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April 12, 2016					
FEDERAL MARITIME COMMISSION					

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**DOCKET NO. 12-02**

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**MAHER TERMINALS, LLC**

**v.**

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

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**ORDER ON SUBPOENA REQUESTS AND RESPONDENT'S MOTION FOR  
PROTECTIVE ORDER FROM REVISED DISCOVERY REQUESTS**

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**I.**

On March 10, 2016, respondent The Port Authority of New York and New Jersey ("Port Authority") filed a motion for protective order from revised discovery requests and deposition notices. On March 17, 2016, complainant Maher Terminals, LLC ("Maher") filed its opposition to the motion for protective order. As explained below, the protective order motion is granted in part and denied in part.

On March 17, 2016, Maher requested the issuance of subpoenas for two third-party witnesses and seven former Port Authority employees. On April 4, 2016, the Port Authority requested subpoenas for three people. As explained below, both sets of requests for subpoenas are denied without prejudice.

**II.**

The Port Authority seeks a protective order from 38 additional interrogatories, 24 document requests, and 13 deposition notices, arguing that Maher's requests improperly seek information previously provided, Maher's requests improperly expand the substantive scope of discovery, Maher's requests improperly multiply the volume of discovery, Maher's requests improperly expand the temporal scope of discovery, and Maher's notice of thirteen depositions far exceeds the needs of this case. Motion at 5-10.

Maher contends that the Port Authority failed to carry its burden to establish undue burden. Maher narrowed its discovery requests per the scheduling order, the Port Authority's "substantive scope" objections are baseless because Maher's requests concern only the issues that remain in this proceeding, the "temporal scope" of Maher's requests is directly based on the timeframe of PANYNJ's improper conduct and/or alleged defenses; and Maher's deposition notices conform to the rules and the Port Authority's answers. Opposition at 3-10.

### III.

#### A. Motion for Protective Order from Revised Discovery Requests

Upon remand from the Commission and prior to issuing a scheduling order, the parties were required to file a joint status report addressing the status of discovery among other issues. The parties did not agree on discovery, with Maher proposing that the parties exchange initial disclosures and any additional discovery requests while the Port Authority proposed that the parties identify previously sought discovery relating to the remaining counts that were still outstanding. Joint Status Report at 4, 7.

After consideration of the parties' arguments, the Scheduling Order addressed the scope of discovery, stating:

The Commission's decision in this proceeding narrowed the issues. Each party needs to review its discovery requests to identify requests or parts of requests that are still relevant and that have not already been answered in this proceeding or in the other related proceedings. Each party will then issue a *revised request that identifies prior discovery requests that it asserts have not already been answered and that are relevant to the remaining issues in this proceeding*. The Commission noted that "many of the discovery requests at issue are overbroad on their face" and the parties have been able to review the previously filed motions to compel. The parties should be prepared to identify the relevance of all of the revised requests.

Scheduling Order at 2-3 (emphasis added).

The Port Authority asserts that many of Maher's revised interrogatories are duplicative of previous interrogatories, including discovery obtained in FMC Docket No. 08-03. Motion at 5-6. Maher contends that "work already accomplished cannot be a source of undue burden." Opposition at 4-5. However, the Scheduling Order clearly indicated that discovery requests should be limited to "prior discovery requests that it asserts have not already been answered." Scheduling Order at 2-3. It is not an efficient use of resources to seek information that has already been provided. Accordingly, such cumulative and duplicative discovery requests will not be permitted.

The Port Authority asserts that the temporal scope of discovery has increased, from a time period of 1997 to 2012 for interrogatories and 2005 to 2012 for document requests, to discovery requests seeking information from 1948 to 2016. Motion at 8-9. Maher asserts that it requires discovery regarding the Port Authority's alleged terminal investments from 1948 and that discovery should be provided through 2016 as a continuing violation is alleged. Opposition at 7-8. However, the Scheduling Order clearly indicated that discovery requests should be limited to "prior discovery requests that it asserts have not already been answered." Scheduling Order at 2-3. The parties were instructed to limit, not expand, their discovery requests. Accordingly, temporal requests that are longer than initially requested will not be permitted.

The Port Authority asserts that Maher's requests expand the substantive scope of discovery to cover new topics and that new interrogatories improperly require detailed explanations of answers provided previously. Motion at 6-8. Maher asserts that the new interrogatories should be permitted because they concern issues that remain in the proceeding and that the legal standard applicable to this proceeding has been impacted by subsequent Commission decisions. Opposition at 2, 7. These new requests clearly exceed the scope of discovery permitted by the Scheduling Order. However, there have been additional decisions which may impact the applicable legal standard. Accordingly, in addition to the narrowed interrogatories permitted by the Scheduling Order, the parties will both be permitted an additional ten interrogatories. Any interrogatory requested after the Scheduling Order will count against the ten interrogatory limit unless it has been withdrawn or it has been propounded in this litigation prior to the Scheduling Order. A previously asked interrogatory which is expanded or for which additional detail is requested counts as a new interrogatory.

The Port Authority objects to Maher's notice of thirteen depositions and proposes that the parties be limited to four depositions, with the ability to seek leave to take additional depositions upon a showing of good cause. Motion at 9. Maher contends that the depositions do not violate the rules and fails to account for the number of knowledgeable witnesses the Port Authority has identified. Opposition at 8-10. To ensure that the preceding progresses efficiently and given the extensive discovery conducted in related proceedings, the parties will be limited to eight depositions. Pursuant to Commission Rule 203(d), "a deposition is limited to a day of 7 hours" unless otherwise stipulated or ordered. 46 C.F.R. § 502.203(d). The parties may file a motion seeking additional discovery but will need to establish good cause for the request.

## **B. Subpoena Requests**

Both parties submitted subpoena requests for deposition witnesses. In light of the ruling above limiting the number of depositions, all of the subpoena requests are denied without prejudice. The parties should coordinate and agree upon deposition dates prior to submitting requests for subpoenas for deposition witnesses.

IV.

For the reasons set forth above, the it is hereby **ORDERED** that the Port Authority's motion for protective order from revised discovery requests and deposition notices be **GRANTED IN PART AND DENIED IN PART**. The parties will both be permitted an additional ten interrogatories and eight depositions as outlined above.

It is further **ORDERED** that Maher's request for the issuance of subpoenas for two third-party witnesses and seven former Port Authority employees be **DENIED WITHOUT PREJUDICE**.

It is further **ORDERED** that the Port Authority's request for the issuance of subpoenas for three people be **DENIED WITHOUT PREJUDICE**.

In addition, the parties are reminded of the requirements to file monthly joint status reports at the beginning of each month and to send courtesy copies of all filings to *judges@fmc.gov*.

  
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Erin M. Wirth  
Administrative Law Judge