

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: February 24, 2003

Respondent found to have violated section 10(b)(10) of the Shipping Act of 1984, 46 U.S.C. app. § 1709(b)(10), by unreasonably refusing to deal or negotiate with applicant for tug franchise at port.

The Commission found that there is insufficient evidence to make a determination of the appropriate amount of civil penalties and requests additional briefing.

BY THE COMMISSION: {Steven R. BLUST, *Chairman*;
Joseph BRENNAN, Harold J. CREEL, Jr., Rebecca F. DYE,
and Delmond J.H. WON, *Commissioners*.}

ORDER

On February 25, 2002, the Commission issued an Order to Show Cause in the above-captioned proceeding directing Respondent Canaveral Port Authority ("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),¹ for its refusal to consider the application for a tug and towing franchise in Port Canaveral, Florida, filed by Tugz International, LLC (“Tugz”) in June, 2000, and updated in September, 2001. CPA is the owner and operator of Port Canaveral and has the authority to grant franchises to entities to perform functions within the port. Tugz and Seabulk Towing, Inc. (“Seabulk”), holder of the sole tug franchise granted by CPA, intervened in the proceeding. CPA and Seabulk filed memoranda in response to the Order to Show Cause, the Bureau of Enforcement (“BOE”) thereafter filed its reply memoranda and Tugz filed an affidavit of fact, and CPA and Seabulk then filed rebuttal memoranda. The Commission also heard oral argument.

POSITIONS OF THE PARTIES

A. Responses to Order to Show Cause

1. CPA

a. Jurisdiction

CPA initially argues that the Commission does not have jurisdiction over CPA’s towing operations. CPA at 8. CPA asserts that, while it is a marine terminal operator as defined by the Shipping Act,* its towing operations are not the furnishing

¹ Section 10(b)(10) is applicable to marine terminal operators pursuant to section 10(d)(3) of the Shipping Act, 46 U.S.C. app. § 1709(d)(3).

² Section 3(14) provides that “‘marine terminal operator’ means a person engaged
(continued. ..)

of “terminal facilities” subject to Commission jurisdiction. The Shipping Act, CPA claims, limits jurisdiction to terminal activities and does not extend it to towing or tug operations. Id. at 9. CPA contends that the Commission narrowed the definition of terminal activities in Bethlehem Steel Corp. v. Indiana Port Commission, 21 F.M.C. 629, 632 (1979), by holding that levying a harbor service charge to finance construction of harbor facilities was a navigational activity because it was related to the harbor itself rather than the pier or terminal. Id. Therefore, CPA argues that towing operations are navigational services performed in the harbor and not subject to Commission jurisdiction. Id. at 10.

CPA further asserts that legislative history also supports its claim that the Commission lacks jurisdiction in this case. CPA contends that an initial version of the Shipping Act, 1916 included “operations such as ‘forwarding, ferrying, towing or furnishing transfer, lighterage, dock, warehouse, or other terminal facilities.’” Id. Ferrying, towing, transfer and lighterage, CPA asserts, were then removed by Congress before passage of the final version of the Shipping Act, 1916, thus proving that Congress did not intend for the Commission to have jurisdiction over towing. Id. at 11.

Moreover, CPA argues, the “control theory” of jurisdiction does not support the Commission’s exercise of jurisdiction over its towing operations. Id. at 12. CPA points to A.P. St. Philip, Inc. v. The Atlantic Land and Improvement

²(...continued)

in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier” 46 U.S.C. app. §1702(14).

Co., 13 F.M.C. 166 (1969), to illustrate its argument. CPA contends that the Commission found that while tugboat service did not constitute a terminal service, it nevertheless was transformed into a terminal function by usurping the function of the carrier and making access to the terminal dependent upon the exclusive tugboat service provided at the terminal. Id. (citing A.P. St. Philip, 13 F.M.C. at 172). This is different from the instant case, CPA asserts, because the contract for towing services with Seabulk is not exclusive. CPA claims that it held hearings on whether to extend a franchise to another towing company and did not do so based on “an objective finding that additional towing services were not necessary and would not serve the public interest.” Id. at 14. The instant case further differs, CPA avers, because access to the terminal is not dependent upon the use of Seabulk’s towing services as many vessels do not need tugs. Therefore, CPA argues that the control theory of jurisdiction does not apply and, even if it did, CPA’s towing franchise system does not qualify. Id.

In addition, CPA avers that in Plaouemines Port, Harbor, and Terminal District v. Federal Maritime Commission, 838 F.2d 536 (D.C. Cir. 1988), the D.C. Circuit upheld the Commission’s jurisdiction based on a challenge to a tariff for fire and emergency services at the terminal that controlled access to the terminal and was thus considered the furnishing of terminal facilities. Id. at 15. CPA argues that the control theory of jurisdiction applied in Plaouemines does not apply here because towing operations are navigational activities not terminal activities as were the fire and emergency services. Id. at 16.

Moreover, CPA contends that the Commission found in Petchem v. Canaveral Port Authority, 23 S.R.R. 974 (1986),

that, although the Commission does not have jurisdiction to regulate tug services, it did have jurisdiction over respondent's³ tug system because respondent retained "significant threshold control" over access to those services. Id. at 16-17. The Commission found, however, that respondent's tug system was lawful. CPA asserts that the D.C. Circuit, affirming the Commission's ultimate decision but not addressing jurisdiction, "endorsed the navigation/terminal activity distinction that the Commission adopted in Bethlehem Steel." Id. at 17.

Finally, CPA claims that the court in Puerto Rico Ports Authority v. Federal Maritime Commission, 919 F.2d 799 (1st Cir. 1990), rejected the control theory of jurisdiction as too expansive and rather applied the navigational/terminal activity distinction. CPA avers that the court found that a harbor service charge was navigational and beyond the scope of Commission jurisdiction. Id. at 18.

b. Merits

CPA asserts that its tug franchise system and its management of it has been approved previously by the Commission in the Petchem case. Id. at 20-21 (citing Petchem, 23 S.R.R. at 979). CPA argues that the tug franchise granted to Seabulk is non-exclusive and CPA has the authority to grant additional franchises after holding a hearing on the public convenience and necessity for them. Id. at 21. It held such a hearing to consider Petchem's application for a franchise in 1983, which was thereafter denied. CPA states that the Commission rejected Petchem's complaint challenging that decision, "holding that CPA had acted properly and within its

³ CPA was also the respondent in the Petchem case.

rights and responsibilities in denying the Petchem request for a franchise.” Id. The Commission’s decision was affirmed, CPA notes, by the D.C. Circuit, Petchem v. Federal Maritime Commission, 853 F.2d 958 (D.C. Cir. 1988).

CPA maintains that Petchem refiled for a franchise in 2000 and CPA held a hearing, but Petchem was unable to provide sufficient evidence on the issue of public convenience and necessity, and its application was thus denied. An application for a franchise was then immediately filed by Tugz, CPA contends, and CPA refused to hold a hearing on Tugz’s application because “there had been no substantive change in operations or economics” since Petchem’s hearing and to hold such a hearing “would be a wasteful and duplicative effort.” Id. at 22-23.

CPA avers that it has the responsibility to ensure that the port is operated in a safe and efficient manner. In furtherance of that goal, CPA argues, it has been reluctant to add a second tug franchise because it believes that the port will not be able to support two competing franchises as the market for assist tugs is shrinking.⁴ Id. at 24 (citing Bancroft Declaration, Attachments 4 and 6). CPA asserts that, at the urging of BOE and in furtherance of settling the case, it advertised for new applications for a tug franchise in May, 2002, requesting that a new franchisee offer one large and one small tug on a full time

⁴ CPA supports this claim by presenting the number of tug movements in the past few years: in 1999 there were 1,212 tug movements for passenger vessels and 1,248 tug movements for cargo vessels, and in 2001 there were 64 tug movements for passenger vessels and 1,223 tug movements for cargo vessels. Id. at 27. CPA blames the drastic decrease in tug movements for passenger vessels on the new cruise ships that are equipped with thrusters and the bankruptcies of Cape Canaveral Cruise Lines and Premier Cruise Lines. Id.

basis, as does the current franchisee. CPA avers that this is necessary “in order to provide safe assistance to all vessels in the port.” Id. at 25. No bids were received. CPA also notes that there have been no carrier complaints regarding CPA’s tug franchise system.

CPA argues that the use of a single tug franchise has not been detrimental to the port or its stakeholders because the prices for those services are low. Id. at 28. CPA asserts that the rates have not risen since 1994, and states that the rates per tug use range from \$485 to \$1,275, which they claim are among the most competitive in Florida. Id. at 28-32 (Tables 1 and 2).

Finally, CPA avers that its business judgment is entitled to deference. The Commission, CPA contends, has twice found that “a public port agency presumably acts in the public interest, and. . . its business judgment about port matters should not be lightly reversed.” Id. at 39.

2. Seabulk

Seabulk argues that the Order to Show Cause has been superseded by events and possibly rendered moot. Seabulk at 1. By issuing an invitation for applications for a second tug franchise in May, 2002, Seabulk asserts, CPA demonstrated its willingness to consider granting a second franchise even though no applications were submitted. Id. at 2. Moreover, Seabulk contends that the minimum qualifications established by CPA in the invitation do not constitute an unreasonable refusal to deal or negotiate in violation of the Shipping Act, as they are less onerous than what Seabulk is required to provide. Id. at 2-3. Finally, Seabulk provides statistics and a study regarding the average use rate of the current tugs and the economic

consequences of adding another tug franchise, which indicate, **Seabulk** argues, that CPA's decision not to grant a second tug franchise does not violate the Shipping Act. Id. at 3-4.

B. Replies

1. BOE

a. Jurisdiction

BOE disputes CPA's claim that the Commission does not have subject matter jurisdiction over its tug operations. BOE argues that the facts of A.P. St. Philip are similar to those in the instant case; the Commission found that the marine terminal operator had usurped the right of the carrier to choose its tug operator, making access to the terminal facilities dependent on one tug operator, thus transforming tug service into a terminal function "related to the receiving, handling, storing or delivering of property." BOE Reply at 3-4 (quoting A.P. St. Philip, 13 F.M.C. at 171-72). BOE maintains that CPA argues that because Seabulk's franchise is not exclusive, A.P. St. Philip does not apply. However, BOE asserts, as Seabulk has held the only tug franchise awarded by CPA for the last 40 plus years and CPA has denied other applications for tug franchises, **Seabulk** has a de facto exclusive contract. Id. at 5.

BOE further avers that the Commission has applied the "control theory" of jurisdiction articulated in A.P. St. Philip to Port Canaveral in the Petchem case. BOE argues that in Petchem the Commission rejected the jurisdictional argument that CPA is making here. Id. at 6. BOE quotes the Commission's decision holding that A.P. St. Philip still has precedential value and that Bethlehem Steel should be

distinguished from A.P. St. Philip and Petchem's situation, which are similar. Id. at 6-7 (citing Petchem, 23 S.R.R. 774). The Commission found jurisdiction over CPA in the Petchem case, BOE notes, because the exclusive tug franchise system at the port extends the furnishing of terminal facilities into the harbor and the practice relates to terminal operations and the receiving and handling of cargo. Id. at 7 (quoting Petchem, 23 S.R.R. 774).

BOE further avers that the D.C. Circuit did not endorse the navigational/terminal distinction developed in Bethlehem Steel in reviewing and affirming the Petchem decision. , BOE points out, the D.C. Circuit affirmed the Commission's case on the merits and declined to address the jurisdiction issue at all. Id. at 7-8. Moreover, BOE contends that the First Circuit did not reject the "control theory" of jurisdiction in Puerto Rico Ports Authority as CPA claims; they simply held that there was no jurisdiction based upon cases and the legislative history of the Shipping Act. Id. 8-9.

Finally, BOE avers that the Commission has recently affirmed its jurisdiction over exclusive tug arrangements in River Parishes Co., Inc. v. Ormet Primary Aluminum Corp., 28 S.R.R. 75 1 (1999), relying on A.P. St. Philip and Petchem.

b. Merits

BOE contends that CPA and Seabulk presented inappropriate and inaccurate factual assertions, and thus BOE only addresses those portions of their arguments that it asserts are pertinent to the Order to Show Cause. Id. at 9- 10. BOE sets forth what it argues are a list of undisputed facts, which include, inter alia, that: (1) Seabulk is the only tug company that has

been awarded a franchise by CPA since 1958; (2) on July 21, 2000, CPA denied an application for a tug franchise filed by Petchem in January, 2000; (3) on July 19, CPA denied Tugz's June 13, 2000 request to consider their application for a tug franchise at the hearing to consider Petchem's application; and (4) on September 18, 2001, Tugz filed another application for a tug franchise and was notified by CPA that no hearing would be granted to consider the application. Id. at 1 O-1 1. BOE contends that these facts establish CPA's refusal to deal or negotiate with regard to Tugz's application for a tug franchise and that the only remaining issue is the reasonableness of CPA's refusal. Id. at 11.

BOE refutes Seabulk and CPA's claim that, because it invited applications for a second tug franchise in May, 2002, and no one responded, this proceeding has been rendered moot. First, BOE argues, subsequent actions cannot annul past violations. Second, BOE contends, advertising for applications does not terminate Tugz's already pending application.⁵ Id. at 1 1 - 12. BOE avers that CPA and Seabulk's argument that CPA justifiably refused to consider Tugz's application because there is not sufficient business in Port Canaveral to support two tug companies is inapposite.

BOE asserts that CPA is violating due process by ignoring Tugz's application. CPA is a marine terminal operator, BOE avers, and thus is a public utility that has the responsibility to uphold the public interest in an objective

⁵ BOE states that it will not challenge here CPA's assertions with respect to the reasonableness of creating minimum standards for a second tug franchise in its May, 2002 invitation, as that issue will be addressed in Docket No. 02-03, Exclusive Tug Arrangements in Port Canaveral, Florida.

manner. Id. at 13-14 (citing Munnv. Illinois, 94 U.S. 113, 126 (1876); American Export Isbrandtsen Lines, Inc. v. Federal Maritime Comm'n, 444 F.2d 824, 828 (D.C. Cir. 1970); A.P. St. Philip, 13 F.M.C. at 174; Investigation of Free Time Practices - Port of San Diego, 9 F.M.C. 525, 547-48 (1966)). Although CPA argues that a hearing may take forms other than a formal public hearing, BOE contends that there is no procedure available for considering a second tug franchise in Port Canaveral other than the “convenience and necessity” hearing CPA committed to in its contract with Seabulk. Moreover, BOE argues, CPA does not show that a hearing of any kind was afforded to consider Tugz’s application. Id. at 14.

BOE further notes that one of the goals of the Ocean Shipping Reform Act of 1998 (“OSRA”), which added section 10(b)(10),⁶ was to “encourage competition in international shipping and growth of United States imports and exports, and for other purposes.” Id. at 14-15 (quoting S. Rep. No. 61, 105th Cong., 1st Sess. 1 (1997)). BOE avers that CPA’s refusal to consider Tugz’s application precludes the type of competition OSRA intended and is consistent with the type of behavior section 10(b)(10) was designed to prevent. Id. at 15. BOE argues further that CPA is biased toward Seabulk to the detriment of other companies as it has favored Seabulk for the past 44 years, and recently granted it a ten-year amended franchise agreement while Tugz’s application had been pending for ten months. Id. at 16.

BOE maintains that, since Tugz filed its original application for a tug franchise on June 13, 2000, CPA could be found in violation of section 10(b)(10) for 600 to 800 days,

⁶ Replacing former sections 10(b)(12) and (13).

depending on when the Commission finds the violations were tolled. Id. at 16- 17. As a result of these numerous violations, BOE asserts, it may be more efficient to refer the determination of the appropriate number of violations and the penalty amount to an administrative law judge. Id. at 17.

Finally, BOE avers that because of the Supreme Court's decision in Federal Maritime Comm'n v. South Carolina State Ports Auth., 122 S.Ct. 1864 (2002), finding that a private complainant is barred by the doctrine of sovereign immunity from bringing suit against a state-run port authority at the Commission, the Commission more than ever has an increased responsibility with regard to the practices of state-owned marine terminal operators. Id. at 17-18.

Therefore, BOE argues that CPA's refusal to consider Tugz's application for a tug franchise for more than two years is a violation of section 1 O(b)(10) of the Shipping Act, and CPA has presented no plausible justification for its actions. BOE requests that the Commission find that CPA has violated section 10(b)(10); confirm that each day of the continuing violation constitutes a separate violation; order CPA to cease and desist from further violations; and refer the matter to an administrative law judge to determine the number of violations and the assessment of civil penalties therefor. Id. at 2 1-22.

2. Tugz's Reply Affidavit

Tugz filed a reply affidavit of Captain James C. DeSimone, Senior Vice President, Operations, for the Great Lakes Towing Company, Managing Member of Tugz. DeSimone Aff. at ¶ 1. DeSimone began working at Great Lakes Towing in 1996 and is currently the custodian of records

at Tugz. Id. at ¶¶ 2-3. DeSimone states that in early June, 2000, Tugz filed a “Tugboat and Towing Franchise Application” with CPA. Id. at ¶ 4. DeSimone asserts that Tugz, via Ronald Rasmus, President of Managing Member, personally appeared before the CPA Commissioners on July 19, 2000, requesting a hearing, which CPA denied. Id. at ¶ 8.

On September 18, 2001, DeSimone states, Rasmus sent a letter updating Tugz’s June, 2000 application and requesting that it be heard and granted. Id. at ¶ 9 (attachment). Tugz received a letter in response from CPA, dated September 25, 2001, stating that Tugz did not have an application pending and it would not be placing Tugz’s application on the agenda for the next meeting. Id. at ¶ 10 (attachment). DeSimone asserts that on October 29, 2001, Tugz again sent a letter to CPA requesting that Tugz’s application be placed on the agenda for review and action by CPA’s Commissioners and that a refusal to do so would be a violation of due process, equal protection and the Shipping Act. Id. at ¶ 11 (attachment). DeSimone maintains that no reply was received. Id. at ¶ 12.

DeSimone claims that CPA never indicated that Tugz’s application was deficient and it was neither granted nor denied, but rather just ignored. Id. at ¶ 14. The publication of a request for applications for additional tug franchises in May, 2002, 23 months after Tugz filed its original application, DeSimone contends, does not justify CPA’s actions. Id. at ¶ 16. Tugz did not respond to the advertisement by CPA, DeSimone claims, because it contradicted CPA’s own preexisting tugboat operational criteria, developed in September, 2001 with the Port Canaveral Pilots and the Coast Guard, and the new criteria would render any new tug operator “financially unviable.” Id.

DeSimone disputes CPA's claim that there has been no carrier interest protesting the tug system at Port Canaveral, stating that in an October 24, 2001, letter, the Florida-Caribbean Cruise Association stated that it is in favor of a competitive tug business in Port Canaveral and fully supports Tugz's application for a tug franchise. Id. at ¶ 18.

In conclusion, DeSimone contends that CPA's conduct is proscribed by the Shipping Act and that CPA should be sanctioned. Id. at ¶ 20.

C. Rebuttals

1. CPA

a. Jurisdiction⁷

CPA argues that BOE has not demonstrated that the Commission has jurisdiction in this case. CPA asserts that the Commission only has jurisdiction over a marine terminal operator's furnishing of terminal services. Towing operations, CPA maintains, are not terminal activities. CPA Rebuttal at 14-15. CPA avers that certain legislative history also shows that Congress did not intend for the Commission to have jurisdiction over tug operators. Id. at 15.

Moreover, CPA contends that the control theory of jurisdiction, a limited exception applied in A.P. St. Philip, does not apply in this case because the current tug franchise is not exclusive and other tug companies do not have the equipment

⁷ Much of CPA's argument in its Rebuttal Memorandum is a restatement of its opening memorandum and will not be discussed in detail.

to meet the needs at Port Canaveral. Id. at 16- 17. Rather, CPA argues, the navigational/terminal activity test applies in this case. CPA contends that two Commission cases issued after A.P. St. Philip, Marine Terminal Practices of the Port of Seattle, 21 F.M.C. 397 (1979), and Bethlehem Steel, 21 F.M.C. 629, clarified the Commission's reach over marine terminal operators. Id. at 17-18. Bethlehem Steel in particular, CPA claims, limited the Commission's jurisdiction, stating that activities conducted on water are not terminal activities, a holding that was affirmed by the D.C. Circuit. Id. at 18 (citing Bethlehem Steel Corp. v. Federal Maritime Comm'n, 642 F.2d 1215 (D.C. Cir. 1980)). CPA argues that towing operations are navigational activities that occur in the water of the harbor, and therefore, in accordance with Bethlehem Steel, the Commission has no jurisdiction over those activities at Port Canaveral. Id. at 19.

Furthermore, CPA avers that the Petchem decision is inapplicable to this case even though the Commission found at that time that CPA's exclusive towing franchise was subject to Commission jurisdiction. Id. at 20. Again, CPA notes that the D.C. Circuit did not address the jurisdictional issue in affirming the Commission's decision. Id. at 21 (citing Petchem v. Federal Maritime Comm'n, 853 F.2d at 961). CPA asserts that the current tug franchise is not exclusive and both Tugz and Petchem failed to apply for a franchise when they had the option to do so in 2002. The Commission cannot, therefore, apply the control theory of jurisdiction, CPA contends, and as a result it has no jurisdiction in this case. Id. at 21-22.

b. Merits

CPA argues that it acted reasonably in dealing with Tugz's application for a tug franchise. CPA contends that it properly denied Tugz's request for a hearing on its application because "it would be a waste of its modest staff resources to hold a second public hearing for Tugz so shortly after the Petchem hearing . . . and there was no indication that Port conditions had suddenly changed." Id. at 9. CPA avers that the Tugz application would not have benefitted from a public hearing and that CPA informed Tugz that its application would not be placed on the agenda for a public hearing, as "[n]o amount of public hearing would have changed the fact that [CPA] knew that there was not sufficient business in the port to support another tug franchise." Id. at 10.

CPA further asserts that the port enjoys high-quality service, low prices and satisfied customers. CPA claims that the port is a "highly contestable market," because the credible threat of competition from other tug companies keeps prices for quality service low and is better than the destructive competition that could result from allowing two or more tug franchises. Id. at 11-12 (Attachments 7, 8). In addition, CPA notes, according to the franchise agreement with Seabulk, Seabulk's franchise may be terminated at any time upon 60 days' notice. Thus, in order to retain its franchise, CPA contends, Seabulk must continue to provide quality, low-cost service. Id. at 12.

c. Constitutional arguments

CPA argues that the Commission should not be allowed to substitute its business judgment for that of CPA, a local port authority. CPA asserts that it “weighed the potential competitive benefits against its own needs for security and safety, and determined that the public interest of the users of Port Canaveral and its community would be best served by having one [tug] provider.” Id. at 24. Moreover, CPA maintains, when CPA set minimum equipment standards for tug providers and invited applications, Tugz did not apply. Id.

CPA avers that the Tenth Amendment of the Constitution imposes limits on the reach of the Federal government’s powers over states: “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Id. at 24-25; U.S. Const. amend. X. CPA claims that the Supreme Court has confirmed that federal officials cannot dictate that state officials take specific legislative or regulatory action. Id. at 25-26 (citing Printzv. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992)). CPA avers that the Tenth Amendment prohibits the Commission from mandating how CPA should administer the port’s tug operations. In fact, CPA asserts, it is improper for BOE to even argue that CPA’s failure to hold a hearing on Tugz’s original June, 2000 application or its updated 2001 application was unreasonable. Id. at 26-27. No change in circumstances has been shown by either BOE or Tugz, CPA contends, to justify a different decision. Therefore, CPA avers that BOE’s attempt to force CPA to hold a hearing on Tugz’s application is without economic or legal justification. Id. at 27.

Moreover, CPA argues that the Supreme Court has shown that even though the Federal government may have plenary power over maritime matters, a state may legislate on maritime matters that are local in nature or are designed to protect the public health and promote safety. Id. at 28 & nn.47-48 (citing Kellv. Washington, 302 U.S. 1 (1937); Parkersburg and Ohio River Transp. Co. v. City of Parkersburg, 107 U.S. (17 Otto) 691 (1883); Cooley v. Bd. of Wardens of Port of Philadelphia, 53 U.S. (12 How.) 299 (1851)). CPA contends that tug services in a particular port are a local concern and CPA's service to many cruise lines and proximity to NASA and military facilities shows that it has a heightened need to protect passengers and vessels. Id. (Attachments 1 1-12). CPA avers that it has analyzed these issues and has determined that the public is best served by a single tug franchise provided by Seabulk. Id. at 29. As CPA will be held responsible for whatever happens at the port, CPA asserts, the Tenth Amendment protects a state's right to manage its affairs without federal interference. Id. at 29-30.

In addition, CPA argues, the Tenth Amendment limits federal administrative agencies' enforcement and regulatory action. Because Congress cannot enact a statute that compels a state to act, CPA contends it cannot do so indirectly through an administrative agency. Id. at 30-3 1. Moreover, CPA avers that BOE's contention that the Supreme Court increased the Commission's responsibility with regard to state-owned marine terminal operators in South Carolina State Ports Authority is incorrect. Rather, CPA asserts, the Court merely noted that the case did not address the Commission's investigation or enforcement powers over state ports, but it did not give the Commission "an increased mandate to micro-manage port affairs." Id. at 3 1.

BOE is also incorrect, CPA claims, in arguing that antitrust jurisprudence supports its position. CPA argues that under the federal antitrust laws, CPA would be exempt pursuant to the “state action exemption” or Id. rker doctrine.^{1 - 3 2 .} This exemption, CPA avers, allows governmental entities to engage in otherwise improper anticompetitive activities. CPA claims that in Gold Cross Ambulance v. City of Kansas City, 538 F. Supp. 956, 967-68 (W.D. Mo. 1982), aff’d on other grounds, 705 F.2d 1005 (8th Cir. 1983), the court held that dismantling an ambulance service franchise granted by the city to one ambulance service to the exclusion of two other ambulance service providers was improper in part because the application of federal antitrust laws would violate the Tenth Amendment. Id. at 32-33. Both the district court and the 8th Circuit, CPA maintains, held that the single franchise system for ambulance services was exempt under the state action exemption, because “the community was seeking through its system the public benefits of a single provider - not an economic benefit to itself.” Id. at 33 (citing Gold Cross Ambulance, 538 F. Supp. at 956). CPA contends that this is analogous to CPA’s tug franchise system, because CPA also found, after a hearing, that the public safety and welfare required a single franchise and that otherwise the port “would suffer adverse effects on port security, safety, efficiency, and environmentally sound operations.” Id. at 33-34.

Finally, CPA rebuts Tugz’s claim that it should have received a hearing on its application for a tug franchise. CPA asserts that it did consider Tugz’s application thoroughly and it is not statutorily or constitutionally required to provide a formal public hearing before denying the application. Id. at 36-37 (attachment 3). Moreover, Tugz’s general letter of support from a cruise trade association is insufficient evidence to show that

carriers support Tugz's attempt to win a tug franchise as no carrier has either expressed dissatisfaction with the current tug franchise system or intervened in this proceeding to support Tugz. Id. at 37-38.

Therefore, CPA argues that the Commission should find that CPA is an arm of the State of Florida and is immune from this proceeding and thus the Commission should discontinue this proceeding. Id. at 40.

2. Seabulk

a. Jurisdiction

Seabulk adopts CPA's argument that the Commission does not have jurisdiction. Seabulk's Rebuttal at 2 n. 1.

b. Merits

Seabulk reiterates that CPA did not violate the Shipping Act in denying consideration of Tugz's application. Seabulk maintains that CPA explained to Tugz that "there was no point in considering its application," because "it had recently affirmed its prior determinations that operations in the port did not yet warrant two tug operators and that nothing had come to its staffs attention to suggest a different conclusion." Id. at 2-3. Furthermore, Seabulk asserts, neither BOE nor Tugz has presented evidence to show the need for a second tug operator at the port.

Moreover, Seabulk contends, even if the Commission finds that CPA refused to deal or negotiate with regard to Tugz's application, that refusal was reasonable and not in

violation of the Shipping Act. Seabulk asserts that it presented two studies demonstrating that traffic at the port will not support two tug operators, which BOE does not dispute. Id. at 3-4. In addition, Seabulk avers, CPA did not hold a formal hearing, but that was reasonable in light of its recent determination that a second franchise was not viable. Id. at 4. Whether this action conforms to “allocable” standards of due process, Seabulk argues, is a matter for the courts of the State of Florida.

Therefore, Seabulk contends, based on the facts presented, there is no basis to find that CPA unreasonably refused to deal or negotiate.

D. Outstanding: petition

BOE has an outstanding petition filed with the Commission requesting that the testimony of William Bancroft, Deputy Executive Director of CPA, taken on October 3 1,200 1, during Fact Finding No. 24, Exclusive Tug Arrangements in Florida Ports, be admitted into the record. BOE asserts that this testimony impeaches Mr. Bancroft’s second declaration attached to CPA’s rebuttal memorandum in this proceeding, whereby he states that he “did review the document which Tugz submitted.” BOE Petition at 1-2. BOE argues that, to the contrary, in his testimony in Fact Finding No. 24, Mr. Bancroft stated that he did not review the application of Tugz and did not know what equipment Tugz was offering. Id. BOE states that it did not file this petition earlier because it was restricted by the fact that the record in Fact Finding No. 24 was not public until it was released by the Commission on September 6, 2002.

CPA has no objection to admitting this testimony into the record. CPA contends, however, that there is no inconsistency between the testimony and Mr. Bancroft's second declaration and that BOE mischaracterizes his statements. CPA Reply Petition at 1-2. CPA's argument relies on the similarity between "looked at" and "reviewed;" while Mr. Bancroft admitted that he did not review the document in detail, he did look at it. Id. at 2. CPA further avers that BOE should have brought this to the attention of the Commission earlier and that its failure to do so "is telling of its true belief as to the merits of its claimed inconsistency." Id. at 3.

FINDINGS OF FACT

The following constitutes the Commission's Findings of Fact based on the pleadings and evidence submitted by the parties:

1. CPA is a political subdivision of the State of Florida, created by Florida law. CPA owns and operates Port Canaveral, Florida, which encompasses approximately 3,300 acres. CPA at 6 and Attachment 7; CPA Rebuttal at 4.
2. Port Canaveral is a deepwater port with six cruise terminals, two liquid bulk facilities, and nine dry cargo berths. CPA at Attachment 4 (Bancroft Dec.), ¶¶ 6-7; CPA Rebuttal at 8.
3. CPA is headed by five elected Commissioners who oversee the fiscal, regulatory, and operational policies of the port. CPA has a staff of approximately 158 people, headed by Executive Director Malcolm McLouth. CPA Rebuttal at 4.

4. Any of the five Commissioners or the Executive Director may place an item on the public agenda. CPA Rebuttal at 5, and Attachment 4 (McLouth Dep.) at 14.

5. CPA is a marine terminal operator as defined by section 3(14) of the Shipping Act. CPA at 9.

6. CPA owns and leases property at the port to tenants and offers a broad range of services to its tenants. CPA at 6 and Attachment 7.

7. CPA has the authority to grant franchises to persons or corporations to perform enumerated services within the port, including requiring and granting franchises for tug assist and towing services. CPA at 6 and Attachment 7; BOE at 10.

8. Seabulk Towing, Inc., d/b/a Port Canaveral Towing, formerly Hvide Marine Towing, Inc., is a tug service provider that has its principal place of business in Fort Lauderdale, Florida. It is the current franchisee for tug services at Port Canaveral and has been the sole franchisee there since 1958. CPA at 7; CPA Rebuttal at 5; BOE at 10.

9. Tugz International, LLC is a tug service provider. Tugz and/or its affiliates in The Great Lakes Group operate approximately fifty tugboats in approximately forty commercial and military ports and has been in the towing business since 1899. DeSimone Aff. at ¶ 4.

10. Petchem, Inc. is a tug service provider that applied for a tug franchise in Port Canaveral in the 1980s but was denied a franchise. CPA at 7.

11. Sometime in December, 1999 or January, 2000, Petchem submitted an application for a tug franchise at **Port Canaveral** with CPA. BOE at 10; CPA Rebuttal, Attachment 4 (McLouth Dep.) at 3 1.

12. On April 19, 2000, CPA decided to hold a hearing on July 21, 2000, to consider Petchem's application for a tug franchise. CPA Rebuttal at 7.

13. On June 13, 2000, Tugz submitted an application for a tug franchise at Port Canaveral with CPA. BOE at 10; DeSimone Aff. at ¶ 4; CPA Rebuttal at 8.

14. On July 19, 2000, Tugz appeared before the CPA Commissioners at a public meeting and requested that its application for a tug franchise be heard by the Commission at the July 21, 2000 hearing. CPA denied the request. DeSimone Aff. at ¶ 8; Transcript at 69-70.⁸

15. On July 21, 2000, CPA held a hearing on the public convenience and necessity of Petchem's application for a tug franchise at Port Canaveral. CPA rejected Petchem's application. CPA Rebuttal at 7.

16. On April 18, 2001, CPA entered into an Amended and Restated Franchise Agreement with Seabulk, amending and restating the 1975 Franchise Agreement. The Agreement grants Seabulk a ten (10) year "Non-Exclusive Franchise to provide vessel towing service at Port Canaveral," and from year to year thereafter until terminated by either party. The Agreement provides that CPA will not grant another tug franchise "without

⁸ "Transcript" refers to the transcript from oral argument.

first having a public hearing showing a convenience and necessity.” The Agreement further provides that Seabulk will provide two operational tugs, one being a tractor tug, equipped with fire-fighting apparatus, with a third and fourth tug on standby. CPA at 7 and Attachment 8.

17. By letter dated September 18, 2001, to Mr. McLouth of CPA, Tugz submitted an updated application for a tug franchise and requested a formal hearing. DeSimone Aff. at ¶ 9 and Attachment.

18. By letter dated September 25, 2001, to Tugz, Mr. McLouth of CPA notified Tugz that it did not have an application pending from Tugz and that it would neither recommend that another tug franchise be granted nor place Tugz’s application on CPA’s meeting agenda. Mr. McLouth stated that there was no change of circumstances at the port since the July 21, 2000 meeting considering Petchem’s application to warrant such action. DeSimone Aff. at ¶ 10 and Attachment; CPA Rebuttal at 8; BOE at 11.

19. By letter dated October 29, 2001, to Mr. McLouth of CPA, Tugz again requested that CPA hold a formal hearing on Tugz’s application for tug services. DeSimone Aff. at ¶ 11 and Attachment.

20. Tugz did not receive a response from CPA to its October 29, 2001 letter. DeSimone Aff. at ¶ 12.

21. On May 20, 2002, CPA published a notice inviting applications for an additional tug franchise at Port Canaveral. CPA requested that any application be submitted no later than June 6, 2002, and that all applicants be prepared to present their

qualifications at a hearing before the Commissioners on June 12, 2002. CPA at Attachment 1.

22. CPA received no applications in response to its notice. CPA Rebuttal at 9; DeSimone Aff. at ¶ 16.

DISCUSSION

The Order to Show Cause directs CPA to show cause why it should not be found in violation of section 1 O(b)(10) of the Shipping Act for refusing to deal or negotiate with Tugz regarding its application for a tug franchise at Port Canaveral. Because CPA raised the question of subject matter jurisdiction, the Commission must first determine if it has jurisdiction over CPA's tug and towing operations. However, as an initial matter, we must clarify the burden issue raised by Seabulk at oral argument.

Seabulk contends that BOE's Reply Memorandum indicated that it was CPA's burden to show that any refusal to deal or negotiate was reasonable. Seabulk argued instead that it is BOE's burden to show that CPA's refusal to deal or negotiate was unreasonable, and thus BOE has the ultimate burden of proof. Transcript at 82, 84. BOE argues that the Order to Show Cause sets forth a prima facie case of a violation of section 1 O(b)(10), which then puts the burden on CPA to justify its refusal to deal or negotiate. Transcript at 87.

The Order to Show Cause set forth a prima facie case of CPA's refusal to deal or negotiate, and it is CPA's responsibility to present a justification for its actions. However, it is ultimately BOE's burden to prove that the justification

presented by CPA is not a reasonable one and that CPA's actions constitute a violation of the Shipping Act.

A. Jurisdiction

The Shipping Act grants jurisdiction to the Commission over marine terminal operators, defined, in part, as "person[s] engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier." 46 U.S.C. app. §1702(14). CPA meets the definition of marine terminal operator and, thus, the Commission has personal jurisdiction over it. FF 1, 2, 5.⁹ Whether the Commission has subject matter jurisdiction over CPA in this proceeding depends upon whether the restrictions on tug services in the port are "relat[ed] to or connected with receiving, handling, storing, or delivering property" as defined by section 10(d)(1) of the Shipping Act, 46 U.S.C. app. § 1709(d)(1). CPA argues that the Commission does not have subject matter jurisdiction because tug and towing operations are navigational services, not terminal services; the legislative history shows that Congress intentionally omitted towing from the Shipping Act, 1916; and the tug franchise system in place at the port is not exclusive. BOE disagrees, arguing that this case is similar to the Commission's decisions in A.P. St. Philip and Petchem, where the Commission found jurisdiction over certain tug operations.

The Commission addressed the issue of subject matter jurisdiction over tug operations in A.P. St. Philip and Petchem. In both cases, the Commission found that where a terminal operator has usurped the right of a carrier to choose its tug

⁹ "FF" refers to our Findings of Fact presented, supra.

operator and made access to terminal facilities dependent on one predetermined tug operator, the furnishing of tug services is transformed into a terminal function related to the receiving, handling, storing, or delivering of property. Petchem, 23 S.R.R. at 986-87;¹⁰ A.P. St. Phillip, 13 F.M.C. at 171-72. The Commission noted in A.P. St. Philip that, ordinarily, tug operations are not a terminal function subject to Commission jurisdiction because the selection of a tug operator is within the exclusive domain of carriers, not marine terminal operators. 13 F.M.C. at 171-72. In both cases, however, the marine terminal operator had entered into exclusive contracts with a single tug company to provide all tug services, removing any choice from the carriers. Therefore, as the Commission found in Petchem, the port's exclusive tug system "extend[ed] the . . . [marine terminal operator's] furnishing of terminal facilities from the pier onto the waters of the harbor," and had "an underlying purpose relating to terminal operations and a more than incidental relationship to the receiving and handling of property and cargo." 23 S.R.R. at 987.

CPA contends, however, that the Commission narrowed the definition of terminal activities in Bethlehem Steel, where it found that a harbor service charge levied against all commercial vessels engaged in import, export and/or lake traffic in the harbor to recoup its investment in the construction of the harbor as a container for water was navigation-related and not subject to Commission jurisdiction. CPA at 9-10. The

¹⁰ CPA highlights the fact that the D.C. Circuit did not affirm the jurisdictional finding of the Commission and endorsed the navigational/terminal distinction of Bethlehem Steel in its review of the Petchem case, 853 F.2d at 961.1 7 . Although it is true that the court affirmed the case on the merits and declined to address jurisdiction because it was not necessary to do so, this does not constitute rejection of the Commission's finding of jurisdiction.

Commission itself distinguished Bethlehem Steel in Petchem, stating that the case had not overturned A.P. St. Philip. “The effect of a harbor construction fee on a ship’s access to terminal facilities is far more remote and tangential than that of tug service.” Petchem, 23 S.R.R. at 986.

The instant case falls squarely within the jurisdictional parameters set forth in A.P. St. Philip and Petchem. CPA contends that this is not possible because Seabulk does not have an exclusive contract. CPA at 14. We find, however, that although Seabulk’s arrangement is denominated a “non-exclusive franchise,” it is a de facto exclusive arrangement. CPA has granted a franchise to one tug company, Seabulk, for tug services for the entire public area of the port. FF 8, 16. Seabulk has been the only tug service provider granted a franchise at the port since 1958. FF 8. After receiving the application from Tugz, CPA renewed the franchise agreement with Seabulk in April, 2001, granting Seabulk a ten year franchise. FF 16. The agreement provides that CPA will not grant another franchise “without first having a public hearing showing a convenience and necessity.” FF 16; CPA at Attachment 8. Furthermore, CPA restricts access to the port through its franchise system; vessels may access the port only by using Seabulk’s tug services.¹² By controlling who may offer tug services and by granting that right to only one tug company, CPA has made access to the terminals and terminal facilities dependent on a commitment to Seabulk, and thus has limited the prerogative of carriers to choose a tug operator.

¹¹The original 1975 franchise agreement included this same language. Petchem, 23 S.R.R. at 978.

¹²Unless the vessel has its own thrusters. CPA at 27.

Therefore, the restriction on tug choice appears to relate directly to the receiving, handling, storing, or delivering of property at the terminals and is not navigation-related (i.e., related to the harbor waters or non-terminal facility services) like the fees assessed in Bethlehem Steel.

Two federal appellate cases discussed by CPA that address jurisdiction at marine terminals also deserve mention. In Plaaumines Port. Harbor and Terminal District v. Federal Maritime Commission, a port that did not own or operate wharves, docks or other terminal facilities (they were privately owned), included in its tariff a charge for the fire and emergency services it provided via a “Harbor Fee” on all commercial vessels that docked at the port and a “Supplemental Harbor Fee” on commercial vessels transferring cargo within the port. 838 F.2d at 540-41. The port was able to deny access to the private port facilities as well as deny credit to those who failed to pay the fees. Id. at 541. The D.C. Circuit affirmed the Commission’s finding of jurisdiction, holding that the port’s offering of essential services and controlling access to the terminals equaled the furnishing of terminal facilities. Id. at 543. The court was careful to explain that this would not, however, result in the Commission controlling fire and emergency services at all ports. The court noted that only if ports began charging fees and controlling access to facilities would the holding in this case bring them within Commission jurisdiction. Id.

CPA argues that the Plaaumines decision does not apply to the instant case because towing operations are navigational activities rather than terminal activities. CPA at 15- 16. CPA misreads the court’s opinion. The D.C. Circuit did not find that fire and emergency services were inherently

terminal activities, but rather that by charging a fee for essential services and controlling access to the terminals based on the payment of that fee, the port's action amounted to the furnishing of terminal facilities. That is analogous to the instant case where CPA, through its franchise agreement with Seabulk, is offering an essential service, tug and towing, and is controlling access to the terminals based on the use of Seabulk's tugs.

In the other case, Puerto Rico Ports Authority v. Federal Maritime Commission ("PRPA"), the Puerto Rico Ports Authority levied a harbor service charge against vessels entering the Port of Ponce and receiving the benefit of general services provided by the Puerto Rico Ports Authority at that port. 919 F.2d at 800. The First Circuit held that the Puerto Rico Ports Authority was not a marine terminal operator subject to personal jurisdiction, but that even if it were, the court would not find that the fee was related to the furnishing of terminal facilities but rather that it was navigationally related. Id. at 804-05. However, the First Circuit distinguished its holding from the Commission's decisions in A.P. St. Philip and Petchem:

We agree with the holdings of the cited cases that some activities that do not involve the actual physical handling of cargo are subject to the reach of the Shipping Act when performed by a marine terminal operator and related to receiving, handling, storing or delivering property.

Id. at 803. The instant case is similarly distinguishable. PRPA is akin to the Commission's finding in Bethlehem Steel, where a harbor service charge was found to be navigational because it was related to the navigable waters of the harbor. As the Commission stated, that type of fee's effect on a ship's access

3 2 CANAVERAL PORT AUTHORITY - POSSIBLE VIOLATIONS

to terminal facilities is far more removed than that of tug service. See Petchem, 23 S.R.R. at 986. PRPA does not affect the Commission's decision with regard to subject matter jurisdiction over exclusive tug arrangements.

Therefore, the Commission finds that it has subject matter jurisdiction over CPA's tug franchise system.

B. Merits

The Order to Show Cause directs CPA to show cause why it should not be found in violation of section 1 O(b)(10) of the Shipping Act for unreasonably refusing to deal or negotiate with Tugz. This requires a two-part inquiry: whether CPA refused to deal or negotiate, and, if so, whether its refusal was unreasonable. To make this determination, we must analyze a course of events beginning in June, 2000 and ending in May 2002: the June 13, 2000 application submitted by Tugz, and the subsequent refusal by CPA on July 19, 2000, to consider that application at a July 21, 2000 meeting convened to consider another application for a tug franchise submitted by Petchem; the September 18, 2000 updated application submitted by Tugz and the September 25, 2001 letter in response from Mr. McLouth, the Executive Director of CPA; and the May 20, 2002 notice published by CPA requesting applications for an additional tug and towing franchise at Port Canaveral.

As a general matter, CPA avers that it did consider Tugz's application for a tug franchise even though it did not hold a formal hearing; that the port would not be able to support a second tug franchise system anyway; and that it advertised for applications for a second tug franchise in May, 2002, and Tugz did not respond. BOE disputes CPA's claims, arguing that

there is no evidence to show that CPA afforded Tugz's application what it characterizes as "due process" when it refused Tugz's request for a formal hearing; and that CPA's invitation for applications in 2002 neither annulled its past actions nor terminated Tugz's already pending application.

1. Refusal to deal or negotiate

Petchem submitted an application for a tug franchise in late 1999 or early 2000, and in April, 2000, a hearing was scheduled for July 21, 2000, to consider Petchem's application. FF 11, 12. The original franchise agreement and the amended franchise agreement provide that CPA will not grant an additional tug franchise "without first having a public hearing showing a convenience and necessity."¹³ FF 16. Tugz also submitted an application for a tug franchise on June 13, 2000, and requested that it be considered at the July 21 hearing. FF 13. After no indication from CPA that it would consider the application at the July 21 hearing, Tugz attended a CPA hearing on July 19, 2000, and requested that its application be considered at the July 21 hearing. FF 14. That request was denied. FF 14. CPA concedes that it did not hold a hearing of convenience and necessity to consider Tugz's application, although it claims that "[i]t has been reviewed, has been received, has been discussed by the Commissioners at Canaveral Port Authority on July the 19th, 2000, at which meeting they decided that they were not going to hear it in conjunction with Petchem's application." Transcript at 69-70.

¹³ See n. 11, supra.

CPA failed to provide Tugz a hearing of convenience and necessity to consider Tugz's application. The only procedure whereby CPA can grant an additional tug franchise is by a public hearing of convenience and necessity, and CPA refused to hold such a hearing. Furthermore, CPA's decision at the July 19 hearing was not a ruling to reject the application, but rather was a determination to not consider Tugz's application at the July 21 hearing. There is no indication that the Commissioners considered the merits of Tugz's application at that time. Moreover, CPA has not provided any evidence to support its claim that it provided some other type of "hearing" to consider Tugz's application. An unsupported assertion that the Commissioners considered the application is not sufficient. Therefore, we find that CPA's failure to provide that hearing to Tugz constitutes a refusal to deal or negotiate.

2. Reasonableness

A refusal to deal or negotiate is not on its own a violation of the Shipping Act. We must also determine whether that refusal was unreasonable. Cf., Petchem. Inc. v. Federal Maritime Comm'n, 853 F.2d 558,563 (D.C. Cir. 1988) ("The Shipping Act clearly contemplates the existence of permissible preferences or prejudices."). CPA first argues that Tugz's submission, filed one month before the scheduled hearing, was too late for its staff to prepare for in time for the July 21 hearing. CPA contends that there was a great deal of effort expended to prepare for the July 21 hearing to consider Petchem's application alone.¹⁴ CPA Rebuttal at 7-8,

¹⁴ It is unclear when this preparation began. There is reference to it beginning in January, soon after Petchem's application was submitted, and in April, after the
(continued. ..)

Attachment 3 (Bancroft 2d Dec.) at ¶ 15, and Attachment 5 (Kotas Dec.) at ¶¶ 5-6. CPA maintains that it directed its staff to “analyze the needs of Port users and the community as well as the effect a second tug operation would have on safety, security, and environmental quality.” CPA at 7. For example, Lauren Kotas, Director of Marketing and Trade Development for CPA, prepared traffic projections for the July 21 hearing:

[W]e speak to the ship agents resident in port, terminal operators, and a representative sampling of ship charterers. In addition, we monitor shipping industry trends, take into consideration surrounding market changes and related service needs, monitor competitive developments in the seaport industry include [sic] taking field trips to observe changes in competing facilities and hold [sic] discussions with some national consultants.

CPA Rebuttal, Attachment 5 (Kotas Dec.) at ¶ 5. Furthermore, Ms. Kotas explained that these projections are updated a couple of times per year and that they must at all times be on “short notice” to report this information to the Commissioners. CPA Rebuttal, Attachment 5 (Kotas Dec.) at ¶¶ 5-6.

As described by CPA, much of the information researched and prepared by its staff was generic, *i.e.*, not specific to Petchem’s application. It does not appear that this analysis would have to have been significantly modified if Tugz’s application were also considered. In addition, the staff appears to have at its disposal certain information necessary to

¹⁴(...continued)

July 21 hearing date was set. CPA Rebuttal at 7-8.

consider applications. We also note that when CPA decided to advertise for applications for a tug franchise in May, 2002, it requested that all applications be submitted by June 6, 2002, and that a hearing on any and all submissions would be held on June 12, 2002. FF 21. This indicates that CPA did not believe it was necessary to have applications well in advance of the hearing date in order to properly prepare for the hearing. We are not convinced by CPA's argument that it would not have been able to prepare Tugz's June 13 application for consideration at the July 21 hearing.

CPA next avers that Tugz was denied inclusion in the July 21 hearing as a result of opposition by Petchem, which "was vigorously protesting any inclusion of Tugz in what they regarded as their hearing" and because Petchem was first in line in applying and was "fighting to get the focus on themselves." Transcript at 45-46, 48-49. CPA also asserts that Florida law requires it to provide notice of a meeting a certain number of days before the meeting, and that it could not re-notice the meeting to include Tugz's application. Transcript at 48-49.

These claims, in addition to having been presented by CPA for the first time at oral argument, are irrelevant. If CPA believed that the July 19, 2000 hearing was not the proper forum at which to consider Tugz's application, it could have held a separate hearing. We are not convinced that this a reasonable justification for failing to hold a hearing to consider Tugz's application at any time.

CPA further asserts that an additional hearing was not held to consider Tugz's application because the hearing on Petchem's application was so time-consuming and thorough, lasting three-quarters of a day and involving the testimony of

various witnesses, that the Commissioners reached a decision that there was no need for any additional tug franchises at the port. Transcript at 52-54. CPA contends that it found that there was insufficient business at the port to support a second tug franchise.

Whether there was sufficient business at the port to support another tug franchise is inapposite. This argument may be appropriate in determining whether to grant a tug franchise, but not in deciding whether to consider an application for one. This is especially troublesome in light of the fact that CPA has granted a tug franchise at Port Canaveral to **Seabulk**, and CPA considered the application for an additional tug franchise of another entity, **Petchem**, at a public hearing of convenience and necessity, as CPA itself requires in its amended franchise agreement with **Seabulk**. However, CPA failed to accord **Tugz** that same consideration. CPA has not presented any other justification for its failure to provide **Tugz** a public hearing of convenience and necessity.

Refusals to deal or negotiate are factually driven and determined on a case-by-case basis.¹⁵ It is useful to look to the few cases that have rejected claims of refusals to deal or negotiate for comparison. For instance, in Seacon Terminals, Inc. v. Port of Seattle, 26 S.R.R. 886 (1993), **Seacon** alleged that the Port of Seattle unlawfully excluded it from the port by

¹⁵ BOE asserts that antitrust law is helpful in determining whether the conduct of CPA is unreasonable. "Those laws generally prohibit refusals [to deal or negotiate] that tend to **restrain** competition unreasonably, or that produce or reinforce a monopoly." Transcript at 10. The Commission has found, however, that strict antitrust analysis is not necessary in adjudicating an alleged violation of the Shipping Act. Gulf Container Line v. Port of Houston Auth., 25 S.R.R. 1454, 1459 (1991).

refusing to deal and negotiate a new lease and by giving its competitors more favorable lease terms. Seacon did not renew its lease even though the port negotiated with Seacon for over a year. Id. at 899. The Commission found that because no new lease was signed with Seacon, the port's negotiation and eventual agreement for a lease with another company was a reasonable exercise of its business discretion. Id. The Commission deferred to the Port of Seattle's business decision to enter a lease agreement with another company after the port had made a lengthy attempt to enter a lease with Seacon. The Commission's analysis in Seacon indicates that, in determining reasonableness, the agency will look to whether a marine terminal operator gave actual consideration to an entity's efforts at negotiation. By contrast, in the instant proceeding, CPA did not negotiate with Tugz in any way, because CPA refused even to consider Tugz's application. Unlike the complainant in Seacon, Tugz was not given an opportunity to be heard.

In Chilean Nitrate Sales Corp. v. San Diego Unified Port District, 24 S.R.R. 13 14 (1988), the complainant alleged that the respondent port refused to deal or negotiate when it converted a cargo handling space the complainant was leasing into a different type of cargo handling facility. The Commission found that the complainant had not attempted to negotiate a lease for space in the new facility and, therefore, that there was no unreasonable refusal to deal or negotiate. Id. at 13 18. The Commission did not have to address whether the refusal to deal or negotiate was unreasonable as there was no attempt by the complainant to deal or negotiate at all, unlike the instant case where Tugz submitted two applications to CPA.

The facts of the present case are thus distinguishable from the above decisions. CPA only permits an entity to

provide tug services at Port Canaveral if it has a franchise agreement to do so. CPA has granted a franchise to one company, **Seabulk**. CPA requires, through its amended franchise agreement with **Seabulk**, that an additional tug franchise can be granted only by a public hearing of convenience and necessity. Tugz submitted an application for a tug and towing franchise and requested that it be considered at a public hearing of convenience and necessity. Unlike in Seacon, CPA did not “negotiate” with Tugz regarding its application. In fact, CPA refused to consider Tugz’s application at a public hearing of convenience and necessity, even though it conducted such a hearing to consider Petchem’s application. Based on the totality of the circumstances, CPA’s failure to consider Tugz’s application is unreasonable, and its justifications (insufficient time, Petchem’s objection, and insufficient business at the port) are inadequate. Therefore, we find that CPA violated section 1 O(b)(10) with regard to Tugz’s June 13, 2000, application when on July 19, 2000, it refused to consider it at the July 21, 2000 hearing.

3. Length of violation

Having found a violation of the Shipping Act, we must determine how long this violation continued and when, if at all, it ended. BOE and Tugz argue that the violation continues until this day because CPA never actually formally considered Tugz’s application or denied it. CPA and **Seabulk** assert that even if the Commission finds that CPA initially violated section 1 O(b)(10), CPA made it clear in response to Tugz’s resubmitted application in September, 2001, that the port would not be able to sustain an additional tug franchise, and that any outstanding application after that was rendered moot by inviting applications for a second tug franchise in May, 2002. BOE and

Tugz dispute that claim, contending that CPA never properly considered and denied Tugz's updated September, 2001 application, that CPA's later invitation for applications did not terminate Tugz's outstanding application, and that Tugz did not submit an application to the invitation because CPA refused to answer questions about the notice's requirements.

a. September, 2001

On September 18, 2001, over a year after CPA's denial to consider Tugz's June 13, 2000 application at the July 21 hearing, Tugz submitted, by letter to Mr. McLouth, an updated application for a tug franchise and a request for a formal hearing. FF 17. Mr. McLouth responded on September 25, 2001, notifying Tugz that CPA did not have an application pending from Tugz, that CPA had denied Tugz's request to participate in the July 21 hearing where it rejected Petchem's application, that there had been no increase in demand for tug services since that hearing, and as a result he would neither recommend that another tug franchise be granted nor place Tugz's application on the Commission's agenda for a hearing. FF 18. CPA now argues that there had been no substantive change in the operations or economics of the port and that holding another hearing would have been a waste of resources. CPA contends that Tugz made no showing in its application or in the evidence presented at the Petchem hearing to demonstrate that such a change occurred or that the port could support another tug franchise. Transcript at 64, 75. Moreover, CPA asserts that the port would not be able to support two competing tug franchises because the market at the port is shrinking.

While this may be true, CPA still failed to provide Tugz the hearing CPA itself designed to address applications for tug

franchises, a public hearing for convenience and necessity, even after submission of the updated application and the renewed request for a formal hearing. FF 16. Although CPA is correct that hearings may take many forms, it has not shown that any type of hearing was held to determine Tugz's initial application or that it has any other procedures in place for one. CPA's claims that the market would not support an additional franchise and that holding another full public hearing of convenience and necessity would have been a waste of resources may be sufficient justification for denying the application.¹⁶ However, that argument does not excuse CPA's failure to provide any sort of meaningful consideration of Tugz's application. We find that by providing that tug franchises can only be granted by a public hearing of convenience and necessity, by granting a hearing to another applicant, and by refusing to do so for Tugz, CPA's refusal to consider Tugz's September 18, 2001 updated application is a continuation of its initial unreasonable refusal to deal or negotiate in violation of section 1 O(b)(10).

b. May, 2002

Finally, the Commission must determine whether CPA's May 20, 2002 notice inviting applications for an additional tug franchise tolled the clock on CPA's violation. On May 20, 2002, CPA published a notice inviting applications for an additional tug franchise at Port Canaveral. FF 21. CPA requested that any application be submitted no later than June 6, 2002, and that all applicants be prepared to present their qualifications at a hearing of convenience and necessity before

¹⁶ However, this is not the appropriate proceeding in which to make that determination. It is more appropriately addressed in Docket No. 02-03, Exclusive Tug Arrangements in Port Canaveral, Florida.

the Commissioners on June 12, 2002. Id. No applications were received by CPA, and Tugz concedes that it did not submit one. FF 22. Tugz argues that it did not respond to the notice because it believed that its original application was still pending and because it had asked several questions regarding the notice that CPA did not answer, so it could not make a proper business decision about whether to submit an application.¹⁷ Transcript at 25-26, 92-93.

CPA's actions would have afforded any applicant that responded to the notice, including Tugz, consideration of its application at a public hearing for convenience and necessity. Tugz's justification for not responding to the notice, that it had unanswered questions regarding the application that prevented it from making a decision about whether to apply, is puzzling. It is unclear why these questions prevented it from applying in response to CPA's notice, but not from submitting two previous applications." If Tugz had responded, it would have had an opportunity to be heard. The notice also shows CPA's willingness to deal or negotiate with an applicant. While this may not have terminated Tugz's pending application and tolled CPA's refusal to deal or negotiate with Tugz, we believe that, at the very least, it transforms that refusal to one that is not unreasonable. CPA's violation of section 1 O(b)(10) thus ended

¹⁷ Tugz also maintains that it did not reply to the notice because the minimum qualifications were untenable. As BOE correctly notes, the reasonableness of those qualifications is more appropriately addressed in Docket No. 02-03, Exclusive Tug Arrangements in Port Canaveral, Florida.

¹⁸ The questions ranged from the types of tugs required to what would happen if the other tug operator went out of business. While some of these questions were specific to CPA's requirements in the notice, others were more general and applicable to any application. Transcript at 25-28, 90, 92-93.

on May 20, 2002, when it published the notice inviting applications for an additional tug franchise.

Therefore, we find that CPA violated section 10(b)(10) beginning on July 19, 2000, when it refused to consider Tugz's June 13, 2000, application for a tug franchise at Port Canaveral, and that the violation continued until May 20, 2002, when it published an invitation for applications for an additional tug franchise.

C. Constitutional arguments

1. Tenth Amendment

In its Rebuttal memoranda, CPA for the first time contends that the Tenth Amendment to the Constitution limits the Commission's authority to mandate how CPA should administer the port's tug operations. CPA claims that federal officials cannot dictate that a state take specific legislative or regulatory action, and that the Commission cannot compel CPA to hold a hearing on Tugz's application for a tug franchise. While presenting a new argument for the first time on rebuttal is not favored, we will address it as the argument presents a constitutional question about the Commission's authority to regulate state ports. Moreover, BOE and Tugz had an opportunity to present opposing positions at oral argument.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Supreme Court has found that Congress has the authority to regulate state activities subject to the exercise of Commerce

Clause powers, an authority delegated to the federal government by the Constitution. In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 554 (1985),¹⁹ the Court held that Congress could subject the San Antonio Metropolitan Transit Authority, responsible for the mass-transit system of the city, to the minimum wage and overtime requirements of the Fair Labor Standards Act as nothing in those requirements “is destructive of state sovereignty or violative of any constitutional provision.” The Court further clarified this holding in New York v. United States, 505 U.S. 144,160 (1992), where it found that regulation of the interstate market in waste disposal is within Congress’ authority under the Commerce Clause and the Supremacy Clause. It held that while Congress could not “commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program,” it may “encourage States to adopt a legislative program consistent with federal interests.” Id. at 167. Congress may do this, the Court stated, because it has been recognized that where Congress can regulate private activity under the Commerce Clause, it can also provide that states regulate that activity according to federal standards, or it can preempt state law by federal regulation. Id.

Finally, in Reno v. Condon, 528 U.S. 141 (2000), the Court found that the Drivers Privacy Protection Act, which

¹⁹ The specific holding of Sec. 11 has been overruled by statute. _____ of Governors of Univ. of N. Carolina v. United States Dept. of Labor, 722 F. Supp. 1301, 1306 n.10 (E.D.N.C. 1989). However, the analysis is unchanged.

²⁰ In Printz v. United States, 521 U.S. 898 (1997), a case cited by CPA, the Court found that Congress did exactly that in commanding state and local law enforcement officers to perform background checks on handgun purchasers and other related tasks under certain provisions of the Brady Handgun Act.

regulates the disclosure of personal information in state department of motor vehicles' records and bans the disclosure of that information unless the state has consent, is a proper exercise of Congress' authority under the Commerce Clause. The Court found that Congress neither required the state to enact any laws or regulations nor required state officials to assist in the enforcement of regulating private individuals. Id. at 151. The Court stated that the difference lies in the regulation of state activities versus controlling the way in which states regulate private parties. Id. at 150. As the Court explained,

“Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.”

Id. at 150-1 5 1 (quoting South Carolina v. Baker, 485 U.S. 505, 514-15 (1988)).

We disagree with CPA that the Commission does not have the authority to regulate the manner in which it conducts business as a marine terminal operator. Congress enacted the Shipping Act to enable the Commission to regulate “the common carriage of goods by water in the foreign commerce of the United States.” 46 U.S.C. app. § 1701(1). CPA is subject to the authority of the Commission. In California v. United States, 320 U.S. 577, 585-86 (1944), the Supreme Court found that a state-owned marine terminal operator was an “other person” furnishing wharfage, dock warehouse, or other terminal

4 6 CANAVERAL PORT AUTHORITY - POSSIBLE VIOLATIONS

facilities in connection with a common carrier under the Shipping Act, 1916, the predecessor of the Shipping Act of 1984, and thus is subject to regulation by the Commission.²¹ The Court explained that:

The crucial question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies to public owners of wharves and piers. . . . [W]ith so large a portion of the nations' dock facilities, as Congress knew [citation omitted], owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies.

Id. Pursuant to this analysis, which remains valid under the Shipping Act of 1984,²² CPA is clearly a "person" subject to Commission regulation.

The proper inquiry is whether the Commission, pursuant to the Shipping Act, is merely regulating CPA's activities, which would be permissible, or is seeking impermissibly to control CPA by directly compelling it to enact and enforce a federal regulatory program to regulate private parties. We find that, contrary to CPA's claim, BOE is not attempting, through

²¹ Regulation at that time was overseen by one of the FMC's previous incarnations, the United States Maritime Commission.

²² See, e.g., Plauemmes, 838 F.2d at 542 ("the intent behind, and prior interpretations of, the 1916 Act's provisions have continuing precedential force" under the Shipping Act of 1984).

this proceeding, to substitute its business judgment for that of CPA or to force CPA to hold a hearing. Rather, BOE and Tugz are arguing that by refusing to consider Tugz's application either by a public hearing to consider the convenience and necessity of an additional tug franchise or by some other type of "hearing," CPA has violated section 1 O(b)(10) of the Shipping Act. This is exactly the type of regulatory action the Supreme Court has approved; the Commission, pursuant to authority granted to it by Congress in the Shipping Act, may evaluate and determine whether a marine terminal operator, public or private, is refusing to deal or negotiate with another entity. By making a finding that CPA has violated section 10(b)(10), the Commission is not dictating that CPA enact certain legislation or directing that CPA and its employees take certain actions. Rather, it is analogous to the Supreme Court's decision in Reno v. Condon; if CPA wants to engage in marine terminal activities, it must comply with the standards set forth in the Shipping Act, even if that requires CPA to take administrative action. That does not transform the Commission's action into an impermissible expansion of federal authority. The Commission's ability to render a decision in this proceeding is, therefore, directly sanctioned by the Supreme Court's conclusions in the aforementioned cases.

Moreover, contrary to CPA's claim, the Supreme Court, in Federal Maritime Commission v. South Carolina State Ports Authority, 122 S.Ct. 1864, 1878-79 (2002), while finding that the Commission may not adjudicate a private complaint against a state-run port, emphasized that the Commission "retains ample means of ensuring that state-run ports comply with the Shipping Act and other valid federal rules governing ocean-borne commerce," as the agency is "free to investigate alleged violations of the Shipping Act, either upon its own initiative or

upon information supplied by a private party. . . and to initiate its own administrative proceeding, against a state-run port." (Citations omitted) (emphasis added). The Commission's Order to Show Cause in this case is precisely the kind of regulatory action envisioned with approval by the Supreme Court in South Carolina State Ports Authority.²³ The Commission investigated alleged violations of the Shipping Act at Port Canaveral in Fact Finding No. 24, Exclusive Tug Arrangements in Florida Ports. Based on that fact finding, the Commission then decided to initiate a show cause proceeding against CPA to determine whether it violated section 10(b)(10). It is clear that the Commission has the authority to proceed in this manner.

We therefore reject CPA's claim that the Commission lacks the authority to regulate CPA's operation of its tug system pursuant to the Tenth Amendment.

2. Preemption

CPA confusingly asserts a preemption argument within its analysis of the Tenth Amendment. Essentially, CPA claims that the Commission cannot interfere with CPA's tug franchise system because the Supreme Court has found that a state may legislate on maritime matters that are local in nature or are designed to protect the public and promote safety. Among the cases cited by CPA is the Supreme Court's decision in Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. (12 How.) 299 (185 1). While we recognize that the Supreme Court has found that there is an important role for states in the local

²³ Indeed, the private complainant in South Carolina State Ports Authority had alleged a violation of the same section of the Shipping Act that CPA is found to have violated in this proceeding. 122 S.Ct. at 1868.

regulation of waterways and ports, that decision is distinguishable from the instant case. By finding that the Commission has jurisdiction over CPA's tug and towing operations, we have determined that those tug and towing operations are not local in nature but rather relate to the federal interest in regulating the "receiving, handling, storing, or delivering [of] property" under the Shipping Act. 46 U.S.C. app. § 1709(d)(1).

Moreover, in United States v. Locke, 529 U.S. 89, 108 (2000), the Supreme Court determined that there is no assumption that concurrent regulation by states in the field of national and international maritime commerce is a valid exercise of police power. The Court noted:

Rather we must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives a uniformity of regulation for maritime commerce.

Id. We need not even reach this question. CPA argues that the Shipping Act cannot preempt CPA's decision to control the tug and towing operations at Port Canaveral by requiring franchise agreements. However, that is not what the Commission has done in this case. Rather, we have determined that CPA violated section 1 O(b)(10) by refusing to deal or negotiate with Tugz regarding its application for a tug and towing franchise. By finding that CPA violated section 1 O(b)(10), we have not found concurrently that the franchise system is a per se violation of the Shipping Act, nor could we. Section 10(b)(10) does not provide the means to make that determination. All we have found is that based on the totality of the circumstances in this

5 0 CANAVERAL PORT AUTHORITY - POSSIBLE VIOLATIONS

case, CPA unreasonably refused to deal or negotiate with Tugz.

Therefore, CPA's argument regarding preemption is rejected.

D. Outstanding: petition

BOE seeks to have admitted into the record the testimony of William Bancroft, Deputy Executive Director of CPA, taken in Fact Finding No. 24, Exclusive Tug Arrangements in Florida Ports, which it claims impeaches his second declaration submitted as part of CPA's Rebuttal Memorandum. CPA does not oppose the petition.

As CPA does not object to admitting this testimony into the record, it is so admitted. It is not particularly helpful to the resolution of this case, however, as we have discussed at length other more relevant and reliable evidence that supports our finding that CPA violated section 10(b)(10) by failing to consider Tugz's application for a tug franchise at Port Canaveral.²⁴

E. Penalties

BOE argues in its Reply Memorandum that if the Commission finds that CPA violated section 10(b)(10), it should also find that each day of the continuing violation

²⁴ BOE also requested, for the first time at oral argument, to strike CPA's discussion of settlement negotiations in its memorandum from the record. BOE could have made this request formally in its reply memorandum, but did not. Moreover, we are aware that such discussion is inappropriate and have not relied on it in our analysis. Therefore, it is unnecessary to strike such material from the record. BOE's request is denied.

constitutes a separate violation, order CPA to cease and desist from further violations, and refer the matter to an administrative law judge to determine the number of violations and the assessment of civil penalties. BOE Reply at 21-22. BOE contends that it would be more efficient considering the many possible permutations of violations the Commission could find, ranging anywhere from 600 to 800 days. *Id.* at 16-17. Regardless, BOE asserts that the violations are serious, as demonstrated by the “tone” of CPA’s September 25, 2001 letter to Tugz, and “by the fact that CPA locked up the tug franchise business in the port with Seabulk for another ten years while refusing to consider Tugz International’s application.” *Id.* at 17. CPA did not address the issue of penalties, and penalties were not discussed at oral argument by any party.

At this point, we do not have sufficient information to make a determination of the appropriate amount of civil penalties. However, we disagree that determining the proper penalty is too involved for the Commission to calculate and accordingly decline to remand the penalty phase of this proceeding to an administrative law judge. Instead, we order the parties to submit briefs on the issue. The parties shall present appropriate arguments weighing and balancing the numerous factors set forth in section 13(c), 46 U.S.C. app. § 17 12(c), including “the nature, circumstances, extent, and gravity of the violation committed and with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require.”

CONCLUSION

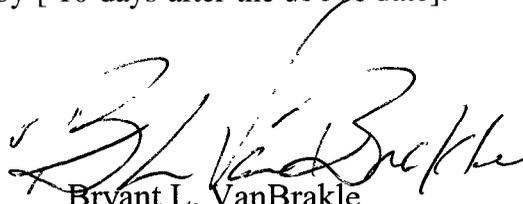
THEREFORE, IT IS ORDERED, That Canaveral Port Authority violated section 10(b)(10) of the Shipping Act, 46 U.S.C. app. § 1709(b)(10), beginning on July 19, 2000, and continuing until May 20, 2002, by refusing to consider the application for a tug and towing franchise submitted by Tugz International, LLC, on June 13, 2000, and updated on September 18, 2001;

IT IS FURTHER ORDERED, That BOE's Motion to Accept Into Evidence the Sworn Testimony of William Bancroft in Fact Finding Investigation No. 24 to Impeach William Bancroft's Second Declaration in This Proceeding is granted;

IT IS FURTHER ORDERED, That the parties file opening briefs on the issue of penalties by [15 days after the date of this Order]; and

IT IS FURTHER ORDERED, That the parties file reply briefs on the issue of penalties by [10 days after the above date].

By the Commission.


Bryant L. VanBrakle
Secretary