

S E R V E D
December 4, 2015
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET NO. 14-06

**SANTA FE DISCOUNT CRUISE PARKING, INC., d/b/a EZ CRUISE PARKING;
LIGHTHOUSE PARKING INC.; and
SYLVIA ROBLEDO d/b/a 81st DOLPHIN PARKING**

v.

**THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES; and
THE GALVESTON PORT FACILITIES CORPORATION**

INITIAL DECISION¹

I. INTRODUCTION AND SUMMARY OF DECISION.

Respondents the Board of Trustees of the Galveston Wharves (Board) and the Galveston Port Facilities Corporation (GPFC) (collectively referred to as Respondents or the Port) own and operate the Texas Cruise Ship Terminal at Piers 25 and 27 (cruise terminal) and Terminal parking lots in Galveston, Texas. The cruise terminal is a marine terminal and Respondents are marine terminal operators within the meaning of the Shipping Act of 1984 (Shipping Act or Act). Respondents opened the cruise terminal in 2000. Common carriers such as Royal Caribbean Cruise Lines and Celebrity Cruise Lines call on the cruise terminal.

Complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking (EZ Cruise), Lighthouse Parking, Inc. (Lighthouse), and Sylvia Robledo d/b/a 81st Dolphin Parking (Dolphin) (collectively Complainants) are private companies that own and/or operate parking lots outside the cruise terminal. Each Complainant operates a parking lot located within a few blocks of the cruise terminal. Complainants focus their businesses on providing cruise passengers with convenient and

¹ The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

secure parking lot storage for their vehicles while the passengers are on cruises. Each Complainant operates shuttles to transport customers with their luggage directly to and from the cruise terminal, allowing them to stay with their luggage, keep their families together, and avoid traffic at the port facility entrance otherwise associated with unloading baggage from their cars prior to parking. ALJFF 1-11.²

In January 2005, the Port began enforcing an access fee imposed by its tariff on commercial passenger vehicles, including Complainants' shuttles, for each trip to the cruise terminal. EZ Cruise objected that the access fee imposed on each trip was too high, a position in which Dolphin and Lighthouse joined. The Port continued to charge access fees for each trip, but Complainants did not pay any access fees while Complainants and the Port negotiated this issue.

In the summer of 2006, Complainants and the Port agreed that the Port would change its tariff to provide for a flat monthly access fee calculated at the rate of \$8.00 per parking space maintained by the off-port parking user per month. Payment of the flat rate would entitle an off-port parking user to unlimited access to the cruise terminal for its shuttles. The Port amended the tariff to add the flat rate and agreed to apply the flat rate retroactively to access fees owed by Complainants beginning January 2005, significantly reducing Complainants' accumulated but unpaid access fees. The Port continued to impose access fees on other commercial passenger vehicles accessing the cruise terminal at the per trip rate.

In June 2014, Complainants commenced this proceeding alleging that the Port violated the Shipping Act of 1984 (Shipping Act or Act), 46 U.S.C. §§ 40101-41309, by charging Complainants at the \$8.00 flat rate while continuing to charge access fees for other commercial passenger vehicles at the per trip rate, thereby allegedly giving an undue or unreasonable preference or advantage to the other users and/or imposing an undue or unreasonable prejudice or disadvantage with respect to Complainants in violation of section 41106(2). I conclude that Complainants have not proved by a preponderance of the evidence that the Port violated section 41106(2). Assuming the Port violated section 41106(2), I conclude that Complainants have not proved by a preponderance of the evidence that they suffered actual injury from the violation. Therefore, Complainants' Complaint is dismissed with prejudice.

II. FACTUAL BACKGROUND.

On October 27, 2003, the Port issued Tariff Circular No. 6, Naming Rules and Regulations Governing Dockage, Shed Hire, and Other Services and Charges Applying at the Facilities of the Galveston Wharves. ALJFF 14. The 2003 Tariff Circular No. 6 defines "commercial passenger vehicle" as:

[A] motor vehicle while it is used, or offered (orally or in a writing or sign) to be used, to transport one or more people, on land, either:

² ALJFF followed by a number or numbers refers to findings of fact set forth in this decision.

- (A) in exchange for a fare, charge, or other thing of value (paid, demanded, or expected for the transportation service, in whole or in part, directly or indirectly, by the person transported or by another person, or otherwise); or
- (B) in connection with the operations of a commercial business entity, regardless of whether a fare, charge, or other thing of value is paid, demanded or expected for the transportation service.

It shall be a presumption that a motor vehicle bearing the name, trade name, common name, emblem, trademark or other identification of a commercial business entity and being used to transport a passenger is a commercial passenger vehicle.

ALJFF 15. The definition of commercial passenger vehicle was amended on December 17, 2007, by changing the opening clause to read “a motor vehicle not otherwise defined in this Tariff while it is used, or offered (orally or in a writing or sign) to be used, to transport one or more people, on land, either,” ALJFF 16, but has not changed since then. ALJFF 17. Complainants operate commercial passenger vehicle. ALJFF 18.

Tariff Circular No. 6 defines “ground transportation company.”

GROUND TRANSPORTATION COMPANY means any Person (other than the Galveston Wharves of any person or entity under contract to provide transportation services for the Galveston Wharves) owning or operating the following types of vehicles as defined in this section: commercial passenger vehicle, bus, bus service, charter bus, courtesy vehicle, shuttle, limousine, taxi or taxicab service.

ALJFF 19. This definition has not changed. Complainants are ground transportation companies. ALJFF 20-21.

The tariff also defines “off-port parking user.”

OFF-PORT PARKING USER means a commercial business entity which provides or arranges for one or more commercial passenger vehicles, buses or shuttles, however owned or operated, to pick up or drop off passengers within a terminal complex of the Galveston Wharves in connection with the operations of a business of the user involving the parking of motor vehicles of any type at a facility located outside of the boundaries of property owned, operated or controlled by the Galveston Wharves.

ALJFF 21. In 2006, the Port amended this definition by inserting the phrase “courtesy vehicles” between “commercial passenger vehicles” and “buses or shuttles,” ALJFF 23, but has not changed since then. ALJFF 24. Complainants are off-port parking users. ALJFF 25.

The 2003 Tariff Circular No. 6 required ground transportation companies to obtain a port use permit by paying an initial licensing fee of \$250.00 and an annual renewal fee of \$50.00 in order to conduct activities on or in connection with the cruise terminal. ALJFF 26. It imposed an access fee on vehicles for each entry onto port property.

Note C In addition to the annual Port Use Permit fee, ground transportation companies . . . accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27 (Cruise Ship Terminal Complex), shall be subject to the following decal or access fees for each vehicle that shall have such access:

Type of Vehicle	Decal and access charge
Bus, Charter Bus, Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle or Bus and Shuttle or Bus [sic]	\$10.00 per Access/Trip
Limousines	\$10.00 per decal per vehicle, annually
Taxi and Taxicab	\$7.50 per decal per vehicle, annually

ALJFF 29. The Port did not order collection of the access fees to begin until September 1, 2004, when the Board instructed port staff to fully implement the tariff and begin invoicing port users for the access fee effective January 1, 2005. ALJFF 30. On May 20, 2005, the Port sent notice to port users and included the first invoices for fees that users had incurred since January 1, 2005. ALJFF 31.

Complainant EZ Cruise did not pay the fee. ALJFF 32. On October 15, 2005, EZ Cruise wrote a letter to the Port claiming that the \$10.00 fee for each trip³ was “too high and would greatly affect our ability to provide a quality service to the thousands of customers who come to Galveston each year to experience a cruise” EZ Cruise asked the Port not to charge Complainants on the basis of \$10.00 per trip, but to charge them a flat monthly fee that would permit them unlimited access. EZ Cruise proposed:

[A] flat rate of \$1,000.00 per month for all shuttles used by EZ Cruise Parking, beginning January 2005. The flat fee is much easier for a start-up company, such as ours to budget and reflect expenses for reports at our monthly shareholder meetings. Billing 6 or 7 months at a time is extremely burdensome to a small, start-up company.

ALJFF 37.

³ Tariff Circular No. 6 uses the term “access/trip” for entry by a vehicle on the port. I shorten that to trip in this decision.

Complainants and the Port entered into negotiations to resolve the access fees owed by Complainants and to discuss changing the tariff. By the middle of 2006, EZ Cruise had not paid the Port for access fees charged from January 2005 to June 2006, Lighthouse had not paid for access from January 2006 when it began operations to June 2006, and Dolphin had not paid for access from July 2005 when it began operations to June 2006. ALJFF 32-35. As part of the negotiations, on June 14, 2006, EZ Cruise proposed a payment of \$20,000.00 to satisfy all outstanding port access fees for EZ Cruise and for Galveston Limousine Service (not a party in this proceeding) for trips on which Galveston Limousine transported passengers for EZ Cruise for the period January 2005 to March 2006. ALJFF 38. On July 20, 2006, the Port responded, stating that it disagreed with EZ Cruise's characterization of the negotiations, but proposed a flat monthly access fee of \$2,500.00. EZ Cruise responded with a proposal for future access with a flat monthly fee of \$1,200.00. ALJFF 39-42.

The Port and Complainants eventually agreed to reduce Complainants' future access fees by adding Note D to Tariff Circular No. 6. Note D provides that in lieu of the \$10.00 per trip access fee, parking lot operators pay a flat access fee of \$8.00 per month for each parking space in Complainants' lots. This payment would permit unlimited access to the cruise terminal for Complainants' shuttles, meaning that Complainants would not pay increased fees for sending partially loaded shuttles to the cruise terminal instead of full shuttles. ALJFF 42-43. On August 28, 2006, the Port amended Tariff Circular No. 6 to revise the access fee to be paid by off-site parking users.

Note D: Those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, as of August 15, 2006 shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of \$8.00 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. The \$8.00 Access Fee will be effective on and after August 15, 2006.

ALJFF 44. At times in this decision, the Note D provision is called the \$8.00 flat rate or the flat rate. The August 28, 2006, amendment did not change the access fees imposed on commercial passenger vehicles by Note C. ALJFF 45.

Complainants and the Port also agreed to apply the \$8.00 flat rate retroactively to January 2005 to recalculate access fees for Complainants that had been incurred at the per trip rate, but that Complainants had not paid. ALJFF 46. The Port had invoiced EZ Cruise a total of \$87,930.00 for access to the port between January 2005 and June 2006. As a result of the application of the \$8.00 flat rate, EZ Cruise paid \$35,680.00 for access between January 2005 and June 2006, saving \$52,250.00. The Port had invoiced Lighthouse a total of \$14,230.00 for access to the port between

January 2005 and June 2006. As a result of the application of the flat rate, Lighthouse paid \$9,120.00 for access between January 2005 and June 2006, saving \$5,110.00. The Port had invoiced Dolphin a total of \$25,430.00 for access to the port between January 2005 and June 2006. As a result of the application of the flat rate, Dolphin paid \$11,520.00 for access between January 2005 and June 2006, saving \$13,910.00. ALJFF 47-49.

The Port amended some provisions of Tariff Circular No. 6 in 2007, ALJFF 51-54, but did not change the \$8.00 flat rate until shortly before Complainants commenced this proceeding. From 2006 to the date Complainants initiated this proceeding, the Port calculated access fees for Complainants at the \$8.00 flat rate while it continued to calculate access fees for all other commercial passenger vehicles at the per trip rate as set forth in Note C. ALJFF 81. At the request of Complainants and when appropriate, the Port adjusted the number of parking spaces used to calculate Complainants' access fees resulting in a decrease or increase in the monthly fee. ALJFF 55-58. Complainants did not object to using the \$8.00 flat rate to calculate their access fees until shortly before they commenced this proceeding. ALJFF 59.

In the action that precipitated this proceeding, on May 19, 2014, the Port again amended Tariff Circular No. 6. The amended tariff, effective July 1, 2014, adjusted the decal and per trip access fees imposed on commercial passenger vehicles by Note C of the tariff. ALJFF 65, 67. The Port also significantly increased the flat rate to \$28.88 per parking space used to calculate Complainants' fees for unlimited access to the cruise terminal.

Those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, as of August 15, 2006 shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of \$28.88 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. The Access Fee will be effective on and after July 1, 2014.

ALJFF 66.

On June 16, 2014, Complainants initiated this proceeding by filing a Complaint alleging that the Port violated the Shipping Act when it calculated Complainants' access fees at the \$8.00 flat rate while calculating access fees for other ground transportation companies at the per trip rate, or, in the case of taxicabs, not charging an access fee. ALJFF 68. Complainants also filed a complaint in the United States District Court for the Southern District of Texas seeking declaratory and injunctive relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and a preliminary injunction pursuant to the Shipping Act that would bar the Port from enforcing the amended tariff. See 46 U.S.C. § 41306(a) ("After filing a complaint with the Federal Maritime Commission under section 41301 of this title, the complainant may bring a civil action in a district court of the United States to enjoin conduct in violation of this part."). On August 5, 2014, the district court entered an

agreed order permitting Complainants herein to deposit accruing monthly access fees in excess of \$8.00 per parking space per month into the court registry. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, C.A. No. 3:14-cv-00206 (S.D. Tex. Aug. 5, 2014) (Agreed Interim Order). ALJFF 69-70.

On September 22, 2014, the Port again amended the tariff. ALJFF 71. Fees for charter bus owners and operators, commercial passenger vehicles, courtesy vehicles, shuttles, limousines, and taxicabs were not changed from the May 22, 2014, tariff. ALJFF 72. The amended tariff reverted to the rate of \$8.00 per parking space per month for unlimited access for off-port parking users prior to October 1, 2014, and rescinded the provision that determined the monthly access fee for off-port parking users as a multiple of the number of parking spaces for access after October 1, 2014.

Note D: Prior to October 1, 2014, those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of \$8.00 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. In addition, Off-Port Parking Users shall pay a decal fee of \$15.00 per decal per vehicle annually. This Access Fee and decal fee will be effective until October 1, 2014.

Beginning on October 1, 2014, all Off-Port Parking Users, as defined herein, shall be governed by the Provision of Note C above.

ALJFF 73. The Port assessed Complainants' access fees at the \$8.00 flat rate for July-September 2104. ALJFF 74. After October 1, 2014, the Port returned calculating Complainants's access fees using the per trip rate as it had prior to the August 28, 2006, amendment. ALJFF 75-79.

III. COMPLAINANTS' FMC COMPLAINT AND PROCEDURAL BACKGROUND.

On June 16, 2014, Complainants filed a Complaint alleging that by imposing access fees on them at the rate of \$8.00 per parking space per month while at the same time charging other commercial passenger vehicles for each trip, the Port violated three sections of the Act.

"A . . . marine terminal operator . . . may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

“A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or (3) unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41106.

On October 21, 2014, the Port filed a motion to dismiss the Complaint. Also on October 21, 2014, the Secretary received a “First Amended Verified Complaint” substantially identical to the original Complaint, but adding allegations regarding events subsequent to the filing of the original Complaint. On October 24, 2014, Complainants filed an opposed motion for leave to file the Amended Complaint. The Port filed an opposition to the motion for leave to amend.

On November 21, 2014, the Port’s motion to dismiss was granted regarding the claims of violation of sections 41102(c) and 41106(3) and denied regarding the claim of violation of section 41106(2). Leave to file the “First Amended Verified Complaint” was also granted. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, FMC No. 14-06 (ALJ Nov. 21, 2014) (Order on Pending Motions and Partial Dismissal), Notice Not to Review, Dec. 23, 2014. References to “Complaint” in this decision should be understood as reference to the Complaint as amended. The parties have engaged in discovery and filed briefs with proposed findings of fact and supporting documents. This proceeding is ripe for decision.

IV. STATUTORY FRAMEWORK AND CONTROLLING CASE LAW.

Complainants filed their Complaint pursuant to section 41301 of the Act.

A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.

46 U.S.C. § 41301(a).

The Complaint alleges that Respondents are marine terminal operators within the meaning of the Act.

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

46 U.S.C. § 40102(14).

The term “common carrier” – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for

the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6). A cruise ship is a common carrier within the meaning of the Act. *Lisa Anne Cornell and G. Ware Cornell, Jr. v. Princess Cruise Lines, Ltd. (Corp), Carnival plc, and Carnival Corporation*, 33 S.R.R. 614, 620 (FMC 2014), *pet. for rev. den. sub nom. Cornell v. FMC*, No. 14-1208 (D.C. Cir. Dec. 2, 2015).

As part of its tariff, the Port imposes an access fee on commercial vehicles transporting passengers to the cruise terminal, including Complainants. Complainants allege that because the Port calculated the access fee on Complainants at the \$8.00 flat rate while it calculated access fees for other commercial passenger vehicles at the per trip rate, the Port violated section 41106(2) of the Act: “A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.” 46 U.S.C. § 41106. Complainants are persons within the meaning of the Act. *See* 1 U.S.C. § 1 (“In determining the meaning of any Act of Congress, unless the context indicates otherwise – . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”). The Complaint alleges that the Port’s tariff affecting passenger access to the cruise terminal violates the Shipping Act. Therefore, the Commission has jurisdiction over this proceeding because its allegations “involve elements peculiar to the Shipping Act.” *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000).

Complainants place primary reliance on the Commission’s decision in *Ceres Marine Terminal, Inc. v. Maryland Port Administration (Ceres I)*, 27 S.R.R. 1251 (FMC 1997).

In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) the two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of the injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

Ceres I, 27 S.R.R. at 1270-1271.

[Complainants have] the burden of proving, by a preponderance of the evidence, that the Port violated the Shipping Act, and this burden of persuasion does not shift. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Revocation of Ocean Transportation Intermediary License No. 022025 Cargologic USA LLC*, Docket No. 14-01, 2014

FMC LEXIS 18, at *8 (FMC Aug. 28, 2014); *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, 32 S.R.R. 763, 765 (FMC 2012).

The burden of *production*, however, shifts in two relevant respects. . . . [W]ith respect to [a respondent's] unreasonable preference or prejudice claim, the "complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors." *Ceres I*, 27 S.R.R. 1251, 1270-71. . . . [I]t is the burden of production that shifts, not the burden of persuasion, meaning that although the Port may in some circumstances bear the burden of adducing evidence justifying its conduct, [Complainant] bears the ultimate burden of proving that the Port acted unreasonably. [*Maier v. PANYNJ*, 33 S.R.R. 349, 376 (ALJ 2014)] (citing *Maier v. PANYNJ*, 32 S.R.R. 1185, 1193 (FMC 2013)); *West Gulf Maritime Assoc. v. Port of Houston*, 18 S.R.R. 783, 791 (FMC 1978) (noting that "the burden of establishing the unreasonableness of a practice is squarely upon [the complainant]"); see also 5 U.S.C. § 556(d) (stating that "the proponent of a rule or order has the burden of proof"); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994) (holding that "the APA's unadorned reference to 'burden of proof'" refers to the burden of persuasion).

Maier Terminals, Inc. v. The Port Authority of New York and New Jersey, 33 S.R.R. 821, 840-841 (FMC 2014) (*Maier v. PANYNJ*) (emphasis in original).

The Act provides: "A person may file with the . . . Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a). Until December 18, 2014, the Act defined actual injury as follows:

(a) *Definition*. – In this section, the term "actual injury" includes the loss of interest at commercial rates compounded from the date of injury.

(b) *Basic amount*. – If the complaint was filed within the [three-year] period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305. On December 18, 2014, the Act was amended by deleting the phrase "plus reasonable attorney fees" from section 41305(b) and adding a new section 41305(e): "*Attorney Fees*. – In any action brought under section 41301, the *prevailing party* may be awarded reasonable attorney fees." Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, § 402, 128 Stat. 3022, 3056 (Dec. 18, 2014) (Coble Act) (emphasis added). This amendment did not change the definition of "actual injury." The Complaint alleges that

Complainants have been injured by the Port's alleged violations of the Act and seeks reparation awards for Complainants' claimed actual injuries.

V. ABANDONED CLAIMS.

The Complaint alleges:

[T]here are two other private parking lots . . . , Galveston Park and Cruise and V.I.P. Parking, which have an estimated 280 parking spaces and pay nothing – *zero* – to the Port of Galveston in the form of Access Fees, because passengers are allowed to walk with their luggage across Harborside Drive through the 25th Street gate into the Cruise Terminal.

(Complaint ¶ IV.Y (emphasis in original). *See also* Complaint ¶ IV.EE.) Complainants do not address this claim in their briefs on the merits. Therefore, it is deemed abandoned. *See, e.g., Palmer v. Marion County*, 327 F.3d 588, 597-598 (7th Cir. 1999) (finding that a plaintiff had abandoned a claim he made in his complaint when the plaintiff failed to address the claim either in his opposition to summary judgment or in his brief to the court). I note that Complainants now complain that charging them on a per parking space rate in lieu of the Access/Trip fee violates the Act. Complainants do not cite to any authority that would permit the Port to impose a tariff on an off-site parking lot that does not itself access the cruise terminal because the parking lot's customers walk onto the Port to take cruises.

The Complaint alleges that the Port operates its own parking lots and that the shuttles carrying passengers from the Port's lots to the cruise terminal are permitted to enter the port through the back gate at the intersection of 33rd Street and Old Port Industrial Road, while Complainants' shuttles are not permitted to use this gate. (Complaint ¶¶ IV.C-D; Complaint ¶ V.G.5.) Complainants do not address this claim in their briefs on the merits. Therefore, it is also deemed abandoned. *Palmer v. Marion County*, 327 F.3d at 597-598.

VI. EVIDENCE CONSIDERED AND FINDINGS OF FACT.

A. Evidence.

The parties submitted appendices with several thousand pages of documents. The Port objects to admission of a Certification Summary (Comp. App. 044 at 768),⁴ a Summary of Access

⁴ Pages in the appendix are numbered sequentially beginning with page 1. Complainants and the Port submitted electronic copies of their appendices. "Comp. App. [document number]" or "Port App. [document number]" refers to an electronic folder in the electronic copy of Complainants' Appendix or the Port Appendix. For example, the citation to Port App. 001 at 1-73 refers to sequential page numbers 1-73 found in the Port's electronic folder 001. Page numbering for Port App. 002 begins at 74.

Fees (Comp. App. 045 at 769-770), and transcriptions from audio records of hearings prepared by a legal assistant to Complainant's counsel (Comp. App. 019 at 418-433; 030 at 534-547). (Port Resp. to Comp. Prop. FF at 1-2.) The parties object to other exhibits in their responses to proposed findings of fact. All objections to admissibility of the exhibits are overruled, but the arguments against admission are considered regarding the weight to be given to an exhibit. All proffered evidence is admitted.

B. Findings of Fact.⁵

The parties submitted proposed findings of fact. This initial decision addresses only material issues of fact and law. It is not necessary to resolve disagreements on matters not material to the outcome of this proceeding. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-194 (1959); *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983).

1. Respondents the Board of Trustees of the Galveston Wharves (the Board) and the Galveston Port Facilities Corporation (GPFC) (collectively referred to as the Port) operate a cruise ship terminal complex (cruise terminal) on Galveston Island, Galveston, TX, that consists of two terminals. (Comp. Resp. to Port Prop. FF 21.)
2. The Port is a marine terminal operator within the meaning of 46 U.S.C. § 40102(14).
3. The cruise ships that call on the cruise terminal are common carriers within the meaning of 46 U.S.C. § 40102(6).

⁵ To the extent any finding of fact may be deemed a conclusion of law, it should be considered a conclusion of law. The findings of fact are based on and cite to the following documents:

- Complainants' Amended Complaint – cite to Amended Complaint at paragraph (Complaint ¶)
- Port's Answer – cite to Answer at paragraph (Answer ¶)
- Complainants' Appendix – cite to the PDF version of Complainants' appendix by document number (001 through 124) at appendix page number (*e.g.*, Comp. App. 026 at 510-511)
- Complainants' Proposed Findings of Fact – cite to the Port's Corrected Response and Opposition to Complainants' Proposed Findings of Fact as it sets forth each proposed finding followed by Respondents' response (*e.g.*, Port Resp. to Comp. Prop. FF 2-3)
- Port's Appendix – cite to the PDF version of Respondents' appendix by document number (001 through 104) at appendix page number (*e.g.*, Port App. 001 at 19)
- Port's Proposed Finding of Fact – cite to Complainants' Objections and Responses to Respondents' Proposed Findings of Fact as it sets forth each proposed finding followed by Complainants' response (*e.g.*, Comp. Resp. to Port Prop. FF 1-2)

4. The Board manages the Galveston Wharves, a separate utility created by the City of Galveston. (Comp. Resp. Port Prop. FF 1-2.)
5. The Board established and revises the port's tariff. (Port App. 001 at 1; Port App. 002 at 74; Port App. 003 at 149; Port App. 005 at 304; Port App. 006 at 387.)
6. The Board created GPFC to facilitate the financing, construction, and operation of the Galveston Island Cruise Terminals and is entitled to any income generated by GPFC that is not needed to pay GPFC's expenses or obligations. (Comp. Resp. Port Prop. FF 8-9.)
7. GPFC has never billed or collected Access Fees from Complainants. (Comp. Resp. to Port Prop. FF 12.)
8. Lease agreements between the Wharves Board (as lessor) and GPFC (as lessee) deny GPFC the right to assess and collect fees published in the Tariff for "commodities moving over, or vessels berthing at the Leased Premises" (Comp. Resp. to Port Prop. FF 11.)
9. Complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking (EZ Cruise), Lighthouse Parking, Inc. (Lighthouse), and Sylvia Robledo d/b/a 81st Dolphin Parking (Dolphin) (collectively Complainants) are private companies that own and/or operate parking lots located outside the port within a few blocks of the cruise terminal. (Port Resp. to Comp. Prop. FF 2-3 (EZ Cruise); FF 10-11 (Lighthouse); FF 18, 20 (Dolphin).)
10. Complainants are in the business of providing parking for passengers who embark on cruises from the cruise terminal. They focus their businesses on providing cruise passengers with convenient and secure parking lot storage for their vehicles while they are on cruises. Virtually all of Complainants' customers are cruise passengers seeking to park their vehicles for the duration of their cruises. (Comp. Resp. to Port Prop. FF 55.)
11. Each Complainant operates shuttles to transport customers with their luggage directly to and from the cruise terminal, allowing the customers to stay with their luggage, keep their families together, and avoid traffic at the port facility entrance otherwise associated with unloading baggage from their cars prior to parking. (Port Resp. to Comp. Prop. FF 2-3 (EZ Cruise); FF 10-11 (Lighthouse); FF 18, 20 (Dolphin).)
12. Many hotels in and near Galveston offer parking to cruise passengers who stay overnight at the hotel and embark on cruises from the cruise terminal. The terms of parking at hotels vary with the hotel: (1) free parking and free round-trip shuttle to the cruise terminal; (2) free parking without a shuttle to the cruise terminal; (3) free parking and paid round-trip shuttle to the cruise terminal; (4) paid parking and free round-trip shuttle to the cruise terminal; and (5) paid parking and paid round-trip shuttle to the cruise terminal. (Comp. App. 026 at 510-511.)

13. On June 24, 2002, the Port promulgated, but did not enforce, a tariff that included port access fees assessed on commercial passenger vehicles. (Port App. 050 at 1758.)
14. On October 27, 2003, the Port issued Tariff Circular No. 6, Naming Rules and Regulations Governing Dockage, Shed Hire, and Other Services and Charges Applying at the Facilities of the Galveston Wharves. (Port App. 001 at 1; Port App. 050 at 1758.)
15. The 2003 Tariff Circular No. 6 defines “commercial passenger vehicle” as:

[A] motor vehicle while it is used, or offered (orally or in a writing or sign) to be used, to transport one or more people, on land, either:

- (A) in exchange for a fare, charge, or other thing of value (paid, demanded, or expected for the transportation service, in whole or in part, directly or indirectly, by the person transported or by another person, or otherwise); or
- (B) in connection with the operations of a commercial business entity, regardless of whether a fare, charge, or other thing of value is paid, demanded or expected for the transportation service.

It shall be a presumption that a motor vehicle bearing the name, trade name, common name, emblem, trademark or other identification of a commercial business entity and being used to transport a passenger is a commercial passenger vehicle.

(Port App. 001 at 18-19.)

16. The definition of commercial passenger vehicle in Tariff Circular No. 6 was amended on December 17, 2007, by changing the opening clause to read “a motor vehicle not otherwise defined in this Tariff while it is used, or offered (orally or in a writing or sign) to be used, to transport one or more people, on land, either.” (Port App. 003 at 169.)
17. The definition of commercial passenger vehicle in Tariff Circular No. 6 has not changed since December 17, 2007. (Port App. 005 at 324; Port App. 006 at 395.)
18. Complainants operate commercial passenger vehicle within the meaning of Tariff Circular No. 6.
19. The 2003 Tariff Circular No. 6 defines “ground transportation company” as “any Person (other than the Galveston Wharves or any person or entity under contract to provide transportation services for the Galveston Wharves) owning or operating the following types of vehicles as defined in this section: commercial passenger vehicle, bus, bus service, charter bus, courtesy vehicle, shuttle, limousine, taxi or taxicab service.” (Port App. 001 at 19.)
20. The definition of ground transportation company in Tariff Circular No. 6 has not changed. (Port App. 002 at 93; Port App. 003 at 170; Port App. 005 at 325; Port App. 006 at 397.)

21. Complainants are ground transportation companies within the meaning of Tariff Circular No. 6.
22. The 2003 Tariff Circular No. 6 defines “off-port parking user” as

a commercial business entity which provides or arranges for one or more commercial passenger vehicles, buses or shuttles, however owned or operated, to pick up or drop off passengers within a terminal complex of the Galveston Wharves in connection with the operations of a business of the user involving the parking of motor vehicles of any type at a facility located outside of the boundaries of property owned, operated or controlled by the Galveston Wharves.

(Port App. 001 at 20.)
23. The 2006 Tariff Circular No. 6 amended the definition of “off-port parking user” by inserting “courtesy vehicles” between “commercial passenger vehicles” and “buses or shuttles.” (Port App. 002 at 93.)
24. The definition of off-port parking user in Tariff Circular No. 6 has not changed since 2006. (Port App. 003 at 170; Port App. 005 at 325; Port App. 006 at 397.)
25. Complainants are off-port parking users within the meaning of Tariff Circular No. 6.
26. Hotels that provide parking to cruise passengers in connection with an overnight stay at the hotel and transport the passengers to the cruise terminal in commercial passenger vehicles are off-port parking users within the meaning of Tariff Circular No. 6.
27. The Port reduced, but did not impose, the access fees in June 2003. (Port App. 050 at 1758.)
28. The 2003 Tariff Circular No. 6 required ground transportation companies to obtain a port use permit by paying an initial licensing fee of \$250.00 and an annual renewal fee of \$50.00 in order to conduct activities on or in connection with the cruise terminal. (Port App. 001 at 16.)
29. The 2003 Tariff Circular No. 6 imposed an access fee on commercial passenger vehicles operated by ground transportation companies.

Note C: In addition to the annual Port Use Permit fee, ground transportation companies . . . accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27

(Cruise Ship Terminal Complex), shall be subject to the following decal or access fees for each vehicle that shall have such access:

Type of Vehicle	Decal and access charge
Bus, Charter Bus, Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle or Bus and Shuttle or Bus [<i>sic</i>]	\$10.00 per Access/Trip
Limousines	\$10.00 per decal per vehicle, annually
Taxi and Taxicab	\$7.50 per decal per vehicle, annually

(Port App. 001 at 17.)

30. The Port did not initiate collection of the access fees imposed by the tariff until September 1, 2004, when the Board of Trustees of Galveston Wharves instructed port staff to fully implement the tariff and begin invoicing port users for access fees effective January 1, 2005. (Port App. 050 at 1758; Port App. 075 at 2072; Comp. Resp. to Port FF 62.)
31. On or about May 20, 2005, the Port sent a notice to port users and included the first invoices for fees that users had incurred since January 1, 2005. (Port App. 050 at 1758; Port App. 075 at 2072.)
32. Although the Port sent invoices, EZ Cruise did not pay the Port for access fees charged from January 2005 to June 2006. (Port App. 103 at 2773.)
33. Although the Port sent invoices, Lighthouse did not pay the Port for access from January 2006, when it first accessed the port, to June 2006. (Port App. 103 at 2774.)
34. Although the Port sent invoices, Dolphin did not pay the Port for access from July 2005, when it first accessed the port, to June 2006. (Port App. 103 at 2775.)
35. Complainants and the Port entered into negotiations to resolve the access fees owed by Complainants. (Comp. Resp. to Port Prop. FF 72-73; Port App. 075 at 2072.)
36. On October 15, 2005, EZ Cruise wrote a letter to the Port contending that the \$10.00 fee for each trip was “too high and would greatly affect our ability to provide a quality service to the thousands of customers who come to Galveston each year to experience a cruise . . .” (Port App. 053 at 1773.)
37. EZ Cruise proposed that the Port adjust EZ Cruise’s current fees “to a flat rate of \$1,000.00 per month for all shuttles used by EZ Cruise Parking, beginning January 2005. The flat fee is much easier for a start-up company, such as ours to budget and reflect expenses for reports

at our monthly shareholder meetings” and would permit them unlimited access. (Port App. 053 at 1773; Port App. 075 at 2072.)

38. As part of the negotiations, on June 14, 2006,⁶ EZ Cruise proposed a payment of \$20,000.00 to satisfy all outstanding port access fees for EZ Cruise and Galveston Limousine Service, not a party in this proceeding but an entity that at the request of EZ Cruise transported some EZ Cruise customers to and from the cruise terminal, for the period January 2005 to March 2006. (Port App. 054 at 1777.)
39. EZ Cruise rejected the Port’s proposal of a flat \$2,500.00 flat monthly fee for unlimited access and offered a proposed monthly fee of \$1,200.00. (Port App. 054 at 1777.)
40. On July 20, 2006, the Port responded that the \$20,000.00 figure the parties had discussed would apply only to outstanding access fees for EZ Cruise shuttles, not for access fees for Galveston Limousines providing transportation to EZ Cruise customers in 2005 and 2006. (Port App. 054 at 1774-1775.)
41. The Port rejected the EZ Cruise revised proposal of a flat monthly fee of \$1,200.00 and stated that “the Port may be willing to consider a sliding scale that would permit a discount to those heavy users of the Port, like your business, after a certain number of trips during a month and a possible maximum cap on the monthly charge.” (Port App. 054 at 1774-1775.)
42. Complainants and the Port agreed on a flat fee of \$8.00 per month for each space in their parking lots that would allow unlimited access to the cruise terminal for Complainants’ shuttles. (Port App. 075 at 2072.)
43. It was the Port’s intention “to have the monthly charges outlined above, \$8 per month per parking spaces in the parking operators lots, incorporated into the Port’s tariff at the August 28th, 2006 regular Board meeting” (Port App. 056 at 1787.)
44. On August 28, 2006, as agreed by Complainants and the Port, the Port amended Tariff Circular No. 6 to revise the access fee to be paid by off-site parking users:

Note D: Those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, as of August 15, 2006 shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of \$8.00 per parking space located in the Off-Port Parking

⁶ The letter is dated June 14, 2005. It refers to a meeting May 25, 2006, and proposes a settlement for fees due for the period January 2005 to March 2006. Therefore, I conclude that the 2005 date is a typographical error and that EZ Cruise wrote the letter in 2006.

User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. The \$8.00 Access Fee will be effective on and after August 15, 2006.

(Port App. 002 at 90-91.)

45. The August 28, 2006, amendment did not change the access fees imposed on commercial passenger vehicles by Note C. (Port App. 002 at 90; Port App. 075 at 2073.)
46. The Port agreed to apply the \$8.00 per space per month rate retroactively to January 2005 to recalculate access fees that Complainants had incurred, but not paid. (Comp. Resp. to Port Prop. FF 81; Port App. 075 at 2072.)
47. The Port had invoiced EZ Cruise a total of \$87,930.00 for access to the port between January 2005 and June 2006. As a result of the application of the \$8.00 per space per month access provision, EZ Cruise paid \$35,680.00 for access between January 2005 and June 2006, saving \$52,250.00. (Port App. 103 at 2773; Comp. Resp. to Port Prop. FF 84.)⁷
48. The Port had invoiced Lighthouse a total of \$14,230.00 for access to the port between January 2006 and June 2006. As a result of the application of the \$8.00 per space per month access provision, Lighthouse paid \$9,120.00 for access between January 2006 and June 2006, saving \$5,110.00. (Port App. 103 at 2774; Comp. Resp. to Port Prop. FF 85.)
49. The Port had invoiced Dolphin a total of \$25,430.00 for access to the port between July 2005 and June 2006. As a result of the application of the \$8.00 per space per month access provision, Dolphin paid \$11,520.00 for access between July 2005 and June 2006, saving \$13,910.00. (Port App. 103 at 2775; Comp. Resp. to Port Prop. FF 86.)
50. On December 17, 2007, the Port amended Note C of Tariff Circular No. 6 to impose new decal and access charges.

Note C: In addition to the annual Port Use Permit fee, ground transportation companies . . . accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27 (Cruise Ship Terminal Complex), shall be subject to the following decal or access fees for each vehicle that shall have such access:

⁷ The Port proposed findings of fact regarding the amounts saved by EZ Cruise, Lighthouse, and Dolphin found in this and the next two findings of fact. Complainants denied the proposed findings on other grounds, but did not dispute the dollar amounts.

Type of Vehicle and Vehicle Seating Capacity	Decal and Access Charge
Bus, Commercial Passenger Vehicle, Courtesy Vehicle with Seating Capacity of greater than fifteen (15) persons (**Except as noted in Notes D & E, below)	\$10.00 per decal per vehicle, annually and \$50.00 per Access/Trip
Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle or Limousine with Seating Capacity of fifteen (15) persons (**Except as noted in Notes D & E, below)	\$10.00 per decal per vehicle annually and \$20.00 per Access/Trip
Commercial Passenger Vehicle, Courtesy Vehicle or Shuttle with Seating Capacity of up to fourteen (14) persons (**Except as noted in Notes D & E, below)	\$10.00 per decal per vehicle, annually and \$10.00 per Access/Trip
Limousine or Taxi and Taxicabs with Seating Capacity of nine (9) to fourteen (14) persons (**Except as noted in Notes D & E, below)	\$10.00 per decal per vehicle, annually and \$10.00 per Access/Trip
Limousine with Seating Capacity of not more than eight (8) persons	\$10.00 per decal per vehicle, annually
Taxi and Taxicabs with Seating Capacity of not more than eight (8) persons	\$7.50 per decal per vehicle, annually

(Port App. 003 at 167.)

51. The December 17, 2007, amendment did not change the \$8.00 flat rate access fee imposed on off-port parking users by Note D. (Port App. 003 at 167.)
52. The December 17, 2007, amendment added Note E imposing a parking fee of \$50.00 on charter bus owners and operators for each use of any bus parking space locate in the cruise

terminal complex in lieu of the payment of initial application and renewal fees for port use permits, decal fees and/or the access/trip fee. (Port App. 003 at 168.)

53. [Intentionally blank]
54. When the Port implemented the \$8.00 per space per month access fee, it stopped counting the trips of Complainants' shuttles because the number of trips was not needed to calculate the access fee. (Port Resp. to Comp. Prop. FF 108; Comp. App. 016 at 312.)
55. The Port adjusted the monthly access fees when Complainants reduced or increased the number of parking spaces used for cruise passenger parking. (Port App. 075 at 2073; Comp. Br. at 28-35.)
56. The Port charged EZ Cruise \$2,560.00 per month for 320 parking spaces from 2006 through April 2011, \$1,760.00 per month for 220 parking spaces from May 2011 through October 2011, \$2,560.00 per month for 320 parking spaces from November 2011 through October 2012, and \$3,040.00 for 380 parking spaces from November 2012 through June 2014. The number of parking spaces remained at 380 until June 2014, with an additional fee of \$400.00 for 50 parking spaces at Railroad Museum parking for some months. (Comp. App. 009 at 58-117; Comp. App. 009 at 118-140;⁸ Port Resp. to Comp. Prop. FF 3.)
57. The Port charged Dolphin \$960.00 per month for 120 parking spaces from 2006 through December 2008, \$400.00 per month for fifty parking spaces from September 2009 through December 2013, and \$768.00 per month for ninety-six parking spaces from January through June 2014. (Comp. App. 011 at 220-277.)⁹
58. The Port charged Lighthouse \$1,520.00 per month for 190 parking spaces from 2006 through December 2013, \$1,656.00 per month for 207 parking spaces from January through April 2014, and \$1,760.00 per month for 220 parking spaces in May and June 2014. (Comp. App. 010 at 141-219.)
59. Between August 1, 2006, and May 2014, Complainants did not formally complain to the Port regarding the practice of calculating their access fees using the \$8.00 per parking space per month formula. (Port App. 075 at 2073; Comp. Resp. to Port Prop. FF 103.)
60. On November 21, 2013, the Board considered a proposal to amend Tariff Circular No. 6 to impose new decal and access charges. (Port App. 004 at 219-303; Port App. 093 at 2702-2708.)

⁸ There are two folders named "009. . ." in Complainants' electronic appendix.

⁹ Dolphin did not operate as an off-port parking user from January through August 2009.

61. The Board voted to defer consideration of the proposed amendments. (Port App. 093 at 2708.)
62. In 2013, Port employees erroneously posted the proposal to amend Tariff Circular No. 6 that the Board deferred on November 21, 2013. (Port App. 075 at 2073-2074; Port App. 077 at 2085.)
63. The Port continued to calculate access fees for Complainants using the \$8.00 flat rate. (Comp. App. 009 at 134-140 (EZ Cruise charged \$8.00 per parking place per month for December 2013-June 2014); Comp. App. 010 at 213-219 (Lighthouse charged \$8.00 per parking place per month for December 2013-June 2014); Comp. App. 011 at 264-140 (Dolphin charged \$8.00 per parking place per month for December 2013-September 2014).)
64. On May 19, 2014, the Port amended Tariff Circular No. 6 and made the amendment effective July 1, 2014. (Port App. 005 at 322.)
65. The May 19, 2014, amendment changed the decal and access fees for ground transportation companies:

Note C: In addition to the annual Port Use Permit fee, ground transportation companies . . . accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27 (Cruise Ship Terminal Complex), shall be subject to the following decal or access fees for each vehicle that shall have such access:

Type of Vehicle and Vehicle Seating Capacity	Decal and Access Charge
Charter Bus Owners and Operators	\$60.00 Parking Fee
Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle or Limousine with Seating Capacity of fifteen (15) persons or more	\$25.00 per decal per vehicle annually and \$30.00 per Access/Trip
Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle or Limousine with Seating Capacity of less than fifteen (15) persons	\$15.00 per decal per vehicle, annually and \$20.00 per Access/Trip
Taxicabs with City of Galveston permit	\$7.50 per decal per vehicle, annually

(Port App. 005 at 322.)

66. The May 19, 2014, amendment increased the flat rate access fee for off-port parking users such as Complainants:

Note D: Those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, as of August 15, 2006 shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of \$28.88 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. The Access Fee will be effective on and after July 1, 2014.

(Port App. 005 at 322.)

67. The May 19, 2014, amendment amended Note E, effective July 1, 2014, increasing the parking fee for charter bus owners and operators. (Port App. 005 at 323.)
68. On June 16, 2014, Complainants filed their Complaint with the Commission alleging that the Port violated the Shipping Act.
69. On June 26, 2014, Complainants filed a complaint in the United States District Court for the Southern District of Texas seeking declaratory and injunctive relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and a preliminary injunction pursuant to the Shipping Act that would bar the Port from enforcing the amended tariff. *See* 46 U.S.C. § 41306(a) (“After filing a complaint with the Federal Maritime Commission under section 41301 of this title, the complainant may bring a civil action in a district court of the United States to enjoin conduct in violation of this part.”). *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, C.A. No. 3:14-cv-00206 (S.D. Tex. June 26, 2014) (complaint filed).
70. On August 5, 2014, the district court entered an agreed order permitting Complainants in this proceeding to deposit the new monthly access fee in excess of \$8.00 per parking space per month into the court registry. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, C.A. No. 3:14-cv-00206 (S.D. Tex. Aug. 5, 2014) (Agreed Interim Order).
71. On September 22, 2014, the Port amended Tariff Circular No. 6. (Port App. 006 at 387-400.)
72. The September 22, 2014, amendment did not change the fees for charter bus owners and operators, commercial passenger vehicles, courtesy vehicles, shuttles, limousines, and taxicabs imposed by Note C and Note E of the May 22, 2014, tariff. (First Amended Verified Complaint ¶¶ IV.HH-NN; Port App. 006 at 391 (Note C) and 393 (Note E).)

73. The September 22, 2014, amendment to Tariff Circular No. 6 rescinded the May 19, 2014, Note D increase of the flat rate fee to \$28.88 effective July 1, 2014, and returned to the flat rate of \$8.00 per parking space per month through September 2014; rescinded effective October 1, 2014, the provision that determined the access fee for off-port parking users as a multiple of the number of parking spaces per month; and imposed on Complainants the access fee per trip identical to that imposed for other users effective October 1, 2014.

Note. D: Prior to October 1, 2014, those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of \$8.00 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. In addition, Off-Port Parking Users shall pay a decal fee of \$15.00 per decal per vehicle annually. This Access Fee and decal fee will be effective until October 1, 2014.

Beginning on October 1, 2014, all Off-Port Parking Users, as defined herein, shall be governed by the Provision of Note C above.

(Port App. 006 at 391-393.)

74. Complainants were charged access fees at the rate of \$8.00 per space per month for the period prior to October 1, 2014. (Port App. 075 at 2075.)
75. On October 1, 2014, the \$8.00 per space per month access rate was eliminated and access fees for commercial passenger vehicles except taxicabs are assessed on a per-trip basis. (Port App. 075 at 2075.)
76. Beginning October 1, 2014, the Port calculated Complainants' access fees at the \$20.00 per trip rate. (Port App. 063 at 1923-1924 (EZ Cruise); Comp. App. 011 at 276-277 (Dolphin); Port Supp. App. filed Nov. 13, 2015 at 2787 and Port App. 064 at 1925 (Lighthouse).)
77. The Port charged EZ Cruise for 542 trips at \$20.00 per trip in October 2014 and 392 trips at \$20.00 per trip in November 2014. (Port App. 063 at 1923-1924.)
78. The Port charged Dolphin for 385 trips at \$20.00 per trip in October 2014 and for 410 trips at \$20.00 per trip in November 2014. (Comp. App. 011 at 276-277.)

79. The Port charged Lighthouse for 319 trips at \$20.00 per trip in October 2014 and for 341 trips at \$20.00 per trip in November 2014. (Port Supp. App. filed Nov. 13, 2015 at 2787; Port App. 064 at 1925.)
80. Between August 28, 2006, and October 1, 2014, Note D of Tariff Circular No. 6 did not provide a mechanism to determine “billable parking spaces” for hotels providing parking to cruise passengers with transportation to and from the cruise terminal. (Port App. 002 at 90-91; Port App. 003 at 167-168; Port App. 005 at 322; Port App. 006 at 391-393.)
81. Throughout the period from 2005 through July 31, 2014, the Port charged hotels the \$10.00 per trip access fee for hotel shuttles accessing the cruise terminal carrying embarking or debarking cruise passengers who parked their cars at the hotels during their cruises, then increased the per trip access fee to \$20.00 as established by the May 19, 2014, amendment to Tariff Circular No. 6. (*See* Comp. App. 032 at 549-571 (Holiday Inn); Comp. App. 034 at 573-650 (Moody Gardens); Comp. App. 036 at 653-661 (Comfort Inn & Suites on the Beach); Comp. App. 038 at 663-743 (The San Luis); Comp. App. 046 at 771-800 (Commodore on the Beach); Comp. App. 047 at 801-832 (Country Inn & Suites); Comp. App. 048 at 833-854 (Courtyard Marriott); Comp. App. 049 at 855-894, 049 at 896-909 (Fertitta Hospitality); Comp. App. 050 at 922-932 (Galveston Beach); Comp. App. 051 at 933-980 (Hampton Inn); Comp. App. 052 at 981-1038 (Holiday Inn); Comp. App. 053 at 1039-1100 (Holiday Inn Sunspree Resort); Comp. App. 054 at 1101-1216 (Hotel Galvez); Comp. App. 055 at 1217-1227 (Inn at the Waterpark); Comp. App. 057 at 1239-1345 (La Quinta); Comp. App. 058 at 1346-1464 (Moody Gardens); Comp. App. 059 at 1465-1581 (The San Luis); Comp. App. 060 at 1582-1687 (Tremont House); Comp. App. 061 at 1688-1693 (The Woodlands).)¹⁰
82. Cruise passengers occupy a very small percentage of the parking spaces at hotels. (Resp. to Port Prop. FF 36 (between April 2013 and April 2014, fewer than 3% of lodgers at Hilton on Galveston Seawall were cruise passengers); Resp. to Port Prop. FF 37 (Complainants have no information to admit or deny estimate of general manager of Hotel Galvez that over his six years of experience, 5% of Galvez guests use parking and shuttle service).)
83. Between 2004 and 2013, the Port experienced the following levels of cruise traffic:

Year	Cruise Ship Calls	Cruise Passengers
2004	219	434,855
2005	233	532,241

¹⁰ The May 19, 2014, amendment states it became effective July 1, 2014. A review of the hotel invoices indicates that the Port continued to charge \$10.00 per trip in July 2014 and the new rate in August. I note that some hotels have more than one group of invoices and that there appears to be at least some duplication of these exhibits. *Compare* Comp. App. 034 *with* Comp. App. 058 (Moody Gardens); Comp. App. 038 *with* Comp. App. 059 (San Luis).

2006	253	616,939
2007	207	523,303
2008	133	376,815
2009	139	394,640
2010	152	434,254
2011	152	459,448
2012	174	604,272
2013	179	604,994

(Port App. 100 at 2753.)

VII. CLAIMS AGAINST THE GALVESTON PORT FACILITIES CORPORATION ARE DISMISSED.

Complainants bring this proceeding against two Respondents: the Board and GPFC. The Board manages the Galveston Wharves, a separate utility created by the City of Galveston. The Board established and periodically revises the port’s tariff. The Board created GPFC to facilitate the financing, construction and operation of the Galveston Island Cruise Terminals and is entitled to any income generated by GPFC that is not needed to pay GPFC’s expenses or obligations. GPFC has never billed or collected access fees from Complainants. Lease agreements between the Wharves Board (as lessor) and GPFC (as lessee) deny GPFC the right to assess and collect fees published in the Tariff for “commodities moving over, or vessels berthing at the Leased Premises” ALJFF 4-8.

The Port contends that claims against GPFC should be dismissed.

Complainants do not identify any specific acts by GPFC which form the basis of its Complaint. As discussed above, GPFC does not submit any charges or invoices to Complainants which they are required to pay. GPFC did not invoice or collect the Access Fees forming the basis of Complainants’ claims. GPFC has no tariff. Thus, in terms of [*Ceres I*], Complainants were not subject to any “treatment” by GPFC – prejudicial or otherwise. Thus, their claims against GPFC should be dismissed.

(Port. Br. at 26.) Complainants do not respond to this argument in their reply brief.

Based on the facts stated above and Complainants’ failure to respond to the Port’s argument, I conclude that Complainants have not proved by a preponderance of the evidence that GPFC committed a violation or is liable to Complainants for a violation of the Shipping Act. Therefore, the claims against GPFC are dismissed with prejudice.

VIII. COMPLAINANTS HAVE NOT PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT THE PORT VIOLATED SECTION 41106(2).

Complainants' claim that the Port violated section 41106(2) is based on their contention that by amending Tariff Circular No. 6 on August 28, 2006, to calculate access fees for Complainants at the \$8.00 per parking place per month rate instead of the per trip rate and calculating access fees based on the \$8.00 flat rate, the Port discriminated against Complainants in favor of hotels that provide parking to cruise passengers and in favor of other commercial passenger vehicles charged per trip.

Until October 1, 2014, the Wharves Board historically has not charged Complainants per-trip Access Fees based upon their proportional volume of traffic in the Cruise Terminal like other Cruise Terminal users. Instead, the Wharves Board has charged Complainants "per-space per-month" based upon the "market share" of parking spaces each has in proportion to those contained in the Wharves Board's own parking lots.

(Comp. Br. at 4 (citations omitted).)¹¹

By charging Access Fees based on the total number of parking spaces maintained by Complainants, without regard to Complainants' actual access to the Cruise Terminal, rather than based on the same criteria for which the Access Fees were charged to other Cruise Terminal users who were similarly situated and/or in competitive relationships with Complainants, the Wharves Board violated the Shipping Act.

(Comp. Br. at 17.)

This is a clear example of disparate treatment between Complainants and local hotels/motels which are similarly situated and/or in a competitive relationship with Complainants. From 2007 through 2014, Complainants should have been charged in the same manner as those hotels/motels; based on their actual access to the Cruise Terminal. Or, in the alternative, those hotels/motels should have been charged in the same manner as Complainants under the Tariff; per parking space.

(Comp. Br. at 18.) "Had the Wharves Board not assessed the Access Fees pursuant to the Tariff upon Complainants in violation of the Act, Complainants would not have been injured." (Comp. Br. at 26.)

¹¹ "Historically," the Port charged Complainants the per-trip access fee from January 2005 until the Port agreed to amend the tariff August 28, 2006, to establish the \$8.00 flat rate and to apply the flat rate retroactively to January 2005 to recalculate Complainants' unpaid access fees.

Complainants contend that they meet all of the *Ceres I* elements. The Port has discretion to exercise business judgment when imposing access fees, however.

It is only undue or unreasonable preferential or prejudicial treatment that violates the Shipping Act. *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 900 (FMC 1993); *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. 974, 988 (FMC 1986). Moreover, ports need not apply the same rate to all customers and may consider many factors relevant to negotiating a lease. *Ceres I*, 27 S.R.R. at 1273, 1274; *Ceres Marine Terminals, Inc. v. Maryland Port Admin. (Ceres II)*, 29 S.R.R. 356, 369, 372 (FMC 2001) (“The Commission is not responsible for ensuring that everybody makes a good deal – just that the commercial environment is not hampered by unreasonable or unjustly discriminatory practices.”).

Maher v. PANYNJ, 33 S.R.R. at 841. The Commission may defer to a port’s reasonable, discretionary business decisions. *See Maher v. PANYNJ*, 33 S.R.R. at 853 (“Moreover, the Commission may defer to a port’s reasonable, discretionary business decisions regarding negotiations.”), citing *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. at 899.

When EZ Cruise approached the Port in 2005 to resolve its obligation to pay access fees imposed by Tariff Circular No. 6, the Port had an obligation imposed by the Shipping Act to engage in discussions regarding the issue. *See* 46 U.S.C. § 41106 (“A marine terminal operator may not . . . (3) unreasonably refuse to deal or negotiate.”). Because of the discretion granted to the Port in making its business decisions, *Maher v. PANYNJ, supra*, the Port did not act unreasonably when it amended the tariff to provide for a flat monthly rate permitting unlimited access, an option first proposed by EZ Cruise. ALJFF 36-37. When the Port settled its claims against Complainants for unpaid access fees for the period through June 2006 by applying the \$8.00 flat rate to those accumulated fees, Complainants paid far less than the Port originally charged at the per trip rate. ALJFF 47-49. Complainants also paid far less for each shuttle trip to the cruise terminal than hotels that provided parking to their customers in connection with an overnight visit and transported their customers to the cruise terminal in shuttles. While the question is not raised in this proceeding and need not be answered as part of this initial decision, the Port did not give an undue or unreasonable preference or advantage to Complainants or impose an undue or unreasonable prejudice or disadvantage to the hotels in violation of section 41106(2) by making a discretionary business decision to charge Complainants, the Port’s three largest off-port parking users, a lower access fee.

A. *Ceres I* Element One – Complainants Have Not Proved by a Preponderance of the Evidence That Complainants Are Similarly Situated to or in a Competitive Relationship with Hotels That Provide Parking to Cruise Passengers or Common Carriers.

Complainants contend:

The first element of Complainants' claim of unreasonable preference or advantage and unreasonable prejudice and disadvantage is met where Complainants are similarly situated and/or in a competitive relationship with other entities that, by virtue of Respondents' violations of the Shipping Act, were given undue or unreasonable preference or advantage, and/or against which, by virtue of that same conduct, Complainants suffered undue or unreasonable prejudice or disadvantage. Specifically, those entities include local hotels, parking lots, taxicabs, limousines, and buses calling on Respondents' Cruise Terminal.

(Comp. Br. at 14.)

1. Complainants have not proved that they are similarly situated or in a competitive relationship with hotels that provide parking to cruise passengers.

Complainants describe their businesses as follows: "(1) provide a place for cruise passengers to park their vehicles, and (2) provide for the transportation of those cruise passengers from their parked vehicles to the Cruise Terminal." (Comp. Br. at 14.) They contend:

Similarly, local hotels/motels provide a place for cruise passengers to park their vehicles in their parking lots, and also transport those passengers to the Cruise Terminal, either in their own vehicles, or by use of taxicabs. Indeed, these hotels/motels typically own and/or operate "Courtesy Vehicles" or arrange for "Commercial Passenger Vehicles" to pick up or drop off passengers within the Cruise Terminal complex in connection with their operations outside the boundaries of property owned, operated, or controlled by the Wharves Board. In fact, during the May 12, 2014 Special Finance Meeting of the Wharves Board, the Wharves Board itself admitted that the operational effect of the hotels/motels with regard to parking cruise passengers' vehicles and shuttling the passengers to the Cruise Terminal is "no different than [that of] a parking lot." (PFF 21, Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on September 22, 2014 at 19:18-20.) In addition to being similarly situated, these hotels/motels are also in a competitive relationship with Complainants; in so far as vehicles that are parked in the parking lots of local hotels/motels cannot concurrently be parked in Complainants' parking lots.

(*Id.* at 14-15 (footnotes omitted).)

Complainants are in the business of operating parking lots for cruise passengers to leave their vehicles while they enjoy the many cruises that depart from the Port of Galveston. As such, Complainants compete for customers with any business that facilitates those passengers parking their vehicles at other locations, be it a hotel/motel parking lot, a charter bus parking lot, or another privately owned

location. It is not necessary that an entity own or operate a parking lot for that entity to be in a competitive relationship with Complainants.

(Comp. Rep. Br. at 10.)

Hotels are in the business of providing lodging to persons, not the business of operating parking lots. “In this chapter, ‘hotel’ means a building in which members of the public obtain sleeping accommodations for consideration.” Tex. Tax Code § 156.001. *See also City of Houston v. Hotels.com, L.P.*, 357 S.W.3d 706, 714, 2011 Tex. App. LEXIS 8448, *19 (Tex. App. Houston 14th Dist. 2011) (“The commonly understood meaning of the word hotel is ‘a commercial establishment providing lodging and, usually, meals and other services for the public, especially for travelers.’ See Webster’s New World College Dictionary 653.”). As Respondents correctly note, “[h]otels are primarily engaged in the business of lodging. If the Cruise Terminal closed these hotels would still be primarily engaged in the business of lodging.” (Resp. Br. at 28.) Complainants do not cite to any evidence that would support a finding that cruise passengers occupy more than a very small percentage of the parking spaces at hotels.

The hotels are not in competition with Complainants for cruise passenger who want to leave their vehicles in a parking lot during their cruises without staying in their hotels. Complainants’ evidence indicates that the hotels offer parking in connection with a stay in the hotel of at least one night. Complainants’ evidence identifies eight hotels that provide complementary parking and free round trip shuttle to the cruise port with an overnight stay of one night (seven hotels) or two nights (one hotel); six hotels that offer complementary parking with a paid shuttle (two hotels) or no shuttle (six hotels); and four hotels that offer paid parking and free shuttle (two hotels) or paid shuttle (two hotels). (ALJFF 12; Comp. App. 026 at 510-511. *See also* Port App. 043 at 1712-1713 (similar evidence offered by the Port).) Complainants do not identify any evidence that hotels offer parking to cruise passengers who do not stay overnight. (*See* Comp. Resp. Port Prop. FF 47.) It is Complainants’ burden to provide this evidence. I note that Complainant offered evidence of the access fees actually paid by several of these hotels. *See* ALJFF 81.

The goal of a hotel is to fill its rooms, not its parking lot. The hotels are in competition with each other for the market of customers who want or need to stay overnight in Galveston when they go on a cruise. Because providing lodging is the primary business of the hotels, it is highly unlikely that they would fill their parking lots with vehicles of cruise passengers who are leaving on a cruise but not staying in their hotels and risk not having parking available for other customers paying for lodging. A hotel operator with an empty parking lot and full rooms would be happy indeed. A hotel operator with a full parking lot and empty rooms would soon be out of business.

Complainants do not operate hotels and are not in competition for the market of cruise passengers who want or need to stay overnight in Galveston. Virtually all of Complainants’ customers are cruise passengers who want to park their vehicles for the duration of their cruises. ALJFF 10. Most of the hotels’ customers are not cruise passengers who leave their vehicles in a hotel lot. ALJFF 82.

Therefore, I conclude that Complainants have not proved by a preponderance of the evidence that Complainants and hotels that provide parking for their customers who are taking cruises are “similarly situated or in a competitive relationship,” *Ceres I*, 27 S.R.R. at 1270-1271.

2. Complainants have not proved that they are similarly situated or in a competitive relationship with taxicabs, limousines, and buses.

As noted above, Complainants provide a place for cruise passengers to park their vehicles, and provide for the transportation of those cruise passengers from their parked vehicles to the Cruise Terminal. (Comp. Br. at 14.) Complainants contend that:

[T]axicabs, limousines, and buses, like Complainants, transport passengers and their luggage into the Cruise Terminal. While these entities may not perform all functions of Complainants’ businesses – they do not operate parking lots – the disparate rates charged by Respondents for the same access to the Cruise Terminal was equally prejudicial to Complainants as was Respondents’ preferential treatment of local hotels/motels.

(*Id.* at 16.)

Complainants quite clearly are not in a competitive relationship with the taxicabs, limousines, and buses that bring cruise passengers to the terminal. Taxicabs, limousines, and buses are common carriers, although not as that term is defined by the Shipping Act. 46 U.S.C. § 40102(6). Texas courts have defined common carriers as “those in the business of carrying passengers and goods who hold themselves out for hire by the public.” *Mount Pleasant Indep. Sch. Dist. v. Lindburg*, 766 S.W. 2d 208, 213 (Tex. App. 1989).

The Texas Transportation Code does not define common carriers, but a predecessor to the current statute defining the duties and liabilities of a common carrier included “railroad companies, and other carriers of passengers, foods, wares, merchandise for hire, within this state, on land, or in boats or vessels on the waters entirely within this state.” Acts 1969, 61st Leg., ch. 213, 1969 Tex. Gen. Laws 618 (current version at TEX. TRANSP. CODE. ANN. § 5.001). The current statute continues to reference this statement in the revisor’s notes. TEX. TRANSP. CODE. ANN. § 5.001 revisor’s notes. Texas courts have defined a common carrier as “a person who engages in the *transportation* of persons or things from place to place for hire and holds himself or herself out as ready and willing to serve the public in the branch of transportation for which he or she is engaged.” 11 TEX. JUR. 3D Carriers § 2 (2002) (emphasis added); see *Howell v. City Towing Assoc., Inc.*, 717 S.W.2d 729, 731 (Tex. App. – San Antonio 1986, writ ref’d n.r.e.) (“A common carrier of passengers is one that solicits and operates a public passenger transportation service.”). We have stated that the “underlying concept” of a common carrier is “that of a transportation service . . .” *Lake Transport, Inc., v. R.R. Comm’n of Tex.*, 505 S.W.2d 781, 784,

17 Tex. Sup. Ct. J. 210 (Tex. 1974). Texas statutes on public health define common carriers as “[a]ny licensed firm, corporation or establishment which solicits and operates public freight or passenger transportation service.” The term has been held to include railroads, buses, airplanes, taxis, street cars, and other vehicles. *Howell*, 717 S.W.2d at 733.

When determining whether someone who provides transportation is a common carrier, we look to their primary function. It must be determined whether the business of the entity is public transportation or whether such transportation is “only incidental” to its primary business. *Lindburg*, 766 S.W. 2d at 213. For example, this Court held in *Mount Pleasant Independent School District v. Lindburg*, that a school district is not in the business of transporting students, but rather of educating them. *Id.* Therefore, school bus drivers are not held to the higher standard of care of a common carrier. *Id.* Another Texas court has held that a tow truck driver is not a common carrier of passengers when passengers whose cars are being towed ride in the tow truck, again because a towing company is primarily in the business of transporting cars, not people. *Howell*, 717 S.W.2d at 733. It may owe a high standard of care in transporting the cars, but not to any people who ride along.

Speed Boat Leasing, Inc. v. Elmer, 124 S.W.3d 210, 212-213, 47 Tex. Sup. J. 182 (Tex. 2003). See also *Nat’l Union Fire Ins. Co. v. McMurray*, 342 Fed. Appx. 956, 959-960 (5th Cir. 2009) (affirming judgment that whitewater rafting company is not a common carrier).

Taxicabs, limousines, and buses are common carriers (or in some cases possibly contract carriers, a distinction without a difference for this proceeding) that transport members of the public from one place to another. Some of their customers may be cruise passengers transported to or from the cruise terminal. Complainants do not cite to any evidence that would support a finding that the taxicabs, limousines, and buses operate parking lots that provide a place for cruise passengers to park their vehicles, then transport their customers to the cruise terminal as part of their business, and Complainants concede that they do not. Taxicabs, limousines, and buses are not similarly situated or in a competitive relationship with Complainants.

Complainants hold themselves out as parking lot operators that provide secure parking for the vehicles of cruise passengers while on a cruise. Complainants do not engage in the transportation of persons from place to place for hire and hold themselves out as ready and willing to transport the public. The only transportation that Complainants provide is offered to entice customers to leave their vehicles in parking lots owned and operated by Complainants and is incidental to their primary business of renting parking places that provide a place for cruise passengers to park their vehicles while on a cruise. Complainants do not claim to be and are not common carriers under Texas law. Complainants’ carriage is limited to transportation of their paying customers between their parking lots and the cruise terminal.

Therefore, I conclude that Complainants have not proved by a preponderance of the evidence that Complainants and the taxicabs, limousines, and buses that take cruise line customers to and from

the cruise terminal are “similarly situated or in a competitive relationship,” *Ceres I*, 27 S.R.R. at 1270-1271, with Complainants.

B. *Ceres I* Element Two – Complainants have proved by a preponderance of the evidence that Complainants and the hotels, taxicabs, limousines, and buses were accorded different treatment.

Assuming Complainants proved that Complainants and the hotels, taxicabs, limousines, and buses are similarly situated or in a competitive relationship, Complainants have proved by a preponderance of the evidence that during the relevant period, they were charged a monthly fee calculated by multiplying the number of parking places in their lots by \$8.00. ALJFF 46-49, 53, 56-58, 63, 74. During the same period, hotels, limousines, and buses were charged for each access, and taxicabs were not charged for access. ALJFF 29, 50, 65, 81. Therefore, Complainants have proved *Ceres I* Element Two, that Complainants and the hotels, taxicabs, limousines, and buses were accorded different treatment.

C. *Ceres I* Element Three – Complainants have not proved by a preponderance of the evidence that the Port acted unreasonably by charging Complainants a monthly fee and charging other ground transportation companies for each trip.

I. Complainants have not proved that the Port acted unreasonably by charging Complainants a monthly flat rate and charging hotels providing cruise parking for each trip.

Assuming that hotels providing parking spaces to cruise passenger and shuttle service to the cruise terminal and parking lots providing parking spaces to cruise passengers and shuttle service to the cruise terminal are similarly situated or in competition, I address *Ceres I* Element Three – have Complainants proved that Respondents acted unreasonably by imposing different access fees on the hotels and Complainants?

Complainants contend:

Significantly, the Chairman of the Wharves Board . . . admitted to preferential treatment of local hotels/motels when he informed Complainants’ representatives that “[hotels/motels] help the [Port of Galveston] attract passengers [and he does] not want to charge them like parking lots.” In-line with the Chairman’s preferences, and despite local hotels/motels meeting the Wharves Board’s definition of “Off-Port Parking Users” and the express applicability of the 2006 and 2014 Tariff to them, local hotels/motels have not been charged Access Fees as required of “Off-Port Parking Users.”

(Comp. Br. at 17 (citations to record omitted).)

Complainants' vehicles access the Cruise Terminal via the same route, in the same manner, and for the same purpose as the other users of the Cruise Terminal identified herein. There is no qualitative difference in access or use of the Cruise Terminal between Complainants and those other users. All herein identified users of the Cruise Terminal, Complainants included, transport only cruise passengers and their luggage from and to the Cruise Terminal, and do so in vehicles meeting the requirements of the Tariff. Accordingly, transportation factors do not exist that justify Respondents' disparate treatment of Complainants.

(Comp. Br. at 25.)

As noted above, the hotels and Complainants conduct entirely different operations. Hotels compete for cruise passengers who want or need lodging in Galveston prior to or after their cruises and offer free parking and shuttle service as an inducement to their guests. There is no evidence that providing parking to cruise passengers is anything but a small part of the hotels' business. ALJFF 82. Complainants compete with each other for cruise passengers who want to leave their vehicles in secure parking while they cruise. Almost all, if not all, of Complainant's parking customers are going on cruises. ALJFF 5.

This analysis must start with the observation that when the Port began to charge commercial vehicles for access to the cruise terminal, it calculated access fees charged to Complainants in exactly the same manner that the Port calculated fees for hotels that offer parking to cruise passengers and for other shuttle operators accessing the port – \$10.00 per trip. In 2005, the Port sent the first invoices for access to the port. In response, Complainant EZ Cruise requested that the fees be reduced because they were “too high and would greatly affect our ability to provide a quality service to the thousands of customers who come to Galveston each year to experience a cruise.” ALJFF 36. After a year of negotiations, the Port agreed to charge Complainants a flat monthly rate for unlimited access, ALJFF 37, thereby greatly reducing the access fees paid by Complainants for the first 18 months that the Port collected access charges and for the future. ALJFF 47-49.

The unlimited access provision in the \$8.00 flat rate provided a significant transportation advantage to Complainants. Under the \$10.00 per trip rate, Complainants were charged the same amount for each shuttle trip whether the shuttle carried one passenger or fifteen. The Port would charge a Complainant access fees totaling \$10.00 for one port entry by a full shuttle, but \$40.00 for four trips by shuttles each one-fourth full. Therefore, it was in Complainants' economic interest to send as few shuttles as possible, meaning that cruise passenger likely were required to wait at the parking lot until the shuttle was full or nearly full. With unlimited access, a Complainant's access fees would be the same whether it sent one full shuttle, four shuttles each one-quarter full, or fifteen shuttles each carrying one cruise passenger. Whether a Complainant's shuttles made one hundred trips or one thousand trips in a month, the Complainant would pay the same access fee. As a result, delay for cruise passengers was reduced. Support for the benefit of unlimited access is found in the deposition testimony of Jason Hayes, the son of EZ Cruise owner Cynthia Hayes Tompkins and himself an eight percent owner and EZ Cruise employee. Jason Hayes testified that the flat rate

permitted EZ Cruise to “[run] the buses in as – as freely as the customers wanted to.” (Port App. 081 at 2450 (deposition of Jason Hayes).) “[I]f I paid \$10 per trip, I would have never ran my buses like that.” (Port App. 081 at 2451.) The reduced delay in transporting cruise passengers to and from the cruise terminal is a transportation factor within the meaning of the Shipping Act.

Complainants contend that hotels that provide parking to cruise passengers as an inducement to stay in their hotels meet the definition of “off-port parking user” and Tariff Circular No. 6 requires that the hotels be charged the \$8.00 off-port parking user flat rate, not on a per trip basis. Therefore, charging the hotels on a per trip basis was an undue or unreasonable preference or advantage to the hotels or an undue or unreasonable prejudice or disadvantage to Complainants in violation of section 41106(2). (Comp. Br. At 17-18.) The Port argues that the hotels do not meet the definition of off-port parking user. (Port Br. at 34-35.)

The definition of off-port parking user predates the adoption of the \$8.00 flat rate method of calculating access fees. The hotels are commercial business entities that provide or arrange for commercial passenger vehicles to pick up or drop off passengers at the cruise terminal in connection with the operation of their hotels and provide parking of motor vehicles at a facility located outside of the boundaries the port. ALJFF 12. Therefore, they are off-port parking users within the meaning of the tariff.

EZ Cruise proposed the flat rate because a “flat fee is much easier for a start-up company, such as [EZ Cruise], to budget.” ALJFF 37. Complainants do not identify any contemporary evidence to support a finding that during the negotiations between Complainants and the Port to resolve the access fees invoiced for the period January 2005 through June 2006 and development of the \$8.00 flat rate, either Complainants or the Port contemplated applying the flat rate to hotels offering parking for cruise passengers. Complainants do not identify any evidence supporting a finding that the hotels they argue should have been assessed access fees calculated at the \$8.00 flat rate – Holiday Inn, Moody Gardens, Comfort Inn & Suites on the Beach, and the other hotels identified in ALJFF 81 – were start-up companies such as EZ Cruise for which the flat rate would be much easier to budget. Complainants do not identify any evidence supporting a finding that when the Port amended the tariff, it intended to apply the flat rate to hotels in lieu of the per trip rate already applicable to hotel shuttles.

Although hotels met the definition of off-port parking user both before and after the promulgation of the flat rate, the Port historically recognized a distinction between parking lot operators providing parking to cruise passengers and hotels providing parking to cruise passengers. (See Comp. App. 029 at 532 (Port Tariff Charges for 2006 separating hotels from common carriers and parking lot operators).) The \$8.00 flat rate to be paid by off-port parking users in lieu of the \$10.00 per trip rate is based on the number of “billable parking spaces” maintained by the off-port parking user. For parking lot operators such as Complainants, virtually all of whose customers are cruise passengers, ALJFF 10, the number of billable parking spaces is easily calculated: How many parking spaces does the parking lot operator have? There is no mechanism established by the tariff to determine billable parking spaces for hotel operators that provide parking and transportation for

the small percentage of their customers who leave their vehicles in hotel lots while they cruise, but occupy only a very small portion of the hotel's parking spaces. ALJFF 82.

I find that although hotels that provide parking to cruise passengers and transport the passengers to the cruise terminal in commercial passenger vehicles are off-port parking users within the meaning of the tariff, because: (1) the \$8.00 flat rate does not provide a mechanism to determine the number of billable parking spaces for these hotels; (2) developing a mechanism to determine access fees for determining the billable parking spaces of hotels that use only a small percentage of their parking spaces for cruise passenger is virtually impossible; and (3) there is no contemporaneous evidence that either the Port or Complainants intended to require these hotels to use the \$8.00 flat rate in lieu of the \$10.00 per trip access fee when the flat rate was adopted, the Port did not intend to require the hotels to use the flat rate. I further conclude that continuing to use the per trip rate instead of the flat rate to calculate access fees for the hotels did not discriminate unreasonably against Complainants or in favor of hotels that provide parking to cruise passengers.

2. Complainants have not proved that the Port acted unreasonably by charging Complainants a monthly access fee while it charged common carriers for each trip and not charging taxicabs.

As noted above, common carriers do not operate parking lots for cruise ship passengers; therefore, they are not off-port parking users. It would not only be difficult – it would be impossible to calculate their monthly port access fees “equal to the amount of \$8.00 per parking space located in the [common carrier's] parking facility.” ALJFF 44. Therefore, it was not unreasonable for the Port to charge common carriers for each trip to the cruise terminal.

Complainants argue that the Port discriminated against them by not charging any access fees for limousines and taxicabs. (Comp. Br. at 22-23, 24.) The 2007 Tariff Circular No. 6 did not impose an access fee on either taxicabs or limousines with a seating capacity of not more than eight persons. ALJFF 50. The Port argues that it has a justifiable business reason not to charge taxicabs for access. (Port Br. at 36-37.) Getting sufficient taxi service has been a problem at the cruise terminal since at least February 27, 2006. (Port App. 068 at 1943-1945.) The Port Director has studied the issue of taxicabs servicing the cruise terminal.

45. From my observations and working with my staff on traffic issues, it has been difficult securing a sufficient number of taxicabs to provide transportation for cruise passengers. I have personally observed instances in which returning cruise passengers have had to wait well over an hour for a taxicab in order to leave. Thus, there is a very limited supply of taxicabs servicing the Cruise terminal. I and my staff have concluded that requiring taxicab companies to also pay Access Fees, or to collect and then remit Access Fees from passengers, would be an additional disincentive to taxicabs servicing the Cruise Terminal and further reduce and already inadequate supply of

taxicabs. This would further impede our ability to efficiently move passengers into and out of the Cruise Terminal.

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47. In my meetings over the years with local taxicab companies, their representatives have told me that attempting to charge an access fee would result in a significant reduction in taxicabs serving cruise passengers. I and my staff already have trouble encouraging enough taxicabs on cruise ship days to come to the Terminal to pick up passengers. We absolutely need these taxicabs to move the passengers. A reduction in the supply of available taxicabs would result in increased congestion and hinder traffic flow at the Cruise Terminal.
48. I believe these transportation factors justify not asking the City Council of the City of Galveston to alter its current ordinance to require taxicabs to pay Cruise Terminal Access Fees.

(Port App. 075 at 2077-2078.) Therefore, I conclude that the decision not to charge access fees to taxicabs for access to the cruise terminal is a reasonable discretionary business decision of the Port. Limousine operations are substantially the same as taxicab operations. Likewise, I conclude that the decision not to charge access fees to limousines for access to the cruise terminal is a reasonable discretionary business decision of the Port. *Maier v. PANYNJ*, 33 S.R.R. at 841, 853.

IX. CERES I ELEMENT FOUR – ASSUMING THE PORT VIOLATED SECTION 41106(2), COMPLAINANTS HAVE NOT PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT COMPLAINANTS SUFFERED ACTUAL INJURY.

Complainants have the burden of proving entitlement to reparations. 5 U.S.C. § 556(d).

As the Federal Maritime Board explained long ago: “(a) damages^[12] must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.”

James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist., 30 S.R.R. 8, 13 (FMC 2003).

The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (Oct. 19, 1990)] and the other cited cases

¹² Reparations under the Shipping Act and damages are synonymous. *See Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.

Tractors and Farm Equip. Ltd. v. Cosmos Shipping Co., Inc., 26 S.R.R. 788, 798-799 (ALJ 1992).

A. Decision on the Affirmative Defense of Statute of Limitations Is Pretermitted.

Complainants filed their Complaint on June 16, 2014. The Act provides that a complaint seeking a reparation award must be filed within three years after the claim accrues. 46 U.S.C. § 41301(a). Complainants seek a reparation award for violations occurring between 2006 and 2014. The Port argues that a claim for a reparation award for violations occurring more than three years before Complainants filed their Complaint is barred by the Act's statute of limitations. The Port argues that Complainants knew by looking at Tariff Circular No. 6 that taxicabs were not charged for access. Regarding the hotels, the Port argues that assuming the hotels are off-port parking users within the meaning of the tariff, Complainants could have found out that Port continued to charge the hotels for each access because the Port's records are subject to review under state laws. (Port Br. at 39-40.)

Complainants contend that the Complaint is timely regarding the 2014 amendment exempting taxicabs carrying more than eight persons from the access fee because Complainants filed within three years of that event. Complainants contend the rest of their claims are subject to the discovery rule. Regarding hotels, they contend that until 2014, even with the exercise of due diligence they could not have known that hotels were not being charged the \$8.00 flat rate. (Comp. Rep. Br. at 20-25.)

Because of the decision on the merits reached below that Complainants have not proved by a preponderance of the evidence that they suffered actual injury from use of the flat rate, I pretermite a decision on the question of whether the statute of limitations would bar Complainants' claim for a reparation award resulting from violations occurring more than three years before Complainants filed their FMC Complaint.

B. Complainants Have Not Proved That They Suffered Actual Injury from the Port's Use of the \$8.00 Flat Rate to Calculate Their Access Fees.

Complainants contend that they are entitled to a reparation award because the Port overcharged them by using the \$8.00 flat rate to calculate Complainants' access fees. Assuming that

the Port violated section 41106(2) by charging a parking lot operator at the \$8.00 flat rate during a period when it charged hotels a per trip rate, a parking lot operator would only suffer actual injury if it paid more in access fees for a particular month calculated at the \$8.00 flat rate than it would have if it were charged at the rate of \$10.00 per trip, and its measure of damages would be the difference between the two amounts.

Calculating the actual injury, if any, suffered by a Complainant for a particular month should be a simple task: One would divide \$10.00 into the amount the amount the Port charged to a Complainant for the month at \$8.00 per parking place. This process would determine the break-even point – that is, the number of trips by the Complainant’s shuttles at which the \$8.00 flat rate with unlimited access benefitted the off-port parking user by becoming cheaper than the per trip rate. If the number of trips exceeds the break-even point, the Complainant paid a lesser amount using the flat rate and did not suffer actual injury. If the shuttles made fewer trips than the break-even point, the Complainant would be injured by the product of \$10.00 times the difference between the number of trips and the break-even point. Using EZ Cruise as an example, in June 2008, EZ Cruise was charged a flat rate access fee of \$2,560.00 for 320 parking spaces. ALJFF 50. If the Port had charged EZ Cruise \$10.00 per trip instead, the break-even point would be $\$2,560.00 \div \$10.00 = 256$ trips. Assuming the Port violated section 41106(2) by using the flat rate in June 2008, EZ Cruise would have suffered actual injury only if its shuttles had fewer than 256 trips to the cruise terminal in June 2008. The burden is on EZ Cruise to prove that it had fewer than 256 trips in June 2008, not on the Port to prove that it had more than 256 trips. 5 U.S.C. § 556(d); *Ceres I*, 27 S.R.R. at 1270-1271.

The Port charged EZ Cruise \$2,560.00 per month for 320 parking spaces from 2006 through April 2011 and the break even point was 256 trips. The Port charged EZ Cruise \$1,760.00 per month for 220 parking spaces from May 2011 through October 2011 and break-even point was 176 trips. The Port charged EZ Cruise \$2,560.00 per month for 320 parking spaces from November 2011 through October 2012 and the break even point was 256 trips. The Port charged EZ Cruise \$3,040.00 for 380 Parking spaces from November 2012 through June 2014 and the break-even point was 304 trips. An additional fee of \$400.00 for 50 parking spaces (equals 40 trips) at Railroad Museum parking for some months. ALJFF 56.

The Port charged Dolphin \$960.00 per month for 120 parking spaces from 2006 through December 2008 and the break-even point was ninety-six trips. Dolphin did not operate a cruise passenger parking business from January through August 2009. From September 2009 through December 2013, the Port charged Dolphin \$400.00 per month for fifty parking spaces and the break-even point was forty trips. From January through June 2014 the Port charged Dolphin \$768.00 per month for ninety-six space and the break-even point was seventy-seven trips (rounding up).

The Port charged Lighthouse \$1,520.00 per month for 190 parking spaces from 2006 through December 2013 and the break-even point was 152 trips. From January through April 2014, the Port charged Lighthouse \$1,656.00 per month for 207 parking spaces and the break-even point was 166

(rounding up) trips. In May and June 2014, the Port charged Lighthouse \$1,760.00 per month for 220 parking spaces and the break-even point was 176 trips.

Complainants' problem is that neither the Port nor Complainants kept track of the number of trips by Complainants' shuttles after the Port added the \$8.00 flat rate tariff. (*See* Comp. Br. at 27 ("Respondents here admit that they did not track Complainants access to the Cruise Terminal after 2006 for the duration of this period for which Complainants seek reparations.")) Complainants contend that it is the Port's fault that Complainants are unable to present evidence of the number of trips.

Complainants have shown the fact of injury with reasonable certainty, and the reparations Complainants seek are, as a result of the nature of Respondents' violations of the Shipping Act of 1984 and their concurrent and associated failure to document the number and passenger capacities of the vehicles accessing the Cruise Terminal, based on allowable "reasonable estimations." *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) (Providing that "the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable."); *California Shipping Lines, Inc., v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1230 (October 19, 1990) (Providing that "in situations where a wrongdoer has by its own action prevented the precise computation of damages, the [Supreme] Court has stated that the wrongdoer must bear the risk of the uncertainty and that damages can be shown by just and reasonable estimates based on relevant data.").

(Comp. Reply Br. at 26.)

Once the Port amended the tariff to permit the flat rate, the number of trips by Complainants' shuttles was no longer needed to determine Complainants' access fees. ALJFF 54. The Port had no reason to keep track of Complainants' shuttles' trips to the cruise terminal – one hundred trips or one thousand, the access fee would be the same.

Complainants' contention that by not counting the number of trips by Complainants' shuttles the Port "by its own action prevented the precise computation of damages" is without merit. It would have been a poor business practice for a Complainant not to keep track of its shuttle trips between January 2005 and June 2006 to make sure that the Port charged it for the correct number of trips. Once the Port implemented the flat rate, it is surprising that Complainants did not continue to keep track of the trips for any number of business reasons, including monitoring whether they were paying less with the \$8.00 flat rate than they would with the \$10.00 per trip tariff. Complainants' shuttles are used only for transporting their customers between their parking lots and the cruise terminal. Complainants' failure to keep track of their own shuttle trips to the cruise terminal is not the Port's fault and the Port did nothing to prevent Complainants from keeping track of their own shuttle trips. While there may be solid reasons that a port *should* keep track of the

commercial vehicles driving onto port property, it was certainly not “misconduct” in violation of the Shipping Act for the Port not to keep track of Complainants’ shuttle trips when the number of trips was not necessary to calculate Complainants’ access fees, and the Port’s decision not to keep track did not interfere with Complainants’ ability to count trips by their own shuttles.

Because they did not keep track of the number of trips to the cruise terminal between 2006 and 2014, Complainants attempt to prove damages based on an unsubstantiated claim and by engaging in a series of conjectures.

I. The evidence in the record does not support a finding that the Port based the August 28, 2006, adoption of the \$8.00 flat rate on a “study.”

Complainants contend:

The Access Fees charged from December 17, 2007 through June 30, 2014 were established based on average trip counts for individual Cruise Terminal users found in a study conducted by Respondents in 2006. (PFF 17 and 53, Depo. M. Mierzwa at 68:21 - 69:18, 143:25 - 145:5; Port Tariff Charges for the Year 2006 (Access Fee Study).)

(Comp. Br. at 27.) The first proposed finding of fact on which Complainants rely (PFF 17) states: “81st Dolphin commenced doing business in May 2009. *Id.*” (Port Resp. Comp. Prop. FF 17.) This proposed finding is not relevant to the genesis of the \$8.00 flat rate and provides no support for the claim that the Port established the access fees for the period December 17, 2007, through June 30, 2014, based on average trip counts in 2006.

Complainants’ proposed findings of fact 49 through 53 purport to state facts that they contend support Complainants’ contention.

49. The between 2006 and 2014, the Wharves Board determined the Access Fees to charge by considering the recorded number of accesses to the Cruise Terminal by all vehicles subject to Access Fees under the Tariff, with the exception of “Off-Port Parking Users.” (Depo. M. Mierzwa at 68:21 - 69:18, 143:25 - 145:5 (ALJ App. 293).
50. From that data, the Wharves Board determines the anticipated revenue generated by the Tariff by those users. *Id.*
51. That number was then subtracted from the deficit represented by the difference between GPFC’s revenues and the expenses of the Cruise Terminal. *Id.*

52. The Wharves Board then divided the remaining portion of the deficit by the total number of parking spaces operated by the Wharves Board and certain “Off-Port Parking Users,” including Complainants. *Id.*
53. The resulting number was the per-space, per-month Access Fee charged to Complainants. *Id.*

(Port Resp. Comp. Prop FF.) Except for non-substantive test and citation changes, the Port’s response to each proposed finding is the same.

Response: Respondents object to this proposed finding because, as originally written, it was uncited. Respondents also object to this proposed finding as it is a mischaracterization of the testimony cited. The discussion with Mr. Mierzwa makes clear that he was discussing a proposal by the study group in May of 2014 and how that group determined to recommend raising the \$8 per space per month fee charged to the Complainants and per trip access fees charged to other users based on information available “at that time.” Depo. M. Mierzwa at 67:1-25 through 69:1-18, (Resp. App. Tab. No. 78 at p. 002202-002204); 143:25 - 145:5 (Comp. App. 16 at p.00311)). In May of 2014, a study group of Port Staff recommended that the Port use a similar formula to assess the proposed and later rescinded \$28.88 fee to Complainants. The time period referenced in the study group documents relates to an analysis and study performed the above referenced analysis every year from in May of 2014 for consideration of the \$28.88 per space access fee which was never put into effect. No tariff has been implemented and enforced which relied upon or forms the basis of this study. Complainants then are asking the Judge to retroactively apply this rejected formula to 2006 through 2014 in order to bolster their alleged reparations claims. Subject to and without waiving these objections, Respondents deny conducting the above referenced analysis at any time from 2006 until 2013, but admit to conducting this analysis in 2014. Affidavit of Mark Murchison 17 (Resp. App. Tab. No. 77 at p. 002085); Affidavit of Peter Simons 3 (Resp. App. Tab. No. 76 at p. 002078).

(Port Resp. Comp. Prop FF 53.)

The Port created a spreadsheet entitled Port Tariff Charges for the Year 2006. (Comp. App. 029 at 532-533). This spreadsheet records the number of trips each month during the first six months of 2006 for several entities (including Complainants), the total trips each month, the total trips for each entity for the six month period, and the total trips into the port for those six months. Complainants call the spreadsheet the “Access Fee Study” and contend that the Port based its 2006 adoption of the \$8.00 flat rate on this study.

The evidence cited by Complainants in support of their proposed findings 49-53 does not support their contention. The context of M. Mierzwa’s deposition testimony on which they rely

leads to this conclusion. Complainants cited to testimony on pages 68 and 69 of the transcript. (Comp. App. 016 at 304.) This testimony is the continuation of a colloquy that began on page 66 of the transcript (Comp. App. 016 at 304) in which Mierzwa states that he was not involved in determining what to charge Complainants in 2006. Mierzwa states that although as port director he commissioned the access fees study two or three years before his January 30, 2015, deposition, he was not involved in the study. (*Id.* 66:11-67:25.) Mierzwa then describes the considerations used in the study two or three years before his deposition to determine the per trip access fee users should pay. This discussion includes the portion of the transcript cited by Complainants to support their contention. (*Id.* 68:1-69:18.)

The second portion of Mierzwa's deposition on which Complainants rely (Comp. App. 016 at 311) is a colloquy regarding the minutes of the May 19, 2014, meeting of the Board of Trustees of the Galveston Wharves (Comp. App. 025 at 481-492). (*See* Comp. App. 016 at 310.) The questioner quotes portions of the minutes, (*id.* 139:18-141:25), and discussion of Port cost and revenue. (*Id.* 142:1-143:5.) Mierzwa responds: "This was a recommendation from the study group." (*Id.* 143:6.) This is soon followed by the discussion of the "delta" determined by the study on which Complainants rely. Although it appears that the study group included in its study a spreadsheet of port tariff charges showing payments by month of a number of entities that accessed the port in 2005 (Port App. 058 at 1790), it is abundantly clear that the study discussed at the May 19, 2014, board meeting was conducted "two or three years" before Mierzwa's deposition, not a study done in 2006 when the Port amended the tariff to provide for the \$8.00 flat rate.

The contemporaneous documentary evidence in the record indicates that the Port and Complainants arrived at the flat fee of \$8.00 per parking place per month through negotiation, not a "study by the Port." When EZ Cruise did not pay the access fee in 2005, the president/manager of EZ Cruise sent a letter to the Port arguing that the \$10.00 per trip fee was too high and proposed that the Port adjust the fee to a flat rate of \$1,000.00 per month and permit unlimited access. After more negotiations, EZ Cruise proposed a payment of \$20,000.00 to satisfy all outstanding port access fees for EZ Cruise and Galveston Limousine Service. The Port proposed a flat \$2,500.00 flat monthly fee that EZ Cruise rejected and proposed a monthly fee of \$1,200. The Port rejected this proposal and stated that might consider a sliding scale that would permit a discount to those heavy users of the Port, like your business. Complainants and the Port eventually agreed on a flat fee of \$8.00 per month and unlimited access to be retroactive to January 2005 to recalculate access fees for Complainants that had been incurred, but not paid, and amended the tariff for future access. ALJFF 32-43. Although the Port Staff reviewed Complainants' volume of traffic in the Port Tariff Charges for the Year 2006 during these negotiations (Port Resp. Comp. Prop. FF 91), the fact that the Port may have been aware of Complainants' usage does not support a finding that "[t]he Access Fees charged from December 17, 2007 through June 30, 2014 were established based on average trip counts for individual Cruise Terminal users found in [the Port Tariff Charges for the Year 2006]" as Complainants contend. Complainants do not cite to any contemporaneous evidence proving or

even suggesting that the Port based the \$8.00 flat rate figure on the “study” Complainants cite or any other study.¹³

2. Complainants’ argument does not prove damages with reasonable certainty.

In their brief, Complainants set forth a purported analysis that they contend establishes that they suffered actual injury from being charged the \$8.00 flat rate for access instead of the \$10.00 per trip rate that the hotels were charged.

Complainants’ analysis for each Complainant begins with factual information about access to the cruise terminal in by commercial passenger vehicles the first six months of 2006. In January through June 2006, there were 14,848 total trips to the cruise terminal. (Comp. App. 029 at 533.) During that period, Dolphin maintained 120 parking spaces and made 1304 trips. (Comp. App. 029 at 532 (Dolphin identified as “Aslam Kapadia/Sylvia’s shuttle).) Therefore, Dolphin accounted for 8.8% of the trips by commercial passenger vehicles in first 6 months of 2006.

During January through June 2006, EZ Cruise maintained 320 parking spaces. ALJFF 56. In their opening brief, Complainants contended that EZ Cruise accounted for 11.2% of Cruise Terminal traffic in first six months of 2006. The Port objected because Complainants did not include trips by Galveston Limo on behalf of EZ Cruise. Complainants apparently concede this point and in their reply brief include Galveston Limo trips on behalf of EZ Cruise with EZ Cruise shuttle trips to bring EZ Cruise percentage “from 11.2% to just shy of 20.0%.” (Comp. Reply Br. at 28.) This is consistent with the percentage determined by dividing the total number of EZ Cruise trips at issue when the parties settled EZ Cruise access fees for January 2005 to June 2006. (See Port App. 007 at 415 (2936 EZ Cruise trips for January 2006 through June 2006: $2936 \div 14848 = 0.1977$.) Therefore, I assume that this figure is correct.

During January through June 2006, Lighthouse maintained 190 parking spaces and made 1423 trips. Therefore, Lighthouse accounted for 9.6% of Cruise Terminal traffic in first six months of 2006.

For each Complainant, Complainants then factor in any changes in the number of parking spaces maintained by each Complainant between 2006 and 2014, calculate a claimed percentage reduction or increase from previous parking capacity for that Complainant, calculate the decrease in the number of cruise passengers for each year, “assume that [Complainant’s] passenger transportation also fell [or rose] by that same percentage,” and contend that this results in an

¹³ The Port did use the study conducted two or three years before the Mierzwa deposition when it promulgated the May 19, 2014, changes to Tariff Circular No. 6, including the increase of the flat rate to \$28.88 that resulted in this proceeding. ALJFF 64-67. This increase was rescinded and the Port calculated Complainants’ access fees at the \$8.00 flat rate until October 2014 when the Port rescinded the flat rate. ALJFF 71-73.

“observed percentage of Cruise Terminal traffic . . . during this period.” From this figure, they calculate how much a Complainant’s number of trips to the cruise terminal would have been reduced and how much this would have reduced the Complainant’s access fees for 2007 through 2014 if the Complainant had been charged at the per trip rate instead of the \$8.00 flat rate.

For example, regarding Dolphin, Complainants contend:

Pursuant to the above, from January of 2008 through May of 2009, when 81st Dolphin possessed the same number of parking spaces as it did when it accounted for 8.8% of the overall Cruise Terminal traffic, 81st Dolphin paid \$16,320.00 – or, 10.3% – of the \$158,276.52 total collected by the Wharves Board in Access Fees. Accordingly, 81st Dolphin overpaid by 1.5% – or, \$2,374.14 – of the total Access Fees Collected during that time period. 81st Dolphin did not operate a parking lot from June to August of 2009. In the same manner, as provided above, from September of 2009 through December of 2013, 81st Dolphin maintained only 50 parking spaces, and should have represented only 3.7% of the overall Cruise Terminal traffic, and accounted for that same percentage of the overall Access Fees collected during that time period. However, during that time period, 81st Dolphin paid \$20,800.00 – or, 4.1% – of the \$512,081.06 total collected by the Wharves Board in Access Fees. Accordingly, 81st Dolphin overpaid by 0.4% – or, \$2,048.32 – of the total Access Fees collected during that time period. Likewise, and as outlined above, from January of 2014 through June of 2014, 81st Dolphin maintained 96 parking spaces, 80% of what it maintained when it represented 8.8% of the total Cruise Terminal traffic. As such, 81st Dolphin should have represented only 7.0% of the overall Cruise Terminal traffic, and accounted for that same percentage of the overall Access Fees collected during that time period. However, during that time period, 81st Dolphin paid \$4,608.00 – or, 4.9% – of the \$94,087.00 total collected by the Wharves Board in Access Fees. Accordingly, 81st Dolphin underpaid by 2.1% – or, \$1,975.83 – of the total Access Fees collected during that time period. In total, as a result of Respondents’ violations of the Shipping Act, 81st Dolphin was overcharged, and overpaid in the amount of \$2,446.63, for which 81st Dolphin seeks reparations.

(Comp. Br. at 30-31 (citations to record omitted).) Complainants engage in similar analysis for EZ Cruise (*id.* at 31-34) and Lighthouse. (*Id.* at 34-36)

Complainants do not state whether they offer their analysis as expert opinion pursuant to Fed. R. Evid. 702, lay opinion pursuant to Fed. R. Evid. 701, or argument of counsel. Complainants do not identify who formulated the analysis or that person’s qualifications for making the analysis; therefore, the analysis does not have a sponsoring witness to a lay a foundation for admission as evidence. The September 30, 2014, scheduling order required Complainants to “designate affirmative expert witnesses and produce expert reports for same” on or before December 1, 2014. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, FMC

No. 14-06 (ALJ Sept. 30, 2014) (Order Amending August 11, 2014, Discovery Schedule); 46 C.F.R. § 502.201(d). If offered as lay opinion, Rule 201 required disclosure with Complainants' initial disclosures, 46 C.F.R. § 502.201(b), or a supplement. 46 C.F.R. § 502.201(k). In either case, if the analysis were offered as evidence, the Port would have a right to depose the witness. The Port contends that prior to filing their brief, "Complainants never disclosed their theory supporting reparations, or proffered any details on the amounts they were claiming as injury and how those amounts were determined." (Port Br. at 42.) Therefore, I conclude that the analysis is not offered as evidence of injury, but argument of counsel.

Complainants do not set forth any rationale for choosing the factors that they include in the analysis. The Port's expert witness, a certified public accountant in Houston, Texas, since 1980, offers a rebuttal questioning most, if not all, of Complainants' analysis. (Port App. 103 at 2456-2784.)

The most glaring omission from Complainants' analysis is that it fails to factor in the transportation benefit to their customers resulting from Complainants' right to unlimited access to the terminal. It is likely that Complainants minimized their shuttle trips during the first six months of 2006 when they were being charged at the \$10.00 per trip rate. With the right to unlimited access that came with the flat rate, Complainants were able to "[run] the buses in as – as freely as the customers wanted to." (Port App. 081 at 2450 (deposition of Jason Hayes).) Complainants could send their shuttles to the cruise terminals without waiting for a full load without having to pay more in access fees. It is likely that even if number of Complainants' cruise passengers remained the same, the number of trips to the cruise terminal increased. Complainants also fail to take into account whether individual hotels implemented or discontinued their offers of parking in connection with a stay at the hotel.

One could conjure up any number of equally valid arguments based on the known facts to argue that Complainants either did or did not pay more using the \$8.00 flat rate than they would have paid if charged per access. Some arguments may show that Complainants would have paid less if charged per access than charged at the \$8.00 flat rate and some arguments may show that Complainants would have paid more. Each could be based on equally valid assumptions, speculation, and conjecture. None would prove by a preponderance of the evidence that Complainants suffered actual injury from use of the flat rate.

An equally valid argument would first assume that a Complainants' number of trips per month to the cruise terminal for in the first six months of 2006 (the year that the Port had 616,939 passengers – its biggest year on record, ALJFF 83) continued for the rest of the year, then assume a Complainant made the same percentage of cruise passengers as in 2006, ignoring any possible increase in the number of trips permitted by the right of unlimited access. One would reduce that number of trips by the percentage reduction in the number of passengers for the later year, then multiply that number by \$10.00 per trip to determine what the Complainant would have paid if charged by the trip. For instance, between January and June 2006, Dolphin operated 120 parking spaces and its shuttles made 1304 trips to the cruise terminal. (Comp. App. 029 at 532; Port App.

103 at 2775.) Assuming Dolphin's percentage of the cruise passenger traffic remained the same for July-December 2006, Dolphin made 2608 trips to the cruise terminal in 2006. In 2008, the Port had its worst year with 376,815 passengers, 61% of the 2006 figure. ALJFF 83. Dolphin maintained the same number of parking spaces in 2008. Assuming Dolphin's percentage of the cruise passenger traffic remained the same as in 2006 and ignoring any increase in number of trips resulting from Dolphin's right to unlimited access to the terminal, Dolphin's number of trips to the cruise terminal would have been reduced to 61% of the 2006 figure, or 1590 (rounding down) trips in 2008. The Port would have charged \$10.00 per access; therefore, Dolphin would have paid \$15,900.00 in access fees for 2008. Because Dolphin had 120 parking spaces each month in 2008, the Port charged Dolphin \$960.00 per month for twelve months, or \$11,520.00. Therefore, using this argument, in the year when the Port had its lowest passenger total, Dolphin paid less in access fees at the \$8.00 per parking space per month flat rate than it would have paid at \$10.00 per trip. There were more cruise passengers in every other year at issue, so every other year at issue, if Dolphin's number of parking spaces remained the same, it would have more trips to the cruise terminal and paid more in access fees using the \$10.00 per trip rate.

Similar calculations may be done for EZ Cruise and Lighthouse. Between January and June 2006, EZ Cruise operated 320 parking spaces and its shuttles and Galveston Limo carrying EZ Cruise customers made 2936 trips to the cruise terminal. (Comp. App. 029 at 532; Port App. 103 at 2773.) Assuming EZ Cruise's percentage of the cruise passenger traffic remained the same for July-December 2006, EZ Cruise made 5872 trips to the cruise terminal in 2006. EZ Cruise had the same number of parking spaces in 2008. Assuming EZ Cruise's percentage of the cruise passenger traffic remained the same as in 2006 and ignoring any increase in number of trips resulting from EZ Cruise's right to unlimited access to the terminal, EZ Cruise's number of trips to the cruise terminal would have been reduced to 61% of the 2006 figure, or 3581 (rounding down) trips in 2008. The Port would have charged \$10.00 per access; therefore, EZ Cruise would have paid \$35,810.00 in access fees for 2008. Because EZ Cruise had 320 parking spaces each month in 2008, the Port charged EZ Cruise \$2,560.00 per month for twelve months, or \$30,720.00. Therefore, using this argument, in the year when the Port had its lowest passenger total, EZ Cruise paid \$5,090.00 less at the \$8.00 per parking space per month flat rate than it would have paid at \$10.00 per trip. There were more cruise passengers in every other year at issue. In every year from 2006 through 2013, EZ Cruise would have paid more on a per trip basis for each of these years

Between January and June 2006, Lighthouse operated 190 parking spaces and its shuttles made 1423 trips to the cruise terminal. (Comp. App. 029 at 532; Port App. 103 at 2774.) Assuming Lighthouse's percentage of the cruise passenger traffic remained the same for July-December 2006, Lighthouse made 2846 trips to the cruise terminal in 2006. Lighthouse had the same number of parking spaces in 2008. Assuming Lighthouse's percentage of the cruise passenger traffic remained the same as in 2006 and ignoring any increase in number of trips resulting from Lighthouse's right to unlimited access to the terminal, Lighthouse's number of trips to the cruise terminal would have been reduced to 61% of the 2006 figure, or 1736 (rounding down) trips in 2008. The Port would have charged \$10.00 per access; therefore, Lighthouse would have paid \$17,360.00 in access fees for 2008. Because Lighthouse had 190 parking spaces each month in 2008, the Port charged

Lighthouse \$1,520.00 per month for twelve months, or \$18,240.00. Therefore, using this argument, in 2008, the year when the Port had its lowest passenger total, and assuming that lighthouse did not run more shuttle trips to the cruise terminal because it had a right to unlimited access, Lighthouse paid \$880.00 more at the per parking space per month flat rate than it would have paid at \$10.00 per trip. If Lighthouse averaged 7.33 additional trips each month because of its right to unlimited access or any other reason, it would equal the amount it paid at the \$8.00 flat rate. In 2009, the Port's second worst year, the Port had 394,640 cruise passengers, 64% of the 2006 total. Lighthouse would have had 64% of its 2006 trips, or 1821 (rounding down) trips. The Port would have charged \$10.00 per access; therefore, Lighthouse would have paid \$18,210.00 in access fees for 2008. Because Lighthouse had 190 parking spaces each month in 2009, the Port again charged Lighthouse \$18,240.00 for the year. Therefore, using this argument, in 2009, the year when the Port had its second lowest passenger total, Lighthouse paid \$30.00 more at the \$8.00 flat rate than it would have paid at \$10.00 per trip. If Lighthouse took three more trips during 2009 because of its right to unlimited access or any other reason, it would equal the amount it paid at the \$8.00 flat rate. Lighthouse maintained 190 parking spaces every year through 2013. In every year other than 2008 and 2009, assuming no increase in the number of trips because of its right to unlimited access, Lighthouse would have paid more in access fees at the \$10.00 per access rate. The fact that for two years out of nine, assuming no increase in the number of trips because of the right to unlimited access and no change in the percentage of cruise passengers parking in Lighthouse's lot, Lighthouse paid more in access fees at the flat rate than at the per trip space rate does not prove by a preponderance of the evidence that the Port gave an undue or unreasonable preference or advantage to the hotels or imposed an undue or unreasonable prejudice or disadvantage on Lighthouse or the other Complainants in violation of section 41106(2) in the years from 2006 through June 2014.

The burden is on Complainants to prove their damages with reasonable certainty. *Tractors and Farm Equip. Ltd. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. at 798-799. Assuming that the Port violated section 41106(2) when it calculated Complainants' access fees using the \$8.00 flat rate, Complainants' argument does not prove by a preponderance of the evidence that Complainants suffered actual injury from use of the flat rate.

3. Circumstantial evidence supports a conclusion that Complainants did not suffer actual injury from the Port calculating their access fees at the \$8.00 flat rate.

The only direct evidence based on known number of trips of the effect calculating Complainants' access fees at the \$8.00 flat rate instead of the \$10.00 per trip rate comes from the Port's decision to apply the flat rate retroactively to recalculate Complainants' monthly access fees for the period 2005 through June 2006 and the actual count of Complainants' trips when the Port amended the tariff to delete the \$8.00 flat rate beginning October 1, 2014. Comparing the flat rate with the per trip rate for these months when the actual number of trips is known provides circumstantial evidence that Complainants paid less under the flat rate than they would have under the per trip rate for the intervening period.

For the period before adoption of the flat rate, using the \$10.00 per trip rate, the Port invoiced EZ Cruise a total of \$87,930.00 for access to the port between January 2005 and June 2006. As a result of the application of the \$8.00 flat rate, EZ Cruise paid \$35,680.00 for access between January 2005 and June 2006, saving \$52,250.00, or more than 59%. The Port invoiced Lighthouse a total of \$14,230.00 for access to the port between January 2006 and June 2006. As a result of the application of the \$8.00 flat rate, Lighthouse paid \$9,120.00 for access between January 2006 and June 2006, saving \$5,110.00, or more than 35%. The Port invoiced Dolphin a total of \$25,430.00 for access to the port between July 2005 and June 2006. As a result of the application of the \$8.00 flat rate, Dolphin paid \$11,520.00 for access between July 2005 and June 2006, saving \$13,910.00, or more than 54%. Therefore, Complainants enjoyed a significant benefit for this period when the Port agreed to charge them the \$8.00 flat rate and did not suffer any actual injury resulting from the Port charging them at the flat rate instead of the \$10.00 per trip rate between January 2005 and June 2006.

In September 2014, the last month before rescission of the flat rate, the Port charged EZ Cruise the \$8.00 flat rate for 380 parking spaces for unlimited access, a total of \$3,040.00. Because the per trip rate for shuttles carrying fewer than fifteen passengers had been raised to \$20.00 when Tariff Circular No. 6 was amended May 19, 2014, ALJFF 65, the break-even point for September 2014 was $\$3040 \div \$20 = 152$ trips. The September EZ Cruise invoices do not record the number of trips. In October 2014, when EZ Cruise had the same number of parking spaces but no longer had unlimited access and could no longer “[run] the buses in as – as freely as the customers wanted to,” (Port App. 081 at 2450 (deposition of Jason Hayes)), the Port charged EZ Cruise for 542 trips at \$20.00 each for a total charge of \$10,840.00 (Port App. 063 at 1923), \$7,800.00 more than would have been charged at the \$8.00 flat rate. Even if the Port had charged EZ Cruise at the \$10.00 per trip rate in effect until July 2014, it would have charged \$5,420.00 for October, \$2,380.00 more than the flat rate. In November 2014, the Port charged EZ Cruise for 392 trips at \$20.00 each for a total of \$8,800.00 (Port App. 063 at 1924), \$5,780.00 more than the flat rate. Even if the Port had charged EZ Cruise at the \$10.00 per trip rate, it would have charged \$3,920.00 for October, \$880.00 more than the flat rate. (See Port App. 103 at 2776.) EZ Cruise averaged 467 trips for October and November when it no longer had unlimited access. EZ Cruise does not identify evidence of the number of trips for September 2014, but because it averaged 467 trips for October and November when it no longer had unlimited access, it is highly unlikely that EZ Cruise had fewer than 152 trips in September when it had a right to unlimited access. Many unknown factors could influence this number, and the burden is on EZ Cruise to prove that it had fewer than 152 trips. If in September EZ Cruise ran the average number of trips for October and November, the Port would have charged EZ Cruise 467 times \$20.00, a total of \$9,340.00 for access, \$6,300.00 more than EZ Cruise paid at the flat rate. Even if the Port charged the old rate of \$10.00 per trip for September, the Port would have charged EZ Cruise 467 times \$10.00, a total of \$4,670.00 for access, \$1,630.00 more than EZ Cruise paid at the flat rate.

In September 2014, the Port charged Dolphin the \$8.00 flat rate for unlimited access for 135 parking spaces (\$1,080.00) (Comp. App. 011 at 274) plus thirty-nine “additional spaces per litigation” (\$312.00), a total of \$1,392.00. (Comp. App. 011 at 275.) The break-even point for

Dolphin for September 2014 was seventy trips ($\$1,392.00 \div \$20.00 = 69.9$). The September Dolphin invoices do not record the number of trips. In October 2014, when Dolphin had the same number of parking spaces but no longer had unlimited access, the Port charged Dolphin for 385 trips at \$20.00 each for a total charge of \$7,700.00 (Comp. App. 011 at 276), \$6,308.00 more than the \$8.00 flat rate. Even if the Port had charged Dolphin at the \$10.00 per trip rate in effect until July 2014, it would have charged \$3,850.00 for October, \$2,458.00 more than the flat rate. In November 2014, the Port charged Dolphin for 410 trips at \$20.00 each for a total of \$8,200.00, (Comp. App. 011 at 277), \$6,808.00 more than the \$8.00 flat rate. Even if the Port had charged Dolphin at the old \$10.00 per trip rate, it would have charged \$4,110.00 for November, \$2,718.00 more than the flat rate. Dolphin does not identify evidence of the number of trips for September 2014, but because it averaged 397.5 trips for October and November when it no longer had unlimited access, it is highly unlikely that Dolphin had fewer than seventy trips in September when it had a right to unlimited access. Many unknown factors could influence this number, and the burden is on Dolphin to prove that it had fewer than seventy trips. If in September Dolphin ran the average number of trips for October and November, the Port would have charged Dolphin 397 (rounding down) times \$20.00, a total of \$7,940.00 for access, \$6,548.00 more than it actually paid for September using the flat rate. Even if the Port charged the old per trip rate of \$10.00 per trip for September, the Port would have charged Dolphin 397 (rounding down) times \$10.00, a total of \$3,970.00 for access, \$2,578.00 more than Dolphin paid at the flat rate.

In September 2014, the Port charged Lighthouse the \$8.00 flat rate for unlimited access for 220 parking spaces (\$1,760.00) (Port Supp. App. filed Nov. 13, 2015 at 2786) plus an additional \$80.00 for ten spaces (Port Supp. App. filed Nov. 13, 2015 at 2788), a total of \$1,840.00. The break-even point for Lighthouse for September 2014 was ninety-two trips ($\$1,760.00 \div \$20.00 = 92$). The September Lighthouse invoices do not record the number of trips. In October 2014, when Lighthouse had the same number of parking spaces but no longer had unlimited access, the Port charged Lighthouse for 319 trips at \$20.00 each for a total charge of \$6,380.00 (Port Supp. App. filed Nov. 13, 2015 at 2787), \$4,620.00 more than the flat rate. Even if the Port had charged Lighthouse at the \$10.00 per trip rate in effect until July 2014, it would have charged \$3,190.00 for October, \$1,430.00 more than the flat rate. In November 2014, the Port charged Lighthouse for 341 trips at \$20.00 each for a total of \$6,820.00 (Port App. 064 at 1925), \$4,980.00 more than the flat rate. Even if the Port had charged Lighthouse at the old \$10.00 per trip rate, it would have charged \$3,410.00 for October, \$1,570.00 more than the flat rate. Lighthouse averaged 330 trips for October and November. Lighthouse does not identify evidence of the number of trips for September 2014, but because it averaged 330 trips for October and November when it no longer had unlimited access, it is highly unlikely that Lighthouse had fewer than ninety-two trips in September when it had a right to unlimited access. Many unknown factors could influence this number, and the burden is on Lighthouse to prove that it had fewer than ninety-two trips. If in September Lighthouse ran the average number of trips for October and November, the Port would have charged Lighthouse 330 times \$20.00, a total of \$6,600.00, for September access, \$4,760.00 more than it actually paid for September using the flat rate. Even if the Port charged the old per trip rate of \$10.00 per trip for September, the Port would have had charged Lighthouse 330 times \$10.00, a total of \$3,300.00, for September access, \$1,460.00 more than Lighthouse paid at the flat rate.

This circumstantial evidence is bolstered by the analysis at pages 45-47 indicating that assuming Complainants each continued to have provided parking to the same percentage of Galveston cruise passengers adjusted by changes in the number of parking spaces that they maintained, and assuming that Complainants' number of trips to the cruise terminal did not increase because they had unlimited access to the cruise terminal, only Lighthouse, and it only marginally for two years, would have paid less if charged the per trip rate. This circumstantial evidence weighs against a finding that Complainants' trips to the cruise terminal dropped below the break-even point between 2006 and September 2014.

4. Complainants' other contentions do not prove by a preponderance of the evidence that Complainants suffered actual injury as a result of the Port charging Complainants for access at the rate of \$8.00 per parking place per month through September 2014.

Complainants contend:

While evidence of this disparate treatment is found in each and every month that the Tariff has been enforced against Complainants by way of per-space per-month Access Fees, the starkest examples of same are found in Respondents' Access Fee invoices for the months of (May 2008, June 2008, September 2008, November 2008, and February 2009. During those months, despite Respondents' "Cruise Calls" calendar showing fifty-five (55) cruise ships calling on Respondents' Cruise Terminal, *not one single entity was charged an Access Fee other than Complainants.* (PFF 49, Galveston Wharves Historical Detailed Trial Balance, Access Fees (2008); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009); Port of Galveston Cruise Calls (2006 - 2010).)

(Comp. Br. at 22 (double emphasis in original).) The Port responds: "This is simply incorrect. (Compton Affidavit Paragraph 35, Resp. App. Tab 103, p. 2765; Historical Trial Balance, BOT_006375 Resp. App. Tab 66 p. 1929)." (Port Br. at 44-45.) Complainants did not reply to the Port's responses.

Complainants proposed finding of fact 49 on which Complainants rely states:

The between 2006 and 2014, the Wharves Board determined the Access Fees to charge by considering the recorded number of accesses to the Cruise Terminal by all vehicles subject to Access Fees under the Tariff, with the exception of "Off-Port Parking Users." (Depo. M. Mierzwa at 68:21 - 69:18, 143:25 - 145:5 (ALJ App. 293).

(Port Resp. Comp. Prop. FF 49.) Complainants' proposed finding of fact 49 provides no support for the contention in their brief that "not one single entity was charged an Access Fee other than

Complainants” in those five months. Complainants’ proposed findings of fact 101 and 102 purport to support Complainants’ claim, but those proposed facts are not supported by the evidence.

Regarding access fees for September 2008, Hurricane Ike hit Galveston in September. The Port waived access fees for September and October 2008. Although Complainants paid access fees for September and October, those fees were refunded to Complainants on October 31, 2008. (Comp. App. 002 at 37.) Therefore, the Port did not charge access fees to Complainants for September 2008.

Evidence in Complainants’ own appendix regarding the other months proves that Complainants’ claim that no other entity was charged access fees for these months is unfounded. The Port charged access fees to several hotels for some or all of these months. (*See* Comp. App. 032 at 554, 555, 558) (Holiday Inn); Comp. App. 034 at 578, 579, 583, 586 (Moody Gardens); Comp. App. 036 at 657, 658 (Comfort Inn & Suites on the Beach); Comp. App. 038 at 667, 668, 671, 674 (The San Luis); Comp. App. 049 at 889, 890, 893, 897 (Fertitta Hospitality); Comp. App. 052 at 1019, 1020, 1023 (Holiday Inn); Comp. App. 054 at 1138, 1139, 1143, 1146 (Hotel Galvez); Comp. App. 057 at 1270, 1271, 1275 (La Quinta); Comp. App. 060 at 1618, 1619, 1623 (Tremont House).) Complainants’ claim that the Port did not charge access fees to any entities other than Complainants in May, June, and November 2008 and February 2009 is contradicted by the evidence in Complainants’ appendix. The Commission should not have to spend time considering arguments based on erroneous factual claims.

5. Complainants did not subsidize other users as a result of the May 19, 2014, increase in the flat rate to \$28.88.

Complainants seek reparations for injuries that they claim they suffered as a result of the increase in the flat rate access fee to \$28.88 per parking space per month promulgated on May 19, 2014, to be effective July 1, 2014, but rescinded on September 22, 2014.

The Wharves Board justified the increase in Access Fees by stating that same was necessary to satisfy an asserted \$1.5M deficit in Respondents’ Cruise Terminal operations. This increase subjects Complainants to injury by virtue of the fact that, while Complainants always paid the Access Fees as required by the Tariff, Respondents engaged in routine, long-standing preferential enforcement of the Tariff, exempting some Cruise Terminal users completely, and significantly undercharging a great majority of others. Specific examples of same follow.

(Comp. Br. at 36.) Complainants then identify what they claim are “specific examples” regarding the treatment of limousines (*id.* at 36-37), buses (*id.* at 37-38), taxicabs (*id.* at 38-39), and hotels/motels. (*Id.* at 39-42.)

The record demonstrates that Complainants were permitted to deposit the new monthly access fee in excess of \$8.00 per parking space per month into the district court registry, ALJFF 70, the Port rescinded the increase to \$28.88 on September 22, 2014, ALJFF 73, and the Port charged

the \$8.00 flat rate for July-September 2014. ALJFF 74. Therefore, Complainants did not suffer actual injury from the May 19, 2014, increase.

6. Complainants have not proved that the Port acted unreasonably by charging Complainants a monthly access fee when it charged other ground transportation companies access fees that were not consistent with that required by the tariff.

Complainants do not cite any authority that would support a conclusion that when a regulated entity charges one (or several) customers at amounts less than the tariff rate, it has unreasonably imposed an undue or unreasonable prejudice or disadvantage in violation of section 41106(2) with respect to all other customers who paid the tariff rate. Even assuming that Complainants have proved that the Port violated section 41106(2), Complainants have not proved by a preponderance of the evidence that they suffered any actual injury from the violation.

C. Conclusion on Actual Injury.

If it is assumed that the Port violated section 41106(2) by calculating Complainants' access fees using the \$8.00 flat rate, Complainants have not proved by a preponderance of the evidence that they suffered actual injury from the violation.

X. COMPLAINANTS HAVE NOT PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT THE COMMISSION SHOULD ENTER A CEASE AND DESIST ORDER.

The imposition of a cease and desist order normally requires a showing that unlawful conduct is ongoing or likely to resume. *See Alex Parsinia d/b/a Pac. Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997) (“a cease and desist order is appropriate when the record shows that there is a likelihood that offenses will continue absent the order and when the record discloses persistent offenses”); and *Portman Square Ltd. – Possible Violations of Section 10 (a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86 (ALJ 1998) (“the general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities”). After proving violations of the Act, in order for Maher to obtain cease and desist relief against PANYNJ, it will have to make that showing.

Maher Terminals, LLC v. Port Authority of New York and New Jersey, 32 S.R.R. 1185, 1190 n.8 (FMC 2013).

Complainants contend that because Tariff Circular No. 6 as amended May 19, 2014, permits taxicabs to access the cruise terminal without paying an access fee, the Port is violating section 41106(2); therefore, Complainants seek a cease and desist order.

Notwithstanding the foregoing, even now, Respondents still seek to impose Access Fees which provide an unreasonable preference and/or advantage on certain Cruise Terminal users, while effecting an unreasonable prejudice and/or disadvantage against Complainants. To establish a claim of this nature, Complainants are again required to meet the *Ceres* elements outlined above. Complainants reassert and adopt their showing, supra, of the “similarly situated” and/or “competitive relationship” status pertaining to other users of the Cruise Terminal.

The Wharves Board’s 2014 amendment to the Tariff, as effective October 1, 2014, is unreasonably prejudicial and discriminatory against Complainants; even as modified it still favors taxicabs over other similarly situated commercial passenger vehicles accessing the Cruise Terminal, like those operated by Complainants. The current Tariff wholly exempts taxicabs from paying per-trip Access Fees, while requiring Complainants to pay an Access Fee of \$20.00 to \$30.00 per trip.

(Comp. Br. at 42-43.)

As discussed above, parking lot operators such as Complainants are not similarly situated to or in competition with common carriers such as taxicabs. Even if they are considered to be similarly situated or in competition, the Port made a reasonable, discretionary business decision not to charge access fees to taxicabs. Complainants have not proved by a preponderance of the evidence that the Port is violating the Act by not charging access fees to taxicabs. Therefore, cease and desist relief is not warranted.

XI. ATTORNEY FEES.

In its Answer, the Port asserted a claim for an award of attorney fees. (Answer at 9.) When Complainants filed their FMC Complaint, the Shipping Act provided: “If the complaint was filed within the [three year] period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.” 46 U.S.C. § 41305(b). Not long thereafter, Congress amended the Act to strike the phrase “plus reasonable attorney fees” from section 41305(b) and add a new section 41305(e): “*Attorney Fees.* – In any action brought under section 41301, the *prevailing party* may be awarded reasonable attorney fees.” Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, § 402, 128 Stat. 3022, 3056 (Dec. 18, 2014) (Coble Act) (emphasis added). Therefore, a prevailing complainant or respondent may be awarded attorney fees.

When controlling law is changed mid-case, the question of retroactivity arises. In one attorney fee case, *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974) [*Bradley*], the Court held that a tribunal should “apply the law in effect at the time it renders its decision.” *Bradley*, 416 U.S. at 711. In another attorney fee case, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) [*Bowen*], the Court stated “retroactivity is not favored in the law. . . . Congressional enactments and

administrative rules will not be construed to have retroactive effect unless their language requires this result.” *Bowen*, 488 U.S. at 711. Tension exists between the holdings of the two cases.

For the reasons stated in *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC; IFS International Forwarding, S.L.; and IFS Neutral Maritime Services*, FMC No. 14-04 (ALJ Apr. 15, 2015) (Initial Decision Dismissing Proceeding for Failure to Prosecute), Notice Not to Review, May 18, 2015, I find that because the FMC Complaint has been dismissed, the Port is the prevailing party in this proceeding and may be awarded reasonable attorney fees for attorney services performed after the effective date of the Coble Act. Determination of the fee awarded, if any, is deferred until the Commission decision is final.

XII. CONCLUSION.

Complainants have not proved by a preponderance of the evidence that the Port has violated section 41106(2) of the Shipping Act by calculating Complainants’ access fees at the rate of \$8.00 per parking space per month. Even if the Port were found to have violated section 41106(2), Complainants have not proved by a preponderance of the evidence that they suffered actual injury as a result of the violation. Therefore, Complainants’ Complaint is dismissed with prejudice.

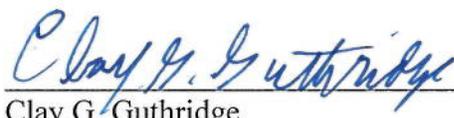
ORDER

Upon consideration of the record in this proceeding and for the reasons set forth above, complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking, Lighthouse Parking, Inc., and Sylvia Robledo d/b/a 81st Dolphin Parking have not proved by a preponderance of the evidence that assuming a violation of section, respondent The Galveston Port Facilities Corporation violated section 41106(2) of the Shipping Act of 1984, 46 U.S.C. § 41106(2). Therefore, it is hereby

ORDERED that Complainants’ Complaint against respondent The Galveston Port Facilities Corporation be **DISMISSED WITH PREJUDICE**.

Upon consideration of the record in this proceeding and for the reasons set forth above, complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking, Lighthouse Parking, Inc., and Sylvia Robledo d/b/a 81st Dolphin Parking have not proved by a preponderance of the evidence that respondent The Board of Trustees of the Galveston Wharves violated section 41106(2) of the Shipping Act of 1984, 46 U.S.C. § 41106(2). Therefore, it is hereby

ORDERED that Complainants’ Complaint against respondent The Board of Trustees of the Galveston Wharves be **DISMISSED WITH PREJUDICE**.



Clay G. Guthridge
Administrative Law Judge