

S E R V E D

July 28, 2009
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 06-11

**R.O. WHITE & COMPANY and
CERES MARINE TERMINALS, INC.**

v.

**PORT OF MIAMI TERMINAL OPERATING COMPANY,
CONTINENTAL STEVEDORING & TERMINALS, INC.,
FLORIDA STEVEDORING, INC.,
PORTS AMERICA, INC.,
PORTS AMERICA FLORIDA, INC.,
DANTE B. FASCELL PORT OF MIAMI DADE, a.k.a.
MIAMI-DADE COUNTY SEAPORT DEPARTMENT, and
MIAMI-DADE COUNTY**

**INITIAL DECISION¹ BY PAUL B. LANG,
ADMINISTRATIVE LAW JUDGE**

Statement of the Case

Complainants R.O. White & Co. ("White" or "ROW") and Ceres Marine Terminals, Inc. ("Ceres") (collectively "White/Ceres" or "Ceres/ROW") filed the Complaint on November 22, 2006. On January 25, 2007, the Port of Miami Terminal Operating Company ("POMTOC") filed an Answer and, on the same date, motions to

¹ This decision will become the decision of the Commission in the absence of review thereof by the Commission; Rule 227, Rules of Practice and Procedure, 46 C.F.R. §502.227.

dismiss were filed by the remaining Respondents, including Eller-ITO Stevedoring Company L.L.C. ("Eller-ITO"). Respondents Dante B. Fascell Port of Miami Dade, a.k.a. Miami-Dade County Seaport Department and Miami-Dade County (collectively "County" or "Port") also filed a motion to quash service of process.

On July 2, 2007, Acting Chief Administrative Law Judge Clay G. Guthridge, who was then the presiding officer², issued a Memorandum and Order by which he granted the motion to dismiss of Eller-ITO and denied the motions of the remaining Respondents.³ Judge Guthridge also granted the petition of the Complainants to file an amended Complaint and denied a motion to intervene by the Commission's Bureau of Enforcement ("BOE"). The Complainants filed a First Amended Complaint on July 11, 2007; each of the Respondents filed timely answers.

On March 24, 2008, Judge Guthridge referred this case to the Office of Consumer Affairs and Dispute Resolution Services. The parties were unable to resolve either the underlying issues or their disagreement as to the discovery schedule. Consequently, I established a final discovery schedule on September 8, 2008, and an Order on Submission of Evidence and Briefs on December 9, 2008; the briefing schedule was revised by the Order Regarding Briefs of March 5, 2009. Each of the parties has complied with the schedule contained in the Order.⁴

Upon review of the evidence, applicable law and the briefs submitted by the parties I have concluded that the Complainants have not met their burden of proof of unlawful action by the Respondents. Accordingly, the Complaint is dismissed.

Positions of the Parties

The Complainants

Initial Brief

The Complainants maintain that POMTOC and each of its members is a marine terminal operator ("MTO") which is subject to the jurisdiction of the Commission. According to the Complainants, the member companies have identified themselves as MTOs in a number of filings with the Commission. In addition, each of the member companies operated as a MTO prior to the formation of POMTOC and is continuing to operate as such through POMTOC. The member companies exercise active control over

² The case was assigned to me on August 6, 2008.

³ On October 29, 2007, Judge Guthridge denied the remaining Respondents' motions for reconsideration and leave to appeal.

⁴ Continental did not initially join in the briefs of the POMTOC Respondents, but, by Satisfaction of Order to Show Cause dated May 21, 2009, was subsequently allowed to do so.

the operations of POMTOC, thus making them more than mere investors. Furthermore, each of the individual companies operates as a MTO in other locations in Miami, in other ports, and in some instances in both.

The Complainants also allege that the POMTOC Respondents⁵ are operating in Miami in violation of the Shipping Act ("Act") by failing to follow agreements that they filed with the Commission and by operating under agreements that should have been filed with the Commission. Specifically, the Complainants allege that the POMTOC Respondents have adopted practices and implemented unfiled agreements which:

- a. Deny Ceres, through White, the opportunity to stevedore vessels at the POMTOC terminal while simultaneously denying ocean carriers the right to choose Ceres as their stevedore.
- b. Tie a carrier's use of the POMTOC terminal to the use of a POMTOC member or affiliate as its stevedore.
- c. Award preferences to POMTOC members in their competition with Ceres, both in Miami and on the East and Gulf Coasts.
- d. Fail to propose rates or criteria by which non-member stevedores may be granted access to the POMTOC terminal.
- e. Allow a stevedore who is neither a member nor an affiliate of POMTOC to have access to its terminal while denying such access to Ceres.
- f. Create the false impression that POMTOC is a lawful entity which is entitled to enter into or implement such agreements.

The Complainants further maintain that the POMTOC Respondents have implemented unreasonable and discriminatory practices in violation of the Act. This, according to the Complainants, is evidenced by the following facts:

- a. NYK Line, Ceres' corporate parent, and Hapag Lloyd were required to use the POMTOC terminal for a new service that they brought to Miami.
- b. The POMTOC Respondents refused to allow Ceres to operate in the terminal in spite of its having been nominated by NYK/Hapag to act as their stevedore.
- c. POMTOC does not control piers, wharves or gantry cranes. Those facilities are owned by the Port and are available to any stevedore with a Port permit.

⁵ For the sake of brevity I shall refer to the Respondents other than the County collectively as the "POMTOC Respondents" unless it is necessary to distinguish between them.

- d. POMTOC is not a stevedore and does not contract to provide stevedoring services.
- e. Under the POMTOC tariff, vessel operators, rather than stevedores or cargo interests, pay to use the terminal for container points of rest.
- f. Vessel operators pay POMTOC for the use of the terminal as a facility for truckers to pick up and deliver containers. POMTOC does not charge truckers for entry to the terminal for that purpose.
- g. Ceres offered to reimburse POMTOC for out-of-pocket costs related to its access to the terminal.
- h. POMTOC realizes "gargantuan" profits from its terminal operation.⁶
- i. The Port has publicly acknowledged the anticompetitive impact of exclusive stevedoring arrangements such as exist at the POMTOC terminal.

The Complainants allege that the Port has failed to enforce reasonable regulations and has given POMTOC and its affiliated stevedores an unreasonable preference to the detriment of Ceres. The Complainants maintain that, contrary to the Port's allegations, it is more than a mere landlord and, as an admitted MTO, is subject to affirmative duties under the Act.⁷ Specifically, the Port violated its duty to ensure that the only common-user terminal in Miami is operated in a fair and reasonable manner.

The Complainants emphasize that the Port may not justify its refusal to act on its purported reluctance to become involved in a private dispute. To the contrary, the duty of the Port as a MTO is non-delegable and requires that it act to correct the statutory violations occurring at its public terminal. The Act requires that the Port "enforce" just and reasonable regulations and practices at the terminal. Therefore, the failure of the Port to take action is, in itself, a violation of the Act.

The Complainants allege that they have suffered injuries due to the Respondents' violations of the Act. Such injuries include lost profits from specific vessel services as well as from additional business that they could have obtained but for the Respondents' unlawful actions. The Complainants also claim reparations of approximately \$300,000

⁶ The Complainants have marked a statement to this effect in their brief as being subject to the protective order which applies in this case. Any further allusion to this or to any other material subject to the protective order will be only in the most general terms so as not to divulge proprietary information.

⁷ As will be shown, the Port has not explicitly admitted that it is an MTO, but has not pressed its original position that it is outside of the Commission's jurisdiction.

arising out of rent paid to the Port in anticipation of their ability to conduct stevedoring operations.⁸

In anticipation of arguments which it expects to be made by the POMTOC Respondents, the Complainants maintain that the holdings of the Commission in *All Marine Moorings, Inc. v. ITO Corp. of Baltimore*, 27 S.R.R. 539 (1996) ("*All Marine*") and *River Parishes Co. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751 (1999) ("*RIVCO*") do not support the Respondents' position but, on the contrary, show that their actions are illegal.

According to the Complainants, there is no merit to each of the following justifications offered for their actions by the POMTOC Respondents:

a. That, in the context of the relevant market, the actions and policies of the POMTOC Respondents have not adversely affected competition. The Complainants dispute the proposition that the relevant market is greater than the POMTOC terminal or the Port of Miami.

b. That the terminal operating agreement ("TOA") between POMTOC and the Port creates a right of "quiet enjoyment" by which POMTOC is entitled to control access to the leased terminal. The Complainants maintain that, even if the contractual language has the meaning ascribed to it, it cannot authorize the POMTOC Respondents to violate the Act.

c. That the substantial investment by POMTOC members entitles them to exclude nonmember stevedores. The Complainants argue that this attempted justification, if accepted, would immunize all MTOs from the requirements of the Act. Furthermore, the investment by POMTOC members does not justify POMTOC itself, which is a separate entity, from granting a preference to its members. This distinction is especially apt since, by its own admission, POMTOC is not a stevedore. Finally, POMTOC members receive a return on their investment by virtue of their right to share in POMTOC's substantial profits. Those profits are derived from payments by carriers who use the POMTOC terminal. The Complainants also cite the significant return on investment as indicated in the discovery responses of POMTOC members.

d. That Ceres could have attained access to the POMTOC terminal through commercial negotiation. The Complainants maintain that this defense is negated by the prolonged efforts of Ceres to convince POMTOC to allow it to perform stevedoring services at its terminal. The Complainants also maintain that this defense rests on a flawed predicate inasmuch as POMTOC had a legal obligation to honor its customers' choices of stevedores. Furthermore, POMTOC was not entitled to charge Ceres for

⁸ In the Memorandum and Order on Discovery Schedule of September 8, 2008, I deferred discovery concerning the calculation of reparations until after I had made a determination as to the liability of the Respondents.

access since it was already being paid for terminal services by its own customers in accordance with its tariff.

e. That Ceres could have attained access to the POMTOC terminal by becoming a member of POMTOC. According to the Complainants, Ceres should not have to become a MTO in order to operate as a stevedore for customers of the POMTOC terminal. In addition, the 2005 amendment to the POMTOC operating agreement, contrary to its TOA with the Port, gives POMTOC the discretion to deny membership applications and requires that an applicant demonstrate that it has already carried out gate moves in Miami. The Complainants characterize this requirement as a "Catch-22" which excludes applicants that are not already stevedores in Miami.

Complainants' Reply Brief⁹

The Complainants maintain that the jurisdictional challenges by POMTOC members largely rely upon conclusory affidavits which they originally submitted along with their unsuccessful motions to dismiss. The Complainants point to the fact that Ports America, Inc. and Ports America Florida, Inc. have admitted that they are MTOs in ports other than Miami, thus bringing them within the personal jurisdiction of the Commission. Jurisdiction over those Respondents is further established by their TOA with POMTOC, which is an admitted MTO in Miami.

The Complainants further maintain that Florida Stevedoring, Inc. ("FSI") is within the jurisdiction of the Commission because it directly carries on activities in Miami which are marine terminal services. It is of no consequence that FSI does not own or lease the facility where it performs such services since neither the Act nor Commission regulations establish those factors as necessary elements in the definition of a MTO.

The Complainants argue that, because Continental did not submit proposed findings of fact, it has failed to overcome the presumption of jurisdiction as set forth in *Dart Containerline Co. v. FMC*, 722 F.2d 750, 752 (D.C. Cir. 1983). Even if that were not so, jurisdiction arises out of the fact that Continental is a party to agreements with Eller-ITO and POMTOC.

Finally, the Complainants maintain that jurisdiction over all of the member companies arises out of their control of POMTOC.

The Complainants challenge what they characterize as the efforts of the POMTOC Respondents to trivialize their violations of the requirements for the filing of their agreements. The Complainants assert that the changes to the agreements were substantive and that they affected competition by eliminating the exclusion of stevedoring from POMTOC's business, thus making it more difficult for non-members to join. They further assert that the unwritten agreements between POMTOC and its

⁹ In their reply briefs each of the parties, besides responding to the initial briefs of their adversaries, has restated most or all of its original arguments.

members are in violation of the Act. Their claim for reparations is not time-barred since the POMTOC Respondents continue to operate according to those agreements, thereby committing a continuing violation of the Act.

The Complainants assert that they have established a *prima facie* case of the unreasonableness of the practices of the POMTOC Respondents and argue that this issue must be assessed in the context of a market that is no larger than the Port of Miami. They further assert that the Commission has never looked beyond a single terminal or a single port in its evaluation of the impact of a challenged practice. However, in view of the volume of cargo through Miami, the practices of the POMTOC Respondents are unreasonable even if the relevant market were deemed to include Port Everglades.

The Complainants maintain that, because of the Respondents' unreasonable practices, they have suffered injury which is cognizable under the Act. They characterize as frivolous the argument by the Port that the Act offers redress only to "customers" of the maritime industry rather than to its members and argue that Section 10 of the Act establishes prohibited acts by members of the maritime industry.

The Complainants maintain that POMTOC's exclusion of Ceres is not excused by the fact that two competing stevedores are allowed to operate in the POMTOC terminal. That number is down from the original four and POMTOC has acted so as to ensure that there will be no more. The Port itself has indicated that it is not satisfied with the level of competition among stevedores and has taken action to allow the APM terminal to accept business from third-party carriers with their own stevedores. The Complainants observe that, in any event, Commission precedent indicates that the existence of an absolute monopoly is not a precondition to a finding that practices are unreasonable.

According to the Complainants, the constitutional argument raised by the POMTOC Respondents, *i.e.*, that the relief sought by the Complainants would amount to the taking of private property in contravention of the Fifth Amendment to the Constitution, should not be considered inasmuch as it was not included in their pre-hearing statement. Furthermore, the argument is invalid on its merits in that it would eradicate the power of the Commission to regulate agreements, such as the POMTOC TOA, which are covered by the Act. The Complainants also argue that the exemption of marine facilities agreements, like the TOA, from the requirement for filing, along with the 45-day waiting period, do not exempt such agreements from the Commission's enforcement of the prohibitory language of the Act.

In a further challenge to the "taking" argument of the POMTOC Respondents, the Complainants state that the property right claimed by those Respondents was created by the TOA which, in turn, is subject to scrutiny by the Commission. Stated otherwise, the right of POMTOC to the "quiet enjoyment" of its terminal is conditioned on compliance with the Act. In addition, the taking argument is inconsistent with the long-standing precedent of the Commission and of federal courts.

The Complainants cite the alleged attempts of POMTOC members to conceal their “stonewalling” in the face of multiple attempts by Ceres to obtain access to the terminal. The record shows that POMTOC members never deliberated or negotiated with Ceres in good faith, but, on the contrary, had determined to prevent Ceres from providing stevedoring services to certain carriers which were POMTOC’s customers for terminal services. According to the Complainants, the POMTOC Respondents acted unreasonably by insisting that Ceres engage in a commercial negotiation. The Complainants maintain that Ceres made two legitimate offers: one to reimburse POMTOC for out-of-pocket expenses, and the other to pay a sum certain for each container that it moved. The POMTOC Respondents unreasonably insisted that Ceres pay for the use of a point of rest for each container in spite of the fact that such charges had already been paid by the carriers. The argument that such insistence was justified by the investments of POMTOC members is belied by the already large return on their investments.

The Complainants again cite what they allege to be the unreasonable membership requirements set forth in the current TOA. Those requirements make it impossible for Ceres to qualify for membership.

The Complainants also maintain that, contrary to the assertions of the POMTOC Respondents, it is not necessary for a stevedore to lease or invest in a terminal. According to the Complainants, that proposition is refuted by the fact that the Port issues stevedoring permits without such a requirement. Furthermore, South Florida Container Terminal (“SFCT”) is currently stevedoring at the POMTOC terminal despite the fact that it is not a member and has not made an investment.

The Complainants maintain that there is no evidence that POMTOC would be harmed by allowing Ceres access to its terminal. POMTOC would not be affected by increased competition among stevedores because it is not a stevedore. It is conceivable that POMTOC would benefit from increased terminal business from Ceres’ customers. Furthermore, the prospect of economic harm has not deterred POMTOC from allowing SFCT onto its terminal.

The Complainants maintain that the Port has offered no economic or public policy justification for the exclusionary and anti-competitive practices at what the Complainants call its “public terminal.” Furthermore, the Port is not entitled to characterize itself as a neutral party in a private dispute. The Port itself created POMTOC as the only multi-user terminal in Miami and has taken affirmative action to maintain that status.

The Complainants argue that, because the Port is a MTO and subject to the jurisdiction of the Commission, it has a duty to avoid unreasonable action. Commission deference to the Port’s managerial and economic decisions is conditioned upon the reasonableness of the Port’s actions. The Complainants further argue that the Port itself has recognized the legitimacy of Ceres’ position and, while failing to take action to eliminate the unreasonable practices of the POMTOC Respondents, has attempted to foster open competition between stevedores.

According to the Complainants, the Port has offered only weak justifications for its actions or lack thereof. The Complainants respond to those justifications as follows:

- a. The Port's claim that it did not grant an exclusive stevedoring franchise is belied by the fact that, by allowing POMTOC to exclude all stevedores except FSI and Eller-ITO, it allowed for the creation of a *de facto* exclusive franchise.
- b. The failure of the Port to take the necessary corrective action is not excused by the fact that there is no Commission precedent which is squarely on point with the facts of this case. All determinations of unreasonable and anti-competitive conduct are dependent on the facts of the particular situation. The logical conclusion of this rationale is that no MTO could ever be called to account for its unlawful actions.
- c. The Port is not exonerated by the proposition that POMTOC, as a terminal operator, has been good for the Port of Miami and has not had a harmful effect on competition. The operative fact is that POMTOC is being used by its members as a vehicle for the exclusion of stevedores with permits from the Port.
- d. The Port's claim that it has fostered stevedoring competition is not borne out by the requirement that POMTOC members have Port stevedoring permits since only two of the current members hold such permits. Furthermore, the Port acceded to the 2005 revisions to the POMTOC TOA which prevent the admission of new members over the objections of any current member. It is of no consequence that the Port has issued permits to eight stevedores as long as they are not permitted to compete for business at the only public multi-user terminal in Miami. Finally, the methodology by which the Port conducted its surveys of carriers, as well as the responses, does not show that current users of the Port are satisfied with the level of competition among stevedores.

The Complainants argue that the failure of White to become a POMTOC member when it was formed has no bearing on Ceres' current efforts to gain access to the POMTOC terminal. White had no connection with Ceres when POMTOC was formed.

The Complainants allege that the Port practiced discrimination by renting land to them for equipment storage at about sixteen times the rate at which the Port allowed POMTOC to sublease land to FSI and Eller-ITO for the same purpose. Contrary to the position of the Port, the Complainants, in their pre-hearing statement, preserved their claim against the Port for unreasonable and discriminatory rental charges. According to the Complainants, this claim does not rest on a comparison of the POMTOC TOA with Ceres' ground lease. Rather, it is based on the denial of the lower rate to the Complainants.

POMTOC, Florida Stevedoring, Inc., Ports America, Inc.,
Ports America Florida, Inc. and Continental Stevedoring and Terminals, Inc.¹⁰

Initial Brief

The above-named Respondents, other than POMTOC, deny that they are subject to the personal jurisdiction of the Commission and maintain that they have been improperly named in the Complaint. In support of that argument, they raise the following points:

- a. They do not meet the statutory definition of MTOs as set forth in 46 U.S.C. §40102(14) and as further described in Commission regulations at 46 C.F.R. §525.1(c)(13).
- b. They do not exercise individual control over POMTOC.
- c. The fact that they mistakenly identified themselves as MTOs in documents filed with the Commission does not mean that they are actually MTOs.
- d. The failure of the POMTOC Respondents to file their 1999 agreement with the Commission does not mean that POMTOC has not legally existed since that time.

The member companies maintain that, since they are not MTOs, they were not required to file agreements with the Commission. The member companies also maintain that the agreements at issue were of a routine, operational or administrative kind that, under Commission regulations prevailing at the time, did not need to be filed even by MTOs.

The POMTOC Respondents deny that they unreasonably refused to deal with Ceres. They maintain that they rejected Ceres' initial offer for the use of the terminal as commercially unacceptable but were, and still are, amenable to further proposals representing a "fair investment" by the Complainants.¹¹ Instead of accepting the offer to resume negotiations, the Complainants initiated this proceeding in an attempt to pressure the Respondents into accepting their position and to persuade the Commission to require that the Complainants be allowed to use facilities in which they have not invested and for which they have not paid. The POMTOC Respondents cite Commission precedent to the effect that a finding of an unreasonable refusal to deal can only arise out of an unreasonable refusal to consider a *bona fide* offer; Ceres never made such an offer. On

¹⁰ According to counsel for these Respondents, Ports America, Inc. was formerly known as P&O Ports North America, Inc.; Ports America Florida, Inc. was formerly known as P&O Ports Florida, Inc.

¹¹ There is no evidence that POMTOC or its members made any proposal to the Complainants other than an invitation to explore becoming a member.

the contrary, Ceres' communications with the Respondents show that it had no interest in arriving at a fair resolution but, instead, clung to its objective of attaining access to the POMTOC terminal at no cost and without any risk or commitment.

The member companies assert that the three current members of POMTOC have a long history of operations in South Florida and are the successors in interest to the four founding members. Prior to the formation of POMTOC, each of the founding members leased its own marine terminal in Miami. When POMTOC was formed at the urging of the County each of those members contributed its existing leased terminal facilities and other assets in exchange for membership shares. The new POMTOC terminal took the place of the four individual terminals, thus allowing for greater efficiency and the elimination of redundant features such as fencing, roadways and gates. According to these Respondents, the objective behind the creation of POMTOC was to allow the members to continue operating as they did in their separate facilities, but with the efficiency of a pooled terminal configuration.

The POMTOC Respondents further allege that all stevedoring companies in Miami were afforded the opportunity to become members of POMTOC. Complainant White was given the opportunity to become a member either at the time of the creation of POMTOC or shortly thereafter but decided not to do so.

The POMTOC Respondents maintain that POMTOC was formed by the combination of privately leased facilities. POMTOC was never intended to act as an agent for or otherwise on behalf of the County, nor was the POMTOC facility ever intended to be a public terminal. On the contrary, the lease agreement with the County grants POMTOC the right to operate its terminal for the benefit of its members. POMTOC is not required to allow a nonmember to perform stevedoring services at its terminal without an appropriate level of investment in or compensation to POMTOC.

The POMTOC Respondents deny that they have failed to establish, observe and enforce just and reasonable regulations and practices. They further deny that such a finding could legitimately be based on their refusal to acquiesce to Ceres' unreasonable demand to be allowed essentially free access to the POMTOC terminal. The Commission has no authority to require open access to marine terminal property and has never held that the Act authorizes such expropriation.

The POMTOC Respondents also maintain that they have not prevented the Complainants from offering stevedoring services to carriers in the market and have no control over whether the Complainants do so. They emphasize that they do not control the other terminal facilities in the Port of Miami, nor do they control the channels, berths, wharves, the apron areas of the piers or the public roadways into and around the Port. The POMTOC Respondents only control whether and on what terms the Complainants' employees and equipment are permitted to enter the POMTOC facility and to use POMTOC's proprietary information technology system.

The POMTOC Respondents dispute the contention that their refusal to allow the Complainants to use the POMTOC facility on a commercially unreasonable basis is tantamount to preventing them from engaging in stevedoring. There is no stevedoring monopoly within the POMTOC terminal, in Miami or in the South Florida market. They define the relevant market area as the South Florida Metropolitan Area, which includes the Port of Miami, Port Everglades and a number of smaller terminals in the general area. According to these Respondents, the POMTOC facility is only one of three major container terminals within the Port of Miami. They maintain that there are other facilities in the Miami and Port Everglades areas which the Complainants could utilize. The Complainants have negotiated, or are currently negotiating, for the use of such facilities.

The POMTOC Respondents argue that the Complainants have not made any plausible allegations as to how they were harmed by the purported failure of the private Respondents to file the agreements and further state that the alleged violations occurred years before the Complainants sought to utilize the POMTOC facilities. Therefore, the Complainants' claim for reparations for Count I of the Complaint should be dismissed as a matter of law.

POMTOC Respondents' Reply Brief

The POMTOC Respondents deny that they have implemented unreasonable and discriminatory practices and maintain that the Complainants have not presented a *prima facie* case on this issue. They argue that the Commission has never found that the use of leased business premises by a stevedore or group of stevedores for their own purposes is presumptively unlawful so as to shift the burden to the stevedores of justifying their practices. They cite recent judicial precedent to the effect that earlier Commission decisions as to the presumptive illegality of exclusive arrangements are no longer controlling.

The POMTOC Respondents also maintain that the Complainants have not made a *prima facie* showing of unreasonable exclusive practices according to the criteria of *All Marine* and *RIVCO*. They maintain that the circumstances of the instant case are more favorable to them than to the respondents in *All Marine*. They base their argument on the fact that in *All Marine* the Commission found no violation in the maintenance of a single line handler in a terminal, whereas users of the POMTOC terminal may choose between two competing stevedores.

Without abandoning their position regarding the Complainants' failure to present a *prima facie* case, the POMTOC Respondents assert that they have shown ample justification for rejecting Ceres' demands. They cite the following justifications:

- a. The members' property rights in POMTOC as well as their substantial investments in the terminal. While arguing that the profitability of POMTOC is irrelevant, they argue that the Complainants have "hand-picked" seven years when the company was making a profit in spite of the fact that, in other years, it was operating at a loss so as to require contributions of capital by the

members. The POMTOC Respondents also dispute the allegation that they are seeking to charge the Complainants for services that have already been paid for by the carriers.

- b. Ceres has demonstrated an unwillingness to pursue market-based solutions to satisfy its need for access to terminal space. Ceres has declined to join POMTOC and has not pursued negotiations for other terminal space with the Port or other tenants. Ceres also broke off discussions with Port Everglades and tenants at that port.

The POMTOC Respondents expand on the jurisdictional arguments contained in their initial brief. They maintain that FSI is not a MTO because it does not furnish a wharf, dock, warehouse or another terminal facility. They dispute the argument that the cargo handling services performed by FSI are “facilities” within the meaning of the Act and Commission regulations.

The POMTOC Respondents dispute the position of BOE that, because Ports America and Ports America Florida are MTOs in other ports in the United States, they are subject to the personal jurisdiction of the Commission in this case. They further maintain that BOE has incorrectly denied that the Commission is to take a port-by-port approach in determining personal jurisdiction. They also argue that Ports America Florida is not a MTO merely by virtue of its membership interest in POMTOC, and that Ports America is not a MTO by virtue of its ownership interest in Ports America Florida.

The POMTOC Respondents deny that the Commission has subject matter jurisdiction over Ports America and Ports America Florida because of their ability to enter into agreements with MTOs to control stevedoring or other activity affecting competition in Miami. They maintain that BOE’s reliance on *Plaquemines Port, Harbor and Terminal District v. Federal Maritime Comm’n*, 838 F.2d 536 (D.C. Cir. 1988) (“*Plaquemines*”) is misplaced since that holding was based on a different set of facts.

The POMTOC Respondents maintain that, since none of the members are MTOs, neither the POMTOC operating regulations nor other POMTOC documents fall within the definition of “cooperative working agreement” and are thus exempt from the filing requirements of the Act. They also argue that, even if the members were MTOs, the 1999 and 2005 agreements were not required to be filed. The POMTOC Respondents acknowledge that there is no Commission precedent precisely on point since the Commission has never before considered a case involving an entity such as POMTOC which was formed by the consolidation of the terminal operations of stevedores who continued to compete with each other.

Finally, the POMTOC Respondents maintain that the Complainants have failed to prove that they were injured by the alleged failure to file certain agreements with the Commission.

The POMTOC Respondents have disputed certain of the findings of fact proposed by the Complainants. Those disputes, to the extent relevant, will be resolved by the Findings of Fact set forth below.

The County¹²

Initial Brief

The County notes that Ceres' only claim against it is for allegedly unreasonable practices with respect to the POMTOC terminal. It also maintains that the Complainants are barred from advancing a claim of discrimination or of refusal to deal because such claims were not included in the Complainants' prehearing statement and are therefore barred by Rule 95 of the Rules of Practice and Procedure, 46 C.F.R. §502.95 and by the Order of March 9, 2009.¹³

The County cites *All Marine* and *RIVCO* in support of the proposition that it is not required to justify the maintenance of an exclusive arrangement until the Complainants present a *prima facie* case of resulting harm to competition within a relevant market. According to the County, the Complainants have not defined a relevant market, nor have they proven the existence of competitive harm. The County maintains that, in order to meet their burden of proving competitive harm within a relevant market, the Complainants must show harm within the market as a whole rather than merely to a single party such as Ceres.

The County asserts that it is not opposed to Ceres' efforts to engage in stevedoring in the Port. However, since there is already adequate competition for stevedoring services, the County denies that it has an affirmative duty to aid Ceres in its efforts or to compel POMTOC to accept Ceres' demands.

According to the County, the Complainants have alleged only two affirmative actions by the County with regard to their dispute with POMTOC. The first is the

¹² Miami-Dade County and Dante B. Fascell Port of Miami-Dade have filed a single prehearing statement and briefs. Miami-Dade County maintains that the Port of Miami-Dade is operated by the County and is not *sui juris*. However, the County has not stipulated that it would be bound by a Commission order directed to the Port or that the County would be liable to the Complainants if it were determined that the Port of Miami-Dade had violated the Act and that the Complainants were entitled to reparations. Therefore, with perhaps an excess of caution, I shall treat them as separate parties, while referring to them collectively wherever appropriate.

¹³ Apparently the County is referring to the Order Regarding Briefs of March 5, 2009, in which I indicated that the parties would be limited to the allegations contained in their pre-hearing statements unless they received permission to raise additional issues. Such permission would only be granted under unusual circumstances and under conditions designed to protect the rights of the parties.

County's approval in July of 2005 of an amendment to POMTOC's procedures for the admission of new members. The amendment, which allegedly made admission to membership more difficult, occurred while Ceres was seeking access to the POMTOC terminal without becoming a member. In response to this allegation, the County maintains that there is no evidence that Ceres ever made a *bona fide* offer to join POMTOC or that it ever sought the County's assistance in becoming a member. In fact, Ceres' allegation that it should be able to conduct stevedoring operations at the POMTOC terminal without becoming a member is inconsistent with its allegation that it was adversely affected by the change in membership requirements.

In response to the allegation that it has established and maintained POMTOC as a monopolistic public-user terminal, the County maintains that the allegation is belied by the fact that the Complainants have disclaimed the intent to allege that a stevedoring monopoly exists in the Port of Miami as a whole. In addition, there has been no showing of an adverse effect on vessels calling at the Port.

The County emphasizes that it has no policy or agreement in place that prevents POMTOC from allowing the use of its terminal by stevedores other than those currently operating on its premises. It maintains that Ceres' alleged inability to work in Miami is the result of the failure of White to have invested in a terminal and of Ceres' failure to come to terms with POMTOC or other MTOs.

The County describes several actions that it took to promote competition when POMTOC was created. The first of such actions was its invitation to all of the stevedores operating in Miami to join POMTOC. Secondly, the County required that its TOA with POMTOC include a provision requiring the members to allow other firms to buy into POMTOC at a predetermined fair market price. The County also required POMTOC members to have stevedoring permits so that vessels using the terminal would have a choice of stevedores from among POMTOC members. In addition, the County continues to monitor the competitive climate through customer surveys and has entered into a TOA with TLM which allows it to serve third party carriers without the consent of the Port.¹⁴

The County maintains that, even if the Complainants had presented a *prima facie* case of anti-competitive conditions, it has amply justified its actions on the following grounds:

- a. The dispute between the Complainants and the POMTOC Respondents involves claims of violations of the Act. Such a dispute should be resolved by the Commission rather than by the County.
- b. The County may validly act so as to avoid claims from long-term tenants. The County cites *New Orleans Stevedoring Co. v. Board of Commissioners of the Port of New Orleans*, 29 S.R.R. 539 (2002), *aff'd sub nom.*, *New Orleans*

¹⁴ Presumably the third party carriers are free to select their own stevedores which may use the TLM terminal.

Stevedoring Co. v. FMC, 30 S.R.R. 261 (D.C. Cir. 2003) (unreported) in support of the proposition that its desire to avoid liability to POMTOC under its lease agreement justifies its failure to support the Complainants' position.

- c. Since no Commission precedent squarely supports the Complainants' position, the County was not obligated to inject itself into their dispute with the POMTOC Respondents and to invalidate the terms of the County's lease agreement with POMTOC. Specifically, the County maintains that it is aware of no instance in which the Commission has found that a port is liable for acquiescing in the misconduct of another entity.
- d. The County acted reasonably and in good faith. It was reasonable for the County to avoid taking sides between the Complainants, whose claims involved an issue of first impression with the Commission, and the POMTOC Respondents, who had a contract which entitled them to the exclusive use of the leased terminal. In addition, the County has surveyed its users and determined that, with the exception of Ceres, they are satisfied with the level of service, the competitiveness of stevedore rates and the number of stevedores in the Port.

The County relies on Commission precedent to the effect that it will not substitute its own judgment for that of entities which are familiar with local conditions and are responsible for the day-to-day operations of ports. It asserts that there is no evidence to contradict the presumption that it has acted in good faith, nor is there any evidence to show that the County benefited financially from the alleged exclusion of the Complainants from the POMTOC terminal.

County's Reply Brief

The County maintains that the Complainants have not alleged a relevant market or proposed any findings of fact that would establish a market. Accordingly, the Complainants have failed to establish an essential element of a *prima facie* case of an unreasonable practice under the Act. The County cites the fact that there are 10 terminals at Port Everglades and that a large number of carriers have switched, or have considered switching, between the ports. The Complainants have failed to show that carriers lack alternatives to POMTOC in the South Florida Market. Ceres has improperly attempted to define the relevant market based on where its potential customers call, rather than on the competitive alternatives which are open to them.

The County also maintains that the Complainants have failed to show harm to competition as a whole rather than merely to Ceres and its corporate parent. The County cites the results of its survey of the customers of the Port showing widespread satisfaction with stevedoring services and rates. This is in contrast to self-serving statements by representatives of Ceres and NYK, its corporate parent.

The County further argues that the Complainants have failed to show that it engaged in any affirmative anti-competitive acts. Instead, the Complainants have focused on the refusal of the County to force POMTOC to allow the Complainants access to the POMTOC terminal on the Complainants' terms. Such action by the County would be tantamount to adjudicating a private dispute which is within the jurisdiction of the Commission and for which there is no controlling precedent.

According to the County, the Complainants have incorrectly claimed that it took affirmative action to ensure that POMTOC remained the only common user terminal in Miami by prohibiting the other two terminal operators from serving third party carriers. On the contrary, the County required those terminal operators to obtain permission to handle third party carriers only to insure that they did not improperly make use of volume discounts to which they were not entitled. The County granted permission to service third party carriers whenever it was requested with the exception of a single instance in which the carrier did not agree to the proposed terms for the approval. Under the current lease to TLM as of 2008 third party review and approval is no longer required.

The County further maintains that there is no basis for the Complainants' contention that it established POMTOC as a "public" terminal. According to the POMTOC TOA, the terminal is a private entity, access to which is subject to the exclusive rights of the members.

The County disputes the allegation that it "watched", or did nothing to foster competition, as the number of stevedores at the POMTOC terminal went from four to two. The County maintains that it has continued to act to further competition whenever consistent with its contractual obligations. Such action included the invitation to all port-permitted stevedores to join POMTOC as well as the requirement that POMTOC accept all stevedores which have port permits and are prepared to share the members' investments at fair market value. The County also points to the creation of the TLM terminal which may serve third parties without its approval and to the surveys of Port users as to the adequacy of stevedoring competition.

The County maintains that, even if the Complainants had made a *prima facie* case of unreasonable practices, its actions were amply justified. In support of that proposition, the County again states that:

- a. It was not required to take sides in a private commercial dispute for which there is no precedent. If the Commission were to rule otherwise, ports around the country would be placed in untenable positions not contemplated in the Act.
- b. It acted reasonably so as to avoid liability to POMTOC.
- c. Ceres concedes that there is no clear precedent that supports its position.
- d. There is no evidence that it did not act in good faith.

Bureau of Enforcement

By Order of April 10, 2009, BOE was granted leave to submit an *amicus curiae* brief on the issue of jurisdiction only. BOE supports the Complainants' position as to the jurisdiction of the Commission over the Respondents. BOE maintains that the Commission's jurisdiction over Ports America, Ports Florida and FSI flows from their admissions that they operate as MTOs at locations other than the POMTOC terminal.¹⁵ BOE emphasizes that the Commission has never determined jurisdiction on a port-by-port basis, nor does the Act establish a geographical requirement for jurisdiction other than that terminal operations must be carried on within the United States.

BOE further maintains that the test of subject matter jurisdiction is whether the Complaint sets forth claims that are cognizable under the Act. Both the language of the Act and Commission precedent support a broad interpretation of subject matter jurisdiction consistent with the statutory responsibilities of the Commission. Furthermore, the statutory definition of a MTO does not include the requirement that its activities be carried out in premises which it owns or controls. BOE also maintains that, because Ports America, Ports Florida and FSI are MTOs, their agreement with POMTOC is subject to the requirements imposed by the Act.

Findings of Fact

In weighing the evidence and applying the pertinent law, I am guided by the principle, as set forth in Rule 155, 46 C.F.R. §502.155, that the Complainants have the burden of showing that they are entitled to relief. The applicable standard of proof is the preponderance of the evidence or, stated otherwise, that the existence of a fact is more probable than not, *Petition of South Carolina State Ports Authority for Declaratory Order*, 27 S.R.R. 1137, 1161 (1997).

The majority of the pertinent facts are undisputed.

The Parties

1. Ceres operates as a stevedore and marine terminal operator at numerous ports throughout the United States, but did not operate in the Port of Miami under its own name at any time relevant to this proceeding. Ceres is a wholly-owned subsidiary of Nippon Yusen Kaisha Lines ("NYK"), which operates container vessels.

2. In 2005 Ceres purchased White, which is a stevedore. At the time White was purchased by Ceres it held a permit to operate as a stevedore in the Port of Miami.

¹⁵ FSI admits that it provides cargo and freight handling services in Miami in a location other than the POMTOC terminal. It denies that such activities make it a MTO in Miami because its operations are carried out in premises owned or controlled by the Port.

Ceres withdrew its own application for a stevedoring permit in Miami when it completed the purchase of White

3. POMTOC is a limited liability company organized under the laws of the State of Florida. From April 4, 1993, until July of 2008 POMTOC operated the only multi-user marine terminal in Miami under a long-term lease with the County; POMTOC continues to operate the terminal. Until July of 2008 each of the other terminals was dedicated to a single carrier or group and could only service the vessels of other carriers with the permission of the County.

4. The original members of POMTOC were Continental Stevedoring & Terminals, Inc. ("Continental"), Florida Stevedoring, Inc. ("FSI"), S.E.L. Maduro (Florida) ("S.E.L.") and Oceanic Stevedoring Company ("Oceanic"), each with a 25% interest.

5. The current members of POMTOC are Continental (25% interest), FSI (25% interest) and Ports America Florida, Inc. (50% interest).

6. Continental owns a 50% membership interest in Eller-ITO. Eller-ITO is one of two stevedores authorized by POMTOC to operate in its terminal.

7. FSI is the second of two stevedores authorized by POMTOC to operate in its terminal.

8. Ports America, Inc. is the successor in interest to P&O Ports North America, Inc. Ports America, Inc. is the sole owner of Ports America Florida, Inc. Ports America, Inc. admittedly operates as a MTO at various locations throughout the United States other than Miami.

9. Ports America Florida, Inc. is the successor in interest to P&O Ports Florida, Inc.¹⁶ It owns a 50% membership interest in Eller-ITO and admittedly operates as a MTO in Tampa, Florida.

10. The County is a political subdivision of the State of Florida. The Dane B. Fascell Port of Miami-Dade is a department of the County and is owned by the County.

Agreements Filed With the Commission

11. On February 5, 1992, the original members of POMTOC filed an agreement with the Commission, identified by the Commission as Agreement No. 200616, ("Agreement") so as to allow the signatories to commence discussions and reach agreement as to how POMTOC was to provide marine freight handling services in the Port of Miami. The signatories also stated their intention to commence discussions and

¹⁶ By Order of April 28, 2009, the caption was revised so as to reflect the changes to the names of P&O Ports North America, Inc. and P&O Ports Florida, Inc.

reach agreement with the Port of Miami as to how POMTOC was to conduct business as a marine terminal operator. The Agreement was signed by the Senior Vice President of Continental and by the Presidents of each of the other members. The Agreement identified each of the members as marine terminal operators and was effective as of March 21, 1992. The Agreement is posted on the Commission's website, www.fmc.gov. (Official notice.)¹⁷

12. On February 15, 1993, the original members of POMTOC filed the first amendment to the Agreement with the Commission. This amendment ("1993 Agreement") governed the operation of POMTOC as a MTO. (Complainants' Ex. 7; Commission website.) Neither this nor any of the subsequently filed amendments addresses the qualifications for new members.

13. The members of POMTOC filed a second non-substantive amendment to the Agreement on April 18, 1995. The amendment, which was effective as of April 24, 1995, indicated that S.E.L. had withdrawn from membership and had been replaced by I.T.O. Corporation of Florida ("I.T.O."). The amended Agreement was signed by a Director of Continental and by the Presidents of each of the other members. It identified each of the members as marine terminal operators. (Complainants' Ex. 11.)

14. The members of POMTOC filed a third non-substantive amendment to the Agreement on April 23, 2003. The amended Agreement indicated that Continental and I.T.O. had withdrawn from membership and had been replaced by P&O Ports North America, Inc. and P&O Ports Florida, Inc. The amended Agreement was signed by representatives of each member, but without their titles. The amended Agreement, which was effective as of June 25, 2003, identified each of the members as marine terminal operators. Christopher Morton signed the agreement on behalf of both of the P&O corporations. (Complainants' Ex. 14.)

Unfiled Agreements and Correspondence Concerning POMTOC

15. On September 15, 1994, POMTOC and the County entered into a terminal operating agreement ("TOA"; Complainants' Ex. 29). Among the provisions of the TOA are:

Sect. 1.2: County grants POMTOC the exclusive use of approximately 135 acres.

Sect. 1.3: POMTOC, upon payment of contractual sums and compliance with its other contractual obligations, is entitled to "peaceably and quietly hold and enjoy the Premises for the Term hereby demised" without interference from any persons claiming

¹⁷ Official notice is broader than judicial notice and may be taken, not only of public records and generally accepted facts, but also of matters within an agency's area of special expertise, *Union Electric Co. v. F.E.R.C.*, 890 F.2d 1193, 1202 (D.C. Cir. 1989). The Commission has addressed the taking of official notice in Rule 226, 46 C.F.R. §502.226.

by or through the Port. The right of quiet enjoyment is subject to the terms and conditions of the TOA.

Sect. 2.1: POMTOC and its members are authorized to use the premises “for the purpose of handling cargo and all related activities.” POMTOC is authorized to use improvements and equipment “for the purpose of operating a marine cargo terminal area, including the activities normally carried out in a marine cargo terminal” provided that each of its members holds a County stevedoring permit. POMTOC may exclude any member which no longer holds a County stevedoring permit after first receiving written permission from the Seaport Director (a representative of the County) or his designee. POMTOC may not use the premises for any purpose not set forth in the TOA unless specifically authorized in writing by the County.

Sect. 5.1: POMTOC is to take no action to materially change its corporate structure, majority ownership or control without prior written approval of the Port Director.¹⁸ The POMTOC Respondents represent that members hold County stevedoring permits and agree to maintain such permits in good standing as long as they maintain an interest in POMTOC.

Sect. 9.1: POMTOC is to operate, maintain and secure the premises and the cargo handling equipment “as a common cargo terminal for the use of its members.” POMTOC is to use its best efforts to, among other things, “supervise and coordinate the receiving and delivery of container and breakbulk cargo” and to “otherwise administer the Premises to promote efficient and safe cargo handling operations.”

Sect. 9.4: POMTOC is to acquire a computerized terminal operating system (“TOS”) from Maher Terminals, Inc. One of the required functions of the TOS is to “Provide for ‘live’ yard inventory control thus maximizing the utilization of the terminal and increasing the number of containers per acre.”

Sect. 9.5: POMTOC agrees to admit as members stevedores which are licensed by the County and which hold Port permits on the same terms as “reasonably established by POMTOC and approved by the Port Director.” Among the requirements for membership is the payment of the fair market value of the interest of the new member, which is to be calculated according to a specified formula. A new member may not be admitted, nor may a membership interest be transferred, without the approval of the Port Director.

Sect. 9.6: Port is to receive 30 days written notice of the intent of POMTOC to change tariffs and filings with the Commission. Changes require prior approval of the Port.

¹⁸ It is unclear whether subsequent changes to the agreement between the POMTOC Respondents, whether or not filed with the Commission, were submitted to the Port for approval or whether the Port even knew of the changes. There is no evidence as to whether the Port acted on such knowledge, if any.

Sect. 11.1B: POMTOC is to maintain and secure the premises "as a common cargo terminal for the use of its members."

Although POMTOC and the Port subsequently discussed amendments to the TOA, it is unclear if the TOA was amended and, if so, when such amendments occurred. It has not been alleged that such amendments, if any, were relevant to the issues in this proceeding.

16. On or about May 14, 1998, the members of POMTOC entered into what was designated as the fourth amendment to the Agreement (Complainants' Ex. 19). This amendment concerned the appointment and term of the Senior Manager of POMTOC.

17. On December 23, 1998, the members of POMTOC executed a resolution giving their consent to a number of provisions regarding new members. Among those provisions were:

5. For a New Member to become a full Member of POMTOC with and [*sic*] equal share in POMTOC and the same rights as an existing Member, the New Member must contribute new business to POMTOC in accordance with the following formula:

The minimum new business to be contributed by a New Member shall be not less than the POMTOC annual volume prevailing at the time the New Member is admitted, multiplied by a factor, the numerator of which is one and the denominator is the number of POMTOC Members immediately prior to the admission of the New Member.

For a New Member who cannot achieve the requirement for full membership, the New Member may qualify for limited membership if the New Member contributes new business at not less than 10% of the POMTOC annual volume prevailing at the time the New Member is admitted. In such instances, the New Member will become a non-voting Member and will have a share in the allocations and distributions being determined by the New Member's business expressed in annual gate moves at the Port of Miami for the current calendar year as the numerator being divided by a denominator arrived at by adding POMTOC's aggregate gate moves for the current calendar year plus the New Member's contributed business.

[There is an example of a calculation of the income distribution to a New Member with limited membership.]

(Complainants' Ex. 21)

18. On or about December 28, 1998, the members of POMTOC entered into what was designated as the fifth amendment to the Agreement. The amendment effected a change to the New Member Purchase Price and was to be effective upon approval by the Port Director. Such approval occurred in 1999. (Complainants' Ex. 22.)

19. On May 25, 1999, Continental, Florida Stevedoring, Inc., Oceanic Stevedoring, Inc. and ITO Corporation of Florida issued Amended and Restated Regulations of Port of Miami Terminal Operating Company, LL.C. ("1999 Agreement"; Complainants' Ex. 23).¹⁹ The 1999 Agreement contains the following recitals:

a. That POMTOC was formed by articles of organization filed with the Florida Secretary of State on January 28, 1993.

b. Citations to the original operating agreement of February 15, 1993, and to amendments to the operating agreement of December of 1994, which were made on or about August 2, 1996, February 25, 1997, April 21, 1998 and December of 1998, as well as to resolutions which went into effect in or around December of 1998.

c. A statement that the members desire:

. . . to simplify the array of documents that govern POMTOC by adopting Amended and Restated Regulations that combine, amend and supersede [the documents cited above].

The following portions of the 1999 Agreement are relevant to the issue of the members' status as MTOs:²⁰

§6.1: "Managers (Agents). The overall management and control of the business and affairs of POMTOC shall be vested in the Voting Members who shall appoint agents (the 'Managers')" Each Member is entitled to appoint two Managers, but the Managers appointed by a single member must vote the same on all issues.

§6.2: Each member agrees to instruct its Managers to vote the member's management rights on various matters, including the election of Managers, "two (2) of whom shall be appointed from time to time by each Voting Member."

¹⁹ The members do not refer to themselves as MTOs in the preamble to the 1999 agreement.

²⁰ Even if the Complainants are correct in maintaining that the POMTOC Respondents may not rely on unfiled agreements in their defense, certain portions of those agreements may be construed as admissions or statements against interest. The significance of the Respondents' failure to file certain agreements will be addressed below.

20. By letter of May 4, 2004, POMTOC notified the Port that it was exercising its option to renew the TOA for an additional five years. The letter also referred to POMTOC's request for four additional five-year extensions. (Complainants' Ex. 32.)

21. On or about July 28, 2005, the members of POMTOC amended their agreement to effect certain changes with regard to new members (Complainants' Ex. 25). Section 5.6, entitled "New Members", states in pertinent part:

(e) A new Member must contribute new business to POMTOC in accordance with the following formula:

For a New Member to become a full Member of POMTOC with an equal share in POMTOC and the same Management Rights as an existing Member, the minimum new business contributed by a New Member during the 12 calendar months immediately preceding the time the New Member is admitted (and which must continue during the first 12 months after the New Member becomes a Member, or the New Member's distributive share of allocations and distributions shall be reduced to the distributive amount that such new business represents – hereinafter referred to as a "First Anniversary Adjustment") shall not be less than the POMTOC annual volume prevailing during the immediately preceding 12 months at the time the New Member is admitted, not including the volume contributed by the New Member, multiplied by a factor, the numerator of which is one and the denominator is the number of POMTOC Members immediately prior to the admission of the New Member.

For a New Member who cannot achieve the requirements for full membership, the New Member may qualify for limited membership if the New Member contributed new business at not less than 10% of the POMTOC annual volume prevailing during the immediately preceding 12 months at the time the New Member is admitted. In such instances, the New Member will become a non-voting Member, and will have a share in the allocations and distributions of POMTOC with the percentage of the allocations and distributions being determined by the New Member's annual gate moves at the Port of Miami for the immediately preceding 12 months (numerator) being divided by the amount which is POMTOC's aggregate annual gate moves for the immediately preceding 12 months plus the New Member's contributed business, subject to a First Anniversary Adjustment. . . .²¹

²¹ This language is not a model of clarity. It could be construed to require prospective members to contribute business to POMTOC, perhaps even before they had decided to seek membership. Such a construction would be far-fetched and has not been advocated even by the Complainants. The language could also be construed so as to require a new

Conditions at the Port of Miami

22. The Port of Miami is a deepwater port situated on approximately 518 acres on two adjoining islands in Biscayne Bay. The Port consists of wharfs, berthing areas, cargo terminals, cranes and other facilities related to cruise ship traffic and the handling of cargo which enters and leaves the port on ocean-going vessels.

23. From the time of the opening of the POMTOC terminal until on or about July of 2008 it was the only multi-user marine terminal in Miami, *i.e.*, the only marine terminal which could service any vessel calling at Miami without the permission of the Port. Prior to that date, each of the other two cargo terminals were dedicated to single carriers, their affiliates and members of vessel sharing agreements ("VSAs") to which the carriers were parties. Those terminals could only service "third party" carriers with the permission of the Port.

24. On or about July of 2008 the Port entered into a TOA with Terminal Link Miami ("TLM") whereby TLM is free to handle third party business without the approval of the Port.

25. The closest major port to Miami is Port Everglades which, like Miami, offers deep-water berths and other facilities for handling cargo. Port Everglades is approximately 28 miles from Miami. It advertises itself on its website, www.porteverglades.net, as the "No. 1 container port in Florida." (Official notice.)

26. Shippers consigning cargo to the South Florida area will consider Miami and Port Everglades as a single option in the absence of special considerations dictating the use of a specific port (Galloway²² deposition, pp.21, 27; Complainants' Ex. 196).

27. Miami and Port Everglades compete for container business. Carriers calling Miami have, from time to time, moved their cargo operations to Port Everglades (Galloway deposition, pp.49, 153, 154; Complainants' Ex. 196).

member to have operated in Miami for the 12 months preceding its becoming a member, but, contrary to the Complainants' assertions, such a construction is not mandatory. The language could logically be interpreted to require that a prospective member show that it has handled the required volume of cargo in other ports, a requirement that could almost certainly have been met by Ceres. A contrary construction would discourage the introduction of new business to Miami and would be unlikely to have the approval of the County. In any event, these provisions were apparently never applied since there is no evidence that POMTOC received any applications for membership.

²² At the time of his deposition Stephen F. Galloway was the Director of Corporate Operations for Hapag Lloyd, a corporate affiliate of Ceres.

Ceres' and Whites' Dealings with POMTOC

28. On December 8, 2004, Ceres informed POMTOC that its parent NYK and Hapag Lloyd planned to commence a new joint service to South America using vessels of both lines. Ceres also advised POMTOC that NYK/Hapag had nominated Ceres to perform its stevedoring in Miami. Ceres again notified POMTOC of its nomination later that month after it had finalized its agreement to acquire White.

29. On June 21, 2005, White sent POMTOC a formal request from Ceres for access to the POMTOC terminal so that Ceres, through White, could service vessels in the NYK/Hapag South American service.²³ Ceres further stated that POMTOC would continue to act as the MTO for NYK/Hapag. FSI was currently acting as the stevedore for that service. Ceres offered to reimburse POMTOC for its "out of pocket" expenses arising out of its access to the POMTOC terminal and to POMTOC's TOS. (Complainants' Ex. 62.)

30. Communications between Ceres and the POMTOC Respondents, directly and through their respective attorneys, continued through November of 2005. At that time POMTOC advised Ceres that its proposal was unacceptable. POMTOC invited Ceres to submit a proposal for membership.²⁴ Ceres did not do so.

The Involvement of the Port

31. The Port does not employ longshoremen or any other personnel engaged in the handling of cargo, whether on the piers or in marine terminals. The Port has published a Port Tariff which POMTOC is contractually obligated to follow. The current version of the tariff is linked to the Port of Miami website, www.miamidade.gov/portofmiami/. The preamble to the tariff states, in pertinent part:

This Tariff is issued by the Miami-Dade County Manager under authority of Administrative Order No. 4-4 pursuant to Section 4.02 of the Home Rule Charter; *Miami-Dade County having jurisdiction over and control of the operation of the Port of Miami-Dade.* (Emphasis supplied.)

Among the provisions of the tariff is the assessment of charges for dockage (the use of a berth by a vessel), wharfage (the use of the wharves or piers) and wharf demurrage and

²³ It is clear from the evidence that Ceres was the principal mover in the Complainants' dealings with the Respondents. Ceres acquired White so that it could use White's Miami stevedoring permit to service potential customers. White itself had no cargo customers and serviced only one cruise line with relatively infrequent service to Miami.

²⁴ The POMTOC Respondents assert that they are open to consideration of any commercially viable offer from Ceres. Apparently Ceres offered to pay a specific sum for each container, but the parties were unable to agree on the amount.

terminal storage;²⁵ among the “Miscellaneous Charges” in the tariff are charges for providing fresh water and electricity to vessels. (Official notice.)

32. Beginning in spring of 2004 Ceres informed the Port of its desire to act as the stevedore for NYK and other lines and repeatedly sought the help of the Port in attaining access to the POMTOC terminal. Ceres also had NYK write to the Port in support of its position. The Port declined to intervene in what it deemed to be a private dispute.

33. The Port conducts periodic surveys of its users to determine whether they are satisfied with services in Miami. The results of each of the surveys indicated that the users of the Port were satisfied with stevedoring rates and with the quality of service provided by the stevedores.²⁶

Other Sources of Potential Business in Miami for Ceres

34. At all times pertinent to this proceeding NYK was a member of a VSA known as the Grand Alliance (“GA”). The GA agreement called for the use of stevedores affiliated with members whenever possible so long as the rates were competitive and the service was satisfactory. Pursuant to the GA agreement, NYK was designated as the lead member for South Florida. This meant that NYK was responsible for procuring stevedoring services for all of the GA members. Besides NYK, the GA members are Hapag Lloyd (an affiliate of Ceres) and OOCL. Ceres would also have been able to compete for other business in Miami if it had obtained access to a marine terminal.

Other Efforts by Ceres to Establish Itself In and Around Miami

35. In March of 2006 Ceres leased land from the Port to store stevedoring equipment. The Port terminated the lease in August of 2008 in order to use the land for a parking lot.

36. At some point Ceres submitted a joint proposal with APM Terminals to service GA vessels. APM Terminals is affiliated with Maersk and required the permission of the Port to service GA vessels. By letter of March 20, 2007, the Port granted such permission through December 31, 2007, subject to renewal upon request. The Port withdrew its permission on April 10, 2007, because of the refusal of Maersk to agree to the payment of certain fees to the Port.

²⁵ Definitions of each of these terms are contained in Commission regulations at 46 C.F.R. §525.1(c) (5), (20), (22) and (23).

²⁶ The Complainants have correctly noted that there is no evidence as to the form of the surveys or of the method by which they were conducted. Nevertheless, there is no evidence to contradict the proposition that the surveys were taken; the weight to be assigned to their purported results is another matter.

37. Ceres did not seek to establish itself at facilities along the Miami River because it considered them to be unsuitable for servicing large container vessels. Ceres also considered Miami to be the only suitable port in South Florida.²⁷

POMTOC's Dealings with Other Entities

38. From on or about 2001 to 2004, POMTOC and APM Terminals, which operated an adjoining terminal, handled cargo for a VSA that included vessels operated by Maersk, which was APM's parent company, and a carrier that was a customer of POMTOC. Accordingly, both terminals would typically have containers for each vessel in the VSA. In order to facilitate the movement of the VSA cargo, APM and POMTOC would enter each other's terminal by a back gate to deliver cargo to the terminal which serviced the vessel that would be carrying that cargo. POMTOC eventually terminated the arrangement for business reasons.

39. In September of 2008 POMTOC entered into an agreement with SFCT, which took over the APM terminal, by which POMTOC members and SFCT may operate in each others' terminals to service vessels in VSAs. The number of vessels and the amount of cargo handled in each terminal under this arrangement are roughly equal.

40. POMTOC allows truckers onto its premises without charge to pick up and deliver containers and other cargo.

Discussion and Analysis

Complainants' Objections to County's Exhibits

In their rebuttal statement the Complainants have raised objections to various exhibits submitted by the Respondents. In addressing those objections, I am guided by the provisions of Rule 156 of the Rules of Practice and Procedure, 46 C.F.R. §502.156, which states, in pertinent part:

. . . all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible. All other evidence shall be excluded. Unless inconsistent with the requirements of the Administrative Procedure Act and these Rules, the Federal Rules of Evidence, Pub. L. 93 - 595, effective July 1, 1975, will also be applicable.

²⁷ At a meeting of the Board of Miami-Dade County Commissioners on July 1, 2008, the Port Director stated that a number of shipping lines had chosen to remain in Miami in spite of overtures by other ports (he did not identify which ones). The Port Director cited as reasons for those decisions the Port's 50 foot depth of water and generally greater capacity. (Complainants' Ex. 48, p.25)

Rule 156 and other Rules must be applied in the context of the fact that, with the concurrence of the parties, I have determined that cross-examination of witnesses is not necessary to a fair and complete resolution of the issues in this proceeding. Accordingly, the parties have participated in a "paper hearing" as contemplated in Rule 154, 46 C.F.R. §502.154. Each of the parties has submitted written statements and affidavits, none of which were subject to cross-examination. Most, if not all, of such submissions would not be admissible in an oral hearing.

The Complainants have moved to strike in their entirety the deposition transcripts of Jorge Roviroso (County Ex. 9, App. D), Carlos Arocha (County Ex. 10, App. D), Ray Mauri (County Ex. 33, App. D) and Captain Johan Bjorksten (County Ex. 34, App. D). Each of these depositions was taken in litigation in which neither the Complainants nor any of the Respondents other than the County were parties. In support of their objection the Complainants cite Rule 209(a), 46 C.F.R. §502.209(a), which provides that a deposition which is otherwise admissible may be used against any party "who was present or represented at the taking of the deposition or who had due notice thereof." The Complainants correctly observe that, since they were not parties to the litigation in question, they were not represented when the depositions were taken and did not receive notice of their scheduling. The Complainants also cite *Rose International, Inc. v. Overseas Moving Network International, Ltd.*, 29 S.R.R. 119, 159 (2001) ("*Rose*") in which the Commission affirmed the exclusion of such a deposition by the Administrative Law Judge pursuant to Rule 209(a). It is significant to note that in *Rose* the disputed deposition was offered to supersede a subsequent deposition of the same person which had been taken in the proceeding which was then before the Commission. The party offering the deposition had maintained that the latter deposition was somehow flawed but did not support that assertion. Both the Administrative Law Judge and the Commission understandably concluded that the admission of the prior deposition was not justified under the circumstances.

The circumstances of this case dictate a result different from that in *Rose*. The most obvious difference is that there is only one deposition of Roviroso in the record of this case, while in *Rose* the party offering the deposition was attempting to offer a deposition in a different case in an attempt to supplant a subsequent deposition in the current case. Presumably all of the parties to the *Rose* case had an opportunity to cross-examine the deponent. Although Rule 209(a) is not, by its terms, limited to oral hearings, its obvious purpose of preserving the right of cross-examination is inapplicable when there is no cross examination in the first place. Nevertheless, simple fairness dictates that the County should not be allowed the benefits of cross-examination when the same opportunity was not available to the other parties. Accordingly, I will partially sustain the Complainants' objections and will strike the County's cross-examination of the deponents. The deponents' direct testimony, whatever its relevance and weight, is equivalent to their affidavits and will be allowed.

The Complainants have objected to the affidavit of a former Port Director, which the County had submitted in a different case, on the grounds that it is not reliable within the meaning of Rule 156. The Complainants base their contention on the fact that the

U.S. District Judge in the other case rejected the affiant's stated rationale. It is apparent that this objection, although couched in terms of admissibility, actually goes to the weight of the evidence. As trier of fact, I am required to make an independent assessment of the weight of the evidence and am not bound by the determination of another trier of fact in a different case. The objection is overruled.²⁸

The Complainants have objected to numerous portions of the written statement of Bill Johnson, the Port Director. All of the objections are based upon the proposition that those portions of the statement are either factually incorrect or misleading. If so, the Complainants were free to submit rebuttal evidence and to attack the written testimony in their reply brief. As with the affidavit of the former Port Director, the Complainants' objections go to the weight of the evidence and are overruled.

The Complainants' objections to portions of the written statement of John Ballestro of POMTOC are based upon the same rationale as their objections to the Johnson affidavit. They are correct in characterizing portions of the Ballestro statement as vague, conclusory and self-serving. The same can be said for portions of statements submitted by the Complainants. As before, the objections go to the weight of the evidence which is admissible under the broad parameters of Rule 156. The objection is overruled.

In objecting to the written statement of Jorge Roviroso of FSI the Complainants are again confusing admissibility with weight. Their objection is overruled on the same basis as their objections to the other written statements.

The Complainants' Pre-hearing Statement

The County maintains that, in their pre-hearing statement, the Complainants did not refer to claims of discriminatory policies and practices or of discriminatory rental charges by the County and, pursuant to Rule 95 of the Rules of Practice and Procedure, 46 C.F.R. §502.95 and the Memorandum and Order on Evidentiary Issues of March 9, 2009.²⁹ I will address those issues in order.

The Complainants' Claim of Discriminatory Policies and Practices

In their pre-hearing statement the Complainants refer to Count II of the Complaint in which they allege that the POMTOC Respondents "implemented unreasonable and

²⁸ The Complainants also contend that there is a "logical inconsistency" between Rule 209(a) and the County's introduction of an affidavit taken in a case to which they were not parties. Such inconsistency is not readily apparent. The affidavit is no different than written testimony which the Complainants themselves have introduced.

²⁹ Among the provisions of the Order was that, "Absent a showing of good cause, the parties will be held to the positions stated in their prehearing statements. No other positions will be considered."

discriminatory terminal practices” (pre-hearing statement, p.4 *et seq.*). The Complainants also refer to Count III of the Complaint in which they allege that the County is responsible for failing to prevent unlawful actions by the POMTOC Respondents (pre-hearing statement, p.8 *et seq.*).

This language only refers to the vicarious liability of the County for the allegedly discriminatory actions of the POMTOC Respondents. It does not provide adequate notice of claims based on the independent actions of the County. Accordingly, other than with regard to the rental charges described below, such claims will not be allowed.

The Complainants’ Claim for Reimbursement of Rental Charges

Part of the Complainants’ claim for reparations is based on their alleged entitlement to reimbursement of excessive and discriminatory rental charges by the County. The County maintains that the Complainants should be prohibited from advancing this portion of their claim because it was not included in their pre-hearing statement. According to the Complainants, the claim for reimbursement of rental charges is covered by the reference in their pre-hearing statement to their Supplemental Discovery Response of September 17, 2008.

In the Complainants’ pre-hearing statement, under the heading “Harm to Complainants”, they state:

Complainants were injured by Shipping Act violations, including, *inter alia*, lost business opportunities, lost profits and increased costs, as outlined in Complainants’ September 17, 2008, supplemental discovery response (pre-hearing statement, p.9).

In rebuttal the County cites the Complainants’ response to its initial discovery request on September 21, 2007, and, in particular, their response to interrogatory 7. In that interrogatory the County requested that the Complainants “describe with specificity and particularity” the County’s alleged violations of the Shipping Act. In their response the Complainants made an objection to the interrogatory as premature in that it called for them to make an affirmative case prior to the hearing and the completion of discovery. The Complainants then proceeded to describe alleged violations by the County “without waiving these objections, and without in any way limiting their right at hearing to establish violations of any type by the Port.” The Complainants’ description of alleged violations contains no reference to rental charges.

While it is possible that the County tried to induce the Complainants to supplement their response, it did not seek a formal resolution of a discovery dispute pursuant to Rule 201(g) of the Rules of Practice and Procedure, 46 C.F.R. §502.201(g), nor did the County seek formal action with regard to Complainants’ Supplemental Discovery Response Concerning Damages of September 17, 2008 (“Supplemental

Response").³⁰ The Supplemental Response contains a reference to "increased costs" including rental payments to the County (Supplemental Response, p.7).

The language of the Complainants' pre-hearing statement and of their Supplemental Response provided the County with timely and sufficient notice of their claim for reimbursement of rental payments. Accordingly, the Complainants are entitled to go forward with that portion of their claim for reparations.

The Status of POMTOC Members as Marine Terminal Operators

The members of POMTOC claim that they are not subject to the jurisdiction of the Commission because they are not MTOs. In support of their positions the members have submitted affidavits to the effect that they do not engage in any of the activities by which MTOs are defined in the Act. They further maintain that there is no evidence to contradict their affidavits and that the circumstances of this case do not justify the piercing of the corporate veil by the Commission so as to hold them responsible for the unlawful actions, if any, of POMTOC.

The Act, at 46 U.S.C.A. §40102(14), defines a MTO as an entity which is:

. . . 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.

The affidavits submitted by the POMTOC members, which are mixed statements of law and fact, are directly contrary to representations to the Commission by each of the members that it is a MTO (Findings of Fact 11, 13 and 14). The language of the agreement of February 5, 1992, is not, in itself, an admission by the members that they are subject to Commission jurisdiction for the purposes of this case. It is undisputed that, at the time of the creation of POMTOC, its members were MTOs and that they pooled their resources to form POMTOC. However, in view of the members' repeated assertions to the Commission after the creation of POMTOC that they were MTOs, their current denials of that status would appear to be after-thoughts. Those repeated assertions may not, as suggested by the member companies, logically be dismissed as administrative errors by low-level employees. Neither the 1999 Agreement (Finding of Fact 19) nor any of the amendments or resolutions after the non-substantive modification of June 25, 1993, was filed with the Commission, nor did the members or POMTOC file a notice that their previous filings were no longer in effect.

³⁰ On June 4, 2009, I ordered the Complainants to submit a copy of their supplemental discovery request pursuant to Rule 150 of the Rules of Practice and Procedure, 46 C.F.R. §502.150. The Complainants submitted the required material on June 5, 2009. In accordance with the Order of June 4 the County submitted rebuttal evidence on June 10, 2009. The County's rebuttal evidence was the Complainants' response of September 21, 2007.

The operation of POMTOC itself runs contrary to the assertions of the member companies that they are not MTOs. An examination of the agreement of the 1993 Agreement, and its subsequent amendment, reveals that the members are far more than investors and, in fact, were acting as MTOs in the context of the events described in the Amended Complaint. The members maintain that the transfer of their assets and accounts to POMTOC proves that they terminated their status as MTOs at that time. Contrary to those assertions, the language of the 1999 Agreement shows that POMTOC is actively controlled by its members through the Managers whom each of them appoint to act as their agents.

Even the less detailed 1993 Agreement shows that the members exercised direct control over POMTOC. In §4.1: Management and control of POMTOC is vested in its members through eight Managers. In §4.6: Approval of Members is required for actions outside of the ordinary course of business. Presumably this includes the admission of new members.

Section 608.701, Florida Statutes Annotated,³¹ provides that, in determining whether members are personally responsible for the actions of a limited liability company, the court is to apply case law regarding the piercing of a corporate veil. However, it is not necessary to pierce a corporate veil to hold the members liable for the actions of POMTOC. Section 608.422(7)(3), Florida Statutes Annotated, provides that:

The member's, managing member's, manager's, or other person's duties and liabilities may be expanded or restricted by provisions in a limited liability company's articles of organization or operating agreement.

The provisions of the original marine terminal operating agreement and of the 1999 Agreement clearly show that POMTOC is a member-managed company whose members, through their agents, actively control its operations.

The control of POMTOC by its members is consistent with the language of §608.422, Florida Statutes Annotated, which is entitled, "Management of the limited liability company":

(1) Unless otherwise provided in its articles of organization or the operating agreement, the limited liability company shall be a member-managed company.

The 1994 unfiled agreement specifically states that POMTOC is a member-managed company. If POMTOC were a manager-managed company, then, unless otherwise stated in the articles of organization, each manager would have to be elected by a vote of the majority-in-interest of the members pursuant to §608.422(4)(c)(1), Florida Statutes

³¹ While the status of the POMTOC members as MTOs must be determined according to federal law, the Florida statute provides an indication of the intentions of the members and the manner in which POMTOC was designed to operate.

Annotated. Because POMTOC is a member-managed company, each member appoints two managers at its sole discretion.

POMTOC, like any limited liability company, is a cross between a business corporation and a general partnership. The status of the members bears some similarity to that of corporate stockholders and certain of the Managers' functions are comparable to those of corporate directors. Nevertheless, both the original TOA and the 1999 amendments indicate that the members of POMTOC have taken the option, as contemplated by the Florida statute, to assume a direct involvement in the operation of the company. As acknowledged in their prehearing statement, the members formed POMTOC so as to continue their business operations in a more efficient and productive manner. There is no question but that the status of the members as MTOs would have been unaffected if they had merely removed the fences separating their respective premises and had otherwise pooled their resources. It would be directly counter to the intent and language of the Act to allow them to evade the jurisdiction of the Commission merely because they do not perform the functions of a MTO with their own employees. By consolidating their marine terminal operations the members have surrendered some of the independence that they exercised in running their own terminals, but, in view of the degree of retained control, they have not changed their status as MTOs.

Ports America Florida admits that it provides MTO services in Tampa, but maintains that it does not do so in Miami. Ports America admits that it is a MTO in several ports in the United States, but denies that it is a MTO in Miami (POMTOC Initial Brief, p.52). They have cited no authority in support of the proposition that the personal jurisdiction of the Commission is to be determined separately at each port. The allegation that Ports America is not a member of POMTOC is effectively rebutted by the amendment of June 25, 2003, to the POMTOC agreement (Finding of Fact 14) and by the status of Ports America as the successor in interest to P&O Ports North America, Inc. (Finding of Fact 8).³²

FSI admits that, "from time to time", it has:

. . . provided freight handling services for cargo interests, including the loading and unloading of freight, the loading and unloading of full containers, and the loading and unloading of cargo to and from containers and other specialized equipment. (Proposed Finding of Fact 29 of POMTOC initial brief.)

FSI emphasizes that all of the above activities, which are clearly within the statutory definition of a MTO, are performed at premises owned and controlled by the

³² Because the status of Ports America as a MTO is not dependent upon its affiliation with POMTOC, it is not necessary to address the significance of the fact that it is no longer a member. Its sole ownership of Ports America Florida is of no significance to this issue.

Port and that charges for such services are assessed directly by the Port.³³ FSI's lack of ownership or control over the premises where it performs the activities described above is not determinative of its status as a MTO. Rather, it is the nature of the activities that is controlling. In *Plaquemines*, 838 F.2d at 543 the court affirmed the Commission's holding that its jurisdiction was not dependent on ownership or operation of terminal facilities.

For the above-stated reasons, I have concluded that each of the POMTOC members falls within the statutory definition of a MTO and is within the personal jurisdiction of the Commission. In reaching this conclusion, I am mindful that the parties may not confer jurisdiction on the Commission by their own statements, *Plaquemines*. They may, however, by their actions and admissions, provide evidence by which jurisdictional findings can be made, *Dart Containerline Co. v. Federal Maritime Com'n*, 722 F.2d 750, 752 (D.C. Cir. 1983). There is such evidence in this case.

Subject matter jurisdiction arises out of the fact that the Complainants have alleged that the Respondents have violated specific portions of the Act and that the agreements under which the Respondents are operating are as described in the Act at 46 U.S.C. §§40301(b)(2) and 40302(a). This does not mean that every action by a MTO is under the jurisdiction of the Commission, but only that the allegations of the Complaint are legally sufficient.

The Status of the County as a MTO

While the County has not pursued its challenge to the jurisdiction of the Commission, it appears to contest the assertions of the Complainants that it is a MTO. Because jurisdiction may be raised at any stage of the proceedings, I will address the status of the County so as to avoid any ambiguity as to the meaning of this Initial Decision.

The County maintains that it is merely a non-operating or "landlord" owner of the Port. To be sure, the County is not a member of POMTOC and exercises no control over its day-to-day operations. Nevertheless, the preamble to the Port Tariff as well as the County's ownership and control of the berths and wharves that are essential to access to private facilities, such as the POMTOC terminal, and the provision of essential services, such as water and electricity (Finding of Fact 30), put it squarely within the statutory definition of a MTO and of the holding in *Plaquemines* in which the court affirmed the finding of the Commission that the action of the port district in controlling access to private facilities and providing essential services confirmed its status as a MTO.

The fact that the County is a governmental entity is not inconsistent with its status as a MTO. As stated in 46 C.F.R. §525.1(c)(13), the definition of "marine terminal operator" includes, "terminals owned or operated by states and their political

³³ FSI also admits that some of the services are performed at the POMTOC terminal (POMTOC Initial Brief, p.52) but does not identify the entity that bills for those services.

subdivisions.” See also, *Canaveral Port Authority*, 29 S.R.R. 1436 (2003) (“*Canaveral*”).

For the reasons set forth above, I find that the Complainants have met their burden of affirmative proof of jurisdiction within the meaning of such cases as *Negron-Torres v. Verizon Communications, Inc.*, 478 F.3d 19, 23 (1st Cir. 2007).

The Status of the POMTOC Terminal

The parties have vigorously disputed the issue of whether POMTOC is a “public” terminal. The crux of the dispute is whether POMTOC was entitled to condition Ceres’ access to the premises either on White becoming a member or the payment of fees in an amount acceptable to POMTOC. That question would remain regardless of whether the POMTOC terminal is public or private. Even if the County itself operated the terminal, it would be not be prohibited from assessing reasonable and non-discriminatory charges.

It is undisputed that the POMTOC terminal is located on land owned by the County. It is also undisputed that the POMTOC Respondents are private entities and there is no evidence that they are agents of or surrogates for the County. The POMTOC terminal is a multi-user terminal in that it is not dedicated to any particular ocean carrier or group of carriers. This is in contrast to other facilities leased by the County such as the former APM terminal (adjacent to the POMTOC terminal) which, according to the terms of its lease, was limited to the servicing of Maersk vessels unless approved by the County.

There can be no doubt that, in creating POMTOC, its members (all of whom, like the current members, were stevedores or were affiliated with stevedores) were motivated by a desire to enhance their competitive positions over nonmembers. The members understandably felt no obligation to facilitate the operations of nonmembers, nor is such a duty imposed by the Act. The crucial issue is whether, in prohibiting the Complainants³⁴ from accessing the POMTOC terminal at virtually no charge, the POMTOC Respondents are unreasonably refusing to deal or negotiate within the meaning of §10(b) of the Act, 46 U.S.C. §41106(3), or to:

... fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

within the meaning of §10(d)(1) of the Act, 46 U.S.C. §41102(c).

³⁴ Although it was only White that was seeking access to the POMTOC terminal, the distinction between the two Complainants has no bearing on the issue of whether there was an unreasonable denial of such access.

The Significance of the Unfiled Agreements

The Act, at 46 U.S.C. §40301(b)(2), regulates certain agreements, including those among and between marine terminal operators to

. . . engage in exclusive, preferential, or *cooperative working arrangements*, to the extent the agreement involves ocean transportation in the foreign commerce of the United States. (Emphasis supplied.)³⁵

According to 46 U.S.C. §40302 true copies of certain agreements, including those described above, are to be filed with the Commission.

46 U.S.C. §40304 mandates that, within seven days of the filing of a regulated agreement, the Commission is to forward a notice of filing to the *Federal Register*. The Commission then conducts a preliminary review of the agreement so as to determine its conformance to the requirements of 46 U.S.C. §§40302 and 40303 and, if deemed necessary, requests that additional information or documents be submitted. The Commission is to give written notice to the person filing the agreement of the reason for its rejection.

46 U.S.C. §40303, entitled “Content requirements”, addresses ocean common carrier agreements, conference agreements, interconference agreements and vessel sharing agreements; the section makes no mention of agreements among MTOs. It is significant to note that neither section of the Act cited above sets forth any standards for the content of cooperative working agreements between MTOs. While neither the Act nor Commission regulations specifically describe the scope of the review of filed agreements, 46 U.S.C. §40103 authorizes the Commission to exempt any class of agreements from, among other things, the filing requirements upon a finding that “the exemption will not result in substantial reduction in competition or be detrimental to commerce.”

In 46 C.F.R. §535.302 the Commission has exempted certain non-substantive modifications to covered agreements from the 45-day waiting period for them to go into effect set forth in 46 U.S.C. §40304(c). However, such modifications are required to be submitted to the Commission and remain subject to Commission scrutiny.³⁶

³⁵ The POMTOC Respondents have cited no authority for the proposition that the various POMTOC agreements do not fall under the definition of “cooperative working arrangements.” It is difficult to imagine how an agreement by MTOs to pool their resources to form a single terminal, which they operate jointly, would not be such an arrangement.

³⁶ Under 46 C.F.R. §535.308 certain marine terminal agreements are exempted from the waiting period. The exemption does not apply to

The POMTOC Respondents maintain that both the 1999 and 2005 amendments to their agreement (Findings of Fact 19 and 21) are exempt from the requirement of filing by virtue of 46 C.F.R. §535.310. The problem with that argument is that neither of the agreements is a marine terminal facilities agreement as defined by the regulation. According to the regulation, a marine terminal facilities agreement is one that

. . . conveys to any of the involved parties any rights to operate any marine terminal facility by means of lease, license, permit, assignment, land rental, or other similar arrangement for the use of marine terminal facilities or property.

Only the TOA of September 15, 1994, and amendments thereto meet the above definition for the obvious reason that it was the County, rather than any of the member companies, that leased the facilities to POMTOC.

Under 46 U.S.C. §41102(b)(2) it is unlawful to operate under an agreement which is required to be filed if it has not become effective or has been rejected, disapproved or canceled. Clearly, an agreement that has not been filed in the first place cannot become effective. Since an unfiled agreement has not been reviewed by the Commission, there is no presumption that it does not have an anti-competitive effect, nor is such an agreement exempted from the application of anti-trust laws pursuant to 46 U.S.C. §40307. However, there is nothing either in the Act or in Commission regulations or precedent to suggest that violations of the filing requirement would justify either ignoring POMTOC's status as a legal entity or presuming that the POMTOC Respondents have violated other portions of the Act. If the unfiled agreements never went into effect, then the original 1993 Agreement, as modified, was still valid. The POMTOC Respondents have not based their defense on the changes contained in the unfiled agreements and the Complainants have not shown that they have been harmed, monetarily or otherwise, by the failure of the POMTOC Respondents to comply with the filing requirements of the Act.

Violations of a regulation or order of the Commission may result in the issuance of remedial orders and the assessment of monetary penalties pursuant to 46 U.S.C. §§41107 - 41109 and 46 C.F.R. Part 506. Such penalties, when warranted, are typically assessed in proceedings arising out of Orders of Investigation and Hearing issued by the Commission pursuant to 46 U.S.C. §41302. The assessment of civil penalties in

. . . a joint venture agreement among marine terminal operators to establish a separate, distinct entity that fixes its own rates and publishes its own tariff.

Accordingly, the blanket exemption does not apply to the POMTOC agreement. (On June 26, 2009, the Commission issued a Notice of Proposed Rulemaking, Docket No. 09-02, which would remove §535.308 from the regulations.)

complaint cases is not within the contemplation of the statutory scheme, *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1231 (1990).

The Controlling Law

Each of the parties has cited *All Marine* and *RIVCO* in support of their positions as to the effect, or lack thereof, of the practices of the Respondents on competition in the relevant market area. The Respondents point to the fact that, in both cases, the Commission held that the complainants had failed to carry their burden of proof that the alleged violations of the Act had unreasonably restricted competition. The Complainants maintain that the same holdings support their position because, in analyzing the facts in those cases, the Commission established criteria that, when applied to the facts in this case, support their contention that the Respondents' actions have significantly restricted competition in the Miami area and thus are unreasonable within the meaning of the Act.

All Marine stands for a number of principles that are applicable to this case. One such principle is that alleged violations of sections 10(b)(12) and 10(d)(1) of the Act are to be evaluated in the context of the surrounding facts; see also, *Gulf Container Line v. Port of Houston Authority*, 25 S.R.R. 1454, 1459 (1991) ("*Gulf Container Line*"). Another is that, in determining whether challenged practices are in violation of the Act, the Commission will first determine their impact on competition in the relevant market area; this is an issue on which the complainant has the burden of proof. If the practices do not have a significant impact on competition, the respondent need not justify them and the inquiry is at an end. If, on the other hand, there is a significant impact, then the burden shifts to the respondent to show that the practices are justified. The extent of the respondent's burden is dependent on the anti-competitive effect of the practices. Finally, the Commission will not conduct a strict anti-trust analysis in determining the legality of the challenged practices; see also, *Gulf Container Line*. While anti-trust factors may be useful, they are not controlling. In the context of this case, the Complainants need not show that the denial of access to the POMTOC terminal at little or no cost totally shut them out of the relevant market.

In *RIVCO* the Commission made it clear that exclusive arrangements, such as those between POMTOC and its affiliated stevedores, are not presumptively improper. As in *All Marine*, the Commission first determined the relevant market and then assessed the effect of the respondent's practices on competition in that market. In both cases the Commission found that there was no significant effect on competition, thus relieving the respondent of the necessity of justifying its practices.

The clear import and purpose of the actions of the POMTOC Respondents is to condition the use of the terminal on the engagement of one of the two stevedores that is either a POMTOC member or is affiliated with a member. However, the Commission has rejected the proposition that "tying" arrangements, *i.e.*, those in which a customer must engage a specified service provider in order to obtain the services of another provider, are inherently improper, *RIVCO*, 28 S.R.R. at 768. In order to prevail the Complainants must show that POMTOC has sufficient economic power with regard to

marine terminal services (the tying service) to force its customers to accept the services of one of the two preferred stevedores (the tied service). Again, the Commission has recognized that the determination of the merits of cases such as this one requires an assessment of the particular facts, *Canaveral Port Authority – Possible Violations of Section 10(b)(10)*, 29 S.R.R. 1436, 1439-40 (2003).

In *Volkswagenwerk v. FMC*, 390 U.S. 261, 279, 19 L.Ed.2d 1090 (1968) (“*Volkswagenwerk*”) the Supreme Court enunciated the so-called “triangular analysis” to determine whether a practice amounts to unlawful discrimination. Under the triangular analysis, a finding of discrimination in a situation not involving freight rates is not dependent upon a showing that the allegedly favored entity was in direct competition with the complainant. It need only be shown that a third party has enjoyed an unfair advantage over the complainant with regard to a benefit that both were seeking. Although *Volkswagenwerk* was decided under §16 of the Shipping Act of 1916, its precedent has been held by the Commission to be still valid because of the close similarity of the language of the superseded statute to §10(d)(4) of the Act. See, for example, *Credit Practices of Sea-Land Service, Inc and Nedlloyd Lijnen, BV*, 25 S.R.R. 1308, 1313 (1990).

The Relevant Market

In order to assess the effect of the challenged practices on competition it is first necessary to determine the market in which competition is to be examined. The Complainants have not specifically defined what they consider to be the relevant market but assert that it is no larger than the Port of Miami. However, they acknowledge at least the possibility that they could have stevedored the vessels of NYK/Hapag and GA in Port Everglades (Complainants’ Proposed Findings of Fact 68, 69). Inherent in such acknowledgement is the recognition that Port Everglades is close enough to Miami so as to allow stevedores to realistically compete for the same business in either port.

It stands to reason that, in view of the close proximity of Miami and Port Everglades, carriers will consider both of them in deciding where to call (Findings of Fact 23-26). However, that is not to say that the ports are interchangeable or that some carriers may not prefer or insist upon a specific port. Miami, like all other ports, markets itself as having unique advantages. Nevertheless, Miami and Port Everglades are part of a single South Florida market, at least for container cargo (Findings of Fact 23-25). While individual carriers or shippers may prefer Miami to Port Everglades (or the other way around), the ports are close enough and similar enough so that carriers and other customers will consider them as a single entity. Potential customers will take a number of factors into account in choosing between the two ports, but the evidence indicates that location is rarely if ever a prime consideration.

The Complainants have cited a number of cases to show that the Commission has never before, with the allegedly qualified exception of *RIVCO*, found a relevant market to exist beyond a single port (Complainants’ Reply Brief, footnote 15). The Complainants assert that, even in *RIVCO*, the Commission revised its finding so as to conclude that the

relevant market was a single terminal, *Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Mississippi River*, 29 S.R.R. 232 (2001) (Order to Show Cause). While the Complainants are correct, the stated reason for the revision is not helpful to their position. The Commission revised its finding because “the vessel operators can only choose the single tug company exclusively serving the terminal”, 29 S.R.R. at 234. In the instant case, carriers calling at the POMTOC terminal have their choice of two competing stevedores. It has not been shown that FSI and Eller-ITO are not engaged in *bona fide* competition, at least with each other.

In *Ocean Common Carriers Serving the Lower Mississippi River*, 28 S.R.R. 1574 (2000) (Section 15 Order on Exclusive Tug Franchises) the Commission explained why its re-examination of the issue of the relevant market was consistent with the decision in *RIVCO*. While concluding that River Parishes Company had not met its burden of showing that Ormet’s exclusive tug arrangements caused anti-competitive conditions in the lower Mississippi River,

The Commission left open, however, the question of whether it would violate the 1984 Act if the relatively isolated exclusive tug arrangement in the *Ormet* [or *RIVCO*] case spread to other terminals and became more pervasive along the lower Mississippi River. (*Id.* at 1575)

This is yet another example of the proposition, cited repeatedly by the parties, that findings in these cases are highly dependent on the relevant facts. The Commission revised its finding in the light of changed circumstances.

In presenting their argument as to the scope of the relevant market area the Complainants have overlooked *Agreement Nos. T-3310 and T-3311*, 20 S.R.R. 712 (I.D., 1980) in which it was found that Port Burns, Indiana and Chicago were in the same market in spite of the 70 mile distance between them. The Administrative Law Judge did not discuss the issue at length and there is no indication in the Initial Decision as to whether the parties disagreed over the relevant market area. Although that case involved an alleged violation of the Shipping Act of 1916, subsequent changes to the language of the Act would not mandate a different result. More to the point, none of the cases cited by the Complainants involve Miami and all of the outcomes are dependent on specific facts. Consistent with the approach taken in all of the cases cited by each of the parties, my conclusion is based upon the evidence in this case as well as the application of the legal standards which are established by Commission precedent.

The mere fact that Miami competes with Port Everglades is not determinative of whether they are in the same market. Presumably each of the two ports also competes with other South Atlantic and even Gulf ports for certain types of business. The pertinent question is whether a significant number of shippers and consignees would consider the two ports to be a single acceptable alternative to other competing ports. Simple logic leads to the conclusion that, given their geographic proximity which is much closer to each other than to other ports, and roughly equivalent facilities, Miami and Port Everglades would be considered as a single option for most customers. While the

Complainants have derided the suggestion that they could conduct container operations at locations such as those along the Miami River, they have not alleged that Port Everglades does not have the capacity (*i.e.*, depth of water, terminal facilities, cranes, etc.) to accommodate most if not all of the container vessels that call Miami. It may well be true that some shippers or consignees prefer Miami to Port Everglades, but there is no evidence that Miami is so unique that such preference could not be overcome by such factors as pricing or guarantees as to the availability of berths. The fact that Miami is seen by some customers as a more attractive alternative to Port Everglades is not to say that there is no such alternative. Regardless of whether Miami or Port Everglades, or neither of the two, is generally regarded as the more desirable, the fact remains that each of the ports is a going concern and that each can handle the same container traffic.

Competition in the Relevant Market

The Respondents maintain that they have not materially diminished competition among stevedores. Not only do the two stevedores authorized by POMTOC compete for business at the POMTOC terminal, but, according to the Respondents, all stevedores are free to compete for business in the South Florida Metropolitan Area which includes Port Everglades and Palm Beach. According to the Respondents, there is vigorous competition between Miami and Port Everglades³⁷ and the Complainants are free to offer their services in Port Everglades to any carrier that calls Miami. More importantly, the Complainants have not alleged that there is an insufficient number of competing stevedores in Miami or Port Everglades.

The Complainants have emphasized that their exclusion from the POMTOC terminal has prevented them from servicing Hapag and GA vessels and from generally operating in Miami. Clearly, the Complainants' ability to service those vessels is more difficult. However, the Complainants have not shown that they cannot operate in Port Everglades or that NYK/Hapag or GA could not redirect their vessels to Port Everglades in spite of their preference for Miami or for POMTOC in particular.³⁸ The fact that they have not done so, and perhaps would never do so, only means that POMTOC or the Port of Miami is, at least thus far, a more effective competitor than Port Everglades for GA business. It does not mean that there is a legally insufficient level of competition in the relevant market area.

The Complainants have not shown that GA vessels could not be serviced in Port Everglades and the evidence shows that Ceres has been operating there. Bruce Cashon,

³⁷ The Respondents have alluded to Port Canaveral, Palm Beach, the Miami River and other areas only in passing. There is insufficient evidence to show that they are part of the same relevant market area as are Miami and Port Everglades, at least for container vessels.

³⁸ It is unclear whether the shippers which prefer or insist upon Miami would object to their cargo being discharged in Port Everglades and then being transhipped to Miami for delivery to the consignee.

Senior Vice President of Ceres, testified in his deposition that Ceres was providing stevedoring services at the King Ocean Terminal in Port Everglades, but that GA vessels could not utilize the terminal because it did not employ labor under the jurisdiction of the International Longshoremen's Association ("I.L.A."). Mr. Cashon was able to name four other terminals in Port Everglades from memory, among which were those that did use I.L.A. labor (POMTOC Ex. 7, pp.44-46).

Contrary to the assertions of the Complainants, the County's surrender of its right to approve the servicing of third-party carriers at the SFCT terminal (Finding of Fact 39) is not a tacit admission that there is insufficient competition in Miami within the meaning of the Act. The County's action could just as logically be seen as an effort to encourage competition as a matter of policy. It is undisputed that the organization and operation of POMTOC is atypical of other MTOs and is perhaps unique. The most that may be said is that the County may, in hindsight, wish that its arrangement with POMTOC had been different or that it had monitored the operation of POMTOC more closely. The Complainants have offered no authority in support of the proposition that a party accused of stifling competition takes action to increase competition at its peril.

The Allegedly Unreasonable and Discriminatory Practices

In challenging the economic justification for their being denied the same access to the POMTOC terminal that is enjoyed by FSI and Eller-ITO, the Complainants point to the undisputed fact that POMTOC is not a stevedore. According to the Complainants, it follows that POMTOC has no legitimate economic interest in the selection of the stevedores who are allowed into its terminal. Inherent in the Complainants' position is the implication that the affiliation of a MTO with a stevedore is inherently suspect. There is no basis for that premise. As the lessee of the terminal, POMTOC has a property right which allows it to exercise control over the leased premises subject to the prohibitions of the Act. That right is not dependent on whether POMTOC is operating at a profit or a loss. Before POMTOC was created, its member companies operated their own terminals in conjunction with their stevedoring operations and in anticipation of the income from both. The same is true now that the member companies have pooled their resources to form a single terminal for their joint use. One of the advantages of membership in POMTOC is the ability of the members to use the facilities for stevedoring, directly or through affiliates. The Complainants have cited no authority that would compel the POMTOC Respondents to "share the wealth" because they can afford to do so.

In their challenge to POMTOC's refusal to grant them access to its terminal the Complainants cite the fact that the County issues stevedoring permits without regard to whether stevedores are affiliated with MTOs. The County's criteria for issuing stevedoring permits prove only that affiliation with a MTO is not a legal requirement for operating as a stevedore. Nevertheless, a practical economic requirement existed in Miami, and almost certainly elsewhere, and the Complainants have not shown that it was contrary to law. The possession of a stevedoring permit is no guarantee of commercial success, but merely permission to enter the marketplace with whatever success the permit holder is able to achieve. If Ceres can negotiate a more favorable arrangement with

another MTO, or with POMTOC itself, it is free to do so. However, the Complainants may not legitimately claim the right to operate in the terminal of another company on their own terms. The Complainants have not shown that it is unreasonable for POMTOC to reserve its facilities for the use of its members, especially since Ceres may become a member through White.

The Complainants have not been excluded from the relevant market although their access to that market has been curtailed. There can be no doubt that the POMTOC facility represents a significant portion of the marine terminal capacity in Miami or that Miami is a major part of the relevant market area. However, even if the relevant market were limited to Miami, the Complainants could have obtained access to the market by virtue of White having become a member of POMTOC. The Complainants have argued that a membership application by White would have been futile in view of the revision to the requirements for membership contained in the 2005 Agreement. While it is possible that a membership application by the Complainants would have been summarily rejected, such a result is not inevitable (Finding of Fact 21; footnote 21). White would not initially qualify for full membership, but could qualify for a limited membership with its entitlement to a share in the profits to be determined based upon its contribution of new business after it became a member. Even a limited membership would have provided the Complainants with access to the POMTOC terminal with an income distribution to be determined in the future.

The Complainants have correctly asserted that White's failure to become a "charter member" of POMTOC is of no consequence since neither White nor Ceres sought access to the terminal at that time and POMTOC had a continuing contractual obligation to the County to admit new members. Nevertheless, after White had been purchased by Ceres it could have applied for membership. Putting aside the issues related to the unfiled agreements, this could have been accomplished either under the 1998 agreement with its somewhat more straightforward requirements for full or limited membership (Finding of Fact 17) or, later, under the 2005 agreement (Finding of Fact 21).

While the members of POMTOC might not have welcomed the presence of a third stevedore in the terminal, the Complainants never tested their good faith by submitting a membership application, or even discussing the possibility of membership, on behalf of White. It is possible that POMTOC would have denied the application or imposed unreasonable requirements. It is also possible that one or more of the POMTOC members would have boycotted White's membership application. If any of those possibilities were to occur in response to a future application, the merits of a subsequent proceeding may well be far different than they are now. Furthermore, the failure of the Port to intervene in such a situation could subject it to liability under the Act.

Although the Complainants have not specifically alleged that any of the Respondents' practices are discriminatory *per se*, the principles of *All Marine*, *RIVCO* and their progeny are not as readily applicable to the instances of alleged discrimination whose merits are independent of the state of competition in the relevant market area. An

effective analysis of the following practices is more in keeping with the standards set forth in *Volkswagenwerk* and the numerous Commission decisions in which those standards have been applied.

The Complainants have cited POMTOC's allowance of certain non-member stevedores to operate in its terminal as proof of the discriminatory practices of the POMTOC Respondents. That argument is unpersuasive. Those stevedores were only allowed to deliver cargo to the POMTOC terminal as part of reciprocal arrangements to service carriers who were part of VSAs (Findings of Fact 37 and 38). The "favored" stevedores were not given blanket access to the POMTOC terminal, but only under limited circumstances and in return for a benefit to POMTOC, through its affiliated stevedores, in the form of access to the adjoining terminal under the same conditions. This arrangement enabled POMTOC to satisfy the requirements of its own customers. Applying the *Volkswagenwerk* test, it is evident that this arrangement did not amount to unlawful discrimination under the Act inasmuch as the favored stevedores did not receive the benefit that the Complainants are seeking, *i.e.*, unlimited access to the terminal, and that the arrangement was not an unreasonable preference in view of its reciprocal nature.

While POMTOC could legitimately charge truckers for access to the terminal, its failure to do so does not undermine the legitimacy of its refusal to allow free access to the Complainants. The truckers are receiving the same benefit sought by the Complainants, but the disparity in their treatment is, as asserted by the POMTOC Respondents, based on the simple fact that neither POMTOC nor its members are in the trucking business and would derive no competitive disadvantage by allowing free access to the truckers. Indeed, there could conceivably be a competitive disadvantage to assessing a charge that might be passed along to POMTOC's customers. Accordingly, the disparity in treatment is reasonable according to the *Volkswagenwerk* test.

Putting aside considerations of standing, the carrier's right to select its own stevedore, to the extent that it exists, does not include the right to impose that stevedore on a MTO. The refusal of a MTO to honor the carrier's preference may carry economic consequences up to the loss of the carrier's business. The likelihood of such a result will largely depend on a number of considerations including the alternatives available to the carrier. In this case, NYK/Hapag and GA evidently decided that the advantages of the POMTOC terminal outweighed their preference for the Complainants. The fact that those carriers chose not to make arrangements with other MTOs does not mean that such alternatives were not available.

The Complainants maintain that the County discriminated against them by charging them rent for an equipment storage area which was reportedly far in excess of the rates at which POMTOC subleased equipment storage space to FSI and Eller-ITO. The Complainants' position is based on the premise that the County, by allowing POMTOC to charge those rates, was thereby obligated to extend the benefit of those rates to the Complainants. Besides arguing that the Complainants did not give the required notice of this claim in their prehearing statement, the County maintains that it was reasonable to allow the sublease of space within the POMTOC terminal at a lower rate

than the rate for the lease of "non-containerized open ground space" to the Complainants because the terminal generates wharfage and dockage fees, while the space which was leased to the Complainants generates only the income from rental charges (County's Initial Brief, p.29, footnote 11). The Complainants deride the County's "apples and oranges" argument by emphasizing that they are not challenging the rates charged by POMTOC, but only the failure of the County to match those numbers in their own lease (Complainants' Reply Brief, p.59).

Putting aside the question of the County's responsibility for the actions of POMTOC in this instance, the stated rationale for the difference in rental charges, while arguably strained, is not so unreasonable as to outweigh the long-established reluctance of the Commission to substitute its judgment for that of an entity that is responsible for the day-to-day operation of a port, *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. 974, 989 (1986), *affirmed sub nom., Petchem, Inc. v. FMC*, 853 F.2d 958 (DC Cir. 1988). Accordingly, it was not unreasonable within the meaning of *Volkswagenwerk* for the County to assess a higher charge to the Complainants than the rate that POMTOC charged to its affiliated stevedores. Even if the sublease rate was below market, POMTOC could reasonably provide a discount to those stevedores for the same reason that it could reasonably allow them access to the terminal while denying it to the Complainants; both are legitimate benefits of membership.

In the words of Rule 223, 46 C.F.R. §502.223, "Initial decisions should address only those issues necessary to a resolution of the material issues presented on the record." Accordingly, this Initial Decision should not be construed as a determination of the legal effect of the Respondents' failure to file certain agreements, the legality of the criteria for membership in POMTOC, or the constitutional defense of the POMTOC Respondents.

For the reasons stated above I have concluded that the Complainants have failed to present a *prima facie* case of a lack of adequate competition among stevedores in the relevant market area of Miami and Port Everglades. Accordingly, the Respondents will not be required to justify their practices. Even if that were not so, the Respondents' practices are justified.

It is hereby **ORDERED** that the Complaint be, and hereby is, **DISMISSED**.


Paul B. Lang
Administrative Law Judge