

February 22, 2022

Capt. Bob Carr, Chair
Ad Hoc Committee to Review the Pilotage Ratesetting Process
Board of Pilot Commissioners
Delivered via email

Re: Draft Report of the Ad Hoc Committee to the Board (24 February 2022 version)

Dear Chair Carr and Ad Hoc Committeemembers:

On behalf of the members of the Pacific Merchant Shipping Association (PMSA), whose ocean carrier members calling on San Francisco Bay ports are pilotage customers, thank you to the Ad Hoc Committee and Board staff for the time and dedication to produce the draft Report and for all of the work of the past year to review the pilotage ratesetting process.

While we do not support the final recommendation proposed in the draft Report, we would nonetheless commend the Ad Hoc Committee for moving this process to its completion and for consideration of the Report by the full Board.

PMSA has been pleased to participate in the Committee's review and appreciated the request for industry participation and the open and honest dialogue amongst Committeemembers regarding this input. We would similarly thank the leadership at the San Francisco Bar Pilots (SFBP) for their cooperation and coordination with us and for working with us on numerous submissions during this process.

As a result of this work by PMSA and SFBP to find areas of consensus, industry and pilots have reached agreement on the substantive components of what a new formulaic ratesetting process would look like. This is a major milestone, and is a key to successfully moving forward with reform efforts.

The stumbling blocks remain not as much as to "what" the substantive components of a new and more formulaic rate approach will be considered, but by "who" and "how." As we have stated multiple times to the Ad Hoc Committee, and repeated over the past 6 years to the Legislature and the Board on numerous occasions, PMSA believes that a reform of the current system which results in a fair, fact-based, impartial, and depoliticized ratesetting process will improve the system for everyone.

PMSA specifically believes that the creation of a new structure based on the utilization of an objective, third-party Administrative Law Judge, sitting independently of the Board is the best path forward. The draft Report's recommendations to the full Board fall short of this outcome, despite the Report's positive strides to attempting to build restrictions around Board actions. While we are very appreciative of these efforts, and know that they are being made in good faith to address our concerns, recommendation nevertheless opts to elevate the promotion of Board control of rates over the integrity and value of maintaining a truly independent process.

Specific Comments on the 16 February 2022 draft Report

With respect to “Background,” while the inception of the Committee was the decision of the Board in response to a request of SFBP in December 2020, it should be noted that this was not initiated in the context of the COVID pandemic alone as might be inferred from the Background. We believe that the Report’s Background section should be expanded to include reference to the fact that conversations over ratesetting reform in the San Francisco pilotage grounds have been extensive and wide-ranging in the Legislative forum since 2015. The Committee was provided with copies of much of this correspondence from over the past six years, and the positions taken by stakeholders in this process reflect and were informed by these many years of work on ratesetting reform.

With respect to “Identified Problems with the Current Ratesetting Process,” the third bullet regarding the needs to make the process more formulaic and consistent is not stated as a concern with the existing system. This could be restated as a flaw regarding the current system, as it is indisputable that the process is not formulaic and is inconsistent in its approach to issues.

With respect to “History of the Rate Setting Process at the Board,” the statement that, with respect to rates and surcharges, “[a] Navigation Technology Surcharge recommendation from the 2015 rate hearing has been the only legislative action since 2002” is an inaccurate statement. PMSA and SFBP provided a history of numerous rate and surcharge proposals and actions considered by the Legislature over the past 20 years to the Ad Hoc Committee and Board staff. This sentence should be struck or edited to reflect a panoply of changes made to the statutes on rates and surcharges since 2002.

With respect to “PROPOSED SOLUTIONS TO IDENTIFIED PROBLEMS” regarding “The process has flaws in evaluating evidence” at the top of page 8 of the draft Report, we make the following observations:

PMSA disagrees with the Committee recommendation that “the Board remain the authority which makes rate determinations.”

PMSA appreciates and agrees that if the Board is to retain a role, then the Board’s actions be limited and the Board should not be to reopen the hearing and take the case upon itself.

Finally, we would note that the comment in Footnote 15 was an attempt by the industry Commissioner on the Ad Hoc Committee to ensure balance, fairness, and integrity to the process should the Board be acting to reject or alter the ALJ’s proposed decision by requiring that at least one pilot and one industry member would be needed to vote in agreement. Footnote 15 cites that this was rejected because it required a “super majority which is not otherwise required in statute.” This is not necessarily true and not a good reason to reject this offer in compromise; a requirement that one pilot and one industry member vote in favor of such an action does not necessarily require a “supermajority,” simply put, if a majority of the public members, namely two, plus one pilot member and one industry member vote in favor, that is a vote of four members of the Board. Moreover, since the specific purpose of the ratesetting reform is to change the current statute, simply pointing out that this is inconsistent with the current statute is not a good reason to reject this proposal.

With respect to “PROPOSED SOLUTIONS TO IDENTIFIED PROBLEMS” regarding “The process needs to make rate setting more formulaic, consistent” on page 9 of the draft Report, it is true that PMSA and SFBP submitted a joint outline of our formula and formula factors, but we did not submit a joint “statute.” Instead, our submission specifically reserved that this was a draft and that no specific language had been negotiated or submitted. PMSA stands by the concepts that were jointly submitted and looks forward to working on language, but we have not submitted any specific language. Similarly, PMSA has not agreed that these formulaic changes need to be included in Harbors and Navigation Code §1203 nor agreed to any of the language submitted to the Ad Hoc Committee by Board counsel.

With respect to “PROPOSED SOLUTIONS TO IDENTIFIED PROBLEMS” regarding “The rate setting process creates a highly contentious and politicized environment” on page 10 of the draft Report, we would suggest that instead of identifying that “there has been no comprehensive action on pilotage rates for 16 years,” that the Ad Hoc Committee consider that prior to the 2011 rate hearing and legislation that there were no requests for action on rates. We would welcome any number of ways to restate this more accurately, perhaps by instead affirmatively identifying the years where the Legislature was presented with a Board recommendation and the recommendation was not adopted.

With respect to “BOARD OF PILOT COMMISSIONERS’ ROLE IN SETTING RATES,” PMSA understands that a majority of the Ad Hoc Committee disagrees with our position that the process should be independent of the Board. We do not need to restate or debate the point here, as previously discussed and submitted. However, we do feel it is important to state for the record that we disagree with the Report’s assertion that “[t]o remove the responsibility of rate setting would be to forego responsibilities in ensuring a competent, efficient, and regulated pilotage.” This is simply not true. First, the Board does not now have the responsibility of rate setting, and it is able to competently meet its other responsibilities of ensuring competency, efficiency in the regulation of state licensed pilots. Second, the experience in Washington demonstrates that the ratesetting function of a Board of Pilotage Commissioners can be removed to a separate agency and that such a move does not degrade competency, efficiency, or oversight of the regulation of state licensed pilots. And, third, PMSA’s position is that the Board should have more time, energy, and resources to carry out all of its duties to ensure competency, efficiency, and regulation of pilotage if it is also not saddled with the burden of ratesetting. The licensing, training, and discipline of pilots are the core competencies and areas of expertise of the Board staff and Board members; there is little to no expertise or experience with ratesetting.

With respect to the “Process Outline,” PMSA agrees generally with Outline steps 1, 2, 3, and 4.a., but disagrees generally with steps 4.b, 5, 6, and 7.

Ad Hoc Committee on Pilotage Ratesetting Reform

Re: Draft Report of 2/16/22

February 22, 2022

Page 4

Thank you again for your time, energy, and assistance in moving this issue forward and creating this draft Report. PMSA believes that ratesetting reform is in the best interest of the state's pilotage system, we know that SFBP and the Ad Hoc Committee share that belief, and we will continue to advocate for a truly independent process for ratesetting if this Board recommendation moves forward.

Sincerely,



Mike Jacob

Vice President & General Counsel

cc: Allen Garfinkle, Executive Director
Capt. John Carlier, Port Agent
Capt. Anne McIntyre, San Francisco Bar Pilots