

## FEDERAL MARITIME COMMISSION

DOCKET NO. 08-05 - CITY OF LOS ANGELES, CALIFORNIA, HARBOR DEPARTMENT OF THE CITY OF LOS ANGELES, BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LOS ANGELES, CITY OF LONG BEACH, CALIFORNIA, HARBOR DEPARTMENT OF THE CITY OF LONG BEACH, AND THE BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LONG BEACH ---POSSIBLE VIOLATIONS OF SECTIONS 10(B)(10), 10(D)(1) AND 10 (D)(4) OF THE SHIPPING ACT OF 1984

Docket No. 08-05

Served: August 21, 2009

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**BY THE COMMISSION: Joseph E. BRENNAN, *Acting Chairman*; Rebecca F. DYE and Richard A. LIDINSKY, Jr., *Commissioners***

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### **ORDER GRANTING MOTION TO DISMISS PROCEEDING**

On July 29, 2009, the Bureau of Enforcement (BOE) filed a motion to dismiss this proceeding based on substantial factual changes surrounding matters under investigation. BOE included in its motion a request to the presiding

Administrative Law Judge (ALJ) that the motion be certified to the Commission for disposition. Certification was made by the ALJ in an order served July 30, 2009. The Respondents filed a joint reply supporting the motion on August 3, 2009. Having considered BOE's motion and Respondents' supporting reply,<sup>1</sup> the Commission finds that the circumstances giving rise to the proceeding have changed sufficiently to warrant dismissal for the reasons identified by the Bureau of Enforcement.

On September 24, 2008, the Commission issued an Order of Investigation and Hearing (Order of Investigation) instituting this proceeding to determine whether specific elements of the Clean Truck Programs (CTPs) adopted by the Ports of Los Angeles (POLA) and Long Beach (POLB) violated sections 10(b)(10), 10(d)(1), and 10(d)(4) of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998, 46 U.S.C. § 40101, *et seq.* (Shipping Act). The CTPs were adopted to address environmental concerns arising from port drayage trucking, and were scheduled to become effective on October 1, 2008.

The Commission explained in the Order of Investigation that it was specifically concerned about the effects of: (1) POLA's prohibition against the use of owner-operator truck drivers in drayage service at the port and the requirement that Licensed Motor Carrier (LMC) concessionaires use only employee drivers; (2) POLA's offer

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<sup>1</sup> The three intervenors that remain in the proceeding did not submit replies to the motion. These intervenors are: (1) the Intermodal Motor Carriers Conference of the American Trucking Associations, Inc.; (2) the Natural Resources Defense Council, Sierra Club, and Coalition for Clean Air, participating jointly; and (3) the National Association of Waterfront Employers.

of payments to certain motor carriers as an incentive to provide drayage service at the port but not to other motor carriers; (3) POLA's requirement that drayage carriers have port-approved arrangements for off-street parking; (4) the exemption by both ports from payment of their Clean Truck Fee (CTF) if the cargo was transported in 2007 compliant trucks that are privately financed, while imposing the fee on beneficial cargo owners whose cargo moved in publicly financed clean trucks and certain trucks manufactured between 1989 and 2006; and (5) the failure of both Ports to establish criteria by which their respective applications for concessions would be considered for an award or denial of a concession.

Since this proceeding was initiated, numerous changes have occurred with respect to the Ports' CTPs relating to each of the matters set for investigation and hearing. With respect to the employee driver and off-street parking requirements, unrelated litigation<sup>2</sup> by the American Trucking Associations has had critical impact upon the implementation of the CTP here at issue before the Commission. In *ATA Inc., supra*, the employee driver requirement, off-street parking requirement, and concession agreement requirements were challenged by the American Trucking Associations as preempted under provisions of the Federal Aviation Administration Authorization Act of 1994 (FAAA Act), codified in the Interstate Commerce Act, 49 U.S.C. § 14501(c)(l). Though the District Court initially denied ATA's motion for a preliminary injunction, *American Trucking Associations, Inc. v. City of Los Angeles*, 577 F. Supp.2d 1110 (C.D. Cal, 2008), the U.S. Court of Appeals for the Ninth Circuit, on March 20, 2009, reversed the lower court and remanded the case for

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<sup>2</sup> *American Trucking Associations, Inc. v. City of Los Angeles, et al.*, No. 08-04920, C.D. Calif., 2009 WL 1160212 (C.D. Cal. Apr. 28, 2009) (*ATA, Inc.*).

issuance of a preliminary injunction, finding in particular that the employee driver mandate and the off-street parking requirements are likely preempted. *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1057-58 (9th Cir. 2009). The District Court subsequently enjoined the Ports from pursuing the employee driver and off-street parking requirements because such requirements were preempted by the FAAA Act.<sup>3</sup> The pending action on the merits for a permanent injunction is currently set for trial, to commence no earlier than December 2009.

As announced, POLA's incentive program for truck purchases raised concerns whether the program, as applied, was reasonable and non-discriminatory. On November 6, 2008, however, the Los Angeles Board of Harbor Commissioners approved an Incentive Addendum to its Concession Agreement, authorized the collective payment of incentive awards for 2,200 trucks in 2008 and provided details for eligibility and other requirements for participation. On December 23, 2008, the Port announced that it had begun the process of distributing approximately \$44 million in incentive checks. In discovery materials obtained in this proceeding, BOE indicates that POLA has identified the recipients of approved payments, the amounts of awards, and for each, the number of vehicles committed to and placed in port service. In short, BOE notes that the program has been made available to a broader population of LMCs than initially indicated.

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<sup>3</sup> The American Trucking Associations has taken a second appeal to the Ninth Circuit challenging those portions of the Ports' concession requirements that were not enjoined by the District Court. *See American Trucking Associations, Inc. v. City of Los Angeles*, No. 09-55749 (9th Cir. appeal filed May 14, 2009).

Though collection of the Clean Truck Fee and application of the CTF exemptions were scheduled to commence on October 1, 2008, the fees and exemptions were delayed until February 18, 2009. Between the commencement of this proceeding and May, 2009, the Ports have modified their CTF programs on several occasions and expanded the categories of clean trucks eligible for the exemption. At present, privately funded 2007-compliant diesels as well as those purchased with public funds prior to May 4, 2009, are exempt from payment of the CTF. In addition, certain 2007-compliant “alternative fuel” trucks that were not previously exempt have now been exempted, whether purchased with public or private funds.

When this proceeding was commenced, the Ports were only then beginning to accept and process concession applications and there was no way to discern who had applied, how many applicants would receive concessions or on what basis grants and denials would be made. Each of the Ports has now posted on its website a log of concession applications that are updated daily showing the applicant’s name and other identifying information, and the status and disposition of each application. BOE avers that copies of these public logs provided in discovery indicate that all applications furnishing the requested information have been granted by the Ports.

The effects of the employee driver and the off-street parking requirements that may have violated the Shipping Act have been eliminated temporarily and, likely, permanently due to the federal statutory preemption of those provisions found by both the District Court and the Ninth Circuit. As indicated in BOE’s motion and in the Ports’ reply in support of the motion, continuation of this proceeding with respect to the

employee driver and off-street parking requirements would entail the development of a record based on facts that may have applied at the time this proceeding was started, but do not now and may not ever exist.

Though the Commission's Order of Investigation reflected concerns that the Ports' CTPs might violate the Shipping Act, the Commission expressly acknowledged the significant environmental and public health benefits sought to be achieved by the Ports. Those concerns originally raised in the Order of Investigation resulting from CTF exemptions, the lack of transparency relative to the concession application process, and POLA's truck purchase incentive program appear to have been sufficiently addressed in light of the Ports' actual implementation and modification of those programs, as reflected in the Ports' public announcements and in discovery documents reviewed by BOE in this proceeding.

There appears to be no regulatory purpose to the continuation of a proceeding to address the legality of past conduct where the circumstances have changed so substantially. *See, Contract Marine Carriers, Inc.*, 22 SRR 1091, 1093 (FMC 1984) (granting motion to dismiss enforcement proceeding due to changed circumstances stemming from enactment of the Shipping Act of 1984). *See also Wilfredo Garcia a/k/a Willie "Bill" Allen, et. al*, 26 SRR 870 (ALJ 1993); *Eddins B. Taylor, Marcella Shipping Co. Ltd.*, 25 SRR 1502 (ALJ 1991) (granting motions to dismiss due to District Court proceedings and other actions by respondents to comply with the law).

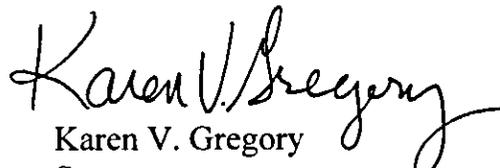
CONCLUSION

THEREFORE, IT IS ORDERED, That the presiding Administrative Law Judge's certification of the motion to dismiss filed by the Bureau of Enforcement to the Commission is affirmed;

IT IS FURTHER ORDERED, That the motion to dismiss of the Bureau of Enforcement is granted; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued as of the date this order is served upon the parties to the proceeding.

By the Commission.

  
Karen V. Gregory  
Secretary