ORIGINAL

(S E R V E D)
(March 14, 2006)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

March 14, 2006

DOCKET NO. 04-10

AGREEMENT NO. 201158
DOCKING AND LEASE AGREEMENT BY AND BETWEEN CITY OF PORTLAND, MAINE AND SCOTIA PRINCE CRUISES LIMITED

ORDER OF DISMISSAL

The City of Portland, Maine (City) and Scotia Prince Cruise Ltd. (SPC) entered into Docking and Lease Agreement No. 201158 for the provision of ferry service by SPC on the M/S Scotia Prince between Portland and Yarmouth, Nova Scotia. This agreement included provisions that the City would not grant to any other operator permission to use the terminal facility for passenger or vehicle service and that SPC would not operate in passenger or vehicle service between any other New England port and Nova Scotia.

On August 23, 2004 an Order of Investigation and Hearing was served in this case. The Order raised questions of whether the exclusivity provisions violated Section 10 of the Shipping Act of 1984, 46 U.S.C. App. § 1709. Bay Ferries Limited, a Canadian corporation that operates a high-speed ferry was granted permission to intervene in this investigation on November 1, 2004.

On April 5, 2005 SPC notified the City that it was canceling the 2005 season and on April 6, 2005 the City terminated Agreement 201158. As a result of this action SPC filed a motion to dismiss the investigation on the grounds of mootness on May 4, 2005. The City and the Bureau of Enforcement (BOE) opposed the motion. The Administrative Law Judge who was then

assigned to the case denied the motion on May 18, 2005.

In opposing SPC's motion the BOE characterized it as premature. In addition, the BOE noted that the Commission's Order included the issue of whether, in the event violations were found, civil penalties should be assessed, and that the issue of penalties was still pending.

On January 11, 2006 the BOE filed the present motion to dismiss the proceeding. In its motion the BOE expressly stated that it was not seeking civil penalties, thus eliminating one of the potential issues that had caused it to oppose SPC's earlier motion to dismiss. The City filed its opposition to the motion on January 30, 2006. The City's response did not challenge any factual assertions in BOE's motions, so I have accepted those assertions for purposes of this motion.

Since the first motion to dismiss was denied both the City and SPC have changed their positions substantially in apparent reliance on the complete termination of the Agreement. SPC has listed the M/S Scotia Prince for sale, and the vessel is currently chartered to the Military Sealift Command to assist in hurricane relief efforts on the Gulf Coast. The City has approved an agreement with Bay Ferries for the latter to provide ferry service between Portland and Yarmouth in the 2006 season. That agreement does not provide for exclusive rights either to the route or to terminal facilities.

The City opposes the motion to dismiss on two grounds:

1. SPC has contested the City's right to cancel Agreement 201158 and the parties are in arbitration. If SPC prevails the agreement may arguably still be in effect.

2. The issue may reoccur in the future.

The merits of SPC's claim against the city for cancellation of the agreement are the subject of the arbitration. If SPC prevails in the arbitration the financial or other remedies it would receive are not relevant to this matter. The only way in which the arbitration might affect the issues in this case is if, as suggested by the City, the arbitration were to issue a finding that the agreement was still in effect.

The 2005 season passed without SPC or anyone else providing the service, and the vessel with which the service was to be provided is unavailable for the 2006 season. In addition, the City has since contracted with Bay Ferries for service on the same route. The terminated agreement with SPC was for exclusive service. Indeed, the exclusivity was the primary aspect leading to the Order of Investigation.

At this point it would be a logical paradox for the arbitration between the City and SPC to revive an exclusive contract between the two, because the rights and interests of Bay Ferries under its more recent agreement would then be called into question. An attempt to revive Agreement 201158 might give rise to a complicated question of contract law. It might even give rise to a matter within the jurisdiction of the Commission, but if so it would be a different matter,

involving different issues, than the present case.

The City's other basis for opposing dismissal is that it would be an inefficient use of the resources that have been devoted to this matter "to have the issue dismissed as moot only to have it reoccur in the near future." Since canceling Agreement 201158 the City has entered into a non-exclusive agreement with Bay Ferries. While that agreement is in effect the City cannot, by definition, enter into an exclusive agreement for the same service with another operator.

The process of investigation and regulation of exclusive terminal agreements is highly fact specific and those agreements are examined on a case by case basis. Such agreements are generally undesirable but may be justified by particular circumstances. *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. 974 (1986). Even if this matter proceeded to a decision on the merits the result would not necessarily govern a different agreement in the future in which the City might be considering entering into an exclusive terminal agreement.

There is no apparent likelihood that in the near future the City will, or even can, enter into an agreement resembling the one that was challenged in this case. The prospect of it doing so is too remote to justify maintaining an ongoing investigation. The motion to dismiss on the grounds of mootness is granted.

Kenneth A. Krantz
Administrative Law Judge