

FEDERAL MARITIME COMMISSION

EXCLUSIVE **TUG FRANCHISES.** -
MARINE TERMINAL OPERATORS
SERVING THE LOWER
MISSISSIPPI RIVER

Docket No. 01-06

Served: October 15, 2001

Order establishing new procedural schedule and referring case to the Office of Administrative Law Judges.

BY THE COMMISSION: Harold J. CREEL, Jr., *Chairman*; Joseph BRENNAN, Antony M. MERCK, John A. MORAN, and Delmond J.H. WON, *Commissioners*.

**ORDER ESTABLISHING NEW PROCEDURAL
SCHEDULE AND REFERRING CASE TO THE OFFICE
OF ADMINISTRATIVE LAW JUDGES**

On June 11, 2001 the Commission issued an Order to Show Cause in the above-captioned case directing certain marine terminal operators on the lower Mississippi River to show cause why they have not violated sections 10(d)(1) and 1 O(d)(4) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. §§ 1709(d)(1) and (d)(4). Soon thereafter, certain respondents to the proceeding filed requests for discovery. On June 22, 2001, the Commission issued an order referring all discovery issues to the Office of Administrative Law Judges

("ALJs"). On June 28, 2001, River Parishes Co., Inc. ("RIVCO"), a tug company operating on the lower Mississippi, filed a Petition to Reaffirm the Show-Cause Procedures in order to permit an orderly disposition of the proceeding and postpone discovery.¹ The Commission's Bureau of Enforcement ("BOE") filed a reply in support of RIVCO's petition, and six of the respondents in this proceeding, ADM/Growmark River Systems, Inc. ("ADM/Growmark"), Cargill, Inc. ("Cargill"), Ormet Primary Aluminum Corp. and International Marine Terminals ("Ormet/IMT"), Peavey Co. ("Peavey"), St. James Stevedoring Co., Inc. ("St. James"), and Zen-Noh Grain Corp. and Consolidated Gram & Barge Co., Inc. ("Zen-Noh") (jointly "Respondents"), filed replies in opposition to RIVCO's petition. Subsequently, additional related petitions were filed which will be addressed in conjunction with the aforementioned petition: (1) Petition for Referral of Proceeding to the Office of ALJs filed by Cargill on July 2, 2001, which was supported by replies filed by ADM/Growmark, Ormet/IMT, and St. James, and opposed by replies filed by BOE and RIVCO; (2) Motion to Establish Discovery and Procedural Schedule filed by Ormet/IMT on July 2, 2001, which was supported by a reply filed by St. James, and opposed by replies filed by BOE and RIVCO; and (3) Petition for Coordinated Consideration of Filings Directed to the Show Cause Procedure and for Setting a Common Date for Response filed by RIVCO on July 6, 2001, which was supported by a reply filed by BOE.^{3, 4}

¹ RIVCO simultaneously filed a Petition to Intervene, which was subsequently granted.

² In response to a simultaneously filed Petition to Shorten Time to Reply to Certain Petitions by RIVCO, the Commission, on June 29, 2001, held the procedural schedule in abeyance until it ruled on RIVCO's Petition to Reaffirm Procedures.

³ This petition is moot as replies have been filed and we are considering the four aforementioned petitions together.

⁴ Ormet/IMT also filed a reply to BOE's "Omnibus Opposition," i.e., Reply in Opposition to: (1) Petition of Cargill for

POSITIONS OF THE PARTIES

A. Petition to Reaffirm the Show-Cause Procedures

1. RIVCO

RIVCO claims that because the Commission has entertained the discovery requests of respondents Cargill and Ormet/IMT prior to the dates established by the Commission in the Order to Show Cause for written submissions, it has created uncertainty with respect to the “carefully crafted” schedule set forth in the Order to Show Cause. RIVCO asserts that the Commission should adhere to its original schedule “which did not contemplate discovery prior to the submission of the parties’ responsive filings but which . . . not only preserves to all possibly affected parties their full due process rights but also provides for the orderly disposition of the issues.” RIVCO at 2. RIVCO contends that this is necessary to prevent an unnecessarily lengthy discovery process and the disclosure of commercially sensitive business records.

RIVCO argues that the Order to Show Cause makes no provision for discovery prior to the submission of the responsive memoranda of law and affidavits of fact. Moreover, RIVCO avers that this is consistent with the prior practice of the Commission which has never provided for discovery in a show cause proceeding prior to the submission of memoranda of law and affidavits of fact. Furthermore, RIVCO contends that the tight procedural schedule could not accommodate discovery. Also, the only entities that are currently parties are BOE and the named Respondents, because no other interested parties would have filed petitions to intervene as prescribed

Referral of Proceeding to Office of ALJs; (2) Motion of Ormet/IMT to Establish Discovery and Procedural Schedule; and (3) Motion of St. James to Establish Reasonable Discovery and Procedural Schedule. Replies to replies are not permitted by the Commission’s Rules of Practice and Procedure without a petition to file such reply. It is therefore rejected.

by the Order to Show Cause. Thus, RIVCO claims that only BOE and Respondents would be able to participate in discovery.

RIVCO also takes issue with the fact that Cargill and Ormet/IMT are seeking discovery of the entire Commission investigative file developed by BOE under the commitment that all information would be “‘treated confidentially to the full extent permitted by law, until and unless the Commission determines that such information is necessary to be used in any Commission or court proceeding.” RIVCO at 4 (quoting the Commission’s Section 15 Orders and requests for voluntary responses served August 21, 2000).⁵ RIVCO argues that the Commission has yet to make a determination on the confidentiality of the information submitted and the Commission’s referral to the Office of ALJs on June 22, 2001 to handle discovery matters did not make such a determination. Moreover, RIVCO asserts that a determination to release or use confidential information must be based on something more substantial than Cargill and Ormet/IMT’s discovery request, as it alleges BOE was required to do in Docket No. 99-05, ANERA and Its Members - Opting Out of Service Contracts.

RIVCO also argues that it is entitled both to notice that discovery information relating to it is being sought and to an opportunity to respond to requests for release. For example, RIVCO asserts that under the Freedom of Information Act (“FOIA”), 5 U.S.C. §552, an agency may not release a private party’s confidential business information as doing so would violate the Trade Secrets Act, 18 U.S.C. § 1905. RIVCO at 6 (citing Chrysler Corp. v. Brown, 441 U.S. 281 (1979)). Moreover, release of such confidential information, RIVCO claims, would prejudice the Commission’s ability to obtain information

⁵ In August 2000, the Commission issued Section 15 Orders to 67 ocean common carriers and informal requests for information to carrier agents, terminal operators, ports and tug operators regarding the use and impact of exclusive arrangements for tug services on the lower Mississippi River. The information collected by BOE in response to these requests is what certain Respondents are seeking to discover.

voluntarily in the future.

RIVCO further asserts that many of the documents sought are “at least arguably privileged” under the deliberative process privilege, the informer’s privilege, the law enforcement privilege and the confidential report privilege. RIVCO at 6-7 (citing Association for Women in Science v. Califano, 566 F.2d 339, 343-44 (D.C. Cir. 1977)). A determination of these privileges would be time-consuming, RIVCO contends, because the actual documents would have to be reviewed by an agency official and the privileges can only be outweighed by a sufficient showing of need. Thus, RIVCO asserts that Respondents would have to demonstrate with particularity the need for specific documents.

RIVCO further submits that the current procedural schedule should be maintained, with only an adjustment of the filing dates to reflect the delays caused by the discovery requests, as those procedures are legally appropriate. The Order to Show Cause, RIVCO argues, provides three opportunities for Respondents to develop their cases. Moreover, RIVCO contends that the Order to Show Cause’s procedural schedule satisfies due process requirements, because it provides for BOE to submit its entire case on the record and provides for Respondents to submit argument and fact evidence in response. Due process does not require, RIVCO claims, that parties be allowed wholesale discovery of information not on the record. RIVCO at 8 (citing Kennch Petrochemicals, Inc. v. National Labor Relations Bd., 893 F.2d 1468, 1484 (3d Cir. 1990)).

Nevertheless, RIVCO avers, discovery is provided in the Order to Show Cause, if shown to be appropriate. Any party may request an evidentiary hearing after all memoranda of law and affidavits of fact are filed. In addition, RIVCO maintains that all interested parties will be before the Commission at that time and thus all procedural rights will be protected. At that time, RIVCO avers, an informed judgment can be made regarding whether to have discovery and, if so, the breadth of such discovery. RIVCO asserts that Car-gill and Ormet/IMT’s discovery request is unfocused, and maintains that keeping to the original procedural schedule, with the possibility of discovery after the

filing of memoranda of law and affidavits of fact, is the only appropriate decision. Otherwise, **RIVCO** argues, all parties would have to be granted the same rights to discovery which could trigger a “multi-year discovery detour.” RIVCO at 11.

Finally, **RIVCO** argues that its argument against discovery applies with even greater force with respect to discovery addressed to private parties. RIVCO asserts that “there can be no possible claim to Commission reliance other than on information already in the Commission’s investigative record.” RIVCO at 12.

2. BOE

BOE supports RIVCO’s Petition to Reaffirm Procedures. BOE asserts that Respondents are not being denied their due process because the Order to Show Cause provides for full due process. BOE contends that the Commission has used the same procedure as set forth in the Order to Show Cause “for many years,” and the Commission should reaffirm that procedure here.

BOE urges the Commission not to disregard the procedures already prescribed in the Order to Show Cause as doing so would cause a protracted proceeding akin to an investigation and hearing. BOE maintains that there is an opportunity for an evidentiary hearing and discovery, if necessary, later in the proceeding. Respondents, BOE claims, believe that due process requires that discovery be commenced immediately in order to appropriately respond to the Order to Show Cause. BOE argues, however, that Respondents will be allowed to make extensive factual assertions, even as to deficiencies in the Order to Show Cause, in their opening submissions, and then BOE and intervenors in opposition to Respondents would reply with pertinent evidence. BOE states that Respondents would then be able to rebut these replies and may then request further evidentiary proceedings. BOE claims that this would serve to “narrow or eliminate factual and legal issues so as to permit [the Commission] to deal efficiently and effectively only with matters which arguably are still at issue,” *i.e.*, an evidentiary hearing, if granted, and discovery would only cover factual matters still at issue. BOE at 4 n.2.

BOE contends that show cause proceedings are established to provide due process, and that therefore Respondents' claims to the contrary are unfounded.' Moreover, BOE argues, discovery at this stage of the proceeding would conflict with the Commission's Order to Show Cause. There is longstanding precedent, BOE asserts, "that issues of fact must be raised according to the procedure established in a show cause order." BOE at 5 (citing World Line Shipping, Inc. and Saeid B. Maralan (aka Sam Bustani) - Order to Show Cause, 29 S.R.R. 17 (2001)). BOE maintains that in American Export & Isbrandtsen Lines v. Federal Maritime Commission, 334 F.2d 185, 194, (9th Cir. 1964), the court held that petitioner was not entitled to an evidentiary hearing in a show cause proceeding because it failed to file memoranda of law and affidavits of fact disputing certain facts as required. BOE further alleges that in Persian Gulf Outward Freight Conference v. Federal Maritime Commission, 375 F.2d 335,341 (D.C. Cir. 1967), the court found that the Commission had provided respondents a sufficient hearing in a show cause proceeding although they were not given the opportunity to file affidavits of fact. Moreover, BOE asserts, the Supreme Court has held in Costle v. Pacific Legal Foundation, 445 U.S. 198 (1980), that an agency does not have the burden of proving that there are no disputed issues in a case to satisfy due process requirements; in fact, an agency may require the parties to establish the need for a hearing.

Finally, BOE claims that the Commission has recognized that the rules governing show cause proceedings "allow[] for discretion in adapting the show cause procedure to requirements of the particular case." BOE at 7 (quoting Pacific Coast European Conference Port Equalization Rule, 7 F.M.C. 623,626 (1963)). This is supported, BOE avers, by the D.C. Circuit in American Airlines, Inc. v. Civil Aeronautics Board, 359 F.2d 624, 633 (D.C. Cir. 1966), cert. denied, 385 U.S. 843 (1966), which recognized that agencies are allowed to be flexible in

⁶ BOE further claims that in order for Respondents to show that the procedures in this proceeding are deficient they would have to show that show cause proceedings are per se improper, which they cannot do.

adopting “approaches subject to expeditious adjustment in the light of experience.” BOE at 7.

Therefore, BOE concludes that the Commission should reaffirm the procedures set forth in the Order to Show Cause by suspending all current discovery efforts, withdrawing the referral of discovery matters to the ALJ, and establishing a revised schedule for the parties’ submission.

3. Respondents

ADM/Growmark, Cargill, Ormet/IMT and St. James all filed separate replies to the petition, while Peavey and Zen-Noh filed replies simply adopting ADM/Growmark’s reply.

a. ADM/Growmark

ADM/Growmark initially argues that RIVCO does not have standing as an intervenor to object to any efforts by Respondents to obtain discovery. RIVCO, ADM/Growmark asserts, neither is required to respond to the Order to Show Cause nor is in jeopardy of losing anything if it does not respond to that order. Therefore, as RIVCO seeks only to inhibit discovery, ADM/Growmark contends, the petition should be denied.

Moreover, ADM/Growmark argues, the Commission has already decided to permit discovery at this stage of the proceeding. ADM/Growmark asserts that RIVCO assumes that the Commission did not intend to permit discovery prior to submission of the parties’ responsive filings in the Order to Show Cause because of the compacted procedural schedule. While ADM/Growmark agrees that the schedule is too compact within which to conduct discovery, it avers that the Commission’s June 22, 2001 order appointing an ALJ to resolve discovery issues reflects the Commission’s intention to permit discovery. In fact, ADM/Growmark claims, BOE even acknowledges that discovery is appropriate but merely requests that it be deferred until after responsive filings are made.

Furthermore, ADM/Growmark contends that even the ALJ recognizes the need for discovery in this proceeding. ADM/Growmark notes that the ALJ stated that under the Commission's rules discovery is available in all adjudicatory proceedings and that discovery is necessary to "challenge the probative value of opposing evidence." ADM/Growmark at 5-6 (quoting Addendum to Ruling on Deposition of Jeffrey D. Beech at 1 (July 3, 2001)).

ADM/Growmark also contends that the real motive behind RIVCO's argument against discovery is that it "does not wish to be the subject of any discovery itself and fears that adequate discovery will enable the Respondents to demonstrate the lawfulness of their private agreements with tug companies, thereby defeating RIVCO's goal in prompting the Commission to commence this proceeding" and reverse the decision in River Parishes Co., Inc. v. Ormet Primary Aluminum ADM/Growmark 751 (1999) ("Ormet"). 5 . ADM/Growmark asserts that it is doubtful that RIVCO is entitled to assert any privilege to protect information it voluntarily provided to the Commission. Moreover, ADM/Growmark submits that had the Commission not decided to issue the Order to Show Cause, RIVCO would have had to assert its claim via a complaint against all twelve Respondents and thus submit itself to discovery.

ADM/Growmark avers that RIVCO also objects to the discovery of the documents and information received by the Commission from 116 companies in response to its inquiries via Section 15 Orders and informal requests for information in this proceeding as it is already in the Commission's investigative record. ADM/Growmark claims that RIVCO's position is that "there can be no possible claim to Commission reliance other than on information the Commission already has." ADM/Growmark at 7 (quoting RIVCO at 12). ADM/Growmark argues that this premise is false and "assumes that there is no information that any of the Respondents could seek which is not already in the Commission's [investigative] file." Id. This argument fails, ADM /Growmark contends, because: (1) the discovery requests submitted by Cargill, Ormet/IMT and ADM/Growmark seek more than that information relied upon by the Commission in its Order to Show Cause as "one must assume that the information in the

Commission's 'investigative record' . . . did not persuade the Commission" that the exclusive agreements are lawful (ADM/Growmark at 7-8); (2) despite the previous argument, RIVCO argues that Respondents are not entitled to discovery of the Commission's investigative files because due process does not require that parties be allowed to discover information that is neither in the record nor relied upon by the Commission; and (3) ADM/Growmark and other Respondents may be seeking discovery of information that is relevant but was not actually collected by the Commission because it did not consider it relevant or parties declined to voluntarily submit the information.

Finally, ADM/Growmark argues that RIVCO should be seeking a protective order rather than trying to prevent discovery generally. This would require the ALJ to weigh the interests of RIVCO to protect the information versus Respondents' interest in obtaining discovery.

b. Cargill^{8,9}

Cargill argues at length that there are several factual issues in dispute and as such there must be discovery in order for it to properly

⁷ ADM/Growmark further asserts that it will not know what information the Commission relies on for its position until BOE files its memoranda of law and affidavits of fact.

⁸ The majority of Cargill's reply is actually argument that should have been made in its Petition for Referral of Proceeding to the ALJ. Those arguments will thus be addressed in that section of the Order, while only arguments relevant to RIVCO's Petition to Reaffirm the Show-Cause Procedures will be addressed in this section.

⁹ Cargill has also filed a Petition for Leave to File a Reply to the Reply of BOE Supporting RIVCO's Petition to Reaffirm the Show-Cause Procedures. As replies to replies are generally not permitted under the Commission's Rules of Practice and Procedure and Cargill offers no compelling reason to grant it, the petition is denied.

present evidence to oppose the Commission's factual basis for the Order to Show Cause. For example, Cargill asserts that the prices claimed for assist tug services in the Order to Show Cause and the argument that there has been no improvement in the level of service are inaccurate and unsubstantiated. In addition, Cargill avers that because the Commission must determine whether the terminals served common carriers, which is based on the facts of each particular case, it must have the "opportunity to develop these facts and challenge any factual allegations that already have been made and that will be made by the BOE, RIVCO, or any other party." Cargill at 6.

Moreover, Cargill contends that many statements in the Order to Show Cause conflict directly with the findings of fact in Ormet. Cargill at 5-6 (citing River Parishes Co., Inc. v. Ormet Primary Aluminum Corp., 28 S.R.R. 188, 197-98 (I.D. 1998)). As is discussed in greater detail in the section addressing Cargill's Petition for Referral of Proceeding to the ALJ, infra, Cargill agrees with the ALJ's statement that "defendants . . . have the right to evidence that is used against them so that they may challenge governmental claims." Cargill at 10 (citing Deposition of Jeffrey D. Beech Postponed Until Further Notice and Return Date of Accompanying Subpena Suspended Accordingly at 3-4 (July 3, 2001)). In this connection, Cargill contends that RIVCO's sole purpose is to overturn the Commission's decision in Ormet. This does not grant RIVCO, Cargill argues, the right to hide from discovery. Moreover, Cargill asserts, RIVCO's fear that the Commission will have to turn over Cargill's confidential business information in such discovery is without merit as much of the information sought is not proprietary and RIVCO's reliance on FOIA is misplaced. Cargill avers that this is not a fishing expedition, but rather an attempt by Respondents to defend themselves and assert their right to engage in a certain business activity.

c. Ormet/IMT

Ormet/IMT initially argues that RIVCO's petition is moot because it is seeking to reaffirm a schedule that had yet to be abandoned by the Commission and to prohibit discovery that had been referred already to the ALJ. The petition has been made even more irrelevant,

Ormet/IMT avers, by two Commission orders issued since the petition was filed, which provided that the procedural schedule would be held in abeyance and that discovery would still be allowed to proceed.

Ormet/IMT further contends that because it and the other Respondents intend to file motions to dismiss," the Commission should not decide this petition until those motions have been filed. Ormet/IMT maintains that it will present arguments regarding administrative res judicata as to Respondents because of the Ormet case, and whether the Commission should use its discretion to dismiss the matter because it has de minimis jurisdiction while the "proposed course of action will have a broad effect far outside the scope of its statutory authority and contrary to the stated objectives of the Shipping Act." Ormet/IMT at 2. Ormet/IMT claims that it would be inefficient to require Respondents to present their defenses via legal memoranda and affidavits of fact if Respondents prevail on these issues.

Ormet/IMT also contends that in order to have a fair opportunity to respond to the Order to Show Cause and present its case, it must be allowed to obtain and rebut evidence used against it. The discovery required to access this information, Ormet/IMT argues, cannot be accomplished under the original schedule. Thus, Ormet/IMT claims that a revised schedule would ease the burden on all parties. Moreover, Ormet/IMT avers, the Order to Show Cause raised complex issues such as relevant markets, market power and prices, competition, and monopolies regarding three different markets, those of the marine terminal operators, tug operators and "ship chartering." Ormet/IMT contends that to properly respond to these issues, discovery and expert economic analysis are required and this cannot be accomplished in a matter of weeks.

Moreover, Ormet/IMT asserts that the Shipping Act and Commission regulations confer a right of discovery in adjudicatory

¹⁰ As of this time ADM/Growmark, Ormet and IMT (separately) have filed Motions to Dismiss Proceeding or Vacate Show-Cause Order.

proceedings, citing 46 U.S.C. app. § 1711 (a)(l) and 46 CFR § 502.201(a) respectively, and that Commission regulations require such discovery to commence within 30 days of the initiation of such a proceeding, citing 46 CFR § 502.201(b)(2). Therefore, Ormet/IMT requests that RIVCO's petition be demed and instead that a new procedural schedule be adopted to allow for orderly presentation of dispositive motions, the taking of discovery and the presentation of defenses.

d. St. James

St. James argues that the Order to Show Cause does not preclude the use of normal discovery procedures provided in Commission regulations. St. James believes that RIVCO's motivation in seeking to reaffirm the procedural schedule in this proceeding is to require Respondents to respond to the Order to Show Cause without the "benefit of adequate time or discovery necessary to fairly and fully defend themselves." St. James at 2. Moreover, St. James asserts that RIVCO's claim that discovery could be afforded after the parties' memoranda are filed would prejudice Respondents because they cannot file responsive memoranda until they have an understanding of the facts underlying the Order to Show Cause. Furthermore, St. James avers that discovery after the issues have been briefed via memoranda of law would be inefficient, as discovery could moot or invalidate positions in Respondents' memoranda, which could lead to additional briefing and discovery. St. James asserts that it is not seeking to delay the proceedings but rather its interest in a "fair and fully developed inquiry" outweighs RIVCO's interest in an expedited process.

St. James also argues that RIVCO's concerns regarding confidentiality, privilege and burdensomeness would be addressed by the ALJ, as he has been placed in charge of discovery. St. James contends that the petitions it and Ormet/IMT recently filed requesting reasonable discovery and procedural schedules would afford Respondents a fair opportunity to conduct discovery. Further, St. James avers that granting these petitions would allow the parties to seek protection from discovery requests "which raise legitimate concerns regarding privilege and confidentiality." St. James at 4.

Therefore, St. James requests that RIVCO's petition be demed, as it would be unfair either to deny Respondents discovery or to delay discovery until after the parties' memoranda of law and affidavits of fact are filed.

B. Petition for Referral of Proceedme to Office of Administrative Law Judges

1. Cargill¹¹

On July 3, 2001, Cargill petitioned the Commission to refer the entire proceeding to the Office of ALJs. ADM/Growmark, Ormet/IMT and St. James submitted memoranda in support of Cargill's petition.

Cargill expresses concern that assigning only discovery matters to the ALJ will not lead to an efficient and orderly conclusion of the case. In order to protect the procedural rights of the parties, Cargill suggests that the proceeding be assigned en toto to the ALJ for a full administrative hearing leading to an initial decision. Cargill argues that the proceeding, as structured, does not currently provide adequate due process protections for Respondents, and is ungainly for the Commission to monitor. As a result, Cargill warns that a "truncated Show Cause procedure" will be vulnerable on appeal. Cargill Petition for Referral of Proceeding to Office of ALJs at 2.

Expanding upon its reasoning in its Reply in Opposition to Petition of RIVCO to Reaffirm Procedures, Cargill first lists significant

¹¹ As discussed at n.8, supra, this summary combines the arguments set forth in Cargill's Petition for Referral of Proceeding to Office of ALJs and its Reply to RIVCO's Petition to Reaffirm Show-Cause Procedures, as the argument is actually set forth in that latter petition.

factual issues that will require quantitative and qualitative analyses.¹² Cargill purports that some issues are unique and “require a detailed factual record,” in particular, “the price of tug assist services and the benefits generated by sole provider tug arrangements.” Cargill Reply in Opposition to Petition of RIVCO to Reaffirm Procedures (“Cargill Reply”) at 3.

As to the price of tug assist services, Cargill notes that the Commission and RIVCO presented different dollar figures for those services prior to the sole provider activities. Cargill submits that this difference proves that the figures presented in the Order to Show Cause are unreliable. Further, Cargill suggests that because the prices submitted by RIVCO are cited as “negotiated,” such prices may not be based on fact. Cargill believes that the unreliability of these facts “undermines the very premise of the Show Cause Order - that ‘the tug assist charges which vessel operators must now pay at closed terminals are higher than those paid by the vessel operators before implementation of the exclusive tug arrangements.’” *Id.* at 4. Cargill therefore believes that the Commission should assign the entire proceeding to the ALJ for a “comprehensive investigation into the facts underlying this proceeding.” *Id.* at 5.

¹² Significant factual issues cited by Cargill are: “the actual cost of tug assist service at various terminals today and prior to the institution of Respondents’ current business practices; whether any Respondent even serves sufficient common carrier vessels to invoke the Commission’s jurisdiction; service improvements resulting from using a sole provider system; the relevant geographic market for tug assist services; the impact of sole provider tug assist services; the percentage of shipments for which a Respondent is shipping cargo on its own account; the regularity of service provided by vessels that call at Respondents’ facilities; the competitive nature of the lower Mississippi River terminals and practices of both shippers and carriers; and the increased safety and efficiency benefits that Respondents’ current business practices provide for vessel interests and others.” Cargill Reply in Opposition to Petition of RIVCO to Reaffirm Procedures at 3.

Cargill challenges the Commission's assertion that service has not improved as a result of sole provider arrangements. Cargill asserts that "safety and efficiency have improved;" namely, dock damage has lessened, tugs are always available to assist vessels, and productivity and compliance with Coast Guard regulations has increased. Id. Cargill further alleges that the Commission's assertion contradicts several findings of fact in the Ormet case, and that Cargill's experience has been similar to that cited by the ALJ in Cargill, avers that "if the Commission wants to overrule its earlier factual findings in Ormet, then it must provide Respondents a similar forum to defend the Commission's own findings made only two years ago." Id. at 6. Cargill again asserts that it would like an opportunity to develop and challenge factual issues, referring to Commission recognition that "it must look at the facts of each individual case." Id. at 6.

Cargill believes that the practical effect of the Order to Show Cause is to shift the burden of proof to Respondents. Cargill states that RIVCO's April 14, 2000 positron paper has been converted into a de facto complaint by the Order to Show Cause, and that "[i]n any other situation, RIVCO or the BOE would bear the burden of finding initially that a monopoly situation exists in this administrative proceeding under the Administrative Procedure Act (APA) and the Commission's regulations." Id. at 7 (footnotes omitted). As a result, Cargill contends that Respondents are entitled "to develop a factual record before an [ALJ] to ensure that findings in this proceeding are supported by all of the facts, not just those that the BOE and RIVCO may share." Id. Further, Cargill maintains that it seeks to exercise "the right to know what evidence is being used against one and the opportunity to rebut that evidence." Id. (citing Robbins v. United States R.R. Retirement Bd., 594 F.2d 448,452 (5th Cir. 1979)).

Cargill next asserts its procedural due process right to a full formal hearing. **While** acknowledging that due process requires a meaningful opportunity to be heard, but is flexible in nature, Hannah v. Larche, 363 U.S. 420,440 (1960), Cargill opines that "the Show Cause Order does not provide meaningful due process to Respondents." Cargill Reply at 9. Accordmg to Car-gill, the Order to Show Cause "asserts only conclusory allegations" and does not explain why the

business practice at issue is in violation when the same practice was found lawful in Ormet. Id. Cargill urges the matter be resolved by an ALJ, citing the procedural safeguards of “confrontation and cross examination.” Id. (citing Goldberg v. Kelly, 397 U.S. 254,269 (1970)). Cargill declares that it is entitled to “every opportunity to inquire into the underlying facts.” Cargill Reply at 10 (citing 46 CFR § 502.154).

Cargill further submits that the Commission is “promulgating a *per se* rule that sole provider tug assist arrangements are prohibited,” thereby changing its policy. Cargill Reply at 11. Such a change in policy requires that the agency justify and explain the change, argues Cargill. Id. (citing Action for Children’s Television v. Federal Communications Comm’n, 821 F.2d 741, 745 (D.C. Cir. 1987); Committee for Community Access v. Federal Communications Comm’n, 737 F.2d 74, 77 (D.C. Cir. 1984); and Baton Rouge Marine Contractors, Inc. v. Federal Maritime Comm’n, 655 F.2d 1210 (D.C. Cir. 1981)). Cargill avers that the Commission must provide a justification for departing from, or overruling, its decision in Ormet.

Moreover, Cargill suggests the Commission consider initiating a rulemaking proceeding because a “rulemaking may be what the Commission is doing across the board on the issue of sole provider tug arrangements, considering that it also simultaneously is conducting an investigation into similar practices in Florida.” Cargill Reply at 13. Furthermore, Cargill posits that “even if the Commission’s action constitutes the changing of an ‘interpretive rule,’ a notice and comment period is necessary because the Show Cause Order affects not only Ormet, but a long line of cases.”¹³

¹³ Cargill lists the following: Seacon Terminals, Inc. v. Port of Seattle, 26 S.R.R. 886 (1993); Petchem Inc. v. Canaveral Port Auth., 23 S.R.R. 974 (1986) aff’d, 853 F.2d 958 (D.C. Cir. 1988); and A.P. St. Philip Inc. v. Atlantic Land & Improvement Co., 13 F.M.C. 166, 174 (1969).

2. Ormet/IMT

Ormet/IMT adopts Cargill's arguments in the Petition for Referral of Proceeding to Office of ALJs and adds that Respondents are being denied discovery tools and time necessary to defend itself properly. Ormet/IMT notes that the prior proceeding, Ormet, required three years, and posits that the current procedure aims to avoid as vigorous a defense as was presented therein.

3. ADM/Growmark

ADM/Growmark joins Cargill's petition and emphasizes that the complexity of the issues raised in the Order to Show Cause requires referral to the ALJ. Further, ADM/Growmark believes that the Commission has the burden to prove the violations alleged and that the Order to Show Cause improperly presumes the Commission has already carried its burden.

4. St. James

St. James adopts Cargill's petition and Ormet/IMT's reply, emphasizing that "a proceeding of this magnitude and gravity deserves a fair and in-depth inquiry." St. James at 1.

5. BOE¹⁴

BOE submitted an "Ombus Opposition" in reply to Cargill's

¹⁴ Some of BOE's arguments appear to be replies to Cargill's reply to RIVCO's Petition to Reaffirm; however, because many of Cargill's arguments are actually arguments in support of its Petition for Referral to Office of ALJs, as discussed supra, those arguments of BOE will be considered. Moreover, any arguments by BOE that are in fact a reply to a reply of RIVCO's Petition to Reaffirm Procedures will not be addressed, as the Commission does not permit the filing of such replies except upon the filing and grant of a motion for leave. Therefore, those arguments which are a reply to a reply are rejected.

petition requesting Referral of the Proceeding to Office of ALJs, and to Ormet/IMT and St. James's Motions to Establish Discovery and Procedural Schedule.

In response to Respondents' argument that full discovery is necessary before making opening submissions, BOE posits that the Respondents have shown that they already have sufficient facts at their disposal. BOE points to pleadings of both Ormet/IMT and Cargill in which those Respondents argue that the facts presented in the Commission's Order are contrary to facts it has in its control. BOE further avers that Respondents themselves are "the best source of information" for addressing material factual issues, as they would naturally have information on their own service and accounts. BOE at 3. BOE suggests that the "competition of facts and legal argument at the outset of the show cause proceeding immediately focuses the areas of dispute in contrast to a routine investigation and hearing." Id. at 4.

BOE reiterates that due process does not require that discovery be provided at the outset of the proceeding, as discussed, supra. BOE further submits that, despite Cargill's concerns, the Commission does bear the burden of proof in this proceeding, and must still prove the facts set forth in the Order to Show Cause. Regardless of the order of proof, BOE points out that the decision will be based upon the record in the proceeding, and that Car-gill's motion to shift the proceeding to the ALJ is a tactic to delay a decision and examine issues extraneous to the proceeding. BOE concludes that the show cause procedure is appropriate in this proceeding.

According to BOE, the order establishes a prima facie case as well as the Commission's jurisdiction. BOE posits that the "next logical step" is for Respondents to provide any justifications they can for the exclusive arrangements, and to challenge the Commission's jurisdiction if Respondents believe it is defective. BOE believes this procedure will save significant time over a formal evidentiary hearing before an ALJ, which would require BOE to expend time in discovery and depositions to obtain information that would be produced in response to the Order to Show Cause. BOE also avers that the show cause procedure allows Respondents to present their justification for the exclusive contracts

quickly if such justification exists, thereby avoiding a lengthy proceeding.

BOE deems Cargill's argument with respect to a Commission policy change a "red herring." BOE at 6. BOE contends that no policy change has been undertaken and that any policy change in the Commission's final decision will be explained at that time. In this regard, BOE submits that only a "reasoned analysis" is required for an agency to change a policy. Id. (citing Air Line Pilots Assoc. v. Department of Transp., 791 F.2d 172, 175 n.4 (D.C. Cir. 1986)).

6. RIVCO¹⁵

RIVCO submitted a reply to the Referral of the Proceeding to Office of ALJs in the form of a Reply to the Petitions and Motions to Terminate the Show Cause Proceeding. RIVCO opines that show cause proceedings offer the advantages of "speedy and inexpensive dispensation of justice – while retaining the flexibility to provide due process and fundamental fairness," and posits that use of such a proceeding is appropriate here, where issues of statutory construction are implicated. RIVCO at 3.

RIVCO states that respondents to show cause proceedings have not challenged their effective use in the past, and also notes that a recent show cause proceeding was completed in eight months. RIVCO counters Respondents' argument that discovery and a full evidentiary

¹⁵ Some of RIVCO's arguments appear to be replies to Cargill's reply to RIVCO's Petition to Reaffirm; however, because many of Cargill's arguments are actually arguments in support of its Petition for Referral to Office of ALJs as discussed, supra, those arguments of RIVCO will be considered. Moreover, any arguments by RIVCO that are in fact a reply to a reply of RIVCO's Petition to Reaffirm Procedures will not be addressed, as the Commission does not permit the filing of such replies except upon the filing and grant of a motion for leave. Therefore, those arguments which are a reply to a reply are rejected.

hearing are necessary by pointing out that, as a matter of law, “due process does not require discovery in administrative proceedings.” RIVCO at 5 (citing Kelly v. Environmental Protection Agency, 203 F.3d 519,523 (7th Cir. 2000); Kropat v. Federal Aviation Admin., 162 F.3d 129, 132-33 (D.C. Cir. 1998); Sims v. National Transp. Safety Bd., 662 F.2d 668, 671 (10th Cir. 1981); National Labor Relations Bd. v. Valley Mold Co., 530 F.2d 693,695 (6th Cir. 1976); and Beverly Enterprises v. Herman, 130 F. Supp. 2d 1, 18-19 (D.D.C. 2000)).

RIVCO distinguishes the cases used in support of the ALJ’s Order Postponing Deposition and in Cargill’s reply to RIVCO’s petition, which hold that agencies “may not usually render a final decision based on material that is not in the record or otherwise available to respondent.” RIVCO at 6. RIVCO opines that these cases have no relation to whether due process requires discovery of material that will not be entered into the evidentiary record. RIVCO concludes that the opportunities to respond both before and after BOE presents its case are sufficient.

Further, in response to the argument that Respondents are due a “‘formal’ hearing,” RIVCO points out that such logic would extend that right to every show cause proceeding, and states that “a formal hearing under the APA can consist of nothing more than an opportunity to submit argument and affidavits of fact, and may in some circumstances even exclude the opportunity to offer fact affidavits.” RIVCO at 6 (citing Persian Gulf Outbound Freight Conference, 375 F.2d at 340-41; and American Export & Isbrandtsen Lines, 334 F.2d 185).

RIVCO believes that, if necessary, discovery can be conducted in a show cause proceeding, at the appropriate time. However, RIVCO avers that only information material to the agency’s decision would be discoverable. RIVCO at 7 (citing Doolin Security Savings Bank. F.S.B. v. Federal Deposit Ins. Corn., 53 F.3d 1395, 1401 n.10 (4th Cir. 1995); Pacific Gas & Electric Co. v. Federal Enerw Regulatory Comm’n, 746 F.2d 1383, 1388 (9th Cir. 1984)). RIVCO also disputes Cargill’s citation to World Line Shipping, Inc. v. Saeid B. Maralan - Order to Show Cause, Docket No. 00-05, as a case in which discovery was permitted

in a show cause proceeding. According to RIVCO, discovery was conducted only in the penalty phase, which was referred to an ALJ for an evidentiary proceeding. Liability, however, was decided in a show cause proceeding, without discovery.

Furthermore, RIVCO avers that Respondents have not presented any specific facts to justify their need for discovery out of step with normal show cause procedures. Again, RIVCO surmises that Respondents do indeed have sufficient facts in their possession to respond to the Order to Show Cause. According to RIVCO, all the information necessary to determine the factual issues Cargill lists in its Reply to the RIVCO Petition to Reaffirm are in its own control. By way of example, RIVCO explains that the dispute on the price of tug services will be best resolved in a show cause proceeding because BOE will put data as to those costs into the record. If such data differs from what the terminals claim, Respondents will then have the opportunity to respond with their own data.

RIVCO challenges Cargill's argument that either a full evidentiary hearing or a rulemaking proceeding are required because the Commission is changing policy by departing from Ormet. V C O describes Cargill's argument "to be that of a mutant Goldilocks," because the procedures available are not "just right." RIVCO at 9. RIVCO declares the claim that policy has changed as "involous," as the Ormet decision was limited to its facts. According to RIVCO, those facts have changed "dramatically." RIVCO at 10. Moreover, according to RIVCO, the Commission need only explain its reasoning if it is changing policy.

As to the allegation that the show cause proceeding reverses the burden of proof, RIVCO characterizes the show cause proceeding as "simply a procedural device to organize a proceeding." RIVCO at 10. RIVCO quotes the Commission in ANERA, 28 S.R.R. 1215, 1229 (1999) (Order to Show Cause), as rejecting a similar argument explaining that only the "initial burden of going forward with the evidence," is shifted. RIVCO concurs with BOE that BOE will still have the burden of proof, and points out, as did BOE, that federal courts use an identical show cause process. RIVCO at 11 (citing Cook

v. American S.S. Co., 134 F.3d 771, 776 (6th Cir. 1998)).

RIVCO concludes with the suggestion that if the Commission revises the procedures to allow “substantive activities to commence,” it should provide other interested parties the opportunity to intervene at the outset. RIVCO at 11.

C. Motion to Establish Discovery and Procedural Schedule

1. Ormet/IMT

On July 2, 2001, Ormet/IMT submitted a Motion to Establish Discovery and Procedural Schedule. On July 3, 2001, St. James submitted a Motion to Establish Reasonable Discovery and Procedural Schedule, adopting and incorporating the arguments made by Ormet/IMT, and making further arguments in support of its motion.”

Ormet/IMT argues that the Commission should revise the original procedural schedule in this proceeding and proposes that Respondents be “permitted to exercise their right to discovery before presenting their case-in-chief.” Ormet/IMT at 1. Ormet/IMT believes that the Commission has been presented with “at best misleading or at worst false and fraudulent” evidence thus far and that the discovery necessary to rebut that evidence cannot be accomplished easily under the existing procedural schedule. Id.

Ormet/IMT further explains that it intends to file motions to dismiss presenting “very serious legal issues,” and posits that such “issues need to be presented to the Commission in an orderly fashion

¹⁶ BOE generally opposes this motion in its “Omnibus Opposition” as does RIVCO in its Reply to Petitions and Motions to Terminate the Show Cause Proceeding of Respondents Cargill, Ormet/IMT and St. James and Memoranda in Support Thereof or Joinder Therein of Respondents ADM/Growmark and St. James, but neither party specifically sets out any arguments in reply and, therefore, none will be addressed here.

at an early date.” Id. at 2. Next, Ormet/IMT suggests that the many complicated antitrust-type issues in this proceeding justify expert analysis “which cannot be prepared and submitted within a matter of weeks.” Id. at 3. Ormet/IMT thus proposes the following schedule: 60 days for submission of motions contesting jurisdiction, to intervene, or to add parties; 180 additional days for depositions and written discovery; 90 further days for submission of briefs and evidence with the opportunity for reply and rebuttal; and requests for oral argument or hearing be made concurrent with the last round of briefs.

2. St. James

St. James adds that “[f]undamental fairness and due process require that St. James and others be afforded a meaningful opportunity to discover the basis for the allegations made against them before being compelled to submit their responses.” St. James at 2. St. James argues that the need for discovery and “an appropriate schedule within which to conduct discovery” is supported by ALJ Kline’s “clear support” for such in his July 3, 2001 ruling postponing a deposition. Id. St. James posits that discovery relating to jurisdiction will promote efficiency and may eliminate the need for a decision on the merits with regard to some parties. Finally, St. James believes that the original schedule “is neither fair nor reasonable,” given that the parties are only given 30 days to present their cases and “denies these parties fundamental rights of due process.” Id. at 3.

DISCUSSION

Rule 66 of the Commission’s Rules of Practice and Procedure, 46 CFR § 502.66, provides that “[t]he Commission may institute a proceeding by order to show cause . . . [which] may require the person named therein to answer, and shall require such person to appear at a specified time and place and present evidence upon the matters specified.” In addition, Rule 201 of the Commission’s Rules of Practice and Procedure, 46 CFR §502.201, provides that discovery is available in all adjudicatory proceedings under the Shipping Act.

The Commission issued an Order to Show Cause on June 11,

2001, to twelve marine terminal operators on the lower Mississippi River directing them to show cause why they have not violated sections 10(d)(1) and 10(d)(4) of the Shipping Act. The Order to Show Cause ordered, ~~inter alia~~ that proceeding is limited to the submission of affidavits of fact and memoranda of law; (2) those persons interested in intervening shall file a petition for leave to intervene which shall be accompanied by petitioner's memorandum of law and affidavits of fact which shall be filed in accordance with the following dates; (3) Respondents' affidavits of fact and memoranda of law and any intervenors and their affidavits and memoranda in support shall be filed by July 18, 2001; (4) BOE's reply affidavits of fact and memoranda of law and any intervenors and their affidavits and memoranda in support shall be filed by August 17, 2001; (5) parties may request an evidentiary hearing by September 17, 2001, which request must be made with a statement setting forth the facts to be proved, the relevance of those facts and a description of the evidence which would be adduced and why it cannot be submitted by affidavit; and (6) parties may request oral argument by September 17, 2001, which request must be made with an explanation as to why a memorandum of law is inadequate to present the party's case.

On June 22, 2001, the Commission referred all discovery issues to the Office of ALJs, causing an entity not a Respondent to the proceeding, RIVCO, to seek to intervene in the proceeding prior to the time for such filings." In ad&don, the parties have filed numerous petitions/motions regarding discovery and the proceeding generally. In an attempt to fairly address all of the issues presented by the parties' filings, the Commission stayed the procedural schedule set forth in the Order to Show Cause. We must now determine whether discovery should be allowed at this point in the proceeding, and if so, to what extent, and the procedures under which this proceeding should continue.

The main dispute before the Commission is whether and when discovery should be had in this proceeding. Both RIVCO and BOE

¹⁷ As noted, supra, the petition was granted as a matter of right.

argue that it is inappropriate to have discovery before the pleadings have been filed in accordance with the Order to Show Cause, while Respondents argue that discovery is necessary before they file their pleadings so that they have access to the information upon which the Order to Show Cause is based.

RIVCO suggests that discovery is not required at all to provide due process in an administrative proceeding, arguing that discovery is not required by either the Constitution or the APA in such proceedings. However, Commission rules provide for discovery in its adjudicatory proceedings and, therefore, the Commission is required to follow its rules and provide discovery. See Pacific Gas and Electric Co. v. Federal Energy Regulatory Comm'n, 746 F.2d 1383 (9th Cir. 1984) (finding that the extent to which a party is entitled to discovery in an administrative proceeding is determined by the agency's rules and that if those rules provide for discovery in a proceeding "the agency is bound by those rules").

Moreover, we disagree with RIVCO and BOE that discovery in a show cause proceeding cannot be had prior to the filing of pleadings. They argue that the Commission has never allowed discovery prior to the submission of memoranda of law and affidavits of fact and that the Order to Show Cause provides that the parties can request an evidentiary hearing after those pleadings have been filed, which they believe is the appropriate time for discovery. BOE cites several cases in which the Commission or another agency proceeded under an order to show cause in which no discovery was provided (and in some cases the level of due process afforded was far less than in the instant proceeding) and yet the decisions were upheld on appeal. See Costle, 445 U.S. 198; Persian Gulf Outward Freight Conference, 375 F.2d 335; American Airlines, Inc., 359 F.2d 624; American Export & Isbrandtsen Lines, 334 F.2d 185; Pacific Coast European Conference Port Equalization Rule, 7 F.M.C. 623.

While most show cause proceedings do not provide for discovery, there is no prohibition against discovery occurring before the filing of memoranda of law and affidavits of fact. The Commission has no rules regarding show cause proceedings other than Rule 66, which

is limited to prescribing the contents of a show cause order and does not dictate the actual procedures for show cause proceedings. In Docket No. 79-1 04, Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U.S. Pacific Coast Trade, the Commission issued a show cause order which specifically provided for discovery before the filing of pleadings. We recognize this approach is unusual, but the instant proceeding is more complex than the typical cases that proceed under show cause orders.

Respondents cite several cases for the proposition that procedural due process requires a full evidentiary hearing in this proceeding, with the presentation of the evidence at the outset. However, this case law does not appear to be applicable to the instant proceeding. In both Robbins v. United States R.R. Retirement Bd. and Goldberg v. Kelly, the complainants were challenging the termination of government retirement and welfare benefits respectively without the opportunity for an appropriate hearing. In the instant proceeding, however, the Commission is not attempting to terminate Respondents' property rights. Moreover, in Mathews v. Eldridge, 424 U.S. 319, 333 (1976), also cited by Cargill for the proposition that due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner," the Supreme Court held that social security disability benefits could be terminated prior to a hearing. While finding that an individual does have a property interest in such benefits, the Court balanced the individual's interest with the risk of deprivation of that interest, and the value of further procedural protections in determining what process was due. Even Cargill recognizes that due process is a flexible concept, but contends that the Order to Show Cause does not provide it adequate protection. These cited cases relate to the requirement that the government provide a meaningful opportunity for a hearing; they do not address the process by which the government initiates such a hearing. To the extent that procedural due process requires a hearing, the Order to Show Cause provides such a hearing.

An agency is not necessarily required to afford respondents a full evidentiary hearing when it proceeds under a show cause proceeding. For instance, in Persian Gulf Outward Freight Conference, the Commission issued an order to show cause why tariff revisions

should not be declared unlawful, and it limited the proceeding to the filing of memoranda of law and oral argument. 375 F.2d at 337. The respondent argued that the APA requires a full evidentiary hearing, particularly in light of the fact that the Commission was seeking a cease and desist order. *Id.* at 337-38. The D.C. Circuit held that the respondent was allowed to present what facts it felt were material via oral argument, despite not being allowed to present affidavits of fact, and that the Commission could conclude that those facts were undisputed and irrelevant. *Id.* at 341. As the question before the Commission was one of law, the D.C. Circuit held that an evidentiary hearing was not required because where no genuine or material issue of fact is presented the agency may pass upon issues of law after according the parties the right of argument. *Id.* However, all of the Commission cases that BOE cites address improper tariffs, the facts of which would not likely be in dispute and therefore would not require a full evidentiary hearing. In fact, past show cause proceedings have primarily presented only questions of law for the Commission to resolve. In the instant case, it already appears from Respondents' filings that there are numerous facts in dispute and this proceeding is not one which can be determined solely on questions of law.

Cargill alone presents several factual issues it believes to be in dispute. Car-gill asserts that this proceeding is fact- dependent and that some of the facts essential to proving violations are likely to be disputed by Respondents, such as whether Respondents serve common carriers (which goes to jurisdiction), the effect on the price of tug assists, and whether the exclusive arrangements have resulted in service improvements and increased safety and efficiency at each of the terminals. And, because there are twelve Respondents in this proceeding, any factual disputes will be amplified. Accordingly, we conclude that discovery is required in this proceeding.

However, Car-gill's argument that the Commission's factual predicates in the Order to Show Cause contradict many of the findings of fact in the Ormet case and thus a similar forum to examine those factual predicates is required is without support. The Commission's decision in Ormet addressed a factual situation that existed at a single port in 1995 and 1996, whereas the Order to Show Cause addresses the

years after the issuance of the decision at many different terminals. In effect, the Order to Show Cause presents a case where the facts have changed dramatically. For instance, it is asserted that an increased number of terminals have entered exclusive tug arrangements, fees for tug services have increased, and vessel operators are now complaining about the lack of choice and service.

Cargill further argues that the Commission is changing the policy established in Ormet to a per se prohibition of exclusive tug arrangements and, as a result, the Commission must justify this change in policy and refer the entire case to the ALJ. We note, however, that no party appears to be seeking a per se rule. Moreover, the Commission may reexamine or adjust a policy, if a policy even exists, as experience or conditions dictate. See American Airlines, Inc., 359 F.2d at 633.

Cargill and ADM/Growmark's argument that RIVCO's sole purpose is to overturn Ormet is misplaced. There appears to be a great misunderstanding as to what the Commission actually held in Ormet. Many Respondents assert that the Commission found that the exclusive tug arrangement at issue was indeed reasonable. This is an incorrect reading of the decision. No determination regarding the reasonableness of exclusive tug arrangements was made in the Ormet base. r , t h e Commission held that RIVCO, the complainant, had failed to make a prima facie case that the exclusive arrangement for tug services between Ormet and another tug company violated sections 1 O(b) (11) and (b) (12) or section 10(d)(1) of the Shipping Act, 46 U.S.C. §§ 1709(b)(11), (b)(12), and (d)(1).¹⁸ Ormet at 765. The Commission specifically did not establish what would constitute the relevant market for tug services, but rather stated that there was not enough evidence to conclude what the relevant market should be. Id. at 768-69. In addition, the Commission noted that there were no complaints from vessel interests and that the vessels calling at Ormet's terminal at that time were paying

¹⁸ This case was based on activities prior to the passage of the Ocean Shipping Reform Act, and thus the violations alleged refer to the pre-OSRA Shipping Act.

less for tug services than at other terminals. Id. at 769. Without proof from complainant of the relevant market and the harm occasioned by the practice within that market, Ormet was not obligated to justify its actions. Therefore, the Commission did not rule that the exclusive arrangement was in fact reasonable, but rather that complainant RIVCO had failed to present arguments or evidence necessary to shift the burden of production. As such, Respondents are incorrect when they assert that the Commission has sanctioned this activity via the Ormet decision. Whether such arrangements are reasonable was a question left open by the Commission.

Cargill also claims that the Order to Show Cause effectively and improperly shifts the burden of proof to Respondents. BOE counters that regardless of the order in which the evidence is presented, the Commission's decision will be based on the entire record. RIVCO cites ANERA, 28 S.R.R. at 1229, in which the Commission found that only the burden of going forward with the evidence was shifted by a show cause order. In ANERA, the Commission affirmed that the order to show cause established a prima facie case and fulfilled the Commission's initial burden of producing evidence, but went on to make clear that "[i]n doing so, it did not shift the basic burden of persuasion from itself to ANERA but only the burden of going forward with the evidence." Id. We agree with RIVCO's position that a show cause proceeding is "simply a procedural device to organize a proceeding." RIVCO at 10. The structure of the proceeding does not alter the Commission's responsibility to make a decision based on a fully developed evidentiary record.

Finally, there are a few miscellaneous concerns that must be addressed. First, RIVCO is concerned that by not adhering to the schedule set forth in the Order to Show Cause other intervenors will not be able to participate in discovery if the Commission ordered it to take place before the filing of memoranda of law and affidavits of fact. The new procedural schedule presented, infra, remedies that problem. Second, RIVCO is also concerned that granting discovery prior to the filing of memoranda of law and affidavits of fact will cause the proceeding to be protracted, something about which the Commission itself has already expressed concern. We agree that the proceeding

should not be dragged on by an ovenvrought discovery process and by an excessive motions practice, as has already occurred; however, that concern is tempered by the need to allow discovery to be conducted at a time that will provide the appropriate due process to all parties. With the many factual issues likely to be in dispute, it is inappropriate to require the parties to wait to proceed with discovery until after the filing of memoranda of law and affidavits of fact. As this proceeding is more complex than the average show cause proceeding generally, i.e., where the facts are undisputed and straightforward, where the parties are limited, and where the issues are questions of law (usually as to the application of the Shipping Act as to specific tariff provisions), due process requires discovery as well as the filing of the parties' evidentiary cases prior to the filing of pleadings in order to allow Respondents a true opportunity to respond to the claims in the Order to Show Cause.

It is difficult to imagine how Respondents could properly rebut the many factual allegations presented without access to information that they do not have at their disposal, particularly with regard to the section 10(d)(4) claim of disadvantage or prejudice to RIVCO. However, any such discovery should be strictly limited to the issues set forth in the Order to Show Cause and should occur under a strict schedule established by the ALJ. The ALJ has issued two tentative discovery rulings that were appealed to the Commission: Report of Discussion at Discovery Conference and Rulings on August 14, 2001, and Rulings on Motion of Respondents to Compel on September 5, 2001. In light of this order, and for the purpose of firming up his tentative rulings, we are remanding these two discovery orders to the ALJ for further consideration.

In this regard, we must also address RIVCO's concern with the scope of the Respondents' discovery requests. RIVCO cites FOIA restrictions on the release of information covered by the Trade Secrets Act and various governmental privileges.¹⁹ However, the scope of

¹⁹ RIVCO lists the deliberative process privilege, the informer's privilege, the law enforcement privilege, and the confidential report privilege. As described in Associaun for Women in Science, 566 F.2d

discovery is not now before the Commission, but has been assigned to **the ALJ**. **RIVCO's** concerns are not viable arguments against having discovery at all in this proceeding, but rather are arguments that are more properly made before the ALJ as to what information should or should not be released via discovery. As a result, BOE and RIVCO are advised to assert these arguments as affirmative defenses to discovery, if warranted, and/or to seek a protective order from the ALJ.

In addition, Ormet/IMT posits that the Commission should wait to make any decisions regarding discovery until it addresses the motions to dismiss the proceeding filed by it and ADM/Growmark. **We** disagree that postponing what has already become a prolonged proceeding due to the numerous petitions and motions the Commission has had to address will be beneficial at this time. It is more important to continue this proceeding and address the motions to dismiss and their replies after this order is issued in accordance with the order in which they were filed. Accordingly, we direct the ALJ not to hold the proceeding in abeyance while considering the motions to dismiss.

Finally, Cargill argues that the Commission should inmate a rulemaking proceeding because it is seeking to make a decision on the sole provider issue generally, considering the simultaneous investigation into similar practices in Florida. Agencies have broad discretion to determine what type of proceeding is best suited to address a particular issue. See Securities and Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 202-03 (1974). Here, there is no basis for the Commission to proceed with a rulemaking, nor has Cargill articulated a sufficient one, and, therefore, we refuse to alter the proceeding in such a manner.

339 (D.C. Cir. 1977), these privileges have been claimed exclusively by the government to avoid disclosure in judicial proceedings. These privileges are separate and apart from exemptions to disclosure in FOIA.

CONCLUSION

We find that as the nature of the proceeding is fact driven and not merely constrained to questions of law, discovery must be granted and shall be conducted prior to the filing of any briefs by the parties. This will enable all parties to obtain and review relevant information before making their arguments. Moreover, we find that the proceeding, because of its complexity and factual nature, is better managed by an ALJ rather than the Commission. Therefore, we are referring the entire case to an ALJ who will handle all aspects of the proceeding, *i.e.*, developing a factual record, weighing the evidence and the credibility of witnesses, if necessary, and making findings of fact and conclusions of law in an initial decision.

NOW, THEREFORE, IT IS ORDERED That Judge Kline's August 14, 2001 and September 5, 2001, discovery rulings are remanded;

IT IS FURTHER ORDERED, That the proceeding be assigned in its entirety for expedited hearing before an Administrative Law Judge;

IT IS FURTHER ORDERED, That the presiding Administrative Law Judge shall dispose of outstanding motions currently before the Commission as necessary;

IT IS FURTHER ORDERED, That the following procedural schedule shall be adhered to, provided that the presiding Administrative Law Judge, upon a showing of good cause, may make such changes as he deems necessary:

1. Petitions for Leave to Intervene, October 22, 2001;
2. Replies to Petitions for Leave to Intervene, October 26, 2001;
3. Rulings on Petitions for Leave to Intervene, November 2, 2001;
4. Discovery recommences, November 5, 2001;
5. Initial Decision, July 1, 2002.

The time period between which discovery recommences and the Initial Decision is issued shall include, inter alia, and pursuant to a schedule set by the presiding Administrative Law Judge, the submission of the parties' evidentiary cases and rebuttals, any evidentiary hearings as deemed necessary by the presiding Administrative Law Judge, and simultaneous opening briefs and simultaneous reply briefs filed by the parties; and

IT IS FURTHER ORDERED, That the final decision of the Commission in this proceeding shall be issued by November 1, 2002.

By the Commission.


Bryant L. VanBrakle
Secretary