S E R V E D
October 29, 2007
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 06-11

R.O. WHITE & COMPANY and
CERES MARINE TERMINALS INC.

v.

PORT OF MIAMI TERMINAL OPERATING COMPANY,
CONTINENTAL STEVEDORING & TERMINALS, INC.,
FLORIDA STEVEDORING, INC.,
P&O PORTS NORTH AMERICA, INC.,
P&O PORTS FLORIDA, INC.,
DANTE B. FASCELL PORT OF MIAMI DADE a.k.a.
MIAMI-DADE COUNTY SEAPORT DEPARTMENT, and
MIAMI-DADE COUNTY

MEMORANDUM AND ORDER ON
P&O PORTS NORTH AMERICA MOTION FOR RECONSIDERATION and
JOINT MOTION OF CONTINENTAL STEVEDORING & TERMINALS, INC., FLORIDA STEVEDORING, INC., P&O PORTS NORTH AMERICA, INC., AND P&O PORTS FLORIDA, INC. FOR LEAVE TO APPEAL THE JULY 2, 2007 ORDER OF THE PRESIDING ADMINISTRATIVE LAW JUDGE (RULE 153)

On July 2, 2007, I entered an order *inter alia* denying the Motion to Dismiss P&O Ports North America, Inc. (P&O-NA) and P&O Ports Florida, Inc. (P&O-Fla) for Lack of Jurisdiction filed January 25, 2007 (P&O Ports Motion), and the Joint Motion to Dismiss for Lack of Jurisdiction filed January 25, 2007, by respondents Continental Stevedoring & Terminals, Inc. (Continental

Stevedoring); Florida Stevedoring, Inc. (Florida Stevedoring); and Eller-ITO Stevedoring Company L.L.C. (Eller-ITO). *R.O. White & Co. v. Port of Miami Terminal Operating Co.*, FMC No. 06-11, slip op. at 13-23 (ALJ July 2, 2007) (Corrected Memorandum and Order on Pending Motions and Petition). On July 17, 2007, P&O-NA served a motion for reconsideration of the denial of its motion to dismiss. (P&O-NA Motion for Reconsideration). On July 27, 2007, Continental Stevedoring filed an uncontested motion for an extension of time to respond to the motion for reconsideration, followed by a corrected version of this motion on July 30, 2007. This motion sought an order extending the time for all parties to reply to P&O-NA's motion for reconsideration to September 30, 2007. On August 1, 2007, I entered an order granting this motion. On October 1, 2007, complainants R.O. White & Company, Inc. (White) and Ceres Marine Terminals, Inc. (Ceres) (referred to collectively as White/Ceres) and respondent Continental Stevedoring filed responses to P&O-NA's motion for reconsideration.[1]

Also on July 17, 2007, Continental Stevedoring, Florida Stevedoring, P&O-NA, and P&O-Fla served a joint motion for leave to appeal the portion of the July 2 order denying their motions to dismiss (Joint Motion for Leave to Appeal). They also seek a stay of the proceedings against them during the pendency of the appeal. On August 1, 2007, complainants White/Ceres served their reply to this motion.

The motions are now ripe for decision. The motions are denied.

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[1] The order granting the motion for extension of time states that "[t]he time for *Continental Stevedoring and Terminals, Inc.* to reply to P&O Ports North America Motion for Reconsideration is enlarged to September 30, 2007." *R.O. White & Co. v. Port of Miami Terminal Operating Co.*, FMC No. 06-11, slip op. at 2 (ALJ Aug. 1, 2007) (Order Granting Uncontested Motion for Extension of Time) (emphasis added). The motion sought, and the undersigned intended, that the time for all parties to reply be extended. As September 30, 2007, was a Sunday, the October 1, 2007, filings were timely.

I. FACTUAL BACKGROUND.

The facts are set forth in the order of July 2, 2007, *R.O. White & Co. v. Port of Miami Terminal Operating Co.*, *supra*, slip op. at 1-12 (ALJ July 2, 2007), and will only be repeated here to the extent necessary to understand the pending motions.

The complaint alleges that White is a wholly owned subsidiary of Ceres. White holds a permit issued by respondent Dante B. Fascell Port of Miami-Dade a.k.a. Miami-Dade County Seaport Department (the Port or Port of Miami) authorizing it to perform stevedoring services at the Port. White has entered into a lease with the Port for office space and for an area to store its stevedoring equipment.

The original complaint identified seven respondents: Port of Miami Terminal Operating Company, L.L.C. (POMTOC); Continental Stevedoring; Florida Stevedoring; P&O-NA; P&O-Fla (P&O-NA and P&O-Fla are referred to collectively as P&O Ports); Eller-ITO; and the Port of Miami. The order of July 2, 2007, dismissed the complaint against Eller-ITO, but denied the motions to dismiss of the other Respondents. *R.O. White & Co. v. Port of Miami Terminal Operating Co.*, *supra*, slip op. at 38-39 (ALJ July 2, 2007).[2]

The complaint alleges that POMTOC operates the Port under the authority of FMC Agreement No. 224-200616, an Operating Agreement that was filed with the Commission pursuant to section 5 of the Shipping Act and became effective April 4, 1993. (Complaint Exhibit B (Marine Terminal Agreement FMC No. 224-200616).) The parties to FMC Agreement No. 224-200616 have

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[2] The July 2, 2007, order also denied the Port's motion to dismiss, denied a petition to intervene filed by the Commission's Bureau of Enforcement, and granted White/Ceres's motion for leave to file an amended complaint adding Miami-Dade County as a respondent. These rulings are not challenged by the motions addressed in this order. POMTOC filed an answer to the complaint.

changed through the years. Respondents Continental Stevedoring, Florida Stevedoring, P&O-NA, and P&O-Fla are the current members of POMTOC; hence, they are parties to FMC Agreement No. 224-200616. White/Ceres allege that Respondents are marine terminal operators as defined by the Shipping Act, 46 U.S.C. § 40102(14), and that they have violated the Shipping Act by interfering with White/Ceres's right to perform stevedoring work in the Port.

In two separate motions addressed in the July 2, 2007, order, Continental Stevedoring, Florida Stevedoring, Eller-ITO, P&O-NA, and P&O-Fla argued that the complaint against them should be dismissed for lack of personal jurisdiction. Respondents asserted that they are not "marine terminal operators" as defined by the Act and Commission regulations; therefore, the Commission cannot exercise personal jurisdiction over them. *R.O. White & Co. v. Port of Miami Terminal Operating Co.*, *supra*, slip op. at 13-17 (ALJ July 2, 2007).

Respondents attached affidavits and declarations to their motions to dismiss as support for their claims that they are not marine terminal operators. The president of Continental Stevedoring stated that Continental Stevedoring is a holding company whose only assets are its interests in POMTOC and Eller-ITO. He further stated that Continental Stevedoring "is not engaged in the business of furnishing wharfage, dockage, warehouse, or other terminal facilities in connection with common carrier or water carriers. Continental does not own, lease, or otherwise furnish terminal space or facilities in the Port of Miami-Dade." (Continental Stevedoring Motion, Declaration of Joseph A. Muldoon, III.) The vice-president of Florida Stevedoring stated that Florida Stevedoring is licensed to stevedore vessels and provides stevedoring and freight handling services. He further stated that Florida Stevedoring:

> is not engaged in the business of furnishing wharfage, dockage, warehouse, or other terminal facilities in connection with common carriers or water carriers. FSI uses terminal facilities operated by [POMTOC] or controlled by the Port of Miami-Dade .... FSI does not own, lease, or otherwise furnish terminal space or facilities in the Port of Miami-Dade.

(Continental Stevedoring Motion, Declaration of Jorge Rovirosa.) The president and CEO of P&O-NA stated that P&O-NA does not have a direct ownership interest in POMTOC and that P&O-Fla has a 50% ownership interest in POMTOC. He further stated that P&O-NA and P&O-Fla "do not furnish wharfage, dock, warehouse or other terminal facilities at the POMTOC marine terminal or elsewhere in the Port of Miami." (P&O Ports Motion to Dismiss, Affidavit of Stephen A. Edwards.) White/Ceres opposed the motions to dismiss.

As no specific Commission Rule provides for a motion to dismiss for lack of personal jurisdiction, I applied Rule 12(b)(2) of the Federal Rules of Civil 46 C.F.R. § 502.12 Procedure. 46 C.F.R. § 502.12 ("[i]n proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.") .

> Where a district court's personal jurisdiction is contested, plaintiffs ultimately bear the burden of persuading the court that jurisdiction exists. A district court deciding a motion to dismiss for want of personal jurisdiction should apply the prima facie standard, under which the district court considers only whether the plaintiff has proffered evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction. However, the prima facie showing of personal jurisdiction must be based on evidence of specific facts set forth in the record. In other words, the plaintiff must go beyond the pleadings and make affirmative proof.

Negrón-Torres v. Verizon Communications, Inc., 478 F.3d 19, 23 (1st Cir. 2007) (citations and internal quotation marks omitted). *See R.O. White & Co. v. Port of Miami Terminal Operating Co., supra*, slip op. at 20 (ALJ July 2, 2007).

As noted above, in their motions to dismiss, Continental Stevedoring, Florida Stevedoring, P&O-NA, and P&O-Fla, relying on the affidavits by company officials, argued that the Commission does not have personal jurisdiction over them because they themselves are not marine terminal operators. I found that other evidence in the record demonstrated that each respondent has represented to the Commission that it is a marine terminal operator. (Complaint Exhibit B (Marine Terminal Agreement FMC No. 224-200616 ("Pomtoc is owned by four (4) marine terminal operators in the Port of Miami, Florida and are parties to this agreement," identifying Continental Stevedoring, Florida Stevedoring, P&O-NA, and P&O-Fla as the owners).) I noted that neither motion attempted to explain the inconsistency between the June 25, 2003, non-substantive amendment of FMC Agreement No. 224-200616 in which Continental Stevedoring, Florida Stevedoring, P&O-NA, and P&O-Fla identify themselves as "marine terminal operators" and the affidavits filed by Respondents claiming that they are not marine terminal operators. Accordingly, I determined that their attack on the Commission's jurisdiction was "launched from a very weak position," *Dart Containerline Co. v. Federal Maritime Comm'n*, 722 F.2d 750, 752-753 (D.C. Cir. 1983). I also found that the non-substantive amendment filed with the Commission provides affirmative proof of facts essential to personal jurisdiction. *Negrón-Torres v. Verizon Communications, Inc.*, *supra*. *See R.O. White & Co. v. Port of Miami Terminal Operating Co.*, *supra*, slip op. at 19-22 (ALJ July 2, 2007)

I noted that evidence presented in this proceeding could ultimately lead to the conclusion that Continental Stevedoring, Florida Stevedoring, P&O-NA, and P&O-Fla are not proper respondents, but based on the record at that time, their motions to dismiss must be denied. *Id.* at 22. Therefore, at this stage of the proceeding, it has not been conclusively determined whether the Commission has personal jurisdiction over Continental Stevedoring, Florida Stevedoring, P&O-NA, and P&O-Fla.

II. P&O PORTS NORTH AMERICA MOTION FOR RECONSIDERATION.

A. Motion and Oppositions.

In its motion, P&O-NA submits additional information that it argues resolves the discrepancy between the Edwards affidavit filed in support of its motion to dismiss and FMC Agreement No. 224-200616. P&O-NA attached a copy of a letter dated April 4, 2007, from its attorney to the director of the Commission's Office of Agreements stating that in reviewing for this case, P&O-NA officials had realized that the non-substantive amendment to FMC Agreement No. 224-200616 "erroneously" listed P&O-NA as a party to the POMTOC agreement. Attached to the letter is a declaration of Christopher Morton, the person who signed the non-substantive amendment, stating that when he signed the amendment, he trusted that the amendment was routine and accurate without making any independent review of the facts or seeking any information from his superiors. Morton states that he "now understands that [the non-substantive amendment] contains numerous errors and should not have been signed by me." (Declaration of Christopher Morton ¶ 5.) The letter also included a copy of the Edwards Affidavit that had been attached to the P&O Ports motion to dismiss. P&O-NA argues that this information should overcome the understandable caution I faced when ruling on the motion to dismiss. (P&O-NA Motion for Reconsideration at 2.) P&O-NA also requests a "mini-hearing on the issue to receive evidence on whether P&O Ports is or is not an owner of POMTOC and whether it should be dismissed from this proceeding." (P&O-NA Motion for Reconsideration at 4.)

On October 1, 2007, White/Ceres served its reply to the motion for reconsideration. It attached to the opposition a number of documents received in discovery. White/Ceres included at Tab 3 a document titled Amendment to Amended and Restated Regulations of Port of Miami

Terminal Operating Company, L.C., that identifies P&O-NA as a member of POMTOC along with Continental Stevedoring, Florida Stevedoring, and P&O Ports, Fla. The amendment, effective July 28, 2005, is signed by Robert Scavone as Executive Vice President of P&O-NA. Scavone also signed a president of P&O-Fla.

Respondent Continental Stevedoring also filed a response in opposition to the motion for reconsideration. It attached a declaration of Joseph O. Click, a partner in the law firm representing Continental Shipping, to which are attached the following documents:

1. Joinder and Acceptance dated 28 March 2001, signed by Thomas J. Simmers, Executive Vice President, indicating "P&O Ports N.A., intending to be legally bound, does hereby accept the transfer of a 25% Membership Interest in [POMTOC]";

2. Membership Certificate dated May 23, 2001, certifying that "P&O Ports, N.A." is a member of POMTOC ;

3. Minutes of the joint annual meeting of members and managers of POMTOC indicating that the members, including "P&O Ports North America Inc.," ratified the actions taken at the meeting February 20, 2002, signed by Thomas J. Simmers and Christopher Morton as managers for P&O Ports North America Inc.;

4. Joinder and Acceptance dated June 2, 2003, indicating "P&O Ports Florida, Inc., intending to be legally bound, does hereby accept the transfer of 25% Membership Interest in [POMTOC] from Oceanic Stevedoring Company";

5. The same July 28, 2005, Amendment to Amended and Restated Regulations of Port of Miami Terminal Operating Company, L.C., submitted by White/Ceres.

(Response of Respondent Continental Stevedoring & Terminals, Inc. to Motion for Reconsideration Filed by P&O Ports North America Inc. (Continental Stevedoring Response), Click Declaration, Tabs 1-5.) Continental Stevedoring offers this as evidence rebutting the claim set forth in the motion for reconsideration that P&O-NA "does not have and has never had a direct ownership interest in [POMTOC]." (Affidavit of Stephen A. Edwards ¶ 2.)

B. Discussion.

"A presiding officer may properly reconsider and reverse interlocutory rulings made prior to the initial decision, whether those rulings are made by him or her or by a previously assigned administrative law judge." *Carolina Marine Handling, Inc. v. South Carolina State Ports Authority*, 28 S.R.R. 1603 (ALJ 2000) (citing *Knight v. Lane*, 228 U.S. 6 (1912); *Bookman v. United States*, 435 F.2d 1263 (Ct. Cl. 1972); *Faircrest Site Opposition v. Levi*, 418 F. Supp. 1099 (N.D. Ohio 1976)), *rev'd on other grounds*, 30 S.R.R. 1017 (2006).

The core of the ruling that P&O-NA is asking me to reconsider is the finding that the non-substantive amendment of FMC Agreement No. 224-200616 in which Continental Stevedoring, Florida Stevedoring, P&O-NA, and P&O-Fla identify themselves as "marine terminal operators" provides *prima facie* evidence that they are "marine terminal operators" within the meaning of the Shipping Act. *See R.O. White & Co. v. Port of Miami Terminal Operating Co.*, *supra*, slip op. at 21 (ALJ July 2, 2007) ("The non-substantive modification provides affirmative proof of facts essential to personal jurisdiction."). The non-substantive amendment is admissible evidence in this proceeding. *See* Fed. R. Evid. 801(d)(2)(C) and 801(d)(2)(D) (Admission by party-opponent). The evidence submitted with the motion for reconsideration claims that P&O-NA's declaration that it is an owner of POMTOC was a mistake and that it never was an owner of POMTOC. (Declaration of Christopher Morton ¶ 5; Affidavit of Stephen A. Edwards ¶ 2.) The claim that P&O-NA was never an owner of POMTOC is rebutted by the documents submitted by the parties opposing the motion. *See supra* at 7-8.

The affidavits do not alter the non-substantive amendment's quality as "evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction." *Negrón-Torres*

v. Verizon Communications, Inc., 478 F.3d at 23. Therefore, the motion for reconsideration must be denied. A "mini-hearing" would not alter the amendment's quality as evidence. Accordingly, the request for a mini-hearing on the issue is denied.

III. JOINT MOTION OF CONTINENTAL STEVEDORING & TERMINALS, INC., FLORIDA STEVEDORING, INC., P&O PORTS NORTH AMERICA, INC., AND P&O PORTS FLORIDA, INC. FOR LEAVE TO APPEAL THE JULY 2, 2007 ORDER OF THE PRESIDING ADMINISTRATIVE LAW JUDGE (RULE 153).

A. Motion and Opposition.

Continental Stevedoring, Florida Stevedoring, P&O-NA, and P&O-Fla seek leave to appeal the portion of the July 2, 2007, order denying their motions to dismiss for lack of personal jurisdiction based on their claims not to be marine terminal operators. They also seek to have the proceeding "stayed as regards to them pending a ruling on whether they are subject to FMC jurisdiction." (Joint Motion for Leave to Appeal at 1.)

Respondents contend that the July 2, 2007, order declining to find that they are not marine terminal operators "was flawed, first in its substantive legal analysis of the definition of [marine terminal operator] as applied to these parties . . . and second, in that the Order is inconsistent with the Commission's well-settled policy of resolving threshold jurisdictional challenges promptly at the outset of the case." (Joint Motion for Leave to Appeal at 2-3.)

Respondents cite to Commission Rule 153 for the standards to be applied when a party seeks leave to appeal an interlocutory ruling:

> Rulings of the presiding officer may not be appealed prior to or during the course of the hearing, or subsequent thereto, if the proceeding is still before him or her, except where the presiding officer shall find it necessary to allow an appeal to the Commission to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party.

46 C.F.R. § 502.153(a). Relying primarily on two decisions by Commission administrative law judges, *River Parishes Co. v. Ormet Primary Aluminum Corp.*, 27 S.R.R. 669, 670 (ALJ 1996) (*River Parishes II*) and *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 28 S.R.R. 1631, 1632 (ALJ 2000) (*Inlet Fish II*), Respondents contend that "Commission precedent indicates that it is particularly appropriate to allow interlocutory appeals of rulings regarding threshold jurisdictional issues." (Joint Motion for Leave to Appeal at 3-5.)

Applying the standards they articulate to this proceeding, Respondents argue that:

> If an appeal is not permitted, Respondents will incur substantial, unrecoverable legal fees and costs, and endure the disruption, lost productivity and executive time that necessarily comes with litigation. . . . Granting the appeal will expedite and streamline resolution of this matter, and will not delay the proceeding or prejudice Complainants or other parties. Clearly, the contentious issue of jurisdiction will have to be reviewed by the Commission at some point before the conclusion of this proceeding. It is far better for the Commission to undertake that review at the outset, rather than after time and resources have been expended by all parties pursuing discovery, briefing and hearings involving inappropriately-named parties.

(*Id.* at 5.) Based on the affidavits attached to the Motions to Dismiss, Respondents state that

> it is clear that *Respondents* have determined that they are not [marine terminal operators]. Therefore, it follows that [FMC Agreement No. 224-200616] is not appropriately on file with the Commission. However, we have deferred formal cancellation of the [Agreement] until the Presiding Officer had an opportunity to consider the evidence presented regarding Respondents' lack of "wharfage, dock, warehouse or other terminal facilities," and to dispose of the novel veil-piercing jurisdictional theories advanced by Complainants.

(*Id.* at 5-6 (emphasis added).) Respondents claim that the key issue to be resolved is whether they provide "wharfage, dock, warehouse or other terminal facilities." Implicit in their motion for leave to appeal is the claim that the Commission should make this decision on appeal on the current evidentiary record.

In their reply, White/Ceres identify three primary arguments they find in Respondents' motion for leave to appeal:

> (I) that there is a "strong likelihood" the Commission would overturn the . . . Order denying their motion to dismiss . . .; (ii) that the Order is inconsistent with an alleged FMC "policy of resolving threshold jurisdictional challenges promptly at the outset of the case"; and (iii) that the equities favor an appeal and related stay.

(Complainants' Reply-Motion for Leave to Appeal at 2.) First, White/Ceres argue that Respondents' motion ignores the fact that their filings with the Commission provide the *prima facie* evidence of Respondents' status as marine terminal operators that is required to overcome their motion to dismiss for lack of personal jurisdiction. (*Id.* at 3-7.) Second, Respondents' affidavits do not rebut the other evidence of Respondents' status as marine terminal operators cited by White/Ceres in their opposition to the motions to dismiss. (*Id.* at 7-13.) Third, White/Ceres argue that they have a right to take discovery on the facts relevant to personal jurisdiction over Respondents prior to a decision conclusively determining the question. (*Id.* at 13-14.)

White/Ceres argue that Respondents incorrectly state Commission precedent regarding the resolution of jurisdictional challenges at the outset of a proceeding, arguing that Commission precedent does not favor interlocutory appeals of jurisdictional rulings. (*Id.* at 14-17.) White/Ceres argue that the burden that an interlocutory appeal would be imposed upon them and upon the orderly prosecution of the case is much greater that the burden placed upon Respondents by denial of leave to appeal. (*Id.* at 17-20.)

B. Discussion.

Commission Rule 153 provides that a presiding officer may allow an interlocutory appeal if he or she finds it necessary "to prevent substantial delay, expense, or detriment to the public

interest, or undue prejudice to a party." 46 C.F.R. § 502.153(a). The Commission has recognized that it is an "extraordinary step" to grant leave to petition the Commission "to overturn the ALJ's jurisdictional ruling denying [a] motion to dismiss." *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. 306, 315 (2001) (*Inlet Fish III*). The Commission has also held that it is appropriate to look to the procedures established for the district courts for guidance in determining whether an interlocutory appeal is appropriate. *See Amzone International, Inc. v. Hyundai Merchant Marine Co.*, 27 S.R.R. 386, 389 (1995) ("[I]nterlocutory appeals are permissible if a district judge certifies that an otherwise unappealable order '. . . involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . .' 28 U.S.C. § 1292(b).").

It is abundantly clear that if this proceeding were in a United States district court, leave to appeal would be denied. The United States courts of appeal have jurisdiction of appeals "from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. "A party generally may not take an appeal under § 1291 until there has been a decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988) (footnote omitted), *quoting Catlin v. United States*, 324 U.S. 229, 233 (1945). This rule that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits:

> emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and

> cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981), *quoting Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

The order denying Respondents' motion to dismiss for lack of personal jurisdiction does not end the litigation on the merits. Therefore, it would not be appealable under section 1291 as a final judgment.

The Court has recognized that there is a "small class" of decisions that are immediately appealable under section 1291 even though the decision has not terminated the proceedings in the district court. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). A decision is final and appealable for purposes of section 1291 if it "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* To come within the collateral order doctrine of *Cohen*, the order must satisfy each of three conditions: It must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted).

> The conditions are "stringent," and unless they are kept so, the underlying doctrine will overpower the substantial finality interests § 1291 is meant to further: judicial efficiency, for example, and the "sensible policy 'of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise.'"

* * *

> Prior cases mark the line between rulings within the class and those outside. On the immediately appealable side are orders rejecting absolute immunity and qualified immunity. A State has the benefit of the doctrine to appeal a decision denying its claim to Eleventh Amendment immunity[3] and a criminal defendant may collaterally appeal an adverse ruling on a defense of double jeopardy.

Will v. Hallock, 546 U.S. 345, 349-350 (2006) (citations omitted).

> The critical question . . . is whether the essence of the claimed right is a right not to stand trial. This question is difficult because in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial. But the final-judgment rule requires that except in certain narrow circumstances in which the right would be irretrievably lost absent an immediate appeal, litigants must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review. . . . Admittedly, there is value – to all but the most unusual litigant – in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial.
>
> Because of the important interests furthered by the final-judgment rule . . . and the ease with which certain pretrial claims for dismissal may be alleged to entail the right not to stand trial, we should examine the nature of the right asserted with special care to determine whether an essential aspect of the claim is the right to be free of the burdens of a trial.

Van Cauwenberghe v. Biard, 486 U.S. at 524-525 (citations and internal quotation marks omitted).

Courts have recognized that an order denying a motion to dismiss for lack of personal jurisdiction is not immediately appealable under the *Cohen* doctrine.

> The district court's order denying Sudan's motion to dismiss for lack of personal jurisdiction is not a final order because it does not "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." Nor does it fall within the category of non-final orders that are immediately appealable under the collateral-order doctrine because they are "conclusive, . . . resolve important

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[3] *Accord Odyssea Stevedoring Of Puerto Rico, Inc. v. Puerto Rico Ports Auth.*, FMC No. 02-08, 2004 WL 2678539, at *1 (Nov. 22, 2004) (proceedings before administrative law judge stayed by Commission during review of denial of motions to dismiss claiming sovereign immunity).

> questions separate from the merits, and . . . are effectively unreviewable on appeal from the final judgment in the underlying action." There is nothing that would prevent effective review of the denial of a motion to dismiss for lack of personal jurisdiction following final judgment in the district court.

Rux v. Republic of Sudan, 461 F.3d 461, 474-475 (4th Cir. 2006) (citations and footnote omitted), *cert. denied*, 127 S. Ct. 1325 (2007). *See also Byrd v. Corporacion Forestal Y Industrial De Olancho S.A.*, 182 F.3d 380, 381 n.1 (5th Cir. 1999) (court of appeals does not have jurisdiction over interlocutory appeal of order denying motion to dismiss for lack of personal jurisdiction).

Respondents contend that appeal of the July 2, 2007, order should be permitted because "the Order was flawed . . . in its substantive legal analysis of the definition of [marine terminal operator] as applied to these parties. (Joint Motion for Leave to Appeal at 2.)

> [I]nterlocutory orders are not appealable "on the mere ground that they may be erroneous." *Will v. United States*, 389 U.S. 90, 98, n.6 (1967). Permitting wholesale appeals on that ground not only would constitute an unjustified waste of scarce judicial resources, but also would transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291.

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. at 375-376.

Even if the denial of a motion to dismiss for lack of personal jurisdiction fit within the "small class" of non-final decisions that are immediately appealable under section 1291, the order in this proceeding would not be appealable because it does not meet the first of the *Cohen* criteria. The July 2, 2007, order states "[i]t may be that evidence presented in this proceeding ultimately leads to the conclusion that Continental Stevedoring, Florida Stevedoring, P&O-NA, and P&O-Fla are not proper respondents. At this time, however, their motions to dismiss must be denied." *R.O. White & Co. v. Port of Miami Terminal Operating Co.*, *supra*, slip op. at 22 (ALJ July 2, 2007). This ruling does not "conclusively determine the disputed question" of personal jurisdiction as it recognizes that

evidence acquired in discovery may ultimately lead to the conclusion that the Commission does not have personal jurisdiction over Respondents.

As noted above, the Commission has held that it is appropriate to look to section 1292(b) as authority to appeal an interlocutory order. *Amzone International, Inc. v. Hyundai Merchant Marine Co.*, 27 S.R.R. at 389. Section 1292 permits appeal when an order "involves a controlling question of *law* as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b) (emphasis added). The July 2, 2007, order did not deny the motion the motion based on an interpretation of a controlling question of law, but because there is a question of fact: Are Respondents marine terminal operators? Therefore, section 1292(b) cannot be a basis of jurisdiction for an interlocutory appeal of the order.

Specifically addressing the criteria in Rule 153, permitting Respondents to appeal the July 2, 2007, order and stay proceedings against Respondents while the Commission considers the appeal is more likely to cause than to prevent substantial delay. Respondents contemplate that the other parties would conduct discovery while the Commission reviews the denial of the motion to dismiss. (Joint Motion for Leave to Appeal at 2.) If this were to occur, when the Commission affirms the denial of the motion to dismiss and remands the case for further proceedings against Respondents, the other parties may have to go through a second round of discovery with Respondents. The procedural schedule established in Respondents' absence may have to be revised to permit Respondents to catch up with the litigation. The other parties may have to respond to a new round of discovery propounded by Respondents. Witnesses may have to undergo a second deposition to permit Respondents to seek information about which there was no inquiry because Respondents did not attend the first deposition. Rulings on motions may have to be reconsidered because

Respondents did not argue their position when the motion was first considered. Granting a respondent's motion for leave to appeal and stay pending appeal when it is ultimately determined that the Commission has jurisdiction has the potential of causing far more delay, expense, detriment to the public interest, and undue prejudice to parties, 46 C.F.R. § 502.153(a), than denying a respondent's motion for leave to appeal and it is ultimately determined that the Commission does not have jurisdiction over Respondents. *See Van Cauwenberghe v. Biard*, 486 U.S. at 524-525, quoted *supra* at 15.

Respondents argue that Commission precedents in *River Parishes II* and *Inlet Fish II* "indicate[] that it is particularly appropriate to allow interlocutory appeals of rulings regarding threshold jurisdictional issues." (Joint Motion for Leave to Appeal at 3-5.) In *River Parishes*, the administrative law judge had issued an earlier ruling *granting* (not denying) the respondent's motion for dismissal in part. This ruling limited the relief available to the complainant. *River Parishes Co. v. Ormet Primary Aluminum Corp.*, 27 S.R.R. 621 (ALJ 1996) (*River Parishes I*). The complainant filed a motion for leave to appeal the limitation, and it was this motion that was before the administrative law judge when he issued the opinion on which Respondents rely.

Applying Commission Rule 153, the administrative law judge concluded that the complainant had "shown persuasively that unless the Commission is allowed to rule upon the question of the scope of its jurisdiction in cases of the instant type, the parties could suffer substantial delay and expense and [the complainant] could suffer [undue] prejudice." *River Parishes II*, 27 S.R.R. at 670. He granted leave to appeal the order. *Id.*

On appeal, the Commission vacated the *River Parishes I* order limiting jurisdiction. *River Parishes Co. v. Ormet Primary Aluminum Corp.*, 27 S.R.R. 823, 825 (1996) (*River Parishes III*).

In its Order Vacating Ruling Granting Respondent's Motion for Dismissal in Part, the Commission found:

> The issue of whether or not the Commission has jurisdiction over this proceeding has not yet been determined. The parties are currently engaged in discovery to determine whether any vessels calling at the Burnside Terminal have been common carriers, and, therefore, whether the Commission has jurisdiction over the complaint pending before the ALJ.
>
> It is generally more expeditious to resolve the jurisdictional question prior to addressing the merits of the controversy. *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990). Thus, *it is premature to prescribe the limits of the Commission's jurisdiction with respect to the activities of an entity when the parties are still in the process of establishing whether that entity is, in fact subject to the Commission's jurisdiction.* It is speculative at best to attempt to determine the extent of Commission jurisdiction in a case where perhaps one, or perhaps one hundred, common carriers have called at the Terminal. It appears . . . that the ALJ prematurely defined the scope of the Commission's subject matter jurisdiction by limiting relief to activities involving common carriers.

River Parishes III, 27 S.R.R. at 824 (emphasis added).

In this proceeding, as in *River Parishes*, "[t]he parties are currently engaged in discovery to determine . . . whether the Commission has jurisdiction over the complaint." Therefore, "it is premature to prescribe the limits of the Commission's jurisdiction."[4]

In *Inlet Fish*, the complainant alleged that the respondent had violated the Shipping Act when it permitted other shippers, but not the complainant, to subtract the tare weight from shipments. Consequently, the complainant's competitors paid lower rates for similar shipments. *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 28 S.R.R. 1626 (ALJ 2000) (*Inlet Fish I*). The respondent

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[4] The *River Parishes* series of cases arguably would provide support for granting White/Ceres leave to appeal the decision dismissing the complaint against Eller-ITO. *Compare* Fed. R. Civ. P. 54(b) (court may direct entry of final judgment as to one party and make express determination that there is no just reason for delay; appeal may be taken); 15A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Jurisdiction 2d* § 3914.7 (2d ed.1992)

moved dismiss for lack of jurisdiction on the grounds that the complaint was filed after the three-year statute of limitations had run. *Id.* The administrative law judge held that the cause of action accrued less than three years before the complaint was filed and denied the motion to dismiss. *Id.* at 1631.

The respondent filed a motion for leave to appeal and to stay the proceeding pending appeal, arguing that

> a ruling from the Commission on the threshold issue would prevent undue expense as well as undue prejudice to [the respondent] . . . . [I]t is axiomatic that undue prejudice and unnecessary expense likely would result if the Commission is not allowed to consider as a threshold matter whether it has jurisdiction over a particular action . . . . [I]t is well-established that the Commission has the discretion to stay all proceeding pending an appeal, particularly if such a stay would allow the Commission and the parties to avoid the waste, burden and inefficiency . . . .

Inlet Fish II, 28 S.R.R. at 1632 (citations omitted). The administrative law judge granted the motion for leave to appeal, holding that "it is evident that the jurisdictional question presented in the proceeding is appealable from an adverse interlocutory ruling and clearly meets the requirements of Rule 153." *Id.* The administrative law judge also granted the respondent's motion to stay discovery. *Id.* This is the opinion on which Respondents rely.

As stated above, although the Commission heard the appeal, it recognized that it is an "extraordinary step" to grant leave to petition the Commission "to overturn the ALJ's jurisdictional ruling denying [a] motion to dismiss." *Inlet Fish III*, 29 S.R.R. at 315. On the merits, it upheld the administrative law judge's holding that the complaint was timely filed. *Id.* at 316.

River Parishes II and *Inlet Fish II* do not support Respondents' contention "that it is particularly appropriate to allow interlocutory appeals of rulings regarding threshold jurisdictional issues." (Joint Motion for Leave to Appeal at 3-5.) Furthermore, many cases with precedential value equal to the cases cited by Respondents are to the contrary. *See, e.g.*, *Compania Transatlantica*

Espanola, S.A. v, Virginia International Terminals, Inc., 26 S.R.R. 532 (ALJ 1992) (motion for leave to appeal denial of motion to dismiss claiming Commission lacked jurisdiction denied); *Government of Guam v. Sea-Land Service, Inc.*, 25 S.R.R. 1453 (ALJ 1991) (same); *Independent Pier Co. v. Philadelphia Port Corp.*, 25 S.R.R. 1381, 1382 (ALJ 1991) (same); *Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal Dist.*, 19 S.R.R. 995 (ALJ 1979) (same). As the Commission stated, granting a motion for leave to appeal the denial of a motion to dismiss on jurisdictional grounds is an "extraordinary step," *Inlet Fish III*, 29 S.R.R. at 315, not a "particularly appropriate" step.

I am aware the "[t]he general rule is that an adjudicatory body must first find that it has jurisdiction over the parties and the subject matter of the case before it reaches the merits." *Government of Guam v. Sea-Land Service, Inc.*, 28 S.R.R. 252, 265 (1998). (*See* Joint Motion for Leave to Appeal at 2-3 and n.3.) This rule merely means that before or contemporaneous with the issuance of an Initial Decision on the merits, the presiding officer must determine that the Commission has jurisdiction over the matter. Respondents' extrapolation of that rule would create a lengthy and cumbersome two-stage proceeding whenever a respondent unsuccessfully challenges jurisdiction: Litigation on the merits would cease after the presiding officer finds that there is jurisdiction while the Commission reviews this decision and gives its imprimatur to the finding. This would be contrary to the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Cobbledick v. United States*, 309 U.S. at 325. While it cannot be said that there would *never* be a proceeding in which an interlocutory appeal should be permitted from the denial of a motion to dismiss on

jurisdictional grounds "to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party," 46 C.F.R. § 502.153(a), I say with confidence that this is not such a case.

Accordingly, Respondents' motion for leave to appeal must be denied. Respondents' motion for a stay pending appeal is dismissed as moot.

ORDER

Upon consideration of P&O Ports North America Motion for Reconsideration, the oppositions thereto, the record, and for the reasons set forth above, it is hereby

ORDERED that P&O Ports North America Motion for Reconsideration be **DENIED**. It is

FURTHER ORDERED that P&O Ports North America's request for a mini-hearing be **DENIED**.

Upon consideration of the Joint Motion of Continental Stevedoring & Terminals, Inc., Florida Stevedoring, Inc., P&O Ports North America, Inc., and P&O Ports Florida, Inc. for Leave to Appeal the July 2, 2007 Order of the Presiding Administrative Law Judge (Rule 153), the opposition thereto, the record, and for the reasons set forth above, it is hereby

ORDERED that the Joint Motion of Continental Stevedoring & Terminals, Inc., Florida Stevedoring, Inc., P&O Ports North America, Inc., and P&O Ports Florida, Inc., for Leave to Appeal the July 2, 2007 Order of the Presiding Administrative Law Judge (Rule 153) be **DENIED**. It is

FURTHER ORDERED that the request of Continental Stevedoring & Terminals, Inc., Florida Stevedoring, Inc., P&O Ports North America, Inc., and P&O Ports Florida, Inc., to stay this proceeding as to them pending a ruling on appeal be **DISMISSED** as moot.

Clay G. Guthridge

Clay G. Guthridge
Administrative Law Judge