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January 21, 2005

Bryant L. VanBrakle, Secretary
The Federal Maritime Commission
800 North Capitol Street, N.W.
Washington DC 20573

RECEIVED
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FEDERAL MARITIME COMMISSION

Re: *Odyssea Stevedoring v. Puerto Rico Ports Auth.*, Docket No. 02-08; *Int'l Shipping Agency v. Puerto Rico Ports Auth.*, Docket No. 04-01; and *San Antonio Maritime Corp., et al. v. Puerto Rico Ports Auth.*, Docket No. 04-06

Dear Mr. Secretary:

Please enter my appearance in these proceeding as counsel for the Puerto Rico Ports Authority.

I request to be informed of service of the administrative law judge's initial or recommended decision and of the Commission's decision in this proceedings by electronic mail.

Daniel H. Charest
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Thank you for your attention in this matter.

Respectfully submitted,



Daniel H Charest

DHC:pcm

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COMMISSIONERS

**BEFORE THE
FEDERAL MARITIME COMMISSION**

ODYSSEA STEVEDORING OF PUERTO
RICO, INC.,

Complainant,

v.

FMC Docket No. 02-08

PUERTO RICO PORTS AUTHORITY,

Respondent.

COMPLAINANT'S REPLY MEMORANDUM
IN COMPLIANCE WITH THE ORDER OF THE
COMMISSION SERVED NOVEMBER 22, 2004

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FEDERAL MARITIME COMMISSION

Submitted By:

RICK A. RUDE, Esq.
Suite 103
207 Park Avenue
Falls Church, Virginia 22046

Dated: 15 February 2005

Counsel For Complainant
Odyssea Stevedoring of Puerto Rico, Inc.

INTRODUCTION

COMES NOW, Complainant, Odyssea Stevedoring of Puerto Rico, Inc. (hereinafter referred to as “Odyssea” or “Complainant”) in compliance with the Order of the Commission served November 22, 2004, as amended, directing the parties submit legal memorandum addressing the issue of whether or not the Commonwealth of Puerto Rico possesses “constitutional” sovereign immunity. Odyssea has received memoranda from the complainants in Case Numbers 04-01 and 04-06. Such memoranda require no reply. Odyssea has also received Opening Memorandum from Respondent (hereinafter referred to as “PRPA” or “Respondent”) and a Petition to file a Brief as *Amicus Curiae* filed by the Office of the Solicitor General of the Commonwealth of Puerto Rico.

Odyssea does not object to the receipt and consideration of the submission by the Commonwealth of Puerto Rico. It is the position of Odyssea that the involvement of the Commonwealth in these proceedings is long overdue. It is of importance to note that the legal contentions of PRPA and the Commonwealth are inconsistent in so far as PRPA being an ‘arm of the state’ under the facts alleged by PRPA as support for PRPA’s claim of sovereign immunity.¹ Cf. *Trans-Caribbean Maritime Corp. v. Commonwealth of Puerto Rico*, 2002 PR.App. LEXIS 595 (March 27, 2002) (PRPA is not an arm of the

¹ Odyssea pointed out in its Opening Memorandum that PRPA’s factual premise regarding the nexus between the complaint proceedings before this Commission and the alleged “Golden Triangle Project” were specious. PRPA again repeats its incorrect factual assertions at page 1 of its Opening Brief. Odyssea, as well as the other complainants, pointed out to the Commission that the Puerto Rico Court of Appeals issued a decision in which both PRPA and the Commonwealth of Puerto Rico participated and the Court held that PRPA was not an arm of the state and had NO IMMUNITY as is being alleged by PRPA, even under the factual grounds alleged by PRPA, in these proceedings before the Commission. The implicit question is “why” has the Commonwealth permitted PRPA to continue the improper characterization of the relationship between PRPA and the Commonwealth. Since the Commonwealth has now appeared and inserted itself in these proceedings, the matter is ripe for an order to show cause to be issued to BOTH the Solicitor General and counsel to PRPA. Simply, the existence of the Golden Triangle Project and its purported implementation, have little or no bearing on the violations alleged in Docket No. 02-08.

state in regard to its leasing arrangements, including the termination of leases as part of the Golden Triangle Project).

SUMMARY OF ODYSSEA'S REPLY

It is acknowledged by PRPA, and the Commonwealth of Puerto Rico, that the relationship between the United States Government (hereinafter referred to as "USG") and the Commonwealth of Puerto Rico (hereinafter referred to as the "Commonwealth") is governed and controlled by the "Compact". The Compact is not a federal statutory enactment imposed on upon the Commonwealth. The Compact is in fact a "mutual agreement" and therefore a contract between USG and the Commonwealth. The Compact, even though it is now part of the United States Code, must be construed in the same manner as a "contract". The Compact contains no reservation of sovereign immunity for the Commonwealth as to "federal law". The Compact implements an agreed upon arrangement for "local self government"-- nothing more. The sovereign immunity which Puerto Rico possessed, prior to the 1952 Compact, related solely to "local" matters. The question of whether or not such immunity 'continued' as to "local" matters is irrelevant. It is plain error to confuse the concept of sovereign immunity in "local" matters with the concept of whether or not Puerto Rico has sovereign immunity to federal law. The specific legal question which this Commission must address is—"Whether or not the Commonwealth has sovereign immunity to the provisions of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998?" The answer is that plainly the Commonwealth has no such immunity.² The Compact

² PRPA and the Commonwealth have submitted what are clearly complimentary memorandum. Whether this can be construed as the submission of two briefs by one party is open to question. However, it appears that these memorandum are duplicative in material respects. Accordingly, since PRPA has no standing to assert this immunity issue, Odyssey will address the matters raised in the Commonwealth's brief. Under

represents an agreement, and therefore waiver by the Commonwealth, that federal statutory law will control all matters that are not matters of solely “local” interest. The terms of the Compact are controlling and no extended legal analysis of collateral legal precedent is required to resolve the issue. Further, the First Circuit has fashioned an interpretation of a section 9 of the Compact which is not consistent with the Congressional intent of that provision. There is no ‘statutory immunity’ contained in section 9, nor does the term “statutory laws” include Constitutional Amendments.

REPLY ARGUMENT

General Observations

The Commission has raised the question of “constitutional” immunity. This cannot be a careless reference. The 2002 *South Carolina Ports Authority* decision by the U.S. Supreme Court is alleged to have expanded the scope of sovereign immunity. In that decision, the Supreme Court concluded that federal agency adjudications were similar enough to a court proceeding to invoke the Eleventh Amendment. The Supreme Court ruled that “private citizen” suits were barred by the Eleventh Amendment. However, the Court did hold that an action by the Federal Maritime Commission to enforce the Shipping Act was not precluded. 535 U.S. 743, 768 (2002). The “dignity defense” therefore does not extend to actions instituted by the Federal Government. *Ibid.*

the Constitution of the Commonwealth, The Office of the Solicitor General is the only entity authorized to represent the Commonwealth in these types of cases. PRPA’s efforts at such litigation would probably not be binding upon the Commonwealth in such circumstances. PRPA’s free wheeling approach to litigation and these issues is highly detrimental to the interests of the Commonwealth and PRPA in particular. This loose treatment of the law is exemplified by the contention that the Puerto Rico Federal Relations Act preceded federal shipping regulation. The 1984 Act was a substantial revision of the Shipping Act, 1916. 46 U.S.C. Appx. 801 et seq. The 1916 Act pre-dates PRFRA by 36 years. This sort of careless legal analysis runs through out the briefs of both PRPA and the Commonwealth.

Puerto Rico is admittedly “not a State”. Puerto Rico therefore must admit that it may not claim the explicit protections of the Eleventh Amendment.³ There is no indicia that USG gave nor intended to provide the Commonwealth with any form of immunity from the application of federal law. Section 9 of the Compact (48 U.S.C. 734) explicitly makes federal “statutory laws” applicable to Puerto Rico in all ‘non-local’ matters. PRPA’s and the Commonwealth’s contention that they hold sovereign immunity to “federal law” cannot be squared with the past nor present status of the Commonwealth. There is an absence of legal basis, in either the terms of Compact or anywhere else for that matter, for a finding of immunity which would be the same as that described in the South Carolina Ports Authority Supreme Court decision. The Commonwealth’s contentions present an “EITHER OR” situation. Either the Commonwealth has complete and total immunity (to include that of the full immunity from any “Commission” instituted enforcement action as well) OR, the Commonwealth has NO immunity—period.

It is important to note that the analysis required of the Commission’s query requires a brief review of the structure of the United States Constitution. It is not disputed that Congress has plenary authority to control and regulate territories under the “territories clause”. A major defect of Respondent/Commonwealth’s argument is revealed by its application. Simply, in order for the Commonwealth to have the scope of immunity that

³ The Court’s discussion of Dual Sovereignty is reflective of the structure of the U.S. Constitution and Amendments 9, 10 and 11. This ‘tripod’ reflects the concept that the Constitution is a form of arrangement between the people, the States and the newly created Federal Government. The key point is the 10th Amendment which reflects that the powers not delegated to the Federal Government are ‘reserved’ to the States or the people. This reservation of power, between ‘joint sovereigns’ (535 U.S. at 765), is at the heart of our ‘dual sovereignty’. A review of the Compact between USG and the Commonwealth reflects an ‘agreement’ between ‘superior and inferior’ entities. Puerto Rico was a territory—it is not nor was it a co-equal of either the USG or of the States under the Constitution. It is strange that the Commonwealth would contend that section 9 of the PRFRA (48 U.S.C. 734) works to extend the Eleventh Amendment to include Puerto Rico. (See, Commonwealth brief at page 47). Section 734 applies only to “statutory laws”—not Constitutional Amendments. PRPA and the Commonwealth apparently believe that Congress has the ability to pass Constitutional amendments without the knowledge and consent of the 50 States.

is alleged, then Congress would have had to have “granted” such immunity to the Commonwealth. It is inconceivable to believe that in the structure of the U.S. Constitution; the States gave to Congress, under the territories clause (Art. IV, Sec. 3, Cl. 2), the ability to circumvent the requirements of Art. IV, Section 3—Admission of New States.⁴ As noted *infra*, the term “statutory law” does not include Constitutional Amendments. The contention of a “default rule” statute is not correct.

The litany of cases cited by the Commonwealth share a common threads—(1) they involve decision making based upon the concept of *Stare Decisis*, such as in *Mercado*; (2) they do not take into account that the Puerto Rico Federal Relations Act is a compact based upon a “mutual agreement”; (3) they fail to make the subject matter distinction between “local” and “non-local” matters; (4) they mis-interpret a contract clause as an abstract ‘statute’; and (5) they improperly rely upon “pre-Compact” Supreme Court decisions in a “post-Compact” world.

The case law, from 1913 to 2004, makes sporadic reference to Puerto Rico sovereign immunity. The origin Supreme Court decisions, upon which PRPA/Commonwealth premise their claims of immunity from federal law, all involved issues that were “local”

⁴ Section 3, Clause 1 of Article IV of the U.S. Constitution states: “Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any States by formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress”. Neither Congress nor the Executive Branch may make any law, or executive order, which would provide a territory (Commonwealth or otherwise) with a legal standing equal to that of a State without violating the procedures set forth in the Constitution to “make a ‘State’ a ‘State’”. The concept of “Dual Sovereignty” may only exist among equals. The Constitution of Puerto Rico remains subject to the Resolution enacted by Congress in approving the Constitution, United States Federal Law, and with Public Law 600. See; P.L. No. 447, 66 Stat. 327 (March 3, 1952). Since USG retains “veto power” over Puerto Rico, there can be no ‘equals’. As was noted by the Supreme Court in *Torres v. Puerto Rico*, 442 U.S. 465, 472-473 (1979), Puerto Rico has no “inherent sovereign authority”. This is the very “inherent sovereign authority” which PRPA/Commonwealth would have this Commission ‘find’ in these administrative proceedings.

in nature.⁵ The Compact made the delineation of controlling law clear. The original section 9 of the Compact is actually a carry forward of standard language employed by Congress as early as 1850 to insure that federal statutory law was extended to and therefore applicable and followed in the western territories. It is pure fantasy to contend that an 1850 statute which was clearly intended to extend federal statutory law to the western territories works to extend the Constitutional Amendments as well. It is well understood that the Constitutional Amendments did not apply to territories BECAUSE the territories were NOT States. Cf. *Balzac v. People of Porto Rico*, 258 U.S. 298, 305 (1921). The Commonwealth's interpretation of section 9 of the Compact (48 U.S.C. 734) is patently inconsistent with the Court's holdings in *Balzac* as but one example. The interpretation placed upon section 9 (now section 734 of the Puerto Rico Federal Relations Act) is not as represented by the Commonwealth. The burden is not upon a plaintiff or complainant to prove that the Commonwealth "lost" its sovereign immunity (or that Congress took it away under the Compact), but is instead upon the Commonwealth to establish that such alleged immunity to federal law exists. The mere

⁵ These cases and their 'local issues' are as follows: *People of Puerto Rico v. Shell Company*, 302 U.S. 253, 261 (1937) (case involved a conspiracy in restraint of trade "within the borders of Puerto Rico" which the court then said was "clearly a local matter"); *Bonet v. Yabucoa Sugar Co.*, 306 U.S. 505, 510 (1939) (case involved the interpretation of a Puerto Rico tax law which the Court said was "purely local" in nature); and *People of Porto Rico v. Manuel Rosaly Y Castillo*, 227 U.S. 270, 273 (1913) (case involved a dispute over land, land rents and profits which is obviously a "local" matter). It is highly doubtful that the Supreme Court would have found that Puerto Rico had any form of sovereign immunity from the application of the federal laws of the United States. Cases involving sovereign immunity as to "local" matters cannot form a proper foundation (either factually or legally) for a claim that PRPA/Commonwealth have or hold sovereign immunity from the application and enforcement of a federal statute. In fact, under the 1900 and 1917 Organic Acts, Congress and the President held veto power over "local legislation" of the Puerto Rican government. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 670-671 (1974). In that case the Supreme Court further noted that Puerto Rico under the Compact was only given "freedom from control or interference by Congress in respect to internal government and administration subject to compliance with the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by Judicial decision. Those laws which directed or authorized interference with MATTERS OF LOCAL GOVERNMENT by the Federal Government have been repealed". 416 U.S. at 673, fn. 9. The Compact involves "local government" and does not result in the creation of a "de facto State" as is being contended by PRPA and the Commonwealth.

re-recitation of miss-cited case precedent does not meet that burden. In fact, the Commonwealth's memorandum is based upon an incorrect factual assertion that Puerto Rico had sovereign immunity to enforcement of federal statutory laws since 1913. This major error is compounded by the 1st Circuit's treatment of section 9 and associated blind adherence to past precedent. These points represent fundamental error in legal analysis.

COMPLAINANT'S SPECIFIC RESPONSES

The Commonwealth engages in a series of legal errors, large and small, in order to reach its desired conclusions. The major errors are (1) that Puerto Rico has sovereign immunity to federal law prior to the 1952 Compact, and (2) that section 9 of the Compact results in affording Eleventh Amendment protections to Puerto Rico. The secondary errors include (3) the interpretation of section 9 of the Compact as a 'statute' rather than as part of a contract, (4) the application of some sort of 'quasi-statutory' analysis to Puerto Rico Federal Relations Act rather than the proper 'contract' analysis required under U.S. Supreme Court precedent. The application of the proper analysis to PRFRA and section 9 in particular, when combined with the actual scope of the pre-Compact Supreme Court precedent, results in the conclusion that Puerto Rico has no 'constitutional' sovereign immunity. Absent such immunity, the contentions of PRPA fail irrespective of the underlying falsity of PRPA's factual premises in the first instance.⁶

⁶ See footnote 1 at page 2 *infra*; The Commonwealth avoids any Statement of Facts by assertedly adopting the facts contained in the Commission's November 22, 2004 Order. It is respectfully submitted that the Commonwealth by its intervention herein, must be compelled to 'step up' and either embrace the factual and legal contentions of PRPA or disavow those factual contentions. The Commonwealth and PRPA may not 'have it both ways'. The failure to advance a factual basis for the Commonwealth's legal position in this proceeding precludes this Commission from crafting a decision which is anything but "advisory". Absent a proper nexus to the facts, the Commonwealth's brief would have the Commission make and issue a decision which is not dispositive to any matter in these complaint proceedings. It was established over 100 years ago that the issue of State sovereign immunity analysis had as a threshold any analysis of the facts allegedly supporting the claim of immunity. See; *Ex Parte Ayers*, 123 U.S. 443 (1887). In *Ayers*, the Supreme Court noted that the 11th Amendment application was not to be determined by the 'named party of

As noted above, the Commonwealth's brief contains errors. These errors are reflective of omission of or incomplete statements which result in misleading the Commission. These statements are commingled with correct assertions which tend to obscure the errors. Rather than attempt to address the involved brief, page-by-page, it is more expeditious to simply point out the errors. Odyssea therefore in reply to the Commonwealth's brief states as follows:

I. THE COMMONWEALTH HAD SOVEREIGN IMMUNITY ONLY AS TO 'LOCAL MATTERS' AND THE CLAIM OF UNFETTERED OR UNLIMITED SOVEREIGN IMMUNITY IS PLAINLY INCORRECT.

The Commonwealth alleges that it has both 'statutory' and 'constitutional' sovereign immunity. (Commonwealth Brief at pages 2-3, 6, 13, 15, 18-20, 25-26, 27 fn.93, 44, 47). The question of 'statutory immunity' will be addressed in Odyssea's discussion of section 9 of the Puerto Rico Federal Relations Act ("PRFRA") below. However, it is necessary to note that the Commonwealth acknowledges that the "compact" controls. (See; Commonwealth Brief at pgs. 12-13; 14, fn 35; 15, fn 39; 27; 32). It is beyond dispute that "compacts" are essentially contracts which are to be construed under contract principals. See; *Texas v. New Mexico*, 462 U.S. 554 (1983), and on further hearing, 482 U.S. 124, 128 (1987). The courts, nor this Commission, may revise nor make any findings which are inconsistent with the express terms of the compact. 462 U.S. at 564.

record' but the Court was to look beyond the record to determine the real party in interest. 123 U.S. at 488-489. The 11th Amendment analysis must find that the "State is not only the real party to the controversy, but that the real party against which relief is sought ...". 123 U.S. at 491. The Commonwealth is not the named defendant in this complaint cases. The relief sought is from PRPA. The Commonwealth is insulated by "local" Puerto Rican laws from any liability for the actions of PRPA. The Supreme Court, in *Ayers*, made it clear that before any 11th Amendment analysis was necessary or appropriate, the court had to determine "who was the real party in interest". If the "State" (in the case Puerto Rico) is not the real party in interest, there is no need for application of any 11th Amendment analysis. Any decision by the Commission in these complaint cases MUST include this fact analysis as a 'threshold' question BEFORE the question of Puerto Rico 'constitutional sovereign immunity' can be or need be addressed.

The compact contains what amounts to a “governing law” provision.⁷ The Commonwealth cites a series of pre-1952 cases and then makes the unqualified statement that “The government of the People of Puerto Rico has enjoyed sovereign immunity from its inception” (Brief at page 3); “Puerto Rico retains its inviolate sovereign immunity from suit without its consent in local and federal proceedings, at minimum, to the same extent as the States”(Brief at page 3); “Congress did not retreat from the Supreme Court’s expression of Puerto Rico’s sovereignty” (Brief at page 11); “The very manner in which the compact was entered, through offer and acceptance, shows that Congress once again acknowledged the sovereignty of Puerto Rico articulated by the Supreme Court as early as 1913” (Brief at page 13); “Under the 1952 compact, sovereign immunity remains an inherent characteristic of the Commonwealth of Puerto Rico” (Brief at page 27); “Whether or not Puerto Rico’s long-held sovereign immunity is constitutional or common-law in nature, it has not been abrogated by Congress here” (Brief at page 31, fn. 93); “Alden identified as the sine qua non of sovereign immunity the dignity afforded the States under the dual system of government and their preexisting sovereign immunity. Calero-Toledo does the same for the Commonwealth of Puerto Rico” (Brief at page 44); and “Congress had the opportunity to exclude the Eleventh Amendment from the constitutional provisions applicable to the Commonwealth. It did not.” (Brief at page 47).

⁷ The Commonwealth and the 1st Circuit have defined this statute as a ‘default rule’. This is fundamental error. The compact must be construed as a ‘whole’ and Section 9 (48 U.S.C. 734) provides a measure by which the ‘applicable law’ can be determined. The law is divided into “local” and “non-local” matters. The briefs of both PRPA and Commonwealth omit the discussions of the courts in two key cases which explain how section 9 is to be actually applied. Those cases are United States v. Gerena, 649 F.Supp. 1183 (D. Conn. 1986) and Hodgson v. Union de Empleados del los Supermercados Pueblos, 371 F.Supp. 56 (D. PR. 1974). The question is whether “local law” or “federal statutory law” is to be applied. The courts note that question is to be determined on the basis of the facts. This is the identical analysis which was recently restated and employed by the United States Supreme Court in Norfolk Southern Railway v. Kirby Pty, Ltd., 543 U.S. _____, Case No. 02-1028, (Nov. 9, 2004), Slip Op. at page 6.

The above representations are premised upon three pre-1952 U.S. Supreme Court decisions.⁸ The lead decision is a case involving a local land dispute. See *People of Puerto Rico v. Rosaly y Castillo*, 227 U.S. 270, 273 (1913). The Commonwealth's discussion cited above needs to be qualified to note that Puerto Rico was afforded sovereign immunity but ONLY as to 'local matters'. The Compact, likewise, provided for "local" self-government. The Commonwealth concedes this point. (See Commonwealth Brief at pages 10-12, 16, 32). It is necessary to point out that the key case relied upon by PRPA and the Commonwealth starts with the proposition that Puerto Rico has sovereign immunity. That case is *Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d. 34 (1st Cir. 2000). The court noted that it had previously held that Puerto Rico had sovereign immunity. 214 F.3d. at 37 citing several cases including *Ramirez v. Puerto Rico Fire Service*, 715 F.2d. 694, 697 (1st Cir. 1983). If the ruling in *Ramirez* is traced to its source, the case identified is *Ursulich v. Puerto Rico National Guard*, 384 F.Supp. 736 (D. PR. 1974). The Judge in that case relied upon *Rosaly y Castillo* for the proposition that Puerto Rico had immunity from suit. 384 F.Supp. at page 737. This was the fountainhead of the legal analysis which has been perpetuated by the First Circuit in its decisions.⁹ Simply, the First Circuit's reliance upon a past precedent has resulted in a

⁸ See the cases cited and the discussion at footnote 5 *infra*. These cases, as applied to section 9, reflect that the Supreme Court acknowledged that Puerto Rico had sovereign immunity as to the fact issues involved. Each case involved what the court found to be a "local matter". The Commonwealth's brief fails to articulate this clear qualification to the scope of the alleged sovereign immunity. *Odyssey* has no issue with the conclusion that Puerto Rico had and retains sovereign immunity as to all matters which come within the term "local". What this Commission must be wary of is the importation of imprecise analysis into the Commission analysis of whether or not these cases afforded Puerto Rico sovereign immunity to "non-local" matters. The application of the Shipping Act of 1984 is a matter of interstate commerce and maritime law and certainly is not a "local" matter.

⁹ The *Ramirez* case was noted by the Supreme Court, without acceptance, in *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). *Ramirez* in turn relied upon *Ezratty v. Puerto Rico*, 648 F.2d. 770, 776 (1st Cir. 1981)(715 F.2d. at page 697); *Ezratty*, in turn relied upon two cases, (1) *Carreras Roena v. Cammara de Comerciantes*, 440 F.Supp. 217, 219 (D. P.R. 1976) and (2)

string of erroneous decisions. As has been noted, it is not appropriate to make a finding of sovereign immunity as to “federal statutory law” based upon “local” law cases. When this analysis is properly applied to the Commonwealth’s unqualified statements of general sovereign immunity (See the quotations at page 10 *infra*), it is clear that the Commonwealth has NOT established the existence of sovereign immunity (by way of case law) prior to the 1952 Compact. The burden to establish that fact is upon both PRPA and the Commonwealth, not on a complainant. Under administrative procedure, the failure to meet this burden by PRPA and the Commonwealth requires the Commission to find that no such sovereign immunity existed.

II. THE COMMONWEALTH’S CLAIM OF STATUTORY SOVEREIGN IMMUNITY IS HIGHLY FLAWED.

The Commonwealth makes the argument that section 9 of PRFRA (48 U.S.C. 734) provides the Commonwealth with statutory immunity.¹⁰ (See Commonwealth Brief at pages 2-3, 6, 16, 19-23 wherein section 9 is called a ‘default rule’) The basis for this default rule argument is *Mercado*. (Commonwealth Brief at page 19, fn. 53).

Commonwealth states this purported rule as “statutes of general application would apply equally to Puerto Rico and to the fifty states unless Congress made specific provision for different treatment”. (Brief at pages 2-3, 6, 19). This argument is placed in quotations without proper reference. The broad reference to *Mercado* and a review of the court’s

Ursulich v. Puerto Rico National Guard, *supra*. (648 F.2d. 776, fn. 7). Carreras Roena cited and relied upon Ursulich for its finding of sovereign immunity. 440 F.Supp. at 219.

¹⁰ Section 734 of PRFA states as follows:

“The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws other than those contained in the Philippine Trade Act of 1946 or the Philippine Trade Agreement Revisions Act of 1955: Provided, however, That hereafter (May 1, 1946) all taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States, or consumed in the island shall be covered into the Treasury of Puerto Rico.”

language in that case reveals that the First Circuit was attempting to somehow paraphrase section 9 of the Compact. (See footnote 10 herein for the correct reading of section 9). The First Circuit stated that it was the court's "reasonable assumption" that this interpretation of section 9 (48 U.S.C. 734) was what Congress intended. Cf. 214 F.3d. at 42. The First Circuit is not correct. The Supreme Court in a 1976 opinion again involving Puerto Rico noted and explained the actual source and Congressional intent of language identical to that now contained in section 9. The court in *Examining Board of Engineers, Architects and Surveyors v. Flores*, 426 U.S. 572 (1976) stated the origins and usage of the involved language. Cf. 426 U.S. at 582-591. Congress first employed that language in 1850 when it established the territory of New Mexico. See; 426 U.S. at 588, fn. 20. The Court noted that this 1850 language became the "model" for subsequent territorial legislation. *Id.* The Court explained that it was the Congressional intent to use such language as an "explicit extension" of an 1871 federal statute to the involved territory. See; 426 U.S. at 585. The language is intended to make clear that persons residing in the territories were protected by the statutory laws of the United States. See; 426 U.S. at 582-583. The Court in discussion of the 1900 Foraker Act noted that this language was included in 1902 as a means of extending remedies guaranteed by the Constitution and laws of the United States to "persons" acting under color of territorial law. The "not locally inapplicable" language was explained by the court to mean that Congress was not certain of its own powers respecting Puerto Rico and Congress therefore "left the question of personal rights" of the residents to the "orderly development by this Court". See; 426 U.S. at 589, and 589 fn. 22. The Commonwealth errs when it alleges that section 9 extended the 11th Amendment to Puerto Rico. The

discussion in *Examining Board* reflects the intent to extend only personal rights guaranteed under the Constitution. This is confirmed by the parallel discussion regarding the Philippines. See; 426 U.S. at 588, fn. 21 omitting this language from the Revised Statutes of 1878 because Congress had already provided the residents of the Philippines with a “bill of rights guaranteeing most of the basic protections afforded by the Constitution”. *Id.* The Court further provided a practical explanation for the Congressional use of such language. The Court noted that while Congress had plenary power over territories, effective control over local activities was impossible. The Congress then left “municipal law to be developed largely by the territorial legislatures” but “subject to a retained power of veto”. See; 426 U.S. at 596, fn. 28. Simply, Congress left “local matters” to the local government while retaining power over matters involving interstate commerce and anything which could be decided to be “locally inapplicable”. The contentions of Commonwealth that section 9 incorporated all of the Constitution and all of the Amendments cannot withstand scrutiny. Section 9 is not as quoted by either the 1st Circuit nor by PRPA and the Commonwealth. The Commonwealth is arguing that USG through the Congressional power to regulate territories has created a “State” within the meaning of both the federal Constitution and the 11th Amendment. There is absolutely no basis for such a contention. Section 9 represents a Congressional intent to provide a measure (local versus interstate) by which controversies can be resolved and federal statutory laws specifically extended to territories. Section 9, as read by PRPA and the Commonwealth, would work to negate all other Admission provisions of the federal Constitution as well as the plain wording of the 11th Amendment. It is basic statutory

interpretation that a single provision of a statutory structure may not be read to negate other provisions.

III. THE COMMISSION IN ITS ANALYSIS OF PUERTO RICO SOVEREIGN IMMUNITY MUST FOLLOW AND APPLY THE PUERTO RICO COMPACT UNDER PRINCIPLE THAT ARE APPLICABLE TO CONTRACTS.

Odyssea, at pages 5-10 of its Opening Memorandum, pointed out that the 1952 Compact was the controlling document for the Commission's analysis. Commonwealth and PRPA apparently fully agree with Odyssea on this point. However, Commonwealth and PRPA fail to recognize and apply contract principles. Odyssea pointed out that Compacts are contracts. Further, the Supreme Court noted in *Texas v. New Mexico*, supra, that:

“Although a compact, when approved by Congress, becomes a law of the United States, it is still a contract, subject to construction and application in accordance with its terms”.
(482 U.S. at 124, 96 L.Ed.2d. at 111)

The Court also made it clear that the Court was “not free to rewrite” any defect which may be found in a compact. See; 462 U.S. at 565. The Court further concluded that it is the courts “first and last order of business” to interpreting a compact and the Court possesses no equitable power to reform the compact. See; 462 U.S. at 567-568. In the cited case, a provision of the involved compact was found to be flawed. See; 462 U.S. at 560-562. The court refusing to rewrite the compact enforced the compact in accordance with the parties obligations. See; 482 U.S. at 133-134.

The Commission, in the review of PRFRA, needs to construe the compact as a whole.

The Commission must follow and apply the plain meaning of the terms contained in the contract.¹¹ The enactment of the contract gives the contract the force of federal law. The interpretation of federal statute begins with the “Plain language” rule. The Compact is admittedly designed to afford the Commonwealth of Puerto Rico “local control” and local autonomy. However, if we were to extend such a concept to interstate matters, we run afoul of the limitation that Puerto Rico has not authority to usurp federal law and control. Commonwealth admits the application of the Shipping Act of 1984 provisions to Puerto Rico. The plain wording of section 9 states that Puerto Rico is subject to federal statutory laws. The Shipping Act of 1984 comes within that term. It was not appropriate for the 1st Circuit nor the Commonwealth to attempt to provide an interpretation of section 9 “in isolation” to the other provisions of the Compact. It is cardinal rule of both contractual and statutory construction that a provision or statute must be “upon the whole” so that “no clause, sentence or word shall be superfluous, void or insignificant”. Cf. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The plain meaning of “statutory laws of the United States” would not include the 11th Amendment. Such a contention is not only strained, but frivolous. It is noted that the Supreme Court in *Hess v. Port Authority Trans-Hudson*, 513 U.S. 30, 42-43 (1994) held that Compact parties are “presumed” not to have 11th Amendment immunity unless the compact clearly contains that intent.

¹¹ This is the same as following the plain meaning in review of a statute. The statutory rules involving interpretations are that (1) statutes must be read to give effect to all of their terms, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); (2) any reading of a statute which renders another provision a “nullity” is to be avoided, *Reiter*, supra; (3) specific sections of a statute take precedence over more general provisions, *MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1943); (4) when Congress adopts a new law which incorporates sections of a prior law, it is presumed that Congress is aware of the administrative and judicial interpretations of that law and to adopt those interpretations, *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978); (5) when Congress explicitly enumerates exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent. *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-617 (1980). The Congressional usage of the 1850 New Mexico language in the Foraker Act, as carried forward in PRFRA, reflect the Congressional intent to adhere to the original purpose and intent of that language. Commonwealth’s belated argument that Congress intended to incorporate the 11th Amendment under the term “statutory laws” is patently incorrect.

Commonwealth fully acknowledges that Puerto Rico has agreed to bound by the plain terms of the Compact. Section 9 represents what could be described as a waiver (presuming that Puerto Rico possessed any immunity to any federal law) so that the Commonwealth could be compelled to comply with any federal statutory law which has specifically been made applicable to Puerto Rico and is “not locally inapplicable”. There is no scintilla of evidence contained in PRFRA that could be used to support the claim that the Compact reserved to Puerto Rico sovereign immunity from federal statutory law.

CONCLUSION

Wherefore, in consideration of the above and foregoing, it is hereby respectfully submitted that the Commission deny Respondent’s claim of sovereign immunity; that the Commission issue such an order as is necessary to require Respondent and the Commonwealth of Puerto Rico to establish why this issue was not resolved by the decision of the Puerto Rico Courts of Appeals in the *Trans-Caribbean Maritime* case; and for such other and further order as the Commission deems just and appropriate in the circumstances.

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Certificate Of Service

I hereby certify that a copy of this document has been served, by first class mail, postage prepaid, upon the below listed parties of record in these proceedings.

Dated this 15th day of February 2005 at Falls Church, Virginia.



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