S E R V E D
January 29, 2016
FEDERAL MARITIME COMMISSION

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DOCKET NO. 12-02

MAHER TERMINALS, LLC

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

SCHEDULING ORDER

On December 18, 2015, the Commission served an order remanding this case for further proceedings on counts I, VI, VIII, and XII and dismissing the remaining counts and all other pending motions. On December 23, 2015, an Order Requiring Joint Status Report was issued requiring the parties to meet and confer and file a joint status report addressing the status of discovery, motions, stipulations, settlement, and a proposed schedule. On January 19, 2016, the parties filed their joint status report ("JSR").

In the joint status report, complainant Maher Terminals, LLC ("Maher") and respondent The Port Authority of New York and New Jersey ("Port Authority" or "PANYNJ") each provided a different proposed schedule and raised a number of issues in contention, including the answer, protective order, scope of discovery, and disclosure of experts. These issues are addressed below and considered in the schedule.

Answer

Maher asserts that the Port Authority failed to file an answer within ten days of the Commission's December 17, 2015, denial of its motion to dismiss as to counts I, VI, VIII, and XII. JSR at 2. Maher contends that the Port Authority "defaulted by failing to answer within the time required, and therefore the Presiding Officer should enter default judgment in favor or Maher on the remaining four counts of the Complaint." JSR at 2.

The Port Authority filed its answer on January 20, 2016, in response to the allegations of default in the January 19, 2016, joint status report. Answer at 2. In its section of the joint status report, the Port Authority proposes a due date for its answer and states that "more than the standard statutory period provided under FMC Rule § 502.62(b) was required, particularly since the Answer would have otherwise been due in the middle of the winter holiday." JSR at 8. The Port Authority indicates that significant time has passed since the Complaint was filed in 2012, necessitating a review of older information from storage and a need to confer with now-former Port Authority employees. JSR at 2. In its answer, the Port Authority asserts that "Maher has not been prejudiced by the timing of this filing, nor could it ... plausibly so assert." Answer at 2.

Pursuant to Rule 62(b), "[f]or good cause shown, the presiding officer may extend the time for filing an answer." 46 C.F.R. § 502.62(b). Moreover, failure to file an answer in Commission proceedings generally results in an order to show cause why default should not be issued. In this proceeding, the Port Authority has already provided argument regarding why default is not appropriate and reiterated its intent to contest the remaining allegations in the complaint. The Port Authority has established good cause to extend the time to file its answer.

Protective Order

The parties agreed to a proposed protective order which was filed by the parties with their May 15, 2012, joint status report. Maher indicates that "a protective order is essential to discovery in this proceeding." As the parties previously agreed to a proposed protective order, they will be given an opportunity to file a joint request for changes to the proposed protective order. If no changes are requested, the proposed protective order will be approved. Note, however, that the protective order agreed to between the parties does not alter the Commission's obligations under the Freedom on Information Act (FOIA) nor does it alter the parties' obligations to follow Commission procedures regarding the handling of confidential material. *See, e.g.*, Rules 2(f)(2) and 201(j).

Discovery

Maher proposes that the parties exchange initial disclosures and any additional discovery requests. JSR at 4. The Port Authority proposes that the parties identify previously sought discovery relating to the remaining counts that they believe are still outstanding. JSR at 7. The Port Authority asserts that both parties responded to each other's interrogatories, both parties supplemented their interrogatory responses to provide fuller responses, and both parties served written responses and objections to discovery responses but that neither produced documents in this litigation. JSR at 8.

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.

The schedules proposed by the parties did not conclude discovery until November or December of 2016. JSR at 4, 7. These proposed schedules do not allow sufficient time for the parties to prepare their briefs and resolve the proceeding in an efficient manner. Therefore, although the deadlines proposed by the parties were considered, the schedule is designed to move the proceeding in a more expeditious manner.

All discovery requests shall be answered within thirty days of service. The parties shall schedule time to complete all depositions and supplemental discovery, and to have discovery motions resolved, prior to the close of discovery. Parties should be prepared to proceed without any discovery requested after the discovery cut-off date. The parties are reminded of their obligation to proceed in an expeditious manner. All requests for extensions will be reviewed for good cause, even if the parties agree on the requested extension.

Disclosure of Experts

The parties disagree on the timing of disclosures regarding expert witnesses. Maher asserts that it should have a reasonable amount of time after the conclusion of fact discovery to confer with its experts and that Maher should not be required to identify its experts three months before the Port Authority identifies its experts. JSR at 4. The Port Authority asserts that it should have more than thirty days after learning about Maher's expert's identities and topics to select its own experts and prepare their reports. JSR at 6.

The arguments of both parties were considered in setting the schedule below. The parties may consult with potential expert witnesses prior to the completion of fact discovery and should be prepared to progress directly into the expert discovery process.

For the above-stated reasons, the following schedule is hereby **ORDERED**:

February 16, 2016	Parties serve revised interrogatories and document requests
February 19, 2016	Parties file any objections to previously proposed protective order
March 17, 2016	Responses to revised interrogatories and document requests due
April 28, 2016	Depositions of fact witnesses completed
May 12, 2016	Fact discovery closes
May 26, 2016	Parties file stipulation of facts on which they agree

June 9, 2016	Maher designates expert witnesses and produces their reports
July 12, 2016	Port Authority designates expert witnesses and produces their reports
August 12, 2016	Maher designates rebuttal expert witnesses and produces their reports
September 16, 2016	Expert witness depositions completed
October 17, 2016	Maher files Brief and Proposed Findings of Fact
November 16, 2016	Port Authority files Opposition Brief, Responses to Complainant's Proposed Findings of Fact, and Proposed Findings of Fact
December 14, 2016	Maher files Reply Brief and Responses to Respondent's Findings of Fact

In addition, the parties are required to file monthly joint status reports, with the first report due March 1, 2016, and subsequent reports due at the beginning of each month thereafter. The parties are reminded to send courtesy copies of all filings to judges@fmc.gov and to follow the other requirements in the April 13, 2012, Amended Initial Order.

Erin M. Wirth

Erin M. Wirth
Administrative Law Judge