

ORIGINAL

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FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 07-01

APM TERMINALS NORTH AMERICA, INC.

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

v.

MAHER TERMINALS LLC

**INITIAL DECISION GRANTING
JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT AND
DISMISSAL WITH PREJUDICE¹**

On December 29, 2006, complainant APM Terminals North America, Inc. (APM or APMT), formerly known as Maersk Container Service Company, Inc. (Maersk), commenced this proceeding by filing a complaint with the Secretary alleging that respondent Port Authority of New York and New Jersey (PANYNJ or Port Authority) violated the Shipping Act of 1984. The complaint is based on events related to a lease (Lease EP-248) pursuant to which APM, a marine terminal operator, occupies portions of the Elizabeth Port Authority Marine Terminal in Elizabeth, New Jersey, operated by PANYNJ. APM alleges that it did not receive an additional portion of marine terminal property (the Added Premises) by the date on which Lease EP-248 required PANYNJ to provide it.

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

that the delay caused harm to APM, and that the delay showed a preference for Maher Terminals, LLC (Maher), another marine terminal operator that occupied the Added Premises pursuant to leases with PANYNJ before and during the delay of the transfer. PANYNJ filed an answer to the complaint denying liability and filed a counter-complaint against APM for allegedly failing to perform construction work required by Lease EP-248. APM answered the counter-complaint denying liability.

PANYNJ filed a third-party complaint against Maher based on PANYNJ's claim that Maher failed to surrender the Added Premises as required by Lease EP-249, the lease pursuant to which Maher occupied the Added Premises on the date on that Lease EP-248 required PANYNJ to provide the Added Premises to APM. Maher filed an answer to the third-party complaint denying liability and filed a counter-complaint against PANYNJ alleging that PANYNJ failed to provide Maher with reasonably specified dates to vacate the Added Premises as required by Lease EP-249, and failed to make specified improvements PANYNJ was required to make before PANYNJ could require Maher to surrender the Added Premises.

APM and PANYNJ have signed a proposed Settlement Agreement and a Third Supplemental Agreement to Lease EP-248 resolving their claims in this proceeding and other matters related to Lease EP-248 and have filed a motion seeking Commission approval of the Settlement Agreement. Maher opposes the motion. For the reasons stated herein, the motion to approve the Settlement Agreement is granted.

BACKGROUND

I. THE LEASES.

A. Lease EP-248.

APM occupies certain land and facilities at the Elizabeth Port Authority Marine Terminal for use as a marine terminal pursuant to Lease EP-248 dated January 6, 2000, filed with the Commission as FMC Agreement No. 201106 on August 2, 2000.² Pursuant to Section 1(a) of Lease EP-248, PANYNJ leased to Maersk (now APM) a portion of the Elizabeth Port Authority Marine Terminal described in the lease as the "Initial Premises." (Lease EP-248 at 2.) Lease EP-248 provides that "[t]he term of the letting under this Agreement of the initial premises shall commence at 12:01 o'clock A.M. on January 6, 2000 and, unless sooner terminated, shall expire at 11:59 o'clock P.M. on December 31, 2029." (*Id.* at 3 (Section 2).) Section 1(b) of Lease EP-248 required that an additional portion of the Elizabeth Port Authority Marine Terminal (the Added Premises)

² As this lease and the Maher lease described below are on file with the Commission, I take official notice of these leases pursuant to 46 C.F.R. § 502.226. They can be accessed at http://www2.fmc.gov/agreements/mtos_npage.aspx (accessed September 26, 2008).

“shall become part of the premises under this Agreement in whole or in contiguous portions thereof during the period from January 6, 2000 through December 31, 2003.” (*Id.* at 2.)

The term of the letting under this Agreement of the [A]dded [P]remises or any portion thereof shall commence at 12:01 o'clock A.M. on the respective date set forth in the notice referred to in Section 1(b) hereof given by the Port Authority with respect to the [A]dded [P]remises or any such portion thereof and, unless sooner terminated, shall expire at 11:59 o'clock P.M. on December 31, 2029.

(*Id.* at 3 (Section 2).) Lease EP-248 further provides:

Notwithstanding any other provision of this Agreement, in the event that the [A]dded [P]remises or any portion thereof shall not have become a part of the premises under this Agreement by December 31, 2003, then, and in such event, the Lessee shall have the right to terminate this Agreement upon prior written notice given to the Port Authority within one hundred eighty (180) days of December 31, 2003, and each party shall and does release and discharge the other of and from any claims or demands based on this Agreement or based on any breach or alleged breach hereof with respect to such termination.

(*Id.* at 2 (Section 1(d)).)

Lease EP-248 imposed on APM certain construction requirements identified as “Class A Work”:

The Lessee understands that construction and installation work is required with respect to its occupancy of and operations on the premises, and the Lessee agrees to and shall perform the following items of work with respect to the premises (each specific work item is hereinafter sometimes called the “specific work item”): (i) the increase of the crane rail capacity to six thousand (6,000) linear feet and structurally strengthening the foundation of six thousand (6,000) linear feet of crane rail, (ii) the reinforcement of the berth to allow for dredging of the four thousand eight hundred (4,800) linear feet of the berthing area shown in diagonal crosshatching but not in the color blue on the sketch attached hereto, hereby made a part hereof and marked “Exhibit A-2” to fifty (50) feet below mean low water, (iii) the dredging of the four thousand eight hundred (4,800) linear feet of the berthing area shown in diagonal crosshatching but not in the color blue on Exhibit A-2 to fortyfive (45) feet below mean low water, (iv) the upgrade of the B container yard, including the resurfacing of approximately two hundred forty (240) acres of the premises, transtainer runs, ancillary yard support, and reefer outlets, (v) the upgrade of the electric services.

(Lease EP-248 at 12 (Section 7(a)(1)).) Lease EP-248 required APM to

complete the Class A Work within one year of the later of the date that all of the [A]dded [P]remises have become part of the premises under this Agreement or the date of the completion of the Forty-five Foot Deepening (as defined in Section 41(a)(1) hereof) (the later of which dates is hereinafter called “the Class A Work Completion Date”).

(*Id.* at 14 (Section 7(a)(4)).) Section 41(a)(1) provides that the term

“Forty-five Foot Deepening” shall mean the following work to be performed by the United States Corps of Engineers . . . : the completion of a channel of a depth of forty-five (45) feet below mean low water in the Kill Van Kull and the Newark Bay sufficient to allow passage of a single ship at one time to or from the Elizabeth-Port Authority Marine Terminal.

(*Id.* at 82-83.)

B. Lease EP-249.

On October 1, 2000, PANYNJ and Maher entered into Lease EP-249, filed with the Commission as FMC Agreement No. 201131 on March 8, 2002. Prior to entering into Lease EP-249, Maher occupied portions of Elizabeth Port Authority Marine Terminal (the Old Premises) pursuant to two leases and a permit. (Lease EP-249 at 1.) Lease EP-249 created a new lease of the Old Premises and designated added premises. (*Id.* at 1-2 (Section 1).) Maher uses the leased property as a marine terminal. Lease EP-249 required Maher to surrender four specifically identified portions of the Old Premises in stages (the Partial Surrender). The surrender of each portion would be “by the date reasonably specified by the Port Authority.” (*Id.* at 3 (Section 1(d)).) The Partial Surrender premises included the property described as the Added Premises in Lease EP-248 that were to become part of the premises leased to APM.

Lease EP-249 also provides a remedy for PANYNJ in the event Maher failed to surrender the portions identified for Partial Surrender “by the date reasonably specified by the Port Authority”:

It is understood and agreed that in the event the Lessee fails to deliver the Partial Surrender in a timely manner, the Lessee shall be responsible to the Port Authority, shall hold the Port Authority harmless and shall make such payments as shall be necessary to compensate fully the Port Authority for all additional costs for delay of construction of the ExpressRail Facility (as hereinafter defined) and/or any damages or losses to the Port Authority arising out of that certain lease dated as of January 6, 2000 bearing Port Authority File Number EP-248 between the Port Authority and Maersk Container Service Company, Inc.

(Lease EP-249 at 3 (Section 1(d)).) This provision may be referred to as the “Indemnity Provision.”

Lease EP-249 imposed Class A Work requirements on Maher similar to the Class A Work requirements that Lease EP-248 imposed on APM:

The Lessee understands that construction and installation work is required with respect to its occupancy of and operations on the Premises, and the Lessee agrees to and shall perform the following items of work with respect to the Premises: (i) the structural strengthening of the foundation of four thousand five hundred (4,500) linear feet of crane rail (which needs [*sic*] not be contiguous) and construction of new 100 foot gauge crane rail, (ii) reinforcement of the berth to allow for dredging of three thousand three hundred (3,300) linear feet (which needs [*sic*] not be contiguous) of the Berthing Area to fifty (50) feet below mean low water, (iii) dredging of three thousand three hundred (3,300) linear feet (which needs [*sic*] not be contiguous) of the Berthing Area to forty-five (45) feet below mean low water (hereinafter in this Agreement called the "Forty-five Foot Dredging"), (iv) the upgrade of the container yard, including the resurfacing of approximately one hundred forty-five (145) acres of the Premises, transtainer runs, ancillary yard support, and reefer outlets.

(Lease EP-249 at 16 (Section 7(a)(1)). Cf. Lease EP-248 at 12 (Section 7(a)(1)).)

Lease EP-249 used language similar to that in Lease EP-248 to establish a completion date for Maher's Class A Work: "The Lessee agrees that it will complete the construction projects of the Class A Work within one year of the date of the completion of the Forty-five Foot Deepening (as defined in Section 41(a) hereof)." (Lease EP-249 at 17 (Section 7(a)(4)).) Lease EP-249 did not provide an adjustment of that date that could result from a delay in delivery of the Added Premises as Lease EP-248 did for APM, however. (*Compare* Lease EP-248 at 14 (Section 7(a)(4)), *supra*.) The definition of the forty-five foot deepening in Section 41(a) of Lease EP-249 is substantially identical to the definition in Section 41(a) of Lease EP-248, as each refers to the completion of a forty-five foot channel in the Kill Van Kull and Newark Bay by the Corps of Engineers. Lease EP-249 changes "single ship at one time to or from the Elizabeth-Port Authority Marine Terminal" to "single ship at one time to or from portion or portions of the Berthing Area which has or have been deepened by the Lessee to forty-five (45) feet." (*Compare* Lease EP-248 at 82-83 (Section 41(a)) *with* Lease EP-249 at 94-95 (Section 41(a)).) *See supra*, p. 4.

II. THE PLEADINGS.

A. APM's Complaint.

In its complaint, APM alleges that PANYNJ failed to deliver the Added Premises on December 31, 2003, as required by Lease EP-248. APM alleges that the "Added Premises were an integral part of APMT's business plan and were necessary, among other things, to relieve congestion and space constraints in the Premises." (APM Complaint at 3.) During the period when PANYNJ

denied APM access to the Added Premises, it permitted Maher to occupy and use the Added Premises. PANYNJ did not deliver the Added Premises to APM until December 25, 2005. (*Id.* at 5.) Because PANYNJ did not deliver the Added Premises as required by Lease EP-248, APM alleges that it incurred substantial additional costs for operations, labor, and construction at the Initial Premises and increased costs of construction at the Added Premises. (*Id.*)

APM alleges that PANYNJ's actions constitute a failure to operate in accordance with the terms of the lease in violation of section 10(a)(3) of the Shipping Act (46 U.S.C. § 41102(b)(2)); unjust and unreasonable practices in violation of section 10(d)(1) of the Shipping Act (46 U.S.C. § 41102(c)); an unreasonable refusal to deal or negotiate with APM in violation of sections 10(d)(3) and 10(b)(10) of the Shipping Act (46 U.S.C. §§ 41106(3) and 41104(10)); and imposition of undue or unreasonable prejudices or disadvantages with respect to APM in violation of section 10(d)(4) of the Shipping Act (46 U.S.C. § 41106(2)). (APM Complaint at 7-8.) As relief, APM seeks an order that PANYNJ cease and desist from violating the Shipping Act, pay reparations for the injuries it caused to APM, and comply with Lease EP-248. (*Id.* at 9.)

B. PANYNJ's Answer and Counter-Complaint.³

On July 30, 2007, PANYNJ filed an answer and counter-complaint against APM. PANYNJ's answer denies liability and asserts that APM's exclusive remedy for PANYNJ's failure to deliver the Added Premises by December 31, 2003, was to terminate Lease EP-248 as provided in Section 1(d) of the lease. (PANYNJ Answer and Counterclaim at 5-6.) PANYNJ also asserts several other affirmative defenses. PANYNJ filed a counter-complaint against APM alleging that APM had breached its obligation to perform the Class A Work required by Section 7(a)(1) of Lease EP-248, and that the "delay in Class A Work has adversely affected the Port Authority and put in jeopardy its plans for the future of the Newark/Elizabeth Port complex." (*Id.* at 7.)

³ PANYNJ initially responded to the complaint with a motion to dismiss. PANYNJ argued two points as grounds for dismissal. First, it argued that since the Commission expressly exempted marine terminal facilities agreements from the filing requirements of the Act, *see* 46 C.F.R. § 535.310(b) ("All marine terminal facilities agreements as defined in § 535.310(a) are exempt from the filing and waiting period requirements of the Act and this part."), the Commission did not have jurisdiction to enforce the terms of Lease EP-248. Second, it argued that Section 1(d) of Lease EP-248 gave APM two options in the event the Added Premises were not delivered: (a) terminate the agreement and attempt to negotiate a new agreement; or (b) proceed under the terms of the existing agreement notwithstanding the absence of the Added Premises. I denied the motion on the first ground and found that the discovery would be necessary on the second ground. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ July 13, 2007) (Memorandum and Order on Respondent's Motion to Dismiss Complaint).

C. PANYNJ's Third-Party Complaint.

PANYNJ filed a third-party complaint against Maher alleging that Maher violated section 10(a)(3) of the Shipping Act (46 U.S.C. § 41102(b)(2)) by failing to deliver the Partial Surrender as required by Section 1(d) of Lease EP-249 so PANYNJ could deliver the Added Premises to APM as required by Lease EP-248. PANYNJ further contends that Lease EP-249 requires Maher: (1) To indemnify and hold harmless PANYNJ for any damages resulting from PANYNJ's failure to turn over the Added Premises to APM in a timely manner, since this failure was caused by Maher's failure to vacate the Added Premises by Lease EP-249; and (2) to defend PANYNJ at Maher's sole expense for any claim arising out of its terminal operation under Lease EP-249. (PANYNJ Third Party Complaint ¶ 3. *See also* Lease EP-249 at 3 (Section 1(d)), *supra* at 4.) PANYNJ alleges that Maher has refused to comply with these obligations. (*Id.* ¶¶ 4-5.) PANYNJ contends:

Any fair reading of [leases] EP-248 and EP-249 which were negotiated and entered into almost simultaneously reveals that the parties well knew that the Added Premises, then occupied by Maher, might not be handed over to APMT by December 31, 200[3].⁴ In fact, both Leases contain provisions as to available remedies should that transfer not occur on time.

(PANYNJ Third Party Complaint ¶ 10.) PANYNJ contends that if the Commission determines that PANYNJ violated 46 U.S.C. § 41102(b)(2) by failing to deliver the Added Premises to APM as required by Lease EP-248, the Commission must also find that Maher violated 46 U.S.C. § 41102(b)(2) by failing to vacate the Added Premises as required by Lease EP-249. (*Id.* ¶ 15.) PANYNJ contends that Maher violated the Shipping Act, 46 U.S.C. § 41102(b)(2), by failing to defend the Port Authority pursuant to Lease EP-249. (*Id.* ¶ 16.) PANYNJ seeks reparations from Maher in the amount of any damages and costs found to be due to APM as a result of the failure of PANYNJ timely to deliver the Added Premises to APM. (*Id.* at 8.)

D. Maher's Answer to the Third-Party Complaint and Maher's Counter-Complaint.

On September 4, 2007, Maher filed its answer to the third-party complaint and a counter-complaint against PANYNJ. In its answer, Maher denies violating the Shipping Act and denies that PANYNJ was injured. In its counter-complaint, Maher alleges Maher and PANYNJ are parties to Lease EP-249. Maher states that it submitted its counter-complaint "as a protective measure in the event that it is adjudged that the Commission has jurisdiction both over the subject matter of this proceeding and Maher itself in this proceeding." (Maher's Answer to Third Party Complaint & Counter-Complaint ¶ 33.) In its counter-complaint, Maher alleges that:

⁴ In this and several other places, PANYNJ's Third-Party Complaint says "December 31, 2007" when the context is clear that "December 31, 2003" was intended.

38. Among other things, [Lease EP-249] required PANYNJ to provide Maher reasonable specified dates for the surrender of certain premises and to make specified improvements to certain premises prior to Maher's surrender of premises.
39. Furthermore, PANYNJ has filed a Third-party Complaint against Maher with the Commission wrongfully alleging breach of [Lease EP-249] and violation of the Shipping Act by Maher.
40. As a result of the foregoing, PANYNJ has failed to operate in accordance with [Lease EP-249], failed to establish, observe, and enforce just and reasonable regulations and practices, unreasonably refused to deal or negotiate with Maher, and has imposed unjust and unreasonable prejudice or disadvantage with respect to Maher concerning the turnover of certain premises, all in violation of the Shipping Act of 1984, 46 U.S.C. § [41102(b)(2)], 41102(c), 41106(3) and 41106(2).

(*Id.* at 5-6.) Maher seeks an order "commanding PANYNJ to pay Maher by way of reparations for the unlawful conduct hereinabove described with interest and attorney fees, and such other relief as the Commission deems appropriate." (*Id.* at 6.)

E. New Jersey State Court Case Filed by PANYNJ.

PANYNJ commenced a civil action against Maher and APM in the Superior Court of New Jersey, Union County, seeking declaratory and injunctive relief related to Lease EP-248 and Lease EP-249. *Port Authority of New York and New Jersey v. Maher Terminals, LLC and APM Terminals North America, Inc.*, No. 1760-08 (N.J. Super. Ct. (Union County) Ch. Div. May 22, 2008) (Verified Complaint for Declaratory Judgment and Injunctive Relief) (filed).⁵ The claims in PANYNJ's New Jersey complaint parallel its claims in this proceeding. PANYNJ summarizes APM's claims against PANYNJ in this proceeding, its own defenses against APM's claims, and its counterclaim against APM for failing to complete the Class A Work. (*Id.* ¶¶ 9-14.) PANYNJ also summarizes the claims against Maher in the third-party complaint in this proceeding, including its claim that Maher did not turn over the Added Premises as required by Lease EP-249 and its claim that Maher is obligated to indemnify PANYNJ for any damages it may be required to pay APM. (*Id.* ¶¶ 15-22.) PANYNJ then alleges that it and APM have entered into a settlement and states that it has presented the settlement to Maher with a request that Maher either agree that the settlement is reasonable or undertake the defense of the Port Authority and indemnify the Port Authority against all damages it faces in the FMC proceeding. (*Id.* ¶¶ 23-24.) PANYNJ seeks a judgment from the New Jersey court declaring that the APM/PANYNJ settlement is reasonable or requiring Maher to undertake the defense of

⁵ A copy of the complaint is in the record as Attachment A to the letter dated September 15, 2008, from Alexander O. Levine to the Office of the Secretary.

PANYNJ in this proceeding and a judgment that Maher must indemnify PANYNJ for any damages PANYNJ is required to pay APM. (*Id.* at 8-10.)

F. Maher's FMC Complaint against PANYNJ, FMC Docket No. 08-03.

On June 3, 2008, Maher commenced a separate proceeding against PANYNJ before the Commission. *Maher Terminals LLC v. Port Authority of New York and New Jersey*, FMC No. 08-03 (June 11, 2008) (Notice of Filing of Complaint and Assignment). In that proceeding, Maher alleges that PANYNJ has violated the Shipping Act:

PANYNJ (a) gave and continues to give an undue or unreasonable prejudice or disadvantage with respect to Maher, (b) gave and continues to give an undue or unreasonable preference or advantage with respect to APMT, (c) has and continues unreasonably to refuse to deal or negotiate with Maher, and (d) has and continues to fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

B. PANYNJ's agreement with APMT, EP-248, violated [46 U.S.C. §§ 41106(2) and (3) and 41102(c)] of the Shipping Act by granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement.

(Maher FMC No. 08-03 Complaint at 3.) Maher then contrasts provisions in APM's Lease EP-248 with analogous provisions in Maher's Lease EP-249: (1) APM's base rent is \$19,000 per acre for 30 years, while Maher's base rent is \$39,750 per acre escalating at the rate of two percent per annum to \$70,590 per acre at the end of thirty years, resulting in undue prejudice to APM's advantage totaling millions of dollars over thirty years; (2) PANYNJ preferred and continues to prefer APM with respect to investment requirements, requiring Maher to invest greater sums and providing APM more favorable financing terms; (3) PANYNJ prefers APM over Maher with respect to container throughput requirements, requiring Maher to provide greater throughput guarantees and risk greater consequences; (4) PANYNJ prefers APM over Maher with respect to a first point of rest requirement for automobiles; (5) PANYNJ prefers APM over Maher with respect to security deposit, requiring Maher to provide a \$1.5 million deposit not required of APM; (6) PANYNJ refuses to deal with Maher despite its requests to be treated equally with APM; (7) with respect to Lease EP-248, during the year 2008, PANYNJ negotiated with APM to address APM's claim that PANYNJ violated the Shipping Act by failing to provide certain premises in a timely fashion, but at the same time PANYNJ refused to negotiate with Maher concerning its claim that the PANYNJ violated the Shipping Act with respect to Lease EP-249 by failing to provide certain premises to Maher in a timely fashion. (*Id.* at 3-5.) Maher alleges that there is no valid transportation purpose for PANYNJ's undue or unreasonable prejudices against Maher and preferences advantaging APM or for PANYNJ's refusal to deal with Maher, but if there is a valid transportation purpose, PANYNJ's

discriminatory actions exceed what is necessary to achieve the purpose. (*Id.* at 5.) PANYNJ filed an Answer denying Maher's allegations. Maher and PANYNJ are currently engaged in discovery in that proceeding. *Maier Terminals LLC v. Port Authority of New York and New Jersey*, FMC No. 08-03 (ALJ Aug. 1, 2008) (August 1, 2008, Discovery Order).

III. THE COURSE OF LITIGATION AND SETTLEMENT DISCUSSIONS IN FMC NO. 07-01.

As noted above at 6 n.3, PANYNJ responded to APM's complaint by filing a motion to dismiss. After that motion was denied, PANYNJ filed its answer, counter-complaint against APM, and third-party complaint, and Maher filed its answer and counter-complaint. The parties commenced discovery.

On December 3, 2007, APM and PANYNJ filed a joint Motion to Stay Proceedings Pending the Outcome of Settlement Discussions. Maher opposed the motion to stay. On January 24, 2008, I entered an Order staying the proceeding until March 3, 2008, to permit APM and PANYNJ to conduct settlement discussions. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Jan. 24, 2008) (Order on Joint Motion to Stay Proceedings). I also entered an order establishing a discovery schedule that would go into effect without further order if APM and PANYNJ did not reach a settlement by that date. *Id.* APM and PANYNJ did not reach a settlement, the stay expired, and discovery resumed.⁶

On July 11, 2008, APM and PANYNJ informed me that they had reached a comprehensive agreement to settle their dispute. The settlement would be subject to the approval of the PANYNJ Board of Commissioners, and if approved by the Board, a Gubernatorial veto period during which the agreement could be vetoed by the governor of New York or the governor of New Jersey. The Board was scheduled to vote on the settlement at its July 24, 2008, meeting. APM and PANYNJ asked that FMC No. 07-01 be stayed pending the Board's review of the agreement. Over Maher's objection, I stayed the proceeding through July 28, 2008, and ordered that PANYNJ serve and file a statement setting forth the result of the Board's vote by July 25, 2008. I also ordered PANYNJ to

⁶ Disagreements about discovery resulted in a number of orders attempting to resolve disputes. *See* the following orders entered in FMC No. 07-01: Interim Order on Motions to Compel and Request for Conference (Apr. 17, 2008); Memorandum and Order on Rule 30(b)(6) Depositions and Depositions of Two Employees of the Port Authority of New York and New Jersey (May 16, 2008); Memorandum and Order on Motions to Compel Responses to Discovery (June 4, 2008); Memorandum and Order on Maher's Emergency Motion for an Immediate Order for PANYNJ to Refrain from Disrupting Depositions and Motion for Sanctions Against PANYNJ (June 9, 2008); Order on Pending Motions (June 13, 2008); Order on Emergency Motion to Compel APM Terminal Witness to Attend Depositions at a Video Conferencing Center in Charlotte, N.C. (June 17, 2008); Order on Third-party Respondent's Motion to Compel Response from the Port Authority of New York and New Jersey (June 30, 2008).

advise me of the date the statutory Gubernatorial veto period would expire. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ July 14, 2008) (Order Staying Proceeding Pending Review of Proposed Settlement by the Port Authority of New York and New Jersey).

On July 25, 2008, PANYNJ filed a notice that the Board had approved the settlement agreement between it and APM. PANYNJ also stated that the Gubernatorial veto period would expire August 11, 2008, and that PANYNJ was not permitted to sign the agreement until the veto period expired. APM and PANYNJ submitted a joint motion to extend the stay. APM and PANYNJ stated that they intended “to formally execute the settlement agreement on August 12, and to file on that day a motion seeking Commission approval of the agreement.” (Joint Motion for Extension of the Stay of Proceedings at 2). APM and PANYNJ ask that “the stay be extended to August 15, which is the Friday following the date the settlement agreement is expected to be formally executed.” (*Id.*) Based on their representations, I extended the stay to August 15, 2008. I ordered PANYNJ to notify me forthwith if either governor vetoed the Settlement Agreement, and if neither governor vetoed the agreement, to file a motion seeking Commission approval of the Settlement Agreement on or before August 14, 2008. I also scheduled a telephonic status conference for July 30, 2008. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ July 28, 2008) (Order Extending Stay of Proceeding Pending Expiration of Gubernatorial Veto Period of Proposed Settlement by the Port Authority of New York and New Jersey).

In the July 30 conference, Maher stated that it would oppose the motion for approval of the Settlement Agreement and requested the full fifteen days provided by Commission Rules to prepare its reply. Neither APM nor PANYNJ opposed the request. On August 1, 2008, I ordered Maher to file its reply to the expected joint motion for approval of the settlement agreement on or before August 29, 2008, and extended the stay to September 15, 2008. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Aug. 1, 2008) (Procedural Order Extending Stay of Proceeding Pending Expiration of Gubernatorial Veto Period of Proposed Settlement by the Port Authority of New York and New Jersey and Consideration of Motion for Approval of Settlement Agreement).

On August 14, 2008, APM and PANYNJ filed their Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice (Joint Motion for Approval). Maher filed its opposition on August 29, 2008. On September 3, 2008, APM and PANYNJ filed a Joint Motion for Leave to File a Reply to Maher’s Opposition to the Settlement Agreement with an attached Reply to Maher’s Opposition to the Settlement Agreement. On September 9, 2008, Maher filed an opposition to the joint motion for leave to file a reply. I granted APM and PANYNJ’s motion for leave to file their reply. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Sept. 10, 2008) (Order Granting Joint Motion for Leave to File a Reply to Maher’s Opposition to the Settlement Agreement). I also issued an order requiring the parties to supplement the record, *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Sept. 10, 2008) (Order for Parties to Supplement the Record), and extended the stay to September 30, 2008. *APM Terminals North America, Inc. v. Port Authority of New York and New*

Jersey, FMC No. 07-01 (ALJ Sept. 10, 2008) (Order Extending Stay of Proceeding Pending Consideration of Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice). On September 30, 2008, the stay was extended to October 7, 2008, *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Sept. 30, 2008) (Second Order Extending Stay of Proceeding Pending Consideration of Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice), extended again to October 10, 2008, in an order issued October 7, 2008. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Oct. 7, 2008) (Third Order Extending Stay of Proceeding Pending Consideration of Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice), and extended again to the date an order is issued on the Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Oct. 10, 2008) (Fourth Order Extending Stay of Proceeding Pending Consideration of Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice). On October 1, 2008, I issued a second order for the parties to supplement the record. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Oct. 1, 2008) (Second Order for Parties to Supplement the Record). The parties have supplemented the record as requested and the Joint Motion for Approval is ripe for decision.

IV. JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT.

A. Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice Filed by APM and PANYNJ.

APM and PANYNJ filed a Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice (Joint Motion for Approval) with a signed proposed Settlement Agreement and a signed Third Supplemental Agreement to Lease EP-248 ending their FMC proceeding and revising their obligations under Lease EP-248. The Settlement Agreement⁷ recites that the parties agree to resolve the disputes set forth in the APM's complaint alleging that PANYNJ "committed

⁷ APM and PANYNJ filed a public version and a confidential version of the Joint Motion for Approval. In response to a request to supplement the record, APM and PANYNJ each stated that they intended only the three lines redacted from Paragraph 3 of the public version of the proposed Settlement Agreement to be treated as confidential. In a subsequent filing, APM and PANYNJ withdrew the assertion of confidentiality and stated that they "have no objection to the entire text of the Settlement Agreement that they filed with the FMC being available to the public." (Response of APM . . . and [PANYNJ] to Order Directing Them to State Reasons Why Redacted Information Is Confidential Information at 2.) In a separate order issued today, I ask the Secretary to make public the confidential version. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Oct. 24, 2008) (Request for Secretary to Make Public the Confidential Version of Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice).

various violations of the Shipping Act . . . in connection with the delivery of 84 acres of land under [Lease EP-248]" (the Added Premises) and PANYNJ's counter-complaint "that APMT was in material breach of [Lease EP-248] in connection with the completion of certain construction work described in the Lease as 'Class A Work.'" (Settlement Agreement at 1.) "[T]he parties desire to resolve the Complaint and the Counter-Complaint amicably and without further litigation." (*Id.*) The substance of the Settlement Agreement is set forth in thirteen numbered paragraphs. The paragraphs are summarized as follows:

1. The parties will submit the Agreement to the Commission for approval with a request that the Complaint and the Counter-Complaint be dismissed with prejudice.
2. APM and PANYNJ shall execute a Third Supplemental Agreement to Lease EP-248 that shall become effective on the date the Commission approves the dismissal of the Complaint and Counter-Complaint.
3. PANYNJ consents to the transfer of Maersk Inc.'s interest in APM:

Notwithstanding anything in the Lease (including the Lease Amendment) to the contrary, to the extent required under the Lease (including the Lease Amendment), the Port Authority consents to the transfer of Maersk Inc.'s interest in APMT (the "APMT Shares") to any affiliate of Maersk Inc., including without limitation the transfer of the APMT Shares by Maersk Inc. to A.P. Moller-Maersk A/S ("APMM"), the transfer of the APMT Shares by APMM to APM Terminals B.V. and the transfer of the APMT Shares by APM Terminals B.V. to APM Terminals North America B.V., provided the named transferee is and continues to be an affiliate of Maersk Inc. For the purposes of this paragraph, the term "affiliate" shall mean any entity that controls, is controlled by, or is under common control with the named entity. "Control" shall mean the ownership of greater than 50% of the direct or indirect beneficial ownership of such entity together with voting control over such entity. For the avoidance of doubt, any future assignments or changes in the ownership of Lessee under the Lease shall be subject to the terms and provision of the Lease, including without limitation, Sections 18 and 46 thereof. Under no circumstances, without the prior written consent and approval of the Port Authority, shall APMM cease to maintain Control (as defined in the Section 3) of [APMT].

4. PANYNJ releases APM from all claims relating to the complaint or the counter-complaint or otherwise relating to the subject matter of FMC Docket No. 07-01. PANYNJ warrants that it has "no known or foreseen claims, disputes, demands, actions, suits, liabilities, suits in equity and damages of any kind or character against

any APMT Party accrued or unaccrued related to APMT's obligations, operations, use and occupancy under the Lease as of the date of this Agreement."

5. APM releases PANYNJ from all claims relating to the complaint or the counter-complaint or otherwise relating to the subject matter of FMC Docket No. 07-01. APM warrants that it has "no known or foreseen claims, disputes, demands, actions, suits, liabilities, suits in equity and damages of any kind or character against any Port Authority Party accrued or unaccrued as of the date of this Agreement, except with respect to any monies which the Port Authority is obligated to provide to APMT under Section 7(a)(3) of the Lease."^{8]}
6. APM and PANYNJ acknowledge and agree that the only reduction in the rental amount due under the Lease shall be the reduction resulting from the surrender of the "Second Surrendered Area" as defined and described in Section 4 of the Lease Amendment.
7. Each party shall be responsible for its own legal costs.
8. APM and PANYNJ state that the Settlement Agreement "shall be treated as confidential and shall be filed with the FMC as Confidential Information as provided in the Protective Order issued by the Presiding Officer on September 25, 2007." *But see n.7, supra.*
9. "The Settlement Agreement does not constitute an admission by either party of any violation of the Shipping Act of 1984, as amended, or of any violation of any Lease term."
10. The representatives of the parties signing the agreement represent that they are authorized to sign.
11. The agreement may be signed in counterparts.
12. The agreement shall be governed by the laws of the State of New York.
13. "This Agreement is subject to the veto authority of the Governors of New York and New Jersey and shall not become effective or enforceable until the veto period expires with no veto being issued."

(Joint Motion for Approval, Exhibit A (Settlement Agreement).)

⁸ Section 7(a)(3) of Lease EP-248 sets forth the provisions pursuant to which APM is permitted to obtain outside funding for certain work required by the lease.

APM and PANYNJ also signed the Third Supplemental Agreement to Lease EP-248 described in paragraph 2 of the Settlement Agreement. The substance of the Third Supplemental Agreement is set forth in fourteen numbered paragraphs. The paragraphs are summarized as follows:

1. The Third Supplemental Agreement will become effective when the Commission approves the Settlement Agreement.
2. PANYNJ and APM identify the completed and the remaining Class A Work. They agree that APM has completed the work described in Lease EP-248, Section 7(a)(1)(iii), (iv), and (v). They also agree that with regard to Section 7(a)(1)(i) that required APM to increase of the crane rail capacity to 6,000 linear feet and structurally strengthening the foundation of 6,000 linear feet of crane rail, 2,500 feet alongside Berths 94-98 had not been completed. With regard to Section 7(a)(1)(ii) that required APM to reinforce of the berth to allow for dredging of the 4,800 linear feet of the berthing area fifty feet below mean low water, 1,300 feet running from Berth 94 through half of Berth 96 had not been completed.
3. The completion date for the remaining Class A Work is extended to the later of the first anniversary of the full completion of the Panama Canal Expansion Project or December 31, 2017, whichever occurs first, but in no case earlier than December 31, 2013. Provisions are made for APM to post an irrevocable letter of credit if the Class A Work is not completed by the completion date.
4. APM agrees to surrender 2.5 acres of its premises plus additional acreage if necessary to PANYNJ to be used for the Port Authority's expansion of McLester Street. The parties establish a date for surrender and agree to reduce APM's basic rental a prorated amount.
5. PANYNJ agrees to use reasonable efforts to prevent obstruction or hindrance to vehicular ingress and egress in connection with the contemplated project to widen McLester Street.
6. APM and PANYNJ agree to cooperate in connection with traffic planning and modeling efforts.
7. The parties represent that they have the right and power to perform the Agreement and that there are no uncured defaults on the part of Lessee under the Lease.
8. With the exception of dredging at berths 94-96 (that will be performed in accordance with the First Supplement to Lease EP-248) and conversion of a building, the parties acknowledge that APM has timely completed the Class B work required by Lease EP-248.

9. Except as modified by the Third Supplemental Agreement, Lease EP-248 remains in effect.
10. The agreement may be signed in counterparts.
11. The agreement shall be governed by the laws of the State of New York.
12. If any term or portion of the Agreement is found to be invalid, the rest of the Agreement shall be valid.
13. Captions and headings are for convenience of reference.
14. The Third Supplemental Agreement, Lease EP-248, and the Settlement Agreement constitute the entire agreement between PANYNJ and APM.

(Joint Motion for Approval, Exhibit A/Exhibit 1 (Third Supplemental Agreement).)

APM and PANYNJ summarize the settlement as follows:

- APM will dismiss with prejudice its complaint against PANYNJ, thereby relinquishing its claim for damages, asserted to amount to \$45 million, and absolving PANYNJ and Maher for any liability for not delivering the Added Premises by December 31, 2003
- PANYNJ will dismiss with prejudice its counter-complaint against APM for failing to complete the Class A Work by the completion date originally established by Lease EP-248
- The parties adjust their obligations with respect to work required of APM
- PANYNJ consents to transfer of share interests in APM held by Maersk Inc. to any affiliate of Maersk, Inc.
- APM will have no further obligation with respect to completed portions of Class A Work identified in Exhibit A attached to the Third Supplemental Agreement
- The completion date for other Class A Work identified in Exhibit B attached to the Third Supplemental Agreement is extended with an obligation imposed on APM to post a \$73 million letter of credit if the work is not completed by that date
- APM releases PANYNJ for all claims related to the complaint and counter-complaint in FMC No. 07-01

- PANYNJ releases APM for all claims related to the complaint and counter-complaint in FMC No. 07-01
- PANYNJ will dismiss with prejudice its third party complaint against Maher in FMC No. 07-01
- PANYNJ will dismiss with prejudice its New Jersey state court complaint against APM and Maher

(Joint Motion for Approval at 3-5.)

APM and PANYNJ argue that the settlement of their controversy meets the standards set forth in the Administrative Procedure Act, 5 U.S.C. § 554(c)(1), Commission precedent, *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1092 (ALJ 1978), and Commission regulations, 46 C.F.R. § 502.91. They point out that it is not disputed that PANYNJ did not deliver the Added Premises until December 2005. APM alleges that this failure to deliver violated the Shipping Act, resulting in actual injury to APM in the amount of \$45 million.

While the outcome of this dispute was not certain, it is clear that the Settlement Agreement relieves PANYNJ of the potential for liability on a very substantial claim without having to make any monetary payment to APMT, and relieves both parties and the Commission of the need for expending further resources in litigating a complex dispute.

(Joint Motion for Approval at 8.)

PANYNJ and APM balance APM's claim for harm caused by the delay in the transfer of the Added Premises with PANYNJ's claim for harm caused by APM's failure to complete the Class A Work by the end of 2006 as required by Lease EP-248.

While there are legitimate questions regarding the timing and nature of APMT's obligations and any damages claimed by PANYNJ, it is undisputed that a portion of the Class A work remains to be completed. In the interest of settling the claim against it regarding the Added Premises, PANYNJ has concluded that it makes practical sense to waive its claim against APMT for an alleged default of its Class A work obligations. In reaching this conclusion, PANYNJ has determined that so long as the remaining Class A work is completed by 2017, as the Settlement Agreement requires APMT to do, it will not be substantially damaged.

(*Id.*) APM and PANYNJ contend that their

decision to forgo substantial and complex, if uncertain, claims against each other in exchange for resolving any potential liability is thus obviously fair, adequate, and

reasonable. The parties' decisions to settle were made independently, based upon careful consideration of its merits and the potential litigation costs, and were not the product of any collusion or coercion.

(Id. at 9.)

APM and PANYNJ speculate that Maher's objection to the settlement would likely be a claim that "the Settlement Agreement is an act of unreasonable or undue preference by PANYNJ of APMT over Maher." *(Id. at 10.)* APM and PANYNJ agree that APM failed to complete the Class A Work by the end of 2006 as required by Lease EP-248 and that PANYNJ believes APM is in default of its obligation.

By the terms of the Settlement Agreement, APMT will be relieved of the alleged default, and will have until as late as 2017 to complete the work. The remaining Class A work relates solely to expanding capacity for deepwater vessels. At this time there is no demand for additional deepwater capacity. Thus, although APMT is [benefitted] by being able to delay its investment in the construction, the Port Authority is not harmed by the delay because the work is not yet needed. The extended completion date included in the Settlement Agreement is tied to the construction of Panama Canal upgrades, which when complete, could create a demand for the additional deepwater berth. PANYNJ has determined that so long as the work is completed by then, such postponement is a fair concession in exchange for the release of APMT's claim for PANYNJ's belated delivery of the Added Premises. So while APMT is getting a benefit, it is giving substantial consideration to obtain that benefit in the form of the release of a substantial claim against PANYNJ. By comparison, Maher is giving nothing in exchange for its being relieved of any potential liability on PANYNJ's claim for indemnity.

(Id. at 11.)

APM and PANYNJ contend that

even if Maher could show that the Settlement Agreement amounts to a preference by PANYNJ of APMT over Maher – which it clearly cannot – Maher's remedy is not to enjoin the Settlement Agreement and APMT Lease amendment. Maher has no standing to prevent the execution of a lease amendment by APMT and PANYNJ, whether it is entered into in the ordinary course of business or in connection with a settlement agreement as here. Maher must file a claim against the Port Authority alleging a Shipping Act violation.

(Id. at 12.) APM and PANYNJ argue that the proposed Settlement Agreement fits within the Commission's strong policy in favor of settlements. There is no fraud, duress, or mistake, and the agreement was not reached through collusion to cause harm to Maher. There is no requirement that

all claims in a proceeding be settled as part of the same settlement, and if the Commission disapproves the settlement, APM and PANYNJ will be compelled to resume the litigation of claims that they have resolved. Therefore, the Commission should approve the proposed Settlement Agreement. (*Id.* at 13-15.)

B. Maher's Reply in Opposition to the Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice.

Maher contends that the Joint Motion for Approval does not meet the Commission's standard for settlement approval. It contends:

First, it misdirects the Commission by arguing that Maher lacks standing to object, etc.⁹ Second, it fails to provide the Commission facts about PANYNJ's new grants to APM of valuable preferences. Third, the settlement violates the Shipping Act and contravenes public policy. Finally, the dismissal with prejudice of APM prejudices Maher's ability to prosecute its counter-complaint against PANYNJ.

(Maher Reply in Opposition at 2.)

Maher sets forth the following arguments to support its contention that the Commission should not approve the Settlement Agreement:

1. PANYNJ "failed and continues to fail to establish, observe, and enforce just and reasonable regulations and practices" by including the indemnity provision in Lease EP-249, contending that the indemnity provision is barred by the Shipping Act, New Jersey law, and PANYNJ's regulations. (Maher Reply in Opposition at 4-5 and n.3.)
2. PANYNJ "has imposed and continues to impose unjust and unreasonable prejudice or disadvantage against Maher and undue preference or advantage for APM." With respect to the Added Premises, PANYNJ "enforced against Maher the unlawful indemnity provision discussed above for PANYNJ actions delaying the turnover of premises, but did not enforce such an indemnity on APM. As a practical matter, PANYNJ seeks to impose liability on Maher for acts for which it is not responsible while not seeking to impose such liability on APM." (*Id.* at 5.)
3. PANYNJ "imposed unjust and unreasonable disadvantage with respect to Maher and undue preference or advantage with respect to APM by requiring Maher to pay throughput rent on containers beginning 2008, notwithstanding PANYNJ's delays in providing premises to Maher, while postponing this requirement for APM until 2009 because of PANYNJ's delay in providing the 84 acres to APM." (*Id.* at 5-6.)

⁹ It is not clear what Maher means by "etc."

4. PANYNJ “unreasonably refused to deal or negotiate with Maher and continues to refuse to deal or negotiate with Maher” by settling its dispute with APM, but refusing to settle its dispute with Maher. (*Id.* at 6.)
5. PANYNJ failed to satisfy the requirements of Lease EP-249 to improve other premises before providing dates for Maher to vacate the Added Premises. (*Id.* at 6-7.)
6. PANYNJ and APM are “improperly seek[ing] the imprimatur of the Commission for new violations of the Shipping Act” that they will then “foist . . . on Maher as evidence that ‘any preference . . . contained in the Settlement Agreement’ is justified by ‘the Commission’s policy favoring settlement,’” thereby seeking “Commission approval in direct furtherance of their scheme to discriminate against Maher” in violation of “the fundamental purpose of the Shipping Act to establish a ‘nondiscriminatory’ regulatory process.” (*Id.* at 12.) The terms of the proposed settlement show that PANYNJ:
 - a. agreed to provide unjust and unreasonable preference with respect to APM and unjust and unreasonable prejudice or disadvantage with respect to Maher;
 - b. failed to establish, observe, and enforce just and reasonable regulations and practices; and
 - c. unreasonably refused to deal or negotiate with Maher.

Maher contends that these actions violate the Shipping Act of 1984, 46 U.S.C. §§ 41106(2), 41102(c), and 41106(3). (Maher Reply in Opposition at 12.)

7. PANYNJ and APM “misdirect the Commission by portraying the settlement as principally involving the exchange of consideration in the forms of APM’s relinquishment of its claim for PANYNJ’s tardy conveyance of the [Added Premises] in return for PANYNJ’s relinquishment of its claim for APM’s failure to complete ‘Class A’ investments in the leasehold.”
 - a. PANYNJ and APM only cryptically describe PANYNJ’s consent to transfer interests in APM held by Maersk Inc. to any affiliate of Maersk, but fail to disclose its “true nature and value.”
 - b. PANYNJ and APM do not disclose the real significance of their agreement about the McLester Street project.

(*Id.* at 13-15.)

8. Through the agreement, PANYNJ grants APM new preferences that violate the Shipping Act by “forgiving APM’s failure to make terminal investments of \$50 – 73 million required by EP-248 by the end of 2006.” Maher cites to the deposition testimony of Marc E. Oppenheimer, an APM representative, that Lease EP-248 would obligate Maersk to invest \$100 million in basic infrastructure modifications by 2008. (*Id.* at 15; Maher Reply in Opposition, Exhibit 12.) Maher contrasts this treatment of APM with PANYNJ’s treatment of other terminal operators from which it extracts “tribute” to obtain PANYNJ’s consent to a change in ownership interest. (Maher Reply in Opposition at 15-17.)
9. PANYNJ refused to engage in meaningful negotiations with Maher about Maher’s claims set forth in response to PANYNJ’s third-party complaint and Maher’s counter-complaint in this proceeding and the issues raised in Docket 08-03 while PANYNJ negotiated with APM about APM’s claims. Furthermore, the negotiations with APM went beyond the claims set forth in APM’s complaint and PANYNJ’s counter-complaint to their “larger business relationship.” Neither the provision for change of ownership nor the McLester Street project were part of this proceeding. (*Id.* at 17-19.)
10. Although the Commission may approve a partial settlement, the Commission must carefully consider third party objections, objections that Maher has standing to make. Given Maher’s objections, approval of the Settlement Agreement is not in the public interest. (*Id.* at 19-20.)
11. Factual disputes prevent the entry of the Settlement Agreement. (*Id.* at 20-21.)

C. APM and PANYNJ’s Reply to Maher’s Opposition to the Settlement Agreement.

APM and PANYNJ were permitted to file a Reply to Maher’s Opposition to the Settlement Agreement.¹⁰ Their Reply addressed three statements in Maher’s Reply in Opposition to the Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice. First, APM and PANYNJ contend that they never said that Maher does not have standing to object to the settlement. They contend that a fair reading of their memorandum reveals that their position is that Maher has no standing to prevent the execution of a lease amendment, but concede that Maher has standing to challenge the settlement of the litigation. (Reply to Maher’s Opposition to the Settlement Agreement

¹⁰ The reply was attached to APM and PANYNJ’s Joint Motion for Leave to File a Reply to Maher’s Opposition to the Settlement Agreement. Maher opposed the motion for leave to file the reply. I granted the motion for leave to file the reply. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Sept. 10, 2008) (Order Granting Joint Motion for Leave to File a Reply to Maher’s Opposition to the Settlement Agreement).

at 2.) Second, APM and PANYNJ challenge Maher's contention that PANYNJ has granted APM a valuable change or ownership provision in paragraph 3 of the Settlement Agreement. APM and PANYNJ contend that through this provision, PANYNJ has agreed

that an internal reorganization within Maersk, Inc. and its affiliates will not be deemed to violate the lease. It has nothing to do with true changes in ownership for which PANYNJ has, from time to time, required compensation. Indeed, the Settlement Agreement provision simply consents to the type of internal restructuring that Maher itself underwent in 2006, and as to which PANYNJ required no compensation.

(*Id.*) Third, APM and PANYNJ contend that the transfer of approximately 2.5 acres for the McLester Street widening project is part of a long-term project of roadway enhancements that will benefit all users of the port. (*Id.* at 3.)

D. PANYNJ's Response to the First Order for Parties to Supplement the Record.

On September 10, 2008, I issued an order for APM and PANYNJ to supplement the record by responding to a series of questions and providing additional documents. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Sept. 10, 2008) (Order for Parties to Supplement the Record). On September 15, PANYNJ responded with a letter enclosing affidavits from Dennis Lombardi and Karen Eastman, employees of PANYNJ, and four attachments. (Letter dated September 15, 2008, from Alexander O. Levine to the Office of the Secretary.) In addition to a file-stamped copy of the complaint filed in the New Jersey court, PANYNJ responded with the following information:

1. PANYNJ has sixty-three leases for marine terminal property with thirty-seven marine terminal operators (Declaration of Dennis Lombardi ¶¶ 2-3);
2. Since May 1, 1999, on 233 occasions, PANYNJ has renegotiated leases for marine terminal property with marine terminal operators resulting in either a new lease or a supplemental agreement to a lease (*Id.* ¶ 4);
3. PANYNJ only sought confidentiality of the three lines redacted from the public version of the Settlement Agreement (*Id.* ¶ 7);
4. With regard to the Class A Work required by Lease EP-248, Section 7(a)(1)(i) (increase the crane rail capacity to 6,000 linear feet and structurally strengthening the foundation of 6,000 linear feet of crane rail), APM has increased the crane rail capacity and structurally strengthened the foundation of 3,500 linear feet of crane rail, leaving 2,500 feet to be completed (*Id.* ¶ 8);

5. With regard to the Class A Work required by Lease EP-248, Section 7(a)(1)(ii) (reinforcement of the berth to allow for dredging of the 4,800 linear feet of the berthing area to fifty feet below mean low water), APM has reinforced 3,500 feet of the berth to allow for dredging to fifty feet below mean low water, leaving 1,300 feet to be completed (*Id.* ¶ 9);
6. The “Forty-five Foot Deepening” as defined by Section 41(a)(1) of Lease EP-248 was completed in December 2004 (*Id.* ¶ 10);
7. With regard to Paragraph 3(a) of the Third Supplemental Agreement, which links the Class A Work Completion Date for the work remaining required by Lease EP-248, Sections 7(a)(1)(i) and (ii) to the completion of the Panama Canal Expansion Project, the Project is significant because “[o]nce the Panama Canal Expansion Project has been completed, larger ships will be available to travel through that route from the Far East to the Port. Accordingly, deepening of the berth was postponed to when the Panama Canal Expansion Project would be complete.”(*Id.* ¶ 11);
8. With regard to the circumstances in which Maher underwent an internal restructuring in 2006 and for which PANYNJ did not require compensation, PANYNJ states:

Based upon what the Port Authority has been advised by Maher, evidently there was a change in corporate form with respect to the entity that held Leases EP-249, EP-250, and EP-251. Attached as Exhibits B & C, please find the correspondence pertaining to this 2006 restructuring. As Basil Maher’s letter of October 12, 2006 (Exhibit B hereto) states at p. 4, “the result of the change in entity structure would be to substantially maintain the status quo. . . .” There was no new or supplemental lease with respect to that Maher internal reorganization. Such a supplement was contemplated (see Exhibit C hereto), but since Maher indicated that a real change in control and ownership was in process, as actually occurred in 2007, no such supplement as to this internal reorganization was ever prepared.

(*Id.* ¶ 12);

8. With regard to the McLester Street project, PANYNJ states:

McLester Street and the streets it turns into (Lyle King Street and Corbin Street) run most of the length of the Port Elizabeth peninsula and abut the APMT terminal, Maher terminal, the ExpressRail, WWL (an automobile processor), and Expressport Plaza (which includes a variety of warehouse tenants). In addition, this roadway carries traffic

north of Port Elizabeth peninsula to other tenants of the Port. McLester Street is the southern entrance to the Port, and serves as only one of three road entryways into the Port. The widening will relieve vehicle traffic congestion, facilitate the movement of goods and services within the Port, and relieve congestion at the other entryways where drivers have gone to avoid the congestion on McLester Street. . . . Maher did not surrender any leased land for the widening of McLester Street and adjacent streets.

(Id. ¶ 13);

9. PANYNJ answered the following questions about the “Port Facilities – Consent to Transfer of Leases and Changes of Ownership Interests.”

QUESTION 1: Prior to adoption of this resolution, what procedure did PANYNJ use to consider a proposed Tenant Entity Change? Is that procedure set forth in PANYNJ regulation? If so, please provide a copy of the regulation.

ANSWER: Prior to the adoption of the resolution, PANYNJ staff would review each requested change in order to provide the Board with a report and appropriate recommendations for Board consideration and action by resolution. There were and are no PANYNJ regulations regarding this matter. (Karen E. Eastman Affidavit ¶ 2.)

QUESTION 2: Must the PANYNJ Board approve a Tenant Entity Change to which the Executive Director has consented?

ANSWER: In light of the February 2007 resolution, the Executive Director may act within the discretion granted to him without Board approval. (*Id.* ¶ 3.)

QUESTION 3: Does the PANYNJ Board retain any power to disapprove a Tenant Entity Change to which the Executive Director has consented?

ANSWER: Once the Executive Director has executed the agreements and other documents necessary to effectuate a Tenant Facility Change, the Board does not retain any power to disapprove such change. In addition, the Board did not reserve powers to review the actions of the Executive Director before he effectuates such a Change. (*Id.* ¶ 4.)

QUESTION 4: When it adopted “Port Facilities – Consent to Transfer of Leases and Changes of Ownership Interests,” did the Board intend to establish a policy or procedure applicable to its own consideration of a proposed Tenant Entity Change?

ANSWER: The resolution did not change the substantive standards that had previously applied, but did delegate the decision-making to the Executive Director so that PANYNJ

would “be able to respond to requests for its consent to proposed changes in a uniform, efficient and timely manner.” (*Id.* ¶ 5.)

E. APM’s Response to the Order for Parties to Supplement the Record.

On September 15, 2008, APM submitted the declaration of Joe Nicklas Nielson, Chief Financial Officer for APM Terminals Americas, in response to the September 10 order to supplement the record. APM states:

1. APM is only seeking confidentiality for the three lines redacted from the public version of the Settlement Agreement (Declaration of Joe Nielson at 2);
2. With regard to the Class A Work required by Lease EP-248, Section 7(a)(1)(i) (increase the crane rail capacity to 6,000 linear feet and structurally strengthening the foundation of 6,000 linear feet of crane rail), APM has increased the crane rail capacity and structurally strengthened the foundation of 3,500 linear feet of crane rail, leaving 2,500 feet to be completed (Declaration of Joe Nielson at 2);
3. With regard to the Class A Work required by Lease EP-248, Section 7(a)(1)(ii) (reinforcement of the berth to allow for dredging of the 4,800 linear feet of the berthing area to fifty feet below mean low water), APM has reinforced 3,500 feet of the berth to allow for dredging to fifty feet below mean low water, leaving 1,300 feet to be completed (Declaration of Joe Nielson at 2-3);
4. APM does not have sufficient information to state whether the “Forty-five Foot Deepening” as defined by Section 41(a)(1) of Lease EP-248 was completed. Paragraph 3(a) of the Third Supplemental Agreement establishes firm dates for the completion of Class A Work regardless of the date such deepening was or is accomplished (Declaration of Joe Nielson at 3);
5. With regard to Paragraph 3(a) of the Third Supplemental Agreement, which links the Class A Work Completion Date for the work remaining required by Lease EP-248, Sections 7(a)(1)(i) and (ii) to the completion of the Panama Canal Expansion Project, APM states:

The remaining Class A Work is intended to add an additional berth to APMT’s terminal capable of servicing deep draft vessels known as “post-Panamax vessels.” Additional capacity is not needed at this time, as there is no demand from carriers for APMT to service this level of post-Panamax vessels. The Panama Canal expansion project will, however, allow post-Panamax vessels in the Transpacific trade to transit the Panama Canal and reach APMT’s facilities at the Port of Elizabeth. (The vessels are too large to transit the canal at this

time). At that time, the demand for deep-draft capacity may increase and APMT may need the additional berth to be constructed in order to meet that demand.

(Declaration of Joe Nielson at 4)'

6. With regard to the McLester Street project, PANYNJ states:

APMT's surrender of approximately 2 1/2 acres of land for the McLester Street widening was a concession requested by the Port Authority and granted by APMT as part of the settlement negotiations. APMT considered the concession reasonable because the street widening will improve traffic flow at the port and will allow easier ingress and egress to APMT's facility as well as the facilities of all other port tenants. APMT has no information regarding whether Maher surrendered any land for the project.

(Declaration of Joe Nielson at 5.)

F. Maher's Response to the Information Provided by PANYNJ and APM in Response to the Order for Parties to Supplement the Record.

On September 17, 2008, Maher filed its Response to the Information Provided by PANYNJ and APM in Response to the Order of September 10, 2008. Maher contends that "[t]he PANYNJ-APM coordinated submissions only serve to confirm Maher's point that PANYNJ-APM failed to disclose the true nature and value of PANYNJ's new preferences accorded APM – the deferred construction obligations, the 'consent to transfer of shares,' and the McLester Street improvements." (Maher's Response to the Information Provided by PANYNJ and APM in Response to the Order of September 10, 2008 at 3.)

With regard to the "deferred construction obligations," Maher contends that although PANYNJ and APM admit that substantial work required by Lease EP-248 would be deferred until December 31, 2017, "they have not offered the Commission even their own calculation of the value of that deferral." (*Id.*) Maher contends that the proposed deferral "highlights the prejudice to Maher, which was already required to undertake even greater construction obligations, at enormous expense, despite the absence of commercial demand. Thus, PANYNJ's concession to APM, allowing it to avoid required capital costs when demand is low, is a further discrimination against Maher." (*Id.* at 3-4.)

With regard to the "consent to transfer of shares" provision in the settlement agreement that would permit "to any affiliate of Maersk Inc., . . . provided the named transferee is and continues to be an affiliate of Maersk Inc." Maher contends that PANYNJ and APM do not contest that

PANYNJ's Transfer of Ownership Policy applies to the transfer of up to 50 percent of Maersk, Inc.'s share of APM proposed as part of the settlement.

With regard to the McLester Street project, Maher contends that "PANYNJ's admission that the road widening is for the benefit of all port users still does not articulate the value of that benefit to APM, which PANYNJ trumpeted in its Port News release cited by Maher's reply in opposition." The press release indicates that completion of the project "will allow double right-handed truck moves into and out of APM Terminals." (Maher Reply in Opposition, Exhibit 9.)

G. Maher's Response to the Second Order for Parties to Supplement the Record.

On October 1, 2008, I issued an order for Maher to supplement the record by responding to a series of questions and providing additional documents. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Oct. 1, 2008) (Second Order for Parties to Supplement the Record). On October 3, Maher responded with the following information.

When it referred to "even greater construction obligations" in Maher's Response to the Information Provided by PANYNJ and APM in Response to the Order of September 10, 2008, it was referring to the Class A Work that Section 7(a)(1) of Lease EP-249 required Maher to perform. Maher states that it completed this work in May 2006. (Affidavit of Gerald A. Morrissey III ¶¶ 2-4.) Question 4 of the October 1 Order asked Maher if it had contacted "PANYNJ with a request to negotiate a deferral of the completion date for [the Class A Work]? If so, please provide details of those contacts and supply any supporting documents." (*Id.* at 3.) Maher did not directly answer the question, but responded:

PANYNJ failed to inform Maher that it did not enforce reasonable practices with respect to APM's failure to comply with the Class A Work requirement in FMC agreement number 201106. Nor did PANYNJ offer Maher the opportunity to defer any of Maher's Class A Work, either prior to or after PANYNJ's recent agreement to do so with APM. Indeed, on July 30, 2007, PANYNJ characterized APM's failure to complete Class A Work as a "material breach of the Lease Agreement" and a violation of the Shipping Act. *See* PANYNJ Answer and Counter-Complaint, at 7. Once Maher learned of PANYNJ's decision in the proposed settlement agreement to grant another undue preference to APM, Maher timely objected in this proceeding. Importantly, PANYNJ refused to deal with Maher with respect to all its claims in proceedings 07-01 and 08-03 as explained in Maher's submissions in opposition to the settlement, including in this respect. In response to the request for details of Maher's contacts and any supporting documents, please see Maher's response to PANYNJ's Interrogatory No. 19 in 08-03 (pgs. 17-20), attached as Exhibit 1 hereto, and communications between Maher and PANYNJ, attached as Exhibit 2 hereto, both reflecting Maher's repeated contacts and efforts to deal with PANYNJ since November 2007 and PANYNJ's refusal to deal with Maher.

(Affidavit of Gerald A. Morrissey III ¶ 5.) In its response to Interrogatory No. 19, Maher describes a series of attempts it made beginning in November 2007 to settle Maher's claims in 07-01 and what it describes as PANYNJ's refusal to engage in meaningful negotiations to resolve those claims.

H. APM and PANYNJ's Reply to Maher's Response to the October 2, 2008 Second Order for the Parties to Supplement the Record.

APM and PANYNJ responded to Maher's response by stating Maher did not contact PANYNJ to request deferral of the Class A Work Completion Date. Instead of responding in a straightforward manner, Maher sets for arguments about Maher's claim that PANYNJ refused to deal with Maher, the claim Maher makes in Docket No. 08-03. (Reply to Maher's Response to the October 2, 2008 Second Order for the Parties to Supplement the Record at 1-2.) APM and PANYNJ also contest Maher's claim that it was "required to undertake even greater construction obligations" than was APM, contending that APM was obligated to perform more work than Maher and that the amount of work already performed by APM pursuant to Lease EP-248 is comparable to all the work Lease EP-249 required Maher to undertake. (*Id.* at 2.)

DISCUSSION

I. STANDARD OF REVIEW.

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. 975, 978 (2002), quoting *Old Ben Coal Co v. Sea-Land Service, Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*). See also *Ellenville Handle Works v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981). Using language borrowed in part from the Administrative Procedure Act,¹¹ Rule 91 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement "where time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.91(b).

The law favors resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of

¹¹ "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092, quoting 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976).

“While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation.”
Id.

If a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval.

Id. at 1092-1093.

Generally, when examining settlements, the Commission looks to see if the settlement has a reasonable basis and reflects the careful consideration by the parties of such factors as the relative strengths of their positions weighed against the risks and costs of continued litigation. Furthermore, if it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement.

Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia - New Zealand Conference and Columbus Line, Inc., 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

II. RELEVANT FACTS.

I find that the following facts relevant to the proposed Settlement Agreement are not in dispute.

1. The Added Premises as defined by Lease EP-248 did not become part of the premises occupied by APM prior to December 31, 2003. (APM Complaint at 4.)
2. On December 31, 2003, pursuant to Lease EP-249, Maher occupied the portion of the Elizabeth Port Authority Marine Terminal identified as the “Added Premises” in Lease EP-248. (APM Complaint at 5.)

3. Maher did not surrender the “Added Premises” until December 15, 2005. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ June 4, 2008) (Memorandum and Order on Motions to Compel Responses to Discovery at 32) (quoting Maher Response to PANYNJ Interrogatory to Maher No. 3).
4. The Added Premises did not “become part of the premises under [Lease EP-248]” (*i.e.*, APM did not take possession of the Added Premises) until December 25, 2005. (APM Complaint at 5.)
5. The “Forty-five Foot Deepening” as defined by Section 41(a)(1) of Lease EP-248 and Section 41(a)(1) of Lease EP-249 was completed in December 2004. (Declaration of Dennis Lombardi ¶ 10.)
6. Pursuant to Lease EP-248, APM’s Class A Work Completion Date was December 25, 2006. (Lease EP-248 at 14 (Section 7(a)(4).))
7. APM did not complete the Class A Work required by Section 7(a)(1) of Lease EP-248 by the Class A Work Completion Date. (Declaration of Dennis Lombardi ¶¶ 8-9.)
8. Pursuant to Lease EP-249, Maher’s Class A Work Completion Date was December 2005. (Lease EP-249 at 17 (Section 7(a)(4).))
9. Maher completed the Class A Work required by Lease EP-249 Section 7(a)(1) in May 2006. (Affidavit of Gerald A. Morrissey III ¶ 4.)
10. Maher did not approach PANYNJ with a request to negotiate a deferral of the completion date for the Class A Work required by Lease EP-249. (Affidavit of Gerald A. Morrissey III ¶ 5.)
11. PANYNJ has sixty-three leases for marine terminal property with thirty-seven marine terminal operators. (Declaration of Dennis Lombardi ¶¶ 2-3.)
12. Since May 1, 1999, on 233 occasions, PANYNJ has renegotiated leases for marine terminal property with marine terminal operators resulting in either a new lease or a supplemental agreement to a lease. (Declaration of Dennis Lombardi ¶ 4.)

III. MAHER'S STANDING TO OBJECT TO THE SETTLEMENT AGREEMENT AND THIRD SUPPLEMENTAL AGREEMENT.

In their Joint Motion, APM and PANYNJ contend that

there is no basis for any contention by Maher that any benefit APMT is receiving [under the Settlement Agreement and the Third Supplemental Agreement] could be deemed a preference over Maher. The issue of APMT's extension to perform its Class A work under the APMT Lease has nothing to do with Maher. It has to do with obligations exclusively by and between APMT and PANYNJ. Moreover, APMT is giving PANYNJ substantial consideration for any benefit it is receiving and is by no means getting any benefit *gratis*. Moreover, Maher will also benefit from the settlement as PANYNJ will drop its claim against Maher for indemnity arising from APMT's claim for belated delivery of the Added Premises.

Equally important, even if Maher could show that the Settlement Agreement amounts to a preference by PANYNJ of APMT over Maher . . . [9] Maher's remedy is not to enjoin the Settlement Agreement and APMT Lease amendments. Maher has no standing to prevent the execution of a lease amendment by APMT and PANYNJ, whether it is entered into in the ordinary course of business or in connection with a settlement agreement as here. In order to challenge any terms of the agreement as constituting an undue preference, Maher must file a claim against the Port Authority alleging a Shipping Act violation. It could then seek reparations or consistent treatment by the Port Authority. It cannot, however, enjoin the effectiveness of the lease amendment. Moreover, Maher would need to show that any preference allegedly contained in the Settlement Agreement or lease amendment is "unreasonable" or "undue" in order to show that the Settlement Agreement violated the Shipping Act. It is patent, however, that Maher could never make such a showing, since the Commission's policy favoring settlement of disputes, particularly disputes as complex and expensive as this one, provides all the "reason" on would ever need. In short, no reason exists to deny approval of the Settlement Agreement.

(Joint Motion at 11-12.)

In its opposition, Maher construes this APM/PANYNJ statement as a contention "that Maher has 'no standing' to object to the settlement and that 'Maher's remedy is not to enjoin the Settlement Agreement and APMT Lease amendment.'" (Maher Reply in Opposition at 10.) Citing Commission precedent, *Activities of the Trans-Atlantic Agreement and its Members, etc.*, 27 S.R.R. 51 (1995), and District of Columbia Circuit precedent for review of settlements entered in proceedings before the Federal Power Commission, *Penn. Gas & Water Co. v. Federal Power Comm'n*, 463 F.2d 1242 (D.C. Cir. 1972) and *Citizens for Allegan Cty. Inc. v. Federal Power Comm'n*, 414 F.2d 1125 (D.C. Cir. 1969), Maher contends that "consideration of third-party objections to a settlement is in keeping with the practice of other administrative agencies and the law." (Maher Reply in Opposition at 10.)

APM and PANYNJ respond that they “never said that Maher has “no standing” to object to the settlement” of the proceeding. They contend that a fair reading of their memorandum reveals that their position is that Maher has no standing to prevent the execution of a lease amendment, but concede that Maher has standing to challenge the settlement of the litigation. (Reply to Maher’s Opposition to the Settlement Agreement at 2.)

It is clear that Maher has standing to object to approval of the proposed Settlement Agreement. Therefore, I will consider Maher’s objections.

IV. MAHER’S OBJECTIONS.

MaHer contends that the proposed settlement agreement between APM and PANYNJ should not be approved because PANYNJ has violated three sections of the Shipping Act:

1. PANYNJ agreed to provide unjust and unreasonable preference with respect to APM and unjust and unreasonable prejudice or disadvantage with respect to Maher in violation of 46 C.F.R. § 41106(2) (“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.”).
2. PANYNJ failed to establish, observe, and enforce just and reasonable regulations and practices in violation of 46 C.F.R. § 41102(c) (“A common carrier, marine terminal operator, or ocean transportation intermediary 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.”).
3. PANYNJ unreasonably refused to deal or negotiate with Maher in violation of 46 C.F.R. § 41106(3) (“A marine terminal operator may not – . . . (3) unreasonably refuse to deal or negotiate.”).

(See Maher Reply in Opposition at 12.)

MaHer’s arguments against approval of the Settlement Agreement can be divided into five main contentions: (1) PANYNJ violated the Shipping Act in and around the year 2000 when it negotiated Lease EP-248 with APM and Lease EP-249 with Maher; (2) PANYNJ violated the Shipping Act by negotiating the Settlement Agreement and the Third Supplemental Agreement to Lease EP-248 with APM, but refusing to negotiate revisions to Lease EP-249 with Maher; (3) PANYNJ violated the Shipping Act by including the indemnity provision in Section 1(d) of Lease EP-249 and filing its third party complaint against Maher to enforce the indemnity provision; (4) the provisions of the Settlement Agreement and the Third Supplemental Agreement violate the Shipping Act; and (5) the dismissal with prejudice of APM would prejudice Maher’s ability to prosecute its counter-complaint against PANYNJ.

A. Allegations of Shipping Act Violations by PANYNJ Connected with the Negotiations That Resulted in Lease EP-248 and Lease EP-249.

Some of Maher's arguments against approval of the Settlement Agreement in this proceeding do not concern the Settlement Agreement or the Third Supplemental Agreement, but alleged Shipping Act violations in the negotiations between PANYNJ and Maher that resulted in Lease EP-249 in the year 2000. For instance, Maher contends that when PANYNJ and Maher were negotiating the terms of Lease EP-249, Maher was aware that the rent that APM (then Maersk) would pay pursuant to Lease EP-248 was considerably less than the rent PANYNJ proposed Maher would pay under Lease EP-249. When Maher asked that it get same lease rate as Maersk, it "was told that the Maersk lease rates were off the table, it was not something the Port Authority was willing to negotiate" and that "this was the final offer for the Port Authority and that they were not going to negotiate any further." (Maher Opposition at 6 and Exhibit 4.) Maher also contends that the terms in Lease EP-248 for investment requirements, throughput requirement, and the security deposit requirement were more favorable to APM than corresponding terms in Lease EP-249 were to Maher.

As set forth above, Maher has commenced another proceeding against PANYNJ (FMC No. 08-03) alleging that PANYNJ violated 46 U.S.C. §§ 41106(2) and (3) and 41102(c) of the Shipping Act in its conduct of the negotiations with APM and Maher in and before 2000 that led to Lease EP-248 and Lease EP-249. See Background Section II.F, *supra*. The parties believe that Docket No. 08-03 "will be a complicated and time-consuming case." *Maher Terminals, LLC v. Port Authority of New York and New Jersey*, FMC No. 08-03 (Aug. 1, 2008) (August 1, 2008, Discovery Order). I take official notice that the discovery motions and replies already filed in Docket No. 08-03 create a stack of paper nearly five inches high. Approval of the Settlement Agreement in this proceeding will not have an effect on the issues raised in No. 08-03. It is not in the public interest to delay approval of the Settlement Agreement in this proceeding pending a determination of the unrelated claims regarding the 2000 negotiations of the leases.

B. Allegations of Shipping Act Violations by PANYNJ Connected With the Negotiations between APM and PANYNJ that Resulted in the Settlement Agreement and Third Supplemental Lease.

Maher claims that PANYNJ violated the Shipping Act when it refused to negotiate with Maher over revising the terms of Lease EP-249, (*see* Maher Reply in Opposition, Exhibit 5 (stating Maher's request to negotiate about the original "lease terms in EP-248 that are preferential to those granted to Maher in EP-249 [including] basic annual rental rate per acre, investment requirements, throughput requirement, and the security deposit requirement")), but did engage in the negotiations with APM that resulted in the Settlement Agreement and Third Supplemental Agreement. As set forth above, Maher's complaint in FMC Docket No. 08-03 addresses these issues in the context of the negotiations in 2000.

The Shipping Act provides that “[a] marine terminal operator may not . . . (3) unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41106. The record indicates that PANYNJ has sixty-three leases for marine terminal property with thirty-seven marine terminal operators. On 233 occasions since May 1, 1999, PANYNJ has renegotiated a lease with a marine terminal operator resulting either in a new lease or a supplemental agreement to a lease. When PANYNJ and APM were renegotiating provisions of Lease EP-248 as part of their settlement discussions in this proceeding, Maher’s position as the lessee of Lease EP-249 was no different with respect to the PANYNJ/APM negotiations than the lessees on the other sixty-one leases. Maher cites no authority holding that when a port authority renegotiates specific lease provisions in one lease for marine terminal property with one of its marine terminal operator tenants, the Shipping Act requires it to renegotiate with all of its other marine terminal operator tenants about whatever provisions in their leases they want to renegotiate. It would paralyze a port authority’s ability to renegotiate leases as may be required by changed conditions for fear of being inundated with demands from other marine terminal operators seeking unrelated changes to their leases. Therefore, the claimed refusal by PANYNJ to renegotiate Lease EP-249 as demanded by Maher does not bar approval of the Settlement Agreement.

This is not to say that there could never be a situation in which it might be appropriate to withhold approval of a proposed settlement agreement because a port authority has refused to negotiate with another lessee. Altering the facts in this situation can provide a hypothetical situation in which withholding approval might be appropriate. As a matter of historical fact, Maher finished the Class A Work required by Lease EP-249 in May 2006, prior to the Class A Work Completion Date for APM established by Lease EP-248. If, however, it is assumed that:

- (1) Maher had not finished the Class A Work required by Lease EP-249;
- (2) APM had not finished the Class A Work required by Lease EP-248;
- (3) PANYNJ renegotiated with APM to extend the Completion Date for APM’s Class A Work “to the later of the first anniversary of the full completion of the Panama Canal Expansion Project or December 31, 2017, whichever occurs first;” and
- (4) PANYNJ refused to renegotiate with Maher to extend the Completion Date for Maher’s Class A Work to the same date;

then it may have been appropriate for the Commission to decline to approve the proposed Settlement Agreement because of the differences in treatment. Instead, Maher was seeking renegotiation of lease provisions to which it agreed in 2000 that are unrelated to the provisions in the Settlement Agreement and Third Supplemental Agreement. The fact that PANYNJ may have declined to renegotiate these provisions does not preclude approval of the Settlement Agreement.

C. Allegations of Shipping Act Violations by PANYNJ Connected With the “Indemnity Provision” in Lease EP-249.

PANYNJ based its third party complaint in this proceeding on the “indemnity provision” in its lease with Maher. (Lease EP-249 at 3 (Section 1(d)).) PANYNJ contends that Maher violated the Shipping Act by failing to vacate the Added Premises by the date required by the lease so PANYNJ could deliver the Added Premises to APM as required by Lease EP-248. As a result of this failure to vacate, PANYNJ contends that Lease EP-249 requires Maher: (1) To indemnify and hold harmless PANYNJ for any damages resulting from PANYNJ’s failure to turn over the Added Premises to APM in a timely manner; and (2) to defend PANYNJ at Maher’s sole expense for any claim arising out of its terminal operation under Lease EP-249. As part of the proposed settlement, PANYNJ has committed itself to dismiss with prejudice its third party complaint against Maher in this proceeding and the case it brought against Maher and APM in the New Jersey state court. (Joint Motion for Approval at 3-4 (“If the Settlement Agreement is approved by the Commission, PANYNJ will dismiss its third-party complaint against Maher and the parallel New Jersey state court action, with the result that not only will PANYNJ be absolved of any liability for the failure to deliver the Added Premises by December 31, 2003, but Maher will thereby be absolved as well.”).)

Maher mounts a three-pronged attack on the “indemnity provision” to support its argument that the Settlement Agreement should not be approved. First, Maher argues that PANYNJ “failed and continues to fail to establish, observe, and enforce just and reasonable regulations and practices” by including the indemnity provision in Lease EP-249 when it was drafted in 2000, contending that the indemnity provision is barred by the Shipping Act, New Jersey law, and PANYNJ’s regulations. (Maher Reply in Opposition at 4-5 and n.3.) Second, as a defense to PANYNJ’s claim that Maher failed to vacate the Added Premises as required by Lease EP-249, Maher contends that PANYNJ failed to improve other premises as required by Lease EP-249 before providing dates for Maher to vacate the Added Premises. (*Id.* at 6-7.) Since PANYNJ failed to make those improvements, Maher contends it was entitled to remain on the Added Premises until the date it vacated and may not be required to indemnify PANYNJ or pay for its defense of the APM claim. Third, Maher claims that PANYNJ refused to engage in meaningful negotiations with Maher about PANYNJ’s third party complaint based on the indemnity provision and Maher’s defenses to it, thereby violating the Shipping Act by unreasonably refusing to deal or negotiate with Maher.

With regard to Maher’s claim that PANYNJ violated the Shipping Act when it included the indemnity provision in Lease EP-249, this claim is more appropriately considered with the claims in FMC No. 08-03, Maher’s proceeding against PANYNJ, not as an objection to entry of the proposed Settlement Agreement and/or the Third Supplemental Agreement. Except for the dismissal of PANYNJ’s claims against Maher based on the indemnity provision, the proposed Settlement Agreement and the Third Supplemental Agreement are unrelated to the indemnity provision. PANYNJ is dismissing with prejudice the claim for indemnity set forth in its third party complaint in this proceeding and the claims in the New Jersey state court action against Maher and APM. Therefore, Maher’s defense to that claim based on PANYNJ’s alleged failure to improve other premises as required by Lease EP-249 before providing dates for Maher to vacate the Added

Premises is moot. Maher's claim that PANYNJ unreasonably refused to deal or negotiate with Maher about PANYNJ's third party complaint and Maher's defenses to it is also moot, as there is no need for PANYNJ to negotiate about a dismissal with prejudice OF THE CLAIM AGAINST Maher that requires Maher to pay nothing or take no action. With regard to Maher's claim that "PANYNJ's third-party complaint against Maher which is grounded in an unlawful indemnity provision constitutes a violation of the Shipping Act and an abuse of process for which PANYNJ is liable" (Maher Reply at 23; *see* Maher's Answer to Third Party Complaint & Counter-Complaint ¶ 39), Maher cites no authority holding that filing an FMC complaint alleging a Shipping Act violation is itself a Shipping Act violation, or, to the extent that filing a complaint alleging a Shipping Act violation can be considered "abuse of process," the Commission has jurisdiction to adjudicate the abuse of process claim. To the extent there is such authority, Maher's counter-complaint survives the dismissal with prejudice of the third-party complaint and can be addressed as appropriate.

Maher also faults PANYNJ because it "enforced against Maher the unlawful indemnity discussed above for PANYNJ actions delaying the turnover of premises, but did not enforce such an indemnity on APM." (Maher Reply in Opposition at 5.) Maher does not identify a provision in APM's Lease EP-248 that required APM to surrender leased property as Section 1(d) of Lease EP-249 required Maher to surrender the Added Premises. Accordingly, it is entirely logical that Lease EP-248 did not contain an indemnity provision to be enforced against APM if APM failed to surrender leased property in a timely manner.

Therefore, Maher's allegations of Shipping Act violations by PANYNJ connected with the "indemnity provision" in Lease EP-249 do not prevent approval of the proposed Settlement Agreement and Third Supplemental Agreement.

D. Allegations that Provisions of the Settlement Agreement and the Third Supplemental Agreement Violate the Shipping Act.

Maher contends that four aspects of the Settlement Agreement itself violate the Shipping Act: (1) the deferral of the completion date for APM's Class A Work discriminates against Maher because Maher has already completed similar more extensive work; (2) APM and PANYNJ have not demonstrated the values of the deferral of the Class A Work Completion Date and the APM claim for reparations caused by the delay in transfer of the Added Premises; (3) the "change in ownership" provision in the Settlement Agreement for which APM pays nothing contrasts starkly with requirements placed on Maher and other marine terminal operators to pay "tribute" for consent to change ownership interests; and (4) although APM and PANYNJ portray the transfer of property for the McLester Street projects as a way "to improve traffic flow on Port roadways," they fail to disclose the direct benefit to APM's terminal." (Maher Reply in Opposition at 14.)

1. Deferral of Completion Date of Class A Work Required by Lease EP-248.

Maier contends that the deferral of the completion date for Class A Work that Lease EP-248 requires APM to perform “highlights the prejudice to Maier, which was already required to undertake even greater construction obligations, at enormous expense, despite the absence of commercial demand. Thus, PANYNJ’s concession to APM, allowing it to avoid required capital costs when demand is low, is a further discrimination against Maier.” (Maier’s Response to the Information Provided by PANYNJ and APM in Response to the Order of September 10, 2008 at 3-4.) In response to the Second Order for supplemental information, Maier identifies the “even greater construction obligations” as the Class A Work that Lease EP-249 required Maier to perform.

Lease EP-249 required Maier to complete the Class A Work set forth in the lease within one year of the completion date of the forty-five foot deepening of the channel through Kill Van Kull and Newark Bay. According to PANYNJ, the forty-five foot deepening was completed in December 2004 (Declaration of Dennis Lombardi ¶ 10), a date that Maier does not dispute; therefore, the Class A Work Completion Date established by Lease EP-249 was December 2005. Maier states that it completed its Class A Work in May 2006, five months after the completion date established by Lease EP-249. (Affidavit of Gerald A. Morrissey III ¶ 4.)

Lease EP-248 required APM to complete the Class A Work required by Lease EP-248 “within one year of the later of the date that all of the [A]dded [P]remises have become part of the premises under this Agreement or the date of the completion of the Forty-five Foot Deepening.” The Added Premises did not become part of APM’s leased premises until December 25, 2005. Therefore, the Class A Work Completion Date under Lease EP-248 was December 25, 2006, one year after the Class A Work Completion Date Lease EP-249 established for Maier’s work and seven months *after* Maier completed its Class A Work.

Question 4 in the Second Order to Supplement the Record asked this question of Maier:

Did Maier contact PANYNJ with a request to negotiate a deferral of the completion date for the work to which it refers in its Response to the Information Provided by PANYNJ and APM in Response to the Order of September 10, 2008 at 3-4? If so, please provide details of those contacts and supply any supporting documents.

APM Terminals North America, Inc. v. Port Authority of New York and New Jersey, FMC No. 07-01 (ALJ Oct. 1, 2008) (Second Order for Parties to Supplement the Record). Maier did not directly answer the question. (See Affidavit of Gerald A. Morrissey III ¶ 5, quoted *supra* at 27.) I conclude from its lack of response to this direct question and the other information set forth in its response that Maier did not contact PANYNJ with a request to negotiate a deferral of the completion date. Instead, Maier faults PANYNJ for “fail[ing] to inform Maier that it did not enforce reasonable practices with respect to APM’s failure to comply with the Class A Work requirement in FMC agreement number 201106.” (*Id.*) Maier had completed its Class A Work seven months before the

date Lease EP-248 established as APM's Class A Work Completion Date. Maher does not explain how PANYNJ could have known before Maher completed its Class A Work that APM would not complete APM's Class A Work by the completion date established in Lease EP-248, thereby arguably creating an obligation on PANYNJ to inform Maher that it would not enforce the Class A Work Completion Date in Lease EP-248.

Maher also faults PANYNJ for failing to "offer Maher the opportunity to defer any of Maher's Class A Work, either prior to or after PANYNJ's recent agreement to do so with APM." (Affidavit of Gerald A. Morrissey III ¶ 5.) Maher had completed its Class A Work prior to the date Lease EP-248 required APM to complete its Class A Work and prior to the date on which APM and PANYNJ reached their agreement to defer the completion date. A PANYNJ offer to Maher permitting Maher to defer its Class A Work after Maher had completed that work would not make sense. Furthermore, Maher knew or should have known from the fact that it did not complete its Class A Work until well after its Class A Work Completion Date that it could ask PANYNJ to defer that date.

As stated above, if the evidence demonstrated that PANYNJ had refused to negotiate with Maher regarding deferral of its Class A Work Completion Date, but negotiated a deferral with APM, a finding that PANYNJ refused to negotiate or deal with Maher sufficient to justify disapproval of the settlement agreement might be justified. This is not the case, however. Therefore, the fact that Maher completed its Class A Work but the completion date of APM's Class A Work will be deferred by the Settlement Agreement does not justify disapproval of the Settlement Agreement.

2. The Value of the Deferral of the Class A Work Completion Date and the Value of the Delay in Transfer of the Added Premises.

Maher contends that "while APM trumpets the substantial nature of its \$45 million claim [for the delay in transfer of the Added Premises], it provides no evidence to support its bald assertion that it is really giving up anything that valuable" (Maher's Reply in Opposition at 22) and that this failure should preclude approval of the proposed Settlement Agreement. PANYNJ valued its counter-complaint based on APM's failure to complete the Class A Work required by Lease EP-248 at approximately \$50 million. (Maher Reply in Opposition, Exhibit 1). By dismissing their claims against each other, APM and PANYNJ have determined for the sake of settlement that APM's claim for damages resulting from the delay in transfer of the Added Premises and PANYNJ's claim for damages resulting from the delay in Class A Work offset each other. "In respect to the particular amount of damages upon which the parties have agreed, the Commission has recognized that this is a matter for the parties to determine." *Perry's Crane Serv. v. Port of Houston Auth.*, 19 S.R.R. 517, 520 n.3 (ALJ 1979) (citations omitted). Therefore, APM and PANYNJ are not required to present evidence to prove the value of the delay in transfer of the Added Premises and the value of the deferral of the Class A Work Completion Date to justify approval of the Settlement Agreement.

3. The "Change in Ownership" Provision.

In Paragraph 3 of the proposed Settlement Agreement, PANYNJ consents to the "transfer of Maersk Inc.'s interest in APMT (the "APMT Shares") to any affiliate of Maersk Inc. . . . provided the named transferee is and continues to be an affiliate of Maersk." Maher contrasts the permission granted by this provision with PANYNJ's treatment of other terminal operators from which Maher contends PANYNJ extracted "tribute" to obtain PANYNJ's consent to a change in ownership interest. (Maher Reply in Opposition at 15-17.)

On February 16, 2007, PANYNJ announced that it had obtained a commitment of a \$50 million investment in return for its consent to a change in ownership interest with respect to Port Newark Container Terminal ("PCNT"). (Ex. 14.) (PANYNJ Press Release 16-2007.) On May 9, 2007, PANYNJ announced that it obtained a commitment of \$51 million, including \$16 million in cash, in return for its consent to a change in ownership interest with respect to New York Container Terminal, Inc. ("NYCT"). (Ex. 15.) (PANYNJ Press Release 0-2007.) And, on July 5, 2007, PANYNJ announced that it had obtained \$114 commitment, including \$22 million in cash, in return for its consent to a change in ownership interest with respect to Maher. (Ex. 13.) In total, PANYNJ required the payment of \$237 million in cash and investment from the terminal operators to obtain PANYNJ's consent to change of ownership interest.

(Maher Reply in Opposition at 15-16.)

Each of the changes in ownership described by Maher involved transfer of an ownership interest in a lease from a PANYNJ lessee to an unaffiliated entity. The February 16, 2007, press release regarding Port Newark Container Terminal states: "Following positive talks, representative of DP World, AIG Global Investment Group and the Port Authority have reached an agreement in principle that will allow Ports America, Inc. (an affiliate of AIG Global Investment Group) to acquire DP World's interest in the Port Newark Container Terminal," (Maher Reply in Opposition, Exhibit 14.) The May 9, 2007, press release state: "We're pleased to have reached an agreement with Orient Overseas International Ltd., Ontario Teachers Pension Plan and the operator of the Howland Hook Marine Terminal. . . . Under the agreement, Ontario Teachers will acquire the remaining 12 years of the Howland Hook lease from Orient Overseas International Ltd." (*Id.*, Exhibit 15.) The July 5, 2007, press release states:

The Port Authority today reached an agreement with Maher Terminals LLC and affiliates of RREEF Infrastructure, part of Deutsche Asset Management's RREEF Alternative Investments, for a change of ownership of the New Jersey-based port facility. . . . Under the agreement, RREEF Infrastructure will acquire Maher Terminals LLC from the Maher family, which has owned and operated the family-owned terminal operating company and has 23 years remaining on its existing lease.

(*Id.*, Exhibit 13.) In each of these transfers, the party to which PANYNJ leased marine terminal property transferred its interest in and control of the leased property to an unaffiliated entity.

In contrast to the transfers cited by Maher, Maersk would still have the ultimate control after the transfer permitted by the proposed Settlement Agreement, as the Agreement only permits transfer to an “affiliate” of Maersk, defined as “any entity that controls, is controlled by, or is under common control with the named entity,” and “control” means “the ownership of greater than 50% of the direct or indirect beneficial ownership of such entity together with voting control over such entity.” (Joint Motion for Approval, Exhibit A (Settlement Agreement ¶ 3).) The APM “change in ownership” provision is similar to the change in corporate structure for which Maher sought permission in 2006. There is no suggestion by PANYNJ or Maher that PANYNJ required or even contemplated requiring Maher to pay “tribute” for this change. (*See* Declaration of Dennis Lombardi ¶ 12, Lombardi Exhibit B (Letter dated October 12, 2006 from Basil Maher to Dennis Lombardi), and Lombardi Exhibit C (Letter dated November 21, 2006 from Dennis Lombardi to Basil Maher); Maher’s Response to the Information Provided by PANYNJ and APM in Response to the Order of September 10, 2008 at 4-6.) Therefore, Maher’s claims regarding the “change in ownership” provision in the Settlement Agreement do not preclude approval of the Agreement.

4. The McLester Street Project.

Pursuant to the Third Supplemental Lease, APM will return approximately 2.5 acres of leased property to PANYNJ to permit widening of McLester Street. The resolution submitted to the PANYNJ Board of Commissioners states:

APM also would permanently surrender up to 2.5 acres and temporarily surrender up to 5 acres of its leasehold to allow for the planned widening of McLester Street by the Port Authority. The proposed lease supplement would commence on or about August 1, 2008 for an approximately 21-year term APM would receive an abatement for the surrendered property on a pro-rata basis, in accordance with its existing base terminal rates. Current basic rent would be permanently abated by approximately \$47,500 annually and temporarily abated by approximately \$95,000 annually during the construction period. The total rental reduction related exclusively to the property surrender over the term of the agreement would be approximately \$1 million.

(Maher Reply in Opposition, Exhibit 1 (Confidential – Elizabeth-Port Authority Marine Terminal – APM Terminals North America, Inc. – Lease No. EP-248 – Settlement Agreement and Lease Supplement).)

Maher contends that the Joint Motion for Approval fails to disclose the “real significance” about the McLester Street project.

While portraying it as merely “to improve traffic flow on Port roadways,” [APM and PANYNJ] fail to disclose the direct benefit to APM’s terminal. (Ex. 9.) (PANYNJ

Port View at 3, Sept./Oct 2007.) (“McLester Street expansion . . . will . . . double right-handed truck moves into and out of APM Terminals.”)

(Maher Reply in Opposition at 14.) APM and PANYNJ reply that the

widening project is part of PANYNJ’s long-term roadway enhancements to benefit all users of the port including both Maher and APMT. The widening will increase the capacity for traffic flow throughout the Port, including to the Express Rail, which would benefit both Maher and APMT, who manage the Express Rail as joint venturers.

(Reply to Maher’s Opposition to the Settlement Agreement at 3.)

The first Order to Supplement the Record asked PANYNJ to “provide more details on how the widening of McLester Street will ‘benefit all users of the port’” and whether “Maher surrender[ed] any leased land for widening McLester Street or ‘the street it turns into.’” PANYNJ submitted an affidavit from one of its officials about the McLester Street project:

McLester Street and the streets it turns into (Lyle King Street and Corbin Street) run most of the length of the Port Elizabeth peninsula and abut the APMT terminal, the Maher terminal, the ExpressRail, WWL (an automobile processor), and Express Port Plaza (which includes a variety of warehouse tenants). In addition, this roadway carries traffic north of Port Elizabeth peninsula to other tenants of the Port. McLester Street is the southern entrance to the Port, and serves as only one of three entryways into the Port. The widening will relieve vehicle traffic congestion, facilitate the movement of goods and services within the Port, and relieve congestion at other entryways where drivers have gone to avoid the congestion on McLester Street. . . . Maher did not surrender any leased land for the widening of McLester Street and adjacent streets.

(Declaration of Dennis Lombardi ¶ 13). Maher responds that

neither PANYNJ nor APM disclose to the Commission why there is such serious traffic congestion at APM’s facility in the first place. For example, they do not disclose that the traffic backups are caused by trucks backing up to enter APM’s terminal because PANYNJ failed to require APM to devote adequate terminal area to its gate facility queuing area. PANYNJ’s response to question 12 that “Maher did not surrender any leased land for the widening of McLester Street and adjacent streets” fails to disclose that PANYNJ required Maher to devote substantially more of its terminal area for which it pays rent, approximately 60 acres in total, to its gate area precisely to avoid the traffic congestion problems PANYNJ now allegedly seeds to solve for APM.

(Maher's Response to Information Provided by PANYNJ and APM in Response to the Order of September 10, 2008 at 6.) Maher does not cite to any evidence supporting these claims. I also note that the PANYNJ Port View article that Maher attached to its opposition and upon which it relies states that the overall roadway improvement effort "includes building an exclusive roadway to facilitate access for Wallenius Wilhelmsen Logistics (WWL), the Maher Chassis Depot, and several warehouse facilities in that area." (Maher Reply in Opposition, Exhibit 9 at 1, 3 (emphasis added).)

Irrespective of whether Maher can support its claims and could demonstrate that PANYNJ violated the Shipping Act in its treatment of Maher as compared to APM, it would not be in the public interest to delay road improvements to McLester Street while this issue is litigated. Therefore, any controversy about the return of 2.5 acres from APM to PANYNJ for the widening of McLester Street is not sufficient to justify disapproval of the Settlement Agreement.

E. The Dismissal with Prejudice of APM Would Prejudice Maher's Ability to Prosecute its Counter-Complaint Against PANYNJ.

Maher contends that APM has "[benefitted] from the discovery process" in this proceeding and "should not be allowed to escape the logical consequences of the litigation it spawned by alleging an undue preference for Maher." (Maher Reply in Opposition at 25.) It cites a Commission administrative law judge opinion for the proposition that "because APM has been 'participating in the discovery process . . . it would be inequitable for [APM] to seek reprieve from a process which [it] had used to [its] advantage to obtain discovery materials from other parties.'" (*Id.*, citing *Exclusive Tug Arrangements in Port Canaveral, Florida*, 29 S.R.R. 1020, 1022 (ALJ 2002).) "Therefore, if the Commission approves the settlement, it should require APM to remain subject to the proceeding for purposes of discovery." (Maher Reply in Opposition at 25.)

As set forth above at pages 6-7, Maher's counter-complaint against PANYNJ is based on two alleged violations of the Shipping Act by PANYNJ: (1) PANYNJ failed to provide Maher with reasonably specified dates for the surrender of the Added Premises and failed to make specified improvements to other premises prior to the date on which Lease EP-248 required PANYNJ to provide the premises to APM; and (2) PANYNJ filed a Third-party Complaint against Maher with the Commission wrongfully alleging breach of Lease EP-249 and violation of the Shipping Act by Maher. (See Maher's Answer to Third Party Complaint & Counter-Complaint ¶¶ 38-39.) The counter-complaint does not allege any wrongdoing by APM, and APM did not file a pleading against Maher alleging a Shipping Act violation. With the exception of the period from December 2007 through March 3, 2008, Maher had an opportunity in this proceeding to take discovery from APM.¹²

¹² The parties were directed not to file discovery with the Commission "until . . . used in the proceeding or the court orders filing." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ June 27, 2007) (Notice of Assignment). Maher did not move to compel responses from APM. See *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ June 4, 2008) (Memorandum and Order on Motions to Compel Responses to Discovery). Therefore, written

Furthermore, it is not apparent what information, if any, APM could have that PANYNJ would not have that would be relevant to Maher's allegations against PANYNJ. Therefore, it would not be appropriate to require APM to remain subject to this proceeding for purposes of discovery.

V. DISMISSAL OF THE NEW JERSEY CASE.

PANYNJ states that it will dismiss with prejudice the complaint it filed against APM and Maher in the New Jersey state court. (Joint Motion for Approval at 3-5.) The Commission does not have the authority to dismiss the New Jersey case.

The New Jersey civil rule governing voluntary dismissal provides for dismissal:

(a) By Plaintiff; By Stipulation. . . . [A]n action may be dismissed by the plaintiff without court order by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs; or by filing a stipulation of dismissal specifying the claim or claims being dismissed, signed by all parties who have appeared in the action. Unless otherwise stated in the notice or stipulation, the dismissal is without prejudice.

(b) By Order of Court. Except as provided by paragraph (a) hereof, an action shall be dismissed at the plaintiff's instance only by leave of court and upon such terms and conditions as the court deems appropriate. If a counterclaim has been filed and served by a defendant prior to being served with plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

N.J.R. 4:37-1. This Initial Decision approving the Settlement Agreement is conditioned upon PANYNJ taking timely and appropriate action to dismiss the New Jersey case with prejudice. PANYNJ is ordered to take this action within ten days of the date on which this decision becomes final and to file with the Commission a file-stamped copy of its submission to the New Jersey court within five days of its filing. PANYNJ is also ordered to file with the Commission a file-stamped copy of the New Jersey court's order on PANYNJ's submission within five days of receipt of the order. If PANYNJ defaults on this condition, this proceeding may be reinstated on application of APM or Maher. *See Safmarine Container Lines N.V. v. Garden State Spices, Inc.*, 28 S.R.R. 1498, 1499 (ALJ 2000) (Commission may approve settlement agreement conditionally subject to reinstatement should a party default on its obligations under the agreement) (citing cases).

discovery served on APM by Maher is not part of the record.

CONCLUSION

I have carefully considered the proposed Settlement Agreement and Maher's objections to the Agreement. I find that PANYNJ and APM have met their burden to demonstrate that the Settlement Agreement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable. The Agreement does not create any new violations of the Shipping Act and is consistent with public policy and Commission precedent regarding approval of settlements. "Finally, the settlement agreement has the added benefit of terminating the state court case, another point in its favor, and, as is obvious from my discussion, fully comports with the strong policy in the law favoring settlements." *Al Kogan d/b/a Galaway International v. World Express Shipping*, 29 S.R.R. 68, 70 (ALJ 2000). Maher's contentions do not lead to a conclusion that the proposed Settlement Agreement should be disapproved. Therefore, I approve the Settlement Agreement.

ORDER

Upon consideration of the Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice filed by complainant APM Terminals North America, Inc. and respondent Port Authority of New York and New Jersey, Maher Terminals, LLC's Reply in Opposition to the Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, the subsequent filings of the three parties regarding the joint motion, the record herein, and for the reasons stated above, it is hereby

ORDERED that the Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice be **GRANTED** and the Settlement Agreement attached to the motion be **APPROVED**. It is

FURTHER ORDERED that the complaint in this proceeding filed by APM Terminals North America, Inc., against the Port Authority of New York and New Jersey be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that the counter-complaint in this proceeding filed by the Port Authority of New York and New Jersey against APM Terminals North America, Inc., be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that the third-party complaint in this proceeding filed by the Port Authority of New York and New Jersey against Maher Terminals, LLC, be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that within ten days of the date on which this decision become final, the Port Authority of New York and New Jersey take appropriate action to dismiss with

prejudice *Port Authority of New York and New Jersey v. Maher Terminals, LLC and APM Terminals North America, Inc.*, No. 1760-08 (N.J. Super. Ct. (Union County) Ch. Div. May 22, 2008) (Verified Complaint for Declaratory Judgment and Injunctive Relief) (filed). The Port Authority of New York and New Jersey is ordered to file with the Commission a file-stamped copy of its submission to the New Jersey court within five days after it is filed with the court. The Port Authority of New York and New Jersey is ordered to file with the Commission a file-stamped copy of the New Jersey court's order on PANYNJ's submission within five days after the Port Authority receives the order. If the Port Authority of New York and New Jersey defaults on this obligation, all or some of the dismissed pleadings may be reinstated on application of APM Terminals North America, Inc., or Maher Terminals, LLC.


Clay G. Guthridge
Administrative Law Judge