FEDERAL MARITIME COMMISSION

CAROLINA MARINE HANDLING, INC. *v.* SOUTH CAROLINA STATE PORTS AUTHORITY, CHARLESTON NAVAL COMPLEX REDEVELOPMENT AUTHORITY, CHARLESTON INTERNATIONAL PROJECTS, INC. AND CHARLESTON INTERNATIONAL PORTS, LLC	Docket No. 99-16

Served: June 30, 2006

BY THE COMMISSION: A. Paul ANDERSON, Joseph E. BRENNAN, and Harold J. CREEL, Jr., *Commissioners*. Steven R. BLUST, *Chairman*, and Rebecca F. DYE, *Commissioner*, concurring in part and dissenting in part.

REPORT AND ORDER

This matter is before the Federal Maritime Commission upon a complaint filed by Carolina Marine Handling, Inc. ("CMH") against the South Carolina State Ports Authority ("SCSPA"), Charleston Naval Complex Redevelopment Authority ("RDA"), Charleston International Projects, Inc. ("Projects, Inc.") and Charleston International Ports, LLC ("Ports, LLC") (Projects, Inc. and Ports, LLC are collectively

referred to as "CIP" by Complainant), alleging violations of various sections of the Shipping Act of 1984. All of the respondents to the proceeding filed motions to dismiss before the presiding administrative law judge ("ALJ"). While the ALJ initially denied the motions, he subsequently granted CIP's motion for reconsideration, and dismissed it from the proceeding based upon a finding that it was not a marine terminal operator ("MTO") during the time period raised in CMH's complaint. The ALJ also determined later in the proceeding to dismiss SCSPA due to its sovereign immunity. The ALJ declined to dismiss RDA, which like SCSPA claims that it is an arm of the State of South Carolina and therefore entitled to sovereign immunity from regulatory adjudications.

For the reasons set forth below, we have determined to affirm the ALJ's dismissal of SCSPA; to reverse in part the ALJ's decision to dismiss CIP, and to reinstate CIP as a party to this proceeding; and to hold that RDA is an arm of the State of South Carolina, thus entitled to sovereign immunity from this regulatory adjudication.

BACKGROUND

A. The Complaint

Complainant CMH states that it is a South Carolina corporation, headquartered in North Charleston, South Carolina. CMH provides marine terminal services, stevedoring, licensed freight forwarding, and steamship agency services at the Port of Charleston and elsewhere in the State of South Carolina. CMH has served common carriers and other vessels in the U.S. foreign and domestic trades. Amended Complaint at 1-2. CMH claims that it has "sought to have an active role in the

commercial development of the former Charleston Naval Complex in North Charleston following its closure by the federal government in 1995." Id.

CMH states that SCSPA is an instrumentality and agency of the State of South Carolina. According to CMH, SCSPA has control over the regulation, development, and maintenance of all South Carolina harbors or seaports and their port facilities for the handling of U.S. foreign and domestic water-borne commerce. Id. at 2. CMH asserts that SCSPA is "an 'operating' port authority" at the Port of Charleston and is an MTO subject to Commission jurisdiction under the Shipping Act. Id.

CMH also states that RDA is an instrumentality and agency of the State of South Carolina and that RDA was established to "acquire, manage and dispose of the Charleston Naval Complex, a federal military installation that will be deeded to the State of South Carolina following its closure by the federal government." Id. at 4. CMH further alleges that "[a]t all times material to the Complaint, RDA was and is engaged in the business of a marine terminal operator at the Charleston Naval Complex in North Charleston." Id.

CMH claims that Projects, Inc. is a "start-up Michigan corporation that has no maritime experience or expertise." Id. at 5. CMH claims further that Ports, LLC is a "recent start-up company that is successor in interest to Charleston International Projects, Inc., and has no maritime experience." Id. CMH collectively refers to both Projects, Inc. and Ports, LLC as CIP.

B. Violations Alleged

In its complaint, CMH alleges that Respondents violated sections 5(a), 10(a)(2), 10(d)(1) and 10(d)(4) of the Shipping Act, 46 U.S.C. app. §§ 1704(a), 1709(a)(2), 1709(d)(1), and 10(d)(4).[1] Because some of the alleged actions occurred prior

[1]Those sections read:

Section 5(a):

Filing requirements. A true copy of every agreement entered into with respect to an activity described in section 4(a) or (b) of this Act shall be filed with the Commission, except agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate or maintain a marine terminal in the United States. In the case of an oral agreement, a complete memorandum specifying in detail the substance of the agreement shall be filed. The Commission may by regulation prescribe the form and manner in which an agreement shall be filed and the additional information and documents necessary to evaluate the agreement.

Section 10(a)(2):

No person may operate under an agreement required to be filed under section 5 of this Act that has not become effective under section 6, or that has been rejected, disapproved or canceled.

Section 10(d)(1):

No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Section 10(d)(4):

No marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.

to the effective date of the Ocean Shipping Reform Act of 1998 ("OSRA"), CMH also alleges that Respondents violated sections 10(b)(11), 10(b)(12) and 10(d)(3), 46 U.S.C. app. §§ 1709(b)(11),(b)(12), and (d)(3).[2]

CMH asserts that in 1993 RDA was created to "oversee the conversion of the Charleston Naval Complex to commercial and governmental use." Id. at 7-8. Two years later, RDA solicited proposals from the public concerning the commercial use of the Charleston Naval Complex. CMH submitted a

[2] Pre-OSRA sections relevant to this proceeding provided:

Section 10(b):

No common carrier, either alone or in conjunction with any other person, directly or indirectly may --

> (11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;
>
> (12) subject any particular person, locality or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever;

Section (d):

Common carriers, ocean freight forwarders, and marine terminal operators.

> (3) The prohibitions in subsections (b)(11), (12), and (16) of this section apply to marine terminal operators.

business plan, proposing to lease several piers and warehouses. CMH alleges that it was prohibited from operating a marine terminal facility in competition with SCSPA because SCSPA provides all the terminal facilities, and no Port of Charleston terminals are leased to private parties. In order to provide stevedoring services, a license must first be obtained from SCSPA. CMH contends that SCSPA acted unfairly and in a discriminatory fashion "by refusing to grant authorization to stevedores who seek permission to perform cargo handling functions on [SCSPA] facilities for the shipper's account." Id. at 9.

CMH further alleges that RDA "falsely and disingenuously led CMH to believe that CMH would be able to obtain and/or maintain a lease or leases to facilities at the Charleston Naval Complex." Id. at 12. In December 1995, RDA had a five-year sublease with Charleston Shipbuilders, Inc. ("CSI") for facilities at the Charleston Naval Complex. CSI in turn entered into "a 'secondary sublicense' agreement with CMH, followed by a five-year 'secondary sublease' for CMH's use of warehouse facilities and an adjacent pier at the Charleston Naval Complex." Id. at 13. In December 1998, RDA decided to cancel its lease with CSI, which also canceled CMH's secondary sublease with CSI. CMH was consequently evicted from the marine cargo handling area. CMH later sought to continue using the warehouse and pier it was initially using; however, RDA did not lease this pier to CMH.

CMH contends that RDA's selected plan of disposition for the Charleston Naval Complex involved a "scheme concertedly devised" by RDA, SCSPA, and CIP. Under the plan, RDA was to grant a thirty-year lease to SCSPA, which in turn would sublease to CIP the use of the Charleston Naval

facilities for thirty years. CMH argues that the agreement between SCSPA and CIP requires the Charleston Naval Complex leased facilities to be used solely for breakbulk or bulk cargo, and that all other types of cargo can be handled only with SCSPA's approval. CMH argues further that SCSPA and CIP are required to charge the same rates and assess similar conditions under their separately published schedules, and that the terms of the agreement require joint approval of any rate changes by CIP. Id.

CMH contends that the agreement between SCSPA and CIP meets the terms of an agreement under the Shipping Act pursuant to section 4(b)(1) because it is between two terminal operators and it "fix[es] or regulate[s] rates or other conditions of service." 46 U.S.C. app. § 1703(b)(1). CMH explains that section 5(a) requires agreements that are entered into with respect to an activity described in section 4(b) to be filed with the Commission. Accordingly, CMH avers that SCSPA and CIP are in violation of section 5(a) of the Act and 46 C.F.R. Part 535, the equivalent section of the Commission's Rules and Regulations, because their August 30, 1999 agreement was never filed. CMH also asserts that the failure to file deprives the public of its right under 46 C.F.R. § 535.603 to comment on and protest the implementation of an agreement, as well as obstructs the Commission's oversight pursuant to section 6 of the Shipping Act.[3] Id. at 25, 28.

[3] 46 C.F.R. § 535.603 states that persons may file written comments regarding filed agreements and details the procedure for submitting comments to the Commission. Section 6 of the Shipping Act provides for Commission action on agreements. 46 U.S.C. § app. 1705.

CMH avers that SCSPA and RDA are also in violation of section 10(a)(2), 46 U.S.C. app. § 1709(a)(2), because they operated under the allegedly unfiled agreement. CMH argues that the agreement had not become effective under section 6 of the Shipping Act. Id. at 26.

CMH further alleges that RDA, SCSPA, and CIP have violated section 10(d)(1) of the Shipping Act, 46 U.S.C. app. § 1709 (d)(1), by failing to establish, observe, and enforce just and reasonable practices relating to the use of terminal facilities at the Charleston Naval Complex and Port of Charleston. CMH claims that the following actions constitute unjust and unreasonable practices: RDA's and SCSPA's refusal to negotiate with CMH or to make available suitable terminal, pier, dock and storage facilities; RDA's, SCSPA's, and CIP's interference in CMH's use of the facilities and business relationships; RDA's and SCSPA's granting concessions to CIP while denying the same terminal use to CMH "contrary to RDA's and SCSPA's mandate as public terminals"; and RDA's, SCSPA's, and CIP's unjust discrimination against CMH, its vessels, and its cargoes. Id. at 26, 28.

CMH also contends that the special advantage RDA and SCSPA have given CIP and others regarding the leasing, allocation, and use of terminal facilities while denying comparable terminal space and concessions to CMH constitutes undue preference and the imposition of unreasonable prejudice or disadvantage pursuant to sections 10(b)(11) and 10(b)(12), as well as an unreasonable refusal to deal or negotiate under sections 10(d)(3) and 10(d)(4). Id. at 27. Finally, CMH submits that RDA, SCSPA, and CIP may have committed additional violations of the Shipping Act "that may be revealed in the course of this proceeding and which will be incorporated herein

by reference." Id. at 27.

In its prayer for relief, CMH requests: 1) that the Commission order Respondents to cease and desist from ongoing violations and from barring CMH from the Charleston Naval Complex; 2) that RDA be ordered to grant CMH leases under the same terms granted by RDA and SCSPA under the April 9, 1999 lease agreement and by SCSPA to CIP under the August 30, 1999 lease agreement at the Charleston Naval Complex, and to provide CMH with sufficient terminal facilities and "such other real and personal property" under the same terms as the aforementioned leases; 3) that RDA, SCSPA and CIP be ordered to establish and enforce practices that the Commission determines to be lawful and reasonable; 4) that RDA, SCSPA and CIP be ordered to pay reparations "in an amount to be determined at a future time," including additional amounts for the section 10(a)(2) violations, and for the damages caused to CMH as a direct result of Shipping Act violations, including interest and attorney's fees; and 5) that the Commission provide CMH "such other and further relief as the Commission determines to be proper in the premises." Id. at 29.

C. The Respondents' motions to dismiss

After the complaint was filed and the proceeding was assigned to the ALJ, each Respondent filed a motion to dismiss. The motions challenged the Commission's jurisdiction over the Respondents and argued that CMH's allegations are insufficiently grounded such that they need not be considered in a full-fledged adjudication, but could instead be dismissed at the outset of the proceeding. CMH filed a reply in opposition to the various motions.

1. ALJ denies all motions to dismiss

The ALJ initially denied the Respondents' motions to dismiss. Turning first to SCSPA's and RDA's claims of sovereign immunity from regulatory adjudications, the ALJ cited the Commission's earlier ruling in South Carolina Maritime Services, Inc. v. South Carolina State Ports Authority, et. al., 28 SRR 1385 (2000) ("S.C. Maritime Services"). In that case, the Commission had found that the doctrine of state sovereign immunity from suit did not apply in Shipping Act adjudications.[4] The ALJ followed this precedent and denied SCSPA's and RDA's sovereign immunity claims.

The ALJ next examined the motions to dismiss on ordinary jurisdictional grounds. He noted that the Commission follows the federal rules of civil procedure with respect to motions to dismiss, and explained that a complaint may be dismissed only if it is clear that no relief may be granted under any set of facts that could be proved consistent with the allegations contained in the complaint. ALJ's Order at 55.

Turning to the jurisdictional question of whether the respondents are marine terminal operators, the ALJ noted that the relevant inquiry is whether a port is engaged in "furnishing . . . other terminal facilities" as defined by the Shipping Act, 46 U.S.C. app. § 1702(14). To answer that question, the ALJ explained, requires an examination of "the existence of a port authority's 'control and administration' over the terminal

[4] SCSPA appealed the Commission's decision in S.C. Maritime Services to the U.S. Court of Appeals for the Fourth Circuit, which overturned that decision as discussed below.

facilities and the port's resultant ability to discriminate." Id. at 70 (citing Plaquemines Port v. Federal Maritime Comm'n, 838 F.2d 536 (D.C. Cir. 1988); Puerto Rico Ports Auth. v. Federal Maritime Comm'n, 919 F.2d 799 (1st Cir. 1990)).

Based upon his review of the evidence submitted thus far in the proceeding, the ALJ concluded that RDA appears to act as a "landlord" port by specifying the terms and conditions of the leases, by issuing licenses, and by granting or withholding exclusive rights to terminals, piers, wharves, and storage facilities at the Charleston Naval Complex. Id. at 62. The ALJ found that RDA's control over marine terminal facilities via its leasing power "leads to the conclusion that RDA is 'furnishing' marine terminal facilities, subjecting itself to Commission personal and subject matter jurisdiction." Id. at 65. The ALJ reached the same conclusion with respect to SCSPA and CIP, explaining that their "exercise of control over access to marine terminal facilities enables them to discriminate." Id. at 70. The ALJ thus concluded that all of the Respondents are MTOs subject to Commission jurisdiction.

The ALJ then addressed the specific violations alleged in the complaint and the Respondents' arguments that those violations have not been adequately supported by the complainant. The ALJ determined that because "[t]he material furnished by the parties puts into dispute factual matters that are central to a determination on the merits of CMH's allegations," a motion to dismiss could not be granted. Id. at 71. In effect, the ALJ concluded that CMH had presented enough facts to justify a proceeding on the merits of its various allegations.

2. ALJ reconsiders CIP's motion

Respondent CIP subsequently filed a motion for reconsideration of the ALJ's denial of its motion to dismiss. In its motion for reconsideration, CIP argued for the first time that the collective reference "CIP" is incorrect. It contended that Projects, Inc. and Ports, LLC are two separate and distinct legal entities. CMH filed a reply in opposition to the Motion for Reconsideration.

The ALJ granted the motion for reconsideration, finding that Projects, Inc. was a different "person" than Ports, LLC, and stated that the collective reference "CIP" had contributed to the misunderstanding that they were the same person. ALJ's Ruling Granting Motion for Reconsideration at 3. The ALJ held that CMH had failed to state a claim against Projects, Inc. because the amended complaint acknowledges that Projects, Inc. has never operated a marine terminal. The ALJ also found that CMH had failed to state a claim against Ports, LLC because it did not exist until March 1999, subsequent to the conduct described in CMH's complaint.

The ALJ further determined that the license agreement is in fact a facilities agreement and not a marine terminal conference agreement. The ALJ noted that the license agreement does not provide for the "'fixing of and adherence to uniform rates'" as required by 46 C.F.R. § 535.307(b). Id. at 3. The ALJ concluded that many of the provisions of the license agreement are typical for any commercial real or personal property lease or license. Moreover, the ALJ found that the provision of the license agreement that the order denying the motions to dismiss focused primarily on, namely that Ports, LLC "shall be responsible for the day-to-day operations of the Premises with guidance" from the SCSPA, does not contain a provision requiring Ports, LLC to follow such guidance from

the SCSPA, and none of the matters that SCSPA is to provide guidance on concerns "rates, charges, practices and conditions of service, as required by 46 C.F.R. § 535.307(b)." Id. at 8.

CMH appealed the ALJ's decision to grant the motion for reconsideration and to dismiss CIP from the proceeding to the Commission.

3. Abeyance

After the ALJ denied the motions to dismiss, SCSPA filed a motion to hold the instant proceeding in abeyance due to the status of its appeal of S.C. Maritime Services. RDA also filed a motion requesting that the ALJ stay the proceeding. In addition, RDA filed exceptions to the ALJ's denial of its motion to dismiss, as well as a motion for leave to appeal the ALJ's ruling to the Commission, pursuant to Rule 153 of the Commission's Rules of Practice and Procedure. Although interlocutory appeals are ordinarily forbidden, Rule 153 provides that an ALJ may certify such an appeal to the Commission if doing so would "prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party." 46 C.F.R. § 502.153.

The ALJ granted the motions of SCSPA and RDA to hold the proceeding in abeyance, and certified RDA's appeal to the Commission. On November 27, 2000, the Commission ordered RDA's appeal held in abeyance, pending the completion of appellate review of S.C. Maritime Services by the U.S. Court of Appeals for the Fourth Circuit.

D. Renewed motions to dismiss

On March 12, 2001, the Fourth Circuit reversed the Commission's decision in S.C. Maritime Services, concluding that state-run ports are immune from privately-initiated administrative adjudications. South Carolina State Ports Authority v. Federal Maritime Comm'n, 243 F.3d 165 (4th Cir. 2001). The Commission then filed a petition for a writ of certiorari requesting that the U.S. Supreme Court review the Fourth Circuit's decision. The Supreme Court granted the Commission's petition on October 15, 2001. Federal Maritime Comm'n v. South Carolina State Ports Auth., 534 U.S. 971 (2001). On May 28, 2002, the Court issued an opinion in which it concluded that sovereign immunity principles implicitly incorporated into the U.S. Constitution bar the Commission from adjudicating a private party's complaint against a nonconsenting state. Federal Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002).

1. SCSPA

On June 25, 2002, SCSPA filed a second motion to dismiss, arguing that it should be dismissed from the proceeding because the Supreme Court had found that it is immune from adjudications initiated by private citizens before the Commission. SCSPA also addressed CMH's earlier argument that SCSPA has waived its immunity due to a provision found in SCSPA's tariff.[5] SCSPA asserted that the tariff provision merely indicates the jurisdiction in which any disputes will be

[5] SCSPA's Tariff No. 8 provides in relevant part that "[j]urisdiction for any action against the Authority, arising from Authority services . . . lies exclusively in the Circuit Courts of the State of South Carolina, and in no other forum." SCSPA Motion to Dismiss at 3 n.6.

resolved. SCSPA asserted further that while this provision refers to jurisdictional choices, it only applies to those from which the "authority would not have sovereign or Eleventh Amendment immunity." SCSPA Motion to Dismiss at 4.

On July 2, 2002, CMH filed a reply to SCSPA's motion. CMH averred that even if the ALJ were to grant SCSPA motion, SCSPA does not have immunity from Commission oversight and enforcement. CMH Reply at 1. CMH argued that the meaning and intent of SCSPA's tariff provision is a question of fact that has not been fully developed. CMH argued further that the Agreement between SCSPA and CIP is in violation of the Shipping Act and that the parties, namely CIP, continue to engage in conduct that violates the Shipping Act. CMH contended that should the ALJ grant SCSPA's motion to dismiss, the Commission would "not be able to rely upon the instant complaint proceeding to assist in its investigation and enforcement roles with respect to this Agreement." Id. at 4. Finally, CMH averred that the Commission could institute an investigation into the activities of SCSPA when those activities result in "serious and harmful consequences," and furthermore that "the Commission is duty-bound to determine the appropriate remedy when it finds marine terminals have engaged in unreasonable and discriminatory conduct under the Act." Id. (citing California v. United States, 320 U.S. 577, 583 (1944)).

The ALJ granted SCSPA's motion on September 18, 2002. See ALJ's Order Dismissing SCSPA at 6-7. The ALJ based his decision on the Supreme Court's conclusion that SCSPA is immune from Commission proceedings initiated by privately-filed complaints. The ALJ indicated that should CMH wish to pursue this matter further, it must present its request for

an agency-initiated investigation to the Commission.

CMH appealed the ALJ's order of dismissal to the Commission, arguing that the ALJ had relied solely on the Supreme Court decision in South Carolina and had failed "to consider any of the contentions and points raised by CMH, such as whether SCSPA waived immunity." Appeal of CMH from Order Dismissing SCSPA at 1. In its appeal, CMH reiterates the arguments it asserted in its earlier reply.

2. RDA

Following the Supreme Court's decision in Federal Maritime Commission v. South Carolina State Ports Authority, supra, RDA filed another motion to dismiss before the ALJ (Motion to Dismiss of Charleston Naval Complex Redevelopment Authority ("RDA's Motion to Dismiss II")), although its appeal from the ALJ's denial of its first motion to dismiss (Respondent Charleston Naval Complex Redevelopment Authority's Motion to Dismiss for Lack of Personal Jurisdiction and Lack of Subject Matter Jurisdiction ("RDA's Motion to Dismiss I")) remained pending (and held in abeyance) before the Commission. In this Motion, RDA asserts that, like SCSPA, it is an instrumentality and agency of the State of South Carolina. RDA's Motion to Dismiss II at 3. In addition, RDA points to several other factors that indicate that it is an arm of the State of South Carolina. Id. at 3-6. CMH filed a reply in opposition to RDA's motion, asserting that the motion should be denied because there has been no adjudication in any forum that RDA is an arm of the State of South Carolina. Id. at 2, 7.

DISCUSSION

A. SCSPA

CMH has appealed to the Commission the ALJ's decision to dismiss SCSPA on the basis of its sovereign immunity. CMH contends that the ALJ's dismissal of SCSPA would leave the issues emanating from the SCSPA-CIP Agreement unresolved, and that the Agreement is in violation of the Shipping Act. CMH argues that the Supreme Court's decision in Federal Maritime Commission v. South Carolina State Ports Authority does not immunize SCSPA from Commission oversight or enforcement, should the Commission elect to investigate SCSPA's activities. Appeal of CMH, Inc. from Order Dismissing SCSPA at 4-6. CMH also argues that it is entitled to an adjudication on the issue of whether SCSPA had waived its immunity in this case.

CMH is correct that it is entitled to a determination of whether SCSPA has waived its immunity in this case. The ALJ did not address this question in his order granting SCSPA's motion to dismiss. The tariff provision provides that the Circuit Courts of South Carolina have exclusive jurisdiction over SCSPA. Motion to Dismiss of South Carolina State Ports Authority at 3. Its waiver of immunity is limited to actions in the Circuit Courts of South Carolina. As a matter of law, a state does not waive its sovereign immunity from a proceeding in a federal forum by consenting to suit in its own courts. See College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676 (1999); Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 306 (1981). Therefore,

the Commission finds that the SCSPA marine terminal tariff provision in question does not constitute a waiver of SCSPA's sovereign immunity.

CMH also asserts that the Commission must evaluate whether SCSPA has waived its immunity "by seeking relief on the merits from a U.S. appellate court, or by having litigated on the merits before the Commission without raising a sovereign immunity defense." CMH Appeal at 3. Although CMH does not support this contention in any detail, it appears that CMH's point is that SCSPA has taken those actions in other cases before the Commission, such as its determination to seek appellate review of the Commission's decision in S.C. Maritime Services. Even if it is assumed that seeking appellate review can effect a waiver of sovereign immunity, such a waiver would not apply in the present proceeding, because SCSPA has not sought review in a U.S. appellate court in this case. Similarly, SCSPA has not litigated on the merits in the instant case without raising a sovereign immunity defense; rather, it raised the defense promptly after the complaint was filed. The Commission rejects CMH's arguments to the contrary.

CMH's further contention that the Commission is obligated to adjudicate its allegations despite dismissing SCSPA as a party to the proceeding is erroneous. The Supreme Court has determined that the Commission lacks jurisdiction over complaints initiated by private citizens against state-run ports. Federal Maritime Comm'n v. South Carolina State Ports Auth., supra. In addition, it has been determined that SCSPA is an arm of the State of South Carolina. See Ristow v. South Carolina Ports Auth., 58 F.3d 1051 (4th Cir. 1995). As SCSPA has decided to assert its immunity from this proceeding, the ALJ was correct in granting its motion to dismiss. Accordingly, we

affirm the ALJ's dismissal of SCSPA as a party to the proceeding.

B. RDA

1. Sovereign Immunity

RDA asserts that it is entitled to sovereign immunity because it is an arm of the State of South Carolina. CMH, however, contends that RDA lacks sufficient connections to South Carolina to be an arm of that state. If RDA proves that it is entitled to sovereign immunity, the Commission is barred from adjudicating complaints filed against it pursuant to the doctrine of state sovereign immunity. See Federal Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. at 743.

Sovereign immunity bars an administrative adjudication against a state or an entity so closely connected to a state that the state is the real, substantial party in interest. See id.; Alden v. Maine, 527 U.S. 706, 756 (1999); Mt. Healthy City School Bd. of Educ. v. Doyle, 429 U.S. 274, 280-281 (1977); Ceres Marine Terminals, Inc. v. Maryland Port Admin., 30 SRR 358, 366 (2004). The Supreme Court has determined that this immunity does not extend to political entities with an identity that is distinct from a state, such as counties and municipal corporations. Federal Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. at 751; Northern Ins. Co. v. Chatham County, __ U.S. __, 2006 WL 1071413 (April 25, 2006). We must determine whether RDA is an arm of the state partaking of South Carolina's sovereign immunity, or whether RDA is to be treated as a county or municipal corporation and therefore not entitled to protection under sovereign immunity. Alden v. Maine, 527 U.S. at 756. RDA has the burden to demonstrate that it is an arm of the state. See Gragg v. Ky.

Cabinet for Workforce Dev., 289 F.3d 958, 963 (6th Cir. 2002); Christy v. Pa. Turnpike Comm'n, 54 F.3d 1140, 1144 (3rd Cir. 1995); Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 734 n.5 (7th Cir. 1994).[6]

2. Standard

In order to determine whether RDA is an arm of the state, the Commission must look to federal law. Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429-430 n.5 (1997). The Supreme Court has developed broad factors that must be analyzed in order to reach a determination of whether an entity is an arm of the state. See Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48 (1994). Because of the broad nature of the inquiry the Supreme Court has directed lower courts to employ, the particular standard varies somewhat from one circuit to another. For example, the Fourth Circuit has said that if the state will have to pay any judgment out of its treasury, then "[t]his is often the end of the inquiry, . . . [and] consideration of any other factor becomes unnecessary." Kitchen v. Upshaw, 286 F.3d at 179, 184 (4th Cir. 2002). In contrast, Fresenius, a case from the

[6] The court in Gragg v. Kentucky Cabinet for Workforce Development, 289 F.3d 958, 963 (6th Cir. 2002), stated that the defendants claiming sovereign immunity in that case pointed to nothing in the record establishing that they were arms of the state, unlike the case before us, and the court noted that it had been unable to "find anything in the record" establishing that they were arms of the state. In other words, the court looked at the entire record in the case when it considered whether the defendants were entitled to sovereign immunity. Consistent with the consideration of the sovereign immunity claim by the court in Gragg, our consideration of RDA's claim of sovereign immunity is based on the evidence presented by RDA as well as other relevant evidence in the record.

First Circuit, initially examined the structure of an entity and determined that, if that structure leads to the conclusion that the entity is an arm of the state, the inquiry ends there. Fresenius, 322 F.3d at 68. As a result, an entity demonstrating that it is sufficiently connected with a state as to be an arm of the state has the "dignity interest" of a state and is not subject to suit by private persons. Id. at 65.

In U.S. Dept. of Energy v. FLRA, 106 F.3d 1158 (4th Cir. 1997) (Luttig, J., concurring), Judge Luttig explained that an agency cannot know where parties to adjudications will seek judicial review and thus cannot effectively avoid the possibility of applying the "wrong" circuit standard in any given case. 106 F.3d at 1165. Judge Luttig stated that an agency subject to a multiple-venue appellate review process may "at the adjudicatory stage of its proceedings . . . follow that case law which it prefers," but that a reviewing court would be bound by the standards set forth in its own precedents. Id. As an agency with a multi-venue review process, the Commission cannot automatically apply the standards used by the circuit in which a particular port is located. This is because parties may appeal Commission orders in the circuit in which the alleged Shipping Act violations occurred or to the U.S. Court of Appeals for the D.C. Circuit. See 28 U.S.C.§ 2343; Ceres, 30 SRR at 366 n.4.

In Ceres, the Commission did not rely solely on case law from the respective circuit where the parties were located, which held that protecting the state treasury is the most important reason for state sovereignty. Ceres, 30 SRR at 369. Instead, the Commission also considered decisions from circuits finding that the primary function of sovereign immunity is to "afford the states dignity and respect due to sovereign entities." Id. Such consideration is in accord with the Supreme Court's holding in

Federal Maritime Commission v. South Carolina State Ports Authority, where the Court explained that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." 535 U.S. at 760. In the instant proceeding, the Commission will follow the approach set forth in Ceres.

3. RDA's Status under the *Ceres* Test

In order to determine whether RDA is an arm of the State of South Carolina, we will analyze RDA's status under the two-part test that examines the structure of the entity and the risk to the state treasury. In reviewing the structure of the entity, the following factors must be considered: 1) the degree of control that South Carolina exercises over RDA; 2) whether RDA deals with local rather than statewide concerns; and 3) the manner in which South Carolina law treats RDA. Ceres, 30 SRR at 369, citing Kitchen v. Upshaw, 286 F.3d at 179, 184 (2002)(citation and quotation marks omitted). If RDA demonstrates that it has close enough ties with South Carolina after examining the factors of the two-part test, RDA will be considered an arm of South Carolina and entitled to immunity from regulatory adjudications.

a. Structure
(1). Degree of Control

The Complainant, CMH, argues that RDA "was intended to be a partner with, and not an arm of, the State of South Carolina," that RDA "operates as a legal and operational entity wholly apart and separate from the State," and that "RDA's genesis was in federal law." Reply of CMH in Opposition to Motions to Dismiss at 24-25. However, the South Carolina

General Assembly established the Charleston Naval Complex Redevelopment Authority for the purpose of acquiring, managing, and disposing of the Charleston Naval Complex, a former military installation closed pursuant to the U.S. Defense Base Closure and Realignment Act of 1990, 10 U.S.C. § 2687. South Carolina gave RDA, an instrumentality and agency of the State[7], specific powers for meeting its statutory objectives. These include the authority to prepare, adopt, and carry out redevelopment projects within its area of operation and to act as an agent of the state or federal government or any of its instrumentalities or agencies for the public purposes set out in the statutory title. S.C. Code Ann. § 31-12-70(A). While CMH maintains that RDA operates independently from the State, even when it is operating as an agent for the State (Reply of CMH in Opposition to Motions to Dismiss at 26), South Carolina would have complete control over RDA when the latter acts as South Carolina's agent.

South Carolina also determines the membership of RDA. Of the nine members of RDA, two are representatives of the State, nominated by the South Carolina legislature and appointed by the governor, and the other seven are appointed

[7] The Complainant considers RDA to be "an instrumentality and agency of the State of South Carolina." CMH's Amended Complaint at 4. A party's assertion of fact in a pleading is a judicial admission by which it is bound. Davis v. A.G. Edwards and Sons, Inc., 823 F.2d 105 (5th Cir. 1987). The Commission will consider CMH's factual assertion that RDA is an instrumentality and agency of South Carolina to be a judicial admission. This does not end our inquiry. We must still undertake the Ceres analysis to determine whether RDA qualifies as an arm of the state for purposes of state sovereign immunity.

subject to the advice and consent of the South Carolina State Senate. S.C. Code Ann. § 31-12-40(H). CMH maintains that the federal property subject to disposal by RDA is not, as RDA maintains, wholly within one county. Reply of CMH to Motions to Dismiss at 28-29. According to CMH, RDA is a tri-county authority and therefore, under S.C. Code Ann. § 31-12-40(D), must have six local members who are nominated by local governments. Id. According to CMH, these residency requirements show that RDA's operations are local, not state, in character. Id. Even if RDA's membership is established according to subsection (D) rather than (B), however, all RDA members would still take office only subject to the advice and consent of the Senate, thus indicating ultimate state control of RDA's membership. S.C. Code Ann. § 31-12-40(H). Furthermore, the governor would retain the "discretion to accept or reject the name of any individual submitted" for his or her consideration from a slate of candidates submitted by a municipal governing body. S.C. Code Ann. § 31-12-40(D)(1)(c).

The fact that South Carolina chose not to provide for the procedural device of a veto when establishing RDA does not, as CMH argues (Reply of CMH in Opposition to Motions to Dismiss at 33), indicate that RDA operates independently of the State. It is clear from the statute that RDA is not autonomous, but rather has the limited function of carrying out and effectuating its explicit statutory purpose: overseeing and disposing of federal defense facilities. S.C. Code Ann. § 31-12-70(A).

As noted by CMH (Reply of CMH in Opposition to Motions to Dismiss at 33), South Carolina law provides that RDA may dissolve the authority by a "two-thirds vote of the

entire number of authorized members if no property remains for development or if the authority decides to transfer the remaining redevelopment properties to another public body or successor entity created by statute." S.C. Code Ann. § 31-12-100(A). This provision is consistent with the General Assembly's purpose in setting up RDA: that RDA is to acquire, manage, and dispose of the Charleston Naval Complex. It is logical that South Carolina would authorize RDA to dissolve itself by a two-thirds vote if no property remains for development or if RDA decides to transfer any remaining property to another statutorily created body.

The State's control of RDA is evident in several other areas. Each member of RDA must comply with the State Ethics Act, including the requirement to file a statement of economic interests. S.C. Code Ann. § 31-12-40(E) (referring to Chapter 13 of Title 8 of the 1976 Code of Laws); RDA's Motion to Dismiss I, Attachment D, Charleston Naval Complex Redevelopment Authority By-Laws ("RDA By-Laws"), section 10.2. RDA's by-laws also require the Authority and its members to adhere to the South Carolina Freedom of Information Act,[8] including the requirement to notify the media and the public of all public meetings and to provide written minutes of those meetings. RDA By-Laws, sections 10.3 (referring to S.C. Code Ann. § 30-4-10 et seq.) and 4.7. RDA must also comply with the provisions of the South Carolina Procurement Code and the

[8]We are not persuaded by CMH's argument that, merely because local governments--which lack sovereign immunity--are subject to the same Act, mandatory compliance with the South Carolina Freedom of Information Act should be considered irrelevant to the issue of state control. Reply of CMH in Opposition to Motions to Dismiss at 27.

related regulations issued by the Budget and Control Board. S.C. Code Ann. § 31-12-120; RDA By-Laws, section 10.4 (referring to S.C. Code Ann. § 11-35-10 et seq.).

We also note, as further indication of state control, that RDA's operations were the subject of a review conducted by a special legislative committee of the state legislature. Affidavit of William C. Mescher, Attachment B to CMH's Reply in Opposition to Motions to Dismiss ("Mescher Affidavit") at 2. Upon the completion of that review, the Charleston County Legislative Delegation requested that the South Carolina Legislative Audit Council ("LAC")[9] "conduct a management audit of the state agency know[n] as the Charleston Naval Complex Redevelopment Authority (RDA)." Exhibit 5 to Mescher Affidavit. One of the issues that the Delegation requested the LAC to investigate was whether RDA "maintains an improper relationship with a sister state agency, namely the South Carolina State Ports Authority." Id. On March 31, 1999, the LAC voted formally and unanimously to conduct an audit of RDA and SPA. Mescher Affidavit at 7.

---

[9]The South Carolina Legislative Audit Council is empowered to, among other things, conduct audits upon request of the General Assembly, report its findings and recommendations to the requesting entity, and establish a system of post audits for all state agencies of the state government. S.C. Code Ann. § 2-15-60(b) and (d). The LAC is directly responsible to the General Assembly. S.C. Code Ann. § 2-15-10. The "state agencies" that it audits are defined, in part, as "all officers, departments, boards, commissions, institutions, universities, colleges, [and] bodies politic and corporate of the State." S.C. Code Ann. § 2-15-50. RDA was created as "a public body corporate and politic, exercising public and essential governmental powers." S.C. Code Ann. § 31-12-70(A).

In summary, it would be contrary to the intent of the South Carolina General Assembly, as expressed in the manner by which it structured RDA, to conclude that South Carolina does not exercise a great degree of control over RDA. The State of South Carolina: created RDA and empowered it to act as an agent of the state government; approves the appointment of all RDA members; and oversees RDA's fiscal matters and financial transactions through the Legislative Audit Council. Furthermore, RDA must comply with the South Carolina Consolidated Procurement Code and related regulations issued by the Budget and Control Board. Accordingly, the Commission finds that South Carolina exercises significant control over RDA.

(2). State vs. Local Concerns

We next turn to the second Ceres factor--whether the entity deals with statewide or local concerns. As an initial matter, we note that CMH has argued that RDA's functions are local in character because its regulation and coordination of land use is a function that is traditionally a local activity and not a state one. CMH Reply in Opposition to Motions to Dismiss at 32. CMH further notes that the Naval Complex property is contained within North Charleston. Id. at 33. However, our review of the mandate and operations of the Charleston Naval Redevelopment Authority leads us to the inevitable conclusion that RDA deals with statewide concerns.

When the Federal government transferred the use of the Charleston Naval Complex to the State of South Carolina, pursuant to the Base Closure Act, it was not transferring a mere parcel of land to be used solely for the enjoyment of the citizens of North Charleston, South Carolina. Instead, the U.S.

government transferred the use of a 1,600 acre, fully-developed, deep-water port facility that is vitally important to all of the citizens of South Carolina. When the Naval Complex closed on April 1, 1996, it contained waterfront improvements that included 23 piers with 31,000 linear feet, 5 dry docks, and a marina with 152 slips. In addition, the facility contained 2.3 million square feet of industrial space, 1.8 million square feet of warehouse space, 2.2 million square feet of administrative space, and 700,000 square feet of training space. RDA's Motion to Dismiss I, Exhibit E, at 1-2. As Complainant CMH has noted, "the Charleston Naval Complex is part of the Charleston gateway, which provides an essential link between the economy of the State of South Carolina, and beyond, and [is] the source and destination of many U.S. imports and exports." CMH Reply in Opposition to Motions to Dismiss at 5-6. We agree with CMH that ports in the United States, such as Charleston, serve as vital gateways to international commerce, impacting the economies of their respective states.

In 1994, the State of South Carolina created the Charleston Naval Complex Redevelopment Authority for the sole purpose of acquiring, managing, and disposing of the Charleston Naval Complex. RDA was created as "a public body corporate and politic, exercising public and essential governmental powers." S.C. Code Ann. § 31-12-70(A). In this regard, RDA was also empowered to act as the agent of the State of South Carolina in developing and managing this port facility. S.C. Code Ann. § 31-12-70(A)(7).

RDA has argued that its responsibilities over the development of the Charleston Naval Complex together with its replacement of thousands of jobs lost as a result of the base closure are of vital statewide importance. RDA's Reply to

Complainant's Response in Opposition to RDA's Motion to Dismiss at 14. In addition to the fact that RDA has affected the jobs of thousands of South Carolinians, and has had a positive impact on the economy of the state, we also believe that its oversight of the Naval Complex is of paramount statewide importance. As the Commission concluded with respect to the Maryland Port Authority in Ceres Marine Terminals, Inc. v. Maryland Port Admin., 30 S.R.R. 358, 369 (2004)**,** we conclude here that RDA exercises authority over statewide concerns and that its oversight of the Charleston Naval Complex is an essential function of the State of South Carolina.

(3). Manner in Which State Law Treats the Entity

We now turn to the manner in which South Carolina law treats RDA. RDA was created by the Governor of South Carolina in an Executive Order signed and executed on September 30, 1994. The South Carolina state statute which sets out the composition and powers of RDA states that a redevelopment authority is "a public body, corporate and politic, exercising public and essential governmental powers, including powers . . . to act as an agent of the state or federal government." S.C. Code Ann. § 31-12-70 (A)(7).

South Carolina law provides that RDA is an agency of the State of South Carolina for purposes of the South Carolina Torts Claim Act. S.C. Code Ann. § 31-12-110. CMH argues that the Tort Claims Act also applies to political subdivisions, which are not entitled to Eleventh Amendment immunity. Reply of CMH in Opposition to Motions to Dismiss at 26. While the Tort Claims Act is applicable to political subdivisions, the Act clearly distinguishes them from the "State,"which is defined to mean "the State of South Carolina and any of its offices,

agencies, authorities, departments, commissions, boards, divisions, instrumentalities . . . ." S.C. Code Ann. § 15-78-30(e). As noted above, state law provides that RDA is an agency of the state for purposes of the Tort Claims Act, so that RDA falls under the definition of the State of South Carolina in that Act, as distinguished from a political subdivision.

The distinction between the state and a political subdivision is also made in the section of the Tort Claims Act dealing with waiver of immunity from suit in federal court. This section provides that nothing in the Act is to be construed as "a waiver of the state's or political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be sued in any state court beyond the boundaries of the State of South Carolina." S.C. Code Ann. § 15-78-20(e).

While RDA's treatment as an agency of the state of South Carolina is strong evidence of the state's intent that it is to be treated as an arm of the state, the Supreme Court has said that the question of whether a particular state agency is an arm of the state can be answered only after consideration of state law defining the agency's character. Regents of the University of California v. Doe, 519 U.S. 425, 429 n.5 (1997). An agency's character is determined in part by its composition. In the case of RDA, two of its members are representatives of the State, nominated by the South Carolina legislature and appointed by the Governor, and all other members are appointed subject to the advice and consent of the South Carolina State Senate. S.C. Code Ann. § 31-12-40(H). The state therefore exercises a degree of control over RDA's membership. An agency's character is also determined by the manner in which it acts for the state. In this case, South Carolina law provides that RDA is

the "sole representative of the State for negotiations with the appropriate federal authority for reuse and disposal of property," S.C. Code Ann. § 31-12-40(A), further indicating that RDA acts as the alter ego of the state in this role.

South Carolina law further provides that RDA is required to comply with the South Carolina Consolidated Procurement Code and related regulations issued by the Budget and Control Board. S.C. Code Ann. § 31-12-120. As noted by CMH, political subdivisions do not operate directly under provisions of the State Procurement Code (Reply of CMH in Opposition to Motions to Dismiss at 27), thus further distinguishing the treatment of RDA under South Carolina state law from the treatment of political subdivisions under state law.

As further indication of RDA's treatment as an arm of the state, RDA's by-laws require that notice of meetings be provided to the media and public in accordance with the South Carolina Freedom of Information Act. RDA By-Laws, section 4.3. In addition, minutes of public meetings must be provided to the media and public in accordance with the South Carolina Freedom of Information Act. RDA By-Laws, section 4.7. RDA and its members must also comply with provisions of the State Ethics Act. RDA By-Laws, section 10.2. Finally, as stated above, the State of South Carolina exercises oversight over RDA's operations through the Legislative Audit Council, which conducts independent performance audits of state agencies and programs, as requested by the South Carolina General Assembly.

Based on the facts that South Carolina law empowers RDA to act as an agent of the state, requires RDA to operate pursuant to state law consistent with requirements placed on

state agencies and instrumentalities as distinguished from political subdivisions, and provides that RDA's activities are overseen by a South Carolina Legislative Audit Council which is charged with overseeing state agencies and programs, we conclude that state law treats RDA as an arm of the state.

(4). Conclusion as to Structure

Based on our analysis of the three factors, we conclude that: (1) South Carolina exercises a high degree of control over RDA; (2) RDA deals with issues of statewide importance; and (3) South Carolina law treats RDA as an arm of the state. Accordingly, we find that this portion of the arm of the state analysis leads to the conclusion that RDA is an arm of South Carolina.

b. Risk to Treasury

We will next consider whether a monetary judgment against RDA would place state funds at risk. We note at the outset that RDA's by-laws require RDA to "maintain eligibility to apply for and receive public monies." RDA By-Laws, section 6.3(b). RDA states that it generates its own funding through operating revenues and revenue bonds. RDA's Motion to Dismiss I at 6. Furthermore, South Carolina's Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 1998 states that "the State does not have an ongoing financial interest" in the Charleston Naval Complex Redevelopment Authority. Reply of CMH to Opposition to Motions to Dismiss at 29 (citing Exhibit D). Notwithstanding that RDA receives no direct state financial support, we find that a judgment adverse to RDA could impinge upon the State fisc.

First, the record shows that a shift of state taxes to RDA occurs in the form of "rural development income," which in the fiscal year ending in 1998 accounted for a full 26 percent ($1.5 million) of RDA's budget. Reply of CMH in Opposition to Motions to Dismiss at 31 (citing RDA's budgets (Exhibit F)). While not a direct state appropriation, such rural development income implicates the state treasury in that it is state tax money paid to RDA rather than to the state. Because RDA cannot assess rent against units of the federal government, federal entities operating at the Naval Base[10] have agreed to send to RDA, rather than to South Carolina, state income taxes deducted from the payroll of their federal civilian employees. Reply of CMH in Opposition to Motions to Dismiss at 30-31 (citing Exhibit A, Stender Affidavit ¶ 80 and Exhibit F, RDA's Budgets). By means of this procedure, a significant source of RDA's revenue does, in fact, originate from funds that otherwise would be available to the State of South Carolina.

Second, RDA asserts that it would likely seek additional operating revenues from the state legislature or from other state sources in order to perform its statutorily mandated functions, in the event that RDA's funds or reserves were to prove inadequate to satisfy a judgment. RDA's Motion to Dismiss I at 6. RDA also states that, because it generates its own funding through operating revenues and revenue bonds, it would first turn to available RDA funds to satisfy a judgment entered

[10] These include the U.S. Postal Service, the Department of State, the National Oceanic and Atmospheric Administration, and the U.S. Border Patrol. Reply of CMH in Opposition to Motions to Dismiss at 30, 31 (citing Exhibit A, Stender Affidavit ¶ 80).

against it.[11] RDA's Motion to Dismiss I at 6. Pursuant to the South Carolina Tort Claims Act, RDA has procured insurance to satisfy tort liability relating to risks for which immunity has been waived. RDA's Motion to Dismiss I at 4 (citing Exhibit C to Sprott Affidavit); Reply of CMH in Opposition to Motions to Dismiss at 34 (citing Exhibit E, RDA's Financial Report, at 13).

In a "state treasury" analysis involving asserted sovereign immunity, the proper focus is not necessarily whether a judgment against the enterprise would, strictly speaking, be legally enforced against the state, but rather whether the practical effect of a judgment could implicate the state treasury. Ristow v. South Carolina State Ports Authority, 58 F.3d 1051 (4th Cir. 1995). CMH argues that the United States Supreme Court, in Regents of the University of California v. Doe, 117 S. Ct. 900 (1997), "changed the arm-of-the-state test by placing central emphasis on the state's legal liability for a money judgment rather than on the practical effect of such a judgment on the state's treasury." Reply of CMH in Opposition to Motions to Dismiss at 39. In fact, the Court in Doe explicitly referred to California's *legal* liability only for the purpose of distinguishing between, on the one hand, California's potential legal liability to pay a judgment against its state entity and, on

[11]CMH points out that, in 1999, RDA settled a breach-of-contract suit brought against it by one of its former tenants and that the settlement amount of $4 million was to be paid in installments from RDA's own reserves. CMH's Reply in Opposition to Motions to Dismiss at 31 (citing Exhibit E, RDA's Financial Reports). RDA's payment of the settlement amount is consistent with RDA's statement that it will satisfy judgments first from operating revenues and revenue bonds, if possible, before turning to state funds.

the other hand, the federal government's agreement to indemnify the state entity against adverse judgments. Holding that third-party indemnification of the state agency was irrelevant to whether the agency was the kind of entity that should be treated as an arm of the state, the Court in Doe did not foreclose consideration of practical harm to a state's treasury. Doe at 904 (favorably citing its focus, in Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 51-52 (1994), on the fact that two states, "both legally and *practically*," would have been obligated to pay a judgment obtained against a bistate entity created by the states (emphasis added)). Such is the case here, where RDA, in order to perform its statutorily mandated functions, would seek funds from the State whenever RDA's own revenue sources should prove insufficient to satisfy a judgment against RDA.

In summary, RDA--in order to continue to perform its statutorily mandated functions-- would likely seek funds from South Carolina for payment of a reparations award exceeding RDA's existing funds. Furthermore, rural development income, while not direct state funding, amounts to a significant state source of RDA's revenue. Based on these facts, RDA has shown that a regulatory adjudication against RDA could impact South Carolina revenues.

4. Conclusion

In the final analysis, our conclusion that RDA is an arm of the State of South Carolina is based on a consideration of all of the Ceres factors taken together and not upon any one in isolation. We conclude that RDA has met its burden of proving that it is an arm of the State of South Carolina and that it is

therefore entitled to sovereign immunity.[12]

C. CIP

1. Appeal

CMH filed an appeal with the Commission of the ALJ's decision to grant CIP's motion for reconsideration and to dismiss CIP from this proceeding. CMH argues that the ALJ's re-classification of the license agreement as a facilities agreement rather than a conference agreement results in the agreement being exempt from the filing requirement of section 5 of the Shipping Act and that no violation was committed by CIP for failure to file the agreement before its implementation. See Appeal of CIP's Dismissal at 3. CMH further argues that the ALJ's ruling that Ports, LLC could not be held liable for conduct before entering into the license agreement because it had not obtained its license to operate as a marine terminal, as well as the ALJ's dismissal of Projects, Inc. because it was not the licensee to the license agreement, "oversimplified and ignored critical facts and evidence to the contrary." Id.

CMH contends that Projects, Inc.'s predecessor, Performance Automotive Services, Inc., negotiated a marine terminal arrangement with SCSPA at the Charleston Naval Complex in 1997. Once Performance Automotive Services, Inc.

[12]While CMH states that the Commission must determine whether RDA has waived its Eleventh Amendment rights, it has not offered any grounds to support a conclusion that RDA has waived these rights. Therefore, we conclude that RDA has not waived its rights.

changed its name to Projects, Inc., the agreement to operate a public marine terminal at the Charleston Naval Complex was placed on SCSPA's website in 1998. CMH asserts that SCSPA abandoned negotiations with Projects, Inc. to operate a pier with CIP; instead, it changed its plans to operate with CIP at the Zulu Pier at the Charleston Naval Complex, and it was at this point that Ports, LLC emerged. Id. CMH asserts that a finding of overlapping identities is supported by affidavits and documentary evidence submitted by CMH, and that a dismissal of the parties at this stage in the proceeding would prevent CMH from engaging in discovery and developing the record with respect to CIP's identity. Id. at 8-9.

CMH also argues that the ALJ's dismissal of CIP does not conform with the standards governing motions to dismiss. CMH asserts that while the ALJ found that "the material submitted by the parties puts into dispute material factual matters," the ALJ concluded on reconsideration that no such disputed facts existed, even though CMH had not acquiesced on any fact-based issues. Id. at 14. CMH concludes in its Appeal that the Commission should order the amended complaint reinstated with respect to CIP and that a complete record be developed on the issues presented in this proceeding. Id. at 21.

2. Opposition

In its brief in opposition to CMH's Appeal, CIP argues that the ALJ correctly determined that Projects, Inc. and Ports, LLC are two distinct entities. CIP claims that no authority exists under the Shipping Act to treat the two entities as one, given the undisputed facts in this case, namely that Projects, Inc.

is not now and has never been an MTO and that Ports, LLC did not exist before March 1999. CIP Brief in Opposition at 14. CIP asserts that the ALJ correctly held that CMH failed to allege a violation of the Shipping Act by either Projects, Inc. or Ports, LLC because neither were MTOs at the time of the alleged conduct. CIP also contends that the ALJ, contrary to CMH's assertion, followed applicable legal standards when dismissing CIP as a party to the proceeding. CIP claims that CMH has not presented any facts to be disputed, and that conclusory factual allegations are not sufficient to state a claim for relief. Id. at 31 (citations omitted). CIP also cites caselaw supporting its contention that CMH's request to conduct discovery and develop a record would be abusive of the judicial process and would allow CMH to embark on a classic fishing expedition. Id. at 36 (citations omitted).

3. Discussion

In granting CIP's Motion for Reconsideration, it appears that the ALJ applied the standard used when ruling upon motions for summary judgment rather than motions to dismiss. This was correct. The last sentence of Rule 12(b) provides that a Rule 12(b)(6) motion to dismiss is to be converted into a motion for summary judgment whenever matters outside the pleading are presented to, and accepted by, the court. See 5A Wright & Miller, Federal Practice and Procedure, § 1357 (1990). Both parties have submitted affidavits, letters, articles and other extraneous material to bolster their positions. As both parties have submitted pleadings with supporting evidence, the ALJ's conversion of the motion to dismiss into a motion for summary judgment was appropriate.

A motion for summary judgment should be granted only when genuine issues of material fact do not exist. See McKenna Trucking Co., Inc. v. A.P. Moller-Maersk Line and Maersk Inc., 27 SRR 1050 (1997). In granting CIP's Motion for Reconsideration, the ALJ found that there was not a genuine issue of material fact, although CMH posits that it did not concede any fact-based issues. CMH's Appeal at 14. In its Motion for Reconsideration, CIP attached a copy of Ports, LLC's bylaws as well as documents demonstrating that CMH had judgments entered against it in the Charleston County Courts for failure to pay two vendors for services rendered. This was the only supporting evidence submitted with CIP's Motion for Reconsideration.

The ALJ was correct in concluding that the License Agreement between SCSPA and CIP is a marine terminal facilities agreement, not a marine terminal conference agreement, and is therefore exempt from the filing requirements of section 5 of the Shipping Act. However, the dismissal of CIP collectively, or of Projects, Inc. and Ports, LLC individually, as a party or parties to this proceeding seems premature inasmuch as a genuine issue of material fact still exists in this proceeding, as we will explain.

a. License Agreement

The Agreement in question is between SCSPA and Ports, LLC. In the Rulings on Respondents' Motions to Dismiss, the ALJ held that the Agreement was a marine terminal conference agreement, which is defined as:

> an agreement between or among two or more marine

> terminal operators and/or ocean common carriers for the conduct or facilitation of marine terminal operations which provides for the fixing of and adherence to uniform maritime terminal rates, charges, practices and conditions of service relating to the receipt, handling, and/or delivery of passengers or cargo for all members.

46 C.F.R. § 535.307(b).

The ALJ maintained that the Agreement was not merely a lease or license because it required CIP to charge the same rates at the Naval Complex that SCSPA charged at the Port of Charleston, which is a completely different terminal. ALJ Order at 72. The ALJ concluded that sections 8 through 10 of the Agreement provide for the fixing of, and adherence to, uniform practices and conditions of service. Id. at 73. Furthermore, the License Agreement requires that Ports, LLC charge the same rates as those set forth in SCSPA's tariff for the Port of Charleston; and requires SCSPA and Ports, LLC to form a Joint Cooperative Committee to approve any deviations charged by Ports, LLC from the rates contained in SCSPA's tariff.

In the Ruling granting CIP's Motion for Reconsideration, the ALJ reversed his previous ruling and found that the Agreement was a marine terminal facilities agreement and therefore was exempt from the filing requirements of the Shipping Act. The ALJ stated that the provisions contained in the Agreement are typical of those found in leases or licenses for commercial or real property. ALJ Ruling Granting Motion for Reconsideration at 8. The provisions concerned the use of the premises, encumbrances, utilities, maintenance, improvements, damage to the premises,

taxes, insurance, a description of the licensed property, and a listing of fees to be paid by Ports, LLC. Id. The ALJ indicated that none of these provisions are found in a typical marine terminal conference agreement. The ALJ stated further that the provisions in question only apply at Ports, LLC's terminal, not SCSPA's, as required by the Commission's regulations governing marine terminal conference agreements. 46 C.F.R. § 535.307(b) (2004).

CMH argues in its Appeal of the Ruling granting the Motion for Reconsideration that the ALJ's finding that the Agreement is exempt from the Shipping Act's filing requirements "ignores the law governing agreements that are subject to the Shipping Act and Commission jurisdiction." CMH's Appeal at 5. This argument is erroneous.

Section 4(b) of the Shipping Act states in pertinent part that "[t]his Act applies to agreements among marine terminal operators . . . to discuss, fix, or regulate rates or other conditions of service or engage in exclusive, preferential, or cooperative working arrangements[.]" 46 U.S.C. app. § 1703(b). Section 5 of the Shipping Act requires that "a true copy of every agreement . . . described in section 4 . . . shall be filed with the Commission, except agreements relating to . . . transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States..." 46 U.S.C. app. § 1704(a). The Commission's regulations define a marine terminal facilities agreement in relevant part as "any agreement between or among two or more marine terminal operators . . . which conveys to any of the involved parties any rights to operate any marine terminal facility by

means of lease, license . . . or other similar arrangement for the use of marine terminal facilities or property." 46 C.F.R. § 535.311(a) (2004). Additionally, "[a]ll marine terminal facilities as defined in § 535.311(a) are exempt from the filing and waiting period requirements of section 5 and 6 of the Shipping Act of 1984 and this part of 535." 46 C.F.R. § 535.311(b) (2004).

It appears that the ALJ's reconsidered characterization of the Agreement as a marine terminal facilities agreement is correct. The Agreement contains provisions that are typical of a lease or license, some of which are: fees, use of premises, improvements, and other responsibilities with respect to safety, maintenance, accounting, administration, and access into the premises. These provisions do not concern "rates, charges, practice and conditions of service" typical of a marine terminal conference agreement. 46 C.F.R. § 535.307(b). Moreover, the requirement that Ports, LLC and SCSPA form a Joint Committee to approve of any departures in charges by Ports, LLC from the rates contained within SCSPA's tariff does not alter the License Agreement's exempt status. The Commission has previously determined that requiring the filing of every agreement that could theoretically have anti-competitive effects would serve no useful regulatory purpose. See Marine Terminal Facilities Agreements - Exemption, 58 Fed. Reg. 5627, 5630 (Jan. 22, 1993).

CMH's argument that the Agreement is a marine terminal conference agreement is unpersuasive. The Commission finds that the Agreement is exempt from the Shipping Act's filing requirements.

b. Alleged Violations

In the ruling granting the motion for reconsideration, the ALJ noted that Projects, Inc. and Ports, LLC have asserted that each entity is a different "person." They argue that Projects, Inc. is a corporation while Ports, LLC is a limited liability company that did not exist until March 1999. The ALJ concluded that there is no authority under the Shipping Act for treating Projects, Inc. and Ports, LLC as the same person. ALJ's Ruling Granting Motion for Reconsideration at 3. The ALJ held that the amended complaint failed to state a claim against Projects, Inc. because the complaint acknowledged that Projects, Inc. has never operated a marine terminal. The ALJ held further that the amended complaint failed to state a claim against Ports, LLC because it did not exist until March 1999, and therefore cannot be held liable for conduct that occurred prior to that date. Id. at 4-5.

The issue before the Commission is whether the ALJ's determination that Projects, Inc. and Ports, LLC are indeed two distinct entities was correct. In its Motion for Reconsideration, Ports, LLC submitted a copy of its bylaws. CMH contends, however, that Preventive Automotive Services, Projects, Inc.'s predecessor, negotiated a marine terminal arrangement with SCSPA in 1997 covering the Alpha Pier at the Charleston Naval Complex. CMH's Appeal at 7. Preventive Automotive Services then changed its name to Projects, Inc., and the agreement to operate a public marine terminal between Projects, Inc. and SCSPA at the Charleston Naval Complex was publicly announced in 1998 and placed on SCSPA's website. Id. SCSPA then abandoned plans to operate with Projects, Inc. at the Alpha Pier; instead, it sought to operate

with Ports, LLC[13] at the Charleston Naval Complex's Zulu Pier.

Because both parties have submitted extraneous material in addition to their pleadings, the ALJ was correct to treat CIP's Motion to Dismiss as a Motion for Summary Judgment. Using the summary judgment standard, the burden is on CIP to demonstrate that no genuine issue of material fact exists. In this regard, Ports, LLC submitted a copy of its bylaws to demonstrate that it is a different entity from Projects, Inc.

However, CMH contends that Ports, LLC is a successor in interest to Projects, Inc. Neither party has provided any evidence thus far in the proceeding that indicates whether this contention is accurate. Thus, it seems that discovery is warranted to flesh out the "identity" of Ports, LLC. The possible overlapping identities of CIP, initially as Preventive Automotive Services, then Projects, Inc., and then as Ports, LLC, is a genuine issue of material fact that needs to be resolved before a motion for dismissal or summary judgment may be granted. If CMH can demonstrate that Ports, LLC is an alter ego of Projects, Inc. and Preventive Automotive Services, then Ports, LLC could be liable for any conduct of its predecessors that violated the Shipping Act.

The Commission has previously determined that, in some circumstances, claims cannot be dismissed merely by reading the complaint but require examination of the underlying factual evidence to determine whether the claims raise genuine issues of material fact requiring further evidence

[13] CMH contends that at this point, Ports, LLC emerged.

and possibly a trial-type hearing. See, e.g., McKenna Truck Co., 27 SRR at 1061. Allowing the proceeding to continue at this procedural stage will ensure that CMH has an adequate opportunity to present its case. Therefore, since the primary issue of material fact controlling the analysis of the Commission's jurisdiction is whether Ports, LLC is a successor in interest to Projects, Inc., the Commission will allow further discovery. After an evidentiary record is established, CIP may renew its motion to dismiss or move for summary judgment, if warranted.

CONCLUSION

THEREFORE, IT IS ORDERED, That SCSPA is dismissed as a party to this proceeding based on its sovereign immunity from regulatory adjudications;

IT IS FURTHER ORDERED, That RDA, being an arm of the State of South Carolina and immune from the complaint filed against it, is dismissed as a party to this proceeding;

IT IS FURTHER ORDERED, That the Licence Agreement between SCSPA and CIP is a marine terminal facilities agreement, and is exempt from the Shipping Act's filing requirements;

FINALLY, IT IS ORDERED, That CIP is reinstated as a party to this proceeding and the parties shall engage in discovery to determine whether Projects, Inc. and Ports, LLC are two distinct entities or if Ports, LLC is the successor in

interest to Projects, Inc.

By the Commission.

Bryant L. VanBrakle
Secretary

CHAIRMAN BLUST AND COMMISSIONER DYE, CONCURRING IN PART, DISSENTING IN PART:

A. Introduction

We agree with the majority's decision to dismiss the South Carolina State Ports Authority as a party to this proceeding and to affirm the Administrative Law Judge's finding that the License Agreement between South Carolina State Ports Authority and CIP (Projects, Inc., and Ports, LLC) is a marine terminal facilities agreement and is exempt from the filing requirements of the Shipping Act of 1984. We also agree with the majority's decision to reinstate CIP as a party to this proceeding and to order that the parties engage in discovery to determine whether Projects, Inc., and Ports, LLC, are two distinct entities or if Ports, LLC, is the successor in interest to Projects, Inc. However, we disagree with the majority's finding that Charleston Naval Complex Redevelopment Authority ("RDA") is an arm of the State of South Carolina and immune from the complaint filed against it. For the reasons stated below, we respectfully dissent.

B. Sovereign Immunity is an Affirmative Defense

Sovereign immunity is an affirmative defense, and the burden of proof lies solely on its proponent. See Gragg v. Ky. Cabinet for Workforce Dev., 289 F.3d 958, 963 (6th Cir. 2002); Christy v. Pa. Turnpike Comm'n, 54 F.3d 1140, 1144 (3rd Cir. 1995); Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 734 n.5 (7th Cir. 1994). It is paramount in such delicate matters as infringing upon a state's dignity that the Commission follow this well-established precedent. An erroneous designation of an entity as an arm of the state is just as detrimental to a state's dignity as an erroneous decision failing to recognize such status. Ceres, 30 S.R.R. at 367, citing Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico, 322 F.3d 56 (1st Cir.), cert. denied, 540 U.S. 870 (2003). It must be underscored that there is no presumption that it advances a state's dignity to assume that every entity connected to a state is an arm of that state. Id. at 366.

We find very problematic that a portion of RDA's arm of the state defense as presented in the Order fails to reflect the actual evidence and arguments submitted by RDA itself, as required by law. Rather, some of these arguments appear to be crafted by the majority from the collective evidence in the record. Accordingly, the majority has effectively relieved RDA of its burden of proof under the law.

C. Arm of the State Analysis

We would conclude that RDA has failed to prove that it is an arm of the state sharing in South Carolina's sovereign immunity given: 1) the broad powers it has to act without approval from South Carolina; 2) the fact that the entity deals

mainly with local concerns; 3) the manner in which South Carolina treats RDA; and 4) the South Carolina treasury is not jeopardized by a judgment against RDA. Accordingly, we would find that RDA is not an arm of the State of South Carolina.

1. RDA's Status Under the *Ceres* Test

Following is our consideration of the evidence in the record as submitted by the parties to this complaint under the Ceres test. While we agree with the majority that Ceres sets forth the appropriate test, we believe the majority's analysis of the evidence in this case is erroneous.

(a) First Prong: Structure of an Entity

(1) Degree of Control: RDA Exhibits Sufficient Autonomy From South Carolina

It is our view that RDA's arguments with respect to degree of control are insufficient to support the claim that it is an arm of the state. While RDA was established pursuant to an enactment of the South Carolina General Assembly, the Federal Defense Facilities Redevelopment Law states that an authority created pursuant to this chapter may dissolve the authority by a two-thirds vote of the entire number of authorized members of that authority. See S.C. Code Ann. § 31-12-100. Carolina Marine Handling ("CMH") states that RDA's power to dissolve itself after its purpose is fulfilled is further evidence that the state did not intend RDA to function

as an arm of the state. January 31, 2000, Reply of CMH in Opposition to Motion to Dismiss ("CMH Motion to Dismiss Reply 2000") at 33.

CMH also mentions that the South Carolina governor appoints only two of RDA's eight board members while the other six members are local politicians. Id. at 28-29, citing S.C. Code Ann. § 31-12-40. Moreover, CMH asserts that South Carolina has no residual or veto powers over RDA when it acts within its statutory authority. Id. at 33.

It is important to note that RDA's required compliance with state regulations is not unique. The Supreme Court has ruled that arm of the state status does not extend to political entities or subdivisions with an identity that is distinct from a state such as counties and municipal corporations. Federal Maritime Commission v. SCSPA, 535 U.S. at 751. South Carolina requires political subdivisions to comply with the South Carolina Freedom of Information Act and the South Carolina Ethics Act. CMH Motion to Dismiss Reply 2000 at 27; see S.C. Code Ann. § 8-13-100 et seq.; S.C. Code Ann. § 30-4-10 et seq.

While political subdivisions do not operate directly under the South Carolina Consolidated Procurement Code, the Code requires them to adopt similar laws. CMH Motion to Dismiss Reply 2000 at 27, citing S.C. Code Ann. § 11-35-20(e) (purpose to require the adoption of competitive procurement laws by units of state and local governments) and S.C. Code Ann. § 11-35-50 (requiring political subdivisions to adopt "appropriately competitive procurement"). Moreover, RDA

argues that state procurement law is inapplicable to federal naval base leases. CMH Motion to Dismiss Reply 2000 at 28.

South Carolina has empowered RDA with a large number of independent authorities, including, inter alia, the ability to sue and be sued; make and execute contracts; cooperate with any government or municipality; and to prepare, adopt and carry out redevelopment projects within its area of operation. Brief in Support of Charleston Naval Complex Redevelopment Authority's Exception to Presiding Officer's Ruling at 3; CMH Motion to Dismiss Reply 2000 at 25-26. These authorities demonstrate a high level of autonomy from the state.

In summary, the State of South Carolina: may not dissolve RDA except by legislative act; does not appoint six of RDA's eight board members; has no residual or veto powers over RDA when RDA acts within its statutory authority; and requires private and public entities, whether or not they are arms of the state, to comply with its regulations. It is our view that RDA exhibits sufficient autonomy from the state. As such, we would find that RDA has not met its burden of proof to show that South Carolina exercises an adequate degree of control over it to support an arm of the state claim.

(2) State vs. Local Concerns: RDA's Concerns Are Local In Nature

Next, we examined whether RDA deals with state or local concerns. The facts show that RDA deals with local concerns.

RDA maintains that the development of the Naval Complex and the replacement of thousands of jobs lost to South Carolinians as a result of base closure are of vital statewide importance. RDA Reply to Complainant's Response In Opposition to RDA's Motion to Dismiss at 14 ("RDA Motion to Dismiss II"). By making this argument, the majority and RDA imply that the economy of South Carolina is a statewide concern and thus RDA's operations are statewide in nature. This argument, however, is not feasible, since any corporation or other entity that hires a workforce could be considered to deal primarily with statewide concerns. Furthermore, the mere fact that hiring a workforce is important to South Carolina does not transform RDA's activities into statewide concerns.

CMH also makes several assertions that lean heavily toward concluding that RDA is concerned with local matters. First, six of the eight RDA board members are local politicians serving local interests. CMH Motion to Dismiss Reply 2000 at 29. Second, CMH notes that since RDA's purpose is to redevelop or dispose of federal property contained in North Charleston, RDA's functions are limited to that location. Id. at 32-33. Third, CMH states that regulating and coordinating land use is usually considered a local activity rather than a state one. Id. at 32.

The Supreme Court has held that regulating land use is

a function that is traditionally performed by local governments. Lake Country Estates, Inc. v. Tahoe Regional Planning Auth., 440 U.S. 391 (1979). A compact between California and Nevada created the Tahoe Regional Planning Authority ("TRPA") to coordinate and regulate development in the resort area of the Lake Tahoe Basin and conserve the natural resources of that area. The Court in Lake Country Estates held that TRPA's function of regulating land use is traditionally performed by local governments. Id. at 402.

In this case, South Carolina created RDA to regulate land use. While South Carolina has remained silent on whether it intended to confer arm of the state status on RDA, CMH's assertions that RDA's function is traditionally shared by local governments and that local politicians constitute the vast majority of RDA's members outweigh RDA's argument that because it provides jobs for South Carolina citizens its operations should be considered statewide in nature. Also, RDA's activities are limited to North Charleston. It is our view that the record supports a finding that RDA deals with concerns of a local nature. As a result, we would find that RDA has failed to meet its burden of proof to exhibit that its concerns are statewide.

(3) Manner In Which The State Treats The Entity: RDA Is Treated As A State Agency But Is Not Treated As An Arm of South Carolina

Finally, we examined whether South Carolina treats RDA as an arm of the state. RDA makes several assertions

indicating that it is treated as an arm of the state. First, RDA asserts that it must comply with several South Carolina laws and regulations, including the South Carolina Freedom of Information Act, the South Carolina Ethics Act, and the South Carolina State Procurement Code. Memorandum of Law in Support of Respondent RDA's Motion to Dismiss at 24 ("RDA Motion to Dismiss I"). Second, RDA asserts that its employees are eligible to participate in the South Carolina State Employee retirement system and are subject to the South Carolina workers' compensation system. Id. Finally, RDA states that the state statute establishing its authority empowers it to act as an agent of the State or federal government. Id. at 3-4. While these contentions arguably demonstrate that South Carolina may treat RDA as an arm of the state, there are other considerations that suggest otherwise.

RDA's assertion that it is required to comply with certain state regulations is not determinative because political subdivisions are also required to comply with those same laws and regulations, except for the South Carolina Consolidated Procurement Code. S.C. Code Ann. § 11-35-50; CMH Motion to Dismiss Reply 2000 at 27, citing S.C. Code Ann. § 15-78-20(a), (b). However, South Carolina requires political subdivisions to enact laws similar to the South Carolina Consolidated Procurement Code. Id. Complaints against political subdivisions must also comply with the South Carolina Tort Claims Act. Id., citing S.C. Code Ann. § 15-78-40.

We now turn to RDA’s assertion that it is an arm of South Carolina because its employees are eligible to participate in the state retirement system and workers’ compensation system. This argument is undermined by the fact that

employees of political subdivisions, cities and counties are also eligible to participate in the South Carolina State employee retirement system. See S.C. Code Ann. § 9-1-480. As a result, RDA's assertion that it is an arm of the state because its employees are eligible to participate in South Carolina's retirement system is not persuasive.

Furthermore, any employee hired in South Carolina, injured in South Carolina or who is employed in South Carolina, is eligible to receive workers' compensation from South Carolina. Voss v. Ramco, 352 S.C. 560, 482 S.E.2d 582, 583 (S.C. App. 1997). In Voss, the court held that the plaintiff, a Texas resident, was eligible to receive workers' compensation from South Carolina because his employer Ramco, a private sector manufacturer, was based in South Carolina. Id. at 590; S.C. Code Ann. § 42-15-10 et seq. Thus any injured private sector employee, as well as any injured public sector employee in South Carolina, may be eligible for workers' compensation from South Carolina. Accordingly, RDA is unconvincing in its argument that it is an arm of the state because its employees are eligible to receive workers compensation from South Carolina.

RDA states that its enabling statute, the Federal Defense Facilities Redevelopment Act, deems any redevelopment authority created under it as an agency of South Carolina for the purposes of the South Carolina Tort Claims Act, see S.C. Code § 31-12-110. RDA and the majority argue that this designation evidences South Carolina's intent to treat RDA as an arm of the state. Moreover, the majority states that RDA's audit by the South Carolina Legislative Audit Council evidences RDA's status as an arm of the state. Order at 25-26.

While we agree that the Legislative Audit Council has the authority to audit all South Carolina state agencies, as defined under S.C. Code Ann. § 2-15-50, and that RDA is in fact a state agency, we would argue that an entity's agency status is not conclusive in an arm of the state analysis.

As the Supreme Court stated in Regents of the Univ. of Cal. v. Doe (Regents):

> Ultimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the state, and therefore, 'one of the United States' within the meaning of the Eleventh Amendment, is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character.

519 U.S. 425, 429-430 n.5 (1997).

In other words, not all state agencies are arms of the state. Nowhere in the record does RDA convincingly show on its own behalf that South Carolina characterizes or treats RDA as a state agency with arm of the state status. We do not agree with the majority's finding that RDA has met its burden of proof in this matter.

(4) Conclusion

In light of the foregoing analysis of the three factors in the first prong of the Ceres test, we would determine that (1) RDA is sufficiently autonomous from South Carolina; (2) RDA deals with issues of local importance; and (3) South

Carolina does not treat RDA as an arm of the state.

(b) Second Prong: Risk to Treasury, RDA is Liable for Payment of Monetary Judgments

The final part of the arm the state analysis required us to determine whether a monetary judgment against RDA would have to be paid out of state funds. The facts in this proceeding support a finding that RDA, not the State of South Carolina, would be liable for payment of a monetary judgment.

CMH makes several arguments in support of its contention that South Carolina would not be liable for a judgment against RDA. First, CMH argues that RDA's executive director admits that RDA would look to its own sources of funds rather than to the State to pay any money judgment against it. CMH Motion to Dismiss Reply 2000 at 31 citing Sprott Aff. at 14. CMH also asserts that RDA, like political subdivisions, maintains insurance to satisfy judgments pursuant to the South Carolina Tort Claims Act. Id. at 34, citing RDA's Financial Report, Exhibit E at 13; South Carolina Tort Claims Act. S.C. Code Ann. § 15-78-140(b). CMH further asserts that RDA settled a lawsuit with Braswell, one of its former tenants, for $4 million. RDA is paying this in installments from its own resources, not from the South Carolina State Treasury. CMH also notes that the RDA settled with Braswell without the approval of the State Budget and Control Board, which is by statute required to approve any settlement over $100,000 paid from "public funds." CMH Motion to Dismiss Reply 2000 at 31-32 citing S.C. Code Ann. § 11-1-45(A). RDA acknowledges that it would use money

from one of its available funds if a reparation order were entered against it in this proceeding. RDA Motion to Dismiss II at 6.

RDA's sources of funding and responsibility for its financial obligations show that its financial resources are separate from the South Carolina Treasury. CMH states that South Carolina does not support RDA through regular or special appropriations. CMH Motion to Dismiss Reply 2000 at 29. CMH further contends that the State of South Carolina has acknowledged that it does not have an ongoing financial interest in RDA. CMH claims that the State of South Carolina also excludes RDA from its financial statements because it does not consider itself to be financially accountable for RDA. Id.; see RDA Financial Report, Exhibit E at 62.

CMH points out that while South Carolina's Federal Defense Facilities Redevelopment Act authorizes RDA to borrow, issue bonds and to pledge collateral in support of its borrowing, it also states that "the authority may not pledge the full faith and credit of the State or any of its political subdivisions for the repayment of bonds." CMH Motion to Dismiss Reply 2000 at 32, citing S.C. Code Ann. §31-12-70 (A)(10). The State has shielded itself from liability for RDA's obligations, an indication that the state would not assume responsibility for judgments against RDA. Id.

Moreover, we do not agree with the majority's reliance on Regents as proper support for the finding that RDA would seek funds from South Carolina whenever its own revenues prove insufficient to satisfy a judgment against it in order to

perform its statutorily mandated functions. Order at 34, citing 519 U.S. at 431, 117 S. Ct. at 904. In Regents, the Supreme Court explicitly stated that with respect to the Eleventh Amendment question, "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." 519 U.S. at 431, 117 S. Ct. at 904. Other than positing that it would turn to South Carolina for financial support for operational functions, RDA Motion to Dismiss I at 6, RDA Motion to Dismiss II at 13, RDA has not substantiated the claim that it poses any potential legal liability for South Carolina where actual judgments are concerned.

We believe that RDA has not met its burden to show that a judgment against it would impact the South Carolina Treasury or that its funds are so entangled with South Carolina's funds as to make South Carolina liable for judgments against RDA. In light of the foregoing, we would find that RDA failed to establish that there is a risk to the South Carolina Treasury if a judgment is entered against RDA.

D. Conclusion

The effect of the majority's decision is to establish the precedent that an entity, even when it would pay a money judgment out of its own resources as opposed to the state treasury, could still be entitled to sovereign immunity from the adjudication of a complaint under the Shipping Act of 1984. We are concerned that this will have a chilling effect on a private party's ability to seek reparations under the Shipping Act from entities that have any link, no matter how small, with

a state government.

We would determine that RDA has not carried the burden of proof to show that it is entitled to sovereign immunity. Therefore, we would conclude that RDA is not arm of the state of South Carolina, due to 1) the broad powers it has to act without the approval of South Carolina; 2) the fact that the entity deals mainly with local concerns; 3) the manner in which South Carolina treats RDA; and 4) the South Carolina Treasury is not jeopardized by a judgment against RDA. Accordingly, we would permit CMH's complaint to proceed to full adjudication for a determination of whether RDA violated the Shipping Act of 1984.