

ORIGINAL

FEDERAL MARITIME COMMISSION

CANAVERAL PORT AUTHORITY -  
POSSIBLE VIOLATIONS OF SECTION  
10(b)(10), UNREASONABLE REFUSAL TO  
DEAL OR NEGOTIATE

Docket No. 02-02

Served: October 8, 2002

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**ORDER DENYING CANAVERAL PORT AUTHORITY'S  
PETITION TO CONSOLIDATE**

On February 25, 2002, the Commission issued an Order to Show Cause in the above-captioned proceeding directing Respondent Canaveral Port Authority ("Respondent" or "CPA") to show cause why it should not be found in violation of section 10(b)(10) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. § 1709(b)(10), for its refusal to consider the application for a tug and towing franchise in Port Canaveral filed by Tugz International, LLC ("Tug?") in June, 2000, and updated in September, 2001. Tugz and Seabulk Towing, Inc. ("Seabulk"), holder of the sole tug franchise granted by CPA, intervened in the proceeding. In filing its Memorandum of Law in Response to the Order to Show Cause, CPA also filed a Petition to Consolidate, requesting that the Commission consolidate the instant proceeding with Docket No. 02-03, Exclusive Tug Arrangements in Port Canaveral, Florida, a related case. The Bureau of Enforcement ("BOE") filed a reply to the petition in its Memorandum of Law, and CPA filed a rebuttal in its Rebuttal Brief. Tugz also replied to CPA's

petition. Seabulk did not take a position on the request to consolidate. This Order addresses only CPA's Petition to Consolidate.

### POSITION OF THE PARTIES

#### A. CPA's Petition for Consolidation

CPA put forward practical as well as legal considerations as justification for its consolidation petition. CPA first posits that the Commission is structured so as to enable it to perform its most crucial function of formulating national maritime regulatory policy and that this structure makes the Commission unsuitable for managing an adjudicative proceeding. CPA Response at 33. This, CPA argues, is because adjudications are best handled by a "trained lawyer with a background in litigation," and not a "collegial body" which is forced to always reach a group consensus on procedural matters. This requirement, CPA charges, results in numerous delays that are "harmful to all the parties involved . . . [and are] an unnecessary waste of the Commission's limited resources." Id. at 33-34. CPA further asserts that the Commission's administrative law judges ("ALJ") are better suited to managing adjudicative proceedings because of their extensive experience in litigation. Id. at 34. CPA reasons that because this proceeding's companion case, Docket No. 02-03, is presently before an ALJ, it would be more efficient for the Commission if this proceeding were transferred to the ALJ and the Commission limited its role to solely reviewing the ALJ's Initial Decision. Id. at 34. In addition, CPA claims that consolidation would prevent the duplication of costs, effort and energy that would result in holding two separate proceedings. Id. at 35.

CPA points to the Commission's rules' and case law, as well as the Federal Rules of Civil Procedure<sup>2</sup> and federal case law, contending that they favor consolidation when proceedings involve the same factual and legal issues. CPA contends that consolidation would prevent duplicate litigation, delay and different outcomes in such proceedings and would not change the substantive rights of the parties involved. *Id.* at 36-39. CPA argues that the instant case and Docket No. 02-03 involve the same factual and legal issues; they involve the tug franchise at Port Canaveral and CPA's actions determining whether or not to grant a second franchise, and whether CPA's actions violate the Shipping Act. *Id.* at 38. CPA asserts that there are no other factual "situations" or questions of law at issue. Therefore, CPA contends that the two cases should be consolidated.

#### B. Tugz's Reply Affidavit

Tugz opposes CPA's Petition, arguing that the issue before the Commission in this proceeding is a "highly circumscribed and basic" one, and consolidation of both proceedings would delay a decision on this "narrow" issue. Tugz Reply Affidavit at 4.

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<sup>1</sup> **Rule 148 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.148, states that "[t]he Commission . . . may order two or more proceedings which involve substantially the same issues consolidated and heard together."**

**'Rule 42(a) of the Federal Rules of Civil Procedure states: When actions involving common issues of fact or law are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs and delay.'**

### C. BOE's Memorandum of Law

BOE opposes CPA's Petition charging that the petition to consolidate this "relatively uncomplicated" proceeding with the more "numerous and factually complex issues" in Docket No. 02-03 is an attempt by CPA to delay this proceeding. BOE Memorandum at 18. Any such delay, BOE argues, would only benefit CPA and Seabulk, to the detriment of Tugz and Petchem, Inc. (an intervener in Docket No. 02-03). Id. Moreover, BOE contends, the Commission could have initiated a single proceeding before an ALJ, but specifically chose not to do so. Id. at 20. BOE further argues that the two proceedings are not substantially similar, as this proceeding involves one issue, while the issues in Docket 02-03 are numerous. Id. Finally, BOE points out that the parties in both proceedings are not the same, as Petchem has chosen not to participate in this proceeding. Id. at 21.

### D. CPA's Rebuttal Brief

CPA also filed a Rebuttal Brief denying that it is attempting to unnecessarily delay either proceeding. It argues instead that it is only attempting to avoid unnecessary duplication since both proceedings are substantially similar. CPA Rebuttal Brief at 38. CPA avers that both dockets "involve whether [CPA's] single franchise system is consistent with the Shipping Act," and thus consolidation would promote efficiency and the public interest rather than complicate and disrupt both cases. Id. CPA also states that the fact that Petchem has chosen not to request to intervene in this proceeding is irrelevant, because Petchem and Tugz are the only two companies besides Seabulk that have expressed an interest in providing additional tug services at Port Canaveral. As a result, CPA argues, the issues and parties are the same, and both proceedings should be consolidated. Id. at 39.

CPA asserts that Tugz's affidavit merely makes conclusory statements appropriate only for the ALJ and reiterates its position on consolidation but not any arguments against consolidation. Id.

### DISCUSSION

The Commission has the discretion to consolidate proceedings if they involve substantially the same issues. 46 C.F.R. § 502.148. The Federal Rules of Civil Procedure also provide for consolidation at the discretion of the court if there is a common issue of law or fact and consolidation would serve to "avoid unnecessary costs or delay." Fed. R. Civ. P. 42(a). The Federal Rules give the court broad discretion to decide whether to consolidate: "it is for the court to weigh the saving of time and effort that consolidation would produce against any inconvenience, delay or expense that it would cause." 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d §2383 (1994). In addition, even if a common question of law or fact exists and consolidation would be permissible, consolidation is not required. Id. Consolidation may be denied if it would cause a delay in the processing of the cases or would cause confusion or prejudice in the management of the case. Id.

The two proceedings CPA seeks to consolidate both address the exclusive tug franchise arrangement in Port Canaveral, Florida. Docket No. 02-02, the instant case, was initiated by an Order to Show Cause, while Docket No. 02-03 was initiated by an Order of Investigation and Hearing. Docket No. 02-02 ordered CPA to show cause why it should not be found in violation of section 10(b)(10) for its refusal to consider the application for a tug and towing franchise filed by Tugz. The facts regarding the alleged violation are not in dispute, and therefore the case is purely a question of law. In Docket No. 02-03, the Commission initiated an investigation to determine whether CPA violated sections 10(d)(1) and/or 10(d)(4) of the

Shipping Act, 46 U.S.C. app. §§ 1709(d)(1) and 1709(d)(4), by failing to establish, observe and enforce just and reasonable regulations and practices relating to tug and towing services, and/or by giving an undue or unreasonable preference or advantage to Seabulk; or imposing undue or unreasonable prejudice or disadvantage with respect to other potential tug providers, including Petchem and Tugz. Docket No. 02-03 thus deals with prohibited acts different from those at issue in Docket No. 02-02, and concerns both factual and legal issues. Finally, the parties differ slightly: Petchem did not intervene in Docket No. 02-02, and Tugz has withdrawn from Docket No. 02-03.

It does not appear that consolidating the cases would be more efficient, preventing duplicate litigation, delay and different outcomes. Docket No. 02-02 is already ripe for review by the Commission, while Docket No. 02-03 is currently in discovery before an ALJ. As a result, the parties in Docket No. 02-03 have yet to file briefs detailing their positions. Consolidation would only serve to delay Docket No. 02-02. Moreover, the two cases were initiated under two different schemes: order to show cause versus order of investigation and hearing. Consolidating the two cases and assigning them to an ALJ would generate new obstacles, the resolution of which would create additional delays, e.g., whether to hold additional discovery and whether to require the parties to submit new briefs. Furthermore, different outcomes could occur even if the cases were consolidated; the Commission could find that CPA violated section 10(b)(10) but not sections 10(d)(1) or 10(d)(4). CPA's arguments are, therefore, unpersuasive.

CPA also cites to various cases where the Commission or a federal court allowed consolidation, noting that consolidation was found to be appropriate where it would not deprive any party of substantive rights originally possessed. CPA Response at 37-39

(citing Johnson v. Manhattan R.R., 289 U.S. 479 (1933); National Labor Relations Bd. v. S.E. Nichols. Inc., 862 F.2d 952 (2d Cir. 1988), cert. denied, 490 U.S. 1108 (1989); Save On Shipping, Inc. v. Puerto Rico Maritime Shipping Auth., 26 S.R.R. 1455 (1994); International Ass'n of NVOCCs v. Atlantic Container Line, 24 S.R.R. 1150 (1988)). While this may be true, it does not require the Commission to automatically consolidate proceedings. It is possible that the parties in Docket Nos. 02-02 and 02-03 would not be deprived of substantive rights if the proceedings were consolidated; however, we believe that consolidation would be inefficient and such delay would deprive the parties of a timely decision with regard to the alleged section 10(b)(10) violation, which is now ripe for a Commission decision.

Moreover, as BOE points out, the Commission has already considered the possibility of a single proceeding, but consciously chose to separate them. The Commission believed that separating the alleged violations into two distinct proceedings, a show cause and an investigation before an ALJ, would be the best way to manage the issues. At this stage of the proceedings, with Docket No. 02-02 ripe for review and Docket No. 02-03 nearing the end of discovery, it would be even less advisable to treat the proceedings as one. Therefore, we find that CPA's Petition to Consolidate is denied.

THEREFORE, IT IS ORDERED, That Canaveral Port Authority's Petition to Consolidate Docket No. 02-02 and Docket No. 03-03 is denied.

By the Commission.



Bryant L. VanBrakle  
Secretary