

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 12-03**

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**THE AUCTION BLOCK COMPANY, an ALASKA CORPORATION, and  
HARBOR LEASING, LLC, an ALASKA LIMITED LIABILITY COMPANY**

**v.**

**THE CITY OF HOMER, a MUNICIPAL CORPORATION, and its PORT OF HOMER**

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**INITIAL DECISION<sup>1</sup>**

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**I. INTRODUCTION**

**A. Overview and Summary of Decision**

On April 2, 2012, Complainants The Auction Block Company (“Auction Block”) and Harbor Leasing, LLC, (“Harbor Leasing”) filed a complaint against Respondents The City of Homer (“City”) and its Port of Homer (“Port”) alleging violations of the Shipping Act of 1984 (“Shipping Act”), 46 U.S.C. § 40101 et seq.<sup>2</sup> Complainants allege that the City and Port are marine terminal operators who violated the Shipping Act by unreasonable prejudice or preference, refusal to deal, and unfair practices. Fourth Amended Complaint (“4th Complaint”) at 3; 46 U.S.C. §§ 41106(2), 41106(3), and 41102(c) (formerly sections 10(d)(4), 10(d)(3), and 10(d)(1)) .

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<sup>1</sup> The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

<sup>2</sup> On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill’s purpose was to “reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.” H.R. Rep. 109-70, at 2 (2005).

Respondents denied the Complainants' allegations in their revised fourth amended complaint ("Answer to 4th Complaint"). Respondents raise as defenses that the Commission lacks subject matter jurisdiction; the complaint fails to state a claim for which relief can be granted; and reparations are barred by the statute of limitations. Answer to 4th Complaint at 3.

Commercial and sport fishing for halibut, salmon, and black cod are mainstays of the Homer, Alaska, economy. RX 1232. The Homer Port and Harbor are located on a 4.5 mile-long promontory into Kachemak Bay called the Homer Spit. RX 1086, 1224. The Spit is home to three separate and distinct terminal facilities. RX 1225. At the very end of the Spit and outside the City harbor, the City operates its Deep Water Dock and its Pioneer Dock. RX 1225. Within the City harbor, which is created and protected by a jetty, the City operates the Fish Dock and small boat docks. RX 1225, 1229 (map).

Auction Block is a seafood processing and logistics firm engaged in the primary purchase and processing of Alaskan seafood, the provision of fishing vessel services, and the procurement and use of terminal services. 4th Complaint at 1; Answer to 4th Complaint at 1. In addition, Auction Block receives, handles, stores, and delivers fish. 4th Complaint at 1; Answer to 4th Complaint at 1. Harbor Leasing is a real estate management company that leases property from the City of Homer and leases property to Auction Block. The case involves a lease between the City and Harbor Leasing dated March 26, 2008, for Fish Dock terminal facilities utilized by Auction Block. CX 217.

As discussed more fully below, the evidence does not demonstrate that the City and Port violated the Shipping Act. Specifically, Complainants have not established that the lease is subject to Commission jurisdiction. The evidence does not support a finding that the City and Port are marine terminal operators as required for the violation because the terminal facilities at issue are not provided in connection with a common carrier as defined by the Shipping Act. Rather, at most, the lease impacts the local fishing industry. Accordingly, the Complainants have not met their burden to demonstrate a Shipping Act violation.

## **B. Procedural Background**

Complainants initiated this proceeding on April 2, 2012, by filing a complaint with the Federal Maritime Commission alleging that Respondents violated the Shipping Act. Complainants amended the complaint as the proceeding progressed with the fourth amended complaint being filed on October 19, 2012. During the course of the proceedings, the Complainants dismissed some of their original allegations.

Respondents denied the allegations in their revised fourth amended answer, accepted on November 27, 2012. Order Granting Motion to Amend Respondents' Answer to Fourth Amended Complaint to Include Verification (ALJ Nov. 27, 2012). Respondents raised as defenses that the Commission lacks subject matter jurisdiction; the fourth amended complaint fails to state a claim for which relief can be granted; and reparations are barred by the statute of limitations. 4th Amended Complaint at 3.

The parties had a number of discovery disputes. These discovery issues were addressed in an October 25, 2012, Order on Pending Motions; a November 27, 2012, Order on Motion to Compel; and a December 21, 2012, Order on Motions for Sanctions and Expedited Consideration. A November 27, 2012, Order Denying Motions for Summary Decision denied Complainants' motion seeking summary decision based on the absence of any genuine issues of material fact and denied Respondents' motion seeking partial summary decision based on the statute of limitations. Additional orders addressed the timing and page limits of the parties' briefs.

Complainants filed their initial brief and proposed findings of fact on December 4, 2012. Respondents filed their response on January 4, 2013, with corrections filed on January 18, 2013. Complainants filed their reply on January 25, 2013, with corrections to the reply brief filed on January 30, 2013. Two motions filed during or after briefing are addressed below.

### **C. PENDING MOTIONS**

#### **1. Motion for Leave to File Documents Under Seal**

On January 4, 2013, Respondents filed a motion for leave to file documents under seal and memorandum in support. Respondents seek to keep fish ticket data confidential as required by Alaska statutes. Specifically, Respondents request that confidential treatment be accorded to appendix exhibits RX 836-1078, RX 1263-1309, and sections of their prehearing brief. On February 19, 2013, Respondents filed a similar motion, seeking to seal portions of their motion to strike and for sanctions, which discusses specific Alaska fish financial data.

On February 27, 2013, Complainants filed a motion to join in Respondents' motion for leave to file documents under seal and memorandum in support. Complainants concur with Respondents' efforts to protect the confidentiality of business and tax information.

Commission rules permit the presiding officer to order that "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." 46 C.F.R. § 502.201(h)(vii). The financial data sought to be protected is confidential commercial information protected under Alaska law. Good cause having been shown, the Respondents' motion for leave to file documents under seal is granted.

#### **2. Motion to Strike and for Sanctions**

On February 19, 2013, Respondents moved to strike specific assertions in Complainants' reply brief and moved for sanctions. Respondents object to references in Complainants' reply brief to Alaska fish financial data that was not provided in discovery; argue that Complainants misled the tribunal with their report of tax revenues; contend that the reply brief exceeds its permitted scope; address additional alleged mischaracterizations and falsehoods that bolster the need to strike additional portions of the reply brief; and assert that sanctions are warranted. Respondents attach the financial records provided by Complainants in discovery, stating "*None* of the documents included descriptions of amounts paid by Auction Block to the State of Alaska pursuant to the

various taxes the State levies on such purchasers and processors.” Motion to Strike at 4-5 (emphasis in original).

On February 27, 2013, Complainants filed their response to the motion to strike and for sanctions. Complainants assert that Respondents filed a sur-reply without an accompanying motion and that the Alaska fish financial data was “disclosed by Complainants to Respondents either in this proceeding or as part of the regular reporting requirements of The Auction Block Company to the City of Homer.” Opposition at 3. Complainants discuss affidavits presented by Respondents to which the Complainants object. Complainants submit a letter dated February 25, 2013, from a CPA, which they state should be a sufficient explanation of the treatment of fish taxes by a business. Opposition to Motion to Strike at 12 and Appendix.

The Alaska fish financial data has been the subject of two prior motions. Respondents filed a motion to compel on October 29, 2012, which sought evidence of damages in fishing reports, evidence of damages in other documents, and evidence of common carrier status. The Order on Motion to Compel, issued November 27, 2012, states:

Complainants contend that the Respondents should have obtained the fishing reports from the State of Alaska, however, they then refuse to provide the release necessary to do so. Complainants will cooperate with respondents’ attempts to obtain the fishing reports at issue from the State of Alaska by signing the requested release. If complainants intend to rely on invoices, receipts, bills of lading, or other documents recording the transportation of fish to or from Auction Block’s facilities to any fish processing plant, those documents must be provided to respondents. The issue of common carrier status will be resolved on the merits after briefing.

Accordingly, it is hereby **ORDERED** that the motion for leave to file the motion to compel be **GRANTED** and that the motion to compel be **GRANTED IN PART AND DENIED IN PART**. Complainants will cooperate with respondents by signing a release and shall supplement any remaining discovery by November 30, 2012. *Parties will not be permitted to rely on documents that were not provided to the opposing party.* Any remaining or unresolved issues should be addressed in the proposed findings of fact and brief with appendix.

Order on Motion to Compel at 2 (emphasis added).

On December 19, 2012, Respondents filed a motion for sanctions, seeking sanctions for Complainants’ failure to cooperate with them to obtain fish ticket processor data from the State of Alaska. In a December 21, 2012, Order on Motions for Sanctions and Expedited Consideration, the parties were instructed:

Complainants were previously ordered to cooperate with respondents in providing the requested discovery by November 30, 2012, and have been warned not to rely on information that was not provided to opposing counsel in discovery. In addition, the

parties have previously been instructed that any remaining or unresolved issues should be addressed in the proposed findings of fact and brief with appendix.

*Complainants face sanctions if they fail to disclose relevant information, particularly where they have offered to provide the information and have been ordered to do so.* Given the current time frame, however, this issue may not be resolved prior to briefing. Therefore, the parties may brief the issue of sanctions for failure to provide discovery on fish processor data in their remaining briefs due on January 4, 2012, and January 18, 2012.

Order on Motions for Sanctions and Expedited Consideration at 1-2 (emphasis added).

Despite an opportunity to identify when the Alaska fish financial data was provided to Respondents, Complainants have failed to do so. Moreover, Complainants were unable to indicate whether the financial data was even disclosed to Respondents in this proceeding or as part of the regular reporting requirements. Complainants have been specifically warned, twice, that failure to produce in discovery requested information could result in a sanction. Based on their willful failure to produce the requested information in this proceeding, and their reliance on information not provided in discovery or in response to a motion to compel, good cause exists to impose a sanction. The section of Complainants' reply brief labeled *Complainants Are Paying More Fish Tax*, pages 5-7 of the reply brief, is stricken and excluded from consideration. No additional sanctions will be imposed.

#### **D. Evidence**

Under the Administrative Procedures Act ("APA"), an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision is based on the pleadings, exhibits, testimony, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this initial decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

All of the exhibits provided by the parties are admitted and were considered. This initial decision provides specific findings of fact; an analysis and conclusions of law with a discussion of burden of proof, statutory framework, and jurisdiction; and the Order.

## **II. FINDINGS OF FACT**

The parties agreed to a number of facts.<sup>3</sup> These undisputed facts are provided prior to the additional facts necessary to reach a decision in this proceeding.

### **A. Undisputed Facts**

1. The City of Homer, Alaska, is a small seaside community of approximately 5,000 people in southcentral Alaska. RX 1086, 1224.
2. The City of Homer is a municipal corporation, organized under the laws of the State of Alaska.
3. The City of Homer is owner and operator of the City of Homer Port and Harbor. RX 1086, 1224.
4. The Port and Harbor are located on a 4.5 mile-long promontory into Kachemak Bay called the Homer Spit ("Spit"). RX 1086, 1224.
5. Commercial and sport fishing for halibut, salmon, and black cod are mainstays of the local economy. RX 1232.
6. The City operates a public dock on City property.
7. In the 1970s, Seward Fisheries, Inc., was a seafood processing company interested in acquiring an existing processing plant in Homer. It later changed its name to Icicle Seafoods, Inc. RX 81-82; CX 208.
8. On September 14, 1979, Icicle and the City entered into a 25-year Lease Agreement, with an additional 25-year option to renew, which is referred to as the Icicle Lease. CX 192-207; RX 83, 1089.
9. The Icicle Lease, dated September 14, 1979, is recorded at Book 111, Pages 884 through 902A in the Homer Recording District. CX 192-207.

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<sup>3</sup> The facts agreed to by the parties are accepted with minor changes to citations. Because the parties agree to these facts, the facts without citations to the record are accepted as stipulations.

10. An amendment to the Icicle Lease dated July 1, 1986, is recorded at Book 172, Pages 673 through 678 in the Homer Recording District and leases the following property ("First Amendment to the Icicle Lease"):

- Lessee shall have the use of the covered structure at the Fish Dock.
- Lessee may continue to operate its ice dispensing equipment at its present location on the Fish Dock.
- Lessee shall have the use of loading cranes No. 7 and 8 to a maximum of 1,850 hours per year. Use of the cranes by Lessee in excess of that time shall be at the rate of Fifteen Dollars (\$15.00) per hour.
- Seafood wharfage charges are included within the rental given above.
- Lessee shall have the use of one fish buying shed. Lessor shall have the right to select the shed for Lessee's use.

CX 208-212.

11. The Second Amendment of the Icicle Lease dated January 25, 1988, with an effective date of September 14, 1987, is recorded at Book 181, Pages 383 through 386 in the Homer Recording District and leases the following property:

- The existing camping area shall be relocated to an area reasonably close to Lessee's processing operations in order to facilitate placement of fill material on the West side of the Homer Spit.
- The existing parking arrangements will be re-evaluated and amended to reflect changes resulting from the Interim Spit Plan at the next scheduled review of the lease.
- Dock use includes crane use up to 1300 hour maximum. All hours of use above the 1300 hour maximum shall be charged at the rate of \$15 per hour. Crane use is no longer limited to cranes No. 7 and 8.

CX 213-216.

12. The Icicle Lease included a provision stating that every four years the parties would re-appraise the value of the property, and then replace the rates in the Icicle Lease with the new rental rates. CX 194-195.

13. On July 1, 1998, the Icicle plant burned down. RX 1090.

14. Despite the loss of its plant, Icicle maintained a presence in the City. RX 1117-1122.
15. To date, Icicle has not rebuilt its plant. RX 1117-1122.
16. Icicle now brings in a floating processor in the summer and docks it at the Deep Water Dock but does not operate a shoreside processing plant in Homer. RX 8, 1087, 1090, 1115-1116.
17. Icicle continues to use the facilities described above for the handling of its catch and pays the rates set by the 1986 Lease Amendment.
18. Auction Block has been operating in the City since the early 1990s.
19. Initially Auction Block was a sole proprietorship and an online company acting as a broker between fish buyers and commercial fishermen. RX 10.
20. The Auction Block Company was incorporated in the State of Alaska as a corporation in 1998 and is still in good standing in the state of Alaska.
21. In 2007, the City issued a Request for Proposals (“RFP”) seeking proposals by entities interested in leasing Lot 12C on the Homer Spit. RX 91-227.
22. Harbor Leasing, LLC, was organized as an Alaska limited liability company on January 29, 2008, and is still in good standing in the state of Alaska. CX 249.
23. Harbor Leasing, LLC, is a business in Homer that leases property from the City. Harbor Leasing, LLC, responded to the RFP with a lease proposal, intending to sublease Lot 12C to Auction Block, a business in Homer that was interested in using the lot for a seafood-related business. CX 252-253.
24. Harbor Leasing, LLC, was the only entity to respond to the RFP.
25. A little more than one year after Harbor Leasing submitted its initial RFP response, the parties signed an agreement for a twenty-year lease of Lot 12C with two five-year options to renew (“Harbor Leasing Lease”). CX 217-220.
26. The Harbor Leasing Lease between Harbor Leasing, LLC, and the City of Homer was not recorded until February 19, 2009. The document was officially recorded on “2/19/2009 at 3:19 PM” as indicated by the state of Alaska notation in the upper right hand corner. CX 217.
27. The First Amendment to the Harbor Leasing Lease is dated February 18, 2009, was signed on February 18, 2009, and recorded with the Complainants’ Lease. CX 265-266.

28. Under the Harbor Leasing Lease, Complainants agreed to “pay for wharfage, crane use, ice, and other Port and Harbor Services at the rates published in the Port and Harbor Terminal Tariff.” CX 223.
29. Auction Block also agreed to and did construct a “fish buying facility and associated office, warehouse, cold storage, staging, and operational and logistical support for dock operations.” CX 227-228.
30. Respondents filed with the Federal Maritime Commission (“FMC”) a “Terminal Tariff No. 600 Filed under ATFI Rules” effective January 1, 2009, for the years 2009 and 2010; a “Terminal Tariff No. 600 Filed under ATFI Rules” effective January 1, 2011; a “Terminal Tariff No. 600 Filed under ATFI Rules” effective April 25, 2011; and a “Terminal Tariff No. 600 Filed under ATFI Rules” effective July 25, 2011. CX 64-103.
31. Mr. Hogan served as a Commissioner on the City of Homer Port and Harbor Advisory Commission from April 9, 2007, through October 20, 2009. RX 711, 713.
32. Mr. Hogan served as a Commissioner on the City of Homer Economic Development Advisory Commission from November 13, 2007, through October 20, 2009. RX 712-713.
33. Mr. Hogan served as a Council member on the Homer City Council from October 20, 2009, through his resignation on March 12, 2012. RX 713.
34. The Parties dispute the level of processing occurring at the shoreside fish processing facility operated by Complainants as well as to its current or projected capacity. However, both Parties agree that The Auction Block Co. owns, and is using to some extent, a shoreside fish processing facility.
35. Auction Block uses the City’s Fish Dock cranes as part of its business.
36. One of Auction Block’s custom offloading customers is Icicle. CX 625-679.
37. Icicle is also a buyer from whom Auction Block seeks bids when conducting an auction for fish. CX 625-679.
38. The Individual Fish Quota System reduced the quota in the halibut industry the last two years.
39. Complainants are not registered as vessel-operating common carriers or licensed as non-vessel-operating common carriers with the FMC. RX 40.
40. Respondents are registered as a “marine terminal operator” with the FMC. Notice is posted on the FMC’s website. RX 1087.

## **B. Additional Facts**

41. The Homer Spit is home to three separate and distinct terminal facilities. RX 1225, 1229 (map).
42. The Homer Port is comprised of two commercial docks, the Pioneer Dock and Deep Water Dock, and a harbor basin containing small boat docks, the Fish Dock, and a commercial barge ramp. RX 1100.
43. At the very end of the Spit and outside the City harbor, the City operates its Deep Water Dock and its Pioneer Dock. RX 1225.
44. Within the City harbor, which is created and protected by a jetty, the City operates the Fish Dock and small boat docks. RX 1225.
45. Unlike the Harbor, the Deep Water Dock and the Pioneer Dock are able to accommodate large deep draft ocean-going vessels due to their open water location on Kachemak Bay and the deeper waters surrounding those docks. RX 1102, 1225.
46. The Alaska Marine Highway, a state run ferry system shuttling passengers between Alaska communities, moors at the Pioneer Dock, as does an occasional cruise ship. RX 1087, 1101.
47. The Deep Water Dock is the terminal facility where large vessels such as common carriers, scrap metal barges, Icicle Seafoods' floating processor, and cruise ships dock. RX 1225.
48. While the City definitely attempts to draw large vessels to its Deep Water Dock, common carriers generally moor in Anchorage, Alaska, which is a major ocean transportation hub located approximately 220 nautical miles from Homer. RX 1225-1226.
49. The Pioneer Dock and Deep Water Dock have designated restricted/non-restricted areas, gated TWIC access, and comply with the United States Coast Guard's requirements for regulated/non-regulated vessels utilizing those facilities. RX 1101.
50. The City's Fish Dock, given its shallow waters and the protection afforded it by a jetty, cannot accommodate large deep draft ocean going vessels and is used strictly by fishing vessels and recreational boaters. RX 1100, 1225.
51. The cranes fixed to the Fish Dock are large enough to lift the nets of fish coming into port but not capable of lifting the Conex containers generally used for cargo shipment. RX 1087, 1101-1102.
52. Icicle's salmon floating processor is too large to dock at the City's Fish Dock and thus uses the Deep Water Dock. RX 1087.

53. No common carriers are permitted or able to use the Fish Dock. RX 1087.
54. The City provides services to occasional common carriers and cruise ships on its Deep Water Dock and Pioneer Dock but not at the Fish Dock. RX 1087.
55. While most of the cruise ships do not originate from foreign ports and the City serves only a handful of common carriers annually, the City believed that the use of its Deep Water Dock facilities by an occasional common carrier obligated the City to register as a marine terminal operator under the Act and comply with its provisions. RX 1087.
56. The City has adopted policies specifying that the primary purpose of the Fish Dock is for the use of commercial fishing operations. RX 1087.
57. While the City chooses to apply the tariff to the Fish Dock, it does so to ensure transparent and uniform governance of all City facilities and never intended to subject itself to the Shipping Act for conduct on that dock. RX 1243.
58. Commercial and sport fishing provide income for many residents, a substantial tax base for the City, and draw tourists from around the globe. The Fish Dock has been designed by the City to foster that industry. RX 1232.
59. The City leases about twenty-four parcels on the Spit for a variety of different uses ranging from restaurants and theaters to fish buyers like Icicle and offloaders like Auction Block. RX 1231.
60. The City's primary goals in leasing property in the Spit adjacent to the Fish Dock are to foster economic development and the commercial fishing industry. RX 1232.
61. Auction Block was originally an online auction company. RX 10.
62. The lease between Complainants and Respondents describes the use of the property as follows:

Except as otherwise provided herein, Tenant must use the Property for the following purposes:

Fish buying facility and associated office, warehouse, cold storage, staging, and operational and logistical support for dock operations. Primary and secondary commercial and sport seafood processing, retail seafood sales, maintenance and general fisherman's support facilities.

Tenant must use the Property for no other purposes without the Landlord's written consent ...

CX 225 (capitalization altered).

63. Auction Block's General Manager, Jessica Yeoman, described the primary activities of Auction Block as offloading, processing, and brokering (buying and selling) fish. RX 608-610. She testified:

Q. And do you ship – or does the company ship some of the product internationally?

A. We hire – usually we'll – yes, we do. We ship internationally. I use – you know, I will sell the fish to a buyer, who then – you know, I know that we're packing for international. So we do different things. We have different labels. But, yes, that has happened in the past.

RX 611-612.

64. Auction Block admits that it, “does not advertise the transportation of either cargo or passengers by water.” CX 27.

65. Auction Block does not provide any services on the Deep Water Dock or Pioneer Dock. RX 1101.

66. Auction Block does not operate a vessel, although its owners own vessels. CX 26-27.

67. Auction Block's transportation of fish is exclusively undertaken by truck, according to the bills of lading produced by Auction Block. RX 1310-1311.

### **III. ANALYSIS AND CONCLUSIONS OF LAW**

#### **A. Burden of Proof**

To prevail in a proceeding brought to enforce the Shipping Act, a complainant has the burden of proving by a preponderance of the evidence that the respondents violated the Act. 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); 46 C.F.R. § 502.155; *Exclusive Tug Franchises*, 29 S.R.R. 718, 718-19 (ALJ 2001). “[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA's unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.” *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). “[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose.” *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation.

*Waterman S.S. Corp. v. General Foundries Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

## **B. Statutory Framework**

### **1. Unreasonable Preference or Prejudice**

Complainants allege three violations of the Shipping Act. The first alleged violation is that the City and Harbor gave Icicle Seafood an undue or unreasonable preference or advantage. The statute states: “A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.” 46 U.S.C. § 41106(2) (formerly Shipping Act § 10(d)(4)).

The Commission has established factors to consider:

In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury.

*Ceres Marine Terminal, Inc. v. Maryland Port Admin.*, 27 S.R.R. 1251, 1270 (FMC 1977), *aff'd in part, remanded*, 28 S.R.R. 545 (4th Cir. 1998) (footnote omitted) (citing *Distribution Services, Ltd. v. Trans-Pacific Freight Conf. of Japan*, 24 S.R.R. 714, 720 (FMC 1988)). “The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors. *Ceres*, 27 S.R.R. at 1270-71 (citing *Cargill, Inc. v. Waterman Steamship Corp.*, 21 S.R.R. 287 (FMC 1981)).

### **2. Refusal to Deal**

Complainants’ second allegation is that the City and Port refused to deal or negotiate with Auction Block. The statute states: “A marine terminal operator may not . . . (3) unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41106(3) (formerly Shipping Act § 10(d)(3)). “This requires a two-part inquiry: whether [the port authority] refused to deal or negotiate, and, if so, whether its refusal was unreasonable.” *Canaveral Port Auth.*, 29 S.R.R. 1436, 1448 (FMC 2003). The Commission has held that a port authority’s refusal to consider a proposal constitutes a refusal to deal or negotiate. *Id.* The Commission “must determine whether the refusal was unreasonable or whether it may have been justified by particular circumstances in effect.” *Docking and Lease Agreement By and Between City of Portland, Maine and Scotia Prince Cruises Limited*, 30 S.R.R. 377, 379 (FMC 2004). And in doing so, the Commission has held that with respect to a port authority, “in determining reasonableness, the agency will look to whether a marine terminal operator gave actual consideration of an entity’s efforts at negotiation.” *Canaveral Port Auth.*, 29 S.R.R. at 1450.

The Commission explained the underlying reason for and purpose of the application of the Shipping Act here:

One of the fundamental purposes of the Shipping Act of 1984 is the establishment of a nondiscriminatory regulatory transportation process for the common carriage of goods in the U.S. foreign commerce. . . . The Commission . . . recognized this policy in stating that “[t]he prevention of economic discrimination is at the heart of the regulatory scheme established by Congress in the 1984 Act. . . . In furtherance of the Act’s declared policy of maintaining a nondiscriminatory transportation system, Section 10 contains various provisions prohibiting certain unjustly discriminatory, preferential or prejudicial practices.

*Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, B.V.*, 25 S.R.R. 1308, 1313 (FMC 1990) (citing *Motor Vehicle Manufacturers Ass’n of the United States, Inc.*, 25 S.R.R. 849, 853 (FMC 1990)).

### **3. Unreasonable Regulations and Practices**

Complainants’ third allegation is that the City and Port failed to establish just and reasonable regulations and practices. Section 46 U.S.C. § 41102(c) (formerly Shipping Act § 10(d)(4)) provides that a marine terminal operator “may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” “[A]s applied to terminal practices, we think that ‘just and reasonable practice’ most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view.” *West Gulf Maritime Ass’n v. Port of Houston*, 18 S.R.R. 783, 790 (FMC 1978); *NPR, Inc. v. Bd. of Comm’rs of the Port of N.O.*, 28 S.R.R. 1512, 1531 (ALJ 2000) (quoting *Investigation of Free Time Practices-Port of San Diego*, 7 S.R.R. 307, 329 (FMC 1966)).

#### **C. Jurisdiction**

##### **1. Background**

Complainants describes themselves as “two interrelated companies doing business in Homer, Alaska, buying and selling commercially caught fish and other seafood in Alaska for processing, freezing, storage, sale and distribution in America and the international market.” Brief at 1.

The Homer Port and Harbor is located on a 4.5 mile-long promontory into Kachemak Bay called the Spit. RX 1086, 1224. Commercial and sport fishing for halibut, salmon, and black cod are mainstays of the local economy. RX 1232. The Spit is home to three separate and distinct terminal facilities. RX 1225.

At the very end of the Spit and outside the City harbor, the City operates its Deep Water Dock and its Pioneer Dock. RX 1225. Within the City harbor, which is created and protected by a jetty, the City operates the Fish Dock and small boat docks. RX 1225. Unlike the harbor, the

Deep Water Dock and the Pioneer Dock are able to accommodate large deep draft ocean going vessels due to their open water location on Kachemak Bay and the deeper waters surrounding those docks. RX 1102, 1225. The primary purpose of the Fish Dock is for the use of local commercial fishing operations. RX 1087. The parties disagree as to whether the Fish Dock in the harbor serves common carriers.

## 2. Arguments of the Parties

Complainants assert that the Commission has subject matter and personal jurisdiction because Complainants are common carriers and Respondents are marine terminal operators. Brief at 74-78. Complainants allege that Auction Block is a common law common carrier and that the Shipping Act should be given broad construction and interpretation. Brief at 74-75. Complainants further allege that the City and Port are marine terminal operators because they registered with the Commission as a marine terminal operator and because they maintain a tariff which they filed with the Commission and applied to Respondents. Brief at 76-77. Complainants conclude that the Commission has subject matter and personal jurisdiction, relying on federal and commission caselaw. Brief 78-87.

Respondents contend that the Federal Maritime Commission does not have jurisdiction over Auction Block's claims; the City's Fish Dock operations fall outside the Commissions' jurisdiction; the City of Homer is not a marine terminal operator for activity on the Fish Dock; and Auction Block is not a common carrier. Opposition Brief at 26-35. Respondents argue that "to expand the FMC's authority beyond the international shipping arena and into the heavily regulated and localized fishing industry would be devastating to communities across the country and would be in direct contradiction with the stated purpose of the [Shipping] Act." Opposition Brief at 27.

## 3. Legal Analysis

Proper jurisdiction for a federal court is fundamental and necessary before touching the substantive claims of a lawsuit. *Arena v. Graybar Elec. Co., Inc.*, 669 F.3d 214, 223-24 (5th Cir. 2012). "A litigant generally may raise a court's lack of subject matter jurisdiction at anytime in the same civil action, even initially at the highest appellate instance." *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 576 (2004) (citations omitted). When a defendant makes a "factual" attack on a court's subject-matter jurisdiction, the court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Morris v. U.S. Dept. of Justice*, 540 F. Supp. 898, 900 (S.D. Tex.1982), *aff'd*, 696 F.2d 994 (5th Cir.1983). The party asserting jurisdiction bears the burden of proof if the opposing party raises lack of subject matter jurisdiction. *Branon v. Debus*, 289 Fed. Appx. 181, 183, 2008 WL 3307218, \*2 (9th Cir. 2008) (citing *Lew v. Moss*, 797 F.2d 747, 749 (9th Cir.1986)).

The Commission has jurisdiction over the violations alleged by Complainants if the City and its Port are marine terminal operators. 46 U.S.C. 41102(c) ("A common carrier, marine terminal operator, or ocean transportation intermediary may not"); 46 U.S.C. 41106 ("A marine terminal operator may not –"). There are no allegations or indications that the City and its Port are common

carriers or ocean transportation intermediaries. Therefore, to be liable under these sections of the Shipping Act, Complainants must show that Homer and its Port are marine terminal operators within the meaning of the Shipping Act.

The Shipping Act defines a marine terminal operator.

The term 'marine terminal operator' means a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49.

46 U.S.C. 40102(14).

Marine terminal operators provide terminal facilities in connection with common carriers. A common carrier is also defined by the Shipping Act.

(6) Common carrier.--The term "common carrier"--

(A) means a person that--

(i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation;

(ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country; but

(B) does not include a carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker, or by vessel when primarily engaged in the carriage of perishable agricultural commodities--

(i) if the carrier and the owner of those commodities are wholly-owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities; and

(ii) only with respect to the carriage of those commodities.

46 U.S.C. § 40102(6); *see also* 46 C.F.R. § 515.2(f).

The definition of a marine terminal operator has been discussed in a series of tug and harbor

fees cases. In a case involving harbor fees at Plaquemines Port in Louisiana, the Commission stated: “The statutory scheme contemplates regulation of any entity if it exercises sufficient control over terminal facilities to have a discernible effect on the commercial relationship between shippers and carriers involved in that link in transportation.” *Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal Dist.*, 21 S.R.R. 1072, 1079 (FMC 1982) (*Plaquemines I*). The harbor fees at issue were subject to scrutiny because the “Commission finds that such pervasive involvement in the business of common carriers, marine terminals and the commerce of the United States confers on the Commission jurisdiction over the Port.” *Plaquemines I*, 21 S.R.R. at 1080.

In *Petchem*, the respondents asserted that Canaveral Port was not a marine terminal operator, contending that it did not serve cargo common carriers, that cruise ships were not common carriers, and that the tug services at issue did not constitute providing terminal facilities. *Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 974, 981 (FMC 1986), *aff’d*, 853 F.2d 958 (D.C. Cir. 1988). The Commission found that although Canaveral Port may have previously served cargo carriers, and maintained a tariff at the Commission that included charges for servicing cargo carriers, that these facts were not sufficient to find jurisdiction on the basis of serving cargo common carriers. The Commission stated that “*Continental Grain* does not establish that ‘holding out’ by itself creates Commission jurisdiction over a terminal facility. If jurisdiction were to be found here over Port Canaveral on the basis of its tariff publication and solicitation of common carriers, an explicit extension of existing precedent would be required.” *Petchem*, 23 S.R.R. at 983 (discussing *Prudential Lines, Inc. v. Continental Grain Co.*, 21 S.R.R. 133 (ALJ 1981), *aff’d* 21 S.R.R. 1172 (FMC 1982)). The Commission did find jurisdiction based on cruise ships being common carriers and tug activities constituting providing terminal facilities, findings which were discussed but not decided by the federal court on appeal. *Petchem*, 853 F.2d at 961-62.

In a subsequent case involving the Plaquemines Port, the D.C. Circuit addressed the jurisdictional issue.

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.

*Plaquemines Port, Harbor and Terminal Dist. v. Federal Maritime Commission*, 838 F.2d 536, 543 (D.C. Cir.1988) (*Plaquemines II*).

The First Circuit took a different approach, finding that the Commission lacked jurisdiction over a harbor fee, holding that where the Puerto Rico Ports Authority (“PRPA”) does not own or

operate any facilities serving common carriers by water, that fact should end the jurisdictional inquiry. *Puerto Rico Ports Authority v. Federal Maritime Commission*, 919 F.2d 799, 802 (1st Cir 1990) (citing *Plaquemines I*, 21 S.R.R. at 1083 (Moakley, dissenting)). This decision focused on the first element of the marine terminal operator definition – whether services provided include furnishing wharfage, dock, warehouse, to other terminal facilities. In addition, services provided at other ports were not sufficient to create jurisdiction. The First Circuit concluded that while “PRPA may furnish terminal facilities at San Juan and Mayaguez, the Commission properly did not base its jurisdiction on those activities. We hold that PRPA, through the imposition of a harbor service fee at Ponce, has not subjected itself to the jurisdiction of the Commission.” *Puerto Rico Ports Authority v. Federal Maritime Commission*, 919 F.2d at 802.

The Commission clarified the analysis of jurisdictional issues in a subsequent tug case regarding Canaveral Port, stating:

[The Canaveral Port Authority] offers an essential service, tug and towing, and controls access to the terminal facilities based on the use of a predetermined tug operator. Consistent with the D.C. Circuit’s conclusions in *Plaquemines [II]*, this control of access amounts to the furnishing of terminal facilities within the Shipping Act’s definition of marine terminal operator.

*Canaveral Port Authority and Exclusive Tug Arrangements in Port Canaveral, Florida*, FMC Dkts. 02-02 and 02-03, 2003 WL 21551810, \*6 (FMC July 8, 2003) (Order Granting Joint Petition to Approve Settlement and Discontinue Proceedings and Modifying the Findings of Jurisdiction) (citations omitted).

A more recent federal district court case explains that although the ultimate result differed, the legal analysis supporting both *Puerto Rico* and *Plaquemines II* can be reconciled.

The Court agrees with the reasoning of *Puerto Rico* as applied to the allegations here, and concludes that the Bridgeport Port Authority is not a “Marine Terminal Operator” within the meaning of the Shipping Act. Under the plain meaning of the Act, the Port Authority is not engaged “in the business of furnishing wharfage, dock warehouse or other facilities in connection with a common carrier.” The only terminal facility operated by the Port Authority is the Water Street Dock, and it is undisputed that it is used only by the Ferry Company, which is not a common carrier. Although the Port Authority retains regulatory authority over the private cargo terminals at Bridgeport Harbor, there are no claims that it exercised significant control over the use of the terminals by common carriers or limited their access to the terminals. This conclusion is consistent with both *Puerto Rico* and *Plaquemines Port* and reflects the intent of Congress in enacting the Shipping Acts: to encourage participation by U.S. shipping in the international shipping cartels, but prohibit discrimination by terminal facilities serving the commercial maritime trade. Since the Port Authority exercises little control over the operations of the private marine cargo terminals at the Bridgeport Harbor, and since its control over the Ferry

Company does not impact those private facilities, it does not implicate the concerns behind the Shipping Act or make the Authority a “Marine Terminal Operator” under the Shipping Act.

*Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 335 F. Supp. 2d 275, 282-83 (D. Conn. 2004) (citation omitted).

In a more recent decision, the Commission explained that to determine whether a party is a marine terminal operator, the first element of this definition is whether wharfage, dock, warehouse, or other terminal facilities are provided. *The Lake Charles Harbor and Terminal Dist. v. West Cameron Port, Harbor and Terminal Dist.*, Dkt. 06-02, 2007 WL 2468431, at \*4 (FMC Aug. 2, 2007) (Order Discontinuing Proceeding). The second step is to determine whether the facilities are provided in connection with a common carrier. *Id.* In the *Lake Charles* case, the Commission affirmed the granting of a motion to dismiss where the West Cameron Port did not provide any services that constituted the equivalent of terminal facilities. *Id.*, at \*7.

In this proceeding, to determine whether the City and Port are marine terminal operators, it must be determined whether they provide terminal facilities and, if so, whether the facilities are provided in connection with a common carrier. The parties do not dispute that the City and Port provide terminal facilities. The issue *sub judice* is whether the terminal facilities are provided in connection with a common carrier. If Auction Block is a common carrier, the issue is resolved. If not, the question is whether the City and Port serve other common carriers or can otherwise be classified as marine terminal operators. If the City and Port are not marine terminal operators, then the allegations against them must be dismissed for lack of jurisdiction.

### **3. Discussion**

#### **a. Auction Block is not a common carrier**

Complainants assert that they “are a common carrier for purposes of the Shipping Act of 1984 as amended.” Reply Brief at 42, *see also* Brief at 74-96. Complainants “aver that they provide transportation by water of cargo between the United States and foreign countries, namely Canada, Japan, Korea and others.” Reply Brief at 42. Complainants rely on their own answers to Respondents’ discovery requests and statements of Jessica Yeoman, their General Manager and part-owner of Auction Block, to establish that Auction Block is a common carrier. If Auction Block is a common carrier then the Respondents are marine terminal operators serving a common carrier.

Respondents contend that Auction Block is not a common carrier. Respondents point out that Auction Block has not registered and is not licensed with the Federal Maritime Commission as a common carrier and contend that Auction Block failed to show that it (1) holds itself out to the general public to provide transportation by water, (2) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, or (3) uses a vessel operating on the high seas. Opposition Brief at 33.

The evidence in this proceeding is consistent with findings made by the Supreme Court of Alaska regarding Auction Block. *Deaver v. Auction Block*, 107 P.3d 884 (Alaska 2005). The Alaska Supreme Court found that “Auction Block is an Alaska corporation that conducts online auctions of fish and provides other services to fishers and fish buyers.” 107 P.3d at 885. In *Deaver*, a fish seller sued Auction Block demanding payment according to a fish ticket issued to Deaver by Auction Block. Although the issues in *Deaver* were different, and Auction Block’s business has developed significantly since 2005, it provides a helpful example of Auction Block’s transactions. Two fish auctions are described. In the first auction, Deaver’s fish was purchased by Icicle Seafoods; Deaver delivered the fish directly to Icicle in Seward, Alaska; and Deaver paid Auction Block a one percent commission for the transaction. *Deaver*, 107 P.3d at 886. In the second auction, a Vancouver, British Columbia, firm was the highest bidder. Auction Block offloaded the fish from Deaver’s boat; issued Deaver a fish ticket; and arranged to have the fish trucked to Vancouver. *Deaver*, 107 P.3d at 886. Auction Block argued that “it provided services to Deaver – offloading the fish, arranging for their shipment, and processing the necessary administrative paperwork and fisheries reporting requirements – but did not buy his fish.” *Deaver*, 107 P.3d at 890. The court ultimately found that Auction Block was the buyer for statutory and regulatory purposes. *Deaver*, 107 P.3d at 890. These examples demonstrate that Auction Block’s transactions do not involve transportation by water between a foreign port and the Fish Dock.

The lease between Complainants and Respondents describes the use of the property as follows:

Except as otherwise provided herein, Tenant must use the Property for the following purposes:

Fish buying facility and associated office, warehouse, cold storage, staging, and operational and logistical support for dock operations. Primary and secondary commercial and sport seafood processing, retail seafood sales, maintenance and general fisherman’s support facilities.

Tenant must use the Property for no other purposes without the Landlord’s written consent ...

CX 225 (capitalization altered).

The evidence shows that Auction Block is primarily a fish processing plant and fish brokerage service. Auction Block was originally an online auction company. RX 10. Under the Harbor Leasing Lease, Auction Block agreed to and did construct a “fish buying facility and associated office, warehouse, cold storage, staging, and operational and logistical support for dock operations.” CX 225. Auction Block also agreed to “pay for wharfage, crane use, ice, and other Port and Harbor Services at the rates published in the Port and Harbor Terminal Tariff.” CX 223.

Auction Block's General Manager, Jessica Yeoman, described the primary activities of Auction Block as offloading, processing, and brokering (buying and selling) fish. RX 608-610. She testified:

Q. And do you ship – or does the company ship some of the product internationally?

A. We hire – usually we'll – yes, we do. We ship internationally. I use – you know, I will sell the fish to a buyer, who then – you know, I know that we're packing for international. So we do different things. We have different labels. But, yes, that has happened in the past.

RX 611-612.

In her affidavit, Ms. Yeoman states that “[a]bout 70 - 80 percent of The Auction Block business in the last four years involves purchasing, selling, brokering, freezing, processing, transporting and *arranging for the transportation* of commercially caught fish.” CX 171 (emphasis added). In addition “[a]bout 20 - 30 percent of the Auction Block business involves offloads of fresh fish for our fisherman and for others such as Icicle Seafoods.” CX 172.

To support their assertion that they provide transportation by water of cargo between the United States and foreign countries, Complainants cite their own responses to Respondents' requests for admission and Ms. Yeoman's affidavit. In their own response to requests for admission, quoted in their brief, Complainants allege that they pay the tariff rate for the transportation of cargo to engage the services of ocean common carriers; that they act as agent or forwarder for deliveries to foreign countries; that they use water transportation; that they provide water transportation for cargo between the United States and foreign countries for compensation; and that they have paid the tariff for the transportation of cargo by water from the United States to the port of a foreign country. Brief at 41. However, Complainants fail to provide even one bill of lading or other independent evidence supporting these allegations.

In her affidavit, Ms. Yeoman states that the plant “processes, grades, packages and *arranges for the shipping* of Pacific cod milt to Japan; of salmon roe (eggs) to Japan; and of headed and gutted (H & G) Pacific cod and fresh black cod (sable fish) to the U.S., Canada, Korea and Japan.” CX 173 (emphasis added).

The evidence demonstrates that Auction Block arranges for transportation of goods, as do many sellers of goods. Auction Block did not advertise transportation of cargo by water, rather, it held itself out as a fish broker, seller, and processor. Any transportation was incidental to its role as seller of goods, making it the shipper, not the common carrier. Paying a tariff for transportation of cargo by water and engaging common carrier ships, alone, is not sufficient to qualify as a common carrier as that term is used in the Shipping Act. There is not sufficient evidence to find that Auction Block did anything more than sell or distribute goods.

Auction Block admits that it does not hold out to transport cargo or passengers by water, stating that “Auction Block does not advertise the transportation of either cargo or passengers by water, but the transportation of cargo is structured into the business operations despite not being separately noted in representations to the public.” CX 27. There are no advertisements or other evidence in the record that suggest that Auction Block holds out to transport goods by water as required to be a common carrier under the Shipping Act. Similarly, Auction Block did not present convincing evidence to show that it assumes responsibility for the transportation of goods, for example, there is no evidence that Auction Block issues bills of lading.

The definition of common carrier explicitly excludes a carrier when primarily engaged in the carriage of perishable agricultural commodities by a person primarily engaged in the marketing and distribution of those commodities. 46 U.S.C. § 40102(6). While seafood is not an agricultural product, this section is instructive regarding the treatment of the perishable commodity handled by Auction Block. In both cases, the seller is holding out to provide perishable commodities, and any transportation by water is merely incidental.

A Pacific Fishing article, *Kevin Hogan: Changing the Halibut Industry*, focuses on Auction Block’s role as a fish buyer and seller and notes that Homer is a top halibut port, in part, because of its road access, explaining “fresh fish can be trucked down the Alaska Highway, and Anchorage International Airport is just four hours away.” CX 167 (May 1999). The article does note that “for an additional fee [Action Block] also will set up processing or shipping.” CX 166. This article appeared before Auction Block’s processing plant was built in 2009. RX 19.

Complainants assert in their requests for admission responses that Auction Block is not registered as a common carrier with the Federal Maritime Commission but that Auction Block is registered as a common carrier with the United States Department of Transportation and that it operates three trucks which “are actively engaged in receiving, handling, storing, and delivering property including fish product on a regular basis. Most if not all of the fish product originates or is delivered to The Auction Block using the facilities of the Respondents.” CX 26. Complainants do not, however, provide any independent evidence, such as bills of lading, to support the claim that they transport by water between the Fish Dock and a foreign port.

The evidence shows that while Auction Block prepares fish for international shipping and arranges for shipping, it does so as a shipper. Moreover, Complainants did not meet their burden to establish that Auction Block utilizes, “for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country,” as required to be a common carrier. Rather, the evidence suggests that Complainants rely on transportation by truck and by air and there is no persuasive evidence in the record that these shipments are by water. The evidence does not support a finding that Auction Block utilizes a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. Accordingly, the evidence does not support a finding that Auction Block is a common carrier. The next question is whether the Respondents serve other common carriers on the Fish Dock, as required to meet the Shipping Act’s definition of marine terminal operator.

**b. City and Port are not marine terminal operators**

The statutes at issue apply to marine terminal operators. Therefore, Complainants must establish that the City and Port are marine terminal operators for the Federal Maritime Commission to have subject matter jurisdiction. To be a marine terminal operator, the City and Port must provide terminal services to a common carrier. As explained above, Auction Block is not a common carrier. However, it is possible that the City and Port serve other common carriers at the Fish Dock so that they could be considered marine terminal operators. As discussed below, however, the evidence does not support a finding that Respondents are marine terminal operators.

The Complainant “has the ultimate burden of showing facts necessary to establish jurisdiction in the Commission.” *AHL Shipping Co. v. Kinder Morgan Liquids Terminals, LLC*, 30 S.R.R. 520, 521 (ALJ 2004). It would be sufficient to show that the Respondents provide terminal facilities to a common carrier, even if that common carrier were not Auction Block. However, in this case, Complainants have not provided sufficient evidence to show that the City and Port provide Fish Dock facilities to common carriers. Therefore, the City and Port are not marine terminal operators.

The City of Homer and its Port provide wharfage, dock, warehouse, and other terminal facilities on the Fish Dock. The City provides services to occasional common carriers and cruise ships on its Deep Water Dock and Pioneer Dock, but not at the Fish Dock. RX 1087. While most of the cruise ships do not originate from foreign ports and the City serves only a handful of common carriers annually, the City believed that the use of its facilities by an occasional common carrier obligated the City under the Shipping Act to register with the Federal Maritime Commission as a marine terminal operator and comply with Federal Maritime Commission provisions. RX 1087. The City states that while it chooses to apply the tariff to the Fish Dock, it does so to ensure transparent and uniform governance of all City facilities and never intended to subject itself to the Shipping Act for conduct on that dock. RX 1243.

Filing a tariff with the Commission, alone, is not sufficient to establish that the City and Port are marine terminal operators. The Commission, in *Petchem*, stated that “[i]f jurisdiction were to be found here over Port Canaveral on the basis of its tariff publication and solicitation of common carriers, an explicit extension of existing precedent would be required.” *Petchem*, 23 S.R.R. at 983. The Commission did not need to reach the issue, finding that the Port was a marine terminal operator serving common carriers for other reasons. Just as whether Auction Block is a common carrier is not determined merely by its failure to register with the Commission, the issue of whether the Respondents are marine terminal operators is not determined merely by their registration with the Commission.

The evidence shows that the City and Port provide services to occasional common carriers, including cruise ships, on its Deep Water Dock and Pioneer Dock but not on the Fish Dock. RX 1087. It is not clear that common carriers would be able to use the Fish Dock as the cranes are not large enough to accommodate containers. RX 1087, 1101. In fact, Icicle’s salmon floating processor is too large to dock at the City’s Fish Dock and thus uses the Deep Water Dock. RX 1087.

In addition, only the Pioneer Dock and Deep Water Dock have designated restricted/non-restricted areas. RX 1101. There are no advertisements or bills of lading in evidence that show that a common carrier utilized the Fish Dock.

In their responses to findings of fact, Complainants assert that the “City’s Fish Dock is used by coastal freight operations, coastal salvage vessels, landing crafts, oil supply vessels and Foss tugs which may be a common carrier,” although they do not provide citations to any evidence supporting these allegations. Complainants’ Response to Respondents’ Proposed Findings of Fact at 20. The Respondents contested the Commission’s jurisdiction to hear this matter in their answers and the Complainants were aware that jurisdiction was an issue. The Complainants, as the party asserting jurisdiction, bear the burden of proof. *AHL Shipping Co.*, 30 S.R.R. at 521; *see also The Lake Charles Harbor and Terminal Dist.*, Dkt. 06-02, 2007 WL 2468431, at \*4. Mere allegations without supporting factual evidence is not sufficient to meet this burden.

The commercial fishing industry in Alaska is highly regulated by the state. This extensive regulation reflects the state’s strong interest in the management of a local renewable resource. *Deaver*, 107 P.3d at 888. The purpose of the Shipping Act is to encourage participation by United States shipping in the international shipping cartels, but prohibit discrimination by terminal facilities serving the commercial maritime trade. *Bridgeport*, 225 F. Supp.2d at 283. The local Alaska fishing industry does not implicate the international commercial maritime trade nor restrict access to international commerce.

There is not sufficient evidence to find that common carriers currently, or in the past, have utilized the Fish Dock. The mere potential that common carriers might, at some point, utilize the Fish Dock is not sufficient to sustain jurisdiction. There is not sufficient evidence to find that policies that the City and Port implement at the Fish Dock will have an impact on common carriers. The lease between the parties will not impact discrimination by terminal facilities serving the international commercial maritime trade. Under the plain meaning of the Shipping Act, at the Fish Dock, the City and Port are not engaged “in the business of furnishing wharfage, dock warehouse or other facilities in connection with a common carrier.” Accordingly, the evidence does not establish that the City and Port are marine terminal operators. Because the Respondents are not marine terminal operators, the violations alleged in the complaint are not applicable to them. Therefore, the complaint must be dismissed.

Having found that the complaint exceeds the jurisdiction of the Commission, it is not necessary or appropriate to reach the remaining allegations made by Complainants.

**IV. ORDER**

Upon consideration of the findings and conclusions set forth above, and the determination that Auction Block and Harbor Leasing have not established that the City of Homer and its Port have violated the Shipping Act, it is hereby

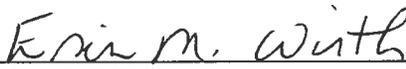
**ORDERED** that the Respondents' Motion for Leave to File Documents under Seal be **GRANTED**. It is

**FURTHER ORDERED** that Respondents' Motion to Strike and for Sanctions be **GRANTED**. The section of Complainants' reply brief labeled *Complainants Are Paying More Fish Tax*, found on pages 5-7, shall be stricken and excluded from consideration. It is

**FURTHER ORDERED** that the claims herein be **DENIED**. It is

**FURTHER ORDERED** that the Fourth Amended Complaint be **DISMISSED WITH PREJUDICE**. It is

**FURTHER ORDERED** that this proceeding be **DISCONTINUED**.

  
\_\_\_\_\_  
Erin M. Wirth  
Administrative Law Judge