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(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

May 2, 2000

DOCKET NO. 99-16

CAROLINA MARINE HANDLING, INC.

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

Respondents found subject to the personal and subject matter jurisdiction of the Commission, and their motions to dismiss are denied. Respondents directed to file answers to the amended complaint and to consult with complainant and propose a draft procedural schedule for the next phase of this proceeding on or before May 31, 2000.

RULING ON RESPONDENTS' MOTIONS TO DISMISS

Frederick M. Dolan, Jr., Administrative Law Judge

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Background

Complainant Carolina Marine Handling, Inc. (“CMH”) filed a complaint, as amended, against respondents South Carolina State Ports Authority (“SPA” or “SCSPA”), Charleston Naval Complex Redevelopment Authority (“RDA”), and Charleston International Projects, Inc. and Charleston International Ports, LLC (collectively “CIP”), alleging violations of various sections of the Shipping Act of 1984 (“1984 Act”).¹

Respondents have each filed a Motion to Dismiss. CMH replied to the motions. Respondents were granted leave to and they filed replies to CMH’s reply, and CMH, the non-movant, was allowed to have the last word and filed an additional response.

CMH earlier requested that this proceeding be partially consolidated with Docket No. 99-21 to allow uniform and fair administrative determination of issues related to Eleventh Amendment sovereign immunity. In the alternative, CMH requested that all parties’ papers on sovereign immunity be deemed filed in each of the affected proceedings. On January 4, 2000, CMH’s alternative request was granted and all the parties’ papers on the Eleventh Amendment sovereign immunity in Docket No. 99-21 have been thoroughly considered in this proceeding. But subsequent events have largely mooted that issue as will be shown next.

¹CMH alleges that respondents violated sections 5, 10(a)(2), 10(b)(11), 10(b)(12), 10(d)(1), 10(d)(3) and 10(d)(4) of the 1984 Act, 46 U.S.C. app. §§ 1704, 1709(a)(2), 1709(b)(11), 1709(b)(12), 1709(d)(1), 1709(d)(3) and 1704(d)(4), pursuant to section 20(e)(3) and such other provisions as to which violations may be proved, and Part 535 of the Commission’s Rules and Regulations. CMH seeks reparations, interest, attorneys fees, a cease and desist order and other relief for the future.

March 23, 2000 Commission Ruling in Docket No. 99-21

On March 23, 2000, in Docket No. 99-2 1, *South Carolina Maritime Services, Inc. v. South Carolina State Ports Authority*, the Commission addressed respondent's affirmative defense that "[t]he Eleventh Amendment of the U.S. Constitution prohibits suits by private parties for reparations against" a state agency like South Carolina State Ports Authority, and ruled that the doctrine of state sovereign immunity does not prohibit the FMC from asserting jurisdiction over a case brought by a private complainant against a port authority arguably operating as an arm of the State of South Carolina.

The Commission discussed the doctrine of sovereign immunity and stated that the Supreme Court has defined its terms and found that the definition does not extend to administrative proceedings; that all the recent Supreme Court proceedings, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1966), and *Alden v. Maine*, 119 S. Ct. 2240 (1999), involved proceedings either against states, in judicial tribunals not before administrative agencies, mimeo at 6, or suits in federal court, again not before administrative agencies. *Id.* at 8. *College Sav. Bank v. Florida Prepaid Post Secondary Educ. Expenses Bd.*, 119 S. Ct. 2219 (1999); *Florida Prepaid Post Secondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999), and *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000). *Id.* at 8.

The Commission also observed that Circuit Court opinions before and after *Seminole Tribe* reached the same conclusion, viz. the 9th Circuit in *Premo V. Martin*, 119 F.3d 764,769 (9th Cir. 1997), *cert. denied*, 522 U.S. 1147 (1998), and the 8th Cir. earlier in *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981).

The Commission also emphasized on page 5, as follows:

In California v. United States, 320 U.S. 577, 585-6 (1944), the Supreme Court ruled, under identical language in the Shipping Act's predecessor statute (the Shipping Act, 1916), that "with so large a portion of the nation's dock facilities . . . owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." *See also Reno v. Condon*, 120 S. Ct. 666 (2000) (Federal government may regulate commercial activities of State entities).

Noting that the Commission's jurisdiction over state ports has been in place for decades, the Commission further pointed out that the Shipping Acts of 1916 and 1984 "illustrate Congress's decision that the regulation of ports, whether publicly or privately owned, is essential to protecting the nation's oceanborne commerce. Commission jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports. Accordingly, the Commission has in the past rebuffed attempts to restrict its jurisdiction over public port authorities." *Id.* at 9.

The Commission holds that the doctrine of sovereign immunity does not bar complaints against state-run ports. In the circumstances, the Commission expressed no opinion as to whether respondent South Carolina State Ports Authority is in fact an arm of the State of South Carolina. *Id.* at 11, footnote 7.

SPA's Motion to Dismiss²

Respondent SPA filed a motion to dismiss the amended complaint, or in the alternative, to hold that SPA is immune from this complaint proceeding under the Eleventh Amendment of the U.S. Constitution. As noted earlier, since the Commission found in Docket No. 99-21 that the Eleventh Amendment and the doctrine of state sovereign immunity did not bar the complaint by a private complainant for reparations against a state port authority, this issue is moot and will not be further discussed in this proceeding. There is no meaningful difference between SPA and RDA insofar as this issue is concerned and the Commission conclusions in Docket No. 99-21 are applicable to RDA as well.

Respondents' other reasons for seeking dismissal of the complaint will be addressed next. SPA states that complainant CMH asks the Commission to review and to interfere with the decisions of fellow public agencies to secure for CMH the right to 'establish and to operate a marine terminal at the former Charleston Naval Complex in North Charleston, SC; that nothing in the 1984 Act guarantees such a right; and that rather, the Act regulates, and imposes responsibilities on, marine terminal operators ["MTO"].

SPA states that respondent RDA has been planning the economic redevelopment of the former Charleston Naval Complex in coordination with federal, state, and local officials for approximately five years; that although the complaint seeks review of both the planning process and

²RDA's motion to dismiss on the grounds of alleged lack of personal jurisdiction is addressed later in this ruling.

the criteria applied, it does not explain why the Commission should concern itself with the economic redevelopment activities of South Carolina.

SPA states that CMH contends in its amended complaint that respondents violated Commission rules by failing to file the RDA-SPA and SPA-CIP agreements, *infra*, referring to Part 535 of the Commission's rules; that the rules do not apply to the RDA-SPA agreement, and they exempt the SPA-CIP agreement from the waiting-period and filing requirements of the 1984 Act; that the planning efforts that led to the agreements have been subject to public review and comment in South Carolina; and that the agreements have been reviewed by South Carolinapublic bodies, and they are available for public inspection upon request in South Carolina.

SPA's Statement of Facts

SPA states that the United States and the State of South Carolina are transforming the former Charleston Naval Complex into private facilities to spur economic growth in Charleston and Dorchester counties, SC. SPA states that the decision to close the former Charleston Naval Complex in 1993 was prescribed by the Defense Base Closure and Realignment Act of 1990 ("the Base Closure Act");³ that the former Charleston Naval Complex comprises what was the Charleston Naval Shipyard and the adjoining Charleston Naval Station; and that the facility, which encompasses about 1,600 acres, contains numerous buildings, five drydocks, and approximately twenty finger piers.

³Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808 (1990), reprinted in note following 10 U.S.C. § 2687, *et seq.* (the "Base Closure Act"); *Dalton v. Specter*, 511 U.S. 462, 464-65 (1994).

SPA states that to aid the local economies where the military installations were being closed, Congress passed the Base Closure Act to facilitate the transfer of those installations to local redevelopment authorities;⁴ that Congress designated the Department of Defense as the federal agency responsible for disposing of the land; that to assist the local communities surrounding the closed bases, Congress directed the Secretary of Defense to consider local and regional economic needs when disposing of the land; and that section 2905(b)(4)(B)(i)(I) of the Base Closure Act sets forth the criteria to be employed by the Secretary of Defense to evaluate land use proposals: 1) consideration in kind (including goods and services;) 2) real property and investments; and 3) any other considerations that the Secretary considers appropriate.

SPA states that South Carolina created respondent RDA to best address the economic damage done, and to restore the jobs lost, when the base closed in 1996; that to maximize the economic impact of the converted facility, RDA was given wide-ranging powers including the power to make and to execute contracts; to cooperate and negotiate with all necessary governmental entities; and to dispose of land in any way it deems fit; that RDA's membership includes both local and appointed officials who are responsible for developing and implementing a comprehensive program to replace lost jobs and to integrate the facility back into the community; that all decisions relating to the disposal of the former Charleston Naval Complex have been the result of extensive federal-state-local cooperation; and that the involved governmental entities did no more than legally implement a federal law.

⁴Base Closure Act, §§ 2901; 2903(c).

SPA states that RDA and SPA, both South Carolina agencies, agreed to a lease agreement in furtherance of economic development. SPA states that RDA solicited bids for the initial tenancies on the former Charleston Naval Complex from April 24, 1995 to June 6, 1995; that, on the other hand, in its bid, CMH proposed to operate a breakbulk and cargo-handling facility at the former Charleston Naval Complex; that RDA determined that CMH's proposal was undesirable compared with the other bids and did not offer CMH a lease on the property; and that CMH did not appeal this decision.

SPA states that RDA made a second request for proposals ("RFP"); that RDA received several proposals, including offers from Charleston Shipbuilders, Inc. ("Shipbuilders") as well as CMH, and SPA; that RDA evaluated the proposals on August 30, 1996; that, again, CMH's bid to operate a breakbulk and cargo facility was denied because CMH's proposed cargo handling at the north end of the former Charleston Naval Complex would be inconsistent with a North Charleston ordinance, and because CMH's proposal would employ workers only on a per diem or as-needed basis and these workers would receive few benefits from their jobs; that RDA decided that the employment opportunities that would be created were insufficient; and that RDA selected proposals that offered greater long-term economic benefits and higher wages to workers.

SPA states that Shipbuilders, which ranked third in the second bid process, decided to sublease one of its buildings, Building 193, to CMH and permitted CMH to use one of Shipbuilders's piers or quay walls; that, unfortunately for Shipbuilders, unrelated economic problems forced it to cancel the lease in May 1999; and that this cancellation, by its terms, resulted in the automatic termination of the sublease which CMH had with Shipbuilders.

SPA states that in addition to its sublease with Shipbuilders, CMH also leased several buildings directly from RDA in 1997; that CMH continues to use those buildings in its operations today; that in 1998, CMH entered into another lease with RDA; that, under this agreement, RDA subleased Pier Mike, Building 224 and adjacent property to CMH and another entity; and that CMH decided to cancel this lease eight months later, before any rental payments were due.

SPA states that during Shipbuilders's lease, and as required by South Carolina law, RDA continued to investigate how to generate the maximum economic benefit from the complex; that at the same time, SPA began pursuing a lease from RDA to convert part of the Naval Complex into a non-containerized cargo facility; that RDA considered SPA a desirable tenant because of its expertise in port management, its financial resources, and its status as a public enterprise; and that after extended negotiations during public meetings, and with the approval of the U.S. government and South Carolina, SPA and RDA signed a lease agreement in April 1999.

SPA states that the lease agreement covered approximately 100 acres in the middle part of the complex, and includes Pier Zulu, a modern double-deck pier, and two smaller piers; that it does not include Building 193, which at the time was still under the RDA-Shipbuilders lease and the Shipbuilders-CMH sublease; that, in other words, the parties specifically and consciously protected CMH's sublease by not including Building 193 as SPA's property until December 1, 2000, the date on which the Shipbuilders-CMH lease was originally to have expired; and that RDA also had commitments to other tenants and, therefore, temporarily withheld other land, piers, and buildings, which will ultimately be added to SPA's lease by 2007.

SPA states that under the 30-year lease, SPA initially received approximately 76.5 acres; that under the terms of the lease agreement, SPA must: 1) develop the land as a non-containerized cargo

facility; 1) invest at least \$7 million in capital improvements, which can be offset by any sub-lessee investments; and 3) hire at least 40 employees within six years. SPA states that the agreement also gives SPA the option to buy the property should the Navy Department convey it outright to RDA.

SPA states that shortly after the SPA-RDA lease agreement became effective on August 30, 1999, SPA and respondent CIP entered into a "License Agreement"; that the License Agreement addresses the general operation of the terminal, including maintenance, insurance, and utilities; that the License Agreement also requires CIP to use the premises as a dedicated breakbulk cargo facility; that Building 193 will be added to the License Agreement on December 1, 2000; that under the License Agreement, SPA also agreed to provide certain limited assistance to CIP; and that RDA approved the License Agreement at its regular public meeting held on August 31, 1999, and CIP published tariffs for the use of the facility that same day.

SPA states that CMH has brought a series of unsuccessful complaints before state and federal authorities before filing the instant complaint.

SPA argues that the 1984 Act is concerned with the regulation of international ocean shipping-not with economic redevelopment of former defense installations; that because CMH's complaint seeks relief in a commercial dispute with local, state, and national implications, there is no reason for the Commission to hear this case; and that neither the 1984 Act nor any Commission rule requires the SPA-RDA and the SPA-CIP agreements to be filed.

SPA states that CMH's complaint attempts to subvert the Commission's statutory authority to protect carriers, shippers, and ports from unfair or discriminatory shipping practices by asking the Commission to review the economic redevelopment plans of the U.S. government and South Carolina. SPA states that CMH's complaint-that it is unhappy with a series of distinct decisions

made by state and federal authorities-does not implicate unfair practices in ocean shipping; that the Commission should avoid the inevitable result of CMH's complaint: that the Commission review and invalidate all planned uses of the complex, the zoning ordinances adopted by the City of North Charleston, and the environmental assessments conducted by the U.S. government and South Carolina.

SPA states that federal law requires the Secretary of Defense to consult "with the Governor of the State and the heads of the local governments concerned for the purpose of considering any plan for the use of such property by the local community concerned"; that under the Base Closure Act, the Administrator of General Services must delegate to the Secretary of Defense his authority to dispose of surplus property, and the Secretary must comply with regulations covering disposal of surplus property; that the Secretary of Defense is authorized to transfer property to RDA; and that this transfer may be for consideration at or below the estimated fair market value of the property transferred or without consideration.

SPA states that the South Carolina General Assembly determined that the redevelopment of former federal military installations requires substantial periods of time and investment to re-integrate these properties into the surrounding communities; that to accomplish this, state law authorizes RDA to convey to an appropriate public body real property to be used for a public purpose; that this conveyance can occur with or without consideration at a private sale; and that RDA is required to gain the consent and concurrence of local governing bodies having planning and zoning authority over the surrounding areas.

SPA states that RDA balances many public interests wholly unrelated to shipping in making its decisions, which are then subject to Defense Department approval before it can take any action

with regard to the use of the former Charleston Naval Complex. SPA states that the complaint is staggering in its scope in that CMH asks the Commission to vacate the detailed statutory scheme established by South Carolina and Congress; and that a Commission order effectively granting the relief sought by complainant would nullify the statutory mandated decisions of the Secretary of Defense, the South Carolina Budget and Control Board, RDA, and the City of North Charleston.

SPA states that, under federal law, the agency charged with review of proposed state actions regarding surplus federal defense installations is the Department of Defense, not the Federal Maritime Commission; that the Base Closure Act identifies federal agencies that have a role in determining the proper use of this property, e.g., the Secretary of Health and Human Services; and that CMH's attempt to have the FMC review, and perhaps overrule, the decisions of the Secretary of Defense and the State of South Carolina, and the zoning decisions of the City of North Charleston, is improper.

SPA contends that CMH's self-portrayal as an unknowing victim of an RDA-SPA conspiracy is inaccurate; that CMH's amended complaint boasts of many years of experience in providing marine terminal services, stevedoring, terminal-related services, licensed freight forwarding, and steamship agency services; that despite this experience, CMH voluntarily entered into a lease for only five years, one that would terminate automatically if the lessor canceled its lease; that, presumably, the leasing cost reflected the risk that CMH assumed that it could lose its leasehold without recourse; that CMH's sublease automatically terminated, regardless of whether RDA or Shipbuilders terminated it early; that CMH's allegation that RDA terminated the lease with Shipbuilders is irrelevant, since CMH had voluntarily and with full understanding of the consequences assumed a short-term, terminable sublease with Shipbuilders; that, similarly, CMH

cannot complain that it lost its \$300,000 investment in the warehouse because it knew that it was not guaranteed long-term access to the warehouse; that, however, RDA did not terminate the Shipbuilders-RDA lease early; and that, rather, Shipbuilders requested termination and RDA acquiesced.

SPA states that, although CMH contends that SPA and other respondents conspired to drive CMH out of business, this is not true; that CMH has likely fallen prey to normal business pressures, and that these pressures precluded it from entering into a new lease with RDA when its lease with Shipbuilders terminated; and that whether this case reflects a procedural dispute over South Carolina's redevelopment efforts and choice of a developer, or has resulted from the economics of CMH's chosen market niche, the Commission should not concern itself with this matter.

SPA states that neither the 1984 Act nor any Commission rule requires the SPA-CIP and RDA-SPA agreements to be filed; that although section 5 of the 1984 Act would require filing of the SPA-CIP lease, it is a marine terminal facilities agreement, and the Commission's rules exempt it from the section 5 filing and the section 6 waiting-period requirements; and that, accordingly, CMH has failed to establish a basis for its assertion that the parties have violated section 10(a)(2) of the 1984 Act.

The RDA-SPA Sublease. SPA states that the RDA-SPA sublease is an agreement between two entities of the Government of South Carolina for the purpose of ameliorating the economic impact caused by closure of the former Charleston Naval Complex; that RDA is not in the business of providing marine terminal facilities, but is engaged in planning the economic redevelopment and disposal of the Naval Complex properties, some of which happens to be waterfront property suitable for development as a marine terminal and which provides a small part (about 100 of approximately

1600 acres) of the total property (with whatever buildings and other facilities that the Navy left behind on the subleased land when it closed the complex); that RDA provides nothing to any common carrier under the sublease; that section 5 of the 1984 Act requires the filing of agreements between two marine terminal operators; that section 10(a)(2) prohibits parties to such agreements from implementing them unless they are filed and effective; that RDA is not a marine terminal operator so the 1984 Act does not apply to the RDA-SPA sublease; that the sublease is not an agreement between two marine terminal operators and section 5 of the 1984 Act does not require it to be filed; and that, even if the Commission were to conclude that section 5 requires the SPA-RDA sublease to be filed, Commission rules exempt it from the 1984 Act's filing and waiting-period requirements.⁵

SPA-CIP Agreement. SPA states that the SPA-CIP License Agreement is a marine terminal facilities agreement which, under Commission rules, is exempt from the 1984 Act's filing and waiting-period requirements. The Commission defines a marine terminal facilities agreement as:

any agreement between or among two or more marine terminal operators, or between one or more marine terminal operators and one or more ocean common carriers, to the extent that the agreement involves ocean transportation in the foreign commerce of the United States, which 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.⁶

⁵ 46 C.F.R. § 535.31 1(b).

⁶ 46 C.F.R. § 535.3 11(a).

SPA states that an analysis of the SPA-CIP License Agreement shows that it is a marine terminal facilities agreement; that the SPA-CIP agreement conveys to CIP the rights and responsibilities of a marine terminal facility operator; that the agreement addresses the allocation of costs and risks between SPA and CIP with regard to improvements, insurance, maintenance, and other issues relating to the facility itself; that because the SPA-CIP agreement is devoted to the rules governing operation of the facility and financial responsibility for its upkeep, it falls squarely under the Commission's definition of a marine terminal facilities agreement; that even the title, "License Agreement," reflects the parties' intention to enter into a marine terminal facilities agreement; that, as a facilities agreement, the SPA-CIP agreement is exempt from the filing and waiting-period requirements of the 1984 Act, and the parties did not violate section 10(a)(2) by implementing it immediately; and that, even to the extent that any filing or waiting period has been violated, this does not afford CMH a private cause of action for monetary damages under the 1984 Act.⁷

SPA requests the Presiding Judge to dismiss CMH's complaint because it raises no issues cognizable under the 1984 Act; that CMH fails to meet its burden of proof that the Commission has jurisdiction over this matter; and that the 1984 Act and the Commission's rules do not require the filing of the SPA-CD? and the RDA-SPA agreements.

⁷ SPA cited *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (finding that the antitrust laws protect competition, not individual competitors).

The Motion to Dismiss of Respondent RDA

Respondent RDA filed a motion to dismiss the amended complaint of CMH for lack of personal jurisdiction over respondent RDA and for lack of subject matter jurisdiction.

RDA states that it is an instrumentality and agency of South Carolina; that it is a state authority that constitutes “a public body, corporate and politic, exercising public and essential governmental powers”; and that RDA was established with the sole purpose and authority to acquire, manage, and dispose of the Naval Complex pursuant to an enactment of the General Assembly of South Carolina.

RDA states that all of its alleged actions referred to or alleged in the amended complaint arose from actions pursuant to an express grant of statutory authority vested in RDA as an agency and instrumentality of South Carolina; that, in connection with those alleged actions, RDA was exercising its governmental functions and duties as an agency of South Carolina; and that RDA may not be subjected to a suit brought by a private citizen before a federal court, or before a federal agency acting in an adjudicatory capacity, pursuant to the prohibitions contained in the Eleventh Amendment to the Constitution of the United States as explained in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). RDA contends that the Eleventh Amendment is applicable to private complaint proceedings brought before federal agencies against states or state agencies because a federal agency, acting in its adjudicatory capacity, has no greater authority to impinge on the sovereign immunity of South Carolina than does an Article III court, citing *Seminole Tribe*, 517 U.S. at 72-73, and that RDA, as an agency and instrumentality of South Carolina, is entitled as a matter of law to the protections and immunities applicable to the State itself.

RDA states that Congress may not use its Article I powers, limit or otherwise narrow the immunity provided states under the Eleventh Amendment, citing *Seminole Tribe*, 517 U.S. at 54 (1996); and that, thus, this Commission, a creature of the legislative branch (Article I) of the federal government, cannot be used by private citizens as a means to limit or narrow the sovereignty enjoyed by South Carolina and political subdivisions protected by the Constitution of the United States.

As noted, this portion of RDA's motion to dismiss will be denied for the same reasons the similar motion of SPA was denied.

RDA states that it is not now, nor has it ever been, vested with the authority to operate as an "operating" port authority or a "landlord" port authority; that it does not now engage, nor has it ever engaged, in the business of furnishing wharfage, dock, warehouse, and other terminal facilities in connection with ocean common carriers and other common carriers in the foreign commerce of the United States; that it is not a "marine terminal operator" or any other person subject to the 1984 Act; that the FMC lacks jurisdiction over RDA; that the complaint must be dismissed; and that even if it could be determined that RDA could be classified as a marine terminal operator, the actions complained of in the complaint fall outside the subject matter jurisdiction of the FMC.

RDA's Statement of Facts

RDA was created by virtue of Executive Order 94-22, signed and executed by Carroll A. Campbell, Jr., Governor of South Carolina, on September 30, 1994.⁸ The Executive Order was issued pursuant to the authority granted to the Governor and set out in the *Military Facilities*

⁸A copy of the Executive Order is annexed as Exhibit A to the Affidavit of Jack C. Sprott ("Sprott Affidavit").

Redevelopment Law, Act No. 462, signed into law by Governor Campbell on June 30, 1994.
S.C. Code Ann. § 31-12-10 et seq. (“Redevelopment Law ”).⁹

The South Carolina General Assembly established RDA in response to the U.S. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510 (reprinted following note to 10 U.S.C. § 2687) (hereinafter “Base Closure Act”) to oversee the disposition of real and personal federal property that has been or will be turned over to South Carolina. *S.C. Code Ann. § 31-12-40(A)*. Specifically, RDA was created to acquire, manage and dispose of the Charleston Naval Complex, formerly a military installation closed pursuant to the Base Closure Act.

RDA’s grant of power set out in the *Redevelopment Law* in Section 31-12-70 defines the parameters of RDA’s grant of authority, including but not limited to the power:

- to make and from time to time amend and repeal bylaws, rules, regulations, and resolutions;
- to have perpetual succession;
- to adopt a seal;
- to sue and be sued;
- to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority; and any contract or instrument when signed by the chairman or vice chairman and secretary or assistant secretary of the authority must be held to have been properly executed for and on its behalf;
- to cooperate with any government or municipality as defined in this title;

⁹Chapter 31 of the South Carolina Code is entitled “Housing and Development.” The entire text of the *Redevelopment Law* is annexed as Exhibit B to the Sprott Affidavit.

- to act as agent of the state or federal government or any of its instrumentalities or agencies for the public purposes set out in this title; and
- to prepare or cause to be prepared and adopt redevelopment plans and to undertake and carry out redevelopment projects within its area of operation

S. C. Code Ann. § 31-12-70(A).

RDA states that after commencing operations in September 1994, RDA developed written guidelines for leasing or sub-leasing property to entities desiring to operate on the Naval Complex; that the Leasing Policy of RDA was established on November 17, 1994; that RDA established these guidelines in conjunction with the South Carolina Office of General Services (“OGS”)utilizing the processes allowed by law in establishing such regulations and guidelines; that in addition, RDA approved a Standard Operating Procedure including tenant evaluation and selection criteria on November 17, 1994; that both documents are publicly available; and that the evaluation criteria are referred to in a publication entitled “Information for Prospective Tenants.”¹⁰

RDA states that it is not now, nor has it ever been in the marine terminal operating business; that it does not deal with either common or contract carriers; that RDA does not arrange for or provide berths for common carriers; that it does not furnish wharfage, dock, warehouse, and/or other terminal facilities in connection with ocean common carriers; and that RDA’s sole purpose is to acquire, manage, and dispose of the Charleston Naval Complex and in so doing generate new jobs for the Tri-County area and South Carolina through the exercise of its public and essential

¹⁰A copy of the “Information for Prospective Tenants” publication is annexed as Exhibit E to the Sprott Affidavit.

governmental powers.¹¹ RDA contends that the fact that some of the enterprises that seek space on a waterfront property may be engaged in maritime-related commercial activities does not vest RDA with the characteristics of the companies that seek to lease property at the Naval Complex.

**RDA's History of the Relationship Between
RDA and CMH and the Handling**

RDA states that in the interests of judicial economy, it refers the Presiding Judge to the Sprott Affidavit which sets out details of the relationship between CMH and RDA virtually since RDA's inception in September 1994; that the Affidavit recounts the history of the dealings between RDA and CMH; and that the Affidavit also contains a letter dated January 20, 1999, and annexed as Exhibit F to the Sprott Affidavit, which letter contains RDA's official response to various questions and complaints raised by CMH before a legislative Ad Hoc Committee, created by the Charleston area Joint Legislative Delegations to review the allegations of impropriety against RDA raised by CMH.

RDA asserts that it does not now, nor has it ever been engaged in the business of furnishing wharfage, dock, warehouse, or other terminal facilities either alone or in conjunction with a common

¹¹As set out in ¶ 75 of the Sprott Affidavit, RDA has entered into sublease agreements with a broad section of commercial and public enterprises, including, but not limited to: Allied Technology Group, Inc; Beckley Engineering; Carolina Youth Development Center; Charleston Grip & Electric; Chesapeake Health Education Program; College of Charleston Child Care; College of Charleston Record Storage; Cooper River Machine; Disabilities Board of Charleston County; Green Custom Builders, Inc.; Heritage Wood Products, Inc.; Hi-Tek Chemical Corp.; JW Aluminum Company; Lowcounty AIDS Services; Lowcounty Foodbank; 100 Black Men of Charleston, Inc. Sani-Mobile Environment LLC; Southern Valve, Inc.; Spring's Alteration & Dry Cleaning Service; TECH Special Schools; U.S. Postal Service, Remote Encoding; and Watts Industrial Services, Inc. RDA states that, as can be seen from even a superficial review of the partial lists of tenants, RDA is in the business of land and job development; that it is not in the business of running a port; that it is not in the business of loading or unloading ships; and that it is not in the business of supervising the loading or unloading of ships or the handling of cargo in any way, shape, or form.

carrier; that, consequently, RDA is not a person subject to the 1984 Act; that the FMC lacks personal jurisdiction over RDA; that CMH's assertion of law regarding RDA's status as an MTO is made solely for the purpose of jurisdictional pleading and there is no need to presume such a characterization is true for the purposes of a motion to dismiss, citing *Papasain v. Allain*, 478 U.S. 265,286 (1986); and that the fact that RDA, during the course of its job and property development activities, may come into contact with, or even sublease properties to entities engaged in maritime-related activities does not imbue RDA with the maritime-related characteristics sufficient to warrant the jurisdiction of the FMC. RDA concludes that it does not act as a landlord or operating port authority and it does not engage in any activities of a marine terminal operator,¹² and that the complaint must be dismissed for lack of personal jurisdiction over respondent RDA.

RDA notes that it is quite clear that the FMC may only exercise subject matter jurisdiction over an MTO in connection with its offering of service of facilities in connection with a common carrier by water; that, as is set out in the Affidavit of Jack C. Spratt, RDA's dealing and/or agreements are, by force of statute and the operation of RDA's Bylaws, entered into in connection with property and job development; that they are demonstrably not made in connection with the carriage of cargo by water; that subject matter jurisdiction over any of the development subleases entered into by RDA in its capacity as an agency entrusted with the creation of jobs for the citizens of South Carolina simply does not exist; that the FMC has no greater subject matter jurisdiction over agreements between RDA and SPA (or between RDA and CMH for that matter) than it has over the

¹²RDA argues, as SPA does, that it does not engage in any common carrier activities, and therefore, does not come within the Commission's jurisdiction; that, similarly, section 5 of the 1984 Act does not require any of its agreements, including the one with SPA, to be filed; and that, in any event, even if the Presiding Judge finds that RDA is an MTO, the agreement would be exempt from the 1984 Act's filing requirements, citing 46 C.F.R. § 535.31 1(b).

sublease agreements between RDA and Spring's Alteration & Dry Cleaning Services; and that for the reasons set out above, the amended complaint should be dismissed with prejudice with respect to RDA.

RDA's state sovereign immunity arguments were addressed by the Commission in its ruling in Docket No. 99-21 and the Commission concluded that the doctrine of state sovereign immunity does not prohibit the Commission from asserting jurisdiction over a complaint brought by a private person against a state agency like SPA (SCSPA). RDA has not established that it is so unlike the SPA that the effect of the ruling in Docket No. 99-21 does not also impact RDA.¹³ Thus, since RDA is not a beneficiary of the doctrine of state sovereign immunity, it is unnecessary to consider RDA's abrogation, waiver, or other arguments on this issue. See the March 23, 2000 ruling of the Commission in Docket No. 99-21, footnote 7 on page 11 ("Because it is not necessary to a resolution of the sovereign immunity question, we express no opinion regarding whether SCSPA is in fact an arm of the State of South Carolina.").

CIP's Motion to Dismiss

Respondents Charleston International Projects, Inc. and Charleston International Ports, LLC (collectively "CIP") also filed a motion to dismiss. CIP states that it has obtained a license from South Carolina to operate a breakbulk marine terminal on a portion of the former Charleston Naval Complex, the State having obtained the property for this express purpose pursuant to a lease with

¹³RDA has the burden of proof, under *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140, 1144 (3rd Cir.), cert. denied, 516 U.S. 932 (1995), to establish its affirmative defense that the Eleventh Amendment bars the amended complaint of CMH before the agency and it has not carried that burden.

the United States. Noting that CMH claims that the State and CIP have discriminated against it because CMH was unable to obtain a license for this same specific property, CIP states that its only alleged infraction has been to obtain from South Carolina a license to operate a breakbulk marine terminal.

CIP states that both CIP companies are “start-up” companies that “ha[ve] no maritime experience or expertise,” with the latter company being a “successor in interest” to the former.

CIP states that the amended complaint boils down to the following allegations: that in February 1995, RDA, although not required to do so by South Carolina law, requested that interested persons submit business proposals for the use of the Naval Complex’s various properties and assets; that CMH, one of 13 entities which responded to the request, proposed leasing a few piers and warehouses for operation as a marine terminal for breakbulk and other non-containerized cargoes; that in December 1995, RDA entered into a five-year lease with a non-party, Charleston Shipbuilders, Inc. (“Shipbuilders”), for “extensive facilities” at the Complex; that in 1996, complainant CMH and Shipbuilders entered into a five-year sublease and sublicense for CMH’s use of warehouse facilities and an adjacent pier at the Charleston Naval Complex; that CMH then commenced providing marine terminal and related services including the handling of a substantial frozen chicken export business and the handling of other commodities; that RDA announced on December 4, 1998, that it was canceling Shipbuilders’ lease; that, in turn, CMH’s sublease and sublicense with Shipbuilders terminated according to their own terms; that the amended complaint alleges that in April 1999, instead of entering into a long-term lease with CMH, RDA entered into a 30-year lease with SPA for certain facilities to be used by SPA and CIP as a breakbulk marine terminal; that on August 30, 1999, SPA and CIP entered into a 30-year license that requires CIP to

(1) use the property covered by the RDA-SPA lease as a breakbulk and bulk cargo marine terminal, (2) charge the same tariff rates as those charged by SPA, (3) handle other types of cargo only with SPA's approval, and (4) make rate changes only when such changes are approved by SPA; and that the amended complaint also alleges that SPA and CIP did not file the license agreement with the Commission.

CIP contends that CMH includes CIP in conclusory allegations that the actions of respondents were undertaken as part of a four-and-one-half-year "pre-existing scheme" that was designed "to lease to SPA the facilities sought by CMH at the Charleston Naval Complex"; and that "RDA's premeditated scheme has permeated and propelled the entire leasing process at the Charleston Naval Complex, including the 1995 RFP."

CIP states that, apparently, CMH would like the Commission to cancel CIP's license and order SPA to grant it the license; that it is not clear, however, how CIP's license prevents CMH from conducting its business or, indeed, what its business is.

CMH's Claim that SPA and CIP Did Not File the License Agreement

CIP states that as its first claim for relief, CMH alleges that "SPA and CIP have failed to file their August 30, 1999 agreement with the Commission" as required by sections 4(b)(1) and 5(a) of the 1984 Act and the Commission's regulations. CIP states that CMH presumably means to allege that CIP has violated section 10(a)(2) of the 1984 Act.

CIP states that the Commission's regulations exempt the SPA-CIP license from the 1984 Act's filing requirements; that, assuming the amended complaint's allegations that CIP and

SPA are maritime terminal operators to be true, the SPA-CD? license is a “marine terminal facilities agreement,” which the Commission’s regulations define as an “agreement between two . . . marine terminal operators . . . which conveys to [one] of the involved parties [a] right[] to operate [a] marine terminal facility by means of [a] lease [or] license, . . . for the use of marine terminal facilities . . .,” citing 46 C.F.R. § 535.311(a); that such agreements are exempt from section 5’s filing requirements, citing 46 C.F.R. § 572.3 1 l(b); and that the amended complaint thus fails to allege a violation of sections 5(a) or 10(a)(2) of the 1984 Act.

**CMH’s Claim that CIP Has Failed to Establish,
Observe and Enforce Just and Reasonable Practices**

CMH asserts that respondents have violated section 1 O(d)(1) of the 1984 Act which provides that “[n]o common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property,” 46 U.S.C. app. § 1709(d)(1). CIP states that the amended complaint fails to allege any factual basis for such a violation with respect to CIP.

CIP states that the amended complaint relies upon “RDA’s and the SPA’s refusal to negotiate with or make, available to CMH adequate and suitable terminal, pier, dock, and storage facilities” and “RDA’s and SPA’s granting concessions to CIP and other persons while denying comparable terminal use to CMH”

CIP states that the assertion that CIP somehow “interfered” in CMH’s use of terminal facilities at the Naval Complex is belied by the amended complaint’s other allegations, which make

clear that CMH lost whatever rights it had when its sublease and sublicense with Shipbuilders was terminated; that the amended complaint makes clear that CIP is to operate the facilities as a public terminal; that CMH is free to use the facilities so long as it pays CIP's tariff rates, the same as is required of any other person; that there is no allegation that CMH has ever attempted so to use the facilities and been denied access by CIP; and that, for the same reasons, CMH's assertions of "unjust discrimination . . . against CMH, its vessels and its cargoes" is frivolous.

CIP states that liberally construing the amended complaint, one might read it to allege that CMH's "interference" claim is based on the termination of its prior sublease with Shipbuilders; that such a liberal construction still does not make out a claim against CIP; that the amended complaint contains no factual allegations that in any way describe any conduct by CIP with respect to that termination; that the amended complaint alleges that CIP entered into a license with SPA after CMH's lease with Shipbuilders had been terminated and CMH had lost whatever rights it had thereunder; and that CIP had nothing to do with the termination of CMH's agreements. CIP states that to the extent that the section 10(d)(1) claim against CIP is based on CMH's inability over the years to obtain a lease or license directly from RDA, it is clear from the amended complaint's allegations that CIP-a "recent start-up company" with no maritime experience-did not even exist when that conduct took place.

**CMH's Claims Against CIP Under
Sections 10(b)(11), 10(b)(12), 10(d)(3) and 10(d)(4)**

CMH also alleges that respondents violated those provisions of section 10 of the Shipping Act that prohibit (1) giving any person an unreasonable preference or advantage and (2) subjecting any person to an unreasonable refusal to deal or an unreasonable prejudice or disadvantage;¹⁴ and that these claims must be dismissed with respect to CIP.

CIP states that the only conduct by CIP alleged in the Amended Complaint is CIP's obtaining the August 1999 license from SPA; that CIP negotiated for the best deal that it could vis-a-vis SPA; that logic alone dictates that in doing so, CIP could not have given anyone any type of preference or advantage, unreasonable or otherwise, nor did CIP, in merely negotiating for and obtaining from SPA the best license that it could, refuse to negotiate or deal (unreasonably or otherwise) with CMH or any other person; and that CIP could not have subjected CMH or any other person to any 'undue or unreasonable "prejudice or disadvantage merely by entering into a license agreement.

CIP states that these logical conclusions are confirmed by the amended complaint itself which alleges in conclusory fashion that respondents "have subjected CMH, its vessels, its cargoes and its terminal operations to an unreasonable refusal to deal and negotiate and to undue and unreasonable prejudice and disadvantage with respect to, *inter alia*, the leasing, allocation and use

¹⁴CIP states that because the amended complaint's only allegations with respect to CIP concern its receipt of the August 1999 license from SPA, the only statutory provision referenced in this part of the amended complaint that is applicable to CIP is section 10(d)(4), as amended by the Ocean Shipping Reform Act of 1998; that CMH's reliance on "[s]ections 10(b)(11), 10(b)(12), and 10(d)(3) . . . (pursuant to section 20(e)(3))" must refer to these provisions as they existed prior to May 1, 1999, the date that the Ocean Shipping Reform Act of 1998's amendments to the Shipping Act of 1984 became effective, because, as amended by the Reform Act, sections 10(b)(11) and 10(b)(12) now apply only to common carriers, and not to marine terminal operators; that on the other hand, prior to the Reform Act, these provisions were made applicable to marine terminal operators (as well as common carriers) by section 10(d)(3) of the 1984 Act; and that because the amended complaint makes no allegations with respect to conduct by CIP that occurred before May 1, 1999, these provisions cannot apply to CIP.

of terminal facilities”; that it fails, however, to allege any facts with respect to CIP that might even suggest that CMH tried to negotiate a lease of terminal facilities with CIP, much less that CIP had any duty to negotiate such a lease with CMH and refused to do so; that CMH’s “prayer for relief” asks the Commission to order RDA to lease the same property to CMH on the same terms as the RDA-SPA lease; and that CMH contradicts the conclusory allegation of a refusal to deal by CIP in the same paragraph by asserting that “RDA and SPA have refused to negotiate with or to make available to CMH adequate and suitable terminal, pier, dock, and storage facilities,” conspicuously failing to include CIP.

CIP states that the same is true with respect to the conclusory allegation that CIP “subjected CMH, its vessels, its cargoes and its terminal operations to . . . undue and unreasonable prejudice and disadvantage with respect to, *inter alia*, the leasing, allocation and use of terminal facilities”; that no allegation even hints at what undue or unreasonable prejudice and disadvantage CIP may have imposed on CMH; that CMH also contradicts this conclusory allegation by asserting (again in the same paragraph) that “RDA and SPA have unjustly discriminated against CMH and its cargoes,” again conspicuously excluding any mention of CIP.

CIP states that far from alleging that CIP gave anyone an unreasonable preference or advantage, CMH alleges that “RDA and SPA have given CIP and others an unreasonable preference and advantage with respect to *inter alia*, the leasing, allocation and use of terminal facilities”; that the amended complaint alleges that “RDA and SPA have granted terminal space and concessions to CIP and others while unreasonably denying comparable terminal space and concessions to CMH” *Id.*

CIP states that, in short, CMH's amended complaint fails to state a claim against CIP with respect to section 10(d)(4), and CMH cannot possibly allege any facts consistent with the amended complaint's allegations that would entitle CMH to relief with respect to CIP; and that the amended complaint should be dismissed with prejudice with respect to CIP.

Response of CMH Dated January 21, 2000

**Do Respondents Control Access to
Charleston Naval Complex Marine Terminals?**

CMH states that respondents take issue as to Commission Shipping Act jurisdiction; that SPA and CIP do not deny the Commission's personal jurisdiction over them; but RDA does; and that all three respondents contest subject matter jurisdiction. CMH argues that the facts demand a finding that the Commission has both subject matter and personal jurisdiction over all three respondents.

CMH states that since the Charleston Naval Complex began providing public marine terminal facilities, operators of these facilities have held themselves out to provide services for ocean common carriers and, in fact, ocean common carriers have called at and have been provided services at Naval Complex terminals; that SPA and CIP publish FMC marine terminal tariffs covering their marine terminal operations at the Port of Charleston and the Charleston Naval Complex, respectively; that both of these tariffs can be found at the same Port of Charleston website, as to which the Commission can take official notice (Stender Aff. ¶¶ 67 and 68); and that SPA is obligated by its license with CIP to be an active participant in CIP's Naval Complex terminal operations (SPA Motion, Exhibit D, Articles 8, 9 and 10).

CMH contends that RDA, by exercising complete control over the marine terminal facilities at the Charleston Naval Complex, has become a landlord port authority; that respondents' control over access to the Charleston Naval Complex terminal facilities and respondents' resulting ability to discriminate constitute the furnishing of wharfage, dock, warehouse or other marine terminal facilities in connection with common carriers and therefore subjects respondents to Commission personal jurisdiction; and that their activities, practices and conduct at the Charleston Naval Complex in connection with the receiving, handling, storing and delivery of property give rise to Commission subject matter jurisdiction.

Does the Commission Have Jurisdiction Over RDA?

CMH contends that the factual circumstances require the conclusion that the Commission has jurisdiction over RDA and its activities at the Charleston Naval Complex; that RDA uses its administration and control over the Charleston Naval Complex to engage in unlawful discriminatory conduct toward CMH and others; that RDA's objective, in concert with SPA and its pass-through partner CIP, is to vest control of all marine terminal services and facilities at the Naval Complex with SPA through exclusive leases; and that RDA thereby prevents CMH from leasing such facilities and performing such services at the Charleston Naval Complex, which CMH was able to do prior to its eviction from the Naval Complex, citing *Stender Aff.* ¶¶ 25-27 (SPA has, in addition, full control as an "operating" port over the Port of Charleston and the Ports of Georgetown and Port Royal).

CMH states that RDA's sole argument is that it is not a marine terminal operator because RDA's directive is to acquire, manage and dispose of the Charleston Naval Complex and because RDA leases portions of the Naval Complex to non-maritime-related businesses. CMH contends that RDA exercises absolute control over the Charleston Naval Complex marine terminal facilities through its unilateral determination over who should be granted a lease, over the particular terms and conditions of the lease and who should be denied a lease to Naval Complex marine terminal property and facilities; and that RDA uses this control to discriminate and prejudice CMH by imposing unreasonable restraints on CMH in connection with the receiving, handling and storage of property in connection with common carriage.

Does the Commission Have Jurisdiction Over SPA and CIP?

CMH states that SPA argues that the Commission has no authority to inquire into the process and procedure whereby RDA was designated to engage in activities for the redevelopment of the Charleston Naval Complex; that SPA's argument against a finding of Commission subject matter jurisdiction is implied in SPA's claim that state governmental actions are beyond the scope of review under the 1984 Act.

CMH states that CIP argues that it has done nothing more than enter into an arrangement with SPA for the use of marine terminal facilities at the Charleston Naval Complex and therefore cannot be charged successfully with any wrongful conduct; that this is not an explicit denial of subject matter jurisdiction, but it is implied by CIP's claim of innocent participation; and that the

facilities occupied by CIP at the Naval Complex are essentially the same as those leased to SPA by RDA.

CMH states that a proper and thorough determination of the jurisdictional issues depends on a fact-driven analysis; that the complete picture is provided by CMH's affiants Mr. Stender and Senator Mescher; and that all of CMH's supporting documentation will compel the conclusion that respondents' motions fail to satisfy the legal standard for dismissal.

Application of Facts According to CMH

CMH states that for several years beginning in 1993, SPA aggressively sought to exclude CMH from stevedoring and other cargo handling services at the Port of Charleston through SPA's restrictive licensing practices; that CMH had successfully attracted new and promising cargo business to the Port of Charleston that specifically requested SPA to permit cargo handling and other services to be performed exclusively by CMH; that SPA for more than a year refused to grant CMH's stevedore license application, and SPA routinely rejected the requests for CMH's services by CMH's customers; that SPA sought to divert and in some cases did divert CMH's business to its own cargo handling facilities, interfering in CMH's business relationships, heedless that this potential new business was therefore moved through other ports; and that these incidents are documented in Paragraphs 12-21 of Mr. Stender's affidavit.

CMH states that the Commission eventually found that SPA was employing stevedoring licensing criteria that unreasonably restricted competition under the standard of section 10(d)(1) of the 1984 Act (46 U.S.C. app. § 1709(d)(1)), citing *Petition of South Carolina State Ports Authority*

a *for Declaratory Order, Order Vacating Initial Decision and Denying Petition, 27 S.R.R. 1137 (FMC 1997); and that notwithstanding this ruling, CMH eventually decided to give up its stevedoring business at the Port of Charleston because SPA regularly imposed obstacles and financial deterrents to CMH's detriment (Stender Aff. ¶ 21).*

CMH states that it determined to pursue its goal of performing marine terminal services by moving its operations to the Charleston Naval Complex, which recently had been placed under RDA control; that CMH's anticipation was that the Naval Complex would provide a fresh environment; and that the Naval Complex was attractive to CMH because it was unencumbered and because no other parties appeared to be interested in developing any kind of public marine terminal there (Stender Aff. ¶¶ 22 and 23).

CMH states that it submitted solid business plans to RDA for operation of breakbulk cargo handling facilities (Exhibit C (videotape)), but CMH was passed over in favor of less qualified applicants for the lease of marine terminal facilities; that unknown to CMH at the time, RDA rigged the process for selecting tenants to operate such facilities in order to choose its favored, lower-ranked candidates; and that notwithstanding SPA's public denial of interest in the Charleston Naval Complex, privately SPA and RDA conspired to install SPA at the Charleston Naval Complex with SPA's pass-through partner, CIP, there to "run" the operation (Stender Aff., ¶¶ 24-64).

a CMH states that RDA refused to lease to CMH terminal facilities at the Naval Complex with piers that could accommodate the draft of vessels that CMH would serve; that, as a result, CMH was forced to enter into costly and short-term sublicenses with tenants of RDA in order to obtain non-exclusive access to a building and a proximate pier to operate its developing business; and that RDA

imposed harsh burdens on CMH, calculated to control and restrict CMH's access to adequate pier, warehouse and storage space and ultimately to drive CMH out of business (Stender Aff. ¶¶ 38, 39).

CMH states that RDA deliberately engineered a series of bait and switch maneuvers in contrivance with SPA and CIP to insure their installation at the Naval Complex; that RDA accomplished this by reneging on promised leases, by terminating leases prematurely, by unreasonably denying access to cargo handling facilities, and by intentionally engaging in other deceptive practices adversely affecting the receiving, handling, storing, and delivery of property in connection with ocean common carriage (Stender Aff. ¶¶ 41-60).

CMH states that beginning in 1996 or 1997 CIP became an active player in this scheme to oust existing lessees of marine terminal property in favor of CIP and SPA, that CIP first appeared under the name Performance Automotive Services, Inc. wherein it negotiated an agreement with SPA in 1997 for use of the Naval Complex's Alpha Pier as a dedicated project cargo facility; that then CIP donned a different hat and emerged as Charleston International Projects in concert with SPA, again for cargo handling at Alpha Pier and nearby November Pier; and that, when RDA agreed to abandon Alpha Terminal in favor of the City of North Charleston to assuage its objections over its use as a cargo handling facility, CIP (first as Charleston International Projects and then reincarnated as Charleston International Ports, LLC) cojoined again with SPA, this time to gain access and control of Zulu Pier, the prize marine terminal of the Charleston Naval Complex and which CMH was using already (Stender Aff. ¶¶ 21, 22; CMH Reply Exhibit K).

CMH states that respondents' planned installation of SPA and CIP at Zulu Pier resulted in their desired ouster of CMH from its subleased building proximate to Zulu Pier; that this was because RDA unreasonably denied CMH the continued non-exclusive access to Zulu Pier it

previously enjoyed, notwithstanding RDA's acknowledgment that CMH's leased building and the business it housed would be useless without such access to the pier; that CMH's exclusion represented a material element in the respondents' plan to rid SPA and CIP of CMH's threatened competition and to ensure SPA's complete and total control over terminal facilities in the Charleston gateway; and that RDA's unreasonable and unjustifiable practices in connection with meeting every demand by the favored SPA and CIP for marine terminal facilities have resulted in unfair and unreasonable treatment of CMH, forcing its departure from Zulu Terminal and allowing SPA and CIP monopoly control (Stender Aff. ¶ 41-75).

Does Commission Law Dictate Finding of Jurisdiction?

CMH states that SPA and CIP cite no cases on these jurisdictional issues and that RDA provides no persuasive argument and cites no authority to support the contention that the Commission lacks Shipping Act jurisdiction over RDA on the particular facts of this Amended Complaint. CMH states that the Commission has stated, "the status of a person is not determined by his own declaration as to what he is but by what he is in fact doing," citing *Marine Terminal Practices of the Port of Seattle*, 18 S.R.R. 1029 (FMC 1978); and that the proper analysis of RDA's status depends on detailed consideration of the plain facts.

CMH contends that the key element in finding that the Commission has jurisdiction in this case is the existence of a port authority's "control and administration" over the terminal facilities and the port's resultant ability to discriminate, citing *Puerto Rico Ports Authority v. Federal Maritime Commission*, 9 19 F.2d 799 (1st Cir. 1990) ("Ponce"); and *Plaquemines Port, Harbor and Terminal*

District v. Federal Maritime Commission, 838 F.2d 536 (D.C. Cir. 1988) (“*Plaquemines*”); that this “control theory” furnishes the foundation of Commission jurisdiction in this proceeding as to RDA, and as to RDA, SPA and CIP jointly; that Commission jurisdiction arises from their concerted planning and implementation of their scheme to oust CMH and others from the public marine terminal facilities at the Charleston Naval Complex for the exclusive benefit and use of SPA and CIP; and that forcing the departure of CMH is an essential element in respondents’ scheme to insure SPA’s monopoly control of public terminals in the Charleston gateway and to eliminate all viable competition to SPA and CIP’s breakbulk cargo handling facility at the Naval Complex.

CMH notes that *Ponce* stands for the proposition that determination of Commission subject matter jurisdiction requires a detailed assessment of the factual impact by the parties on the terminal operation; that in *Ponce*, the First Circuit evaluated the factual circumstances and held that the Commission had no jurisdiction because the Puerto Rico Ports Authority exercised no control or **administration** over terminal facilities exclusively within the Ponce municipal jurisdiction, and particularly where the Puerto Rico Ports Authority did not own, operate or even lease those facilities. CMH contends that the application in *Ponce* to the instant proceeding would yield a different result; that RDA, in the role of port authority, exercises complete control and administration of the Naval Complex’s marine terminal operations and leasing arrangements; that the D.C. Circuit in *Plaquemines* affirmed **Commission** jurisdiction even though the port did not own or operate the terminal facilities that were privately owned; that the critical distinction in *Plaquemines* was that “the degree of the Port’s involvement enables the Port to discriminate”; and that the court determined that the Port was able to discriminate because of its control over access to terminal facilities, citing 838 F.2d. 543.

CMH contends that RDA acts as “owner,” manager, and as the entity in complete control over access to all marine terminal facilities at the Naval Complex and over the nature of the cargo that may be handled (breakbulk) (SPA Motion, Exhibit C, Article 8); that RDA’s involvement in the combination of “owning,” leasing and allocating essential marine terminal facilities and “controlling access” to them gives rise to Commission jurisdiction; that RDA’s demonstrated ability to discriminate through the extent of its involvement in the provision of terminal facilities constitutes “furnishing of terminal facilities” within the meaning of the 1984 Act and provides the foundation of Commission jurisdiction.

CMH contends that RDA’s all encompassing “degree” of “involvement” at the Charleston Naval Complex has enabled it to control and discriminate; that RDA leases, licenses, refuses to lease, refuses to license, grants exclusive rights or withholds rights to terminals, piers, wharves, storage facilities and back-up areas throughout the entire Charleston Naval Complex; that RDA, in an unjust and discriminatory manner, grants monopoly use, access and occupancy of the Charleston Naval Complex marine terminal facilities to favored entities SPA and CIP while denying disfavored CMH comparable facilities; that to satisfy SPA and CIP’s demand for exclusive control, RDA has evicted CMH from the Charleston Naval Complex’s Zulu Terminal without regard to the fact that CMH has conducted its business there, and without regard to the inability of CMH to find comparable facilities in order to relocate elsewhere at the Naval Complex; and that RDA has leased multi-million dollar terminal facilities exclusively to its favored tenant SPA rent-free for a portion of the tenancy (Stender Aff. ¶ 68).

CMH contends that SPA and CIP’s exercise of control over access to marine terminal facilities enables them to discriminate as well; that under its lease agreements with RDA, SPA has

been granted exclusive rights for the furnishing of wharfage, dock, storage and terminal facilities at the Charleston Naval complex and has licensed such rights and benefits to SPA's pass through partner, CIP; that under their license arrangement, SPA and CIP jointly, but within the strictures imposed by RDA, enjoy exclusive marine terminal rights over breakbulk cargoes; that these rights accorded SPA and CIP have been and are being utilized to control carrier and cargo access to the Charleston Naval Complex; that SPA and CIP dictate the nature of marine terminal service allowed at the Charleston Naval Complex and bar any competition for the marine terminal handling of vessels at the Charleston Naval Complex; and that the factual and legal tests for establishing Commission jurisdiction have been met with respect to all three respondents (Stender Aff. ¶¶ 65-72).

CMH urges that the motions to dismiss must be denied because there is more than ample demonstration of factual information, which, if proved, would entitle CMH to its requested relief based on the allegations in the amended complaint; that respondents' recitation of their largely unsupported "facts" should be disregarded; and that if there is any doubt on these issues and the underlying factual information, they must be construed in favor of CMH, the nonmoving party, for purposes of the motions to dismiss.

Are the Allegations in CMH's Amended Complaint Fully Supported?

The Respondents' Unfiled Agreement

CMH states that SPA and CIP argue that their terminal agreement is exempt from filing as a "marine terminal facilities agreement"; that they contend that their Zulu Terminal agreement is a simple landlord-tenant license and is thus covered by that exemption. CMH contends that they

misdescribe their agreement and mischaracterize it; that the SPA and CIP agreement is a “marine terminal conference agreement” among two or more marine terminal operators “which provides for the fixing of and adherence to uniform maritime rates, charges, practices and conditions of service”; that their agreement fits within this framework because it is not merely a lease or license between landlord SPA and tenant CIP; that SPA is more than just the lessor of terminal facilities that SPA happens to control at the Naval Complex; that SPA also is a competing port operator at a completely different port: the Port of Charleston; that therefore the requirement that CIP at the Naval Complex must charge the same rates that SPA charges at the Port of Charleston renders the agreement as one between CIP and SPA/Port of Charleston; that it is therefore a marine terminal conference agreement, subject to the requirement that it be filed with the Commission; and that implementation of an agreement required to be filed but not filed is a violation of section 10(a)(2) of the 1984 Act (citing 46 C.F.R. 535.307).

Unreasonable Practices

CMH states that the facts support a finding that RDA, SPA and CIP have failed in their responsibilities as marine terminal operators to “establish, observe and enforce just and reasonable practices relating to the use of terminal facilities” in connection with common carriage at the Charleston Naval Complex; that an ocean terminal is akin to a “public utility,” demanding unequivocal fairness in the provision of such facilities, citing *Investigation of Free Time Practices-Port of San Diego*, 7 S.R.R. 307, 329-330 (FMC 1966); and *Marine Terminal Practices of the Port of Seattle*, 18 S.R.R. 151, 156, 159 (Initial Decision 1978), adopted 18 S.R.R. 1029

(FMC 1978), citing *American Export Isbrandtsen Lines, Inc. v. F.M.C.*, 444 F.2d 824, 828-829 (D.C. Cir. 1970); that the Commission's test for reasonableness was set forth in *West Gulf Maritime Assn. v. Port of Houston Authority*, 18 S.R.R. 783,790 (FMC 1978), *aff'd* without opinion sub. nom. *West Gulf Maritime Ass'n v. Federal Maritime Comm'n*, 610 F.2d 100 (D.C. Cir., cert. denied, 449 U.S. 822 (1980)), stating that "[t]he test of reasonableness as applied to terminal practices is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view."

CMH contends that at the Charleston Naval Complex, RDA, SPA and CIP are engaged in "excessive" and discriminatory practices through the unfair and unreasonable granting of exclusive use of terminal facilities that have produced and will continue to produce "unreasonable" and harmful consequences to CMH, to the shipping public and to other potential port users.

CMH states that the earlier discussed facts which support a finding of section 10(d)(1) violations also support a finding that RDA, SPA and CIP have subjected CMH to unreasonable prejudice and disadvantage and granted SPA and CIP unreasonable preference and advantage, including self-preference; that RDA and SPA have given CIP and others an unreasonable preference and advantage with respect to the leasing, allocation and use of terminal facilities; that RDA, SPA and CIP have subjected CMH, its vessels, its cargoes and its terminal operations to an unreasonable refusal to deal and negotiate in good faith and to undue and unreasonable prejudice and disadvantage with respect to the leasing, allocation and use of terminal facilities; that RDA and SPA have refused to negotiate in good faith with or to make available to CMH adequate and suitable terminal, pier, dock, and storage facilities, and have interfered with CMH's right to the use of such facilities; that RDA and SPA have granted terminal space and concessions to CIP and others while unreasonably

denying comparable terminal space and concessions to CMH contrary to RDA's and SPA's mandate as public terminals; and that RDA and SPA have unjustly discriminated against CMH and its cargoes and unduly preferred CIP.

CMH contends that the *court* in *Plaquemines* recognized that the same set of circumstances can violate both the reasonableness and the anti-discrimination standards of the 1984 Act, 838 F.2d 547; that the common facts here include denying CMH essential facilities, barring CMH from operating as a marine terminal operator, and imposing insufferable burdens on CMH.

Can the Commission Grant the Relief Sought?

CMH contends that it is for the Commission to determine the appropriate remedy when it finds marine terminals to have engaged in unreasonable and discriminatory conduct under the Act, citing *State of California v. United States*, 320 U.S. 577, 583 (1944); that as the Supreme Court reiterated:

Finding a wrong which it is duty-bound to remedy, the Maritime Commission, as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing.

Id., 584.

CMH contends that respondents' suggestion that the issues in this proceeding should properly be decided in pending cases before administrative and judicial forums in South Carolina improperly seeks to divest the Commission of jurisdiction; that the "[p]endency of a state court suit cannot defeat [Commission] jurisdiction," even if they "were predicated on the identical matter"

when the conduct of marine terminal operators is at issue, citing *International Trading Corporation of Virginia, Inc. v. Fall River Line Pier, Inc.*, 3 S.R.R. 1043, 1049 (FMC 1964); that respondents are incorrect in claiming that a legislative investigative committee in South Carolina has exonerated RDA of alleged wrongdoing in connection with its conduct regarding the Naval Complex; that the investigation being conducted by this committee has not been completed and has not cleared RDA of the allegations (Mescher Aff); and that the Supreme Court has upheld the Commission's proper role in asserting jurisdiction in a case such as this:

The Commission simply cannot defer to the courts matters which are so intricately involved with its responsibilities under the shipping statutes.

Paczfzc Maritime Assn.—Cooperative Working Arrangements, 14 S.R.R. 1447, 1451 (FMC 1975),
aff' d. *Federal Maritime Commission v. Pacific Maritime Assn.*, 435 U.S. 40 (1978).

**RDA's Reply Dated March 1, 2000 to CMH's Response
in Opposition to RDA's Motion to Dismiss**

RDA replies that RDA is not a marine terminal operator subject to the 1984 Act, and that CMH's "control theory" of jurisdiction cannot create *in personam* jurisdiction over an entity that does not provide terminal services in connection with common carriers. RDA contends that it does not furnish "wharfage, dock, warehouse and other terminal facilities in connection with common carriers . . ." CMH bases its counter-argument on a "control theory" which it purports to draw from *Ponce* and *Plaquemines*. In response to CMH's assertions that jurisdiction can be sustained on "their [respondents'] planning and implementation of their scheme to oust CMH and others from the public

marine terminal facilities at the Charleston Naval Complex,” RDA states that there is no authority for the proposition that a state agency that has no dealings of any sort with common carriers and in no way provides services or assesses fees related to wharfage, dock or warehousing, etc., can be deemed a marine terminal subject to the Act. RDA states that *Ponce* is particularly harmful to CMH; that the dispute in the *Ponce* case was over a navigation fee charged by the Puerto Rico Ports Authority (“PRPA”); that the Commission asserted jurisdiction over PRPA by reasoning that payment of the contested navigation fee was a condition of vessel exit from the Port of Ponce and PRPA had the “authority and ability” to differentiate the services provided for the fee at the three major ports in Puerto Rico (San Juan, Mayaguez, and Ponce), thus potentially affecting decisions of vessel owners about which port to use when calling Puerto Rico; and that the First Circuit, however, declined to follow this reasoning and found the language of section 10(d)(1) of the 1984 Act to reflect a clear Congressional intent to regulate a defined class of persons (Marine Terminal Operators) whose business is the “furnishing of wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.”

RDA states that PRPA, unlike RDA, was an acknowledged port authority with Commonwealth-wide responsibilities that included, in ports other than Ponce, the acknowledged provision of terminal services; that at the Port of Ponce, however, PRPA’s activities were confined to providing “such general harbor services as law enforcement, radio communications, harbor cleaning and port captain services” in addition to the assessment of the disputed harbor service fee; that the First Circuit found that these activities, even when performed by a port authority clearly

subject to FMC jurisdiction in other ports in the Commonwealth, did not conform to the statutory definition of the type of business defined by Congress as a Marine Terminal Operator (“MTO”).¹⁵

RDA states that it is even further removed from the statutory definition of an MTO than was PRPA; that its purpose is “to redevelop and/or dispose of federal property located in North Charleston . . .; that RDA does not even provide the “general harbor services” that PRPA furnished in *Ponce*; that RDA oversees and manages the disposition of Naval Complex property to a variety of businesses and provides no harbor or port-related services; that CMH does not claim otherwise, but argues that an ability “to discriminate” can create *in personam* jurisdiction where it otherwise would not exist.

RDA states that the so-called “control theory” of jurisdiction ratified by the D.C. Circuit in *Plaquemines* arose in a peculiar fact context where there was an acknowledged port authority that provided rescue/fire services and marine communication services to common carriers and other vessels; that the issue was whether exemptions in a tariff for port charges violated section 10(b)(3) of the 1984 Act, 46 U.S.C. § 1709(b)(3); that the Court concluded that because the port and harbor district provided essential terminal services, assessed fees for the services, and conditioned access to the facilities upon payment of the fee, the FMC was justified in finding the jurisdictionally-requisite “furnishing” of facilities; that CMH has not identified any services offered by RDA that qualify as MTO services covered by the suit; that CMH has not identified common carriers with

¹⁵RDA states that the “discrimination” frequently alluded to by CMH appears to be RDA’s lease of Naval Complex property that CMH wants to persons other than CMH; that the mere leasing of property at the Naval Complex, some of which may have or may be put to marine applications, does not render RDA a “landlord port authority” or a “port authority”; and that CMH cites no authority for the proposition that dispositions of real property that has actual or potential utility or attractiveness to marine enterprises can, without more, transform the lessor into a person subject to the jurisdiction of the Commission.

whom RDA engages in transactions involving fees and services; and that CMH has not contended that RDA is assessing fees as a condition of vessel entry or varying those fees discriminatorily between ports or users. “Only if such ports *begin to charge a fee for their services and to control access to private facilities to enforce their charges* will today’s decision bring them within the jurisdiction of the FMC.” *Plaquemines*, 83 8 F.2d at 543. (Emphasis added by RDA.) RDA states that, unlike the defendant in *Plaquemines*, RDA is not a port, and that RDA does not condition access to marine facilities on payment of fees for terminal services.

CIP’s Reply Memorandum Dated March 1, 2000

CMH asserts that the CIP-SPA license is not exempt from filing because it is a “marine terminal conference agreement” that is required to be filed under 46 C.F.R. § 572.307, and the license “fits within this framework” because:

SPA also is a competing port operator at a completely different port: the Port of Charleston. Therefore the requirement that CIP at the Naval Complex must charge the same rates that SPA charges at the Port of Charleston renders the agreement as one between CIP and SPA/Port of Charleston.

CIP states that the license does not “fit within th[e] framework” of a marine terminal conference agreement because it contains no provision for the fixing of “practices and conditions of service relating to the receipt, handling and/or delivery of passengers or cargo for all members,” citing 46 C.F.R. 572.307(b)(1)(I); nor does it provide for “the conduct of the collective administration of affairs” (*id.*, § 572.307(b)(1)(ii)) or “the filing of a common marine terminal tariff in the name of the group and in which all the members participate, or, in the event of multiple tariffs,

each member participates in at least one such tariff’ (*id.*, § 572.307(b)(2)).¹⁶ CIP also states that while the SPA-CIP license provides for agreement on prices and charges, the Commission’s exemption from filing for licenses and leases between marine terminal operators applies even if the license or lease provides for the fixing of rates, citing *Marine Terminal Facilities Agreements-Exemptions*, 58 Fed. Reg. 5627, 5629 (Jan. 22, 1993).

CIP states that, in short, the license fits precisely within the definition of a marine terminal facilities agreement, and is exempt from section 5’s filing requirements.

CIP states that the amended complaint correctly alleges that CIP obtained its license to operate a marine terminal in August 1999; that CIP could not and did not begin operating until after obtaining the license; that even if CIP was an existing company when the events of which CMH complains took place, it did not at those times “engag[e] in the business in the United States of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier . . .”; that respondent Charleston International Projects, Inc. does not have a license and has never operated a marine terminal; and that because the amended complaint makes clear that CIP was not a marine terminal operator when virtually all of the alleged conduct took place, it fails to, and cannot possibly, allege facts stating a section 10 claim against CIP.

CIP states that CMH’s reference to Performance Automotive, Inc. (“PAI”) is apparently an attempt to overcome this fact, but that PAI is an entirely separate company from CIP,¹⁷ and that

¹⁶CIP states that 46 C.F.R. § 572.307 has been amended and recodified as 46 C.F.R. § 535.307; and it reiterates that CIP’s license does not qualify as a marine terminal conference agreement under the amended provision because it does not provide for the “fixing and adherence to uniform marine terminal rates, charges, practices and conditions of service relating to the receipt, handling, and/or delivery of passengers and cargo for all members.” 46 C.F.R. § 535.307(b). (Underscoring by CJP.)

¹⁷CIP states that the “agreement” between SPA and PIA never became effective.

CMH's contradictory allegations that CIP participated in a "plan" or "scheme" when CIP did not even exist must be rejected. CIP states that CMH merely provides conclusory assertions that CIP was part of a four-and-one-half year plan against CMH, and that such conclusory allegations will not suffice to state a claim for relief, citing cases.

CIP states that other conclusory assertions in CMH's reply memorandum are insufficient; that CMH asserts that CIP and SPA are utilizing their rights 'to control carrier and cargo access, . . . dictate the nature of marine terminal service, . . . and bar any competition for marine terminal handling of vessels at the Charleston Naval Complex.' CIP states that other than CIP's obtaining a license from SPA, which, of course, does not violate the 1984 Act, no facts are anywhere to be found that even suggest that CIP has (1) refused to provide terminal services to any ship or cargo that it is capable of handling, (2) "barred" any other marine terminal operator from operating or seeking to operate a terminal at the Naval Complex or anywhere else on the Charleston waterfront, or (3) "dictated" that only breakbulk terminal services may be provided at the Naval Complex.

CIP states that as to section 10(d)(1), CMH asserts in conclusory fashion that "[t]he facts support a finding that RDA, SPA and CIP have failed in their responsibilities as marine terminal operators to 'establish, observe and enforce just and reasonable practices relating to the use of marine terminal facilities' in connection with common carriage at the Charleston Naval Complex" and that "[a]t the Charleston Naval Complex RDA, SPA and CIP are engaged in 'excessive' and discriminatory terminal practices through the unfair and unreasonable granting of exclusive use of terminal facilities. . . ." CIP states that the only fact alleged in the amended complaint (or in any other document) concerning CIP is that CIP obtained a license to operate a marine terminal from SPA and that one cannot possibly conclude from this fact that CIP has violated the 1984 Act.

With respect to sections 1 O(d)(3) and 1 O(d)(4), CIP states that CMH's memorandum asserts legal conclusions which do not state a claim for relief, citing cases; that CMH has been subjected to an unreasonable refusal to deal, but CMH does not square this assertion with the amended complaint's admission that CIP operates the facilities as a public marine terminal open to all who agree to pay the published tariff rates, and its failure to allege one instance in which CMH even attempted to use CIP's facilities, much less that CIP denied CMH such use.

CIP asserts that as to its assertions of unjust discrimination and preference, CMH's memorandum inconsistently asserts (emphasis added by CIP) with respect to CIP that:

RDA and SPA have given CIP and others an unreasonable preference and advantage with respect to the leasing, allocation and use of terminal facilities. . . . RDA and SPA have refused to negotiate in good faith with or to make available to CMH adequate and suitable terminal, pier, dock, and storage facilities, and have interfered with CMH's right to the use of such facilities. RDA and SPA have granted terminal space and concessions to CIP and others while unreasonably denying comparable terminal space and concessions to CMH contrary to RDA's and SPA's mandate to public terminals. RDA and SPA have unjustly discriminated against CMH and its cargoes and unduly preferred CIP.

and that the amended complaint makes clear that CIP has not refused to do business with anyone, or discriminated against or preferred anyone.

CIP states that Jack Stender's affidavit contains the same conclusory allegations that CIP was somehow part of a four-and-a-half-year plan to destroy CMH, even though CIP did not even exist when almost all of the conduct about which Stender complains occurred; that it is clear that CMH cannot allege any facts consistent with the amended complaint that would entitle it to relief; and that CMH's amended complaint should be dismissed with prejudice with respect to CIP.

Rebuttal of CMH Dated March 10, 2000

CMH states that RDA's claim that it is not a marine terminal operator is belied by the facts; that RDA has submitted no rebuttal affidavit; that disclaiming its status as a marine terminal operator is a bootstrap argument; that the Commission is obligated to investigate the totality of facts and circumstances in order to evaluate what an entity is actually doing and not what it claims it is not doing, citing *Marine Terminal Practices of the Port of Seattle*, 18 S.R.R. 141,156 (Initial Decision 1978), adopted, 18 S.R.R. 1029 (FMC 1978); and that a marine terminal operator cannot insulate itself from Commission jurisdiction by hiding behind unsubstantiated disclaimers.

CMH states that RDA misunderstands the underlying principle of the *Plaquemines* and *Ponce* cases; that RDA consequently reaches the wrong conclusion about the proper test for FMC jurisdiction; and that a correct analysis yields a finding of Commission jurisdiction over RDA.

CMH states that a finding of jurisdiction over RDA is required; that a sufficient foundation exists to conclude that RDA is a marine terminal operator under the 1984 Act and that its activities in connection with the leasing of marine terminal facilities at the Charleston Naval Complex subject it to Commission subject matter jurisdiction and that if it is found that there are disputes as to material factual matters on this fact-driven issue, the motions to dismiss must be denied and the proceeding ordered to go forward.

CMH states that SPA (together with CIP, and through RDA) holds a monopoly position at the Charleston gateway; that no facilities exist outside of SPA-CIP control that can accommodate breakbulk cargoes that RDA and SPA mandate must be the exclusive type of Naval Complex cargoes; that none of the seventeen terminals along the Charleston harbor listed in the Hughes

Affidavit, ¶ 13, has any capability for serving common carrier breakbulk vessels and cargoes; and that all of these terminals are private; most handle the proprietary cargoes of the terminal owner; many of the terminals are capable of handling only liquid bulk cargoes; and many of these terminals have no docks, no wharves and no cargo laydown areas.

SPA stated that CMH's January 29, 2000 Stender Affidavit is "false and inaccurate" to the extent that it alleges improper, deceptive or discriminatory SPA conduct or a conspiracy. CMH states that SPA thereby puts into dispute material factual matters that are central to a determination on the merits of CMH's allegations; that a motion to dismiss cannot be sustained under these circumstances; and that CMH is entitled to a hearing on the issues.

CMH states that CIP's opposition to CMH's argument that the SPA-CIP agreement must be filed with the Commission ignores the plain language of their agreement for use of Charleston Naval Complex marine terminal facilities; and that a reading of this language reveals that the agreement does, indeed, meet the Commission's definition of a "marine terminal conference agreement" as follows:

. . . an agreement between or among two or more marine terminal operators . . . for the conduct or facilitation of marine terminal operations which provides for the fixing of and adherence to uniform maritime terminal rates, charges, practices and conditions of service relating to the receipt, handling, and or delivery of passengers or cargo for all members.

46 C.F.R. § 535.307(b).

CMH states that the terms and conditions of the SPA-CIP agreement (which appears in Exhibit D to SPA's Motion to Dismiss) comport with the definitional requirements for a marine terminal conference in the following ways:

1. The agreement's objective is the "conduct *or facilitation* of marine terminal operations." (Emphasis supplied by CMH.) Section 5 of the agreement requires CIP to provide service to breakbulk cargoes in order to "*facilitate* the movement of water-borne commerce through the Port of Charleston." (Emphasis supplied by CMH.)

2. CIP admits that the agreement "provides for the fixing of and adherence to uniform maritime terminal rates . . . [and] charges." CIP Reply at 2-3.

3. The SPA-CIP agreement provides for "the fixing of and adherence to uniform . . . practices and conditions of service" as shown by the following terms in Sections 8 through 10 of the SPA-CIP agreement:

- CIP's operations are "with guidance provided by the SPA" (Section 8);
- SPA and CIP must "form a 'Joint Cooperation Committee'" (Section 8);
- The Joint Cooperation Committee is composed of an equal representation of both SPA and CIP (Section 8);
- The Committee through concurrence of both parties determines "necessary infrastructure improvements; marketing strategies; quality standards; and pricing deviations from the SPA's then current Terminal Tariff." (Section 8);
- "both parties agree to use their best efforts to advertise the Premises' capabilities to existing and potential customers." (Section 9);
- "both parties agree to use their best efforts to ensure that quality services are delivered to customers" (Section 9);
- "The SPA agrees to use its relationship and bargaining position for the benefit of the Premises and its operations." (Section 10); and
- "[T]he SPA agrees that certain of its personnel, such as engineers and marketers will be available to assist CIP in CIP's discretion, in the planning, engineering, and operations at the Premises"; (Section 10).

CMH states that what matters is how the parties have agreed to conduct their activities under the agreement; that further evidence of their agreement status as a marine terminal conference is that the CIP marine terminal tariff is located at SPA's website (www.port-of-charleston.com) and that online inquiries concerning pricing information for both the Port of Charleston and for the Charleston Naval Complex are directed to SPA.

CMH states that CIP denies that it existed through most of the period covered by the Amended Complaint and also denies that CIP is a separate company from Performance Automotive Services, Inc. which negotiated an agreement with SPA in 1997 for use of facilities at the Charleston Naval Complex's Alpha Pier. CMH states that these assertions are contradicted by the February 11, 1998 letter signed by Richard L. Tapp, Jr., Vice-President of Charleston International Projects, Inc., in which Mr. Tapp described CIP as "f/k/a Performance Automotive Services, Inc."; and that CMH would be glad to use discovery procedures to demonstrate CIP's prior existence as a necessary participant in the RDA-SPA scheme to discriminate unlawfully against CMH and others; and that the culmination of this plan for CIP was the entry into its agreement with SPA and the ongoing implementation of that agreement, all of which, together, constitute continuing violations of the 1984 Act.

Conclusion of CMH

CMH states that it seeks redress for the serious 1984 Act violations asserted in the Complaint, as amended, that are continuing to occur to CMH's detriment; that CMH believes that

with this submission the record is sufficient for the Presiding Judge to make a finding that the Commission has jurisdiction in all respects necessary for this proceeding to go forward; that CMH does not waive its right to discovery in any respect; that CMH urges the Presiding Judge to deny the motions of RDA, SPA and CIP to dismiss CMH's amended complaint, to find that the Commission has personal and subject matter jurisdiction in this proceeding, to order the respondents to answer CMH's amended complaint and to order that this proceeding go forward in accordance with the appropriate procedural rules.

Discussion and Conclusions

The Federal Maritime Commission is an independent regulatory agency of the United States. As relevant here, its primary responsibility is the enforcement of the 1984 Act, 46 U.S.C. app. § 1701 *et seq.*, which provides a comprehensive scheme for regulation by the FMC of the practices of common carriers and others, including marine terminal operators. The 1984 Act in sections 4(b) and 5(a) requires agreements among marine terminal operators, to the extent they involve ocean transportation in the foreign commerce of the United States, to be filed with the Commission. 46 U.S.C. app. §§ 1703(b) and 1704(a). Section 5(a) of the 1984 Act covers both written and oral agreements. *Id.* app. § 1704(a). Section 6 of the 1984 Act gives the Commission authority to review such agreements, to reject them if they fail to meet statutory standards, and to seek injunctions if they threaten to cause certain anticompetitive effects. *Id.* app. § 1705. Once effective, section 7 immunizes these agreements from the antitrust laws. *Id.* app. § 1706. In addition, the 1984 Act contains a list of practices which are prohibited. Section 10(a)(2) makes it unlawful for any person

to operate under an agreement required to be filed under section 5 of the Act that has not become effective under section 6. *Id.*, app. § 1709(a)(2). Section 10(a)(3) of the Act makes it unlawful for any person, party to an agreement governed by the Act, to operate except in accordance with the terms of their agreement. *Id.* app. § 1709(a)(3).

Sections 10(b)(11)-(12) of the 1984 Act also prohibit ~~certain~~ other conduct, including any undue or unreasonable preference or advantage, and any unreasonable refusal to deal or undue or unreasonable prejudice or disadvantage. 46 U.S.C. app. § 1709(b)(11)-(12). These prohibitions are made applicable to marine terminal operators by section 10(d)(3). *Id.* app. § 1709(d)(3)

Section 10(d)(1) requires that marine terminal operators “establish, observe, and enforce just and reasonable regulations and practices related to or in connection with receiving, handling, storing, or delivering property.” *Id.* app. § 1709(d)(1). The Commission is authorized to award reparation, interest and attorney’s fees to parties injured by conduct which violates the 1984 Act. *Id.*, app. § 1710(g).

Pursuant to Rule 12 of the Rules of Practice and Procedure, the Commission follows the Federal Rules of Civil Procedure when there is no specific Commission rule, to the extent that the federal rules are consistent with sound administrative practice and procedure. 46 C.F.R. § 502.12; *Miscellaneous Amendments to Rules of Practice and Procedure*, 26 S.R.R. 902, 904 (1993); *McKenna Trucking Co. Inc. v. A.P. Moller-Maersk*, 27 S.R.R. 1045, 1051 (ALJ, Administratively Final: June 23, 1997). Under the Federal Rules, motions to dismiss are governed by Rule 12(b) and its standards. The federal rules forming the basis of respondents’ motions are Rule 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(2) (lack of personal jurisdiction).

This Commission, following federal civil procedure rules, may dismiss a complaint only if it is clear that no relief may be granted under any set of circumstances that could be proved consistent with the allegations contained in a complaint. *Hishon v. King and Spaulding*, 467 U.S. 69, 73 (1984). When the Commission reviews the sufficiency of a complaint, before the reception of any evidence, the issue is not whether the complainant will ultimately prevail, but whether the complainant is entitled to offer evidence to support its claims. *Scheuer v. Rhodes*, 416 U.S. 232,236 (1974). On motions to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(2) the Commission may properly consider affidavits or other evidentiary materials without converting the motion into one for summary judgment under Fed. R. Civ. P. 56.¹⁸ However, the Commission may not prematurely dismiss a sufficient complaint without providing the complainant an opportunity by subsequent proof to establish its claim. *Scheuer*, 416 U.S. at 236.

On a Rule 12(b)(1) motion (lack of subject matter jurisdiction), the Commission “should apply the standards applicable to a summary judgment motion,” under which “the moving party will prevail only if material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Richmond, Fredericksburg & Potomac R.R. v. United States*, 945 F.2d 765,768 (4th Cir. 1991), *cert. denied*, 503 US. 984 (1992). Moreover, “it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.” *Scheuer*, 416 U.S. at 236.

¹⁸*Deuser v. Vecera*, 139 F.3d 1190 (8th Cir. 1998); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D. N.Y.1996), *aff’d*, 126 F.3d 25 (2nd Cir. 1997) (Rule 12(b)(2)); and *Robinson v. TCI/US West Communications Inc.*, 117 F.3d 900 (5th Cir. 1997) (Rule 12(b)(1)).

On a Rule 12(b)(2) motion (lack of personal jurisdiction) before discovery has commenced and before an evidentiary hearing, as here, complainant need **only** make a prima facie showing of personal jurisdiction through factual allegations in its complaint. See *Felch v. Transportes Lar-Mex SA De CV*, 92 F.3d 320, 326 (5th Cir. 1996); *Bensusan Restaurant Corp. v. King*, *supra*, *aff'd*, 126 F.3d 25 (2d Cir. 1997). Furthermore, uncontroverted allegations in the complaint must be taken as true and conflicts between the parties' affidavits must be resolved in the complainant's favor. *Felch*, 92 F.3d at 326.

The party asserting subject matter jurisdiction has the burden of proving its existence. *Boudreau v. United States*, 53 F.3d 81, 82 (5th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996) (plaintiff must demonstrate subject matter jurisdiction over claim ostensibly brought under federal statute).

The identical burden of proof exists in response to Rule 12(b)(2) motions asserting a lack of personal jurisdiction over a defendant. *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502,507 (2d Cir. 1994) (plaintiff must prove court had personal jurisdiction over defendant), *cert. denied*, 519 U.S. 1006 (1996).

RDA argues that it is not subject to the personal jurisdiction of the Commission. RDA argues that it is not a marine terminal operator because RDA's directive is to acquire, manage, and dispose of the Naval Complex and because RDA leases portions of the Naval Complex to non-maritime related businesses.

RDA states that it is not now, nor has it ever been, vested with the authority to operate as an "operating" or a "landlord" port authority; that it is not now, nor has it ever been in the marine terminal operating business; that it does not deal with either common or contract carriers; that RDA

does not arrange for or provide berths for common carriers; that it does not furnish wharfage, dock, warehouse, and/or other terminal facilities in connection with ocean common carriers; and that RDA's sole purpose is to acquire, manage, and dispose of the Charleston Naval Complex and in so doing generate new jobs for the Tri-County area and South Carolina through the exercise of its public and essential governmental powers. RDA contends that the fact that some of the enterprises that seek space on a waterfront property may be engaged in maritime-related commercial activities does not vest RDA with the characteristics of the companies that seek to lease property at the Naval Complex.

RDA asserts that it does not now, nor has it ever been engaged in the business of furnishing wharfage, dock, warehouse, or other terminal facilities either alone or in conjunction with a common carrier; that, consequently, RDA is not a person subject to the 1984 Act; that the FMC lacks personal jurisdiction over RDA, and that the fact that RDA, during the course of its job and property development activities, may come into contact with, or even sublease properties to entities engaged in maritime-related activities does not imbue RDA with the maritime-related characteristics sufficient to warrant the jurisdiction of the FMC over RDA.

It has been held that the status of a person is not determined by his or her own declaration of what he or she is but what he or she is in fact doing. See *Marine Terminal Practices of the Port of Seattle*, 18 S.R.R. 141, 156 (ID 1978), adopted 18 S.R.R. 1029 (FMC 1978). Thus, a proper determination thus hinges on a consideration of the facts. *Id.*

RDA is the State entity created by South Carolina in response to the DOD Base Closure Act. The purpose of RDA is to oversee the disposition of real and federal property pursuant to 10 U.S.C. § 2687. The 1984 Act defines the entities it seeks to regulate. 46 U.S.C. app. § 1702. The law is

well settled that an administrative agency can exercise only those powers conferred on it by Congress. See *Stark v. Willard*, 321 U.S. 288,309 (1944); and *Trans-Pacific Freight Conference of Japan v. F.M.B.*, 302 F.2d 875,880 (D.C. Cir. 1962).

The question is whether RDA falls within the definition of any regulated entity noted, defined or otherwise referred to in the Act-more specifically is RDA a “landlord” port authority¹⁹—a marine terminal operator as alleged by CMH and denied by RDA.

As will become clear, the answer to the question whether RDA is an MTO subject to the Commission’s jurisdiction is that it comes within the definition of an MTO in section 3(15) since it is engaged in “furnishing . . . other terminal facilities.” This was explained in *Plaquemines Port v. Federal Maritime Corn ’n*, 838 F.2d 536 (D.C. Cir. 1988), where the Court stated at page 542-543, in part, as follows:

[3] We address the FMC’s jurisdiction first. Jurisdiction is governed by the 1984 Act’s definition of “marine terminal operator.” Section 3(15) of the 1984 Act, 46 U.S.C. § 1702(15) (Supp. III 1985), states that a marine terminal operator is a person engaged “in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.” If the Port engages in “furnishing. . . other terminal facilities,” it is a “marine terminal operator” and falls under the 1984 Act and the FMC’s jurisdiction. As noted in the legislative history of the 1984 Act, H.R. Rep. No. 53, 98th Cong., 2d Sess., pt. 1, at 29, *reprinted in* 1984 U.S. Code Cong. & Admin. News 167,194, the relevant language was taken directly from the definition of “other person subject to [the 1916 Act].” 46 U.S.C. § 801 (1982).⁵ For this reason, the intent behind, and prior interpretations of, the 19 16 Act’s provisions have continuing precedential force.

The 19 16 Act was designed to strengthen the U.S. shipping industry. Then, as now, shippers operated in cartels, often called “conferences.” Congress believed

¹⁹Until such time as the United States was prepared to sell or deed the Naval Property, RDA would secure offers for the lease of various sites. Once an offer was accepted RDA would enter into a base agreement with the United States for the designated property. At that time, if all the preliminary requirements were met, RDA would then execute a sub-lease with the prospective operator of the facility. (Sprott affidavit, ¶ 16.)

that U.S. shippers could not opt out of the international cartel system and survive at the level thought required by national needs and security. The 1916 Act, therefore, granted antitrust immunity to shippers' cartels. In exchange, the cartels were subjected to the provisions of the 1916 Act which prohibited discriminatory practices and required the filing and publication of tariffs with the FMC. Essay, *The Shipping Act of 1984, A Return to Antitrust Immunity*, 14 *Transp.L.J.* 153, 155-56 (1985).

In order to regulate the shippers' cartels effectively, it was necessary to regulate other links in the transportation chain. The sponsor of the 1916 Act, Congressman Alexander, in response to an amendment to strike "other person" subject to the Act, explained that, in order for regulation of the shippers to be effective, the FMC must also "have supervision of all those incidental facilities connected with the main carriers." 53 *Cong.Rec.* 8276 (1916). Alexander stated that the bill contained no provision regulating shippers that did not also apply to terminal facilities. *Id.* Moreover, he noted, if terminal facilities owned and operated by state political subdivisions discriminated unduly, they, too, would be subject to the 1916 Act. In 1943, the Supreme Court relying on Congressman Alexander's remarks, held that waterfront terminals owned and operated by municipalities were "other person[s]" subject to the [1916 Act]." *California v. United States*, 320 U.S. 577, 585-86, 64 S.Ct. 352, 356-57, 88 L.Ed. 322 (1944).

In its 1982 *Dreyfus Order*, the FMC relied upon *California v. United States's* ruling that local government authorities are covered by the statute. The FMC then focused on the Port's degree of involvement in the provision of terminal facilities to determine whether that involvement was sufficient to constitute the "furnishing" of the facilities. Since the Port assessed a fee for its essential services ancillary to the facilities and conditioned access to the private facilities within its jurisdiction upon payment of that fee, the FMC found a "furnishing" of the facilities. As the FMC noted, the Port "has imposed utilization of its services and payment of its fee as an unavoidable appurtenance to all private facilities." 21 S.R.R. (P & F), at 1080.

In the order now before us, the FMC applied the same rationale to determine that the Port is a "marine terminal operator" within the meaning of the 1984 Act. *NOSA Order*, 23 S.R.R. (P & F) at 1372. We agree with the FMC that the Port's combination of offering essential services and controlling access to the private facilities amounts to the furnishing of terminal facilities. Like the FMC, we read the purpose of the relevant portions of the 1916 Act, and its successor, the 1984 Act, to be the prevention of discrimination in the provision of terminal facilities. Ownership or operation of terminal facilities is not a necessary prerequisite to the ability to discriminate. Thus, the critical issue for jurisdiction is that the degree of the Port's involvement enables the Port to discriminate. In this case, the Port has the ability to discriminate in the fees it charges by controlling access to private terminal facilities. This is sufficient to sustain FMC jurisdiction.

Our conclusion is buttressed by the fact that in a previous interpretation of the provision at issue here, the Supreme Court focused on the Shipping Act's legislative scheme and required a broad construction to make effective the scheme of regulation the statute established. *United States v. American Union Transp.*, 327 U.S. 437, 447-57, 66 S.Ct. 644, 649-54, 90 L.Ed. 772 (1946). The FMC has twice found that the Port's tariffs, or at least portions of them, violate substantive provisions of the Shipping Acts. It should be clear by now that allowing such discrimination would nullify the Shipping Acts for the first 100 miles of the Mississippi River north of the Gulf.

The DOJ argues that upholding FMC jurisdiction over the Port could result in the FMC controlling the fire and emergency services of every waterside city in America. This argument is overstated. Waterside cities will not automatically or accidentally fall into FMC jurisdiction. Only if such ports begin to charge a fee for their services and to control access to private facilities to enforce their charges will today's decision bring them within the jurisdiction of the FMC. [Footnote omitted.]

⁵Section 1 of the 1916 Act (formerly 46 U.S.C. § 801 (1982)) defined "other person" subject to the 1916 Act as meaning:

... any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water.

As a proper framework to evaluate the present proceeding, it is also important to re-read the reasoning of the Supreme Court more than half a century ago, in *United States v. American Union Transport, supra*, where the question was whether independent freight forwarders were subject to FMC jurisdiction under the predecessor definition of "other person" even though none of them was controlled by or affiliate with a common carrier by water.

The Court found that they came within the definition of "other persons," even though dissenting Justice Frankfurter, Black and Douglas noted that the Shipping Act had been on the books for 26 years, but the agency had never determined that forwarders of this type were subject to it. *Id.* 458.

The majority felt that their conclusion was “required not only by the broad and literal wording of the definition but also to make effective the scheme of regulation the statute established and by consideration of policy implicit in that scheme, as well as by the legislative history and the decision” in the companion cases of *California v. United States* and *Oakland v. United States*, 320 U.S. 577. *Id.* 443.

The Court emphasized the consequences of including or excluding so-called independent forwarders for effective administration of the Act and achievement of its policy. *Id.* 443.

The Court noted that the definition was broad and general and that no intent is suggested “to divide persons ‘furnishing wharfage, dock, warehouse or other facilities’ into regulated and unregulated groups.” *Id.* 443. The Court further noted that the absence of any such suggestion becomes highly significant by contrast with similar definitions of other statutes more or less related to the Shipping Act. *Id.* 443.

The Court then turned to the various statutory provisions and concluded that “jurisdiction by the Commission over forwarders would seem essential to effectuate the policy of the Act and the absence of jurisdiction well might prevent giving full effect to that policy.” *Id.* 447.

The Court further explained that: “The statute throughout is drawn in very broad terms. It forbids direct or indirect accomplishment of the outlawed acts.” *Id.* 450.

The Court emphasized that when dealing with the breadth of the term “other person subject to the Act” the manager of the bill in the House of Representatives, Representative Alexander, said, “Hence, if the board [the United States Shipping Board] effectually regulates water carriers, it must also have supervision of all those incidental facilities connected with the main carriers. . . .” 52 Cong. Rec. 8276. The Court then observed, “Certainly the language is not indicative of intent

to give a narrowly restricted scope to the definition's coverage. Quite the opposite is its effect." *Id.* 451.

The Court further concluded that nothing in the hearings, the committee reports, or the debates, upon the original or the substituted bills suggests either an original intention to restrict to carrier affiliates the coverage of forwarders or other furnishers of terminal or "link" service or a later intention to change the broad coverage by so restricting it. "Silence so complete cannot be taken as the voice of change." *Id.* 453.

In concluding, the Court remarked that "It is inherent in the view we take of the statute that more is involved than merely a carrier's attempt to immunize itself against the Act's penalties by using a forwarder to evade the regulations made binding on carriers. In that respect forwarders are obviously no different ~~from~~ other persons, for the Act does not permit such evasion by a carrier whether through the use of forwarders or any other persons. What is more important is that the Act is designed and in terms undertakes not only to prevent such evasion by carriers through denying them immunity when they hide behind immunity, it also denies immunity to the forwarders themselves when they commit the acts or practices carriers and others subject to the Act are forbidden to perform." *Id.* 457.

On the basis of the material furnished in the present proceeding at this juncture, before any evidence is submitted and before discovery, it is evident that RDA acts as a "landlord" port by specifying the terms of the leases and conditions of the leases, by issuing licenses or declining to issue licenses and by granting or withholding exclusive rights to terminals, piers, wharves, storage facilities and back-up areas at the marine terminal facilities at the Naval Complex in connection with the receiving, handling and storage of property in connection with common carriage. (Stender

affidavit, ¶¶ 11-67 and Sprott affidavit, ¶¶ 13, 16, 22, 24-37, 41-48, 60-61.) RDA exercises complete control over the occupancy and use of all marine terminal facilities at the Naval Complex. (Stender affidavit.) RDA does this through its determination over who should be granted a lease, license and rights to terminals, piers, wharves, storage facilities and back-up areas throughout the Naval Complex. (Stender affidavit at ¶ 66.)

RDA emphasizes that it has leased the Naval Complex premises to a host of corporate entities engaged in a wide variety of commercial, corporate, manufacturing, or other non-maritime endeavors. RDA lists 22 such entities. (Sprott affidavit, ¶ 78.) However, in addition, RDA has awarded leases or licenses as to the following maritime piers: license to Braswell Services Group for the Pier Alpha Terminal, a lease to Charleston Shipbuilders, Inc. for the Pier Zulu Area, a sublease to complainant CMH for Buildings 1604, 1605 and 1607, a sublease of Pier M, Building 224 and adjacent property to CMH (and another entity), and a sublease with SPA for Pier Alpha-all maritime enterprises. (Sprott affidavit, ¶¶ 22, 24, 33, 37 and 41.) Clearly, RDA has the ability to unlawfully discriminate among prospective tenants as shown in the affidavits of Stender and Sprott.

As seen in *Plaquemines*, the Commission and the D.C. Circuit Court of Appeals were confronted with a port authority that neither owned nor operated the private marine terminal facilities over which it sought to exercise regulatory control. The fact that the port provided a service to the private terminals was insufficient, alone, to attach Commission jurisdiction: “Thus the critical issue for jurisdiction is that the degree of the Port’s involvement enables the Port to discriminate.” 838 F.2d at 245.

The key term enunciated by the court was “involvement.” The court found that the port’s “involvement” arose from its assessment of the fee in a discriminatory manner that resulted in the

port's exercise of control over access to the terminal facilities. The implement of "involvement" was the fee that the port used in a discriminatory manner to control access to marine terminal facilities and from which Commission jurisdiction was derived.

In the instant proceeding, the implement of "involvement" is RDA's leasing power. RDA uses such power in a manner that the results are controlling access to public marine terminal facilities. RDA's leasing practices combined with RDA's control of access to the Naval Complex terminal facilities meet the criteria established by the court and constitutes the furnishing of wharfage, dock, warehouse or other terminal facilities in connection with a common carrier, and therefore subjects RDA to Commission personal jurisdiction as a marine terminal operator within the meaning of section 3(15) of the 1984 Act, 46 U.S.C. §1702(15).

It is evident that it is RDA's ability to discriminate through the extent of its involvement in the provision of terminal facilities that is sufficient to sustain Commission bedrock jurisdiction, for one of the main purposes of the 1984 Act is "to establish a nondiscriminatory regulatory process:" 46 U.S.C. app. § 1701. To deny jurisdiction over RDA and to allow RDA to escape from its clearly actionable conduct under the Shipping Act before the onset of discovery and the presentation of evidence would be to defeat one of the principal purposes of the 1984 Act.

RDA mistakenly relies on former Commissioner Moakley's dissent in the Commission decision *in Plaquemines*, 25 F.M.C. 73, and reaches an erroneous conclusion. Commissioner Moakley expressed concern over the extent of Commission jurisdictional reach, commenting solely on the particular factual scenario presented to the Commission in *Plaquemines*. His dissent in no way discredits the "controlling of access" to marine terminals as a basis for implicating Commission jurisdiction. Serving as the Fact Finding Officer in FMC Fact Finding Investigation No. 17,

Commissioner Moakley thereafter issued *his* Report, *Fact Finding Investigation No. 17 Rates, Charges and Services Provided at Marine Terminal Facilities*, 24 S.R.R. 1260 (issued August 31, 1998), declaring “the control of access” jurisdictional link to represent the essence of economic control by a terminal operator and to be subject to the greatest potential for abuse:

The ability to control access to terminal facilities is the economic power subject to the greatest potential for abuse, as the railroads demonstrated early in this century. Regulatory oversight which ensures reasonable, non-discriminatory access to those facilities should be the primary focus of the Commission’s regulation of marine terminal activities.

24 S.R.R. 1260, 1280.

RDA also asserts that it must “furnish” services in order to implicate Commission jurisdiction. That is not the holding of *Plaquemines* as may be seen in the earlier quote from that case or the criterion used by the court to reach the conclusion that the port had subjected itself to Commission jurisdiction. Moreover, in Fact Finding Investigation No. 17, Commissioner Moakley reinforced the Commission’s definitional stance:

Most terminal facilities are constructed and improved by public ports who “furnish” such facilities to terminal operators or ocean common carriers through leases or other negotiated arrangements. In a very real sense, these public authorities control use of and access to those facilities through the lease terms and charges and, very often, through required adherence to the port’s tariff.

24 S.R.R. 1260, 1281.

It is clear that RDA’s control over the provision of marine terminal facilities implemented through its leasing power leads to the conclusion that RDA is “furnishing” marine terminal facilities, subjecting itself to Commission personal and subject matter jurisdiction.

As noted earlier, in *Puerto Rico Ports Authority v. Federal Maritime Commission*, 919 F.2d 799 (1st Cir. 1990) (“Ponce”) the First Circuit found a port service charge assessed by the Puerto Rico Ports Authority against vessels in the Puerto Rican navigable waters not to be subject to Commission jurisdiction with respect to the port’s assessment of such charges at the Port of Ponce. The First Circuit reached this conclusion on the basis of unusual facts. The Port of Ponce was an agency of the municipality of Ponce and operated its own terminal facilities under a franchise from the Commonwealth government; and the Port of Ponce exercised exclusive “control and administration” over its own terminal facilities, independent of the Puerto Rico Ports Authority. The Puerto Rico Ports Authority was statutorily excluded from such authority and functions at Ponce. 919 F.2d 799,804 and 806.

The First Circuit concluded that the Commission had no jurisdiction because the Puerto Rico Ports Authority exercised no control or administration over terminal facilities exclusively within the Ponce municipal jurisdiction, and particularly where the Ports Authority did not own, operate or lease those facilities. The First Circuit also found that the Ports Authority’s charges were related to navigation and not directly related to terminal practices. *Id.* at 804-805.

However, in the instant proceeding, the Commission is confronted with an entirely different factual scenario. RDA exercises direct authority and control over the Charleston Naval Complex and its terminal facilities; and its unilateral ability to offer leases and licenses, to enter into leases and licenses, and to refuse to enter into leases and licenses is directly related to, affects and comprises essential terminal services. Whereas in *Ponce* the fees at issue were determined not to constitute a terminal function, the object of Commission scrutiny in the instant docket are marine terminal leases and licenses whose very terms and conditions are related directly to the “receiving,

handling, storing or delivering of property.” See *Ponce* at 805. As a result, RDA’s terminal leasing practices in connection with the furnishing of marine terminal facilities brings RDA squarely under Commission jurisdiction.

Respondents present other contentions variously that CMH’s problems would be solved if CMH, as a member of the public, simply provided services at the Naval Complex under CIP’s published tariffs; that the Commission has no authority to inquire into the process and procedure whereby RDA was designated to engage in activities for the redevelopment of the Naval Complex; that governmental actions are beyond the scope of review under the 1984 Act; and that CIP has done nothing more than enter into an arrangement with SPA for the use of marine terminal facilities at the Naval Complex and therefore cannot be charged successfully with any wrongful conduct. (Recall that the facilities occupied by CIP at the Naval Complex are essentially the same as those leased to SPA by RDA.)

These arguments and the factual scenario presented by respondents are contested by CMH as shown next with the result that these factors must be further addressed in discovery and the presentation of evidence precluding granting the motions to dismiss at this time.

CMH presented an affidavit of Mr. Stender, CMH’s president, as noted. In it he contends that for several years beginning in 1993, SPA aggressively sought to exclude CMH from stevedoring and other cargo handling services at the Port of Charleston through SPA’s restrictive licensing practices; that CMH had successfully attracted new and promising cargo business to the Port of Charleston that specifically requested SPA to permit cargo handling and other services to be performed exclusively by CMH; that, however, SPA for more than a year refused to grant CMH’s stevedore license application; that SPA routinely rejected the requests for CMH’s services by CMH’s

customers; that SPA sought to divert and in some cases did divert CMH's business to its own cargo handling facilities, interfering in CMH's business relationships, seemingly oblivious to the fact that this potential new business was then diverted through other ports. (Stender affidavit, ¶¶ 12-21.)

CMH points out that the Commission found that SPA was employing stevedoring licensing criteria that unreasonably restricted competition under the standard of section 10(d)(1) of the 1984 Act (46 U.S.C. app. § 1709(d)(1)) in *Petition of South Carolina State Ports Authority for Declaratory Order, Order Vacating Initial Decision and Denying Petition*, 27 S.R.R. 1137 (FMC 1997), and that notwithstanding this ruling, CMH eventually decided to give up its stevedoring business at the Port of Charleston because SPA regularly imposed obstacles and financial deterrents to CMH's detriment.

CMH contends that it determined to pursue its goal of performing marine terminal services by moving its operations to the Naval Complex, which recently had been placed under RDA control. (Stender affidavit, ¶¶ 22 and 23.)

CMH states that it submitted solid business plans to RDA for operation of breakbulk cargo handling facilities (Exhibit C (videotape)), but that CMH was passed over in favor of other allegedly less qualified applicants for the lease of marine terminal facilities. CMH alleges that, unknown to CMH at the time, RDA rigged the process for selecting tenants to operate such facilities in order to choose its favored, lower-ranked candidates and that notwithstanding SPA's public denial of interest in the Naval Complex, privately SPA and RDA conspired to install SPA at the Naval Complex with SPA's pass-through partner, CIP, there to "run" the operation. (Stender affidavit, ¶¶ 24-64.)

CMH contends that RDA refused to lease terminal facilities at the Naval Complex to CMH with piers that could accommodate the draft of vessels that CMH would serve; and that, as a result,

CMH was forced to enter into costly and short-term sublicenses with tenants of RDA in order to obtain non-exclusive access to a building and a proximate pier to operate its developing business.

CMH states that beginning in 1996 or 1997 CIP became an active player to oust existing lessees of marine terminal property in favor of CIP and SPA, that CIP first appeared under the name Performance Automotive Services, Inc. wherein it negotiated an agreement with SPA in 1997 for use of the Naval Complex's Alpha Pier as a dedicated project cargo facility; that CIP then donned a different hat and emerged as Charleston International Projects in concert with SPA, again for cargo handling at Alpha Pier and nearby November Pier; and that when RDA agreed to abandon Alpha Terminal in favor of the City of North Charleston to assuage its objections over its use as a cargo handling facility, CIP rejoined again with SPA, this time to gain access and control of Zulu Pier, the prize marine terminal of the Naval Complex and which CMH was using already. (Stender affidavit, ¶¶ 21, 22; CMH Reply, Exhibit K.)

CMH argues that respondents' planned installation of SPA and CIP at Zulu Pier resulted in their desired ouster of CMH from its subleased building proximate to Zulu Pier; that this was because RDA unreasonably denied CMH the continued non-exclusive access to Zulu Pier it previously enjoyed, notwithstanding RDA's acknowledgment that CMH's leased building and the business it housed would be useless without such access to the pier; that CMH's exclusion represented a material element in the respondents' plan to rid SPA and CIP of CMH's threatened competition and to ensure SPA's complete and total control over terminal facilities in the Charleston gateway; and that RDA's unreasonable and unjustifiable practices in connection with meeting every demand by the favored SPA and CIP for marine terminal facilities have resulted in unfair and

unreasonable treatment of CMH, forcing its departure from Zulu Terminal and allowing SPA and CIP monopoly control. (Stender affidavit, ¶¶ 41-75.)

The key element in finding that the Commission has jurisdiction in this case is the existence of a port authority's "control and administration" over the terminal facilities and the port's resultant ability to discriminate. See *Ponce* and *Plaquemines*. This "control theory" furnishes the foundation of Commission jurisdiction in this proceeding as to RDA, and as to RDA, SPA and CIP jointly. Commission jurisdiction arises from their concerted planning and implementation of their scheme to oust CMH and others from the public marine terminal facilities at the Naval Complex for the exclusive benefit and use of SPA and CIP. Forcing the departure of CMH is an essential element in respondents' scheme to insure SPA's monopoly control of public terminals in the Charleston gateway and to eliminate all viable competition to SPA and CIP's breakbulk handling facility at the Naval Complex.

SPA and CIP's exercise of control over access to marine terminal facilities enables them to discriminate as well. Under its lease agreements with RDA, SPA has been granted exclusive rights for the furnishing of wharfage, dock, storage and terminal facilities at the Naval Complex and has licensed such rights and benefits to SPA's pass through partner CIP. Under their license arrangement, SPA and CIP jointly, but within strictures imposed by RDA, enjoy exclusive marine terminal rights over breakbulk cargoes. These rights accorded SPA and CIP have been and are being utilized to control carrier and cargo access to the Naval Complex. SPA and CIP dictate the nature of marine terminal service allowed at the Naval Complex and bar any competition for the marine terminal handling of vessels at the Naval Complex.

In response to SPA's depiction of available terminal areas (SPA Reply, Hughes Affidavit, ¶¶ 13-15), CMH states that SPA does (together with CIP, and through RDA's complicity) hold a monopoly position at the Charleston gateway; that no facilities exist outside of SPA-CIP control that can accommodate breakbulk cargoes that RDA and SPA mandate must be the exclusive type of Naval Complex cargoes (CMH Reply at 59-60 and the cited portions of the January 29, 2000 Stender Affidavit); that none of the 17 terminals along the Charleston harbor listed in the Hughes Affidavit, ¶ 13, has any capability for serving common carrier breakbulk vessels and cargoes; that all of these terminals are private; most handle the proprietary cargoes of the terminal owner; that many of the terminals are capable of handling only liquid bulk cargoes; and that many of these terminals have no docks, no wharves and no cargo laydown areas. (See the March 9, 2000 Declaration of H.R. "Jock" Stender and attached chart (Exhibit B).)

CMH states that, furthermore, SPA has acknowledged publicly its monopolistic intentions and position; that SPA unsuccessfully petitioned the Commission for a declaratory order, asking the Commission, *inter alia*, to agree that it was lawful for SPA to retain for itself all marine terminal container operations (before the Naval Complex was available for breakbulk operations) to the exclusion of all other marine terminal operators. *Petition of South Carolina Ports Authority for Declaratory Order*, 27 S.R.R. 1137, n. 3 (FMC 1977).

The material furnished by the parties puts into dispute material factual matters that are central to a determination on the merits of CMH's allegations. A motion to dismiss cannot be sustained under these circumstances and a hearing is required on the issues.

**Respondents SPA and CIP's Motions as to
Other Allegations in CMH's Amended Complaint**

Respondents SPA and CIP's Unfiled Agreement

SPA and CIP argue that their 20-page SPA-CIP terminal agreement (Exhibit D to SPA's motion to dismiss) is exempt from filing as a "marine terminal facilities agreement"; and that their Zulu Terminal agreement is a simple landlord-tenant license and is thus covered by that exemption.

Respondents' agreement is not merely a lease or license between landlord SPA and tenant CIP. SPA is more than just the lessor of terminal facilities that SPA happens to control at the Naval Complex. SPA also is a competing port operator at a completely different port: the Port of Charleston. Therefore the requirement that CIP must charge the same rates at the Naval Complex as SPA charges at the Port of Charleston renders the agreement as one between CIP and SPA/Port of Charleston.

The Commission's definition of a "marine terminal conference agreement ("MTCA") is as follows:

. . . an agreement between or among two or more marine terminal operators . . . for the conduct or facilitation of marine terminal operations which provides for the fixing of and adherence to uniform maritime terminal rates, charges, practices and conditions of service relating to the receipt, handling, and or delivery of passengers or cargo for all members.

46 C.F.R. § 535.307(b).

The terms and conditions of the SPA-CIP agreement comport with the above definition in the following ways:

1. The objective of an MTCA is the “conduct or facilitation of marine terminal operations.” In keeping with that objective, Section 5 of the SPA-CIP agreement in issue requires CIP to provide service to breakbulk cargoes in order to “facilitate the movement of water-borne commerce through the Port of Charleston.”

2. Moreover, the agreement “provides for the fixing of and adherence to uniform . . . practices and conditions of service.” This is demonstrated by the following terms in Sections 8 through 10 of the issue SPA-CIP agreement:

- CIP’s operations are “with guidance provided by the SPA” (Section 8, ¶ 2, lines 2-3);
- SPA and CIP must “form a ‘Joint Cooperation Committee’” (Section 8, ¶2);
- The Joint Cooperation Committee is composed of an equal representation of both SPA and CIP (Section 8, ¶ 3);
- The Committee through concurrence of both parties determines “necessary infrastructure improvements; marketing strategies; quality standards; and pricing deviations from the SPA’s then current Terminal Tariff.” (Section 8, ¶ 3);
- “both parties agree to use their best efforts to advertise the Premises’ capabilities to existing and potential customers.” (Section 9);
- “both parties agree to use their best efforts to ensure that quality services are delivered to customers” (Section 9);
- “The SPA agrees to use its relationship and bargaining position for the benefit of the Premises and its operations.” (Section 10); and,
- “[T]he SPA agrees that certain of its personnel, such as engineers and marketers will be available to assist CIP in CIP’s discretion, in the planning, engineering, and operations at the Premises”; (Section 10).

An important factor is shown by the foregoing manner in which the parties have agreed to conduct their activities pursuant to the terms of the agreement. Further evidence of their agreement

status as a marine terminal conference is that the CIP marine terminal tariff is located at SPA's website (www.port-of-charleston.com) and that online inquiries concerning pricing information for both the Port of Charleston and for the Charleston Naval Complex are directed to SPA. Thus, the SPA and CIP agreement is a "marine terminal conference agreement" among two or more marine terminal operators "which provides for the fixing of and adherence to uniform maritime rates, charges, practices and conditions of service" and is subject to the requirement that it be filed with the Commission. Implementation of an agreement required to be filed but not filed is a violation of section 10(a)(2) of the 1984 Act (46 U.S.C. app. § 1709(a)(2)). See Docket No. 96-13, Motions of Philadelphia Regional Port Authority and Pasha Auto Warehousing, Inc. for Summary Judgment Denied, pp. 57-63, and cases cited therein, served February 9, 2000.

CIP asserts that it has no "past" that is related to the unlawfully discriminatory conduct detailed in the Amended Complaint and in CMH's reply to the motions to dismiss, accompanied by the January 29, 2000 Stender Affidavit. For example, CIP denies that it existed through most of the period covered by the Amended Complaint and also contends that CIP is an entirely separate company from Performance Automotive Services, Inc. which negotiated an agreement with SPA in 1997 for use of facilities at the Charleston Naval Complex's Alpha Pier. CIP Reply at 4; CMH reply at 55-56.

CMH shows that these assertions are plainly contradicted by the February 11, 1998 letter signed by Richard L. Tapp, Jr., Vice-President of Charleston International Projects, Inc., in which Mr. Tapp described CIP as "E/Ma Performance Automotive Services, Inc." See Attachment K to January 29, 2000 Stender Affidavit. CIP's prior existence and complicity as a necessary participant in the RDA-SPA scheme to discriminate unlawfully against CMH and others, if proven, would show

that the culmination of this plan for CIP was the entry into its agreement with SPA and the ongoing implementation of that agreement, all of which, together, constitute continuing violations of the 1984 Act.

Unreasonable Practices

An ocean terminal is akin to a “public utility,” demanding unequivocal fairness in the provision of such facilities. *Investigation of Free Time Practices-Port of San Diego*, 7 S.R.R. 307, 329-330 (FMC 1966); *Marine Terminal Practices of the Port of Seattle*, 18 S.R.R. 141,159 (Initial Decision 1978), citing *American Export Isbrandtsen Lines, Inc. v. F.M. C.*, 444 F.2d 824, 828-829 (D.C. cir. 1970).

The Commission’s test for reasonableness was set forth in *West Gulf Maritime Assn. v. Port of Houston Authority*, 18 S.R.R. 783,790 (FMC 1978), aff’d without opinion *sub nom. West Gulf Maritime Ass’n v. Federal Maritime Comm’n*, 610 F.2d 100 (D.C. Cir.), *cert. denied*, 449 U.S. 822 (1980), stating that “[t]he test of reasonableness as applied to terminal practices is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view.”

The conclusion can be reached on the basis of facts thus far presented that at the Naval Complex, RDA, SPA and CIP are engaged in “excessive” and discriminatory terminal practices through the unfair and unreasonable granting of exclusive use of terminal facilities that have produced and will continue to produce “unreasonable” and harmful consequences to CMH, to the shipping public and to other potential port users. Thus the conclusion could also be reached that

RDA, SPA and CIP have failed in their responsibilities as marine terminal operators to “establish, observe and enforce just and reasonable practices relating to the use of terminal facilities” in connection with common carriage at the Naval Complex.

**Unreasonable Preference or Advantage and
Unreasonable Prejudice or Disadvantage**

CMH contends that RDA and SPA have given CIP and others an unreasonable preference and advantage with respect to the leasing, allocation and use of terminal facilities; that RDA, SPA and CD? have subjected CMH, its vessels, its cargoes and its terminal operations to an unreasonable refusal to deal and negotiate in good faith and to undue and unreasonable prejudice and disadvantage with respect to the leasing, allocation and use of terminal facilities; that RDA and SPA have refused to negotiate in good faith with or to make available to CMH adequate and suitable terminal, pier, dock, and storage facilities, and have interfered with CMH’s right to the use of such facilities; that RDA and SPA have granted terminal space and concessions to CIP and others while unreasonably denying comparable terminal space and concessions to CMH contrary to RDA’s and SPA’s mandate as public terminals; and that RDA and SPA have unjustly discriminated against CMH and its cargoes and unduly preferred CIP. Thus, the facts which support a finding of section 10(d)(1) violations, discussed above, and if proven, also could support a finding that RDA, SPA and CIP have subjected CMH to unreasonable prejudice and disadvantage and granted SPA and CIP unreasonable preference and advantage, including self-preference. The *court in Plaquemines, supra*, recognized that the same set of circumstances can violate both the reasonableness and the anti-discrimination standards of the 1984 Act. *Id.*, 547.

Contrary to respondents' assertions (RDA Mem.; SPA Motion) the relief requested by CMH would be within the Commission's authority to grant. Moving this case forward would not be an exercise in futility. It is for the Commission to determine the appropriate remedy if it finds marine terminals to have engaged in unreasonable and discriminatory conduct under the Act. *State of California v. United States*, 320 U.S. 577. 583 (1944). As the Supreme Court reiterated:

Finding a wrong which it is duty-bound to remedy, the Maritime Commission, as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing.

Id., 584.

Respondents' suggestion that the issues in this proceeding should properly be decided in pending cases before administrative and judicial forums in South Carolina improperly seeks to divest the Commission of jurisdiction. The "[p]endency of a state court suit cannot defeat [Commission] jurisdiction," even if they "were predicated on the identical matter" when the conduct of marine terminal operators is at issue. *International Trading Corporation of Virginia, Inc. v. Fall River Line Pier, Inc.*, 3 S.R.R. 1043, 1049 (FMC 1964). Further, respondents are incorrect in claiming that a legislative investigative committee in South Carolina has exonerated RDA of alleged wrongdoing in connection with its conduct regarding the Naval Complex. The investigation being conducted by this committee has not been completed and has not cleared RDA of the allegations. (Mescher Aff.)

The Supreme Court has upheld the Commission's proper role in asserting jurisdiction in a case such as this:

The Commission simply cannot defer to the courts matters which are so intricately involved with its responsibilities under the shipping statutes.

Pacific Maritime Assn.-Cooperative Working Arrangements, 14 S.R.R. 1447, 1451 (FMC 1975), affd. *Federal Maritime Commission v. Pacific Maritime Assn.*, 435 U.S. 40 (1978). In the circumstances, respondents' motions to dismiss will be denied.

IT IS ORDERED: (1) that the letter dated January 8, 2000, fi-om the State of South Carolina Budget and Control Board to South Carolina Governor James M. Hodges is accepted as an addendum to RDA's Reply dated March 1, 2000; and (2) that the letter of CMH dated March 7, 2000, in response, is noted and accepted for filing as are the letters of December 6, 1999 and March 10, 2000, attached to CMH's letter of March 20, 2000.

IT IS FURTHER ORDERED: (1) that the motions of RDA, SPA and CIP to dismiss CMH's Complaint, as amended, are denied; (2) that the Commission has personal and subject matter jurisdiction in this proceeding; (3) that the respondents are required to answer CMH's Complaint, as amended; and (4) that the respondents should confer with complainant and present an appropriate joint procedural schedule to govern the next phase of this proceeding on or before May 31, 2000.


Frederick M. Dolan, Jr.
Administrative Law Judge