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April 8, 2024

Daniel T. Haley
Commission Chair
Board of Harbor Commissioners
For Portland Harbor
2 Portland Fish Pier, Suite 105
Portland, ME 04101

Re: ***Portland Pilots 3.25.24 Rate Filing – Request for Protective Order and Scheduling Order***

Dear Chair Haley and members of the Board:

Through this letter, I am requesting on behalf of the Portland Pilots, Inc. (“Portland Pilots”) that the Board of Harbor Commissioners for Portland Harbor (“Board”) issue a protective order with regard to a revenue and expense spreadsheet (the “Spreadsheet”) that the Portland Pilots would like to submit to the Board in support of its request for a pilotage rate increase submitted on March 25, 2024 (the “Rate Filing”). The Spreadsheet was identified as “Attachment 2” in the Rate Filing. Additionally, for the reasons noted at the end of this letter, I am requesting the issuance of a scheduling order in this case to enable the Rate Filing to be processed expeditiously and fairly.

The Portland Pilots request a protective order for the Spreadsheet because this document contains confidential and proprietary information related to the Portland Pilots, the disclosure of which would be harmful to the operations of the business and violate the privacy of individual pilots employed by the Portland Pilots. Issuance of a protective order by the Board will ensure that the Spreadsheet is a designated confidential document that may not be publicly disclosed and would not be a “public record” subject to public disclosure under Maine’s Freedom of Access Act (FOAA).

Legal standard. The FOAA excepts from its definition of “public records” those “[r]ecords that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding.” *1 M.R.S.A. §402(3)(B)*. If information is the subject of a protective order in a court proceeding, the FOAA does not compel an agency to disclose that information. *Bangor Publ’g Co. v. Town of Bucksport*, 682 A.2d 227, 229-30 (Me.1996). Under Rule 26(c) of the Maine Rules of Civil Procedure followed by the courts of this state, a court may make any order “which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Under Rule 26(c)(7), courts may issue a protective order to protect a “trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.” Rule 26(c) further provides that the rule shall be exercised with “liberality toward the accomplishment of its purpose to protect parties and witnesses.” In light of this framework, the Commission has the authority – and duty – to protect against the disclosure of sensitive commercial information where such disclosure could cause “annoyance, embarrassment, oppression, or undue burden and expense.” And in the case of the Spreadsheet, for the reasons noted below, public disclosure of such

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document would cause such harms and is therefore should be accorded confidential treatment through a protective order.

The Spreadsheet should not be publicly disclosed. In support of our request for protective order, we first note that the information contained in the spreadsheet has been submitted in substantially similar form in the past four rate requests submitted by the Portland Pilots, and in each such instance, the Board has expressly or tacitly allowed such confidential treatment of the information. For the Board to find otherwise in this rate filing, absent any change in circumstances, would be arbitrary and capricious.

Second, the Portland Pilots are a small, private business. The business employs a small number of individuals who live in the community. If the Spreadsheet were publicly disclosed, it would include sensitive information related to the salaries and benefits of these easily-identifiable individuals, which information is highly sensitive. In a world where data privacy is increasingly paramount, it is a well-established principle that personal, financial data is private and should not be shared. State and federal laws prohibit banks and financial institutions from releasing personal, financial data, and similar laws prohibit institutions of higher education from disclosing personal, student data. Likewise, public utilities may not disclose customer data. In the case of the Portland Pilots, public disclosure of sensitive, personal financial information could subject individual employees to future data breaches of their personal accounts, establish these individuals as targets for hackers, or even subject the individuals to embarrassment. How much an individual in a private business earns is their own business and is not something that should be publicly disclosed.

Third, pilot compensation data is competitively sensitive and proprietary. There are relatively few qualified pilots in this country, and pilot associations compete aggressively against each other to attract the most qualified candidates. With few exceptions, pilot associations do not publicly disclose their compensation arrangements with their pilots, in part due to the competitively sensitive nature of this data. The Portland Pilots have historically followed this same practice with the historic support of the Commission.

Fourth, and finally, the Portland Pilots is a private business in a competitive market. The Portland Pilots are strongly vested in making Portland Harbor a place where vessels can enter safely and at competitive rates. Pilotage rates are one element of what makes a port attractive to maritime commerce, and the Portland Pilots strive to keep pilotage rates at levels that attract, rather than repel business. But this does not mean that the cost structure behind pilotage rates should be made public. To the contrary, public release of this data could enable competing ports to use the data for their competitive advantage, including by enabling ports to draw potentially unwarranted conclusions about the direction that pilotage rates might make in the future to the disadvantage of Portland Harbor. To avoid this outcome, the Portland Pilots have historically protected their private cost structure, also with the longstanding support of the Commission.

Public disclosure is not needed for the Board to set pilotage rates. It has long been the case in Portland and in most ports around the nation, including in the northeast, that pilotage rates are market-based. When the Maine Pilotage Commission sets rates, the primary data point is the rates charged by other ports in the region. The same is true of the rate setting process in the ports outside of Maine that compete with Portland, including Boston, New York, Rhode Island, and Portsmouth, NH. In Portland, pilotage rates are competitively sensitive, and if rates are set above the market, there is a risk of a further erosion of commercial marine traffic in Portland Harbor. This market-based approach has been evident in Portland based on the reality that pilotage rates in Portland lag the rates established in other competing ports in the northeast, illustrated in Attachment 4 to the Rate Filing, and pilotage rates in Portland have

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historically lagged the expense structure of the Portland Pilots. If Portland were truly following a cost-based approach, pilotage rates in Portland would be higher – but they are not.

In recent years, the Board has sought additional information regarding the revenues and expenses of the Pilots, and the Board has undertaken the exercise of setting a “target” pilot compensation regarding what level of compensation pilots should make. The Board has also sought to determine what level of pilotage rates are needed to ensure a safe and efficient pilotage system in Portland Harbor. In each of these exercises, it has been demonstrated that these “target” compensation levels and hypothetical “safe operating” harbor pilotage rates exceed what the market will bear. As a result, pilotage rates in Portland are not set based on a theoretical expense structure; rather, the opposite is largely true as expenses made by the Portland Pilots are driven – and driven down – by the market.

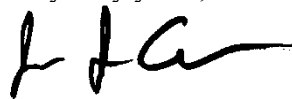
In light of this basic framework for ratesetting in Portland Harbor, the Spreadsheet is ultimately not determinative of pilotage rates, but rather simply a “check” to allow the Board to understand that actual expenses and target compensation levels exceed the level of revenues that a market-based pilotage rate actually yields. The Board is able to make this determination by reviewing the Spreadsheet on a confidential basis, and if needed, the Board can engage in discussions with and ask questions of the Portland Pilots regarding the Spreadsheet in executive session.

In short, the Board can undertake its responsibility to set pilotage rates by reviewing the Spreadsheet without the need to publicly disclose it.

Request for scheduling order. The Rate Filing submitted by the Portland Pilots was submitted on March 25, 2024. On April 5, 2024, the Portland Pilots submitted additional attachments to the Rate Filing. At this stage, the only document related to the Rate Filing that has not yet been submitted is the Spreadsheet. As we anticipate that resolution of the confidentiality of this document will be addressed no later than the scheduled meeting of the Board on April 11, 2024, we respectfully request that the Commission issue a formal schedule associated with the Commission’s review of the Rate Filing. We further note that, in issuing a scheduling order, I will not be in the country between April 30 and May 17 and therefore cannot appear before the Commission during that time. The Portland Pilots therefore ask that any meetings of the Commission related to the Rate Filing not be scheduled during this time frame. We very much appreciate the Commission’s understanding in this regard.

Conclusion. For the reasons noted above, the Portland Pilots respectfully request that the Board issue a protective order that designates the Spreadsheet as confidential information not subject to public disclosure, and further that any discussion by the Board regarding such Spreadsheet be undertaken in executive session.

Very truly yours,



James I. Cohen
Counsel for Portland Pilots, Inc.

cc: Kevin Battle, Harbor Master
Maya Howard, Assistant Harbor Master
Mary Costigan, Counsel for Harbor Commission
Capt. Calvin Klopp, Portland Pilots