

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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FEDERAL MARITIME COMMISSION  
800 North Capitol Street, N.W.  
Washington, D.C. 20573-0001

Plaintiff

vs.

CITY OF LOS ANGELES, CALIFORNIA  
200 North Spring Street, Room 260  
Los Angeles, California 90012

HARBOR DEPARTMENT OF THE  
CITY OF LOS ANGELES  
425 South Palos Verdes Street  
San Pedro, California 90731

BOARD OF HARBOR COMMISSIONERS  
OF THE CITY OF LOS ANGELES  
425 South Palos Verdes Street  
San Pedro, California 90731

CITY OF LONG BEACH, CALIFORNIA  
333 West Ocean Boulevard  
Long Beach, California 90802

HARBOR DEPARTMENT OF THE  
CITY OF LONG BEACH  
333 West Ocean Boulevard  
Long Beach, California 90802

BOARD OF HARBOR COMMISSIONERS  
OF THE CITY OF LONG BEACH  
333 West Ocean Boulevard  
Long Beach, California 90802

Defendants

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**COMPLAINT FOR AN  
INJUNCTION PURSUANT  
TO SECTION 6(h) OF THE  
SHIPPING ACT OF 1984  
46 U.S.C. § 41307**

**Civil Action No.** \_\_\_\_\_

The Federal Maritime Commission (“Commission” or “FMC”) brings this action pursuant to section 6(h) of the Shipping Act of 1984 (“Shipping Act” ), 46 U.S.C. § 41307(b)(2), to permanently enjoin certain authorities, and conduct engaged in pursuant to those authorities, set forth in an amendment to the “Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement,” filed with the Federal Maritime Commission and designated as Agreement No. 201170-001. On October 29, 2008, the Commission made a formal determination under section 6(g) of the Shipping Act, 46 U.S.C. 41307(b)(1), that Agreement No. 201170-001 is likely, by a reduction in competition, to result in an unreasonable decrease in transportation service or an unreasonable increase in transportation cost. As required by section 6(g), the Commission notified the Agreement parties that same date of the Commission’s determination to seek injunctive relief from this Court.

### **JURISDICTION AND VENUE**

1. Jurisdiction and venue in this Court is invoked pursuant to section 6(h) of the Shipping Act, 46 U.S.C. § 41307(b)(1), which provides:

If, at any time after the filing or effective date of an agreement under chapter 403 of this title, the Commission determines that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, the Commission, after notice to the person filing the agreement, may bring a civil action in the United States District Court for the District of the Columbia to enjoin the operation of the agreement. The Commission’s sole remedy with respect to an agreement likely to have such an effect is an action under this subsection.

2. This Court also has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question), § 1337(a) (arising under statutes regulating commerce or protecting trade, and commerce against restraints and monopolies) and § 1345 (the United States as plaintiff).

### **THE PARTIES**

#### **Federal Maritime Commission**

3. Plaintiff Federal Maritime Commission is an independent regulatory agency of the United States and is charged with the administration of the Shipping Act, 46 U.S.C. § 40101, et seq.

#### **Port of Los Angeles**

4. Defendant City of Los Angeles is a municipal corporation established under Article XI of the Constitution of the State of California and is a political subdivision of that state.

5. Defendant Harbor Department of the City of Los Angeles, also commonly known as the “Port of Los Angeles,” (“LA Harbor Department”) is a department of the City of Los Angeles. The Harbor Department is responsible for administering and operating the “Harbor District” of the Port of Los Angeles. The Harbor Department is operated as a proprietary and self-supporting department that derives its revenues from fees for shipping services such as dockage, wharfage, pilotage, storage, property rentals, royalties and other port services. The Harbor Department is a landlord port, leasing its property to tenants who then, in turn, operate their own facilities.

6. Defendant Board of Harbor Commissioners of the City of Los Angeles, (“LA Board”) is comprised of a five member board appointed by the mayor of the City and confirmed by the Los Angeles City Council. The LA Board provides direction, creates policy, and promulgates rules

and regulations governing the operation, maintenance and use of the Harbor District. The LA Board controls the assets and facilities of the Harbor Department.

7. The City of Los Angeles, the LA Harbor Department and the LA Board shall be referred to jointly as the “Port of LA” or “POLA” for ease of reference where differentiation is not needed. POLA is a marine terminal operator within the meaning of the Shipping Act because they own and maintain the docks and other facilities that ocean common carriers use. 46 U.S.C. § 40102(14).

### **Port of Long Beach**

8. Defendant City of Long Beach is a municipality established under Article XI of the Constitution of the State of California and is a political subdivision of the State.

9. Defendant Harbor Department of the City of Long Beach, also commonly known as the “Port of Long Beach,” (“LB Harbor Department”) is a department of the City of Long Beach. The LB Harbor Department is responsible for administering and operating the “Harbor District,” which includes the Port of Long Beach. The LB Harbor Department is operated as a proprietary and self-supporting department that derives its revenues from fees for shipping services such as dockage, wharfage, pilotage, storage, property rentals, royalties and other port services. The LB Harbor Department is a landlord port, leasing its property to tenants who then operate their own facilities.

10. Defendant Long Beach Board of Harbor Commissioners (“LB Board”) is composed of five members that are appointed by the mayor and confirmed by the Long Beach City Council. The LB Board provides direction, creates policy, and promulgates rules and regulations governing the operation, maintenance and use of, the Harbor District, which includes the Port of Long Beach. The LB Board controls the assets and facilities of the Harbor Department.

11. The City of Long Beach, the LB Harbor Department and the LB Board shall be referred to as “Port of LB” or “POLB” for ease of reference where differentiation is not needed. POLB is a marine terminal operator within the meaning of the Shipping Act because they own and maintain the docks and other facilities that ocean common carriers use. 46 U.S.C. § 40102(14).

12. Where reference is made to the Defendants (POLA and POLB) together, they will be referred to as the “Ports.”

### **STATUTORY BACKGROUND**

13. The Commission is an independent administrative agency of the United States responsible for the regulation of oceanborne transportation in the foreign commerce of the United States pursuant to, inter alia, the Shipping Act of 1984, 46 U.S.C. § 40101 et seq. The Federal Maritime Commission was established in 1961, as the successor agency to the United States Maritime Commission.

14. Among other persons regulated under the Shipping Act, the Commission has jurisdiction over the rates, practices and agreements of marine terminal operators (“MTOs”). 46 U.S.C. §§ 40301(b), 40501(f)-(g), 41102(c), 41103, and 41106.

15. The term “marine terminal operator” is defined, in pertinent part, in section 3(14) of the Shipping Act, 46 U.S.C. §40102(14), 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.”

16. The Commission’s jurisdiction over agreements between MTOs is provided pursuant to section 4 (b) of the Shipping Act, 46 U.S.C. § 40301(b), which provides, in pertinent part:

This part applies to an 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.

17. Agreements that are subject to the Shipping Act, including agreements entered into by MTOs, must be filed with the Commission pursuant to section 5 of the Shipping Act, 46 U.S.C. § 40302.
18. The Shipping Act prohibits any person, including a marine terminal operator, from operating under an agreement that has not become effective under 46 U.S.C. §40304, or that has been “rejected, disapproved or canceled.” 46 U.S.C. §41102(b)(1).
19. The Shipping Act prohibits any person, including a marine terminal operator, from operating under an agreement required to be filed with the Commission if such operations are not in accordance with the terms of the agreement or any modifications to the agreement made by the Commission, 46 U.S.C. §41102(b)(2).
20. Under the review process established by the Shipping Act, agreements filed with the Commission ordinarily “shall become effective – on the 45<sup>th</sup> day after filing . . . or if additional information is required” by the Commission from the parties, “on the 45<sup>th</sup> day after the Commission receives all the additional information and documents” requested to conduct its review. 46 U.S.C. § 40304(c). The Commission is required by section 6 (d), 46 U.S.C. § 40304(d), to request information from the filing parties before the 45<sup>th</sup> day after the agreement is filed.
21. Following review by the Commission, and the agreement becoming effective under section 6 of the Shipping Act, 46 U.S.C. §40304, such filed agreements obtain exemption from

application of the antitrust laws pursuant to section 7 of the Act, 46 U.S.C. §40307. Section 7 of the Act provides, in part, that:

The antitrust laws do not apply to –

(1) an agreement . . . that has been filed and is effective under this chapter;

\* \* \* \*

(3) an agreement or activity within the scope of this part, whether permitted under or prohibited by this part, undertaken or entered into with a reasonable basis to conclude that it is –

(A) pursuant to an agreement on file with the Federal Maritime Commission and in effect when the activity takes place . . . .

22. If, however, the Commission’s review results in a determination that an agreement will, by a reduction in competition, result in an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, section 6(g) of the Shipping Act, 46 U.S.C. §41307(b)(1), authorizes the Commission to seek “appropriate injunctive relief” in this Court. The Commission is limited solely to seeking injunctive relief to address these conditions. The Commission must provide notice to the agreement parties before commencing such action.

23. Pursuant to section 6(h) of the Shipping Act, 46 U.S.C. § 41307(b)(2), this Court may issue a temporary restraining order or a preliminary injunction, and may issue a “permanent injunction after a showing [by the Commission] that the agreement is likely to have the effect” of decreasing transportation service or increasing transportation cost as a result of a decrease in competition.

24. The Court may not allow third parties to intervene in the injunction proceeding commenced by the Commission. 46 U.S.C. §41307(b)(3).

25. Section 6(k) of the Shipping Act, 46 U.S.C §41307(d)(1), permits the Commission, after notice to the Attorney General, to represent itself before this Court in these injunctive proceedings. Notice was provided to the Attorney General on October 29, 2008.

## NATURE OF THE CASE

26. This proceeding represents the culmination of the Commission's review process of amended and restated Agreement No. 201170-001 ("amended Agreement") filed by the Cities of Los Angeles and Long Beach, acting by and through their respective Boards of Harbor Commissioners, on August 1, 2008. The Commission's review process is mandated under section 6 of the Shipping Act, 46 U.S.C. §§ 40304, 41307. Agreement No. 201170 was originally filed by the Ports in June of 2006, and became effective August 10, 2006. However, the amended Agreement (201170-001) greatly expands upon the authorities contained in the original Agreement. The amended Agreement includes information concerning the Ports' Clean Truck Program ("CTP") that the Ports have jointly developed and revised since November 2006. Among other things, the amended Agreement reflects the Ports' intent to "coordinate and cooperate" as to the implementation and evaluation of their CTP and their respective concession programs.

27. As MTOs subject to the requirements of the Shipping Act, the Ports filed their original Agreement and the amended Agreement with the Commission as required by the Act. The Commission, as it does with all agreements, reviewed the Ports' original 2006 Agreement under the standard established in section 6(g) of the Shipping Act, 46 U.S.C. § 41307, in order to determine whether that Agreement was likely, by a reduction in competition, to result in an unreasonable decrease in transportation service or an unreasonable increase in transportation cost.

28. In the time since the Ports' original Agreement became effective, the Commission has closely followed the Ports' establishment of their Clean Air Action Plan Action in November, 2006 and their joint CTP announced in April, 2007. The Commission has closely monitored

numerous modifications and developments regarding the Ports' CTP that have occurred in the intervening two years. Irrespective of some differences between requirements put into place at each Port, the Ports continue to discuss, agree and coordinate their activities under Agreement No. 201170-001 to synchronize implementation of their CTP, in order to achieve the environmental benefits and port development goals claimed by the parties.

29. The Commission commenced its review of the Ports' amended Agreement when it was filed in August of 2008. In conducting that review, the Commission determined to issue a formal Request for Additional Information ("RFAI") to obtain information and documentary materials from the Ports that were necessary for assessing the competitive impact of the amended Agreement. The Commission issued the RFAI on September 12, 2008.

30. The Ports responded to the RFAI, in substantial part, on September 19, 2008. The Ports' response commenced a new 45-day period, following which the amended Agreement would become effective. That 45-day period expires on November 2, 2008.

31. By letter from the Commission's Bureau of Trade Analysis dated October 3, 2008, Commission staff requested copies of specific additional materials responsive to the earlier RFAI, which documents were believed to be in the possession of the Ports but were not provided with the Ports' response on September 19, 2008. The Ports furnished their supplemental response on October 9, 2008. Commission staff thereupon completed their section 6 economic review of the amended Agreement, utilizing information from the Parties' responses to the RFAI, public comments and other materials submitted to the FMC, available public sources, and third party consultants contracted by the Ports.

32. At the Commission's meeting on October 29, 2008, the Commission made the formal determinations required under section 6(g) of the Shipping Act, and determined that the amended

Agreement was likely, by a reduction in competition, to unreasonably decrease transportation service or to unreasonably increase transportation cost. More specifically, the Commission determined that the CTP-induced changes to the drayage market and corresponding reductions in competition caused by the requirements to use employee-drivers exclusively (“employee mandate”), truck subsidies, CTP fee and exemptions, and reductions in the number of Licensed Motor Carriers, as implemented by POLA as part of the Ports’ CAAP, CTP and respective concession program, will give rise to substantial transportation cost increases, beyond what is necessary to generate the public health and environmental benefits asserted by the Ports. The greatest impact found by the Commission’s section 6 economic review is attributed to increased costs of the employee-driver requirement which, taken alone, will likely account for over 60 percent of the CTP’s total cost through year 2025, as measured by a forward-looking analysis conducted by the Commission’s Bureau of Trade Analysis.

33. If allowed to be implemented under the authority claimed by the Ports under Agreement 201170-001, the Commission believes these fundamental, and unreasonable, changes to the local drayage industry including reductions or elimination of smaller LMCs now serving the Ports will be impracticable, if not impossible, to reverse following implementation of the Ports’ programs and respective concessions.

34. Although POLB has determined not to institute a ban on Independent Owner Operators (“IOOs”) at this time, the agreement authority contained in Agreement 201170-001 is sufficiently comprehensive to allow these Defendants, without precondition of further filing with the Commission, to further discuss with its closest port competitor the adoption of new or revised proposals for employee mandates as a component of the Ports’ CTP and concession programs; to reach agreement with its counterpart port on the terms, conditions or effective date for such

changes, whether limited to employee mandate requirements or as part of ongoing modifications to the CTP and concession programs; and thereafter to implement any such changes, whether jointly or severally as between the Ports.

35. The Commission has determined that worker status of truck drivers does not, in any quantifiable way, contribute to the CTP's environmental and public health benefits. A CTP without an employee mandate not only provides all the relevant public health benefits, but does so at substantially lower cost and with greater overall net benefits. POLA has also indicated a preference for drastically reducing the number of LMCs serving the Port, which will have the effect of increasing POLA's ability to enforce the employee mandate and empowering LMCs to raise drayage prices.

36. The concession program agreed to by the Ports under their CTP also includes certain truck subsidies, container fees to be assessed against cargo owners and other shippers (and exemptions therefrom, based on the source of truck financing and types of drayage truck employed by the LMC in physically draying the cargo), and incentive payments, all of which will substantially disadvantage small LMCs operating at POLA. Any action by the Ports that reduces the number of LMCs is likely to significantly increase drayage prices in the medium and long term by enhancing the ability of the remaining LMCs to increase prices. While POLA and POLB have set their container fee exemptions and incentive payments at different levels, such programs remain an integral part of the Ports' overall CAAP and CTP programs. The Ports have publicly committed to a process by which they will "coordinate and cooperate" as to the implementation and evaluation of their CTP and their respective concession programs. Such collusion among port competitors is only lawful under the anti-trust protections afforded by the Shipping Act.

## FACTUAL ALLEGATIONS

37. The San Pedro Bay port area comprises a single port area with a common boundary shared by the Cities of Los Angeles and Long Beach. The Port of Los Angeles and the Port of Long Beach comprise the portion of the San Pedro Bay within their respective eponymous City. The Ports of Los Angeles and Long Beach are located in Los Angeles County in the State of California.

38. The container port operations of the Port of Los Angeles have the greatest throughput of any container port in the United States. Along with the Port of Long Beach, the Ports' throughput accounts for greater than 40% of all U.S. import and export container load traffic. Combined, the two ports would rank fifth among container ports in the world by volume.

39. Containers transiting the Ports move from and into the U.S. interstate and international commerce. The great majority of containers of cargo moving from the Ports are loaded onto trucks, then hauled, or as more commonly called "drayed," by motor carriers directly to customers, off-dock terminals, or to railheads. Once the containers are drayed to one of these locations, the cargo may be loaded onto different trucks for a long-haul move across the U.S. Such containers may also be unstuffed from the ocean container and the cargo sorted into different trucks for carriage to final destination, as there frequently are many shippers' cargo loaded into a single container. Export cargo is often subject to the process in reverse. These cargo movements by truckers, including drayage truckers, may be carried pursuant to contracts with end users of the cargo or pursuant to contracts between the motor carrier and ocean carriers in which the motor carrier serves as the ocean carriers' agent or subcontractor.

40. Under the Constitution and laws of the United States, container cargo that remains in the continuous flow of the interstate and foreign commerce of the United States and the drayage of cargo containers to and from the Ports constitutes “interstate commerce”.

41. Motor carriers serving the Ports often are registered motor carriers under the federal Motor Carrier Act, 49 U.S.C. chapter 139, as well as holders of Motor Carrier of Property Permits under the laws of the state of California. Such carriers are referred to as Licensed Motor Carriers (“LMCs”).

### **Licensed Motor Carriers**

42. Licensed motor carriers (LMCs”) provide port drayage services by utilizing either employee-drivers, or by contracting with independent owner operators (“IOOs”) who are paid on a per trip basis. Some LMCs operate with a hybrid model combining employee drivers and contract operators.

43. Under California Vehicle Code, section 34624, independent owner operators may obtain their own permits as property motor carriers. Such IOOs have valid commercial drivers’ licenses and may own only one tractor and not more than three trailers. It is estimated that approximately 1,300 motor carriers provide drayage service at the Ports of Los Angeles and Long Beach using approximately 17,000 IOOs.

44. For many years prior to the implementation of the Ports’ Concession Plan (described below), any motor carrier, whether an IOO or an LMC using employee drivers, could provide drayage services moving cargo containers at the Ports of LA and LB, without restriction or mandate as to the employment status of the driver of the drayage truck nor pre-condition as to obtaining a concession to provide services over the public highways accessing terminal facilities within the Ports.

**Joint Actions Related to CARB Clean Truck Requirements and the Ports’ “Clean Air Action Plan”**

45. The California Air Resources Board (“CARB”) adopted rules on December 7, 2007, limiting emissions from diesel trucks providing drayage services at California’s ports and intermodal rail yards. The CARB regulations mandated phased-in limits upon particular trucks operating within port areas with deadlines of December 31, 2009 and December 31, 2013, respectively. By December 31, 2013, all drayage trucks must be equipped with an engine that meets or exceeds 2007 emissions standards.

46. On November 6, 2006, California approved a bond funding program known as Proposition 1B, that, among other things, authorized one billion dollars (\$1 billion) in bonds, such funds to be used to reduce emissions associated with the movement of freight along California’s trade corridors, and the legislature adopted necessary funding authority.

47. On November 20, 2006, the Los Angeles Board of Harbor Commissioners and the Long Beach Board of Harbor Commissioners, operating under their FMC-filed Agreement and the anti-trust immunity afforded thereby, jointly approved the San Pedro Bay Ports Clean Air Action Plan (“CAAP”). One of CAAP’s stated goals was to eliminate older trucks from the San Pedro Bay terminals within 5 years.

48. CARB issued guidelines on February 28, 2008, for awarding Proposition 1B funds to retrofit or replace drayage diesel engines in advance of the deadlines established in its drayage diesel regulations. The guidelines contemplate that the Proposition 1B CARB funds would be made available to IOOs. IOOs receiving funds must purchase replacement trucks that are operational for at least two (2) years prior to the next phase deadline.

49. On April 4, 2008, the Ports acted jointly to submit a proposal to CARB to award \$211 million in Proposition 1B funds to replace older drayage diesel trucks in compliance with CARB regulations. The Ports' joint Application emphasized that their administration of the grant funds would not restrict funding availability to a preferred individual, company, business entity, or other group of equipment owners, and that it would involve outreach to, and participation of, independent owner-operators.

50. On May 22, 2008, CARB approved the Ports' funding for their CAAP program in the amount of \$98 million.

#### **The Ports' Clean Truck Programs and Concession Plans**

51. The Ports jointly unveiled their original Clean Truck Program ("CTP") proposal to the public on April 12, 2007. The Ports announced their intent to implement their CTP within months, albeit without any plan to conduct an economic impact study to gauge the effectiveness of the plan. The Ports also announced that the CTP included a common concession program. They have since characterized their concession plan as a "harmonized POLA & POLB concession agreement" as the Ports have incorporated certain program element differences. Implementation of the Ports' CTP required that all drivers of trucks serving the Ports must be employees, resulting in the exclusion of IOOs, estimated at that time to account for 85 to 90 percent or more of the container moves at the two ports.

52. In September 2007, the Harbor Boards of both Ports announced publicly that they had adopted "Clean Truck" standards applicable at both Ports. These standards were published in substantially identical fashion in their respective harbor tariffs. The Ports' joint standards would:

- a. Ban pre-1989 trucks from Port service by October 1, 2008;
- b. Ban 1989-1993 trucks from Port service by January 1, 2010;

c. Ban un-retrofitted 1994-2003 trucks from Ports' service by January 1, 2010; and

d. Require all trucks providing service within the Ports to meet Model Year 2007 emissions standards by January 1, 2012.

Provisions applicable to the rolling ban of pre-1989 trucks were jointly implemented by the parties on October 1.

53. The Ports jointly employed a consultant to conduct an economic impact study of their proposed CTP. The results of the Ports' study were made public in early September, 2007.<sup>1</sup> Following release of their consultant's findings, the Ports' staffs jointly developed revisions to the CTP to mitigate some of the potential problems that had been identified by the consultants, as well as to finance further research on several options for reorganizing the CTP.<sup>2</sup> Revisions were later adopted by the Ports' Harbor Boards.

54. The Ports agreed to adopt: (1) a set of deadlines for removing older trucks based on Environmental Protection Agency emissions standards (commonly referred to as the "rolling ban" on older trucks); (2) a Clean Truck Fee on containerized cargo to be levied upon cargo interests (rather than by trucking companies) and to place such fees in a Clean Truck Fund to be used by the Ports to provide subsidies for the replacement and retrofitting of the to-be-excluded older trucks; and (3) concession programs that directly and indirectly restricted drayage service to LMCs.

55. Prior to the proposed concessions being implemented, most of the LMCs serving the Ports were non-asset owning organizations that utilized IOOs (as opposed to LMCs utilizing

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<sup>1</sup> Husing, John E., Brightbill, Thomas E. and Cooper, Peter A., "Economic Analysis: Proposed Clean Truck Program," September 7, 2007.

<sup>2</sup> Husing, John E. and Brightbill, Thomas E., "Clean Truck Program Option Assessment: Proposed Clean Truck Program, Draft, December 16, 2007.

employee drivers). The LMCs arranged drayage service for their clients who need containers moved – usually cargo owners, ocean transportation intermediaries or ocean carriers.

56. In its Concession agreement, POLA implemented a ban on LMCs utilizing IOOs, thereby forcing LMCs to use employee drivers, and to contractually commit to shift to exclusive use of employee drivers on a phased-in basis. This “employee mandate,” and the related requirement that LMCs own or control the trucks, will force LMCs to become asset-owning firms with drivers who are direct employees and bear the associated capital and labor costs. De facto, the execution of a POLA Concession Agreement terminates IOOs’ ability to conduct drayage operations at POLA beginning November 1, 2008 and progressively excluding such IOO operations until their complete elimination in December 31, 2013.

#### **The Ports’ Concession Plans**

57. On February 19, 2008, the Defendant Long Beach Harbor Board approved a plan requiring that only drayage trucks operated under the authority of a motor carrier holding a Concession Agreement with the City of Long Beach would be permitted to enter the Port beginning on October 1, 2008.

58. The Los Angeles Harbor Board adopted an Order March 20, 2008 that restricted entry to POLA to drayage trucks operated by a motor carrier holding a Concession Agreement with the City of Los Angeles:

Beginning October 1, 2008, at 8:00 am, no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage truck unless such Drayage Truck is registered under a Concession from the Port of Los Angeles....

The LA Board reserved the right to amend the Concession requirements at any time, without the consent of those who had already signed a concession agreement, and stated that neither its ordinance nor the grant of a Concession created any property interest in a Concessionaire.

59. On July 18, 2008, the LA Board released its Concession Plan. (Exhibit A)<sup>3</sup> The Concession Plan includes an agreement that must be signed by motor carriers before they could serve the Port. Eligibility for obtaining a Concession agreement with POLA required each motor carrier to submit an Application that, among other elements, requires an applicant to demonstrate, to the satisfaction of the Port's Executive Director, its financial capacity to meet obligations under the Concession Agreement.

60. Also on July 18, 2008, the Long Beach Harbor Department released the Concession Plan Agreement (Exhibit C) that must be signed by any motor carrier wishing to serve the latter port. To be eligible to sign a Concession Agreement, a motor carrier must first submit an Application. The Long Beach application differs from Los Angeles in that Long Beach requires that only motor carriers obtaining operating authority after June 1, 2008, need demonstrate their financial viability.

61. Through means of the Ports' collusive activities conducted pursuant to their FMC filed Agreement, the concession agreements adopted by each of the Ports contain comparable, if not completely identical, conditions requiring motor carriers to:

- (a) Be licensed and in good standing on a continuing basis;
- (b) Enter and maintain accurate information on each truck and driver into the Ports' Drayage Truck Registry;
- (c) Take responsibility for compliance and performance of their drivers who access the Port;

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<sup>3</sup> POLA's current Concession Agreement (dated October 8, 2008) is attached as Exhibit B.

- (d) Assure that all trucks comply with the Clean Trucks Program on an ongoing basis;
- (e) Comply with parking restrictions and submit for approval a parking plan for trucks accessing the Port;
- (f) Tender a truck maintenance plan;
- (g) Comply with truck safety and operations regulations;
- (h) Make available all records required for compliance with existing regulatory programs, including documents on driver qualifications;
- (i) Ensure that each of their drivers has a valid Transportation Worker Identification Card (TWIC);
- (j) Ensure that each of their trucks has a Radio Frequency Identification Device (RFID) connected to the Drayage Truck Registry so that the relevant information is available when the truck enters the Port;
- (k) Ensure that all trucks comply with security laws and regulations;
- (l) Ensure that all trucks post placards providing a phone number to allow the public to report emissions and safety concerns;
- (m) Implement necessary technology required by the Concession or the Clean Trucks Program; and,
- (n) Ensure that they have the financial capability to execute the concession agreements;

62. The two Ports' Concession Agreements differ in certain respects, however, those differences were not seen by either as inconsistent or detrimental to their CTP. The significant differences are: (1) POLA requires concessionaires to use employee drivers only (beginning at the end of 2009) whereas POLB permits concessionaires to use independent owner operators as subcontractors (as well as employees); and (2) POLB also allows the required parking plan for

each drayage truck to include provisions for parking at any legal parking space and is not restricted only to off-street parking (as required by POLA).

### **Agreements Filed With The Commission to Implement The Ports' CTP**

#### **- The Ports' Amended and Restated Agreement Number 201170-001**

63. The Ports filed their basic agreement, the "Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement," with the Commission in June of 2006. This Agreement authorizes the Parties to meet from time to time to confer, discuss, exchange information, and agree on a voluntary basis with respect to rates, charges, operating costs, practices, legislation, regulations, and terminal operations, including trucking, rail, and vessel operations. The Ports included authority to confer, discuss, exchange information, and agree on a voluntary basis on the funding, establishment, and construction of port-related transportation infrastructure projects and environmental programs. The Agreement, as originally filed, indicates that "transportation infrastructure projects" may include, but are not limited to, truck and engine replacement programs, engine and equipment fuel use and emissions standards, and bridge, rail, and roadway improvements.

64. The Ports, however, were cautioned in a May 16, 2008 Commission letter that the Agreement, as originally filed, insufficiently set forth agreement authority to cover all of the discussions, agreements and actions taken by the Ports with respect to their CTP and concession agreements. The Ports were advised at that time that the Commission expected them to make amendments to the Agreement to cure those defects. Two months later, on August 1, 2008, the Ports filed the amended and restated Agreement No. 201170-001.<sup>4</sup>

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<sup>4</sup> The Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement is attached as Exhibit D.

65. Agreement No. 201170-001 amends and restates the agreement in its entirety. The amended Agreement provides more details related to their Clean Truck Program, as well as makes miscellaneous changes to the Purpose section of the original Agreement.

66. Article 5 (E) of the amended Agreement would provide the Parties with specific authorities to discuss, exchange information, cooperate and coordinate with respect to: (1) the adoption of drayage truck deadlines, commonly referred to as the “rolling ban” on older trucks, based on Environmental Protection Agency emissions standards; (2) the adoption of a Clean Truck Fee on containerized cargo to be paid by the beneficial cargo owner (“BCO”) and placed into a Clean Truck Fund used by the Parties to finance the replacement and retrofit of drayage trucks to decrease pollution from emissions; and (3) the adoption of concession programs for Licensed Motor Carriers (“LMCs”). The amended Agreement provides that these concession programs may include requirements for environmental compliance, driver training and safety, insurance, parking, and driver credentialing and licensing, among other requirements.

67. Article 5(H) of the amended Agreement would allow the Parties to coordinate and cooperate on the implementation and evaluation of the Ports’ respective CTP requirements, including the creation and maintenance of recordkeeping databases to assist with implementation of the Program, including administration and information-technology related functions. The amended Agreement would also authorize the Parties to retain a third party vendor for these purposes, where necessary.

**- Los Angeles/Long Beach Port/Terminal Operator Administration and Implementation Agreement (FMC Agreement No. 201178)**

68. On February 14, 2008, the Ports of Los Angeles and Long Beach, along with the members of the West Coast Marine Terminal Operator Agreement, filed the “Los Angeles/Long

Beach Port/Terminal Operator Administration and Implementation Agreement.” This Agreement authorizes the Ports and MTOs to meet, discuss, exchange information and agree on port security, safety, and environmental issues that arise under state and Federal laws. It also allows for the development of databases concerning trucks serving the Ports, criteria and procedures to govern access to the Ports, the collection and uses of security and environmental fees, and procurement of funds for programs addressing clean air, security, and port and terminal infrastructure improvements. Due to a lack of specific information surrounding the agreement authorities, the Commission requested additional information from the agreement parties through a formal request for additional information on April 3, 2008.

69. The Commission ultimately decided to take no further action to prevent or delay that Agreement’s effectiveness; however, on June 13, 2008, the Commission advised the parties that key requirements of the Ports’ clean truck program had not been reflected in the Ports’ Agreement No. 201170. The Commission provided notice to the Ports that it did not wish to unnecessarily delay the implementation of those aspects of the programs which were most likely to improve air quality at the Ports. The Commission further advised the Parties that it wanted to ensure that complete agreement was on file with the Commission and that any further agreements reached under Agreement 201178, as well as related agreements of the Ports, must be timely filed with the Commission for its review under section 6 of the Shipping Act.

**- Los Angeles and Long Beach Marine Terminal Agreement**

**(FMC Agreement No. 201196)**

70. On September 30, 2008, the Ports of Los Angeles and Long Beach filed the “Los Angeles and Long Beach Marine Terminal Agreement.” This agreement sets forth terms and conditions under which drayage trucks are permitted access to Port owned and controlled facilities. This

Agreement also includes a pro forma concession agreement containing terms and conditions to allow drayage trucks access to a port terminal.

71. As this Agreement does not expressly authorize the Ports to fix, or adhere to uniform maritime terminal rates, charges, practices and conditions of service relating to the receipt, handling, or delivery of cargo (or authorize the Ports to discuss the foregoing subjects), it automatically became effective upon filing on September 30, 2008 pursuant to an exemption from the waiting period requirements under the Commission's regulations at 46 C.F.R. § 535.308(e).

#### **Collusive Effects of the Ports' Agreements in Combination**

72. Agreement 201170-001 is the agreement brought before the Court for purposes of enforcing the standards found in section 6(g) of the Shipping Act, and is therefore central to the web that the Ports have created to assure that their CTP is fully implemented and enforced. Nonetheless, the two related FMC-filed agreements, which the Ports have created, underscore how critical their combined discussions, agreements and implementation have become. Agreement 201178 provides the means through which POLA and POLB implement the requirements of their CTP and concession programs, and impose such requirements upon their lessee Marine Terminal Operators. Through this agreement and requirements imposed upon private MTOs through individual port leases, the Ports can coordinate implementation of the Port Drayage Truck Registry, use of Radio Frequency Identification Devices and electronic readers to be included on trucks. The Ports have discussed and agreed with the MTOs upon the terms of a , a separate agreement to result in the establishment of "PortCheck," a program to facilitate tracking and accounting of trucks passing through terminal gates for purposes of collecting the

Clean Truck Fee (\$70.00 per 40 foot container) and to monitor and enforce compliance with the Ports' concession agreements.

73. Agreement No. 201196 allows the Ports, jointly as well as severally, to implement and enforce, among other things, their model year truck bans, Drayage Truck Registry and their Clean Truck and Infrastructure Fees.

### **Commission Jurisdiction**

74. As Marine Terminal Operators, POLA and POLB fall within the jurisdiction of, and are subject to regulation by, the Commission pursuant to the Shipping Act of 1984. POLA and POLB qualify as MTOs because they own and maintain the docks and other facilities that ocean common carriers use. 46 U.S.C. § 40102(14).

75. As drayage within, and to and from, the Ports' terminal facilities is an integral part of the ocean transportation of cargo in the United States foreign ocean-borne commerce, the Commission has jurisdiction under the Shipping Act to address activities that may constitute a violation of the Act, including activities engaged in pursuant to the authorities contained in Agreement No. 201170-001.

76. The Ports' Agreement No. 201170-001 falls within the scope of the Commission's jurisdiction because all agreements between or among MTOs are subject to the Shipping Act.

77. Agreement 201170-001 is subject to Commission review for conformity with the requirements of the Shipping Act. The Commission performed the required review of the Ports' Agreement pursuant to section 6 (g) of the Shipping Act. 46 U.S.C. §41307(b)(1).

78. Pursuant to its economic review, the Commission determined that the amended Agreement would result in a reduction in competition impacting the port drayage labor market, cargo owners' drayage costs and services, and marine terminal operators' (i.e., lessees of terminal facilities from the two landlord Ports) administrative responsibilities and expenses.

79. After conducting a comparative analysis of the benefits and costs of the CTP, the Commission determined that certain aspects of the Agreement, as reflected in the Ports CTP, would result in unreasonable increases in transportation cost by reviewing the likely impact of the Agreement's CTP (including the Ports' concessions requirements) on transportation costs and service. The Commission's analysis revealed that there were activities in the current CTP that would likely produce unreasonable cost increases or service reductions. These activities include the employee mandate and the application of the CTP fees, subsidies and incentives.

80. These determinations were made relying largely upon data provided by the Ports themselves (including responses to Requests for Additional Information made by the Commission pursuant to the Shipping Act and the Commission's regulations), their outside consultants (Dr. Husing, Starcrest Consulting Group and Boston Consulting Group), organizations supportive of the Ports' CTP (Coalition for Clean and Safe Ports and Los Angeles Alliance for a New Economy), and independent academic works (Monaco & Grobar – California State University Long Beach, Belman & Monaco - Industrial and Labor Relations Review), as well as information gathered from public comments filed with the Commission.

81. Data provided as late as October 9, 2008 by the Ports in response to the Commission's Request for Additional Information, indicate that the cost of the employee mandate may have been substantially underestimated. The original analysis was premised on an estimated 16,800 trucks and drivers actively engaged in port drayage on a frequent or semi-frequent basis.

Generated in 2005, this estimate was developed by a consultant to the Ports (Starcrest Consulting Group, LLC) based on a rather restricted sampling of truck license plates that were recorded over a 37-day period using optical character recognition technology as trucks passed through the gates at five out of the fourteen container terminals at the two ports. This initial estimate of 16,800 frequent and semi-frequent trucks serving the two ports has been used extensively by the Ports as a basis for planning their CTP. More recently, however, the same consultants generated a revised estimate based on a complete census of all truck license plates passing through all container terminal gates at the two ports during the whole of calendar year 2006. The consultant's revised estimate indicates that the number of frequent and semi-frequent trucks calling at the Ports is 19,475, rather than 16,800. This 16 percent discrepancy will likely add a similar percentage to the cost of the employee mandate.

82. At the Commission's meeting on October 29, 2008, the Commission adopted the formal determinations required under section 6(g) of the Shipping Act, and determined that the amended Agreement was likely, by a reduction in competition, to unreasonably decrease transportation services or to unreasonably increase transportation costs. More specifically, it was determined that the CTP-induced changes to the drayage market caused by the employee mandate, truck subsidies, CTP fee and exemptions, and reductions in the number of Licensed Motor Carriers, as implemented by POLA as part of the Ports' CAAP, CTP and respective concession program, will give rise to substantial transportation cost increases, beyond what is necessary to generate the public health and environmental benefits asserted by the Ports. The greatest impact found by the Commission's section 6 economic review is attributed to increased costs of the employee-driver requirement which, taken alone, will likely account for over 60 percent of the CTP's total cost

through year 2025, as measured by a forward-looking analysis conducted by the Commission's Bureau of Trade Analysis.

83. It was also determined that the Ports' collusive activities under their Agreement in constructing their CTP would induce substantial changes to the drayage market as a direct result of the employee mandate, truck subsidies, CTP fee and exemptions, and reductions in the number of Licensed Motor Carriers operating at POLA. If allowed to be implemented under the authority claimed by the Ports under Agreement 201170-001, the Commission believes these fundamental, and unreasonable changes to the local drayage industry, and corresponding reductions in competition, will be impracticable, if not impossible, to reverse following implementation of the Ports' programs and respective concessions.

#### **COUNT ONE**

84. The Commission hereby alleges that Agreement No. 201170-001 is a substantially anticompetitive agreement with respect to the authority of the Ports to discuss, agree or implement a concession plan or plans under the Ports' CTP that requires, directly or indirectly, the use of only employee drivers to perform truck drayage service at the Ports of Los Angeles and Long Beach.

85. The Commission has determined the Ports' operations under such agreement authorities are likely to result in a reduction in competition; that such agreement authorities are likely to produce a reduction in transportation service or an increase in transportation cost; and that such reductions in transportation service or increases in cost are found to be unreasonable.

86. That retention of such authority, and continuation of the conduct and activities engaged in pursuant to such authorities under Agreement No. 201170-001 is contrary to the standards established in section 6(h) of the Shipping Act, 46 U.S.C. §41307(b).

### **COUNT TWO**

87. The Commission hereby alleges that Agreement No. 201170-001 is a substantially anticompetitive agreement with respect to the authority of the Ports to discuss, agree or implement a concession plan or plans under the Ports' CTP that prohibits, directly or indirectly, the use of independent owner-operator drivers to perform truck drayage service at the Ports of Los Angeles and Long Beach.

88. The Commission has determined the Ports' operations under such agreement authorities are likely to result in a reduction in competition; that such agreement authorities are likely to produce a reduction in transportation service or an increase in transportation cost; and that such reductions in transportation service or increases in cost are found to be unreasonable.

89. That retention of such authority, and continuation of the conduct and activities engaged in pursuant to such authorities under Agreement No. 201170-001 is contrary to the standards established in section 6(h) of the Shipping Act, 46 U.S.C. §41307(b).

### **COUNT THREE**

90. The Commission hereby alleges that Agreement No. 201170-001 is a substantially anticompetitive agreement with respect to authority to discuss, agree or implement a concession plan or plans under the Ports' CTP that establishes, directly or indirectly, the use of: (1) truck purchase incentives; (2) fees or other obligations, or exemptions from such fees or obligations,

imposed upon some, but not all, drayage truck drivers, owners, or operators at the Ports of Los Angeles and Long Beach.

91. The Commission has determined the Ports' operations under such agreement authorities are likely to result in a reduction in competition; that such agreement authorities are likely to produce a reduction in transportation service or an increase in transportation cost; and that such reductions in transportation service or increases in cost are found to be unreasonable.

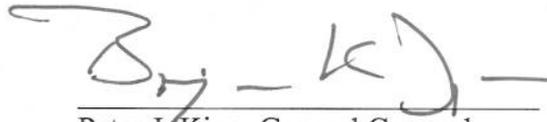
92. That retention of such authority, and continuation of the conduct and activities engaged in pursuant to such authorities under Agreement No. 201170-001 is contrary to the standards established in section 6(h) of the Shipping Act, 46 U.S.C. §41307(b).

#### PRAYER FOR RELIEF

Wherefore, Plaintiff Federal Maritime Commission respectfully requests that this Court: Issue a permanent injunction pursuant to section 6 (h) of the Shipping Act, 46 U.S.C. § 41307(b), enjoining the Defendants from, directly or indirectly, operating under Agreement No. 201170-001 with the purpose of discussing, agreeing or implementing a concession plan or plans under the Ports' CTP that: (1) requires use of only employee drayage truck drivers to serve the Ports of Los Angeles or Long Beach; (2) prohibits independent owner-operator drayage truck drivers, based upon their status as such, from serving the Ports of Los Angeles and Long Beach; (3) establishes, directly or indirectly, the use of truck purchase incentives or fees or other obligations, or exemptions from such fees or obligations, imposed upon some, but not all,

drayage truck drivers, independent owner-operators, LMCs and shippers at the Ports of Los Angeles and Long Beach; and for such other relief as the Court shall find proper.

Respectfully submitted,



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