obligation upon which to act, should the Board nevertheless move forward at this juncture it will confirm the Board’s rate bias in favor of the pilots. The Board’s actions speak louder than its words if it, once again, seeks an unfounded recommendation of a significant increase for pilots over the objections of ratepayers.

Pilots Should Be Encouraged to Negotiate With Customers, File a Proper Petition, or Both

Rather than proceed further down this path, the pilots should be encouraged to go back to the negotiating table to discuss options for rate changes with their customers, or to file a proper petition with supporting evidence for any claims that rates should be adjusted as requested and then carry their associated burden of proof for those claims, or to pursue both options. Contrary to unfounded pilot assertions, industry has negotiated in good faith, and remains available to continue to sit at the table.

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We respectfully request that the Board refrain from self-initiating a rate hearing for the San Francisco Bar Pilots.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mike Jacob", is written over a light blue horizontal line.

Mike Jacob
Vice President & General Counsel

cc: Allen Garfinkle, Executive Director