

1 **FEDERAL MARITIME COMMISSION**

2 \_\_\_\_\_

3 **DOCKET NO. 12-03**

4 \_\_\_\_\_

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' EXCEPTIONS BRIEF**

11 \_\_\_\_\_

12

13

14

15

16

17

18

19

20

21

Table of Contents

1

2 I Procedural Background 1

3 II Exceptions 1

4 III Argument 4

5 1. The ALJ erred in finding that the Commission does not have subject 4  
6 matter jurisdiction over the leasing practices of a marine terminal  
7 operator when such facilities include those served by common  
8 carriers. Complainants asserted, Respondents admitted and the ID  
9 found that common carriers serve marine terminal facilities owned  
10 by the Respondents. The Commission should rely on these facts  
11 and the plain language in the applicable Tariffs filed by  
12 Respondents with the Commission to find that Respondents are a  
13 “marine terminal operator” under the Shipping Act of 1984, as  
14 amended, and confirm that the Commission has jurisdiction over  
15 the Respondents’ leasing practices in the Port and Harbor of  
16 Homer, Alaska, including the area described as the Fish Dock.  
17

18 2. The ALJ erred in addressing a number of evidentiary matters which  
19 impact not only the merits of the underlying proceeding, but also  
20 the ALJ’s jurisdictional findings. These matters include:  
21

22 A. 39  
23 The ALJ erred in not finding that Respondents admitted the specific  
24 contentions set forth in Complainants’ Verified Complaints pursuant  
25 to the clear language in Commission Rules §§ 502.62(a),  
26 502.64(a), 502.70(c) and 502.207(b) and thus Complainants’  
27 Proposed Findings of Fact 1 – 109 should be deemed admitted as  
28 a matter of law.  
29

30 B. 44  
31 The ALJ erred in not striking the untimely testimony presented by  
32 the Respondents from individuals who were not timely disclosed in  
33 any disclosures, namely the testimony of Mr. Wrede, Mr. Hawkins,  
34 Mr. Woodruff and Mr. Sharp.  
35

36 C. 48  
37 The ALJ erred in not striking self-serving litigation-related  
38 expressions of prior subjective intent or understanding and parol  
39 evidence by certain witnesses as not “relevant, material, reliable  
40 and probative” as required by Commission Rule § 502.156 because  
41 such statements are not considered probative of parties’

1	reasonable expectations at the time when the Respondents entered	
2	into the written agreements.	
3		
4	D	49
5	The ALJ erred in granting Respondents' Motion To Strike And For	
6	Sanctions. The Commission should admit the information set forth	
7	on pages 5 – 7 of Complainants' Reply Brief stating the taxes paid	
8	by Complainants.	
9		
10	IV. Conclusion	50
11		
12	Authorities:	
13	Federal Statutes:	
14	46 U.S.C. § 1702(18)	12, 40
15	46 U.S.C. § 40102(14)	5, 12, 40
16	46 U.S.C. § 41102(c)	20
17		
18	Federal Regulations:	
19	46 C.F.R. § 502.62	21
20	46 C.F.R. § 502.64	42
21	46 C.F.R. § 515.227	1
22	46 C.F.R. § 515.2(p)	12, 40
23		
24	Federal Rules:	
25	Civil Rule 26(e)	45
26	Civil Rule 30(b)(6)	46, 47
27	Civil Rule 37(c)(1)	47
28		
29	Commission Rules:	
30	Commission Rule § 502.12	47
31	Commission Rule § 502.62(a)	1, 39, 40, 42

1	Commission Rule § 502.64	42, 43
2	Commission Rule § 502.64(a)	1, 39, 41, 42, 44
3	Commission Rule § 502.70	42, 43
4	Commission Rule § 502.70(c)	1, 39, 42, 44
5	Commission Rule § 502.156	2, 26, 48
6	Commission Rule § 502.201(b)	1, 24
7	Commission Rule § 502.207(b)	2, 39, 44
8	Commission Rule § 502.225	1, 2
9	Commission Rule § 502.226	13
10	Commission Rule § 502.227	1
11		
12	Case Authority:	
13	<u>A. P. St. Philip, Inc. v. Atlantic Land and Improvement Co.</u> , 13 FMC 166, 11 SRR 309	
14	(FMC 1969)	15
15		
16	<u>AHL Shipping Co. v. Kinder Morgan Liquids Terminals, LLC</u> , 30 SRR 520, 521 (ALJ	
17	2004)	21
18	<u>Anderson v. Yungkau</u> , 329 U.S. 482, 485 (1947)	41
19	<u>Bethlehem Steel Corp. v. Indiana Port Commission</u> , 21 FMC 629, 18 SRR 1485 (FMC	
20	1979)	15
21	<u>Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority</u> , 335 F.	
22	Supp.2d 275, 282 (D. Conn. 2004)	22
23	<u>California v. United States</u> , 320 U.S. 577 (1943)	7, 19
24	<u>Capitol Transportation, Inc. v. Federal Maritime Commission</u> , 612 F.2d 1312, 1318 (1 <sup>st</sup>	
25	Cir. 1979)	42
26	<u>Cosco Container Lines v. Port of New York and New Jersey</u> , FMC Dkt. 11-12 at p. 4	
27	(Initial Decision) (ALJ June 20, 2013)	5
28	<u>Credit Practices Of Sea-Land Service, Inc.</u> , 25 SRR 1308, 1313 (FMC 1990)	23
29	<u>Escoe v. Zerbst</u> , 295 U.S. 490, 493 (1935)	41
30	<u>Evans v. Port Authority of New York and New Jersey</u> , 201 F.R.D. 96 (S.D.N.Y. 2001)	47
31	<u>Fowler v. City of Anchorage</u> , 583 P.2d 817, 820 (Alaska 1978)	41

1	<u>Hammel v. Eau Galle Cheese Factory</u> , 407 F.3d 852, 869 (7th Cir. 2005), <u>cert. denied</u> ,	
2	546 U.S. 1033 (2005)	48
3	<u>In re Estate of Fields</u> , 219 P.3d 995, 1012 at n. 57 (Alaska 2009)	49
4	<u>International Shipping Agency, Inc. v. The Puerto Rico Ports Authority</u> , 30 SRR 407,	
5	433 (ALJ 2004)	41
6	<u>Lake Charles Harbor and Terminal Dist. v. West Cameron Port, Harbor and Terminal</u>	
7	<u>Dist.</u> , Dkt. 06-02, 2007 WL 246831 at *4 (FMC Aug. 2, 2007)	22
8	<u>Lexecon Inc. v. Milberg Weiss Bershad Hynes &amp; Lerach</u> , 523 U.S. 26, 35 (1998)	41
9	<u>Lopez v. Davis</u> , 531 U.S. 230, 241 (2001)	41
10	<u>Motor Vehicle Manufacturers Ass'n of the United States, Inc.</u> , 25 SRR 849, 853 (FMC	
11	1990)	23
12	<u>Petchem, Inc. v. Canaveral Port Authority</u> , 23 SRR 974 (1986), <u>aff'd sub nom, Petchem,</u>	
13	<u>Inc. v. Federal Maritime Commission</u> , 853 F.2d 958, 24 SRR 1156 (D.C. Cir. 1988)	
14		14 - 16
15	<u>Plaquemines Port v. Federal Maritime Commission</u> , 838 F.2d 536, 24 SRR 813, 818 –	
16	19 (D.C. Cir. 1988)	16 - 18
17	<u>Prudential Lines, Inc. v. Continental Grain Co.</u> , 21 SRR 133 (ALJ 1981), <u>aff'd</u> , 21 SRR	
18	1172 (FMC 1982)	7 - 8
19	<u>Puerto Rico Ports Authority v. Federal Maritime Commission</u> , 919 F.2d 799, 802 (1 <sup>st</sup> Cir.	
20	1990)	19 - 21
21	<u>R.O. White &amp; Co. and Ceres Marine v. Port of Miami Terminal Operating Co.</u> , 31 SRR	
22	783 (ALJ 2009)	9, 39, 49
23	<u>River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.</u> , 27 SRR 621 (Order 1996)	
24		8 - 9
25	<u>River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.</u> , 28 SRR 188, 209 (1998)	
26		8 - 9
27	<u>Service Employees Intern. Union v. U.S.</u> , 598 F.3d 1110, 1113 (9th Cir. 2010)	41
28	<u>South Carolina Ports Authority v. Georgia Ports Authority</u> , 22 SRR 1111, 1117 (1984)	
29		12, 14, 16
30	<u>Transpacific Westbound Rate Agreements v. Federal Maritime Commission</u> , 951 F.2d,	
31	25 SRR 1577 (9 <sup>th</sup> Cir. 1991)	21
32	<u>Union Electric Co. v. F.E.R.C.</u> , 890 F.2d 1193, 1202 (D.C. Cir. 1989)	13
33	<u>Weiss Bershad Hynes &amp; Lerach</u> , 523 U.S. 26, 35 (1998)	41

1 Western Pioneer, Inc. v. Harbor Enterprises, Inc., 818 P.2d 654 (Alaska 1991) 49

1     **I     Procedural Background**

2             Mr. Hogan, as President and Member, with Complainants filed the initial  
3     Complaint pro per with the Commission on April 2, 2012. Complainants' Fourth  
4     Amended Complaint dated September 4, 2012 is at CX 272 – 280. Respondents' Forth  
5     Amended Complaint dated November 29, 2012 is at CX 281 – 285. The Administrative  
6     Law Judge (“ALJ”) filed the Initial Decision (“ID”) on May 20, 2013.

7     **II     Exceptions**

8             Pursuant to Rule 227 of the Federal Maritime Commission's Rule of Practice and  
9     Procedure, 46 C.F.R. § 502.227, Complainants file their Exceptions to the ID as follows:

- 10    1.     The ALJ erred in finding that the Commission does not have subject  
11          matter jurisdiction over the leasing practices of a marine terminal operator  
12          when such facilities include those served by common carriers.  
13          Complainants asserted, Respondents admitted and the ID found that  
14          common carriers serve marine terminal facilities owned by the  
15          Respondents. The Commission should rely on these facts and the plain  
16          language in the applicable Tariffs filed by Respondents with the  
17          Commission to find that Respondents are a “marine terminal operator”  
18          under the Shipping Act of 1984, as amended, and confirm that the  
19          Commission has jurisdiction over the Respondents’ leasing practices in  
20          the Port and Harbor of Homer, Alaska, including the area described as the  
21          Fish Dock.  
22
- 23    2.     The ALJ erred in addressing a number of evidentiary matters which impact  
24          not only the merits of the underlying proceeding, but also the ALJ’s  
25          jurisdictional findings.<sup>1</sup> These matters include:  
26
- 27          A.     The ALJ erred in not finding that Respondents admitted the specific  
28          contentions set forth in Complainants’ Verified Complaints pursuant to the  
29          clear language in Commission Rules §§ 502.62(a), 502.64(a), 502.70(c)

---

<sup>1</sup>     The ID does not address contentions 2. A., B. and C. other than to conclude: “All of the exhibits provided by the parties are admitted and were considered.” ID at 6. See Commission Rule § 502.225. These evidentiary decisions must be appealed or they could possibly be deemed waived if there is a remand. These evidentiary issues are inextricably intertwined with the issues regarding subject matter jurisdiction.

1 and 502.207(b) and thus Complainants' Proposed Findings of Fact 1 –  
2 109 should be deemed admitted as a matter of law.  
3

4 B. The ALJ erred in not striking the untimely testimony presented by  
5 the Respondents from individuals who were not timely disclosed in any  
6 disclosures, namely the testimony of Mr. Wrede, Mr. Hawkins, Mr.  
7 Woodruff and Mr. Sharp.  
8

9 C. The ALJ erred in not striking self-serving litigation-related  
10 expressions of prior subjective intent or understanding and parol evidence  
11 by certain witnesses as not "relevant, material, reliable and probative" as  
12 required by Commission Rule § 502.156 because such statements are not  
13 considered probative of parties' reasonable expectations at the time when  
14 the Respondents entered into the written agreements.  
15

16 D. The ALJ erred in granting Respondents' Motion To Strike And For  
17 Sanctions. The Commission should admit the information set forth on  
18 pages 5 – 7 of Complainants' Reply Brief stating the taxes paid by  
19 Complainants.  
20

21 The ALJ overlooked material facts and salient legal contentions which resulted in  
22 the ALJ committing legal error.<sup>2</sup> At core, Respondents' ownership of all marine terminal  
23 facilities affords them complete control of all leasing and marine terminal activities with  
24 great impact on the activities of common carriers using and potentially using the Port  
25 and on the assessment of charges related to the handling of cargo. Such control over  
26 the activities of common carriers subjects the Respondents' leasing practices to the  
27 Commissions' subject matter jurisdiction. Through the Tariffs adopted after Homer City

---

<sup>2</sup> The ID concludes that Complainants "have not established that the City of Homer and its Port have violated the Shipping Act." ID at 25. The ID discusses the statutory violations and case law generally at ID at 13 - 14 and understandably does not address the substantive statutory violations of the Shipping Act discussed by Complainants because of the findings regarding subject matter jurisdiction. Complainants file these exceptions to the ID but are not rearguing the substantive statutory violations because they are expressly not addressed in the ID. The substantive violations are addressed in Complainants' Brief filed on December 4, 2012 and the Reply Brief filed on January 25, 2013 and other pleadings.

1 Council review and approval and then filed with the Commission, Respondents made  
2 clear their conclusion that the facilities at issue are subject to the Commissions'  
3 jurisdiction. The Complainants request the Commission to find that the ALJ erred in  
4 failing to find subject matter jurisdiction and to address the evidentiary matters before  
5 remanding this matter to the ALJ for further proceedings.

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

---

<sup>3</sup> As Mr. Hogan avers in his affidavits noted below, Mr. Hogan is the President and majority shareholder of The Auction Block Company, an Alaska corporation in good standing, and the manager and one member along with his wife Ms. Bronwyn Kennedy of Harbor Leasing, LLC, an Alaska limited liability company in good standing. Harbor Leasing is the lessee of the lease with Respondents and a pass-through entity that leases the property to The Auction Block Company. Ms. Jessica Yeoman is the Vice President and minority owner of The Auction Block Company.

<sup>4</sup> Homer is a charming small Alaska town. Homer is also a vexing place for a business person to do business who is not afforded special treatment and favoritism by the City. Leasing activity and access to the Port is controlled and dictated by one person, the Homer City Manager Mr. Walt Wrede. The City through Mr. Wrede exempted an entity, Icicle Seafoods, Inc. ("Icicle"), from paying the rates and fees set forth in the written Tariffs filed with the Federal Maritime Commission even after expiration of the lease that may have provided some basis for the disparate treatment and then Respondents demanded that Complainants comply with the Tariffs because the Tariffs apply to activities on the Homer Fish Dock. Respondents provided incentives

1 **III. Argument**  
2

3 **1. The ALJ erred in finding that the Commission does not have**  
4 **subject matter jurisdiction over the leasing practices of a marine**  
5 **terminal operator when such facilities include those served by**  
6 **common carriers. Complainants asserted, Respondents admitted**  
7 **and the ID found that common carriers serve marine terminal**  
8 **facilities owned by the Respondents. The Commission should rely**  
9 **on these facts and the plain language in the applicable Tariffs filed**  
10 **by Respondents with the Commission to find that Respondents are a**  
11 **“marine terminal operator” under the Shipping Act of 1984, as**  
12 **amended, and confirm that the Commission has jurisdiction over the**  
13 **Respondents’ leasing practices in the Port and Harbor of Homer,**  
14 **Alaska, including the area described as the Fish Dock.**  
15

---

to Icicle based on Icicle’s maintenance and operation of a shore-based seafood processing plant in Homer. However, the plant burned down in 1988 and was never rebuilt nor does Icicle ever intend to rebuild the plant. Icicle has not rebuilt a plant and instead tethers a floating processor that receives and trucks the fish to Seward, Alaska for processing and then departs Homer at the end of the season. The Expired Icicle Lease expired on September 14, 2004. Nonetheless, Respondents have not required Icicle to adhere to the rates and provisions in the Tariffs and continue to provide the incentives and relief gratuitously.

Complainants sought a long-term lease with Respondents with the same incentives offered to Icicle. Complainants expanded their extant fish processing plant and developed a state-of-the-art shore-based “Solid-Fuel Absorption Refrigeration” seafood processing plant in Homer. Despite fulfilling the stated requirement to obtain the incentives, Respondents refused and refuse to provide the incentives to Complainants. Applying to the Respondents is futile. The City has at times stated that Complainants can submit an application for a lease. However, Respondents unreasonably refuse to deal or negotiate with Complainants. Mr. Hogan testifies that the Homer lease process is “futile,” a “sham” and a “fraud.” Ms. Yeoman testifies that the Homer lease process is a “farce” and a “charade.” Complainants’ only realistic recourse is to seek immediate redress before this honorable Commission. Complainants must and have filed Verified Complaints with the Federal Maritime Commission to seek the relief afforded by the Shipping Act of 1984, as amended.

Respondents’ favorable treatment of Icicle and prejudicial treatment of Complainants and refusal to deal or negotiate have inflicted substantial economic losses and continue to inflict substantial economic losses on Complainants. The City has hobbled The Auction Block’s ability to compete for the purchase and sale of commercially caught fish and seafood and to sell the cargo in the American and international market is undermined.

1 In Cosco Container Lines v. Port of New York and New Jersey, FMC Dkt. 11-12

2 at p. 4 (Initial Decision) (ALJ June 20, 2013), Judge Wirth states:

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

10 Nothing in the record presented so far suggest that the Commission  
11 lacks jurisdiction over this matter. It appears that the Port Authority  
12 provides terminal services, that those services are provided to common  
13 carriers, and that the cargo facility charge is levied upon, and therefore  
14 related to, handling of cargo. One wonders why a Complainant would  
15 initiate a proceeding in a venue that it believed did not have jurisdiction.

16 (Emphasis added). Complainants believed and continue to believe that the Federal  
17 Maritime Commission has subject matter jurisdiction and thus initiated this proceeding.  
18 As discussed below, the Parties agree that Respondents provide terminal services,  
19 those services are provided to common carriers, and the cargo facility charge is levied  
20 upon, and therefore related to, the handling of cargo by Complainants. The  
21 Commission has subject matter jurisdiction.

22 A "marine terminal operator" is defined in 46 U.S.C. § 40102(14) as follows:

23 The term "marine terminal operator" means a person engaged in the  
24 United States in the business of providing wharfage, dock, warehouse, or  
25 other terminal facilities in connection with a common carrier, or in  
26 connection with a common carrier and a water carrier subject to  
27 subchapter II of chapter 135 of title 49.

28  
29 (Emphasis added). A "marine terminal operator" operating "in connection with" "a"  
30 "common carrier" is subject to the Commission's subject matter jurisdiction. Where a  
31 marine terminal operator owns and controls the marine terminal facilities as contrasted  
32 with merely "regulating" some activities, the Commission has jurisdiction. Where a

1 marine terminal operator is involved in providing “terminal services” such as crane  
2 usage, wharfage, ice and the transfer of cargo rather than merely overseeing  
3 “navigational services,” the Commission has jurisdiction. Where a marine terminal  
4 operator is involved in receiving, handling, storing or delivering property, the marine  
5 terminal operator is subject to Commission jurisdiction. When a marine terminal  
6 operator’s published Tariffs by their clear terms apply to all the marine terminal facilities  
7 and assess charges related to handling cargo, the Respondents now should not be  
8 heard to argue that the Commission does not have jurisdiction over all of the marine  
9 terminal facilities clearly defined and described in the Tariffs.

10 In the instant case, Respondents “in connection with” “a” “common carrier” on  
11 some of the marine terminal facilities discriminate against other users and lessees  
12 including common carriers, Complainants and others; own and control the marine  
13 terminal facilities and charge a fee at the Homer Port for the on-load and off-load of  
14 cargo (crane use), the transit of the cargo across the dock (wharfage) and for ice to  
15 preserve and protect the cargo; are involved in the lease and control of fundamental  
16 and undisputed “terminal services” such as crane usage, wharfage, ice and the transfer  
17 of cargo rather than merely overseeing some “navigational services”; are engaged in  
18 receiving, handling, storing and delivering property; and filed Tariffs that by their clear  
19 written terms apply equally to all the marine terminal facilities at the Port subject to only  
20 two clear written exceptions. The Commission has subject matter jurisdiction.

21 As discussed in more detail below, the ID has established that “a” “common  
22 carrier” serves the Port of Homer. The Commission should consider the relationship  
23 between the Respondents’ leasing practices and the impact of such practices on the

1 marine terminal facilities leased by the Respondents and those served by “a” “common  
2 carrier” or “common carriers.” Complainants submit that, consistent with Commission  
3 precedent, Respondents’ leasing practices serve to control access to marine terminal  
4 facilities and have more than a “discernible” impact on common carriers at the Port of  
5 Homer. Respondents’ have placed themselves in the exclusive position of determining  
6 which facilities may be accessed by common carriers and from where they may be  
7 excluded. The specific facility at issue, the area described as the Fish Dock, is both a  
8 berth and a cargo handling facility designed for loading and unloading vessels, cold  
9 storage, warehousing and other services which come not only within the Commission’s  
10 jurisdiction but also within the Commission’s area of expertise. Because this facility in  
11 involved in receiving, handling, storing, handling and delivering cargo and because the  
12 Respondents own, operate and are in a position to allocate space for use by common  
13 carriers, the facility at issue is properly within the Commission’s jurisdiction. In addition,  
14 Respondents unilaterally deem the Tariffs not to apply to areas of the port based on  
15 self-serving litigation-related parol evidence provided by individuals not timely disclosed  
16 that conflicts with the clear written provisions adopted by the Homer City Council and  
17 published in all of the Tariffs filed with the Commission.

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

22 In the present case, therefore, having chosen not to exclude common  
23 carriers from its N&W Elevator by tariff or otherwise, Continental has  
24 **gained the benefits of serving common carriers as well as contract**  
25 **carriers. It cannot, therefore, renounce its status as a public terminal**

1 operator unless and until it specifically discontinues service to  
2 common carriers in its tariff and adheres to such publication.  
3

4 (Emphasis added).<sup>5</sup> In Prudential Lines, Inc. v. Continental Grain Co., 21 SRR 1172,  
5 1175 at n. 10 (FMC 1982), the Commission concludes and holds:

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

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

17 (Emphasis added). In River Parishes Co., Inc. v. Ormet Primary Aluminum Corp., 28  
18 SRR 188, 209 (ALJ 1998)<sup>6</sup>, the Initial Decision discusses the principles of statutory  
19 construction to interpret of the Shipping Act of 1984, as amended and the decision in  
20 Prudential. The ALJ states in pertinent part:

21 Statutory Construction—  
22 Interpreting Exemptions from Remedial Statutes Narrowly

23 . . .

24  
25  
26 One of the principles of statutory construction is that a remedial  
27 statute should be broadly construed in order to enable an agency to give

---

<sup>5</sup> Former Homer City Council member Mr. Hogan discusses the City review process to review and adopt amendments to the Tariffs in an affidavit previously filed with the Commission and discussed below.

<sup>6</sup> 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 subject matter jurisdiction.

1 effect to the statute's salutary purposes. **The Commission has held that**  
2 **the Shipping Act is remedial and accordingly should be liberally**  
3 **construed when persons seek to avoid Commission jurisdiction.**  
4

5 . . .

6  
7 The principle that when not completely clear, remedial statutes  
8 should be broadly construed to effectuate their purposes is well  
9 recognized in law and is followed in many cases. [Citations.]  
10

11 . . .

12  
13 The fact that the Shipping Acts are remedial and are to be broadly  
14 construed to effectuate their salutary purposes was recognized by the  
15 Supreme Court in connection with the interpretation of the Commission's  
16 jurisdiction under the same statutory provision in the 1916 Act in which the  
17 Commission's jurisdiction over terminal operators was first conferred.  
18 [Citation.]  
19

20 (Emphasis added; citations omitted). The ALJ finds and concludes:

21 Under the test laid out in Prudential Lines, Inc. v. Continental Grain  
22 Company, cited above, 21 SRR 133 (I.D.), adopted, 21 SRR 1172, namely  
23 that jurisdiction attaches if only one common carrier sends a ship to a  
24 marine terminal, the record shows that not only one but at least 12  
25 recognized common carriers have sent ships to the Burnside terminal. . . .  
26 . . . However, under the Prudential test, all that matters is that a common  
27 carrier sent one of its ships to the terminal whether or not the particular  
28 ship was in common carriage herself at the time because the Commission  
29 held that "the Shipping Act regulates carriers, not type of carriage."  
30 (Prudential, 21 SRR 1174.)  
31

32 (Emphasis added). The Shipping Act of 1984, as amended, is remedial legislation and  
33 should be given a broad construction and interpretation to serve its remedial ends in the  
34 instant case. Settled law requires only one common carrier to call at a marine terminal  
35 operator. As discussed below, the Parties agree and the ALJ found that more than one  
36 common carrier called at Respondents' marine terminal facilities.

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

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

5  
6 The Initial Decision finds and concludes:

7  
8 Ports America Florida admits that it provides MTO services in Tampa, but  
9 maintains that it does not do so in Miami. Ports America admits that it is a  
10 MTO in several ports in the United States, but denies that it is a MTO in  
11 Miami . . . . They have cited no authority in support of the proposition that  
12 the personal jurisdiction of the Commission is to be determined separately  
13 at each port.

14  
15 Id. at 807. There is no authority in support of the proposition that the subject matter  
16 jurisdiction of the Commission is to be determined separately at each area within a port,  
17 in particular when the Tariffs apply equally to all facilities. The ID at 10 and 11 found:

18 47. The Deep Water Dock is the terminal facility where large vessels  
19 such as common carriers, scrap metal barges, Icycle Seafoods' floating  
20 processor, and cruise ships dock. RX 1225.

21 . . .

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

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

30 . . .

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

35 (Emphasis added). The Commission had jurisdiction as soon as the Respondents  
36 serviced "a" "common carrier." The Commission has subject matter jurisdiction because

1 of Respondents' prior and continuing services to common carriers and Respondents'  
2 ability to discriminate in the use of and charges for the Port marine terminal facilities.

3 Respondents have cited no authority for the proposition that subject matter  
4 jurisdiction exists for some areas of the Port and not others when the Tariffs are clear  
5 that the Tariffs apply equally to all the properties owned, controlled and potentially  
6 leased by the Port. Congress charges the Commission with maintaining a competitive  
7 market for essential terminal services operated by a marine terminal operator serving,  
8 among others, common carriers, and vests the Commission with subject matter  
9 jurisdiction to review violations of the Shipping Act of 1984. Jurisdiction attached as  
10 soon as the Respondents serviced a common carrier. In an affidavit below, Mr. Hogan,  
11 the former City Council member and member of a number of Homer Commissions,  
12 discusses the formal notice and hearing process that must be followed before making  
13 valid changes to the written Tariffs.<sup>7</sup> Respondents have not undertaken that process  
14 and have not validly modified the written provisions in the Tariffs.

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

17 The Auction Block is involved on a daily basis in the business of using and  
18 paying for the essential terminal services and facilities of the  
19 Respondents.  
20

21 The ID found at 8 and 9:

22  
23 23. Harbor Leasing, LLC is a business in Homer that leases property  
24 from the City. Harbor Leasing, LLC responded to the RFP with a lease  
25 proposal, intending to sublease Lot 12C to Complainants, a business in  
26 Homer that was interested in using the lot for a seafood related business.  
27

---

<sup>7</sup> Fourth Supplemental Affidavit of Mr. Kevin Hogan at CX 269 – 270, paragraphs 6 – 10.

1 . . .

2  
3 28. Under the Complainants' Lease, Complainants agreed to "pay for  
4 wharfage, crane use, ice, and other Port and Harbor Services at the rates  
5 published in the Port and Harbor Terminal Tariff."

6  
7 29. Auction Block also agreed to and did construct a "fish buying facility  
8 and associated office, warehouse, cold storage, staging, and operational  
9 and logistical support for dock operations."

10  
11 . . .

12  
13 34. The Parties dispute the level of processing occurring at the  
14 shoreside fish processing facility operated by Complainants as well as to  
15 its current or projected capacity. However, both Parties agree that the  
16 Auction Block Company owns, and is using to some extent, a shoreside  
17 fish processing facility.

18  
19 35. Complainants use the City's Fish Dock cranes as part of its  
20 business.

21  
22 (Emphasis added). After the discussion of applicable case law, the testimony of Mr.  
23 Hogan and Ms. Stack not considered in the ID is discussed below and further  
24 addresses Complainants' and other activities and use of Port marine terminal services.

25 Complainants The Auction Block Company and Harbor Leasing, LLC are entitled  
26 to the protections of the Shipping Act of 1984, as amended, each as a "person" as  
27 defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p).<sup>8</sup> Respondents  
28 The City of Homer and Port of Homer are subject to the provisions of the Shipping Act  
29 of 1984, as amended, as a "marine terminal operator" as defined in 46 U.S.C. §  
30 40102(14) reprinted above. Respondents are registered as a "marine terminal

---

<sup>8</sup> 46 C.F.R. § 515.2(p) states: "*Person*' includes individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country." "*Any person*' means any person." South Carolina Ports Authority v. Georgia Ports Authority, 22 SRR 1111, 1117 (1984).

1 operator.”<sup>9</sup> As discussed above and developed below, Respondents are a de facto  
2 “marine terminal operator” under settled Commission and case law.

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

12 In their capacity as a marine terminal operator, Respondents filed Tariffs and  
13 filed amended Tariffs with the Commission that by their express written terms cover all  
14 of Respondents’ property subject to only two specific written exceptions discussed  
15 below. Exhs. D, E, F and G / CX 64 - 103. In their capacity as a marine terminal  
16 operator and invoking that status, Respondents impose the rates in the Tariffs and  
17 others using the Fish Dock and other docks and facilities including Complainants and  
18 common carriers. In their capacity as a marine terminal operator and invoking that  
19 status, Respondents exempt Icicle Seafoods from paying the rates in the Tariffs by

---

<sup>9</sup> 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 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 citing a provision in the Tariffs, albeit without a valid legal basis. In their capacity as a  
2 marine terminal operator and invoking that status, Respondents seek to rationalize their  
3 decision to exempt Icicle Seafoods from the application of the Tariffs by citing, albeit  
4 incorrectly, to a provision in the Tariffs. In their capacity as a marine terminal operator  
5 and invoking that status, Respondents exclude other persons including potentially  
6 additional common carriers from the Homer waterfront and property by precluding  
7 access or overcharging for access and/or services, albeit illegally. The Shipping Act of  
8 1984, as amended, does not allow a marine terminal operator to doff and don the  
9 marine terminal operator's hat on a whim or to reject the clear written scope of the  
10 Tariffs without first properly amending the Tariffs after notice and an opportunity to be  
11 heard, official written Homer City Council action on the record and published revised  
12 Tariffs. In one celebrated decision, one of the parties, Petchem, noted that jurisdiction  
13 does not "wink on and off" depending on the presence of common carriers.<sup>10</sup> To  
14 paraphrase the conclusion in South Carolina Ports Authority v. Georgia Ports Authority,  
15 22 SRR 1111, 1117 (1984), "a 'marine terminal operator' means a 'marine terminal  
16 operator.'"

17 Complainants contend and Respondents admit the facts that underpin the  
18 Court's subject matter over this matter. In Petchem, Inc. v. Canaveral Port Authority, 23  
19 SRR 974, 986 - 87 (FMC 1986), aff'd sub nom, Petchem, Inc. v. Federal Maritime  
20 Commission, 853 F.2d 958, 24 SRR 1156 (D.C. Cir. 1988)<sup>11</sup>, the Commission states:

---

<sup>10</sup> Petchem, Inc. v. Canaveral Port Authority, 23 SRR 974, 983 at n. 30 (FMC 1986), aff'd sub nom, Petchem, Inc. v. Federal Maritime Commission, 853 F.2d 958, 24 SRR 1156 (D.C. Cir. 1988).

<sup>11</sup> The opinion is authored by Judge James L. Buckley.

1 Respondents' analysis is incorrect. The essential facts of  
2 Bethlehem Steel<sup>12]</sup> should be distinguished from those of St. Philip<sup>13]</sup> and  
3 this case. The effect of a harbor construction fee on a ship's access to  
4 terminal facilities is far more remote and tangential than that of tug  
5 service. Moreover, two decisions more recent than Bethlehem Steel  
6 indicate that the theory articulated in St. Philip has continuing vitality. In  
7 Louis Dreyfus Corp v. Plaquemines Port, Harbor and Terminal District,  
8 \_\_\_ FMC \_\_\_, 21 SRR 1072 (1982), the Commission stated:

9  
10 **"The statutory scheme contemplates regulation of any**  
11 **entity if it exercises sufficient control over terminal**  
12 **facilities to have a discernible effect on the commercial**  
13 **relationship between shippers and carriers involved in**  
14 **that link in transportation."** Id. at 1079.

15  
16 The administrative law judge in Plaquemines had characterized St.  
17 Philip as establishing a "control theory" of Commission jurisdiction over  
18 terminal activities. Id. at 1077, n. 5. The Commission adopted this phrase  
19 and stated that "conditioning access to a port's private facilities upon the  
20 payment of a charge for governmental services reflects significant  
21 threshold control over terminal facilities." Id. at 1080. On the basis of this  
22 "control theory," the Commission concluded that it had both personal  
23 jurisdiction over the respondent Port District (which was a political  
24 subdivision of the State of Louisiana) and subject matter jurisdiction over  
25 the Port District's practice of assessing fees for certain vessel services  
26 based on cargo transactions. The Commission specifically held that it had  
27 subject matter jurisdiction under Section 17 of the 1916 Act – now Section  
28 10(d)(1) of the 1984 Act – because the Port's practices had an underlying  
29 purpose relating to terminal operations and a more than incidental  
30 relationship to the handling of cargo. On this point, the Commission  
31 distinguished Bethlehem Steel.

32  
33 (Emphasis added; citation omitted). Respondents not only condition access they  
34 completely own and absolutely control access to the Port's facilities and assess widely  
35 varying charges for those entities and businesses provided access. The Port of  
36 Homer's activities play an essential role in the terminal operations in Homer and a more

---

12 Bethlehem Steel Corp. v. Indiana Port Commission, 21 FMC 629, 18 SRR 1485  
(FMC 1979).

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

1 than incidental relationship to the handling of cargo. In another footnote in the case, the

2 Commission notes:

3 A necessary implication of Respondents' arguments on this point is  
4 that Petchem lacks standing to bring a complaint before the Commission  
5 because, as a tug operator, it is not a member of a class protected by the  
6 Shipping Acts. In fact, Respondents expressly made such arguments  
7 before the Presiding Officer. . . . Respondents' position is contradicted by  
8 the broad terms of Section 22 of the 1916 Act, 46 USC §821 (1982 ed.),  
9 and Section 11(a) of the 1984 Act, 46 USC app. §1710, which permit any  
10 "person" to file a complaint alleging violations of the statute. "Any person"  
11 means any person." South Carolina Ports Authority v. Georgia Ports  
12 Authority, \_\_\_ FMC \_\_\_, 22 SRR 1111, 1117 (1984).

13  
14 Id. at 987 at n. 39.<sup>14</sup> Other common carriers use the Respondents' facilities.  
15 Complainants are a "person" and Respondents are a "marine terminal operator" subject  
16 to regulation and the Commission's subject matter jurisdiction.

17 In Plaquemines Port v. Federal Maritime Commission, 838 F.2d 536, 542 - 43, 24  
18 SRR 813, 818 - 19 (D.C. Cir. 1988)<sup>15</sup> (often referred to as "Plaquemines II" by courts  
19 and commentators), the Circuit Court states:

20 We address the FMC's jurisdiction first. Jurisdiction is governed by  
21 the 1984 Act's definition of "marine terminal operator." Section 3(15) of

---

<sup>14</sup> In a concurring opinion, Commissioner Thomas F. Moakley states:

The distinction between navigation and terminal services that the Commission articulated in the Bethlehem Steel decision seems a logical interpretation of our authority over port functions and a proper narrowing of the broad language of the St. Philip case. Tug services fall neatly on the navigational side of such a dividing line and outside the scope of terminal services.

Petchem, Inc. v. Canaveral Port Authority, 23 SRR 974, 996 (FMC 1986) (Citations omitted; emphasis added). The terminal services at issue in this case fall neatly inside the scope of terminal services. Commissioner Moakley surely would find that the Commission has subject matter jurisdiction in the instant case.

<sup>15</sup> The opinion is 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. Sec. 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 the  
18 fees it charges by controlling access to private terminal facilities. This is  
19 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 focused  
22 on the Shipping Act's legislative scheme and required a broad  
23 construction to make effective the scheme of regulation the statute  
24 established. *United States v. American Union Transp.*, 327 U.S. 437, 447-  
25 57, 66 S.Ct. 644, 649-54, 90 L.Ed. 772 (1946). The FMC has twice found  
26 that the Port's tariffs, or at least portions of them, violate substantive  
27 provisions of the Shipping Acts. It should be clear by now that allowing  
28 such discrimination would nullify the Shipping Acts for the first 100 miles of  
29 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 if  
34 such ports begin to charge a fee for their services and to control access to  
35 private facilities to enforce their charges will today's decision bring them  
36 within the jurisdiction of the FMC.

37 (Citations omitted; emphasis added). Unlike the Port in Plaquemines that did not own  
38 the facilities, Respondents own the facilities subject to the Tariffs and serve common

1 carriers and a fortiori are subject to continuing FMC jurisdiction.<sup>16</sup> Respondents'  
2 ownership, involvement and control are complete and enable them to discriminate in the  
3 manner in which they conduct their leasing practices. Such ability to discriminate meets  
4 the jurisdictional threshold because it affords the opportunity to negatively effect  
5 potential lessees and common carriers by charging different fees and rates for the same  
6 services and/or access to the marine terminal facilities.

7 In Puerto Rico Ports Authority v. Federal Maritime Commission, 919 F.2d 799,  
8 802 (1<sup>st</sup> 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 First Circuit Court states:

11 It [the Commission in Bethlehem Steel] thus drew a distinction between  
12 navigational 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 navigational  
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".

---

<sup>16</sup> 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)."

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 property.  
9

10 Id. at 804 - 05.<sup>17</sup> The First Circuit Court states:

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

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

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

---

<sup>17</sup> This court overlays one of the operative phrases from the substantive statute in 46 U.S.C. § 41102(c) that 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). 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 Id. at 806 (Emphasis added). PRPA only imposes a “harbor service fee” yet does not  
2 own, operate or lease the port at issue, namely the Port of Ponce. In sum, PRPA was  
3 found to have merely regulatory control of the lands in question and therefore does not  
4 confer jurisdiction on the Commission. However, in this matter, Respondents own,  
5 provide, control, regulate and exercise “plenary control” over all of the terminal services  
6 on all of the docks and facilities on the Homer waterfront and charge disparate amounts  
7 for the use, access and services. The analysis in Puerto Rico Ports Authority does  
8 acknowledge the “mode of statutory analysis employed by the Commission and the  
9 District of Columbia Court of Appeals.” The decision supports sustaining Commission  
10 subject matter jurisdiction on the facts in this case.

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

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

22  
23 (Emphasis added). In addition, Respondents’ customers and lessees receiving terminal  
24 services are engaged in providing transportation by water of cargo between the United  
25 States and foreign countries. The Order further states:

26 The reliance on Transpacific v. Federal Maritime Commission<sup>[18]</sup> is  
27 misplaced. The jurisdiction of the Federal Maritime Commission is not  
28 based on an agreement between a complaining carrier and the marine

---

<sup>18</sup> Transpacific Westbound Rate Agreements v. Federal Maritime Commission, 951  
F.2d, 25 SRR 1577 (9<sup>th</sup> Cir. 1991).

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

10  
11 Id. at 522 (Emphasis added). Jurisdiction is based on the business practices of a  
12 marine terminal operator such as Respondents engaged in allocating services and  
13 property to “persons” and common carriers and Complainants.

14 In Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority, 335  
15 F. Supp.2d 275, 282 (D. Conn. 2004), the district court finds:

16 Although the Port Authority retains regulatory authority over the private  
17 cargo terminals at Bridgeport Harbor, there are no claims that it exercised  
18 significant control over the use of the terminals by common carriers or  
19 limited their access to the terminals.

20  
21 (Emphasis added). In the instant case, Respondents own the property and facilities  
22 and exercise significant control over the use of the terminal facilities by common carriers  
23 and limit their access to the terminals.

24 In Lake Charles Harbor and Terminal Dist. v. West Cameron Port, Harbor and  
25 Terminal Dist., Dkt. 06-02, 2007 WL 246831 at \*4 (FMC Aug. 2, 2007), the Commission  
26 affirmed the granting of a motion to dismiss where the West Cameron Port did not  
27 provide any services that constituted the equivalent of marine terminal facilities. Id. at 7.  
28 In the instant matter, Respondents own, provide and control a full range of marine  
29 terminal facilities and services.

1 In Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, B.V., 25 SRR  
2 1308, 1313 (FMC 1990), the Commission discussed the “fundamental purposes” of the  
3 Shipping Act as follows:

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

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

15  
16 (citing Motor Vehicle Manufacturers Ass’n of the United States, Inc., 25 SRR 849, 853  
17 (FMC 1990))(Emphasis added). As the ALJ observes, the commercial fishing industry  
18 in Alaska is highly regulated by the state of Alaska and by the federal government. The  
19 state and the federal government establish seasons, catch limits, reporting  
20 requirements, and other rules and regulations to maintain and sustain the biological  
21 resource. In addition, many governmental entities regulate the industry to protect the  
22 public health, safety and welfare. However, no governmental entity regulates  
23 competition at the ports utilized by the industry to transport cargo in international trade.  
24 The Commissions’ proper focus is the regulation of the terminal-side cargo operations  
25 but not regulations pertaining to the fishing industry as the ALJ seems to suggest.  
26 Absent participation by the Federal Maritime Commission, no federal or state court,  
27 agency or commission is protecting and promoting competition in an industry that is  
28 involved in the transfer of cargo in international shipping. Respondents have a  
29 monopoly on all terminal services in Homer. Respondents have provided Icicle

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

7 The written Tariffs govern the business dealings and leasing activities of the  
8 Respondents with the Complainants, with Icicle Seafoods and others including common  
9 carriers. The ID admits these Tariffs at paragraph 30 at 9. The plain language of the  
10 Tariffs adopted by the Respondents defines the geographic scope and jurisdiction of the  
11 "marine terminal operator" for purposes of the Shipping Act of 1984, as amended, at  
12 least until the Tariffs are amended. Exhibits D / CX 64 - 73, E / CX 74 - 83, F / CX 84 –  
13 93 and G / CX 94 - 103.<sup>19</sup> "Terminal Tariff No. 600 Filed under ATFI Rules" effective  
14 January 1, 2009 addressing "General Application Of Tariff" at Subsection 105(a) at  
15 page 11 / CX 71 states:

16 Rates, charges, rules and regulations provided in this Tariff will apply to  
17 persons and vessels using certain terminal facilities under jurisdictional  
18 control of the City of Homer and located within the harbor bounded by the  
19 City of Homer with the Small Boat Harbor entrance located at latitude 59 36'  
20 15" N and longitude 151 24' 48" W and specifically to docks, appurtenant  
21 structures thereto, and waterways under the management of the City of  
22 Homer. Special terms and conditions exist for the dock operations by the  
23 State of Alaska, Alaska Marine Highway System, for operations of the State  
24 Ferry System on the Pioneer Dock and for the dock operations by a

---

<sup>19</sup> 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.

1 contractor engaged in chip storage and loading operations on or in the  
2 vicinity of Deep Water Dock.

3  
4 Id. (Emphasis added). In addition, Respondents' three (3) "Terminal Tariff No. 600 Filed  
5 under ATFI Rules" effective January 1, 2011 and April 25, 2011 and July 25, 2011  
6 addressing "General Application Of Tariff" at Subsection 105(a) at page 11 state the  
7 same general application of the Tariffs including to the "Small Boat Harbor" and "Fish  
8 Dock." CX 81, 91, and 101. <sup>20</sup>

9 The written definitions in the Tariffs are controlling. The following references  
10 refer to the Tariffs at Exhs. Exhibits D / CX 64 - 73, E / CX 74 - 83, F / CX 84 - 93 and  
11 G / CX 94 - 103. Rule 34.2 addresses "ABBREVIATIONS, SYMBOLS, DEFINITIONS."  
12 In the "DEFINITIONS" section at page 8 of the Tariff, the first definition states "(a)  
13 DEFINITIONS OF FEDERAL MARITIME COMMISSION MAY CONTROL: Unless  
14 provided in this Tariff, applicable definitions set fort[h] in 46 C.F.R. shall control." "(p)  
15 TERMINAL FACILITIES" are defined at page 10 / CX 70, 80, 90 and 100 as:

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

21  
22 (Emphasis added). "(c) CITY DOCKS" are defined at page 8 / CX 68, 78, 88 and 98 as:

23  
24 The city docks of the City of Homer include all docks, floats, stalls,  
25 wharves, ramps, piers, bulkheads, and sea walls owned or operated by  
26 the City of Homer including the Deep Water Dock, the Wood and Steel

---

<sup>20</sup> 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. The Tariffs do not provide for any special terms and conditions for Iccle Seafoods or even generally refer to an entity such as Iccle Seafoods. The Tariffs do not exempt and expressly reference and include the "Fish Dock."

1 tidal grids, the Main (Ferry) Dock, **Fish Dock**, and beaches within the  
2 boundaries of the City of Homer.

3  
4 (Emphasis added). “(g) HOMER HARBOR” is defined at page 9 / CX 69, 79, 89 and 99  
5 as:

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

9  
10 “(o) SMALL BOAT HARBOR” is defined at page 10 / CX 70, 80, 90 and 100 as:

11  
12 “Small Boat Harbor” means that area of water protected by breakwaters  
13 constructed by the federal government and by the line of the mean higher  
14 high water of the shoreline of the area protected by breakwaters, including  
15 docks, floats, berths, tidal grids and other mooring facilities as operated by  
16 the City.

17  
18 (Emphasis added). This definition includes the land and every structure and marine  
19 terminal facility in the Port of Homer and does not partition or limit the applicability of the  
20 Tariffs except in two specific instances.<sup>21</sup>

21 Respondents seek to introduce parol evidence in affidavits from undisclosed  
22 individuals that contradicts prior statements and actions and contemporaneous and  
23 clear written documents. Mr. Wrede and Mr. Hawkins in particular attempt to amend,  
24 supplement and/or repudiate earlier statements and advance an interpretation of  
25 activities at the Port inconsistent with the written provisions in the Tariffs. As developed  
26 below, their testimony should be stricken and disregarded by the Commission.

---

<sup>21</sup> 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.” The Tariff uses the mandatory verb “shall” rather than the discretionary verb “may.” Icicle used and uses the city docks and terminal facilities and the Deep Water Dock. Icicle’s use of the city docks and terminal facilities and the Deep Water Dock of the City is deemed acceptance of the Tariff and the terms and conditions named herein.

1 By contrast, Complainants' testimony provided by Mr. Kevin Hogan and Ms.  
2 Jessica Yeoman in support of the Commission's subject matter jurisdiction and of the  
3 violations of the Shipping Act is relevant, material, reliable and probative.<sup>22</sup> Their timely  
4 testimony based on their first-hand experiences comports with the written record. In the  
5 Complainants' Proposed Findings of Fact (CPFOF), Complainants refer to the specific  
6 line and/or paragraph in an affidavit to support a contention. The testimony of Mr.  
7 Hogan and Ms. Yeoman is "relevant, material, reliable and probative" and thus properly  
8 received in evidence by the Commission. Commission Rule § 502.156.

9 In the Affidavit of Kevin Hogan at Exh. P / CX 143 - 151, Mr. Hogan avers:<sup>23</sup>

- 10 1. I am the President and majority shareholder of The Auction Block Company, an  
11 Alaska corporation in good standing.
- 12 2. I am also the manager and forty-nine percent (49%) owner member of Harbor  
13 Leasing, LLC, an Alaska limited liability company in good standing that is the lessee of  
14 the Lease with the Respondents and a pass-through entity. My wife, Ms. Bronwyn  
15 Kennedy, is a fifty-one percent (51%) owner member.
- 16 3. I have personal knowledge of the facts stated herein. I am competent to testify to  
17 these facts and do so on the basis of personal knowledge.

---

<sup>22</sup> Questions posed by Respondents at the depositions of Mr. Kevin Hogan and Ms. Jessica Yeoman were somewhat scattered and random which is not surprising given the scope and complexity of the fishing industry and the transportation network supporting distribution of the cargo and the interplay of state and federal requirements. After their respective depositions, Mr. Hogan and Ms. Yeoman sat down and developed organized discussions in their affidavits providing the answers to the somewhat scattered and random questions raised by Respondents at their respective depositions.

<sup>23</sup> 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 4. . . .

2 5. Exhibit B [CX 20 – 55] is a true and correct copy of the Complainants' Discovery  
3 Responses To The City Of Homer's Amended First Discovery Requests To  
4 Complainants. I personally assisted in the preparation of all of the responses. My  
5 signature verifies the responses. I have reviewed the responses and adopt each of  
6 them as my own response on behalf of the Complainants.

7 6. - 11. . . .

8 12. That the following four Tariffs are true and correct copies of the applicable Tariffs:

9 13. - 16 [Authenticates the Tariffs at Exhibit D [CX 64 – 73], Exhibit E [CX  
10 74 – 83], Exhibit F [CX 84 – 93], and Exhibit G [CX 94 – 103].]

11 17. - 26. . . .

12 27. I have prepare[d], revised, finalized and verified the complaints and responded to  
13 and verified the discovery requests.

14 28. - 44. . . .

15 45. At the December 12, 2011 meeting of the Council, I again raised questions  
16 related to the application of the Tariff. The Council voted to affirm the proposition before  
17 them which was to not increase the Tariff rates. However, the concerns I raised related  
18 to the deviation from the Tariff rates. These comments were made because the City  
19 attorney failed to inform the Council of the unfounded departures from the Tariffs for  
20 Icicle without any basis in law or contract.

21 C. **Resolution 11-095.** A Resolution of the City Council of Homer, Alaska,  
22 Maintaining the Port of Homer Terminal Tariff No. 600 at the Current Rates. City  
23 Clerk. Recommended to follow Budget Ordinance 11-41 schedule.  
24 Mayor Hornaday opened the public hearing. In the absence of public testimony,  
25 Mayor Hornaday closed the public hearing.

1 Motion on the floor from October 10th: MOTION TO ADOPT RESOLUTION 11-  
2 095 BY READING OF TITLE ONLY.

3 Councilmember Hogan referenced pg. 168 of the terminal tariff, specifically rule  
4 34.2 regarding contract rates. His thought is filing something with the Federal  
5 Maritime Commission is to ensure uniformity to the published rates.

6 City Attorney Klinkner advised there is a provision for contract rates to be  
7 negotiated outside of the filed tariff.

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

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

14 VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.  
15

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

21 In the Supplemental Affidavit of Kevin Hogan at Exh. Q / CX 152 - 157, he avers  
22 that he and Complainants relied on Respondents' admissions in their Answers when  
23 making decisions regarding the hiring of experts and the conduct of depositions:<sup>24</sup>

24 1. - 3 . . .

25 4. I engaged Stephen T. (Steve) Grabacki, FP-C, the President of and Certified  
26 Fisheries Professional with GRAYSTAR Pacific Seafood, Ltd., as a possible expert  
27 witness for Complainants; I engaged Joe Moore, CPA, with Altman Rogers & Co. who  
28 has knowledge of Complainants' financials and industry economics as a possible expert  
29 witness for Complainants; and I considered engaging Barbara Carper, CPA with Profit

---

<sup>24</sup> Mr. Hogan authenticates the documents at CX 158 – 168.

1 Soup who oversaw financial and systems review and business consulting for  
2 Complainants as a possible expert witness for Complainants. Because Respondents  
3 admitted the detailed and specific factual and legal contentions in their Answers, expert  
4 reports were no longer necessary and therefore I did not seek any expert reports.

5 5. - 19. . . .

6 In the Third Supplemental Affidavit of Mr. Kevin Hogan, he notes the importance  
7 of Commission review of Respondents' practices.<sup>25</sup>

8 In the Fourth Supplemental Affidavit of Mr. Kevin Hogan at CX 269 - 270, he  
9 avers and discusses the City's Tariff review and amendment process:

10 1. - 5. . . .

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

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

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

---

<sup>25</sup> In the Third Supplemental Affidavit of Mr. Kevin Hogan at Exh. Y / CX 185 - 186, he avers:

1. - 5. . . .

6. The Federal Maritime Commission is empowered to decide whether the Plant will be a functioning facility providing jobs to the citizens of Homer and tax revenue to the City of Homer or an abandoned monument to the arrogance and influence of Mr. Wrede.

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

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

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

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

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

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

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

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

1 1. I Jessica Yeoman, being duly sworn, hereby depose and state as follows:  
2 2. I have personal knowledge of the facts stated herein. I am competent to testify to  
3 these facts and do so on the basis of personal knowledge and information.  
4 3. I am a sixteen percent (16%) owner of The Auction Block Company.  
5 4. I first began working with The Auction Block in 1998 and managed dock offloads  
6 of fish and developed business relationships with commercial fishermen. . . . .  
7 5. My responsibilities grew and expanded over the years including assisting in  
8 developing the fleet of vessels that delivered their commercially caught fish and seafood  
9 to The Auction Block, maintaining the many regulatory documents and filing the reports  
10 that are required by federal and state law, assisting in designing and developing The  
11 Auction Block processing facility in Homer, and supervising marketing and advertising  
12 for The Auction Block.  
13 6. - 7. . . .  
14 8. The Auction Block offers the full range of services for commercial fishermen  
15 including purchasing, selling, brokering, offloading, freezing, processing, transporting  
16 and arranging for the transportation of commercially caught fish and seafood in the  
17 United States and in the international market.  
18 9. - 12. . . .  
19 13. The Auction Block has established business relationships with many ultimate  
20 purchasers of the product such as restaurants that inform us of their needs which we  
21 then can satisfy in a timely manner by working with our fleet of fishing vessels.  
22 14. - 16. . . .

- 1 17. About 70 - 80 percent of The Auction Block business in the last four years  
2 involves purchasing, selling, brokering, freezing, processing, transporting and arranging  
3 for the transportation of commercially caught fish. . . . .
- 4 18. About 20 – 30 percent of The Auction Block business involves offloads of fish for  
5 our fishermen and for others such as Icicle Seafoods. . . . .
- 6 19. . . .
- 7 20. A positive growth market for The Auction Block is the increasing visitor industry in  
8 Homer. The growing influx of tourists is buying and shipping seafood from our fresh  
9 and frozen seafood market facilities.
- 10 21. An increasing number of cruise ships are docking within minutes of our retail fish  
11 market at the City Deep Water Dock. In addition to selling to the passengers, we are  
12 selling fish and seafood products wholesale to their galleys. . . . .
- 13 22. - 26. . . .
- 14 27. The Plant processes, grades, packages and arranges for the shipping of Pacific  
15 cod milt to Japan; of salmon roe (eggs) to Japan; and of headed and gutted (H & G)  
16 Pacific cod and fresh black cod (sable fish) to the U.S., Canada, Korea and Japan. The  
17 Auction Block has worked for over a decade to develop business relationships with  
18 customers in the international market.
- 19 28. The majority of The Auction Block's frozen, headed and gutted (H & G) Pacific cod  
20 is loaded into refrigerated containers and shipped on TOTE (Totem Ocean Trailer  
21 Express) (<http://www.totemocean.com/>) vessels for shipment to foreign countries.
- 22 29. About 80 percent of our H & G halibut is delivered to buyers in Canada with most  
23 of it delivered to Ladner and Vancouver in British Columbia.

1 30. - 32. . . .

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

4 34. - 49. . . .

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

10 Complainants' Finding: 312

11

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

14

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

18

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

20 Complainants' Finding: 313

21 According to a Federal Maritime Commission decision, "the term 'common  
22 carrier' as used in the 1916 Act and as better defined in the 1984 Act has  
23 been interpreted in many cases to mean the common carrier as that term  
24 was understood in the common law." The Auction Block Company  
25 performs many of the activities of a "common carrier" as that term was  
26 understood in the common law.

27

28 City's Reply: Denied. CX 0026; RX 40; RX 611-612; RX 680-1; RX 680-2.

29 Complainants' Finding: 314

30 After The Auction Block registered its business for the ground  
31 transportation of cargo with the Federal Motor Carrier Safety  
32 Administration, the United States Department of Transportation  
33 designated USDOT "common carrier" number 1320081 for The Auction

1 Block. The Auction Block maintains and operates three trucks that are  
2 actively engaged in receiving, handling, storing, and delivering property  
3 including fish product on a regular basis. Most if not all of the fish product  
4 originates or is delivered to The Auction Block using the facilities of the  
5 Respondents.

6  
7 City's Reply: Admitted.

8 Complainants' Finding: 315

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

13  
14 City's Reply: Denied. RX 680-A – 680-C.

15 Complainants' Finding: 316

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

19  
20 City's Reply: Denied. RX 611-612.

21 Complainants' Finding: 317

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

26  
27 City's Reply: Denied. RX 611-612.

28 Complainants' Finding: 318

29 The Auction Block has provided water transportation for cargo between  
30 the United States and foreign countries for compensation. The Auction  
31 Block has handled or acted as agent or forwarder for deliveries of cargo to  
32 foreign countries for compensation.

33  
34 City's Reply: Denied. RX 611-612.

35 Complainants' Finding: 319

36 The Auction Block has paid the tariff for the transportation of cargo by  
37 water from the United States to the port of a foreign country and engages

1 the services of ships with Tote, Lynden, Maersk, Sealand, CSX and APL  
2 to Europe, Japan and Canada. To the best of The Auction Block's  
3 knowledge, these entities are registered as "common carriers" with the  
4 Federal Maritime Commission.

5  
6 City's Reply: Denied. RX 611-612.

7 Complainants' Finding: 320

8 The Auction Block does not advertise the transportation of either cargo or  
9 passengers by water, but the transportation of cargo is structured into the  
10 business operations despite not being separately noted in representations  
11 to the public.

12  
13 City's Reply: Admitted.

14 Complainants' Finding: 321

15 One of the owners of The Auction Block owns and operates a United  
16 States Coast Guard documented vessel official number 279036. One of  
17 the owners of The Auction Block also owns and operates an Alaska  
18 registered vessel number AK 4886AL.

19  
20 City's Reply: Unable to admit or deny.

21 Complainants' Finding: 322

22 The Auction Block issues and receives Bills of Lading for shippers and  
23 consignees. The Auction Block has prepared and filed National Marine  
24 Fisheries Service shipping reports in the past. The Auction Block now  
25 prepares and files Product Transfer Reports ("PTRs") with the National  
26 Marine Fisheries Service.

27  
28 City's Reply: Admitted.

29 Complainants' Finding: 323

30 The Auction Block is involved on a daily basis in the business of using and  
31 paying for the essential terminal services and facilities of the  
32 Respondents.

33  
34 City's Reply: Admitted.

1 Respondents' primary support for their denials is a general citation to two pages of the  
2 deposition of Ms. Yeoman at RX 611 – 612 that do not involve the subject matter of the  
3 proposed findings of fact.<sup>26</sup>

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

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

7  
8 **RESPONSE:** Deny. Auction Block contracts with independent operators  
9 of fishing vessels to purchase their fish. Auction Block dictates how much  
10 fish to catch, when to catch the fish and where and how to deliver the fish.  
11 In addition, Auction Block is a marketing agent for fishing vessels.

12  
13 . . .

14  
15 **REQUEST FOR ADMISSION NO. 12:** Admit that your Lease with the City  
16 was not an agreement for the receiving, handling, storing, or delivering of  
17 property.

18  
19 **RESPONSE:** Deny. Paragraph 5.01 addresses the "Use" of property and  
20 facilities in the Lease and states in pertinent part:

21  
22 FISH BUYING FACILITY AND ASSOCIATED OFFICE, WAREHOUSE,  
23 COLD STORAGE, STAGING, AND OPERATIONAL AND LOGISTICAL  
24 SUPPORT FOR DOCK OPERATIONS. PRIMARY AND SECONDARY  
25 COMMERCIAL AND SPORT SEAFOOD PROCESSING, RETAIL  
26 SEAFOOD SALES, MAINTENANCE AND GENERAL FISHERMAN'S  
27 SUPPORT FACILITIES.

28  
29 This description accurately describes some but not all of the business  
30 activities of The Auction Block Company and its related entity Harbor  
31 Leasing, LLC.

32  
33 The Auction Block Company and its related entity Harbor Leasing,  
34 LLC are actively engaged in receiving, handling, storing, and delivering  
35 property on a daily basis. Complainants receive, handle, store and deliver  
36 commercially caught fish in particular halibut, red (sockeye) salmon, silver  
37 (coho) salmon, king (chinook) salmon, chum (dog) salmon, pink (humpy)  
38 salmon, sablefish (black cod), Pacific cod, ling cod, scallops, skates,

---

<sup>26</sup> The question and answer at RX 611 – 612 is adopted as Finding of Fact 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 yellow eye rockfish, rough eye rockfish, thorny head rockfish, hooligans  
2 and other species of fish. Complainants receive, handle, store and deliver  
3 storage boxes, totes, palettes, packaging materials, bait, and other gear  
4 and equipment. Complainants receive, handle and store bait and  
5 packaging materials in lockers rented from the City for delivery.  
6

7 . . . [Discusses the certifications of the Plant.]  
8

9 Respondents have admitted in their Fourth Answer to the Fourth  
10 Amended Complaint that the Complainants are engaged in receiving,  
11 handling, storing, and delivering property. See Paragraph I at line 6 of the  
12 Fourth Amended Answer.  
13

14 Paragraph 5.01 noted and discussed above is reprinted at Exh. 10 at pages 8 - 9 / CX

15 224 - 225. The admission noted in the last paragraph above in the Fourth Amended

16 Answer is at CX 281.

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

18 Complainants' Finding: 230  
19

20 Complainants have provided discovery responses and testimony showing  
21 that we hold our business out to the public to provide transportation of the  
22 fish and seafood product by water, by truck or by air depending on the  
23 needs of the ultimate consumer who are at times members of the public or  
24 commercial consumers of the product.  
25

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

27 Complainants' Finding: 231  
28

29 Complainants assume legal responsibility for the transportation from the  
30 port or point of receipt [receipt] of the product to the port or point of  
31 destination.  
32

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

34 Complainants' Finding: 232  
35

36 Complainants use vessels operating on the high seas including vessels  
37 we own, vessels we charter and vessels that fish and operate at our  
38 direction.  
39

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

1 Complainants' Finding: 233

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

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

9 Respondents' primary support for their denials again is a general citation to two pages  
10 of the deposition of Ms. Yeoman at RX 611 – 612 and one page from the deposition of  
11 Mr. Hogan that do not involve the proposed findings of fact. CX 0026-28 is a reference  
12 to the three pages that provide these assertions in Complainants' Initial Disclosures and  
13 do not dispute the proposed findings of fact. Respondents admit these contentions by  
14 operation of law.

15 **2. A. The ALJ erred in not finding that Respondents admitted the**  
16 **specific contentions set forth in Complainants' Verified Complaints**  
17 **pursuant to the clear language in Commission Rules §§ 502.62(a),**  
18 **502.64(a), 502.70(c) and 502.207(b) and thus Complainants' Proposed**  
19 **Findings of Fact 1 – 109 should be admitted as a matter of law.**

20  
21 Complainants agree that the Commission always must ascertain that it has  
22 subject matter jurisdiction over a matter. Complainants specifically contend in their  
23 Fourth Amended Complaint and Respondents do not specifically deny in their Fourth  
24 Amended Answer or any other Answer that the Commission has both subject matter  
25 jurisdiction of this matter and personal jurisdiction over the Respondents.<sup>27</sup> CX 273 at

---

<sup>27</sup> In R.O. White & Co. and Ceres Marine v. Port of Miami Terminal Operating Co.,  
31 SRR 783, 808 (ALJ 2009), the Initial Decision notes:

In reaching this conclusion, I am mindful that the parties may not confer jurisdiction on the Commission by their own statements, Plaquemines. They may, however, by their actions and admissions, provide evidence by which jurisdictional findings can be made, Dart Containerline Co. v.

1 page 2 at lines 17 – 19. As discussed below and by operation of law, Respondents also  
2 admit Complainants' contentions at CX 273 at page 2 at lines 7 – 10 that:

3 The City and Port are subject to the provisions and protections of the  
4 Shipping Act of 1984, as amended, as a "marine terminal operator" as  
5 defined in 46 U.S.C. § 40102(14) and other authority and as a "person" as  
6 defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p)  
7 and other authority.

8 "Specific" and "verified" complaints, answers and amendments to pleadings are  
9 at the core of the Commission process that is fundamentally different than the "notice  
10 pleading" system in the federal and other courts. These clear specific written  
11 requirements are clearly substantive not merely procedural. Clear specific agency  
12 rules<sup>28</sup> acknowledged and agreed to repeatedly by the Parties in writing control over the  
13 general notion that a regulatory agency considers all evidence.<sup>29</sup> Commission Rule §  
14 502.62(a) "Complaints and fee" states the contents of a complaint and requires

---

Federal Maritime Com'n, 722 F2d 750, 752 [22 SRR 547] (DC Cir 1983).  
There is such evidence in this case.

By their actions and admissions, Respondents provide evidence by which jurisdictional findings can be made. There is such evidence in this case that is undisputed.

<sup>28</sup> The Commission Rules are those in effect at the time this matter was pending. Some changes in the Commission Rules were effective on November 12, 2012. Subpart E of the Federal Maritime Commission Rules addresses "Proceedings; Pleadings; Motions, Replies" and includes the requirements for complaints, answers and amendments to pleadings. Mr. Hogan with Complainants filed the initial Complaint pro per and conscientiously and diligently followed these provisions and detailed the factual information and cited the specific statutory violations required by Commission Rules. Complainants' five complaints set forth the statutory violations supported by the available disclosures and discovery at the time. Each complaint is properly verified under oath as required by Commission Rule § 502.62(a).

<sup>29</sup> If these Commission Rules are found not to apply after the case has been briefed on the merits, which Commission Rules actually apply and which do not really apply?

1 verification of the contentions.<sup>30</sup> Commission Rule § 502.64(a) Answer to complaint;  
2 counter-complaint” establishes the requirements for an answer in pertinent part:

3 Recitals of material and relevant facts in a complaint, amended complaint,  
4 or bill of particulars, unless specifically denied in the answer thereto, shall  
5 be deemed admitted as true, but if request is seasonably made, a  
6 competent witness shall be made available for cross-examination on such  
7 evidence. An answer to the complaint must be verified.”  
8

9 (Emphasis added). The Rule uses the mandatory verbs “shall” and “must” rather than  
10 the discretionary verbs “may” or “could” to note that the requirements are mandatory not  
11 discretionary.<sup>31</sup> The verb “shall” in a statute or rule means “shall” and states a  
12 mandatory duty and obligation. By contrast, the verbs “may” or “will” are discretionary.  
13 Everyone benefits when a rule or statute is clear on its face.<sup>32</sup>

---

<sup>30</sup> In International Shipping Agency, Inc. v. The Puerto Rico Ports Authority, 30 SRR 407, 433 (ALJ 2004), the ID finds: “The Complaint before the Commission is very thorough and complies with Commission pleading requirements.” (citing Commission Rule 62 in the Code of Federal Regulations). Complainants’ verified Complaints each complied with Commission Rules and pleading requirements.

<sup>31</sup> In Service Employees Intern. Union v. U.S., 598 F.3d 1110, 1113 (9th Cir. 2010), the Ninth Circuit, relying on United States Supreme Court decisions, states: “‘There shall be paid \$X’ is language commanding a statutorily required amount. This language does not confer on the agency discretion to decide how much ought to be paid. ‘The word ‘shall’ is ordinarily ‘The language of command.’” (citing Anderson v. Yungkau, 329 U.S. 482, 485 . . . (1947) (quoting Escoe v. Zerbst, 295 U.S. 490, 493 . . . (1935)); see also Lopez v. Davis, 531 U.S. 230, 241 . . . (2001) (“Congress used ‘shall’ to impose discretionless obligations”); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 . . . (1998) (“[T]he mandatory ‘shall,’ . . . normally creates an obligation impervious to judicial discretion.”).)

<sup>32</sup> The interpretation of verbs in federal laws and rules is consistent with the settled interpretation of verbs in Alaska. In Fowler v. City of Anchorage, 583 P.2d 817, 820 (Alaska 1978), the Alaska Supreme Court states: “Unless the context otherwise indicates, the use of the word ‘shall’ denotes a mandatory intent.” (Footnote omitted). The interpretation of the word “shall” in the Homer City Code also expresses a mandatory intent.

1 Not one of the Respondents' five Answers "specifically denie[s]" the "[r]ecitals of  
2 material and relevant facts in a complaint [or] amended complaint" in their five Answers  
3 as required by Commission Rule § 502.64(a). In addition, until November 29, not one of  
4 Respondents' five Answers is even verified as required by Commission Rule §  
5 502.64(a). CX 281 – 285.

6 In Capitol Transportation, Inc. v. Federal Maritime Commission, 612 F.2d 1312,  
7 1318 (1<sup>st</sup> Cir. 1979), the First Circuit Court states: "Capitol never filed an answer  
8 denying this status even though under the Commission's rules material facts not denied  
9 are deemed admitted. 46 C.F.R. § 502.64 (1978)." No other case seems to address  
10 the Rule that is clear on its face. Both the requirements and the import of failure to  
11 meet the requirements are manifest and logical.<sup>33</sup> Respondents admitted their duty to  
12 comply with these requirements.<sup>34</sup>

---

<sup>33</sup> Commission Rule § 502.70(c) "Amendments or supplements to pleadings" states:

Whenever by the rules in the part a pleading is required to be verified, the amendment or supplement **shall also be verified**.

(Emphasis added). The Rule uses the mandatory verb "shall" rather than the discretionary verbs "may" or "could" to note that the requirement is mandatory not discretionary. The Rule is clear on its face and consistent with the verification requirements in Commission Rules §§ 502.62(a) and 502.64(a). The Court allowed Respondents to verify their Fourth Amended Complaint, but the Respondents never specifically responded to the Complainants' contentions.

<sup>34</sup> In the UNOPPOSED MOTION AND MEMORANDUM TO AMEND COMPLAINT AND ALLOW FOR ANSWER at Pleading Number 15 at page 1, the Respondents sought to include and the Parties included the following language in the UNOPPOSED MOTION:

Complainants and Respondents agree that Respondents have the right to file their amended answer addressing the new and/or expanded allegations within 30 days pursuant to Commission Rules 502.64 and 502.70.

1 Respondents specifically required that this language be included in these two  
2 pleadings filed with the Federal Maritime Commission to recognize the Respondents'  
3 right and obligation to file their answer pursuant to Commission Rule § 502.64 and their  
4 amended answers pursuant to Commission Rule § 502.70. However, Respondents did  
5 not comply with the very Rules they expressly stated they reserved the right to follow.<sup>35</sup>

6 Even the untimely verification is unavailing at this time because the statements in  
7 the Fourth Amended Answer cannot be verified without bordering on committing and  
8 also without possibly suborning perjury. Complainants specifically state the costs billed  
9 by Respondents to the Complainants and paid by the Complainants to Respondents in  
10 their Complaints. The Answers incorrectly claim: "Respondents lack knowledge or

---

(Emphasis added). The Answer filed by the Respondents did not comply with the very Rules cited by the Respondents. In addition, in the JOINT MOTION AND MEMORANDUM TO AMEND COMPLAINT AND ALLOW FOR ANSWER at Pleading Number 20 at page 1, the Respondents sought to include and the Parties included the following language in the JOINT MOTION:

Complainants and Respondents agree that Respondents have the right to file their amended answer addressing the new and/or expanded allegations within 30 days pursuant to Commission Rules 502.64 and 502.70.

(Emphasis added). The Answer filed by the Respondents did not comply with the very Rules cited by the Respondents.

<sup>35</sup> The Court reminded the Parties to comply with the procedure and deadlines in the Scheduling Order dated May 31, 2012 at Pleading Number 11 at page 2. "The parties are reminded that a 'scheduling order "is not a frivolous piece of paper, idly entered which can be cavalierly disregarded by counsel without peril."' (Citations omitted).

The Court reminded the Parties to comply with the procedure and deadlines in the Order dated August 9, 2012 at Pleading Number 18. The Court notes at page 2 at paragraph 3 in its concluding paragraph in pertinent part: "The parties were previously advised that '[p]arties cannot control an agency's docket or procedures through agreement among themselves.'" (Citation omitted).

1 information from which to form a belief as to the accuracy of the costs incurred by  
2 Complainants as alleged in Paragraph V, and therefore deny the same.” Respondents  
3 do not lack knowledge and do not lack information.

4 Neither Commission Rule § 502.64(a) nor § 502.70(c) requires a finding or even  
5 a showing of prejudice. Complainants rely on the admissions and would be prejudiced  
6 if Respondents were allowed to withdraw their admissions after the close of discovery.

7 Commission Rule § 502.207(b) addressing “Requests for admission” is  
8 instructive and states in pertinent part:

9 (b) *Effect of admission.* Any matter admitted under this rule is  
10 **conclusively established** unless the presiding officer **on motion** permits  
11 withdrawal or amendment when the presentation of the merits of the  
12 action will be subserved thereby and the party who obtained the  
13 admission fails to satisfy the presiding officer that withdrawal or  
14 amendment will be prejudicial in maintaining the party's action or defense  
15 on the merits. . . . .

16 (Emphasis added.) The Commission should note that there is no motion in the record  
17 providing good cause and seeking leave to withdraw these admissions of fact.  
18 Respondents admit the specific factual and legal contentions in Complainants' Fourth  
19 Amended Complaint at CX 272 - 279 at page 1 at line 12 – page 8 at line 9 by operation  
20 of law. The Commission should find that Respondents admitted Complainants'  
21 Proposed Findings of Fact (“CPFOF”) numbered 1 – 109 as a matter of law.

22 **2. B. The ALJ erred in not striking the untimely testimony presented**  
23 **by the Respondents from individuals who were not timely disclosed**  
24 **in any disclosures, namely the testimony of Mr. Wrede, Mr. Hawkins,**  
25 **Mr. Woodruff and Mr. Sharp.**

26  
27 Mr. Hogan filed the initial Complaint pro per on April 2, 2012. The Scheduling  
28 Order dated May 31, 2012 at Pleading Number 11 established the close of discovery on

1 October 9, 2012. The Parties exchanged Initial Disclosures on June 4, 2012.  
2 Complainants' Disclosures are at CX 109 - 119; Respondents' Disclosures are at CX  
3 121 - 126. After the exchange of disclosures, Respondents did not seasonably  
4 supplement their disclosures as required by Federal Civil Rule 26(e).<sup>36</sup>

5 The Commission should disregard testimony that would not be admissible at a  
6 hearing on this matter.<sup>37</sup> In the JOINT PREHEARING STATEMENT filed on November  
7 6, 2012 at Pleading Number 47 at pages 17 – 18, Complainants raise and preserve this  
8 objection to testimony as follows:

9 Complainants contend that Charles Sparks, John Woodruff and  
10 Kenneth "Duff" Hoyt cannot be called as witnesses because they were not  
11 disclosed by Respondents in RESPONDENTS' INITIAL DISCLOSURES  
12 or before the close of discovery. A true and correct copy of  
13 RESPONDENTS' INITIAL DISCLOSURES is marked at Exhibit K at  
14 Docket 31.

---

<sup>36</sup> Complainants note that Respondents' Response to CPFOF 125 states:

Respondents did not list any possible experts in their Initial Disclosures  
marked as Exh. K / CX 121 - 126.

Denied. CX 0121 – 0126.

The Parties agree that the Commission can review CX 121 - 126 to determine whether  
Mr. Sparks was timely disclosed by Respondents as an expert. He was not disclosed.

<sup>37</sup> Complainants expressly renew their objection to the admission of the testimony  
of these named individuals at pages 11 - 12 of their Reply Brief at Pleading Number 76  
as follows:

These affidavits and the testimony presented in them are untimely and  
inadmissible. Complainants are not obligated to move to strike the  
testimony of these individuals in a separate pleading; Respondents were  
obligated to move to admit their late-filed affidavits and reports in a  
separate pleading and to provide good cause for their admission by the  
Commission.

1 Complainants contend that Walt Wrede, Bryan Hawkins and Charles  
2 Sparks cannot be called as expert witnesses because they were not  
3 disclosed by Respondents in RESPONDENTS' INITIAL DISCLOSURES  
4 or before the close of discovery. A true and correct copy of  
5 RESPONDENTS' INITIAL DISCLOSURES is marked at Exhibit K at  
6 Docket 31.

7  
8 (Emphasis added). Exhibit K is at CX 121 - 126. These affidavits and the testimony  
9 presented in them are untimely and inadmissible as a matter of settled rule and law.

10 Respondents flood the file with late-filed inadmissible statements from individuals  
11 who were never timely disclosed by Respondents.<sup>38</sup> Respondents file multiple affidavits  
12 from Mr. Wrede that decree how he runs things on the docks. However, how he runs  
13 things on the docks contravenes federal law, state law, the Homer City Code, the Tariffs  
14 and the Shipping Act of 1984 as amended. The Commission should note that Mr.  
15 Wrede was not appointed the City Manager until 2003. In the RPFOF, Mr. Wrede's  
16 allegations about events that occurred before he took control or that he cannot testify to  
17 because he lacks first-hand knowledge are inadmissible.

18 Respondents rely on affidavits, most from undisclosed witnesses, first provided  
19 on the last day set for discovery on October 9, 2012 and waited until nine months after  
20 the filing of the initial Complaint, namely on January 2 and 3, 2013, to begin making  
21 their defense somewhat clearer. Icicle Seafoods produced Mr. Kenneth Hoyt with Icicle  
22 Seafoods as its Federal Civil Rule 30(b)(6) representative for deposition on September  
23 19, 2102.<sup>39</sup> Without notice, however, Respondents also filed multiple affidavits for a Mr.

---

<sup>38</sup> Complainants' concern with these late-filed allegations is grounded in fundamental due process considerations and "fundamental fairness" which derive from the Due Process Clauses of the United States Constitution. Complainants were obligated to and did make their case on December 4, 2012.

<sup>39</sup> Complainants withdrew their objection to the admission of Mr. Kenneth Hoyt's testimony, the individual produced in response to the Rule 30(b)(6) sub poena.

1 John Woodruff with Icicle Seafoods, although Respondents failed to disclose him as a  
2 possible witness. CX 121 - 126. Mr. John Woodruff did not respond to the Rule  
3 30(b)(6) deposition notice and sub poena.<sup>40</sup> In addition, the first affidavit from Mr.  
4 Woodruff filed by Respondents is dated October 9, 2012, the day discovery closed, and  
5 another one is subsequent to that date. The Commission should disregard his  
6 testimony at RX 1105 – 1124 except the admissions against interest.

7 The consequences are a matter of settled law. Because Respondents failed to  
8 disclose these names, the Commission should refuse to receive testimony from the  
9 persons whose names were not disclosed pursuant to the “automatic” and “self-  
10 executing” exclusion provisions of Federal Civil Rule 37(c)(1).<sup>41</sup> See Commission Rule  
11 § 502.12. The individuals who were not timely disclosed are precluded from providing  
12 testimony. Evans v. Port Authority of New York and New Jersey, 201 F.R.D. 96  
13 (S.D.N.Y. 2001). In addition, the untimely expert reports submitted by Mr. Sparks at RX

---

<sup>40</sup> Complainants previously objected to the admission of Mr. John Woodruff's testimony. In his first tardy affidavit, Respondents have Mr. Woodruff attempting to authenticate a letter purportedly from Mr. Kenneth Hoyt and another letter purportedly from Mr. Dennis Guhlke. RX 1106 at paragraphs 6 and 11, respectively. Complainants continue to reserve their objections to Mr. Woodruff's testimony in general and to his inability to authenticate such documents in particular.

<sup>41</sup> Rule 37(c)(1) of the Federal Rules of Civil Procedure states in pertinent part:

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), **the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.**

(Emphasis added).

1 1263 – 1309 who was not timely disclosed are subject to automatic and mandatory  
2 exclusion unless the delayed disclosure is substantially justified by Respondents or is  
3 harmless. Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 869 (7th Cir. 2005),  
4 cert. denied, 546 U.S. 1033 (2005). Complainants are not obligated to move to strike  
5 the testimony of these individuals in a separate pleading; Respondents were obligated  
6 to and did not move to admit their late-filed affidavits and reports in a separate pleading  
7 and to provide good cause for their admission by the Commission.

8 Except for the admissions against interest, the allegations in the “January 2,  
9 2013 Affidavit of Bryan Hawkins Re: Respondents’ Brief” at RX 1224 – 1230 and in the  
10 “January 2, 2013 Affidavit of Walt Wrede Re: Respondents’ Brief” at RX 1231 – 1262  
11 and in the “Affidavit of H. Charles Sparks Regarding Respondents’ Brief” dated January  
12 3, 2012 at RX 1263 – 1269 that was not disclosed previously should be stricken by the  
13 Commission. In addition, Mr. Sparks’ untimely reports at RX 1263 – 1309 should be  
14 stricken.

15 **2. C. The ALJ erred in not striking self-serving litigation-related**  
16 **expressions of prior subjective intent or understanding and parol**  
17 **evidence by certain witnesses as not “relevant, material, reliable and**  
18 **probative” as required by Commission Rule § 502.156 because such**  
19 **statements are not considered probative of parties’ reasonable**  
20 **expectations at the time when the Respondents entered into the**  
21 **written agreements.**

22  
23 Respondents’ defense is built on the statements in the multiple untimely affidavits  
24 of Mr. Walt Wrede, the City Manager of Homer; of Mr. Bryan Hawkins, the Homer  
25 Harbormaster; and the tardy and inadmissible statements of Mr. John Woodruff with  
26 Icicle, that contradict clear written contemporaneous documents, statements and  
27 actions including the express written provisions in the Tariffs.

1 Alaska state law governs the interpretation of contracts and agreements between  
2 and among the Parties including the scope of the Tariffs and the admission of parol  
3 evidence to vary the clear written terms.<sup>42</sup> In Western Pioneer, Inc. v. Harbor  
4 Enterprises, Inc., 818 P.2d 654 (Alaska 1991), the Alaska Supreme Court held that the  
5 terms of the written contract govern the interpretation of the contract and are binding on  
6 parties to the contract. The Supreme Court states in pertinent part:

7 The superior court found this evidence to be conflicting and  
8 proceeded to interpret the lease in light of the parol evidence rule as set  
9 forth in Lower Kuskokwim. The court ruled that the testimony of Lindsey  
10 and Woods supported Harbor Enterprises' contention that its obligation  
11 under Section 3.1 for City Dock fuel sales was conditioned on it  
12 constructing the Harbor-City Dock Pipeline, while Jensen's affidavit  
13 indicated that Section 3.1 was intended to include all City Dock fuel sales  
14 regardless of how the fuel reached the dock.

15 In our opinion, Lindsey's testimony reflects only a restatement of  
16 his position in this litigation to which little, if any, weight should be given.  
17 Extrinsic evidence of parties' subjective intent, expressed during the  
18 course of litigation, does not establish an issue of fact regarding the  
19 parties' reasonable expectations.

20 Id. at 657 (Citations omitted; emphasis added).<sup>43</sup> Extrinsic evidence of Respondents'  
21 and of Icicle Seafoods' subjective intent, expressed during the course of litigation, does

---

<sup>42</sup> The Commission often applies state law. In R.O. White & Co. and Ceres Marine v. Port of Miami Terminal Operating Co, 31 SRR 783, 806 at n. 31 (ALJ 2009), the Initial Decision notes:

While the status of the POMTOC members as MTOs must be determined according to federal law, the Florida statute provides an indication of the intentions of the members and the manner in which POMTOC was designed to operate.

<sup>43</sup> In a recent case, In re Estate of Fields, 219 P.3d 995, 1012 at n. 57 (Alaska 2009), the Alaska Supreme Court restates and reaffirms this rule:

The evidence they apparently wished to present was live, but duplicative, testimony about their alleged prior subjective understandings. We have noted in another context that self-serving litigation-related

1 not repudiate the clear written provisions. Clear agreements should not be amended,  
2 supplemented or repudiated by self-serving litigation-related parol evidence.

3 **2. D. The ALJ erred in granting Respondents' Motion To Strike And**  
4 **For Sanctions. The Commission should admit the information set**  
5 **forth on pages 5 – 7 of Complainants' Reply Brief stating the taxes**  
6 **paid by Complainants.**

7  
8 For the reasons stated in the Affidavit of Steven J. Shamburek at CX 297 – 298  
9 and the supporting authenticated documents at CX 288 – 296 and the discussion in the  
10 Response Brief, the information set forth on pages 5 – 7 of Complainants' Reply Brief  
11 stating the taxes paid by Complainants should be considered by the Commission.

#### 12 **IV Conclusion**

13 For the reasons discussed above, Complainants move the Commission to  
14 confirm its subject matter jurisdiction because: (1) Respondents provide terminal  
15 services, (2) that services are provided to common carriers, and (3) that the charge at  
16 issue is related to handling cargo. Complainants also seek entry of an Order adopting  
17 the admission of CPFOF 1 – 109 as facts as a matter of law; striking the untimely  
18 testimony of Messrs. Woodruff and Sparks; limiting the untimely and unfounded  
19 testimony of Messrs. Wrede and Hawkins; admitting the tax information; and remanding  
20 this matter for further proceedings.

21

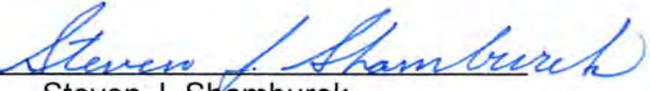
---

expressions of prior subjective intent or understanding are generally not considered probative of parties' reasonable expectations when they entered into a contract; the court must look to express manifestations of each party's understanding.

(Citation omitted; emphasis added). Respondents flooded the record with untimely affidavits from undisclosed individuals.

1 DATED this 21st day of June, 2013.

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

4  
5  
6 By:   
7 Steven J. Shamburek  
8 ABA No. 8606063  
9 425 G Street, Suite 610  
10 Anchorage, Alaska 99501  
11 Telephone: (907) 522-5339  
12 [shamburek@gci.net](mailto:shamburek@gci.net)  
13 [shambureklaw@gci.net](mailto:shambureklaw@gci.net)  
14 [shamburekbank@gci.net](mailto:shamburekbank@gci.net)  
15

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](mailto:tklinkner@bhb.com)  
21 and also a copy to Holly C. Wells at [hwells@bhb.com](mailto:hwells@bhb.com).

22 Dated this 21st day of June, 2013.

23  
24 By:   
25 Steven J. Shamburek  
26  
27