

JAMES I. COHEN
PARTNER
jcohen@verrill-law.com
207-253-4708

One Portland Square
Portland, Maine 04101-4054
Main 207-774-4000

June 5, 2024

John Henshaw
Acting Chair
Board of Harbor Commissioners
For Portland Harbor
2 Portland Fish Pier, Suite 105
Portland, ME 04101

Re: ***Portland Pilots, Inc. March 25, 2024 Rate Filing/Petitioner's Response to Board's May 22, 2024 Discovery Requests with Incorporated Motions and Objections***

Dear Acting Chair Henshaw and members of the Board:

On behalf of Portland Pilots, Inc. (Portland Pilots, Pilots, or Petitioner), in the above-noted proceeding, I am pleased to submit our written response to the discovery requests submitted by the Board of Harbor Commissioner for Portland Harbor (Board) dated May 22, 2024 (Discovery Requests). The Portland Pilots also raise and/or reiterate several motions and/or objections as specifically noted below, including the Pilots' strong urging that the Board expeditiously act on the Pilots' pending request for (1) issuance of a protective order related to expense and revenue data associated with the above-noted proceeding – which request was submitted on April 8, and (2) the issuance of a scheduling order to move the proceeding forward in an orderly manner.

Procedural Background Regarding Rate Filing. On March 25, 2024, the Portland Pilots submitted a comprehensive request for a pilot unit rate increase with incorporated attachments to substantiate the rate request (Rate Filing). The Rate Filing conformed to the eight initial factors identified in the Board's June 19, 2019 decision setting pilot unit rates for the Portland Pilots (2019 Decision). In support of the Rate Filing, the Portland Pilots subsequently submitted two letters of support: (1) a letter of support for the Rate Filing from Sprague dated April 1, 2024, which letter constituted Attachment 9 to the Rate Filing; and (2) a letter of support from MaineCruisePro dated April 5, 2024, which letter constituted Attachment 10 to the Rate Filing. On April 18, 2024, the Portland Pilots submitted a Cost of Equity calculation from Wipfli, and a submission from the late Captain George Quick regarding appropriate rates of return for small businesses in the waterfront transportation sector. These latter submissions constituted Attachment 11 to the Rate Filing. Finally, on April 26, for the convenience of the Board, the Portland Pilots resubmitted all of the previously submitted documents in a single package. The Portland Pilots provided this consolidated document because at prior meetings of the Board, several members indicated that they were either unable to locate previously submitted documents in their emails, or that the previously submitted documents had not been forwarded to them by either the Board chair or Board staff.

Procedural Background Regarding Request for Protective Order. On April 8, following several communications commencing April 1, 2024 with then-Board Chair Dan Haley and counsel for the Board, the Portland Pilots submitted a formal request for a protective order (Protective Order) to allow the filing of Attachment 2 to the Rate Filing (Attachment 2), which attachment included a balance sheet and

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related information regarding the Portland Pilots' expenses and revenues for the 2023 test year and the 2024 rate effective year. As indicated in the Protective Order, the Pilots sought to submit Attachment 2 to the Board without redaction, but were seeking confidential treatment of the document so that it would not be a public document subject to Maine's Freedom of Access Act. Consistent with recent rate cases involving the Pilots, information of this nature has been submitted "confidentially" to the Board without objection. Absent a protective order or similar determination by the Board, Attachment 2 would be a public document, the release of which would raise competitive and other trade secret concerns. On April 11, 2024, the Board considered the Protective Order but refused to act pending receipt of a redacted copy of Attachment 2 showing the nature of the information contained in the attachment. The Pilots objected to the delay, noting that the April 8 filing and the Rate Filing itself provided substantial detail regarding the contents of Attachment 2. The Pilots also orally related to the Board the nature of Attachment 2. The Board nonetheless directed the Pilots to file a redacted copy of Attachment 2.

Subsequent to the April 11 meeting, the Portland Pilots submitted such a redacted copy of Attachment 2 along with additional information responsive to substantive issues raised by the Board during the April 11 meeting. These substantive issues related to prior rate cases acted on by the Board and the type and confidential nature of information received by the Board in those cases. On April 25, 2024, the Board again considered the Protective Order but did not rule on the request. The Board stated at the time that, before ruling on the Protective Order, it first wanted to issue a request for additional information and see how the Portland Pilots responded. The Board indicated that such request for additional information would be forthcoming in short order, but the request did not issue the notice until May 22, 2024 (Request for Additional Information or Request), the day before the Board's scheduled meeting of May 23, 2024. In the Request for Additional Information, the Board stated "we have outlined the above requested materials substantially in the format of your most recent rate increase request, as we believe this will help us settle on a structured format for future requests." Request at 2. At the May 23 meeting, Acting Board Chair John Henshaw commented publicly regarding the Request that it had been developed with input from Board members and legal counsel for the Board and was designed to align with prior submissions from the Pilots. The clear import of the Request is that the Board had reviewed the Pilots' Rate Filing and, in the nature of traditional discovery, the Board was requesting that the Pilots: (1) resubmit much of the same information previously submitted in a format and order preferred the Board, even if the information was the same as previously submitted, and (2) to the extent the Request sought additional information not otherwise provided, such information should be included in the Pilot's response to the Request. As noted below, Pilots have in fact provided a detailed response to the Request.

At the May 23 Board meeting, the Portland Pilots renewed its request for issuance of the Protective Order to enable the Pilots to submit Attachment 2 confidentially to the Board. The Pilots further commented orally on each individual item listed in the Request for Additional Information. In its oral comments, the Portland Pilots noted that the majority of items requested were covered by the Rate Filing and accompanying documents. The Pilots further noted a range of objections to many of the items in the Request, including objections that some of the requested information was irrelevant, unavailable, and/or unduly burdensome and intrusive. The Board again failed to act on the Protective Order, notwithstanding the Pilots' oral objection that the Board had sufficient information to rule on the Protective Order as a standalone item. The Board also indicated that it would not act on any of the Pilots' oral objections until the objections were submitted in writing,

Objection and Motion regarding Protective Order. In light of the foregoing, the Portland Pilots hereby renew their objection to the Board's continued refusal to act on the Protective Order related

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to Attachment 2 and the Pilots renew its request for an immediate ruling on the Protective Order.¹ Very simply, two detailed written submissions, the Rate Filing itself, and three Board meetings should be more than sufficient to allow the Board to act. At this stage, the Board's ongoing refusal to act amounts to a denial of due process and effectively amounts to a decision by the Board not to permit the Petitioner to submit to the Board information it has been seeking to provide for two months. Given that the Protective Order is only about how Attachment 2 is treated under FOAA, and that the Pilots are not objecting to providing an unredacted copy of Attachment 2 for the Board's review, the Pilots strongly urge the Board to rapidly agree to the Request – even if on a preliminary basis -- to avoid further unnecessary delays in the processing of the Rate Filing.

Delay in Processing the Rate Case Is Harmful. As the Pilots have shared with the Board at two of its most recent meetings related to the Rate Filing, delay in processing the Rate Filing is harmful in a number of ways. First, the ongoing delay denies the Pilots an opportunity to recover the costs identified in the Rate Filing since the rates contained in the Rate Filing assumed an effective date of May 2024. As the weeks and months pass by since this identified date, the opportunity for those recommended rates to meet the costs of the Pilots gets smaller. This works an economic disadvantage to the Pilots, and further justifies a pilotage rate higher than what the Pilots originally requested.

Second, the ongoing delay creates a major distraction for the Pilots' business and the individuals who directly provide pilotage services. The business of a pilot is extremely important as well as dangerous, and when the Board takes actions to unnecessarily delay processing of its rate filing while also imposing ever-increasing procedural burdens on the Pilots, it directly and negatively impacts the individuals who have to provide pilotage services in Portland Harbor. As we noted last week, the Portland Pilots is a small business, and the Portland Harbor Commission is a small agency. This is not Central Maine Power and the Maine Public Utilities Commission, and the nature of the proceedings related to rates should take this into account.

Completeness of Rate Filing. During the Board's May 23 meeting to address proposed rules governing the pilot unit rate setting process, a single member of the Commission – Commissioner Peter Stocks -- raised a question as to whether the Rate Filing was "complete" since the Portland Pilots had not yet submitted all of the information contained in the Request for Additional Information. In response, the Portland Pilots orally objected and stated that it viewed the Rate Filing as complete and that any remaining information sought by the Board in the Request for Additional Information was either in the record already, possibly in a different numerical order than what was sought in the Request, and that any other information sought was either unavailable, objectionable, or irrelevant.

In support of its objection at the May 23 meeting, the Portland Pilots note that the information contained in the Rate Filing met the eight factors set forth in the 2019 Decision, and the only missing information was Attachment 2 that the Board itself was blocking the Pilots from submitting by refusing to act on the Protective Order. In many respects, the information contained in the Rate Filing – both in the detailed narrative forming the basis of the Rate Filing as well as the accompanying attachments -- exceeded what has been provided in the past, and far exceeds the information sought from and provided by pilots in nearly every other jurisdiction around the country during rate setting proceedings, including in

¹ As noted in the Pilots' response to Item #12 in the Request for Additional Information, attached to this letter, Petitioner is requesting that the Request for Protective Order be technically amended to include Attachment 12. The information in Attachment 12 was submitted confidentially by the Pilots to the Board in a 2022 pilotage rate case and includes expense and revenue information from 2020-2022 similar in nature to Attachment 2, which document is the subject of the pending Protective Order in this case.

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rate cases before comparable ports in the northeast. The Pilots further note that there are no formal rules of the Board defining what information must be submitted in support of a rate filing, nor has the Board otherwise ruled on the question of what constitutes a “complete” filing. Finally, the Pilots note that, when Acting Board Chair Henshaw referenced the Request during the May 23 meeting, he indicated that the Request had been delayed to allow time for input from the Board and its counsel. This statement, coupled with language in the Request indicating that the letter was an effort to develop a process for “future requests,” illustrates the lack of any formal process associated with supporting information in rate proceedings, and that the Request is in the nature of discovery, not a formal prerequisite for a rate filing.

Response to Request for Additional Information. As noted above, the Board issued a Request for Additional Information on May 22, nearly two months after Petitioners submitted the Rate Filing. If this information was important to the Board, fairness dictates that this information request should have been issued immediately by the Board upon receipt of the Rate Filing, and in no event should issuance of this Request have been delayed for nearly one and a half months after the Pilots issued its request for scheduling order on April 8, 2024.

Turning to the specific line items in the Request for Additional Information, the Portland Pilots’ fully incorporate all oral comments and objections made at the May 23, 2024 Board meeting, and the Pilots further offer a range of written comments and objections. For convenience, the Pilots have addressed these comments and information requests in the order of items listed in the Request, with a separate page or pages indicating the Pilots’ comments, objections, and any responsive information. Although the attachments include responsive information, with the exception of one item, all of the information was previously provided in the Rate Filing and has simply been reordered to conform to the item order contained in the Request.

Conclusion. We appreciate the opportunity to provide the additional information requested by the Board, subject to the comments and objections noted in our responses. We also continue to urge the Board to act immediately on the Protective Order and proceed with a formal scheduling order. Continued delay is both unfair and inappropriate.

If you have questions or need other information, please let us know.

Sincerely,



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, President, Portland Pilots, Inc.