

**BEFORE THE FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.**

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INTERNATIONAL LONGSHOREMAN’S	:	
ASSOCIATION,	:	
	:	
Complainant,	:	
	:	
v.	:	FMC Docket No.: 22-12
	:	
GATEWAY TERMINALS, LLC;	:	
CHARLESTON STEVEDORING COMPANY,	:	
LLC; PORTS AMERICA FLORIDA, INC.;	:	
CERES MARINE TERMINALS, INC.; AND	:	
SSA ATLANTIC, LLC,	:	
	:	
Respondents.	:	
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RESPONDENTS’ MOTION TO DISMISS

Respondents Gateway Terminals, LLC (“Gateway”), Charleston Stevedoring Company, LLC (“CSC”), Ports America Florida, Inc. (“PA”), Ceres Marine Terminals, Inc. (“Ceres”), and SSA Atlantic, LLC (“SSA”) move to dismiss the Complaint filed by the International Longshoreman’s Association (“ILA”), for the reasons set forth below.

I. Overview

The Complaint fails to meet threshold pleading standards necessary to establish personal or subject matter jurisdiction in FMC adjudicative proceedings. During the 2019 review of FMC Agreement No. 201293 – the primary focus of the ILA’s complaint – Respondents’ joint venture agreement was closely reviewed by the Commission and found to be outside the agency’s jurisdiction, leading to the withdrawal of that agreement. Complainant fails to plead any facts which, if true, would provide a basis for revisiting or reversing that determination and asserting jurisdiction. Further, the Complaint pleads violations of the Clayton Act, which clearly are outside the Commission’s jurisdiction and reserved by statute to the federal courts.

The Complaint also fails to plead facts necessary to establish a substantive violation of any of the provisions of the Shipping Act that the ILA invokes. These pleading shortcomings are not just technical omissions. Rather, the ILA's allegations, even if true (and they clearly are not), do not come close to establishing a violation of the Shipping Act. For example, the ILA alleges that Respondents have violated 46 U.S.C. § 41102(b) by failing to operate in accordance with the terms of FMC Agreement No. 201293, although that agreement was withdrawn from consideration in 2019 at the agency's urging based on lack of jurisdiction. Similarly, the ILA asserts that Respondents have violated 46 U.S.C. § 41105(6), which restricts ocean common carriers' ability to negotiate collectively for certain shoreside services. Clearly none of the Respondents are ocean-common carriers, and the Complaint does not allege facts suggesting otherwise.

Moreover, the Complaint seeks a series of remedies that are far beyond the Commission's statutory authority to grant. The ILA asks the Commission to order Respondents to pay reparations to third parties – a remedy beyond the scope of the agency's reparations power in 46 U.S.C. § 41305(b). It further seeks that the Commission order Respondents to make antitrust-related filings before other agencies, although such an action is outside any FMC authority. Accordingly, even accepting all facts pled on the face of the Complaint as true, the ILA fails to state a viable claim, and the Complaint must be dismissed.

None of the foregoing is to suggest, however, that Respondents concur with the ILA's inaccurate factual narrative. In suggesting that Ceres, PA and SSA have merged competing marine terminal operators, the ILA tries to obscure the well-known fact that Savannah and Charleston are operating ports, in which terminal real estate is controlled by the state ports authorities (not leased to private terminal operators), and container yard services in those facilities are provided by public-sector workers employed by the state agency. The joint ventures of which the ILA complains were

formed not on Respondents’ own initiative, but rather at the behest of the state port authorities in Georgia and South Carolina, which elected to transition their operations to a single stevedoring-concessionaire model – a step considered necessary by those state policymakers to improve the operational efficiency of those facilities in the face of rising cargo volumes, looming terminal capacity constraints and supply chain issues. The ILA’s allegations of price-fixing as between Charleston and Savannah are a complete fabrication: both South Carolina and Georgia have mandated appropriate separation between Gateway and CSC and have imposed state oversight to ensure that pricing at each port is set independently and competitively, and Respondents have maintained appropriate internal controls in compliance with these State mandates.

However, as noted above, it is not necessary for the Presiding Officer to resolve any of these factual issues at this stage of the proceeding, as the Complaint on its face fails on both jurisdictional and substantive grounds. Rather than exercising an appropriate level of care to present the Commission with well-pled and colorable allegations of Shipping Act violations, the ILA has used this FMC adjudication process as a platform to spread false and disparaging accusations about Respondents, with aims seemingly unconnected to the Commission’s statutory mandate. Accordingly, dismissal of this proceeding with prejudice is now warranted.

II. Factual Background

a. State Action Drove Formation of Consolidated Stevedoring Companies

Gateway is a stevedoring company that operates in Savannah, Georgia, and a joint-venture company ultimately owned by Marine Terminals Corporation – East (“MTCE”),¹ Ceres, and SSA. CSC is a stevedoring company that operates in Charleston, South Carolina, and a JV company also owned by MTCE, Ceres, and SSA. Prior to 2019, MTCE, Ceres and SSA each provided

¹ MTCE is an affiliated company of PA.

stevedoring services independently in both Charleston and Savannah. In Savannah, MTCE, Ceres and SSA combined their respective stevedoring assets into the pre-existing Gateway entity that managed gate services, as the Georgia Ports Authority (“GPA”) wanted stevedoring services to be consolidated into one provider. CSC was created after the South Carolina Ports Authority similarly raised concerns about the operational inefficiencies generated by multiple stevedoring companies working in each port. Having multiple stevedores operating competitively in the same space was recognized by the state policymakers as an obstacle to necessary port reforms, such as optimizing the physical configurations of the ports, more closely integrating terminal and stevedoring operations, updating and unifying the parties’ operating systems, more efficiently utilizing equipment in the facility, and reducing redundant administrative and backroom costs that impaired the competitiveness of each port. To avoid undue disruption of existing commercial relationships between stevedores and carriers, each port gave SSA, Ceres and MTCE the option of proposing a single joint venture stevedoring-services provider, which the parties ultimately pursued in 2019 forming CSC in Charleston and consolidating stevedoring services into Gateway in Savannah, each of which operate independently of one another.

Each port required the respective JV to execute a license agreement that authorized it to engage in consolidated stevedoring services, subject to certain conditions, including the requirement to provide competitive rates. Gateway also agreed with the Georgia Ports Authority to allow GPA to oversee its stevedoring rates to assure competitiveness. The licenses included various other performance requirements imposed upon each JV designed to increase operational efficiency.

b. FMC Agreement: Filing, Determination of No Jurisdiction, and Withdrawal

As part of the compliance process in connection with establishing their joint-venture operations, on March 29, 2019, Ceres, SSA and PA filed FMC Agreement No. 201293, the “Georgia – South Carolina Marine Terminal Operator Cooperative Working Agreement with the Commission.” While the Commission lacks jurisdiction over providers of stevedoring services, the parties noted that certain of their services – in particular their role in gate operations and controlling access to the terminal – might have brought them within the scope of the Shipping Act’s definition of “marine terminal operator,” and therefore could have made their agreement subject to FMC filing under the Shipping Act. See 46 U.S.C § 40102(15) and 46 U.S.C § 40301(b). The Commission commenced a comprehensive review process pursuant to § 40304(d), gathering information from the parties regarding their current and planned operations and market conditions pursuant to a Request for Additional Information dated May 9, 2019.

After extensive review, the Commission’s General Counsel issued an opinion letter on August 6, 2019, in which he concluded that “the Parties to the agreement do not appear to be marine terminal operators (MTOs) as defined by the Shipping Act of 1984.” See Exhibit A. The General Counsel reasoned:

In this case, it appears that the Parties do not exercise sufficient “control” over any terminal facilities to render them MTOs under the Shipping Act at either Port. Their primary activities consist of stevedoring services provided to the carriers, and, as noted by the Parties, the Commission does not consider stevedores to be MTOs under the Act. See *Final Rule: Exemption of Certain Marine Terminal Arrangements*, 57 Fed. Reg. 4578, 4581 n.16 (Feb. 6, 1992) (“The Commission does not assert or claim jurisdiction over stevedoring activities.”). And none of the other services listed by the Parties involve the exercise of control over terminal facilities.

The parties elected not to contest the General Counsel’s jurisdictional determination before the full Commission. As a result of the opinion letter, the parties formally withdrew the proposed

agreement from the Commission's consideration by letter to the General Counsel, with copy to the Bureau of Trade Analysis, dated September 9, 2019. See Exhibit B.

III. Standard of Review

Although the Commission's Rules do not explicitly provide for motions to dismiss, Commission Rule 12 states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. The "Commission looks to Federal Rule of Civil Procedure 12(b)(1) when considering dismissals based on lack of subject matter jurisdiction, and to Rule 12(b)(6) when considering dismissals based on failure to state a claim." *MAVL Capital v. Marine Transport Logistics*, Docket No. 16-16, 2020 FMC LEXIS 216 at *6 (FMC Oct. 29, 2020).

The standard of review governing a motion to dismiss a complaint for failure to state a claim before the FMC at the pre-discovery stage is as follows:

To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 663] (2009).

Marine Transp. Logistics, Inc., 2019 WL 5206007, at *2 (quoting *Mitsui O.S.K. Lines Ltd.*, 32 S.R.R. at 136) (alteration in original).

This standard does not . . . require "heightened fact pleadings of specifics" or detailed factual allegations. *Twombly*, 550 U.S. at 555, 570. . . . Further, Rule 12(b)(6) does not require "the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible." *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120-21 (2d Cir. 2010).

Maher Terminals, LLC v. Port Auth. of N.Y. & N.J., 34 S.R.R. 35, 58 (FMC 2015); accord *Marine Transp. Logistics, Inc.*, 2019 WL 5206007, at *3. "Instead, "the complaint's factual allegations [simply] must be enough to raise a right to relief above the speculative level and must nudge claims across the line from conceivable

to plausible.” *Marine Transp. Logistics, Inc.*, 2019 WL 5206007, at *3 (quoting *Maier Terminals, LLC*, 34 S.R.R. at 57-58) (internal quotations omitted). . . . [T]he cornerstone of the Rule 12 standard of review is that all well-pleaded factual allegations in the complaint must be assumed to be true and construed in the light most favorable to the non-moving party (here, Complainant). *See, e.g., Marine Transp. Logistics, Inc.*, 2019 WL 5206007, at *2-3; *accord Maier Terminals, LLC*, 34 S.R.R. at 58; *see also Mitsui O.S.K. Lines Ltd.*, 32 S.R.R. at 136 (under Rule 12(b)(1), “[a]s it does when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged . . . in the complaint as true”) (quoting *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009)).

See MCS Industries, Inc. v. Cosco Shipping Lines Co., Ltd. and MSC Mediterranean Shipping Company Sa, No. 21-05, 2022 WL 154535, at *3 (FMC Jan. 7, 2022)

IV. Argument

a. The Complaint Fails to Plead Facts Establishing Personal Jurisdiction

The ILA’s Complaint is predicated, in large part, on a mistaken belief that Agreement No. 201293 is on file and in effect at the Commission, and that the Commission therefore has determined that Respondents are marine terminal operators. Paragraphs 10-12 of the Complaint assert jurisdiction over PA, Ceres, and SSA “because Article 13 of the FMC Agreement expressly acknowledges that the Agreement and its terms are ‘[s]ubject to the Shipping Act of 1984, as amended.’” Similar claims are made about CSC and Gateway in paragraphs 8 and 9: “The Commission has personal jurisdiction over Gateway because Gateway has engaged in and continues to engage in international maritime commerce of the United States, and because it has submitted to the jurisdiction of the Commission by filing agreements with the Commission” – despite the fact that the agreement was withdrawn, and in any event CSC and Gateway were never signatories to it.

What the Complaint is wholly lacking, however, are any factual allegations to support the assertion that Respondents are now marine-terminal operators – i.e., that they are “in the business

of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.” Paragraphs 14 and 15 allege that the Ports of Charleston and Savannah “leased the marine terminal property to Ports America, Ceres, and SSA until December 31, 2019.” Even if taken as true for purposes of a motion to dismiss, this allegation only appears to support a determination that PA, SSA and Ceres may have been MTOs subject to FMC jurisdiction before 2019 but are not now. The allegation provides no support for the contention that CSC or Gateway are MTOs. Given that the agency already devoted ample time and resources to evaluating its jurisdiction over these same parties and joint ventures and found jurisdiction to be lacking, the failure of the ILA to plead any facts regarding the provision of terminal facilities to establish personal jurisdiction provides ample basis for dismissal.

b. Commission Lacks Jurisdiction Over Antitrust Claims

The Commission lacks subject matter jurisdiction over Complainant’s antitrust claims in Counts 2, 3 and 8 of the Complaint.

Count 3 of the Complaint alleges that Respondents have violated section 13 of the Clayton Act and asks that the Commission impose monetary reparations in accordance with 15 U.S.C. § 15. However, the FMC lacks any statutory authority to adjudicate Clayton Act or other antitrust claims, as such claims are reserved to the federal district court by 28 USC § 1337. *See also See Seatrain Lines, Inc. v. Fed. Mar. Comm’n*, 460 F.2d 932, 936 (D.C. Cir. 1972), *aff’d*, 411 U.S. 726, 93 S. Ct. 1773, 36 L. Ed. 2d 620 (1973) (Clayton Act does not extend the jurisdiction of any agencies identified therein.)

Count 2 of the Complaint does not cite any antitrust or Shipping Act authority at all. Rather, it simply asks that the Commission determine that the joint ventures constituted a merger, and award reparations to “prevent further harm by the Respondents to the ocean carriers and residential

customers and consumers.” Even if this count did articulate a colorable cause of action, jurisdiction would not lie with the FMC, as the Shipping Act expressly excludes mergers and acquisitions from the scope of the Act. See 46 U.S.C. § 40301(c).

Similarly, in Count 8, the ILA asks the FMC to “direct the Respondents to file the necessary merger filings and declare the FMC Agreement ineffective until the Federal Trade Commission has ruled on the legality of the merger between the Respondents.” However, there is no statutory basis or precedent for the FMC to adjudicate the legality of an alleged merger or to mandate the submission of antitrust-related filings with another regulatory agency.

c. Remaining Counts Fail to State a Claim

In addition to the jurisdictional flaws described above, each of the remaining counts set forth in the Complaint fails to plead facts sufficient to establish a violation of the Shipping Act.

In addition to the three antitrust/merger claims addressed on jurisdictional bases above (Counts 2, 3 and 8), the Complaint includes five additional counts:

i. Count One: “Restraint on Competition and Trade”

The ILA cites the following authority for its Count One claim:

58. The Commission is expressly directed to reject agreements that are "likely to substantially lessen competition in purchasing of certain covered [Marine Terminal Operator] services." Frank LoBiondo Coast Guard Authorization Act of 2018, Pub. L. No. 115-282, Title VII § 710.

The section cited relates to the 2018 amendments to 46 USC § 41307(b)(1), the injunctive standard by which the Commission can request a federal district court to enjoin an agreement on file with the FMC on certain competition-related grounds. The Commission is not authorized to “expressly [] reject” such agreements.

Unlike other sections of the Shipping Act, no private right of action exists under § 41307(b)(1), and the ILA is not authorized to invoke it in their Complaint. See 46 USC § 41301(a)

(“A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1)”).

Furthermore, the Complaint asserts that Respondents caused carriers and others “as much as \$1,000,000.00” in allegedly inflated charges and demands that the Commission order the Respondents to pay reparations. While the ILA argues that the Respondents should be made to pay reparations, under the Shipping Act, the ILA cannot maintain a claim for reparations for harm to non-parties like carriers, and it pleads no specific facts showing that the ILA itself was injured by Respondents. *See e.g., In Re Vehicle Carrier Services*, Nos. 16-01, 16-07, 16-10 and 16-11, 2018 WL 4091566, at *16 (FMC Aug. 21, 2018) (“46 U.S.C. §41301(a) provides that ‘any person’ may file a complaint alleging a violation of the Shipping Act, but 46 U.S.C. § 41305(b) limits reparations only to those that suffer ‘actual injury’ and longstanding Commission precedent holds that only direct purchasers suffer ‘actual injury.’ ”).

ii. Count Four: “Concerted Action in Violation of § 41105(6)”

Section 41105(6) restricts groups of common carriers from negotiating jointly for certain covered services, unless those negotiations comply with the antitrust laws. The threshold element of any claimed violation of § 41105 is that the violation was committed by a group of carriers or a conference. As Respondents are not carriers (and the Complaint does not suggest otherwise) this claim must fail as a matter of law.

iii. Count Five: “Refusing to Deal”

The ILA cites § 41106(2), which makes it unlawful for a marine-terminal operator to impose any undue or unreasonable prejudice or disadvantage with respect to any person, and § 41106(3), which makes it unlawful for a marine-terminal operator to unreasonably refuse to deal or negotiate with any person. The ILA asserts that “any rates and charges imposed by Respondents

are unreasonable and disadvantage the carriers and other customers which must pay the arbitrary rates and charges.” The Commission’s general counsel has already opined that the Respondents are not MTOs.

The Complaint, however, fails to allege any of the factual elements necessary to make out either violation. To successfully plead a discrimination (i.e., unreasonable preference or prejudice) claim under the Shipping Act, a complainant must show: (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice is the proximate cause of injury. The ILA fails to plead facts supporting any of these factors. Similarly, it fails to allege any instances where it was subjected to an unreasonable refusal to deal.

iv. Count Six: “Operating Contrary to the Agreement”

The ILA contends that Respondents are operating contrary to the terms of the agreement on file with the FMC in violation of § 41102(b). However, as noted above, the parties do not currently have an agreement on file with the Commission. This count apparently is based on the ILA’s confusion regarding the status of the agreement and the FMC’s jurisdiction over Respondents. In any event, the pleading of a core element of the violation, an actual filed agreement, is missing in this case.

v. Count Seven: “Declaratory Order”

The ILA requests the FMC issue a “Declaratory Order stating that the FMC Agreement No. 201293 substantially lessens competition in the purchasing of certain covered Marine Terminal Operator services in violation of the United States’ antitrust laws.” In this count, the ILA blends terminology from the Shipping Act’s restrictions on carrier-group purchasing, discussed above, with a request for an order under the antitrust laws. This requested relief exceeds

the scope of the FMC's jurisdiction as it asks that the FMC adjudicate antitrust issues, and in any event the remedy sought cannot be granted, as Agreement No. 201293 is not currently in effect.

WHEREFORE, Respondents respectfully move this Commission to dismiss the ILA's Complaint with prejudice for the reasons discussed above, and for all such other and further relief as may be just and proper.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was provided to Complainant's counsel of record by email on this 9th day of May 2022.

Matthew J. Thomas

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Office of the General Counsel

August 6, 2019

Mr. Matthew J. Thomas, Esq.
Blank Rome
1825 Eye Street, NW
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Re: Georgia – South Carolina Marine Terminal Operator Cooperative
Working Agreement (FMC Agreement No. 201293)
OGC Opinion on Commission Jurisdiction

Dear Mr. Thomas:

This is to advise that the Office of the General Counsel (OGC) has conducted a review of the materials provided thus far to the Federal Maritime Commission (Commission) in response to the May 9, 2019 Request for Additional Information (RFAI) issued regarding FMC Agreement No. 201293, Georgia – South Carolina Marine Terminal Operator Cooperative Working Agreement.¹ It is the opinion of OGC that, based on the materials provided, the Parties to the agreement do not appear to be marine terminal operators (MTOs) as defined by the Shipping Act of 1984, and that this agreement therefore falls outside of the Commission's jurisdiction. This opinion is that of OGC alone and is nonbinding on the Commission.

The Shipping Act's agreement filing requirements (and corresponding antitrust immunity) apply only to ocean common carrier² and MTO agreements. See 46 U.S.C. §§ 40301, 40307(a). The Act defines a marine terminal operator agreement as:

¹ The Parties have acknowledged that the information and documents provided thus far do not constitute a complete response to the RFAI or a statement of noncompliance containing the information described in the RFAI. Therefore, the 45-day review period set forth in 46 U.S.C. § 40304(c)(2) has not been triggered.

² None of the Parties claim to be ocean common carriers.

[A]n agreement between or among marine terminal operators, or between or among one or more marine terminal operators and one or more ocean common carriers, to- (1) discuss, fix, or regulate rates or other conditions of service; or (2) engage in exclusive, preferential, or cooperative working arrangements, to the extent the agreement involves ocean transportation in the foreign commerce of the United States.

§ 40301(b). This definition establishes a two-part test for determining whether an agreement falls within the scope of § 40301 and the Commission's jurisdiction: the agreement must (1) be between at least two MTOs or between at least one MTO and one ocean common carrier; and (2) concern one of the enumerated categories of activities. § 40301; see *Foreign-to-Foreign Agreements – Exemption*, 22 S.R.R. 455, 461 (FMC 1989) (discussing this two-part test in the context of ocean common carrier agreements).

The Act defines an MTO as “a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.” 46 U.S.C. § 40102(15). Although not defined in the Act, Commission regulations define “terminal facilities” in 46 C.F.R. part 525 and “marine terminal facilities” in 46 C.F.R. part 535. Part 535, which includes a slightly broader definition, states that “marine terminal facilities” are:

[O]ne or more structures (and services connected therewith) comprising a terminal unit, including, but not limited to docks, berths, piers, aprons, wharves, warehouses, covered and/or open storage space, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers or the interchange of same between land and ocean common carriers or between two ocean common carriers.

46 C.F.R. § 535.104(p). In determining whether an entity qualifies as an MTO, the Commission examines whether the entity meets the definition with respect to its activities at the specific facility at issue. See *Auction Block Co. v. City of Homer*, 33 S.R.R. 589 (FMC 2014), *aff'd sub nom. Auction Block Co. v. Fed. Mar. Comm'n*, 606 F. Appx. 347, 348 (9th Cir. 2015); see *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 919 F.2d 799 (1st Cir. 1990).

The Parties contend that they qualify as MTOs at the Ports of Charleston and Savannah (Ports) because of: (1) their gate activities, which include operational control and staffing of the gates, controlling access to terminal facilities, and the

assessment and collection of gate fees; and (2) the provision of essential services, including checking, yard planning, and stevedoring. *Initial Joint Resp. to Request for Add'l Info.* at 4-6 (June 22, 2019). They point to *Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536 (D.C. Cir. 1988) (*Plaquemines*), in which the court upheld the Commission's "control theory" of jurisdiction. The Parties argue that their provision of services and control over gate activities meets this test, rendering them MTOs under the Act.

In the Commission cases underlying *Plaquemines*, the Commission concluded that a public port authority fell within its jurisdiction even though the port authority did not own or operate any terminals. *Louis Dreyfus Corp. v. Plaquemines Port Harbor & Terminal Dist.*, 25 F.M.C. 59 (FMC 1982); *New Orleans Steamship Ass'n v. Plaquemines Port Harbor & Terminal Dist.*, 28 F.M.C. 556 (FMC 1986). The Commission determined that an entity need not directly or physically provide terminal facilities or services to be deemed an MTO under the Act; the "statutory scheme contemplates regulation of any entity if it exercises sufficient control over terminal facilities to have a discernible effect on the commercial relationship between shippers and carriers involved in that link in transportation." *Louis Dreyfus Corp.*, 25 F.M.C. at 65. The Commission concluded that the combination of: (1) the port authority's exclusive ability to render the relevant services (essential police, fire, and emergency services); the port authority's assessment of fees; and (3) its control over access to private terminal facilities, i.e., its ability to condition access to private terminal facilities on payment for the port authority's services brought it within the Commission's jurisdiction. *Id.* at 66-67. The court in *Plaquemines* agreed that the "combination of offering essential services and controlling access to the private facilities amounts to the furnishing of terminal facilities." 838 F.2d at 543.

Examining the first element, the Parties emphasize that the services they provide are "essential," apparently relying on the *Plaquemines* court's use of the phrase "essential services" to describe the services provided by the port authority in that case. *See id.* As the Parties note, however, those services consisted of "essential health, safety, and security services," i.e., police, fire, and emergency services, which the port authority had the "exclusive ability" to provide. *See Louis Dreyfus Corp.*, 25 F.M.C. at 66. The services provided by the Parties are not health, safety, or security services, and there is no indication that the Parties have the exclusive ability to provide them.

Even if the Parties' services are "essential," it is unclear that they meet the other elements described in the *Plaquemines* and the underlying Commission cases. The main thrust of the Parties' argument is that the provision of gate services renders them MTOs. But the Parties only charge carriers for gate services in

Savannah (fees for gate services at Charleston are charged by the Port). Thus, the second element in *Louis Dreyfus Corp.*, the assessment of a fee for the services provided, is met only with respect to the Savannah arrangement. *See id.*

Finally, we examine the level of control exercised by the Parties over the facilities at the Ports. The Shipping Act, the Commission's regulations, and the *Plaquemines* case make clear that an entity must have some level of control over physical terminal assets in order to meet the MTO definition; performing services alone is insufficient. The Shipping Act refers to the provision of "wharfage, dock, warehouse, or other terminal facilities." 46 U.S.C. § 40102(15) (emphasis added). The Commission's regulations, in turn, define "marine terminal facilities" as "*one or more structures* (and services connected therewith) comprising a terminal unit." 46 C.F.R. § 535.104(p) (emphasis added). To the extent that the Parties suggest that the parenthetical "(and services connected therewith)" be read as meaning that services alone constitute "marine terminal facilities," we disagree. By using the conjunctive "and" instead of the disjunctive "or" in the parenthetical, the definition is most reasonably read as stating that marine terminal facilities include the relevant structures *and* connected services, not merely the services. Moreover, the Commission and the court in *Plaquemines* emphasized the Commission's control over private terminal facilities as an essential factor in determining that the port authority was an MTO. *Louis Dreyfus Corp.*, 25 F.M.C. at 66-67; *Plaquemines*, 838 F.2d at 543. Thus, the fact that the Parties perform services at the Ports, including services defined in Commission regulations as "marine terminal services," is not enough to establish that they are MTOs under the Act.

In this case, it appears that the Parties do not exercise sufficient "control" over any terminal facilities to render them MTOs under the Shipping Act at either Port. Their primary activities consist of stevedoring services provided to the carriers, and, as noted by the Parties, the Commission does not consider stevedores to be MTOs under the Act. *See* Final Rule: Exemption of Certain Marine Terminal Arrangements, 57 Fed. Reg. 4578, 4581 n.16 (Feb. 6, 1992) ("The Commission does not assert or claim jurisdiction over stevedoring activities."). And none of the other services listed by the Parties involve the exercise of control over terminal facilities. Although some of the services described are performed at the gates, which might be considered terminal facilities, the Parties' description indicates that the Ports own the gates, and the Gate Companies merely perform services at those locations (e.g., inspecting cargo, providing directions to truckers). In other words, it does not appear that the services provided by the Gate Companies are directly connected to the use of terminal facilities, akin to providing wharfage, dockage, or warehousing. *See* 46 U.S.C. § 40102(15). Additionally, nothing in the information provided by the Parties suggests that they have the ability, like the port authority in *Plaquemines*,

to condition access to the gates or the terminals on payment of fees for their services.³

For the foregoing reasons, it is the opinion of OGC that the parties to the Georgia – South Carolina MTO Cooperative Working Agreement do not appear to be MTOs under the Act at the Ports and, therefore, the Agreement is not subject to the Commission's jurisdiction.

Further, regardless of whether the Parties are regulated entities under the Act, it is unclear from the documents provided at this point whether the Agreement constitutes a merger that falls outside the scope of the Act.

As mentioned previously, OGC's opinion is not binding on the Commission, and OGC makes no statements as to the competitive effects of the proposed Agreement. This opinion is based on the information provided to the Commission by the Parties. Should the facts change or differ from our current understanding as discussed in this letter, our response may be different. If you or the Parties have any questions, please contact the OGC at (202) 523-5740.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Tyler J. Wood'.

Tyler J. Wood
General Counsel

³ The Parties assert that they “control access to the terminal,” but this appears to refer to the mere fact that truck traffic must pass through the gates to enter the terminal.

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September 9, 2019

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800 N. Capitol St. NW
Washington, DC 20573

Re: Withdrawal of FMC Agreement No. 201293 – *Georgia – South Carolina Marine Terminal Operator Cooperative Working Agreement*

Dear Mr. Wood,

In light of the view set forth in your August 6th letter that the above-captioned agreement does not fall within the Commission's jurisdiction, the parties now ask that it be withdrawn from consideration.

We appreciate the time and attention the staff invested in reviewing the proposed agreement, and your work to clarify the jurisdictional issues presented.

Although the agreement is now withdrawn, the information the parties provided during the agreement review process continues to be highly sensitive, as it includes trade secrets and other non-public confidential business information, and we therefore ask that it continue to be withheld from public disclosure to the full extent permitted by law.

Very truly yours,



Matthew J. Thomas
Partner

Cc: Florence Carr, Director, BTA