

ORIGINAL

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(January 5, 2000)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

January 5, 2000

DOCKET NO. 99-21

SOUTH CAROLINA MARITIME SERVICES, INC.

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

Complainant, an operator of a cruise ship offering gambling, alleges that respondent South Carolina State Ports Authority (SCSPA) has refused to allow its ship to berth at Charleston although allowing another cruise line operator to obtain berthing. Complainant alleges that SCSPA has therefore violated sections 10(b)(10) and 10(d)(4) of the Shipping Act of 1984 by such refusal and discriminatory conduct. Complainant seeks a cease and desist order plus money damages. Respondent SCSPA answers that it is following State law and policy and that it cannot be sued by private parties because it is an arm of the State that is immune from such suits under the 11th Amendment to the Constitution. Respondent therefore moves for dismissal of the complaint. It is ruled:

- (1) Respondent SCSPA has been found to be an arm of the State of South Carolina by the Fourth Circuit Court of Appeals and therefore to enjoy immunity from private suits under the 11th Amendment to the Constitution. This decision is consistent with recent Supreme Court decisions holding that States are immune from private suits in federal courts.
- (2) Pursuant to a federal law known as the Johnson Act, the matter of regulating cruise ships offering gambling has been left to the States and it appears that there is a Charleston Ordinance that bans such ships.

- (3) The 11th Amendment does not preclude the Commission as opposed to a private party from investigating and regulating a bona fide State-run marine terminal. Consequently, if there is any merit to complainant's allegations of unlawful discrimination, the Commission may itself investigate the matter by whatever procedure the Commission may choose. The complaint is accordingly dismissed.

**MOTION OF RESPONDENT SOUTH CAROLINA STATE
PORTS AUTHORITY TO DISMISS COMPLAINT GRANTED**

Norman D. Kline, Administrative Law Judge.

The Complaint and Answer

By complaint served on October 27, 1999, complainant South Carolina Maritime Services, Inc. (Maritime Services) alleges that it is a South Carolina corporation that charters a passenger ship known as the M/V TROPIC SEA, that flies the flag of the Bahamas. Maritime Services alleges that this ship is a passenger vessel having six decks, five of which are designated for passenger access, three of which (the A, D, and E decks) contain passenger staterooms. Besides buffet tables and restaurant, gift shop, lounge with bar and swimming pool, and facilities for officers and crew, the M/V TROPIC SEA allegedly contains a small casino on Deck B and a main casino on Deck C. Maritime Services alleges furthermore that it intends to offer "passenger cruises" from the Port of Charleston sometimes to nowhere and sometimes to the Bahamas. Maritime Services also alleges that it offers numerous activities for its passengers, including dining service and entertainment such as dancing, live musicals, piano bar, and live band. However, it also alleges that it offers "bingo, casino games, and various games for the passengers' children" but maintains that passengers may enjoy casino gambling only "while the vessel is in international waters." In this regard, it is alleged, "[g]ambling operations will only be conducted while the vessel is in international waters, and will

not occur in South Carolina waters.” Complainant alleges that it “is a common carrier engaged in the business of providing transportation of passengers for hire.”

Maritime Services alleges that respondent South Carolina State Ports Authority (SCSPA) has refused to give it berthing space at Charleston, citing five specific letters of rejection received from SCSPA between December 1998 and August 1999, which denied berthing because of a city ordinance or South Carolina laws and SCSPA’s “policy” of refusing berthing to ships whose “primary purpose is gambling.” Notwithstanding such “policy,” it is alleged, SCSPA did provide berthing for another cruise operator, Carnival Cruise Lines, who advertised overnight “cruises to nowhere” aboard the M/S INSPIRATION, an oceangoing passenger vessel flying the flag of Panama and containing a casino featuring “slot machines, blackjack, roulette, Caribbean stud poker, wheel of fortune, bingo, and MegaCash, advertised by Carnival “as the world’s largest cruise ship jackpot.” Like complainant’s ship, it is alleged that for its “cruises to nowhere” Carnival “provided gambling activities to the passengers while the vessel was in international waters.” Maritime Services alleges furthermore that SCSPA berthed Carnival’s ship that boarded passengers on May 28 and September 11, 1999, that Carnival has advertised further cruises departing Charleston on October 7, 1999, and future cruises to depart in May and October 2000, that SCSPA charged Carnival relevant port tariff charges under SCSPA’s tariff and has agreed with Carnival to provide berthing to Carnival’s ship.

Because of the foregoing alleged conduct, Maritime Services alleges that SCSPA has unreasonably refused to deal or negotiate with it, in violation of section 10(b)(10) of the Shipping Act of 1984 and has unduly and unreasonably preferred Carnival and unduly and unreasonably prejudiced or disadvantaged complainant, in violation of section 10(d)(4) of the 1984 Act. Complainant asks for an order compelling SCSPA to cease and desist fi-om the aforesaid alleged

violations, to order lawful and reasonable practices, and to compensate complainant “for its actual injuries caused by the Ports Authority’s discriminatory practices, as well as interest and reasonable attorney’s fees.” Complainant alleges such injuries to include but not to be limited to “loss of profits, loss or earnings, loss of sales, and loss of business opportunities.” Finally, complainant asks “[t]hat this Commission award Maritime Services such other and further relief as is just and proper.”

SCSPA admits a number of factual allegations made by Maritime Services when it has information to confirm the allegations, such as the allegation that SCSPA is “a political agency, entity, body and/or subdivision of the State of South Carolina,” that it has rejected. Maritime Services’ repeated requests for berthing at Charleston because of state or local laws or ordinances and a “policy” regarding gambling ships, and that it has berthed Carnival’s ship at Charleston, at least in September 1999. However, SCSPA denies any agreement with Carnival or that Carnival’s ship is primarily one designed for gambling like complainant’s. SCSPA states in its answer to the complaint that “[w]ith regard to future cruises by any cruise line or other entity, the SPA denies that it will accommodate any vessel that offers a cruise, the primary purpose of which is to promote gaming.”

Complainant also asks that the Commission file suit in the U.S. District Court for the District of South Carolina, Charleston Division, in order to obtain a temporary restraining order and preliminary injunction against SCSPA. Complainant cites “Section 1710(h) of the Shipping Act...” (Para. 33, complaint.) SCSPA opposes this particular request, citing the fact that complainant has the right to seek its own injunction in federal court pursuant to section 1 l(h)(2) in aid of its own complaint whereas the Commission can seek such injunction in court pursuant to section 1 l(h)(1) of the Act in aid of a Commission-instituted investigation, which the instant proceeding is not. (Answer, para. 33, and SCSPA’s Motion to Dismiss at 10-1 1.) After I advised complainant that it had the right to seek its own injunction in federal court under section 1 l(h)(2), complainant’s counsel advised that “it is likely that our client will seek an injunction pursuant to sec. 1 l(h)(2).” (Letter dated November 11, 1999, from complainant’s counsel to the presiding judge.) In view of the SCSPA’s argument that it is entitled to immunity from private suits “as an arm of the State” under the 1 1th Amendment to the Constitution, it is doubtful if any federal court would have jurisdiction to issue such an injunction, as will be made more clear in my discussion of the 1 1th Amendment and State sovereign immunity doctrine below.

Aside from the particular denials by SCSPA, the main thrust of SCSPA's answer is that Maritime Services is attempting wrongfully to invoke the Commission's jurisdiction because "Congress, through the Johnson Act, has specifically determined not to preempt state laws prohibiting and regulating gaming activities within their borders, including port calls by gaming vessels." SCSPA argues that the State of South Carolina prohibits "gambling junkets, and the SPA will not permit its cruise facilities to be used to provide such services. Rather, the SPA's policy allows cruise ships to use its facilities only where gaming activities are not the primary purpose of the cruise." Several times in its answer SCSPA indicates that it will deny its facilities to cruise ships having gambling devices on board and will do so "even where the primary purpose of the cruise is not gambling" if necessary to eliminate alleged discrimination.² Moreover, SCSPA offered five affirmative defenses relating mainly to its contention that the Commission has no jurisdiction over the complaint because of a particular statute and the 11th Amendment to the Constitution. SCSPA also argues that SCSPA's actions are based upon the proper exercise of the police power of the State of South Carolina and contends that "Maritime Services is not a common carrier within the meaning of the Shipping Act of 1984." In its Answer to the complaint SCSPA promised to file a motion to dismiss on these grounds and three days later, it did.

²On page one of its answer, SCSPA states that "should any determination be made to the contrary [i.e., that SCSPA has unlawfully discriminated] the SPA will deny facilities to all vessels departing from and returning to Charleston for short-term 'cruises to nowhere' with gambling devices on board, even where the primary purpose of the cruise is not gambling." On page six of its answer, at para. 27., SCSPA states that "[w]ith regard to future cruises by any cruise line or other entity, the SPA denies that it will accommodate any vessel that offers a cruise, the primary purpose of which is to promote gaming." On page 8 of its answer, SCSPA states that "if the Commission determines that the complaint states a claim cognizable under the Shipping Act, the SPA will take appropriate remedial measures to eliminate any perceived discrimination or undue preference, as described on page 1 of this Answer."

SCSPA's Motion to Dismiss

In its Motion to Dismiss SCSPA has launched a massive attack on the complaint based on a number of arguments, several of which are jurisdictional in nature while others pertain more to complainant's standing and the merits of its factual allegations. Two of the arguments relate to the Constitution or to a particular statute. Thus, SCSPA argues that it is a State agency and is therefore immune under the 11th Amendment to the Constitution from being sued by private parties either in federal courts or before the Commission. SCSPA cites recent Supreme Court decisions, such as *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 119 S. Ct. 22 19 (1999); and *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

A second argument by SCSPA of a jurisdictional nature is that Congress has reserved the matter of regulation of gambling ships to the States. SCSPA cites the Johnson Act, 15 U.S.C. sec. 1175, and argues that this Act shows that Congress intended to defer to State law with respect to control of gambling devices on ships. SCSPA cites *Casino Ventures v. Stewart*, 183 F. 3d 307 (4th Cir. 1999), in which the court held that the State of South Carolina could lawfully control gambling on ships even beyond State territorial waters under its own laws which were not pre-empted by the Johnson Act and, indeed, that Congress intended to extend, not curb State police power in this field. Continuing in this vein, SCSPA argues that complainant's ship is not a cruise ship at all but is classified as a "ferry," cannot provide accommodations for all its passengers, and has, as her primary purpose, gambling, therefore differing significantly from the Carnival cruise ship that SCSPA is accused of unlawfully preferring. SCSPA contends that complainant is making a "transparent attempt to circumvent the Johnson Act" and argues that complainant "seeks

Commission review of state law and policy in an area that Congress has specifically left to South Carolina.” (SCSPA’s Motion at 8.) SCSPA therefore concludes that “the proper forum for the interpretation of South Carolina law in areas expressly reserved to the states is in a South Carolina state court.” (*Id.*) SCSPA also cites a number of South Carolina anti-gambling statutes and a City of Charleston Ordinance Sec. 21-179, which it claims to authorize its conduct.

SCSPA’s other arguments relate somewhat to the Commission’s jurisdiction under the Shipping Act but also go to the merits of complainant’s allegations of violations of that Act. Thus, SCSPA argues that complainant cannot seek relief from the Commission because allegedly complainant has failed to comply with federal law regulating cruise lines, a law that the Commission administers. Moreover, SCSPA argues that it is not a marine terminal operator as regards complainant’s ship because complainant is not a common carrier by water and furthermore the Commission does not regulate everything that a marine terminal operator does even if SCSPA is a regulated marine terminal operator, especially when the activity in question involves anon-common carrier that SCSPA believes complainant to be.³

Complainant’s Response to the Motion to Dismiss

In its Response, Maritime Services contends that SCSPA “has engaged in a pattern of discriminatory practices in its role as marine terminal operator in the Port of Charleston, South Carolina” (Response at 1.) Maritime Services reiterates the allegations in its complaint that

³SCSPA also argues that the complaint is unverified and that “[t]his failure alone is sufficient to support dismissal.” (SCSPA’s Motion at 17.) If this were true, it would amount to a technical violation which could easily be cured. See *Gillen’s Sons Lighterage v. American Stevedores*, 10 S.R.R. 195 (ALJ 1968); 12 F.M.C. 325, 331 n. 6 (1969). However, the complaint has a “Verification” signed by Frank Guarino, President of Maritime Services, Inc. that is sworn and subscribed before a Notary Public. See “Exhibit F” attached to Complainant’s Response to Respondent’s Motion to Dismiss.

SCSPA has unlawfully discriminated against it by denying its ship berthing at Charleston but allowing another cruise line, Carnival, to berth at Charleston, although, like complainant, Carnival allegedly offers “cruises to nowhere” on ships that provide gambling. Complainant contends that the various South Carolina statutes cited by SCSPA do not apply to its operations and that one South Carolina court has so held regarding another cruise operator. Complainant also contends that the 1984 Act “clearly vests the Commission with authority to investigate and direct payment of reparations, as well as to subsequently file suit for injunctive relief against marine terminal operators-such as the Ports Authority-who fail to abide by the provisions of the Shipping Act.” (Complainant’s Response at 2.) Complainant contends that SCSPA is not immune from an action taken by the Commission under the 11th Amendment to the Constitution, that Maritime Services qualifies as a common carrier by water and that it has complied with applicable laws requiring certification of financial responsibility.

**Complainant’s Focus on SCSPA’s Enforcement
of South Carolina Law**

Although perhaps not always completely consistent, Maritime Services contends that it is not contesting the constitutionality of the underlying South Carolina laws on which SCSPA claims to justify its policy of denying berthing to complainant’s ship. Instead, Maritime Services argues that it is challenging SCSPA’s alleged discriminatory enforcement of this policy. In complainant’s own words: (Complainant’s Response at 4.)

In actual fact, Maritime Services is unconcerned with the Constitutionality of the underlying laws which the Ports Authority cites as authority for its decision not to allow the M/V TROPIC SEA to berth at its facilities. Again, at least one South Carolina court reaching the issue has held squarely that these statutes do not apply

to the “cruise to nowhere” activities which Maritime Services has proposed to undertake. (Case citation omitted.) This action is a complaint about the Ports Authority’s unreasonable and discriminator-v enforcement of its policies, not a complaint about the policies themselves. It is the Ports Authority’s discriminatory berthing practices that serve as the basis of Maritime Services’ complaint and the intended focus of Federal Maritime Commission action. (Emphasis added except for the word “enforcement”.)

Having stated that Maritime Services is not challenging the South Carolina laws (which it deems not to be applicable anyway) nor the alleged “policy” that SCSPA claims to be supported by these laws, nevertheless Maritime Services states that SCSPA is wrong to follow such “policy” when dealing with individual carriers applying for berths. Instead, Maritime Services contends that SCSPA should have decided whether to berth any particular carrier strictly on “transportation and economic conditions” and not on “moral considerations which are completely unrelated to transportation or economic conditions.” (Response at 5-6.) Maritime Services contends therefore that “the Port Authority’s decision to prohibit the M/V TROPIC SEA from docking at the Ports Authority’s terminal is based on impermissible considerations.” (*Id.* at 6.)

Complainant’s Supplementation to Its Response

In lieu of conducting a formal prehearing conference, I instructed complainant to clarify several matters in order that I not misunderstand its arguments before ruling on the SCSPA’s Motion. (See Order to Supplement the Record, December 9, 1999.) In particular, I requested clarification on three matters: 1) the effect of the City of Charleston Ordinance Sec. 21-179 that appears to deal with gambling ships at Charleston and that was cited by SCSPA but which complainant had not addressed; 2) whether complainant was attacking the underlying South Carolina laws or their enforcement by SCSPA; and 3) how complainant intended to prove its allegations of

“undue” or “unreasonable” conduct by SCSPA within the meaning of the Shipping Act. The last matter would be relevant to the conduct of the case assuming that the complaint was not dismissed. In response to my inquiries, complainant furnished the following answers: 1) City of Charleston Ordinance Sec. 2 1 - 179 has not been interpreted by a South Carolina court but, in any event, neither South Carolina law enforcement officials nor the City of Charleston enforce the Ordinance against cruise ships and SCSPA is not authorized to enforce the Ordinance. Moreover, “. . . Complainant respectfully suggests that anti-gambling laws or ordinances are not before this Commission.” (Complainant’s Supplementation at 2.) However, states complainant, “the City of ‘Charleston Ordinance, if considered, would premise berthing decisions on factors other than purely transportation or economic considerations. The Shipping Act prohibits that consideration.” (*Id.* at 3.) This answer overlaps with the next one.

2) Complainant states that it is not attacking the constitutionality of South Carolina statutes or the Charleston Ordinance and states that “[t]hat determination is for another forum.” (*Id.* at 3.) However, complainant states that it is attacking SCSPA’s alleged “policy” of barring only complainant’s ship from Charleston and its “discriminatory enforcement.” (*Id.*) Thus complainant argues that should the SCSPA’s “policy” (which SCSPA contends to be based on South Carolina laws) be upheld, complainant “asks the Commission to prohibit SCSPA from continuing to discriminate against Complainant while allowing its competitors to berth and engage in the identical activity.” (*Id.*) In any event complainant contends that the South Carolina laws cited by SCSPA “are all ultimately inapplicable to this proceeding.” (*Id.* at 4.)

3) Complainant states that it was not aware of the Commission’s rule requiring complainants to commence discovery with the Sling of their complaints but that it “intends to participate in full discovery in order to resolve issue of fact in this action.” (*Id.* at 4.) However, complainant also

states that it “intends to work with counsel for the Ports Authority for the purpose of arriving at stipulations of fact so that the case may be decided in an expeditious manner.” (*Id.*)

Whether Maritime Services is challenging SCSPA’s alleged discriminatory conduct among cruise ship operators or challenging an underlying State or City “policy” or State or City laws, as I explain below, the problem is that SCSPA is an “arm” of the State of South Carolina and therefore enjoys immunity from being sued by “private” persons either in courts or before administrative agencies. Consequently, as I also mention below, if there is merit to Maritime Services’ allegations that SCSPA is discriminating among cruise ship operators without any justification recognized by the Shipping Act, the merit of such allegations would have to be determined by a procedure instituted by the Commission itself, whether informal or formal.

DISCUSSION AND CONCLUSIONS

As discussed above, respondent SCSPA has raised several arguments in asking that the instant complaint be dismissed. The first two relate to the Commission’s jurisdiction while the others involve consideration of the merits of the alleged unlawful discrimination. I find, however, that the recent Supreme Court decisions interpreting the 11th Amendment and State sovereign immunity from private suits plus a decision in the U.S. Court of Appeals for the Fourth Circuit holding that SCSPA is an “arm of the State” and therefore entitled to the 11th Amendment immunity from private suits require that the instant complaint be dismissed. m p l a i n a n t ’ s allegations that SCSPA has unlawfully discriminated and unreasonably refused to deal with complainant in violation of sections 10(d)(4) and 10(b)(10) of the 1984 Act, respectively, Maritime Services’ allegations and request for remedial orders would have to be considered by the

Commission in the form of a Commission-instituted investigation, whether formal or informal, because the doctrine of State sovereign immunity does not extend to proceedings against the States brought by the superior federal sovereign acting through its agent, the Federal Maritime Commission.

In recent years the Supreme Court has been elevating the doctrine of State sovereign immunity from private lawsuits to new heights and has even held various attempts of Congress to regulate State entities under the Interstate and Indian Commerce Clause of the Constitution (Article 1, sec. 8, cl. 3) to be beyond Congress's power. The first of these recent Supreme Court decisions was issued in 1996, namely, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44. In that case the court held that Congress could not abrogate State sovereign immunity from private suits under the Constitution. Prior to 1996 no State-run entity against which a complaint had been filed with the Commission had argued that the complaint had to be dismissed on 11th Amendment grounds. Indeed, it had always been believed that any person could file a complaint against State-run marine terminal operators that enjoyed no special privileges under the Shipping Act merely because they were operated by States. The Supreme Court had so held in the leading case of *California v. United States*, 320 U.S. 577 (1944), a case involving a Commission-instituted investigation. Consequently, the Commission has for many years enforced the Shipping Act against State-run marine terminal operators by means of Commission-instituted investigations and also by proceedings initiated by private complaints. State-run or purportedly State-run marine terminal operator argued that it enjoyed some type of privilege against claims against it in complaint proceedings, the arguments were quickly rejected on the authority of *California v. United States*. See, e.g., *Perry's Crane Service v. Port of Houston Authority*, 16 S.R.R. 1459, 1480-1484 (I.D.), adopted in relevant part, 19 F.M.C. 548, 556 (1977) ("... the state agency exemption has been

demolished”); *Pate Stevedoring Co. of Mobile v. Alabama State Docks Dept.*, 24 S.R.R. 657, 670-673 (I.D.), adopted, 24 S.R.R. 1221 (1988).

However, in view of the decision in *Seminole Tribe of Florida* and several followup decisions of the Court, namely, *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Board*, 119 S. Ct. 2219, 144 L.Ed 2d 605 (1999); and *Alden v. Maine*, 119 S. Ct. 2240, 144 L.Ed 2d 636 (1999), the question of whether State-run or arguably State-run marine terminal operators named as respondents in Commission complaint proceedings enjoy 11th Amendment immunity from private suits has arisen.⁴ This development has been fueled by the fact that the Court overruled previous Court decisions that had held that States had waived their 11th Amendment immunity or had consented to being sued by private parties by virtue of entering into businesses subject to federal regulation and that Congress could abrogate State sovereign immunity under Congress’s powers under the Interstate and Indian Commerce Clause of the Constitution.’ Moreover in *Alden v. Maine*, cited above, the court held that Congress could not even abrogate State sovereign immunity from Private suits in the State’s own courts under the Interstate Commerce Clause. h e l d that it did not matter in which forum a private case was brought as regards State sovereign immunity,

⁴Thus, the question of the States’ 11th Amendment immunity from private suits has been raised in Docket No. 99-16 - *Carolina Marine Handling, Inc. v. South Carolina State Ports Authority, et al.*; Docket No. 98-23 - *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*; and in Docket No. 99-04 - *Ceres Marine Terminals, Inc. v. Maryland Port Administration*. However, in No. 98-23 (*New Orleans*), it appears that the federal courts have already decided that the respondent New Orleans Board is not entitled to 11th Amendment immunity, not being an “arm of the State.” See Docket No. 98-23 - Further Adjustment of Schedule to Delete Consideration of Special Jurisdictional Issue, December 13, 1999 (ALJ). In Docket No. 99-04 (*Ceres*), the parties have agreed to present the question to a federal court in the future, if need be, rather than to the Commission. The question, however, is being presented to the Commission both in the instant case and in Docket No. 99-16 (*Carolina Marine Handling, Inc.*)

⁵In its decision in *Parden v. Terminal R. Co. of Alabama Docks Dept.*, 377 U.S. 184 (1964), the Court held that a State had consented to being sued by private parties because the State had entered into a federally regulated business, by operating an interstate railroad. The Court expressly overruled *Parden* in *College Sav. Bank of Florida v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S., _____ 144 L.Ed 2d 605, 619 (1999). In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court had held that Congress had the power to abrogate State sovereign immunity under the Interstate Commerce clause. However, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 46 (1996), the Court expressly overruled *Union Gas*.

Commission has indicated that it approves of its judges addressing a jurisdictional issue before proceeding to consider the merits of complaints. Thus, in *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 75 1, 762 (1999), the Commission stated that “an agency must reach jurisdictional issues before addressing the merits of a case.” The Commission cited one of its earlier decisions in *Government of the Territory of Guam v. Sea-Land Service, Inc. (Gov-Guam)*, 28 S.R.R. 252,265 (1998); and *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990). The Commission noted that sometimes the agency could bypass deciding a jurisdictional issue and proceed to decide the merits of a case when the merits and jurisdiction were intertwined and when the merits were so easy to decide that “the better use of administrative resources warrants a disposition on the merits without a finding of jurisdiction.” (*Id.*) However, as the Commission noted, the Supreme Court abrogated the second reason to bypass deciding jurisdictional issues as regards federal courts in the case of *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1012 (1998). The issue as to SCSPA’s State sovereign immunity is separate from the merits of the complaint and the merits are not easily determined without a thorough investigation of the facts of alleged discrimination and the application of local South Carolina law. Consequently, I conclude that the jurisdictional issue should be addressed and resolved now exactly for the reasons given in *GovGuam* as well as the reasons given below.

The next matter that I have considered is the fact that deciding an issue under the 11th Amendment does implicate the Constitution and the Commission has declined to rule upon a constitutional issue in a past case. Thus, in *Plaquemines Port v. Federal Maritime Commission*, 838 F.2d 536,544 (D.C. Cir. 1988), the court affirmed the Commission’s decision in *New Orleans Shipping Association v. Plaquemines Port*, 23 S.R.R. 1363, 1371 (1986), in which the Commission found several marine terminal charges to be unlawful under the Shipping Act but declined to address

a constitutional question as to their validity under a non-Shipping Act provision of the Constitution. The court stated that the Commission could have decided the constitutional question but **did not** have to and the court itself decided the question so as to affirm the Commission's decision on the Shipping Act issues.

More recently, in the ongoing case of Docket No. 94-01 - *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, which is now before the Commission on remand from the Fourth Circuit Court of Appeals, the respondent Maryland Port Administration (MPA) has agreed with complainant Ceres to defer litigating the question as to whether MPA is an "arm" of the State of Maryland entitled to 11th Amendment immunity and has agreed to raise the question before a court if necessary. The Commission approved the agreement of the parties and stated that "any Eleventh Amendment and sovereign immunity issues can be resolved most appropriately and efficiently in federal court." Docket No. 94-01, Order Granting Joint Motion to Approve Stipulation, September 17, 1999, at 2. I do not conclude that I should defer ruling on SCSPA's Motion on account of the *Plaquemines* or *Ceres* rulings for the reasons given below.

In the instant case, SCSPA is not asking the Commission to interpret a provision of the Constitution having nothing to do with the Shipping Act. *In Plaquemines*, the particular constitutional provision in question concerned a prohibition against taxes on exports. In the instant case, however, SCSPA is asking the Commission to rule upon the scope of its jurisdiction under the Shipping Act and whether SCSPA's defense of State sovereign immunity from private suits is a valid one under that Act. Surely the Commission is able to rule upon its own statute and if Congress has been silent on the question, a court will defer to the Commission's interpretation of its own enabling Act if the interpretation has a reasonable basis. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In the *Ceres* case, the parties agreed to postpone litigating the question as to whether MPA was an “arm of the State” entitled to 11th Amendment immunity from private complaints. ^{u s l y} that has not happened in the instant case in which SCSPA wants a ruling now on the question. Secondly, the parties have largely progressed beyond the hearing stage in *Ceres* unlike the instant case which is in its very early stages. Therefore, MPA would have less motivation in having its jurisdictional defense decided by the Commission in the interest of avoiding the burden and expense of mounting a defense on the merits of the complaint. Thirdly, whether MPA is an “arm of the State” entitled to 11th Amendment immunity has apparently never been decided by any court, at least counsel for MPA has not cited any such court decision to the Commission as far as I am aware. By contrast, in the instant case, the Fourth Circuit Court of Appeals has decided the question as to SCSPA and found SCSPA to be a bona fide “arm of the State” that qualifies for the 11th Amendment immunity. See *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051 (4th Cir. 1995). As the court’s decision in *Ristow* illustrates, determining the status of a purported State-run marine terminal operator under the 11th Amendment is not an easy task but requires consideration of a number of factors, including State law. *Ristow*, 58 F.3d at 1052 n. 3.⁶ Consequently, the Commission need not defer to a court to await the court’s decision as to whether SCSPA is entitled to 11th Amendment

⁶The determination of an entity’s status as an “arm of the State” entitled to 11th Amendment immunity from private suits involves consideration of complicated factors under tests enunciated by the Supreme Court and the Circuit Courts of Appeals. In *Ristow*, the court cited a Supreme Court decision setting forth six factors to consider, and the Fourth Circuit “distilled” these factors into four, including how the entity was treated as a matter of state law. *Ristow*, 58 F.3d at 1052 n. 3. Other circuit courts have described the process as involving a “multi-factor, fact-intensive ‘arm of state’ test.” *Parella v. R.I. Employees’ Retirement System*, 173 F.3d 46, 54-55 (1st Cir. 1999). See also *Supreme Court’s Construction of Eleventh Amendment, Restricting Federal Judicial Power Over Suits Against States*, 106 L.Ed 660-720 (1991). Whether a particular quasi-public port authority or commission is entitled to 11th Amendment immunity depends upon local laws and considerations. SCSPA has been found to qualify for 11th Amendment immunity. However, other port commissions or authorities have not been so found. See, e.g., *Principe Compania Naviera, S.A. v. Board of Commissioners of the Port of New Orleans*, 333 F. Supp. 353 (E.D. La. 1971) (Board not entitled to 11th Amendment immunity); *Jacintoport Corp. v. Greater Baton Rouge Port*, 762 F.2d 435 (5th Cir. 1985) (Baton Rouge Port Commission not entitled to 11th Amendment immunity). Clearly, as the Commission stated in *Ceres*, the status of MPA under the 11th Amendment “can be resolved most appropriately and efficiently in federal court.”

immunity from private suits nor as to whether SCSPA has consented to being “sued” by a private complainant. In the instant case the Commission need only decide if it must alter the form in which it enforces the Shipping Act against State entities that operate marine terminals by relying on Commission-instituted investigatory proceedings rather than on Byvate complaints. r i n g ruling on SCSPA’s Motion at this time, there is a risk of delay because SCSPA could probably seek immediate court review under the so-called “collateral order” doctrine that allows an aggrieved party whose rights will be irretrievably lost without immediate judicial review to seek such review before being forced to undergo the burden and expense of defending on the merits in what could be a lengthy trial. The normal rule governing judicial review of the Commission’s decisions under the Judicial Review Act (the “Hobbes Act”) precludes judicial review before there is a “final order” of the Commission. See 28 U.S.C.A. sec. 2344. This rule is known as the “ripeness for review” doctrine in administrative law. The Supreme Court has explained that the reason for the rule is to prevent premature judicial interference with administrative proceedings, but the Court also recognized that under some circumstances judicial review might be necessary at an early stage. In the words of the Court:

. . . it is fair to say that its [the ripeness for review doctrine] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decisions and the hardship to the parties of withholding court consideration. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (footnote omitted) (emphasis added).

If the Commission defers ruling on SCSPA’s Motion or denies it, the SCSPA, an “arm of the State,” will be forced to undergo the burden and expense of defending against a private party in a

complaint proceeding even though the Fourth Circuit Court of Appeals has found that SCSPA is a bona fide State “arm” entitled to 11th Amendment immunity from Private Suits. Supreme Court views the denial of a State entity’s immunity rights under the 11th Amendment to be so important that it has held that a State entity has the right to an immediate appeal to a court if its motion is denied. See *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139,146 (1993), in which the Court described the importance of respecting the 11th Amendment’s protection of and respect for the States’ ‘dignitary interests.’ In the words of the Court:

“The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.” (Case citation omitted.) The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including a sovereign immunity. (Case citation omitted.) It thus accords the States the respect owed them as members of the federation. While application of the collateral order doctrine in this type of case is justified in part by a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States’ dignitary interests can be fully vindicated. (Footnote quoted below in part.) (Emphasis added.)

In the footnote to the above quotation, the Court rejected the argument that the States need not enjoy their special immunity from private suits because they might be able to “bear the burden of litigation” better than could individual officials. The Court remarked:

The Eleventh Amendment is concerned not only with the States’ ability to withstand suit, but with their privilege not to be sued. (Emphasis added.)

Other decisions of the federal courts allowing immediate appeals to courts before requiring entities to undergo the burdens of defending on the merits when they would irretrievably lose rights

thereby illustrate how the courts find it necessary to shortcut the usual appellate procedure that requires parties to litigate all issues to termination before seeking judicial review.⁷

In conclusion, I can find no valid reason to defer ruling on SCSPA's Motion or to deny SCSPA the protection from private suits that the Fourth Circuit has already found that SCSPA has. Nor do I see any significance to an argument that the doctrine of 11th Amendment-State sovereign immunity from private suits does not extend to administrative proceedings. ~~u r t h a s~~ held that statutes enacted by Congress under Article 1, sec. 8, cl. 3 of the Constitution (the Interstate and Indian Commerce Clause) cannot abrogate the States' 11th Amendment immunity. See *Seminole Tribe of Florida v. Florida*, cited above. If federal courts that are established under Article III of the Constitution must respect States' 11th Amendment immunity and Congress is powerless to override the States' immunity under Article I of the Constitution, it is irrational to argue that an agency like the Commission, created under an Article I statute, is free to disregard the 11th Amendment or its related doctrine of State immunity from private suits. would appear to be inconsistent with the Supreme Court's holding in *Alden v. Maine*, cited above, 144 L.Ed 2d at 665, that "The logic of the decisions [interpreting State immunity under the 11th Amendment] . . . does not turn on the forum in which the suits were prosecuted . . ." To find that the Commission has the power to disregard

⁷The "collateral order" doctrine was designed to protect parties from losing the protection of a valuable right or privilege which was a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiffs cause of action." *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963). In the case cited, defendants raised a special immunity-from-suit statutory defense which had to be decided at the outset rather than subject the defendants "to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings. The "collateral order" doctrine originated in the case of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In *Cohen*, the Court allowed immediate appeal because if judicial review were postponed until the termination of the litigation of the merits of the case, "it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." *Cohen*, 337 U.S. at 546. In the instant case, if SCSPA loses its claimed immunity from a private complaint and even assuming that it prevails on the merits, it will have lost the protection against enduring the burden, expense and "indignity" of defending against a private party, a protection that the Supreme Court believes that States should have.

an 11th Amendment claim of immunity from proceedings initiated by private parties would mean that the Commission, which cannot enforce its orders without the aid of the federal courts, has a power that those courts lack.’ At least one court which has addressed the question of whether an Article I agency can entertain a proceeding brought by a private party against a State agency entitled to 11th Amendment immunity has held that the proceeding had to be dismissed. See *Hensel v. Office of Chief Admin. Hearing*, 38 F.3d 505 (10th Cir. 1994). However, it is unnecessary for the Commission to become involved in an 11th Amendment controversy, which would occur if the Commission decides to retain the instant private complaint and continue the instant proceeding in the form in which it was brought against SCSPA. That is because the Commission has the authority to look into allegations of Shipping Act violations and enforce the Shipping Act by means other than private complaints, which other means are not barred by the 11th Amendment.

The Commission, of course, is authorized by law to institute a formal investigatory proceeding into any violations of the Shipping Act whether committed by an “arm of the State” or by a purely private entity. See section 11(c), Shipping Act of 1984. Alternatively, the Commission could simply refer the allegations in the complaint to the Bureau of Enforcement (BOE) and await

⁸Enforcement of Commission orders for payment of money can only be done if “the person to whom the award was made” seeks enforcement of a Commission order in a United States district court. See sec. 13(d) of the 1984 Act, as amended. Enforcement of nonreparation orders (i.e., cease and desist orders) similarly requires an order of a district court. See section 13(c) of the 1984 Act, as amended. As another example of the futility of a private party trying to prove its allegations of violations of the Shipping Act in a private complaint proceeding that seeks a cease and desist order plus an order for the payment of reparations (money damages), such party would have to go to federal court for enforcement against the State “arm.” But what federal court would take jurisdiction of a private suit for enforcement of a reparations award that would have to be paid out of the State treasury? Furthermore, the complainant in the instant case would have to seek enforcement in a district court in South Carolina, which lies in the Fourth Circuit. But according to the Fourth Circuit’s opinion in *Ristow v. South Carolina Ports Authority*, cited above, 58 F.3d at 1054 . . . “a judgment against the Ports Authority cannot be legally enforced against the state.” For that matter, how would complainant even obtain enforcement of a cease and desist order against SCSPA, such order being equivalent to an injunction issued by a federal court. See *Seminole Tribe of Florida v. Florida*, cited above, 517 U.S. at 58 (the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment); *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997) (if State is the real party affected by the private suit, the State enjoys immunity from a suit seeking injunctive relief); *Hensel v. Office of Chief Administrative Hearing*, 38 F.3d 505, 508-409 (10th Cir. 1994) (State is immune from private suit seeking prospective injunctive relief).

BOE's recommendations. For example, in Docket No. 98-13 - *Tak Consulting Engineers v. Sam Bustani et al.*, the Commission referred complainant's request for a formal investigation into the activities of respondent NVOCCs to BOE, stating:

The Commission has determined to refer the request for an investigation to its Bureau of Enforcement, so that it may decide whether to recommend initiation of a formal investigation in this case or take other appropriate action. Docket No. 98-13 - Order Referring Request for Investigation to Bureau of Enforcement, September 11, 1998, 28 S.R.R. 578.

Alternatively, the Commission may dismiss the instant complaint and instruct complainant first to seek a ruling from the appropriate South Carolina State court as to the lawfulness of SCSPA's conduct under South Carolina law, namely, Charleston Ordinance Sec. 21-179, before asking the Commission to look into the complainant's allegations.

Whatever procedure the Commission may choose that is not barred by the 11th Amendment, as is the instant private complaint proceeding, SCSPA's arguments that Congress intended to leave to the States the matter of regulating cruise ships offering gambling will have to be considered as will the question as to how South Carolina law, namely, Charleston Ordinance Sec. 21-179, affects the issues.'

⁹Two other cruise ship operators have sought and obtained rulings from the federal and State courts under South Carolina anti-gambling laws that did not speak to the instant situation at Charleston. See *Casino Ventures v. Stewart*, 183 F.2d 307 (4th Cir. 1999); and *Stardancer Casino, Inc. v. Robert M. Stewart, Sr., et al.*, Court of Common Pleas, State of South Carolina, County of Charleston (attached as Exhibit A to complainant's Response to SCSPA's Motion to Dismiss). No court has yet interpreted Charleston Ordinance Sec. 21-179. By bypassing the opportunity to obtain a declaratory or similar ruling from a State court, Maritime Services is asking the Commission to invade the province of the State courts to some extent and to make detailed findings of fact under State law regarding the status of complainant's ships as compared to those of Carnival Cruise Lines, the alleged preferred person. A ruling by a State court could eliminate the alleged discrimination or at least narrow the issues. When there is a question of State law that might resolve or substantially alter the ultimate determination of a federal case, federal courts "abstain" to allow the State courts to rule on the matter under local law. See the leading cases of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); and *Louisiana Power & Light Co. v. City of Thibodeaux*, 360 U.S. 25 (1959). The Commission has followed its own version of "abstention." In *Burlington* (continued...)

The instant complaint is dismissed on the basis of respondent SCSPA's entitlement to immunity from private suits under the 11th Amendment to the Constitution and its related doctrine of State sovereign immunity from private suits. This ruling is subject to whatever action the Commission might deem appropriate with respect to complainant's allegations that SCSPA has violated the Shipping Act."

Norman D. Kline

Norman D. Kline
Administrative Law Judge

⁹ (... continued)

Northern Railroad Co. v. M. C. Terminals, 26 S.R.R. 934 (1993), the Commission declined to rule on the Shipping Act lawfulness of a certain marine terminal operator's practice that intimately involved a railroad's duties under the Interstate Commerce Act. The Commission ordered the parties before it to initiate a proceeding before the Interstate Commerce Commission (I.C.C.), failing which the Commission would dismiss the complaint. If the parties initiated such a proceeding, the Commission announced that it would hold the pending complaint case before the Commission in abeyance pending ruling of the I.C.C. (26 S.R.R. at 950).

¹⁰I am aware of the fact that respondent SCSPA has also moved for dismissal on 11th Amendment grounds in Docket No. 99-16 - *Carolina Marine Handling, Inc. v. SCSPA et al.*, and that Judge Dolan has denied a motion to partially consolidate this case with that one but will consider all necessary pleadings in both cases before ruling. See his ruling in Docket No. 99-16, January 4, 2000. SCSPA's Motion in the instant case was filed as long ago as November 19, 1999, has been answered by the complainant in the instant case, and has been ripe for decision for some time. The instant ruling will obviously have precedential value. Complainant in Docket No. 99-16 is not a party to the instant case. However, it will now have the opportunity of analyzing the instant ruling and addressing the reasons I have given for dismissal before filing its reply to SCSPA's Motion in No. 99-16, now due on January 18, 2000.