

1 **FEDERAL MARITIME COMMISSION**

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3 **DOCKET NO. 12-03**

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5 **THE AUCTION BLOCK COMPANY, an ALASKA CORPORATION, and HARBOR**
6 **LEASING, LLC, an ALASKA LIMITED LIABILITY COMPANY**

7 **v.**

8 **THE CITY OF HOMER, a MUNICIPAL CORPORATION, and its PORT OF HOMER**

9 _____

10 **COMPLAINANTS' PREHEARING BRIEF**

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1 **I. Introduction**

2 The Federal Maritime Commission (“FMC”) Order dated December 18, 2013
3 regarding oral argument requires the parties to address the following question:

4 Whether the Port of Homer, which provides terminal services to common
5 carriers at two docks within the Port, is an MTO under the Shipping Act of
6 1984, 46 U.S.C. § 40102(14), with regard to the leasing and tariff practices
7 of the Port and its dockside cargo handling facilities, which do not
8 currently service common carriers.
9

10 **II. Summary of Argument**

11
12 The answer to this question fundamentally involves whether the Commission has
13 personal jurisdiction over the Respondents rather than whether the Commission has
14 subject matter jurisdiction over the violations asserted by Complainants against
15 Respondents. Respondents never challenged the Commission's personal jurisdiction
16 over them. Respondents 1) admitted the Commission's personal jurisdiction over them
17 by operation of law (CX 282); 2) neither denied personal jurisdiction; 3) nor asserted an
18 affirmative defense (CX 283); and 4) never filed a timely motion. Any challenge to
19 personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) is now
20 absolutely waived pursuant to Federal Rule of Civil Procedure 12(h)(1). See
21 Commission Rule 502.12 (adopting the Federal Rules). The ID committed error in
22 analyzing this issue as one involving subject matter jurisdiction rather than personal
23 jurisdiction. Respondents' challenge should be dismissed as untimely and unfounded.

24 In Canaveral Port Authority – Possible Violations of Section 10(b)(10), 29 SRR
25 1455, 1459 (FMC 2003), the Commission finds and concludes:

26 [W]e have realized that, while the findings of jurisdiction over CPA are
27 correct, the analyses are unnecessarily restrictive. In order to avoid any
28 future precedential effects of such determinations, pursuant to section
29 14(b) of the Shipping Act, 46 USC app. §1713(b), to clarify that **the**

1 **Commission has jurisdiction over CPA pursuant to section 3(14) of**
2 **the Shipping Act, 46 USC app. §1702(14) [now at 46 U.S.C. §**
3 **40102(14)].**
4

5 In Docket No. 02-02, the Commission found that it has jurisdiction
6 over CPA because CPA had usurped the right of carriers to choose their
7 tug operator and made access to the terminal facilities dependent on one
8 predetermined tug operator, thus transforming the furnishing of tug
9 services into a terminal service. Canaveral Port Auth. – Possible
10 Violations of Section 10(b)(10), Unreasonable Refusal to Deal or
11 Negotiate [29 SRR 484], Slip Op. at 27-32. The Commission set forth the
12 inquiry as follows:
13

14 **The Shipping Act grants jurisdiction to the Commission**
15 **over marine terminal operators, defined, in part as**
16 **“person[s] engaged in the United States in the business of**
17 **furnishing wharfage, dock, warehouse, or other terminal**
18 **facilities in connection with a common carrier.”** 46 USC app.
19 **§1702(14) [now at 46 U.S.C. § 40102(14)].** **CPA meets the**
20 **definition of marine terminal operator and, thus, the**
21 **Commission has personal jurisdiction over it.** FF 1, 2, 5.
22 **Whether the Commission has subject matter jurisdiction**
23 **over CPA in this proceeding depends upon whether the**
24 **restrictions on tug services in the port are “relat[ed] to**
25 **or connected with receiving, handling, storing, or**
26 **delivering property” as defined by section 10(d)(1) of the**
27 **Shipping Act, §1709(d)(1) [now at 46 U.S.C. § 41102(c)].**
28

29 Id. at 27 (footnote omitted) (emphasis added). However, the second part
30 of the analysis is not necessary. Whether the furnishing of tug services is
31 related to the “receiving, handling, storing or delivering of property” is only
32 relevant when a section 10(d)(1) [now at 46 U.S.C. § 41102(c)] violation is
33 alleged. The issue in Docket No. 02-02 was whether CPA refused to deal
34 or negotiate pursuant to section 10(b)(10) [now at 46 U.S.C. § 41106(3)].
35 Accordingly, whether CPA’s operation of the tug franchise system
36 constituted the furnishing of terminal facilities is the only relevant question.
37 To require that the services in question relate to the “receiving, handling,
38 storing or delivering of property” would in effect apply the additional
39 jurisdictional boundaries of section 10(d)(1) to cases brought under
40 section 10(b)(10), an outcome that would be unduly restrictive.
41

42 In any event, the Commission correctly found that it has jurisdiction
43 over CPA. Indeed, CPA had conceded that it is a marine terminal
44 operator; it had also argued that its operation of the tug franchise system
45 did not constitute the furnishing of terminal facilities subject to Commission
46 jurisdiction.

1
2 Id. at 1459 (Emphasis added).

3 In Petition of the Association of Bi-State Motor Carriers, Inc., 30 SRR 104 (FMC
4 2004), the Commission finds and concludes:

5 Because neither Petitioner nor the commenters have correctly articulated
6 the basis for the Commission's jurisdiction, we take this opportunity to
7 clarify the issue.

8
9 The Shipping Act grants the Commission **personal jurisdiction** over
10 MTO's, defined, in part as "person[s] engaged in the United States in the
11 business of furnishing wharfage, dock warehouse, or other terminal
12 facilities in connection with a common carrier." 46 USC app. §1702 (14)
13 [now at 46 U.S.C. § 40102(14)]. NYTC concedes that it is a conference of
14 MTOs, therefore the Commission had **personal jurisdiction** over it.
15 NYTC Comments at 2.

16
17 As for **subject matter jurisdiction**, the Commission must determine
18 whether the truck detention rules promulgated by NYTC relate to or are
19 connected with "receiving, handling, storing or delivering property" under
20 section 10(d)(1) [now at 46 U.S.C. § 41102(c)] of the Shipping Act. The
21 Commission's decisions in A.P. St. Philip, Inc. v. Atlantic Land and
22 Improvement Co., 13 FMC 166 [11 SRR 309] (1969) ("A.P. St. Philip"),
23 and Petchem, Inc. v. Canaveral Port Authority, 23 SRR 974 (1986),
24 provide useful guidance in making such a determination. [Footnote 5 is
25 reprinted below.]

26
27 In A.P. St. Philip, violations of sections 15, 16, and 17 of the 1916
28 Act were alleged against the respondent, the lessor of a phosphate
29 elevator facility. The Commission ascertained that it must find personal
30 jurisdiction under section 1 [now at 46 U.S.C. § 40102(14)] and subject
31 matter jurisdiction under section 17 [now at 46 U.S.C. § 41102(c)] of the
32 1916 Act in order to have complete jurisdiction over respondents.
33 **[Footnote 6 is reprinted below.]** While respondent stated it was an MTO
34 under section 1, the Commission also found personal jurisdiction due to
35 the lessor's control over the elevator facility through a contract with a
36 towing company to exclusively provide all towing services at the elevator
37 facility. 13 FMC at 166. The Commission found that if an entity retains
38 control over a terminal, that entity is "furnishing terminal facilities" and is
39 therefore a marine terminal operator. The Commission applied the same
40 analysis regarding its subject matter jurisdiction pursuant to section 17
41 [now at 46 U.S.C. § 41102(c)], and concluded that the furnishing of tug
42 services at the facility transformed tug services into a terminal function

1 related to “receiving, handling, transporting, storing or delivering of
2 property.” Id. at 172.

3 In Petchem, a section 10(d)(1) violation (among others) was
4 alleged against respondents Canaveral Port Authority (“CPA”) for its
5 operation of a tug franchise system. Upon a finding of personal
6 jurisdiction over the port’s operation of the tug franchise system, the
7 Commission then held that CPA’s practices had an underlying purpose
8 relating to terminal operations and “a more than incidental relationship to
9 the receiving and handling of property and cargo.” 23 SRR at 987.
10 Accordingly, the Commission found that it had jurisdiction over the matter.

11 In view of the rationale from those holdings, the Commission finds
12 that it has subject matter jurisdiction over this matter. It has been
13 established that NYTC is a conference of MTOs with control over their
14 respective terminals, furnishing terminal facilities. The truck detention
15 rules promulgated by NYTC under its Tariff are integral to the loading and
16 unloading of cargo from common carriers, the interchange of containers
17 and chassis, and the ultimate delivery of property for shippers. As such,
18 we conclude that the promulgation of truck detention rules at the relevant
19 facilities is a terminal function related to “receiving, handling, storing or
20 delivering property” as provided in section 10(d)(1) of the Shipping Act.

21 Id. at 111 – 112 (Emphasis added). Footnote 5 noted above states:

22 For further clarification of MTO jurisdiction, see the recent order issued in
23 Canaveral Port Authority – Possible Violations of Section 10(b)(10),
24 Unreasonable Refusal to Deal or Negotiate, and Exclusive Tug
25 Arrangements in Port Canaveral, Florida, 29 SRR 1455 (2003).

26 Id. at 111. Canaveral is discussed above. Footnote 6 noted above states:

27 Section 1 was carried over, as modified in its current form, as section
28 3(14) of the Shipping Act of 1984. That section stated in relevant part:

29 The term “other person subject to this Act” means any
30 person not included in the term “common carrier by water in
31 interstate commerce” carrying on the business of forwarding
32 or furnishing wharfage, dock, warehouse, or other terminal
33 facilities in connection with a common carrier by water in
34 interstate commerce.

35 As explained earlier, section 17 was carried over, as modified in its current
36 form, as section 10(d)(1).

37 Id. Section 1, then at Section 3(14), is now at 46 U.S.C. § 40102(14); Section 17, then
38 at Section 10(d)(1), is now at 46 U.S.C. § 41102(c), each modified as discussed below.

1 In a recent case, R.O. White & Co. and Ceres Marine v. Port of Miami Terminal
2 Operating Co., 31 SRR 783, 797 (ALJ 2009), the Initial Decision notes:

3 **BOE emphasizes that the Commission has never determined**
4 **jurisdiction on a port-by-port basis, nor does the Act establish a**
5 **geographical requirement for jurisdiction** other than that terminal
6 operations must be carried on within the United States.

7
8 (Emphasis added). The Initial Decision finds and concludes:

9
10 Ports America Florida admits that it provides MTO services in
11 Tampa, but maintains that it does not do so in Miami. Ports America
12 admits that it is a MTO in several ports in the United States, but denies
13 that it is a MTO in Miami **They have cited no authority in support**
14 **of the proposition that the personal jurisdiction of the Commission is**
15 **to be determined separately at each port.**

16
17 Id. at 807 (Emphasis added). The Initial Decision concludes:

18
19 For the above-stated reasons, I have concluded that each of the
20 POMTOC members falls within the statutory definition of a MTO and is
21 **within the personal jurisdiction of the Commission.** In reaching this
22 conclusion, I am mindful that the parties may not confer jurisdiction on the
23 Commission by their own statements, Plaquemines. They may, however,
24 by their actions and admissions, provide evidence by which jurisdictional
25 findings can be made, Dart Containerline Co. v. Federal Maritime Com'n,
26 722 F2d 750, 752 [22 SRR 547] (DC Cir 1983). There is such evidence in
27 this case.

28
29 **Subject matter jurisdiction arises** out of the fact that the
30 Complainants have alleged that the Respondents have violated specific
31 portions of the Act and that the agreements are as described in the Act at
32 46 USC §§40301(b)(2) and 40302(a). This does not mean that every
33 action by a MTO is under the jurisdiction of the Commission, but only that
34 the allegations of the Complaint are legally sufficient.

35
36 Id. at 808 (Emphasis added). The Commission has personal jurisdiction over
37 Respondents and subject matter jurisdiction over the allegations asserted in
38 Complainants' Fourth Amended Complaint.

39 The parties agree, the Administrative Law Judge found, and the Commission
40 affirms that common carriers call at the terminal facilities and use the terminal services

1 of the Port of Homer, a registered marine terminal operator with the FMC. The parties
2 agree that the Port of Homer services, regulates, and excludes common carriers and
3 other persons at all the terminal facilities that are completely owned, controlled and
4 regulated by the Port. In the Tariffs and in statements and admissions, the Port affirms
5 and confirms that it can bar, ban and restrict activities and maintains absolute
6 ownership, control and regulation of all terminal facilities. Respondents' absolute
7 control over all terminal facilities has much more than a discernable impact on common
8 carriage. The express written Tariffs filed with the FMC and provided to common
9 carriers, other persons and the public confirm the absolute control and discernable
10 impact on commerce. The specific and detailed terms, conditions and definitions in the
11 Tariffs are a binding and actionable contract confirmed by the repeated oral and written
12 declarations of the City Manager to Complainants. Until this matter was filed, the Port
13 insisted that the Tariffs apply equally to all the Port facilities and services including the
14 Fish Dock, subject only to an unwarranted and unfounded exception for Iccle Seafoods.
15 The lack of common carriers calling at the Fish Dock recently is some evidence that
16 Respondents are able to discriminate and exclude common carriers and other persons.

17 Respondents suggest that the Commission reject the Congressional mandate
18 and direction and the settled precedents and devise a contradictory exception that will in
19 practice result in greater uncertainty, more litigation and increased costs to business.
20 This Commission should reject that challenge and instead acknowledge the
21 Congressional mandate, settled precedents and established practice of the parties and
22 find that it has personal jurisdiction over Respondents and subject matter jurisdiction to
23 address the violations admitted by Respondents by operation of law.

1 **III. Factual Discussion**

2 The Initial Decision ("ID") notes that Complainants are two interrelated
3 companies doing business in Homer, Alaska buying and selling commercially caught
4 cargo - fish and other seafood product - in the waters around Alaska for processing,
5 freezing, storage, sale and distribution via different transportation modes including by
6 sea to America and the international market including Canada, Japan and Korea. ID at
7 14. The Parties agree that Respondents exclusively own, control and lease all marine
8 terminal facilities and terminal services and assess and collect fees for terminal facilities
9 and services involving those marine terminal facilities and the handling of cargo in the
10 City of Homer including the activities of common carriers that use or are prevented from
11 using Respondents' facilities and services.

12 The ID at 10 and 11 found:

13 47. The Deep Water Dock is the terminal facility where large vessels
14 such as common carriers, scrap metal barges, Icicle Seafoods' floating
15 processor, and cruise ships dock. RX 1225.

16 . . .

17 54. The City provides services to occasional common carriers and
18 cruise ships on its Deep Water Dock and Pioneer Dock but not at the Fish
19 Dock. RX 1087.

20 55. While most of the cruise ships do not originate from foreign ports
21 and the City serves only a handful of common carriers annually, the City
22 believed that the use of its Deep Water Dock facilities by an occasional
23 common carrier obligated the City to register as a marine terminal
24 operator under the Act and comply with its provisions. RX 1087.

25 . . .

26 57. While the City chooses to apply the tariff to the Fish Dock, it does
27 so to ensure transparent and uniform governance of all City facilities and
28 never intended to subject itself to the Shipping Act for conduct on that
29 dock. RX 1243.

1 (Emphasis added).¹

2 In response to Complainants' Proposed Findings of Fact (CPFOF) 323,
3 Respondents admit the following factual contention:

4 The Auction Block is involved on a daily basis in the business of using and
5 paying for the essential terminal services and facilities of the
6 Respondents.

7
8 (Emphasis added). The ID found at 8 and 9:

9
10 23. Harbor Leasing, LLC is a business in Homer that leases property
11 from the City. Harbor Leasing, LLC responded to the RFP with a lease
12 proposal, intending to sublease Lot 12C to Complainants, a business in
13 Homer that was interested in using the lot for a seafood related business.

14 . . .

15
16
17 28. Under the Complainants' Lease, Complainants agreed to "pay for
18 wharfage, crane use, ice, and other Port and Harbor Services at the rates
19 published in the Port and Harbor Terminal Tariff."

20
21 29. Auction Block also agreed to and did construct a "fish buying facility
22 and associated office, warehouse, cold storage, staging, and operational
23 and logistical support for dock operations."

24 . . .

25
26
27 34. The Parties dispute the level of processing occurring at the
28 shoreside fish processing facility operated by Complainants as well as to
29 its current or projected capacity. However, both Parties agree that the
30 Auction Block Company owns, and is using to some extent, a shoreside
31 fish processing facility.

¹ As part of the evidentiary objections raised in their Exceptions Brief, Complainants objected and continue to object to Respondents offering untimely self-serving litigation-related parol evidence to vary the clear express written terms in the Tariffs, to contradict the written representations made by Respondents to Complainants, and to vary the written terms of leases, contracts and letters. Almost all of the "Additional Facts" at ID 10 – 12 were asserted by witnesses for Respondents for the first time after Complainants filed their Opening Brief. Complainants asserted and discussed four fundamental evidentiary challenges that are intertwined with the Respondents' challenge to jurisdiction. The discussion in Complainants' Exceptions Brief dated June 21, 2013, pp. 39 – 50, is incorporated by reference.

1
2 35. Complainants use the City's Fish Dock cranes as part of its
3 business.

4
5 (Emphasis added).

6 Complainants' testimony provided by Mr. Kevin Hogan and Ms. Jessica Yeoman,
7 who were both timely disclosed by Complainants (CX 109 - 110) and timely deposed by
8 Respondents, provided in support of the Commission's jurisdiction and to develop the
9 violations of the Shipping Act is "relevant, material, reliable and probative" and thus
10 properly received in evidence by the Commission. Commission Rule § 502.156. Their
11 timely testimony based on their first-hand experiences comports with the written record.
12 In the Complainants' Proposed Findings of Fact (CPFOF), Complainants refer to the
13 specific line and/or paragraph in an affidavit to support a contention.

14 In the Affidavit of Mr. Kevin Hogan at Exh. P / CX 143 - 151, he avers:²

15 1. - 44 [Mr. Hogan states his title and position, explains his ownership
16 interest in Complainants, avers that he makes the statements based on personal
17 knowledge, authenticates the Complaints and discovery responses and incorporates
18 them as his own, notes that the four copies of the Tariffs filed with the FMC are true and
19 correct copies of the original, and authenticates other documents.]

20 44. At the December 12, 2011 meeting of the Council, I again raised questions
21 related to the application of the Tariff. The Council voted to affirm the proposition before
22 them which was to not increase the Tariff rates. However, the concerns I raised related
23 to the deviation from the Tariff rates. These comments were made because the City

² Mr. Hogan authenticates the documents at CX 1 – 107 at Exh. P at paragraphs 4 - 18. His Affidavit was filed with Complainants' RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING STATUTE OF LIMITATIONS and then marked as Exh. P / CX 143 - 151.

1 attorney failed to inform the Council of the unfounded departures from the Tariffs for
2 icicle without any basis in law or contract.

3 C. **Resolution 11-095.** A Resolution of the City Council of Homer, Alaska,
4 Maintaining the Port of Homer Terminal Tariff No. 600 at the Current Rates. City
5 Clerk. Recommended to follow Budget Ordinance 11-41 schedule.
6 Mayor Hornaday opened the public hearing. In the absence of public testimony,
7 Mayor Hornaday closed the public hearing.
8 Motion on the floor from October 10th: MOTION TO ADOPT RESOLUTION 11-
9 095 BY READING OF TITLE ONLY.

10 Councilmember Hogan referenced pg. 168 of the terminal tariff, specifically rule
11 34.2 regarding contract rates. His thought is filing something with the Federal
12 Maritime Commission is to ensure uniformity to the published rates.
13 City Attorney Klinkner advised there is a provision for contract rates to be
14 negotiated outside of the filed tariff.

15 Councilmember Howard supports passing the resolution that shows no change in
16 the tariff. The Port and Harbor Improvement Committee is reviewing all tariffs
17 to determine what rates need to be changed to service the bond. It is expected
18 increases to support the bond will be before Council in March.

19 Councilmember Hogan asked for those amendments to go to the Port and
20 Harbor Advisory Commission first.

21 VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

22

23 [Emphasis added.].

24

25 46. I did cast a vote to uphold the current rates and yet raised questions related to
26 the discrimination practiced by the City. I was barred from introducing an amendment to
27 specifically address the disparity by the City's conflict of interest rules. I was also aware
28 of the dire consequences that befall one who challenges the Administration. I could
29 count that the votes were not there to support an amendment.

30 In the Fourth Supplemental Affidavit of Mr. Kevin Hogan at CX 269 - 270, the
31 former City Council member and member of a number of Homer Commissions (I.D. at 9
32 at Findings 31, 32, and 33) discusses the formal notice and hearing process that must
33 be followed before making valid changes to the written Tariffs. He avers and discusses
34 the City's Tariff review and amendment process:

1 1. - 5. . . .

2 6. According to the Homer City Code, Tariff amendments are enacted by the City
3 Council only after conducting a public hearing.

4 7. Prior to assuming a seat on the City Council, I raised the issue with the
5 administration that tariff amendments were being instituted without a public hearing.

6 8. In response, the City began scheduling tariff authorization matters concurrent
7 with the budget and scheduling a public hearing on proposed Tariff amendments.

8 9. In their affidavits, Mr. Wrede and others propose amendments to and
9 interpretations of the Tariffs that must be subject to public hearing and adopted by the
10 City Council in writing to be legally effective.

11 10. If the City Council seeks to amend the Tariffs so that they do not apply to the
12 Fish Dock, there is a legally binding process and procedure to follow before the change
13 is legally effective.

14 11. Complainants have provided discovery responses and testimony showing that
15 we hold our business out to the public to provide transportation of the fish and seafood
16 product by water, by truck or by air depending on the needs of the ultimate consumer
17 who are at times members of the public or commercial consumers of the product.

18 12. Complainants assume legal responsibility for the transportation from the port or
19 point of receipt [receipt] of the product to the port or point of destination

20 13. Complainants use vessels operating on the high seas including vessels we own,
21 vessels we charter and vessels that fish and operate at our direction.

1 14. Complainants can and do purchase or broker any and all legally caught fish
2 and/or seafood products and deliver it by any means on the water, over the ground, or
3 in the air depending on the needs of the ultimate consumer to any country on the planet.

4 15. Mr. Wrede always represented and insisted that the Tariffs applied to the Fish
5 Dock and refused to allow Complainants to receive the incentives bestowed gratuitously
6 on Icicle that also used the Fish Dock. If Mr. Wrede is now saying under oath that the
7 Tariffs do not apply to the Fish Dock, he is admitting that he refused to negotiate or deal
8 in good faith and honestly.

9 In the Affidavit of Ms. Jessica Yeoman at Exh. U / CX 169 - 178, she avers:

10 1 - 7 [Ms. Yeoman states her title and position, explains her ownership
11 interest in Complainants, avers that she makes the statements based on personal
12 knowledge, and discussed her professional background.]

13 8. The Auction Block offers the full range of services for commercial fishermen
14 including purchasing, selling, brokering, offloading, freezing, processing, transporting
15 and arranging for the transportation of commercially caught fish and seafood in the
16 United States and in the international market.

17 9. - 19 . . .

18 20. An increasing number of cruise ships are docking within minutes of our retail fish
19 market at the City Deep Water Dock. In addition to selling to the passengers, we are
20 selling fish and seafood products wholesale to their galleys.

21 21. - 26. . . .

22 27. The Plant processes, grades, packages and arranges for the shipping of Pacific
23 cod milt to Japan; of salmon roe (eggs) to Japan; and of headed and gutted (H & G)

1 Pacific cod and fresh black cod (sable fish) to the U.S., Canada, Korea and Japan. The
2 Auction Block has worked for over a decade to develop business relationships with
3 customers in the international market.

4 28. The majority of The Auction Block's frozen, headed and gutted (H & G) Pacific cod
5 is loaded into refrigerated containers and shipped on TOTE (Totem Ocean Trailer
6 Express) (<http://www.totemocean.com/>) vessels for shipment to foreign countries.

7 29. About 80 percent of our H & G halibut is delivered to buyers in Canada with most
8 of it delivered to Ladner and Vancouver in British Columbia.

9 30. - 32. . . .

10 33. The Plant is able to handle 4400 pounds of H & G Pacific cod per hour. . . . Two
11 other individuals sort, wash, grade and pack the milt for further shipment to Japan.

12 34. - 49. . . .

13 Respondents state in response to Complainants' PFOF as follows:³

14 Complainants' Finding: 312

15

16 **REQUEST FOR ADMISSION NO. 1:** Admit that Auction Block is not a
17 "common carrier," as the term is defined in 46 U.S.C. § 40102(6).

18

19 **RESPONSE:** Deny. This request calls for a legal conclusion. The
20 Auction Block Company is not registered as a "common carrier" with the
21 Federal Maritime Commission.

22

23 City's Reply: Unable to admit or deny.

24 Complainants' Finding: 313

25 According to a Federal Maritime Commission decision, "the term 'common
26 carrier' as used in the 1916 Act and as better defined in the 1984 Act has

³ A true and correct copy of Complainants' Discovery Responses to Respondents' Discovery Requests is attached as Exh. B / CX 20 – 55 and additionally is verified by Mr. Hogan above. Complainants stated as their Complainant's Proposed Findings of Fact (CPFOF) 312 – 323 their response to Respondents' discovery requests.

1 been interpreted in many cases to mean the common carrier as that term
2 was understood in the common law.” The Auction Block Company
3 performs many of the activities of a “common carrier” as that term was
4 understood in the common law.

5
6 City’s Reply: Denied. CX 0026; RX 40; RX 611-612; RX 680-1; RX 680-2.

7 Complainants’ Finding: 314

8 After The Auction Block registered its business for the ground
9 transportation of cargo with the Federal Motor Carrier Safety
10 Administration, the United States Department of Transportation
11 designated USDOT “common carrier” number 1320081 for The Auction
12 Block. The Auction Block maintains and operates three trucks that are
13 actively engaged in receiving, handling, storing, and delivering property
14 including fish product on a regular basis. Most if not all of the fish product
15 originates or is delivered to The Auction Block using the facilities of the
16 Respondents.

17
18 City’s Reply: Admitted.

19 Complainants’ Finding: 315

20 The Auction Block contracts with independent operators of fishing vessels
21 to purchase their fish. The Auction Block directs how much fish to catch,
22 when to catch the fish and where and how to deliver the fish. In addition,
23 Auction Block is also a marketing agent for fishing vessels.

24
25 City’s Reply: Denied. RX 680-A – 680-C.

26 Complainants’ Finding: 316

27 The Auction Block pays the tariff rate for the transportation of cargo to
28 engage the services of ships with Tote, Lynden, Maersk, Sealand, CSX
29 and APL to Europe, Japan and Canada.

30
31 City’s Reply: Denied. RX 611-612.

32 Complainants’ Finding: 317

33 The Auction Block has handled or acted as agent or forwarder for
34 deliveries to foreign countries. Auction Block uses water transportation
35 and engages the services of ships with Tote, Lynden, Maersk, Sealand,
36 CSX, APL and Cargo Consultants to Europe, Japan and Canada.

37
38 City’s Reply: Denied. RX 611-612.

1 Complainants' Finding: 318

2 The Auction Block has provided water transportation for cargo between
3 the United States and foreign countries for compensation. The Auction
4 Block has handled or acted as agent or forwarder for deliveries of cargo to
5 foreign countries for compensation.

6
7 City's Reply: Denied. RX 611-612.

8 Complainants' Finding: 319

9 The Auction Block has paid the tariff for the transportation of cargo by
10 water from the United States to the port of a foreign country and engages
11 the services of ships with Tote, Lynden, Maersk, Sealand, CSX and APL
12 to Europe, Japan and Canada. To the best of The Auction Block's
13 knowledge, these entities are registered as "common carriers" with the
14 Federal Maritime Commission.

15
16 City's Reply: Denied. RX 611-612.

17 Complainants' Finding: 320

18 The Auction Block does not advertise the transportation of either cargo or
19 passengers by water, but the transportation of cargo is structured into the
20 business operations despite not being separately noted in representations
21 to the public.

22
23 City's Reply: Admitted.

24 Complainants' Finding: 321

25 One of the owners of The Auction Block owns and operates a United
26 States Coast Guard documented vessel official number 279036. One of
27 the owners of The Auction Block also owns and operates an Alaska
28 registered vessel number AK 4886AL.

29
30 City's Reply: Unable to admit or deny.

31 Complainants' Finding: 322

32 The Auction Block issues and receives Bills of Lading for shippers and
33 consignees. The Auction Block has prepared and filed National Marine
34 Fisheries Service shipping reports in the past. The Auction Block now
35 prepares and files Product Transfer Reports ("PTRs") with the National
36 Marine Fisheries Service.

37
38 City's Reply: Admitted.

1 Complainants' Finding: 323

2 The Auction Block is involved on a daily basis in the business of using and
3 paying for the essential terminal services and facilities of the
4 Respondents.

5
6 City's Reply: Admitted.

7 Respondents' primary support for their denials is a general citation to two pages of the
8 deposition of Ms. Yeoman at RX 611 – 612 that do not involve the subject matter of the
9 proposed findings of fact.⁴

10 Complainants' business is addressed and discussed in the discovery responses.

11 **REQUEST FOR ADMISSION NO. 7:** Admit that you do not operate a
12 fleet of fishing vessels.

13
14 **RESPONSE:** Deny. Auction Block contracts with independent operators
15 of fishing vessels to purchase their fish. Auction Block dictates how much
16 fish to catch, when to catch the fish and where and how to deliver the fish.
17 In addition, Auction Block is a marketing agent for fishing vessels.

18
19 . . .

20
21 **REQUEST FOR ADMISSION NO. 12:** Admit that your Lease with the City
22 was not an agreement for the receiving, handling, storing, or delivering of
23 property.

24
25 **RESPONSE:** Deny. Paragraph 5.01 addresses the "Use" of property and
26 facilities in the Lease and states in pertinent part:

27
28 FISH BUYING FACILITY AND ASSOCIATED OFFICE, WAREHOUSE,
29 COLD STORAGE, STAGING, AND OPERATIONAL AND LOGISTICAL
30 SUPPORT FOR DOCK OPERATIONS. PRIMARY AND SECONDARY
31 COMMERCIAL AND SPORT SEAFOOD PROCESSING, RETAIL
32 SEAFOOD SALES, MAINTENANCE AND GENERAL FISHERMAN'S
33 SUPPORT FACILITIES.

34
35 This description accurately describes some but not all of the business
36 activities of The Auction Block Company and its related entity Harbor
37 Leasing, LLC.

⁴ The question and answer at RX 611 – 612 is adopted as Finding 63. ID at 12. Complainants agree with this exchange but, as noted in the text, observe that the exchange does not provide a basis to dispute Complainants' Proposed Findings of Fact.

1
2 The Auction Block Company and its related entity Harbor Leasing,
3 LLC are actively engaged in receiving, handling, storing, and delivering
4 property on a daily basis. Complainants receive, handle, store and deliver
5 commercially caught fish in particular halibut, red (sockeye) salmon, silver
6 (coho) salmon, king (chinook) salmon, chum (dog) salmon, pink (humpy)
7 salmon, sablefish (black cod), Pacific cod, ling cod, scallops, skates,
8 yellow eye rockfish, rough eye rockfish, thorny head rockfish, hooligans
9 and other species of fish. Complainants receive, handle, store and deliver
10 storage boxes, totes, palettes, packaging materials, bait, and other gear
11 and equipment. Complainants receive, handle and store bait and
12 packaging materials in lockers rented from the City for delivery.
13

14 . . . [Discusses the certifications of the Plant.]
15

16 Respondents have admitted in their Fourth Answer to the Fourth
17 Amended Complaint that the Complainants are engaged in receiving,
18 handling, storing, and delivering property. See Paragraph I at line 6 of the
19 Fourth Amended Answer.
20

21 Paragraph 5.01 noted and discussed above is reprinted at Exh. 10 at pages 8 - 9 / CX
22 224 - 225. Respondents' expressly admitted the statement in the Fourth Amended
23 Complaint noted in the last paragraph above that the Complainants are engaged in
24 "receiving, handling, storing, and delivering property." (CX 281, line 9).

25 In response to CPFOF 230 – 233, Respondents state:

26 Complainants' Finding: 230
27

28 Complainants have provided discovery responses and testimony showing
29 that we hold our business out to the public to provide transportation of the
30 fish and seafood product by water, by truck or by air depending on the
31 needs of the ultimate consumer who are at times members of the public or
32 commercial consumers of the product.
33

34 City's Reply: Denied. CX 00127-00128; RX 1079-1104.

35 Complainants' Finding: 231
36

37 Complainants assume legal responsibility for the transportation from the
38 port or point of recipe [receipt] of the product to the port or point of
39 destination.
40

1 City's Reply: Denied. CX 0026-28; RX 40; RX 611-612.

2 Complainants' Finding: 232

3
4 Complainants use vessels operating on the high seas including vessels
5 we own, vessels we charter and vessels that fish and operate at our
6 direction.

7
8 City's Reply: Denied. CX 0026-28; RX 40; RX 611-612.

9 Complainants' Finding: 233

10
11 Complainants can and do purchase or broker any and all legally caught
12 fish and/or seafood products and deliver it by any means on the water,
13 over the ground, or in the air depending on the needs of the ultimate
14 consumer to any country on the planet.

15
16 City's Reply: Denied. RX 611-612.

17 Respondents' primary support for their denials again is a general citation to two pages
18 of the deposition of Ms. Yeoman at RX 611 – 612 and one page from the deposition of
19 Mr. Hogan that do not involve the subject matter of the proposed findings of fact. CX
20 0026-28 is a reference to the three pages that provide these assertions in
21 Complainants' Initial Disclosures and do not dispute the proposed findings of fact.

22 IV. Legal Discussion

23 At core, Respondents' complete ownership of all marine terminal facilities affords
24 them complete control of all leasing and marine terminal services and activities with
25 substantial impact on the activities of common carriers using and potentially using the
26 Port and on the assessment of charges related to the handling of cargo. Such control
27 over the activities of common carriers subjects the Respondents' leasing practices to
28 the Commission's jurisdiction and review. Through the Tariffs adopted after Homer City
29 Council review and approval before being filed with the Commission, Respondents

1 made clear their conclusion that the terminal facilities and terminal services at issue are
2 subject to the Commissions' jurisdiction. The lack of common carriers calling at the Fish
3 Dock recently is some evidence that Respondents are able to discriminate and exclude
4 common carriers and others. No entity other than Complainants even responded to
5 Respondents' request for proposal (RFP) to lease the property. ID at 8 at Finding 24.

6 Complainants The Auction Block Company and Harbor Leasing, LLC are entitled
7 to the protections of the Shipping Act of 1984, as amended, each as a "person" as
8 defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 525.1(c)(15).⁵
9 Respondents City of Homer and Port of Homer are subject to the personal jurisdiction of
10 the FMC as a "marine terminal operator" as defined in 46 U.S.C. § 40102(14) and as a
11 "person" as defined in 46 C.F.R. § 525.1(c)(15). A "marine terminal operator" is defined
12 in 46 U.S.C. § 40102(14) as follows:

13 The term "marine terminal operator" means a person engaged in the
14 United States in the business of providing wharfage, dock, warehouse, or
15 other terminal facilities in connection with a common carrier, or in
16 connection with a common carrier and a water carrier subject to
17 subchapter II of chapter 135 of title 49.

18
19 (Emphasis added). Respondents are registered as a "marine terminal operator" with
20 the Commission.⁶ Respondents are a de jure and de facto "marine terminal operator"

⁵ 46 C.F.R. § 525.1(c)(15) states: "*Person* includes individuals, firms, partnerships, associations, companies, corporations, joint stock associations, trustees, receivers, agents, assignees and personal representatives." "Any person" means any person." South Carolina Ports Authority v. Georgia Ports Authority, 22 SRR 1111, 1117 (1984).

⁶ Notice is posted on the Commission's website. (<https://www2.fmc.gov/FMC1Users/scripts/ExtReports.asp?tariffClass=mto>). Official notice is broader than judicial notice and may be taken, not only of public records and generally accepted facts, but also of matters within an agency's area of special expertise. Union Electric Co. v. F.E.R.C., 890 F.2d 1193, 1202 (D.C. Cir. 1989). The

1 under settled Supreme and Circuit Court law and Commission decisions. In Puerto
2 Rico Ports Authority v. Federal Maritime Commission, 919 F.2d 799, 806 (1st Cir. 1990),
3 the First Circuit Court holds: “Through its plenary control over the private terminal
4 facilities, the Port became a **de facto terminal operator**.” (Emphasis added.)

5 Parsing the definition, “a” “marine terminal operator” operating “in connection
6 with” “a” “common carrier” provides the Commission with personal jurisdiction. Where a
7 marine terminal operator owns and controls the marine terminal facilities and provides
8 terminal services as contrasted with merely “regulating” some facilities or activities, the
9 Commission maintains jurisdiction. Where a marine terminal operator is involved in
10 providing fundamental “terminal services” such as crane usage, wharfage, ice and the
11 transfer of cargo rather than merely overseeing “navigational services,” the Commission
12 maintains jurisdiction. Where a marine terminal operator leases to a tenant involved in
13 receiving, handling, storing or delivering property, the marine terminal operator remains
14 subject to the Commission’s jurisdiction. When a marine terminal operator’s published
15 Tariffs that by their clear terms apply to all the marine terminal facilities and services
16 and assess charges related to handling cargo, the Respondents now should not be
17 heard to reverse their position and also should be estopped from arguing that the
18 Commission does not have jurisdiction over all of the marine terminal facilities and
19 terminal services clearly defined and described in the Tariffs.

20 In the instant case, Respondents “in connection with” “a” “common carrier” on the
21 marine terminal facilities 1) admittedly own and control the marine terminal facilities and

Commission addresses the taking of official notice in Commission Rule 226, 46 CFR § 502.226. The ID found at 9: “40. Respondents are registered as a ‘marine terminal operator’ with the FMC. Notice is posted on the FMC website.”

1 charge a fee at the Homer Port for the on-load and off-load of cargo (crane use), the
2 transit of the cargo across the dock (wharfage) and for ice to preserve and protect the
3 cargo; 2) discriminate against other users and lessees including common carriers,
4 Complainants and others; 3) are admittedly involved in the lease and control of
5 fundamental and undisputed "terminal services" such as crane usage, wharfage, ice
6 and the transfer of cargo rather than merely overseeing some "navigational services"; 4)
7 operate facilities and lease property to Complainants involved in receiving, handling,
8 storing and delivering property; and 5) filed Tariffs that by their clear written terms apply
9 equally to all the marine terminal facilities and services at the Port subject to exceptions
10 for only two entities. For these reasons, the Commission has and maintains jurisdiction.

11 As discussed above, the record has established that more than "a" "common
12 carrier" serves the Port of Homer. The Commission should consider the relationship
13 between the Respondents' leasing practices and the impact of such practices on the
14 marine terminal facilities leased by the Respondents and those served by "a" "common
15 carrier" or "common carriers." Complainants submit that, consistent with Court and
16 Commission precedent, Respondents' leasing practices serve to control access to
17 marine terminal facilities and have more than a "discernible" impact on common carriers
18 at the Port of Homer. Respondents' have placed themselves in the exclusive position of
19 determining which facilities may be accessed by common carriers and from where they
20 may be excluded. The specific facility at issue, the area described as the Fish Dock, is
21 both a berth and a cargo handling facility designed for loading and unloading vessels,
22 cold storage, warehousing and other services which come not only within the
23 Commission's jurisdiction but also within the Commission's area of expertise. Because

1 Respondents operate facilities and lease property involved in receiving, handling,
2 storing, handling and delivering cargo and because the Respondents own, operate and
3 are in a position to allocate space for use by common carriers, the facility at issue is
4 properly within the Commission's jurisdiction. The alleged lack of common carriage
5 recently at the Fish Dock is consistent with Complainants' contention that Respondents
6 discriminatory practices are effective in driving out all competitors and eliminating
7 competition. In addition, Respondents unilaterally deem the Tariffs not to apply to areas
8 of the port based on self-serving litigation-related parol evidence not timely disclosed by
9 individuals that conflicts with the clear written provisions adopted by the Homer City
10 Council and published in all of the Tariffs filed with the Commission. The Complainants
11 renew their request for the Commission to find that it remains vested with jurisdiction
12 and to address the evidentiary matters before remanding this matter to the ALJ for
13 further proceedings.⁷

14 In California v. United States, 320 U.S. 577 (1943), the United States Supreme
15 Court found and held generally that the Commission has jurisdiction over the vast
16 majority of municipal ports. In Prudential Lines, Inc. v. Continental Grain Co., 21 SRR
17 133, 161 (ALJ 1981), aff'd, 21 SRR 1172 (FMC 1982), Judge Kline finds and holds:

18 In the present case, therefore, having chosen not to exclude common
19 carriers from its N&W Elevator by tariff or otherwise, Continental has
20 **gained the benefits of serving common carriers** as well as contract
21 **carriers. It cannot, therefore, renounce its status as a public terminal**
22 **operator unless and until it specifically discontinues service to**
23 **common carriers in its tariff and adheres to such publication.**
24

⁷ Complainants incorporate the evidentiary exceptions raised and developed in their Exceptions Brief filed on June 21, 2013 and specifically the discussion at pages 39 – 50 and note that they are intertwined with this discussion of jurisdiction.

1 (Emphasis added).⁸ In Prudential Lines, Inc. v. Continental Grain Co., 21 SRR 1172,
2 1175 at n. 10 (FMC 1982), the Commission concludes and holds:

3 Continental no longer relies on the decision in Fall River Line Pier, Inc. v.
4 International Trading Corp. v. Virginia, 399 F2d 413 [8 SRR 20, 255] (1st
5 Cir. 1968), in support of its argument that even if the Carriers were
6 identified as common carriers, the low incidence of such carriage would
7 not be of sufficient consequence to warrant assertion of jurisdiction over
8 the N & W Elevator. The Presiding Officer, however, properly
9 distinguished facts of that case from those in the instant proceeding.

10 Moreover, Section 1 of the Shipping Act makes subject to the Act a person
11 “furnishing . . . terminal facilities in connection with a common carrier by
12 water.” (emphasis added). **It would appear, therefore, that jurisdiction**
13 **attached as soon as the terminal services one common carrier.**

14 (Emphasis added). The MTO not only held itself out to provide terminal services, it like
15 Respondents provided services and made its facilities available to more than one
16 common carrier.

17 In River Parishes Co., Inc. v. Ormet Primary Aluminum Corp., 28 SRR 188, 209
18 (ALJ 1998)⁹, aff'd in substantial part, 28 SRR 751 (FMC 1999), Judge Kline discusses
19 the principles of statutory construction that underpin the interpretation of the Shipping
20 Act of 1984, as amended, and the pivotal and controlling decision in Prudential Lines.
21 Judge Kline states in pertinent part:

22 Statutory Construction—

⁸ In an affidavit previously filed with the Commission and discussed above, former Homer City Council member Mr. Hogan discusses the mandatory City review process that must be followed to review and adopt valid amendments to the Tariffs.

⁹ Judge Kline, the ALJ in River Parishes, discusses many cases and concerns regarding subject matter jurisdiction in a detailed Order addressing pending motions at River Parishes Co., Inc. v. Ormet Primary Aluminum Corp., 27 SRR 621 (Order 1996) and then, after the completion of further discovery by the parties, filed the Initial Decision at River Parishes Co., Inc. v. Ormet Primary Aluminum Corp., 28 SRR 188, 209 (ALJ 1998) addressing jurisdiction and the substantive claims.

1 Interpreting Exemptions from Remedial Statutes Narrowly
2

3 In the 1984 Act Congress gave the Commission jurisdiction over a
4 "marine terminal operator" who was defined as a "person engaged in the
5 United States in the business of furnishing wharfage, dock, warehouse, or
6 other terminal facilities in connection with a common carrier." (Section
7 3(15) of the 1984 Act.) This was essentially the same definition as that
8 contained in section 1 of the 1916 Act. **Elsewhere in the 1984 Act**
9 **Congress defined "common carrier" more in keeping with the**
10 **common-law definition of such a carrier as one "holding itself out of**
11 **the general public to provide transportation by water . . . except that**
12 **the term does not include a common carrier engaged in ocean**
13 **transportation by . . . ocean tramp"** (Section 3(6).) **The term**
14 **"common carrier" as used in the 1916 Act and as better defined in**
15 **the 1984 Act has been interpreted in many cases to mean the**
16 **common carrier as that term was understood in the common law.**
17 See Tariff Filing Practices, etc. of Containerships, Inc., 9 FMC 56, 62
18 (1965), and cases cited therein.
19

20 One of the principles of statutory construction is that a remedial
21 statute should be broadly construed in order to enable an agency to give
22 effect to the statute's salutary purposes. The Commission has held that
23 **the Shipping Act is remedial and accordingly should be liberally**
24 **construed when persons seek to avoid Commission jurisdiction.**
25

26
27

28 The principle that when not completely clear, remedial statutes
29 should be broadly construed to effectuate their purposes is well
30 recognized in law and is followed in many cases. [Citations.] . . . ("A
31 remedial statute is designed to correct an existing law, redress an existing
32 grievance, or introduce regulations conducive to the public good, and
33 generally is to be liberally construed."[])
34

35 The fact that the Shipping Acts are remedial and are to be broadly
36 construed to effectuate their salutary purposes was recognized by the
37 Supreme Court in connection with the interpretation of the Commission's
38 jurisdiction under the same statutory provision in the 1916 Act in which the
39 Commission's jurisdiction over terminal operators was first conferred. In
40 the case of United States v. American Union Transport, Inc., 327 US 427,
41 437 (1946),
42

43 Id. at 208 - 09 (Citations omitted; emphasis added). Judge Kline's discussion is
44 instructive in evaluating Respondents' proposed exemption. Judge Kline states:

1 The statute involved in this proceeding is therefore remedial and to
2 be broadly construed to effectuate its salutary purposes and the
3 congressional intention to regulate marine terminals as necessary “links”
4 in commerce with common carriers is clear, thus **militating against**
5 **exemptions from the scope of the statute.** Because respondent in the
6 instant case is arguing for an exemption from the reach of the statute,
7 reference to another principle of statutory construction is now warranted.
8 **That principle is that provisos or exceptions to remedial statutes are**
9 **to be narrowly construed and persons claiming such exemptions**
10 **have to make appropriate showings that they qualify for the**
11 **exemptions.**

12
13 Id. at 210 (Citations omitted; emphasis added). Judge Kline finds and concludes:

14 The Relevant Facts Showing Commission Jurisdiction
15 Under The Tests Previously Discussed
16

17 Under the test laid out in Prudential Lines, Inc. v. Continental Grain
18 Company, cited above, 21 SRR 133 (I.D.), adopted, 21 SRR 1172, namely
19 that jurisdiction attaches if only one common carrier sends a ship to a
20 marine terminal, the record shows that not only one but at least 12
21 recognized common carriers have sent ships to the Burnside terminal. . . .
22 . . . However, under the Prudential test, all that matters is that a common
23 carrier sent one of its ships to the terminal whether or not the particular
24 ship was in common carriage herself at the time because the Commission
25 held that “the Shipping Act regulates carriers, not type of carriage.”
26 (Prudential, 21 SRR 1174.)
27

28 Id. at 211 (Emphasis added). Settled law requires only that common carriers call at a
29 marine terminal operator’s facilities or use its services. In River Parishes Co., Inc. v.
30 Ormet Primary Aluminum Corp., 28 SRR 751, 764 (FMC 1999), the Commission holds:

31 Furthermore, in the instant case, the evidence shows that Ormet has
32 served many common carriers. I.D. at 14-27. Therefore, it is unnecessary
33 to address either Ormet’s [Respondent’s] or RIVCO’s [Complainant’s]
34 arguments relating to the number of common carriers served at a terminal.
35

36 The Shipping Act of 1984, as amended, is remedial legislation and should be given a
37 broad construction and interpretation to serve its remedial ends in the instant case. In
38 addition, because exceptions to remedial statutes are to be narrowly construed,
39 Respondents’ proposed exception should be rejected by the Commission.

1 By their actions and admissions, Respondents provide evidence by which
2 jurisdictional findings can be made. In addition, the supporting evidence in this case is
3 undisputed. There is no authority in support of the proposition that the jurisdiction of the
4 Commission is to be determined separately at each sub-area within a port, in particular
5 when the Tariffs by their terms apply equally to all terminal facilities and services and
6 the Respondents apply the Tariffs to all the terminal facilities and terminal services.

7 The Commission had jurisdiction as soon as the Respondents serviced "a"
8 "common carrier." The Commission maintains jurisdiction because of Respondents'
9 prior and continuing services to common carriers and Respondents' ability to
10 discriminate against common carriers and others in the use of and charges for the Port
11 marine terminal facilities and terminal services.

12 In addition, Respondents have cited no authority for the proposition that
13 jurisdiction exists for some areas of the Port and not others when the Tariffs are clear
14 that the Tariffs apply equally to all the properties owned, controlled and potentially
15 leased by the Port. Congress charges the Commission with maintaining a competitive
16 market for essential terminal services and facilities operated by a marine terminal
17 operator serving, among others, common carriers, and vests the Commission with
18 jurisdiction to review violations of the Shipping Act of 1984. Jurisdiction attached as
19 soon as the Respondents serviced a common carrier. Mr. Hogan discussed the City's
20 formal written review and amendment process above.¹⁰ Respondents have not
21 undertaken that process and have not validly modified the clear written provisions in the
22 Tariffs.

¹⁰ Fourth Supplemental Affidavit of Mr. Kevin Hogan at CX 269 – 270, paragraphs 6 – 10.

1 Almost the entire product that moves from the sea to the Complainants'
2 processing plant, then to the trucks, to the planes, and to the ships in Homer is lifted
3 from a vessel (crane use) by City-owned cranes and transited across the City-owned
4 docks (wharfage) using City-owned water services including at times ice making
5 facilities and other terminal services for delivery of the cargo to the ultimate consumer in
6 American and internationally. The City-owned and leased cranes deliver ice and bait to
7 a vessel before it departs and then offload the fish and trash after the vessel returns.
8 Respondents own and control all marine terminal facilities located in the Port of Homer
9 including the cranes and the wharfs at issue in this proceeding.

10 In Petchem, Inc. v. Canaveral Port Authority, 23 SRR 974, 986 - 87 (FMC 1986),
11 aff'd sub nom, Petchem, Inc. v. Federal Maritime Commission, 853 F.2d 958, 24 SRR
12 1156 (D.C. Cir. 1988)¹¹, the Commission states:

13 Respondents' analysis is incorrect. The essential facts of
14 Bethlehem Steel¹² should be distinguished from those of St. Philip¹³ and
15 this case. The effect of a harbor construction fee on a ship's access to
16 terminal facilities is far more remote and tangential than that of tug
17 service. Moreover, two decisions more recent than Bethlehem Steel
18 indicate that the theory articulated in St. Philip has continuing vitality. In
19 Louis Dreyfus Corp v. Plaquemines Port, Harbor and Terminal District,
20 ___ FMC ___ [25 FMC 203], 21 SRR 1072 (1982), the Commission
21 stated:

22
23 **"The statutory scheme contemplates regulation of any**
24 **entity if it exercises sufficient control over terminal**

11 The opinion was authored by Judge James L. Buckley.

12 Bethlehem Steel Corp. v. Indiana Port Commission, 21 FMC 629, 18 SRR 1485 (FMC 1979), aff'd per curiam, 642 F.2d 1215 (D.C. Cir. 1980) (The Commission determined that it lacked jurisdiction over charges assessed by a port to recoup the expense of harbor construction.).

13 A. P. St. Philip, Inc. v. Atlantic Land and Improvement Co., 13 FMC 166, 11 SRR 309 (FMC 1969).

1 facilities to have a discernible effect on the commercial
2 relationship between shippers and carriers involved in
3 that link in transportation.” Id. at 1079.

4
5 The administrative law judge in Plaquemines had characterized St.
6 Philip as establishing a “control theory” of Commission jurisdiction over
7 terminal activities. Id. at 1077, n. 5. The Commission adopted this phrase
8 and stated that “conditioning access to a port’s private facilities upon the
9 payment of a charge for governmental services reflects significant
10 threshold control over terminal facilities.” Id. at 1080. On the basis of this
11 “control theory,” the Commission concluded that it had both personal
12 jurisdiction over the respondent Port District (which was a political
13 subdivision of the State of Louisiana) and subject matter jurisdiction over
14 the Port District’s practice of assessing fees for certain vessel services
15 based on cargo transactions. The Commission specifically held that it had
16 subject matter jurisdiction under Section 17 of the 1916 Act – now
17 Section 10(d)(1) of the 1984 Act – because the Port’s practices had an
18 underlying purpose relating to terminal operations and a more than
19 incidental relationship to the handling of cargo. On this point, the
20 Commission distinguished Bethlehem Steel.

21
22 (Citation omitted; emphasis added). Respondents not only condition access they
23 completely own and absolutely control access to the Port’s facilities and assess widely
24 varying charges for those entities and businesses provided access. The Port of
25 Homer’s activities play an essential role in the terminal operations in Homer and a more
26 than incidental relationship to the handling of cargo.

27 In Plaquemines Port v. Federal Maritime Commission, 838 F.2d 536, 540, 24
28 SRR 813, 815 (D.C. Cir. 1988)¹⁴ (often referred to as “Plaquemines II” by courts and
29 commentators), the Circuit Court notes: “Unlike virtually all other municipal ports, the
30 Port neither owns nor operates wharves, docks or other waterside facilities.” The court
31 provides an oft-cited seven paragraph discussion of jurisdiction:

32 We address the FMC’s jurisdiction first. Jurisdiction is governed by
33 the 1984 Act’s definition of “marine terminal operator.” Section 3(15) of

¹⁴ The opinion was authored by Judge Robert H. Bork.

1 the 1984 Act, 46 U.S.C. § 1702(15) (Supp. III 1985), states that a marine
2 terminal operator is a person engaged "in the business of furnishing
3 wharfage, dock, warehouse, or other terminal facilities in connection with a
4 common carrier." If the Port engages in "furnishing ... other terminal
5 facilities," it is a "marine terminal operator" and falls under the 1984 Act
6 and the FMC's jurisdiction. As noted in the legislative history of the 1984
7 Act, H.R. Rep. No. 53, 98th Cong., 2d Sess., pt. 1, at 29, reprinted in 1984
8 U.S. Code Cong. & Admin. News 167, 194, the relevant language was
9 taken directly from the definition of "other person subject to [the 1916
10 Act]." 46 U.S.C. § 801 (1982). For this reason, the intent behind, and
11 prior interpretations of, the 1916 Act's provisions have continuing
12 precedential force.

13 The 1916 Act was designed to strengthen the U.S. shipping
14 industry. Then, as now, shippers operated in cartels, often called
15 "conferences." Congress believed that U.S. shippers could not opt out of
16 the international cartel system and survive at the level thought required by
17 national needs and security. The 1916 Act, therefore, granted antitrust
18 immunity to shippers' cartels. In exchange, the cartels were subjected to
19 the provisions of the 1916 Act which prohibited discriminatory practices
20 and required the filing and publication of tariffs with the FMC. Essay, *The*
21 *Shipping Act of 1984: A Return to Antitrust Immunity*, 14 Transp. L.J. 153,
22 155-56 (1985).

23 In order to regulate the shippers' cartels effectively, it was
24 necessary to regulate other links in the transportation chain. The sponsor
25 of the 1916 Act, Congressman Alexander, in response to an amendment
26 to strike "other person" subject to the Act, explained that, in order for
27 regulation of the shippers to be effective, **the FMC must also "have**
28 **supervision of all those incidental facilities connected with the main**
29 **carriers."** 53 Cong.Rec. 8276 (1916). Alexander stated that the bill
30 contained no provision regulating shippers that did not also apply to
31 terminal facilities. *Id.* Moreover, he noted, if terminal facilities owned and
32 operated by state political subdivisions discriminated unduly, they, too,
33 would be subject to the 1916 Act. In 1943, the Supreme Court relying on
34 Congressman Alexander's remarks, held that waterfront terminals owned
35 and operated by municipalities were "other person[s] subject to the [1916
36 Act]." *California v. United States*, 320 U.S. 577, 585-86, 64 S.Ct. 352,
37 356-57, 88 L.Ed. 322 (1944).

38 In its 1982 Dreyfus Order, the FMC relied upon California v. United
39 States's ruling that local government authorities are covered by the
40 statute. The FMC then focused on the Port's degree of involvement in the
41 provision of terminal facilities to determine whether that involvement was
42 sufficient to constitute the "furnishing" of the facilities. Since the Port
43 assessed a fee for its essential services ancillary to the facilities and

1 conditioned access to the private facilities within its jurisdiction upon
2 payment of that fee, the FMC found a "furnishing" of the facilities. As the
3 FMC noted, the Port "has imposed utilization of its services and payment
4 of its fee as an unavoidable appurtenance to all private facilities." 21 SRR
5 (P & F) at 1080.

6 In the order now before us, the FMC applied the same rationale to
7 determine that the Port is a "marine terminal operator" within the meaning
8 of the 1984 Act. *NOSA Order*, 23 SRR (P & F) at 1372. We agree with
9 the FMC that the Port's combination of offering essential services and
10 controlling access to the private facilities amounts to the furnishing of
11 terminal facilities. Like the FMC, we read the purpose of the relevant
12 portions of the 1916 Act, and its successor, the 1984 Act, to be the
13 prevention of discrimination in the provision of terminal facilities.
14 Ownership or operation of terminal facilities is not a necessary
15 prerequisite to the ability to discriminate. Thus, the critical issue for
16 jurisdiction is that the degree of the Port's involvement enables the Port to
17 discriminate. **In this case, the Port has the ability to discriminate in**
18 **the fees it charges by controlling access to private terminal facilities.**
19 **This is sufficient to sustain FMC jurisdiction.**

20 **Our conclusion is buttressed by the fact that in a previous**
21 **interpretation of the provision at issue here, the Supreme Court**
22 **focused on the Shipping Act's legislative scheme and required a**
23 **broad construction to make effective the scheme of regulation the**
24 **statute established.** *United States v. American Union Transp.*, 327 U.S.
25 437, 447-57, 66 S.Ct. 644, 649-54, 90 L.Ed. 772 (1946). The FMC has
26 twice found that the Port's tariffs, or at least portions of them, violate
27 substantive provisions of the Shipping Acts. It should be clear by now that
28 allowing such discrimination would nullify the Shipping Acts for the first
29 100 miles of the Mississippi River north of the Gulf.

30 The DOJ argues that upholding FMC jurisdiction over the Port
31 could result in the FMC controlling the fire and emergency services of
32 every waterside city in America. This argument is overstated. Waterside
33 cities will not automatically or accidentally fall into FMC jurisdiction. **Only**
34 **if such ports begin to charge a fee for their services and to control**
35 **access to private facilities to enforce their charges will today's**
36 **decision bring them within the jurisdiction of the FMC.**

37 Id. at 542 – 43, 818 – 19 (Citations omitted; emphasis added). Unlike the Port in
38 Plaquemines that did not own the facilities, Respondents own and control the operation
39 of the facilities subject to the Tariffs and serve common carriers and a fortiori are

1 subject to continuing FMC jurisdiction.¹⁵ Respondents' ownership, involvement and
2 control are complete and enable them to discriminate in the manner in which they
3 conduct their leasing practices. Such ability to discriminate exceeds the jurisdictional
4 threshold because it affords the opportunity to negatively impact potential lessees and
5 common carriers by charging different fees and rates for the same terminal services
6 and/or access to the marine terminal facilities.

7 In Puerto Rico Ports Authority v. Federal Maritime Commission, 919 F.2d 799,
8 802 (1st Cir. 1990), the First Circuit found that "PRPA's sole function at Ponce is to
9 provide such general harbor services as law enforcement, radio communications,
10 harbor cleaning, and port captain services." Id. at 802. The Court states:

11 It [the Commission in Bethlehem Steel] thus drew a distinction between
12 navigation and terminal services. A service charge that was related
13 solely to navigation would not be subject to the Commission's
14 jurisdiction, while charges relating to terminal facilities would come
15 within the Commission's jurisdiction. The Commission's order was
16 affirmed on appeal. Bethlehem Steel Corp. v. Federal Maritime
17 Commission, 642 F.2d 1215, 1216 (D.C. Cir. 1980).

18 The port service charge at Ponce is related closely to navigation
19 aspects of the port. All services listed in PRPA's tariff are related to
20 navigation within the harbor. Moreover, the terminal facilities in the port
21 are under the exclusive administration and control of the Port of Ponce by
22 virtue of a 1911 franchise from the government of Puerto Rico. PRPA is
23 excluded expressly by statute from controlling or administering any
24 terminal facilities controlled by municipalities. 23 L.P.R.A. § 2202.

25 Id. at 804 (Emphasis added). The First Circuit Court states:

26 The Commission attached considerable significance to the fact that
27 the harbor fee in Bethlehem Steel was used "to recoup harbor
28 construction costs" and clearly was navigational in nature while the port
29 service charge in the instant case is not as "apparently navigation-related".

¹⁵ Footnote six states in pertinent part: "Moreover, the FMC already has jurisdiction over the vast majority of municipal ports. California v. United States, 320 U.S. 577 ... (1994)." Plaquemines, 838 F.2d at 543, 24 SRR at 819.

1 We believe that the Commission misreads the holding in that case. In
2 Bethlehem Steel, the Commission merely used the navigation-terminal
3 distinction to illustrate that the harbor charge was unrelated to cargo
4 handling and thus not subject to their jurisdiction. Bethlehem Steel, supra,
5 21 SRR at 633 (FMC 1979). Whether the harbor charge here is not as
6 “apparently navigation-related” is not the critical inquiry. The critical
7 aspect of the charge here involved, like the charge in Bethlehem Steel, is
8 that it is unrelated to receiving, handling, storing or delivering of
9 property.

10
11 Id. at 804 – 05 (Emphasis added).¹⁶ The First Circuit Court states:

12 We believe that the Commission’s reliance on Plaquemines II in the
13 instant case is misplaced. The Port in Plaquemines II had complete
14 control over the private terminals, including the amount of fee the
15 terminals charged. The Commission found that Plaquemines Port
16 administered and controlled all privately owned docks and wharves within
17 its geographical jurisdiction. The Port had complete control over the fees
18 and charges levied by the owners of private terminal facilities. **Through**
19 **its plenary control over the private terminal facilities, the Port**
20 **became a de facto terminal operator.**

21
22 By contrast, Puerto Rico law specifically exempts the private
23 terminal facilities at Ponce from PRPA’s “control and administration”, 23
24 L.P.R.A. § 2202. Ponce is solely responsible for establishing the
25 wharfage and dockage charges. . . . In short, unlike the private terminal
26 owners in Plaquemines II, Ponce has complete control over its terminal
27 facilities and dockage charges.

28
29 . . .
30
31 Since we conclude that PRPA did not exercise the type of plenary
32 control over Ponce terminal facilities that the Port exercised over private
33 terminal facilities in Plaquemines II, we need not consider the mode of
34 statutory analysis employed by the Commission and the District of
35 Columbia Court of Appeals.

¹⁶ One of the operative requirements from the substantive statute in 46 U.S.C. § 41102(c) provides for relief if a marine terminal operator “fail[s] to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” (Emphasis added). As noted above, Respondents expressly admit in their Fourth Answer to the Fourth Amended Complaint that the Complainants are engaged in receiving, handling, storing, and delivering property. See Paragraph I at line 6 of the Fourth Amended Answer. CX 281. Respondents admit this contention at CPFOF Number 4 at page 9 of Respondents’ Reply To Complainants’ Proposed Finding Of Fact.

1
2 Id. at 806 (Emphasis added). PRPA only imposes a “harbor service fee” yet does not
3 own, operate or lease the port at issue, namely the Port of Ponce, and is expressly
4 precluded by statute from exercising “control and administration.” In sum, PRPA was
5 found to have merely limited regulatory control of the lands in question that does not
6 confer jurisdiction on the Commission. However, in this matter, Respondents own,
7 provide, control, regulate and exercise “plenary control” over all of the terminal facilities
8 and services on all of the docks and facilities on the Homer waterfront and charge
9 disparate amounts for the use, access and services. The analysis in Puerto Rico Ports
10 Authority does acknowledge the “mode of statutory analysis employed by the
11 Commission and the District of Columbia Court of Appeals.” Id. at 807. In addition, the
12 decision and analysis support sustaining Commission subject matter jurisdiction on the
13 facts in this case.

14 In AHL Shipping Co. v. Kinder Morgan Liquids Terminals, LLC, 30 SRR 520, 521
15 (ALJ 2004), the Order states in pertinent part:

16 It is not necessary for the Complainant to show that it provides
17 transportation by water of passengers or cargo between the United States
18 and a foreign country; it is only necessary for the Complainant to show for
19 each Respondent that at least one of the Respondent’s customers
20 receiving terminal services is engaged in providing transportation by water
21 of passengers or cargo between the United States and a foreign country.
22 Those facts would establish jurisdiction in the Commission and the
23 proceeding could then progress to the merits of the claims made against
24 the Respondents.

25
26 (Emphasis added). In addition, Respondents’ customers and lessees receiving terminal
27 services are engaged in providing transportation by water of cargo between the United
28 States and foreign countries. The Order further states:

1 The reliance on Transpacific v. Federal Maritime Commission^{17]} is
2 misplaced. The jurisdiction of the Federal Maritime Commission is not
3 based on an agreement between a complaining carrier and the marine
4 terminal operator. **The jurisdiction is based on the business practices**
5 **of a marine terminal operator engaged in service to ocean common**
6 **carriers.** Section 10 of the Shipping Act, 26 (App.) USC 1709(d) prohibits
7 marine terminal operators from engaging in unreasonable practices.
8 Section 11, 46 (App.) USC 1710(a), permits “any person” to file a
9 complaint with the Federal Maritime commission alleging a violation of any
10 part of the Shipping Act. The phrase “any person” is not limited to those
11 persons engaged in ocean transportation between the United States and
12 foreign ports.

13
14 Id. at 522 (Emphasis added). Jurisdiction is based on the business practices of a
15 marine terminal operator such as Respondents engaged in allocating services and
16 facilities to “persons” and to common carriers and to Complainants.

17 In Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority, 335
18 F. Supp.2d 275 (D. Conn. 2004), a provider of public ferry service for passengers and
19 vehicles and two frequent passengers challenged the passenger fees. The district court
20 states:

21 Under the plain meaning of the Act, the Port Authority is not engaged “in
22 the business of furnishing wharfage, dock warehouse or other facilities in
23 connection with a common carrier.” 46 U.S.C.App. § 1702(15). The only
24 terminal facility operated by the Port Authority is the Water Street Dock,
25 and it is undisputed that it is used only by the Ferry Company, which is not
26 a common carrier. Although the Port Authority retains regulatory authority
27 over the private cargo terminals at Bridgeport Harbor, there are **no claims**
28 **that it exercised significant control over the use of the terminals by**
29 **common carriers or limited their access to the terminals.** This
30 conclusion is consistent with both Puerto Rico and Plaquemines Port and
31 reflects the intent of Congress in enacting the Shipping Acts: to
32 encourage participation by U.S. shipping in the international shipping
33 cartels, but prohibit discrimination by terminal facilities serving the
34 commercial maritime trade. Id. at 806-808. Since the Port Authority
35 exercises little control over the operations of the private marine cargo
36 terminals at the Bridgeport Harbor, and since its control over the Ferry

¹⁷ Transpacific Westbound Rate Agreements v. Federal Maritime Commission, 951
F.2d, 950, 25 SRR 1577 (9th Cir. 1991).

1 Company does not impact those private facilities, it does not implicate the
2 concerns behind the Shipping Act or make the Authority a “Marine
3 Terminal Operator” under the Shipping Act.
4

5 Id. at 282 - 83 (Emphasis added). Respondents own all the property and facilities and
6 exercise complete control over the use of the terminal facilities by common carriers and
7 other persons and are able to limit and do limit their access to terminals.¹⁸

8 In a recent decision, Cosco Container Lines v. Port of New York and New Jersey,
9 FMC Dkt. 11-12 at p. 4 (Initial Decision) (ALJ June 20, 2013), Judge Wirth succinctly
10 states the standard for jurisdiction as follows:

11 To establish jurisdiction, the Complainants must show that (1)
12 Respondents provide terminal services, (2) that services are provided to
13 common carriers, and (3) that the charge at issue is related to handling
14 cargo. If there is no jurisdiction, the merits of the case, i.e. the
15 reasonableness of the fee, is not reached and the complaint is dismissed.
16 See Auction Block Co. and Harbor Leasing, LLC v. The City of Homer,
17 FMC Dkt. 12-03 (Initial Decision) (ALJ May 20, 2013) (exceptions filed).

18 Nothing in the record presented so far suggests that the Commission
19 lacks jurisdiction over this matter. It appears that the Port Authority
20 provides terminal services, that those services are provided to common
21 carriers, and that the cargo facility charge is levied upon, and therefore
22 related to, handling of cargo. One wonders why a Complainant would
23 initiate a proceeding in a venue that it believed did not have jurisdiction.

24 (Emphasis added). Complainants brought and maintain this action because they
25 believe that the Federal Maritime Commission has subject matter jurisdiction. The
26 Parties agree that 1) Respondents provide and regulate all terminal services (and own
27 and lease facilities); 2) those services (and facilities) are provided to common carriers

¹⁸ In Lake Charles Harbor and Terminal Dist. v. West Cameron Port, Harbor and Terminal Dist., Dkt. 06-02, 2007 WL 246831 at *4 (FMC Aug. 2, 2007), the Commission affirmed the granting of a motion to dismiss where the West Cameron Port did not provide any services that constituted the equivalent of marine terminal facilities. Id. at 7. However, in the instant matter, the ALJ found: “The parties do not dispute that the City and Port provide terminal facilities.” ID at 19.

1 (and other persons); and 3) the cargo facility charge (and other charges and fees) is
2 levied upon, and therefore related to, the handling of cargo by Complainants.

3 In Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, B.V., 25 SRR
4 1308, 1313 (FMC 1990), the Commission discussed the “fundamental purposes” of the
5 Shipping Act as follows:

6 One of the fundamental purposes of the Shipping Act of 1984 is the
7 establishment of a nondiscriminatory regulatory transportation process for
8 the common carriage of goods in the U.S. foreign commerce. . . . The . . .
9 Commission . . . recognized this policy in stating that “[t]he prevention of
10 economic discrimination is at the heart of the regulatory scheme
11 established by Congress in the 1984 Act.”[Citation]

12
13 In furtherance of the Act’s declared policy of maintaining a
14 nondiscriminatory transportation system, Section 10 contains various
15 provisions prohibiting certain unjustly discriminatory, preferential or
16 prejudicial practices.

17
18 (citing Motor Vehicle Manufacturers Ass’n of the United States, Inc., 25 SRR 849, 853
19 (FMC 1990))(Emphasis added). As the ALJ observed, the commercial fishing industry
20 in Alaska is highly regulated by the state of Alaska and by the federal government. The
21 state and the federal government establish seasons, catch limits, reporting
22 requirements, and other rules and regulations to maintain and sustain the biological
23 resource. In addition, many governmental entities regulate the industry to protect the
24 public health, safety and welfare. However, no governmental entity regulates
25 competition at the ports utilized by the industry to transport cargo in international trade.
26 The Commissions’ proper focus is the regulation of the terminal-side cargo operations
27 but not regulations pertaining to the fishing industry as the ALJ seems to suggest.
28 Absent participation by the Federal Maritime Commission, no federal or state court,
29 agency or commission is protecting and promoting competition in an industry that is

1 involved in the transfer of cargo in international shipping. Respondents have a
2 monopoly on all terminal services in Homer. Respondents have provided Icicle
3 Seafoods with unwarranted benefits that are not offered to any other individual or entity
4 in direct contravention to the Tariffs adopted by the Homer City Council and filed with
5 the Commission that impact on the use and enjoyment of the facilities by common
6 carriers and others. The Congressional amendments to the Shipping Act of 1984 seek
7 to continue the Commissions' limited, critical and focused "steady hand" to restore the
8 "invisible hand" that underpins a free market.

9 The written Tariffs govern the business dealings and leasing activities of the
10 Respondents with the Complainants, with Icicle Seafoods and others including common
11 carriers. The ID admits these Tariffs at Finding 30 at 9. The plain language of the
12 Tariffs adopted by the Respondents defines the geographic scope of the activities of the
13 "marine terminal operator" for purposes of the Shipping Act at least until the Tariffs are
14 amended in writing by Respondents.¹⁹ "Terminal Tariff No. 600 Filed under ATFI Rules"
15 effective January 1, 2009 addressing "General Application Of Tariff" at Subsection
16 105(a) at page 11 / CX 71²⁰ states:

¹⁹ Exhibits D / CX 64 - 73, E / CX 74 - 83, F / CX 84 - 93 and G / CX 94 - 103. Complete copies of all four Tariffs were authenticated and filed as exhibits to Complainants' RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT at Pleading Number 23 as Exhibits D, E, F and G. This BRIEF references copies of the relevant pages.

²⁰ In addition, Respondents' three (3) "Terminal Tariff No. 600 Filed under ATFI Rules" effective January 1, 2011 and April 25, 2011 and July 25, 2011 addressing "General Application Of Tariff" at Subsection 105(a) at page 11 state the same general application of the Tariffs including to the "Small Boat Harbor" and "Fish Dock" are in the record. CX 81, 91, and 101.

1 Rates, charges, rules and regulations provided in this Tariff will apply to
2 persons and vessels using certain terminal facilities under jurisdictional
3 control of the City of Homer and located within the harbor bounded by the
4 City of Homer with the Small Boat Harbor entrance located at latitude 59 36'
5 15" N and longitude 151 24' 48" W and specifically to docks, appurtenant
6 structures thereto, and waterways under the management of the City of
7 Homer. **Special terms and conditions exist for the dock operations by**
8 **the State of Alaska, Alaska Marine Highway System**, for operations of the
9 **State Ferry System on the Pioneer Dock** and for the dock operations by a
10 **contractor engaged in chip storage and loading operations on or in the**
11 **vicinity of Deep Water Dock.**
12

13 Id. (Emphasis added).²¹ The Tariffs do not provide for any special terms and conditions
14 for Icicle Seafoods or even generally refer to an entity such as Icicle Seafoods. The
15 Tariffs do not exempt and to the contrary expressly reference and include the "Fish
16 Dock" within the scope, control, and purview of the Tariffs.

17 The written definitions in the Tariffs are instructive and controlling.²² Rule 34.2
18 includes the definitions: "(p) TERMINAL FACILITIES" are defined at page 10 / CX 70,
19 80, 90 and 100 as:

20 Terminal Facilities include the two (2) City Docks which are the Deep
21 Water Dock and the Pioneer (Ferry) Dock the **Fish Dock** within the Small
22 Boat Harbor and associated equipment, offices, warehouses. Storage
23 space, roads, paved areas, water banks, beaches and shoreline under the
24 management and control of the City of Homer.

25
26 (Emphasis added). "(c) CITY DOCKS" are defined at page 8 / CX 68, 78, 88 and 98 as:
27

²¹ The Tariffs acknowledge and provide for the special terms and conditions for a specifically named State entity ("State of Alaska, Alaska Marine Highway System" . . . "on the Pioneer Dock") and for the private sector contractor ("contractor" . . . "on or in the vicinity of Deep Water Dock") engaged in business. Id.

²² The following references refer to the Tariffs at Exhs. Exhibits D / CX 64 - 73, E / CX 74 - 83, F / CX 84 - 93 and G / CX 94 - 103. Rule 34.2 addresses "ABBREVIATIONS, SYMBOLS, DEFINITIONS." In the "DEFINITIONS" section at page 8 of the Tariff, the first definition states "(a) DEFINITIONS OF FEDERAL MARITIME COMMISSION MAY CONTROL: Unless provided in this Tariff, applicable definitions set fort[h] in 46 C.F.R. shall control."

1 The city docks of the City of Homer include all docks, floats, stalls,
2 wharves, ramps, piers, bulkheads, and sea walls owned or operated by
3 the City of Homer including the Deep Water Dock, the Wood and Steel
4 tidal grids, the Main (Ferry) Dock, **Fish Dock**, and beaches within the
5 boundaries of the City of Homer.

6
7 (Emphasis added). “(g) HOMER HARBOR” is defined at page 9 / CX 69, 79, 89 and 99

8 as:

9 For the purpose of this Tariff, “Homer Harbor” shall mean all salt water or
10 tide water laying within the boundaries of the City, including that area
11 known as the Small Boat Harbor.

12
13 “(o) SMALL BOAT HARBOR” is defined at page 10 / CX 70, 80, 90 and 100 as:

14
15 “Small Boat Harbor” means that area of water protected by breakwaters
16 constructed by the federal government and by the line of the mean higher
17 high water of the shoreline of the area protected by breakwaters, including
18 docks, floats, berths, tidal grids and other mooring facilities as operated by
19 the City.

20
21 (Emphasis added).²³ In their capacity as a marine terminal operator, Respondents 1)
22 filed Tariffs and filed amended Tariffs with the Commission that by their express written
23 terms cover all of Respondents’ terminal facilities and terminal services subject only to
24 exceptions for two entities; 2) impose the rates in the Tariffs on those persons using the
25 Fish Dock and other docks and facilities including Complainants and common carriers;
26 3) exempt Icicle Seafoods from paying the rates in the Tariffs by citing a provision in the
27 Tariffs, albeit without a valid legal basis; and 4) exclude other persons including
28 potentially additional common carriers from the Homer waterfront and property by
29 precluding and overcharging for access by citing provisions in the Tariffs, albeit illegally.

30

²³ Rule 34.4 addresses “APPLICATION OF TARIFF.” Exhs. D, E, F, and G at page 12 / CX 72, 82, 92 and 102. SUBSECTION 105(c) ACCEPTANCE OF TARIFF” at page 12 states “Use of the city docks and terminal facilities of the City shall be deemed acceptance of this Tariff and the terms and conditions named herein.”

1 **V. Conclusion**

2 Respondents 1) admit the Commissions personal jurisdiction over them by
3 operation of law (CX 282); 2) neither denied personal jurisdiction; 3) nor asserted an
4 affirmative defense (CX 283); and 4) never filed a timely motion. Any challenge to
5 personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) is now
6 absolutely waived pursuant to Federal Rule of Civil Procedure 12(h)(1). See
7 Commission Rule 502.12 (adopting the Federal Rules of Civil Procedure).

8 Respondents' complete ownership of and absolute control over all terminal
9 facilities and services allows it to "exercise[] sufficient control over terminal facilities to
10 have a discernible effect on the commercial relationship between shippers and carriers
11 involved in that link in transportation" including over common carriers and other persons
12 and shippers such as Complainants. Respondents agree that Complainants "receive,
13 handle, store and deliver" property and cargo. The Port's practices "have an underlying
14 purpose relating to terminal operations and a more than incidental relationship to the
15 handling of cargo." Respondents lease and control undisputed "terminal services" such
16 as crane usage, wharfage, ice and the transfer of cargo rather than merely overseeing
17 some "navigational services" at the Port. Because "the Port has the ability to
18 discriminate in the fees it charges by controlling access to private terminal facilities," the
19 Commission sustains FMC jurisdiction; Respondents here own the terminal facilities.
20 The FMC must also "have supervision of all those incidental facilities connected with the
21 main carriers" including the Fish Dock. For the reasons stated above, the Commission
22 clearly has personal jurisdiction over Respondents and subject matter jurisdiction over
23 the allegations asserted in Complainants' Fourth Amended Complaint.

1 DATED this 3rd day of February, 2014.

2 LAW OFFICE OF STEVEN J. SHAMBUREK
3 Attorney for Complainants

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16 **CERTIFICATE OF SERVICE**

17
18 I hereby certify that I have this day served a copy of this pleading upon Thomas F.
19 Klinkner, Birch Horton Bittner & Cherot, 1127 West 7th Avenue Anchorage, Alaska
20 99501 by sending a copy by U.S. Mail and by e-mail attachment to tklinkner@bhb.com
21 and also a copy by e-mail attachment to Holly C. Wells at hwells@bhb.com.

22
23 DATED this 3rd day of February, 2014.

24 *Steven J. Shamburek*
25
26 Steven J. Shamburek
27
28