BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 08-03

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S INITIAL SUPPLEMENTAL BRIEF

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Respondent the Port Authority of New York and New Jersey ("Port Authority") submits this Initial Supplemental Brief to address the issues raised on remand from the Court of Appeals, pursuant to the Federal Maritime Commission's Order dated June 21, 2016.

PRELIMINARY STATEMENT

On December 17, 2014, after six and a half years of hard-fought litigation, the Commission rejected, on the merits, Maher Terminals, LLC's ("Maher") claims that the rental rate to which it agreed in its marine terminal lease was unreasonable or unreasonably prejudicial as compared to APM's[1] rental rate.[2] *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 821, 861 (F.M.C. Dec. 17, 2014) ("F.M.C. Op."). Based on a detailed review of the voluminous evidentiary record, the Commission held that the rental rate differential was justified by: (1) "the exigent need to retain Maersk and Sea-Land," in the face of their "credible threat to leave the Port for Baltimore" and the "severe and irrevocable" "loss to the competitiveness of the Port and associated regional economic activity"—and the concomitant damage to all of the Port's constituents, including Maher—that would result from APM's departure; (2) the enormous benefits to the Port and its constituents that would result from the retention of APM; and (3) the undisputed fact that Maher presented no comparable port-wide risks or benefits. *Id.* at 832, 842-43. The Commission also found that APM had rejected every one of the Port Authority's proposals to retain APM on lease terms more favorable to the Port, and held also that the rate differential was further supported by the "enforceable Port Guarantee provided by APM/Maersk"

[1] Unless otherwise indicated, "APM" shall refer to "APM/Maersk," formerly Sea-Land/Maersk.

[2] As Maher did not challenge the Commission's rejection of Maher's additional claims, *see* RA vol. II-1, Final Br. of Pet. Maher at 3 (D.C. Cir. Oct. 27, 2015), they are no longer at issue. Citations are to the Remand Appendix ("RA") submitted herewith, volume I of which contains all record evidence submitted by the parties in prior appendices and volume II of which contains excerpts from briefs, cases, and other authorities cited herein.

that Maher could not and would not match, as well as by the superior "characteristics of [Maher's] terminal," which was "the largest at Port Elizabeth." *Id.* at 842. [3]

Acting on Maher's petition for review, the D.C. Circuit remanded the case for further "explanation of [the Commission's] decision and its policy," *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Case No. 15-1035, slip op. at 9 (D.C. Cir. Mar. 22, 2016) ("D.C. Cir. Op."), but pointedly expressed no view on the merits. *Id.* at 5-9. It sought more "explanation" as to "why the same rates were not offered to [Maher]," in light of "economic conditions in the port and the competitive impact of the preference" (*id.* at 6, 7, 9); the extent to which the "reasonableness" of different treatment must be based on "transportation factors" (*id.* at 9); whether the rental rate differential in this case was "based on a 'transportation factor'" (*id.* at 7); why the Commission's decision is consistent with its precedents in *Ceres* and *Ballmill* (*id.* at 7-8); and whether those "previous decisions" should be "overrule[d] or modif[ied]," *id.* at 9.

On remand, the Commission identified seven issues for the parties to address that are of "significance" not just to Maher and the Port Authority, but to port operations nationwide. Order to File Supp. Briefs at 2 (F.M.C. June 21, 2016) ("Briefing Order"). They place directly at stake a port authority's long-settled discretion to respond flexibly to "the particular circumstances existing at a given port" in order to "advance the port's economic well-being." RA vol. II-2, *Petchem, Inc. v. F.M.C.*, 853 F.2d 958, 963 (D.C. Cir. 1988). Moreover, the issues raised in the D.C. Circuit's opinion as framed in the Briefing Order are fundamental to how the Commission can and should implement its broad discretion to interpret and enforce the general proscriptions

[3] Although the Court of Appeals noted the Commission's concession on appeal that the Port Guarantee and Maher's superior terminal characteristics would not *themselves* "justify the lower rent," D.C. Cir. Op. at 6, in no way are these important factors irrelevant. As the Commission previously held, the Port Guarantee and Maher's superior terminal characteristics, taken together with the enormous economic benefits and economic risks that only APM presented, clearly help justify the rental rate differential. I.D., 33 S.R.R. 842-843.

of the Shipping Act, as to which, all concede, the Commission is entitled to "tremendous" deference. RA vol. II-3, Final Reply Br. of Pet. Maher at 4 (D.C. Cir. Oct. 27, 2015).

The answers to the Commission's seven questions, which we will address in a somewhat different order, confirm that the Commission should (1) sustain its prior decision in this case as in full accord with precedent and the policies animating the Shipping Act; and (2) reaffirm that it will continue to discharge its broad mandate to enforce the Shipping Act flexibly and in light of the particular facts and record of the case. "[M]arket conditions," "advance[ment] of the port's economic well-being," "the nature and character of potential lessees," "available locations and facilities," and "each parcel and each operator['s] [] geographical and commercial idiosyncrasies," among other factors, should remain legitimate considerations in assessing reasonableness under the Act. *See* pp. 14-15 *infra*.

<u>RECORD ON ECONOMIC CONDITIONS AND COMPETITIVE IMPACT</u>

In remanding this case, the Court of Appeals acknowledged the Port Authority's position that "it would be commercially irrational for it to extend the same terms to Maher" as it did to APM, but suggested that more should be said concerning "economic conditions in the port and the competitive impact of the preference." D.C. Cir. Op. at 7. As the facts relevant to those subjects were not recited in full by the Commission, but are contained in the record already submitted in support of the Port Authority's Proposed Findings of Fact, we now briefly summarize the undisputed and compelling evidence in that regard, which only further underscores the reasonableness and legality of the Port Authority's leasing actions. In doing so, we will assume familiarity with the facts found in detail by the Presiding Officer, virtually all of which were affirmed by the Commission, F.M.C. Op., 33 S.R.R. at 861.

By the 1980s, the Port of New York and New Jersey, which had long been "the largest and busiest on the East Coast," found itself up against other East Coast ports that had begun "to compete aggressively for traffic that had previously moved to and through New York," RA vol. I-1 at 3465; RA vol. I-2 at 15, particularly for "discretionary cargo that can be moved from one port to another." Expert Report of Frederick A, Flyer (June 24, 2011) ("Flyer Report") ¶ 38, RA vol. I-3 at 280. Hamstrung by outmoded facilities, shallow channels and high labor costs, the Port's "share in Atlantic Coast container traffic (US only) . . . f[e]ll[] from 29 percent in 1990 to 23 percent in 2000," while its "share in Atlantic Coast container traffic (including US and Canada) . . . f[e]ll[] from 25 percent in 1990 to 21 percent in 2000." *Id.* ¶¶ 44-45, RA vol. I-3 at 283.

Economic conditions in the Port were bad. The Port division was operating at an annual loss, *see* RA vol. I-4 at 200; Shiftan Dep. 20:19-23, 28:11-20, RA vol. I-5 at 476, 478; Philibosian Dep. 105:21-25, RA vol. I-6 at 367, and would continue to do so in the future absent major changes in prevailing marine terminal rental rates. Although the Commission observed in its December 2014 decision that certain evidence cited by the Port Authority did not prove that "Maher's rent does not fully compensate the Port for Maher's own leasehold," F.M.C. Op., 33 S.R.R. at 847 n.15, the undisputed evidence in the record fully demonstrates that all of the marine terminal leases were unprofitable and less than compensatory to the Port Authority throughout the relevant time period, including Maher's new October 2000 lease.

As Port officials testified without contradiction, "on the New Jersey side . . . the port leases generally were – or produced negative cash flows." Shiftan Dep. 28:11-19, RA vol. I-5 at 478; *see also* Yetka Dep. 249:21-25, RA vol. I-7 at 239; Shiftan Dep. 20:17-18, RA vol. I-5 at 476; Philibosian Dep. 105:21-25, RA vol. I-6 at 367. The Port Authority thus began to explore how best to revitalize the marine terminals during the 1990s. RA vol. I-4 at 200.

Against this backdrop of physical and competitive decline and continuous and prospective operating losses, most of the marine terminal leases at the Port were set to expire in the late 1990s. I.D., 33 S.R.R. at 361. The Port Authority viewed this as an opportunity to design new leases with higher rental rates that would eliminate, or at least minimize, the losses sustained by the Port Authority owing to marine terminal operating costs, and provide funds for the extensive infrastructure upgrades necessary to modernize the Port to meet the shipping industry's changing demands and competition from other ports. *See* Borrone Dep. 159:1-17, RA vol. I-8 at 150; I.D., 33 S.R.R. at 361. The Port Authority thus began lease negotiations by seeking rental rates at a rate much higher than the then-current rental rates being paid by the marine terminal operators, but that would be fully compensatory of the PA's costs. RA vol. I-9 at 139; Borrone Dep. 158:11-160:19, RA vol. I-8 at 150. The Port Authority's initial proposals to Maher and APM were in that "fully compensatory" range, equivalent to approximately $68,750 and $62,800 per acre per year, respectively. RA vol. I-10 at 203-04; Borrone Dep. 255:2-9, RA vol. I-8 at 157; RA vol. I-11 at 223-24.

The Port Authority was obliged to abandon the effort to achieve marine terminal leases that would cover the Port Authority's costs when APM rejected the Port Authority's rent proposals out of hand and threatened to leave the Port and take an enormous percentage of the Port's already declining container traffic with it if the Port Authority did not drastically reduce its rent demands. F.M.C. Op., 33 S.R.R. at 832-834. The facts surrounding the undisputed credibility of that threat and, equally if not more important, the devastating consequences of its being carried out are fully recited in the Initial Decision and the Commission's December 2014 opinion. I.D., 33 S.R.R. at 362-63; F.M.C. Op., 33 S.R.R. at 832-33. We will only mention that Port Authority consultant, Paul Richardson, and Maher's own long-time CEO, Brian Maher, specifically warned that the risk of losing APM and its affiliated cargo volume was very real and the consequences for the region in general and Maher in particular would be devastating. As Brian Maher wrote the Governor of New Jersey:

> You should also know that *they will almost certainly be successful in routing most of their freight through Baltimore or Halifax.* Shippers and consignees are port blind assuming that freight costs and transit times are equal. Sea-Land and Maersk are sophisticated, successful steamship operators *who have the logistical capability to move cargo through other ports* and deliver it in the metropolitan area at the same cost to the shipper and with the same level of service. If Sea-Land and Maersk do, in fact, move their major operations to Baltimore or some other combination of Baltimore and Halifax, *the Port will lose 25-30% of its current volume*. Instead of growing at the currently predicted annual rate of 3-5% with the attendant economic benefits to the State and the entire region, the Port will suffer a dramatic decline in volumes which will raise the costs to the remaining business and motivate other major carriers to look for similar alternatives.

I.D., 33 S.R.R. at 364 (ALJ-FOF ¶ 86); RA vol. I-12 at 1044-1045 (emphasis added).

Everyone understood that the unthinkable loss of at least *a quarter* of Port cargo volumes would initiate "an increasing cost spiral situation" in which thousands of jobs would be lost, per-container charges at the Port would increase, other carriers would flee the Port, and the necessary Port investments would be jeopardized. *See* "The PANYNJ Sea-Land/Maersk East Coast Terminal Bid – Risk Analysis & Profile of Competing Ports," (May 26, 1998) ("Richardson Report"), RA vol. I-13 at 375, 379-80, 391; RA vol. I-14 at 461; I.D., 33 S.R.R. at 364 (ALJ-FOF ¶ 86). Mr. Richardson's report—which was never disputed—advised the Port Authority that, as a result of this inevitable "domino effect" on other carriers, Richardson Report, RA vol. I-13 at 393, there was "'an extremely high risk of losing . . . ***up to 55%*** of the Port of NY & NJ's (the Port's) entire containerized cargo base," *id*. at 374; I.D., 33 S.R.R. at 362 (ALJ-FOF ¶ 68) (emphasis added). Brian Maher warned that "the private sector would be crazy to make the[] investments" necessary to upgrade the Port if APM left. RA vol. I-15 at 1047. Indeed, as Brian Maher well understood, an APM departure would "***bring into question the viability of all the***

remaining terminal operations" at the Port. RA vol. I-16 at I-1067. Retaining APM, however, offered "tremendous immediate and long term benefits to the Port": in the first year after retention, additional container volume alone would create roughly 23,300 direct and indirect jobs—worth nearly $1 billion in wages; by the fifth year, an additional 45,000 jobs representing over $1.5 billion in wages; and by the tenth year, an additional 50,000 jobs totaling over $2 billion in wages. Richardson Report, RA vol. I-13 at 396-97.

Faced with the threat of port-wide devastation, the Port Authority determined to do what it took "to prevent that from occurring," just as Brian Maher urged. RA vol. I-12 at 1046. After rejecting all Port Authority proposals, APM demanded that the Port Authority reduce its proposal by $120 million to match the Baltimore proposal, which the Port Authority did by offering a fixed annual base rent of $19,000 per acre and $30 million in free construction capital. I.D., 33 S.R.R. at 362-363, 365, 380 (ALJ-FOF ¶¶ 63, 75, 79, 82, 94). At the same time, however, the Port Authority obtained a Port Guarantee from APM that incentivized its affiliates "to bring discretionary cargo – cargo that otherwise would have gone to another port – to PANYNJ" and provided for rent increases if specified volume levels were not met, *Id.* at 365-68 (ALJ-FOF ¶¶ 101-20), as occurred in 2010 and 2011, when APM's rent rose to $34,200 and $32,300 per acre, respectively. F.M.C. Op., 33 S.R.R. at 836.

Maher's rent under its October 2000 lease was significantly less than the Port Authority had previously proposed to Maher, RA vol. I-10 at 203-04, and far less than fully compensatory of the Port Authority's costs. Indeed, the head of finance at Port Commerce, Cheryl Yetka, explained that *none* of the rents paid by the marine terminals at that time were compensatory, that "***as soon as we dropped below the 65,000 or the – yeah, about 65,000 an acre***" each of the marine terminal leases became unprofitable and placed the Port Authority in a money-losing position. C. Yetka Dep. 282:3-11, RA vol. I-17 at 576 (emphasis added). The negotiated rent in the new Maher lease, $39,750 per acre with a two percent escalator, resulted in an average rent of approximately $54,000 over the thirty-year lease term, I.D., 33 S.R.R. 368 (ALJ-FOF ¶¶ 121, 123), well below the compensatory level.

The record evidence is overwhelming that by retaining APM through economic concessions the Port Authority was making an economic decision in the best interest of the *entire* Port and *all* of its marine terminal operators, including Maher. As the Port Authority's economic expert, Mr. Flyer, explained—also without contradiction—the successful negotiation of "PANYNJ's lease with APM has enabled the Port Authority to undertake extensive capital improvements at the Port[.]" Flyer Report ¶ 38, RA vol. I-3 at 280. Mr. Maher predicted the same (RA vol. I-12 at 1045), and, just as Mr. Richardson's Report had forecast, Port terminal operators saw "a 73% increase in traffic at the Port . . . between 2000 and 2008." Flyer Report ¶ 42, RA vol. I-3 at 282. The Port's "competitive standing" rebounded, with its share of Atlantic Coast container traffic returning to 29% for US only and 27% for US and Canada. *Id.* ¶¶ 43-45, RA vol. I-3 at 283-84.

None of this was to the competitive disadvantage of Maher, which *benefitted substantially* from the different leases the Port Authority entered into with APM and subsequently with Maher itself. The most immediate impact on Maher was to initiate significant *growth* in Maher's business. *See, e.g.*, M.B. Maher Dep. 92:10-13, RA vol. I-18 at 273; Mosca Dep. (07-01) 88:3-7, 88:17-20, 90:1-5, RA vol. I-19 at 74-75. As Mr. Flyer explained, "overall expansion of the business at the Port likely will benefit [] independent terminal operators [like Maher] the most," because they "get 100% of their cargo from the third-party carriers" while "APM focus[ed] its primary operations on its affiliate shipping business." Flyer Report ¶ 48, RA vol. I-3 at 286. That is in fact what occurred. From 2000 to 2010, APM's container volume increased by "roughly 37%," while the container volume for other marine terminal operators ("MTOs"), including Maher, increased by "roughly [] 79.7%." *Id.* ¶ 50, RA vol. I-3 at 287. Maher's financial statements confirm that after 2000, its container volumes, net revenues, profit margins, and EBITDA all steadily improved, until its sale to RREEF, a Deutsche Bank infrastructure fund, in 2007 for a purchase price of over $2 billion, some $1.8 billion of which was attributable to its Port Elizabeth terminal alone. Expert Report of Daniel R. Fischel (June 24, 2011) ("Fischel Report") Ex. H, RA vol. I-20 at 256; RA vol. I-21 at 1692.

The competitive impact of the difference in rental rate between APM and Maher was nonexistent. The rent differential represented only a tiny fraction of Maher's total operating costs. Kerr Dep. 90:11-92:11, RA vol. I-22 at 415; RA vol. I-23 at 1463. For example, in 2001, the rent differential was approximately $6.5 million, only 2-3% of Maher's operating budget. *Id.* Maher itself admitted that its base rent was only "marginally higher" than APM's base rent, while also admitting that such differential was fully justified by the "superior nature of the Maher property" and its "favorable infrastructure attributes." Empire Report, RA vol. I-24 at 2149-50.

As Maher was gaining all this business as a result of APM's retention, it did not lose *any* business to APM, as Brian Maher confirmed. M.B. Maher Dep. 47:6-48:5, RA vol. I-18 at 266; *see* Davis Dep. 57:1-5, RA vol. I-25 at 333. Indeed, APM had never been a significant competitor of Maher, since it was focused "on its own shipping business first, its vessel sharing partners second and, lastly, third party business." Flyer Report ¶ 54, RA vol. I-3 at 289. Since APM was occupied with its affiliated cargo, it "was not a predatory competitor to Maher or to PNCT or the other terminals," as Brian Maher testified. M.B. Maher Dep. (07-01) 181:11-182:3, RA vol. I-26 at 57. In fact, Maher's executives preferred APM's adjacent presence to "a void at that facility . . . that created an opportunity for maybe one of the steamship lines or several steamship lines to partner and . . . move over to the Maersk facility, which meant that Maher would have lost quite a bit of business." Mosca Dep. (07-01) 162:14-163:19, RA vol. I-19 at 90. Notably, Maher's only significant lost customer, Mediterranean Shipping Company, went not to APM, but to PNCT, which paid a *higher* rental rate than Maher. Davis Dep. 57:16-58:8, RA vol. I-25 at 333-34; RA vol. I-27 at 2248. Brian Maher never thought that there was any violation of the Shipping Act. "It didn't even cross my mind." M.B. Maher Dep. 206:23-207:3, RA vol. I-18 at 292.

ARGUMENT

The Commission should reaffirm its decision to deny Maher's unreasonable preference and unreasonable practice claims. We address each of the seven numbered items set forth in the Briefing Order as follows: 7, 2, 3, 4, 1, 5 and 6.

Item No. 7: The Policies Animating the Shipping Act

The Shipping Act embodies a regulatory regime whereby Congress has committed to the authority of the Federal Maritime Commission the regulation and promotion of commerce and competition of cargo transportation in and through the ports of the United States, largely through review of a wide variety of practices for "reasonableness" in consideration of the myriad facts and particular circumstances and idiosyncrasies of the cargo transportation business. RA vol. II-4, H.R. Rep. No. 97-611, at 14-15 (1982); RA vol. II-2, *Petchem*, 853 F.2d at 963; *Agreement No. T-2880*, 19 F.M.C. 687, 700 (A.L.J. 1976).

The Shipping Act strikes an important policy compromise. On one hand, the Act is animated by "equitable and pro-competitive norms" that militate against unreasonable preferences of one port user over another. RA vol. II-2, *Petchem*, 853 F.2d at 963. On the other hand, by using a "flexib[le]" reasonableness standard, the application of which is committed to the expert discretion of the Commission, the Act safeguards a port authority's ability to meet its "overriding responsibility for the efficient operation of the Port" by making reasonable distinctions based on the "particular circumstances existing at a given port." *Id*. at 963, 965.

Item No. 2: The Extent To Which The Port Authority's Reasons For Not Offering Maher The APM Rental Rates Are Relevant To The Unreasonable Preference/Prejudice Analysis

A port authority's reasons for differentiating between port users are important to an analysis of whether such different treatment is "reasonable" and therefore in compliance with the Shipping Act. As *Ceres* explained, "[i]n order to differentiate between port users and offer favorable lease terms to some users and not to others, [] the port must ensure that any such differentiation is reasonable, based on the particular facts and circumstances of potential lessees." *Ceres Marine Terminal, Inc. v. Md. Port Admin*., 27 S.R.R. 1251, 1273 (F.M.C. 1997) (*Ceres I*). The Shipping Act "forbids only 'undue or unreasonable preference[s]' and 'undue or unreasonable prejudice[s].'" RA vol. II-2, *Petchem*, 853 F.2d at 963. "The Act clearly contemplates the existence of permissible preferences or prejudices." *Id.*; *Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 974, 988 (F.M.C. 1988) (the Act "do[es] not forbid all preferential or prejudicial treatment; only that which is undue or unreasonable").

The reasonableness standard "allow[s] the FMC flexibility in applying the antidiscrimination provisions in light of the particular circumstances existing at a given port." RA vol. II-2, *Petchem*, 853 F.2d at 963, and safeguards the appropriate "discretion" vested in the port authorities to "mak[e] managerial decisions which affect port operations," within the bounds of reasonableness. *Agreement No. T-2880*, 19 F.M.C. at 700; RA vol. II-4, H.R. Rep. No. 97-611, at 44-45 ("It should not be the responsibility of the Federal Maritime Commission to determine what industry practices might best achieve the efficiencies required by the marketplace.”). It also necessarily ensures that the reasonableness determination is context-specific, based on each port’s “particular circumstances,” as the courts and the Commission have repeatedly held. RA vol. II-2, *Petchem,* 853 F.2d at 963; *see also* RA vol. II-5, *New Orleans Stevedoring Co. v. F.M.C.*, 80 F. App’x 681, 684 (D.C. Cir. 2003) (determining the reasonableness of “preferential treatment under the specific circumstances”); *New Orleans Stevedoring Co. v. Bd. of Comm’rs of the Port of New Orleans*, 29 S.R.R. 345, 352 (A.L.J. 2001) (holding that what is “reasonable” depends on “specific facts rather than broad generalizations”). The same is true of leasing. *Ceres I*, 27 S.R.R. at 1273 (“the port must ensure that any such differentiation is reasonable, based on the particular facts and circumstances of potential lessees”).

Item No. 3: The Extent To Which A Reasonable Preference or Prejudice Must be Based on “Transportation Factors”

The phrase “transportation factors” does not appear in the text of the Shipping Act. The Act simply prohibits “undue or unreasonable preference[s]” and “prejudice[s],” and thus requires only that a preference must be reasonable. 46 U.S.C. § 41106(2). “[B]ecause ‘unreasonable’ is an amorphous term,” there is no fixed meaning. RA vol. II-6, *Newspaper Ass’n of Am. v. Postal Regulatory Com’n*, 734 F.3d 1208, 1214 (D.C. Cir. 2013). It essentially constitutes a delegation of regulatory authority to the regulating agency, so long as the agency construes it rationally. *Id.* And where, as here, the statute is ambiguous, courts must “accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.” RA vol. II-7, *Nat’l Cable & Telecommc’ns. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); RA vol. II-8, *Capital Network Sys, Inc. v. F.C.C.*, 28 F.3d 201, 204 (D.C. Cir. 1994) (“reasonable and unreasonable are ambiguous statutory terms”) (internal quotation marks omitted); *see also* RA vol. II-9, *E.P.A. v. EME Homer City Generation, L.P.*, 134 S.Ct. 1584, 1603 (2014) (courts "routinely accord dispositive effect to an agency's reasonable interpretation of ambiguous statutory language").

In performing the reasonableness analysis, the Commission has frequently utilized the terms "transportation factors" or "transportation circumstances." *See Distrib. Servs. Ltd. v. Trans-Pac. Freight Conf. of Japan and Its Member Lines,* 24 S.R.R. 714, 720 (F.M.C. 1988) (unequal treatment must be justified by "transportation circumstances"). This phrase was originally applied in the context of the Interstate Commerce Act to "deal with a situation in which two or more competitors, shipping on the same carrier over different routes to the same destination, receive different treatment. . . ." *Id.* (citing RA vol. II-10, *Liberty Cooperate & Lumber Co. v. Mich. Cent. R.R. Co.*, 109 I.C.C. 1 (1926); RA vol. II-11, *Tex. & Pac. Ry. v. ICC*, 162 U.S. 197 (1896)). "The classic case would be where the shippers at A and B are competitive in a common market at C, the line hauls from A and B to C are the same[,] and the same competitive influences apply to both." *N. Atl. Med. Freight Conf. – Rates on Household Goods,* 9 S.R.R. 775, 784 (F.M.C. 1967). In such contexts, the term "transportation factors" connoted characteristics that affect the cost or value of transporting goods. RA vol. II-12, *Harborlite Corp. v. I.C.C.*, 613 F.2d 1088, 1100-01 (D.C. Cir. 1979).

While such a connotation makes sense in the context of cases that involved "different treatment" of "competitors" shipping goods on the "same carrier['s]" vessels, to "the same destination," *Distrib. Servs.*, 24 S.R.R. at 720, no case has held that in assessing "reasonableness" in the myriad contexts to which the Shipping Act applies, such as marine terminal leasing, "transportation factors" that may be considered are limited to "tangible" differences in "the cost or value" of transporting goods, as Maher has argued. RA vol. II-13, Maher Reply to Resp.'s Br. at p. 50-51 (Dec. 9, 2011) ("A valid transportation purpose for a port authority's disparate pricing of the same service, *e.g.* letting land for a marine terminal in this case, refers to a legitimate difference between the cost or value of the service provided."); RA vol. II-14, Maher Exceptions at 10 (June 9, 2014) ("A valid transportation purpose pertains only to differences in the nature or cost of the services provided.") ; RA vol. II-1, Final Br. of Pet. Maher at 31 ("In short, a 'transportation factor' is a tangible characteristic of the transportation service being regulated or charged. . . ."). Any such limitation would be wholly contrary to the Commission's repeated acknowledgment—confirmed by the case law—that the reasonableness determination must be based on the facts and circumstances of each case, *Ceres*, 27 S.R.R. at 1273, as well as "the statutory language" itself, RA vol. II-2, 853 F.2d at 963. Moreover, Maher's proposed artificial limitation would mean that a port authority could never consider the litany of tangible and intangible factors that courts and the FMC have previously recognized as legitimate, including:

- a port authority's obligation to "advance the port's economic well-being," to "provide adequate and consistent service to a port's carriers or shippers," and to "insure attractive prices for such services" (RA vol. II-2, *Petchem*, 853 F.2d at 963);
- the "conditions at a port" *(*"50 Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atl. & Gulf Coast Ports, 24 S.R.R. 411, 455 (F.M.C. 1987));
- "the convenience of the public," "the fair interest of the carrier," or "the situation and circumstances of respective customers," (*N. Atl. Med. Freight Conf. – Rates on Household Goods*, 9 S.R.R. at 784); or
- an operator's threat to "withdraw from the Port" when withdrawal would "jeopardize the Port's ability to assure reliable, competent [] services. . . ." (RA vol. II-2, *Petchem*, 853 F.2d at 964).

There is not, and cannot be, a narrow or fixed list of transportation-related factors that may be considered in determining what is "reasonable" under the Shipping Act. Rather, the statutory "reasonableness" determination is, by definition, an open-ended assessment committed to the discretion and expertise of the Commission based on a context-specific multiplicity of factors bearing on economic and competitive aspects of cargo transportation at each port in the context of the ever-changing transportation industry.

Item No. 4: What Factors, Transportation-Related Or Otherwise, Bear On Whether A Preference Or Prejudice Is Reasonable In the Context Of Port Authority Leasing Decisions

As just noted above, the factors that bear on whether a preference or prejudice is reasonable have not been confined to a fixed or narrow list. *Ceres* expressly "preserve[d] the ports' ability to consider the *many factors* relevant to negotiating a lease," without limitation. 27 S.R.R. at 1274. Reasonableness is determined "based on the particular facts and circumstances of potential lessees," including, at a minimum "market conditions, available locations and facilities, and the nature and character of potential lessees." *Id.* at 12 73-74. Indeed, even "[a] vessel call guarantee" can qualify as a "valid transportation factor by which ports can distinguish between lessees when offering favorable lease terms." *Id.* at 1273. Other legitimate considerations include "each parcel and each operator['s] [] geographical and commercial idiosyncrasies," *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 900 (F.M.C. 1993); a port user's "financial[] attractive[ness] and congruen[ce] with the Port's long term development strategy," *id.* at 899; whether lessees had made a "greater commitment to the Port,' (through minimum cargo throughput guarantees and assumption of fixed costs)," RA vol. II-5, *New Orleans Stevedoring*, 80 F. App'x at 684; and the need to "maintain long-term relationships with these lessees," *id.* at 683.

The breadth and flexibility of the kinds of things that may be considered is well illustrated by *Petchem*, in which both the Commission and D.C. Circuit rejected the complainant's unreasonable practice and preference claims under the Shipping Act. In *Petchem*, the Canaveral Port Authority ("CPA") denied Petchem's application for a nonexclusive franchise to provide tugboat services at the port, while retaining its exclusive franchise with nonparty

Hvide Shipping, Inc. It did so, in part, based on Hvide's credible threat to leave the port, which would have jeopardized the CPA's ability to meet commercial shipping needs at the port. The Commission upheld the CPA's determination as reasonable, rejecting any "rule that . . . exclusive port arrangements are per se violative of the Shipping Acts." Instead, it recognized that "in the proper circumstances," such arrangements "may be justified as necessary to advance economic efficiency or produce other benefits," 23 S.R.R. 988, or "to provide adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services and generally to advance the port's economic well-being," *id.* at 990. Accordingly, in analyzing the "reasonableness" of the CPA's denial, the Commission reviewed the "extensive economic and business testimony in support of the arrangement," *id.* at 988, such as the increased demand for services at the port; Petchem's lack of experience and inability to meet this demand; Hvide's commitment to remain at the port despite substantial losses; Hvide's credible threat to leave if competition for commercial towing were permitted; and the lack of a third party towing operator to fill the gap in services were Hvide to leave. In light of these factors, the Commission found, and the D.C. Circuit agreed, that the CPA's denial of Petchem's application for a nonexclusive franchise arrangement was justified and not unreasonable, specifically, in part, based on Hvide's threat to leave the port and the consequence that would ensue. *See id.* at 990-91; RA vol. II-2, 853 F.2d at 964-65.[4]

To be sure, the flexibility accorded to a port authority in making business decisions at the port does not give it carte blanche to discriminate for anticompetitive, pretextual, or irrational

[4] We note that the Commission in its December 2014 Opinion said that *Petchem* was "of limited relevance . . . because it did not discuss the risk of losing Hvide . . . in the context of §41106(2)." 33 S.R.R. at 844. We respectfully submit, however, that that case *is* directly relevant because the Commission expressly rejected the attack on the CPA's actions as an unreasonable preference in part based on the disruption to towing service were Hvide to leave, a point made absolutely clear in the D.C. Circuit's affirmance, RA vol. II-2, 853 F.2d at 964.

reasons. But the Commission has consistently recognized that "appropriate deference" is due "to the Port Authority, [as] an entity familiar with business circumstances at [the] Port [] and *entitled to a presumption that it is concerned with public and not private interest*." *Petchem*, 23 S.R.R. at 993 (emphasis added); *Seacon*, 26 S.R.R. at 899. "[T]he duly authorized Port Authority is the proper body to weigh and evaluate business risks related to that Port's efficiency in the first instance," and "[i]t is not [the Commission's] function to gainsay the day-to-day economic decisions of th[e] Port." *Agreement No. T-2598*, 17 F.M.C. 286, 297 (F.M.C. 1974); *see Agreement No. T-2880*, 19 F.M.C. at 700 (the Commission "accord[s] public port authorities discretion in making managerial decisions which affect port operations so long as the Port Authority has not acted unreasonably"). The long-settled discretion accorded to port authorities enables them to respond flexibly to the particular circumstances that arise at a given port, and at the same time enables the Commission to carry out its broad mandate to proscribe *unreasonable* preferences and prejudices that are not warranted by the circumstances of a given case.

Item No. 1: The Port Authority's Reasons For Not Offering Maher the APM Rental Rates

The overwhelming proof in this case demonstrates that the Port Authority acted out of legitimate, grave concerns for the public interest—and not to advance private, anticompetitive interests—when it agreed to give APM the $120 million in rent and other concessions necessary to secure its vital presence at the Port. The record confirms that APM could and would have left the Port had the Port Authority refused to meet its demand. And the Port Authority's decision to grant the concessions that APM demanded was motivated not by a mere threatened departure, but by undisputed evidence of a detailed and credible threat, and most importantly, by the undisputed evidence of the quantified devastating *consequences* of that departure for the viability of the entire Port and all of its terminal operators, including Maher. *See* pp. 5-7 *supra*.

Having determined that it had no practical alternative but to give APM $120 million in rent and other concessions to secure the Port's economic well-being, the Port Authority did not offer the identical rent concession to Maher (as well as the other MTOs at the port), because Maher's absence would not have had the "same overall economic impact on the port" that APM's absence would have had. I.D., 33 S.R.R. at 382; F.M.C. Op., 33 S.R.R. at 842. Nor could Maher provide the crucial port-wide economic benefits that APM's presence uniquely would secure through the retention of its affiliated cargo traffic, which justified the unique rent concession to APM alone. Brian Maher openly conceded these key distinctions between the commercial attributes of the two MTOs: "I was very concerned that they [Maersk] would actually leave. And I thought the Port Authority needed to do what – ***do what was necessary in order to keep Maersk, on the basis that Maersk was going to bring a substantial amount of volume to the port.***" M.B. Maher Dep. 181:2-7 (07-01), RA vol. II-26 at 57. By contrast, as Brian Maher confirmed, "Maher does not control and did not control cargo and as to what port it would – it would be handled in." I.D., 33 S.R.R. at 367; M.B. Maher Dep. 175:17-19, RA vol. II-18 at 290. In sum, and as the Commission correctly concluded, the difference between the terms offered to APM and Maher were clearly justified, and not unreasonable, in light of the undisputed fact that Maher (and for that matter all of the other MTOs) did not pose the same risks, or offer the same anticipated benefits to the port and all its constituents and the entire region, as APM.

Moreover, the unique economic benefits that only APM could offer the Port were both memorialized and cemented through the Port Guarantee, which Maher expressly could not and would not provide. As Lillian Borrone explained, the Port Authority agreed to the rent concession to APM only if it obtained "a specific guarantee from them to assure that we got a particular percentage of their volume" of discretionary cargo, which APM's affiliates otherwise could re-route to other ports. I.D., 33 S.R.R. at 366; Borrone Dep. 80:1-3, RA vol. II-8 at 139. The Port Guarantee "guaranteed that a certain volume of Maersk-affiliated containers loaded with cargo would go through the Port on an annual basis, regardless of which terminal it comes through," and included substantial shortfall penalties that would reduce the rent concession obtained by APM if it failed to bring in sufficient affiliated cargo. I.D., 33 S.R.R. at 365-66. Maher has attempted to demean the Port Guaranty, pointing to the unsurprising fact that the volume of cargo guaranteed by APM was not as great as the Port originally sought in the negotiations. As noted above, however, the Guaranty had real teeth, and APM has already lost a significant portion of the rent concession when cargo volume shortfalls in 2008 to 2010 caused its rent to increase to $34,200 per acre in 2010 and $32,300 per acre in 2011. *Id.* at 368; 33 S.R.R. 836. If APM's affiliates were to pull their cargo entirely, APM's rent would end up being significantly *higher* than Maher's. *Id.*

It is undisputed that Maher could not offer a comparable guarantee. As Brian Maher testified, "[m]y interpretation of a port guarantee is cargo controlled by a – by an individual entity that they can direct to the port. ***We were not in a position to do that***." I.D., 33 S.R.R. at 367; M.B. Maher Dep. 165:14-18, RA vol. II-18 at 288. Maher's executives understood that this distinction made a difference in the rental rates available to it. Mosca Dep. 139:18-140:5, RA vol. II-28 at 125. Maher's former CFO Randall Mosca explained that APM was "able to generate a port guarantee for volume, which we were unable to do, and, therefore, the Maersk rates were off the table for us." *Id.* at 140:2-5.

The third circumstance supporting the reasonableness of the difference in base rent as between APM and Maher is that Maher's "leased property is significantly different," as the

Presiding Officer determined and the Commission already affirmed. I.D., 33 S.R.R. at 377; 33 S.R.R. at 842-843. Specifically, and "[n]ot surprisingly for a maritime lease, the leased properties differ in size, depth, berthing options, buildings, and access to transportation and infrastructure." I.D., 33 S.R.R. at 377-78. The evidentiary record here overwhelmingly demonstrates that Maher's terminal was the superior one—a huge, ideally configured terminal with more acreage, and proportionately greater linear berth space, crane rail, and berth capacity, as compared with the APM terminal. *See* Vickerman Report, RA vol. II-29 at 315-318; RREEF Investment Case: Maher Terminals (May 2007), RA vol. II-30 at 1841; Greenhill Offering Mem., RA vol. II-31 at 1577. Maher touted these superior characteristics of its terminal in an Offering Memorandum prepared by its financial advisor Greenhill & Co., LLC, as did its new owner RREEF, and as did both Maher and RREEF in the Empire Report. Greenhill Mem., RA vol. II-31 at 1577; DeWitte Dep. 34:22-36:5, 59:2-23, 60:2-61:12, 62:5-64:19, 65:1-66:4, RA vol. II-32 at 146, 152-154; Empire Report, RA vol. II-24 at 2140, 2149-50. Indeed, the Empire Report expressly recited the admission by Maher and RREEF that the Maher terminal's superior characteristics justified its basic rental amount, which they characterized as only "*marginally higher*" than other tenant rents (Empire Report, RA vol. II-24 at 2150):

> Management and RREEF attributed the differences in basic rental amount (and per acre rental amount) to Maher U.S.'s favorable infrastructure attributes, including: (1) depth of channel; (3) [sic] length of berth; (3) size of yard; and (4) intermodal access. Management and RREEF believe that the higher basic rental amount and per acre amount paid and to be paid by Maher U.S. reflects the superior nature of the Maher property, the additional flexibility in yard usage, and its infrastructure. RREEF and management believe that going forward, the maximum capacity constraints placed on the other terminal operators within Port Elizabeth by their infrastructure that are not applicable to Maher U.S. outweigh the marginally higher basic rental amount.

I.D., 33 S.R.R. at 374; RA vol. II-24 at 2150.

All of these sound reasons for differentiating between APM and Maher were further supported by the economic and competitive challenges facing the Port Authority. The notion that the Port Authority—which was and would be operating at an annual loss at the Port—should have had to provide *additional* concessions to Maher and the other MTOs is entirely *un*reasonable. The Port Authority projected that the New Jersey segment of the Port business alone would suffer a net present value deficit of more than $600 million over the period of the new leases if the $120 million in concessions to APM had to be provided to all of the MTOs. *See* RA vol. I-33 at 3701.

This was not a case where the Port Authority favored APM alone by exempting it from a generally applicable policy and placed Maher and other MTOs at a competitive disadvantage. APM may have received a greater rental rate concession than Maher, but that was because it would retain business for the Port that was needed in order to support the viability of the *other* MTOs in the Port—as Brian Maher vociferously urged. There is no reason why the Port Authority, which was already losing money from the marine terminal leases, including Maher's, through below-compensatory rental rates, should have been obliged to eliminate the rent differential when that rent differential was, as a practical matter, only "marginal," and causing no negative competitive impact on Maher. Indeed, the undisputed evidence confirmed that rather than suffering any competitive harm, Maher *benefitted* from the lease that retained APM as the Port's anchor tenant subject to terms that differed from its own lease. *See* pp. 8-9 *supra*.

Item No. 5 Whether the Commission's Holdings In *Ballmill Lumber v. Port of N.Y.*, 10 S.R.R. 131 (FMC 1968), and *Ceres Marine Terminal v. Md. Port Admin.*, 27 S.R.R. 1251 (FMC 1997)—That The Threat Of A Port Tenant To Leave For A Competing Port Is Not A Factor That May Justify A Preference or Prejudice—Should Be Modified Or Overruled. In Addressing This Question The Parties Should Consider The Relevance Of Principles of "Ramsey Pricing," Which (In A General Sense) Allows Differential Pricing Based on Demand Elasticity

The Commission's prior decisions in *Ceres* and *Ballmill*, in which certain differences in treatment were held to be unreasonable, were based on the "particular facts and circumstances" of each case, as required under the Shipping Act, *Ceres I*, 27 S.R.R. at 1273, facts and circumstances that differ fundamentally from those presented here. They need not be modified or overruled.

Neither *Ceres* nor *Ballmill* held, categorically or otherwise, that the threat of a port tenant to leave for a competing port cannot be considered as a factor that may justify a preference. Although, as the Court of Appeals noted (D.C. Cir. Op. at 8), while there was at least an assertion of a threat to leave the port in *Ceres* and *Ballmill*, nothing in those opinions commented either on the credibility of the threat or the nature and extent of the consequences had a departure occurred. There was certainly no holding in either *Ceres* or *Ballmill* that a threat of a port participant to leave the port, and the consequences of such departure, may *never* be considered in evaluating whether a port authority's conduct was reasonable in the circumstances, irrespective of the threat's credibility or consequence. And, indeed, as discussed above at pp. 14-15, in *Petchem*, which post-dated *Ballmill* by some twenty years, both the Commission and the Court of Appeals expressly relied upon the likelihood and potential consequences of a port participant's departure in assessing the reasonableness of the port authority's conduct—and did so as to circumstances far less compelling than those presented to the Port Authority in this case.

Ceres involved an MTO's claim that the Maryland Port Administration ("MPA") refused to give it the same rates it gave ocean carrier Maersk "based on a generic class distinction between terminal operators and vessel operators without any attempt by MPA to evaluate Ceres' particular circumstances and ability." *Ceres I*, 27 S.R.R. at 1255. The MPA failed to adduce any evidence that its different treatment was based on anything other than "status," and openly "maintain[ed] that its incentive rates were only available to ocean carriers who made long-term vessel call commitments to the port." *Id.* at 1272. The evidence showed, moreover, that, unlike this case, "Ceres was willing and able to provide the same sort of guarantee to MPA," *id*., and indeed, *had repeatedly offered to match or even "double the vessel calls guaranteed by Maersk*," *id.* at 1255, rendering any reliance on the vessel call guarantee—which also lacked any effective enforcement mechanism—artificial, *id*. at 1272-73.

Under these circumstances, the Commission properly held that the MPA treated Ceres differently based on "[s]tatus alone," which "is not a sufficient basis by which to distinguish between lessees." *Id.* at 1273. And although the MPA had asserted, without evidentiary support, that "it feared it was about to lose Maersk" and "important benefits" that it provided, *id.* at 1260-61, the benefits on which it premised the distinction could have been provided equally by Ceres, which was virtually begging to provide them. Moreover, there was no record evidence in *Ceres*, at least as appears in the Commission's opinions, as to the likelihood or gravity of impact of Maersk's leaving Baltimore. Nowhere does *Ceres* suggest that a carrier's threat to leave a port may *never* be considered as a transportation factor, no matter what the likelihood or how devastating the effect on cargo transportation in the port and other port businesses.

"*Ceres* . . . w[as] context-specific," as the Court of Appeals has previously recognized. RA vol. II-5, *New Orleans Stevedoring*, 80 F. App'x at 684. And the facts of this case are very different in every important respect. First, unlike *Ceres*, the overwhelming evidence here shows that APM's retention at the Port directly prevented the port-wide devastation—including to Maher—that would have resulted from its departure, and secured the substantial "economic benefits"—including for Maher—that resulted from maintaining cargo volumes at the Port. I.D., 33 S.R.R. at 364. Maher could not offer the same protection against port-wide devastation or similarly undergird the economic vitality of the Port going forward. *See* pp. 18-20 *supra.* Second, Maher's CEO expressly acknowledged that Maher could not and would not have provided a port guarantee comparable to the one APM provided in this case. *See* pp. 19 *supra*. That concession is determinative, as *Ceres* itself explained: "If there were a realistic indication that Ceres would have been unable to fulfill those [vessel call guarantee] requirements, MPA could have legitimately denied Ceres the more favorable lease terms." 27 S.R.R. at 1273. Finally, in *Ceres*, nothing about Ceres's terminal could have justified its higher rates because, if anything, Ceres's terminal was "demonstrably inferior" to Maersk's terminal. 27 S.R.R. at 1258. Here, in contrast, Maher itself directly attributed its "marginally higher" base rent to *its superior* terminal characteristics. *See* pp. 9, 20-21 *supra*. Accordingly, the ruling in *Ceres,* that the MPA's conduct there was *un*reasonable is wholly consonant with the ruling on the facts and record in this case that the Port Authority's leasing conduct was *reasonable*. Hence, there is no reason either to overrule or modify *Ceres*, although the Court of Appeals has called for a fuller explanation or clarification as to why.

Ballmill, too, was a very different case that need not be modified or overruled. There, the Port Authority had decided to institute a "policy of trying to regain full control over all the backhandling at Port Newark"—meaning the "delivery of lumber from ship's tackle to the place of rest." *Ballmill Lumber & Sales Corp. v. Port of N.Y. Auth.*, 10 S.R.R. 131, 133 n.1, 139

(F.M.C. 1968). Accordingly, the Port Authority required Ballmill, like other Port tenants, to "use the Port Authority or its agent or its approved contractor [ironically, Maher] for all backhandling of lumber received by water." *Id.* at 132-33. But the Port Authority made an exception for Weyerhaeuser, another port tenant, which alone was allowed to "retain the right to backhandle its own lumber." *Id.* at 133. The Port Authority exempted Weyerhaeuser out of solicitousness for "the long-established equities which had accrued to Weyerhaeuser" based on its "heavy investment" in setting up its own backhandling service, and also "pointed out that Weyerhaeuser was ready to leave Port Newark if it did not retain these rights." *Id*. at 138. The opinion recited no evidence as to the extent of damage, if any, to the port that would have resulted from Weyerhaeuser's absence, much less that its departure would have harmed other port businesses. *Id.*

The Commission held that the Port Authority's exemption of Weyerhaeuser alone from its general backhandling policy was unreasonably preferential because it "placed [Weyerhaeuser] in a favored position competitively" and in a "superior financial or competitive position" as compared to Ballmill, due to Weyerhaeuser's backhandler's "lower rates," of which Weyerhaeuser and "[n]ontenants took advantage." *Id.* at 135, 137. Meanwhile, Ballmill was forced to pay the Port Authority backhandler's higher rates, which impaired its ability "to compete with competitors," including nontenants, that could use Weyerhaeuser's lower rates. *Id.* Thus, the Commission held that "Ballmill's efforts to compete [were] hindered and prejudiced by the differences in its lease vis-à-vis Weyerhaeuser." *Id.* at 139.

Again, the facts of the instant case are readily distinguishable from *Ballmill* in at least two determinative ways. The undisputed facts in this case are completely unlike *Ballmill*, in which there was no hint that any substantial record evidence supported any threat by

Weyerhaeuser to abandon the port, much less that such departure would have wreaked havoc on the economics of cargo transportation in the port and threatened the vitality of the business of *other* port constituents. Here, the undisputed record established that APM's threat to leave the Port was real, and indeed likely to be carried out absent the demanded concessions, and that the consequences would have been devastating for the Port and all of its constituent business, including Maher. Second, unlike in *Ballmill*, in which the complainant suffered clear competitive harm from the preferential treatment of its competitor, the rent differential here had no damaging competitive impact on Maher at all. As already noted, extensive undisputed evidence—including the damning Greenhill and Empire reports—confirmed that the difference in rental rates was at most "marginal" in context, and that Maher benefited directly and tremendously from the Port's leasing actions. Indeed, Maher itself touted its competitive advantages over APM. *See* pp. 20-21 *supra*. Accordingly, while the conduct in *Ballmill* was appropriately condemned as unreasonable under the Shipping Act, there is every reason to sustain the Commission's opposite result here. *Ballmill* need not be modified or overruled, but simply further explained as to why it is not inconsistent with the outcome in this case.

If applicable, Ramsey pricing principles would provide additional further support for the ruling in the Port Authority's favor in this case and for distinguishing *Ceres* and *Ballmill*. "Ramsey pricing" is the phenomenon where "natural monopolies," such as public utilities or railroads, "charg[e] a higher price the less elastic the buyer's demand," something that is considered a positive and procompetitive economic activity, at least where the monopolist does not reap excess profits. RA vol. II-15, Richard A. Posner, ECONOMIC ANALYSIS OF LAW 376-77 (7th ed. 2007); RA vol. II-16, William G. Shepard, *Ramsey Pricing: Its Uses and Limits*, UTILITIES POLICY 296, 298 (October 1992). Here, as discussed below at pp. 28-29, there is no monopoly. The principles of Ramsey pricing are therefore not truly germane.

Nonetheless, to the extent Ramsey pricing principles were relevant, the record shows that the Port Authority was earning no excess profits at the Port and, on the contrary, all of the marine terminal leases were unprofitable. *See* pp. 4, 7-8 *supra*. Moreover, APM's demand for port acreage was so elastic that it made a credible $120 million threat to move to the Port of Baltimore. By contrast, Maher did not make any such credible threat, and thus the Port Authority could charge Maher a higher rent (albeit one that was less than the break-even rent sought by the Port Authority) without any genuine risk. 33 S.R.R. at 839; C. Yetka Dep. (07-01) 282:3-11, RA vol. I-17 at 576. It does not appear that comparable considerations were presented in either *Ballmill* or *Ceres*. Accordingly, if anything, Ramsey pricing principles would provide further support for the ruling in the Port Authority's favor in this case and for distinguishing *Ceres* and *Ballmill*.

Item No. 6: Whether In The Absence Of The Shipping Act, The Rental Rates At Issue Would Violate Other Federal Antitrust Laws

The economic and legal principles underlying the federal antitrust laws encourage precisely the type of vigorous competition that the Port Authority engaged in to compete with other North American ports. The Supreme Court long held that the purpose of the antitrust laws is "the protection of *competition*, not competitors." RA vol. II-17, *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). The policy behind the antitrust laws counsels against judicial regulation of prices (including rental rates), as the Supreme Court has admonished that "antitrust courts" are "ill suited" to "act as central planners, identifying the proper price, quantity, and other terms of dealing." RA vol. II-18, *Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004).

The bedrock public policy of fostering competition that underlies the antitrust laws fully supports the Port Authority's rental rates here. The undisputed evidence shows that the PANYNJ reduced rates for both APM and Maher; reduced APM's rates by only as much as was needed to keep its anchor tenant and avoid crippling the Port, which would have hurt all tenants by reducing carrier traffic (*see* D.C. Cir. Op. at 3); and enhanced the Port with additional investment in infrastructure (*see id.* at 1). These actions led to lower prices (*see id.* at 3-4) and increased output and innovation, the very essence of procompetitive conduct. It is obvious that the antitrust laws would not condemn the Port Authority's conduct as anticompetitive.

<u>The Rental Rates At Issue Would Not Violate The Federal Antitrust Laws</u>

Section 2[5]: "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." RA vol. II-19, *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). *See also* RA vol. II-18, *Trinko*, 540 U.S. at 407 ("the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*") (emphasis in original). Neither element would be met here. First, the Port Authority does not possess monopoly power in the relevant market.[6] The uncontroverted record in this case shows that the Port Authority competed vigorously with other

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[5] Even if one were to examine the rental rates under Section 1 of the Sherman Act, they would not be viewed as unreasonable restraint of trade because the undisputed procompetitive effects would outweigh any anticompetitive effect. *See* RA vol. II-20, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007).

[6] "Monopoly power" is defined as "the power to control prices or exclude competition." RA vol. II-21, *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). For purposes of this discussion, we conservatively assume the most narrowly defined geographic market, which is the East Coast of North America. We also assume that the product market is limited to sea transportation, and excludes alternative modes of transport, such as by air or rail.

ports throughout North America, losing money as it struggled to compete by *lowering* its rental rates. Borrone Dep. 82:12-20, RA vol. I-8 at 140; RA vol. I-2 PAppx. I at 15. The D.C. Circuit aptly summarized the "underlying problem" as one of "*competition between ports* for a larger share of carrier traffic." D.C. Cir. Op. at 9.[7] Second, the rates at issue did not result from any anticompetitive conduct. Indeed, because "cutting prices in order to increase business often is the very essence of competition," the Supreme Court has cautioned not to "chill the very conduct the antitrust laws are designed to protect." RA vol. II-23, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). While antitrust law recognizes "predatory pricing" as a type of anticompetitive conduct, neither of the two elements of such a claim could be made out here. First, the Port Authority matched – but did not beat – the value offered to APM by the Port of Baltimore (I.D., 33 S.R.R. at 365), and so did not charge prices below an appropriate measure of a rival's costs. Second, the Port Authority was not able to inflate other marine terminal operators' rents to recoup its losses to APM, *see* pp. 7-8, meaning there was no dangerous probability of recoupment by the firm that cut prices. *See* RA vol. II-24, *Brooke Grp. Ltd v. Brown & Williamson Tobacco*, 509 U.S. 222, 224 (1993).

<u>The Rental Rates At Issue Constitute Permissible Price Discrimination</u>

Robinson-Patman[8]: The Port Authority's decision to offer lower rental rates to APM than Maher is consistent with the provisions of the principal federal statute directed at price

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[7] The Port Authority's expert opined that the Port Authority's share of container traffic along the Atlantic Coast was barely over 20% when the rental rates at issue were negotiated. *See* Flyer Report, RA vol. I-3 PAppx. IV at 283-85. As a matter of law, a market share below 30% is insufficient for monopoly power. *See, e.g.,* RA vol. II-22, *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945) ("[T]o constitute a monopoly[,] it is doubtful whether sixty or sixty-four percent would be enough; and certainly *thirty-three per cent is not*") (Hand, J.).

[8] The Robinson-Patman Act generally makes certain forms of price discrimination, primarily involving the sale of commodities (not services), unlawful absent justification. 15 U.S.C. § 13.

discrimination. The Robinson-Patman Act prohibits a seller from discriminating in price *only* when the "commodities" sold are of "like grade and quality" (and only when such price discrimination harms competition). 15 U.S.C. § 13(a). And even if a seller engaged in prohibited price discrimination, the seller has an absolute defense when it acts "in good faith to meet an equally low price of a competitor." *Id*. § 13(b). The undisputed evidence shows that APM and Maher's properties were different in material ways and that the Port Authority was meeting competition from the Port of Baltimore. *See* pp. 6, 7, 20 *infra*. The core principles of the Robinson-Patman Act would support the disparity between the rental rates at issue.

<u>CONCLUSION</u>

For the foregoing reasons, the Commission should adhere to its sound decision to hold that Maher has failed to prove unreasonable preference and unreasonable practice.[9]

[9] Although the issue would be moot if the Commission reaffirms its rulings on the merits, we are constrained to note, respectfully, that the Court of Appeals was in error in stating, in *dictum*, that Maher would be "entitled to reparations for the full three-year period" preceding the filing of the complaint, "in the event a violation was found." D.C. Cir. Op. at 5 n.2. The Commission ruled that Maher's claim for reparations based on lease-term discrimination was barred in its entirety. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Dkt. No. 08-03, slip op. at 18 (F.M.C. Jan. 31, 2013) ("PANYNJ's motion for summary judgment that Maher's claim for reparations based on unreasonable discrimination in lease terms for violations of the Act is barred by the Act's statute of limitations is granted."); *see also* F.M.C. Op, 33 S.R.R. 838 ("The Commission . . . granted the Port's motion for summary judgment as to reparations for alleged discrimination in lease terms.").

Dated: July 15, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the persons listed below in the matter indicated.

Via Federal Express and E-mail: Richard P. Bress Melissa Arbus Sherry Benjamin W. Snyder Latham & Watkins LLP 555 Eleventh Street NW Suite 1000 Washington, DC 20004 Lawrence I. Kiern Bryant E. Gardner Gerald A. Morrissey III Rand K. Brothers Winston & Strawn LLP 1700 K Street, N.W. Washington DC 20006-3817	Dated at New York, NY this 15th day of July, 2016

Alea J. Mitchell